

MEDIATING ANIMAL LAW MATTERS

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INTRODUCTION

- I. ANIMAL LAW—THE CHANGING NATURE OF OUR RELATIONSHIPS WITH ANIMALS—SELECTED OVERVIEW
- II. ANIMAL LAW—EXPLORING SPECIFIC CONTEXTS
 - A. Divorce
 - B. Animal Cruelty
 - C. Experimentation
 - D. Veterinarian Malpractice
 - E. Alternatives—Mediation
- II. ASSESSMENT OF CURRENT APPROACHES TO RESOLVING ANIMAL LAW QUESTIONS
 - A. Litigation/Law Reform
 - B. Legislation/Legislative Advocacy)
- III. MEDIATION AS AN APPROACH
 - A. What is Mediation?
 - B. Why it Mediation Useful
 - 1. Cost and Efficiency for Parties and Courts
 - 2. Control of Process and Outcome by Parties
 - C. Process
 - 1. Private vs. public justice
 - a. Critique
 - b. Response
 - c. Application of Mediation in the Animal Law Context
 - 2. Precedent—Failure to Follow and Develop
 - a. Critique
 - b. Response
 - c. Application of Mediation in the Animal Law Context
 - D. Application Concerns
 - 1. Power Imbalances
 - a. Critique

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- b. Response
- c. Application of Mediation in the Animal Law Context
- 2. Resolution of Rights-based Disputes
 - a. Critique
 - b. Response
 - c. Application of Mediation in the Animal Law Context

IV. QUESTIONS TO CONSIDER

- A. Mediation as a Tool to Address the Evolving Role of Animals in Society
- B. Test of Appropriateness—What Questions do we Ask?
 - 1. Is Mediation Appropriate?
 - a. For Individuals
 - b. For Society
 - c. For Animal Advocates
 - d. In an Area of Evolving Law
 - 2. Does it Promote or Inhibit Justice?
 - 3. Is Mediation Practical?
- C. Should Mediation be Preferred Process for Animal Law Issues?

CONCLUSION

INTRODUCTION

Animal law matters are slowly, but increasingly, making their way through our court system, resulting in (and from) changes in the way our society views our relationships with non-human animals. Courts are struggling to reconcile two opposing constructs: the present legal reality that animals are property,¹ and the social reality that animals are not pure property and are in fact different from other forms of property.² 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 while the law continues to develop?

Mediation³ is a method increasingly turned to in this country as an

¹ *Pierson v. Post*, 3 Cai. R. 175 (N.Y. 1805), based its decision on the idea that animals are property. See also 4 Am. Jur 2d Animals 6 (2006) (stating the general rule that animals are property). See also David S. Favre, *Judicial Recognition of the Interests of Animals-A New Tort* 2005 MICH. ST. L. REV. 333 (2005) (advocating a new tort to deal with claims of animals for protection against harms inflicted by humans); Gary L. Francione, ANIMALS, PROPERTY, AND THE LAW, (1994) (detailing a thorough review of animals as property and how future legislation can change our basic views of animal status in society); Gary L. Francione, INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR YOUR DOG?, (2000) (discussing the basic right of animals to not be considered property); SONIA S. WAISMAN, BRUCE A. WAGMAN, PAMELA D. FRASCH, ANIMAL LAW, 58 (2d ed. 2002) (discussing the concept of animals as property); Steven M. Wise, *Rattling the Cage Defended*, 43 B.C. L. REV. 623 (2002) (discussing critiques of his recent book, RATTLING THE CAGE, in which he advocates basic legal common law rights for animals, specifically chimpanzees and bonobos); and also see Taimie L. Bryant, *Animals Unmodified: Defining Animals/Defining Human Obligations to Animals*, UCLA School of Law Research Paper No. 06-24, University of Chicago Legal Forum 2006, available at <http://ssrn.com/abstract=902041>; and *Animals and Their Legal Rights, A Survey of American Laws From 1641 to 1990*, Animal Welfare Institute, Fourth Edition (1990).

² 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 that 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. Another reason for this focus is that companion animals are treated less like property than any other category of animal.

³ 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. For a bibliography on ADR see Trevor C.W. Farrow, *Dispute Resolution and Legal Education: A Bibliography*, 7 CARDOZO J. CONFLICT RESOL. 119 (2005).

appropriate alternative to traditional litigation.⁴ It has become a fixture in many courts and communities⁵ and provides a way for individuals to resolve their own problems. 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.⁶

⁴ In response to heavy caseloads and budget restraints many federal courts have instituted ADR programs allowing civil litigants a viable alternative to traditional litigation. 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, increasing demands on the traditional court system. Rene L. Rimelspach, *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, 95 (2001). See also Peter Lantka, *The Use of Alternative Dispute Resolution in the Federal Magistrate Judges Office: A Glimmering Light Amidst the Haze of Federal Litigation*, 36 U. WEST L.A. L. REV. 71 (2005). Regarding the growth of ADR, see also, Nancy Erbe, *The Global Popularity and Promise of Facilitative ADR*, 18 TEMP. INT'L. & COMP. L.J. 343 (Fall, 2004) (discussing the growth of ADR as a global trend especially after war and for cross ethnic dispute resolution); Susan B. Schultz, *Your Administrative Case is Going to Mediation: Are You Ready?*, 6 TEX. TECH. J. TEX. ADMIN. L. 189 (2005) (addressing the growth of Mediation in Texas especially in the cases with governmental agencies); John S. Diaconis, *Mediating with Municipalities: Effective Use of ADR to Resolve Employment and Public Policy Disputes*, 33 WESTCHESTER B.J. 19 (2006) (addressing the vanishing trial and the emergence of ADR and the benefits for municipalities to pursue ADR); and Hon. Lisa Sullivan, *ADR Offers What the Bench Cannot*, 85 MICH. B.J. 16 (February, 2006) (discussing the benefits of ADR over litigation).

See also the following discussing the growth of ADR internationally: David D. Day, *International ADR Skills and Executive Decision-Making*, HAW. B.J. (Sept., 2005); Penny Brooker & Anthony Lavers, *Mediation Outcomes: Lawyers' Experience with Commercial and Construction Mediation in the United Kingdom*, 5 PEPP. DISP. RESOL. L.J. 161 (2005); Nancy D. Erbe, *Appreciating Mediation's Global Role in Promoting Good Governance*, 11 HARV. NEGOT. L. REV. 355 (2006); Steven Austermler, *Mediation in Bosnia and Herzegovina: A Second Application*, 9 YALE HUM. RTS. & DEV. L.J. 132 (2006); and Jose Alberto Ramirez Leon, *Why Further Development of ADR in Latin America Makes Sense: The Venezuelan Model*, 2005 J. DISP. RESOL. 399 (2005).

⁵ Lantka, *supra* note 4.

⁶ See Carrie Menkel-Meadow, *The Trouble With The Adversary System In A Post Modern Multicultural World, The Teaching of Legal Ethics*, 38 WM AND MARY L. REV. 5 (1996) (suggesting that the adversarial system may not be the best forum for a problem solving); Carrie Menkel-Meadow, *New Roles: The Lawyer as Problem Solver and Third-Party Neutral: Creativity and Non-Partisanship in Lawyering*, 72 TEMP. L. REV. 785 (1999) (discussing the different concepts of the role of the lawyer in representing a client); Scott R. Bellhorn, *Settling Beyond the Shadow of the Law: How Mediation Can Make the Most of Social Norms*, 20 OHIO ST. J. ON DISP. RESOL. 981 (2005); and Carrie Menkel-Meadow, *Whose Dispute is it Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)* 83 GEO. L.J. 2663 (1995).

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 and parties who disregard, or are unaware of, prevailing law when settling their disputes. How then does, or should, mediation work in the area of animal law given these advantages and disadvantages?

What happens when existing law has no answer to the legal question posed, or parties wish to deviate from existing law? What happens when only one party wishes to deviate from the law, viewing the animal as more than mere property? 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 under the law.⁷ If both parties love the animal and wish to continue a relationship with it, the court is 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 half the animal's economic value.⁸

These matters are difficult to resolve because the law in some areas is not well established, and in others, it dictates results which are inconsistent with the realities of the parties. Courts, and parties seeking alternative processes for resolution, have little guidance in their efforts to resolve animal law disputes. With respect to other legal matters which are hard to resolve, for instance, child custody and visitation, 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 animal law, and the need for precedent, outweigh the benefits other areas of law have enjoyed from an alternative dispute resolution approach. Conversely, we may ask whether this is a critical time in which to incorporate alternative thinking about processes for conflict resolution into the field of animal law as it continues to develop.⁹

⁷ See *Pierson v. Post*, *supra* note 1 (treating an animal as property).

⁸ Courts are beginning to struggle with these issues. See Stephanie Francis Ward, *Canine Case is Doggone Tough*, ABA J., e-report 5-19-07; Kathianne Boniello, *Who's Your Daddy, Visitation Rights Battles for Fido Looms for Divorcing Couples*, HOME NEWS TRIBUNE ONLINE, Jan. 8, 2007.

⁹ Consideration of whether mediation is a particularly appropriate method to address and

This Article will explore these issues 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 mediation as well as animal law and the role of animals in our society. These topics are explored below.

I. ANIMAL LAW—THE CHANGING NATURE OF OUR RELATIONSHIPS WITH ANIMALS¹⁰

The majority of households in the United States have companion animals.¹¹ The amount of money spent on these animals for food, clothing, medical care, entertainment, exercise and the like indicates that care of companion animals is a very significant industry in our country.¹² This 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 at the veterinarian's office for a five-year-old cat that was purchased for \$15. But that reality, and others like it, is repeatedly on display every day in this country. If people felt their animals were mere property, like lamps or books, they would get new pets rather than try to heal older, sick pets which have no cognizable market or economic value. However, this is not the case.

In fact, the trend is in the opposite direction. People can now purchase health insurance policies for their animals.¹³ Companies specialize in

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.

