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Living Property: A New Status for Animals Within the Legal System

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LIVING PROPERTY: A NEW STATUS FOR ANIMALS WITHIN THE LEGAL SYSTEM

DAVID FAVRE*

This Article develops the proposition that non-human animals can possess and exercise legal rights. This proposal is supported by the fact that our legal system already accommodates a number of animal interests within the criminal anti-cruelty laws and civil trust laws. To make a more coherent package of all animal-related public policy issues, it is useful to acknowledge the existence of a fourth category of property, living property. Once separated out from other property, a new area of jurisprudence will evolve, providing legal rights for at least some animals. This Article establishes why animals should receive consideration within the legal system, which animals should be focused upon, what some of the legal rights might be, and how the traditional rules of property law will be modified to accommodate the presence of this new category of property.

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In the text of this Article, the author may refer to an animal with the pronouns “his,” “her,” “she,” “he,” or “who.” An animal is not a sexually neutral “it.” All the animals referred to in this Article are either male or female. A car is an “it,” or a computer perhaps, but an animal should not be an “it.” Perhaps the rules of property have long supported the rules of grammar by placing animals with nonliving things. Respect for the animals should compel us to refer to them as living beings, not inanimate objects.

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I. INTRODUCTION

Humans have interests in possessing, owning, using, and protecting lawfully obtained property. This is all well and good, and has been the case since the beginning of human civilization. However, what if some of the objects, some of the property, have interests independent of the humans who own them? This raises a conflict that is different from the usual individual human versus individual human or individual human versus human society conflicts with which the law most often struggles. However, this is not a universal problem with property; it arises only in the case of a special category of property, living property.

Only living entities can have interests. Since the 1860s in the United States, the legal system has been trying to ascertain the best way to deal with the animal subset of the category of personal property. The law, initially just at the state level, has adopted protective provisions for animals.¹ In doing so, the law has stretched the attributes of personal property to accommodate this special class, but the fit is not good. For example, given the reality that many

1. These laws are generally found within the category of state anti-cruelty laws. *See infra* Part II.C.

humans attach an emotional, personal value to their pets, the present position of the law that says that damages to property are primarily measured by the fair market value of the property, constitutes a large disconnect between public expectations and the rules of property.² To deal with this and many other issues, it is time to formally acknowledge a new category of property, that of living property. Inherent in acknowledging the interests of animals, which justify the creation of the new category, will be the creation of legal rights to assure that these interests are given some measure of weight in the decision making of the legal process.

A premise of this Article is that it is ethically acceptable to continue to have animals within a property status. This premise is contrary to the beliefs of a number of individuals in the field of animal rights, particularly those who self-identify as abolitionists. Among these writers, the first order of business is the elimination of the property status of animals, and then making animals (or some subset of animals, such as primates) legal persons. This author rejects this path forward. The key ethical question upon which the basis of this Article diverges from the abolitionists is whether it is acceptable for humans to keep, possess, and use animals. Their answer is “no,” and at least some members of this school of thought push the non-use analysis to the point of asserting that humans should not keep, own, and use pets.³ This author rejects their ethical position upon the belief that positive human communities can include animals that are owned and used by humans.

This Article does not further consider the general ethical arguments of the abolitionists.⁴ However, this Article does provide a comprehensive contrary view of the opinion often expressed by abolitionists: that animals will not be

2. This disconnection is also reflected in the holdings of judges. An Illinois case from 2008 represents the dilemma. At trial court, a judge had held that the value of a pet dog was \$200 in a tort case (using a loose fair market analysis). On appeal, the court held that the value of the animal was at least the amount that the plaintiffs spent on veterinary bills to care for the dog after he had been attacked by the defendant's dog, \$4,782.72. See Dave Bakke, *Judges Rule on the Proper Value of a Dog's Life*, STATE JOURNAL-REGISTER (Springfield, Ill.), Jan. 4, 2009, available at <http://www.sj-r.com/news/x2094350144/Dave-Bakke-Judges-rule-on-the-proper-value-of-a-dog-s-life>.

3. See Gary L. Francione, *Animals—Property or Persons?*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 108, 134 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004). Professor Francione is one vocal advocate of the abolitionist perspective: “And if the treatment of animals as resources cannot be justified, then we should abolish the institutionalized exploitation of animals. We should care for domestic animals presently alive, but we should bring no more into existence.” *Id.* This debate is international in scope. See generally HERON JOSE SANTANA GORDILHO, ANIMAL ABOLICIONISMO (2008) (written in Portuguese and published in Brazil).

4. For a full discussion of the moral and legal status of animals, see generally ANIMAL RIGHTS (Clare Palmer ed., 2008). This book is a collection of thirty-one reprinted essays from the major authors in this area. See also Martha C. Nussbaum, *Animal Rights: The Need for a Theoretical Basis*, 114 HARV. L. REV. 1506 (2001) (reviewing STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS (2000)).

able to receive legal rights so long as they remain the property of humans. Their position is without support, regardless of the number of times that it is stated.⁵ Not only is it conceptually possible, but animals, or at least some animals, already possess limited legal rights. Admittedly, animal rights are not equal to legal rights of humans, but they are rights nevertheless.⁶

To support and explain the proposition of this Article will require a consideration of several primary issues: Does the legal system have the capacity to accept animals as juristic persons? How can animal legal rights be most usefully characterized? What impact would the creation of this new category have upon the rights of the human owners of living property? What legal rights ought to be allocated to those within this new category of living property? It is admitted that to give some status to animals will necessarily mean that the legal rights of some humans will be restricted. The advancement of intellectual, civilized society has always been marked by the dilution of legal rights for some in order to make way for the new rights of others.⁷

This Article shall first provide a brief consideration of the history of animals within the legal system and the system's capacity for change (Part II). A suggested matrix for categorizing legal rights will be proposed (Part III). Next, the nature and characteristics of the category of living property will be developed (Part IV). Finally, a revised set of rules for the human owners will be considered, followed by a list of proposed legal rights for animals (Part V). All of these topics could clearly fill a book, and perhaps in time will do so, but for this Article, the conceptual development is the primary task.

II. HISTORY

A. *Evolution of Categories of Property*

The common law legal system has its conceptual roots in the Roman law period. The Roman view of the world produced two fundamental categories: persons and things. Persons had access to the law and property law was written about things. Property law is an institution with four component parts: the persons who hold the rights, the relationships between persons, the objects to which property concepts attach, and sanctions for violations of the rules.⁸

5. See Gary L. Francione, *Animals, Property, and Personhood*, in PEOPLE, PROPERTY, OR PETS? 77 (Marc D. Hauser et al. eds., 2006) ("I argue that if we are to take animal interests seriously, then we must accord animals one right: the right not to be treated as our property."); Bernard E. Rollin, *Animal Ethics and Breed-Specific Legislation*, 5 J. ANIMAL L. 1 (2009).

6. For an article proposing equal legal rights for animals, see Ani B. Satz, *Animals as Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy, and Property*, 16 ANIMAL L. 65 (2009).

7. As women gained legal property and political rights, men saw a dilution of their property and political legal rights. See *infra* notes 34–37 and accompanying text.

8. 1 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 2.02 (Michael Allan Wolf ed.,

Property laws are written to deal with conflicting claims of the individual human against other individuals or society, generally regarding possession and use of “things” or land.⁹ It is inherent in the nature of humans to seek to control objects or land obtained and possessed.¹⁰ The protection of individual property from the demands of the state have even received U.S. constitutional protection under the Fifth Amendment, which limits the government’s taking of property, unless the use is for a public purpose and just compensation is provided.¹¹ Why this is the case and how to describe the origin of property law is beyond the scope of this Article, as there is much dispute among the writers of jurisprudence about the origin and organization of property issues.¹² Instead, the starting point will be that the concept of property exists and is well-entrenched in our legal thinking.

The standard discussion of property today lists three basic categories of property—real property, personal property, and intellectual property. These distinct categories are all under the umbrella of property law in that owners receive the benefits of ownership of property, as opposed to contract rights or claims under tort law. But there are three categories because each has unique characteristics that shape a different set of public policy concerns. Real property is fixed in place, visible for all to see and will last indefinitely (unless it is beachfront¹³). Records about real property can be put in a local courthouse and found by everyone. Personal property is physical, moveable, and has a limited physical existence. Historically, most personal property was of modest value.¹⁴ Intellectual property is a product of a human mind.

2009).

9. See 3 ROSCOE POUND, JURISPRUDENCE 103 (1959) (“In civilized society men must be able to assume that they may control for purposes beneficial to themselves what they have discovered and appropriated to their own use, what they have created by their own labor, and what they have acquired under the existing social and economic order.”).

10. See *id.* at 106 (“Indeed, taking possession of what one discovers is so in accord with a fundamental human behavior tendency that discovery and occupation have stood in the books ever since substantially as the Romans stated them.”). The application of these ideas played out in the awkward historic case of *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823), in which the Court held the discovery of the land of the United States by the Europeans gave them superior title to the land occupied by Native American tribes. *Id.* at 567.

11. The importance and nature of the debate about protection of individual property ownership versus the needs of the state can be seen in the case of *Kelo v. City of New London*, 545 U.S. 469 (2005). In this case, the Supreme Court held that the city was allowed to take the title of the plaintiff’s property and transfer title to another private party for development because of the public good to be realized by the private development activity. *Id.* at 483–84.

12. See 3 POUND, *supra* note 9, at 105–55 (giving a full discussion of the various views of property over the centuries); see also GEORGE WHITECROSS PATON, A TEXTBOOK OF JURISPRUDENCE 505–52 (G.W. Paton & David P. Derham eds., 4th ed. 1972).

13. For an article on the relentless intrusion of the ocean, eliminating land and houses, see Alyssa Abkowitz, *Beating Back the Ocean Proves an Enduring Riddle*, WALL ST. J., Sept. 12, 2008, at A12.

14. For a brief discussion of how the category of personal property evolved out of real property

Historically, it resulted in a physical reality, like a book. Today, however, significant value can exist with property that has only limited real physical attributes, such as computer software.¹⁵

B. Animals Are Part of Personal Property

Some animals are, and have always been, categorized as personal property.¹⁶ However, as the English common law developed, not all animals had equal presence or status within the law:

The common law regards and gives the greatest protection to those animals designated as “useful,” and the least protection to those *ferae naturae*. Useful animals [e.g., cattle and sheep] are regarded as having intrinsic value, and are given the same protection as is given to goods; but, at common law, animals of a base nature are not regarded as property to the extent of being subjects of larceny, nor could a criminal action be brought for maliciously killing an animal of a base nature [e.g., dogs and cats].¹⁷

The reader may be surprised to learn that dogs remained in this non-property status into the early 1900s.¹⁸ This meant that the keeper of the non-

concepts, see 1 POWELL, *supra* note 8, § 5.04. He suggests that it became separate as personal property items became economically valuable. *Id.*

15. John Paczkowski, *Apple to Psystar: And Don't Get Any Bright Ideas About a Black Friday Sale, Either, All Things Digital* (Nov. 25, 2009), <http://digitaldaily.allthingsd.com/20091125/apple-to-psystar-and-dont-get-any-bright-ideas-about-a-black-friday-sale-either/>.

And make no mistake, Apple legal is going to grind Psystar into fine silicon dust. In addition to the injunction, Apple is requesting compensation for legal costs and statutory damages owed under the Copyright Act and the Digital Millennium Copyright Act. And according to Apple's expert witness, statutory damages for the former should run “between \$1500 and \$300,000” and for the latter “between \$449,500 and \$4,495,000.”

Id.

16. For more details about the history of animals as property, see generally Rebecca J. Huss, *Valuing Man's and Woman's Best Friend: The Moral and Legal Status of Companion Animals*, 86 MARQ. L. REV. 47, 68–69 (2002) (noting that the first U.S. judicial decision to authorize a property right in dogs was recorded in 1871); see also Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. ENVTL. AFF. L. REV. 471 (1996); William C. Root, Note, “*Man's Best Friend*”: *Property or Family Member? An Examination of the Legal Classification of Companion Animals and Its Impact on Damages Recoverable for Their Wrongful Death or Injury*, 47 VILL. L. REV. 423, 424 (2002).

17. FRANK HALL CHILDS, *PRINCIPLES OF THE LAW OF PERSONAL PROPERTY, CHATTELS AND CHOSSES* 35–36 (1914).

18. See DAVID FAVRE & PETER L. BORCHELT, *ANIMAL LAW AND DOG BEHAVIOR* 10–11 (1999). A clear statement of the legal status of dogs and cats did not appear in Virginia law until 1984: “All dogs and cats shall be deemed personal property and may be the subject of larceny and malicious or unlawful trespass.” VA. CODE ANN. § 3.2-6585 (2008). Connecticut did not change its

property animal could not look to the protections of the law; an owner could not call the police if her dog had been stolen or killed. If the human owner's interest in her dog was not recognized by the law, then clearly the interests of the dog also were not recognized. In a curious twist of social development, the interests of the dog would come to be recognized by the law, by the adoption of anti-cruelty laws, before the property status of the dog, protecting the interests of the owners, was established.¹⁹

C. *The First Transformation on Behalf of Animals*

Throughout history, the social view of animals has been reflected in the provisions of the law. Up through the 1860s, the law was dealing primarily with the economic value that an animal represented.²⁰ Indeed, legal protection was provided for farm animals, not pets, as pets had no socially recognized value. However, beginning in the 1860s, there was a clear transition in the laws dealing with animals—from mere protection of the property interests of owners and the economic value of those interests, which did not restrict what an owner could do to her own animal, to concerns about the animals themselves, regardless of the actor.²¹ The 1867 New York law,²² promoted by

law until 1949, when the following was adopted: "All dogs are deemed to be personal property. . . . Any person who steals a dog may be prosecuted under section 22-351 or under sections 53a-118 to 53a-129, inclusive." CONN. GEN. STAT. ANN. § 22-350 (West 2001).

19. In the 1889 Annual Report of the American Society for the Prevention of Cruelty to Animals (ASPCA), the following is found:

Thos. McCormac, [charged with] setting dogs to fight on the public highway. The offender was requested by a lady to cease urging the dogs to fight but he replied insolently, and encouraged them on the more. While so engaged, he was arrested by one of the Society's officers. Realizing his danger, he commenced to cry for mercy, and even appealed to the [lady] he had insulted. Sentenced to serve five days in jail by Judge Kenna.

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, TWENTY-FOURTH ANNUAL REPORT FOR 1889, at 18 (1890) [hereinafter ASPCA], available at <http://www.animallaw.info/historical/articles/arusaspcreport1889.htm>.

20. See CHILDS, *supra* note 17, at 36. Even as late as 1914, Childs spoke in terms of two categories of domestic animals: "Useful" animals were kept for food or fiber, while "base nature" animals "[were] kept for whim or pleasure, as cats and dogs." *Id.* at 35.

21. See generally David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800's*, 1993 DET. C.L. REV. 1 (1993).

An example of a statute that reflects the strict property concept of animals, which existed at the beginning of the nineteenth century, is found in Vermont legislative law. . . . Section 2 state[s] in part:

"Every person who shall wilfully and maliciously kill, wound, maim or disfigure any horse, or horses, or horse kind, cattle, sheep, or swine, of another person, or shall wilfully or maliciously administer poison to any such animal . . . shall be punished by imprisonment [of] . . . not more that five years, or fined not exceeding five hundred dollars . . ."

