

# The Profit and Loss Report on Animal Rights: How Profit Maximization Has Driven the Stagnation of the Legal Identification of Animals as Property

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# The Profit and Loss Report on Animal Rights: How Profit Maximization Has Driven the Stagnation of the Legal Identification of Animals as Property

Anthony M. Doss

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## ABSTRACT

The concern for the wellbeing and humane treatment of animals continues to grow in the United States. However, while public opinion on how animals should be treated has largely changed, the legal classification for animals has not. Nonhuman animals today, just as in centuries past, keep only a property classification in the law. This classification, which we humans assign to furniture, jewelry, and paper plates, comes with a set of legal rights held exclusively by the owner of the property. These rights bestow upon the owner the abilities to sell, use, and destroy the property as they see fit with little regard to factors outside of the owner's mere whim. This property classification, while perfectly suited to inanimate objects, does little to adequately address the pain and suffering felt by a sentient nonhuman animal.

Many articles exist exploring the psychological aversion towards giving nonhuman animals the same rights as humans or exploring the deficiencies in statutes intended to protect animals. This Article, however, takes a different look at the status of nonhuman animals in the law and instead looks at the role capitalism has played in maintaining the property classification. To accomplish this goal the Article looks to one of the few other instances of sentient beings classified as property, the enslavement of African Americans, and the role capitalism played in driving and maintaining the institution of slavery past the economic purpose. Additionally, the Article discusses some of the animal rights issues that exist and how the current legal field fails to protect the nonhuman animals involved. Finally, the Article considers the psychological and emotional opposition to human rights and suggests a compromise that can advance the nonhuman animal's interests to some degree while resulting in minimal impact on the average person's day to day exploitation of nonhuman animals.

## AUTHOR NOTE

Anthony Doss is a J.D. Candidate, 2018, University of Massachusetts School of Law.

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## I. INTRODUCTION

One of the driving factors that leads many entrepreneurs into business, the business-savvy into corporate officer positions, and potential shareholders into investing in a company, is the opportunity to make money. While for-profit companies increasingly operate with a socially responsible cause at their core, there are still many companies whose sole focus is profit. This focus is ingrained into the American business scheme through years of legal ambiguities regarding a corporation's key responsibilities and the process by which business investments are acquired.

The never-ending desire for higher profits by businesses has stunted the growth of animal rights in the United States. Moreover, the classification in law of animals simply as property, like a paper cup, used and disposed of once the usefulness ends, has led to tragic consequences and unbelievably bad treatment of various species of animals. This classification has endured, mainly due to the funding and advocacy of large businesses that derive profit by using animals in ways that should not be allowed for living creatures. For these reasons, this classification results in even the most menial and insignificant whim of humans outweighing the heavy toll on animals without a second thought.

Further, this is not the first time in the history of the United States that the desire for ever-increasing profit margins has usurped the need for humane treatment. Historically, corporate want for cheap or free labor was a driving factor in slavery and arguably a critical factor in extending the use of slavery longer than it was economically useful. Through studying the evolution of human slavery, one sees a similar trend in the way animals are treated. Even though public opinion in the United States has shifted a great deal regarding how animals should be treated by the law, one of the biggest hurdles to an improved classification for animals is overpowering the efforts of large corporations. These corporations use lobbying efforts and propaganda to prevent the improvement out of fear that such improvement would force them to adapt their way of making profit.

Animals were initially considered tools to accomplish jobs such as plowing fields or providing wool for clothing.<sup>1</sup> With the industrial

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<sup>1</sup> Pat Shipman, *The Animal Connection and Human Evolution*, 51 CURRENT ANTHROPOLOGY 1, 5 (2010); see also Krystal D'Costa, *The Animal Connection: Why Do We Keep Pets?*, SCI. AM. (Jan. 20, 2012),

revolution, animal labor use began to disappear primarily due to both technical developments in advanced machinery that could do the manual labor faster and cheaper than animals,<sup>2</sup> and the widespread use of synthetic fibers in clothing.<sup>3</sup> While a large part of the use of animals is still for consumption<sup>4</sup> new sectors have emerged.<sup>5</sup> Today many animals are exploited for entertainment value or for use in drug and product testing. Meanwhile, the predominate view of the role of animals in American society has gradually changed over the course of the last two decades.<sup>6</sup> More Americans are concerned with animal welfare

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[www.blogs.scientificamerican.com/anthropology-in-practice/the-animal-connection-why-do-we-keep-pets/](http://www.blogs.scientificamerican.com/anthropology-in-practice/the-animal-connection-why-do-we-keep-pets/) [<https://perma.cc/L8QJ-4DMF>].

- <sup>2</sup> John F. Reid, *The Impact of Mechanization on Agriculture*, 41 THE BRIDGE 22, 24 (2011) (“A major turning point occurred when tractors began to replace draft animals in the early decades of the 20th century. Tractors leveraged a growing oil economy to significantly accelerate agricultural productivity and output.”).
- <sup>3</sup> Audra J. Wolfe, *Nylon: A Revolution in Textiles*, CHEMICAL HERITAGE FOUND. 21, 25 (2008) (“In 1965 synthetic fibers made up 63% of the world’s production of textiles; by the early 1970s that number had dropped to 45%.”).
- <sup>4</sup> See Eliza Barclay, *A Nation of Meat Eaters: See How It All Adds Up*, NPR (June 27, 2012, 3:03 AM ET), [www.npr.org/sections/thesalt/2012/06/27/15527365/visualizing-a-nation-of-meat-eaters](http://www.npr.org/sections/thesalt/2012/06/27/15527365/visualizing-a-nation-of-meat-eaters) [<http://archive.is/z0URS>] (finding total meat consumption in the U.S. grew from 9.8 billion pounds in 1909 to an estimated 52.2 billion pounds in 2012 with most of that consumption being beef and chicken).
- <sup>5</sup> See ELIZABETH HANSON, ANIMAL ATTRACTIONS: NATURE ON DISPLAY IN AMERICAN ZOOS 3 (2002) (“The first zoo in the United States was opened in 1874 . . . . By the turn of the twentieth century . . . [major cities began opening their own zoos]. By 1940 there were zoos in more than one hundred American cities.”); see also Dominique Jando, *Short History of the Circus*, CIRCOPIEDIA, [www.circopedia.org/Short-History-Of-The-Circus](http://www.circopedia.org/Short-History-Of-The-Circus) (last visited July 29, 2017) [<http://archive.is/DME7x>] (noting one of the first circuses to feature animals began in 1825 with a collection of 135 farmers, developing in 1835 under a trust that controlled thirteen menageries and three circuses, and culminating in 1871, when P.T. Barnum joined the industry).
- <sup>6</sup> See Rebecca Riffkin, *In U.S., More Say Animals Should Have Same Rights As People*, GALLUP (May 18, 2015), [www.gallup.com/poll/183275/say-animals-rights-people.aspx](http://www.gallup.com/poll/183275/say-animals-rights-people.aspx) [<https://perma.cc/S34A-3B2G>]; see also Alicia Graef, *Our Attitudes About Animals Are Changing for the Better*, CARE2 (May 21, 2015), [www.care2.com/causes/our-attitudes-about-animals-are-changing-for-the-better.html](http://www.care2.com/causes/our-attitudes-about-animals-are-changing-for-the-better.html) [<https://perma.cc/XL7K-YJVS>] (explaining that according to a 2015 Gallup Poll nearly two-thirds of Americans are concerned about animal rights); *Research*, NAT’L COUNCIL FOR ANIMAL PROTECTION, [www.ncapweb.org/programs/research/](http://www.ncapweb.org/programs/research/) (last visited July 8, 2017) [<https://perma.cc/UQP5-YBNT>] (indicating a poll conducted by National Council for Animal Protection (NCAP) and the Humane Research Council (HRC) in

every year, as demonstrated by the marked increase in the number of Americans who support protections and even full legal rights for animals.<sup>7</sup>

Despite these changes in social attitudes, the legal classification of animals has remained that of property, a classification better suited to inanimate objects than to a living creature.<sup>8</sup> To help analyze this classification issue, one can look to slavery as the most prominent historical example of the dire consequences on humane treatment that result from the inappropriate application of the property classification to living creatures.

This Article will first discuss the instrumentalities that businesses use to measure success. Second, it will look at the evolution of slavery in the United States and how the drive for higher profit margins of plantation owners contributed to the extension of slavery. Third, the Article will discuss the physical abuses and exploitations that are faced by animals in the modern day and how those abuses are similarly driven by the business motive for higher profit margins. Finally, it will outline a new suggestion for a compromise classification for animals that would acknowledge that living creatures deserve more protections and hold a higher value than inanimate objects, while simultaneously addressing the concern that full personhood would too drastically interrupt the American way of life to an extent that is unpalatable to some.

## II. BACKGROUND

### A. The Bottom Line: How Many Corporations Judge Their Success

Many for-profit companies operate and make decisions in pursuit of the most profit they can achieve.<sup>9</sup> This is how they measure their success and, more importantly, it is how the public makes the decision

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which animal protection was listed as the cause most favorable to Americans with 85 percent in support).

<sup>7</sup> Graef, *supra* note 6.

<sup>8</sup> Susan J. Hankin, *Not a Living Room Sofa: Changing the Legal Status of Companion Animals*, 4 RUTGERS J.L. & PUB. POL'Y 314, 317 (2007) ("The traditional legal view that treats all animals as property is beginning to give way to an increasing recognition that *animals are fundamentally different from inanimate property . . .*" (emphasis added)).

<sup>9</sup> Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L. J. 439, 439 (2001); Ian B. Lee, *Corporate Law, Profit Maximization, and the "Responsible" Shareholder*, 10 STAN. J.L. BUS. & FIN. 31, 32 (2005).

whether to invest in them. The public uses this information for investing purposes because the amount of profit that a company earns usually correlates to the value of dividends paid out to their shareholders or to the increase in value that one can expect when selling that stock.<sup>10</sup> Because shareholders are often considered the most important of the stakeholder group, the company's board of directors often makes its decisions based on what is the most beneficial to them and may not consider other stakeholders in their decisions.<sup>11</sup> Common law has long emphasized this thought process,<sup>12</sup> which can be seen in cases throughout the American legal system.<sup>13</sup>

### 1. The Law of Green: The Law Profit Maximization

While the recent influx of millennial business owners has brought an increase in the number of for-profit corporations operating with a social awareness issue at its heart, this is not the case for all corporations and was not the case in decades past. For those corporations that do not operate with social awareness issues at their core, it is often because the board of directors is under the impression that its primary and singular responsibility is to obtain increased profits for the stockholders. This ethos has a long history in United States business law and is evident in court cases from a century ago. The Michigan Supreme Court articulated the duties of the directors of the board in its 1919 opinion *Dodge v. Ford*.<sup>14</sup> In *Dodge*, the Court wrote that, "a business is carried on primarily for the profit of the stockholders. The powers of the Directors are to be employed for that end. The directors have discretion only in the choice of how to attain that end, not in the choice to change the end itself."<sup>15</sup> Courts have interpreted this general concept of

<sup>10</sup> Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 303-05 (1999) (arguing that while the goal is stated as maximization of profits, it is more correctly an increase in shareholders' equity).