¹⁰ This section is intended to provide context for the discussion and analysis that follows and is not meant to be a comprehensive assessment of the role of animals in our society.

¹¹ In the American Pet Products Manufacturers Association ("APPMA") 2005-2006 survey, 69.1 million American households were found to have at least one companion animal, comprising of 358.8 million pets in American households, which includes dogs, cats, fresh and salt water fish, birds, small animals, and reptiles. APPMA, 2005-2006 National Pet Owners Survey, http://www.appma.org/press_industrytrends.asp (last visited Feb. 25, 2007).

¹² In 2005, \$36.3 billion was spent on companion animals and an estimated \$38.4 billion was spent in 2006. *Id.*

¹³ 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*

cremation, burial and memorial services for animals.¹⁴ Increasingly invasive and extensive medical care is available for animals, including chemotherapy and significant surgeries.¹⁵

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 replacement cost (value) of the property. Imagine how quickly a lawnmower repair business would fold if it charged 10 times the purchase price for repairs. However, veterinarians are unique in this instance, for this is exactly what veterinarians do, and must do, in order to stay in business. One notable irony is that veterinarians rely on people making this unreasonable economic choice in order to sustain their businesses. Yet many vets then seek to assert the low economic value of animals as property when it comes to paying damages for negligence. And while there are reports on the lack of doctors resulting from economic difficulties, there is no similar news regarding the lack of veterinarians. It appears, in fact, that their businesses are booming.¹⁶

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,

Care of Companion Animals, 10 ANIMAL L. 163, (2004). See also Pet Health Insurance, <http://www.petinsurance.com> (last visited Feb. 25, 2007) (detailing various pet insurance plans available to the public).

¹⁴ Information on burial, cremation and memorial services for animals: Pet burials range from \$250 to \$1,000, and any type of service is available. Cremation is the cheapest option. Cremation Urns: \$24.00 to \$79.00 for bronze, metal, brass, Standard Pet Casket: \$69.95 to \$249.95, Craft Persons Series Pet Casket: \$29.95 to \$199.95, Cremation Keepsake Jewelry: \$39.95 to \$ 49.95 See Angel Sleeping Pet Caskets, <http://www.thepetcasketshop.com/Index.html>, (last visited Feb. 25, 2007); <http://www.casketsforpets.com>; All About Pet Urns, <http://www.allaboutpeturns.com>, (last visited Feb. 25, 2007); TS Pet Memorials, <http://www.tspetmemorials.com> (last visited Feb. 25, 2007).

¹⁵ See Russell Smith, *Surgery for Fido and Garfield*, SWEETWATER REPORTER, May 25, 2003, available at <http://www.russelltexas.com/Newspaper/perspectiveMay252003.htm>, (providing information on newer surgical techniques for pets, including cosmetic surgery and transplant surgery). See also CNN.com, *Acupuncture, aromatherapy available for Rover and Kitty*, CNN.com, Nov. 21, 2007, available at <http://www.cnn.com/2006/11/20/pet.acupuncture.ap/index.html> (discussing additional alternative health procedures available for animals).

¹⁶ In 2005, \$8.7 billion was spent on veterinary care, \$8.7 billion was spent on supplies and OTC medicines, and \$2.5 billion was spent on pet services such as grooming and boarding. In 2006, an estimated \$9.4 billion was spent on veterinary care, \$9.3 billion was spent on supplies and OTC medicines, and \$2.7 billion was spent on pet services such as grooming and boarding. APPMA, 2005-2006 National Pet Owners Survey, *supra* note 11.

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 resulting from damage to the human-animal bond.¹⁷ 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 more in insurance premiums than the purchase price or replacement cost of the property they seek to protect. Individuals do not leave money for their bicycles in their wills, or seek visitation arrangements for their televisions upon the termination of their marriages.

Yet individuals attempt to do all these things and more for their companion animals.¹⁸ Why? Why are animals, as a category of property,

¹⁷ Non-economic damages is a category of damages that include losses due to pain and suffering and losses of companionship. These damages do not compensate for economic loss, but rather for emotional or other loss, which is not easily calculated through the use of traditional economic analysis.

Articles addressing the question of non-economic damages in this context include Victor E. Schwartz and Emily J. Laird, *Non-Economic Damages in Pet Litigation: The Serious Need to Preserve a Rational Rule*, 33 PEPP. L. REV. 227 (2006); David Gram, *Couple Thinks Pet's Death Merits More than Law Allows*, Knoxnews (December 5, 2006) available at http://www.knoxnews.com/kns/national/article/0,1406,KNS_350_5190422,00.html; Margit Livingston, *The Calculus of Animal Valuation: Crafting a Viable Remedy*, 82 NEB. L. REV. 783 (2004); Rebecca Huss, *Valuation in Veterinary Malpractice*, 35 LOY. U. CHI. L.J. 479 (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 (2003); Janice M. Pintar, *Negligent Infliction of Emotional Distress and the Fair Market Value Approach in Wisconsin: The Case for Extending Tort Protection to Companion Animals and Their Owners*, 2002 WISC. L. REV. 735 (2002); Rebecca Huss, *Valuing Man's and Woman's Best Friend: The Moral and Legislative Status of Companion Animals*, 86 MARQ. L. REV. 47 (2002); Steve M. Wise, *Recovery of Common Law Damages for Emotional Distress, Loss of Society, and Loss of Companionship for the Wrongful Death of a Companion Animal*, 4 ANIMAL L. 33 (1998); Sonia S. Waisman and Barbara R. Newell, *Recovery of "Non-Economic" Damages for the Wrongful Killing or Injury of Companion Animals: A Judicial and Legislative Trend*, 7 ANIMAL L. 45 (2001); David S. Favre & Peter L. Borchelt, *ANIMAL LAW AND DOG BEHAVIOR* 52-64 (1999).

¹⁸ See *supra* note 14 (noting the prices people pay for caskets and urns for their companion animals) and APPMA, 2005-2006 National Pet Owners Survey, *supra* note 11 (reporting that people spent \$38.4 billion on their companion animals in 2006). A strong minority of states allow pet trusts, such as Alaska, California, Colorado, Michigan, Missouri, Montana, New Mexico, New York, North Carolina, and Utah. Also many states without specific state statutes allow honorary trusts for pets. Darin I. Zenov and Barbara Ruiz-

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. 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.¹⁹ Though there may be arguments to enact such laws with respect to other forms of property,²⁰ 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 this property itself or intend 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.

Likewise, 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

Gonzalez, *Trusts for Pets*, 79 FLA. B.J. 22 (December 2005), available at <http://www.floridabar.org>. See also Gerry W. Beyer, *Pet Animals: What Happens when their Humans Die?* 40 SANTA CLARA L. REV. 617 (2000) (discussing the prohibition animal beneficiaries); Christine Cave, *Trusts: Monkeying Around With Our Pets' Futures: Why Oklahoma Should Adopt a Pet-Trust Statute*, 55 OKLA. L. REV. 627 (2002) (acknowledging the importance of animal companions to people and detailing how animals' futures should be secure); Joseph D. Grownney, *Need for an Enforceable Pet Trust Statute in Missouri*, 72 UMKC L. REV. 1053 (2004) (highlighting the trend towards providing for companion animals in wills); Rebecca J. Huss, *Separation, Custody, and Estate Planning Issues Relating to Companion Animals*, 74 U. COLO. L. REV. 181, (2003) (describing the importance of companion animals to individuals); Jennifer R. Taylor, *A Pet Project for State Legislatures: The Movement Toward Enforceable Pet Trusts in the Twenty-First Century*, 13 QUINN. PROB. L.J. 419 (1999) (discussing the movement towards allowing animals to be beneficiaries of wills).

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, *supra id.*

¹⁹ Each state determines what animals are covered by anti-cruelty laws. Stephan K. Otto, *Animal Protection Laws of the United States of America*, (Animal Legal Defense Fund, CD-ROM, 2d ed. 2005). 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).

²⁰ Arguments can be (and have been) made for treating other forms of personal property differently, such as engagement rings, wedding albums or dresses, heirlooms, or property of historic or cultural value. See generally Sarah Harding, *Justifying Repatriation of Native American Cultural Property*, 72 IND. L.J. 723 (1997) (discussing special protection for cultural property); Emily L. Sherwin, *Constructive Trusts in Bankruptcy*, 1989 U. ILL. L. REV. 297 (1989) (protecting property (heirlooms) that becomes bound up with individuals' sense of themselves or their future.)

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 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 conveyance of rights, legal consideration, and protection of status.²¹

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 significant dialogue and recent legal and social developments. One such area of development can be seen in the law enforcement arena with those police officers and prosecutors who have begun to take animal abuse cases more seriously.²² 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.²³ 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.²⁴ Second, some law

²¹ See, e.g., JEREMY BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* 310-11, at n. 1 (1988) (describing qualities which entitle a creature to legal personhood); JOHN RAWLS, *A THEORY OF JUSTICE* 505 (1971) (same); PETER SINGER, *ANIMAL LIBERATION* (rev. ed., Ecco, 2002) (1975) (same).

²² FRANK R. ASCIONE, *CHILDREN AND ANIMALS: EXPLORING THE ROOTS OF KINDNESS AND CRUELTY* (2005); see also PHIL ARKOW, *THE EVOLUTION OF ANIMAL WELFARE AS A HUMAN WELFARE CONCERN*, in *CHILD ABUSE, DOMESTIC VIOLENCE AND ANIMAL ABUSE*, (Frank R. Ascione and Phil Arkow eds., 1999); Randall Lockwood and Frank R. Ascione eds., *CRUELTY TO ANIMALS AND INTERPERSONAL VIOLENCE* (1998). See also John Koopman, *The Badge*, SFGATE.COM, May 7, 2007, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=c/a/2007/05/07/BAGIEPLEK51.DTL> (detailing a San Francisco police officer's mission to protect animals); Dick Clarke, *Men Accused of Rape and Cat Cruelty in Court Today*, THE POST STANDARD (Syracuse) Dec. 29, 2006, available at http://www.syracuse.com/news/updates/index.ssf?/mtlogs/syr_poststandard/archives/2006_12.html; and Jen Chung, *Animal Cruelty Complaint Turns Into Rape Arrest*, Gothamist.com, Dec. 19, 2006, http://www.gothamist.com/2006/12/19/animal_cruelty.php.

