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### Safe Haven Conundrum: The Use of Special Bailments to Keep Pets Out of Violent Households

Joan MacLeod Heminway  
*University of Tennessee College of Law*

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Summer 2017

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Joan M. Heminway

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ARTICLE

**SAFE HAVEN CONUNDRUM: THE USE OF SPECIAL  
BAILMENTS TO KEEP PETS OUT OF VIOLENT HOUSEHOLDS**

*By: Joan MacLeod Heminway\* and  
Patricia Graves Lenaghan\*\**

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## Introduction

Family violence<sup>1</sup> is a continuing social problem that breeds new complexity at every turn. Just as we seem to get a modicum of control over the sheltering of at-risk mothers and children (among other human victims), we find that family pets<sup>2</sup>—dependent creatures endangered by the same

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<sup>1</sup> This article uses the terms “family violence” and “domestic violence” interchangeably to denote repeated conduct involving abuse, including physical and verbal aggression, in a marital, familial, or other or setting characterized by cohabitation.

<sup>2</sup> This article addresses protection for a specific subset of nonhuman animal dependents—those commonly treated as family members in U.S. households. The word “pet” is used in this article instead of the term “companion animal” unless the context requires the use of the latter. “Companion animal” may be interpreted more narrowly, even if more favorably. *See, e.g.,* Kathy Matheson, *Pet? Companion animal? Ethicists*

violent behavior that threatens their human caretakers—often are left unprotected or under-protected by both law and society. In most cases, pets are unable to be sheltered with human victims of domestic violence due to shelter restrictions.<sup>3</sup> Although the heroic efforts of Allie Phillips—through her Sheltering Animals & Families Together (SAF-T)<sup>TM</sup> initiative—and others aim to change the bias against the communal sheltering of abuse victims and their pets (and are enjoying success),<sup>4</sup> many targets of family violence cannot find shelter with their pets. Restrictions on the sheltering of abuse victims with their pets result in difficult choices for human victims who cohabit with pets. Those choices potentially affect the well-being of both the humans and their pets in leaving (and, in some cases, returning to)

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say term matters, ASSOC. PRESS (May 4, 2011), <https://phys.org/news/2011-05-pet-companion-animal-ethicists-term.html>; see also *infra* note 149 and accompanying text (relating to relevant statutory definitions).

<sup>3</sup> See, e.g., Nathaniel Fields, *The Pet and Women Safety (PAWS) Act will save lives*, THE HILL (Aug. 11, 2016, 5:11 PM), <http://thehill.com/blogs/congress-blog/healthcare/291166-the-pet-and-women-safety-paws-act-will-save-lives> (noting that “[t]he Urban Resource Institute’s URIPALS (People and Animals Living Safely) program is the only program in New York City and one of the few nationally that allows domestic violence survivors to co-shelter (live in a domestic violence shelter apartment with their pets).”); Annamarya Scaccia, *New Bill Would Help Domestic Violence Survivors Find Shelter for Their Pets Too*, REWIRE (Apr. 14, 2015, 5:31 PM), <https://rewire.news/article/2015/04/14/new-bill-help-domestic-violence-survivors-find-shelter-pets/> (“Less than five percent of domestic violence shelters nationwide house pets”).

<sup>4</sup> See *Sheltering Animals & Families Together*<sup>TM</sup>, You Can Do More!, <http://alliephillips.com/saf-tprogram/> (last visited July 30, 2017). The number of SAF-T shelters (“shelters . . . equipped to accept families of domestic violence along with their pets”) is updated regularly and continues to grow; over 100 shelters now are listed on the SAF-T Shelters website. See *SAF-T Shelters*, You Can Do More!, <http://alliephillips.com/saf-tprogram/saf-t-shelters/> (last visited July 30, 2017).

their violent households.<sup>5</sup> Federal lawmakers have twice introduced legislation to help address this issue, but neither attempt progressed beyond the committee phase.<sup>6</sup>

Animal safe haven programs have stepped up to serve some of this unmet need.<sup>7</sup> These programs agree to take in the cats, dogs, and (in some cases) other pets of domestic violence victims who decide to seek refuge in a shelter. This solution is not without problems, however. Pets are separated from their owners at the very time they may need each other most. Moreover, safe havens typically only offer temporary care to pets, and the time limits on these arrangements may not mesh well with the transitioning of victims to new, independent housing situations after their shelter stays are over. Finally, a victim may decide to return to the abusive household and take the animal with her, subjecting the animal, as well as herself, to renewed abuse.

This article ultimately addresses the last of these three identified weaknesses of safe haven programs—which we refer to as the safe haven conundrum—and suggests a solution rooted in traditional notions of property and contract law and consistent with related public policy. In the process of doing so, the article panoramically describes the overall societal and legal context in which the issue arises. This background is important to many social and legal issues

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<sup>5</sup> See Fields, *supra* note 3; Scaccia, *supra* note 3.

<sup>6</sup> See Pet and Women Safety Act of 2015, H.R. 1258, 114th Cong. § 3(a) (2015); Pet and Women Safety Act of 2014, H.R. 5267, 113th Cong. § 3(a) (2014). See generally Pet and Women Safety (PAWS) Act, <https://awionline.org/content/pet-and-women-safety-paws-act>.

<sup>7</sup> See Tara J. Gilbreath, *Where's Fido: Pets Are Missing in Domestic Violence Shelters and Stalking Laws*, 4 J. ANIMAL L. 1, 9–12 (2008). See generally Safe Havens Mapping Project for Pets of Domestic Violence Victims, <https://awionline.org/content/safe-havens-mapping-project-pets-domestic-violence-victims>; The Human Society of the United States, Directory of Safe Havens for Animals™ Programs, [http://www.humanesociety.org/issues/abuse\\_neglect/tips/safe\\_havens\\_directory.html](http://www.humanesociety.org/issues/abuse_neglect/tips/safe_havens_directory.html) (last visited Aug. 8, 2017).

involving nonhuman animals, not just the protection of animals threatened by violent households.

With the foregoing in mind, this article proceeds in additional parts. Part I outlines important connections between human and animal violence (known among many in the field as “The Link”<sup>8</sup>) that underlie the institutionalization and operation of animal safe haven programs. Part II places nonhuman animals—particularly pets—in their legal context, underscoring the notion that animals continue to be viewed under the law as property, albeit an evolving and specially protected form of property. The legal conception of pets, as described in Part II, is sometimes in tension with related social constructions of the human/pet relationship—including human/pet relationships that exist in the context of domestic violence. For example, when an abuse victim shelters a pet in a safe haven program during his or her stay in a domestic violence shelter, property ownership conventions must be observed and may collide with public policy considerations at several decision-making junctures.

One significant juncture at which this tension manifests itself is highlighted and deconstructed in Part III of this article. A pet owner who is a sheltered victim of family violence may put his or her pet in a safe haven shelter and then later decide to return to the abusive household. In that event, the victim not only potentially re-victimizes and endangers herself but also her animal. Elements of our social services system are designed to help and look after human victims of domestic violence in making and living through this decision; and if a victim is a parent (most commonly a

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<sup>8</sup> See What is the Link, <http://nationallinkcoalition.org/what-is-the-link/> (last visited July 30, 2017) (referring numerous times to “The Link” and observing that “[a]nimal abuse, cruelty and neglect are often considered isolated incidents wholly separated from other forms of family violence. Today, professionals involved with victims of family violence are not surprised when they learn that often these acts are linked, and that various agencies are working with the same families . . .”).



woman) who leaves and returns to a home with children, other elements of our social services system exist to protect those children.<sup>9</sup> No social services exist, however, to protect the pet of a domestic violence victim when the owner determines to return the animal to a household in which an abuser resides and abuse may recur. Part III of the article highlights this issue and suggests that a special form of bailment—a conditional bailment—may help to protect animals at this critical juncture. This suggestion then is described and critiqued. Following Part III, we offer a brief conclusion.

## **I. Domestic Violence and Animal Abuse**

### **A. Unfortunate Connections: Linkages Between Human and Nonhuman Animal Violence**

The role of pets in family violence has remained relatively unexplored in academic literature.<sup>10</sup> A study

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<sup>9</sup> See generally Janet E. Findlater & Susan Kelly, *Child Protective Services and Domestic Violence*, 9 THE FUTURE OF CHILDREN 84 (1999) (describing then current and aspirational relationships between child protective services and domestic violence protection and prevention). Our reference to female victims reminds us to expressly acknowledge that women are not the only targets of family violence. Where references are made to battered women and female victims of domestic violence, we offer them as nonexclusive illustrations of what has historically been the majoritarian fact pattern—i.e., abuse by men of their female cohabitants. Nevertheless, it is important to acknowledge that victims of domestic violence are not homogeneous in sex, gender, age, or other characteristics, and their unique attributes may contribute to both the fact and impact of their victimization.

<sup>10</sup> See Frank R. Ascione, *Battered Women's Reports of Their Partners' and Their Children's Cruelty to Animals*, 1 J. EMOTIONAL ABUSE 119, 121 (1998) [hereinafter Ascione, *Women's Reports*] (identifying then existing literature on the issue); Sharon L. Nelson, *The Connection Between Animal Abuse and Family Violence: A Selected Annotated Bibliography*, 17 ANIMAL L. 369, 377–86 (2011) (listing articles showing connections between animal abuse and family violence); Vivek

conducted by the Humane Society of the United States in 2000 found that 21% of animal cruelty cases were intertwined with other family violence.<sup>11</sup> “Experts estimate that from 48 percent to 71 percent of battered women have pets who also have been abused or killed.”<sup>12</sup> As a general matter, available evidence indicates that “[v]iolence exhibited by one family member against another rarely involves a single act of abuse against one type of victim.”<sup>13</sup>

Moreover, data from existing studies on the connection between animal and human abuse should be treated with caution. In critiquing his own work and that of others in this area, Dr. Frank R. Ascione, a nationally recognized expert in the interaction between human and animal violence, notes that studies of animal cruelty and family violence against women do not “include comparison samples of non-battered women or battered women who are not currently in shelters.”<sup>14</sup> Furthermore, the sample sizes of all these studies are inevitably quite small. As a leading

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Upadhyaya, Comment, *The Abuse of Animals As a Method of Domestic Violence: The Need for Criminalization*, 63 EMORY L. J. 1163, 1167 (2014) (“Although the commission of animal cruelty has long been identified as a potential risk factor for subsequent criminality, and as a possible indicator of psychological disorders, only in the past three decades has scholarship focused on the link between the two forms of abuse.” (footnotes omitted)). Of course, humans are also animals. For simplicity’s sake, we often refer to nonhuman animals simply as “animals” in this article.

<sup>11</sup> HUMANE SOC’Y U.S., THE HUMANE SOCIETY OF THE UNITED STATES (HSUS) FIRST STRIKE® CAMPAIGN 2000 REPORT OF ANIMAL CRUELTY CASES (2001), [http://humanesociety.org/assets/pdfs/CAMP\\_FS\\_2000report.pdf](http://humanesociety.org/assets/pdfs/CAMP_FS_2000report.pdf).

<sup>12</sup> Animals & Family Violence, <https://awionline.org/content/animals-family-violence>.

<sup>13</sup> Charlotte Lacroix, *Another Weapon for Combating Family Violence: Prevention of Animal Abuse*, 4 ANIMAL L. 1, 4 (1998); see also Clifton P. Flynn, *Woman’s Best Friend: Pet Abuse and the Role of Companion Animals in the Lives of Battered Women*, 6 VIOLENCE AGAINST WOMEN 162, 171 (2000) [hereinafter Flynn, *Woman’s Best Friend*] (“[D]ifferent forms of violence often coexist within families”).

<sup>14</sup> Ascione, *Women’s Reports*, *supra* note 10, at 125.

researcher in the field, Ascione stresses that his own 1998 study (described below) cannot prove causation but is instead “descriptive.”<sup>15</sup> Even where links between animal and human violence exist, it is far too easy to confuse correlation with causation. It is thus impossible to use Ascione’s results to extrapolate to a national comparison.<sup>16</sup> However, a number of small-scale studies have reached similar results in various areas of the country.<sup>17</sup>

In sum, despite the relative paucity of research on the links between animal and human violence and the shortcomings of the small amount of research that has been done, existing studies do provide basic information that supports connections between violence to animals and humans. These studies are useful to the discussion of our ideas about the sheltering of animals exposed to domestic violence or a significant risk of future domestic violence. As one commentator observed, “[t]he link between abuse against animals and abuse against humans is long documented both in psychological and sociological studies as well as anecdotal reports.”<sup>18</sup> Taken as a whole, these studies and reports reveal some disturbing connections and trends.

### 1. The Triad: Domestic Violence, Child Abuse, and Animal Abuse

In Ascione’s groundbreaking study in 1998, thirty-eight women at a domestic violence shelter in Utah were interviewed by shelter staff concerning their pets.<sup>19</sup> Many expressed appreciation that someone had finally

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<sup>15</sup> *Id.* at 127.

<sup>16</sup> *Id.* at 126.

<sup>17</sup> *Id.*

<sup>18</sup> Gilbreath, *supra* note 7, at 5.

<sup>19</sup> Ascione, *Women’s Reports*, *supra* note 10, at 123.

acknowledged concern for their pets.<sup>20</sup> Of the 74% who owned pets, 71% reported that their abuser had either harmed or threatened to harm their pets.<sup>21</sup>

Jane Ann Quinlisk's statewide study of shelters in Wisconsin found similar percentages—about 86% of the seventy-two respondents owned pets, of whom 68% reported that their abusers were also abusive to their animals.<sup>22</sup> Although there were lower rates of pet ownership in Flynn's study in South Carolina due to the socio-demographic composition of that state,<sup>23</sup> Flynn also found a connection between animal abuse and woman battering. Forty percent of the 107 respondents owned pets, of whom 46.5% reported that their abusers harmed or threatened to harm their pets.<sup>24</sup>

Animal abuse is not merely an indicator of spousal abuse; it also has implications in the development of children.<sup>25</sup> Several studies suggest that children mimic the behavior that is modeled by the adults in their lives. Some report that children who witness domestic violence are more likely to become perpetrators of domestic violence or victims of domestic violence, depending on their gender.<sup>26</sup> Similarly, children who witness animal abuse may be more likely to abuse animals themselves.<sup>27</sup> In Ascione's study, for example, 32% of the victims who had children reported that

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<sup>20</sup> *Id.* at 124.

