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Just Don't Call Me "Mom": Pros and Cons of A Family Law Model for Companion Animals in the U.S.

At the annual veterinarian visit for my two cats and dog, I am cheerily addressed as "mom." Moments later, the vet, readying to take a routine blood sample from my dog Grover, turns to reassure, "Don't worry, Mom, this won't hurt your baby." Though my unfiltered gut reaction might best be described as annoyance, I toss off a joke that any critter emerging from my body wouldn't have four legs and fur.

In other words, "Just don't call me Mom." The vet looks surprised. Clearly, she's wondering why I resist what many view as a harmless or even complimentary designation of the relationship many humans claim to share with companion animals. But I'm unable to offer a ready substitute. Like many, I eschew the word "pet," and often opt for "companion animal," since we do live together inside a house, they share my bed, we play together, and I talk to them (and, I might contend, they talk back through body language and vocalizations).

The vet may well call my pets family, but the law refers to them as my property, pure and simple, just like a sofa or car. I can pretty much do whatever I want with my companion animals, as long as I do not blatantly violate the often rather minimal and toothless anti-cruelty statutes of Indiana (farm animals are not even covered under these rules). I can leave them outside, tie them up, sell them, dump them at the shelter, put them in cages. The law would not allow me to do any of these things with my own offspring.

The law, sometimes a mechanism for social change, just as easily functions as a tool for maintaining the status quo. It is, simply put, often far behind the times. For animals, U.S. law currently offers the possibility of two options: either juristic personhood (which some animal rights scholars argue for) or thinghood, and it has traditionally settled on the latter. Animals owned by humans, whether they are pets, working, or farm animals, are considered "personal property." Yet the reality is that animals, whether or not they have status as companions (e.g., wildlife, farm animals, zoo animals, and indeed the entire universe of non-human animals), are not "things." Nor are they people.

For the purposes of this essay, I will explore a very small piece of this complex puzzle, particularly as changing attitudes and cultural practices regarding companion animals generate a shift toward the “pet as family” model in law. In part, this is a direct response to growing public sentiment about the intimate role of animal companions in family life. In a recent online Harris Poll from 2007, 93% of Americans with dogs and 89% of those living with cats proclaimed their companion animals “members of the family.”¹

These figures jibe with other surveys, like the oft-quoted Associated Press poll, which additionally demonstrated that single women are the most likely to consider pets as members of the family.² A booming pet industry confirms that Americans spend billions of dollars a year on pet food, accessories, travel, pet sitters and daycare, and veterinary services.³ More and more pet owners include pets in traditional family activities, including holiday gift exchanges, vacations (witness the rise in pet-friendly hotels!), play dates, dog camps, doggy daycare, indoor living, and high-end pet food.⁴ Of course, not all pets are so “lucky,” and many continue to be neglected, abused, and abandoned. However, some legislation and the legal system have finally begun to crack under pressure to acknowledge that, yes, maybe there is something different about companion animals, who deserve more beyond the basic protections every states provides in animal anti-cruelty statutes.⁵

Writers like Marjorie Garber, Donna Haraway, and Carolyn Knapp have insightfully theorized various possibilities for illuminating the bond between people and their pets (in particular, dogs). The claims that such friendships and reciprocities specifically between people and dogs do, in fact, exist find support beyond these writers’ sharp observations and almost ethological approaches to the animals in their own lives. Recent evidence of the historical co-evolution and dynamics that emerged between early humans and the dog’s ancestor, the wolf, are buttressed by ongoing scientific research into the unique interactions between dogs and people.⁶ Dogs, of course, are just one of many kinds of animals whose primary purpose is to offer companionship to human beings, and my own experience living almost my entire life in the company of cats is reflected in the words of Chris J. Cuomo, who writes, “living with cats is seeing how their small furry faces express emotions, desires, preferences, pain. My knowledge of my cats’ faces is in significant ways, the same kind of knowledge that I have of a human friend’s face. I’ve seen that expression before” (138).

So how might the law better begin to address and accommodate these special relationships? At the moment, the family paradigm provides something of an analogy, or even a bridge, as evidenced in the explosion of requests for pet trusts,⁷ pet custody determinations, and various torts cases that may well include requests for non-economic damages (typically available only for loss of human life or injury). And while most courts at all levels are still very reluctant to accept a legal outcome that veers toward implying animal companions are not property, many arguments being made in courts across the country on behalf of companion animals rely heavily on illuminating the “member of the family” role the animal plays in the humans’ lives. While strategically we find it useful to reach for tools that make life better for animals, I find myself questioning whether the benefits of a “family model” really outweigh the disadvantages, not just to companion animals, but all the other animals not included in the moral compass of the rosy fiction of “family.”⁸

If I am not a parent, not even *in loco parentis*, and these animals are not my children, and yet they are clearly different from my real property and other possessions (I may love my house and my Subaru, but certainly not the way I love Grover, and the two cats, Buckminster and Bird), how do we find language for this bond within a legal system that remains grossly inflexible? More than an exercise in conceptual or linguistic gymnastics, this question goes straight to the heart of defining our responsibilities to and expectations of the animals we choose to call our companions.

In striking contrast, parents have numerous legal duties to their children, most of which exist to protect and promote the child’s welfare and safety (compulsory education, medical care, the duty to intervene if the child is in danger, etc.). Pet owners have very few (mostly just providing food, water, and some version of shelter) and, excepting anti-cruelty statutes that require someone to refrain from abusing and neglecting an animal, most laws regarding animals center on the welfare and safety of human beings (e.g., leash laws, rabies vaccinations, etc.).

