

Article

# Chattel or Child: The Liminal Status of Companion Animals in Society and Law

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**Abstract:** Companion animals in the U.S. are increasingly regarded as members of the family with whom one may share a strong emotional bond. However, despite an evolving social construction that has elevated their status in the dominant culture, companion animals lack meaningful legal rights, and “family member” is a provisional status that can be dissolved at will based on the discretion of the sole rights-holder in the relationship: the human owner. Because they are still defined within the U.S. legal system as property, it is a common lament within the animal protection movement that the law has not kept pace with the emergent cultural perception of companion animals as family or best friends who may occupy a significant place in one’s constellation of interpersonal relationships. But how divergent are the laws that govern our treatment of companion animals from prevailing social norms? This article examines current trends in animal law and society to shed light on this question. I find that while a new family member cultural status is emerging for companion animals in the U.S., their legal status as property is a countervailing force, enabling contradictory practices and beliefs that construct animals as expendable. The fact that their cultural status is in flux in turn reinforces their status under the law. I conclude with proposed policy reforms that will facilitate the integration of companion animals into society as true rather than rhetorical family members.

**Keywords:** animal law; human-animal bond; legal status of companion animals; animal protection

## 1. Introduction

The existing legal framework as it applies to companion animals is situated within the larger context of two evolving social trends: (1) the development of the field of animal law in the U.S. and (2) the emergent (in some cultural milieus, dominant) cultural perception of pets as surrogate family members. While animal law is a relatively new field (Tischler 2012), ethical concern for nonhuman animals<sup>1</sup> has a long history, the tenor of which has changed over time depending upon several factors, including prevailing social norms, changing economic conditions, scientific advances regarding the cognitive and emotional capacities of animals, and the emergence of the animal protection movement. That concern is amplified and perhaps at its most contradictory when it comes to those animals who are culturally defined as “pets” (and more recently, “companions”), and hence are afforded greater legal protections than other biologically similar, but differentially socially constructed, categories of animals (e.g., farmed animals, who are often excluded from the protection of cruelty laws).

Americans increasingly report a strong emotional bond with their companion animals and regard them as family members. According to a 2015 Harris Poll, more than three in five Americans (62 percent) have at least one pet, with the highest percentage being among the two youngest

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<sup>1</sup> I will mostly refer to nonhuman animals as “animals” in the following discussion.

generations tested, Millennials and Gen Xers.<sup>2</sup> Ninety-five percent of these respondents considered their animal to be a member of the family—a number that has increased each year the question was asked (Shannon-Missal 2015). A 2018 Harris Poll revealed a majority of Americans with pets (69 percent) see them as “family members,” and one in five (23 percent) see their pets as children. Compared to other generations, millennials view their pets as “starter children” as they delay having kids of their own (Lane 2018).

This shifting cultural norm is reflected in current trends in animal law. For example, in recent years, there has been an increase in custody battles over beloved companion animals, which can become as bitter and emotionally fraught as those involving human children (American Academy of Matrimonial Lawyers 2014). Additionally, more people are making provisions for their companion animals in their wills, and there are now “pet trust” laws on the books in all 50 states. Victims of domestic violence often delay leaving an abusive partner out of fear the abuser will harm or kill a cherished animal companion as a means of control and retaliation. Unfortunately, this fear is often justified (Ascione et al. 2007; Hardesty et al. 2013). Compounding this difficulty is the fact that most domestic violence shelters have “no-pets” policies. As their role in the family continues to become more significant, animals are increasingly entangled in the web of domestic violence and abuse, and several states now have laws allowing domestic violence protective orders to include pets.<sup>3</sup> For better or worse, companion animals occupy surrogate positions in the family.

This is a provisional status, however—a fact that is brought into stark relief when we consider the staggering number of pets put to death every year in animal shelter facilities because they are no longer anyone’s family member, or perhaps never were. “Family member” is a conditional position that confers life or death on individual animals, and this status can be dissolved at any time based entirely on the discretion of the sole rights-holder in the relationship: the human owner.<sup>4</sup>

A common lament in the animal protection movement is that the law has not kept pace with changing societal norms regarding animals.<sup>5</sup> Proponents of this view cite the fact that despite the shifting social understanding of companion animals as family members, they are still defined as property under the law. As noted in a *Harvard Magazine* article on the evolution of animal law:

As the role of animals in society and the economy has evolved, and more recently, as scientific research has revealed more about animals’ cognitive abilities and social development, public sensibility has changed dramatically, often leaving outmoded law behind. As a result, lawyers worldwide have begun searching for innovative ways to make animals more visible to the law: strengthening and enacting new anti-cruelty statutes, improving basic protections, and, in some more radical cases, challenging animals’ property status itself in an effort to grant them fundamental rights. (Feinberg 2016)

In the case of companion animals, the outmoded aspect of law most frequently cited is that their legal status as property is inconsistent with their current cultural status as quasi-family members. This is a compelling assertion that jibes with the intuitive sense and quotidian experience of animal advocates, who are more likely to associate with likeminded others whose companion animals are true family members and best friends. Further lending credence to this claim, the law is an inherently conservative

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<sup>2</sup> As of 2018, Millennials comprise the largest segment of companion animal owners at 72–73 percent (TD Ameritrade 2018, American Pet Products Association 2017–2018).

<sup>3</sup> I use the terms “companion animal” and “pet” interchangeably in this article to reflect their common usage in law and culture.

<sup>4</sup> Though some argue that animal cruelty laws constitute a weak form of rights (e.g., Sunstein 2003), outside of that narrow context and within the domain of the family, the human owner is the only party with appreciable rights, holding virtually absolute power to control every aspect of the companion animal’s life—within the very broad bounds of permissible conduct under cruelty laws.

<sup>5</sup> See “Animals’ Legal Status” (Animal Legal Defense Fund n.d.a).

social institution that tends to follow rather than lead social change.<sup>6</sup> But how divergent are the laws that govern our treatment of companion animals from prevailing social norms?

In examining in this question, I will first give a brief overview of the current status of animals in the U.S legal system. I will then highlight areas in society and law in which the status of animals as family members is gaining increasing recognition. Next, I will consider the contradictory social construction of companion animals as expendable, which challenges the common belief that their status as family members is ascendant and even normative. I will then revisit the legal status of animals and how it enables practices and beliefs that construct companion animals as disposable commodities in contrast to family members. In conclusion, I will propose policy reforms that will facilitate the integration of companion animals into society as true rather than rhetorical family members.<sup>7</sup>

## 2. The Legal Status of Companion Animals

If the law is a reflection of norms and values in society<sup>8</sup> (Hessler 2010), what does the body of laws that pertains to companion animals tell us about our relationship with them? While the dominant cultural narrative regarding pets has transformed over the last century from a utilitarian view to one in which they are primarily defined as surrogate family members, this colloquial designation has little bearing within the legal system.<sup>9</sup> Companion animals are still defined as property under the law.

In a discussion of the legal status of companion animals in Australia, White articulates the uneasy relationship between the conceptualization of animals as both property and family member:

On the one hand, opinion surveys and an emerging body of sociological literature suggest that our relationship with companion animals is vested with such meaning and significance that they have come to be regarded by many as ‘members of the family’. Consistent with this significance, animal welfare law is more stringent in protecting the interests of companion animals than it is for any other category of animal. On the other hand, significant numbers of companion animals are relinquished to animal shelters every year, where the fate of many, especially kittens and cats, is death. Although animal welfare law criminalises the abandonment of companion animals, it provides no sanction for the relinquishment of companion animals to animal shelters. (White 2009, p. 2)

This dual status places companion animals in a liminal space in society, elevated above both mere chattel and other animals who are not defined as companions,<sup>10</sup> yet uniquely vulnerable due to both their legal classification as property and inconsistencies in the cultural narrative that defines them as family.

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<sup>6</sup> However, this is not always the case. For example, the Williams Institute found a dramatic drop in anti-gay attitudes in states that legalized marriage equality. Following changes in these laws, “47% of residents who initially were opposed changed their minds” (Flores and Barclay 2015). Other studies have found that smoking bans changed behavior and social norms (Satterlund et al. 2012; Orbell et al. 2009).

<sup>7</sup> Animals have intrinsic worth and deserve basic legal protections regardless of their cultural status or value to humans. However, the focus of this article is on culture and the law, specifically: (1) the current gap between the legal and cultural perception of companion animals, (2) the fact that the cultural perception itself is not uniform but in a state of flux, and (3) the law’s role in enabling one or the other competing status to prevail. Since the relationship between social norms and the law is multi-directional, the cultural status that becomes ascendant will in turn affect companion animals’ treatment within the legal system.

<sup>8</sup> And, in cases where there is ambiguity or room for interpretation, judges tend to make decisions based on dominant social norms and values (Liebman 2011).

<sup>9</sup> Likewise, although some jurisdictions have passed legislation changing the status of pet owners to “guardians,” these resolutions are symbolic and have no legal bearing. For this reason, I also use the term “owner,” which is the way this relationship is characterized under the law.

<sup>10</sup> Despite their legal status as property and the shortcomings of animal cruelty laws, companion animals are easily the most protected class of animals in society. Farmed animals are among the least. The majority of modern state animal cruelty laws expressly exempt either farmed animals or standard agricultural practices. These include “accepted,” “common,” “customary,” or “normal” farming practices, which are defined by the industry itself (Wolfson and Sullivan 2004). In addition to the limitations in current law, prosecutions for the abuse of farmed animals are vanishingly rare.

## 2.1. Animals as Property

Their legal status as property means that courts have been reluctant to recognize that animals have meaningful legal rights, including standing, or the ability to bring a lawsuit to court (Cassuto et al. 2006; Magnotti 2006). Standing is an obstacle for animal advocates as well, who in civil cases typically have to show that they themselves have suffered an injury as a result of an animal being abused (Morrish 2014; Sunstein 2000). Direct harm to the animal is rarely enough to bring a lawsuit and criminal animal cruelty laws, with some exceptions, can only be enforced by prosecutors, not private citizens (Reppy 2005).<sup>11</sup>

Because it has been a persistent barrier to protecting them from exploitation and other harmful conduct, many legal experts believe that animals must be removed from the category of property in order to be granted fundamental legal rights (Francione 2004; Wise 2010).<sup>12</sup> Because, in some important ways, the U.S. legal system contains a fundamental distinction between “things” and “persons” (Wise 2000), one way to change the status of animals as property is for them to be redefined as legal persons—which do not have to be human beings. In the U.S., both corporations and ships are defined as persons for limited legal purposes. Outside the U.S., an Argentinian court in 2016 declared a chimpanzee named Cecilia to be a “non-human legal person” in its decision that she should be released from a zoo and sent to a sanctuary.<sup>13</sup> And in 2018, a high court in India granted animals the status of “legal entity/legal person.”<sup>14</sup> In recent years, rivers in New Zealand and India have also been granted personhood.<sup>15</sup>

Although animals are defined as property in the legal system, there are ways the law treats them distinctly from other, inanimate property. Chief among these are animal cruelty laws. You will not be punished for kicking your coffee table or trashing your bicycle. However, if you abuse your dog or cat, you may be in violation of the law and could be prosecuted for animal cruelty. The existence of animal cruelty laws indicates companion animals are fundamentally different from other types of property, and such laws may be construed as conferring limited rights; however, they do not nullify animals’ designation as property.<sup>16</sup>

## 2.2. Animal Cruelty Laws

Despite their legal status as property, the history of animal law in the U.S. as it pertains to companion animals has reflected an increasing concern with their welfare. The first anti-cruelty laws

<sup>11</sup> In addition to criminal laws to protect animals from cruelty, North Carolina (Chapter 19A) and Oregon (ORS 105.597) provide civil remedies that allow private citizens to sue to stop animal cruelty in limited instances.

<sup>12</sup> Other legal scholars, while noting shortcomings in the law, believe animals receive sufficient benefits from human ownership that the property category should be retained, though it could be revised in a way to provide better legal protections for animals (Cupp 2016; Sunstein 2003; Favre 2000, 2010; Epstein 2002).

<sup>13</sup> For more on this decision, including a link to the translated ruling in English, see the Nonhuman Rights Project’s media release, “The NhRP Praises Argentine Court’s Recognition of Captive Chimpanzee’s Legal Personhood and Rights.” <https://www.nonhumanrights.org/media-center/12-5-16-media-release-nhrp-praises-argentine-court-on-legal-personhood-for-chimpanzee/>.

<sup>14</sup> Press Trust of India, “Animals are ‘legal persons’, all citizens their parents, orders Uttarakhand HC,” *India Today* 4 July 2018. <https://www.indiatoday.in/india/story/animals-are-legal-persons-all-citizens-their-parents-orders-uttarakhand-hc-1277559-2018-07-04>.

<sup>15</sup> For an overview of decisions regarding river personhood and the legal rights of nature, see “Creating legal rights for rivers: lessons from Australia, New Zealand, and India” (O’Donnell and Talbot-Jones 2018. *Ecology and Society* 23(1):7) and “Rights of Nature: Rivers That Can Stand in Court” (Cano Pecharroman 2018. *Resources*. 7(13)). In the U.S., on 26 February 2019, voters in Toledo, Ohio, approved a ballot measure to give legal rights to Lake Erie, which would theoretically give the lake standing so that people could sue polluters on its behalf. The following day, a farmer filed a federal lawsuit challenging its constitutionality (Williams 2019). The new legislation, dubbed the Lake Erie Bill of Rights, would establish “irrevocable rights for the Lake Erie Ecosystem to exist, flourish and naturally evolve, a right to a healthy environment for the residents of Toledo, and which elevates the rights of the community and its natural environment over powers claimed by certain corporations.”

<sup>16</sup> While animal cruelty laws differentiate animals from inanimate property in the legal system, it is interesting to note that property protection was one of the purposes of early versions of many animal cruelty statutes, “which only criminalized conduct if it was directed at animals owned by others—it was not illegal to commit the same acts upon one’s own animals or wild animals.” Animal cruelty laws also have historically served as a type of “moral legislation,” enforcing a code of behavior that says certain behaviors are immoral or socially unacceptable (Waisman et al. 2014, p. 71), rather than being motivated by concern for the animal him or herself.

were passed in New York and Massachusetts in the 1820s and 1830s, but no enforcement agencies existed until the founding of the American Society for the Prevention of Cruelty to Animals (ASPCA) in 1866 by Henry Bergh, who recognized that passing legislation was not enough to help animals—dedicated enforcement was also needed.<sup>17</sup> Bergh’s advocacy and high profile campaigns against animal cruelty were a catalyst, but the rapid creation of state and local humane agencies modeled on the ASPCA and enactment of animal protection legislation around the country signaled a societal shift in attitudes about animal welfare that was already underway (Finsen and Finsen 1994; Waisman et al. 2014, pp. 70–71).