²³ *Id.*

²⁴ See 2005 Me. HP 1321, Me 122nd Cong. (2006) for legislative history of Maine bill protecting animals in domestic violence cases. See also Pam Belluck, *New Maine Law Shields Animals in Domestic Violence Cases*, N.Y. TIMES, Apr. 1, 2006. See also *Law Would*

enforcement officials and mental health professionals accept the view that violence is a trait that often escalates if not curbed.²⁵ Therefore, some of these professionals now advocate for early and aggressive intervention in order to prevent more serious future violent crimes. There is no agreement yet whether the best approach to this problem is harsher criminal penalties or treatment and therapeutic responses. Changes in how police, prosecutors, and courts address animal abuse, though stemming primarily from instrumental motivations to help humans, have ancillary benefits for animals. Though these concerns may be the primary motivation for most law enforcement personnel, certainly some 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; 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 of vegan labeling on food, health, beauty products, shoes, and other clothing items; the creation and increase of animal bar associations and committees, law classes and student groups; 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 (Animal Liberation Front (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. After hurricanes Katrina and Rita, many individuals refused to leave their homes without their companion animals. Emergency personnel were directed to leave the animals behind, and as a result, many individuals stayed with their animals rather than seeking shelter, with some tragic consequences. This phenomenon created significant social and political dialogue, resulting in the creation of the federal PETS Act (Pets Evacuation

Help Keep Pets Safe, SUB. CHI. NEWS, July 19, 2006, (discussing a bill in Chicago modeled on the Maine and Vermont legislation).

²⁵ Kathleen M. Roche et al. *Early Entries Into Adult Roles; Associations with Aggressive Behavior From Early Adolescence Into Young Adulthood*, YOUTH AND SOC'Y Vol. 38, No. 2, 236-261 (2006).

and Transportation Standards Act of 2005) legislation,²⁶ Louisiana Senate Bill 607,²⁷ and a letter from the American Bar Association in support of federal legislation to address these issues, to name a few.²⁸

Coupled with the development of social awareness of animal issues is the growth in our scientific understanding of the nature and capabilities of animals.²⁹ Where some once claimed that animals could not feel, suffer, or reason,³⁰ now scientists seem to have accepted that for many species of animals, (most mammals for instance) these traits are present and verifiable.³¹ The evolution of scientific knowledge that relates to the animal field is not restricted to animal behaviorists. I will also briefly identify two other areas of scientific endeavor that are closely related to animal issues.

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.³² These situations are a good example of the development, and interdisciplinary nature of, animal issues. These cases often involve, doctors, psychiatrists, psychologists, veterinarians, police, animal control or humane officers, lawyers and courts.

Another area of scientific development with a focus on human behavior is animal cruelty and abuse. As noted above, 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, and therefore professionals regard these crimes against animals more

²⁶ Pets Evacuation and Standards Transportation Act of 2006, Pub. L. No. 109-308 (2006) was signed into law by President Bush on October 6, 2006.

²⁷ S.B. 607, 2006 La. Sess., (La. 2007).

²⁸ Robert D. Evans, Governmental Affairs Office, American Bar Association, (March 17, 2006) (on file with the University of Pennsylvania J. Animal Law & Ethics).

²⁹ See, e.g., DIAN FOSSEY, *GORILLAS IN THE MIST* (1983) (providing one example of increased understanding of animal sentience); JANE GOODALL, *CHIMPANZEES I LOVE, SAVING THEIR WORLD AND OURS*, (2001) (same); JANE GOODALL, *IN THE SHADOW OF MAN*, (Mariner Books, rev. ed., 2001) (same). See also STEVEN M. WISE, *DRAWING THE LINE: SCIENCE AND THE CASE FOR ANIMAL RIGHTS*, (2002) (arguing for the rights of non-human animals); Gorilla Foundation, www.koko.org (last visited Feb. 25, 2007) (advocating for the rights of gorillas).

³⁰ RENE DESCARTES, *DISCOURSE ON THE METHOD AND MEDITATIONS ON FIRST PHILOSOPHY* 34-36 (David Weismann, ed., 1997) (1637).

³¹ See GOODALL, *supra* note 29.

³² Randy Frost, *People Who Hoard Animals*, 17 *PSYCHIATRIC TIMES* (2000), <http://www.psychiatristimes.com/p000425.html>, (last visited Feb. 25, 2007). But see *HOARDING OF ANIMALS. RESEARCH CONSORTIUM, Animal Hoarding: Structuring Interdisciplinary Responses to Help People, Animals and Communities at Risk*, (Gary J. Patronek, Lynn Loar, & Jane N. Nathanson, eds., 2006).

seriously.³³

So what do these developments in how our society conceptualizes the role and nature of animals teach us? 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; if some capacity to reason for some animals is acknowledged; if our own elected representatives see fit to offer protections for animals against abuse and neglect and in times of disaster, then why are the courts and legislatures 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 currently addressed.

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 CONTEXTS³⁴

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 companion animal may face, with the four corresponding current legal responses. The contexts chosen for the hypothetical situations 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, academic, and government interests are involved; and fourth—animals in relation to private business interests.

³³ See *supra* note 22 (describing the link between violent acts on animals and violent acts on people).

³⁴ 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, this section hopes to illustrate sufficient context to show something of the current state of evolution in the way we think about, eat, purchase, live and generally interact with animals, sufficient to highlight the widespread nature of both what is at stake and changing. This section does not suggest how much of this evolution has already occurred and how much is still to come, but it argues that, as a result of the completely intertwined nature of humans' relationship with other animals, that when change comes, it will be widespread and have far reaching impact which must be considered. Likewise, the scope of the paper is also somewhat limited. It focuses more on the court than the legislative process and attempts to raise more questions than it answers.

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, eight-year-old twins. They also have a dog, a five-year-old beagle named Sasha. Malik and Natasha are getting divorced. They have reached agreement with respect to the terms of spousal and child 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 \$20. Although 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. Moreover, 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 dog's primary caregiver, taking him to the vet when necessary, walking him, and going 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 deems reasonable.

2. Current Response—Divorce³⁵

Courts are responsible for determining the division of marital property upon divorce when the parties cannot reach settlement. Pets are currently considered property.³⁶ 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. Courts may order the property sold and the proceeds equitably divided when parties cannot agree to the division of property.

Applying this reasoning to the instant case, a good 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

³⁵ The application of divorce law as applied to this particular 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.

³⁶ See *supra* note 1 and accompanying text (describing the current legal status of animals as property).

parties, the court could 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. The court could also 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 agreement, as it is without jurisdiction (as most judges are currently interpreting the limits of their judicial authority) to do so.³⁷

There is no secondhand market for companion animals, unlike cars or even household goods, which would assist the court in determining Sasha's value. No one is likely to buy an animal that 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 cannot be readily determined.

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 parties³⁸ will be displeased with the court's ruling. Yet what are the

³⁷ See *Bennett v. Bennett*, 655 So. 2d 109, 110-11 (Fla. Dist. Ct. App. 1995) (holding 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); *Akers v. Sellers*, 54 N.E.2d 779, 780 (Ind. Ct. App., 1944) (refusing to find that the husband was the owner of dog in suit in replevin when the court hearing his divorce declined to make any order with respect to the dog); *In re Marriage of Stewart*, 356 N.W.2d 611, 613 (Iowa Ct. App. 1984) (decreeing that dogs are personal property and the court therefore does not need to determine its best interests); *Arrington v. Arrington*, 613 S.W.2d 565 (Tex. App. 1981) (finding that a dog is personal property and not therefore appropriate for the office of managing conservators consideration as that office was designed for children and not dogs). 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. 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.

³⁸ The wife and husband (or in Massachusetts, parties of the same gender) are the parties to the divorce. Though the children certainly have an interest in the outcome, legislatures have constrained the courts and parents to be mindful of their interests, but have not made

alternatives? The court is without statutory authority 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.³⁹

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 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 goes far beyond contemporary legal reality. Courts⁴⁰ and parties⁴¹ have significant difficulty

children parties to the litigation. 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 U.S. 393 (1857) (suggesting there is a class of legal persons whose interests are not recognized by the courts)).

³⁹ Some courts are beginning to resist this interpretation of the limits of their authority. See *Dickson v. Dickson*, No. 94-1072 (Ar. Garland Cty 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 ordered to pay half of outstanding debts for the dog's care, relieving him of all further liability but depriving him of any further interest in the dog); see also *Assal v. Barwick*, No. 164421 (Md. Cir. Ct., Dec. 3, 1999) (giving a 30-day visitation period to the husband each summer); *In re Marriage of Fore*, No. DW 243974 (Minn. Dist. Ct., Nov. 9, 2000) (allowing the husband and wife to work out visitation schedule for the dog, ultimately unsuccessful because the husband often refused to return the dog). *But see*, *Nuzzaci v. Nuzzaci*, 1995 WL 783006, (Del. Fam. Ct. Apr. 19, 1995) (refusing 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). For an argument to expand the interpretation of the limits of the court's authority and contending that courts should treat companion animals as more than mere chattel, see Barbara Newell, *Animal Custody Disputes: A Growing Crack in the Legal Thing-hood of Nonhuman Animals*, 6 ANIMAL L. 179, 182 (2000).

