

**DRAFT - PLEASE DO NOT CITE OR CIRCULATE**  
**Mediating Animal Law Matters**

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## I. Introduction

Animal law matters are slowly making their way through our court system, resulting in (and from) changes in the way we, as a society, view or respond to our relationships with non-human animals. Courts are increasingly struggling to reconcile two opposing constructs: the idea that animals are property under the law, and the reality that animals are not pure property and are in fact different from other forms of property. Progress in resolving this tension within the courts and legislatures is, and will continue to be, slow. The question then arises, what alternative exists to address and resolve this tension?

Mediation<sup>2</sup> is a method increasingly turned to in this country as an appropriate alternative to traditional litigation.<sup>3</sup> It has become a fixture in many courts and communities and provides a

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Mediation is only one technique for alternative or appropriate dispute resolution (ADR). While arbitration, mini-trials, med-arb, and other techniques may also be appropriate, this paper will focus on mediation as a technique that is well established and well suited for the realm of animal law. It will be left to others to evaluate additional techniques for suitability, though some of what may be said about the appropriateness of mediation in these settings may also apply to other techniques as a matter of general suitability of ADR.

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“As of the mid-1990s, the National Center for State Courts estimated that more than 200 court-connected mediation programs existed nationwide. The growth and popularity of mediation has been expanding in all areas of the law and it does not appear that the trend will reverse itself any time in the near future. Courts have been implementing mediation programs in an effort to cut costs, increase efficiency, and better respond to the public’s increasing demands on the traditional court system.” Rene L. Riemspach, Mediating Family Disputes in a World with Domestic Violence: How to Devise a Safe and Effective Court-Connected Mediation Program, 17 Ohio St. J. on Disp. Resol. 95 (2001). *See also*: Peter Lantka, The Use of Alternative Dispute Resolution in the Federal Magistrate Judge’s Office: A Glimmering Light Amidst the Haze of Federal Litigation, 36 U. West L.A. L. Rev. 71 (2005). In response to heavy caseloads and budget restraints many federal courts have instituted ADR programs allowing civil

way for individuals to resolve their own problems.<sup>4</sup> Mediation is often successful because it allows the parties to take into account more than just the legal realities affecting a conflict, and the process allows the parties to craft for themselves a remedy that is tailored to the particular needs of a given situation.<sup>5</sup>

This flexibility and autonomy in decision making presents tantalizing possibilities for those with animal law disputes. It also suggests some significant drawbacks, such as outcomes which lack precedential value. How then does, or should, mediation work in the area of animal law?<sup>6</sup>

What happens when existing law has no answer to the legal question posed, or parties wish to deviate from existing law? For instance, how should a court equitably divide a dog, deemed marital property, in a divorce? Dogs, companion animals though they may be, are considered property.<sup>7</sup> If both parties love the animal and wish to continue a relationship with it, the court is

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<sup>4</sup> litigants a viable alternative to traditional litigation.  
*Id.* at 3.

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*See* Carrie Menkel-Meadow: W.M. Keck Foundation Forum on the Teaching of Legal Ethics: The Trouble With The Adversary System In A Post Modern Multicultural World, 38 *Wm and Mary L. Rev.* 5 (October, 1996) *also*: Carrie Menkel-Meadow, New Roles: Problem Solving the Lawyer as Problem Solver and 3<sup>rd</sup> Party Neutral: Creativity and Non-Partisanship in Lawyering, 72 *Temp. L. Rev.* 785 (Winter 1999).

<sup>6</sup>

Though Animal Law encompasses a vast number of legal contexts, this paper will focus on the companion animal context. The phrase companion animal used here is a term of art, simply referring to animals who live with, and are cared for by, humans. It replaces the more common word pet, which is more conducive to the property notions of animals and therefore begs the questions asked here. The term includes, but is not limited to, therapy and service animals, although that is the only meaning of the term as used in the disability field.

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*Pierson v. Post*, 3 *Caines* 175, 2 *Am. Dec.* 264 (N.Y. Sup. Ct. 1805) based its decision on the idea that animals are property. *See also*, 4 *Am. Jur* 2d § 6. *See also*, Sonia S. Waisman,

at a loss for a resolution. There is no custody or visitation for property, no guardian may be appointed to determine what is in the property's (animal's) best interest, and neither party is likely to be satisfied with an award equal to the animal's economic value alone. Further, what happens when only one party wishes to deviate from the law, viewing the animal as more than mere property?

These matters are more difficult to resolve because the law is not well established. The courts and parties have little guidance. In the instance of other very complex legal matters which are hard to resolve, for instance, custody and visitation of children, there are many protections for the interests of children already built into the law which act as a check on the parties' ability to craft outcomes. In the case of animals, no such protections exist, and more problematic, there is no ready mechanism to discuss the need for such protections within the litigation context.

Another critical inquiry is whether the relative youth of this area of law and the need for precedent outweigh the benefits other areas of law have enjoyed from an alternative dispute resolution approach, or alternatively, whether this is a critical time in which to incorporate

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Bruce A. Wagman, Pamela D. Frasch, ANIMAL LAW, Second Edition 2002, Chapter two, Section Five for a discussion of the concept of animals as property. See also David S. Favre, *Judicial Recognition of the Interests of Animals – A New Tort*, 2005 Mich. St. L. Rev. 333 (Summer, 2005) advocating a new tort to deal with claims of animals for protection against harms inflicted by humans. Steven M. Wise, *Rattling the Cage Defended*, 43 B.C. L. Rev. 623 (May, 2002) Discussing critiques to his recent book, *Rattling the Cage*, in which he advocates basic legal common law rights for animals, specifically chimpanzees and bonobos. See also: Gary L. Francione, *Introduction to Animal Rights: Your Child or the Dog?* Philadelphia: Temple University Press 2000, discussing the basic right of animals to not be considered property. See also: Gary L. Francione, *Animals, Property, and the Law*, Philadelphia: Temple University Press, 1994 for a thorough review of animals as property and how future legislation can change our basic views of animal status in society.

alternative thinking about processes for conflict resolution into the field.<sup>8</sup>

This paper will explore these, and other issues which are particular to animal law, and will explore the implications of mediating issues within this emerging area of law. Whether the field of animal law is sufficiently established that it is appropriate to explore alternative methods, such as mediation, for resolving personal, corporate, and societal issues involving animals is an open and fundamental question, and one which academics, activists, and practitioners have not yet addressed.

To address and answer these questions, one needs to know something about animal law and mediation. Therefore, both these topics are explored below in Sections Three and Four. In order to determine more fully whether there is a problem with the way society in general, and the courts in particular, address animal legal claims, and to consider the scope and possible solutions for any such problems, the current legal posture of animals is examined below.

## II. Animal Law - Exploring specific contexts

The following hypothetical situations are offered to help the reader understand how courts (and to a much lesser extent, legislatures and the media) are currently addressing some matters concerning animals. Presented below are four situations a single companion animal may face,

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Consideration of whether mediation is a particularly appropriate method to address and resolve animal law disputes, just as labor law early on, incorporated arbitration as a method of resolving those disputes, is an important question, only lightly addressed here.

with the four corresponding legal responses. The contexts chosen for the hypothetical highlight different structural settings in which the roles of animals may be considered: first, animals in relation to individuals; second, animals interests regulated by the government; third, animals where corporate and government interests are involved; and fourth, animals in relation to business interests.

A. Divorce

1. Hypothetical - an example of animals in relation to individuals

Malik and Natasha have been married for 15 years and live in Northern Ohio. They have two children, Sienna and Juan, 8 year old twins. They also have a dog, a 5 year old beagle, named Sasha. Malik and Natasha are getting divorced. They have reached agreement with respect to the terms of spousal support, custody, and visitation. They have resolved the matter of division of property, with one exception. They cannot agree on who will get the dog. Five years ago, Natasha bought Sasha for twenty dollars. Though she understands that anything purchased with marital assets is part of the marital estate, she feels quite attached to Sasha and wants to keep him. This is especially true because Natasha will have primary custody of the children and they, too, are quite attached to Sasha and want to continue to live with him. Malik, however, disagrees. He loves Sasha and has been the person who primarily cared for him, taking him to the vet when necessary, taking him for walks and to the park for exercise on a regular basis. Natasha and Malik decide to ask the court for assistance in determining an appropriate custody, visitation, and support arrangement for Sasha, and have agreed in advance to abide by any plan the court determines reasonable in this regard.

## 2. Current Response - Divorce<sup>9</sup>

Courts are responsible for the division of marital property upon divorce. Pets are considered property.<sup>10</sup> If property is part of the marital estate, it is subject to division by the court if the parties cannot themselves agree to an equitable division. When parties cannot agree to the division of property, (for instance, who gets the house or television set) courts may order the property sold and the assets equitably divided.

Applying that reasoning to the instant case, a clear argument can be made that Sasha is part of the marital estate because he was purchased during the marriage, assuming the purchase was with funds of the marriage (marital assets). If Sasha is marital property, that status is not affected by who purchased or cared for him. Therefore, absent agreement by the parties, the court can order that Sasha become the sole property of one of the parties, with compensation to the other party for an equitable portion of his value. Or, the court can order that Sasha be sold and the proceeds from the sale be equitably distributed between the parties. Certainly, if the parties can agree who will own Sasha, the court will endorse that decision. However, even if the parties agree to a visitation or support award for Sasha, the court will not validate such an

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The application of divorce law as applied to this animal law question reflects the current status of divorce law in general and is not meant to raise jurisdictional distinctions from state to state or the finer points of this area of law. The author is aware of the variance in divorce law among the states and is using law generally applied simply to indicate how animal issues are addressed.

<sup>10</sup>

Id at \_\_\_\_.

agreement, as it is without jurisdiction (as most judges are currently interpreting the limits of their judicial authority) to do so.<sup>11</sup>

Unfortunately for the court, there is no second hand market for companion animals, unlike cars or even household goods, which would assist it in determining Sasha's value. No one is likely to buy an animal who has lived with others for a while. Sometimes, people give away animals they no longer wish to live with or care for. Often in those cases, the person giving up the animal pays the person assuming responsibility for the animal, rather than money flowing in the reverse direction. Therefore, as a companion animal, Sasha has no resale value and no market value. The court, in lieu of those measures of property valuation, could determine that the purchase price of Sasha is the appropriate measure of value, and award half that amount (or whatever amount is equitable) to the party who does not receive ownership of Sasha. In some cases, the court could decide to assess special value where market value can not be readily determined.

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*Akers v. Sellers*, 114 Ind. App. 660, 54 N.E.2d 779 (1944) Court declined to determine that husband was owner of dog in suit in replevin when the court hearing his divorce declined to make any order with respect to the dog. *Bennett v. Bennett*, District Court of Appeal of Florida, First District 665 So. 2d 109 (1995) Court found that the trial court was without authority to order visitation with personal property and that the dog would appropriately be dealt with through the equitable distribution process. *Arrington v. Arrington*, Court of Civil Appeals of Texas, Fort Worth, 613 S.W.2d 565 (1981) A dog is personal property and not therefore appropriate for the office of managing conservator's consideration as that office was designed for children and not dogs. *In re the Marriage of Stewart*, Court of Appeals of Iowa, 356 N.W.2d 611 (1984) The court decreed that dogs are personal property and the court therefore does not need to determine its best interests.

This may seem an odd result because the parties could make a contract for visiting, and paying for the care of Sasha. Such an agreement could, if made outside the domestic court context, be enforceable by a court with appropriate jurisdiction. A small claims courts, however, which usually lack equitable jurisdiction and have the power only to render monetary judgments would not be able to enforce the visitation part of any such agreement.

Where both parties love the animal and wish to continue a relationship with the animal, as in the instant case, this is an unsatisfactory result. Both parties<sup>12</sup> will be displeased with the court's ruling. Yet what alternatives exist for the court? The court is without jurisdiction to make a custody, visitation, or support award for property. Thus, if the court acquiesced to the parties' request for such relief, any such decision would be without legal grounds to support it and subject to appeal.<sup>13</sup>

Here, the inability of the legal system to address the concern of the parties is the subject of their complaint, rather than the typical challenge based on an outcome disfavoring one party or

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The wife and husband (or in Massachusetts, parties of the same gender) are the parties to the divorce. Though the children certainly have interests in the outcome, legislatures have constrained the courts and parents to be mindful of their interests, but have not made them parties. As the status and role of animals in these situations evolve and become clarified, it is possible that their interests would also be considered in these settings. Currently, they are not parties, nor do they have any rights or interests which we are bound to consider (loosely applying the legal reasoning of *Dred Scott v. Sanford*, 60 US 393, 1857).