Even when I substitute for “pet” and “pet owner” the current term of art “guardian,” I know it has no legal weight, though arguably perhaps it does, as some proponents maintain, move us at least symbolically away from the concept of a property model to one that sounds frankly more, well, familial, which of course puts us back in parent/child land. And though the term “guardian” has replaced “owner” in some city and county statutes relating to animals — an effort to recalibrate our perceptions of what we owe our animals — the word does not have the force of the law behind it.⁹

On the other hand, an advantage of the parent/child model may be that it reminds us we are dealing with sentient beings whose lives are inextricably woven into ours, that they are dependent on us, and that we are responsible for more than just the bare minimum in terms of their health, safety, and welfare. Maybe even their happiness? It is possible that the family model provides an imperative to take better care of these animals.

Though I often resort to using “guardian,” it too remains problematic, despite its connotations of “caretaking.” Legally, “guardian” applies to adult human beings with a legal responsibility to either human children or disabled adults in our care, and it also may contribute to the infantilization of these animals in our care. Companion animals are neither human nor disabled, nor are they children for long.

So how to characterize and categorize the interactions and responsibilities and dependencies in a way that can be codified, and still to reflect the complex interactions that evolve between people and pets without relying on anthropocentric models?

Before I fully understood the “breeding world” of animals I fell for the “family model” on a breeder’s website. Until then I had always adopted shelter cats. But I fell in love with the Bengal, in a photo someone showed me, completely ignorant of the realities of the breeding world, which is dominated by folks who promise everything from good health to good temperament. Though I prided myself on doing careful research, visiting the home cattery, and spending time with the breeder and her animals, I was fooled by the family atmosphere and the promises that “you know what you’re getting with a purebred.” I was also unaware of the problems of overbreeding that contribute to the surplus of cats that end up unwanted. After all, breeding is a business. In addition, Bucky, like Bird, both purebred Bengals, shouldn’t even exist. Like many purebred cats, contrary to the claims of breeders, Bengals are high on the list of cats with behavior problems, and my cats are no exception. Wonderfully smart, active, and sweet, but also highly-strung, Bengals like Bucky and Bird are the brainchildren of a woman named Jean Mills, who originated this hybrid back in the late ‘60s by breeding an Asian leopard cat to a domestic cat, to appeal to people like me who love the look of the wild. These cats are hard-wired for action. They are climbers and leapers. They act out. They can be temperamental. They are clever and funny. They are affectionate. Cat and dog breeder websites often rely on language like the following from a Bengal breeder site: “All babies are raised in the home, in a family environment, with children and other

pets. AgapeBengals takes care in the placement of our babies and will only allow them to go to approved homes" (3). Or this: "Should you have any questions about your bundle of fur after it leaves our nest, please know we consider to be extended members of our family" (4).

Over and over, testimonials on the websites and breeder home pages employ a similar rhetoric, the animal as "baby," the act as "adopting," the clients as parents.

Certainly, living all together, participating in one another's daily routines, my animals and I exert influences on one another (Bird has taught me to play "plastic straw cat chess," and Grover believes whenever the phone rings that someone is calling for a dog hike), so together we create a whole new configuration which, in some superficial ways, might resemble a family. All three of my animals seem to enjoy music, and one cat prefers cat grass over catnip. How do I know? He told me. I have cried to my animals, they have seen me through hard times. Grover lay for days on end in the hospital bed where my father was dying; my cats kept me company through a divorce. We nap on the sofa together, we watch movies (well, okay, I watch the movies and the animals sleep on me). And yet it seems I am still implicitly compelling animals to take on a variety of family roles: sometimes children (cats are almost exactly infant-sized, lap dogs are just that), sometimes parent (a dog who protects, for example), or even a life partner (an animal to whom we tell our troubles and who helps provide emotional stability for those who are either single or in unsatisfying relationships).

Marjorie Garber asks, "Why is it sometimes easier to say 'I love my dog' than 'I love my spouse'? Dogs, we often say, offer unconditional love, where human lovers and human beloveds are often, well . . . all too human in their inconsistencies, frailties, and willfulness. But what is 'unconditional love,' and what are the conditions that produce and nurture it?" (14).

It is important to ask in return, is our love for our animal companions as unconditional as the love Garber claims they offer us? It is true that our expectations of unconditional love and obedience are often undercut by the actions and personalities of the actual animals themselves, when they do not conform to our hopes, and under the law we have the right to tie them out back, give them away, surrender them to shelters, or have otherwise healthy animals euthanized.

On this point Donna Haraway observes that “the status of a pet puts a dog at special risk in societies like the one I live in — the risk of abandonment when human affection wanes, when people’s convenience takes precedence, or when the dog fails to deliver on the fantasy of unconditional love” (38). I add to this list the potential inability of the dog (or any pet) to deliver on the fantasy of unconditional compliance, for which there is no legal remedy. In her terrific memoir *Pack of Two*, dog-obsessed Carolyn Knapp explores and critiques her bond with Lucille as an object of human self-definition, and observes the dangers of projecting our many desires and anxieties onto the animals we call “companions” (54). The idea of “pet as family” may engender false expectations and frustration when the pet does not perform the expected roles.

And even at its best, is love enough? We certainly cannot legislate emotions among animals and people any more than we can among people, but we can legislate the roles and responsibilities that govern our relationships. Instead of referring to themselves as “pet owner” or “guardian,” some prefer to call themselves “caretaker,” which sounds kinder than “owner,” but again traditionally applies to someone hired to care for real property or paid to look after a minor child or a disabled adult. So none of these terms — pet owner, guardian, caretaker — comes close to being an accurate expression of the reciprocities involved in living with companion animals. We can debate “guardian versus owner,” and even more broadly-construed concepts like “stewardship versus dominion” (Linzey 29), because language does, of course, both shape and reflect our practices, as well as characterize the duties imposed by those practices. And, in the law, definition and categories are everything.

