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BACKYARD BEEKEEPING IN THE BEEHIVE STATE:
SALT LAKE CITY'S BEEKEEPING REGULATIONS, NUISANCE
CONCERNS, AND THE LEGAL STATUS OF HONEY BEES

Robert T. Moriarty*

I. INTRODUCTION

With increased emphasis on sustainability and concerns about disappearing bees, backyard or urban beekeeping is all the rage these days.¹ Even the Obama White House had a hive,² and the University of Utah keeps several colonies on campus.³ The increased popularity of urban beekeeping has prompted municipalities around the country to authorize and regulate beekeeping.⁴ This trend has given rise to concerns about the nuisance honey bees create in nonagricultural settings.⁵ In light of such nuisance concerns, this Note examines the regulations passed by the City Council of Salt Lake City in 2009 and judicial precedent about nuisance issues associated with beekeeping.

The analysis then turns to a consideration of the legal status of honey bees. After surveying the possibility that honey bees might be classified under the traditional categories of trespasser, invitee, and licensee, this Note proposes that the most appropriate designation for the creatures lies outside the traditional categories. With the appropriate classification, honey bees and their owners will be entitled to certain protections under the law. While this Note specifically considers the

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¹ While small-scale amateur beekeeping has been around for many years, the hobby has enjoyed a renaissance of late. See Valerie Phillips, *Oh, Honey: Utahns Helping Bees Survive by Being Backyard Beekeepers*, DESERET NEWS (June 26, 2012, 4:27 PM), <http://www.deseretnews.com/article/765586118/Oh-honey-Utahns-helping-bees-survive-by-being-backyard-beekeepers.html> [<https://perma.cc/PY2U-DKRQ>] (describing the growth of suburban beekeeping in Utah).

² Paul Bedard, *Michelle Obama Goes Organic and Brings in the Bees*, U.S. NEWS & WORLD REP. (Mar. 28, 2009, 11:46 AM), <http://www.usnews.com/news/blogs/washington-whispers/2009/03/28/michelle-obama-goes-organic-and-brings-in-the-bees> [<https://perma.cc/U4L4-NYX9>].

³ J. FitzLandry, *Campus Is Buzzing: An Interview with the University of Utah Beekeeper's Association*, SUSTAINABLE UTAH (Apr. 20, 2016), <https://sustainableutah.wordpress.com/2016/04/20/campus-is-buzzing-an-interview-with-the-university-of-utah-beekeepers-association> [<https://perma.cc/YVH6-ZQ96>].

⁴ Julie Satow, *Worker Bees on a Rooftop, Ignoring Urban Pleasures*, N.Y. TIMES (Aug. 6, 2013), <http://www.nytimes.com/2013/08/07/realestate/commercial/worker-bees-on-a-rooftop-ignoring-bryant-parks-pleasures.html> [<https://perma.cc/5KPG-8NYF>].

⁵ *Id.*

beekeeping ordinance adopted by Salt Lake City, municipalities from Anchorage, Alaska⁶ to Ypsilanti, Michigan⁷ have adopted similar regulations.⁸ This analysis, *mutatis mutandis*, should be applicable to most localities that have chosen to regulate urban beekeeping.

II. THE SALT LAKE CITY BEEKEEPING ORDINANCE

The Salt Lake City Ordinance (“Ordinance”) authorizes beekeeping subject to certain regulations.⁹ It seeks to regulate the practice to “avoid problems that may otherwise be associated with beekeeping in populated areas.”¹⁰ When passed by the city council in 2009, the Ordinance consisted of two sections: (A) a short preamble and (B) a substantive section that was amended to the city code.

A. *The Preamble: A Rationale for the Ordinance*

While the preamble—owing to its exhortative nature—is unsuitable for codification, it still offers valuable insights about the rationale and policy considerations for the change in regulations. The Preamble states that bees benefit humans by providing agriculture, garden, and fruit pollination and by producing honey, wax, and other products.¹¹ Via pollination, the Preamble asserts that bees are

⁶ ANCHORAGE, ALASKA, CODE OF ORDINANCES § 21.05.070.D.3 (2014), <https://www.muni.org/Departments/OCPD/Planning/Projects/t21/T21%20Adopted%20Chapters%20and%20Ordinances/Chapter%205%20amended%201-28-14.pdf> [<https://perma.cc/BP89-2J9D>].

⁷ YPSILANTI, MICH., CODE OF ORDINANCES §§ 14-171–14-183 (2016), https://library.municode.com/mi/ypsilanti/codes/code_of_ordinances?nodeId=PTIICOR_CH14AN_ARTVBE [<https://perma.cc/EZ3V-K9LA>].

⁸ With the rise in interest in backyard beekeeping, nearly every municipality of any size has adopted regulations. These ordinances can be found by conducting a simple search of a municipality’s website. It appears that most of the ordinances share a common model because they are remarkably similar in terms of scope and concerns addressed. The Agricultural Center Louisiana State University has produced a model for use in the state. Timothy Schowalter & Dale K. Pollet, *Model Beekeeping Ordinance for Louisiana Local and Municipal Governments*, LA. ST. U. AGRIC. CTR. (Feb. 28, 2005, 10:26 PM), http://www.lsuagcenter.com/topics/environment/insects/bees_wasps/model-beekeeping-ordinance-for-louisiana-local-and-municipal-governments [<https://perma.cc/LHC5-Q2VP>].

⁹ Salt Lake City, Utah, Ordinance No. 71 of 2009 (Dec. 1, 2009), http://www.slcdocs.com/slcgreen/Beekeeping_ORDINANCE.pdf [<https://perma.cc/4PY6-3PG5>]. The Ordinance amended the Salt Lake City Code to add definitions and authorize beekeeping in the city. SALT LAKE CITY, UTAH, CODE § 8.10 (2016), <http://www.slcdocs.com/CityOrds/code2016.pdf> [<https://perma.cc/J4BK-5GWH>].

¹⁰ SALT LAKE CITY, UTAH, CODE § 8.10.010 (2016).

¹¹ TAMMY HORN, BEES IN AMERICA: HOW THE HONEY BEE SHAPED A NATION 19–24 (2005).

responsible for fifteen to thirty percent of food eaten by American consumers.¹² The Preamble expresses concern that the domesticated honey bee population has declined by fifty percent over the last fifty years.¹³ It notes that Salt Lake City allowed apiaries¹⁴ in agriculturally zoned areas until concerns about “killer bees”¹⁵ led to the prohibition of apiaries in the city.¹⁶ The Preamble further states that domestic strains of honey bees have been selectively bred for desirable traits, including gentleness, honey production, reduced swarming, and pollination attributes.¹⁷ It notes that these gentle strains of honey bees can be raised in populated

¹² These numbers are conservative: “Plants that depend on pollination make up 35 percent of global crop production volume with a value of as much as \$577 billion a year.” John Schwartz, *Decline of Pollinators Poses Threat to World Food Supply, Report Says*, N.Y. TIMES (Feb. 26, 2016), <http://www.nytimes.com/2016/02/27/science/decline-of-species-that-pollinate-poses-a-threat-to-global-food-supply-report-warns.html> [https://perma.cc/K9SD-5RZD]. However, it should be noted that honey bees are not the only pollinators. In addition to domesticated honey bees, there are wild bees (some 20,000 species), birds, butterflies, moths, wasps, beetles, and bats that also pollinate. *Id.*

¹³ Salt Lake City, Utah, Ordinance 71 (Dec. 1, 2009).

