

SAFE HAVEN CONUNDRUM: THE USE OF SPECIAL BAILMENTS TO KEEP PETS OUT OF VIOLENT HOUSEHOLDS

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INTRODUCTION

Family violence is a continuing social problem that seems to breed new complexity at every turn. Just as we seem to get a modicum of control over the sheltering of at-risk mothers and children, we find that family pets—dependent creatures endangered by the same violent behavior that threatens their human caretakers—often are left unprotected (or under-protected) by both law and society. In most cases, companion animals are unable to be sheltered with human victims of domestic violence due to shelter restrictions, which means (among other things) that human victims face difficult choices (potentially involving both human and nonhuman animal dependents) in leaving and returning to their violent households.

Animal safe haven programs have stepped up to serve some of this unmet need. These programs agree to take in the cats, dogs, and (in some cases) other companion animals of domestic violence victims who decide to seek refuge in a shelter. This solution is not without problems, however. Pets are separated from their owners at the very time they may need each other most. Moreover, safe havens typically only offer temporary care to animals, and the time limits on these arrangements may not mesh well with the transitioning of women to new, independent housing situations after their shelter stays are over. Finally, a woman may decide to return to the abusive household and take the animal with her, subjecting the animal, as well as herself, to renewed abuse.

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This article ultimately addresses the last of these three identified weaknesses of safe haven programs and suggests a solution rooted in traditional notions of property and contract law and consistent with related public policy. In the process of doing so, however, the article panoramically describes the overall societal and legal context in which the issue arises. This background is important to many social and legal issues involving nonhuman animals, not just the protection of animals threatened by violent households.

With the foregoing in mind, this article proceeds in additional parts. Part I outlines important connections between human and animal violence that underlie the institutionalization and operation of animal safe haven programs. Part II places nonhuman animals—particularly companion animals—in their legal context, underscoring the notion that animals continue to be viewed under the law as property, albeit an evolving and specially protected form of property. The legal conception of animals, as described in this Part, is sometimes in tension with related social constructions of the human/animal relationship. For example, when an abuse victim shelters a pet in a safe haven program during her stay in a domestic violence shelter, property ownership conventions may collide with public policy considerations at several decision-making junctures.

One significant juncture at which this tension manifests itself is highlighted and deconstructed in Part III of this article. A pet owner who is a sheltered victim of family violence may put her pet in a safe haven shelter and then later decide to return to the abusive household. In that event, the victim not only potentially re-victimizes and endangers herself, but also her animal. Elements of our social services system are designed to help and look after women in making and living through this decision, and if women have children with them when they leave

and return home, other elements of our social services system exist to protect those children.³ However, no social services exist to protect the companion animal of a domestic violence victim when the owner determines to return the animal to a household in which an abuser resides and abuse may recur. Part III of the article describes this issue and suggests that a special form of bailment—a conditional bailment—may help to protect animals at this critical juncture. This suggestion then is described and critiqued. At the end of Part III, we offer a brief conclusion.

I. DOMESTIC VIOLENCE AND ANIMAL ABUSE

A. Unfortunate Connections: Linkages Between Human and Nonhuman Animal Violence

The role of animals in family violence has remained relatively unexplored in academic literature,⁴ despite the fact that a study conducted by the Humane Society of the United States in 2000 found that 21% of animal cruelty cases were intertwined with other family violence.⁵ In fact, available evidence indicates that “[v]iolence exhibited by one family member against another rarely involves a single act of abuse against one type of victim.”⁶

Moreover, data from existing studies on the connection between animal and human abuse should be handled with caution. In critiquing his own work (and that of others) in this area, Dr. Frank R. Ascione, a nationally recognized expert in the interaction between human and animal

³ See generally Janet E. Findlater & Susan Kelly, *Child Protective Services and Domestic Violence*, 9 THE FUTURE OF CHILDREN 84 (1999) (describing then current and aspirational relationships between child protective services and domestic violence protection and prevention).

⁴ Frank R. Ascione, *Battered Women’s Reports of Their Partners’ and Their Children’s Cruelty to Animals*, 1 JOURNAL OF EMOTIONAL ABUSE 119, 121 (1998) [hereinafter *Women’s Reports*]. Of course, humans are also animals. For simplicity’s sake, we often refer to nonhuman animals simply as “animals” in this article.

⁵ *HSUS Releases Yearlong Study on Animal Cruelty in America*, HUMANE SOCIETY OF THE U.S., April 12, 2001, http://www.hsus.org/press_and_publications/press_release/hsus_releases_yearlong_study_on_animal_cruelty_in_america.html.

⁶ Charlotte Lacroix, *Another Weapon for Combating Family Violence: Prevention of Animal Abuse*, 4 ANIMAL L. 1, 4 (1998); see also Clifton P. Flynn, *Woman’s Best Friend: Pet Abuse and the Role of Companion Animals in the Lives of Battered Women*, 6 VIOLENCE AGAINST WOMEN 162, 171 (2000) [hereinafter *Woman’s Best Friend*] (“different forms of violence often coexist within families”).

violence, notes that studies of animal cruelty and family violence against women do not “include comparison samples of non-battered women or battered women who are not currently in shelters.”⁷ Furthermore, the sample sizes of all these studies are inevitably quite small. As a leading researcher in the field, Ascione stresses that his study cannot prove causation, but is instead “descriptive.”⁸ Even where links between animal and human violence exist, it is far too easy to confuse correlation with causation. It is thus impossible to use these results to extrapolate to a national comparison.⁹ He does buoy his results, however, by noting that other small-scale studies have reached similar results in various areas in the country.¹⁰

Yet, despite (a) the paucity of research on the links between animal and human violence and (b) the shortcomings of the small amount of research that has been done, existing studies do provide basic information that is useful to our ideas about the sheltering of animals. Taken as a whole, these studies reveal some disturbing trends.

1. The Triad: Domestic Violence, Child Abuse, and Animal Abuse

In Ascione’s groundbreaking study in 1998, 38 women at a domestic violence shelter in Utah agreed to be interviewed by shelter staff concerning their pets.¹¹ Many expressed appreciation that someone had finally acknowledged concern for their pets.¹² Of the 74% who owned pets, 71% reported that their abuser had either harmed or threatened to harm their pets.¹³ Quinlisk’s statewide study of shelters in Wisconsin found similar percentages – about 86% of the 72 respondents owned pets, of whom 79% reported that their abusers were also abusive to their

⁷ *Women’s Reports*, *supra* note 4, at 125.

⁸ *Id.*

⁹ *Id.* at 126.

¹⁰ *Id.*

¹¹ *Women’s Reports*, *supra* note 4, at 123.

¹² *Id.* at 124.

¹³ *Id.* at 124-25.

animals.¹⁴ Although there were lower rates of pet ownership in Flynn's study in South Carolina due to the sociodemographic composition of that state,¹⁵ Flynn also found a connection between animal abuse and woman-battering. Forty percent of the 107 respondents owned pets, of whom 46% reported that their abusers harmed or threatened to harm their pets.¹⁶

Animal abuse is not merely an indicator of spousal abuse; it also has implications in the development of children. Several studies suggest that children mimic the behavior that is modeled by the adults in their lives. Some suggest that children who witness domestic violence are more likely to become perpetrators of domestic violence or victims of domestic violence, depending on their gender.¹⁷ Similarly, children who witness animal abuse may be more likely to abuse animals themselves.¹⁸ In Ascione's study, for example, 32% of the victims who had children reported that their children had also harmed the pets.¹⁹ Of those instances, the adult batterer had either harmed or threatened to harm the animal 71% of the time.²⁰ In Quinlisk's Wisconsin survey, abuse of the pet by an adult perpetrator occurred in the presence of the children 76% of the time.²¹ Fifty-four percent of those women stated that their children had later copied the behavior on the pet.²² In Flynn's study, two women reported instances where their children abused the pet; one believed that her child was mimicking the behavior of the adult abuser.²³

¹⁴ Jane Ann Quinlisk, *Animal Abuse and Family Violence*, in CHILD ABUSE, DOMESTIC VIOLENCE, AND ANIMAL ABUSE 168, 169 (Frank R. Ascione & Phil Arkow eds., 1999).

¹⁵ *Woman's Best Friend*, *supra* note 6, at 170.

¹⁶ *Id.* at 166.

¹⁷ Quinlisk, *supra* note 14, at 170.

¹⁸ *Women's Reports*, *supra* note 4, at 127.

¹⁹ *Id.* at 125.

²⁰ *Id.*

²¹ Quinlisk, *supra* note 14, at 169.

²² *Id.*

²³ *Woman's Best Friend*, *supra* note 6, at 167.

Childhood animal abuse might have ramifications that extend far beyond the abhorrence of the act itself. Rates of childhood animal cruelty are “alarmingly high;” two studies of college undergraduates indicated that almost half had either perpetrated or witnessed animal cruelty.²⁴ For centuries, philosophers have linked animal cruelty to later violence against humans. In the sixteenth century, Michel de Montaigne observed that “[n]atures that are bloodthirsty toward animals give proof of a natural propensity toward cruelty. At Rome, after they had become accustomed to the spectacle of the slaughter of animals, they proceeded to that of men and of gladiators.”²⁵ In more recent years, anecdotal evidence seems to buttress these connections. In several infamous cases, mass murderers engaged in abhorrent violence against other animals before turning their attention to humans, including the “Son of Sam” killer and the adolescents who murdered their peers at Columbine High School in 1999.²⁶

Building from this long history of anecdote and conjecture, empirical research has attempted to find and explain connections between childhood animal abuse and later violence against humans, often using a “violence graduation hypothesis” that predicts that “violence toward animals comes first and is subsequently generalized to humans.”²⁷ In 1966, Drs. Daniel Hellman and Nathan Blackman interviewed 84 male patients “at an acute intensive psychiatric treatment center,” 31 of whom were charged with aggressive crimes and 53 of whom were not.²⁸ The patients were asked about a “triad” of behavior consisting of fire setting, bedwetting, and

²⁴ Clifton P. Flynn, *Why Family Professionals Can No Longer Ignore Violence Toward Animals*, 49 FAMILY RELATIONS 87, 88 (2000) [hereinafter *Family Professionals*].

²⁵ MICHEL DE MONTAIGNE, *Of Cruelty*, in THE COMPLETE ESSAYS OF MONTAIGNE 103, 109 (Donald M. Frame trans., Anchor Books 1960).

²⁶ Margit Livingston, *Desecrating the Ark: Animal Abuse and the Law’s Role in Prevention*, 87 IOWA LAW REV. 1, 43-44 (2001).

²⁷ Arnold Arluke et al., *The Relationship of Animal Abuse to Violence and other Forms of Antisocial Behavior*, 14 J. OF INTERPERSONAL VIOLENCE 963, 963-64 (1999).

²⁸ Daniel Hellman & Nathan Blackman, *Enuresis, Firesetting, and Cruelty to Animals: A Triad Predictive of Adult Crime*, 122 AM. J. OF PSYCHIATRY 1431, 1432 (1966).

animal abuse.²⁹ Seventy-four percent of patients charged with aggressive crimes “had a history of triad or part of the triad,” whereas only about 28% of the nonaggressive patients did.³⁰ Some subsequent studies purport to validate these findings. In 1985, for example, Kellert and Felthous conducted a study that concluded that there was an “inordinately high frequency of childhood animal cruelties among aggressive criminals.”³¹ Such findings led Flynn to assert that “case studies of troubled youth . . . and retroactive studies of aggressive criminals . . . have consistently revealed a relationship between childhood animal abuse and interpersonal violence in childhood and as an adult.”³²

Yet, in their totality, the studies have actually produced mixed results.³³ Some researchers criticize the attempt to use one sort of violence to *predict* another, citing various flaws in research that has substantiated the violence graduation hypothesis. Dr. Arnold Arluke, for example, emphasizes that the existing research relies heavily on self-reports in prisons, where “seriously troubled” participants might exaggerate their past behavior in order to present a “mean and aggressive personae.”³⁴ Another conundrum is that phrases such as “animal abuse” are not clearly defined to the respondents (also a shortcoming in studies relied upon by the Department of Justice).³⁵ In 1987, Drs. Felthous and Kellert reviewed nine studies that did not establish a link between childhood animal cruelty and later violence against humans and four studies that did find such a link, concluding that no relationship had yet been proven but not ruling out the

²⁹ *Id.*

³⁰ *Id.* at 1432-33.

³¹ Stephen R. Kellert & Alan R. Felthous, *Childhood Cruelty toward Animals among Criminals and Noncriminals*, 38 HUMAN RELATIONS 1113, 1119 (1985).

³² *Family Professionals*, *supra* note 24, at 90.

³³ Arluke, *supra* note 27, at 964.

³⁴ *Id.* at 966. *See, e.g.*, LINDA MEREZ-PEREZ & KATHLEEN M. HEIDE, ANIMAL CRUELTY: PATHWAY TO VIOLENCE AGAINST PEOPLE 71, 77-78 (2004) (the researchers conducted “face-to-face interviews” with 50 violent criminals and 50 non-violent criminals at a prison in Florida to ask them direct questions about childhood animal abuse).

³⁵ FRANK R. ASCIONE, U.S. DEPARTMENT OF JUSTICE, ANIMAL ABUSE AND YOUTH VIOLENCE 2 (2001), *available at* <http://www.ncjrs.gov/pdffiles1/ojjdp/188677.pdf>.

possibility of it.³⁶ Arluke has suggested that the parameters of future studies should be broadened to include nonviolent antisocial behavior, such as drug and property crimes.³⁷

Arluke and his team attempted to remedy these perceived shortcomings in their own study. As a sample, they used the records of the Massachusetts Society for the Prevention of Cruelty to Animals to locate people who had been convicted of animal cruelty over an eleven-year period, while selecting individuals from the same neighborhoods as these abusers to serve as a control.³⁸ The researchers then used state criminal records to see if sample members had been prosecuted for other crimes, concluding that although animal abusers are much more likely than non-abusers to engage in other criminal behavior, animal abuse is not “a predictor or a distinct step in the development of increasingly criminal or violent behavior” because “[a]nimal abuse was no more likely to precede than follow either violent offenses . . . or nonviolent offenses”³⁹ Thus, Arluke has suggested a “deviance generalization hypothesis” whereby “animal abuse is simply one of many forms of antisocial behavior that can be expected to arise from childhood on.”⁴⁰ Although Arluke avoided some of the verification problems of past studies, he was unable to fully scrutinize childhood progression because juvenile criminal records are sealed.⁴¹

Such findings have prompted a more nuanced approach that focuses on the wider spectrum of social deviance.⁴² Most researchers could at least agree that animal abuse by children is a “serious antisocial behavior”⁴³ that sometimes indicates a broader proclivity to

³⁶ MEREZ-PEREZ & HEIDE, *supra* note 34, at 22.

³⁷ Arluke, *supra* note 27, at 967, 969.

³⁸ *Id.* at 966-67.

³⁹ *Id.* at 968-70.

⁴⁰ *Id.* at 965.

⁴¹ *Id.* at 968.

⁴² Livingston, *supra* note 26, at 54.

⁴³ *Family Professionals*, *supra* note 24, at 91.

violence.⁴⁴ The implications of childhood animal abuse are so grave that the *Diagnostic and Statistical Manual of Mental Disorders* added animal abuse to its list of criteria to analyze “conduct disorder” in 1987.⁴⁵

2. A Silent Epidemic: Society Ignores the Link Between Human and Nonhuman Violence

These studies strongly suggest a correlation between domestic violence, childhood violence, and animal abuse. For a multitude of reasons, however, society tends to disregard how batterers threaten pets. Companion animals are valued less than humans, so that any violence against companion animals meets with less shock than violence against human victims.⁴⁶ Furthermore, a misguided belief that animal abuse is rare has become entrenched and exists alongside the assumption that “crimes against animals are . . . isolated incidents,” not part of a larger pattern of violent activity.⁴⁷ As a society, we have not yet fully perceived the integral role that companion animals play in the cycle of human violence.⁴⁸

Or, perhaps we have simply forgotten what we used to know. In the late 19th century, the private movement to protect abused children was intertwined with the animal welfare movement.⁴⁹ Due to a lack of government services, private societies often handled both human and nonhuman service needs, with institutions that we today associate with animals taking a far more active role in human welfare.⁵⁰ For example, in 1874 in New York City, the Society for Prevention of Cruelty to Animals engaged in activities that included the rescue of a child from an

⁴⁴ Livingston, *supra* note 26, at 13.

⁴⁵ *Family Professionals*, *supra* note 24, at 89.

