

PETS: PROPERTY AND THE PARADIGM OF PROTECTION

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“All animals are equal, but some animals are more equal than others.”¹

I. INTRODUCTION

Humans are unique because of the enormous range of emotions they are able to express, their inclination towards technical thinking, their vast ability to communicate and their capabilities for justification, compassion and hate. *Homo sapiens*, as animals, are still prone to utilize survival instincts and have yet to defy many evolutionary principles. Humans continue to function in similar ways to their ancient ancestors, as do most mammals and members of the animal kingdom. Yet humans manifest the belief that they are beyond evolution, that they have outgrown their ‘evolutionary roots,’ that because of their position at the ‘top of the food chain’ they possess the power to manipulate and control every creature that falls below them in the hierarchy of beings. As such, and unfortunately so, humans often do not give equal respect to the diversity of other animals who inhabit this planet. These other animals are used for labor, food, scientific research and companion purposes, but generally they are considered ‘lesser beings’ because of they lack those capacities that make humans ‘special.’ While humans remain human all other animals are relegated to the category of *property*. But are these other animals more than inanimate property?

According to statistical data, in the United States there are roughly 77.5 million cats and 65 million dogs held as domestic pets.² Significantly problematic is when human’s mistreat their animals and pets. Any type of animal abuse is reprehensible, but we as a society have forcibly domesticated animals and cause them to rely on human generosity to meet their needs for shelter, hydration, sustenance, and company. Historically, many animals that are currently considered pets were actually once untamed animals (*faeae naturae*) who were forced to fend for themselves in the wilderness. By bringing these animals into our homes we have greatly reduced their instinctive, self-preservation behaviors. As such, many domesticated animals are not capable of caring for themselves in a non-domesticated, “natural” setting. Basically these animals have been reduced to pure reliance on their owners for survival. This absolute reliance is similar to that of a young child, an organism who is completely unable to care for itself and forced to relying entirely on others for necessities.

Pets are held captive, their physical freedom is restrained by collars and leashes, fences and cages. Pet owners exercise complete dominion and control over their animals, as property or

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¹ George Orwell, *Animal Farm*, available at http://www.quotationspage.com/quotes/George_Orwell (last visited March 27, 2006).

² See generally United States Pet Ownership Statistics provided by the American Pet Products Manufacturers Association (APPM) 2003-2004 National Pet Owner’s Survey, at <http://www.hsus.org> (last visited March 22, 2006).

chattels, relegating them to live within the bonds and convenient legal fictions concocted by society. Thus, because the public, through its actions has “domesticated” animals, often to animals’ detriment when forced to live with cruel, abusive and neglectful owners, we must afford animals, the same legal remedies that we would afford any other helpless creature, like an infant child.

Society lacks sufficiently integrated, and reliable mechanisms to monitor domesticated animals’ wellbeing. The United States Constitution is the primary backbone used to govern its citizens, but we apply the Constitution’s tenets only to human animals. To help protect animals from harm and further, to promote necessary public policy that discourages preferential treatment for humans over other animal species, the Constitution, specifically the Fourth Amendment, requires re-conceptualization. Primarily, by changing animals categorization in society from ‘mere’ property to an alternative quasi-property classification, it is then possible to promote better animal care and treatment by allowing stricter standards for animal ownership and maintenance. Also, changing animals from ‘property’ to a quasi-property, or some other entirely new classification, potentially allows reduced restrictions when domesticated animals are removed from owners who are suspected of abuse and mistreatment.

This paper will address the issues of improved treatment of domesticated animals and their proposed rights based on a re-conceptualized view of animals as property . In addition, it discusses how this new categorization or transmogrification of animals carries the potential to affect search and seizure of abused animals under the Fourth Amendment. Section Two provides a historical analysis of evolution of legal property definitions and addresses how society should distinguish between animals, especially domestic pets, and other more traditional forms of property. In Section Three develops a constitutional analysis of why animals fall outside the scope of the Fourth Amendment as it relates to an individual’s property. Finally, Section Four contains suggested policy recommendations with regard to the seizure of abused and mistreated animals in order to protect the animals’ rights of well-being while continuing to respect the constitutional rights of the individual pet owners.

II. PROPERTY ANALYSIS

A. THE DEFINITION OF PROPERTY AND ITS HISTORICAL EVOLUTION

Chattel, the legal terminology for moveable and transferable personal property, has embraced various meanings throughout history.³ Personal chattel “may be called so in two respects: one because they belong immediately to the person of a man . . . [T]he other for that being any way injuriously withheld from us.”⁴ When an individual owns property, a “thing,” or chattel that person exercises dominion and control over the object and possesses the ability to sell, lease or otherwise transfer that property.⁵ The basic definition with relation to property has remained virtually the same, however what objects included under the property definition umbrella have evolved nearly consistently with society’s morals and principles. Simply stated, property is something that belongs to us, whether it be a car, computer or chicken coop. Does this mean a person can do what he will with his property without any adverse consequences? Not necessarily. While the United States Constitution confers broad property rights to its citizens, common principals and statutory laws exist to maintain the social order and stability.

³ BLACK’S LAW DICTIONARY 251 (8th ed. 2004).

⁴ *Id.*

⁵ 4 AM. JUR. 2D ANIMALS § 5 (1964).

Prior to the Thirteenth Amendment which states, “Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction,” Caucasian citizens were legally entitled to own slaves.⁶ Slaves were treated as less than human. They were mere “property.” As such, they were subject to torture, rape and other abuses at the hands of their owners.⁷ United States society continued to progress technologically and morally as reflected in its Constitution, and as consequence:

The . . . United States Civil War led to the end of chattel slavery in America. Lincoln’s Emancipation Proclamation of January 1, 1863 was a symbolic gesture that proclaimed freedom for slaves within the Confederacy, although not for those in the strategically important border states of Tennessee, Maryland and Delaware. However, the proclamation made the abolition of slavery an official war goal and it was implemented as the Union retook territory from the Confederacy. Legally, slaves within the United States remained enslaved until the final ratification of the Thirteenth Amendment to the Constitution in December of 1865, eight months after the cessation of hostilities in the Civil War.⁸

It is nearly impossible to imagine subjugating another human to a life of servitude in today’s culture, yet slavery was a notorious presence in this nation’s history and, unfortunately, it continues as a practice in many countries and cultures throughout the world.

Similarly, in England, serfdom was the forced labor of agrarian workers on wealthy land owners property, in return for their protection and the privilege to work the landowner’s property.⁹ “Serfs differed from slaves in that serfs were not property themselves and could not be sold apart from the land which they worked.”¹⁰ Yet serfs, like animals, were similarly treated as something less than human.¹¹

Additionally, in the newly developing United States in the 19th Century, men traditionally treated their wives and children as personal property.¹² Women under the dominion and control of their husbands or fathers possessed few rights of their own, as a continuation of English common law, which found a receptive audience in the United State’s cultural ideals.¹³ A wife’s primary duties were to care for her family and home. For a time a woman was not even capable of owning her own property.¹⁴ The role and lack of legally recognizable rights relegated women to a category that was similar to chattel. Over time women gained important rights that put them on nearly equal footing with men, although major legal and practical differences still separate or distinguish the legal rights of the sexes (e.g. dower).