As of 2014, all 50 states have a felony animal cruelty provision. However, under-enforcement is a persistent problem, due to issues such as limited prosecutorial resources and funding, the perception that animal abuse is not a serious crime, and lack of expertise in animal cruelty cases, which have unique challenges. Among these are forensic and evidentiary issues (the animal is both victim and evidence in cruelty cases), vagueness in the way many animal cruelty statutes are written, confusion over which agency or agencies are responsible for enforcement, lack of training of law enforcement officers on cruelty laws and animal care issues, potential costs of animal care and logistical complications involved with seizing multiple animals, and the fact that the animal victim cannot speak on their own behalf (Smith-Blackmore 2018; Ramsey 2014; Merck 2012; New Hampshire Governor’s Commission on the Humane Treatment of Animals 2009; Animal Legal Defense Fund n.d.b). Even when animal cruelty laws are enforced, it is a common lament that those convicted of serious crimes against animals receive light sentences.<sup>18</sup>

This is changing, however. With increasing evidence and awareness of the connection between cruelty to animals and violence against humans (Nelson 2011; Linzey 2009; Arkow and Ascione 1998; Ascione and Lockwood 1997), there has been a cultural shift toward taking crimes against animals more seriously—if not for the animal’s sake, then out of concern that animal abuse is a “gateway” crime that will lead to violence against humans in the future (National Sheriffs’ Association 2018).<sup>19</sup> However, beyond the concern that animal cruelty may be linked to other criminal or anti-social behavior, courts are increasingly recognizing animals themselves as crime victims (Animal Legal Defense Fund n.d.c; Cima 2014).<sup>20</sup>

### 3. Societal and Legal Trends: Companion Animals as Family

Despite the general trajectory of improvement in animal cruelty laws over the last 150 years, and a lively academic debate around the question of animal personhood, there have been few significant challenges mounted against the property status of an animal through U.S. courts until relatively recently.<sup>21</sup> The shift in the dominant social construction of companion animals as family members

<sup>17</sup> Organized efforts to protect children gained momentum during this time as well. Bergh also founded the first organization dedicated to child welfare, the New York Society for the Prevention of Cruelty to Children, eight years after he founded the ASPCA.

<sup>18</sup> Not all animal advocates believe that enhanced criminal penalties and increased enforcement are positive trends. In *Beyond Cages: Animal Law and Criminal Punishment* (2019), law professor Justin Marceau argues that the animal protection movement’s focus on “carceral animal law” has placed it at odds with other social justice movements, and that this focus may be detrimental to both humans and animals.

<sup>19</sup> Though this narrative has had an impact on policy, and there is a correlation between animal abuse and other violent crimes, the available data does not support a predictive causal relationship (Marceau 2019).

<sup>20</sup> For a discussion of the inherent speciesism of the discipline of victimology and suggestions for ways its theory and practice could be extended to include nonhuman suffering, see Flynn and Hall (2017). In two recent cases, *State v. Nix* and *State v. Fessenden*, the Oregon Supreme Court found that animals can be victims of a crime (Animal Legal Defense Fund 2014). In the former, the court rejected the defense’s argument that property, which animals are under Oregon law, cannot be seen as crime victims (instead, the public or the owner would be the victim).

<sup>21</sup> The Nonhuman Rights Project has in recent years mounted unique habeas corpus challenges on behalf of four chimpanzees and three elephants: “The world’s first habeas corpus hearing on behalf of an elephant and the second habeas corpus hearing on behalf of a nonhuman animal in the US . . . argued that Happy [an elephant], as an autonomous being, is a legal person with the fundamental right to bodily liberty protected by a common law writ of habeas corpus” (Choplin 2018). In 2018, the Animal Legal Defense Fund filed a unique lawsuit in Oregon on behalf of a severely neglected horse named Justice: “What makes this lawsuit unusual is that Justice [a horse] is named as the plaintiff . . . If successful, this would be the first case to establish that animals have a right to sue their abusers” (Pallotta 2018a). And in 2012, People for the Ethical

with little to no corresponding erosion of their property status has led to mounting cultural tension and ambivalence about their place in society, which in turn has created confusion and inconsistency in law and policy issues affecting both companion animals and their human guardians, which I will discuss further below.

The following sections examine key areas of society and law that highlight the cultural status of companion animals as family members, followed by a discussion of countertrends that reinforce the notion that they are expendable. Contrasting these contradictory cultural currents raises questions about whether the popular perception of companion animals as valued family members in society is more myth than reality. I will then return to the legal status of animals to examine its relationship to these dual social constructions.

### 3.1. Financial Expenditures on Companion Animals

Looking at societal trends, the amount of money Americans spend on companion animals has steadily increased over time.<sup>22</sup> According to the American Pet Products Association (APPA), an industry trade group that tracks consumer spending in this area, Americans spent about 70 billion on companion animals in 2017, which was a 32 percent increase from 2012's total of 53 billion. When the APPA first began tracking spending on pets in 1994, total spending was 28 billion (adjusted for inflation).<sup>23</sup>

Despite attention-grabbing media stories about outrageously "pampered pets,"<sup>24</sup> which suggest lavish lifestyles are the new normal for dogs and cats<sup>25</sup> in U.S. households, most of the money spent on companion animals covers basics such as food, medicine, and veterinary care. Following food, the largest overall expense is veterinary care. Although "luxuries" do not represent the bulk of spending on companion animals, spending has also increased in categories such as daycare, toys, and treats.<sup>26</sup>

The strongest growth sectors of consumer spending on companion animals include services such as grooming and dog and cat sitting (APPA 2018). The pet health insurance industry is also rapidly growing, as both the cost of veterinary care and insurance options have increased,<sup>27</sup> expanding from one provider in 1997 to 12 companies in North America today. In the span of one year, from 2016 to 2017, the total number of companion animals insured in the U.S. and Canada increased 17 percent (North American Pet Health Insurance Association 2018).

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Treatment of Animals filed a lawsuit (ultimately unsuccessful) on behalf of five orcas against Seaworld for enslaving the orcas in violation of the Thirteenth Amendment of the U.S. Constitution, arguing the amendment's protections can extend to nonhuman animals (Kerr et al. 2013).

<sup>22</sup> While spending may also have increased over time for inanimate objects such as houses and cars, and their associated maintenance, expenditures on companion animals tend to go toward enhancing their well-being rather than their utility (since the vast majority of companion animals are not working animals).

<sup>23</sup> Included in this figure are live purchases of pets themselves, so the data does not indicate expenditures exclusively for an animals' well-being. The categories used by the APPA include (listed from highest to lowest expenditures for dogs) in 2017: Food; Supplies/OTC Medicine; Vet Care; Live Animal Purchases; and Other Pet Services, which include grooming and boarding ([https://www.americanpetproducts.org/press\\_industrytrends.asp](https://www.americanpetproducts.org/press_industrytrends.asp)).

<sup>24</sup> See "How the Rich Pamper Their Pets" (Mann 2008) [http://www.forbes.com/2008/01/14/pets-pampering-celebs-oped-cx\\_pma\\_0115pets.html](http://www.forbes.com/2008/01/14/pets-pampering-celebs-oped-cx_pma_0115pets.html); "For Owners, It's More Than Puppy Love" (Warren 2010) <https://www.chicagotribune.com/lifestyles/ct-xpm-2010-04-29-sc-fash-0429-ellen-pet-shopping-column-story.html>; "Pet 'Parents' Pamper to the Extreme" (Benbow 2013): <https://www.usatoday.com/story/news/nation/2013/07/21/pet-parents-pamper-to-the-extreme/2572021/>.

<sup>25</sup> While they are the most common companion animals, dogs and cats also are typically included in the legal definition of "pet" or "companion animal," whereas other species included in that category vary by state and locality (as does which animals are included in the legal definition of "animal" itself). However, many other species are kept as companion animals. For a discussion of inherent challenges to the well-being of specific species kept as pets, see *Run, Spot, Run: The Ethics of Keeping Pets* (Pierce 2016).

<sup>26</sup> "These 4 Charts Explain Exactly How Americans Spend \$52 Billion on Our Pets in a Year" (Thompson 2013): <http://www.theatlantic.com/business/archive/2013/02/these-4-charts-explain-exactly-how-americans-spend-52-billion-on-our-pets-in-a-year/273446/>.

<sup>27</sup> "The Dog Maxed Out My Credit Card" (Bounds 2011), available online: <http://www.wsj.com/articles/SB10001424052970204394804577011824160591082>; "Who Suffers Most from the Rising Cost of Veterinary Care?" (Dale 2013): <http://veterinarybusiness.dvm360.com/who-suffers-most-rising-cost-veterinary-care>.

Though the media displays a fondness for stories about affluent individuals who spend large sums of money on luxuries for their companion animals,<sup>28</sup> with the implication this behavior is depraved and wasteful, individuals experiencing poverty or homelessness often put their companion animals' needs ahead of their own (Irvine 2013). Exaggerated media stories about spoiled pets frame the overall increase in societal spending on companion animals as a problem, indicative of anthropomorphism run amok. But stories of those in difficult circumstances who nevertheless find a way to provide for their companion animals—even if it means going hungry themselves<sup>29</sup>—receive less attention. It is relatively easy for the media to make fun of affluent people spending their discretionary income on something “frivolous.” It is more difficult to ridicule an elderly person living on a fixed income or someone who is homeless and struggling to feed his or her animal, not out of a misguided allocation of financial resources, but out of genuine love and concern for their well-being. In recognition that some clients were feeding their meals to their companion animals, Meals on Wheels in recent years has launched efforts to assist local chapters in establishing programs to also donate food and services to help seniors care for their companion animals (Meals on Wheels 2016).

In the category of municipal spending, there has also been a significant increase on dog parks, which began to appear in the 1980s in response to the widespread adoption of leash laws and have proliferated in recent years (Krohe 2005). The fastest growing urban parks are off-leash dog parks, which have grown by 89 percent since 2007 (The Trust for Public Land 2016). This increasing demand reflects demographic shifts, as households with dogs now outnumber those with children. According to Peter Harnik of The Trust for Public Land, which compiles annual data on the nation's largest urban parks, “there was a playground movement 100 years ago. In the last 15 to 20 years, it's these off-leash dog areas. There's a tremendous upsurge in demand and love for them” (El Nasser 2011).

### 3.2. Companion Animal Loss and Grief

In perhaps the most profound example of the significance of companion animals as family members and best friends, it is now well-documented that losing a cherished animal companion can be as devastating as losing an important human relationship. People can experience intense grief over the death of a beloved animal (Toray 2004; Carmack 2003; Cowels 1985; Adrian et al. 2009).

Although the death of a companion animal can still result in experiences of “disenfranchised grief,” in which the emotions associated with a loss are not recognized by society as legitimate (Doka 1989),<sup>30</sup> the societal acceptance of companion animals as legitimate objects of grief has become more widespread alongside greater recognition of the strong bond that can be forged with an animal, and the proportionate impact that can result from loss.<sup>31</sup>

Companion animals who are treated as family members become woven into the fabric of daily life. In addition to the primary loss of the relationship, those who lose an animal companion may also lose a reliable source of social support, stability, and the daily routine involved in caring for the animal. In addition to a constant presence and source of routine and stability, dogs and cats provide

<sup>28</sup> “The Problem of Pampered Pets” (Berger 2012): <http://www.seattlemag.com/article/problem-pampered-pets>; “When Nothing is Too Fancy for Fido” (Griggs 2013): <http://www.cnn.com/2013/04/15/living/pampered-pets/>.

<sup>29</sup> “After Meals on Wheels volunteers noticed a growing number of clients giving their food away to their furry friends, they started working with shelters and other pet groups to add free pet food to their meal deliveries.” (Associated Press 2013, “Meals on Wheels helps feed pets of seniors, disabled.” CBS News, 25 December 2013.)

<sup>30</sup> This is communicated through dismissive phrases like “it's only an animal.”

<sup>31</sup> While this has been the general trend, there are still areas in which the loss of a companion animal may be socially unrecognized. For example, workplace bereavement policies that include companion animals are uncommon, and support or acknowledgement from friends and family may be lacking. Public rituals such as funerals are also less normative, though some do hold ceremonies celebrating the life of a companion animal and mourning their death. For a general discussion of this subject, see *Mourning Animals: Rituals and Practices Surrounding Animal Deaths* (DeMello 2016). A cultural deficit with regard to mourning and death in the U.S. is not limited to companion animals, though it is starker here. Some have noted that upon the death of a close human family member, Americans are often allowed to take only a week or two off work (or in some cases, just a few days), with the fact that the person is still grieving often left unacknowledged by others outside a very short period of expected mourning (Noel and Blair 2000).

dependable companionship, the perception of unconditional love, and consistent emotional support to their human caregivers—all of which can complicate the grieving process (Pallotta 2016).

In recent decades, mounting research about the human-animal bond has raised awareness within the mental health field about the potential impact of companion animal loss, and both self-help books and support groups addressing this issue have proliferated (Pash 2015; Clements et al. 2003). This growing recognition has informed policy debates about the legal issues mentioned in later sections, such as damages available upon wrongful death of companion animals. Of course, support groups and grief counseling are not necessary for other forms of property.

### 3.3. Domestic Violence and Animal Abuse

Despite their legal status as property, the important place of companion animals in the family—for better or worse—is highlighted when they, along with other vulnerable members of the family, become targets of domestic violence. Although domestic violence is a social problem and not a positive trend, the fact that companion animals are frequently targets of abuse clearly demonstrates their place in the family: companion animals are part of the abuser's web of dominance and control. Companion animals occupy the bottom rung of the power hierarchy within the family, having less autonomy even than children (and indeed are sometimes abused by children). Additionally, threatening to harm a partner's cherished animal companion is a common tactic of control and manipulation used by abusers to terrorize and coerce the victimized partner to stay. If she leaves, the abuser may harm or kill her animal as a means of retaliation. Therefore, many victims of domestic violence delay leaving an abusive relationship because they have no safe place for their animals (Ascione et al. 1997). A 2017 study showed that 56 percent of women in domestic violence shelters had delayed their escape out of fear for their animals and a desire to protect them (Barrett et al. 2017).

Victims of domestic violence often find themselves in this difficult position because most domestic violence shelters have "no-pets" policies. Such policies are one of the many indicators of the context-dependence and inherent instability of the family member role. The social construction of this relationship—so real in the context of the micro-world shared by the animal and his or her family (which may comprise just one person)—encounters obdurate limits in the wider society, in the form of exclusionary law and policy that defines animals differently. "No-pets" policies in shelters, rental housing, and other lodging significantly reduce options for a victim who wants to flee an abuser but not leave her animal in harm's way.

"No-pets" policies also disproportionately affect poor and working-class women who lack resources to pay higher prices for pet-friendly apartments or lodging, and thus find themselves with far fewer options for safe spaces—unless they leave behind their animal, who may not only be in grave danger if their human companion leaves, but who also may be a primary source of comfort, support, and emotional stability for the victim.

This is one of the many areas where a companion animal may be considered a family member in one context but not another. The risk of being entangled in the web of domestic violence also demonstrates that being part of the family does not mean that an animal will be treated well. Here, the tension between property and family member is also evident:

Complicating the issue is the fact that animals are considered property in all 50 states. If an abuser refuses to relinquish a pet and the pet is not listed on a temporary restraining order (TRO), police and even courts are often reluctant to get involved in what is usually considered a marital property dispute. As a result, abusers have been known to threaten to harm or kill a pet if a victim does not return to the home, or dismiss criminal charges or restraining orders against an abuser. In one such case, a woman suddenly left a domestic violence shelter after she received pictures of her husband cutting her dog's ears off with garden shears. Another woman was forced to watch as her husband shot and killed her dog in front of her young son. (Ramsey et al. 2010, p. 17)

However, in light of mounting research that shows a connection between animal abuse and violence against humans (Nelson 2011), there have been positive legal and policy developments in this area. To address the problem that most domestic violence shelters do not allow animals, “safe havens for pets” programs have been created to provide emergency care for companion animals while their guardians stay at a domestic violence shelter or other temporary housing situation that does not allow pets (Nelson 2011; Ramsey et al. 2010).

A positive trend in the legal system reflecting awareness of the link between family violence and animal abuse—and the recognition that animals are more than mere property—is the increase in legislation allowing courts to include animals in domestic violence protective orders. In 2006, Maine enacted the first statute that specifically allowed judges to include companion animals in protection orders issued against domestic abusers (Ramsey et al. 2010), and other states have followed suit. As of 2018, 32 states had such laws on the books.