<sup>11</sup> See Christyne J. Vachon, *Playing in the Sandbox: Moral Development and the Duty of Care in Collaborations Between For-Profit and Nonprofit Corporate Persons*, 33 PACE L. REV. 1045, 1051 (2013) ("shareholder primacy is still the norm in many jurisdictions . . . [t]herefore the emphasis of management conduct has been on the profit motive.").

<sup>12</sup> *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939) (explaining the common-law duty is one of "undivided and unselfish loyalty" to the corporation); see D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 288 (1998).

<sup>13</sup> See Smith, *supra* note 12; see generally Lee, *supra* note 9, at 32-37 (discussing Shareholder Primacy Norm and the case law most commonly referenced).

<sup>14</sup> *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919).

<sup>15</sup> *Id.* at 684.



narrowly focusing business goals around objective profit maximization with greater ambiguity.<sup>16</sup> For example, Delaware courts have allowed businesses to make “reasonable corporate gift[s] of a charitable or educational nature” despite those contributions reducing the amount available to shareholders.<sup>17</sup> A line of reasoning used by the Delaware court included the recognized obligation of corporations to philanthropic causes<sup>18</sup> and the ultimate benefit to shareholders,<sup>19</sup> which results from the increase of recognition for the corporate brand.

*Shlensky v. Wrigley*<sup>20</sup> is another example of the courts interpreting the *Dodge* decision more ambiguously. In *Wrigley*, Shlensky, a minority shareholder, sued the board of directors of the Chicago National League Ball Club, Inc., including Philip K. Wrigley, for their decision not to put lights in Wrigley Field to facilitate nighttime baseball games.<sup>21</sup> The board, led by Mr. Wrigley, felt baseball should not be played at night and, more importantly, also worried about the deteriorating effect the lights would have on the surrounding neighborhood.<sup>22</sup> Shlensky pointed to the *Dodge* decision as proof that Wrigley was beholden to the profit maximization interests of the business’ shareholders.<sup>23</sup> Shlensky felt that lights would increase the quantity of games, and as a result increase profits.<sup>24</sup> He therefore argued that the board had a duty to install the lights or pay the minority shareholders for damages.<sup>25</sup> The *Wrigley* court felt differently though and expressed its opinion that a corporation’s management is allowed to consider the effects on non-shareholder stakeholders,<sup>26</sup> especially when those effects can impact the long-term value of the company. The *Wrigley* court stated:

<sup>16</sup> Lee, *supra* note 9, at 35; *see also* Christyne J. Vachon, *Burma Just Around the Corner: When U.S. Corporations Employ Refugees*, 28 WIS. J.L. GENDER & SOC’Y 159, 174 (2013) (emphasizing the *Dodge* court’s distinction that shareholder benefit is the primary purpose, but not the only purpose).

<sup>17</sup> *Theodora Holding Corp. v. Henderson*, 257 A.2d 398, 405 (Del. Ch. 1969).

<sup>18</sup> *Id.* at 404.

<sup>19</sup> *Id.* at 405.

<sup>20</sup> *Shlensky v. Wrigley*, 237 N.E.2d 776 (Ill. App. Ct. 1968).

<sup>21</sup> *Id.* at 777.

<sup>22</sup> *Id.* at 778.

<sup>23</sup> *Id.* at 779.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *See Stakeholder*, BLACK’S LAW DICTIONARY (10th ed. 2014) (referring to someone who has an interest or concern in a business or enterprise, which could

*We are not satisfied that the motives assigned to Philip K. Wrigley, and through him to the other directors, are contrary to the best interests of the corporation and the stockholders. For example, it appears to us that the effect on the surrounding neighborhood might well be considered by a director who was considering the patrons who would or would not attend the games if the park were in a poor neighborhood. Furthermore, the long-run interest of the corporation in its property value at Wrigley Field might demand all efforts to keep the neighborhood from deteriorating.*<sup>27</sup>

Thus, the court deemed the decision of Wrigley and the other board members to be within the interests of shareholders and therefore sound business judgment, broadening the discretion held by boards of directors to considerations beyond immediate profit increases.

The cases above may lead one to believe that many courts have spoken clearly and stated that profit maximization and the duty to the shareholder are not the only motivations for corporate directors. However, the courts have also “muddied the waters.”<sup>28</sup> This has resulted in some legal minds feeling that corporate law is irrational and unsettled.<sup>29</sup> Nevertheless, corporate boards of directors frequently choose the safer route of making profit maximization their key motivation in order to avoid appearing in court to face shareholders who feel that their financial interests have not been well-represented by the board.

Shareholders also have the stock market as a device by which they can influence the corporate directors to act towards profit maximization.<sup>30</sup> The stock market’s effect on a corporation’s value encourages corporate directors to take shareholders’ wishes into

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include a shareholder, employee, customer, or any other person who may have a reason to care about the decisions that a board of directors makes).

<sup>27</sup> Wrigley, 237 N.E.2d at 779-81.

<sup>28</sup> Lee, *supra* note 9, at 32-36 (discussing how the case law has been “more nuanced” and considered “schizophrenic” regarding corporate director motivations).

<sup>29</sup> *Id.*; see also William T. Allen, *Our Schizophrenic Conception of the Corporation*, 14 CARDOZO L. REV. 261, 280 (1992) (remarking that the former Chief Justice of Delaware’s corporate law court understandably described the legal conception of the corporation as “schizophrenic” and predicted that it will likely continue to be thought of as such indefinitely).

<sup>30</sup> Lee, *supra* note 9, at 37.

consideration in their decisions.<sup>31</sup> When current and potential shareholders are happy with the decisions of corporate directors, the stock price will rise because fewer stockholders will be selling and more potential stockholders will want to buy.<sup>32</sup> However, if they are unhappy, the stock price may suffer as the stockholders sell their stock, which can place downward pressure on the stock price.<sup>33</sup> As explained by Professor Ian B. Lee in his article, *Corporate Law, Profit Maximization, and the 'Responsible' Shareholder*,<sup>34</sup> this stock market device means that "it is the aggregated preferences of stockholders that ultimately determine management's freedom to act responsibly."<sup>35</sup> For a corporate director, this means that profit maximization is a key consideration by law, a best practice to avoid suits, and necessary to appease the shareholders and maintain market position. This adherence to profit maximization considerations can especially be true when the shareholders themselves are not socially responsible, due to either apathy or incognizance.

## **B. The Backs Upon Which Capitalism Stands: Chattel Slavery**

There are few situations in the history of the United States, or the history of the world, that one can look to for guidance on how the property classification affects a living being. Slavery provides an example of both how society applied the property classification to living beings, as well as its eventual usage termination. To successfully learn from the mistake of slavery, one must understand the differences and similarities between indentured servitude and chattel slavery, how and why race became a factor in chattel slavery, and how the treatment of humans as property resulted in slave owners' ability to be cruel in the worst cases and apathetic in the best.

### **1. Indentured Servants in the Colonies**

Often when people think of the foundations of America, they think of the Pilgrims sailing away from religious persecution or the scrappy

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<sup>31</sup> *Id.*

<sup>32</sup> Slav Fedorov, *What Influence Do Stockholders Have in a Business?*, CHRON, [www.smallbusiness.chron.com/influence-stockholders-business-20747.html](http://www.smallbusiness.chron.com/influence-stockholders-business-20747.html) (last visited July 30, 2017) [<https://perma.cc/N3QG-MXH2>].

<sup>33</sup> *Id.*

<sup>34</sup> Lee, *supra* note 9, at 37.

<sup>35</sup> *Id.*

kid who saved up just enough money to buy a ticket to the New World.<sup>36</sup> However, many immigrants actually came to the United States as indentured servants.<sup>37</sup> Whether they entered into servitude of their own free will in exchange for passage or because English courts sentenced them to forced labor for their crimes, they took that ship to America in exchange for their labor contracts.<sup>38</sup> These servants worked until they accrued enough hours to discharge their debts and earn their freedom.<sup>39</sup>

In the early 1600s until around 1680, indentured servants from Britain and Europe made up the dominant labor force in the early American colonies.<sup>40</sup> Masters owned these servants as property.<sup>41</sup> This meant servants could be assigned or sold to satisfy a master's debt. Further, they passed by descent through testamentary laws.<sup>42</sup> Indentured servants could not marry, trade with others, or travel without their masters' consent.<sup>43</sup> One difference between an indentured servant and a chattel slave, of course, is that the servitude of the former was only for

<sup>36</sup> T.H. Breen & Stephen Foster, *Moving to the New World: The Character of Early Massachusetts Immigration*, 30 WM. & MARY Q. 189-222 (3d ser. 1973); Anthony Salerno, *The Social Background of Seventeenth-Century Emigration to America*, 19 J. BRIT. STUD. 31, 51-52 (1979).

<sup>37</sup> Mary Sarah Bilder, *The Struggle Over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 MO. L. REV. 743, 753 (1996) ("One recent economic historian suggests that 'between half and two-thirds of all white immigrants to the American colonies after the 1630s and before independence came under indenture.' Another confirms that 'some 60%' of immigrants in the seventeenth century were indentured servants, as were a 'sizable share' of eighteenth-century emigrants.").

<sup>38</sup> *Id.* at 754; see also MARCUS W. JERNEGAN, *LABORING AND DEPENDENT CLASSES IN COLONIAL AMERICA, 1607-1783* 47-48 (1980 ed. 1931) (discussing the three types of indentured servants coming to America: those with indentures, "redemptioners," and transported convicts).

<sup>39</sup> See DAVID W. GALENSON, *WHITE SERVITUDE IN COLONIAL AMERICA: AN ECONOMIC ANALYSIS* 13 (1981); see also RICHARD MORRIS, *GOVERNMENT AND LABOR IN EARLY AMERICA* 310 (1946) (explaining the origination of the term "indentured servant," which derives from "by deed indented," the name of the work agreement between parties).

<sup>40</sup> EDMUND MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* 105-06 (1975).

<sup>41</sup> WILLIAM W. HENING, *2 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619*, 509-10 (1823).

<sup>42</sup> MORGAN, *supra* note 40.

