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# ECO-ABLEISM IN THE ENVIRONMENTAL JUSTICE MOVEMENT

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*Clare Pledl\**

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## INTRODUCTION

When Hurricane Katrina hit Louisiana, Mississippi, and Alabama in 2005, nearly half a million people with disabilities lived in the counties affected.<sup>1</sup> Despite the foreseeability of evacuation being more difficult for people with disabilities, the most vulnerable people were left to fend for themselves.<sup>2</sup> Evacuation prior to the storm was not an option for many people with disabilities.<sup>3</sup> Emergency shelter spaces lacked entrances that could

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1. Rooted in Rights, *The Right to be Rescued*, Vimeo (Oct. 6, 2017), <https://vimeo.com/ondemand/therighttoberescuedad>.

2. *Id.*

3. *Id.*

accommodate wheelchairs.<sup>4</sup> Transportation vehicles, if available, lacked the lifts needed to transport someone to a shelter space, and those lucky enough to be transported often had hours-long wait times in 90°-heat.<sup>5</sup> The storm took the lives of over 1,300 people—hitting the most vulnerable populations hardest.<sup>6</sup> It is difficult to ascertain how many people with disabilities died due to the storm, as many people passed away in the years following due to health complications.<sup>7</sup>

We are living in a time where environmental disasters, such as Hurricane Katrina, are going to become more common. Frequent natural disasters are the new normal.<sup>8</sup> The environmental justice movement has shed light on the way that race and class status increases susceptibility to the impacts of climate change. However, the environmental justice movement often fails to include a disability analysis.<sup>9</sup> People with disabilities cannot continue to be ignored given the significant impact of climate change on their lives. People with disabilities are the largest minority group in the United States, comprising no less than 20% of the population.<sup>10</sup> However, the United States has a long history of oppressing people with disabilities. This subordination has led to the disabled population becoming more likely to experience extreme impacts of climate change. To be truly inclusive, the environmental justice movement must incorporate the voices of people with disabilities when fighting for systemic change.

There is an imminent need to implement disability-specific legal responses under the existing body of environmental law. Using an intersectional analysis of disability and class, this note will first explain how people with disabilities historically were segregated into communities that now face severe consequences from climate change. To analyze why many

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4. *Id.*

5. Kathleen Otte, *No One Left Behind: Include Older Adults and People with Disabilities in Emergency Planning*, ADMINISTRATION FOR COMMUNITY LIVING (Sept. 4, 2015) <https://acl.gov/news-and-events/acl-blog/no-one-left-behind-including-older-adults-and-people-disabilities#:~:text=The%20storm%20inflicted%20a%20terrible,over%20the%20age%20of%2060>.

6. *Id.*

7. Carrie Morantz, *CDC Reports on Illnesses in Hurricane Katrina Evacuees and Relief Workers*, AM. FAM. PHYSICIAN (Nov. 15, 2005), <https://www.aafp.org/afp/2005/1115/p2132.html>.

8. Alice Wong, *In California Wildfires, Disabled People May Be Left Behind*, CURBED S.F. (Nov. 13, 2018), <https://sf.curbed.com/2018/11/13/18087964/california-wildfires-disabled-people-elderly-evacuation-disabilities>.

9. Krystal Vasquez, *Why Environmental Justice Research Needs to Include Disability*, GREEN BIZ (Sept. 16, 2021), <https://www.greenbiz.com/article/why-environmental-justice-research-needs-include-disability>.

10. HARRIET TUBMAN COLLECTIVE, *DISABILITY SOLIDARITY: COMPLETING THE “VISION FOR BLACK LIVES” IN DISABILITY VISIBILITY: FIRST PERSON STORIES FROM THE TWENTY-FIRST CENTURY* 236 (Alice Wong, ed. 2020) [hereinafter HARRIET TUBMAN COLLECTIVE].

people with disabilities have become devalued as workers and relegated to low-income areas, we must understand the impact of capitalism on our social system. Next, this note will highlight several instances of climate emergencies and their disproportionate impact on people with disabilities. These examples will highlight the disparate impacts and the lack of resources available to people with disabilities. The analysis section of this note will then explore ways to reform the environmental justice movement to advocate for the rights of people with disabilities. This analysis will build off of a discussion about the current state of disability rights legislation. Finally, the note will end with suggestions about where the environmental justice movement can strengthen their activism through the grassroots efforts led by activists working towards an equitable environmental justice movement.

## I. DISABILITY IS A CRITICAL ISSUE IN THE FIGHT FOR ENVIRONMENTAL JUSTICE

### A. A Brief History of Disability

The history of disability is difficult to track as societies tend to define disability based on how they view normal behavior. Michel Foucault tracked the history of our cultural understandings of disability through the term *madness*.<sup>11</sup> During the Middle Ages, *madness* was linked with *folly*. *Folly* is an evil vice, a human weakness.<sup>12</sup> Other weaknesses included greed, being quick-tempered, or gluttonous.<sup>13</sup> Since disability was not understood to be a developmental or physical difference, it was explained away through the understanding of evils. These evils were used to explain irregularities in human conduct.<sup>14</sup> Essentially anything abnormal, like a disability, was viewed as a weakness that could be overcome through a life of morality.<sup>15</sup>

The turn of the 16th century in Europe introduced a new way of viewing disability—as something that must be contained, confined, and managed through hospitalization. Houses of correction popped up throughout Europe representing “establishments of religion and public order, of assistance and punishment, [and] of governmental charity and welfare measures.”<sup>16</sup> People with disabilities were not the only people confined in these hospitals, which

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11. MICHEL FOUCAULT, *MADNESS & CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON* 24 (Richard Howard trans., Vintage Books 3rd ed. 1988).

12. *Id.*

13. *Id.* at 27.

14. *Id.* at 27.

15. *Id.*

16. *Id.* at 43.

also served as places of punishment for vagabonds.<sup>17</sup> The houses of correction were funded through taxes.<sup>18</sup> Local judges chose whether someone should be sent to a house of correction or whether a workhouse (the typical penitentiary of this time) would be more appropriate.<sup>19</sup> Today, we still often utilize the court system to determine the extent to which someone is disabled.<sup>20</sup>

The religious context of the 16th century helps explain the power of these houses of correction. Through Catholic, Protestant, and Calvinistic ideas about idleness as rebellion, the people who could not work within their communities represented a danger to society.<sup>21</sup> The houses of correction weaponized an “ethical power of segregation” where they ejected those who were not socially useful to their community.<sup>22</sup> Ideas about morality justified the desire to confine those who could not work. These new morality-based meanings about the importance of work and the obligation to provide for yourself set a dangerous precedent for the treatment of disability moving forward. Many historical messages about disability are prominent in the modern era. Disability is still frequently seen in conjunction with other undesirable social conditions, such as poverty and criminal behavior.

The concept of houses of correction laid the groundwork for the massive institutionalization of people with disabilities in the United States throughout the 19th and 20th centuries. Institutions, parading themselves as schools or places of reform, opened throughout the country.<sup>23</sup> These schools were advertised as places where “with proper training . . . people with disabilities could be educated to return to the community and lead productive lives.”<sup>24</sup> At first, the schools seemed to be successful—children were able to gain social skills and return to their homes.<sup>25</sup> However, these schools quickly turned into asylums when they began providing custodial care for children with significant disabilities.<sup>26</sup> This marked the beginning of the dehumanizing period, where the institutions focused primarily on how

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17. *Id.*

18. *Id.*

19. *Id.* at 44.

20. See *Arc Guide to Decision Making*, THE ARC MINN. <https://arcminnesota.org/resource/arc-guide-to-guardianship/> (last visited Sept. 20, 2021) (providing a general overview of decision-making options in court for people with disabilities).

21. FOUCAULT, *supra* note 11, at 56.

22. *Id.* at 58.

23. *Parallels in Time: A History of Developmental Disabilities*, MINN. DEP’T OF ADMIN., <https://mn.gov/mnddc/parallels/four/4d/9.html> (last visited Sept. 23, 2021).

24. *Id.*

25. *Id.*

26. *Id.*



economical their facilities could be.<sup>27</sup> Having a disabled child had a high financial impact on low-income families. Institutions presented an opportunity to have children cared for at a low cost to their families. As enrollment in these facilities increased, the focus on education was left behind.

Institutions became medically oriented as doctors were chosen to be supervisors of the facilities.<sup>28</sup> Children with disabilities were viewed as sick, needing to be cured. Popular cultural ideas about eugenics spurred further interest in removing people with disabilities from society and moving them into these facilities.<sup>29</sup> Sterilization of institutionalized residents was commonplace.<sup>30</sup> The Supreme Court of the United States had the opportunity to intervene on these sterilization practices in 1927 with *Buck v. Bell*.<sup>31</sup> In this case, the plaintiff was a disabled woman whose mother and grandmother were also disabled.<sup>32</sup> Chief Justice Oliver Wendell Holmes famously declared, “three generations of imbeciles are enough!” and approved of the plaintiff’s involuntary sterilization.<sup>33</sup> The forced and involuntary sterilization of people with disabilities continues today.<sup>34</sup>

People without disabilities have been trying to explain and understand disability for many years. Foucault’s history of disability shows the progression of this understanding. Unfortunately, much of this attempt to explain disability has resulted in subordination and harm to people who were viewed as abnormal and different. This stigma and confusion around disability has continued into our modern era.

### *B. The Disability Rights Movement*

It was not until the disability justice movement of the 1950s and 1960s that general American society began to understand people with disabilities as deserving of treatment, not just confinement. When the disability rights movement began to gain momentum, one of the first actions was closing

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27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. Ari Ne’eman, *Washington State May Make it Easier to Sterilize People with Disabilities*, ACLU (Jan. 29, 2018), <https://www.aclu.org/blog/disability-rights/integration-and-autonomy-people-disabilities/washington-state-may-make-it>.

institutions and instituting reforms of those facilities.<sup>35</sup> Although institutions have undergone much reform in the last 30 years, many people with disabilities still feel they live “institutional lives.”<sup>36</sup> Many people with disabilities rely on government resources for survival. Confinement is still often utilized as a form of *treatment* for people with disabilities today.<sup>37</sup>

The disability justice movement has taken many forms throughout the 20th and 21st centuries. The disability justice movement of the 1980s and 1990s focused on equality, primarily with remedying access to the workforce.<sup>38</sup> Disability advocates were responsible for the passage of the Americans with Disabilities Act (ADA) in 1990, the first major piece of federal legislation to address equality for people with disabilities.<sup>39</sup> This Act, similar to other civil rights legislation, was also an economics bill.<sup>40</sup> The activists and legislators who worked to pass the ADA understood that for people with disabilities to be seen as equals they needed access to the workforce.

Several legal definitions of disability involve differentiating between the ability and inability to work. Notably, the Social Security Administration (SSA) defines disability as:

the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairments which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.<sup>41</sup>

The definition’s use of “substantial gainful activity” is a roundabout way to describe the ability to work.<sup>42</sup> Many people with disabilities can perform substantial gainful activity and hold jobs in their community, but if they want

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35. *A Brief History of the Disability Rights Movement*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/education/resources/backgrounders/disability-rights-movement> (last visited Oct. 22, 2021).

36. *Id.*

37. *Institutions: Definitions, Populations, and Trends*, NAT’L COUNCIL ON DISABILITY (Sept. 19, 2012), <https://ncd.gov/publications/2012/Sept192012/Institutions>.

38. ANTI-DEFAMATION LEAGUE, *supra* note 35.

39. *Id.*

40. MARTA RUSSELL, *CAPITALISM & DISABILITY* 41 (Keith Rosenthal ed., 2019).

41. *Disability Evaluation Under Social Security Part 1 - General Information*, SOC. SEC. ADMIN., <https://www.ssa.gov/disability/professionals/bluebook/general-info.htm> (last visited Oct. 22, 2021).

42. *Id.*

to benefit from Social Security, then they are unable to do so.<sup>43</sup> This definition of disability incentivizes staying unemployed to remain eligible for other necessary benefits of Social Security.

Many people with disabilities who are unable to work rely on government benefits through programs like the SSA. However, these payments are not enough to cover the costs of daily life. The average monthly disability benefit in 2019 was \$1,234.<sup>44</sup> The SSA acknowledges that this payment is modest and “barely enough to keep a beneficiary above the 2018 poverty level (\$12,140 annually).”<sup>45</sup> These payments are often the only income that people with disabilities receive.<sup>46</sup> The application process for these government benefits is tedious and confusing.<sup>47</sup> People who do not understand how the process works may be denied access to the benefits system.

Many people with disabilities live in poverty or experience homelessness because they have fallen through the cracks in our system. Even if they do receive benefits from the SSA, people with disabilities tend to hover around the poverty line.<sup>48</sup> A 2019 study from The Institute on Disability places the poverty rate for people with disabilities age 18–64 around 26.1%.<sup>49</sup> For similar age groups of nondisabled people, the poverty rate hovers around 10.7%.<sup>50</sup> People with disabilities are disproportionately represented in the chronically homeless population.<sup>51</sup> It is estimated that nearly one-quarter of people who are experiencing chronic homelessness are people with disabilities.<sup>52</sup> This is a serious issue—many people with disabilities are forced to live in low-income areas without access to safe and stable housing. The result is extreme vulnerability to environmental disasters.

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43. *Id.*

44. *The Faces and Facts of Disability*, SOC. SEC. ADMIN., <https://www.ssa.gov/disabilityfacts/facts.html> (last visited Oct. 22, 2021).

45. *Id.*

46. *Id.*

47. SOC. SEC. ADMIN., *Disability Benefits: The Disability Application Process*, <https://www.ssa.gov/benefits/disability/> (last visited Oct. 22, 2021).

48. *The Faces and Facts of Disability*, *supra* note 44.

49. E.A. Lauer et.al., *Annual Disability Statistics Compendium: 2019*, DURHAM, NH: U. OF N.H., INSTITUTE OF DISABILITY (2020), 62, [https://disabilitycompendium.org/sites/default/files/iod/reports/2019-annual-disability-statisticscompendium\\_pdfs/2019\\_Annual\\_Disability\\_Statistics\\_Compendium\\_ALL.pdf?ts=1580831674](https://disabilitycompendium.org/sites/default/files/iod/reports/2019-annual-disability-statisticscompendium_pdfs/2019_Annual_Disability_Statistics_Compendium_ALL.pdf?ts=1580831674) [hereinafter *Annual Disability Statistics Compendium*].

50. *Id.*

51. *Homelessness in America: Focus on Chronic Homelessness Among People with Disabilities*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS (Aug. 2018), [https://www.usich.gov/resources/uploads/asset\\_library/Homelessness-in-America-Focus-on-chronic.pdf](https://www.usich.gov/resources/uploads/asset_library/Homelessness-in-America-Focus-on-chronic.pdf).

52. *Id.*

*C. The Significant Impacts of Climate Change on Disability*

Hurricane Katrina is a frequent example used in conversations about climate change and separately in conversations about disability. Among climate change activists, Hurricane Katrina represents a public awakening of the changes that global warming can bring to global weather.<sup>53</sup> The scientific community is unsure whether climate change will create more hurricanes, however they are confident that their intensity will increase.<sup>54</sup> Katrina's impact was worsened by the high sea level in the Gulf Coast at the time.<sup>55</sup> If a storm of Katrina's scale happened under the sea level conditions in 1990, the impact on the coast would have been anywhere from 15–60% lower.<sup>56</sup> Temperature changes also likely played a part in Katrina's impact, as warmer ocean temperatures have been found to increase the intensity of storms.<sup>57</sup>

For the disability community, Hurricane Katrina is often pointed to as a failure on the part of local governments to protect their most vulnerable populations. People with disabilities were disproportionately impacted by the storm partly due to governmental failures to disperse resources in a timely fashion.<sup>58</sup> Weather forecasters warned government officials ahead of time, so the storm exposed major failures in America's disaster preparedness and response systems.<sup>59</sup> One of the largest issues was general confusion due to a breakdown in communication.<sup>60</sup> After the initial storm, over three million customer telephone lines were knocked down resulting in the inability of the government to communicate with people who could not evacuate.<sup>61</sup> Over 20 million telephone calls did not connect in the day after the storm.<sup>62</sup> The New Orleans Police Department's communication system failed and was

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53. Andrea Thompson, *Was There a Link Between Climate Change and Hurricane Katrina?* GRIST (Aug. 27, 2015), <https://grist.org/climate-energy/was-there-a-link-between-climate-change-and-hurricane-katrina/>.

54. *Hurricanes and Climate Change*, CTR. FOR CLIMATE ENERGY SOLS., <https://www.c2es.org/content/hurricanes-and-climate-change/> (last visited Oct. 22, 2021).

55. *Id.*

56. *Id.*

57. *Id.*

58. See *Generally* SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, 109TH CONG., A FAILURE OF INITIATIVE: FINAL REPORT OF THE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA (Comm. Print 2006) [hereinafter BIPARTISAN COMMITTEE REPORT] (detailing how the government's response to Hurricane Katrina failed people with disabilities through underwhelming evacuation and supply efforts).

59. Chris Edwards, *Hurricane Katrina: Remembering Federal Failures*, THE CATO INSTITUTE (Aug. 27, 2015), <https://www.cato.org/blog/hurricane-katrina-remembering-federal-failures>.

60. *Id.*

61. BIPARTISAN COMMITTEE REPORT, *supra* note 58.

62. *Id.*

unreachable for three days following the storm.<sup>63</sup> This communication breakdown severely hindered emergency response team's ability to provide assistance.<sup>64</sup> People with disabilities were left waiting for help that never came.

Many people with disabilities were unable to evacuate for Hurricane Katrina due to a lack of information on how to evacuate. People with visual and hearing disabilities were unable to obtain evacuation information because government communications were not in compliance with federal law.<sup>65</sup> Broadcasters and emergency management agencies failed to "comply with legal obligations to provide accessible emergency information."<sup>66</sup> News releases failed to offer sign language interpreters, or TV stations cut the interpreters out of screen.<sup>67</sup> While the nondisabled population in Louisiana was able to access televised news for critical updates, many people with disabilities were left unaware of the magnitude of the emergency.<sup>68</sup> People who relied on cell phone messaging updates were unable to access any information once the phone lines went down. Additionally, evacuation by public transportation was inaccessible: most buses did not have wheelchair lifts.<sup>69</sup>

Unfortunately, there was also no plan on how to rescue people with disabilities after the storm hit.<sup>70</sup> There was no plan to transport wheelchairs or the people who use them.<sup>71</sup> There was no preplanning for evacuating hospitals or nursing homes.<sup>72</sup> No accommodations were made in shelters for people who were deaf, blind, or used wheelchairs.<sup>73</sup> These were not simple inconveniences, these were "life-preserving accommodations that many people with disabilities need in order to live."<sup>74</sup> The point of emergency planning is to think about disasters ahead of time. While the national and

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63. *Id.*

64. *Id.*

65. Lex Frieden, *The Impact of Hurricanes Katrina and Rita on People with Disabilities: A Look Back and Remaining Challenges*, NAT'L COUNCIL ON DISABILITY (Aug. 3, 2006), <https://ncd.gov/publications/2006/aug072006#:~:text=Almost%20immediately%20after%20Hurricane%20Katrina,hit%20by%20the%20hurricane%3A%20Biloxi%2C>.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. Jordan Melograna, *People with Disabilities Left Behind During Katrina Tell Their Stories*, HUFFPOST (Aug. 26, 2016), [https://www.huffpost.com/entry/people-with-disabilities-\\_2\\_b\\_8045700](https://www.huffpost.com/entry/people-with-disabilities-_2_b_8045700).

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*



state governments failed generally to plan for Hurricane Katrina, people with disabilities were not even incorporated into emergency response plans.<sup>75</sup>

While major climate emergencies gain national attention, the daily impact of climate change on people with disabilities is often much more subtle. As sea levels in Miami continue to rise, the city has struggled to figure out how to maintain city streets while also combatting the all-too-common flooding.<sup>76</sup> Flood experts have a suggestion—raise the roads.<sup>77</sup> The city has addressed sea level rise with road elevation in the past, much to the disdain of the residents.<sup>78</sup> The impact of the raised roads on neighborhoods has been significant: water overflow onto properties, insurance issues, and long construction times.<sup>79</sup> But the raised roads also present an issue to people with disabilities, many who already struggle to access roads.<sup>80</sup> Even a simple half-inch difference in street height can mean a massive change in accessibility for people with mobility disabilities.<sup>81</sup> While the city of Miami works to figure out a solution that prevents flooding without upsetting residents, people with disabilities hope for a solution that is accessible.

Although the Americans with Disabilities Act requires ramps or curb cuts in any accessible route with a greater level change than a half-inch, many people with mobility disabilities know that this is often not the case.<sup>82</sup> Dropped curbs, doorways without steps, or wheelchair-friendly access ramps are often the exception and not the rule.<sup>83</sup> Comedian Zach Anner shed light on the lack of accessible routes in New York City in a viral YouTube video.<sup>84</sup> Anner has cerebral palsy and utilizes a motorized wheelchair.<sup>85</sup> His goal for the video: exit his hotel and take the subway to Brooklyn to grab a rainbow bagel.<sup>86</sup> An estimated 28-minute trip took over five hours as Anner struggled to find an elevator to exit his hotel, subway stations without stairs, sidewalks

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75. *Id.*

76. Alex Harris, *Raising Flood-Prone Roads has Angered Miami Beach Residents. Experts Say They Need to Go Higher*, MIA. HERALD (Feb. 03, 2020), <https://www.miamiherald.com/news/local/environment/article239486308.html>.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Chapter 4: Ramps and Curb Ramps*, THE U.S. ACCESS BD. (July 2015), <https://www.access-board.gov/guidelines-and-standards/buildings-and-sites/about-the-ada-standards/guide-to-the-ada-standards/chapter-4-ramps-and-curb-ramps>.

82. *Id.*

83. Saba Salman, *What Would a Truly Disabled-Accessible City Look Like?* THE GUARDIAN (Feb. 14, 2018), <https://www.theguardian.com/cities/2018/feb/14/what-disability-accessible-city-look-like>.

84. Cerebral Palsy Foundation, *Zach Anner & The Quest for the Rainbow Bagel*, YOUTUBE (Mar. 20, 2017), <https://www.youtube.com/watch?v=LhpUJRGzGzc>.

85. *Id.*

86. *Id.*

with curb cuts, and a bagel storefront with a ramp.<sup>87</sup> His attitude throughout the video is upbeat and humorous, but Anner points out serious accessibility issues within the city. Anner even notes that as far as cities go, New York is fairly accessible. Anner demonstrates that a simple trip for most New Yorkers becomes a true quest when you utilize a wheelchair.

Feeling at the mercy of sudden changes in your environment is all too common of a reality for many people with disabilities. Something as routine as a power outage can be life-threatening to a person reliant on medical equipment.<sup>88</sup> People with disabilities may rely on “equipment powered by electricity, such as motorized wheelchairs, elevators, refrigerated medications, oxygen generators, and more.”<sup>89</sup> When there is an unexpected power outage, many people with disabilities are ill-equipped to handle a blackout. Wind causes many power outages. As strong wind activity becomes more common with climate change, we can count on wind-caused power outages to also become more common.<sup>90</sup> This means that fallen power lines, downed trees, or broken poles will likely cause increased power outages.<sup>91</sup>

When power companies prepare for incoming wind storms, they may proactively turn off power in neighborhoods expected to be hit hard.<sup>92</sup> If people with disabilities living in those communities are not prepared for a power outage or notified of a proactive power turnoff, they may be placed in dangerous situations without access to help.<sup>93</sup> A massive blackout in California in October of 2019 left over 700,000 people without electricity for over 72 hours.<sup>94</sup> The power outage was in response to the threat of growing wildfires in the region. However, many utilities customers were not notified about the expected length of the power outage.<sup>95</sup> Many people with

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87. *Id.*

88. Elizabeth Wright, *Climate Change, Disability, and Eco-Ableism: Why We Need to be Inclusive to Save the Planet*, UX COLLECTIVE (Feb. 19, 2020), <https://uxdesign.cc/climate-change-disability-and-eco-ableism-why-we-need-to-be-inclusive-when-trying-to-save-the-88bb61e82e4e>.

89. Stephanie Collins, *US Power Outages Endanger People with Disabilities*, HUM. RTS. WATCH (Oct. 23, 2019), <https://www.hrw.org/news/2019/10/23/us-power-outages-endanger-people-disabilities#>.

90. Maxine Mouly, *PG&E Power Outages Leave About 400,000 Customers Without Power*, THE DAILY CAL. (Feb. 13, 2020), <https://www.dailycal.org/2020/02/13/pge-power-outages-leave-about-400000-customers-without-power/>.

90. See Chelsea Harvey, *The World's Winds Are Speeding Up*, E&E NEWS (Nov. 19, 2019), <https://www.scientificamerican.com/article/the-worlds-winds-are-speeding-up/>.

91. *Id.*

92. *Id.*

93. Collins, *supra* note 89.

94. *Id.*

95. *Id.*

disabilities purchased generators, stayed in hotels, or reported to hospitals.<sup>96</sup> These unexpected costs hit people with disabilities harder than the average person due to the financial inequalities that accompany disability. Since blackouts are not considered natural disasters, there are few resources to fund aid or shelters—leaving vulnerable populations at the mercy of their power companies.<sup>97</sup> Power companies often have maps of where their most vulnerable customers are and sometimes are able to provide access to generators.<sup>98</sup> However, this does not always happen in time for long-ranging blackouts.

As climate emergencies occur with more frequency, it is critical that people with disabilities are incorporated into planning for those emergencies. However, it is not just those climate emergencies where people with disabilities have historically felt like an afterthought. People experience daily hardship in examples of poor city planning, seen both in New York and Miami. While the ADA is supposed to provide guidance on city planning to protect people with disabilities, this is not always the case in practice. People with disabilities have been asking for years to be included in conversations that will impact their lives. By partnering with the environmental justice movement, perhaps there is finally an opportunity for their voices to be heard.

## II. ECO-ABLEISM AND THE ENVIRONMENTAL JUSTICE MOVEMENT

The environmental justice movement was primarily championed in the United States by people of color.<sup>99</sup> Environmental justice advocates are people working to address the fact that “the people who live, work and play in America’s most polluted environments are commonly people of color and the poor.”<sup>100</sup> This injustice is commonly called environmental racism.<sup>101</sup> One of the defining moments of the environmental justice movement was the call to action in Warren County, North Carolina, in 1982.<sup>102</sup> Primarily low-income, rural black people made up the population of Warren County.<sup>103</sup> When the state government of North Carolina chose the county as a dumpsite

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96. *Id.*

97. *Id.*

98. *Emergency Power Planning for People Who Use Electricity and Battery-Dependent Assistive Technology and Medical Devices*, PAC. ADA CTR. (Oct. 2021), <https://adata.org/factsheet/emergency-power>.