<sup>21</sup> *Id.* at 125.

<sup>22</sup> Jane Ann Quinlisk, *Animal Abuse and Family Violence*, in *CHILD ABUSE, DOMESTIC VIOLENCE, AND ANIMAL ABUSE: LINKING THE CIRCLES OF COMPASSION FOR PREVENTION AND INTERVENTION* 169 (Frank R. Ascione & Phil Arkow eds., 1999).

<sup>23</sup> Flynn, *Woman's Best Friend*, *supra* note 13, at 170–71.

<sup>24</sup> *Id.* at 167.

<sup>25</sup> See generally Jared Squires, *The Link Between Animal Cruelty and Human Violence: Children Caught in the Middle*, KY. CHILD. RTS. J. 2, 6–7 (2000) (collecting “Child-Related Statistics, Facts, and Theories”).

<sup>26</sup> Quinlisk, *supra* note 22, at 170.

<sup>27</sup> Ascione, *Woman's Reports*, *supra* note 10, at 127.

their children had also harmed the pets.<sup>28</sup> Of those instances, the adult batterer had either harmed or threatened to harm the animal 71% of the time.<sup>29</sup> In Quinlisk's Wisconsin survey, abuse of the pet by an adult perpetrator occurred in the presence of the children 76% of the time.<sup>30</sup> Fifty-four percent of those respondents stated that their children had later copied the behavior on the pet.<sup>31</sup> In Flynn's study, two women reported instances where their children abused the pet; one believed that her child was mimicking the behavior of the adult abuser.<sup>32</sup> Some researchers have attempted to demonstrate, with mixed and sometimes controversial results, that animal abuse during childhood can predict future violence against other humans under a "violence graduation hypothesis."<sup>33</sup> Other researchers have suggested a "deviance generalization hypothesis," positing that "animal abuse is simply one of many forms of antisocial behavior that can be expected to arise from childhood on."<sup>34</sup> Most of these researchers likely agree that animal abuse by children is a "serious antisocial behavior"<sup>35</sup> that sometimes indicates a broader proclivity to violence.<sup>36</sup>

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<sup>28</sup> *Id.* at 125.

<sup>29</sup> *Id.*

<sup>30</sup> Quinlisk, *supra* note 22, at 169.

<sup>31</sup> *Id.*

<sup>32</sup> Flynn, *Woman's Best Friend*, *supra* note 13, at 167.

<sup>33</sup> Arnold Arluke et al., *The Relationship of Animal Abuse to Violence and other Forms of Antisocial Behavior*, 14 J. INTERPERSONAL VIOLENCE 963, 963-64 (1999).

<sup>34</sup> *Id.* at 965.

<sup>35</sup> Clifton P. Flynn, *Why Family Professionals Can No Longer Ignore Violence Toward Animals*, 49 FAM. REL. 87, 88 (2000) [hereinafter Flynn, *Family Professionals*].

<sup>36</sup> Margit Livingston, *Desecrating the Ark: Animal Abuse and the Law's Role in Prevention*, 87 IOWA L. REV. 1, 44-45 (2001).

2. A Silent Epidemic: Society Ignores the Link  
Between Human and Nonhuman Violence

These studies strongly suggest a correlation between domestic violence, childhood violence, and animal abuse. For a multitude of reasons, however, society tends to discount or disregard batterer threats against pets. Pets are valued less than humans in weighing societal concerns, so that any violence against pets meets with less shock than violence against human victims.<sup>37</sup> Furthermore, a misguided belief that animal abuse is rare has become entrenched and exists alongside the assumption that “crimes against animals are . . . isolated incidents,” not part of a larger pattern of violent activity.<sup>38</sup> As a society, we have not yet fully appreciated the integral role that pet abuse plays in the cycle of human violence.<sup>39</sup>

To a limited extent, connections between human and animal social welfare movements are beginning to be acknowledged in the United States through newly established institutions, including (at least in East Tennessee) Family Justice Centers.<sup>40</sup> A Family Justice

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<sup>37</sup> Flynn, *Family Professionals*, *supra* note 35, at 87.

<sup>38</sup> *Id.*

<sup>39</sup> Catherine A. Faver & Elizabeth B. Strand, *Domestic Violence and Animal Cruelty: Untangling the Web of Abuse*, 39 J. SOC. WORK EDUC. 237, 240 (2003).

<sup>40</sup> See *id.* at 239; Family Crisis Unit, <http://knoxsheriff.org/family/index.php> (last visited July 30, 2017) (“The Family Justice Center is the hub of more than 60 partnering agencies working together to provide assistance and education pertaining to domestic violence, child abuse, elder abuse, animal abuse and cyber investigations.”). Recent institutions that acknowledge connections between human and nonhuman violence may be conceptualized as a modern reimagining of social movements from the nineteenth century. In the late nineteenth century, the private movement to protect abused children was intertwined with the animal welfare movement; private societies would simultaneously handle both human and nonhuman service needs. *Id.* In the early twentieth century, however, this common service system split

Center is “the co-location of a multi-disciplinary team of professionals who work together, under one roof, to provide coordinated services to victims of family violence,” including allowing the victims to “talk to an advocate, plan for their safety, interview with a police officer, meet with a prosecutor, receive medical assistance, receive information related to shelter, and receive help with transportation.”<sup>41</sup> Family Justice Centers are a relatively new phenomenon, based on the San Diego model.<sup>42</sup> The growth in Family Justice Centers over the past fifteen years was fueled by a \$20 million funding initiative announced by President George W. Bush in October 2003; the Knoxville, Tennessee Family Justice Center was seed-funded with a grant from the United States Department of Justice through the President’s Family Justice Center Initiative and included an animal abuse component (supported by the work of the Animal Abuse Task Force of the Community Coalition on Family Violence) at its initiation.<sup>43</sup> There are currently more than

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apart when the government took over the management of child protective services. *Id.* Although government intervention in child welfare was certainly laudable, it also divorced concern for human welfare from that of nonhuman animal welfare. See Allie Phillips, *The Dynamics between Animal Abuse, Domestic Violence, and Child Abuse: How Pets Can Help Abused Children*, 38 PROSECUTOR 22, 22–23 (2004).

<sup>41</sup> Tennessee Department of Finance & Administration, Family Justice Centers, <https://www.tn.gov/finance/article/fa-ocjp-fjc> (last updated April 13, 2016).

<sup>42</sup> *Id.*

<sup>43</sup> See Meg Townsend et al., *Evaluability Assessment of the President’s Family Justice Center Initiative* (September 30, 2005), at 55–56, <https://www.ncjrs.gov/pdffiles1/nij/grants/212278.pdf>. Professor Heminway was involved in the funding application process, which was supported by The University of Tennessee College of Law. We both reside in Knoxville and are licensed to practice in Tennessee. Moreover, our experience with the matters addressed in this article arises out of pro bono and public service work done in Tennessee. Accordingly, we have written this article using primarily Tennessee examples and law. We also have inserted references to other examples and laws, however, as relevant or desired.

seventy operational Family Justice Centers in the United States; Family Justice Centers also exist in five foreign countries.<sup>44</sup> A number of these centers, like Knoxville's, opened with financial support from the U.S. Department of Justice. By linking public and private advocates across the spectrum of human and animal violence initiatives, Family Justice Centers hold promise to bind social welfare groups in a powerful way.

### 3. Abusers Manipulate Bonds Between Human and Nonhuman Victims

Academic studies of pets and family violence do not merely describe a link between domestic violence and animal abuse. They also help to explain, in a more comprehensive way, why domestic violence exists. Animal abuse was previously a missing link in the family violence puzzle. The key to the link between animal abuse and domestic violence is that animals are part of the "intimate home environments of human beings."<sup>45</sup>

A 1983 study showed that people regard their pets as beloved family members.<sup>46</sup> In that study, 87% of respondents considered pets to be family members, and 79% celebrated their pets' birthdays.<sup>47</sup> In a 1995 study by the American Animal Hospital Association, 70% of respondents who had owned a pet indicated that they thought of those

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<sup>44</sup> For a list of centers with web links, see <http://www.familyjusticecenter.org/affiliated-centers/family-justice-centers/> (last visited March 26, 2017).

<sup>45</sup> Faver & Strand, *supra* note 39, at 238.

<sup>46</sup> *Id.* at 240.

<sup>47</sup> Dianna J. Gentry, *Including Companion Animals in Protective Orders: Curtailing the Reach of Domestic Violence*, 13 YALE J.L. & FEMINISM 97, 102 (2001).



pets as children.<sup>48</sup> Today, more people have pets than have children.<sup>49</sup> Humans tend to view their animals as “social actors who are capable of interacting symbolically.”<sup>50</sup> In 2016, pet owners spent an estimated \$62.75 billion dollars on their pets.<sup>51</sup> U.S. veterinary expenses tripled between 1991 and 2001, an early indicator of the increasing value placed on pets.<sup>52</sup>

Given this evidence of a strong human-pet bond, it is no surprise that it extends to subjects of family violence. In one study, Flynn conducted interviews with ten battered women at a shelter in South Carolina who owned pets.<sup>53</sup> The women described their pets as family members, including two respondents who brought photos of their pets with them to the interview, behaving like “proud parents.”<sup>54</sup> Three women even referred to their pets as “children.”<sup>55</sup>

Although this bond is touching, it has sinister implications when recognized by an abuser. A pet’s status as a family member makes the pet vulnerable to abuse.<sup>56</sup> The connection between animal abuse and other forms of domestic violence is not simply a sign of a general violent disposition on the part of the abuser, however. Instead, this

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<sup>48</sup> Sonia S. Waisman & Barbara R. Newell, *Recovery of “Non-Economic” Damages for Wrongful Killing or Injury of Companion Animals: A Judicial and Legislative Trend*, 7 ANIMAL L. 45, 59 (2001).

<sup>49</sup> Clifton P. Flynn, *Battered Women and Their Animal Companions: Symbolic Interaction Between Human and Nonhuman Animals*, 8 SOCIETY & ANIMALS 99, 101 (2000) [hereinafter Flynn, *Symbolic Interaction*].

<sup>50</sup> *Id.*

<sup>51</sup> Pet Industry Market Size & Ownership Statistics, [http://www.americanpetproducts.org/press\\_industrytrends.asp](http://www.americanpetproducts.org/press_industrytrends.asp) (last visited March 26, 2017).

<sup>52</sup> Susan J. Hankin, *Not A Living Room Sofa: Changing the Legal Status of Companion Animals*, 4 RUTGERS J. L. & POL’Y 314, 316 (2007).

<sup>53</sup> Flynn, *Symbolic Interaction*, *supra* note 49, at 103.

<sup>54</sup> *Id.* at 105.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 107.

correlation appears to result from the batterer's concerted strategy to take advantage of the intimate family environment for his or her own purposes. Abusers batter pets to establish their power, instill fear, and encourage the "habit of compliance" among their human victims.<sup>57</sup> Abusers recognize that harming or threatening a human victim's pet is a viable strategy to coerce the human victim to do what the abuser wants.<sup>58</sup> Customized versions of the Duluth Model of Power and Control, frequently used to illustrate locus of authority and influence in domestic violence settings, identify the elements of this concerted strategy.<sup>59</sup>

As part of the family, pets exist within the same environment that permits violence to occur against human victims. This violence is fostered by the privacy associated with the home and the position of "power and control" that abusers can exercise over pets due to their "dependent status" and "smaller physical stature."<sup>60</sup> Even more importantly, abusers react with jealousy to the strong emotional attachments that exist between their human victims and pets.<sup>61</sup>

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<sup>57</sup> Jennifer Robbins, Note, *Recognizing the Relationship Between Domestic Violence and Animal Abuse: Recommendations for Change to the Texas Legislature*, 16 TEX. J. WOMEN & L. 129, 133 (2006).

<sup>58</sup> Faver & Strand, *supra* note 39, at 238.

<sup>59</sup> See How Are Animal Abuse and Family Violence Linked?, <http://nationallinkcoalition.org/faqs/what-is-the-link> (last visited July 30, 2017) (applying the Power and Control Wheel to issues at the intersection of domestic violence and animal abuse); Wheels: Understanding the Power and Control Wheel, <https://www.theduluthmodel.org/wheels/> (last visited July 30, 2017) (explaining descriptive "wheels," including the Power and Control Wheel, developed by the Domestic Abuse Intervention Programs).

<sup>60</sup> Flynn, *Symbolic Interaction*, *supra* note 49, at 107.

<sup>61</sup> Flynn, *Woman's Best Friend*, *supra* note 13, at 172. This article also postulates that there are two key reasons why domestic violence victims may form unique emotional attachments to their pets. First, battered women may identify with pets that have been similarly abused, and second, pets may serve as emotional substitutes who fill the need of

Abusers manipulate these bonds between human abuse victims and their pets. Because these pets are so important to the human subjects of domestic violence, abusers can harm and threaten the pets in order to further harm and coerce their human victims.<sup>62</sup> The abuser can use the pet to convince the victim to come home or drop criminal charges.<sup>63</sup> Analysts identify this strategy among abusers as a negative surrogacy, where the abuser targets the animal to hurt and control the human victim in a phenomenon known as “triangling.”<sup>64</sup> In one of Flynn’s studies, female victims of family abuse cited their emotional attachment to the pet as being part of the reason why their abusers targeted the animals.<sup>65</sup> One woman insightfully stated, “[the pet] was like an extension of me, you know? And . . . maybe he abused the dog ‘cause [sic] he . . . didn’t want to go to jail for abusing me . . . .”<sup>66</sup> Another stated of her abuser, “I think he uses the dog big time to hurt us . . . .”<sup>67</sup> Similar examples of abusers using violence against pets to hurt human victims play out in communities across the country.<sup>68</sup> The *Knoxville News Sentinel*, for example, reported on felony animal abuse charges filed against a man who broke the neck of his

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companionship for battered women, who are often socially isolated by their abusers. *Id.* at 168–74.