<sup>43</sup> *An ACT Relating to Servants and Slaves, Ch. XLIV* (Apr. 1715), 1 Laws of Maryland, 1692-1799 n.p. (William Kilty ed. 1799-1800).

a set period of years.<sup>44</sup> Another difference was that upon completion of the service term, indentured servants in most colonies received “freedom dues,” which initially were land grants.<sup>45</sup> For example, in Maryland, as much as ninety percent of indentured servants received land upon completion of their service.<sup>46</sup> Indentured servitude, while still prevalent for many years after the institution of slavery spread throughout the colonies, eventually began to lose favor among colonists and the British monarchy.<sup>47</sup>

## 2. The Shift to Racial Slavery

Factors such as economic depressions, interruptions of transport shipping, and a growing discomfort regarding white people being bound laborers are some of the predominant factors that led to the decrease in indentured servitude.<sup>48</sup> The decline in this form of “free labor” gave rise to a race-based slavery system, which was in part fueled by a growing racism among white people.<sup>49</sup> Rising levels of fear among the British monarchy and an uneasiness after seeing African slaves and white servants band together in rebellions such as Bacon’s Rebellion in 1676 were other factors that instigated the racial component of chattel slavery in the colonies.<sup>50</sup>

The Virginia Slave Code of 1705 codified the slave laws and solidified racism and race-based slavery in the United States. To prevent poor white people and African-Americans from perceiving their common interests and joining together against the wealthy, an attitude and system where race always trumped class status needed to be

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<sup>44</sup> See Bilder, *supra* note 37, at 759.

<sup>45</sup> *Id.*

<sup>46</sup> Russell R. Menard, *From Servant to Freeholder: Status Mobility and Property Accumulation in Seventeenth-Century Maryland*, 30 WM. & MARY Q. 37, 63 (1970).

<sup>47</sup> Bilder, *supra* note 37, at 760.

<sup>48</sup> See MORGAN, *supra* note 40, at 760.

<sup>49</sup> ROBERT J. STEINFELD, *THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350-1870* 121-46 (1991).

<sup>50</sup> See William M. Wiecek, *The Origins of the Law of Slavery in British North America*, 17 CARDOZO L. REV. 1711, 1757 (1996); see also WILCOMB E. WASHBURN, *THE GOVERNOR AND THE REBEL: A HISTORY OF BACON’S REBELLION IN VIRGINIA* (1957); STEPHEN S. WEBB, *1676, THE END OF AMERICAN INDEPENDENCE* (1984); THOMAS J. WERTENBAKER, *TORCHBEARER OF THE REVOLUTION: THE STORY OF BACON’S REBELLION AND ITS LEADER* (1940).

implemented.<sup>51</sup> Racial slavery ensured that there would be a distinct group from which even the poorest white colonists were recognizably different, and, according to the dominant social narrative, superior.<sup>52</sup> As a result, poor white Americans identified with the wealthy white ruling class instead of the slaves and servants they in fact had more in common with.<sup>53</sup> The codification of acts in The Virginia Slave Code of 1705 included the following changes: it established new property rights for slave owners, allowed the legal, free trade of slaves, established separate trial courts, prohibited African-Americans, whether free or enslaved, from owning weapons, prohibited African-Americans from employing or owning white people, and allowed the apprehension of any African-American suspected of being a runaway.<sup>54</sup>

### 3. Life as Property

As a result of these slave laws, African-Americans became property in the eyes of the law. The infamous *Dred Scott* opinion delivered by Chief Justice Taney demonstrated the deep-rooted idea that the United States Constitution did not, and never intended to, include African-American slaves in its definition of a citizen.<sup>55</sup> Chief Justice Taney's decision that African-Americans did not have standing to file a claim because they were not "citizens" relegated slaves to the subordinate classification of property. As Taney wrote in his opinion:

*[the class of persons] were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such*

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<sup>51</sup> See Wiecek, *supra* note 51, at 1758-59.

<sup>52</sup> *See id.*

<sup>53</sup> *See id.*

<sup>54</sup> HENING, *supra* note 41, at 449-50 (An Act Concerning Servants and Slaves, Ch. XLIX).

<sup>55</sup> *See Dred Scott v. Sandford*, 60 U.S. 393 (1857).

*as those who held the power and the Government might choose to grant them.*<sup>56</sup>

This classification clearly reflects the belief of superiority by the slave owner and apathy for the well-being of the slave.<sup>57</sup> This apathy and acceptance of the socio-legal construct of slavery led plantation owners, as businessmen, to put the production output of the plantation over the treatment of the worker or slaves.<sup>58</sup> The costs to the plantation owner to purchase and work a slave were ultimately less than it would have cost him to hire a farmhand.<sup>59</sup> The initial cost to purchase a slave could be as much as eight hundred dollars.<sup>60</sup> While a slave owner was expected to provide necessities for slaves, many would provide the least amount possible.<sup>61</sup> However, the tradeoff to human suffering and indignity was the cruel efficiency of slave labor due to slaves being driven to work longer days and at a grueling pace.<sup>62</sup> The forced pace resulted in the same amount of output production in thirty-five minutes as a free man could produce in an hour.<sup>63</sup> With this increased production, the plantation owner earned the upfront cost of each slave back within three years of purchase.<sup>64</sup> Further, the slave owner had the ability to either

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<sup>56</sup> *Id.* at 404-05.

<sup>57</sup> MURRAY N. ROTHBARD, *CONCEIVED IN LIBERTY* 63 (1979) (explaining that one historical myth holds that since the slaves were their owners' capital, the owners' economic self-interest dictated kindly treatment of their property). Nevertheless, slave owners were compelled to solidify ownership over their property, and for this, systematic brutality was perceived as necessary to turn hard labor into coerced channels for their own economic benefit. *Id.*

<sup>58</sup> *See id.* at 64. (implying that the slave was capital, but if that capital no longer promised a return the owner would not be burdened with the concern for his property).

<sup>59</sup> Samuel H. Williamson & Louis P. Cain, *Measuring Slavery in 2016 Dollars*, MEASURINGWORTH, [www.measuringworth.com/slavery.php](http://www.measuringworth.com/slavery.php) (last visited Aug. 1, 2017) [<https://perma.cc/4NGY-CPC3>].

<sup>60</sup> *Id.* (calculating that this amount would equal nearly \$160,000.00 in today's economy).

<sup>61</sup> *Slave Life and Slave Codes*, U.S. HISTORY.ORG, [www.ushistory.org/us/27b.asp](http://www.ushistory.org/us/27b.asp) (last visited Aug. 1, 2017) [<https://perma.cc/BPB2-JHHX>] ("Plantation slaves lived in small shacks with dirt floors and little or no furniture. Life on large plantations with a cruel overseer was oftentimes the worst. However, work for a small farm owner who was not doing well could mean not being fed.").

<sup>62</sup> *See* ROBERT FOGEL, *WITHOUT CONSENT OR CONTRACT*, 78-79 (1989).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

continue working that slave for more production, or to sell the slave again for an increased profit.<sup>65</sup>

The property classification in the law has often been likened to a bundle of sticks, with each stick in the bundle representing a different right the owner has over the property.<sup>66</sup> The right of the owner to dispose of or destroy property at will is one of the more egregious issues that arises when applying the property classification to living beings. This right, held by the slave owner, can be seen in a 1669 act passed by the Virginia Legislature pertaining to the casual killing of slaves. The act provided that an owner would not be prosecuted for the death of his slave even when that death was caused by corporal punishment.<sup>67</sup> It allowed a slave owner to torture with impunity his slave to the point of death.<sup>68</sup> The Virginia General Assembly, in 1669, passed the act based on the notion that a slave owner would not maliciously destroy his own slave property, which held great financial value to him.<sup>69</sup> The General Assembly passed another act in 1680 making it legal to kill any slaves who escaped from their owners, further establishing the their property rights over the slave.<sup>70</sup> Additionally, an act from 1691 allowed sheriffs to “kill or destroy [by gun or otherwise] any [slave] unlawfully absent themselves from their masters service.”<sup>71</sup> As Dr. Paul Finkelman explained, “These laws effectively reduced slaves to the legal status of wild beasts, to be ‘destroy[ed]’ by public authorities without any trial or hearing. Slaves were property, except when they might ‘lie hid and lurk’ and then they were reduced to the legal status of wild creatures.”<sup>72</sup> In

<sup>65</sup> *Id.*; see also Williamson, *supra* note 60.

<sup>66</sup> J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711, 712-13 (1996) (describing the bundle-of-sticks metaphor as a “dominant paradigm” in property law); see also Jeffrey S. Kerr et al., *A Slave by Any Other Name Is Still a Slave: The Tilikum Case and Application of the Thirteenth Amendment to Nonhuman Animals*, 19 ANIMAL L. 221, 225 (2013).

<sup>67</sup> HENING, *supra* note 41, at 270 (describing that “[a]n act about the casual killing of slaves” held that owners who kill their slaves in the act of punishing them are held not to be responsible of murder).

<sup>68</sup> *See id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 481 (describing that “[a]n act for preventing Negroes Insurrections” stated that if an escaped slave hides, injures a Christian, or resists any person it shall be lawful for such person to kill said slave).

<sup>71</sup> *Id.* at 86 (describing “[a]n Act for Suppressing Outlying Slaves”).

<sup>72</sup> Paul Finkelman, *Slavery in the United States: Persons or Property?*, in *THE LEGAL UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO THE CONTEMPORARY* 105, 114 (Jean Allain ed., 2012).



enacting these statutes, Virginia adopted a basic premise of Roman slave law, namely the notion that the killing of a slave was not a criminal act.<sup>73</sup>

As evidenced by the journals of slave owners, masters commonly abused slaves. One such journal is that of William Byrd II who, despite considering himself a “kindly master” who despised the “brutes who mistreat their slaves” wrote numerous journal entries detailing the whipping and branding of slaves for sometimes minor offenses.<sup>74</sup> While the excerpt from the journal is small and spans a period of only eleven months, it lists ten separate actions of punishment perpetrated by Mr. Byrd or his wife against slaves.<sup>75</sup> The beatings are primarily centered around two young slaves, Jenny and Eugene, who were whipped, burned with a hot iron, and beaten.<sup>76</sup> The journal also mentions miscellaneous other slaves being branded with an iron, hung, and having a bit (which is a form of mask similar to a horses bit) placed on them.<sup>77</sup> Evidently even those slave owners whom considered themselves humane nevertheless abused and degraded human life because they viewed those lives as their property.