99. Renee Skelton & Vernice Miller, *The Environmental Justice Movement*, NAT’L RES. DEF. COUNCIL (Mar. 17, 2016), <https://www.nrdc.org/stories/environmental-justice-movement>.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

for 6,000 truckloads of toxic soil, the residents of Warren County were justifiably concerned about the impact on the environment and their community.<sup>104</sup> The community's residents and their allies expressed their concerns through marches and nonviolent street protests; over 500 people were arrested.<sup>105</sup> The people of Warren County ultimately lost this battle, but it represented a turning point in the United States—the national media finally exposed the need for an environmental justice movement.<sup>106</sup>

Although other people protested environmental harm in their communities before Warren County, this was one of the first protests to gain national attention.<sup>107</sup> In the years following the Warren County protests, activists all over the country began to recognize the patterns of environmental racism: “pollution-producing facilities are often sited in poor communities of color.”<sup>108</sup> These communities lacked the connections to advocate during city council meetings; the financial resources to hire legal experts to protest decisions; and frequently experienced language barriers to accessing this information.<sup>109</sup> Research done by Congress's General Accounting Office in the 1980s and 1990s gave credibility to these claims of environmental racism.<sup>110</sup> Their study revealed 75% of the hazardous waste sites in eight states were located in primarily low-income, Black, and Latino communities.<sup>111</sup>

The environmental justice movement steadily gained momentum in the mainstream public as politicians began to take up the cause. The Office of Environmental Justice was established in 1992 to address the needs of “vulnerable populations by decreasing environmental burdens, increasing environmental benefits and working collaboratively to build healthy, sustainable communities.”<sup>112</sup> President Clinton signed Executive Order 12898 in February 1994, directing federal agencies to identify and address health risks of policies on people who were low-income or racial minorities.<sup>113</sup> It also directed agencies to seek new ways to prevent discrimination in federally funded programs addressing health or the

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104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Office of Environmental Justice in Action*, ENV'T PROT. AGENCY (Sept. 2017), [https://www.epa.gov/sites/production/files/201709/documents/epa\\_office\\_of\\_environmental\\_justice\\_factsheet.pdf](https://www.epa.gov/sites/production/files/201709/documents/epa_office_of_environmental_justice_factsheet.pdf).

113. Skelton, *supra* note 99.

environment.<sup>114</sup> This political recognition of the environmental justice movement further legitimized the need for action.

While the environmental justice movement has always had a strong focus on the adverse impacts of environmental changes on low-income communities and racial minority groups, the movement has lacked a strong emphasis on the intersectional identity of disability. Given the inability of many people with disabilities to work, there tends to be a strong reliance on government programs to make ends meet. Over a quarter of people with disabilities live below the poverty line.<sup>115</sup> They are likely to live in the same communities advocated for by the environmental justice movement.<sup>116</sup> However, the environmental justice movement tends to ignore the prevalence of people with disabilities within these communities. This oversight reinforces social bias about disability—it is something to hide, an issue for somebody else to solve, or it is generally not important. Given the overlaps in need between people with disabilities, racial minorities, and people who are low-income, it is logical to ask the environmental justice movement to take steps to incorporate disability into the movement.

#### *A. Perpetuation of Ableism in the Environmental Movement*

Scholar Valerie Ann Johnson writes, “those in the environmental justice community are not immune to our society’s standards of health, beauty and normality, and until we confront those values we will replicate the oppressive structures we seek to overturn.”<sup>117</sup> Johnson outlines the need for a more inclusive environmental justice movement in the essay *Bringing Together Feminist Disability Studies and Environmental Justice*.<sup>118</sup> Johnson uses the example of the Earth Charter, a document codifying a global consensus around sustainability.<sup>119</sup> This document was created by an independent global organization after the Earth Summit in 1992.<sup>120</sup> In the Earth Charter’s list of principles, they state the need for upholding “the right of all, without discrimination, to a natural and social environment supportive of human dignity, bodily health, and spiritual well-being, with special attention to the

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114. *Id.*

115. *Annual Disability Statistics Compendium*, *supra* note 49.

116. *Id.*

117. Valerie Ann Johnson, *Bringing Together Feminist Disability Studies and Environmental Justice*, CTR. FOR WOMEN POL’Y STUD. (Feb. 2011), [https://www.peacewomen.org/assets/file/Resources/Academic/bringingtogetherfeministdisabilitystudiesandenvironmentaljustice\\_valerieannjohnso.pdf](https://www.peacewomen.org/assets/file/Resources/Academic/bringingtogetherfeministdisabilitystudiesandenvironmentaljustice_valerieannjohnso.pdf).

118. *Id.* at 73.

119. *Id.* at 74.

120. *Id.*



rights of indigenous peoples and minorities.”<sup>121</sup> The charter then outlines examples of these minority groups, including “race, color, sex, sexual orientation, religion, language, and national, ethnic or social origin.”<sup>122</sup> Notably, the category of ability or ableness is missing from this list.<sup>123</sup>

Johnson uses this document as an example of where disability is missing from the greater conversation between environmental justice advocates. Johnson asks the environmental justice movement to be explicit with their calls for activism, because “without explicitly naming ability or ableness as a category where discrimination can occur, we cannot be sure that sustainability (for example) in relation to persons with disabilities will in fact be addressed.”<sup>124</sup> Johnson worries that “disability is subsumed under one of the other categories,” masking or obscuring “the issues that need to be attended to when considering . . . mental and physical ability.”<sup>125</sup> While Johnson notes that this may be an unintentional oversight, this leads to a lack of voices and perspectives from those who identify as disabled.<sup>126</sup>

When people with disabilities are left out of environmental justice conversations, the environmental justice movement can act in ways that are adverse to the needs of people with disabilities. Recently, there was a push to reduce the public’s reliance on single-use plastics, such as grocery bags and plastic straws.<sup>127</sup> Photos and videos circulated on social media of sea turtles and other charismatic megafauna with straws in their noses. The public immediately jumped on board with the cause, petitioning local legislators to ban single-use plastics. The impact was the creation of regulations like in Malibu, California, which prohibited restaurant vendors from providing plastic straws to customers.<sup>128</sup>

Vermont’s single-use plastic ban went into effect in July 2020.<sup>129</sup> While this initially seemed like an exciting step for the environmental movement, disability advocates spoke out about the harm this caused—people who relied on straws to consume beverages could no longer rely on restaurants to

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121. *Id.*

122. *Id.*

123. *Id.* at 75.

124. *Id.*

125. *Id.*

126. *Id.* at 76.

127. Duncan J.J. Kessler, *Plastic Straw Bans Can Run Afoul of the Americans with Disabilities Act*, 69 AM. U. L. REV. F. 1, 7-8 (2019).

128. *Id.*

129. *Single-Use Products Law*, VT. DEP’T OF ENV’T CONSERVATION, <https://dec.vermont.gov/content/single-use-products-law> (last visited Oct. 24, 2021) [hereinafter *Single-Use Products Law*].

provide them.<sup>130</sup> Straws were first developed as tools for people with disabilities and use in hospitals.<sup>131</sup> The Vermont legislature was clearly conscious of plastic straws and their utility as tools since the legislation includes exemptions for places like nursing homes, assisted living facilities, and hospitals.<sup>132</sup> However, by making these exemptions location-specific, this legislation ostracizes and segregates people with disabilities from the rest of their community. If certain people can only access plastic straws in one location, such as an assisted living facility, then they are forced to only use straws in those places. Or people with disabilities need to take on the extra burden of bringing their own straws with them when they want to run a simple errand such as picking up a coffee from their local café. Single-use plastic bans have effectively added another barrier to the lives of many people with disabilities.

Many disability activists felt that the well-being of persons with disabilities came second to the health of marine animals.<sup>133</sup> The use of plastic straws, and other single-use plastics, is a matter of daily life for many people with disabilities. People who experience limited mobility in their hands and arms may rely on a straw to serve their beverage if they are unable to lift a cup to their mouths.<sup>134</sup> Straws also allow people who frequently experience choking to pace themselves when consuming liquids.<sup>135</sup> These needs are not mediated by non-plastic straws as “paper and similar biodegradable straws can quickly fall apart, particularly in hot liquids. Further, this type of straw can present both a burning and choking hazard and is easy for people with limited jaw control to bite through.”<sup>136</sup> Reusable straws need to be washed, which presents another issue for people with limited hand mobility.<sup>137</sup> Glass, metal, and bamboo straws can be dangerous if used with hot liquids.<sup>138</sup>

An additional unexpected side effect is the potential allergens in compostable straws. Compostable straws and utensils are often made from

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130. Kessler, *supra* note 127, at 24.

131. Olivia Babis, *The Significant Role Plastic Straws Play in Health and Safety*, Florida Restaurant & Lodging Association (Oct. 9, 2019), <https://frla.org/role-plastic-straws-play-in-health-and-safety/>.

132. *Single-Use Products Law*, *supra* note 129.

133. *The Last Straw: Ableism in Environmental Campaigns*, UNIV. OF ALA. BIRMINGHAM INST. FOR HUM. RTS. BLOG (Oct. 10, 2018), <https://sites.uab.edu/humanrights/2018/10/10/the-last-straw-ableism-in-environmental-campaigns/>.

134. *Id.*

135. *Id.*

136. Kessler, *supra* note 127, at 13.

137. *Id.*

138. *Id.*

the starch of plants like corn, potatoes, or wheat.<sup>139</sup> For people with gluten allergies or starch sensitivities, these alternative straws pose a serious risk. Most restaurants do not know the composition of materials in their straws, meaning they cannot guard their customers against allergic reactions.<sup>140</sup> While strides have been made in the development of reusable straws, these alternatives are often expensive for a person with a disability who may require the use of many throughout the day.

Nondisabled Americans, who took those single-use plastics for granted, effectively created a massive problem for the people with disabilities who relied on those straws to consume their meals. The straw ban legislation also made it harder to find plastic straws for home use, meaning that people with disabilities felt the impact in their homes as well.<sup>141</sup> When Seattle announced their citywide ban of plastic straws, utensils, and cocktail sticks in July of 2018, many people with disabilities expressed their outrage and concern.<sup>142</sup> The legislation was passed without consulting members of the disability community, causing concern among people who rely on straws for daily use.<sup>143</sup> The Seattle Commission for People with disAbilities wrote to the Seattle City Council and described the problem as this:

Requiring people with disabilities to treat a routine fast-food trip as something that requires planning and supplies is an unplanned failure in equity, when these restaurants could just as easily offer them upon request to individuals who need them. Disability is already very expensive, and many people are forced to carry around large amounts of equipment or types of medication and devices. Adding another specialized device, simply for them to be able to hydrate themselves, is an undue burden, and an unfortunate effect of this law.<sup>144</sup>

The straw ban is just one example of what disability activists have labeled *eco-ableism*.<sup>145</sup> Eco-ableism is the idea that there is ableism within the environmental movement resulting in the exclusion or suppression of

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139. Melissa Hellmann, *Straw Ban Leaves Disabled Community Feeling High and Dry*, SEATTLE WKLY. (July 11, 2018), <https://www.seattleweekly.com/news/straw-ban-leaves-disabled-community-feeling-high-and-dry/>.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. Hellmann, *supra* note 139.

145. Wright, *supra* note 88.

people with disabilities.<sup>146</sup> Eco-ableism results in people with disabilities feeling like they are excluded from the environmental movement, or guilt for requiring the use of items that nondisabled people view as conveniences.<sup>147</sup> Disability activist Elizabeth Wright writes, “climate change is symbiotically connected to our human world, and that includes all that comes with the human world. If you are a person alive today you are an instigator and an experiencer of climate change. This includes disabled people.”<sup>148</sup> The disability community has long rallied around the idea of “nothing about us, without us.”<sup>149</sup> This must also include the fight for inclusive, effective environmental justice.

*B. Protections Under the Americans with Disability Act are Insufficient*

Since most of the plastic straw bans did not go into effect until 2018, there have been no court opinions to determine whether the Americans with Disabilities Act (ADA) provides enough coverage to people with disabilities to overrule the plastic straw bans. However, there have been settlements in the past for similar complaints. In 2009, a person with a fused neck was denied a straw at a Florida restaurant.<sup>150</sup> The person complained and the restaurant agreed to modify their “no straws” policy, as well as paying out a \$500 compensation.<sup>151</sup> Although there was no formal court proceeding in the Florida instance, it has been theorized that Title III of the ADA may provide guidance on allowing establishments to provide straws to people with disabilities who request them.<sup>152</sup>

The ADA provides that “no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services . . . of any place of public accommodation.”<sup>153</sup> The purpose of Title III of the ADA is to provide recourse for people who have been denied: service; full and equal enjoyment; or reasonable modifications.<sup>154</sup> Under this public

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146. *Id.*

147. *Id.*

148. *Id.*

149. Sheri Levinsky-Raskin & Greg Stevens, *Nothing About Us, Without Us: Reflections on Inclusive Practices at Cultural Institutions*, AM. ALL. OF MUSEUMS (Jan./Feb. 2016), <http://ww2.aam-us.org/docs/default-source/resource-library/nothing-about-us-without-us.pdf>.

150. *Enforcing the ADA: A Status Report from the Department of Justice April–September 2009*, U.S. DEP’T OF JUST. CIV. RTS. DIV. DISABILITY RTS. SECTION (March 17, 2010), <https://www.ada.gov/aprsep09.htm>.

151. *Id.*

152. Kessler, *supra* note 127, at 20.

153. 42 U.S.C. § 12182.

154. Kessler, *supra* note 127, at 11.

accommodations provision, the ADA requires businesses “to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities.”<sup>155</sup> The keyword here for court analysis is *reasonable*. When analyzing claims under the ADA, the court applies an *undue burden* standard.<sup>156</sup> The undue burden must be unreasonable and outweigh the benefit to the person with the disability. An undue burden on a place of business would be if they were forced to engage in an accommodation that is unreasonable or not readily achievable. The court will find that the business was not in violation of the ADA because of the undue burden of the accommodation.<sup>157</sup>

A good test case of this principle would be if a person with a disability who requires the use of a plastic straw were denied access to one by the business they were at because the business attempted to comply with single-use plastic legislation. Here, the person with a disability would have a strong argument that a plastic straw should be considered a reasonable accommodation. The burden for a restaurant to maintain a small supply of plastic straws, as well as the non-plastic straws to maintain compliance with single-use plastic legislation, is small. However, the impact on the person with the disability is significant. They are unable to access the same benefits from the business as nondisabled customers.

One possible solution to the plastic straw bans is that establishments could offer to provide the straws upon asking. However, this may require the person with a disability to out themselves as disabled to access a straw. They may have to justify their need for the plastic straw by explaining their medical purpose. While asking for a plastic straw may seem miniscule or trivial to nondisabled people, many people with disabilities cannot make it through a day without being viewed as disabled. They are constantly perceived as someone with a disability. Having to take another step to ask for a plastic straw adds a burden that people who are nondisabled do not have.

The ADA continues to be one of the leading legislative enactments providing protections to people with disabilities. However, it fails to address the needs of all protected individuals.<sup>158</sup> When the ADA was amended in 2008, Congress acknowledged this failure by stating that “historically, society has tended to isolate and segregate individuals with disabilities, and,

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155. 2 U.S.C. § 12182.

156. Kessler, *supra* note 127, at 22.

157. *Id.*

158. Russell, *supra* note 40, at 5.



despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.”<sup>159</sup> Congress identifies this discrimination as being persistent in “employment, housing, public accommodations, transportation, communication, education, recreation, institutionalization, health services, voting, and access to public services.”<sup>160</sup>

Disability discrimination is unique from other forms of discrimination based on factors such as race or sex.<sup>161</sup> Factors like race and sex “generally do not create any rational differences between individuals regarding the ability to do a job or qualification to perform in a program.”<sup>162</sup> Therefore, there is rarely a reason to treat someone differently based on their race or sex. Disability is unique in that it “may—to differing degrees—affect his or her ability to perform, and thus may—to differing degrees—constitute a permissible reason for treating that individual in a different manner.”<sup>163</sup> Therefore, the courts are hesitant to assume that all “disparate treatment of persons with disabilities is discriminatory.”<sup>164</sup> The analysis is much more complex. Racial discrimination is typically based on irrational and hostile beliefs.<sup>165</sup> Stigma towards disability usually comes from a variety of factors, such as discomfort, pity, or apathy.<sup>166</sup> This combination of stigmatizing beliefs makes it difficult to create a single solution to discriminatory actions.

Current disability legislation offers little legal recourse to people impacted by climate change and natural disasters. When considering the impacts that a storm, such as Hurricane Katrina, has on a person with a disability it seems highly unlikely that someone would succeed on an ADA claim for damages relating to a storm. The language of the Act provides that “no individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”<sup>167</sup> There is perhaps an argument to be made for the government’s failure to provide resources to people with disabilities before

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159. RUTH COLKER, *FEDERAL DISABILITY LAW IN A NUTSHELL* 1 (6th ed. 2019).

160. *Id.*

161. *Id.* at 2.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 3.

167. 42 U.S.C. § 12132.

and after Katrina.<sup>168</sup> Several citizens filed lawsuits after the hurricane to decide whether the federal government was responsible for the levee break or whether the state was responsible for not preparing its citizens.<sup>169</sup>

At this point, there is still much confusion about how to define causation as it relates to storm damages. After Hurricane Katrina, residents of impacted areas sued the United States for flood damages.<sup>170</sup> The Fifth Circuit for the Court of Appeals ruled in favor of some residents but not others.<sup>171</sup> The main difference is whether the government was liable for the flood damage was deciding whether the waters that caused damage were related to flooding control.<sup>172</sup> This is a complicated issue to prove in court. Essentially, if the water that flooded your house was caused by governmental “flood control” efforts, then the government is not responsible for the damages.<sup>173</sup> The government can only be held responsible for flood damages if it was negligent in its flood control responsibility.<sup>174</sup>

This established an unfortunate precedent—if your house was flooded by water that was not “touched” by the government for flood control, then the government is immune from suit.<sup>175</sup> It was assumed that homeowner’s insurance should cover those flood damages instead of the government.<sup>176</sup> This decision makes it extremely difficult for residents of flooded zones to recover damages from the government because they have to prove both a government association with the waters and the government’s negligence. This precedent makes it extremely unlikely that a person with a disability who wants to sue the government for lack of protection during Hurricane Katrina would be successful.

After Hurricane Katrina, the United States Department of Transportation’s Federal Highway Administration put together a guide to support evacuation for people with disabilities.<sup>177</sup> This guide begins by acknowledging the tragedies of Hurricane Katrina and Hurricane Rita.<sup>178</sup> The

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168. See *Crescent Towing Salvage Co. v. M/V Chios Beauty*, No. CIV.A. 05-4207, 2008 WL 5264268 (E.D. La. Dec. 16, 2008) (providing an example of a case filed after Hurricane Katrina to determine liability of individuals versus the State).

169. *Id.*

170. *In re Katrina Canal Breaches Litig.*, 696 F.3d 436, 436-37 (5th Cir. 2012).

171. *Id.* at 454.

172. *Id.* at 444.

173. *Id.*

174. *Id.*

175. *Id.* at 445.

176. *Id.*

177. FEDERAL HIGHWAY ADMIN., FED. HIGHWAY ADMIN., ROUTES TO EFFECTIVE EVACUATION PLANNING PRIMER SERIES: EVACUATING POPULATIONS WITH SPECIAL NEEDS (2009), <https://ops.fhwa.dot.gov/publications/fhwahop09022/fhwahop09022.pdf>.

178. *Id.* at iii.

document also states that “evacuation operations are primarily a State and local function; therefore, State and local authorities are the most knowledgeable in this area.”<sup>179</sup> This language specifically places responsibility for evacuation efforts on the states themselves. Significantly, this relieves the federal government<sup>180</sup> Because of the DOT’s guide, states must develop disaster management programs.

The litigation post-Hurricane Katrina focused primarily on determining the government’s responsibility for the damage to homes. Very little, if any, focus was given to the actual individuals harmed by the flooding and storm. This sets a dangerous tone for harm endured from future storms—there is no legal remedy established for individuals who are injured by environmental emergencies. The governmental response has been to place more emphasis on the need for evacuation before emergencies occur.<sup>181</sup> This is significant because we do not have a consistent federal or state plan in place to evacuate people before they are harmed. We also do not have legal remedies in place for after the harm occurs. Instead, people with disabilities are forced to wait in limbo without any real governmental protection from environmental disasters.

*C. Expanding Environmental Legislation Protections to People with Disabilities*

Disability activist Marta Russell writes, “having a disability is conventionally regarded as a personal tragedy which the individual must overcome, or as a medical problem to which the individual must become adjusted.”<sup>182</sup> By treating disability as an individual issue, this ignores the systems within our society that actively oppress and limit people with disabilities. Disability activists have rallied around a different idea: “it is society which disables persons with impairments.”<sup>183</sup> The Harriet Tubman Collective described disability in similar terms: “the phrase ‘differently abled’ suggests that we are the locus of our disability when we are, in fact, disabled by social and institutional barriers.”<sup>184</sup> This shift in thinking posits that our social institutions are responsible for creating barriers for people with

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179. *Id.*

180. *Id.* at 1.

181. *Id.*

182. Russell, *supra* note 40.

183. *Id.*

184. HARRIET TUBMAN COLLECTIVE, *supra* note 10, at 239.

disabilities. This shift also places those institutions in the position to take responsibility for the removal of those barriers.

As climate emergencies and storms occur with more frequency, it is likely that this body of law will continue to grow. At this point, it is still difficult for courts to determine who should be at fault and responsible for damages after disasters. Disability-focused legislation, such as the ADA, was not intended to provide recourse for climate change. Instead, environmental legislation seems to be a better route for legal resources. The United States Environmental Protection Agency (EPA) is likely the best starting point to offer protections to people with disabilities facing environmentally related issues.

The EPA offers several environmental justice grants and funding opportunities. One grant opportunity, the State Environmental Justice Cooperative Agreement Program, offers to “support and/or create model state activities that lead to measurable environmental public health results in communities disproportionately burdened by environmental harms and risks.”<sup>185</sup> It is important to note that this grant is available only to state programs and not to individuals.<sup>186</sup> Therefore, a state would need to take the initiative to apply. Interested states could receive \$200,000 for a two-year project period.<sup>187</sup> The goals of the program are to:

- (1) achieve measurable and meaningful environmental and/or public health results in communities;
- (2) build broad and robust, results-oriented partnerships, particularly with community organizations within disproportionately impacted areas;
- (3) pilot activities in specific communities that create models, which can be expanded or replicated in other geographic areas;
- (4) reinforce connections to EPA regional [environmental justice] EJ activities and priorities and,
- (5) strengthen the development and implementation of specific approaches to achieve environmental justice.<sup>188</sup>

States could utilize grants from the EPA such as this to develop action plans to combat the impacts of climate change within their communities. These action plans could follow the guidelines released by the Department

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185. U.S. ENV'T PROT. AGENCY: THE STATE ENV'T JUST. COOP. AGREEMENT PROGRAM (2021).

186. *Id.*

187. *Id.*

188. *Id.*

of Transportation after Hurricane Katrina. States could utilize grant money to connect with the grassroots disability activists who are already preparing for natural disasters. This grant opportunity could help to ensure that planning for future disasters includes steps on evacuating people with disabilities safely to accessible locations. This opportunity places the power to implement change into the hands of the state to take care of *all* its citizens.

The EPA also offers grants through their Environmental Justice Small Grants Program.<sup>189</sup> This program is open to community-based organizations that work on supporting communities through environmental justice issues.<sup>190</sup> Projects are funded up to \$30,000.<sup>191</sup> Past projects have included education on air pollution in Springfield, Massachusetts, and energy efficient weatherization of houses for residents in Wichita, Kansas.<sup>192</sup> This grant offers an opportunity to smaller organizations interested in the relationship between disability and environmental justice to take action in their communities. Disability advocacy groups could apply for project grants, such as these, to act in their own communities. These organizations could take the initiative to fill in some of the gaps in their states where resource provisions do not focus on people with disabilities.

Interestingly, the EPA began observing National Disability Employment Awareness Month in 2016.<sup>193</sup> This came as a result of a Presidential Proclamation under the Obama Administration that declared the right to dignity and respect in the workplace for people with disabilities.<sup>194</sup> The goal of this proclamation was to “recognize the significant progress our country has made for those living with disabilities” and to “honor the lasting contributions and diverse skills they bring to our workforce.”<sup>195</sup> The public acknowledgment by President Obama of the important contributions made by people with disabilities represented a turning point in our ideas of disability—the federal government values people with disabilities as employees.

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189. *Environmental Justice Small Grants Program*, ENV'T PROT. AGENCY, <https://www.epa.gov/environmentaljustice/environmental-justice-small-grants-program> (last updated June 2, 2021).

190. *Id.*

191. *Id.*

192. *Air Projects: Fostering Community Participation in Air Pollution Reduction Initiatives (Springfield, MA)(2012)*, ENV'T PROT. AGENCY, <https://www.epa.gov/environmentaljustice/air-projects> (last updated Oct. 15, 2021).

193. *Profiles of Americans with Disabilities at EPA*, ENV'T PROT. AGENCY, <https://www.epa.gov/careers/national-disability-employment-awareness-month> (last updated July 26, 2021).

194. Proclamation No. 9509, 81 Fed. Reg. 194, 69373, (Oct. 6, 2016).

195. *Id.*

The recognition of people with disabilities in the workforce represents a huge societal shift in thinking about disability. In the late 1980s, only two-thirds of “working age Americans with disabilities who were able to be employed had jobs, and many of those who did have jobs were working in positions below their capabilities.”<sup>196</sup> Many employers refused to hire people with disabilities or considered people with disabilities only for entry-level positions.<sup>197</sup> The people with disabilities who wanted to work and were denied jobs were required to depend on government benefits “to the disadvantage of all Americans.”<sup>198</sup> The Presidential Proclamation recognizing the importance of people with disabilities to access the workforce sends a powerful and simple message—people with disabilities have value within the federal government. The EPA’s recognition of Disability Employment Awareness Month may be interpreted as part of this change in attitude towards people with disabilities and their importance in the fight for environmental justice. Incorporating the voices of people with disabilities into one of the most important environmentally focused agencies in the country is a significant sign of progress.

### III. GRASSROOTS MOVEMENTS AND FUTURE STEPS

For the environmental justice movement to advocate for true equity, there must be inclusion of people with disabilities within these conversations. Although the legal system offers some protections to people with disabilities, very little analysis has been done on legal resources available to disabled people impacted by climate change and climate emergencies. Given the likelihood of the increasing frequency of climate emergencies, it is imperative that people with disabilities are covered by environmental legislation. While some states have taken the initiative to write emergency strategies that include planning for the safety of people with disabilities before emergencies, there is no legal recourse for people with disabilities who need assistance afterwards.<sup>199</sup> This is where the work of grassroots organizers and disability activists may be able to provide guidance.