For now, any change in terms remains purely symbolic, because animals, in the eyes of the law, remain property.

Let me say it again. Animals are property and we own them.¹⁰

Because I live alone with three companion animals, I am solely responsible for their care, feeding, safety, and well-being. Every day I make decisions for them, not unlike what one would do for any dependent: I choose what and when they eat, what toys

they have, how many walks Grover gets, what vaccinations to give them, when to take them to the vet, and so on. Grover and I attended dog training so I could learn how to communicate basic commands to him, like sit, heel, down, stay, and drop it. I took him regularly to the park to meet other dogs because I wanted him to be socially confident. And though I am considered by friends and family to be a “good pet owner,” not a day goes by that I don’t find myself musing on the meaning of this odd experiment in animal domestication in which we are engaged. I’ve lived with pets longer than without them, and over the years, particularly as basic practices of pet owning have evolved, my views on pet owning have been transformed through both my work in animal law and the courses I teach, like “Animals and Ethics” and “The Literary and Legal Animal.” I cannot consider it to be a natural, unquestioned act to own a pet. And yet, pet owning in the U.S. is at an all-time high.¹¹

Recent legislation and court action in the expanding arena of animal law¹² relating to increased protections for companion animals have exploited the family analogy, for better and for worse. Many more lawyers stand ready to draw up legally enforceable pet trusts, or in divorces or separations to help settle custody disputes, using a version of the “in the best interest of the child standard.” There are also attorneys who, under the right circumstances, may pursue veterinary malpractice cases on behalf of the owners. More and more, courts are addressing housing disputes involving “no pets” policies and anti-discrimination laws. There are damage cases arising from wrongful death or injury of a companion animal. Criminal laws also encompass domestic violence and state anti-cruelty laws, and in the last few years more states are beginning to include legislation that acknowledges the well-established link between the two.¹³

Many state bar associations with animal law sections or committees now offer continuing legal education classes with titles like “Animals Are Family, Too.”¹⁴ In both principle and as a practical matter I am certainly willing to convince fellow attorneys that the “animals as family” model has legal merit, particularly since it is often linked to developing and strengthening legislation to insure better treatment for the animals in our lives. In fact, I have presented enthusiastically at Continuing Legal Education classes on such topics as pet trusts, pet custody, and valuation,¹⁵ and I agree, in part, with other animal advocates who view these as progressive steps toward carving out more legally enforceable protections.

Recently in Indiana, a group of lawyers received approval for the first Animal Law section of the Indiana State Bar Association. Not surprisingly, the start-up was controversial, since “animal law” is often conflated with “animal rights,” and mentioning “animal rights,” one of the most misunderstood terms of the century, often has the same effect of dropping a ticking bomb in a room, especially in a state where farming, hunting, and fishing are important businesses. In fact, concern was expressed from a number of quarters that the committee might be composed of a bunch of “wild-haired animal rights activists”¹⁶ or “members of PETA.”

Our first CLE course was (frankly, to my disappointment) as conciliatory and non-controversial as could be, as evidenced by the twee title, “Fuzzy Financials.” We strategically agreed to focus on companion animals, since most people can support the idea that companion animals or pets deserve humane treatment, though one of the speakers arriving in a floor-length mink coat did blurt out, before presenting on tax issues relating to pet trusts, that, yes, she likes her pets just fine, but if they ever needed surgery, she’d be quick to euthanize them.

When I started law school ten years ago, very few people had ever heard of “animal law,” including the faculty at the institution I attended. In fact, I was teased mercilessly. Typical jokes, even from good friends, ran along the predictable lines of “So how are those raccoons going to pay you?” After a mere decade, however, animal law is no longer a laughing matter. Many U.S. attorneys and law firms are incorporating animal law into their practices, in part because it is income-producing, a product of mainstreaming, and in part because their human clients expect it.¹⁷ That animal law as its own discipline has been elevated in status is probably a good sign, though it is important to understand the very real distinction between practicing animal law and practicing animal rights law.

“Animal law” per se does not signify any particular philosophy regarding the moral status of nonhuman animals. Put another way, an animal lawyer might well defend a client whose dog has bitten the mail carrier, or assist a client with a contract for the purchase of an expensive racehorse, or defend a veterinarian accused of veterinary malpractice. Until Indiana’s bar law section began offering CLE’s, the only available CLE that I was able to find online in the state was directed to attorneys who wished to

protect medical researchers from animal rights “extremists.” Animal rights law, however, is specifically geared toward the ending of all exploitation of non-human animals. While “better cages” is the goal of the welfarist, “empty cages” becomes the goal of rightists.

At heart and in spirit I’m an animal rightist, and subscribe now to a fairly basic principle: we human animals should do as little to interfere with or cause harm to nonhuman animals as possible. Even “pet owning,” regardless of whether we dress it up in language of guardianship or animal companionship, or rely on historical and scientific evidence of co-evolution, remains problematic for me, an issue I struggle with regularly, in part because companion animals are now being specifically bred, modified, and developed for the purpose of giving us pleasure. Additionally, the overabundance of these animals, many of whom are sold as commodities in pet stores and by breeders, creates an even greater ethical dilemma when there are too few good homes for them, and many end neglected, abandoned, abused, and even euthanized.¹⁸ When we participate in pet-owning, when we rescue animals from shelters, we still participate in a multi-billion dollar industry that exploits other animals for veterinary medical research and pet food, and ultimately views animals as commodities in a large-scale business. When my three animals are no longer with me, will I ever “own” another pet? I don’t know. Would my life be less rich without them? Absolutely.

