

## AN ANIMAL IS NOT AN IPOD

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Those of us who teach animal law know one pervasive theme that resonates throughout our courses: American society's convenient classification of animals as property, worth nothing more than a piece of merchandise – and a low-priced one at that. That treatment inevitably leads to the most basic question of how a society as great as ours can equate life – any life, much less man's best friend – with a piece of furniture or even the latest iPod. Our animal law textbooks are replete with decision after decision that make all too clear that the law does nothing to genuinely protect animals, nor does it recognize their true value and special place in our homes and within our families. Our legal system just does not recognize the bond between people and their companion animals,

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and when that bond is severed, it completely fails to compensate for that loss.

#### I. COMPANION ANIMALS VERSUS OTHER ANIMALS

In any discussion concerning reform, the question often arises as to whether we should distinguish companion animals, like dogs and cats, from other animals when we argue for eliminating the property classification of animals or expanding animal rights. Clearly, it is an easier argument to limit it to companion animals, and in our experience, is a more receptive argument to the expansion of rights or the elimination of the property classification. However, such a distinction puts too great a strain on science and compassion for us to promote without reservation. Although it would be easy to give into the distinction between companion animals and other animals, to do so ignores the fact that non-companion animals, like chimpanzees, have genetic make-ups very similar to ours and have the capacity to experience great pain. To suggest that a dog has rights and value beyond property, but a chimp does not, leads to an absurd conclusion: that chimps can be seen as worthless innate objects even though dogs cannot. Chimps can experience a broad array of emotions like joy, grief, and sadness. Their genetic make-up is nearly identical to ours. So we posit this: Shouldn't a chimp have rights equal with recognition of those qualities? Isn't it morally wrong for a chimp to have its fundamental needs ignored, or for there to be no recourse or remedy to the pain and suffering it receives because we treat it as the property of humans? Of course it is. But a unique aspect of animal law is that the majority of its issues pertain primarily to companion animals. Cruelty and humane treatment of animals aside, tort law, contract law, wills and trusts law, and family law all deal with issues regarding companion animals (with the exception of a tort against livestock, which the law actually grants *more* protection to so long as it is part of one's livelihood).<sup>1</sup> While

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<sup>1</sup> See generally *Katsaris v. Cook*, 180 Cal. Ct. App. 3d 256 (1986), which held that an owner of livestock was permitted to shoot a neighbor's dogs who had wandered onto his property and growled at his cattle. *Id.* at 262-63. According to the court, "the Legislature found that the public's interest in protecting farm animals outweighed the dog owners' right to permit

environmental and constitutional law issues (such as the Endangered Species Act and the Marine Mammal Protection Act) do address the rights of non-companion animals, in arguably higher profile manner (who has not heard that tuna nets also trap dolphins?), the property classification of animals affects—and hurts—companion animals more than it does our non-domesticated friends. Therefore, while animal welfare groups have done a good job raising the awareness of the plight of the giant panda and the previously endangered bald eagle, the greatest strides yet to be made involve companion animals.

**Comment [JB1]:** Wasn't the author previously arguing that companion animals are given more protection and that we need to be worried about non-companion animals, such as chimps?

## II. PROPERTY CLASSIFICATION

As wrong as it is, animals are considered property in the eyes of the law despite the fact we all know animals feel pain, display emotion, exhibit loyalty and sadness, and (in some cases) share most of our genetic make-up. We could argue for judicial notice of this. Based on our common knowledge of animals, the need to eliminate animals as property is a crucial requirement to the expansion of animal rights. We think this argument is beyond dispute.

Most of us remember reading the historically embarrassing *Dred Scott*<sup>2</sup> decision, in which the court discusses that black African slaves were “bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it.”<sup>3</sup> So, slaves were considered property and specifically, the property of their owners. The property classification of slaves was wrought with problems: How can one “free” property? How can property be a beneficiary of a will or trust? Ironically, however, slaves were held responsible for crimes. It is interesting that “property” could be punished for a crime, but clearly this distinction was made to support the economic interest of the slave owner.

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their animals to roam freely on land occupied by livestock,” *id.* at 263, and “[a]ny conduct necessary to the killing of a trespassing dog will be within the privilege,” *Id.* at 266.

<sup>2</sup> See *Scott v. Ford*, 60 U.S. 393 (1846).