⁶ U.S. CONST. amend. XIII.

⁷ Wikipedia The Free Encyclopedia, *History of Slavery in the United States*, available at http://en.wikipedia.org/wiki/History_of_Slavery_in_the_United_States (last visited March 13, 2006).

⁸ *Id.*

⁹ Wikipedia The Free Encyclopedia, *Serfdom*, available at <http://en.wikipedia.org/wiki/Serf> (last visited March 14, 2006).

¹⁰ Serfdom, *supra* note 9.

¹¹ *Id.*

¹² Women’s International Center, *Women’s History in America*, available at <http://www.wic.org/misc/history.htm> (last visited March 13, 2006).

¹³ Women’s History in America, *supra* note 11.

¹⁴ *Id.*

It is important to understand how the legal and social categorization of slaves, serfs, and women has evolved historically. Two cognizable groups, once deemed chattel, gained significant statutory rights. While previously marginalized as merely “property,” almost completely subjugated to the unlimited interests and control of the owner, they now possess the same rights to which they were formerly subjugated. Also to be considered is the scheme of legal personhood.¹⁵ ‘Person’ is generally assumed to mean a human being, but corporations additionally receive the designation for purposes of jurisprudential standing and other legal necessities.¹⁶ A corporation is a business façade, despite being based on its person members, while animals are a living creatures. Why should a conceived entity receive protections and privileges that an animal does not?

A final category to contemplate are the rights of children. Under Greek and Roman law, unborn children enjoyed little protection; prosecution of abortion was based conceptually on “a violation of the father’s right to his offspring.”¹⁷ Moreover, a Roman father could sell his children or put them to death if he chose to do so, without cause.¹⁸

Children as individuals have certain, inalienable rights, but family (or parental autonomy) is related primarily to the rights parents possess with respect to the wellbeing and upbringing of their children. In *MEYER v. NEBRASKA*, 262 U.S. 390 (1923) the Justices inferred that parents have specific enumerated and un-enumerated privileges and liberties, some specifically with regard to raising their children:

While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated.

Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.¹⁹

Clearly children are not property in the same sense that slaves and women were considered chattel, but because society considers children unable to make rational and informed decisions regarding their personal welfare, parents and other members of society are allowed to step in and make decisions on the child’s behalf. It appears that, for a time when the child is a juvenile, certain of the child’s rights are transferred to the parents or another informed guardians. Yet, while, “the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally . . . [and] the individual has certain fundamental rights which must be respected,” society still places a limitation on children’s rights and liberties because it is an appropriate means to ensure children are kept safe and healthy, are sufficiently educated, are instilled with proper morals and ethics to independently function as citizens when emancipated.²⁰

¹⁵ Mary Midgley, *Persons and Non-Persons in IN DEFENSE OF ANIMALS* 52-62 (Peter Singer ed., 1985).

¹⁶ *Id.*

¹⁷ *Roe v. Wade*, 410 U.S. 113, 131 (1973).

¹⁸ Forsyth, *CUSTODY OF INFANTS* § 8 (1850).

¹⁹ *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

²⁰ *Id.* at 402.

What this history tells us is that the notion of “property” evolves with morality and sophistication in thought of a progressive culture.

B. ANIMALS AS ‘PROPERTY’

Domesticated animals receive the same designation under United States law as personal property.²¹ However, animals differ from ‘typical’ property because they are not inanimate objects. If you kick your television set you only succeed in hurting your foot and probably damaging your T.V., to boot. But that swift kick does not cause the appliance any physical pain. A television set is inanimate property. In contrast, if you kick a domesticated pet you can cause serious damage *and* physical pain to the animal. Similarly, humans are fully capable of wounding wild animals, but the distinction remains that domesticated animals reflect a reduced instinctive for self defense or self preservation because they are accustomed to the presence of people, if not fully dependent on humans, and thus the animal is not frightened by human presence. As discussed previously, domesticated animals rely on their human owners for food, water and shelter, they become companions in the home, not “objects.” They are trained to be obedient and not to ‘bite the hand that feeds them.’

Animals communicate in different forms than humans, but their doing so does not reduce their abilities to feel, sense or experience emotions. According to the People for the Ethical Treatment of Animals, animals “[A]re individuals with feelings, they experience love, happiness, loneliness and fear, just as . . . [p]eople do.”²² A dog’s wagging tail or a cat’s soft purr are proof that a reciprocal relationship exists between a pet and its owner, that distinguishes this form of ‘property’ from another.

Property laws are derivative of man’s convenience.²³ “Rights are either legal or metalegal. They are either conceived and created by law; or they exist as aspects of reality prior to their legal annunciation, and are merely recognized by law. Whatever rights are accorded man . . . [A]re granted solely on the grounds that they will further some real human good: they will somehow serve to enhance the quality of life, to make life richer, better, more satisfactory.”²⁴ Society chose to place animals in a position of subjugation, often to eradicate their freedom and to bestow them with no, or far fewer legal rights than humans. In the environment, the ecological hierarchy of the “food chain” determines which species trump one another, but that is a natural and evolutionary, not a cultural, decision. In his book, *The Origin of Species*, Charles Darwin hypothesized that the best, fittest and most superior of organisms would survive and repopulate future generations.²⁵ Humans have evolved into arguably the most intelligent of all species. Yet at what cost? Does intelligence permit the near total domination and utilization of lesser evolved organisms?

It has been theorized that animals deserve a new status: equitable self ownership.²⁶ This innovative category would provide certain, significant impacts on domesticated animals, “First,

²¹ 4 AM. JUR. 2D ANIMALS § 5 (1964).

²² PETA Vegetarian Starter Kit, *Everything You Need to Eat Right for Your Health, Animals and the Earth*. People for the Ethical Treatment of Animals. Norfolk Virginia. See also <http://www.PETA.org> (last visited March 17, 2006).

²³ David Favre, *Equitable Self-Ownership for Animals*, 50 DUKE L.J. 473, 478 (2000).

²⁴ Iredell Jenkins, *The Concept of Rights and the Competence of Courts*, 18:1 AM. J. JURIS. 1 (1973)

²⁵ Charles Darwin, *The Origin of Species: By Means of Natural Selection or the Preservation of Favoured Races in the Struggle for Life*, New York, F.Ungar Pub. Co., (1956).