While it was not disputed at the time that owners held rights to use their slaves and sell or trade them, the above statutes set forth their common law ability to dispose of slaves at their discretion. This legally clarified and established that slaves did not have the basic human rights to be free from torture or abuse at the hands of an owner because of their status as property. As explained above, this property classification reinforced the owner’s freedom to use and dispose of his slave in whatever way benefited him. The property classification ultimately resulted in slaves abused to ensure compliance with grueling labor demands, and the inhumane disposal of humans who no longer provided financial benefits to their owners. The main value in looking to the harrowing lessons of slavery is in recognizing that the chattel status as applied to humans, which seemed undisputable to the majority of society, is difficult to imagine in the United States today. History has

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<sup>73</sup> *Id.*

<sup>74</sup> See ROTHBARD, *supra* note 58 (providing an excerpt from William Byrd II’s journal which details punishing a child named Eugene by whipping him for running away and failing to do anything the day prior). The author continues “the point is not only that the slave system was one where such acts *could* take place; the point is that *threats* of brutality underlay the whole relationship.” *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

revealed the property classification of humans to be temporary socio-legal constructions and not truisms.<sup>78</sup> It is hard to imagine rational people ever legally withholding personhood from humans today, and in the future, it is likely that the same will one day be true of nonhuman animals.<sup>79</sup>

### C. The Plight of the Furry, the Scaly, and the Aquatic: Animal Rights

Distinguished law professor and legal scholar Gary L. Francione wrote in his book *Animals, Property, and the Law* that “[t]o label something property, is, for all intents and purposes, to conclude that the entity so labeled possesses no interests that merit protection and that the entity is solely a means to the end determined by the property owner.”<sup>80</sup> For centuries, people have considered animals to be property with no rights of their own.<sup>81</sup> As a result, people have found a plethora of ways to exploit such property for profit. Exploitation of animals includes testing and developing medical devices and pharmaceuticals, mistreating animals in increased drives to provide food to a growing population that consumes more meat than any other nation in the world, and using animals in unnatural environments to profit from their entertainment value.

Companies in all three of these fields exploit and abuse animals for financial gain and are aided by a reluctance to extend legal rights to animals. Some people are reluctant to recognize the abuses or to implement the mechanisms that would end the abuse because of an antiquated and incorrect belief that animals do not feel pain.<sup>82</sup> Others are reluctant because of what one author calls “the rhetoric of human specialness,” which is the notion that humans are superior to nonhuman animals and that the only value a nonhuman animal holds is in its usefulness to humans.<sup>83</sup> Still others wish to remain willfully blind to

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<sup>78</sup> See Kerr, *supra* note 67, at 236.

<sup>79</sup> *Id.*

<sup>80</sup> GARY L. FRANCIONE, *ANIMALS, PROPERTY, AND THE LAW* 49 (1995).

<sup>81</sup> See generally *id.*; Steven J. Bartlett, *Roots of Human Resistance to Animal Rights: Psychological and Conceptual Blocks*, 8 *ANIMAL L.* 143, 143-44 (2002); Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 *B.C. ENVTL. AFF. L. REV.* 471 (1996).

<sup>82</sup> DALLAS PRATT, *ALTERNATIVES TO PAIN IN EXPERIMENTAL ANIMALS* 11 (1980).

<sup>83</sup> Martha C. Nussbaum, *Animal Rights: The Need for a Theoretical Basis*, 114 *HARV. L. REV.* 1506, 1544 (2001) (book review).

avoid disrupting the comfort that the exploitation of animals provides in their lives, for example, as food, clothing, and entertainment.<sup>84</sup>

### 1. Product Testing

The use of animals in product testing is a broad issue touching on experiments using live animals to test drugs, products, and conduct scientific research and educational experiments.<sup>85</sup> While the exploitation of animals for research projects and scientific education purposes are some of the more common ways animals are abused, it is worth noting that there are many more ways that animals are abused in the name of science that are not discussed in this Article.

Experimentation on animals has been documented for nearly three thousand years<sup>86</sup> with very little change in the view of animals as property since. The Animal Welfare Act (“AWA”) was amended to develop and improve laboratory standards on the heels of several high-profile cases involving federally funded laboratories engaging in cruelty towards animals.<sup>87</sup> Two such prominent cases of medical research-related animal abuse include one legal suit against Edward Taub and one investigation by the National Institute of Health against Thomas Gennarelli. In *Taub v. State of Maryland*, Edward Taub, a scientific investigator at the Institute for Behavioral Research in Silver Spring, Maryland, was charged with seventeen counts of violation of state animal cruelty codes for inhumanely severing the nerves to various limbs on the monkeys and not providing adequate veterinary

<sup>84</sup> Bartlett, *supra* note 82, at 143-44 (“our relationship with the majority of animals is one in which we exploit them: we eat them, hunt them and use them in a variety of ways that are harmful to the animals.”).

<sup>85</sup> Nikki Leung, *Detailed Discussion of Medical Research and Animals*, MICH. ST. UNIV.: ANIMAL LEGAL & HIST. CTR. (2014) <https://www.animallaw.info/article/detailed-discussion-medical-research-and-animals> [<https://perma.cc/MWP7-FKPR>] (discussing the types of medical research performed on live animals and the laws impacting that research); *see also* Katie C. Galanes, *Detailed Discussion of Animal Testing in Commercial Products*, MICH. ST. UNIV.: ANIMAL LEGAL & HIST. CTR. (2010) <https://www.animallaw.info/article/detailed-discussion-animal-testing-commercial-products> [<https://perma.cc/B5GS-NULM>] (discussing the types of commercial product testing that is performed on animals and the laws relating to it).

<sup>86</sup> Lorin M. Subar, *Out from Under the Microscope: A Case for Laboratory Animal Rights*, DET. C.L. REV. 511, 546 (1987).

<sup>87</sup> Animal Welfare Act, 7 U.S.C. §§ 2131, 2158-2159 (1994).

treatment.<sup>88</sup> While the trial court found Dr. Taub guilty on six of the charges, the court of appeals overruled that decision stating that it did not feel the legislature intended the statute to apply to research activities under a federal program.<sup>89</sup> The second case involved Dr. Thomas Gennarelli, a researcher at the University of Pennsylvania who worked on head injury research. He tried to recreate head injuries in baboons by accelerating the animals' heads at high speeds to increase scientific knowledge of head injuries in humans.<sup>90</sup> While no charges were filed, Dr. Gennarelli's research was the center of an animal rights uproar when the video recordings were obtained by activist group People for the Ethical Treatment of Animals ("PETA"), who turned it into a film titled "Unnecessary Fuss."<sup>91</sup> As a result of the media attention, public outcry, and congressional pressure, the National Institute of Health, which provided roughly one million dollars annually to Dr. Gennarelli's research, found that the research violated the AWA and closed the facility.<sup>92</sup> These experiments seem to be based on genuine intentions to improve the lives and medical treatment of humans. However, the underlying notion establishing that the abuse of these animals is the only way to conduct experiments, and that their pain and suffering matters so little, is troublesome.<sup>93</sup> Further, a look at the availability of project grants in the United States may also indicate a less altruistic drive for the research.

Medical research is a business in the sense that it is driven by profit maximization interests. The primary difference between medical research and general for-profit businesses is that research funding typically comes from grants intended to fund further research, experiments, and ultimately, profitable solutions. Thus, it is no surprise to see the same drive for ever-increasing "profit" in the scientific community (in the form of grant money) as that seen in the broader business community. The United States government currently provides approximately \$140 billion each year for scientific research and

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<sup>88</sup> Taub v. Maryland, 463 A.2d 819, 819-20 (Md. 1983).

<sup>89</sup> *Id.* at 822.

<sup>90</sup> FRANCIONE, *supra* note 81, at 195.

<sup>91</sup> LAWRENCE FINSSEN & SUSAN FINSSEN, THE ANIMAL RIGHTS MOVEMENT IN AMERICA: FROM COMPASSION TO RESPECT 67 (1994) (causing animal rights activists to stage protests at the testing facility).

<sup>92</sup> *Id.* at 70-71.

<sup>93</sup> *Id.* at 166.

development.<sup>94</sup> The opportunity for large amounts of grant money pushes some researchers to use any means necessary to achieve the results needed to continue to receive the grants, even at the expense of the test subject. Moreover, the loopholes applicable to animal use in scientific experiments in the AWA,<sup>95</sup> and the exemptions in state regulations for the same purpose,<sup>96</sup> allow researchers to retain a great deal of autonomy and deference to their opinions regarding necessity.<sup>97</sup>

The combination of such relative autonomy, the treatment of animals as property in the law, and the implicit incentive of possible financial gain (either through grants or profitable experiment results) leads researchers and institutions to use and dispose of animals in a cruel and exploitive way in order to maintain lowered costs and increased profits. This is similar to the way plantation owners would use, abuse, and exploit African-American slaves to drive the plantation profitability while maintaining minimal costs.<sup>98</sup> The public outcry and pressure on legislatures after the above incidents led to amendments to the AWA intended to prevent similar abuses in the future.<sup>99</sup> While the amendments to the AWA claimed to provide protections for animals in experimentations, they actually possessed a number of exemptions and loopholes criticized for not adding protections at all, including exemptions for many federal-created research facilities and excluding from coverage the species of animals that make up 97% of those used in scientific research.<sup>100</sup> Further, the amendments rely on the facilities' own internal review and policing through the use of Institutional Animal Care and Use Committees ("IACUC").<sup>101</sup> Each facility covered by the

<sup>94</sup> Art Jahnke, *Who Picks Up the Tab for Science?*, B.U. RES., <http://www.bu.edu/research/articles/funding-for-scientific-research/> (last visited Aug. 2, 2017) [<https://perma.cc/HD4X-P64S>].

<sup>95</sup> See generally FRANCIONE *supra* note 81, at 195-207 (detailing the Animal Welfare Act and its amendments as they relate to animal experimentation).

<sup>96</sup> MARGARET C. JASPER, ANIMAL RIGHTS LAW 15-17 (1997) ("Although all jurisdictions had enacted some type of animal anti-cruelty statute, many routinely exempted animal experimentation.").

<sup>97</sup> Carole Lynn Nowicki, Note, *The Animal Welfare Act: All Bark and No Bite*, 23 SETON HALL LEGIS. J. 443, 464 (1999); see also FRANCIONE, *supra* note 81, at 258.

<sup>98</sup> See *supra* Part II.B.3.

<sup>99</sup> FRANCIONE, *supra* note 81, at 258.

<sup>100</sup> Darian M. Ibrahim, *Reduce, Refine, Replace: The Failure of the Three R's and the Future of Animal Experimentation*, U. CHI. LEGAL F. 195, 214 (2006).

<sup>101</sup> *Id.* at 206; 7 U.S.C. § 2143(b)(1)(B) (2000).