¹⁴ An apiary is a place where colonies or hives of bees are located. The word finds its origin in the descriptive and charming Latin name for the honey bee, *Apis mellifera*. *Apis* means “bee,” and *mellifera* translates as “honey bearing.” So, a honey bee is literally a “bee that carries honey.” The name is not really accurate as honey bees do not ever carry honey. Rather, they make it as their food. Worker bees collect nectar from flowers and carry it back to the hive in an extra stomach called the crop. On returning to the hive, bees regurgitate the nectar into the mouths of other workers, where the nectar mixes with enzymes produced by the insects. After a few minutes, the nectar is placed in wax cells where it is fanned to evaporate excess moisture. This process breaks the complex sugars in the nectar into simple sugars more easily digestible by the bees and less susceptible to bacterial degradation. Once the excess water content of the nectar is evaporated, the remaining thicker syrup, known as honey, is sealed in the comb cells for future use as food for the beehive. Elizabeth Palermo, *What Is Honey?*, LIVE SCI. (June 20, 2013, 3:09 PM), <http://www.livescience.com/37611-what-is-honey-honeybees.html> [https://perma.cc/FA8N-QSBQ].

¹⁵ Notwithstanding its insensitive connotations, the term “Africanized bee” is generally preferred to the more sensational “killer bee.” The Africanized bee is actually a hybrid of two subspecies, the Italian honey bee and the African honey bee, hence the name. The hybrid, developed in 1956 and purported to be more prolific and industrious, was distributed to Brazilian beekeepers. Unfortunately, the hybrid was quite aggressive and began to displace the more docile insects favored by beekeepers. Philip Moore et al., *Africanized Bees: Better Understanding, Better Prepared*, EXTENSION (Jan. 8, 2015), <http://articles.extension.org/pages/73118/africanized-bees:-better-understanding-better-prepared> [https://perma.cc/4QEK-MRM5].

¹⁶ Salt Lake City, Utah, Ordinance 71 (Dec. 1, 2009).

¹⁷ The Ordinance gives the impression that gentle strains of honey bees are a recent innovation. In truth, there is only one species of domesticated honey bee, *Apis mellifera*. A subspecies, the Italian honey bee, was introduced to the Americas by explorers centuries ago. Different subspecies of *Apis mellifera*, which vary in temperament, are kept by beekeepers

areas without causing a nuisance if properly located, managed, and maintained. Therefore, the Salt Lake City Council authorized beekeeping—subject to certain regulations—to further the “health, safety, and general welfare of the citizens of Salt Lake City.”¹⁸

B. Substance of the Ordinance

The substance of the Ordinance consists of a series of provisions designed to discourage the keeping of bees in a “manner that threatens public health or safety, or creates a nuisance.”¹⁹ These provisions were incorporated into the Salt Lake City Code and are summarized below.

Colony Location, Colony Density, and Setbacks: A maximum of five hives may be kept on a residential lot.²⁰ On lots greater than one-half acre, the number of hives may increase to ten.²¹ Written permission is required to place a hive on property owned or occupied by another person.²² Hives are to be placed at least five feet from any property line and six inches above the ground. An adjoining property owner may waive in writing this setback requirement.²³

Flyways: The regulations require that hives be placed on property so the “general flight pattern of bees is in a direction that will deter bee contact with humans and domesticated animals.”²⁴ If a hive is within fifteen feet from an area that provides public access or from a property line, a six-foot barrier (e.g., solid wall, fence, dense vegetation, or a combination thereof) is to surround it to force the bees to fly at least six feet above adjacent property.²⁵

Water: “Each beekeeper shall ensure that a convenient source of water is available to the colony continuously between March 1 and October 31 of each year. The water shall be in a location that minimizes any nuisance created by bees seeking water on neighboring property.”²⁶

throughout the world. The spread of feral colonies of subspecies hybrids may actually be contributing to an overall increase in aggressive bees. See Moore et al., *supra* note 15.

¹⁸ Salt Lake City, Utah, Ordinance 71 (Dec. 1, 2009).

¹⁹ SALT LAKE CITY, UTAH, CODE § 8.10.020 (2016).

²⁰ *Id.* § 8.10.030.

²¹ *Id.*

²² *Id.* § 8.10.020.

²³ *Id.* § 8.10.050. The rationale for setting hives back from the property line is self-evident, but why is there a requirement that they be six inches above the ground? This provision is most likely a hygienic measure enacted to prevent moisture and mold damage to the hive. See James E. Tew, *Bee Hive Stands: This May Be the Golden Age of Hive Stands*, BEE CULTURE (June 19, 2015), <http://www.beeculture.com/bee-hive-stands-this-may-be-the-golden-age-of-hive-stands/> [<https://perma.cc/4P2C-LHED>] (exploring the various methods and reasons for elevating hives).

²⁴ SALT LAKE CITY, UTAH, CODE § 8.10.060 (2016).

²⁵ *Id.*

²⁶ *Id.* § 8.10.070.

Storage of Beekeeping Equipment: “Each beekeeper shall ensure that no bee comb or other beekeeping equipment is left upon the grounds of an apiary site. Upon removal from a hive, all such equipment shall promptly be disposed of in a sealed container or placed within a building or other bee-proof enclosure.”²⁷

Registration and Compliance with State Regulations: Beekeepers are required to register with the Utah Department of Agriculture and Food.²⁸ Each hive must be marked with the owner’s name, address, telephone number, and state registration number.²⁹ Beekeepers are also required to operate hives in compliance with the Utah Bee Inspection Act.³⁰ This Act concerns the overall health of honey bees and regulates activities (namely, raising bees, importing bees, queen rearing, and salvaging wax) that may contribute to the spread of bee diseases.³¹ The Act also requires the appointment of county bee inspectors to ensure compliance with the regulations. While the inspector may check all apiaries annually, immediate inspection is authorized on receipt of a complaint of a diseased, parasitized, or abandoned apiary.³² To facilitate easy access during inspection, only moveable frame hives are allowed.³³ The Act also addresses issues directly related to the nuisance aspects of beekeeping. It specifically mandates that a beekeeper may not intentionally keep “aggressive or unmanageable” strains of bees.³⁴ The Act states, “[i]t is a public nuisance to keep an abandoned or diseased apiary, apiary equipment, or appliance anywhere other than in an enclosure that prohibits the entry of bees.”³⁵

²⁷ *Id.* § 8.10.080.

²⁸ *Id.* § 8.10.040.

²⁹ *Id.* § 8.10.050.

³⁰ *Id.* The Utah Bee Inspection Act is found in the UTAH CODE ANN. § 4-11-101 (2017).

³¹ UTAH CODE ANN. §§ 4-11-104, 109, 111, 113. One bacterial pathogen remains infective for thirty-five years and causes a disease known as American foulbrood, fatal to bees. The only remedy involves burning infected equipment. Wax from an infected colony contributes to the spread of the disease. Obviously, beekeepers and state agencies are highly motivated to prevent spread of such a virulent and economically devastating disease. See SUE HUBBELL, *A BOOK OF BEES: AND HOW TO KEEP THEM* 71–73 (1988) (discussing some of the serious diseases that afflict honey bees).

³² UTAH CODE ANN. § 4-11-107 (2017).

³³ *Id.* § 4-11-106. The modern moveable frame hive was invented in the mid-nineteenth century. Prior to that time, logs, baskets, and clay pots were used, which did not allow for inspection and generally required killing the hive in order to collect the honey. The hive featured on the seal of the State of Utah, known as a skep, is an example of a primitive hive. Skeys are not favored by modern beekeepers because they do not allow for easy manipulation of hives and harvesting of honey. Collecting honey from a skep results in the destruction and death of the colony. In addition, skeys cannot be opened and inspected to ensure that a colony is free of disease. For an overview of the history of beekeeping, see Eva Crane, *The World’s Beekeeping Past and Present*, in *THE HIVE AND THE HONEY BEE* 1–22 (Joe Graham ed., rev. ed., 2015).

