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PAWING OPEN THE COURTHOUSE DOOR: WHY ANIMALS' INTERESTS SHOULD MATTER WHEN COURTS GRANT STANDING

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"[T]he difference in mind between man and the higher animals . . . is one of degree and not of kind. We have seen that the senses and intuitions, the various emotions and faculties, such as love, memory, attention, curiosity, imitation, reason, [etc.], of which man boasts, may be found . . . in the lower animals."
—Charles Darwin[1]

INTRODUCTION

Animals do not have legal personhood and are treated as property under the law.[2] While such a legal classification may not comport with people's common interactions with animals, it is nonetheless the prevailing law. Due to their status as property, animals have no standing to bring suit themselves,[3] and individuals and organizations that bring legal actions on behalf of mistreated animals regularly find their suits dismissed due to lack of standing.[4] Courts view the abuse of animals as

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1 CHARLES DARWIN, THE DESCENT OF MAN 319 (Encyc. Britannica, Inc. 1952) (1871).

2 *See generally* Jett v. Mun. Court of San Diego, 223 Cal. Rptr. 111, 113–15 (Ct. App. 1986) (holding that ownership of a tortoise was not subject to forfeiture even though the owner treated it with cruelty); Mass. Soc'y for the Prevention of Cruelty to Animals v. Comm'r of Pub. Health, 158 N.E.2d 487, 490, 493–94, 496 (Mass. 1959) (finding that a statute authorizing the use of lost and strayed animals from a pound for the purpose of scientific experiments was constitutional because those animals were abandoned property). For a thorough discussion of the status of animals as property and the impact this has on the treatment of animals, see GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW (1995).

3 Occasionally, however, animals have been plaintiffs themselves, bringing suit in their own right. *See* discussion *infra* Part II.D.

4 In *San Juan Audubon Society v. Wildlife Services*, wildlife preservation groups

peripheral to the "real injury" of the person bringing suit, creating a fallacy in these cases whereby an injury to a person is often fabricated so that the real case to protect the animals may ensue.[5]

In order for any cause of action to proceed, the party bringing suit must meet the constitutional requirements for standing.[6] First, the party bringing suit must have experienced an injury in fact and, second, the plaintiff's injuries must have been caused by the defendant.[7] Finally, the court must be able to redress the plaintiff's injury if the plaintiff prevails on the merits.[8] In addition to the constitutionally mandated requirements, the courts may impose prudential requirements before holding that a party has standing. These include the general prohibition of raising a third party's legal rights, the requirement that the suit fall within the "zone of interests" of the

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sued the Secretary of Agriculture and Wildlife Services (part of the Department of Agriculture). The defendants implemented a livestock-protection program. As part of the program, predator animals were killed with cyanide-ejector devices planted in the ground. The plaintiffs alleged that defendants failed to follow proper procedures and thereby placed endangered species in danger of being poisoned with cyanide. The court held that the plaintiffs lacked standing because the members of the plaintiff organizations failed to prove that they had concrete plans to view the endangered species in the future. *See* San Juan Audubon Soc'y v. Wildlife Servs., 257 F. Supp. 2d 133, 135, 139–42 (D.D.C. 2003). Similarly, in *Fund for Animals v. Norton*, 295 F. Supp. 2d 1 (D.D.C. 2003), groups and individuals dedicated to conserving animals in their natural habitats sued to prevent the importation of Argali sheep for sport hunting. *Id.* at 2. The court held that the plaintiffs' victory would not adequately curb the killing of the sheep because the countries from which the sheep were being imported would not improve their conservation efforts just because importation permits had been denied in the United States. *See id.* at 7. The plaintiffs' injuries would not be redressed even if they prevailed in their suit, and the court denied standing in part on that basis. *See id.*

[5] *See* discussion *infra* Part II.A.

[6] For a complete overview on the issue of standing as related to animals, see discussion *infra* Part II.

[7] *See infra* note 67 and accompanying text.

[8] *See generally* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–71 (1992) (demonstrating the strict adherence to these constitutional requirements). The Supreme Court held that, despite a statutory provision that expressly allowed "all citizens" to bring suit, citizens still needed to prove a concrete injury in fact. *See id.* at 576, 578. The Court stated that to allow Congress to give citizens the option to sue over a general public interest would be to reduce the significance of the separation of powers by transferring from the executive branch to the judiciary the power to ensure that the laws are faithfully executed. *See id.* at 576; *see also* Allen v. Wright, 468 U.S. 737, 750–52 (1984) (discussing the "separation of powers" doctrine with regard to the standing issue); United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 686 (1973).

law at issue, and the disallowance of generalized grievances.[9] Thus, to have its case heard in court, a plaintiff must show that it has experienced a direct injury; arguing that an animal has been injured is inadequate to establish standing.[10]

The constitutional injury-in-fact requirement creates a unique problem for protecting abused animals. Since no direct harm is committed against the group or individual bringing the suit, suits brought to protect the interests of abused animals are frequently dismissed because the plaintiffs cannot prove a direct injury in fact.[11]

While judges have slowly become more permissive in granting standing to those trying to protect animals, even the most progressive courts directly hold that the standing they grant is not premised on the mistreatment of the animal itself. For example, in *American Society for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*,[12] the court was innovative in holding that standing was based largely on a former circus employee's emotional attachment to the elephants that were being abused.[13] The court also expressly held, however, that standing was *not* based on any continuing injury to the animal.[14]

While animals have historically been viewed as property under the law, it cannot be denied that animals are qualitatively different than the average piece of personal property, such as a desk, sweater, or television. Animals are living beings capable of

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[9] *See generally* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12, 17–18 (2004) (holding that "prudential standing encompasses 'the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked' ") (quoting *Allen*, 468 U.S. at 751)). It is the "zone of interests" factor which is the prudential requirement most often at issue where people or organizations attempt to get standing to bring suit on behalf of animals. *See, e.g.*, Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426, 444–45 (D.C. Cir. 1998).

[10] *See* discussion *infra* Part II.A.

[11] In *Animal Lovers Volunteer Ass'n v. Weinberger*, the court held that the plaintiffs did not have standing to compel the Navy to stop killing feral goats on San Clemente Island in California. 765 F.2d 937, 938 (9th Cir. 1985). Because the plaintiffs could not prove any direct injury beyond a general interest of the organization in preventing cruelty to animals, the plaintiffs did not have standing. *See id.* at 938–39.

[12] 317 F.3d 334 (D.C. Cir. 2003).

[13] *Id.* at 338.

[14] *Id.* at 336–37.

feeling physical pain, experiencing varying degrees of rational thought,[15] and forming seemingly emotional attachments.[16] Outside of the legal context, it would be quite outdated—if indeed it was ever plausible—to presume that a family's dog or cat is *not* distinct from that family's couch or dining room table. Within the legal context, however, courts have adopted the view that animals can be treated under the law as any other inanimate item of personal property.[17] Such a legal stance is inconsistent with society's general notions of animals,[18] as well as a rational, common-sense view of animals.

The issue of standing is of serious import to the protection of animals as it is the threshold issue before the merits of the case can even be considered. While the relief sought in these suits is generally an injunction to stop the mistreatment of the animals and/or to have the animals removed from the custody of the abusers, the current law forces plaintiffs to generate bases for standing that are essentially unrelated to the relief sought. As a result, the standing alleged in these suits is a legal fiction, since the injury being pleaded is often not the injury with which the parties are typically concerned.[19] To avoid these legal fictions, courts faced with the standing issue should become more

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[15] *See generally* JAMES RACHELS, CREATED FROM ANIMALS: THE MORAL IMPLICATIONS OF DARWINISM 132–33 (1990) (explaining Darwin's arguments that animals have similar rational capacities to humans).

[16] For most people, it is easiest to relate to this idea in terms of domesticated animals, which most people view as part of their families. *See* Elaine T. Byszewski, *Valuing Companion Animals in Wrongful Death Cases: A Survey of Current Court and Legislative Action and a Suggestion for Valuing Pecuniary Loss of Companionship*, 9 ANIMAL L. 215, 218–19 (2003) (discussing how courts have tried to measure a dog's value by taking into account a sentimental element rather than limiting damages to a nominal amount).

[17] *See infra* note 99 and accompanying text.

[18] For example, the entire state of Rhode Island and all cities within Marin County in California have passed laws which recognize animal caretakers as "guardians" as opposed to "owners." *See* The Guardian Campaign, Do You Live in a Guardian Community?, http://www.guardiancampaign.com/guardiancity.htm (last visited Nov. 12, 2005) (listing those cities which have become so-called "Guardian cities"). Thus, on animal tags, adoption forms, signs in public parks, and veterinary and kennel forms, the term "guardian" must be used. *See id.*

[19] *See* Humane Soc'y of the U.S. v. Hodel, 840 F.2d 45, 51–52 (D.C. Cir. 1988) (holding that a challenge to laws allowing increased hunting could be maintained when the injury in fact was that the members of the Humane Society could not adequately utilize animal refuge systems, but could not be maintained when the injury was a strong interest in the "preservation, enhancement and humanitarian treatment of wildlife").

progressive by viewing animals as beings with independent interests. This would not require an abandonment of the legal classification of animals as property; rather, courts could recognize that animals are a special type of property entitled to certain legal protections not afforded to typical inanimate objects.

I. HISTORICAL OVERVIEW: WHY ARE ANIMALS TREATED AS OBJECTS IN WESTERN CULTURE?

While it is impossible within the confines of this Note to cover thoroughly the origins of animals' treatment as mere objects, a brief overview of some of the more influential sources is provided. It should be preliminarily noted that while the concept of animals as objects is prevalent throughout the West, many Eastern cultures teach great respect for all living beings, and those cultures do not espouse the views below.[20]

A. Judeo-Christian Origins

"[T]he Western concept of private property . . . is explicitly linked to the status of animals as resources that were given to us by God."[21] Beginning with the story of Creation in the Book of Genesis, the Judeo-Christian tradition adopts the premise that God created humans to rule over animals. After creating the fish, birds, and cattle, God created mankind in His own image and "[l]et them *have dominion* over the fish of the sea, the birds of the air, and the cattle, and over all the wild animals and all the creatures that crawl on the ground."[22]

The theme of animal subjugation permeates the Bible. While there are some passages that teach that animals and humans share many similarities and that animals should be treated humanely,[23] the Bible generally shows very little regard

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[20] Gary L. Francione, a law professor and animal-rights activist, noted that "there are some Eastern religions that promote the sanctity of all life, and . . . at least some believers in every religion that adopt the view that animal interests are morally significant . . . ." GARY L. FRANCIONE, INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR THE DOG? 109 (2000).

[21] *Id.* at 51.

[22] *Genesis* 1:24–26 (New American) (emphasis added).