"Every person who shall wilfully and maliciously kill, wound, maim or

Henry Bergh, founder of the American Society for the Prevention of Cruelty to Animals (ASPCA), created the conceptual breakthrough.²³ Thereafter, new laws were adopted by many states, based upon the New York model.²⁴ Besides the benefits to humans, the existence of these laws clearly reflects the legislatures' acceptance of the proposition that an animal's interest in being free from unnecessary pain and suffering should be recognized as a value within the legal system. In most states, the freedom from pain and suffering was allowed for all animals, whether or not the property of humans, and was certainly allowed for the dog.²⁵

This new proposition was recognized by the courts of the time. In the case of *Stephens v. State*, the court found that:

This statute is for the benefit of animals, as creatures

disfigure any horse, or horses, or horse kind, cattle, sheep, or swine, of another person, or shall wilfully or maliciously administer poison to any such animal . . . shall be punished by imprisonment [of] . . . not more than five years, or fined not exceeding five hundred dollars”

Id. at 7 (alteration in original) (quoting Act of Oct. 23, 1846, ch. 34, § 2, 1846 Vt. Laws 35).

Note that in this language there is no provision prohibiting the cruel treatment of animals generally. The list of animals protected was limited to commercially valuable animals, not pets or wild animals. The purpose of this law was to protect commercially valuable property from the interference of others, not to protect animals from pain and suffering inflicted by the owner. Finally, because the penalty was for up to five years of jail time, a violation of this law was a felony, again evidence of property protection.

22. Act of Apr. 12, 1867, ch. 375, § 1, 1867 N.Y. Laws 86 (current version at N.Y. AGRIC. & MKTS. § 353 (Consol. 2004)).

23. This may be considered to have occurred earlier in England. In 1822, the English Parliament adopted the Martin Act, which adopted humane standards for some animals. “[T]he animals included in the Act ceased to be the mere property of their owners.” HENRY S. SALT, ANIMALS’ RIGHTS: CONSIDERED IN RELATION TO SOCIAL PROGRESS 6 (New York, MacMillan & Co. 1894). But see an 1821 law from Maine suggesting a tentative earlier concern for the welfare of some animals. Favre & Tsang, *supra* note 21, at 8 (citing Act of Feb. 24, 1821, ch. IV, § 7, 1821 Me. Laws 60).

24. Within a few years, the following states had adopted the same pattern of legislation as that in New York, with both new criminal laws and the chartered creations of state societies for the prevention of cruelty to animals (SPCAs): Massachusetts (Act of June 2, 1869, ch. 344, 1869 Mass. Acts 712), Pennsylvania (XXIV PA. STAT. ANN. §§ 7770–7783 (West 1921)), Illinois (Act of Mar. 31, 1869, ch. 5a, §§ 1–3, 1869 Ill. Laws 115), New Hampshire (N.H. LAWS ch. 281, §§ 26–27 (1878)), and New Jersey (Act of Apr. 1, 1873, §§ 1–17, 1873 N.J. Laws 80, and Act of Mar. 25, 1875, §§ 1–2, 1875 N.J. Laws 40 (codified at N.J. REV. STAT. §§ 64–82 (1877))). As of 1904, most states had some type of organized SPCA. AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, THIRTY-NINTH ANNUAL REPORT FOR 1904, at 139–40 (1905), available at <http://www.animallaw.info/historical/articles/arusaspcareport1889.htm> (scroll down the page to see the 1904 annual report). See generally RICHARD D. RYDER, ANIMAL REVOLUTION: CHANGING ATTITUDES TOWARDS SPECIESISM 171–75 (1989).

25. As examples of traditional initial language, see CAL. PENAL CODE § 599b (West 1999 & Supp. 2010) (adding “every dumb creature” to the code in 1905) and MISS. CODE ANN. § 97-41-1 (2006), *invalidated by* *Davis v. State*, 806 So. 2d 1098 (Miss. 2001) (noting that the original 1880 statute used the phrase “any living creature,” which also appears in N.Y.’s 1867 law).

capable of feeling and suffering, and it was intended to protect them from cruelty, without reference to their being property, or to the damages which might thereby be occasioned to their owners.²⁶

This point was also made in an Arkansas case in which the court acknowledged this new concern when it noted that the new laws

are not made for the protection of the absolute or relative rights of persons, or the rights of men to the acquisition and enjoyment of property, or the peace of society. They seem to recognize and attempt to protect some abstract rights in all that animate creation . . . from the largest and noblest to the smallest and most insignificant.²⁷

These new laws clearly reflected society's acknowledgment that animals have interests in being free from pain and suffering.

However, it must also be recognized that the early laws also sought to balance these newly acknowledged interests of animals against human interests. The laws recognized that sometimes the human interests will supersede that of the animals', and pain and suffering might lawfully occur. Within the original New York law itself, this balancing existed. The critical prohibitions on beating and killing animals were modified with "unnecessarily" and "needlessly."²⁸ Thus, if a horse had to be hit to make him start pulling the wagon, or if an animal had to be killed to be eaten, such actions did not violate the law. Another clear balancing of interests occurred in the context of scientific experimentation. Section 10 of the 1867 New York law provided that properly conducted scientific experiments did not violate the law, thus allowing the intentional infliction of pain and suffering for the advancement of scientific knowledge.²⁹

26. *Stephens v. State*, 3 So. 458, 458 (Miss. 1888).

27. *Grise v. State*, 37 Ark. 456, 458 (1881).

28. The 1867 New York anti-cruelty law stated that

[i]f any person shall over-drive, over-load, torture, torment, deprive of necessary sustenance, or unnecessarily or cruelly beat, or needlessly mutilate or kill, or cause or procure to be over-driven, over-loaded, tortured, tormented or deprived of necessary sustenance, or to be unnecessarily or cruelly beaten, or needlessly mutilated or killed, as aforesaid, any living creature, every such offender shall, for every such offense, be guilty of a misdemeanor.

Act of Apr. 12, 1867, ch. 375, § 1, 1867 N.Y. Laws 86 (current version at N.Y. AGRIC. & MKTS. § 353 (Consol. 2004)).

29. "Nothing in this act contained shall be construed to prohibit or interfere with any properly conducted scientific experiments or investigations, which experiments shall be performed only under the authority of the faculty of some regularly incorporated medical college or university of the state of New York." *Id.* § 10, 1867 N.Y. Laws 87-88 (current version at N.Y. AGRIC. & MKTS. § 353

Over the past fifty years, increasing social concern for the welfare of animals has resulted in modifications of the anti-cruelty laws. The requirement in the original New York law for providing food and water has been expanded significantly in many states to include food, water, shelter, and veterinary care.³⁰ Additionally, the punishment level for violation of these statutes has increased. For intentional acts of cruelty, punishment is now most often at the felony level rather than just a misdemeanor. In 1993, only seven states had felony anti-cruelty provisions; by 2005, forty-one states had some felony provisions.³¹

D. Capacity for Change

While property law is often slow to change, it does change over time as the moral and ethical perspectives of society change.³² There are two key points to be briefly made here. The first is that society can change who is a legal person, and secondly, that different categories of legal persons often have different or more limited categories of rights. Indeed, legal rights often arrive in a piecemeal fashion, as the lawmakers see fit. The most obvious example of the first point is the transformation of African-Americans from the non-person status of slaves to freedom and legal personhood.³³

As an example of the second point, consider the legal status of women several hundred years ago within the laws of the United States. When a woman married a man, the common law view at that time was that the woman's property interests were merged into those of the man, and the man had the full power of disposition of property that had previously been under the control of the unmarried woman.³⁴ This began to change in the 1840s,

(Consol. 2004)).

30. For example, the Michigan law now states: "'Adequate care' means the provision of sufficient food, water, shelter, sanitary conditions, exercise, and veterinary medical attention in order to maintain an animal in a state of good health." MICH. COMP. LAWS ANN. § 750.50(1) (West 2004 & Supp. 2009).

31. Stephan K. Otto, *State Animal Protection Laws—The Next Generation*, 11 ANIMAL L. 131, 132 (2005).

32. From Powell's treatise on property law:

At any stage in human history the prevailing institution of property is chiefly an inheritance from the past. This inheritance, however, is subject to constant change. These changes represent efforts to work out adaptations to the new problems presented by new ingredients in the political, economic, and philosophical atmosphere of the moment. The fact of change is an ever-present phenomenon in society.

1 POWELL, *supra* note 8, § 2.06.

33. The legal realization of the status change is reflected in the Fourteenth Amendment to the U.S. Constitution. U.S. CONST. amend. XIV.

34. JOSHUA WILLIAMS, PRINCIPLES OF THE LAW OF REAL PROPERTY 223 (Philadelphia, T. & J.W. Johnson & Co. 5th ed. 1879). Before the formation of the United States, the common law of

with the adoption of Married Women Acts.³⁵

An even more stark difference reflecting the different status of men and women deals with the legal right to have a voice in the political process, the right to vote. The moral/political battle by which women obtained the right to vote has been well covered by other writers of legal history.³⁶ Two points follow from this long battle. First, clearly women were always legal persons, but they were not treated equally with men. Thus, the legal system is capable of handling legal persons with different sets of rights. Secondly, the legal system is capable of piecemeal change in deciding which legal rights should be allocated to which legal persons. Therefore, our legislatures could decide that some animals, but not all animals, should possess some but not all possible legal rights. Such different treatment is fully within the common law tradition of this country. Indeed, incremental change is the norm, not sudden universal change.³⁷

England also held under the rule of primogenitor that males would inherit lands in preference to female heirs. On the death of a husband, a wife had the right of dower in her husband's land (a one-third life estate), but the husband had the right of curtesy in his wife's lands at her death, which was a full life estate. *Id.* at 223 n.1, 232.

35. See 41 AM. JUR. 2D *Husband and Wife* § 3 (2005).

The social order upon which the concept of legal unity between husband and wife was predicated no longer exists. During the nineteenth century, Married Women's Emancipation Acts were passed in all American jurisdictions. These were designed to confer upon married women a separate legal personality and to give them a separate legal estate in their own property. They conferred upon a wife the capacity to sue or be sued without joining the husband and, generally, as far as third persons were concerned, made the wife separately responsible for her own torts. From an early date it was recognized that a primary purpose of these statutes was to free the wife's property from the control of her husband.

Id.; see generally NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE AND PROPERTY IN NINETEENTH-CENTURY NEW YORK* (1982); KATHLEEN S. SULLIVAN, *CONSTITUTIONAL CONTEXT: WOMEN AND RIGHTS DISCOURSE IN NINETEENTH-CENTURY AMERICA* (2007). In both these books, the process of legal change is found to be very slow, taking place over decades, not as a big one-time event. The legal system reluctantly changed; it was not transformed at any one point of time. See also 1 POWELL, *supra* note 8, § 6.02.

36. See generally DORIS WEATHERFORD, *A HISTORY OF THE AMERICAN SUFFRAGIST MOVEMENT* (1998).

37. See 18 PA. CONS. STAT. ANN. § 5511 (West 2000 & Supp. 2009). As a small example of different categories of animals receiving different treatment, consider some of the provisions of the Pennsylvania Anti-Cruelty Law. Under this law a person:

[C]ommits a misdemeanor of the second degree if he willfully and maliciously . . . kills, maims or disfigures any *domestic animal* of another person

[C]ommits a felony of the third degree if he willfully and maliciously . . . kills, maims or disfigures any *zoo animal* in captivity.

[C]ommits a misdemeanor of the first degree if he willfully and maliciously . . .

III. THE ALLOCATION OF LEGAL RIGHTS

The present schemes for describing legal rights are inadequate to the task of identifying the path that is being followed for the creation of legal rights for animals. As will be explained, animals already exist as individuals within our legal system, but not in a systematic, focused way that is accessible to traditional writers of jurisprudence. To best grasp what our legal system has been doing, there must be a focus on the separation between the possession of a legal right and the exercise of the right. Animals are like infant children in that they can be recognized as legal persons, but do not have the capacity to understand or knowingly exercise any legal rights allocated to them. This has been particularly difficult for the animals as, unlike children, they are property and one of the legal mantras often repeated is that property cannot be the holder of legal rights. Yet, at least some animals can and have gathered legal rights. This has occurred despite the mantra asserting the contrary and obscuring the view of most observers of the reality of legal events in the United States.

A. A Card Game

To help visualize what has happened and what might happen in the future, consider the granting and using of legal rights as a multi-layered card game. Legal rights are represented by cards. Cards have different values, and without possessing cards, you cannot play. Further, just because someone has cards does not mean the cards will be well played. The government is the dealer of the cards, deciding both who gets the cards and what values the cards represent. One unusual aspect of The Rights Game is that those with cards can vote to direct the dealer to either give them more cards or take away cards already given out, or most importantly, to give cards to individuals who previously had no cards. (One complexity that we will not deal with here is that we have three levels of government: federal, state, and local. So, cards can be received from at least three different dealers.) In this game there is no limit to the number of players who can hold cards, or play cards, or number of cards that might be created. A critical aspect of this game is that cards can and often must be played by someone other than the original possessor of the card. Parents might hold and play cards allocated to their children, and with the right legal document, e.g., a power of attorney, children might hold and

kills, maims, mutilates, tortures or disfigures any *dog or cat*, whether belonging to himself or otherwise.

Id. (emphasis added). The same act has three levels of punishment depending not upon the species of animal or even the market value of the animal, but upon the category of animal—pet, zoo animal, or those animals within a general “other” category. This is not rational from the perspective of the animals. It only makes sense in the context of what is politically important or acceptable within human legislatures.

play the cards allocated to their parents. Of course, the government (legislature) can deal itself cards for playing. Not every card that the government seeks to distribute is a lawful card, as the courts have the power to force the dealer to collect and destroy cards if the courts find that the government was without authorization, under the rulebook of the Constitution, to create the particular card. All of this is enough to suggest the context for the following, more focused discussion about animals in particular.

An animal, under the theory of this Article, has the capacity to be a player, a holder of cards. Two possible cards are: (1) the right to be free from pain (FFP) inflicted by the intentional acts of a human, and (2) the right to receive food adequate for a healthy life (Food). For the animals of New York, these cards were initially distributed by the New York legislature under the previously described New York anti-cruelty law.³⁸ Perhaps the value for the cards was low, but they were cards nevertheless. Humans also have FFP cards, but adult humans do not have the Food card held by animals and children. The government itself does not possess either a FFP or a Food card.

Now, what makes this game interesting and complex is that the cards come in three colors, with the color denoting not who can hold a card, but who can play a card. The colors are red, blue, and green. Red cards can be played only by government players (prosecutors), blue cards can be played by human players, and green cards can be played by non-human animals (by attorneys appointed to represent particular animals). Consider the FFP cards held by humans. They come in two colors: The red FFP card has to be given to a government player (a prosecutor) who will decide whether to play it by bringing criminal charges against the actor. Or, harmed humans may use the blue card to play themselves (as plaintiffs) in a civil law suit. The vast majority of the cards held by animals today are red and are created by a state's criminal anti-cruelty laws. Animals have legal rights, but cannot assert or play the cards themselves. Rather, the government has to be willing to reach over and take an animal's card and play it on the animal's behalf. So, those animals that possess red FFP cards are dependent upon the government player-prosecutors. Sometimes the government will play these red FFP cards, sometimes it does not. That the government does not play a card does not mean that an animal does not possess a card.