<sup>62</sup> Faver & Strand, *supra* note 39, at 238.

<sup>63</sup> Flynn, *Woman’s Best Friend*, *supra* note 13, at 172.

<sup>64</sup> *Id.* at 174.

<sup>65</sup> Flynn, *Symbolic Interaction*, *supra* note 49, at 107.

<sup>66</sup> *Id.* at 110.

<sup>67</sup> *Id.* at 109.

<sup>68</sup> Articles summarizing published reports of incidents and legal actions involving the link between animal abuse and domestic violence are regularly published in the *LINK-Letter*, a newsletter produced by the National Link Coalition. These articles are available on the National Link Coalition’s website at <http://nationallinkcoalition.org/resources/link-letter-archives>.

stepdaughter's Jack Russell terrier puppy in order to "torment" his estranged wife.<sup>69</sup>

Even in situations where the abuser does not threaten or harm the pet, targets of family violence are often emotionally scarred by their pets' reactions to the abuse that the pets witness.<sup>70</sup> One woman described being upset because her dog "panics" and "starts shivering" when the abuser yells at her.<sup>71</sup> In sum, all abuse, whether it be of a human or a pet, contributes to the "climate of . . . terror" that perpetuates further violence.<sup>72</sup>

#### 4. Community Action in Response to Abuse

Society at large has begun to take notice of the connection between human and nonhuman victims of abuse. Academic studies are one indicator of this emerging acknowledgment of this linkage.<sup>73</sup> Changes to legal process and even law itself are others. In addition, there has been a focus on enforcement efforts against perpetrators of animal cruelty in the hopes that they will help diminish violence against humans.<sup>74</sup> This enforcement rationale suggests that

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<sup>69</sup> Michael Silence, *A felony animal abuse case*, KNOX NEWS, Feb. 1, 2005, <http://www.wate.com/story/2919445/man-gets-two-years-in-plea-deal-on-puppy-killing>.

<sup>70</sup> Flynn, *Symbolic Interaction*, *supra* note 49, at 116.

<sup>71</sup> *Id.* at 117.

<sup>72</sup> *Id.* at 113.

<sup>73</sup> A bibliography of academic studies in this area is available at <http://animaltherapy.net/animal-abuse-human-violence/bibliography/>.

<sup>74</sup> GARY L. FRANCIONE, *ANIMALS, PROPERTY, AND THE LAW* 122–25 (Temple University Press 1995) (citing a variety of judicial opinions concerning animal cruelty to distinguish direct and indirect duties). Francione concludes that, although some judicial opinions interpret animal cruelty statutes as creating duties owed directly to the animals, others emphasize a "dual purpose" where the duty owed to the animal is indirect. *Id.* at 122. The author reiterates that, "the primary rationale for the anticruelty statutes is essentially that cruelty to animals has a detrimental impact on the moral development of human beings." *Id.* at

one potent reason why society cares about animal rights is because animal interests are intertwined with human interests.<sup>75</sup>

One important change in this area is the growing emphasis on including animals in orders of protection.<sup>76</sup> In Tennessee, for example, a protective order may “direc[t] the care, custody or control of any animal owned, possessed, leased, kept, or held by either party or a minor residing in the household.”<sup>77</sup> The Tennessee statute also insists that animals be placed in the direct custody of the petitioner or in animal foster care, emphasizing that the animal should never be placed in the custody of the respondent to the protective order.<sup>78</sup> Although the Tennessee Code does not extend protection to first responders who help the abuse victim remove pets from the household, such aid is available through the internal guidelines of various law enforcement offices.<sup>79</sup>

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125. An emphasis on indirect duties is also prevalent in some theories of animal ethics. See, e.g., PETER CARRUTHERS, *THE ANIMALS ISSUE* 146 (Cambridge University Press 1992) (“[S]ome ways of treating animals are morally wrong . . . but only because of what those actions may show us about the moral character of the agent. This will then be a form of indirect moral significance for animals that is independent of the fact that many rational agents care about animals, and hate to see them suffer.”).

<sup>75</sup> Livingston, *supra* note 36, at 5.

<sup>76</sup> As of 2016, thirty-two states, plus Washington, D.C. and Puerto Rico, have enacted statutes that permit the inclusion of pets in protection orders. For more details about the statutory language in each state, see Rebecca F. Wisch, *Domestic Violence and Pets: List of States that Include Pets in Protection Orders*, ANIMAL LEGAL & HISTORICAL CENTER (2016), <https://www.animallaw.info/article/domestic-violence-and-pets-list-states-include-pets-protection-orders>.

<sup>77</sup> TENN. CODE ANN. § 36-3-606(a)(9) (2016).

<sup>78</sup> *Id.*

<sup>79</sup> Telephone interview with Jackie Roberts, Case Coordinator, Family Justice Center in Knoxville, Tenn. (June 20, 2008). As part of their standard operations, Knoxville police officers “standby” for fifteen minutes while the victim retrieves personal belongings from the house. For safety reasons, this standby procedure is never utilized at night. *Id.*

In other rule making, state legislatures are increasing penalties for animal abuse. All fifty states currently have felony provisions for animal cruelty.<sup>80</sup> In Tennessee, a perpetrator's first animal cruelty offense is a Class A misdemeanor,<sup>81</sup> punishable by no more than 11 months and 29 days of incarceration, along with a fine not to exceed \$2,500.<sup>82</sup> Any subsequent offense is a Class E felony,<sup>83</sup> requiring incarceration for one to six years and a fine up to \$3,000.<sup>84</sup> Tennessee has a separate statute, however, to deal with aggravated animal cruelty, which occurs when a person "intentionally kills or intentionally causes serious physical injury to a [pet]" in a manner that exhibits "aggravated cruelty" that has "no justifiable purpose."<sup>85</sup> Aggravated cruelty is a Class E felony.<sup>86</sup>

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<sup>80</sup> Animal Cruelty Facts and Stats, [http://www.humanesociety.org/issues/abuse\\_neglect/facts/animal\\_cruelty\\_facts\\_statistics.html](http://www.humanesociety.org/issues/abuse_neglect/facts/animal_cruelty_facts_statistics.html) (last visited March 26, 2017). In recent years, activists have concluded that the best pragmatic approach to achieving greater protection for pets is to emphasize how animal abuse serves as an indicator of interpersonal violence. The increase in state felony laws from five in 1990 to fifty today parallels the renewed focus on the link between different types of violence, as highlighted by the American Humane Society, The Humane Society of the United States, the Animal Welfare Institute, the National Link Coalition, and other animal protection organizations and institutions. For instance, legislators in both Pennsylvania and Texas recently cited the link between violence to animals and people in enacting an overhaul of those states' anti-cruelty statutes. See, e.g., *Pennsylvania Cites Link in Enhancing Cruelty Penalties*, THE LINK-LETTER (July 2017), at 1, <http://nationallinkcoalition.org/wp-content/uploads/2017/07/LinkLetter-2017-July-v3.pdf>; *Link Cited as Rationale for Increased Cruelty Penalties*, The LINK-Letter (July 2017), at 3, <http://nationallinkcoalition.org/wp-content/uploads/2017/07/LinkLetter-2017-July-v3.pdf>.

<sup>81</sup> TENN. CODE ANN. § 39-14-202(g)(1) (2016).

<sup>82</sup> *Id.* § 40-35-111(e)(1).

<sup>83</sup> *Id.* § 39-14-202(g)(2).

<sup>84</sup> *Id.* § 40-35-111(b)(5).

<sup>85</sup> *Id.* § 39-14-212(a).

<sup>86</sup> *Id.* § 39-14-212(d).

Another important area of animal protection legislation is cross-reporting as among child and adult protective services and animal abuse responders.<sup>87</sup> Tennessee requires that any agency or government employee involved in “child or adult protective services” report suspected animal abuse to the appropriate animal protection authority.<sup>88</sup> In order to make cross-reporting as potent as possible, states also need to require humane society investigators to report to social workers when they suspect child abuse or domestic violence.<sup>89</sup> Other states have extended mandatory reporting into other professions, such as by requiring veterinarians to report suspected animal abuse.<sup>90</sup> Many states, for example, either require veterinarians to report suspected animal abuse or provide immunity if veterinarians report such information, prescriptions that resemble child abuse reporting requirements.<sup>91</sup>

As a logical extension of these legislative efforts, Tennessee law also provides for an animal abuse registry akin to sex offender registries provided for by law in Tennessee and elsewhere.<sup>92</sup> At the time work on this article was completed, the registry included information on eight

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<sup>87</sup> The National Link Coalition produces summaries of state cross-reporting requirements (mandatory and permissive), based on the nature of required reporters (e.g., child protection, adult protective services, animal care and control, and veterinary professionals) and type of abuse. These summaries are available at <http://nationallinkcoalition.org/resources/articles-research>.

<sup>88</sup> *Id.* § 38-1-402(a).

<sup>89</sup> Heather D. Winters, *Updating Ohio's Animal Cruelty Statute: How Human Interests Are Advanced*, 29 CAP. UNIV. L. REV. 857, 868 (2002).

<sup>90</sup> Gentry, *supra* note 47, at 104.

<sup>91</sup> Abuse Reporting Requirements by State, <https://www.avma.org/KB/Resources/Reference/AnimalWelfare/Pages/Abuse-Reporting-requirements-by-State.aspx> (last visited April 1, 2017).

<sup>92</sup> Tennessee Animal Abuser Registration Act, TENN. CODE ANN. §§ 40-39-401–404 (2016).

convicted animal abusers.<sup>93</sup> Although Tennessee was the first state to adopt legislation of this kind, municipalities in other states have started to implement animal abuse registries.<sup>94</sup> The effect of these still-young initiatives is unclear, but they do represent another socio-legal response to the link between human and animal abuse.<sup>95</sup>

In perhaps the most novel development, Connecticut has recently passed legislation (“Desmond’s Law”) allowing animals to have court-appointed advocates to represent them in abuse and cruelty cases.<sup>96</sup> Either the prosecutor or the defense attorney may request the animal advocate, and the judge has discretion as to whether to make the appointment. At this time, seven lawyers and a law professor are approved as volunteer advocates. The passage of the law appears to be connected to concern over both the link between animal abuse and violence against people and the paucity of animal abuse cases resulting in a conviction.

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<sup>93</sup> See Tennessee Animal Abuse Registry, Tennessee Bureau of Investigation, <https://www.tn.gov/tbi/topic/tennessee-animal-abuse-registry> (last visited July 30, 2017).

<sup>94</sup> See Karin Brulliard, *Animal abusers are being registered like sex offenders in these jurisdictions*, WASH. POST (September 13, 2016), [https://www.washingtonpost.com/news/animalia/wp/2016/09/13/animal-abusers-are-being-registered-like-sex-offenders-in-these-jurisdictions/?utm\\_term=.4dd192c8abd8](https://www.washingtonpost.com/news/animalia/wp/2016/09/13/animal-abusers-are-being-registered-like-sex-offenders-in-these-jurisdictions/?utm_term=.4dd192c8abd8).

<sup>95</sup> See *id.* (“The registries are part of widening efforts in the United States to punish and track animal abusers, who, research has shown, commit violence against people at higher rates than normal.”). Bills introducing state animal abuse registries were introduced in a number of state legislatures during the 2017 legislative sessions. New State Animal Abuser Registries Proposed in 2017, <https://www.navs.org/new-state-animal-abuser-registries-proposed-2017/#.WYiRDq3MxAY>.

<sup>96</sup> See, e.g., Laurel Wamsley, *In a First, Connecticut’s Animals Get Advocates in the Courtroom*, THE TWO-WAY (June 2, 2017), [http://www.npr.org/sections/thetwo-way/2017/06/02/531283235/in-a-first-connecticuts-animals-get-advocates-in-the-courtroom?utm\\_source=facebook.com&utm\\_medium=social&utm\\_campaign=npr&utm\\_term=nprnews&utm\\_content=20170603](http://www.npr.org/sections/thetwo-way/2017/06/02/531283235/in-a-first-connecticuts-animals-get-advocates-in-the-courtroom?utm_source=facebook.com&utm_medium=social&utm_campaign=npr&utm_term=nprnews&utm_content=20170603).



Beyond legislation, the judiciary has begun to highlight the presence of animal abuse in cases involving domestic violence (especially child abuse), exposing the interrelationships among the three types of household violence.<sup>97</sup> In one Kentucky case, the judge permitted joinder of interrelated child abuse and animal cruelty charges when the defendants allegedly sexually abused their children and used their pets for sexual gratification.<sup>98</sup> In another brutal case out of Oregon, a jury convicted Charles Smith of murdering his pregnant wife by tying her hands and feet behind her back and leaving her to die of exposure in a remote area. At trial, the state presented evidence of Smith's long history of violence against both women and animals, including how he threw a kitten into a burning woodstove and beat his wife's puppy to death.<sup>99</sup>

Beyond the research initiatives on the link between animal abuse and human aggression and the legislative, regulatory, and judicial activity that they have engendered, practical issues have emerged in handling matters at the intersection of animal and human violence. For example, there is widespread concern about the adequacy of social services offered to victims of domestic violence.<sup>100</sup> A particularly salient concern is the fact that most domestic violence shelters do not take in the animals of human domestic violence victims.