When, on the one hand, we refer to our companion animals as “family,” while legally they remain our property, the clanging bell of cognitive dissonance is hard to ignore.¹⁹ There is no law, for example, preventing us from choosing to end a pet’s life, or giving the animal away. The animal has no say in the matter and, unlike other family members, it has no legal voice. Laws were written to govern the relationships among people, and ever since common law labeled animals “property” we have had to wrestle with this problem. Being a real companion to the animal, loving the animal, walking the dog, playing with the cat, and touching the animal are not requirements. In addressing the special loyalties exhibited by dogs, in particular, animal psychologist/philosopher Konrad Lorenz reminds us of “affection’s claim,” and the responsibilities that a “dog’s fidelity” engenders (543-545). How might affection’s claim be codified? Is it even possible?

Garber describes dog love as “local love, passionate, often unmediated, virtually always reciprocated, fulfilling, manageable. Love for humans is harder . . . [D]og love is not an

evasion or a substitution. It calls upon the same range and depth of feelings that humans have for humans” (14).

As has become increasingly obvious over the last century and a half, animals are not only sentient, living, breathing beings, and not “things,” they are also full of capabilities we are still just beginning to understand.²⁰ But “personhood” has been reserved for human beings (not all human beings have historically had personhood, of course),²¹ although in one exceptional twist of irony and a strange history leading to a controversial Supreme Court case from 1886, “corporations” became the one non-human entity to have been granted legal personhood.²² They are view as “juristic persons.” Animals are not.

Over time, despite the slow turns of the creaky wheels of justice, the law has begun rumbling down a bumpy road through a changing landscape. The categories we assign certain animals and our human relationships with them, even within the same species (a pet pig is assigned a different status from a pig raised for food) determine their fates. The same speciesism that promotes notions like “dolphins and Great Apes should be singled out for special treatment because they are so intelligent” is at work in the case of companion animals. The special status is based not on the type of animal or “how like us it is,” but the purpose for which human beings use that animal.

The dog lounging on her \$100 Dr. Foster and Smith orthopedic bed in the living room is given an intrinsic value by her human owner that is not extended to the caged lab dog being mutilated for organ transplant experiments. The difference? The dog on the fancy bed was lucky enough to be loved by his human guardian. Unfortunately, the family law model has the potential to create moral blindness, to make us feel better about the way we are treating certain kinds of animals, particularly the ones who are most visible in our lives and whose purpose is companionship. But the dog we select and feed and love and maybe sleep with, take trips with, and consider “family” is otherwise no different from the dog used in medical research. Or, is it possible that the dog owner now viewing her responsibilities to her beloved dog within the context of a family law model might be compelled to work to extend similar moral consideration to the more invisible lab dog?

The label of companion animal is certainly not limited to dogs and cats and can easily include popular animals like horses, rodents, birds, snakes, and other animals that human beings keep for companionship and pleasure. Why then is there one rabbit we love and train to use the litter box and cuddle with, and yet think nothing of putting another one under the broiler. One we call “family,” and the other one we call “dinner.” The law offers protections for one and not the other.

The only difference is that we have conferred, with a certain arbitrariness, on specific individual animals this special status that deems mistreatment or harm of them morally reprehensible, if not outright illegal. One rat sold at the local pet store goes home to a child who loves it and plays with it, recognizing that rats are social and intelligent. Her rat buddy in the same cage is purchased by a “herp” to feed a python, where it may sit for hours or days in terror waiting for the snake to strike. Though rats, mice, and birds are popular pets, more than 90% of animals used in research are, yes, rats and mice, and birds, too, all of whom, unlike other animals in research, are exempt from any protections under the Animal Welfare Act.²³ In other words, the majority of animals — farm animals, wildlife, research animals — remain not only consumable resources, but out of the reach of any protections and advantages a family model might offer, regardless of their species.

Though many pet owners have taken legal action when their companion animals have been harmed, injured, or killed, in the majority of U.S. states courts have made it clear that in such cases they will stick to “fair market value” of the animal in question, and will not recognize claims like negligent infliction of emotional distress. In some states, like Tennessee, Alaska, and Kentucky, courts have ruled more sympathetically, if the behavior of the defendant rises to the level of outrageous intention. In some important lower court cases the emotional bonds between human beings and their companion animals who have been injured or killed are recognized in decisions which, even if not decided in favor of the plaintiff on the particular facts of that case, clearly leave open the possibility of, for example, for non-economic damages, especially in cases involving the intentional infliction of emotional distress.²⁴ But even so, such theories are still anthropocentric at their core, given that it is not the animal’s own intrinsic worth that is valued, but the human plaintiff’s relationship with the animal that determines the animal’s worth.²⁵

Though it is gaining some legal ground, the family model applied to our companion animals remains, for me, double-edged. If it could result in a larger cosmic, philosophical acknowledgment of the familial bonds of all living creatures, it might be more clearly an avenue to pursue.

But instead, I continue to wonder if too much of our legal energy is being directed toward the animals we treasure the most emotionally, allowing us to ignore the plight of the staggering numbers of animals we cause to suffer as we raise, mutilate, kill, and consume them for food and clothing, and in the name of research. Does the rise, in both theory and practice, of a “family model” for companion animals blind us to the gritty realities of most animals whose lives are equally at the mercy of human actions? Does the family model inadvertently promote legalized speciesism, operate as a shorter-term panacea, and undermine a longer-term goal of bettering the lives of all animals? Or, as I sometimes hope, might the model help make inroads into the law itself for rethinking the property status of all animals in the possession of humans, with the potential for a positive trickle-down impact on all animals?

