Is friendship possible for the animal or between animals? Like Aristotle, Heidegger would say: no. Do we not have a responsibility toward the living in general? The answer is still “no,” and this may be because the question is formed, asked in such a way that the answer must necessarily be “no” according to the whole canonized or hegemonic discourse of Western metaphysics or religions, including the most original forms that this discourse might assume today . . . 1

Jacques Derrida

The idea of “legal personhood” for animals is theoretically interesting but far removed from the legal or practical reality of animals in the United States. Most animals are not protected by law at all, let alone recognized as

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legal persons. All states have anticruelty statutes, but those statutes do not protect the vast majority of animals or constrain to any meaningful extent the infliction of horrific suffering on animals.\(^2\) Through exemptions for common practices attendant to research, entertainment, and food production, most owners of most animals completely escape the reach of state anticruelty law.\(^3\) Common practices and activities involving unowned animals, such as pest control\(^4\) and hunting,\(^5\) are generally exempt as well.\(^6\) Thus, state anticruelty statutes protect only very few kinds of animals, and those animals are protected only from certain acts of gratuitous violence too shocking for prosecutors to ignore.

As Professor Gary L. Francione has persuasively argued, this is because anticruelty statutes criminalize only those acts that inflict suffering on animals “unnecessarily.”\(^7\) As long as an individual or entity can justify as necessary the infliction of suffering on animals, that infliction of suffering is beyond the reach of state anticruelty laws, regardless of the type and degree of suffering animals experience.\(^8\) The threshold for finding “necessity” is

\(^{2.}\) See GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 134-60 (1995) [hereinafter FRANCIONE, ANIMALS, PROPERTY, AND THE LAW] (discussing how some state anticruelty laws require proof of a particular mental state, contain broad exemptions for activities that traditionally involve animal suffering and death, prohibit only activities involving “unnecessary” or “unjustified” cruelty, and impose only minor penalties for violation); see also Darian M. Ibrahim, The Anticruelty Statute: A Study in Animal Welfare, 1 J. ANIMAL L. & ETHICS 175, 176, 179-81 (2006).


\(^{5.}\) See, e.g., CAL. PENAL CODE § 599c (West 1999); GA. CODE ANN. § 16-12-4(c) (2007); MICH. COMP. LAWS ANN. § 750.50(11)(b) (West Supp. 2008); N.J. STAT. ANN. § 4:22-16(c) (West 1998).

\(^{6.}\) CURNUTT, supra note 3, at 77-79; WAISMAN, FRASCH & WAGMAN, supra note 3, at 474 (confirming that state anticruelty statutory exemptions cover classes of unowned animals as well as owned); Frasch et al., supra note 3, at 77-78.


\(^{8.}\) See FRANCIONE, ANIMALS, PROPERTY, AND THE LAW, supra note 2, at 142-43.
extremely low.\textsuperscript{9} Moreover, Francione observes, courts do not address the question of whether it is necessary to use animals, they address only questions about the necessity of particular acts in relation to the presumed entitlement of humans to use animals.\textsuperscript{10} For instance, the presumed necessity of eating meat is not questioned, only the necessity of particular practices connected to the production of meat can be challenged. Since producers of animal products are allowed to define what acts are necessary, acts we know as a matter of common sense to cause intense suffering do not constitute cruelty as a matter of law.\textsuperscript{11} This is illustrated by legislation proposed by California State Assemblymember Lori Saldana in 2005.\textsuperscript{12} The proposed law would have prohibited killing specifically enumerated domestic animals through “burning, burying, grinding, drowning, rapid freezing, or suffocation.”\textsuperscript{13} That such a bill was necessary reveals the failings of anticruelty statutes and the extreme extent of owner prerogative. That the bill died in its first policy committee reveals the difficulty of addressing even those practices that cause horrific suffering.\textsuperscript{14}

The same is true at the federal level. There is an extensive body of federal law that concerns unowned wild animals,\textsuperscript{15} but federal law does not provide significant protection of owned animals any more than does state law.\textsuperscript{16} The few federal laws that exist narrowly define “animals” covered by the law, and the laws themselves do little for the animals they do cover. For instance, for decades the federal Animal Welfare Act (“AWA”)\textsuperscript{17} was

\textsuperscript{9} Id.

\textsuperscript{10} Gary L. Francione, Reflections on Animals, Property, and the Law and Rain Without Thunder, 70 Law & Contemp. Probs. 9, 10 (2007) [hereinafter Francione, Reflections].


\textsuperscript{13} Id.


\textsuperscript{16} Mariann Sullivan & David J. Wolfson, If It Looks Like a Duck . . . New Jersey, the Regulation of Common Farming Practices, and the Meaning of “Humane”, in Animal Law and the Courts: A Reader 95-97 (Taimie L. Bryant et al. eds., 2008).

\textsuperscript{17} 7 U.S.C. §§ 2131-2159 (2000).
interpreted to exclude mice, rats, and birds, despite the fact that these creatures constitute approximately ninety percent of the animals used in research.\(^{18}\) When advocates for animals finally convinced the Secretary of Agriculture to include mice, rats, and birds in the statutory definition of animals covered by the AWA, Congress amended the AWA to explicitly exclude them.\(^{19}\) Moreover, the AWA deals primarily with transportation and husbandry requirements, such as the size of cages in which animals used for research and exhibition are confined.\(^{20}\) And, as to these minimal requirements, enforcement of the AWA is limited to the United States Department of Agriculture (“USDA”),\(^{21}\) which does not prioritize inspections or enforcement of the AWA.\(^{22}\) Most importantly, the AWA does not create meaningful limitations on experimentation even in cases in which the procedures cause tremendous, obvious suffering.\(^{23}\) For example, it is completely legal to conduct “writhing tests,” in which chemicals are injected into the abdominal cavity of an unanaesthetized animal and then researchers count how often the animal writhes in pain over a five-minute period.\(^{24}\) These tests are performed on rats, mice, guinea pigs, dogs, cats, and primates in order to better understand abdominal pain in humans.\(^{25}\) Apparently, we spare no sentient creature—except humans, of course.

Similarly, the federal Humane Methods of Slaughter Act (“HMSA”)\(^{26}\) could be interpreted to provide for the humane slaughter of most animals slaughtered for food, but it has been interpreted to apply to only about five percent of the close to ten billion animals slaughtered for food in the United

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25. *Id*.
States each year. As written, the HMSA provides that animals covered by the HMSA should be rendered unconscious before they are killed and dismembered. As interpreted, there is no requirement to render unconscious 95% of those 10 billion animals killed for food each year in this country. Further, the HMSA does not provide for efficient enforcement mechanisms any more than does the AWA. Widespread violations of the HMSA, including the skinning and dismemberment of conscious animals, were reported by The Washington Post in 2001. As recently as January 30th, 2008, The Washington Post reported egregious violations of federal

27. See CURNUTT, supra note 3, at 169 (stating that ninety-five percent of animals slaughtered for food are not covered by the federal Humane Slaughter Act); Jeff Welty, Humane Slaughter Laws, 70 LAW & CONTEMP. PROBS. 175, 182-83 (2007) (discussing the limitations in scope of the Humane Slaughter Act); Wolfson & Sullivan, supra note 11, at 206 (reporting that as of 2004 approximately 9.5 billion animals are killed in the United States for food). It is difficult to get a completely accurate count of the number of animals slaughtered, although various scholars peg the number at 9.5 to 10 billion animals. See, e.g., Darian M. Ibrahim, A Return to Descartes: Property, Profit, and the Corporate Ownership of Animals, 70 LAW & CONTEMP. PROBS. 175, 182-83 (2007) (discussing the limitations in scope of the Humane Slaughter Act); Wolfson & Sullivan, supra note 11, at 206 (reporting that as of 2004 approximately 9.5 billion farm animals are slaughtered each year); Gaverick Matheny & Cheryl Leahy, Farm-Animal Welfare, Legislation, and Trade, 70 LAW & CONTEMP. PROBS. 325, 325 (2007) (“Around ten billion farm animals will be raised and killed in the United States this year—one million slaughtered per hour.”); Mariann Sullivan and David J. Wolfson, What’s Good for the Goose . . . The Israeli Supreme Court, Foie Gras, and the Future of Farmed Animals in the United States, 70 LAW & CONTEMP. PROBS. 139, 139 (2007) (“Approximately ten billion animals, excluding fish, are killed annually in the United States for food.”); Welty, supra, at 175 (stating that “in the United States, over nine billion chickens are killed each year for food, along with more than a hundred million pigs, and tens of millions of cattle”).


29. CURNUTT, supra note 3, at 169.

30. As with the AWA, enforcement of the HMSA resides with the USDA. 7 U.S.C. § 1907 (2000). For a description of enforcement mechanisms under the HMSA, see Welty, supra note 27, at 183-89. See also Victoria Kim, Questions Raised on Meat Safety, L.A. TIMES, Feb. 7, 2008, at B1 (noting that illegal abuse of cows at a Chino, California slaughterhouse occurred “under the noses of eight on-site USDA inspectors” and that the abuse was uncovered and reported by the Humane Society of the United States and not by those USDA inspectors).

31. Francione, Reflections, supra note 10, at 32 & n.108 (citing Joby Warrick, ‘They Die Piece by Piece’: In Overtaxed Plants, Humane Treatment of Cattle Is Often a Battle Lost, WASH. POST, Apr. 10, 2001, at A1) (naming the “story [as one] exposing widespread serious violations of the [Humane Slaughter] Act . . . . This report, which discussed incidents such as the skinning and dismemberment of animals who were still alive, made clear that the Act was doing little to alleviate the suffering of nonhumans being slaughtered and that the USDA was not enforcing the Act”).
law in a slaughterhouse subject to federal inspection. 32 Workers engaged in such illegal acts as the use of electric shock on various parts of cows’ bodies and use of high pressure water hoses to force water into the nostrils and mouths in attempts to force non-ambulatory cows to move. 33 These illegal acts were not reported by any of the eight on-site USDA inspectors charged with reporting violations of federal law; they were revealed as a result of an undercover investigation by the Humane Society of the United States. 34 If the limitations of slaughter law were not bad enough, there are no laws that prohibit practices that cause tremendous suffering to factory-farmed animals while they are being raised for food production. 35 In short, owners of animals, whether in laboratories, factory farms, or most other contexts, are no more impeded by federal law from inflicting tremendous suffering on animals than they are by state law.

There is widespread agreement among people educated about animals that animals are sentient, that animals suffer horribly from devastating human-inflicted injuries, and that legal protection is currently grossly inadequate. 36 The idea of “legal personhood” has considerable gravitational pull as a means for protecting animals because, regardless of the particular theory of legal personhood, the combination of words, at least, implies respect for animals as individuals who should receive more protection under the law than they currently receive. However, the starting point for legal reform—the legal status of animals as the property of humans—is so far


33. Id. On February 8, Weiss followed up with a report that the USDA had confirmed the abuse. Rick Weiss, Inspectors Verify Abuse of Cows in California; Mistreatment Was Captured on Video at Slaughterhouse, WASH. POST, Feb. 7, 2008, at A2. These violations specifically concern “downed” (non-ambulatory) cows, which the USDA has banned from being slaughtered for human food. Id. No other species of “downed” animal is covered by the USDA rules, and the rules do not require that downed animals be humanely euthanized. For an explanation of these rules and a description of legislation pending in Congress to expand legal protection to include other animal species and to provide for humane euthanasia of downed animals, see the summaries of the Downed Animal Protection Act, S. 1779, 109th Cong. (2005), http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN01779:@@@D&summ2=m&; H.R. 3931, 109th Cong. (2005), http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR03931:@@@D&summ2=m. California does have an anticruelty statute that covers other species of animals and requires prompt humane euthanasia of downed animals. CAL. PENAL CODE § 599f (West 1999). Therefore, the reported conduct at the Chino, California slaughterhouse violated both state and federal law.

34. Kim, supra note 30.


removed from a position of respecting animals that the term “legal personhood” is at this point only a vessel containing difficult legal and cultural questions. For that reason, there is no roadmap theory of legal personhood that can take us with certainty from the current situation of widespread, intense animal suffering to a future situation in which animals will not suffer from direct, devastating human-inflicted injuries. In fact, there is great divergence in opinion about the goal (autonomy or humane exploitation), the extent to which the status of property must be dismantled, the moral basis for recognizing animals’ interests in law, which of animals’ interests warrant legal protection, and the means by which animals’ interests should be recognized.

Against this backdrop, Part I of this article begins with consideration of two different definitions of legal personhood. The first is a broad definition: legal recognition of the extent to which animals should be considered “persons” entitled to inclusion in the moral community such that humans cannot commit acts on animals that humans cannot commit on equally situated humans. I briefly recount criticisms of this approach, which I have developed more fully elsewhere. Those criticisms include pragmatic and philosophical reasons to reject pursuit of a concept of “legal personhood” that requires endless, fruitless proofs that animals bear such substantial similarity to humans. Such attempted proofs fail for two reasons: 1) humans are heavily invested in defining themselves in opposition to animals; and 2) humans are equally heavily invested in using/consuming animals. Further, arguments that gain admission for a few, select animal species into the privileged and exalted company of humans only reinforce the hierarchy by which those few additional animal species can, through their human legal representatives, abuse and oppress other animal species that have not gained entrance to the moral community at the same time. Most significantly, playing the game of “tell me what about animals justifies curtailing my right to use them as I please” leaves unchallenged the presumption that humans are morally entitled to do whatever they please—the presumption that humans are the center of the universe and the measure of all worth.

The second definition of legal personhood I consider is quite narrow: legal standing as an “aggrieved person” entitled to sue to enforce laws enacted ostensibly to protect that aggrieved person from the harm he or she

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alleges. Pursuit of legal personhood in the form of legal standing need not result in the same fruitless attempted proofs of animals’ similarity to humans. Legal standing for animals could be considered simply as a pragmatic means of increasing humans’ compliance with human-made laws to protect animals by way of a procedural mechanism that does the least conceptual violence to traditional standing principles. Under this view, injuries ought to be brought to the attention of a court by those who are directly injured and not indirectly by those who care that another has been injured. After all, if animals are the intended beneficiaries of laws that purport to protect them and it is animals themselves who are harmed when those laws are violated, why should a human have to show harm derived from the harm done to an animal? In seeking to address the harm to an animal, it makes more procedural sense for a lawyer to say, “I am here representing a particular animal plaintiff who has been harmed by a particular human’s failure to provide food and water” than to say, “I am here representing a human plaintiff who has been harmed by another human’s failure to provide food and water to an animal.” The human plaintiff may have been injured, but the human’s injury is distinguishable from that of the animal. The idea that injured parties should have access to the courts to enforce existing law should, as a matter of logic, result in recognition of standing for both the human and the animal as to their respective injuries.

Pursuit of this narrow definition of legal personhood will be no more fruitful than a broad definition in producing meaningful change for animals if it only devolves into endless debate about whether animals are similar enough to humans to be entitled to standing before a court. Nor will it be fruitful if the result of legal standing is only further inscription of the property status of animals. If animals are recognized as plaintiffs but the result of litigation is that the laws themselves are interpreted as they currently are, then we will not have helped animals by giving them standing; we will have done no more than make them participants in their victimization. Moreover, we will have only increased the complacency with which people consume products made from animals or go about their business assuming that animals are adequately protected. Thus, the narrow definition of legal personhood (legal standing) has conceptual and instrumental meaning only if it interrupts the feedback loop between ideas of the superiority and entitlement of humans and the manifestation of those ideas in the legal status of animals as property.

Although there is recognition that the legal status of animals as the property of humans adversely affects the ability to impose constraints on human uses of animals that cause great suffering, several scholars contend that legal personhood of some kind is possible for animals even if animals
remain the legal property of humans. I do not find their arguments convincing for several reasons I describe in Part I. Among those reasons is the sheer enormity of the gap between our professed desire to protect animals and our failure to provide legal protection sufficient to prevent even the most horrific suffering inflicted on animals by the billions every year. Were that gap not so great, perhaps there could be room for argument about tinkering with the status of property or establishing legal personhood for animals in specific contexts. However, the gap is truly enormous: we do not treat animals badly; we treat them abominably. To date, no one has successfully refuted Professor Francione’s argument that the property status of animals accounts for that extreme gap between widespread, commonsense recognition of animals as sentient beings and the grossly inadequate legal means of protecting animals from even the most extreme types of human-inflicted suffering. When animals can be lawfully treated in ways that cause such great suffering for human ends, it is difficult to conceptualize them as “legal persons” under any definition of that term.

The reason that the legal status of animals as the property of humans has such a dramatic effect is that it rests so firmly on an ideology of humans’ presumed superiority to animals and humans’ presumed centrality in the natural world. Indeed, to some, the risk of decentering humans—challenging humans’ primacy at the top of a hierarchical world order—is reason enough to deny animals legal personhood. For instance, Professor Richard L. Cupp argues that elevating the standing of animals would diminish that of humans, thereby reducing human responsibility to care for animals appropriately.38

Among those legal scholars who do attempt to elevate the standing of animals, there is primary reliance on arguments that animals have particular attributes that make them worthy of respect, consideration, and protection.39 For reasons I describe in Part I, I do not rely primarily on that approach.

39. See Steven M. Wise, Drawing the Line: Science and the Case for Animal Rights 231-41 (2002) [hereinafter Wise, Drawing the Line] (justifying cognition as the appropriate line-drawing measure for inclusion in the moral community and illustrating how other species of animals will be included as their cognitive capacities are shown to be similar to that of humans); Steven M. Wise, Rattling the Cage: Toward Legal Rights for Animals 179-81 (2000) [hereinafter Wise, Rattling the Cage] (arguing that chimpanzees and bonobos should be recognized as legal persons on the basis of cognitive similarity to humans). See generally Gary L. Francione, Taking Sentience Seriously, 1 J. ANIMAL L. & ETHICS 1 (2006) [hereinafter Francione, Sentience] (arguing that sentience should be the only criterion for inclusion in the moral community).
Instead, I prefer to focus on the attributes of humans that make them so unwilling to accord even minimal respect to animals. In Part II, I make use of philosopher Jacques Derrida’s suggestion that humans maintain their hegemony and conceptual separation from animals by failing to include animals in the proscription “Thou shalt not kill.” Derrida asserts that as long as killing animals is not considered murder, animals will not be included among those to whom moral responsibilities are owed. The amorality of killing animals sustains a view of animals as sufficiently different from humans that concepts of justice are not offended when animals are exploited in ways that humans cannot be exploited. This line of thinking, in turn, justifies the status of animals as the legal property of humans and, at the same time, prevents animals from becoming legal persons. According to Derrida, it is morally imperative that humans correctly situate themselves in the world. He contends that sacrificing the sacrifice of animals is an important means to that end.

The word “sacrifice” takes on many meanings in Derrida’s work. In this article, I only borrow from his thinking, and I do so quite literally, for purposes of exploring what it might mean legally to curtail humans’ supposed “right” to kill certain owned animals. Both of my examples of sacrificing sacrifice concern companion animals: invalidation of testators’ will directives to kill their healthy companion animals and legislative prohibition of the immediate killing of healthy companion animals relinquished by their owners to animal shelters. I have chosen examples that concern companion animals partially because of the claim that these are animals already treated by many as “family members” instead of property. If anything, the examples I have chosen to explore in Part II (testators’ will

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40. See Derrida, “Eating Well”, supra note 1, at 112.
41. See id. at 112-13.
directives to kill their companion animals and owners’ relinquishing their companions to animal shelters with the request that they be killed) suggest that those claims are overstated. Additional evidence that the property status of companion animals remains strong is seen in the existence of puppy mills, cloning, and the legal availability of surgical mutilations, such as debarking, ear cropping, tail docking, and declawing, that serve only human interests. Professor Elizabeth DeCoux provides further evidence from prosecutions of animal cruelty in which those who burned and tortured dogs to death escaped serious punishment under anticruelty statutes but received much heavier penalties for arson, the destruction of another’s property by fire.46 Nevertheless, I think that the situation of companion animals is interesting and worth exploring in relation to the proposition that there may be some laws, if only a few, that provide an opportunity to challenge humans’ prerogative to do what they want with their property when that property is a companion animal.

Another reason I have chosen these examples is that they give rise to consideration of a notion of sacrifice that I find at once compelling and troubling. Both of the legal reforms I explore for their utility in decentering humans (invalidation of testators’ will directives and prohibiting the immediate killing of animals relinquished to animal shelters) involve sacrificing the idea that it is preferable for animals that they be “sacrificed.” Sacrificing sacrifice, we shall see, really does involve sacrifice on many levels. It means, among other things, prohibiting killing even when killing seems to the owner to be better for a loved animal than to be left in a world that does not treat animals well.

Finally, exploration of these two examples facilitates discussion of whether pursuit of legal standing for animals is necessary for purposes of decentering humans. Ultimately, I conclude that these two examples indicate that pursuit of direct legal standing for animals themselves is not always necessary to secure positive substantive changes in the law. Moreover, if pursuit of standing devolves into discussion about whether animals are sufficiently like humans to be treated as “persons,” such pursuit could be counter-productive to advocates’ ultimate goals. Nevertheless, because pursuit of direct legal standing for animals themselves is arguably the

46. Elizabeth L. DeCoux, Pretenders to the Throne: A First Amendment Analysis of the Property Status of Animals, 18 FORDHAM ENVTL. L. REV. 185, 191-96 (2007) (describing cases of cruelty where the perpetrator escaped serious punishment when prosecuted for cruelty, including two cases in which the penalties for burning dogs to death was far greater when prosecuted as arson cases rather than anticruelty cases).
procedural device that is parallel to the substantive goal of decentering humans, it may be worth pursuit in some cases.

I. DEFINITIONS OF LEGAL PERSONHOOD AND THE STATUS OF ANIMALS AS PROPERTY

In their pursuit of improved treatment of animals, legal scholars and advocates use two different definitions of legal personhood. One is quite broad: the extent to which animals have characteristics that make them so similar to humans that the law should recognize them as beings with interests that should be legally protected even in cases where protection of those interests conflicts with humans’ interests in using animals. Some contend that some animals are so cognitively similar to humans that it is unjust to exploit them in ways in which we would not exploit humans of similar cognitive capacity. Others argue that moral worth and legal personhood should turn on the capacity to suffer. Still others focus on the multiple capacities of animals and argue that society has a duty to allow full expression of the multiple capacities possessed by individual nonhuman, as well as human, animals.

