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Animals as More Than “Mere Things,” But Still Property:
A Call for Continuing Evolution of the Animal Welfare
Paradigm

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ANIMALS AS MORE THAN “MERE THINGS,” BUT STILL PROPERTY: A CALL FOR CONTINUING
EVOLUTION OF THE ANIMAL WELFARE PARADIGM

Richard L. Cupp Jr.*

Survival of the animal welfare paradigm (as contrasted with a rights-based paradigm creating legal standing for at least some animals) depends on keeping pace with appropriate societal evolution favoring stronger protections for animals. Although evolution of animal welfare protection will take many forms, this Article specifically addresses models for evolving conceptualizations of animals’ property status within the context of animal welfare. For example, in 2015 France amended its Civil Code to change its description of companion animals and some other animals from movable property to “living beings gifted with sensitivity,” while maintaining their status as property. This Article will evaluate various possible approaches courts and legislatures might adopt to highlight the distinctiveness of animals’ property status as compared to inanimate property. Although risks are inherent, finding thoughtful ways to improve or elaborate on some of our courts’ and legislatures’ animals-as-property characterizations may encourage more appropriate protections where needed under the welfare paradigm, and may help blunt arguments that animals are “mere things” under the welfare paradigm. Animals capable of pain or distress are significantly different than ordinary personal property, and more vigorously emphasizing their distinctiveness as a subset of personal property would further both animal welfare and human interests.

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INTRODUCTION

In recent years the question of whether courts should treat at least some nonhuman animals as legal persons has been a subject of intense debate in the courts and in the public square.¹ Treating

* John W. Wade Professor of Law, Pepperdine University School of Law. Many of the themes in this article were presented as the University of Cincinnati Victor Schwartz Chair in Torts Lecture on Oct. 21, 2015. I thank the University of Cincinnati for inviting me to present this lecture and article, and thank the Pepperdine University School of Law its support. I also thank Robert Anderson, David Favre, James Gesualdi, Phil Goldberg, Michael Helfand, Mark Scarberry, and Victor Schwartz for their helpful comments and suggestions related to the ideas presented in this Article, and Jodi Kruger, Natalie Lagunas, and Samantha Parrish for their outstanding research assistance. The input and assistance these individuals have graciously provided me do not necessarily reflect agreement with any or all of this Article’s theses.

¹ Attorney and scholar Steven Wise brought considerable attention to this issue in his 2000 book, *RATTLING THE CAGE*, and in other publications. STEVEN WISE, *RATTLING THE CAGE* (2000). In late 2013 the Nonhuman Rights Project, a group headed by Mr. Wise, filed several similar lawsuits in New York state courts seeking to have a total of four chimpanzees declared to be legal persons for purposes of seeking a writ of habeas corpus to challenge their captivity. *See* People ex. rel. Nonhuman Rights Project, Inc. v. Lavery, 124 A.D. 3d 148 (3rd Dept. 2015); Matter of the Nonhuman Rights Project, Inc. v. Presti, 124 A.D. 3d 1334 (4th Dept. 2015); The Nonhuman Rights Project v. Stanley, Supreme Court of the State of New York, New York County, Decision and Order, Index. No. 152736/15, July, 29, 2015, available at <http://www.nonhumanrightsproject.org/wp-content/uploads/2015/07/Judge-Jaffes-Decision-7-30-15.pdf>. In December, 2015 the organization filed a fourth lawsuit involving the same parties named in the *Lavery* case in New York County, a different county from where the first *Lavery* lawsuit was filed in New York. *See* Nonhuman Rights Project Inc. v. Lavery, Supreme Court of the State of New York, New York County, Declined to Sign: Order to Show Cause & Writ of Habeas Corpus, Index No. 162358/2015, Dec. 23, 2015, available at

animals as legal persons would represent a radical and highly controversial change to our legal system.² However, courts and legislatures presently consider owned animals to be a form of personal property, and this paradigm has faced increasing criticisms that it makes animals “mere” property and undervalues them.³

This Article seeks a workable middle ground within the personal property paradigm between conceptualizing animals as “mere” property and declaring them to be legal persons. The Article addresses conceptualizations of animals’ property status, and explores whether evolution in how courts and legislatures describe and conceptualize animals as property might bring society to a better place in appropriately balancing human interests and animals’ welfare. Specifically, the Article seeks to encourage more thoughtful efforts to highlight animals’ status as a quite distinctive subset of personal property.

https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=2FAAP/keZ_PLUS_ptiKc1FQrdhQ==&system=prod (website last checked January 6th, 2016). The lower court dismissed the lawsuit, and the Nonhuman Rights Project has indicated it will file an appeal. See Nonhuman Rights Project, *New York Trial Court Denies Tommy’s Second Bid for Freedom*, Jan. 7th, 2016, available at <http://www.nonhumanrightsproject.org/2016/01/07/new-york-court-denies-tommys-bid-for-freedom/>. Shortly after the dismissal of the second *Lavery* case, in January 2016 the Nonhuman Rights Project filed a fifth lawsuit involving the same parties named in the *Presti* case in New York County, a different county in New York from where the first *Presti* lawsuit was filed. See Nonhuman Rights Project, *NhRP Re-Files Habeas Corpus Case on Behalf of Kiko in New York*, available at <http://www.nonhumanrightsproject.org/2016/01/12/nhrp-re-files-habeas-corpus-case-on-behalf-of-kiko-in-new-york/>.

The cases have generated considerable national and international media attention. See, e.g., James Gorman, *Rights Group is Seeking Status of ‘Legal Person’ For Captive Chimpanzee*, NEW YORK TIMES Dec. 2, 2013; Charles Siebert, *Should a Chimp Be Able to Sue Its Owner?*, N.Y. TIMES MAG., Apr. 23, 2014; Chris Hegedus & D.A. Pennebaker, *Animals are Persons, Too*, N.Y. TIMES (Apr. 23, 2014), <http://www.nytimes.com/2014/04/23/opinion/animals-are-persons-too.html>; Krishnadev Calamur, *Research Chimps Get Their Day In Court In New York*, NPR (May 27, 2015, 3:11 PM); Erin Fuchs, *New York Lawsuit Says That Chimps Are People Too*, BUS. INSIDER (Dec. 2, 2013, 5:03 PM); Kevin Conlon, *Chimpanzee personhood effort fails first legal tests in New York*, CNN (Dec. 10, 2013, 8:04 AM); David Grimm, *Lawsuits Could Turn Chimpanzees Sperson*, BBC (Oct. 9 2014); Associated Press, *Chimps Denied Legal Personhood will be Retired from Research*, NEW YORK TIMES, July 31st, 2015, available at http://www.nytimes.com/aponline/2015/07/31/us/ap-us-chimps-legal-rights.html?_r=0. In January 2016 a documentary about the lawsuits entitled *Unlocking the Cage* had its debut at the Sundance Film Festival and is scheduled to be broadcast in 2016 on HBO and on BBC. See Lauren Choplin, *Nonhuman Rights at Sundance*, Nonhuman Rights Project Website, Dec. 8th, 2015, available at <http://www.nonhumanrightsproject.org/2015/12/08/nonhuman-rights-at-sundance/>.

The first four lawsuits (all of the lawsuits except for the second *Presti* lawsuit) were rejected in the opinions cited above. In September 2015 the State of New York Court of Appeals denied a motion to appeal the intermediate appellate court decisions in *Lavery* and *Presti*. In the Matter of the People ex rel. The Nonhuman Rights Project, Inc. v. *Lavery*, State of New York Court of Appeals, Mo. No. 2015-293, Sept. 1, 2015. As of the publication of this article, the *Stanley* case is still working its way through New York’s appellate courts, the Nonhuman Rights Project has indicated that it will appeal the trial court’s dismissal of the second *Lavery* case, and the second *Presti* case has not yet been ruled upon by the trial court. The Nonhuman Rights Project has indicated that it plans to file additional lawsuits involving other intelligent animals, at least tentatively planning to focus on elephants as its next plaintiffs. Michael Mountain, *Q and A with Steven M. Wise*, April 24th, 2014, available at <http://www.nonhumanrightsproject.org/2014/04/24/q-a-with-steven-m-wise/>.

² See *infra* notes 94-120 and accompanying text. For purposes of brevity, this Article will often refer to nonhuman animals as “animals.”

³ See *infra* notes 7-25 and accompanying text.

At present, property is sometimes described as having three major categories: real property, personal property, and intellectual property.⁴ Animals fall under personal property.⁵ This Article rejects the idea of designating animals as a fourth category of property, but calls for courts and legislatures to become more conscious of the importance of expressly emphasizing that personal property has two subsets with significant distinctions: general personal property; and animal personal property.

Part I of this Article sets forth challenges to treating animals as a form of personal property in a rapidly evolving society. Society is becoming increasingly sensitive to the differences between animals and other forms of property. The Part argues that the animal welfare paradigm, which accepts animals' property status but calls for laws requiring humans to treat animals with appropriate care, must evolve or it will slowly die. Part II introduces the concept of framing, and asserts that how a concept is described influences both perceptions of the concept and the concept's potential substantive evolution. The Part calls on legislatures and courts to be more thoughtful in framing animals' property status to more expressly emphasize distinctions between animals and other forms of property based on animals' susceptibility to pain or distress.⁶ Part III considers whether highlighting animal property as a distinctive subset of personal property creates legal rights for animals. It asserts that whether animals have rights depends on one's definition of rights, and that conceptualizing animal protection as a human responsibility under an animal welfare approach is preferable to conceptualizing protections as rights. Part IV explores potential framing vocabulary for animals as a distinctive subset of personal property. It focuses primarily on addressing pros and cons of vocabulary and concepts regarding animals utilized by other nations or suggested by other writers. Part V provides some illustrations of how legislatures and courts might more effectively highlight animals' distinctiveness as a specially protected form of property. Part VI concludes that doing more to emphasize animals' special status as property that is capable of pain or distress may help us to attain better treatment for animals while preserving an evolving animal welfare paradigm.

I. THE PROPERTY PROBLEM

A. Animals are Property, but they are Not “Mere Things”

The property paradigm for animals is as old as humans' use of animals.⁷ Animals have always served important needs for humans: such as for food, for clothing, for sources of transportation or

⁴ See, e.g., Shubba Ghosh, *Exclusivity—The Roadblock to Democracy?*, 50 ST. LOUIS U. L.J. 799, 800 (2006) (discussing “property rights, whether of the real, personal, or intellectual species”).

⁵ See, e.g., Neb. Rev. Stat. § 13-405 (2012) (“No political subdivision may by rule, regulation, ordinance, resolution, or proclamation define or assign a legal status to an animal or animals that is in any manner inconsistent with the status of animals as personal property”).

⁶ This article frequently uses the term “pain or distress” in recognition of the concern that many animals can suffer physically from pain but can also suffer a form of emotional distress that may not entail physical pain. For example, an animal that is restricted from its normal range of motion by a restrictive crate or pen may experience distress regardless of whether it experiences physical pain. See *infra* note 179 and accompanying text.

⁷ See *infra* notes 8–11 and accompanying text. This Article focuses on animals that are owned. Animals in the wild are not a form of property. See David Favre, *Living Property: A New Status for Animals Within the Legal System*, 93 MARQ. L. REV. 1021, 1042-43 (2009-10).

power, for medical research, and for other uses in products.⁸ Thus, all of the ancient legal systems classified animals as a form of property, and often were quite detailed and specific regarding remedies for damage to or destruction of an animal as property. For example, the Hebrew Scriptures detail appropriate compensation for owners of donkeys and oxen who fall into an uncovered pit created or uncovered by another person, the appropriate remedies in differing contexts when a person's bull kills another person's bull, and compensatory and punitive damages appropriate when an animal is stolen.⁹ Indeed, for many ancients, animals may have been the most valuable property they owned.¹⁰ Professor Richard Epstein has proffered "the simple but powerful proposition that the survival and advancement of human civilization depended on the domestication and use of animals."¹¹

Individual ownership of animals is still a widespread and central aspect of economic well-being in many parts of the world.¹² Several charities based in first world nations seek donations to purchase individual farm animals or sets of farm animals for impoverished people in third-world nations.¹³ This approach illustrates that owning animals for their economic utility is important to many impoverished people in the third world living at a subsistence level. The website of one of these charities features a picture of a smiling child holding a goat, with the text "[a]nimals like goats and chickens provide vital nutrition to feed children and families while bringing extra income."¹⁴ The website also features a video that notes that the animals purchased through donations "help keep children fed, in school, and in good health."¹⁵ Another farm animal donation organization that works in Haiti explains that in assessing needs after the devastating 2010 earthquake in that country, it found that "almost every rural household in Haiti rears at least one form of livestock."¹⁶ The implications of abandoning the property status of animals would be

⁸ See generally *Human Characteristics: Tools & Foods*, SMITHSONIAN, <http://humanorigins.si.edu/human-characteristics/tools-food> (last visited Nov. 11, 2015).

⁹ THE BIBLE, Leviticus 21: 33-36, 22:3-4 (New International Version) ("If anyone uncovers a pit or digs one and fails to cover it and an ox or a donkey falls into it, the one who opened the pit must pay the owner for the loss and take the dead animal in exchange. If anyone's bull injures someone else's bull and it dies, the two parties are to sell the live one and divide both the money and the dead animal equally. However, if it was known that the bull had the habit of goring, yet the owner did not keep it penned up, the owner must pay, animal for animal, and take the dead animal in exchange . . . Anyone who steals must certainly make restitution, but if they have nothing, they must be sold to pay for their theft. If the stolen animal is found alive in their possession—whether ox or donkey or sheep—they must pay back double.").

