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SUSTAINABILITY IN HISTORIC DISTRICTS: HOW HISTORIC PRESERVATION CAN HELP WASHINGTON REACH ITS GOALS

Abigail Johnson

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Sustainability can no longer remain simply a “concern.” It is much more than a complex scientific theory and is certainly not something that can be dealt with in the future. Climate change continues to warm our planet, cause severe weather, and damage homes and ecosystems.¹ This next decade is

1. Press Release, General Assembly, Only 11 Years Left to Prevent Irreversible Damage from Climate Change, Speakers Warn during General Assembly High Level Meeting: Ambition, Urgency Needed to Address Global Emergency, Secretary-General Says, U.N. Press Release GA/12131 (March 28, 2019).

crucial for repairing some of the damage that has been done.² Sustainable buildings can help us take a step in the right direction.

Globally, urban populations are rising.³ Cities are home to hundreds of millions of residents—the combined populations of the world’s 50 largest cities surpass every country on the planet besides China and India.⁴ Cities create large amounts of pollution due to their density and productive economies; higher population numbers also mean that cities have a larger stake in climate change mitigation than less populated areas.⁵ Pollution in cities is more concentrated, which in turn harms more people. Since cities have such a broad impact on global climate, reducing the carbon footprint of large cities is a crucial step in combatting climate change in the coming years.

The United States as a whole spends an ever-increasing amount on new construction—with over \$1.5 billion as the last measured monthly cost.⁶ Green building considerations are also becoming more developer-friendly. Rating systems such as Leadership in Energy and Environmental Design (LEED) provide structured point categories, levels, and expertise in areas that project teams can focus on to build more sustainably.⁷

Although programs like LEED are not entirely new, they have gained increased traction. More companies, universities, and organizations are seeking out greener facilities to call home.⁸ The increase in prestige and desirability that green buildings have is certainly a positive step, but there is much more to be done.

As LEED, and sustainable building more generally, gains traction,⁹ developers have increasingly taken on more responsibility for the changing climate.¹⁰ Setting a building up to use less water, less energy, and more renewable materials can have a profound impact.¹¹ This is particularly

2. *Id.*

3. Dan Hoornweg, *Cities and Climate Change: An Urgent Agenda*, in SUSTAINABLE LOW-CARBON CITY DEVELOPMENT IN CHINA 3, 5 (Axel Baeumler, Ede Ijjasz-Vasquez, Shomik Mehdiratta eds., The World Bank 2012).

4. *Id.* at 4. Table 1.1 puts the world’s 50 largest cities at a total combined population of 500 million residents. *Id.*

5. *Id.* at 6.

6. U.S. CENSUS BUREAU, MONTHLY CONSTRUCTION SPENDING, SEPTEMBER 2022 (Nov. 1, 2022).

7. *LEED Rating System*, U.S. GREEN BLDG. COUNCIL, <https://www.usgbc.org/leed> (last visited Oct. 26, 2021).

8. Pres. Green Lab, *The Greenest Building: Quantifying the Environmental Value of Building Reuse*, NAT’L TR. FOR HIST. PRES. 18-19 (2011), <https://forum.savingplaces.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=5119e24d-ae4c-3402-7c8e-38a11a4fca12&forceDialog=0>.

9. *Id.* at 13.

10. THOMAS E. GLAVINICH, CONTRACTOR’S GUIDE TO GREEN BUILDING CONSTRUCTION xx (2008).

11. *Id.*

relevant for new construction but can also apply to existing buildings; any reduction in pollution or energy consumption can positively affect a city's overall climate impact.

Washington, DC (DC or the City) has taken climate change seriously, acknowledging the planet's current state and exploring dozens of options for building a more sustainable city.¹² In recent years, DC has implemented the Sustainable DC 2.0 Plan (the Plan). In creating the Plan, the City incorporated input from the public in an extensive planning process.¹³ Community “pop-ups” were set up to get local feedback.¹⁴ The City also consulted with working groups formed for generating feedback on the Plan, hired a consulting firm to ensure “ambitious yet achievable” targets, and released drafts for additional community comments.¹⁵

The end result is a plan that lays out both short- and long-term goals for not only expanding green building, but also more sustainable practices in food, transportation, and more.¹⁶ The Plan contains highly ambitious goals. DC has taken key steps towards fully implementing the full Sustainable DC 2.0 Plan; however, the latest data shows the City still has some progress to make.¹⁷ To reach its goal of becoming the most livable and sustainable city in the nation, what additional steps can DC take?

This article will argue that historic preservation is the perfect candidate to begin filling that gap. Sometimes, “the greenest building is one that is already built.”¹⁸ For example, constructing a brand new more “energy efficient” building may have a greater climate impact (especially in the short-term during construction) than a lightly renovated or existing building utilizing an average (or below average) amount of energy.¹⁹

When new construction is set to occur, it is crucial that—despite being built in a historic district—the building's climate impact is a larger part of the discussion. The aesthetics of historic districts may constrain a building to

12. See DEPT. OF ENERGY & ENV'T, SUSTAINABLE D.C.: SUSTAINABLE DC 2.0 PLAN (2018), https://sustainable.dc.gov/sites/default/files/dc/sites/sustainable/page_content/attachments/sdc%202.0%20Edits%20V5_web_0.pdf (outlining different sustainability factors that DC should use in their city planning).

13. *Id.* at 11.

14. *Id.* at 14.

15. *Id.* at 15.

16. *Id.* at 6.

17. DEP'T OF ENERGY & ENV'T, SUSTAINABLE D.C. 2.0 PROGRESS REPORT 2021 (2021).

18. Carl Elefante, *The Greenest Building Is . . . One That is Already Built*, 27 FORUM J. 1 (2012) 1, 62 (2012).

19. PRES. GREEN LAB, THE GREENEST BUILDING: QUANTIFYING THE ENVIRONMENTAL VALUE OF BUILDING REUSE, 18–19 (2011), <https://forum.savingplaces.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=5119e24d-ae4c-3402-7c8e-38a11a4fca12&forceDialog=0>.

maintain the neighborhood character.²⁰ Along with this, however, should come an analysis of how to comply with those aesthetics while still constructing a building that will have as little climate impact as reasonably possible, both in the short- and long-term.

The DC Historic Preservation Office (HPO) should expand its compatibility analysis for new construction in a historic district to include sustainability. Typically, this analysis looks at whether a potential new building will be “compatible” with the rest of the district. Adding sustainability to the list of compatibility criteria, which as it currently stands is mainly concerned with aesthetics, could add a new layer to city-wide efforts for preservation. Sustainability could serve as a final step to consider the longevity of the neighborhood and ensure that the building will minimally contribute to climate change pressures over time, not only preserving a historic district’s character and charm, but also helping to ensure that the City—and the planet—is also preserved and protected. The City itself contains 70 historic districts, meaning there is ample opportunity to utilize the power that the HPO wields over new construction in DC.²¹

The most commonly referenced definition of sustainability derives from the United Nations, who defines sustainability as: “meeting the needs of the present without compromising the ability of future generations to meet their own needs.”²² Additionally, the American Society of Testing and Materials defines Green Building as: “a building that provides the specified building performance requirements while minimizing disturbance to and improving the functioning of local, regional, and global ecosystems both during and after its construction and specified service life.”²³ Overall, sustainability and green building should focus on increasing the efficiency of buildings while reducing pollution and harm both to the surrounding area and future generations. Although these definitions certainly align with DC’s current sustainability goals, it will be more helpful to narrow the definition to better highlight historic preservation’s role in the climate change discussion.

This article defines sustainability as DC’s ability to achieve the sustainability goals outlined in the relevant construction-related sections of the Sustainable DC 2.0 Plan. These sections include energy (focusing on reducing energy consumption) and built environment (focusing on an overall

20. D.C. OFF. OF PLAN., NEW CONSTRUCTION IN HISTORIC DISTRICTS, https://planning.dc.gov/sites/default/files/dc/sites/op/publication/attachments/DC_New_Construction_SW.pdf.

21. *DC Historic Districts*, D.C. OFF. OF PLAN. (last visited Nov. 15, 2022), <https://planning.dc.gov/page/dc-historic-districts>.

22. *Sustainability*, UNITED NATIONS, <https://www.un.org/en/academic-impact/sustainability> (last visited Nov. 15, 2022).

23. GLAVINICH, *supra* note 10, at 2–3.

more accessible and efficient community).²⁴ These sections also provide explicit guidelines for how and where additional sustainable building measures can step up to fill the City's needs.²⁵

The HPO engages in a true balancing act—they must prioritize preservation of some of the City's oldest and most revered sites while juggling exterior social and economic pressures. There are also general city building codes and zoning ordinances at play, making matters even more complex.²⁶ The HPO has provided guidance on retrofitting historic buildings to increase sustainability but has not provided such sustainability-related guidance for new construction.²⁷ By incorporating sustainability into a historic district's pre-construction compatibility considerations, the HPO can build a much-needed bridge between its current guidance, DC building code, and the City's admirable goals to fight climate change.

First, this article will provide background information on the Sustainable DC 2.0 Plan, along with key provisions of DC historic preservation law, HPO sustainable building guidance, and the general DC building code. This article will then discuss how historic preservation fits into DC's sustainability equation. Finally, this article will outline what incorporating sustainability into the HPO's compatibility analysis would look like in practice and how such a plan would further DC's own sustainability goals.

I. SUSTAINABLE DC 2.0 PLAN

The Sustainable DC 2.0 Plan (the Plan) reflects the City government's goals to make DC an even more sustainable place to live. The new strategies, rooted in the original Plan but expanded in 2018, encompass an array of goals and the mechanisms for achieving them.²⁸ The Plan is very broad. It places sustainability in the spotlight but acknowledges the importance of incorporating other city-wide concerns.²⁹ The Plan emphasizes balance, discussing how “[s]ustainability is about balancing the environmental, economic, and social needs of the District of Columbia today as well as the needs of the next generation, and the one after that.”³⁰ The Plan also stresses

24. SUSTAINABLE D.C. 2.0 PLAN, *supra* note 12, at 75.

25. *Id.* at 32.

26. D.C. DEP'T OF BLDGS., 2017 DISTRICT OF COLUMBIA BUILDING Code 1 (2020), https://dob.dc.gov/sites/default/files/dc/sites/dob/publication/attachments/2017%20District%20of%20Columbia%20Building%20Code_Part%201.pdf.

27. DC HISTORIC PRES. REV. BD., SUSTAINABILITY GUIDE FOR OLDER AND HISTORIC BUILDINGS 2 (2019).

28. *See* SUSTAINABLE D.C. 2.0 PLAN, *supra* note 12, at 6 (discussing a summary of the goals that the Plan promotes).

29. *See generally id.* (explaining how environmental events can impose health threats to D.C. residents).

30. *Id.* at 3.

inclusivity: highlighting the importance of promoting sustainability to all, not just in certain areas of DC.³¹

The Plan is organized into 13 topics, or categories, within which the City intends to improve sustainability practices.³² These topics include: governance, equity, food, health, climate, economy, education, nature, transportation, waste, water, energy, and built environment.³³ Each topic is also split into goals, targets, and actions.³⁴ Goals encompass “big picture” ambitions. Targets act as the Plan’s quantifiable measures to track progress towards these goals. Finally, actions are concrete steps taken to reach each target.³⁵

The topics within Sustainable DC 2.0 that are most relevant to the relationship between historic preservation and sustainability are Built Environment and Energy. With buildings making up 75% of the City’s energy consumption, the Plan is intended to make the Built Environment—the City’s “human-made” environment—more “sustainable, equitable, and resilient to the harmful effects of the changing climate.”³⁶ The Energy topic is more technical, incorporating more renewable energy sources and financing “energy efficiency and clean energy upgrades” in the City’s buildings.³⁷

The Plan also brings in multiple agencies, expanding the scope and therefore the power of the Plan to make an impact in the City.³⁸ Certain agencies, including DC’s Department of Energy & Environment and the DC Department of Transportation, will take the lead on a target. They will bring in other agencies as necessary to assist in the work of reaching their goals.³⁹

Finally, the Plan brings six “overall themes” to the forefront.⁴⁰ The themes are intended to reflect community input and the “guiding principles” in the development of the Plan.⁴¹ The themes are incorporated into every single goal, target, and action outlined throughout the document. These themes include the following:

1. *Better incorporate accessibility*: This theme includes the hope for increased accessibility in all city-wide sustainability

31. *Id.*

32. *Id.* at 4.

33. *Id.* at 6.

34. *Id.*

35. *Id.* at 4.

36. *Id.* at 31.

37. *Id.* at 70.

38. *Id.* at 5.

39. *Id.*

40. *Id.* at 7.

41. *Id.*

planning. Accessibility is defined as both physical accessibility and accessibility to all races, ages, and genders.⁴²

2. *Think regionally; track locally*: The Plan recognizes that sustainability is typically not a hyper-localized issue. Rather, looking regionally at air and water quality, food systems, and transportation can help create a deeper understanding of the effects of climate change during the planning process. However, this theme also pushes for more detailed local tracking of these same metrics, thus enabling the City to better adapt and respond to changes not just on the City level, but on a more fine-tuned, neighborhood level.⁴³
3. *Increase quantitative rigor*: This theme encourages rigorous collection and analysis of environmental facts and data.⁴⁴ Such data is crucial in forming a deeper understanding of the City's progress.
4. *Focus on equity*: This is the most important theme, as the Plan labels it the "leading principle of Sustainable DC 2.0."⁴⁵ The Plan points out that although equity is sometimes difficult to weave into the sustainability discussion, it must be incorporated into DC's mission.⁴⁶
5. *Use community priorities as foundation*: Community outreach played a large role in forming Sustainable DC 2.0. Thus, it is crucial to consider community-wide priorities in all aspects of sustainability development.
6. *Align with other District plans*: DC values planning to further many of the City's goals outside of sustainability. Consequently, there is some overlap between the topics discussed in the Plan and other DC planning documents. Thus, the Plan will work to build on and align with these other tools.⁴⁷

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

These themes communicate just how broad the sustainability discussion can be. The tools that can help achieve sustainability goals are equally broad. Historic preservation, specifically the HPO's compatibility analysis, is a logical next step. Historic preservation shares a common goal with sustainability—both movements intend to maintain and protect as much as possible for future generations, but within reasonable and achievable measures. If the City wishes to check off more goals and targets from its list, especially in the Built Environment and Energy categories, historic preservation should be a part of the discussion.

II. SUSTAINABLE DC 2.0 PROGRESS REPORT (ARE DC'S GOALS BEING MET?)

To better understand where historic preservation can help fulfill the City's sustainability goals, it is important to turn to the Sustainable DC 2.0 2021 Progress Report (Report).⁴⁸ The Report outlines, both quantitatively and qualitatively, how far along the City is in achieving each goal. Just as the Plan is broken into topics, so is the Report.

The Built Environment section focuses on the City's steps towards: an inclusionary zoning plan; an eviction and utility cut-off moratorium; and community renovations.⁴⁹ There are few mentions of quantitative decreases in waste or emissions, or improved water and air quality. The Plan does mention the kick-off of the City's Building Innovation Hub, which is supposed to work towards increasing energy efficiency.⁵⁰ Notably, however, this disproportionate emphasis on tenant protection is probably due to the COVID-19 pandemic taking priority in 2020–21. The City likely needed to pour more resources into rebuilding after the pandemic, and other sustainability projects (understandably) might have been pushed lower on the list of priorities. The City has also attributed this lag to the district's general growth over time, bringing in new residents, and, as a result, new sources of pollution.⁵¹

The Report's Energy section appears more promising. With a similar equity theme, this section provides updates on general energy efficiency. The energy section further highlights increased efforts to bring more sustainable energy options to low-income families.⁵² Most importantly, the Report shows

48. D.C. 2.0 PROGRESS REPORT 2021, *supra* note 17, at 12.

49. *Id.* at 6.

50. *Id.*

51. DEP'T OF ENERGY & ENV'T, *Carbon Neutrality FAQ* (last visited Nov. 20, 2022), https://doee.dc.gov/sites/default/files/dc/sites/ddoe/service_content/attachments/Carbon%20Neutrality%20FAQ_0.pdf.

52. D.C. 2.0 PROGRESS REPORT 2021, *supra* note 17, at 8.

the City's progress toward obtaining 50% of its energy from renewable sources.⁵³ In 2012, 2.22% of DC's energy was renewable, and the Report shows that number is now, in 2021, 7.25%.⁵⁴ There are also updates on additional solar panels and electric vehicle charging stations throughout the City.⁵⁵

Again, there is still more progress to be made. DC's sustainability movement may need an extra push, especially emerging from a year of lockdown and virtual work.

III. DC CODE AND DC BUILDING CODE

The HPO also operates under the regular DC Code and DC building code. DC Code Title 6 Chapter 11 provides the guiding principles for historic preservation in the District. Section 6-1101 outlines the statute's purposes, which includes:

- (2) Safeguard the city's historic, aesthetic and cultural heritage, as embodied and reflected in such landmarks and districts;
- (3) Foster civic pride in the accomplishments of the past;
- (4) Protect and enhance the city's attraction to visitors and the support and stimulus to the economy thereby provided; and
- (5) Promote the use of landmarks and historic districts for the education, pleasure, and welfare of the people of the District of Columbia.⁵⁶

As well as,

- (1) With respect to properties in historic districts:
 - (A) To retain and enhance those properties which contribute to the character of the historic district and to encourage their adaptation for current use;
 - (B) To assure that alterations of existing structures are compatible with the character of the historic district.⁵⁷

The language of the statute—particularly the use of the phrases “adaptation for current use,” “education, pleasure, and welfare,” and “compatible”—demonstrates the potential to incorporate sustainability

53. *Id.*

54. *Id.*

55. *Id.*

56. D.C. Code § 6-1101(a)(2)–(5) (2011).

57. D.C. Code § 6-1101(b)(1)(A)–(B) (2011).

factors in more historic preservation analyses. Climate change is an ever-growing discussion, and historic preservation must reflect that discussion to remain compatible and adaptable within the City. Moreover, it must reflect that discussion to account for the public welfare. In addition, the charge to encourage property adaptation for “current use” suggests that agencies should consider how changes over time may need to shift past practices.

Fighting climate change is a highly prevalent issue worldwide, but these discussions are also of particular importance in DC. The City has increasingly prioritized sustainability, taking such steps as the Sustainable DC 2.0 Plan. Along with this step, multiple agencies are getting involved in the discussion.

The City has expanded its reach and acknowledged how the overlap between its agencies can be advantageous to fight climate change. For example, collaborating with DC’s Department of Transportation on a project for more environmentally-friendly food and agriculture practices improves not just the sustainability of the food and farming itself but also the shipping of the food. The City has also publicized its goal of constructing more net-zero energy buildings, further recognizing the importance of reducing greenhouse gas emissions in DC.⁵⁸ The Department of Energy & Environment has also identified key sticking points and hurdles that tend to stand in the way of the City achieving its sustainability goals and how to overcome them.⁵⁹ One of those sticking points is a general reluctance among developers and the lack of market incentive to build “greener.”⁶⁰

In addition to the DC Code, the City has a general building code that the HPO must consider. The building code lays out construction and alteration requirements for residential and commercial buildings throughout the District.⁶¹ Section 101.10 outlines the City’s Energy Conservation Code.⁶² In the alternative, buildings also have the option to comply with the Green Building Act, which places LEED certification requirements on both residential and non-residential projects.⁶³

58. *Green Building in the District*, DEP’T OF ENERGY & ENV’T, <https://doee.dc.gov/node/1506686>.

59. *Carbon Free DC by 2050- New Constr. & Embodied Carbon Discussion*, DEP’T OF ENERGY & ENV’T (Sept. 23, 2020), https://doee.dc.gov/sites/default/files/dc/sites/ddoe/service_content/attachments/New%20Construction%20and%20Embodied%20Carbon%20Discussion%20Notes_0.pdf.

60. *Id.*

61. D.C. DEP’T OF BLDGS., *supra* note 26, at Part 1.

62. *Id.* at 5.

63. Green Building Act of 2006, D.C. CODE § 6-1451 (2006); *see also Green Building Act of 2006*, DEP’T ENERGY & ENV’T, <http://doee.dc.gov/node/7882> (Dec. 17, 2021) (providing a graphic aid to understanding the Green Building Act of 2006).

All residential and commercial buildings must comply with these energy efficiency standards. However, the building code mentions an interesting exception—historic buildings.⁶⁴ Specifically, “[p]rovisions of the Energy Conservation Code relating to the construction, repair, alteration, restoration and movement of structures, and change of occupancy shall not be mandatory for historic buildings”; unless there is proof signed by the owner, a design professional, or the HPO “demonstrating that compliance with that provision would threaten, degrade or destroy the historic form, fabric or function of the building.”⁶⁵

The building code’s historic buildings exception represents a hole that the HPO can fill. The language of the building code demonstrates a reluctance to step on the toes of the HPO and other historic preservationists. The building code acknowledges the expertise of the HPO and preservationists due to their immersion in a highly complex and detailed field. Thus, the historic preservation community should use this deference to contribute to the City’s sustainability where possible. The HPO should look to the long-term, not just at maintaining the character and aesthetics of historic buildings but also the cities and ecosystems that the buildings exist within. Notably, preservationists in general are not entirely opposed to more sustainable buildings. This is particularly evidenced by the HPO’s guidance on sustainability in historic buildings, as discussed below.

IV. HPO GUIDELINES ON DC CODE AND SUSTAINABILITY IN HISTORIC BUILDINGS

The HPO has also released guidelines for retrofitting historic buildings with both the DC code and sustainability in mind.⁶⁶ First, the guidelines outline the HPO’s analysis of a new building’s compatibility within a historic district.⁶⁷ This analysis requires a new building’s design to be compatible with surrounding structures, including: setback, orientation, scale, proportion, rhythm, massing, height, materials, color, roof shape, details and ornamentation, and landscape features.⁶⁸

The HPO is also very clear, however, that compatibility is not merely an analysis of a building’s design features in a vacuum or its aesthetics as compared to surrounding buildings. Rather, there should also be an “analysis of how these design principles are used in the neighborhood and how they

64. D.C. Mun. Regs. tit. 12, § 101.10.3.1(2) (2017).

65. D.C. DEP’T OF BLDGS., *supra* note 26, at 6.

66. GOV’T OF D.C.: OFF. OF PLAN., DISTRICT OF COLUMBIA HISTORIC PRESERVATION GUIDELINES: NEW CONSTRUCTION IN HISTORIC DISTRICTS, <https://planning.dc.gov/publication/new-construction-historic-districts>; DC OFF. OF PLAN., *supra* note 20.

67. GOV’T OF D.C.: OFF. OF PLAN., *supra* note 66, at 1.

68. *Id.*

can be interpreted using today's materials and construction techniques.”⁶⁹ This language, similar to the DC Code's historic preservation language, suggests an inclination towards flexibility in projects to meet the City's needs. Particularly, in order to truly use “today’s materials and construction techniques,” architects and developers must be able to adapt to modern building efficiency standards.

Architects are still able to seamlessly integrate new building practices in a way that maintains compatibility with older buildings.⁷⁰ So, a historic district’s character can be maintained while still branching out into more efficient and sustainable practices. This adjustment could not have occurred overnight, and instead has evolved as the City’s building code has grown and changed. This shows that historic preservation practices can be flexible enough to incorporate cleaner and greener buildings. Thus, it is still possible to comply with the HPO’s guidelines while incorporating more of DC’s sustainability goals.

Next, the HPO gets more specific, outlining sustainability best practices for historic buildings in a separate guidance document.⁷¹ This document does not discuss new construction. Instead, it highlights its views on retrofitting current historic buildings while still maintaining their individual integrity and the compatibility of the whole district. The HPO guidance document recommends considering both the visibility of the retrofit from the street and the level of significance the property holds. This document also looks at: how compatible the addition is with the building itself, the quality and design of the materials used, whether the addition is temporary or permanent, and whether the project helps to achieve a reasonable balance within the community.⁷²

The final criteria of achieving reasonable balance is particularly relevant here. Even though the HPO suggests considering many classic design elements, it also recommends weighing those elements against community needs. For instance, a certain alteration may not be as compatible as the HPO would prefer, but when weighed in balance, the alteration might be the only reasonable and cost-effective way to execute a highly necessary project. The HPO states, “[a]dapting old buildings requires a thoughtful consideration of practical needs along with the environmental and civic benefits of protecting architectural and historical characteristics valued by the community.”⁷³

69. *Id.*

70. AMY WEINSTEIN, LOOKING AT HISTORIC PRESERVATION THROUGH AN ARCHITECT’S EYES HISTORIC PRESERVATION LAW (2021) (discussing adjustment that can be made to building with new modern-day sustainable building requirements in place).

71. D.C. HISTORIC PRES. REV. BD., *supra* note 27, at 2.

72. *Id.*

73. *Id.*

As discussed in prior sections, a very similar trend emerges here: there is room for sustainability in this analysis. The HPO has used language like “adapting” and “balance”; even though this guidance is geared towards existing buildings, the logic could easily be extended to compatibility of new construction as well. Not only is there a hole in the historic preservation sections of the City’s building code, the same hole is also missing in the HPO’s sustainability guidance. The HPO has guidelines for sustainability in existing buildings, but the HPO’s guidelines for new construction do not mention sustainability.

By adding sustainability into the existing criteria for the compatibility analysis, the HPO can do its part under the purpose of the DC Code on historic preservation, and to round out their already existent sustainability analyses in other areas. This will also help the City fulfill its climate change goals, which have become exponentially more clear and accessible now that they are laid out in the Sustainable DC 2.0 Plan.

DC has very ambitious sustainability goals, and historic preservation can do even more to help push for a more sustainable DC by incorporating sustainability into its compatibility analysis.

V. WHY DO SUSTAINABILITY CONSIDERATIONS FIT IN NEW CONSTRUCTION COMPATIBILITY ANALYSIS?

DC’s historic preservation regulations and guidance show that historic preservation furthers the City’s sustainability goals. Incorporating sustainability into the HPO’s compatibility analysis for new construction is not just a win for Sustainable DC 2.0, but also for DC overall. Moreover incorporating sustainability will not disrupt current historic preservation practices and can further preservation goals.

First, by its very nature, the compatibility analysis should include modern-day concerns like sustainability. Restricting the compatibility analysis to merely an aesthetic design conversation ignores how much DC is constantly growing and changing.

Climate change has been raised as more of a concern in recent decades, alongside increased discussion of equity and accessibility in the City. To not incorporate such a crucial element of life in DC as climate change impedes historic preservation from reaching its full potential. Incorporating sustainability will help the City and can also maximize historic preservation’s impact.

By creating more overlap, environmentalist individuals and organizations that may not have been involved in historic preservation efforts in the past may now recognize the importance of investing in the cause. The HPO and other preservation groups have a wonderful leadership opportunity

to bridge that gap and demonstrate the full scope of historic preservation's benefits.

Second, in many instances, historic preservation and sustainability go hand-in-hand. The HPO's guidance for sustainability in existing historic buildings points out that "buildings are the primary source of energy use" in the District and "success at reducing emissions depends on reducing its energy use."⁷⁴ The guidance also discusses how energy efficiency updates are not only beneficial for those living in or using the building the updates are also a key step in preserving the City's older buildings. For example, the HPO recommends using "conscientious maintenance" to maintain "the unique character of buildings and neighborhoods."⁷⁵ Thus, sustainability can be incorporated to benefit the community. In fact, such incorporation is unlikely to disrupt preservation in most instances. The HPO describes the relationship between historic preservation and sustainability as having quite a bit of overlap:

There is a common misconception that the principles of sustainability and green building design are at odds with those of historic preservation. Quite the opposite is true: historic buildings offer effective solutions to save energy . . . Additionally, building systems and components, like HVAC or lighting, that do not contribute to the historic character of a building can be updated without triggering historic review at all. Maintaining existing buildings and improving their energy performance will help the District meet its sustainability goals as the District, like any major city, cannot build its way out of these impacts.⁷⁶

This demonstrates the flexibility that exists in both the historic preservation and the sustainability analysis—flexibility that should also apply to new construction.

VI. HOW WOULD INCORPORATION OF SUSTAINABILITY INTO THE COMPATIBILITY ANALYSIS WORK?

This article has already established that historic preservation is an ideal vehicle for additional sustainability efforts within DC. The question then arises: where and how would this occur in practice?

74. *Id.* at 3.

75. *Id.*

76. *Id.* at 5.

Since the HPO has guidelines for retrofitting current buildings, the next logical place to expand sustainability considerations would be as an additional criterion to the new construction compatibility analysis. Although sustainability appears to be a good fit within the HPO's compatibility analysis, there are certainly some areas of conflict. For example, some aesthetic concerns described in the current compatibility analysis, such as windows and roofing, may bump up against sustainability goals. A window may need to be made of a certain type of glass to be as energy efficient as possible. However, this glass may not be the most compatible option for the aesthetics of the buildings in a certain historic district. Here, there is the potential for conflict between sustainability and preservationist goals. Should this completely bar sustainability considerations in such instances? Is there a remedy or best practice when these situations arise?

Luckily, the HPO seems to have some wiggle room to balance both sides. As discussed previously, the sustainability guidelines for retrofitting existing historic buildings include consideration of a "reasonable balance" within the community.⁷⁷ The compatibility analysis for new construction may be a good place to begin incorporating that balance. The compatibility analysis already includes aesthetic concerns but has some room for sustainability concerns. One possibility for approaching this balancing test is to group all the current aesthetic criteria together and weigh them against sustainability. This would mean that every single existing compatibility criterion (setback, orientation, scale, proportion, rhythm, massing, height, materials, color, roof shape, details and ornamentation, landscape features) would be weighed equally as a whole against sustainability concerns (energy efficiency and built environment under the Plan).

