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DEVELOPMENTS IN ANIMAL LAW: AN EVOLVING AREA IN VIRGINIA LAW

Ryan Murphy *

INTRODUCTION

On December 15, 2013, my wife and I welcomed a puppy into our family. We love dogs, grew up with them, but we had never raised one (or any living creature for that matter). As I drove to our Richmond Fan apartment from the foster home in Goochland, I felt helpless while he scratched at the carrier, frantic and screeching. During his first weeks with us, he smelled, relieved himself frequently and anywhere, and exhibited signs of abdominal distress that sent us on a trip to the companion animal equivalent of an emergency room.

Two years later he chases cats, retrieves sticks, splashes in mud, and chews and consumes things too obscene to mention. He learns tricks and the names of his toys.¹ He ignores commands. He has also begun grunting (no other word could describe the peculiar emanation) at 6:00 PM until I let him outside.² And I think he loves us.³

* J.D., 2014, University of Richmond School of Law; B.A., 2007, University of Virginia. I am grateful to Assistant Attorney General Michelle Welch for discussing the newly created Animal Law Unit and her comments on Part I of this article. Thank you also to Sarah Murphy, who provided comments and suggestions, and the *University of Richmond Law Review* staff. The views and opinions expressed herein are those of the author and do not necessarily reflect the position of his employer.

1. See generally Monique A.R. Udell & C.D.L. Wynne, *A Review of Domestic Dogs' (Canis Familiaris) Human-Like Behaviors: Or Why Behavior Analysts Should Stop Worrying and Love Their Dogs*, 89 J. EXPERIMENTAL ANALYSIS OF BEHAV. 247, 249, 253 (2008) (citing examples of dogs building "vocabularies").

2. See *id.* at 251–52 (citing a study indicating that dogs "cue" humans).

3. See Gregory S. Berns, Andrew M. Brooks & Mark Spivak, *Scent of the Familiar: An fMRI Study of Canine Brain Responses to Familiar and Unfamiliar Human and Dog Odors*, 110 BEHAV. PROCESSES 37, 44 (2015); Luke E. Stoeckel, Lori S. Palley, Randy L. Gollub, Steven M. Niemi & Anne Eden Evins, *Patterns of Brain Activation when Mothers View Their Own Child and Dog: An fMRI Study*, 9 PLOS ONE 1, 6, 9 (2014); cf. Marc Bekoff, *Animal Emotions: Exploring Passionate Natures*, 50 BIOSCIENCE 861, 861, 864, 868 (2000) (positing that animals feel a variety of emotions, while recognizing arguments

We adopted Nico through For the Love of Animals in Goochland (“FLAG”).⁴ As I understand, the owner of the beagle that whelped Nico did not want the puppies, and one way or another, a FLAG foster care provider began caring for a litter of puppies newly separated from their dam.⁵

It would seem that Nico is (and we are) fortunate: fortunate that organizations like FLAG exist; fortunate that such organizations promote adoption and humane methods of controlling feral populations while reducing resource drain in shelters.⁶ Across the United States, an estimated 3.9 million dogs and 3.4 million cats enter shelters—an estimated 1.2 million dogs (31%) and 1.4 million cats (41%) are euthanized in those shelters.⁷ In Virginia, the Department of Agriculture and Consumer Services annually compiles data from shelters in the Commonwealth. The 2014 report indicates that over ninety thousand dogs and seventy-five thousand cats entered shelters in the Commonwealth—and nearly seventeen thousand dogs and over thirty-two thousand cats were euthanized, representing roughly 18% and 38% of the shelter populations, respectively.⁸

that humans indulge in a certain amount of projection).

4. FLAG is an all-volunteer, non-profit “private animal shelter” dedicated to rescuing and finding homes for abandoned and neglected dogs. See VA. CODE ANN. § 3.2-6500 (Cum. Supp. 2015) (defining “home-based rescue” and “private animal shelter”).

5. See *id.* § 3.2-6510 (prohibiting any person from giving away any dog under the age of seven weeks without its dam).

6. See *infra* Part I.D for a discussion of trap-neuter-return in Virginia.

7. No government agency or private organization routinely tracks the influx and disposition of animals within shelters nationwide. *Pet Statistics*, AM. SOC’Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, <https://www.aspc.org/about-us/faq/pet-statistics> (last visited Oct. 1, 2015); see also *Pets by the Numbers*, HUMANE SOC’Y OF THE U.S. (Jan. 30, 2014), http://www.humanesociety.org/issues/pet_overpopulation/facts/pet_ownership_statistics.html. Approximately 35% of the 3.9 million dogs and 37% of the 3.4 million cats entering shelters are adopted. *Pet Statistics*, *supra*. But while 26% of dogs that enter as strays are reunited with their owners, only 5% of such cats are reclaimed. *Id.*

8. *VDACS Online Animal Reporting*, VA. DEP’T OF AGRIC. & CONSUMER SERVS., https://arr.va-vdacs.com/cgi-bin/vdacs_search.cgi (last visited Oct. 1, 2015). I calculated the number of animals entering a shelter in the Commonwealth by omitting the number of animals transferred between releasing agencies and the number “on hand” beginning January 1, 2014. The euthanasia rates include the number “on hand” beginning January 1, 2014. Including the number of animals “on hand” beginning January 1, 2014, approximately 45% of the canine shelter population and 45% of the feline shelter population was adopted. *Id.* Similar to the data nationwide, 22% of dogs that entered the shelter were reclaimed by the owner, while only 2% of cats were reclaimed. *Id.*

We are fortunate that Nico never spent a day in a puppy mill.⁹ While no official definition exists, puppy mills are marked by “high volume” breeding, inadequate space and exercise, and inadequate veterinary care.¹⁰ A 2010 audit report issued by the United States Department of Agriculture, Office of the Inspector General documented dogs at a number of facilities living with untreated wounds, lesions rotting to the bone, and tick infestations, among other ailments.¹¹ The report highlighted unsanitary practices—such as permitting excrement and urine to accumulate in kennels and contaminate water and food—that pose health risks to the animals and to humans.¹² At one facility, inspectors found multiple “dead dogs and other starving dogs that had resorted to cannibalism.”¹³ Moreover, puppy mills contribute to pet overpopulation, and consequently, the high rates of euthanasia described above.¹⁴ Such horrors have been documented since the early 1990s, but despite traditional state regulatory authority to control land use and combat nuisances, puppy mill abuses continue.¹⁵ Federal legislators have repeatedly introduced bills aimed at curbing puppy mill abuses only to watch them die on the floor.¹⁶

Part I of this article will survey the developments in Virginia animal law between the 2014 and 2015 sessions of the General Assembly, as well as several ongoing debates. Virginia has taken a progressive approach to this evolving field of law—recent action includes introducing the nation’s first Attorney General Animal Law Unit in 2015 and enacting a law designed to counteract the

9. See *infra* Part I.F for a discussion of commercial breeder regulation in Virginia.

10. See Puppy Uniform Protection and Safety Act, H.R. 847 & S. 395, 113th Cong. (2013); see also U.S. DEPT OF AGRIC., OFF. OF INSPECTOR GEN., ANIMAL AND PLANT HEALTH INSPECTION SERVICE ANIMAL CARE PROGRAM INSPECTIONS OF PROBLEMATIC DEALERS 1, 11–12 (2010) [hereinafter OIG AUDIT REPORT].

11. OIG AUDIT REPORT, *supra* note 10, at 11–12.

12. *Id.* at 20–21.

13. *Id.* at 13.

14. *Dog Overpopulation and Puppy Mills*, INT’L SOC’Y FOR ANIMAL RIGHTS, <http://isaonline.org/programs/dog-and-cat-overpopulation/dog-overpopulation-and-puppy-mills/> (last visited Oct. 1, 2015).

15. See generally Jack McClintock, *Not Fit for a Dog*, LIFE, Sept. 1992; Kevin Trager & Kaitlin Barger, *183 Animals Seized from Suspected Ark. Puppy Mill*, USA TODAY (Feb. 28, 2014), <http://www.usatoday.com/story/news/nation/2014/02/28/arkansas-puppy-mill-raid/5905591/> (describing various violations occurring in Arkansas).

16. See, e.g., Puppy Uniform Protection and Safety Act, H.R. 847 & S. 395, 113th Cong. (2013); H.R. 6949 & S. 3519, 110th Cong. (2008); H.R. 3058 & S. 1478, 107th Cong. (2001). *But see* Animal Welfare; Retail Pet Stores and Licensing Exemptions, 78 Fed. Reg. 57227 (Sept. 18, 2013) (codified at 9 C.F.R. §§ 1.1 & 2.1).

competitive advantages enjoyed by puppy mills in 2014.¹⁷ Part I will also address a few examples of defeated legislation to assess the merits of such.

Part II of this article will propose a voluntary labeling program for Virginia designed to connect local Virginia meat and poultry producers with consumers concerned about the raising (production) methods employed by factory farms and the environmental impacts of such. A theme throughout this article is the relationship between animal welfare and other societal and legal concerns—including criminal law, domestic relations, and consumer protection.

I. VIRGINIA ANIMAL LAW: A SURVEY OF DEVELOPMENTS AND DEBATES

A. *Outlining the Regulatory Regime*

A brief sketch of the Virginia authorities charged with administering animal laws situates the area with respect to related fields. The primary source of Virginia animal law is Chapter 65 of Title 3.2 of the Virginia Code entitled “Comprehensive Animal Care” (“Animal Code”).¹⁸ The Animal Code vests the Board of Agriculture and Consumer Services (“Board”) with authority to adopt regulations and guidelines necessary to administer and enforce its provisions.¹⁹ The Board also promotes the Commonwealth’s agricultural interests and oversees the Commonwealth’s farmers’ market system.²⁰

The Commissioner of Agriculture and Consumer Services (“Commissioner”) is the executive officer of the Board and directs various programs through the Department of Agriculture and

17. Press Release, Commonwealth of Va., Off. of the Att’y Gen., Herring Creates Nation’s First Attorney General’s Animal Law Unit (Jan. 22, 2015), <http://www.oag.state.va.us/index.php/media-center/news-releases/435-january-22-2015-herring-creates-nation-s-first-attorney-general-s-animal-law-unit> [hereinafter First Attorney General’s Animal Law Unit].

18. See VA. CODE ANN. §§ 3.2-6500 to -6584 (Repl. Vol. 2008 & Cum. Supp. 2015).

19. *Id.* §§ 3.2-100, -6501 (Repl. Vol. 2008). The Board is comprised of fifteen citizen members appointed by the governor for four-year terms. *Id.* § 3.2-109 (Cum. Supp. 2015). Currently, at least eight members must be practicing farmers and two members must be affiliated with the pesticide industry. *Id.*

20. *Id.* § 3.2-111 (Cum. Supp. 2015).

Consumer Services (“VDACS”).²¹ These programs generally relate to agricultural marketing, product grading and certification, food and dairy inspection, consumer protection and education, and encouraging animal welfare.²²

With respect to animal welfare, the Animal Code empowers the State Veterinarian to inspect shelters and businesses for violations of its provisions, violations of other state law governing animal welfare, and violations of other state law governing property rights in animals.²³ More broadly, the Animal Code charges all law-enforcement officers in the Commonwealth with responsibility for enforcement, and it directs counties and cities to employ animal control officers with authority to enforce the chapter and related ordinances.²⁴

The Animal Code concerns domestic animals, a category including agricultural animals and companion animals.²⁵ As suggested above, domestic animals within Virginia borders are property.²⁶

21. *Id.* § 3.2-102 (Cum. Supp. 2015).

22. *Id.* VDACS is also responsible for pesticide regulation and endangered plant and insect species protection. *Regulatory Services*, VA. DEP’T OF AGRIC. & CONSUMER SERVS., www.vdacs.virginia.gov/plant&pest/angered.shtml (last visited Oct. 1, 2015). The agency is subdivided into four units: the Commissioner’s Office, the Division of Animal and Food Industry Services, the Division of Consumer Protection, and the Division of Marketing. *About VDACS*, VA. DEP’T OF AGRIC. & CONSUMER SERVS., <http://www.vdacs.virginia.gov/about/index.shtml> (last visited Oct. 1, 2015).

23. VA. CODE ANN. § 3.2-6502 (Cum. Supp. 2015). The State Veterinarian is an office within the Division of Animal and Food Industry Services. *See About VDACS*, VA. DEP’T OF AGRIC. & CONSUMER SERVS., <http://www.vdacs.virginia.gov/about/directory-ais.shtml> (last visited Oct. 1, 2015).

24. VA. CODE ANN. §§ 3.2-6555, -6567 (Repl. Vol. 2008 & Cum. Supp. 2015). The Code also permits towns to employ animal control officers with the same authority to enforce the chapter and related ordinances. *Id.* § 3.2-6555 (Repl. Vol. 2008).

25. For a brief discussion of the consequences of such distinction, *see infra* Part II. In Virginia, a “companion animal” is any

domestic or feral dog, domestic or feral cat, nonhuman primate, guinea pig, hamster, rabbit not raised for human food or fiber, exotic or native animal, reptile, exotic or native bird, or any feral animal or any animal under the care, custody, or ownership of a person or any animal that is bought, sold, traded, or bartered by any person.

VA. CODE ANN. § 3.2-6500 (Cum. Supp. 2015). The definition excludes “agricultural animals, game species, or any animals regulated under federal law as research animals. *Id.* “Agricultural animals” include “poultry,” meaning “all domestic fowl and game birds raised in captivity,” and “livestock,” defined as “all domestic or domesticated: bovine animals; equine animals; ovine animals; porcine animals; cervidae animals; capradae animals; animals of the genus *Lama*; ratites; fish or shellfish in aquaculture facilities . . . or any other individual animal specifically raised for food or fiber.” *Id.*

26. *See id.* § 3.2-6585 (Repl. Vol. 2008); *cf. id.* § 3.2-5900 (Repl. Vol. 2008).

For that reason, it is anomalous (in the context of this article) to speak of an animal possessing rights: to the extent that the law supplies protection or prescribes certain treatment for an animal, such prescription is derived from a human property interest. And generally, the human property interest can be defined according to the category of animal.²⁷ Consequently, provisions for the welfare of animals are intimately related to the interests of their owners.

The following sections discuss recent developments in Virginia animal law. The Animal Code has many strengths, but its potential lays in further interdisciplinary advancements.