¹⁰ The Hebrew Scriptures' story of Job provide an illustration of animals serving as a key form of wealth in the ancient world. The beginning of the story states that Job was "the greatest man among all the people of the East," (THE BIBLE, Job 1: 3 (New International Version)), and describes his wealth as owning "seven thousand sheep, three thousand camels, five hundred yoke of oxen and five hundred donkeys." *Id.*, v. 4. After going through many trials, by the end of the story Job is described as having become even wealthier. "He had fourteen thousand sheep, six thousand camels, a thousand yoke of oxen and a thousand donkeys." *Id.*, 42:12.

¹¹ Richard A. Epstein, *Animals as Objects, or Subjects, of Rights* 143, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum, eds., 2004).

¹² See *infra* notes 13-20 and accompanying text.

¹³ See, e.g., *Together We Have Power Over Hunger & Poverty*, HEIFER INT'L, <http://www.heifer.org/> (last visited Nov. 11, 2015).

¹⁴ *Animals*, WORLD VISION, <http://donate.worldvision.org/ways-to-give/by-category/animals> (last visited Nov. 11, 2015).

¹⁵ *Id.*

¹⁶ *Reach*, HEIFER INT'L, <http://www.heifer.org/ending-hunger/our-work/programs/reach/index.html> (last visited Nov. 11, 2015).

staggering, not only for fighting diseases and sustaining the economies of first world nations, but also, absent dramatic changes that do not seem likely in the foreseeable future, for the very survival of many people living at subsistence levels in the third world.

But there is an inherent challenge in the animals-as-property legal paradigm. Simply calling animals “property” undervalues our evolving sense of their appropriate status. When writers address the legal status of animals, they sometimes insert the adjective “mere” before the word property.¹⁷ In most contexts, our legal system treats property as having no status as a being.¹⁸ Rather, our legal system generally treats property as things.¹⁹

For example, a table is personal property, but it has no interests and no protections as a being. If we own a table as property, we can hit it if we wish to, we can leave it uncared for, or we can destroy it in any manner we wish if we desire to do so. Like most other personal property, a table is truly a mere thing, and our ownership of it allows us to do whatever we wish to it with no thought of interference from the legal system. Thinking of an animal that is capable of pain or distress as being legally equivalent to an inanimate thing offends our sensibilities, and it should.

Lawsuits seeking noneconomic damages over the tortious killing of a companion animal provide a concrete example of the tension between the appropriate status of animals as property and the special attributes of animals that make them so much more than mere things.²⁰ These lawsuits have become much more common in recent years, with a number of cases resulting in published appellate decisions addressing whether emotion-based damages are available for the tortious death of a companion animal.²¹

Many of us tend to think of our companion animals as members of our families, and treating companion animals as property akin to a table or a chair would be odious to caring owners. Yet, because companion animals have the legal designation of personal property, the traditional measure of damages when companion animals are tortuously killed is the same as other personal property: their market value.²²

Since typical loving companion animal owners care for them far beyond the value that the market would assign as property,²³ activists began focusing on seeking emotion-based damages in

¹⁷ See, e.g., Elaine T. Byszewski, *Valuing Companion Animals in Wrongful Death Cases: A Survey of Current Court and Legislative Action and a Suggestion for Valuing Pecuniary Loss of Companionship*, 9 ANIMAL L. 215, 230 (2003) (criticizing veterinarians who seek to value companion animals as “mere property”)

¹⁸ See generally Barbara Newell, *Animal Custody Disputes: A Growing Crack in the “Legal Thinghood” of Nonhuman Animals*, 6 ANIMAL L. 179 (2000).

¹⁹ This has been described as the “legal thinghood” of nonhuman animals. See, e.g., Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. ENVTL. AFF. L. REV. 471 (1996); Newell, *supra* note 18.

²⁰ Compare *McMahon v. Craig*, 97 Cal. Rptr. 3d 555 (Cal. App. 2004) (The plaintiff’s show dog was killed because of veterinary negligent malpractice, but the California Court of Appeals awarded only market value of the dog with no further punitive damages or damages for emotional distress.), with *Kimes v. Grosser*, 126 Cal. Rptr. 3d 581, 582 (Cal. App. 2011) (stating “[w]e hold that the owner can recover the costs of care of the pet attributable to the injury if the costs are found to be reasonable and necessary, and punitive damages if the injury is found to be intentional.”).

²¹ See *Kimes*, 126 Cal. Rptr. 3d at 582–86.

²² See, e.g., *Strickland v. Medlen*, 397 S.W.3d 184 (Tex. 2013) (rejecting sentimental value or intrinsic value for the tortious killing of a companion animal, and instead limiting damages to market value).

²³ For example, imagine a much-loved family dog that is a mixed breed and relatively old. Despite its enormous worth to the humans who own it, there is likely no market value for this companion animal. Even the market value of a much-loved family dog that is young and a purebred generally would often not compare with its value to its owners.

such cases, asking courts to treat the deaths of companion animals more like they treat the deaths of some close human relatives.²⁴ This issue is addressed in more detail in Part V; for purposes of this Part, cases seeking noneconomic damages cases for harm to companion animals provide illustrations of how using ordinary personal property language regarding animals can represent a significant disconnect with how owners actually feel about some animals, such as beloved companion animals.²⁵ Even agricultural animals, with whom humans do not typically have emotion-based relationships, are enormously different from ordinary personal property because, unlike ordinary personal property, they are generally capable of pain or distress.

B. The Challenge to the Animal Welfare Paradigm: Evolve or Die

This Article asserts that personal property status for animals should be maintained under an animal welfare paradigm, but that using personal property language requires significant elaboration to highlight the importance of providing legal protections for animals as beings capable of pain or distress. Courts and legislatures should avoid rights language when addressing legal protections for animals, and should instead focus on requiring *human* responsibility for avoiding cruelty to animals and for providing appropriate care for them. Although whether animals presently have “rights” is dependent upon how one defines the word,²⁶ rights are best understood as a human concept appropriate for human beings and their proxies.²⁷ As bearers of rights, humans are responsible for their treatment of animals.²⁸

This summary of an animal welfare perspective is probably consistent with the views of most Americans,²⁹ but it is a perspective that is under serious challenge.³⁰ Polls reveal an increasing attraction to the concept of animal rights among the general public in the United States.³¹ A Gallup poll taken in 2015 revealed that 32 percent, almost one in three Americans, believe that “animals deserve the exact same rights as humans to be free from harm and exploitation.”³² In 2008, only 25 percent of Americans believed this.³³ Thus, the percentage believing not only in animal rights, but in animal rights equivalent to the rights of humans, gained seven percentage points in just seven years. This belief increased in percentage among all demographic groups in the survey.³⁴

²⁴ See Henry Mark Holzer, *Harming Companion Animals: Liability and Damages*, ANIMAL L. COALITION (Aug. 30, 2008), <http://animallawcoalition.com/harming-companion-animals-liability-and-damages/>.

²⁵ Noneconomic damages are not nearly as problematic, and perhaps should be permitted, in cases involving harm that is inflicted intentionally rather than negligently. See *infra* notes 204-08 and accompanying text.

²⁶ See *infra* notes 94-120 and accompanying text.

²⁷ See *infra* notes 94-120 and accompanying text. Regardless of the merits of corporate personhood, and regardless of whether courts have extended corporate personhood too far, corporations are proxies for humans. See *Nonhuman Rights Project v. Lavery*, 124 A.D. 3d 149, 152 (2014).

²⁸ See *infra* notes 119-120 and accompanying text.

²⁹ See *infra* notes 32-37 and accompanying text.

³⁰ For example, according to a Gallup poll the percentage of Americans who believe that animals should have the same rights as humans rose seven percent between 2008 and 2015. See Rebecca Rifkin, *In U.S., More Say Animals Should Have Same Rights as People*, GALLUP (May 18, 2015), <http://www.gallup.com/poll/183275/say-animals-rights-people.aspx>.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

One might suspect that many Americans associate the concept of “rights” for animals with caring about animals’ welfare, without fully considering the implications of granting animals rights that are equivalent to the rights of humans to be free from harm and exploitation. This suspicion may be supported by another Gallup Poll in 2012 which indicated that only five percent of Americans identify themselves as vegetarians.³⁵ If these polls are correct, about five out of six of the 32 percent of Americans who think animals should have the same right to freedom from harm and exploitation as humans actually eat the animals they supposedly place on the same level as humans.

But even if the rising poll numbers of Americans supporting equal rights between animals and humans regarding harm and exploitation suggest some fuzzy thinking, they reflect more generally a rising tide of concern among Americans that we need to treat animals better than we have in the past.³⁶ A wealth of evidence demonstrates that Americans’ views about animals are changing, and that the change is taking place relatively quickly.³⁷

Many illustrations could be provided to demonstrate how Americans’ views about animals are changing. For example, legal organizations dedicated to protecting animals and law school courses focusing on legal protections for animals have quickly proliferated.³⁸ 20 years ago, only one or two law schools in the United States offered a course on Animal Law.³⁹ Now at least 119 law schools are offering or have offered Animal Law courses.⁴⁰ A now-influential organization called the Animal Legal Defense Fund was a small group 20 years ago.⁴¹ Presently the organization reports that it is supported by thousands of attorneys and more than 100,000 members and supporters.⁴²

The rapid rise of felony animal cruelty law provides another illustration of how society’s views about animals is quickly changing.⁴³ 20 years ago only a few states made severe animal cruelty a

³⁵ See Frank Newport, In U.S., 5% Consider Themselves Vegetarians, GALLUP (July 26, 2012), <http://www.gallup.com/poll/156215/consider-themselves-vegetarians.aspx>.

³⁶ See *infra* notes 37-50 and accompanying text.

³⁷ See, e.g., Jeremy Rifkin, *A Change of Heart About Animals*, LA TIMES (Sept. 1, 2003), <http://articles.latimes.com/2003/sep/01/opinion/oe-rifkin1>; see also *infra* notes 38-50 and accompanying text.

³⁸ See generally Richard L. Cupp Jr., *Children, Chimps, and Rights Arguments from “Marginal” Cases*, 45 AZ. ST. L. J. 1, 3 (2013); Richard L. Cupp, Jr., *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 SAN DIEGO L. REV. 27, 28-31 (2009) [hereafter *Beyond Animal Rights*].

³⁹ See Fran Ortiz, *Animal Law in the Classroom*, 74 TEX. B.J. 902, 902 (2011).

⁴⁰ *Law Schools*, NATIONAL ASSOCIATION OF BIOMEDICAL RESEARCH, <http://www.nabranimallaw.org/law-schools/> (last visited Nov. 11, 2015).

⁴¹ See *The Early History of Animal Law*, ANIMAL LEGAL DEF. FUND (2009), <http://aldf.org/resources/law-professional-law-student-resources/law-professionals/the-early-history-of-animal-law/>.

⁴² *About Us*, ANIMAL LEGAL DEF. FUND, <http://aldf.org/about-us/> (last visited Nov. 11, 2015).

⁴³ The author also provides this illustration of rapid change in animal cruelty laws in Richard L. Cupp Jr., *Cognitively Impaired Humans, Intelligent Animals, and Legal Personhood* (forthcoming) [hereafter *Cognitively Impaired Humans*]; Richard L. Cupp Jr., *Focusing on Human Responsibility Rather than Legal Personhood for Nonhuman Animals*, 33 PACE ENVTL. L. REV. __, __ (2016) (forthcoming) [hereafter *Personhood for Nonhuman Animals*]; and Richard L. Cupp Jr., *Human Responsibility, Not Legal Personhood, for Nonhuman Animals*, 16 ENGAGE 34, 38 (2015) [hereafter *Human Responsibility*].

felony.⁴⁴ In most states the only charge available was a misdemeanor.⁴⁵ However, rising concern about protecting animals caused a quick succession of changes in states elevating severe cruelty to felony status.⁴⁶ In 2014 South Dakota became the last of all 50 states to make animal cruelty a potential felony.⁴⁷ In terms of legal change, that reflects an abrupt turnabout in our societal mindset regarding the seriousness of animal cruelty.

Such illustrations reflect that society is in a period of accelerated evolution regarding how we view the status of animals.⁴⁸ Whether that evolution leads society to a legal rights paradigm for animals or to a more robust animal welfare paradigm is an open question that is quite actively in play. The author's anecdotal sense is that most of the legal scholarship being published on the subject pushes toward some form of a legal rights paradigm, and that the current trend among most philosophers writing on the subject is to favor assigning some form of moral rights to animals.

This is perhaps not surprising, in that scholars committed to significantly changing a paradigm are the most likely to write on the subject. However, the breadth of societal sentiment that we need to continue changing in our approach to animals should not be understated. Put simply, if the animal welfare paradigm does not evolve to match societal evolution regarding appropriate care for animals, the animal welfare paradigm is in danger of a slow, step-by-step death.⁴⁹ If the public does not see that protections of animals are evolving fairly quickly for the better under our animal welfare paradigm, the trend reflected in recent polling toward embracing an animal rights paradigm may continue.⁵⁰ If people do not feel that the welfare approach is working, they are more likely to become attracted to the concept of a legal rights approach.