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Some courts are beginning to resist this interpretation of the limits of their authority. See *Dickson v. Dickson* No. 94-1072 (Ar. Garland County Ch. Ct., Oct. 14 1994) Divorcing parties first agreed to joint custody, for dog's care and maintenance, later modified to give wife sole custody and husband was ordered to pay half of outstanding debts for the dog's care. This relieved him of all further liability but also gave him no further interest in the dog. See also, *In re Marriage of Fore* No. DW 243974 (Minn. Dist. Ct., Nov. 9 2000) Husband and wife worked out visitation schedule for the dog, but it was not successful because the husband would often refuse to return the dog. See also, *Assal v. Barwick* No. 164421 (Md. Cir. Ct., Dec. 3, 1999) Husband was given 30-day visitation period each summer with animal. But see, *Nuzzaci v. Nuzzaci* (1994 WL 783006) (Del. Fam. Ct. Apr. 19, 1995). Court refused to sign a Stipulation and Order for visitation rights relating to a golden retriever, citing concerns as to the court's ability to make decisions on the custody or visitation of animals in the absence of the parties' agreement and refusing to apply a best interests of the animal approach. See also, Barbara Newell, *Animal Custody Disputes: A Growing Crack in the "Legal Thing-hood" of Nonhuman Animals*, 6 Animal L. 179 (2000)

another after applying the law to their claims. Even if the parties reached a custody, visitation, or support agreement and wanted to have that agreement memorialized in their divorce decree along with the agreements relating to other marital property and their children, the court would not have the jurisdiction to incorporate the wishes of the parties into any order of the court.

This is an example of what results when social reality has gone far beyond contemporary legal reality. Courts<sup>14</sup> and parties<sup>15</sup> have significant difficulty in the domestic relations context even

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Divorce is more difficult with children and significant property at issue. “In the last few decades, mediation and other forms of ADR for disputes between divorcing, divorced, or never-married parents have spread rapidly, particularly for conflicts involving custody and issues about children” Robert E. Emery, David Sbarra, & Tara Grover, Divorce Mediation: Research and Reflections, 43 Fam. Ct. Rev. 22 (January, 2005). Longitudinal research study that found that mediation can (1) settle a large percentage of cases otherwise headed for court; (2) possibly speed settlement, save money, and increase compliance with agreements (3) clearly increase party satisfaction and (4) most importantly lead to remarkably improved relationships between nonresidential parents and children, as well as between divorced parents.

Purpose of study: To evaluate the effectiveness of mediation in comparison to adversary settlement, and the mediation process used was short-term, so as to be practical for court programs, yet the mediation style was also informed by therapeutic considerations applicable to the area of divorce. *But see*: Katherine Kitzmann, Child and Family Coping One Year After Mediated and Litigated Child Custody Disputes, Journal of Family Psychology, 8(2); 150-159 (1994) One year study finding that overall in terms of the parents’ attitudes about child custody dispute, child behavioral problems, parent-child relationships, parental distress and accepting the termination of the marriage, there were no significant differences to the outcome of mediation or litigation.

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“Divorce causes more stress than getting fired and more stress than a jail term. In fact it is more stress than any other single event except the death of a spouse” at <http://www.divorceinfo.com/mediation.htm>. Risk of suicide is 3 times greater for divorcing people than for married people. You’re also more vulnerable to psychiatric illness, homicide, depression, anxiety, motor vehicle accidents, and even physical illness. At *Id.* “Divorce Sucks” Websites have been created to specifically help children and parents through the difficulties of divorce. See <http://www.uptoparents.org/faq.cfm> Up to Parents: Home of Parents’ Commitments to Children of Divorce and <http://www.divorceinfo.com/mediation.htm> promotes mediation in divorce because it is “flexible and confidential” “In child custody disputes, it is usually not in the best interests of the child to have parties cut off contact... The adversarial nature of traditional negotiations between lawyers is claimed to be a major factor in creating

without the animal law concerns. The total incapacity of the court system to address the questions brought to it by these parties indicates weakness in the court's ability to address issues arising out of social change in general, and animal law in particular. The courts will, of course, become more able to address these issues over time, and the mixed results currently emanating from the bench sends signals to the legislature about the need for action on these matters. Legislatures are open to these messages from the judiciary and other, and are beginning to exhibit more willingness than in the past to address matters of animal law.<sup>16</sup>

However, the discourse related to animals in domestic relations matters is not one making much progress, nor is recognition of the need for discussion. So if the courts and legislatures are not helpful here, what about the media? No media campaign can assist the parties here. No matter how successful, any support or awareness derived from such a campaign could not drive a court to issue a decision of the kind the parties seek. Such a campaign might birth legislative attention to this matter, but cannot raise, analyze, and conclude any such inquiry in time to help these parties, or any parties, in the near term. It will be quite a long time before courts are in the

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acrimony between parents. “Connie Beck & Bruce Sales, A Critical Reappraisal of Divorce Mediation and Policy, 6 Psych. Pub. Poly. & L. 989, 1013 (December 2000) *and Also*: Ben Barlow, Divorce Child Custody Mediation: In Order to Form a More Perfect Disunion? 52 Clev. St. L. Rev 499 (examining whether mediation is viable for child custody divorce cases)

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Examples of legislative activity on behalf of animals include: Maine - legislation allowing court orders for protection in instances of abuse to cover animals, LD 1881, NY Times article, April 1, 2006 “New Maine Law Shields Animals in Domestic Violence Cases” by Pam Belluck; Rhode Island - the first state to require cat owners to spay or neuter their pets, M.L. Johnson, *R.I. to Order Cat Owners to Spay, Neuter*, May 24, 2006, Associated Press; Chicago - ban on foie gras, Gretchen Ruethling, *Chicago Prohibits Foie Gras*, New York Times April 27, 2006; and introduction of the PETS Act (Pet Emergency Transportation Safety Act - S. 2548) and the Farm Animal Stewardship Purchasing Act (Bill HR 5557) in Congress.

business of arranging custody and support awards for animals. The question then arises, what are people to do in the meantime? The parties are left to accept an unpalatable reality, or look for alternative approaches to solving their problems.

B. Animal Cruelty

1. Hypothetical - animals interests regulated by the government

As Sienna and Juan are playing outside with Sasha one day, he strays into the neighbor's yard. The teenage boy who lives there, Nicholas, has told the children before that if Sasha gets into his yard one more time he will kill the dog. Nicholas comes outside before Sienna and Juan are able to get Sasha back into their yard. Nicholas yells at the children about the mess the dog makes in his yard. He picks up Sasha and slams him against the garage door repeatedly. The children are nearly hysterical but are finally able to get the dog away from Nicholas and, with their parents, take the dog to the veterinary hospital. The family decides to file a police report with respect to Nicholas' actions. The police decide to file charges. The prosecutor agrees to pursue the case and a court date is set for Nicholas on animal cruelty charges.

## 2. Current Response - Animal Cruelty<sup>17</sup>

Once prosecution proceeds, if the facts above are proven, Nicholas is likely to be convicted of misdemeanor charges of animal cruelty or abuse. It is unclear what penalties would flow to Nicholas in this case. In some jurisdictions there might be fines paid to the court, some jail time, mandatory counseling or a combination of those options. The answer depends on many variables, including whether this is a first offense, the posture of the prosecutor on such cases, the nature of remedies available for such behavior, whether Nicholas admits and apologizes for his behavior, assessment of recidivism risk, and attitude of the judge in question.

As for the family, they would not likely be eligible for victims' compensation funds. If they brought a civil suit for damages, they would likely only receive the costs of any veterinary care affiliated with the incident (or if the dog had died, market value or replacement cost in addition). These monetary damages clearly will not compensate the family for the pain and suffering caused by the incident, or even the tangible therapy costs related to the incident. In most states, non-economic damages are not available as a result of harm to animals and do not flow easily with respect to harm to property. The family is not likely to be even minimally (much less fully)

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There is still a good deal of variation in statutory schemes, application, enforcement, and determination of penalties across jurisdictions. *See in part Animal Protections Laws of the United States of America*, (CD Rom) Stephen K. Otto, Second Edition, 2005, Animal Legal Defense Fund. See also, Pamela D. Frasch et al., State Anti-Cruelty Statutes: An Overview, 5 Animal L. 69 (1999) (looking at the states' schemes for restrictions and penalties with respect to animal cruelty); and Stephen K. Otto, State Animal Protection Laws - The Next Generation, 11 Animal L. 131 (2005) (addressing the trend to increase penalties and enforcement of anti cruelty laws).

compensated for their economic loss because few attorneys would take such a case when the potential monetary recovery would be far outweighed by attorney's fees and litigation costs.

Even more clearly, Sasha himself will not be eligible for any damages. It may be said that the states have determined, in creating an animal cruelty statute, that some animals have the right to be free from abuse. This conclusion would be strongly disputed. Rather, it might be stated that these statutes vest in property owners certain measures of protection which the state is obligated to enforce against those who would damage the covered property. Others would argue that the genesis of animal cruelty laws lay in religious and cultural concerns for one's soul resulting from inflicting harm on lesser creatures. Still others would cite the potential for violence perpetrated on humans as reason for enacting or enforcing these laws. Only animal advocates would likely argue that these laws may, or should, posit rights in the individual animal.

Even if one were to accept that proposition for the sake of argument, the next question that would arise is, in whom does the right to protect those interests vest? Clearly Sasha cannot call the police, or bring a civil suit. He cannot give testimony or spend an award of damages. How then would such a right be protected and vindicated? This is one of the most fundamental questions in animal law today. Once we consider the possibility that animals might not be legally categorized as property, an entirely new set of difficult questions arise. There are many talented and dedicated individuals addressing and suggesting answers to those questions.<sup>18</sup> As

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David S. Favre, *Judicial Recognition of the Interests of Animals – A New Tort*, 2005 Mich. St. L. Rev. 333 (Summer, 2005) advocating a new tort to deal with claims of animals for protection against harms inflicted by humans. Steven M. Wise, *Rattling the Cage Defended*, 43 B.C. L. Rev. 623 (May, 2002) Discussing critiques to his recent book, *Rattling the Cage*, in which he advocates basic legal common law rights for animals, specifically chimpanzees and

compelling as that inquiry is, it is beyond the scope of this paper.

Currently, each state has laws prohibiting the type of behavior in which Nicholas engaged.<sup>19</sup> Police, prosecutors, and courts have been more willing in recent years to move these matters forward and take them more seriously than in the past.<sup>20</sup> This result may flow from many efforts. Animal advocates have successfully presented the link between animal and human abuse.<sup>21</sup> Television shows, such as those on Animal Planet, which show the realities of abuse and the work of those addressing such cruelty, create more public awareness of these matters.<sup>22</sup> Media coverage of animal cruelty cases and other realities have been a factor in persuading

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bonobos. *See also:* Garly L. Francione, *Introduction to Animal Rights: Your Child or the Dog?* Philadelphia: Temple University Press 2000, discussing the basic right of animals to not be considered property. *See also:* Gary L. Francione, *Animals, Property, and the Law*, Philadelphia: Temple University Press, 1994 for a thorough review of animals as property and how future legislation can change our basic views of animal status in society. *See also* Cass R. Sunstein, *Standing for Animals*, University of Chicago Law School, Public Law and Legal Theory Working Paper No. 06 (November 1999); *See also* Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership, and The Moral Status of Animals*, *The Chronicle Review*, February 3, 2006; and *See also* Cass R. Sunstein and Martha C. Nussbaum, eds., *Animal rights: Current Debates and New Direction*, (Oxford University Press 2004).

<sup>19</sup>

Id at \_\_\_\_.

<sup>20</sup>

Stephen K. Otto, State Animal Protection Laws - The Next Generation, 11 *Animal L.* 131 (2005) (addressing the trend to increase penalties and enforcement of anti cruelty laws).

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Frank R. Ascione, *Children and Animals: Exploring the Roots of Kindness and Cruelty* (Purdue U. Press 2005); *See also* Phil Arkow, *The Evolution of Animal Welfare as a Human Welfare Concern*, in *Child Abuse, Domestic Violence and Animal Abuse: Linking the Circles of Compassion for Prevention and Intervention*, Frank R. Ascione and Phil Arkow eds., (Purdue U. Press 1999); and Randall Lockwood and Frank R. Ascione eds., *Cruelty to Animals and interpersonal Violence: Readings in research and Application* (Purdue U. Press 1998).