### **B. No Room at the Inn: Most Domestic Violence Shelters Do Not Accept Pets**

As an extension of the emerging interest in the connection between domestic violence and animal abuse, researchers have begun to highlight and criticize the failure

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<sup>97</sup> Gentry, *supra* note 47, at 104.

<sup>98</sup> *Id.* at 104–05.

<sup>99</sup> *Id.* at 105.

<sup>100</sup> Faver & Strand, *supra* note 39, at 243.

of domestic violence shelters to evaluate or address the importance of pets in the lives of domestic violence victims.<sup>101</sup> Most domestic violence shelters do not accept pets, due to “health regulations, space limitations, additional costs, and potential liabilities.”<sup>102</sup> Concerned members of the community have begun to change this norm,<sup>103</sup> but the situation persists.

Researchers stress that shelter staff should inquire about pets at intake and take seriously the victims’ emotional turmoil about leaving their pets.<sup>104</sup> In Wisconsin, Quinlisk found that large, urban shelters asked abuse victims about their pets during intake, while small, rural shelters did not.<sup>105</sup> Quinlisk stressed that even if a shelter has no program to take in pets of domestic violence victims, merely expressing concern and helping them “brainstorm” about their options for their pets is helpful.<sup>106</sup> Over two-thirds of those surveyed whose pets had been abused expressed concern for the safety of those pets.<sup>107</sup> In another study by Flynn, all of the abuse

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<sup>101</sup> *Id.*; see also Frank R. Ascione, *The Abuse of Animals and Human Interpersonal Violence: Making the Connection*, in CHILD ABUSE, DOMESTIC VIOLENCE, AND ANIMAL ABUSE 50, 56 (Frank R. Ascione & Phil Arkow eds., 1999) (83% of directors at surveyed domestic violence shelters acknowledged an “overlap” between domestic violence and animal abuse, but only 28% of those shelters routinely ask their clients about animal abuse); Flynn, *Symbolic Interaction*, *supra* note 49, at 123 (suggesting that shelter staff should inquire about pets at intake and consider establishing foster programs or on-site housing programs for pets, particularly because some women delay seeking shelter due to concern for their pets).

<sup>102</sup> THE HUMANE SOC’Y OF THE U.S., STARTING A SAFE HAVENS FOR ANIMALS PROGRAM 2, [http://www.humanesociety.org/assets/pdfs/2004\\_SafeHavens\\_Guide.pdf](http://www.humanesociety.org/assets/pdfs/2004_SafeHavens_Guide.pdf) [hereinafter HSUS, SAFE HAVENS].

<sup>103</sup> See *supra* note 4 and accompanying text.

<sup>104</sup> Flynn, *Symbolic Interaction*, *supra* note 49, at 123.

<sup>105</sup> Quinlisk, *supra* note 22, at 173.

<sup>106</sup> *Id.*

<sup>107</sup> Flynn, *Woman’s Best Friend*, *supra* note 13, at 170.

victims who were interviewed wished that the shelter could accommodate their animals.<sup>108</sup>

Some victims of family violence delay coming to a domestic violence shelter out of concern for their animals, which indicates the gravity of the failure to shelter the pets of battered women. In Ascione's study, 18% of those surveyed delayed seeking shelter out of concern for their pets' safety.<sup>109</sup> Similarly, eight women, or 18.6% of respondents, in one of Flynn's studies delayed seeking shelter for themselves due to their pets.<sup>110</sup> All of them acknowledged that their pets had also been victims of abuse; five of them delayed coming to the shelter for over two months.<sup>111</sup> A staff member at the shelter told the researcher that one woman who had come to the shelter on three separate occasions during his study returned home each time because she feared for the safety of her pet.<sup>112</sup>

Yet, as striking as these numbers and stories may be, research involving abuse victims in domestic violence shelters likely understates the overall risk to those victims because there most certainly are victims who never seek shelter at all (at least in part because of a fear that their pets will be abused or killed if they leave the household).<sup>113</sup> This shortcoming in the empirical data on abuse victims is likely to persist because the study population is difficult to identify. Even interviewing unsheltered domestic violence victims whose abusers are arrested would not completely overcome

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<sup>108</sup> Flynn, *Symbolic Interaction*, *supra* note 49, at 118.

<sup>109</sup> Ascione, *Women's Reports*, *supra* note 10, at 125.

<sup>110</sup> Flynn, *Woman's Best Friend*, *supra* note 13, at 170.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 172.

<sup>113</sup> See Samantha Cowan, *No Dog Left Behind: Pet-Friendly Domestic Violence Shelter Makes It Easier to Leave*, TAKEPART (Oct. 17, 2015), <http://www.takepart.com/article/2015/10/17/domestic-violence-pets> ("The institute's findings support past studies, which have found that up to 50 percent of women delay leaving abusive situations out of concern for their pets.").

the deficiency (although that certainly would be a valuable contribution). Regardless, however, it seems likely that domestic violence victims who delay leaving an abusive situation may actually be risking their own lives to protect their pets, making animal sheltering a key concern for all social workers and human services professionals.<sup>114</sup>

Having said that, this research on human domestic abuse victims and their pets reveals that the humans are not the only ones at risk in this situation. If a human victim of family violence leaves a domestic violence situation without securing the safety of a pet, the pet is at a significant risk of abuse. In Flynn's in-depth interviews with domestic violence victims, he explored the fears that women had when they were separated from their pets while at the domestic violence shelter.<sup>115</sup> Some women had been fortunate enough to leave their pets with family or friends, while six were compelled to give their pets away or take them to a local animal shelter, which typically would require surrender of ownership of the animals.<sup>116</sup> Slightly over half of the women had left their pets with their abusers.<sup>117</sup> One of those women worried that her husband was not feeding her dog, while another received threats from her husband that he would take their dog away from her.<sup>118</sup> It is noteworthy, however, that temporary fostering was open to these women, and Flynn concluded that the women who deeply feared that their abusers would hurt their pets put them in foster care before

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<sup>114</sup> Quinlisk, *supra* note 22, at 173.

<sup>115</sup> Flynn, *Symbolic Interaction*, *supra* note 49, at 119.

<sup>116</sup> Flynn, *Woman's Best Friend*, *supra* note 13, at 169–70. Most animal shelters require women to surrender ownership and many shelters assume that they own pets that are brought to them. See FRANK R. ASCIONE, SAFE HAVENS FOR PETS 38–39 (2000), [http://vachss.com/guest\\_dispatches/ascione\\_safe\\_havens.pdf](http://vachss.com/guest_dispatches/ascione_safe_havens.pdf) [hereinafter ASCIONE, SAFE HAVENS].

<sup>117</sup> Flynn, *Woman's Best Friend*, *supra* note 13, at 170.

<sup>118</sup> Flynn, *Symbolic Interaction*, *supra* note 49, at 119.

coming to the domestic violence shelter.<sup>119</sup> Even though the women who left their pets at home recognized that these pets might be abused or neglected, they expressed guilt at taking their pets away from abusers who also had also developed relationships with the pets.<sup>120</sup> The psychological and emotional impacts of the many disruptions in a violent household are fraught with complexity.

### C. Promising New Developments with Undesirable Side Effects

In reaction to the grave dangers that develop due to the lack of safe shelter for battered women's pets, novel arrangements are beginning to crop up to address the problem. A growing number of domestic violence shelters and social services organizations are taking part in efforts to aid animals that are affected by domestic violence.<sup>121</sup> Domestic violence shelters have begun to welcome pets, despite the practical and legal barriers to doing so.<sup>122</sup> In Columbus, Ohio, social workers developed an innovative program in which the pets of battered women are taken to a women's prison, where the inmates care for them.<sup>123</sup> These and other similar efforts should be encouraged and supported. But until they are more universally and uniformly available, other (potentially less desirable) options will continue to play strong roles.

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<sup>119</sup> *Id.* at 120.

<sup>120</sup> *Id.* at 119–20.

<sup>121</sup> Faver & Strand, *supra* note 39, at 243.

<sup>122</sup> See Bridgid Schulte, *Sheltering Women—and Their Pets, Too*, WASHINGTON POST, (Nov. 8, 2007) <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/07/AR2007110700860.html>; *SAF-T Shelters*, <http://alliephillips.com/saf-tprogram/saf-t-shelters/> (updated Feb. 2017).

<sup>123</sup> Pam Belluck, *New Maine Law Shields Animals in Domestic Violence Cases*, N.Y. TIMES, (April 1, 2006) <http://www.nytimes.com/2006/04/01/us/01pets.html?n=Top/Reference/TimesTopics/People>.

Significant among those options, community-based sheltering in so-called “safe haven” programs may be the most common, though not very widespread. Safe haven programs typically are formed when domestic violence shelters partner with “animal shelters, animal care and control agencies, veterinary clinics, and private boarding kennels” in order “to provide temporary housing for victims’ pets.”<sup>124</sup> Ascione’s 1999 survey identified 113 safe haven programs nationwide, the youngest of which were still in the conceptual phase<sup>125</sup> and the oldest of which had been operating for ten years.<sup>126</sup> The animal welfare agencies involved in these programs estimated that they sheltered a total of 2,000 to 50,000 animals per year.<sup>127</sup> Safe haven shelters are now more widely known and are more regularly noted and currently documented by various organizations.<sup>128</sup> This article focuses its core attention and proposal on pets sheltered apart from their owners in safe haven programs.

The general attributes and operations of a safe haven program are explained in the “Starting a Safe Havens for Animals Program” brochure that is available on the website of the Humane Society of the United States<sup>129</sup> and in the “Safe Havens for Pets” brochure produced by Ascione.<sup>130</sup> The Humane Society brochure prefers that domestic violence shelters serve as the “primary referring agency for animals who require temporary foster care,” but it encourages safe haven programs to consider accepting referrals from other sources, such as the police and animal shelters.<sup>131</sup> Personnel need to be available at all times for animal intake because many domestic violence victims must

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<sup>124</sup> HSUS, SAFE HAVENS, *supra* note 102, at 2.

<sup>125</sup> See ASCIONE, SAFE HAVENS, *supra* note 116, at 3.

<sup>126</sup> See *id.* at 5.

<sup>127</sup> See *id.* at 6.

<sup>128</sup> See *supra* note 7 and accompanying text.

<sup>129</sup> HSUS, SAFE HAVENS, *supra* note 102.

<sup>130</sup> ASCIONE, SAFE HAVENS, *supra* note 116.

<sup>131</sup> HSUS, SAFE HAVENS, *supra* note 102, at 3.

flee their homes during the night.<sup>132</sup> Moreover, the brochure strongly suggests that veterinarians should immediately check the animals.<sup>133</sup> Safe haven programs commonly use animal shelters, foster homes, veterinary clinics, and private kennels to house the animals.<sup>134</sup> In Ascione's survey of safe haven programs, for example, only three domestic violence shelters (roughly 14% of the shelters interviewed) indicated that they could shelter pets at their own facilities.<sup>135</sup> Most programs offer sheltering services for fourteen to thirty days.<sup>136</sup> Due to safety concerns and the stress of visits, it is unadvisable to allow the human victim to visit her pet during sheltering.<sup>137</sup>

The brochures also address procedures through which the victims reclaim their pets. In many (if not most) cases, the expectation is that the women and their pets will move to a new home where they are more likely to be free from abuse. However, some women decide to return to their abusers. The Humane Society brochure acknowledges that this outcome is "frustrating" and advises shelter personnel to "educate the victim about the dangers of returning" to a "potentially harmful situation."<sup>138</sup> However, the brochure does no more to elaborate on the serious risks that humans and pets face when they return to an abusive home. Instead, the brochure concludes that "the program will have to allow the victim to reclaim the pet and return to the abuser if the victim so chooses."<sup>139</sup>

Ascione's "Safe Havens for Pets" brochure reaches the same conclusion.<sup>140</sup> Ascione reminds us that "[l]eaving a

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<sup>132</sup> *Id.* at 4.

<sup>133</sup> *Id.* at 5.

<sup>134</sup> ASCIONE, SAFE HAVENS, *supra* note 116, at 19.

<sup>135</sup> *Id.* at 8.

<sup>136</sup> HSUS, SAFE HAVENS, *supra* note 102, at 5.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 6.

<sup>139</sup> *Id.*

<sup>140</sup> ASCIONE, SAFE HAVENS, *supra* note 116, at 51.

batterer is often a process rather than a one-time decision” and that “[w]omen should not be coerced into remaining away from batterers by preventing them from retrieving pets from a SHP program.”<sup>141</sup> He recognizes that this policy sometimes produces “horror stories,” recounting an incident where a woman came to the safe haven shelter with her batterer to reclaim her pet.<sup>142</sup> Nonetheless, scholars and social workers typically do not challenge the premise that abused women should be able to reclaim their pets regardless of their intentions. Moreover, as Part II illustrates, the law’s conception of pets as personal property supports a domestic violence victim’s right to reclaim her animal.

This article suggests that we should rethink this assumption. By allowing domestic violence victims to reclaim their pets and return with them to an abusive household, safe haven programs perpetuate the cycle of human and animal violence. The safe haven movement, designed to solve a pressing social problem—ensuring the temporary safety and welfare of pets of human abuse victims—raises compelling philosophical, legal, and ethical issues. However, a solution to this safe haven conundrum—an issue at the intersection of the emotional and psychological needs and legal rights of humans, on the one hand, and the socio-legal aspects of animal protection, on the other—may be possible. A potential solution lies in the combination of traditional property and contract law concepts with current legal and public policy support for animal protection.