C. At Least Two of Several Possible Factors Influencing our Changing Attitudes Regarding Animals

1. Shifting from an Agrarian Society to an Urban/Suburban Society

Society's attitudes about animals are evolving for at least two reasons: first, we have shifted from an agrarian society to an urban/suburban society.⁵¹ The United States had nearly seven

⁴⁴ See *South Dakota Lawmakers Enact Stronger Animal Cruelty Penalties*, HUMANE SOC'Y (Mar. 14, 2014), http://www.humanesociety.org/news/news_briefs/2014/03/south-dakota-lawmakers-enact-stronger-animal-cruelty-penalties-031414.html.

⁴⁵ See Kim Campbell Thornton, *5 Worst States to be an Animal: Abuse Laws Lax*, NBC NEWS (Feb. 3, 2010), http://www.nbcnews.com/id/35202253/ns/health-pet_health/t/worst-states-be-animal-abuse-laws-lax/#.VkPCUcqT1Us.

⁴⁶ See Bernard E. Rollin, *Animal Rights as a Main Stream Phenomenon*, MDPI (Jan. 19, 2011), <http://www.mdpi.com/2076-2615/1/1/102/htm>.

⁴⁷ See Chris Berry, *All 50 States Now Have Felony Animal Cruelty Provisions!*, ANIMAL LEGAL DEF. FUND (Mar. 14, 2014), <http://aldf.org/blog/50-states-now-have-felony-animal-cruelty-provisions/>.

⁴⁸ See *supra* notes 36–47 and accompanying text.

⁴⁹ Changes to deeply-held societal views may take place “funeral by funeral” over generations. See STEVEN M. WISE, *supra* note 1, at 72 (quoting economist Paul Samuelson).

⁵⁰ See *supra* notes 29–34 and accompanying text.

⁵¹ The author has similarly addressed urbanization and increasing scientific understanding of animals as at least partial reasons for society's changing views in Richard L. Cupp Jr., *Cognitively Impaired Humans*, *supra* note 43; Richard L. Cupp Jr., *Personhood for Nonhuman Animals*, *supra* note 43; and Richard L. Cupp Jr., *Human*

million farms in 1935.⁵² By 2012, the number of farms had declined to about 2.1 million.⁵³ In 1900, farms employed 41 percent of the United States' workforce.⁵⁴ By 2012 only about one million Americans considered farming their principle occupation,⁵⁵ out of a total population of about 313 million.⁵⁶

These dramatic changes reflect that we are no longer an agrarian society where most citizens regularly come into contact with animals owned for economic utility.⁵⁷ In earlier times a large percentage of Americans directly participated in raising animals for food or for economic use.⁵⁸ The 1952 book *Charlotte's Web* provides a familiar illustration of a child raising a beloved pig on the family farm, and learning later that the pig had been designated for slaughter.⁵⁹ Most Americans are now shielded from the harsh reality of animals we frequently interact with being used for food or for some other kind of economic utility.

In our present urban and suburban society, most Americans who regularly interact with animals do so solely for emotional utility, rather than for food or for economic utility.⁶⁰ And there is strong evidence that our emotional attachments to the animals we know are getting stronger.⁶¹ In the United States, there are now four companion animals for every one human child.⁶² In 2001 Americans spent a large sum -- \$28.5 billion -- on their companion animals.⁶³ But by 2014 the amount spent on companion animals had more than doubled to about \$58 billion.⁶⁴

Although Americans' love for companion animals seems stronger than ever, we should not overstate the insensitivity of earlier generations toward animals. For example, in 1942, well before our spending on companion animals mushroomed, *Bambi*, a sentimental movie about a fawn whose mother was killed by a hunter, was released with great success.⁶⁵ The movie was nominated

Responsibility, *supra* note 43, at 35. For a discussion of reasons for changing attitudes addressing a broader range of possible factors, see Bernard E. Rollin, *supra* note 46.

⁵² *American Farms*, Chapter 3 in *Agriculture Fact Book*, U.S. DEP'T AGRIC. (2001-02), <http://www.usda.gov/documents/usda-factbook-2001-2002.pdf>.

⁵³ *U.S. Farms and Farmers*, CENSUS OF AGRICULTURE (2012), http://www.agcensus.usda.gov/Publications/2012/Preliminary_Report/Highlights.pdf.

⁵⁴ *The 20th Century Transformation of U.S. Agriculture and Farm Policy*, U.S. DEP'T AGRIC. (2012), http://www.ers.usda.gov/media/259572/eib3_1_.pdf.

⁵⁵ *U.S. Farms and Farmers*, *supra* note 53.

⁵⁶ *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <http://www.census.gov/popclock/> (last visited Nov. 11, 2015).

⁵⁷ See *supra* notes 51-56 and accompanying text.

⁵⁸ See *supra* note 54 and accompanying text.

⁵⁹ E.B. WHITE, *CHARLOTTE'S WEB* (Harper & Bros., 1952).

⁶⁰ See, e.g., *U.S. Pet Ownership Statistics*, AVMA, <https://www.avma.org/KB/Resources/Statistics/Pages/Market-research-statistics-US-pet-ownership.aspx> (last visited Nov. 11, 2015) (According to a 2012 study, in the United States 36.5% of households own a dog and 30.4% of households own a cat.).

⁶¹ See *infra* notes 62-73 and accompanying text.

⁶² JONATHAN V. LAST, *WHAT TO EXPECT WHEN NO ONE'S EXPECTING: AMERICA'S COMING DEMOGRAPHIC DISASTER 2* (2013) (quoted by *Strickland v. Medlen*, 397 S.W.3d 184 (Tex. Sup. Ct. 2013)).

⁶³ *Pet Industry Market Size and Ownership Statistics*, AM. PET PRODUCTS ASS'N, http://www.americanpetproducts.org/press_industrytrends.asp (last visited Oct. 11, 2015).

⁶⁴ *Id.*

⁶⁵ *BAMBI* (Disney 1942).

for three academy awards.⁶⁶ *Lassie Come Home*, another popular sentimental movie, focused on the love between a boy and his dog, and was released in 1943.⁶⁷

We can go much further back in history for evidence that strong emotional bonds with animals are not limited to recent generations.⁶⁸ Researchers indicate that ancient humans sometimes buried what appear to be companion animals in a manner that suggests deep affection for them.⁶⁹ The Hebrew Scriptures include a powerful story told to King David by the prophet Nathan reflecting deep emotional connections between humans and animals:

The LORD sent Nathan to David. When he came to him, he said, "There were two men in a certain town, one rich and the other poor. The rich man had a very large number of sheep and cattle, but the poor man had nothing except one little ewe lamb he had bought. He raised it, and it grew up with him and his children. It shared his food, drank from his cup and even slept in his arms. It was like a daughter to him. Now a traveler came to the rich man, but the rich man refrained from taking one of his own sheep or cattle to prepare a meal for the traveler who had come to him. Instead, he took the ewe lamb that belonged to the poor man and prepared it for the one who had come to him. David burned with anger against the man and said to Nathan, "As surely as the LORD lives, the man who did this must die! He must pay for that lamb four times over, because he did such a thing and had no pity."⁷⁰

Although humans in the twentieth and twenty-first century are not the first to love companion animals, in developed nations we are among the first generations where most members of society regularly interact with owned animals almost exclusively as beloved companion animals. It seems inevitable that this change in our day-to-day relationships with animals is powerfully influencing our perceptions of how animals should be treated.

2. *Scientific Discoveries Regarding Many Animals' Complexity and Cognitive Abilities*

Researchers are constantly learning more about how some animals' minds work, complex ways some animals interact with each other, the nature of human/animal relationships, and about

⁶⁶ *The 15th Academy Awards: 1943*, available at <http://www.oscars.org/oscars/ceremonies/1943>.

⁶⁷ *LASSIE COME HOME* (Metro-Goldwyn-Mayer Technicolor 1943).

⁶⁸ See *infra* notes 69–70 and accompanying text.

⁶⁹ E.g., Tia Ghose, *Ancient Native Americans May Have Had Pet Bobcat*, *LIVESCIENCE* (July 8, 2015), <http://www.livescience.com/51479-bobcat-buried-like-humans.html> (Archeologists discovered a 2,000 year old burial mound with what they believe to be a bobcat wearing a special collar indicating that it was likely a well-loved pet to early Americans.); L. Bodson, *Animal Burial in Classical Antiquity* 28, in *COMPANION ANIMALS AND US: EXPLORING THE RELATIONSHIPS BETWEEN PEOPLE AND PETS* (Anthony L. Podberscek, Elizabeth S. Paul, James A. Serpell, eds., 2000) (Greeks and Romans in antiquity were permitted to bury deceased pets with grave markers in cemeteries where humans were also buried, but some Greeks and Romans apparently did not respect the practice).

⁷⁰ 2 Samuel 12:1–5 (New International Version). Nathan revealed to David that the story was a metaphor for David taking away a poor man's wife and causing the poor man to be killed. *Id.*, vv. 7-10. David then confessed his misconduct. *Id.* v. 13.

animals' capacities that were previously not understood.⁷¹ A cumulative effect of all of these discoveries may be that many animals seem less different from us than we previously perceived them to be. To be clear, science has also confirmed there are vast differences between humans' abilities and animals' abilities.⁷² Learning that animals are less different from humans than humans previously believed is much different than learning that animals are quite similar to humans, for example, in cognitive abilities. They are not.⁷³ However, learning that many of them are more intelligent and more complex than we previously understood is likely to appropriately influence humans to be more thoughtful about how animals are treated.

D. What to Do About the Property Problem: Two Untenable Positions and a Middle-Ground Position

This Article seeks to articulate a workable middle ground position regarding animals as a form of personal property.⁷⁴ It identifies this middle ground position as lying between at least two untenable positions.⁷⁵ One untenable position would be to seek to cling tightly to the status quo regarding our laws and enforcement of laws related to animals. This approach might assert that all animals are being provided appropriate protections at present, and that no real evolution in how our legal system deals with animals is needed. This approach would be unrealistic and unsustainable, and it would not provide enough protections for animals. Our society is changing in how it views animals, and our legal system's treatment of animals will change along with society. The only question is *how* it will change.

A second untenable position would be to apply a legal rights paradigm along with some kind of legal standing for animals so that advocates could bring lawsuits directly on their behalf with the animals as litigants. As addressed in Part III, treating any animals as legal persons or otherwise

⁷¹ A few of several illustrations that could be drawn from the single month of November 2015, include: Yvette Brazier, *Children with Pets Have Less Stress*, MEDICAL NEWS TODAY, Nov. 29, 2015 (reporting on study finding that children with pets have less stress than other children), <http://www.medicalnewstoday.com/articles/303276.php> (last visited Dec. 5th, 2015); Virginia Morell, *Birds Would Rather go Hungry than Leave their Mate Behind*, SCIENCE, Nov. 12, 2015 (reporting on study showing wild birds choosing to stay with their mates even if doing so deprives them of food), <http://news.sciencemag.org/plants-animals/2015/11/birds-would-rather-go-hungry-leave-their-mate-behind> (last visited Dec. 5th, 2015); Jun Hongo, *Japan Researchers Study Chimpanzees Caring for Disabled Infant in the Wild*, WALL STREET JOURNAL, JAPAN REALTIME, Nov. 10, 2015 (reporting on study by Japanese researchers observing over nearly two-year period how chimpanzees cared for an infant chimpanzee with intellectual and physical disabilities), <http://blogs.wsj.com/japanrealtime/2015/11/10/japan-researchers-study-chimpanzees-caring-for-disabled-infant-in-the-wild/tab/print/> (last visited Dec. 5th, 2012).

⁷² See, e.g., David Shultz, *Humans can Outlearn Chimps Thanks to More Flexible Brain Genetics*, SCIENCE, Nov. 16, 2015, <http://news.sciencemag.org/brain-behavior/2015/11/humans-can-outlearn-chimps-thanks-more-flexible-brain-genetics> (last visited Dec. 5, 2015); Natalie Wolchover, *What Distinguishes Humans From Other Animals?*, LIVESCIENCE (July 30, 2011), <http://www.livescience.com/33376-humans-other-animals-distinguishing-mental-abilities.html>.

⁷³ See *infra* note 72 and accompanying text.

⁷⁴ See *supra* notes 75-76 and accompanying text.

⁷⁵ The author has similarly addressed identifying two undesirable positions and a middle ground position in Richard L. Cupp Jr., *Cognitively Impaired Humans*, *supra* note 43; Richard L. Cupp Jr., *Personhood for Nonhuman Animals*, *supra* note 43; and Richard L. Cupp Jr., *Human Responsibility*, *supra* note 43, at 35-36.

giving them legal standing would be societally harmful over the long term, particularly to the most vulnerable humans.⁷⁶

In-between these two extremes, a reasonable middle-ground position is to embrace evolution in our laws, but to keep that evolution in the context of human responsibility for the humane treatment of animals under an animal welfare approach. This position rejects arguments that society does not need to evolve its laws, but also rejects arguments that society needs to grant legal standing to animals or make them legal persons. This position embraces appropriate changes, perhaps even significant changes in some areas, while keeping that change in the context of a focus on human responsibility. Adopting this position would maintain the animal welfare paradigm as most appropriate vehicle for addressing animals under our laws, and it would lead us toward balanced, appropriate improvements in our treatment of animals.

II. FRAMING—THE POWER OF DESCRIPTION

Multiple paths may lead to change in how our legal system addresses animals under an animal welfare paradigm. Some paths may directly address specific substantive legal changes, and some may focus on conceptual evolution that could influence changes our thinking about legal protections for animals more broadly.⁷⁷ This Article focuses on the latter, addressing ways in which courts and legislatures might use language to evolve conceptualizations of animals as property.