³⁴ UTAH CODE ANN. § 4-11-115 (2017).

³⁵ *Id.* § 4-11-114.

It goes on to authorize the county bee inspector to seize and destroy abandoned equipment in an effort to prevent the spread of pests and disease.³⁶

III. HONEY BEES AS A NUISANCE

While honey bees certainly have some annoying characteristics, courts have been reluctant to characterize them as a nuisance *per se*—or attach strict liability to them. Nuisance claims would likely be supported only if accompanied by some degree of negligence in acting outside reasonable apicultural practice on the part of the beekeeper.

A. Honey Bees Are Not a Nuisance Per Se

While bees have the potential for creating a nuisance, especially if they are aggressive, they have not usually been considered a nuisance *per se*.³⁷ The Arkansas Supreme Court established this principle in a *per curiam* decision striking down a city ordinance prohibiting the keeping of bees: “Neither the keeping, owning, nor raising of bees is in itself a nuisance. Bees may become a nuisance in a city, but whether they are so or not is a question to be judicially determined in each case.”³⁸ The Mississippi Supreme Court followed this same balancing principle in holding a beekeeper not liable for the loss of a tenant’s horses stung to death by bees:

[A]s bees are useful to society, and are property of value, the ordinary rule as to wild animals, imposing absolute liability for the injuries inflicted by them, is not applicable to bees but the rules of domestic animals; that is, that the owner must know of their vicious tendencies, and that the owner is under a reasonable duty to place bees so they will not come in contact with persons traveling roads and similar places.³⁹

In *Whitemarsh Township v. Cummings*,⁴⁰ a Pennsylvania court held that keeping fewer than ten hives in a residential area does not constitute a nuisance.⁴¹ The neighbors in *Cummings* alleged that the bees were attracted by backyard swimming pools and stinging children.⁴² They also complained that the bees were causing brown spots to appear on white garments and sheets hung out to dry.⁴³ The court found the neighbors’ complaints insufficient to establish nuisance. The

³⁶ *Id.*

³⁷ Patricia E. Salkin, *Honey, It’s All the Buzz: Regulating Neighborhood Beehives*, 39 B.C. ENVTL. AFF. L. REV. 55, 63 (2012).

³⁸ *Arkadelphia v. Clark*, 11 S.W. 957, 958 (1889).

³⁹ *Ammons v. Kellogg*, 102 So. 562, 563 (1925).

⁴⁰ 7 Pa. D. & C.2d 557 (Ct. Com. Pl. 1956).

⁴¹ *Id.* at 561.

⁴² *Id.*

⁴³ *Id.*

spotting—which was actually fecal matter—was limited to the bees’ first flights in the spring and not frequent enough to be deemed a nuisance.⁴⁴ In rather cavalier fashion, the court asserted the following:

We cannot take the stings very seriously. The writer of this adjudication was raised in the country and the stings of insects were frequent occurrences and we paid little attention to them; a dab of wet mud on the sting and we were on our way. Children are sometimes bitten by dogs and cats, but this constitutes no reason for barring all dogs and cats from a neighborhood.⁴⁵

Finally, the court brought up the obvious problem of identifying the bees. Noting that bees range several miles in search of nectar and that there were many hives in the area, the court observed that “[n]ot one of the witnesses for plaintiff would undertake to say that the culprits were defendant’s bees.”⁴⁶ Here the court adopted the generally accepted view that bees do not constitute a nuisance unless the annoyance they cause is unreasonable, substantial, sustained, and readily traceable to a specific colony.⁴⁷

B. Bees May Constitute a Nuisance Under Certain Circumstances

Cases where bees are considered a nuisance are rare, but they generally involve having an unreasonably large number of colonies in residential areas or colonies placed near the path of travel.⁴⁸ A New York court, in *Olmsted v. Rich*,⁴⁹ upheld an injunction against a beekeeper requiring him to move 140 hives because they constituted a nuisance to the use and enjoyment of neighboring property.⁵⁰ In *People*

⁴⁴ *Id.* at 560. Bees are tidy creatures and will not defecate inside the hive. On warm winter days, bees undertake “cleansing flights” to relieve themselves, and neighbors find mysterious small yellow-brown spots on cars and laundry. As repulsive as the concept of a cleansing flight might be, those who consume honey are comforted by this habit of honey bees. See HUBBELL, *supra* note 31, at 47–48 (describing the hygienic behavior of honey bees).

⁴⁵ *Whitemarsh*, 7 Pa. D. & C.2d at 560.

⁴⁶ *Id.* This comment about bee identification was likely made tongue-in-cheek. Absent genetic testing or perhaps the expert testimony of an entomologist, most bees appear identical to a casual observer. The problem of bee identity is also raised in *Holden v. Lewis*, 56 Pa. D. & C. 639, 644 (Ct. Com. Pl. 1946).

⁴⁷ *Whitemarsh*, 7 Pa. D. & C.2d at 560.

⁴⁸ *Olmstead v. Rich*, 6 N.Y.S. 826, 830 (N.Y. Gen. Term 1889) (stating that large numbers of colonies must be located at distance from neighboring property); *People v. McOmber*, 133 N.Y.S.2d 407, 411 (N.Y. Sup. Ct. 1954) (asserting that colonies must be placed in such a manner as not to interfere with activities of neighbors).

⁴⁹ 6 N.Y.S. 826 (N.Y. Gen. Term 1889).

⁵⁰ *Id.* at 830.

v. McOmber,⁵¹ another New York court found the presence of thirty colonies in a residential area created a nuisance:

[W]hile the defendant admittedly has a right lawfully to maintain a colony of honey bees upon his premises, he is nevertheless charged with a duty of maintaining them in such a manner that they will not annoy, injure or endanger the comfort, repose, health or safety of any considerable number of persons or to render a considerable number of persons insecure in the use of their property.⁵²

Bees have also been deemed a nuisance when hives are placed too near property lines or in areas where people or animals might be expected to appear.⁵³ In *Ferreira v. D'Asaro*,⁵⁴ the court found that seven colonies of bees placed five feet from the property line and only twelve feet from where the neighbors tied their dog, resulting in an attack on the dog and its owner being repeatedly stung, constituted a nuisance.⁵⁵

IV. ANALYSIS OF THE SALT LAKE CITY BEEKEEPING ORDINANCE IN LIGHT OF NUISANCE CONCERNS

Salt Lake City's beekeeping regulations effectively address most nuisance concerns associated with beekeeping in residential settings.

First, the Ordinance seeks to minimize unintended contact with bees by limiting colony density.⁵⁶ In *Olmsted* and *McOmber*, excessively high colony density formed the basis for the courts' decision that the honey bees constituted a nuisance. The Ordinance limits the number of colonies to five on small lots and ten on larger lots.⁵⁷ This restriction should mitigate the effect of excessively large number of bees in a residential area.

Second, following the caution laid down in *Ferreira*, *Allman*, and *Ammons*, the Ordinance also requires that hives be physically situated so as to limit contact with neighbors and their pets.⁵⁸ While the Ordinance only requires a setback of five feet, it also mandates that beekeepers orient hives so that bee flight patterns will be

⁵¹ 133 N.Y.S.2d 407 (N.Y. Sup. Ct. 1954).

⁵² *Id.* at 411. Similar to *Whitemarsh*, the neighbors in *McOmber* were victims of stings and fecal spotting.

⁵³ *Ferreira v. D'Asaro*, 152 So. 2d 736, 737 (Fla. Dist. Ct. App. 1963).

⁵⁴ *Id.*

⁵⁵ *Id.*; see also *Allman v. Rexer*, 21 Pa. D. & C. 431, 434 (Ct. Com. Pl. 1934) (placing hives near where persons or animals might pass may constitute a nuisance); *Ammons v. Kellogg*, 102 So. 562, 563 (1925) (noting that bees must be located to minimize contact with persons traveling roads and similar places).