<sup>22</sup>

Cite to show on animal planet

prosecutors and legislatures to respond. Some legislatures have established increasingly severe penalties for such behavior and have also considered the need for treatment for any mental illness which this behavior may evidence.<sup>23</sup>

Despite this progress, the family who owns Sasha, though perhaps comforted by a criminal conviction, is still left with no recovery for the economic and emotional harm caused by Nicholas.

### C. Experimentation

#### 1. Hypothetical - corporate and government interests are involved

After the divorce, the family sells the home, splits the proceeds, and moves into two new apartments. Sasha has been having difficulty with his eyesight since the incident with Nicholas so the family has been keeping him inside. Because of that, and because of recurring neck pain from the incident, they tend not to put Sasha's collar on unless they plan to be outside. After the move, Sasha gets lost and cannot find his way to either of the new homes. On the day Sasha gets lost, he is not wearing his collar. Sasha spends three days living on the streets until he is picked up by an animal breeder and sold to a medical laboratory where animal experimentation is conducted. Sasha becomes part of an experiment to test a new topical medication. His skin is shaved and experimental medicine applied to test for efficacy and irritability. After being at the lab for three weeks, Sasha and the other animals are freed by individuals who identify

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See generally Animal Protection Laws of the United States, Id at \_\_\_\_.

themselves as members of the Animal Liberation Front. The incident, prosecution of the activists, and Sasha, are in the local news, which enables Malik and Natasha to claim him.

## 2. Current Response - Experimentation<sup>24</sup>

The criminal courts are comfortable addressing the actions of the activists. As to the person who took and sold Sasha, if the person were found and the facts above proven, such a person might be subject to prosecution for theft. She took property that did not belong to her, converted it to her use, and profited from the sale of such property. A likely defense would be that the person considered Sasha to be abandoned property. Without dogs tags, identifying information or license, the defendant might argue that she was not on notice that this property was owned by another and that absent such notice, there was no duty to find an owner or clarify the question of ownership. The local regulations requiring dog tags would be relevant and perhaps deprive the family of redress. Though a court would have jurisdiction to hear this matter, the outcome of such a case is not immediately clear. If the defendant was found liable, Natasha and Malik would have a strong basis for filing a civil suit. However, even if they were successful, little financial responsibility would result to the defendant and again the burden of attorneys fees and litigations costs would far outweigh any likely recovery.

As to the person who experimented on Sasha, Malik and Natasha might try to urge a prosecutor

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This paper is concerned only with research that is legally conducted and does not inquire in to the efficacy or morality of research, or research that does not meet the standards imposed by federal law.

to bring claims of receiving stolen property and animal cruelty. If there is evidence that the individual knew or should have known that Sasha was stolen, perhaps a criminal case would lie. And certainly if the neighbor, Nicholas, had behaved in the same way towards Sasha as those in the lab did, he would be again liable for animal cruelty. However, in this case, ownership of Sasha is the only legal question. If the person in question here is a bona fide employee of a licensed lab, the same acts which would result in liability for the neighbor results in none for the lab employee as long as he (or the lab) owns Sasha. Researchers are exempted from prosecution for acts which might otherwise violate anti-cruelty statutes, by the Animal Welfare Act (AWA) which regulates the field of treatment of animals in research and experimentation.<sup>25</sup> If the researcher did not provide housing, exercise, or food and water to Sasha, liability might arise.<sup>26</sup> But beyond that, and to the extent that denial of such basic necessities is deemed necessary by the research protocol, those behaviors would be safe from prosecution. Very few prosecutions are pursued or are successful against laboratories or their personnel given the nature of the AWA. Congress has determined that society's interests in research outweighs harm to animals that would in other contexts be illegal. Natasha and Malik would have a hard time convincing a court that they have standing and a cognizable claim. Again, they are left to accept an unpalatable reality, or to look for alternative approaches to solving their problems.

#### D. Veterinarian Malpractice

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<sup>25</sup>

Animal Welfare Act, 7 USC §§ 2131 et seq.

<sup>26</sup>

Animal Welfare Act, 7 USC §§ 2131, housing - section 3.2-3.6, exercise (dogs) - section 3.8, food - section 3.9, water - section 3.10.

1. Hypothetical - animals in relation to business interests

When Malik and Natasha go to claim Sasha, they learn that the activists have taken him to a veterinarian, Dr. Animas, who happens to be their own vet. However, Dr. Animas has been called away on an emergency and Dr. Little tends to Sasha instead. When the family returns to pick up Sasha, his wounds have been dressed, but they discover that Dr. Little also gave Sasha the wrong medication which resulted in Sasha having seizures and going blind.

2. Current Response - Veterinarian Malpractice

If the facts above were proven as to Dr. Little, the outcome of litigation would depend on the jurisdiction in which the claims were brought. Most states do not recognize claims for veterinary malpractice.<sup>27</sup> However, most would recognize a common law or statutory negligence

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<sup>27</sup>

Veterinarian malpractice is an area of law in some significant flux. State courts and legislatures are considering issues related to claims for compensation that go beyond mere negligence and rely on the relevant professional standards of veterinarians. Some courts are still only comfortable with veterinary negligence claims absent authority from the legislature. These claims have a lower evidentiary threshold and result in lower damages. Concerns for increased malpractice insurance costs have been raised, and that is being balanced by concerns for professional accountability and the possibility of non-economic damages which would compensate individuals in circumstances of professional negligence beyond the mere market value of the animal injured or killed. See generally, Rebecca J. Huss, *Valuation in Veterinary Malpractice*, 35 Loy. U. Chi. L.J. 479 (2004); Katie J.L. Scott, *Bailment and Veterinary Malpractice: Doctrinal Exclusivity or Not?*, 55 Hastings L.J. 1009 (2004); Elaine T. Byszewski, *Valuing Companion Animals in Wrongful Death Cases: A Survey of Current Court and Legislative Action and A Suggestion for Valuing Pecuniary Loss of Companionship*, 9 Animal L. 215, Chris Green, *The Future of Veterinary Malpractice Liability in the Care of Companion Animals*, 10 Animal L. 163 (2004); *People v. Arroyo*, 777 N.Y. S. 2d 836 (date), Judge concluded no duty to provide veterinary care.

or breach of contract claim in these circumstances.

Again, the issue of damages would depend on the jurisdiction. Ohio, for instance, does not recognize non-economic<sup>28</sup> damages for injury to animals, or for injury to humans as a result of injury to animals.<sup>29</sup> Some states have begun to allow for such recovery.<sup>30</sup> The family would still have even more difficulty finding a lawyer to take a case of veterinary malpractice because such cases require expert testimony to prove the claim, further increasing the costs of litigation. The limits on damage to recovery for breach of contract or damage to property, act as a disincentive for litigating these matters.

Another option for the family would be to make a complaint to the appropriate licensing body

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Non-economic damages refers to a category of damages that include losses due to pain and suffering, loss of companionship and the like. These are damages that do not compensate economic loss, but rather emotional or other loss that is not easily calculated through economic analysis.

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*Sean and Mellisa Oberschlake v. Veterinary Associates Animal Hospital*, 151 Ohio App. 3d 741 (2<sup>nd</sup> App. 2002) – where the appellate court dismissed appellants argument that non-economic damages should be awarded for animals, and that animals should be distinguished from other personal property. The Court held that damages were properly limited to costs connected to improper surgery and did not include emotional distress or the pain and suffering of either the dog or the owners. *See also, Andrew Pacher, Jr. & Boomer Pacher, et al. v. Invisible Fence of Dayton*, 154 Ohio App. 3d 744, (OH 2<sup>nd</sup> App. 2003) where the 2<sup>nd</sup> Appellate Ct held that Ohio does not recognize a cause of action for severe emotional distress caused by injury to property (dog) and that the dog's status as "personalty" deprived him of any status to sue.

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Most recently, *Womack v. Von Rardon*, 24221-8-III, Division III, Washington Court of Appeals, May 25, 2006 (Div. II, published) the court granted \$5,000 recovery for the loss of a pet cat and for emotional distress of the owner; and initially, Tennessee's T-Bo Act, TN ST § 44-17-403 (2000).

which oversees the professional conduct of veterinarians and both issues and can revoke licenses.<sup>31</sup> Courts have jurisdiction to review the decisions of such boards in the revocation of licenses or sanction of negligent veterinarians. He family would have no control over, or say in, the process. Once more, the parties are left to accept an unpalatable reality, or look for alternative approaches to solving their problems.

#### E. Alternatives

If the above approaches are not optimal for either individuals or society in terms of cost, time, or resolution of issues, alternative approaches should be considered.<sup>32</sup> This is not to suggest that litigation, legislation, or media approaches should cease or that they have no value, for they clearly do. It is simply to ask whether there are other, complimentary, approaches that might be added to this list of options.

Although one could consider many other approaches or combinations of approaches, this paper is focused on mediation in particular. So how does mediation compare as an approach? There is no evidence that mediation is currently being used in any systemic or noticeable way to resolve issues relating to animal law. There is no information therefore about the appropriateness or

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Pennsylvania, *Grounds for Disciplinary Proceedings*, 63. P.S. § 485.21 (2005). Idaho, *Grounds for Discipline* Idaho Code § 54-2115 (2006). Tennessee, *Denial, suspension, or revocation of license*, Tenn. Doe Ann. § 63-12-24 (2005).

<sup>32</sup>

Certainly, these outcomes are not optimal for Sasha, whose interests at this point the courts are powerless to consider.

efficacy of the use of mediation in this context. This appears to be a question of first impression. In order to answer this question, additional information about both the status of animals in our society and mediation is needed and follows.

### III. Animal Law - Identifying and Exploring the law and related issues generally

Now that some specific tension between the goals of parties in litigation with outcomes has been highlighted above, it is appropriate to explore the source of that conflict a bit more broadly.<sup>33</sup>

#### A. The changing nature of our relationships with animals - selected overview

The majority of households in the United States have companion animals.<sup>34</sup> The amount of money spent on these animals, for food, clothing, medical care, entertainment, exercise and the like indicates that care of animals is one of the more significant industries in our country.<sup>35</sup> This

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The scope of this section is somewhat limited. It does not attempt a comprehensive evaluation of all of the contexts in which human-animal relations and disputes arise. But rather, the author hopes to provide sufficient context to show something of the current state of evolution in the way we think, eat, purchase, live and generally interact with animals, sufficient to highlight the widespread nature of both what is at stake and changing. This is not to say how much movement has occurred or what is still to come, but that as a result of the completely intertwined nature our human's relationship with other animals, that when change comes, it too is widespread and has far reaching impact and must be considered.

<sup>34</sup>

In 2004, 112.4 million households had companion pets, comprising of 358.8 million pets in American households, which includes dogs, cats, fresh and salt water fish, birds, small animals, and reptiles. American Pet Products Manufacturers Association, *2005-2006 National Pet Owners Survey*.

<sup>35</sup>

Estimated at \$35.9 billion by the end of 2005. Rebecca Boreczky, Pet projects, *The Daily*

economic reality reflects an emotional one. People in this country who live with companion animals do not treat them purely as property. It makes no economic sense for an individual to spend \$470 dollars at the veterinarian's office for a five year old cat purchased for \$15 dollars. But that reality, and others like it, is replayed over and over every day in this country. If people felt their animals were mere property, they would get new pets rather than try to heal older, sick pets with no cognizable market or economic value. However, this is not the case.

In fact, the trend is in the opposite direction. People now can purchase health insurance policies for their animals.<sup>36</sup> Companies specialize in cremation, burial and memorial services for animals.<sup>37</sup> Increasingly invasive and extensive medical care is available for animals, including chemotherapy and significant surgeries.<sup>38</sup>

Though there are many individuals who make a living repairing damage to property, none organize their businesses so that they regularly charge far more than the purchase price or

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<sup>36</sup> Record, April 1, 2005.  
"400 million in online pharmaceuticals, \$11 billion in companion animal care services and about \$17 billion in veterinary services" Id.

<sup>37</sup>

Information on burial, cremation and memorial services for animals Pet burials range from \$250 - \$1,000, any type of service is available. Cremation is the cheapest option. Cremation Urns: \$24.00-\$79.00 for bronze, metal, brass, Standard Pet Casket: \$69.95-\$249.95, Craft Persons Series Pet Casket: \$29.95- \$199.95, Cremation Keepsake Jewelry: \$39.95-\$49.95 Angel Sleeping Pet Caskets <http://angelsleeping.excitemerchant.com/page/10sq/Home.html>. See also, The Pet Casket Store, <http://www.thepetcasketshop.com/Index.html>, <http://www.casketsforpets.com>, All About Pet Urns <http://www.allaboutpeturns.com>, Pet Memorials.Org, <http://www.petmemorials.org/id9.html>.