One potential issue with this suggestion is that a balancing test may give unequal weight to sustainability concerns, as aesthetics are considered all together rather than as individual components of the building. However, the opposite effect may occur if each aesthetic piece (windows, front door, setback, materials, etc.) is considered on its own against sustainability. In this case, aesthetics might be given too much weight in the equation. Any one design concern has the potential to completely "knock out" more sustainable building components if they conflict with the building's character or aesthetic compatibility.

On the other hand, if the principal concern is incorporating sustainability in a way that is as minimally intrusive on existing preservation guidance as possible, it may make sense to go with the one-by-one design element approach. This would mean that any conflict between compatibility and sustainability would be overridden in compatibility's favor. Sustainability

77. *Id.* at 2.

would have to prevail over every single compatibility design element individually, making it more likely that sustainability would rarely ever win out at the end of the analysis. On the other hand, if the goal is for sustainability to have a lasting impact on new construction in historic districts then a bigger push may be helpful in furthering that goal, as well as giving sustainability more weight in HPO's balancing equation. So, weighing sustainability against all aesthetic concerns together can provide the push the City needs to make sustainability more of a priority.

Another important consideration is that preservationists might prefer an unequal weighting system. To them, aesthetic concerns might warrant more weight than sustainability. Along a similar vein, environmentalists may want a compromise—giving sustainability and aesthetics equal weight. Weighing all design elements equally may not be the logical choice for all historic districts. For example, one district may be known for its landscaping where height and scale may not matter as much. In these cases, beginning the analysis by balancing the importance of specific signature design elements in a particular historic district against sustainability may make more sense. This option may allow for more flexibility in the analysis, as the different design elements of compatibility can have individual community-specific weights rather than combining them all equally.

An even less intrusive way to incorporate sustainability into the compatibility analysis for new construction may be to consider sustainability in a separate step in the process. For example, the HPO could first consider its traditional aesthetic compatibility factors. If the project meets those criteria and matches the character of the district, then a consideration of climate change impacts could come in afterwards. Architects and developers would have the initial burden to demonstrate that additional energy-efficient elements of the building contribute to the character of the historic district rather than detract from the project's compatibility.

There could be a “more compatible” option, given that a historic district is likely composed of older buildings. So, a new building designed to match those around it would be more compatible if it was built in a similar aesthetic as the older buildings. Although this may seem ideal from a historic preservation standpoint, such design may prove harmful to the preservationist mission. One important element of the HPO's discussion of new construction is that while compatibility is important, it is equally as important to not create a “false sense of history.”⁷⁸

78. GOV'T OF D.C.: OFF. OF PLAN., *supra* note 66, at 2.

“By relating to the existing buildings and the environment, but being of its own time, a new building shows a district's evolution just as the existing buildings show its past.”⁷⁹

Sustainability has certainly been a key component of the city's evolution. By placing sustainability dead last in the order of consideration and focusing on making buildings as aesthetically compatible as possible, new construction will not reflect such evolution if newer buildings included more weight given to sustainability. Therefore, it may better serve the goals of historic preservation to give sustainability more weight than the one-by-one approach provides. Considering sustainability against aesthetics as a whole gives sustainability more weight.

Finally, viewing sustainability as various factors is important to consider, while the HPO lays out elements for new construction compatibility. DC's city-wide sustainability goals are not an on-off switch or a line in the sand. Every step towards more sustainable buildings, regardless of how small, has an impact.

Similarly, one “green” addition to a building that improves its energy efficiency does not necessarily make it sustainable. Often, there are additional steps that can be taken to further DC's goals. Instead, sustainability within the HPO's compatibility analysis should be viewed as a spectrum. This could be achieved by looking deeper into the Plan's Built Environment (of which the Sustainable DC 2.0 Plan prioritizes efficiency, innovation, and equity) and Energy Efficiency categories.

The following section outlines a feasible approach to the incorporation of sustainability into HPO's compatibility analysis for new construction.

A. The Most Realistic Implementation Strategy—Finding a Middle Ground

The best approach would be to reach a middle ground between the one-by-one approach and group all the elements together in one. This way, the compatibility analysis can remain concerned with aesthetics in its majority but can also give proper weight to sustainability considerations.

First, the HPO should select which design elements are most important to that historic district. The balancing would thus only be occurring within the list of traditional compatibility design elements. None of the other elements would need to be removed or discounted necessarily, but certain aesthetic components can be prioritized through this analysis. This could also be a space for community input and can allow the analysis to have a more localized focus.

79. *Id.*

Next, sustainability should be factored in. After the decision of which aesthetic elements would make a building compatible with the historic district, it will be easier to balance them against sustainability factors. Similar to the compatibility elements, certain sustainable components of a building may be realistic depending on the design restrictions presented by the district. So, along the sustainability spectrum, new construction in one district might be able to accommodate more energy-efficient features than new construction in another district due to key aesthetic components that conflict with green additions in the building's design.

True balancing comes in where there is conflict. In some cases where a certain design element is necessary, and that element conflicts with a certain sustainability addition, the design element may override. In these instances, the architect or developer can consider alternative options for green building. There is certainly flexibility here.

Looking at LEED certification, for example, buildings can earn points towards certification from many different categories. These include: water efficiency, air efficiency, open space, materials, energy metering, energy consumption, and more.⁸⁰ Within each category, LEED presents varying action items (concrete steps that a project team can engage in) that add up to a greener building. If a developer building in a historic district seeks LEED certification, but there is a conflict between an intended point-gaining design element and a historic requirement, there are plenty of workarounds. The building plan can be altered to gain those desired points from a different category, thus satisfying both sustainability and preservation goals.

Similarly, there is flexibility even where historic preservation and sustainability efforts may conflict. For example, a building's analysis can compare the categories of design and green building components that are most realistic for a particular community. This approach properly balances the importance and urgency of sustainable building with the understanding that historic districts are highly unique. Thus, districts could require different approaches to an in-depth aesthetic compatibility analysis. In turn, communities can accommodate different levels of sustainability and incorporate green building in different ways. This flexible yet straightforward analysis also allows for an ongoing dialogue between preservationists and environmentalists—an important element in fostering increased partnership between historic preservation and sustainability in DC.

80. U.S. GREEN BLDG. COUNCIL, *supra* note 7.

VII. HOW CAN INCORPORATING SUSTAINABILITY HELP FURTHER DC'S GOALS?

Incorporating sustainability into the HPO's compatibility analysis for new construction can be helpful to achieve its energy and built environment goals laid out in the Sustainable DC 2.0 plan. Green building can aid in both climate change mitigation and adaptation as the City transitions.⁸¹

A. Energy Goals

The Plan outlines the City's energy efficiency goals at the individual, neighborhood, and district levels.⁸² Ninety-six percent of the City's emissions come from its energy use.⁸³ Any energy generated from fossil fuels will add to DC's carbon footprint.⁸⁴ The more often fossil fuels are used, the worse the region's air quality becomes.⁸⁵ Thus, DC is faced with multiple challenges: reducing energy costs, reducing overall energy consumption, and incorporating more renewable energy sources including wind and solar.⁸⁶ The Plan also notes that all goals need to be met despite the City's continuing population and economic growth.⁸⁷

The Energy Section of the Plan includes three targets: reduce per capita energy use by 50% by the year 2032; increase DC's renewable energy use to 50% by 2032; and have 100% of DC residents living within walking distance of clean backup power sources in case of an outage.⁸⁸ Although each target contains both short- and long-term goals, the following will focus on the goals most relevant to historic preservation and most served by incorporating sustainability into the HPO's compatibility discussions.

First, the Plan includes monitoring current building performance throughout the City.⁸⁹ This permits the city to collect important data and to plan for how to expand and improve energy efficiency in the future. The expanded scope of data collection will incorporate additional buildings that were not previously included. The historic building exception in the DC Building Code highlights how DC has frequently excluded the energy efficiency equation.⁹⁰ This gap can be filled to the extent that new

81. D.C. 2.0 Progress Report 2021, *supra* note 17, at 12–13.

82. SUSTAINABLE D.C. 2.0 PLAN, *supra* note 12 (recommending actions for DC to take at the individual, neighborhood, and district levels).

83. *Id.* at 70.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 74–78.

89. *Id.* at 72.

90. D.C. DEP'T OF BLDGS., *supra* note 26, at 6.

construction projects can implement reasonable efficiency tracking standards in their projects housed in historic districts.

Second, the Plan pledges to “[r]eplace all street and public lighting with high efficiency fixtures that protect public health, reduce light pollution, and do not harm wildlife.”⁹¹ Lighting can play a large role in a site’s design and aesthetic, making it a perfect place for historic preservation and sustainability to coexist. For example, in historic districts with threatened or endangered birds, low-impact lighting should be given more weight when balanced against aesthetics. In the alternative, the building team could propose multiple options for bird-safe lighting, and the HPO could select the option that would be most compatible with the City’s aesthetics.

Third, the Plan hopes to “[b]uild and support commercial and residential renewable energy projects sufficient to get at least five percent of citywide electricity from local generation.”⁹² Incorporating sustainability into the HPO compatibility analysis could certainly help with this goal at little or no administrative cost. Simply by adding sustainability into the new construction conversation, the HPO is expressing support for the Plan and for citywide energy efficiency. Considering sustainability is a huge step in the right direction even if there is conflict with aesthetics (which, as discussed above, can be remedied).

Next, the Plan will “[u]se smart meters and smart grid infrastructure to collect data on electricity use.”⁹³ This goal is particularly keyed to historic preservation goals because inclusion of a smart meter is highly unlikely to intrude on a building’s aesthetics. With modern advanced technology, smart meters are no larger than a toaster, and often smaller. Smart meters are crucial in collecting diagnostic information about energy performance and would be helpful in aiding the city’s learning process as it improves its energy infrastructure. Since a principal concern with modern energy technology is that it potentially intrudes on compatibility and aesthetics, using non-intrusive technology wherever possible is essential.

Finally, historic preservation can help in the Plan’s goal to “[r]emove all barriers to modernizing electricity infrastructure to enable the deployment of neighborhood-scale energy systems and distributed energy resources.”⁹⁴ Where there is a hole in DC’s guidance and regulation, there is a barrier to implementing more sustainable practices. Thus, folding sustainability into new construction, like the HPO’s guidance for retrofitting existing buildings, increases access to greener buildings.

91. *Id.* at 75.

92. *Id.* at 76.

93. *Id.* at 78.

94. *Id.* at 79.

B. Built Environment Goals

While the Plan's discussion of a more sustainably built environment certainly concerns energy efficiency, the Plan goes beyond that—emphasizing inclusivity in new sustainable practices. Similar to the energy efficiency targets, the Built Environment Section aims to: develop workforce trainings, develop public-private partnerships, increase efficiency requirements, and continue to adopt the greenest building practices possible.⁹⁵ However, the key theme throughout the section is that “sustainability is not sustainable without inclusivity.”⁹⁶

The simplest way to increase access to clean energy and expand green building practices is to grow the scope of where green building practices are used throughout the city. Especially in a place like DC, where there are so many historic districts spread throughout the city's geography, additional sustainability considerations are even more likely to increase access. With DC's large number of historic districts encompassing many residences and businesses, more people will be able to take advantage of these efficient structures.

These are only some of the ways that deeper incorporation of sustainability into the HPO's compatibility analysis can help further DC's sustainability goals. Most importantly, historic preservation can help ensure this wide range of goals can be met. Since these are merely examples, additional flexibility exists for how the overlap between sustainability and historic preservation can continue to contribute to DC's climate change discussion over time.

CONCLUSION

Overall, in order to help the city of DC continue to fulfill its sustainability goals, the DC HPO should incorporate sustainability into its compatibility analysis for new construction in historic districts. This can be done by making sustainability an additional criterion, or step, within the analysis. Historic preservation already serves as an excellent mechanism for incorporating more sustainable practices into local buildings.

Especially in DC, there is a unique hole in energy efficiency regulation for historic buildings. In addition, there are ways to remedy conflict between aesthetic and sustainability elements. Therefore, the HPO's compatibility analysis should incorporate sustainability, since this is the logical next step for green building in DC.

95. *Id.* at 38–41.

96. *Id.* at 31.

HOLISTIC REWILDING: THE USE OF EXISTING PROPERTY LAW TO SECURE INTERESTS OF THE WILDERNESS

By Drake Stobie

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INTRODUCTION

The critical question of "standing" would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation. —*Justice William O. Douglas*¹

1. *Sierra Club v. Morton*, 405 U.S. 727, 741–42 (1972) (Douglas, J., dissenting).

Justice William O. Douglas's famous dissent in *Sierra Club v. Morton* exemplifies both the problems of excluding the environment from legal standing and that including the environment within our legal framework would not be an extraordinary measure. Contemporary issues have exacerbated the necessity for a legal system that provides avenues for environmental interests to be adequately considered. Legal traditions allowing nonhumans to have legal standing could reasonably be extended to wildlife. This article analyzes "rewilding" as a way of exploring the ways in which wildlife could fit into the context of contemporary property law. As the United Nations has declared 2021–30 as the "Decade on Ecosystem Restoration," the time is ripe for governments to look to legal mechanisms to conserve and enrich the wilderness.²

Robust conservation efforts, such as rewilding, have become necessary from various perspectives. In the current era of the Anthropocene, human activity has increasingly driven environmental changes. This has led to seismic changes in wildlife and anthropocentric climate change.³ Biodiversity loss and climate change are economic, existential, and moral problems facing the world today; indeed, over the past half-century, Earth has lost two-thirds of its wildlife and an additional 40% of plant species face possible extinction.⁴ Likewise, this problem directly relates to the governance of Western industrial democracies. Notably, both the United States and the United Kingdom have contributed to this problem within their own territories. The United Kingdom has decimated a large portion of its environment—as much as 40% of all species—through destructive farming practices, hunting, pollution, and contamination.⁵ Further, the United States has had a significant negative impact on nearly all aspects of the country's environment. This trend is omnipresent throughout the world. For example, humans have substantially damaged forests, reduced global wetlands by 50%, and damaged the ecosystems of coastal waters through pollution and damaging fishing practices.⁶ These harms reinforce each other because

2. Phillippa C. McCormack et al., *Wilderness Law in the Anthropocene: Pragmatism and Purism* 51 ENV'T L. 383, 432 (2021); see also FOOD AND AGRIC. ORG. OF THE UNITED NATIONS, THE UN DECADE ON ECOSYSTEM RESTORATION 2021-2030 (June 2020), <https://wedocs.unep.org/bitstream/handle/20.500.11822/30919/UNDecade.pdf> (discussing the United Nation's goal of ecosystem restoration).

3. McCormack et al., *supra* note 2, at 419–20.

4. Rosie Frost, *Scotland Could Become the World's First 'Rewilding Nation'. How Did They Get Here?*, EURO NEWS (April 26, 2021), <https://www.euronews.com/green/2021/04/26/scotland-could-become-the-world-s-first-rewilding-nation-how-did-they-get-here>.

5. Sarah Wilson, *Rewilding Scotland*, THE SCOTSMAN, <https://www.scotsman.com/interactive/rewilding-scotland-natural-ecosystem#main-page-section-0> (last visited Nov. 12, 2021).

6. See Anastasia Telesetsky, *Ecoscapes: The Future of Place-Based Ecological Restoration Laws*, 14 VT. J. ENV'T L. 493, 499 (2013) (stating "acreage of primary old-growth forests . . . has decreased by over forty million hectares since 2000").

climate change is an additional driver of biodiversity loss: “even low levels of biodiversity loss in wilderness areas will likely include global losses of important reservoirs of genetic information, some of the last remaining reference points for restoration and rewilding, and habitat strongholds for many threatened species, ecological communities, and ecological processes.”⁷ Wilderness areas also serve as a refuge for species in times of climate change or crisis, and their degradation reinforces these issues.⁸

In addition to biodiversity loss and climate change, this environmental degradation poses a direct threat to world hunger needs. For example, 87% of the world’s fisheries face overexploitation.⁹ These environmental issues demand legal action to prevent the most negative consequences of climate change, biodiversity loss, and fishery depletion from happening. Preservation and restoration of wilderness spaces is important for both anthropocentric and environmental reasons.¹⁰

I. ANGLO AMERICAN TRADITION

Within British common law is a doctrine that gives wildlife the right to pass through private land: *fera naturae*.¹¹ Additionally, as Justice Douglas addressed in his famous dissent in *Sierra Club*, there is precedent for granting legal personhood to wildlife: “Legal institutions have long extended legal personhood for the sake of property interests to nonhumans, including corporations, real estate investment trusts, and even ships. Animals already have a limited capacity to own property.”¹² Applying this concept to the wilderness would not require a radical overthrow of Anglo-American law; on the contrary, such application would be simply an extension of longstanding precedent. Furthermore, both American and European customs support this assertion. Legal philosophers throughout the Western tradition have endorsed paradigms that, while anthropocentric, leave room for

7. McCormack et al., *supra* note 2, at 422.

8. *Id.*

9. Telesetsky, *supra* note 6, at 500.

10. See McCormack et al., *supra* note 2, at 387 (discussing a variety of reasons to value wilderness through environmental, scientific, and economic perspectives: wilderness mitigates greenhouse gas pollution, provides habitats for biodiversity to flourish, provides recreational experiences for humans; inspires religious and spiritual values in humans; offers scientists unique research opportunities; and garners economic value through tourism and ecosystems services).

11. KAREN BRADSHAW, *WILDLIFE AS PROPERTY OWNERS: A NEW CONCEPTION OF ANIMAL RIGHTS* 57 (Univ. of Chi. Press 2020).

12. *Id.* at 130.

nature.¹³ The largest barrier to stronger legal rights for wildlife interests lies in systemic attitudes toward property ownership. Humans generally do not consider wildlife's dependence on shared resources because they treat the environment as a resource instead of a claim holder.¹⁴ While the current systems within American and international law lack structure for wildlife interests, these systems themselves provide room for the wilderness to play a larger role within law.

II. AMERICAN LAW

In American law, environmental protection exists through a regulatory patchwork sewn into balance of powers in the federalist system. The Property Clause of the United States Constitution addresses the governance of public land: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."¹⁵ Courts have traditionally interpreted this provision by deferring to Congress's judgment.¹⁶ As a result, conservation efforts at the federal level have been manifested through two major pieces of legislation: the Wilderness Act¹⁷ and Endangered Species Act.¹⁸ Congress passed the Wilderness Act with the purpose of "protect[ing] areas 'untrammled by man, where man himself is a visitor who does not remain.'"¹⁹ In doing so, Congress established a National Wilderness Preservation System that designates certain federal lands as "wilderness" and grants them certain legal protections.²⁰ Under this system, in which only Congress may identify lands for preservation, protected lands have increased from about nine million acres in 13 states to about 111 million acres in 44 states.²¹ While there have been several other congressional actions intended to protect wildlife, these two laws are crucial elements of congressional efforts to protect the environment. Additionally, the federal government has established agencies

13. *See id.* at 22 (stating "Although Western property theorists have long assumed that only humans had property rights, they also noted the natural, universal nature of rights. Plato described law as operating in accordance with nature. Aristotle described law as 'universal' and 'all-embracing.' John Locke described property as a 'natural right' that preexisted government. Blackstone believed that human property behavior operated along principles reducible to mathematical equations. Natural law scholars believed that it was useful to look at human behavior divorced from government, but ended at the human—not considering broader biological principles.").

14. *Id.* at 38.

15. U.S. CONST. art. IV, § 3, cl. 2.

16. *See Kleppe v. New Mexico*, 426 U.S. 529, 536 (1976) (noting that courts have traditionally deferred to Congress when faced with issues about the Property Clause).

17. Wilderness Act, 16 U.S.C. §§ 1131–36 (1964).

18. Endangered Species Act, 16 U.S.C. §§ 1531–54 (1973).

19. *See Wolf Recovery Found. v. U.S. Forest Serv.*, 692 F. Supp. 2d 1264, 1266 (D. Idaho 2010). (quoting 16 U.S.C. § 1131(c)).

20. McCormack et al., *supra* note 2, at 402–03.

21. *Id.* at 403.

pursuant to the Property Clause to enact congressional legislation and serve as drivers of environmental conservation efforts; specifically, these agencies include the Environmental Protection Agency,²² the U.S. Fish and Wildlife Service,²³ and the Bureau of Land Management.²⁴

Meanwhile, American courts have traditionally protected Congress's authority under the Property Clause, generally finding that the Clause grants Congress the power to determine rules for public lands without limitation.²⁵ In the case of *Kleppe v. New Mexico*, the United States Supreme Court reviewed Congress's authority to protect unclaimed horses and burros on public land.²⁶ The Court held that Congress's power over public lands encompasses the power to protect and regulate the wildlife inhabiting those public lands.²⁷ Furthermore, the Court determined that even when state governments have claim to public land, Congress has the ultimate authority: "Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant [to] the Property Clause."²⁸ Ultimately, the American Constitution enumerates that Congress has the authority regarding property of the United States. Congress has delegated portions of this power to administrative agencies and the Executive Branch. Examples of this delegation include President Ulysses S. Grant demarcating the Alaska Pribilof Islands as a home for the northern fur seal with land use restrictions, and President Theodore Roosevelt establishing the Pelican Island Migratory Bird Reservation.²⁹ Courts have respected these actions, and public land is effectively used by the federal government for environmental conservation. Karen Bradshaw provides two examples of this dynamic: (1) in 1976 and 1980, Congress passed legislation converting millions of acres of unclaimed land in Alaska and the western half of the

22. See Act of September 6, 1966, Pub. L. No. 89-554, 1966 (80 Stat.) 378, (authorizing Reorganization Plan No. 3 of 1970 with "An Act to enact title 5, United States Code, 'Government Organization and Employees' codifying the general and permanent laws relating to the organization of the Government of the United States and to its civilian officers and employees"); See U.S. EPA, *The Origins of EPA*, <https://www.epa.gov/history/origins-epa> (last visited June 24, 2022) (recounting EPA's institutional history).

23. *History of the U.S. Fish & Wildlife Service*, U.S. FISH & WILDLIFE SERVICE, <https://www.fws.gov/history-of-fws> (last visited June 30, 2022).

24. BUREAU OF LAND MGMT., *National History*, U.S. DEP'T OF THE INTERIOR, <https://www.blm.gov/about/history/timeline> (last visited Jun. 30, 2022); Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 (codified as amended at 43 U.S.C. §§ 1701-82); see also 48 U.S.C. §§ 1-2241.

25. *Kleppe*, 426 U.S. at 539.

26. *Id.* at 546.

27. *Id.* at 540-41.

28. *Id.* at 542-43.

29. BRADSHAW, *supra* note 11, at 57.

contiguous United States to federal ownership; and (2) the federal government owns and protects roughly 640 million acres, which is approximately one-third of American land.³⁰

However, American law has also incorporated and developed common law rules regarding private property that coexist with principles governing public property (governed by the Property Clause). Private property owners, for example, have rights and powers over property that come with a degree of permanence absent in legislative protections that can be reversed by later Congresses.³¹ Private property has played a significant role in environmental degradation and could play a significant role in the reverse of this process. However, the current American system of private property does not grant legal voice to the environment, and landowners have traditionally opposed conservation efforts by the government on private land.³² This trend has allowed conservation efforts to hit a snag. While wilderness protection initiatives have been successful on public land, this success lies at the mercy of congressional action and administrative support. The vast amount of wildlife that depends on private land does not have legal recourse, even when there is congressional and administrative action.

III. COMPARATIVE/INTERNATIONAL LAW

The United States is not the only country with an approach to conservation law. The legal frameworks of other countries encompass rewilding and other environmental protection methods. Scotland, in particular, has faced a recent push to repair its natural landscape through rewilding. However, other countries have also engaged in various approaches to address climate change and biodiversity loss. This trend reflects the global nature of these problems:

Based on a definition of wilderness that is an area without significant human disturbance such as forestry, farming or mining, we are losing

30. *Id.* at 39–40.

31. *Id.* at 19.

32. *See id.* at 35 (describing the conflict between landowners and federal agencies, and how this conflict ultimately leads to a lack of environmental protection: “Many endangered species rely on habitat located on private land. To protect species, federal agencies must conserve their habitat. Agencies do so by exerting control over state and private landowners through critical habitat designations under the Endangered Species Act. Landowners fear that such designation will reduce property values and restrict future development on their property. As a result, landowner opposition has formed the primary barrier to species conservation, creating well-documented public choice effects through which agency officials avoid designating valuable private land as critical habitat. Congressional control of agency budgets creates further incentives for the agency to avoid listing species or designating habitat in the regions represented by key Congressmen. Property owners even destroy habitat or kill soon-to-be-listed wildlife to avoid federal control over their land.”).

it rapidly: the planet lost one tenth of its wilderness between 1993 and 2016 (3.3 million km², an area larger than India). Today, the largest wild areas within national borders are the Australian outback, Alaska's arctic tundra, Canada's and Russia's vast boreal forests, and the Amazon jungle. The principal wilderness areas outside national borders are in Antarctica and the high seas, although even these wildernesses are declining. Recent research shows that less than 32% of the Antarctic continent may be considered inviolate wilderness, and researchers consider only 13% of the oceans comprise wilderness, free from fishing, shipping or other disturbances.³³

While Scotland, amongst other countries, has taken efforts to restore the wilderness in certain areas, more work needs to be done within the legal frameworks of countries across the world in order to combat climate change, biodiversity loss, and other forms of environmental degradation.

A. Scotland

While Scotland is known for its beautiful landscapes, it is actually a location that has faced significant natural destruction.³⁴ The Scottish Rewilding Alliance, a group of several environmental organizations in Scotland, has campaigned to expand rewilding efforts in the country.³⁵ Presently, popular support has grown for rewilding in Scotland as evidenced by a 2020 poll indicating that 76% of respondents supported rewilding while only 7% opposed it.³⁶ The Scottish Parliament even proposed a measure recognizing Scotland's potential as a "rewilding nation."³⁷ However, the government has been hesitant to lean heavily into this approach, so rewilding

33. McCormack et al., *supra* note 2, at 389.

34. See generally Ilona Amos, *Scotland's Wildlife in Crisis as Half of Species Declining and One in Ten At Risk of Extinction*, THE SCOTSMAN (Oct. 3, 2019), <https://www.scotsman.com/news/scottish-news/scotlands-wildlife-crisis-half-species-declining-and-one-ten-risk-extinction-1406066> (discussing the decline of species and habitat in Scotland over the past 25 years); Billy Briggs, *Scotland's Wildlife and Habitats At Risk With More Than 1100 in 'Poor' State*, THE HERALD (Oct. 20, 2021), <https://www.heraldscotland.com/news/homenews/19655278.scotlands-wildlife-habitats-risk-1100-poor-state/> (discussing how wildlife instability in Scotland is in part linked to overall global warming).

35. *About the Alliance*, THE SCOTTISH REWILDING ALL., <https://www.rewild.scot/about> (last visited Nov. 15, 2022).

36. Stephanie Parker, *Scotland Could Become the World's First 'Rewilding Nation'*, HOWSTUFFWORKS (May 10, 2021), <https://science.howstuffworks.com/environmental/conservation/issues/scotland-rewilding-nation-news.htm>.

37. Scotland's Potential to be a Rewilding Nation, Motion Ref. S5M-24154 (Feb. 17, 2021) (Scot.), <https://www.parliament.scot/chamber-and-committees/votes-and-motions/votes-and-motions-search/S5M-24154>.

and conservation efforts have been driven by private individuals.³⁸ For example, in 2003 a wealthy individual named Paul Lister purchased 23,000 acres for rewilding, and in the succeeding 17 years he has planted a million native trees, reintroduced species, and revitalized peatlands.³⁹ Likewise, another private initiative launched recently aims to rewild the Affric Highlands (a large part of the Scottish Highlands between Loch Ness and the west coast), including a mountain range, peat bogs, and forests.⁴⁰ Species reintroduction has been effectively utilized with the successful reintroduction of the European beaver, white-tailed eagle, and the rare vendace fish.⁴¹

The efforts made in Scotland thus far show that rewilding is an effective weapon against climate change and biodiversity loss. Specifically, the reintroduction of beavers has reinvigorated wetlands and the promotion of white-tailed sea eagles on the Isle of Mull, contributing significantly to revenue from tourism.⁴² These benefits are not only limited to species reintroduction, but they are also obtained through restoration of landscapes themselves. Restored peatlands in Scotland have the potential to store annually as much as the average amount of carbon dioxide citizens of the United Kingdom emit each year.⁴³

Rewilding advocates in Scotland want to make Scotland the first “rewilding nation” and have several other goals they hope to achieve beyond the current success. The Scottish Rewilding Alliance is advocating for public officials to commit to five policies: rewilding 30% of public land; establishment of a community fund for rewilding in more urban areas; reintroduction and integration of keystone species; creation of a coastal zone with a ban on trawling and dredging; and a plan to prevent overgrazing and control deer population growth.⁴⁴ The largest hurdle for rewilding advocates in Scotland is a key demographic: farmers. Since most action has been private thus far, farmers hold significant power because they manage a substantial amount of land.⁴⁵ This is a problem for rewilding supporters as farmers are less likely than the population to support rewilding, even when given information about the ecology of species that have been proposed for

38. Wilson, *supra* note 5.

39. *Id.*

40. Phoebe Weston, *Vast Area of Scottish Highlands to be Rewilded in Ambitious 30-Year Project*, THE GUARDIAN (Sept. 24, 2021), <https://www.theguardian.com/environment/2021/sep/24/vast-area-of-scottish-highlands-to-be-rewilded-in-ambitious-30-year-project-aoe>.

41. Whitney G. Stohr, *Trophic Cascades and Private Property: The Challenges of a Regulatory Balancing Act and Lessons the UK Can Learn from the Reintroduction of the American Gray Wolf*, 2 U. BALT. J. LAND & DEV. 15, 35 (2012).