[23] The Book of *Ecclesiastes* provides an example:

As for the children of men, it is God's way of testing them and of showing that they are in themselves like beasts. For the lot of man and of beast is one lot; the one dies as well as the other. Both have the same life-breath, and man has no advantage over the beast; but all is vanity.

for the humane treatment of animals. Animals are routinely offered as sacrifices to God in great numbers throughout the Bible.[24] Indeed, Jesus Himself caused two thousand pigs to jump over a cliff where they drowned in the sea as He cast out demons.[25] In describing this incident, St. Augustine said "that to refrain from the killing of animals . . . is the height of superstition, for[ ] judging that there are no common rights between us and the beasts . . . , [h]e sent the devils into a herd of swine. . . . Surely[ ] the swine had not sinned."[26] As further evidence of the marginalization of animals in the Bible, Saint Paul wrote in his letters to the Corinthians that even when the law of God directly benefited animals, that law was nonetheless created for the benefit of humans.[27]

The treatment of animals in the Judeo-Christian tradition has directly impacted modern property law. William Blackstone, who authored the hugely influential *Commentaries on the Laws of England*[28] at the end of the eighteenth century, relied on the story of Creation in the Book of *Genesis* and the divine grant of authority to humans over animals as the primary justification for the property rights that humans have in all of nature, including animals.[29] Blackstone stated, "The Earth, therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the creator."[30] One hundred years later, through the writings of James Kent, the legal status of animals as property carried over into the

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Ecclesiastes 3:18–19; *see also Proverbs* 12:10 ("The just man takes care of his beast . . . .").

[24] *See, e.g.*, *Leviticus* 3:1; *Numbers* 7:87–88; *2 Chronicles* 29:32–33.

[25] *See Mark* 5:1–13.

[26] PETER SINGER, ANIMAL LIBERATION 192 (3d ed. 2002) (alterations in original) (quoting SAINT AUGUSTINE, THE CATHOLIC AND MANICHAEAN WAYS OF LIFE 102 (Donald A. Gallagher & Idella J. Gallagher trans., The Catholic Univ. of Am. Press 1966)).

[27] For example, while the Book of *Deuteronomy* teaches that oxen should not be muzzled while working the grain, St. Paul references that passage in a letter to the Corinthians and says, "Is God concerned about oxen, or is [H]e not really speaking for our sake? It was written for our sake, because the plowman should plow in hope, and the thresher in hope of receiving a share." *1 Corinthians* 9:9–10; *see also Deuteronomy* 25:4. Thus, St. Paul indicates that the law that provides for the humane treatment of oxen is not meant to benefit the oxen themselves but is meant to assist humans.

[28] WILLIAM BLACKSTONE, COMMENTARIES.

[29] *See* JORDAN CURNUTT, ANIMALS AND THE LAW 27 (2001).

[30] *Id.* (quoting WILLIAM BLACKSTONE, 2 COMMENTARIES *3).

American common law.[31]

B. Cartesian Philosophy

In his studies of science, Descartes asserted that everything composed of matter operated much like the mechanistic action of a clock ticking.[32] Because Descartes was a devout Christian, he needed to resolve his religious beliefs with his determination that *all* matter—including humankind—acted mechanistically.[33] He thus distinguished humans from other entities composed of matter by recognizing the presence of a human soul that did not follow these mechanistic rules.[34] Animals, on the other hand, had neither souls nor consciousness.[35] According to Descartes, animals were *automata*, which meant that they were essentially machines.[36]

During Descartes's life, vivisection (experimentation on live animals) increased drastically, and physiologists, calling themselves Cartesians, performed truly horrific experiments on live animals without anesthesia.[37] For example, eyewitness accounts report that conscious dogs were nailed to boards by their four paws and sliced open so that physiologists could observe their vascular systems.[38] Thus, Descartes's philosophies regarding the mechanical nature of animals translated into particularly brutal uses of animals.

Remnants of the Cartesian methods of using animals as objects for experimentation continue to pervade modern medicine. For example, research regarding strokes conducted at Columbia University involved a surgical procedure in which experimenters removed baboons' left eyes, drilled the bone at the back of their eye sockets, removed their brains' outer coverings,

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[31] *See id.* at 28 ("So we find that from Kent to Blackstone to Justinian, the legal status of animals as property, with no standing and no rights whatsoever, has been deeply embedded into the law of Western civilization for many centuries."); STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS 42 (2000).

[32] *See* SINGER, *supra* note 26, at 200.

[33] *See id.*

[34] *See id.*

[35] *See id.*

[36] *Id.*; *see* TOM REGAN, THE CASE FOR ANIMAL RIGHTS 3 (1983).

[37] *See* SINGER, *supra* note 26, at 201.

[38] *See id.* at 201–02. Reportedly the dogs' screams were seen as almost mechanical reactions to the slicing of their flesh, as opposed to humans' screams, which would result from fear and pain. *See id.* at 201.

and clamped their blood vessels.[39] Employees of the University subsequently complained that the baboons were not adequately treated for pain after surgery, lived in such poor conditions that some resorted to eating their own feces and consistently biting themselves, and were essentially left to die.[40] While this Note does not attempt to argue the merits of scientific experimentation on animals, it proposes that the Cartesian tradition of treating animals as mere machines is still present in society through some modes of modern medical experimentation.

C. Lockean Philosophy

The writings of John Locke further reinforced the status of animals as property in a particularly influential way because his theories of property powerfully impact modern property law. Locke argued that an owner of property has exclusive dominion over and use of the property he owns.[41] Locke felt that while the world was given to humankind collectively, laboring over a particular parcel of the collective gives an individual private property rights in that parcel.[42] Locke stated that "[p]roperty, *whose Original is from the Right a Man has to use any of the Inferior Creatures* . . . is for the benefit and sole Advantage of the Proprietor, so that he may even destroy the thing, that he has Property in by his use of it."[43] Therefore, under Locke's teachings, property rights "originated in the exclusive control and use of animals that God supposedly gave to humans."[44] According to Locke, while God gave animals to all humankind, a person may join his or her work with a particular animal and thus obtain ownership of that animal.[45]

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[39] *See* Bryn Nelson, *Where Pain Can Lead to Progress; The Deep Divide Over the Merits of Animal Research Rages on at a Venerable New York Medical Institution*, NEWSDAY (New York), Sept. 26, 2004, at A03.

[40] *See id.*

[41] *See* FRANCIONE, *supra* note 20, at 53.

[42] *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 296 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) ("[B]ut supposing the *World* given as it was to the Children of Men *in common*, we see how *labour* could make Men distinct titles to several parcels of it, for their private uses; wherein there could be no doubt of Right, no room for quarrel.").

[43] *Id.* at 209 (emphasis added).

[44] FRANCIONE, *supra* note 20, at 53.

[45] *See* FRANCIONE, *supra* note 2, at 38–39.

D. Darwinism

Until Darwin's time, humans were thought of as one category of beings and nonhuman animals were considered a separate category;[46] this was largely based on the Creation story found in Genesis.[47] After Charles Darwin popularized the theory of evolution, such categorization was no longer feasible.[48] Humans were merely another link on the evolutionary chain, and thus, the idea that humans had free reign over nonhuman animals became more difficult to justify morally or philosophically. According to one scholar, "[t]he reason Descartes's view of animals is not possible today . . . is that between him and us came Darwin. Once we see the other animals as our kin, we have little choice but to see their condition as analogous to our own."[49] While it had been generally accepted that humans were pointedly different from animals because God had endowed them with a rational soul, Darwin demonstrated that the development of rationality was simply a function of natural selection. Darwin argued that while animals did not possess the same degree of rationality as humans, rational thought was indeed present in other animal species.[50] In addition, Darwin believed that the use of language—another characteristic seen as being distinctly within the purview of humankind—existed in varying degrees in animal species, often through signals.[51] When the similarities among the species are recognized, and when it is acknowledged that the difference between humans and other animals is "one of degree and not of kind,"[52] it is increasingly difficult to see animals simply as objects.[53]

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[46] *See id.* at 36–38.

[47] *See supra* notes 22–27 and accompanying text.

[48] *See* RACHELS, *supra* note 15, at 131.

[49] *Id.* While it has become more difficult to justify morally the complete disregard of animals' ability to feel pain in the face of modern science, there are still some arenas, such as a "factory farm," in which "everything we've learned about animals at least since Darwin has been simply . . . set aside. To visit a modern [factory farm] is to enter a world that, for all its technological sophistication, is still designed according to Cartesian principles: animals are machines incapable of feeling pain." Michael Pollan, *An Animal's Place*, N.Y. TIMES, Nov. 10, 2002, § 6 (Magazine), at 58, 62–63; *see also infra* notes 228–32 and accompanying text.

[50] *See* RACHELS, *supra* note 15, at 132–33.

[51] *See id.* at 137.

[52] *See* DARWIN, *supra* note 1, at 319.

[53] Charles Darwin himself was opposed to the abuse of animals. *See* RACHELS,

Around the time of Darwin, other philosophers who viewed animals in a sympathetic and moral way became more prevalent. For example, Jeremy Bentham anticipated a time "when the rest of the animal creation may acquire those rights which never could have been withheld from them but by the hand of tyranny."[54] These philosophers further heightened the awareness of the plight of animals.

E. Singer and the Advancement of Animal Rights

Although there have been champions of animal rights dating back to Saint Francis of Assisi and the plight of animals has gained the support of some of the world's most brilliant minds such as Leonardo DaVinci and Albert Einstein, it was Peter Singer's *Animal Liberation*, published in 1975, that brought the moral issues concerning animals to the forefront of popular dialogue.[55] Singer appealed to his readers' intellects rather than their sensitivities by presenting the treatment of animals philosophically.[56]

In the preface to the first edition of his book, Singer related that he was never "inordinately fond of dogs, cats, or horses in the way that many people are" and that he "d[oes]n't 'love' animals."[57] Rather, Singer is opposed to "arbitrary discrimination."[58] In adopting this type of rhetoric, which presents the issues of animal rights and animal welfare as a rational argument made by a philosopher rather than an emotional plea made by overly sensitive "Bambi lovers,"[59] Singer

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supra note 15, at 212–13. His son, Francis Darwin, wrote that "[Charles Darwin] returned one day from his walk pale and faint from having seen a horse ill-used, and from the agitation of violently remonstrating with the man." Furthermore, "his humanity to animals was well known in his own neighbourhood." *See id.* at 213 (quoting 2 THE LIFE AND LETTERS OF CHARLES DARWIN 374 (Francis Darwin ed., D. Appleton & Co. 1905) (1887)). Darwin argued that while we naturally tend to have more sympathy for a "harmless animal" and less sympathy for "vermin," we must acknowledge that "the actual agony must be the same in all cases." *Id.* at 213–14 (quoting Charles Darwin, *Vermin and Traps*, GARDENERS' CHRON. & AGRIC. GAZETTE, Aug. 1863, at 821, 822, *reprinted in* 2 THE COLLECTED PAPERS OF CHARLES DARWIN 84 (Paul H. Barrett ed., 1977)).

[54] JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 283 (J.H. Burns & H.L.A. Hart eds., Methuen & Co. 1982).

[55] SINGER, *supra* note 26; *see also* Pollan, *supra* note 49, at 58–60.

[56] *See* Pollan, *supra* note 49, at 60.

[57] SINGER, *supra* note 26, at xxi.