In 2018, further progress was made with the passage of the bipartisan Pet and Women Safety (PAWS) Act, which expands existing federal domestic violence protections (which aid in the enforcement of state-issued protection orders) to include companion animals. Among other provisions, the PAWS Act broadens the definition of stalking under the criminal code “to include conduct that causes a person to experience a reasonable fear of death or serious bodily injury to his or her pet.”<sup>32</sup> The new law also urges states that have not already done so to adopt legislation allowing courts to include animals in domestic violence protective orders. In recognition of the problem posed by “no-pets” policies in domestic violence shelters, the PAWS Act also establishes a grant program to assist programs that address the shelter and housing needs of domestic violence victims with companion animals.

Due to a growing awareness of the co-occurrence of child abuse and animal cruelty (Nelson 2011), there has also been an increase in laws mandating or permitting cross-reporting.<sup>33</sup> The fact that animal abuse has also been found in many homes under investigation for child abuse further demonstrates companion animals’ vulnerable place in the family.

Increased societal awareness of the connection between animal cruelty and violence against humans has led to the former being taken more seriously by law enforcement. In a relatively new development, programs dedicated to investigating and prosecuting animal cruelty and neglect are rapidly appearing in district attorneys’ offices and police departments across the country.

The first unit of this kind, the Los Angeles County Animal Cruelty Prosecution Program, was created in 2007 and became a model for others around the country. It followed the formation two years earlier of the Los Angeles Police Department (LAPD) Animal Cruelty Task Force. In supporting the measure to create the task force, LAPD officials “cited studies finding that animal abusers were often involved in other crimes such as drug trafficking, child abuse and domestic violence” (Leonard 2009).

In the decade since, similar units have been established in other jurisdictions. In 2016, the state attorney for Orange and Osceola Counties in central Florida created a dedicated animal cruelty unit, consisting of attorneys who volunteered to take additional casework and develop expertise in the applicable laws and special challenges involved in prosecuting animal cruelty cases. In 2016, the Queens County district attorney created an Animal Cruelty Investigations Unit, which was the first of its kind in New York City. The previous year, the district attorney for Fresno County, California, established an Animal Cruelty Unit dedicated to addressing animal abuse cases, in part to break the connection between animal abuse and human violence (County of Fresno 2015). Also, in 2015, Virginia’s attorney general created the nation’s first statewide Animal Law Unit. Most recently, in 2018, the San Diego County District Attorney’s Office launched an Animal Prosecution Unit to provide investigative support and dedicated expertise in animal cruelty cases—fittingly, it is housed within the DA’s Family Protection Division (County of San Diego, Office of the District Attorney 2018).

<sup>32</sup> H.R.909—Pet and Women Safety Act of 2017—115th Congress (2017–2018).

<sup>33</sup> See “Table of Veterinary Reporting Requirement and Immunity Laws” (Wisch 2017): <https://www.animallaw.info/topic/table-veterinary-reporting-requirement-and-immunity-laws>.

While concern that abusing animals will lead to other crimes has helped bring awareness to the problem of animal cruelty, it is also being taken more seriously as a crime in itself—not because animal abuse portends other criminal behavior but because it is wrong to abuse an animal, full stop.<sup>34</sup> This is evident in the abovementioned trend to recognize animals as crime victims. In addition, in 2016, the FBI added “animal cruelty” as a distinct category to the agency’s Uniform Crime Report, a nationwide crime-reporting system, which enabled crimes against animals to be tracked for the first time. Prior to this, animal cruelty offenses were lumped into a miscellaneous “all other offenses” category ([Federal Bureau of Investigation 2016](#)).

#### 3.4. Companion Animal Custody

Custody battles over companion animals have been on the rise in recent years and represent another arena in which the legal landscape has been shifting toward increased recognition that animals are more than property. A 2014 survey found that more than 25 percent of matrimonial lawyers had seen an increase in pet custody cases during the previous five years, and 22 percent noted that courts are more frequently allowing these cases ([American Academy of Matrimonial Lawyers 2014](#)).

Although custody disputes of this nature reflect the important role of animals in people’s lives and families, courts typically resolve these disputes based on one criterion: the property status of the animal, or who the more rightful owner is. This is determined by who purchased the animal or paid her adoption fee, typically without regard to quality of life factors such as who is the more involved caregiver, has a closer bond with the animal, takes the animal to the vet, spends more time with the animal, or does most of the purchasing of food, treats, and toys. In short, courts generally are not required to consider an animal’s well-being or treat her differently from other marital property that must be fairly divided in a divorce.

Because the legal dispensation of companion animals in divorce has historically been decided no differently than the division of other jointly owned material assets (such as furniture, vehicles, and other inanimate objects), the word “custody” is a misnomer in these cases. In legal terms, they are about property distribution. For those who share their lives with animals, the prospect of a judge treating a cherished animal in the same manner as a car or toaster often seems odd, even for attorneys:

The very first question posed to me as a new member of the bar some twenty-six years ago was, “When a couple divorce, who gets custody of the dog?” Bewildered, I sought the advice of a more experienced attorney. She supposed that custody of the dog would be awarded to the individual who fed it, walked it, groomed it, took it to the veterinarian, and got up at 6:30 A.M. to let it out. In short, she described a primary caregiver test that, although not much articulated then, has come to be a *force majeure* in child custody cases. Her answer, though logical, was almost certainly incorrect. A deep divide separates the attitude of most families, who view pets as family members, from the law, which regards pets as chattels, not different in kind from household property such as a sofa or coffee cup. For years courts have successfully straddled this divide; however, the influx of pet ownership has shifted the issue of pet custody to the forefront. ([Britton 2006](#), pp. 1–2)

In addition to receiving heightened media attention in recent years,<sup>35</sup> the issue of companion animal custody has been evolving in the legal system. A growing number of courts have acknowledged that people have a special relationship with their companion animals that is different from their relationship with other types of inanimate property.

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<sup>34</sup> It is again worth noting, the vast majority of these cruelty laws apply only to animals defined as companions. The same acts that would be considered torture, abuse, or neglect in the case of a companion animal would usually not be prosecuted—or in most cases even deemed illegal—if done to a farmed animal.

<sup>35</sup> Glamour Magazine recently ran a series about millennial divorce, which included the article, “Your Marriage Is Over—Who Gets Custody of the Pets?” ([Wranke 2018](#)).

However, while judges have the discretion to consider a companion animal's interests in divorce proceedings—and some have done so—the legal norm is still to adhere to a strict property analysis. Some have speculated that reticence to employ a “best interests” standard, which is the norm in child custody cases, in cases involving companion animals is due to judges' reluctance to appear as activists (Mele 2017). Also, in cases where courts have strayed from a strict property analysis—for example, in awarding joint custody or visitation for an animal—appellate courts have sometimes overturned the decision, on the grounds that the lower court lacked authority because animals are property. The court's reasoning in *Bennett v. Bennett* (1995) is typical:

While a dog may be considered by many to be a member of the family, under Florida law, animals are considered to be personal property. There is no authority which provides for a trial court to grant custody or visitation pertaining to personal property. While several states have given family pets special status within dissolution proceedings, we think such a course is unwise. Determinations as to custody and visitation lead to continuing enforcement and supervision problems (as evidenced by the proceedings in the instant case). Our courts are overwhelmed with the supervision of custody, visitation, and support matters related to the protection of our children. We cannot undertake the same responsibility as to animals. While the trial judge was endeavoring to reach a fair solution under difficult circumstances, we must reverse the order relating to the custody of “Roddy,” and remand for the trial court to award the animal pursuant to the dictates of the equitable distribution statute. (quoted in Waisman et al. 2014, p. 552)

Although in the U.S. the most common approach to determining custody of companion animals has been a strict property analysis, a number of courts have deviated from that standard in favor of a “best interests of the animal” test (Rook 2014). However, this remains a murky legal area. Recently, though, a new legislative trend empowering courts to take the well-being of animals into account in divorce proceedings has emerged. These new laws are accelerating the shift already underway that is challenging the strict property paradigm as applied to animals in custody cases.

In 2016, with a groundbreaking amendment to its divorce law, Alaska became the first state to require judges to take into account the “well-being of the animal” in custody disputes. This law was the first of its kind in the U.S. to expressly require courts to address the interests of companion animals when deciding how to assign ownership in divorce and dissolution proceedings. It was also the first to explicitly allow joint ownership of a companion animal. In 2017, Illinois enacted a similar law (Pallotta 2017b, 2018b). California followed suit in 2018 with a weaker version that authorizes, rather than requires, courts to take into account the care of companion animals. Despite it being permissive rather than mandatory, California's custody law still provides important guidance to courts in distinguishing companion animals from other forms of property, where before there was none.

### 3.5. Tort Law and Valuation of Companion Animals in Wrongful Death

As financial spending on companion animals' well-being has increased, a related question arises: what is their value in civil lawsuits if wrongfully injured or killed? Because animals are legally defined as personal property, the worth of a companion animal is generally restricted to his or her market value (typically the animals' purchase price or adoption fee). This is a limiting factor when we consider whether the legal status of companion animals has kept pace with their increasing importance in society.

Although in tort cases involving humans, such as medical malpractice, the court may consider an individual's pain and suffering, when an animal is wrongfully injured or killed—for example, in cases of veterinary malpractice—there is no legal mechanism to redress their pain and suffering because they are generally not considered “persons” under the law. Therefore, tort lawsuits involving companion animals typically must show the owner has been harmed and address the loss suffered by the human.

Three common types of tort cases include personal injury, injury to property, and injury to others with whom the law recognizes a close relationship. While the wrongful death of a companion animal

does not constitute a personal injury (except in rare cases involving service animals, whom courts have conceptualized as being extensions of the human<sup>36</sup>), both of the latter two may be used to describe the wrongful death of a companion animal. Generally, non-economic damages are not recoverable for injury to property but can be recoverable for injury to another party with whom the law recognizes a close relationship.

Some have argued that, despite their classification as property, it is more sensible to treat cases where a companion animal is wrongfully killed as “wrongful death” rather than “destruction of property” cases (Martin 2011, p. 939). This legal theory also better reflects the relationship many people have with their companion animal, as “people do not plan memorial services, or invest in serious medical treatment for their books or lawnmowers” (Hessler 2007).

Most people who consider their animal to be part of the family would balk at the idea of placing a dollar value on their life, as they would with a human being. But this is the legal remedy available in such cases, and it can be a confusing area of law when it comes to companion animals. It is beyond the scope of this paper to attempt a succinct overview of this “muddled, but evolving, area of the law” (Frasch et al. 2011, p. 142), but for purposes of this discussion, although there have been some exceptions, companion animals’ designation as personal property has meant non-economic damages, such as for loss of companionship or emotional distress, are generally not available in cases of wrongful injury or death of an animal. Additionally, compensatory damages to cover economic losses such as veterinary bills are typically limited to the animal’s “fair market value.”

Market value is calculated using economic factors such as purchase price, special training, pedigree, and age of the animal. If an animal is negligently injured or killed, using the fair market value standard, an owner would be eligible to recover the amount for which the animal could have been sold on the open market. So, if your animal is a purebred for whom you paid thousands of dollars, you could potentially recover that purchase cost. However, if you adopted your mixed breed dog from a shelter, his or her economic worth would be minimal, especially if the animal were older. The market value standard only allows recovery for the cost to “replace” that animal (as with other types of property) and does not take into account the value of the special relationship that may exist with that unique animal. Most courts have been unwilling to see beyond the traditional notion of “market value” for the loss of a pet, despite their evolving social status (Favre 2003).

Many companion animals have little monetary worth using a strict economic analysis, and replacing him or her with another animal of the same age and physical characteristics would strike most animal guardians as absurd as the suggestion that a child could be replaced by having another. Yet requests to add “sentimental value” or “loss of companionship” to the calculation of actual value of an animal companion to the owner have typically been denied by the courts. Although in a narrow set of circumstances, some courts and legislatures have allowed non-economic damages in lawsuits involving harm to companion animals, the general rule is that companion animal owners are not allowed to recover for mental or emotional distress due to their animal’s injury, because these damages are not allowed in claims for damage to property (Seps 2010, p. 1345).

Although courts sometimes express remorse and empathy for animals and their owners, they routinely declare that their hands are tied by common law. In *Rabideau v. City of Racine*, the court said “we are uncomfortable with the law’s cold characterization of a dog as mere ‘property,’” yet proceeded to use this characterization in its ruling, claiming it must apply the “established legal doctrine”

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<sup>36</sup> For example, in the case *In the Matter of Lillian Kline*, no. A-1788-95T5 (N.J. Super. Ct. App. Div. 12 July 1996), a service dog’s owner was permitted recovery under New Jersey’s crime victim compensation law although it was her service dog and not herself who was attacked by teenagers throwing stones; Ms. Kline was not injured and in fact witnessed the attack from inside her home. In allowing recovery, the court concluded “in view of the function of the dog as a veritable extension of the appellant’s own body, an injury to the dog is tantamount to an injury to the appellant’s person.” The court went on to analogize a trained service dog to an artificial limb (Waisman et al. 2014, pp. 525–26).

(Septs 2010, p. 1347). In this 2001 case, where an owner sued for negligent infliction of emotional distress after a police officer shot her dog, the court further elaborated:

Labeling a dog “property” fails to describe the value human beings place upon the companionship that they enjoy with the dog. A companion dog is not a fungible item, equivalent to other items of personal property. A companion dog is not a living room sofa or dining room furniture. This term inadequately and inaccurately describes the relationship between a human and a dog . . . Nevertheless, the law characterizes the dog as personal property . . . to the extent this opinion uses the term “property” in describing how humans value the dogs they live with, it is done only as means of applying established legal doctrine to the facts of this case. (quoted in Waisman et al. 2014, pp. 171–72)

From a policy perspective, some have argued that adding broad emotion-based damages for companion animals would increase the cost of veterinary care and other companion animal services due to increased liability (Goldberg 2013). In addition to the purported limits of established legal doctrine, courts (including the above) have also employed slippery slope concerns about “opening the floodgates of litigation” to justify decisions to not include animals in the sphere of close family relationships eligible for recovery of noneconomic damages. Thus, although the court in *Rabideau v. City of Racine* sympathized with the notion that animals are more than mere property, it nevertheless determined that “since emotional distress cases are limited to a closed set of close family members, pets cannot fit into that category” and held that “allowing emotional distress claims by a pet’s human companion enter[s] a field that has no sensible or just stopping point” (Schwartz and Laird 2006, p. 255).

This highlights an interesting question in considering the place of companion animals in tort law. How do we conceptualize the human–companion animal relationship: are they best friends or family members? This makes a difference in cases of injury or death of humans, and the categories are not interchangeable.