Another definition of legal personhood for animals is quite narrow: legal recognition of animals as having standing as legally “aggrieved persons” for purposes of bringing lawsuits to enforce laws enacted ostensibly to protect them. In some respects, this definition contains elements of the broader

47. See Wise, Rattling the Cage, supra note 39, at 179-81.
50. See Elizabeth L. DeCoux, In the Valley of The Dry Bones: Reuniting the Word “Standing” with Its Meaning in Animal Cases, 29 WM. & MARY ENVTL. L.& POL’y REV. 681, 684 (2005) (contending that direct standing for animals already exists but that the standing doctrine is too confusing to be applied with rigor or consistency); Lauren Magnotti, Paving Open the Courthouse Door: Why Animals’ Interests Should Matter When Courts Grant Standing, 80 St. John’s L. Rev. 455, 495 (2006) (claiming that “[t]he idea that animals should
debate about animals as “persons.” For instance, if animals do not have cognitive capacity comparable to humans and cannot communicate their preferences, how could they direct attorneys representing them in court? If they are not “persons” as we understand that term generally, how can they be “aggrieved persons”? Nevertheless, this debate could remain focused on standing for animals as a means of correcting the problem of under-enforcement of laws enacted for the benefit of animals because of the argument that it makes most procedural sense for those directly injured by non-compliance with those laws (in this case, animals) to have standing to enforce those laws.

A. Litigation Against Primarily Primates, Inc., as an Introductory Illustrative Case

Aspects of both of these approaches to legal personhood for animals are illustrated by litigation regarding the care of nine primates held by Primarily Primates, Inc. ("PPI"), a nonprofit primate care facility. The lawsuit was commenced by seven chimpanzees and two capuchin monkeys (as represented by their attorneys). There are also three human plaintiffs identified as interested in the primate plaintiffs’ welfare. Plaintiffs are suing PPI for breach of a contract between Ohio State University ("OSU"), be protected if and only if a human being is adversely affected is antiquated, inhumane, and out of step with reality’); Sunstein, supra note 22, at 1336, 1367 (arguing that it is appropriate to expand legal standing for humans to protect animals and to create standing for animals directly).

51. See Sarah v. Primarily Primates, Inc., No. 04-06-00868-CV, 2008 WL 138080 (Tex. App. Jan. 16, 2008). The Texas Court of Appeals dismissed the lawsuit for lack of standing, and plaintiff-appellants’ request for rehearing was denied. Plaintiff-appellants’ next course of action is Texas Supreme Court review. Interview with Lisa Vance, attorney who represented plaintiffs before the trial court (April 30, 2008, 10:35 a.m. PST); Interview with Tom Crofts, appellate attorney representing plaintiff-appellants (April 30, 2008, 3:45 p.m. PST); E-mail from Tom Crofts to author (April 30, 2008, 5:07 PST) (on file with author).

52. Plaintiffs’ Second Amended Original Petition at 1, Sarah v. Primarily Primates, Inc., No. 1006-CI-06691 (Dist. Ct. of Bexar County, 73rd Judicial Dist. of Texas, May 4, 2006). The chimpanzees are Sarah, Keeli, Ivy, Sheba, Darrell, Harper, and Emma. Id. The two capuchin monkeys are Rain and Ulysses. Id. The chimpanzees whose deaths led to the lawsuit (Kermit, Bobby, and Lynn) are not named as plaintiffs. See id. at 5-6. The capuchin monkey who got lost from her enclosure (Jane) is also not named as a plaintiff. See id. at 6.

53. See id. at 3. Dr. Henry Melvyn Richardson, Stephany Harris, and Klaree Boose are the human plaintiffs. Id. Dr. Richardson is named plaintiff in his capacity as a veterinarian and a person interested in the welfare of the chimpanzees and capuchin monkeys. Id. Ms. Harris and Ms. Boose are named plaintiffs in their capacity as former OSU caretakers and persons interested in the welfare of the chimpanzees and capuchin monkeys. Id.
where the nonhuman primates ("primates") were utilized for cognition research, and PPI, where the primates were relocated when funding for the cognition research at OSU ran out. 54 According to the Second Amended Original Petition ("Petition"), OSU selected PPI as "an appropriate retirement facility" for the primates and entered into a written contract with PPI, whereby OSU would transfer the primates and $236,483.00 to PPI, which was to provide lifetime care to the primates.55

The primate plaintiffs are suing as third-party beneficiaries to the contract between OSU and PPI.56 The human plaintiffs are suing as humans who claim personal connection to the primates such that injuries to the primates constitute injuries to the human plaintiffs.57 They also claim that the payment of money from OSU to PPI should be treated as the creation of a "trust for the care of an animal," as provided under the Texas Property Code.58 The human plaintiffs claim standing under subdivision (b) of that statute,59 which allows enforcement of such a trust by a person with "an interest in the welfare of an animal that is the subject of a trust [for the care of an animal] authorized by this section."60

The Petition alleges heartrending facts in support of its claim that PPI is not providing adequate care to the primates. In addition to allegations about generally bad conditions for the primates, the Petition alleges the following facts about the deaths of three chimpanzees (Kermit, Bobby, and Lynn), the solitary confinement of another chimpanzee (Darrell), and the loss of one of the capuchin monkeys (Jane).61

By the time he reached the PPI facility in Texas, Kermit, a twenty-five-year-old male chimpanzee, had already spent sixty consecutive hours in a transport cage so small relative to his body size that he was forced to remain in a seated position the entire time.62 His confinement continued well into the next day because PPI had not made prior arrangements for transferring the primates safely into temporary enclosures immediately upon their arrival.63 Some eighty hours after he had been placed in his small transport cage and

54. Id. at 2.
55. Id. at 2.
56. Id. at 3.
57. See id.
58. TEX. PROP. CODE ANN. § 112.037 (Vernon 2007).
60. TEX. PROP. CODE ANN. § 112.037(b) (Vernon 2007).
61. Plaintiffs' Second Amended Original Petition, supra note 52, at 4-6.
62. Id. at 4-5.
63. Id.
while still seated in that same transport cage, Kermit was subjected to not one but three doses of ketamine and then left unattended. Ketamine is a chemical restraint and dissociative drug. The Petition alleges that Kermit died when, in this drugged state in which he could not control his movements, his head dropped against the cage door, thereby severely limiting or entirely cutting off his air supply.

For the preceding 23 years at OSU, Kermit had shared the same sleeping area with another chimpanzee named Darrell. Kermit and Darrell were supposed to be housed together at PPI. Like all the other OSU chimpanzees and monkeys, Darrell had been trained in communication and had maintained close social relationships with other animals in the same cognitive research program. However, at PPI, Darrell “was transferred to a partially constructed, windowless cinder block room where he remains today. Darrell does not have access to the outdoors and is alone in a strange and frightening world that he cannot possibly understand.”

About six weeks after arrival at PPI, two more chimpanzees died. One, a 16 year-old male named Bobby, was found dead in his cage. In the week prior to his death, Bobby had lost weight and refused to leave his sleeping area for the week before his death, but no veterinarian was called. The other, a female named Lynn, died after exhibiting clearly observable symptoms of a serious health problem.

Her body was partially paralyzed and she had to drag herself into her sleeping area where she later died. Her body remained inside the sleeping area for two days after her death because PPI staff was unable to “lock down” the cage and safely segregate the body from the other chimpanzees in the enclosure.

64. Id. at 5.
65. See id. at 4.
66. Id. at 5.
67. Id.
68. Id.
69. See id. at 2.
70. Id. at 5.
71. See id. at 6.
72. Id.
73. Id.
74. Id.
75. Id.
Within days of her arrival at PPI, Jane, a capuchin monkey, somehow escaped from the facility.\textsuperscript{76} Although she was seen in the area within the first few days, she was never seen again.\textsuperscript{77} The Petition alleges that at no time did PPI alert local animal control or residents of the area so that Jane could be recovered and safely returned to PPI.\textsuperscript{78}

In addition to those allegations, the Petition alleges generally inadequate living conditions for the primates, including failures to “sanitize living areas,” to “adequately secure cage doors with functioning locks,” to “provide bedding materials of any kind,” and to provide appropriate protection from high summertime temperatures in Texas.\textsuperscript{79} In their Petition, the plaintiffs request that the court issue all appropriate temporary injunctions to create safe conditions for the primates, to prevent PPI from dissipating the money it received from OSU for the care of the primates, and to prevent PPI from accepting any additional primates.\textsuperscript{80} The plaintiffs also request permanent relief either in the form of specific performance or an award of damages in the amount of the full contract payment made to PPI which would be “held in trust and applied towards the acquisition of shelter and care [for the primates] at a suitable facility.”\textsuperscript{81}

1. The PPI Litigation in the Context of a Broad Definition of Legal Personhood for Animals

As noted earlier, pursuit of legal personhood for animals sometimes rests on the claim that justice requires that like entities be treated alike. If an animal species has characteristics that humans believe are essential to their own definition of themselves as humans, shouldn’t members of that animal species be treated legally the same as similarly situated humans? The PPI litigation concerns animals we have long known to be similar to humans with respect to many characteristics we have deemed essential to the definition of humans.\textsuperscript{82} For instance, we have known for a long time that chimpanzees

\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id. at 6-7. It was 115 degrees Fahrenheit in the outside part of the chimpanzee enclosure when a court-ordered investigator visited the PPI facility. Transcript of Oral Argument on Motion for Temporary Restraining Order at 53, Sarah v. Primarily Primates, Inc., No. 1006-CI-06691 (Dist. Ct. of Bexar County, 73rd Judicial Dist. of Texas, June 22, 2006).
\textsuperscript{80} Plaintiffs’ Second Amended Original Petition, supra note 52, at 11.
\textsuperscript{81} Id. at 11-12.
\textsuperscript{82} See Bryant, Similarity or Difference, supra note 37, at 212-13.
and other great apes are cognitively similar to humans. They can communicate with each other and with us, they have highly developed social communities, they have a sense of morality, and they have the capacity to suffer from various kinds of physical and psychological injuries. Yet, for all our knowledge about characteristics chimpanzees share in common with us—characteristics by which we define our own moral worth—we continue to exploit and abuse them in a variety of ways. We subject them to invasive, painful experiments, probably because of the cruel irony that they are so similar to us. We keep them in zoos, and we use them for various forms of entertainment and advertising. Chimpanzees are the classic example of why it is so apparently counter-productive to pursue legal personhood for animals based on identifying characteristics that make them sufficiently similar to humans such that justice requires prohibiting acts on them that cannot be performed on humans. For every attempted re-definition of these and other animals, it is only humans who have been re-defined in order to keep the boundary between animals and humans distinct. The paucity of laws to protect these animals reveals that, while we could recognize in law that animals have moral standing we actively choose not to do so. Apparently, we would like to think of ourselves as kind to animals, but at the same time we do not want to have to make sacrifices based on recognition of their

84. Jane Goodall, The Chimpanzees of Gombe: Patterns of Behavior 357-87 (1986) (describing behavior that reflects the sociability and moral sensibilities of chimpanzees she observed in the wild).
85. For instance, it was reported in the New York Times that a Coca-Cola scientist engaged in research that involved cutting open the faces of chimpanzees to study nerve impulses used in the perception of sweet tastes. Brenda Goodman, Coca-Cola and PepsiCo Agree to Curb Animal Tests, N.Y. Times, May 31, 2007, at C3.
86. See Bryant, Similarity or Difference, supra note 37, at 211-12.
87. One highly touted exception is that of the Chimpanzee Health Improvement, Maintenance and Protection (“CHIMP”) Act of 2000. 42 U.S.C. § 287a-3a (2000). The Act creates requirements ostensibly to provide federally subsidized lifetime “retirement” for chimpanzees who have been used in experiments. See id. § 287a-3a(a). It has been praised as proof of the feasibility of incremental change to benefit animals. See David S. Favre, Judicial Recognition of the Interests of Animals—A New Tort, 2005 Mich. St. L. Rev. 333, 348-51 (2005). But see Curnutt, supra note 3, at 497 (criticizing the CHIMP Act on various grounds); Francione, Reflections, supra note 10, at 17-22 (discussing various limitations of the Act and provisions designed to protect humans’ interest in using “retired” chimpanzees in future experiments).
moral standing.\textsuperscript{88} Treating chimpanzees as legal persons would make our exploitation of them much more difficult, if not impossible.

When continued legal entitlements to exploit animals are at stake, advocates for animals do not succeed in debates about characteristics of animals that reveal their similarity to humans and correlative moral standing. For decades, to no apparent avail in legal contexts, advocates for animals have been disputing Cartesian notions of animals as machines,\textsuperscript{89} which support both the treatment of animals as property and definitions of humans as “not-animals.”\textsuperscript{90} Since one of the purposes of defining animals is to define humans through contra-distinction from animals, humans will not readily relinquish any definition of animals that does violence to their definitions of themselves as humans. Nor will humans readily relinquish valuable property entitlements to use animals, particularly those they consider “man-made” (domesticated).

Because there is much at stake, there are endless arguments about the attributes of animals that could give rise to legal recognition of “personhood” and about the basic question of the worthiness of animals to be protected.\textsuperscript{91} Whatever characteristic of an animal that is put forth as justifying sufficient protection to make any meaningful difference to animals—cognitive ability, sentience, or multiple capacities—is countered by evidence that, after all, animals do not have those characteristics quite the way that humans have them. The conclusion is that, after all, they are “just” animals and that it is

\textsuperscript{88} Professor Gary Francione refers to this as a type of “moral schizophrenia.” FRANCIONE, INTRODUCTION TO ANIMAL RIGHTS, supra note 7, at 1-30.


\textsuperscript{90} This Cartesian philosophical concept may be characterized in secular terms, but Elizabeth DeCoux characterizes the same phenomenon as a function of the conjunction of two religious precepts: (1) God created man (and not other animals) in his own image (thereby assuring humans’ superiority over animals); and (2) God gave man dominion over animals (thereby assuring humans’ entitlement to use animals). DeCoux, supra note 46, at 196-200, 214-20 (arguing that the property status of animals is an impermissible legal enactment of religious precepts). As Derrida observed in the opening quotation, Western metaphysical and religious concepts run parallel in many respects that concern human conceptualizations of animals. Derrida, “Eating Well”, supra note 1, at 112.

\textsuperscript{91} I have dealt at length with multiple problems of how the law currently defines animals and also problems that arise from advocacy based on arguments of animals’ similarity to humans in support of the claim that justice requires that like entities be treated alike. Bryant, Animals Unmodified, supra note 37, 153-55, 161-62; Bryant, Similarity or Difference, supra note 37, at 215-26.
appropriate for humans to own and to use them as means to human ends, that is, as resources.92 For instance, if animals are characterized as cognitively similar to humans, the way in which they think will not be of the type that warrants full comparison to humans.93 If animals are characterized by their capacity to suffer, the way in which they suffer will not be of the type that warrants any fundamental change in humans’ entitlement to inflict suffering on them.94 I repeat: consider the case of chimpanzees, whom we continue to exploit in many different ways that cause them to suffer despite ample evidence of multiple similarities to humans.

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92. Bryant, Similarity or Difference, supra note 37, at 211-12.

93. Tom Regan, while arguing for animal rights on the basis of their being subjects-of-a-life, nevertheless argues that if a choice must be made between the survival of a dog and the survival of a human, the moral preference should lie with the human because the dog does not live in anticipation of the future or understand what his loss would be. Tom Regan, The Case for Animal Rights 324-25 (1983). Lack of the type of thinking that involves moral judgment has also “disqualified” animals. John Rawls, Outside the Scope of the Theory of Justice, in Political Theory and Animal Rights 154, 155 (Paul A.B. Clarke & Andrew Linzey eds., 1990). Similarly, Mary Anne Warren has argued that animals are significantly different from humans, because they cannot change their minds on the basis of rational thought. Mary Anne Warren, Difficulties with the Strong Animal Rights Position, in Animal Experimentation: The Moral Issues 89, 95 (Robert M. Baird & Stuart E. Rosenbaum eds., 1991) (“We cannot negotiate a treaty with the feral cats and foxes, requiring them to stop preying on endangered native species in return for suitable concessions on our part.”). Raymond Frey argued that animals’ lack of complex language is a cognitive difference that warrants treating them differently. See R.G. Frey, Interests and Rights: The Case Against Animals 96 (1980).

The nature of animal communication and its complexity is better understood now. See generally Donald H. Owings & Eugene S. Morton, Animal Vocal Communication: A New Approach (1998) (arguing that animals use verbal communication in complex ways). However, the debate continues as to differences in cognitive capacity. See generally Daniel C. Dennett, Kind of Minds: Toward an Understanding of Consciousness (1996). Those differences can be made relevant to the inclusion or exclusion of animals in the community of those among whom moral conduct is expected.

94. Temple Grandin, a professed animal protection advocate, has written: I think injured animals are probably somewhere in between a leucotomy patient and a normal human being. They do feel pain, sometimes intense pain, because their frontal lobes haven’t been surgically separated from the rest of their brains. But they probably aren’t as upset about pain as a human being would be in the same situation, because their frontal lobes aren’t as big or all-powerful as a human’s. . . . I think it’s possible that animals may have as much pain as people do, but less suffering.

I wish to be clear that the problem with this approach is not just that claims of similarity are so easily rejected. There are four other serious problems. One is that seeking moral standing for specific animal species on the basis of similarity to humans ignores the importance of the web of life within which all species are situated. It ignores bases for moral obligation other than those derived from symmetrical reciprocal relationships between rights-holders and duty-holders. Another is that responding to the demand “tell me what about animals justifies my not using them as I please” accepts the underlying premise that it is morally acceptable for humans to do as they please unless there is a compelling reason for them to stop; they need not anticipate and avoid harm, even when they have every reason to believe that it is occurring, unless and until their own self-interest is so negatively affected that they must, for their own self-interest, stop engaging in harmful acts. Arguing about the similarity of animals to humans leaves in place the uncontested notion that it is moral for humans to define morality as it serves their purposes. Third, even if some animals gain entrance to the exalted community of those with moral standing, the result will be simply the entitlement of those animals, through their human representatives, to participate in the oppression of other animal species that have not yet gained entrance to the moral community. Fourth, the frame of the claim for moral consideration based on similarity need not, but in fact does, limit the scope of the moral response. For instance, if chimpanzees have cognitive capacity similar to that of humans, why is it not sufficient to keep them in cages containing intellectual enrichment tools? If dogs have the capacity to suffer, why is it not sufficient to anaesthetize them before we mutilate them and experiment on them? The reason these are not sufficient responses is that none of them resonate with any sense of an animal having inherent value, of an animal’s life being worth something to the animal him or herself. That sense of another’s inherent value is the recognition of that other’s moral standing.

The first problem is illustrated by a report in the L.A. Times about the dynamic relationship (“mutualism”) among thorny African acacia trees, aggressive ants that live in the trees, and the animals who eat the leaves of the trees. It turns out that it is necessary for all three to exist together for

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95. The AWA requires the provision of “physical environment adequate to promote the psychological well-being of primates.” 7 U.S.C. § 2143(a)(2)(B) (2000). Nevertheless, enforcement has been problematic. See Curnutt, supra note 3, at 60-63 (describing advocates’ efforts to enforce those AWA provisions, the circumstances that led to those efforts, and judicial interpretation of the AWA as to standing and required care for primates).

there to be sufficiently healthy trees, ants, and animals, such as elephants and

giraffes who eat the leaves. If all three are in balance, elephants and
giraffes cannot decimate a tree’s leaves at one time because ants living in the
trees sting them. Yet, when those animals were prevented from eating
leaves at all, the trees produced less of the nectar on which the ants could
live. With less nectar and fewer swollen thorns in which to live, the ants
damaged the trees or other tree-damaging insects moved in. The end result
was a reduced source of leaves for the animals when access was restored.
Is it only elephants who are worth protecting in this scenario? If the most
important question is seen to be identifying which of the trees, ants, or
elephants deserve moral standing, have we really accomplished anything of
value? If elephants are deemed worthy of moral standing, perhaps their
moral standing could result in derivative protection of ants and trees,
although that is unlikely if the elephants’ interests conflict with those of
humans. While we are arguing about the moral standing of discrete units
within a complex configuration of relationships, we are not discussing moral
duties to prevent harm at the level that would be appropriate to protect all
constituent elements of the configuration. That discussion is at least as
important, if not more important, than is discussion about the moral standing
of individual would-be “rights”-holders.
We already know intuitively that there is harm, without identifying
specifically harmed entities who are harmed in demonstrably specific ways
and without a fully articulated theory of those entities’ moral standing and

97. Id.
98. Id.
99. Id.
100. Id.
101. Id.
102. I note that while we are still arguing about whether elephants have sufficient
moral standing to justify particular kinds of protection, we do not even get to the questions of
either the protection of ants as derivative of elephants’ rights or our duty to protect nature,
regardless of whether there are recognized rights-holders among the constituent parts of
nature. The sheer focus on picking and choosing targets of moral consideration results in
failure to consider moral obligations that are not grounded in reciprocal, symmetrical
relationships between rights-holders and duty-holders. That said, I do think that the failure to
appreciate ants as ants and the requirement that they think or suffer like humans is another
instance of speciesism that most people reserve for arguments to include animals they believe
most closely mimic humans. In that regard, I think that there is little basis for discriminating
against the ant other than speciesism. That we cannot comprehend the value of an ant’s life to
the ant does not mean that there is none. That the value to an ant of his life may be different
than the value of a human life to a human cannot be captured by a moral system that treats as
relevant only human values.
right to be protected from harm. The demand that those who would protect animals, especially in cases of conflict with human interests, must submit rigorous analytic proofs of moral entitlement do not appear to require the same intellectual rigor of themselves. For instance, philosopher David DeGrazia asks one of the most fundamental questions of all when he asks: how can there be equal consideration of those who have different degrees of moral standing?103 But, he relies on nothing other than “a vague but powerful intuition” that animals have lesser moral standing as a backdrop for evaluating contests between human and animal interests.104 That “vague but powerful intuition” is nothing other than unexamined speciesism; it is unreflective, uncritical acceptance of that line of Western metaphysical and religious thinking that Derrida challenges as “hegemonic” in the opening quotation of this article.