Disability activist Patty Berne writes, “communities around the world are grappling with a growing number and intensity of climate-related

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196. COLKER, *supra* note 159, at 5.

197. *Id.*

198. *Id.*

199. Patty Berne & Vanessa Raditz, *To Survive Climate Catastrophe, Look to Queer and Disabled Folks*, YES! MAG. (Jul. 31, 2019), <https://www.yesmagazine.org/opinion/2019/07/31/climate-change-queer-disabled-organizers>.

disasters.”<sup>200</sup> As we continue to experience worsening floods, fires, and earthquakes, there is a need for direction during this “climate chaos.”<sup>201</sup> Berne suggests looking towards the knowledge and wisdom of disabled queer and trans people:

The history of disabled queer and trans people has continually been one of creative problem-solving within a society that refuses to center our needs. If we can build an intersectional climate justice movement—one that incorporates disability justice, that centers disabled people of color and queer and gender nonconforming folks with disabilities—our species may have a chance to survive.<sup>202</sup>

Berne outlines examples of how “disabled queer and trans communities of color are already preparing for the survival of their communities through oncoming disasters.”<sup>203</sup> They have created networks to teach other skills in resilience-based organizing, share masks, air filters, and generators to refrigerate medication, and lead healing workshops.<sup>204</sup> Berne notes that while this movement may be invisible to most, it should not be surprising.<sup>205</sup> This type of grassroots organizing is built on the “gritty persistence that disabled people embody every day.”<sup>206</sup> Berne’s essay ends with a call to action: “[w]elcome to our world. We have some things to teach you if you’ll listen so that we can all survive.”<sup>207</sup>

#### CONCLUSION

For the environmental justice movement to advocate for true equity, there must be inclusion of people with disabilities within these conversations. Although the legal system offers some protections to people with disabilities, little analysis has been done on legal resources available to disabled people impacted by climate change and climate emergencies. Given the likelihood of the increasing frequency of climate emergencies, it is imperative that people with disabilities are covered by environmental legislation. While some states have taken the initiative to write emergency strategies that

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200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

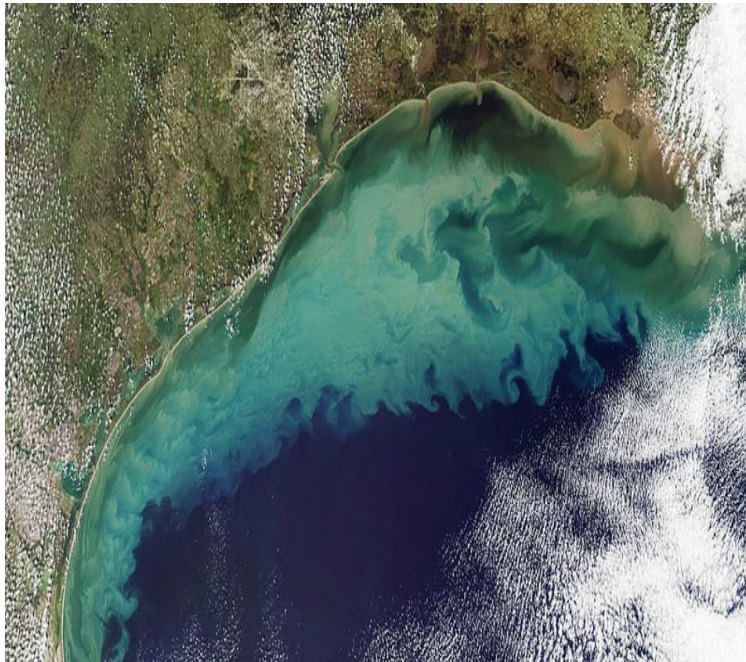
include planning for the safety of people with disabilities before emergencies, there is little legal recourse for people with disabilities who need assistance afterward. This is where looking to the federal government for funding and to the individual work of grassroots organizers and disability activists can provide guidance.



# **A CATASTROPHE IN FULL BLOOM: ANALYSIS OF THE FEDERAL GOVERNMENT’S RESPONSE TO GULF HYPOXIA**

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*Bradley Adams*



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## INTRODUCTION

In the continental United States, 41% of the landmass drains into the Mississippi River Basin.<sup>1</sup> Ensconced within the basin are parts of 31 states and the Canadian provinces of Ontario and Manitoba, 18 million individuals who rely on its water, and one of the largest and richest blocks of prime soil in the world.<sup>2</sup> Over the past several decades a troubling reality has come into focus. Research has revealed a connection between increased anthropogenic deposits of the nutrients phosphorous and nitrogen into the river basin and a large hypoxic zone (more commonly referred to as a *dead zone*) in the Gulf of Mexico that is devoid of oxygen and aquatic life.<sup>3</sup> As disruptive effects of the dead zone begin to seriously impact the environment and communities along the Gulf Coast, it is necessary to scrutinize governmental efforts undertaken to try and address the problems presented by Gulf Hypoxia.

This paper analyzes the federal government's efforts to address Gulf Hypoxia under the Harmful Algal Bloom and Hypoxia Research and Control Act (HABHRCA) and parts of other adjacent legislation. Part I details the causes and impacts of HABs and hypoxia. Part II describes how harmful algal blooms (HABs) and hypoxic zones form and the consequences that accompany them. Part III discusses the government's efforts to address Gulf Hypoxia primarily through a series of progress reports required under HABHRCA.<sup>4</sup> Part IV then analyzes alternative and additional measures the government should implement to create a robust effort that can reduce or eliminate the Gulf's hypoxic zone.

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1. Jessie Stolarik, *The Farm Bill Represents Fresh Opportunity to Address Growing Issue of Dead Zones*, ENV'T AND ENERGY STUDY INST. (Jan. 5, 2018), <https://www.eesi.org/articles/view/the-farm-bill-represents-fresh-opportunity-to-address-growing-issue-of-dead>.

2. U.S.D.A. Natural Resources Conservation Service, Mississippi River Basin Healthy Watersheds Initiative 1 (2010).

3. Mississippi River/Gulf of Mexico Hypoxia Task Force, *Hypoxia 101: What is hypoxia and what causes it?*, EPA (Jan. 31, 2019), <https://www.epa.gov/ms-htf/hypoxia-101>.

4. "Algal bloom" is a generalized term used to describe events where one or more species of phytoplankton (plant or plant-like organisms that use photosynthesis for nutrition) aggregate in water and achieve a maximum concentration in a given area of water, followed by a decaying stage; the presence of algal blooms is generally accompanied by an increase of zooplankton (animals and protozoans that consume phytoplankton or one another). LASSE H. PETERSSON AND DMITRY POZDNYAKOV, MONITORING OF HARMFUL ALGAL BLOOMS 3 (2013); *What are Plankton?*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., <https://oceanservice.noaa.gov/facts/plankton.html> (last updated Feb. 26, 2021).

## I. THE CAUSES AND IMPACTS OF HABs AND HYPOXIA

### A. What Causes HABs?

HABs are characterized by a rapid increase of a single algae species over a large swath of nutrient laden water resulting in one of more of the following negative effects: toxic substances; high levels of biomass; and/or mucilage which can impair oxygen intake of aquatic life.<sup>5</sup> These negative effects may be caused by the phytoplankton themselves or may be caused by a byproduct of the increased presence of zooplankton's biological waste after consuming the phytoplankton.<sup>6</sup>

HABs can occur in both fresh and saline water systems.<sup>7</sup> A variety of factors can cause harmful algal blooms, but the rise in occurrence of HABs over the last few decades<sup>8</sup> can be directly attributed to anthropogenic deposits of the nutrients nitrogen and phosphorous into waterways.<sup>9</sup> Significant sources of nutrient pollution include municipal waste and storm water runoff, fossil fuel use, and household products containing those compounds.<sup>10</sup> However, the primary cause of HABs in most areas correlates to increased agricultural activities that intensively use and generate nitrogen and phosphorous.<sup>11</sup> Two corollary examples are: (1) fertilizer application, and; (2) animal waste from concentrated animal feeding operations (CAFOs).<sup>12</sup> The collateral effects of HABs are cause for concern as they can create hypoxic zones like the one found in the Gulf of Mexico.

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5. See *What are Plankton?*, *supra* note 4 (detailing the science behind how shifts in phytoplankton populations can affect the food chain).

6. Patricia M. Glibert et. al., *Harmful Algal Blooms and the Importance of Understanding Their Ecology and Oceanography*, GLOBAL ECOLOGY AND OCEANOGRAPHY OF HARMFUL ALGAL BLOOMS 9-10 (2018).

7. See *Nutrient Pollution: The Issue*, EPA, <https://www.epa.gov/nutrientpollution/issue> (last updated Aug. 31, 2021) (asserting that since water sources of many types can become polluted with nitrogen and phosphorus, which are the nutrients algal blooms thrive on, both saline and fresh waters are susceptible to algal blooms).

8. See Appendix I for a depiction of the rise in HABs since 1972.

9. *Nutrient Pollution: Sources and Solutions*, EPA, <https://www.epa.gov/nutrientpollution/sources-and-solutions>, (last visited Sept. 22, 2021).

10. *Id.*

11. Patricia M. Glibert et. al., *Changing Land-, Sea-, and Airscapes: Sources of Nutrient Pollution Affecting Habitat Suitability for Harmful Algae*, in *Global Ecology and Oceanography of Harmful Algal Blooms* 53, 55-59 (Patricia M. Gilbert et. al. eds., 2018).

12. *Id.*

### *B. What Causes Hypoxia?*

Hypoxic zones can occur in synchrony with waters that experience HABs. They develop in waters where oxygen levels drop below a critical threshold that is unsupportive of aquatic life.<sup>13</sup> In the Gulf of Mexico, an annual cycle begins as the hypoxic zone expands during the summer months.<sup>14</sup> The Mississippi and Atchafalaya Rivers deposit phosphorous- and nitrogen-rich waters into the Gulf, followed by a shrinking phase during the winter.<sup>15</sup> Though urban runoff contributes a statistically significant amount of nutrients to the Gulf, the largest contributors are agricultural activities.<sup>16</sup> Agriculture accounts for 80% of phosphorous pollution in the Gulf.<sup>17</sup> For nitrogen, agriculture contributes 71%, with corn and soybean growth alone comprising 52% of the total.<sup>18</sup>

As warm and nutrient rich freshwater from the Mississippi River Basin (MRB) enter estuaries and flow outward to the ocean, the freshwater sits atop denser and colder salt water in a process referred to as stratification.<sup>19</sup> The nutrient-laden top layer of water provides a prime condition for phytoplankton to thrive. The technical term for waterbodies (or portions thereof) that contain excessive levels of nutrients is *eutrophication*.<sup>20</sup>

As phytoplankton grow and perish at exponential rates, bacteria consume both the dead algae and the abundant wastes from predatory zooplankton that sink to the lower layers.<sup>21</sup> Meanwhile, the bacteria deplete the oxygen concentration of the water, creating a hypoxic zone (or *dead zone*) within the Gulf.<sup>22</sup> The dead zone's size varies on a year-to-year basis.<sup>23</sup> The size depends on weather patterns and events, such as hurricanes, which can

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13. Mohammad N. Allahdadi, & Chunyan Li, *Modeling Coastal Hypoxia: Numerical Simulations of Patterns, Controls and Effects of Dissolved Oxygen Dynamics* 1, 2 (Dubravko Justic et al. eds. 2017) (defining hypoxic zone as an area in water with an oxygen concentration of less than two milligrams per liter).

14. *Id.*

15. *Id.*

16. *Differences in Phosphorus and Nitrogen Delivery to the Gulf of Mex. from the Miss. River Basin*, UNITED STATES GEOLOGICAL SERV. (Mar. 4, 2014), [https://water.usgs.gov/nawqa/sparrow/gulf\\_findings/primary\\_sources.html](https://water.usgs.gov/nawqa/sparrow/gulf_findings/primary_sources.html).

17. *Id.*

18. *Id.*

19. Daniel R. Obenour et. al., *Quantifying the Impacts of Stratification and Nutrient Loading on Hypoxia in the Northern Gulf of Mexico*, 46 ENV'T SCI. TECH. 5489, 5489 (2012).

20. *Id.* at 5490.

21. *About Hypoxia: What Causes Hypoxia?*, HYPOXIA RSCH. TEAM AT LUMCON (2018), <https://gulfhypoxia.net/about-hypoxia/> (see appendix II for visual representation of the process).

22. *Id.*

23. R.E. Turner, et. al., *Predicting Summer Hypoxia in the Northern Gulf of Mex.: Redux*, 64 MARINE POLLUTION BULL. 319, 320 (2012).

replenish the oxygen levels in bottom water through turbulent winds and rainfall.<sup>24</sup> For example, in 2019 the dead zone measured 18,005 square kilometers, whereas in 2020 it was only measured at 3,405 square kilometers due to Hurricane Hanna.<sup>25</sup>

### C. The Impacts of Hypoxia and HABs

#### 1. Economic

Toledo, Ohio's drinking water was declared unsafe in 2014 due to a cyanobacteria bloom in Lake Erie.<sup>26</sup> The HAB was severe enough that services could not be restored for three days.<sup>27</sup> In response to concerns over water quality, the city installed a \$54 million treatment system capable of filtering out toxins created from blue-green algae.<sup>28</sup> Since 2010, communities have spent over a billion dollars treating their water supplies, with Ohio residents bearing the lion's share at over \$800 million invested.<sup>29</sup> Property values can also be adversely affected by the presence of HABs in an area.<sup>30</sup> One study looking at six Ohio communities posited that homes in the area lost anywhere from 11%–22% of their value as a result of HABs.<sup>31</sup> The most important factor in the reduction of home value was proximity to polluted waterbodies.<sup>32</sup>

West Coast fisheries are also suffering from the impacts of HABs. In 2015, a crab fishery that was expected to generate \$97.5 million of revenue was forced to close when the region experienced its largest algal bloom on record.<sup>33</sup> The same bloom increased toxin levels in clams to dangerous levels,

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24. *Id.*

25. Miss. River/Gulf of Mex. Hypoxia Task Force, *Northern Gulf of Mex. Hypoxic Zone*, U.S. ENV'T PROT. AGENCY (2020), <https://www.epa.gov/ms-htf/northern-gulf-mexico-hypoxic-zone>.

26. Sarah Graddy, *4 Years Since Toledo Water Crisis, Toxic Algal Blooms on Rise Across U.S.*, ENV'T WORKING GRP. (May 15, 2018), <https://tinyurl.com/y8mhyswc>.

27. *Id.*

28. Anne Schechinger, *The Huge Cost of Toxic Algae Contamination*, ENV'T WORKING GRP. (Jun. 7, 2019), <https://www.ewg.org/news-insights/news/huge-cost-toxic-algae-contamination>.

29. Anne Schechinger, *The High Cost of Algae Blooms in U.S. Waters: More Than \$1 Billion in 10 Years*, ENV'T WORKING GRP. (Aug. 26, 2020), <https://www.ewg.org/research/high-cost-of-algae-blooms/>.

30. David Wolf and H. Allen Klaiber, *Bloom and Bust: Toxic Algae's Impact on Nearby Property Values*, 135 ECOLOGICAL ECON. 209 (2017).

31. *Id.* at 217–18.

32. *Id.*

33. HITTING US WHERE IT HURTS, NAT'L OCEANIC & ATMOSPHERIC ADMIN., <https://noaa.maps.arcgis.com/apps/Cascade/index.html?appid=9e6fca29791b428e827f7e9ec095a3d7> (last visited Oct. 10th, 2021).

which cost Washington state approximately \$40 million dollars in tourism revenue that recreational clam diggers provide.<sup>34</sup> Negative impacts to the community cascaded because commercial fisheries could not employ their workers, seafood markets had nothing to sell, and the hospitality industries suffered from reduced clientele.<sup>35</sup>

Regarding Gulf Hypoxia, the dead zone creates difficulties for those whose livelihood depends on a thriving aquatic ecosystem.<sup>36</sup> Research shows that the hypoxic zone's effect on the growth potential for brown shrimp has driven up prices for the larger version of the crustacean relative to the smaller variety.<sup>37</sup> This phenomenon has the potential to spread to other markets due to the environmental impacts of hypoxia on the Gulf as the *edge effect* puts a target on the resident aquatic life for fisheries, who can easily locate their catch.<sup>38</sup>

## 2. Environment and Ecology

The edge effect in a hypoxic zone occurs when animals at the bottom of the food chain congregate at the perimeter of the oxygen-deprived environment.<sup>39</sup> This is due to their food sources compiling at these locations, and because retreating into the inhospitable waters is useful as an escape route from predators.<sup>40</sup> Predatory animals like fish and shrimp aggregate around the zone's border, leading fisheries to target these areas for their catch.<sup>41</sup> This situation is problematic from a resource depletion standpoint for fisheries; large numbers of sea life are situated around the zone's edge, so the potential for overfishing exists in an area where the habitat's delicate equilibrium is already dangerously imbalanced.<sup>42</sup> Consequences for the aquatic inhabitants themselves are much more dire.

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34. *Id.*

35. *Dealing with Dead Zones: Hypoxia in the Ocean* (NOAA Ocean Podcast Feb. 22, 2018), <https://oceanservice.noaa.gov/podcast/feb18/nop13-hypoxia.html>.

36. *Id.*

37. *Price of Shrimp Impacted by Gulf of Mexico "Dead Zone,"* NCCOS (2017), <https://coastalscience.noaa.gov/news/price-of-shrimp-affected-by-gulf-of-mexico-dead-zone/> (last visited Sep 21, 2021) [hereinafter *Price of Shrimp*].

38. See generally Elizabeth D. LaBone et. al., *Comparing Default Movement Algorithms for Individual Fish Avoidance of Hypoxia in the Gulf of Mexico*, MODELING COASTAL HYPOXIA CH. 10 (D. Justic et. al eds., 2017)(showing that fish avoid hypoxic areas).

39. *Dealing with Dead Zones: Hypoxia in the Ocean*, *supra* note 35.

40. *Id.*

41. *Id.*

42. LaBone, *supra* note 38.

Creatures such as shellfish and worms are unable to move away from the dangerous waters and suffocate as a result.<sup>43</sup> Fish can swim out, but occasionally schools become trapped in bayments resulting in large fish kills.<sup>44</sup> Other mobile creatures face similar issues.<sup>45</sup> But even for those organisms that do escape, the loss of large swaths of habitat and bottom-fauna food sources cause sub-lethal damage which makes living conditions difficult.<sup>46</sup> Research is shining light on the effects that intermittent exposure to hypoxic waters has on bottom dwellers who suffer from growth reductions and impairments to their reproductive cycle.<sup>47</sup> In years where the hypoxic zone is large, the brown shrimp endures these struggles, and the species-wide inability to reach its full growth potential depresses its economic value.<sup>48</sup>

Freshwater HABs can be just as destructive to their local environment.<sup>49</sup> While some algal blooms only impact the aesthetics of water supplies by causing discoloration, others have much more troubling effects.<sup>50</sup> Some blooms kill off native zooplankton species that are critical components in their respective food chains.<sup>51</sup> Others create hypoxic conditions similar to the Gulf of Mexico or are so prolific that they simply block sunlight from reaching the bottom areas of a waterbody.<sup>52</sup> Other blooms, however, have a much more pernicious effect on local fauna.<sup>53</sup>

### 3. Social and Health

HABs pose a variety of different effects, threatening the health of humans and animals who encounter them.<sup>54</sup> In saltwater environments, exposure to toxins produced by HABs can happen through direct contact or aerosolized air droplets.<sup>55</sup> Shellfish that are exposed to HABs and then

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43. *Dealing with Dead Zones: Hypoxia in the Ocean*, *supra* note 35.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *See generally* SANTOSH KUMAR SARKAR, MARINE ALGAL BLOOM: CHARACTERISTICS, CAUSES AND CLIMATE CHANGE IMPACTS (2018).

50. *Id.* at 24.

51. *Id.*

52. *Algal Blooms*, NAT'L INST. OF ENV'T AND HEALTH SCI., <https://www.niehs.nih.gov/health/topics/agents/algal-blooms/index.cfm> (last visited Sept. 08, 2021).

53. KUMAR SARKAR, *supra* note 49, at 23–26.

54. *Harmful Algal Bloom (HAB)- Associated Illness, Illness and Symptoms: Marine (Saltwater) Algal Blooms*, CDC, <https://www.cdc.gov/habs/illness-symptoms-marine.html> (last visited Sept. 21, 2021).

55. *Id.*



consumed by humans can cause a wide range of effects from nausea associated with Azaspiracid Shellfish Poisoning to paralysis and respiratory failure connected to Paralytic Shellfish Poisoning.<sup>56</sup> In 2007, a bloom of the dinoflagellate *Akashiwo sanguinea* located in Monterey Bay off the coast of California created a substance that covered the feathers of seabirds and reduced their ability to repel water; as the bird feathers soaked in water, the birds became stranded and their body temperatures fell to alarming levels.<sup>57</sup> Freshwater HABs are most commonly caused by cyanobacteria that sometimes produce cyanotoxins that can damage the nervous system, liver, skin, stomach, or intestines in both humans and animals.<sup>58</sup> Cyanotoxins have not caused any known human deaths in the United States, but have caused deaths to dogs, livestock, and wild animals.<sup>59</sup> As a result of these effects, at-risk areas have to maintain procedures to warn the public and close off affected waterbodies, resulting in the loss of valuable recreational activities such as fishing and swimming.<sup>60</sup>

#### *D. Factors Exacerbating the Frequency and Intensity of Hypoxia and HABs*

Climate change exacerbates HABs and hypoxia in the Gulf of Mexico through higher and more intense rainfall totals that increase flooding.<sup>61</sup> This causes municipal sewer overflows and higher amounts of nitrogen and phosphorus runoff from nonpoint sources.<sup>62</sup> Changes in ocean and freshwater temperatures spread HABs into new ecosystems that can be devastated by the compound's arrival.<sup>63</sup> Growing populations will also increase nutrient loads into waterways; more people means a greater concentration of individuals to highly-populated areas which will be acutely felt in coastal zones.<sup>64</sup> Additionally, the need for greater agricultural

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56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. See, e.g., Sarah Graddy et al., *Toxic Beaches: Bacteria and Algae Triggered Hundreds of Warnings and Closures This Year*, ENV'T WATCH GRP., (Sept. 30, 2020), <https://www.ewg.org/research/toxic-beaches/>.

61. Rebecca Lindsey, *Wet Spring Linked to Forecast for Big Gulf of Mexico 'Dead Zone' this Summer*, CLIMATE.GOV, <https://www.climate.gov/news-features/features/wet-spring-linked-forecast-big-gulf-mexico-%E2%80%98dead-zone%E2%80%99-summer> (last updated Apr. 18, 2021).

62. See *id.* (stating that heavier runoff would increase nutrient input into the Gulf of Mexico).

63. Christopher J. Gobler, *Climate Change and Harmful Algal Blooms: Insights and Perspective*, 91 HARMFUL ALGAE DOI: 101731, 2020, at 1, 1-2.

64. Donald Anderson, *HABs in a Changing World: A Perspective on Harmful Algal Blooms, Their Impacts, and Research and Management in a Dynamic Era of Climactic and Environmental*

production will lead to higher levels of nonpoint source phosphorus and nitrogen into waterways.<sup>65</sup>

## II. GOVERNMENTAL EFFORTS TO ADDRESS HYPOXIA AND HABs

### *A. Government Regulations and Programs Pertinent to Nutrient Reduction*

#### 1. Farm Bill Provisions

Several programs sponsored by the federal government provide resources that can assist farmers with reducing their nutrient load without adversely affecting their economic standing.<sup>66</sup> The 2018 Farm Bill reauthorized five programs overseen by the National Resources Conservation Service that can be utilized to help keep nitrates and phosphorus out of waterways:<sup>67</sup> the Environmental Quality Incentives Program (EQIP),<sup>68</sup> the Conservation Stewardship Program,<sup>69</sup> the Agricultural Management Assistance Program (AMA),<sup>70</sup> the Agricultural Conservation Easement Program (ACEP),<sup>71</sup> and the Regional Conservation Partnership Program.<sup>72</sup> The Farm Bill also reauthorizes the Conservation Reserve Program (CRP), which is administered by the Farm Service Agency.<sup>73</sup>

The particulars of each of these programs are not central to this work outside of demonstrating the bureaucratic complexities involved in their

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*Change*, Harmful Algae 2012, 2-3 (2012),

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4667985/pdf/nihms691284.pdf>.

65. *Id.*

66. NAT'L RES. CONSERVATION SERV., FARM BILL 2018, <https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/farmbill/> (last visited Sept. 22, 2021).

67. *Id.*

68. *Environmental Quality Incentives Program*, USDA: NAT'L RES. CONSERVATION SERV., <https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/financial/eqip/> (last visited Nov. 5, 2021).

69. *Conservation Stewardship Program*, NAT'L RES. CONSERVATION SERV., <https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/financial/csp/> (last visited Nov. 5, 2020).

70. *Agricultural Management Assistance*, USDA NAT'L RES. CONSERVATION SERV., <https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/financial/ama/> (last visited Nov. 5, 2021).

71. *Agricultural Conservation Easement Program*, Nat'l Res. Conservation Serv., <https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/easements/acep/> (last visited Nov. 5, 2021).

72. *Regional Conservation Partnership Program*, NAT'L RES. CONSERVATION SERV., <https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/financial/rcpp/> (last visited Nov. 5, 2021).

73. *Conservation Reserve Program*, FSA, <https://www.fsa.usda.gov/programs-and-services/conservation-programs/conservation-reserve-program/> (last visited Sept. 21, 2021).

administration. It is sufficient to say that, broadly speaking, they provide technical and financial support to agricultural operations to install and maintain conservation practices such as: planting cover crops, rotating crops, and maintaining native grasslands.<sup>74</sup> Agriculturally-oriented conservation advocates recognize that CSP and EQIP are the government's weightiest efforts to create a sustainable agricultural model.<sup>75</sup> However, the statutory language that enables these programs holds keeping a high level of agricultural production and environmental protections in equal esteem.<sup>76</sup> It also states a desire to avoid enacting further regulations on farming activities to assist operators.<sup>77</sup>

## 2. Clean Water Act

Section 303 of the Clean Water Act (CWA) requires states to label a waterbody as impaired when nonpoint source pollutants, such as agricultural nutrient runoff, threaten or render inutile the waterbody relative to the waterbody's designated use.<sup>78</sup> For example, if a lake's designated use is categorized as swimmable, but is not safe to swim in due to nonpoint source pollution, the lake's status would be impaired.<sup>79</sup> States must create management programs to address waters polluted by nonpoint sources that list best management practices (BMPs) and a plan that describes: (1) how to implement the practices; (2) identifies regulation and nonregulatory mechanisms to reduce pollution, and; (3) discerns technical and financial federal resources that can be used to ameliorate the pollutant's effects.<sup>80</sup> State management programs that fail to meet the statutory standards can be rejected, whereupon the state must amend its program provisions and begin the approval process anew.<sup>81</sup> Section 319 of the CWA also provides financing

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74. *A Closer Look at the 2018 Farm Bill: Working Lands Conservation Programs*, NAT'L SUSTAINABLE AGRIC. COAL., <https://noaa.maps.arcgis.com/apps/Cascade/index.html?appid=9e6fca29791b428e827f7e9ec095a3d7> (last visited Sept. 18, 2021).