<sup>38</sup>

Russell Smith, *Surgery for Fido and Garfield*, Sweetwater Reporter, (Sunday May 25, 2003) (Information on newer surgical techniques for pets, including cosmetic surgery and transplant surgery.)

replacement cost (value) of the property. None that is, other than veterinarians, for this is exactly what veterinarians do, and must do, in order to stay in business.<sup>39</sup> And while we have heard much about the lack of doctors, we hear no corresponding concern for lack of veterinarians.

It seems reasonable to assert that the market forces supporting animal related industries rest on something beyond pure rational economic choice, but of sufficient merit nonetheless to sustain these industries. That something is the emotional bond people have with their animals. This bond, like the bond between humans, cannot easily be quantified. Yet the bond between humans is recognized in both economic and legal terms. Negligent medical services resulting in the death of one's spouse gives rise to legal claims for economic loss such as lost wages, but also non-economic loss, such as pain and suffering or loss of consortium. These causes of action are not generally accepted yet for loss or harm created as a result of damage to the human-animal bond. This creates dissonance in our lives and legal system.

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

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One notable irony is that veterinarians rely on people making this unreasonable economic choice in order to sustain their businesses, and yet many seek to assert the low economic value of animals as property when it comes to paying damages for negligence.

Yet individuals attempt to do all these things and more for their companion animals.<sup>40</sup> Why? Why are animals, as a category of property, treated so differently in reality, if not in law? It is not just individual choice which reflects this different approach to addressing issues relating to animals compared with other, even favored, forms of property. As seen above, the legislatures of each state have determined that is a violation of state law to abuse or neglect a certain category of property called animals.<sup>41</sup> Though there may be arguments for such laws to exist

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Memorial services - Id at \_\_\_. Medical treatment - Id at \_\_\_\_\_. Insurance policies for animals - Every year Americans spend \$90 million on health insurance policies for their pets, and the policies are the number one requested corporate employment benefit after health and dental insurance. Christopher Green, *The Future of Veterinary Malpractice Liability in the Care of Companion Animals*, 10 Animal L. 163, (2004); and See also Popular pet insurance: [www.petinsurance.com](http://www.petinsurance.com), [PetCareInsurance.com](http://PetCareInsurance.com).

A strong minority of states allow pet trusts, such as Alaska, California, Colorado, Michigan, Missouri, Montana, New Mexico, New York, North Carolina, and Utah, many states without specific state statutes allow 'honorary trusts for pets' Darin I. Zenov and Barbara Ruiz-Gonzalez, *Trusts for Pets*, 79 Fla. Bar J. 22 (December 2005). See also. Rebecca J. Huss, *Separation, Custody, and Estate Planning Issues Relating to Companion Animals*, 74 U. Colo. L. Rev. 181, (Winter 2003). See also. Jennifer R. Taylor, *A "Pet" Project for State Legislatures: The Movement Toward Enforceable Pet Trusts in the 21<sup>st</sup> Century*, 13 Quinn. Prob. Law Jour. 419 (1999). See also Gerry W. Beyer, *Pet Animals: What Happens when their Humans Die?* 40 Santa Clara L. Rev. 617 (2000). See also. Joseph D. Growney, *The Need for an Enforceable Pet Trust Statute in Missouri*, 72 UMKC L. Rev. 1053 (2004). See also. Christine Cave, *Trusts: Monkeying Around With our Pets' Futures: Why Oklahoma Should Adopt a Pet-Trust Statute*, 55 Okla. L. Rev. 637 (2002).

Divorce courts are increasingly being faced with deciding pet custody issues – How the pet is valued can vary dramatically and trial courts often approve settlement agreements that award custody and even support – 'petimony' to one spouse in a divorce proceeding. Rebecca J. Huss, *Separation, Custody, and Estate Planning Issues Relating to Companion Animals*, 74 U. Colo. L. Rev. 181, (Winter 2003)

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Each state determines what animals are covered by anti-cruelty laws. Id at \_\_\_\_ .

with respect to other forms of property,<sup>42</sup> none are yet in effect. Though there are laws regulating the maintenance of homes and real estate, and the emissions of automobiles, none of these are motivated by concern for the benefit of property itself or seek to criminalize those who do not maintain these types of property. Rather, these laws and regulations are in effect because of some common good asserted, such as the maintenance of property values or air quality standards in a community.

As discussed above, it can be argued that anti-cruelty laws are not designed for the benefit of the animals themselves, but rather for their owners and for society. Accepting that position, one must ask why animal cruelty laws are in the criminal code, and not in the zoning or other codes related to property. If a state legislature does not care whether one abuses or neglects a book or a chair, why should it care if a person abuses or neglects an animal? That is, if an animal is really just property like all other types of property, entitling neither the animal nor the owner to special or different rights or consideration, why are animals (or their owners) granted special legal protection in cruelty cases?

The answer, of course, is that animals are different. Animals are living, breathing, sentient beings. Many animals exhibit all the characteristics modern philosophers require for the

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Arguments can (and have been) be made for treating other forms of personal property differently, engagement rings, wedding albums or dresses, heirlooms, or property of historic or cultural value. Emily L. Sherwin, *Constructive Trusts in Bankruptcy*, 1989 U. Ill. L. Rev. 297, n. 154 (1989) (Protecting property (heirlooms) that “becomes “bound up” with individuals’ sense of themselves or their future”); and Sarah Harding, *Justifying Repatriation of Native American Cultural Property*, 72 Ind. L.J. 723 (1997) (Discussing special protection for cultural property).

conveyance of rights, legal consideration, and protection of status.<sup>43</sup>

With the increasing visibility and activity of animal advocacy organizations and those opposing them, these, and other questions concerning the relationship between humans and animals, have resulted in dialogue and some recent legal and social developments. One such area of development can be seen in the police officers and prosecutors who have begun to take animal abuse cases more seriously.<sup>44</sup> They appear to do so for two reasons. First, they have come to believe that these cases often occur in affiliation with abuse of humans.<sup>45</sup> Taking these cases more seriously gives law enforcement officials the opportunity to intervene in an animal abuse case and perhaps discover and resolve a case of spousal or child abuse.<sup>46</sup> Secondly, some law enforcement officials and mental health professionals accept the view that violence is a trait that often escalates if not curbed.<sup>47</sup> Therefore, some of these professionals now advocate for early and aggressive intervention, though there is no agreement yet whether the best approach to this problem is harsher criminal penalties or treatment and therapeutic responses. Changes in how

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See Jeremy Bentham, *The Principles of Morals and Legislation* 310-11, n 1 (Prometheus 1988), and John Rawls, *A Theory of Justice* 505 (1971), and Peter Singer, *Animal Liberation* (rev. ed., Ecco 2002) (1975).

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Id at \_\_\_\_.

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Id at \_\_\_\_.

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See legislative history of Maine bill protecting animals in domestic violence cases, and NY Times article, April 1, 2006 “New Maine Law Shields Animals in Domestic Violence Cases” by Pam Belluck.

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Id at \_\_\_\_.

police, prosecutors, and courts address animal abuse, though stemming primarily, for some, from motivations to help humans, have ancillary benefits for animals. And certainly, others are motivated to protect the animals themselves from abuse.

Additional development in the attitudes towards animals can be seen in a variety of ways. These include the depiction of animals in popular media; increase and frequency of activist activity and the corresponding responses (protests, boycotts, advocacy and other activity); the rise and fall and rise of the economic outlook of the fur industry; declines and new initiatives to promote and protect hunting and fishing; increases in vegetarian options at restaurants and stores; focus on the source and treatment of animals before they become food; the advent vegan labeling on food, health and beauty products; and labeling of shoes and other clothing items; the creation and increase of animal bar associations and committees, law classes and student groups; trend information from PETA and others; the move to increase penalties for animal abusers; changes in the use of the word pet to companion animal in common parlance and in some municipalities; labeling animal rights advocates (ALF in particular) as terrorists; and more awareness and discussion about animal hoarders. This list could go on and on and is only meant to briefly show how broad discourse has become with respect to animal issues.

One more specific and recent example of an increased awareness of the role of animals in our lives results from the tragedy of the 2005 hurricane season. Many individuals refused to leave their homes without their companion animals. Emergency personnel were directed to leave the animals behind, and therefore many individuals stayed with their animals rather than seeking shelter. This phenomenon created significant social and political dialogue, resulting in the

creation of the federal PETS Act (Pets Evacuation and Transportation Standards Act of 2005) legislation, Louisiana Senate Bill 607, and a letter from the American Bar Association in support of federal legislation to address these issues, to name a few.

Coupled with this development in the social awareness of issues relating to animals is the growth in our scientific understanding of the nature and capabilities of animals.<sup>48</sup> Where some once claimed that animals could not feel, suffer, or reason,<sup>49</sup> now scientists seem to have accepted that for many species of animals, (most mammals for instance) these traits are present and verifiable.<sup>50</sup>

The evolution of scientific knowledge that relates to the animal field is not restricted to animal behaviorists. Two other areas of scientific endeavor that are closely related to animal issues are briefly examined. One is the situation that arises when an individual takes in far more animals than she can care for. Some psychiatrists have labeled this condition “hoarding” or “collecting” and consider it an obsessive-compulsive disorder.<sup>51</sup> These situations are a good example of the

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Steven M. Wise, *Drawing the Line: Science and the Case for Animal Rights* (Persueus Publishing 2002); Jane Goodall, *Chimpanzees I Love, Saving their World and Ours* (Scholastic Press 2001), Jane Goodall, *In the Shadow of Man*, (Mariner Books, rev. ed. 2001), Dian Fossey, *Gorillas in the Mist* (Houghton Mifflin 1983). See generally the Gorilla Foundation at [www.koko.org](http://www.koko.org).

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See Rene Descartes, *Discourse on the Method and Meditations on First Philosophy* 34-36 (David Weismann, ed., Yale Univ. Press 1997) (1637).

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Id at \_\_\_\_.

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Corresponding Author Randy Frost, Ph.D., *People Who Hoard Animals by The Hoarding of Animals research Consortium*, April 2000, Vol. XVII, Issue 4 - from the *Psychiatric Times*

interdisciplinary nature of animal issues. These cases often involve, doctors, psychiatrists, psychologists, veterinarians, police, animal control or humane officers, lawyers and courts.

A second area of scientific development with a focus on human behavior is animal cruelty and abuse. Some professionals worry that a person who treats animals cruelly, especially in childhood, may be more likely to escalate to committing violence on humans than individuals who do not.<sup>52</sup>

So what do the developments in how our society conceptualizes the role and nature of animals teach us? What is their relevance? If people treat animals differently from other forms of inanimate property; if scientists no longer find much separation between animals and humans in the capacity to sense and if they recognize some capacity to reason; if our own elected representatives see fit to offer more protections for animals against abuse and neglect and in times of disaster, then why are the courts so slow to recognize that animals are not pure property? This is a difficult question to answer. Perhaps before pursuing an answer, it would be useful to consider in more detail a few ways in which animal issues are addressed in courts and through other avenues.

#### B. Assessment of current approaches to resolving animal law questions<sup>53</sup>

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website [www.psychiatrictimes.com](http://www.psychiatrictimes.com).

<sup>52</sup>

Id at \_\_\_\_

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The focus of this paper is not on an analysis of legislation, litigation or media approaches to resolving the questions of animal law. Therefore, little time and attention will be spent on a

Are current legal outcomes with respect to animal law questions optimal for individuals or society? That is a question that cannot likely be answered with any consensus. The answer also is not likely to be static. As we evolve in our understanding of the matters at stake, the questions and answers also evolve. If we cannot answer this question, we need to consider another.

Without consideration of outcomes, are the *approaches* described above for resolving these questions optimal? The significance of this question rests on the assumptions our legal system is built upon, that is, if the process is designed to achieve just results, then the overall outcomes will be generally acceptable to society, even when the process does not work well in specific instances.

What approaches are currently used to address and resolve questions of animal law? Those involved in promoting, or defending against, the expansion of recognition of animals in our society use the same methods all other social justice movements have used. They make appeals to and through, and struggle with, all three branches of government, the executive, legislative and judicial. Dialogue and debate are conducted via legislation, litigation, and use of the “fourth estate”, the media. Though significant consideration of all these approaches is warranted, that endeavor is beyond the scope of this paper which will focus primarily, and summarily, on the litigation and legislative venues with an eye toward determining whether they are effective or sufficient.