²⁶ Favre, *supra* note 21, at 485.

the animal would have access to the legal system, at least in what has historically been the realm of equity, for the protection and assertion of his or her interests. Secondly, the human holder of legal title would, like a traditional trustee, fulfill fiduciary obligations to the equitable owner of the animal, that is the animal himself.”²⁷ Further, equitable self ownership for animals would shift the position of the animal owner from trustee to guardian, would allow the self owned animal to hold equitable interests in other property, enjoy additional expanded property rights, and would be able to access tort law principles to protect their individual interests.²⁸ Self-ownership for animals can exist in the same sense that it exists for infant children. Parents do not have title or ownership of their infant child, but they retain physical possession and control over the being.²⁹ Professor and author, Steven M. Wise, suggests:

The paradigm of all nonhuman animals as legal things has presented formidable obstacles to the development of personhood for nonhuman animals under the common law, indeed throughout Western law. But the modern rule of the legal thing hood of nonhuman animals was borrowed from ancient laws whose foundations have been destroyed and whose mechanical application today violates modern notions of fundamental principles of justice.

The legal thing hood of nonhuman animals has existed continuously since the dawn of law . . . It has cumbered nonhuman animals for so long because even the most fundamental legal rights of beings will go unrecognized by a society that accepts a hierarchical cosmology in which those beings are seen as inherently inferior or that fails to connect law to the values of liberty and equality.³⁰

Changing the status of nonhuman animals to one where the animals possess equitable self ownership of themselves is fundamental to encouraging social justice and concomitantly helps to recognize and facilitate animal protection rights.

C. AN ANALOGY

It is helpful to analogize domestic animals to young children.³¹ As stated before, domesticated animals and children are both incapable of meeting their requisite needs for hydration, sustenance, shelter and health care. Both domesticated animals and (infantile) children need a more sophisticated voice to speak on their behalf because both are physically powerless to verbally communicate. If either an animal or infant are abused, the only manner of communicating the mistreatment is based on physical (and possibly emotional) evidence. A dog cannot tell you that his owner kicks him daily, nor can a child tell you that he is the victim of abuse or neglect.

Imagine for instance, that as you walk past a neighbor’s home you observe their 10 month old infant sitting alone in the backyard. The child looks frail and there is no food or bottle in sight. The child is exposed to the elements. The child is crying loudly. But no one rushes from the house to check the infant’s condition. Most passersby would consider this negligence on

²⁷ *Id.* at 474.

²⁸ Favre, *supra* note 21, at 502.

²⁹ *Id.* at 483.

³⁰ Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. ENVTL. AFF. L. REV. 471,476, 545 (1996).

³¹ For the duration of the paper the term “children” or “child” will refer to an individual of such an age that they are incapable of being self sufficient.

behalf of the parents or the child's guardian, if not outright child abuse. Society aims to protect children primarily because of their inability to pursue self-help. A child has little or no means for self protection, sustenance or escape if being mistreated.

What would be different about a domesticated animal in the same circumstances? Consider the same situation, but instead the creature in the backyard is a 10 month old puppy. The puppy looks frail. There is no food or water dish in sight. The puppy is whining and chained. It is unprotected from the elements. Here, the reaction is different because many people do not consider animals and pets to deserve the same attention and care that an infant child requires or deserves. But viewing the situation from the standpoint that both creatures are mistreated, neither possess the ability to exit the situation, cannot verbally request help, are incapable of defending themselves from harm or inattention, why should one situation inspire outrage and the other barely a passing concern, if not irritation at the barking? Perhaps if we re-conceptualized domesticated animals as being self-owned, and elevate them to more than mere personal property, the societal response would be different.

III. A CONSTITUTIONAL ANALYSIS

A. DUE PROCESS

The privileges of both procedural and substantive due process, provided by the United States Constitution and selectively incorporated by the states through the 14th Amendment, determine the manner in which federal and state laws function and what the laws can and cannot prohibit. Due process is important in relation to property because fundamental components of liberty and democracy require the individual property owner have particularized rights prior to confiscation.

Early in our judicial history, various jurists attempted to form theories of natural rights and natural justice that would limit the power of government, especially regarding property and the rights of persons. Opposing *vested rights* were jurists who argued that the written constitution was the supreme law of the State and that judicial review could look only to that document — not to the *unwritten law of natural rights*. Opponents further argued that the *police power* of government enabled legislatures to regulate the holding of property in the public interest, subject only to specific prohibitions of the written constitution.³²

Addressing the due process issues regarding removal of mistreated domestic animals assures that citizens' essential civil liberties will not be disregarded by government. Due process requires legislation to be fair and reasonable in content and to further a legitimate governmental objective.³³ The Court in *WOLFF v. MCDONNELL* declared, "The touchstone of due process is protection of the individual against arbitrary action of government, whether the fault lies in a denial of fundamental procedural fairness, or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective."³⁴ In order to ensure that an individual's substantive due process rights are not violated law enforcement officers' actions

³² Wikipedia The Free Encyclopedia, *Substantive Due Process: Development and Use as Legal Doctrine*, available at http://en.wikipedia.org/wiki/Due_process (last visited April 23, 2006).

³³ BLACK'S LAW DICTIONARY 538-39 (8th ed. 2004).

³⁴ *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974).

should not be “arbitrary, egregious [or] outrageous as to shock the contemporary conscience.”³⁵ Hence, if an officer intends to confiscate a domesticated animal he believes is being mistreated and abused by its owner, the officer should have a reasonable belief of the mistreatment and should not base his assumption on arbitrary or inadequate information.

There are many people in society who would argue that because animals are classified as personal property, there should never be rationale for confiscating a pet. Yet, every state has passed laws that forbid animal cruelty.³⁶ The typical state statute requires that an animal be provided with adequate care, shelter and food; that the owner not neglecting the needs of the animal; the animal be maintained in sanitary conditions and inflicting unnecessary pain and suffering of the animal be avoided.³⁷ Therefore, a law enforcement officer does not violate an individual owner’s substantive due process rights when an animal is seized when it manifests signs of abuse by the owner. This seizure by the law enforcement officer hardly constitutes arbitrary, egregious and outrageous action prohibited by the Fourth Amendment.³⁸

However, entering upon a animal owner’s real property with the intention of seizing the resident’s personal property requires a reasonable belief of illegality held by the law enforcement officer. Yet, as noted later, the fluid concepts of reasonable belief and the emergency doctrine often serve to frustrate the timely enforcement of animal cruelty laws.