B. *The Attorney General Animal Law Unit*

On the heels of the successful prosecution of the “Big Blue” cockfighting pit operators,²⁸ Virginia Attorney General Mark Herring announced the creation of the nation’s first Attorney General Animal Law Unit (“Unit”).²⁹ The Unit will serve as a resource for local law enforcement and prosecutors, which will retain their customary enforcement and prosecution authority for violations of animal welfare standards and crimes of animal fighting or abuse.³⁰ The Unit will also provide training with respect to identifying violations, preserving evidence, and managing other evidentiary issues.³¹ Upon request from the primary prosecuting authority, members of the Unit are prepared to serve—and have

27. See Larry Cunningham, *The Case Against Dog Breed Discrimination by Homeowners' Insurance Companies*, 11 CONN. INS. L. REV. 1, 43–44 (2005).

28. See *United States v. Stumbo*, No. 1:14CR00014-003, 2014 U.S. Dist. LEXIS 127276, at *1 (W.D. Va. Sept. 11, 2014); Press Release, Commonwealth of Va., Off. of the Att’y Gen., Operators of “Big Blue” Cockfighting Pit, in McDowell, Kentucky, Sentenced to Prison (Oct. 9, 2014), <http://www.oag.state.va.us/index.php/media-center/news-releases/148-operators-of-big-blue-cock-fighting-pit-in-mcdowell-kentucky-plead-guilty-july-25-2014> [hereinafter “Big Blue” Cockfighting Pit].

29. First Attorney General’s Animal Law Unit, *supra* note 17. The Unit has five attorneys who split their time between the Unit and other divisions within the Attorney General’s Office. Interview with Assistant Attorney General Michelle Welch, Head of the Animal Law Unit (Mar. 10, 2015) (on file with author).

30. First Attorney General’s Animal Law Unit, *supra* note 17.

31. Interview with Assistant Attorney General Michelle Welch on Mar. 10, 2015, *supra* note 29.

served—as special prosecutors, a role that encompasses duties ranging from advisory to full involvement in the minutiae of trial.³²

Since its creation in January 2015, the five-attorney Unit has already provided assistance in over 100 cases across the Commonwealth, offering its expertise to prosecutors confronting issues ranging from animal fighting to animal hoarding.³³ And apart from providing case assistance, the Unit is designing—or has already implemented—a number of programs, including several for law-enforcement agencies.³⁴ Among these initiatives, the Unit is currently designing a pilot program with the Virginia Association of Chiefs of Police, the Virginia Sheriff's Association, and the National Sheriff's Association that will introduce a uniform curriculum and training on animal fighting and cruelty into police academies.³⁵ A standardized approach to these and related issues in the academy could result in more effective policing and prosecution in the community and the courts.³⁶

In addition, the Unit is considering police training based on a program designed by the National Canine Research Council with Safe Humane Chicago and the United States Department of Justice, Office of Community Oriented Policing Services that aims to provide police with strategies for interacting with dogs while on-duty.³⁷ As law-enforcement tactics come under increasing scrutiny, the use of force against companion animals has often been a point of contention between communities and the officers that serve them.³⁸ Besides the emotional backlash, and the distrust

32. *Id.*; see “Big Blue” Cockfighting Pit, *supra* note 28.

33. Interview with Assistant Attorney General Michelle Welch, Head of the Animal Law Unit (June 9, 2015) (on file with author).

34. *Id.*

35. *Id.*

36. Prior to the Unit's formal creation, the Office of the Attorney General sponsored a conference for law-enforcement on animal fighting in November 2014. *Id.* Despite a number of high profile Virginia cases involving animal fighting, it was the first time that the Office of the Attorney General had sponsored a conference on this topic. *Id.*

37. *Id.*; see *Police and Dog Encounters: Tactical Strategies and Effective Tools to Keep Communities Safe and Humane*, NAT'L CANINE RES. COUNCIL, <http://nationalcanineresearchcouncil.com/police-resources/> (last visited Oct. 1, 2015).

38. See, e.g., David Griffith, *Can Police Stop Killing Dogs?*, POLICE: THE LAW ENFORCEMENT MAGAZINE (Oct. 29, 2014), <http://www.policemag.com/channel/patrol/articles/2014/10/can-police-stop-killing-dogs.aspx>; Christine Mai-Duc, *Man Who Watched Police Shoot His Dog Sues City of Hawthorne*, L.A. TIMES (Feb. 14, 2014), <http://articles.latimes.com/2014/feb/14/local/la-me-ln-hawthorne-dog-shooting-lawsuit-20140214>; Dawn Turner

such use of force engenders, the killing of a companion animal carries significant legal consequences for a locality: courts uniformly hold that the killing of a companion animal by police implicates the Fourth Amendment.³⁹

As noted above, in Virginia and elsewhere, an owner holds a possessory interest in his or her companion animal.⁴⁰ Consequently, a companion animal is an “effect” for Fourth Amendment purposes and therefore qualified for protection from “unreasonable” seizures.⁴¹ The inquiry into whether a seizure is reasonable requires a careful balancing of the officer’s actions and the stated governmental justification for such actions in light of the circumstances of the encounter.⁴² In other words, the inquiry is fact intensive.⁴³ Sizeable judgments turn on an officer’s ability to read the situation, read the body language of a dog or provide it with cues, or even avoid an encounter altogether.⁴⁴ The comprehensive training would involve working with a dog behaviorist and would include tactical strategies, education regarding dog behavior and postures, and guidelines for communicating with and reacting to dogs.⁴⁵ If implemented, the program has the potential to reduce the number of police-dog encounters involving force, thereby reducing the risk of judgments against localities and promoting community policing throughout the Commonwealth.

Other initiatives examine the relationship between interpersonal violence and animal abuse.⁴⁶ Currently, the Unit is studying

Trice & Jeremy Gorner, *Are Police Too Quick on the Draw Against Dogs?*, CHI. TRIB. (Aug. 6, 2013), http://articles.chicagotribune.com/2013-08-06/news/ct-met-cops-shooting-dogs-20130806_1_police-shootings-police-officer-rottweiler.

39. See *Viilo v. Eyre*, 547 F.3d 707, 710 (7th Cir. 2008); accord *San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 975 (9th Cir. 2005); *Altman v. City of High Point*, 330 F.3d 194, 204–05 (4th Cir. 2003); *Brown v. Muhlenberg Township*, 269 F.3d 205, 210 (3d Cir. 2001).

40. See VA. CODE ANN. § 3.2-6585 (Repl. Vol. 2008); *Altman*, 330 F.3d at 201–04 (discussing the common law property interest in dogs); *Brown*, 269 F.3d at 210 (citing 3 PA. STAT. AND CONS. STAT. ANN. § 459-601(a) which declares dogs to be personal property).

41. *Altman*, 330 F.3d at 203. A “seizure” occurs when “there is some meaningful interference with an individual’s possessory interests in [personal] property.” *Id.* at 223 (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)).

42. See *id.* at 205.

43. Compare *id.* at 206, with *Hells Angels Motorcycle Club*, 402 F.3d at 976–77, and *Brown*, 269 F.3d at 210–11; see also *Viilo*, 547 F.3d at 710.

44. See Griffith, *supra* note 38; Trice & Gorner, *supra* note 38.

45. See Griffith, *supra* note 38.

46. The relationship is discussed further in Part I.C *infra*.

the history of Virginia's sexually violent predators, looking for examples of sexual deviancy with animals or examples of other animal abuse in their backgrounds that might establish an association between such behavior and later sexually violent behavior against humans.⁴⁷ A number of studies have linked animal abuse and violent crimes against humans; some have even suggested that a history of animal abuse in childhood or adolescence may be a risk factor for future violent behavior.⁴⁸ Much of the research essentially reports that domestic violence—spousal abuse, child abuse, and elder abuse—and animal cruelty “often occur in the same households”⁴⁹ Consequently, criminologists have concluded that the relationship between acts of cruelty against animals and acts of violence against humans demands further study;⁵⁰ key questions include: Is animal cruelty a symptom or effect of mental disorder, an outcome of witnessing violence or experiencing abuse, or a point along a spectrum of violence from which an abuser graduates to interpersonal violence? Can preventing animal abuse or rehabilitating an abuser reduce the risk of future violence against humans?⁵¹ The Unit's research may provide additional data for criminologists seeking answers to those questions.

As it conducts its own research, the Unit is contributing to the dialogue on “the Link” in other ways.⁵² In May 2015, the Unit conducted a training session on the relationship between animal abuse and domestic violence for advocates, Department of Social Services officials specializing in child and adult protective services, law-enforcement officers, and animal control officers.⁵³ The Unit intends to host a session on these issues in each region of

47. Interview with Assistant Attorney General Michelle Welch on Mar. 10, 2015, *supra* note 29.

48. BRUCE A. WAGMAN, SONIA S. WAISMAN & PAMELA D. FRASCH, *ANIMAL LAW: CASES AND MATERIALS* 180–83 (4th ed. 2010) (surveying representative literature); see Marie Louise Petersen & David P. Farrington, *Cruelty to Animals and Violence to People*, 2 *VICTIMS & OFFENDERS* 21, 38 (2007) (discussing need for additional criminological research on the topic).

49. Petersen & Farrington, *supra* note 48, at 32, 34–35.

50. *Id.* at 38.

51. *Id.*

52. See Jake Burns, *The Link Between Animal Abuse and Domestic Violence*, CBS6 (May 14, 2015, 1:52 PM), <http://wtvr.com/2015/05/14/the-link-between-animal-abuse-and-domestic-violence/>.

53. Interview with Assistant Attorney General Michelle Welch on June 9, 2015, *supra* note 33.

the Commonwealth to ensure that the dialogue continues to occupy a space in the mainstream.⁵⁴

C. Cross-Reporting and New Conditions in Protective Orders

Though the probabilistic relationship between animal cruelty and interpersonal violence requires further study, the correlation between animal cruelty and domestic violence has immediate implications, including the possibility that an abuser could threaten or abuse a companion animal as a means to control the abused or prevent the abused from seeking shelter.⁵⁵ The General Assembly responded to research indicating that abused individuals delay or forgo shelter out of concern for their pets by passing 2014 Acts chapter 346, which explicitly authorizes courts to provide for custody of companion animals in protective orders.⁵⁶ Under the provisions of 2014 Acts chapter 346, the petitioner for a protective order may retain possession of any companion animal in the household provided the petitioner meets the definition of an “owner.”⁵⁷ The Animal Code defines “owner” broadly to include “any person who: (i) has a right of property in an animal; (ii) keeps or harbors an animal; (iii) has an animal in his care; or (iv)

54. *Id.*

55. For example, a 2007 study of women residing at domestic violence shelters found that such women were eleven times more likely to report that their partners had abused pets than a comparison group of women who reported that they had not experienced domestic violence. Frank R. Ascione et al., *Battered Pets and Domestic Violence: Animal Abuse Reported by Women Experiencing Intimate Violence and by Nonabused Women*, 13 VIOLENCE AGAINST WOMEN 354, 365 (2007). The authors noted that a significant number of the women reported that their concern for household pets had caused them to delay seeking shelter from their abuser. *Id.* These reports supported the findings of other researchers. *Id.* at 366; see, e.g., Catherine A. Faver & Elizabeth B. Strand, *To Leave or to Stay? Battered Women’s Concern for Vulnerable Pets*, 18 J. INTERPERSONAL VIOLENCE 1367, 1368–71, 1375 (2003). Of course, an abuser may also harm a companion animal as a method of inflicting psychological or emotional abuse on others in a household. Sarah DeGue & David K. DiLillo, *Is Animal Cruelty a “Red Flag” for Family Violence?: Investigating Co-Occurring Violence Toward Children, Partners, and Pets*, 24 J. INTERPERSONAL VIOLENCE 1036, 1051 (2009); see Margreta Vellucci, *Restraining the (Real) Beast: Protective Orders and Other Statutory Enactments to Protect the Animal Victims of Domestic Violence in Rhode Island*, 16 ROGER WILLIAMS U. L. REV. 224, 236 (2011).

56. Act of Mar. 27, 2014, ch. 346, 2014 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 16.1-253, -253.1, -253.4, -279.1, 19.2-152.8, -152.9, -152.10 (Cum. Supp. 2015)); see *House Protects Victims of Domestic Violence and Beloved Family Pets*, HUMANE SOC’Y OF THE U.S. (Feb. 11, 2014), http://www.humanesociety.org/news/press_releases/2014/02/va-protects-domestic-violence-victims-and-pets-021114.html.

57. Act of Mar. 27, 2014, ch. 346, 2014 Va. Acts __, __.

acts a custodian of an animal.”⁵⁸ Consequently, many (if not most) petitioners now have legal ground to remove companion animals from abusive situations. But practical impediments remain; even if a petitioner seeks and obtains a protective order containing a provision for his or her companion animal, not all shelters will accept pets.⁵⁹ Policies and programs—likely at the local level—must encourage domestic violence programs to partner with animal shelters to achieve the purpose behind 2014 Acts chapter 346 and provide abused individuals with more options for leaving abusive situations.

Next, the association between animal cruelty and interpersonal violence suggests certain tools with potential criminological benefits. In particular, tools based on cross-reporting animal cruelty and interpersonal violence will allow agencies or organizations with authority in one sphere—animal control, child services, domestic violence—to share information about individual incidences that may indicate a larger pattern of household violence.⁶⁰ In turn, the information obtained through cross-reporting may permit service providers to make more effective and timely interventions in abusive situations.⁶¹ In the Commonwealth, animal control officers have a statutory duty to report suspected child abuse or neglect, and the basic animal control course must include training in recognizing evidence of child abuse or neglect.⁶² However, these statutes provide only for one-way reporting, and no Virginia statutes provide for cross-reporting of other spheres of domestic violence.⁶³

58. VA. CODE ANN. § 3.2-6500 (Cum. Supp. 2015).

59. See *Directory of Safe Havens for Animals Programs*, HUMANE SOC'Y OF THE U.S. (Feb. 5, 2015), http://www.humanesociety.org/issues/abuse_neglect/tips/safe_havens_directory.html#va; *Protecting Your Family Pet*, COMMUNITY & HUM. SERVS, CITY OF ALEXANDRIA, <http://alexandriava.gov/DomesticViolence> (last visited Oct. 1, 2015).