Though the family model arguably offers a natural analogy for lawyers, it is possible that we are furthering our moral schizophrenia by privileging particular groups of animals, based not even on species, but on context.

Garber writes:

Dog stories find a place in our ongoing folklore as the real embodiment of what we would like to think were “family values” among other human beings. Sheba, a Rottweiler mix in Oakland Park, Florida, was chained up by her owner after giving birth to nine puppies. The owner, who didn’t want the pups, buried them alive, but Sheba broke from her chains and dug them out. The puppies—and the heroic mother—were rescued; the owner faced charges of animal abuse In another very similar incident, the mother dog rescued her puppies from a trash compactor into which the owner had tossed them. In default of any consensus about social planning, family planning, even what constitutes “the family,” in a populace increasingly weary of economic struggle and social divisiveness, “family values,” like other values, are — it is fascinating to note — now

often passed on in popular culture not through human stories, but through stories of, and love for, dogs. (15)

On this brighter side of “dog family values,” as Garber describes them, might this offer human beings a model for familial devotion, perhaps suggesting that invoking the family model could increase empathy and appreciation, and reduce the moral distance we often keep from non-human animals? Might it offer a practical framework (and concession) as we move legally to improve the status of all animals?²⁶ The risk in taking an all-or-nothing approach in fighting for the day when all animals, to borrow Singer’s word, are “liberated” from human interference and allowed to be left alone, is that since that is an unlikely result, all animals could end up in limbo, with no room for compromise.

In an ironic twist, applying the family model to companion animals is highly controversial and widely denounced, for very different reasons, by those at the opposite end of the spectrum: big agri-business and factory farming, hunters, and researchers who routinely use animal subjects in experiments, just to name a few, whose extreme fears run along lines of the “slippery slope” argument. These powerful groups exert great political force and billions of dollars to oppose any legislation that would increase protections in general for animals and create impediments to their professions.²⁷ The stance of the very powerful American Veterinary Medical Association (AVMA), for example, is to oppose adamantly any possibility for the recovery of non-economic damages in veterinary malpractice suits, claiming that such costs will discourage applicants from pursuing veterinary school and will put practicing veterinarians out of business. The reality is these suits are rare, and since the suits have been allowed, there’s been no major increase, and the vast majority of plaintiffs never prevail, as the standard of proof is so high.²⁸

The AVMA provides an interesting example of a group opposed to the family model, particularly since, as my opening anecdote suggests, the veterinary industry may want it both ways. Many vets invoke in their practices the “family model,” either explicitly or implicitly, by encouraging pet owners to think of their animals as important as family members to encourage them to attend to the animal’s health care with diligence, investing more and more in the medical treatment of their animal companions (often referred to as “clients”). This may be good for the animals, but is also good for the vets.

Every year, like many pet owners, I receive in the mail appointment reminders from my vet for dental cleaning and annual vaccinations, just as I would from my own health care provider, and when my companion animals become ill, there appears a limitless list of referrals to specialists, including oral surgeons and dermatologists, for innovative treatments.²⁹ Many veterinary offices now offer information brochures on pet health insurance, which is paid by a monthly premium, and functions very much the way private-pay human health insurance does (including rules about pre-existing conditions, etc.). In addition, many veterinarians offer in-home services, including euthanasia for terminally ill pets, cremation as an option for the deceased, and even condolence cards acknowledging the loss. While this is not an indictment of those delivering sound medicine to our animal companions, it is hard not to think that if they invite us to view our animals as family members, then logic would dictate we, as consumers, should also have available, in cases of medical negligence, legal recourse to claims of emotional distress for malpractice that results in harm or death.

Observing my own companion animals, I wonder if it really benefits them to be considered family members. If they are family members, then what sort are they precisely? Do we need to broaden our notion of “family,” as the law is currently being challenged to do by the changing demographics that include configurations including gay marriage, open adoption, assisted-reproductive therapy, extended and blended families? Even so, the family model, no matter how it broadens for people, may not be appropriate for animals. In addition to anthropomorphizing animals by asking us to “love our animals too much,” it may encourage us to forget that they are animals at all, and to be viewed as “little fur babies,” substitutes for children, to be doted on and pampered, stuffed with treats, and expected to respond to us as people would. The anthropomorphizing can be damaging on both sides, when pet owners interpret their pets’ behaviors through the lens of human emotions. “My cat’s mad at me,” “my dog’s disappointed,” “my rabbit understands me when I’m sad.” Though it may crack open the door of certain legal advantages, the family model as a legal tool remains controversial for a number of the reasons explored here. In addition, it is an assimilative, anthropocentric model inviting direct comparisons between animals and people, with all the expectations that naturally ensue.

So when I say, “Don’t call me Mom,” I return to the question with which I began. What exactly am I to these three sentient beings who play such important roles in my life, and

how can the law best accommodate our various roles? I tentatively try out “friends.” No, it’s my fantasy. Friendship is something one both consents to and engages in, and while I like to think that my two cats and dog stick around because I am special and they choose to be with me, I keep Grover leashed so he will not disappear after a chipmunk, and I don’t put Bucky and Bird at risk to roam freely among all the dangers outdoor life holds. Because the very lives of pets are “artificial,” meaning that these particular animals would not exist if people had not developed animals specifically for these purposes, it is purely an intellectual exercise to ask what would my animals do if they were left alone to their own devices.³⁰ The fact is, we have altered their behaviors, as well as their bodies, historically through breeding and forced accommodations to human life, in order for them to become suitable for “companionship.”