[58] *Id.*

[59] "Bambi lovers" is a disparaging term often used to refer to those who fight to

forced the readers of his book to take the issue of animal abuse seriously. Indeed, since 1975, a great number of laws have been passed to protect animals,[60] a casebook on animal rights has been published, and approximately sixty law schools across the country currently offer classes on animal law.[61]

II. ANIMALS AND STANDING

As discussed above, in order to bring any suit, one must have standing.[62] Animals are legally categorized as property and, therefore, are viewed as legal things and not legal persons.[63] As one scholar put it, "[w]e have assigned ourselves, alone among the million animal species, the status of 'legal persons.' . . . [Animals] are 'legal things.' . . . Without legal personhood, one is invisible to civil law."[64] Thus, since animals have no legal personhood and, as a result, no legally enforceable rights, they typically cannot bring suit on their own behalf.[65] Consequently, it is left to individuals and organizations working on behalf of animals to bring suit when animals need protection. Because those bringing suit have generally not experienced an obvious injury in fact, their cases are often dismissed for a lack of standing.[66]

It is well established that for a party to have standing, she must demonstrate that she has suffered an injury in fact, that her injury is traceable to the defendant, and that the injury can

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protect animals from abuse. *See, e.g.*, Jennifer Everett, *Environmental Ethics, Animal Welfarism, and the Problem of Predation: A Bambi Lover's Respect for Nature*, 6 ETHICS & ENV'T 42 (2001), *available at* http://muse.jhu.edu/demo/ethics_and_the_environment/v006/6.1everett.pdf. Those to whom this term is directed often take exception to the implication that their beliefs stem purely from an emotional and sentimental outlook on animals. REGAN, *supra* note 36, at xii. Those individuals can only overcome such accusations by "making a sustained commitment to rational inquiry." *Id.*

60 *See* CURNUTT, *supra* note 29, at 4.

61 *See* PAMELA D. FRASCH ET AL., ANIMAL LAW (2000). For a list of current and future animal law classes, see Animal Legal Defense Fund—Animal Law Classes, http://www.aldf.org/windows/courses.html (last visited Nov. 12, 2005).

62 *See supra* notes 6–9 and accompanying text.

63 *See supra* notes 2–3 and accompanying text.

64 WISE, *supra* note 31, at 4.

65 Occasionally, species of animals have successfully brought suit in their own right, typically under the Endangered Species Act. *See* discussion *infra* Part II.D.

66 *See, e.g.*, Humane Soc'y of the U.S. v. Babbitt, 46 F.3d 93, 97–99 (D.C. Cir. 1995).

be redressed by a favorable ruling against the defendant.[67] These are the constitutional requirements for standing under Article III. In addition to the constitutional requirements, courts have established prudential limitations that must also be met to establish standing.[68] These prudential limitations include the following requirements: (1) the parties may not sue for a generalized grievance; (2) the plaintiff's complaint must be within the "zone of interests" protected by the statute at issue; and (3) the parties are generally prohibited from bringing a suit to protect the legal interests of a third party.[69] While the constitutional requirements are unchangeable, Congress has the authority to limit the prudential requirements by granting an express cause of action within the statute at issue.[70]

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[67] *See* Allen v. Wright, 468 U.S. 737, 751 (1984) ("A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.").

[68] *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 474 (1982) ("Beyond the constitutional requirements, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing.").

[69] *See id.* at 474–75. Of these prudential requirements, the one most often at issue in suits involving animal protection is the "zone of interests" requirement. For example, in *Animal Legal Defense Fund, Inc. v. Glickman*, the plaintiff sued under the Animal Welfare Act ("AWA") due primarily to his observation of the terrible living conditions of various primates at a game farm and his intention to continue attending the game farm. The court held that the plaintiff's aesthetic injury fell within the interest of the AWA, based on "logic, legislative history, and the structure of the AWA." Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426, 444–45 (D.C. Cir. 1998); *see also* Animal Legal Def. Fund, Inc. v. Espy, 23 F.3d 496, 499 (D.C. Cir. 1994).

[70] *See* Warth v. Seldin, 422 U.S. 490, 501 (1975) ("Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains . . . ."). Suits surrounding the Endangered Species Act often avoid the limiting effects of prudential standing requirements. *See, e.g.*, Bennett v. Spear, 520 U.S. 154, 161–65 (1997). The Endangered Species Act contains the following provision entitled "Citizen suits":

> (1) [A]ny person may commence a civil suit on his own behalf—
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> (A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or
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> (B) to compel the Secretary to apply . . . the prohibitions set forth in or authorized . . . with respect to the taking of any resident endangered species or threatened species within any State; or
>
> (C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty . . . which is not discretionary with the Secretary.

A. *Pleading the Injury in Fact*

The greatest barrier that people and organizations bringing suit on behalf of animals face in meeting the constitutional requirements of standing is the injury-in-fact requirement. Usually the injury is directly suffered by the animals and not by the people or organizations that are bringing suit on their behalf. In pleading such suits, the plaintiffs may not base their standing to sue on harm caused to the animal. Instead, they must allege a direct injury to themselves.[71]

There are indeed many instances where people are able to bring suit to protect the interests of one who is not in a position to do so himself. For example, capable people may act as guardians and bring suit on behalf of children or the mentally handicapped.[72] In those suits, the guardians have standing based on the injuries that happened directly to the ward[73] because the ward has legally cognizable interests that he or she is entitled to have protected.[74] For example, in *Bauchman v.*

Endangered Species Act of 1973, 16 U.S.C. § 1540(g)(1) (2000) (emphasis added). While plaintiffs bringing suit under the Endangered Species Act still must meet the Article III constitutional requirements, the prudential requirements need not be satisfied. In *Bennett v. Spear*, the district court and the court of appeals held that the plaintiffs who were suing under the Endangered Species Act did not have standing because their complaints did not fall within the zone of interests sought to be protected by the Act. *See* 520 U.S. at 160–61. The Supreme Court reversed, holding that "Congress legislates against the background of our prudential standing doctrine, which applies unless it is expressly negated" and that the zone of interests test was indeed negated by the citizen suit provision of the Endangered Species Act. *Id.* at 163–64.

[71] In *Animal Lovers Volunteer Ass'n v. Weinberger*, the court denied standing to a humane organization that was trying to prevent the Navy from killing feral goats on San Clemente Island. 765 F.2d 937, 938 (9th Cir. 1985). In reaching its decision, the court stated that "[a] general contention that because of their dedication to preventing inhumane treatment of animals, ALVA members will suffer distress if the goats are shot does not constitute an allegation of individual injury." *Id.* The court acknowledged that it "may to some degree share ALVA members' distress over a particular form of capricide," but was nonetheless unable to grant standing without proof of injury. *Id.* The court found that there was proof of neither an organizational stake of ALVA as a whole nor a personal stake of any of the individual members of ALVA. *Id.* at 939. ALVA needed to "differentiate[ ] its concern from the generalized abhorrence other members of the public may feel at the prospect of cruelty to animals" in order to have had standing. *Id.*

[72] *See* 4 JAMES WM. MOORE ET AL., MOORE'S FED. PRACTICE § 17.10[3][c] (3d ed. 2005); *see, e.g.*, Bauchman v. W. High Sch., 132 F.3d 542, 545 (10th Cir. 1997) (describing a case where a mother, as a guardian, brought suit alleging violations of her daughter's rights under the state and federal constitutions).

[73] *See Bauchman*, 132 F.3d at 545–46.

[74] *See* MOORE ET AL., *supra* note 72, § 17.10[3][c]. This is such an accepted

West High School,[75] a high school student sued her high school, school board, and various individuals through her mother as guardian.[76] The claim alleged that the student, who was Jewish, was forced to sing Christian songs in her school choir in violation of her First Amendment rights.[77] While the student's mother brought the claim on behalf of her minor child, the mother was not required to claim any direct personal injury.[78] The court needed only to look at the injury to the student, and the effect of the school's actions on the mother was not a relevant issue that was ever addressed.

In cases involving animals, the person or organization bringing suit is similarly trying to protect a being which cannot voice its own concerns in a court of law. In contrast to cases being brought by guardians of children or the mentally handicapped, because animals have no independent legal interests due to their classification as property, the plaintiff cannot simply plead that the animal is suffering an injury as a guardian can do for a ward. The plaintiff must instead plead an injury to himself that is independent from the injury to the animal.[79]

For example, in *International Primate Protection League v. Institute for Behavioral Research, Inc.*,[80] plaintiff Pacheco, a former employee of the defendant, together with animal rights organizations, brought suit under the Animal Welfare Act to become the guardians of monkeys that were being experimented on in a particularly cruel manner.[81] The monkeys allegedly were given inadequate food and water and were kept in unsanitary conditions.[82] One primatologist stated that he had "never seen a laboratory as poorly maintained [as that of the Institute for Behavioral Research]."[83] Monkeys reportedly chewed their own fingers and further mutilated their limbs that had been

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principle of law that courts do not even address the issue of standing in these cases. *See, e.g.*, *Bauchman*, 132 F.3d 542.

[75] *Bauchman*, 132 F.3d 542.

[76] *Id.* at 545.

[77] *Id.* at 546.

[78] *See* MOORE ET AL., *supra* note 72, § 17.10[3][c].

[79] *See, e.g.*, Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus, 317 F.3d 334, 336–38 (D.C. Cir. 2003).

[80] 799 F.2d 934 (4th Cir. 1986).

[81] *Id.* at 935–37.

[82] *See id.* at 936; *see also* FRANCIONE, *supra* note 2, at 72–73.

[83] *See* FRANCIONE, *supra* note 2, at 73.

experimented on.[84] The defendant-institute's inhumane treatment of the monkeys was probably most strongly demonstrated by the fact that Dr. Edward Taub, the chief experimenter at the Institute, kept a hand that he had amputated from one of the monkeys as a paperweight on his desk.[85] Despite these conditions, the United States Department of Agriculture ("USDA"), responsible for enforcing the Animal Welfare Act,[86] found no violations of the Act.[87] Pacheco provided his information to the police who ultimately seized the monkeys, and the monkeys were given temporarily to the care of an animal activist.[88]

Despite the cruel treatment of the animals and the fact that the purpose of the Animal Welfare Act is, in part, "to insure that animals intended for use in research facilities . . . are provided humane care and treatment,"[89] the plaintiffs nonetheless had to plead standing based on an injury to themselves. They attempted to prove injury in fact on three separate bases. First, they claimed a financial interest as taxpayers in ensuring that the National Institutes of Health, which funded the experiments, respected the law.[90] This claim was rejected essentially as a generalized taxpayer claim.[91] Second, they argued that they had personal interests in the humane treatment of animals.[92] This basis was held to be inadequate based upon the Supreme Court's holding in *Sierra Club v. Morton*,[93] in which the Court denied standing based upon "a mere 'interest in a problem.'"[94] Finally, the plaintiffs tried to counter directly the concerns of *Sierra Club* and argued that their personal relationships with the monkeys would be upset if the monkeys were returned to the Institute,

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[84] *See id.*

[85] *See id.*

[86] 7 U.S.C. §§ 2131–2159 (2000).

[87] *See* FRANCIONE, *supra* note 2, at 73.

[88] Int'l Primate Prot. League v. Inst. For Behavioral Research, Inc., 799 F.2d 934, 936 (4th Cir. 1986); *see also* FRANCIONE, *supra* note 2, at 73.

[89] 7 U.S.C. § 2131(1).

[90] *Int'l Primate Prot. League*, 799 F.2d at 937–38.

[91] *Id.*

[92] *Id.* at 938. At first glance, it may appear that standing was argued based on the humane treatment of animals, but it was, in fact, the *people's interest* in not being exposed to the inhumane treatment of animals that was pleaded. *Id.* The injury to the animals themselves was irrelevant.

[93] 405 U.S. 727 (1972).