75. *Id.*

76. *Id.*

77. *See, e.g.*, 16 U.S.C. § 3839aa (2018) (explaining the reasons for assisting producers and the need for regulatory programs).

78. 33 U.S.C. § 1329(a)(1) (1998); 33 U.S.C. § 1313(d) (2000).

79. *See id.* § 1329(d)(2-3) (declaring that management programs may be rejected because the proposal (1) is not adhering to statutory mandates or is unlikely to achieve the statute's prescribed goals, (2) the state does not have the legal authority or funding to carry out the program, (3) the timeframe for implementation is not sufficiently expeditious, and (4) the proposal is not expected to adequately reduce nonpoint source pollution).

80. *Id.* § 1329(b).

81. *See id.* § 1329(d)(2-3) (declaring that management programs may be rejected because the proposal (1) is not adhering to statutory mandates or is unlikely to achieve the statute's prescribed goals,

and grant programs that states can apply to for assistance with the costs of implementing management plans.<sup>82</sup>

*B. The Harmful Algal Bloom and Hypoxia Research and Control Act:  
Tracking Progress from 2008 to the Present*

The Harmful Algal Bloom and Hypoxia Research and Control Act (HABHRCA) creates a multi-agency task force (the Task Force), formed under the guidance of the National Science and Technology Council.<sup>83</sup> It works with coastal state, local, and tribal governments to develop strategies addressing the “prevention, reduction, management, mitigation, and control of” HABs.<sup>84</sup> The Act requires the Task Force to submit an assessment to Congress once every five years detailing the causes, impacts, and social/economic costs of hypoxia in the Great Lakes and coastal regions.<sup>85</sup> The Task Force must also provide a scientific assessment detailing HABs in both coastal and freshwater systems every five years.<sup>86</sup> State, local, and tribal governments may apply for federal assistance in analyzing problems associated with HABs and hypoxic events.<sup>87</sup> The action strategy must set out specific actions, the timeframe for their application, and a list of regional areas that need additional research.

The Act authorizes a National Harmful Algal Bloom and Hypoxia Program administered by the National Oceanic and Atmospheric Administration (NOAA).<sup>88</sup> The program must be based on comprehensive research and include an *action strategy* to address the harms of HABs and hypoxia.<sup>89</sup> The action strategy must set out specific actions, the timeframe for their application, and a list of regional areas that need additional research.<sup>90</sup> Regions targeted in the action strategy must have regionally-specific issues articulated.<sup>91</sup> Prevention and mitigation measures specific to the area must be identified, such as the implementation of technologies or

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(2) the state does not have the legal authority or funding to carry out the program, (3) the timeframe for implementation is not sufficiently expeditious, and (4) the proposal is not expected to adequately reduce nonpoint source pollution).

82. See *id.* § 1329(h) (discussing grant programs to help fund management programs).

83. 33 U.S.C. §§ 4001(a)-(b)(2019).

84. *Id.*

85. §§ 4001(f)(1)-(2).

86. *Id.* § 4001(g).

87. *Id.* § 4001(e).

88. *Id.* § 4002(d).

89. 33 U.S.C. § 4003(a) (2014).

90. *Id.* §§ 4003(a)(1)-(3).

91. *Id.* § 4003(b)(1).

techniques that lessen the frequency of hypoxic events and HABs, along with capable mechanisms to detect unsafe waters.<sup>92</sup> A regional strategy must also include a means by which the information obtained can be disseminated to interested parties such as state and local governments and other researchers.<sup>93</sup>

Provisions in HABHRCA directly address Gulf hypoxia by requiring a progress report, made by the Mississippi River/Gulf of Mexico Watershed Nutrient Task Force (MRTF),<sup>94</sup> to be submitted to Congress.<sup>95</sup> Reports must outline the effectiveness in carrying out the goals listed in the region's 2008 action plan.<sup>96</sup> The progress report must relay information regarding nutrient reduction, the water quality of both the Gulf's hypoxic area and the waters of the Mississippi River Basin, and the social or economic impacts that have resulted.<sup>97</sup>

### 1. Gulf Hypoxia Action Plan 2008—Overview

The 2008 plan set three goals to address Gulf hypoxia.<sup>98</sup> The first was to shrink the hypoxic zone's surface area to lower than 5,000 square kilometers by 2015 through voluntary governmental actions and addressed the sources that deposit nutrients to the gulf.<sup>99</sup> Second, the plan sought to protect human and aquatic health by implementing nutrient reduction practices in the 31 states that feed into the Mississippi River Basin.<sup>100</sup> The third goal looked to improve economic conditions within the basin, particularly for "the agriculture, fisheries, and recreation sectors."<sup>101</sup> This goal focused on

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92. *Id.* § 4003(b)(2).

93. *Id.* § 4003(b)(6).

94. See *Mississippi River/Gulf of Mexico Hypoxia Task Force, Hypoxia Task Force Members*, EPA, <https://www.epa.gov/ms-htf/hypoxia-task-force-members> (last visited Sept. 25, 2021). The MRTF is comprised of member states, federal agencies, and tribal representatives. The member states are Arkansas, Illinois, Indiana, Iowa, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Ohio, Tennessee and Wisconsin. States are generally represented by their respective agricultural, environmental, natural resource, or other related departments. The federal agencies involved with the MRTF are the National Oceanic and Atmospheric Administration, Environmental Protection Agency, Department of Agriculture, Department of the Interior, the Army Corps of Engineers, the U.S. Geological Survey and the Fish and Wildlife Service. Native American interests are represented by the National Tribal Water Council. *Id.*

95. 33 U.S.C. § 4004(a).

96. *Id.*

97. *Id.* § 4004(b)(1).

98. *Mississippi River/Gulf of Mexico Watershed Nutrient Task Force: Gulf Hypoxia Action Plan 2008*, EPA, [https://www.epa.gov/sites/default/files/2015-03/documents/2008\\_8\\_28\\_msbasin\\_ghap2008\\_update082608.pdf](https://www.epa.gov/sites/default/files/2015-03/documents/2008_8_28_msbasin_ghap2008_update082608.pdf) (last visited Sept. 21, 2021).

99. *Id.*

100. *Id.*

101. *Id.*

improving both public and private land management practices and introduced incentives for the installation of remediation measures.<sup>102</sup>

To effectuate these goals, MRTF promulgated a list of actions designed to expedite the reduction of nutrients into the basin.<sup>103</sup> The first was to create comprehensive nutrient reduction strategies for each state with a significant water source that flows into the Mississippi River.<sup>104</sup> MRTF noted that this approach was necessary because each state will have varying conditions affecting their capability to reduce runoff.<sup>105</sup> Second, the MRTF developed strategies to reduce nutrients for basin-wide projects, starting with projects that have heavy federal involvement such as fishery management and the setting of water quality standards.<sup>106</sup> Lastly, the 2008 plan aimed to use existing mechanisms and management authority to examine and implement opportunities that further protect local water supplies and the Gulf.<sup>107</sup> The MRTF stated that their local goals and their 2008 plan's goals have overlap: nutrient reduction is good for drinking water supplies.<sup>108</sup> Therefore, using already-in-place measures and asking states to consider their mitigation strategy's impact on the Gulf was an efficient means of achieving nutrient reduction.<sup>109</sup> The MRTF further advocated for including a robust system of monitoring, information gathering, and distribution of the knowledge and best practices learned to inform policy decisions.<sup>110</sup>

## 2. Overview of the 2013 Update and Federal Agency Reports

The MRTF issued a report in 2013 (the 2013 Progress Report) to track the progress made since their 2008 plan.<sup>111</sup> Action Item One created the State Nutrient Reduction Strategy Work Group (Nutrient Reduction Group) in 2010.<sup>112</sup> The Nutrient Reduction Group worked on implementing nutrient

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102. *Id.*

103. *Id.* at 29.

104. *Id.* at 32.

105. *Id.*

106. *Id.* at 34.

107. *Id.* at 36.

108. *Id.*

109. *Id.*

110. *Id.* at 44-59 (listing seven additional steps which include actions such as performing cost benefit analyses, developing more productive and less expensive solutions, quantifying harms, consolidating data to facilitate easy access, and developing a full scientific understanding of nutrient pollution's causes and effects).

111. *Reassessment 2013: Assessing Progress Made Since 2008*, Miss. River Gulf of Mex. Watershed Nutrient Task Force, [https://www.epa.gov/sites/default/files/2015-03/documents/hypoxia\\_reassessment\\_508.pdf](https://www.epa.gov/sites/default/files/2015-03/documents/hypoxia_reassessment_508.pdf) (last visited Nov. 5, 2021).

112. *Id.* at 2.

reduction practices for states whose membership comprised tribal, state, and federal participants.<sup>113</sup> This group also worked to identify the critical components needed to implement nutrient reduction practices at the state level.<sup>114</sup> The work group's critical components aligned with the EPA's recommendations published in 2011, including: prioritizing the protection of watersheds at a statewide level; controlling agricultural runoff; creating accountability measures, and; submitting annual reports covering implementation and bi-annual reports regarding nutrient reduction and the impacts on the environment.<sup>115</sup> Both the EPA and the work group agreed that, while no one strategy will be a panacea to nutrient loading issues, these components must be addressed for any plan to be effective.<sup>116</sup> Action Item Two, creating basin-wide reduction strategies for projects (starting with those that have heavy federal involvement), focused on materials in the federal strategy (further discussed in detail below).<sup>117</sup>

In the third action, the MRTF described how existing programs can be used to address agricultural nutrient deposition.<sup>118</sup> The report discusses how CWA § 319 funding is available to mitigate nonpoint source pollutants like agricultural runoff.<sup>119</sup> A State Revolving Fund program under the CWA offers additional assistance (including financial assistance) to states.<sup>120</sup> The report also covers how NRCS offers financial and technical help to states through EQIP.<sup>121</sup> The Army Corps of Engineers has projects dedicated to restoring aquatic habitats and diverting nutrient-heavy water sources into wetlands.<sup>122</sup> The United States Geological Survey (USGS) Cooperative Water Program and National Wetlands resource center offers further assistance for, and coordination among, states.<sup>123</sup> The National Wetlands Research Center focuses on distributing information to states concerning wetlands' critical role in preventing nutrients from entering into larger bodies of water.<sup>124</sup>

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113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 8.

118. *Id.* at 10.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 11.

123. *Id.*

124. *Id.*

Under Action Item Four,<sup>125</sup> the 2013 Report discussed USDA's preliminary efforts in the development of environmental markets where nonpoint polluters would be assigned an allotment of nutrients they would be able to discharge.<sup>126</sup> Entities who fall beneath the prescribed limit could sell their leftover balance to those who need to make discharges beyond what their permit allows.<sup>127</sup> Action Item Six, which covers how the MRTB will aggregate and disseminate data to states, lays out how agencies have made several helpful and innovative tools for states (such as the aforementioned Water Quality Portal).<sup>128</sup> This facilitates informed decision-making about regulating nutrient loads but stresses the need for additional resources to provide a fully informed set of data upon which states can rely when crafting policy.<sup>129</sup> This dovetails with Action Item Seven's goal of annually tracking the progress of program actions in reducing nutrients.<sup>130</sup> The 2013 Report acknowledges that contemporaneous research was insufficient to gauge the efficacy of agriculturally-oriented conservation measures regarding the amount of nutrients they remove, and to what extent they need to be implemented to succeed.<sup>131</sup>

In pursuit of developing a nutrient reduction strategy for basin-wide projects, agencies with membership in the MRTF created a comprehensive federal strategy.<sup>132</sup> A document was created in 2012 with a consolidated list of the various financial and technical assistance agencies could offer to the 12 member-states.<sup>133</sup> In 2013, federal members of the MRTF issued a report entitled *Looking Forward: The Strategy of the Federal Members of the Hypoxia Task Force* (the 2013 Federal Report) regarding how the various agencies could further assist the "development, refinement, and implementation of state nutrient reduction strategies."<sup>134</sup> The agencies pledged to improve nutrient monitoring by working with states and other

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125. *Id.* at 15.

126. *Id.* at 17.

127. *Id.*

128. *Id.* at 35.

129. *Id.*

130. *Id.* at 37.

131. *Id.*

132. *Id.* at 7-8.

133. See generally *Federal Support to Hypoxia Task Force States on Nutrient Reduction Strategies Report: Appendix*, MISS. RIVER GULF MEX. WATERSHED NUTRIENT TASK FORCE (Sept. 2012), [https://www.epa.gov/sites/production/files/2015-03/documents/hypoxia\\_annual\\_federal\\_strategy\\_appendix-508.pdf](https://www.epa.gov/sites/production/files/2015-03/documents/hypoxia_annual_federal_strategy_appendix-508.pdf) (explaining how agencies can offer financial and technical assistance to member-states).

134. *Looking Forward: The Strategy of the Federal Members of the Hypoxia Task Force*, MISS. RIVER GULF OF MEX. WATERSHED NUTRIENT TASK FORCE (Sept. 2013) at 1, [https://www.epa.gov/sites/production/files/201503/documents/hypoxia\\_annual\\_federal\\_strategy\\_508.pdf](https://www.epa.gov/sites/production/files/201503/documents/hypoxia_annual_federal_strategy_508.pdf).



researchers to create a standardized and accessible monitoring system that collects relevant data on water sources that flow into the basin.<sup>135</sup> A system of monitoring for the Gulf itself was also in development, centered around using autonomous gliders to gather data on the hypoxic zone.<sup>136</sup> The 2013 Federal Report also detailed plans on how the agencies would consolidate and disseminate information, such as through the creation of the Water Quality Portal.<sup>137</sup> This allows regulators, and other interested parties, to access information about monitoring sites.<sup>138</sup>

The USDA also developed models to track the effect of conservation measures on agricultural land through the Conservation Effects Assessment Project (CEAP).<sup>139</sup> A related project was the use of the Agricultural Policy/Environmental Extender model, which gathers data about how nutrients flowing from the Raccoon and Boone Rivers affect the water quality of the Des Moines River in Iowa.<sup>140</sup> Another related project, the Soil and Water Assessment Tool (SWAT), provided data on impacts to the environment resulting from implemented conservation practices.<sup>141</sup> Other modeling projects included improving in-stream measurement capability and making an annual forecast for the hypoxic zone size.<sup>142</sup> The size is based on available data collected from autonomous underwater vehicles.<sup>143</sup>

On the regulatory and policy spectrum, the 2013 Federal Report emphasized the need for states to adopt numeric criteria for nitrogen and phosphorus levels in waterways.<sup>144</sup> States can then track the levels of nitrogen and phosphorus therein and what remedies need to be implemented to reduce nutrient loads.<sup>145</sup> The EPA developed an online toolkit to help states determine the best route toward achieving this goal.<sup>146</sup> The report also called for collaboration between agricultural agencies and land grant universities to best utilize their collective resources when developing nutrient reduction strategies.<sup>147</sup> Additionally, an association of private landowners named Delta

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135. *Id.* at 3–6.

136. *Id.* at 4.

137. *Id.* at 5–6.

138. *Id.*

139. *Id.* at 6.

140. *Id.*

141. *Id.*

142. *Id.* at 6–8.

143. *Id.*

144. *Id.* at 10.

145. *Id.*

146. *Id.*

147. *Id.* at 11.

Farmers Advocating Resource Management worked with the Army Corps of Engineers to design and promote a broad range of conservation measures.<sup>148</sup>

States could receive help to create agricultural certification programs from the National Resource Conservation Service (NRCS).<sup>149</sup> Certification programs provide guarantees to farmers that if they adopt and maintain state-approved conservation practices, the state will consider them in compliance with state water quality expectations for a predetermined time period.<sup>150</sup> NRCS sought to further develop technical assistance for agricultural operations through public-private partnerships.<sup>151</sup> This would ensure the implementation and success of conservation programs.<sup>152</sup> The NRCS was also advancing efforts to maintain soil health and quality by encouraging the northern states in the basin to adopt better water drainage management practices.<sup>153</sup>

### 3. Progress Reports 2015 and 2017 and Measuring Nutrient Reduction

The 2014 amendments to HABHRCA shortened the length of time between progress reports from five years down to two.<sup>154</sup> The first report under the new rules was issued to Congress in 2015 (hereinafter the 2015 Report).<sup>155</sup> New goals were adopted by the Task Force regarding shrinking the Gulf hypoxic zone.<sup>156</sup> The Task Force maintained its goal to bring the hypoxic zone to under 5,000 square km, but moved the target date back from 2015 to 2035 citing the following reasons: the size of the MRB; the lack of funding for projects that need to be implemented, and; complications posed by climate change.<sup>157</sup> The Task Force set an interim goal to reduce nutrient totals in the Gulf by 20% before 2025.<sup>158</sup> The MRTF stresses the need for resources and investment in the programs to realize these goals.<sup>159</sup>

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148. *Id.* at 6-8.

149. *Id.* at 15.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 16.

154. See MISS. RIVER GULF OF MEX. WATERSHED NUTRIENT TASK FORCE, *May 2019 Hypoxia Task Force Meeting Accomplishments and Next Steps* (2019), [https://www.epa.gov/sites/default/files/2019-10/documents/meeting\\_summary\\_public\\_document\\_508\\_0.pdf](https://www.epa.gov/sites/default/files/2019-10/documents/meeting_summary_public_document_508_0.pdf) (explaining that the EPA is currently preparing the 2019 Report to Congress).

155. 33 U.S.C. § 4004(b)(3).

156. *Id.*

157. MISS. RIVER GULF OF MEX. WATERSHED NUTRIENT TASK FORCE, 2015 REP. TO CONGRESS, 10 (2015).

158. *Id.*

159. *Id.*

The 2015 Report rearticulates the importance of fashioning a robust monitoring system to understand the complex interactions that occur in the Gulf.<sup>160</sup> MRTF created a set of priorities to maximize available funding, the first of which is to further develop glider technology that can span the distance of the dead zone.<sup>161</sup> The next two priorities are: expanding other methods to gather information over greater distances for longer periods of time, and; creating a system of sensors that can detect how hypoxic conditions affect wildlife.<sup>162</sup> Other goals from the 2015 Report involve the MRTF working to achieve hypoxia zone reduction by working with states to fully implement their nutrient reduction strategies and using quantitative data to track nutrient reductions in the MRB.<sup>163</sup> The MRTF also wants to identify and apply federal conservation programs (e.g., EQIP) to the areas where those dollars will achieve their highest benefit.<sup>164</sup>

The most recent progress report was submitted in 2017 (the 2017 Report).<sup>165</sup> It discusses the launching of the Hypoxia Nutrient Data Portal, which allows policy makers to access data at water quality monitoring stations to address hot spots of nutrient pollution.<sup>166</sup> The report also discusses the development of the Runoff Risk Advisory Forecast.<sup>167</sup> This tool is tailored to the needs of each state and designed to establish BMPs for fertilizer application, reducing the chances that nutrient-rich material runs off into vulnerable waters.<sup>168</sup> USGS's SPARROW model provided a breakthrough as a mapping tool that allows for the tracking of nutrient loads on a basin-wide scale.<sup>169</sup> SPARROW confirmed the findings of USDA's SWAT-CEAP<sup>170</sup> model, which determined that the bulk of nitrogen and phosphorus in the Gulf originates from cultivated land uses in the "Upper Mississippi, Lower Mississippi, and Ohio basins."<sup>171</sup> However, the 2017

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160. *Id.*

161. *Id.* at 13.

162. *Id.*

163. *Id.*

164. *Id.* at 82.

165. *Id.*

166. See 2017 U.S. ENV'T PROT. AGENCY BIENNIAL REP. MISS. RIVER/GULF OF MEX. WATERSHED NUTRIENT TASK FORCE, at 16, [https://www.epa.gov/sites/default/files/2017-11/documents/hypoxia\\_task\\_force\\_report\\_to\\_congress\\_2017\\_final.pdf](https://www.epa.gov/sites/default/files/2017-11/documents/hypoxia_task_force_report_to_congress_2017_final.pdf), [hereinafter 2017 EPA BIENNIAL REP.] (describing several implementation systems like Gulf of Mexico Coastal Ocean Observing System (GCOOS), a Regional Association of the Integrated Ocean Observing System (IOOS) network).

167. *Id.*

168. *Id.* at 17.

169. *Id.*

170. *Id.* at 26.

171. *Id.* at 26-27.

Report acknowledges the likelihood of incongruencies between models like SPARROW and future state model reports because of variances in data inputs and modeling assumptions.<sup>172</sup>

Overarching goals in the 2017 Report emphasize creating a measurement framework that demonstrates the effectiveness of conservation measures designed to reduce nutrient loads.<sup>173</sup> Using the EPA's National Rivers and Streams Assessment, the Task Force intends to gather information on the ecological conditions and the concentrations of rivers and streams within the MRB.<sup>174</sup> The Task Force also wants to aggregate long-term information that reveals changes in environmental conditions on a decade-based time scale using tools such as the National Water Quality Assessment (NAWQA), which collates 25 million nutrient data sets dating back to 1972.<sup>175</sup> Additionally, the Mississippi River Basin Monitoring Collaborative will identify and gather data on streams that have long monitoring records (to help gauge the impact of conservation measures installed at nearby sites) where nitrogen and phosphorus have historically flowed into the waterways.<sup>176</sup>

In 2018, MRTF issued a report proposing a framework designed to measure the effectiveness of conservation practices in reducing nonpoint source nutrient loads.<sup>177</sup> A MRTF workgroup was formed in 2014 to determine the best way to track nonpoint nutrient pollution focused on agricultural sources.<sup>178</sup> The workgroup realized that any measurement tool is dependent upon state data inputs and established two guidelines for the creation of their model.<sup>179</sup> First, measurement reporting "must be reasonably reportable for all member states." Second, the measuring tool must be "impactful towards reducing nutrient loads to the Gulf of Mexico."<sup>180</sup> With those guidelines in mind, the workgroup determined that tracking the progress of nutrient reduction is best accomplished through a *practice summary*.<sup>181</sup> The practice summary incorporates data from sources such as CEAP, SPARROW, NAWQA, and annual hypoxic zone measurements

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172. *Id.* at 27.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 110.

177. PROGRESS REP. ON COORDINATION FOR NONPOINT SOURCE MEASURES IN HYPOXIA TASK FORCE STATES, MISS. RIVER GULF OF MEX. WATERSHED NUTRIENT TASK FORCE, at 4 (May 2018), [https://www.epa.gov/sites/production/files/2018-05/documents/nps\\_measures\\_progress\\_report\\_1-\\_may\\_2018.pdf](https://www.epa.gov/sites/production/files/2018-05/documents/nps_measures_progress_report_1-_may_2018.pdf).

178. *Id.* at 3.

179. *Id.*

180. *Id.*

181. *Id.* at 5.

made by NOAA to identify basin-wide, regional, and local fluctuations of nutrient levels in waterways.<sup>182</sup>

### III. ANALYSIS AND DISCUSSION

#### *A. Assessment of the Efficacy of Governmental Efforts*

The success or failure of the government's efforts to address Gulf hypoxia depends on the frame that those efforts are viewed through. From one perspective, the work of the MRTF and Task Force have been admirable in modeling the sources of nutrient pollution through items such as CEAP and SPARROW, as well as gathering and disseminating information through items like the Water Quality Portal.<sup>183</sup> However, the glacial pace at which a successful means of tracking the effectiveness of conservation measures is a significant detraction.<sup>184</sup> And even with the development of the practice summary to detect trends in nutrient loads, significant challenges exist that might undercut the model's usefulness.<sup>185</sup>

Difficulties can arise with the use of the practice model when assessing nutrient data due to the differences in topography and local weather patterns from one area of the MRB to the next.<sup>186</sup> In some given areas one practice model is applicable, but not in other areas.<sup>187</sup> Another issue is that some inputs that will inform the practice summary were not designed specifically to detect the changes as a result of conservation efforts and might not be an accurate representation of a given practice's effects.<sup>188</sup> Variances in practice applications can also cause irregularities, such as agricultural operators who vary in the methods used to plant cover crops, which can obfuscate data.<sup>189</sup> Also, differences among the state policies and regulations will play a role in the quality of the practice summary.<sup>190</sup> For example, Indiana's measurement

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182. *Id.*

183. MISS. RIVER GULF OF MEX. WATERSHED NUTRIENT TASK FORCE, *supra* note 154, at 32.

184. *See State Progress Toward Developing Numeric Nutrient Water Quality Criteria for Nitrogen and Phosphorus*, EPA (Sept. 21, 2021), <https://www.epa.gov/nutrient-policy-data/state-progress-toward-developing-numeric-nutrient-water-quality-criteria#tb3>.

185. *Id.*

186. *Id.* at 7.

187. *Id.*

188. *Id.*

189. *Id.*

190. *See e.g.*, Julie Harrold & J. Ryan Benefield, *Nonpoint Source Measurement Framework: Advancements, Next Steps and Lessons Learned in Indiana and Arkansas that Can Inform Progress Tracking in All HTF States*, TETRA TECH (May 16, 2019), <https://water-meetings.tetrattech.com/Hypoxia/Content/Docs/2%20->

of nutrient load reductions only records data related to sediment.<sup>191</sup> Indiana's measurements do not record dissolved nutrients from stormwater or snowmelt, which creates a critical gap in the data used to construct the model.<sup>192</sup> However, there is an argument to be made that these faults had more to do with a lack of available resources, as opposed to poor choices or decision-making on the part of the Task Force and the MRTF.