⁵⁶ SALT LAKE CITY, UTAH, CODE § 8.10.030 (2016).

⁵⁷ *Id.*

⁵⁸ *Id.* § 8.10.050.

directed away from human activity.⁵⁹ The Ordinance even requires a six-foot barrier around hives near a property line or areas of public access to force bees to fly above most neighborhood activities.⁶⁰

Third, seeking to avoid the stinging issue addressed in *Whitemarsh*, the Ordinance requires beekeepers to provide a water source near their hives so that bees will be less likely to interfere with neighborhood recreational activities involving water.⁶¹

Fourth, the Ordinance features a prudent measure to minimize the presence of aggressive honey bees, a specific issue that has not yet been addressed widely by the courts.⁶² By incorporating state regulation on the matter, the Ordinance prohibits beekeepers from intentionally keeping aggressive strains of bees.⁶³ While it might be difficult to prove a beekeeper intentionally raises unmanageable stock, the county inspector would be able to identify aggressive colonies during an annual visit, or in response to a complaint, and put a beekeeper on notice of the condition.⁶⁴

Fifth, the Ordinance seeks to minimize the spread of disease with its provisions on abandoned apiaries and securing unused equipment.⁶⁵ Abandoned beehives and improperly stored equipment create more than the nuisance of attracting pests. They also threaten public health and safety in much the same way that neglected livestock threatens agricultural enterprises. The Ordinance also features an implicit mechanism for identifying, reporting, and remedying nuisance hives through the activity of county bee inspectors.⁶⁶ Given that all colonies are to be registered with the state and include the name and phone number of the owner, the Ordinance provides an effective means to identify problem hives and report any accompanying nuisance to proper authority.⁶⁷

But the ordinance could be improved. For example, it could require the location of hives be published or that signs be required to advise the public of the presence of hives in an area. Such notice would be useful to those who are allergic to bee stings or have an unusual fear of bees. However useful such notice would be to

⁵⁹ *Id.*

⁶⁰ *Id.* § 8.10.060.

⁶¹ *Id.* § 8.10.070. Bees use a lot of water for their own biological needs and as an aid to cooling the hive by evaporation in the warmer months. See Norman Gary, *Activities and Behavior of Honey Bees*, in *THE HIVE AND THE HONEY BEE* 271, 300-01 (Joe M. Graham ed., rev. ed., 2015).

⁶² SALT LAKE CITY, UTAH, CODE § 8.10.020. However, the court in *Allman* noted that a beekeeper would be negligent if he had been notified of the “vicious” nature of his bees and their propensity to sting and had “neglected to correct it or to remove the bees.” *Allman v. Rexer*, 21 Pa. D. & C. 431, 434 (Ct. Com. Pl. 1934).

⁶³ See SALT LAKE CITY, UTAH, CODE § 8.10.040.

⁶⁴ See *id.*

⁶⁵ See *id.* § 8.10.080.

⁶⁶ See *id.* § 8.10.090.

⁶⁷ See *id.*

vulnerable members of the community, such a measure would prove unpopular with beekeepers, since beehives are often stolen or vandalized.⁶⁸

Ultimately, a municipality would need to engage in a public policy balancing analysis. The burden could be placed on beekeepers to protect their hives from vandals or it could be placed on the vulnerable members of the community to engage in self-protection (e.g., by carrying epinephrine injections). More reasonably, the Ordinance might be revised to include a requirement that individuals complete some sort of certification and educational program before being allowed to keep bees. Beekeeping is complicated business, and much of its potential nuisance would be proactively addressed by simply educating newcomers to the best practices of the craft. Much like a person needs to complete a driver education course and obtain a license before being allowed to drive, beekeepers would have to complete certain requirements before being authorized to own a hive.

V. THE LEGAL STATUS OF HONEY BEES

This Section of the Note explores the three traditional classifications of visitors on property as applied to honey bees: trespasser, licensee, and invitee. Even though the general application of the three categories has been rejected or merged in some jurisdictions,⁶⁹ the designations remain in wide use and prove useful for clarifying the rights and duties of honey bees and beekeepers. The category of trespasser is the only one that has received any judicial treatment with respect to honey bees. Consequently, it is considered in greater detail to show its inadequacy both conceptually and as a matter of public policy. The other two classifications—licensee and invitee—provide a better framework, but are still inadequate. In the final analysis, honey bees are probably best considered as falling outside the established categories, much like the status of public servants.

A. “Trespasser” Is an Inadequate Classification for Honey Bees

The appeal of the trespasser classification for honey bees appears to be based on the similarity the insects share with livestock and the notion of strict liability associated with escaped animals.

Somewhere around the middle of the fourteenth century, the courts began to recognize a rule making the owner of cattle liable when his animals

⁶⁸ A hive is worth up to \$500, and over 1700 beehives are stolen annually in California. See Ann-Marie Jeffries, *Catch the Buzz—Bee Hive Thefts on the Rise*, BEE CULTURE (Mar. 12, 2016), <http://www.beeculture.com/catch-the-buzz-bee-hive-thefts-on-the-rise> [https://perma.cc/EHS3-4GKS] (exploring the increasing problem of hive theft).

⁶⁹ *Rowland v. Christian*, 443 P.2d 561, 568 (Cal. 1968) (abandoning categories of trespasser, licensee, and invitee for the purpose of determining a property owner’s duty of care to visitors).

trespassed upon the plaintiff's land. The origin of the rule is somewhat obscure. It has been attributed to a fiction that the trespass of the animals was to be attributed to the owner, because he was in some way identified with them, and responsible for what they did. . . . The kinds of animals for whose trespasses their owner would be liable were limited, and they had a definite barnyard pattern.⁷⁰

In addition to the obvious farm animals (e.g., cattle, hogs, sheep, horses, goats), trespassing animals could also include turkeys,⁷¹ chickens,⁷² and even pigeons.⁷³ As the *McPherson* court succinctly put it, “[w]e understand that every domestic animal, by going on any premises, fenced or unfenced, without the consent of the owner, expressed or implied, becomes a trespasser.”⁷⁴

Drawing on this tradition, honey bees have been accused of trespassing with some frequency.⁷⁵ The issue of trespassing bees usually arises in the context of beekeepers seeking recovery for damages sustained to their colonies by the alleged negligent use of pesticides.⁷⁶ Some courts have reasoned that landowners owe only a minimal duty to protect honey bees from harm caused by insecticide use because bees are trespassers.⁷⁷ However, the Minnesota Supreme Court has indicated that classifying bees as trespassers is unnecessary to analyze a landowner's duty, at least in the context of insecticide use.⁷⁸ “[E]ven if we were to classify bees as trespassers,

⁷⁰ VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS; CASES AND MATERIALS 714–15 (Robert C. Clark et. al. eds., 12th ed. 2010).

⁷¹ *McPherson v. James*, 69 Ill. App. 337, 339 (1896) (holding that a flock of turkeys which ate the plaintiff's apples and corn were trespassers).

⁷² *Adams Bros. v. Clark*, 224 S.W. 1046, 1047 (Ky. Ct. App. 1920) (holding that defendant's chickens trespassed when they ate the plaintiff's grain and vegetables and that owners of domestic animals, including fowl, were liable for their animal's trespass onto the land of another).

⁷³ *Taylor v. Granger*, 37 A. 13, 13 (R.I. 1896) (applying the maxim, *sic utere tuo ut alienum non loedas* (use your own as not to injure others), the court found straying pigeons may have trespassed).

⁷⁴ *McPherson*, 69 Ill. App. at 339.