[94] *Id.* at 739; *Int'l Primate Prot. League*, 799 F.2d at 938.

thereby arguing a more direct, specific injury to themselves.[95] The court replied that this case is distinguishable from *Sierra Club* because the plaintiffs in *Sierra Club* were litigating over an issue involving a national park and they could continue to use the park if the defendants complied with the law.[96] The plaintiffs in *International Primate Protection*, however, would never be able to see the monkeys even if the defendants complied.[97]

International Primate Protection highlights the treatment of animals as property in the context of standing in two distinct ways. First, in pleading standing, the plaintiffs had to establish injuries that occurred to *themselves*, when clearly the intention of their litigation was to prevent further injuries to the animals undergoing the abuse. Essentially, the plaintiffs had to contrive an injury that affected *people* so that the true injury—the abuse of the *animals*—could be stopped. Second, in denying standing because the plaintiffs would never see the monkeys again, the court was essentially creating a barrier against enforcement of the Animal Welfare Act and sanctioning abuse when animals are owned as private property. This is because private ownership precludes any further direct interaction between the plaintiffs and the privately owned animals and thus bars any possibility of showing a continuing harm.[98] Under the court's logic, "because the monkeys were the private property of [the Institute for Behavioral Research], no private person or organization could claim standing to challenge the treatment of what the court

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[95] *See Int'l Primate Prot. League*, 799 F.2d at 938.

[96] *See id.*

[97] *See id.*

[98] *See id.* Injuries that plaintiffs have experienced in the past are inadequate to prove a current case or controversy under Article III of the Constitution. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992). Moreover, when plaintiffs allege injuries that will occur in the future, they must do so with specificity in order to have injury in fact. *See id.* In *Lujan v. Defenders of Wildlife*, the plaintiffs brought suit under the Endangered Species Act and alleged that they had seen the endangered species before and intended to see them again in the future, although they were unable to provide a specific date of return. *See id.* at 563–64. The Court held that "[s]uch 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." *Id.* at 564. Thus, when the plaintiffs in *International Primate Protection* alleged an injury premised upon future interactions with animals, which were speculative at best due to the animals' status as the personal property of their adversary in the lawsuit, their future injury would also be speculative at best. Since there was no present or future injury, there was no injury in fact. *See Int'l Primate Prot. League*, 799 F.2d at 938.

essentially regarded as pieces of property."[99]

A similar method of pleading occurred in *American Society for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus.*[100] In that case, Ringling Brothers used Asian elephants, which are protected under the Endangered Species Act, in its circus performances.[101] One of the former elephant trainers alleged that Ringling Brothers prematurely removed baby elephants from their mothers by force, left the elephants chained for extended periods of time, and "trained" the elephants by beating them with bullhooks.[102] The plaintiffs sought, among other forms of relief, an injunction to stop the horrific abuse of the circus elephants and to have Ringling Brothers' ownership of the elephants forfeited.[103]

The plaintiffs obviously brought suit to end the mistreatment of animals, but they had to plead standing based upon injuries that personally affected one of the plaintiffs. The plaintiff elephant trainer pleaded that he had an aesthetic injury based on his emotional attachment to the individual elephants.[104] The court held that, based on his emotional attachment, he would indeed be aesthetically injured if he decided to attend the circus, and furthermore, he would be unable to seek reemployment at the circus because he would suffer emotional injury.[105] Although the court held that the plaintiffs had standing, clearly neither the handler's employment status nor his circus attendance was the purpose of bringing the lawsuit. The injuries that needed to be redressed consisted of the beating of elephants with sharp metal bullhooks, the removal of baby elephants before they could be weaned, and other such abuses.[106]

The court stated that "[w]hile the complaint here says the elephants are still being mistreated, continuing harm to the animals is not our main focus. It is [the elephant handler] who

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99 FRANCIONE, *supra* note 2, at 75.

100 317 F.3d 334 (D.C. Cir. 2003).

101 *Id.* at 335.

102 *Id.* A bullhook is used in "training" elephants. It is essentially a long handle made of wood, fiberglass, or some other material with a sharp metal hook on the end, which is allegedly used to beat the elephants. A more detailed description is offered by the People for the Ethical Treatment of Animals at http://www.circuses.com/bullhooks.asp (last visited Nov. 12, 2005).

103 *Am. Soc'y for the Prevention of Cruelty to Animals*, 317 F.3d at 335–36.

104 *Id.* at 335.

105 *See id.* at 337–38.

106 *Id.* at 335.

must be suffering injury now or in the immediate future."[107] Thus, the court explicitly stated that the injury to the animals was not the focus of the standing issue. While the court's recognition of an individual's ability to become emotionally attached to animals is somewhat progressive, it is clear from the court's statement that the suffering of the animals had no direct effect on the standing issue. The court's concern was simply that the handler would suffer injury resulting from his observation of the elephants in their abused condition, and, because of that injury, the handler would no longer be able to attend or work for the circus.[108] By acknowledging that this was a sustainable injury that would continue into the future, the court found that plaintiffs had showed an injury in fact.[109]

As seen in *Ringling Bros.* and *International Primate*, due to the pervasion of animals as property and without legal personhood, courts continue to look at the abuse of animals as tangential to the "real injury" of the person bringing suit. This creates a fiction in these cases whereby an injury is essentially fabricated so that the case to protect the animals may proceed.

B. The Current Judicial Interpretation of the Injury-in-Fact Requirement as Applied to Cases Protecting Animals Does Not Comport with Common Law Standing Doctrine

The Supreme Court has stated that the "[s]tanding doctrine ensures, among other things, that the resources of the federal courts are devoted to disputes in which the parties have a concrete stake."[110] Moreover, it has held that "[t]he plaintiff must have a 'personal stake in the outcome' sufficient to 'assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of

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[107] *Id.* at 336.

[108] *See id.* at 338.

[109] *See id.*

[110] Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 170 (2000). The Supreme Court has recently emphasized that "concrete adverseness" is not the only requirement that must be met for constitutional standing. Clinton v. City of N.Y., 524 U.S. 417, 462–63 (1998) (citations omitted). Courts have held that constitutional standing also involves " 'defin[ing] the role assigned to the judiciary in a tripartite allocation of power,' and 'a part of the basic charter . . . provid[ing] for the interaction between [the federal] government and the governments of the several States.' " *Id.* at 462 (alterations in original) (citations omitted).

difficult . . . questions.'"[111] The Supreme Court has therefore emphasized that the doctrine of standing requires conflict between the parties so that the parties will be zealously represented and the real issues of the case will come to light.

In the case of animals that are abused, however, those basic tenets of the standing doctrine are marginalized. Under a strict property interpretation, the owner of an animal experiences the most direct injury when the animal is abused, and thus the owner is the most logical plaintiff. In most suits involving mistreatment of animals, however, it is the *owner himself* who is the *abuser*.[112] Therefore, the owner of the animal is the one who could most zealously argue for the termination of the abuse of the animal because he has borne the injury due to the abuse of his own property; however, the owner is *also* the party who would most often *inflict* the abuse upon the animal that is the very cause of the lawsuit.

In *International Primate Protection League v. Institute for Behavioral Research, Inc.*,[113] the plaintiffs brought suit under the Animal Welfare Act for horrific abuses taking place against primates in a research facility.[114] Under a strict property perspective, the Institute for Behavioral Research ("IBR") could have best advocated for the position that there had been violations of the Animal Welfare Act. If the monkeys are to be seen as purely personal property, then the abuse of the animals would have devalued the IBR's asset (the monkeys), and IBR, as the owner, would have been in the best position to advocate for the protection of the animals—its property—against mistreatment. It was precisely the IBR, however, that was inflicting the abuse. Thus, under a position that categorizes animals as pure property, the owner of the animal is often the best party to bring the suit *and* the best party to defend the suit.

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[111] Lujan v. Defenders of Wildlife, 504 U.S. 555, 583 (1992) (Stevens, J., concurring in judgment) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

[112] For example, in *Ringling Bros. & Barnum & Bailey Circus*, the plaintiffs brought suit in order to stop the abuse of elephants owned by Ringling Brothers, although they had to plead that the injury in fact was an injury directly to the former elephant handler. *See* 317 F.3d at 335–36. If animals are to be viewed as purely property, because the elephants were the property of Ringling Brothers, the abuse of the elephants was actually injurious to the circus.

[113] 799 F.2d 934 (4th Cir. 1986).

[114] *See supra* Part II.A for a full discussion of the facts underlying *International Primate Protection League*.

Such a result is inconsistent with the aforementioned tenets of the standing doctrine.

If, on the other hand, courts recognize that animals are indeed different than other types of property, the standing doctrine can be preserved in cases involving animals. By altering the perspective of these suits from one based purely on notions of property and toward one that recognizes that animals are indeed something more than ordinary personal property, this contradiction in the common law can be cured. If courts continue to ignore this crucial distinction and treat animals as if they are *not* qualitatively distinct from the typical piece of personal property, they are furthering a legal fiction and will continue to render decisions that do not comport with their own common law standing doctrine, which requires zealous representation of adverse interests. Once the courts recognize that animals—as distinct from other inanimate objects—do indeed have interests worthy of protection, the person who is best suited to protecting that interest is someone *other than the property owner* because it is normally the owner of the animal who is responsible for the abuse in the first place. Thus courts must retreat from their categorization of animals as solely property when evaluating issues of standing in order to abide by their own standing doctrine.

C. *Animals Are Qualitatively Different than Other Types of Property and This Difference Should Be Recognized When Deciding Standing in Cases Involving Mistreatment of Animals*

Animals, while considered property under the law, are qualitatively different from what one would consider an average piece of personal property. While the law views animals as simply property, common sense and human experience dictate that a living animal is objectively distinct from, for example, a book or a carpet. Animals are legally property, but they have crucial additional characteristics, such as life and the ability to experience pain, which make them materially different from other personal property.

1. Slaves Were Legally Recognized as a Qualitatively Different Type of Personal Property

It would not be novel for the courts to recognize that there is

a type of property that has special qualities making it qualitatively different from other forms of personal property, thereby entitling that property to certain special legal protections. An analysis of the common law, statutory law, and constitutional law surrounding slavery within the United States reveals that slaves, while still classified as property, were actually treated as something in between property and entities vested with interests entitled to protection.[115] This analogy is not made to assert that animals are in any way to be equated to those individuals who lived through the wildly unjust confines of slavery. It is asserted, however, that the legal reasoning that was employed during the period of slavery—namely, that an entity may qualify as property but still have legal interests that go beyond those afforded to ordinary property—can be similarly employed in the context of animals.

The common law recognized that slaves were more than simply property in the context of criminal law. First, slaves could be charged with crimes in the same way as non-slaves.[116] This was an implicit recognition of slaves as individuals capable of making culpable choices and being held accountable for their actions. Clearly, an ordinary piece of personal property could not be so qualified. In addition, until statutes were passed making the murder of slaves a distinct felony, the common law recognized the killing of a slave as murder.[117] Indeed, some states' constitutions directly provided that those who kill slaves should be prosecuted in the same manner as those who kill free people.[118] Again, there would be no such recognition for the destruction of other forms of personal property, such as a book or

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[115] *See* Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1745, 1747–50 (2001); *see generally* A. Leon Higginbotham, Jr. & F. Michael Higginbotham, *"Yearning to Breathe Free": Legal Barriers Against and Options in Favor of Liberty in Antebellum Virginia*, 68 N.Y.U. L. REV. 1213, 1233–55 (1993) (describing ways in which slaves could seek freedom by petitioning the courts).

[116] *See* Note, *supra* note 115, at 1748.

[117] *See id.* at 1748 & n.11.