While advocates for animals play the game of which animal is most like a human and which animals are capable of having rights—a game we are required to play with substantial rigor imposed on the definition of similarity to humans without equivalent rigor imposed on those who argue that humans are so different as to justify grossly differential treatment, we participate in ignoring other bases upon which moral obligations could be found to arise. For instance, if there can be a “vague but powerful intuition” that animals have lesser moral standing than humans, there can surely be a “vague but powerful intuition” that humans have moral obligations to nature, even if nature is not the type of entity that can be said to have rights.105 However, such a concept is difficult for those who define moral conduct explicitly to exclude conduct in relation to those who are deemed to lack equal moral standing in their own right. Like psychopaths who define moral responsibility in exclusively self-serving ways,106 humans generally define


104. Id. (“[A]mong ethical theorists and lay-persons alike, many who hold that animals are subject to some fundamental principle of equality (e.g., equal consideration) nevertheless hold that normal humans and animals are different in morally significant ways. It is this vague but powerful intuition that I wish to capture in speaking in terms of unequal moral status.”).

105. See Mary Midgley, Duties Concerning Islands, in ENVIRONMENTAL PHILOSOPHY: A COLLECTION OF READINGS 166, 174 (Robert Elliot & Arran Gare eds., 1983).

106. See Professor Paul Litton’s characterization of psychopaths as those who give lip service to the moral standing of others as, for example, when a psychopathic rapist justifies rape by saying that the victim thanked him. If the psychopath did not recognize that his victim has some degree of moral standing, her reaction would be irrelevant. Thus, the problem is not that the psychopath lacks moral capacity altogether but that the psychopath lacks sufficient
morality in terms of what comports with their identity as the only truly important beings on the planet. What humans want is, by definition, what is moral.

When animal advocates buy into the game of identifying which animals are worthy of moral consideration by virtue of cognitive capacity, sentience, or multiple capacities, they further entrench the view that what humans want and what humans define as important constitute the field of moral consideration. By focusing so extensively and explicitly on challenging Cartesian notions of animals by way of asserting similarity to humans, advocates have failed to sufficiently challenge Cartesian notions of humans. The famous assertion, “I think, therefore I am,”¹⁰⁷ feeds notions of the primacy of humans as much as it feeds notions of the inferiority of animals. Certainly, challenging the primacy of humans is implied by discussion of the qualities of animals that make them worthy of respect as individuals, but mere implication does little good when humans opposed to increased animal protection can keep the spotlight of debate focused so relentlessly on animals themselves and why they are or are not worthy of increased protection.

Even if this approach were to succeed for those animals deemed most like humans, the end result would only be reinforcement of a hierarchy of entitlement based on (1) similarity to humans and (2) ability to appreciate and accept human values. More animals besides humans would simply be in the position to oppress animals further down on the human-centric hierarchy by which they entered.¹⁰⁸ For example, if sea lions are deemed to be sufficiently like humans to be part of the moral community, then why wouldn’t they be entitled to eat as much fish as they need to remain healthy? In the wild they may not be able to capture as many fish as required, but if they are sufficiently like humans (who are entitled to protect their health), then why wouldn’t sea lions be entitled to protect their health even if it means more intensive fish farming?¹⁰⁹

moral capacity or sufficient rationality to exercise moral judgment to restrain himself from engaging in behaviors that harm others beyond narrowly defined, necessary self-defense. See Paul Litton, Responsibility Status of the Psychopath: On Moral Reasoning and Rational Self-Governance, 39 Rutgers L.J. ___ (2008). [PRODUCTION EDITOR: Update citation following pagination] Similarly, it is not that humans accord no moral standing to animals. The problem is that humans lack the moral capacity to make any sacrifices whatsoever when their preferences and interests conflict with those of animals.

¹⁰⁷. DESCARTES, supra note 89, at 21.
¹⁰⁸. See Bryant, Similarity or Difference, supra note 37, at 217-19.
¹⁰⁹. Lest the reader think that this would be a minimal cost to fish, research has shown that fish do suffer and that the conditions of fish farming cause very high levels of suffering. See Stephen Hume, Fishing for Answers, in STEPHEN HUME, ET AL., A STAIN UPON THE SEA:
Finally, identification of those characteristics by which animals are recognized as similar to humans invites a response that falls well short of recognizing the moral value that advocates would claim is attendant to a successful proof that animals are similar enough to humans to be considered beings with inherent value. For example, advocates may argue that chimpanzees, like humans, are social animals who suffer cognitively and emotionally when kept in isolation. Yet, proof that a chimpanzee suffers from isolation can result only in the caging of others nearby. Proof that a chimpanzee suffers because of lack of intellectual stimulation could result in the provision of a few toys in his cage. Yet, the heart of the claim is that chimpanzees are too much like humans for it to be just for humans to engage in acts of capture, captive breeding, caging, exhibition, and experimentation at all.

For all of these reasons, it is not appropriate or helpful to pursue a broad definition of legal personhood that is based on arguments that animals similar to humans should be treated similarly to humans, if the definition of what it means to be human and the presumption of human supremacy are not directly challenged at the same time. If and only if that challenge to human supremacy could occur while one is pursuing legal personhood for animals, then pursuing legal personhood for animals would be part and parcel of taking moral responsibility for appropriately situating humans and animals in the world and in society.

2. The PPI Litigation in the Context of a Narrow Definition of Legal Personhood for Animals

The nature of primates as essentially similar to humans may have motivated the PPI litigation, but it is in the narrower procedural meaning of “legal personhood” as legal standing to sue as an “aggrieved person” entitled to sue to enforce the law that the lawsuit is playing out in the courts. PPI has consistently maintained that all of the plaintiffs—primate and human—lack standing to sue PPI and that, therefore, the court lacks jurisdiction to hear the

WEST COAST SALMON FARMING 24-25 (2004) (noting observations of farmed fish bleeding at the eyeballs and the base of their fins from being ravaged by parasitic sea lice); Andrew Purvis, Farmed Fish, THE OBSERVER (U.K.), May 11, 2003, at 20, available at http://observer.guardian.co.uk/foodmonthly/story/0,,951686,00.html (noting the slow suffocation and suffering of fish caused by overcrowding and poor water quality at fish farms).
Obviously, PPI need not deal with allegations of chimpanzees and monkeys suffering if they can prevent the court from hearing the lawsuit at all. The chimpanzee and capuchin monkey plaintiffs claim that they have standing as third-party beneficiaries of the contract between OSU and PPI. They contend that the contract was entered on their behalf to provide for their care and that they are the injured parties when PPI breaches its contract with OSU.

In support of its argument that the plaintiffs lack standing, PPI denies that the plaintiffs are “persons.” PPI consistently emphasizes that the chimpanzees and capuchin monkeys are not persons with the legal capacity to sue because they are the property of PPI:

The chimpanzees and monkeys that have been named as “Plaintiffs” in this lawsuit are property acquired by PPI from Ohio State. They are not parties to the contract; rather they are the commodity that is the subject of the contract. An exhaustive search of Texas and Ohio jurisprudence establishes that animals have never been elevated to the same legal status as humans so as to allow animals standing to file a lawsuit.

Specifically with respect to the primate plaintiffs’ claim of standing based on third-party beneficiary status, PPI contends as follows:

The chimpanzees and monkeys are the property that is the subject of the contract, not the beneficiaries of the contract. Animals, or anyone purporting to act as the animals’ “next of friend” cannot be a third-party beneficiary to a contract. PPI owns the animals and any rights that the animals may have.

PPI also contests standing for the human plaintiffs.

None of the [human] plaintiffs have authority to enforce the contract between PPI and Ohio State. They do not claim ownership rights to the animals. They

References:

111. See Plaintiffs’ Second Amended Original Petition, supra note 52, at 4-6.
112. Brief in Support of Motion for Reconsideration of First Amended Motion to Dismiss, supra note 110, at 4 (citations omitted).
113. Id. at 5.
do not claim to be parties to the contract or even beneficiaries of the contract. They have no nexus or connection to the animals other than alleging to be “interested” in the animals.

To maintain standing in a lawsuit, a plaintiff must have a justiciable interest peculiar to that person individually and not as a member of the general public. The Plaintiffs in this suit are no different from other members of the general public. They assert no property rights to the animals unique to themselves. Plaintiffs must show an infringement of their property rights to present a justiciable interest sufficient to maintain standing. Plaintiffs cannot demonstrate that they have been deprived of a valuable property right necessary to show justiciable interest to establish their standing. A party may only complain of an action that injuriously affects that party. Plaintiffs do not allege, nor can they show, any injury to themselves. For that reason, they have no justiciable interest in this cause and no general standing.

In addition to arguments resting on general standing, the human plaintiffs base their standing on Texas Property Code section 112.037(b), which provides that a person with “an interest in the welfare of an animal that is the subject of a trust [for the care of an animal] authorized by this section [112.037(a)]” has the right to enforce the trust. In response, PPI argues that the contract between OSU and PPI did not establish a trust to provide care for an animal for two reasons. First, the contract explicitly provides for Ohio state law to govern interpretation of the contract, and Ohio law did not have a law comparable to Texas Property Code section 112.037 at the time the contract was entered. Second, even if Ohio did have such a law, this particular contract did not create a trust; rather, “[t]he contract between Ohio State and PPI transfers title to the animals in fee to PPI.”

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114. Id. at 6 (citations omitted).
115. TEX. PROP. CODE ANN. § 112.037(b) (Vernon 2007).
116. Brief in Support of Motion for Reconsideration of First Amended Motion to Dismiss, supra note 110, at 7.
117. Id.
118. Id. at 8.
The trial court dismissed the plaintiff’s petition for lack of standing, and the Texas Court of Appeals affirmed the trial court’s decision. Since both of plaintiff-appellants’ requests for rehearing were denied by the Court of Appeals, plaintiff-appellants’ next course of action is Texas Supreme Court review. Consideration of the merits of the plaintiffs’ allegations and request for relief can occur only if the gateway issue of standing is decided favorably for plaintiff-appellants.

Since standing is but a gateway issue, it is important to consider the consequences of standing for these animals either directly as plaintiffs or indirectly by way of the human plaintiffs seeking relief on their behalf. What if one or more of the plaintiffs is granted standing? Although the legal question is not yet fully briefed, PPI’s position is that plaintiffs’ request for relief exceeds the type of relief that can be granted, even if it is determined that one or more of the plaintiffs have standing. PPI claims that this is strategic litigation designed to create a precedent whereby animals have standing and to secure interpretations of the relevant laws that would advance the interests of animals, not just these particular plaintiffs. That seems rather obvious. All plaintiffs, not just social justice activists, seek favorable interpretations of the law. As they have been interpreted to date, existing laws enacted ostensibly to protect confined animals have not resulted in meaningful protection at all. If the litigation does no more than create the lowest possible standard of compliance with very limited laws,

119. The court dismissed for lack of standing not because the court was confident that the plaintiffs lacked standing, but because the court thought that the matter of standing should be determined by an appellate court due to the far-reaching implications of finding that the plaintiffs have standing. Transcript of Oral Argument on Motion to Abate at 8-15, Sarah v. Primarily Primates, Inc., No. 2006-CI-06691 (Dist. Ct. of Bexar County, 73rd Judicial Dist. of Texas, Dec. 15, 2006).
121. E-mail from Tom Crofts to author, supra note 52.
122. Id.
123. Brief in Support of Motion for Reconsideration of First Amended Motion to Dismiss, supra note 110, at 10; Brief of Appellee Primarily Primates, Inc., supra note 110, at 15.
124. In its brief in support of its motion for reconsideration of its amended motion to dismiss, PPI states “People for the Ethical Treatment of Animals (P.E.T.A.) initiated this lawsuit. P.E.T.A. fears that P.E.T.A. initiated this suit in an attempt to establish a precedent that animals have legal standing to file lawsuits and to erode ownership rights of animals from humans. With legal standing, an animal could file suit against a zoo for false imprisonment or to complain of the food it is being fed by the zookeeper.” Brief in Support of Motion for Reconsideration of First Amended Motion to Dismiss, supra note 110, at 4 n.2 (citations omitted).
then PPI will have won something of a victory even if the animal plaintiffs have standing to litigate. The situation would be analogous to that of Marc Jurnove, who was granted standing to sue the Long Island Game Farm Park and Zoo on grounds that the animals he regularly observed at the Game Farm Park and Zoo were harmed by the defendant’s failure to comply with the Animal Welfare Act. Jurnove won on the issue of standing, only to lose the lawsuit when an appellate court decided that the USDA’s current minimal standards satisfied the Secretary’s legal obligation.

This is not to say that the litigation against PPI is flawed or should not have been brought. If the allegations in the petition are accurate, even minimal enforcement of federal and state law would be an improvement not only for the nine OSU primates but also for the 800 to 1,000 other primates PPI holds in its Texas facility. Moreover, the grant of standing to human plaintiffs under a statute that provides for the enforceability of trusts established to benefit animals would seem to hold promise to the extent that those who care about animals can, at least, get to the merits of their allegations that animals are being mistreated. It is to say only that the approach of pursuing legal standing to gain interpretations of laws that will significantly improve the lot of animals, let alone change their status as property, will be arduous because the reason for pursuing standing for animals is obvious to all concerned. The reason to seek standing must be to seek favorable interpretations of laws, which could constrain what humans can lawfully do to animals they consider to be their property.

The outcome of the PPI litigation may well be driven by factors unique to that case, but the PPI litigation raises the interesting question of the

125. Animal Legal Defense Fund, Inc. v. Glickman, 154 F.3d 426, 429 (D.C. Cir. 1998) (holding that Jurnove had standing to sue the Secretary of Agriculture for failure to promulgate standards by which the psychological well-being of primates could be promoted while in captivity).


127. The number of animals at PPI is reported in the Transcript of Oral Argument on Motion for Temporary Restraining Order, supra note 79, at 43.

128. For instance, the Court of Appeals did not agree with the plaintiff-appellants reliance on an argument that under the particular facts of this dispute the defendant-appellee’s agreement to the trial court’s appointment of a master in chancery with “authority to take such action as is necessary to ensure the contractual provisions of the contract between Ohio State University and Primarily Primates, Inc. are complied with.” constituted an agreement sufficient to confer standing on the plaintiff-appellants. Sarah v. Primarily Primates, No. 04-06-00868-CV, 2008 WL 138080 (Tex. App. Jan. 16, 2008) at *3. Similarly, the court held that the specific contract at issue in the dispute did not create an express trust, as required for operation of the Texas statute under which the plaintiff-appellants are claiming standing to
utility of trust law in advancing the interests of animals by establishing a fiduciary relationship between an animal and a human caretaker and by providing an effective enforcement mechanism. More states seem to be adopting some form of Uniform Probate Code section 2-907, which provides for the creation of enforceable trusts for the care of animals. Thus far, the trend seems to have been driven by the interests of owners of companion animals to provide for their animals when the owners die. Nevertheless, sufficient room in trust doctrine may develop to allow for the protection of animals by way of express, resulting or constructive trusts. Perhaps there could come a time that a court would order that money donated to a zoo be held in constructive trust for the intended beneficiaries—the animals, and zoos would have fiduciary duties to those animals. Perhaps in some cases donors would have standing to sue under animal trust statutes to protect the intended beneficiaries. Since having a fiduciary duty to a "thing"—to something identified as "property"—is antithetical to notions of property as resources for human use, the expansion of trust doctrine to include animals as beneficiaries would involve at least an implicit challenge of the categorization of animals as property. The relevant issues would be recognition of animals as persons for purposes of characterizing them as beneficiaries of a trust and the legal content of the trustees' fiduciary duties to those animal beneficiaries. For instance, in the PPI case a decision that would most fully protect the interests of the plaintiff-appellants would include recognition that (1) a trust for the benefit of animals was established by the contract between PPI and OSU, (2) a fiduciary duty to the animals was thereby created, and (3) fulfilling that duty extends beyond mere compliance with the floor established by anticruelty statutes or the husbandry

sue. Id. at *8-*12. The Court of Appeals decision is unpublished, which suggests that the court thought that the factors at issue resulted in a decision that would have little transferable value for deciding other cases.

129. Unif. Probate Code § 2-907 (amended 2001). For recent discussions of developments in trust law to provide for the care of companion animals, see Hankin, supra note 45, at 358-65; William A. Reppy, Jr., Estate Planning to Provide for the Post-Death Care of Pets, in Animal Law and the Courts: A Reader 217 (Taimie L. Bryant et al. eds., 2008).

130. See Hankin, supra note 45, at 359-61; Reppy, supra note 129, at 237-38.

131. Donors already have some ability to earmark their donations or provide for reversionary interests that give them standing to sue to enforce the terms of their gifts or to seek reversion of the gift, but there are legal difficulties associated with enforcing the fiduciary duties of nonprofit managers of donated funds and assets. See James J. Fishman & Stephen Schwarz, Nonprofit Organizations 260-62 (3d ed. 2006). Moreover, not all donors think to include such provisions, and, of course, donees are not likely to inform donors of that option.
requirements of state and federal laws that regulate the particular facility where the animals live.

Whether this is accomplished by way of direct legal standing for Sarah and the other named primates or by way of standing for the human plaintiffs is a separable question. If the outcome described above is possible regardless of who is recognized as a plaintiff, is there a benefit to pursuing the narrow definition of legal personhood for animals? Do the human plaintiffs want something different than what the animal plaintiffs want? Ultimately, animals will be dependent upon human legal representatives to bring suit in any case, either in the name of the animal or in the name of a human who is concerned about the animal. If there is a sufficiently sympathetic, empathic human\textsuperscript{132} to represent an animal, expanded human standing may be sufficient to accomplish the same goals that would be accomplished if the animal sued in his or her own right. Depending on the facts and the applicable law, there may be little difference in outcome.

Of course, there are obvious differences between humans’ claiming injury for harms done to an animal and animals’ claiming harm to themselves. First, recognizing that the alleged injury really is to the animal, not to the human, correctly identifies the victim and the harm. Second, legal standing in the name of the individual that alleges the harm, even if it is an animal, does less conceptual violence to the traditional idea of standing than does expanded legal standing for humans, who would be claiming that they are injured by virtue of injuries to another. Third, the argument could be made that one might as well attempt a direct route, since expanding existing legal standing for humans to protect animals does not appear to be any easier a prospect than establishing standing for animals.\textsuperscript{133} The problem appears to be essentially one of establishing greater access to the courts to protect animals at all, regardless of whether it would be the animals themselves or

\textsuperscript{132} The difference between sympathy and empathy is important in this and other contexts. A sympathetic individual may well interpret problems and develop solutions from outside the individual, idiosyncratic frame of reference of the person who is directly affected by a problem. Note, \textit{Sympathy as a Legal Structure}, 105 Harvard L. Rev. 1961, 1962 (1992). For example, a person sympathetic to the plight of an animal may readily believe that the animal is better off dead than alive, while a person who is empathic may more readily search for solutions that reflect any sense that person receives from the animal that the animal would prefer to continue living despite difficult circumstances. Because a sympathetic person will rely on common understandings of a situation, sympathy can be characterized as “a conservative social force that reinforces common perspectives and marginalizes non-common viewpoints.” \textit{Id.}

\textsuperscript{133} Sunstein, supra note 22, at 1342-61.
humans who care about them. Finally, requiring lawyers to consider what an animal client would want might, in some cases, result in a different calculation of costs and benefits than simply relying on a human plaintiff’s wanting to “do what’s right” for an animal. For instance, perhaps a human plaintiff concerned about an animal whose owner has executed a will directive to kill the animal upon the owner’s death might not pursue litigation to invalidate the directive if there isn’t certainty of a good home available immediately upon the death of the owner. An animal plaintiff might well be willing to take his chances and fight to stay alive even if there isn’t certainty of a good home immediately—or ever. However, as we shall see in Part II, the few reported cases of litigation about such will directives reveal the existence of human plaintiffs who do seek invalidation of will directives to kill companion animals even when a good home is not certainly available. Standing is less of a problem in such cases than is animals’ status of property, which makes them vulnerable to testators executing such will directives in the first place.

Despite arguments in favor of pursuing direct legal standing for animals, there may be significant disadvantages. Proceeding with litigation in the name of animal plaintiffs can easily give rise to fruitless debates about the characteristics of animals that warrant their recognition as “persons.” This is exemplified by the extent to which the PPI brief emphasizes the incompatibility of the status of animals as property. That these animals are suffering will be an important background issue. It was significant to the trial court. But, it does not appear to have been significant enough to the trial court that it was prepared to grant standing and let PPI be the one in the position of appealing the decision to grant standing.

The question of legal personhood for animals in terms of standing as an “aggrieved person” is interesting, but it is of far less legal significance to animals than their legal status as property. If the primate plaintiffs remain the property of some animal sanctuary—be it PPI or another sanctuary—does it

135. When considering whether to dismiss or abate the lawsuit, the court expressed concern that the animals were being taken care of. See Transcript of Oral Argument on Motion to Abate, supra note 119, at 6-8.
136. If the plaintiffs had been granted standing, PPI would have been in the position of appealing the decision. However, only if PPI had an unfavorable outcome on the merits would PPI have been able to appeal the grant of standing. The trial court’s dismissing the case for lack of standing meant that the plaintiffs would have to take the matter of standing up on appeal before the court considered the merits of the case. Therefore, dismissing for lack of standing may be explained as a matter of judicial economy. Interview with Tom Crofts, appellate attorney representing plaintiff-appellants, supra note 51.
make much difference to the protection of their interests if they are entitled to sue under laws that are premised on the ownership of animals by humans? If legal personhood is merely a gateway, then what is it a gateway to? I contend that it is only meaningful as a gateway if it is used to dismantle the status of animals as property. While humans could treat their animal property differently, they have shown that they choose not to and that they will resist being made to do so. The entitlement is so strong that it has led, among other things, to the pursuit of explicit exemptions in anticruelty statutes, which were silent before, as to agribusiness practices and to the recently enacted, truly draconian Animal Enterprise Terrorism Act, which attempts to foreclose the only means by which investigative journalists and others have revealed what happens to private property animals held in private property facilities. At the time of this writing, petitions are circulating in California in support of a ballot measure that would amend California’s constitution to

137. See Wolfson & Sullivan, supra note 11, at 212-16; Ibrahim, supra note 2, at 184 n.35.

138. 18 U.S.C. § 43 (2006). In 2006, the Animal Enterprise Terrorism Act (“AETA”) amended the existing Animal Enterprise Protection Act of 1992 to include undefined acts of intimidation and harassment that “disrupt” businesses, increased the amount of monetary penalties and length of imprisonment that could be ordered, and extended the definition of “animal enterprises” to include many more enterprises, including animal shelters, pet stores, breeders’ facilities, and furriers’ facilities. See id.