Procedural due process requires that an individual be provided notice and an opportunity to be heard before he or she is deprived of a protected property interest. “[A] person must be afforded opportunity for some kind of a hearing, except for extraordinary situations where some valid government interest is at stake that justifies postponing the hearing until after the event.”³⁹ Additionally, “the formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of subsequent proceedings.”⁴⁰ Because domesticated animals are currently deemed personal property under law, in order to confiscate an individual’s property (the harmed pet) all aspects of constitutional procedural due process must first be met. An explicitly stated law must be violated before property can be confiscated without warning. This is problematic in the sense that, regardless of the evidence that an animal is being abused and mistreated by its owner, it is extremely difficult to remove the animal from its owner unless the owner is provided advance notice of a potential deprivation of his or her property interests and subsequent to confiscation of that property a timely trial must be held. In family law, the process leading up to termination of parental rights includes: a filed report with the appropriate state agency, a follow up investigation, provision of assistive services for the parents and child, initial intervention either through summary seizure or temporary custody of the child, and finally termination of parental rights by the State.⁴¹ A similar process should be applicable to animals; abuse intervention through seizure or temporary custody prior to official termination of ownership rights would be both reasonable and equitable. Further, this confiscation of the pet would allow investigators to document the abuse and build a case for trial.

The notice aspect of procedural due process with regard to animals is beneficial because it serves to warn the owner that others are aware of his continuing animal mistreatment; he is

³⁵ *County of Sacramento v. Lewis*, 523 U.S. 833, 841 (1998).

³⁶ *See* Animal Rights Law: Anti-Cruelty Statutes, <http://www.animal-law.org/statutes/> (last visited March 22, 2006), contains anti-cruelty statutes of the fifty states and the District of Columbia.

³⁷ MICH. COMP. LAWS ANN. § 750.50 (1970).

³⁸ *Id.*

³⁹ *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971).

⁴⁰ *Id.*

⁴¹ *In Re Juvenile Appeal*, 455 A.2d 1313 (1983).

then left with the option to either amend his behavior or to continue his mistreatment, but suffer the consequent deprivation of his property and the possibly other related legal consequences. Alternatively, the notice aspect can be irrelevant if the owner does not heed the warning and continues to abuse his animal.

The hearing aspect of procedural due process is important to the owner because it allows the person to offer an explanation for his actions. The problem arises when individuals want the hearing PRIOR to confiscation of their threatened animal, usually by claiming that their notice was insufficient. According to *MATHEWS V. ELDRIDGE*, a balancing test is to be applied with relation to the timing and scope of the required due process hearing.⁴² The Eldridge test provides that the required due process hearing for potential property deprivation does not necessarily need to occur prior to the deprivation of the protected property.⁴³ Whether, and to what extent, a prior evidentiary hearing should occur is determined by weighing: one, the importance of the individual interest involved; two, the value of specific procedural safeguards to that interest; and three, the government's interest in fiscal and administrative efficiency.⁴⁴ As a general principle, society should not tolerate the torture and abuse of animals, whether they are wild, domesticated, or used for animal husbandry. Thus, while there exists a valid individual interest that a person's property is not arbitrarily confiscated, there is an equally valid interest that an animal not remain in an environment where it is needlessly subjected to mistreatment and cruelty. If as a culture we wish to protect innocent beings and maintain their physical and emotional wellbeing to the greatest extent possible, it goes against public policy to let an individual's interest to personal property override the animal's interest to be free from harm.

The second prong of the test relates to weighing the value of the procedural safeguards. It also favors of a hearing after deprivation.⁴⁵ If an individual mistreats his domesticated pet or animal then he is already aware of the fact that he is doing something wrong and inhumane. Perhaps this implicit knowledge rises to the level of 'moral notice' because any sane person understands that beating, withholding sustenance from, or tormenting an animal is *prima facie* cruel. Yet, in addition to the 'moral notice' argument, generally an individual has some form of prior notice before deprivation either through neighbor complaints, visits from members of the American Society for the Prevention of Cruelty to Animals (ASPCA) or warnings by law enforcement personnel.⁴⁶ Therefore, when balancing property rights against the welfare of an animal, the value of a hearing prior to deprivation in addition to previous notice does not outweigh the interests of removing the animal from an existing abusive environment.

The third prong of the Eldridge test considers the government's interest in fiscal and administrative efficiency.⁴⁷ This is likely the most difficult prong to justify because government, in a larger sense, has never, historically, articulated an especially significant rationale to protect domesticated animals. However, an expansive interpretation of the police power doctrine (which notes that government possesses broad rights to protect health, safety, welfare and uphold morals) would allow a presumption that it is in the government's best interests to withhold property from individuals who mistreat their domesticated animals or at least temporarily remove

⁴² *Mathews v. Eldridge*, 424 U.S. 319 (1976).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Mathews*, 424 U.S. at 319.

⁴⁶ The American Society for the Prevention of Cruelty to Animals originated nearly 130 years ago with the goal of preventing and rectifying abuse towards animals. The ASPCA has a Humane Law enforcement department to investigate and educate about animal abuse. For more information *see*, <http://www.aspc.org/>

⁴⁷ *Mathews*, *supra* note 44.

the animals from that abusive environment. In short a legitimate government interest is advanced, both fiscally and administratively, if confiscation of mistreated animals is allowed prior to a due process hearing.

B. SEARCH AND SEIZURE UNDER THE FOURTH AMENDMENT AND THE EXIGENT CIRCUMSTANCE OR EMERGENCY DOCTRINE

The Fourth Amendment of the United States Constitution mandates that, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures, shall not be violated . . . but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.”⁴⁸ Standard search and seizure policy is that a judge must issue a search warrant for the specified premises and only then may law enforcement officers search the premises according to the limitations of the signed warrant, though “it goes without saying that the Fourth Amendment bars only *unreasonable* searches and seizures.”⁴⁹ Yet, the United States Supreme Court has recognized “that a warrantless entry by criminal law enforcement officials may be legal when there is compelling need for official action and no time to secure a warrant.”⁵⁰ If law enforcement officers are under a reasonable belief that the extant situation constitutes an emergency, they may abandon the legal need to obtain a warrant in order to protect human life.⁵¹

The so called ‘Exigent Circumstances’ or ‘Emergency Doctrine’ primarily allows police or other designated authorities to avoid the procedures and the time that it takes to obtain a warrant to search an individual’s premises or property. In *UNITED STATES V. CERVANTES*, the Court noted that, “The emergency doctrine allows law enforcement officers to enter and secure premises without a warrant when they are responding to a perceived emergency . . . [the doctrine is] based on and justified by the fact that, in addition to their role as criminal investigators and law enforcers, the police also function as community caretakers.”⁵² To justify a warrantless search, certain criteria must first be met:

One, the police must have reasonable grounds to believe there is an emergency at hand and an immediate need for their assistance *for the protection of life or property*. Two, the search must not be primarily motivated by intent to arrest or seize evidence. Three, there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.⁵³

Analyzing the Fourth Amendment and its common law exception of the Exigent Circumstances or the Emergency Doctrine together, various interpretations exist that could apply to the confiscation of animals from abusive environments. One approach is that the doctrine only applies to human emergencies. Thus, a domesticated pet that suffers in an abusive setting would not qualify as an emergency situation, even though the animal’s life may be at stake. An alternative approach would be to provide to the term “emergency” a broader scope, so as to

⁴⁸ U.S. CONST. amend. IV.