<sup>3</sup> *Id.* at 407.

Similarly, a woman was considered nothing more than the chattel of her husband.<sup>4</sup> And with respect to children, windswept across the Atlantic came the well established notion that children, like wives, were considered property, and the courts dragged their heels—and still do in certain situations—in recognizing basic rights of children. It seems courts still worry about running roughshod over parental rights. There is also resistance from commercial interests, which brand animals as chattel. Animals are defined as property because it is convenient—and profitable. This allows them to be exploited, harmed and used for experimentation and entertainment, all with impunity.

As we make the argument that just as the African slave did, animals, women, and children deserve a non-chattel status, we recognize human personhood status may be too quick a leap to gather the requisite momentum to win this battle today. It has been suggested that a midway approach is to classify animals as sentient property.<sup>5</sup> Sentient property has the capacity to feel pain, which, as anyone who has trimmed a dog's nails too short can attest, clearly animals have. Although this approach is underinclusive, perhaps it would advance the ball toward a "personhood" status for animals.

Approximately 20 cities—and even one entire state—have taken the leap of considering animals as more than just mere property.<sup>6</sup> Boulder, Colorado; West Hollywood, San Francisco, and Berkeley, California; Amherst, Massachusetts; Windsor, Ontario; and Rhode Island<sup>7</sup> are among the locales that passed measures to change the status of people from owners to guardians of their companion animals. While this is good news for the perception that animals are more than inanimate objects, the

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<sup>4</sup> See *Burdano v. Amperse*, 14 Mich. 91, 92 (1866).

<sup>5</sup> See SENTIENT PROPERTY: A Novel Proposal for Animal Law: MORE THAN PROPERTY, LESS THAN PERSONS, Animal Legal Report Services, July 28, 2004, <http://www.animallegalreports.com/press.asp>.

<sup>6</sup> Oregon Veterinary Medical Association, *Owner vs. Guardianship*, <http://www.oregonvma.org/news/owner.asp> (last visited Feb. 4, 2008).

<sup>7</sup> See Jon Katz, *Guarding the Guard Dogs: Are You a Dog "Owner" – Or a Dog "Guardian"?*, SLATE, <http://www.slate.com/id/2096577/> (last visited Feb. 4, 2008); <http://www.vet.upenn.edu/bellwether/v62/article2.shtml> (last visited Feb. 13, 2008).

classification of guardianship does carry with it some drawbacks. For example, guardians—in the legal sense—do not take "title" to the "property," must be appointed by the court, and have only the powers prescribed to them by statute.<sup>8</sup> Of course, given the fact that no one else is likely to claim "ownership" or contest the guardianship, these legal technicalities are largely irrelevant in this context.

There is another possibility. Perhaps the best solution is that set forth by David Favre. Favre suggests applying the principles of trust and property law to split the "ownership"—or title—between the animal and the human. Under the equitable self-ownership theory,<sup>9</sup> the animal would gain equitable title, and its human would retain legal title, much like a trustee would have.<sup>10</sup> In this scenario, the animal would have the right to protect its own interests, which would give it standing (a current problem with the property classification), and the human would have the responsibility to make sure he or she acts in the animal's best interest.<sup>11</sup>

### III. THE EFFECT OF THE PROPERTY CLASSIFICATION ON TORT LAW

Perhaps the property classification is most limiting in the recovery for harm done to the animal. There is no question that a parent can recover for negligent injuries inflicted on her child, but the same is not true if the parent—or child—sees her Yorkshire terrier hit by a reckless driver. This is because, with a property classification, the law sees the animal as nothing more than chattel, and the recovery for damaged chattel is simply the fair market value of its worth. But anyone who has ever enjoyed a pet knows that the cost of the pet is hardly a fair measure of its worth. A 2005 survey revealed that 75% of pet owners consider pets to be part of their families.<sup>12</sup> The law must catch up with the emphasis our society now places on its pets.

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<sup>8</sup> See RESTATEMENT (SECOND) OF TRUSTS § 7 (1959).

<sup>9</sup> See David Favre, *Equitable Self-Ownership for Animals*, 50 DUKE L.J. 473 (2000).

<sup>10</sup> See *id.* at 476.

<sup>11</sup> See *id.* at 496-97.