⁴⁰ 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, 22 (January, 2005) (focusing on a 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

in the domestic relations context even 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 legal framework 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 are beginning to exhibit more willingness than in the past to address matters of animal law.⁴²

well as between divorced parents). The purpose of study was to evaluate the effectiveness of mediation in comparison to adversary settlement. 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 M. Kitzmann & Robert E. Emery, *Child and Family Coping One Year After Mediated and Litigated Child Custody Disputes*, 8 J. FAM. PSYCHOL. 150-159 (1994) (discussing a 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).

⁴¹ "Divorce causes more stress than getting fired and more stress than a jail term. In fact it is more stressful than any other single even except the death of a spouse . . . Risk of suicide is three times greater for divorcing people than for married people. [Divorcing individuals are] also more vulnerable to psychiatric illness, homicide, depression, anxiety, motor vehicle accidents, and even physical illness." *See Divorce Stinks*, at <http://www.divorceinfo.com/divorcestinks.htm> (last visited Jan 31, 2006). Websites have been created to specifically help children and parents through the difficulties of divorce. *See Up to Parents: Home of Parents' Commitments to Their Children During and Following Divorce*, available at <http://www.uptoparents.org/faq.cfm> (last visited Feb. 21, 2007) (providing a guide to parents about how to best deal with their children and how to avoid court proceedings during their divorce); *see also Divorce Mediation*, <http://www.divorceinfo.com/mediation.htm> (last visited Feb. 21, 2007) (promoting mediation in divorce because it is "flexible and confidential"). Scholars have noted "[i]n 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 acrimony between parents." *See also* Connie Beck & Bruce Sales, *A Critical Reappraisal of Divorce Mediation and Policy*, 6 PSYCHOL. PUB. POLY. & L. 989, 1013 (2000); Ben Barlow, *Divorce Child Custody Mediation: In Order to Form a More Perfect Disunion?* 52 CLEV. ST. L. REV. 499 (2004-2005) (examining whether mediation is viable for child custody divorce cases).

⁴² Examples of legislative activity on behalf of animals include: Maine, 2005 Me. ALS 510 (allowing court orders for protection in instances of abuse to cover animals); Pam Belluck, *New Maine Law Shields Animals in Domestic Violence Cases*, N.Y. TIMES, Apr. 1, 2006; M.L. Johnson, *R.I. to Order Cat Owners to Spay*, NEUTER, A. P. NEWS, May 24, 2006 (discussing Rhode Island as the first state to require cat owners to spay or neuter their pets); Gretchen Ruethling, *Chicago Prohibits Foie Gras*, N.Y. TIMES, April 27, 2006, at A16 (discussing Chicago's prohibition on foie gras); introduction and passage of the PETS Act (Pet Emergency Transportation Safety Act) S. 2548, 109th Cong. (2006); and Farm Animal

However, the discourse related to animals in domestic relations matters is not one making much progress, nor is there great recognition of the need for discussion. So if the courts and legislatures will not offer solutions in the near term, 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 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,⁴³ 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. Nicholas, the teenage boy who lives there, has previously told the children that if he sees Sasha in 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 made in his yard, and 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' help, take the dog to the veterinary hospital. Subsequently, the family

Stewardship Purchasing Act, H.R. 5557, 109th Cong. (2006) in Congress; as well as introduction of Animal Fighting Bill, see *Gallegly to Introduce Animal Fighting Bill*, CAL. CHRON., Jan. 7, 2007,

<http://www.californiachronicle.com/articles/viewArticle.asp?articleID=18753>; *EU tightens animal transport rule*, BBC NEWS, Jan. 19, 2007, available at

<http://newsvote.bbc.co.uk/mpapps/pagetools/print/news/bbc.co.uk/2/hi/europe/6232563.stm>;

ALDF news, *Historic Legal Decision Protects Cats From Being Returned to Their Abusers*, <http://www.aldf.org/news/details.php?id=208> (discussing a court decision in Oregon to remove cats from their neglectful owner, case available at

<http://www.publications.ojd.state.or.us/A131082.htm>); and Nancy Harbert, *Cracking Down on Pet Owners*, ALBUQUERQUE, Jan. 2, 2007 (regarding a new ordinance that may have reduced the euthanasia rate by 50%).

⁴³ Under our current legal rubric, Sasha cannot be considered a party, though this legal change has been advocated. Note that Sasha has no say in determining the outcome regardless of the effect on him, and no parties are bound to consider what is in his best interest, as they must do for the children.

decides to file a police report with respect to Nicholas's actions. The police decide to file charges and the prosecutor agrees to pursue the case; a court date is set for Nicholas to be tried on animal cruelty charges.

2. Current Response—Animal Cruelty⁴⁴

Once Nicholas is prosecuted, if the facts above are proven, Nicholas is likely to be convicted of misdemeanor charges of animal cruelty or abuse.⁴⁵ It is unclear what penalties would flow to Nicholas in this case. In some jurisdictions an order might include fines paid to the court, some jail time, probation, mandatory counseling, community service, or a combination of those options. The outcome 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 for the children 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.⁴⁶ The family is not likely to be even minimally (much less fully) 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.

⁴⁴ There is still a good deal of variation in statutory schemes, application, enforcement, and determination of penalties across jurisdictions. See Stephen K. Otto, *Animal Protection Laws of the United States of America*, *supra* note 19 (gathering information on animal cruelty laws throughout the country); 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); Stephen K. Otto, *State Animal Protection Laws - The Next Generation*, 11 ANIMAL L. 131, 132 (2005) (addressing the trend of increasing penalties and enforcement of anti cruelty laws).

⁴⁵ ALDF, *Best States to Abuse an Animal?*, 25 THE ANIMALS ADVOCATE (Summer 2006), available at http://www.aldf.org/assets/130_animalsadvocatesummer06.pdf (listing Alaska, Arkansas, Hawaii, Idaho, Mississippi, North Dakota, South Dakota, Utah (as well as American Samoa, Northern Marianas, Guam and Puerto Rico)).

⁴⁶ See *supra* note 17 regarding non-economic damages.

Even more clearly, Sasha himself will not be eligible for any damages. It may be said that the state has determined, in creating an animal cruelty statute, that certain categories of animals have the right to be free from abuse. This assertion would be strongly disputed. Rather, it might be more accurately 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 the last 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.⁴⁷ As compelling as that inquiry is, it is beyond the scope of this Article.

Currently, each state has laws prohibiting the type of behavior in which Nicholas engaged.⁴⁸ Police, prosecutors, and courts have been more willing

⁴⁷ See GARY L. FRANCIONE, INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR THE DOG? (2000) (discussing the basic right of animals to not be considered property); GARY L. FRANCIONE, ANIMALS, PROPERTY AND THE LAW, (1994) (reviewing the notion of animals as property and how future legislation can change our basic views of animal status in society); CASS R. SUNSTEIN AND MARTHA C. NUSSBAUM, EDS., ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTION (2004); David S. Favre, *Judicial Recognition of the Interests of Animals: A New Tort*, 2005 MICH. ST. L. REV. 333, 352 (2005) (advocating a new tort to deal with claims of animals for protection against harms inflicted by humans); Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership, and The Moral Status of Animals*, CHRON. REV., February 3, 2006 at 6 (arguing for an increased moral respect towards animals); 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); Cass R. Sunstein, *Standing for Animals, Public Law and Legal Theory* (Univ. of Chicago Law Sch. Pub. Law and Legal Theory Working Paper No. 6, 1999), available at <http://www.law.uchicago.edu/academics/publiclaw/resources/06.CRS.Animals1.pdf> (suggesting that animal welfare statutes be amended to grant private causes of action).

⁴⁸ See *supra* note 44 (citing several different approaches to animal cruelty laws).

in recent years to move these matters forward and take them more seriously than in the past.⁴⁹ This result may flow from many efforts. Animal advocates and researchers have successfully established a link between animal and human abuse.⁵⁰ 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.⁵¹ Media coverage of animal cruelty cases have been a factor in persuading 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.⁵²

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—Involving Corporate, Academic, and Government Interests

After the divorce, Natasha and Malike sell the home, split the proceeds, move into two new apartments, and agree to informally share custody of Sasha. Sasha has been having difficulty with his eyesight since the incident with Nicholas, so the family has been keeping him inside. Because of this, and because of the 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. The laboratory shaves his skin and applies experimental medicine to test for

⁴⁹ See Stephen K. Otto, *State Animal Protection Laws - The Next Generation*, *supra* note 44 (addressing the trend to increase penalties and enforcement of anti cruelty laws).

⁵⁰ See *supra* note 22 (arguing a link exists between violence toward animals and violence against humans).

⁵¹ See Animal Planet, Daily TV Schedule, <http://animal.discovery.com/tvlistings/weekly.jsp?&channel=APL> (last visited Feb. 22, 2007), for a listing of such shows as *Animal Precinct* (Animal Planet broadcast, Jan. 2, 2007) and *Emergency Vets* (Animal Planet broadcast, Jan. 2, 2007).

⁵² See Stephen K. Otto, *Animal Protection Laws of the United States of America*, *supra* note 19 (gathering information on animal cruelty laws throughout the country).

efficacy and irritability. After being at the lab for three weeks, Sasha and the other animals are freed by individuals who identify themselves as members of the Animal Liberation Front. The local media covers the incident and the prosecution of the activists, which leads Malik and Natasha to locate and claim Sasha.

*2. Current Response - Experimentation*⁵³

The criminal courts are comfortable addressing the actions of the activists such as members of SHAC (Stop Huntingdon Animal Cruelty) or the Animal Liberation Front⁵⁴ Regarding the individual who took and sold Sasha, if she were found and the facts above proven, she could be subjected to prosecution for theft. After all, 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 individual who took Sasha considered him to be abandoned property. Without dog tags, identifying information, or license, the defendant might argue that she was not put on notice that this property was owned by another; and that absent such notice, Sasha was essentially lost property and the defendant had no duty to find Sasha's owner or to clarify the question of ownership. Local regulations requiring dog tags, which would be vital to the defense, could deprive the family of redress. In the end, although a court would have jurisdiction to hear this matter, the outcome of this 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, the defendant would bear little financial responsibility and 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 urge a prosecutor to bring claims of receiving stolen property and animal cruelty against this individual. If there is evidence that the individual knew or should have known that Sasha was stolen, perhaps a criminal case would lie. Certainly if Nicholas, Malik and Natasha's neighbor, had behaved in

⁵³ This paper is concerned only with research that is legally conducted and does not question either the efficacy or morality of research or research that does not meet the standards imposed by federal law.