B. Card Characteristics

To give some descriptive characterization to the cards, consider the red cards as representing weak legal rights, in that they can be played only by

38. See *supra* notes 22, 28–29 and accompanying text.

government entities. Blue cards are strong legal rights and can be played by humans or some non-governmental group of humans (perhaps humane societies). They are stronger in the sense that legal action for protection of animal interests may be carried out by private parties, even in the absence of action by the government. Green cards represent preferred legal rights and can be played by animals directly.³⁹ This third category is what is traditionally considered the fullest realization of a legal right, but this is too narrow of a view. In the broader sense of the term, a legal right exists when a court is willing and able to consider a specific interest of a particular being.

1. Red Cards—Weak Legal Rights

Under the Michigan anti-cruelty laws, a number of red cards have been given to many of the animals within the state:

- The right not to be tortured.
- The right not to be killed without just cause.⁴⁰
- The right to be provided with food, water, and shelter.
- The right to be provided with veterinary care.⁴¹

But, not all domestic animals in Michigan receive these red cards. For example, farm animals are specifically exempted from the state law if the action is a standard agricultural practice.⁴² In Michigan, for unexplained reasons, zoo animals do not receive the red cards requiring proper care but do get the red cards to be free from torture.⁴³ Wild animals in Michigan receive the red cards for FFP, but not the Food card.⁴⁴ For perhaps understandable reasons, animal pests such as rats do not receive the red cards as well, depending upon the context in which the rat lives.⁴⁵ Under the Michigan law, these red cards are, by the statutory definition of “animal,” limited to vertebrate animals.⁴⁶ So, if an individual decides to torture a jellyfish or a zebra mussel, these animals have no cards for anyone to play. It is also true that farm animals do not receive any red cards from the Michigan law, or indeed, from the federal government under the federal Animal Welfare Act. Chickens commercially raised in the United States have nowhere near the

39. Do not confuse the substance of this right with the practical procedural issues of how the right would be asserted.

40. MICH. COMP. LAWS ANN. § 750.50b (West Supp. 2009) (“[A] person shall not do any of the following without just cause: Knowingly kill, torture, mutilate, maim, or disfigure an animal.”).

41. *Id.* § 750.50.

42. *Id.* §§ 750.50(8)(f), 750.50b(7).

43. *Id.* § 750.50(8)(d); *see also* § 750.50b.

44. *See id.* §§ 750.50–750.50b.

45. *See id.* §§ 750.50(8)(e), 750.50b(8)(c).

46. *Id.* § 750.50(1)(b).

number of red cards that a pet cat receives, if indeed the chicken has any.⁴⁷

2. Blue Cards—Strong Legal Rights

Blue card examples are represented by both some of the oldest cases filed by the ASPCA in New York and a twenty-first-century case filed by the Animal Legal Defense Fund in North Carolina. After the adoption of the 1867 Animal Act, the ASPCA, as a private organization, was authorized by the statute to file criminal prosecutions in the local courts for violations of that law alone.⁴⁸ The ASPCA would prosecute the case without the necessity of the state prosecutor being part of the process.⁴⁹ (Of course, the State of New York could prosecute if it chose to do so.) Animals in New York City at the time had both a red and blue copy of the FFP card. This was a good thing, as it is doubtful that the red card would ever have been played. Today, the blue FFP cards have been withdrawn, as criminal prosecution has been brought back to being solely a government responsibility (red card).

As a present-day example of a blue card (strong legal right), consider a state law that allows private citizens or organizations to file civil actions for the benefit of animals. Existing criminal law anti-cruelty provisions can constitute the standards for such civil cases. A North Carolina statute allows civil enforcement of anti-cruelty provisions.⁵⁰ The case of *ALDF v. Woodley* is representative of this type of action.⁵¹ The Animal Legal Defense Fund (ALDF) filed suit to remove more than 300 dogs from the defendants' home

47. This disparity of legal rights arises more from the reality that the cats have high social visibility with humans and therefore more political capital, rather than from any inherent value cats may have over chickens.

48. Section 8 of the 1867 New York anti-cruelty law stated:

Any agent of the American [S]ociety for the [P]revention of [C]ruelty to [A]nimals, upon being designated thereto by the sheriff of any county in this state, may, within such county, make arrests, and bring before any court or magistrate thereof having jurisdiction, offenders found violating the provisions of this act; and all fines imposed and collected in any such county, under the provisions of this act, shall inure to said society, in aid of the benevolent objects for which it was incorporated.

Act of Apr. 12, 1867, ch. 375, § 8, 1867 N.Y. Laws 87 (current version at N.Y. AGRIC. & MKTS. § 371 (Consol. 2004)). Thus, the ASPCA had the power to arrest, prosecute, and receive any fines imposed—an amazing exercise of legal power by one private group.

49. In 1889, the ASPCA prosecuted 949 cases in the courts. ASPCA, *supra* note 19, at 17.

50. N.C. GEN. STAT. ANN. § 19A-2 (West 2007) (“It shall be the purpose of this Article to provide a civil remedy for the protection and humane treatment of animals in addition to any criminal remedies that are available . . .”). This statute is discussed in detail in a law review article, William A. Reppy Jr., *Citizen Standing to Enforce Anti-Cruelty Laws by Obtaining Injunctions: The North Carolina Experience*, 11 ANIMAL L. 39 (2005).

51. *Animal Legal Defense Fund v. Woodley*, 640 S.E.2d 777 (N.C. Ct. App. 2007).

because of the adverse conditions in which the animals were living.⁵² The court ordered all the animals removed from the Woodleys' home and title was transferred to ALDF, which found homes for almost all the animals. ALDF's trial court win was upheld on appeal.⁵³ After the civil case was filed, criminal charges were also filed against the owners on behalf of some of the animals (using these animals' red cards) and the defendants were found guilty in the criminal case. Without the blue card having been played first by ALDF, along with its attendant publicity, it is doubtful that the government would have played the red card on behalf of the animals. A second civil suit against a different defendant was filed by ALDF in 2007, and before the court ruled on the merits, the parties reached a settlement that provided appropriate care for the animals.⁵⁴

The North Carolina statute is an excellent example of a strong legal right that is both conceptually important and powerful. As in *Woodley*, the court's factual inquiry and the core of its decision will focus not on the plaintiff human organization, but on the animals in question. Using a modest number of words in one section of a statute, the state can bring to bear a new set of resources for the benefit of the animals. As the plaintiff organization will receive no financial benefit for bringing the case, the exercise of the power

52. The court stated the facts as such:

On 23 December 2004, [the] plaintiff filed a complaint against the defendants seeking preliminary and permanent injunctions under North Carolina's Civil Remedy for Protection of Animals statute[, N.C. GEN. STAT. ANN. § 19A-1]. [The] plaintiff alleged that [the] defendants had abused and neglected a large number of dogs (as well as some birds) in [the defendants'] possession.

Id. at 777–78. In this case, the defendants, Barbara and Robert Woodley, appealed from an injunction forfeiting all their rights in the animals and an order granting temporary custody of the animals to the plaintiff, the Animal Legal Defense Fund. *Id.* at 777.

53. On appeal, the defendants argued that Section 19A is unconstitutional in that it purports to grant standing to persons who have suffered no injury, and that it violates Article IV, Section 13 of the N.C. Constitution by granting standing through a statute. The court held that “Article IV, Section 13 . . . merely ‘abolished the distinction between actions at law and suits in equity’ . . . rather than placing limitations on the legislature’s ability to create actions by statute,” contrary to the defendants’ interpretation. *Id.* at 779 (quoting *Reynolds v. Reynolds*, 182 S.E. 341, 369 (N.C. 1935)).

54. See Pleadings, *Animal Legal Defense Fund v. Conyers*, No. 07CVD17739 (N.C. Dist. Ct. 2007), available at <http://www.animallaw.info/pleadings/pbusnconyers.htm>. “[The plaintiff’s sought] preliminary and permanent injunctions pursuant to [N.C. GEN. STAT. §§ 19A-1 to -4] against [the d]efendant Janie Conyers, who was found to have 106 animals living in her house under deplorable conditions.” *Id.* “Most of the animals suffer[ed] from severe chronic oral and skin conditions due to neglect.” *Id.* “[The] [p]laintiff[] also moved for an order pursuant to [N.C. GEN. STAT. § 19A-4] terminating all possessory interests in the animals seized and awarding custody and possessory rights to the ALDF.” *Id.* See Press Release, Animal Legal Defense Fund, Animal Legal Defense Fund Sues to Rescue 100+ Dogs From Real-Life House of Horrors in Raleigh (Oct. 31, 2007), <http://www.aldf.org/article.php?id=468>.

will occur only when private individuals are willing to invest resources to help animals. Indeed, the *Woodley* case cited above cost ALDF significant amounts of money, both in attorney's fees and housing costs for hundreds of animals during the months the case wound its way through the courts. Finally, the statute is powerful as the inquiry is specifically focused on the conditions of the animals and on who should have ownership and responsibility for them. The remedy is focused on protecting the interests of the animals in question. It is doubtful that the local government had the resources to take on a case involving such a large number of animals, even if it had the will to do so. For the immediate future, this is the strongest and quickest path for the realization of animal rights in our legal system.

3. Green Cards—Preferred Legal Rights

Preferred legal rights exist when the animal or animals in question are the plaintiffs of the suit. In the above example, with only a small modification of the statute, North Carolina could allow enforcement by the animals themselves. The language "or domestic animal" could easily be added to the authorizing section. If the state did so, the domestic animals of the state would receive a green card right to add to the existing red and blue cards and the statute would represent a preferred legal right for animals.

As animals are not able to initiate a lawsuit personally or understand legal proceedings generally, the first step in the application of a preferred legal right will be the appointment of a legal guardian who can represent the animal or animals in the legal arena. This is not conceptually impossible and in fact has already occurred several times within the United States. A chimpanzee has had a guardian appointed for purposes of the animal's interests in a trust,⁵⁵ a dog has had a guardian appointed for purposes of placement,⁵⁶ and the fifty Michael Vick pit bulls were placed under the guardianship of an attorney.⁵⁷

55. Order Appointing Guardian ad Litem, *In re Fla. Chimpanzee Care Trust*, No. CP-02-1333-IY (Prob. Div. Palm Beach County Cir. Ct., Apr. 1, 2002) (on file with author) ("It is hereby ordered: 1. C.S. is appointed as guardian ad litem to represent the interests of the beneficiaries of the Trust in all future matters involving the Trust; and 2. C.S.'s reasonable fees for serving as guardian ad litem for the Trust beneficiaries shall be paid from the assets of the trust.").

56. Order Appointing Guardian ad Litem, *In re Estate of Ronald W. Callan Jr.*, No. D-2252 (Shelby County Prob. Ct., Mar. 20, 2007) (on file with author) ("It is therefore Ordered Adjudged and Decreed that: 2. The Guardian Ad Litem owes a duty to this Honorable Court to impartially investigate and to determine the facts to the Court. The Guardian Ad Litem is not an advocate for the dog, but has the duty to determine what is best for the dog's welfare.").

57. Second Order as to Disposition and Appointing Guardian/Special Master at 2, *United States v. Approximately 53 Pit Bull Dogs*, No. 3:07CV397 (E.D. Va. Oct. 15, 2007), available at http://www.animallaw.info/pleadings/pb_pdf/pbusvick_order_appointing_guardian.pdf ("1. Rebecca J. Huss is hereby appointed as guardian/special master to consider appropriate options for a final disposition of the remaining 48 pitbull dogs previously forfeited to the United States. 2. Professor Huss shall have the following powers and duties to fulfill her obligations: (a) Consider available

The threshold for appointment of a guardian is dependent on state law, but generally is allowed for children if (1) there is a prima facie showing of need within the legal system and (2) the party asking for the guardianship is capable of representing the child.⁵⁸ To expand the present system to include animals on a limited basis would not be difficult. This is primarily a procedural issue that is well within the existing capacity of our court system.

Examples of green cards are more limited. The primary example deals with human-created trusts for the care of animals, usually pets. The drafters of the Uniform Trust Code addressed this issue in the late 1990s with the drafting of Section 408 of the Model Law. Under this section, a trust for the care of an animal is specifically allowed, along with the authorization for courts to appoint someone to enforce the trust.⁵⁹ Parallel language has also been made part of the Uniform Probate Code.⁶⁰ Thus, a pet has become a legally relevant being, one who has equitable title in the income and assets of a trust. This is a limited legal personhood, but it goes beyond animal welfare concerns to actually provide a legal right for animals. The result of these

disposition and placement options as she deems appropriate for the final disposition of the remaining dogs[.]”); Motion for Second Order as to Disposition and Appointing Guardian/Special Master, *Approximately 53 Pit Bull Dogs*, No. 3:07CV397, available at http://www.animallaw.info/pleadings/pb_pdf/pbusvick_motion_to_appoint_guardian.pdf.

58. For examples of statutes providing for appointments of guardians for children, see ALASKA STAT. § 13.26.055 (2008) (“The court may appoint as guardian any adult whose appointment would be in the best interests of the minor”); WIS. STAT. § 48.977 (2007–2008) (appointment is allowed when a child is judged to be “in need of protection or services”); MICH. COMP. LAWS ANN. § 700.5212 (West 2009) (“The court may appoint as guardian a person whose appointment serves the minor’s welfare”). See generally Peter Mosanyi, Comment, *A Survey of State Guardianship Statutes: One Concept, Many Applications*, 18 J. AM. ACAD. MATRIM. LAW. 253 (2002).

59. UNIF. TRUST CODE § 408 (amended 2005).

(a) A trust may be created to provide for the care of an animal alive during the settlor’s lifetime. The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than one animal alive during the settlor’s lifetime, upon the death of the last surviving animal.

(b) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court. A person having an interest in the welfare of the animal may request the court to appoint a person to enforce the trust or to remove a person appointed.

Id.

60. See, e.g., ARIZ. REV. STAT. ANN. § 14-2907 (2005 & Supp. 2009).

[A] trust for the care of a designated domestic or pet animal is valid. The trust terminates when no living animal is covered by the trust. A governing instrument shall be liberally construed to bring the transfer within this subsection, to presume against the merely precatory or honorary nature of the disposition and to carry out the general intent of the transferor. Extrinsic evidence is admissible in determining the transferor’s intent.

Id.

provisions is that the animal is the beneficiary of the trust, and if issues arise, the trustee could be sued by the animal, through a court-appointed attorney, to enforce the provisions of the trust.

C. Playing Your Hand—The Balancing of Interests

As in most card games, to play a card does not mean that you will win the hand. That depends on the cards held by the other players. If an animal control officer has to use force to capture a dog, thus inflicting pain, the government may play the dog's FFP card. In turn, the animal control officer may play his "use of reasonable force" card that he received when he took on the job of dogcatcher. A jury will decide which card is stronger under the criminal law standard of proof beyond a reasonable doubt.⁶¹ If the same force was used by a neighbor, the dog's card will win, unless the human could play the "self-defense" card.