Social scientists have articulated a process related to the portrayal of issues known as “framing.”⁷⁸ Framing is defined as “to select some aspects of a perceived reality and make them more salient in a communication text, in such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation.”⁷⁹ Framing recognizes that the choice of words and tone used in describing an issue play a significant role in how the issue is perceived.⁸⁰ As described by Robert M. Entman, “the concept of framing consistently offers a way to describe the power of a communicating text. Analysis of frames illuminates the precise way in which influence over a human consciousness is exerted by the transfer (or communication) of information from one location--such as a speech, utterance, news report, or

⁷⁶ See *infra* Part III.

⁷⁷ For an example of seeking substantive changes providing greater protections specifically for great apes within the current property paradigm, see Alexandra B. Rhodes, *Saving Apes with the Laws of Men: Great Ape Protection in a Property-Based Legal System*, 20 ANIMAL LAW 121 (2013).

⁷⁸ See generally TIMOTHY D. LYTTON, HOLDING BISHOPS ACCOUNTABLE 82-84 (2008) (discussing the concept of issue framing in a law-related context).

⁷⁹ Robert M. Entman, *Framing: Toward Clarification of a Fractured Paradigm*, 43 J. OF COMMUNICATION 51, 52 (1993). See Lauren Guggenheim, Mo Jang, Soo Young Bae & W. Russell Neuman, *The Dynamics of Frame Competition in Traditional and Social Media*, 659 ANNALS AM. ACAD. POL. & SOC. SCI. 207, 208 (describing this as the “now classic definition” of framing).

⁸⁰ See Shanto Iyengar, *Framing Responsibility for Political Issues: The Case of Poverty*, 12 POLITICAL BEHAVIOR 19, 19-20 (1990) (“what psychologists call ‘framing’ – the specific contexts and terms used to present choice or decision options – has been found to exert powerful effects on judgment and choice”).

novel--to that consciousness.”⁸¹ Framing is often discussed in the context of media portrayals.⁸² However, it is also applicable to the portrayal of issues by courts and legislatures.

Framing matters in the evolving legal landscape regarding animals. The words, phrases and tone used to describe something influences how we think about it, and can ultimately have a powerful effect on substantive issues. Specifically, two terms that are particularly significant in how we conceptualize animals’ legal status are “property” and “rights.” The manner in which courts and legislatures utilize and elaborate upon these terms has the power to influence for better or for worse protection both of humans’ interests and of animals’ welfare.

As noted in Part I, simply using the word “property” alone without elaboration to describe animals’ legal status is problematic, because it violates our common sense to think of an intelligent animal as being the same under the law as a table or a chair.⁸³ Further, this violation of our common sense is offensive to a growing percentage of the population. If courts and legislatures casually refer to “property” without elaboration and context when addressing about animals’ legal status, they may understandably be perceived to be demeaning animals. Describing animals as property without elaboration invites criticisms that courts and legislatures are treating animals as *mere* property or as *mere* things.

How courts and legislatures describe the term “rights” in relation to animals is also of course a central issue regarding their legal status. The concept of rights appropriately has a feel-good appeal as the foundation of human freedom. Americans like rights, and for humans they should be deeply cherished.⁸⁴ The American Revolution’s struggle for rights, the Civil Rights Movement, and other struggles for rights in American history are all things Americans appropriately celebrate and honor. This Article addresses in Part III why the generally attractive word “rights” is not helpful vocabulary in addressing animals’ legal status.⁸⁵ But the Article will primarily focus on possible ways courts and legislatures can clarify what is meant by designating animals as property through more thoughtful descriptions.⁸⁶ Evolving how courts and legislatures communicate about animals’ property status can help to advance animals’ welfare and can help to counter the unhelpful trend toward thinking about animals’ legal status in terms of rights.

An illustration of utilizing vocabulary framing in an effort to influence substantive rules is the movement to use the word “guardian” interchangeably with or instead of the word “owner” in companion animal regulations.⁸⁷ Some governmental entities, primarily cities, have taken this step.⁸⁸ These regulations are typically set up not to establish any substantive changes at present in

⁸¹ Entman, *supra* note 79, at 51-52.

⁸² See Lauren Guggenheim, Mo Jang, Soo Young Bae & W. Russell Neuman, *supra* note 79, at 208. See also, e.g., Rebecca A. Glazier & Amber E. Boydston, *The President, the Press, and the War: A Tale of Two Framing Agendas*, 29 POLITICAL COMMUNICATION 428 (2012); Dhavan V. Shah, Mark D. Watts, David Domke, & David P. Fan, 2002. *News Framing and Cueing of Issue Regimes: Explaining Clinton's Public Approval in Spite of Scandal*, 66 PUBLIC OPINION QUARTERLY 339 (2002).

⁸³ See *supra* notes 7–50 and accompanying text.

⁸⁴ MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* x-xi (1991).

⁸⁵ See *infra* Part III. The author has also previously addressed problems with the use of rights language in the context of animals. See, e.g., Richard L. Cupp Jr., *Beyond Animal Rights*, *supra* note 38.

⁸⁶ See *infra* notes 121-219 and accompanying text.

⁸⁷ See Susan J. Hankina, *Making Decisions About Our Animals' Health Care: Does it Matter Whether We are Owners or Guardians?*, 2 STAN. J. ANIMAL L. & POL'Y 1, 5-8 (2009).

⁸⁸ *Id.* at 5.

the rules regarding companion animal owners,⁸⁹ but are intended to change our mindset so that we view ourselves as our animals' guardians rather than their owners.⁹⁰ This particular effort to improve our vocabulary is problematic, because the word "guardian" has a recognized legal meaning regarding children and other humans who need a guardian, and trying to apply that legal concept to companion animals could create confusion even when regulations state that they are not intended to create substantive legal changes.⁹¹ Further, if the symbolic regulations ever evolved into substantive legal guardian obligations with real legal meaning, an entire slate of new issues would add to the confusion and could lead to harmful results (for example, if a companion animal owner is really a pet's guardian, is a veterinarian's duty to the companion animal or to the owner? Would court action be necessary to put down a companion animal that is suffering and dying?).⁹² Thus, while skeptical about using legal guardian vocabulary that could lead to both confusion and undesirable substantive changes, this Article supports using more helpful terms and descriptions regarding animals-as-property that would add clarity and that would help improve our appreciation of animals' protected status.⁹³

III. DOES HIGHLIGHTING ANIMAL PROPERTY AS A DISTINCTIVE SUBSET OF PERSONAL PROPERTY CREATE LEGAL RIGHTS FOR ANIMALS?

This Article advocates evolution in courts and legislatures to become more consistently thoughtful and purposeful in emphasizing that animals are significantly different from other forms of personal property because animals require protection from unnecessary suffering. But does "different" mean that animals, unlike other forms of property, have legal rights?

As with most legal questions, the best answer is "it depends." In this case, it depends on the context of a rights claim and on how we define the term "rights." What constitutes a legal "right" at the borders of the concept is subject to the term's interpretation. Courts can use the term with differing meanings in cases related to animals' legal status.⁹⁴ Under one interpretation, it may be argued that animals already have some form of legal rights.⁹⁵ Laws exist that protect animals.⁹⁶

⁸⁹ *Id.* at 6 ("The symbolic language change alone is not intended to have a legal impact.").

⁹⁰ *Id.* at 5-6.

⁹¹ *Id.* at 18. Links to several publications critical of the pet guardian movement are available at <http://www.nabranimallaw.org/state/ownership-v-guardianship/> (website last visited Dec. 7th, 2015).

⁹² *See, e.g.,* American Veterinary Medical Law Association, *Ownership of Animals Versus Guardianship of Animals*, March 14, 2002, available at <http://www.nabranimallaw.org/wp-content/uploads/2014/08/AVMLAWhitePaper.pdf>. (website last visited Dec. 7th, 2015).

⁹³ For an interesting analysis of presenting protection of great apes as being supportive of human interests under a property paradigm, see Alexandra B. Rhodes, *supra* note 77, at 227 ("By recognizing that crimes against an animal often infringe on a human right, advocates successfully litigate animals' interests within the property-based animal law system.").

⁹⁴ *See, e.g.,* *See People ex. rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D. 3d 148, 152 (NY 3rd Dept. 2014) (rejecting argument that chimpanzees are legal persons and holding that they "cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions"); *Tilikum ex rel. PETA, Inc. v. Sea World Parks & Entm't Inc.*, 842 F. Supp. 2d 1259, 1264 (S.D. Cal. 2012) (rejecting argument that orcas are legal persons protected by the 13th amendment, but stating in dicta "that is not to say that animals have no legal rights; as there are many state and federal statutes affording redress to Plaintiffs, including, in some instances, criminal statutes that 'punish those who violate statutory duties that protect animals.'" [citation omitted]).

⁹⁵ *See Tilikum*, 842 F. Supp. 2d at 1264.

⁹⁶ *Id.*

It may be argued that the laws prohibiting cruelty to animals give protected animals a “right” not to be treated cruelly.⁹⁷

This interpretation of rights is to some extent illustrated in *Tilikum ex rel. PETA, Inc. v. Sea World Parks & Entm’t Inc.*⁹⁸ In *Tilikum*, People for the Ethical Treatment of Animals, Inc. (“PETA”) sued Sea World in the United States District Court, Southern District of California, naming five orcas owned by Sea World as plaintiffs.⁹⁹ The lawsuit alleged that Sea World was violating the 13th Amendment to the Constitution of the United States by holding the orcas in captivity.¹⁰⁰ The court dismissed the lawsuit, holding that the 13th Amendment “applies to persons, and does not apply to non-persons such as orcas.”¹⁰¹ However, in dicta at the end of the decision the court implied that even though animals are not legal persons, they have some rights, stating: “Even though Plaintiffs lack standing to bring a Thirteenth Amendment claim, that is not to say that animals have no legal rights; as there are many state and federal statutes affording redress to Plaintiffs, including, in some instances, criminal statutes that ‘punish those who violate statutory duties that protect animals.’”¹⁰² This dicta seemingly interpreted rights as existing whenever legal protections are in place. Under this apparent interpretation, animals already have some legal rights despite not being legal persons because they have legal protections.

Interestingly, even among those who argue that animals *should* have legal rights, there is debate over whether they already do have them.¹⁰³ Some advocates assert that animals already have some level of legal rights, relying on arguments akin to the *Tilikum* court’s dicta.¹⁰⁴ These advocates may wish to expand rights or broaden the ability to enforce these rights, but they believe that some rights already exist. Other animal rights advocates argue that animals currently do *not* have rights, because to have rights one has to be a legal person rather than legal property.¹⁰⁵ These advocates may want courts or legislatures to assign legal personhood to at least some animals, such as particularly intelligent animals like chimpanzees, so that they will have legal rights.¹⁰⁶

The animal rights supporters who argue that a being must be a legal person before it can have rights set a higher bar in evaluating whether something is a legal right. This higher bar is appropriate, and because animals do not have legal personhood, it is unhelpful to assert that they presently hold legal rights. Rather, rights-bearing humans have a moral responsibility to treat animals in a thoughtful and appropriate manner.

A recent example of a court adopting this approach toward rights is *People ex. rel. Nonhuman Rights Project, Inc. v. Lavery*, decided in late 2014.¹⁰⁷ In *Lavery*, New York’s Appellate Division,

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 1260.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 1263.

¹⁰² *Id.* at 1264 (citation omitted).

¹⁰³ See *infra* notes 104-106 and accompanying text.

¹⁰⁴ See *e.g.*, David Favre, *supra* note 7, at 1033-34 (asserting that many animals presently hold legal “rights” protecting their treatment, but that the rights may only be protected by government entities).

¹⁰⁵ See, *e.g.*, Michael Mountain, *Animal Rights . . . Without the Rights*, NHRP (July 9, 2013), <http://www.nonhumanrightsproject.org/2013/07/09/animal-rights-without-the-rights/>.

¹⁰⁶ *Id.*

¹⁰⁷ 124 A.D. 3d 148 (NY 3rd Dept. 2014).

Third Department unanimously rejected applying legal personhood status to chimpanzees.¹⁰⁸ The court noted that legal personhood “has consistently been defined in terms of both rights *and duties*.”¹⁰⁹ The court concluded that “Needless to say, unlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions. In our view, it is this incapability to bear any legal responsibilities and societal duties that renders it inappropriate to confer upon chimpanzees the legal rights . . . that have been afforded to human beings.” In effect, the *Lavery* court agreed with the position that legal rights may only exist for legal persons, and concluded that chimpanzees cannot be legal persons. Importantly, the court emphasized that even though chimpanzees are not legal persons, the legislature has enacted protections for them, and that the legislature may provide further legal protections for chimpanzees if they are needed.¹¹⁰

In 1991 Harvard Law School professor Mary Ann Glendon published a thoughtful book entitled *Rights Talk: The Impoverishment of Political Discourse*.¹¹¹ In the book she writes about the “romance of rights” that has developed in our nation, such that we increasingly think of all sorts of interests in terms of rights.¹¹² This can have the effect of diluting the concept of rights, with negative consequences for recognizing the distinctiveness of fundamental rights, such as civil rights, speech rights, and other core freedoms.¹¹³

In American culture, “rights” is a loaded word; it has near sacred meaning to us because individual rights are at the center of our national identity. Professor Glendon is correct in asserting that we should carefully guard the significance of rights by being cautious about loose expansion of the concept.¹¹⁴ Rights are tied to personhood in our national identity; our rights history has been appropriately focused on rights for *humans* and their proxies.¹¹⁵

Whether we describe laws or legal proposals protecting animals as “rights” influences perceptions and reactions. Whether to use rights language with animals is a vocabulary choice; as addressed above, it is possible to use legal rights language regarding animals without supporting legal personhood or legal standing for animals.¹¹⁶ However, use of rights language is an important

¹⁰⁸ *Id.* at 152.