⁵⁴ Andrew Stepanian, the first of the SHAC 7 to go to jail, was convicted of violating the Animal Enterprise Protection Act. Interview with Amy Goodman, *First Member of SHAC 7 Goes to Jail for Three Year Sentence*, Democracy Now, Oct. 3, 2006, <http://www.democracynow.org/article.pl?sid=06/10/03/142235>. The Animal Enterprise Protection Act, 18 U.S.C. § 43 (2000), was the precursor to the Animal Enterprise Terrorism Act (AETA) 18 U.S.C. § 43 (2006) which was passed this year.

the same way towards Sasha as those in the lab did, he would be liable for animal cruelty. However, in this case, the true ownership of Sasha is the only legal question. If the person who experimented on Sasha was a bona fide employee of a licensed lab, even if she performed the same acts that would result in liability for Nicholas, she would not be liable as long as she (or the lab) owned Sasha and her actions were part of an approved research protocol. This result is due to the fact that researchers are exempted from prosecution by the Animal Welfare Act (AWA) which regulates the treatment of animals in research and experimentation.⁵⁵ for acts which might otherwise violate anti-cruelty statutes. If the researcher did not provide housing, exercise, or food and water to Sasha, she might face liability under the AWA.⁵⁶ But beyond this, and to the extent that denial of such basic necessities is deemed required by the research protocol, such behaviors would be exempt from prosecution. Given the nature of the AWA, very few prosecutions are pursued against laboratories that conduct tests on animals or their personnel.⁵⁷ Congress has determined that society's interest in research outweighs the harm caused to animals that would, in other contexts, be illegal. As a result, Natasha and Malik would have a hard time convincing a court that they would have standing and a cognizable claim under the AWA. Again, they would be left to either accept the unpalatable reality that they have no means of redress for the harm caused to Sasha, or to look for alternative approaches to solving their problems.⁵⁸

D. Veterinarian Malpractice

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 named Dr. Little. Although Sasha's wounds have been cleaned and dressed, they discover that Dr. Little also gave him the wrong medication which caused Sasha to have seizures and go

⁵⁵ See Animal Welfare Act (hereinafter "AWA"), 7 U.S.C.A. §§ 2131-2159 (2006) (regulating the sale and treatment of animals, particularly those intended for use in research facilities).

⁵⁶ See *id.* at §2143 (describing requirements for the humane treatment and care of animals under the AWA, such as provisions of housing, exercise, food, and water).

⁵⁷ See *Assal v. Barwick*, No. 164421 (Md. Cir. Ct., Dec. 3, 1999) (providing an alternative to traditional remedies by providing the husband a visitation period for the animal).

⁵⁸ Again, Sasha has no say in the outcome and his interests are not considered.

blind.

2. Current Response—Veterinarian Malpractice

If the facts above were proven with regard to Dr. Little's conduct, the outcome of the litigation against Dr. Little would depend on the jurisdiction in which their claims were brought. Most states do not recognize claims for veterinary malpractice.⁵⁹ However, most states would recognize a common law or statutory negligence or breach of contract claim in these circumstances.

The resolution of the issue of damages would also depend on the particular jurisdiction in which the veterinary malpractice claim would be brought. Ohio, for instance, does not recognize claims seeking non-economic⁶⁰ damages for injuries to animals, or claims for injuries caused to humans as a result of injuries caused to their animals.⁶¹ Some states have

⁵⁹ Veterinarian malpractice is an area of law that is in a significant state of flux. Some 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. Other courts are still only comfortable considering veterinary negligence claims absent authority from the legislature. Such claims have a lower evidentiary threshold and result in lower damages. Concerns for increased malpractice insurance costs have been raised with respect to veterinary malpractice. However, these concerns are balanced by judicial and legislative interests in professional accountability and the possibility of awarding non-economic damages, which would compensate individuals in circumstances of professional negligence beyond the mere market value of the animal injured or killed. See *People v. Arroyo*, 777 N.Y.S.2d 836, 846 (N.Y. Crim. Ct. 2004) (concluding that the defendant had no statutory duty to provide veterinary care to a terminally ill animal); Rebecca J. Huss, *Valuation in Veterinary Malpractice*, 35 LOY. U. CHI. L.J. 479, 501-502 (2004) (describing the types of negligence and malpractice claims to which veterinarians may be subjected); Katie J. L. Scott, Note, *Bailment and Veterinary Malpractice: Doctrinal Exclusivity or Not?*, 55 HASTINGS L.J. 1009, 1009 (2004) (arguing that when courts determine negligence by a veterinarian, they set aside animals' classifications as property); Elaine T. Byszewski, Comment, *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, 217-24 (2003) (describing current valuation standards of animals employed by the courts); Christopher Green, Comment, *The Future of Veterinary Malpractice Liability in the Care of Companion Animals*, 10 ANIMAL L. 163, 169-170 (2004) (evaluating the major arguments related to veterinary liability).

⁶⁰ See *supra* note 17 discussing non-economic damages.

⁶¹ See *Oberschlake v. Veterinary Assoc. Animal Hosp.*, 785 N.E.2d 811, 814 (Ohio Ct. App. 2003) for an Ohio appellate court's dismissal of the appellants' arguments that non-economic damages should be awarded for animals and that animals should be distinguished from other personal property. In this case, 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 dog's owners. *Id.* at 814-15. See also *Pacher v. Invisible Fence of Dayton*, 798 N.E.2d 1121, 1125 (Ohio Ct. App. 2003) (holding that Ohio does not recognize a cause of action for severe emotional distress caused by injury to property (dog)

begun to allow for such forms of recovery.⁶² However, Malik and Natasha would have difficulty finding a lawyer to take on a case of veterinary malpractice even in those states where such a claim is cognizable unless non-economic recovery would also be allowed because such cases require expert testimony to prove the claim, further increasing the costs of litigation. Moreover, the limitation on recovery for breach of contract or property damage claims to the value of the dog act as a disincentive for litigating these matters.

Another option for Malik and Natasha would be to complain to the appropriate licensing body which oversees the professional conduct of veterinarians and which issues and revokes licenses.⁶³ Courts have jurisdiction to review such boards' decisions to revoke veterinarians' licenses or to sanction negligent veterinarians. The family, however, would have no say in this process where they would be witnesses rather than parties. The process focuses on whether sanctions to licensee are appropriate rather than compensation to the affected individuals. Once again, a party attempting to receive compensation for harm done to it and to its pet must either accept an unpalatable reality, or look for alternative approaches to solving its problems.⁶⁴

E. Alternatives - Mediation

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.⁶⁵ 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 the question whether there are other, complimentary,

and that the dog's status as property deprived him of any status to sue).

⁶² Most recently, the Court of Appeals of Washington, in *Womack v. Von Rardon*, 135 P.3d 542, 543, 546 (Wash. Ct. App. 2006), granted \$5,000 to the Plaintiff for the loss of her pet cat and for her emotional distress. *See also* Tennessee's T-Bo Act, TENN. CODE ANN. § 44-17-403 (West 2000) (stating that if the death of an animal is caused by the negligent act of another, the owner of the pet may receive up to \$5000 in non-economic damages under certain circumstances).

See, e.g., IDAHO CODE ANN. § 54-2115 (West 2000) (providing the grounds for discipline of veterinarians under Idaho statutory law); 63 PA. CONS. STAT. ANN. § 485.21 (West 2003) (stating the grounds for disciplinary proceedings against veterinary medicine practitioners in Pennsylvania); TENN. CODE ANN. § 63-12-124 (West 2006) (indicating the grounds on which a veterinarian's license could be suspended or revoked under Tennessee statutory law).

⁶⁴ Once more Sasha has no role in determining the outcome.

⁶⁵ Certainly, these approaches are not optimal for Sasha, whose interests, at this point, the courts are powerless to consider.

approaches that might be added to this list of options and which might be pursued immediately. Before considering alternatives, however, it is useful to explore how law reform and legislative advocacy are currently utilized in the context of animal law matters.

III. ASSESSMENT OF CURRENT APPROACHES TO RESOLVING ANIMAL LAW QUESTIONS⁶⁶

Are current legal outcomes to animal law questions optimal for individuals or for society? This is a question that cannot likely be answered with any consensus. The answer to this question is also 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 abovementioned *approaches* for resolving these questions optimal? The significance of this question rests on the assumptions upon which our legal system is built, 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 individuals involved in promoting, or defending against, the expansion of recognition of animals in our society use the same methods that all other social justice movements have used. They make appeals to, and through, and struggle with, all three branches of government. Dialogue and debates on this topic are conducted via legislation, litigation, and the “fourth estate”—the media. Although significant consideration of these approaches is warranted, such an endeavor is beyond the scope of this Article, which primarily focuses on litigation and legislative approaches, with an eye toward determining whether they are effective and sufficient.

A. Litigation/Law Reform

The main approach of animal advocates pressing for change in the area of animal law is to bring new and innovative cases before the courts.⁶⁷ This

⁶⁶ The focus of this Article is not an analysis of legislation or media approaches to resolving questions of animal law. Therefore, relatively little time and attention will be spent on a critique of these approaches. Instead, I will rely on what has been written elsewhere, presuming that these approaches will not bring to a quick conclusion the debates within the animal law field.