⁴⁹ *Skinner v. Railway Labor Executives’ Assn.*, 489 U.S. 602 (1989). (Emphasis author’s own)

⁵⁰ *Michigan v. Tyler*, 436 U.S. 499, 509 (1978).

⁵¹ *Tyler*, 436 U.S. at 509.

⁵² *United States v. Cervantes*, 219 F.3d 882, 888-89 (9th Cir. 2000).

⁵³ *Id.* at 888. (emphasis author’s own)

include all situations where any life is threatened, be it human life or animal life. Furthermore, as noted above in the CERVANTES, *supra*, criteria, the historic emergency exception to the Fourth Amendment requires protection of “life or property.”⁵⁴

The current approach, which is the least optimal manner to view an emergency situation, is that the animal itself is (under current common law) personal property of the owner undeserving of immediate protection. A more enlightened alternative is to view the animal as a living being whose life should be valued, protected and which possesses a right to ‘well being.’

C. CURRENT LEGAL CONTEXT FOR THE PROBLEM

All states have enacted laws that prohibit cruelty towards animals.⁵⁵ Yet, due to the limiting statutory language used or the inability or lack of resources to enforce the laws, or a combination of the two, animal abuse still occurs.⁵⁶ Current animal anti-cruelty laws are too lenient in their consequences and further, are not sufficiently enforced. In SCOTT V. JACKSON COUNTY, 403 F.Supp.2d 999 (2005) the plaintiff, owner of some 400 plus rabbits, brought an action against the County for violation of her constitutional due process rights. According to the facts in the record, animal control officers were sent to inspect the rabbits at the behest of a concerned neighbor.⁵⁷ During their visit to the premises on May 8, 2001, officers found the rabbits in “deplorable condition[s]” with little to no water or food.⁵⁸ The officers gave aid to the rabbits after unsuccessfully attempting to contact the rabbits owner.⁵⁹ The officers returned the next day and related the neighbor’s complaint and their concerns to the plaintiff with regard to the rabbits’ conditions; one of the officers issued the plaintiff a citation for animal neglect and informed her that the rabbits would continue to be monitored by the County.⁶⁰ As a matter of procedural due process, the plaintiff had sufficient notice at this point, May 9, 2001, that her animals were in desperate need of immediate remedial care. Over the course of the next three months (from May 2001 to August 2001) animal control officers repeatedly returned to inspect the rabbits; during this time the owner refused to expend additional resources, or time, to maintain her animals. On August 1, 2005, “sheriff”’s deputies served the warrant and seized approximately half of the rabbits on the property.⁶¹ This was the first instance of seizure on behalf of the government, although law enforcement agents were previously informed as to the rabbits’ mistreatment and abuse, beginning as early as May 8, 2005. The Court commented: “Here, Animal Control officers determined that seizure of the rabbits on August 1, 2001, was necessary to prevent further neglect of the animals, given their conditions and the plaintiff’s repeated failure to provide adequate shelter, food, water or veterinary care.”⁶² Yet, if there was adequate knowledge of the abuse inflicted on these rabbits, why was the county forced to wait nearly three months to seize rabbits known to be dying from dehydration, lack of sustenance and

⁵⁴ *Id.* (emphasis author’s own).

⁵⁵ See Lewis, *supra* note 30.

⁵⁶ See generally The Humane Society of America (HSUS) First Strike Campaign 2003 Report of Animal Cruelty Cases, <http://files.hsus.org/web-files/PDF/2003AnimalCrueltyRprt.pdf#search=‘animal%20cruelty%20statistics’> (last visited March 22, 2006).

⁵⁷ Scott v. Jackson County, 403 F.Supp.2d 999, 1003 (2005).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 1004.

⁶¹ Scott, 403 F.Supp.2d at 1004.

⁶² *Id.* at 1007.

defective shelter? Perhaps the law enforcement agents were reluctant to confiscate the rabbits because they were concerned about claims of due process violations by the owner. Removing the rabbits before issuance of a warrant would have exposed the agents up to legal liability.

In *McCLENDON V. STORY COUNTY SHERIFF'S OFFICE*, 403 F.3d 510 (2005) reports and complaints about the owner's neglect of her horses began to filter into the Sheriff's office in May 2001 and continued through July 2001.⁶³ On June 6, 2001, two animal control officers inspected the McClendon's property.⁶⁴ The officers found "over crowded pens . . . dangerous barnyard conditions . . . lack of water . . . [and] signs of serious illness."⁶⁵ Further, the owner did not have appropriate or proper equipment and supplies to care for the horses. As such many of the horses appeared malnourished.⁶⁶ These sheriff's officers, like in *SCOTT*, *supra*, made repeated visits and inspections of the property and the horses, but they continued to find no improvement in the animal's living conditions.⁶⁷ After the issuance of a warrant, the two animal control officers, a local veterinarian, a livestock inspector and deputy sheriffs arrived to seize the mistreated horses.⁶⁸ Unfortunately, "two horses had died [and] their bloating carcasses" remained in the immediate vicinity of the herd.⁶⁹ Here, again, helpless and innocent animals had to suffer and eventually die prior to the government stepping in to prevent the cruelty they knew was occurring. More than a month passed between the initial visit to the plaintiff's horse farm and the actual seizure of the abused animals. It is irrational and unnecessary that, despite knowing that several horses received negligent treatment, or no treatment at all, and that they were likely suffering greatly, animal control officers or other law enforcement officers were unable or unwilling to halt the mistreatment because of legal formalities, such as obtaining a warrant to remove the owner's property.

Similarly, in *STATE V. KLAMMER*, 41 N.W.2d 451, 455 (1950) 28 of the defendant's 36 horses died from mistreatment, mainly starvation, over a period of eight weeks. On November 22 the owner of the equines received a letter from the Minnesota Society for the Prevention of Cruelty that shared a concern about the condition of the animals and informed defendant Klammer of the pertinent Minnesota laws.⁷⁰ The court found there to be evidence beginning roughly around October 1, that Klammer had knowledge of the lack of adequate food for the horses and further, had continuous knowledge thereafter until their deaths in mid-January of the following year.⁷¹ 'Caged' animals were left to painfully starve to death because 'the law,' or a notion of the law as written, would not allow the immediate seizure of the owner's "property."

Likely the most prevalent problem presented in the context of current law are owner's claims that his due process rights are violated upon seizure of his animals. Many individuals claim improper or unreasonable search and seizure when government officers or officials intervene to protect potentially abused or mistreated animals. Legislatures claim that constitutional integrity insists a citizen's rights to life, liberty and property are of utmost

⁶³ *McCleendon v. Story County Sheriff's Office*, 403 F.3d 510, 513 (2005).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 514 (the Animal Control officers returned to the plaintiff's property at various times over the course of a five week period. On July 12, 2001 they brought a livestock inspector with them on a visit to assess the condition of the horses).