⁴⁶ *Id.* at 87.

⁴⁷ *Id.*

⁴⁸ Catherine A. Faver & Elizabeth B. Strand, *Domestic Violence and Animal Cruelty: Untangling the Web of Abuse*, 39 JOURNAL OF SOCIAL WORK EDUCATION 237, 240 (2003).

⁴⁹ *Id.* at 239.

⁵⁰ Allie Phillips, *The Dynamics between Animal Abuse, Domestic Violence, and Child Abuse: How Pets can Help Abused Children*, 38 PROSECUTOR 22, 22 (2004).

abusive foster home.⁵¹ In the early 20th century, however, this unified movement split apart when the government took over child protective services.⁵² Although government intervention in child welfare was laudable, it divorced concern for human welfare from that of companion animal welfare by shifting human concerns to the government and leaving animal concerns in the hands of private organizations. In the contemporary context, “public and private agencies addressing animal welfare or child safety . . . have been so intent on carrying out their individual missions that they have had little to no awareness of the common ground they tread.”⁵³

Although complicated historical shifts severed the interrelationships between and among various social welfare movements, these connections are again being made in the United States through newly established institutions, such as the Family Justice Center. A Family Justice Center is “the co-location of a multi-disciplinary team of professionals who work together, under one roof to provide coordinated services to victims of family violence,” including by allowing the victims to “talk to an advocate, plan for their safety, talk to a police officer, meet with a prosecutor, receive medical assistance, receive information on shelter, and get help with transportation.”⁵⁴ Family Justice Centers are a new phenomenon, based on the San Diego model that opened its doors in 2002.⁵⁵ There are currently thirty Family Justice Centers across seventeen states; Family Justice Centers also exist in four foreign countries.⁵⁶ Many of these centers opened with financial support from the U.S. Department of Justice. In Knoxville,

⁵¹ *Id.*

⁵² *Id.*

⁵³ Mary Pat Boatfield & Sally Vallongo, *How to Build a Successful Community Coalition*, in CHILD ABUSE, DOMESTIC VIOLENCE, AND ANIMAL ABUSE 351, 351 (Frank R. Ascione and Phil Arkow ed., 1999).

⁵⁴ FAMILY JUSTICE CENTER, FREQUENTLY ASKED QUESTIONS, <http://www.familyjusticecenter.org/familyjusticecenters/faq.php>.

⁵⁵ *Id.*

⁵⁶ For a list of centers with web links, visit <http://www.familyjusticecenter.org/familyjusticecenters/overview.php>.

Tennessee (where the authors reside⁵⁷), the Family Justice Center emphasizes both “childcare and pet care.”⁵⁸ By linking public and private advocates across the spectrum of human and animal violence initiatives, Family Justice Centers promise to bind social welfare groups in a powerful way.

3. Abusers Manipulate Bonds Between Human and Nonhuman Victims

Sadly, academic studies do not merely describe a link between domestic violence and animal abuse; they also help to explain why domestic violence exists. The key to the link between animal abuse and domestic violence is that animals are part of the “intimate home environments of human beings.”⁵⁹ Although social workers have been slow to perceive the integral role that companion animals play in the lives of domestic abuse victims,⁶⁰ the strong bond between battered women and their pets is unsurprising when it is considered within the context of the connection between people and companion animals that exists in society at large.

As early as 1983, studies showed that people regard their pets as beloved family members.⁶¹ In that study, 87% of respondents considered pets as family members and 79% celebrated their pets’ birthdays.⁶² In a 1995 study by the American Animal Hospital Association, 70% of respondents who had owned a pet indicated that they thought of those pets as children.⁶³ Today, more people have pets than have children.⁶⁴ Humans tend to view their animals as

⁵⁷ One of the authors is licensed to practice in Tennessee. In addition, the authors’ experience with this issue arises out of pro bono work done in Tennessee. Accordingly, the authors have written this article using primarily Tennessee law, but they have inserted references to other laws where relevant.

⁵⁸ See KNOXVILLE FAMILY JUSTICE CENTER, SERVICES PROVIDED, <http://www.fjcknoxville.org/services.htm>.

⁵⁹ Faver & Strand, *supra* note 48, at 238.

⁶⁰ *Id.* at 240.

⁶¹ *Id.*

⁶² Dianna J. Gentry, *Including Companion Animals in Protective Orders: Curtailing the Reach of Domestic Violence*, 13 YALE J.L. & FEMINISM 97, 102 (2001).

⁶³ Sonia S. Waisman, *Recovery of ‘Non-Economic’ Damages for Wrongful Killing or Injury of Companion Animals: A Judicial and Legislative Trend*, 7 ANIMAL L. 45, 59 (2001).

⁶⁴ Clifton P. Flynn, *Battered Women and Their Animal Companions: Symbolic Interaction Between Human and Nonhuman Animals*, 8 SOCIETY & ANIMALS 99, 101 (2000) [hereinafter *Symbolic Interaction*].

“social actors who are capable of interacting symbolically.”⁶⁵ In 2005, pet owners spent \$36.3 billion dollars on their pets.⁶⁶ Veterinary expenses in the U.S. tripled between 1991 and 2001, an indicator of the increasing value placed on pets.⁶⁷

If such a strong human-pet bond exists, it is no surprise that it extends to battered women as well. In one study, Flynn conducted interviews with 10 battered women who owned pets at a shelter in South Carolina.⁶⁸ The women described their pets as family members. Two brought photos of their pets with them to the interview, acting like “proud parents.”⁶⁹ Three women even referred to their pets as “children.”⁷⁰

Although this bond is touching, it also has sinister implications when recognized by an abuser. Being viewed as family makes a pet vulnerable to abuse.⁷¹ The connection between animal abuse and other forms of domestic violence is not simply a sign of a general violent disposition on the part of the abuser; instead, this correlation appears to result from the batterer’s concerted strategy to take advantage of the intimate family environment for his or her own purposes. Abusers batter pets to establish their power, instill fear, and encourage the “habit of compliance” among their human victims.⁷² Abusers recognize that harming or threatening a human victim’s pet is a viable strategy to coerce the human victim to do what the abuser wants.⁷³

As part of the family, pets exist within the same environment that permits violence to occur against human victims. This violence is fostered by the privacy associated with the home

⁶⁵ *Id.*

⁶⁶ Jennifer Robbins, Note, *Recognizing the Relationship Between Domestic Violence and Animal Abuse: Recommendations for Change to the Texas Legislature*, 16 TEX. J. WOMEN & L. 129, 131.

⁶⁷ Susan J. Hankin, *Not a Living Room Sofa: Changing the Legal Status of Companion Animals*, 4 RUTGERS J. L. & POL’Y 314, 316 (2007).

⁶⁸ *Symbolic Interaction*, *supra* note 64, at 103.

⁶⁹ *Id.* at 105.

⁷⁰ *Id.*

⁷¹ *Id.* at 107.

⁷² Robbins, *supra* note 66, at 133.

⁷³ Faver & Strand, *supra* note 48, at 238.

and the position of “power and control” that abusers can exercise over pets due to their “dependent status” and “smaller physical stature.”⁷⁴ Even more importantly, abusers react with jealousy to the strong emotional attachments that exist between their human victims and pets.⁷⁵

There are perhaps two key reasons why domestic violence victims may form unique emotional attachments with their pets.⁷⁶ First, battered women may identify with pets that have been similarly abused.⁷⁷ In the South Carolina study, women whose pets were abused indicated a stronger emotional attachment to those pets than women whose pets had not been victimized.⁷⁸ In many cases where women killed their batterers in self-defense, they indicated that they decided to do so after the abuser killed their pets.⁷⁹ These women interpret the killing of their pets as the loss of their “last hope.”⁸⁰ Thus, they so strongly identify with their abused pets that they conclude that the killing of the pets forebodes their own deaths.

Secondly, pets serve as emotional substitutes.⁸¹ Because battered women are often socially isolated by their abusers, pets tend to become surrogates who fill their need for companionship.⁸² In various studies, battered women described the comfort and unconditional love that their pets provided, especially immediately after a violent episode.⁸³ Concerning her pets, one woman stated, “having them around just makes you know that everything is okay. . .”⁸⁴ Flynn found that 73% of battered women with pets described those pets as being important

⁷⁴ *Symbolic Interaction*, *supra* note 54, at 107.

⁷⁵ *Woman’s Best Friend*, *supra* note 6, at 172.

⁷⁶ *Id.* at 171.

⁷⁷ *Id.*

⁷⁸ *Id.* at 168.

⁷⁹ Carol J. Adams, *Bringing Home Peace: A Feminist Philosophical Perspective on the Abuse of Women, Children, and Pet Animals*, 9 *HYPATIA* 63, 66 (1998).

⁸⁰ *Id.*

⁸¹ *Woman’s Best Friend*, *supra* note 6, at 171.

⁸² *Id.* at 174.

⁸³ *Symbolic Interaction*, *supra* note 64, at 114.

⁸⁴ *Id.*

sources of emotional support.⁸⁵ Pets were more important to women who did not have children, another indicator that the pets were serving as substitutes for human companionship.⁸⁶

Furthermore, the fairly common occurrence of pets attempting to protect women from their batterers is a further sign of the unconditional love that battered women so value.⁸⁷

Regardless of why victims of domestic violence form strong emotional attachments to pets, their abusers manipulate these bonds. Because these pets are so important to the women, abusers can harm and threaten the pets in order to further harm and coerce their human victims.⁸⁸ The abuser can use the pet to convince the victim to come home or drop criminal charges.⁸⁹ This strategy among abusers has been identified as a negative surrogacy, where the abuser targets the animal to hurt and control the human victim in a phenomenon known as “triangling.”⁹⁰ In one of Flynn’s studies, eight of the 10 women cited their emotional attachment to the pet as being part of the reason why their abusers targeted the animals.⁹¹ One woman insightfully stated, “. . . it was like an extension of me, you know? And . . . maybe he abused the dog ’cause he . . . didn’t want to go to jail for abusing me.”⁹² Another stated of her abuser, “I think he uses the dog big time to hurt us . . .”⁹³ Similar examples of abusers using violence against pets to hurt human victims play out in every community across the country. The *Knoxville News Sentinel*, for example, reported on the felony animal abuse charges filed against a man who broke the neck of his stepdaughter’s Jack Russell terrier puppy in order to “torment” his estranged wife.⁹⁴

⁸⁵ *Woman’s Best Friend*, *supra* note 6, at 168.

⁸⁶ *Id.* at 169.

⁸⁷ *Symbolic Interaction*, *supra* note 64, at 115.

⁸⁸ Faver & Strand, *supra* note 48, at 238.

⁸⁹ *Woman’s Best Friend*, *supra* note 6, at 172.

⁹⁰ *Id.* at 174.

⁹¹ *Symbolic Interaction*, *supra* note 64, at 107.

⁹² *Id.* at 110.

⁹³ *Id.* at 109.

⁹⁴ Michael Silence, *A felony animal abuse case*, KNOX NEWS, Feb. 1, 2005, <http://web.knoxnews.com/silence/archives003089.html>.

Even in situations where the abuser does not threaten or harm the pet, battered women are often emotionally scarred by their pets' reactions to the abuse that the pets witness.⁹⁵ One woman was upset because her dog “panics” and “starts shivering” when the abuser yells at the woman.⁹⁶ In sum, all abuse, whether it be of the woman or of her pets, contributes to the “climate of . . . terror” that perpetuates further violence.⁹⁷

4. Community Action in Response to Abuse

Society at large is finally beginning to take notice of the connection between human and nonhuman victims of abuse. An increase in scholarly studies is one indicator of this emerging acknowledgment of the link. In addition, there has been a flurry of legislative activity in recent years to crack down on animal cruelty in the hopes that (among other things) it will help diminish violence against humans.⁹⁸ This strategy suggests that one potent reason why society cares about animal rights is because animal interests are intertwined with human interests.⁹⁹ One important change in this area is the growing emphasis on including animals in orders of protection. In Tennessee, for example, a protective order may “direc[t] the care, custody or control of any animal owned, possessed, leased, kept or held by either party or a minor residing in the household.”¹⁰⁰ The Tennessee statute also insists that animals be placed in the direct

⁹⁵ *Symbolic Interaction*, *supra* note 64, at 116.

⁹⁶ *Id.* at 117.

⁹⁷ *Id.* at 113.

⁹⁸ GARY L. FRANCIONE, *ANIMALS, PROPERTY, AND THE LAW* 122-25 (Temple University Press 1995) (using a variety of judicial opinions concerning animal cruelty to distinguish direct and indirect duties, concluding that although some judicial opinions interpret animal cruelty statutes as creating duties owed directly to the animals, others emphasize a “dual purpose” where the duty owed to the animal is indirect because “the primary rationale for the animal cruelty statutes is essentially that cruelty to animals has a detrimental impact on the moral development of human beings”) [*hereinafter* *ANIMALS, PROPERTY, AND THE LAW*]. An emphasis on indirect duties is also prevalent in some theories of animal ethics. *See, e.g.*, PETER CARRUTHERS, *THE ANIMALS ISSUE* 146 (Cambridge University Press 1992) (“[S]ome ways of treating animals are morally wrong. . . but only because of what those actions may show us about the moral character of the agent. This will then be a form of indirect moral significance for animals that is independent of the fact that many rational agents care about animals, and hate to see them suffer). *See also* Part II for a fuller discussion of ethical perspectives on animals.

⁹⁹ Livingston, *supra* note 26, at 5.

¹⁰⁰ TENN. CODE ANN. § 36-3-606(a)(9) (West 2007).

custody of the petitioner or in animal foster care, emphasizing that the animal should never be placed in the custody of the respondent to the protective order.¹⁰¹ Although the Tennessee code does not extend protection to first responders who help the abuse victim remove pets from the household, such aid is available through the internal guidelines of various law enforcement offices.¹⁰²

In other rule making, state legislatures are increasing penalties for animal abuse. Tennessee, Indiana, Nebraska, and Virginia have all increased the penalties for first-time animal abusers in recent years.¹⁰³ In Tennessee, the first animal cruelty offense is a Class A misdemeanor (unless it constitutes aggravated animal cruelty, as described below),¹⁰⁴ punishable by no more than 11 months and 29 days of incarceration, along with a fine not to exceed \$2,500.¹⁰⁵ Any subsequent offense is a Class E felony,¹⁰⁶ requiring incarceration for 1 to 6 years and a fine up to \$3,000.¹⁰⁷ Tennessee has a separate statute, however, to deal with aggravated animal cruelty, which occurs when a person “intentionally kills or intentionally causes serious physical injury to a companion animal” in a manner that exhibits “aggravated cruelty” that has “no justifiable purpose.”¹⁰⁸ Aggravated cruelty is a Class E felony.¹⁰⁹

Another important area of legislation is cross-reporting as among child and adult protective services and animal abuse responders. Tennessee requires that any agency or government employee involved in “child or adult protective services” report suspected animal

¹⁰¹ *Id.*

¹⁰² Telephone Interview with Jackie Roberts, Case Coordinator, Family Justice Center in Knoxville, Tenn. (June 20, 2008) (As part of their standard operations, Knoxville police officers “standby” for fifteen minutes while the victim retrieves personal belongings from the house. For safety reasons, this standby procedure is never utilized at night).

¹⁰³ *Tennessee Animal Cruelty Case Apparently Involves Domestic Violence*, HUMANE SOCIETY OF THE U.S., Nov. 3, 2004, http://hsus.org/acf/news/tennessee_cruelty_domestic_violence.html?print=t.

¹⁰⁴ TENN. CODE ANN. § 39-14-202(g)(1) (West 2007).

¹⁰⁵ *Id.* at § 40-35-111(e)(1) (West 2007).

¹⁰⁶ *Id.* at § 39-14-202(g)(2) (West 2007).

¹⁰⁷ *Id.* at § 40-35-111(b)(5) (West 2007).

¹⁰⁸ *Id.* at § 39-14-212(a).