## **II. Animals, Property, and Rights: Legal Rules Relevant to a Resolution of the Safe Haven Conundrum**

If the law is to provide a solution to the safe haven conundrum, it is important to understand current legal rules

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 68.



relating to animals. This Part identifies certain relevant legal rules relating to animals and summarizes salient aspects of the history and development of those rules. The Part also makes certain observations about those legal rules in light of their nature, history, and development.

### **A. Animals as Property in the Current Legal Paradigm**

Because pets are classified as property under the current legal paradigm, a brief overview of certain elements of property law is necessary to any disposition of the safe haven conundrum.<sup>143</sup> From a legal standpoint, property is a bundle of rights related to a given object, making it a fundamental organizing principle of any legal system.<sup>144</sup> American law traditionally treats animals as property in the

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<sup>143</sup> Property status has, of course, been an important part of the conceptualization of animals for centuries, if not millennia. Aristotelian and Stoic philosophies espoused teleological anthropocentrism—the belief that the physical world was designed for use by humans, as exemplified by the concept of the Great Chain of Being. Steven M. Wise, *How Nonhuman Animals were Trapped in a Nonexistent Universe*, 1 ANIMAL L. 15, 19–24 (1995). Various developments—including, but not limited to, the rise of modern science and the environmental movement—have tempered enthusiasm for the notion of human dominion over the natural world. *Id.* at 34–41. Nonetheless, commentators continue to debate whether modern concepts such as evolution truly detract from the position that human interests are superior to animal interests. Compare Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 N.Y.U. ENVTL. L.J. 531, 559–64 (1998) (arguing that “[t]he gulf between humans and other animals evaporated in the Darwinian revolution” and that “the ranking of humans in evolution” does not “giv[e] humans special status and rights”) with CARRUTHERS, *supra* note 74, at 143–45 (arguing that “human beings are continuous with the rest of the natural world, having evolved, like any other species of animal, through a process of natural selection,” but that only humans are “rational agents” who deserve “direct rights”).

<sup>144</sup> David Favre, *Equitable Self-Ownership for Animals*, 50 DUKE L.J. 473, 477 (2000) [hereinafter Favre, *Equitable Self-Ownership*].

same way that a book or chair is property.<sup>145</sup> We can buy and sell our pets, and they can also be the subject of bailment agreements and the object of theft.<sup>146</sup>

Historically, states have viewed animals as “personal property without any special value.”<sup>147</sup> In 1857, for example, a Tennessee court affirmed a human owner’s property rights in a dog.<sup>148</sup> With this mindset, some states were reluctant to create a definition of “pet” or “companion animal” in their statutory codes.<sup>149</sup> The law typically “denies all justice to all nonhuman animals”; legal rights inuring to an animal’s benefit generally are exercised by the animal’s owner or legal guardian or the state, while legal duties in relation to an animal are owed to the animal’s owner or legal guardian or the state via statute.<sup>150</sup>

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<sup>145</sup> Hankin, *supra* note 52, at 317.

<sup>146</sup> *Id.* at 321.

<sup>147</sup> Merry B. Guben, *Animal Law Litigation: On the Road to a Modern View with some Landmarks Along the Way*, 77 PA. B. ASS’N Q. 58, 59 (2006).

<sup>148</sup> *Wheatley v. Harris*, 36 Tenn. 468, 468 (1857) (“[T]he law upon the point of the master’s property in a dog is well settled.”).

<sup>149</sup> See Guben, *supra* note 147, at 59. But see TENN. CODE ANN. § 44-17-403(b) (2016) (stepping away from this traditional view by defining a “pet” as “any domesticated cat or dog normally maintained in or near the household of the owner”); *id.* § 39-14-201(3) (defining a “non-livestock animal” as “a pet normally maintained in or near the household . . . of its owner . . . other domesticated animal, previously captured wildlife, an exotic animal, or any other pet, including but not limited to, pet rabbits, a pet chick, duck, or pot bellied pig that is not classified as ‘livestock’ . . .”).

<sup>150</sup> Wise, *supra* note 143, at 17; Favre, *Equitable Self-Ownership*, *supra* note 144, at 480–81, 494 (describing the unique situation of wildlife). The state does not possess title in wildlife, but instead it “has the right to decide the conditions under which humans can obtain title” in wildlife, so that unless they are in captivity, wild animals possess self-ownership. *Id.* at 481. While some progress has been made in this area over the course of the time that this article was researched and written, the property law norms applicable to questions involving animals and law are well entrenched. See, e.g., *Matter of Nonhuman Rights Project, Inc. v. Stanley*, 49 Misc. 3d 746, 746 (N.Y. Sup. Ct. 2015) (granting standing

Yet, these conceptions of animals do not harmonize well with the modern reality of pet ownership. As noted in Part I.A.3, victims of family violence may describe their pets as family members, echoing the mentality of many in society at large. We view pets on an entirely different plane than we view inanimate property.<sup>151</sup> As Kathy Hessler suggests:

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.<sup>152</sup>

Law, as the embodiment of social values, should reflect this distinction.

Persistent social norms, however, sanction the human domination of animals, which tends to create

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to a nonprofit organization to commence a proceeding for a writ of habeas corpus on behalf of two chimpanzees held as research subjects but ultimately denying habeas corpus relief).

<sup>151</sup> See, e.g., *Matter of Nonhuman Rights Project, Inc.*, 49 Misc. 3d at 766 (“[S]ome animals, such as pets and companion animals, are gradually being treated as more than property, if not quite as persons, in part because legislatures and courts recognize the close relationships that exist between people and their pets, who are often viewed and treated by their owners as family members.”); *Travis v. Murray*, 42 Misc. 3d 447, 451 (Sup. Ct. 2013) (“Where once a dog was considered a nice accompaniment to a family unit, it is now seen as an actual member of that family, vying for importance alongside children.”).

<sup>152</sup> Kathy Hessler, *Mediating Animal Law Matters*, 2 J. ANIMAL L. & ETHICS 21, 28 (2007).

ambiguity and ambivalence in prevailing legal structures. In many cases, the law and legal process remain virtually straitjacketed by the fact that animals are property, and property cannot have rights.<sup>153</sup> Animal cruelty is typically a crime under state law,<sup>154</sup> and our laws generally proscribe unnecessary harm to animals.<sup>155</sup> Yet this proscription is a weak form of protection, in part because of the way in which we balance human interests against animal interests to make a determination of necessary harm.<sup>156</sup> In this balancing act, “animals almost never prevail, irrespective of what might be the relatively trivial human interest at stake and the relatively weighty animal interest involved . . . .”<sup>157</sup> Even where the interests of animals may or should prevail, their abuse is hard to detect, and the penalties for their abusers still pale in comparison to penalties for some human violence or other related crimes, compelling prosecutors to seek punishment for something other than animal cruelty.<sup>158</sup> While it may be

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<sup>153</sup> See FRANCIONE, *supra* note 74, at 4; *Matter of Nonhuman Rights Project, Inc.*, 49 Misc. 3d at 765 (“For purposes of establishing rights, the law presently categorizes entities in a simple, binary, ‘all-or-nothing’ fashion. ‘Persons have rights, duties, and obligations; things do not.’”).

<sup>154</sup> See *infra* Part II.C.1.

<sup>155</sup> See FRANCIONE, *supra* note 74, at 4.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> Human violence often accompanies animal violence and is punishable at higher felony levels. Compare TENN. CODE ANN. § 39-13-212(b) (2016) (stating that charge accompanying the *least* culpable mental state for homicide, criminally negligent homicide, is punished as a Class E felony) with *id.* § 39-14-212(d) (dictating the *most* severe form of animal cruelty in Tennessee is punished as a Class E felony). Furthermore, other violations such as tax evasion and gambling often accompany cock and dog fighting, and penalties for those crimes are more stringent. Compare *id.* § 67-1-1440(g) (criminalizing tax evasion is a Class E felony) and *id.* § 39-17-504(c) (1989) (classifying aggravated gambling promotion as a Class E felony) with *id.* § 39-14-203(c)–(d) (categorizing dog fighting as a Class E felony, being a spectator at a dogfight as a Class B or C misdemeanor, and cock fighting as a Class A misdemeanor). Thus, scarce prosecutorial resources are

easier to identify and successfully prosecute crimes other than animal cruelty in some of these cases, the focus of enforcement efforts on other criminal activity accompanying animal abuse and away from animal abuse itself may tend to reify and entrench perceptions that animals and animal abuse are unimportant (or always less important than human life and criminal activity—like tax evasion or gambling—implicating only human victims). Legislative initiatives defining domestic violence to include animal cruelty—enabling prosecutors to file for either or both crimes<sup>159</sup>—highlight the importance of animal welfare but may or may not change these perceptions. In general, the legal conception of animals as property drives, supports, and embeds these and other related patterns in law enforcement and the use of legal process. As a result, overall, a pure property law approach to animals has increasingly proven unworkable in a contemporary context.

### **B. Changing Perceptions of Animals in the Legal Order**

In light of increasing ethical, social, and legal tension in balancing animal and human interests, commentators have suggested a variety of new legal paradigms for pets.<sup>160</sup> At one extreme lies the “animal rights” perspective, which suggests that we should remove property status from animals

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often better spent on crimes other than animal cruelty. *See Dog Fighting Fact Sheet*, [http://www.humanesociety.org/issues/dogfighting/facts/dogfighting\\_fact\\_sheet.html?credit=web\\_id94655252](http://www.humanesociety.org/issues/dogfighting/facts/dogfighting_fact_sheet.html?credit=web_id94655252) (last visited Aug. 8, 2017) (noting that “[b]ecause dogfighting yields such large profits, the penalties associated with misdemeanor convictions are much too weak to act as a sufficient deterrent, and are simply seen as the cost of doing business[.]” and that dog fighting fosters other crime).

<sup>159</sup> The National Link Coalition quotes and cites to the state statutory definitions resulting from these initiatives in a document available at <http://nationallinkcoalition.org/wp-content/uploads/2017/03/DV-CTA-is-definition-of-DV-EA-2017-03a.pdf> (last visited July 30, 2017).

<sup>160</sup> Hankin, *supra* note 52, at 381–88.

altogether, thus making them full-fledged legal right-holders.<sup>161</sup> Gary L. Francione, for example, rejects accommodation with the traditional paradigm by framing the issue as a choice between two polar opposites: animals “are either persons, beings to whom the principle of equal consideration applies and who possess morally significant interests in not suffering, or things, beings to whom the principle of equal consideration does not apply and whose interests may be ignored if it benefits us. *There is no third choice.*”<sup>162</sup> According to Francione, improving the treatment of animals within a property framework is insufficient—we must instead recognize the moral significance of animals by affording them “equal consideration.”<sup>163</sup> This standard would apply to any animal that is sentient and can suffer.<sup>164</sup> In practice, this framework would end the usage of animals as “resources” so that the “institutional exploitation of animals for food, biomedical experiments, entertainment, or clothing” would cease.<sup>165</sup> Although the animal rights perspective is both simple and, to many, compelling, significant criticisms have been levied against it.<sup>166</sup>

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<sup>161</sup> Kelch, *supra* note 143, at 532.

<sup>162</sup> Gary L. Francione, *Animals—Property or Persons?*, in *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* 131 (Oxford University Press, Cass R. Sunstein & Martha C. Nussbaum, eds. 2004) (emphasis added).

<sup>163</sup> GARY L. FRANCIONE, INTRODUCTION TO *ANIMAL RIGHTS: YOUR CHILD OR THE DOG?* 100–01 (Temple University Press 2000) [hereinafter FRANCIONE, *YOUR CHILD OR THE DOG?*].

<sup>164</sup> *Id.* at 82, 159.

<sup>165</sup> *Id.* at 102. Francione does accept that “conflicts may require accommodation of some sort” and that an animal’s legal rights may be “overridden by appropriate moral considerations,” such as that a human appropriately preferring to help another human over an animal “in situations of true emergency.” FRANCIONE, *supra* note 74, at 4, 10; see also FRANCIONE, *YOUR CHILD OR THE DOG?*, *supra* note 163, at 157–59.

<sup>166</sup> Among other things, commentators find the comparison that animal rights activists make between racism, sexism, and the current role of animals to be “inappropriate,” “distasteful,” and not cogent, while also arguing that the animal rights position devalues human life. For further

A countervailing viewpoint advocates the status quo. Animals have no rights beyond the “protections they have incident to the economic, aesthetic, and humanitarian interests of human beings.”<sup>167</sup> The “aggregate” of human characteristics, including “the ability to express reason, to recognize moral principles, to make subtle distinctions, and to intellectualize” makes “humans fundamentally, importantly, and unbridgeably different from animals.”<sup>168</sup> Many advocates of this position argue that the social contract, as the underpinning of our legal system, is predicated on a consent of the governed that can only arise from these unique intellectual capabilities.<sup>169</sup> Therefore,

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exploration of these critiques, see David Schmahmann & Lori Polacheck, *The Case Against Rights for Animals*, 22 B.C. ENVTL. AFF. L. REV. 747, 757, 780 (1995). Comparisons between the current role of animals in our society and ancient and modern slavery, as well as analogies to societal prejudices against women and immigrants, are common in the animal rights literature. See, e.g., Favre, *Equitable Self-Ownership*, *supra* note 144, at 477–78, 491; Kelch, *supra* note 143, at 534; Wise, *supra* note 143, at 16.

<sup>167</sup> Schmahmann & Polecheck, *supra* note 166, at 759.

<sup>168</sup> *Id.* at 752.