139. Institutional owners of animals (“animal enterprises”) enjoy private property legal protection in two ways: (1) they own the facilities in which animals are kept; and (2) they own the animals themselves. Due to their ownership of the private property facilities in which animals are kept, animal enterprises can post “no trespassing” signs and prevent the public from finding out for themselves how animals are treated. Moreover, animal enterprises do not have to disclose their practices to the public. Legal scholars Jeff Leslie and Cass Sunstein have argued that Americans do not have sufficient information about what is going on in agribusiness facilities, and they contend that disclosure of agribusiness practices would be helpful to consumers. Jeff Leslie & Cass R. Sunstein, Animal Rights Without Controversy, 70 LAW & CONTEMP. PROBS. 117, 117 (2007) (“[E]xisting markets do not disclose the relevant treatment of animals, even though that treatment would trouble many consumers. Steps should be taken to promote disclosure so as to fortify market processes and to promote democratic discussion of the treatment of animals.”) As it is, undercover investigations, such as the recent undercover investigation by the Humane Society of the United States of a Chino, California slaughterhouse, play an important role in bringing abusive practices to light. See supra notes 30-34 and accompanying text. In its opposition to the Animal Enterprise Terrorism Act, the American Civil Liberties Union specifically mentions that undercover investigations would be negatively impacted by the Act. American Civil Liberties Union, ACLU Letter to Congress Urging Opposition to the Animal Enterprise Act, S. 1926 and H. R. 4239 (Mar. 6, 2006), available at http://www.aclu.org/freespeech/gen/25620leg20060306.html.
state explicitly that animals are property.140 These reiterations of the property status of animals reveal its centrality to those who own animals.

Despite its obvious significance, advocates for legal reform to benefit animals differ with respect to whether changing the legal status of animals as the property of humans is necessary, feasible, or good for animals. Since I argue that one must take care in the shaping and use of legal personhood (standing) in order to avoid further inscription of the status of animals as property, perhaps it behooves me to explain a little bit about why I do not find arguments in opposition to such a change persuasive.

B. Arguments Based on Lack of Necessity to Change the Legal Status of Animals as Property

Some, such as Professor Cass Sunstein, argue that it is not necessary to change the property status of animals because (a) in some cases existing laws would be sufficient to protect animals if standing were expanded to include animals and more bases of standing for humans interested in protecting animals,141 and (b) in those cases in which existing laws are insufficient, laws can be enacted that adjust owners’ property rights while leaving the property status of animals intact.142 The argument is that since “property” is really a bundle of rights associated with things, one can simply remove some of the rights in that bundle that result in the suffering of animals.143 One problem with this view is that there are so many rights that are connected to the suffering of animals—suffering that animal exploiters minimize as insignificant or as necessary in any case—that, once one has removed even just those rights that negatively impact animals’ bodily integrity, there really


141. See Sunstein, supra note 36, at 389-90 (“In the United States, state anticruelty laws go well beyond prohibiting beating, injuring, and the like, and impose affirmative duties on people who have animals in their care. . . . If taken seriously, provisions of this kind would do a great deal to protect animals from suffering, injury, and premature death. But animal rights, as recognized by state law, are sharply limited . . . . [E]nforcement can occur only through public prosecution.”). In Standing for Animals, Sunstein advocates both expanding the standing of humans who care about animals and creating standing for animals. Sunstein, supra note 22, at 1336, 1367.

142. See Sunstein, supra note 36, at 392 (“We should focus attention not only on the ‘enforcement gap,’ but also on the areas where current law offers little or no protection.”).

143. See id.; see also Garner, supra note 48, at 168.
isn’t anything left of the owner’s property right. For instance, an owner of a facility that produces eggs will tell you, I think correctly, that there is not enough left of his property right in his chickens if he cannot do the following: manipulate the genetic make-up of the chickens so that they produce the most eggs; destroy as cheaply as possible male chicks which are of no use in egg production (and, because of specialized genetic modification of chicken breeds for different human purposes, of no use for chicken meat production); cut hens’ beaks so that they cannot peck at each other even if it means that they cannot eat normal food normally; feed the hens a diet that harms their bones but makes eggshells stronger; completely stop feeding hens altogether for long periods of time so that those who survive will produce more eggs when food is restored; keep them in such small cages that it is impossible to spread their wings; and destroy so-called “spent” hens as cheaply as possible if they have survived to the point that they no longer produce enough eggs to justify even the meager cage space they are allocated. During their miserable lives, every natural instinct the hens may have had, including the laying of eggs in private, has been intentionally frustrated. Yet from the owner’s point of view, these injurious practices are essential to the efficient and profitable operation of a mass production egg facility.

Because property owners are entitled to use, modify, and destroy their property with the most efficient means possible, we have day-old male chicks crammed into plastic garbage bags suffocating in dumpsters standing in the hot sun. The destruction of “spent” hens is equally brutal; it is just

144. Descriptions of agribusiness practices are common, but Peter Singer’s description of various practices affecting livestock, including chickens, remains particularly useful because it is based on reviews of industry journals and also includes descriptions of how animals react to the practices. SINGER, supra note 48, at 96-170. As Singer notes in the Preface to the 1995 edition of the book, some people find it hard to believe that such cruel practices continue into the present time. Id. at x. However, many of the practices Singer describes in his updated 1995 edition are described as on-going practices by the court in New Jersey Society for the Prevention of Cruelty to Animals v. New Jersey Department of Agriculture, 2007 WL 486764 (N.J. Sup. Ct. App. Div. Feb. 16, 2007). The opinion is analyzed by Mariann Sullivan and David Wolfson who argue that cruel practices have increased over time. See generally Sullivan & Wolfson, supra note 16.

145. See SINGER, supra note 48, at 107-08 (“Since the male chicks have no commercial value, they are discarded. Some companies gas the little birds, but often they are dumped alive into a plastic sack and allowed to suffocate under the weight of the other chicks dumped on top of them. Others are ground up while still alive, to be turned into feed for their sisters. At least 160 million birds are gassed, suffocated, or die this way every year in the United States alone. Just how many suffer each particular fate is impossible to tell, because no
deferred until after they have been mutilated and intensively confined for so long as they can manage to stay alive to produce eggs. It doesn’t really matter to producers if individual chickens die in their cages of untreated injuries or starvation during “forced molting” or having been crushed by other chickens. Of what value to the producer is one chicken? One could list the horrific practices wreaked on these animals and try to attack them one by one, but what is the principled means of distinguishing the various harms inflicted on these animals? Which ones will be chosen first or second or not at all? Would the replacement practice be any better? Freeing laying hens from cages will not represent much of a pragmatic difference in recognition of their interest in not being crushed, if the result of prohibiting cages is that chickens are crushed by being crammed into sheds instead of being crushed in cages. Moreover, freeing laying hens from cages will not address in any way other injurious acts necessary to sustain a business based on laying hens, such as the destruction of unwanted male chicks. And, without a principled basis for selecting only one or a few harmful practices, how can property owners be assured that “enough” of their right to use their property will be left intact? Surely they know that there will simply be more challenges to their practices because all of these practices are intertwined and all of them cause animals to suffer.

Taken as a totality, all the requirements that would be needed to produce eggs without chickens’ suffering would so increase the cost of eggs that it would not be worthwhile to own a business that is based on the ownership of chickens. Chickens are but the raw material by which the primary ownership interest that supports the producer and his family (the business itself) can exist. “Over-”regulation of the raising, keeping, and killing of chickens imperils the property interests of which the chickens are but a part.

Like Professor Cass Sunstein, political scientist Robert Garner subscribes to the view that property entitlements can be scaled back such that owners of animals could have fewer property rights than owners of inanimate objects, but owners of animals would still be able to own and exploit animals as their property. Professor Garner agrees that, as a philosophical matter, equal consideration of animals’ and humans’ interests is morally justified and that the “personhood argument for human moral superiority . . . is

records are kept: the growers think of getting rid of male chicks as we think of putting out the trash.”).

146. Ibrahim, supra note 27, at 99-100 (agreeing with James Rachels that meat would be too expensive for most consumers if it were humanely produced).

surprisingly vulnerable.” Moreover, he states that “[c]learly, while animals remain property they cannot have the full entitlement of rights, particularly the right to be free from exploitation.” Nevertheless, he thinks that it is not necessary to dismantle the property status of animals because (1) it is not politically feasible and (2) animals can be treated sufficiently better than they are now without discarding the status of property. His proof of the latter is that there are better animal protection laws in Britain than there are in the United States, despite the fact that in both places they are legally the property of humans.

Professor Garner offers no evidence that animals are actually treated substantially better, as an empirical matter, where laws apparently provide more protection. After all, federal and state laws that appear to confer protection on animals in the United States do not actually confer much protection at all for reasons that include the existence of exemptions and lack of enforcement. Moreover, if on a scale of one to 1000 (1000 being the most horrible of circumstances), American chickens are at 1000 while British chickens are at 999, what difference does it make that British chickens are comparatively better off than American chickens?

Professor Garner argues that it is possible to ascribe some degree of moral worth to animals, even though we treat them as property, and that it is, therefore, unnecessary to adhere to the position that animals cannot have moral standing as long as they are property. But, the problem is not failure to recognize that animals have some degree of moral standing; we already recognize that sentient animals are morally entitled to be protected from suffering. Our anticruelty statutes carry that presumption, despite the fact that they are not actually used for that purpose. The problem is not that we have failed to recognize that animals have some degree of moral standing; the problem is that we ignore or override that moral standing when our human interests conflict with those of animals because we assign lesser moral standing to animals than to ourselves. Professor Garner does not provide a philosophical basis for a requirement that humans treat animals better while those animals remain the property of humans; he asserts only that humans could treat animals better.

148. Id. at 165.
149. Id. at 168.
150. See id. at 169-71.
151. Id. at 170-71.
152. Francione makes this and other related points. See Francione, Reflections, supra note 10, at 32-39.
153. See Garner, supra note 48, at 170-71.
As philosopher David DeGrazia observes, it is difficult to talk about “equal consideration” of the interests of beings who have unequal moral standing. Indeed, it is difficult to see how, by itself, the recognition of animals’ lesser moral standing does anything other than justify the status quo, if that moral standing is deemed to be less than that of a human. While humans might, as a result of recognition of animals’ (lesser) moral standing, provide animals with some measure of relief from human-inflicted suffering, they need not as a matter of recognizing that animals have some moral standing. That recognition could lead only to requirements for justifications for overriding animals’ interests and not necessarily (as a consequence of recognizing the animals have some moral standing) lead to protecting animals’ interests at all. And that is exactly what we do when we interpret anticyclalty statutes to allow absolutely any degree of animal suffering if humans decide that such suffering is “necessary.” Since animals’ moral standing is lesser than that of humans’, recognition of animals’ moral standing leads only to the requirement that there be justification for harming them, not to the requirement that animals’ interests in not suffering constrain human conduct. For animals to be actually protected there has to be some other, additional requirement that the interests of animals cannot be overridden even though they are of lesser moral standing. Yet, that makes little sense. If they are of lesser moral standing than humans, then humans are entitled to override their interests for the sake of a higher moral good (that is, satisfying the interests of higher-ranking beings with moral standing).

Another approach to animal protection that retains the status of animals as property is Professor David Favre’s theory that the concept of property can be subdivided into legal rights and equitable rights such that animals can remain the legal property of humans while holding “equitable self-ownership.” On first impression, the concept of equitable self-ownership holds promise: if anyone is going to “own” an animal, why shouldn’t the animal have an ownership interest in himself? However, does it actually

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155. As I understand it, this is precisely Professor Francione’s point in emphasizing the extent to which anticyclalty statutes are applied only in cases of suffering inflicted on animals “unnecessarily.” See Francione, Animals, Property, and the Law, supra note 2, at 142-43; Francione, Introduction to Animal Rights, supra note 7, at xxi-xxv; Francione, Reflections, supra note 10, at 34-37 (responding to Cass Sunstein’s assertions that the law already provides for recognition of animals’ interests).
make sense to have an ownership interest in one’s self? Additionally, how would the idea of shared ownership between humans and animals work in practice? What are the circumstances under which the holder of equitable self-ownership would prevail over a legal owner?157 If a dog has equitable self-ownership and considers debarking to be fundamentally against his self-interest, but his legal owner considers that debarking the dog is fundamental to the owner’s legal right, would the dog be debarked or not? Would we attempt to “split the difference” between the equitable self-owner and the legal owner: the legal owner is awarded the right to debark the dog, but the dog is awarded the right to have the procedure done with as little pain as possible? If the ability to bark is fundamental to being a dog, how does debarking the dog “painlesslly” result in any kind of “win” for the dog as to his fundamental interest in barking? It is a “win” in relation to preventing performance of the surgery in a way that causes pain, but, arguably, that is already prohibited under the anticruelty statutes. If this is most likely how Favre’s approach would work pragmatically, then Favre’s suggestion is primarily a civil law adjunct to the criminal anticruelty statutes, with legal standing vested in animals. But, if, aside from purely gratuitous infliction of suffering, owners’ property interests are deemed superior to those of animals, then mere provision of a civil law equivalent to an anticruelty law and standing for animals will accomplish little, if anything.

In sum, arguments based on the lack of necessity to dismantle the status of property do not take sufficient account of the extreme gap between our professed recognition of the moral standing of animals to be free from, at minimum, the worst forms of human-inflicted suffering and legal facilitation of all manner of suffering, including those worst, most obviously devastating forms. Such arguments do not properly recognize the intertwined nature of harmful practices, and they do not accurately assess the strength with which property entitlements are defended. Finally, they do not provide a reliable, principled basis for animals’ interests ever to prevail over those of humans to use, modify, and destroy animals however they deem appropriate.

157. Favre recognizes that it is important to consider cases of conflict between human and animal interests. See, e.g., Favre, supra note 87, at 336 for his criticism of Steven Wise’s theory regarding recognizing rights for animals who are cognitively similar to humans (“Mr. Wise’s writings do not suggest how to think about balancing human and animal rights when they are in conflict.”).
C. Arguments Based on the Idea That Elimination of the Status of Property is not Good for Animals

Some scholars contend that the status of property confers sufficient benefits to animals to justify its retention. 158 Professor Cass Sunstein argues that domesticated animals are not able to live on their own and that wild animals live better lives under human control (for instance, in zoos) because “[n]ature can be very cruel.”159 As to those animals who can appreciate autonomy, Sunstein argues that there is already sufficient autonomy.

Owners of dogs and cats care about the desires of the animals who live with them; they permit both dogs and cats to make countless free choices every day. . . . In this sense, the autonomy of domesticated animals is limited but real, in the same family as autonomy of young children.160

Similarly, Sunstein thinks that pursuit of autonomy for wild animals is overrated and that what matters is whether animals have “good lives”:

[W]e could imagine that many lions, elephants, giraffes, and dolphins will, in fact, have better lives with human assistance, even if confined, than in their own habitats. They are not slaves, but they are, in a sense, imprisoned. If their lives are nonetheless good, it is difficult to see what sort of response might be made by those who believe in animal autonomy. Perhaps autonomy advocates disagree on the facts, not on the theoretical issue, and think it highly unlikely, in most cases, that wild animals can have decent lives under human control. I do not believe that they are correct on the facts. In any case, the claim for animal autonomy must, in the end, depend on an assessment of what will give animals good lives.161

This is not the only area in which Sunstein chalks up difference in opinion to mere insufficiency of factual support, which, by the way, is also the most typical claim of animal exploiters seeking to diminish the claim that more protection of animals is necessary. Apparently, Sunstein has read sufficiently the literature on some areas to believe that there is adequate factual support for increased regulation in such areas as scientific research,

158. See Cupp, supra note 38, at 11-12; Sunstein, supra note 36, at 397.
159. Sunstein, supra note 36, at 397.
160. Id.
161. Id. at 398.
hunting, entertainment, and food production. However, as to those areas of
animal exploitation, he argues that adequate protection of animals is possible
by adjusting their owners’ property rights. To take but one example, he
asks, “Shouldn’t it be possible to reduce the level of suffering in scientific
experiments by, for example, requiring animals to be adequately sheltered
and fed?” Indeed. The federal Animal Welfare Act already requires that
level of husbandry, yet even on the face of the law it is clear that researchers
need not supply even the most basic of needs if doing so conflicts with their
use of the animals as subjects of experimentation. For instance, laboratory
animals, including those most like humans (primates), are induced to
“participate” in even the most horrible of experiments by causing them to be
so desperately thirsty that water can serve as an efficient reward. It is also
the case that a researcher can inflict any amount of pain on a completely
unanaesthetized animal through any method at all, if it is part of his research
design to do so.

Scientists’ rights to use animals as raw materials for their experiments, a
property-based entitlement and expectation, cannot now be compromised
even to the extent of nonowners’ expectations that research animals be
adequately sheltered and fed or shielded from acts that cause excruciating
pain. Seemingly easy, small fixes in the form of regulatory changes become
laborious fights because of the strength of entitlement attendant to the
property status of animals. What, other than the strength of entitlement that
comes through property ownership, accounts for the failure of measured,
conscientious, consistent advocacy for the past several decades to have the
Animal Welfare Act, as inadequate as it is, interpreted to cover birds, mice,
and rats, which constitute an estimated ninety percent of the animals used in
experiments?

162. See id. at 392.
163. See id. at 396.
164. Id.
166. Id. § 2143(a)(3)(E) (providing exception to standards of the AWA “when
specified by research protocol” and detailed and explained in a report).
167. See generally Hisao Nishijo et al., Motivation-Related Neuronal Activity in the
Object Discrimination Task in Monkey Septal Nuclei, 7 HIPPOCAMPUS 536 (1997) (describing
research conducted at Toyama Medical and Pharmaceutical University, Sugitani, Toyama,
Japan in which monkeys were deprived of food and fluids to determine the role of septal
nuclei in motivational behaviors).
168. See 7 U.S.C. § 2143(a)(3)(E); see also supra note 24 and accompanying text
(regarding the use of writhing tests).
169. See Francione, Reflections, supra note 10, at 31.
Sunstein’s argument that domesticated animals, such as cats and dogs, now make “countless free choices”170 is naïve about the extent of choice such animals are allowed to exercise. The “free choices” of dogs and cats are completely constrained by their owners, whose rights extend to declawing and debarking them and to having them killed while still healthy. Similarly, Sunstein’s general argument that domesticated animals are now so dependent that it would not serve them well to dismantle a legal structure that confers protection underestimates the extent to which the current legal structure—their status as the property of humans—does or could, with adjustment, confer adequate protection. It also presumes that we know in advance what incremental freedom from the status of property would look like. For instance, animals with legal standing who seek, by way of human legal representatives, to ban genetic modification of members of their species could, if successful, throw tremendous sand in the gears of the machinery that reduces animals’ apparent worth to nothing more than that of docile artifacts of human manipulation and invention. Reclamation of genetic and material means of autonomy should not seem preposterous to those who believe that Sunstein is correct that domestic animals such as dogs and cats can and do “make countless free choices every day.”171 It should not seem preposterous even if one does not agree with Sunstein that animals themselves directly make “free choices” because it is easy to predict that animals, like humans, would not want to be the subjects of genetic modification designed to suit the needs of another species. The way in which it seems preposterous for animals to make such choices is from the perspective of those who think that the current entitlement to use animals as resources is morally correct.

Like Sunstein, Professor Richard Cupp is skeptical that it is beneficial to animals to eliminate their status as the property of humans.172 Although his argument rests primarily on a belief that “humans must have primacy [because] human suffering will ultimately increase if we begin viewing ourselves on the same level as animals,”173 he also claims that “[t]he cost to humans of receiving rights is the heavy burden of responsibility, including responsibility for preventing inappropriate treatment of socially powerless animals.”174 Erosion of the primacy of humans would mean erosion of their

170. See Sunstein, supra note 36, at 397.
171. See id.
172. Cupp, supra note 38, at 28.
173. Id.
174. Id. at 29.
responsibility to prevent “inappropriate treatment of socially powerless animals,” and, therefore, more “inappropriate treatment.”

Cupp does not define what he means by “inappropriate treatment.” Would he include the kind of suffering inflicted on factory-farmed animals or laboratory animals? Would he, like Sunstein, think that it is a simple matter to require scientists to provide adequate food and shelter to the animals they use? In fact, it turns out not to be a simple matter to instill a sense of moral responsibility to property one uses exclusively as a means to human-selected ends. The treatment of animals is actually getting worse as factory-farming involves increasingly intensive confinement and practices that go along with cramming animals into such small spaces. The treatment of animals is also getting worse as a function of scientific and technological advances that make experimentation on animals more interesting to scientists. It is precisely because humans have failed so miserably and so obviously in that “burden of responsibility” to “socially powerless animals” that the pursuit of legal rights for animals has developed as explosively as Cupp describes in the opening paragraphs of his article.

D. Arguments Based on Lack of Feasibility and the Need for Incremental Change

The potential for incremental change is, to many, an important consideration in determining whether to challenge the status of property. Francione argues that skepticism about the feasibility of incremental change that seeks nontradable legal interests (“rights”) need not, but does, drive the pursuit of endpoint humane exploitation (“welfarism”). And, in his view, welfarism leads only to reinforcement of the status of animals as property. In Rain Without Thunder, he outlines an incremental approach to pursuit of sentient animals’ right not to be property, an approach he believes is morally grounded in those animals’ sentience.

175. See generally Sullivan & Wolfson, supra note 16.
176. Cupp, supra note 38, at 3-4.
177. Francione, Rain Without Thunder, supra note 7, at 4 (describing an incremental approach to elimination of the status of animals as property); Francione, Reflections, supra note 10, at 40-47 (disputing that it is not possible to pursue an incremental approach that seeks the end of the property status of animals, which serves as a justification for pursuit of what he refers to as “welfarism”).
178. Francione, Rain Without Thunder, supra note 7, at 4.
Steven Wise also proposes an incremental approach that would secure rights for animals. However, while Francione focuses on sentience as the moral basis for protecting animals, Wise focuses on those animals whose cognitive capacity is similar enough to that of humans that justice requires prohibiting humans from engaging in acts on those animals that humans are prohibited from engaging in on other humans. He proposes, as an initial matter, creating legal personhood for great apes by way of legal standing. Those plaintiffs could then use the common law to secure both affirmative rights, such as the right to socialize with others of their species, and the “negative” right of non-interference, non-exploitation by humans. In other words, he agrees that the property status of animals is problematic, at least as to those animals who are cognitively similar to humans. The PPI litigation is an example of the approach Wise endorses.