¹⁰⁹ *Id.* at § 39-14-212(d).

abuse to the appropriate animal protection authority.¹¹⁰ In order to make cross-reporting as potent as possible, states need to also require humane society investigators to report to social workers when they suspect child abuse or domestic violence.¹¹¹ Other states have extended mandatory reporting into other professions, such as by requiring veterinarians to report suspected animal abuse.¹¹² Nine states, for example, either require veterinarians to report suspected animal abuse or provide immunity if veterinarians report such information, which resembles the requirements of child abuse reporting.¹¹³

Beyond legislation, the common law has also begun to highlight the presence of animal abuse in cases that come before the courts due to domestic violence and child abuse, thus revealing the inevitable link between the three types of violent behavior.¹¹⁴ In one Kentucky case, the judge permitted joinder of interrelated child abuse and animal cruelty charges when the defendants allegedly sexually abused their children and used their pets for sexual gratification.¹¹⁵ In another brutal case out of Oregon, a jury convicted Charles Smith of murdering his pregnant wife by tying her hands and feet behind her back and leaving her to die of exposure in a remote area. At trial, the state presented evidence of Smith's long history of violence against both women and animals, including how he threw a kitten into a burning woodstove and beat his wife's puppy to death.¹¹⁶

Beyond the research initiatives on the link between animal abuse and human aggression and the legislative, regulatory, and judicial activity that they have engendered, practical issues have emerged in handling matters at the intersection of animal and human violence. For

¹¹⁰ *Id.* at § 38-1-402(a).

¹¹¹ Heather D. Winters, *Updating Ohio's Animal Cruelty Statute: How Human Interests Are Advanced*, 29 CAPITAL UNIV. L. REV. 857, 868 (2002).

¹¹² Gentry, *supra* note 62, at 104.

¹¹³ Hankin, *supra* note 67, at 369-70.

¹¹⁴ Gentry, *supra* note 62, at 104.

¹¹⁵ *Id.* at 104-105.

¹¹⁶ *Id.* at 105.

example, there is widespread concern about the social services offered to victims of domestic violence.¹¹⁷ Among these concerns is the failure of most domestic violence shelters to take in the animals of battered women.

B. No Room at the Inn: Most Domestic Violence Shelters Do Not Accept Pets

As an extension of the emerging interest in the connection between domestic violence and animal abuse, researchers have begun to highlight and criticize the failure of domestic violence shelters to evaluate the importance of companion animals in the lives of domestic violence victims.¹¹⁸ Most domestic violence shelters do not accept pets, due to “health regulations, space limitations, additional costs, and potential liabilities.”¹¹⁹

Researchers stress that shelter staff should inquire about pets at intake and take seriously the victims’ emotional turmoil about leaving their pets.¹²⁰ In Wisconsin, Quinlisk found that large, urban shelters asked women about their pets during intake, while small, rural shelters did not.¹²¹ Quinlisk stressed that even if a shelter has no program to take in pets of battered women, merely expressing concern and helping women “brainstorm” about their options for their pets is helpful.¹²² Over two-thirds of the women whose pets had been abused expressed concern for the

¹¹⁷ Faver & Strand, *supra* note 48, at 243.

¹¹⁸ *Id.*; see also Frank R. Ascione, *The Abuse of Animals and Human Interpersonal Violence: Making the Connection*, in CHILD ABUSE, DOMESTIC VIOLENCE, AND ANIMAL ABUSE 50, 56 (Frank R. Ascione and Phil Arkow eds., 1999) (83% of directors at surveyed domestic violence shelters acknowledged an “overlap” between domestic violence and animal abuse, but only 28% of those shelters routinely ask their clients about animal abuse); *Symbolic Interaction*, *supra* note 64, at 123 (shelter staff should inquire about pets at intake and consider establishing foster programs or on-site housing programs for pets, particularly because some women delay seeking shelter due to concern for their pets).

¹¹⁹ HUMANE SOCIETY OF THE U.S., STARTING A SAFE HAVENS FOR ANIMALS PROGRAM 2 (2004), available at http://files.hsus.org/web-files/PDF/2004_SafeHavens_Guide.pdf [hereinafter HSUS].

¹²⁰ *Symbolic Interaction*, *supra* note 64, at 123.

¹²¹ Quinlisk, *supra* note 14, at 173.

¹²² *Id.*

safety of those pets.¹²³ In another study by Flynn, all of the women who were interviewed wished that the shelter could accommodate their animals.¹²⁴

Some women actually delay coming to a domestic violence shelter out of concern for their animals, which indicates the gravity of the failure to shelter the pets of battered women. In Ascione's study, 18% of women delayed seeking shelter out of concern for their pets' safety.¹²⁵ Similarly, 8 women, or 18.6% of respondents, in one of Flynn's studies delayed seeking shelter for themselves due to their pets.¹²⁶ All of these women acknowledged that their pets had also been victims of abuse.¹²⁷ Five of these women delayed coming to the shelter for over 8 weeks.¹²⁸ A staff member at the shelter told the researcher that one woman who had come to the shelter on three separate occasions during his study returned home each time because she feared for the safety of her pet.¹²⁹

Yet, as striking as these numbers may be, the research with women in domestic violence shelters surely must understate the overall risk to female victims of domestic violence, since there most certainly are women who never seek shelter at all, at least in part because of a fear that their pets will be abused or killed if they leave the household. This gap in the empirical data on abused women is destined to remain an unknown, since the study population is difficult to identify. Even interviewing unsheltered female domestic violence victims whose abusers are arrested would not completely fill the gap. Regardless, however, it seems obvious that women who delay leaving an abusive situation may actually be risking their own lives for those of their

¹²³ *Id.*

¹²⁴ *Symbolic Interaction*, *supra* note 64, at 118.

¹²⁵ *Women's Reports*, *supra* note 4, at 125.

¹²⁶ *Woman's Best Friend*, *supra* note 6, at 170.

¹²⁷ *Id.*

¹²⁸ *Id.* at 169.

¹²⁹ *Id.* at 172.

pets, making animal sheltering a key concern for all social workers and human services professionals.¹³⁰

Of course, this research on abused women and their pets reveals that battered women are not the only ones at risk in this situation. If women leave domestic violence situations without securing the safety of their pets, these pets then are at a significant risk of abuse. In Flynn's in-depth interviews with domestic violence victims, he explored the fears that women had when they were separated from their pets while at the domestic violence shelter.¹³¹ Some women had been fortunate enough to leave their pets with family or friends, while six were compelled to give their pets away or take them to a local animal shelter, which typically would require surrender of ownership of the animals.¹³² Slightly over half of the women had left their pets with their abusers.¹³³ Amongst those women, one worried that her husband was not feeding her dog, while another received threats from her husband that he would take their dog away from her. It is noteworthy, however, that temporary fostering was open to these women, and Flynn concluded that the women who deeply feared that their abusers would hurt their pets put them in foster care before coming to the domestic violence shelter.¹³⁴ Even though the women who left their pets at home recognized that these pets might be abused or neglected, they expressed guilt at taking their pets away from abusers who also had also developed relationships with the companion animals.¹³⁵

C. Promising New Developments with Undesirable Side Effects

¹³⁰ *Id.* at 173.

¹³¹ *Symbolic Interaction*, *supra* note 64, at 119.

¹³² *Woman's Best Friend*, *supra* note 6, at 170. Most animal shelters require women to surrender ownership and many shelters assume that they own pets that are brought to them, *see* SAFE HAVENS, *infra* note 141 at 38-39.

¹³³ *Id.* at 169.

¹³⁴ *Symbolic Interaction*, *supra* note 54, at 120.

¹³⁵ *Id.* at 119.

In reaction to the grave dangers that develop due to the lack of safe shelter for battered women's pets, novel arrangements are beginning to crop up to address the problem. A growing number of domestic violence shelters and social services organizations are taking part in efforts to aid animals that are affected by domestic violence.¹³⁶ A handful of domestic violence shelters in states like Virginia have begun to welcome pets, in spite of the practical and legal barriers to doing so.¹³⁷ These arrangements are very rare, but organizers in Virginia plan to create 15 more shelters of this kind by the end of this year.¹³⁸ In Columbus, Ohio, social workers have developed an innovative new program in which the pets of battered women are taken to a women's prison, where they are cared for by the inmates.¹³⁹

Despite the variety of emerging options, community-based sheltering in so-called "safe haven" programs is the most common (although by no means widespread). Safe haven programs are formed when domestic violence shelters partner with "animal shelters, animal care and control agencies, veterinary clinics, and private boarding kennels" in order "to provide temporary housing for victims' pets."¹⁴⁰ Ascione's 1999 survey identified 113 safe haven programs nationwide, the youngest of which were still in the conceptual phase¹⁴¹ and the oldest of which had been operating for 5 years.¹⁴² The animal welfare agencies involved in these programs estimated that they sheltered a total of 2,000 to 50,000 animals per year.¹⁴³

¹³⁶ Faver & Strand, *supra* note 48, at 243.

¹³⁷ Bridgid Schulte, *Sheltering Women – and Their Pets, Too*, WASHINGTON POST, Nov. 8, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/07/AR2007110700860.html>.

¹³⁸ *Id.*

¹³⁹ Pam Belluck, *New Maine Law Shields Animals in Domestic Violence Cases*, N.Y. TIMES, April 1, 2006, <http://www.nytimes.com/2006/04/01/us/01pets.html?n=Top/Reference/TimesTopics/People>.

¹⁴⁰ HSUS, *supra* note 119, at 2.

¹⁴¹ Paul Ascione, *SAFE HAVENS FOR PETS* 3 (2000), *available at* http://vachss.com/guest_dispatches/ascione_safe_havens.pdf [hereinafter *SAFE HAVENS*].

¹⁴² *Id.* at 5.

¹⁴³ *Id.* at 6.

The general attributes and operations of a safe haven program are explained in the “Starting a Safe Havens for Animals Program” brochure that is available on the website of the Humane Society of the United States and in the “Safe Havens for Pets” brochure produced by Ascione. The Humane Society brochure prefers that domestic violence shelters serve as the “primary referring agency for animals who require temporary foster care,” but encourages safe haven programs to consider accepting referrals from other sources, such as the police and animal shelters.¹⁴⁴ Personnel need to be available at all times for animal intake, as many domestic violence victims must flee their homes during the night.¹⁴⁵ The animals should immediately be checked by a veterinarian.¹⁴⁶ Safe haven programs commonly use animal shelters, foster homes, veterinary clinics, and private kennels to house the animals.¹⁴⁷ In Ascione’s survey of safe haven programs, for example, only three domestic violence shelters (roughly 14% of the shelters interviewed) indicated that they could shelter pets at their own facilities.¹⁴⁸ Most programs offer sheltering services for 14 to 30 days.¹⁴⁹ Due to safety concerns and the stress of visits, it is unadvisable to allow the human victim to visit her pet during sheltering.¹⁵⁰

The brochures also address procedures through which the victims reclaim their pets. The hope, of course, is that the women and their pets will move to a new home where they are free from abuse. However, some women decide to return to their abusers. The Humane Society brochure acknowledges that this outcome is “frustrating” and advises shelter personnel to “educate the victim about the dangers of returning” to a “potentially harmful situation,”¹⁵¹ although the brochure does no more to elaborate on the serious risks that humans and companion

¹⁴⁴ HSUS, *supra* note 119, at 3.

¹⁴⁵ *Id.* at 4.

¹⁴⁶ *Id.* at 5.

¹⁴⁷ SAFE HAVENS, *supra* note 141, at 19.

¹⁴⁸ *Id.* at 8.

¹⁴⁹ *Id.* at 5.

¹⁵⁰ *Id.*

¹⁵¹ HSUS, *supra* note 119, at 6.

animals face when they return to an abusive home. Instead, the brochure concludes that “the program will have to allow the victim to reclaim the pet and return to the abuser if the victim so chooses.”¹⁵²

Ascione’s “Safe Havens for Pets” brochure reaches the same conclusion.¹⁵³ Ascione justifies this position by asserting that “[l]eaving a batterer is often a process rather than a one-time decision” and that “[w]omen should not be coerced into remaining away from batterers by preventing them from retrieving pets from a SHP program.”¹⁵⁴ Ascione recognizes that this policy sometimes produces “horror stories,” recounting an incident where a woman came to the safe haven shelter with her batterer to reclaim her pet.¹⁵⁵ Nonetheless, scholars and social workers typically do not challenge the premise that abused women should be able to reclaim their pets regardless of their intentions. (Moreover, as Part II illustrates, the law supports a domestic violence victim’s right to reclaim her animal.) This article suggests that we should rethink this assumption. By allowing domestic violence victims to reclaim their pets and return with them to an abusive household, safe haven programs perpetuate the cycle of companion and human violence. The safe haven movement, in solving one social problem—ensuring the temporary safety and welfare of companion animals of human abuse victims—raises philosophical, legal, and ethical issues that must be addressed. However, a solution to this sheltering conundrum—an issue at the intersection of the emotional and psychological needs and legal rights of humans, on the one hand, and the socio-legal aspects of animal protection, on the other—may be possible. A potential solution lies in the combination of traditional property and contract law concepts with current legal and public policy support for animal protection.

¹⁵² *Id.*

¹⁵³ SAFE HAVENS, *supra* note 141, at 51.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 68.

II. ANIMALS, PROPERTY, AND RIGHTS: LEGAL RULES RELEVANT TO A RESOLUTION OF THE SAFE HAVEN SHELTERING CONUNDRUM

If the law is to provide a solution to the safe haven sheltering conundrum, it is important to understand current legal rules relating to animals. This Part summarizes the history and development of those rules.

A. Animals As Property In The Current Legal Paradigm

The current status of animals as property reflects several ancient strains of philosophy that, though abating, continue to inform our conception of animals. In the traditional Western view, animals are completely subservient to humans.¹⁵⁶ This view is rooted in Aristotelian and Stoic philosophies espousing teleological anthropocentrism—the belief that the physical world was designed for use by humans.¹⁵⁷ Furthermore, Aristotle rejected any suggestion that nature operated by chance, instead insisting that the world has remained unchanged since its creation.¹⁵⁸ Therefore, a permanent, natural hierarchy exists in the form of the Great Chain of Being.¹⁵⁹ Although “dominion” is appropriate under this view, our conception of animals has always been nuanced. After all, many religions “sacralize” nature, and although Christianity has been accused of being harsher toward animals than some of the pagan religions of antiquity, its texts nevertheless stress that “needless cruelty to animals should be avoided.”¹⁶⁰ Moreover, some of the earliest and most famous literary works extol the kinship between humans their animal companions, as exemplified by the scene in Homer’s *Odyssey* where Odysseus returns home in

¹⁵⁶ Livingston, *supra* note 26, at 5.

¹⁵⁷ Steven M. Wise, *How Nonhuman Animals were Trapped in a Nonexistent Universe*, 1 ANIMAL L. 15, 19 (1995).

¹⁵⁸ *Id.* at 21-23.

¹⁵⁹ *Id.* at 24.

¹⁶⁰ Richard A. Posner, *Animal Rights: Legal, Philosophical, and Pragmatic Perspectives*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 53 (Oxford University Press, Cass R. Sunstein & Martha C. Nussbaum, eds. 2004) (theorizing that “[t]he pagan religions had tended to sacralize nature” because humans could not have successfully domesticated and hunted animals without “considerable empathy and respect” for those animals, while also suggesting that Christianity was more hostile to animals at least in part due to its rivalry with those pagan religions); Livingston, *supra* note 26, at 8, 14-15 (citing both the Old and New Testaments to describe a “duality” in which humans are permitted to use and kill animals but should avoid unnecessary cruelty that “degrades the human abusers, destroys valuable economic assets, and inflicts gratuitous suffering on living creatures”).

disguise after 20 years of absence but is nevertheless recognized by his loyal dog.¹⁶¹ Although ancient Greek literature contains such scenes of interspecies kinship, the Greek philosophy of natural hierarchy continued on to influence both Roman Stoics and Christian philosophers of late antiquity and the Middle Ages.¹⁶²

Yet, in the early modern era, this world view clashed with scientific discovery.¹⁶³ Biblical, Greek, and Roman authorities—texts that Westerners had long believed to hold unerring and complete truths—were suddenly challenged by “astronomers’ reports of telescopic observations, philosophers’ reports on their cogitations, mariners’ reports of voyages, and physicians’ reports of anatomies.”¹⁶⁴ These discoveries forced us to reconsider some of our most fundamentally held views on the nature of humans and the Universe.

Later in the modern era, overwhelming proof in favor of Darwinian evolution added a new layer of complexity to theories of design and human superiority. Within the scientific community, the Great Chain of Being fell by the wayside, and with it went teleological anthropocentrism.¹⁶⁵ Yet acceptance of evolution has enflamed, not extinguished, the debate about the extent to which humans and animals are comparable. Interestingly, an intellectual acceptance of evolution can coexist with a visceral rejection of interspecies similarities, a

¹⁶¹ HOMER, *ODYSSEY* 265-66 (Stanley Lombardo trans., 2000) (“[A] dog was lying there This was Argus, whom Odysseus himself had patiently bred Now, his master gone, he lay neglected in the dung And now, when he sensed Odysseus was near, he wagged his tail and dropped both ears but could not drag himself nearer his master. Odysseus wiped away a tear [T]he shadow of death descended upon Argus, once he had seen Odysseus after twenty years.”)