42. Wilson, *supra* note 5.

43. *Id.*

44. Frost, *supra* note 4.

45. Wilson, *supra* note 5.

reintroduction (such as the lynx).⁴⁶ Opposition from rural communities and a lack of action from Scottish Natural Heritage are barriers to more widespread action.⁴⁷ A broader problem exists with the agricultural subsidy program, which rewards farmers for productivity without concern for environmental conservation.⁴⁸ Reforming the subsidy system to reward farmers for environmental work and sustainable practices would be an important first step, even if doing so would not solve every problem between the rewilding movement and the farming community.⁴⁹

B. Other Countries

Outside of Scotland, other countries have engaged with rewilding as a conservation effort. Switzerland, for example, provides an early case study in environmental conservation, as it established the Swiss National Park in 1914.⁵⁰ Specifically, Switzerland emphasized restoring wilderness through active intervention instead of passive protection, this led to culling overabundant deer populations and reintroduction of multiple indigenous species.⁵¹ Norway recently strengthened environmental protection with the Svalbard Environmental Protection Act of 2001. The Act established a protected area containing about 65% of the arctic archipelago.⁵² The provisions of the Act aim “to maintain large, continuous and largely undisturbed areas of natural environment on land and in the sea with intact habitats, ecosystems, species, natural ecological processes, landscapes, cultural heritage, and cultural environments.”⁵³ France recently saw the creation of its first private wildlife preserve, which reinforces the myriad of wilderness regulatory bodies.⁵⁴ The creation of this preserve, however, was a response to liberalization of protected areas in natural parks, allowing for more human interference.⁵⁵ France recently passed a new law increasing

46. *Id.*

47. Stohr, *supra* note 41, at 35–36.

48. Wilson, *supra* note 5.

49. *Id.*

50. Pascale Meyer, *The Birth of the Swiss National Park*, SWISS NAT’L MUSEUM BLOG (May 24, 2022), <https://blog.nationalmuseum.ch/en/2022/05/the-birth-of-the-swiss-national-park/>.

51. McCormack et al., *supra* note 2, at 393–94.

52. *Id.* at 412; *see also Svalbard Environmental Protection Act Act of 15 June 2001 No.79 Relating to the Protection of the Environment in Svalbard*, NOR GOV’T: MINISTRY OF CLIMATE & ENV’T, (June 15, 2001), <https://www.regjeringen.no/en/dokumenter/svalbard-environmental-protection-act/id173945/#:~:text=The%20purpose%20of%20this%20Act,provided%20for%20information%20purposes%20only.>

53. McCormack et al., *supra* note 2, at 412.

54. Audrey Garric, *Wildlife and Conservation Given a Home in France's First Private Nature Reserve*, THE GUARDIAN (May 5, 2014), <https://www.theguardian.com/environment/2014/may/06/grand-barry-private-nature-wildlife-reserve-france>.

55. *Id.*

protections and rights afforded to certain animals,⁵⁶ and the country also established The French Biodiversity Agency in 2020 to advance greater biodiversity preservation.⁵⁷ In Germany, the Conservation of Nature and Landscapes Act provides for several comprehensive conservation measures including: protections for critical species, intervention regulation, and conservation planning.⁵⁸ China implements a variety of measures to protect its extensive wildlife, such as designated protected areas and efforts to combat illegal wildlife trade.⁵⁹ China has also recently increased the amount of animals afforded significant protection under Chinese law.⁶⁰ In Japan, there are multiple civil society organizations dedicated to promoting wildlife conservation,⁶¹ and the government has enacted statutes governing hunting regulations and wildlife protection.⁶² Additionally, in Australia, a variety of efforts have been endorsed to actively intervene in the environment to promote conservation. There, the Western Australian Department for Environment and Water described various methods of active intervention to promote conservation in a 2017–18 report: “burning, fire management, track and trail maintenance, mechanical hazard reduction in wilderness protection areas, feral goat and deer eradication, aerial and ground-based fox baiting, wildlife trapping, pitfall trapping, camera traps including baited camera traps, and drone flights for aerial population mapping of sea lions and island habitat.”⁶³ Globally, the rewilding movement has tried to balance the policies of environmental conservation with economic concerns. Notably, rewilding advocates have also used environmental tourism to replace income that would have been obtained through “extractive jobs.”⁶⁴

56. *Historic Animal Protection Bill Passed in France*, EUROGROUP FOR ANIMALS (Nov. 19, 2021), <https://www.eurogroupforanimals.org/news/historic-animal-protection-bill-passed-france>.

57. *See About Us*, THE FRENCH BIODIVERSITY AGENCY, <https://www.ofb.gouv.fr/en/french-biodiversity-agency-ofb> (citing law no. 2019-773 of 24 July 2019 that established the Office Français de la Biodiversité).

58. *Federal Nature Conservation Act (Bundesnaturschutzgesetz, BNatSchG)—Excerpts*, GERMAN L. ARCHIVE (Sept. 21, 1998), <https://germanlawarchive.iuscomp.org/?p=319>.

59. Guangping Huang, et al., *Wildlife Conservation and Management in China: Achievements, Challenges and Perspectives*, 8 NAT'L SCI. REV. 7, 1 (2021).

60. Xinhua, *China Increases Wildlife Protection with List Revision*, THE PEOPLE'S REPUBLIC OF CHINA: THE STATE COUNCIL (Feb. 6, 2021), http://english.www.gov.cn/statecouncil/ministries/202102/06/content_WS601e36f0c6d0f725769453b5.html.

61. Chris Lee, *3 Japanese Organizations Dedicated to Biodiversity and Conservation*, ZENBIRD (June 21, 2021), <https://zenbird.media/3-japanese-organizations-dedicated-to-biodiversity-and-conservation/>.

62. MINISTRY OF THE ENV'T, *Wildlife Protection System and Hunting Law: Wildlife Conservation in Japan*, GOV'T OF JAPAN, <https://www.env.go.jp/en/nature/biodiv/law.html> (last visited July 5, 2022).

63. McCormack et al., *supra* note 2, at 400.

64. Sophie Yeo, *New Rewilding Project Teaches Tour Guides to Offer Fresh Look at Travel*, THE GUARDIAN (Jan. 22, 2021), <https://www.theguardian.com/travel/2021/jan/22/new-rewilding-project-teaches-tour-guides-to-offer-fresh-look-at-travel>.

IV. LEGAL PARADIGM OF THE WILDERNESS

In order to come to a solution and take rewilding to the next level of a legal framework, it is important to evaluate the nature of jurisprudence. Helena Howe, a professor at the University of Sussex, argues that we need to shift our current legal reasoning toward an “Earth Jurisprudence” to prioritize ecocentrism: “Until we change our thought processes—our jurisprudence—we cannot change the way we regulate our interactions with the natural world. Views may differ about the precise content of this concept, particularly the extent to which it encompasses a recognition of the intrinsic value of all nature.”⁶⁵ Howe further argues that we need to shift our paradigm from one focused on “the rights-based liberal concept of private property, in which land is seen as a dephysicalised object or commodity” in favor of “a more ecocentric perspective that recognises the uniqueness and ecological integrity of land.”⁶⁶ Through this paradigm shift, property owners would have a legal obligation to care for the common good of the environment.⁶⁷

In defining “the wilderness,” there are several characteristics that are critical to understanding the goals of rewilding and legal conservation efforts. The concept of *ecoscap*es, as described by Howe, is a helpful way of evaluating the wilderness as a potential legal actor. Under this conception, *ecoscap*es are not fixed spaces; rather, they change as humans change their level of commitment to restoring ecosystems.⁶⁸ Many projects related to these *ecoscap*es have been advanced through private civil society and there have been varying degrees of reliance on human action to facilitate restoration.⁶⁹ A critical component of successful development of *ecoscap*es is size—a large enough geographic area is necessary because fragmentation into smaller parcels of land kneecaps management and reduces efficacy.⁷⁰ Additionally, a large size is critical to enable the area to absorb natural disasters.⁷¹ Another component to the definition of “wilderness” is the concept of “remoteness” from human society: “[r]emoteness from human infrastructure and activity . . . protects the ecological and experiential values of wilderness, such as enabling visitors to experience solitude and a sense of place in nature . . . wilderness would be strengthened and enhanced if

65. Helena R. Howe, *Making Wild Law Work - The Role of ‘Connection with Nature’ and Education in Developing an Ecocentric Property Law*, 29 J. ENV’T L. 19, 29 (2017).

66. *Id.*

67. *Id.*

68. Telesetsky, *supra* note 6, at 528.

69. *Id.* at 539.

70. *Id.* at 540.

71. Dave Foreman, Symposium, *Wilderness Act of 1964: Reflections, Applications, and Prediction: Content: III. Specific Application: The Wildlands Project and the Rewilding of North America*, 76 DENV. U. L. REV. 535, 543–44 (1999).

remoteness was recognized as its primary value.”⁷² Wilderness must also be defined geographically, to an extent, on its own terms and not on land derogated by humans as a result of the land being “lesser” in value.⁷³

Broadening the legal paradigm to include a space for the wilderness as an actor is compatible with current legal conventions. Standing, the legal concept that allows legal persons to appear in court in cases that are legally relevant to them, has been granted to non-human entities in the past. As Justice Douglas wrote,

Inanimate objects are sometimes parties in litigation. A ship has a legal personality, a fiction found useful for maritime purposes. The corporation sole . . . is an acceptable adversary, and large fortunes ride on its cases. The ordinary corporation is a ‘person’ for purposes of the adjudicatory processes.⁷⁴

Likewise, the concept of property ownership, through presence or through the concept of establishing a “home,” is utilized by animals in the wild. In many cases, the concept of property ownership mirrors the function of a residency that humans use (even in the creation of structures, such as nests or burrows).⁷⁵ Animals hunting on their territory could be perceived as “working the land” as there are both public and private functions fulfilled by allowing animals to hunt on their territory.⁷⁶ The greatest distinction between functions of property “ownership” in humans and animals is the concept of alienation, as humans often claim property in excess of individual needs in order to gain additional economic value.⁷⁷ However, a paradigm of property law that is inclusive of the wilderness as a legal actor would refrain from instigating clashes between the interests of humans and the wilderness. Instead, this paradigm would promote synergy across all interests involved, in contrast with the current framework which sees the interests of animals and humans as zero-sum.⁷⁸ Howe lays out a roadmap for this paradigm shift in the law of property:

72. McCormack et al., *supra* note 2, at 388.

73. See BRADSHAW, *supra* note 11 (“Accepting the premise that species can be restricted to less valuable land diminishes the intrinsic value of species and undermines our country’s ecological values. Such reasoning commodifies the value of animal habitat rather than capturing the full value of a landscape or ecosystem.”).

74. *Sierra Club v. Morton*, 405 U.S. 727, 742 (1972) (Douglas, J., dissenting).

75. BRADSHAW, *supra* note 11, at 49.

76. *Id.*

77. *Id.* at 55.

78. *Id.* at 132–33.

A Wild Law of property, for example, holds that humans understand that they play a part in a wider ecological whole and they must exercise rights over the land in ways which respect the ecological sustainability of that whole. This is not just a sense of interdependence with non-human nature, although this is vital. Property, on this view, is a social relationship which shapes human interaction. The significance of property to the development or protection of autonomy, identity and freedom is recognised but it is interpreted as socially situated and thus as involving obligations to others who may need to use or access the land.⁷⁹

A. Rewilding

Rewilding as a concept exists as an extension of other conservation efforts. Rewilding consists of returning land back to the wilderness and restoring ecosystems to the point that they are self-sustainable. This can be viewed conceptually as a stream of environmental idealism that flows beyond several “currents” of environmental conservation efforts that have already been observed and reinforce each other. The first current of the traditional wilderness movement promotes recreation and inspiration from the environment.⁸⁰ The second current focuses on the protection of “hot spots” for biodiversity and important habitats.⁸¹ And the third current recognizes the need for connection between protected areas to reflect advancements in biogeography.⁸² These currents are a marked improvement from the focus on conserving individual species without concern for habitats as a whole. Which can produce species without a functioning natural habitat and can therefore only exist in captivity or for the purpose of human recreation.⁸³ However, these approaches are not mutually exclusive and can effectively coexist and reinforce each other.⁸⁴ Some scholars have used three features to describe rewilding: large wilderness reserves, connectivity, and keystone species.⁸⁵ Taking these features into account, there are a variety of aspects to rewilding as well as multiple legal perspectives that could be used to implement this concept. But there is some criticism of the rewilding approach, as many

79. Howe, *supra* note 65.

80. Foreman, *supra* note 71, at 549.

81. *Id.*

82. *Id.*

83. BRADSHAW, *supra* note 11, at 15, 39.

84. Foreman, *supra* note 71, at 550.

85. *Id.* at 548.

ecosystems have substantially changed to the point where rewilding efforts would radically transform existing ecosystems.⁸⁶

B. Keystone Species Reintroduction

Taking a page from the economic concept of self-regulation, there is evidence to suggest that undisturbed ecosystems would be able to provide adequate regulation over their property. This environmental self-sustainability is based on the concept of “keystone species,” which can manifest through species that perform several different functions for the ecosystem. According to Brian Miller (a conservation biologist with the Denver Zoo), keystone species exist alongside other types of “focal species.” These types of species include the following: umbrella species that cover large areas and impact the habitats of a wide variety of wildlife; flagship species, which inspire support for wildlife among the population (like the bald eagle); and indicator species, which are sensitive to environmental changes and often provide warnings to observers about the impacts of environmental degradation in a localized area.⁸⁷ Miller defines keystone species in a much broader manner. According to Miller, they are species which enrich their specific ecosystem in impacts that are disproportionate to their number.⁸⁸ For example, “[a]pex predators provide natural top-down regulation within their respective range habitat. The impact of the predator-prey relationship resonates throughout the food chain in a trophic cascade, from the apex predator at the top to the soil.”⁸⁹ However, as these keystone species have been eliminated from their habitats, humans must reintroduce these species to restore balance to the ecosystem and rein in the unforeseen consequences of their elimination.⁹⁰ These unforeseen consequences can be wide-reaching and affect a variety of other species in the ecosystem as well as the landscape of the habitats themselves.⁹¹

The reintroduction of the wolf in Yellowstone National Park in the United States is a successful example of reintroduction. In 1995, a small population of wolves was reintroduced to Yellowstone National Park alongside a privately managed trust to compensate victims of any associated livestock loss. The wolf population grew exponentially and reestablished itself as a species in the ecosystem.⁹² After the wolves were reintroduced to Yellowstone, elk overgrazing was reined in as they were driven back to

86. Telesetsky, *supra* note 6, at 506–07.

87. Foreman, *supra* note 71, at 546–47.

88. *Id.* at 546.

89. Stohr, *supra* note 41, at 19.

90. *Id.*

91. *Id.* at 20.

92. *Id.* at 28.

normal behavioral patterns associated with a predator-prey relationship, vegetation surged, and other animals saw restoration of their habitats—holistically, the ecosystem “reawakened.”⁹³ Opposition from local interests, especially ranchers, remains ardent in spite of empirical successes of species reintroduction.⁹⁴ Despite this opposition, scientists argue that large predators are necessary for three reasons: ecosystems are often maintained by “top-down” interactions stemming from large predators; large predators justify having significant amounts of land for wilderness designation; and they require connectivity, which also ensures sustainability of the ecosystem as a whole.⁹⁵ There is also the novel idea proposed by some rewilding advocates of introducing non-native species in hopes of constructing favorable environmental areas, such as introducing animals like lions, tigers, and elephants to North America to hopefully construct new ranges for them.⁹⁶

A limitation of species reintroduction is its narrowness. Even with keystone species, there are a host of other factors that have contributed to environmental decline rather than the elimination of specific species from their historic habitats.⁹⁷ Revitalizing specific species will likely be insufficient to revitalize environmental areas. The reintroduction of keystone species therefore would not serve as a silver bullet for environmental conservation—reintroduction needs to be accompanied with additional measures as part of a larger scheme.

C. Public-Private Partnerships

Public-private partnerships are another mechanism to expand rewilding and other expansion of rights for the wilderness. Public-private partnerships have seen some empirical application with the establishment of the Tall Grass Prairie Preserve in Kansas.⁹⁸ In this case, a trust purchased and now manages

93. *Id.* at 20–21.

94. Telesetsky, *supra* note 6, at 506.

95. Foreman, *supra* note 71, at 547.

96. Telesetsky, *supra* note 6, at 506–07.

97. See generally Chong Wang et al., *Social and Economic Factors Responsible for Environmental Performance: A Global Analysis*, PLOS ONE (Aug. 27, 2020) <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0237597>; Mahendra Pratap Choudhary et al., *Environmental Degradation: Causes, Impacts and Mitigation*, CONFERENCE: NATIONAL SEMINAR ON RECENT ADVANCEMENTS IN PROTECTION OF ENVIRONMENT AND ITS MANAGERIAL ISSUES (Feb. 2015) https://www.researchgate.net/publication/279201881_Environmental_Degradation_Causes_Impacts_and_Mitigation; Jenna Tsui, *Five Biggest Environmental Issues Affecting the U.S.*, ENV'T PROT. (Feb. 24, 2020), <https://eponline.com/articles/2020/02/24/five-biggest-environmental-issues-affecting-the-us.aspx>.

98. Tyler Sutton & Joel Sartore, *Lead Commentary: Renewing the Great Plains: Towards a Greater Black Hills Wildlife Protected Area*, 5 GREAT PLAINS NAT. RES. J. 1, 3–4 (2001).

public land for the purpose of the Preserve.⁹⁹ While an admirable effort to preserve a unique ecosystem, the limited size renders the Preserve's value to the wilderness fairly small.¹⁰⁰ As a result, a serious effort to reintroduce extirpated wildlife, such as bison, would require an application of this concept to a much larger area.¹⁰¹ Two issues that have prevented a more aggressive approach to environmental protection and restoration of the Great Plains are a lack of a larger concept and sustained advocacy.¹⁰² Given the cross-border nature of ecosystems and the status of public land in America, federal legislation is likely necessary to promote a more aggressive pursuit of public-private partnerships on federal land, in addition to amenable local policy.¹⁰³

A problem with this approach is that it provides a significant amount of oversight to private organizations. These organizations can lack the stability and longevity of state agencies, and they have the potential to co-opt the public interest. Another issue is the aforementioned lack of sustained advocacy that is necessary for a public-private partnership effort on a large scale. Finally, the federalist system in the United States requires a patchwork approach to provide effective conservation measures across land owned by both the federal and state governments.

D. Trusts

Legal scholar Karen Bradshaw proposes integrating wildlife interests into the system of trust law:

Under this model, human trustees would manage the land at an ecosystem level for the collective benefit of animal beneficiaries, operating under a fiduciary duty. To ensure consistently sound practices, each trustee would operate under the guidance of a private governance committee, which would regularly update standards requiring best practices. Such practices would operate against the backdrop of judicial oversight under trust law. Trustee selection could be determined on a trust-by-trust basis, so long as it accords with the general principles established by the overarching governance committee and common-law trust principles.¹⁰⁴

99. *Id.*

100. *Id.*

101. *Id.* at 4.

102. *Id.*

103. *Id.* at 5.

104. BRADSHAW, *supra* note 11, at 66–67.

Under this system, trustees would make decisions with the health of the overall ecosystem in mind. This proposal seeks to address the inability of animals themselves to communicate their desires for proper use of their property. Likewise, this proposal also takes an ecosystem approach rather than a species approach, which allows for more holistic decision making—instead of the interests of a single species. Bradshaw describes several problems with an individual approach, such as the need for censuses and the inability to gather accurate information due to migration and seasonal changes in wildlife.¹⁰⁵ Bradshaw touts the benefits of an ecosystem approach, as it would benefit all animals in the territory of the trust, define ownership by mere physical presence (possession) in the landscape, allow room for biologists to gather information, maintain affordability, and create an opportunity to connect humans with animal users which share resources.¹⁰⁶

Bradshaw also argues for a singular certification regime of experts that would allow trusts to be set up with “perpetual certification” and would create rules for trusts to govern responses to environmental changes.¹⁰⁷ Bradshaw touts three benefits of this regime: “First, it creates a single, transparent set of guidelines that trustees, the public, and courts can review. Second, it threatens trustee transfer under conditions of improper management. Third, the existence of a standing group avoids issues of statutory ossification and allows flexible rules responsive to changes over time.”¹⁰⁸

Wilderness trusts would also likely need to leave room for active intervention by managers to preserve and/or restore parcels in the event of natural disasters, such as replanting vegetation after a fire.¹⁰⁹ However, a trust regime brings its own risks. Notably, two risks are significant: (1) people hostile to the interests of the environment might capture these trusts, and (2) benign trusts could project human interests onto environmental actors.¹¹⁰ This potential for subversion undermines trusts as a “silver bullet” to enact a more assertive conservation scheme. To prevent infiltration by hostile actors, there must be a means to ensure that environmental trusts continue to serve the best interests of the environments they seek to represent. This also has the potential for problems as what is “best for the environment” can itself be

105. *Id.* at 67.

106. *Id.* at 69.

107. *Id.* at 75.

108. *Id.*

109. McCormack et al., *supra* note 2, at 425.

110. BRADSHAW, *supra* note 11, at 74.

a subject of debate.¹¹¹ As a result, environmental trusts, while a reasonable and effective measure, are insufficient to carry the full weight of a conservation-based legal regime. Without other measures in place to reinforce environmental trusts, they would ultimately be ineffective in accomplishing broad conservation goals on their own.

E. Custom

In Anglo-American law, custom often serves as a guide for courts to inform application of the law. This concept allows domestic courts to look to the jurisprudence of other courts to inform their decisions. This is especially effective between the United Kingdom and the United States, two countries with closely related legal systems. Specifically, when two countries have similarities between their legal regimes, transplanting laws might be more successful—because these two countries share several historical, ecological, and cultural characteristics, the ground between them is fertile for legal transplantation.¹¹² Custom also allows courts to look to private practices that predate the formation of the relevant law to inform the application and scope of relevant law.

In the United States, there were a variety of indigenous communities with their own customs and traditions, regarding the environment already in existence when Europeans founded the country.¹¹³ These longstanding traditions could be used by courts to expand the legal rights of the wilderness, as some indigenous communities had a conception of animals as coequal with people regarding property rights.¹¹⁴ In addition to indigenous traditions, there were also comparative European customs at the time of America's founding that could inform property rights for the wilderness. Europeans were influenced by Christian perspectives that animals and humans are coparticipants on God's Earth. For example, "In medieval France, Italy, and Switzerland, local officials brought class action lawsuits against insects and rodents who occupied land. Courts held elaborate trials against animals, in which the animals appeared in court and were represented by skilled lawyers."¹¹⁵

Bradshaw argues that since there was no explicit rejection of indigenous customs regarding the environment, they could still be invoked by courts as effective; specifically, colonial courts did not challenge rights that animals

111. Patrik Sörqvist & Linda Langeborg, *Why People Harm the Environment Although They Try to Treat It Well: An Evolutionary-Cognitive Perspective on Climate Compensation*, FRONTIERS IN PSYCH. (Mar. 4, 2019), <https://www.frontiersin.org/articles/10.3389/fpsyg.2019.00348/full>.

112. Stohr, *supra* note 41, at 36.

113. BRADSHAW, *supra* note 11, at 56–57.

114. *Id.* at 81.

115. *Id.* at 56–57.

claimed under certain indigenous customs, rendering them dormant yet still arguably valid.¹¹⁶ Likewise, the doctrine for the allowance of custom to supersede common law was traditionally invoked “if the customary right existed without dispute for a time that supposedly ran beyond memory, and [was] well-defined and reasonable.”¹¹⁷ This practice has generally been determined to predate the reign of Richard I of England in 1189 CE.¹¹⁸ While early American courts were reluctant to find that any customary practices superseded common law, these courts did not consider Tribal laws and customs that predated colonization and likely satisfy the common law test for customary rights.¹¹⁹ Courts, therefore, could recognize indigenous practices as legal customs and use them as a way to expand legal rights for environmental actors—both individual animal species and the wilderness as a whole.

The problem with custom as a method arises with the fundamental question: did the establishment of the *discovery doctrine* also erase any preexisting customs? In the foundational case of *Johnson v. M’Intosh*, a dispute arose over land claimed by both parties: one by title acquired from indigenous tribes, the other through a patent granted by the United States government.¹²⁰ The Court, led by Chief Justice John Marshall, found that the federal government would reject private purchases on tribal lands¹²¹ because the indigenous peoples did not hold the legal right to sell them.¹²² Through this decision, the Court reiterated the *discovery doctrine*, which is based on the concept that the discovery of land in America gave exclusive title of the land to the government to whom the discovery was made. Thus, the discovering country had the exclusive right to acquire land from the indigenous population against other European countries.¹²³ This decision arguably eliminates the ability of pre-founding customs used by the indigenous peoples to have salience in American courts as the *discovery doctrine* could be seen as erasing indigenous legal customs utilized by the tribes in order to enshrine those of the “discoverer” and subsequent United States.

116. *Id.* at 81.

117. *Id.* (edited in original) (internal quotations omitted).

118. *Id.*

119. *Id.*

120. Eric Kades, *History and Interpretation of the Great Case of Johnson v. M’Intosh*, 19 L. & HIST. REV. 67, 69 (2001), <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1050&context=facpubs>.

121. *Id.*

122. *See Johnson v. M’Intosh*, 21 U.S. 543, 584–85 (1823) (annulling all property transactions between Native Americans and individuals).

123. *Id.* at 573.

However, despite the establishment of the *discovery doctrine*, there is reason to believe that custom would be a compelling argument in today's courts. First, the decision in *Johnson v. M'Intosh* leaves several holes in the *discovery doctrine* that recognized indigenous property rights at the time. Marshall wrote that the United States had title to all the lands within its boundaries "subject only to the Indian right of occupancy," and the exclusive power to extinguish that right was also placed in the United States.¹²⁴ This indicates a couple of conclusions. First, the indigenous peoples did hold at the very least a right of occupancy on their lands, and they might implicitly have held other types of rights that were not enumerated in the decision at the time. Second, while the United States did have the power to extinguish the indigenous right of occupancy, it also implicitly has the power to confer additional property rights onto indigenous peoples. Additionally, Marshall explicitly recognized the independence of the indigenous tribes occupying the lands acquired from France in the Louisiana Purchase.¹²⁵ Finally, in assessing "title by conquest," Marshall outlines limits on the power of the conqueror. Rather than being "wantonly oppressed," conquered peoples are usually incorporated into the conquering nation and become citizens or subjects of that nation. Notably, "the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connexions, and united by force to strangers."¹²⁶ Through these conclusions, Marshall effectively left open a path to greater recognition of indigenous property rights, including legal recognition of indigenous customs, while still issuing a decision that would satisfy an expansionist nation.

Asserting those rights through custom would also run through the complex path of American Tribal law. Modern Supreme Court jurisprudence suggests that litigation regarding dormant customs might be successful. In the case of *McGirt v. Oklahoma*, the Supreme Court held that much of the land granted to tribes in Eastern Oklahoma had never been disestablished by Congress, thus granting tribes authority over the prosecution of crimes on these lands.¹²⁷ While this case was about criminal law and tribal authority, it suggests that courts would be receptive to a reinvigoration of tribal legal authority, potentially including recognition of tribal customs regarding land and the environment. Even if this recognition was only limited to lands in which tribes have recognized authority, this would likely be a useful tool for environmental preservation. However, because at one time tribes controlled

124. *Id.* at 584–85.

125. *Id.* at 587.

126. *Id.* at 589.

127. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020).

all American land and there is no explicit evidence suggesting a repudiation of tribal environmental customs, there is potential for a revival of a different paradigm regarding land use and environmental conservation. Additionally, shortly after *McGirt*, the Supreme Court released its decision in *Oklahoma v. Castro-Huerta*, which rolled back tribal authority in favor of state governments. There, the Court asserted that the understanding of tribal sovereignty in *Worcester v. Georgia*, which viewed tribal reservations as distinct from their surrounding states, had been abandoned.¹²⁸ These two cases, that seem to be operating from conflicting paradigms, suggest that jurisprudence is in flux regarding tribal authority. The future of the issues present in those cases remains in doubt. Consequently, it is impossible to predict how the Supreme Court, or any federal court, would review a claim arising from indigenous customs concerning land use or environmental conservation.

F. A Holistic Approach to Rewilding

Ultimately, these different methods all showcase pathways to bolster the property rights of the amorphous *wilderness* within the current legal regime. These methods should not be viewed as mutually exclusive. This article proposes that all of these approaches should be synthesized to construct a robust place for the wilderness within the current system of property rights. While these different approaches would likely be insufficient and open to exploitation by hostile interests on their own, taken together they provide a self-reinforcing, robust framework for revitalizing American wilderness by bestowing a complex system of property rights on the wilderness itself. Where there are gaps in a certain approach, those gaps would likely be filled in by another approach. For example, the limits of any indigenous customs incorporated into our modern system could be supplemented by robust environmental trusts and vice versa.

A synthesis of approaches, including those discussed above, form a holistic method of rewilding that is the best pathway forward for wilderness protection and sustainability. This proposal may appear controversial to both critics of environmental conservation and property law scholars. After all, property law was devised from an anthropocentric perspective, and the system places an importance on the interests of humans.¹²⁹ Opponents of this

128. *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2491 (2022).