⁶⁷ See generally Animal Legal Defense Fund, <http://www.aldf.org> (last visited Feb. 21, 2007) (providing alerts about new cases and issues in the area of animal law); People for the

approach is costly and time intensive and, as a result, there is no reason to assume that it alone will resolve pressing animal law questions. As long as the costs of litigation far outweigh the chances of any recovery, fewer cases will be brought and still fewer will result in the kinds of decisions needed to clarify the development of animal law. Although 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 cost of litigation is a significant drawback to activists and individuals wishing to resolve animal law disputes through the courts.⁶⁸

Additionally, courts are required by precedent and statutory law to consider animals as property. 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.

Another weakness of the litigation approach to resolving animal law matters is that, absent class action or Supreme (or other high) Court ruling, change through the court system proceeds on a case-by-case basis. Though individual case decisions may have local impact if they are published, it takes a long time before the decision of a Nebraska or North Dakota state court is adopted as the majority approach for those states, much less the rest of the nation. The cases which often have the most impact are those cases which have been appealed and reached conclusion at a fairly high level. This requires expenditure of significant time and resources. Additionally, court outcomes are win or lose for the parties and do not result in nuanced approaches to resolving the problems at hand.

Even when the courts are more able to address animal law matters, they are not likely to be able to resolve the underlying source of the disputes for which there is no consensus in society. Litigation cannot change how we deal with animals in our society in the near future. It cannot satisfactorily address certain questions relating to animals for which there is insufficient legal support. It cannot even adequately reflect changes in society with respect to animals, as evidenced by its failure to end other debates for which

Ethical Treatment of Animals (PETA), <http://www.peta.org> (last visited Feb. 21, 2007) (describing new animal law legislation and cases); The Humane Society of the United States, <http://www.hsus.org> (last visited Feb. 21, 2007) (presenting information about current animal law issues and cases).

⁶⁸ Although many animal law cases brought are initiated or supported by animal activists, many others are brought by individuals having no connection to the animal right movement, who simply desire to obtain redress for their losses.

there is no societal consensus, such as matters involving racism, sexism and homophobia.

Although litigation is a strong force for change in our society, and is important in maintaining the rule of law, it can only be one part of a long term strategy for addressing animal law concerns. Thus, litigation is a necessary, but insufficient, part of the discourse regarding the role of animals in our society.

B. Legislation/Legislative Advocacy

Another approach for animal rights advocates in pursuing their goals is to address their legislatures and advocate for animal law reform. Such initiatives are being conducted locally as well as on the state and federal levels.⁶⁹ This approach has resulted in some change.⁷⁰ However, this approach is also time consuming, requires a great deal of resources. As a result, many of the criticisms addressed to the litigation approach also apply to the legislative approach. Another aspect of legislation is that it requires a willingness to seek compromise.

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 animal law initiatives.⁷¹ However, other legislation is more symbolic, such as declarations by some municipalities that animals shall no longer be referred to as pets, but as companion animals.⁷²

Unlike the litigation approach, compromise is very much a part of the legislative process. Sometimes, the parties involved are happy with the

⁶⁹ See *supra* note 42 and accompanying text (describing current legislative activity on behalf of animals).

⁷⁰ See *id.* (discussing successful animal law legislation, such as legislation that protects abused animals).

⁷¹ See *id.* (describing a Maine initiative to protect animals in domestic violence cases and a Rhode Island initiative requiring pet owners to spay or neuter their pets) and see Hannah Sentenac, *Case of Dog Shot in Vermont Sparks Movement to Legally Recognize Bond Between People and Pets*, FOX NEWS, Dec. 7, 2006

http://www.foxnews.com/printer_friendly_story/0,3566,235240,00.html.

⁷² See R. Scott Nolen, *Pet Owners in San Francisco Become "Pet Guardians,"* JAVMA NEWS, March 1, 2003, available at <http://www.avma.org/onlnews/javma/mar03/030301d.asp> (describing the implications of San Francisco's adoption of the term "pet guardian" to describe pet owners); see also The Guardian Study: Firepaw, Inc. Study, available at http://www.youthforanimals.org/firepaw_study.htm (last visited Feb. 21, 2007) (presenting a national study "examining the social and personal factors surrounding the movement to change the language from pet 'owner' to that of 'guardian'").

result. The recent PETS Act⁷³ may fit this category of legislation. But more often, advocates must be content to move incrementally toward their goals. Like the litigation approach, it cannot be said that the legislative approach has successfully put an end to debate regarding other societal concerns such as racism, sexism and homophobia. Legislative advocacy, like litigation, is a part of the discourse regarding the role of animals in our society rather than a complete strategy to resolve these issues.

C. Alternatives

If the litigation and legislative approaches are not sufficient, alone or even together, to immediately address or resolve current problems related to animal law, do any alternative approaches exist? This Article now turns to an examination of mediation as a potential approach to solving animal law issues and to an assessment of how this process works when applied to animal law.

Although one could consider many other approaches or combinations of approaches, this Article focuses on the mediation process, in particular. How does mediation compare to the litigation and legislative approaches? There is no evidence that mediation is currently being used in any systemic or noticeable way to resolve issues relating to animal law. Therefore, there is no information about the appropriateness or efficacy of the use of mediation in this context. As a result, this appears to be a question of first impression.

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. It proceeds to apply and assess this process in the animal law context.

A. What is Mediation?

Mediation, like litigation, is a process for resolving disputes.⁷⁴

⁷³ See *supra* note 26 and accompanying text (describing the Pets Evacuation and Standards Transportation Act of 2006 (PETS)).

⁷⁴ See generally LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION

Mediation is often called facilitated negotiation. No consensus exists within the ADR community regarding a definition of mediation. In fact, many practitioners do not accept each other's descriptions or models of mediation. However, it is fair to say that in mediation, the mediator typically brings parties together and encourages them to develop their own solution to their dispute.

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

- A neutral (the mediator) who attempts to help adversaries in a dispute reach a mutually agreeable settlement;
- The fair, unbiased behavior of the neutral;
- The ability of the adversaries to design, accept, and/or reject any potential resolutions; and
- Confidentiality.

The longer 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 as mediator in legal disputes;
- Whether the mediator should simply be a person in charge of the process and trying to facilitate the parties developing their own solution or more involved with the process, suggesting outcomes and evaluating options and likely results at trial;⁷⁵
- 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);⁷⁶
- Whether it must always be voluntary or can be compelled; and
- 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

AND LAWYERS Chapter 4 (2d. ed. 1997); KIMBERLEE K. KOVACH, *MEDIATION PRINCIPLES AND PRACTICE* (3rd ed. 2000); JOHN W. COOLEY, *THE MEDIATOR'S HANDBOOK* (2000); HAROLD I. ABRAMSON, *MEDIATION REPRESENTATION ADVOCATING IN A PROBLEM SOLVING PROCESS* (2004); PAUL J. ZWIER & THOMAS F. GUERNSEY, *ADVANCED NEGOTIATION AND MEDIATION THEORY AND PRACTICE* Chapters 2 & 9 (2005); and JAMES J. ALFINI ET AL., *MEDIATION THEORY AND PRACTICE* (2001).

⁷⁵ *Id.*

⁷⁶ *Id.*

country. To understand why, it is useful to consider the utility of mediation in its many forms.⁷⁷

B. Why Mediation is Useful

When the process of mediation is used successfully, it produces a number of positive outcomes including efficiencies in cost and time, as well as the parties' ability to exert control over the outcome, and to some extent, the process.⁷⁸

⁷⁷ See Karen Arnold-Burger, *Municipal Court Mediation: Reducing the Barking Dog Docket*, 35 CT. REV. 50 (1998) (discussing the use of mediation in a municipal court setting); Daniel Marcus & Jeffrey M. Senger, *ADR and the Federal Government: Not Such Strange Bedfellows After All*, 66 MO. L. REV. 709 (2001) (explaining that the federal government has assumed a leading role in the development and use of ADR); Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47 (1996) (using case studies from a small claims court mediation clinic to discuss the role of law in mediation).

⁷⁸ See generally 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) (discussing societal and cultural influences on mediation); Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1 (2000) (providing a historical view of those who developed the concept and framework of ADR); Belhorn, *supra* note 6 (utilizing mediation to change social norms); Menkel-Meadow, *supra* note 6 (discussing a philosophical and democratic defense of settlement).

Additional issues arise as regarding the very notion of mediating animal law matters because animal law 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? Can private justice in large enough quantities inform the development of the law 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

1. Cost and Efficiency Benefits for Parties and Courts

First and foremost, mediation is often faster and less expensive than traditional ways of addressing problems. Some courts and communities offer free mediation services. These services may be available before,⁷⁹ 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. Certainly, not all cases involve extensive mediation, especially the more numerous cases which take place in small claims and other courts of first instance. If mediation occurs after filing, it cannot save whatever costs have already been expended, though it can allocate payment of 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 do not often create inefficiencies as the parties are free to continue developing their cases while preparing for or engaging in mediation. Even when not resolving the entire case, mediation often results in resolving, narrowing, or clarifying at least some of the issues at stake.

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 agreements they make than those outcomes imposed on them by courts.⁸⁰ When mediation results in a settlement, parties lose less time away

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.

⁷⁹ Referred to as “pre-filing mediation” in the civil setting and sometimes “pre-charge mediation” in the criminal context.

⁸⁰ Nina R. Meierding, *Does Mediation Work? A Survey of Long-Term Satisfaction and Durability Rates for Privately Mediated Agreements*, 11 *MEDIATION Q.* 157 (1994); Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 *WM. & MARY J. WOMEN & L.* 145, 176–77 (2003); see also 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, 1051, 1056 (1996) (noting better compliance with ADR agreements than with judicial decisions).

from work, pay less toward collection of judgments, and often get much faster resolution than is possible in court. When a court issues a judgment, collection becomes the responsibility of the successful party. However, a mediator generally helps the parties take those matters into account in crafting an agreement. 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 that mediation addresses. 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 relatively equally in all areas of law, including animal law matters. There may, of course, be higher transactional costs in some settings depending on the design of the particular mediation program. However, there is no evidence to suggest that mediation costs come close to the costs of litigation.