In addition, even when it works to an animal’s advantage, the family model fits philosophically into a welfarist notion of animals, in which the focus is to try to improve the lives of those animals bred, sold, rescued, and adopted for the purposes of companionship with human beings. The purpose is not to “free” them or to leave them alone to live their own lives, or to slowly spay and neuter pets out of existence, as some rightists would argue. In the family model, any animal acquired strictly for the purposes of companionship seems likely to fill the bill, so that it is really our proclaimed affection that has the potential to be legally protected, and not the animal itself. This is why the farmer who claims to love his beef cattle, as one lawyer-farmer in my CLE class challenged me to believe, cannot turn around and claim emotional distress and “non-economic damages” if someone else slaughters them first. At best, he might get fair market value, but that would be the extent of it. Nor is it likely he would choose to write up a pet trust³¹ to provide for any hogs he might precede in death, or to work out a “pet custody arrangement” for the disposition of his sheep should he and his spouse divorce.³²

So it is, in my other life as a pro bono attorney that I make my welfarist concession and reluctantly subscribe to the family model for animal companions, if for no other reason than it may improve the lives of some animals, and perhaps help gain some of the force of the law behind it. In my legal life, I advocate pet trusts (I included pet trusts in my own will), believing that once one accepts responsibility for the animal in one’s life, one should at the very least make legally enforceable provisions for the animal should one die first. And, no, one cannot leave one’s estate or money to one’s beloved cat. Property cannot inherit property.³³

Yes, the family model may help some animals — those animals we lavish most of our love and attention on — gain more legal protections and reflect the intimate bonds through legislation that benefits animals. Despite my own ruminations on the ethics of pet owning, there is no doubt that companion animals occupy a special and important status in our lives, and the practice of pet owning is likely to continue.

Exiting the vet's office recently one afternoon with a prescription for Prozac in hand for Bucky, who was expressing some unexplained misery through inappropriate elimination and attacks on his beloved Bird, I wonder again what it is we are asking of these animals we call our family when we expect them to conform to our lives. If Bucky had his way, he would be terrorizing the neighborhood, not confined to three storeys of a small house. But instead I have forced a compromise: the tri-level outdoor cat cage I call the "catarium" must suffice for his forays into the wilds. And here I am, pills in hand, going home to these wild simulacra I adore, about to make yet another decision on their behalf. What am I now? If not "Mom," then what? Keeper? Drug pusher?

When I walk in the door, all three are there to greet me. I get down on my knees and let them swarm over me. Though they are all close in size and shape, even with my eyes closed I know each one's body intimately, the particularity of tails and ears, the smell and texture of fur. We are indeed a funny mixed-species tribe, and perhaps our union is familial. Whatever description I choose remains symbolic, reflective of how I interpret the dynamic between us at any given moment, and difficult to codify legally.

At the very least, I suppose, the family model may push us a bit more toward re-evaluating the legal "thinghood" of all animals who touch our lives, whether they are urban wildlife, the animals sacrificed in research, farm animals, or pets. In the meantime, I'll keep struggling with the question of who really benefits more from this odd arrangement of living with animals and what it means.

NOTES

1. See "Pets Are Members of the Family," Online Harris Poll, <http://www.all-creatures.org/articles/cac-petsare.html>

2. Ibid.

3. Participation in the “pet industry” is another form of complicity, but remains too big a topic to undertake here. The breeding, buying, and selling of animals for pets, as opposed to adopting from rescues or shelters is one aspect. Another is the very question of whether we should have “pets” at all. Legal scholar and Gary Francione has suggested on more than one occasion that his goal is to see pets spayed and neutered out of existence. His writings boil down to one basic concept: animals have the right not to be treated as the property of humans. Period.

4. For an entertaining, and eye-opening romp through the new world of privileged pets, see Michael Schaeffer 2009 bestseller, *One Nation Under Dog*.

5. Currently, 46 of the 50 U.S. states have enacted felony statutes for certain kinds of cruelty to animals. While some of these laws remain more symbolic than others, given that enforcement remains a huge issue, the point is that states voters and legislators have seen fit to enact laws that are animal-centered rather than human-centered. The Animal Legal Defense Fund (ALDF) releases an annual report ranking the animal protection laws of every state based on their relative strength and general comprehensiveness. In the 2009 report, the top five states with the strongest anti-cruelty laws were California, Illinois, Maine, Michigan, and Oregon. The worst states were Hawaii, Idaho, Mississippi, North Dakota, and Kentucky, with Kentucky at the very bottom. “Year End Study Names 2009s ‘Five Best States to Be An Animal Abuser’,” Animal Legal Defense Fund (ALDF). Web. December 16, 2009. <http://www.aldf.org/article.php?id=1143>

6. For an excellent summary of this history, I highly recommend the *Nova* special, “Dogs Decoded” (2010), now available on DVD, which explores new genetic discoveries on not only the genetic origins of the dog, but “the science” behind the special bond between people and dogs. “Dogs Decoded” (dir. Dan Child). PBS. DVD.

7. Although it is up to each state whether or not to recognize pet trusts, their creation is allowed for in the Uniform Probate Code, and as of 2011 forty states now recognize pet trusts.

8. It is important to mention that a number of legal scholars argue that “property status” is a double-edged sword, that without being designated “property” animals would have no one in a position to pursue legal remedies on their behalf.