¹⁶² Wise, *supra* note 157, at 27-28, 32 (“The Stoics . . . shared with Aristotle the view of Socrates on the natural hierarchy of humans and animals,” including the conception that every type of animal was created for the benefit of some other animal. This view was passed “from Hellenistic Greece through Republican and Imperial Rome,” and in the fifth century St. Augustine “firmly consolidated the Christian and Stoic streams of thought” by explaining that the prohibition of murder did not apply to animals because they have a “sensitive-appetitive-locomotive” soul instead of the “intelligent or thinking soul” possessed by humans and angels). *See also* Posner pg 53 – (noting that Christianity espoused a harsher view toward animals than that of ancient pagan religions).

¹⁶³ ANTHONY GRAFTON, *NEW WORLDS, ANCIENT TEXTS: THE POWER OF TRADITION AND THE SHOCK OF DISCOVERY* (Harvard University Press 1992).

¹⁶⁴ *Id.* at 3.

¹⁶⁵ Wise, *supra* note 157, at 34-41.

phenomenon which E.O.Wilson, the founder of the field of evolutionary psychology (or sociobiology), knows all too well. In 1975, when Wilson used biological inheritance to explain social behavior in a variety of species including humans, he was “surprise[d]” that “[m]any scientists and others believed that it would have been better if [he] had . . . remain[ed] chastely on the zoological side of the boundary between the natural sciences and humanities.”¹⁶⁶

Moreover, commentators continue to debate whether evolution truly detracts from the position that human interests are superior to animal interests.¹⁶⁷

The rise of modern science and the environmental movement (together with related challenges to teleological anthropocentrism) has tempered our enthusiasm for the notion of human dominion over the natural world. We increasingly recognize that “dominion” does not adequately describe the way in which “animal interests are intertwined with human interests.”¹⁶⁸

This increased awareness of our interrelatedness with animals is a small step forward from a social and legal framework that advocates domination.¹⁶⁹ Today, the major goals of animal cruelty statutes include punishing the perpetrator¹⁷⁰ and reducing the human suffering connected to animal abuse, including any related domestic violence and child abuse.¹⁷¹ The law values

¹⁶⁶ EDWARD O. WILSON, *ON HUMAN NATURE* xii-xiv (Harvard University Press 2004); *see also id.* at xv-xvi (explaining that in the “revolutionary left” atmosphere that dominated universities in the 1970s, “[t]alk of the inheritance of IQ and human behavior were punishable offenses” due to a fear of the “misuse of biology” manifested in past policies such as the Nazis’ advocacy of eugenics).

¹⁶⁷ Compare Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 N.Y.U. ENVTL. L.J. 531, 559-64 (arguing that “[t]he gulf between humans and other animals evaporated in the Darwinian revolution” and that “the ranking of humans in evolution” does not “giv[e] humans special status and rights” because evolution is not normative (only cockroaches would survive a nuclear war), morality should not be attached to science, “differences between species are incremental,” and “the evolutionary system is not goal-oriented”) with CARRUTHERS, *supra* note 98, at 143-45 (arguing that “human beings are continuous with the rest of the natural world, having evolved, like any other species of animal, through a process of natural selection,” but that only humans are “rational agents” who deserve “direct rights” because no other species “appear capable of long-term planning, or of representing to themselves different possible futures” or “of conceptualizing (let alone acting under) general socially agreed rules.”).

¹⁶⁸ Livingston, *supra* note 26, at 5.

¹⁶⁹ *Id.* at 16.

¹⁷⁰ Amie J. Dryden, Note, *Overcoming the Inadequacies of Animal Cruelty Statutes and the Property-Based View of Animals*, 38 Idaho L. Rev. 177, 179 (2001).

¹⁷¹ Lacroix, *supra* note 6, at 4.

animal welfare as “a means to an end”¹⁷²—a human-oriented end. In short, the impetus for changing the legal identity of animals often derives from promised physical and emotional benefits to humans.

Regardless of whether animals are to be dominated or given more respect due to their interrelatedness with us, property status is an important part of the conceptualization. From a legal standpoint, property is a bundle of rights related to a given object, making it a fundamental organizing principle of any legal system.¹⁷³ American law traditionally treats animals as property in the same way that a book or chair is property.¹⁷⁴ We can buy and sell our pets, while they can also be subject to bailment agreements and theft.¹⁷⁵ Historically, states have viewed animals as “personal property without any special value.”¹⁷⁶ In 1857, for example, a Tennessee court asserted the right of property in dogs.¹⁷⁷ With this mindset, states have been reluctant to create a definition of “pet” or “companion animal” in their statutory codes.¹⁷⁸ The law currently “denies all justice to all nonhuman animals;” any legal rights inuring to an animal’s benefit

¹⁷² Francione, *supra* note 98, at 10-11. Although scholars argue that some legislation (such as that intended for species preservation) is enacted with the primary goal of benefitting the animals themselves, it could be argued that the main attraction of this legislation has been the promise of indirect benefits to human interests. Compare David Favre, *Judicial Recognition of the Interests of Animals – A New Tort* 2005 MICH. ST. L. REV. 333, 342 (2000) (stressing that the federal Endangered Species Act requires that species be placed on the endangered list in consideration of threats to their survival without regard to any human interests) [hereinafter *Judicial Recognition*] with E.O. Wilson, *THE CREATION: AN APPEAL TO SAVE LIFE ON EARTH* 26, 30 (as a tactic to interest people in species preservation, urging that “Nature is . . . vital to our physical and spiritual well-being” and listing a series of plant and animal species that have been crucial in the development of medicine, such as the Norwegian fungus that made organ transplants possible).

¹⁷³ David Favre, *Equitable Self-Ownership for Animals*, 50 DUKE L.J. 473, 477 (2000) [hereinafter *Equitable Self-Ownership*].

¹⁷⁴ Hankin, *supra* note 67, at 317.

¹⁷⁵ *Id.* at 321.

¹⁷⁶ Merry B. Guben, *Animal Law Litigation: On the Road to a Modern View with some Landmarks Along the Way*, 77 PA. B. ASS’N Q. 58, 59 (2006).

¹⁷⁷ *Wheatley v. Harris*, 36 Tenn. 468 (1857).

¹⁷⁸ Guben, *supra* note 176, at 59. Compare with TENN. CODE ANN. 44-17-403(b) (West 2007) (stepping away from this traditional view by defining a “pet” as “any domesticated cat or dog normally maintained in or near the household of the owner”) and TENN. CODE ANN. 39-14-212(b)(2) (West 2007) (defining a “companion animal” as “a pet normally maintained in or near the household . . . of its owner . . . , other domesticated animal, previously captured wildlife, an exotic animal, or any other pet, including but not limited to, pet rabbits, a pet chick, duck, or pot bellied pig that is not classified as ‘livestock’”).

are exercised by the animal's owner or legal guardian or the state, while legal duties in relation to an animal are owed to the animal's owner or legal guardian or the state via statute.¹⁷⁹

Yet these conceptions of animals do not harmonize well with the modern reality of pet ownership. As mentioned in the previous section, battered women describe their pets as family members, echoing the mentality of society at large. We view pets on an entirely different plane than we view inanimate property. Law, as the embodiment of social values, should reflect this distinction. After all, as Kathy Hessler stated:

People do not plan memorial services, or invest in serious medical treatment for their books or lawnmowers. They don't plan to pay more in insurance premiums than the purchase price or replacement cost of the property they seek to protect. Individuals do not leave money for their bicycles in their wills, or seek visitation arrangements for their televisions upon the termination of their marriages. Yet individuals attempt to do all these things and more for their companion animals.¹⁸⁰

Because of this reality, traditional conceptions are no longer tenable. Law and society change slowly, however. Persistent social norms sanction the human domination of animals, which tends to create ambiguity and ambivalence in prevailing legal structures. Gary L. Francione describes the ambivalence that we have toward animals; although a majority of people condemn animal cruelty, we write laws and encourage law enforcement and prosecutorial practices that do very little to stop it.¹⁸¹ Instead, in many cases, the law and legal process remain virtually straitjacketed by the fact that animals are property, and property cannot have rights.¹⁸² Even short of cruelty, our laws proscribe unnecessarily harm to animals.¹⁸³ Yet this requirement

¹⁷⁹ Wise, *supra* note 157, at 17; *Equitable Self-Ownership*, *supra* note 173, at 494. See also *id.* at 480-81 (describing the unique situation of wildlife, as the state does not possess title in wildlife, but instead the state "has the right to decide the conditions under which humans can obtain title" in wildlife, so that unless they are in captivity, wild animals possess self-ownership).

¹⁸⁰ Kathy Hessler, *Mediating Animal Law Matters*, 2 J. ANIMAL L. & ETHICS 21, 28 (2007).

¹⁸¹ Francione, *supra* note 98, at 4. See also *id.* at 119 (describing a judicial opinion where the defendant had undeniably abused his "fifty-year-old Aldebra tortoise," but the court nevertheless returned the "property" to the defendant).

¹⁸² *Id.*

¹⁸³ *Id.*

is easily satisfied at present because of the way in which we balance human interests against animal interests to make a determination of necessary harm.¹⁸⁴ In this balancing act, “animals almost never prevail, irrespective of what might be the relatively trivial human interest at stake and the relatively weighty animal interest involved”¹⁸⁵ And even where the interests of animals may or should prevail, their abuse is hard to detect, and the penalties for their abusers still pale in comparison to penalties for some human violence or other related crimes, compelling prosecutors to seek punishment for something other than animal cruelty.¹⁸⁶ For all of these reasons, an antiquated, pure property law approach to animals has increasingly proven unworkable in a contemporary context.

B. Changing Perceptions Of Animals In The Legal Order

In light of increasing ethical, social, and legal tension in balancing animal and human interests, commentators have suggested a variety of new legal paradigms for pets.¹⁸⁷ At one extreme lies the suggestion that we should remove property status from animals altogether, thus making them full-fledged legal rightholders.¹⁸⁸ This is the “animal rights” perspective. Gary L. Francione, for example, rejects accommodation with the traditional paradigm by framing the issue as a choice between two polar opposites: animals “are either persons, beings to whom the

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Human violence often accompanies animal violence and is punishable at higher felony levels. Compare TENN. CODE ANN. § 39-13-212(b) (the charge accompanying the *least* culpable mental state for homicide, criminally negligent homicide, is punished as a Class E felony) with TENN. CODE ANN. § 39-14-212(d) (the *most* severe form of animal cruelty is punished as a Class E felony). Furthermore, other violations (such as tax evasion and gambling) often accompany cock and dog fighting, and penalties for those crimes are more stringent. Compare TENN. CODE ANN. 67-1-1440(g) (tax evasion is a Class E felony) and TENN. CODE ANN. 39-17-501 (although gambling and gambling promotion are misdemeanors, aggravated gambling promotion is a Class E felony) with TENN. CODE ANN. 39-14-203(c)-(d) (although dog fighting is a Class E felony, being a spectator at a dogfight is only a Class B or C misdemeanor, while cock fighting is only a Class A misdemeanor). Thus, scarce prosecutorial resources are often better spent on crimes other than animal cruelty. Cf. THE HUMANE SOCIETY OF THE U.S., THE FINAL ROUND (2001), available at http://files.hsus.org/web-files/PDF/Animal_Fighting_Broch_Eng.pdf (describing how in states where cock and dog fighting are not felonies, “animal fighters consider misdemeanor fines as merely a business expense” and how there is “a strong connection between organized animal fighting and other crimes” such as gambling, illegal possession of firearms, and drugs).

¹⁸⁷ Hankin, *supra* note 67, at 381-88.

¹⁸⁸ Kelch, *supra* note 167, at 532.

principle of equal consideration applies and who possess morally significant interests in not suffering, or things, beings to whom the principle of equal consideration does not apply and whose interests may be ignored if it benefits us. *There is no third choice.*¹⁸⁹ According to Francione, improving the treatment of animals within a property framework is insufficient; we must instead recognize the moral significance of animals by affording them “equal consideration.”¹⁹⁰ This standard would apply to any animal that is sentient and can suffer.¹⁹¹ In practice, this framework would end the usage of animals as “resources” so that the “institutional exploitation of animals for food, biomedical experiments, entertainment, or clothing” would cease.¹⁹² Similarly, other activists insist that animals “should be free from human-inflicted pain except where such pain is afflicted for the benefit of the animal.”¹⁹³

Even if property status were removed from animals, animal rights would be neither “absolute” nor unwaveringly equal to human rights.¹⁹⁴ Theorists argue that animals have “equal inherent value” with humans while sharing *some*, but not all, of the rights of humans.¹⁹⁵ Francione accepts that “conflicts may require accommodation of some sort” and that an animal’s legal rights may be “overridden by appropriate moral considerations.”¹⁹⁶ For example, humans may appropriately prefer to help another human over a member of some other species “in situations of true emergency” where the ultimate choice is “arbitrary,” such as when a person must choose between saving a dog or a child from a burning house.¹⁹⁷

¹⁸⁹ Gary L. Francione, *Animals – Property or Persons?*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 131 (Oxford University Press, Cass R. Sunstein & Martha C. Nussbaum, eds. 2004) (emphasis added).

¹⁹⁰ GARY L. FRANCIONE, INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR THE DOG? 100-101 (Temple University Press 2000) [*hereinafter* YOUR CHILD OR THE DOG?].

¹⁹¹ *Id.* at 82, 159.

¹⁹² *Id.* at 102.

¹⁹³ Kelch, *supra* note 167, at 582-83.

¹⁹⁴ ANIMALS, PROPERTY, AND THE LAW, *supra* note 98, at 10.

¹⁹⁵ *Id.* at 4, 10.

¹⁹⁶ *Id.*

¹⁹⁷ YOUR CHILD OR THE DOG?, *supra* note 190, at 157-59.

Many criticisms have been lobbed against this animal rights position. Perhaps this position is impracticable because it is too far removed from our inherited biological traits. Although Francione ascribes to “equal consideration,” even he condones a seemingly strong bias in favor of humans in a “true emergency,” a stance which he only justifies by citing our natural predilection to favor our own species.¹⁹⁸ Francione thus suggests that we can give in to our innate biological programming in a burning house scenario, but must repress biological programming as it relates to things such as our long evolution as omnivores. Perhaps he sets the bar of biological repression too high. Furthermore, critics often find the comparison that animal rights activists make between racism, sexism, and prejudice against animals to be “inappropriate,” “distasteful,” and not cogent.¹⁹⁹ If these three types of prejudice are comparable, and if speciesism is morally allowable in a burning house scenario, then would racism and sexism be equally appropriate in the same situation? Some critics further suggest that the animal rights viewpoint devalues human life, particularly when the most extreme activists state that they would not condone the death of one rat even if that death would cure all human diseases.²⁰⁰

A countervailing viewpoint advocates the status quo. Animals have no rights beyond the “protections they have incident to the economic, aesthetic, and humanitarian interests of human beings.”²⁰¹ The “aggregate” of human characteristics, such as “the ability to express reason, to recognize moral principles, to make subtle distinctions, and to intellectualize” makes “humans fundamentally, importantly, and unbridgeably different from animals.”²⁰² Many advocates of

¹⁹⁸ *Id.* at 159.

¹⁹⁹ Schmahmann & Polecheck, *supra* note 167, at 780. The comparison of nonhuman animals to ancient and modern slavery, as well as to prejudices against women and immigrants, is common in the animal rights literature. See, e.g., Favre, *supra* note 173, at 477-78, 491; Kelch, *supra* note 167, at 534; Wise, *supra* note 157, at 16.

²⁰⁰ Schmahmann & Polecheck, *supra* note 167, at 757.

²⁰¹ Schmahmann & Polecheck, *supra* note 167, at 759.