<sup>12</sup> This survey of 1,518 people was conducted by Harris Interactive on behalf of The Hartz Mountain Corporation, Pet age.com, *Pets as Part of*

Shirley S. Abramson, Chief Justice of the Wisconsin Supreme Court, in her concurring opinion in *Rabideau v. City of Racine*,<sup>13</sup> wrote, "the plaintiff's only remedy is for loss of property."<sup>14</sup> She suggests that the issue of damages beyond property loss for companionship, love, and the like belongs with each state's legislature.<sup>15</sup> In her concurring opinion, the Chief Justice writes, "I wish to emphasize that this case is about the rights of a pet owner to recover in tort for the death of her dog. Scholars would not classify this case as one about animal rights."<sup>16</sup>

As much as we have great respect for this Chief Justice having appeared before her progressive court, this conclusion is wrong. Concluding that the plaintiff's only recovery is for "property loss" reflects a continuation of the view that animals have no intrinsic worth and fails to recognize the human/animal bond. Admittedly, the Wisconsin Court did not rule out the possibility of recovery for intentional, rather than negligent, infliction of emotional distress.

A handful of states have enacted statutes providing recovery for damages for intentional or negligent harm to animals. In California, for example, one may recover for "wrongful injuries to animals" as a result of gross or willful negligence.<sup>17</sup> Tennessee, the first state to permit such recovery, allows up to \$5,000 for the death of a pet caused by the negligent or intentional act of another.<sup>18</sup> It is important to note that the Tennessee legislature made a distinction between negligent and intentional acts in that if the death was a result of negligence, it must have occurred on the pet owner or caretaker's property, or under the supervision of such. This caveat therefore exempts deaths caused by negligent veterinary care.

In Ohio, one who maliciously or willfully, without the owner's consent, injures another's farm or domestic animal can be

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*the Family*, <http://www.petage.com/news070508.asp> (last visited Feb. 4, 2008).

<sup>13</sup> 627 N.W. 2d 795 (2001).

<sup>14</sup> *Id.* at 807.

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

<sup>16</sup> *Id.* at 806.

<sup>17</sup> See Cal. Civ. Code Ann. § 3340 (West 2007).

<sup>18</sup> See Tenn. Code Ann. § 44-17-403 (2007).

ordered to pay restitution to the owner.<sup>19</sup> The statute specifically exempts veterinarians. Illinois provides redress for aggravated acts of cruelty or torture for which the owner is entitled to recover up to \$25,000 “for each act of abuse or neglect to which the animal was subjected.”<sup>20</sup>

One of the best examples of the wrongness of the property classification of animals is the denial of emotional distress damages when a person’s pet is killed during transport by an airline carrier. The pet’s owner (guardian) will typically recover the baggage liability limit of \$1,250.00 as though a helpless dog killed at the hands of an airline during a flight is the same as a missing bag of luggage containing a couple of suits and pairs of shoes.

In our animal law class, we discuss the case of *Gluckman v. American Airlines, Inc.* in which the court dismissed claims for both negligent and intentional infliction of emotional distress as well as claims for the loss of companionship and for the animal’s (“Floyd”) pain and suffering, despite the fact that American Airlines admitted its behavior was negligent and caused Floyd’s death.<sup>21</sup> When a mechanical error forced the plane to taxi for more than an hour, the temperature in the unventilated cargo area (where Floyd was forced to travel) reached 140 degrees. Gluckman found Floyd lying on his side panting, face and paws bloody, with blood all over the crate. The condition of the crate showed clearly that Floyd desperately tried to escape.<sup>22</sup> American Airlines, 45 minutes later, brought Floyd to a veterinarian, who diagnosed Floyd as suffering from heatstroke and brain damage.<sup>23</sup>

The New York court dismissed the negligent infliction of emotional distress claim stating such action “arises only in unique circumstances, when a defendant owes a special duty only to plaintiff, or where there is proof of a traumatic event that caused the plaintiff to fear for her own safety.”<sup>24</sup> As to the intentional infliction of emotional distress claim, the court suggests that “[a]

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<sup>19</sup> See Ohio Rev. Code Ann. § 959.02 (West 2007).

<sup>20</sup> 510 Ill. Comp. Stat. Ann. 70/16.3 (West 2004).

<sup>21</sup> 844 F. Supp. 151, 156 (1994).