If a young man decides he wants to smell burning flesh and therefore sets his neighbor's dog on fire, the government can play the animal's red FFP card in every state and will most likely win the hand, as the young man holds no cards justifying such action. (His particular interest, to smell burning flesh, is not judged by society to be appropriate if the animal is alive, and may indeed be an interest judged adverse to other social values.) Note that this is a different card than the dog owner's property ownership cards, which might be played against the young man in a civil action to collect for damages to his property. However, if a researcher at Big University decides to burn the skin of a dog in order to do research on the recovery process of burned skin, the outcome will likely be very different. If the government seeks to play the FFP card here, the researcher has a powerful "go free" card because of the outright exemption for infliction of pain in scientific research. It is not even a matter of seeing which card has more value: at the present time the researcher's card simply trumps the animal's FFP card, regardless of the value of the dog's

61. *State v. Wrobel*, 207 A.2d 280 (Conn. Cir. Ct. 1964). The dog warden of East Hartford had been found guilty of cruelty to animals because of the violence he used as he rounded up dogs to take to the shelter. *Id.* at 282. In overturning the dog warden's conviction, the appellate court said that:

What is cruelty under one set of circumstances may not be cruelty in another. The issue of justification, we believe, was treated too abruptly. It was left to the jury to determine whether the defendant was justified in doing what he did. Further, explication, it appears, was needed, pointing to the extent and limits of the defendant's duty and authority as dog warden: that in performing his duty he may not only resort to force, beating, injuring or killing a roaming dog but may be required to do so; that the application of such force, although it may appear to be cruel to bystanders, who are under no responsibility to act, may be the practicable and reasonable means to accomplish the capture and impounding of the offending dog, and therefore not within the statutory meaning of cruelty.

Id. at 284-85.

card.

A 2008 Supreme Court case, *Winter v. NRDC*,⁶² provides an excellent example of a blue card legal balancing process between the interests of a set of animals and society's interest in military preparedness. In this case, the plaintiffs had obtained a preliminary injunction to stop the Navy from using high levels of sonar signals during open ocean training because of the risk of harm to whales and other mammals who are particularly sensitive to that range of sound.⁶³ Under the National Environmental Policy Act (NEPA), and the requirement that government agencies do an Environmental Impact Statement (EIS) before engaging in particular projects or actions,⁶⁴ the possibility of injury or death to groups of animals must be considered before the action is taken. This is a weak blue card held by the whales and dolphins. Under NEPA, citizen suits may be filed to assert the blue card of the animals in question, and in this case, the NRDC and others chose to do so.⁶⁵ At the lower level, the courts gave sufficient weight to the blue card of the whales to support a preliminary injunction, telling the Navy it could not proceed with the training exercise until the plaintiffs' claim about the lack of an EIS by the Navy could be heard by the courts.⁶⁶

62. *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365 (2008).

63. Admittedly, these animals are not human property. But wildlife shares the same interests in being free from pain and suffering as domestic animals. The author is presently drafting an article to address the issue of legal rights for wildlife.

64. As described by the Court:

The National Environmental Policy Act of 1969 (NEPA) requires federal agencies "to the fullest extent possible" to prepare an environmental impact statement (EIS) for "every . . . major Federal actio[n] significantly affecting the quality of the human environment." An agency is not required to prepare a full EIS if it determines—based on a shorter environmental assessment (EA)—that the proposed action will not have a significant impact on the environment.

Winter, 129 S. Ct. at 372 (internal citations omitted) (alteration in original).

65. The Supreme Court explained the plaintiffs' allegations of harm as follows:

They contend that MFA sonar can cause much more serious injuries to marine mammals than the Navy acknowledges, including permanent hearing loss, decompression sickness, and major behavioral disruptions. According to the plaintiffs, several mass strandings of marine mammals (outside of SOCAL) have been "associated" with the use of active sonar. They argue that certain species of marine mammals—such as beaked whales—are uniquely susceptible to injury from active sonar; these injuries would not necessarily be detected by the Navy, given that beaked whales are "very deep divers" that spend little time at the surface.

Id. at 371.

66. As stated by the Supreme Court:

The Court of Appeals further determined that plaintiffs had carried their burden of establishing a "possibility" of irreparable injury. Even under the Navy's own figures, the court concluded, the training exercises would cause

The Supreme Court reversed this position, striking the injunction and telling the Navy it could proceed with the training, without concern for the whales or dolphins. The weighing process was clearly stated by the majority:

While we do not question the seriousness of these interests, we conclude that the balance of equities and consideration of the overall public interest in this case tip strongly in favor of the Navy. For the plaintiffs, the most serious possible injury would be harm to an unknown number of the marine mammals that they study and observe. In contrast, forcing the Navy to deploy an inadequately trained antisubmarine force jeopardizes the safety of the fleet. Active sonar is the only reliable technology for detecting and tracking enemy diesel-electric submarines, and the President—the Commander in Chief—has determined that training with active sonar is “essential to national security.”⁶⁷

Thus, the animals had an interest worthy of considering, but the weight of their interests was not sufficient to overcome the military need of the state.⁶⁸ Two of the Justices⁶⁹ and others would have struck a different balance.⁷⁰ Note that the Supreme Court did not suggest what units of measurement should be used to do this balancing of interests, yet it seemed very sure of the ultimate weight assigned to each side. This is reflective of the difficulty in predicting the outcome of any particular conflict involving animal interests. It is often difficult to predict in advance just how a court will weigh either the interests of the animals in question or the value of the human enterprise that is at issue.

As the above suggests, animals presently have modest levels of legal rights in our system. These rights arise out of the factual reality that they, as

564 physical injuries to marine mammals, as well as 170,000 disturbances of marine mammals' behavior. Lastly, the Court of Appeals held that the balance of hardships and consideration of the public interest weighed in favor of the plaintiffs.

Id. at 374 (internal citation omitted).

67. *Id.* at 378.

68. The Court had to speak in terms of the plaintiffs' interest, as they have standing under NEPA, while the whales do not. *Id.* at 378. While it is certainly true that under our concepts of standing, humans have a cognizable interest in watching whales, the plaintiffs are also surrogates for the interests of the whales. The *Lujan*-based “harm” of the humans in this case opened the door for the Court to consider the real physical harm that the whales themselves would undergo when subjected to high-intensity bursts of sonar. *Id.* at 377–78.

69. Justices Ginsburg and Souter dissented. *Id.* at 387. Justice Ginsburg wrote: “I would hold that, in imposing manageable measures to mitigate harm until completion of the EIS, the District Court conscientiously balanced the equities and did not abuse its discretion.” *Id.* (Ginsburg, J., dissenting).

70. Editorial, *Sonar over Whales*, N.Y. TIMES, Nov. 15, 2008, at A20.

living beings, have interests. This is what separates animals from other personal property. They have and can hold cards in The Rights Game. Previous writers have not considered this reality in a systematic way. The following is offered to help bring some structure to the consideration of what legal rights might and should be granted to animals.

IV. LEGAL CHARACTERISTICS OF LIVING PROPERTY

As mentioned initially, this analysis assumes that animals will remain in some form of property status. This is not to suggest that wild animals do not deserve or are somehow not capable of holding legal rights.⁷¹ Under states' anti-cruelty statutes, the protections provided animals do not depend upon their status of being wild or domestic. However, this Article addresses only domestic animals and leaves for another day an article about legal rights for animals outside the realm of property law.

In the following, the word "ownership" will be used to describe the general relationship between humans and owned animals. This word is offensive to a number of individuals who believe the use of the word implies an attitude suggesting a superior human status with total control over the animal. Some suggest the term "guardian" be used instead.⁷² But, the concept of ownership as applied to an animal can be either beneficial, as when the relationship is respectful, or detrimental, when the relationship is oppressive. For this Article, the traditional word will be used in a more neutral and limited connotation. The owner of an animal is that human, or entity, who has responsibility for the animal in the context of the limited human and animal rights that will be set out below. Now we turn to consideration of the new, fourth category of property, living property.

71. More than a generation ago, one article argued for the legal rights of whales. Sudhir K. Chopra, *Whales: Toward a Developing Right of Survival as Part of an Ecosystem*, 17 DENV. J. INT'L L. & POL'Y 255 (1989). As discussed in *supra* notes 62–69, the U.S. Supreme Court weighed the interests of whales to be free from the negative effects of sonar. Additionally, the Great Ape Protection Project, or Project GAP, seeks to establish legal rights for the great apes. See Project GAP: World Declaration on Great Primates, <http://www.greatapeproject.org/en-US/oprojetogap/Declaracao/declaracao-mundial-dos-grandes-primatas> (last visited June 15, 2010). See also Lee P. Breckenridge, *Can Fish Own Water?: Envisioning Nonhuman Property in Ecosystems*, 20 J. LAND USE & ENVTL. L. 293 (2005) (discussing the need to modify property law concepts in the face of the complexities of managing nature resource ecology).

72. This movement for change has realized some success with the change of terms to "guardian" occurring in twenty cities and the State of Rhode Island. Diane Sullivan & Holly Vietzke, *An Animal Is Not an iPod*, 4 J. ANIMAL L. 41, 44–45 (2008).

A. *Who Is Within This New Category? A Sweeping Definition
Thereafter Limited*

1. Living Beings

There have been a number of attempts to define the relevant group of animals for purposes of ethical or legal discussion. Most attempts at definitions are on a comparative basis relative to human characteristics. For example, it might be argued that legal rights should be extended to those animals who are conscious, self-aware, have language, use tools, or feel pain.⁷³ This author seeks a different, more fundamental, starting point of analysis. There is a more compelling characteristic common to all, that of being alive. Moral and ethical concerns should start with all beings who have self-interests, meaning those who are driven to live a life by the encoding of their DNA. The various species-specific capacities, such as consciousness or self-awareness, of groups of animals will be important for deciding which rights an animal might deserve. However, consideration of capacities is not necessary for initial consideration of admission into the new category of living property. Thus the word “living” is initially as broad as the surface of the Earth.

The first limitation on the scope of the phrase living property is of course the word property. Beings must be a human’s property to be within the relevant group. That is, they have to be knowingly possessed by a human (or human substitute such as a city or corporation) with an intention to exclude others. That a living being lives upon or crosses over the real property of a human does not constitute possession of that living being for this purpose. Wild beings within natural ecosystems are not personal property. While governments assert the right to control access to wild animals, they do not have possessory rights or ownership of wild animals.⁷⁴ The state does not possess these animals, and has little control over them and little responsibility for their well-being, at least at the present. While wild animals have many of the same sorts of interests as domestic animals and therefore a basis for legal rights, the legal context for acknowledging them will require a different analysis than is provided in this Article. For example, the concepts of living space and duty of care have to be different when the animals are not possessed by humans.

73. See DAVID S. FAVRE, *ANIMAL LAW: WELFARE, INTERESTS, AND RIGHTS* 406–19 (2008). New information suggests that magpies may join the elite list of self-aware animals, as they recently showed self-recognition while looking in mirrors. Bruce Bower, *Magpies Check Themselves Out: Reactions to Mirror Image Suggest Self-Recognition*, SCI. NEWS, Sept. 13, 2008, at 10.

74. See generally FAVRE & BORCHELT, *supra* note 18, at 36–43.

2. Practical Limitations

Now there must be excluded from our consideration a large set of living beings for practical purposes. For the time being, the plant kingdom must be set aside in the consideration of legal rights. Plants certainly are living beings, but we simply do not know how to think about plants at this point in time.⁷⁵ They do not have a central nervous system and do not seem to feel pain in the way that animals do. As a result, they do not trigger the bridge of compassion that exists with animals, with whom we share the experience of pain. Humans certainly do own plants, use them, possess them, create new ones, and kill them on a regular basis, both intentionally and unintentionally. But the world is complex enough when just dealing with animals and resources are limited in both the political and legal worlds. Most humans have just not given sufficient thought to plants to propose general legal principles beyond that of protection of plants as endangered species.⁷⁶ However, some initial thoughts about plants and human ethical duties have been pursued by a Swiss committee.⁷⁷

Even if we limit our consideration to animals, some additional limitations will be necessary. While most insects, worms, and other small animals are not the property of humans and therefore not part of this discussion, some

75. In one of the earliest articles on this issue, one scholar suggested that plants, as part of an ecosystem, deserve special legal standing. See Christopher D. Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

76. This protection seems to arise more out of concern for saving the diversity of the ecosystem than ethical concern for the plants themselves. Under the U.S. Endangered Species Act, plants found to be either endangered or threatened receive protection from human destruction. 16 U.S.C. § 1538(a) (2006).

77. Consider the following:

In April of 2008, the Swiss Confederation convened the Federal Ethics Committee on Non-Human Biotechnology (ECNH) to ponder the issue of plants' rights. Philosophers, geneticists, lawyers and theologians came together to contemplate the "moral consideration of plants for their own sake." In citing the commonalities of plants and animals at the molecular and cellular levels, those assembled determined that plants have inherent worth and their own interests, [and] thus, deserve protection. The Committee ruled that plants, like other living organisms, should be considered as part of the "moral community," as they are living beings able to experience good and bad effects on their survival. Some panelists expressed the belief that plants actually have feelings. The philosophy of plant life devised by participants was published in a report entitled, "The Dignity of Living Beings With Regard to Plants: Moral Consideration of Plants for Their Own Sake."

Janet Levy, *People for the Ethical Treatment of Plants and Rivers*, AM. THINKER, Dec. 8, 2008, http://www.americanthinker.com/2008/12/people_for_the_ethical_treatme.html. For the Committee's report, see FED. ETHICS COMM. ON NON-HUMAN BIOTECH. (ECNH), THE DIGNITY OF LIVING BEINGS WITH REGARD TO PLANTS (2008), available at <http://www.ekah.admin.ch/fileadmin/ekah-dateien/dokumentation/publikationen/e-Broschure-Wurde-Pflanze-2008.pdf>.

humans choose to possess the most amazing array of animals. To keep the discussion focused upon those who have the most complex needs and for whom we can do the most, a further limitation will be useful. Many states initially defined protected animals with the full sweep of the biological definition of the word “animal,”⁷⁸ but the application of the definition, as reflected in the cases filed at the time, was mostly limited to mammals.⁷⁹ More recently, as violations of these laws have become felony violations, the legal definition of animal has been redrawn at the line of vertebrate animals.⁸⁰ Likewise, the following discussion of a new property status will be extended only to vertebrate animals. Non-vertebrate animals, who are the property of humans, will be governed by the traditional rules of property. Again, in the future this line could be redrawn. As science provides more information, the legislatures will have to adopt new provisions. This is not to suggest that invertebrate animals are not worthy of ethical concern, as they do have individual interests, even if they might sit more lightly on the scale of our moral concerns.

3. Individualism

Our legal system may grant rights or restrict benefits to large groups of individuals, but our primary legal dispute mechanisms presume that individuals will step forward before agencies or courts. These individuals have names that provide identification. The world of non-human animals contains some animals who have been given names and therefore can be uniquely identified, but many, if not most, are nameless property. For example, the pet dog may be Rough Smith, but the ten leghorn chickens in the backyard are nameless and indeed almost impossible to uniquely identify with the human eye.