2. Control of Process and Outcome by Parties

In mediation, parties may design an appropriate response to their own dispute. The parties are 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 in mediation 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. Very few parties testify in *ex parte* proceedings, though this does occur in certain hearings for injunctive relief, the hearings that follow do not allow parties to 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. On the other hand, in mediation, the process is generally 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 mediation, parties are free to accept or reject any proposed settlement, to suggest changes to any proposal, and to offer their own options for resolution. Parties are free to agree to any terms they wish. 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 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.⁸¹ 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.⁸² 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's ability to mete out justice is often limited 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. For instance, if one neighbor drove over another's mailbox, the court could award the cost of the repair or replacement of the mailbox, though perhaps not the cost of installation; the court certainly could not order the work be done by the offending neighbor. In mediation, the neighbor could agree to purchase and personally install a replacement mailbox, leaving no work or inconvenience to the other neighbor and no court judgment on the record of the offending neighbor. Thus, the parties achieve a result the court could not mandate, but which is fair and just to both.

It is useful to juxtapose the ability to control the mediation process and outcome with 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 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

⁸¹ Perhaps because of the flexible solutions it offers parties, ADR has effectively filled the gap formed by the decline of equity jurisdiction in the courts. See Jacqueline M. Nolan-Haley, *The Merger of Law and Mediation: Lessons from Equity Jurisdiction and Roscoe Pound*, 6 CARDOZO J. CONFLICT RESOL. 57 (2004) (describing the similarities between ADR and past equity courts).

⁸² *But see Man to Wear Pup Costume for Shooting Dog*, S.F. GATE, Dec. 15, 2006, available at <http://sfgate.com/cgi-bin/article.cgi?file=/news/archive/2006/12/15/national/a131156S40.DTL>.

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? Court-ordered mediation does not present a problem because even if the process is compelled against a party's wishes, no outcome may be compelled. Thus, the parties are still able to litigate or choose another method of resolution. Court-ordered mediation may reduce some of the efficiency and cost reduction benefits, but it does not affect the outcomes or development of the law. It is also unlikely to occur in an emerging area of law.

Whether to allow parties to select a process for resolution is in part a question of costs, of balancing costs and interests, and determining who bears those costs. If we deny individual choice to mediate, 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. Because private settlements are still available, the remedy of forcing adjudication does not 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 any legal context, including animal law matters.

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 mediation process in general or its application. Others suggest that mediation is a good process but that there are circumstances when it is not appropriate. These critiques, as well as responses to those critiques, and application to the animal law context, are discussed below.

C. Process

1. Private Justice vs. Public Justice

a. The 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.⁸³ This critique is often two-fold. First is the concern for the

⁸³ Of course, this is not the only negative critique of mediation. See, e.g., Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986) (noting that much of the support for ADR results from questionable motives and interests); Andre R. Imbrogno, *Using ADR to Address Issues of Public Concern: Can ADR*

private nature of the process and outcome. Second is the concern for the lack of reliance on, and development of, precedent. The private justice critique addressed 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, because the public has a stake in the resolution of these questions and needs to know as the ground rules of society evolve. This public airing allows for more uniform and efficient responses to breaches of the law and social norms.⁸⁴ It offers notice to individuals about the consequences of breaking the law, which serves not only a notice but perhaps a deterrence function. When this public process is not used, these benefits may not be realized, and society 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, though mediation may 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,⁸⁵ and parties are not bound to follow any rules or law in those settlements (with some exceptions, e.g.,

Become and Instrument for Social Oppression? 14 OHIO ST. J. DISPUTE RESOL. 855 (1999) (describing the dangers of using ADR to mediate familial conflicts).

⁸⁴ For further discussion regarding settlements and their effects on social norms, see Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1979); Marc Galanter, *The Civil Trial: Adaptation and Alternatives – The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255 (2005); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Reshaping Our Legal System*, 108 PENN ST. L. REV. 165 (2003); Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927 (2006).

⁸⁵ See Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 2 (1996) (“Of the hundreds of thousands of civil lawsuits that are filed each year in America, the great majority are settled; of those that are not settled, most are ultimately dismissed by the plaintiffs or by the courts; only a few percent are tried to a jury or a judge.”); Leandra Lederman, *Which Cases Go to Trial?: An Empirical Study of the Predictors of Failure to Settle*, 49 CASE W. RES. L. REV. 315, 318–19 (1999) (noting that the “vast majority” of cases settle before they go to trial); W. Cris Lewis & 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 (1997) (asserting that in 1992, less than four percent of the suits filed in U.S. district courts went to trial).

class actions). Moreover, 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. They 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 more lawsuits will 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 did not 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 within the court process, 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 considered 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 of somewhat more 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 and unsettled area of law, for mediation.

Some might say that all animal law issues ought to be publicly and judicially decided at least until they are well settled. There is some merit to that argument. 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 a need to determine 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. 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 those who find themselves similarly situated, animal advocates, and society at large.

The conclusion that there is a benefit to the public resolution of these cases is not an answer to 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 ample opportunity for resolution of these matters in the public justice system, there seems to be no reason 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 precedent⁸⁶ 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 come 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 law, and yet mediation and other forms of alternative 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. To take an example from 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 desire of the justice system to develop broad, uniformly applicable rules makes it difficult to fairly resolve unforeseen controversies. This is especially true when the distinction is arguably insufficient to create a new category or rule, and some would say that is exactly what is required. These kinds of new questions are exactly what animal law matters raise.

Also, it is possible for settlements to develop precedent. Settlements create (and reflect) social norms as do court decisions, albeit in a somewhat

⁸⁶ See Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986); see also Carrie Menkel-Meadow, *Mothers and Fathers of Invention: the Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1 (2001) (assessing Lon Fuller's theory of disputes and ADR).

different way.⁸⁷ 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 supersede the ability of the parties to decide for themselves which process is best to resolve their individual disputes. Additionally, animal law—an emergent area of law—provides no shortage of cases, or parties, interested in using the courts to resolve their legal disputes.

More specifically, which of the above hypothetical situations require the reliance on, or development of, precedent? “All” might be as good an answer as “none.” The hypotheticals evidence the need for adjudication and limitation of individual choice as it relates to society's need for precedent as well as the opposing need for immediate and appropriate outcomes which are more readily achieved outside the litigation context. If parties wish to resolve a dispute privately, that is, or should be, the choice of the parties.

Yet there are limitations on the ability of parties, even when willing, to make precedent. Returning to the divorce hypothetical, 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 new precedent, they have failed.⁸⁸ 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 newly 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 though it has been. Thus it is important to recognize the role judges play in the evolution of the law, but not to suggest that the potential of this benefit restrains party choice in determining how to

⁸⁷ See Menkel-Meadow, *supra* note 86 (discussing the social norms created by settlement).

⁸⁸ They could however, through the court process, reaffirm existing precedent indicating that animals are property.

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 between public and private justice. Nothing in the nature of animal law disputes requires restricting party autonomy.

D. Application Concerns

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 off-limits area was domestic violence matters. Both restrictions were due in part to concern over power imbalances.⁸⁹ 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 than for animal law matters.

1. Power Imbalances

a. Critique

As mediation developed and its application in the criminal law context

⁸⁹ See, e.g., Lauri Boxer-Macomber, *Revisiting the Impact of California's Mandatory Custody Mediation Program on Victims of Domestic Violence Through a Feminist Positionality Lens*, 15 ST. THOMAS L. REV. 883 (2003); Andre R. Imbrogno, *Using ADR to Address Issues of Public Concern: Can ADR Become an Instrument for Social Oppression?*, 14 OHIO ST. J. ON DISP. RESOL. 855 (1999); Debra Baker, Comment, *Juvenile Mediation: Innovative Dispute Resolution or Bad Faith Bargaining?*, 27 U. TOL. L. REV. 897 (1996).

was considered, there was an increased emphasis on protecting victims from perpetrators. Few thought it would benefit a crime victim 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 retribution, allowing an offender to influence her sentence 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 victim are safe from further harm at the hands of the offender? 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 most 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 potentially protective rules and process of the court system.⁹⁰ There was concern that mediators would be unable to protect the victim or even understand the risk and significant harm which could occur 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 lack of protection would lead not only 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.⁹¹ Others would suggest

⁹⁰ See Boxer-Macomber, *supra* note 89. But see Kate McCabe, *A Forum for Women's Voices: Mediation Through a Feminist Jurisprudential Lens*, 21 N. ILL. L. REV. 459 (2001) (arguing that mediation is better for women).

⁹¹ See 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); Alyssa H. Shenk, *Victim-Offender Mediation: The Road to Repairing Hate Crime Injustice*, 17 OHIO ST. J. ON DISP. RESOL. 185 (2001); Ilyssa Wellikoff, *Victim-Offender Mediation and Violent Crimes: On the Way to Justice*, 5 CARDOZO J. CONFLICT

that if victims of the most horrific offenses can face their victimizers in truth and reconciliation settings, and find benefits, then 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 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 mediating may allow them to have a role in the development of 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 the re-victimization which may result from participating in a required process. With no requirement, again the parties are left to choose for themselves whether to participate and what sort of resolution is appropriate.⁹²

Whether domestic violence is an area suited for mediation remains a matter of debate. 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 present. 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 that abuse is an element of the relationship between the parties. 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

RESOL. 1 (2003); Patrick Glen, Comment, *Victim-Offender Mediation in Texas: When An Eye for Eye Becomes Eye to Eye*, 47 S. TEX. L. REV. 647 (2006).;

⁹² 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. However, general issues of competence in mediation are beyond the scope of this article.

mediation might be appropriate even within an abuse context. In fact, one could imagine a victim choosing this process as part of a plan for healing.