The prime deficiency of the federal government's strategy in addressing hypoxia, and a theme that arises time and again in the progress reports, is inadequate funding and resources.<sup>193</sup> Consider that the combined size of the Mississippi River Basin, the Atchafalaya River Basin, and the average-sized hypoxic zone is approximately 800 million acres.<sup>194</sup> A 2016 Government Accountability Office report estimated that federal agencies spent \$101 million on HAB-related activities (not exclusive to the Gulf) beginning in fiscal year 2013 through 2015 for a yearly average of approximately \$43.7 million.<sup>195</sup> If we assume that agency spending was on par with this total during the 12-years from the adoption of the 2008 Action Plan through 2020, and even if we generously assume, for simplicity's sake, that every dollar spent went toward solving Gulf hypoxia, then annual spending by the agencies charged with rehabilitating the Gulf ecosystem and safeguarding the economic interests of Gulf Coast communities averages out to about five-cents per acre of land and surface water.<sup>196</sup> Under-resourcing leads to results

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%20Nonpoint%20Source%20Measurement%20Framework.pdf (explaining the state models in Arkansas and Indiana).

191. *Id.*

192. *Id.*

193. Kevin Degood, *A Call to Action on Combating Nonpoint Source and Stormwater Pollution*, Ctr. for Am. Progress (Oct. 27, 2020), <https://www.americanprogress.org/issues/economy/reports/2020/10/27/492149/call-action-combating-nonpoint-source-stormwater-pollution/>.

194. Cliff R. Hupp et. al., *Recent Sedimentation Patterns Within the Central Atchafalaya Basin, Louisiana*, 28 WETLANDS 125, 125 (2008) (noting the size of the Atchafalaya Basin at 5,670 square km, which translates to 1,423,327 acres); *The Mississippi/Atchafalaya River Basin (MARB)*, MISS. RIVER/GULF OF MEX. HYPOXIA TASK FORCE (Sep. 9, 2016), <https://www.epa.gov/ms-htf/mississippiatchafalaya-river-basin-marb> (noting the size of the Mississippi River Basin at 1,245,000 square miles, which translates to 796,800,000 acres); *Average-sized Dead Zone Forecasted for the Gulf of Mexico*, UNITED STATES GEOLOGICAL SURV. (June 2018) (noting the size of the average Gulf dead zone at 5,460 square miles, which translates to 3,494,400 acres).

195. U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-119, INFORMATION ON FEDERAL AGENCIES' EXPENDITURES AND COORDINATION RELATED TO HARMFUL ALGAE (2016).

196. It should be noted that this total is meant to give a general idea of how woefully underfunded the goals of HABHRC and the 2008 Action Plan are and is not intended to be taken as an accurate representation of total spending. State and private funds spent on HABs are not accounted for here, and the fact that some of those 800 million acres within the basin are more problematic than others should be acknowledged. Conversely, it should also be pointed out that these federal agency dollars are not spent exclusively on Gulf hypoxia, as the GAO report notes that agency spending in the context of HABs is divided across several arenas, such as the Chesapeake Bay and Bay Delta conservation efforts.

such as the utterly inexcusable circumstance of NOAA not being able to perform a survey of the hypoxic zone in 2016. A mechanical problem to the vessel used in the measuring process prevented the survey from taking place despite NOAA's efforts to find a replacement.<sup>197</sup> If the United States government is serious about addressing Gulf Hypoxia, it should at least have a backup plan to collect the central data points against which all other efforts are measured.

Finally, the most glaring hole in the federal efforts is that, despite the efforts of the Task Force and MRTF, there is no noticeable impact on the size and frequency of the hypoxic zone.<sup>198</sup> One needs to look no further than the 2017 hypoxic event when the NOAA survey recorded the largest dead zone on record despite HABHRCA's enactment twenty years prior.<sup>199</sup> The following section addresses what changes should be made at the federal level to produce a healthy Gulf ecosystem.

### *B. Proposed Solutions to the Shortcomings of HABHRCA*

#### 1. Short Term Actions

One change in policy that should be immediately carried out is that the EPA must use its authority under §303(d) of the CWA to reject states' impaired water submissions and force them to develop total maximum daily loads (TMDLs) for lakes, rivers, and streams that have high contents of phosphorus and nitrogen.<sup>200</sup> A TMDL sets a maximum amount of a given pollutant a waterbody may contain.<sup>201</sup> Once a TMDL is established for a given waterbody, states must then identify both point and nonpoint sources that contribute the pollutant to the water source and develop plans to keep the pollutant at, or under, the prescribed level.<sup>202</sup> Of the twelve states that are part of the MRTF, only two have statewide nutrient-based numeric criteria

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197. *NOAA and Partners Cancel Gulf Dead Zone Summer Cruise*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., <https://www.noaa.gov/media-release/noaa-and-partners-cancel-gulf-dead-zone-summer-cruise> (last updated July 29, 2016).

198. *Gulf of Mexico Dead Zone is the Largest Ever Measured*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (Aug. 2, 2017), <https://www.noaa.gov/media-release/gulf-of-mexico-dead-zone-is-largest-ever-measured>.

199. *Id.*

200. 33 U.S.C. § 1313(d).

201. *Id.*

202. *Id.*

listed for lakes, reservoirs, rivers, and streams.<sup>203</sup> Two MRTF states have partial criteria listed for certain lakes and reservoirs, and the remaining eight states do not have any regulations for nutrient loads in any water body.<sup>204</sup> This reality makes efforts such as those put forth by the NRCS working with states to create certification programs look pointless. If only two states have meaningful regulations against which a certification program could be measured, is spending effort developing those programs the best use of the agency's time and resources? States are not ignorant to the problems caused by nitrogen and phosphorus ending up in waterways. Forcing their hand is entirely justifiable as a response to any further refusals to take action.

Next, Congress should allocate a large stream of funding to research the best management practices for nutrient reductions within each region of the MRB. Additional funding is necessary to at least begin implementing those practices in areas where conservation measures are most needed. Closing the knowledge gaps and uncertainties regarding which conservation efforts work best at a given location has to be the first step in addressing excess nutrient loads. This step should include accelerating the timeframe to put the automated gliders in the water to achieve a markedly better system of continuous monitoring at greater depth than what is currently achievable. At the very least, funding should be made available so that a similar situation to the 2016 failure of recording a survey cannot happen absent extreme circumstances. As for implementing the practices once BMPs are established, states must receive financial help from grant and loan programs.<sup>205</sup> One study suggested a sum upwards of \$20 billion in grants and loans for states to implement conservation practices.<sup>206</sup>

## 2. Long Term Solution

The long-term solution to addressing Gulf Hypoxia is making conservation practices mandatory for agricultural operations in the MRB. While a great deal of research and debate would need to take place to iron out the particulars of how such legislation would operate, there are some principles from the CWA's regulation of point sources that can be applied to regulating nonpoint agricultural runoff. First, agricultural operations in the

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203. *State Progress Toward Developing Numeric Nutrient Water Quality Criteria for Nitrogen and Phosphorus*, ENV'T PROT. AGENCY (Jan. 23, 2020), <https://www.epa.gov/nutrient-policy-data/state-progress-toward-developing-numeric-nutrient-water-quality-criteria#tb3>.

204. *Id.*

205. Kevin Degood, *supra* note 193, at 23–24.

206. *See id.* (totaling the amount recommended Congress should allocate for state conservation programs).



Mississippi River Basin, or other sensitive watersheds, should be subject to a permit process in order to start or maintain operations.<sup>207</sup> The permit would spell out what conservation practices need to be performed and how they need to be maintained, and where applicable, for a farming or animal feeding operation to be in compliance with the CWA.<sup>208</sup> Second, states should be allowed to monitor their own water supplies and control what types of practices are used to mitigate agricultural runoff, subject to an approval plan by a reviewing authority (likely the EPA or a joint agency effort between the EPA and USDA).<sup>209</sup> Such a process would help ensure that nutrient loads are kept at manageable levels.<sup>210</sup>

Third, agricultural operations should be subject to escalating control technologies depending on the type of activity they are engaged in. For example, a relatively small ten-acre plot that primarily grows soybeans, a crop that customarily does not produce as much nutrient runoff as corn, would not need nearly the level of control as a concentrated animal feeding operation because these operations typically generate large amounts of nutrient runoff through animal manure.<sup>211</sup> Congress and the USDA could consider additional grant funding at sites that require extra controls to ensure the cost of remediation does not make an operation non-competitive in the marketplace. The law could also contain a carve-out where, if a given operation in a sensitive watershed will not, or is not likely to, produce nitrogen or phosphorus runoff, it is exempt from the permit process.

#### CONCLUSION

A review of the MRTF progress reports reveals human ingenuity, scientific accomplishment, and the failures of political bureaucracy where leaders are either unable or unwilling to act despite staring down the barrel of dire and potentially irreparable consequences. Whether or not the efforts of the Task Force and MRTF are ultimately considered a success or failure depends upon how policymakers act on the wealth of information gathered—it spells out the daunting magnitude of effort required to stop nutrients from flowing to the Gulf. It is past time for the United States to earnestly address that our cheap food system has immense hidden costs, and that the

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207. See, e.g., 33 U.S.C. § 1342(a)(1) (2019) (explaining the Administrator may issue a discharge permit).

208. See, e.g., 33 U.S.C. § 1342(b) (explaining the current guidelines requires under this title).

209. See, e.g., 33 U.S.C. § 1313 (2000) (explaining water quality standards and implementation plans).

210. *Id.*

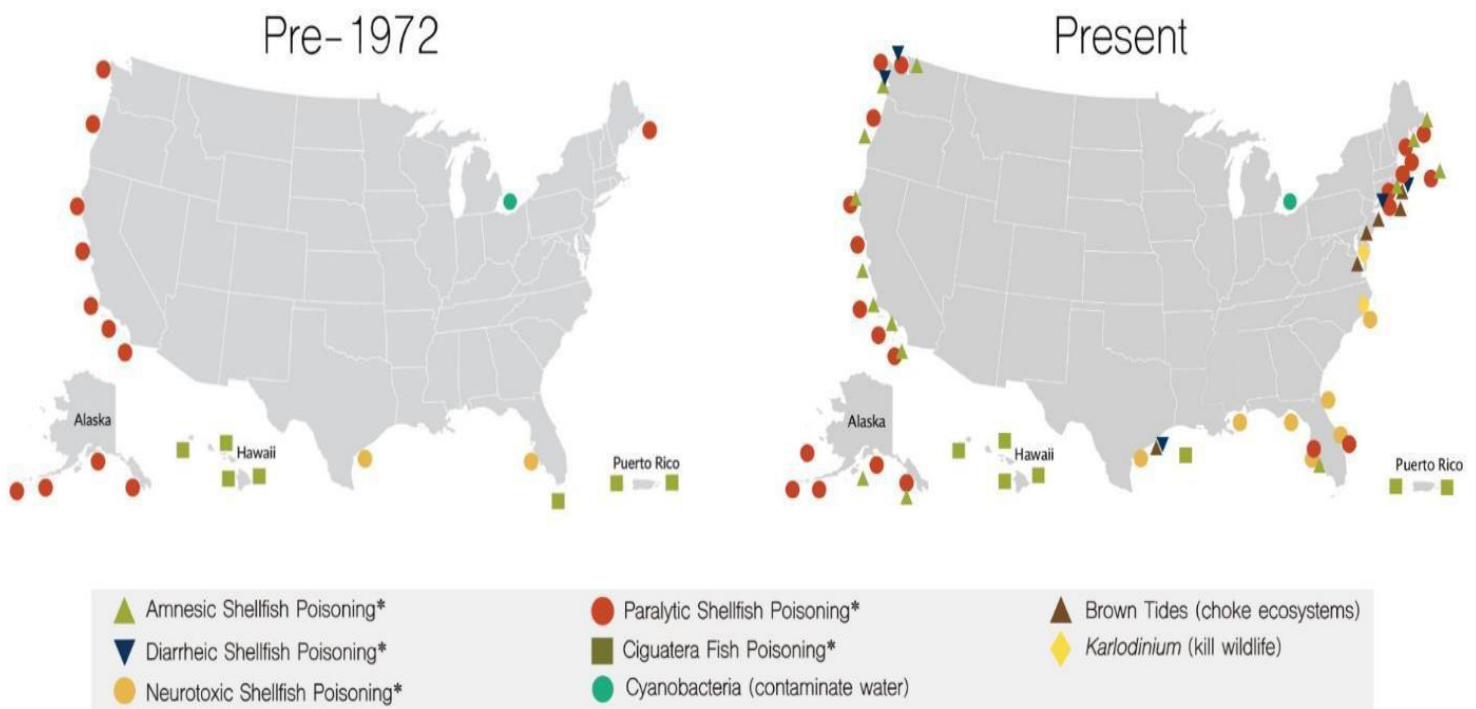
211. See, e.g., 33 U.S.C. § 1314(b) (2000) (explaining the effluent limitation guidelines).

responsibility of doing so should not be entirely cast upon agricultural producers. This might be a less dire circumstance if nutrient pollution in the Gulf were a single, isolated problem, but that is not the case. Nutrient pollution sits among a litany of other stressors such as rising sea temperatures, increases in hurricane activity, wetland reduction, urban development, and the unmitigated disaster of Deepwater Horizon.<sup>212</sup> Something must be done to stop the degradation now, because the price of inaction is too high to pay.

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212. Alejandra Borunda, *We Still Don't Know the Full Impacts of the BP Oil Spill, 10 Years Later*, NAT'L GEOGRAPHIC (Apr. 20, 2020), <https://www.nationalgeographic.com/science/2020/04/bp-oil-spill-still-dont-know-effects-decade-later/>.

### Appendix I: Increase in Frequency and Variety of HABs Since 1972

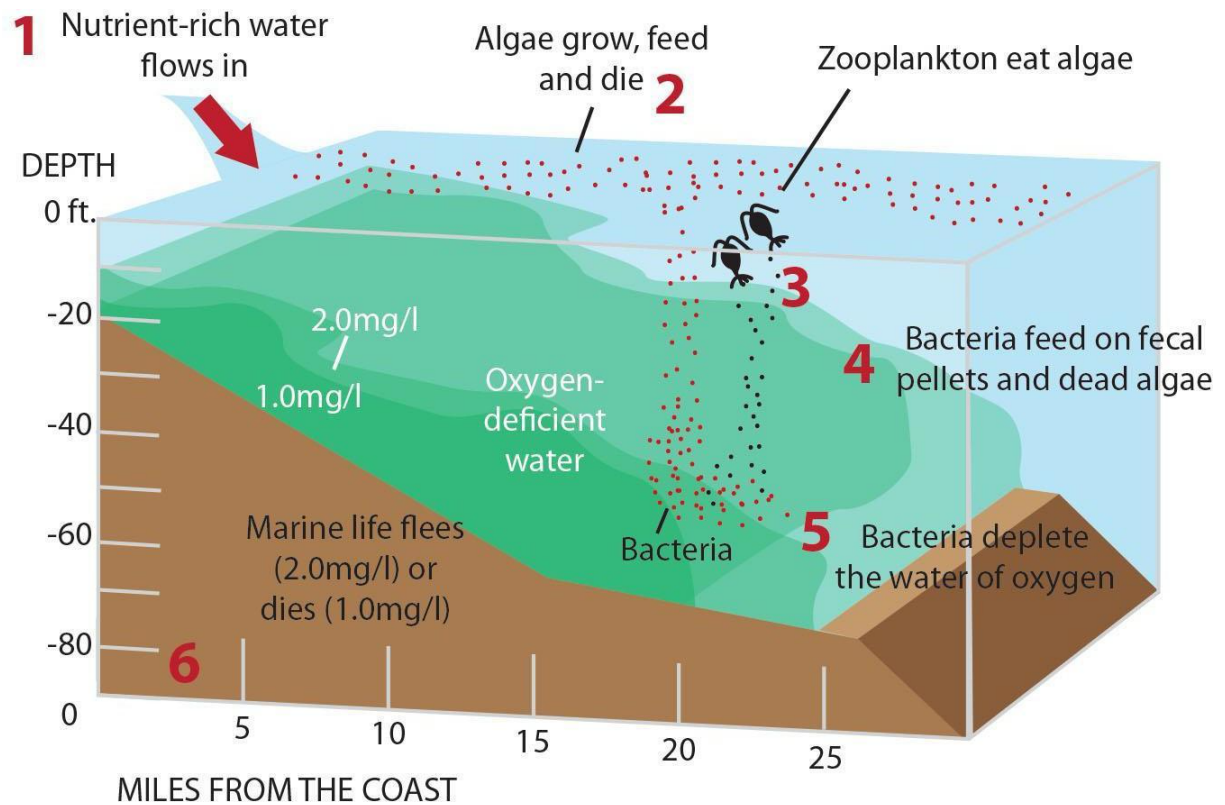


\*Make people sick; learn more at: <https://www.cdc.gov/habs/index.html>

"Present" includes events through 2017. Inland freshwater harmful algal blooms are pervasive across the U.S. but are not shown here

Graphic from the National Office for Harmful Algal Blooms at Woods Hole Oceanographic Institution

Source: *Hitting Us Where It Hurts: The Untold Story Of Harmful Algal Blooms*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. NORTHWEST FISHERIES SCIENCE CTR. (Dec. 10, 2020), <https://noaa.maps.arcgis.com/apps/Cascade/index.html?appid=9e6fca29791b428e827f7e9ec095a3d7>.

**Appendix II: Visual Depiction of the Creation of the Gulf's Dead Zone**

Source: *About Hypoxia: What Causes Hypoxia?*, HYPOXIA RESEARCH TEAM AT LUMCON (2018), <https://gulfhypoxia.net/about-hypoxia/>.

**STOP PUR-PETUATING THE NORM: AMENDING THE LACEY  
ACT TO INCLUDE A “DANGEROUS OR POTENTIALLY  
DANGEROUS WILDLIFE” DEFINITION FOR EXOTIC PET  
PROTECTION**

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*Michelle R. Amidzich\**

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## INTRODUCTION

In the early morning hours, a lion-like animal roamed a Milwaukee, Wisconsin suburb.<sup>1</sup> In the middle of an afternoon, police captured a rouge marsupial at a busy intersection in Franklin, Wisconsin.<sup>2</sup> Franklin's ordinance restricts animal ownership to a two-animal limit on dogs, cats, or even tiny horses, but mentions nothing about exotic pets; therefore, the owners legally possessed the marsupial.<sup>3</sup> Franklin's ordinance is the norm across other municipalities in the state. It is easier to own a tiger than a dog in some municipalities due to the state's lax licensure scheme.<sup>4</sup> The lack of regulation makes Wisconsin a hot spot for the exotic pet trade because the federal government generally leaves private exotic pet enforcement and regulation up to the states.<sup>5</sup>

However, exotic pet regulation issues are not exclusive to Wisconsin. Many other states do not necessarily ban wild animals as pets.<sup>6</sup> Instead, they require permits for some species but not for others.<sup>7</sup> Five states have no statutory or regulatory scheme.<sup>8</sup> Fourteen states allow private ownership through a license or permitting scheme, while thirteen states have partial exotic pet bans.<sup>9</sup> Twenty states have comprehensive bans.<sup>10</sup>

Each state approaches and defines exotic pet bans differently.<sup>11</sup> A comprehensive ban broadly means that states classify wild cats, large non-domesticated carnivores, reptiles, and nonhuman primates as *dangerous*

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1. Marion Renault, *Two More Unconfirmed Sightings of Lion-like Animal*, MILWAUKEE J. SENTINEL (July 31, 2015), <https://archive.jsonline.com/news/milwaukee/two-more-unconfirmed-sightings-of-lion-like-animal-b99548442z1-320318901.html/>.

2. Erik S. Hanley, *A Kangaroo had to be Captured After it got Loose from a Yard in Franklin*, MILWAUKEE J. SENTINEL (June 9, 2020), <https://www.jsonline.com/story/communities/south/news/franklin/2020/06/09/kangaroo-loose-franklin-police-chief-rick-oliva/5330613002/>.

3. *Id.*

4. *Wisconsin One of Five States Where 'Dangerous' Exotic Animals can be Pets*, WIS. CTR. FOR INVESTIGATIVE JOURNALISM (Aug. 16, 2015), <https://www.wisconsinwatch.org/2015/08/exotic-and-exploited-lions-and-tigers-and-wisconsins-lax-wild-animal-laws/>.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Map of Private Exotic Pet Ownership Laws*, ANIMAL LEGAL & HIST. CTR., <https://www.animallaw.info/content/ma.-private-exotic-pet-ownership-laws> (last accessed Oct. 4, 2020).

9. *Id.*

10. *Id.*

11. Martha Drouet, *Overview of Exotic Pet Laws*, ANIMAL LEGAL & HIST. CTR. (2014), <https://www.animallaw.info/intr./exotic-pets-update-2013> (last visited Oct. 4, 2020).

*animals* or otherwise prohibit private ownership of these species.<sup>12</sup> Alaska facially bans certain exotic pets, but the regulation does not outright do so, which is similar to Wisconsin's approach.<sup>13</sup> Comparatively, California only issues permits for narrow purposes and does not allow a permit for exotic pet ownership.<sup>14</sup> The hodge-podge, state-by-state approach fosters illegal trade and jeopardizes public health and safety for both the animals and humans.<sup>15</sup>

This note analyzes the missing link between federal and state regulation of exotic wildlife and pet ownership. Congress passed the Lacey Act (the Act) in 1900.<sup>16</sup> This Act was the country's first law that attempted to regulate poaching and interstate shipment of wildlife.<sup>17</sup> Congress amended the Act over the years, which diverged from its original intent.<sup>18</sup> Congress must amend the Act to supplement the *injurious wildlife* standard because it does not adequately protect wild animals or exotic pets. The solution is to create an all-encompassing standard that adds *potentially dangerous or aggressive wildlife* in addition to the injurious wildlife standard. Amending the Lacey Act to protect all potentially dangerous wildlife will ensure enhanced animal welfare for exotic animals, while simultaneously providing for the public health and safety of humans and animals. This note recommends using the Lacey Act over other federal laws because the Act provides the most coverage and offers the most significant potential for penalties.<sup>19</sup>

This note provides a background section that discusses: (1) the history and overview of the United States' exotic animal trade—focusing on the history of the first United States' zoo; (2) the Act's history, and; (3) the intersections between the Act, the Animal Welfare Act (AWA), and the Endangered Species Act (ESA). Part I discusses: (1) the Act's current approach to wildlife trafficking and regulation; (2) Ohio's recent efforts to curb exotic pet ownership; and (3) how combining the Act's original legislative intent with Ohio's approach to exotic pet ownership creates the new recommended proposal for amending the Act. Part II discusses the Act's federal application and how states, such as Wisconsin, would benefit from the proposed amendment to the Act. Part III addresses potential concerns to

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12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *The Lacey Act*, U.S. SUSTAINABILITY ALL., <https://thesustainabilityalliance.us/lacey-act/> (last visited October 4, 2020).

17. *Id.*

18. Kaela S. Sculthorpe, *Ethical Management of Invasive Species*, ANIMAL LEGAL & HIST. CTR. 16 (2018), <https://www.animallaw.info/sites/default/files/Ethical%20Management%20of%20Invasive%20Species%20The%20Burmese%20Python.pdf> (explaining that the Lacey Act initially banned all species unless Congress explicitly provided approval until 1949 when amendments to the Act changed it to its current approach).

19. Robert S. Anderson, *The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking*, 16 PUB. L. L.R. 27, 30 (1995).

the proposed amendment, such as Commerce Clause and state law concerns. It also refutes Congress's species-by-species approach. The last section concludes the argument.

## I. BACKGROUND

### *A. History and Overview of the United States' Exotic Animal Trade*

*Exotic pet* has a broad definition, but it generally refers to “any non-traditionally domesticated animal that is kept as a pet.”<sup>20</sup> A domestic pet is typically an animal that has been “selectively bred by humans for hundreds, or even thousands, of years.”<sup>21</sup> These animals are usually cats, dogs, and horses.<sup>22</sup> The exotic pet trade is a legal or illegal business that deals with and handles exotic pets.<sup>23</sup>

Philadelphia was the first city in the United States to establish a zoo, which officially opened on July 1, 1874.<sup>24</sup> The zoo's owner hired a naturalist to capture and transport live wild animals from overseas; the zoo also accepted live animal donations.<sup>25</sup> Donations of animals often came from the Western United States or from wealthy hunters who no longer wished to show off their foreign, captured prize.<sup>26</sup> The zoo's success became so popular that Congress waived all customs fees for animals headed to the Philadelphia zoo.<sup>27</sup>

Zoo popularity gained traction and expanded into the next century with 60 new zoos formed by the American Association of Zoological Parks and Aquariums (AZA).<sup>28</sup> The AZA imported animals for the zoos directly from the wild.<sup>29</sup> As the American public expressed great interest in circuses and zoos, these organizations began to excessively breed animals like lions and tigers.<sup>30</sup> The overbreeding led to such a surplus of baby animals that zoos and circuses had to figure out another use for them, so many created exhibits for

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20. Gabrielle C. Tegeder, A Research Framework for the Geographic Study of Exotic Pet Mammals in the USA (Jan. 2015) (Ph.D. dissertation, U. of Neb. Lincoln) at 12, <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1026&context=geographythesi>.

21. *Id.*

22. Jani Actman, *Exotic Pet Trade, Explained*, NAT'L GEOGRAPHIC (Feb. 20, 2019), <https://www.nationalgeographic.com/animals/reference/exotic-pet-trade/>.

23. *Id.*

24. Sandy Hingston, *11 Things You Might Not Know About: The Philadelphia Zoo*, PHILA. MAG. (Dec. 22, 2015), <https://www.phillymag.com/news/2015/12/22/philadelphia-zoo-facts/>.

25. *Id.*

26. *Id.*; *History of the Exotic Pet Trade*, TURPENTINE CREEK WILDLIFE REFUGE (June 29, 2018), <https://www.turpentinecreek.org/history-of-the-exotic-pet-trade/>.

27. Hingston, *supra* note 24.

28. TURPENTINE CREEK WILDLIFE REFUGE, *supra* note 26.

29. *Id.*

30. *Id.*



people to feed the baby animals.<sup>31</sup> The zoo or circus would kill the now-adult animal if it did not have the room or a buyer for the animal.<sup>32</sup>

Zoos and aquariums were not the only places people wished to see animals. In the United States, private exotic pet ownership rose to 29 million pets in 2012.<sup>33</sup> The demand for private exotic pet ownership exploded because the internet provides ease of access to social media and e-commerce websites.<sup>34</sup> Many people assume their exotic animal is captive-bred but that is not always true.<sup>35</sup> Often, traders purposely mislabel the animals as captive-bred when they actually smuggled the animal out of the wild or its native country.<sup>36</sup> These animals suffer during transportation, and if they do not die before reaching the United States, the animals often cannot “eat, move, and behave as they would in the wild.”<sup>37</sup> The animals may—and frequently do—attack their owners and can spread diseases to their human handlers and other animals.<sup>38</sup> There are global efforts to combat the exotic pet trade, but countries like the United States have few federal laws that specifically address the exotic pet industry.<sup>39</sup> The closest federal law the United States has to combat the global issue is the Lacey Act.