[118] In *State v. Coleman*, 5 Port. 32 (Ala. 1837), the Supreme Court of Alabama held that the "true purpose" of the provision of the Alabama constitution, which states that "[a]ny person who shall maliciously . . . deprive a slave of life, shall suffer such punishment as would be inflicted, in case the like offence had been committed on a free white person" is to secure for the slaves the same treatment by the legislature that a free white person enjoys, and not to create a separate cause of action. *Id.* at 39.

a lamp.

In addition to the common law, some states had statutes providing that slaves were able to sue under certain circumstances to try to prove that they were actually free people. For example, in Virginia, the Freedom Suit Act allowed slaves to sue if they felt they were wrongfully enslaved.[119] Under the statute, a slave was appointed counsel to represent him in a cause of action to prove that he was actually a free person.[120] In addition, Virginia passed the Importation Act that precluded the further importation of slaves into Virginia.[121] Enslaved individuals could bring suit under the Importation Act if the slave owner imported them illegally.[122] The Virginia courts interpreted the statute to presume that the slave bringing suit was legally acquired and placed the burden of proof on the slave to prove both that she was illegally imported and that she had been a resident of the state of Virginia for twelve months.[123]

Both of these statutes existed as a means to liberate those *free persons* who were wrongfully enslaved, and *not* to grant rights to a "properly" enslaved individual.[124] These suits nonetheless implicitly acknowledged that slaves were, indeed,

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[119] *See* Higginbotham & Higginbotham, *supra* note 115, at 1234–48.

[120] *See id.* at 1235–36. Although there were some differences, these suits were akin to habeas corpus actions. *See id.* "The statutes allowed slaves to file avowedly fictitious suits for trespass, false imprisonment, and assault and battery and pretended that the slaves were not slaves just for that one purpose." Steven M. Wise, *Hardly a Revolution—The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy*, 22 VT. L. REV. 793, 820 (1998) (citing Higginbotham & Higginbotham, *supra* note 115, at 1235–36 n.125).

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> The objective of the Importation Act was to reduce the domestic slave population within Virginia and to maximize their value for sale in other states by reducing foreign competition within the state. Unlike most colonies, Virginia had a surplus of slaves. Fierce competition existed between Virginia and international slave trading interests in supplying slaves to other colonies.

Higginbotham & Higginbotham, *supra* note 115, at 1248–49 (footnotes omitted).

[122] *See id.* at 1249.

[123] *Id.* at 1250.

[124] *See id.* at 1234–35 ("Freedom suits existed not as a means for blacks to alter their legal status from slave to free, but as a recourse for those who were *in fact* free, and who thus possessed a remedy for illegal enslavement."); *see also* Wise, *supra* note 120, at 820 ("The statutes continued to assume that slaves were legal things, not legal persons, and had no legal rights, including the power-right to bring suit."). Thus, the rationale behind these laws was not necessarily to grant rights to those who did not have them but rather to provide an opportunity for those who may be wrongfully enslaved to be freed.

living beings who were a special type of personal property. First, the causes of action were primarily concerned with whether the human being bringing suit did or did not bear the burden of enslavement.[125] Surely no statutes were passed that allowed the cotton grown by the slave owner to bring suit to determine whether it was enslaved because such an inanimate piece of property could *never* enjoy freedom. While the point may seem obvious, it must be noted that this is because cotton is qualitatively different than an enslaved person. Furthermore, while these statutes did not *directly* recognize slaves as being more than property, by allowing a slave to file a cause of action under the representation of an attorney, there was an implicit recognition that slaves were a distinct category of property able to interact competently with an attorney and have their interests represented in court. In addition, these suits were only occasionally won, so while the plaintiff was ultimately deemed to be a slave, and thus a piece of personal property, the suits were still able to proceed.[126]

Thus, the common law, statutory law, and the constitutions that existed at the time of slavery recognized slaves to be different from other forms of personal property. While slaves were still undoubtedly property, it cannot be questioned that the law recognized that slaves had an additional quality that made them markedly distinct. Rather than ignoring these differences, the law recognized that slaves, while property under the law, should be categorized as qualitatively different from other forms of personal property.

2. Alternatives—Legally Recognizing the Qualitative Difference Between Animals and Other Types of Property

Courts should take steps to recognize that animals are clearly distinguishable from other forms of personal property. From an objective standpoint, animals are significantly distinct in that they are alive and can experience physical pain. Moreover, animals have, in varying degrees, the ability to rationalize; some, in fact, have the ability to communicate with others of their species and even with humans.[127] Indeed, primates have been taught sign language and have demonstrated

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[125] *See* Higginbotham & Higginbotham, *supra* note 115, at 1250–51.

[126] *Id.* at 1233–34.

[127] *See, e.g.*, RACHELS, *supra* note 15, at 132–33.

a startling capacity to communicate.[128] For example, chimpanzees have created "swear words" and have been reported to sign the words for "Me cry" when their caretakers depart.[129] In addition, some chimpanzees have observed their sentences on a computer program and have erased sentences that contained grammatical errors.[130] This level of intelligence, rationality, and apparent emotion, obvious in the higher primates and likely existent to a lesser degree in other animals, is evidence of the differences between animals and inanimate objects, both of which are legally classified as property with no distinguishable differences in the civil law.

A more subjective difference between animals and other types of personal property can be seen in examining the relationships between people and their nonhuman companions. For example, approximately seventy percent of people with companion animals celebrate their animals' birthdays, and "[s]tudies show that the grief responses following the death of a companion animal are comparable to those experienced upon the loss of a spouse, parent, or child."[131] Moreover, in 2001, Americans spent in excess of $28.5 billion providing for their animals.[132] There are herbal remedies available for those pets who feel stressed, and dogs are regularly put in "doggie day care centers" while their human companions are gone for the day.[133] At least when it comes to their own domesticated animals, people generally view animals as vital members of their own family. This is quite a different view than the public would likely espouse regarding their inanimate items of personal property.

It is evident that the legislature has also recognized that animals are worthy of protection by enacting statutes designed to protect animals, perhaps most obviously through the Animal Welfare Act.[134] While the courts have not always been effective in upholding the spirit of animal welfare laws,[135] it is clear that

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[128] *See* CARL SAGAN, THE DRAGONS OF EDEN: SPECULATIONS ON THE EVOLUTION OF HUMAN INTELLIGENCE 115–19 (1977).

[129] *Id.* at 118.

[130] *See id.* at 119.

[131] *See* Byszewski, *supra* note 16, at 216–17.

[132] *See* Rebecca J. Huss, *Valuing Man's and Woman's Best Friend: The Moral and Legal Status of Companion Animals*, 86 MARQ. L. REV. 47, 48 (2002).

[133] *See id.* at 48–49.

[134] 7 U.S.C. §§ 2131–2159 (2000).

[135] For example, in *State v. Fowler*, the North Carolina Court of Appeals

the laws are passed by the legislature to afford a special level of protection to animals that is not given to inanimate objects.

The courts should recognize that animals are qualitatively distinguishable from other types of personal property in deciding whether those who bring suit on behalf of mistreated animals have standing. If courts continue to disregard the obvious fact that animals are not only pieces of property but also that they have additional features that make them much more than property, they will continue to support a system of false pleadings, which does not address the real interests of the suits.

It is abundantly clear that animals are more than simply property. Yet in deciding whether those bringing suit on behalf of abused animals have standing, that fact is overwhelmed by the classification of the animals as property, and the animal's interests—which, at a minimum, include the right to be free from physical abuse—are not protected. Courts must recognize the interests of animals in order to stop furthering the "standing" fiction that exists with regard to animals and to comply with the courts' own standing doctrine. People or organizations should be able to present the injury to the animal directly in their pleadings as the injury in fact and should be permitted to act in their capacity as guardian or representative of the animal. Just as guardians of minor children are permitted to bring suit on behalf of those children without pleading a separate injury to themselves,[136] courts should allow people and organizations to bring suit on behalf of animals without having to plead an injury separate from the abuse of the animals. To do so, courts would not have to overturn the common law, which recognizes animals

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reversed defendant Fowler's conviction under the North Carolina animal welfare statute. 205 S.E.2d 749, 751 (N.C. Ct. App. 1974). Fowler beat his dog Ike and then restrained him. *Id.* at 750; *see also* FRANCIONE, *supra* note 2, at 136. The defendant held Ike's head in a hole filled with water and would then lift his head. *Fowler*, 205 S.E.2d at 750; *see also* FRANCIONE, *supra* note 2, at 136. He repeated this process for about fifteen to twenty minutes. *Fowler*, 205 S.E.2d at 750; *see also* FRANCIONE, *supra* note 2, at 136. To ensure that the dog was being adequately drowned, the defendant's wife kept filling the hole with water. *Fowler*, 205 S.E.2d at 750; *see also* FRANCIONE, *supra* note 2, at 136. Following this, they untied the dog, beat it again, and tied it to a pole near the hole. *Fowler*, 205 S.E.2d at 750; *see also* FRANCIONE, *supra* note 2, at 136. The court held that in order to uphold the conviction, the action of the defendant had to be willful, which means without reason. *Fowler*, 205 S.E.2d at 751. If the drowning and beating was meant to discipline the dog for digging holes in the backyard, this could be considered a justifiable reason for the abuse. *See id.*

[136] *See supra* notes 72–78 and accompanying text.

as property. Instead courts would just have to recognize the obvious—animals are *more than* the average inanimate piece of personal property and they truly have cognizable interests worthy of protection.

D. Exceptions—Cases in Which Animals Have Themselves Brought Suit

No discussion of animals and standing would be complete without mentioning that there have been rare cases in which animals have been held to have standing. While the overwhelming number of decisions has denied standing directly to animals,[137] there have been rare instances in which animals have *themselves* brought suit, most typically under the Endangered Species Act.[138] In those cases where animals successfully sued, their standing was not challenged by the defendants and the issue was not raised by the courts sua sponte.[139] In the cases where the standing of animals was actually considered by the court and the animals were granted standing, the holdings have been heavily criticized as a misinterpretation of the Endangered Species Act.[140] Therefore,

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[137] In *Citizens to End Animal Suffering & Exploitation, Inc. v. New England Aquarium*, a dolphin named Kama was named as a plaintiff in a suit brought under the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1361 (2000), to protest his transfer from an aquarium to the Department of the Navy where he was studied for his sonar capabilities. 836 F. Supp. 45, 46–47 (D. Mass. 1993). The court held that the animal itself did not have standing to sue under the MMPA and that if Congress or the President wished to take the unusual step of granting standing directly to an animal, they should have explicitly done so in the statute. *See id.* at 49–50. The court noted that § 1374(d)(6) of the MMPA references the Administrative Procedure Act as the standard of review, which states that " '[a] *person* suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.' " *Id.* at 49 (quoting Administrative Procedure Act, 5 U.S.C. § 702 (2000)). Thus the dolphin itself was not granted standing. *Citizens to End Animal Suffering & Exploitation, Inc.*, 836 F. Supp. at 49–50.

[138] *See, e.g.*, Mt. Graham Red Squirrel v. Madigan, 954 F.2d 1441, 1447–48 (9th Cir. 1992) (allowing a species of endangered squirrels to sue under the Endangered Species Act, the National Forest Management Act, and the Arizona-Idaho Conservation Act without addressing the issue of standing); Palila v. Haw. Dep't of Land & Natural Res., 852 F.2d 1106, 1107 (9th Cir. 1988) (holding that an endangered species of six-inch long finches "wing[ed] its way into federal court as a plaintiff in its own right").

[139] *See Citizens to End Animal Suffering & Exploitation, Inc.*, 836 F. Supp. at 49.