¹⁰⁹ *Id.* at 151.

¹¹⁰ *Id.* at 152-53. In December, 2015, the Nonhuman Rights Project filed a new lawsuit seeking to have chimpanzees declared legal persons in a different judicial district in New York, and with the new lawsuit submitted affidavits asserting that chimpanzees are capable of bearing duties and responsibilities. CITE.

¹¹¹ MARY ANN GLENDON, *supra* note 84.

¹¹² *Id.* at 5 (“To a great extent, the intellectual framework and the professional ethos of the entire current population of American lawyers have been infused with the romance of rights”).

¹¹³ *Id.* at x-xi, 1-17.

¹¹⁴ *See* GLENDON, *supra* note 84, at x-xi.

¹¹⁵ *See, e.g.,* Nonhuman Rights Project Inc. v. Lavery, 124 AD3d 148 (2014) (legal rights are appropriate only for humans and for human proxies, such as corporations and municipalities). Starting with the third word of its preamble (“We the people . . .”), the Constitution of the United States repeatedly refers to “people” or “person.” CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION (2014), available at https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=2FAAP/keZ_PLUS_ptiKc1FOrdhQ==&system=prod. Regardless of whether corporate rights have or have not been extended too far, they are assigned rights as proxies for human interests. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751, 2768 (2014) (“An established body of law specifies the rights and obligations of the people (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.”).

¹¹⁶ *See supra* notes 94-102 and accompanying text.

framing issue. Talking about animal protections in terms of legal rights is harmful in part because it gives a sense that animal interests may be similar to or equivalent to core human rights. Among other concerns, this creates an unintended threat to marginalized humans.¹¹⁷ For example, some intelligent animals, such as typical chimpanzees, have more cognitive ability and autonomy than some humans with intellectual disabilities or medical conditions, such as being in a persistent vegetative state.¹¹⁸ If courts and legislatures start embracing the concept of legal rights for animals, might they at some point in the perhaps distant future determine that animals have stronger rights than marginalized humans if the animals have more cognitive ability and autonomy than the marginalized humans?

Further, thinking about animals in terms of rights diverts focus from what really matters regarding how animals are treated.¹¹⁹ Although the language we choose is significant, however we dress things up in terms of words, humans will ultimately decide how animals are treated. Courts and legislatures should keep their focus squarely on human responsibility for animals' treatment rather than radically restructuring our legal system by treating animals as persons or rights-bearers.

Although the issue of rights rhetoric is important, in the end, whether protections for animals are termed rights or are not termed rights is not the most important matter. The two most important matters are whether we take appropriate care in our treatment of animals, and whether our approach toward animals causes undue harm to humans. Regarding the latter, our greatest concern should be for the most vulnerable humans—including the cognitively impaired and the very poor.¹²⁰

IV. POTENTIAL FRAMING CONCEPTS FOR ANIMALS AS A DISTINCTIVE SUBSET OF PERSONAL PROPERTY

If courts and legislatures recognize the benefits of being more explicit about animals constituting a subset of personal property with important distinctions from other personal property, they must make decisions regarding how to go about it. An op-ed writer has noted that “[e]very word we can use to describe the human-pet relationship is incomplete, problematic or both.”¹²¹

This observation is correct, and appropriately describing the status of non-companion animals entails challenges as well, but the perfect should not be the enemy of the good. This Part will share

¹¹⁷ The author addresses this threat to marginalized humans in more detail in Richard L. Cupp Jr., *Cognitively Impaired Humans*, *supra* note 43. See also David R. Schmammann, Lori J. Polacheck *The Case against Rights for Animals*, 22 B.C. ENVTL. AFF. L. REV. 747, 752 (1995); Nicholas H. Lee, *In Defense of Humanity: Why Animals Cannot Possess Human Rights*, 26 REGENT U. L. REV. 457, 484 (2013-14).

¹¹⁸ Richard L. Cupp Jr., *Cognitively Impaired Humans*, *supra* note 43; see also Richard L. Cupp Jr., *Personhood for Nonhuman Animals*, *supra* note 43; Richard L. Cupp Jr., *Human Responsibility*, *supra* note 43, at 35.

¹¹⁹ Richard L. Cupp Jr., *Cognitively Impaired Humans*, *supra* note 43; see also Richard L. Cupp Jr., *Personhood for Nonhuman Animals*, *supra* note 43; Richard L. Cupp Jr., *Human Responsibility*, *supra* note 43, at 35.

¹²⁰ The present significance of animals as property in the impoverished third world is addressed *supra* notes 12-16 and accompanying text.

¹²¹ Christie Keith, *Call Me 'Owner'—but 'Mom' is Fine Too*, SF GATE (Oct. 27, 2010), <http://www.sfgate.com/pets/yourwholepet/article/Call-me-owner-but-mom-is-fine-too-2459883.php> (quoted in Adrian Hochstadt, *Legal and Practical Considerations of Changes in the Legal Status of Animals* (May 4, 2012), http://downloads.ohiohar.org/conventions/convention2012/701_animallaw_handout3.pdf).

and evaluate possible vocabulary changes that could be made. Part V will then address some approaches courts and legislatures could take to highlight animals' unique status.

A. Animals as Sentient Property

Until 2014 year France's Civil Code, also known as the Napoleonic Code, characterized animals as "movable property."¹²² But in 2014 it changed the description of many animals to "living beings capable of feelings."¹²³ This new language does not create new animal rights or otherwise substantively alter the legal status of animals—they remain property—but it emphasizes that they are not "mere" property like furniture.¹²⁴ The simple language change highlights that animals capable of pain or distress require thoughtful and humane treatment under an animal welfare approach.

Some English-language publications have described this "living beings capable of feelings" language as meaning "sentient beings" or "sentient living beings."¹²⁵ Regardless of whether "sentient beings" is the best vocabulary term to use—"sentient property" would be better, and even that variation has issues¹²⁶—this kind of change illustrates in general efforts to shift the framing of how we think and talk about animals without abandoning property status. The new law does not change any substantive rules, but framing is a powerful tool – the new language may over time help change how people think about animals, and it counters arguments that property status means animals are "mere things" just like any other property.

Some other governments and entities have also begun using sentience vocabulary to emphasize that animals are distinctive from other property. For example, in 2009 the European Union took an important step toward reframing animals' property status with The European Commission Treaty of Lisbon.¹²⁷ The treaty describes animals as sentient beings in requiring "full regard" for their welfare requirements without rejecting property status.¹²⁸

¹²² FRANCE ANIMAL PROTECTION INDEX 2014 RANKING: C., WORLD ANIMAL PROTECTION 1 (2014), http://api.worldanimalprotection.org/sites/default/files/api_france_report.pdf.

¹²³ The French phrase used is "êtres vivants doués de sensibilité." Thank you to Professor Mireille Butler for providing the translation to English. BING TRANSLATOR translates the phrase as "beings living sentient sensitivity." BING TRANSLATOR, <https://www.bing.com/translator/?ref=TTThis&text=&from=&to=en> (last visited Nov. 13, 2015).

¹²⁴ See *Animals Have Feelings, French Parliament Rules*, THE LOCAL FR, Jan. 29th, 2015, available at <http://www.thelocal.fr/20150129/animals-do-have-feelings-french-parliament-rules>,

¹²⁵ See, e.g., David Chazan, *Pets no longer just part of furniture in France*, THE TELEGRAPH, Apr. 16, 2014, available at <http://www.telegraph.co.uk/news/worldnews/europe/france/10771361/Pets-no-longer-just-part-of-furniture-in-France.html>; *Animals are Sentient and 'not Furniture', French Parliament Says*, NZHERALD.CO.NZ, Jan. 29th, 2015, available at http://www.nzherald.co.nz/world/news/article.cfm?c_id=2&objectid=11393640.

¹²⁶ See *infra* notes 139-141 and accompanying text.

¹²⁷ See European Commission, *Animal Welfare*, available at http://ec.europa.eu/food/animals/welfare/index_en.htm.

¹²⁸ *Id.*

In May 2015, New Zealand enacted legislation describing animals as “sentient.”¹²⁹ However, it did not reject property concepts; “owners” as well as others in control of animals are required “to attend properly to the welfare of those animals.”¹³⁰

In December, 2015, Canada’s Province of Quebec enacted a bill changing the designation of animals to “sentient beings,” but with addition of substantive animal welfare reforms.¹³¹ The bill represents “a symbolic change to the legal status of animals under the Civil Code of Quebec,” but the full scope of the change that will come with the legislation will likely only be seen over time.¹³²

Some veterinary organizations in the United States have also made declarations that animals are sentient beings rather than “mere” property while not abandoning the property paradigm. In 2012 the American Animal Hospital Association (“AAHA”) adopted a policy declaring that animals are “sentient beings.”¹³³ The AAHA policy does not directly address what animals it views as sentient. However, AAHA focuses on veterinarians working with companion animals, and this may provide context for its policy.¹³⁴

The California Veterinary Medical Association’s veterinary members work with all kinds of animals, not just companion animals but farm animals as well.¹³⁵ This organization has also added to its “Principles of Animal Care, Use, and Welfare” a position that “[a]nimals are sentient beings with wants and needs that may differ from those of humans and are worthy of respect from individuals and society.”¹³⁶

The nation’s largest veterinary organization is the American Veterinary Medical Association (“AVMA”).¹³⁷ The AVMA has not adopted “sentient being” language, but in a 2009 article in the ABA Journal, the AVMA’s president and the director of its State Legislative and Regulatory Affairs Department wrote that “we support the idea of states adopting statutory language recognizing that animals are unique, living beings.”¹³⁸

In 2006, attorney Carolyn B. Matlack published a book arguing for substantive legal changes protecting “sentient property,” which she defines as a “warm-blooded, domesticated, nonhuman

¹²⁹ Animal Welfare Amendment Bill, Part 1, cl. 3A (2013), http://www.legislation.govt.nz/bill/government/2013/0107/latest/DLM5174814.html?search=sw_096be8ed81047b83_sentient_25_se&p=1.

¹³⁰ *Id.*

¹³¹ See Barbara Cartwright, *Quebec’s Bill 54 Falls Short Of Protecting All Animals*, HUFF POST CANADA, Dec. 9, 2015; *Quebec Animal Welfare Bill Hearings Begin at National Assembly*, CBC NEWS (Sept. 14, 2015), <http://www.cbc.ca/news/canada/montreal/bill-54-quebec-animal-welfare-national-assembly-1.3226924>.

¹³² *ALDF Rankings Once Again Name Quebec as Worst Province for Animal Protection in Canada*, SPCA (July 2015), <http://www.sPCA.com/?p=11296&lang=en>.

¹³³ See American Animal Hospital Association, *Sentient Beings*, July, 2012, available at https://www.aaha.org/professional/resources/sentient_beings.aspx#gsc.tab=0.

¹³⁴ See American Animal Hospital Association, *About AAHA*, available at https://www.aaha.org/professional/about_aaha/default.aspx#gsc.tab=0 (describing AAHA’s focus on care for pets).

¹³⁵ *The California Veterinary Medical Association’s Eight Principles of Animal Care, Use, and Welfare*, CAL. VETERINARY MEDICAL ASSOCIATION, <http://cvma.net/resources/cvma-policies/cvma-eight-principles-of-animal-care-and-use/> (last visited Nov. 12, 2015) [hereinafter *CVMA*].

¹³⁶ *Id.*

¹³⁷ The AVMA represents over 86,500 veterinarians. American Veterinary Medical Association, *Who We Are*, available at <https://www.avma.org/About/WhoWeAre/Pages/default.aspx>.

¹³⁸ James O. Cook & Adrian Hochstadt, *Non-Economic Damages in Pet Lawsuits*, A.B.A. (July/August 2009), http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/petlawsuits.html

animal dependent on one or more human persons for food, shelter, veterinary care, or companionship normally kept in or near the household of its owner, guardian or keeper.”¹³⁹ This language may be an improvement on “sentient beings” language because it highlights that animals are still property (albeit a protected kind of property). However, Ms. Matlack argues that the designation should allow covered animals to bring lawsuits through a guardian ad litem to directly assert their interests.¹⁴⁰ As addressed above, a substantial change to our legal system giving any animals a form of legal standing should not be adopted.¹⁴¹ However, courts and legislatures do not need to accept the legal changes Ms. Matlack argues should go with the term to appreciate the term as a more progressive way of framing animals’ legal status within the context of property.

B. Issues with “Sentient Property” or “Sentient Beings” Language

Although a large percentage of animals are susceptible to pain or distress and thus require special legal protections, sentience language presents some challenges as well as benefits. Some problems and questions regarding the use of sentience framing for animals include:

1. Not All Animals are thought to be Sentient

Webster’s Dictionary indicates that the primary definition of “sentient” is “responsive to or conscious of sense impressions.”¹⁴² If courts and legislatures described animals as sentient property, would they inadvertently create special protections for many animals that scientists do not believe suffer pain, such as many invertebrates?¹⁴³ What about animals scientists not sure about regarding sentience? If scientists lack sufficient information to determine whether an animal is sentient, where are courts and legislatures to draw the line? In short, describing all owned animals as sentient property is probably over-inclusive without some sort of limitations. This problem could be addressed by specific definitions of what animals or types of animals are included. For example, courts could limit the definition to all mammals and other vertebrate animals, although

¹³⁹ CAROLYN B. MATLACK, WE’VE GOT FEELINGS TOO: PRESENTING THE SENTIENT PROPERTY SOLUTION 72 (2006).