### *B. The Lacey Act's History*

Congress passed the Lacey Act in 1900 as its first attempt to regulate poaching and illegal interstate shipment of wildlife.<sup>40</sup> In its current form, the Act states: “any exotic species may be imported into the United States unless the Department of Interior designates the species as ‘injurious wildlife.’”<sup>41</sup> *Injurious wildlife* are animals that are harmful to other wildlife or to humans and human interests like agriculture and forestry.<sup>42</sup> These animals are typically invasive and include mammals, wild birds, reptiles, amphibians, fishes, mollusks, and crustaceans.<sup>43</sup>

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31. *Id.*

32. *Id.*

33. Tegeder, *supra* note 20, at 9.

34. Actman, *supra* note 22.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. Drouet, *supra* note 11.

40. U.S. SUSTAINABILITY ALL., *supra* note 16.

41. Robert Brown, *Exotic Pets Invade United States Ecosystems: Legislative Failure and A Proposed Solution*, 81 IND. L.J. 713, 719 (2006).

42. *Injurious Wildlife: A Summary of the Injurious Provisions of the Lacey Act*, U.S. FISH & WILDLIFE SERV. (Dec. 2017), [https://www.fws.gov/injuriouswildlife/pdf\\_files/InjuriousWildlifeFactSheet2017.pdf](https://www.fws.gov/injuriouswildlife/pdf_files/InjuriousWildlifeFactSheet2017.pdf).

43. *Id.*

The Act also regulates the interstate and foreign commerce wildlife trades.<sup>44</sup> Importers must verify specific information about the wildlife import, such as: genus and species name; value of the animal; the exporting country; etc., before Customs and Border Protection (CBP) clears the import.<sup>45</sup> The Act's enforcement powers include civil and criminal penalties and even imprisonment.<sup>46</sup> The USDA's Animal and Plant Health Inspection Service (APHIS), the Department of the Interior's Fish and Wildlife Service (FWS), and the Department of Homeland Security all operate with enforcement authority under the Act.<sup>47</sup> If the Department of Interior places an animal on the injurious wildlife list, the Act cannot prevent the animal's breeding or ownership amongst the states unless United States federal law or Indian tribal law prohibits ownership.<sup>48</sup> This is one of the major flaws in the Act.

### *C. Intersections Between the Act, the Animal Welfare Act, and the Endangered Species Act*

There are a few policies and federal laws that address exotic animals, but the big three are the Lacey Act, the Animal Welfare Act (AWA), and the Endangered Species Act (ESA).<sup>49</sup> This note will discuss these three acts. As previously stated, the Lacey Act spurred federal control of illegal wildlife in 1900.<sup>50</sup> The Act targets the illegal trafficking of fish, wildlife, and plants through the USDA and FWS enforcement.<sup>51</sup>

Several decades later in 1966, President Lyndon Johnson signed the AWA into law.<sup>52</sup> The AWA's primary focus was on dogs and cats, but it later added other animals such as nonhuman primates, rabbits, hamsters, and guinea pigs.<sup>53</sup> The AWA requires dealers and laboratories to be licensed, provide identification for their animals, and set minimum care and handling

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44. 50 C.F.R. § 16.3.

45. U.S. SUSTAINABILITY ALL., *supra* note 16.

46. *Id.*

47. *Id.*

48. 16 U.S.C. § 3372(a)(1) (2000).

49. Rebecca Chapman, *Tiger King: Murder, Mayhem and Conservation Policy*, OHIO STATE U. (Apr. 3, 2020), <https://u.osu.edu/chapman.751/2020/04/03/tiger-king-murder-mayhem-andconservation-policy/>.

50. Holly Doremus, *The Endangered Species Act: Static Law Meets Dynamic World*, 32 WASH. U. J. L. & POL'Y 175, 204 (2010).

51. Chapman, *supra* note 49.

52. Benjamin Adams & Jean Larson, *Legislative History of the Animal Welfare Act: Introduction*, NAT'L AGRIC. LIBR., <https://www.nal.usda.gov/awic/legislative-history-animal-welfare-act-introduction> (last visited Oct. 4, 2020).

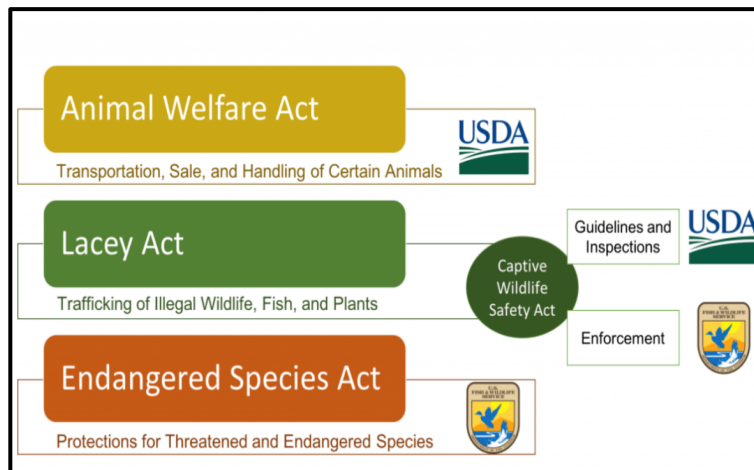
53. *Id.*

guidelines.<sup>54</sup> The AWA made the Department of Agriculture responsible for the law's implementation.<sup>55</sup>

Finally, Congress enacted the ESA in 1973 “to protect and recover imperiled species and the ecosystems upon which they depend.”<sup>56</sup> The ESA “prohibits the taking of, sale, transportation, ownership, and harm of any listed species.”<sup>57</sup> However, the ESA only covers purebred species; therefore, the FWS may issue permits for hybrids, scientific research, or captive-bred wildlife.<sup>58</sup>

Many pieces of separate animal-specific legislation govern various aspects of an animal's life. How a law governs an animal depends mostly on two requirements: (1) the animal's method of transportation throughout the United States, and (2) how the animal will be used.<sup>59</sup> Figure 1 provides a visual representation of the three main pieces of wildlife protection legislation. Without the implementation of new legislation, the United States must use what is already law to curb the exotic pet trade. The best legislation amongst the three is the Lacey Act.

**Figure 1: Key Federal Laws Related to Exotic Animals<sup>60</sup>**



54. *Id.*

55. *Id.*

56. *Endangered Species Act Overview*, U.S. FISH & WILDLIFE SERV. (Jan. 30, 2020), <https://www.fws.gov/endangered/laws-policies/index.html>.

57. Chapman, *supra* note 49.

58. *Id.*

59. 9 C.F.R. § 1.1.

60. Chapman, *supra* note 49.

## II. APPROACHES TO EXOTIC SPECIES REGULATION

*A. The Lacey Act's Current Blacklist Approach*

This section explains the Act's current blacklist approach.<sup>61</sup> The Department of the Interior designates species as injurious, which subsequently bars their import.<sup>62</sup> Congress can also add or prevent the addition of a species to the blacklist.<sup>63</sup> For the agencies, the listing process operates via informal rulemaking under the Administrative Procedure Act (APA).<sup>64</sup> The agency proposes the listing, receives and evaluates public comments, and issues a final rule.<sup>65</sup>

The agency and FWS must also comply with the National Environmental Policy Act (NEPA) environmental impact provision and prepare an environmental impact statement (EIS) if findings are significant.<sup>66</sup> The agencies do not have a formal definition of what constitutes as an injurious species, but FWS has unofficial guidance criteria: "FWS conducts a risk analysis to assess the likelihood of escape, establishment, and eradication of a proposed injurious species. It also considers the likelihood and magnitude of the injurious species' impact on species listed under the Endangered Species Act; humans; agriculture; horticulture; and forestry."<sup>67</sup>

However, the APA procedure is slow, and it can take up to six years before the government lists a species as injurious.<sup>68</sup> The delay allows a threatening species to become well established in its new ecosystem, which can be deadly to other wildlife and costly to manage.<sup>69</sup> The Act also lacks an emergency measure to expedite a species listing without a previous APA filing.<sup>70</sup> A petition option is available, but it lists very few species as a result.<sup>71</sup> Additionally, once the Agency lists the species, current animal owners can still retain their ownership, breed, and sell the animal within the United States.<sup>72</sup>

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61. Christopher J. Patrick, *Ballast Water Law: Invasive Species and Twenty-Five Years of Ineffective Legislation*, 27 VA. ENV'T L.J. 67, 80 (2009).

62. Kristina Alexander, CONG. RESEARCH SERV., R43170, INJURIOUS SPECIES LISTINGS UNDER THE LACEY ACT: A LEGAL BRIEFING 1, 8 (2013).

63. *Id.* at 10.

64. *Id.* at 8.

65. *Id.*

66. *Id.*

67. *Id.* at 10.

68. Sculthorpe, *supra* note 18, at 16.

69. *Id.* at 18.

70. *Id.* at 19.

71. *See id.* (discussing that another method is to petition a species listing, but this method is slow—only one species has made the list via petition in the past decade).

72. *Id.*

The blacklist approach is the least effective method to curb invasive species and completely misses regulating animals used in wildlife trafficking and the exotic pet trade. The blacklist approach is problematic because a species must already be in the United States and invading an ecosystem before the FWS considers adding the species to the blacklist.<sup>73</sup> If the FWS adds the species to the blacklist, the approach effectively prevents importation.<sup>74</sup>

Another option is to have a *clean list* or *whitelist* approach, which deems all species illegal to import and transport until decided otherwise through the APA's procedure or Congress.<sup>75</sup> The Act originally operated through a whitelist approach because of its broad language banning "any foreign wild animal or bird" except with a permit.<sup>76</sup> In 1949, Congress passed an amendment that changed the injurious species provision to the current blacklist approach.<sup>77</sup> The blacklist started with four species: the mongoose, fruit bats, sparrows, and starlings.<sup>78</sup> Later, Congress "added scientific names for the mongoose and fruit bat, included fish, amphibians, and reptiles to the term 'animals and birds,' and removed the English sparrow and starling from the black list."<sup>79</sup> The blacklist approach creates a less effective measure for preventing and reducing the spread of invasive species and is against the original intent of the Act.<sup>80</sup>

### *B. State Law Approach—Ohio as an Example*

In October of 2011, Terry Thompson from Zanesville, Ohio, released his 56 exotic animals from their pens on his property before killing himself.<sup>81</sup> Sheriff Lutz, familiar with the local and notorious Thompson, arrived on the scene to find dozens of exotic animals off Thompson's property.<sup>82</sup> Sheriff Lutz ordered the officers to shoot all of the animals that had wandered off Thompson's property.<sup>83</sup> Sheriff Lutz feared that the animals could hurt the officers and that some of the monkeys had the Herpes B virus because

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73. Patrick, *supra* note 61, at 80.

74. 16 U.S.C. § 3372(a)(1) (2000).

75. Sculthorpe, *supra* note 18, at 16.

76. *Id.* at 4 (emphasis added).

77. *Id.*

78. Sculthorpe, *supra* note 18, at 17.

79. *Id.*

80. *Id.*

81. Christina Caron, *Zanesville Animal Massacre Included 18 Rare Bengal Tigers*, ABC NEWS (Oct. 19, 2011), <https://abcnews.go.com/US/zanesville-animal-massacre-included-18-rare-bengal-tigers/story?id=14767017>.

82. Chris Heath, *18 Tigers, 17 Lions, 8 Bears, 3 Cougars, 2 Wolves 1 Baboon, 1 Macaque, and 1 Man Dead in Ohio*, GQ (Feb. 6, 2012), <https://www.gq.com/story/terry-thompson-ohio-zoo-massacre-chris-heath-gq-february-2012>.

83. *Id.*

animal's lack of veterinarian care and horrific living conditions.<sup>84</sup> It took authorities and zoologists all night to account for each of Thompson's animals.<sup>85</sup> In all, authorities slaughtered 49 animals and managed to rescue six: three leopards (still in their cages), two macaques, and a small grizzly bear (kept in a small bird cage).<sup>86</sup>

The Sheriff's office had cited Thompson's property as a huge problem in the past for law enforcement.<sup>87</sup> Past violations resulted in an Alcohol, Tobacco, and Firearms (ATF) raid and one year of jail time for Thompson.<sup>88</sup> The Zanesville Massacre sparked Ohio legislators to review their exotic animal laws.<sup>89</sup> At the time, Ohio had exotic animal laws analogous to Wisconsin's—there were few to none.<sup>90</sup> The only control in place was that to breed, exhibit, or commercially transport animals across state lines, owners needed a USDA license requiring facility inspection.<sup>91</sup> Otherwise, there were no further special checks or controls, which made Ohio the state with one of the most lenient exotic pet laws in the country.<sup>92</sup>

In the wake of the Zanesville Massacre, lawmakers passed (and Governor John Kasich signed into law on June 5, 2012) the Dangerous Wild Animal Act (DWA) despite widespread opposition.<sup>93</sup> The law bans new ownership of dangerous and wild animals but grandparented in current exotic pet owners.<sup>94</sup> Grandparented pet owners must: (1) register with the state; (2) obtain permits; (3) obtain liability insurance; (4) comply with housing and safety standards; and (5) pass a criminal background check.<sup>95</sup> Owners had to obtain a permit by October 1, 2013, to keep their animals past January 1, 2014, when the law went into full enforcement.<sup>96</sup>

The Ohio Department of Agriculture (ODA) oversees the law's enforcement.<sup>97</sup> ODA seized 122 exotic animals in the first three years that

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84. *Id.* (Herpes B is not dangerous to monkeys, but it is extremely dangerous to humans and can lead to deadly brain infections).

85. *Id.*

86. *Id.*

87. *Id.*

88. Caron, *supra* note 81.

89. Heath, *supra* note 82.

90. *Id.*

91. *Id.*

92. 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 VILL. ENV'T L.J. 125, 140 (2013).

93. *Id.* at 141.

94. *Id.*

95. *Id.*

96. Sheila McLaughlin, *Hundreds of Exotic Animals Registered in Ohio*, THE CINCINNATI ENQUIRER (Nov. 23, 2012), <https://www.usatoday.com/story/news/nation/2012/11/23/exotic-animals-registered-in-ohio/1723753/>.

97. *Dangerous Wild Animals*, OHIO DEP'T OF AGR. (Apr. 10, 2018), <https://agri.ohio.gov/wps/portal/gov/oda/divisions/animal-health/resources/dangerous-wild-animals>.

the law was in full effect.<sup>98</sup> Various exotic pet owners filed a lawsuit against the ODA in 2012 stating that the DWA was unconstitutional.<sup>99</sup> Plaintiffs' cited First Amendment, Fourteenth Amendment Due Process, and Fifth Amendment Takings Clause violations.<sup>100</sup> The United States District Court for the Southern District of Ohio held that the DWA did not violate plaintiffs' First, Fourteenth, and Fifth Amendment rights, and stated that the owners were not likely to succeed on the merits for any of their claims.<sup>101</sup> The plaintiffs appealed the First Amendment claim, and the district court's holding that the DWA's microchipping requirement constituted a Fifth Amendment Taking.<sup>102</sup> The Sixth Circuit disagreed and affirmed the lower court's decision.<sup>103</sup>

The Sixth Circuit is not alone in its ruling. Other states and the circuit courts are known to uphold dangerous animal laws and ordinances against pet owners.<sup>104</sup> Broadly, these courts held that the states have a legitimate interest in distinguishing between dangerous exotic animals and other animals based "on a rational basis review to justify the disparate treatment between these classes of pet owners."<sup>105</sup> Strict exotic animal laws serve a legitimate purpose when courts uphold them. A nationwide reform could provide a solution for states like Wisconsin that do not have adequate exotic pet laws.

### *C. Recommendation and Solution*

Because the state-by-state approach to curb exotic pet ownership is slow or nonexistent in some states, Congress should amend the Act back to its original intent which was whitelist approach. Additionally, Congress should take reform one step further to include "potentially dangerous or aggressive wildlife" language to its injurious definition. The "potentially dangerous or aggressive wildlife" portion would add an extra layer of protection for wildlife that may not meet the FWS's criteria for injurious and invasive. The

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98. *Id.*

99. *Wilkins v. Daniels*, 913 F. Supp. 2d 517, 532 (S.D. Ohio 2012), *aff'd*, 744 F.3d 409 (6th Cir. 2014).

100. *Id.*

101. *Id.*

102. *Wilkins v. Daniels*, 744 F.3d 409, 411 (6th Cir. 2014) (explaining that the Act required owners microchip their animals upon registration. Petitioners argued the microchipping requirement constituted a physical taking without compensation violating the Takings Clause of the Fifth Amendment.)

103. *Id.*

104. *Lucca*, *supra* note 92, at 144.

105. *Id.*

proposed definition could model that of Ohio's Dangerous Wild Animal Law.<sup>106</sup>

The law states that a "dangerous wild animal" means any of the following, including hybrids and a detailed list of restricted snakes, unless otherwise specified:

- (1) Hyenas; (2) Gray wolves, excluding hybrids; (3) Lions; (4) Tigers; (5) Jaguars; (6) Leopards, including clouded leopards, Sunda clouded leopards, and snow leopards; (7) All of the following, including hybrids with domestic cats unless otherwise specified: (a) Cheetahs; (b) Lynxes, including Canadian lynxes, Eurasian lynxes, and Iberian lynxes; (c) Cougars, also known as pumas or mountain lions; (d) Caracals; (e) Servals, excluding hybrids with domestic cats commonly known as savannah cats; (8) Bears; (9) Elephants; (10) Rhinoceroses; (11) Hippopotamuses; (12) Cape buffaloes; (13) African wild dogs; (14) Komodo dragons; (15) Alligators; (16) Crocodiles; (17) Caimans, excluding dwarf caimans; (18) Gharials; (19) Nonhuman primates other than lemurs and the nonhuman primates specified in division (C)(20) of Ohio Revised Code 935; (20) All of the following nonhuman primates: (a) Golden lion, black-faced lion, golden-rumped lion, cotton-top, emperor, saddlebacked, black-mantled, and Geoffroy's tamarins; (b) Southern and northern night monkeys; (c) Dusky titi and masked titi monkeys; (d) Muriquis; (e) Goeldi's monkeys; (f) White-faced, black-bearded, white-nose bearded, and monk sakis; (g) Bald and black uakaris; (h) Black-handed, white-bellied, brown-headed, and black spider monkeys; (i) Common woolly monkeys; (j) Red, black, and mantled howler monkeys.<sup>107</sup>

Ohio's DWA prohibits owning, trading, selling, or offering for sale a dangerous wild animal without a permit unless protected by the grandparent clause.<sup>108</sup> The DWA requires that owners (1) register with the state and (2) apply for a permit.<sup>109</sup> The DWA does not require a permit for certain organizations such as: (1) an accredited AZA facility; (2) an accredited Zoological Association of America facility; (3) wildlife sanctuaries, and; (4) eight other types of organizations.<sup>110</sup>

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106. OHIO REV. CODE ANN. § 935.01 (2012).

107. *Id.*

108. *Dangerous Wild Animals*, OHIO DEP'T OF AGRI, *supra* note 97.

109. *Id.*

110. *Id.*



When the DWA went into full effect (January 1, 2014), the ODA had registration applications from 150 private exotic animal owners, and a number of zoos registered 888 animals.<sup>111</sup> The owners then had to apply for a permit from the state per DWA regulation.<sup>112</sup> By the 2014 deadline, the ODA had only five complete and 25 incomplete permit applications for the exotic pets, which meant about 90% of private owners lacked a permit.<sup>113</sup> The state approved 53 permit requests less than six months later.<sup>114</sup> That still left out countless pet owners.<sup>115</sup>

The ODA said it saw a huge shift of exotic pet owners giving up their animals to sanctuaries and new homes out-of-state.<sup>116</sup> For example, a 45-year-old chimpanzee “who had spent most of his life locked in a cage in a Dayton garage went to [the] Center for Great Apes, an accredited sanctuary in Florida. When he first arrived, he could barely walk, but now Clyde has largely regained his health and even has a girlfriend.”<sup>117</sup> Other notorious Ohio exotic pet owners sent their bears and big cats to accredited agencies in other states.<sup>118</sup> The state worries about—and has no way to track—owners who may relocate their animals to unaccredited facilities or private owners in other states.<sup>119</sup> Overall, the state has seen a decrease in exotic pet breeding and ownership.<sup>120</sup>

The federal government should apply the same measures in the DWA to the Lacey Act to create comprehensive wildlife protection nationwide. The strict standards of the DWA protects animals from cruel and unsanitary conditions and allows the animals to live in sanctuaries where organizations properly care for and manage the animals.<sup>121</sup> Applying the dangerous wild animal language to the Act expands the scope beyond *injurious* and protects noninvasive species. The added language provides the animals with an extra layer of protection and helps the Act get back to its original intent.

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111. Catherine Becker, *Ohio's Dangerous Wild Animal Act of 2012: Enactment, Implementation and Evaluation* (Dec. 9, 2014) (Ph.D. dissertation, Ohio State U.) at 19, <https://cpbusw2.wpmucdn.com/u.osu.edu/dist/9/5049/files/2015/01/6000-Final-Paper-Becker-lj7ufe9.pdf>.

112. *Id.*

113. *Id.*

114. *Id.* at 20.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 21.

## III. FEDERAL FUNCTION AND STATE FAILURE

*A. The Lacey Act's Federal Application*

This section goes beyond the scope of the Act's history and looks at conduct prohibited by the Act and its application in lawsuits. First, the Act requires accurately marking wildlife shipments.<sup>122</sup> Section 3372(b) prohibits the import, export, or transport in interstate commerce of any container of wildlife or fish that is not plainly marked, labeled, or tagged as required by the applicable regulations.<sup>123</sup> Next, preparing false documentation for shipments of wildlife, fish, or plants violates the Act and comes with a misdemeanor or felony penalty.<sup>124</sup> The difference between a misdemeanor or felony penalty depends on if the violator knowingly created false documentation and the market value exceeds \$350.<sup>125</sup> While there is some litigation about this section, it is not the main provision officials use to prosecute individuals.<sup>126</sup>

The main provision officials use for prosecution are sections 3372(a)(1) and (a)(2).<sup>127</sup> These sections outline and refer to the unlawful (1) import, export, transport, selling, receiving, acquiring, or purchasing of (2) wildlife, fish, or plants that have been taken, possessed, transported, or sold in violation of a (3) state, federal, foreign, or tribal law or regulation.<sup>128</sup> The Act analyzes trafficking violations with these questions:

1. Is the wildlife, fish, or plant at issue covered by the Lacey Act?
2. If so, can the government prove that the wildlife, fish, or plant was taken, possessed, transported, or sold in violation of a wildlife-related state, federal, tribal, or foreign law or regulation?
3. If so, can the government prove that the defendant imported, exported, transported, received, acquired, or purchased the illegal wildlife, fish, or plant, or attempted to do so?
4. If the underlying law was a state or foreign law, did the accused import, export, transport, receive, acquire, or purchase the wildlife, fish, or plant in interstate or foreign commerce?

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122. 16 U.S.C. § 3372(b).

123. *Id.*

124. Anderson, *supra* note 19, at 53.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

5. If so, are the additional elements necessary for proof of a misdemeanor or felony violation present, such as commercial conduct, market value, and knowledge of the wildlife's illegality?<sup>129</sup>

The following cases provide just a few examples of how the Act works to protect wildlife, and the power of its criminal prosecutions. In July 2020, the United States District Court for the Western District of Louisiana upheld Kaenon Constantin's conviction under the Lacey Act's §§3372(a)(1) and 3373(d)(2).<sup>130</sup>

Constantin, along with a juvenile, shot two whooping cranes—a protected species—in May of 2016.<sup>131</sup> Constantin only found the body of one whooping crane and immediately transported it to the juvenile's house where they severed its legs and removed a tracking transponder.<sup>132</sup> Constantin pled guilty that knew or should have known that he took and possessed the wildlife unlawfully.<sup>133</sup> The lower court sentenced Constantin to “a fine of \$10,000 and special assessment of \$25, due immediately, the payment of restitution in the amount of \$75,000, payable over a 60-month period of probation, and conditions of probation including 360 hours of community service approved by the LDWF, and a prohibition against hunting during that period.”<sup>134</sup> The fine is so high because the International Crane Foundation estimates it costs \$94,000 to raise, release, and monitor the protected whooping crane.<sup>135</sup>

Louisiana—a state traditionally favored by bird poachers—has more prosecutions than any other state in the last five years for illegally killing or possessing a migratory bird.<sup>136</sup> Louisiana's shift to a pro-prosecution state largely has to do with an uptick in government convictions.<sup>137</sup> The shift effectively proves that when the government takes serious action against illegal wildlife trafficking, it sends a message to poachers and traffickers that the government will convict them for their actions. The government's full enforcement allows the Act to do what Congress intended almost 120 years ago—to stop illegal poaching and trafficking to protect wildlife.

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129. *Id.*

130. *United States v. Constantin*, No. 6:19-CR-00345-01, 2020 WL 5807519, at \*1 (W.D. La. Sept. 29, 2020).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. Sara Sneath, *Poachers Threaten Louisiana's Mostly Successful Whooping Crane Reintroduction Program*, NOLA (Sept. 6, 2020), [https://www.nola.com/news/courts/article\\_2354dde4-ee4f-11ea-aff0-eb82f52359ab.html](https://www.nola.com/news/courts/article_2354dde4-ee4f-11ea-aff0-eb82f52359ab.html).

136. *Id.*

137. *Id.*

The Environmental Crimes Division of the United States' Department of Justice uses the Act to protect wildlife.<sup>138</sup> It also prosecutes individuals and organizations involved in illegal wildlife trafficking.<sup>139</sup> For example, Robert MacInnes and Robert Keszey co-owned a reptile dealership in Florida that was well-known because of a Discovery Channel TV show.<sup>140</sup> The owners illegally collected wild timber rattlesnakes and transported the snakes from Florida to Pennsylvania and New York over the course of two years.<sup>141</sup> The owners even arranged for some of the snakes to go to an exotic pet auction in Europe.<sup>142</sup> The United States caught the owners and charged them with violations of the Lacey Act.<sup>143</sup> The government successfully proved the Lacey Act violations, among other charges, at trial.<sup>144</sup> The court sentenced MacInnes to 18 months of incarceration and a \$4,000 fine and sentenced Keszey to 12 months of incarceration and a \$2,000 fine.<sup>145</sup> The Third Circuit denied the owners' motion for a new trial and upheld their convictions.<sup>146</sup> This recent case is a primary example of how wildlife in the United States ends up in the exotic pet trade, but there are other case examples of people facing Lacey Act violations.