[140] In *Marbled Murrelet v. Pacific Lumber Co.*, the court looked to prior holdings that allowed animals to bring suit under the Endangered Species Act and allowed

those cases in which animals or species of animals were granted standing, while noteworthy in a limited sense, do not create any real precedent upon which to base an argument that animals should have standing. This is largely because "animal species have remained named plaintiffs in . . . cases in which the defendants did not contest the issue," but "in the only reported case in which the naming of an animal as a party was challenged, the court found that the animal did not have standing to bring suit."[141]

Whenever the case law on this issue has been assessed directly by the courts, they have found the cases granting standing to animals to be without any real impact on their decisions because in those cases, standing was simply unchallenged.[142] No decision has been more significant in this respect than *Cetacean Community v. Bush*,[143] in which the Ninth Circuit significantly limited its earlier holding in *Palila v. Hawaii Department of Land & Natural Resources*.[144] In *Palila*, a species of bird was directly granted standing in its own right.[145] In *Cetacean Community*, the Ninth Circuit stated that its earlier statements in *Palila* were "nonbinding dicta," noting that when it wrote its opinion, three other published opinions on the case had already been issued.[146] Because the standing of the other parties was undisputed and the court was never asked to decide the

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the Marbled Murrelet, a species of bird, to sue as an endangered species under the Endangered Species Act. 880 F. Supp. 1343, 1346 (N.D. Cal. 1995), *aff'd sub nom*, Marbled Murrelet v. Babbitt, 83 F.3d 1060 (9th Cir. 1996). Similarly, the court in *Palila v. Hawaii Department of Land & Natural Resources* held that the *Loxioides bailleui*, another species of bird, also had standing under the Endangered Species Act. *See Palila*, 852 F.2d at 1107. These decisions have been heavily criticized, however, and one would be strongly cautioned before relying on these opinions. *See* Hawksbill Sea Turtle v. Fed. Emergency Mgmt. Agency, 126 F.3d 461, 466 n.2 (3d Cir. 1997) (maintaining that *Palila* and *Marbled Murrelet* granted standing to animals "without significant analysis" and contrasted those cases with other "thoughtful opinions" in which animals were held not to have standing); Cetacean Cmty. v. Bush, 249 F. Supp. 2d 1206, 1210 (D. Haw. 2003), *aff'd*, 386 F.3d 1169 (9th Cir. 2004) (stating that these decisions were just dicta and did not provide "convincing authority").

[141] *Citizens to End Animal Suffering & Exploitation, Inc.*, 836 F. Supp. at 49 (citations omitted).

[142] *See id.* at 49–50.

[143] 386 F.3d at 1169.

[144] 852 F.2d at 1106. *Palila* is perhaps the most widely cited case in which animals were given standing.

[145] *Id.* at 1107.

[146] *Cetacean Cmty.*, 386 F.3d at 1173–74.

standing of the species, the court explained that it had the jurisdiction to hear the case without considering whether the species of bird itself had standing.[147] Thus, the court's statements in *Palila* regarding the standing of the species of bird were "little more than rhetorical flourishes. They were certainly not intended to be a statement of law, binding on future panels, that animals have standing to bring suit in their own name under the [Endangered Species Act]."[148]

III. THE PROPERTY STATUS OF ANIMALS HAS BEEN WEAKENED IN OTHER AREAS OF LAW

While the common law surrounding the issue of standing has been rather recalcitrant regarding the legal status of animals as simple property, other areas of the common law have been receptive to the idea that animals are a qualitatively different type of property. Specifically, the areas of tort law and family law have indicated that judges do indeed recognize that animals have a greater worth than other items of personal property. In the area of tort law, courts have recognized the emotions, companionship, and sentimentality that attaches to companion animals.[149] In the area of family law, courts have recognized that animals do have their own interests that the law can protect.[150]

A. Tort Law

As a general rule, due to the status of animals as property, when an animal is wrongfully killed, the recovery is the monetary value of the animal.[151] In making that valuation, the courts will consider any special value or particular characteristics of the animal.[152] In the case of companion

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[147] *Id.* at 1174.

[148] *Id.*

[149] *See* discussion *infra* Part III.A.

[150] *See* discussion *infra* Part III.B.

[151] *See* Snyder v. Bio-Lab, Inc., 94 Misc. 2d 816, 818, 405 N.Y.S.2d 596, 597 (Sup. Ct. Monroe County 1978) (asserting that animals are like "personal property generally," and thus "the measure of damages for injury to, or destruction of, an animal is the amount which will compensate the owner for the loss and thus return him, monetarily, to the status he was in before the loss").

[152] *See* Stettner v. Graubard, 82 Misc. 2d 132, 133, 368 N.Y.S.2d 683, 685 (Harrison Town Ct. Westchester County 1975) (confirming that the factors that should be used to calculate the market value of a dog include "any special traits or characteristics of value"); 4 AM. JUR. 2D *Animals* § 162 (2d ed. 1995) (taking into account "any special value, particular qualities or capabilities" of an animal in

animals, factors to be considered include purchase price, training, and the average life span of the breed.[153] If a companion animal has no particular value, a court may sometimes award nominal damages.[154] In addition, consequential damages for items such as veterinary bills may be awarded, and punitive damages are sometimes given for particularly egregious behavior against animals.[155] Such methods of calculating damages, however, afford no consideration to the fact that to most pet owners, an animal is more akin to a family member than a piece of property.[156]

Some courts have recognized that companion animals have value that goes beyond the strict market value of the animal and thus recognize animals as more than just objects.[157] These courts

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determining its market value).

[153] The "purchase price, . . . age, health, breed, training, [and] usefulness" of an animal are factors that will be considered in evaluating its market value. *See Stettner*, 82 Misc. 2d at 133, 368 N.Y.S.2d at 685. When it comes to domestic pets, however, "[s]entiment . . . may not be considered since that often is as much a measure of the owner's heart as it is of [a pet's] worth." *Id.*, 368 N.Y.S.2d at 685.

[154] *See* Brent v. Kimball, 60 Ill. 211, 214 (1871) (recognizing the availability of nominal damages for the killing of a dog, as the killing was considered a destruction of property); 4 AM. JUR. 2D *Animals*, *supra* note 152, § 165 (observing that the law will imply nominal damages if an owner cannot prove the value of a dog). *But see* Brousseau v. Rosenthal, 110 Misc. 2d 1054, 1055, 443 N.Y.S.2d 285, 286 (N.Y. Civ. Ct. N.Y. County 1980) (emphasizing that when a pet has no market value, damages need not be limited to nominal damages because courts can assess the "actual value to the owner" to properly make the owner whole).

[155] *See* Burgess v. Taylor, 44 S.W.3d 806, 812–14 (Ky. Ct. App. 2001) (upholding the trial court's award of $75,000 in punitive damages when the defendant, who was entrusted with caring for plaintiff's beloved pet horses, sold the horses knowing they would be slaughtered); *see also* Byszewski, *supra* note 16, at 218 (reporting that courts have allowed reasonable veterinary expenses).

[156] In some situations, courts have awarded individuals additional damages for the loss of property that had special meaning. For example, individuals who lose a family heirloom may receive damages for emotional distress. *See* Windeler v. Scheers Jewelers, 88 Cal. Rptr. 39, 44–45 (Ct. App. 1970) (declaring that at the time the bailment of heirlooms was made, the defendant was aware of the emotional value the heirlooms had to the plaintiff, and thus emotional distress damages could be awarded because they were foreseeable). In addition, when photographs or videotapes are destroyed, courts will sometimes incorporate their emotional and sentimental value when awarding damages. *See* Landers v. Municipality of Anchorage, 915 P.2d 614, 618–19 (Alaska 1996). While the damages for the value of the loss of a pet are typically restricted to the market value of the pet, the damages given for the loss of photographs and videotapes are often the value of the item to the owner. *See id.* at 618–19 & n.5. It is remarkable that even such inanimate objects are often afforded more value as a matter of law than a living creature.

[157] *See, e.g.*, Corso v. Crawford Dog & Cat Hosp., Inc., 97 Misc. 2d 530, 531, 415 N.Y.S.2d 182, 183 (N.Y. Civ. Ct. Queens County 1979) (noting that while an

have awarded emotional distress damages to owners and assessed the worth of a companion animal by looking to the "actual value to the owner."[158] The "actual value" is given in place of nominal damages in order to account for the emotional attachment of humans to their companion animals and recognizes—either explicitly or implicitly—that animals have their own inherent value, distinguishing them from other forms of ordinary personal property.[159] Thus, judges have slowly recognized that animals are distinct from chairs, tables, or other items of property and that they have value as living beings. Consequently, tort case law contains numerous decisions awarding damages beyond the basic market value for the wrongful death of companion animals, breaking away from the legal classification of animals as pure property.[160]

Some judges have awarded damages for emotional distress when defendants' actions regarding companion animals are particularly egregious. In *Burgess v. Taylor*,[161] the plaintiff became quite ill, and as a result, she could no longer properly care for her two horses, which she testified that she "loved . . . as if they were her 'children.'"[162] She contracted with the defendants, and they agreed that while plaintiff would retain control and ownership of the horses and could interact with the horses, the defendants would care for them on a daily basis.[163] If the defendants ever wanted to end the arrangement, the plaintiff would take back custody of the horses.[164] Within a few days of

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heirloom certainly has its own sentimental value, it is quite distinct from a family pet because it is an inanimate object that is "not capable of returning love and affection").

158 *Brousseau*, 110 Misc. 2d at 1055, 443 N.Y.S.2d at 286.

159 Courts have acknowledged that the main role of modern household pets is companionship. "By considering the loss of companionship when a dog is negligently destroyed, the court more accurately values the lost animal, thereby more fairly compensating the owner for her loss in property." Mercurio v. Weber, No. SC1113/03, 2003 N.Y. Misc. LEXIS 801, at *5 (Dist. Ct. Nassau County June 20, 2003).

160 "[M]any jurisdictions have relied upon various legal rationales to value companion animals above their purported market price. . . . [W]hile the case law in some jurisdictions is somewhat inconsistent, a number of states have modified their legal theories in order to compensate companion animal guardians adequately and deter wrongful conduct." Debra Squires-Lee, Note, *In Defense of Floyd: Appropriately Valuing Companion Animals in Tort*, 70 N.Y.U. L. REV. 1059, 1077, 1080 (1995).

161 44 S.W.3d 806 (Ky. Ct. App. 2001).

162 *Id.* at 809.

163 *Id.*

164 *Id.*

taking ownership, however, the defendants contracted with a known slaughter buyer and sold the horses for $1,000.00.[165] When the plaintiff indicated that she wanted to visit the horses, the defendants engaged in a variety of reprehensible actions, such as providing the plaintiff directions to false locations and telling her that they gave the horses to an unknown individual on a trail ride.[166] Eventually, the plaintiff discovered that her beloved horses were killed in a slaughterhouse.[167] The jury awarded the plaintiff $1,000.00 for the fair market value of the horses, $75,000.00 in punitive damages, and $50,000.00 for the tort of outrage, more commonly known as intentional infliction of emotional distress.[168]

In affirming the award for emotional distress, the court highlighted the fact that the plaintiff thought of her horses as her children and that she had been "pleading for their lives."[169] Moreover, "[c]ompelling evidence was presented at trial establishing Taylor's love for her horses."[170] The court further held that emotional distress damages would not be precluded solely because the claims were based on animals.[171] Many cases have not allowed recovery of emotional distress damages on the basis that sentiment should have no bearing on awards made regarding animals because of their status as personal property.[172] Those cases in which emotional distress damages have been awarded, however, represent a promising perspective of judges

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165 *Id.*

166 *Id.* at 810.