60. DeGue & DiLillo, *supra* note 55, at 1050 (concluding that animal abuse may provide a “more reliable marker for other forms of family violence” for cross-reporting systems, according to the authors’ research); see Petersen & Farrington, *supra* note 48, at 37 (discussing UK pilot program).

61. See DeGue & DiLillo, *supra* note 55, at 1050.

62. VA. CODE ANN. § 3.2-6556 (Repl. Vol. 2008); *id.* § 63.2-1509 (Cum. Supp. 2015).

63. See Caitlin Gibson, *Loudoun Program Underscores the Link Between Domestic Violence, Animal Abuse*, WASH. POST (Sept. 24, 2014), http://www.washingtonpost.com/local/loudoun-program-underscores-the-link-between-domestic-violence-animal-abuse/2014/09/23/9c4f9512-432a-11e4-b4-7c-f5889e061e5f_story.html.

During the 2015 session, Senator William M. Stanley Jr. (R-20th Senate District) and Delegate David I. Ramadan (R-87th House District) introduced Senate Bill 700 and House Bill 1354, which would have created a registry of animal abusers.⁶⁴ The registry, named the “Animal Cruelty Conviction List,” would, first, provide animal shelters and pet stores with a record of convicted animal abusers, which shelters and pet stores could consult before authorizing an adoption or completing a sale.⁶⁵ Currently, a court may prohibit a person convicted of animal cruelty from possessing or owning a companion animal by order; however, shelters and stores lack a mechanism for quickly identifying persons under such court orders.⁶⁶ Proponents also contend that such registries may provide a tool for combating animal hoarding, an under-addressed welfare issue.⁶⁷

64. Both bills provided that:

The Superintendent of State Police shall establish, organize, and maintain within the Department of State Police, by 2017, a computerized Animal Cruelty Conviction List (the List) as a database of information regarding persons convicted of a felony violation of the prohibition against (i) cruelty to animals as provided by § 3.2-6570; (ii) animal fighting as provided by § 3.2-6571; (iii) maiming, killing, or poisoning an animal as provided by § 18.2-144; or (iv) killing or injuring a police animal as provided by § 18.2-144.1. Information on the List shall include the name of the offender at the time of conviction as well as the offense for which the offender was convicted and the date and jurisdiction of conviction. Access to the List shall be made available to the public on the website of the Department of State Police.

Effective July 1, 2015, a person convicted of an offense listed in clauses (i) through (iv) shall pay a fee upon conviction in the amount of \$50 per conviction that shall be used by the State Police to pay for the maintenance of the List. The State Police shall automatically purge from the List a person's name and information 15 years after listing if he has no additional felony conviction of an offense listed in this section.

S.B. 700, Va. Gen. Assembly (Reg. Sess. 2015); H.B. 1354, Va. Gen. Assembly (Reg. Sess. 2015). Previous versions were introduced in 2014, 2013, and 2011. *See* S.B. 32, Va. Gen. Assembly (Reg. Sess. 2014) (continued to 2015 and left in the Senate Committee on Finance); H.B. 2242, Va. Gen. Assembly (Reg. Sess. 2013) (left in House Committee on Agriculture, Chesapeake and Natural Resources); H.B. 1930, Va. Gen. Assembly (Reg. Sess. 2011) (left in House Committee on Courts of Justice).

65. *Stanley to Introduce Bills to Protect Animals*, FRANKLIN NEWS-POST (Dec. 9, 2014), <http://www.thefranklinnews.com/article.cfm?ID=28758>; *see* Chris Green, *NYC Creates City-Wide Animal Abuser Registry*, ANIMAL LEGAL DEF. FUND (Feb. 5, 2014), <http://aldf.org/blog/nyc-creates-city-wide-animal-abuser-registry/>.

66. VA. CODE ANN. § 3.2-6570 (Cum. Supp. 2015); *see New State Animal Abuser Registries Proposed in 2015*, NAT'L ANTI-VIVISECTION SOC'Y, <https://www.navs.org/news/new-state-animal-abuser-registries-proposed-in-2015> (last visited Oct. 1, 2015).

67. *See* Paula Calvo Soler, *Animal Hoarding Isn't Just Gross, It's a Recognized Psychiatric Disorder*, WASH. POST (Aug. 8, 2014), <http://www.washingtonpost.com/news/to-yo-ur-health/wp/2014/08/08/animal-hoarding-isnt-just-gross-its-a-recognized-psychiatric-disor>

Burgeoning research indicates that more than 1000 cases of animal hoarding occur every year in the United States.⁶⁸ Though the behavior remains relatively unstudied, the American Psychiatric Association recently recognized animal hoarding as a psychiatric disorder.⁶⁹ Other researchers have characterized animal hoarding as “a symptom of a larger maladaptive situation” or a possible manifestation of other psychological disorders (such as dementia, delusional disorders, and obsessive compulsive disorder), but no matter the underlying cause, simply removing the animals is ineffective.⁷⁰ Without effective intervention (including treatment) and monitoring, a hoarder will almost certainly relapse: researchers estimate that the recidivism rate exceeds 50%.⁷¹ Documented cases of animal hoarding frequently involve conditions that would be universally considered inhumane—and threatening to human health—yet the hoarder is frequently unaware (or unwilling to admit) that the animals are ill, dying, or dead, and that the space has become uninhabitable.⁷² In a recent Virginia case, officers found over fifty animals, many with open sores or unaddressed medical issues, and generally unsanitary conditions.⁷³

order; Ian Urbina, *Animal Abuse as Clue to Additional Cruelties*, N.Y. TIMES (Mar. 17, 2010), <http://www.nytimes.com/2010/03/18/us/18animal.html>.

68. Gary J. Patronek, *Hoarding of Animals: An Under-Recognized Public Health Problem in a Difficult-to-Study Population*, 114 PUB. HEALTH REP. 81, 83 (1999) [hereinafter Patronek, *Hoarding of Animals*]; see Soler, *supra* note 67. Recognizing that this issue requires additional study and attention, the Animal Law Unit is planning a conference on animal hoarding to be held in January 2016. Interview with Assistant Attorney General Michelle Welch on June 9, 2015, *supra* note 33.

69. See Soler, *supra* note 67.

70. Amanda I. Reinisch, *Animal Welfare: Understanding the Human Aspects of Animal Hoarding*, 49 CAN. VETERINARY J. 1211, 1212 (2008); accord Gary J. Patronek, *The Problem of Animal Hoarding*, 19 MUN. LAW. 6, 7 (2001).

71. Reinisch, *supra* note 70, at 1212.

72. P. Calvo, C. Duarte, J. Bowen, A. Bulbena & J. Fatjó, *Characteristics of 24 Cases of Animal Hoarding in Spain*, 23 ANIMAL WELFARE 199, 199 (2014); Patronek, *Hoarding of Animals*, *supra* note 68, at 84–85. One study of animal hoarding found that 16% of involved residences were condemned as unfit for human habitation, 93% were deemed unsanitary, and 70% had outstanding fire hazards. Reinisch, *supra* note 70, at 1211.

73. Phil Benson, *MCSO Arrests Woman in New River Animal Hoarding Case*, NBC12, <http://www.nbc12.com/story/27766012/mcso-suspect-in-new-river-hoarding-case-hospitalized> (last updated Feb. 19, 2015). In a 2013 case, a Virginia woman was ordered to surrender over fifty animals after animal cruelty charges were nolle prossed. See Scott Wise, *Woman Ordered to Give Up More Than 50 Pets*, CBS6, <http://wtvr.com/2013/09/13/annette-thompson-deal/> (last updated Sept. 13, 2013); Laura Kebedeand & Bill McKelway, *Goochland Woman Charged with Animal Cruelty*, RICH. TIMES-DISPATCH (Apr. 3, 2013), http://www.richmond.com/news/local/central-virginia/article_afcc40da-36a8-5c22-a823-e97a054c71c8.html. In 2014, the General Assembly amended the definition of “home-based rescue” to refer to “an animal welfare organization that takes custody of companion animals for

In many cases, the costs to clean up sites and care for rescued animals can be staggering and are generally borne by localities.⁷⁴

Hoarding cases implicate the jurisdiction of multiple agencies—a local government with ordinances limiting the number of pets in a household, an animal welfare organization, social services, and public health authorities will each have expertise to contribute in such cases.⁷⁵ A registry would provide a means for reducing the risk of recidivism by reducing recovering hoarders' access to animals and by increasing oversight by third-parties without increasing the number of intrusive inspections. Moreover, a registry may promote an atmosphere conducive to cross-reporting between such agencies so that future cases are discovered and treated during their early stages.

Similarly, proponents contend that an animal abuse registry would reduce dog fighters' access to low-cost "bait" dogs by providing notice to animal shelters and pet stores.⁷⁶ As applied to dog fighters, the argument appears tenuous; whereas isolation is a common characteristic of hoarders,⁷⁷ dog fighters often operate in rings and may be able to evade barriers to access by using third parties.⁷⁸ Nonetheless, a registry would expose dog fighters and other abusers to additional scrutiny that could bring recidivist behavior to light.

Critics of registry laws argue that the laws do not directly help animals, can be costly to implement, publicly shame offenders, and capture a broad range of conduct, some of which may be inadvertent or negligent.⁷⁹ As an initial matter, the registry would

the purpose of facilitating adoption and houses such companion animals in a foster home or a system of foster homes." Act of Mar. 5, 2014, ch. 148, 2014 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 3.2-6500 (Cum. Supp. 2015)). Previously, the definition included "any person" who "accepts more than 12 companion animals [or] more than nine companion animals and more than three unweaned litters of companion animals in a calendar year" for the purpose of finding permanent homes for such companion animals. VA. CODE ANN. § 3.2-6500 (Repl. Vol. 2008). Presumably, the amendment will prevent hoarders from claiming the status of a home-based rescue operation.

74. See Urbina, *supra* note 67.

75. See Reinisch, *supra* note 70, at 1214.

76. See, e.g., Green, *supra* note 65.

77. Patronek, *Hoarding of Animals*, *supra* note 68, at 84, 86; see Reinisch, *supra* note 70, at 1211.

78. Cf. First Attorney General's Animal Law Unit, *supra* note 17; "Big Blue" Cock-fighting Pit, *supra* note 28.

79. See, e.g., Va. Dep't of Planning & Budget, *2014 Fiscal Impact Statement*, VA.

list only individuals convicted of felony cruelty or other felony violations (dog fighting, injuring or killing a police animal), which would exclude merely inadvertent or negligent behavior.⁸⁰ For example, a felony conviction for failing to provide veterinary treatment under Virginia Code section 3.2-6570(B)(iv) requires the Commonwealth to prove that the person “maliciously” deprived a companion animal of “necessary food, drink, shelter or emergency veterinary treatment”—where “emergency veterinary treatment” is defined as “veterinary treatment to stabilize a life-threatening condition, alleviate suffering, prevent further disease transmission, or prevent further disease progression.”⁸¹ Canons of statutory construction would lead courts to conclude that the definition excludes treatment for minor conditions—unless the condition became degenerative, life-threatening, or caused the animal to suffer, *and* the person failed to obtain treatment *maliciously*. Moreover, a felony conviction under section 3.2-6570(B)(iv) requires a prior animal cruelty conviction and either the prior or the instant

LEGIS. INFO. SYS. (Jan. 13, 2014), <http://lis.virginia.gov/cgi-bin/legp604.exe?141+oth+SB32F122+PDF>; Sharyn Hutchens, *Legislative News*, VA. FED’N OF DOG CLUBS & BREEDERS (Jan. 28, 2015), <http://www.virginiafederation.org/legislative-news/>; Wayne Pacelle, *Reservations About the Animal Abuse Registry*, A HUMANE NATION (Dec. 3, 2010), <http://blog.humanesociety.org/wayne/2010/12/animal-cruelty-registry-list.html>.

80. S.B. 700, Va. Gen. Assembly (Reg. Sess. 2015); H.B. 1354, Va. Gen. Assembly (Reg. Sess. 2015); *see also* VA. CODE ANN. § 3.2-6570(B) (Cum. Supp. 2015); *id.* §§ 18.2-144 & 18.2-144.1 (Repl. Vol. 2014).

81. VA. CODE ANN. §§ 3.2-6500, -6570(B)(iv) (Cum. Supp. 2015). While “necessary” food, drink, or shelter are undefined, the Animal Code does define “adequate” feed, water, and shelter. *Id.* § 3.2-6500 (Cum. Supp. 2015). In relevant part, subsection (B) of section 6570 states:

Any person who: (i) tortures, willfully inflicts inhumane injury or pain not connected with bona fide scientific or medical experimentation, or cruelly and unnecessarily beats, maims, mutilates or kills any animal whether belonging to himself or another; (ii) sores any equine for any purpose or administers drugs or medications to alter or mask such sores for the purpose of sale, show, or exhibit of any kind, unless such administration of drugs or medications is under the supervision of a licensed veterinarian and solely for therapeutic purposes; . . . (iv) maliciously deprives any companion animal of necessary food, drink, shelter or emergency veterinary treatment; (v) instigates, engages in, or furthers any act of cruelty to any animal set forth in clauses (i) through (iv) or (vi) causes any of the actions described in clauses (i) through (v), or being the owner of such animal permits such acts to be done by another; and has been within five years convicted of a violation of this subsection or subsection A, is guilty of a Class 6 felony if the current violation or any previous violation of this subsection or subsection A resulted in the death of an animal or the euthanasia of an animal. . . .

Id. § 3.2-6570(B) (Cum. Supp. 2015). Subsection A states the elements of misdemeanor animal cruelty. *See id.* § 3.2-6570(A) (Cum. Supp. 2015); *id.* § 18.2-403.1 (Repl. Vol. 2014).

conviction to have resulted in the death of the animal.⁸² A felony conviction under Virginia Code section 3.2-6570(F), which prosecutors invoke more often, requires the Commonwealth to prove that the defendant “torture[d], willfully inflict[ed] inhumane injury or pain not connected with bona fide scientific or medical experimentation or cruelly and unnecessarily beat[], maim[ed] or mutilate[d]” a companion animal and directly caused its death or directly caused it to be euthanized due to its condition.⁸³ Again, this section excludes merely negligent or inadvertent behavior.