AWA must have a committee consisting of at least three members, one of whom must be a veterinarian, and one of whom must be unconnected with the research facility.<sup>102</sup> The issue present with the IACUC portion of the amendments is the self-policing and honor system, which allow violations and abuses to go unreported due to facilities utilizing veterinarians who are sympathetic to the researchers' causes and less concerned about potential animal rights abuses.<sup>103</sup>

Another major downfall of the AWA is the vast number of animals not covered by the act.<sup>104</sup> The act covers only dogs, cats, nonhuman primates, rabbits, hamsters, and guinea pigs.<sup>105</sup> This leaves approximately 97% of the animal species that are used as test subjects, including rats, mice, birds, fish, and farm animals not covered under the AWA.<sup>106</sup> As a result, these animals are left to seek protection through state anticruelty laws.<sup>107</sup> Unfortunately, animal experimentation is either specifically exempted in provisions of state anticruelty laws, or through provisions that allow for "customary" uses.<sup>108</sup> These exemptions from the law mean that an overwhelming majority of the animals used in scientific experimentation are afforded only the protections that come with their classification as property, or in other words, no true legal protections for animals.

While one may be quick to argue that medical research is a "necessary evil" that helps save lives, this is not truly the case as technology has advanced.<sup>109</sup> Medical research is not the only field that

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<sup>102</sup> 7 U.S.C. § 2143(b)(1).

<sup>103</sup> PETER SINGER, *ANIMAL LIBERATION* 80-81 (N.Y. rev. 3d ed. 2002) (discussing the unchanged exemption from interference given to the experiments themselves, these committees have no authority over what goes on in the experiments).

<sup>104</sup> Ibrahim, *supra* note 101, at 214.

<sup>105</sup> 7 U.S.C. § 2132(g) (2000).

<sup>106</sup> F. B. Orlans, *Data on Animal Experimentation in the United States: What They Do and Do Not Show*, 37(2) *PERSP. BIOLOGY & MED.* 217, 218 (1994); Ibrahim, *supra* note 101; Katie C. Galanes, *Brief Summary of Animal Testing in Commercial Products*, *MICH. ST. UNIV.: ANIMAL LEGAL & HIST. CTR.* (2010), <https://www.animallaw.info/intro/animal-testing-commercial-products> [<https://perma.cc/QF7N-WZS5>].

<sup>107</sup> David Favre, *Some Thoughts on Animal Experimentation*, 2 *ANIMAL L.* 161, 162 (1996).

<sup>108</sup> *E.g.*, *IDAHO CODE ANN.* § 25-3504 (West 2012); *VA. CODE ANN.* § 3.2-6570 (West 2015).

<sup>109</sup> FRANCIONE, *supra* note 81, at 167 (explaining that scientists point to supposed benefits which may consist of benefits that already exist and are allegedly a result

conducts experiments on animals. For example, cosmetics companies also test their products on animals to ensure that they are safe for humans.<sup>110</sup> Some products like mascaras, shampoos, and perfumes are often tested on the eyes of rabbits that have their eyelids forcibly held open to achieve better absorption of the tested item.<sup>111</sup>

## 2. Agricultural Mistreatment

The United States accounts for only 5% of the world's population yet consumes 15% of its animal products.<sup>112</sup> The average American consumes over one-and-a-half times the federally recommended daily allowance of protein, and 67% of that protein comes from animal sources, as opposed to the world average of 34%.<sup>113</sup> To keep up with the demand, cut costs, and provide the most meat possible, industrial farms choose to confine animals in cramped, unsanitary cages, serve them cheap and unwholesome food, and take shortcuts in the disposal of animal waste through the use of "waste lagoons."<sup>114</sup> The living conditions of animals on these farms is more accurately likened to fetid prisons of abuse and neglect for the animal, and also pose serious health risks to humans.<sup>115</sup> The high demand for animal products leads to a plentiful industry with large amounts of money to be earned by the factory farmers.<sup>116</sup> These agriculture businesses enjoy a lack of governmental oversight as the United States Department of Agriculture

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of animal use, benefits that supposedly have some direct application to a problem, or benefits without any immediate application).

<sup>110</sup> *Types of Animal Testing*, CRUELTY FREE INT'L, <https://www.crueltyfreeinternational.org/why-we-do-it/types-animal-testing> (last visited Aug 2, 2017) [<https://perma.cc/DM8K-AFZJ>] (explaining that testing may be for fundamental research to support scientific inquiry, genetically modifying animals in misguided attempts to replicate or eradicate diseases, and testing for regulations of medicines, chemicals, and cosmetics).

<sup>111</sup> Galanes, *supra* note 107.

<sup>112</sup> David N. Cassuto & Sarah Saville, *Hot, Crowded, and Legal: A Look at Industrial Agriculture in the United States and Brazil*, 18 ANIMAL L. 185, 195 (2012).

<sup>113</sup> *Id.*

<sup>114</sup> Anastasia S. Stathopoulos, *You Are What Your Food Eats: How Regulation of Factory Farm Conditions Could Improve Human Health and Animal Welfare Alike*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 407, 410 (2010).

<sup>115</sup> *Id.*

<sup>116</sup> *The Meat and Poultry Industry: Basic Statistics*, THE MARKET WORKS, [www.themarketworks.org/stats](http://www.themarketworks.org/stats) (last visited Aug. 2, 2017) [<https://perma.cc/U78Q-BQAP>] (finding annual sales total \$133 billion in meat packing and processing and \$52 billion in poultry slaughter and processing).

(“USDA”) has no authority to regulate on-farm activities.<sup>117</sup> Additionally, the Environmental Protection Agency (“EPA”) does not have authority to regulate waste lagoons because they, and the ground water they pollute, are not “waters of the United States.”<sup>118</sup> Finally, the Food and Drug Administration (“FDA”) arguably has regulatory power over the conditions on the farms by virtue of its authority to regulate the contents of animal feed, drugs, and to prevent the spread of communicable diseases.<sup>119</sup> However, these agencies, including the FDA, have not yet exercised their full potential to regulate industrial agriculture at the farm level, allowing millions of animals within the industry to suffer for a lack of enforceable regulations.<sup>120</sup>

It has been observed that from an economic standpoint it is more profitable to frequently slaughter a large number of unhealthy animals than to slaughter fewer, healthier animals less often.<sup>121</sup> As Anastasia Stathopoulos notes in *You Are What Your Food Eats: How Regulation of Factory Farm Conditions Could Improve Human Health*, “[a]s a consequence of the rise of factory farming and its goal of increasing quantity and efficiency at all costs, farmed animals have become commodities.”<sup>122</sup> Because farming is a business, the farmers are in the same position as the businesses described above, and must drive for the lowest cost possible in order to obtain the largest profit margin possible.<sup>123</sup> Thus factory farmers are indifferent to the welfare of their animals because the farmers are focused on the bottom line. Unfortunately, that bottom line is “getting as many animals to the minimum slaughter weight as quickly and cheaply as possible.”<sup>124</sup> The lack of adequate regulation leaves the animals dependent on the farm industry to self-regulate, leading to a generally tortured existence of pain and deprivation.<sup>125</sup> As Stathopoulos summarizes:<sup>126</sup>

<sup>117</sup> Stathopoulos, *supra* note 115, at 434.

<sup>118</sup> Cassuto, *supra* note 113, at 197.

<sup>119</sup> Stathopoulos, *supra* note 115, at 434.

<sup>120</sup> Cassuto, *supra* note 113, at 197.

<sup>121</sup> Cassuto, *supra* note 113, at 188; Stathopoulos, *supra* note 115, at 411 (quoting *Challenging Concentration of Control in the American Meat Industry*, 117 HARV. L. REV. 2643, 2652 (2004)).

<sup>122</sup> Stathopoulos, *supra* note 115, at 410.

<sup>123</sup> See *supra* Part II.A.

<sup>124</sup> Stathopoulos, *supra* note 115, at 411.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*



*The vast majority never experience sunshine, grass, trees, fresh air, unfettered movement, sex, or many other things that make up most of what we think of as the ordinary pattern of life on earth. They are castrated without anesthesia, on occasion deliberately starved, live in conditions of extreme and unrelieved crowding, and suffer physical deformities as a result of genetic manipulation.<sup>127</sup>*

These painful procedures and deprivations of natural activities lead to high levels of stress in the animals and, as a result, the animals display abnormal pecking, kicking, scratching, and chewing.<sup>128</sup> Farmers will attempt to protect the value of the animal property by removing the chickens' beaks or snipping off the tails of cows and pigs.<sup>129</sup> The application of the property classification to animals allows the farmers to commit these acts because the animal has no legal rights in itself, and instead all of the rights and protections are afforded to the farmer as the owner of the property.

### 3. Entertainment

Animals in circus performances demonstrate and glorify animal abuse in the entertainment industry. Most animals do not jump through rings of fire, balance on bikes, or dance on their hind legs naturally, thus requiring a great deal of coercive training to perform such tricks.<sup>130</sup> Animals are trained in these unnatural behaviors through negative and abusive reinforcement.<sup>131</sup> One example of the negative reinforcement training came to light during a lawsuit against the Ringling Brothers Circus in which a former employee described the use of bull hooks on sensitive parts of the Asian elephants and chains on a front and back leg

<sup>127</sup> David J. Wolfson & Mariann Sullivan, *Foxes in the Henhouse - Animals, Agribusiness, and the Law: A Modern American Fable*, in ANIMAL RIGHTS 205, 217 (Cass R. Sunstein & Martha C. Nussbaum, eds., 2004), *quoted in* Stathopoulos, *supra* note 115, at 411.

<sup>128</sup> Stathopoulos, *supra* note 115, at 413.

<sup>129</sup> *Id.*; Wolfson, *supra* note 128, at 218.

<sup>130</sup> Jacqueline Neumann, *Redefining the Modern Circus: A Comparative Look at the Regulations Governing Circus Animal Treatment and America's Neglect of Circus Animal Welfare*, 36 WHITTIER L. REV. 167 (2014).

<sup>131</sup> Stephanie Francis Cahill, *An Elephant Never Forgets*, 2 No. 6 ABA J. E-REP. 9 (2003) (recounting from Thomas Rider, a former animal handler at Ringling Bros. and Barnum & Bailey Circus, who witnessed elephant abuse at the circus).

to restrict the elephants from socializing.<sup>132</sup> These abuses are unfortunately not isolated to Ringling Brothers since, for example, lions and tigers in various other circuses experience similar abuses with trainers utilizing whips and sticks to “motivate” the cats to act.<sup>133</sup> These big cats are often starved for days to ensure they will perform in a desperate plea for food.<sup>134</sup>

While the AWA regulates treatment of animals in the entertainment industry, it fails to provide mechanisms to properly enforce the regulations. Instead, the Endangered Species Act (“ESA”) has become the primary federal regulation used to punish animal rights violations by circuses.<sup>135</sup> Further, some individual states have legally recognized the abuse. For example, both New York and Illinois recently introduced bills banning elephants from circuses.<sup>136</sup> The extreme pressure from the public and legislature has led one of the biggest circuses in existence, the Ringling Brothers Circus, to remove elephants from its main act.<sup>137</sup> Shortly thereafter, due to declining ticket sales and high operating costs, Feld Entertainment, the company that owns Ringling Brothers, announced that the circus would be closing.<sup>138</sup>

The issue of animal abuse in entertainment has moved more into the forefront of public concern over the last few years. While on the surface the average person could assume that laws such as the AWA, ESA, and

<sup>132</sup> Am. Soc’y. for Prevention of Cruelty to Animals v. Feld Entm’t Inc., 677 F. Supp. 2d 55, 58 (D. D.C. 2009).