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critique of these approaches, relying instead on what has been written elsewhere, and working on the presumption that these approaches will not bring to a quick conclusion the debates within the animal law field.

## 1. Litigation

The main approach for animal advocates to press for change is to bring new and innovative cases before the courts. Though this approach is currently being used by animal advocates,<sup>54</sup> it is costly and time intensive and there is no reason to assume this approach alone will resolve these matters. As seen above, the costs of litigation are likely to far outweigh any recovery. Though these cases are no more costly than other types of cases, because the recovery is less certain, and likely to be lower than in other cases, the costs of litigation are a significant drawback to activists and individuals wishing to resolve animal law disputes through the courts.

Courts are limited by precedent and statute to consider animals as property. Much has been written about animals as property from the early days of our nation. Yet, until new legal interpretations of existing laws and cases allow judges to move beyond well codified notions of property law to address animal law issues, or until legislation changes the status of animals, courts will be limited in what they can do for people seeking resolution of animal law disputes.

Even when the courts are more able to address matters of animal law, they will not likely be able to resolve disputes for which there is no consensus in society. One of the things litigation cannot do for those who wish it, is to change the nature of how we deal with animals in our society in the near future. It also cannot satisfactorily address certain questions relating to animals when

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See generally the websites, [www.aldf.org](http://www.aldf.org), [www.hsus.org](http://www.hsus.org), [www.peta.org](http://www.peta.org)

there is insufficient legal support for doing so. It cannot even reflect changes in the social reality with respect to animals. Litigation has been utilized to address questions regarding the role, rights, and responsibilities of African Americans, women, children, people with disabilities, the gay, lesbian, bi-sexual, transgender, intersex, and other communities or groups in our society and has not ended the debate or dialogue on these matters.

Another weakness in a litigation approach is that, absent class action or Supreme Court ruling, change through the court system is on a case-by-case basis. It takes a long time before the decision of a state court in Nebraska or North Dakota becomes the majority approach for the rest of the nation.

Though litigation is a strong force for change in our society, and is important in maintaining the rule of law, it can only be a long term strategy for addressing animal law concerns, absent the unusual case. Litigation is a necessary part of the discourse on the role of animals in society, but not the only one.

## 2. Legislation

Another approach for animal advocates to pursue their goals is to address their legislatures for reform. This is being done locally as well as on the state and federal level.<sup>55</sup> This approach has

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Id at 54.

resulted in some change.<sup>56</sup> However, this approach also requires significant time and resources and it requires compromise. Much of the critique above applies here as well, in terms of resource and time requirements.

One benefit of legislation is its power to impact large numbers of affected individuals with one act. Some legislation is meaningful and immediately significant, like the recent Maine and Rhode Island initiatives.<sup>57</sup> Others are more symbolic, like those municipalities which declare that animals shall no longer be referred to as pets, but as companion animals.<sup>58</sup>

Here, compromise is very much a part of the process. Sometimes, the parties involved are happy with the result, perhaps the PETS Act or similar responses to the hurricanes fit that category. But more often, the parties are happy to move incrementally toward their goals. It cannot be said that the legislative approach to the issues of the role, rights, and responsibilities of women, children, people with disabilities, gays and lesbians, the environment, or other groups and interests in our society has successfully concluded debate on those issues.

### Alternatives

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Id at 16.

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Id at \_\_\_\_.

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R. Scott Nolen, Pet Owners in San Francisco become 'pet guardians' JAVMA News, March 1, 2003. See generally, The Guardian Campaign, [www.guardiancampaign.com](http://www.guardiancampaign.com), The Guardian Study: An Examination of the Attitudes, Perceptions and behaviors of Companion Animal Guardians and Pet Owners.

If litigation and legislation are not sufficient alone or together, to solve the problems related to animal law that individuals have currently, what alternatives exist? We now turn to an examination of mediation as a process and to an assessment of how it works when applied to animal related issues.

#### IV. Mediation as an approach

In order to critically assess whether mediation is a good approach to resolving animal law issues, one must first understand some basics about mediation. Though this paper in no way purports to present a comprehensive summary of mediation, it does present some of the basics by way of approach as well as theoretical critique and support for the process, as a process. It then proceeds to apply and assess the process in the animal law context.

##### A. What is it

Mediation (like litigation) is a process for resolving disputes. Mediation is often called facilitated negotiation. Typically, the mediator brings the parties together and encourages them to develop their own solution to their dispute. No consensus exists within the ADR community regarding a definition of mediation. In fact, many practitioners do not accept one another's descriptions or models of mediation.

There are, however, a few concepts accepted as basic and necessary for mediation. These include:

- The need for a neutral, the mediator, who attempts to help parties to a dispute reach a

mutually agreeable settlement

- The neutral must not have a stake in the outcome of the dispute
- The ability of the parties to design, accept, and/or reject any potential resolutions
- The need for confidentiality

The long list of things about which there is no agreement in the mediation community includes:

- Whether the mediator must be trained
- Whether it is preferable to have a lawyer mediator in legal disputes
- Whether the mediator should be facilitative (simply a person in charge of the process and trying to facilitate the parties developing their own solution) or evaluative (more involved with the process, suggesting outcomes and evaluating options and likely results at trial)
- Whether the agreements should be private or filed with a court
- Whether there is a preferred process or style of mediation (e.g. the step process vs. transformative mediation)
- Whether it must always be voluntary or can be compelled
- Whether it is useful or appropriate in all contexts

Regardless of the style used, or how any particular mediator resolves the questions noted above, the use of mediation is significantly increasing in courts, schools, business, government agencies, and communities across the country. To understand why, it is useful to consider the

utility of mediation in its many forms.<sup>59</sup>

## B. Why it is useful

When the process of mediation is used successfully, there are a number of positive outcomes including efficiencies in cost and time as well the parties' ability to exert control over the outcome, and to a lesser the extent, the process.<sup>60 61</sup>

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Judge Karen-Arnold Burger, *Municipal Court Mediation: Reducing the barking Dog Docket*, 35 *Court Review* 50 (1998); and Daniel Marcus & Jeffrey M. Senger, *ADR and the Feral Government: Not Such Strange Bedfellows After All*, 66 *Mo. L. Rev.* 709 (2001); and Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 *Wash. U.L.Q.* 47 (1996)

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Carrie Menkel Meadow, *Motors and Fathers of Invention: The Intellectual Founders of ADR*, 16 *Ohio St. J. On Disp. Resol.* 1 (2000), and Clark Freshman, *The Promise and Perils of "Our" Justice: Psychological, Critical, and Economic Perspectives on Communities and Prejudices in Mediation*, 6 *Cardozo J. Conflict Resol.* 1 (2004)

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Additional issues arise at the very notion of mediating matters arising out animal law as it is an emerging area of law. What is the best way for the justice system, and those involved in it, to address legal matters relating to animals? Some would say that only through traditional litigation will we see resolution of legal questions relating to animals. This is a sound response - it is important for any emerging area of law to develop and codify precedent. One might also posit that it is through the resolution of cases in the court system, and the resulting social dialogue, that community consensus is formed and evolves. On the other hand, one might also logically claim that an alternative process is more likely to allow for the development of satisfactory outcomes in those cases where the law is not sufficiently developed to take cognizance of certain claims. As long as the law does not recognize in non-human animals more than mere property status, it cannot recognize, and therefore compensate, any number of harms asserted by those who feel themselves in a relationship with those non-human animals.

A number of ancillary questions then also arise. Is it possible to determine under what circumstances mediation or litigation is preferred in resolving legal disputes relating to non-human animals? Is it possible to develop guidelines to help us make those determinations? How much does, or should, the law developing around animals inform mediation processes. Does private justice always hurt the development of an emerging consensus in a developing area of the law? Or can private justice in large enough quantities inform the development of the law

## 1. Cost and Efficiency (parties and courts)

First and foremost, mediation is often a faster and less expensive way to address problems.

Some courts and communities offer free mediation services. These services may be available before, or in other cases, only after lawsuits have been filed. If parties choose mediation before filing a lawsuit, both they and the courts may be spared the time and expense of a suit if the matter is settled. Further, individuals and entities will be spared the creation of a public record (eviction, bankruptcy, etc.) which may cause difficulty in the future.

If mediation occurs after a suit is filed and is successful, it can save the parties and the court the time and expense of a trial as well as some, or all, of the intensive discovery and motions portions of the case. If mediation occurs after filing, it cannot save whatever costs have already been expended, though it can allocate those costs in a way the parties deem fair through a mediation agreement. Certainly, if mediation is not successful, it may not save the parties any of the costs incurred in the process. However, failed mediations often do not create inefficiencies as the parties are free to continue the development of their cases while preparing for or engaging in mediation, and even when not resolving the entire case, often some issues can be resolved or narrowed.

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through individualized trial and error and assessment of outcomes? Does the explicit nature of the questions of morality and fairness in the context of legal issues relating to non-human animals affect the answers to these questions more than in other contexts where moral questions are not recognized or are more implicit? Is it appropriate for parties to use mediation expressly because they feel there is inadequate remedy at law? Do parties in mediation look for more equitable application of the law or exceptions to the law? Only some of these, and related questions, are within the scope of this paper - though attention is due to them all.

When parties are successful in reaching an agreement, this relieves the court's docket both in the immediate case, and also often in enforcement and other follow up matters. Studies indicate that parties are more likely to keep the agreements they make than those outcomes imposed on them by courts.<sup>62</sup> Parties lose less time away from work, pay less toward collection of judgments, and often get much faster resolution than is possible in court. Though a court may issue a judgment, collection is the responsibility of the successful party. However, a mediator generally takes those matters into account in crafting an agreement with the parties and often cases are not resolved without immediate transfer of payment or an enforceable promise to pay.

The cost and efficiency benefits of mediation can be applied to any area of law which is addressed by mediation. The measure of benefit is not related to the area of law and therefore the same benefits and risks of mediation, in terms of cost and efficiency, apply to animal law equally as to others.

## 2. Control of process and outcome by parties

In mediation, parties may design an appropriate response to their own dispute. The parties are

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Ann C. Hodges, Dispute Resolution under the Americans with Disabilities Act: A Report to the Administrative Conference of the United States, 9 Admin L.J. Am. U. 1007 (Winter, 1996); and Nancy Ver Steegh, Yes, No and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence, 9 Wm & Mary Jo. of Women & L. 145 (Winter 2003); and Nina R. Meierding, Does Mediation Work? A Survey of Long-Term Satisfaction and Durability rates for Privately Mediated Agreements, 11 Mediation Q. 157 (1994).

able to explain what happened, why they feel the way they do, and what they would like to see happen. The parties are more engaged in, and have more control over, the process than in the litigation setting. It turns out that sometimes it is more important for a party to tell her story than to get a certain monetary award. Parties often talk about “having their day in court” or wanting to “tell it to the judge.” However, it is extremely rare for a party to be able to tell her story in court in an uninterrupted fashion and escape cross examination. It is also rare for a party to be able to tell her story directly to a judge without interruption or questions. Whereas, in mediation, the process is designed to allow the parties to tell their stories, uninterrupted, to one another and the mediator. Very often, once the parties hear completely from one another, the door to resolution is opened.

In a mediation the parties are free to accept or reject any proposed settlement, to suggest changes to any proposal, and to offer their own options for resolution. The parties are free to agree to any terms that are mutually acceptable. This is true even though these terms may not comport with relevant law or procedure. For instance, the prevailing party may choose to pay filing fees and other costs that ordinarily the court would order the losing party to pay. Likewise, though one party might be more likely to win at trial, that party might choose to give up some of what the court would award in order to reach a more immediate and satisfactory result.

More importantly, mediation allows the parties to craft results that go beyond the court’s authority and jurisdiction. Many parties to mediation seek apologies or specific performance of a promise. Few courts would comfortably order one party to apologize to another, and rightfully

so, as authority for such an order may not be clear even in a court with equitable jurisdiction.<sup>63</sup> Further, the parties may undertake to provide services for one another or refrain from exercising rights. Here again, a court may not be able to order such an outcome. But where the parties feel such an agreement is fully understood and equitable, it is in their interest to pursue such an agreement.

The court is often limited in its ability to mete out justice solely to awarding monetary damages. Very often parties are willing to settle for this approximation of justice, but in mediation they can achieve a more appropriate result. If one neighbor drove over another's mailbox, the court could award the cost of the repair or replacement of the mailbox, though not likely the cost of installation. In mediation, the neighbor could agree to purchase and install a replacement mailbox, leaving no work or inconvenience to the other neighbor and no court judgment on the record of the first neighbor. Thus, the parties achieve a result the court could not mandate, but which is fair and just to both.