9. For more on the Guardianship Campaign, please visit their website for a list of communities that have adopted this language on animal tags, kennel forms, public park signs, etc. <http://guardiancampaign.com/guardiancity.htm>

10. No one owns those wild animals who live in their own habitats, not even the owners of the land on which the animals reside. However, game laws and other government rules and regulations generally dictate the “taking” of wild animals, through trapping, hunting, fishing, and other forms of extermination.

11. In his provocative essay “The Pet World,” Paul Shepherd argues that pets, whom he describes as “civilized paraphernalia” and “deficient” animals, confuse our notions of the “wild,” without which we cannot be restored to wholeness.

12. “Animal law is, in its simplest (and broadest) sense, statutory and decisional law in which the nature—legal, social or biological—of nonhuman animals is an important factor.” (Waisman, et al. xvii).

13. Statistics vary, but according to a report by the Humane Society of the United States, 71% of pet-owning women, who are victims of domestic violence, report abuse, harm, and death to family pets by their batterer. 75% of these incidents occur in the presence of children. Cf. <http://www.americanhumane.org/about-us/newsroom/factsheets/animal-abuse-domestic-violence.html>

14. Course sponsored by New Jersey Animal Law Committee, Atlantic City, N.J. 2010

15. Valuation concerns the recovery beyond the fair market value of an animal and refers to non-economic damages for the injury or death of companion animals. In the world of law, damages are divided into two categories: compensatory and punitive. The point of compensatory damages is to make a plaintiff whole again, and to restore things to where they were. They are not meant to punish, and take two forms: economic (tangible injuries like loss of income and medical expenses) and non-economic, which can include pain and suffering, loss of companionship, and emotional distress. Some jurisdictions may also permit such claims as loss of enjoyment of life and other unquantifiable injuries. Under emotional distress, it's helpful to distinguish between that which is intentionally inflicted and that which is the result of negligence. The goals of punitive damages are not only to punish the defendant for conduct, but to act as a deterrence to future wrongs, as well as discourage others from engaging in the conduct.

16. I do not know the origins of this phrase, but have heard it with some frequency on both television shows and in life, and it may have been exactly the image of animal activists that the Federal government wanted to invoke for the larger public when it passed the controversial Animal Enterprise Terrorism Act in 2006.

17. Thanks to campaigns by organizations like the Animal Legal Defense Fund (ALDF), HSUS, ASPCA, PETA, etc., the previously "invisible" cruelties to animals, such as abuses at factory farms, animal cruelty and domestic violence, and animal hoarding, have become more visible, and therefore less tolerated. Early animal cruelty laws in England stemmed from the cruel treatment, usually in the form of beatings, of work animals like horses, on city streets, in plain view of passersby.

18. According to the HSUS, an estimated 6-8 million cats and dogs enter shelters each year, and 3-4 million (almost half) are euthanized by shelters each year. "Pet Overpopulation Estimates." Humane Society of the United States (HSUS). Web. November 23, 2009.

http://www.humanesociety.org/issues/pet_overpopulation/facts/overpopulation_estimates.html

19. Some animal rights advocates, such as legal scholar David Favre, have argued for a new classification for pets known as "sentient property" (not a sofa), which would take

into account the fact that animals feel pain and can suffer. David Favre also argues that animals in general might benefit from a recategorization from “property” to something he calls “equitable self-ownership.” See his now classic essay, “Equitable self-ownership for Animals,” and also his most recent essay, “Living Property: A New Status for Animals within the Legal System,” in which he makes a very strong argument that non-human animals should possess and exercise legal rights. Another legal scholar, and Great Apes activist, Steven Wise has argued that primates might be singled out as deserving of a new status closer to that of human animals. While the law historically moves much more slowly than public sentiment and changing times dictate, it seems that in 2011 we are in an interesting time of legal action occurring in this area of animal law, and we can learn much by observing the roller coaster ride of case law and statutes from different states.

20. Philosophically, the property status of animals stems from antiquity, the start of which is often credited to Aristotle, who in *Politics* wrote that all nonhuman animals were created for the sake of humans. His view that animals lacked rational soul, later merging with Christian notions of humans having been created in the image of a Divine Creator, prevailed until the 17th and 18th centuries, when Descartes and various other philosophers, influenced by “science,” began to shift the larger “world view,” though it wasn’t much help to animals, who were still acknowledged not to be rational and in Descartes’ view, were simply machines who could not feel. Still, our modern view, influenced by the grandfather of utilitarianism, Jeremy Bentham, is shaped by the irrefutable knowledge that animals have the capacity to suffer, and this is one of many characteristics that distinguish them from other “real property.”

21. For an example of people without “personhood,” see *Dred Scott v. Sanford* 60 US 393 (1857), in which the U.S. Supreme Court ruled that slaves are not citizens, but are property of their owners, and Congress has no right to deprive citizens of their property.

22. See *Santa Clara Co. v. Southern Pacific Railroad*, 118 U.S. 394, 1886, which held that corporations were recognized for the purposes of the Fourteenth Amendment. The benefits attached to the juristic personhood of corporations have been expanded

through a number of cases, including the most recent, *Citizens United v. Federal Election Committee*, 130 S.Ct. 876, 2010.

23. The Animal Welfare Act (AWA), signed into law in 1966, and enforced by the USDA and APHIS, is the only Federal law governing the treatment of animals in research and other uses like transport, exhibition, etc. In addition, fish and frogs are not covered under the Act, nor are animals who are used for food.

24. Some examples: In Washington, in *Womack v. Von Rardon* (2006), a cat owner sued a minor (and parents) after the minor doused her cat in gasoline and set him on fire. The court held that “for the first time in Washington, we hold malicious injury to a pet can support a claim for, and be considered a factor in measuring a person’s emotional distress damages.”