The United States convicted Christopher Loncarich in violation of the Lacey Act because he illegally captured and maimed mountain lions and bobcats even though they were not kept as exotic pets.<sup>147</sup> Over the course of three years, Loncarich guided hunts for mountain lions and bobcats across the Book Cliffs Mountains along the Colorado-Utah border.<sup>148</sup> Loncarich trapped the cats in cages prior to hunts and would shoot them in the paws, legs, or place leghold traps to keep them from moving too much.<sup>149</sup> Loncarich would then release the cats when a hunter was nearby, so that the hunter had a better chance for the kill.<sup>150</sup> Loncarich pled guilty to Lacey Act conspiracy charges, and the court sentenced him to 27 months incarceration.<sup>151</sup>

These cases provide just a few examples that the Act works when prosecutors use its full force. The Obama administration recognized that it is

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138. *Id.*

138. *Environment and Natural Resources Division*, DEP'T OF JUST., <https://www.justice.gov/enrd/prosecution-federal-wildlife-crimes> (last visited Nov. 29, 2020) [hereinafter *ENRD*, DEP'T OF JUST.].

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *United States v. Keszey*, 643 F. App'x 153, 155 (3d Cir. 2016).

147. *ENRD*, DEP'T OF JUST, *supra* note 138.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

in the United States' best interest to combat the ever-escalating international wildlife trafficking crisis by taking a "whole-of-government" approach to curb the threat.<sup>152</sup> The approach aimed to "both strengthen anti-trafficking efforts already underway in ENRD and other federal agencies and elevate illegal wildlife trafficking as a priority for additional agencies whose missions include law enforcement, trade regulation, national security, international relations, and global development."<sup>153</sup> While the whole-of-government approach was meant to be effective, it is subject to differing presidential administration priorities and directives. Amending the Act to include protections for animals outside the scope of the injurious wildlife standard creates concrete protections for these animals that can withstand administration change.

*B. Wisconsin's Failure to Protect Exotic Pets*

Wisconsin is one of five states with virtually no wild or exotic animal laws.<sup>154</sup> The state sets loose guidelines for obtaining a license and primarily relies on the AWA and USDA for inspection and enforcement. Wisconsin statutes outline two requirements for wildlife possession but has a lengthy list of exemptions where a license is not needed.<sup>155</sup> The following subsections explain when owners do not need a license.<sup>156</sup>

The Wisconsin Department of Agriculture, Trade and Consumer Protection is the agency responsible for regulating the imports and exports of exotic animals, including exotic pets.<sup>157</sup> The state requires a certificate of veterinary inspection (CVI) for importing exotic species.<sup>158</sup> While Wisconsin requires a CVI, the state does not require vaccinations and official individual identification for exotic pets.<sup>159</sup> For moving exotic animals within the state and exporting them Wisconsin "does not have specific requirements for

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152. *Id.*

153. *Id.*

154. *Wisconsin One of Five States Where 'Dangerous' Exotic Animals can be Pets*, WIS. CTR. FOR INVESTIGATIVE JOURNALISM, *supra* note 4.

155. WIS. STAT. § 169.04(1)(a) (2001); *See* WIS. STAT. § 169.04(1)(b) (2001) (defining restrictions on possession of live wild animals in the state's Captive Wildlife chapter); *See also* WIS. STAT. § 169.04(4) (2001) (listing exemptions for certain wildlife); *See also* WIS. STAT. § 169.04(5) (2001) (providing general exceptions to persons and institutions).

156. *Id.*

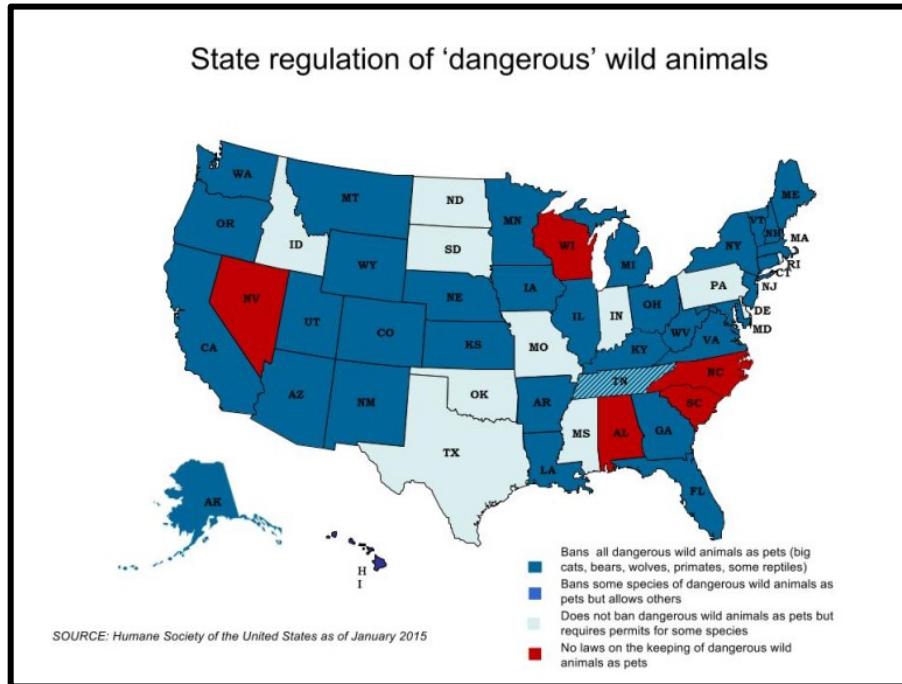
157. *Exotic Species Movement*, DEP'T OF AGRIC., TRADE AND CONSUMER PROT., [https://datcp.wi.gov/Pages/Programs\\_Services/ExoticSpeciesMvmt.aspx](https://datcp.wi.gov/Pages/Programs_Services/ExoticSpeciesMvmt.aspx) (last visited Nov. 3, 2020).

158. *Id.*

159. *Id.*

moving exotic animals [in the state] [and] does not have specific export requirement for exotic animals.”<sup>160</sup>

**Figure 2: State Regulation of ‘Dangerous’ Wild Animals**<sup>161</sup>



Comparatively, Wisconsin State Statute Chapter 174 is entirely about dogs.<sup>162</sup> Chapter 174.02 outlines the owner’s liability for damage caused by a dog.<sup>163</sup> In some cases, a court may even issue a kill order for the dog.<sup>164</sup> Wisconsin statute draws a stark contrast between the details and laws for dog ownership compared to exotic animals.

In 2015, State Senator Van Wanggard introduced a bipartisan bill to the Wisconsin State Legislature that would ban the ownership, breeding, and sale of dangerous exotic animals “including nonnative big cats, nonnative bears,

160. *Id.* (demonstrating the DATCP’s administrative code ATCP 10.06 and others in the chapter on animal diseases and movement).

161. *Id.*

162. WIS. STAT. § 174 (2011).

163. *Id.*

164. *Id.*

apes, and crocodilians.”<sup>165</sup> The bill required insurance and care regulations similar to Ohio’s law.<sup>166</sup> It also grandparented in current pet owners and provided financial penalties for owners whose animal attacked someone or caused property damage.<sup>167</sup> While many organizations supported the bill, others said it did not go far enough to protect popular exotic pet species.<sup>168</sup> The Zoological Association of America (ZAA) opposed the bill because it said that there were no important differences in the bill’s language regarding animal welfare and public safety concerns.<sup>169</sup> The ZAA also cited the lengthy exemption list of permitted exotic pets and stressed that the bill’s current form will not likely achieve what lawmakers intend. Figure three below illustrates what species the law would outright ban and not ban.<sup>170</sup>

**Figure 3: Species Banned or Not Banned in Senate Bill 241**<sup>171</sup>



165. *Limits to Exotic Pets in Wisconsin Loom, but Critics Cite Several Loopholes*, WIS. WATCH (Oct. 15, 2015), <https://www.wisconsinwatch.org/2015/10/limits-to-exotic-pets-in-wisconsin-loom-but-critics-cite-several-loopholes/>.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. Haley Henschel, Illustration of potentially banned or not banned exotic animals in the Wis. Senate Bill 241, in Wisconsin Center for Investigative Journalism.

As the list indicates, people could still keep animals like kangaroos, baboons, and zebras as exotic pets. Nevertheless, this bill never made it out of committee, and the Wisconsin Legislature has not returned to it.<sup>172</sup>

#### IV. CONSTITUTIONAL CONCERNS AND CURRENT INEFFICIENCY

##### *A. Addressing Concerns*

##### 1. Potential Commerce Clause and State Constitutional Concerns

Congressman Lacey considered Commerce Clause implications of the Act at its inception.<sup>173</sup> He stated on the House floor that the Act's intent was not to be a "national game law, which, I think, would be unconstitutional."<sup>174</sup> Rather, Congressman Lacey argued that the federal government had authority to "begin where the State authority ends."<sup>175</sup> Congress actually used the Commerce Clause to its benefit by regulating in the Act that all interstate shipments of wildlife must be clearly marked and labeled.<sup>176</sup> The Act also circumvented Commerce Clause concerns by removing "federal restrictions on the states' ability to regulate the sale of wildlife within [its] borders by subjecting all game animals and birds entering a state to the state's laws."<sup>177</sup> The Act modeled language from a federal statute that allowed dry states to regulate liquor sales passing through their jurisdictions.<sup>178</sup>

The Commerce Clause plays a prominent role over federal wildlife laws.<sup>179</sup> For example, the ESA is constitutionally justified in its exercise of commerce power because the federal government may use its powers to deal with multistate transport issues.<sup>180</sup> Adding the "potentially dangerous or aggressive wildlife" language to the injurious wildlife standard would not frustrate the Commerce Clause. The new language simply expands the scope of protected animals and leaves the marking requirement.<sup>181</sup> Consequently, owners could transport and move exotic pets throughout the United States.

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172. S.B. 241, 2015 Leg. (Wis. 2015.), <https://docs.legis.wisconsin.gov/2015/related/proposals/sb24>.

173. Anderson, *supra* note 19, at 40.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. David Favre, *American Wildlife Law – An Introduction*, ANIMAL LEGAL & HIST. CTR. (2003), <https://www.animallaw.info/article/american-wildlife-law-introduction>.

180. *Id.*

181. 16 U.S.C. § 3372(b) prohibits the import, export, or transport in interstate commerce of any container of wildlife or fish not plainly marked, labeled, or tagged as required by the applicable regulations.



They would just be subject to a strict regulatory process. To allow otherwise continues the hodge-podge approach to exotic wildlife and pet regulation.

Similarly, the proposed amendment does not interfere with state law concerns. The Act's disclaimer provision does "not repeal, modify, or supersede . . . nor change state or tribal power to regulate the activities of persons on Indian reservations."<sup>182</sup> The proposed amendment merely supplements state wildlife laws and does not seek to overturn or frustrate any current state laws. Again, Congress designed the Act to supplement inadequate state law, and the proposed amendment adds to that supplementation. The Ninth Circuit held that "[T]he Act must be applied to conduct that is also regulated by an existing treaty, state or federal law, regulation or tribal law. The grand purpose of fish, wildlife, and plant protection by the federal government would be severely dissipated by an exaggerated reading of the disclaimer provision."<sup>183</sup> It is in the federal government's interest to protect wildlife, and the Act can live in harmony with state and tribal laws. The proposed amendment will not disrupt that harmony.

## 2. The Species-by-species Approach is Ineffective

The U.S. House of Representatives passed "The Big Cat Public Safety Act" (H.R. 1380) on Thursday, December 3, 2020.<sup>184</sup> The Big Cat Public Safety Act amends the Captive Wildlife Safety Act "to prohibit the private possession of lions, tigers, leopards, cheetahs, jaguars, cougars, or any hybrid of these species" by individuals who are not licensed by the U.S. Department of Agriculture.<sup>185</sup> The Captive Wildlife Safety Act's (CWSA) title is misleading in the sense that it does not apply to all captive wildlife and only applies to "big cats."<sup>186</sup> The CWSA amended the Lacey Act to make it illegal to import, export, buy, sell, transport, receive, or acquire certain big cats, but the CWSA did not place restrictions on various potential owners. The Big Cat Public Safety Act also ends roadside zoos from offering cub petting and photo-ops because its other goal is to restrict direct contact between the public and big cats for both human and the cat's protection.<sup>187</sup> The bill includes exemptions for sanctuaries, universities, and accredited zoos.<sup>188</sup> It

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182. Anderson, *supra* note 19, at 62.

183. *Id.* (citing *United States v. Sohappy*, 770 F.2d 816, 818-20 (9th Cir. 1985), cert. denied, 477 U.S. 906 (1986)).

184. H.R. 1380, 116th Cong. (2020).

185. *Big Cat Public Safety Act*, ANIMAL WELFARE INST., <https://awionline.org/legislation/big-cat-public-safety-act> (last visited Dec. 2, 2020).

186. *Captive Wildlife Safety Act – What Big Cat Owners Need to Know*, U.S. FISH & WILDLIFE SERV. (Aug. 2007), <https://www.fws.gov/Le/pdf/CaptiveWildlifeSafetyActFactsheet.pdf>.

187. McPherson, *supra* note 170.

188. *Big Cat Public Safety Act*, *supra* note 184.

grandparents in current owners of big cats but requires them to register their animals with the government “to ensure that first responders and animal control officers are aware of the presence of such animals in their communities.”<sup>189</sup> The Senate received the bill and referred it to the Committee on Environment and Public Works.<sup>190</sup>

While the Big Cat Public Safety Act is a step in the right direction, a species-by-species approach is a slow and ineffective way to protect all dangerous or potentially dangerous wildlife in private captivity. It should not take a TV show or massacre like Zanesville to spur action from Congress to protect exotic pets. The CWSA and Big Cat Public Safety Act’s language models this article’s proposed amendment language to the Act, and Congress recognizes it is well within its purview to regulate big cats. The solution is a sweeping and universal proposal to protect all wildlife in the exotic pet trade. Amending the Lacey Act with the proposed new language is the most effective method for protecting these exotic pets.

#### CONCLUSION

The Lacey Act provides the most robust consequences for violators of the wildlife trade and its nexus to exotic pet ownership. But as the Act currently stands, it fails to yield strong enough language to protect vulnerable animals that may not meet the injurious wildlife standard. Amending the injurious wildlife standard to include “injurious wildlife or potentially dangerous or aggressive wildlife” using Ohio’s model could expand the Lacey Act to protect animals in the exotic pet trade. Amending the Act to allow for federal exotic animal and ownership regulation within the states provides the most robust protections for the most vulnerable animals in the exotic pet industry. Congress is already attempting to protect exotic pets, but the species-by-species approach is slow and ineffective. A sweeping amendment by Congress would put states like Wisconsin on notice that the federal government will not tolerate private exotic pet ownership with relaxed laws. Without the amendment, the world will continue to see environmental degradation, exotic pet attacks, and increased zoonotic diseases. Change must happen now.

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189. *Id.*

190. H.R. 1380, 116th Cong. (2020).

# UNSEEN ABUSE: ELEVATING ANIMALS' STATUS AS VICTIMS UNDER THE LAW TO EFFECTIVELY RESCUE PET VICTIMS OF MUNCHAUSEN SYNDROME BY PROXY

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## INTRODUCTION

In pop culture, sensationalized stories of Munchausen Syndrome by Proxy (MSBP) abuse cases have captivated audiences.<sup>1</sup> This nuanced abuse phenomenon has also perplexed academia since its first recognition in 1977.<sup>2</sup> While most known MSBP cases involve caregivers fabricating—or inducing—symptoms in their children to get sympathy and attention, MSBP cases involving pet victims have surfaced in recent years. This area of abuse

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1. Sarah Kim, *The Performances In Hulu's 'The Act' Are Award-Winning, But The Show Itself Is Largely Problematic*, FORBES (Sep 23, 2019), <https://www.forbes.com/sites/sarahkim/2019/09/23/the-act-hulu-disability-representation/?sh=46710b6d659> (providing that the story of Gypsy Rose Blanchard, as portrayed in *The Act* (2019), gained nationwide popularity and won Patricia Arquette an Emmy award for her portrayal of the abuse perpetrator Dee Dee Blanchard).

2. Roy Meadow, *Munchausen Syndrome by Proxy: The Hinterland of Child Abuse*, 310 LANCET 343, 345 (1977).

is both under-studied and under-documented.<sup>3</sup> But as it gains more attention, scholars anticipate that more animal victim cases will be identified.<sup>4</sup> Law and policy must concurrently evolve to best provide relief for animals suffering under their owners' "care."

Unlike child MSBP victims, the law considers animals as property.<sup>5</sup> Their legal status as property results in an incoherence with laws which aim to protect animals and prevent animals victims.<sup>6</sup> Due to this complicated reality, this paper suggests two interventions which will prioritize animals as victims and provide the best opportunity to rescue them. First, enact laws that grant veterinarians the authority to confiscate animals that they suspect are victims of abuse. This intervention subordinates animals' status as property to rescue abuse victims before it is too late. Second, provide for swift civil dispositional hearings regarding the animal's ownership based on their owner's fitness. Such hearings will give pet MSBP victims the best opportunity to be separated from abusive owners. With quick hearings that can terminate ownership, these victims can recover and be adopted out to new, loving homes.

Part I of this paper provides a brief background on MSBP. Part II discusses documented MSBP cases with pet victims, highlighting the need for intervention. Part III discusses the two interventions that provide the best opportunity to rescue pet MSBP victims: (1) granting veterinarians the authority to confiscate suspected abused animals and (2) implementing swift civil dispositional hearings.

## I. WHAT IS MUNCHAUSEN SYNDROME BY PROXY?

Munchausen Syndrome by Proxy (MSBP), also called medical child abuse,<sup>7</sup> is a unique and baffling form of abuse. MSBP occurs when a caretaker falsifies—or even causes—a child's illness or injury and then seeks out medical treatment.<sup>8</sup> The caretaker often denies knowing the source or

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3. See James A. Oxley & Marc D. Feldman, *Complexities of Maltreatment: Munchausen by Proxy and Animals*, 21 *Companion Animal* 586, 588 (2016) (explaining case research has been mostly limited to mostly individual case studies).

4. *Id.*

5. Katie Galanes, *The Contradiction: Animal Abuse—Alive and Well*, 44 *J. MARSHALL L. REV.* 209, 209–210 (2010).

6. See generally Taimie L. Bryant, *Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of Animals as Property, and the Presumed Primacy of Humans*, 39 *RUTGERS L. J.* 247, 252 (2008).

7. Oxley & Feldman, *supra* note 3, at 586.

8. Meadow, *supra* note 2, at 343.

cause of the illness.<sup>9</sup> Generally, the child's symptoms or illnesses disappear when the child is separated from their caretaker.<sup>10</sup>

MSBP can manifest in three distinct ways: outright falsification of medical injuries or illnesses; the tampering of medical records or test results, and; the physical inducement of injuries or illnesses in a child.<sup>11</sup> These avenues of abuse have also been documented to manifest in pet victims.<sup>12</sup> It is thought that mothers or caretakers engage in this behavior to find a sense of purpose, for example, to feel fulfilled as a mother in taking care of their child.<sup>13</sup> These caretakers have extensive medical knowledge and cooperate happily with medical staff and doctors.<sup>14</sup> They thrive in the hospital environment.<sup>15</sup>

MSBP can be difficult to identify and diagnose.<sup>16</sup> A particular nuance of these cases is that these caretakers, who fabricate—or induce—illnesses in their children, are suffering from a mental illness themselves.<sup>17</sup> MSBP is treated as a rare occurrence, with the most sensationalized and unusual cases getting widespread attention.<sup>18</sup> The general belief is that MSBP rarely occurs.<sup>19</sup> This belief overshadows the data indicating that this syndrome is more prevalent than perceived, which leads to cases slipping through the cracks and remaining unidentified.<sup>20</sup> Unfortunately, as cases remain unidentified, child victims stay in abusive situations that can ultimately lead to their deaths.<sup>21</sup>

## II. MUNCHAUSEN SYNDROME BY PROXY MANIFESTING IN PET VICTIMS

For the reason that young children present as ideal victims, pets are also perfect victims for MSBP abuse. Young children do not understand what is happening to them, whether the caretaker is lying about the child's illness or

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9. Donna A. Rosenberg, *Web of Deceit: A Literature Review of Munchausen Syndrome by Proxy*, 11 CHILD ABUSE & NEGLECT, 547, 549 (1987).

10. *Id.*

11. Christopher Bools, Brenda Neale & Roy Meadow, *Munchausen Syndrome by Proxy: A Study of Psychopathology*, 18 CHILD ABUSE & NEGLECT 773, 773 (1994); H.M.C. Munro & M.V. Thrusfield, 'Battered Pets: Munchausen Syndrome by Proxy (Factitious Illness by Proxy)', 42 J. SMALL ANIMAL PRAC. 385, 386 (2001).

12. Munro & Thrusfield, *supra* note 11, at 386.

13. Rosenberg, *supra* note 9, at 548.

14. Michael T. Flannery, *Munchausen Syndrome by Proxy: Broadening the Scope of Child Abuse*, 28 U. RICH. L. REV. 1187, 1190 (1994).

15. *Id.*

16. *See id.* at 1182 (explaining that cases of MSBP are often unreported because people working in hospitals and court rooms do not recognize it).

17. Bools et al., *supra* note 11, at 783.

18. Flannery, *supra* note 14, at 1188.

19. *Id.*

20. *Id.*

21. Oxley & Feldman, *supra* note 3, at 588.

inducing it themselves.<sup>22</sup> Young child victims also cannot verbalize what is happening to them—just as pets cannot.<sup>23</sup> Additionally, pets, like young children, are wholly dependent on their caregivers.<sup>24</sup>

Over the past 25 years, pet MSBP-victim cases have begun to surface.<sup>25</sup> The first veterinary research study of this victimization was conducted by H.M.C. Munro and M.V. Thrusfield through the Royal School of Veterinary Studies at the University of Edinburgh, and was published in the *Journal of Small Animal Practice* in 2001.<sup>26</sup> This study identified that out of 448 cases of non-accidental injury in animals reported by 1,000 randomly selected veterinary surgeons in the United Kingdom, six cases were described as MSBP cases.<sup>27</sup> Three possible MSBP cases were also identified.<sup>28</sup> These cases involved mostly dogs and cats, but one case involved eight to twelve different pets of unidentified species.<sup>29</sup> In three of the cases, the animals died at the hands of their owners, while in two cases, the animals were euthanized due to their injuries.<sup>30</sup>

The veterinarians reporting these cases documented several clinical factors of MSBP.<sup>31</sup> They noted that some owners exhibited attention-seeking behavior, such as repeated requests for their animals' treatment.<sup>32</sup> In some cases, the pets recovered from their illnesses or injuries following separation from their owners.<sup>33</sup> One veterinarian suspected that an owner interfered with the treatment administered to the animal.<sup>34</sup> Another veterinarian documented that an owner engaged in *vet shopping*, which is similar to *doctor shopping* (frequently changing providers, an established feature for child MSBP victims).<sup>35</sup> In one animal's case, the veterinarian noted a series of incidents over several years.<sup>36</sup> In another case, the owner's pets died in suspicious and

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22. Flannery, *supra* note 14, at 1199.

23. *See id.* (explaining that young children, like animals, suffer abuse in silence).

24. James A. Oxley & Marc D. Feldman, *More Research Needed for Munchausen by Proxy and Pets*, 248 J. AM. VETERINARY MED. ASS'N., 1229, 1229 (2016).

25. Marc D. Feldman: *Canine Variant of Factitious Disorder by Proxy*, 154 AM. J. PSYCHIATRY 1316, 1316 (1997) [hereinafter "*Canine Variant*"] ("A 1995 survey of veterinarians suggested that household pets may become the surrogates used by individuals who seek engagement with health care practitioners.").

26. H.S. Tucker, F. Finlay & S. Guiton, *Munchausen Syndrome Involving Pets by Proxies*, 87 ARCHIVES OF DISEASE IN CHILDHOOD 263, 263 (2002).

27. Munro & Thrusfield, *supra* note 11, at 386.

28. *Id.* at 387.

29. *Id.*: Hal Herzog, *Hurting Pets to Get Attention and Drugs: A Growing Problem*, PSYCH. TODAY (Aug. 20, 2018), <https://www.psychologytoday.com/us/blog/animals-and-us/201808/hurting-pets-get-attention-and-drugs-growing-problem>.

30. Munro & Thrusfield, *supra* note 11, at 387.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 388–89.

36. *Id.* at 387.

unexplained circumstances.<sup>37</sup> One veterinarian noted that the animal seemed to fear their owner.<sup>38</sup> Another pet victim was only recognized because the owner was prosecuted and convicted for attempting to poison their child.<sup>39</sup>

Pet-MSBP-victim prevalence has not been studied in the U.S. as it has in the U.K., but there has been anecdotal documentation. Dr. Marc Feldman, from the University of Alabama, has written on this issue. Dr. Feldman described one case where an owner repeatedly brought their dog to the veterinarian, claiming it was suffering from a stomach disorder.<sup>40</sup> This owner eventually admitted that they were starving the animal to get attention and sympathy.<sup>41</sup> After a local breeder confiscated the dog, the dog regained its health and thrived.<sup>42</sup>

Further anecdotes regarding potential MSBP cases with pets as proxies pop-up on online message boards where veterinarians and concerned peoples share stories about suspected cases.<sup>43</sup> Some pet MSBP cases manifest on the internet, where perpetrators use social media to gain sympathy from others regarding the medical conditions of their pet.<sup>44</sup> These cases are known to scholars and researchers but have “not been addressed in the professional literature.”<sup>45</sup>

A mainstream U.K. news outlet featured a criminal case involving MSBP with a pet victim. In this 2013 case, veterinary nurse Georgiana Bretman was charged and convicted for “causing an animal unnecessary suffering” by deliberately poisoning her cocker spaniel, Flo, with insulin.<sup>46</sup> Bretman’s peers were suspicious of her attention-seeking behavior and the disappearance of Flo’s symptoms—collapsing, twitching, and vomiting—between her “episodes.”<sup>47</sup> The employer suspected that insulin was being administered to Flo as the test results following episodes showed low glucose levels.<sup>48</sup> When a court found Bretman guilty, it noted she “show[ed] no remorse” for what she did.<sup>49</sup> Although she was not sentenced to any jail time, she was required to perform 140 hours of unpaid work under a Community

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37. *Id.*

38. *Id.*

39. *Id.* at 386.

40. *Canine Variant*, *supra* note 25, at 1316.

41. *Id.* at 1317.

42. *Id.*

43. *Can Dogs Be Victims of Munchausen by Proxy?*, DOGSTER (Feb. 12, 2013), <https://www.dogster.com/lifestyle/dogs-victims-munchausen-by-proxy>.