For an animal to have a human-designated name suggests a level of human concern, recognition, and interaction which separates that animal from the unnamed living property. These animals may be easier to consider within the legal system (politically and practically). Categories of named property,

78. See, e.g., CAL. PENAL CODE § 599b (West 1999 & Supp. 2010), (the phrase “every dumb creature” was added to the Code in 1905); MISS. CODE ANN. § 97-41-1 (1930) (based on New York’s 1867 law and featuring the phrase “[a]ny living creature”), *invalidated* by *Davis v. State*, 806 So. 2d 1098 (Miss. 2001); *and* MINN. STAT. § 343.20(2) (2009) (the phrase “every living creature except members of the human race” was added sometime before 1900).

79. For example, ASPCA gives a list of cases filed and the vast majority deal with horses and dogs, but a duck and turkey case was also reported. See ASPCA, *supra* note 19, at table of contents.

80. See, e.g., VA. CODE ANN. § 3.2-6500 (2008) (substantial revisions of the state’s cruelty laws in the 1990s included adding the phrase “any nonhuman vertebrate species except fish”); see also MICH. COMP. LAWS ANN. § 750.50(1)(b) (West Supp. 2009) (defining animals as “any vertebrate other than a human being”).

e.g., pets, may receive some legal rights before other categories, e.g., laboratory animals. Remember, progress will be piecemeal.

As a brief aside, the naming of individual animals who are not human property may be an effective mechanism by which specific animals could be granted access to legal personhood.⁸¹ Tigers in India are being given identification cards.⁸² The chimpanzees named by Jane Goodall⁸³ or the named, identifiable mountain gorillas of Rwanda have the individuality that humans are comfortable with and that could be acknowledged within a legal system.⁸⁴

The remaining difficulty is how to identify potential plaintiff animals who are nameless. Dispute resolution and assertion of legal rights are often heavily fact-dependent. Therefore, dispute resolution should be limited in the legal world to instances in which the facts for groups of living property are, first, discoverable, and second, approximately the same in a given fact pattern. This can be accomplished by group identification. For example, the pigs on the Jones Farm or the bison on the Flying K Ranch may be considered a group for the protection of the law and allowed to assert legal rights through human owners. This presumes that the nature of the right asserted and the remedy sought does not require consideration of specific individuals.⁸⁵

In summary, the term living property shall refer to vertebrate animals who are property and shall be identified by either specific name or by group reference.

B. What Are Animal Interests?

1. Identification of Interests

The creation of this new category of property is based upon the reality that these beings, like human beings, have individual interests worthy of our consideration, both within the world of personal morals and ethics and the

81. For an insightful discussion of the consequence of seeing animals as individuals, see Joseph Vining, *The Mystery of the Individual in Modern Law*, 52 VILL. L. REV. 1 (2007).

82. In January 2008, it was announced that the tigers of India would be given individual identification cards. See Apinya Wipatayotin, *Tigers Get Own ID Cards*, BANGKOK POST (Thail.), Jan. 16, 2009, available at <http://www.bangkokpost.com/news/local/9807/tigers-get-own-id-cards>.

83. JANE GOODALL, *THE CHIMPANZEES OF GOMBE: PATTERNS OF BEHAVIOR* (1986).

84. There are eighteen family groups of mountain gorillas that have been studied to the point that they are readily identifiable by their “noseprints,” as opposed to human fingerprints. The International Gorilla Conservation Programme has information pertaining to these gorillas, as well as family albums showing the pictures of seven readily identifiable mountain gorilla families of Rwanda. The pictures show each gorilla along with its name. See International Gorilla Conservation Programme, *Mountain Gorillas*, http://www.igcp.org/gorillas/gorillas_mountain.htm (last visited June 15, 2010).

85. This analysis parallels that done for organizational standing. For a general discussion of human standing in the traditional animal law context, see FAVRE, *supra* note 73, at ch. 9.

world of law. It is therefore important to consider in more detail just what is contemplated by the concept of “interests.”

As a starting point, some of the behaviors that most, but not necessarily all, animals engage in and that demonstrate the scope of their interests include:

- fighting for continued life,
- finding and consuming food daily,
- socializing with others (usually of the same species),
- mating,
- caring for their young,
- sleeping,
- accessing sunlight (or not),
- exercising their inherent mental capacities, and
- moving about in their physical environment.

Roscoe Pound starts his five-volume analysis of jurisprudence with the proposition that human interests exist and that the resolution of conflicting or competing interests is a primary function of the legal system.⁸⁶ This Article urges the same approach for non-human animals. The concept of animal interests needs to be considered in relation to three fundamental questions: Do animals have interests? (This is definitional.) Can humans be confident enough about understanding these interests to articulate them within the legal system? (This is a matter of science.) And finally, do they deserve to be acknowledged within the legal system? (This implicates moral beliefs in a political system.)

That living property has interests is not a matter of philosophy or debate, it is a matter of fact that is derived from the existence and nature of the DNA⁸⁷ that creates each individual being on Earth (pardon this brief foray into the realm of science). Inherent in the nature of the DNA molecule is that it self-

86. See 3 POUND, *supra* note 9, at 17.

Conflicts or competition between interests arise because of the competition of individuals with each other, the competition of groups or associations or societies of men with each other, and the competition of individuals with such groups or associations or societies in the endeavor to satisfy human claims and wants and desires.

Id.

87. For this Article, the consequences of DNA are the starting point of analysis. Where DNA came from or how it evolved is not necessary to discuss. A discussion of the nature of DNA is fundamental to any course on biology, and therefore part of many textbooks. See, e.g., CHRIS R. CALLADINE & HORACE R. DREW, UNDERSTANDING DNA: THE MOLECULE & HOW IT WORKS (3d ed. 2004); KARL DRLICA, UNDERSTANDING DNA AND GENE CLONING: A GUIDE FOR THE CURIOUS (4th ed. 2004).

replicates. The DNA that is found in living beings are special groups of self-replicating molecules that have evolved into increasingly complex packages that help assure the replication of the next generation of DNA molecules.⁸⁸ The packages protect the DNA from environmental harm, seek out optimal conditions for creating the next generation, and may actually shelter and support the next generation of DNA until they have the best chance to survive on their own. Some packages learned to breathe oxygen, others learned to run toward or away from other packages. Some can see the world with color; others can smell the world around them. Many DNA packages have developed the capacity to feel pain and some have a capacity for self-awareness or consciousness. These specific packages of DNA, which we see as the animals around us, have evolved over the millions of years under the rules of natural selection. Rocks and cars have no DNA, do not have a capacity to self-replicate, and therefore, have no interests deserving our attention.

DNA beings have the molecular desire to replicate and this requires them to live, to fight to live, and perhaps to kill other DNA beings in order to live. To say that a living being has interests is to simply acknowledge that each individual has been endowed by their DNA with a package of skills and capabilities that we expect the individual to exercise in pursuing his or her life. A primary interest of a bat is to be in darkness during the day, while the turtle will seek out the sun to raise his body temperature and become fully functional. Having evolved within the family of mammals, it is easy to see how some of our primary interests or skills are shared with other mammals. For example, the desire of a mother to care for her young is shared with most mammals, be they sheep, whales, or rabbits.

The examples set out above are, of course, just suggestive of what is important to beings. To the extent that we are comfortable in describing and protecting the interests of humans, we should also be comfortable in understanding at least the basic interests of mammals, and perhaps other animals. Our scientific knowledge of other beings seems to grow exponentially each decade. It is not critical to know all the interests of all animals before we proceed to acknowledge the critical interests of some of the

88. See RICHARD DAWKINS, *THE SELFISH GENE* 23 (1976).

We are survival machines, but 'we' does not mean just people. It embraces all animals, plants, bacteria, and viruses. . . . We are all survival machines for the same kind of replicator—molecules called DNA—but there are many different ways of making a living in the world, and the replicators have built a vast range of machines to exploit them.

Id. at 22.

animals.⁸⁹ Change in the legal system is inherently incremental, in part because information comes to us incrementally. As suggested above, our society has indeed already started down that path; it is now time to acknowledge the reality and to deal with the issues in a more systemic way.

There is one interest that others suggest is a paramount interest of animals and that is not on the list above—that of liberty of movement. Assuming that liberty for animals is defined as the ability to self-direct individual movement without the restraint of humans or their fences, then clearly this interest is not possible in the world of living property, where possession is critical and restraint is presumed.⁹⁰ Nor would it be proper to consider children to have a right of liberty. However, it can be suggested that wildlife do possess a right of personal liberty so long as they can exist in their natural habitat.

The personal observations of this author suggest that while providing a livable space is important to an animal, full liberty of movement is not. Consider sheep. The author of this Article has had the privilege of helping raise Icelandic sheep for more than five years. The sheep like to be with other sheep, they like to wander to look for food. Without fences, they would

89. For example, there has been a tentative recognition of the interests of our genetic cousins, the chimpanzee, in continued life:

In 2000, Congress passed the Chimpanzee Health Improvement, Maintenance, and Protection Act. The issue before Congress was what should be done for or with the more than one thousand long-living chimpanzees that had been part of the U.S. federal research system for many years, but were no longer needed for research. A special committee of the National Research Council looked into the issue and found that continued lab housing for chimpanzees would have been expensive, particularly when the animal was no longer actively part of research. The cheapest alternative would have been to euthanize the unneeded animals, though this option was rejected by the Committee, and ultimately by Congress as well. The option suggested by the Research Committee and adopted by Congress was the creation of retirement sanctuaries that would be operated and partly supported by Congress and non-profit private organizations.

David S. Favre, *Judicial Recognition of the Interests of Animals—A New Tort*, 2005 MICH. ST. L. REV. 333, 348 (2005) (citing Pub. L. No. 106-551, 114 Stat. 2752 (codified at 42 U.S.C. § 287a-3a (2006))). See also CHIMPANZEE HEALTH IMPROVEMENT, MAINTENANCE, AND PROTECTION ACT, S. REP. NO. 106-494, at 3 (2000) (“The CHIMP Act is designed to provide a cost-effective and humane solution to the problem of surplus chimpanzees in research.”). By early 2010, while more than 1,100 chimps remained in research facilities, more than 100 were retired at Chimp Haven. See Chimp Haven: Our History, <http://www.chimphaven.org/about-history.cfm> (last visited June 15, 2010).

90. This discussion distinguishes the need of living beings for living space from the concept of liberty for the individual. Requirements of personal liberty are not part of the realm of living property. One path to animal rights suggested by others would be a legal action based upon habeas corpus. Thus, a zoo or research laboratory might be sued in the name of a possessed chimpanzee to free her from a place as a legal person with personal liberty. Under the principles of this Article, the chimpanzee could not complain about the fact of ownership and therefore possession, but could well complain that her interests in appropriate living conditions (space) have been violated.

undoubtedly go off our land to see what is in the next field. But if they do so, I cannot protect them from the risk of the broader world and I cannot protect the rest of the world from the risk of a 220-pound ram. After a number of years of observation, I believe that the vast majority of their interests can be fully realized within our fences and that their inability to wander at will is fully offset by the protection they receive from negative consequences to themselves and others arising out of unrestrained movement. This does not mean that it would be appropriate to keep them in a five-by-five-foot pen in the barn, as this would frustrate most of their other interests and their quality of life.⁹¹

2. Which Interests?

Having established that animals have interests and that some animal interests can and have previously been acknowledged in the legal system, a remaining question to consider is, Which additional interests ought to be protected within the legal system?⁹² The quick answer to this question is, Those interests that can garner sufficient political support for the passage of new laws. The likelihood is that different species will have different sets of interests acknowledged within the legal system. Again, this will be the result of the political reality of incremental legal change.⁹³

As with humans, not all animal interests will deserve the attention of the legal system.⁹⁴ For example, humans have an interest in receiving correct, true information. Therefore, it is generally considered a wrong to make a false statement to another human (false statements to pets may not fall under

91. Likewise, to give the author's dogs, 100-pound Great Pyrenees, total personal liberty would put the dogs, cars, and others at risk. Again, it is a judgment matter, as the benefit of their total freedom does not seem to be as important as the protections of restraints for the realization of other interests, such as freedom from pain and suffering. Cats, of course, are another matter. Cats often have full liberty, but the negative risk of liberty to them and to others is much less than with dogs or sheep. Other cat owners weigh the balance of protection versus freedom differently. Perhaps the risk of harm to other small animals such as mice and birds weighs heavily in the balance, restricting the cat's liberty.

92. In the first part of the CRIBBET & JOHNSON hornbook on property law, the authors start with an animal reference. They begin by acknowledging that a dog has a possessory interest in certain personal property, such as a bone, to which other animals and even humans must give a certain amount of respect. But, as they point out, the protection of the bone by brute force and cunning does not rise to a property right; that is, the law does not at the moment acknowledge the dog's interest in possessing the bone. See JOHN E. CRIBBET & CORWIN W. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY* 4 (3d ed. 1989). But, there is no conceptual reason it could not.

93. Compare the retirement system contemplated by federal law for chimpanzees, Favre, *supra* note 89, with the status of rats or mice also used in experiments. Not only do the rats not have a retirement system, but they are specifically excluded from the protection of the Animal Welfare Act. 7 U.S.C. § 2132(g) (2006).

94. For an example of the parallel nature of human interest and that of a human's pet and how they could result in parallel legal rights in the world of torts, see FAVRE, *supra* note 73, at 327.

this proposition). While all mothers have an interest in not being lied to by their children, it is not illegal to lie to your mother. Imagine the clogging of the courts if such was the law and imagine the difficulty of determining just what the truth might be. How could the damages flowing from the false statement to your mother be calculated, and what remedies could be provided? However, when it comes to lying in the context of providing information the government needs, laws have been adopted. It is illegal to lie on your tax return,⁹⁵ and it is perjury to lie in a court proceeding.⁹⁶ Thus, as it is that not all human interests are within the legal system, so it will be with animal interests. Dogs may have an interest in getting treats every day, but that does not seem fundamental to a dog's well-being and therefore will not rise to the level of a legal right.

As an example of how new information creates a political re-weighing of conflicting interests, consider the issue of smoking cigarettes. Some humans have a high interest in smoking cigarettes, others have a high interest in not being subjected to inhaling cigarette smoke. Initially, the freedom of individual action outweighed the complaints about breathing the smoke of others. This conflict was brought into the legal system only after there were scientific facts that suggested the harm of cigarette smoke to others.⁹⁷ Increasingly over time, legislatures have given more weight to those seeking to remain free from the risk than to the freedom of individuals to engage in risky conduct.⁹⁸ The law has imposed bans on smoking in many places.⁹⁹

95. 18 U.S.C. § 1001 (2006).

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title, imprisoned not more than 5 years . . . or both.

Id.

96. 18 PA. CONS. STAT. ANN. § 4902 (West 1983); ARIZ. REV. STAT. ANN. § 13-2702 (2001); MISS. CODE. ANN. § 97-9-61 (2006); 18 U.S.C. § 1621 (2006).