129. Julie Elizabeth Boyd, *Considering Environmental/Property Law Towards a More Eco-Centric Position Within Legal Education*, TEACHING AND LEARNING CUHK LAW (July 6, 2020), <https://www.learning.law.cuhk.edu.hk/post/considering-environmental-property-law-towards-a-more-eco-centric-position-within-legal-education>.

holistic rewilding approach have several crucial arguments. First, they would likely argue that this approach would subvert the current legal regime and place a significant amount of human ownership into question. However, this article argues that this would neither be a radical realignment of American property law, nor would it eliminate property interests in a manner inconsistent with the current regime. Some nonhuman actors, like corporations, are already granted legal recognition and property rights in many circumstances.¹³⁰ Utilizing the aspects of property law that could be used to represent and empower environmental interests would not obliterate precedent or predictability in a substantial way. Additionally, mechanisms such as the Takings Clause and eminent domain have existed for centuries without significant threat to the system of property law. Holistic rewilding would not create new methods for seizing private property. Holistic rewilding would utilize public land in addition to private land granted through cooperation, consent, and methods already used for public projects in a manner consistent with history and tradition.

Critics would also argue that even with environmental interests represented, they would still be managed by humans so the permeation of anthropocentrism into disputes is inevitable. Likewise, humans would still make value judgments about environmental interests, undermining the idea of extending legal property rights to wilderness actors. While this article concedes that the fact that humans are inevitably making value judgments, rendering anthropocentrism inevitable to some extent, the way anthropocentrism is oriented can vary to be used to prioritize the interests of the wilderness. This article argues conservation is a net-good through an anthropocentric lens, given the scientific, recreational, and economic benefits of a healthy environment. This is particularly true in light of climate change, meaning that the interests of anthropocentrism and ecocentrism are aligned. Actions that would be endorsed by a framework of ecocentrism would also be celebrated through an anthropocentric lens. Meanwhile, over time, norms are certain to develop that will solidify ecocentrism within the system and gradually alleviate anthropocentric influences. Even with humans conceiving and administering these property schemes, the interests of the wilderness can be centered through the institutionalism of wilderness values.

130. Adam Winkler, *The Long History of Corporate Rights*, 98 B.U. L. REV. ONLINE 64 (2018), <https://www.bu.edu/bulawreview/files/2018/11/WINKLER-4.pdf>.

CONCLUSION

The conflict between the interests of the environment, which presently is unable to advocate for itself, and the interests of humans invites a paradox in any exploration of a resolution: “Either humankind must agree to live absent law and markets on animal-owned land by taking no more than they can individually consume and resolving disputes without courts, or they must force animals to resolve conflict on human terms in courtrooms and through market solutions.”¹³¹ Several options within the current legal regime exist that could be used to establish a greater voice within the law for the environment. To expand environmental conservation to a rewilding system, legal structures will have to adapt to allow the legal interests of the wilderness. A *holistic rewilding* approach would be the most efficacious and durable way to protect the interests of the wilderness without fundamentally changing the current law of property. Likewise, this could also serve as a model for other countries to enshrine their own protections for the wilderness as an independent, collective entity.

131. BRADSHAW, *supra* note 11, at 73.

CONTAMINATED CONFINEMENT: CORRECTIONAL FACILITY NONCOMPLIANCE WITH EPA REGULATIONS

*Tommi M. Mandell**

ENVIRONMENTAL JUSTICE BEGINS with the observed fact that certain groups of people bear a disproportionate burden of environmental problems. That is, polluting factories, lead in water pipes, filthy air, polluted water, toxic soil, and similar issues are more likely to be found in places where people have less control over decision making – typically, in areas inhabited by minorities and the poor.¹

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1. LOUIS P. POJMAN, PAUL POJMAN & KATIE MCSHANE, ENVIRONMENTAL ETHICS: READINGS IN THEORY AND APPLICATION, 306 (7th ed. 2015).

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INTRODUCTION

The United States has 1,566 state prisons, 102 federal prisons, 1,510 juvenile correctional facilities, 2,850 local jails, 186 immigration detention facilities, and 82 Indian Country jails, among other carceral facilities.² Approximately two million individuals are incarcerated in these facilities.³ The incarcerated community is amongst the most affected and neglected communities facing environmental harms.⁴ However, research regarding

2. Wendy Sawyer & Peter Wagner, *Report: Mass Incarceration: The Whole Pie 2022*, PRISON POLICY INITIATIVE (March 14, 2022), <https://www.prisonpolicy.org/reports/pie2022.html>.

3. *Fact Sheet: Trends in U.S. Corrections*, SENTENCING PROJECT, 2 (last updated May 2021), <https://www.sentencingproject.org/wp-content/uploads/2021/07/Trends-in-US-Corrections.pdf>.

4. Madeline Verniero, *The Truth About Toxic Prisons*, REGUL. REV.: SYNOPSIS: ENV'T (Oct. 5, 2021), <https://www.thereview.org/2021/10/05/verniero-truth-toxic-prisons/>.

environmental injustice and environmental health impacts on incarcerated communities is sparse.⁵

The Eighth Amendment to the United States Constitution protects against cruel and unusual punishment.⁶ A correctional officer violates the Eighth Amendment by acting with “deliberate indifference” to an incarcerated individual’s welfare.⁷ Many correctional facilities across the United States do not comply with environmental laws and regulations.⁸ As a result, these facilities knowingly expose confined individuals to environmental hazards that environmental laws and regulations aim to protect individuals from.⁹ Facility officials’ noncompliance with regulations is a deliberate indifference to incarcerated individuals’ welfare because facilities are knowingly exposing these individuals to environmental hazards.

This article will examine current correctional facilities’ noncompliance with Environmental Protection Agency (EPA) regulations and how the EPA recognizing these facilities as environmental justice communities and implementing environmental justice assistance programs can mitigate the issue. Part I examines: (1) incarcerated individuals’ rights; (2) environmental justice and injustice; and (3) applicable laws related to incarcerated individuals’ constitutional rights and environmental protections. Part II demonstrates that correctional facilities are violating the Eighth Amendment and causing environmental injustices by failing to comply with environmental laws and regulations. Factors included in this analysis are: (1) facility compliance status with EPA regulations under the Safe Drinking Water Act (SDWA), Clean Water Act (CWA), and Clean Air Act (CAA); (2) EPA regulation enforcement on correctional facilities; and (3) facility compliance with EPA settlement terms.

Part III proposes four solutions to address environmental injustices at these facilities. Proposed solutions include: (1) recognizing incarcerated communities as environmental justice communities; (2) shifting enforcement actions from settlements and fines to criminal sanctions (mirroring Eighth Amendment violation sanctions); (3) increasing EPA funding to provide for frequent facility inspections; and (4) creating an EPA committee or task force specifically devoted to correctional facility compliance with regulations.

5. Kimberly M. S. Cartier, *An Unfought Geoscience Battle in U.S. Prisons*, EOS.ORG: FEATURES (Nov. 10, 2020), <https://eos.org/features/an-unfought-geoscience-battle-in-u-s-prisons>.

6. U.S. CONST. amend. VIII.

7. See Daniel Yves Hall, *The Eighth Amendment, Prison Conditions and Social Context*, 58 MO. L. REV. 207, 208 (1993) (citing *Wilson v. Seiter*, 501 U.S. 294, 297 (1991)).

8. See generally *Facility Search Results*, U.S. ENV’T PROT. AGENCY: ENF’T & COMPLIANCE HIST. ONLINE, <https://echo.epa.gov/facilities/facility-search/results> (last visited Sept. 23, 2021) (showing many facilities on ECHO as being noncompliant for 12 out of 12 quarters).

9. See generally *Laws and Executive Orders*, U.S. ENV’T PROT. AGENCY: LAWS & REGULS., <https://www.epa.gov/laws-regulations/laws-and-executive-orders> (last visited Dec. 4, 2021) (“[L]aws serve as EPA’s foundation for protecting the environment and public health.”).

Incarcerated individuals will receive environmental justice and Eighth Amendment protections if the federal government devotes more EPA resources to provide for correctional facility compliance with its regulations.

I. BACKGROUND

A. Impacted Population

The United States has approximately two million individuals incarcerated in prisons and jails,¹⁰ representing about 0.7% of the overall United States population.¹¹ Correctional facilities consist of predominately minority populations.¹² As of 2019, the state and federal prison population was 31% white, 33% black, 23% latinx, and 13% other races or ethnicities.¹³ The prison population makeup is approximately three-fifths low-income individuals and approximately two-thirds minorities.¹⁴ Imprisonment rates thus have disproportionate effects on low-income and minority populations.¹⁵ Correctional facilities—specifically prisons—are inhumane by design and house one of the most vulnerable populations.¹⁶

While incarcerated, an individual's contact with outside communities is limited. The correctional institution becomes the individual's primary community. These facilities serve as communities, yet the census counts incarcerated individuals as residents within the town where they are incarcerated using the facility's address.¹⁷ Despite being counted as residents these individuals lack voting rights in 48 states,¹⁸ while their census count

10. SENT'G PROJECT, *supra* note 3, at 3.

11. Peter Wagner & Wanda Bertram, "What percent of the U.S. is incarcerated?" (*And other ways to measure mass incarceration*), PRISON POL'Y INITIATIVE (Jan. 16, 2020), <https://www.prisonpolicy.org/blog/2020/01/16/percent-incarcerated/>.

12. Tara O'Neill Hayes & Margaret Barnhorst, *Incarceration and Poverty in the United States*, AM. ACTION F. (June 30, 2020), <https://www.americanactionforum.org/research/incarceration-and-poverty-in-the-united-states/>.

13. SENT'G PROJECT, *supra* note 3, at 5 (citing E.A. Carson, *Prisoners in 2019*, WASH., D.C.: BUREAU OF JUST. STAT. (2021)).

14. Hayes & Barnhorst, *supra* note 12.

15. *Id.*

16. Hot Take, *The Ultimate Abolition*, at 3:40 (Mar. 21, 2021), <https://www.hottakepod.com/the-ultimate-abolition/>.

17. *Prison Gerrymandering Project: Population and the Census—FAQ*, PRISON POL'Y INITIATIVE, <https://www.prisonersofthecensus.org/faq.html> (Aug. 24, 2022).

18. See SENT'G PROJECT, *supra* note 3, at 7 (referencing Uggen, C., Larson, R., Shannon, S., & Pulido-Navo, A., *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, The Sentencing Project (2020)).

gerrymanders free citizens' districts.¹⁹ Gerrymandering, in this respect, works to dilute the vote of minority groups.²⁰ Prisons and jails are "inextricably intertwined" with society,²¹ yet individuals within these facilities lack decision-making rights that affect society, and that all other citizens retain. Thus, these individuals lack political representation—mirroring environmental justice communities.²² These individuals lack a voice in political representation and thus do not take part in the political process that leads to creating environmental legislation. The population size and treatment suggest a slippery slope: a society curtailing this many individuals' rights risks forgoing the entire society's rights as well.²³

Individuals in the United States detention system are ignored in the environmental justice movement.²⁴ Yet, these individuals come from communities with toxic environments and transition to toxic correctional facilities.²⁵ A Scottish court recently declined extraditing a Scottish man who allegedly committed a crime in Texas—reasoning that the poor correctional conditions in the United States are potentially international human rights violations.²⁶ Experts noted that an extradition denied solely due to confinement conditions is extremely rare.²⁷ The criminal justice system and the impacted communities are noticeably linked to environmental injustice—

19. Hansi Lo Wang & Kumari Devarajan, *Your Body Being Used: Where Prisoners Who Can't Vote Fill Voting Districts*, CODE SWITCH, NPR.ORG (Dec. 31, 2019), <https://www.npr.org/sections/codeswitch/2019/12/31/761932806/your-body-being-used-where-prisoners-who-can-t-vote-fill-voting-districts>.

20. ALAN IDES & CHRISTOPHER N. MAY, *CONSTITUTIONAL LAW: INDIVIDUAL RIGHTS*, 297 (Aspen Publishers, 5th Ed. 2010).

21. Aaron Littman, *Free-World Law Behind Bars*, 131 *YALE L. J.* 1385, 1388 (2022).

22. Katie Fagan, *Prisoners Need Environmental Justice too*, U. ALA. BIRMINGHAM: UAB INST. HUM. RTS. BLOG (Feb. 17, 2020), <https://sites.uab.edu/humanrights/2020/02/17/prisoners-need-environmental-justice-too/>.

23. Ram A. Cnaan, Jeffrey N. Draine, Beverly Frazier & Jill W. Sinha, *The Limits of Citizenship: Rights of Prisoners and ex-Prisoners in USA*, U. PENN. SCHOLARLYCOMMONS, 1, 7 (JAN. 1, 2008).

24. Adam Mahoney, *America's Biggest Jails Are Frontline Environmental Justice Communities*, PRISON LEGAL NEWS (Aug. 1, 2021), <https://www.prisonlegalnews.org/news/2021/aug/1/americas-biggest-jails-are-frontline-environmental-justice-communities/>.

25. *See id.* ("This social and environmental harm is then intensified when members of these communities are moved out of the toxic environments in which they live and into toxic facilities where they are held against their will.")

26. Keri Blakinger, *Do Texas Prison Conditions Violate Human Rights Standards? One Scottish Court Says Yes: Tiny Cells, Lacking Medical Treatment and Sweltering Conditions Cited by Judge who Blocked Extradition*, MARSHALL PROJECT: INSIDE OUT (Mar. 17, 2022), <https://www.themarshallproject.org/2022/03/17/do-texas-prison-conditions-violate-human-rights-standards-one-scottish-court-says-yes>.

27. Michael Marks, *Scottish Judge Rejects Extradition Request due to Texas Prison Conditions*, TEX. STANDARD: NAT'L DAILY NEWS SHOW TEX. (Mar. 18, 2022), <https://www.texasstandard.org/stories/scottish-judge-rejects-extradition-request-due-to-texas-prison-conditions/>.

showing an imminent need for the environmental justice movement to include incarcerated individuals.²⁸

B. Relevant Laws and Enforcement

1. Constitutional Provisions

Courts are obligated to enforce the constitutional rights of “all persons, including prisoners.”²⁹ Individuals retain the “essence of human dignity inherent in all persons” even while incarcerated.³⁰ Incarcerated individuals retain Eighth Amendment rights against cruel and unusual punishment, Fourteenth Amendment Equal Protection from discrimination, and limited First Amendment rights to free speech and religion.³¹ To determine whether prison regulations infringe on incarcerated individual’s constitutional rights, courts use a rational basis test that considers whether the regulation’s means are rationally connected to a legitimate governmental interest.³²

The Eighth Amendment reads: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”³³ Prison officials’ duty under the Eighth Amendment is to ensure reasonable safety.³⁴ These officials violate their Eighth Amendment duty if they are deliberately indifferent while exposing incarcerated individuals to a “sufficiently substantial” risk of serious damage to future health.³⁵ A court examines “deliberate indifference” using a subjective recklessness test—considering whether the prison official was subjectively aware that the incarcerated individual faced a risk.³⁶ The incarcerated individual must allege an objectively, sufficiently-serious deprivation that posed a substantial risk of serious harm.³⁷

28. Tamisha Walker & Sagaree Jain, *Prisons Pollute and Incarcerated or not, Everyone Deserves Just Transition*, PRISM: CRIME, REFORM & ABOLITION (Feb. 17, 2022), <https://prismreports.org/2022/02/17/prisons-pollute-and-incarcerated-or-not-everyone-deserves-just-transition/>.

29. *Brown v. Plata*, 563 U.S. 493, 510 (2011).

30. *Id.* (holding that “prisoners retain the right essence of human dignity inherent in all persons”).

31. *Prisoners’ rights*, LEGAL INFO. INST.: WEX, https://www.law.cornell.edu/wex/prisoners%27_rights (last visited Sept. 26, 2021).

32. *Id.*; *Rational Basis Test*, LEGAL INFO. INST.: WEX, https://www.law.cornell.edu/wex/rational_basis_test (last visited Dec. 7, 2021).

33. U.S. CONST. amend VIII.

34. *Farmer v. Brennan*, 511 U.S. 825, 844 (1994).

35. *Id.* at 843.

36. *Id.* at 828, 839, 840.

37. *Id.* at 834.

The Fifth and Fourteenth Amendments provide that no individual shall be deprived life, liberty, or property without due process.³⁸ Due process protections include both substantive and procedural rights.³⁹ The Supreme Court observed that the substantive due process doctrine can be supported by “a rule of personal autonomy and bodily integrity”⁴⁰ A lower federal court has found this substantive due process right in the environmental context,⁴¹ and scholars have analyzed substantive due process being used to protect public health and welfare.⁴² For example, a plaintiff can show a Due Process Clause violation if a government actor was deliberately indifferent concerning public water systems contaminants, thus creating “a special danger to a plaintiff that the [government] knew or should have known about,” even if the subject statutory minimums were not exceeded.⁴³ Thus, a plaintiff can show a Due Process Clause violation if a government actor was deliberately indifferent regarding dangerous contaminants, even if the contaminants were within statutory minimums, if the government knew or should have known a special danger existed.

2. Environmental Statutes

The Clean Water Act (CWA) and the Safe Drinking Water Act (SDWA) are two significant environmental laws. The CWA establishes the basic structure for regulating: (1) pollutant discharges into United States’ waters and (2) quality standards for surface waters.⁴⁴ The EPA has used its CWA authority to implement pollution control programs and develop recommendations for national surface waters quality criteria.⁴⁵

The SDWA protects drinking water quality in the United States—focusing on all waters actually or potentially designed for drinking use.⁴⁶ The EPA has SDWA authority to: (1) establish minimum standards to protect tap water and (2) require all public water systems owners or operators to comply

38. U.S. CONST. amends. V, XIV.

39. See CLIFFORD VILLA, ET AL., ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION 138 (3d ed. 2020) (citing Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc’y of Sisters, 268 U.S. 510 (1925); Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973)).

40. See *id.* (citing Parenthood v. Casey, 505 U.S. 833 (1992)).

41. See *id.* (citing Juliana v. United States, 217 F.Supp.3d 1224, 1250 (D. Or. 2016)).

42. See *id.* (citing Michael C. Blumm & Mary Christina Wood, “No Ordinary Lawsuit”: *Climate Change, Due Process, and the Public Trust Doctrine*, 68 AM. U. L. REV.1 (2017)).

43. See *id.* at 168 (citing Boler v. Earley, 865 F.3d. 391 (6th Cir. 2017), *cert. denied*, 138 S.Ct. 1294 (2018)).

44. 33 USCS § 1251; *Summary of the Clean Water Act*, U.S. ENV’T PROT. AGENCY: LAWS & REGULS., <https://www.epa.gov/laws-regulations/summary-clean-water-act> (last visited Oct. 8, 2021).

45. *Id.*

46. 42 U.S.C. §300f; *Summary of the Safe Drinking Water Act*, U.S. ENV’T PROT. AGENCY: LAWS & REGULS., <https://www.epa.gov/laws-regulations/summary-safe-drinking-water-act> (last visited Nov. 15, 2021).

with standards.⁴⁷ The EPA can authorize state governments to implement SDWA rules for the agency.⁴⁸ Under the SDWA, the EPA set maximum contaminant levels and treatment requirements for over 90 contaminants in public drinking water.⁴⁹ SDWA violations, like many environmental statutes, are generally subject to strict liability.⁵⁰

3. Environmental Regulations

The EPA identifies and attempts to solve environmental issues.⁵¹ Regulatory statutes require pursuing “public interest,” because without regulation, private behavior will not prioritize public interest.⁵² Regulation further centers around performance—specifically by—aligning utilities with public needs.⁵³

The EPA sets national standards for states and tribes to enforce through their own regulations.⁵⁴ The EPA’s original intent was to set and enforce standards collaboratively with states while providing financial and technical support to develop and expand state pollution control programs.⁵⁵ The EPA suggests a “step-by-step financial planning process” to assist communities in determining their capital assets, technical and financial needs, and find resources to meet compliance goals.⁵⁶ The EPA presents four main financing options: (1) municipal revenue-generating authority, (2) grants, (3) loans, and (4) bonds.⁵⁷

Supplemental to the SDWA, the National Primary Drinking Water Regulations (NPDWR) and the National Secondary Drinking Water Regulations (NSDWR) provide additional drinking water standards.⁵⁸ The NPDWR sets standards and treatment techniques limiting drinking water contaminate levels to protect public health.⁵⁹ Public water systems are

47. *Id.*

48. *Id.*

49. *Drinking Water Standards and Regulations*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/healthywater/drinking/public/regulations.html> (last visited Nov. 15, 2022).

50. VILLA, ET AL., *supra* note 39, at 168.

51. *Our Mission and What We Do*, U.S. ENV’T PROT. AGENCY: ABOUT EPA, <https://www.epa.gov/aboutepa/our-mission-and-what-we-do> (last visited Nov. 6, 2021).

52. SCOTT HEMPLING, *PRESIDE OR LEAD? THE ATTRIBUTES & ACTIONS OF EFFECTIVE REGULATIONS* 3 (2d. 2013).

53. *Id.* at 41.

54. U.S. ENV’T PROT. AGENCY: ABOUT EPA, *supra* note 51.

55. *The Origins of EPA*, U.S. ENV’T PROT. AGENCY: EPA HIST., <https://www.epa.gov/history/origins-epa> (last visited Nov. 6, 2021).

56. *Financing for Environmental Compliance*, U.S. ENV’T PROT. AGENCY: COMPLIANCE, <https://www.epa.gov/compliance/financing-environmental-compliance> (last visited Oct. 7, 2021).

57. *Id.*

58. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 49.

59. *Id.*

required to follow NPDWR standards and treatment techniques.⁶⁰ The NPDWR also outlines Maximum Contaminant Level Goals (MCLG), which are the contaminant levels in drinking water that present no known or expected risks to health.⁶¹ However, MCLGs are non-enforceable public health goals.⁶²

The NPDWR enforceable standards are set according to Maximum Contaminant Levels (MCL), which are the highest contaminant levels allowed in drinking water—set as close to MCLGs “as feasible” considering technology and costs.⁶³

The NSDWR water quality standard guidelines are provided to help public water systems manage drinking water issues.⁶⁴ The NSDWR sets standards for 15 contaminants that “may not be harmful to public health,” but water systems are not required to follow these standards.⁶⁵ Thus, the levels prioritize feasibility yet still allow room for contaminant levels that may have known or expected risks to health.

4. Environmental Enforcement Procedures and Tools

Environmental enforcement stems from Congress enacting environmental laws and the EPA implementing the law through regulations and enforcement.⁶⁶ The legal standard for environmental law liability depends on whether liability is civil or criminal. Environmental civil liability is strict and arises when an environmental violation exists, without considering if the responsible parties knew the law or regulation was violated.⁶⁷

Current EPA enforcement procedures are separated into two categories: civil enforcement and criminal enforcement.⁶⁸ The EPA can choose to handle a case internally as an administrative or civil matter or refer the case to the

60. *Id.*

61. *National Primary Drinking Water Regulations*, U.S. ENV'T PROT. AGENCY: GROUND WATER & DRINKING WATER (2009), https://www.epa.gov/sites/default/files/2016-06/documents/npwdr_complete_table.pdf.

62. *Id.*

63. *Id.*

64. *Id.*; *Drinking Water Standards and Regulations*, CTRS. FOR DISEASE CONTROL & PREVENTION: HEALTHY WATER: DRINKING WATER: PUB. WATER SYS. (Nov. 3, 2020), <https://www.cdc.gov/healthywater/drinking/public/regulations.html>.

65. U.S. ENV'T PROT. AGENCY: GROUND WATER & DRINKING WATER, *supra* note 61.

66. U.S. ENV'T PROT. AGENCY: ABOUT EPA, *supra* note 51; *See generally* U.S. ENV'T PROT. AGENCY: EPA HIST. *supra* note 55 (outlining the EPA's creation, resulting from President Nixon's plan to consolidate federal government's environmental responsibilities under one federal agency).

67. *Basic Information on Enforcement*, U.S. ENV'T PROT. AGENCY: ENF'T, <https://www.epa.gov/enforcement/basic-information-enforcement> (last visited Oct. 7, 2021).

68. *Id.*

Department of Justice (DOJ) for external civil or criminal prosecution.⁶⁹ When violations may result in both civil and criminal action, the EPA has a parallel proceedings policy.⁷⁰

Civil enforcement results include settlements, civil penalties, injunctive relief, supplemental environmental projects (SEPs), and mitigation.⁷¹ Injunctive relief here requires a regulated entity to perform or refrain from performing a designated action, to bring the entity into environmental law compliance.⁷² SEPs, which an alleged environmental law violator may undertake, provide tangible environmental or public health benefits to the community or environment affected by the alleged violation.⁷³ SEPs are closely related to the relevant violation, but go beyond any legal requirements for resolving the violation.⁷⁴

Environmental criminal liability requires the responsible party's intent to violate the law or regulation.⁷⁵ Environmental crimes may be prosecuted through conventional criminal codes regarding conspiracies, false statements, mail and wire fraud, and environmental specific statutes that make acts criminally punishable.⁷⁶ The EPA's environmental crime investigations mostly involve environmental felonies, labeled "knowing violations."⁷⁷ Environmental felonies invoke liability when the responsible party had intent regarding the subject violation.⁷⁸ Criminal enforcement results include: (1) criminal penalties such as fines imposed by a judge at sentencing and restitution to the violation's affected individual(s); and (2) incarceration for the individual defendant.⁷⁹

The EPA's audit policy provides regulated entities 21 days from discovering an actual or potential violation to disclose that violation to the EPA.⁸⁰ The EPA defines "discovery" as "when any officer, director, employee or agent of the facility has an objectively reasonable basis for

69. SALLY S. SIMPSON, JOEL GARNER & CAROLE GIBBS, FINAL TECHNICAL REPORT: WHY DO CORPORATIONS OBEY ENVIRONMENTAL LAW? ASSESSING PUNITIVE AND COOPERATIVE STRATEGIES OF CORPORATE CRIME CONTROL, 66 (2007), <https://www.ojp.gov/pdffiles1/nij/grants/220693.pdf>.

70. DANIEL RIESEL, ENVIRONMENTAL ENFORCEMENT: CIVIL AND CRIMINAL §6.01[2] (2021).

71. U.S. ENV'T PROT. AGENCY: ENF'T, *supra* note 67.

72. *Id.*

73. *Supplemental Environmental Projects (SEPs)*, U.S. ENV'T PROT. AGENCY: ENF'T, <https://epa.gov/enforcement/supplemental-environmental-projects-seps> (last visited Oct. 7, 2021).

74. *Id.*

75. U.S. ENV'T PROT. AGENCY: ENF'T, *supra* note 67.

76. RIESEL, *supra* note 70, § 6.01[1].

77. U.S. ENV'T PROT. AGENCY: ENF'T, *supra* note 67.

78. *Id.*

79. *Id.*

80. *EPA Audit Policy*, U.S. ENV'T PROT. AGENCY: COMPLIANCE, <https://www.epa.gov/compliance/epas-audit-policy> (last visited Nov. 5, 2021).

believing that a violation has, or may have, occurred.”⁸¹ The Policy’s incentives include: (1) significant penalty reductions; (2) for criminal violation disclosures, no recommendation for criminal prosecution; and (3) no routine requests for audit reports to trigger enforcement investigations.⁸²

The EPA “Enforcement and Compliance History Online” tool (ECHO) provides information on individual facilities’ compliance with environmental laws.⁸³ ECHO shows enforcement cases, facility reports, air pollutant reports, pollutant loading reports, effluent charts, effluent limit exceedances reports, CWA program area reports, facility documents, and permit limits report.⁸⁴ The EPA recently added “ECHO Notify,” allowing individuals to sign up for weekly email notifications for specific locations and facilities’ enforcement and compliance data changes.⁸⁵

The EPA also maintains a State Review Framework Results Table providing recommendations “designed to address significant issues identified during the review, and consequently, represent a key tool for improving the performance of compliance and enforcement programs across the country.”⁸⁶

C. Current Legal Solutions

1. Incarcerated Individuals’ Rights to Law and Courts

Courts disagree regarding when incarcerated individuals have rights to access courts.⁸⁷ The Supreme Court has held incarcerated individuals’ right to access courts does not guarantee the right to file any claim, but only the right to non-frivolous lawsuits attacking prison sentences or challenging confinement conditions.⁸⁸

Incarcerated individuals face procedural issues when raising claims. While incarcerated individuals can file lawsuits in court, they must first

81. *Id.*

82. *Id.*

83. *ECHO Tool Guide*, U.S. ENV’T PROT. AGENCY: ENF’T. & COMPLIANCE HIST. ONLINE, <https://echo.epa.gov/resources/general-info/tool-guide> (last visited Sept. 23, 2021).

84. *ECHO Quick Start Guide*, U.S. ENV’T PROT. AGENCY: ENF’T & COMPLIANCE HIST. ONLINE, <https://echo.epa.gov/resources/general-info/learn-more-about-echo> (last visited Sept. 23, 2021).

85. *ECHO Notify*, U.S. ENV’T PROT. AGENCY: ENF’T & COMPLIANCE HIST. ONLINE, <https://echo.epa.gov/tools/echo-notify> (last visited Mar. 25, 2022); EPA Press Office, *New EPA Tool Provides the Public with Customized Updates on Local Enforcement and Compliance Activities*, U.S. ENV’T PROT. AGENCY: NEWS RELEASES: HEADQUARTERS (Mar. 22, 2022), <https://www.epa.gov/newsreleases/new-epa-tool-provides-public-customized-updates-local-enforcement-and-compliance>.

86. *State Review Framework Results Table*, U.S. ENV’T PROT. AGENCY: COMPLIANCE, <https://www.epa.gov/compliance/state-review-framework-results-table> (last visited Sept. 23, 2021).