44. Oxley & Feldman, *supra* note 24, at 587.

45. *Id.*

46. Ashlie McAnally, ‘Munchausen Syndrome by Pet Proxy’ Vet Nurse Spared Jail After Poisoning Her Own Dog, DAILY RECORD UK: NEWS: CRIME (Sept. 22, 2017), <https://www.dailyrecord.co.uk/news/crime/munchausen-syndrome-pet-proxy-vet-11219003>.

47. *Id.*

48. *Id.*

49. Georgina Bretman, ROYAL COLL. VETERINARY SURGEONS ¶ 30, at 10 (May 21, 2019).

Payback Order; she was disqualified from owning a dog for 2 years, and; she was suspended from her position as a veterinary nurse.<sup>50</sup> This was the first prosecution and conviction of a perpetrator for this kind of abuse in the U.K.<sup>51</sup> Flo was taken into possession by the Scottish Society for Prevention of Cruelty to Animals (SSPCA) to be re-homed.<sup>52</sup>

Overall, the incidence rate of MSBP with pet victims is unknown due to the almost complete lack of research on this particular form of animal abuse.<sup>53</sup> The existing research consists of individual case studies, such as the Feldman study and the Munro and Thrusfield study of U.K. vets, which involve only cats and dogs; although, a case of MSBP involving a horse has recently been documented.<sup>54</sup> This field of study requires additional research to shed light on the scope of this abuse. Pets, as dependent and voiceless beings, are perfect victims. Through further research, the scope of this issue can be defined, and mechanisms for identifying and reporting these cases can be improved. The lives of innocent animals can be saved. But, in order to rescue these victims, effective legal interventions must be implemented.

### III. HOW CAN LAW AND POLICY ADDRESS ISSUES OF MUNCHAUSEN SYNDROME BY PROXY WITH PET VICTIMS?

Although the research on MSBP abuse is limited, existing studies clearly show that there are identifiable cases of MSBP with pet victims. With additional research, the scope of this issue will widen, and it will become necessary to implement proper mechanisms to best rescue and care for animal victims.

Animals' status as property is a barrier to effective intervention when animals are also victims. This Part will explore two major interventions that elevate animals' victim status, superseding their status as property. The first is to allow veterinarians to confiscate animals they suspect are being abused. The second is to allow for swift civil dispositional hearings based on the owner's ability to adequately care for the animal.

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50. *Id.* ¶ 31.

51. *Id.*

52. *Id.* ¶ 9, at 5.

53. Oxley & Feldman, *supra* note 24, at 588.

54. *Id.*



*A. Implement Laws that Allow Vets to Confiscate Abused Animals*

Animals' status as property is a barrier to preventative rescue measures, resulting in a fundamental incoherence with the goals of animal abuse prevention laws. When an animal is a victim of MSBP, removing the animal from the dangerous home situation is the most immediate need; the animal is in constant danger under the "care" of its owner.<sup>55</sup> But because animals are considered property,<sup>56</sup> the Fourth Amendment poses a challenge to law enforcement officers seeking to rescue an abused animal. This property status creates a disconnect with laws meant to protect animals and prevent animal cruelty.<sup>57</sup> At the same time, animals are properties to be used and exploited under the law, and also victims of abuse under the law.<sup>58</sup> The property paradigm curbs meaningful actions to rescue abused animals and prevent further cruelty. The property status limits how law enforcement can intervene when an animal is abused. Generally, law enforcement agents require a warrant to seize an abused animal.<sup>59</sup> Law enforcement is often hesitant to seek warrants for animal cruelty cases, or even prosecute these cases, because it can be difficult to gather the necessary evidence to support a probable cause finding or to charge a suspect.<sup>60</sup> Sometimes, the seizure of an animal can fall under an exception to the warrant requirement, such as the emergency exception; but, for this exception to apply, an officer must have an "objectively reasonable basis" to believe that there is an "immediate need for police assistance for the protection of life."<sup>61</sup> This exception applies in cases where law enforcement is overwhelmed with evidence of abuse.<sup>62</sup>

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55. See generally Munro & Thrusfield, *supra* note 11, at 388 (discussing the nature of MSBP abuse between the affected animal and the owner).

56. See, e.g., Brooke J. Bearup, *Pets: Property and the Paradigm of Protection*, 4 J. ANIMAL L. 173 (2007) (explaining animals retain their legal status as property because many consider them 'lesser beings.'). Gary L. Francione & Anna E. Charlton, *Animal Advocacy in the 21<sup>st</sup> Century: The Abolition of the Property Status of Nonhumans*, in ANIMAL LAW AND THE COURTS 20 (Taimie L. Bryant et al. eds., 2008) (providing a rich discussion on law reinforces animals' property status).

57. Gary L. Francione, *Animals as Property*, 2 ANIMAL L. i, ii (1996) ("The status of animals as property has severely limited the type of legal protection that we extend to nonhumans.").

58. *Id.*; See *Commonwealth v. Duncan*, 467 Mass. 746, 751–55 (2014) (discussing a case where law enforcement exercised the emergency aid provision under the law and seized three severely emancipated dogs without a warrant. The case also describes other similar situations of animal abuse and court intervention.)

59. Bearup, *supra* note 57, at 182.

60. Joseph G. Sauder, *Enacting and Enforcing Felony Animal Cruelty Laws to Prevent Violence Against Humans*, 6 ANIMAL L. 1, 2, 7 (2000).

61. John F. Decker, *Emergency Circumstances, Police Responses, and Fourth Amendment Restrictions*, 89 J. CRIM. L. & CRIMINOLOGY 433, 457 (1999).

62. See *Duncan*, *supra* note 59 at 746 (2014) (providing where law enforcement seized dogs in a person's front yard that were tied up for days in extremely inclement winter weather; by the time officers stepped in, two of the three dogs already died).

But, in the context of an MSBP case, the evidence of abuse may be more nuanced.<sup>63</sup> When an owner is deliberately lying to veterinary staff and misrepresenting their animal's condition, it may not be apparent that the animal victim is in *immediate need* for police assistance.<sup>64</sup> Under the confines of the property paradigm, it can be very difficult for law enforcement to rescue animal victims in time.

However, if veterinarians are authorized to confiscate animals they believe are victims of abuse, the Fourth Amendment property status issue can be avoided. Under this protocol, a veterinarian, based on their documentation of the animal's health and wellbeing, would have the authority to take abused animals and refuse to return the animal to the suspected abusive owner. The animal would be under the custody of the veterinarian when it is handed over to a law enforcement officer—a voluntary relinquishment. The veterinarian would provide law enforcement with documentation of the animal's condition and suspected abuse to further circumvent any potential Fourth Amendment seizure issues. This information would be the basis for the probable cause necessary to support an emergency exception to the warrant requirement. And, it is likely that a case of MSBP would be an emergency situation. In the Munro and Thrusfield study, five of the nine cases ended in the death of the animals.<sup>65</sup> Additionally, it has been documented that in cases of MSBP with children, when the caregiver is faced with a diagnosis of MSBP, children sent home with these caregivers are subsequently killed.<sup>66</sup>

Pet victims of MSBP are in constant danger under the “care” of their owners. Public policy supports granting confiscation authority to minimize unnecessary cruelty, harm, or pain to animals.<sup>67</sup> Every state in the nation has a set of animal cruelty laws to combat cruelty, and each state also has a felony animal cruelty law.<sup>68</sup> These laws frame animal ownership as a privilege—not a right—which comes with obligations and affirmative duties.<sup>69</sup> When these duties are not upheld, then it logically follows that these privileges be

63. See Flannery, *supra* note 14, at 1210-11 (describing that judges and lawyers face difficult decisions the methods for obtaining the abuse evidence).

64. Phil Arkow, Coordinator, Nat'l Link Coal., *Presentation on Practical Guidance for the Effective Response by Veterinarians to Suspected Animal Cruelty, Abuse, and Neglect at the Veterinary Social Work Summit*, U. OF TEX. (Nov. 3, 2015) [hereinafter *Veterinary Social Work Summit*] (PowerPoint presentation slides available at <http://vetsocialwork.utk.edu/wp-content/uploads/2016/08/P.-Arkow-Pract.-Guidance.pdf>).

65. Munro & Thrusfield, *supra* note 11, at 386-87.

66. Rosenberg, *supra* note 9, at 554.

67. David Cassuto & Tala DiBenedetto, *Suffering Matters: NEPA, Animals, and the Duty to Disclose*, 42 U. HAW. L. REV. 41, 47 (2020) (“[A]voiding unnecessary suffering is a goal shared by humans and nonhumans alike.”).

68. *Laws that Protect Animals*, ANIMAL LEGAL DEF. FUND, <https://aldf.org/article/laws-that-protect-animals/> (last visited Nov. 14, 2021).

69. Madeline Bernstein & Barry M. Wolf, *Time to Feed the Evidence: What to Do with Seized Animals*, 35 ENV'T L. REP. 10679, 10683 (2005).

forfeited.<sup>70</sup> Without effective mechanisms to intervene when these duties and obligations are not upheld, relief may not come in time for the animal to be rescued—a general goal of animal cruelty prevention policy.<sup>71</sup> Therefore, quick intervention is needed to meet the goal of minimizing and avoiding cruelty, giving meaningful effect to animal cruelty laws. Veterinarians are in a position where they can medically evaluate an animal and make an educated determination of whether the animal has been abused.<sup>72</sup> Granting them the authority to confiscate suspected abused animals gives effect to anti-cruelty laws and policies and also rightfully elevates animals' status as victims under these laws. This scheme promotes the goals of improving animal protection laws and policies where the hands of law enforcement are currently tied.

Intervention requires veterinary education and awareness of MSBP with pet victims so these cases can be properly identified and documented. Calls for increased training and education about clinical indicators of this abuse have been raised in Europe, but the need for increased awareness of MSBP in pets is also present in the United States.<sup>73</sup> Some guidelines have been established to help veterinarians identify MSBP in their clients,<sup>74</sup> but more widespread recognition and education is needed to catch more of these cases that could be going unseen. However, veterinarians may not feel comfortable getting involved with animal abuse cases because of the lack of training in recognizing and identifying animal cruelty or abuse.<sup>75</sup> With proper training, veterinarians can be competent and comfortable in identifying this insidious form of abuse and can take the proper action.<sup>76</sup> These professionals are the primary actors in a position to recognize MSBP abuse—their ability to recognize it and take action is vital.

Strengthening abuse reporting requirements can help veterinarians feel comfortable taking this action by reporting the abuse. Currently, twenty states require veterinarians to report suspected animal abuse to proper

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70. *Id.* at 10683–84.

71. H.R. 724, 116th Cong. (2019–2020), <https://www.congress.gov/bill/116th-congress/house-bill/724/text>.

72. Bernstein & Wolf, *supra* note 69, at 10682.

73. Phil Arkow, *Recognizing and Responding to Cases of Suspected Animal Cruelty, Abuse, and Neglect: What the Veterinarian Needs to Know*, 6 VETERINARY MED.: RES. AND REPS., 349, 352, 354 (2015).

74. Phil Arkow, Veterinary Social Work Summit, *supra* note 64; ARKOW ET AL., PRACTICAL GUIDANCE FOR EFFECTIVE RESPONSE BY VETS, *supra* note 53, at 4–7; *Animal Abuse & Veterinary Toxicology: Illicit Substances & Munchausen by Proxy*, ANKARA UNIV., [https://acikders.ankara.edu.tr/pluginfile.php/115401/mod\\_resource/content/0/toxicology%20week%2014.pdf](https://acikders.ankara.edu.tr/pluginfile.php/115401/mod_resource/content/0/toxicology%20week%2014.pdf) (last visited Nov. 14, 2021).

75. Lori Donley, Gary J. Patronek & Carter Luke, *Animal Abuse in Massachusetts: A Summary of Case Reports at the MSPCA and Attitudes of Massachusetts Veterinarians*, 2 J. APPLIED ANIMAL WELFARE SCI. 59, 772 (1999).

76. Arkow, *Veterinary Social Work Summit*, *supra* note 64.

authorities.<sup>77</sup> Other states have voluntary reporting statutes that allow them to report abuse, while fourteen states have laws that neither allow nor require reporting suspected abuse.<sup>78</sup> In contrast, all states have some kind of reporting requirement for child abuse and child abuse hotlines to help facilitate reporting.<sup>79</sup> Statutes requiring abuse reporting could also grant the authority to confiscate abused animals. These statutes would elevate animals' status as victims over their status as property—as it should be when animals are abused.

After the animal is lawfully confiscated by the veterinarian and turned over to law enforcement, the animal can be temporarily placed with a shelter organization, like the Humane Society or the ASPCA, while awaiting a swift civil dispositional hearing regarding the animal's ownership. A strong partnership between all three of these actors, similar to the relationship between doctors, law enforcement, and Child Protective Services, will be vital for the effective rescue of pet victims of MSBP.<sup>80</sup>

*B. Provide Swift Civil Dispositional Hearings Based on the Owner's Ability to Adequately Care for the Pet*

Once an abused animal is confiscated by a veterinarian and turned over to law enforcement, a swift civil dispositional hearing based on the owner's fitness should be held to determine the ownership status of the animal. These proceedings acknowledge the property status of animals but consider their status as victims and as living creatures more important.<sup>81</sup> If more widely implemented, these kinds of proceedings could provide the most relief to pet victims of MSBP.

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77. Rebecca F. Wisch, *Table of Veterinary Reporting Requirement and Immunity Laws*, ANIMAL LEGAL & HIST. CTR. (2020), <https://www.animallaw.info/topic/table-veterinary-reporting-requirement-and-immunity-laws>.

78. *Id.*

79. Jeffrey L. Brown, *Physicians Have Ethical, Legal Obligation to Report Child Abuse*, AAP NEWS & J. (Mar. 2012), <https://www.aappublications.org/content/33/3/20.1>; CHILD.'S BUREAU, U.S. DEP'T HEALTH & HUM. SERVS., MANDATORY REPS. OF CHILD ABUSE AND NEGLECT 2 (2019), <https://www.childwelfare.gov/pubPDFs/manda.pdf>.

80. See generally Diane DePanfilis, CHILD PROTECTIVE SERVS.: A GUIDE FOR CASEWORKERS 2018 (2018), <https://www.childwelfare.gov/pubPDFs/cps2018.pdf> ("It takes professionals and citizens alike to recognize, identify, and report suspected incidents of child maltreatment to CPS. Medical personnel, educators, childcare providers, mental health professionals, law enforcement, clergy, and other professionals often are in a position to observe families and children and to identify possible signs of abuse or neglect.").

81. See generally Webinar Presentation: Jennifer H. Chin, *Pre-Conviction Forfeiture of Seized Animals: Considerations for Justice Professionals Presentation*, JUST. CLEARINGHOUSE (June 25, 2019), <https://www.justiceclearinghouse.com/esource/pre-conviction-forfeiture-of-seized-animals-considerations-for-justice-professionals/> (discussing practical tips for helping animals involved in these proceedings).

Civil forfeiture laws provide for proceedings that legally separate a pet and an owner outside of the criminal system—these are entirely separate procedures from any potential criminal charges.<sup>82</sup> These procedures are particularly valuable in cases where law enforcement may not prosecute, which is likely in a case of MSBP.<sup>83</sup> Relief for the abused animal does not hinge on the outcome of criminal prosecutions. There are several different kinds of civil proceedings that exist among the states that can legally separate a pet and an owner: unfit owner proceedings, bond and forfeiture proceedings, liens, and some proceedings that provide a combination or hybrid of these methods.<sup>84</sup>

Unfit owner proceedings determine the ownership of an animal based on the owner's fitness; this is the least prevalent civil forfeiture method.<sup>85</sup> These are civil proceedings where a court determines whether a defendant is able to provide adequate care to the seized animal.<sup>86</sup> This is unlike the most prevalent civil forfeiture method, bond and forfeiture,<sup>87</sup> where ownership is determined based on whether the owner can pay for the housing, care, and medical treatment required for the seized animal.<sup>88</sup> The major inquiry of unfit owner proceedings is the wellbeing of the animals in the care of the owner, which elevates the animal's best interest over their status as property.<sup>89</sup>

Because the adequate care of the animal is the purpose of these proceedings, unfit owner statutes have the potential to provide the most relief to pet MSBP victims—abusive owners do not have the option to simply pay a bond and maintain ownership of the animal. In an unfit owner proceeding, the seizing agency must demonstrate by a preponderance of the evidence that the owner is not able to adequately provide for their animal.<sup>90</sup> This

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82. *Id.*

83. See Becky Little, *Why Munchausen by Proxy Can Be So Hard to Prove in Court*, TRUE CRIME BLOG: STORIES & NEWS (March 31, 2020), <https://www.aetv.com/real-crime/munchausen-by-proxy-cases-court> (supporting the struggle that law enforcement faces in prosecuting MSBP).

84. Chin, *supra* note 81.

85. *Id.*

86. *Id.*; see also FLA. STAT. § 828.073 (2020) (illustrating the means by which a neglected or mistreated animal may be seized from their owner and cared for in Florida).

87. See generally *Cost of Care Legislation*, ASPCA, <https://www.asPCA.org/animal-protection/public-policy/cost-care-legislation> (last visited Sept. 17, 2021) (illustrating proceedings involve a judicial hearing for the owner of a seized animal in which, if the court finds by a preponderance of the evidence that the animal was abused, the owner is either required to pay for the cost of care of the animal while the animal is seized or relinquish property ownership in the animal); Bernstein & Wolf, *supra* note 69, at 10686–89 (providing that proceedings for seizure or forfeiture of neglected or abused animals vary widely by state).

88. Chin, *supra* note 81.

89. See Allie Phillips, Webinar Presentation: *Release the Hounds: Using Pre-conviction Forfeiture to Save Seized Animals from Re-victimization*, NAT'L DIST. ATT'Y ASS'N, <https://ndaa.org/resource/release-the-hounds-using-pre-conviction-forfeiture-to-save-seized-animals-from-re-victimization/> (last visited Nov. 14, 2021).

90. See FLA. STAT. § 828.073 (2020) (showing the evidence used in determining an owner's fitness to have custody of an animal in Florida).

proceeding is most likely the best option to separate a pet victim of MSBP from its abuser if the veterinarian has documentation of the clinical factors of MSBP and the abuse suffered by the animal.

An example of this kind of provision is Florida Statute § 828.073.<sup>91</sup> This provision provides a “means by which a neglected or mistreated animal may be . . . removed from its present custody.”<sup>92</sup> Under this section, a law enforcement officer or an association for the prevention of cruelty to animals can “lawfully take custody of an animal found neglected or cruelly treated by removing the animal from its present location.”<sup>93</sup> After the seizure, the seizing party must file a petition within 10 days seeking relief under the section. In addition, a hearing to determine “whether the owner . . . is able to adequately provide for the animal and is fit to have custody of the animal” is held within 30 days after the filing.<sup>94</sup> If the court finds that the owner is unfit to provide for their animal, the court can order that the owner “have no further custody of the animal” and that the animal can be “remanded to the custody of the Society for the Prevention of Cruelty to Animals, the Humane Society . . . or any agency or person the judge deems appropriate.”<sup>95</sup> In determining the fitness of an owner, the court will evaluate several factors, including:

1. Testimony from the seizing agent and other witnesses regarding the condition of the animal when it was seized and conditions under which the animal was kept;
2. Veterinary testimony and evidence;
3. Testimony and evidence regarding the type and amount of care provided to the animal;
4. Expert testimony as to the proper and reasonable care for the particular kind of animal in question;
5. Testimony from witnesses regarding the prior treatment or conditions of the animal;
6. The owner’s past record of judgments under the animal cruelty chapter;
7. Prior convictions of animal cruelty; and
8. Other material/relevant evidence.<sup>96</sup>

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91. FLA. STAT. § 828.073 (2020).

92. *Id.* § 828.073(1)(a).

93. *Id.* § 828.073(2)(a). Although this statute gives law enforcement the authority to remove an abused animal from its current location, veterinarians are still in the best position, especially with respect to MSBP victims, to determine when an animal has been abused. Granting veterinarians the authority to similarly confiscate can provide more effective relief to victims.

94. *Id.* § 828.073(2).

95. *Id.* § 828.073(4)(c)(1).

96. *Id.* § 828.073(5)(a)-(h).

When challenged by a plaintiff, whose hundreds of severely neglected dogs were seized pursuant to the statute, the Florida Court of Appeal for the Fifth District found that the petitioning agency must show by “clear and convincing evidence” that there is a “lack of proper and reasonable care of the animal.”<sup>97</sup> Once the petitioning agency does this, the burden then flips to the owner to demonstrate their fitness to care for the animal by clear and convincing evidence.<sup>98</sup>

Iowa has a similar law providing for the “rescue of threatened animals.”<sup>99</sup> This statute states that law enforcement officers who have cause to believe that an animal is threatened must rescue that animal and can do so by entering both public and private property.<sup>100</sup> However, the Fourth Amendment—among other laws and restrictions—applies to such entries.<sup>101</sup> After the rescue, the owner must be notified of the animal’s seizure, and a dispositional hearing for the animal is held within 10 days of the seizure.<sup>102</sup> Pursuant to the civil dispositional hearing, the court will decide if the owner is a threat to the animal.<sup>103</sup> If the court finds that the owner did not threaten the animal, it is returned to the owner’s custody. However, if the court finds the owner threatened the animal, it orders the local authorities to dispose of the animal in the manner appropriate for the animal’s welfare.<sup>104</sup> The court can also order the that owner to pay for costs incurred by the local authority, court costs, and other expenses related to the investigation.<sup>105</sup> Importantly, the inquiry for this proceeding is based on the animal’s welfare—whether the animal is threatened in the care of its current owner.<sup>106</sup> The court’s determination is based on what is the best custody situation for the animal.<sup>107</sup>

There are several advantages to unfit owner proceedings with respect to protecting animal victims. First, the burden of proof is significantly lower than in criminal proceedings. In the Florida statute, the burden of proof is “clear and convincing evidence,”<sup>108</sup> whereas the burden for a criminal

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97. *Brinkley v. County of Flagler*, 769 So. 2d 468, 472–73 (Fla. Dist. Ct. App. 2000).

98. *Id.* at 473.

99. IOWA CODE § 717B.5 (2021).

100. *Id.* § 717B.5(1).

101. *Id.*; *see also* *City of Dubuque v. Fancher*, 590 N.W.2d 493, 495 (Iowa 1999) (“We conclude a challenge to the propriety of the seizure of neglected animals does not impact the authority of the city to file a petition for disposition or the jurisdiction of the district court to hear and decide the petition.”).

102. IOWA CODE § 717B.5(2)–(3) (2021).

103. *Id.* § 717B.4(2).

104. *Id.* § 717B.4(3).

105. *Id.* § 717B.4(3)(a).

106. *Id.* § 717B.4(3).

107. *Id.* §§ 717B.4–717B.5.

108. *Brinkley*, *supra* note 97, at 473.

proceeding is proof beyond a reasonable doubt.<sup>109</sup> In MSBP cases, where the owner is intentionally deceitful in interactions with veterinary staff and others regarding the health of their pet, compiling the evidence to prove abuse beyond a reasonable doubt can be challenging.<sup>110</sup> Because of this, a case of MSBP with a pet victim would likely not be prosecuted.

Second, these proceedings do not turn on the outcome of any criminal proceedings. In fact, the owner may never even make it into court.<sup>111</sup> These civil proceedings are entirely separate processes that deal only with the disposition of the seized animal.<sup>112</sup> In no way is a criminal conviction guaranteed in any case, but this is especially true when the case involves MSBP.<sup>113</sup> Civil proceedings provide a means to look out for the welfare of the animal regardless of what happens with any potential criminal cases.<sup>114</sup> Additionally, swift and successful civil forfeiture proceedings give the animal the opportunity to recover from the abuse and trauma they have endured at the hands of their owners and to be adopted, beginning a new life in a loving home.<sup>115</sup>

Third, and most importantly, the custody of the animal is determined by evaluating whether the owner is fit to care for the animal—a determination keeping the animal’s best interest in mind.<sup>116</sup> This is similar, although not analogous, to the CPS procedures which evaluate a child’s home life in determining what intervention will best suit the child and family.<sup>117</sup> Unfit owner proceedings, while recognizing the fact that animals are considered property, elevate their status as victims under the law. These proceedings strongly consider what is best for the animal victim—instead of prioritizing an abuser’s property interests.

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109. Legal Info. Inst., *Beyond a Reasonable Doubt*, CORNELL L. SCH., [https://www.law.cornell.edu/wex/beyond\\_a\\_reasonable\\_doubt#:~:text=Beyond%20a%20reasonable%20doubt%20is,conviction%20in%20a%20criminal%20case.&text=This%20means%20that%20the%20prosecution,the%20evidence%20presented%20at%20trial](https://www.law.cornell.edu/wex/beyond_a_reasonable_doubt#:~:text=Beyond%20a%20reasonable%20doubt%20is,conviction%20in%20a%20criminal%20case.&text=This%20means%20that%20the%20prosecution,the%20evidence%20presented%20at%20trial) (last visited Oct. 24, 2021).

110. See *Why Prosecutors Don’t Prosecute*, ANIMAL L. DEF. FUND, <https://aldf.org/article/why-prosecutors-dont-prosecute/#:~:text=First%2C%20many%20courts%20are%20under,or%20all%20animal%20abuse%20cases> (last visited Nov. 16, 2021) (explaining how lack of evidence is often a barrier to prosecutors filing criminal charges in animal cruelty cases).

111. Chin, *supra* note 89.

112. Bernstein & Wolf, *supra* note 69, at 10684.

113. Rosenburg, *supra* note 9, at 556.

114. Bernstein & Wolf, *supra* note 69, at 10679–80.

115. *Id.* at 10684.

116. *Position Statement on Protection of Animal Cruelty Victims*, ASPCA, <https://www.aspc.org/about-us/aspc-policy-and-position-statements/position-statement-protection-animal-cruelty-victims> (last visited Sept. 21, 2021).

117. DePanfilis, *supra* note 80, at 99.



## CONCLUSION

With increased study, more pet victims of MSBP will be identified. While animals are still considered primarily property under the law, the means available to rescue abuse victims of MSBP are slight. Law and policy must take steps to elevate animals' status as victims over their status as property to give meaningful effect to anti-cruelty laws. This can happen by passing legislation that grants veterinarians the authority to confiscate abuse victims. Additionally, the widespread implementation of civil forfeiture laws, providing for hearings that determine ownership based on their fitness, similarly elevate the best interests of the animal victim over the owner's property interest. Without the means to intervene in cases of MSBP, these victims may remain unseen, and any attempt to rescue them may come too late. The law must see these animals and take meaningful action to aid the most vulnerable victims of this deadly phenomenon.