While Wise focuses on great apes because of their similarity to humans, Professor Susan Hankin focuses on companion animals because of apparent advances in the legal recognition that companion animals should not be considered property in the same way as nonsentient, inanimate property. Hankin thinks that the property status of animals is problematic but that it is important for strategic reasons to pursue incremental change by explicitly codifying an intermediary category of property, “‘companion animal property.’” Hankin contends that further legislative and common law developments would be facilitated by explicit recognition and codification of the progress made thus far. Like Wise, Hankin focuses narrowly on a particular class of animals because of apparent existing sympathy for that class. Her definition of “companion animal” would be limited to dogs and cats initially but would allow for protection of other animals if the owner

179. Wise, Drawing the Line, supra note 39, at 9; Wise, Rattling the Cage, supra note 39, at 180-81.
180. See Francione, Reflections, supra note 10, at 53-55 (criticizing “similar-minds” theory and emphasizing sentience as the basis for animals’ moral standing). See generally Francione, Sentience, supra note 39.
181. See Wise, Rattling the Cage, supra note 39, at 179-237.
182. See id. at 4; Wise, Drawing the Line, supra note 39, at 231-41.
183. See Wise, Rattling the Cage, supra note 39, at 4.
184. See supra Part I.A.
185. See Hankin, supra note 45, at 380.
186. See id. at 379. Hankin is not the only scholar to take such an approach. See, e.g., Elizabeth Paek, Fido Seeks Full Membership in the Family: Dismantling the Property Classification of Companion Animals by Statute, 25 U. Haw. L. Rev. 481, 517-23 (2003) (advocating the enactment of statutes premised on apparent legal advances in eroding the status of companion animals as the property of their owners).
187. See Hankin, supra note 45, at 387.
could show that the animal is kept as a companion animal (not an animal kept for commercial purposes, for instance). 188

This approach is appealing because of its optimistic reading of judicial and legislative responses to problems that concern companion animals. When it comes to the legal protection of companion animals, Hankin states that:

[T]his category would simply conform to legal trends that have already occurred in areas of animal cruelty law and estates law. In other ways, and in other areas of law, the category would have additional legal effects of its own. Statutes that make cruelty to animals a criminal offense, that create affirmative duties to animals we keep in our homes, and that allow us to leave enforceable trusts to our pets already recognize that these animals are in a different legal category from inanimate property, even if that category has not yet been named. The companion animal property category would encourage these legal trends to continue and would provide a more rational terminology to support these trends in the law. 189

However, without more substantive detail about specific proposed legislation, it is difficult to evaluate this proposal fairly because the trends Hankin identifies as disrupting the property status of companion animals have not been uniform or clearly disruptive of animals’ traditional property status. 190 The bigger problem, however, is that, as long as animals remain property at all, the law will favor legal owners’ preferences even when they conflict with what we might well imagine would be the strong preferences of their companion animals. Otherwise, we have not, as promised, left the owner’s property interest essentially intact. Merely giving a name—companion animal property—to a category that is developing in disparate ways only adds conceptual confusion as to what the new category contains

188. Id. at 386-87.
189. Id. at 387.
190. While it could be said that pet trusts are useful means for providing for animals when their owners die, the development of law in this area only validates some owners’ preferences and does nothing to benefit those animals whose owners do not so choose. Anticruelty statutory enforcement as to companion animals is an improvement, but it is an improvement only as to individual animals owned as companion animals and not in cases such as puppy mills, for example, where companion animals are owned for commercial purposes. These and other criticisms of the claim that companion animal law is disrupting the status of companion animals as property are discussed by Gary Francione. See Francione, Reflections, supra note 10, at 50-51.
and what generative role it can play. Is it merely a name? How does the label itself “encourage these legal trends to continue”?

It seems to me that Hankin’s proposal does not sufficiently anticipate conflict between animals’ interests and owners’ interests. Rather, for the most part, the proposal would result only in validation of benevolent owners’ interests, such as receiving damage awards that reflect more than the economic value of the animal when the animal is harmed and establishment of owners’ rights to create enforceable trusts to provide for their animals when the owners die. 191

Facilitation of benevolent owners’ interests may result in benefits to some individual animals, but it is too much to say that those advances signal so significant a change in the status of animals as property that a new category of companion animal property is justified. Unless a proposal contemplates protecting animals even when their owners disagree with that protection, the proposal has not accomplished much more than validating owners’ interests as against the rest of the world. That is simply an inscription of ownership. 192 It does not address such conflicts as an owner’s preference to protect her furniture by declawing her cat versus the cat’s preference not to have the last digits of her toes cut off.

Hankin’s proposal also does very little to address ownership of animals that leads to the severe suffering of animals, despite the fact that those animals could be classified as companion animals for some purposes and in some contexts. Hankin’s proposed law would cover only those animals that have a companionate relationship with their owners. Thus, even if her proposed “companion animal property” law provided for more cruelty prosecutions or heightened penalties for clear cases of owners’ cruel acts against their companion animals, owners could defend by denying that they

191. The one exception is her reference to including the arguably greater scope of anticruelty statutes in the overall conceptual category of “companion animal property.” See Hankin, supra note 45, at 387. However, there is no value added by establishing “companion animal property” because, as Hankin acknowledges, “[s]tatutes that make cruelty to animals a criminal offense, that create affirmative duties to animals we keep in our homes, and that allow us to leave enforceable trusts to our pets already recognize that these animals are in a different legal category from inanimate property, even if that category has not yet been named.” Id. It is only that creation of a name for the category of property might encourage such trends to continue. See id.

192. Gary Francione writes in great detail about the property-inscribing effects of current legal work on behalf of companion animal owners. Francione, Reflections, supra note 10, at 38, 48-51. “As far as the law is concerned, however, companion animals have no inherent value except in an idiosyncratic sense. The law protects the ability of property owners [of companion animals] to treat [their] property as if it had inherent value.” Id. at 38.
actually owned the companion animal as a “companion animal” within the
meaning of the statute. This would surely be true of puppy mill operators
since puppies are nothing more than commercial animals to them. But, it
would also be true of someone who claims that his relationship with his dog
is not the kind of companionate relationship that the companion animal
property statute covers; the dog is “only” a guard dog. Accordingly,
heightened protection of animals under the companion animal protection
statute would arguably not apply to the very animals most in need of its
application.

Hankin’s approach is quite similar to David Favre’s approach in that it
relies on sub-dividing the legal category of property and using a sub-category
to substantially modify the umbrella category of property. However, neither
is completely convincing. As just noted with respect to Hankin’s proposal,
the sub-category is too narrowly defined and inadequately accounts for
developments in the law that can be explained in ways other than recognition
of animals’ inherent value. Further, both Hankin’s and Favre’s proposals
create difficulties of interface between the sub-category and the umbrella
category of property. In the case of Hankin’s proposal, what would it mean
to animals themselves if we recognize “companion animal property,” and
how does that category result in protections for animals when there is a
conflict between what the animal and his or her human owner wants or
needs? In the case of Favre’s proposal, what would it mean for an animal to
share ownership of himself with a human, and who would win in the case of
conflicts between purportedly fundamental interests held by each?

In a recent article, Favre further develops an incremental approach based
on his view that it is neither feasible nor necessary to eliminate the status of
animals as property.193 His approach is very much like that of Cass Sunstein:
create standing for animals by which animals can enforce animal protection
laws, without taking into account or addressing the property status of
animals.194 In addition to legal standing, Favre proposes a new tort law under
which animals can redress harms to them.195 Favre’s proposed new law
would permit an animal plaintiff to prevail against anyone who harms a
fundamental interest of the animal, if the human defendant’s interests do not
substantially outweigh the interests of the animal.196

193. See Favre, supra note 87, at 338.
194. Sunstein, supra note 22, at 1336, 1361.
195. Favre, supra note 87, at 352-56.
196. Id. at 353, 356-58.
Favre claims that the theory is incremental because, as cultural views change about which of animals’ interests are fundamental and whether they substantially outweigh humans’ interests, courts would allow for animal plaintiffs to prevail over human defendants only when “the moral balance is clearly in favor of the animal.” 197 His proposal is explicitly premised on the lack of feasibility of successfully attacking the property status of animals itself.198 However, this theory provides no more explanation or principled basis than does his theory of equitable self-ownership as to when a court would ever resolve a conflict between an animal and his legal owner in favor of the animal, even if the court finds that an animal’s interest is fundamental to the animal. He trusts in the courts, but, if anticroyelty statutory interpretation is any guide to how courts strike such balances, there would be only one class of cases in which animal plaintiffs would prevail if, as Favre claims, the property status of animals is not supposed to be at issue. Those are cases of totally gratuitous harm to animals. In other words, this proposal, like his proposal for equitable self-ownership, would function as a civil law adjunct to extant criminal anticroyelty statutes. In both cases, the interests of human owners substantially outweigh fundamental interests of animals except for totally purposeless infliction of harm on animals.199 However, the vast majority of harms and suffering inflicted on animals is that caused by owners who justify extremely high levels of animal suffering by claimed necessity of producing human consumption goods, such as puppies, food, and medicines. Accordingly, it is difficult to see how Favre’s approach would incrementally improve the situation of animals.

E. The Status of Property and Legal Personhood: Summary

I have considered two definitions of legal personhood: (1) a broad definition of animals as worthy of legal recognition as persons with interests that should be protected even when they conflict with the interests of humans,200 and (2) a narrow definition of animals as “aggrieved persons” entitled to bring suit to enforce laws enacted ostensibly to protect them.201

197. Id. at 359 (“Admittedly, this new tort will bring new, conflicting public policy questions before the courts, and the courts should act only when the moral balance is clearly in favor of the animal. To do otherwise would undermine the public’s confidence in the right of courts to address these novel issues.”).

198. See id. at 337; David Favre, Integrating Animal Interests into Our Legal System, 10 Animal L. 87, 90-91 (2004).

199. See Francione, Rain Without Thunder, supra note 7, at 133-36.


201. See supra Part I.A.2.
Each definition has appeal as a means of addressing the problem that current levels of animal suffering are extremely high while current levels of legal protection for animals are extremely low. The reason for that gap is the status of animals as the property of humans, which precludes consideration of them as “persons.” Personhood for animals cannot be pursued without addressing the status of animals as property. Mere tinkering with the property status of animals is not promising, especially because ownership of animals has already resulted in such complex, intertwined practices that cause considerable suffering. Making animals a little more comfortable when they suffer as intensely as they do now is comparable to saying that a mere drop of water can resolve the thirst of a person who is close to death from dehydration. Moreover, leaving the property status intact cannot help but leave in place a trump card for humans when human and animal interests conflict. If, as Sullivan and Wolfson suggest, the situation of factory-farmed animals is worsening despite more than thirty years of advocacy since Peter Singer’s ANIMAL LIBERATION was published, then tinkering with the property status of animals has already proven ineffective. If, as Francione asserts, the situation of companion animals is improving only in accordance with the wishes of benevolent owners, then tinkering with the property status of animals in this context, too, has not improved the lot of companion animals as a class.

This does not mean that there is any way to proceed in a manner that, wholesale, eliminates the status of property. Francione does not propose that, and, as Cupp notes, no legal scholar who supports any kind of legal personhood for animals—whether it involves discarding the property status of animals or not—believes that such a change is imminent; all propose incremental steps toward the particular goal they deem appropriate. How could it be otherwise, given our current practices and how intertwined they are? Incrementalism would have to be an inherent part of any endeavor designed to help animals in a legal environment that is currently so antagonistic to their interests.

An unavoidable feature of incrementalism is that all of the perspectives and solutions cannot be known in advance. Much of the scholarship to date has focused on what about animals makes them deserving of better treatment.

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202. See supra notes 134-137 and accompanying text.
203. Sullivan and Wolfson, supra note 16. Francione also makes this point. Francione, Reflections, supra note 10, at 15-16.
204. Francione, Reflections, supra note 10, at 48-51.
205. FRANCIONE, RAIN WITHOUT THUNDER, supra note 7, at 190-219.
such that laws should be changed. When this approach “works” at all, it results in minimal changes that actively reinforce the status of animals as property. For instance, if chimpanzees are proved to have cognitive capacities that make isolation in cages without opportunities for intellectual stimulation an act of cruelty, it will be sufficient to provide them with the means by which their “psychological well-being” can be promoted when they are held captive.207 Advocates may prefer to throw the spotlight on the entirety of what holding chimpanzees captive means to chimpanzees, and emphasizing their cognitive abilities could accomplish this. However, an emphasis on cognitive abilities need not result in a more expansive response than simply providing some minimal kind of intellectual or psychological enrichment opportunities. The frame of the demand—that chimpanzees’ cognitive capacities be taken seriously—can be answered in an extremely limited way. Similarly, if dogs are proved capable of suffering, it will be sufficient to anesthetize dogs as we debark them and as we kill them. The frame of the demand—that the animals’ capacity to suffer be taken seriously—can be answered in a very limited way that results in minimal animal protection.

By focusing exclusively on animals and why they should not be subjects of abuse, we fail to address the underlying presumption of human superiority from which the entitlement to inflict suffering is derived. That entitlement is connected to the perception of humans as superior to other beings; it is the flipside of the Cartesian position that animals are machines.208 The statement “I think, therefore I am” posits the superiority of humans at the same time that it posits the inferiority of animals, which Descartes considered to be mere automata.209 Defending animals on the basis of attributes that refute the characterization of them as machines implies that the characterization of humans is not accurate either. However, mere implication is easily ignored. Direct challenge of human presumed entitlement is important as well.

207. See supra note 95.
208. DESCARTES, supra note 89, at 36.
209. See id.; see also DeCoux, supra note 46, at 196-200 (arguing that the boundary between animals and humans is drawn and maintained through the use of religious concepts of humans’ having been made in the image of God and humans’ having been given by God dominion over animals).
II. LITIGATION TO DECENTER HUMANS: INVALIDATION OF WILL DIRECTIVES TO KILL COMPANION ANIMALS AND PROHIBITIONS ON THE KILLING OF OWNER-RELINQUISHED ANIMALS AT ANIMAL SHELTERS

The uncritical, unselfconscious ease with which humans kill animals is a potent means by which humans sustain the idea of sufficient discontinuity between humans and animals to justify their status as the property of humans. Approximately ten billion animals are killed annually just for food consumption in the United States alone.\(^{210}\) Their deaths register only for statistical purposes; there are no obituaries written for these animals. To most Americans, chicken is a food, not an animal; most people who recognize chickens as living animals are in the food production business in which “animal” means “not-yet-dismembered.” While most Americans do not think of killing their companion animals with the same methods as factory-farmed animals, Americans do request that veterinarians or animal shelters kill young, healthy companion animals. Thus, even as to that class of animals considered to be “companions,” there is considerable acceptance of owner prerogative to kill such animals, as long as the animals do not suffer “unnecessarily” as they are killed.

It is these acts of relatively casual killing that reinforce on a daily basis the status of animals as the property of humans. Through our conduct we define the “other-than-human” (animal) as the means to human ends (property). Legal rules and the interpretations of those rules confirm and enforce that status. Anticruelty statutes, the basic means by which animals could, theoretically, be protected from the worst human-inflicted suffering, are interpreted through the lens of animals’ status as human property. Only those acts that cause “unnecessary” suffering are clearly prohibited; the necessity of killing animals is not, itself, questioned.\(^{211}\)

Ethical vegetarians\(^{212}\) consciously reject this idea of animals as the mere property of humans and limit their participation in the killing of animals for human benefit. Yet, as philosopher Matthew Calarco points out in analyzing Derrida’s meaning of “sacrificing animals”, even those who rigorously avoid consumption of the products of the literal sacrifice of animals—the consumption of animal flesh—cannot help but consume products derived

\(^{210}\) Welty, supra note 27, at 175.

\(^{211}\) Francione, ANIMALS, PROPERTY AND THE LAW, supra note 2, at 142-43; Ibrahim, supra note 2, at 179.

from the killing of animals. Nor can they avoid living in the world in ways connected to the direct and indirect global killing of animals for humans’ benefit. Moreover, as Calarco convincingly articulates, Derrida’s problem of “sacrifice” does not boil down to a distinction of “simply choosing between meat-eating and vegetarianism. The moral question becomes instead one of ‘determining the best, most respectful, most grateful, and also the most giving way . . . of relating the other to the self’ . . . .” “Sacrifice” includes symbolic as well as literal acts. Because it is the consequence of the “hegemonic discourse of Western metaphysics or religions,” no one can truly and completely resist participation in the acts that continually inscribe a boundary between humans and animals. Our society is so accustomed to practices that relegate animals to the category of the “other-than-human” that it seems bizarre to many when the “question of the animal” is posed in the context of humans’ exploitation of animals. What question?

The context for Calarco’s comment is an article in which he discusses Jacques Derrida’s statement that decentering humans (a project of posthumanist thought) fails if the exclusion of nonhuman animals from the general moral imperative to refrain from killing is uncritically accepted. In an interview published with the title “Eating Well,” or the Calculation of the Subject: An Interview with Jacques Derrida, Derrida states:

[R]esponsibility to the other, for the other, comes to him, for example (but this is just one example among others) in the “Thou shalt not kill.” Thou shalt not kill thy neighbor. Consequences follow upon one another, and must do so continuously: thou shalt not make him suffer, which is sometimes worse than death, thou shalt not do him harm, thou shalt not eat him, not even a little bit, etc. . . . The “Thou shalt not kill” is addressed to the other and presupposes him. It is destined to the very thing that it institutes, the other as man. . . . The “thou shalt not kill”—with all its consequences, which are limitless—has never been understood within the Judeo-Christian

214. Id.
215. Id. at 195 (quoting Derrida, “Eating Well”, supra note 1, at 114).
217. Many people express genuine interest in learning about animals themselves or about animals as symbols in our society, but this does not necessarily extend to interest in learning about institutional practices by which animals are mutilated, intensively confined, and killed.
tradition... as a “Thou shalt not put to death the living in general.”... [T]he other, such as this can be thought according to the imperative of ethical transcendence, is indeed the other man: man as other, the other as man...

Discourses as original as those of Heidegger and Levinas disrupt, of course, a certain traditional humanism. In spite of the differences separating them, they nonetheless remain profound humanisms to the extent that they do not sacrifice sacrifice. The subject (in Levinas’s sense) and the Dasein [existence/beingness/engagement-in-the-world, in Heidegger’s sense] are “men” in a world where sacrifice is possible and where it is not forbidden to make an attempt on life in general, but only on the life of a man, of other kin, on the other as Dasein. Heidegger does not say it this way. But what he places at the origin of moral conscience... is obviously denied to the animal.220

Derrida does not provide (or set for himself the task of providing) a fully delineated concept of “sacrifice” but he does refer to it as “need, desire, authorization, the justification of putting to death, putting to death as denegation of murder. The putting to death of the animal, says this denegation, is not a murder.”221

In this specific context, Derrida’s words seem primarily descriptive: the scope of the term “murder” indicates who is included in the category of others-to-whom-we-owe-responsibilities. If animals cannot be murdered (but can only be killed), they are excluded from the category of others-to-whom-we-owe-responsibilities (that is, humans, who may be murdered). Since the word “murder” implies wrongful killing, the inapplicability of the term “murder” to animals means that humans’ killing of animals cannot be wrongful. Thus, the hegemony of humans is sustained by both the act of casual killing and its conceptualization as not murder.

Derrida cannot be talking about decentering humans simply as a matter of humility. In the first quotation above, he links moral responsibility to others, at least in part, to the application of the proscription against murder. If an entity is included in that proscription, there is moral responsibility involved in the relationship between entities covered by the same proscription; there is an “other-to-whom-we-owe-responsibilities.” If the entity is not included in that proscription, there is no moral responsibility or, perhaps most correctly, there is at least not the same kind of moral

220. Id. at 112-13.
221. Id. at 115.
responsibility as exists between entities who are both covered by the
description against murder. Nevertheless, although Derrida uses the
example of animals, the extent of Derrida’s inclusion of nonhuman animals
in the “Thou Shalt Not Kill” is not completely clear. In this interview, the
concept of denegation of murder is used broadly and suggestively.\(^\text{222}\)

However, in another interview Derrida decries the current means by
which animals are reduced to “meat”: “[G]enocidal torture inflicted on them
often in a way that is fundamentally perverse, that is, by raising en masse, in
a hyperindustrialized fashion, herds that are to be massively exterminated for
alleged human needs . . .”\(^\text{223}\)

He argues that the type of violence humans have wreaked on animals,
particularly since Descartes,

will not be tolerated for very much longer, neither de facto nor de jure. It will
find itself more and more discredited. The relations between humans and
animals must change. They must, both in the sense of an “ontological”
necessity and of an “ethical” duty. I place these words in quotation marks
because this change will have to affect the very sense and value of these
concepts (the ontological and the ethical).\(^\text{224}\)

According to Derrida this inevitable change will not come about through
the extension of rights to certain animals because:

to confer or to recognize rights for “animals” is a surreptitious or implicit
way of confirming a certain interpretation of the human subject, which itself

\(^\text{222}\). After stating that “sacrifice” as denegation of murder is applied to “the animal,”
Derrida states further:

I would link this denegation to the violent institution of the “who” as subject. There is
no need to emphasize that this question of the subject and of the living “who” is at the
heart of the most pressing concerns of modern societies, whether they are deciding
birth or death, including what is presupposed in the treatment of sperm or the ovule,
pregnant mothers, genetic genes, so-called bioethics or biopolitics (what should be
the role of the State in determining or protecting a living subject?), the accredited
criteriology for determining, indeed for “euthanastically” provoking death (how can
the dominant reference to consciousness, to the will and the cortex still be justified?),
organ transplant, and tissue grafting.

\(^\text{223}\). Jacques Derrida, *Violence Against Animals, in For What Tomorrow . . . A
\(^\text{224}\). Id. at 64.
will have been the very lever of the worst violence carried out against nonhuman living beings.