Nonetheless, the criticisms are well taken and suggest ways to broaden the registry’s appeal. For one, the registry need not be public—access to the registry could be limited to criminal agencies, animal welfare organizations, social services, and public health authorities. In other words, access could be limited to the agencies that would benefit most from cross-reporting incidents of cruelty. Second, criticisms related to the cost of maintenance re-emphasize the need to research and assess the value of cross-reporting. The debate about cost is a debate about the precautionary principle: should we favor over-protection of vulnerable individuals (children, victims of spousal abuse, the elderly) even if we are unsure of the benefits? Will a registry impose unforeseen costs on the same vulnerable population? Accurately weighing the cost of maintenance against the value of the registry will likely require some jurisdictions to serve as test cases.⁸⁴

D. Local Authority to Manage Animal Populations

The euthanasia figures cited in the Introduction reflect an overpopulation problem, which in turn is an ownership problem.⁸⁵

82. See *id.* § 3.2-6570(B) (Cum. Supp. 2015).

83. *Id.* § 3.2-6570(F) (Cum. Supp. 2015).

84. See Petersen & Farrington, *supra* note 48, at 37 (noting that organizations in the United Kingdom are implementing pilot programs). A few states have existing cross-reporting requirements, but often the reporting moves in only one direction, and as a result, information sharing is incomplete. See *Cross-Reporting—Mandatory & Permitted*, NAT’L LINK COALITION, <http://nationallinkcoalition.org/wp-content/uploads/2014/10/Cross-reporting-Mandatory-Permitted-2014.doc> (last updated Oct. 18, 2014).

85. See Laura Kiesel, *Why Environmentalists Should Care About Pet Euthanasia*, EARTH ISLAND J. (Sept. 23, 2012), http://www.earthisland.org/journal/index.php/elist/eListRead/why_environmentalists_should_care_about_pet_euthanasia/ (citing a consumer society accustomed to disposable products); *Pet Overpopulation*, AM. HUMANE ASS’N, <http://www.americanhumane.org/animals/adoption-pet-care/issues-information/pet-overpopulation.html> (last visited Oct. 1, 2015) (identifying two factors leading to overpopulation: “(1) al-

There are more adoptable animals than there are willing, capable homes, and multiple factors contribute to this shortfall.⁸⁶ Animal welfare advocates often promote spay and neuter programs, adoption, and owner education as strategies for reducing the shortage, but advocates are split on when, or even if, to use euthanasia to address overpopulation.⁸⁷ During the past General Assembly session, the rift between the “no-kill” movement and others who view euthanasia as sometimes necessary exploded over an apparently minor clarification to a definition in the Animal Code.⁸⁸

The dispute centered on a Norfolk animal shelter operated by People for the Ethical Treatment of Animals (“PETA”) that euthanized 1536 of the 1606 cats and 788 of the 1025 dogs that it received in 2014, leading to charges that the shelter failed to make bona fide efforts to find adoptive homes for its animals.⁸⁹ PETA counters that it takes animals other shelters will not and that euthanasia may sometimes be the humane approach to overpopulation.⁹⁰

Before the amendment, the Animal Code defined “private animal shelter” as

a facility that is used to house or contain animals and that is owned or operated by an incorporated, nonprofit, and nongovernmental entity, including a humane society, animal welfare organization, society for the prevention of cruelty to animals, or any other organization operating for the purpose of finding permanent adoptive homes for animals.⁹¹

lowing cats and dogs to reproduce with little chance to find homes for the offspring and (2) pets being relinquished by owners who can no longer keep their animals, or who no longer want them”).

86. See, e.g., *Pet Overpopulation*, *supra* note 85; *Shelter Euthanasia—Whose Fault Is It Anyway?*, 12 N.Y. ST. HUMANE ASS’N (1998), <http://www.nyshumane.org/article-shelter-euthanasia-whose-fault-is-it-anyway/> (citing owners’ failure to neuter or spay pets, puppy mills that overbreed animals, and irresponsible ownership decisions).

87. See Rachel Weiner, *Virginia Measure Could Put PETA Out of the Animal Shelter Business*, WASH. POST (Feb. 23, 2015), http://www.washingtonpost.com/local/virginia-politics/animal-bill-could-put-peta-out-of-the-shelter-business/2015/02/23/2f4f05b6-bb6a-11e4-b274-e5209a3bc9a9_story.html.

88. *Id.*

89. See *id.* For VDACS statistics on the Norfolk shelter, see *Online Animal Reporting*, VA. DEP’T OF AGRIC. & CONSUMER SERVS., https://arr.va-vdacs.com/cgi-bin/Vdacs_search.cgi?link_select=facility&form=fac_select&fac_num=157&year=2014 (last visited Oct. 1, 2015).

90. See Weiner, *supra* note 87 (citing *Euthanasia*, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, <http://www.peta.org/issues/companion-animal-issues/overpopulation/euthanasia/> (last visited Oct. 1, 2015)).

91. VA. CODE ANN. § 3.2-6500 (Cum. Supp. 2015).

In the above definition, the present participle phrase, “operating for the purpose of finding permanent adoptive homes for animals,” probably modifies only “any other organization”—leaving open for interpretation whether the mission of “a humane society, animal welfare organization, [or] society for the prevention of cruelty to animals” had to include “finding permanent adoptive homes for animals.”⁹² As introduced, Senate Bill 1381 shifted the participle phrase so that the phrase modified “facility”—thereby clarifying that a private animal shelter is necessarily a facility “operated for the purpose of finding permanent adoptive homes” by one of the enumerated organizations.⁹³

Senate Bill 1381 also included language that would have required private animal shelters to “facilitat[e] other lifesaving outcomes for animals”—language interpreted as a direct challenge to PETA and as advancing a “no-kill” philosophy.⁹⁴ The version signed into law omits that language.⁹⁵ Nonetheless, the bill achieves a substantive effect and suggests that the Commonwealth will favor “no-kill” policies and strategies to control overpopulation.

As noted, “no-kill” strategies include sterilization programs to prevent unwanted litters and reduce feral populations. Multiple bills designed to promote trap-neuter-return (“TNR”) programs were introduced, but not passed, this session. The first, Senate Bill 698, would have established a fund to reimburse veterinarians who spay or neuter eligible animals, including the companion animals of low-income owners, companion animals held by a “re-

92. *Id.*; see ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 149 (2012). The word “any” is a determiner that seems to limit the effect of the modifying phrase to “organization.”

93. S.B. 1381, Va. Gen. Assembly (Reg. Sess. 2015).

94. *Id.*; see Weiner, *supra* note 87.

95. See Act of Mar. 23, 2015, ch. 492, 2015 Acts __, __ (codified as amended at VA. CODE ANN. § 3.2-6500 (Cum. Supp. 2015)).

leasing agency,” and feral or free-roaming cats.⁹⁶ The bill would have established a surcharge on pet food to sustain the fund.⁹⁷

The others, Senate Bill 699, House Bill 1586, and Senate Bill 693, responded to a 2013 opinion issued by former Virginia Attorney General Kenneth T. Cuccinelli, which concluded that, while a locality may lawfully trap and sterilize feral cats, it would be illegal to release the sterilized feral cat to the environment.⁹⁸ The Attorney General noted that animal control officers had a duty “to capture and confine any companion animal of unknown ownership running at large.”⁹⁹ Moreover, the Attorney General reasoned that the Commonwealth’s policy favored sterilization of companion animals.¹⁰⁰ But the Attorney General found that Virginia Code section 3.2-6546(D) provided only five methods of disposition: (1) release to a humane society, public or private animal shelter, or another releasing agency within the Commonwealth; (2) direct adoption by a resident of the locality; (3) direct adoption by a resident of an adjacent political subdivision; (4) direct adoption by any other person; or (5) release to an animal shelter outside the Commonwealth for the purpose of adoption or euthanasia.¹⁰¹ Given that the Animal Code prescribed certain methods of disposition, the Attorney General concluded that the General Assembly had determined that sterilized feral cats could not be released to the environment by a locality.¹⁰² Indeed, the Animal

96. S.B. 698, Va. Gen. Assembly (Reg. Sess. 2015). The bill defined “low-income owner” as “an animal owner who is a resident of Virginia and whose gross annual income is no more than 125 percent of the poverty standard accepted by the federal agency designated to establish poverty guidelines.” *Id.* A “releasing agency” is “a public . . . or private animal shelter, humane society, animal welfare organization, society for the prevention of cruelty to animals, or other similar entity or home-based rescue that release companion animals for adoption.” VA. CODE ANN. § 3.2-6500 (Cum. Supp. 2015).

97. S.B. 698, Va. Gen. Assembly (Reg. Sess. 2015).

98. *Op. to Douglas W. Napier* (July 12, 2013). The opinion applies only to programs run by localities. *Id.* at 5 (“It is my opinion that a locality may lawfully operate a capture and sterilization program The feral cats may not, however, be released by the *locality* back to the location from whence they came or some other location in the wild.”) (emphasis added).

99. *Id.* at 2 (quoting VA. CODE ANN. § 3.2-6562 (Repl. Vol. 2008)).

100. *Id.* at 2–3 (citing VA. CODE ANN. §§ 3.2-6534, -6574 (Repl. Vol. 2008)).

101. *Id.* at 4; VA. CODE ANN. § 3.2-6546(D) (Repl. Vol. 2008).

102. *Op. to Douglas W. Napier* (July 12, 2013), at 4; *see E.I. du Pont de Nemours & Co. v. Eggleston*, 264 Va. 13, 18, 563 S.E.2d 685, 687 (2002) (“[T]he mention of a specific item in a statute implies that other omitted items were not intended to be included within the scope of the statute.”).

Code prohibits abandoning or dumping animals without securing care for the animal.¹⁰³

Senate Bill 693 provided that individuals and organizations could participate in TNR programs without reservation: the bill explicitly immunized TNR participants from any criminal or civil liability except in the case of willful or wanton misconduct.¹⁰⁴ Senate Bill 699 and House Bill 1586 proposed institutionalizing TNR by directly authorizing localities to operate TNR programs.¹⁰⁵ All three bills were limited to TNR of feral cats.¹⁰⁶

As the Attorney General recognized, the Commonwealth promotes sterilization as a humane method to control companion animal population, prevent unnecessary euthanasia, and reduce strain on animal shelter resources that would be required to sustain animal populations therein. For example, Virginia law provides that a cat or dog—held by a releasing agency—must be spayed or neutered before it is eligible for adoption.¹⁰⁷ Further, localities are authorized to collect license taxes to support “[e]fforts to promote sterilization of dogs and cats.”¹⁰⁸ The bills discussed above would advance this policy; however, legislative efforts alone likely cannot substitute for educating potential pet owners about sterilization, adoption, and the consequences of ownership, or substitute for better understanding the common motivations for pet relinquishment and how to prevent it.¹⁰⁹

103. See Op. to Douglas W. Napier (July 12, 2013), at 4 (citing VA. CODE ANN. §§ 3.2-6500, -6504 (Repl. Vol. 2008)).

104. S.B. 693, Va. Gen. Assembly (Reg. Sess. 2015). For example, an individual who trapped and sterilized a companion animal knowing it to be the companion animal of another person would likely remain subject to civil liability. See VA. CODE ANN. § 3.2-6585 (Repl. Vol. 2008). Senate Bill 693 passed the Senate, but was left in the House Committee on Agriculture, Chesapeake, and Natural Resources. *S.B. 693 Feral Cats; Trapping, Neutering, and Returning to Site Activity*, VA. LEGIS. INFO. SYS., <https://leg1.state.va.us/cgi-bin/legp504.exe?ses=151&typ=bil&val=SB693> (last visited Oct. 1, 2015).

105. S.B. 699, Va. Gen. Assembly (Reg. Sess. 2015); H.B. 1586, Va. Gen. Assembly (Reg. Sess. 2015).

106. See S.B. 693; S.B. 699; H.B. 1586.

107. VA. CODE ANN. § 3.2-6574(B)(1) (Cum. Supp. 2015). Alternatively, the individual may sign an agreement promising to sterilize the animal within thirty days after the animal reaches six months of age. *Id.* § 3.2-6574(B)(2) (Cum. Supp. 2015). A person who violates this section is subject to a civil penalty up to \$250. *Id.* § 3.2-6574(F) (Cum. Supp. 2015).

108. *Id.* § 3.2-6534(6) (Cum. Supp. 2015).

109. Cf. Jennifer Y. Kwan & Melissa J. Bain, *Owner Attachment and Problem Behaviors Related to Relinquishment and Training Techniques of Dogs*, 16 J. APPLIED ANIMAL

E. *Regulatory Phase-Out of Fox Penning*

In 2014, the General Assembly staked out a position amidst a roiling debate over fox penning, which became a symbol of the expanding cultural divide between urban and rural Virginia.¹¹⁰ Fox penning took root in Virginia during the 1980s as a means to train foxhounds, but has since evolved into a commercial venture with judged competitions.¹¹¹ Today, thirty-seven pens ranging from a hundred to several hundred acres operate in Virginia—mostly in Southside—and they attract thousands of patrons.¹¹² The enclosed pens are stocked with wild caught foxes; a 2004 study found that just over half of the stock in one pen was killed during competitions and 88% of the stock perished within eighteen months.¹¹³ The Virginia Department of Game and Inland Fisheries (“VDGIF”) reported that more than 5800 foxes were delivered to the pens in the five years preceding the Act of April 4, 2014.¹¹⁴ Supporters of the practice argue that fox penning remains primarily a training exercise that only incidentally and occasionally results in the quarry’s death.¹¹⁵ However, opponents draw analogies to animal fighting and—citing the reported replenishment rate—contend that penning is inherently violent.¹¹⁶

In 2013, VDGIF adopted regulations imposing permit requirements on fox pen operators.¹¹⁷ Under the 2013 regulations, the enclosures must be fenced such that foxes and hounds cannot es-

WELFARE SCI. 168 (2013) (studying factors leading to relinquishment of dogs).

110. Act of Apr. 2014, ch. 605, 2014 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 29.1-525.2 (Cum. Supp. 2015)); see Caitlin Gibson, *McAuliffe Signs Bill to Phase Out Controversial ‘Fox Penning’ Practice in Virginia*, WASH. POST (Apr. 9, 2014), http://www.washingtonpost.com/local/virginia-politics/fox-penning-will-be-phased-out-ultimately-banned-in-virginia/2014/04/08/a2528aea-bf5f-11e3-b574-f8748871856a_story.html.