Recovery of damages in cases of wrongful death or injury to a human tends to be restricted to spouses, parents, and children (and sometimes minor siblings). Many other close relationships are excluded. For example, damages are not typically available for the death of a best friend. Therefore, some legal experts note that expanding this area of tort law to include companion animals would “elevate” relationships with animals above other close human relationships that are not currently eligible to receive recovery for non-economic damages:

Another unintended consequence of expanding non-economic damages is the fact that human-animal relationships would be elevated above many human-human relationships, a truly bizarre result. Recovery for negligent infliction of emotional distress is generally limited to very close relationships, such as spouses, children, or parents . . . Grandparents, aunts, fiancés, and friends generally cannot recover emotional distress damages, regardless of how close these individuals were with the deceased. Expanding non-economic damages to the human-animal relationship would deem it to be more important than those human–human relationships. (Cook and Hochstadt 2009, p. 35)

Other critics of expanding damages for the loss of an animal companion cite public policy considerations regarding potentially increased caseloads on already burdened courts. The “floodgates of litigation” concern is frequently raised in objection to efforts to expand legal protections for animals, or their status under the law. Although it is an oft-cited argument, whether expanding these remedies would in fact lead to excessive litigation is the subject of debate. Some experts argue that predictions of excessive recoveries, fraudulent claims, or a flood of litigation are a red herring—“theoretically unsound and empirically disproven” (Martin 2011, p. 256). Others point to Hawaii as a counterexample:

The “floodgates of litigation” concern would seem to be addressed by past history in Hawaii, a jurisdiction unique in the fact that for approximately 16 years recovery of emotional distress damages for harm to property was permitted. . . . Throughout the entire 16 year

period during which individuals could seek emotional distress damages for negligent harm to their companion animals . . . [there was one] single published case on the issue and there is no commentary in the literature regarding an onslaught of animal injury cases. (Frasch et al. 2011, p. 111)

It is worth noting that the Hawaii statute (which has since been abolished—though not as a result of litigation over companion animals<sup>37</sup>) addressed damage to property, yet still allowed recovery for mental distress. This highlights the viability of disparate approaches in this area. While a “wrongful death” claim may more accurately reflect the relationship between a caregiver and his dog, abolishing the property status of companion animals or redefining them as “family members” in the common law or legislature is not necessary to allow for recovery of damages beyond fair market value in tort law. This informs the wider debate over whether the abolition of animals’ property status is the best (or only) path forward to securing greater protections and recognition of their interests under the law.

Beyond unwillingness to elevate the status of animals in the legal system, it is also important to note that courts have shown a general reluctance to award damages for mental pain and suffering—not just in cases involving animals. And as noted above, the category of humans who can recover damages for emotional distress or loss of companionship is usually quite circumscribed and limited to close family relationships. Best friends, roommates, unmarried partners, and many others are typically excluded from making these claims, regardless of how close or family-like their relationship is.

Yet, some courts have begun to stray from the traditional treatment of animals as property in these cases and consider them more as “family-like persons” (Seps 2010). Although damages that have been awarded for non-economic harm such as emotional distress and loss of companionship have often been minimal, some animal law experts predict “as the human/companion animal bond is increasingly being recognized in society and in the courts, awards in the future [will] more accurately reflect this evolution” (Frasch et al. 2011, p. 104).

### 3.6. Wills and Trusts for Companion Animals

Interest among guardians in providing for their companion animals in the event of the guardian’s death or incapacitation is not a new phenomenon. The legal recognition of such arrangements, however, is a more recent development. In the past, owners frequently encountered legal obstacles when attempting to provide for the care of their animals through a will or trust, but recent changes in the law authorizing what are commonly called “pet trusts” represent a significant shift in this area (Aflatooni 2011; Hirschfeld 2007).

Pet trusts are distinct from bequeathing an animal to another person as property in a will. Trusts provide a sum of money to a designated caregiver and can include specific instructions pertaining to exercise, recreation, veterinary visits, diet, and other aspects of care for a companion animal. Until recently, most states did not formally allow trusts for animals—which means that although a person could create one, they were unenforceable if challenged:

Under traditional trusts and estate law, a pet owner could do little to ensure that their animal would be provided for properly after the owner’s death. Those who did attempt to create some sort of “trust,” ran into legal problems because animals are considered a type of property and the pet could not legally be a beneficiary to a trust. (American Veterinary Medical Association 2018)

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<sup>37</sup> “Years later, as part of sweeping tort reform prompted by the numerous property damage claims after a hurricane, the state legislature statutorily abolished emotional distress claims arising solely from damage to property” (Frasch et al. 2011, p. 111).

However, this area of law has evolved relatively quickly in response to changing social norms.<sup>38</sup> With the addition of Minnesota in 2016, all 50 states and the District of Columbia now have pet trust laws on their books, enabling owners to create legally sanctioned and enforceable arrangements for the care and maintenance of their animal companion.

Pet trust statutes, like animal cruelty statutes, are among the few areas of law that vividly distinguish companion animals from ordinary property. Some have argued it therefore follows that the wrongful “destruction” of companion animals (as in tort cases discussed above) should be compensated differently than the destruction of other property (Martin 2011, p. 951). However, as discussed in the preceding section, this is not typically the case. Whether that is primarily due to courts’ inflexible view of animals as property or reflects an unwillingness to expand tort law generally (or both) is subject to debate.

It should be noted that, despite general shifts in societal norms regarding animals, efforts to elevate their status in the legal system is not universally perceived as a positive turn. For some, it is a cause for alarm. Obvious dissenters include industries that profit from animal exploitation, but even constituencies that serve animals have competing interests that provoke disagreement about trends in animal law. For example, the American Veterinary Medical Association (AVMA) has opposed legislation that it perceives could be harmful to the veterinary profession and to the professional and financial interests of its members (for example, recovery of non-economic damages in veterinary malpractice cases). Industry front groups that feign interest in defending animals’ interests (e.g., the National Animal Interest Alliance<sup>39</sup>) also actively lobby against even modest animal protection reforms and oppose any efforts to elevate the legal status of animals in defense of owners’ absolute right over their “property.”

#### 4. Countertrends: Companion Animals as Expendable

The previous sections underscored areas of society and law where the emerging status of companion animals as family members is beginning to be recognized. Although there has been some improvement in the legal system, with courts and legislatures recognizing that companion animals are distinct from other types of property, animals are in many ways still treated as property under the law. Therefore, the argument that the legal system has not kept pace with changing social norms or advances in cognitive ethology has merit. But how disparate are the dual frameworks of animals as family and animals as property? And can they comfortably and coherently coexist?

Although companion animals receive the most legal protections of all animals in the U.S., significant limitations exist even within this relatively privileged class when it comes to treatment under the law. Similarly, when we take a closer look at the cultural construction of companion animals as family members, contradictions emerge, revealing a status in flux.

##### 4.1. Family According to Whom?

A number of opinion polls have demonstrated the importance of companion animals in people’s lives. For example, the Harris Poll cited above found that 95 percent of pet owners considered their animal to be a family member in 2015, up from 88 percent in 2007. The American Pet Products Association (APPA) annual survey, which reports similar findings, is also cited frequently in media reports about the special status of pets (APPA 2018).

<sup>38</sup> In addition, despite the unique and nontraditional characteristics of pet trusts, they have earned widespread acceptance and been adopted relatively quickly compared to other novel types of trusts (Vokolek 2008).

<sup>39</sup> The National Animal Interest Alliance is an industry-funded lobbying organization for animal commerce and agribusiness based in Portland, Oregon. Board members “representing breeding, agribusiness, hunting, horse racing, rodeos, circuses and vivisection industries appear to be so concerned about ‘animal rights extremism’ that virtually any attempt at humane advocacy falls neatly into this category” (The Center for Media & Democracy 2011, [https://www.sourcewatch.org/index.php/National\\_Animal\\_Interest\\_Alliance](https://www.sourcewatch.org/index.php/National_Animal_Interest_Alliance)).

Those are just the metaphorical tip of the iceberg with regard to polls indicating that people's relationship with their animal companions more closely approximates that of a close friend or family member than property. Here, I will include just a small sample. The Pew Research Center found that 85 percent of dog owners and 78 percent of cat owners consider their pet to be a member of the family (Pew Research Center 2006). In a 2018 survey commissioned by Mercure, a dog-friendly chain of hotels, 53 percent of the 2000 people polled said they preferred spending time with their pet than with a human companion (Bailey 2018). An online survey of 1166 American dog owners conducted by dog food manufacturer Beneful found that "nearly all American dog owners surveyed consider their beloved pups a part of their family (97 percent) and one of their best friends (93 percent)" (Purina 2016). In an online survey of dog owners conducted by Kelton Global, 83 percent consider their dog to be their best friend (Kelton Global 2017). An earlier study found that 99 percent of pet owners consider their pets family members (Voith 1985). Surveys of pet owner attitudes conducted by the American Animal Hospital Association (AAHA) found that 83 percent refer to themselves as their animal's mom or dad (AAHA 2001) and half would prefer their dog (40 percent) or cat (10 percent) as their only companion if stranded on a desert island (AAHA 2004). Finally, genogram drawings in which they are asked to sketch their important family members have revealed that young children consider their companion animals to be part of the family (Walsh 2009).

The Kelton poll mentioned above also found that adult Americans perceive a change in the status and treatment of companion animals since they were children:

It appears that in the minds of the Americans who responded to the survey, dogs are becoming more important as family members, particularly as children. Most recognize that this represents a change in attitude since nearly 60% believe that their dogs are currently more important in their lives than were the dogs that they had during their childhood days. Two out of three also feel that they are more caring and treat their pet dogs better than did their mother and father. (Coren 2011)

Despite the general finding that people who own companion animals say they are family members, opinion polls are limited in what they can tell us, simply because what people say in polls (or in casual conversations) and what they do in real life are not always the same. Additionally, not all polls are conducted in a scientific manner. Though there may be a cultural truth underlying such surveys, the statistics they yield can be suspect.

It is something you say. Everybody says it. "Pets are part of the family!" is a mantra of the media, the pet industry, and even the academic veterinary literature . . . So, I dug in a little and tried to track down where the "90% of pets are family" data came from. This sound bite—and that's really all it is—comes from an online survey of 1200 pet owners, conducted by the American Pet Products Association—so, basically a marketing survey done on people who purchase pet products. This does not count as "data." (Pierce 2015)

In addition, many dogs are kept as guard, breeding, or yard dogs, rather than companions. These owners might not be reached by—or may choose not to respond to—marketing or other online surveys asking about the family status of animals. In addition, people who own companion animals but do not treat them like family are likely underrepresented in convenience samples drawn from companion animal-centric settings such as vet hospitals or dog parks.

Though reliable quantitative data may be limited, qualitative studies incorporating ethnography, participant observation, and interviews have repeatedly demonstrated the importance of companion animals in people's lives (Brooks et al. 2018; Reisbig et al. 2017; Charles 2016; Brooks et al. 2016, 2018; Irvine 2013; Maharaj and Haney 2014; Cavanaugh et al. 2008). However, broad conclusions are typically limited when looking at qualitative studies, which tend to use smaller sample sizes, case studies, or a particular social setting to focus on describing and understanding specific experiences and social phenomena, rather than counting and measuring large-scale numerical data.

In addition, sites where participants are recruited for qualitative studies can introduce a self-selection bias. For example, a study that recruited participants from among clients at a large urban veterinary hospital found that 85 percent considered their animals to be family members (Cohen 2002). However, their presence at the vet hospital already marks these respondents as potentially more responsible animal caregivers than the general population of those who own pets.

Due to the limitations inherent in both qualitative and quantitative research, and because the underlying questions driving each tend to be different, a combination of both methodologies yields the richest insights about social phenomena like the meaning of companion animals in people's lives. Qualitative studies can provide deep insights about meaning attribution and interpretation that cannot be captured through quantitative methods, which, when conducted properly, can provide a "big picture" snapshot of larger populations and broad trends through statistics that are generalizable.

However, the lack of reliable data about companion animals as family members—and deeper questions, such as what that term *means* to those who agree with such a statement—highlights a central question: how widespread is the family member conceptualization, really? And, a more troubling question: What proportion of those who claim their animals are family members actually treat them as such, with the care and respect befitting such a status?<sup>40</sup>

#### 4.2. Provisional Status as Family

All social science research has limitations because social phenomena are messy. People notoriously hold and employ contradictory beliefs, attitudes, and actions simultaneously. Even the most scientifically solid surveys cannot accurately predict human behavior, for the simple fact that reported attitudes and actual behavior often diverge. People who call their dog or cat a family member now may still get rid of them in the future. I wrote the following on my personal blog in 2009, around the time I began seriously thinking about this issue, particularly in the context of the cultural trope of "unconditional love" as attributed to companion animals:

What got me started thinking about this most recently was an ad I saw on the Portland Craigslist. I never go on the "pets" section of CL, but I was looking for something specific and while there I was surprised and depressed to see all the "free to good home" ads (surprised because for some reason I thought CL disallowed this type of listing, but apparently they only prohibit sales of animals). Out of curiosity, I clicked on a listing that advertised a free pair of Weimaraners. The ad showed a picture of two dogs, a mother and son, and contained a story about how the owner had fallen on rough times during the recent "economic storm" and could no longer keep these cherished family members. After a few paragraphs detailing the charms of the breed and of these two dogs in particular, the person giving her dogs away had the gall to list as a requirement that the new owner love them "unconditionally." Holy shit—are you kidding me? (Pallotta 2009)

Pierce articulates a similar sentiment via a notable encounter she relayed in *Psychology Today*:

The other day, I was with my two dogs, Maya and Bella, at one my local parks. I was throwing the ball for Bella and letting Maya nibble on grass. Maya started barking at a woman walking past. I apologized for Maya's rude behavior—she doesn't always follow the conventions of human etiquette—and the woman was very nice and said "Don't worry about it. I'm a dog person." She went on to tell me about a Manchester Terrier she had had and how much she had adored the dog. She said that watching Bella chase reminded her of him; and she

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<sup>40</sup> An obvious parallel with humans in the family comes to mind. It is certainly not the case that all human family members are treated well, so bestowing care and respect is not a necessary prerequisite for a sincere attribution of family status. Vulnerable members of the family such as children are particularly susceptible to maltreatment. But whether society recognizes certain behaviors as abuse when it comes to animals—e.g., less obvious forms of neglect and lack of consideration for animals' needs versus overt acts of cruelty—is another question.

pressed her hands over her heart, in an “I love you” sign. And she told me and how her little terrier was obsessed with balls. He would stand at the top of the stairs and drop the ball and watch it bounce all the way down; then retrieve the ball and do it again. Then she said, “I got rid of him when I moved.” On the outside, I kept a poker face and said something trite like “That’s too bad.” And inside, I’m thinking to myself, WTF? This dog is part of your family and when you move you just get rid of him? Now, I know this sounds just as judgmental as hell, but seriously: what does “pets are family” really mean? (Pierce 2015)

While the status of animals as family members has gained cultural legitimacy, do the majority of Americans accept and live by this definition in their daily lives? Or do animal advocates see what they want to see, and what is reflected in our homes? A casual glance at popular media may suggest that pet pampering and anthropomorphism have run amok and that we have entered a new era in which companion animals are treated as well as children. And the fact is, some people do both cherish and respect their animal companions and try to give them the best possible life within the confines of an anthropocentric society.

Yet, the fact remains that “pet as family” is a vulnerable status that can be removed at will. Obviously, no other family member relationship can be so easily dissolved. Even divorce (which involves a voluntary relationship) is a legal process involving the state, and parents are typically not allowed to drop their children off at a shelter facility. And in cases of estranged siblings or parents, where a choice is made to sever the relationship socially, these relationships are still recognized by law (although the specific legal definitions of these kinship relationships vary by state).

While the everyday understanding of animals as kin is not a new phenomenon (Charles 2014), it is a more recent development that people have begun to openly include their pets as part of the family (Irvine and Cilia 2017). However, the fact remains that multi-species kinship and a post-human family model have yet to be recognized by the law.