87. COLUM. HUM. RTS. L. REV., A JAILHOUSE LAWYER’S MANUAL 37 (12th ed. 2020).

88. *Id.*

attempt to resolve complaints through the individual facility's grievance procedure before filing a lawsuit and proceed with all available administrative appeals.⁸⁹ Once an incarcerated individual has exhausted administrative remedies, they can bring a suit under the Prison Litigation Reform Act (PLRA).⁹⁰ Generally, courts do not recognize an emergency exception to the exhaustion requirement, but few decisions have allowed for an exception to avoid "irreversible harm."⁹¹ A court can dismiss a case if satisfied that the action is frivolous, malicious, fails to state a claim where relief can be granted, or seeks monetary relief where the defendant is immune from such relief.⁹² Under the PLRA and the Federal Tort Claims Act (FTCA) an incarcerated individual's civil damages claim must show physical injury, as § 1997e(e) prohibits actions for mental or emotional injury.⁹³

2. Constitutional Actions

The Eighth Amendment requires the government to furnishing incarcerated individuals with basic human needs, including "reasonable safety."⁹⁴ Correctional officers deny an incarcerated individual Eighth Amendment rights when they: (1) know and disregard an incarcerated individual's health or safety (conscious disregard); (2) can infer awareness that a substantial risk of serious harm exists (awareness that a risk exists); and (3) draw the inference that a risk exists (actual knowledge that risk exists).⁹⁵ Eighth Amendment deliberate indifference claims are evaluated at a higher standard than regulatory compliance claims.⁹⁶ When a court finds Eighth Amendment violations, it may grant appropriate injunctive relief.⁹⁷

3. Environmental Statute Citizen Suits

Most federal environmental statutes contain citizen suit provisions allowing private individuals to bring actions to enforce requirements

89. *Know Your Rights: The Prison Litigation Reform Act (PLRA)*, AM. CIV. LIBERTIES UNION (last updated Nov. 2002), https://www.aclu.org/sites/default/files/images/asset_upload_file79_25805.pdf.

90. *Id.*; 42 U.S.C. § 1997e (2013).

91. COLUM. HUM. RTS. L. REV., *supra* note 87, at 378.

92. *Id.*

93. *Id.* at 418, 420.

94. *Helling v. McKinney*, 509 U.S. 25, 33 (1993).

95. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (stating "a prison official cannot be found liable under the Eight Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must be both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference").

96. *Stockton v. California*, LEXIS 142078 (E.D. Cal. 2011)

97. *Farmer v. Brennan*, at 846.

established under the relevant law.⁹⁸ Federal agency regulations may preempt states' common law injury claims that result from noncompliance with federal regulations.⁹⁹ The Sixth Circuit found that the SDWA does not preclude civil action for deprivation of rights claims under 42 U.S.C. § 1983.¹⁰⁰ Therefore, when a plaintiff cannot receive adequate relief through environmental laws, they may still seek relief pursuant to 42 U.S.C. § 1983.¹⁰¹

II. LEGAL ARGUMENT

A. *Current Environmental Law Enforcement is Inadequate*

The law in books is different from the law in action. Enforcement determines the distance between the two. Studies show that only a fraction of people with litigable grievances sue. Federal agencies go after an even smaller proportion of offenders. If that changed overnight, and every arguable violation resulted in some form of enforcement action, the law as we know it would mean something very different. The words that appear in statutes and in judicial decisions would be the same, but their practical effect would be transformed by the shift in enforcement practices.¹⁰²

1. Environmental Law Enforcement Generally

Environmental and health inequities still persist in the United States despite federal agencies' attempts at reducing these threats.¹⁰³ The three major purposes for environmental enforcement are fixing the problem, deterring future violations, and leveling the playing field.¹⁰⁴ The EPA was not specifically designed to address unfair outcomes that stem from environmental policies and practices, and the environmental protection paradigm has since institutionalized unequal enforcement.¹⁰⁵ The EPA's

98. VILLA, ET AL., *supra* note 39.

99. *See generally* In Re Chrysler-Dodge-Jeep Ecodiesel Mktg., 295 F. Supp. 3d. 927, 1026 (N.D. Cal. 2018) (holding violation of federal emission standards is directly preempted by the CAA); *see also* Nemet v. VW Grp., 349 F. Supp. 3d. 881, 914 (N.D. Cal. 2018) (holding the CAA did not preempt state law claims); *see also* Jackson v. GMC, 770 F. Supp. 2d. 570, 572–74 (S.D.N.Y. 2011) (holding the CAA preempted state claims because the claims were premised on failing to meet federal standards).

100. Boler v. Earley, 865 F.3d. 391, 409 (6th Cir. 2017), *cert. denied*, 138 S.Ct. 1294 (2018).

101. 42 U.S.C. § 1983 (1996).

102. Margaret H. Lemos, *Articles: State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 699 (2011).

103. Robert D. Bullard, *Overcoming Racism in Environmental Decision Making*, in POJMAN, POJMAN & MCSHANE, *supra* note 1, at 315.

104. VILLA, ET AL., *supra* note 39, at 254.

105. Bullard, *supra* note 103.

objectives to identify and attempt to solve environmental issues should include addressing unfair outcomes, which are undoubtedly environmental issues. This “paradigm” has exploited economically and politically disenfranchised communities’ vulnerability.¹⁰⁶

EPA enforcement procedures have been criticized for “not protect[ing] all impacted communities evenhandedly,” as “low-income communities and communities of color suffer a disproportionate share of environmental harms and enjoy fewer environmental amenities than other communities.”¹⁰⁷ Current laws leave significant gaps in protection and do not alleviate potential for disparate racial impacts.¹⁰⁸ The EPA has various formal enforcement options yet rarely utilizes them.¹⁰⁹ Enforcement decisions are largely subjective and discretionary.¹¹⁰ Enforcement discretion includes deciding which facilities to inspect, what penalties to impose, and where enforcement sources should be allocated.¹¹¹ Agency employees have significant discretion in agency enforcement actions, which are hidden from the public’s view and oversight.¹¹²

The EPA’s most commonly used formal enforcement procedures are administrative cases.¹¹³ In fiscal year 2020, the EPA opened 247 new criminal cases (77 more than fiscal year 2019) and 123 in fiscal year 2021.¹¹⁴ To compare, in both fiscal years 2020 and 2021 the EPA initiated and concluded approximately 1,600 civil judicial and administrative cases.¹¹⁵ The EPA reached 40 SEP agreements with violators and 575 voluntary disclosures covering violations at 787 facilities.¹¹⁶ The EPA announced that

106. *Id.*

107. JOEL A. MINTZ, CLIFFORD RECHTSCHAFFEN & ROBERT KUEHN, ENVIRONMENTAL ENFORCEMENT: CASES & MATERIALS 35, 35 (2007).

108. Marianne Engelman Lado, *No More Excuses: Building a New Vision of Civil Rights Enforcement in the Context of Environmental Justice*, 22 U. PENN. J. L. & SOC. CHANGE 281, 294 (2019).

109. Simpson, Garner & Gibbs, *supra* note 69.

110. MINTZ, RECHTSCHAFFEN & KUEHN, *supra* note 107.

111. *Id.*

112. Robert R. Kuehn, *Remedying the Unequal Enforcement of Environmental Laws*, 9 ST. JOHN’S J. LEGAL COMMENT 625, 640 (1994).

113. Simpson, Garner & Gibbs, *supra* note 69.

114. *EPA Enforcement Annual Results Fiscal Year 2020*, U.S. ENV’T PROT. AGENCY: ENF’T, <https://www.epa.gov/enforcement/enforcement-annual-results-fiscal-year-2020> (last visited April 3, 2022); *EPA Enforcement Annual Results for Fiscal Year 2021*, U.S. ENV’T PROT. AGENCY: ENF’T, <https://www.epa.gov/enforcement/enforcement-annual-results-fiscal-year-2021> (last visited April 3, 2022).

115. Todd S. Mikolop, Alexandra Hamilton & Erin Grisby, *EPA Releases Annual Enforcement Statistics for 2021, Announces “Rigorous Enforcement is Back,”* 12 NAT’L L. REV. 27, <https://www.natlawreview.com/article/epa-releases-annual-enforcement-statistics-2021-announces-rigorous-enforcement-back> (Jan. 27, 2022) (from *Hunton Andrews Kurth: The Nickel Report*).

116. *Id.*

the agency's criminal enforcement investigations for fiscal year 2021 led to a total 28 years of incarceration for 105 defendants charged.¹¹⁷

Despite available avenues for criminal enforcement, environmental agency attorneys rarely pursue alleged criminal violations.¹¹⁸ While the EPA and DOJ have attempted to coordinate criminal investigations and prosecutions, environmental cases brought to criminal court may be subject to scrutiny—as demonstrated by *United States v. Gold*.¹¹⁹ In *United States v. Gold*, a district court dismissed the case because an EPA attorney was involved in the case's administrative proceedings and also referred the case to the State Attorney for criminal proceedings.¹²⁰

Regardless of the EPA's own enforcement procedures, the EPA delegates CAA, CWA, and RCRA implementation authority to the states and territories (54 total entities).¹²¹ The EPA only holds RCRA implementation authority in four entities, CWA implementation authority in seven entities, and CAA implementation authority in one entity.¹²² These numbers demonstrate that the federal government has delegated significant federal regulation implementation authority to the states. The State Review Framework Results Table shows that states' implementation is insufficient. The table shows that for EPA recommended corrective actions or other recommendations, 11% are overdue for state implementation.¹²³ Overdue recommendations date back to 2012.¹²⁴ While 82% of these recommendations were completed, every finding level indicates “area for improvement.”¹²⁵

Confusion clearly exists regarding where authority to enforce environmental laws actually lies. For example, the Sixth Circuit Court of Appeals held that a state law enforcing the gasoline-volatility standard

117. *EPA Announces Enforcement and Compliance Accomplishments for Fiscal Year 2021*, U.S. ENV'T PROT. AGENCY: NEWS RELEASES: HEADQUARTERS (Jan. 20, 2022), <https://www.epa.gov/newsreleases/epa-announces-enforcement-and-compliance-accomplishments-fiscal-year-2021> (last visited December 3rd, 2022); see also *Criminal Enforcement: Environmental Crime Cases Opened, Defendants Charged, and Sentencing Results (Years of Incarceration)*, U.S. ENV'T PROT. AGENCY: ENF'T, <https://www.epa.gov/enforcement/enforcement-annual-results-fiscal-year-2021#criminal%20enforcement> (last visited April 3, 2022).

118. RIESEL, *supra* note 70, § 6.01[2].

119. See *id.* §§ 6.01[2]–[3] (citing *United States v. Gold*, 470 F. Supp. 1336 (N.D. Ill. 1979, *aff'd* 616 F.2d 1021 (7th Cir. 1980)).

120. *Id.* at § 6.01[3].

121. *State Review Framework*, U.S. ENV'T PROT. AGENCY: COMPLIANCE, <https://www.epa.gov/compliance/state-review-framework> (last visited Sept. 23, 2021).

122. See *id.* (stating the EPA holds RCRA implementation authority in Alaska, Iowa, Puerto Rico, and Virgin Islands; CWA implementation authority in the District of Columbia, Idaho, Massachusetts, New Hampshire, New Mexico, Pacific Territories, and Puerto Rico; and CAA implementation authority in the Pacific Territories).

123. *Id.*

124. *Id.*

125. *Id.*

violated the U.S. Constitution’s Supremacy Clause and Dormant Commerce Clause and that the enforcement standard was federal law enforcement.¹²⁶ The court held that the EPA had ultimate enforcement power and power to sanction the state for failing to enforce their implementation plan.¹²⁷

2. Correctional Facility Environmental Law Compliance

While the EPA has tools for tracking environmental compliance, there is no nationwide system to track air or water quality in correctional facilities.¹²⁸ Therefore, current conditions and compliance are observed through conditions reported to the EPA—or conditions complained about by those subjected to them. In the last five years alone, correctional facilities have faced 92 informal and 51 formal CAA violation actions,¹²⁹ notwithstanding the procedural hurdles that may have limited this number.

The ECHO tool lists many correctional facilities having 12 out of 12 noncompliant quarters, with very few to zero inspections and enforcement actions (formal and informal) taken against them.¹³⁰ Many prisons lack systematic monitoring of water, air, and soil quality for compliance.¹³¹ The ECHO tool also has an “Analyze Trends” feature that includes a “Drinking Water Dashboard.”¹³² The Drinking Water Dashboard includes a “Serious Violators” section that shows 2,619 serious violators for FY2021 YTD.¹³³ The 2021 data shows 3 correctional facilities labeled serious violators.¹³⁴ The 2020 data shows 7 correctional facilities out of 4,421 are serious violators.¹³⁵ Prisons routinely have water that is visibly contaminated and rarely have healthy water.¹³⁶

At Osborn Correctional Facility (Osborn) “[t]he inmates say they are forced to drink foul water while guards bring their own bottled water from outside the prison. Even therapy dogs at Osborn are provided with bottled or

126. *Amemex, Inc. v. Wenk*, 936 F.3d 355, 356 (6th Cir. 2019).

127. *Id.* at 360.

128. Walker & Jain, *supra* note 28.

129. *Id.*

130. See generally, U.S. ENV’T PROT. AGENCY: ENF’T & COMPLIANCE HIST. ONLINE, *supra* note 8 (showing many facilities on ECHO as being noncompliant for 12 out of 12 quarters).

131. Cartier, *supra* note 5.

132. *Analyze Trends: Drinking Water Dashboard*, U.S. ENV’T PROT. AGENCY: ENF’T & COMPLIANCE ONLINE HIST. <https://echo.epa.gov/trends/comparative-maps-dashboards/drinking-water-dashboard?state=National> (last visited Sept. 23, 2021).

133. *Id.*

134. *Id.*

135. *Id.*

136. Cartier, *supra* note 5.

filtered water, according to the complaint.”¹³⁷ The EPA’s ECHO tool shows Osborn as maintaining CWA compliance.¹³⁸ However, Osborn has not been inspected for CWA compliance since September 18, 2018.¹³⁹ Further, the ECHO tool has no information regarding the facility’s compliance with SDWA.¹⁴⁰

At Bedford Hills Correctional Facility (Bedford Hills), the incarcerated individuals have reflected that “[a]lthough officials have repeatedly stated that there is no problem with the water, [the incarcerated individuals] have asked multiple officers as well as members of administration to drink it in front of [them], to which [the officers and administrators] have refused.”¹⁴¹ In October 2021, ECHO showed Bedford Hills as CWA noncompliant for 12 out of 12 quarters, with significant violations for 5 quarters.¹⁴² A year later, in 2022, ECHO still showed Bedford Hills as CWA noncompliant for 12 out of 12 quarters, however now with only 3 quarters with significant violations.¹⁴³ Despite this extremely consistent noncompliance—the last CWA “compliance monitoring activity” at Bedford Hills was on December 8, 2021.¹⁴⁴

New York State has taken two formal CWA enforcement actions against Bedford Hills in the past five years, resulting in \$20,000 in penalties.¹⁴⁵ For perspective, New York’s Department of Corrections Budget was \$3,623,062,000.¹⁴⁶ Bedford Hill’s \$20,000 in penalties over the past five years is not even 1% of DOC’s 2021 budget. The EPA Civil Enforcement Case Report does not identify what CWA sections were violated and notes

137. Pat Eaton-Robb, *Connecticut inmates say drinking water is contaminated with sewage*, ASSOCIATED PRESS: HARTFORD COURANT (Sept. 13, 2019), <https://www.courant.com/news/connecticut/hc-news-prison-water-sewage-20190913-ryinyo5iyngbdchbtk3p4csdqe-story.html>.

138. *Detailed Facility Report: Osborn Correctional Institution*, U.S. ENV’T PROT. AGENCY: ENF’T & COMPLIANCE ONLINE HIST. <https://echo.epa.gov/detailed-facility-report?fid=110070374050> (last visited Nov. 20, 2022).

139. *Id.*

140. *Id.*

141. Char Adams, *Women in New York prisons complain of contaminated water after Hurricane Ida*, NBCBLK: NBC NEWS (Sept. 14, 2021), <https://www.nbcnews.com/news/nbcblk/women-new-york-prisons-complain-contaminated-water-hurricane-ida-rcna2020> (last visited December 3rd, 2022).

142. *Detailed Facility Report: Bedford Hills Correctional Facility*, U.S. ENV’T PROT. AGENCY: ENF’T & COMPLIANCE ONLINE HIST., <https://echo.epa.gov/detailed-facility-report?fid=110010438801> (last visited Oct. 8, 2021).

143. *Id.* (last visited Nov. 20, 2022).

144. *Id.*

145. *Id.*

146. *FY 2021 Executive Budget: Department of Corrections and Community Supervision*, N.Y. STATE: DIV. BUDGET (Jan. 29, 2020), <https://www.budget.ny.gov/pubs/archive/fy21/exec/agencies/appropdata/CorrectionsandCommunitySupervisionDepartmentof.html> (last visited December 3rd, 2022).

no data records returned for complying actions, supplemental environmental projects taken, or estimated pollutant reductions.¹⁴⁷

Regarding SDWA compliance, in October 2021, ECHO showed that Bedford Hills had inactive SDWA compliance, had been SDWA noncompliant for 7 of 12 quarters, and had 27 informal enforcement actions against the facility.¹⁴⁸ Now, in 2022, ECHO still shows Bedford Hill's SDWA compliance status as inactive, but with only 2 noncompliant quarters out of 12, and with 23 informal enforcement actions.¹⁴⁹ The state brought all enforcement actions against Bedford Hills, not the EPA.¹⁵⁰ New York's state government owns the facility's water system, which serves 1,300 individuals.¹⁵¹ The water system is sourced from groundwater, under surface water influence, and is a community water system that has changed from public to non-public.¹⁵²

At United States Penitentiary (USP) Atlanta, the water was “adulterated, polluted, and contaminated,” containing harmful substances, specifically arsenic—which is lethal at high levels and can cause cancer at low levels.¹⁵³ USP Atlanta is an EPA Superfund site, but is not listed on the EPA's national priority list.¹⁵⁴ The facility recognized its water issues in November 2018.¹⁵⁵ The drinking water tested in 2018 had 17 ppb of arsenic, while the EPA's maximum contaminant level is 10 ppb.¹⁵⁶ Despite these recognized water issues, USP Atlanta's ECHO facility report only contains information regarding CAA.¹⁵⁷ The facility has unresolved CAA violations, yet as of

147. *Civil Enforcement Case Report: Bedford Hills Correctional Facility*, U.S. ENV'T PROT. AGENCY: ENF'T & COMPLIANCE ONLINE HIST., <https://echo.epa.gov/enforcement-case-report?id=NY-R320190715133> (last visited Oct. 8, 2021).

148. U.S. ENV'T PROT. AGENCY: ENF'T & COMPLIANCE ONLINE HIST., *supra* note 142.

149. *Id.* (last visited Nov. 20, 2022).

150. *Id.*

151. *Id.*

152. *Id.*

153. Wilborn P. Nobles III, *Federal prisoners sue Atlanta over drinking water contamination claims*, ATLANTA J.-CONST. (Apr. 8, 2021), <https://www.ajc.com/news/atlanta-news/federal-prisoners-sue-atlanta-over-drinking-water-contamination-claims/BDTPUCMVR5C2LLOM4XRR7B2FWY/>.

154. *Superfund Site Information: US Penitentiary Atlanta*, U.S. ENV'T PROT. AGENCY: SUPERFUND, <https://cumulis.epa.gov/supercpad/cursites/csitinfo.cfm?id=0405858> (last visited Oct. 8, 2021).

155. Adrienne Haney, *Elevated levels of arsenic found at Federal Penitentiary in Atlanta*, 11 ALIVE: LOCAL (Feb. 7, 2019), <https://www.11alive.com/article/news/elevated-levels-of-arsenic-found-at-federal-penitentiary-in-atlanta/85-ecf4c149-a800-4295-a1b1-6ea8d56bf3af>.

156. *Arsenic Found in Atlanta Prison Drinking Water*, WATER QUALITY PRODS. MAG. (Feb. 7, 2019), <https://www.wqpmag.com/arsenic-removal/arsenic-found-atlanta-prison-drinking-water>; WGCL Digital Team, *Elevated Levels of Arsenic Found in Drinking Water at USP Atlanta*, CBS 46: NEWS (Feb. 6, 2019), https://www.cbs46.com/news/elevated-levels-of-arsenic-found-in-drinking-water-at-usp/article_40dc308e-2a78-11e9-ab38-774359a5f571.html.

157. *Detailed Facility Report: U S Penitentiary Atlanta*, U.S. ENV'T PROT. AGENCY: ENF'T & COMPLIANCE ONLINE HIST., <https://echo.epa.gov/detailed-facility-report?fid=110005664762> (last updated Sept. 21, 2022).

October 2021, had not had an on-site inspection since July 25, 2018 and had only 1 informal enforcement action taken against the facility in 5 years.¹⁵⁸ Now, USP Atlanta has had 2 additional on-site inspections, but still has unresolved CAA violations, with 7 of 12 noncompliant quarters.¹⁵⁹ The ECHO report shows no information regarding USP Atlanta's CWA, RCRA, and SDWA compliance.¹⁶⁰

A prison guard at State Correctional Institution (SCI) Mahanoy, noticing "black, foul-smelling water" told an incarcerated individual that they would "have to be crazy to bathe in that water."¹⁶¹ Similar to USP Atlanta, SCI Mahanoy's ECHO facility report only contains CAA compliance information.¹⁶² SCI Mahanoy has no CAA violation identified, but has not been inspected since April 10, 2018.¹⁶³ The facility's ECHO report contains no CWA, RCRA, or SDWA information.¹⁶⁴

An individual incarcerated at SCI Frackville once wrote that the facility's water was brown and smelled, that they had not had clean water in four months.¹⁶⁵ Yet, the individual noted that the facility's guards drink bottled water, while the incarcerated individuals drink and shower in dirty water.¹⁶⁶ SCI Frackville's ECHO report, like many others, does not contain any information on CWA or SDWA compliance.¹⁶⁷ The report only shows CAA and RCRA information, both with no identified violations.¹⁶⁸ The facility, however, has not had any compliance monitoring activity since March 26, 2021.¹⁶⁹

SCI Fayette specifically, along with many facilities, lacks systematic water, air, and soil quality monitoring.¹⁷⁰ The individuals at SCI Fayette call the water "tea water," due to the brown color.¹⁷¹ ECHO has 2 different

158. *Id.*

159. *Id.*

160. *Id.*

161. Betsy Piette, *Poisoned water plagues Pennsylvania prisons*, WORKERS WORLD (Oct. 17, 2016), <https://www.workers.org/2016/10/27384/>.

162. *Detailed Facility Report: PA Dept. of Corr./Mahanoy SCI*, U.S. ENV'T PROT. AGENCY: ENF'T & COMPLIANCE ONLINE HIST., <https://echo.epa.gov/detailed-facility-report?fid=110001214258> (last visited Oct. 8, 2021).

163. *Id.*

164. *Id.*

165. See Piette, *supra* note 161 ("From SCI Frackville prison, Major Tillery, a prisoners' advocate, wrote Oct. 12: 'We haven't had clean water here for over four months. The water is brown and smells.'").

166. See *id.* ("The guards drink bottled water. We complained and first were told nothing was wrong. Then for three days, a month or so ago, prisoners were given a gallon of bottled water a day. Since then, it's back to drinking and showering in dirty water.").

167. *Detailed Facility Report: PA DEPT OF CORR/FRACKVILLE SCI*, U.S. ENV'T PROT. AGENCY: ENF'T & COMPLIANCE ONLINE HIST., <https://echo.epa.gov/detailed-facility-report?fid=110009435334> (last updated Sept. 21, 2022).

168. *Id.*

169. *Id.*

170. Cartier, *supra* note 5.

171. *Id.*

facility reports for SCI Fayette, labeled “SCI FAYETTE” covering RCRA,¹⁷² and “PA CORRECTIONS/SCI FAYETTE.”¹⁷³ SCI Fayette’s has no CAA violations identified and has been inspected 2 times in 5 years, most recently on September 7, 2021.¹⁷⁴ The facility has no RCRA violations identified, but has not been evaluated for RCRA violations since July 26, 2017.¹⁷⁵ ECHO contains no CWA or SDWA compliance information for SCI Fayette.¹⁷⁶

B. Inadequate Enforcement Violates Environmental Justice Principles

Citizens deserve to expect environmental laws to be enforced vigorously, fairly, and equitably.¹⁷⁷ The EPA’s Fiscal Year 2022 Budget in Brief states that “ensuring compliance and enforcement of cornerstone environmental laws is paramount to a fair and just society.”¹⁷⁸ The EPA defines environmental justice as all people receiving fair treatment with respect to environmental law, regulation, and policy enforcement.¹⁷⁹ Through this definition, the EPA implies that without fair environmental enforcement, environmental justice is not achieved. Fairness includes “evenhanded treatment of regulated entities.”¹⁸⁰ However, the government’s ability for effective compliance oversight is limited because there are too many regulated entities.¹⁸¹ On the other hand, environmental injustice can be defined as: (1) the disproportionate pollution exposure in communities of color and poor communities; (2) its concomitant effects on health and environment; and (3) the unequal environmental protection and

172. *Detailed Facility Report: SCI Fayette*, U.S. ENV’T PROT. AGENCY: ENF’T & COMPLIANCE ONLINE HIST., <https://echo.epa.gov/detailed-facility-report?fid=110020745611> (last updated Sept. 21, 2022).

173. *Detailed Facility Report: PA Corrections/SCI Fayette*, U.S. ENV’T PROT. AGENCY: ENF’T & COMPLIANCE ONLINE HIST., <https://echo.epa.gov/detailed-facility-report?fid=110055589563> (last updated Sept. 21, 2022).

174. *Id.*

175. U.S. ENV’T PROT. AGENCY: ENF’T & COMPLIANCE ONLINE HIST., *supra* note 172.

176. *Id.*; U.S. ENV’T PROT. AGENCY: ENF’T & COMPLIANCE ONLINE HIST., *supra* note 173.

177. *See* Kuehn, *supra* note 112, at 626 (“Citizens have a right not only to expect that environmental laws will be vigorously enforced, but also a right to expect that when the government does enforce the laws, it will do so in a fair and equitable manner...Government efforts to detect noncompliance with environmental laws and the government’s response to such noncompliance should not differ because a community may be comprised of racial minorities or low income persons.”).

178. *FY 2022 EPA Budget in Brief*, U.S. ENV’T PROT. AGENCY: OFF. CHIEF FIN. OFFICER, 1, 11 (2021), <https://www.epa.gov/sites/default/files/2021-05/documents/fy-2022-epa-bib.pdf>.

179. *Environmental Justice*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/environmentaljustice> (last visited Sept. 23, 2021).

180. MINTZ, RECHTSCHAFFEN & KUEHN, *supra* note 107, at 34.

181. RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 191, 191 (2004).

environmental quality provided through laws, regulations, governmental programs, enforcement, and policies.¹⁸²

Enforcement program credibility and promoting compliance rely on this consistent treatment.¹⁸³ Yet enforcement itself has been inadequate in practice, when reported, and even further when the EPA's website inadequately reports enforcement. The ECHO tool—on its face—is an exceptional feat for providing transparency into regulated entities compliance and the EPA's enforcement efforts against noncomplying facilities. However, observing only 6 above-mentioned correctional facilities, all 6 facilities lack compliance and enforcement information regarding at least 1 environmental law. The information available is sparse. The ECHO tool, as it currently stands, is insufficient. The tool mirrors the laws themselves—great on its face, yet poor in implementation. ECHO would be extremely beneficial if it was actually utilized and updated as intended. But information on regulated entities is not up-to-date or adequately reported, if reported at all.

The EPA's Fiscal Year 2022 budget states that it “will hold bad actors accountable for their violation.”¹⁸⁴ But, if a law's purpose is enforcement and responding to the issues it is intended to address,¹⁸⁵ the EPA's goal to hold “bad actors accountable” should not be a new idea. The EPA is unlikely to bring the Bureau of Prisons to court, because federal agencies generally cannot take judicial action against other federal agencies.¹⁸⁶ Further, the federal government is also unlikely to seek enforcement actions and civil penalties against state and local governments.¹⁸⁷ Because both federal and state governments lack serious environmental enforcement, individuals are responsible for their communities' environmental safety, including the air

182. Juliana Maantay, *Mapping Environmental Issues: Pitfalls and Potential of Geographic Information Systems in Assessing Environmental Health and Equity*, 110 ENV'T HEALTH PERSPS. 161, 161 (2002).

183. *Id.*

184. U.S. ENV'T PROT. AGENCY: OFF. CHIEF FIN. OFFICER, *supra* note 178, at 11.

185. *See generally Approaching a Problem*, HOUSE OFF. LEGIS. COUNS.: BEFORE DRAFTING, <https://legcounsel.house.gov/before-drafting/approaching-problem> (“The first step in the legislative drafting process is identifying a problem to be solved.”) (last visited April 10, 2022).

186. *See LAZARUS, supra* note 181, at 191 (“Because of the unitary executive theory—which provides that intra-executive branch disputes must be resolved within that branch—one federal agency generally cannot bring another federal agency to court.”).