<sup>169</sup> *Id.* at 754–55; see also CARRUTHERS, *supra* note 74, at 36, 194 (using contractualism to argue that morality is “a human construction[,] created by human beings . . . to govern . . . relationships . . . in society[,]” and that humans owe no direct moral duties to animals because animals do not possess reason). Although some species have the ability to recognize “the beliefs and desires of others,” rationality also requires “a conception of social rules, and of what it might be for all to act under the same social rules.” *Id.* at 139. Compare JAMES B. REICHMANN, S.J., EVOLUTION, ANIMAL ‘RIGHTS,’ AND THE ENVIRONMENT 252 (Catholic University of America Press 2000) (“The human’s rationality totally penetrates and is suffused throughout his animality; it is not a distinct ‘quality’ added to it. This union of rationality and animality clearly differentiates the human from all other sentient beings whose animality is not a rational animality.”) with Richard A. Posner, *Animal Rights: Legal, Philosophical, and Pragmatic Perspectives*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 57–58 (Oxford University Press, Cass R. Sunstein & Martha C. Nussbaum, eds. 2004) (arguing that rights are not based on “cognitive capacity,” but instead that “legal rights

only humans can directly benefit from the rights bestowed by that social contract—the only practical measure of rights is human interests.<sup>170</sup> The creation of full-fledged animal rights would be an unprecedented and destabilizing shift in our legal system that would demand the courts to enforce the interests of a new and vague constituency.<sup>171</sup> This viewpoint ignores, however, how the current legal paradigm has already proven insufficient to handle the modern role of pets—an insufficiency that creates inefficiencies. Furthermore, the Kantian social contract that is often emphasized in this viewpoint is not the only justification for rights.<sup>172</sup>

Finally, moderate activists urge a more nuanced approach between these two rubrics. Although the most radical animal rights advocates suggest changing pets' status "to one approaching that of persons," many suggest we should continue to conceive of pets as property, albeit with some significant qualifications.<sup>173</sup> Elimination of title in pets

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are instruments for securing the liberties that are necessary if a democratic system of government is to provide a workable framework for social order and prosperity. The conventional rights bearers are with minor exceptions actual and potential voters and economic actors. Animals do not fit this description . . .").

<sup>170</sup> Schmahmann & Polecheck, *supra* note 166, at 759, 760.

<sup>171</sup> *Id.*

<sup>172</sup> David Favre, *Judicial Recognition of the Interests of Animals—A New Tort*, 2005 MICH. ST. L. REV. 333, 334 (2000). Various justifications for human rights exist and are considered in the context of animals. *See id.* at 335. Kant assigned rights due to the dignity arising from rationality and self-awareness, but this conception has been criticized for excluding humans who do not have full rationality, unless the species is considered in the aggregate instead of individually. *See also id.* at 338 (stating that legal analysis should be based on a balancing of "conflicting interests"); Kelch, *supra* note 143, at 538–40 (the ability of a living being to experience pain and suffering makes it worthy of certain moral considerations); CARRUTHERS, *supra* note 74, at 13–26 (describing theism, intuitionism, utilitarianism, and contractualism as possible bases for moral duties).

<sup>173</sup> Hankin, *supra* note 52, at 385.



is “neither advisable nor feasible,” but it should be recognized that a pet is not the same sort of property as is an inanimate object.<sup>174</sup> Within this viewpoint, Carolyn Matlack’s formulation of pets as “sentient property” has garnered attention.<sup>175</sup> Matlack’s definition encompasses any animal that is warm-blooded and domesticated, recognizing these animals as “living, feeling companions,” but not giving them any status that approaches personhood.<sup>176</sup>

In a vein similar to Matlack, animal welfarists argue that “it is morally acceptable, at least under some circumstances, to kill animals or subject them to suffering as long as precautions are taken to ensure that the animal is treated as ‘humanely’ as possible.”<sup>177</sup> This would involve a balancing of human and animal interests within what tends to be a utilitarian framework.<sup>178</sup> Peter Singer argues that “we should give equal consideration to similar amounts of suffering, irrespective of the species (or order) of the beings who suffer” so that consideration is based on the individual, not the species.<sup>179</sup> Furthermore, his framework suggests that humans tend to deserve a “higher degree of consideration” because our mental capacities make us capable of profound suffering.<sup>180</sup> Thus, animal welfarists show it is possible to

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<sup>174</sup> Favre, *Equitable Self-Ownership*, *supra* note 144, at 484, 495.

<sup>175</sup> Hankin, *supra* note 52, at 386.

<sup>176</sup> *Id.* Compare this approach to that of animal rights advocate Joan Dunayer, who argues that all sentient beings “warrant full and equal moral consideration.” JOAN DUNAYER, *SPECIESISM* 4 (2004).

<sup>177</sup> FRANCIONE, *supra* note 74, at 6.

<sup>178</sup> *Id.* at 6–7.

<sup>179</sup> Peter Singer, *Ethics and Animals*, 13 BEHAV. & BRAIN SCI. 45, 46 (1990).

<sup>180</sup> Peter Singer, *The Significance of Animal Suffering*, 13 BEHAV. & BRAIN SCI. 9, 10 (1990) (“to be human is to possess certain characteristics distinctive of our species, such as the capacity for self-awareness, for rationality, and for developing a moral sense . . . . It is not arbitrary to say that beings with these capacities live fuller lives than beings without them . . . .”).

tout our unique human attributes while nevertheless demanding better treatment of nonhuman animals.

David Favre has articulated a salient legal compromise between property in animals and animal rights. Favre's approach, like ours, is rooted in traditional notions of property law. He proposes that property interests in animals be divided into legal and equitable aspects, with legal title belonging to the human owner and equitable interest belonging to the animal itself, providing the animal with a hybrid form of self-ownership similar to a trust.<sup>181</sup> The courts would balance the competing interests between the legal title holder (the animal's guardian) and the animal (equitable owner of itself) in order to reach the fairest outcome.<sup>182</sup> Only the animal's interests in fundamental life-supporting activities would be considered.<sup>183</sup> With the stronger legal standing available to the animal under this legal framework, a more stringent and serious balancing of interests would occur between human and animal.

### **C. Current Tensions Between the Legal and Social Conceptualization of Animals**

As suggested by the enthusiastic proponents of a variety of new paradigms, there is increasing tension between traditional legal conceptions of animals and the change that is occurring in society concerning animal well-being. Despite welfare-oriented leaps forward in jurisprudence, traditional legal conceptions of animals as property persist; however, these conceptions become progressively less descriptive and trenchant as the societal interaction of animals and humans changes. As animals are treated more like humans in society, animals are being

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<sup>181</sup> Favre, *Equitable Self-Ownership*, *supra* note 144, at 491–92.

<sup>182</sup> *Id.* at 501.

<sup>183</sup> *Id.* at 498.

treated more like humans in the law. Both legislatures and courts are part of this change momentum.

Specifically, with social realities—especially those involving human bonding with pets—bearing down, the law has shifted towards acknowledging animal welfare in several major respects. First, statutes against animal cruelty have proliferated and strengthened over the past several decades, although enforcement may not always be vigilant. Second, the law is shifting away from using fair market value as a measure of damages in veterinary malpractice actions, pet death cases, and emotional distress cases. Third, pet custody battles are growing in number and ferocity, forcing a reluctant legal system to address the issue.

1. Pets in Criminal Law: Animal Cruelty Statutes  
Within the Framework of Property Rights

All states have statutes criminalizing animal cruelty, and the level of concern in animal cruelty statutes is not generally replicated for inanimate property.<sup>184</sup> Furthermore, the majority of states now categorize some forms of animal cruelty as misdemeanors and even felonies instead of petty offenses, whereas few states punished violators at the misdemeanor and felony level in the early 1990s.<sup>185</sup>

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<sup>184</sup> Hankin, *supra* note 52, at 324. Some judicial reasoning treats animal cruelty as a type of vandalism or as a charge that complements vandalism. *See, e.g.,* *People v. Baldacchino*, No. C046420, 2005 WL 3249943, at \*5 (Cal Ct. App. 2005) (noting that California has a general vandalism statute that is followed by more specific statutes that include topics such as vandalism of a church, certain types of damage to buildings, and animal cruelty, and urging that charges should be brought under one of the more specific statutes when possible); *People v. Guido-Silva*, No. A106831, 2005 WL 2203274, at \*6 (Cal. Ct. App. 2005) (considering a case where the defendant was charged with both animal cruelty and vandalism in relation to the death of a race horse and holding that to be guilty of vandalism, the defendant's actions had to be a "proximate cause of damage to or destruction of the horse").

<sup>185</sup> Hankin, *supra* note 52, at 367.

In addition to these harsher penalties, offenders in certain jurisdictions, including Tennessee, must forfeit custody of the animals that were the subject of the conviction.<sup>186</sup> In Tennessee, “any governmental animal control agency, law enforcement agency, or their designee” receives custody of animals seized under the animal cruelty statute.<sup>187</sup> Under Tennessee law, the court may also curtail or prohibit the person’s custody of animals for a period of time that it deems reasonable.<sup>188</sup> In a 2005 North Carolina case, the Animal Legal Defense Fund sued and gained custody of dogs based on an anti-cruelty statute similar to Tennessee’s statute.<sup>189</sup> This marked the first time that a private organization was able to “enjoin an owner’s conduct and gain the right to control the animals’ welfare” through the use of an anti-cruelty statute.<sup>190</sup> Thus, some of this state legislation has made pets more akin to children in the eyes of the law.

The tension between property and human treatment is heightened in cases in which defendants charged with animal cruelty use their right to property as a defense to the search and seizure of the animals. Alleged perpetrators have defended against animal cruelty charges on the basis that the animals were seized during warrantless searches of the defendant’s property.<sup>191</sup> In order to avoid a property debate, some courts focus on the evidentiary value of the animals instead of their suffering, effectively meeting the perpetrator’s property argument with a property-oriented response.<sup>192</sup> When the animals are viewed primarily as

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<sup>186</sup> TENN. CODE ANN. § 39-14-202(e) (2016).

<sup>187</sup> *Id.* § 39-14-210(f).

<sup>188</sup> *Id.* § 39-14-202(e).

<sup>189</sup> Guben, *supra* note 147, at 68.

<sup>190</sup> *Id.*

<sup>191</sup> See Amie J. Dryden, Note, *Overcoming the Inadequacies of Animal Cruelty Statutes and the Property-Based View of Animals*, 38 IDAHO L. REV. 177, 202 (2001).

<sup>192</sup> *Id.* at 202–03.

evidence (rather than the victim) of a crime, several exceptions to the warrant rule come into play, such as the plain view exception.<sup>193</sup>

Other exceptions to the warrant requirement place more value on the animal's life. Some courts have been willing to proceed under the exigent circumstances exception to the warrant requirement, which allows for warrantless seizures when immediate action is necessary to preserve life or evidence, thereby preventing the frustration of an important governmental interest.<sup>194</sup> Although they allow the seizure to stand, courts have hesitated when the peril of a nonhuman animal, rather than a human, forms the basis of the emergency.<sup>195</sup>

The Michael Vick case is a well-known—albeit highly unusual—example of a custody transfer resulting from animal mistreatment. It is therefore analogous to the animal surrender and placement options available on a more routine basis in other locales. Vick's pit bulls were seized in April 2007 based on suspicions of his involvement in a dog fighting ring.<sup>196</sup> Although fighting dogs are usually euthanized, animal sanctuaries and rehabilitation centers throughout the country took custody of most of the pit bulls after Vick agreed to pay almost a million dollars for their evaluation and care.<sup>197</sup> This outcome is anomalous and was only available in this instance because Vick offered such a large sum for the care of the animals.

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<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 203.

<sup>195</sup> *Id.* at 203–04.

<sup>196</sup> Juliet Macur, *Given Reprieve, N.F.L. Star's Dogs Find Kindness*, N.Y. TIMES, Feb. 2, 2008, at A1.

<sup>197</sup> *Id.* at A7.

2. Pets in Tort Law: Moving Beyond Fair Market  
Value When a Pet is Harmed or Killed

When a wrongdoer harms or kills a pet, the traditional response by civil courts has been to award the owner damages based on the fair market value of the animal, which is often negligible (particularly if the pet is a mixed-breed animal or of unknown descent) and certainly pales in comparison to the worth of the pet to the owner based on value attributable to companionship and related emotional attachment.<sup>198</sup> The traditional damages framework is beginning to recede, however.<sup>199</sup> Critics of that framework argue that the use of a fair market value in calculating damage awards, which emphasizes economic cost at the expense of sentimental worth, leads to both “under-compensation and under-deterrence.”<sup>200</sup> Because the value of pets to many humans in the United States today cannot be adequately represented in economic terms through a fair market valuation, the availability of non-economic damages is integral if the common law is to meet the tort goals of “compensation, deterrence, and the reflection of societal values.”<sup>201</sup> For the legal system to remain relevant, common law tort actions must keep pace with changing social values.<sup>202</sup>

In 2000, Tennessee became the first state to provide an owner with a statutory remedy for non-economic damages in legal actions involving the death or injury of a

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<sup>198</sup> See Hankin, *supra* note 52, at 323; Lauren M. Sirois, Comment, *Recovering for the Loss of a Beloved Pet: Rethinking the Legal Classification of Companion Animals and the Requirements for Loss of Companionship Tort Damages*, 163 U. PENN. L. REV. 1199, 1202–03 (2015).

<sup>199</sup> See Dryden, *supra* note 191, at 199.

<sup>200</sup> Hankin, *supra* note 52, at 325 (internal footnote omitted).

<sup>201</sup> Waisman & Newell, *supra* note 48, at 46.