97. See Amanda Bosky, Comment, *Ashes to Ashes: Secondhand Smoke Meets a Timely Death in Illinois*, 39 LOY. U. CHI. L.J. 847, 851 (2008) (“The main reason for the sharp downward turn in the prevalence of smoking is simple—knowledge.”); see generally Robert A. Kagan & David Vogel, *The Politics of Smoking Regulation: Canada, France, the United States*, in SMOKING POLICY: LAW, POLITICS, AND CULTURE 22–48 (Robert L. Rabin & Stephen D. Sugarman eds., 1993).

98. Bosky, *supra* note 97, at 851–65.

99. See the timeline of events in Robert A. Kagan & William P. Nelson, *The Politics of Tobacco Regulation in the United States*, in REGULATING TOBACCO 11, 17–19 (Robert L. Rabin &

However, the law has not made it illegal in an individual's home, as a greater public policy of non-interference in a person's residence has trumping power for this issue, for the time being.¹⁰⁰

Choosing which animal interests the legal system should deal with is a judgment call.¹⁰¹ The same matrix of questions has to be asked. Do we understand the interests in question (science information)? Is the interest in conflict with the interests of humans or the government? Can the legal system provide a useful remedy with the resources available? Do other public policies trump the animal's interests? As almost no human interest is absolute, neither shall any animal interests be absolute. The critical interest of dogs and cats to reproduce themselves has been significantly interfered with by laws mandating their sterilization because of the public policy concerns about pet overpopulation. On the other hand, a fair argument can be made that complex animals such as chimpanzees, who spend decades of their lives in single cages in laboratories, are experiencing such a significant interference with any quality of life that those conditions cannot be justified by any possible benefit to humans and therefore should be illegal.¹⁰²

Allowing that some animal interests will be asserted within the legal system, it is now time to consider the outline of what this might mean within the world of property law.

V. INITIAL SCOPE FOR THE RULES OF LIVING PROPERTY

The basic principles of property law will be modified in three basic categories in order to provide legal protection for the interests of living property. First, the rights of owners will have to be limited to some degree to accommodate some of the interests that their property asserts against them. One area of particular impact will be the ability of owners to realize economic value from their animals. What you can do with lumps of coal will be different from what you can do with animals. Second, humans who are not animal owners will have new duties toward living property that they do not have toward non-living property. As juristic persons, remedies for tort wrongs inflicted upon animals will be able to run to the benefit of the illegally

Stephen D. Sugarman eds., 2001).

100. New information pushes the legal and public policy debate forward. A 2009 report suggests there should be a new level of concern for smoking issues. See Roni Caryn Rabin, A New Cigarette Hazard: "Third-Hand Smoke," N.Y. Times on the Web (Jan. 3, 2009), http://www.nytimes.com/2009/01/03/health/research/03smoke.html?_r=1&em.

101. For some discussion of quality of life for animals, see generally TEMPLE GRANDIN & CATHERINE JOHNSON, ANIMALS MAKE US HUMAN: CREATING THE BEST LIFE FOR ANIMALS (2009).

102. See David Favre, *Laboratory Animal Act: A Legislative Proposal*, 3 PACE ENVTL. L. REV. 123 (1986).

harmful animal. Finally, the living property will hold certain rights themselves.

There is no mathematical formula for deciding these questions. It is inherently a balancing of the interests of the animals with those of the humans. And given how intertwined the lives and products of animals are with humans, this is not an easy or abstract task. This balancing can and will occur at a number of locations within our legal system, including legislatures, administrative agencies, and courts. Deciding how much weight to give to an interest is a social and, therefore, political judgment. What can be expected is that the weight given to animal interests has and will continue to increase.

A. *Rights of Human Owners*

1. Original Title

Animals enter the property system in two primary ways. First, they are removed from the wild by humans who kill or capture them.¹⁰³ Second, they are born to mothers who are already within the property system. Under the traditional common law rule, title to a wild animal is secured by obtaining possession of the animal.¹⁰⁴ The other traditional rule for animals is that ownership of a newborn will follow the ownership of the mother.¹⁰⁵ The creation of a living property category does not require a change in these rules, as the public policies supporting the rules are still relevant. They represent simple, enforceable rules that do not normally require a court's intervention.

In addition to the time-honored, natural way of sexual reproduction, today humans are able to manipulate DNA in an assortment of ways. First, there is the process of cloning which allows for non-sexual reproduction, by using just one set of DNA to create the next generation.¹⁰⁶ Ownership of these offspring

103. It will be possible in the future to amend the rules of property so that certain categories of animals, such as primates and whales, are simply not available to be captured and become property. At the moment, the taking of some animals from the wild is limited under Endangered Species Act protections. To go another step further, primates and whales in their natural habitat could be declared legally incapable of becoming property by capture or killing, regardless of their endangered species status. Human laws can exclude species from the realm of property law.

104. The rule of *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805), shall remain as a base point of analysis. Chasing the fox is certainly not enough, dominion and control of the fox is the trigger awarding title to the fox or other wild animals. FAVRE & BORCHELT, *supra* note 18, at 26–27.

105. FAVRE & BORCHELT, *supra* note 18, at 25–26.

106. For a discussion of some of the policy concerns that arise with cloning, see Adrienne N. Calhoun Cash, *Invasion of the Clones: Animal Cloning and the Potential Implications on the Future of Human Cloning and Cloning Legislation in the United States, the United Kingdom and Internationally*, 82 U. DET. MERCY L. REV. 349 (2005). In the expensive world of cloning your pet dog (\$150,000 or more at one lab), it is a commercial enterprise where ownership of the new dog belongs to the person who provides the old dog's DNA and pays for the procedure. See Eric Konigsberg, *Beloved Pets Everlasting?*, N.Y. TIMES, Jan. 1, 2009, at D1.

will be in those humans who own the source of the DNA, unless modified by contract. The second major category is that of transgenic creation.¹⁰⁷ In this case, DNA from different sources or perhaps DNA sequences created by humans in a lab are joined together to create beings that did not exist before. Ownership of these beings will be awarded to the creator of the being. Assuming this new being is capable of sexual reproduction, the traditional rule of ownership following the mother will govern subsequent generations of the new being.

2. Transfer of Title

Assuming an animal is property, a key property right for the owner is the ability to transfer title to another. Under this topic are issues such as: How should title be transferred and are there any limits on who can hold the title of an animal? One underlying factor in the rules of property is that ownership rules often reflect the social desire for economic efficiency so that owners of property may best realize the economic value of their property. With the creation of the category of living property, non-economic values will play a more dominant role; in some circumstances, this will make economic efficiency less dominant in the rule making.

The primary methods of voluntary transfer of title for personal property are by sale, gift, or inheritance. Involuntary transfers of title include foreclosure on a lien, court order, and the government exercise of eminent domain. As a general rule, these methods will remain in place. To the extent that animal ownership is based upon the owner's desire to realize economic value, the right to sell (and the right to buy) an animal is a most important legal right, be it a racehorse or a chicken. To the extent that society wishes to give emphasis to other values that animals represent to society and individuals, the right to sell might be limited. For example, a law precluding the sale of cats could be passed.¹⁰⁸ Ownership transfer could be limited to gift, inheritance, and adoption (defined as a non-profit transfer of an animal with the individual or group facilitating the adoption seeking a good placement for the animal). This would eliminate the profit motive as a reason to keep cats and lessen the possibilities of the creation of economic breeding in adverse conditions (e.g., kitten mills). A number of organizations presently

107. The GloFish may well have been the first commercial product of transgenic engineering. See GloFish Fluorescent Fish FAQ, <http://www.glofish.com/faq.asp> (last visited June 15, 2010); see generally Andrew B. Perzigian, Genetic Engineering and Animal Rights: The Legal Terrain and Ethical Underpinnings, Animal Legal and Historical Center (2003), <http://www.animallaw.info/articles/ddusgeneticengin.htm>.

108. The U.S. Congress recently almost passed a law that would have outlawed the sale of chimpanzees. See Captive Primate Safety Act, H.R. 80, 111th Cong. § 3 (2009) (as reported to Senate, July 20, 2009); see also Joshua Rhett Miller, Chimpanzee Attack Revives Calls for Federal Primate Law, Fox News (Feb. 18, 2009), <http://www.foxnews.com/story/0,2933,495787,00.html>.

carry out the process of animal adoption. However, there are few laws in place to standardize this process by defining who is qualified to do so, or what is the property status of an adopted animal post-adoption. These are important issues for future articles.

Another possibility of change could occur for high-dollar-value animals. If a racehorse or a show dog sells for a five-figure amount, the animal should get some credit for his own high-market value. The law could provide that for animal sales of greater than \$10,000 per animal, 10% of the sale price be set aside in trust for the animal's well-being.

Remembering that the primary public policy consideration for living property is that the interests of the animal should be taken into account, it will be appropriate to consider the reality that not all humans or corporations are appropriate owners. Some do not have the interest or ability to take care of their property, which is an obligation for any owner of living property. One possibility for the legal system would be to consider giving the state or designated organizations the right to challenge a transfer of title when it is not in the best interest of the animal being transferred. For example, if a person dies and leaves six horses to an unemployed twenty-two-year-old with no resources to care for the horses, unless that person willingly transfers the horses to another person capable of providing care, the law should force divestment of title. The horses should not have to wait until they are in health distress before the issue of ownership is addressed.

Another possible limitation that the law could adopt would preclude corporations from owning animals. There is an argument that an animal, particularly a commercial farm animal, owned by an individual or a human family has the best opportunity to receive good care. But, the millionth pig owned by a global corporation is of no particular concern to the corporation. Humans' need for food, a corporation's need for profit, and the needs of 1 million pigs for quality life may not be capable of being balanced out.¹⁰⁹ Another possible approach would be to limit the number of animals that any artificial person could own.

109. While legislatures seem unwilling to balance the corporate interest of profit with pig welfare by adopting protective legislation, more recently the adoption of law by voter referendum has shifted the law toward the welfare of the pigs. In the fall of 2008, California voters adopted Proposition 2, which outlawed the keeping of chickens, veal calves, and pigs in small confinement areas, although the implementation date is put off until 2015. With the adoption of Proposition 2 "Californians voted resoundingly to free about 20 million egg-laying hens of tiny cages." Carla Hall & Jerry Hirsch, *Prop. 2 Unlikely to Hike Egg Prices*, L.A. TIMES, Nov. 6, 2008, at C1. Similar legislation was adopted in Michigan in 2009 under threat of voter referendum. See Act of Oct. 12, 2009, 2009 Mich. Legis. Serv. 117 (West) (codified at MICH. COMP. LAWS ANN. § 287.746 (West 2010)).

3. Use of Property

Inherent in the proposition of keeping animals as living property is the consequence that their owners will use them. The use may be relatively benign, as with a companion cat who shares an apartment with the human owner, or perhaps the sheep who is required to give up her wool every year. Then, there are the horses who are required to carry their owners in return for bed and board. Less benign uses are faced by the mice who spend their short lives in laboratory cages or the chickens who give up their lives for human food or the dog who is used in dogfighting ventures.

Many advocates of legal rights for animals seek to eliminate any use of animals by humans. They believe that no chicken should be used for food, no mouse should be in the lab, no horse in a corral, and perhaps not even a cat in an apartment.¹¹⁰ While an individual may have a personal philosophy about the use of animals, and conform his life in accordance with that philosophy, the non-use of animals is not now the social perspective that informs our legal system. An alternative to the ban on the use of animals by humans might be that only specifically, legislatively allowed uses of animals would be permitted. But the number and complexities of human uses of animals is so large that this is impractical. The world we find ourselves in requires us to work the other way. Human use of animals is presumed acceptable until and unless it has been forbidden by the law. This is how the law has developed in our common law system for almost the past 1,000 years and there is no real likelihood of changing this approach in the near term.

Ultimately, what is an acceptable use of an animal, of living property, is a political decision that balances any number of factors during the legislative process. As a result, prohibitions will arrive sporadically, by species, by fact situation. The majority of Americans have already decided, over the objection of many individual citizens, that dogs cannot be used for dogfighting ventures. No state seeks to control the conditions of dogs used in fighting or the fighting process itself; their use in fighting is entirely banned. This use is so disfavored that in many states, to use a dog in this manner is a felony. Likewise, our society, but not others, has decided that killing dogs for the use of their fur is unacceptable.¹¹¹ But it apparently remains acceptable in the United States to raise and kill mink solely for their fur.

110. See sources cited *supra* note 3.

111. In 1999, Virginia adopted the following provision:

It is unlawful for any person to sell a garment containing the hide, fur, or pelt which he knows to be that of a domestic dog or cat. A violation of this section shall be punishable by a fine of not more than \$10,000.

VA. CODE ANN. § 3.2-6589 (2008). This is also the federal law. See 19 U.S.C. § 1308 (2006).

Society can decide that the use of primates in scientific research is not justified without reaching the question of whether the use of rats is justified. As in New Zealand, a law can be adopted that implements a ban on research use of primates in laboratories.¹¹² Likewise, it is possible to judge that the keeping of primates as pets should not be allowed without a decision about the keeping of parakeets.

Besides the issue of use, there is the key point of which branch of government will be expected to adopt these new views, the legislature or the courts. As common law property concepts are at issue, there is the possibility that court opinions, rather than legislative enactments, will acknowledge these new legal rights for animals. The option of using the courts to create legal rights for animals is not to be discounted, but will not be pursued in this Article.¹¹³

There is a second aspect to the issue of use. Even if the end use of an animal is permitted by the law, or rather, not prohibited by the law, society can still have objections to the conditions under which an animal is being kept for the use. This aspect is the focus of the traditional cruelty laws and has been part of the legal system since the New York laws of the 1860s. Thus, the chicken and mouse may not be able to object to their end use, but may be able to object to their living conditions. Again, it is up to the legislature to provide the definitions of what conditions may or may not be acceptable to society.

The present anti-cruelty laws are but a first step in this process of defining acceptable use. As such, they are a guide to the present-day social perspective about acceptable living conditions for animals, but these laws are still limited in nature and subject to extensive exemptions. The exemptions in particular need to be reexamined. It is no longer clear why agricultural corporations or zoos should be exempt from laws that prohibit general cruelty against animals or the duty to provide care.¹¹⁴ It is time to face up to the living conditions endured by industrial agricultural animals and decide as a society not what is most profitable for corporations, but what are acceptable living conditions for animals who will become human food.¹¹⁵ This Article cannot seek to answer

112. See Peter Sankoff, *Five Years of the "New" Animal Welfare Regime: Lessons Learned From New Zealand's Decision to Modernize Its Animal Welfare Legislation*, 11 ANIMAL L. REV. 7, 7-9 (2005).

113. See WISE, *supra* note 4. In Brazil, plaintiffs in one case sought to establish legal rights for animals by filing a habeas corpus action for a chimpanzee, but unfortunately the chimpanzee died before a decision could be rendered. See Tribunal do Júri de Salvador [Jury Court of Salvador], No. 833085-3/2005, *In re Suica*, Correio da Bahia, 19.9.2005 (Brazil), available at <http://www.animallaw.info/nonus/cases/cabrsuicaeng2005.htm> (author's trans.).