¹⁴⁰ *Id.* at 27.

¹⁴¹ See *supra* notes 116-119 and accompanying text.

¹⁴² MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/sentient>.

¹⁴³ The Cambridge Declaration on Consciousness asserts that mammals and birds “and many other creatures, including octopuses” possess “the neurological substrates that generate consciousness.” *Cambridge Declaration on Consciousness*, July 7th, 2012, available at <http://fcmconference.org/img/CambridgeDeclarationOnConsciousness.pdf>. Without excluding the possibility that they may be sentient, Professor David Favre excludes invertebrates from his proposed definition of “living property” “To keep the discussion focused upon those who have the most complex needs and for whom we can do the most.” Favre, *supra* note 7, at 1044-45. Professor Favre notes that “in the future this line could be redrawn,” and emphasizes that “This is not to suggest that invertebrate animals are not worthy of ethical concern, as they do have individual interests, even if they might sit more lightly on the scale of our moral concerns.” *Id.* at 1045. Professor Favre also cites state animal cruelty statutes that limit protection to vertebrate animals. *Id.* at 1045, n.80 (citing Virginia [which also excludes fish] and Michigan cruelty statutes). Octopuses may be the invertebrate animals most frequently discussed as possessing significant intelligence. See, e.g., Brendan Borrell, *Are Octopuses Smart?*, SCIENTIFIC AMERICAN, Feb. 27th, 2009, available at <http://www.scientificamerican.com/article/are-octopuses-smart/> (discussing evidence of intelligence in octopuses).

that adjustment would replace being over-inclusive with being under-inclusive.¹⁴⁴ France’s Civil Code addressing animals apparently relates to companion animals, which typically are sentient.

2. *Does Sentience Language Imply New Legal Obligations?*

Describing an animal as “sentient” does not in itself create new legal obligations, although it is not inconsistent with creating new legal obligations. The description can be used simply to raise our consciousness that animals are more than simple property or the description can be coupled with statutes or court decisions that create new legal obligations.

Creating new legal obligations is not always a bad thing; as noted above, society is evolving in this area and legal evolution is appropriate. Courts’ and legislatures’ focus should be on ensuring not only that change takes place, but also that the change is a reasonable balancing of human and animal interests, and that the change is undertaken from an animal welfare perspective rather than from a rights perspective.

3. *Rights/Personhood Associations with Sentience: Definition versus Perceptions and the Slippery Slope*

The term “sentient property” may be quite a bit different from the term “sentient being.” The former confirms property status while indicating that animals are special property protected from cruelty.¹⁴⁵ The latter may be more attractive to those who hope to destroy animals’ property status, providing a sense that because they are sentient beings, they cannot be property and should have legal standing.

Peter Singer used the term “sentient” in his landmark book *Animal Liberation*, describing it “as a convenient if not strictly accurate shorthand for the capacity to suffer and/or experience enjoyment.”¹⁴⁶ This definition is not terribly far off from Webster’s “responsive to or conscious of sense impressions.”¹⁴⁷ Singer’s use of the term is not objectionable if taken at face value, but the term is also sometimes used in a context that may be associated with human-like intelligence and awareness. For example, writers addressing whether computers may someday become powerful enough to attain consciousness sometimes phrase the issue as whether computers will attain sentience.¹⁴⁸ Thus, sentience language has the downside of potentially framing animals’ status in the direction of personhood as well as the upside of potentially framing animals as a special form of property that require special protection.

Concerns that describing animals as sentient property could be a slippery slope that might lead to perceptions of animals as legal persons should be taken seriously. To the extent that the word sentience may create a subtle or not so subtle association with having human-like mental

¹⁴⁴ See *supra* note 143 (addressing octopuses as an example of invertebrates that probably are sentient).

¹⁴⁵ See *supra* notes 139-141 and accompanying text.

¹⁴⁶ PETER SINGER, *ANIMAL LIBERATION* 8-9 (1975 Ed.).

¹⁴⁷ See *supra* note 142 and accompanying text.

¹⁴⁸ See, e.g., Anil Ananthaswamy, *Sentient Robots? Not Possible if you do the Maths*, *NEW SCIENTIST*, May 13th, 2014, available at <https://www.newscientist.com/article/dn25560-sentient-robots-not-possible-if-you-do-the-maths/>; Foz Meadows, *When Sentient Artificial Intelligence Becomes Reality*, *HUFFINGTON POST*, Aug. 14th, 2013, available at http://www.huffingtonpost.com/foz-meadows/when-sentient-al-becomes-reality_b_3434882.html.

characteristics, rather than simply the capacity to experience pain or enjoyment, describing animals as sentient has the potential to be a step toward treating animals like they are people. Humans have a strong moral responsibility to avoid cruelty to animals, but improving our treatment of animals should not be confused with treating animals as formal rights-bearers or as legal persons, which would likely lead to harmful societal consequences.¹⁴⁹

Despite these very real concerns, the sentience of mammals, birds, and some other animals is such an obvious point (in the sense that they obviously are responsive to or conscious of sense impressions), and society is evolving so significantly in its perception of animals, that stepping out on a slippery slope of some kind may be necessary, although any steps should be taken with thoughtfulness and caution. We may need to be willing to walk carefully on a potentially slippery slope to do the right thing for animals, and to ensure the continuing survival of the animal welfare paradigm that is so important to society. Sometimes treading with thoughtful preparation on a slippery slope of some sort may be safer than trying to permanently stand still on a narrow ledge of a steep cliff. Perhaps the best approach would be using language other than sentience that still conveys the special concern needed for animals because of their capacity for pain or suffering¹⁵⁰ or perhaps the word sentience could be used but with thoughtful explanation of what sentience means in this context.

4. *Does Sentience Language Impliedly Put Animals Ahead of Some Humans, because Some Humans May Not be Sentient?*

Some humans may not be sentient. For example, a human in a persistent vegetative state may not be capable of experiencing pain.¹⁵¹ Concerns could be expressed that if courts and legislatures provide special protections to animals with an emphasis on the animals being sentient, sentient animals might be valued more highly than non-sentient humans. However, provided that protections provided to animals are based on an animal welfare paradigm rather than a legal personhood paradigm, such concerns should not preclude the possibility of framing animal protections as being based on sentience. Courts and legislatures already treat even non-sentient humans as legal persons based on their humanity without reference to whether they are sentient.¹⁵² As long as distinctions between animals and humans are not blurred, providing protections to animals based on sentience is not inconsistent with providing protections and even fundamental rights to human beings who are not sentient.

¹⁴⁹ See *supra* notes 116-119 and accompanying text.

¹⁵⁰ For discussions of possible descriptions that might be used rather than “sentient property,” see *infra* notes 159-204 and accompanying text.

¹⁵¹ See Andy Coghlan, *Some Coma Patients “Feel Pain”*, NEW SCIENTIST, Oct. 7th, 2008 (discussing study that found little evidence of brain activity consistent with pain in humans in a persistent vegetative state). Interestingly, comatose humans who are not in persistent vegetative state may be capable of experiencing pain despite being in a coma. *Id.*

¹⁵² See, e.g., *Matter of Guardianship of L.W.*, 482 N.W.2d 60 (Wis. 1992) (holding that a man in a persistent vegetative state holds constitutional rights); *Care and Protection of Beth*, 587 N.E. 1377, 1382 (Mass. 1992) (holding that a baby who went into a persistent vegetative state when she was only three months old is “entitled to the same respect, dignity and freedom of choice as competent people.”).

5. *Although Mammals and other Animals Experience Pain, Science does not Completely Understand When and how they Experience it*

Humans often anthropomorphize regarding animals, and this tendency may apply to how pain is experienced. Although science is advancing in this area, uncertainties remain regarding some aspects of how animals experience pain in comparison with humans.¹⁵³ However, in the absence of scientific clarity regarding when and how animals experience pain, some anthropomorphizing may be appropriate. The National Research Council (US) Committee on Recognition and Alleviation of Pain in Laboratory Animals published a report in 2009 addressing the issue of pain in research animals and emphasizing the importance of minimizing the pain they experience.¹⁵⁴ It concluded that strong evidence exists that mammals experience pain. The committee acknowledged difficulties in assessing animals' pain, "mostly because of a lack of methods to validate and objectively measure it."¹⁵⁵ However, rather than using this as an excuse for inaction, the committee concluded that "Until such [measurement] tools are developed, behavioral indices and careful extrapolation from the human experience should be used to assess pain in research animals."¹⁵⁶ The committee concluded that all vertebrates "should be considered capable of experiencing pain."¹⁵⁷

Our lack of scientific certainty regarding all aspects of how animals experience pain should not preclude courts and legislatures from highlighting that they are sentient or from using other terminology to emphasize that they are capable of suffering. As noted above, sentient means "responsive to or conscious of sense impressions,"¹⁵⁸ and that fits animals, such as mammals, regardless of whether they process their sense impressions in the same way we do.

C. **Other Language Suggested: Animals as "Living Property"**

Using different vocabulary, Professor David Favre has proposed that our legal system should recognize animals as "living property."¹⁵⁹ Acceptance of property status is inherent in the designation "living property," but Professor Favre believes living property should be distinct from personal property.¹⁶⁰ He argues it should be a fourth category of property, along with the three that are often currently identified: real property, personal property, and intellectual property.¹⁶¹

¹⁵³ See Andrea Nolan, *Do Animals Feel Pain in the Same Way as Humans Do?*, INDEPENDENT, July 7, 2015, available at <http://www.independent.co.uk/life-style/health-and-families/features/do-animals-feel-pain-in-the-same-way-as-humans-do-10371800.html> (veterinary scholar stating that "We know that animals certainly feel physical pain, but what is less clear is whether this emotional suffering that we feel can be said to be true of animals. And if it is, how we go about measuring it," and applauding "a global effort to raise awareness of pain in animals").

¹⁵⁴ National Research Council (US) Committee on Recognition and Alleviation of Pain in Laboratory Animals, *RECOGNITION AND ALLEVIATION OF PAIN IN LABORATORY ANIMALS* (2009),

¹⁵⁵ *Id.*, Summary, available at <http://www.ncbi.nlm.nih.gov/books/NBK32647/#summary.s2>.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*, *Pain in Research Animals: General Principles and Considerations*, available at <http://www.ncbi.nlm.nih.gov/books/NBK32655/>.

¹⁵⁸ See *supra* note 142 and accompanying text.

¹⁵⁹ Favre, *supra* note 7, at 1052–53.

¹⁶⁰ *Id.* at 1043.

¹⁶¹ *Id.* In his article, Professor Favre considers only domestic animals, leaving the legal status of wild animals "for another day." *Id.*

Although he concedes that all living things with property status are living property, due to practical concerns he excludes plant life, wild animals,¹⁶² and non-vertebrate animals (at least for now) from his term of art.¹⁶³ For purposes of Professor Favre’s proposal, “living property” refers to “vertebrate animals who are property and shall be identified by either specific name or by group reference.”¹⁶⁴

The phrase “living property” has an advantage over the phrase “sentient property” in that “living property” has less baggage—it is less readily associated with concepts of legal rights and arguments for moral equivalence with humanity.¹⁶⁵ However, the term’s breadth creates different challenges. To be useful, it requires explanation and exclusions. Absent an exclusion, plants that are owned would be included, and they are of course dramatically different from animals.¹⁶⁶ Perhaps “living being property” could be used instead of “living property” to avoid confusion about whether plants are included. But absent another exclusion such as that suggested by Professor Favre, worms, insects, and other non-vertebrates who may not be sentient would presumably be included.¹⁶⁷ “Living being vertebrate property” would be an inelegant and complex phrase at best, and thus Professor Favre’s term “living property,” with explanations of appropriate exclusions, may be the best language for this concept.¹⁶⁸

A much bigger challenge with Professor Favre’s creative proposal is that his Article goes on to suggest that expansive new legal rights should come along with legal status as “living property.”¹⁶⁹ For example, he proposes that “living property” should be able to enter into some types of contracts through a guardian,¹⁷⁰ and should be able to file tort lawsuits when appropriate through a guardian.¹⁷¹

Fortunately, using Professor Favre’s “living property” phrase does not require accepting the expansive new legal rights paradigm he proposes. And “living property” does not have to constitute a fourth category of property; the phrase could be used to describe animals as a unique and special subset of personal property. Maintaining living property as a special type of personal property rather than as a new fourth type of property makes an undesirable new rights paradigm less likely to come along with the phrase. The phrase may be helpful as a framing tool to enhance our evolving sensitivity to animals’ special status without having explicit substantive changes attached to it.¹⁷²

¹⁶² However, Professor Favre excludes wild animals only for purposes of the article detailing his proposal, as “the legal context [for acknowledging their rights and interests] will require a different analysis than is provided in this Article.” *Id.* at 1044.

¹⁶³ *Id.* at 1045–46.

¹⁶⁴ *Id.* at 1047.

¹⁶⁵ See *supra* notes 146–49 and accompanying text.

¹⁶⁶ See Favre, *supra* note 7, at 1044.

¹⁶⁷ See *id.* at 1045.

¹⁶⁸ See *id.*

¹⁶⁹ *Id.* at 1062.