167 *Id.*

168 *Id.* at 810. The court named the four elements of the tort of outrage as follows:

1) the wrongdoer's conduct must be intentional or reckless;
2) the conduct must be outrageous and intolerable in that it offends against the generally accepted standards of decency and morality;
3) there must be a causal connection between the wrongdoer's conduct and the emotional distress; and
4) the emotional distress must be severe.

Id. at 811.

169 *Id.* at 812.

170 *Id.*

171 *See id.* at 813.

172 *See* Nichols v. Sukaro Kennels, 555 N.W.2d 689, 691 (Iowa 1996). The court in *Nichols* evaluated both those cases where emotional distress damages had been awarded and those where they had not. *See id.* The court noted that "[i]n most cases, it is held that the sentimental attachment of an owner to his or her dog has no place in the computation of damages for the dog's death or injury and that no award can be made for the value of the plaintiff's mental suffering." *Id.*

who view animals as more than simple pieces of personal property. Their opinions seem to recognize that animals are capable of generating emotions such as love and companionship.

In some cases, the plaintiffs are not seeking damages specifically for emotional distress but are simply seeking an enhanced valuation of their companion animal that exceeds the fair market value and incorporates the real value to the owner. In cases in which companion animals either are held to have no market value or when the market value is not a true representation of the actual value to the owner,[173] some judges have allowed the loss of the companionship of the animal or the sentimental value of the animal to be considered as an element of damages.

In *La Porte v. Associated Independents, Inc.*,[174] the plaintiff had her small dog Heidi tethered securely in her backyard.[175] The garbage collectors, for no apparent reason, threw a garbage can at the dog.[176] The dog's owner heard the dog yelp, ran outside, and saw that the dog was injured.[177] The garbage collector laughed and left the home.[178] The dog sustained serious injuries and ultimately died.[179] While the trial judge included the mental suffering of the dog's owner as a factor to be considered by the jury in awarding damages, the Florida District Court of Appeals overturned the trial court's decision and held that "the basis of recovery may be either the market value, if the dog has any, or some special or pecuniary value to the owner, ascertainable by reference to the usefulness or services of the

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[173] *See* Robin Cheryl Miller, Annotation, *Damages for Killing or Injuring Dog*, 61 A.L.R. 5th 635, 657–60 (1998). While some courts strictly award only the market value of a companion animal, other jurisdictions award the value of the animal to its owner when the animal either has no market value or when the market value does not adequately represent the value to the owner. *See id.* at 657–58. Still other jurisdictions allow a choice between awarding the market value or the actual value to the owner. *See id.* at 659. As early as 1906, courts considering tort cases have recognized characteristics attributable to animals that seemingly would not be attributed to any other item of personal property. *See id.* at 656–57. For example, the owner of a dog could take pleasure in the animal's company and be proud of the things the dog could do; those factors could be used in assessing damages. *See* Klein v. St. Louis Transit Co., 93 S.W. 281, 282–83 (Mo. Ct. App. 1906).

[174] 163 So. 2d 267 (Fla. 1964).

[175] *Id.* at 267–68.

[176] *Id.*

[177] *Id.* at 268.

[178] *Id.*

[179] *Id.*

dog."[180] Furthermore, the court noted that "[i]t is improper to include an allowance for sentimental value of the dog to its owner."[181]

The Supreme Court of Florida overturned the District Court of Appeals' ruling, holding that "[t]he restriction of the loss of a pet to its intrinsic value in circumstances such as the ones before us is a principle we cannot accept." [182] The court went on further to state that the affection an owner feels for her pet is something that is real—and thus recoverable as an element of damages—regardless of the animal's market value.[183]

In some remarkable cases, judges have explicitly argued against the classification of animals as property. In *Corso v. Crawford Dog & Cat Hospital, Inc.*,[184] Judge Friedman made the bold statement that "[t]o say [a dog] is a piece of personal property and no more is a repudiation of our humaneness."[185] He forthrightly commented that "a dog is not just a thing," thereby entitling the owner to more than simply the market value of the dog.[186] Thus, while it is not asserted that tort law has overwhelmingly recognized animals as more than simply property, it is argued that tort law has clearly taken steps toward deconstructing the position that animals are purely personal property under the law and has recognized that animals are qualitatively more than simple property.

B. Family Law

The "legal thinghood" of animals has been eroding in the area of family law as well.[187] Generally, when couples divorce, the "custody" of the couple's pet is granted to whichever spouse

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[180] Associated Indeps., Inc. v. La Porte, 158 So. 2d 557, 558 (Fla. Dist. Ct. App. 1963), *rev'd*, 163 So. 2d 267 (Fla. 1964).

[181] *Id.*

[182] *La Porte*, 163 So. 2d at 269.

[183] *Id.* ("[W]e feel that the affection of a master for his dog is a very real thing and that the malicious destruction of the pet provides an element of damage for which the owner should recover, irrespective of the value of the animal because of its special training . . . .").

[184] 97 Misc. 2d 530, 415 N.Y.S.2d 182 (N.Y. Civ. Ct. Queens County 1979).

[185] *Id.* at 531, 415 N.Y.S.2d at 183.

[186] *Id.*, 415 N.Y.S.2d at 183.

[187] *See generally* Barbara Newell, Essay, *Animal Custody Disputes: A Growing Crack in the "Legal Thinghood" of Nonhuman Animals*, 6 ANIMAL L. 179 (2000) (providing a description of the changes in law and attitudes about animals as more than just property).

has the valid property right in that animal.[188] This is because animals are simply another piece of personal property to be divided with the rest of the marital assets.[189] Thus, if either spouse purchased the animal, was given the animal as a gift, or in any other way had a rightful property claim to the animal, that spouse generally would gain ownership of the animal.[190]

Some judges, however, have moved away from awarding custody of animals based on the simple question of which spouse rightfully owns that piece of property. Instead, they award custody by determining what is in the best interest of the animal. In the oft-cited case of *Raymond v. Lachmann*,[191] the New York Appellate Division, First Department, awarded custody of "Lovey," a family cat, based upon the cat's best interests.[192] In determining the custody of the cat, the court recognized that the cat was already almost ten years old and should be able to live out the rest of her life in the home where she had lived for the past four years, noting that this was where Lovey had "lived, prospered, loved and been loved."[193] In making its ruling, the court never explicitly addressed the property status of the animal. Instead, the court said that it made its ruling "[c]ognizant of the cherished status accorded to pets in our

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[188] *See, e.g.*, Hodo v. Hodo, No. 0954-03-2, 2004 Va. App. LEXIS 39, at *1–5, *7–16 (Ct. App. Jan. 28, 2004) (affirming a divorce decree awarding possession of a family dog to the wife on grounds that the husband had not shown the dog was a gift rather than marital property).

[189] *See* Desanctis v. Pritchard, 803 A.2d 230, 232–33 (Pa. Super. Ct. 2002) (denying the husband "shared custody" or "visitation" rights of the dog because Pennsylvania law calls for all property rights that are dependent on the marriage to be terminated).

[190] *See Hodo*, 2004 Va. App. LEXIS 39, at *4–5, *14. Some courts recognize that animals have their own interests but still make an award based on who is the rightful owner of the animal as property. In *Akers v. Sellers*, the court recognized that while the dog had a market value of $25.00, the proceedings over the custody of the dog were not frivolous because "no man can be censured for the prosecution of his rights to the full limit of the law when such rights involve the comfort derived from the companionship of man's best friend." 54 N.E.2d 779, 779 (Ind. App. 1944). The court expressly declined to determine "[w]hether the interests and desires of the dog . . . should be the polar star pointing the way to a just and wise decision, or whether the matter should be determined on the brutal and unfeeling basis of legal title." *Id.* The court did ultimately grant custody to the wife since it was a gift to her by her husband. *Id.* at 780. The court made this award despite its recognition of "the tragedy of [the dog's] consignment to the [wife] if, in fact, his love, affection and loyalty are for the [husband]." *Id.* at 779.

[191] 264 A.D.2d 340, 695 N.Y.S.2d 308 (1st Dep't 1999).

[192] *Id.* at 341, 695 N.Y.S.2d at 308–09.

[193] *Id.*, 695 N.Y.S.2d at 309.

society [and] the strong emotions engendered by disputes of this nature."[194]

While few cases go as far as *Raymond* by looking entirely to the best interests of the animal, many courts have looked beyond pure property ownership in awarding custody of animals.[195] For example, in *Pratt v. Pratt*,[196] a couple was arguing over the ownership of two St. Bernard dogs.[197] The court held that while it could not use the "best interests standards" and that child custody statutes are inapplicable to matters concerning animals, it may nonetheless consider evidence regarding treatment of the dogs when deciding their custody.[198]

Moreover, some courts have even awarded visitation rights and support payments for companion animals in a manner akin to that which is done for children.[199] By awarding visitation to a spouse, the court is inherently recognizing the sentimental and emotional bonds that are formed with domestic pets, distinguishing them from other forms of personal property.

Furthermore, in the past, when a pet outlived its owner, the only means that the owner had to protect the animal was to leave the pet to a trusted individual in his or her will.[200] While the focus here is on the common law, it is interesting to note that the Animal Legal Defense Fund, in coordination with some of the drafters of the Uniform Probate and Trust Code, has drafted laws that allow individuals to create trusts directly for the benefit of their animals.[201] These laws have been adopted by twenty-eight states and are being considered in nine others.[202]

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194 *Id.*, 695 N.Y.S.2d at 308–09.

195 *See* Rebecca J. Huss, *Separation, Custody, and Estate Planning Issues Relating to Companion Animals*, 74 U. COLO. L. REV. 181, 226–27 (2003) (reviewing cases in which courts have considered the animals' welfare when granting custody in divorce proceedings).

196 No. C4-88-1248, 1988 Minn. App. LEXIS 1113 (Ct. App. Nov. 15, 1988).

197 *Id.* at *1, *3.

198 *Id.* at *3.

199 *See* Arrington v. Arrington, 613 S.W.2d 565, 569 (Tex. Civ. App. 1981) (recognizing that, although animals are property, "[l]ove is not a commodity that can be bought and sold—or decreed," and affirming the visitation arrangements previously made).

200 *See* Steve Ann Chambers, *Furry Finances*, ANIMAL LEGAL DEFENSE FUND, Feb. 11, 2003, http://www.aldf.org/article.asp?cid=105.

201 *See id.*

202 *Id.*

IV. RECOGNITION OF ANIMALS' LEGAL INTERESTS IN THE UNITED STATES AND ABROAD

While the idea of animals having their own legal interests may seem novel, this concept has been recognized in varying degrees both domestically and internationally. The following examples demonstrate some of the more progressive steps that have been taken toward recognizing the legal interests of animals.