187. *See id.* (“Additionally, the federal government has historically proven reluctant to bring enforcement actions and seek civil penalties against state and local governments.”).

they breathe and the water they drink.¹⁸⁸ Thus, the incarcerated individuals bear the burden to hold these facilities accountable.¹⁸⁹

The incarcerated communities face procedural hurdles that the free communities do not, thus face increased difficulties in holding regulated entities accountable. Incarcerated individuals must first attempt to resolve complaints through the individual facility's grievance procedure and exhaust all administrative remedies and appeals before filing a lawsuit.¹⁹⁰ Thus, there are far more steps involved if an incarcerated individual wishes to bring an EPA noncompliance action against a correctional facility than if any nonincarcerated individual wishes to bring an EPA noncompliance action against any regulated entity. For example, CWA protections may be more difficult for incarcerated individuals to receive, because water testing and expert witnesses to prove the subject claim are unlikely to be available to an average pro se incarcerated litigant—an incarcerated litigant appearing on their own behalf.¹⁹¹

Robert D. Bullard, an environmental justice movement leader, observed that at-risk populations could be protected if the laws were enforced.¹⁹² But these laws are not enforced—at least not how Congress or the EPA presumably intended. The EPA's original intent was to set and enforce standards in concert with states while financially and technically supporting state's efforts to develop and expand state programs.¹⁹³ Congress granted the EPA authority to regulate environmental issues,¹⁹⁴ and the EPA delegates vast implementation and enforcement authority to individual states.¹⁹⁵ These inconsistencies regarding whether the EPA or individual states have authority over certain environmental provisions makes the inconsistent and inadequate compliance and enforcement not surprising. The EPA delegating

188. See Vermont Journal of Environmental Law Symposium: The World of Waste in a Wasteful World: CERCLA Panel, at 22:40 (Oct. 16, 2021) (discussing how state and local governments have “gotten out of the business of serious environmental enforcement” and how individuals are on their own regarding their communities' environmental safety).

189. See LAZARUS, *supra* note 181, at 191 (“Citizen suits...have proven critical both in forcing government to act and in guarding against executive branch lawmaking compromises that are not true to the statutory mandates under which the federal agency is operating. Such suits have likewise proven essential to enforcing environmental protection standards directly against the facilities to which those standards apply.”).

190. AM. CIV. LIBERTIES UNION, *supra* note 89.

191. Paul Wright, *Re: Comment on the Inclusion of Prisoner Populations in the EPA's Draft Framework for EJ 2020 Action Agenda*, HUM. RTS. DEF. CTR. 8 (July 14, 2015), https://www.prisonlegalnews.org/media/publications/EJ%202020%20HRDC%20Prison%20Ecology%20comment%20to%20EPA%20with%2091%20sign%20ons%20FINAL_1.pdf; *Pro se*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/pro_se (last visited Dec. 7, 2021).

192. Bullard, *supra* note 103, at 322.

193. U.S. ENV'T PROT. AGENCY: EPA HIST., *supra* note 55.

194. U.S. ENV'T PROT. AGENCY: LAWS & REGULS., *supra* note 9.

195. U.S. ENV'T PROT. AGENCY: COMPLIANCE, *supra* note 121.

authority to states has proven ineffective. States are overdue, at a reported 11% rate, for implementing recommended corrective actions and other recommendations.¹⁹⁶ While 82% of recommendations were completed, most findings showed “area for improvement.”¹⁹⁷ Regardless, if the EPA has delegated extensive authority to the states, how can the EPA be certain self-reporting is accurate and that these numbers are not vastly underrepresenting noncompliance?

Environmental law and regulation enforcement is clearly a widespread problem, not just for the incarcerated population. Yet incarcerated populations are already vulnerable and lack adequate resources necessary to advocate for the responsible agencies to enforce these laws. These populations already have a difficult time accessing courts and judicial relief. Incarcerated individuals already lack rights and freedoms. Although incarcerated individuals are protected against cruel and unusual punishment, correctional facilities do not comply with minimum environmental standards intended to keep these individuals safe. Incarcerated individuals must exhaust all available remedies before relying on the courts to hold these facilities and agencies accountable. If regulated entities viewed noncompliance penalties seriously from the get-go—and if noncompliance penalties were serious—the incarcerated population would not have to jump through these hurdles. Yet this is not the case, and the incarcerated population must jump through procedural hurdles to advocate for an even remotely healthy environment.

C. Incarcerated Individuals Deserve Basic Human Rights

Clean water is a basic right. Prisoners should not have their health destroyed because they broke the law. A life sentence should not be death sentence.¹⁹⁸

Incarceration results in individuals forfeiting constitutional liberties and rights, however, they are still “fellow human beings” and retain “a human dignity.”¹⁹⁹ The Eighth Amendment protects incarcerated individuals from cruel and unusual punishment—this protection is “animated by ‘broad and idealistic concepts of dignity, civilized standards, humanity, and

196. *Id.*

197. *Id.*

198. Jamani M., *Campaign: To: Department of Corrections Secretary John Wetzel, Governor Tom Wolfe, and the Federal EPA: Unsafe Drinking/Bathing Water in Pennsylvania Prisons*, DIY ROOTS ACTION, <https://diy.rootSACTION.org/petitions/unsafe-drinking-bathing-water-in-pennsylvania-prisons> (last visited Nov 20, 2022).

199. *See* Madrid v. Gomez, 889 F. Supp. 1146, 1244 (N.D. Cal. 1995) (citing Toussaint v. McCarthy, 926 F.2d 800, 801 (9th Cir.1990), *cert. denied*, 502 U.S. 874 (1991)).

decency.”²⁰⁰ Is it not cruel and unusual for correctional facilities to knowingly maintain facility conditions that do not comply with environmental standards? Despite how seemingly cruel and inhumane these acts seem, constitutional Eighth Amendment standards at times neglect to adequately protect incarcerated individuals.²⁰¹

Justice Kennedy, as a circuit judge, noted that “[u]nderlying the Eighth Amendment is a fundamental premise that prisoners are not to be treated as less than human beings.”²⁰² Congress and the EPA did not create and enforce environmental laws and regulations for them to be ignored. Yet in correctional facilities maintaining noncompliance, the laws and regulations are clearly ignored. Any facilities not complying with these minimum safety standards are putting the individuals who live in the facilities at risk. An individual’s incarceration status should not dissolve their rights to environmental protections, as “[e]very individual has a right to be protected from environmental degradation.”²⁰³

Correctional facilities impose these conditions upon fellow human beings who retain human dignity—incarcerated individuals are therefore being neglected basic human rights. These individuals are being denied protection from environmental degradation. They are being denied protections that Congress and the EPA designed specific environmental provisions to enforce.

D. Environmental Law Violations Coincide with Eighth Amendment Violations

Laws are made to solve issues.²⁰⁴ Following issues being identified and laws being created to solve them, if responsible agencies do not adequately implement and enforce the laws, then the issues persist.²⁰⁵ Compliance is a major issue regarding environmental laws and regulations.²⁰⁶ Correctional facilities frequently have suits brought against them for inhumane

200. *See id.* at 1245 (citing *Estelle v. Gamble*, 429 U.S. 97, 102, (1976); *Hudson v. McMillian*, 503 U.S. 1 (1992); *Patchette v. Nix*, 952 F.2d 158, 163 (8th Cir.1991); *Michenfelder v. Summer*, 860 F.2d 328, 335 (9th Cir.1988); *Spain v. Procunier*, 600 F.2d 189, 200 (9th Cir.1979)).

201. Littman, *supra* note 21, at 1389.

202. *See Spain v. Procunier*, 600 F.2d at 200 (9th Cir. 1979) (citing *Furman v. Georgia*, 408 U.S. 238, 271–73 (1972) (Brennan, J. concurring)).

203. Bullard, *supra* note 103, at 319.

204. *See generally* HOUSE OFF. LEGIS. COUNSEL: BEFORE DRAFTING, *supra* note 185 (“The first step in the legislative drafting process is identifying a problem to be solved. The next steps are developing a policy for solving it . . .”).

205. E.g., Champe S. Andrews, Esq., *The Importance of the Enforcement of Law*, 34 ANNALS AM. ACAD., July 1909, at 85.

206. *See Sawyer & Peter Wagner, supra* note 2, at 48 (concerning the laws that regulate the quality of drinking water).

environmental conditions—shown through various Eighth Amendment lawsuits. The link between environmental compliance and inhumane correctional facility environmental conditions is overlooked, if not completely ignored, and deserves recognition for what it is: environmental injustice and constitutional rights violations. Correctional officials violate the Eighth Amendment when they expose incarcerated individuals to a sufficiently substantial risk of serious damage to future health while acting with deliberate indifference.²⁰⁷ Facilities thus violate incarcerated individuals' Eighth Amendment rights by knowingly disregarding minimum environmental safety standards that these regulations set. Environmental provisions set minimum enforceable standards—yet the pollutant levels the EPA has recognized as public health goals are not feasible and thus unenforceable. The EPA therefore considered costs and feasibility in setting these standards, neglecting the populations these contaminants negatively impact.

Courts failing to find Eighth Amendment violations in cases where correctional facilities require incarcerated individuals to drink contaminated water demonstrate the inadequacy of Eighth Amendment jurisprudence regarding environmental protection in correctional facilities.²⁰⁸ The Seventh Circuit Court of Appeals held that a correctional facility failing to provide an environment completely free from pollution or safety hazards does not fall under cruel and unusual punishment.²⁰⁹ The court noted that requiring prisons to take remedial measures against contamination, that the responsible agencies do not believe require remedial measures, would be inconsistent with Eighth Amendment principles. The court emphasized that if environmental authorities see no reason to intervene with contamination at a certain level, correctional facilities should not be held to higher standards.²¹⁰ Even recognizing this, the court contradicted itself in finding the Eighth Amendment did not require recovery when the correctional facility's water's contamination level was almost twice the maximum level set by the EPA—based on reasoning that the EPA was “considering” changing the level despite not having done so.²¹¹

Correctional facilities, however, are not even being held accountable for violating the minimum standards. Courts fail to apply the same regulatory standards to incarcerated individuals that are applied to society at large—

207. *Farmer v. Brennan*, 511 U.S. 825, 843 (1994).

208. *See Littman*, *supra* note 21, at 1395 (referencing *Carroll v. DeTella*, 255 F.3d 470, 472 (7th Cir. 2001)).

209. *See Carroll v. DeTella*, 255 F.3d 470, 472 (7th Cir. 2001) (citing *McNeil v. Lane*, 16 F.3d 123, 125 (7th Cir. 1993); *Steady v. Thompson*, 941 F.2d 498 (7th Cir. 1991); *Harris v. Fleming*, 839 F.2d 1232, 1235-36 (7th Cir. 1988); *Clemmons v. Bohannon*, 956 F.2d 1523, 1527 (10th Cir. 1992)).

210. *Id.* at 472-73.

211. *Id.*

substantial compliance is viewed as enough.²¹² These correctional facilities lack the effective enforcement mechanisms for regulatory application that society at large retains,²¹³ leaving incarcerated individuals subject to unsafe conditions. The same regulations apply on paper, but those responsible for oversight leave compliance to correctional facility discretion.²¹⁴

Even if facilities follow these minimum standards, this may not be enough to evade known environmental hazards. Environmental compliance and environmental protection are not necessarily coexistent.²¹⁵ Even if facilities maintain compliance with environmental law, that compliance alone does not mean entirely evading potential harms to incarcerated individuals. At a minimum, correctional facilities should be held to Eighth Amendment standards regarding environmental compliance knowing the minimum standards are just that—minimum enforceable safety standards.²¹⁶ Therefore, by knowingly not complying with even these minimum and feasible environmental standards, facilities are being deliberately indifferent to incarcerated individuals' health and safety.

E. Incarcerated Communities Deserve Environmental Justice Status and Protections

The EPA defines environmental justice as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”²¹⁷ The EPA states environmental justice will be achieved when everyone enjoys: (1) the same degree of protection from environmental and health hazards, and (2) equal access to the decision-making process to have a healthy environment to live, learn, and work.²¹⁸

To reiterate, environmental injustice can be defined as: (1) the disproportionate pollution exposure in communities of color and poor communities; (2) its concomitant effects on health and environment; and (3) the unequal environmental protection and environmental quality provided through laws, regulations, governmental programs, enforcement, and

212. See Littman, *supra* note 21, at 1396 (referencing *Masonoff v. DuBois*, 899 F. Supp. 782, 799 (D. Mass. 1995); *Mawby v. Ambroyer*, 568 F. Supp. 245, 251 (E.D. Mich. 1983); *Capps v. Atiyeh*, 559 F. Supp. 894, 913–14 (D. Or.); *Dawson v. Kendrick*, 527 F. Supp. 1252, 1294–97 (S.D. W. Va. 1981)).

213. Littman, *supra* note 21, at 1403.

214. *Id.* at 1425.

215. VILLA, ET AL., *supra* note 39, at 124.

216. U.S. ENV'T PROT. AGENCY: GROUND WATER & DRINKING WATER, *supra* note 61.

217. U.S. ENV'T PROT. AGENCY, *supra* note 173.

218. *Id.*

policies.²¹⁹ Environmental justice is analyzed through impacts on predominantly-minority communities, even if each such community is not formally labeled an “environmental justice community.”²²⁰ The poor and disenfranchised bear the greatest burden of environmental degradation.²²¹ The correctional facility population characteristics suggest that the adverse environmental conditions within these facilities directly affect already disenfranchised communities.²²²

The EPA is attempting to “elevate environmental justice as a top agency priority” and “cement environmental justice as a core feature of EPA’s mission.”²²³ To elevate this priority, the EPA proposed creating a new national environmental justice program office “to coordinate and maximize the benefits of the agency’s programs and activities for underserved communities.”²²⁴ The EPA’s FY2022 goal is to deliver 40% of relevant federal investments’ overall benefits to disenfranchised communities.²²⁵

Even in environmental justice discussions calling for environmental decisions protecting “all communities,” the focus is generally minority and low-income communities.²²⁶ The EPA has noted that “[o]verburdened and vulnerable communities are most often the victims of environmental crimes.”²²⁷ Incarcerated communities’ population statistics show that these communities are a vulnerable and overburdened population. Two million people are incarcerated in the United States—two-thirds are minority populations and three-fifths are low-income.²²⁸ The majority of the incarcerated community are minority and low-income individuals. These individuals are the environmental justice movement’s focus. Yet correctional facilities are not highlighted nor mentioned in the environmental justice definition. The EPA has not denoted specific resources, as it has for other specific communities, to correctional facilities. The EPA’s environmental justice guidelines and policies fail to consider incarcerated individuals, allowing continued harm.²²⁹

These communities’ makeups meet environmental justice community criteria. The incarcerated population consists of the country’s most

219. Juliana Maantay, *supra* note 182.

220. *Sierra Club v. FERC*, 867 F.3d 1357, 1363 (D.C. Cir. 2017).

221. POJMAN, POJMAN & MCSHANE, *supra* note 1.

222. Cartier, *supra* note 5.

223. U.S. ENV’T PROT. AGENCY: OFF. CHIEF FIN. OFFICER, *supra* note 178, at 10.

224. *Id.*

225. *Id.*

226. Nicholas Targ, *Essays: A Third Policy Avenue to Address Environmental Justice: Civil Rights and Environmental Quality and the Relevance of Social Capital Policy*, 16 TUL. ENV’T L. J. 167, 173 (2002).

227. U.S. ENV’T PROT. AGENCY: OFF. CHIEF FIN. OFFICER, *supra* note 178, at 12.

228. Hayes & Barnhorst, *supra* note 12.

229. Elizabeth A. Bradshaw, *Tombstone Towns and Toxic Prisons: Prison Ecology and the Necessity of an Anti-prison Environmental Movement*, 26 CRITICAL CRIM. 407, 407, 410 (2018).

vulnerable and overburdened citizen demographic.²³⁰ Correctional facility noncompliance should be recognized as environmental injustice because incarcerated communities—vulnerable and overburdened communities—are disproportionately exposed to environmental hazards.

Further, incarcerated individuals are denied “meaningful involvement” regarding development, implementation, and enforcement in the environmental law process. Environmental lawmaking centers on affected communities having meaningful opportunity to provide substantive input, as public participation increases laws’ effectiveness and receptiveness.²³¹ Incarcerated individuals’ inclusion in census data as residing in the town they are incarcerated in, inflates the facilities’ outer communities’ population makeup without giving the specified attention to that specific facility.²³² Thus, while the incarcerated individuals’ population characteristics are accounted for regarding voting, the outer community is who retains the participation utilizing the facilities’ populations’ characteristics. Administrative law is said to give everyone a voice²³³—yet incarcerated individuals voices are left largely powerless. Incarcerated individuals face procedural hurdles that the larger public does not. While administrative law may give everyone a voice,²³⁴ some voices are more powerful than others. The government therefore denies incarcerated individuals the “meaningful involvement” that environmental justice principles call for, further demonstrating that these communities should be categorized as environmental justice communities.

III. PROPOSED SOLUTIONS

A. EPA Should Include “Incarceration Status” in Environmental Justice Definition

The EPA’s “environmental justice” definition should include “incarcerated individuals” as a community deserving fair treatment and meaningful involvement. As it currently stands, the EPA’s definition refers to environmental justice as calling for “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”²³⁵ The definition can be

230. *See id.* at 410 (citing Wright, *supra* note 191).

231. LAZARUS, *supra* note 181, at 189.

232. PRISON POL’Y INITIATIVE, *supra* note 17.

233. *See* HEMPLING, *supra* note 52, at 53 (“Administrative law gives everyone a voice.”).

234. *Id.*

235. *Environmental Justice*, *supra* note 179.

amended to include “the fair treatment and meaningful involvement of all people regardless of . . . incarceration status.” By including incarceration status within the EPA’s environmental justice definition, this community can benefit from special attention regarding environmental conditions. The amended definition’s language may read:

Environmental justice is the fair treatment and meaningful treatment of all people regardless of race, color, national origin, income, or incarceration status, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.

The EPA “Environmental Justice” webpage contains subdivisions regarding specific environmental justice focuses, such as “EJ for Tribes and Indigenous People.”²³⁶ On this webpage, the EPA notes a recognized need to work with recognized tribes and other indigenous populations to “effectively provide for environmental and public health,” in these communities and their interests.²³⁷ The EPA completed its Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples, following the recognized need to work with these populations.²³⁸ The policy specifies the EPA’s work with these communities to protect their environment and public health.²³⁹ The EPA devotes “EJ Tribal and Indigenous People Advisors” for each EPA office and region.²⁴⁰

A similar policy for correctional facilities and incarcerated communities could be beneficial. A need to work with the incarcerated population is clear, but not recognized in the same way that the EPA recognizes the need to work with recognized tribes and indigenous peoples. The EPA should create a Policy on Environmental Injustice for Working with the Incarcerated Population, mirroring its policy regarding recognized tribes and indigenous peoples. This policy should devote specific EJ Advisors within each EPA region—giving correctional facilities’ environmental conditions specialized EPA attention. These specific EJ advisors within each region could advise these facilities on their current violations, how these violations impact the community, and ways to mitigate the disparate impact. This specialized attention may increase facility compliance with existing EPA regulations and environmental law.

236. *Environmental Justice for Tribes and Indigenous People*, U.S. ENV’T PROT. AGENCY: ENV’T JUST., <https://www.epa.gov/environmentaljustice/environmental-justice-tribes-and-indigenous-peoples> (last visited Nov. 16, 2022).

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

B. Congress Should Appropriate Specific Funds to EPA for Correctional Facility Inspections

The EPA's webpage for Environmental Compliance Financing suggests that over the next 20 years, cities, counties, and tribes will need to spend "billions of dollars" to improve capital assets and remain in compliance with federal environmental laws.²⁴¹ Rather than merely suggesting financing options for facility compliance, the EPA should allocate funds specifically for correctional facility environmental law and regulation compliance. The EPA already has similar programs in place for recognized environmental justice communities, namely for Tribal and Indigenous communities.²⁴² Agencies generally neglect to oversee regulation enforcement and compliance in correctional facilities.²⁴³ Despite the same regulations applying to correctional facilities,²⁴⁴ effective enforcement in these facilities does not exist.²⁴⁵

The EPA's FY2022 Budget outlines environmental-justice-specific funding to new grant opportunities, including, among others, a "Tribal Environmental Justice Grant Program, to support work to eliminate disproportionately adverse human health or environmental effects on environmental justice communities in Tribal and Indigenous communities."²⁴⁶ The EPA should create a similar grant program for correctional facilities to eliminate disproportionately adverse human health and environmental effects on incarcerated communities. A similar program could be a "Correctional Facility Environmental Justice Grant Program, to support work to eliminate disproportionately adverse human health or environmental effects on correctional facility environmental justice communities." This language mirrors the EPA's Tribal Environmental Justice Grant Program's language, but focuses on correctional communities.

C. EPA Should Utilize Criminal Enforcement Mechanisms

EPA data demonstrates that their cases are mainly enforced civilly.²⁴⁷ In fiscal year 2020, the EPA only opened 247 new criminal cases compared to initiating and concluding approximately 1,600 civil judicial and

241. U.S. ENV'T PROT. AGENCY: COMPLIANCE, *supra* note 56.

242. U.S. ENV'T PROT. AGENCY: OFF. CHIEF FIN. OFFICER, *supra* note 178

243. Littman, *supra* note 21, at 1425.

244. *Id.*

245. *Id.* at 1403.

246. U.S. ENV'T PROT. AGENCY: OFF. CHIEF FIN. OFFICER, *supra* note 178.

247. See U.S. ENV'T PROT. AGENCY: ENF'T, *supra* note 114 (noting 247 new EPA criminal cases compared to 1,600 initiated and completed civil cases); Mikolop, Hamilton & Grisby, *supra* note 115.

administrative cases, reaching 40 SEP agreements with violators, and 575 voluntary disclosures covering violations at 787 facilities.²⁴⁸ In fiscal year 2021, the EPA only opened 123 new criminal cases with a 96% conviction rate, while administrative and civil case numbers were almost unchanged from fiscal year 2020.²⁴⁹

If correctional facilities that violate EPA regulations' minimum standards are coexistent with facilities violating incarcerated individuals' Eighth Amendment rights, civil sanctions are not enough. Congress must recognize that regulatory and statutory laws are equally applicable in correctional facilities, and courts must enforce that. The contexts behind environmental violations and Eighth Amendment violations are equivalent. Therefore, the EPA should not take these violations lightly and should invoke or mirror Eighth Amendment enforcement procedures to implement their regulations upon these facilities. Civil sanctions are not threatening, especially when they can be justified as an additional business cost.²⁵⁰

If civil remedies were effective, the civil to criminal case ratio would not be concerning—but civil sanctions are not effective. Civil sanctions are not threatening—they allow regulated entities to save more money by maintaining noncompliance than by complying with environmental laws and regulations.²⁵¹ Criminal sanctions, on the other hand, can be far more threatening than fines and should be considered in all environmental matters.²⁵² Criminal sanctions cannot be readily converted into a mere business cost.²⁵³

The EPA may have realized its current criminal enforcement shortfall—the agency's fiscal year 2022 budget notes a “specialized criminal enforcement task force to address environmental justice issues and casework in partnership with the Department of Justice” is important.²⁵⁴ This task force intends to focus on “victims of environmental crimes in communities with environmental justice concerns.”²⁵⁵ The EPA and DOJ have the bandwidth and capabilities to collaborate that is demonstrated by this task force and the agencies' previous attempts to coordinate criminal investigations and

248. U.S. ENV'T PROT. AGENCY: ENF'T, *supra* note 114.

249. U.S. ENV'T PROT. AGENCY: ENF'T, *supra* note 114; Mikolop, Hamilton & Grisby, *supra* note 115.

250. *See generally* LAZARUS, *supra* note 181, at 195 (“A noneconomic criminal sanction cannot be readily converted into a mere cost of doing business ultimately reflected in a higher price charged to consumers[...]. The more expensive it is to comply with an environmental protection requirement, the more money there is to be saved by noncompliance.”).

251. *Id.*

252. *See id.* at 196 (discussing that many high-ranking corporate officials may be significantly more threatened by criminal sanctions than expensive fines); RIESEL, *supra* note 70, § 6.01.

253. *Id.*

254. U.S. ENV'T PROT. AGENCY: OFF. CHIEF FIN. OFFICER, *supra* note 178, at 12.

255. *Id.*

prosecutions.²⁵⁶ However, this task force will only assist incarcerated individuals if the EPA recognizes them as environmental justice communities.

Correctional facility directors may be forced to pay attention to environmental compliance when threatened with severe criminal sanctions such as incarceration, fines, and other penalties.²⁵⁷ Perhaps threatening criminal sanctions would increase publicly available data and reporting. Further, threatening criminal sanctions could create fear in repeatedly noncompliant facilities. Perhaps these facilities' officials would be more inclined to comply with standards if noncompliance would put them under the very same conditions they are causing incarcerated individuals to live in. However, these sanctions will not be effective if just written on paper and not actively enforced.

D. Congress Should Establish a new EPA Position for Correctional Facility Compliance.

Enforcement discretion exists partly because “there are far more regulated entities than resources available to police all of them.”²⁵⁸ Incarcerated individuals falling under the EPA's environmental justice definition's identified classifications, coupled with the widespread correctional facility environmental law noncompliance, demonstrates a need and right to increased attention to enforcement. Thus, even though there are far more regulated entities than resources available, this population deserves increased attention and resources allocated to their protection.

This task force may be a foundation to devote resources to environmental justice communities—but the correctional facilities are in crisis which requires specific attention. Additionally, with broad discretion and the DOJ's involvement with the task force, an additional external position could be useful and reduce any conflicts of interest between correctional facilities and the DOJ. If Congress created a new position, alongside this task force, the EPA can increase strict criminal enforcement and decrease discretion in correctional facilities.

256. RIESEL, *supra* note 70, § 6.01[2].

257. *See id.* § 6.02[3] (quoting Webster L. Hubble, Associate Attorney General, Testimony before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce (Nov. 3, 1993) (reported by Federal Document Clearing House)).

258. MINTZ, RECHTSCHAFFEN & KUEHN, *supra* note 107, at 35.

CONCLUSION

Incarcerated individuals should be recognized as environmental justice communities because they meet the EPA's "environmental justice" definition. Correctional facilities are significantly noncompliant with environmental laws and regulations, subjecting incarcerated individuals to excessive environmental harm. This noncompliance violates the Eighth Amendment by knowingly exposing incarcerated individuals to environmental hazards. Further, the incarcerated population being disproportionately low-income and minority individuals suggests this widespread noncompliance is environmental injustice.

This harm can be addressed by: (1) the EPA recognizing incarcerated individuals as environmental justice communities by amending its "environmental justice" definition to include "incarcerated individuals," and adopting an environmental justice policy for working with correctional facilities; (2) the federal government increasing EPA funding for frequent and consistent facility inspections; (3) the federal government establishing an EPA committee or task force specifically devoted to correctional facility compliance; and (4) shifting enforcement actions from prioritizing settlements and fines to criminal sanctions mirroring those imposed for Eighth Amendment violations.

The EPA amending its "environmental justice" definition to include incarcerated individuals is just one step—but this step alone is not enough. This recognition merely lays the foundation for incarcerated individuals achieving environmental justice—written words alone will not make meaningful change. Incarcerated individuals can begin experiencing true environmental justice when that recognition is translated into operational programs assisting their access to environmental needs.

REASSESSING ANIMALS AND POTENTIAL LEGAL PERSONHOOD: DO ANIMALS HAVE RIGHTS OR DUTIES?

By Bailey Soderberg

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Under legal theory, a *person* is “any being whom the law regards as capable of rights or duties.”¹ The First Judicial Department of the New York Supreme Court's Appellate Division did not complete a new analysis after the Third Judicial Department relied on an incorrect definition of a “legal person” from Black’s Law Dictionary.² The incorrect definition contributed to an ultimate holding that Tommy, a chimpanzee, did not meet the threshold of legal personhood.³ This article will undertake the analysis of the rights or duties of animals based on the correct definition. Animals exist in a strange legal purgatory, caught between their classification as property and their existence as conscious beings. In certain circumstances, animals are afforded

1. *Person*, BLACK’S LAW DICTIONARY (11th ed. 2019).
2. *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 998 N.Y.S.2d 248, 250–51 (App. Div. 2014).
3. *Id.* at 248.

legal protections or benefits that create exceptions to their property status.⁴ Animals are also subject to certain duties in both human and non-human contexts.⁵ To achieve a legal status that reflects the role of animals in both human society and non-human communities, animals should be given a default legal categorization of legal persons with exceptions, rather than property with exceptions.

This article will provide an overview of animals and their status in the United States legal system. Part I will discuss the case of Tommy and the evaluation of his personhood based on an error in the definition of “person.” Tommy’s case serves as the premise for the evaluation of animal capacity for rights or duties in this article. Part II will explore the specific rights and duties of animals, showing that the argument for qualification of animals as legal persons should be reevaluated. Finally, Part III will advance a proposal for the future of animal classification, attempting to close the gap between their lack of legal protections and their existence as sentient beings.

INTRODUCTION

The United States legal system categorizes animals as property.⁶ A haphazard collection of protections exist for animals across varying areas of law.⁷ However, these protections are clouded by human interests, leaving the well-being of animals as second priority or excluding them altogether. Under their status as property, difficulties arise when animals (and their representatives) challenge their own injuries, injustices, and exploitation at the hands of humans.⁸ Standing, a prerequisite for bringing cases in federal court, is unavailable for animals in most contexts.⁹ While animals can meet the basics of constitutional Article III standing—*injury-in-fact*, *causation*, and *redressability*—they are excluded from statutory standing if federal courts determine that either Congress intended the statute to protect

4. See analysis *infra* Part II.A.1 (describing the history of animal litigation and modern animal law and some exceptions to traditional “property rights” like being trust beneficiaries or as victims to animal cruelty)

5. See analysis *infra* Part II.A.1 (extending victimhood status to animals in cruelty cases which has implications and recognition of injuries, duties, and remedies)

6. See *Mullaly v. People*, 86 N.Y. 365, 365 (N.Y. 1881) (holding a dog is personal property subject to larceny); see also *State v. Fertterer*, 841 P.2d 467, 471 (Mont. 1992) (holding that wild animals are public property of the state).

7. Janet Stidman Eveleth, *What Is Animal Law?*, 40 MD. B.J. 4, 4 (2007).

8. See Lauren Magnotti, *Pawing Open the Courthouse Door: Why Animals’ Interests Should Matter*, 80 ST. JOHN’S L. REV. 455 (2006) (stating that animals have no standing, and their representatives also struggle with standing in representing them).