<sup>22</sup> See *id.* at 154.

<sup>23</sup> See *id.*

<sup>24</sup> *Id.* at 157 (citing *Cucchi v. N.Y. Off-Track Betting Corp.*, 818 F. Supp. 647, 656 (1993)).

deplorable as it may be for American to have caused the death of an innocent animal, the Court finds no allegation, and no evidence . . . that American's conduct was directed intentionally at Gluckman."<sup>25</sup>

The court likewise denied the claim for loss of companionship, refusing to recognize such an independent cause of action.<sup>26</sup> Finally, with respect to the cause of action for Floyd's pain and suffering, the court again refused to recognize a viable claim.<sup>27</sup>

Subsequent courts have continued to follow *Gluckman* and the court's line of reasoning. However, the good news is that one of our former students in the animal law class is a commercial airline pilot for a major carrier and informed the class that despite that lack of legal liability, his airline made major changes to their operating procedures when transporting animals following the *Gluckman* decision. He suggests that it is much safer today to transport a companion animal aboard his airline, and in fact he regularly transports his dog who loves the adventure.

While the courts may be slow to provide redress for negligent acts causing harm to animals, some defendants are not. Between 2000 and 2005, Massachusetts utility company NStar was responsible for the deaths of three dogs (and electrocutions of more than a dozen more) when they walked over "hot spots" of live underground wires on the sidewalks in Boston.<sup>28</sup> NStar accepted the blame and settled with the families for undisclosed amounts.<sup>29</sup> Whether these settlement offers were the result of a value the company places on companion animals or the desire to avoid negative publicity and a lawsuit, the outcome remains the same: the families were compensated for much more than "property loss" alone. NStar rightly realized that people have an affection for their pets that cannot be dismissed. In fact, Boston Mayor Thomas

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<sup>25</sup> *Id.* at 158.

<sup>26</sup> *See id.*

<sup>27</sup> *See id.* at 159.

<sup>28</sup> *See* Jessica Bennett & David Abel, *Stray street voltage electrocutes dog*, BOSTON GLOBE, Feb. 5, 2004, B1; *See also* Peter J. Howe, *Dog's family demands \$740,000*, BOSTON GLOBE, Mar. 8, 2005, A1

<sup>29</sup> *See* Howe, *supra* note 28 at A1.



Menino stated he would push for legislation that would fine utility companies up to one million dollars in these instances.<sup>30</sup>

#### IV. PROPERTY AND STANDING

Because animals lack legal rights and are classified as property, they also lack standing. This limitation also presents a significant barrier to bringing cases on behalf of animals. Since animal cases are often brought in federal court, Article III standing must be satisfied. As stated in *Humane Society of the United States v. Hodel*,

Art[icle] III requires the party who invokes the Court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," and that the injury "fairly can be traced to the challenged action" and is "likely to be redressed by a favorable decision."<sup>31</sup>

Because animals' property classification limits animals suing in their own right (except for animals on the endangered species list, who are granted standing automatically), lack of standing represents a significant bar to suits brought on behalf of or for the benefit of animals. The requirement of "injury-in-fact" is a tough hurdle to overcome. Plaintiffs suing on behalf of animals will be easily defeated if the injury is one of emotional harm. If an animal is property, how can a plaintiff satisfy injury-in-fact when emotional harm resulting from pain inflicted on property is non-cognizable?

On a limited basis, organizations, namely animal rights organizations, have satisfied the "organizational standing" requirements.

[An] association has standing to bring suit on behalf of its members when: (a) "its members

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<sup>30</sup> Mac Daniel, *A reckoning after the shock*, *Boston Globe*, Mar. 4, 2004.

<sup>31</sup> 840 F.2d 45,51 (1988) (citing *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982)).

would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."<sup>32</sup>

Since aesthetic injury enables an organizational member to sue in its own right, the first prong of organizational standing can be easily satisfied. Germaneness, as set forth in element two, is often a formidable obstacle to standing. In essence, we see this requirement as meaning the organization's purpose must be closely allied with the lawsuit. We see germaneness as requiring the harm to the animal(s) underlying the basis of the lawsuit to be consistent with the goals or being germane to the organization's purpose. *Humane Society of the United States v. Hodel* held that "[the] lawsuit challenging the revivification of hunting on wildlife refuges is germane to the purposes of the Humane Society, and [we] therefore conclude that the organization has standing to challenge these practices as a representative of its members."<sup>33</sup>

An interesting side note is that a plaintiff litigating on behalf of animals often seeks preliminary injunctive relief. One of the crucial elements a plaintiff must prove is "irreparable harm," which can prove to be rendered meaningless because technically one cannot protect until there is irreparable harm. So, what is left to "protect?"