... A transformation is therefore necessary and inevitable, for reasons that are both conscious and unconscious. Slow, laborious, sometimes gradual, sometimes accelerated, the mutation of relations between humans and animals will not necessarily or solely take the form of a charter, a declaration of rights, or a tribunal governed by a legislator. I do not believe in the miracle of legislation. Besides, there is already a law, more or less empirical, and that’s better than nothing. But it does not prevent the slaughtering, or the “techno-scientific” pathologies of the market or of industrial production.225

Derrida’s ideas facilitate consideration of ways in which the law might be used to encourage humans to sacrifice the sacrifice of animals, thereby gradually reducing a significant conceptual boundary through which animals’ status as human property is maintained. I agree with Derrida’s assertion that there is no miracle of legislation (or litigation) that can transform wholesale the relations between humans and animals. However, I do think that there may be legislation and litigation that can slowly and laboriously shift the contours of the relations between humans and animals, if there is already sufficient sociocultural “space” in the conceptual boundary between humans and animals, a boundary that is currently based to some extent on uncritical, ostensibly amoral killing of animals. I do not believe that legal reform is likely to create such a space where none yet exists. For instance, although I take seriously Derrida’s call to critically reexamine the particular atrocities humans inflict on animals they produce and kill for food, I also take seriously Francione’s skepticism that legal reform of factory-farming at this point in the commodification of those animals can accomplish little but further inscription of the status of animals as the property of humans.226 Consistent extralegal advocacy might ultimately undermine the complex of commodification ideology as to factory-farmed animals, but I am not confident that there is room for legal advocacy that will predictably result ultimately in a willingness to sacrifice the sacrificing of those animals, which are so tightly conceptually bound with notions of “raw material,” “commodity,” and “property.”

225. Id. at 65.
226. See generally Francione, Reflections, supra note 10.
On the other hand, there is evidence that humans are willing to consider (some meanings of) sacrificing (some meanings of) the sacrifice of companion animals. Exploration of two examples may illuminate the complexity of “sacrifice” and the way in which it may continue to inscribe difference even as it appears to reduce difference between humans and animals. Perhaps the most that can be said, ultimately, is that the extent to which companion animals are unreflectively sacrificed is changing.

I have chosen two linked examples through which to explore themes of “sacrifice” and the “sacrifice of sacrifice:” judicial willingness to reject will directives calling for the killing of the testator’s companion animals at the time of the testator’s death and legislation prohibiting animal shelters from immediately killing owner-relinquished animals. Both of these are means by which the previously unquestioned right to kill companion animals is challenged.

These examples, considered separately and together, suggest that sacrificing sacrifice even when there is an apparent will to do so, is a conceptually difficult enterprise. That conceptual difficulty is reflected in laws and legal interpretation of laws that seem to indicate a growing willingness to sacrifice the sacrificing of companion animals, although only under some limited circumstances. Thus, these laws may have limited value in decentering humans and removing prerogatives attendant to ownership of animals.

A. Limitations on Will Directives to Kill Companion Animals

Sometimes owners of companion animals state in their wills that those animals are to be killed upon the death of the owner. Owners may do so for a variety of reasons. It seems unlikely that most owners order the immediate deaths of their animals in order to take them into the next life, as happened to sacred animals in ancient Egypt, though the fact that legislation in Florida allowing the burial of cremated companion animal remains in their owners’ caskets suggests that some might. Commentators suggest that


228. See FLA STAT. ANN. § 497.273(4) (West Supp. 2008). Obviously, the legislation allows for burial of previously cremated companion animals and that may be the most common reason cremated animal remains end up in their owners’ caskets. However, it is not possible to rule out the possibility that some owners will kill and cremate their animals for burial with themselves because they identify the animals as extensions of themselves.
currently stated reasons have more to do with owners’ concerns about the
prospects for continued good care of the animals after the owner’s death.229
Owners are aware that their personal views about what their animals need
may differ significantly from the views of other animal owners because, after
all, even companion animals are property. Media reports of dogs living in
luxury do little to offset our knowledge of abused dogs living on short chains
with encrusted empty water bowls too far out of reach to have satisfied thirst
anyway. Even within the middle range of companion animal ownership there
is considerable variance on such matters as whether and what kind of
veterinary medical care an animal should receive, and how and under what
circumstances animals should be disciplined. Even if the owner knows
someone whose views are compatible with her own, she may still worry that
things will happen such that the chosen caretaker can no longer provide care.
Would the animal end up abused, in a research laboratory, in a shelter? The
animal is mere property, so anything could happen to her, regardless of the
love bestowed on her by her original owner.
I believe that pessimism about the future prospects of companion
animals is directly tied to the fact that there is such great variance in what
ownership of companion animals is thought to entail, which in turn is tied to
the status of animals as property. Because animals are the property of
humans and owners vary considerably with respect to what they think
owning companion animals entails, owners confronting their own deaths
have good reason to be anxious or pessimistic about the future prospects for
their animals. Because animals are property, owners can act on that anxiety
or pessimism by ordering their companion animals killed. The ease with
which owners can kill their companion animals to allay their anxiety about
their companion animals’ futures plays an important role in maintaining the
property status of animals. The property status of animals plays a similarly
important role in maintaining the great variance in how owners treat their
companion animals, which was one of the reasons owners are anxious about
their companion animals’ futures.

Somewhere along this endlessly repeating feedback loop there must be
an interruption if animals are ultimately to be respected. It is a sacrifice to
accept that interruption: we must be willing to sacrifice the comfort of
knowing that, because we have killed an animal as painlessly as possible

229. See Reppy, supra note 129, at 219-20; Sykas, supra note 227, at 939. For a
consideration of a variety of ways in which owners of companion animals can provide for the
care of their animals, even when the owner cannot provide that care due to death, injury, or
other incapacity, see Reppy, supra note 129, at 225-49; Gerry W. Beyer, Pet Animals: What
(that is, sacrificed the animal) that animal will not suffer in a world that treats animals as property. Forbidding the killing of companion animals upon the demand of their owners, even if well-intentioned, is a type of sacrificing sacrifice that can interrupt the feedback loop between animals as property and the ease with which we kill them, but it is truly a sacrifice given what can happen to animals in this society.

The space that has opened sufficiently to challenge unreflective killing of companion animals was created by popular notions of companion animals as family members, even though the law does not yet treat them as such. By contrast, single parents who are confronting the reality of predeceasing their minor children may be pessimistic that anyone could love their children as much as they, but they need not worry that their children will end up as subjects in a gruesome, terminal laboratory experiment or killed by some barely trained minimum wage worker in an animal shelter. The cause for pessimism is less and the available means of dealing with pessimism are fewer: parents cannot legally kill their children even if they believe that death is a kinder fate. Children are not the legal property of their parents. Thus, although a sociocultural space has opened through which some companion animals are perceived to be family members, incomplete recognition of that perception in the law results in a gap. Specifically, this gap contains the temptation to kill to avoid for one’s animal the consequences of being the property of another. Killing—not including companion animals in the “Thou shalt not kill”—is a primary means by which their status as humans’ property is maintained. Yet it may be too difficult for many owners to make that sacrifice (of not sacrificing their animals) because of their pessimistic view of alternative outcomes for those animals if those animals are allowed to live. Would expanded legal standing make a difference in outcome? It seems that it would depend very much on what the human representative of the animal or the human representing his own interests in protecting the animal asks of the court.

230. Some may claim that the development of care options is more important than expanded legal standing to prevent owners from ordering the deaths of their animals. I believe that both are necessary, but I do not believe that one is necessarily superior to the other. If standing is expanded such that a representative has the ability both to prevent the killing and to monitor future care, the development of care options will be enhanced. As it is, without an enforcement mechanism, owners will kill because they fear lack of enforcement of care agreements.

231. Merely expanding standing will not by itself dismantle the property status of companion animals. Depending on who the human representative is for the animal, other human-animal boundary maintenance mechanisms may still operate. For instance, the human
Due to the activism of people and groups that have contested testators’ rights to direct the destruction of their companion animals, it appears that there is at least a small break in that feedback circuitry. There is no appellate court decision regarding the validity of will directives to kill healthy companion animals upon the death of the owner, but several trial courts have invalidated such directives. The promise and limitations of these decisions for breaking the circuitry between killing, property status, and greatly inconsistent treatment of companion animals is illustrated by the 1964 Pennsylvania Orphans’ Court decision of Capers’ Estate. In Capers’ Estate, the executors of Ida Capers’s estate sought relief from a directive in Ms. Capers’s will to kill her two dogs, Brickland and Sunny Birch. The court heard testimony from Ms. Capers’s veterinarian, who claimed that Ms. Capers cared very much about Brickland and Sunny Birch but decided that killing them would be best for the dogs. The court decided it would violate public policy to enforce Ms. Capers’s directive.

For our purposes in considering the extent to which sacrificing companion animals is subjected to scrutiny, the court’s basis for invalidating that attempted sacrifice is important. The court’s decision begins with a lengthy recitation of an attorney’s eloquent ode to dogs, which had been delivered in the case of a neighbor having killed his neighbor’s dog. The following is but a short excerpt from that recitation:

“The one absolutely unselfish friend that a man can have in this selfish world, one that never deserts him, the one that never proves ungrateful or treacherous, is his dog.

If fortune drives his master forth an outcast in the world, friendless and homeless, the faithful dog asks no higher privilege than that of accompanying him to guard against danger, to fight his enemies, and when the last scene of all comes and death takes the master in its embrace and his representative could believe it is ideal to keep the animal alive to breed the animal (forcible reproduction), which is another potent marker of the human-animal boundary.


234. Id. at 141.

235. Id. at 122-23.
body is laid away, there by his graveside will the noble dog be found, his head between his paws, his eyes sad but open in alert watchfulness, faithful and true even unto death.” 236

The court also includes in its opinion a similarly lengthy quotation from Albert Schweitzer, the gist of which may be captured by the following short excerpt:

“The great fault of all ethics hitherto has been that they believed themselves to have to deal only with the relations of man to man. In reality, however, the question is what is his attitude to the world and all that comes within his reach. A man is ethical only when life, as such, is sacred to him, that of plants and animals as that of his fellow men . . . .” 237

Following its quotation of Schweitzer, the court stated that

If affirmation of life and ethics are inseparably combined, it indeed would be unethical to carry out the literal provisions of [the decedent’s will directive to kill the dogs, which would] confiscate the life of the two setters for no purpose. It would be an act of cruelty that is not sanctioned by the traditions and purposes of this court, and would conflict with its established public policy. 238

The court’s decision also reflects considerable attention to the needs of Brickland and Sunny Birch and the ability of their current caretaker to continue providing for them should ownership be transferred to him. 239 The court specifically notes “the strength of the public sentiment in favor of preserving the lives of these animals.” 240

The strength of the court’s invocation of public policy, to the extent of calling the killing of the dogs “cruel,” seems to support the conclusion that the idea of sacrificing sacrifice has gained some traction. Indeed, the quotation from Schweitzer mirrors Derrida’s position that nonhuman animals should be included in the proscription against killing. However, the court’s decision, taken as a whole, does not permit that expansive a reading.

236. Id. at 123.
237. Id. at 130-31 (quoting ALBERT SCHWEITZER, OUT OF MY LIFE AND THOUGHT: AN AUTOBIOGRAPHY 125-26 (Charles Thomas Campion trans., H. Holt & Co., 1949)).
238. Id. at 132.
239. Id. at 129.
240. Id. at 130.
Although the court strongly asserts the public policy in favor of preserving the life of these particular dogs, the court did so only after it decided that the testator in this case would have wanted the dogs to live had she known that such a good home was available for the dogs when she died.241 Because the court was persuaded that the current caretakers, Mr. and Mrs. Miller, would provide at least as good a home as that of Ida Capers, the court was willing to conclude that the testator would have wanted the dogs to go to the Millers.242

If a caretaker that satisfied the court was not certainly available at the time the testator died, would the court have relied on public policy to preserve the dogs’ lives? In this particular case, the residuary legatee was the Western Pennsylvania Humane Society (“Humane Society”). Obviously, Ms. Capers knew about them because she provided for them in her will, but Ms. Capers chose death for her dogs instead of giving the dogs to the Humane Society. When the will directive to kill the dogs was invalidated, the court ordered that ownership of the dogs would pass through the residuary clause to the residuary legatee, in anticipation that the Humane Society would enter an agreement with the Millers that the Millers would own Brickland and Sunny Birch.243 Ultimately, the dogs ended up with the Millers, but, if there had not been a caretaker to whom the Humane Society would yield ownership, would the court have spared the dogs’ lives by letting them pass as personal property through the residuary clause despite the fact that the testator obviously knew of the Humane Society and chose death for her dogs anyway? Because this court spent so much time assessing the testator’s intent and prioritized making that determination before its discussion of public policy, it is possible that the court would not have found public policy sufficiently strong to override the implication that the testator did not want the dogs to go to the Humane Society. Moreover, if the testator had clearly stated that she intended for the dogs to die regardless of any possibility of a good home, it is not clear that the Capers’ Estate Court would have invalidated the will directive.

It is also the case that the court expended considerable energy analyzing the meaning of the word “dispose” in the Pennsylvania Wills Act before concluding that, although the Act gives testators the right to dispose of their

241.  Id. at 129 (“That decedent would rather see her pets happy and healthy and alive than destroyed, there can be no doubt.”).

242.  Id. at 130 (“We . . . believe that the intent of testatrix would be carried out if her two favored Irish setters were placed where they are given the same care and attention that she bestowed on them; where they are doubtlessly as happy and contented as they were during the life of their owner.”).

243.  Id. at 141.
property, the Act does not as a general matter give them the absolute right to choose destruction as the means by which they dispose of their property.\textsuperscript{244} In that regard, Pennsylvania’s law does not seem to be out of keeping with other jurisdictions.\textsuperscript{245} Testators generally have the right to dispose of property as they choose, but there is a presumption against destruction of property presumably because of possible economic loss to the estate.\textsuperscript{246} Since a testator’s ability to destroy her property is already legally limited, it is not such a reach for a court to decide that a testator cannot destroy her companion animals even though those animals probably have little economic value.

The result might well be different if courts were called upon to decide whether it violates public policy for an owner to kill her young, healthy companion animal while the owner is still alive. There is no general prohibition of owners’ rights to destroy their property while they are alive, and so a court would not simply be applying the general prohibition to the specific case of owners’ decisions to kill their companion animals. If the public policy upon which courts have rejected will directives to kill the testators’ companion animals is premised on the public’s interest in protecting companion animals from dying simply because their owners decide to have them killed, one would expect to see that public policy applied with equal strength to challenge owners’ killing their companion animals while they are still alive. Although it is difficult to know what is happening at the trial court level, that does not appear to be the case. As the next example of animal shelter practices will show, there appears to be general acceptance of the idea that owners can kill their animals as long as they do not cause their animals to suffer unnecessarily in the process.

Commentators who approve of judicial invalidation of will directives to kill companion animals express uneasiness that such judicial decisions regularly rest on public policy justifications rather than on statutory law.\textsuperscript{247} Although there is also uncertainty as to how such a statute would be applied, there is arguably greater variance when public policy is the basis for a decision because there are various sources of public policy, and which public policy will be brought to bear in relation to the unique facts of each case is somewhat unpredictable. Indeed, the few trial opinions that have been

\textsuperscript{244} Id. at 135-38.
\textsuperscript{245} For a discussion of judicial opinions addressing the validity of will directives to destroy property generally, see Sykas, supra note 227, at 924-34.
\textsuperscript{246} Id. at 927.
\textsuperscript{247} See Reppy, supra note 129, at 220-21; Sykas, supra note 227, at 928, 935; Carlisle, supra note 232, 895-98.
reviewed suggest singular situations. For instance, in the California case of
Smith v. Avanzino, the court invalidated a will directive to kill the
testator’s dog Sido after the Legislature passed a law specifically to
invalidate that particular will directive to kill Sido. In a Vermont case involving a testator’s will directive to kill his horses, the court was persuaded by a coalition formed to contest the directive, a coalition that included the former owner of one of the horses. In the Capers’ Estate case, the Governor of Pennsylvania intervened with the claim that killing Brickland and Sunny Birch violated public policy.

Not every situation of a companion animal whose owner dies attracts this kind of attention and controversy. In the Capers’ Estate case, the executors sought relief from the directive to kill Brickland and Sunny Birch, but it is possible that many executors simply fulfill will directives, which no one contests. And, of course, many companion animals may well be killed by those who handle nonprobated estates. Therefore, the decision of a few trial courts to invalidate will directives on grounds of public policy does not lend a great deal of comfort to those who care about preserving the lives of companion animals whose owners have decided that those animals should die when their owner dies.

With varying degrees of confidence, three commentators have raised the possibility that some state anticruelty statutes might be interpreted to preclude killing healthy companion animals. Such an interpretation seems unlikely even in the case of state anticruelty statutes that prohibit the “needless” or “unnecessary” killing of animals. Animals are the property of humans, and, while owners cannot cause unnecessary suffering when their animals are killed, the matter of necessity to kill their companion animals at all might well be considered the prerogative of the owner.

249. Frances Carlisle discusses the California Legislature’s action and its relationship to the court’s invalidation of the will directive to kill Sido. Carlisle, supra note 232, at 894. See also, Reppy, supra note 129, at 223 (contending that the legislation to save Sido was unconstitutional).
251. See Sykas, supra note 227, at 934.
253. See Reppy, supra note 129, at 220-21; Sykas, supra note 227, at 941; Carlisle, supra note 232, at 898-900.
Instead of relying on anticruelty statutes either for direct invalidation of will directives or as evidence of public policy against enforcing such directives, Frances Carlisle recommends the enactment of legislation that specifically prohibits testators from directing the deaths of healthy companion animals, at least for a reasonable period of time to allow the executor to look for a suitable home. More radical legislation would require that all companion animals be given an opportunity for adoption before being killed, including the companion animals of owners who choose to kill their animals while the owner is still alive. Prohibiting veterinarians from killing companion animals who are not irremediably suffering would be one avenue, but multiple problems would have to be solved. What would become of animals who are not irremediably suffering but are unwanted for adoption? Would they be transferred to research laboratories to be used in experiments? If that avenue is foreclosed, would they end up in animal shelters? If animals are not killed as a result of will directives, but they are turned over to animal shelters that will kill them as soon as ownership changes to the shelter, then the invalidation of will directives has been to no avail. Since animal shelters are the last stop for many, many animals, legal reform in that area is particularly important. That is one of the reasons I next consider the example of shelter legislation that prohibits the killing of such animals without giving them the opportunity of the same holding period as that provided for strays.

Invalidation of testators’ will directives to kill their companion animals seems to be a type of legal action that challenges a fundamental aspect of ownership. It challenges the centrality of humans to decide if and when animals will live. It requires the sacrifice of sacrificing animals for the comfort of the owner, as long as such will directives are invalidated even when a good home is not immediately available. In fact, in some of the few reported cases of invalidation of will directives, there wasn’t a good home immediately available. In the case of a Canadian testator’s will directive to have his four horses shot by the Royal Mounted Canadian Police ("RMCP"), the court held that enforcing such a provision would violate public policy. Despite the fact that the testator’s wishes appeared to be based on concern about the availability of good homes, the court determined that the testator’s concerns could be sufficiently addressed by directing the

254. See Carlisle, supra note 232, at 901-03.
255. Hankin, supra note 45, at 355-58 (citing In re Wishart, 129 N.B.R.2d 397 (1992)).
256. Id. at 356.
New Brunswick Society for the Prevention of Cruelty to Animals to find new homes for the horses and to enter into agreements with the new owners that would help to insure adequate care of the animals and regular inspections by the New Brunswick SPCA. 257 Similarly, in the case of Smith v. Avanzino, Sido was transferred to Pets Unlimited, an organization named in the residuary clause of the testator’s will, which would retain custody subject to the court’s inspection and determination of suitability. 258 Significantly, the courts in both cases made requirements of the new owners that would help to insure adequate treatment of the animals. 259

If standing is expanded to include either humans initiating standing because they, as humans, have an interest in the welfare of an animal, or direct legal standing for animals, there might well be a significant increase in the number of times that will directives to kill companion animals are challenged. Indeed, for this legal avenue to create a noticeable disruption in this specific area of owner prerogative, there would have to be many more such challenges than have been reported. But, is there a differential benefit in one form of standing versus another? A lawyer representing a human client on the basis of that client’s interest in the welfare of animals may not as zealously fight to keep an animal alive if the availability of a good home is in doubt. A lawyer representing the animal who would be killed if the will directive is enforced may more readily fight for the animal’s opportunity to live regardless of the availability of a good home immediately upon the death of the animal’s owner. If that is true, then legal standing for animals would have a stronger effect on enforcing a law that involves sacrificing the sacrifice of animals—a law that helps to erode the status of property. Nevertheless, as noted above, courts in several cases in which humans, not animals, were plaintiffs spared the lives of animals when a good home was not immediately available and with requirements of agreements and inspection that would help to insure at least adequate treatment. Although it would be an overstatement to claim that direct legal standing for animals in their own right is never necessary, these cases suggest that there are some circumstances under which there is no apparent benefit to animals having standing instead of humans concerned about their well-being. 260 The bigger

257. Id. at 357
258. Id. at 355.
259. See id. at 355 (disposition of Sido in Smith v. Avanzino); id. at 357 (disposition of Barney, Bill, Jack, and King in In re Wishart).
260. One of the reasons for this may be that rules regarding standing to intervene in probate disputes may be more liberal than rules regarding standing in other contexts. Professor
problem is how to erode the property status of animals, not the right of animals to bring lawsuits as plaintiffs in their own names.

B. Limitations on Animal Shelters’ Practice of Killing Owner-relinquished Animals

Many animals end up in animal shelters as strays or as “turn-ins” by people who purport to own them. A very large number of those animals do not leave shelters alive; they leave in barrels stuffed to the brim with the dead bodies of companion animals—animals we as a society claim we care for as “family members.” It is easier for animal shelters to kill homeless companion animals than it is to find them new homes, regardless of how adoptable they may be. Therefore, legal reform of animal shelters to shift them from killing animals to saving their lives is an important avenue for sacrificing the sacrifice of companion animals.

The so-called “no-kill” movement is gaining momentum across the United States, but reducing the killing of companion animals is quite controversial among animal shelter managers and leading animal protection

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William Reppy hints at this possibility in his discussion of judicial invalidation of will directives to kill companion animals. Reppy, supra note 129, at 224.