9. See *e.g.*, *San Juan Audubon Soc’y v. Wildlife Servs.*, 257 F. Supp. 2d 133, 139 (D.D.C. 2003) (holding that the plaintiffs, wildlife preservation groups, did not have sufficient standing).

“persons” or Congress did not intend to allow animals to sue under the statute.¹⁰

When we harm animals, we harm ourselves. As the human population grows, urban development alters animal habitats, destroying biodiversity and increasing the risk of animal encounters that could transmit zoonotic diseases like COVID-19.¹¹ The United States breeds and slaughters billions of land animals every year for food, creating a huge tax on resources like water and arable land.¹² Human activities in the ocean, like overfishing and offshore drilling, injure and kill animals involved in important marine ecosystems that mitigate effects of climate change.¹³ The interests of animals are linked to the interests of humans, and allowing animals to enter courts would benefit both parties.

Beyond their impact on human lives, animals exist in their own communities where they have responsibilities and intrinsic value. Modern science shows that some animals display impressive cognitive abilities from an anthropomorphic standpoint.¹⁴ Many species display highly specialized “ecologically relevant” skills, surpassing humans when considered from a biocentric view.¹⁵ These qualities raise questions about animal classification and whether animals should fall under a legal category that fits their traits better than “property.”

Certain animal advocates are trying to change the classification of animals in our legal system. One group in particular, the Nonhuman Rights Project (NhRP), argues for the highest legal status for animals—personhood.¹⁶ In their efforts to secure legal personhood for animals, NhRP

10. *See* *Naruto v. Slater*, 888 F.3d 418, 418 (9th Cir. 2018) (establishing that a monkey did have Article III standing but lacked statutory standing under the Copyright Act); *see also* *Cetacean Cmty. v. Bush*, 386 F.3d 1169 (9th Cir. 2004) (holding that cetaceans did have Article III standing but lacked statutory standing under various statutes).

11. Felicia Keesing et al., *Impacts of Biodiversity on the Emergence and Transmission of Infectious Diseases*, 468 *NATURE* 647, 647 (2010).

12. Christopher Hyner, *A Leading Cause of Everything: One Industry That Is Destroying Our Planet and Our Ability to Thrive On It*, *GEO. ENV'TL. L. REV.* (Oct. 26, 2015), syndicated on *Env't L. Rev. Syndicate*, <https://harvardelr.com/2015/10/26/elrs-a-leading-cause-of-everything-one-industry-that-is-destroying-our-planet-and-our-ability-to-thrive-on-it/>.

13. Robin Kundis Craig, *Avoiding Jellyfish Seas, or, What Do We Mean by Sustainable Oceans, Anyway*, 31 *UTAH ENV'T L. REV.* 17 (2011).

14. *Anthropomorphic*, *MERRIAM-WEBSTER DICTIONARY* (2021) (defining *anthropomorphic* as “described or thought of as having human form or human attributes” or “ascribing human characteristics to nonhuman things”); *see generally* Juliane Bräuer et al. *Old and New Approaches to Animal Cognition: There Is Not “One Cognition”* 8 *J. INTEL.* 28 (2020) (highlighting the cognitive abilities of apes, birds, dogs, etc.).

15. *Id.*

16. *See e.g.*, Nonhuman Rights Project, <https://www.nonhumanrights.org/> (last visited Nov. 20, 2022) (stating NhRP’s mission statement that “[o]ur groundbreaking work challenges an archaic unjust legal status quo that views and treats all nonhuman animals as “things” with no rights All of human history shows that the only way to truly protect human beings’ fundamental interests is to recognize their rights. It’s no different for nonhuman animals.”).

files cases arguing that animals are legal persons through the theory of habeas corpus.¹⁷ Habeas corpus is a writ that can be used to challenge the detention or imprisonment of a person to determine the legality.¹⁸ One particular case, *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, involved a writ of habeas corpus for a chimpanzee in New York named Tommy who lived in a cage on a used trailer lot.¹⁹ In 2014, the court released its decision, including an analysis of Tommy's potential for legal personhood based on the Black's Law Dictionary definition: "capable of rights and duties."²⁰ Although the court ruled that Tommy was not a person, it used an incorrect definition. Black's Law Dictionary confirmed that a legal person is defined as "capable of rights or duties."²¹

This article argues that animals are legal persons by definition because they meet the prerequisite as entities who are capable of rights or duties. Part I provides the backdrop for this analysis, outlining the case of Tommy the chimpanzee, and the correction of Black's Law Dictionary. Part II evaluates whether animals meet the standard for legal personhood. First, Part II (A) focuses on the history of animals in litigation, their conflicting roles extending beyond "property" in certain legal areas, and other entities granted legal personhood. Next, Part II (B) explores the duties of animals in different contexts: parenthood, community involvement, and individuality. Finally, Part III proposes a strategy moving forward and addresses concerns that elevating animals to a new legal status poses a threat to humans.

I. BACKGROUND

Do animals meet the qualifications of legal persons? This question arose in a landmark case: *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*.²² The subject of this case, Tommy, was a chimpanzee living alone and caged in a shed along a New York state highway.²³ Tommy lived in the Laverys' possession after enduring a life of alleged abuse while he was used in films during the 1980s.²⁴ NhRP applied for a writ of habeas corpus for Tommy, asking for acknowledgement of Tommy as a legal person with a right to

17. *Id.*

18. *Habeas Corpus*, BLACK'S LAW DICTIONARY (11th Ed. 2019).

19. *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 998 N.Y.S.2d 248, 248 (App. Div. 2014).

20. *Id.* at 250–51.

21. BLACK'S LAW DICTIONARY, *supra* note 1.

22. *People ex rel. Nonhuman Rights Project, Inc. v. Lavery (Lavery I)*, 998 N.Y.S.2d 248, 248 (App. Div. 2014).

23. *Client, Tommy (Chimpanzee), The NhRP's First Client*, NONHUMAN RIGHTS PROJECT <https://www.nonhumanrights.org/client-tommy/> (last visited Mar. 6, 2022).

24. *Id.*

bodily liberty.²⁵ As part of the decision, the court held that animals did not have legal personhood because they did not have “rights and duties.”²⁶ The court stated that “case law has always recognized the correlative rights and duties that attach to legal personhood,” citing multiple cases from varying states where courts held that legal personhood is rooted in the “rights and duties” of a human being or an entity.²⁷

In 2017, Kevin Schneider, the Executive Director of NhRP, reached out to Bryan Garner, the editor-in-chief of Black’s Law Dictionary, after the NhRP team noticed an error in part of the definition of a “person.”²⁸ The definition for “person” in Black’s Law Dictionary is lengthy, including various descriptions for different levels of personhood, such as a “private person,” “artificial person,” or “person of incidence.”²⁹ One section of the definition specifically states that a person can be an “entity (such as a corporation) that is recognized by law as having most of the rights and duties of a human being.”³⁰ Black’s Law Dictionary supports this point with an excerpt from *Jurisprudence* about the requirements for personhood under legal theory.³¹ This particular section is where the NhRP found a mistake. *Jurisprudence* states: “a person is any being whom the law regards as capable of rights *or* duties. Any being that is so capable is a person, whether a human being or not”³² In 2014, the year that *Lavery I* was decided, this section of *Jurisprudence* was incorrectly transcribed in Black’s Law Dictionary as “capable of rights *and* duties” (emphasis added).³³

After receiving notification from NhRP about the error, Garner updated the definition.³⁴ This definitional standard significantly lowered the attributes necessary to achieve legal personhood and removed duties as a precondition for rights. NhRP submitted a letter to the New York Supreme Court, Appellate Division, First Judicial Department regarding the change.³⁵ By the time the error was corrected, NhRP had completed the appellate argument for Tommy, and the case was pending before the court.³⁶ Despite the

25. *Lavery I*, 998 N.Y.S.2d at 248.

26. *Id.*

27. *Id.* at 251.

28. Letter from Kevin Schneider to Bryan Garner (Apr. 6, 2017), in *Legal Persons Capable of “Rights or Duties,” Not “Rights and Duties,”* NONHUMAN RIGHTS BLOG, <https://www.nonhumanrights.org/content/uploads/Letter-to-Blacks-re-Def.-of-Person-4.6.17-ks.pdf>.

29. BLACK’S LAW DICTIONARY, *supra* note 1.

30. *Id.* (citing John Salmond, *Jurisprudence* 318 (Glanville L. Williams ed., 10th ed. 1947)).

31. *Id.*

32. JOHN SALMOND, *JURISPRUDENCE* 318 (Glanville L. Williams ed., 10th ed., 1947).

33. Elizabeth Stein, *Legal Persons Capable of “Rights or Duties,” Not “Rights and Duties,”* NONHUMAN RIGHTS BLOG (Apr. 6, 2017), <https://www.nonhumanrights.org/blog/rights-or-duties/>.

34. *Id.*

35. *Id.*

36. *Id.*

corrected definition for personhood, the court refused to reanalyze Tommy's case using the standard of "rights or duties."³⁷

NhRP exclusively works to achieve legal personhood for animals through habeas corpus.³⁸ So far, they have been unable to establish legal personhood for animals through this method.³⁹ In 2022, the New York Court of Appeals denied NhRP's writ of habeas corpus for Happy, an Asian elephant and captive resident of the Bronx Zoo for the last forty years.⁴⁰ NhRP filed another case while Happy's decision was pending, asserting a habeas claim for three elephants at a zoo in Fresno, California.⁴¹ While legal personhood can feel like the holy grail for advocates, habeas corpus may not be the best way to achieve a new status for animals. Tommy could have been spared from cruel conditions under a litigative theory based on animal welfare rather than becoming a martyr for the animal rights movement. Instead, speculators believe Tommy either lives in solitary confinement at DeYoung Family Zoo or he is dead.⁴² This article will focus on the technical definition of legal personhood and whether animals meet the criteria, but the ideal approach to free animals from their property status remains to be determined.

II. ANALYSIS

Animals, as property, do not have the traditional "rights" recognized by the United States legal system. However, certain aspects of their legal status suggest a recognition of traits in animals reflecting some inherent qualities that require legal protections. While recent history largely excludes animals from court, medieval law subjected animals to trial. Modern animal law provides restricted legal protections, allowing animals to function as beneficiaries or victims in certain circumstances. Other non-human entities are afforded legal personhood and limited rights, showing that the legal system retains the ability to extend the rights of non-humans.

37. *Id.*

38. *See* Nonhuman Rts. Project, Inc. v. Breheny, 134 N.Y.S.3d 188 (N.Y. App. Div. 1st Dept. 2020) (holding that an elephant is not a person entitled to a writ of habeas corpus); Nonhuman Rts. Project, Inc. v. R.W. Commerford & Sons, Inc., 192 Conn. App. 36, 36 (2019).

39. *R.W. Commerford*, 192 Conn. App. at 36.

40. Ed Shanahan, *Happy the Elephant Isn't Legally a Person*, *Top New York Court Rules*, N.Y. TIMES (June 14, 2022), <https://www.nytimes.com/2022/06/14/nyregion/happy-elephant-animal-rights.html> ("But in a lengthy dissent, Judge Rowan D. Wilson said the court had a duty 'to recognize Happy's right to petition for her liberty not just because she is a wild animal who is not meant to be caged and displayed, but because the rights we confer on others define who we are as a society.'").

41. *Id.*

42. Chris Churchill, *Churchill: Where is Tommy the Chimp?*, TIMES UNION (Apr. 13, 2021, 9:41 AM), <https://www.timesunion.com/news/article/Churchill-Where-is-Tommy-the-Chimp-16095376.php>.

The duties of animals are more easily recognized. Some animals are punished for their participation in human society: willing or not. Other animals serve as tools for humans with disabilities. In their own communities, animals bear duties and responsibilities similar to those of humans. Animals are individuals and family members—integral to elaborate ecosystems and advanced in their own biologically unique ways.

A. *Do animals have rights?*

1. History of Animal Litigation and Modern Animal Law

In current animal law cases, judges reference historical treatment of animals in the legal system to justify their resistance to extending protections.⁴³ Despite this evasive maneuvering to avoid addressing the legal status of animals, the history of human laws indicates that animals have always been involved. Due to the human-centered nature of the concept of law, animals exist in a legal periphery.

While the idea of animals in the court room may seem like a novel concept, this was once a reality in medieval Europe. Legal trials involving animals occurred from the thirteenth to the twentieth century across many European countries, including: France, Switzerland, Germany, and Italy.⁴⁴ The animals were represented by lawyers, with one prestigious French jurist, Bartholomew Chassenée, building his reputation after serving as counsel for a group of rats put on trial in the religious courts of Autun after they “feloniously” ate the province’s barley supply.⁴⁵

In most situations, animal defendants were found guilty.⁴⁶ Occasional exceptions occurred, including a female donkey acquitted for her good character in a bestiality trial while her owner was executed.⁴⁷ In another case, a sow was sentenced to death in the killing of a young boy, but her piglets were acquitted because there was no proof of their participation.⁴⁸ The animal trials of the Middle Ages were generally divided into two categories: capital punishments decided by secular tribunals and trials carried out by religious courts.⁴⁹ Capital punishments were used for domestic animals like pigs,

43. See *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 998 N.Y.S.2d 248 (App. Div. 3d Dept. 2014) (holding that a chimpanzee is not entitled to the rights and protections afforded to a “person” by the writ of habeas corpus).

44. Sonya Vatomsky, *When Societies Put Animals on Trial*, JSTOR DAILY (Sept. 13, 2017), <https://daily.jstor.org/when-societies-put-animals-on-trial/>.

45. Katie Sykes, *Human Drama, Animal Trials: What the Medieval Animal Trials Can Teach Us about Justice for Animals*, 17 ANIMAL L. 273, 283 (2011).

46. *Id.*

47. *Id.* at 281.

48. *Id.*

49. *Id.* at 280.

cows, and horses after they killed humans or endured bestiality.⁵⁰ Religious trials were held for rats, mice, and other pests to “exorcise” and “excommunicate” them to prevent further decimation of crops.⁵¹ Animal trials of the Middle Ages can be linked to factors like: insecurity from epidemics, economic depression, and social conflicts; the establishment of court procedure in solving disputes; the familiar ritual of public execution; and personification of animals in extreme situations.⁵² Although medieval animal trials seem absurd in hindsight, they can provide insight into human interests interfering with animal protections, limitations of human conceptions of justice, and the role of legal rituals regarding animals.⁵³

Informal versions of public animal executions persisted past the Medieval Ages. In the early 1900s, circus elephants in the United States were executed before crowds if they were found to be “dangerous” or “unruly.”⁵⁴ Although she did not face a trial, a circus elephant named Topsy was publicly executed on Coney Island in 1903 after killing three men.⁵⁵ Topsy could have been privately euthanized, but instead she was fed carrots laced with cyanide, forced onto a stage with a noose around her neck—and electrocuted.⁵⁶ Similar elephant executions occurred from the 1880s through the 1920s, in the United States, with a total of 36 killings on record.⁵⁷ The phenomenon of public elephant executions may not directly correlate to the medieval animal trials of Europe. However, the retributive nature of these executions indicates an extension of the treatment of human criminal behavior during this time period.⁵⁸ Elephants were attributed with human characteristics to justify their killings, described as: quarrelsome, wicked, spiteful, and malicious in a trial of public opinion via newspaper articles.⁵⁹ The executions were considered justified because the trainers and the public “saw these elephants as all too human—criminalized and exoticized, but human.”⁶⁰

The spectacle of public animal trials and executions eventually ended, but issues revolving around the legal status and representation of animals remain. Today, the law incorporates non-human animals in subtler ways. Animals maintain certain privileges not afforded to other “property.” One

50. *Id.*

51. *Id.*

52. Peter Dinzelbacher, *Animal Trials: A Multidisciplinary Approach* 32 J. INTERDISC. HIST. 405, 421 (2002).

53. Sykes, *supra* note 45, at 301.

54. Amy Louise Wood, “Killing the Elephant”: *Murderous Beasts and the Thrill of Retribution, 1885-1930*, 11 J. GILDED AGE & PROGRESSIVE ERA 405, 405 (2012).

55. *Id.* at 405–06.

56. *Id.* at 406 (explaining that the cyanide did not take effect before Topsy was electrocuted with 6,600 volts of electricity).

57. *Id.* at 407.

58. *Id.* at 408.

59. *Id.* at 412.

60. *Id.* at 408.

example is the role of animals as trust beneficiaries.⁶¹ Many pet owners classify their pets as family members or children.⁶² As the emotional bond between humans and their pets became more common with changing social values, animals like dogs and cats appeared in estate-planning tools as beneficiaries.⁶³ “It [is] estimated that between twelve and twenty-seven percent of pet owners include their pets in their estate planning.”⁶⁴ Pet trusts are a type of noncharitable purpose trust because pets are unable to enforce their interest in the property.⁶⁵ When using a pet trust, owners provide for their pets after death by designating a certain amount of their property towards the care of their pet.⁶⁶ The Uniform Trust Code allows for the appointment of a third party, such as a trust protector or guardian, to enforce the terms of the trust in the interest of the animal.⁶⁷ Pet trusts may not seem to provide rights or interests to animals because they cannot access their own trust property. However, pet trusts mirror trusts created to benefit minors that must be enforced by their guardians because children do not have the capacity to request trust property for themselves.⁶⁸

Another area of law where legal animal protections extend beyond their status as property is criminal law. Some jurisdictions are beginning to recognize that state animal cruelty statutes place animals in the status of victims. *State v. Nix*, an Oregon animal neglect case, held that animal cruelty statutes “protect[] individual animals suffering from neglect,” and therefore “the legislature regarded those animals as the ‘victims’ of the offense.”⁶⁹ Victimhood carries implications and recognition of injuries, duties, and remedies. Recently, animal lawyers and scholars have even proposed restorative justice approaches for animal victims.⁷⁰ Restorative justice provides “emphasis on the role and experience of victims in the criminal justice process.”⁷¹ The restorative justice approach is an alternative to the punitive U.S. criminal justice system, which focuses largely on retribution.⁷²

61. Breahn Vokolek, *America Gets What It Wants: Pet Trusts and a Future for Its Companion Animals*, 76 UMKC L. REV. 1109 (2008).

62. *Id.*

63. *Id.*

64. *Id.* at 1128.

65. *Id.* at 1121, 1127–28.

66. *Id.* at 1121.

67. Wendy S. Goffe, *Oddball Trusts and the Lawyers Who Love Them or Trusts for Politicians and Other Animals*, 46 REAL PROP., TR. & EST. L.J., 543, 580 (2012).

68. Schyler P. Simmons, *What Is the Next Step for Companion Pets in the Legal System? The Answer May Lie with the Historical Development of the Legal Rights for Minors*, 1 TEX. A&M L. REV. 253, 278 (2013).

69. *State v. Nix*, 355 Or. 777, 798 (9th Cir. 2014).

70. Brittany Hill, *Restoring Justice for Animal Victims*, 17 ANIMAL & NAT. RESOURCE L. REV. 217, 217 (2021).

71. *Id.* at 219.

72. *Id.* at 218.

Since animals are the identified victims, restorative justice would create an animal-centered approach to addressing injuries—perhaps one of the first areas of animal-involved law that would not be primarily focused on human interests.

Some advocates are working to expand avenues for animal protections by using their victimhood under state cruelty laws. In *Justice v. Vercher*, a quarter horse, Justice, sued Gwendolyn Vercher after she was convicted of animal neglect under a criminal statute in Oregon.⁷³ Vercher left Justice without shelter or food for months, leading to his extreme emaciation and prolapsed genitals after severe frostbite.⁷⁴ Animal Legal Defense Fund (ALDF) sued Vercher on behalf of Justice under a legal theory of negligence per se, which arises when a defendant violates a statute and is negligent as a matter of law.⁷⁵ ALDF requested funds for Justice to pay the veterinary bills that will continue to follow him for the rest of his life due to Vercher's neglect.⁷⁶ While the trial court and the Oregon Court of Appeals dismissed Justice's case, ALDF continues to appeal on Justice's behalf.⁷⁷ If they succeed, the case will be a landmark for animal law in the United States. Justice would be a successful animal plaintiff, bringing his own interests and injuries into court in pursuit of a remedy that will solely serve him.⁷⁸

On a national level, the Model Penal Code—a codification of the substantive criminal law of the United States—categorizes animal cruelty under “Offenses Against Public Order and Decency” rather than “Offenses Against Property.”⁷⁹ The Model Penal Code's categorization of animal cruelty further blurs the “property” status of animals by placing offenses against non-humans outside the property section. Because animals can be categorized as victims under state animal cruelty laws, there is an implication that they exist beyond the boundaries of a property classification. Victimhood status does not equal personhood status for animals, but it establishes a place for non-human animals in the crime victims' movement.⁸⁰ Human crime victims have been able to “remedy the problems that are inherent in a system in which crime victims are not a party.”⁸¹ Crime victims

73. Sherry F. Colb, *Should Animals Be Allowed to Sue?*, *Verdict Legal Commentary and Analysis From Justia*, JUSTIA (Jan. 29, 2020), <https://verdict.justia.com/2020/01/29/should-animals-be-allowed-to-sue>.

74. Brief of Plaintiff-Appellant at 2, *Justice v. Vercher*, No. 18CV17601 (9th Cir. July 8, 2019).

75. *Id.* at 8.

76. *Id.* at 23.

77. Michelle C. Pardo, *Oregon Court of Appeals Rules Animals Are Not Entitled to Legal Personhood*, LEXOLOGY (Sept. 2, 2022), <https://www.lexology.com/library/detail.aspx?g=4b150e0d-fa56-489b-8d01-979a780fead5>.

78. Colb, *supra* note **Error! Bookmark not defined.**.

79. Model Penal Code § 250.11 (AM. L. INST. 2022).

80. Andrew N. Ireland Moore, *Defining Animals as Crime Victims*, 1 J. ANIMAL L. 91, 93 (2005).

81. *Id.*

are not adequately represented by the state or the defendant.⁸² Human victims pushed for consideration of their interests and many states created crime victim amendments to rectify this gap.⁸³ Acknowledgement of animal victimhood places advocates in a position to pursue further legal protections, an avenue not afforded to legal “property” in other situations.⁸⁴

The pursuit of victim rights for animals is exemplified in Desmond’s Law. Desmond’s Law was enacted after the body of a dog, Desmond, was found in a trash bag in the woods of Madison, Connecticut in March 2012.⁸⁵ Desmond was severely beaten and locked in a bathroom during his life, and was eventually killed when his owner twisted his collar until he died.⁸⁶ In 2016, Connecticut enacted Desmond’s Law to provide a voice to animal cruelty victims through court-appointed legal advocates to represent the interests of animal victims and overall justice.⁸⁷ The lawyers, law students, and fellows that participate in the Courtroom Animal Advocate Program (CAAP) provide a neutral resource to the court, contribute novel legal analyses, develop creative remedies, and ultimately protect animal victims.⁸⁸ CAAP firmly establishes animals as crime victims with distinguishable interests that deserve representation.⁸⁹

2. Other Entities Granted Legal Personhood

While the United States legal system resists the reclassification of animals, other non-human entities are granted legal personhood. Limited personhood exists for certain non-human entities like corporations or ships.⁹⁰ This “personhood” does not necessarily acknowledge sentience or human qualities in these inanimate objects. The personhood granted to non-human entities simply serves as a mechanism to allow lawyers to bring issues before the court.

The first acknowledgement of corporations as legal persons occurred in an 1886 Supreme Court case regarding taxation of a railroad company, *Santa Clara County v. Southern Pacific Railroad Company*.⁹¹ Before the argument,

82. *Id.*

83. *Id.*

84. *Id.* at 97.

85. Jessica Rubin, *Desmond's Law: Early Impressions of Connecticut's Court Advocate Program for Animal Cruelty Cases*, 134 HARV. L. REV. F. 263, 263 (2021).

86. *Id.*

87. *Id.* at 264.

88. *Id.* at 267–70.

89. *Id.*

90. See, e.g., Nina Totenberg, *When Did Companies Become People? Excavating the Legal Evolution* NPR (July 28, 2014), <https://www.npr.org/2014/07/28/335288388/when-did-companies-become-people-excavating-the-legal-evolution/> (explaining personal rights accorded to corporations).

91. *Santa Clara County v. Southern Pacific R. Co.*, 118 U.S. 394, 397 (1886).

Chief Justice Morrison Waite stated that “[t]he court does not wish to hear argument” regarding the application of personhood to corporations under the Fourteenth Amendment, because “[w]e are all of the opinion that it does.”⁹² While this is recorded as part of the Court’s discussion rather than the actual decision, future cases treated this as binding precedent.⁹³ Today, corporate personhood is accepted as part of United States law, though it is still widely debated and criticized.⁹⁴

Non-human personhood even affords corporations some constitutional rights equal to those of ordinary human citizens. *Citizens United v. Federal Election Commission* confirmed that business corporations have the same political free speech rights as humans to spend money on election advertisements.⁹⁵ Another case, *Burwell v. Hobby Lobby Stores*, allowed companies exemption from a federal law that required birth control coverage in employee health plans based on the religious liberty under the First Amendment.⁹⁶ A recent controversial case, *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, confirmed the same First Amendment religious liberty rights for corporations by validating a bakery’s decision to discriminate against customers based on sexual orientation.⁹⁷

Kent Greenfield, a law professor at Boston College and a proponent of corporate personhood, promotes a “nuanced test” for the application of rights to corporations.⁹⁸ In *Corporations Are People Too*, he states: “when it comes to the Constitution, corporations are people some of the time. And sometimes they are not.”⁹⁹ By this logic, similar extensions can be provided for animals. If the law is capable of nuance when personhood is extended to corporations, the law should be capable of nuance regarding animal personhood.

Another controversial entity granted limited personhood is the human fetus. While *Roe v. Wade* established that a fetus is not a “person” for the Fourteenth Amendment purposes,¹⁰⁰ many “fetal homicide statutes” protecting mothers and unborn fetuses from the acts of third parties

92. *Id.*

93. Adam Winkler, ‘Corporations Are People’ is Built on an Incredible 19th-Century Lie, *The Atlantic* (Mar. 5, 2018), <https://www.theatlantic.com/business/archive/2018/03/corporations-people-adam-winkler/554852/>

94. See Teneille R. Brown, *In-Corp-O-Real: A Psychological Critique of Corporate Personhood and Citizens United*, 12 *FLA. ST. U. BUS. REV.* 1, 3–4 (2013).

95. Adam Winkler, *Corporate Personhood and Constitutional Rights for Corporations*, 54 *NEW ENG. L. REV.* 23, 23 (2019).

96. *Id.*

97. *Id.*

98. *Id.* at 24.

99. *Id.* (quoting KENT GREENFIELD, *CORPORATIONS ARE PEOPLE TOO (AND THEY SHOULD ACT LIKE IT)* (2018))

100. Juliana Vines Crist, *The Myth of Fetal Personhood: Reconciling Roe and Fetal Homicide Laws*, 60 *CASE W. RES. L. REV.* 851, 854 (2010).

acknowledge viable fetuses as “persons.”¹⁰¹ In 2022, the Supreme Court revisited *Roe* in *Dobbs v. Jackson Women's Health Organization*, although the Court’s opinion circled the topic of fetal personhood and focused instead on the right to an abortion as a constitutional concept.¹⁰² Such debates are also increasing with the rise of new reproductive technologies and decisions regarding frozen embryos created for in vitro fertilization. In *Davis v. Davis*, a divorced couple disagreed about the disposition of seven “frozen embryos” stored at a Knoxville fertility clinic and sought a decision regarding custody of the embryos.¹⁰³ The *Davis* court held that pre-embryos are “not, strictly speaking, either ‘persons’ or ‘property,’ but occupy an interim category that entitles them to special respect because of their potential for human life.”¹⁰⁴

Reproductive rights and fetal homicide statutes coexist in the United States legal system because laws are capable of complex rules and exceptions. “The fetus is not a person in the natural sense, and no legislature has the power to declare otherwise. Instead, the fetus is a juridical person, designated as such so that a state may assert its own interests in life and achieve certain social goods.”¹⁰⁵ Similarly, to reproductive rights and fetus personhood, a reclassification of animals as legal persons would not “sound the death knell” for other areas of animal law or the current roles of animals within our society.¹⁰⁶

While this article is focused on the United States legal system, other nations recognize certain animal rights and enshrine animal protections in their constitutions. India’s constitution contains provisions that vest in animals a right against cruel treatment and a right to liberty.¹⁰⁷ In 2021, the Delhi High Court ruled that community dogs (“stray” dogs) have the right to food and citizens retain the right to feed them.¹⁰⁸ In 2013, India’s Supreme Court declared that Article 21 of India’s Constitution, which guarantees a “right to life,” could be applied to non-human animals.¹⁰⁹ The same year, India’s Ministry of Environment and Forests classified cetaceans as “non-

101. *Id.* at 852.

102. “Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth.” *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2261 (2022).

103. *Davis v. Davis*, 842 S.W.2d 588, 589 (Tenn. 1992).

104. *Id.* at 596.

105. Crist, *supra* note 100, at 887.

106. *Id.* at 854.

107. Vageshwari Deswal, *Do animals have rights?*, TIMES OF INDIA (Aug. 21, 2020, 11:28 PM), <https://timesofindia.indiatimes.com/blogs/legally-speaking/do-animals-have-rights/>.

108. Sofi Ashan, *Stray dogs have the right to food and citizens right to feed them: Delhi HC*, INDIAN EXPRESS (July 1, 2021, 7:10 PM), <https://indianexpress.com/article/cities/delhi/stray-dogs-have-a-right-to-food-and-citizens-right-to-feed-them-delhi-hc-7383865/>.