¹⁷⁰ *Id.* at 1069.

¹⁷¹ *Id.* at 1070.

¹⁷² Mr. Adrian Hochstadt, who at the time was a communications official for the American Veterinary Medical Association, referenced Professor Favre’s living property proposal in 2012, and stated that he agrees that all pets are “unique, special, living property,” although he did not endorse or criticize Professor Favre’s more specific interpretations of what the concept should entail. Adrian Hochstadt, *Legal and Practical Considerations of Changes*

Professor Favre’s proposal that the term “living property” should entail an expansive new rights paradigm demonstrates the slippery slope risk of any language change that would highlight animals’ unique status.¹⁷³ But, as with sentient property language, that slippery slope concern may be outweighed by a concern for improving our treatment of animals, and by a concern that society will be increasingly critical of a welfare approach based on outdated vocabulary that describes animals only as property without highlighting their protected status.

D. Some Other Possibilities for New Descriptions Highlighting Animals’ Special Property Status

This Article has set forth some advantages, disadvantages, and questions regarding courts’ and legislatures’ use of specific language such as “sentient property,” “sentient beings,” “unique, living beings” and “living property” to frame animals’ unique property status based on their capacity for pain or distress.¹⁷⁴ All of these framing descriptions have both merits and challenges, and this Article does not seek to limit courts’ and legislatures’ consideration to any one specific phrase. It is worth briefly noting that the phrases discussed above are not the only possibilities for courts and legislatures to consider in describing animals’ special personal property status. Terms such as “animal property,” “protected property,” “a unique form of personal property,” and others may also be worthy of consideration. Further, identifying the perfect term or phrase is not the key issue. The key issue is providing effective communication that animals must be treated with special consideration despite their property status, regardless of whether that communication entails a specific title or phrase. Part V will address some examples of how courts and legislatures might effectively engage in such communication.

V. PROMOTING STATUTORY AND JUDICIAL DECLARATIONS OF ANIMALS’ DISTINCTIVENESS AS A SPECIALLY PROTECTED FORM OF PROPERTY

A. Legislative Possibilities

Because of our federalism and our common law court system, one sweeping change cannot be prescribed that will alter descriptions of animals-as-property in every context for the nation, such as France undertook in its new law changing companion animals from “moveable property” to “living beings capable of feelings.”¹⁷⁵ However, individual jurisdictions may develop or revise statutes and regulations to emphasize that animals are a unique and protected type of personal property.

A fairly recent statute specifically designed to entrench animals’ property status demonstrates that statutes related to animals’ property status have been passed going the other direction. In 2012, Nebraska adopted LB 459, apparently to prevent any of its cities or counties from changing

in the Legal Status of Animals (May 4, 2012),

http://downloads.ohioabar.org/conventions/convention2012/701_animallaw_handout3.pdf.

¹⁷³ See generally Favre, *supra* note _.

¹⁷⁴ See *supra* notes 122-173 and accompanying text.

¹⁷⁵ See *supra* notes 122-126 and accompanying text.

“owner” language to “guardian” language in a manner that might threaten animals’ property status.¹⁷⁶ The statute reads:

*No political subdivision may by rule, regulation, ordinance, resolution, or proclamation define or assign a legal status to an animal or animals that is in any manner inconsistent with the status of animals as personal property.*¹⁷⁷

This statute is unhelpful for furthering animal welfare in that it does not highlight animals’ distinctiveness as a form of personal property – it insists that they are property, but provides no elaboration on the special protections needed for this form of property. Indeed, the tone seems to seek to minimize animals’ status, even though there is nothing substantively objectionable regarding the statute. However, perhaps states wishing to emphasize animals’ special protected status but also to retain their property status could use the latter part of Nebraska’s restrictive statute to keep pro-animal statutes from being misconstrued as threatening their property status, while adding language helping to promote the frame that unlike other forms of personal property, animals require humane treatment.

1. *Possible Statutory Language: Option One*

This Article provides some undoubtedly imperfect illustrations of how a state might word such a statute. A statute worded in the manner provided below would presumably apply to typical farm animals as well as to companion animals. Current laws generally provide farm animals significantly fewer protections than are provided to companion animals.¹⁷⁸ “The majority of states exempt from anticruelty protection the use of animals as part of ‘customary,’ ‘normal’ or ‘accepted’ agriculture practices.”¹⁷⁹ The potential statutory language proffered below does not include an exemption for agricultural practices, and it might have the best potential for substantive impact among the three illustrations this Article will present. Such a statute might read:

Vertebrate animals that are owned are a unique form of personal property, in that they are generally capable of suffering pain or distress. The capacity of a vertebrate animal to suffer pain or distress must be appropriately taken into account by its

¹⁷⁶ Neb. Rev. Stat. § 13-405 (2012) (quoted in Hochstadt, *supra* note 172.).

¹⁷⁷ *Id.*

¹⁷⁸ See, e.g., Elizabeth Ann Overcash, *Unwarranted Discrepancies in the Advancement of Animal Law: the Growing Disparity in Protection between Companion Animals and Agricultural Animals*, 90 N.C. L. REV. 837, 837 (2012) (arguing that there is a growing disparity in legal protections for companion animals versus agricultural animals, with companion animals gaining increased protections and agricultural animals losing protections). Many examples of controversial treatment of farm animals could be cited, such as gestation grating of sows and battery caging of chickens. A 2008 Pew Commission study concluded that “the Commission believes that the most intensive confinement methods, such as restrictive veal crates, hog gestation pens, restrictive farrowing crates, and battery cages for poultry, all prevent the animal from a normal range of movement and constitute inhumane treatment.” Pew Commission on Industrial Farm Animal Production, *Putting Meat on the Table: Industrial Farm Animal Production in the United States* 38 (2008), available at http://www.ncifap.org/_images/PCIFAPFin.pdf.

¹⁷⁹ Amy B. Draeger, *More than Property: An Argument for Adoption of the Universal Declaration on Animal Welfare*, 12 DRAKE J. AGRIC. L. 277, 279 (2007).

owner or by any other person controlling or knowingly interacting with the animal. This statute shall not be interpreted in any manner inconsistent with the status of animals as personal property.

A statute using this language or other language to the same general effect could be adopted by states to clarify implications of animals' personal property statute. Although it was perhaps motivated by different reasons for clarification, the Nebraska statute LB 459, quoted previously, illustrates the principle that a statute providing clarification of what it means for an animal to be personal property is within the appropriate purview of legislation.¹⁸⁰

The proposed statute is intentionally broad in requiring "appropriate" consideration of animals' pain or distress, as this article's focus is on the importance of highlighting animals' special status rather than on specific practices related to animals. A legislature of course could choose to provide more specific protection language and still achieve a goal of highlighting the unique nature of animals' property status. Whether the proposed language would require more protection for agricultural animals than the limited federal protections currently provided or "'customary,' 'normal' or 'accepted' agricultural practices"¹⁸¹ might depend upon whether such practices are determined to appropriately take into account the animals' susceptibility to pain or distress.

The proposed statute limits coverage to vertebrates due to practical considerations. Applying the statute to all animals would be overbroad, as some species of animals are not known to or are not suspected to experience pain.¹⁸² Vertebrates are generally susceptible to pain, and although exceptions may exist, less evidence has been produced regarding the susceptibility of invertebrates to pain.¹⁸³ Limitations of protections and proposed protections to vertebrates for this reason are not uncommon.¹⁸⁴ However, legislatures could choose to use broader language, such as replacing the words "vertebrate animals" with something along the lines of "animals known or reasonably believed to be capable of suffering pain or distress." Alternatively, legislatures could assign the protections to vertebrates plus a specific list of invertebrates believed to be capable of suffering pain or distress.

The proposed statute does not use catch phrases such as "living property" or "sentient property," but should not imply an unequivocal rejection of those terms. Although "a unique form of personal property" may entail fewer potential complications than "living property," "sentient property" or "sentient beings" language, if legislatures prefer any of the other possible phrases they may use them without unduly threatening animals' status as personal property, provided that the statute includes appropriate clarification of the terms' meaning and explicitly affirms animals' personal property status.

2. Possible Statutory Language: Option Two

¹⁸⁰ See *supra* note 177 and accompanying text.

¹⁸¹ Draeger, *supra* note 179, at 279.

¹⁸² See *supra* notes 142-144 and accompanying text.

¹⁸³ Octopuses are a notable exception, and would seem to merit consideration of their capacity for pain or distress. See *supra* note 143.

¹⁸⁴ See *supra* note 143.

If a legislature would only accept a statute that is less ambitious, it might find something akin to the language below appropriate. This option makes clear that the statute may not be interpreted to replace or alter laws and regulations or to create new duties, laws or regulations:

Vertebrate animals that are owned are a unique form of personal property in that they are generally capable of suffering pain or distress, and they must be treated with appropriate care. This statute shall not be interpreted to replace or to alter any existing duties, laws or regulations related to animals or to require new duties, laws or regulations related to animals, and shall not be interpreted in any manner inconsistent with the status of animals as personal property.

This option may be less likely to exert a direct influence on agricultural practices because of its statement that it “shall not be interpreted to replace or to alter any existing duties, laws or regulations related to animals or to require new duties, laws or regulations related to animals.” Rather, the statute is focused primarily on the framing issue of highlighting animals’ differences from ordinary personal property, with a simple general substantive requirement that animals be treated “with appropriate care.” Even this less ambitious language would be helpful in bringing our legal descriptions more in line with evolving societal expectations regarding the treatment of animals.

3. *Possible Statutory Language: Option Three*

Option three is the least ambitious version, as it does not reference the need for appropriate care, leaving all substantive protections solely to other existing legislation or to other legislation that might be created. This option would be a simple declaration that animals are different from typical personal property:

Vertebrate animals that are owned are a unique form of personal property, in that they are generally capable of suffering pain or distress. This statute shall not be interpreted to replace or to alter any existing duties, laws or regulations related to animals or to require new laws or regulations related to animals, and shall not be interpreted in any manner inconsistent with the status of animals as personal property.

4. *Adding Language to the Uniform Commercial Code’s Definition of “Goods” to Emphasize Animals’ Special Status*

Animals being sold are considered “goods” under the UCC, which is followed by almost all of the states.¹⁸⁵ Language could be added to the UCC definition of “goods” to emphasize that animals need to be treated in a humane manner without changing substantive rules.

¹⁸⁵ See, e.g., *Midwest Hatchery & Poultry Farms, Inc. v. Doorenbos Poultry, Inc.*, 783 N.W.2d 56, 61 (Iowa Ct. App. 2010) (the sale of livestock is included in the sale of goods” under the UCC); *Land O’Lakes Purina Feed LLC v.*

The first part of UCC 2-105,¹⁸⁶ which defines goods, reads:

§ 2-105. *Definitions: Transferability; "Goods"; "Future" Goods; "Lot"; "Commercial Unit".*

(1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).

Section 2-105 then adds five other parts that are not critical to this proposal.¹⁸⁷ A Part 7 could be added to section 2-105, with language such as:

Part 7:

(7) Animals as goods: although owned animals are goods, nothing in this section is intended to limit laws prohibiting cruelty to animals or requiring humane treatment of animals.

This proposed addition focuses on framing animals' distinctiveness to highlight that they are not *merely* "goods," and that they merit protections that are not afforded to non-sentient goods.

Jaeger, 976 F. Supp. 2d 1073, 1076 (S.D. Iowa 2013) (applying Minnesota law; Minnesota's UCC statute includes weaned pigs as "goods"); *Cottle v Hayes*, 875 P.2d 493, 494 (1994) (horses are "goods" under the UCC).

¹⁸⁶ The full text of UCC section 2-105 reads:

§ 2-105. *Definitions: Transferability; "Goods"; "Future" Goods; "Lot"; "Commercial Unit".*

(1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).

(2) Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are "future" goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.

(3) There may be a sale of a part interest in existing identified goods.

(4) An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined. Any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight or other measure may to the extent of the seller's interest in the bulk be sold to the buyer who then becomes an owner in common.

(5) "Lot" means a parcel or a single article which is the subject matter of a separate sale or delivery, whether or not it is sufficient to perform the contract.

(6) "Commercial unit" means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole.

¹⁸⁷ See *supra* note 186.

The proposed language is pragmatic in its focus on framing rather than specific substantive protections. It is worded in the negative to enhance its chances of being adopted; the proposed language avoids arguments that it would require substantive changes to any existing laws. Of course more ambitious language could be adopted, but a simple elaboration such as suggested in the language proposed would be more likely to be accepted, and would be at the least a helpful step in clarifying animals' uniqueness as property.

B. Encouraging Judicial Declarations of Animals' Distinctiveness as a Specially Protected Form of Property

In addition to possible legislative changes such as addressed above, a parallel approach to encouraging change is persuading *courts* to make special efforts to highlight the distinctive status of animals as property. While illustrations of legislatures emphasizing animals' distinctiveness when describing them as property are thus far rare, several such illustrations exist among reported judicial decisions.