114. See MICH. COMP LAWS ANN. § 750.50(11)(d), (f) (West Supp. 2009).

115. California in 2008 made a judgment by ballot initiative when Proposition 2 was passed. The provision outlaws common industrial confinement practices involving pigs, chickens, and veal.

that complex question, but will suggest that under the concept of living property, commercial ownership of animals will be allowed only when the interests of the animals are given considerably more weight than is presently the case in industrial agriculture.¹¹⁶

B. Duties of Owners

A key characteristic that distinguishes living property from other forms of property is that there can be a legal duty toward living property that will be enforced by courts. While some duties of non-interference will be imposed upon non-owners, this is more in the realm of tort and criminal law, not to be considered in this Article.¹¹⁷ In the world of property law, the duty toward the animal by the owner is of both a positive and negative nature. As already suggested by some of the comprehensive state anti-cruelty laws, it is both a duty of not imposing harm as well as a duty of providing care.¹¹⁸

While many of the existing laws focus upon the physical well-being of the animals, there is a lack of legal focus on the mental well-being of animals. The primary exception to this statement is the poorly implemented requirement of the federal Animal Welfare Act that institutions holding primates must provide living conditions that promote the primates' mental well-being. This issue needs to be considered in the context of both specific places and species. For example, animals confined in zoos usually must endure significant space limitations and a duty of mental enrichment should be required from the zoos as compensation for the animals' space limitation. In addition, specific species may have such complex minds that they should not be caged or caged only if the owners can provide sufficient mental stimulation. These are issues of science¹¹⁹ and judgment.

This Article cannot propose the full extent of the owner's duty; rather, it seeks to establish that there is a duty, and that this duty is owed to the animal. The reader can envision more of the colors and contours of this new paradigm if a duty toward an animal is viewed in the light of the legal duty of parents to their child. This is particularly easy when the animal is a pet, as many pets are treated as a child in a family. Good parents understand and provide for the

See supra note 109.

116. For a discussion on the difficulties of making effective animal welfare laws, see Mariann Sullivan & David J. Wolfson, *The Regulation of Common Farming Practices*, in *ANIMAL LAW AND THE COURTS: A READER* 78–131 (Taimie L. Bryant, Rebecca J. Huss & David N. Cassuto eds., 2008).

117. *See Favre, supra* note 89.

118. *See supra* Part II.C.

119. *See* T.S. Stoinski et al., *A Preliminary Study of the Behavioral Effects of Feeding Enrichment on African Elephants*, *ZOO BIOLOGY* 485, 490 (2000); Ruth C. Newberry, *Environmental Enrichment: Increasing the Biological Relevance of Captive Environments*, 44 *APPLIED ANIMAL BEHAVIOUR SCI.* 229, 230 (1995).

needs of the child, even though the child does not assert these needs or may even assert needs that are in fact counter to their long-term best interests. (For example, the child wants unlimited computer time, the dog wants unlimited treats, and both want to play in the street.) The judgment of the parents has to be accepted as presumptively lawful, but there are limits after which the government will seek to intervene to protect the interests of the child (red card legal rights). So might the government, or private individuals authorized by the state, be allowed to intervene to protect the interests of animals (red and blue cards).

It might be noted that there is not a heading in this paper about the duties of animals toward humans. This arises, in part, out of a practical perspective that animals may have difficulty in understanding human interests. Just as the law imposes no duty upon human infants who do not yet understand external obligations or choices of action, it would also be inappropriate to require actions of animals that they cannot understand. One clear exception to the general statement arises in the case of dangerous dogs. Under many dangerous-dog laws, after some semblance of due process, dogs can and are sentenced to death for violations of the statute obligations imposed upon them not to harm humans.¹²⁰ For all practical purposes, the dog could well be considered the defendant in the proceeding as it is the dog's very life that may be at risk.

C. *Rights of Animals*

At a primary level, this Article asserts the legal principle that living property has the capacity to hold legal rights. As will be discussed below, two primary consequences flow from this capacity. First, to some degree their interests have to be part of the legal consideration of any conflict of which they are a part. Second, remedies for breaches of rights have to flow directly to those who were harmed.¹²¹ As many of the most important potential legal rights for animals will deal with living conditions, the availability of injunctive relief to prohibit certain conditions and the right to have ownership transferred will be more important to their rights than money awards; however, financial awards may well be appropriate in certain circumstances.

120. For dangerous-dog law discussion, see generally FAVRE, *supra* note 73, at 180–83.

121. Stephen I. Burr, *Toward Legal Rights for Animals*, 4 ENVTL. AFF. 205, 227–28 (1975).

The Nature of a Legal Right. In a society such as ours, where formal interhuman and human-governmental relationships are controlled by laws, the amount of protection one receives is a function of the legal rights one holds. Fundamentally, a legal right involves the assurance by society that when another person acts inconsistently with a right that you hold, an authoritative public body will give some amount of consideration to your protest.

Id. at 227.

This Article does not suggest that there should be a magical point in time at which all animals (as defined above) will receive all the legal rights suggested below. Rather, this section suggests a broad frame of reference by which to understand and organize present and future legal rights. This Article is like the picture on the front of the jigsaw puzzle box. Seeing the picture does not predict when, if ever, all the pieces inside will come together, but having the picture will aid in the process. Particular legal rights will arrive by the legislature or by court opinions, as pieces of the puzzle. The puzzle itself may remain unfinished for quite awhile, but it is time to begin the assembly enterprise.

1. Standing

Standing for red card and blue card animal legal rights does not require a mention of the concept of standing, as the government or a private human will have to deal with the standing issue.¹²² But if a preferred, green card right is being asserted, then the standing of the animal is an issue. While standing is often discussed as an independent procedural issue, in fact it is tied very closely to the existence of a legal right. If a statute was adopted that said “any animal being held in conditions which violate the state anti-cruelty law may bring an action to contest the animal’s ownership and possession,” then inherent in the language is the granting of standing to any animal who seeks to exercise the legislatively created right. In a 2004 Ninth Circuit case, again dealing with whales, the court said as much:

It is obvious that an animal cannot function as a plaintiff in the same manner as a juridically competent human being. But we see no reason why Article III prevents Congress from authorizing a suit in the name of an animal, any more than it prevents suits brought in the name of artificial persons such as corporations, partnerships or trusts, and even ships, or of juridically incompetent persons such as infants, juveniles, and mental incompetents.¹²³

Identifying the plaintiff might be more difficult in some animal law contexts. Lawsuits normally require specific plaintiffs, in part because of the need to develop a set of facts that will frame the legal issues of a case. For living property, there are two varieties of legal personalities that may be a plaintiff: the individual and the group. If the animal in question has a name, then he

122. For a discussion of standing in the environmental law context, see generally ROGER W. FINDLEY & DANIEL A. FARBER, ENVIRONMENTAL LAW 1–26 (7th ed. 2008); and Andrew Long, *Standing & Consensus: Globalism in Massachusetts v. EPA*, 23 J. ENVTL. L. & LITIG. 73 (2008).

123. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1176 (9th Cir. 2004). For a general discussion of human standing in the traditional animal law context, see FAVRE, *supra* note 73, at 326–29.

has the capacity of individual legal personality, of having cases filed in his individual name. If an animal is unnamed, he can only be part of a group personality by geographic location, species, or some combination of the two. Thus, the green card right suggested in the prior paragraph might be exercised by Thomas “the cat” Hopkins, or Hopkins’ Rabbits, or the Rabbits of 245 Elm Street. In all cases, the plaintiffs will be specific animals around which a set of facts can be developed.

While states or the federal government could articulate the existence of “limited legal personality” for living property in a general procedural statute, it is not a prerequisite to standing. Any time a law acknowledges a preferred (green card) legal right for an animal or group of animals, inherent in doing so is the awarding of limited legal personality for animals to exercise the legal right in their own names.

2. A Few Rights

Within this new property status, animals have the right:

1. Not to be held for or put to prohibited uses.
2. Not to be harmed.
3. To be cared for.
4. To have living space.
5. To be properly owned.
6. To own property.
7. To enter into contracts.
8. To file tort claims.

This list has been derived from the pondering of the author. It is not the definitive list for all time, but a starting list to initiate further discussion. A prior effort on behalf of agricultural animals resulted in a list referred to as the “five freedoms.”¹²⁴ While many of the concerns within those five freedoms are also found within the above list, the proposed list is not a derivation of that list and is meant to have much broader application.

An example of each of the above should help demonstrate the possible scope of each right.

1. *Not to be held for or put to prohibited uses.* Prohibited uses will become a longer list as society becomes more protective of animal interests. An initial list might include: animals used against animals in blood sports,

124. The five freedoms are: Freedom from fear and distress; freedom from hunger and thirst; freedom from discomfort; freedom from pain, injury, and disease; and the freedom to express normal behavior. For fuller discussion, see FAVRE, *supra* note 73, at 294–96. See generally Farm Animal Welfare Council, Five Freedoms, <http://www.fawc.org.uk/freedoms.htm> (last visited June 15, 2010).

horsemeat for human consumption, great apes for research, pigeons for target practice, elephants in zoos, or snakes as pets.

The list of prohibited uses can be developed by using the general principle that a use should not constitute a significant interference with the well-being of the animals involved. For example, a fair case can be made that the use of greyhound dogs at the race track is detrimental to almost all the dogs within the industry, without any significant advantage to humans.¹²⁵ The human interest in gambling can be satisfied hundreds of other ways; there is no need for thousands of dogs to suffer for the realization of that human interest. Therefore, legislative prohibitions on the racing of dogs could easily be adopted. On the other hand, the keeping of dogs for breed shows might be judged as not to interfere with the significant interests of the dogs. But perhaps a full study of dogs in breed shows and of all the dogs bred with the hope of entering breed shows should be done with an eye toward the overall quality of life for the broader set of dogs, not just the winners. Horse racing is harder to judge as a full enterprise. Clearly, some horses in the industry are treated very well, but the quality of life for all of the horses bred to be racers is not so clear. Additionally, there are risks of drugs and injuries that even the successful horse must face.¹²⁶

Another possible measure of whether a particular use is acceptable is whether the animal has to be kept in a cage for the human to use the animal. If long-term cage confinement is required, then perhaps the use should be prohibited. So, confinement of animals in zoos and research facilities should be examined in light of the degree to which the confinement interferes with the interests of the animal in the cage versus the benefits to be received by such confinement, in light of available research alternatives.¹²⁷

2. *Not to be harmed.* The right not to be harmed, not to experience pain and suffering, is the oldest and most obvious of legal rights for some animals. The original New York law made it a crime for any person to “torture, torment, deprive of necessary sustenance, or unnecessarily or cruelly beat, or

125. See generally Michael Atkinson & Kevin Young, *Greyhound Racing and Sports-Related Violence*, in BETWEEN THE SPECIES 213 (Arnold Arluke & Clinton Sanders eds., 2009). Nearly 30,000 young greyhounds are killed in North America every year when they are no longer able to win or place. Approximately 5,000 to 7,000 farm puppies are culled annually and more simply “go missing” without being registered to an owner. *Id.*

126. See Cynthia F. Hodges, *That’s the Breaks: Trainer Responsibility for Racehorse Breakdowns in New York*, Animal Legal and Historical Center (2008), <http://www.animallaw.info/articles/ddusracehorsetrainer.htm>.

127. First, there must be a definition of a cage: an enclosure that significantly limits the mobility and life experience of an animal put into the confined space of the enclosure. The cage under the Animal Welfare Act for a chimpanzee is five by five by seven feet. See 9 C.F.R. § 3.80 (2009). This is very unacceptable for a primate, but ten mice could well live a full life within this space.

needlessly mutilate or kill . . . any living creature.”¹²⁸ Torture, by definition, is unacceptable infliction of pain and suffering; often the use of poison is also a flat prohibition.¹²⁹ Notice that the prohibitions against pain, suffering, and death are usually qualified by the terms such as “unjustified” or “unnecessary.” This means that the legislature has recognized that a balancing of the interests of the animals against the interests of the humans will have to be judged by the jury or judge to determine what is acceptable within their society.¹³⁰

Sometimes, a social consensus can become a political consensus and a specific act becomes illegal. Thus, some states prohibit the docking of tails and the cutting of ears, while the practices’ necessity, and thus legality, is a jury question in others.¹³¹ It will be better for the animals if more social consensus could be stated by the legislature in the form of prohibitions. Going to a criminal jury trial is a significant hardship on one individual when the judgment about the appropriateness of the conduct, like docking a tail, will not be understood until the jury gives its verdict under terms such as “unnecessary.”

In this category, it is not the creation of the right that is underdeveloped, but the human activities statutorily exempted from the general prohibitions that need to be addressed. To give blanket exemptions to zoos and

128. Act of Apr. 12, 1867, ch. 375, § 1, 1867 N.Y. Laws 86 (current version at N.Y. AGRIC. & MKTS. § 353 (Consol. 2004)).

129. See MICH. COMP. LAWS ANN. § 750.50b(2) (West Supp. 2009) (noting that it is illegal for a person to “without just cause . . . knowingly administer poison to an animal, or knowingly expose an animal to any poisonous substance”). But, the killing of rats and other pests is exempted. See *id.* § 750.50b(8)(c).

130. *People v. Voelker*, 658 N.Y.S.2d 180, 181 (N.Y. Crim. Ct. 1997). The defendant was found guilty of charges stemming from a videotaped incident wherein defendant cut off the heads of three live, conscious iguanas and allegedly cooked and consumed the animals. *Id.* The tape of the incident was broadcast by Manhattan Neighborhood Network in a show entitled “Sick and Wrong.” *Id.* While eating the iguanas might have been a justified reason for their death, making a tape for showing the public was not.

131. An example of the legislature drawing the line can be found in N.Y. AGRIC. & MKTS. LAW § 365 (Consol. 2004), which states: “1. Whoever clips or cuts off or causes or procures another to clip or cut off the whole or any part of an ear of any dog unless an anaesthetic shall have been given to the dog and the operation performed by a licensed veterinarian, is guilty of a misdemeanor. . . .” *Id.*

In Indiana there is not a specific statute to deal with cropping and the state had to prosecute, claiming a violation of the prohibition against “torture.” *Elisea v. State*, 777 N.E.2d 46, 47–48 (Ind. Ct. App. 2002). The defendant was convicted of cruelty to animals and practicing veterinary medicine without a license after cropping several puppies’ ears with a pair of office scissors while the puppies were under no anesthesia. The court held that the evidence supported conviction for cruelty under the definition of torture. See also Amy L. Broughton, *Cropping and Docking: A Discussion of the Controversy and the Role of Law in Preventing Unnecessary Cosmetic Surgery on Dogs*, Animal Legal and Historical Center (2003), <http://www.animallaw.info/articles/dduscroppingdocking.htm>.

agricultural activities is not appropriate. In theory, a Michigan zookeeper has no legal duty to provide care to his animals.¹³² This means that if an animal starved to death, no criminal charges could be filed. There is no public policy argument to justify this result. Another sweeping exemption is often given to owners of agricultural animals.¹³³

3. *To be cared for.* There are many state and some federal laws dealing with the issue of care. The providing of water and food is obvious, and was part of the New York 1867 law.¹³⁴ Today's duty of care laws can be much more expansive,¹³⁵ but society has not yet made a full consideration of the tradeoffs between care for animals, the financial costs of care to human owners, and the judgment about the value of an animal's life with pain and suffering versus the animal's death.¹³⁶ The law does not address the social needs of many animals. Herd animals like sheep and cows clearly prefer being with others of the same species and having even a friendly human owner is not a substitute for a companion of the same species; yet, requirements of companionship are not presently part of the law. At a broader level, we have not yet had a discussion about a duty to provide for the mental well-being of animals. For example, if an infant animal has a supporting mother, for how long should the infant stay with the mother? The well-being of the infant animal, not profit maximization for the owner, should be the dominant factor in such a decision.