<sup>133</sup> Anastasia Niedrich, *Animals in Circuses and the Laws Governing Them*, MICH. ST. UNIV.: ANIMAL LEGAL & HIST. CTR. (2010), <https://www.animallaw.info/article/animals-circuses-and-laws-governing-them> [<https://perma.cc/VP4A-ZZ54>].

<sup>134</sup> *Id.*

<sup>135</sup> Endangered Species Act, 16 U.S.C. §§ 1531-1544 (2013).

<sup>136</sup> See Joseph Spector, *NY Bill Passes: Elephants Out as Entertainment*, LOHUD (June 8, 2017, 4:14 PM), [www.lohud.com/story/news/politics-on-the-hudson/2017/06/08/ny-bill-passes-elephants-out-entertainment/102637972](http://www.lohud.com/story/news/politics-on-the-hudson/2017/06/08/ny-bill-passes-elephants-out-entertainment/102637972) [<http://perma.cc/4JL6-96PW>]; see also Scot Bertram, *Bill Banning Elephants from Circuses in Illinois Heads to Governor*, ILL. NEWS NETWORK (June 1, 2017), [https://www.ilnews.org/news/state\\_politics/bill-banning-elephants-from-circuses-in-illinois-heads-to-governor/article\\_0f5ba808-417e-11e7-a4ff-b7005d140201.html](https://www.ilnews.org/news/state_politics/bill-banning-elephants-from-circuses-in-illinois-heads-to-governor/article_0f5ba808-417e-11e7-a4ff-b7005d140201.html) [<https://perma.cc/2W6X-Y5XF>].

<sup>137</sup> Tony Marco & Azadeh Ansari, *Famed Ringling Bros. Circus Closing After More Than 100 Years*, CNN ENT. (Jan. 14, 2017, 10:15 PM), [www.Cnn.com/2017/01/14/entertainment/ringling-circus-closing/index.html](http://www.Cnn.com/2017/01/14/entertainment/ringling-circus-closing/index.html) [<https://perma.cc/9LY7-LS86>].

<sup>138</sup> *Id.*

the various state regulations seem to protect animals, a bevy of special interest groups lobby behind the scenes to carve out exemptions weakening these laws.<sup>139</sup> Documentaries that have experienced great popularity, such as *Blackfish*, have made people more aware of specific issues like the mistreatment of orcas at SeaWorld facilities.<sup>140</sup> The documentary highlights the harsh conditions of the marine mammal entertainment industry.<sup>141</sup> It focused on the story of a particular whale, Tilikum, who suffered from numerous behavioral disorders common among animals in captivity, resulting in aggression, the killing of three people throughout his captive life, and eventually passing away due to a bacterial lung infection.<sup>142</sup> Captive orcas face health concerns not documented in wild orcas, such as parasite infestations, shortened lifespans likely caused by stress, and respiratory issues exacerbated by the artificial environment.<sup>143</sup> The captive orcas also develop psychological issues presumably from the stress of confinement and the unnatural environment.<sup>144</sup> This leads to aggression towards trainers, other whales, and even themselves.

Another federal law, the Marine Mammal Protection Act (“MMPA”), weakened as a result of heavy cash donations in lobby efforts by SeaWorld among other companies,<sup>145</sup> now only focuses on taking marine mammals without authorization from the wild and therefore does not protect the orcas already in captivity.<sup>146</sup> Further, when SeaWorld recently came under fire based upon *Blackfish* and the

<sup>139</sup> Pamela D. Frasch et al., *State Animal Anti-Cruelty Statutes: An Overview*, 5 ANIMAL L. 69, 75-76 (1999) (“[s]pecial interest groups, such as hunting associations and agricultural lobbies, often claim certain practices need to be exempt in order to protect against frivolous lawsuits.”).

<sup>140</sup> BLACKFISH (CNN Films 2013).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> Vanessa Williams, *Captive Orcas ‘Dying to Entertain You’: The Full Story*, 40 (2001), [http://www.wdcs.org/submissions\\_bin/orcareport.pdf](http://www.wdcs.org/submissions_bin/orcareport.pdf) [<https://perma.cc/WX5Q-73GU>].

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 69 (finding in 1994, with cash donations of up to \$35,000 from Anheuser-Busch, American Zoo Aquarium Association and Alliance of Marine Mammal Parks Association (MMPA), representative Robert Jenkins boasted that they had weakened the MMPA “through a consistent, coordinated and unrelenting approach to Capitol Hill and the Congressional staff responsible for the MMPA reauthorization [sic]; the public display community was able to achieve virtually all of [its] agenda”).

<sup>146</sup> *See generally* 16 U.S.C. § 1362(13) (2010).

increased efforts of animal rights organizations, it opted to continue to trudge through with its animal shows and simply introduce a large video screen in the background.<sup>147</sup> The introduction of the new show exemplifies the position of the animal entertainment industry that took the most cost effective option, installing some screens and slightly altering the performance, in an attempt to lull the general public into forgetting about the exploitation, abuse, and deprivation that the animals continued to experience. The enclosures are still the same size, the animals are kept in an unnatural environment, and they continue to be exploited by SeaWorld for profit.

Additionally, the public has looked more critically at zoos over the past several decades.<sup>148</sup> A growing segment of the population is no longer willing to view an animal pacing back and forth in a small cage with concrete floors.<sup>149</sup> Between these public concerns, the AWA, and the ESA, a few zoos have begun to provide larger enclosures for their animals while others have either stopped housing certain animals or resigned themselves to being less appealing to the public and, consequently, less profitable.<sup>150</sup> However, some would argue that holding animals in an enclosure and exploiting them as a profit source

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<sup>147</sup> Lori Weisberg, *Will New Killer Whale Encounter Resurrect SeaWorld?*, SAN DIEGO UNION-TRIB. (May 21, 2017, 6:00 AM) [www.sandiegouniontribune.com/business/tourism/sd-me-seaworld-encounter-20170511-story.html](http://www.sandiegouniontribune.com/business/tourism/sd-me-seaworld-encounter-20170511-story.html) [<https://perma.cc/SVT9-P29Y>] (discussing the new show and SeaWorld's attempts to regain footing amid slowing revenues and public disapproval of animal entertainment and care).

<sup>148</sup> Michelle Kretzer, *Gallup Poll Shows Majority of Americans Are Concerned About Animal Rights*, PETA (May 22, 2015) [www.peta.org/blog/gallup-poll-shows-majority-of-americans-are-concerned-about-animal-rights/](http://www.peta.org/blog/gallup-poll-shows-majority-of-americans-are-concerned-about-animal-rights/) [<https://perma.cc/B9G6-SJDQ>] (“And the majority of people were concerned about marine animals used in amusement parks or aquariums (62 percent), animals in zoos (57 percent), and animals used for food (54 percent).”).

<sup>149</sup> Kali S. Grech, *Detailed Discussion of the Laws Affecting Zoos*, MICH. ST. UNIV.: ANIMAL LEGAL & HIST. CTR. (2004), [www.animallaw.info/article/detailed-discussion-laws-affecting-zoos](http://www.animallaw.info/article/detailed-discussion-laws-affecting-zoos) [<https://perma.cc/VST9-8AF2>] (“It was not until the late 1970s and early 1980s that the appearance of zoos began to change to reflect the public opinion; this transition took place as people were educated about the true conditions endured by zoo animals.”).

<sup>150</sup> Justin Worland, *The Future of Zoos: Challenges Force Zoos to Change in Big Ways*, TIME (Feb. 16, 2017), [www.time.com/4672990.the-future-of-zoos/](http://www.time.com/4672990.the-future-of-zoos/) [<https://perma.cc/SE3X-DPTK>] (finding some, such as the zoos in Omaha, San Diego and Houston, have doubled down with better facilities. Others—in San Francisco, Seattle and Chicago, to name a few—have given up on keeping elephants entirely).

is animal abuse.<sup>151</sup> There have also been cases of animals being subjected to physical and psychological abuse in violation of the ESA while under the care of zoos. Recently, the Animal Legal Defense Fund (“ALDF”) filed *Graham v. San Antonio Zoological Society* on behalf of San Antonio residents for the zoo’s failure to provide adequate shelter and housing conditions to its solitary Asian elephant, “Lucky.”<sup>152</sup> The ALDF argues that the zoo does not provide shade for Lucky during hot days, leaving the elephant extremely susceptible to overheating.<sup>153</sup> Additionally, the complaint alleges that the pool available in her enclosure is too shallow for Lucky to submerge herself, the exhibit floor is too hard and contributes to Lucky’s unusual gait, and Lucky suffers psychologically as the only isolated elephant in the entire zoo.<sup>154</sup> Seemingly in response to the suit, the zoo introduced two new elephants into the enclosure.<sup>155</sup> The court granted summary judgment in relation to the companionship claim for mootness and the claim for the size of the enclosure because it met AWA requirements.<sup>156</sup> However, the court is still considering the issues of inadequate shelter from the sun and the harm caused by the hard concrete flooring.<sup>157</sup>

Animals have also held prominent roles in film media over the years. For example, shows with animals at the forefront dominated television with Lassie, Mister Ed, and Flipper. Additionally, movies such as Secretariat, Homeward Bound, and A Dog’s Purpose captivate audiences. However, the reports of animal abuse in film media abound. Notable accounts from the early days of film include the 1926 version of “Ben Hur,” when 100 horses died during the production,<sup>158</sup> and when

<sup>151</sup> Grech, *supra* note 150 (arguing that regardless of their intent, zoos reinforce the notion of human domination over non-human animals, which is never beneficial to animals.).

<sup>152</sup> *Graham v. San Antonio Zoological Soc’y*, No. SA-15-CV-1054-XR, 2017 WL 2533531, at \*1 (W.D. Tex. Apr. 18, 2017).

<sup>153</sup> *Id.* at \*1.

<sup>154</sup> Natalia Lima, *Lawsuit Filed to Compel San Antonio Zoo to Release Elephant to a Sanctuary*, ANIMAL LEGAL DEF. FUND: PRESS ROOM (Dec. 1, 2015), [www.Aldf.org/press-room/lawsuit-filed-to-compel-san-antonio-zoo-to-release-elephant-to-a-sanctuary/](http://www.Aldf.org/press-room/lawsuit-filed-to-compel-san-antonio-zoo-to-release-elephant-to-a-sanctuary/) [<https://perma.cc/HHZ4-ZG2R>].