In 1997 the Vermont Supreme Court recognized the importance of not simply using the word "property" without elaboration when describing animals' legal status.¹⁸⁸ In *Morgan v. Kroupa*, the court explained that "modern courts have recognized that pets generally do not fit neatly within traditional property principles. . . . Instead, courts must fashion and apply rules that recognize their unique status."¹⁸⁹ This is not a rejection of property principles, but rather a needed clarification that simply describing companion animals as "property" without communicating that animals are unique as property sends an inaccurate and troubling message.¹⁹⁰

Among reported decisions, one of the most thoughtful in terms of emphasizing that animal property is much more than "mere" property is *Strickland v. Medlen*, a Texas Supreme Court case decided in 2013.¹⁹¹ In *Strickland* a family sued for emotion-based tort damages when an animal control center accidentally euthanized their dog, Avery, who had been picked up after he escaped from the family's back yard.¹⁹²

The *Strickland* court, in a decision written by Justice Don R. Willett, made the difficult decision followed by "the overwhelming majority of states" in the context of negligence that emotion-based damages are not appropriate for the death of a companion animal.¹⁹³ The court noted that the fairly recent *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* also rejects such damages.¹⁹⁴ The court ruled that under Texas law damages related to the death of a dog are

¹⁸⁸ See *Morgan v. Kroupa*, 702 A.2d 630 (Vt. 1997).

¹⁸⁹ *Id.*

¹⁹⁰ See *id.* at 633.

¹⁹¹ 397 S.W.3d 184 (Tex. 2013).

¹⁹² *Id.* at 186.

¹⁹³ *Strickland*, 397 S.W.3d at 191.

¹⁹⁴ *Id.* Section 47 comment m of the RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 47 (2012) discusses emotional harm cases involving pets as follows:

Recovery for emotional harm resulting from negligently caused harm to personal property is not permitted under this Section. Emotional harm due to harm to personal property is insufficiently frequent or significant to justify a tort remedy. While pets are often quite different from other chattels in terms of emotional attachment, an actor who negligently injures another's pet is not liable for emotional harm suffered by the pet's owner. This rule against liability for emotional

measured by market value or by the economic value “derived from its usefulness and services, not value drawn from companionship or other non-commercial considerations.”¹⁹⁵

Although the court’s substantive ruling regarding emotion-based damages is less important to this Article than the language the court used to elaborate on animals’ status as personal property, some of the court’s bases for its substantive holding merit a brief recounting. One concern the court noted was that allowing emotion-based damages would actually *harm* companion animals rather than help them. The court noted that “the vast majority of pet-friendly groups oppose the Medlens’ request for emotions-based damages, lest greater liability raise the cost of pet ownership and ultimately cause companion animals more harm than good.”¹⁹⁶ This is particularly a concern regarding the cost of veterinary medicine, where owners rather than insurers make payments and where demand is price-sensitive.¹⁹⁷ For example, an Associated Press poll in 2010 revealed that “[w]hile most pet owners, 62 percent, would likely get vet care if the bill was \$500, the percentage drops below half when the cost hits \$1,000. The number drops to 35 percent if the cost is \$2,000 and to 22 percent if it reaches \$5,000.”¹⁹⁸

The court also expressed concern about the law valuing human-animal relationships over many close human-human relationships. The court expressed concern that the lawsuit

seek[s] damages they plainly could not seek if other close relatives (or friends) were negligently killed: siblings, step-children, grandparents, dear friends, and others. Our cases reject loss-of-consortium recovery for such losses. Losing one’s pet, even one considered family, should not invite damages unavailable if an actual human family member were lost. Put differently, the Medlens seek emotion-based

harm secondary to injury to a pet limits the liability of veterinarians in the event of malpractice and serves to make veterinary services more readily available for pets. Although harm to pets (and chattels with sentimental value) can cause real and serious emotional harm in some cases, lines—arbitrary at times—that limit recovery for emotional harm are necessary. Indeed, injury to a close personal friend may cause serious emotional harm, but that harm is similarly not recoverable under this Chapter. However, recovery for *intentionally* inflicted emotional harm is not barred when the defendant’s method of inflicting harm is by means of causing harm to property, including an animal. See § 46, Comment d.

(emphasis in original)

¹⁹⁵ *Id.* at 192.

¹⁹⁶ *Id.* at 193-94. See Gerald L. Eichinger, *Veterinary Medicine: External Pressures on an Insular Profession and How Those Pressures Threaten to Change Current Malpractice Jurisprudence*, 67 MONT. L. REV. 231, 234-42 (2006) (asserting that if malpractice costs for veterinary medicine rose to the two percent of overall costs estimated for malpractice claims in human medicine, the costs to pet owners would rise \$360 million per year for pet owners); Phil Goldberg, *Courts and Legislatures Have Kept the Proper Leash on Pet Injury Lawsuits: Why Rejecting Emotion-Based Damages Promotes the Rule of Law, Modern Values, and Animal Welfare*, 6 STAN. J. ANIMAL L. & POL’Y 30, 63-72 (2013). Mr. Goldberg also argued that “contrary to some assertions, there has been no statistically valid study on allowing broad emotion-based damages in pet litigation,” and expressed concern about some animals, particularly the animals of less wealthy owners, receiving less care if increased malpractice costs are passed on to pet owners. *Id.* at 70-75.

¹⁹⁷ See Goldberg, *supra* note 196, at 73-75 (noting, among other points, an Associated Press poll report “that 62% of Americans would likely get veterinary care for \$500, less than half would for \$1,000, about a third would for \$2,000, and only 22% would for \$5,000.” (citing Sue Manning, *AP Poll: Money Is a Huge Consideration in Pet Care*, ASSOCIATED PRESS, June 9, 2010, available at http://www.nbcnews.com/id/37591254/ns/health-pet_health/t/money-woes-factor-pet-care/ (last visited Dec. 30th, 2015).

¹⁹⁸ Manning, *supra* note 197.

damages for the death of “man's best friend” when the law denies such damages for the death of a human best friend. For all their noble and praiseworthy qualities, dogs are not human beings, and the Texas common-law tort system should not prioritize human-animal relationships over intimate human-human relationships, particularly familial ones. Analogous would be anomalous.¹⁹⁹

Allowing emotion-based damages, the court explained, “would also invite seemingly arbitrary judicial line-drawing.”²⁰⁰ The court wondered whether animals such as goldfish, pythons or cockatiels would be the subject of emotion-based claims, and worried that “[t]here seems to be no cogent stopping point, at least none that doesn't resemble judicial legislation.”²⁰¹ On the subject of legislation, the court opined that for such a “sweeping alteration of Texas tort law,” the legislature is the best forum for examining “the myriad policy trade-offs at stake here.”²⁰²

Although the court was correct to disallow emotion-based damages in a negligence context, other approaches allowing more recovery than simple market value or economic value may be appropriate in some contexts. For example, the *Strickland* court noted without further comment that “[o]ther jurisdictions have permitted punitive damages where the wrongdoer injured or killed an animal with malice.”²⁰³

One of the most significant concerns about allowing emotion-based damages in a negligence context is greatly diminished in cases seeking emotion-based damages for *intentional* harm to a companion animal: allowing such claims in intentional cases would not seem likely to significantly increase veterinary costs and thus would likely not lead to less medical care for companion animals. Intentional harm by a veterinarian is presumably rare, and thus it seems likely that rare intentional harm cases against a veterinarian would not cause a spike insurance premiums that would have to be passed along to companion animal owners.²⁰⁴ Further, courts allow enhanced damages in other contexts where the defendant has acted in a reprehensible manner rather than merely being negligent.²⁰⁵ Some courts have that have rejected emotion-based damages in negligence cases have in recent years allowed them in intentional harm cases. For example, while rejecting emotion-based damages in a negligence claim, in 2012 a California appellate court allowed such a claim based on intentional harm to a companion animal.²⁰⁶ In 2010 a Washington appellate court similarly allowed emotion-based damages based on intentional harm while

¹⁹⁹ *Strickland*, 397 S.W.3d at 195.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 196.

²⁰³ *Id.* at 193 n.58.

²⁰⁴ However, some concerns applicable to allowing emotion-based damages for harm to companion animals in negligence actions also apply to intentional harm cases. For example, the problem of leapfrogging over many very close human/human relationships where emotion-based damages are not permitted in either negligence or intentional tort claims would still remain. *See supra* note 199 and accompanying text.

²⁰⁵ For example, punitive damages are generally permitted in intentional harm and reckless misconduct cases. *See Jim Gash, Solving the Multiple Punishments Problem: A Call for a National Punitive Damages Registry*, 99 NW. U. L. REV. 1613, 1619 (2005) (“While the particular standard varies slightly between states, it is generally sufficient to prove that the defendant's conduct was ‘reckless’ or ‘willful and wanton’”).

²⁰⁶ *Plotnik v. Meihaus*, 146 Cal.Rptr.3d 585, 601 (2012).

rejecting emotion-based damages based on negligence.²⁰⁷ These rulings seem likely to be followed by some but not all other jurisdictions.²⁰⁸

Although California rejects emotion-based damages in negligence claims involving companion animals, in recent years it has expanded damages in such actions beyond market value. In 2011 the California appellate court case of *Kimes v. Grosser* addressed an allegation of intentional injury to the plaintiff's cat.²⁰⁹ The court concluded that the "plaintiff may present evidence of the bills incurred to save the cat's life and is entitled to recover the reasonable and necessary costs caused by someone who wrongfully injured the cat. Defendants are entitled to present evidence why the costs were unreasonable under the circumstances."²¹⁰ In 2012, a California appellate court in *Martinez v. Robledo* extended *Kimes*' holding to cases involving negligence.²¹¹ Although *Martinez* did not award emotion-based damages, it agreed with *Kimes* that pet owners should be permitted to recover the reasonable cost of an injured pet's care and treatment from a tortfeasor.²¹² This approach may provide a reasonable alternative to limiting recovery to market value while still appropriately rejecting emotion-based damages, although it will not be relevant in cases where an animal is negligently killed without incurring medical expenses.

Regardless of whether its market value approach is the best measure of damages in all cases appropriately rejecting emotion-based damages, the central aspect of *Strickland* for purposes of this Article is that the Texas Supreme Court needed to directly confront the fact that a companion animal is considered property under the law. For purposes of this Article the primary significance of the *Strickland* case is not the specific merits of its ruling, but rather its emphasis on the special status of animals in a case in which it was called to affirm that they are a form of property.

By the author's rough count, the *Strickland* court emphasized that companion animals are more than merely typical property twenty-two times in its opinion. The decision begins with a quote from Lord Byron praising the noble attributes of dogs,²¹³ followed by the sentence "Texans love their dogs."²¹⁴ The court continued:

[t]hroughout the Lone Star State, canine companions are treated—and treasured—not as mere personal property but as beloved friends and confidants, even family members. Given the richness that companion animals add to our everyday lives, losing 'man's best friend' is undoubtedly sorrowful. Even the gruffest among us tears up (every time) at the end of Old Yeller.²¹⁵

Other examples of the court's repeated efforts to emphasize the distinctive nature of animals as property include:

²⁰⁷ *Womack v. Von Rarden*, 135 P.3d 542, 546 (2010).

²⁰⁸ Vermont has rejected this argument. *See Sheele v. Dustin*, 988 A.2d 697, 701 (rejecting emotion-based damages both for negligence and for intentional tort claims, but allowing punitive damages in intentional tort cases).

²⁰⁹ 126 Cal. Rptr. 3d 581 (Cal. App. 2011).

²¹⁰ *Id.* at 586.

²¹¹ 147 Cal. Rptr. 3d 921 (Cal. App. 2012).

²¹² *Id.* at 926.

²¹³ *Strickland*, 397 S.W.3d at 185 ("Beauty without Vanity, Strength without Insolence, Courage without Ferocity, And all the Virtues of Man without his Vices").

²¹⁴ *Id.*

²¹⁵ *Id.*

[A] beloved companion dog is not a fungible, inanimate object like, say, a toaster. The term ‘property’ is not a pejorative but a legal descriptor, and its use should not be misconstrued as discounting the emotional attachment that pet owners undeniably feel.²¹⁶

And:

No one disputes that a family dog – ‘in life the firmest friend’ – is a treasured companion. But it is also personal property, and the law draws sensible, policy-based distinctions between types of property.²¹⁷

Although the *Strickland* decision specifically involved a dog, the court made clear that it viewed all companion animals as having a different status than ordinary property. While citing statistics reflecting how strongly Americans value companion animals in general, the court stated “it is unsurprising that many animal owners view their pets not as mere personal property but as full-fledged family members, and treat them as such.”²¹⁸

Strickland’s focus on companion animals rather than sentient animals in general makes sense given that the case sought emotion-based damages for a companion animals. However, the capacity to suffer makes animals distinctive from other property regardless of whether they are beloved companions. Courts addressing the property status of other sentient animals, such as farm animals, should also go to lengths to emphasize their distinctiveness from other forms of property. Although California’s *Martinez v. Robledo* also addressed recovery for tortious harm to a companion animal, the court provided an example of using broader language highlighting the distinctiveness of all sentient animals as a form of property. The court stated “In California, the Legislature has recognized since 1872 that animals are special, sentient beings, because unlike other forms of property, animals feel pain, suffer and die.”²¹⁹

VI. CONCLUSION

Doing more to recognize and highlight animals’ special status as property that is capable of pain or distress may help us to attain better treatment for animals while preserving an animal welfare paradigm. Our laws regarding animals need changes, including changes in how we frame the matter of animals’ status as property. Gradual acceptance of societally harmful legal standing for at least some animals is unfortunately a real possibility if courts and legislatures do not continue evolving the animal welfare paradigm, and society is appropriately calling for our legal system to do more for animals under the human responsibility-focused animal welfare banner.

²¹⁶ *Id.* at 185-86.

²¹⁷ *Id.* at 197-98.

²¹⁸ *Id.* at 187.

²¹⁹ *Martinez*, 147 Cal. Rptr. 3d at 926.