²⁰² *Id.* at 752.

this position argue that the social contract, as the underpinning of our legal system, is predicated on a consent of the governed that can only arise from these unique intellectual capabilities.²⁰³ Therefore, only humans can directly benefit from the rights bestowed by that social contract; the only practical measure of rights is human interests.²⁰⁴ The creation of full-fledged animal rights would be an unprecedented and destabilizing shift in our legal system that would demand the courts to enforce the interests of a new and vague constituency.²⁰⁵ This viewpoint ignores, however, how the current legal paradigm has already proven insufficient to handle the modern role of companion animals—an insufficiency that creates inefficiencies. Furthermore, the Kantian social contract that is often emphasized in this viewpoint is not the only justification for rights.²⁰⁶

Moderate activists urge a more nuanced approach between these two rubrics. Although the most radical animal rights advocates suggest changing pets' status "to one approaching that of persons," many suggest instead that we should continue to conceive of pets as property, but

²⁰³ *Id.* at 754-55; see also CARRUTHERS, *supra* note 98, at 36, 139, 194 (using contractualism to argue that morality is "a human construction . . . to govern . . . relationships in society" and that humans owe no direct moral duties to animals because animals do not possess reason. Although some species have the ability to recognize "the beliefs and desires of others," rationality also requires "a conception of social rules, and of what it might be for all to act under the same social rules") and JAMES B. REICHMANN, S.J., EVOLUTION, ANIMAL 'RIGHTS,' AND THE ENVIRONMENT 252 (The Catholic University of America Press 2000) ("The human's rationality totally penetrates and is suffused throughout his animality; it is not a distinct 'quality' added to it. This union of rationality and animality clearly differentiates the human from all other sentient beings whose animality is not a rational animality"); compare with Posner, *supra* note 160, at 57-58 (arguing that rights are not based on "cognitive capacity," but instead that "legal rights are instruments for securing the liberties that are necessary if a democratic system of government is to provide a workable framework for social order and prosperity. The conventional rights bearers are with minor exceptions actual and potential voters and economic actors. Animals do not fit this description . . .").

²⁰⁴ Schmahmann & Polecheck, *supra* note 167, at 759, 760.

²⁰⁵ *Id.*

²⁰⁶ *Judicial Recognition*, *supra* note 172, at 334. Various justifications for human rights exist and have been considered in the context of animals, see *id.* at 335 (Kant assigned rights due to the dignity arising from rationality and self-awareness, but this conception has been criticized for excluding humans who do not have full rationality unless the species is considered in the aggregate instead of individually); *id.* at 338 (legal analysis should be based on a balancing of "conflicting interests"); Kelch, *supra* note 167, at 38-40 (the ability of a living being to experience pain and suffering makes it worthy of certain moral considerations); CARRUTHERS, *supra* note 98, at 13-26 (describing theism, intuitionism, utilitarianism, and contractualism as possible bases for moral duties).

with some significant qualifications.²⁰⁷ Elimination of title in companion animals is “neither advisable nor feasible,” particularly because most pets are not capable of caring for themselves and some have economic value, but the relationship between owner and animal should become more like a parent-child relationship than an owner’s relationship with an inanimate object.²⁰⁸ Within this viewpoint, Carolyn Matlack’s formulation of pets as “sentient property” has garnered attention.²⁰⁹ Matlack’s definition encompasses any animal that is warm-blooded and domesticated, recognizing these animals as “living, feeling companions,” but not giving them any status that approaches personhood.²¹⁰ Compare this approach to that of animal rights advocate Joan Dunayer, who argues that all sentient beings “warrant full and equal moral consideration” so that it is “speciesist” to give more weight to the interests of some sentient species than others.²¹¹

In a vein similar to Matlack, animal welfarists argue that “it is morally acceptable, at least under some circumstances, to kill animals or subject them to suffering as long as precautions are taken to ensure that the animal is treated as ‘humanely’ as possible.”²¹² This would involve a balancing of human and animal interests within what tends to be a utilitarian framework.²¹³ Peter Singer argues that “we should give equal consideration to similar amounts of suffering, irrespective of the species (or order) of the beings who suffer” so that consideration is based on the individual, not the species.²¹⁴ Furthermore, his framework suggests that humans tend to deserve a “higher degree of consideration” because our mental capacities make us capable of the

²⁰⁷ Hankin, *supra* note 67, at 385.

²⁰⁸ *Equitable Self-Ownership*, *supra* note 173, at 484, 495.

²⁰⁹ Hankin, *supra* note 67, at 386.

²¹⁰ *Id.*

²¹¹ JOAN DUNAYER, *SPECIESISM* 4 (Ryce Publishing 2004).

²¹² Francione at 6,

²¹³ *Id.* at 6-7.

²¹⁴ Peter Singer, *Ethics and Animals*, 13 *BEHAVIORAL & BRAIN SCIENCES* 45, 46 (1990).

most profound suffering.²¹⁵ Thus, animal welfarists tout our unique human intellect while nevertheless demanding better treatment of nonhuman animals. Francione, who ultimately rejects Singer's approach, nonetheless acknowledges that it "would require a drastic reduction in animal suffering but would permit animal exploitation when the consequences, properly characterized and considered, outweighed the animal's interest in not being exploited."²¹⁶

Perhaps David Favre has articulated the most logical and feasible legal compromise between property in animals and animal rights. Although concerned with a different topic than this article, Favre's approach, like ours, is rooted in traditional notions of property law. He proposes that property interests in animals be divided into their legal and equitable aspects, with legal title belonging to the human owner and equitable interest belonging to the animal itself, providing the animal with a hybrid form of self-ownership similar to a trust.²¹⁷ The courts would balance the competing interests between the legal title holder (the animal's guardian) and the animal (equitable owner of itself) in order to reach the fairest outcome.²¹⁸ Only the animal's interests in fundamental life-supporting activities would appropriately be considered.²¹⁹ With the stronger legal standing available to the animal under this legal framework, a more stringent and serious balancing of interests would occur between human and animal.

C. Current Tensions between the Legal and Social Conceptualization of Animals

As suggested by the enthusiasm with which a variety of new paradigms have been proposed, there is increased tension between traditional legal conceptions of animals and the

²¹⁵ Peter Singer, *The Significance of Animal Suffering*, 13 BEHAVIORAL & BRAIN SCIENCES 9, 10 (1990) ("to be human is to possess certain characteristics distinctive of our species, such as the capacity for self-awareness, for rationality, and for developing a moral sense . . . It is not arbitrary to say that beings with these capacities live fuller lives than beings without them . . .").

²¹⁶ *Id.* at 7. See also Dunayer, *supra* note 208, at 1-5.

²¹⁷ *Equitable Self-Ownership*, *supra* note 173, at 473, 491.

²¹⁸ *Id.* at 501.

²¹⁹ *Id.* at 498.

change that is occurring in society concerning animal wellbeing. Despite welfare-oriented jurisprudential leaps forward, traditional legal conceptions of animals as property persist, but become progressively less descriptive and trenchant as the societal interaction of animals and humans changes. As animals are treated more like humans in society, animals are being treated more like humans in the law. These legal changes have been made by both legislatures and courts.

Specifically, with social realities—especially those involving human bonding with companion animals—bearing down, the law has shifted towards acknowledging animal welfare in several major respects. First, statutes against animal cruelty have proliferated and been strengthened over the past several decades, although enforcement may not always be vigilant. Second, the law is shifting away from using fair market value as a measure of damages in veterinary malpractice actions, pet death cases, and emotional distress cases. Third, pet custody battles are growing in number and ferocity, forcing a reluctant legal system to address the issue.

1. Pets in Criminal Law: Animal Cruelty Statutes Within the Framework of Property Rights

All states have statutes criminalizing animal cruelty, while the level of concern in animal cruelty statutes is not generally replicated for inanimate property.²²⁰ Furthermore, the majority of states now categorize some forms of animal cruelty as misdemeanors and even felonies

²²⁰ Hankin, *supra* note 67, at 324. Some judicial reasoning treats animal cruelty as a type of vandalism or as a charge that complements vandalism. *See* *People v. Baldacchino*, 2005 WL 3249943 at *5 (Cal Ct. App. 2005) (noting that California has a general vandalism statute that is followed by more specific statutes that include topics such as vandalism of a church, certain types of damage to buildings, and animal cruelty, and urging that charges should be brought under one of the more specific statutes when possible); *People v. Guido-Silva*, 2005 WL 2203274 at *6 (Cal. Ct. App. 2005) (considering a case where the defendant was charged with both animal cruelty and vandalism in relation to the death of a race horse and holding that to be guilty of vandalism, the defendant's actions had to be a "proximate cause of damage to or destruction of the horse"). *Compare with* CANADIAN FEDERATION OF HUMANE SOCIETIES, Commonly asked questions regarding animal cruelty amendments, available at http://cfhs.ca/law/commonly_asked_questions_regarding_animal_cruelty_amendments/ (urging that animal cruelty statutes should be moved out of the property section of the Canadian legal code because animal cruelty is not taken seriously when it is treated as a property crime that is "no different than vandalism to your car").

instead of simply being petty offenses, whereas only a few states punished violators at the misdemeanor and felony level in the early 1990s.²²¹

In addition to these harsher penalties, offenders in certain jurisdictions, including Tennessee, must forfeit custody of the animals that were the subject of the conviction.²²² In Tennessee, the state humane society receives custody of animals seized under the animal cruelty statute and may also lawfully intervene to prevent cruelty and arrest the perpetrators.²²³ An owner who allows his or her animal to be abused forfeits the right to the animal. In Tennessee, the court may also curtail or prohibit the person's custody of animals for a period of time that it deems reasonable.²²⁴ In a recent North Carolina case, the Animal Legal Defense Fund sued and gained custody of dogs based on an anti-cruelty statute similar to the Tennessee statute.²²⁵ This marked the first time that a private organization was able to "enjoin an owner's conduct and gain the right to control the animals' welfare" through the use of an anti-cruelty statute.²²⁶ Some of this legislation has made pets more akin to children in the eyes of the law.

The tension between property and human treatment is heightened in cases in which defendants charged with animal cruelty use their right to property as a defense to the search and seizure of the animals. Some alleged perpetrators have defended against animal cruelty charges on the basis that the animals were seized during warrantless searches of the defendant's property.²²⁷ To avoid a slippery property debate, some courts focus on the evidentiary value of the animals instead of on their suffering, effectively meeting the perpetrator's property argument

²²¹ Hankin, *supra* note 67, at 367.

²²²TENN. CODE ANN. § 39-14-202(e) (West 2007).

²²³TENN. CODE ANN. § 39-14-210(b), (f) (West 2007).

²²⁴*Id.* at § 39-14-202(e).

²²⁵ Guben, *supra* note 176, at 68.

²²⁶ *Id.*

²²⁷ Dryden, *supra* note 170, at 202.

with a property-oriented response.²²⁸ When the animals are viewed primarily as evidence (rather than the victim) of a crime, several exceptions to the warrant rule come into play, such as the plain view exception.²²⁹

Other exceptions to the warrant requirement place more value on the animal's life. Some courts have been willing to proceed under the exigent circumstances exception to the warrant requirement, which allows for warrantless seizures when immediate action is necessary to preserve life or evidence, preventing the frustration of an important governmental interest.²³⁰ Although they allow the seizure to stand, courts have hesitated when the peril of a nonhuman animal, rather than a human animal, forms the basis of the emergency.²³¹

The Michael Vick case is a well known—albeit highly unusual—recent example of a custody transfer resulting from animal mistreatment. It is therefore analogous to the animal surrender and placement options available on a more routine basis in other locales. Vick's pit bulls were seized by the government in April 2007 based on suspicions of his involvement in a dog fighting ring.²³² Although fighting dogs are usually euthanized, the government agreed to place most of the pit bulls in animal sanctuaries and rehabilitation centers throughout the country after Vick agreed to pay almost a million dollars for their evaluation and care.²³³ This outcome is anomalous and was only available in this instance because Vick offered such a large sum for the care of the animals in order to mitigate his offense.

2. Pets in Tort Law: Moving Beyond Fair Market Value When a Pet is Harmed or Killed

When a wrongdoer harms or kills a pet, the traditional response by the civil courts is to award the owner damages based on the “fair market value” of the animal, which is often

²²⁸ *Id.* at 202-203.

²²⁹ *Id.*

²³⁰ *Id.* at 203.

²³¹ *Id.* at 203-204.

²³² Juliet Macur, *Given Reprieve, N.F.L. Star's Dogs Find Kindness*, N.Y. TIMES, Feb. 2, 2008, at A1.

²³³ *Id.* at A7.

negligible (particularly if the pet is a mixed-breed animal or of unknown descent) and certainly pales in comparison to the owner's valuation of the pet based on companionship and related emotional attachment.²³⁴ This traditional framework is beginning to recede.²³⁵ The Tennessee Supreme Court, for example, recently upheld the constitutionality of the penalties in the animal abuse statute, which are not based on the monetary value of the animal, but rather on the severity of the criminal conduct.²³⁶ Critics argue that the use of a fair market value in calculating damage awards, which emphasizes economic cost at the expense of sentimental worth, leads to both "under-compensation and under-deterrence."²³⁷ Because the value of pets to many humans in the United States today cannot be adequately represented in economic terms through a fair market valuation, the availability of non-economic damages is integral if the common law is to meet the tort goals of "compensation, deterrence, and the reflection of societal values."²³⁸ For the legal system to remain relevant, common law tort actions must keep pace with changing social values.²³⁹

In 2000, Tennessee became the first state to provide an owner with a statutory remedy for non-economic damages in the death or injury of a pet.²⁴⁰ The relevant statute is known as the T-Bo Act, named after a Shih Tzu owned by Tennessee state senator Steve Cohen. While in his yard, T-Bo was seriously injured by a large dog that was running loose and died after "three days of frantic trips to the night emergency clinic and veterinarian."²⁴¹ After this loss, Cohen realized that the damage awards for companion animals do not correspond to the value of a pet's

²³⁴ Hankin, *supra* note 67, at 323.

²³⁵ Dryden, *supra* note 170, at 199.

²³⁶ State v. Webb, 130 S.W.3d 799 (Tenn. Crim. App. 2003); *see* TENN. CODE ANN. § 39-14-201(b)(1) (cruelty is aggravated if it is done in a "depraved and sadistic manner" so that it "tortures or maims an animal").

²³⁷ Hankin, *supra* note 67, at 325.

²³⁸ Waisman, *supra* note 63, at 46.

²³⁹ *Id.* at 51.

²⁴⁰ Hankin, *supra* note 67, at 338. *See* Tenn. Code Ann. 44-17-403 (West 2007).

²⁴¹ *Canine Loss Spurs New Law*, NATIONAL CONFERENCE OF STATE LEGISLATURES, (2000), *available online at* <http://www.ncsl.org/programs/pubs/1011dog.htm>.

companionship, prompting him to introduce the T-Bo Act.²⁴² Cohen explained the impetus for the bill by lamenting that the only damages available to him upon T-Bo's death were for "repairs, as if it were a clock or desk" and for the cost of buying a similar dog as a replacement.²⁴³ Thus, the T-Bo Act stipulates that an owner can receive up to \$5,000 in non-economic damages²⁴⁴ for "the loss of reasonably expected society, companionship, love, and affection"²⁴⁵ when a pet is harmed or killed. Tennessee starkly contrasts to states like New York, which does not recognize "an independent cause of action for loss of the companionship of a pet."²⁴⁶ This Tennessee statute is particularly noteworthy because it recognizes the capability of animals to be *pets* and the tendency of humans to form strong emotional bonds with those pets, thus beginning to address some of the shortcomings of the traditional legal paradigm, such as its refusal to recognize the companionship function of animals by providing a definition of "pet" or "companion animal" within the statutory law.²⁴⁷

Although the T-Bo Act and other legal proscriptions and prescriptions based on pet or companion animal status acknowledge the growing respect for the bonds that exists between humans and other species, these measures nonetheless typically provide a limited recovery. If an owner sues for a pet injury that betrays the perpetrator's particularly depraved and egregious disrespect for life, the monetary cap of \$5,000 is a "symbolic gesture" that could not possibly provide "full compensation," deterrence, or retribution.²⁴⁸ In addition, only owners may recover, which may create problems depending on how narrowly "owner" is defined and how difficult it

²⁴² 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, 225 (2003).

²⁴³ Waisman, *supra* note 63, at 70.

²⁴⁴ TENN. CODE ANN. § 44-17-403(a) (West 2007).

²⁴⁵ *Id.* at § 44-17-403(d) (West 2007). In pet death cases courts in some states consider how much the owner has expended on the pet in the past in order to gauge how much the owner values the pet, *see supra* note 67 at 330-31.

²⁴⁶ *Gluckman v. American Airlines, Inc.*, 844 F. Supp. 151, 158 (S.D.N.Y. 1994); *see infra* note 266 for a discussion of the court's reasoning concerning the infliction of emotional distress in this case.

²⁴⁷ Guben, *supra* note 176, at 59.