⁷⁵ *Anderson v. State*, 693 N.W.2d 181, 187 (Minn. 2005).

⁷⁶ *Bennett v. Larsen Co.*, 348 N.W.2d 540, 547 (Wis. 1984) (noting that it disagrees with the position adopted by some courts which have held landowners are not responsible for damages suffered by bees *because* bees are regarded as trespassers); *but see Anderson*, 693 N.W.2d at 187 (noting that even if honey bees are classified as trespassers, a landowner is under a duty of reasonable care to protect bees from injury once he is on notice of the trespassing bees' presence and the impending danger posed by pesticides).

⁷⁷ *Lenk v. Spezia*, 213 P.2d 47, 51 (Ca. Ct. App. 1949) (noting that defendant landowners had no duty to protect “plaintiff's trespassing bees” from the danger of pesticides “unless the poison was distributed wantonly, maliciously, or with the deliberate intent to injure or destroy the bees”).

⁷⁸ *Anderson*, 693 N.W. 2d at 186.

a landowner is under a duty of reasonable care ‘once he knows or is on notice of both the trespasser’s presence and the impending danger.’”⁷⁹

In contrast to considering bees as trespassers in light of the injury *suffered by honey bees*, bees have also been characterized as trespassers that *cause damage*.⁸⁰ In an old Pennsylvania case, nursery owners alleged that a neighbor’s bees had damaged the flowers in their hothouses and interfered with their “financial investment in the production of flowers of a particular variety for commercial purposes.”⁸¹ The available court record fails to provide any details about this unusual claim, but perhaps it had to do with the bees pollinating flower hybrids that the nursery owners were selectively breeding. More recently, a similar situation arose in California involving mandarin orange growers who alleged that trespassing honey bees caused damage to property in the act of pollination.⁸² While it might seem counterintuitive, it is possible for honey bees to cause damage by pollinating—the very activity for which honey bees are so valued. A demand letter, dated April 19, 2006, from the legal department of the Paramount Citrus Company issued to beekeepers in Tulare County, California describes this circumstance.⁸³ The letter reads:

As you may know, it is well-established that bees will forage for great distances, often two, three, four and even seven mile [sic] from their hive. As you also may know, Clementine mandarins produce a large amount of

⁷⁹ *Id.* (quoting Dan B. Dobbs, *The Law of Torts* § 231 (2000)) (emphasis in original). The Wisconsin Supreme Court comes to largely the same conclusion regarding the duty of landowner to honey bees when insecticides are used:

However, we do not think that land possessors are liable, at least under the common law, for damage to bees on their property. We conclude that, because land possessors have the right to reasonably use their property as they see fit, and because bees tend to enter property and there is little the land possessor can do to prevent their entry, there should be no common law duty owed to protect the bees on the property, except that the land possessor cannot intentionally or wantonly destroy the bees. However, this is not to say that, as we discuss in this opinion, land possessors may not have a duty toward bees on the property imposed by statutes or administrative regulations, which have the effect of modifying the common law.

Bennett, 348 N.W.2d at 547 n. 3.

⁸⁰ *Allman v. Rexer*, 21 Pa. D. & C. 431, 431 (Com. Pl. 1934).

⁸¹ *Id.*

⁸² Kathleen Phillips, *Honeybee Nice to Your Neighbors: Solutions to the Dispute Between Beekeepers and Citrus Growers in California’s San Joaquin Valley*, 17 SAN JOAQUIN AGRIC. L. REV. 227, 227–30 (2007) (discussing damage caused by honey bees cross-pollinating mandarin oranges with other citrus varieties).

⁸³ Andrew E. Asch, “*The Letter*” from *Paramount Citrus*, BEESOURCE (Apr. 19, 2006) <http://beesource.com/point-of-view/joe-traynor/the-letter-from-paramount-citrus/> [<https://perma.cc/E4UX-A723>].

seeds when bees are present, and, in today's market, seedy Clementines yield only a small fraction of the price of seedless Clementine mandarins. In addition, even a small number of seedy fruit can cause tremendous damage by not only damaging the affected fruit, but also making the remaining fruit suspect since it is impossible to tell which fruit have seeds and which do not. Thus, only a small intrusion by bees can destroy the value of an entire crop.

While we appreciate that bees are sometimes necessary to assist in the pollination of other crops (besides Clementine mandarins, which are self-pollinating), we believe that the bee hives in this instance have been placed dangerously close to Paramount's Property. We also believe that the hives have been, or will be, left in their present unsafe location for far longer than necessary in order to aid in pollination—solely for the purpose of making honey, in part from our Clementine mandarin orchard.

Paramount has invested a substantial sum of money, time and effort in developing the Clementine mandarin industry and takes great pride in bringing the very best quality seedless fruit to its consumers. Paramount will not tolerate any damage caused by bees that *trespass* and interfere with Paramount's use and enjoyment of its land, and threaten to destroy its crop.

Accordingly, Paramount hereby demands that you immediately move your bee hives a minimum of two (2) miles away from Paramount's Property. If you fail to do so . . . we will have no choice but to immediately take legal action against you, including filing suit against you for *negligence*, *trespass*, *nuisance* and other claims. Should such action become necessary, please be advised that Paramount will seek injunctive relief, compensation for any and all damages caused to its crops, as will [sic] as punitive damages.⁸⁴

Paramount Citrus, now known as Wonderful Citrus,⁸⁵ grows and markets the popular "Halo" mandarin oranges.⁸⁶ The demands made by Paramount caused serious concern in the beekeeping community:

⁸⁴ *Id.* (emphasis added).

⁸⁵ Coral Beach, *Paramount Citrus Renamed with Parent Company*, THE PACKER (June 01, 2015, 2:04 PM), <http://www.thepacker.com/news/paramount-citrus-renamed-parent-company> [<https://perma.cc/KAB4-KCTF>].

⁸⁶ Wonderful Citrus markets Halos as being "sweet, seedless, and easy for little hands to peel." HALOS, <http://www.halosfun.com/halos-mandarins.html> [<https://perma.cc/SGZ7-WAJ4>] (last visited Oct. 23, 2017). It should be noted that there are other growers of mandarin oranges in Tulare County, including Sun Pacific, the growers and marketers of the

If beekeepers are held liable for their bees trespassing on another person's property, no bee operation in the U.S. is secure. As one beekeeper put it "we're going to war." Past cases of trespassing bees have been decided in favor of beekeepers but never have beekeepers been pitted against as formidable an opponent as Paramount Citrus and its billionaire owner, Stewart Resnick.⁸⁷

It seems likely that if this issue is ever judicially resolved, beekeepers will have several ready defenses. The most obvious is that it is difficult to prove which honey bees did the pollinating. Expert testimony and genetic testing would likely be necessary because a honey bee simply does not leave much incriminating evidence behind when she visits a flower.

A court will also likely find that Paramount's unusual and extraordinary use of the land prevents it from successfully holding the beekeepers liable for damage caused by the bees. For example, in *Foster v. Preston Mill Co.*,⁸⁸ the plaintiff was a mink rancher who alleged that the defendant's blasting activities caused mother mink to devour their offspring.⁸⁹ The court found that the "exceedingly nervous disposition of mink, rather than the normal risks inherent in blasting operations" was the cause of the damage.⁹⁰

We subscribe to the view . . . that the policy of the law does not impose the rule of strict liability to protect against harms incident to the plaintiff's extraordinary and unusual use of land. This is perhaps but an application of the principle that the extent to which one man in the lawful conduct of his business is liable for injuries to another involves an adjustment of conflicting interests.⁹¹

very popular "Cuties" mandarins. CUTIES, <http://cutiescitrus.com/about/> [<https://perma.cc/3M2P-NT8M>] (last visited Aug. 3, 2017).