25. In 2002 Tennessee enacted a statute known informally as the “T-Bo Law,” named for Congressman Steve Cohen’s dog. This is the first statute in the U.S. ever to provide non-economic damages up to \$5000 (for a cat or a dog). The language of the statute is quite interesting, as it is very similar to the language for the loss or injury of a human family member: “These damages are not for the intentional infliction of emotional distress of the owner or other civil claim, but rather for the direct loss of ‘reasonably expected society, companionship, love and affection of the pet.’” Alaska recognizes a cause of action for intentional infliction of emotional distress for intentional or reckless killing of a pet animal. See *Mitchell v. Heinrichs*. In this case, the Court went on to say, “The challenged conduct must have been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” Alaska also allows for punitive damages for the killing of a pet, but again the plaintiff must produce evidence that the defendant’s conduct was outrageous, such as evidence that the acts were performed with malice, bad motive, or reckless indifference. Kentucky’s famous animal law case *Burgess v. Taylor* (2001 KY Ct. of Appeals) the tort of intentional infliction of emotional distress is determined by the conduct of the offender than the subject of the offense. In Washington’s *Womack v. Von Rardon* (2006), the court held that “for the first time in Washington, we hold malicious injury to a pet can support a claim for, and be considered a factor in measuring a person’s emotional distress damages.”

26. It is now well-established that domestic violence and animal abuse are deeply connected. A New Jersey study found that in 88 percent of families where there had

been physical abuse of children, there were also records of animal abuse. Of 50 shelters surveyed to which women and children had escaped from domestic violence, 85% reported that women in their shelter talked about pet abuse, 63% of children talked about pet abuse, and 83% said that they had observed the coexistence of domestic violence and pet abuse." Cf. "Domestic Violence Against Family Pets Inclusion very important." Change.org. Web. 2010

http://www.change.org/petitions/view/domestic_violence_against_family_pets_inclusion_very_important

As of 2010, 17 states have enacted legislation to include pets in protective orders. Cf. Rebecca Wisch, "Domestic Violence and Pets." Animal Legal and Historical Center. Michigan State University College of Law. Web. 2010

<http://www.animallaw.info/articles/ovusdomesticviolencelaws.htm>

27. The responses by such highly-organized groups recently here in Indiana during legislative discussions of "the puppy mill bill" and the "anti-dog fighting bill" made these realities even more acute. The Center for Consumer Freedom, a front for alcohol, restaurant, food, and tobacco industries, backs ads and exerts political pressure to create obstacles for advocacy groups from the Humane Society to Mothers Against Drunk Driving. Cf. Humane Society of the United States (HSUS), "Center for Consumer Freedom: Nonprofit or Shill?" Web. Nov. 6 2009

http://www.humanesociety.org/issues/opposition/facts/center_for_consumer_freedom.html

28. Several factors must be proven under a traditional malpractice claim to recover damages for injury to an animal under a veterinarian's care. First, the defendant must be under a duty of care toward the animal in question. This means that the veterinarian had accepted responsibility to treat the animal that the owner brought to his or her office. Second, the actions or inaction of the veterinarian must have fallen below the professional standard of care. Expert testimony from other veterinarians is often used to establish that the defendant-veterinarian's conduct fell below the professional standard. This varies according to the state, but generally it means that the veterinarian did not act with reasonable skill, diligence, and attention as would ordinarily be expected of other veterinarians in the community. Third, this deviation from the standard of care must have been the cause or proximate cause of the animal's injury. In the first example above, the veterinarian's inaction with Fido caused the dog to die. Similarly, the veterinarian's inoculation of Fifi also caused injury to her. With proximate

cause a malpractice plaintiff must show that the veterinarian's actions set in motion a train of events that brought about the injury to the animal without the intervention of any other independent source. Finally, the injury or harm resulted in damages to the plaintiff, meaning not just to the animal in question. While this may seem odd at first blush, it stems from the fact the animal injured is not a party to the lawsuit. Thus, the owner must show that he or she suffered some loss (monetary and, infrequently, emotional). (Cf. Wisch.)

29. One friend of mine has spent close to \$8000 for knee replacements and joint treatments for her beloved dog; another has spent \$5000 for radiation treatment for a cat with cancer.

30. One of the most touching moments in my Animals and Ethics class involved a question from a very tender-hearted student who, after reading that day's assignment on farm animals, asked, "But if we stopped killing the farm animals and freed them, where would they go?" I had to explain that farm animals, like "pets," probably would no longer exist.

31. Pet trusts are spelled out in the Wills and Trusts code, and it is left to each state to determine whether pet trusts are available. Though arrangements can be made through contract for the continued care of a companion animal after an animal dies, pet trusts are legally enforceable.

32. In a number of animal custody cases, the evolving, unwritten standard petitioners and their attorneys borrow from is that of "best interests of the child," so that in a number of more recent pet custody cases, the court, if so inclined (and some courts aren't inclined), might be willing to consider evidence such as who has primarily cared for the animal (including medical receipts), who has the most time for the animal, and who is overall best situated to give appropriate care.

33. Depending on the state in which one lives, in preparing for the possible death of a pet owner, pet trusts may be available, or care for the animal may be arranged by contract.

34. In a number of animal custody cases, the evolving, unwritten standard petitioners and their attorneys borrow from is that of "best interests of the child," so that in a number of more recent pet custody cases, the court, if so inclined (and some courts aren't inclined), might be willing to consider evidence such as who has primarily cared

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