²⁴⁸ Waisman, *supra* note 63, at 70.

is to establish proof of ownership. The statute also exempts certain government entities and makes exceptions for rural areas,²⁴⁹ indicating a “rural-urban split in attitudes that could have prevented the Act’s passage.”²⁵⁰ Finally, in its limitation to dogs and cats, Tennessee’s definition of “pet” excludes many species that humans often form strong emotional bonds with but that are more traditionally classified as livestock, such as bunnies, ferrets, birds, turtles, pigs, and horses. The T-Bo Act is nonetheless an impressive and progressive first step. In 2003, Colorado representatives introduced a bill that allowed for up to \$100,000 in damages for loss of pet companionship.²⁵¹ The bill was withdrawn, however, very shortly after being introduced.²⁵²

Despite persisting hesitations, legislatures throughout the country and particularly in Tennessee have made great strides in the past twenty years in recognizing the unique form of property interest that humans have in animals. Courts also have played a role in changing the legal conception of animals as property. In the courts, we witness the same tension between old and new views with which the legislatures contend. Several instructive cases with interesting facts are often cited in the literature on animals and the law. In the famous (or infamous) case of *Corso v. Crawford Dog and Cat Hosp., Inc.*, a woman who had prepared “an elaborate funeral” for her deceased poodle sued the pet hospital for “mental distress and anguish” after the hospital “wrongfully disposed” of the dog and placed a dead cat in the dog’s casket.²⁵³ Under New York precedent, a pet was merely “an item of personal property.”²⁵⁴ This court overruled that precedent, stating that “a pet is not just a thing but occupies a special place somewhere in

²⁴⁹TENN. CODE ANN. § 44-17-403(e) (West 2007).

²⁵⁰ Waisman, *supra* note 63, at 71.

²⁵¹ Elizabeth Paek, Note, *Fido Seeks Full Membership in the Family: Dismantling the Property Classification of Companion Animals by Statute*, 25 U. HAW. L. REV. 481, 518-19 (2003).

²⁵² *Colorado House Bill 03-1260*, NATIONAL ASSOCIATION FOR BIOMEDICAL RESEARCH, www.nabr.org/AnimalLaw/Damages/CO.htm.

²⁵³ *Corso v. Crawford Dog and Cat Hosp., Inc.*, 415 N.Y.S.2d 182, 183 (1979).

²⁵⁴ *Id.*

between a person and a piece of personal property.”²⁵⁵ In its reasoning, the court emphasized that pets, unlike inanimate family heirlooms, are “capable of returning love and affection” and “respond to human stimulation.”²⁵⁶ Although the plaintiff had suffered no special damages (i.e. economic damages), she could recover “damages beyond the market value of the dog” by receiving \$700 for her “shock, mental anguish, and despondency.”²⁵⁷ Although this decision seems seismic, the holding in *Corso* has not been widely followed.²⁵⁸ In *Gluckman v. United Airlines, Inc.*, a federal court in New York held that damage to a pet could not be the basis of a recovery for loss of companionship and that “[i]n viewing a pet as more than property . . . the *Corso* opinion, and the few cases that follow it, are aberrations flying in the face of overwhelming authority to the contrary.”²⁵⁹

In another well known case, *In Re Estate of Brand*, the court addressed the property status of animals in a way that mirrors *Corso*. The court refused to enforce a provision in a will that stipulated that the owner’s horses and Cadillac be destroyed after his death.²⁶⁰ The court held that it was against public policy to destroy the horses, responding in part to public outcry.²⁶¹ The court noted that it received over fifty letters from citizens who were concerned about the horses, but no similar letters expressed concern for the destruction of a “perfectly good Cadillac.”²⁶² Although cases like *Corso* and *Brand* demonstrate the judicial system’s growing

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ Hankin, *supra* note 67, at 344.

²⁵⁹ 844 F. Supp. 151, 158 (S.D.N.Y. 1994). *See also* Rebecca J. Huss, *Valuation in Veterinary Malpractice*, 35 LOY. U. CHI. L.J. 479, 527 n.282 (2004) (listing a variety of cases that demonstrate how various courts have rejected or entertained the possibility of a recovery for loss of animal companionship).

²⁶⁰ Hankin, *supra* note 67, at 353.

²⁶¹ *Id.* at 354.

²⁶² Waisman, *supra* at note 63, at 56.

“discomfort” with traditional legal conceptions of animals as property,²⁶³ no case has produced any substantial “precedential weight.”²⁶⁴

When grieving pet owners invoke the tort theory of emotional distress or loss of companionship (consortium), they move firmly beyond the realm of fair market value. Many jurisdictions struggle with the issue of whether an owner may sue under the tort theory of emotional distress if the distress arises from harm to a companion animal.²⁶⁵ Some jurisdictions allow recovery for the *intentional* infliction of emotional distress upon the pet owner, but not for negligent distress arising from harm to an animal.²⁶⁶ These jurisdictions reason that “the affection of a master . . . is a very real thing.”²⁶⁷ Other states disallow recovery for both intentional and negligent infliction of emotional distress, reasoning that “owners cannot recover for emotional connections to their property.”²⁶⁸ Although Tennessee has a statutory provision for recovery under the T-Bo Act, pet owners or caretakers also need access to “private, civil measures which deter wrongful acts and compensate the victims.”²⁶⁹ Moreover, although the T-Bo Act caps damages at \$5,000, some courts in other states have permitted compensatory damages in emotional distress cases that are ten times that amount.²⁷⁰

In states that recognize a claim for emotional distress arising from injury to a pet, recovery is fact-dependent. In *Ivey v. Hamlin*, for example, a Tennessee appellate court held that onlookers could not recover for intentional infliction of emotional distress when they witnessed a

²⁶³ Hankin, *supra* note 67, at 319.

²⁶⁴ *Id.* at 347.

²⁶⁵ Byszewski, *supra* note 242, at 220.

²⁶⁶ *Id.* See also *Gluckman v. American Airlines, Inc.*, 844 F. Supp. 151, 157-58 (S.D.N.Y. 1994) (holding that a pet owner could recover for intentional infliction of emotional distress if the “conduct” against the pet was “directed intentionally” to make the pet owner suffer, but that a pet owner could not recover for negligent infliction of emotional distress because the court discredits distress that arises from the pet owner being a bystander who witnesses pain suffered by his or her “property”).

²⁶⁷ Jay M. Zitter, Annotation, *Recovery of Damages for Emotional Distress Due to Treatment of Pets and Animals*, 91 A.L.R.5TH 545, 556 (2001).

²⁶⁸ *Id.*

²⁶⁹ Waisman, *supra* note 63, at 65.

²⁷⁰ *Burgess v. Taylor*, 44 S.W.3d 806, 814 (KY Ct. App. 2001).

police officer executing their neighbor's loose bulldog.²⁷¹ Intentional infliction of emotional distress arises when the conduct is done intentionally and is "so outrageous in character and so extreme in degree as to be beyond the pale of decency . . . in a civilized society. . . ."²⁷² In this case, the dog behaved aggressively toward the police officer and the owner ignored warnings that he needed to control the dog.²⁷³

In contrast to *Ivey*, courts have allowed for the potential of recovery for emotional distress in cases with markedly different fact patterns. In *Brown v. Muhlenberg Tp.*, the court reversed the trial court's grant of summary judgment for the defendant in a case brought by the owners of a Rottweiler, Immi, who had been shot by a police officer.²⁷⁴ Immi had escaped from her fenced yard and was wandering through a neighboring parking lot when a police officer stopped to investigate.²⁷⁵ Immi did not show any signs of aggression, and the owners acknowledged ownership and attempted to claim the dog, but the police officer nevertheless chose to shoot Immi.²⁷⁶ The court held that a recovery for intentional infliction of emotional distress was possible, rejecting the defendant police officer's argument that "the killing of a pet under any circumstances would not be recognized . . . as extreme or outrageous."²⁷⁷ The court based its conclusion in part on "the strength of community sentiment against at least some forms of animal abuse and the substantial emotional investment that pet owners frequently make in their pets."²⁷⁸

In veterinary malpractice, the interplay of economic and non-economic damage is shifting in a manner that echoes the changes that we have already seen in cases that involve loss of

²⁷¹ *Ivey v. Hamlin*, No. M2001-1310-COA-R3-CV, 2002 WL 1254444, at *3 (Tenn. Ct. App. June 7, 2002).

²⁷² *Id.* at *3.

²⁷³ *Id.* at *1, *5.

²⁷⁴ 269 F.3d 205, 208 (3d Cir. 2001).

²⁷⁵ *Id.* at 209.

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 217-18.

²⁷⁸ *Id.* at 219.

companionship and emotional distress. Veterinarians worry about increases in malpractice cases and damage awards, while pet owners complain that current remedies do not adequately reflect the human-animal bond.²⁷⁹ While the traditional veterinary malpractice recovery was limited to economic damages based on fair market value, it is increasingly evident that fair market value is simply an impractical and inaccurate measuring tool in calculating damages for injuries to or the loss of some animals.²⁸⁰ Furthermore, preservation of economic value is not necessarily the primary goal of tort law.²⁸¹ Courts have begun to face assertions that emotional distress, punitive damage, and loss of companionship are legitimate measures of damage in pet cases.²⁸² Furthermore, veterinary malpractice may mimic the progression of medical malpractice, where cost-benefit analysis, such as that suggested by Learned Hand, gave way to “a professional paradigm approach” where “[t]he standard of care . . . would rest upon the collective cost-benefit judgments of the professional community.”²⁸³

3. Pets in Family Law: Pet Custody Battles

Of late, increasing attention has been paid to pet custody battles. Kathy Hessler suggests that divorcing couples use mediation to determine custody of their pets in order to avoid the court system, which is often unsympathetic and refuses to mediate between the parties concerning any sort of visitation rights pertaining to pets.²⁸⁴ Unfortunately, if private mediation fails, the couple may nevertheless find themselves in the courthouse. In a Pennsylvania case, for

²⁷⁹ Rebecca J. Huss, *Valuation in Veterinary Malpractice*, 35 LOY. U. CHI. L.J. 479, 500 (2004).

²⁸⁰ *Id.* at 514; Joseph H. King, *The Standard of Care for Veterinarians in Medical Malpractice Claims*, 58 TENN. L. REV. 1, 24-28 (1990) (noting that different animals within the same species or breed could vary greatly in value, some animals would have absolutely no economical value, and economic value fails to consider how a veterinarian’s treatment often depends on what the owner instructs the veterinarian to do).

²⁸¹ Huss, *supra* note 279, at 550 (“Limiting damages to economic value . . . fails to support the general tort goals of deterrence of wrongful acts, appropriate compensation of victims, and affirmation of societal values”).

²⁸² *Id.* at 517-27.

²⁸³ King, *supra* note 280, at 7, 10-11. For Learned Hand’s formulation, *see* U.S. v. Carroll Towing Co., 159 F.2d 169, 173, 173 (2d Cir. 1947) (liability attaches when “the burden of adequate precautions” is less than the probability of the harm multiplied by “the gravity of the resulting injury”).

²⁸⁴ Hessler, *supra* note 180, at 49.

example, a divorcing couple made a written agreement that purported to give custody of the couple's dog to the wife while reserving visitation rights to the husband, although "[t]he 'Agreement' was never incorporated or merged into the Divorce Decree."²⁸⁵ The ex-husband later sued when the ex-wife violated this "Agreement".²⁸⁶ In dismissing the complaint, the trial court emphasized that "any terms set forth in the Agreement are void to the extent that they attempt to award custodial visitation with or shared custody of personal property."²⁸⁷ Most courts assert that disputes over pets are simply property disputes, so that any consideration of the "best interests" of the animal are inappropriate.²⁸⁸

If judicial reasoning continues to evolve, however, courts may become sympathetic to parties filing claims for the resolution of animal custody issues. In a Tennessee case, for example, the judge ruled that dogs at issue in one dispute should remain in the house and neighborhood where they had spent their entire lives, echoing the type of reasoning often used in child custody cases.²⁸⁹ The judge appeared to be sympathetic to the views of many animal rights activists who urge that custody battles for pets should be "based on . . . who has formed a closer bond to the animal, or who can provide a better home for it"²⁹⁰ instead of focusing on property ownership as determined through receipts for purchase and veterinary care.²⁹¹

Determining ownership of an animal for purposes of custody disputes is often difficult. In cases involving married parties, community property issues complicate already murky applications of traditional property law. While the assignment of ownership based on the best

²⁸⁵ *Desanctis v. Prichard*, 803 A.2d 230, 231 (Pa. Super. Ct. 2002). For a discussion of this case, see Hankin, *supra* note 67, at 323.

²⁸⁶ *Desanctis v. Prichard*, 803 A.2d 230, 231 (Pa. Super. Ct. 2002).

²⁸⁷ *Id.* at 232.

²⁸⁸ Paek, *supra* note 251, at 505.

²⁸⁹ Ann Hartwell Britton, *Bones of Contention: Custody of Family Pets*, 20 AM. ACAD. MATRIM. LAW 1, 15 (2006).

²⁹⁰ Hankin, *supra* note 67, at 387.

²⁹¹ Britton, *supra* note 289, at 4.

interests of the animal could be an appropriate method in domestic violence situations,²⁹² in most jurisdictions, the traditional approach to ownership determinations is still the law. Accordingly, traditional property ownership concepts continue to be the basis for educating abuse victims as they consider fleeing from a violent home. For example, one HSUS informational sheet instructs battered women that they can prove ownership of their pets by producing “[a]n animal license, proof of vaccinations, or veterinary receipts” in their names.²⁹³

D. Bailment and Damages for Conversion of Property in a Safe Haven Context

Bailments involving animals raise particularly thorny issues at the intersection of the traditional and progressive conceptions of animals as property. Bailment is the “delivery of personal property by one person (the bailor) to another (the bailee) who holds the property for a certain purpose under an express or implied-in-fact contract.”²⁹⁴ A bailment is neither a gift nor a conveyance of title; the bailee takes possession of the property, but title and the right to recover possession remain with the bailor.²⁹⁵ Thus, Tennessee law (like the law of other U.S. jurisdictions) holds that property delivered by a bailor to a bailee “shall be re-delivered to the person who delivered it or otherwise dealt with according to his direction or kept until he reclaims it.”²⁹⁶ The bailor has a cause of action against the bailee for conversion if the bailee “fail[s] or refus[es], inconsistent with the bailment contract, to return the property. . . .”²⁹⁷

Tennessee also recognizes that a bailment is contractual in nature (centering on an express or

²⁹² Gentry, *supra* note 62, at 115. Yet we must carefully avoid standards that could result in ownership being assigned to the abuser, such as if ownership were based on who had formed the closest bond with the animal.

²⁹³ SAFE HAVENS, *supra* note 141, at A-66.

²⁹⁴ BLACK’S LAW DICTIONARY 151 (8th ed. 2004); *see, e.g.*, Merritt v. Nationwide Warehouse Co., 605 S.W.2d 250, 252 (Tenn. Ct. App. 1980) (“A bailment is a delivery of personalty for a particular purpose or on mere deposit, on a contract expressed or implied, that after the purpose has been fulfilled, it shall be re-delivered to the person who delivered it or otherwise dealt with according to his direction or kept until he reclaims it.”); 1 TENN. JURIS., Bailments, §2 n.18 (2004) (providing a list of Tennessee cases that affirm this definition).

²⁹⁵ BLACK’S LAW DICTIONARY 151 (8th ed. 2004).

²⁹⁶ Aegis Investigative Group v. Metropolitan Government of Nashville and Davidson County, 98 S.W.3d 159, 163 (Tenn. Ct. App. 2002).

²⁹⁷ 8A AM. JUR. 2D *Bailments* § 239 (2008).

implied agreement between the bailor and the bailee), but that a legally valid and enforceable contract is not required to create a legally valid an enforceable bailment.²⁹⁸ For instance, a quasi-contract might suffice, and a bailment may be created by operation of law in certain circumstances.²⁹⁹ There are various types of bailment. Of particular importance in animal care is a gratuitous bailment for the benefit of the bailor, which is in the nature of a caretaking arrangement for the property of the bailor in which “the bailee receives no compensation.”³⁰⁰

Problems often arise concerning the bailee’s duty of care in relation to the property.³⁰¹ Traditionally, the bailee had a duty of ordinary care in a bailment for mutual benefit, strict liability in a gratuitous bailment for the bailee’s benefit, and “slight care” in a gratuitous bailment for the bailor’s benefit.³⁰² In Tennessee, for example, a bailee in a gratuitous bailment for the benefit of the bailor is liable only for gross negligence or bad faith.³⁰³ This likely means that, in regard to living property, the bailee generally must provide life necessities such as food, water, and shelter, while also avoiding “action or inaction which could foreseeably result in injury to the bailed property.”³⁰⁴

Accordingly, the law does not require “a higher or different duty of care” when “the bailed property is a living, sentient creature”³⁰⁵ Animals involved in bailments are typically treated in the same way that inanimate, unsentient property is treated, in accordance with the traditional conception of animals as property.³⁰⁶ Pet owners enter into myriad bailment

²⁹⁸ *Aegis Investigative Group*, 98 S.W.3d at 163.