#### V. UNITED STATES VS. THE WORLD

As law professors specializing in this field, among the most horrific examples of lack of legal recognition of rights of animals include the "animal sacrifice cases." If Mahatma Gandhi was correct when he said, "The greatness of a nation and its moral progress can be judged by the way its animals are treated," then the

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<sup>32</sup> Int'l Union United Auto. Workers v. Brock, 477 U.S. 274, 282 (1966) (citing *Hunt v. Wash. Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)).

<sup>33</sup> *Hodel*, *supra* note 33 at 60.

United States has a very long way to go before it is a great nation, as compared to our allies.<sup>34</sup>

In 1957, the European Economic Community signed the Treaty of Rome.<sup>35</sup> Absent from this treaty were provisions on animal welfare. Accordingly, a revision followed 40 years later, entitled The Treaty of Amsterdam, which included an animal welfare protocol.<sup>36</sup> The strength of this treaty between and among contracting parties is recognition that animals are sentient creatures capable of feeling and experiencing pain, and requires its members "to 'pay full regard to the welfare requirements of animals.'"<sup>37</sup> European law bans veal crates, regulates the treatment of egg-laying hens, calves, and much more.<sup>38</sup> Israel has voted to end force-feeding animals and birds fully recognizing foie gras is a barbaric and inhumane practice.<sup>39</sup> The United States, in fact, does not even ban animal sacrifice. In *Church of the Lukumi Babalu Aye v. City of Hialeah*, the court struck down city ordinances that prohibited the practice of animal sacrifice by the Santeria religion on First Amendment grounds.<sup>40</sup> Even though the Santeria rituals included killing chickens, pigeons, doves, ducks, goats, sheep, and turtles by cutting their carotid arteries, the Court ruled that the ordinances, which specifically prohibited "ritual sacrifices of animals," directly targeted the Santeria practices, thus interfering with the exercise of religion, of which it deemed there were 50,000 practitioners in South Florida at the time.

We, in collaboration with our colleagues, urge individuals here in the United States to unite with us to: (1) ensure the humane treatment of all animals; (2) save the lives of animals; and (3) push for the passage of a declaration on animal welfare by the United Nations. At a minimum, this declaration could be patterned after

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<sup>34</sup> <http://thinkexist.com/quotes/>

<sup>35</sup> See Euro Group for Animals, *The Treaty and Animal Welfare*, [http://www.eurogroupanimalwelfare.org/legislation/legislation\\_more1.htm](http://www.eurogroupanimalwelfare.org/legislation/legislation_more1.htm) (last visited Feb. 6, 2008).

<sup>36</sup> See *id.*

<sup>37</sup> Stephanie J. Engelsman, 'World Leader'—At What Price? A Look at Lagging American Animal Protection Laws, 22 PACE ENVTL. L. REV. 329, 347 (2005).

<sup>38</sup> See *id.* at 347, 352.

<sup>39</sup> See *id.* at 362.

<sup>40</sup> See 508 U.S. 520 (1993).

the European Union's Amsterdam Protocol that says all animals are sentient creatures, meaning that they are living, and living creatures have feelings and in particular feel pain.

For many years, we told our students that societal attitude toward animals has changed and will continue changing. A brighter day is coming, we told them. We assured them that the status of animals, at least companion animals, is evolving into one marked by compassion and humaneness, and that our laws will reflect that new status.

But Hurricane Katrina has shaken up our professorial prophesying. The stories and images were unbearable. Two years after Hurricane Katrina, images remain of people clinging to their companion animals on the top of their roofs and then being forcibly separated. We still see refugees escaping with their pets to designated bus pickup areas, only to be commanded to abandon their pets or remain behind with them in danger. To forbid people access to safety and shelter when they and their pets are giving deep emotional support to each other is unconscionable. We learned of animals, drowned, starved, and left for dead—between two to three thousand in all.<sup>41</sup>

The loss of these lives and the separation of thousands of others from their human companions have given urgency to the need to legally reclassify the status of domestic animals from property to beings. Defining companion animals as property is morally wrong and prevents their full protection.