Finally, under the umbrella of duty to provide care there is the duty to let the animals experience the fullness of life, as provided by their genetic heritage. If a dog is kept for his entire life in a small room, the dog could well receive food and water, veterinary care, and exercise; but, the dog may never be able to experience what it is like to be a dog: to run after a rabbit, to discover new smells, to play with another dog, or have a tummy rubbed by a human. It is not that the dog in the room is in pain or could be shown to be suffering, but that the owner/keeper has prevented him from realizing or experiencing life as his DNA has programmed him to do.

132. See MICH. COMP. LAWS ANN. § 750.50(11)(d).

133. "This section does not prohibit the lawful killing of livestock or a customary animal husbandry or farming practice involving livestock." *Id.* § 750.50b(8). In most states there has never been a court case to determine the scope of the term "customary farming practices."

134. Act of Apr. 12, 1867, ch. 375, § 1, 1867 N.Y. Laws 86 (current version at N.Y. AGRIC. & MKTS. § 353 (Consol. 2004)).

135. See MICH. COMP. LAWS ANN. § 750.50(1)(a) ("Adequate care' means the provision of sufficient food, water, shelter, sanitary conditions, exercise, and veterinary medical attention in order to maintain an animal in a state of good health.').

136. For a full discussion of some of the difficulties contained in this simple phrase, see David Favre, *The Duty of Owners to Provide Veterinary Medical Care to Animals*, in ANIMAL LAW AND THE COURTS: A READER 132-66 (Taimie L. Bryant, Rebecca J. Huss & David N. Cassuto eds., 2008).

A key component of psychological well-being is the opportunity to utilize the capabilities that each animal inherently possesses. It does not matter if science can show that a sow in confinement facilities, on concrete for her life, is not in pain or that stress hormones are absent. If a sow has never been able to put her snout into the dirt, then she has never been able to fully experience what it means to be a pig. Cows should eat grass and chickens should search and scratch. It is unethical for humans to use animals unless the method of use allows the animal to experience the critical components of life for that animal, and the law should reflect this duty.

4. *To have living space.* This right is very important to focus upon as it is the substitute for the human right of personal liberty. As property, animals will be within the possession and control of owners. As such, they cannot have the personal liberty that wild animals have.¹³⁷ But, an owner has the duty to provide adequate space for any living property that is possessed. While some laws presently address the need for shelter as part of the duty to provide care, in criminal provisions, shelter is only part of the issue. While this can be tied to mental well-being, it deserves consideration by itself. If we are to respect and consider the interests of animals, the space provided for the exercise of their inherent capabilities is critical. For example, a number of years ago the Detroit Zoo moved its chimpanzees out of their prison-cell-sized rooms in the primate house, clearly unacceptable, to a four-acre exhibit which can be judged as acceptable.¹³⁸ Now the chimpanzees have the opportunity for complex group interaction and can opt to be in private or public spaces.

As an extreme example, consider the 2003 case in which an individual was found to have a 350-pound Bengal–Siberian tiger, an alligator, another tiger with cubs, rabbits, and a tarantula in his apartment. The owner said his “interest” was in trying to create a Garden of Eden.¹³⁹ Authorities removed the animals, but the news article does not say under which law. Many states have outlawed the personal possession of animals such as tigers and lions, believing that regardless of the interests or motivations of individual humans, neither the animals nor human neighbors should assume the risk of such arrangements.¹⁴⁰

137. See discussion *supra* notes 90–91 and accompanying text.

138. This description is based on the author’s personal observation of the Great Ape House at the Detroit Zoo before it was closed in 1982. In 1989, a new exhibit opened at the zoo: “[A] new 4-acre, \$7.5 million facility that comes as close to a natural chimpanzee environment as possible [given the constraints of an urban zoo] in a northern latitude.” Tom Hundley, *New Zoo Display Lets Chimps Be Themselves*, CHI. TRIB., Dec. 13, 1989, at 6.

139. See Alan Feuer & Jason George, *Police Subdue Tiger in Harlem Apartment*, N.Y. TIMES, Oct. 5, 2003, at 35.

140. See, e.g., CONN. GEN. STAT. ANN. § 26-40a (West 2008) (making it illegal to own any member of a number of animal families, including “felidae [large cats],” “canidae [wolves],” and

5. *To be properly owned.* While violation of the first four rights can be remedied without removing an animal from his or her owner, there is a point at which adverse effects on an animal cause the capacity of the owner to come into question. While it is possible to conceive of removal of ownership simply as a remedy for a violation of the listed animal rights, acceptance of responsibility toward living property is so fundamental to this new paradigm as to require it be stated as a stand-alone right. Any owned animal has the right to expect his or her owner to have the capability and willingness to provide the level of care and space that the particular animal needs.

This issue can arise in either the civil law or criminal law context. While the law should continue to presume that humans can own animals, upon a showing of a particular human not being able to do so, the law should not hesitate to step in and transfer ownership away from the incapable to the capable, and enjoin future ownership of animals. This will be done without compensation to the owner, with non-compensation being in effect a civil fine for failure to provide the necessary living conditions. An extreme fact pattern that raises this issue is seen in the cases of animal hoarding. The previously described North Carolina case is but one example.¹⁴¹

While new statutes might be adopted to more specifically define the duties of an owner, the existing anti-cruelty laws usually constitute a workable set of standards that could be used in a civil lawsuit. It will not be a defense for an owner that possession of an animal was given to another person, as the duty created by this right cannot be delegated. A red card version of this right already exists in Illinois that authorizes the removal of animals from their owners for failure to provide the required care.¹⁴² The Illinois statute does not

“ursidae [bears],” and IOWA CODE ANN. § 717F.1.5.a. (Supp. 2009) (listing a number of animal families as “dangerous” and thereby illegal to own, including, but not limited to, felidae carnivora, canidae carnivora, hyaenidae carnivore (hyenas), ursidae carnivore, rhinoceros tidae (rhinoceros), proboscidea (elephants), crocodilia (crocodiles), etc.).

141. See *supra* notes 50–54 and accompanying text. The North Carolina statute provides:

[I]f the court finds by a preponderance of the evidence that even if a permanent injunction were issued there would exist a substantial risk that the animal would be subjected to further cruelty if returned to the possession of the defendant, the court may terminate the defendant’s ownership and right of possession of the animal and transfer ownership and right of possession to the plaintiff or other appropriate successor owner. For good cause shown, the court may also enjoin the defendant from acquiring new animals for a specified period of time or limit the number of animals the defendant may own or possess during a specified period of time.

N.C. GEN. STAT. ANN. § 19A-4 (West 2007).

142. See 510 ILL. COMP. STAT. ANN. 70/12 (West 2004):

Impounding animals; notice of impoundment: (a) When an approved humane investigator, a Department investigator or a veterinarian finds that a violation of this Act has rendered an animal in such a condition that no remedy

require criminal charges to be filed prior to the state taking action. The previously discussed North Carolina law would support a removal action as either a red card or blue card. Many states at the moment allow removal of the animal from her owner only in conjunction with a criminal law proceeding.

A specific context in which the issue of who is an appropriate owner of an animal arises is that of a divorce proceeding in which the husband and wife have a dispute as to who should have title and possession of the pet. In this case, prior ownership is not as important as is the right of the animal to have a caring owner. Thus, when a court makes a decision about a pet, the primary factor should be, What is in the best interest of the animal?¹⁴³

6. *To own property.* The legal rights discussed above deal with the life conditions and the well-being of the animal. Legal rights 6, 7, and 8 acknowledge the new legal personality that comes with being the new category of property, living property. To be living property is also to have the legal capacity to own other property. The primary property contemplated is financial property, money, and assets, but it could also include personal property, intellectual property, and real property (as equitable owners¹⁴⁴). This right has already been acknowledged in the world of trust.¹⁴⁵ This new concept of living property owning personal property would not be extended to other categories of traditional personal property.

One possible application of this idea arises when contemplating compensation to animals for their labors. An owner does not have to pay an animal for the lawful use of the animal, room and board and quality of life being compensation. But, any time that money comes to the owner because of the presence or efforts of the animal, the animal should have an equitable interest in at least some portion of the money which the animal helped generate. Consider the racehorse that wins a \$100,000 prize. While the efforts of the owner and trainer clearly were important, without the efforts of the horse, the money would not have been won. Our historical acceptance of the labor theory of property supports the proposition that some money be set

or corrective action by the owner is possible, the Department must impound or order the impoundment of the animal. If the violator fails or refuses to take corrective action necessary for compliance with Section 11 of this Act, the Department may impound the animal. . . . Any expense incurred in the impoundment shall become a lien on the animals.

Id.

143. See Lauren Magnotti, Note, *Pawing Open the Courthouse Door: Why Animals' Interests Should Matter When Courts Grant Standing*, 80 ST. JOHN'S L. REV. 455 (2006).

144. How an animal might be equitably self-owned is set out in David Favre, *Equitable Self-Ownership for Animals*, 50 DUKE L.J. 473 (2000).

145. See *supra* notes 55–56 and accompanying text.

aside for the benefit of the horse.¹⁴⁶

Another example of the application of the concept that animals can own property arises if property creation is considered. If humans can create new works of art that receive the protection of copyright laws, so should the original works of animals. Elephants and chimpanzees are capable of creating purposeful art. As the creative artists, they should have intellectual property rights just as humans might have.¹⁴⁷ Their owners may well be their agents for purposes of interacting with the human world. But, as with children, the fact that animals do not understand the rules of copyright law does not justify the owners being the sole beneficiaries of creative work of their animals.

As an animal is not likely to understand the concepts of title and ownership, and may not make good decisions about the investment and use of her money or other property,¹⁴⁸ the money should be treated as money made by underage human children. When a child earns or is awarded money over some amount, then adult humans, usually the child's parents, set aside the money to use for the benefit of the child. This may be a formal or informal trust. Likewise, an animal can have a formal or informal trust of which the animal is the beneficiary. This would make the animal the equitable owner of the property in the trust.¹⁴⁹

7. *To enter into contracts.* There are two general types of contracts that involve animals. The first is the transfer of the animal to another who will care for the animal. This will usually require the owner to pay the keeper (a bailment). For example, 1,000 head of cattle might be owned by Smith, but are transferred to the Flying J for eighteen months at \$5 per head per month. The second type of contract is when the owner provides the animal for a service and the owner is paid by the contracting party for the service. This may or may not involve the transfer of possession. It can involve a bear with a part in a movie or a horse who spends a few weeks on a ranch for breeding purposes. For the first type of contract, a primary concern is that the physical transfer to a new location does not violate any of the animal's rights.

In the second type of contract, while an animal does not have the capacity to enter into a contract independent of the owner of the animal, any animal

146. Lawrence C. Becker, *The Labor Theory of Property Acquisition*, 73 J. PHIL. 653 (1976); JOHN LOCKE, *Second Treatise on Government*, in TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 111–21 (Ian Shapiro ed., Yale Univ. Press) (2003).

147. This possibility is given extensive consideration in Dane E. Johnson, *Statute of Anne-imals: Should Copyright Protect Sentient Nonhuman Creators?*, 15 ANIMAL L. 15 (2008). The author proposes “an equitable title concept of copyright ownership shared between animals and the human organizations to which they may be connected.” *Id.* at 17–18.

148. But then again, the same could be said about any number of adult humans.

149. For a detailed consideration of how the concept of equitable ownership can be considered for animals, see FAVRE, *supra* note 89.

who is the subject of a contract has an equitable interest in the contract, taking something like the role of a third-party beneficiary or an equitable interest holder in the contract. The presumption is that the owner will have the interests of the animal in balance any time the owner enters into a contract for the transfer or services of the animal. If a contract, on its face, violates any of the legal rights of the animal who is the subject of the contract, the contract is void on its face as contrary to public policy. Additionally, a void contract constitutes prima facie evidence of the unfitness of the owners who entered into the contract.

If an animal is a part of the contract, as in the second fact pattern, then some of the benefits of the contract should run to the animal's benefit. If possession of a panda is being transferred by contract for a summer exhibit at a zoo, and the owner of the panda is to receive \$100,000 for the transfer and temporary possession (bailment) by a zoo, then the panda should be considered a party to the contract. The zoo would have to provide for all the rights of the panda. Presumably, the panda will not agree to the contract if it is contrary to her safety and well-being and there is insufficient compensation for the dislocations of her life. Likewise, those humans who provide the animals who play major roles in the entertainment industry will be required to acknowledge the interests of the animals in question, and some of the benefits of the contract should flow directly to these animals.

8. *To file tort claims.* Animals should have the right to sue humans who violate their primary interests. If a human injures an animal, then perhaps, in at least the egregious cases, the animal should have a preferred green card legal right to sue the wrongdoer. To beat a chimpanzee with a club is no different to the chimpanzee than what is experienced by a physically abused human child. Such a beating is as wrong to the primary interests of the chimpanzee as it is to the child. The law should be open to animals who seek injunctive relief for ongoing harms, but damages should also be available where appropriate. In a prior article, this topic was explored in more detail, where the tort of "intentional interference with a fundamental interest" was proposed, so it will not be expanded upon in this Article.¹⁵⁰

VI. CONCLUSION

As developed in this Article, the proposition that animals can possess legal rights is already supported by the reality of events within our legal system. Animals already have a modest variety of legal rights within the categories of weak (red), strong (blue), and preferred (green) rights. To make

150. *See id.* The reader should recognize that this article predates the present Article by five years and therefore some of the concepts in that article might well be modified by the subsequent thinking reflected in the present Article.

a more coherent package of all the animal-related public policy issues, it will be useful to acknowledge the existence of a fourth category of property, living property. Once this new category is separated out from other property, a focused scholarly consideration of the issues will result in a new list of legal rights for at least some of these animals. This Article has suggested both what some of the rights might be and how traditional rules of property law might be modified to accommodate the presence of this new category.

At this point in history, the non-human animals of our Earth are not our brothers, nor our equals, but like our children.¹⁵¹ They have interests of their own that deserve to be nurtured and protected from human harm, both in the consideration of ethical acts and the laws that we humans implement on their behalf.

151. As an example of how this attitude shift is already occurring, consider the Michigan case in which a dog owner knowingly allowed his dog to starve to death by abandoning the house in which the dog was living. The statement of the judge at trial was that “[t]his was murder. An animal, in this court’s opinion, is no different than a child.” Amber Hunt, *Man Gets Jail Time for Starving Dog to Death*, DETROIT FREE PRESS, July 19, 2007, at B1.