111. See Rex Springston, *Fox-pen Limit Advances in Va. Senate*, RICH. TIMES-DISPATCH (Feb. 7, 2014), http://www.richmond.com/news/virginia/article_6e311536-0e8a-53d2-b135-8fcae81ac764.html; Caitlin Gibson, *‘Fox Penning’: Hunting Tradition or Blood Sport?*, WASH. POST (Aug. 10, 2013), http://www.washingtonpost.com/local/2013/08/10/dadb442a-ea34-11e2-aa9f-c03a72e2d342_story.html.

112. See Ken Maguire, *Virginia Law Phasing Out ‘Fox Pens’ Vexes All Sides*, N.Y. TIMES (Apr. 17, 2014), http://www.nytimes.com/2014/04/18/us/virginia-law-phasing-out-fox-pens-vexes-all-sides.html?_r=0; Gibson, *supra* note 111.

113. See Springston, *supra* note 111; Gibson, *supra* note 111.

114. Springston, *supra* note 111; Gibson, *supra* note 111.

115. Maguire, *supra* note 112; Gibson, *supra* note 111.

116. See Maguire, *supra* note 112; Gibson, *supra* note 111.

117. See Foxhound Training Preferences, 29 Va. Reg. Regs. 3463 (Aug. 12, 2013) (to be codified at 4 VA. ADMIN. CODE § 15-290-160).

cape, and must include at least one “escape structure” that “offer[s] foxes effective refuge from dogs.”¹¹⁸ The regulations also restricted the permitted number of hounds per acre (one dog per two acres), required operators to provide delivered foxes with an “acclimation” period, and imposed recordkeeping and reporting requirements.¹¹⁹ However, the regulations placed no limit on the number of foxes stocked per acre or delivered annually.

As introduced, Senate Bill 42 would have entirely prohibited fox pens; a violation would have constituted a Class 1 misdemeanor.¹²⁰ The Senate Committee on Agriculture, Conservation and Natural Resources proposed a substitute bill that contained a grandfathering provision exempting pens holding a permit issued by VDGIF before 2014.¹²¹ Finally, the Senate Committee on Agriculture, Conservation and Natural Resources struck an uneasy compromise that limited the grandfathering provision to forty years and required VDGIF to adopt regulations restricting the number of foxes stocked annually and per acre.¹²² The regulations, which became effective on September 1, 2014, limit “the total number of foxes stocked annually in all preserves combined” to 900.¹²³ In addition, VDGIF reserved the authority to determine annually the number of foxes stocked per acre in each pen.¹²⁴

118. *Id.* at 3464 (codified at 4 VA. ADMIN. CODE § 15-290-160(B)(4) & (5)).

119. *Id.* (codified at 4 VA. ADMIN. CODE § 15-290-160(B)(7)(a), (B)(8)(e), (B)(8)(g) & (B)(10)).

120. S.B. 42, Va. Gen. Assembly (Reg. Sess. 2014). Senator David W. Marsden (D-Fairfax) previously introduced similar bills in 2012 and 2013 that also would have banned pens outright. *See* S.B. 202, Va. Gen. Assembly (Reg. Sess. 2013); S.B. 202, Va. Gen. Assembly (Reg. Sess. 2012). A related bill, House Bill 1188, would have prohibited operators from charging admission to their premises or from permitting patrons to place bets during competitions. H.B. 1188, Va. Gen. Assembly (Reg. Sess. 2014). Moreover, the bill explicitly associated fox penning with animal fighting, and would have apparently criminalized the practice. *Id.*

121. S.B. 42, Va. Gen. Assembly (Reg. Sess. 2014) (Committee substitute dated Feb. 6, 2014).

122. Act of Apr. 4, 2014, ch. 605, 2014 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 29.1-525.2) (Cum. Sum. 2015).

123. 31 Va. Reg. Regs. 74 (Sept. 22, 2014) (codified at 4 VA. ADMIN. CODE § 15-290-160(B)(8)(a)).

124. *Id.*

F. Consumer Protection, Puppy Protection: Bailey's Law

The Humane Society of the United States has estimated that over two million puppies are born each year in large-scale commercial breeding facilities.¹²⁵ Many of these facilities provide their animals with clean, suitable environments and regular, capable veterinary care. But too commonly, dogs in large-scale commercial breeding facilities are kept in near continual confinement without socialization, are provided minimal veterinary care, and are subject to deficient animal husbandry.¹²⁶ Food and water are contaminated with feces and urine, wire cages that do not provide even enough space for the animal to stand or turn around injure paws and legs, and close quarters increase the risk and rate of illnesses including parvovirus, distemper, various respiratory infections, and parasitic afflictions.¹²⁷ In these facilities, pejoratively called “puppy mills,” the physical suffering is immense. But the conditions also exact psychological tolls. A 2011 study captured the long-term behavioral and psychological effects of living in such conditions: breeding dogs rescued from large-scale breeding facilities exhibited significantly higher rates of fear and anxiety and significantly lower rates of “trainability” and energy than dogs from comparative populations, among other issues.¹²⁸

Animal welfare advocates—and many pet owners—attest that the trauma extends to the next generation. They contend that commercial breeders and brokers sell puppies with pre-existing health conditions (intestinal parasites, heartworms, distemper, parvovirus, skin disorders, respiratory infections, and congenital

125. 2012 USDA Breeder and Brokers Figures and Puppy Estimates, HUMANE SOC'Y OF THE U.S., www.humanesociety.org/assets/pdfs/pets/puppy_mills/puppy_mill_estimates_june2012.pdf (last visited Oct. 1, 2015). The OIG Audit Report states that there were 4,604 USDA licensed breeders (Class A licensees) and 1,116 USDA licensed brokers (Class B licensees) as of fiscal year 2008. OIG AUDIT REPORT, *supra* note 10, at 4. According to the Humane Society, USDA inventory counts indicate that the average large-scale operation keeps over eighty dogs on hand for breeding purposes. 2012 USDA Breeder and Brokers Figures, *supra*.

126. See HUMANE SOC'Y VETERINARY MED. ASS'N, VETERINARY REPORT ON PUPPY MILLS 1–2 (2013); OIG AUDIT REPORT, *supra* note 10, at 51 ex.C (listing the frequency and nature of documented violations).

127. VETERINARY REPORT ON PUPPY MILLS, *supra* note 126, at 5–7; see OIG AUDIT REPORT, *supra* note 10, at 10–14, 18–24.

128. See Franklin D. McMillan, Deborah L. Duffy & James A. Serpell, *Mental Health of Dogs Formerly Used as “Breeding Stock” in Commercial Breeding Establishments*, 135 APPLIED ANIMAL BEHAV. SCI. 86, 91–92 (2011).

defects like heart disease and hip dysplasia) to pet stores for resale.¹²⁹ Further, a 2013 study found that puppies obtained from pet stores displayed significantly more behavioral problems than puppies obtained from non-commercial breeders.¹³⁰

For years, puppy mills avoided licensing and inspection requirements at the state level and took advantage of an exception in the federal Animal Welfare Act to avoid federal requirements.¹³¹ Moreover, as discussed in detail by the 2010 OIG Audit Report, federal enforcement of the Animal Welfare Act was generally ineffective. In 2010, the Office of the Inspector General is-

129. VETERINARY REPORT ON PUPPY MILLS, *supra* note 126, at 7–8; *Puppy Mill FAQ*, AM. SOC'Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, <https://www.aspca.org/fight-crue/ty/puppy-mills/puppy-mill-faq> (last visited Oct. 1, 2015).

130. Franklin D. McMillan, James A. Serpell, Deborah L. Duffy, Elmabrok Masaoud & Ian R. Dohoo, *Differences in Behavioral Characteristics Between Dogs Obtained as Puppies from Pet Stores and Those Obtained from Noncommercial Breeders*, 242 J. AM. VETERINARY MED. ASS'N 1359, 1361–63 (2013). The authors' conclusions appear consistent with studies of humans, non-human primates, and rodents that suggest prenatal stress may inflict neurological injuries on offspring that lead to higher rates of behavioral issues during adulthood. *See, e.g.*, Carmen Sandi & József Haller, *Stress and the Social Brain: Behavioural Effects and Neurobiological Mechanisms*, 16 NATURE REV. NEUROSCI. 290, 296 (2015) (discussing structural changes in the brain of humans and rodents associated with prenatal stress); Ora Kofman, *The Role of Prenatal Stress in the Etiology of Developmental Behavioural Disorders*, 26 NEUROSCI. & BIOBEHAV. REVS. 457, 462–63 (2002) (reviewing effects of prenatal stress on rodents and non-human primates); *cf.* GARY M. LANDSBERG, WAYNE L. HUNTHAUSEN & LOWELL J. ACKERMAN, BEHAVIOR PROBLEMS OF THE DOG AND CAT 14 (3d ed. 2013) (noting that studies of the effect of prenatal stress on dogs are “limited”).

131. The regulations implementing the federal Animal Welfare Act provide that “breeders” who meet the regulatory definition of a “dealer” must obtain a Class A license. *See* 9 C.F.R. § 1.1 (2015). Similarly, a “broker” who arranges for the “purchase, sale, or transport of animals in commerce” and who also meets the regulatory definition of a “dealer” must obtain a Class B license. *See id.* The federal Animal Welfare Act exempts small business and retail pet stores from its licensing requirements, and the regulations formerly defined “retail pet store” as “any retail outlet where animals are sold only as pets at retail.” *See* 7 U.S.C. §§ 2131–2134 (2012); 36 Fed. Reg. 24919 (Dec. 24, 1971). The Secretary of Agriculture interpreted its own definition to exempt persons who sell pets from their home or over the Internet directly to consumers, reasoning that such sellers “are already subject to a degree of self-regulation and oversight” by consumers. *See* *Doris Day Animal League v. Veneman*, 315 F.3d 297, 301 (D.C. Cir. 2003). But consequently, puppy mills could avoid federal licensing requirements by selling over the internet, and of course, internet consumers lack direct access to their sellers. *See* OIG AUDIT REPORT, *supra* note 10, at 36. In the absence of regular inspections and facility access, consumers had little assurance that their pets came from reputable commercial breeders and assumed greater risk of purchasing a puppy with behavior or health issues stemming from inhumane conditions. *See id.* at 36–37. In 2013, the Secretary of Agriculture amended the regulatory definition of “retail pet store” to close the loophole and exempt only “a place of business or residence at which the seller, buyer, and the animal available for sale are physically present so that every buyer may personally observe the animal prior to purchasing” 78 Fed. Reg. 57277 (Sept. 18, 2013).

sued a report noting thousands of repeat offenders who received little to no penalty; instead, the USDA took an education-based approach to achieve compliance.¹³² Even to the extent that an education-based approach might have encouraged compliance, USDA inspectors failed to cite or properly document violations, which obscured repeated issues and weakened cases against problematic licensees.¹³³

To combat the proliferation of puppy mills within its own borders, the Commonwealth imposed its own licensing requirements in 2008 after the Humane Society and local authorities seized approximately 1000 dogs from one facility in Carroll County and conducted a raid on another facility in Independence.¹³⁴ The 2008 act also provided that VDACS, the State Veterinarian, any animal control officer, and any public health or safety official may enter a facility to conduct an inspection or investigate a complaint without notice.¹³⁵

Not all states regulate commercial breeders, and those that do take a variety of approaches.¹³⁶ In the absence of coordinated regulation, puppy mills continue to operate and continue to supply pet shops across the nation. Consequently, even after 2008 Acts

132. OIG AUDIT REPORT, *supra* note 10, at 1, 8–16.

133. *Id.* at 1–2, 17–24. Moreover, the agency misapplied its own guidelines, and it excessively reduced penalties even after Congress nearly “tripled the authorized maximum penalty” for violations of the Animal Welfare Act. *Id.* at 2, 28 (citing Pub. L. No. 110-246, 122 Stat. 1651, 2228 (codified at 7 U.S.C. § 2149(b) (2012))).

134. Act of Apr. 23, 2008, ch. 852, 2008 Va. Acts 2235; see M. Alex Johnson, *Damaged Dogs Plucked From the Assembly Line*, NBCNEWS (Dec. 5, 2007), http://www.nbcnews.com/id/22100558/ns/health-pet%20_health/t/damaged-dogs-plucked-assembly-line/#.VcOlgPlVikq; see also Annie Gowen, *Victories, Little by Little, Mark Rescued Dogs’ New Start*, WASH. POST (Nov. 25, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/24/AR2007112401379.html>. The rescue operation cost Carroll County over \$100,000. See VETERINARY REPORT ON PUPPY MILLS, *supra* note 126, at 10. In 2009, over 100 dogs were removed from a breeding facility in Stuarts Draft after an inspection by local authorities. *More Than 100 Dogs Rescued From Va. Puppy Mill*, HUMANE SOC’Y OF THE U.S (Aug. 27, 2009), http://www.humanesociety.org/news/news/2009/08/va_puppy_mill_082409.html. Authorities cancelled the breeder’s permit, but relied on the animal cruelty law for charging. See Tony Gonzalez, *Groups Remain Divided Over Va.’s Puppy-Mill Law*, RICH. TIMES-DISPATCH (Dec. 10, 2009), http://www.richmond.com/news/article_%20f0a9cce4-df0e-566d-a623-54b07b5b5a70.html.

135. Act of Apr. 23, 2008, ch. 852, 2008 Va. Acts 2235 (codified at VA. CODE ANN. § 3.2-6507.3 (Repl. Vol. 2008)). For a discussion of 2008 Acts ch. 852, see K. Michelle Welch, *Animal Law: Annual Survey of Virginia Law*, 44 U. RICH. L. REV. 185, 192–96 (2009).