⁸⁷ Joe Traynor, *Taking on the Resnicks*, BEESOURCE (Dec. 12, 2006) <http://beesource.com/point-of-view/joe-traynor/taking-on-the-resnicks/> [<https://perma.cc/8YND-CVK5>]. Stewart Resnick is a formidable opponent. He graduated from UCLA School of Law. Along with his wife, Lynda, he privately owns Roll International Corporation, whose divisions include juice company POM Wonderful, bottled water company Fiji Water, pistachio and almond growers Paramount Farming, citrus grower Wonderful Citrus, collectible mass marketer Franklin Mint, and flower delivery service Teleflora. *Id.* Stewart and Lynda Resnick are number 142 on the Forbes 400 list of wealthiest Americans, having a net worth of four billion dollars. #142 Stewart and Lynda Resnick, FORBES (Oct. 8, 2016) <http://www.forbes.com/profile/stewart-and-lynda-resnick/> [<http://perma.cc/77DS-BPBP>].

⁸⁸ 268 P.2d 645 (Wash. 1954).

⁸⁹ *Id.* at 647.

⁹⁰ *Id.* at 648.

⁹¹ *Id.*

The beekeepers at odds with Paramount would be wise to follow this same type of reasoning and assert that it is the unusual pollination-sensitive nature of the type of mandarin oranges that is the real cause of the damage, rather than the activity of the honey bees. The beekeepers could also argue that the extent of their liability in lawfully raising bees should be limited due to conflicting interests. This line of reasoning fits well with that adopted in *Ammons v. Kellogg*,⁹² where the court found that honey bees were a nuisance only if they were placed so that they came into contact with persons traveling nearby roads.⁹³ By analogous reasoning, the concept is that honey bees only create a nuisance if they interfere with a common activity associated with the property, not with idiosyncratic endeavors such as growing hyper-sensitive fruit. Using the mandarin growers' logic might lead to an absolute ban on backyard beekeeping as a type of ultra-hazardous activity. After all, there is probably at least one person in any given area who is hyper-sensitive (i.e., allergic) to bee venom.

Other damage that bees might cause involves propolis collection. Propolis is a plant derived resin that bees collect and spread on the interior surface of hives to fill cracks, reduce openings, smooth over the interior of the hive, and cover intruders (e.g., mice, lizards, beetles) in the hive that are too large to carry out.⁹⁴ Because propolis is purported to have numerous medicinal, antimicrobial, and commercial uses, it often is regarded as a valuable product of a beehive, much like honey or pollen.⁹⁵ If natural sources of propolis cannot be found, bees have been known to collect drying paint, road tar, varnish, and caulking compound.⁹⁶ It is possible that such indiscriminate collecting practices could lead to the damage of newly painted surfaces. For example, one can imagine that bees scraping the surfaces of newly painted machinery drying in the yard of a manufacturing plant could result in significant financial damage.

It should be noted that most damage caused by bees does not arise out of normal, expected, and desired honey bee activity, such as pollination and nectar

⁹² 102 So. 562 (Miss. 1925).

⁹³ *Ammons*, 102 So. at 563; see also *Allman v. Rexer*, 21 Pa. D. & C. 431, 434 (Ct. Com. Pl. 1934) (arguing that “[i]t is perfectly obvious that the keeping of bees, for instance, on a property contiguous to a public playground, or to a schoolhouse, or to a place of amusement, where the visitors, patrons, and employes [sic] would be subject to constant annoyance and inconvenience, would be a nuisance.”).

⁹⁴ M.E.A. McNeil & Justin O. Schmidt, *Other Products of the Hive*, in *THE HIVE AND THE HONEY BEE* 705, 734 (Joe Graham ed., rev. ed., 2015) (describing the composition and use of propolis).

⁹⁵ Rena Goldman & Rachel Nall, *The Benefits and Uses of Propolis*, HEALTHLINE (Sept. 2, 2016), <http://www.healthline.com/health/propolis-an-ancient-healer#Overview1> [<https://perma.cc/3TTA-VZMD>]. (arguing that trust in the health benefits of propolis may be imprudent given the fact that bees will indiscriminately collect any aromatic and sticky substance as a substitute.)

⁹⁶ McNeil & Schmidt, *supra* note 94, at 737.

collecting, but from negligent beekeeping.⁹⁷ For example, swarming bees can cause damage to neighboring property.⁹⁸ In addition to the obvious nuisance concerns associated with tens of thousands of honey bees on the move,⁹⁹ a swarm is looking for a new home, and they often find that home in the walls of nearby houses:

Once the bees have setup housekeeping for more than a few days, the job [of removing them] often becomes more difficult. Sometimes, much comb (beeswax), brood, and honey are stored in the wall of a structure. Simply injecting a pesticide in the wall to kill the bees and leaving is risky. The comb will attract wax moths and mice for nesting sites. The honey will attract ants and other insects and may ooze through the wall or ceiling when comb melts during hot weather causing extensive damage.¹⁰⁰

Fortunately, the swarming activity of bees that leads to such damage can be controlled by good hive management on the part of the beekeeper.¹⁰¹ A reasonably skilled and vigilant beekeeper is able to split congested colonies before they swarm.¹⁰²

As discussed in Section III.B., other types of damage that bees might cause are more properly classified as nuisance concerns, which could be prevented by good beekeeping practice. For example, problems associated with aggressive bees harassing neighbors can be solved by simply moving or replacing the bees with a more gentle strain.¹⁰³ Because fecal spotting, caused by bees taking cleansing flights, is usually isolated to warm days in late winter, it constitutes only a minor

⁹⁷ William Michael Hood, *Honey Bee Colony Removal from Structures*, CLEMSON COOP. EXTENSION, <http://www.clemson.edu/extension/beekeepers/fact-sheets-publications/honey-bee-colony-removal.html> [<https://perma.cc/QCA7-MWHW>] (last visited Aug. 3, 2017).

⁹⁸ *Id.*

⁹⁹ It is easy to understand that a swarm of bees might evoke fear in neighbors and increase the likelihood of stinging. *See* *People v. McOmber*, 133 N.Y.S.2d 407, 409 (N.Y. Sup. Ct. 1954) (stating that honey bees swarming on neighboring properties resulted in stinging).

¹⁰⁰ Hood, *supra* note 97; see Gary, *supra* note 61, at 302 (stating the “[s]warms in urban environments are a great problem because they may establish colonies in the walls of houses and other structures.”).

¹⁰¹ Keith Delaplane, *Management for Honey Production*, in *THE HIVE AND THE HONEY BEE* 487, 502–05 (Joe Graham ed., rev. ed., 2015).

¹⁰² *Id.* Honey bees have a natural tendency to swarm in the spring to relieve congestion in the hive. “[I]t is paramount that beekeepers understand and manage the conditions that lead to the actual swarm event. But there are a few predisposing facts that a beekeeper can control and which constitute opportunities for minimizing swarms. Briefly, these are the presence of hive congestion and the presence of queen cells.” *Id.* at 503. The author goes on to describe the proper methods beekeepers should use to avoid swarming.