The provisional cultural status of family intersects with the legal status of animals. The fact that animals, as property, lack fundamental legal rights reinforces the precarious and often ephemeral nature of their position in the family, which can be eliminated by the more powerful members at any time. The termination of pseudo-family privileges can have dire, at times fatal, consequences for companion animals who find themselves without a home.<sup>41</sup>

The term “flexible personhood” captures the limits, inconsistencies, and potentially fleeting nature of animals’ place in the human family:

Pets are treated as loving and loved members of the family, very similar to small children. At the same time, long-term ethnographic research reveals that many loving relationships with animals do not endure: when life changes and unexpected situations pose obstacles to the human-animal love, the people involved may redefine or terminate it. Pets are treated as “flexible persons” or “emotional commodities”; they are loved and incorporated into human lives but can at any moment be demoted and moved outside of the home and the family. (Shir-Vertesh 2012, p. 420)

#### 4.3. Culture Shift or Cultural Myth? Animal Neglect and Commodification

As we have seen, family member status for dogs and cats is not backed by the force of law. However, neither is this status supported by social consensus. Although the social construction of animals as family has undoubtedly gained traction in recent years, it is not the only framework through which to view the position of companion animals in society. Pierce (2016) argues the cultural narrative of “pets as family” is just that—a narrative, used to support the multibillion dollar-per-year pet industry, built on a fragile foundation of inflated statistics derived from leading questions, with little underlying substance.

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<sup>41</sup> Approximately 1.5 million (or 23 percent) of the 6.5 million dogs and cat who enter shelters in the U.S. are killed (ASPCA n.d.).

Sure, some pets truly *are* woven into the lives of families, but Pierce is saying that when we hear the pets-as-family line over and over, we should recognize it for what it is: a hard corporate sell. As she puts it: “A gossamer pets-are-family thread has been woven over the ugliness.” What ugliness? According to Pierce: At least 30 percent of “family” dogs and cats never once visit a veterinarian; lonely animals are confined to tanks, cages or backyards; high rates of animal cancer occur owing to the poor quality of pet food; people have sex with animals, including at animal brothels, at shocking rates; the “euthanasia” deaths carried out at animal shelters often aren’t good deaths at all. (quoted in [King 2016](#))

Returning to the crux of the matter, “companion animal as family member” is an elective and in many cases temporary status which is bestowed at the will and whim of a benevolent powerholder upon a vulnerable animal who lacks practical autonomy<sup>42</sup> and cannot define (or leave) the situation. This provisional status can be taken away just as easily as it was given. For the small subset of animal guardians who not only consider their animals to be family but also care for them responsibly by addressing their species-specific needs, the inclusion of an animal into the family is meaningful and significant. Still others proclaim their animal is family while letting them languish in neglectful circumstances, which may be intentional or the result of careless ignorance on the part of the caregiver. Either way, the outcome is the same for the animal trapped in a home where their basic physical and psychological needs are ignored.

A parallel could be drawn to human children, who also have minimal autonomy and agency in the family and are susceptible to neglect and mistreatment. Not all families are functional and not all parents, whether “pet parents” or parents of human children, are responsible and good. Yet, a fundamental difference is that the human child’s agency will build over time as they grow up; one day they can leave the situation. An animal never will, unless she runs away<sup>43</sup>—which is obviously a perilous proposition for an animal in human society. She could be hit by a car, put to death in a shelter facility, picked up by someone who will abuse or harm her, die of starvation, and the list goes on. A companion animal without an owner is extremely vulnerable—though depending on the owner, the animal may be in just as much danger under their “protection,” which is precisely the double-edged sword of property status.

Countless dogs—fundamentally social creatures who crave companionship—are forced to live in isolation and/or at the end of a chain, rope, or other containment device. Although some jurisdictions have enacted laws against tethering, they are under-enforced. Or an owner may unchain their dog to comply with a tether law, only to leave them isolated in a small pen instead, which does not address the animal welfare issue ([Logan 2013](#)). Animal neglect is usually a misdemeanor that can be difficult to charge because animal neglect laws mandate only minimal standards of care—typically just requiring an animal has water, food, and some form of shelter from the elements.<sup>44</sup> These laws do not address important social, physical, and psychological needs such as companionship, exercise, and mental stimulation.<sup>45</sup> Further, while overt abuse is more evident, there is not a social consensus on what

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<sup>42</sup> I use “practical autonomy” to distinguish between the capacity for autonomy (which companion animals possess) and the ability to exercise it in a meaningful way (which they are generally denied).

<sup>43</sup> This is not to suggest that animals cannot have agency. My point is that they lack practical autonomy, which is to say the barriers in human society to companion and captive animals exercising their agency to any significant degree are so many and so total as to render the concept essentially meaningless. However, although their efforts are almost always thwarted by those in power (i.e., any human in the situation), animals do resist. For more on this issue, see *Fear of the Animal Planet: The Hidden History of Animal Resistance* ([Hribal 2010](#)) and “Animals Without Borders: Farmed Animal Resistance in New York” ([Colling 2014](#)).

<sup>44</sup> See “Animal Neglect Facts: State and Local Law” ([Animal Legal Defense Fund n.d.d](#)).

<sup>45</sup> While the discussion here has been mostly limited to dogs and cats, other species of animals are bought and sold as pets, and they most likely suffer even more. According to Pierce: “When kept alone in a small cage, birds, small mammals like hamsters and gerbils, and even fish lack adequate physical, mental, and social stimulation. Solitary confinement of human prisoners is considered a violation of basic human rights, yet this is essentially what we do to some of our pet animals” (quoted in [King 2016](#)).

constitutes neglect. However, the more we learn about the mental and emotional capacities of animals and their ability to suffer psychologically, the clearer it becomes that many are enduring lives of quiet neglect.

Beyond the neglectful treatment of animals trapped in homes (or confined in yards) with people who ignore them or fail to attend to their needs, it is commonplace for healthy dogs and cats to be killed each day in shelter facilities due to lack of space and available homes. On the other hand, “no-kill” shelters are criticized for warehousing animals who do not have a realistic chance of being adopted and end up sentenced to life in substandard kennel conditions for years on end, which may prolong their suffering while they wait for a “forever home” that never comes. And owners still relinquish their companion animals for reasons that would seem nonsensical if applied to someone who was a true family member, such as moving, new family member (e.g., a baby), or correctable behavior issues. Doubtless some of these issues are exacerbated by social policy—for example, the difficulty and expense of finding rental housing that does not prohibit companion animals (notably, this practice is illegal in some jurisdictions outside the U.S.). However, the fact remains that in this sense, the treatment of dogs and cats in society is, unfortunately, exactly in sync with their property designation.

Also worth noting is that the overall increase in financial expenditures on companion animals discussed above does not tell the whole story. While many individuals who are not well-off make financial sacrifices to care for their companion animals, others abandon them in tough times. In 2014, USA Today reported an increase in owners choosing “economic euthanasia” for their animals as vet costs have risen:

At the Thomas Beath Veterinary Clinic in Fredericksburg, Va., two-thirds of the pets put to sleep every week are euthanized for economic reasons, clinic owners say. “I’ve never seen as many people lining up to turn over pets,” says Kumpf, former executive director of the National Animal Control Association. “It’s heart-wrenching to see so many people come through the door.” (McGinnis and McElhane 2014)

Further detracting from the pets as family narrative, despite the fact that many dogs and cats who enter shelter facilities are put to death, it is still legal to breed and sell them.<sup>46</sup> That it is both legal and socially acceptable for animals to be bought and sold sharply highlights their property status and reinforces the attitude that they are disposable commodities.<sup>47</sup>

#### 4.4. “No-Pets” Policies

As seen to tragic effect in disasters like Hurricane Katrina,<sup>48</sup> guardians of companion animals are also prohibited from boarding public transit with their animals in the U.S.<sup>49</sup> This is not the case globally.

<sup>46</sup> Precise data is difficult to obtain, but some sources say approximately 670,000 dogs and 860,000 cats are put to death in shelters annually (ASPCA n.d.). Other estimates place that number higher, and calculate that 2.7 million of the 7.6 million animals who enter shelters annually in the U.S. are killed (Fox 2014).

<sup>47</sup> A growing number of jurisdictions, including two states as of 2019 (Maryland and California), have enacted laws banning the retail sale of dogs and cats, which mandate that any animals sold in pet stores come from rescue agencies. The impetus for these laws is to combat puppy and kitten mills, and they still allow people to purchase animals from individual breeders. Even without retail sales bans, cities like Portland, San Francisco, New York City, and many others have made tremendous strides in reducing the killing of healthy, adoptable animals in shelter facilities. See <https://www.sfspca.org/who-we-are/successes> (San Francisco—93% live release rate); <http://www.oregonhumane.org/resources-publications/end-petlessness-more/> (Portland—98% adoption rate; one of the best in the nation); <http://www.nytimes.com/2016/01/21/nyregion/animal-adoptions-rise-amid-reforms-at-new-yorks-shelters.html> (New York City—euthanasia rate is not as low as the former two cities but has drastically improved).

<sup>48</sup> Hurricane Katrina, which devastated the Gulf Coast and especially the city of New Orleans in 2005, was a tragic background against which the tension between animals as family and animals as property was highlighted. During the storm, companion animals were not allowed on most rescue vehicles or in shelters. When ordered to leave their companion animals behind, many residents refused to evacuate. One survey found that 44 percent of the storm’s human victims who chose not to evacuate did so because they were unwilling to abandon their animals (Fritz Institute 2006). Other residents were forcibly separated from their companion animals—some at gunpoint—by emergency responders.

<sup>49</sup> This does not apply to designated service animals, who are allowed broad access to public spaces and other accommodations under the federal Americans with Disabilities Act, and are defined differently under the law than family pets.

For example, throughout Europe, dogs and cats are allowed on many trains and buses. In addition to public transportation, the list of spaces in society from which companion animals are legally barred includes much rental housing, most commercial establishments, and trails in all national parks and some state parks (for example, all state parks in California prohibit pets).

“No-pets” restrictions in rental housing and public transportation, in particular, disproportionately affect poor and working-class individuals. It is not only more difficult to find animal-friendly rental housing, but also often more expensive. In addition to simply having far fewer choices, some landlords charge extra “pet rent” or nonrefundable deposits. A study examining the reasons people relinquish their companion animals found that “for respondents who rented, housing reasons were the number one reason for re-homing, and for respondents of lower income, they were significantly more likely to re-home due to cost and housing issues as opposed to pet-related issues” (Weiss et al. 2015).<sup>50</sup>

In addition, the inability to take your companion animal on the bus might not be important to a person who owns a car, but for people whose mobility depends on public transportation, it is a hardship, as well as a barrier to responsible guardianship.<sup>51</sup> How do you transport your animal to a vet, out for a hike, or to a friend’s house or park that is not within easy walking distance (or accessible via wheelchair or other assistive device for those with disabilities)?

These policies not only contribute to the loneliness and isolation of companion animals<sup>52</sup> but are also likely to discourage responsible people from adopting an animal. So it is with “no-pets” clauses in rental leases: those predisposed to be the best guardians will take into account the fact that they may at some point have trouble finding housing that permits companion animals and—not wanting to be forced to give up their animal in that situation—choose to defer adoption to the day when they own their own house. Having a companion animal is a privilege, not a right, but prohibitive companion animal policies should be reformed if as a society we do not want to restrict animal adoption and responsible guardianship to only the most affluent socioeconomic classes.<sup>53</sup>

## 5. The Legal Status of Companion Animals Enables their Treatment as Expendable

While in many cases the law has lagged behind emerging social norms and current scientific understanding regarding companion animals, the preceding section has revealed a secondary area of dissonance: their cultural status. While companion animals are increasingly referred to as family members in common parlance, the practices and beliefs underlying this sentiment are in flux. And not everyone shares this sentiment. While a subset of those who share their lives with companion animals treat them with respect, care, and dignity, others invoke the label “family member” as more of a rhetorical than substantive statement, and still others would not consider an animal they own to be part of the family at all. Thus, the cultural status of companion animals is unstable.

One function of the law is to “take a side” when social norms are in conflict—crowding out some and reinforcing others (Carbonara 2017). The legal status of companion animals as property dampens rather than accelerates the transition currently underway toward greater awareness of, and respect, for their subjectivity as individual beings rather than replaceable objects. The increasing prevalence of the family member label is a symbol of this shifting awareness, though the transition is not complete. Many people still treat their companion animals as expendable. This group—unless they run afoul

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<sup>50</sup> Not all of these animals received new homes. The study’s authors defined “re-home” broadly and included relinquishment to shelters.

<sup>51</sup> This applies mostly to medium- and large-sized dogs, since small dogs and cats are permitted if they are in a carrier that fits on the caregiver’s lap.

<sup>52</sup> This applies specifically to dogs, since most cats have neither the need nor desire to accompany their caregivers around town. However, cats have separate and significant welfare issues associated with whether they are kept as “outdoor” or “indoor” cats.

<sup>53</sup> This is by no means to suggest that affluent individuals take better care of their companion animals, but merely to acknowledge that socioeconomic barriers to responsible animal guardianship exist. Housing and transportation are two basic human necessities, and having to rely on public transit or rent a home with nonhuman family members significantly restricts available options due to existing social policies.

of the minimal protections offered by animal cruelty and neglect statutes—are typically acting in accordance with the law.

Property status enables and reinforces social practices that devalue animals, but law does not dictate culture. Only when social norms change sufficiently—that is, when more people begin to treat their animals like true family members, with all of the care and attention that entails—is it likely we will see significant change in the legal system.

However, because the relationship between law and social norms is multidirectional, changing the legal status of animals—e.g., redefining them as other-than-property—may be equally important. This is in part due to the law’s expressive function, which can shape group values and norms (Nadler 2017). If the simple act of criminalizing conduct can sometimes reduce its prevalence, even in the absence of enforcement (Rachlinski 2000, p. 1544), would reclassifying animals as something other than property inspire better treatment and greater respect for their interests?

### 5.1. Beyond Property

The title of this article, chattel or child, refers to the dual and at times contradictory social construction of companion animals in the private versus public spheres. Tension exists between the ascendant private understanding of animals as family and their classification as property in the public realm of law and policy. Yet, as we have seen, even within the private sphere of the home duality exists, with some treating their animal companions as family and others treating them more like the objects they for the most part are in the U.S. legal system.

Focusing on the child or chattel distinction, animals are not unique in being placed in this position. Human children were themselves defined as chattel for much of history, as were other categories of people. Although opinions abound about the relationship between property status and animal protection, the question remains: can a family member also be property? Reflecting on the case of married women, who at one time had a “legal nonexistence” similar to chattel, and children, who historically were considered the property of their parents, the answer seems to be yes (Waisman et al. 2014, pp. 42, 45). In the current case of companion animals, they are in a position of subjugation similar to that of children and women in the classic patriarchal household before their legal rights were expanded. Yet, children and women were eventually given greater legal rights and redefined as non-property. Will we one day view the classification of sentient nonhuman animals as “legal things” as unenlightened, similar to the way we now view this characterization of human beings?

While the debate over the legal status of animals has often been framed in dualistic terms—property or personhood—some argue that an entity can be both; being property does not mean you cannot also be a person under the law (M. Liebman, personal conversation, 28 January 2019). The fact that corporations and ships can be both property and persons highlights these categories are not mutually exclusive. In rejecting this binary, Fernandez (2019) argues for a quasi-property/quasi-personhood approach that reformulates the status of nonhuman animals in terms of both property and personhood. Others eschew the property/person categorization altogether in favor of an approach that focuses on animals’ capabilities (Nussbaum 2018a; Satz 2009), their status as vulnerable subjects (Deckha 2015), or a different concept for legal subjectivity such as “selfhood” (Donaldson and Kymlicka 2011) or “beingness” (Deckha 2017).

Whether defined as property or legal persons, animals could have the right to participate in legal proceedings through a guardian, surrogate, or other representative.<sup>54</sup> Courts adjudicate issues concerning young children and adults with severe cognitive disabilities<sup>55</sup> on a regular basis using this

<sup>54</sup> Animal protection laws could also be “amended to grant a private cause of action against those who violate them, so as to allow private claimants, either human beings or animals, to supplement currently weak agency enforcement efforts” (Sunstein 2000, p. 1336).