Legislation has been passed that mandates pets be included in evacuations.<sup>42</sup> For instance, U.S. Representative Barney Frank of Massachusetts is one of the sponsors of a federal bill that required provisions for pets and service animals in disaster plans in order for those plans to qualify the state or municipality for federal emergency funding.<sup>43</sup> This is, of course, to be praised, but it is obviously too late to save the animals who perished during the hurricane and its aftermath. We still need more progressive

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<sup>41</sup> See Mira Oberman, *Many Pets Still Homeless After Katrina*, DISCOVERY NEWS, Aug. 25, 2006, [http://dsc.discovery.com/news/2006/08/25/katrinapets\\_an.html?category=animals&guid=20060825133000](http://dsc.discovery.com/news/2006/08/25/katrinapets_an.html?category=animals&guid=20060825133000) (last visited Feb. 6, 2008).

<sup>42</sup> Pets Evacuation and Transportation Standards Act of 2006, Pub.L. No. 109-308, 120 Stat. 1725 (2006).

<sup>43</sup> *Id.*

legislation to reflect the role of a companion animal's place in the family and within society. What about the recent tainted pet food crisis? Under existing law, owners of pets contaminated by melamine that died of renal failure would not be entitled to a judgment for non-economic damages of pain and suffering.

We have made strides. All too often, victims of domestic violence will not leave because most shelters do not allow pets to accompany the victims. This fact creates a no-win dilemma for the victim: either she leaves her pet behind, likely subjecting it to abuse and neglect, or she remains with the pet and suffers abuse herself. While they are still a minority, however, there are some programs that alleviate this situation. The Noah's Ark Foster Care Program in Boston, Massachusetts is a network of volunteers who will temporarily and secretly care for a victim's pet while she seeks the help she needs.<sup>44</sup> In New Mexico, the Companion Animal Rescue Effort (CARE) is a network of animal shelters, boarding kennels, and foster homes that provide temporary emergency care for abuse victims.<sup>45</sup> There are similar programs in Maryland,<sup>46</sup> California,<sup>47</sup> North Carolina,<sup>48</sup> and Arizona.<sup>49</sup>

An animal may now even be protected by restraining orders. In California, Governor Arnold Schwarzenegger signed a

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<sup>44</sup> See Claire Cummings, *Program for pets opens doors for abuse victims*, BOSTON GLOBE, June 7, 2007, at B1.

<sup>45</sup> See CARE Companion Animal Rescue Effort, *A program supporting emergency protective care for companion animals of domestic violence victims*, <http://www.apnm.org/programs/care/index.php> (last visited Feb. 6, 2008).

<sup>46</sup> See Anne Arundel County, Maryland, *Domestic Violence Pet Support Program*, <http://www.aacounty.org/AnimalControl/domesticViolence.cfm> (last visited Feb. 6, 2008).

<sup>47</sup> See Rancho Coastal Humane Society, *Animal Safehouse Program: Helping to Break the Cycle of Violence by Keeping Pets and People Safe*, <http://www.rchumanesociety.org/programs/safehouse.php> (last visited Feb. 6, 2008).

<sup>48</sup> See Forsyth County North Carolina, *Animal Control*, <http://www.co.forsyth.nc.us/AnimalControl/safehaven.aspx> (last visited Feb. 6, 2008).

<sup>49</sup> [http://www.mag.maricopa.gov/archive/du/about\\_dv/keeping\\_safe/animal\\_cruelty/animal\\_cruelty.html](http://www.mag.maricopa.gov/archive/du/about_dv/keeping_safe/animal_cruelty/animal_cruelty.html).

bill that permits judges to name pets in restraining orders,<sup>50</sup> and a similar law went into effect on October 1, 2007 in Connecticut.<sup>51</sup> These very positive developments have undoubtedly raised the status of animals in the eyes of the law, but there still needs to be more improvements, and programs such as these need to be the norm rather than the exception.