⁶⁸ *McCleendon*, 403 F.3d at 515.

⁶⁹ *Scott*, 403 F.3d at 515.

⁷⁰ *State v. Klammer*, 41 N.W.2d 451, 454 (1950).

⁷¹ *Id.* at 451.

importance. Even marginally invading or temporarily suspending these citizen's rights is viewed as a misapplication of justice or lead to a deprivation of liberties that significantly infringe on guarantees integral to United State's interpretation of freedom and democracy. Because of the current state of the law which is heavily weighted in favor of human rights to property the abuse and mistreatment of domesticated animals will continue unabated. Only by employing innovative legal mechanisms can the threat to animals be brought under control. But in order to do so, there must be major policy change to otherwise fundamental constitutional rights.

IV. POLICY RECOMMENDATIONS

“‘Liberty’ and ‘property’ are broad and majestic terms. They are among the ‘(g)reat constitutional concepts . . . Purposely left to gather meaning from experience . . . (T)hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.”⁷² Our current theory of liberty entails that each individual is inherently guaranteed certain freedoms and rights. But as science, technology and morals progress and evolve, our definitions of concepts that we hold so dear must accordingly change. Men creates laws to temper anarchy, to promote social benefits and to permit and prohibit individuals’ behavior. Law and policy serve necessary purposes in society, but because men create laws, they must also learn to recognize when such laws need alteration or refinement. Perhaps the original intent of the animal property laws was valid at a particular point in history, but “only a stagnant society remains unchanged;” the United States prides itself on being a country that is capable of self-transformation and modernization.⁷³ As such, the states should consider the implementation of the following policies: (i) amend the current status of animals to eliminate their categorization as property; (ii) enforce qualified immunity for approved members of society who rescue abused animals; (iii) create an evidentiary presumption of reasonable belief on behalf of law enforcement officers or other qualified individuals when they seize a mistreated pet; (iv) broadly apply the exigent circumstances doctrine to allow for legal searches and seizures without a judicial search warrant; and (v) upon a judicial finding of animal cruelty by its owner, entry of an order for forfeiture of the animal without compensation. Each of these policy changes are addressed in the following sections.

A. NEW STATUS

Many would claim that what most distinguishes humans from animals is the ability for higher reasoning and our verbal communication of knowledge. Clearly there are numerous variations from species to species, but all animals, human or not, possess hearts that beat, contain blood which flows, and lungs which breathe. Physical forms may differ, certain senses may be more acute and defined, and the capacity for knowledge differs based on the animal. Regardless of the vast array of characteristics that make animals different, the traits we share make us all the same in the most important sense, “[a]nimals are not like in inanimate objects . . . Animals feel pain, have emotions, give and return love.”⁷⁴ In support of this generality, consider why people love their pets: “[because they] represent some of the best human traits, including loyalty, trust, playfulness and love. At the same time, [they] typically lack the worst human traits including

⁷² *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (1998).

⁷³ *National Mutual Ins. Co.*, 337 U.S. at 582.

⁷⁴ Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 N.Y.U. ENVTL. L.J. 531, 582 (1998).

avarice, apathy, pettiness and hatred.”⁷⁵ Therefore, it seems illogical that merely based on man’s perception of self-importance, animals are considered lesser beings, incapable organisms and un-evolved.

Thomas G. Kelch, in advocating toward a non-property status for animals concludes that, “That animals are property and, thus, do not have rights is a concept of ancient lineage that is expressed in our common law. But the common law is not an impotent steed fenced by history; it has the liberty and, in fact, the duty to migrate to higher ground when facts and moral awareness dictate.”⁷⁶ The time has come that such facts and moral awareness now dictate that man, as the creator of the legal fiction and the definer of his ‘property interests’ move towards a new conceptualization of property, one that explicitly does not include animals within the scope of its meaning. Steven Wise posits in his book, *Drawing the Line*, that animals possessing practical autonomy are “entitled to personhood and basic liberty rights if [they] can desire; can intentionally try to fulfill [their] desires; and possess a sense of self-sufficiency to allow [them] to understand, even dimly, that it is [they] who want something and it is [they] who [are] trying to get it.”⁷⁷ Arguing the self-awareness or sophisticated conscience of an animal poses the functional problems of measurement. These characteristics of personal comprehension are not attributes that can be tested in a laboratory, or even elements that can be witnessed on a daily basis. But that animals desire is clear. That animals intentionally attempt to fulfill their needs is observable. That animals realize they are trying to obtain something to please themselves is rational and knowable. If autonomy means having a concept of one’s self as a being, then animals surely meet this requirement.

The opposing argument would cite the infeasibility of such an approach, to amend the concept of animals as property, due to the magnitude of the change and likely land on the side of legal inertia. But an appraisal of history verifies that such events have previously occurred. Slaves, once considered property, gained a much higher legal status as citizens with equal rights. Women, once treated as property, now possess the same rights as men. Children, while incapable of personal care, are still entitled to the same benefits and liberties designated by the Constitution. It is not too great a stretch in jurisprudence or legal norms to extend the care and protections afforded to infants to animals.

The most difficult aspect is the mental challenge associated with such a legal change. Human society expects certain things from animals. To give animals the same rights as humans would compel individuals to extinguish their previous callous notions of the term ‘property.’ With regard to length of time, history additionally dictates that such changes can occur, they just happen gradually, step by step. To eliminate a property status for animals will not be easy because the changes required are to more than just legal policy and procedure. Rather changes in values, perceptions and ideologies are required. “A move from the traditional view of animals as property to one recognizing the rights of animals is monumental . . . [t]he elements necessary for change presently exist. Thus, the proposal [bestowing a non-property status on animals], while appearing radical, actually fits within traditional views of appropriate changes to common law.”⁷⁸

Another alternative, though less indicative of societal progress, would be perhaps to implement a system of guardianship for animals. As noted above, an animal, like a child, can be

⁷⁵ *Id.* at 540.

⁷⁶ Kelch, *supra* note 73, at 533.

⁷⁷ Steven M. Wise, *Drawing the Line*, 32 (2002).

⁷⁸ Kelch, *supra* note 68, at 585.

self-owned and merely subject to the possession and control of a human.⁷⁹ For issues such as legal standing, a guardian, next friend, legal representative or social worker can speak on behalf of the animal.⁸⁰ Moreover, states could consider electing animal ombudsmen to speak on behalf of animal rights and welfare.