109. Sanket Khandelwal, *Environmental Personhood: Recent Developments and the Road Ahead*, (Apr. 24, 2020, 2:58 AM), <https://www.jurist.org/commentary/2020/04/sanket-khandelwal-environment-person/>.

human persons.”¹¹⁰ New Zealand Parliament passed the Animal Welfare Amendment Act in 2015 with an express intent to protect animals based on their sentience and the inherent moral value that accompanies sentience.¹¹¹ A recent bill introduced a new article for Spain’s Civil Code that would acknowledge animals as living beings with sentience, and move them away from their status as objects.¹¹² In the United Kingdom, Parliament passed Animal Welfare (Sentience) Act of 2022, which formally recognizes animals as sentient beings and establishes an Animal Sentience Committee comprised of experts devoted to ensuring that government policies consider animal sentience.¹¹³ Several other countries protect animal interests in their constitutional texts, including: Switzerland, Brazil, Slovenia, Germany, Luxembourg, Austria, and Egypt.¹¹⁴

Each country follows their own legal system and abides by specifically tailored constitutions or codes. Despite the differences between the legal systems of each nation, the recognition of animal sentience and certain animal rights by a few countries can serve as an example for the rest. While recognizing animal sentience does not provide personhood for animals under the law, such recognition elevates animals above their historical position as “property” or “objects,” and mandates a recognition of animal interests when legal issues are decided. Officially recognizing animal sentience and value did not cause industries in these countries to collapse or invoke a “flood of litigation,” as many U.S. courts and animal rights critics fear in the face of animal personhood or extensive animal protections.¹¹⁵ In our increasingly globalized world, humans and non-humans would benefit from a uniform approach to the treatment of animals that continues to reflect developing moral values.

110. *Id.*

111. Colin William Anderson, *Recognizing Animal Sentience Within the Law*, 28 DCBA BRIEF 8 (2016).

112. Mayte Rius, *¿Quién se queda la mascota en caso de divorcio? ¿Y de embargo? El Congreso cambia las normas*, LA VANGUARDIA (Apr. 21, 2021, 8:12 AM), <https://www.lavanguardia.com/vivo/mascotas/20210420/6984347/mascota-divorcio-embargo-legal.html>.

113. PRESS RELEASE, U.K. DEP’T ENV’T, FOOD & RURAL AFF., ANIMALS TO BE FORMALLY RECOGNIZED AS SENTIENT BEINGS IN DOMESTIC LAW (May 13, 2021); Animal Welfare (Sentience) Act 2022, LEGISLATION.GOV.UK, <https://www.legislation.gov.uk/ukpga/2022/22/enacted#:~:text=An%20Act%20to%20make%20provisio,n,of%20animals%20as%20sentient%20beings> (last visited Nov. 26, 2022).

114. Jessica Eisen, *Animals in the Constitutional State*, 15 INT’L J. CONST. L. 909, 911 (2017).

115. Richard L. Cupp, Jr., *Litigating Nonhuman Animal Legal Personhood*, 50 TEX. TECH L. REV. 573, 596 (2018).

3. The Role of Communication and Consent

Consent is offered as a reason to deny legal representation of animals. Skeptics argue that because animals cannot speak to us or consent to “legal duties and rights of the governed,” they are unable to possess legal personhood.¹¹⁶ Consent is not considered in many other areas where animals function in human society. Animals are routinely killed for food, used for various services, or forced into captivity without consent or communication—indicating their unwillingness to participate in these human-made systems. Moreover, even if some type of consensual relationship is required for an attorney or agent to consider an animal’s best interests, there are other examples in the legal system of representation without explicit consent.

Children are afforded rights under the legal system despite their inabilities to effectively communicate or comprehend their own interests or positions in society.¹¹⁷ Similar to animals, minors lack procedural capacity to sue.¹¹⁸ To protect the vulnerable class of minors, parents act as natural guardians for children, or the court will appoint a guardian in the case that parents are unable to provide proper care.¹¹⁹ The parent-child standard in the legal system could serve as a template for a guardian-animal standard.¹²⁰ In the case of animals without definitive owners, a legally-appointed advocate could sue on behalf of an animal to safeguard their interests.¹²¹ Moreover, this guardianship is possible as an extension of limited circumstantial rights similarly afforded to other non-human entities, avoiding concerns that courts would lower minors to a lesser status because of the heightened protection for animals.¹²² One area of animal law, pet custody, is rapidly developing to reflect the principles regarding the analysis of optimal environments and guardians for animals. Some states, like Alaska and New York, require courts to consider the “best interests” of a companion animal when they award custody during divorce proceedings.¹²³

As technology progresses, our ability to understand the needs and interests of animals grows. Animals may not be able to communicate in the courtroom, but animal psychologists and behavioral experts can determine

116. Richard L. Cupp, Jr., *Focusing on Human Responsibility Rather Than Legal Personhood for Nonhuman Animals*, 33 PACE ENV'T L. REV. 517, 528 (2016).

117. Simmons, *supra* note 68, at 279.

118. *Id.*

119. *Id.* at 280.

120. *Id.* at 283.

121. *Id.*

122. *Id.*

123. Nick Reisman, *Who gets Fido in the divorce? New law could help solve bone of contention*, SPECTRUM NEWS (Oct. 26, 2021), <https://spectrumlocalnews.com/me/maine/ny-state-of-politics/2021/10/26/who-gets-fido-in-the-divorce->.

the animal's social, psychological, and environmental needs. Along with the framework provided by guardianship, "best interests" for animals can be determined through the expertise of scientists and veterinarians that can study and ascertain the needs of both species as a whole and individual animals.

B. Do animals have duties?

To analyze potential duties of animals, one could evaluate their role in human civilization. Like humans, animals are frequently held accountable for their actions. Capital punishment (usually without due process) is the solution for animals that attack humans or other animals,¹²⁴ or escape confinement.¹²⁵ In some cases, animals are put to death when humans are arguably at fault. In 2016, the Cincinnati Zoo animal response team infamously shot a critically endangered western lowland gorilla named Harambe after a child fell into the gorilla enclosure.¹²⁶ Many states operate under Dangerous Dog statutes, allowing for the classification of individual dogs (or even entire breeds) as "dangerous" after an incident that threatens other animals or humans.¹²⁷ Classifications as a "dangerous" dog may result in mandatory fees, registration, and safety precautions like: muzzling, tattoos, microchips, and confinement.¹²⁸ Certain provisions order euthanasia for repeat offenses or specific dangerous behavior.¹²⁹

Other animals serve as trained "employees" under the presumption of consent, performing jobs that unquestionably invoke important duties to human society. Service animals are trained to work and perform tasks for individuals with disabilities, serving in a role that can be lifesaving.¹³⁰ Dogs and horses serve as members of the police force—tracking criminal activity, aiding crowd control, and charging into dangerous situations at the urging of their human counterparts. Poland recently introduced a plan to provide pensions for dogs and horses in state employment, acknowledging that their

124. See generally, Cheryl Abbate, *The Search for Liability in the Defensive Killing of Nonhuman Animals*, 41 SOCIAL THEORY AND PRACTICE 106 (2015) (discussing the killing of animals in self-defense).

125. Christopher M. Lucca, *Keeping Lions, Tigers, and Bears (Oh My) in Check: The State of Exotic Pet Regulation in the Wake of the Zanesville, Ohio Massacre*, 24 V. ENV'T L. J. 125, 128–29 (2013).

126. Allyson R. Coyne, *Orcas, and Tigers, and Painted Dogs, Oh My: The Need for Targeted Zoo Safety and Security Regulation*, 2 UNIV. ILL. L. REV. 801, 827 (2019).

127. Charlotte Walden, *State Dangerous Dog Laws*, ANIMAL LEGAL & HIST. CTR., MICH. STATE UNIV. COLL OF L., <https://www.animallaw.info/topic/state-dangerous-dog-laws> (last visited Mar. 5, 2022).

128. *Id.*

129. *Id.*

130. *Service Animals*, ADA NAT'L NETWORK, <https://adata.org/factsheet/service-animals> (last visited Mar. 5, 2022).

service deserves equal recognition.¹³¹ Even underwater, animals cannot escape human servitude and human-imposed duties. Since 1959, the United States Navy Marine Mammal Program has trained various marine animals to sense naval threats, recover objects, mark locations of undersea mines, and attach recovery lines to Navy equipment on the ocean floor.¹³² While the Navy trained many species—sharks, rays, sea turtles, whales, and even marine birds—California sea lions and bottlenose dolphins are the animals the program currently uses.¹³³

However, imposing an anthropomorphic lens on animals perpetuates the viewpoint that intrinsic value only exists for humans or animals that mimic human traits. While the baseline for “personhood” is human-centric, the sphere of personhood itself is amorphous.¹³⁴

1. Animals as Parents

Parenthood is recognized as one of the most important duties in human society. The importance of procreation and parenting is recognized and constitutionally protected. Privacy rights developed as part of constitutional jurisprudence allow U.S. citizens the freedom to decide whether to procreate and how they will raise their children.¹³⁵ These same fundamental rights are not afforded to animals. In the farming industry, female cows are routinely artificially inseminated; their calves are taken away immediately after birth, causing psychological distress.¹³⁶ Laying hens are also forcibly impregnated.¹³⁷ If not eaten as part of the nation’s egg supply, female chicks are raised as laying hens, and male chicks are immediately killed upon hatching through brutal methods like maceration.¹³⁸ Animal researchers have

131. Monika Scislowska & Rafal Niedzielski, *Poland plans pensions for dogs, horses in state employment*, AP NEWS (Mar. 27, 2021), <https://apnews.com/article/horses-police-poland-legislation-dogs-b45b58d91a75aa18d02cc5c1ebc82406>.

132. *U.S. Navy Marine Mammal Program*, NAVAL INFO. WARFARE CTR. PAC., <https://www.niwpacific.navy.mil/marine-mammal-program/> (last visited Nov. 21, 2022).

133. *Id.*

134. BRUCE A. WAGMAN, ET AL., *ANIMAL LAW: CASES AND MATERIALS* 60 (6th ed. 2019).

135. *See* *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (holding the Fourteenth Amendment protects the liberty of parents and guardians to direct their children’s education); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding the right to procreation is a fundamental right that cannot be infringed by forced sterilization); *Stanley v. Illinois*, 405 U.S. 645, 645 (1972) (holding unwed fathers are entitled to custody of their children unless declared unfit based on the fundamental right to raise their children); *Troxel v. Granville*, 530 U.S. 57, 75 (2000) (holding parents have a fundamental liberty interest in rearing their child and deciding upon visitation rights).

136. Mary Bates, *The Emotional Lives of Dairy Cows*, WIRED (June 30, 2014, 12:12 PM), <https://www.wired.com/2014/06/the-emotional-lives-of-dairy-cows/>.

137. Tove K. Danovich, *Why the US egg industry is still killing 300 million chicks a year*, VOX (Apr. 12, 2021, 2:30 PM), <https://www.vox.com/future-perfect/22374193/eggs-chickens-animal-welfare-culling>.

138. *Id.*

a history of removing primate mothers from their young for the sake of experiments.¹³⁹ “Cub petting” operations remove lion and tiger cubs from their mothers to serve as part of the industry.¹⁴⁰ The examples of human interference in animal parenthood are numerous. But given the chance to exist without human influence, animals perform their parental duties exceptionally—some to an extent that human parents arguably could not achieve.

During the litigation of *Lavery*, Jane Goodall submitted an affidavit with NhRP’s brief about the duties of chimpanzees.¹⁴¹ As a dedicated advocate performing long-term research on wild primates, Goodall authored numerous publications and delivered many lectures on the behavior, ecology, welfare, and conservation of chimpanzees, baboons, and other monkeys.¹⁴² Goodall details the burdensome duties imposed by motherhood during a chimpanzee’s life.¹⁴³ Mothers must breastfeed infants for three years, which requires carrying the baby until they are old enough to cling to the mother’s back.¹⁴⁴ Female chimpanzees also construct nests large enough for themselves and their offspring.¹⁴⁵ Even when an infant chimpanzee develops into a child, the mother may need to acclimate them to groups of other fully grown offspring.¹⁴⁶ Maternal responsibility includes protecting infants injured by other chimpanzees.¹⁴⁷ In some instances, a chimpanzee mother may return to a fully-grown offspring to help them.¹⁴⁸

Goodall explains that the fatherhood role in chimpanzee communities is more general, as the adult males act in a paternal manner towards all infants in their group rather than specifically providing for their biological children.¹⁴⁹ Adult male chimpanzees protect their communities from outside threats, such as hunters.¹⁵⁰

139. *Harlow’s Classic Studies Revealed the Importance of Maternal Contact*, ASS’N PSYCH. SCI. (June 20, 2018), <https://www.psychologicalscience.org/publications/observer/obsonline/harlows-classic-studies-revealed-the-importance-of-maternal-contact.html#:~:text=Using%20methods%20of%20isolation%20and,separate%20cages%20away%20from%20peers>.

140. See Ann Wilson & Clive J.C. Phillips, *Identification and Evaluation of African Lion (Panthera Leo) Cub Welfare in Wildlife-Interaction Tourism*, 11 ANIMALS 2748, 2755–56 (2021) (exploring the impacts of the cub petting industry on lion cubs in South Africa specifically and discussing the cub petting in many countries as part of animal-based tourism driven by global capitalism).

141. Jane Goodall, Aff. ¶ 1 for Petitioner Nonhuman Rights Project, Inc., People ex rel. Nonhuman Rts. Project, Inc. v. Lavery, 998 N.Y.S.2d 248, 248 (N.Y. App. Div. 3d Dept. 2014).

142. *Id.*

143. *Id.* ¶ 15.

144. *Id.*

145. *Id.*

146. *Id.* ¶ 16.

147. *Id.* ¶ 17.

148. *Id.* ¶ 18.

149. *Id.* ¶ 19.

150. *Id.* ¶ 19.

Older siblings often display the same protective instincts towards their maternal brothers and sisters.¹⁵¹ Goodall describes a nine-year-old female chimpanzee that climbed down a tree to scoop up her three-year-old brother when they encountered a venomous snake.¹⁵² Another young female chimpanzee protected her brother from walking through tall grass infested with ticks.¹⁵³ Older siblings will even adopt infants if their mother dies, despite the social disadvantages placed on the adopter through accepting their dead mother's strenuous duties.¹⁵⁴ Goodall recounts the story of a five-year-old male who carried his one-and-a-half-year-old sister for several months until she died without the necessary breastmilk supply.¹⁵⁵

Chimpanzees and non-human primates are not the only animals committed to their parental duties. Rather, save some exceptions, parenthood is an almost universal duty shared between animals—human and non-human. Researchers observed orca mothers educating and disciplining their children through head movements, distinct noises, and tails slapping the water.¹⁵⁶ The diverse and specific language that orcas use with their children, classified as “baby talk,” is different from the clicks and whistles they use when around the pod.¹⁵⁷ Pigs display parallels to human postpartum disorders when exposed to certain biological, social, and management factors.¹⁵⁸ Remedies that work for human mothers to cure depression after birth—such as a larger social network for support—also work for pig mothers.¹⁵⁹ Some animal parents carry out burdensome physical tasks to raise their offspring. Female strawberry dart frogs lay six eggs at a time and males will protect them following ten days, urinating on the eggs until they hatch into tadpoles.¹⁶⁰ Mothers then carry the tadpoles into the trees, climbing anywhere from three to forty feet, placing them in pools of water that gather in the leaves.¹⁶¹ Mothers will continue to bring the tadpoles food for the next few months, climbing up and down the trees and traveling extensively.¹⁶²

151. *Id.* ¶ 20.

152. *Id.*

153. *Id.*

154. *Id.* ¶ 21.

155. *Id.*

156. Marina Kachar, et al., *Orcas are Social Mammals*, 3 INT'L J. AVIAN & WILDLIFE BIOLOGY 291, 293 (2018).

157. *Id.* at 294.

158. See Courtney Daigle, *Parallels between Postpartum Disorders in Humans and Prewaning Piglet Mortality in Sows*, 8 ANIMALS 1, 1 (2018) (showing that pigs display symptoms of postpartum depression when exposed to certain factors).

159. *Id.*

160. Erica R. Hendry, *A Mother's Journey: How Strawberry Dart Frogs Are Born at the Smithsonian National Zoo*, SMITHSONIAN MAG. (Feb. 26, 2010), <https://www.smithsonianmag.com/smithsonian-institution/a-mothers-journey-how-strawberry-dart-frogs-are-born-at-the-smithsonian-national-zoo-116054632/>.

161. *Id.*

162. *Id.*

2. Animals as Community Members

Beyond their parental and familial roles, animals exist in species-specific and ecological communities comprised of many different animals and plants. Even 100 years ago, humans remarked on the “mutual support” between “allies” within animal communities.¹⁶³ Animals have their own social contracts with one another: unspoken agreements based on mutual benefit manifesting in intricate relationships between both individuals and species.

Goodall’s affidavit for NhRP’s brief mentioned that chimpanzees will adopt orphaned chimpanzees within their community, even if they are not biologically related.¹⁶⁴ One twelve-year-old male chimpanzee cared for a three-and-a-half-year-old male and endured aggression from other adult chimpanzees to protect the orphaned chimpanzee.¹⁶⁵ Generally, adult male chimpanzees protect the territory of their community, fighting with neighboring primate gangs when necessary and closely cooperating to fend off attacks.¹⁶⁶ Even if adult male chimpanzees may be competing within their own community for social dominance, they will put aside their differences to defend their group from outside threats.¹⁶⁷

In addition to chimpanzees, many animals derive support from their species-specific communities. Herds of grazing animals like deer, cattle, horses, and sheep, exist in social hierarchies and benefit from the support of group members for psychological well-being and physical protection.¹⁶⁸ Pelicans, geese, and other waterfowl travel in flight flocks that are highly organized to benefit from aerodynamic formations.¹⁶⁹ Some species of birds even migrate with their relatives. For example, the long-tailed tit preserves family bonds in autumn migration.¹⁷⁰ Animals can also form particularized mutualistic relationships with a different species by working together in a manner that benefits each party. Red-billed oxpeckers, a species of bird native to sub-Saharan Africa, feed from ticks and parasites on black

163. C.F. Holder, *Animal Communities*, 80 SCI. AM. 347, 347 (1899).

164. Goodall, *supra* note 141, ¶ 22.

165. *Id.*

166. *Id.* ¶ 22.

167. *Id.*

168. See MICHAEL D. BREED & JANICE MOORE, ANIMAL BEHAVIOR 367–97 (2012) (explaining the structure and benefits of animal cooperation, such as in group structures like schools, flocks, hordes, and herds).

169. Peter Friederici, *How a Flock of Birds Can Fly and Move Together*, AUDUBON (Mar. 2009), <https://www.audubon.org/magazine/march-april-2009/how-flock-birds-can-fly-and-move-together>.

170. See Raisa Chetverikova et al., *Special Case Among Passerine Birds: Long-tailed Tits Keep Family Bonds During Migration*, 71 BEHAV. ECOLOGY & SOCIOBIOLOGY 1 (2017) (finding that long-tailed tits retain family bonds during migration, since numerous individuals were genetically related in usually temporary flocks).

rhinoceroses.¹⁷¹ The oxpeckers also serve as a warning system for the visually challenged black rhinos, sounding alarm calls when humans approach.¹⁷² Aphids (small, sap-sucking insects) exist in a symbiotic relationship with several species of ants.¹⁷³ Aphids secrete a sugary liquid called honeydew, which ants feed on in exchange for protection from predators and transportation to their nests at night or during the winter.¹⁷⁴ Animal communities are so intricate and interdependent that the introduction of foreign factors like invasive species can create “dramatic and widespread effects” on animal communities.¹⁷⁵

3. Animals as Individuals

To overcome the opposition to non-human personhood, many draw similarities between certain animals (namely primates) and humans to prove that animals deserve rights.¹⁷⁶ Critics of non-human personhood “rely on the naturally ‘superior’ intelligence and cognitive abilities of humans to justify affording rights to humans at the exclusion of other species.”¹⁷⁷ Humans see their own behaviors reflected in the cognitive abilities of certain animals like primates, elephants, and cetaceans, and herald them as superior. Researchers have observed advanced cognitive abilities like self-awareness in many animals.

Humans are misled by the common phrase “bird-brained.” Studies of domestic chickens reveal that they have the capacity for self-control and self-assessment—both elements of self-awareness.¹⁷⁸ Chickens exist in complex social hierarchies, exhibiting complex emotions and cognition on the same level as many other birds and mammals.¹⁷⁹ Due to our limited interactions with fish and common myths about their “three-second memory,” fish are also considered a group of animals with low cognitive abilities and nonexistent emotional capabilities.¹⁸⁰ One study examined the capacity of the

171. Gloria Dickie, *Hitchhiking oxpeckers warn endangered rhinos when people are nearby*, SCIENCE NEWS (Apr. 9, 2020, 11:00 AM), <https://www.sciencenews.org/article/oxpecker-birds-warn-endangered-black-rhinos-people-near-poaching>.

172. *Id.*

173. Ada McVean, *Farmer ants and their aphid herds*, MCGILL OFF. SCI. & SOC’Y (Aug. 16, 2017), <https://www.mcgill.ca/oss/article/did-you-know/farmer-ants-and-their-aphid-herds>.

174. *Id.*

175. See generally J. Sean Doody et al., *Chronic Effects of an Invasive Species on an Animal Community*, 98 ECOLOGY 2093 (2017) (finding that introducing invasive species can trigger trophic cascades within animal communities).

176. Emily A. Fitzgerald, *[Ape]rsonhood*, 34 REV. LITIG. 337, 358 (2015).

177. *Id.* at 359.

178. Lori Marino, *Thinking Chickens: A Review of Cognition, Emotion, and Behavior in the Domestic Chicken*, 20 ANIMAL COGNITION 127, 133–34 (2017).

179. *Id.* at 134.

180. Joseph Stromberg, *Are fish far more intelligent than we realize?*, VOX (Aug. 4, 2014, 8:30 AM), <https://www.vox.com/2014/8/4/5958871/fish-intelligence-smart-research-behavior-pain>.

bluestreak cleaner wrasse (“cleaners”)—a species of fish that eats parasites or dead tissue on the bodies of larger fish in a mutualistic relationship—to demonstrate “theory of mind” abilities.¹⁸¹ “Theory of mind” abilities involve representing the perceptual states of others in strategic interactions, essentially exhibiting that the animal can comprehend what other animals see and know.¹⁸²

Cleaner fish will often work with reproductive partners to clean larger “client” fish.¹⁸³ Cleaners frequently “cheat” and feed on mucus, rather than the dead tissue or parasites that the client fish want removed.¹⁸⁴ Cheating leads to the client fish ending the interaction prematurely, even though the cleaners prefer to feed on mucus.¹⁸⁵ Because pairs of cleaners work together, if the female cleaner feeds on mucus and the client fish ends the interaction, the male cleaner is also punished for the female’s behavior without the benefits of consuming mucus.¹⁸⁶ Larger males punish cheating female cleaners through chasing and biting.¹⁸⁷ This exhibits “theory of mind” behavior because the female will either refrain from consuming mucus when the male is in sight or cooperate in fear of retribution.¹⁸⁸ Cleaners will also avoid consuming mucus from one client fish if there is a bystander client fish observing the behavior, as opposed to cheating when unobserved.¹⁸⁹ These behaviors demonstrate that cleaner fish understand that other fish perceive them and that perception results in implications of their actions.¹⁹⁰

Relying on cognitive abilities for a measurement of personhood or duties can lead to pitfalls by promoting human-centered values and conflicting with the concept of intrinsic rights for mentally-incapacitated humans. More persuasive than animal cognition is the personality of the individual. Recent research is revealing that individual non-humans, possess their own unique personalities, like humans.¹⁹¹ Huge variations in productivity exist between different water striders, a species of water insects that skim the surface of water. Some striders are passive and lazy, while others are ambitious and

181. Katherine McAuliffe et al. *Cleaner fish are sensitive to what their partners can and cannot see*, 4 *Comm’n Biology* 1 (2021).

182. *Id.* at 2.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. John A. Shivik, *Do animals have personalities? Why scientists are starting to admit they do.*, NBC (Dec. 1, 2017, 4:33 AM), <https://www.nbcnews.com/think/opinion/do-animals-have-personalities-why-scientists-are-starting-admit-they-ncna823516>.

hard-working.¹⁹² Male fiddler crabs attract females with their personalities rather than their appearance or physical performance.¹⁹³ Bluebirds have individual stresses and personalities that drive the development of their species' ecology depending on their level of aggression.¹⁹⁴

Given the rapidly evolving science regarding animal sentience, individuality, and culture, a reassessment of human laws and the legal status of animals is overdue. The simple categorization of "property" does not properly encompass the complexities of animals as beings, nor does it provide necessary boundaries to prevent human actions that threaten animals. As Judge Fahey emphasized in her concurrence from *Lavery II*, the issue of animal personhood "is not merely a definitional question, but a deep dilemma of ethics and policy that demands our attention."¹⁹⁵

III. PROPOSAL

The United States legal system has slowly expanded personhood to different groups over time. As the law developed to match society's changing values, "the composition of the class of legal persons has evolved from including only white, male citizens to including all living human beings and a limited group of juridical entities."¹⁹⁶ We should aim to add animals to the "juridical entities." A haphazard collection of laws currently governs animals for the purpose of human interests. Integrating animal interests into human legal systems requires categorical change. Hesitation to provide animals legal personhood springs from the supposed uplifting of animals to the level of humans. The proposed category of limited "juridical entities" is wholly separate from living human beings.

Special classifications of legal personhood are afforded to other "juridical entities" without collapsing the U.S. legal system. Opponents of legal personhood for animals argue that elevating legal status for all non-humans will bring certain humans, like those with limited cognitive abilities,

192. Andrew Sih & Jason V. Watters, *The mix matters: behavioural types and group dynamics in water striders*, 142 BEHAVIOUR 1417, 1427–28 (2005).

193. See Leeann T. Reaney & Patricia R.Y. Backwell, *Risk-taking behavior predicts aggression and mating success in a fiddler crab*, 18 BEHAV. ECOLOGY 521 (2007) (describing an experiment with results showing that female fiddler crabs were more likely to mate with "bold" male fiddler crabs).

194. See Renée A. Duckworth, *Aggressive behaviour affects selection on morphology by influencing settlement patterns in a passerine bird*, ROYAL SOC'Y BIOLOGY PROC. 1789 (2006) (finding that more aggressive bluebirds compete more effectively for nesting territory).

190. Nonhuman Rights Project, Inc., on Behalf of Tommy v. Lavery, 100 N.E.3d 846, 848 (N.Y. 2018).

196. Fitzgerald, *supra* note 176, at 340–41.

down in legal status.¹⁹⁷ This argument ignores the fundamental difference between actual persons and juridical persons. Juridical persons are artificial or fictional persons that are “not necessarily precluded from possessing rights equal to natural persons.”¹⁹⁸ Despite their potential to possess rights equal to natural persons, the rights of juridical persons may be defined and limited.¹⁹⁹ If granting legal personhood to non-humans harmed vulnerable human populations like children and mentally-incapacitated individuals, the circumstantial and limited categorization of entities like corporations and fetuses as persons would have damaged them already.

Some animal advocates propose the options of “quasi-property” or “quasi-personhood” as a new status for non-human animals.²⁰⁰ These new terms may appear to be additions to the legal labeling scheme that will only facially affect animals if they are unaccompanied by actual changes to animal rights.²⁰¹ The new terms real value is the potential to “expand to include more species than ever. . . into a category of ‘persons.’”²⁰² The species identified as having this potential are primates, elephants, and orcas—perhaps poking a hole in the NhRP’s legal theory as applied in the long term if the most cognitively advanced non-human animals can achieve personhood.²⁰³

At the least, the law should reconsider legal personhood. The clarified definition in Black’s Law Dictionary and the evolving moral views of human society warrants a reevaluation of non-human animals under United States laws. An update is long overdue, given that non-human animals status has been static since the founding of the country. A default status of limited legal personhood would provide better protections than existing federal or state laws and avoid irreversible injuries of valuable entities who occupy our planet alongside us.

CONCLUSION

In the words of Jane Goodall, “chimpanzees have well-defined duties and responsibilities.”²⁰⁴ Beyond just chimpanzees, non-human animals generally exhibit their own unique duties and responsibilities. As scientific

197. See generally Richard L. Cupp, Jr., *Focusing on Human Responsibility Rather Than Legal Personhood for Nonhuman Animals*, 33 PACE ENV’T L. REV. 517 (2016) (arguing against legal personhood for animals because of the risk of harm to the legal status of vulnerable humans such as those with limited cognitive abilities).

198. Fitzgerald, *supra* note 176, at 343.

199. *Id.* at 345.

200. Angela Fernandez, *Animals as Property, Quasi-Property, or Quasi-Person*, BROOKS UNIV. ANIMAL L. FUNDAMENTALS 1, 51 (Nov. 19, 2021).

201. *Id.*

202. *Id.*

203. *Id.*

204. Goodall, *supra* note 141, at ¶ 14.

understanding of animal capacity develops and ethical questions arise, human legal systems must alter their standards and categorizations to reflect these advancements. The property status of animals does not match their role in human society or their value outside of human existence. This is evidenced by the question posed in Judge Fahey's concurrence: "Does an intelligent nonhuman animal who thinks and plans and appreciates life as human beings do have the right to the protection of the law against arbitrary cruelties and enforced detentions visited on him or her?"²⁰⁵ Whether it is through the legislature or the courts, the status of non-human animals should be confronted, or it will continue to plague our courtrooms and our collective conscience.

205. Nonhuman Rts. Project, Inc., on Behalf of Tommy v. Lavery, 100 N.E.3d 846, 848 (N.Y. 2018).