¹⁰³ *Allman v. Rexer*, 21 Pa. D. & C. 431, 434 (Ct. Com. Pl. 1934).

inconvenience.¹⁰⁴ Beekeepers can mitigate the nuisance caused by bees collecting water by providing a source near the colonies.¹⁰⁵ In a suburban setting, the impact of large numbers of bees foraging in the local area can be diminished by limiting the number of colonies a beekeeper is allowed to have in a certain area or size of lot.¹⁰⁶

Fortunately for beekeepers, classifying bees as trespassers does not appear to have gained much traction in the courts; indeed, the classification is regarded with great skepticism.¹⁰⁷ As the *Allman* court noted many years ago, honey bees do not properly fit in the category of trespasser.¹⁰⁸ “Plaintiffs seek to classify these [honey bees] as estrays.¹⁰⁹ It takes a wider stretch of the imagination than the court can exercise to place these winged insects in a class with animals of husbandry. There is not only a distinction but a great difference in these classes.”¹¹⁰

The Wisconsin Supreme Court also expresses skepticism about classifying honey bees as trespassers, saying the analogy fails because bees are, by nature, foragers that fly from field to field in search of nectar and pollen.¹¹¹ The Court places great weight on the fact that there is no way for landowners to keep the bees from entering their property.¹¹²

Traditional trespass theory must include the notion that the trespasser can be kept off the property. It is the uninvited entry onto the property which makes the activity a trespass. If there is no way for the land possessor to prevent the entry or to eject the trespasser, that status becomes meaningless insofar as it relates to the rights and duties of the land possessor toward the putative trespasser. We conclude that bees fall into this category and, therefore, should not be considered trespassers as such.¹¹³

¹⁰⁴ *McOmber*, 133 N.Y.S.2d at 411. Increased fecal spotting can also be a symptom of noseema, a parasitic disease that causes dysentery and eventual colony death. It is preventable through good beekeeping practice. See J.S. Pettis et al., *Diseases and Pests of Honey Bees*, in *THE HIVE AND THE HONEY BEE* 833, 841–44 (Joe Graham ed., rev. ed., 2015) (describing the effects and treatment of nosema disease).

¹⁰⁵ Gary, *supra* note 61, at 300–01; see SALT LAKE CITY, UTAH, CODE § 8.10.070 (requiring beekeepers to ensure that there is a convenient source of water available to the colony to minimize nuisance).

¹⁰⁶ See SALT LAKE CITY, UTAH, CODE § 8.10.030 (limiting the number of colonies that may be kept on a residential lot).

¹⁰⁷ *Allman*, 21 Pa. D. & C. at 431–32.

¹⁰⁸ *Id.* at 432.

¹⁰⁹ An “estray” is “a valuable tame animal found wandering and ownerless; an animal that has escaped from its owner and wanders about.” *Estray*, BLACK’S LAW DICTIONARY (10th ed. 2014).

¹¹⁰ *Allman*, 21 Pa. D. & C. at 432.

¹¹¹ *Bennett v. Larsen Co.*, 348 N.W.2d 540, 547 n.3 (Wis. 1984).

¹¹² *Id.*

¹¹³ *Id.* (citations omitted).

The Minnesota Supreme Court also expresses its doubts that honey bees should be classified as trespassers:

As a general rule, trespassing livestock must have committed a “wrongful entry” in the land possessor’s eyes. Honey bees join native bees in pollinating a wide variety of crops, to the benefit of the party who plays host to the bees. Accordingly, it might prove problematic to characterize bees as unwelcome on land where trees and other vegetation are grown for commercial purposes, particularly where agricultural need for bees is at least as great as the need for pesticides.¹¹⁴

When one considers the activity of honey bees, it is easy to see why the courts express such skepticism about classifying them as trespassers. Given the nature of the creature, it is not possible to confine them to a particular area.¹¹⁵ As the *Allman* court points out, honey bees really belong to a unique class of domesticated animals.¹¹⁶ It is in their nature to forage in their range to collect the very products for which they are valued. No other farm animal behaves in a way analogous to the honey bee.¹¹⁷ As *Bennett* makes clear, it is practically impossible for a landowner to prevent honey bees from entering the land. If there is no way to prevent entry, then it logically follows that there can be no wrongful entry.¹¹⁸ The entry of honey bees is a circumstance a landowner simply must accept as a fact of nature. The designation of trespasser thus becomes meaningless.¹¹⁹ The courts also hint at the practical difficulties of identifying the trespassing honey bee.¹²⁰ Since there are likely several beekeepers in a given area, it is practically impossible to identify which hive a given honey bee belongs.¹²¹ In addition to the honey bees that are “kept,” the presence of feral colonies must also be considered. Apart from expensive forensic testing, it is nearly impossible to determine whose honey bee is doing the trespassing.

The trespassing classification proves especially inadequate when viewed in light of municipal ordinances that encourage urban beekeeping. The rationale for these ordinances is generally to promote backyard beekeeping, like the ordinance adopted by Salt Lake City.¹²² Wider practice of beekeeping is seen as a means to bolster declining honey bee populations and ensure that these pollinators—so essential to food production—will be present in our communities.¹²³ It seems

¹¹⁴ *Anderson v. State*, 693 N.W.2d 181, 187 n.2 (Minn. 2005) (citations omitted).

¹¹⁵ *Bennett*, 348 N.W.2d at 547 n. 3.

¹¹⁶ *Allman v. Rexer*, 21 Pa. D. & C. 431, 432 (Ct. Com. Pl. 1934).

¹¹⁷ *Id.*

¹¹⁸ *Bennett*, 348 N.W.2d at 547 n. 3.

¹¹⁹ *Id.*

¹²⁰ *Holden v. Lewis*, 56 Pa. D. & C. 639, 644 (Ct. Com. Pl. 1946).

¹²¹ *Id.*

¹²² Salt Lake City, Utah, Ordinance 71 (Dec. 1, 2009).

¹²³ *Id.*

counterintuitive to classify these “public servant” honey bees as trespassers for doing the very work for which they are so valued and necessary to our society. When honey bees inevitably forage in neighboring property, practical sensibility calls for a more suitable classification than trespasser.

B. “Licensee” Is a Better, But Still Inadequate, Classification for Honey Bees

Perhaps honey bees should be considered licensees. Licensees are regarded as social guests in traditional tort law,¹²⁴ and they typically enter another’s property for their own convenience, benefit, or pleasure and with the implied permission or “license” of the landowner.¹²⁵ This description partially fits the behavior of honey bees. If a property owner has plants and flowers that might attract honey bees, then it seems likely that the landowner has implied that honey bees are welcome to enter the property. Much like a playground set is an open invitation to children to play, a property featuring flowing foliage stands as an enticement to honey bees and other pollinators to forage. As befitting licensees, honey bees enter the property for their own benefit—namely, to collect nectar, pollen, water, or propolis. Of course, the issue of those landowners who do not want honey bees on their property remains problematic with the licensee designation.¹²⁶ Short of extraordinary measures (e.g., covering the property with a net, removing all sources of nectar, water, and propolis), a landowner has no means of keeping honey bees from entering property once the invitation has been implicitly extended.¹²⁷

Therefore, the licensee designation proves inadequate for honey bees, especially in the context of the damage they might cause. The licensee classification is useful, however, in establishing a higher duty of care owed to honey bees and beekeepers. Under licensee analysis, a landowner owes a duty to the beekeeper to “warn him of hidden dangers unknown to the plaintiff of which the [landowner] had

¹²⁴ See *Barmore v. Elmore*, 403 N.E.2d 1355, 1357 (1980) (establishing that a social guest is a licensee).

¹²⁵ See *Olier v. Bailey*, 164 So. 3d 982, 986 (2015) (describing the classification of licensee).

¹²⁶ See *Allman v. Rexer*, 21 Pa. D. & C. 431, 431 (Ct. Com. Pl. 1934) (describing damage pollinating bees did to nursery flowers).