²⁹⁹ *Id.*

³⁰⁰ BLACK’S LAW DICTIONARY 152 (8th ed. 2004).

³⁰¹ David Favre, *Bailments* 56 in ANIMALS: WELFARE, INTERESTS, AND RIGHTS (Animal Law & History Web Center 2003).

³⁰² *Id.*

³⁰³ *Marshall v. Nashville R. & L. Co.*, 118 Tenn. 254, 257 (1907); *Tulane Hotel Co. v. Holohan*, 112 Tenn. 214 (1904); *Whitemore v. Haroldson*, 70 Tenn. 312, 315 (1879); *Colyar v. Taylor*, 41 Tenn. 372, 379 (1860).

³⁰⁴ *Id.* Favre suggests that a better approach is simply “that the duty of care is to provide the level of care appropriate to all the surrounding circumstances,” which is a fact-intensive inquiry. [cite]

³⁰⁵ Francione, *supra* note 98, at 52.

³⁰⁶ *Id.*

situations concerning their pets, by (for example) leaving a pet at a veterinary hospital for a surgery or boarding a pet at a kennel during a vacation. Many of these arrangements are bailments for the mutual benefit of the bailor and the bailee. In addition, a human victim of domestic violence enters into a bailment arrangement (a gratuitous bailment for the benefit of the bailor) when she asks a safe haven shelter to house and care for her pet for a limited amount of time while she is in a shelter that admits only humans. The solution we offer in Part III of this article works with this property law concept.

Bailments involving animals, like custody battles involving animals, raise issues about ownership, since bailors typically are owners or agents of owners (and bailees often want to ascertain the bailor's ownership before accepting the subject property for safekeeping). However, a huge amount of uncertainty exists in this area of the law, as revealed by the responses in Dr. Ascione's survey of shelters that provided services for the pets of domestic violence victims.³⁰⁷ After a brief description of responses he received, Ascione concluded that "specific recommendations are not possible given the current lack of consensus about how to deal with pet ownership issues."³⁰⁸ The lack of clear legal guidance does a disservice to both human and nonhuman victims of violence.

One animal shelter in Ascione's survey indicated that ownership only became an issue if pets were not reclaimed or would otherwise need long-term arrangements.³⁰⁹ Most shelters indicated that they informed women that they would lose ownership of their pets if they failed to reclaim them at the end of the agreed-upon sheltering time, many even requiring the women to sign a form acknowledging this possible eventuality.³¹⁰ Some shelters assumed that the animal

³⁰⁷ See *supra* note 293 and accompanying text. Proof of ownership of personal property can be tricky.

³⁰⁸ SAFE HAVENS, *supra* note 141, at 40.

³⁰⁹ *Id.* at 38.

³¹⁰ *Id.* at 36.

became the property of the shelter upon entry, which seems to indicate a misunderstanding of the nature of a bailment, while others thought that they would have to return the pet to the abuser if he came for it.³¹¹

Legal guidance is especially murky when a victim and her abuser contest pet ownership and a shelter must decide upon a course of action. Clearly, a woman can relinquish a pet or place it in a sheltering program if she is the sole legal owner.³¹² Yet legal ownership of an animal is not always easily discerned, which could have ramifications when a victim of violence attempts to remove a pet from an abusive home or when the pet is in sheltering. Exclusive possession over an extended period of time creates a rebuttable presumption of ownership,³¹³ but such a circumstance does not exist when abusers, human victims, and pets have been living together in a single household. Legal guidance is sparse when the animal in question has been in the possession of both parties who claim ownership. In a case involving a prized show dog that was being shown by the defendants with the plaintiff's permission, an Illinois court held that a certificate of registration that listed the defendants as co-owners created only a presumption of co-ownership that was rebutted by the "demeanor of witnesses" that suggested that the plaintiff had never intended to relinquish sole ownership of the dog when the certificate was created.³¹⁴ Thus, written documents are not a full-proof way to establish ownership, and the issue could instead depend on the credibility of the parties.

Most shelters surveyed by Ascione did not know whether a woman could relinquish a pet when she was a co-owner or the abuser was the sole owner of the animal.³¹⁵ Among the animal shelters that responded to Ascione's survey, 30% believed that a co-owner could relinquish a pet,

³¹¹ *Id.* at 38-39.

³¹² *Id.* at 40.

³¹³ *Beard v. Mossman*, 19 A.2d 850, 851 (Pa. Sup. Ct. 1941).

³¹⁴ *Buczkwicz v. Lubin*, 399 N.E.2d 680, 682 (Ill. App. Ct. 1980).

³¹⁵ SAFE HAVENS, *supra* note 141, at 38.

while 40% believed that she could not.³¹⁶ In a cotenancy of either real or personal property, cotenants have “unity of possession” under “more than one distinct title” so that each cotenant has full title and the right of possession, making it so that no cotenant can exclude any other cotenant from the property.³¹⁷ Accordingly, where a pet is co-owned by a victim of domestic violence and her abuser, neither, alone, can relinquish ownership of the pet.

Current law provides so little guidance in part because of the paucity of cases that exist in these fledgling areas of the law. Few Tennessee cases have dealt with bailment in an animal abuse situation. One noteworthy case, however, is *Largin v. Williamson County Animal Control Shelter*. Williamson County seized animals from the plaintiff’s home as part of animal abuse proceedings that the state had initiated against her.³¹⁸ The plaintiff was eventually convicted of animal abuse³¹⁹ and then initiated a proceeding against the animal shelter when it refused to return the animals to the plaintiff. By refusing to return the animals, the plaintiff alleged that the defendant animal shelter committed conversion and/or negligent bailment.³²⁰ The lower court dismissed the case on a technical matter based on a failure to state a claim upon which relief can be granted,³²¹ because the complaint did not allege that the tort was caused by a government employee behaving negligently within the scope of his employment as is required under Tennessee law.³²² In deciding the case, the appellate court (like the trial court) never reached the

³¹⁶ SAFE HAVENS, *supra* note 141, at 38.

³¹⁷ 20 AM. JUR. 2D *Cotenancy and Joint Ownership* §§ 1-2 (2008).

³¹⁸ *Largin v. Williamson County Animal Control Shelter*, No. M2005-01255-COA-R3-CV, 2006 WL 2619973, at *1-2 (Tenn. Ct. App. Sept. 12, 2006).

³¹⁹ *State v. Siliski*, 238 S.W.3d 338, 343 (Tenn. Crim. App. 2007).

³²⁰ *Largin v. Williamson County Animal Control Shelter*, No. M2005-01255-COA-R3-CV, 2006 WL 2619973, at *2 (Tenn. Ct. App. Sept. 12, 2006).

³²¹ *Id.*

³²² *Id.* at *4.

validity or enforceability of the bailment itself. Instead, it affirmed the lower court's dismissal based on the procedural requirements in Tennessee law.³²³

As inadequate and incomplete as property law may be in this context, it continues to govern the legal relationship between humans and their pets. As a result, under current safe haven arrangements, a human domestic violence victim (as bailor) who shelters her animal in a safe haven program (as bailee) has a legitimate expectation under the law that she will recover possession of her animal on request. This arrangement exists solely for the benefit and subject to the control of the human victim. The health, welfare, and interests of the nonhuman animal, objectively determined, are not accounted for in current bailments of this kind. Even if safe haven shelter or social services professionals reasonably believe that an animal is in danger of being abused if he or she is returned to the owner, bailment law provides that the animal must be returned.

Public policy and legal considerations outside the bailment context, however, provide a basis for rethinking the bailment relationship between domestic violence victims and safe haven shelters. Documented connections between human and animal violence have focused attention on the need to include animals in the equation as a component of the family violence problem and as a means of solving that problem (or at least mitigating its effects).³²⁴ The legal system already has reacted to this phenomenon with the inclusion of animals in protective orders, an increase in criminal penalties for animal abuse, and the adoption of human-animal abuse cross-reporting statutes.³²⁵ In addition, the law has begun to react to the changing nature of the human-pet bond by providing for non-economic tort damages for the death of a companion animal.³²⁶

³²³ *Id.* at *6.

³²⁴ *See supra* Part I.A.4.

³²⁵ *Id.*

³²⁶ *See supra* Part II.C.2.

Because bailment agreements are in contractual, it is possible to better incorporate this changing socio-legal landscape into bailment relationships between human domestic violence victims and safe haven shelters. Part III explores this idea.

III. SPECIAL BAILMENTS AS A SOLUTION TO THE SAFE HAVEN SHELTERING CONUNDRUM

A. A Proposal and its Legal Basis

Because bailments are in the nature of contracts, the bailor and bailee may create a “special bailment.” Whereas a general bailment requires that the property be “redelivered upon request,” in a special bailment the “ delivery to the bailee is upon some condition or term, or stipulation affecting and operating upon the redelivery.”³²⁷ If a pet-owning human domestic violence victim and a safe haven shelter together agree that the victim’s companion animal will be cared for by the shelter for a temporary period and that the shelter will return the pet, subject to the fulfillment of a specified term or the satisfaction of an express condition, that conditional bailment agreement should be enforced if challenged in court.

Exceptions to a court’s enforcement of a special bailment agreement of this kind under Tennessee law may include contract formation or enforcement defenses or public policy considerations. For example, the lack of legal capacity of the bailor pet owner (because of minority status or sufficiently impaired mental capacity) may render the bailment agreement void or voidable.³²⁸ In addition, the court may not enforce a safe haven bailment agreement if: the bailor pet owner enters into the agreement under legally recognized duress or subject to undue

³²⁷ 1 TENN. JURIS., Bailments, § 2 (2004); *see also* Aegis Investigative Group v. Metro. Gov’t of Nashville & Davidson County, 98 S.W.3d 159, 162-163 (Tenn. Ct. App. 2002) (“A bailment is a delivery of personalty for a particular purpose or on mere deposit, on a contract expressed or implied, that after the purpose has been fulfilled it shall be re-delivered to the person who delivered it *or otherwise dealt with according to his direction* or kept until he reclaims it.” (emphasis added)); *Merritt v. Nationwide Warehouse Co.*, 605 S.W.2d 250, 252 (Tenn. Ct. App. 1980) (same); *Rhodes v. Pioneer Parking Lot, Inc.*, 501 S.W.2d 569, 570 (Tenn. 1973) (same).

³²⁸ *See* *Lowery v. Cate*, 108 Tenn. 54, 60 (1901) (noting that infancy is a good defense to a claim of breach of contract).

influence³²⁹ or is parted from her animal as a result of fraud,³³⁰ the agreement is found to be unconscionable;³³¹ or the conduct between the parties gives rise to a valid claim of estoppel.³³² In most cases, the availability of these formation and enforcement defenses can be limited by effective controls on the actions taken by the bailor and bailee.

Public policy in Tennessee supports the use of this kind of special bailment as a solution to the safe haven sheltering conundrum.

Unless a private contract tends to harm the public good, public interest, or public welfare, or to conflict with the constitution, laws, or judicial decisions of Tennessee, it does not violate public policy. The reverse is also true: A contract with a tendency to injure the public violates public policy.³³³

In determining what Tennessee public policy is, the Tennessee Supreme Court has stated that “[p]ublic policy in Tennessee ‘is to be found in its constitution, statutes, judicial decisions and applicable rules of common law.’ Although the determination of public policy is primarily a

³²⁹ See *Reed v. Allen*, 1988 Tenn. App. LEXIS 553, at *3-*4 (1988) (describing an application of the duress and undue influence claim under Tennessee law).

³³⁰ The effect of fraud on contracts and other transactions in Tennessee has been described as follows:

Fraud vitiates and avoids all human transactions, from the solemn judgment of a court to a private contract. It is as odious and as fatal in a court of law as in a court of equity. It is a thing indefinable by any fixed and arbitrary definition. In its multiform phases and subtle shapes, it baffles definition. It is said, indeed, that it is part of the equity doctrine of fraud not to define it, lest the craft of men should find ways of committing fraud which might evade such a definition. In its most general sense, it embraces all “acts, omissions, or concealments which involve a breach of legal and equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.” A judicial proceeding *in rem*, while generally binding upon all persons, is no more free from the fatal taint of fraud than a proceeding in personam, or an individual contract. When once shown to exist, it poisons alike the contract of the citizen, the treaty of the diplomat, and the solemn judgment of the court.

Smith v. Harrison, 49 Tenn. 230, 242-243 (Tenn. 1871)

³³¹ In our view, the defense of unconscionability is unlikely to be raised (or, if raised, survive a motion for summary judgment) in a court action involving safe haven bailment agreement, since the bargain between the pet owner and the shelter is not likely to be so one-sidedly favorable to the shelter—or oppressive to the pet owner—that a court could find the agreement unconscionable. See *Haun v. King*, 690 S.W.2d 869, 872 (Tenn. Ct. App. 1984) (describing, in similar terms, the unconscionability defense in Tennessee).

³³² See *Callahan v. Middleton*, 41 Tenn. App. 21, 36 (Tenn. Ct. App. 1954) (setting forth the elements of an equitable estoppel claim).

³³³ *Spiegel v. Thomas, Mann & Smith, P.C.*, 811 S.W.2d 528, 530 (Tenn. 1991) (citations omitted).

function of the legislature, the judiciary may determine public policy in the absence of any constitutional or statutory declaration.”³³⁴

The Tennessee constitution provides “[t]hat no man shall be . . . deprived of his . . . property, but by the judgment of his peers or the law of the land.”³³⁵ However, the Tennessee State legislature and courts have provided that human animal owners may be deprived of their animals under certain circumstances. For example, human subjects of protective orders in Tennessee may be dispossessed of some or all of their ownership rights in a family pet.³³⁶ Moreover, a person convicted under Tennessee’s animal cruelty statutes may be required by the court to forfeit possession and ownership of the subject animal.³³⁷ In these cases, the court also “may prohibit the person convicted from having custody of other animals for any period of time the court determines to be reasonable, or impose any other reasonable restrictions on the person’s custody of animals as necessary for the protection of the animals.”³³⁸ In *State v. Webb*, 130 S.W.3d 799 (Tenn. Crim. App. 2003), the Tennessee Court of Criminal Appeals upheld the constitutionality of the reasonableness of the trial court’s imposition of a ten-year prohibition on ownership of any animals by the defendant, a person convicted of animal cruelty under Section 39-14-202 of the Tennessee Code Annotated.

Based on the foregoing legal analysis, we propose that safe haven shelters enter into written bailment agreements³³⁹ that expressly condition the return of companion animals to their

³³⁴ *Alcazar v. Hayes*, 982 S.W.2d 845, 851 (Tenn. 1998) (citations omitted).

³³⁵ TENN. CONST. ART. I, § 8.

³³⁶ *See supra* notes 100 and 101.

³³⁷ TENN. CODE ANN. §§ 39-14-202(e) & 212(e).

³³⁸ *Id.*

³³⁹ Many safe haven shelters already use written agreements to settle ownership of the pets during sheltering. In Francione’s survey, for example, 14 safe haven shelters (66.7% of the survey) had a policy that women “would lose custody or ownership of their pets if they failed to retrieve [them].” *See supra* note 310. At 6 of the shelters (30% of survey), “ownership was formally transferred to the animal welfare agency” upon the commencement of sheltering, while at 3 other shelters (15% of survey), pets were re-licensed so as to no longer appear in the woman’s name. *Id.* at 37-38.

owners on an objective determination that the pet is not returning to a household that puts the pet at significant risk of physical, mental, or emotional harm. That objective determination may be made by the shelter itself or by an independent third party (acting in the nature of “animal protective services” or a guardian *ad litem*) and, in either case, should be based on information supplied to it in good faith by or on behalf of the owner in accordance with an established protocol. Because shelter personnel may be considered to be interested parties (perhaps having formed their own human-animal bonds with the companion animals under their care) in the decision-making process, it is preferable that an independent third party be designated to make the risk determination. The decision maker, the timing and nature of notices between the parties, the standard governing the decision, the evidentiary burdens, and the rest of the decision-making process should be delineated expressly in the written bailment agreement. [A sample form of special bailment provision is attached as Annex A.]