<sup>155</sup> *Graham*, 2017 WL 2533531, at \*29.

<sup>156</sup> *Id.* at \*29-30.

<sup>157</sup> *Id.* at \*30-31.

<sup>158</sup> Susan McCarthy, *Hollywood’s Long History of Animal Cruelty*, SALON (Apr. 2, 2012, 3:40 PM),

the first Hollywood Tarzan reportedly stabbed a lion to death during filming.<sup>159</sup> Despite the widespread use of animals in film, there are no federal laws directly related to the welfare of animal actors. The AWA and the ESA partially touch this issue with the former regulating the private parties that rent the animal actor to the production company and the latter protecting wild animals from being captured and used in filming. State anti-cruelty laws may protect the welfare of the animal actor, however, those can vary and the state in which filming takes place may not necessarily have anti-cruelty laws in place. The industry itself created the American Humane Association (“AHA”) and in 1980 gave it the sole authority to monitor how animals are treated in movies, television, commercials, and music shows.<sup>160</sup> The AHA has four basic principles:

*1. No animal will be killed or injured for the sake of a film production; 2. If an animal must be treated inhumanely to perform, then that animal should not be used; 3. Animals are not props! If an animal is used off camera as background or to attract the attention of an animal being filmed, the same humane guidelines must apply to that animal; and 4. “Animal” means all sentient creatures including birds, fish, reptiles, and insects.*<sup>161</sup>

Critics of the AHA’s role, however, point to the “lack of any meaningful enforcement power” and conflicts of interest arising out of the fact the group is funded by major studios.<sup>162</sup>

#### 4. Sales of Domesticated Animals

Animal abuse can also be found outside of the commercial industry of research and entertainment. The Humane Society of the United States

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[www.salon.com/2012/04/02/hollywoods\\_long\\_history\\_of\\_animal\\_cruelty/](http://www.salon.com/2012/04/02/hollywoods_long_history_of_animal_cruelty/) [https://perma.cc/9W6X-ML7Z].

<sup>159</sup> Vincent Rizzo, *Detailed Discussion of the Legal Protections of Animals in Filmed Media*, MICH. ST. UNIV.: ANIMAL LEGAL & HIST. CTR. (2012), <https://www.animallaw.info/article/detailed-discussion-legal-protections-animals-filmed-media> [https://perma.cc/HP3B-UP48].

<sup>160</sup> *About Us*, AM. HUMANE ASS’N, [www.humanehollywood.org/index.php/about-us](http://www.humanehollywood.org/index.php/about-us) (last visited Nov. 2, 2017) [https://perma.cc/Q7ZC-7QTA].

<sup>161</sup> *Id.*

<sup>162</sup> Ralph Frammolino & James Bates, *Questions Raised About Group That Watches Out for Animals in Movies*, L.A. TIMES (Feb. 9, 2001), [www.articles.latimes.com/2001/feb/09/news/mn-23161](http://www.articles.latimes.com/2001/feb/09/news/mn-23161) [https://perma.cc/4LFB-P273].

estimates that 2-4 million dogs bred in puppy mills are sold each year.<sup>163</sup> Only twenty-six states have laws regulating commercial kennels and those licensing requirements are difficult to enforce.<sup>164</sup> One of the main enforcement issues is a result of budgetary and legislative inaction in inspection.<sup>165</sup> Most of the states that have commercial kennel regulations do not have separately mandated entities assigned to inspect the facilities.<sup>166</sup> These puppy mills are harmful because breeders force the animals to breed until they physically cannot anymore, keep the breeding animals in small cages with unsanitary conditions, and remove the puppies from the mother at a very young age for sale.<sup>167</sup>

Horses may also face abusive situations when raised for sale. Often, horses sold through an auction are sold to “killer buyers” who purchase the horse to either send it directly to a slaughterhouse or to be fattened up before going to the slaughterhouse.<sup>168</sup> Some horses at auction have clearly been neglected, with starvation being the most common killer.<sup>169</sup>

### III. HOW THE PROPERTY CLASSIFICATION HAS ALLOWED COMPANIES TO FLOURISH WITHOUT CONSIDERING CONSEQUENCES TO THE ANIMALS.

#### A. In Product Testing

Past medical testing has led to advances in medical science at a high cost to animals.<sup>170</sup> That cost includes substantial numbers of living,

<sup>163</sup> Robyn F. Katz, *Detailed Discussion of Commercial Breeders and Puppy Mills*, MICH. ST. UNIV.: ANIMAL LEGAL & HIST. CTR. (2008), [www.animallaw.info/article/detailed-discussion-commercial-breeders-and-puppy-mills](http://www.animallaw.info/article/detailed-discussion-commercial-breeders-and-puppy-mills) [https://perma.cc/V5G3-DWZY].

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *The Facts About Horse Auctions*, THE HUMANE SOC’Y OF THE U.S. (June 23, 2017), [www.humanesociety.org/issues/horse\\_slaughter/facts/facts\\_horse\\_auctions.html](http://www.humanesociety.org/issues/horse_slaughter/facts/facts_horse_auctions.html) [https://perma.cc/D8YV-N929].

<sup>169</sup> *Id.*

<sup>170</sup> FRANCIONE, *supra* note 81, at 170-71 (“For the better part of the past hundred years, scientists have routinely used animals in the development of virtually every procedure or drug. There is, therefore, no easy way to know which procedures or discoveries were causally related to the use of animals and which were not . . .

breathing animals tortured and harmed.<sup>171</sup> The property classification has allowed companies to ignore the wellbeing of animals and whether the animal is being treated humanely.<sup>172</sup> Troy Seidle, Director of Research & Toxicology for Humane Society International (“HSI”), explained the magnitude of animal testing, as well as the tendency for the government to minimize the numbers as percentages, stating:

*The government may prefer to talk about animals in laboratories as mere percentages because they belie the shocking scale of animal use. But the truth is, behind closed doors thousands of dogs and cats just like our beloved pets at home, are subjected to distressing and often terminal procedures. Hundreds of highly intelligent monkeys endure physical and mental pain, and more than a million rabbits, guinea pigs, hamsters and other rodents go through painful and invasive testing. These animals are not just statistics.*<sup>173</sup>

These issues are sometimes overlooked under the guise of the importance of medical research, but that does not explain the use of animal testing in cosmetics. There are no laws in the United States that require companies to test cosmetics and no laws that protect animals from cosmetic testing. Use of animals like mice in medical research itself is reportedly flawed. According to Gareth Sanger, a Professor of Neuropharmacology at the Blizard Institute, Queen Mary University of London, “[a] recent study has identified literally millions of small genetic differences between different highly inbred strains of mice.”<sup>174</sup> Moreover, it is impossible to know what strain of mice having which genetic differences would translate closely to the genetics of a human.<sup>175</sup> The animals do not have the medical conditions present in the human, such as asthma, so it is not a true test of the medicine’s effectiveness, only its safety for the animal and, hopefully, for the human.

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[some] scientific questions have resisted a solution even though millions of animals have been killed in the process”).

<sup>171</sup> *Id.*

<sup>172</sup> See *supra* Part II.C.1.

<sup>173</sup> Humane Society International, *HSI Replacing Animals in Research*, YOUTUBE, (Jul. 12, 2013), [https://www.youtube.com/watch?v=Z\\_9Vb6tLBTM](https://www.youtube.com/watch?v=Z_9Vb6tLBTM) [<https://perma.cc/6FPU-WDR7>].

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*



In that case, why do companies still use animals instead of the quicker and cheaper methods such as laboratory grown cells?<sup>176</sup> Regarding cosmetic testing, foreign laws that require animal testing is one answer. For example, China has a law that requires that all foreign and special-use cosmetics be tested on animals before being sold in mainland China.<sup>177</sup> The companies that produce cosmetics do not want to forego the potential revenue windfalls gained from entering this very large market of buyers.<sup>178</sup> However, the potentially high initial costs that allow companies to use those alternative methods are of growing concern. This issue affects both cosmetic testing and medical research. While the alternatives to animal testing can complete the tests more quickly and at a reduced cost, they require an initial investment of capital to adapt the facilities and potentially training the employees to work with the alternatives. Loss of revenue and increased costs disrupt the company's goal of achieving the maximum profit margin available, which would likely lead most corporate management teams to decide the current, cheaper method of testing to be ideal.

### **B. In Entertainment: Can We Finally Free Willy?**

Animals are used in the entertainment industry for various purposes. They are used to draw in crowds of people who want to see these magnificent creatures in person and do not think about the unnatural environment those animals are living in. As demonstrated with the Ringling Brothers Circus, once the business was unable to use elephants in its show, ticket sales plummeted. Apart from circuses, individual animals are sometimes used as small sideshows to attract cross-country travelers off the freeways, such as "Tony the Tiger," who was held in a small cage at a rest stop to generate profits.<sup>179</sup> Tiger Truck Stop, where Tony was held, has used tigers to attract customers for twenty years.<sup>180</sup>

<sup>176</sup> *In Testing, Animals in Science/Alternatives*, NEW ENGLAND ANTI-VIVISECTION SOC'Y, <http://www.neavs.org/alternatives/in-testing> (last visited Aug. 2, 2017) [<https://perma.cc/E4BW-Z2M8>] (describing the benefits of *in vitro* test methods and models based on human cell and tissue cultures).

<sup>177</sup> *Fact Sheet: Cosmetic Testing*, THE HUMANE SOC'Y OF THE U.S., [http://www.humanesociety.org/issues/cosmetic\\_testing/qa/questions\\_answers.html](http://www.humanesociety.org/issues/cosmetic_testing/qa/questions_answers.html) (last visited Sept. 13, 2017) [<http://archive.is/Z5iVF>].

<sup>178</sup> *Id.*

<sup>179</sup> *Tony, the Truck Stop Tiger*, ANIMAL LEGAL DEF. FUND, [www.aldf.org/cases-campaigns/features/tony-the-truck-stop-tiger/](http://www.aldf.org/cases-campaigns/features/tony-the-truck-stop-tiger/) (last visited June 23, 2017) [<https://perma.cc/LA9V-JGJ7>].

<sup>180</sup> *Id.*

Veterinarian Jennifer Conrad was recently working with the Animal Legal Defense Fund to have Tony set free.<sup>181</sup> Unfortunately, Tony passed away on October 17, 2017, before ever knowing a life outside of the truck stop at which he was kept.<sup>182</sup> According to Dr. Conrad, Tony had been subjected to the stench of gasoline fumes and the droning of diesel engines, had been taunted by visitors, and was isolated in a tiny cage.<sup>183</sup> Dr. Conrad, who has cared for captive large cats for decades, asserts that the fumes and constant noise are harmful to an animal with such heightened senses and the taunting and small enclosure resulted in behavior indicative of high stress, such as constant pacing.<sup>184</sup> Additionally, Michael Sandlin, the owner of Tiger Truck Stop, has been cited for unsanitary feeding practices, mishandling tigers, and failure to provide veterinary care, shelter from inclement weather, clean drinking water, and knowledgeable employees to care for the tigers as mandated by the USDA.<sup>185</sup> Though it may seem that these animals used in entertainment all live in different environments, they all share the key characteristic of the property classification. This classification allows the truck stop owner, zoo manager, movie producer, and circus company to consider the monetary benefit to the humans as a priority higher than the welfare of the animal.