<sup>55</sup> This is not to suggest that animals are cognitively impaired, but they obviously do not understand human social institutions like the legal system, and cannot speak in the language of the court. Therefore, surrogacy is required.

mechanism.<sup>56</sup> Despite this method being well-established, courts have thus far rarely allowed its use on behalf of animals. Therefore, although legal standing for animals theoretically does not have to be an obstacle, in reality it has been. As discussed above, some cracks have begun to appear in the judicial foundation, but the longstanding status of animals as property has thus far proven to be a significant barrier to their interests being represented in court.<sup>57</sup>

Although skeptics commonly invoke images of fearsome slippery slopes when the issue of animal personhood is raised, it is also worth recalling that “person” is a legal fiction not currently reserved for human beings.<sup>58</sup> As mentioned above, ships and corporations (and recently, entities of nature such as rivers) have been defined as persons under the law for limited purposes. Given that ships and corporations are not sentient, it seems especially archaic that animals are still defined as property rather than persons. Yet, to the extent that we as a species slaughter billions of animals per year, and wish to continue to do so, the specter of a slippery slope may have less to do with the line separating humans from all other animals, and more to do with the bright line we are invested in keeping firm between companion animals and farmed animals.

In thinking about the best path forward, it is also important to consider whether property status is, in fact, more protective than oppressive for companion animals. In critiquing the concept of “owner,”<sup>59</sup> Pierce ponders her dog:

At the same time, the fact that Maya is my property isn’t all bad. In practical terms, it is a good thing. It means no one can take her from me. As long as animals are considered property, they will not gain legal protection as “persons,” but their status as property offers a tiny thread of protection. (Pierce 2016, p. 215)<sup>60</sup>

Undoubtedly, this is true. For companion animals fortunate enough to have responsible and attentive guardians, property status can be protective. And some of the reforms discussed in the next section could be construed as extending owner rights, not animal rights (e.g., access to rental housing and public transit). But for companion animals with neglectful and careless guardians, this status is detrimental. Beyond concerns for the well-being of individual animals, defining animals as property contributes to a cultural narrative that legitimizes and reinforces their negligent treatment. While the average person may not be aware of the precise legal status of animals, this status frames our social relations with animals and defines what is acceptable within a cultural context that, like the proverbial water in which fishes swim, we do not need to be consciously aware of to be profoundly affected by.

Whether property status is abolished, a hybrid personhood/property model is adopted, or a third status altogether comes to ascendancy, we must move beyond property when considering companion animals’ place in the legal system.

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<sup>56</sup> Connecticut’s so-called Desmond’s Law comes close, but allows court-appointed advocates to represent the interests of “justice” in animal cruelty cases, not the animals themselves (Pallotta 2017a).

<sup>57</sup> Property status, rather than being construed as the underlying problem, can also be considered a symptom of the fact that most people and institutions are unwilling or unready to commit to taking the claims of animals seriously. This lack of readiness is manifest in the still-viable social construction of animals as expendable. While property status arose from dominant beliefs and practices, once it was codified into law, this understanding of animals became reified. The symptom and the problem are now essentially the same; property classification in the law has a circular ossifying effect on the culture, mutually reinforcing this understanding and making it harder to change.

<sup>58</sup> In confronting the slippery slope, sentience, or the ability to feel or perceive, seems like a rational and reasonably low bar. For animals about whom we are not sure, we can give the benefit of the doubt in our daily interactions, but the law can use current scientific knowledge as its basis, with updates via legislation and the common law as needed—as happens in the case of new scientific findings about humans. For example, in 2005 the U.S. Supreme Court ruled that the death penalty for juveniles is unconstitutional in light of recent research on brain development. For a summary of this research, see the amicus brief submitted in this case by the American Psychological Association: <https://www.apa.org/about/offices/ogc/amicus/roper.pdf>.

<sup>59</sup> The concept of owner is “technically accurate, but many find it morally offensive and believe that taking ownership over another living being is an act of violence” (Pierce 2016, p. 214).

<sup>60</sup> As noted above, some animal law experts would disagree that because her dog is property, she cannot also be a person.

## 5.2. Animals Deserve a Status That Reflects the Types of Beings They Are

Barring the creation of a comprehensive new status for animals, at the very least their classification as property should be modified to acknowledge their sentience, and that their interests deserve recognition and respect based on this fact.<sup>61</sup> Whatever the ideal legal status for animals, they are not objects or things, and the law should be clear on this fact. This trend is already underway, especially in countries outside the U.S.

For example, the European Union recognized animals as “sentient beings” in 2007 with an amendment to the Lisbon Treaty. In 2015, France, New Zealand, and the Canadian province of Quebec amended their laws to recognize animals as sentient beings. In 2018, Slovakia updated the definition of “animals” in its civil code to reflect that they are living beings rather than things. Several countries have also included provisions relating to animal sentience, dignity, or protection in their constitutions.<sup>62</sup> Some U.S. state legislatures have also addressed animal sentience. For example, Oregon law recognizes that “animals are sentient beings capable of experiencing pain, stress and fear.”<sup>63</sup>

While such laws signal a growing awareness that the conception of animals in the legal system is generally antiquated, whether they are mainly symbolic or will have a widespread positive effect on everyday practices or enforcement remains to be seen.<sup>64</sup> But because of the expressive function of the law—“making statements” as opposed to directly controlling behavior—even legislation that is primarily symbolic in nature can help shape the culture and change social norms (Sunstein 1996). Therefore, even though acknowledging animal sentience or dignity may not go far enough, it is a step in the right direction.

Beyond sentience, or the ability to feel, there is a plethora of scientific evidence demonstrating the capacities and capabilities of animals across a wide array of species. Currently, the law lags behind our knowledge about animals, which has steadily mounted since the cognitive ethology revolution

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<sup>61</sup> Sentience has been defined as the capacity of animals to experience pleasurable states such as joy and aversive states such as pain and fear (Broom 2007). For an overview of research regarding animal sentience and its importance to animal welfare science and the animal protection movement, see “Searching for Animal Sentience: A Systematic Review of the Scientific Literature” (Proctor et al. 2013) and “Animal Sentience: Where are We and Where are We Heading?” (Proctor 2012), both published in the journal *Animals*. As pointed out in these articles, knowledge of vertebrate sentience is much more developed than invertebrates. However, while limited, research on invertebrate sentience is increasing.

<sup>62</sup> For an overview of constitutional animal protection provisions, see Jessica Eisen and Kristen Stilt’s entry, “Protection and Status of Animals,” in the *Max Planck Encyclopedia of Comparative Constitutional Law* (Eisen and Stilt 2016). Eisen (2017) cautions against overstating the extent to which the emergence of such provisions represents a sea change in constitutional priorities because human interests remain significant, if not dominant (p. 918). However, she views them as a positive step, noting that “despite the persistence of human-centric concerns in constitutional animal protection jurisprudence, the lived experiences of animals themselves are now recognized as constitutionally significant in a number of diverse jurisdictions” (p. 922).

<sup>63</sup> Courts in a recent trio of important Oregon cases also relied on sentience to focus on the distinction between animals and all other kinds of legally defined property, “revealing a jurisprudence that approaches the legal status of animals critically, rejecting absolutist constructs that insist animals must either be situated analogous to any other property or analogous to humans” (Dunn and Rosengard 2017, p. 451).

<sup>64</sup> Bolliger (2015) notes that, in the case of Switzerland, which added protection of animal dignity to its constitution in 1992 and enshrined this principle in its federal Animal Welfare Act in 2008, this constitutional provision is unique in the world and a milestone for animal welfare. However, “despite the far-reaching conceptual reorganization of Swiss animal law, no essential change in the human-animal relationship has been observed in practice. To the contrary, in many cases animals still are exploited in ways that are hardly consistent with respect for their dignity” (p. 314). France’s 2015 law, which updated its civil code to align with its penal and rural codes (which already recognized animals as sentient beings), shifted animals from “moveable property” to “beings gifted with sentience,” but did not specify additional legal protections, raising doubts about its practical impact (Garric 2014). However, DiConcetto (2016) writes, “the amendment to the Civil Code is more than just a symbolic victory: it is in fact an important step that opens the door to more change in the way animals are and will be approached under French law . . . It is now up to the courts to give a meaningful interpretation of section 515-14 of the Civil Code, and to confirm that animals are non-property. Under French law, which has only two categories [persons and things], the autonomous category of animals as non-things might be the corner stone of an animal personhood yet to be built through case law.” Likewise, Neumann (2015) notes, “the change is not a revolution for sure, but the change may allow further developments in the law and, therefore, can be considered as paving the way for an evolution of the status of animals in French law in the next coming decades. As such, it can be considered as a highly ‘symbolic move’ which should be warmly welcomed” (p. 13).

spearheaded by Donald Griffin in the late 1970s (Allen and Bekoff 2007).<sup>65</sup> As contemporary ethologist Marc Bekoff writes:

A strong and rapidly growing database on animal sentience supports the acceptance of the fact that other animals are sentient beings. We know that individuals of a wide variety of species experience emotions ranging from joy and happiness to deep sadness, grief, and PTSD, along with empathy, jealousy and resentment. (Bekoff 2013)

While we already know enough about animals to see that the law does not treat them justly, to the extent that such research continues, studies should be designed to be as naturalistic and unobtrusive as possible, not only for ethical reasons but also to obtain the most accurate data about animal experiences. Field research can present ethical problems, but it is far preferable to laboratory research, except in rare cases where the animals do not live in the lab and are given a choice to participate. An example of this type of research is neuroscientist Gregory Berns' studies of dogs' brains using an MRI machine. The dogs in the study, who lived in homes and were brought to the lab for the day, were trained to lie in the machine, but not forced. Berns told the New York Times:

After perfecting a training system, we sent out a call to local dog owners for volunteers for the study. Since 2012, we've trained and scanned a total of about 90 dogs. As a matter of principle, we never restrained or drugged any. If a dog wants to get up from the M.R.I. and leave, they can. There's no compulsion. (quoted in Dreifus 2017)

This type of research should also emphasize the point of view of the animal.<sup>66</sup> The results of Berns' MRI studies are recounted in his 2017 book *What it's Like to Be a Dog: And Other Adventures in Animal Neuroscience*, which encourages readers to take the perspective of animals of several species based on their subjective experience of the world. According to the book jacket, the scientific breakthroughs discussed prove "definitively that animals have feelings very much like we do—a revelation which forces us to reconsider what animal rights ought to be" (Berns 2017).

The last sentence is important. The body of research pertaining to animals' capabilities and ways of perceiving the world should have a practical impact on law, policy, and social norms regarding their treatment. The "animal capital" we gain from studies like this should be used both to help animals on a grand scale and improve our relations with those with whom we share our lives and homes:

Animal capital has nothing to do with knowing about animals to exploit them; it has to do with knowing about them to minimize their exploitation. It has to do with recognizing the intrinsic value of animals' lives. It makes a qualitatively different relationship with animals possible . . . . (Irvine 2004, pp. 66–67)

Within the animal protection movement, there has been much emphasis on animals' ability to suffer and feel pain—with good reason, given the persistent denial of their sentience and the historical weaponization of anthropomorphism in the scientific community. However, we should be mindful to also give attention to the full spectrum of animals' experiences and the richness of their lives, which include positive emotions and capacities, such as for play, friendship, happiness, and love (Corman 2017; Liebman 2018). We should also consider other emotions that thus far have received less attention—e.g., boredom in animals, which is ripe for further investigation (Burn 2017)—but have profound implications for understanding and improving the lives of animals, if only we will

<sup>65</sup> Interestingly, Donald Griffin's influential *The Question of Animal Awareness* (1976) was published one year after Peter Singer's *Animal Liberation* (1975), which is frequently credited for igniting the modern animal rights movement.

<sup>66</sup> An excellent example of this style of research is Alexandra Horowitz's 2009 bestseller *Inside of a Dog: What Dogs, See, Smell, and Know*. And Marc Bekoff and Jessica Pierce's 2019 book *Unleashing Your Dog: A Field Guide to Giving Your Canine Companion the Best Life Possible* synthesizes the available research about dogs into an advocacy guide to encourage guardians to better understand and enhance their dogs' experiences in a human-centered world.

assimilate and act on this information.<sup>67</sup> Deep knowledge of animals is key; coupled with respect for their intrinsic value, it would be transformative.

Those who refer to animals as “voiceless” typically do not mean this literally, but rather are referring to the fact that animals are denied a voice in our political institutions. That said, animals do have voices—they are just too often ignored. As law professor Martha Nussbaum said in a recent keynote address and essay, “Why Freedom of Speech is an Important Right and Why Animals Should Have It:”

Animals provide information about their welfare in many ways. Some really do have some form of quasi-linguistic communication. For instance, whales have song and elephants have patterns of trumpeting. But that isn’t really the whole issue because in many ways—through their behavior and evidence of their delight, fear, and pain—animals are giving us information all the time even without anything like speech if we would stop, look, and interact with them. (Nussbaum 2018b, p. 849)

In considering a co-citizenship model for animals, Nussbaum agrees with Donaldson and Kymlicka (2011) that “the many ways in which domesticated animals give evidence of their preferences, satisfactions, dissatisfactions, fears, and longings should be taken into account through an established system of surrogacy when making law and policy” (Nussbaum 2018b, p. 849).

What is certain from the perspective of anyone with an interest in animal protection and justice is that there is plenty of need for reform. And this article has only examined companion animals. What happens when we widen our lens out to take in all the other animals living in the world, both free and kept in captivity?<sup>68</sup> What should their ideal status be from a philosophical, legal, and advocacy standpoint? American Naturalist Henry Beston famously referred to nonhuman animals as “other nations:”

For the animal shall not be measured by man. In a world older and more complete than ours they move finished and complete, gifted with extension of the senses we have lost or never attained, living by voices we shall never hear. They are not brethren, they are not underlings; they are other nations, caught with ourselves in the net of life and time, fellow prisoners of the splendor and travail of the earth. (Beston 1928, p. 25)

This metaphor has limits, especially as humans continue to relentlessly encroach on other animals’ lives and habitats. But it is a helpful frame to think about how we might respect other animals who live among us—to adopt an attitude of diplomacy and cooperation rather than colonialism and subjugation. Though the animal nations have no emissaries who can speak to us in a language we understand, we could appoint a human ambassador to speak on their behalf. Not just anyone, but someone with the appropriate animal capital (Irvine 2004)—a duck expert to speak on behalf of ducks and a bear behaviorist to represent the ursine community, for example. The model of diplomacy and respect could be restricted to relations between human society and communities of nonhuman animals. We would not need to intervene in interactions between nonhuman animals, who have their own ways of existing together.<sup>69</sup>

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<sup>67</sup> In addition to the emphasis on animals’ negative experiences such as pain and suffering, some have noted that animal rights theory has focused narrowly on the negative rights of animals (e.g., “the right not to be owned, killed, confined, tortured, or separated from one’s family”) but says little about the positive obligations we may owe them (Donaldson and Kymlicka 2011, pp. 5–6).

<sup>68</sup> Additionally, while slippery slope arguments tend to be facile, the question regarding sentience as a baseline for enhanced legal protections is an interesting one when it comes to animals other than mammals, birds, and fishes and other aquatic animals, such as cephalopods, whom science has shown to be sentient. While research in this area continues apace, there is much that is still unknown about certain types of invertebrates, the broad category that includes insects (which comprise a significant percentage of known animal species worldwide).

<sup>69</sup> Or would we? Some argue that human intervention to alleviate wild animal suffering is an ethical obligation, in contrast to the idealized view that anything associated with the “natural world” is inherently good (sometimes called the nature fallacy) and must therefore be left alone (Effective Altruism Foundation 2017; Tomasik 2009).