261. Accurate statistics are difficult to find. In her 2004 proposal for funding a shelter veterinary medical program at Auburn University Veterinary Medical School, Dr. Brenda Griffin reported HSUS estimates that shelters euthanize between 4 and 6 million companion animals annually. Dr. Brenda Griffin, A Proposal for a Maddie’s Shelter Medicine Program at the Auburn University College of Veterinary Medicine, February, 2004, at 3. available at http://www.maddiesfund.org/projects/project_pdfs/auburn_proposal.pdf (last visited May 21, 2008). Dr. Griffin further stated that “[e]uthanasia of healthy unwanted cats and dogs remains the leading cause of death of these species.” Id. In 2007, Nathan J. Winograd, founder of the No-Kill Advocacy Center, published the claim that agencies kill more than 5 million shelter animals annually. NATHAN J. WINOGRAD, REDEMPTION: THE MYTH OF PET OVERPOPULATION AND THE NO KILL REVOLUTION IN AMERICA 1 (2007). In 2007, Professor Rebecca J. Huss used a midpoint between the estimates of 3 and 4 million dogs and cats euthanized annually in order reach the conclusion that “about 9600 animals [are] euthanized each day [which amounts to about] 400 animals each hour or seven animals each minute . . . .” Rebecca J. Huss, Rescue Me: Legislating Cooperation Between Animal Control Authorities and Rescue Organizations, 39 CONN. L. REV. 2059, 2065 (2007). Most recently, Newsweek reported that “[s]helters around the country kill 4 million animals every year; by some estimates 80 percent of them are healthy.” Jeneen Interlandi, PETA and Euthanasia, NEWSWEEK Web Exclusive, 12:43 p.m. ET, Apr. 28, 2008, available at http://www.newsweek.com/id/134549/page/1. These are all estimates; it is difficult to get a completely accurate count, partially due to the fact that animal shelter reporting requirements (and enforcement thereof) vary, depending on the state or local jurisdiction.
organizations. There are many reasons for that resistance, including rejection of legal regulation and retention of the traditional view of pounds as places where animals are killed to rid the streets of strays. Prominent among the reasons advanced by opponents to the “no-kill” movement is reluctance to sacrifice the sacrificing of companion animals when there appears to be a limited number of good homes for homeless companion animals.

Leading “no-kill” activist Nathan Winograd dates the origin of reform to the televised killing of a healthy young mother cat and her four healthy kittens by a shelter director seeking to show to the public exactly what animal shelters were doing on a daily basis. Measured in terms of dollars and the number of animals leaving shelters dead rather than alive, the primary activity of animal “shelters” was, and still is, killing dogs and cats. According to Winograd, the San Francisco Society for the Prevention of Cruelty to Animals (“San Francisco SPCA”), under the leadership of Richard Avanzino, was the first to challenge that status quo on a large, institutional basis. In 1993, Avanzino proposed a San Francisco ordinance that would prohibit public animal control agencies from killing any healthy cat or dog that a humane society would be willing to take for purposes of finding the animal a good home.

Winograd describes the night that Avanzino’s proposal was debated by the San Francisco Animal Welfare Commission:

[Individuals affiliated with animal protection organizations throughout the San Francisco Bay area filled the room. The four largest shelters condemned the plan. When it was over, each of them had spoken out against the proposed new law. Even the most esteemed national organizations—not only those that purport to speak on behalf of shelter animals, but those which preach everything from vegetarianism to ending hunting—came out against the concept, outraged that anyone would propose ending the killing of dogs and cats in San Francisco’s shelters . . .

Without exception, the most vociferous opposition . . . arose from those who should have championed any means of saving animals: the leaders of animal shelters and animals control facilities who for decades turned to sodium...
phenobarbital . . . to manage their shelter populations under the theory that
the best we could do for the bulk of these animals was to kill them.267

The Fund For Animals, one of the organizations that opposed
Avanzino’s plan, argued as follows:

[People] who do not spay and neuter are the greatest single cause of the
companion animal tragedy . . . Each day an estimated 70,000 puppies and
kittens are born (25.5 million a year). Six to ten million, we classify as
“surplus” and kill . . . The problem is simple: we have too many dogs and
cats. Too many for the too few homes available.268

Avanzino’s proposed legislation was not enacted, but San Francisco’s
Department of Animal Care and Control reluctantly agreed to an Adoption
Pact whereby the San Francisco SPCA would take any healthy dog and cat
San Francisco’s Department of Animal Care and Control was going to kill.
Winograd reports that one year later

[T]he deaths of healthy animals in San Francisco dropped to zero, and the
deaths of sick and injured animals dropped by nearly 50 percent, at a time
when most major urban cities were killing upwards of 80 percent of cats and
over half of the dogs . . . In the first five years . . . cat deaths declined by over
70 percent, kitten deaths by over 80 percent, and dog deaths by two-thirds.269

In 1998, when the San Francisco SPCA was proving that it was possible
to save many more companion animals than anyone had thought possible,
California State Senator Tom Hayden proposed statewide legislation to shift
animal shelter practices in the direction of saving lives.270 Senator Hayden
was not aware of the San Francisco achievements at first. A citizen lawsuit

267. Id. at 46-47.
268. Id. at 47.
269. Id. at 49.
270. The bill was introduced to the California Senate as Senate Bill 1785. S.B. 1785,
1997-1998 Reg. Sess. (Cal. 1998). It passed both houses with overwhelming support, and was
signed into law by then Governor Pete Wilson and chaptered as Chapter 752, Statutes of 1998.
A summary of the legislative history of Senate Bill 1785, including the votes taken at different
stages of consideration by the Legislature and the fact of Governor Wilson’s signing Senate
Bill 1785 into law is available at http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=sb_1785&sess=9798&house=B&author=hayden (last visited May 21, 2008) [hereinafter
Summary of Legislative History].
against the Los Angeles City animal shelter system. In the fall of 1997, Senator Hayden held public hearings in Los Angeles where he heard troubling testimony about Los Angeles City shelters. Following those hearings Senator Hayden requested research from a variety of sources to assess animal sheltering practices in California and whether there was a need for animal shelter reform legislation. On the basis of the research findings, Senator Hayden proposed unique comprehensive animal shelter reform legislation designed to incorporate many features of no-kill animal sheltering. The legislation was signed into law by Governor Pete Wilson in 1998 and became known thereafter as the Hayden Law.

271. The lawsuit, Newman v. City of Los Angeles Department of Animal Regulation, is described by Sarah A. Balcom in her article Legislating a Solution to Animal Shelter Euthanasia: A Case Study of California’s Controversial SB 1785, 8 SOC’Y & ANIMALS 1, 3-4 (2000).

272. I have personal knowledge of these facts because of my role from the fall of 1997 to the fall of 1998 as an unpaid consultant to Senator Hayden for purposes of conducting research on animal sheltering practices in California and subsequent drafting of reform legislation based on those, and other, research findings.

273. Balcom, supra note 271, at 3-4 (reporting that Senator Tom Hayden’s decision to introduce animal shelter reform legislation was influenced by a citizen lawsuit against the Los Angeles City Department of Animal Regulation and by hearings he conducted regarding conditions in the city’s shelters). The Newman lawsuit was decided in 1997. Id. The public hearings were conducted in the fall of 1997. Id. The Hayden Law, S.B. 1785, was introduced on February 18, 1998. Summary of Legislative History, supra note 270.

274. Ms. Lois Newman, a former Rand librarian, and I designed a research protocol that we implemented with the help of Dr. Paula Kizlak. The research design has been described by Balcom, supra note 271, at 6. Senator Hayden also requested research by members of his staff and research staff associated with the California Legislature.

275. Winograd, supra note 261, at 123-25; see also, Balcom, supra note 271, at 2. (“SB 1785 [the Hayden Law] is the first statewide legislation that sets out detailed mandates about how humane societies, animal shelters, and animal control agencies should operate.”).

276. Summary of Legislative History, supra note 270. The Summary of Legislative History contains only the facts of legislative committee action, legislative votes, summaries of some of the correspondence received on the proposed legislation, and summaries of some of the Legislature’s analysts. It does not contain information about the substantive content of the hearings themselves, other than the vote. Nor could it contain information regarding the content of meetings with various entities involved in the consideration of the legislation. Additional source of legislative history on the Hayden Law is the highly critical article written by Sarah Balcom, supra note 271. There is also a summary of the Hayden Law written soon after its enactment by a student editor of the McGeorge Law Review. Sara A. Wiswall, Animal Euthanasia and Duties Owed to Animals, 30 McGeorge L. REV. 801 (1999). Wiswall’s summary of the Law itself is not completely accurate, but she provides some description of
The Hayden Law sets forth specific duties that were enacted as new or amended statutes in California’s Civil Code, Food and Agricultural Code, and Penal Code. The Hayden Law, California’s 1998 Legislation to Address Homelessness Among Companion Animals (published circa 2000) (discussing three animal shelter reform laws enacted in California in 1998) available at http://www.nokillnow.com/Loss_of_Face.pdf (last visited May 4, 2008); Taimie Bryant, Hayden Law: An Analysis (published circa 2001) available at http://www.maddiesfund.org/nokill/nokill_legis_hayden.html (last visited May 4, 2008) [hereinafter Bryant, Hayden Law Analysis]; and Taimie Bryant, The Uncertain Present and Future of the Hayden Shelter Reform Legislation of 1998 (published circa 2004) (discussing aspects of the enactment of the Law and describing the impact of legal action taken by animal shelters to require the State to reimburse expenses associated with implementation of the Law) available at http://www.maddiesfund.org/news/news_pdfs/hayden_update.pdf (last visited May 4, 2008) [hereinafter Bryant, Uncertain Present and Future]. All three articles contain information from my participation in various aspects of the legislative process of enacting the Hayden Law. They are based on my experience as a consultant to Senator Tom Hayden from the fall of 1997 to the fall of 1998 for purposes of research, drafting, and testimony related to the passage of Senate Bill 1785. As unpaid consultants to Senator Hayden, Ms. Lois Newman, Dr. Kizlak, and I conducted research on animal shelter practices in California. On the basis of those and other research results, the language of Senate Bill 1785 was drafted for introduction to the California Legislature on February 18th, 1998. Mr. Bob Ferber, Deputy City Attorney for the City of Los Angeles, drafted Penal Code provisions. Mr. David Casselman, a partner in the firm of Wasserman, Comdon, and Casselman, drafted a Civil Code provision concerning liability for non-economic damages (which did not survive subsequent amendments of the bill). Darryl Young, one of Senator Hayden’s aides, was responsible for incorporating the statutes that express the public policy preference for adoption rather than euthanasia of adoptable and treatable animals. I was responsible for drafting other statutory provisions of the bill. Both Dr. Kizlak and I testified at every public hearing of every legislative committee charged with reviewing the proposed legislation. We met personally and repeatedly with many legislative staffers, with those of the Governor’s aides responsible for reviewing the Hayden Law, with Legislative Counsel for the Legislature, with representatives from animal shelters, and with representatives of local government, such as the League of Cities. By participating in those hearings and meetings, I became personally aware of the views of those charged with vetting and voting on the proposed Hayden Law. In many instances I drafted amendments to the proposed legislation so that it would more closely reflect the expectations and preferences of legislators and the Governor. The articles I wrote about the Hayden Law were intended to preserve more of the legislative history than is available in the Summary of Legislative History, supra note 270.  

Francisco Adoption Pact were also inserted in each of those Codes.\textsuperscript{278} Those identically worded statutes stated that it was the policy of the State that adoptable animals be adopted instead of killed and that animals who could become adoptable with reasonable efforts receive that treatment so that they, too, could be adopted instead of killed.\textsuperscript{279} The public policy statutes were included in each of the Codes to emphasize the public policy shift toward saving lives and to ensure that any ambiguity in any statute in any of those Codes would be interpreted in light of the policy to reunite animals with their owners or to find them new homes.\textsuperscript{280}

Some California animal shelters were already managed in accord with the principles embedded in the Hayden Law. The Adoption Pact between the San Francisco SPCA and the San Francisco Department of Animal Care and Control created perhaps the largest shelter system committed to reducing the killing of homeless companion animals, but smaller shelters were also moving in that direction.\textsuperscript{281} Nevertheless, it is safe to say that most animal shelters were still oriented toward killing companion animals.\textsuperscript{282}

Two provisions of the Hayden Law were particularly controversial. One concerned the right of Internal Revenue Code ("IRC") section 501(c)(3) groups to adopt animals slated to be killed.\textsuperscript{283} The Hayden Law attempted to address the problem that animals were frequently killed even when a rescue group was willing and able to adopt them. Correcting this problem was important because some of these groups could provide a longer holding period in foster care than some shelters would be able to provide, thereby sparing the lives of many animals who would be killed at the conclusion of the mandated holding period.\textsuperscript{284} Preliminary research revealed a number of

\begin{footnotesize}
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\item \textsuperscript{278} CAL. CIV. CODE § 1834.4 (West 2001); CAL. FOOD & AGRIC. CODE § 17005 (West 2001); CAL. PENAL CODE § 599d (West 1999).
\item \textsuperscript{279} Id.
\item \textsuperscript{280} Bryant, \textit{Uncertain Present and Future}, supra note 276, at 7-12 (explaining how the statutes may be used to resolve ambiguity in a statute and providing an example thereof).
\item \textsuperscript{281} Bryant, \textit{Uncertain Present and Future}, supra note 276, at 2. See also WINOGRAD,\textit{ supra} note 261, at 49.
\item \textsuperscript{282} “In California in 1997 with a statewide human population of close to 33 million, only 142,385 cats and dogs were adopted from our shelters. 576,097 were killed.” Bryant, \textit{Hayden Law Analysis}, supra note 276, at *4.
\item \textsuperscript{283} See CAL. FOOD & AGRIC. CODE §§ 31108(b), 31752(b) (West 2001).
\item \textsuperscript{284} Although the Hayden Law did increase the holding period for animals to 4 or 6 days, depending on the public’s access hours, it is still a short time period. Extending the holding period meant only that California “joined the bottom six states in the country in terms of holding period.” Bryant, \textit{Hayden Law Analysis}, supra note 276, at *3.
\end{enumerate}
\end{footnotesize}
reasons for shelter managers’ reluctance to cooperate with animal rescue and adoption groups, including the following:

shelter perspectives that these animals are better off dead than living for indefinite periods of time in low-kill or no-kill shelters; the belief that animals are so easily replaceable so why focus on saving this animal; dislike for animal rescue/adoption groups’ criticism of shelter practices; few financial incentives to reduce the kill rate in their shelters; concerns about whether the animal rescue/adoption groups were placing animals in good homes or diverting them into dog-fighting or other cruel or exploitative uses; avoidance of the possible public perception that the shelter doesn’t do an adequate job of finding homes for animals.285

Of these reasons, a few were particularly prominent. Shelters were known to control criticism of shelter practices (and, thereby, public perception of the shelters) by threatening loss of shelter access if a group criticized the shelter.286 Second, shelters’ budgets were structured in ways that created financial incentives to kill animals rather than save lives.

285. Bryant, Uncertain Present and Future, supra note 276, at 8-9. There were other reasons given for resistance to mandatory release to IRC § 501(c)(3) animal rescue and adoption groups. One was that such groups “cherry-pick” the most desirable animals, which further decreases the incentives the public has to go to the shelter to find a desirable animal. Senate Rules Committee, Office of Senate Floor Analyses, Arguments in Opposition to S.B. 1785, 1997-1998 Reg. Sess. (Cal. Aug. 27, 1998) available at http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb_1751-1800/sb_1785_cfa_19980827_204505_sen_floor.html. As Professor Huss points out, that does not seem plausible. Huss, supra note 261, at 2082. Huss notes additional reasons given for resistance to cooperation with rescue groups. Id. at 2078-88. However, for purposes of this article, the point is not to survey all the possible reasons that shelters might not want to work with animal rescue groups. The point is that concern about the lack of good homes is but one reason that animals are “sacrificed.” Some of these reasons have nothing to do with the problem that such sacrifice involves sacrificing the notion that these animals are better off dead. Indeed, the problem of retaliatory denial of access to the shelter suggests the opposite of concern about animals if a shelter’s adoption rate is low.

286. Legislators heard evidence of this at the time the Hayden Law was being considered, and there is evidence that it continues today. Retaliatory denial of the opportunity to adopt from the shelter is one of the allegations in a lawsuit against Los Angeles County. Complaint at 11-12, Nguyen v. County of Los Angeles, No. BS112581 (Cal. Sup. Ct., Los Angeles County, Dec. 20, 2007), available at http://www.nokilladvocacymcenter.org/pdf/Complaint_001.pdf.

Animal shelter reluctance to deal with animal rescue groups is not unique to California. Professor Huss’s research on the subject of rescue groups’ relationship to animal shelters and their role in finding homes for animals who might otherwise die at animal shelters led her to conclude that animal shelters should be legally required to cooperate with rescue groups.
If shelter employees are paid the same regardless of whether cages are empty or full or animals are sick or well, then what incentive is there to aggressively pursue life-saving strategies? If a shelter’s budget is based on a shelter’s apparent need to dispose of unwanted animals, and the shelter cannot divert unused funds into other programs (such as adoption, spay/neuter, and “owner education” programs), then shelters will lose budgetary resources if their operations change in ways that reduce their apparent need for funding.287

Finally, shelters expressed considerable concern about the care and destination of animals taken from the shelter by rescue groups.288 To those of us who had observed terrible conditions in many public shelters, that sounded disingenuous. Moreover, animal shelters in California did not typically set adoption standards or keep track of animals they adopted to members of the public.289 However, those reasons offered by shelter managers resonated with some legislators and with large animal protection organizations such as the Humane Society of the United States.290 Concern that animals could suffer “fates worse than death,”291 exemplifies the idea that sacrificing the sacrifice of shelter animals involves a true sacrifice—one must accept that some placements might be disastrous; good outcomes cannot be guaranteed.

Another controversial provision of the Hayden Law concerned animals relinquished to California animal shelters by their purported owners.292

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287. Bryant, Uncertain Present and Future, supra note 276, at 19.
288. Id., at 8-9; Balcom, supra note 271 at 10 (citing the State Humane Association [of private animal shelters] and California Animal Control Directors Association for the proposition that “[s]helters were concerned that they were not being given any means to insure that rescue groups had the facilities and staffing to care for animals going to them, or that rescue groups had the same screening procedures for their adopters.”).
289. During preliminary research phase prior to introduction of S.B. 1785, some shelter managers expressed concerns about the costs associated with screening potential adopters and lawsuits alleging discrimination if potential adopters were declined. The problem of inadequate record-keeping was raised by Balcom, supra note 271 at 11 (citing the work of others for the proposition that “studies support the notion that record keeping in many shelters is inadequate”).
290. Balcom, supra note 271, at 11 (describing amendment proposed by the Humane Society of the United States for screening breed rescue organizations).
Animal shelters have never had, and still do not have under the Hayden Law, any legal obligation to take in owner-relinquished animals. However, prior to the enactment of the Hayden Law, many shelters did take in owner-relinquished animals and killed those animals as soon as they became the lawful owners of the animals, regardless of whether the person relinquishing the animal requested that the animal be killed or given the opportunity for adoption. The overwhelming majority of owner-relinquished animals are relinquished primarily for reasons that have nothing to do with the health of the animal. Therefore, requiring that owner-relinquished animals be given adoption opportunities is an important part of a no-kill strategy.

293. California’s Food and Agricultural Code section 31754 states only that “any animal relinquished by the purported owner . . . shall be held. . .” It does not state that shelters shall allow owners to relinquish animals; it states only that such relinquished animals as are accepted by the shelters shall be held. After the Hayden Law was enacted, the County of Los Angeles filed a “test claim” with the California Commission on State Mandates, arguing that the County is owed reimbursement by the state for any obligatory duties mandated by the Hayden Law. The Commission on State Mandates decided that no reimbursement is owed for shelter expenses associated with owner-relinquished animals because the law does not require shelters to accept owner-relinquished animals. California Commission on State Mandates, Statement of Decision No. CSM 98-TC-11 (Jan. 25, 2001), at 19 [hereinafter Cal. CSM, Test Claim] available at http://www.csm.ca.gov/tdocs/98tc11sod.pdf.


295. At the time that S.B. 1785 was being considered there were studies indicating that “owner-relinquished animals are among the most adoptable animals entering our shelters.” Bryant, Uncertain Present and Future, supra note 276, at 16 & 38 n.13 (citing two studies “indicat[ing] that only 15 to 24% of owner-relinquished animals are candidates for euthanasia from the standpoint of the animal’s health or temperament.”) A study based on data collected from 12 shelters in 4 regions of the United States revealed that common reasons for relinquishing animals to shelters were “allergies to pets, no time for a pet, personal problems, the death of the owner, divorce, child and pet conflict, owner traveling, a new baby, owner pregnancy, and having received the pet as an unwanted gift.” Janet M. Scarlett et al., Reasons for Relinquishment of Companion Animals in U.S. Animal Shelters: Selected Health and Personal Issues, 2(1) J. OF APPLIED ANIMAL WELFARE SCIENCE 41, 56 (1999). Another report based on the same data discussed moving as a factor. “Moving was the most common reason given for relinquishing dogs. It was the third most common reason for relinquishing cats, following reasons of too many animals in the house and allergies” John C. New, Jr. et al., Moving: Characteristics of Dogs and Cats and Those Relinquishing Them to 12 U.S. Animal Shelters, 2(2) J. OF APPLIED ANIMAL WELFARE SCIENCE 83, 85 (1999). However, the authors report that “[a]lthough moving was frequently reported as a reason for giving animals away, relinquishers reported additional reasons that may have played a role in their decisions.” Id. at 93. While some of those reasons reflect dissatisfaction with an animal’s behavior, the authors suggest that the problem may have to do with owner expectation and lack of owner interaction with the animal. Id. at 93-94. Many of the reported reasons for relinquishment—allergies, lack of time to spend with animals, moving, and incompatibility of an animal with other animals residing in the same home—are still reported as prevalent. See, e.g., National Council on Pet
Shelter managers and their local government representatives resisted enactment of a holding period for owner-relinquished animals, but their arguments were sufficiently countered to secure retention of the provision in the Hayden Law. For instance, opponents stated that taking in owner-relinquished animals was necessary because otherwise those animals would be dumped on the streets, but proponents of the Law argued that many owners abandon their animals precisely because they believe that their animals would be killed immediately if relinquished to a shelter. Opponents also argued that killing these animals without holding them was necessary for reasons of space and financial limitations, but there was contrary evidence that animals were not killed primarily for those reasons. It was suggested that animals were killed because shelter employees paid the same whether a cage is empty or occupied would rather not clean up after animals, vesting of ownership in the shelter made it lawful for the shelter to

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297.  Bryant, Uncertain Present and Future, supra note 276, at 15. The claim of need to take in owner-relinquished animals to prevent abandonment was made not only during the process of legislative consideration of the Hayden Law. The claim was also raised when the Commission on State Mandates considered whether state reimbursement of local government expenses associated with the Hayden Law is required. See Cal. CSM, Test Claim, supra note 293, at 18-19.
298.  Claims of overcrowding and financial limitation are reflected in the analysis prepared for the Assembly Committee on Judiciary when it reviewed S.B. 1785. See Assembly Committee on Judiciary, Arguments in Opposition to S. B. 1785, 1997-1998 Reg. Sess. (Cal. June 22, 1998), available at http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb_ 1751-1800/sb_1785_cfa_19980622_151745_asm_comm.html. Balcom also notes overcrowding as a problem. “In the wake of [a law that limits property tax revenue], recession and high inflation that characterized the 1980s, fiscal austerity across the state led to chronic underfunding of many municipal services, including public shelters. One of the most notable examples [experienced] overcrowding, poor record keeping, high euthanasia rates, and deteriorating buildings. . .” Balcom, supra note 271, at 2. On the other hand, survey research conducted prior to the introduction of S.B. 1785 found that many shelters were holding animals longer than the 72 hour holding period required by existing law. Bryant, Uncertain Present and Future, supra note 276, 37-38 n.12. (“Perhaps as many as 20% of the shelters surveyed were holding animals for only 72 hours. The rest were holding animals longer. However, some were holding dogs longer than cats or animals with owner identification longer than strays, for example.”). Therefore, some shelters were more concerned about loss of flexibility than about the length of the holding period per se. Id. at 12.
kill the animal, and there was little incentive to keep animals likely to die anyway because of scarce adoption opportunities. 299

Since existing law did not require animal shelters to take in owner-relinquished animals at all, it was unnecessary to kill them if there were no space in the shelter. The shelter could decline to take them in until space was available. The same is true today under the Hayden Law; shelters need not accept animals surrendered by their owners. 300 After considering all the arguments, the Legislature decided to give shelters the authority—but not the obligation—to take in owner-relinquished animals. If such animals are taken in, those animals must be held and made available for adoption under the same conditions and with the same opportunities for adoption as strays. 301

Sometimes owners request the euthanasia of animals they relinquish to the shelters. The Hayden Law does not accommodate such owners by providing an exception from the prohibition against killing owner-relinquished animals without giving them the opportunity for adoption. 302 However, the Hayden Law does contain a provision for the immediate euthanasia of irremediably suffering animals. 303 Owners relinquishing animals in need of euthanasia—animals who are actively in the throes of intense suffering from a medical problem so severe that their suffering cannot be alleviated—would therefore be able to lawfully receive the euthanasia of their companion animals. Indeed, the reason for the exception is that it would be inhumane not to euthanize animals whose suffering cannot be alleviated.