¹²⁷ Other than covering vegetation with nets, it is hard to imagine an effective way to keep honeybees off flowering plants.

knowledge.”¹²⁸ From this perspective, a landowner is consequently obligated to warn the beekeeper¹²⁹ of insecticide use that might pose a danger to honey bees.¹³⁰

C. “Invitee” Is the Best of the Established Categories for Honey Bees

While it has received very little development, invitee is likely the most promising designation for honey bees among the traditional classifications of visitors.¹³¹

[A] person¹³² is an invitee on the land of another if (1) he enters by invitation, express or implied, (2) his entry is connected with the owner’s business or with an activity the owner conducts or permits to be conducted on his land and (3) there is a mutuality of benefit or a benefit to the owner.¹³³

With only minimal intellectual stretching, honey bees can be characterized as fitting this description. They enter the land of another by the implied invitation established by the presence of forageable terrain. While on the land, honey bees engage in an activity connected with the owner’s business (e.g., pollinating flowers the owner grows). And this activity is of mutual benefit to the landowner and to the honey bee.

¹²⁸ *Barmore*, 403 N.E.2d, at 1357–58.

¹²⁹ Professor Michael O’Hara suggests that the beekeeper is the “next best friend” of the bee. Obviously, it is not possible to warn individual bees of the danger posed by insecticides, but it is possible to warn her “next best friend.” Michael J. O’Hara, *Trespasser or Implied Invitee: Apis Mellifera*, UNIV. OMAHA, <http://cba2.unomaha.edu/faculty/mohara/web/ALSB2007-Trespasser-or-Implied-Invitee.pdf> [<https://perma.cc/DA9U-23GZ>] (last visited Oct. 23, 2017).

¹³⁰ Millions of honey bees recently died when foraging in fields on which an insecticide used to combat the spread of Zika mosquitoes had been applied. Dorchester County, South Carolina workers failed to notify beekeepers of the application. Beekeepers can take protective measures, such as moving colonies or screening hive entrances to confine the bees, if given sufficient notice of insecticide use. Alan Blinder, *Aimed at Zika Mosquitoes, Spray Kills Millions of Honeybees*, N.Y. TIMES (Sept. 1, 2016), <http://www.nytimes.com/2016/09/02/us/south-carolina-pesticide-kills-bees.html> [<https://perma.cc/89WH-5UX4>].

¹³¹ Professor O’Hara gave a 2007 presentation to the Academy of Legal Studies in Business on this very topic. Unfortunately, a transcript of his presentation does not exist; he indicated in an email to the author of this Article that he never developed the concept. A cryptic outline of his presentation is available at his website. Michael J. O’Hara, *supra* note 129.

¹³² Honey bees are obviously not persons. However, the beekeeper has legal standing. Professor O’Hara suggested that beekeepers might seek legal remedy in their own name as the “next best friend” of honey bees. O’Hara, *supra* note 129.

¹³³ *Madrazo v. Michaels*, 274 N.E.2d 635, 638 (Ill. App. Ct. 1971).

Landowners get their fruit trees and flowers pollinated while honey bees receive pollen and nectar in return.¹³⁴

The designation of invitee also affords honey bees a higher level of care from the landowner. “The duty owed by the owner of premises towards an invitee is greater than that owed towards a licensee Towards an invitee, the owner of the premises has a duty to exercise reasonable care in keeping the premises reasonably safe for use by the invitee.”¹³⁵ Because honey bees have been invited—albeit by implication—for the benefit of the property owner, that owner is bound by a higher degree of care toward them.

The main deficiency of the invitee designation is that it fails to address situations where landowners expressly do not want honey bees on their property. A landowner may assert that he does not want pollinators on his property even though it is overrun with lush vegetation. By definition, honey bees cannot logically be *invitees* if there is an express desire on the part of the landowner for them to stay out.¹³⁶ The key issue is whether a landowner possesses the authority, power, or ability to exclude certain insects that form an integral part of the ecosystem. The problem of conflicting interests among property owners also emerges. One property owner may wish to exclude honey bees while the neighboring owner may desperately desire their presence. And the same practical problem that plagues the licensee and trespasser designations also affects the invitee classification. Namely, there is no efficient, practical, and safe way to prevent nature’s foragers from entering one’s property; honey bees go where they want to go.¹³⁷

D. Honey Bees Should Enjoy a Privilege to Enter a Premises Without a Landowner’s Consent

Considering the vital public service honey bees perform, perhaps they should be considered as quasi-public servants. Obviously this designation can only be reached by analogy and would probably require legislative intervention, but consider how closely the activity of the honey bee matches that performed by public servants:

Public employees or officials do not fit very well into any of the categories that the law has established for the classification of visitors. They are not trespassers, since they are privileged to enter. This privilege is independent

¹³⁴ See Kristen Traynor, *Honey*, in *THE HIVE AND THE HONEY BEE* 673, 674 (Joe Graham ed., rev. ed., 2015) (“Both the plant and the insect benefit from this interaction [i.e., pollination], a relationship known as mutualism.”); see also Gloria Degrandi-Hoffman, *Crop Pollination*, in *THE HIVE AND THE HONEY BEE* 803, 807 (Joe Graham ed., rev. ed., 2015) (“Some plants such as many cultivars of apples, plums, almonds, and other fruit trees will not set fruit unless the blossoms have been pollinated with pollen from a different cultivar (i.e., cross-pollination).”).

¹³⁵ *Barmore v. Elmore*, 403 N.E.2d 1355, 1357 (Ill. App. Ct. 1980).

¹³⁶ *Allman v. Rexer*, 21 Pa. D. & C. 431, 431 (Ct. Com. Pl. 1934).

¹³⁷ *Bennett v. Larsen Co.*, 348 N.W.2d 540, 547 n.3 (Wis. 1984).

of any permission, consent or license of the occupier; they would be privileged to enter and could insist upon doing so even if the landholder made an active objection.¹³⁸

Insight on the classification issue can be gained by remembering the reason municipalities seek to encourage beekeeping. Such actions are not really for the benefit of honey bees themselves but for the common good of the human community.¹³⁹ Honey bees are not like dogs or cats. They are not charming or valued for the companionship they offer humans. Rather, as this Note points out, honey bees have a number of annoying habits and can cause real harm. But they do more good than bad, and for that reason they are valued and need to be nurtured. In other words, their utilitarian contribution far outweighs their liabilities. While such an assertion may sound exaggerated, honey bees perform a service vital to the survival of humanity, or at least vital to the variety of food we humans have come to enjoy. What is good for the honey bee is good for us. The widespread concern for honey bees that has emerged of late is not motivated by love of the insect but concern for ourselves and our role in nature. Lawmakers should acknowledge the service honey bees perform for local communities by declaring they—or their keepers—possess quasi-public servant status and affording them protection befitting that status.

VI. CONCLUSION

Recognizing the increasing popularity of urban beekeeping and the vital role that bees play in the ecosystem, the Salt Lake City Council has acted to allow keeping bees within city limits. To ensure that bees would not present a significant nuisance, the council implemented a simple set of guidelines to regulate the practice. While the Ordinance is an excellent first step that effectively addresses most of the sources of nuisance associated with honey bees, it would be wise to reassess its provisions now that it has been in place for nearly eight years. Perhaps a survey of complaints about urban beehives could be conducted, the results of which could be used to guide a revision of the Ordinance with the aim of maintaining a harmonious relationship between beekeepers and their neighbors.

Apart from the practical aspects of beekeeping ordinances, the status of honey bees needs to be clarified through legislative action. While ordinances have certainly gone far to encourage urban beekeeping, they have done little to provide protection to honey bees or clarify the liability of beekeepers when honey bees are alleged to have caused damage. Rather than attempting to squeeze honey bees into an established category, lawmakers would best serve their constituents by enacting legislation to protect honey bees from harm and shield beekeepers from liability short of negligent apicultural practice. Therefore, in recognition of the essential role they play in service to our ecosystem, honey bees should enjoy a classification that allows them to enter property without a landowner's consent: a public servant.

¹³⁸ SCHWARTZ, *supra* note 70, at 516.

¹³⁹ Satow, *supra* note 4.