Returning to companion animals specifically, a legal status that more closely reflects the growing perception of them as family members would help to extinguish the counter-construction of them as disposable commodities by delegitimizing practices that enable their treatment as expendable.

### 5.3. *Animals as Legal Dependents*

While dogs, cats, and other companion animals are different from both chattel and children, there are elements of each in both the reality of our current relationships with them and likely whatever ideal future we envision. Our relationships with companion animals are also distinct from our relationships with human friends, given our incontrovertible position of power over them. I do not think of my relationship with my dog Teagan as one of power, but of course it inherently is. She is utterly dependent on me for all of her needs. While I choose to take this responsibility seriously, this does not diminish the power dynamic that cannot help but exist between me and any domesticated animal in human society. Therefore, a social and legal status that embodies elements of her being “mine” (in the sense a human child would be mine, meaning no one could take her from me) while also recognizing both her “animalhood” (as a dog) and her individuality (as Teagan) would be ideal.

A status like “legal animal dependent” could capture this and would constitute a form of personhood. This status is similar to equitable self-ownership for animals (Favre 2000) and quasi-property/personhood (Fernandez 2019) but would not necessarily rely on the property paradigm. It would capture that, like a child, Teagan is dependent on me (and that therefore, as her caregiver, I have obligations) but that unlike a human child, she is of another species. The status of legal animal dependent would recognize that Teagan has needs and interests stemming from her identity as both (1) a dog (she needs exercise, companionship, and nutritious food) and (2) an individual (she is introverted, likes soft beds, and is afraid of cats). This status would be recognized under the law, clearing up confusion and alleviating tension created by labeling sentient animals—who, despite the provisional nature of this role, are in many cases treated as family members and friends—as property.

This term is already used in the legal system to refer to humans (e.g., children) who are dependent on another human that is obligated by law to support them. Adding “animal” would allow for duties to be assigned in relation to the role of guardian, but not the same obligations that are owed to human dependents, due to obvious qualitative distinctions in the nature and needs of members of different species. The panoply of duties and rights attached to the role of legal animal guardian, and attendant rights of the legal animal dependent (which should take into account the animal’s intrinsic value, not just their value to a human owner or guardian) are matters for future policymakers. But we can pursue this ideal now in our everyday interactions with companion animals, in hopes of shifting the culture.

While the word “dependent” may have uncomfortable connotations for some, it has a legal meaning currently only reserved for children and other humans. It would therefore elevate animals’ status significantly beyond what it currently is. Also, while words like autonomy and agency have a more respectful ring, companion animals *are* dependent on us. As much as a status like “autonomous animal” may be preferable philosophically, this is neither politically feasible nor logistically possible at this time. For wild animals, perhaps<sup>70</sup>—but how would legal autonomy work at the present time for domesticated animals?

It is not helpful to deny that domesticated animals are currently reliant on humans and occupy an inherently vulnerable position in a society that is—at least for now—thoroughly anthropocentric. A future in which animals become integrated into society on more equal footing could see an embrace of an “animal citizenship” rather than—or in conjunction with—a legal dependent model,

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<sup>70</sup> Though even in the case of wild animals, this idea is utopian on practical terms and not remotely on the political horizon for myriad reasons that are beyond the scope of this paper to discuss.

in which domesticated animals would play an active role in shaping their communities, not just their private families.

In their 2011 book, *Zoopolis, a Political Theory of Animal Rights*, Donaldson and Kymlicka articulate a theory of domesticated animal citizenship:

Drawing on recent work in disability theory, we show that there are many ways for individuals with varying levels of cognitive ability to be treated as citizens and to exercise their citizenship, and that there is no reason why domesticated animals cannot be included within these more expansive ideas of citizenship. (p. 103)

They also argue against a “wardship” model (presumably similar to the legal dependent model discussed here) because it ignores domesticated animals’ capacities for “agency, cooperation, and participation in mixed human-animal settings” and treats them:

As wholly passive and dependent on humans . . . located on the (literal and figural) margins of human society, having no claims regarding how the broader community governs itself and its public spaces. It treats domesticated animals as something like protected aliens or guests, who don’t really belong here, but whom we have a duty to treat humanely. (pp. 102–3)

I disagree with this critique of wardship and believe it has positive potential for the same reasons the American Veterinary Association (AVMA) has issued a position statement against it. The AVMA objects to wardship for companion animals precisely because it would bestow significant legal rights that they do not currently have, including the fundamental legal right of standing (which is essential to personhood):

Use of guardian gives rise to its counterpart “ward.” The ward is defined as the person for whose benefit the guardianship has been established. Wards have legal rights. Applying human guardianship law to animals would mean that animals have legal rights that can be recognized in court (i.e., animals would have legal standing). ([American Veterinary Medical Association 2005](#))

While an animal citizenship model is ideal, the incremental advance of viewing animals as wards or legal dependents could be an intermediate—and still groundbreaking—step preceding the revolutionary leap to full citizenship for animals. This status would give them access to the legal system that they do not currently have, and place their lives and interests more on par with children than chattel. While animals are not children, expansion of a category currently reserved for them (and other humans) to include animals is a better fit than classifying living beings as mere property, and would be a significant advance in recognizing the legitimacy of multi-species families.

These conceptions—legal dependent and co-citizens—are not incompatible. Human children are both. Starting with legal dependent status for some domesticated animals, e.g., dogs and cats, can spur society further along the path toward a more enlightened co-citizenship model. As [Kymlicka \(2017\)](#) writes:

Legal reforms to date have largely focused on acknowledging animals’ membership within private families, but . . . justice requires that [domestic animals] be recognized as members of the broader society and polity as well. To be fully recognized as a member of society would not just involve being treated as a member within private familial settings, but also being treated as a member of the public, with rights to public goods, public services and public spaces. (p. 145)

Given the current position of companion animals in society, a legal dependent or ward model that codifies their role in the family beyond rhetoric would itself be revolutionary. Since companion animals are not yet universally perceived as family members, this, or a similar step, is likely a prerequisite to them being recognized as active and participatory members of the broader polity. It is hard to imagine how a dog who is (legally) confined and isolated by her owner—deprived of companionship, physical

and mental stimulation, the ability to express natural behaviors, and any semblance of agency—could participate as a co-citizen in the wider community. Therefore, while family status for companion animals is still fragile, the first step is to secure their membership in private families. Reframing their status as legal dependents (or another status beyond property) would accomplish this while also giving them legal personhood via the expanded legal obligations placed on guardians<sup>71</sup> and its similarity to children's status as legal dependents.<sup>72</sup>

## 6. Policy Recommendations

Social policies can help facilitate and strengthen the human-animal bond and provide support for the continued integration of companion animals into society, while taking into account the interests and welfare of all species (including humans). Or they can do the opposite. Along with augmenting the legal status of animals, social reforms would strengthen their cultural status as family:

There are two ways to increase the rate of a desirable social behavior: either augment the social forces that increase its prevalence or dampen those social forces that reduce its prevalence. In other words, sometimes the question is not what encourages people to do something, but rather what discourages them from doing it. Often, social reforms emphasize the former issue to the neglect of the latter. (Rachlinski 2000, p. 1567)

Many social policies discourage responsible companion animal guardianship, which tips the scales away from the understanding that companion animals are family, and toward the competing social construction that they are expendable property. People may want to provide a loving home to an animal, but lack knowledge and resources. For example, research has shown people who are in the process of relinquishing their animal to a shelter facility would be open to keeping that animal if help or resources were offered (Weiss et al. 2014).<sup>73</sup>

### 6.1. Access

Of primary importance is access to rental housing. “No-pets” restrictions are a significant obstacle to obtaining affordable housing and a main reason that companion animals are relinquished to shelters (Weiss et al. 2014; Shore et al. 2003; Patronek et al. 1996). One study found:

The majority had given up their pets solely because they were moving. Most had relatively low income, were moving for employment reasons, and were renting their homes. Landlord restrictions were an important factor in relinquishment. High scores on the bonding scale and spontaneous expressions of discomfort and sorrow suggest that external pressures overrode attachment to the animal and the pain of relinquishment. (Shore et al. 2003, p. 39)

For this reason, blanket “no-pets” restrictions should be banned, especially those based on size, breed, or other arbitrary criteria. In their place, non-discriminatory policies should be mandated, which could require references and deposits to cover potential damages or other liability but would ultimately base the decision to rent on information about the individual caregiver and her particular animal(s).

Evictions would be allowed in cases of nuisance or noise disturbance, property damage, or if the animal proves dangerous, but not for the mere fact of owning a companion animal. There is precedent for such legislation, though not yet in the U.S. The Canadian province of Ontario currently bans “no-pets”

<sup>71</sup> Redefining animals as “legal dependents” would also include redefining their owners as “legal guardians.” As mentioned above, there are some jurisdictions that have passed ordinances proclaiming support for the word “guardian” over “owner,” but these laws have thus far been merely symbolic.

<sup>72</sup> Legal duties could include providing opportunities for physical exercise and social interaction/companionship, for example.

<sup>73</sup> This study found that “many people wanted to keep their dogs and had clear ideas of what could have helped. Many ideas provided by the respondents, such as temporary pet-friendly housing or boarding, or financial help for dog costs, such as veterinary care or training, could be addressed with targeted programs or services” (Weiss et al. 2014, p. 424).

clauses in rental agreements and lobbying efforts are underway to institute similar legislation in the British Columbia cities of Vancouver and Victoria (Britten 2017; Larsen 2016).

Caregivers of well-behaved companion animals should also be granted limited access to public transit by allowing leashed and under-control animals on buses and trains when space allows. Dogs and cats are permitted to ride on many trains and buses throughout Europe, and are more likely to be allowed inside stores, restaurants, and cafes (though laws vary by city and country). Clear codes of conduct could be posted and enforced, just like for human riders, and certain cars or buses could be designated animal-free zones to accommodate those with allergies.

As discussed above, “no-pets” restrictions in rental housing, public transportation, and other public and private spaces disproportionately affect poor and working-class individuals and act as barriers to companion animals being integrated into the family.<sup>74</sup>

## 6.2. Education

There is also a need for widespread public education campaigns about animal behavior to raise awareness about species-specific physical, social, and psychological needs. Education is critically important to increase animal well-being and prevent neglect, as well as to reduce human-animal conflicts such as dog bites and violence against animals. Systematic and consistent humane education programs to teach children about the responsibility and long-term commitment involved in companion animal guardianship, as well as respect and appropriate behavior in the company of animals, are crucial. Humane education programs targeted to young people are important because their attitudes and values are still forming; it can be more difficult to change the behavior of adults who have been socialized to think of animals in instrumental or objective ways. But new programs can address the issue of humane education for adults.

Beyond teaching people to treat animals with kindness and compassion, such programs would instill cross-species understanding and respect for the nature, needs, and individuality of nonhuman animals—for example, how the world is perceived through the eyes (or more accurately, the nose) of a dog, and how their ontological experience of being-in-the-world differs from ours. Besides encouraging animal guardians to take the perspective of the animal for greater understanding, these programs could impart additional “animal capital,” or resources that enable caregivers to develop meaningful, nonexploitive companionship with animals, including:

Knowledge about behavior, nutrition, health, history, training, and the variety of things that can enrich animals’ lives. I also include a rapport with animals based on an active interest on their emotions, communication, and cognition. In addition, animal capital means knowing how to find things out. This implies seeking out resources such as veterinarians, trainers, or behaviorists in case of behavioral or health problems. (Irvine 2004, p. 66)

Outside of school programs for youth, humane education for adults could be implemented in a number of ways. Free community classes could be offered, funded through donations to human societies or other nonprofit organizations, or revenue from the sale of specialty license plates could fund government programs on humane education for adults. Nonprofits or government agencies could offer free webinars or short films by animal behaviorists and ethicists that would impart messages, such as those presented in the book *Unleashing Your Dog: A Field Guide to Giving Your Canine Companion the Best Life Possible* (Bekoff and Pierce 2019), about taking the perspective of your companion animal and learning about their species-specific needs. Since motivation may be an issue, participants could be paid a nominal fee to attend classes or watch webinars. Organizations producing these webinars or videos could also offer giveaways or other incentives to view them, and provide before and after surveys

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<sup>74</sup> For a discussion of access and other policy issues that specifically affect companion animals with disabilities and their caregivers, see “Reframing Companion Animal Disability Using the Social Model: Removing Barriers and Facilitating Care” (Pallotta 2019).

to track effectiveness. In addition, advertisements and public service announcements (PSAs) could spread positive messages about animals and their needs as part of a community education campaign.<sup>75</sup>

The Oregon Humane Society's (OHS) "End Petlessness" campaign is an example of a successful program of this nature. This colorful visual campaign was intended to encourage animal adoption through a series of engaging and whimsical advertisements (created for free by a local ad agency) that appeared in print media and on billboards and buses throughout Portland.

They've been a huge hit, says Terra Spencer, a manager at Portland firm Leopold Ketel and Partners, which created the ads pro bono. "People have already written in—they want to know where they can buy posters, they want to know what we're doing with the outdoor posters when we're done." Spencer says. "They want to hang them in their house" . . . The murals are intensely cute and devastatingly effective. Oregon's animal adoptions are up 21.2 percent in the five years since the campaign began, which the Humane Society credits to the ads. Likewise, volunteerism at the OHS is up, says spokeswoman Barbara Bagnon, which she attributes to "the good will the campaign had generated." (Cizmar 2017)

### 6.3. Emotional Support Animals

Laws and policies regarding emotional support animals (ESAs) are currently in the media spotlight as an area in need of reform and clarification. Indeed, this is a trend well underway, with a number of jurisdictions considering or having enacted new legislation addressing the issue of "fake service animals" (Hernandez-Silk 2018; Siler 2018; Edelman 2018; Ollove 2017). The law in this area is poorly understood, which has caused mounting tension and confusion over what exactly the ESA designation means.<sup>76</sup> In recent years, there has been a proliferation of ESAs (some real, some fraudulent) in public spaces and other settings where animals generally are not allowed, leading to a backlash against individuals with service animals defined under the Americans with Disabilities Act (ADA), as well as widespread misconceptions about the difference between ESAs and service animals and the rules and rights associated with each (Schoenfeld-Tacher et al. 2017).<sup>77</sup>

In practice, this has meant special privileges for some, as the current lack of clarity around laws and regulations means that what rules do exist are easily circumvented by people working the system.<sup>78</sup> But should they have to work the system? A growing body of research shows companion animals provide numerous psychological and emotional benefits to their human caregivers, regardless of whether that person has a diagnosed mental disability. Therefore, many companion animals could be correctly considered emotional support animals, without a doctor's note or having to prove the existence of a mental disorder (Pallotta 2016).

<sup>75</sup> For example, the website of veterinarian Sophia Yin has a host of educational resources, such as this poster that explains through colorful illustrations the right and wrong ways to approach a dog: <https://drsophiayin.com/app/uploads/2017/08/How-to-Greet-a-Dog-Poster.pdf>. Posters are also available on how children should and should not interact with dogs, the body language of feline anxiety, and the body language of fear in dogs. Information like this could be presented via radio or television PSAs, or through print advertisements or posters prominently displayed in key community locations.

<sup>76</sup> Currently, a letter from a medical professional stating an animal is an ESA for a verifiable disability allows the owner to claim a "reasonable accommodation" under the Fair Housing Amendments Act (to obtain access to rental housing) and the Air Carrier Access Act (to be able to fly with their animal in an airplane cabin), but does not allow the broad access to public spaces afforded to designated service animals under the ADA. Unlike ESAs, where the mere presence of the animal is considered therapeutic and no special training is necessary, ADA service animals are required to have special training to perform a specific task.