#### VI. CRUELTY TO ANIMALS

Dating back to 1887, Justice Niblack in his opinion in *State v. Bruner* stated,

There is a well defined difference between the offence of malicious or mischievous injury to property and that of cruelty to animals. The former constituted an indictable offence at common law, while the latter did not... The latter has in more recent years been made punishable as a scheme for the protection of animals without regard to their ownership.<sup>52</sup>

The subject matter of this case was a tortured goose, not a companion animal.

The question then is, what happened? Where did our compassion for animals—including those not domesticated—go? Too often we see, read, and hear about people teasing or torturing animals for their own amusement. We need to vigorously prosecute those who abuse, neglect, or harm animals. The good news is that penalties for those actions are now becoming more severe. Massachusetts, for example, makes it a felony, punishable of up to five years in prison and a \$2,500 fine, to abuse an animal.<sup>53</sup> The not-so-good news is that many police chiefs and

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<sup>50</sup> See generally Christie Keith, *Your Whole Pet*, SAN FRANCISCO CHRONICLE, Oct. 16, 2007.

<sup>51</sup> See generally Christine Dempsey, *Law Gives Teeth to Pet Protection*, HARTFORD COURANT, Oct. 1, 2007, A1.

<sup>52</sup> 12 N.E. 103, 104 (1887).

<sup>53</sup> See Mass. Gen. Laws Ann. ch. 272 § 77 (2007).

district attorneys do not pursue these stronger penalties because they still have the mindset that either an animal is property with no rights and little protection under the law, or there are too many other crimes to focus on and that resources should not be used for pursuing animal cruelty crimes.

The recent Michael Vick incident brought dog fighting, an underground practice occurring most frequently in urban areas, to the forefront. The outrage it generated—and the swift penalties that followed—gives hope to those of us who care deeply about animals. The argument (usually in his defense) that "it's cultural" is precisely the problem: we need to change the belief that this is an accepted form of entertainment by some members of our society. Whether he knew it was wrong or not is not relevant: it *is* wrong, and *everyone* needs to know that now.

## VII. CUSTODY DISPUTES

Because animals are property, often divorce courts are left in the difficult position of who gets custody to be resolved typically on a basis of "title to the property" as opposed to the best interest of the pet. Accordingly, courts generally lack the authority to grant visitation of property. In *Bennett v. Bennett*, the court said, "Our courts are overwhelmed with the supervision of custody, visitation, and support matters related to the protection of our children. We cannot undertake the same responsibility as to animals."<sup>54</sup> This holding was despite the fact that the court also noted that many consider a dog to be a member of the family.<sup>55</sup> In Maryland, however, one circuit court did uphold and enforce a divorce settlement agreement that granted one spouse visitation of the couple's dog for one month each summer.<sup>56</sup> Two other courts even considered the pet's best interest. In *Raymond v. Lachman*, the New York appeals court explained, "We think it best for all concerned that, given his limited life expectancy, Lovey, who is now almost ten years old, remain where he has lived, prospered, loved and been loved for the past four years."<sup>57</sup> *Zovko v. Gregory*,

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<sup>54</sup> 655 So. 2d 109,110-11 (1995).

<sup>55</sup> *Id.*

<sup>56</sup> *Ethan Assal v. Jennifer Barwick (Kidwell)*, Civil No. 164421 (Md. Cir. Ct., Montgomery Cty. 1999).

<sup>57</sup> 695 N.Y.S.2d 308, 309 (1999).

a Virginia case, involved roommates who shared the costs and responsibility of a cat.<sup>58</sup> When the roommates parted ways, one of them took the cat, and the other charged him with theft. After a trial to determine who was the better caretaker, the court decided that the cat "would be better off with Mr. Zovko."<sup>59</sup>

The issues of custody and visitation are arising more and more frequently these days, and if the law begins to recognize animals as more than personal property, the "best interest" standard may eventually become the rule.

#### VIII. WILLS & TRUSTS LIMITATION

Courts have historically struggled in upholding wills and trusts that provide for a testator's or grantor's pets and have routinely invalidated bequests to companion animals.<sup>60</sup> Currently, 36 state legislatures and the District of Columbia<sup>61</sup> have enacted laws to enable individuals to provide valid companion animal trusts, and the Uniform Trust Code provides for pet trusts too. What is interesting about wills and trusts law is that where the classification of animals as property is generally a limiting or negative aspect, when directions in a will regarding animals are against public policy, the courts will grant the animals more than just "personal property" status to reach what they deem the correct result. In *In re Estate of Howard H. Brand*, the testator directed that his horses and mules be destroyed upon his death, and the court noted that "the unique type of 'property' involved merits

<sup>58</sup> Case no. CH 97-544 (Va. Cir. Ct., Arlington Cty., Oct. 17, 1997).