136. See Rebecca F. Wisch, *Table of State Commercial Pet Breeders Laws*, ANIMAL LEGAL & HIST. CTR. (2015), <https://www.animallaw.info/topic/table-state-commercial-pet-breeders-laws>.

chapter 852, a Virginia consumer who purchased a puppy from a pet shop had no means to look beyond the pet store to the supplier, no means to ensure that the puppy came to the pet shop from a sanitary, humane environment, and thus risked purchasing a puppy at potentially greater risk of various, often life-threatening diseases.¹³⁷ To promote transparency, and to encourage pet shops to obtain their animals from reputable breeders, the General Assembly enacted 2014 Acts chapter 448 (commonly referred to as “Bailey’s Law”), which required pet shops to disclose their sources and broadened the class of consumers with available remedies.¹³⁸

Bailey’s Law added a paragraph to Virginia Code section 3.2-6512 providing that:

A pet shop operating in the Commonwealth shall post in a conspicuous place on or near the cage of any dog or cat available for sale the breeder’s name, city, state, and USDA license number. A pet shop or a USDA licensed dealer who advertises any dog or cat for sale in the Commonwealth, including by Internet advertisement, shall provide prior to the time of sale the breeder’s name, city, state, and USDA license number.¹³⁹

Also, as Virginia Code section 3.2-6512 provided before the amendment, the Virginia Consumer Protection Act (“VCPA”) continues to protect consumers who purchased a dog or cat within the Commonwealth from “any pet dealer” who promises or represents “that the animal is registered or capable of being registered with any animal pedigree registry organization,” but fails to provide an animal history certificate.¹⁴⁰ In effect, the new paragraph presses pet shops and dealers to provide history on all their ani-

137. See, e.g., Kelly Avellino, *Bailey’s Law Aims to Curb VA Pet Shops from Dealing with Puppy Mills*, NBC12 (Jan. 23, 2014), <http://www.nbc12.com/story/24534508/baileys-law-aims-to-curb-va-pet-shops-from-dealing-with-puppy-mills>; Chap Petersen, *Assembly Passes ‘Bailey’s Law’*, THE CONNECTION (Mar. 5, 2014), <http://www.connectionnewspapers.com/news/2014/mar/05/assembly-passes-baileys-law/>; Laura Donahue, *Opinion, Protect Dogs, Owners, with Bailey’s Law*, RICH. TIMES-DISPATCH (Jan. 25, 2014), http://www.richmond.com/opinion/their-opinion/guest-column%20%20ists/article_42f56cb1-89a8-548b-880a-f565644683c5.html.

138. Act of Mar. 31, 2014, ch. 448, 2014 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 3.2-6515 (Cum. Supp. 2015)); see, e.g., Avellino, *supra* note 137.

139. Act of Mar. 31, 2014, ch. 448, 2014 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 3.2-6512 (Cum. Supp. 2015)).

140. VA. CODE ANN. § 3.2-6512 (Cum. Supp. 2015); see VA. CODE ANN. §§ 59.1-200, -205 & -206 (Repl. Vol. 2014 & Cum. Supp. 2015).

imals, not just those allegedly registered (or capable of being registered) with pedigree registry organizations.¹⁴¹

Moreover, Bailey's Law amended Virginia Code section 3.2-6514 to ensure that additional consumers, not just those who purchase an animal allegedly registered (or capable of being registered) with pedigree registry organizations, have a remedy in the event that a veterinarian certifies a newly purchased animal "unfit for purchase due to illness, a congenital defect . . . , or the presence of symptoms of a contagious or infectious disease."¹⁴² A new pet owner has ten days from receiving the animal to certify most health issues and qualify for relief under this section.¹⁴³ Available remedies include (1) the right to return the animal and obtain a refund; (2) the right to return the animal and receive a new animal of equal value; or (3) if the animal was purchased from a pet shop or a USDA licensed dealer, the right to retain the animal and obtain reimbursement for the costs of veterinary care and certification "incurred up to the time the consumer notifies the pet dealer" that he or she wishes to keep the animal and up to the purchase price of the animal.¹⁴⁴ Finally, pet dealers must provide consumers with notice of these remedies.¹⁴⁵

Despite high hopes for the law, a follow-up investigation conducted by the Humane Society of the United States concluded that Bailey's Law failed to achieve the immediate effect its sponsors and supporters had sought.¹⁴⁶ Humane society investigators visited eighteen pet shops in the Commonwealth and found that the majority of those pet shops were not complying with the disclosure requirements—the backbone of Bailey's Law—and thereby were shifting the onus of investigation back onto consumers.¹⁴⁷

141. A "dealer" may include a pet shop, but it also refers to "any person who in the regular course of business for compensation or profit buys, sells, transfers, exchanges, or barterers companion animals" with some exceptions. VA. CODE ANN. § 3.2-6500 (Cum. Supp. 2015).

142. Act of Mar. 31, 2014, ch. 448, 2014 Va. Acts __, __ (codified at VA. CODE ANN. § 3.2-6514 (Cum. Supp. 2015)).

143. *Id.* The window extends to fourteen days from receipt in the event that the animal is afflicted with parvovirus. *Id.*

144. *Id.*

145. *Id.* (codified at VA. CODE ANN. § 3.2-6515) (Cum. Supp. 2015)).

146. HUMANE SOC'Y OF THE U.S., PUPPY SALES INVESTIGATION BY THE HUMANE SOCIETY OF THE UNITED STATES: WHERE DO VIRGINIA'S PET STORE PUPPIES REALLY COME FROM? 1-3 (2014).

147. *Id.* at 2. The report notes that employees often provided some information upon

The terms of Bailey's Law did not include an enforcement mechanism, and the cross-references between Bailey's Law and the VCPA appear inconsistent. Under Virginia Code section 3.2-6515, the amended required notice states that "[t]he sale of dogs and cats is subject to the provisions of the Virginia Consumer Protection Act (§ 59.1-196 et seq.)."¹⁴⁸ Previously, the required notice stated that only "[t]he sale of *certain* dogs and cats *described as being registered or capable of being registered with any animal pedigree organization* is subject to the provisions of the Virginia Consumer Protection Act (§ 59.1-196 et seq.)."¹⁴⁹ Read in isolation, the amended required notice would indicate that the sale of all dogs and cats is subject to the provisions of the VCPA. Bailey's Law also deleted similar language in Virginia Code section 3.2-6514.¹⁵⁰ However, as noted above, Virginia Code section 3.2-6512 continues to provide only that it is a violation of the VCPA "to sell a dog or cat within the Commonwealth stating, promising, or representing that the animal is registered or capable of being registered with any animal pedigree registry organization, without providing the consumer with a pet dealer's animal history certificate"¹⁵¹

Further, while the amended notice would indicate that the sale of all dogs and cats is subject to the provisions of the VCPA, the VCPA provides only that violations of Virginia Code sections 3.2-6512, 3.2-6513, and 3.2-6516 constitute violations of the act. "Violating any provision of § 3.2-6512, 3.2-6513, or 3.2-6516, relating to the sale of certain animals by pet dealers which is described in such sections, is a violation of this chapter"¹⁵² As noted above, the first paragraph of Virginia Code section 3.2-6512 continues to apply only to dogs or cats allegedly registered or capable of being registered with a pedigree registry organization.¹⁵³ Similarly, Virginia Code section 3.2-6513 provides that including false or mis-

request. *See id.* at 5–11. Investigators traced several puppies back to breeders and brokers with recent Animal Welfare Act violations. *See id.* at 1. The report did not discuss whether the pet shops were providing the required notices under Virginia Code section 3.2-6515 or whether consumers had encountered issues obtaining the relief afforded by Virginia Code section 3.2-6514.

148. VA. CODE ANN. § 3.2-6515 (Cum. Supp. 2015).

149. *Id.* § 3.2-6515 (Repl. Vol. 2008) (emphasis added).

150. *Id.* § 3.2-6514 (Cum. Supp. 2015).

151. *Id.* § 3.2-6512 (Cum. Supp. 2015).

152. *Id.* § 59.1-200(A)(15) (Repl. Vol. 2014).

153. *Id.* § 3.2-6512 (Cum. Supp. 2015).

leading statements in the animal history certificate—required for dogs or cats allegedly registered or capable of being registered with a pedigree registry organization—violates the VCPA.¹⁵⁴ Finally, Virginia Code section 3.2-6516 makes it a violation of the VCPA “for a pet dealer to state, promise, or represent that a dog or cat is registered or capable of being registered with any animal pedigree registry organization,” but subsequently fail to register the animal or “provide the consumer with the documents necessary” to register the animal within 120 days of the sale.¹⁵⁵

Notwithstanding the broad cross-reference in Virginia Code section 59.1-200(A)(15) to Virginia Code section 3.2-6512, context supports the conclusion that only certain transactions involving dogs and cats are subject to the VCPA and the failure to post the disclosure required by Virginia Code section 3.2-6512 does not violate the VCPA.¹⁵⁶ Accordingly, it seemed that pet shops could continue to procure dogs from alleged puppy mills and would continue to provide minimal information about the dogs’ history. But in 2015, rather than rely on consumer pressure alone, the General Assembly took the direct track by enacting 2015 Acts chapter 679, which requires pet shops to procure their dogs from humane societies, public or private animal shelters, or persons who have

not received from the U.S. Department of Agriculture, pursuant to enforcement of the federal Animal Welfare Act (7 U.S.C. § 2131 et seq.) or regulations adopted thereunder, (i) a citation for a direct violation or citations for three or more indirect violations for at least two years prior to the procurement of the dog or (ii) two consecutive citations for no access to the facility prior to the procurement of the dog.¹⁵⁷

The act also imposes a two-year recordkeeping requirement for verification purposes and makes each violation of the section (aggregated according to each dog sold or offered for sale) a Class 1 misdemeanor.¹⁵⁸ By prohibiting pet shops from purchasing dogs

154. *Id.* § 3.2-6513 (Repl. Vol. 2008).

155. *Id.* § 3.2-6516 (Repl. Vol. 2008).

156. *Cf. id.* § 59.1-200(A)(15) (Repl. Vol. 2014) (“Violating *any* provision of § 3.2-6512, 3.2-6513, or 3.2-6516, relating to the sale of certain animals by pet dealers . . .”) (emphasis added).

157. Act of Mar. 27, 2015, ch. 679, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 3.2-6511.1(A) (Cum. Supp. 2015)). The act also makes it unlawful to sell dogs or cats in certain places. *Id.* (codified at VA. CODE ANN. § 3.2-6508.1 (Cum. Supp. 2015)).

158. *Id.* (codified at VA. CODE ANN. § 3.2-6511.1(C)–(D) (Cum. Supp. 2015)).

from facilities with recent direct violations or multiple recent indirect violations, the act seeks to occlude potentially problematic breeders from Virginia's market.

II. A MODEST PROPOSAL: WELFARE LABELING

Part I of this article focused on companion animals, the Virginia laws protecting such animals and the property interests of their owners. Part II considers the welfare of the other class of domestic animals in Virginia: agricultural animals. For companion animals, the Animal Code establishes a baseline standard of care premised on "adequa[cy]," defined through various qualitative criteria.¹⁵⁹ For agricultural animals, the Animal Code largely defers to the needs of "farming activit[ies]," which include "the raising, management, and use of agricultural animals to provide food, fiber, or transportation and the breeding, exhibition, lawful recreational use, marketing, transportation, and slaughter of agricultural animals"¹⁶⁰ Similarly, federal law provides welfare standards for agricultural animals only at distinct points of the production process, principally transportation (the "Twenty-Eight Hour Law")¹⁶¹ and slaughter (the "Humane Methods of Slaughter Act"),¹⁶² leaving conditions on the farm largely unaddressed.¹⁶³ In

159. VA. CODE ANN. §§ 3.2-6500, -6503 (Cum. Supp. 2015).

160. *Id.* § 3.2-6500 (Cum. Supp. 2015); *see id.* § 3.2-6503.1 (Cum. Supp. 2015). A farming activity should be conducted "consistent with standard animal husbandry practices." *Id.* § 3.2-6500 (Cum. Supp. 2015). Some states, such as New Jersey, have adopted criteria incorporating or referencing specific industry practices and academic research to normalize animal husbandry practices. *See, e.g.*, N.J. ADMIN. CODE § 2:8-1.1 (2011). While such criteria may provide objective benchmarks against which to assess production methods, whether the criteria achieve "humane" standards depends on one's perspective. *See, e.g.*, N.J. Soc'y for Prevention of Cruelty to Animals v. N.J. Dep't of Agric., 955 A.2d 886, 894-95 (N.J. 2008); Sean P. Sullivan, *Empowering Market Regulation of Agricultural Animal Welfare Through Product Labeling*, 19 ANIMAL L. 391, 393 (2013).

161. 49 U.S.C. § 80502 (2012). Under the Twenty-Eight Hour Law, a carrier may not confine an animal "in a vehicle or vessel for more than 28 consecutive hours without unloading the animal[] for feeding, water, and rest." *Id.* § 80502(a)(1). USDA regulations provide feed rations and qualitative standards for watering and resting. *See* 9 C.F.R. §§ 89.1-89.5 (2015).

162. 7 U.S.C. §§ 1901-1907 (2012). USDA regulations implementing the Humane Methods of Slaughter Act (the "HMSA") prescribe methods for leading animals to slaughter and authorize certain methods of slaughter. 9 C.F.R. §§ 313.1-313.50 (2015). The HMSA applies to livestock, including "cattle" and "swine," but not poultry. *See, e.g.*, Jeff Welty, *Humane Slaughter Laws*, 70 LAW & CONTEMP. PROBS. 175, 198 (2007).

163. The federal Animal Welfare Act applies to companion animals and animals used "for research, testing, experimentation, or exhibition purposes" *See* 7 U.S.C. § 2132(g) (2012). It excludes farm animals from its protections. *See id.* § 2132(g)(3). The National

many ways, agricultural animals remain invisible until they more closely resemble something that we might find on a plate. But even if the law turns a blind eye to the lives of agricultural animals, consumers care about the welfare of the animals that become their food.¹⁶⁴ They care because the manner of intensive, industrial farming associated with inhumane conditions raises animals that are less healthy, more likely to carry disease, and consequently more likely to adversely impact human health.¹⁶⁵ They care because those same conditions can exact an immense toll on a vulnerable workforce.¹⁶⁶ They care because industrial farming can contaminate waterbodies, degrade the land and air, and divide communities.¹⁶⁷ They care for moral, ethical, and religious reasons.¹⁶⁸

Organic Program does require producers to provide its animals with certain living conditions before they can attain organic certification. See 7 C.F.R. §§ 205.200–205.290 (2015).

164. Sullivan, *supra* note 160, at 394–95; see also *Becoming Certified Humane® Is Good Business*, CERTIFIED HUMANE, <http://certifiedhumane.org/become-certified-humane-is-good-business/> (last visited Oct. 1, 2015) (collecting market research supporting demand for humane food production).