The ability to control the mediation process and outcome is usefully juxtaposed to the litigation context. Is it appropriate to require defendants to defend suits brought against them? This is a position with which our legal system has thus far been comfortable. Defendants in emergent areas of law defend the status quo. Perhaps it is an appropriate societal cost to impose the burden of defense on them in order that emergent questions be addressed. Or, perhaps, it is also

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Jacqueline M. Nolan-Haley, *The Merger of Law and Mediation: Lessons from Equity Jurisdiction and Roscoe Pound*, 6 *Cardozo J. Conflict Resol.* 57 (2004) (Discussing ADR as filling in the gap with the decline in equity jurisdiction in the courts).

appropriate that they too have options for settlement of these disputes. Perhaps the real question then is whether plaintiffs should be made to litigate animal law matters or whether they should have a choice of forums in which to resolve their disputes.

Are there any voluntariness concerns in the other direction? Do we need protection from court-ordered mediation? This does not present a problem because even if the process is compelled against a party's wishes, no outcome may be compelled. This leaves the party still able to litigate or choose another method of resolution. It may reduce some of the efficiency benefits, but does not effect the outcomes or development of the law. It is also unlikely to occur in an emerging area of law.

This is a question of costs, of balancing costs and interests, and determining who bears those costs. If we deny individual choice to mediate animal law matters, we force individuals to bear the costs related to society's interest in public adjudication. Even if this option is chosen, parties can always settle a dispute before trial. Therefore, private settlements are still available, so the remedy of forcing adjudication doesn't necessarily help achieve society's goals of public adjudication.

The ability of parties to assert control over the mediation process and outcome is not dependant on the area of law and therefore these benefits fully apply in the animal law context. If parties in other settings have the ability to choose whether to mediate (have control over the process), why wouldn't parties in an animal law matter have the same ability. There is no reason to assume that this is not just a question of party autonomy as it is in other settings.

So if mediation offers so many benefits why isn't everyone participating in mediation instead of going to court? What are the weaknesses or costs of this method of dispute resolution? Some have difficulty with the process in general or as applied. Others suggest that mediation is a good process but that there are circumstances when it is not appropriate. Both of these types of critiques, as well as responses to those critiques and application to the animal law context are discussed below.

### C. Process

#### 1. Private vs. Public Justice

##### a. Critique

One significant critique of mediation is that the process is a private form of justice, one not bound by the rules of evidence, procedure, or precedent.<sup>64</sup> This critique is often two-fold. First is the concern for the private nature of the process and outcome. The critique articulated here is that our system of justice is a public one and was designed that way intentionally. One goal of a public justice system is that questions concerning the conduct of citizens, or rules of society, be aired and resolved publicly as the public has a stake in the resolution of these questions and needs to know as the ground rules of society evolve. This allows for more uniform and efficient response to breaches of the law. It offers notice to individuals about the results of breaking the law, which serves not only a notice, but perhaps a deterrence function. Therefore, a problem

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Judge Harry T. Edwards, *ADR: Panacea or Anathema?* 99 Harv. L. Rev. 668 (1986); and Andre R. Imbrogno, *Using ADR to Address Issues of Public Concern: Can ADR Become an Instrument for Social Oppression?* 14 Ohio St. J. on Dispute Resol. 855 (1999).

arises when this process is not used as these benefits may not be realized, and society, therefore, is harmed.

b. Response to the critique

In response to the private justice critique, it may fairly be stated that people always have the opportunity to resolve matters privately, and that mediation may or may not increase the number of those matters that are in fact resolved privately. The vast majority of cases filed in court are resolved by agreement without the involvement of the court,<sup>65</sup> and are not bound to follow any rules or law in those settlements (with some exceptions, e.g. class actions). Certainly, there are other disputes that are resolved privately without any filings with the court system. The fact that some matters are resolved privately means that the parties take into account the costs of public justice, balanced against a private, personally tailored agreement, and choose what they deem to be appropriate for their own situation.

Parties may balk at having their disputes addressed in public. Parties are sometimes hesitant to testify and do not want private medical, financial or other matters to become elements of public knowledge or debate. Some parties do not want the terms of a settlement known for fear that

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See generally, Leandra Lederman, Which Cases Go to Trial?: An Empirical Study of the Predictors of Failure to Settle, 49 Case W. Res. 315 (Winter 1999), W. Cris Lewis and Tyler J. Bowles, The Economics of the Litigation Process and the Division of the Settlement Surplus: A Game-Theoretic Approach, 6 J. Legal Econ. 1 (Winter 1996/1997) Samuel R. Gross and Kent D. Syverud, Don't Try: Civil Jury Verdicts in a System Geared to Settlement, 44 UCLA L. Rev. 1 (October 1996)

more lawsuits would ensue. The private nature of settlements, whether before filing with court, through an informal settlement process, or through mediation, serves these interests of parties.

Additionally, the public justice system is so rule bound that it has difficulty dealing with emerging areas of law or unusual circumstances. Jurors sometimes indicate they didn't like the result they reached in a case, and didn't feel it was a just outcome, but felt bound by the law to this result. Judges sometimes indicate in their decisions that they felt bound to reach a certain outcome because of limitations in a statutory or regulatory scheme. And even within the court process itself, jury nullification, bad decisions by judges or juries, and miscarriages of justice exist. Pursuing matters in the public justice system is no guarantee of a good outcome. These problems are common enough to give a party pause when selecting between private and public justice.

c. Application of Mediation in the animal law context

In the public justice dialogue above, it was assumed, as proponents of that argument do, that the court system is one of public justice and that this is the preferred process for resolving legal disputes. If one determines that a private resolution of a matter is appropriate, then mediation is appropriate in that context. If one determines that public resolution of a matter is preferred, mediation may not be the best process to utilize.

Animal law issues present both types of matters for resolution. Clearly, the determination of whether Malik or Natasha get Sasha in the divorce matters to few others outside the family,

whereas the measure of damages determined appropriate for the negligent veterinarian is somewhat more of interest to others as it may set a standard by which other cases are judged. The resolution of property division in the divorce is perhaps the most private, or interest based, matter discussed above. It would be hard to accept that society had an interest in the whether Malik or Natasha received ownership of Sasha. However, as long as the question itself is a difficult one for courts to address, (stated more broadly - how do courts address animals in distribution of property) it could well be argued that it is useful for this matter to go to court. Unfortunately, the parties tried that route and failed to find a resolution. Therefore, this is just the type of case ideally suited, even in an emerging area of law, for mediation.

Some might say that all animal law issues ought to be publicly decided at least until they are well settled. There is some value to that position. However, as other areas of law have evolved in recent years, no restriction was placed on parties' ability to fashion private settlements of their disputes. There has been no public outcry or determination that this has harmed the development of law in these areas, in fact, there is no evidence the question has been raised at all. It is also important to remember that in determining whether mediation is appropriate in the animal law context, the question is whether it is appropriate for some cases, not all cases.

Criminal matters are often deemed matters of public concern because they help define the contours of acceptable social behavior. There is need for determining what relationships and behaviors are appropriate between humans and animals, or at least, which are not. This supports the argument for the public resolution of the case against Nicholas. Such a case may provide emotional vindication for the family and some protection against further abuse in the future from

Nicholas, and perhaps others in this specific case and more generally. Likewise, the development of authority with relation to the behavior of the veterinarian and the lab employee can be said to be in the interest of society, those who find themselves similarly situated, and animal advocates.

Having said that there is a benefit to the public resolution of these cases does not answer the ultimate question of suitability of mediation in this context. As long as there are ample opportunities for private justice without mediation, as long as the system does not seem harmed by that reality, and as long as there also remains plenty of opportunity for resolution of these matters in the public justice system, there seems no basis to eliminate mediation as an option for parties with animal law disputes based on the private justice critique.

2. Precedent - Failure to follow and develop
  - a. Critique

The lack of reliance on, and development of, precedent when disputes are mediated is seen as a problem for at least two reasons. First, the lack of reliance on precedent allows for different outcomes in similar situations. This personalized justice offends the sensibilities of those who require uniformity in application of the law, a basic premise of equal protection. Second, the lack of development of precedent resulting from confidential settlement agreements is also troubling to some who worry that the development of the law will be slowed or skewed if not all questions are brought before public tribunals.

b. Response to critique

The lack of reliance on, and development of, precedent critique echoes some of the private-public justice concerns. Again, as long as there are private ways of resolving disputes absent mediation, these concerns about precedent will exist. Mediation may or may not allow for the development of precedent<sup>66</sup> but it interferes no less with reliance on precedent than any other form of settlement or private agreement in any other area of law.

Certainly in an emerging area of law, one might argue that the more cases coming before the courts, the more quickly the law will develop. Further, legal questions may be sharpened and any distinctions between courts' approaches will enhance the development of the law.

However, this has been the case in other emergent areas of the and mediation and other forms of dispute resolution have not been categorically determined to be inappropriate in those settings.

Another response to the lack of precedent critique is that over reliance on precedent restricts our ability to address difference. In another context, it is clear that the courts (and members of society) are struggling with the tension between rules restricting public nudity (among others) and the desire (or need) of some women to breastfeed their children in public. The goal of the justice system to develop broad rules which apply uniformly, make it difficult to determine

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See Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. Rev. 589 (?? ) and see Carrie Menkel-Meadow, *Mothers and Fathers of Invention: the Intellectual Founders of ADR*, 16 Ohio St. J. on Disp. Resol. 1 (2001) for her assessments of Lon Fuller theory about disputes and ADR - where mediation is useful (where there aren't a set of rules).

equitable resolutions when new questions are raised. This is especially true when some would say the distinction is not sufficient to create a new category or rule, and others would say that is exactly what is required. The kind of new questions are exactly what animal law matters raise.

Also, it is said that settlements can develop precedent. Settlements create (and reflect) social norms as do court decisions, just in a somewhat different way.<sup>67</sup> This would be another reason to go forward with mediation despite the fact that it may not create precedent in the same way as courts and does not require parties to adhere to precedent in crafting their own resolutions.

c. Application of mediation in the animal law context

Even though there is good reason to advance society's understanding and develop legal approaches to questions presented by new areas of law, these reasons do not supercede the ability of the parties to decide for themselves which process is best to resolve their individual disputes. Additionally, animal law as an emergent area of law, provides no shortage of cases, or parties, interested in using the courts to resolve these legal disputes.

More specifically, which of the above hypothetical situations require the reliance on, or

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Settlement as creating social norm like court decisions .. Marc Galanter and Judge Higgenbotham and Owen Fiss on vanishing trial and when litigation and precedent are needed (also Lon Fuller) See Carrie Menkel-Meadow, Mothers and Fathers of Invention: the Intellectual Founders of ADR, 16 Ohio St. J. on Disp. Resol. 1 (2001) for her assessments of Lon Fuller theory about disputes and ADR - where mediation is useful (where there aren't a set of rules).

development of, precedent? One could say all as well as none. As seen earlier, one response is that if parties wish to resolve the dispute privately, that is or should be the choice of the parties. However, the situations also give rise to reasons for adjudication and limitation of individual choice as it relates to society's need for precedent.

Yet, there are limitations on the ability of parties, even when willing, to make precedent. In the divorce matter, though some judges might consider ruling on the matter of who gets Sasha, most would not, and without legislative or other authority, any such ruling would be subject to appeal and dismissal. If Malik and Natasha had hoped to create precedent, they have failed. Had the judge acquiesced, it is likely that any such ruling would be overturned, thus taking more time and money to get to the same place, still with no established precedent. It must be said however, that the ability of certain judges to make reasoned decisions which expand an understanding of an area of law to address animal law matters has been the foundation of some expansion of the law with respect to animal (and other) issues, slow as it has been. This is to recognize the important role judges do play in the evolution of the law, but not to suggest that the potential of this benefit restrains party choice in determining how to resolve a dispute.

Perhaps the situation above least in need of developing precedent is the cruelty case. There are statutes in each state on this matter already and further developments in this area are likely to emanate best from the legislatures. And perhaps the least likely to develop precedent, though activists may wish otherwise, is the case involving the lab employee. Certainly, if a court were to rule that the employee's behavior amounted to cruelty, the implications, should the ruling stand, would be enormous. Again, this might be said for most of the matters raised above. The

question is not whether precedent would be useful in any of these settings, for clearly it would (though certainly each side of the case would prefer different precedents). Rather, the question is whether society's appropriate desire for precedent should outweigh the ability of the parties to choose for themselves public or private justice. Clearly, there is nothing in the nature of animal law disputes which requires restricting party autonomy.