### C. In the Sale of Domesticated Animals: How Much Is That Doggy in the Window?

One of the quintessential rights in the “bundle of sticks” that is property law is the right to free alienability.<sup>186</sup> This is the right of the property owner to sell, trade, or bequeath her property and is a right rarely infringed upon through regulation.<sup>187</sup> As a result, owners of puppy mills may sell puppies to whomever they want, without considering whether they are going to a good home.<sup>188</sup> These

<sup>181</sup> *Id.*

<sup>182</sup> Janet McConnaughey, *Tony the Louisiana Truck-Stop Tiger Dies, Age 17*, THE SEATTLE TIMES (Oct. 17, 2017, 9:50 AM), <https://www.seattletimes.com/nation-world/tony-the-louisiana-truck-stop-tiger-dies-age-17/> [<https://perma.cc/LKN6-ZDUF>].

<sup>183</sup> See *Tony, the Truck Stop Tiger*, *supra* note 180.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> See generally Penner, *supra* note 67.

<sup>187</sup> See generally *id.*

<sup>188</sup> *Laws that Protect Dogs in Puppy Mills*, NO PET STORE PUPPIES, <http://nopetstorepuppies.com/laws-that-protect-dogs-in-puppy-mills> (last visited

irresponsible breeders benefit from the high demand for dogs and their ability to produce a vast quantity of puppies quickly and at low cost because of apathy towards the health of the breeding dogs.<sup>189</sup> Similarly, people can make a much higher profit in the sale of their horses if they keep the cost of raising them low. The ability of these owners to continue to sell horses at auction, despite the breeder/owner's neglect and the availability of "killer buyers" looking to buy multiple horses to send to slaughter, results in a profit incentive to raise the horse at the lowest cost possible.<sup>190</sup>

#### IV. THE BAD AND THE UGLY: NON-HUMAN SLAVERY

The continued use of applying a property classification to animals only sustains their mistreatment and the unimportant wants of humans in a hierarchy above the necessities of life for the animal, continuing to place the whims or greed of humans over the wellbeing of nonhuman animals. Animals in the entertainment industry suffer extreme abuse because of their reduction to chattel status, as humans did historically when they were classified as property. Animals are whipped and prodded with bull hooks, forcing them to perform unnatural acts for profit, such as jumping through flaming hoops or being chained to accommodate photo opportunities. This egregious mistreatment arguably echoes that suffered by humans at the hands of their owners.<sup>191</sup> Animals used in product testing are tortured through unnecessary medical procedures, including injections of medications to determine side effects, or the applications of cosmetic products to their faces and eyes to estimate how much pain it will cause to the human customer.<sup>192</sup> Animals classified as property are legally commodities that can be

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Nov. 24, 2017) [<https://perma.cc/P92E-CM7H>] (providing a description of the types of laws that regulate puppy mills). While a few states have advanced laws that regulate the number of breeding dogs or require licensing of the breeder, none infringe on the rights to sell the "property" at will. *Id.*

<sup>189</sup> *Puppy Mills Are Cruel, NO PET STORE PUPPIES*, <http://nopetstorepuppies.com/puppy-mills-are-cruel> (last visited Nov. 24, 2017) [<https://perma.cc/NH8P-SFWD>] ("Puppy mills are large-scale dog breeding operations where profit is given priority over the well-being of the dogs. Puppy mills treat dogs like products, not living beings, and usually house them in overcrowded and unsanitary conditions without adequate veterinary care, socialization, or even food and water.").

<sup>190</sup> *See Facts About Horse Auctions*, *supra* note 165.

<sup>191</sup> *See supra* Part II.C.3.

<sup>192</sup> *See supra* Part II.C.1.

bought, sold, traded, and forced to breed, allowing their owners to sell any offspring for profit. These exploitations and abuses illustrate the worst of humanity's greed and narcissism, which allows the continued beating, imprisoning, and enslaving of animals to achieve lower costs despite the availability of alternatives through improved technology for labor and experimentation. This nonhuman slavery is promulgated by foolhardy notions that animals do not feel pain, or that humans were intended by an almighty deity to rule and use animals for their own purposes. The exploitation of animals by corporations and individuals who are intent on earning the greatest returns at the expense of all else impacts many industries. As a result, there is a high monetary incentive to continue these abusive practices. Federal animal rights laws, which began as an attempt to protect animals from such abuses, neglect, and deprivation have been rendered all but ineffectual due to exemptions carved out at the behest of lobbying groups seeking to protect their own financial interests. These same federal laws continue to classify animals as property. Thus, most recognized animal rights laws are implicitly intended to protect the interests of the owners or human third parties, whose interests further facilitate animal exploitation, not increased legal rights for animals.<sup>193</sup>

## V. THE GOOD: A POSSIBLE SOLUTION

The property classification for animals is unsatisfactory and results in an environment where the most menial of human wants overpower the most basic welfare needs of animals. Despite this, many are reluctant to give animals the classification of personhood. One major argument opponents give against a personhood classification is that they fear how far-reaching the consequences might be given that this country currently and expansively exploits animals for food, clothing, science, and entertainment.<sup>194</sup> This argument is rooted in an all-or-nothing attitude that ignores practical solutions that could be mutually beneficial to humans and animals.

Legislatures can learn from the past application of the legal property classification to living beings and the relative speed at which those classifications were overturned to seek guidance in advancing the legal rights of nonhumans. In the case of African-American slaves, the Civil

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<sup>193</sup> FRANCIONE, *supra* note 81, at 201.

<sup>194</sup> Riffkin, *supra* note 6 (showing that approximately thirty-two percent of those who responded to a 2015 Gallup poll believed animals should have the same rights as people).

War and the Thirteenth Amendment ultimately abolished slavery in all forms, except as punishment for crimes, relatively quickly in terms of complete legal reclassification.<sup>195</sup> Alternately, the Women's Suffrage Movement, representing the struggle of another class of living beings classified as property, saw a more gradual advancement of individual rights being granted to women over time.<sup>196</sup> These historical fights for non-property classifications provide two examples of the speed at which the movement can take towards a legal status appropriately suited to sentient nonhuman animals.<sup>197</sup>

While the current and historical options for classification in the law have remained locked as either human or property, the American legal system is not a system of limited options and courts may opt to transition to an alternate classification. This classification may be one in which the importance of protecting the health and well-being of the animal is expressly protected. The classification could be tailored to require a minimal standard of care for all animals in all industries, an understanding that animals hold more value than just replacement costs, and a consideration of what is best for the animal when making decisions regarding its care.

Implementing a new classification for animals could ultimately be accomplished to still allow the ownership, sale, and transfer of animals as necessary legal concepts for the human/animal relationship. However, it would force companies, which heretofore have been able to exploit animals similarly to how plantation owners exploited servants and slaves, to place the health and humane treatment of the animals they

<sup>195</sup> See generally ABC-CLIO, *SLAVERY IN THE UNITED STATES: A SOCIAL, POLITICAL, AND HISTORICAL ENCYCLOPEDIA*, 136-43 (Junius P. Rodriguez ed., 2007) (surveying the build-up to the Civil War and the issuance of the Emancipation Proclamation).

<sup>196</sup> *Trammel v. United States*, 445 U.S. 40, 52 (1980). ("Nowhere in the common-law world—indeed in any modern society—is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being. Chip by chip, over the years those archaic notions have been cast aside so that '[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.'" (quoting *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975)).).

<sup>197</sup> Diane Sullivan & Holly Vietzke, *An Animal Is Not an iPod*, 4 J. ANIMAL L. 41, 44 (2008); R. Scott Nolen, *Sentient Property: A Novel Animal Law Proposal*, AM. VETERINARY MED. ASS'N (Sept. 1, 2004), [www.avma.org/news/javmanews/pages/040915j.aspx](http://www.avma.org/news/javmanews/pages/040915j.aspx) [https://perma.cc/SJ5P-EN7S] (discussing the new legal classification as it was presented by Attorney Carolyn B. Matlack at the American Veterinary Medical Law Association in July 2004).

use above the maximization of their profits. Despite the increase in the cost of business, the companies in most animal exploitation industries would likely still thrive.

One such classification that has been suggested is that of “sentient property” presented by Attorney Carolyn B. Matlack.<sup>198</sup> While Attorney Matlack’s proposed definition of which animals would be considered “sentient property” is very narrowly tailored, it rests primarily on a definition of sentience that concludes that the animal is responsive to, or consciously aware of, sense impressions, feelings, or sensations.<sup>199</sup> More concisely, sentience relies on the ability of the animal to feel and perceive pain and pleasure.<sup>200</sup> Over the decades, it has become increasingly more obvious how many creatures humans have incorrectly assumed did not feel pain because of those animals’ inability to express that pain in an understandable way.<sup>201</sup> As technology has improved, scientists have developed techniques to determine that even non-mammal animals such as reptiles, amphibians, and fish have the neuroanatomy necessary to perceive pain.<sup>202</sup>

The Sentient Property Classification would recognize that animals have the capacity to feel pain and could provide additional protections for animals, preventing subjection to unnecessary pain. The classification could also assert that pain inflicted on an animal would need a strong and necessary human interest to be justified. This compromise would also assuage the concerns of those not yet willing to give personhood status to animals by maintaining them as some form of “property,” albeit a heightened version of property that still holds some rights. While this classification may not be all-inclusive, and may lump highly cognizant nonhuman animals in with nonhuman animals lower on the cognition scale, it is a practical compromise that could be one of the first stepping stones towards ensuring that all living creatures are treated with respect.

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<sup>198</sup> Katz, *supra* note 164.

<sup>199</sup> Nolen, *supra* note 198.

<sup>200</sup> JACKY TURNER, STOP-LOOK-LISTEN: RECOGNISING THE SENTIENCE OF FARM ANIMALS 6 (2006) (discussing how animals are capable of being aware of their surroundings, of sensations in their own bodies, including pain, hunger, heat or cold, and of emotions related to those sensations).

<sup>201</sup> Liz Langley, *The Surprisingly Humanlike Ways Animals Feel Pain*, NAT’L GEOGRAPHIC (Dec. 3, 2016), <http://news.nationalgeographic.com/2016/12/animals-science-medical-pain/> [<https://perma.cc/4XBW-YH28>].

<sup>202</sup> *Id.*