165. PEW COMM'N, PUTTING MEAT ON THE TABLE: INDUSTRIAL FARM ANIMAL PRODUCTION IN AMERICA 13–19 (2009) [hereinafter PUTTING MEAT ON THE TABLE] (describing how the scale and practices of industrial farming operations increase the risk of foodborne illnesses and pathogen transfer); see also DOUG GURIAN-SHERMAN, CAFOS UNCOVERED: THE UNTOLD COSTS OF CONFINED ANIMAL FEEDING OPERATIONS 62–63 (2008) [hereinafter CAFOS UNCOVERED] (describing how “the misuse and overuse of antibiotics in livestock operations” has contributed to the spread of antibiotic-resistant pathogens and foodborne illness).

166. See BON APPÉTIT MGMT. CO. FOUND. & UNITED FARM WORKERS, INVENTORY OF FARMWORKER ISSUES AND PROTECTIONS IN THE UNITED STATES 10, 10 tbl. 5 (2011) [hereinafter INVENTORY OF FARMWORKER ISSUES AND PROTECTIONS] (identifying frequent issues confronted by farmworkers including unsafe working conditions, low wages, and sexual harassment); Susan A. Schneider, *A Reconsideration of Agricultural Law: A Call for the Law of Food, Farming, and Sustainability*, 34 WM. & MARY ENVTL. L. & POL'Y REV. 935, 962 (2010); David Kupfer, *Striving for Social Sustainability in Agriculture*, RODALE INST. (Aug. 3, 2004), <http://newfarm.rodaleinstitute.org/features/0804/worker/#>.

167. PUTTING MEAT ON THE TABLE, *supra* note 165, at 23–29, 41–43; see also CAFOS UNCOVERED, *supra* note 165, at 61–62 (discussing the economic costs to rural communities); Natasha Geiling, *The Unintended Consequences of North Carolina's 'Ag-Gag' Law*, THINK PROGRESS (June 7, 2015), <http://thinkprogress.org/climate/2015/06/07/3666617/north-carolina-ag-gag-environmental-impacts/> (describing the environmental impacts of North Carolina's hog industry).

168. See RONALD L. SANDLER, FOOD ETHICS: THE BASICS (2015); Jo Ann Davidson, *World Religions and the Vegetarian Diet*, 14 J. ADVENTIST THEOLOGICAL SOC'Y 114 (2003). A vast body of popular and scientific literature discussing modern industrial food production exists. For fairly extensive discussion and bibliographies, see Jonathan Safran Foer, *Eating Animals* and Michael Pollan, *The Omnivore's Dilemma: A Natural History of Four Meals*. For a seminal work on factory farming, see Jim Mason & Peter Singer, *Animal Factories*.

Because consumers care, retailers have begun adopting welfare-conscious policies. Recently, Wal-Mart announced that it supports the Five Freedoms as an “aspiration” for its supply chain.¹⁶⁹ Chipotle—which temporarily stopped serving pork in hundreds of locations in 2015 after a supplier failed to meet its standards—is among an enclave of young restaurant chains winning popularity in part through conveying welfare-conscious personas.¹⁷⁰ Now, McDonald’s and other old-guard establishments are attempting to distance themselves from suppliers associated with inhumane practices.¹⁷¹

Yet consumers have little way of knowing about the conditions in which their food is raised. Consumers often have little to no access to farms and effectively no way to trace the animal products on the shelf back to a particular farm, even if they did.¹⁷² In the supermarket and elsewhere, consumers find apparently endless variety,¹⁷³ and the consumers who would like to purchase accord-

169. *Animal Welfare Position*, WAL-MART, <http://corporate.walmart.com/policies> (follow Animal Welfare Position hyperlink) (last visited Oct. 1, 2015). The United Kingdom’s Farm Animal Welfare Council first published the Five Freedoms in 1979. See FARM ANIMAL WELFARE COUNCIL, *FARM ANIMAL WELFARE IN GREAT BRITAIN: PAST, PRESENT AND FUTURE* 1–2 (2009). The Five Freedoms are as follows: (1) Freedom from hunger and thirst; (2) Freedom from discomfort; (3) Freedom from pain, injury and disease; (4) Freedom to express normal behavior; and (5) Freedom from fear and distress. *Id.*

170. See Stephanie Strom, *After Suspending Supplier, Chipotle Takes Pork Off Menu in 600 Stores*, N.Y. TIMES (Jan. 14, 2015), http://www.nytimes.com/2015/01/15/business/after-suspending-supplier-chipotle-takes-pork-off-menu-in-600-stores.html?_r=0; Julia Moskin, *Hold the Regret? Fast Food Seeks Virtuous Side*, N.Y. TIMES (July 25, 2014), http://www.nytimes.com/2014/07/26/nyregion/26fastfood.html?_r=0. In 2014, Chipotle had difficulty serving beef raised without antibiotics and turned to conventional suppliers rather than suspend service. See Strom, *supra*.

171. Tiffany Hsu, *Animal Cruelty: Why McDonald’s, In-N-Out, Wall Street Now Say No*, L.A. TIMES (Aug. 23, 2012), <http://articles.latimes.com/2012/aug/23/business/la-fi-mo-mcdonalds-animal-cruelty-20120823>.

172. See Lisa Heinzerling, *Reflections on Current Food and Drug Law Issues: The Varieties and Limits of Transparency in U.S. Food Law*, 70 FOOD & DRUG L.J. 11, 20–21 (2015) (concluding that the legal system has failed to make our nation’s food systems transparent); cf. Sullivan, *supra* note 160, at 407. Sullivan argues that animal welfare is a “credence good,” as distinguished from “search goods” and “experience goods.” *Id.* at 407–08. Unlike search or experience goods, “credence goods are simply unobservable to consumers.” *Id.* at 409. Even farmer’s markets suffer from asymmetrical or inaccessible information. See Samuel R. Wiseman, *Fraud in the Market*, 26 REGENT U. L. REV. 367, 375–78 (2014).

173. See Diana L. Moss & C. Robert Taylor, *Short Ends of the Stick: The Plight of Growers and Consumers in Concentrated Agricultural Supply Chains*, 2014 WIS. L. REV. 337, 353–55 (2014) (noting that agricultural corporations market their products under multiple brand names, including “private label” brands, and that many animal products are virtually indistinguishable).

ing to some ethos that places value on animal, environmental, and occupational welfare—to vote with their wallets for their values—must distinguish between products bearing labels with verdant fields, happy farmers, and animals in natural-looking environments.¹⁷⁴ And what (or how much) meaning should they ascribe to those words streaming across the images from one package to the next: those words like “natural,” “natural-raised,” “fresh,” “pasture-raised,” “grassfed,” “family farmed,” and “organic”?¹⁷⁵

The regulatory apparatus governing what can appear on a label and directing what must appear on a label derives its authority from multiple federal laws and traverses the jurisdictional boundaries of federal agencies like the USDA, the Food and Drug Administration, and the Federal Trade Commission.¹⁷⁶ The extensive apparatus preempts conflicting state law, ensuring a uniform system of labeling designed to produce information about the food stocked on the nation’s shelves and convey it to consumers.¹⁷⁷ But the purpose extends beyond requiring disclosure of nutritional

174. Cf. INVENTORY OF FARMWORKER ISSUES AND PROTECTIONS, *supra* note 166, at ii; FOER, *supra* note 168, at 181–88 (reviewing reports of abuses on industrial pig farms); Roberto A. Ferdman, *The Not-So-Humane Way ‘Humanely’ Raised Chickens Are Being Raised*, WASH. POST (Dec. 8, 2014) <http://www.washingtonpost.com/news/wonkblog/wp/2014/12/08/the-not-so-humane-way-humanely-raised-chickens-are-being-raised/> (reporting on conditions at a Perdue contract farm); Eric Schlosser, *The Chain Never Stops*, MOTHER JONES (July 1, 2001), <http://www.motherjones.com/politics/2001/07/dangerous-meatpacking-jobs-eric-schlosser> (discussing the occupational hazards of the meatpacking industry); Joby Warrick, *They Die Piece by Piece: In Overtaxed Plants, Humane Treatment of Cattle Is Often a Battle Lost*, WASH. POST, Apr. 10, 2001, at A1 (relating often brutal conditions in slaughterhouse for animals and workers).

175. See Moss & Taylor, *supra* note 173, at 354–55 (noting that such terms often lack “concrete legal meaning” and are simply “marketing devices”). See generally ANIMAL WELFARE APPROVED, FOOD LABELING FOR DUMMIES: A DEFINITIVE GUIDE TO COMMON FOOD LABEL TERMS AND CLAIMS (2013) (identifying common terms and claims and indicating whether the term or claim is regulated, legally defined, and independently verified) [hereinafter FOOD LABELING FOR DUMMIES]; *Comprehensive Standards Comparison Chart*, CERTIFIED HUMANE (Nov. 26, 2013), http://certifiedhumane.org/wp-content/uploads/2014/01/Comp.Standards.Comparison.Chart_wappendix.11.26.13.pdf (comparing standards of major programs).

176. U.S. DEP’T OF AGRIC., A GUIDE TO FEDERAL FOOD LABELING REQUIREMENTS FOR MEAT, POULTRY, AND EGG PRODUCTS 4, 6, 11 (2007) [hereinafter A GUIDE TO FEDERAL FOOD LABELING].

177. See *id.* at 13 (quoting the preemption provisions of the Federal Meat Inspection Act and the Poultry Products Inspection Act). The Federal Meat Inspection Act and the Poultry Products Inspection Act are enforced by the Food Safety and Inspection Service of the USDA. *Id.* at 4. The Federal Food, Drug, and Cosmetic Act—enforced by the Food and Drug Administration—also contains a preemption provision. See 21 U.S.C. § 343-1 (2012).

facts and ingredients—it also strives to manage corporate messaging.¹⁷⁸ Thus, the primary federal food laws generally prohibit “misbranding” or misleading representations.¹⁷⁹ And the regulations implementing these laws achieve considerable precision when it comes to certain claims or required disclosures, including the name of a product.¹⁸⁰

When it comes to environmental, labor, or animal welfare claims, however, the apparatus largely withdraws, and the legal substance becomes less certain, leaving consumers to decipher any number of vague, barely distinguishable claims—modern palimpsests obscuring the history of our food.¹⁸¹ For instance, the term “cage-free” has no regulatory definition. It suggests that the producer raised the birds without cages, but it leaves open whether the birds had access to the outdoors and whether the birds were able to engage in normal behaviors, among other concerns.¹⁸² A claim that birds are raised “cage-free” is not necessarily independently verified, and in fact, the industry or a company may create a standard and ask the USDA to confirm that the standard has been met.¹⁸³ But the USDA does require a producer

178. See Heinzerling, *supra* note 172, at 12.

179. See, e.g., Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 343 (2012) (“A food shall be deemed to be misbranded . . . [if] . . . its labeling is false or misleading in any particular”); Poultry Product Inspection Act, 21 U.S.C. § 453 (2012) (“The term ‘misbranded’ shall apply to any poultry product . . . if its labeling is false or misleading in any particular”); Federal Meat Inspection Act, 21 U.S.C. § 601 (2012) (“The term ‘misbranded’ shall apply to any carcass, part thereof, meat or meat food product . . . if its labeling is false or misleading in any particular”).

180. See, e.g., 21 C.F.R. pt. 101 (2013) (containing requirements for nutrition labeling, nutrient content claims, and health claims); 9 C.F.R. pt. 317 (2015) (containing requirements for nutrition labeling and content claims for meat); 9 C.F.R. pt. 381, subpt. Y (2015) (containing requirements for nutrition labeling and content claims for poultry); Heinzerling, *supra* note 172, at 13; see also Poncie Rutsch, *Nut So Fast, Kind Bars: FDA Smacks Snacks on Health Claims*, NPR (Apr. 15, 2015, 6:37 PM), <http://www.npr.org/sections/thesalt/2015/04/15/399851645/nut-so-fast-kind-bars-fda-smacks-snacks-on-health-claims> (explaining that to use the “+” symbol or the word “plus,” a snack bar must contain at least 10% more of the nutrients that are contained in a standard snack bar representative of the category).

181. See Heinzerling, *supra* note 172, at 20–21. Professor Heinzerling also comments on the limits of transparency elsewhere in our nation’s food law. In particular, she laments the apparent disinclination to collect information or conduct testing to verify nutritional and content claims. *Id.* at 16. She also explains the different approval processes used by the agencies and notes that sometimes the agencies may define (or not define) the same words differently. See *id.* at 18–19; see also A GUIDE TO FEDERAL FOOD LABELING, *supra* note 176, at 7.

182. See FOOD LABELING FOR DUMMIES, *supra* note 175, at 6.

183. See Ferdman, *supra* note 174 (“Some companies pay the USDA to verify that

to demonstrate to the agency that its “poultry has been allowed access to the outside” before it can use the terms “free range” and “free roaming.”¹⁸⁴ As other commentators have noted, the definition of “free range” or “free roaming” applies only to poultry—not to cattle, pigs, or laying hens.¹⁸⁵ Moreover, it does not address the range of living conditions or raising practices that would “allow[] access to the outside” with any precision.¹⁸⁶ Conversely, to use the word “organic,” a producer must comply with fairly detailed specifications regulating production and handling processes that do prescribe certain living conditions and require independent third-party verification and certification.¹⁸⁷

In short, by casting light on a single corner, producers can hide the rest of the barn. Other commentators have raised these issues, explaining how such claims can be “bewilder[ing]” or misleading and how such claims may convey little to nothing and conceal considerably more.¹⁸⁸ When I buy something labeled “organic,” I know it comes with the assurance of a certain standard of welfare and environmental sensitivity, even if the regulations implementing the National Organic Program are something of a baseline, permitting a range of practices more or less distinguishable from conventional industrial agriculture, and even though the certification does not wholly account for the social and environmental costs of production.¹⁸⁹ But when I buy something “nat-

they're meeting specific processing points . . . If it's cage-free, and they want us to verify that they are meeting their set guidelines, that's what we do.”)