Importantly, our notions of domestic abuse are expanding, which means that as more kinds of abuse situations are recognized, there is a greater need for diverse approaches to resolution. For instance, mediation might be appropriate for a single instance of abuse, but might not be in the context of a very violent, long-term abusive relationship, or between abusive parents and children.⁹³

c. Application of Mediation in the Animal Law Context

There is rarely an even balance of power between parties to any dispute. The question becomes whether the imbalance is one a mediator can address in order that it not jeopardize a just outcome, or whether it is 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. It is likely that there are differences in education, resources, and other factors 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 with animal law or other disputes, could not participate in mediation, regardless of whatever power balance exists.

In the divorce hypothetical, the parties are aligned in their interest to have the court determine support and visitation for Sasha. Power imbalance is not the concern. Malik and Natasha will likely lose this battle with the court and cannot compel the court to enforce an order arising out of mediation unless it is carefully constructed. The court would not enforce a custody agreement, but may enforce any pre-determined assessment of monetary damages for a breach of a private agreement. Likewise, the court would not enforce a support agreement for Sasha, but would enforce a private contract with a payment obligation.

A true power imbalance exists between the family and the lab and its employee. This is due in large part to the lack of legal support for the family's position. When the legal odds are significantly stacked in one party's favor, mediation may not result in an outcome much different than litigation, but may still be useful. Another aspect of the power imbalance in

⁹³ 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, but is a matter beyond the scope of this article.

this hypothetical is the disparity in resources and expertise available to the parties. Still, the family may in fact be more inclined to choose mediation in this setting because the power imbalance may be more negatively outcome determinative in the litigation setting.

Though there may be power imbalances evident in the hypotheticals involving Nicholas and Dr. Little, the imbalances do not indicate a basis for avoiding mediation. It should also be noted that power imbalances are not static. For instance, though the veterinarian may have more resources than the family, the story of harm to Sasha resulting from negligence is compelling and may result in overcoming any imbalance, a factor which might induce Dr. Little to choose mediation, along with any desire to avoid negative exposure and damage to his business and professional reputation.

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.⁹⁴ It should 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 law disputes.

2. Resolution of Rights-based Disputes

a. Critique

If we accept mediation at all, and private out of court settlements, we accept private justice. The question then arises whether certain legal matters are more appropriate for private settlement. In the rights-based, or constitutional and public policy context, there is concern that resolving these matters outside the view of the public results in bad outcomes, or good outcomes which have no precedential authority and therefore which stall the development of the law.⁹⁵ 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 implicating the interests of society must be resolved through the

⁹⁴ Pam Belluck, *supra* note 24 (reporting adoption of a Maine law which protects companion animals in domestic violence situations).

⁹⁵ See Edwards, *supra* note 83 at 668 (arguing that matters the implicate the interests of society must be resolved in the courts). *But see* Schneider, *supra* note 86 (suggesting the opposite).

public courts process.⁹⁶ That begs the question of which cases are not matters of social interest. However, if that is taken to mean questions of public policy, constitutional matters, and matters of political importance, the argument may be understood to suggest that these matters should never be informally or privately resolved.

b. Response

Though there may be less debate regarding 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 a formal mediation process would be worse in these contexts.⁹⁷

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 and the appropriate spin on the outcome. Also, until very recently, even lawyers were not allowed to cite unpublished cases. How then could society know the true impact of all the cases which were actually litigated to conclusion? Additionally, we now have sources of legal and social norm-setting that did not exist only a few decades ago. With the advent of Court TV and programs such as “Judge Judy” and “Jerry Springer” society has new and perhaps exceedingly skewed sources from which to view the resolution of disputes.

That is not to say there is no benefit to resolving cases in court. It is easy to understand why the resolution of a discrimination case would be of benefit to society if conducted through the court process, as it would help us better understand how better to regulate our behavior. Yet it seems

⁹⁶ See Menkel-Meadow, *Mothers and Fathers of Invention*, *supra* note 86.

⁹⁷ See 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); Barbara Ashley Phillips & Anthony C. Piazza, *Public Interest Law: The Role of Mediation in Public Interest Disputes*, 34 HASTINGS L.J. 1231 (1983).

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. In fact, lawyers may make more strategic decisions about which cases to bring and which not to bring in social justice and emergent law settings than in any other.

c. Application of Mediation in the Animal Law Context

As previously noted, 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.⁹⁸ If we are to consider doing so, we would need to articulate the balance between the interests of individual (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 on both sides of animal legal debates, so there is no real risk of lack of adjudication and therefore society's interest in public justice will be served.

Further, in no other emerging area of law has mediation been expressly banned. Even in the instances of disputes between governments and negotiation of international treaties, mediation has played a role.⁹⁹

One might argue that all of the hypotheticals involve matters of public

⁹⁸ See Robert A. Baruch Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles For Process Choice*, 1984 WIS. L. REV. 893 (1984).

⁹⁹ See Elisa Westfield, *Resolving Conflict in the 21st Century Global Workplace: The Role for Alternative Dispute Resolution*, 54 RUTGERS L. REV. 1221 (2002).

concern if new legal norms are being developed. However, that is potentially true for many cases and does not by itself form a basis for the restriction of parties' ability to choose to mediate their disputes. Certainly, criminal law issues are deemed matters of public interest even more than are private law matters such as divorce. This would indicate that it might be more important to forgo mediation for Nicholas than for Natasha and Malik. However, given the incidence of plea bargains within the criminal justice system, it cannot be asserted that all cases are matters of public concern and need litigation. To act on such an assertion would cause the criminal justice system to collapse from the inability to handle the sheer volume of cases.

There are no constitutional matters or issues relating to discrimination involved in the hypotheticals. Thus, there is no strong argument for litigation other than the need to litigate more cases in emerging areas of law than otherwise might be necessary. However, no such imposition was in place for any other area of emerging law and no argument has been made for the need to create such an imposition for matters of animal law.

Therefore, individuals with animal law disputes should 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-based versus interest-based decision making arises, but based on the above discussion, bars none of the parties from proceeding with mediation.

V. MEDIATION IN THE ANIMAL LAW CONTEXT—QUESTIONS TO CONSIDER

After the critiques¹⁰⁰ have been addressed, mediation emerges as a sound complement, or alternative, to litigation for parties. It remains to be seen whether animal law is a context *well* suited for mediation. The critique that mediation thwarts the development of precedent, though perhaps not immediately compelling, may take on more significance when applied to questions of appropriateness rather than access. 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 particularly 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

¹⁰⁰ It should also be noted that some of the critiques of mediation are also appropriately directed at the adjudication process.

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. This Article seeks to determine whether the mediation process is useful in the animal law 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 well suited to address 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 Mediation 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. Many people are emotionally attached to their companion animals, even feeling that they are part of the family. Indeed, there are few other relationships beyond those of family, friends,

business, or romance, that matter more to many of the people in our society. 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 would 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. The same may be true for Dr. Little who may also prefer the privacy of mediation over litigation.

In order for mediation to be deemed appropriate for the parties, they must see a potential benefit in either the process or the outcome. It is unlikely that the lab employee would consent to mediation, as she is well protected both by the legal process and the likely outcome. To go outside of this protection would make the lab employee more vulnerable. This is not in her interest, and therefore, mediation is not likely appropriate for her.

Clearly, Natasha and Malik would benefit from mediation concerning custody, support and visitation of Sasha. 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 remains an additional avenue of dispute resolution available, and does not end the resolution of animal-related disputes in the court system, it is also 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 desirable. Just as difference in approaches among the circuit courts helps to develop and eventually determine legal doctrine, so too will a variety of approaches help develop appropriate resolutions to questions of animal law.

c. For Animal Advocates

Animal advocacy is a component of a social justice movement that 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 article posits that it is a good question to ask for at least two reasons. First, it is in society's interest 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 in the way that 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 interest to have these questions addressed and answered, it is appropriate to ask whether the process of mediation is beneficial from the standpoint of animal advocates.

The second reason why 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 that its practitioners should consider 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 might animal advocates decide that mediation or any other process is 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 within 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 an animal friendly resolution would not be promulgated as the general standard. This might also be true of the veterinarian, who may choose to resolve the case in mediation for more money than a court might award, with an eye towards maintaining her 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 she does far outweighs the interests of any individual animal. Thus, for these individuals, as well as for animal advocates, determining whether mediation is appropriate depends on their particular goals.

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 taken into

account. 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 it but can only be addressed briefly here.

There is also 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, and 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 Mediation Promote or Inhibit Justice?

Implicit in the above discussion is the question, does mediation in the animal law context promote or inhibit justice? Even though parties on opposite sides of a dispute may define justice differently, both will claim to be 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 disputes are effective in achieving and promoting 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, fairness remains an underlying concept of mediation. No party is required to settle a case in mediation, and certainly no party is required to accept a settlement a judge would deem unfair.

In this way, mediation promotes a sense of justice on the individual level. It also enhances justice in a larger sense because 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 Mediation Practical?

If a process has many positive attributes, but is not practical, it is senseless to pursue it when other processes are available. An impractical process will neither be used nor be 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, are similar to humans, or are worthy of concern. Mediators, too, may be unfamiliar with the contours of this discourse and others. Though this is a potential difficulty for mediating animal law matters, it can also be a benefit. If parties can begin to communicate effectively enough to help one another understand their respective positions, that understanding 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 would be a positive contribution.

C. Should Mediation be the Preferred Process for Animal Law Issues?

Discussed *supra* are the benefits of mediation in the animal law context: It is a positive compliment to the adjudicative 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 preferable 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. 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 determined later that one method of dispute resolution 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 sounding in 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. Until that time, we may fairly rely on parties to choose for themselves when mediation of animal law matters is appropriate. In order to benefit from this approach, mediation must become explicitly and readily available to those with animal law disputes.

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 will not 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 and explore conventional social and legal norms. It is often appropriate for the parties who use it and for those who administer it. 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. So too 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 difficult 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.

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