Altering the definition of a major property concept will not immediately occur, but that is not reason enough to abandon the effort. Citizens will need to assimilate to the idea, but with the nurturing of policy officials and corresponding changes in the law, animals will eventually be able to claim a non-property status. Hopefully one day society will recognize animals as purely self-owned beings. Achievement of equality of interests will guarantee animals and humans the same moral footing and thus, similar legal rights.⁸¹

B. CREATING EXCEPTIONS TO THE FOURTH AMENDMENT AS IT APPLIES TO DOMESTICATED ANIMALS

Given that the current law does not recognize animals as anything other than personal property, and the probability that animals may not achieve a non-property status in the near future, it is necessary to address the issue of mistreatment and abuse under the current laws. To encourage animal control officers and other police to swiftly remove the animals from the abusive environment, a new policy to promote enforcement is required, including qualified immunity. Presently, the test for qualified immunity requires that the court determine whether the plaintiff's constitutional rights were violated by the defendant and whether the claimed violated right "was clearly established such that it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."⁸² Individuals who are abusing their pets will claim that government seizure is wrong because the animal is their personal property and that their constitutional rights were violated. Guaranteeing qualified immunity to officials who search for and seize abused pets will reinforce to society the significance of the act itself. If officers realize they will be protected for saving the life of a dog or cat, it may influence their society's system with regard to nonhuman animals. The cloak of qualified immunity will persuade law enforcement agents to act immediately upon a suspicion of animal mistreatment. Further, they will not need to fear civil repercussions for the removal of the animal from the owner, which in turn eliminates timely negotiations or rationalizations with the recalcitrant pet's owner. Overall, qualified immunity will fortify the current anti-cruelty laws and hasten enforcement of any new laws that are enacted by the states.

In many cases of animal abuse, law enforcement personnel are notified by a concerned neighbor or another person who senses a domestic pet is in danger of mistreatment. In the cases discussed above, despite evidence of abuse, neglect and harm, officers were forced to wait before seizing the animals, presumptively because they did not have a warrant or the owner would not sign the animal over to the officers. Unfortunately, in most of the cases where the seizure is halted until a later date, the animals are forced to suffer further torment, pain and sometimes even death.

⁷⁹ Favre, *supra* note 29.

⁸⁰ David Favre, Professor, Speech at Harvard University Conference on Chimpanzees: A New Tort - Substantial Interference with a Fundamental Interest (2002).

⁸¹ David Favre, *A Dialogue on Animal Rights*, ANIMALS: WELFARE, INTERESTS, AND RIGHTS 455 (2003).

⁸² *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001).

Current law finds that “an officer’s subjective intent is never relevant under a Fourth Amendment analysis, so long as an objective basis for the seizure exists.”⁸³ Accordingly, law enforcement officers should be able to seize animals based on a reasonable belief they are being harmed by their owners; the officer need not know with personal certainty that abuse is occurring so long as there is objective evidence of mistreatment or a lack of well-being. The standard applied by the officer to assess the level of harm to the animal should be an independent personal evaluation under the particular circumstances, specifically, whether the animal’s owner is in violation of current anti-cruelty laws. A typical situation under the standard of assumed reasonable belief would allow an officer to confiscate a pet if the officer, in his or her best judgment and good faith, thought the animal was being abused. The animal would then be inspected by a qualified veterinarian and, based on the expert diagnosis, either impounded by the police or returned to the rightful owner. It is unnecessary for officers to have specialized training with animals because, for the most part, it is generally obvious when an animal is in pain or malnourished. After examination by an experienced veterinarian claims of animal abuse could be nearly conclusively made.

Automatically assuming an officer possesses a reasonable belief of animal abuse will expedite the process of removing the animal from a harmful environment, and such presumption eliminates the likelihood for future abuses by clearly sending a message as to the gravity of the situation. The pet owner will also recognize that, upon a finding of abuse, he or she will be legally reprimanded, through fines or jail time, and their ‘personal property’ will be taken without compensation by the government.

Associated with the assumption of reasonable belief on behalf of law enforcement officials is the expansion of the *exigent circumstances* doctrine. If an officer perceives an emergency situation, he or she is authorized to act without a warrant issued in order to protect life and property.⁸⁴ Depending on an individual’s interpretation, the doctrine as it stands could be reasonably construed to include the protection of animal welfare. If exigent circumstances is construed broadly, an officer who believes property (in these circumstances a domesticated pet) to be in danger, may seize the property to ensure its safety. Also, because ‘life’ is not specified or defined under the doctrine, an officer could act to save the life of an animal he perceived to be in jeopardy.

Exigent circumstances, or emergency, should be read to include any situation where an animal has been the subject of mistreatment, might be further abused, or could die as a result of cruel treatment or neglect. Potential statutory language could read:

“In cases where officers have reasonable grounds to: (1) believe there is an emergency at hand and an immediate need for their assistance for the protection of life, not solely limited to human life, or property, including animate property; 2) when the search is not motivated primarily by subjective intent to arrest or seize evidence, unless the evidence is a living creature and its seizure serves to protect the being; and 3) when there is reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched and potential evidence to be seized.”⁸⁵

⁸³ *Saucier*, 533 U.S. at 210.

⁸⁴ *Cervantes*, *supra* note 47, at 888.

⁸⁵ *Scott*, *supra* note 56, at 1008. (language adopted from *Cervantes* factors listed in *Scott*.)

Increasing the scope of public interest to include animal welfare is not an outrageous goal. Thus, “[i]f immediate action is necessary to protect the public interest, a hearing is not required prior to the exercise of police power, provided adequate post-deprivation procedural safeguards exist.”⁸⁶ An animal can be seized immediately so long as its owner eventually entitled to a hearing to ensure that his or her due process rights are met.⁸⁷

The problem that parallels this line of reasoning is that many people do not believe that animal abuse is an emergency or even a cognizable offense. Their claim is that, as property, animals do not deserve any additional rights; therefore, their care or lack thereof does not constitute an emergency situation. Yet, coupling the language of the exigent circumstances doctrine together with the anti-cruelty animal statutes in each state would authorize an officer to seize domesticated animals without a search warrant to prevent harm or alternatively, to prevent violation of anti-cruelty statutes.

As a first remedy, an abusive animal owner may lose his or her property. “Forfeiture is the divestiture of property without compensation, the loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty [and consequently], title is instantaneously transferred to another, such as the government, a corporation, or a private person.”⁸⁸ In *SCOTT, supra*, after the seizure of the plaintiff’s rabbits, Animal Control was unable to euthanize the sick rabbits or offer for adoption the survivors because an order of forfeiture was never entered.⁸⁹ If the circumstances had been different and an order of forfeiture had been submitted the rabbits pain could have been alleviated sooner and the healthy rabbits would be placed with loving families. The lack of the remedy of forfeiture prolonged the rabbits’ suffering and ultimately the cost to the county to provide them care.