<sup>202</sup> *Id.* at 51 (quoting *Dearborn Fabricating & Engr. Corp. v. Wickham*, 532 N.E.2d 16, 17–18 (Ind. App. 1988)).

pet.<sup>203</sup> The relevant statute is known as the T-Bo Act, named after a Shih Tzu owned by Tennessee Congressman (and previously state senator) Steve Cohen. While in his yard, T-Bo was seriously injured by a large dog that was running loose and died after “three days of frantic trips to the night emergency clinic and veterinarian . . . .”<sup>204</sup> After this loss, Cohen realized that the damage awards for pets do not correspond to the value of a pet’s companionship, prompting him to introduce the T-Bo Act.<sup>205</sup> Cohen explained the impetus for the bill by lamenting that the only damages available to him upon T-Bo’s death were for “repairs, as if it were a clock or desk” and for the cost of buying a similar dog as a replacement.<sup>206</sup> Thus, the T-Bo Act stipulates that an owner can receive up to \$5,000 in non-economic damages<sup>207</sup> for “the loss of reasonably expected society, companionship, love, and affection”<sup>208</sup> when a pet is harmed or killed. Tennessee’s statutory approach starkly contrasts to the common law in states like New York, which does not recognize “an independent cause of action for loss of the companionship of a pet.”<sup>209</sup> The Tennessee statute is particularly noteworthy because it recognizes the capability

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<sup>203</sup> See TENN. CODE ANN. § 44-17-403 (2000); Hankin, *supra* note 52, at 338.

<sup>204</sup> *Canine Loss Spurs New Law*, ST. LEGISLATURES, (Oct. 1, 2000) <http://connection.ebscohost.com/c/articles/3756789/canine-loss-spurs-new-law>.

<sup>205</sup> 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, 225 (2003) (quoting Waisman & Newell, *supra* note 48, at 69–70).

<sup>206</sup> *Id.* at 225 (quoting Waisman & Newell, *supra* note 48, at 70).

<sup>207</sup> TENN. CODE ANN. § 44-17-403(a) (2016).

<sup>208</sup> *Id.* § 44-17-403(d). In pet death cases, courts in some states consider how much the owner has expended on the pet in the past in order to gauge how much the owner values the pet. See Hankin *supra* note 52 at 330–31 (quoting Mitchell v. Heinrichs, 27 P.3d 309, 314 (Alaska 2001)).

<sup>209</sup> Gluckman v. American Airlines, Inc., 844 F. Supp. 151, 158 (S.D.N.Y. 1994).

of animals to be *pets* and the tendency of humans to form strong emotional bonds with those pets, thus beginning to address some of the shortcomings of the traditional legal paradigm which, as earlier noted, fails to recognize the companionship function of animals by providing a definition of “pet” or “companion animal” within the statutory law.<sup>210</sup>

While recovery under the T-Bo Act is limited in terms of both the eligible claimants and the amount of damages that may be awarded, it is nonetheless an impressive and progressive first step. In 2003, Colorado representatives introduced a bill that allowed for up to \$100,000 in damages for loss of pet companionship.<sup>211</sup> The bill was withdrawn, however, very shortly after being introduced.<sup>212</sup> Since that time, state legislators have continued to introduce, and some state legislatures have passed, related legislation.<sup>213</sup>

The judiciary also has played a role in changing the legal conception of animals as property in tort actions. In the courts, we witness the same tension between old and new views with which the legislatures contend. For example, when grieving pet owners invoke the tort theory of

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<sup>210</sup> See *supra* note 149 and accompanying text.

<sup>211</sup> Elizabeth Paek, *Fido Seeks Full Membership in the Family: Dismantling the Property Classification of Companion Animals by Statute*, 25 U. HAW. L. REV. 481, 518–19 (2003).

<sup>212</sup> H.B. 03-1260, 64th Gen. Assemb., 1st Reg. Sess. (Colo. 2003); see also, e.g., Gerald L. Eichinger, *Veterinary Medicine: External Pressures on an Insular Profession and How Those Pressures Threaten to Change Current Malpractice Jurisdiction*, 67 MONT. L. REV. 231, 255 (2006); 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, 249 (2006).

<sup>213</sup> See Sirois, *supra* note 198, at 1203–04 (citing 510 ILL. COMP. STAT. ANN. 70/16.3 (2014)); TENN. CODE ANN. § 44-17-403 (2016)); Julia Fidenzio, *Massachusetts to Allow Non-Economic Damages for Loss of Pets*, COMMITTEE ON ANIMALS AND THE LAW (Feb. 3, 2010), [http://nysbar.com/blogs/animalaw/2010/02/massachusetts\\_to\\_allow\\_no\\_necon.html](http://nysbar.com/blogs/animalaw/2010/02/massachusetts_to_allow_no_necon.html).



emotional distress or loss of companionship (consortium) in litigation, they move firmly beyond the realm of fair market value. Many jurisdictions struggle with the issue of whether an owner may sue under the tort theory of emotional distress if the distress arises from harm to a companion animal.<sup>214</sup> Some jurisdictions allow recovery for the *intentional* infliction of emotional distress upon the pet owner, but not for negligent distress arising from harm to an animal.<sup>215</sup> These jurisdictions reason that “the affection of a master . . . is a very real thing.”<sup>216</sup> Other state courts disallow recovery for both intentional and negligent infliction of emotional distress, reasoning that “owners cannot recover for emotional connections to their property.”<sup>217</sup>

Despite the advent of statutes providing for non-economic damages for harm to pets, pet owners or caretakers may need or desire access to “private, civil measures which deter wrongful acts and compensate the victims.”<sup>218</sup> Among other things, recoveries in these private actions may yield larger damage awards against wrongdoers than these statutes permit. For instance, while the T-Bo Act caps damages at \$5,000, some courts in other states have permitted compensatory damages in emotional distress cases that are ten times that amount.<sup>219</sup>

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<sup>214</sup> Hessler, *supra* note 152, at 44–45 (citing TENN. CODE ANN. § 44-17-403 (West 2000); *Womack v. Von Rardon*, 135 P.3d 542, 543, 546 (Wash. Ct. App. 2006)).

<sup>215</sup> Waisman & Newell, *supra* note 48; Steven 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).

<sup>216</sup> *La Porte v. Associated Indeps., Inc.*, 163 So. 2d 267, 269 (Fla. 1964) (“the affection of a master for his dog is a very real thing”).

<sup>217</sup> Waisman & Newell, *supra* note 48, at 65.

<sup>218</sup> TENN. CODE ANN. § 44-17-403 (2016).

<sup>219</sup> *Id.* § 44-17-403.

### 3. Pets in Family Law: Pet Custody Battles

Pet custody battles also raise questions that implicate the traditional legal conception of animals as property. Kathy Hessler suggests that divorcing couples use mediation to determine custody of their pets in order to avoid the court system, which is often unsympathetic and refuses to mediate between the parties concerning any sort of visitation rights pertaining to pets.<sup>220</sup> Unfortunately, if private mediation fails, the couple may nevertheless find themselves in the courthouse. In a Pennsylvania case, for example, a divorcing couple made a written agreement that purported to give custody of the couple's dog to the wife while reserving visitation rights to the husband, although "[t]he 'Agreement' was never incorporated or merged into the Divorce Decree."<sup>221</sup> The ex-husband later sued when the ex-wife violated this "Agreement."<sup>222</sup> In dismissing the complaint, the trial court emphasized that "any terms set forth in the Agreement are void to the extent that they attempt to award custodial visitation with or shared custody of personal property."<sup>223</sup> Most courts assert that disputes over pets are simply property disputes, so that any consideration of the "best interests" of the animal is inappropriate.<sup>224</sup>

If judicial reasoning continues to evolve, however, courts may become sympathetic to parties filing claims for the resolution of animal custody issues. For instance, Alaska enacted a new statute in 2017 that permits courts to amend divorce or marriage dissolution agreements to include ownership of an animal, taking into consideration the well-being of the animal.<sup>225</sup> Other state legislatures have followed

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<sup>220</sup> Hessler, *supra* note 152, at 49.

<sup>221</sup> *Desanctis v. Prichard*, 803 A.2d 230, 231 (Pa. Super. Ct. 2002). For a discussion of this case, see Hankin, *supra* note 52, at 323.

<sup>222</sup> *Desanctis*, 803 A.2d at 231.

<sup>223</sup> *Id.* at 232 (citing 23 PA. CONS. STAT. § 3502).

<sup>224</sup> Paek, *supra* note 211, at 505.

<sup>225</sup> See *Alaska Legislation Allows Courts to Consider Pet Well-Being*

in proposing and passing similar legislation.<sup>226</sup> Tennessee law may be evolving in this regard. In one Tennessee case, for example, the judge ruled that dogs at issue in one dispute should remain in the house and neighborhood where they had spent their entire lives, echoing the type of reasoning often used in child custody cases.<sup>227</sup> The judge appeared to be sympathetic to the views of many animal welfare activists who urge that custody battles for pets should be “based on . . . who has formed a closer bond to the animal, or who can provide a better home for it,”<sup>228</sup> instead of focusing on property ownership as determined through receipts for purchase and veterinary care.<sup>229</sup>

Determining ownership of an animal for purposes of custody disputes is often difficult. In cases involving married parties, community property issues complicate already murky applications of traditional property law. While the assignment of ownership based on the best interests of the

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in *Marriage Dissolutions and Pet Protective Orders*, THE LINK-LETTER (November 2016), at 1, <http://nationallinkcoalition.org/wp-content/uploads/2016/11/LinkLetter-2016-Novem.pdf>.

<sup>226</sup> See, e.g., Patrick Anderson, *Bill seeks to give pets a voice in R.I. divorce cases + Poll*, PROVIDENCE J. (Feb. 28, 2017), <http://www.providencejournal.com/news/20170228/bill-seeks-to-give-pets-voice-in-ri-divorce-cases--poll>; *Illinois Considers Pets' Welfare in Divorce Proceedings*, THE LINK-LETTER (July 2017), at 10, <http://nationallinkcoalition.org/wp-content/uploads/2017/07/LinkLetter-2017-July.pdf>; Christopher Mele, *When Couples Divorce, Who Gets to Keep the Dog? (Or Cat.)*, N.Y. TIMES (March 23, 2017), [https://www.nytimes.com/2017/03/23/us/divorce-pet-custody-dog-cat.html?\\_r=0](https://www.nytimes.com/2017/03/23/us/divorce-pet-custody-dog-cat.html?_r=0).

<sup>227</sup> Ann Hartwell Britton, *Bones of Contention: Custody of Family Pets*, 20 J. AM. ACAD. MATRIM. LAW 1, 15 (2006) (quoting Michael Lollar, *Who Gets Snoopy? Custody of Pets Can Be a Wrenching Issue in Divorce*, COM. APPEAL, Jan. 11, 1996, at 1C).

<sup>228</sup> Hankin, *supra* note 52, at 387.

<sup>229</sup> Britton, *supra* note 227, at 4 (quoting Ranny Green, ‘Legal Beagle’ Offers Problem-Solving Tips, SEATTLE TIMES, Aug. 25, 1996, at H5 (quoting statements made by Linda Cawley, one the nation’s first and pet law experts)).

animal could be an appropriate method to resolve custody disputes in domestic violence situations,<sup>230</sup> in most jurisdictions, the traditional approach to ownership determinations is still the law. Accordingly, traditional property ownership concepts continue to be the basis for educating abuse victims as they consider fleeing from a violent home. For example, one informational sheet published by The Humane Society of the United States (“HSUS”) instructs battered women that they can prove ownership of their pets by producing “[a]n animal license, proof of vaccinations, or veterinary receipts” in their names.<sup>231</sup>

#### **D. Bailment and Damages for Conversion of Property in a Safe Haven Context**

Bailments involving animals raise particularly thorny issues at the intersection of the traditional and progressive conceptions of animals as property. Bailment is the “delivery of personal property by one person (the bailor) to another (the bailee) who holds the property for a certain purpose, [usually] under an express or implied-in-fact contract.”<sup>232</sup> A bailment is neither a gift nor a conveyance of title; the bailee takes possession of the property, but title and

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<sup>230</sup> Gentry, *supra* note 47, at 115 (citing *Raymond v. Lachmann*, 695 N.Y.S.2d 308, 309 (N.Y. App. Div. 1999)). Yet, we must carefully avoid standards that could result in ownership being assigned to the abuser, such as if ownership were based on who had formed the closest bond with the animal.

<sup>231</sup> ASCIONE, SAFE HAVENS, *supra* note 116, at A-66.

<sup>232</sup> BLACK’S LAW DICTIONARY 162 (9th ed. 2009); *see, e.g.,* *Merritt v. Nationwide Warehouse Co.*, 605 S.W.2d 250, 252 (Tenn. Ct. App. 1980) (“A bailment is a delivery of personalty for a particular purpose or on mere deposit, on a contract expressed or implied, that after the purpose has been fulfilled, it shall be re-delivered to the person who delivered it or otherwise dealt with according to his direction or kept until he reclaims it.”); 1 TENN. JURIS., *Bailments* § 2 n.18 (2004) (providing a list of Tennessee cases that affirm this definition).

the right to recover possession remain with the bailor.<sup>233</sup> Thus, Tennessee law (like the law of other U.S. jurisdictions) holds that property delivered by a bailor to a bailee “shall be re-delivered to the person who delivered it or otherwise dealt with according to his direction or kept until he reclaims it.”<sup>234</sup> The bailor has a cause of action against the bailee for conversion if the bailee “fail[s] or refus[es],” inconsistent with the bailment contract, “to return [the property]. . . .”<sup>235</sup> Tennessee also recognizes that while a bailment is contractual in nature (centering on an express or implied agreement between the bailor and the bailee) a legally valid and enforceable contract is not required to create a legally valid and enforceable bailment.<sup>236</sup> For instance, a quasi-contract might suffice, and a bailment may be created by operation of law in certain circumstances.<sup>237</sup> There are various types of bailment. Of particular importance in animal care is a gratuitous bailment for the benefit of the bailor, which is in the nature of a caretaking arrangement for the property of the bailor in which “the bailee receives no compensation.”<sup>238</sup>

Animals involved in bailments are typically treated the same way inanimate, insentient property is treated, in accordance with the traditional conception of animals as property.<sup>239</sup> Pet owners enter into myriad bailment situations concerning their pets (including by, for example, leaving a pet at a veterinary hospital for a surgery or boarding a pet at a kennel during a vacation). Many of these arrangements are bailments for the mutual benefit of the bailor and the bailee, since the bailee receives compensation for services that

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<sup>233</sup> BLACK’S LAW DICTIONARY 162 (9th ed. 2009).