<sup>77</sup> Though this study also found that, "despite the media's focus on abuses and false representation of these dogs, most participants reported feeling the majority of people are not taking advantage of the system" (p. 642).

<sup>78</sup> ESAs are currently only covered under the federal Fair Housing Act and Air Carrier Access Act, meaning those who have a doctor's note stating their companion animal's presence provides a therapeutic benefit for an emotional disability are allowed to have them in rental housing that otherwise prohibits pets and to have their animal in the cabin on flights that otherwise prohibit animals over a certain size. Although ESAs are not granted the broad access to public accommodations that ADA service animals are, this is not well-known. Furthermore, websites selling doctor's notes and fake service/support animal vests have proliferated, with the public and business owners often not knowing the difference.

Although mental disorders such as anxiety and depression are common in the U.S.,<sup>79</sup> some scholars have noted that the meteoric rise in mental illness is due to a relatively recent shift in the medicalization of what used to be considered normal thoughts, feelings, and behaviors (Stolzer 2016). Critiques of how mental illness is defined and treated underscore a related fundamental question: what does—and what should—“emotional support animal” mean? Should ESAs be covered under the ADA as some have argued (Hernandez-Silk 2018), or should companion animals be recognized as legitimate social support, similar to human family, and hence not need a special label or medical designation to accompany their caregivers in public?

If fewer societal spaces were off-limits to animals, this question would become moot, as “no-pets” policies have undoubtedly contributed to the current situation. Indeed, the Department of Justice (DOJ) expressly and intentionally excludes ESAs from the definition of service animals out of concern that “some individuals with impairments who would not be covered as individuals with disabilities [would claim] that their animals are legitimate service animals, whether fraudulently or sincerely (albeit mistakenly), to gain access’ to public accommodations” (quoted in Hernandez-Silk 2018, p. 316). Given the fact that companion animals are not allowed in airplane cabins (unless they are small enough to fit under the seat in a carrier) and instead must fly in the cargo hold as checked baggage, where they risk injury and death,<sup>80</sup> and much rental housing prohibits animals, it is predictable that people would be motivated to obtain this designation for their animals in order to gain access to these accommodations.

An examination of the (rapidly evolving) patchwork of laws regulating emotional support animals versus ADA-defined service animals is beyond the scope of this article, but it highlights an area in which animals’ dual private and public status is a cause of tension, in part due to the restrictive policies mentioned above.<sup>81</sup>

#### 6.4. Workplace Policies

Company policies that permit employees to bring companion animals to work also reinforce responsible animal guardianship and the notion that they are family who should not be left home alone all day. Though analogies to children are sometimes useful, here it is important to emphasize that animals occupy a special category of family, which should recognize their animality and that they are not, in fact, human children—who are not typically allowed to accompany parents to work. However, companion animals need less supervision than children, so it is possible to work in their proximity without disruption (provided the animal is well-socialized and suitable to the work environment). Allowing flex-time or remote work options (for either those with animals or those with allergies) would

<sup>79</sup> The National Institute of Mental Health estimates that one in five adults live with mental illness. (<https://www.nimh.nih.gov/health/statistics/mental-illness.shtml>).

<sup>80</sup> “Records show that across all airlines from 2015 through 2017, there were 151 animal-related incidents—85 deaths, 62 injuries, and four lost animals” (Rocheleau 2018). Even when animals arrive relatively unscathed, being transported as luggage in the cargo hold of an airplane is, as one can imagine, stressful: “Conditions in the cargo hold of commercial jets are not always friendly; temperatures can fluctuate wildly, noise can be tremendous and air pressure can drop significantly, and pets that are checked into this dark space beneath the passenger cabin sometimes die. In 2011, thirty-five pets died while (or shortly before or after) traveling on commercial flights with U.S. airline companies. Nine animals were injured and two lost entirely. And in 2012, 29 pets died, 26 were injured and one was lost” (Bland 2013). In 2015, in response to a rulemaking petition by the Animal Legal Defense Fund, the Department of Transportation expanded its reporting requirements for airlines regarding the loss, injury, or death of companion animals. See “U.S. Department of Transportation Expands Air Carrier Reporting Requirements for Incidents Involving Animals During Air Transport,” <https://www.transportation.gov/briefing-room/us-department-transportation-expands-air-carrier-reporting-requirements-incidents>; see the Animal Legal Defense Fund’s petition here: <https://www.regulations.gov/document?D=DOT-OST-2010-0211-0001>. For an overview of reasons why animals die in transport, see also “Dying in the Cargo Hold: Is There an Acceptable Level of Loss in Animal Air Transport?” <http://doglawreporter.blogspot.com/2012/12/dying-in-cargo-hold-is-there-acceptable.html>.

<sup>81</sup> There are also ethical issues pertaining to service animals in general—in contrast to emotional support animals, who are in essence the same as family pets since they are not trained to perform specific tasks and thus are theoretically allowed greater agency—but that discussion is also beyond the scope of this article.

accomplish the same goals of supporting the human-animal bond and mitigating companion animal neglect and loneliness.

Many people who would like to adopt an animal—and who would be responsible and loving caregivers—are understandably reluctant to welcome an animal into their life because they work full-time and would either have to leave the animal alone all day or pay for a dog-walking service or “doggie daycare,” a circumstance which again makes responsible animal adoption less accessible to those who are not financially well-off. If a workplace wishes to accommodate companion animals, research shows this can be done in a way that takes everyone’s interests into account, including those with allergies. Examples of large companies with policies permitting their employees to bring their dogs to work include Google, Amazon, and Etsy (Foreman et al. 2017). Employers can take specific measures to assess and address the needs and desires of employees and the physical constraints of the available workspace to determine the feasibility of allowing a dog-friendly office. As an added bonus, studies have shown that companion animals in the workplace can have a positive effect on employee happiness and productivity (Barker et al. 2012; Wells and Perrine 2001).

Public policy presents challenges when it comes to balancing competing interests, and the arena of companion animals and their guardians is no different. But these challenges must be addressed. Integrating companion animals into human society in such a way that their needs are considered, respected, and accommodated is an ethical imperative.

As we consider formulating social policies for a future that is friendly to both animals and people, we must also ask fundamental questions like: do animals belong in public spaces? Is it possible to balance competing interests (e.g., those of people with allergies or who do not like animals) in creating social spaces that are more inclusive of companion animals? We manage it with other groups. For example, not everyone enjoys being around children, but they are permitted almost everywhere, with notable exceptions such as bars and other “adults only” establishments. Likewise, some spaces would be off-limits to animals. Tolerance and compromise will always be an issue in a pluralistic society, so the existence of competing interests should not shut down the conversation. Rather, it presents an opportunity to craft rational policy solutions.

### 6.5. Choice and Consent

While recognizing this would fundamentally transform human-animal relations if universally applied, when considering social policy reform, greater attention should be given to issues of consent and choice. A good place to start is with the companion animals who share our homes. These concepts could also be relayed and reinforced through cultural messaging and humane education for adults.

A few years ago, I happened across a short YouTube video called “Does your dog REALLY want to be petted?” that articulated this concept.<sup>82</sup> The video discusses how to read a dog’s body language to discern whether they actually enjoy being petted or merely tolerate it. Since I first came across that video, there has been a notable proliferation of dog training articles and blogs discussing this issue, which is a welcome turn and promising trend. These concepts go beyond advocating positive training methods (over those grounded in punishment, domination, and fear) to a deeper consideration of a dog’s desires. This approach implicitly recognizes an animal’s individuality and respects her agency. The concepts of consent and choice have the potential to radically transform our relationships with companion animals and improve their lives, and have been missing from the general discourse for too long.

I have pondered this issue with my dog Teagan. During our walks together, it is common for people (often children) to approach and ask, “Can I pet your dog?” which has caused me to think about ways I can introduce consent into the conversation. This can be challenging during fleeting

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<sup>82</sup> <https://www.youtube.com/watch?v=-cGDYI-s-cQ>.

encounters, especially with young children.<sup>83</sup> I usually say something like, “If she wants to be,” in a friendly manner, which can earn me puzzled looks. The thing is, it depends—on the day, the context, the stranger, Teagan’s mood. While Teagan tolerates being touched by strangers, and sometimes actively seeks it out depending on the situation, she is not a dog who is always enthusiastic about greeting strangers. And this should be respected. She is not there for other people’s pleasure.

I think, for the most part, the frequency with which people expect that they should be allowed to pet unknown dogs in public stems from a genuine lack of knowledge and the misguided belief that dogs universally enjoy being touched by strangers. I have observed an increase over the years in the number of people who ask (and teach their children to ask) whether they may pet a strange dog before approaching, which is progress. However, the question is typically framed as an inquiry into whether the dog is “friendly” (meaning non-aggressive) even though this is not synonymous with enjoying being touched. So, the next step is to bring an understanding of consent into the conversation.<sup>84</sup>

Likewise, preference should be noticed, and choices respected, when possible. Once you learn even a small amount about dog behavior, a trip to an off-leash area or just a walk down the street can become a frustrating experience, as so many dogs clearly are in uncomfortable situations to which their guardians are oblivious. It is sadly commonplace to observe dogs being roughly yanked along on a walk (often by a “choke chain” tightened around their neck), forcibly dragged away from some enticing smell by the human on the other end of the leash—with no regard for the fact that this walk is likely the most exciting part of a day spent mostly indoors, and that a dog’s sense of smell, and the role of odor in their world, is profoundly important.<sup>85</sup>

Choice is also important in thinking about ways to increase animal agency in the confines of life in a human world. There are limits to this concept of course, mostly related to safety. Teagan might prefer to chase that squirrel into the street, or eat that disgusting thing she found on the sidewalk, or not have blood drawn during a veterinary exam, but this is not in her best interests. So, there are hard rules, as with any parental or guardian relationship. But within the universe of harmless activities, I have become mindful to give her choices whenever possible.<sup>86</sup>

This is fun because it strengthens our bond and communication as well. It has made me more attuned to Teagan, and she to me. As she has realized I “listen” when she expresses choices,<sup>87</sup> she has become more likely to communicate them to me. I try to make all walks “smell walks” (where she can sniff as long as she wants) and we do “choice walks” as well. One day, Teagan started doing a new thing where she would slow her pace (or sometimes stop completely) while looking up at me. Then, once she caught my eye, she would pointedly turned her gaze (willing mine to follow) in the direction

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<sup>83</sup> However, a parallel movement has emerged in recent years to teach children about consent and bodily autonomy (no more forced hugs!), so cultural awareness around this issue will likely only increase. See Theriault, Anne. “It’s never too early to teach children about consent and boundaries.” *Washington Post*. February 13, 2015. Accessed on 9 March 2019. [https://www.washingtonpost.com/news/parenting/wp/2015/02/13/its-never-too-early-to-teach-children-about-consent-and-boundaries/?utm\\_term=.599ab9d92c32](https://www.washingtonpost.com/news/parenting/wp/2015/02/13/its-never-too-early-to-teach-children-about-consent-and-boundaries/?utm_term=.599ab9d92c32).

<sup>84</sup> The Microsanctuary Resource Center articulates animal subjectivity and choice as one of its core principles: “A resident should never be presented as an object for human touching, and any resident who is shy or does not want to be touched/held/hugged/etc. should be treated appropriately” (<https://microsanctuary.org/2018/08/20/core-principles/>).

<sup>85</sup> As Horowitz (2009) writes:

Dog-walks are often not done with the dog’s sake in mind, but strangely playing out a very human definition of a walk. We want to make good time; to keep a brisk pace; to get to the post office and back. People yank their dogs along, tugging at leashes to noses out of smells, pulling past tempting dogs, to get on with the walk. The dog doesn’t care about making good time. Instead, consider the walk your dog wants. (pp. 284–85)

<sup>86</sup> It is helpful to think of training in this context—i.e., as a practical necessity in a human-centric world rather than as a means of domination and control, akin to teaching children manners and social norms to ease their experience of being in society. Clarifying expectations and boundaries aids in safety and social adjustment, for both children and companion animals. In this sense, the training of companion animals can be conceptualized more as socialization and should focus on imparting behaviors they need to flourish in society.

<sup>87</sup> Even when I cannot honor it, I stop and acknowledge her desire to go down that street, or to that place, but say “sorry, we can’t go there right now” and gently coax her (never yank!) along the alternate route.

she wanted to go.<sup>88</sup> These are lovely moments of communication between us, and they have gotten stronger and more frequent.

Teagan will now sometimes hesitate at an intersection without obviously indicating through eye contact which direction she wants to go. I learned that if I initiate a step in one direction she will merely stand and stare at me, while if I turn to make a move in the other direction (apparently the preferable route), she will eagerly match my step. So, this is another way I can discern her preferences through careful observation. Though how carefully I must observe has diminished; as Teagan has grown more confident that the choices she expresses during walks will be respected, she has become more obvious in communicating them. (As is probably apparent, Teagan is relatively relaxed on walks. Of course, careful observation to discern preferences would not be needed with a dog of a different temperament, such as one who pulls on leash!).

Finding opportunities to recognize and incorporate choice and consent into our companion animals' lives would greatly improve their well-being. Regardless of their legal status, we can forge relationships with the animals in our care based on mutual cooperation and trust, rather than domination and casual indifference. These relationships can serve as a model for the wider society and, once they become more widespread, will have an impact on legal norms as well.

## 7. Conclusions

The status of companion animals is constructed on both an individual and societal level, originating in the home and reflected and codified in law and public policy. Sometimes these levels are in harmony and sometimes they are discordant. The private and public spheres, while distinct, are also intimately intertwined, however, as aggregate micro-level actions comprise the macro social institutions that govern our lives.

To the extent that the law is out of sync with our private understanding of companion animals, this is in part due to dissonance in that private understanding itself. The cultural perception of companion animals as family is not uniformly accepted, and practices and beliefs that treat them as expendable are still prevalent. While a family member understanding is ascending, social forces, including the law, are in conflict, with some bolstering an emergent respect for animals as individuals with inherent value, and others reinforcing an antiquated notion that they are disposable commodities with minimal intrinsic worth. Which social construction will become dominant, and which will be relegated to the historical dustbin? As I have argued, the law plays a key role here.

Yet, the relationship between the law and social norms is multidirectional, with each influencing the other in ways that defy easy measurement. As individuals, we can improve our knowledge of animals generally, and of the animals for whom we are responsible specifically, and use this knowledge to treat them with greater respect and autonomy—both as a means to improve their well-being and, more widely, influence normative behavior regarding animals through social modeling (Bandura 1986). Because individual actions create the culture and social structure in which our relationships with animals are embedded, sustained improvements in the everyday treatment of companion animals can lead to new normative expectations that will also elevate their status in the legal system. Granting companion animals a legal status beyond property can, in turn, shape group values and norms due to the law's expressive function (Nadler 2017).

Because the law expresses social values, it can tip a system of social norms into a new equilibrium (Cooter 1998). Therefore, challenging the property status of animals in the legal system may be as important as changing attitudes and behaviors, even if this functions, at least at first, on a mostly symbolic level.

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<sup>88</sup> I realize anyone who lives with a more headstrong dog (as I have in the past) will find this description of subtle cues laughable—but Teagan is a well-mannered and relatively reserved dog, and her communication style is generally low-key.

Many debates over the appropriate content of law are really debates over the statement that law makes, independent of its (direct) consequences . . . The expressive function of law has a great deal to do with the effects of law on prevailing social norms. Often law's "statement" is designed to move norms in fresh directions. (Sunstein 1996, p. 721)

Where discrepancy exists among competing social norms, the expressive function of law can reinforce some narratives and crowd out others (Carbonara 2017). In the situation of companion animals, where dual definitions of family and property are competing for cultural ascendancy, changing the law could tip the scales and lead to social change.

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