The procedure employed by safe haven shelters to effectuate the special bailment should be carefully designed and executed in a manner that best ensures the agreement will be determined to be a valid and enforceable contract if challenged. Accordingly, the safe haven shelter should, at a minimum, engage in the following steps in entering into and exercising its rights under the bailment agreement.

- Ensure that the pet owner who signs the agreement has the legal capacity to enter into a contract. She must be of the requisite age and have the requisite mental competence under applicable state law in order for a court to determine her to have the requisite legal capacity.³⁴⁰ Obtain documentary proof, if it is available or can be obtained.

³⁴⁰See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 12(2) (1981) (stating that a “natural person” has “full legal capacity to incur contractual duties” unless she is: “under guardianship,” an “infant,” “mentally ill or defective,” or “intoxicated”); 17 C.J.S. *Contracts* § 32 (“The first element of a contract is that the parties have the capacity to contract . . . The capacity to contract involves a person’s inability to understand the terms of an agreement, and not

- Ensure that the pet owner does not feel threatened or intimidated into signing the agreement by any words spoken or actions taken directly or indirectly by the safe haven shelter or any intermediary (e.g., a social worker working with the pet owner).
- Discuss and document all facts about violence to the pet, threats made against the pet, violent behavior directed toward the pet, in addition to basic health and care information.
- Read and describe the standards associated with release of the pet to the owner.³⁴¹

Clarify that the animal may not be returned to the owner under the circumstances outlined in the agreement and that the owner surrenders ownership of the pet to the shelter under those circumstances. Offer standard examples of situations that allow for return of a pet to its owner and of situations that do not allow for return.

These steps (and, as necessary, others specific to the shelter) should be set forth in a written protocol that is used by the shelter each time it enters into a safe haven agreement with a pet owner. Other steps specific to the pet owner and related circumstances may be added to the protocol in discrete cases. Any additions of this kind should be documented in writing and included with the file for the resulting agreement.

B. Possible Extralegal Concerns with the Proposal

The proposal we outline in Part III.A. is not without drawbacks. Paramount among them are the effects of the agreement (and the execution of its terms and provisions) on the mental and

his actual understanding.”); 17 C.J.S. *Contracts* §133(1)(e) (“The test of mental capacity to contract is whether the person in question possesses sufficient mind to understand, in a reasonable manner, the nature, extent, character, and effect of the act or transaction [T]o invalidate his contract it is sufficient to show that he was mentally incompetent to deal with the particular contract in issue”); *Roberts v. Roberts*, 827 S.W.2d 788, 791 (Tenn. Ct. App. 1991) (stating that “[n]o published Tennessee authority is found which defines degree of mental capacity required to invalidate a contract,” but quoting with approval the above language from 17 C.J.S. *Contracts* §133(1)(e)).

³⁴¹ Of course, the shelter should review all of the terms of the arrangement with the pet owner to ensure that she understands all aspects of the arrangement. But we recommend reading

emotional state of the human owner—a victim of domestic violence—and on the social workers that serve them. This section addresses these two critiques of our proposal.

Based on the touching human-pet bond described in Part I, one could argue that it is in the human victim's best interests to keep her pet. Often, the pet is the only source of unconditional love and constancy that the woman has.³⁴² Furthermore, research on domestic violence has revealed that leaving a domestic violence situation is a process, meaning that these human victims rarely make a sudden and complete break from their abusers. In a study conducted in 1983, for example, 50% of the victims who fled to a shelter returned to their abusers.³⁴³ Instead of seeing this return as a "failure," however, the authors of the study cast the stay at the shelter as "part of the process of gaining independence."³⁴⁴ These women return to their violent homes with new insights and knowledge, so that the time at the shelter was in fact quite useful.³⁴⁵ One could therefore argue that it would be detrimental for these women to lose their pets in this situation. Perhaps some women would refuse to come to the shelter at all, and would thus never get a chance to begin the process of growth and understanding that could ultimately help them leave their abusive situations. Or, even when special havens and abuse victims create valid special bailment agreements, a victim could experience a host of unhealthy reactions if the situation were to develop so that the victim had to relinquish her pet. These unhealthy reactions could include an increased sense of isolation, anger toward the special haven system, or distrust of the social workers who are tasked with helping abuse victims.

The process suggested in our proposal also may put additional pressure on social workers working with victims of family violence and create tensions with their obligation of

³⁴² *Woman's Best Friend*, supra note 6, at 174.

³⁴³ Kathleen J. Ferraro & John M. Johnson, *How Women Experience Battering: The Process of Victimization*, 30 *SOCIAL PROBLEMS* 325, 336 (1983).

³⁴⁴ *Id.*

³⁴⁵ *Id.*

confidentiality to their clients. Clinical social workers typically have stressful jobs.³⁴⁶ A 2007 study finds that the stress social workers suffer may subject them to a significant risk of secondary post-traumatic stress disorder.³⁴⁷ Social workers who provide services for domestic violence victims may be subject to unique types of stress, including vicarious traumatization.³⁴⁸ The unhealthy physical and emotional reaction to the stressors of clinical social work and related fields, which is associated with secondary post-traumatic stress disorder and vicarious traumatization, has also been termed “compassion fatigue.”³⁴⁹ This term was first used to describe “burnout in nurses exposed to traumatic work-related experiences,”³⁵⁰ but has now also been applied to doctors, social workers, veterinarians, and animal shelter workers. Their work requires these professionals “to feel the emotional needs and experiences” of their clients (human or animal), but this empathic response makes the caregiver susceptible to trauma.³⁵¹ Compassion fatigue is the result of “prolonged exposure to suffering” coupled with “traumatic memories” of “unresolved conflicts and distress” related to the suffering of clients.³⁵² A study of animal-care workers conducted by the HSUS between 2003 and 2004 found that about 68% of animal shelter workers surveyed were at “high” or “extremely high” risk of developing compassion fatigue, which could manifest itself through symptoms such as self-doubt, numbness, fear, depression,

³⁴⁶ Nat'l Assoc. of Social Workers, *Stress at Work: How Do Social Workers Cope?* (2008) (Membership Workforce Study); CHARLES R. FIGLEY & ROBERT G. ROOP, *COMPASSION FATIGUE IN THE ANIMAL-CARE COMMUNITY 2* (2006) (describing how social workers and workers in the animal-care community often engage with their clients “at the cost of [their] own care”).

³⁴⁷ Brian E. Bride, *Prevalence of Secondary Traumatic Stress among Social Workers*, 52 *SOCIAL WORK* 63 (2007); Shantih E. Clemans, *Understanding Vicarious Traumatization - Strategies for Social Workers*, 4 *SOCIAL WORK TODAY* 13 (2004).

³⁴⁸ Clemans, *supra* note 347, at [].

³⁴⁹ FIGLEY & ROOP, *supra* note 346, at 11.

³⁵⁰ *Id.* at 22.

³⁵¹ *Id.* at 12.

³⁵² *Id.* at 13.

hypervigilance, and sleep disturbances.³⁵³ Similarly, a recent survey conducted by the National Association of Social Workers indicates that 25% of social workers in child welfare/family practices experience sleep disorders, 37% report psychological problems, and 65% suffer from fatigue.³⁵⁴ Undoubtedly, social work and related fields produce highly stressful work environments, and, when reasonable, efforts should be made to avoid creating new policies that would further burden these workers.

Moreover, social workers, like psychologists and attorneys, have a professional obligation to keep client relations and communications confidential absent consent from the client or other compelling professional reasons.³⁵⁵ Tennessee law treats this confidential information as privileged to the same extent that psychologist-patient and attorney-client confidences are privileged.³⁵⁶ In all likelihood, a pet owner who chooses to place her pet in safe haven under our proposed form of special bailment would need to give consent to her social worker to supply necessary information to the person who is charged with determining whether the owner's pet can be returned to her under the terms of the bailment agreement (the shelter or the third-party decision maker).³⁵⁷ Under applicable ethical rules governing social workers, this requires that the social worker inform the client, "to the extent possible, about the disclosure of confidential information and the potential consequences, when feasible before the disclosure is

³⁵³ *Id.* at 23, 48. The study also noted that this percentage of at-risk animal shelter workers (about 68%) was much higher than the percentage of at-risk veterinarians (about 30%), presumably because there is more trauma present in animal shelters. *Id.* at 53, 64.

³⁵⁴ Nat'l Assoc. of Social Workers, *supra* note 346, at 5.

³⁵⁵ NAT'L ASSOC. OF SOCIAL WORKERS, CODE OF ETHICS § 1.07 (1996), *available at* <http://www.socialworkers.org/pubs/code/code.asp> (relating to "Privacy and Confidentiality") [hereinafter NASW CODE OF ETHICS].

³⁵⁶ TENN. CODE ANN. §§ 23-3-105 (attorney-client privilege), 63-11-213 (psychologist-patient privilege), 63-23-109 (social worker-client privilege); *Kirchner v. Mitsui & Co. (U.S.A.), Inc.*, 184 F.R.D. 124, 126 (M.D. Tenn. 1998).

³⁵⁷ The express exception allowing for disclosure of confidential information does not strictly apply here, since the "serious, foreseeable, and imminent harm" anticipated under the special bailment is not "to a client or other identifiable person," but rather to a companion animal. See NASW CODE OF ETHICS § 1.07(c) ("The general expectation that social workers will keep information confidential does not apply when disclosure is necessary to prevent serious, foreseeable, and imminent harm to a client or other identifiable person.")

made.”³⁵⁸ Workers must offer this information in addition to general counseling about “the nature of confidentiality and limitations of clients’ right to confidentiality.”³⁵⁹ The management of confidential information is therefore already complicated and burdensome for social workers, and the special bailment adds to that complexity and burden.

C. Potential Extralegal Benefits of the Proposal

Yet, the proposal we make in Part III.A. also may assist social workers and their clients in dealing with the difficult circumstances and decisions emanating from domestic violence. For example, the existence of a special bailment may provide the social worker with a means of helping the client to relieve additional stress associated with providing care to a companion animal as she attempts to better care for herself, and may provide the social worker with healthy additional leverage in communications with client victims of domestic violence. This section addresses these two potential benefits.

First, the removal of the animal victim could reduce the emotional trauma for both human and non-human victim. Domestic violence victims experience an emotional roller coaster that is similar in origin and manifestation to the phenomenon known as compassion fatigue, as described above in Part III.B. Compassion fatigue severely affects the work of these professionals, whether they be doctors, nurses, veterinarians, or animal shelter workers. Symptoms of compassion fatigue include “[a] sense of powerlessness,” “fear,” “numbness,” and the feeling of being on “[a]n emotional roller coaster.”³⁶⁰ It is quite striking that these are some of the same symptoms that describe the victims of domestic violence. Several studies, for

³⁵⁸ NASW CODE OF ETHICS § 1.07(d).

³⁵⁹ NASW CODE OF ETHICS § 1.07(e).

³⁶⁰ FIGLEY & ROOP, *supra* note 346, at 5.

example, have described the “climate of fear” experienced by the victims of violence.³⁶¹ One study found that women who chose to go to a shelter were actually more fearful than their counterparts who were not at shelters.³⁶² Women who reach out for help, which are the sort of women who shelter their pets while they themselves are in a shelter, are in a state of extreme fear. Battered women have been described as being in “a numbed shock,” while they may also experience a roller coaster of emotions ranging from happiness and excitement to anger and fear.³⁶³ Based on these emotional reactions, it seems that animal-care and healthcare professionals begin to experience the same sort of trauma that their patients experience. Just as animal-care professionals shut down in response to compassion fatigue, domestic violence victims might shut down and be severely hampered in their ability to rationally care for their pets. This numbness raises grave questions about the ability of these human victims to care for their pets, while it also raises the possibility that the separation of human and pet could help break the cycle of fear and numbness.

The possibility of breaking the cycle implicates the second possible benefit of relinquishment of the pet, which is the possibility that the special bailment agreement could provide healthy leverage that actually hastens the human victim along the emotional evolution that will ultimately compel the victim to leave the violent situation. Before victims become willing to sever a violent relationship, they must move from rationalization of the violence (a stage where the victims view the violence as “normal, acceptable, or at least justifiable”) to victimization (a stage where “a variety of catalysts” have forced the victim to “redefin[e] abuse”

³⁶¹ Alfred DeMaris & Steven Swinford, *Female Victims of Spousal Violence: Factors Influencing Their Level of Fearfulness*, 45 FAMILY RELATIONS 98, 98 (1996).

³⁶² *Id.* at 103.

³⁶³ Ferraro & Johnson, *supra* note 343, at 334-35.

and to no longer characterize the abuse as being acceptable).³⁶⁴ The catalysts that lead a victim to stop rationalizing the violence include: a sudden change in the level of violence, a change in resources for the victim, a change in the relationship with the batterer, the onset of despair, an increase in the public nature of the violence, and being confronted with external definitions of the violent relationship.³⁶⁵

The possible removal of the pet could trigger several of these dimensions of the victimization stage. One obvious example would be with respect to “the interjection of external definitions of abuse.”³⁶⁶ Ferraro and Johnson describe how victims react positively to “genuine concern” shown to them by others.³⁶⁷ This reasoning could be extended to a situation that involves the potential removal of the pet. The removal of the pet would highlight the level of concern that is felt by outside observers of the situation, which in turn might alter the paradigm in which the human victim views the violence. Similarly, despite a lack of “systematic research,” researchers emphasize that a child’s desire to leave an abusive situation has a dramatic impact upon a mother in her contemplation of leaving a violent home.³⁶⁸ Although pets cannot vocalize such desires, the forced relinquishment of the pet could be analogous to a child’s request not to return to a violent home.

Another example would be how women are propelled to act when they reach a point of despair and lose all hope that the situation will improve.³⁶⁹ Basically, the victim must hit rock bottom before she will leave a domestic violence situation.³⁷⁰ The possible or actual relinquishment of the pet could push the woman closer to the realization that she herself is a

³⁶⁴ *Id.* at 328, 331.

³⁶⁵ *Id.* at 331.

³⁶⁶ *Id.* at 332.

³⁶⁷ *Id.* at 333.

³⁶⁸ *Id.*

³⁶⁹ *Id.* at 332.

³⁷⁰ *Id.*

victim and that her situation will not improve unless she removes herself from the violent household. Specifically, a social worker could use the special bailment agreement as a tool in educating a domestic violence victim to the danger of returning herself, as well as any dependent children or nonhuman animals, to a violent household. Many social workers express frustration that they are not able to adequately portray for domestic violence victims the risks associated with a return to the very household in which they were subjected to violence.³⁷¹ The assessment and communication of potential harm to both children and pets (as well as potential harm to the victim herself) may help a victim of domestic violence in assessing the merits and risks of returning “home.”

CONCLUSION

The issues involved in situations involving family violence are multifaceted. As we learn more about them and begin to work at resolving them, additional issues present themselves for resolution. In the past ten years or so, a number of these emerging issues have arisen out of our increasing awareness of the link between animal violence and human violence in the home. As humans have developed closer, family-like relationships with their companion animals, these animals have been unwittingly brought into the cycle of family violence. Among other things, we now know that all of these living, sentient beings are at risk of harm as dependents of a perpetrator of domestic violence.

Both the social service system and the law have responded to changes in the conception of animals and their role in family violence. The development and operation of safe haven programs for the pets of domestic violence victims who are transitioning temporarily to shelter life is one of those responses. Overall, the installation of safe haven shelters for pets in these

³⁷¹See, e.g., HSUS, *supra* note 151, at 6 (acknowledging that a woman’s choice to return to an abusive home is “frustrating” to shelter staff);

circumstances has been a positive development. However, the potential that a domestic violence victim will reclaim her pet and return him or her to a violent household highlights a shortcoming in the social services system's response to family violence: nonhuman animal family members are left without advocates in the process. Although domestic violence victims and their children are assisted and protected by specialized counselors, the companion animals in these households continue to be treated not as family members but rather as inanimate, un sentient property. While this has been the historic legal conception of pets, law has begun to acknowledge that this conception is outdated.

We suggest that practices, if not the law, need to evolve further to protect companion animals involved in family violence situations and disputes. In particular, we propose that a special (conditional) bailment be used by animal safe haven shelters when they take in and care for the pets of domestic violence victims. This bailment would prevent return of the pet to its owner if the pet would be at significant risk of physical, mental, or emotional harm. Through the condition and the essential related practices, animals who have witnessed or been victims of domestic violence receive some protection—protection at a level commensurate with their position as nonhuman family members.