A. Recognizing the Legal Interests of Animals Abroad

In comparison to the legal treatment of animals abroad, the United States seems to be among the least progressive nations. For example, some European countries have amended their constitutions in order to grant greater protection to animals. In Germany, the Constitution has been amended to protect animals directly.[203] The lower house of the German Parliament voted overwhelmingly to amend Article 20(a) of the German Constitution to read that "[t]he State, in a spirit of responsibility for future generations, also protects the natural living conditions *and the animals* within the framework of the constitutional rules through the legislation and as provided by the laws through the executive power and the administration of justice."[204] Moreover, in 1992, Switzerland's Constitution was amended to acknowledge formally animals as "beings."[205]

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[203] *See* Grundgesetz für die Bundesrepublik Deutshland [GG] [Federal Constitution] May 23, 1949, Budesgesetzblatt, Teil I [BGB1. I] 1, as amended, July 26, 2002, § 2, art. 20(a), *available at* http://www.bundesregierung.de/static/pdf/GG_engl_Stand_26_07_02.pdf.

[204] *Id.* (emphasis added); *see also Germany: Equal Rights for Animals*, N.Y. TIMES, May 21, 2002, at A6. The constitutional amendment did not grant rights directly to animals. Instead,

> [t]he Directive of the State (*Staatszielbestimmung Tierschutz*) declares protection of animals a value and goal of the state, and mandates the state to exercise this value in all its official capacities. By committing itself to protecting animals, the state holds itself to a much higher standard for fulfilling its obligations to animals.
>
> . . . Animal protection as defined in the *Tierschutzgesetz* now carries constitutional weight, and where the protection of animals and the rights of humans collide, organs of the state will be compelled to consider the constitutional status of animal protection laws.

Kate M. Nattrass, " . . . *Und Die Tiere": Constitutional Protection for Germany's Animals*, 10 ANIMAL L. 283, 302–03 (2004).

[205] Jim Motavalli, *Rights from Wrongs: A Movement to Grant Legal Protection to Animals is Gathering Force*, E/ENVTL. MAG., Mar./Apr. 2003, *available at*

Other nations have worked to protect animals through their common law and statutory law. For example, some Indian courts have held that it is the duty of the courts to protect the legal rights of animals. In *Nair v. Union of India*,[206] a challenge was raised to a Notification issued under India's Prevention of Cruelty to Animals Act, which prohibited the training and exhibition of bears, monkeys, tigers, panthers, and lions.[207] In upholding the Notification, the High Court of Kerala held that " '[i]t is not only our fundamental duty to show compassion to our animal friends, but also to recognise and protect their rights.'"[208] Thus, the court acknowledged that animals should be protected not only because of a basic human sense of morality but also because the animals *themselves* have the *right* to such protection.

As to statutory law, New Zealand passed the Animal Welfare Act of 1999, which has a special provision protecting nonhuman primates from unjustified harmful experimentation.[209] The original bill would have granted the great apes direct rights, including the rights not to be deprived of life, tortured, degraded, or experimented upon when it was not in the best interests of the "non-human hominids"; however, a milder version of the bill ultimately passed.[210] The current law allows research, testing, and teaching on "non-human hominids" but only permits those activities when it "is in the best interests of the non-human hominid" or when it "is in the interests of the species to which the non-human hominid belongs and that the benefits to be derived from the . . . research . . . are not outweighed by the likely harm to the non-human hominid."[211] While the bill as it was originally drafted used much stronger language regarding the protection of animals, just the fact that such a balancing test was derived "[a]t the very least, . . . sends a moral message to

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http://www.emagazine.com/view/?564&src=.

[206] No. 328/2001 (India May 1, 2001).

[207] *See id.*

[208] *See* Martha C. Nussbaum, *Animal Rights: The Need for a Theoretical Basis*, 114 HARV. L. REV. 1506, 1547 n.148 (2001) (book review) (quoting Nair v. Union of India, No. 155/1999, at 38 (Kerala H.C. June 6, 2000)), *aff'd on other grounds*, Nair v. Union of India, No. 328/2001 (India May 1, 2001)).

[209] Animal Welfare Act, 1999, c. 6, § 85 (N.Z.), *available at* http://rangi.knowledge-basket.co.nz/gpacts/public/text/1999/se/142se85.html.

[210] Rowan Taylor, *A Step at a Time: New Zealand's Progress Toward Hominid Rights*, 7 ANIMAL L. 35, 37–38 (2001).

[211] Animal Welfare Act, 1999, c. 6, § 85 (N.Z.), *available at* http://rangi.knowledge-basket.co.nz/gpacts/public/text/1999/se/142se85.html.

other nations."[212]

Perhaps even more significantly, some European nations have passed statutes that explicitly grant standing to certain environmental organizations when they sue regarding environmental issues. Referred to as a *Verbandsklagerecht* in Germany, such a law grants standing even when the organization itself has experienced no violations of its rights.[213] For example, the German Federal Nature Conservation Act, enacted in 2002, states that "[w]ithout having been subject to any violation of its rights,"[214] organizations whose purpose is to "promote, for non-pecuniary purposes and not merely for a limited period of time, the causes of nature conservation and landscape management . . . [that have] existed for at least three years"[215] may file for a legal remedy. While no such *Verbandsklagerecht* has yet been adopted for animal rights organizations, it is anticipated that one may be passed during the next election cycle, particularly because approximately ninety-four percent of German citizens supported the Federal Nature Conservation Act, including the "introduction of the right of associations to take legal action . . . established in the [Act]."[216] Such a law empowering animal rights organizations would give real power to the German constitutional amendment passed to protect animals in 2002.[217]

B. Recognition of the Legal Interests of Animals in the United States

In our own nation, steps have been taken to grant animals protection beyond their current "property" status. There were

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[212] Taylor, *supra* note 210, at 38.

[213] *See* Nattrass, *supra* note 204, at 304.

[214] Bundesnaturschutzgesetz [BNatSchG] [Federal Nature Conservation Act] Mar. 25, 2002 BGBl. I at 1193, as amended, § 7, art. 61 (F.R.G.), *translated by* Environmental Law Alliance Worldwide (E-LAW), *available at* http://www.elaw.org/assets/pdf/de.nature.conserv.eng.pdf.

[215] *Id.* § 7 art. 59.

[216] *See* Press Release, Fed. Ministry for the Env't, Nature Conservation & Nuclear Safety, Environment Remains High on Citizens' Agenda (July 2, 2002), *available at* http://www.bmu.de/english/the_ministry/pm/3618.php.

[217] The environmental *Verbandsklagerecht* was passed in 2002, and it allows for more effective enforcement of Germany's environmental protection policies under Article 20(a) of the German Constitution. German animal-welfare organizations anticipate the passage of a similar law granting standing to protect animal rights in the near future. *See* Nattrass, *supra* note 204, at 304.

two notable contributions in this regard. First, in *Sierra Club v. Morton*,[218] Justice Douglas wrote a forceful dissent arguing that natural objects, including animals, should have standing to sue directly on their own behalves.[219] Second, the State of Florida amended its Constitution to protect animals from suffering terrible abuses in factory farms.[220] That amendment was approved in an advisory opinion issued by the Florida Supreme Court.[221] While the impact of these two actions on the issue of animals and standing has not yet proven itself to be terribly powerful, they do demonstrate hope for progressiveness in our own nation.

In his powerful dissent in *Sierra Club*, Justice Douglas argued that standing should be given to natural objects, such as rivers and forests, thereby giving a voice to the wildlife which it sustains.[222] Justice Douglas argued that the river, forest, or animal should be protected in its own right and not solely because a person has an interest in that natural object.[223] He suggested that "[t]he critical question of 'standing' would be simplified . . . if we fashioned a federal rule that allowed environmental issues to be litigated . . . in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage."[224]

Justice Douglas further commented that "[t]hose inarticulate members of the ecological group cannot speak. But those people who have so frequented the place as to know its values and wonders will be able to speak for the entire ecological community."[225] Justice Douglas argued that those citizens who have an interest in nature and have "hike[d] the Appalachian Trail" or who have "climb[ed] the Guadalupes in West Texas" should be empowered to bring suit on behalf of those natural objects.[226] Thus, Justice Douglas argued that those people with

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[218] 405 U.S. 727 (1972).

[219] *See id.* at 741–42 (Douglas, J., dissenting).

[220] *See* FLA. CONST. art. 10, § 21.

[221] *See* Advisory Opinion to the Att'y Gen. Re Limiting Cruel & Inhumane Confinement of Pigs During Pregnancy, 815 So. 2d 597, 597, 600 (Fla. 2002).

[222] *Sierra Club*, 405 U.S. at 741–43, 749 (Douglas, J., dissenting).

[223] *Id.* at 743.

[224] *Id.* at 741.

[225] *Id.* at 752.

[226] *Id.* at 751–52.

ecological interests should be allowed to bring suit on behalf of the natural object in the form of a guardian: "Permitting a court to appoint a representative of an inanimate object would not be significantly different from customary judicial appointments of guardians ad litem, executors, conservators, receivers, or counsel for indigents."[227] While Justice Douglass's dissent has never been adopted, his arguments demonstrate that judges are capable of very progressive thought when it comes to the issue of animals and standing.

In 2002, the State of Florida adopted an amendment to its constitution to protect certain abuses on factory farms. It is common practice for pigs that are pregnant to be kept in "gestation crates" on factory farms.[228] These sows are kept in such tiny quarters that they are unable to turn around; they can essentially only stand up, lie down, and perhaps take a few steps forward or backward.[229] An amendment to the Florida Constitution was recently passed making it a criminal misdemeanor to confine a pregnant sow "in such a way that she is prevented from turning around freely."[230] While the amendment has been criticized as a frivolous change to the state's constitution,[231] it was held to be constitutional by the Florida Supreme Court.[232] It is a significant step forward toward the recognition of the interests of animals who are subjected to tremendous abuse.

CONCLUSION

It is widely accepted that animals are viewed as property under the law. It is equally apparent, however, that animals are much more than the average inanimate piece of personal property. The law of standing should reflect that animals are

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[227] *Id.* at 750 n.8.

[228] *See* Free Farm Animals From the Cruelty of Confinement—Gestation Crates, http://www.freefarmanimals.org/gc_intro.htm (last visited Nov. 15, 2005).

[229] *Id.*

[230] FLA. CONST. art. 10, § 21.

[231] The Florida state legislature has since attempted to make it more difficult to amend the state constitution and has been looking to the amendment protecting pigs as an example of why such changes are necessary. *See* Jason Garcia, *Rail Backer Seeks To Oust Foes: Effort Targets Lawmakers Defying Voter Initiative*, ORLANDO SENTINEL, Feb. 15, 2004, at B1; Joni James & Steve Bousquet, *Amendment Plan Takes Shape*, ST. PETERSBURG TIMES (Fla.), Apr. 24, 2004, at 1B.

[232] *See* Advisory Opinion to the Att'y Gen. Re Limiting Cruel & Inhumane Confinement of Pigs During Pregnancy, 815 So. 2d 597, 600 (Fla. 2002).

creatures with interests worthy of legal protection in their own right. Thus, while the courts may inevitably continue to recognize animals as property, animals are qualitatively different and the courts can and must take this into consideration when deciding the issue of standing. It is critical that courts allow people and organizations acting on behalf of an animal's best interest—as opposed to the property owner himself—to bring suit based on the injury to the animal. Limiting the party who can bring suit to the owner of the animal contradicts the standing doctrine because the property owner is typically the one inflicting the abuse. He will not zealously represent the interests of the animal because he would be arguing against his own abusive behaviors.

The common law has proven itself willing to progress with social and philosophical advancements and has embraced the idea that animals have independent interests that are worthy of protection. The idea that animals should be protected if and only if a human being is adversely affected is antiquated, inhumane, and out of step with reality. Thus, judges must continue to become more progressive when considering whether there is an injury in fact and consider that the animals themselves have interests entitled to legal protection.