Owner forfeiture raises the question of deprivation without related compensation. When real property is taken, generally the owner is remunerated for his loss.⁹⁰ It is illogical, however, to pay someone because they have abused their pet and consequently the animal is removed from their home. Further, when the state seizes an animal it is responsible for the cost to maintain and care for the animal. Therefore, upon a likely finding of animal cruelty in a civil forfeiture proceeding, an order for forfeiture of the property should be entered by the court, but without money paid to the owner. At the civil proceeding an animal expert, such as a veterinarian, should be present to testify regarding the animals’ physical status.

B. SHIFTING THE BURDEN OF PROOF

The general presumption of a trial court is that upon search or seizure without a warrant, the burden is on the state.⁹¹ Current law requires that the court perform an analysis which views the facts in a light most favorable to the abusive pet owner.⁹² The municipality and law enforcement officers are responsible to prove with sufficient clarity the abuse that the animal received. The owner then must merely rebut the evidence without offering affirmative proof

⁸⁶ *Soranno’s Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1318 (1989).

⁸⁷ *Id.*

⁸⁸ BLACK’S LAW DICTIONARY 677 (8th ed. 2004).

⁸⁹ *Scott, supra* note 51, at 1005.

⁹⁰ *See generally* *Berman v. Parker*, 348 U.S. 26, 34 (1954) (“Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end”).

⁹¹ *State v. Davis*, 2005 WL 2255968

⁹² *McClendon, supra* note 62, at 516.

against the government. Accordingly, the defendant, the owner who caused the abuse, carries a much easier evidentiary burden than does the government. The law finds:

The burden of evidence . . . sometimes termed the burden of producing, or going forward with, the evidence, or the burden of procedure, shifts, or may shift, from side to side at various times during the progress of the trial. Its position at any particular time is controlled by the logical necessities of making proof which a party is under at the time, the burden being always on that party against whom the decision of the tribunal would be given if no further evidence were introduced.⁹³

Therefore, if the state prosecutes an owner under an animal cruelty statute, then it will carry the burden of producing related evidence to that effect. If the owner pursues a civil claim based on a violation of his or her constitutional rights, then as noted, the burden remains on the state to produce evidence because there was no warrant at the time the Fourth Amendment rights were allegedly violated. Even though the animal owner brings the claim, he or she is not obligated to provide any evidence except to disprove the state's claims. In either situation, the burden rests with the state. This is problematic because in all respects, the state and law enforcement officials act under the police powers doctrine, which supports "[t]he idea that private rights always must give way to the social interest in public welfare, safety, and good morals, or holding that such power is limited to or must be based on actual injuries to others."⁹⁴

The state attempts to eliminate unnecessary violence, yet the benefit of doubt lies with the private citizen. In cases where the state removes an abused animal from the home, and the owner responds with a claim for a violation of constitutional rights, the State must make a prima facie case that the owner was abusive. To rebut such evidence, the owner should show that he did not mistreat his domestic pet and that no emergency situation existed that warranted the law enforcement official to take the animal into protective custody. By taking into custody the harmed animal, the state will possess sufficient evidence to prosecute under animal cruelty statutes. Filing suit against abusive owners in civil court, as opposed to prosecuting in criminal court, is more effective and easier to implement.

D. ISSUES OF MORALITY AND ETHICS

The famous philosopher, Descartes, once suggested long ago that animals were "soulless machines without pain, feelings, or emotions."⁹⁵ That conclusion is clearly untrue. Much of the initial rationale for state anti-cruelty laws was to promote humanitarianism.⁹⁶ The basis of the statutes "was limited to those rare situations in which humans harmed nonhuman animals merely 'for the gratification of a malignant or vindictive temper,' and not in the pursuit of some legitimate benefit for which human beings had long been entitled to use them."⁹⁷

Although such statutes do not effectively bestow rights on animals, they intend to reinforce the permissible uses for animals, while they prohibit behavior which may be harmful to the animal or to public sensibilities. The primary legal goal with regard to animals currently is to

⁹³ 31A C.J.S. EVIDENCE § 126

⁹⁴ State v. Ciancanelli, 121 P.3d 613, 627 (Or. 2005).

⁹⁵ Kelch, *supra* note 68, at 557.

⁹⁶ *Id.* at 542.

⁹⁷ Kelch, *supra* note 68, at 542.

promote animal welfare. 'Animal welfare' can be basically described as the protection of animals from physical and mental harm.⁹⁸ Animal rights activists advocate for additional rights for animals, similar to those granted to humans.⁹⁹ The protection of an animal's physical wellbeing is not enough advocates assert; rather animals must be given official rights comparable to humans.

Animals deserve more than mere protection from bodily harm. They require freedom from torment, mental torture and anguish, at a minimum. Official rights will reinforce the idea that animals cannot be treated as things, that they are more than just 'property,' and like humans, they are entitled to a relative well-being. The recognition of animal rights will benefit the humans because the broad values of compassion, tolerance and equality will continue to be spread. In the sense that a singular culture can be ethnocentric, humans as a species are also homocentric. In the hierarchy of beings, in the "food chain," and standing in rank of intelligence, humans believe themselves to be at the top the chart. Yet, by accepting beings outside our species as equals, entitled to dignity, respect and well-being, comparable equality can be garnered and human values sustained. Recognizing animal rights will help equalize other cultures and give a common heritage to all living creatures.

V. CONCLUSION

It is clear that animals have many more differences than similarities to humans than to what is typically known as personal property. Animals have beating hearts. They have mothers and fathers. They produce their own young. They experience emotions. Their feelings may not be equivalent to those of the human species, but how can we judge the quality of emotion? What scale can be used to measure the value of an organism's thought? No scientific method exists to make these particular determinations; even if a discernment did exist, individuals would still disagree with the theory and process behind the results.

Regardless of this debate, animals are not inanimate objects. They should have identifiable, enforceable rights, including, the right to freedom from harm, abuse, cruelty, suffering, starvation, over breeding, inadequate shelter along with others which are immutable, although not yet legally recognized. Animals rights could lead to standing to bring legal claims, conceptually animals could earn the right to vote, could assume criminal responsibility for their actions and under the 13th Amendment would not be subject to involuntary servitude. Gradual changes in the perception of animal welfare rights will have the potential to lead to significant changes regarding their protection. Implementing even one of the policy suggestions which have been identified would benefit thousands of animals in abusive environments. In his novel, *Animal Farm*, George Orwell commented that "all animals are equal, but some animals are more equal than others."¹⁰⁰ Imagine what life would be like if not only all humans were equal, but all species within the universe. Someday with enough persistence and tenacity, desire and drive, domesticated pets and other animals may acquire cognizable rights that they currently lack, to enjoy their time and place on Earth like humans.

⁹⁸ See generally <http://www.PETA.org> (last visited March 27, 2006).

⁹⁹ Kelch, *supra* note 84.

¹⁰⁰ Orwell, *supra* note 1.