#### D. Application

In addition to the general critiques of the mediation process, there are those who assert that although the process can be useful and just, there are instances in which use of mediation is not appropriate. One of the first areas deemed taboo for mediation was criminal matters, another early area off limits was domestic violence matters, both in part, due to concern over power imbalances.<sup>68</sup> Another category deemed inappropriate for mediation has been matters of public concern, those issues which relate to public policy, constitutional matters, and the like. The reasons for asserting that mediation is inappropriate in each of these contexts is somewhat different.

##### 1. Power Imbalances

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Andre R. Imbrogno, *Using ADR to Address Issues of Public Concern: Can ADR Become and Instrument for Social Oppression?* 14 Ohio St. J. on Dispute Resol. 855 (1999); and Lauri Boxer-Macomber, *Domestic Violence Issue: The Impact of CA's Mandatory Custody Mediation Program on Victims of Domestic Violence Through a Feminist Positionality Lens*, 15 St. Thomas L. Rev. 883 (2003), Debra Baker, *Juvenile Mediation: Innovative Resolution or Bad Faith Bargaining?* 27 U. Tol. L. Rev. 897 (1996).

a. Critique

As mediation developed and application in the criminal law context was considered, there was an urge to protect victims from perpetrators. Few thought it would be a benefit for the victim of a crime to hear the perpetrator of that crime tell her story. To those who believe the criminal court process is designed to meet the goals of revenge or retribution, talking with an offender and giving that person a chance to affect the penalty seems absurd. Concerns of safety and practicality also arise in this context. How does the mediator remain responsible for the mediation process and make certain that both the mediator and other party are safe from further harm at the hands of the offender? And the question of how to fit this type of process into a relatively swiftly moving and constrained system arises. It is difficult to reconcile the idea of the offender telling her story with the notion of a right to remain silent. It is also not clear where in the criminal process mediation would appropriately fit: before the speedy trial; after trial but before sentencing; after sentencing; or even before charges are made?

In the domestic violence context, advocates for victims were concerned about re-victimization by the court process. These concerns were multiplied in the mediation setting when considering the vulnerability of a victim sitting in a room with the abuser without the rules and process of the court system.<sup>69</sup> There was concern for the mediator's lack of ability to protect the victim or even

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Lauri Boxer-Macomber, Domestic Violence Issue: The Impact of CA's Mandatory Custody Mediation Program on Victims of Domestic Violence Through a Feminist Positionality Lens, 15 St. Thomas L. Rev. 883 (2003), but see Kate McCabe, A Forum for Women's Voices: Mediation through a Feminist Jurisprudential Lens, 21 N. Ill. U.L. Rev. 459 (2001) for the perspective that mediation is better for women.

understand the risk and significant harm likely to result to a victim. It was thought that even with a mediator who was aware of the need to rectify any power imbalances in the mediation, that those imbalances were so ingrained in the parties' relationship that all efforts to achieve balance or a fair resolution would be unsuccessful. This would not only lead to re-victimization, but a failed mediation as well due to the lack of balance and true two party ownership of the process.

b. Response

In response to the critique that criminal law matters are not suited for mediation, supporters of the concept would offer years of what they deem successful victim-offender mediation programs.<sup>70</sup> Others would suggest that if victims of the most horrific offenses can face their victimizers in truth and reconciliation settings, and find benefits, that our concern for protecting victims may be paternalistic, naive, or overstated. Proponents of mediation in these contexts indicate that some victims want to face the offenders and let them know the harm they caused. Sometimes such a party is looking for an acknowledgment of wrongdoing or an apology and cannot get this in the court setting. If the victim is not motivated by retribution, this makes more sense. Some victims are motivated by retribution and want to have a role in the development of

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Ilyssa Wellikoff, *Victim-Offender Mediation and Violent Crimes: On the Way to Justice*, 5 *Cardozo J. Conflict Resol.* 1 (2003); and Alyssa H. Shenk, *Victim-Offender Mediation: The Road to Repairing Hate Crime Injustice*, 17 *Ohio St. J. on Disp. Resol.* 185 (2001); and Stephanie A. Beauregard, *Court-Connected Juvenile Victim-Offender Mediation: An Appealing Alternative for Ohio's Juvenile Delinquents*, 13 *Ohio St. J. on Disp. Resol.* 1005 (1998); and Patrick Glen, *Victim Offender Mediation in Texas: When "Eye for Eye" Become "Eye to Eye"*, 46 *S. Tex. L. Rev.* 647 (Spring 2006).

the penalty. Because mediation is generally voluntary, the concern for protecting victims should not be a large concern. It would be easy enough to state that in the criminal context, mediation should never be mandatory (there is no evidence it has ever been) in order to avoid the real concern, that is, not simply power imbalance, but re-victimization which may result from participating in a required process. With no requirement, again the parties are left to choose for themselves what is appropriate. This, of course, assumes the party in question is a fully functioning individual who can make that decision, and one must recognize and address the fact that this is not always the case.

With respect to whether domestic violence is an area suited for mediation, this is still a large area of concern. Many mediators believe that these matters cannot or should not be mediated. And further, some believe that no matter should be mediated if the issue arises between parties where abuse is a factor. However, some mediators have been working in this taboo area. They usually have special domestic relations, relationship abuse, and mediation training. Only time will tell whether this area grows or returns to one of strict taboo. It should be noted, that many disputes may arise and go through mediation without the mediator ever being aware of a background of abuse. The same is true in court. Further, not every victim of abuse feels powerless in the face of the abuser. Therefore, the question of party autonomy arises again. Certainly, this is another area in which mediation should never be mandatory. And one would hope that mediators would be sensitive to coercion and power imbalances in a party's decision to proceed with mediation. But assuming true voluntary and knowing willingness to participate (and the ability to leave at any time) it is possible to consider some contexts in which mediation might be appropriate even within an abuse context.

Importantly, our notions of domestic abuse are expanding, which means that with more kinds of abuse situations recognized, there is room for more approaches. For instance, mediation might be appropriate in a dating situation where the abuse happened only once, as opposed to a very violent and long term abusive relationship, or between abusive parents and children. Children would clearly present a different situation as their capacity for decision making is not the same as that of adults. This would be another area for reasonable restriction in the use of mediation, perhaps even in the face of a stated willingness to participate.

c. Application of mediation to animal law context

There is rarely an even balance of power between parties to any dispute. The question then becomes, is the imbalance one a mediator can address in order that it not jeopardize a just outcome, or is it serious enough to reduce the likelihood of a just outcome or process? In the hypothetical situations above, it is not clear that an imbalance of the latter sort is implicated in any of them. It is likely that there are differences in education, resources, and so forth which might lead to a power imbalance in the resolution process. And there may well be power imbalances in the relationships that exist. It is not clear, however, that the parties could not participate in mediation, despite whatever unequal power balance might exist.

The concern of power imbalance would not prevent the parties here from mediating, though in situations involving domestic violence, the question remains real and appropriate.<sup>71</sup> It should

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NY Times article, April 1, 2006 "New Maine Law Shields Animals in Domestic Violence

also be noted that for purposes of this paper, and based on current legal realities, Sasha is not considered a party. Should the legal winds shift sufficiently to allow for such a thing, the question of power imbalance becomes a very important and complex one in mediating animal disputes.

## 2. Resolution of rights-based disputes

### a. Critique

In the rights-based, or constitutional and public policy context, there is concern that resolving matters outside the view of the public results in bad decisions and stalls the development of the law.<sup>72</sup> Some assert that matters of public interest must always be litigated in the public's eye and that only the courts can take into account legal and social developments in a way which enhances the justice system and facilitates appropriate outcomes. Others believe that any matters which implicate the interests of society must be resolved through the public courts process.<sup>73</sup> That begs the question of which cases are not matters of societal interest. However, if that is taken to mean questions of public policy, constitutional matters, and matters of political import, the argument may be understood to suggest that these matters should never be informally or privately

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Cases" by Pam Belluck

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Judge Harry T. Edwards, *ADR: Panacea or Anathema?* 99 *Harv. L. Rev.* 668 (1986); but see Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 *N.Y.U. Rev.* 589 (?? ) suggesting the opposite.

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See Carrie Menkel-Meadow, *Mothers and Fathers of Invention: the Intellectual Founders of ADR*, 16 *Ohio St. J. on Disp. Resol.* 1 (2001) for her assessments of Lon Fuller theory about disputes and ADR - where mediation is useful (where there aren't a set of rules).

resolved.

b. Response

Though there may be less debate with the concept that matters of public interest or policy should not be mediated, there is by no means consensus on the subject. Civil rights voting act violations, matters of discrimination, and other public policy oriented matters, are often privately negotiated, sometimes in the context of lawsuits and sometimes before the courts are involved. Sometimes the results are made public and sometimes they are not. As long as this is allowed and not deemed harmful to the overall process, undermining justice, or impermissibly stiling the enforcement or development of public policy in those contexts, there is no reason to think that mediation would be worse.<sup>74</sup>

Further, it is not clear what resolving disputes in the public eye means. Certainly few people not involved in cases go to court to watch the proceedings. The media chooses which cases to report to the public and the appropriate spin on the outcome. And until very recently, lawyers were not allowed to cite cases which were not published (a process full of mystery and variance). How then could society know the true impact of cases being litigated? Additionally, we now have sources of legal and social norm setting that did not exist only a few decades ago. With the

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Barbara Ashley Phillips, Anthony C. Piazza, *Public Interest Law: The Role of Mediation in Public Interest Disputes*, 34 *Hastings L.J.* 1231 (1983); and Carrie Menkel-Meadow, *Access to Justice: The Social responsibility of Lawyers: When Litigation is Not the Only Way: Consensus Building and Mediation as Public Interest Lawyering*, 10 *Wash. U.J.L. & Pol'y* 37 (2002).

advent of Court TV and programs like the infamous Judge Judy, and Jerry Springer, society has new, and perhaps exceedingly skewed, sources for the resolution of disputes in the public eye.

Having said that is not to say that there is no benefit to resolving cases in court. It is easy to understand why the resolution of a discrimination case would be benefit society if done through the court process, as it would help us to understand how better to regulate our behavior. Yet it seems inappropriate to deny the victim of discrimination the choice to accept a private settlement through mediation, especially one she has the opportunity to craft.

Is it important to have everyone bring emerging law cases to court to let the public justice system resolve them? Is volume a problem? Does society need a critical mass of public litigation on these matters before they can be deemed resolved, established, and no longer emergent or in question? In the civil rights, and other social justice contexts, there was no shortage of litigation no matter how many other cases may have been privately resolved.

c. Application of Mediation in animal law context

As above, where private settlements and mediation are allowed, there is no reason to restrict the choice of those with animal disputes in determining how to resolve their problems.<sup>75</sup> If we are to consider doing so, we would need to articulate the balance between the interests of individual

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Robert A Baruch Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles For Process Choice*, 1984 Wis. L. Rev. 893 (1984)

(low cost, speed, control over process and outcome) with society's interest in articulating, formulating, and implementing rights.

The question becomes, is there any area within animal law in which the societal interests at stake are so important as to require public resolution of the dispute? It is hard to conceive of such an instance. Advocacy groups with a vested interest in challenging the legal status quo can be counted on to bring cases to court specifically because of their reform goal. It is appropriate to let them choose the costs and burden of bringing those issues to court, rather than imposing those costs on parties who do not wish to assume them and may not have the same goals. Advocacy groups are clearly present and active in the animal law field, (on both sides) so there is no real risk of lack of adjudication and therefore, society's interest in public justice is served.

Further, in no other emerging area of law has mediation been expressly banned. Even in the instances of disputes between governments, or negotiation of international treaties, mediation has played a role.<sup>76</sup>

Therefore, individuals with animal law disputes have the right to choose how to resolve their own disputes as well as how to contribute to the national discourse and resolution of such disputes. And in the hypothetical situations above, the question of rights vs. interest based decision making arises, but based on the above discussion, bars none of the parties from

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Elisa Westfield, Resolving Conflict in the 21<sup>st</sup> Century Global Workplace: The Role for Alternative Dispute Resolution, 54 Rutgers L. Rev. 1221 (2001).

proceeding with mediation.