One reason that shelters are no longer allowed to euthanize animals at owner request is that there was unrefuted evidence that people fraudulently relinquish animals, claiming those animals are their own when, in fact, they are not. 304 Due to embarrassment about relinquishing their animals or for the 299. Bryant, Uncertain Present and Future, supra note 276, at 14.
300. See supra note 293 (describing the language of the relevant statute and its interpretation by the California Commission on State Mandates).
301. See supra note 293 (describing the language of the relevant statute and its interpretation by the California Commission on State Mandates).
302. See supra note 293 (describing the language of the relevant statute and its interpretation by the California Commission on State Mandates).
303. Id. § 31754 (West 2001).
304. Id. § 17006 (West 2001).
purpose of securing the immediate killing of the animal they are relinquishing, relinquishing parties will sometimes make untrue claims about the animals, such as stating untruthfully that the animal has bitten someone or that the animal is ill. Sometimes a neighbor turns in a neighbor’s companion animal, requesting that the animal be killed, with the expectation that the true owner would not be able to find and reclaim a pet that has been killed immediately upon relinquishment. Sometimes people turn in their girlfriends’ or boyfriends’ companion animals and request that the animal be killed out of spite or because they do not want the animal to return to the household. Sometimes one family member makes the decision to relinquish the family’s companion animal despite the fact that other family members disagree. Also, there was evidence that stray animals are sometimes mistakenly turned in as though they are owner-relinquished animals or they are mistakenly identified by shelter employees as owner-relinquished animals, due to language barriers and other sources of misunderstanding. 305

The Legislature also heard reports of misunderstandings that led to the killing of animals ostensibly at owners’ requests, when, in fact, the owners thought they were relinquishing the animals for purposes of adoption. 306

What if it could be proved that a particular animal is owned by a particular relinquishing owner who truthfully requests euthanasia of a young, healthy companion animal simply because the owner can no longer keep the animal and does not want to subject the animal to the possibility of a bad

Food and Agricultural Code section 31754. Section 31754 states that “any animal relinquished by the purported owner. . .shall be held . . .” CAL. FOOD & AGRIC. CODE § 31754 (West 2001) (emphasis added). Moreover section 31754, as originally enacted, provided that owner-relinquished animals could not be adopted out the first day of the holding period. Rather they had to be held for the first day exclusively for the purpose of owner-redemption. 1998 Cal. Legis. Serv. Ch. 752 (West) (“The animal shall be available for owner-redemption for the first day. . .”). Section 31754 was amended in 2000 to provide for the availability of owner-redemption or adoption throughout the holding period. 2000 Cal. Legis. Serv. Ch. 567 (West). However, the fact of continued explicit provision for owner-redemption of “owner-relinquished” animals is evidence of continued awareness that fraudulent “owner” relinquishments occur all too frequently. Moreover, when section 31754 was amended, other Food and Agricultural Code sections were amended to require relinquishing parties to provide sufficient documentation to establish their ownership of the animals. CAL. FOOD & AGRIC. CODE §§ 31108.5; 31752.2 (West 2001). Also, the following requirement was added as section 31108.5 of the Food and Agricultural Code: “[a] dog may be made available for immediate euthanasia if it has a history of vicious or dangerous behavior documented by the agency charged with enforcing state and local animal laws. Id. § 31108.5 (emphasis added). In other words, relinquishing parties cannot simply state that the dogs they are relinquishing are vicious and request their immediate euthanasia.

305. Bryant, Uncertain Present and Future, supra note 276, at 15.
adoption placement? There was then, and there still remains, an argument that shelters should be able to kill animals at an owner’s request because, after all, private veterinarians regularly perform so-called “convenience euthanasia.”307 The Hayden Law public policy statutes codifying the People’s preference that animals not be killed when they are adoptable or could become adoptable with reasonable efforts forecloses such acts by animal shelters. Indeed, they cast doubt on the legality of all convenience euthanasia.308 The fact remains, however, that continuing resistance to the Hayden Law is premised partially on the reality that owners do pay private veterinarians to kill their companion animals for reasons of the owners’ convenience, not for reasons of the animal’s medical condition.309 Although it would seem that this is the unnecessary killing of an animal which would be prohibited by state anticruelty statutes,310 it is widely practiced.

Convenience killing does not seem particularly controversial. Perhaps there is a belief that it just doesn’t happen that often, or perhaps there is an understanding that, after all, the animal is the property of his or her owner. Even when courts have invalidated will directives to kill the testator’s

307. See Reppy, supra note 129, at 224-25. In 2005, when a Stanislaus County, California, civil grand jury criticized the county’s animal control director for violating the Hayden Law by, among other things, killing owner-surrendered animals prior to the end of the mandatory holding period, the director stated that “people have the right to do with their animals what they choose to. . . . People that walk in the door and request that their animal be euthanized, it’s uncommon. But it does happen, and we have an obligation to provide that service.” Joel Hood, Reports Rip Shelter, DA—Financial, Ethical and Legal Woes, Panel Says, THE MODESTO BEE, July 2, 2005, at A22. Other examples include Kings County, which advertises the services of euthanasia and private pet cremations, and Los Angeles County, which advertises the service of owner-requested euthanasia to pet owners inside and outside of their jurisdiction. Kings County Department of Animal Control, http://www.countyofkings.com/sheriff/animal%20control.html (last visited May 27, 2008); L.A. County Online, Department of Animal Care and Control, Most Frequently Asked Questions, http://animalcare.lacounty.gov/most%20frequently%20asked%20questions.asp (last visited May 27, 2008). Rich Avanzino, President of Maddie’s Fund, an organization dedicated to “revolutioniz[ing] the status and wellbeing of companion animals,” notes that national statistics for owner-requested euthanasia are high, cites shelter directors who claim that it is a public service, but, nonetheless, urges elimination of the service of owner-requested euthanasia. Maddie’s Fund, About Us, Corporate Background, http://www.maddiesfund.org/aboutus/background.html (last visited May 27, 2008); Maddie’s Fund, About Us, Maddie’s Editorials 2005, A Look at Owner-Requested Euthanasia, http://www.maddiesfund.org/aboutus/editorial_euthanasia.html (last visited May 27, 2008).

308. CAL. CIV. CODE § 1834.4 (West 2001); CAL. FOOD & AGRIC. CODE § 17005 (West 2001); CAL. PENAL CODE § 599d (West 1999).

309. See infra notes 313-316 and accompanying text.

310. See Reppy, supra note 129, at 220.
companion animals, courts have recognized that what the court prohibited
the testator from doing in death the court might not have been able to
prohibit the owner from doing in life.311 Ownership contains the right to
destroy, unless there is a countervailing public policy. Destruction of
property by will directive is already presumptively suspect, so it is not much
of a reach to invalidate will directives to destroy companion animals even if
those animals are not valuable. It is not clear that there is a countervailing
public policy against killing companion animals at their owners’ request
while their owners are still alive.312

The general availability of convenience killing of companion animals is
evident in the American Veterinary Medical Association’s (“AVMA”)
recommendations to veterinary practitioners, who perform the actual killing
in many cases.313 The AVMA discourages but does not condemn the practice
of killing companion animals simply because their owners do not want
them.314 The AVMA states on its website for veterinary practitioners that
other alternatives should be considered: “Economic, emotional, and space
limitations or changes in lifestyle . . . may force an owner to consider
euthanasia of a pet, but it is better to find another solution or an alternative
home for these pets. Euthanasia should be considered only when another
alternative is not available.”315 But the AVMA also states: “The AVMA is
not opposed to the euthanasia of unwanted animals . . . , when conducted by
qualified personnel, using appropriate humane methods . . . .”316

The strength of commitment to killing companion animals is evident in
willful lack of compliance with the Hayden Law requirement that animals
relinquished by their purported owners be held for adoption or owner-
redemption for the entire four-day holding period required for strays. For

311. See Reppy, supra note 129, at 220-21; Sykas, supra note 227, at 930.
312. California’s public policy statute in favor of adoption instead of killing an animal
could be used to assert such a policy. See CAL. PENAL CODE § 599d (West 1999).
313. In order to avoid confusion, I reserve use of the term “euthanasia” for situations
in which animals are killed for reasons of their own health problems; I use the term “kill” for
situations in which an animal’s health is not at issue in the owner’s decision to kill the animal.
314. Reppy raises this issue of the AVMA’s apparent ambivalence in the context of
exploring at length the problem of inconsistency in courts’ invalidating will provisions to kill
healthy companion animals while, at the same time, it is lawful for owners to kill their healthy
pets before those owners die. Reppy, supra note 129, at 224-25. He also discusses circuitous
routes that enable owners to accomplish the same thing after death while avoiding the use of
testamentary directives that could be invalidated by judicial decision. Id. at 225-49.
315. AVMA, Making the Decision, What If the Animal is Healthy?, http://www.avma.
org/careforanimals/animatedjourneys/goodbyefriend/goodbye.asp (last visited May 21, 2008).
316. AVMA, Policy Statements, Euthanasia of Animals That Are Unwanted or Unfit
instance, the Hayden Law had been in effect for less than a year when Mendocino County enacted section 10.24.010 of Title 10, which then provided as follows:

Any animal which is voluntarily surrendered by its owner or person in control of such animal to the Department of Animal Care and Control for the purpose of euthanasia shall not be deemed to be impounded and need not be kept for any minimum period of time as otherwise specified in this Title [related to holding periods for impounded shelter animals].

In 2006, when an attorney representing a Mendocino County resident and taxpayer filed suit against the county, the county conceded that the ordinance was illegal. Mendocino County Counsel eventually provided evidence to the attorney that the County Board of Supervisors had repealed the law, but the ordinance remains prominently featured on the county’s website.

Even without the pretext of contravening local regulations, the requirement to hold owner-relinquished animals is widely ignored by animal shelters throughout California. In 2005 a Stanislaus County civil grand jury issued a report stating that the county’s animal control department “euthanize[ed] healthy, stray and surrendered animals before they had been held the required number of days as specified by state law.” According to The Modesto Bee, the director admitted that animals surrendered by their purported owners were “sometimes put to sleep within an hour of being dropped off.” Some of those animals may have been irremediably suffering, but the director made clear that he thought he had an obligation to

320. Letter from Terry N. Gross, Deputy County Counsel, County of Mendocino, California, to Okorie Okorocha, California Legal Team (June 8, 2007) (on file with the author).
321. Id.
324. Id. at A22.
provide the service of killing animals on an owner-request basis. Also in 2005, Kern County was sued for, among other things, immediately killing owner-relinquished animals instead of holding them for the required four days. Despite this litigation to enforce the Hayden law—a law that has been on the books for almost ten years—“full implementation continues to prove elusive.” Similarly, in 2006, A Dog’s Life Rescue, Inc., an IRC section 501(c)(3) animal rescue and adoption group, filed a lawsuit against the County of Los Angeles to stop its Department of Animal Care and Control (“Los Angeles County DACC”) from killing owner-relinquished animals immediately upon the request of owners. Not only does the Los Angeles County DACC kill owner-relinquished animals on the request of owners in its jurisdiction, it advertises that it will provide the same “service” to people outside its jurisdiction for a higher fee. Other lawsuits on this issue are in the planning stages.

The primary criterion I proposed for determining whether pursuit of legal personhood for animals is worthwhile was whether there are laws that could serve the purpose of dismantling the property status of animals. The Hayden Law’s requirement that owner-relinquished animals be given the opportunity to be adopted, even if their owner requests their death, would appear to meet that criterion. It requires the sacrificing of sacrificing animals, even when no good home seems immediately available. The shelter must, at a minimum, wait four business days, not including the day of impoundment, to give each

325. Id. at A22.
330. The author is a member of a group known as the Shelter Animal Legal Team, which was organized to evaluate the claims of individuals and groups interested in suing local animal control entities for violations of the Hayden Law. The group has prioritized review of complaints about alleged failures to provide a holding period and adoption opportunities for animals relinquished by their purported owners.
SACRIFICING THE SACRIFICE OF ANIMALS

animal an opportunity to be adopted. The fact that IRC section 501(c)(3) animal rescue and adoption groups may take any animal slated for killing makes that four-day holding period more useful in saving animals’ lives. If a rescue group manages to get an animal out of the shelter and can provide foster care indefinitely, an animal will receive a much longer opportunity to be adopted than four days. By contrast, if animals are killed immediately, not only will they lose the paltry four days of holding at the shelter, rescue groups will not know to request them. Given widespread lack of compliance with the Hayden Law, litigation (and standing to litigate) is an important means of effectuating a law designed to spare the lives of animals.

Whether direct legal standing for animals is easier to obtain or preferable to expanded legal standing for humans interested in protecting animals is difficult to assess. Since rescue groups have a statutory right to adopt animals from the shelter, they have a legally cognizable basis for enforcing the legal requirement that owner-relinquished animals be held under the same circumstances as strays, which includes availability for adoption. Where rescue groups are prevalent, a group interested in saving the life of an animal is likely to have standing to sue.

A rescue group would be willing to save the life of an animal even if there is no good home immediately available for the animal. However, would the rescue group be willing to take out apparently “unadoptable” animals? Would an animal with direct legal standing be able to sue to enforce the Hayden Law so that she could have a chance at life by way of adoption by an adoption group if no adoption group expressed interest in taking her?

In the case of this particular law, it does not seem particularly pressing to have direct legal standing for animals. Even if rescue groups are not prevalent in an area, it appears that a taxpayer can sue to enforce the law and then arrange for adoption by rescue groups that did not have standing because they did not operate in the same jurisdiction as the shelter that was sued for violating the law. Whatever the basis for standing, as long as there is standing, the Hayden Law appears to offer a promising model for decentering human supremacy and breaking down the traditional treatment of animals as mere property. The problem is that there appear to be no other jurisdictions that have such a law. If there were an analog in another jurisdiction, it might be that standing directly for animals would be more

331. CAL. FOOD & AGRIC. CODE §§ 31108, 31752, 31753, 31754 (West 2001).
332. See CAL. FOOD & AGRIC. CODE §§ 31108(b), 31752(b), 31753, 31754 (West 2001).
III. CONCLUSION

In Part I of this article, I considered two definitions of legal personhood for animals and the relationship of those definitions to the status of animals as the legal property of humans. The first definition of legal personhood is broad: “the extent to which animals have the attributes of ‘persons’ such that their interests as persons should be legally protected.” The second definition of legal personhood is narrow: “status as an ‘aggrieved person’ entitled to enforce a law enacted to protect animals.” Neither definition of legal personhood currently has much meaning or utility because of the relationship between humans and animals. Humans define themselves by opposition to animals, and humans reinscribe their presumed superiority over animals whenever they use animals to serve human ends. It is fundamentally inconsistent to acknowledge the “personhood” of anything—inanimate or animate—that we use as resources. This is true not only as to so-called “commercial animals,” such as livestock and research animals. It is true even as to animals seemingly most like us. Chimpanzees are still subjected to experiments that could never be conducted on humans, and owners of chimpanzees have few obligations of care. Similarly, many people may feel that their companion animals are as close to them as family members. Yet, it is still possible to genetically and surgically mutilate them, raise them as commercial animals in puppy mills, and order their deaths even when they are young and healthy.

The property status of animals is integrally connected to the presumed moral superiority and entitlement of humans. Despite the growing recognition that such views are “surprisingly vulnerable”333 and based only on “vague but powerful intuitions,”334 it is difficult to dislodge humans’ definitions of themselves as superior to animals and as entitled to use animals as raw materials for their consumption preferences. Yet, this effort lies at the heart of the problem of the property status of animals and animals’ lack of legal personhood. The ideology of human entitlement must be addressed, not just the question of whether animals have attributes as “persons” that make them worthy of greater legal protection. For guidance in this endeavor, I have used posthumanist philosopher Jacques Derrida’s

334. DeGrazia, supra note 103, at 57.
provocative call to critically examine humans’ unwillingness to include animals in the proscription: “Thou shalt not kill.” Derrida defines sacrificing the sacrifice of animals as one means by which humans can fulfill their moral obligation to correctly situate themselves in the world.

In Part II of this article I explored two legal means of sacrificing the sacrifice of companion animals: judicial invalidation of will directives to kill testators’ companion animals and legislation to require animal shelters to make adoption opportunities available to animals relinquished by their purported owners. I examined companion animal situations because of claims in the animal law literature that there have already been breakthroughs in the property status of companion animals. Consideration of companion animal contexts for legal change also generated the opportunity to discuss “sacrifice” from the standpoint of owners’ reluctance to sacrifice the sacrificing of their animals when there is little predictability about what will befall their companion animals in a society in which there is such variance in what the ownership of companion animals entails.

At this point, the two legal avenues of invalidation of will directives and mandates to make owner-relinquished animals available for adoption are quite limited. There are few reported cases of will directive invalidations, considering how many companion animals are owned in this country. And, so far, it appears that California is the only jurisdiction that mandates that animal shelters provide adoption or owner-redemption opportunities to animals relinquished by their purported owners. Nevertheless, both of these approaches appear to hold promise as means of disturbing the status of animals as the property of their owners. I do not contend that these are the only or best laws with which to proceed. In fact, it might be more productive as a starting point to sacrifice the sacrificing of animals that occurs when we generate new animals and modify existing animals at our will. Generating non-generation would seem to be a necessary part of sacrificing sacrifice. I contend only that these examples allow for a modest application of Derrida’s call to sacrifice the sacrificing of animals.

Exploration of these two examples included consideration of whether pursuit of a narrow definition of legal personhood (legal standing) for animals is necessary. In those two examples, direct legal standing for the animals involved did not appear to be necessary as a pragmatic matter. Although such may not be true in all cases, in the particular cases considered at length in this article, human standing proved sufficient both as to getting into court at all and as to making arguments that respected animals’ interests as opposed to those of their owners. Given the current state of laws built on the foundation of animals as the property of humans, the more important
problem is limitations on what can be accomplished through litigation, regardless of who is the plaintiff.

When discussing the litigation against Primarily Primates, Inc., I raised several reasons why establishing direct legal standing for animals could be considered superior as a philosophical matter even if it is not necessarily superior as a pragmatic matter. Even if it seems more radical to grant standing to animals instead of expanding human standing to protect animals, legal standing for animal plaintiffs who claim to have actually suffered an injury actually does less conceptual violence to traditional notions of standing than does expanding legal standing for humans who would be claiming to be injured because of harms done to animals. It is logical that the injured party should be the one with direct access to the court. It is conceptually awkward and pragmatically burdensome if a human has to show how the animal is injured and how the human is injured by that injury to the animal and tie both to the defendant’s conduct. If the human is injured it is a separable injury from the injury to the animal. For instance, in the will directive context, doesn’t it make more sense to say that the animal will be harmed if she is killed at the direction of her owner than to say that a human will be injured because the animal will be killed at the direction of the animal’s owner? And, if a human is injured by enforcement of the will directive to kill an animal, isn’t that injury different in kind (such as loss) than the injury done to the animal (death)? Finally, legal standing recognized only for humans—even if it is expanded to include more opportunities than currently exist to get into court to protect animals—reinforces the idea that humans’ concerns and humans’ interests are central. Direct legal standing for animals makes animals’ concerns and animals’ interests central to the litigation. Thus, direct legal standing for animals could be an important procedural means of seeking the substantive goal of decentering humans.

Despite all of these justifications for direct legal standing for animals, it may well remain elusive. Direct legal standing may do the least violence to traditional notions of standing, but direct legal standing does the most violence to traditional notions of the boundary between humans and animals. Sharing legal space in our laws and in our courts seems unlikely as long as humans consider themselves morally superior to animals and reinforce that conception by treating animals as their property.

Decentering influences are increasing, even as humans cling to their current legal ability to use animals as they choose. See DeCoux, supra note 46, at 224 (quoting Freeman Dyson as stating that “[w]e are moving rapidly into the post-Darwinian era, when species will no longer exist” and

335.
intelligence, human and animal DNA, and the ill effects on the environment caused by human presumptive entitlement calls into question human superiority and presumed centrality. Insights gained from that research in concert with efforts to identify and curtail acts of human privilege to treat animals as they wish can be expected to correctly situate humans in the natural world. It will increasingly be seen as a moral good to do so.

asserting that “[s]everal centuries ago we faced the truth that the earth is part of the universe rather than its center; today we face the truth that humans are part of the animal world rather than its masters.”).