184. *Meat and Poultry Labeling Terms*, U.S. DEPT OF AGRIC., <http://www.fsis.usda.gov/wps/portal/ffsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/food-labeling/meat-and-poultry-labeling-terms/meat-and-poultry-labeling-terms> (last updated Oct. 24, 2014); see Sullivan, *supra* note 160, at 412–13 (noting that it seems “intuitively true that customers interpret ‘free range’ to mean that animals spend considerable time in a pastoral environment”).

185. See, e.g., Sullivan, *supra* note 160, at 413; see 9 C.F.R. § 381.1 (2015) (defining “poultry” and “poultry product”).

186. See Sullivan, *supra* note 160, at 413 (noting that the “wide array of living conditions” that could satisfy certain standards makes it “difficult for a high-animal-welfare producer to effectively disclose” its practices to consumers).

187. 7 C.F.R. pt. 205 (2015).

188. See, e.g., POLLAN, *supra* note 168, at 134–39; Heinzerling, *supra* note 172, at 20–21; Donna M. Byrne, *Eggs, Egg Cartons, and Consumer Preferences*, 26 REGENT U. L. REV. 397, 413–19 (2014); Sullivan, *supra* note 160, at 410, 412; Ferdman, *supra* note 174.

189. POLLAN, *supra* note 168, at 154–73, 182–84; see Heinzerling, *supra* note 172, at 20–21; Aurora Paulsen, *Welfare Improvements for Organic Animals: Closing Loopholes in the Regulation of Organic Animal Husbandry*, 17 ANIMAL L. 337, 341–43 (2011); see also Jason J. Czarnezki, *The Future of Food Eco-Labeling: Organic, Carbon Footprint, and Environmental Life-Cycle Analysis*, 30 STAN. ENVTL. L.J. 3, 14–15 (2011).

ural,”¹⁹⁰ “naturally raised,”¹⁹¹ or “grassfed”¹⁹²—what do I know? Such claims imply sustainable practices, something akin to organic farming, but the claims lack even the degree of comprehensiveness that renders the “organic” claim relatively transparent. In short, these claims (and the pictures) provide little more than a marketing narrative.¹⁹³ As a result, food labels bearing such claims fail to provide the information consumers need to recognize and distinguish between agricultural practices, develop informed preferences, and make purchases according to those preferences.¹⁹⁴

190. See Nicole E. Negowetti, *Defining Natural Foods: The Search for a Natural Law*, 26 REGENT U.L. REV. 329, 343 (2014) (noting that the Food and Drug Administration has repeatedly declined to define or standardize the term “natural”); see also Jennifer L. Pomeranz, *Litigation to Address Misleading Food Label Claims and the Role of the State Attorneys General*, 26 REGENT U.L. REV. 421, 438–40 (2014) (reviewing consumer-based litigation over the term “natural”). The USDA permits the use of the “natural” claim if the product “does not contain any artificial flavor or flavoring, coloring ingredient, or chemical preservative . . . [and] the product and its ingredients are not more than minimally processed.” U.S. DEPT OF AGRIC., FOOD STANDARDS AND LABELING POLICY BOOK 108 (2005). Thus, “natural” refers to post-slaughter processing and includes no information regarding raising practices or environmental conditions. The definition is also somewhat flexible. See Product Labeling: Definition of the Term “Natural,” 71 Fed. Reg. 70503, 70504 (Dec. 5, 2006) (citing Standards and Labeling Policy Memorandum 055 (Nov. 22, 1982)).

191. “Livestock used for the production of meat and meat products that have been raised entirely without growth promotants, antibiotics . . . , and have never been fed animal . . . byproducts derived from the slaughter/harvest processes . . .” United States Standards for Livestock and Meat Marketing Claims, Naturally Raised Claim for Livestock and the Meat and Meat Products Derived From Such Livestock, 74 Fed. Reg. 3541, 3545 (Jan. 21, 2009). Producers can validate a “naturally raised” claim through an audit procedure conducted by the USDA. *Id.* at 3541; see 7 C.F.R. pt. 62 (2015).

192. “Grass and forage shall be the feed source consumed for the lifetime of the ruminant animal Animals cannot be fed grain or grain byproducts and must have continuous access to pasture during the growing season.” United States Standards for Livestock and Meat Marketing Claims, Grass (Forage) Fed Claim for Ruminant Livestock and the Meat Products Derived From Such Livestock, 72 Fed. Reg. 58631, 58637 (Oct. 16, 2007). The producer may supplement the grass-based diet with “non-forage feedstuffs” to accommodate “environmental or physical conditions” and “to ensure the animal’s well being,” provided that such supplementation is documented. *Id.* Producers can validate the “grassfed” claim through the USDA’s audit procedure. *Id.* at 58631; see 7 C.F.R. pt. 62 (2015). As with the “free range” claim, the definition does not address the range of raising practices and living conditions that permit “continuous access to pasture.” An independent, third-party certification program operated by the American Grassfed Association provides more substance to the claim, requiring all livestock to live on land with at least 75% forage cover or unbroken ground. See AM. GRASSFED ASS’N, GRASSFED & GRASS PASTURED RUMINANT STANDARDS 4 (2015). As a result, consumers must distinguish between USDA grassfed products and American Grassfed Association products to understand the scope of the claim.

193. Pollan refers to the narrative as “Supermarket Pastoral.” POLLAN, *supra* note 168, at 137.

194. See Byrne, *supra* note 188, at 418–19; see also Sullivan, *supra* note 160, at 413.

In 2008, the USDA acknowledged that the same “claim may reflect different animal raising practices, depending on how an animal producer or certifying entity defines the basis for the claim.”¹⁹⁵ It further acknowledged that such claims “can be difficult . . . to address through its pre-market label approval process,” and that it often lacks sufficient information to evaluate production practices.¹⁹⁶ The agency also recognized that the use of such claims is important for consumers, who want transparency, and for producers, who want to differentiate their products from other apparently similar products in the supermarket.¹⁹⁷ Despite its awareness of the issue, the USDA has yet to take regulatory action.¹⁹⁸ At this stage, states could regulate production claims without conflicting with federal law, and one could argue that regulation of these claims falls outside the labeling authority of the USDA or FDA in any case.¹⁹⁹

This article does not propose that Virginia should regulate the use of production claims on its own, independent of the other fifty states. Rather, this article proposes a Virginia-oriented production label; one that would be of value to Virginia consumers who seek transparency and to Virginia producers that want to differentiate their products from others in the market.²⁰⁰ The program would be voluntary, and Virginia producers would apply for certification and the right to use the label on their packaging. As a Virginia-oriented production label, it could build from VDACS’ successful “Virginia Grown” and “Virginia’s Finest” marketing

195. Product Labeling: Use of the Animal Raising Claims in the Labeling of Meat and Poultry Products, 73 Fed. Reg. 60228, 60229 (Oct. 10, 2008).

196. *Id.*

197. *See id.*

198. *See Product Labeling: Use of the Animal Raising Claims in the Labeling of Meat and Poultry Products*, REGULATIONS.GOV, <http://www.regulations.gov/#!docketDetail;D=FSIS-2008-0026> (last visited Oct. 1, 2015) (showing no action past Oct. 10, 2008 when the USDA requested comments on the issue).

199. *See* 21 U.S.C. § 343 (2012) (FDCA labeling requirements); *id.* § 457 (2012) (PPIA labeling standards); *id.* § 607 (2012) (FMIA labeling standards); Bruce Friedrich, *Meat Labeling Through the Looking Glass*, 20 ANIMAL L. 79, 90–95 (2013).

200. A number of third-party welfare certification programs with defined standards (Animal Welfare Approved, Certified Humane, Global Animal Partnership, and American Humane Certified) exist on the national market. *See, e.g., Comprehensive Standards Comparison Chart*, *supra* note 175. The standards for these programs vary, and consumers must be able distinguish between these “credible” claims and non-credible claims. *See Sullivan*, *supra* note 160, at 411–12. A Virginia label would be distinctive and come with the imprimatur of state authority.

campaigns and certify that purchases support both a certain method of farming and local producers.²⁰¹

The recently discontinued “Virginia Quality” label provides something of a model for the necessary legislation.²⁰² Virginia Code section 3.2-4313 authorizes VDACS to stamp any qualified agricultural products with a distinctive label, which indicated that the product had been subject to “continuous official inspection” and met the “quality and description” shown on the packaging.²⁰³ The Virginia Code further authorized VDACS to adopt regulations permitting “any producer” to use the label on its qualified products.²⁰⁴ Similar legislation would be required to authorize VDACS to adopt regulations establishing standards for the proposed label.²⁰⁵

To be most effective, and to differentiate itself from existing welfare claims or certification programs, a Virginia label should signify precise environmental and labor standards in addition to animal welfare standards.²⁰⁶ The standards should be science-based, developed in consultation with veterinary, agricultural and environmental scientists, non-governmental organizations, and other stakeholders, and the standards should be quantitative

201. *Marketing and Development*, VA. DEP'T OF AGRIC. & CONSUMER SERVS., <http://www.vdacs.virginia.gov/marketing/index.shtml> (last visited Oct. 1, 2015). As noted earlier, VDACS possesses statutory authority to “promote the development and marketing of the Commonwealth’s agricultural products,” and to that end, the Commissioner may provide marketing assistance and product certification. VA. CODE ANN. § 3.2-102(A) (Cum. Supp. 2015).

202. See Regulations Establishing the Virginia Quality Label (Fast-Track), 29 Va. Reg. Regs. 2197 (May 6, 2013) (to be codified at 2 VA. ADMIN. CODE 5-260). The label had not been used by the agency or by producers in several years. *Id.*

203. VA. CODE ANN. § 3.2-4313 (Repl. Vol. 2008).

204. *Id.* §§ 3.2-4316, -4320 (Repl. Vol. 2008). The General Assembly authorized VDACS to seek injunctions restraining the improper use of the label and made misuse of the label a Class 3 misdemeanor. *Id.* §§ 3.2-4318, -4321 (Repl. Vol. 2008).

205. The discontinued Virginia Quality label indicated that an agricultural or food product passed through “continuous official inspection.” *Id.* § 3.2-4313 (Repl. Vol. 2008); see *id.* § 3.2-4312 (Repl. Vol. 2008) (defining “continuous official inspection”). That purpose is distinguishable from the proposed label, which would condense and convey information beyond product grades and description. The popularity of the Virginia Grown and Virginia’s Finest campaigns demonstrate industry interest in distinguishing their products as “local,” and consumer interest in finding local products. The proposed label would go even further by indicating local products that adhere to superior animal raising, environmental, and labor standards.

206. To develop and incorporate environmental and labor standards, the Commissioner could consult with the Virginia Department of Environmental Quality and the Virginia Department of Labor and Industry.

when feasible. To the extent that qualitative standards are adopted, such standards must describe the acceptable range of conditions that will support compliance.²⁰⁷ The adopted standards should be summarized and explained on the VDACS website for consumer education. Ultimately, the aim of the program is to acknowledge and confront the externalities of food production, so that a framework for innovative, sustainable practices can develop through market-based interactions between the consumer and the producer.²⁰⁸

Further, day-to-day operations must be verified against the standards, either by VDACS itself or by a third-party. Verification should consist of annual and random unannounced inspections to build credibility and consumer confidence, and to ensure that producers cannot undercut their peers by obtaining certification while avoiding the cost of compliance. The results of inspections should be made public, accessible through the VDACS website.²⁰⁹ If a certified producer fails to take corrective action, or fails to meet the program's requirements, their right to use the label would be suspended and then terminated if issues persist.²¹⁰ The program could also encourage the producers to cultivate transparency and self-verify through alternative means, such as casting live video of operations on farm websites or permitting the public to tour farm facilities.²¹¹

207. A label could describe certain "levels" of certification or achievement (i.e., Producer X meets 85% of the standards and receives a score of "1," while Producer Y meets 100% of the standards and receives a score of "5."), thereby permitting consumers to select a level and corresponding price point. In a tiered program, a minimum bar for basic certification would be required.

208. Cf. Schneider, *supra* note 166, at 952–62.

209. The inspections might also produce information about best practices that would benefit the industry generally. Cf. Heinzerling, *supra* note 172, at 21 & n.91.

210. A criminal provision, such as that contained in the Virginia Quality program, would likely discourage producers from applying for the label in the first instance and be counterproductive as a result.

211. See Sullivan, *supra* note 160, at 411–12. Alternative verification methods such as those above could be particularly important victories for transparency in light of industry-sponsored "ag-gag" bills, which often criminalize efforts to expose objectionable or unlawful operations. See Heinzerling, *supra* note 172, at 21 & n.92.

Agriculture in Virginia is big business.²¹² Consumers want sustainable food products that they can believe in. Virginia can help its local producers fill a void in the marketplace by developing a transparent certification program that brings consumers and Virginia producers together. In doing so, Virginia can advance a new era of agricultural policy—one that invites consumers beyond the shelf and attempts to address the ethical, social, and environmental concerns associated with food production instead of burying those issues beneath well-crafted claims.

CONCLUSION

This survey has attempted to identify connections between animal law and other disciplines to illustrate its potential to positively impact Virginia communities. Virginia policymakers have generally been on the forefront of developments in animal law, implementing progressive strategies to combat animal cruelty and introducing strategies to integrate animal law with other disciplines. Further, the growing interest and concern of consumers with the welfare of animals may offer small Virginia producers an opportunity to distinguish their products, provided a coherent and credible system for identifying sustainable products can be developed. Since 2008, animal law has taken an increasingly visible place in Virginia politics, a trend likely to continue in the coming years.

212. Agriculture is the largest industry in Virginia. According to VDACS, the agricultural industry has an economic impact of \$52 billion annually and supports nearly 311,000 jobs. See *Virginia Agriculture—Facts and Figures*, VA. DEPT OF AGRIC. & CONSUMER SERVS., <http://www.vdacs.virginia.gov/agfacts/> (last visited Oct. 1, 2015); see also TERANCE J. REPHANN, WELDON COOPER CTR. FOR PUB. SERV., *THE ECONOMIC IMPACTS OF AGRICULTURE AND FOREST INDUSTRIES IN VIRGINIA 1* (2013). Poultry, cattle, and dairy products in particular make up a significant portion of Virginia agriculture. See *Virginia's Top 20 Farm Commodities*, VA. DEPT OF AGRIC. & CONSUMER SERVS. (Feb. 24, 2015), <http://www.vdacs.virginia.gov/agfacts/top20.shtml>.