## V. Application of Mediation in the animal law context - questions to consider

After the critiques have been addressed, mediation emerges as a sound compliment, or alternative, to litigation for parties. (It should also be noted that some of the critiques of mediation, are also appropriately directed at the adjudication process.) It remains to be seen whether animal law is a context *well* suited for mediation. The critique about mediation as thwarting the development of precedent though perhaps not typically compelling, may take on more significance when used in an area of law that is not well settled, but rather is still evolving. The next section explores additional questions to consider in the application of mediation to the animal law context and seeks to answer the question of whether mediation is appropriate here.

### A. Mediation as tool to address the evolving role of animals in society

Though it should be available, is mediation well suited to address animal law issues? As discussed above, and further below, many of the criticisms of mediation may also be made of the litigation process. For the purposes of comparison, we will assume the courts and mediation processes are working optimally. The paper seeks to determine whether the process is useful in this context, and recognizes that even if it is, there will be mediators and mediations that do not work well and can cause harm. This is also true of the court system. The operating assumption is that both are working well, in order to determine what is appropriate under relatively normative conditions.

B. Test of appropriateness - what questions do we ask?

In order to determine if mediation is appropriate for addressing animal law issues, certain questions must be asked. Already addressed above is discourse as to whether the benefits of mediation apply to the animal law context, having determined that they do, we turn to other questions.

1. Is it appropriate?

The appropriateness question is necessary for the application of any method of dispute resolution to any particular context. Though we do not often ask ourselves whether litigation is appropriate, it is clear the system and parties would benefit if we did so more often. We determine, almost without thinking about it, that criminal matters are better pursued in the criminal courts rather than by civil suits between the parties. We have specific venues for bankruptcy, patent, and other matters. And we tend to think that arbitration is the preferred method of addressing labor law issues. Therefore it should be no surprise that the question arises in the animal law context. Indeed it is more important to attend to here because it is a new area of law, because no particular preferences have been established, and because there has been no significant dialogue on this issue. The next step is to further explicate the question of appropriateness based upon those whose interests are implicated.

a. For individuals

One measure of appropriateness is whether a particular process works well for the parties likely to be involved. Animal law issues, especially those regarding matters related to companion animals, very directly, deeply, and personally touch individuals. Because so many people are so emotionally attached to their companion animals, even feeling that they are part of the family, there are few other relationships beyond those of family, friends, business, or romance, which matter more to many of the people in our society. Therefore, because these matters touch individuals very closely, it is important that the process be appropriate for individuals involved in it.

Mediation may be especially appropriate for addressing matters of animal law. While the courts cannot recognize the value of an animal as more than property, the parties can and do. Natasha and Malik could tell Nicholas of the love they and the children have for Sasha and of the harm the family suffered as a result of Nicholas' actions. They can let Nicholas know that the damage he inflicted is in no way the same as if he destroyed their lawnmower. In addition to the satisfaction the family might derive from such a dialogue, it is possible that Nicholas will come to see his behavior in new terms. This possibility makes mediation in this setting especially powerful. Regardless of whether Nicholas changes his views, he may be more likely to suggest or accept resolutions that are more tailored to the harm identified. For instance, he may be willing to pay for therapy for the children, or for future medical services for Sasha.

In order for mediation to be deemed appropriate for the parties, they must see a potential benefit in either the process or outcome. It is unlikely that the lab employee would consent to

mediation, as he is well protected by both the legal process and likely outcome. To go outside of this protection would make the lab employee more vulnerable. This is not in his interest, and therefore, mediation is not likely appropriate for him.

Clearly Natasha and Malik would benefit from mediation. They had hoped to reach an agreement and needed assistance. They agreed in advance to be bound by any agreement reached, and they were interested in taking on rights and responsibilities the court was unwilling to decree. So to the extent that parties are interested in crafting solutions to their own problems, and to the extent that they feel the courts cannot respond appropriately to their needs, mediation is appropriate for individuals.

It must be noted that because animals cannot yet be parties to disputes, and because no one is obligated to, or may, consider their interests in court, mediation is especially appropriate for them. To the extent that any individual chooses to mediate a dispute with the interests of an animal in mind, that is more protection and consideration than the animal may receive in court. Until that is no longer true, mediation, as a process, is more beneficial to animals in the resolution of disputes than the adjudication process.

b. For society

Because animal law is an evolving area of law, society has a special stake in the outcome of these disputes. However, as long as mediation is an additional avenue of dispute resolution available, and does not end the resolution of animal related disputes in the court system, it is in

society's interest to allow mediation of these matters. No social blueprint exists for addressing new issues of public concern. Having the courts, legislatures, media, and alternative avenues for resolving disputes is not only appropriate, but desired. Just as difference in approaches among the circuit courts helps to develop and eventually determine legal doctrine, so too many legal and non-legal approaches to dispute resolution will help develop appropriate resolutions to questions of animal law.

c. For animal advocates

Animal advocacy is a component of a social justice movement which has an interest in the development of animal law. Advocates' interest in the development of appropriate results, methodologies, process, and precedent is perhaps the strongest of any other. Though the question of whether a process is appropriate for a particular political movement is not often asked or even deemed correct, this paper posits that this is a good question to ask for at least two reasons. First, it is in society's interests that we determine what role we think animals should play in all areas of our lives. No one has more of an interest in developing and shaping that dialogue than animal advocates. Though animal advocates also have an interest in the questions being answered a certain way, there are enough checks built into the system that it is far from certain that any of the questions will be ultimately answered the way advocates want. Therefore, because there is no concern about the advocates being able to direct the outcome or the resolution of the questions, because they are most likely to push dialogue and resolution of these questions, and because it is in society's interests to have these questions addressed and answered, it is therefore appropriate to ask whether the process of mediation is appropriate from the

standpoint of animal advocacy.

The second reason it is appropriate to determine whether mediation is an appropriate process from the perspective of the animal advocates is that animal law is early enough in its development to be considering whether a particular process is more suited to address these questions. Just as the early labor law movement determined that arbitration was a process particularly well suited to the resolution of the issues which would arise, so too animal advocates could decide that mediation or any other process was particularly well suited to address its questions. Therefore, this is another reason that animal advocates should be interested in the question of the appropriateness of mediation.

Advocates for animals cannot all be deemed similar with respect to methods of advocacy or goals for animals. Indeed, there is much debate in the animal advocacy community about these and other matters. And there is likely to be no consensus with respect to the appropriateness of mediation. Some might accept the critique that it slows the development of the law, and therefore reject it completely. Others might find that it is, or can be, appropriate in certain situations and not others. Still others might find it to be the best way to approximate justice for individual animals in the short term while the legal and social discourse continues.

One group of advocates not likely to be interested in mediation in the hypotheticals above, are the animal activists who freed Sasha. They are likely to want to make a public statement about their actions and to use the court as a vehicle for challenging legal and social norms. However, that is not to say that the same activists would not favor mediation for Natasha and Malik or

between the family and Nicholas or the veterinarian. Though advocates will want positive court outcomes to push forward the advocacy agenda, they will also want more immediate justice for individual animals.

And what of the opponents of animal advocacy, how would they assess the appropriateness of mediation in this context? Some might prefer the private nature of mediation in the hope that a resolution in one context does not become the standard more broadly. This might also be true of the veterinarian, who may choose to resolve the case in mediation for more money than a court might order, with an eye towards maintaining his reputation or saving litigation expenses. Others might disdain mediation simply because there is the opportunity to discuss what the law does not yet deem relevant. The lab employee may feel this way, and wish to avoid a conversation about the interests of Sasha, feeling that the research he does far outweighs the interests of any individual animal.

d. In an evolving area of the law

As noted above, the question of process and precedent is particularly important to an area of law that is still evolving, both because a determination of a well suited process might be made, and because the need to allow for the continued development of the area must be considered and protected. Therefore, it is important to consider whether mediation is appropriate in an evolving area of law. It may, in fact, be the most critical question to ask but can only be addressed briefly here.

In addition to what has already been discussed above, there is the possibility that mediation is a particularly appropriate process to introduce in an emergent area of law. Because of the pressure to develop the law in these areas, there will be an increase in demand for court resources.

Mediation can relieve this pressure. This may also allow parties to choose more wisely which matters should be fully adjudicated. If advocates, and their opponents, feel there is an avenue for justice through mediation, then perhaps not every case needs to be litigated in order to achieve their goals.

## 2. Does it promote or inhibit justice

Implicit in the above discussion is the question, does mediation in the animal law context promote or inhibit justice? For even though parties on opposite sides of a dispute may define justice differently, they will both say they are seeking justice and that any process is deficient to the extent that it inhibits justice. Society also has an interest in seeing that processes which are developed to resolve (legal) disputes maintain safeguards and take care to achieve and promote the goals of justice. This too is an important question to ask.

The most direct answer is that because parties are not bound to settle any case brought in mediation, it is hoped that settlements are reached only when parties on both sides are satisfied with the outcome. It is likely that not all parties will be seeking justice. Some may only be seeking to reduce financial or time investment in the matter, while others are seeking to right a wrong. Regardless of the motivation of the parties, an underlying concept of mediation is fairness. No party is required to settle a case in mediation, and certainly no party is required to

accept a settlement deemed unfair.

In this way, mediation promotes a sense of justice on the individual level. It also enhances justice in larger terms for it involves individuals in the resolution of their own disputes, a power often ceded to courts and other authorities. It is in the interests of society to have more individuals who feel interested in, and capable of, resolving their own disputes civilly.

### 3. Is it practical

It is also important to ask whether mediation is practical. If a process has many positive attributes, but is not practical, it is senseless to pursue it when other processes are available. If a process is not practical, it will not be used or successful. Therefore, it is useful to ask whether mediation is a practical process. The answer to this question depends on how mediation is framed in any particular setting. But more broadly, the efficiencies and success of mediation in all other areas of law indicates that it can be a very practical and effective tool for dispute resolution. There are no reasons this will not also be true in the animal law context.

One impediment to widespread usage, however, will be the distance between individuals on matters of animal law. An animal activist who believes that animals should not be eaten, worn, or experimented on will have a hard time developing a constructive dialogue with a lab employee who believes that research is vitally important for the human community and does not believe that animals have sensation or reason, similar to humans or worthy of concern.

Mediators, too, may be unfamiliar with the contours of this discourse. However, this can also be

a benefit of mediating animal law matters. If parties can begin to communicate effectively enough to help one another understand their respective positions, that alone will be a benefit to the parties and to society. Civil discourse in such difficult areas takes attention and practice, and is much needed in the animal law context. Any improvements or work in this area is a positive contribution.

C. Should mediation be the preferred process for animal law issues?

Discussed above are the benefits of mediation in the animal law context. It is a positive compliment to adjudication process. That leaves one last question, if mediation is appropriate, should we encourage its use in this context, mandate its use, or rely on party autonomy? Does the very nature of our complicated relationship with animals call for a process over which participants have more control? Or is the opposite result better because humans cannot be counted on to protect animals' interests? Should we follow the lead of other areas of law where mediation is promoted or discouraged or set out new guidelines for this area?

Mediation should not be the preferred process for animal law issues because to make such a determination would be to deprive this area of law the full richness of analysis present in all of the options for dispute resolution. An evolving area of law, such as this one, deserves to be present and represented in all forms of dispute resolution and should take note of the benefits and risks inherent in each such that parties may make an informed choice in each context as to which is appropriate for them. There is no need to have a preferred process in resolving animal law matters. Though it may be later determined that one is more suited to this area, it is more

likely that animal law will continue to need, and benefit from, all forms of dispute resolution given the vastly different types of claims that can be characterized as animal law.

Significant discussion of this question is appropriate and would be better suited some time hence when more data is available to better address the question.

## VI. Conclusion

The implicit choice here between mediation and litigation is something of a false dichotomy - either can be useful and currently there is limited access to both with respect to animal law matters. Where it may exist, mediation for animal issues is not a panacea. It won't always work or be effective. The same can be said for litigation. However, the addition of mediation expands the options through which society can consider, and potentially address, increasingly difficult questions relating to animal law.

Mediation is well suited for addressing animal law issues and should be considered a valuable option for resolving those issues. It offers those who use it the ability to challenge conventional social and legal norms. It is appropriate for the parties who use it and for those who provide it (Judge Zimmerman). Mediation works toward enhancement and preservation and perhaps building of community.

At its core, the development of animal law is a very hopeful, community interest based expression, as is the development of mediation. Animal advocates often work against their own

self-interest in terms of spending resources and political and social capital for the benefit of the animals rather than themselves, and they work to enlarge the circle of community, compassion, and protection beyond humans to include animals. These goals are hard to achieve through the court system and are well suited to the mediation process.

Mediation of animal law matters is appropriate and useful for society, and the results of mediation in this context matters significantly to society.