<sup>59</sup> Brooke A. Masters, "In Courtroom Tug of War Over Custody, Roommate Wins the Kitty," Wash. Post, Sept. 13, 1997, at B1.

<sup>60</sup> See generally *In Re Howell's Estate*, 260 N.Y.S 598 (1932); See also *In re Searight's Estate*, 95 N.E.2d 779 (1950).

<sup>61</sup> The states with statutes pertaining to pet trusts are Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Michigan, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming. See Estate Planning for Pets.org, *Pet Trust Statutes*, <http://www.estateplanningforpets.com/legal-statutes.htm> (last visited Feb. 6, 2008).



special attention. 'Property' in domestic pets is of a highly qualified nature, possession of which may be subject to limitation and control."<sup>62</sup> A Pennsylvania court also denied the testator's wishes to have her two Irish setters destroyed humanely as being against public policy in *Capers Estate*.<sup>63</sup> Had the courts considered these animals as mere chattel, they would not have ignored the testators' wishes to dispose of their property as they desired.

#### IX. ANIMALS IN LABORATORIES

Like most jurisdictions, in Massachusetts it is a felony to willfully permit an animal to be subjected to unnecessary torture, suffering, or cruelty. Included in the definition of cruelty is "torment."<sup>64</sup> So, how does one justify permitting scientific research on animals? Most people would agree that to use a dog, cat, or even a chimpanzee for research experiments is, at a minimum, tormenting an animal. What many proponents of research would argue, however, is that research on animals is either "necessary," or "justified." To advance this position requires a rationale that a dog, cat, or chimp is the equivalent of an innate piece of property.

The Animal Welfare Act regulates animals used in research and in essence pre-empts state cruelty laws, as most state legislation specifically exempts research labs. State laws must exclude research activities because statutorily it is cruelty, punishable by fines or imprisonment or both.

Furthermore, the act of researching on animals is often supported on First Amendment grounds. The Animal Welfare Act is a weak federal law used to stifle public outrage over lab practices. Individuals like us or other concerned public citizens cannot sue under the act to prevent animal care violations. Oversight of lab animals rests with a committee at each research institution. The care required is minimal and would be a violation of state anti-cruelty laws.

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<sup>62</sup> *In re Estate of Howard H. Brand*, No. 28473 (Probate Court, Chittenden County, Vt., Mar. 17, 1999).

<sup>63</sup> 34 Pa. D. & C.2d 121 (1964).

<sup>64</sup> Mass. Gen. Laws Ann. ch. 272 § 77 (2007).

Arguments that animal research is necessary, justified, or does more good than harm detract from the overarching issue: the propriety of treating millions of animals like property for research at the hand and whim of the researcher. Arguments over the compatibility of different sciences and the necessity of the experimentation are merely collateral issues.

With the advancement of science and technology, it is now possible to conduct testing without having to use live animals. Human tissue, donated from human cells, can be grown in test tubes.<sup>65</sup> Computers can use simulation software to virtually conduct tests.<sup>66</sup> The software can even incorporate "hundreds of variables to simulate" various human conditions and the effects the drug or product would have on them.<sup>67</sup> Given the unreliability associated with testing on live animals (some side effects don't show up until years later),<sup>68</sup> the advancements in research testing should hopefully obviate the need for any animal testing in the near future.

#### X. CONCLUSION

To many individuals, legal rights for animals is worrisome because humans utilize animals for our own pleasures and economic pursuits. With a recognition that animals are sentient creatures capable of experiencing great pain should come a realization that animals are not property—not innate objects—and our legal system must recognize this. It did when slaves, women, and children were considered property, and now it is time to reclassify the status of animals, too.

"The great aim of education is not knowledge but action."  
English philosopher – Herbert Spencer

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<sup>65</sup> See Barnaby J. Feder, *Saving the Animals: New Ways to Test Products*, N.Y. TIMES, Sept. 12, 2007, Section H, page 5).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*