<sup>234</sup> *Aegis Investigative Group v. Metro. Gov’t of Nashville and Davidson County*, 98 S.W.3d 159, 163 (Tenn. Ct. App. 2002).

<sup>235</sup> 8A AM. JUR. 2D *Bailments* § 239 (2014).

<sup>236</sup> *Aegis Investigative Group*, 98 S.W.3d at 163.

<sup>237</sup> *Id.*

<sup>238</sup> BLACK’S LAW DICTIONARY 162 (9th ed. 2009).

<sup>239</sup> FRANCIONE, *supra* note 74, at 52.

include the bailment.<sup>240</sup> Of particular importance to this article, a human victim of domestic violence enters into a bailment arrangement (a gratuitous bailment for the benefit of the bailor) when she asks a safe haven shelter to house and care for her pet for a limited amount of time while she is in a shelter that admits only humans. The solution we offer in Part III of this article works with this property law conception.

Bailments involving animals, like custody battles involving animals, raise issues about ownership; bailors are typically owners or agents of owners, while bailees often want to ascertain the bailor's ownership before accepting the subject property for safekeeping. Significant uncertainty exists in this area of the law as applied in this context, as revealed by the responses in Ascione's survey of shelters that provided services for the pets of domestic violence victims.<sup>241</sup> After a brief description of responses he received, Ascione concluded that "specific recommendations are not possible given the current lack of consensus about how to deal with pet ownership issues."<sup>242</sup> The lack of clear legal guidance Ascione observed persists and does a disservice to both human and nonhuman victims of violence.

Ascione's specific findings revealed different levels of awareness and various understandings of pet ownership questions. One animal shelter in Ascione's survey indicated that ownership only became an issue if pets were not reclaimed or would otherwise need long-term arrangements.<sup>243</sup> Most shelters reported that they informed women that they would lose ownership of their pets if they failed to reclaim them at the end of the agreed-upon sheltering time, many even requiring the women to sign a

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<sup>240</sup> 46 AM. JUR. 3D *Proof of Facts* § 4 (1998).

<sup>241</sup> See ASCIONE, *SAFE HAVENS*, *supra* note 116 and accompanying text. Proof of ownership of personal property can be tricky.

<sup>242</sup> *Id.* at 40.

<sup>243</sup> *Id.* at 38.

form acknowledging this possibility.<sup>244</sup> Some shelters assumed that the animal became the property of the shelter upon entry, which indicates a possible misunderstanding by the shelter of the nature of a bailment; while other shelters thought that they would have to return the pet to the abuser if he came for it.<sup>245</sup>

Moreover, shelters surveyed by Ascione were split on whether a woman could relinquish a pet when she was a co-owner or the abuser was the sole owner of the animal.<sup>246</sup> Among the animal shelters that responded to Ascione's survey, 30% believed that a co-owner could relinquish a pet, while 40% believed that she could not.<sup>247</sup> Under the law, in a cotenancy of either real or personal property, cotenants have "unity of possession" under "more than one distinct title" so that each cotenant has full title and the right of possession, making it so that no cotenant can exclude any other cotenant from the property.<sup>248</sup> Accordingly, if a pet is co-owned by a victim of domestic violence and her abuser, neither, alone, can relinquish ownership of the pet.

Legal ownership is especially important in the safe haven sheltering context when a victim and her abuser contest pet ownership and a shelter must decide upon a course of action. A woman can relinquish a pet or place it in a sheltering program if she is the sole legal owner.<sup>249</sup> However, legal ownership of an animal is not always easily discerned, which could have ramifications when a victim of violence attempts to remove a pet from an abusive home or when the pet is being sheltered.

Ownership in the safe haven context is a combined issue of law and fact that may require judicial resolution.

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<sup>244</sup> *Id.* at 36.

<sup>245</sup> *Id.* at 38–39.

<sup>246</sup> *Id.* at 38.

<sup>247</sup> *Id.*

<sup>248</sup> 20 AM. JUR. 2D *Cotenancy and Joint Ownership* § 1 (2014).

<sup>249</sup> ASCIONE, SAFE HAVENS, *supra* note 116, at 40.

Exclusive possession over an extended period of time creates a rebuttable presumption of ownership.<sup>250</sup> But in a typical domestic violence situation, abusers, human victims, and pets are living together in a single household. Legal guidance is sparse when the animal in question has been in the possession of both parties who claim ownership. In a case involving a prized show dog that was being shown by the defendants with the plaintiff's permission, an Illinois court found that a certificate of registration that listed the defendants as co-owners created only a presumption of co-ownership that was rebutted by the "demeanor of witnesses" that suggested that the plaintiff had never intended to relinquish sole ownership of the dog when the certificate was created.<sup>251</sup> Thus, written documents are not a foolproof way to establish ownership. A legal determination as to ownership could depend instead on other facts and the credibility of the parties in asserting them.

Current law provides so little guidance in part because of the paucity of judicial opinions in this area of the law in a safe haven or analogous context. Few Tennessee cases have dealt with bailment in an animal abuse situation. One noteworthy case, however, is *Largin v. Williamson County Animal Control Shelter*. In *Largin*, Williamson County officials seized animals from the plaintiff's home as part of animal abuse proceedings that the state had initiated against her.<sup>252</sup> The plaintiff was eventually convicted of animal abuse<sup>253</sup> and subsequently initiated a proceeding against the animal shelter when it refused to return the animals to the plaintiff. The plaintiff alleged that, by refusing to return the animals, the defendant animal shelter

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<sup>250</sup> *Beard v. Mossman*, 19 A.2d 850, 851 (Pa. Sup. Ct. 1941).

<sup>251</sup> *Buczkwicz v. Lubin*, 399 N.E.2d 680, 682 (Ill. App. Ct. 1980).

<sup>252</sup> No. M2005-01255-COA-R3-CV, 2006 WL 2619973, at \*1 (Tenn. Ct. App. Sept. 12, 2006).

<sup>253</sup> *State v. Siliski*, 238 S.W.3d 338, 343 (Tenn. Crim. App. 2007).



committed conversion and/or negligent bailment.<sup>254</sup> The trial court dismissed the case on a technical matter based on a failure to state a claim upon which relief could be granted,<sup>255</sup> because the complaint did not allege that the tort was caused by a government employee behaving negligently within the scope of his employment as is required under Tennessee law.<sup>256</sup> In reviewing the matter, the appellate court (like the trial court) never reached the validity or enforceability of the bailment itself. Instead, it affirmed the lower court's dismissal based on the procedural requirements of Tennessee law.<sup>257</sup>

As inadequate and incomplete as property law may be in this context, it continues to govern the legal relationship between humans and their pets. As a result, under current safe haven arrangements, a human domestic violence victim (as bailor) who shelters her animal in a safe haven program (as bailee) has a legitimate expectation under the law that she will recover possession of her animal on request. This arrangement exists solely for the benefit and subject to the control of the human victim. The health, welfare, and overall interests of the nonhuman animal, objectively determined, are not accounted for in current bailments of this kind. This creates a conundrum for the safe haven: even if safe haven shelter or social services professionals reasonably believe that an animal is in danger of being abused if he or she is returned to the owner, bailment law provides that the animal must be returned. This legal conclusion troubles us and motivates this article.

We have determined that public policy and legal considerations provide a basis for rethinking the way in which bailment relationships between domestic violence

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<sup>254</sup> *Largin*, 2006 WL 2619973, at \*1.

<sup>255</sup> *Id.* at \*2.

<sup>256</sup> *Id.* at \*4 (citing *Gentry v. Cookeville Gen. Hosp.*, 734 S.W.2d 337, 339 (Tenn. Ct. App. 1987)).

<sup>257</sup> *Largin*, 2006 WL 2619973, at \*4–5.

victims and safe haven shelters are constructed. Documented connections between human and animal violence have focused attention on the need to include animals in the equation as a component and resolution of the family violence problem (or at least as a means of mitigating the effects of family violence).<sup>258</sup> The legal system already has reacted to this phenomenon with the inclusion of animals in protective orders, an increase in criminal penalties for animal abuse, and the adoption of human-animal abuse cross-reporting statutes.<sup>259</sup> In addition, the law has begun to react to the changing nature of the human-pet bond by providing for non-economic tort damages for the death of a pet.<sup>260</sup> Because bailment agreements are contractual, it is possible to better incorporate this changing socio-legal landscape into bailment relationships between human domestic violence victims and safe haven shelters. Part III explores this idea under the laws of the State of Tennessee, the state in which we are licensed to practice. Analogous arguments may be persuasive in other U.S. jurisdictions.

### **III. Special Bailments as a Solution to the Safe Haven Conundrum**

#### **A. A Proposal and its Legal Basis**

Because bailments are in the nature of contracts, the bailor and bailee may create a “special bailment.” While a general bailment requires that the property be “redelivered upon request,” in a special bailment the “delivery to the bailee is upon some condition or term, or stipulation affecting and operating upon the redelivery.”<sup>261</sup> If a pet-

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<sup>258</sup> See *supra* Part I.A.4.

<sup>259</sup> *Id.*

<sup>260</sup> See *supra* Part II.C.2.

<sup>261</sup> 1 TENN. JURIS., *Bailments* § 2 (2004); see also *Aegis Investigative Group v. Metro. Gov't of Nashville & Davidson County*, 98 S.W.3d 159, 162–63. (Tenn. Ct. App. 2002) (emphasis added) (“A bailment is a

owning human domestic violence victim and a safe haven shelter together agree that the victim's pet will be cared for by the shelter for a temporary period and that the shelter will return the pet, subject to the fulfillment of a specified term or the satisfaction of an express condition, that conditional bailment agreement should be enforced if challenged in court.

Exceptions to a court's enforcement of a special bailment agreement of this kind under Tennessee law may include contract formation or enforcement defenses or public policy considerations. For example, the lack of legal capacity of the bailor pet owner (because of minority status or sufficiently impaired mental capacity) may render the bailment agreement void or voidable.<sup>262</sup> In addition, the court may not enforce a safe haven bailment agreement: if the bailor pet owner enters into the agreement under legally recognized duress or subject to undue influence<sup>263</sup> or is parted from her animal as a result of fraud;<sup>264</sup> if the

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delivery of personalty for a particular purpose or on mere deposit, on a contract expressed or implied, that after the purpose has been fulfilled it shall be re-delivered to the person who delivered it *or otherwise dealt with according to his direction* or kept until he reclaims it.”); *Merritt v. Nationwide Warehouse Co.*, 605 S.W.2d 250, 252 (Tenn. Ct. App. 1980) (same); *Rhodes v. Pioneer Parking Lot, Inc.*, 501 S.W.2d 569, 570 (Tenn. 1973) (same).

<sup>262</sup> See *Lowery v. Cate*, 64 S.W. 1068, 1070 (Tenn. 1901) (noting that infancy is a good defense to a claim of breach of contract).

<sup>263</sup> See *Reed v. Allen*, C/A NO. 1153, 1988 WL 90185, at \*2 (Tenn. Ct. App. Aug. 30, 1988) (describing an application of the duress and undue influence claim under Tennessee law).

<sup>264</sup> The effect of fraud on contracts and other transactions in Tennessee has been described as follows:

Fraud vitiates and avoids all human transactions, from the solemn judgment of a court to a private contract. It is as odious and as fatal in a court of law as in a court of equity. It is a thing indefinable by any fixed and arbitrary definition. In its multiform phases and subtle shapes, it baffles definition. It is said, indeed, that it is part of the equity doctrine of fraud not to define it, lest

agreement is found to be unconscionable;<sup>265</sup> or if the conduct between the parties gives rise to a valid claim of estoppel.<sup>266</sup> In most cases, the availability of these formation and enforcement defenses can be limited by effective controls on the actions taken by the bailor and bailee.

Valid and binding contracts typically are enforced in Tennessee consistent with public policy.

Unless a private contract tends to harm the public good, public interest, or public welfare, or to conflict with the constitution, laws, or judicial decisions of Tennessee, it

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the craft of men should find ways of committing fraud which might evade such a definition. In its most general sense, it embraces all “acts, omissions, or concealments which involve a breach of legal and equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.” A judicial proceeding *in rem*, while generally binding upon all persons, is no more free from the fatal taint of fraud than a proceeding *in personam*, or an individual contract. When once shown to exist, it poisons alike the contract of the citizen, the treaty of the diplomat, and the solemn judgment of the court.

Smith v. Harrison, 49 Tenn. 230, 242–43 (Tenn. 1871) (internal citation omitted).

<sup>265</sup> In our view, the defense of unconscionability is unlikely to be raised (or, if raised, survive a motion for summary judgment) in a court action involving safe haven bailment agreement, since the bargain between the pet owner and the shelter is not likely to be so one-sidedly favorable to the shelter—or oppressive to the pet owner—that a court could find the agreement unconscionable. See Haun v. King, 690 S.W.2d 869, 872 (Tenn. Ct. App. 1984) (describing, in similar terms, the unconscionability defense in Tennessee) (citing Hume v. United States, 132 U.S. 406 (1889); Christian v. Christian, 365 N.E.2d 849 (N.Y. 1977)).

<sup>266</sup> See Callahan v. Middleton, 292 S.W.2d 501, 508 (Tenn. Ct. App. 1954) (setting forth the elements of an equitable estoppel claim) (citing 19 AM. JUR. Estoppel § 42).

does not violate public policy. The reverse is also true: A contract with a tendency to injure the public violates public policy.<sup>267</sup>

In determining the sources of Tennessee public policy, the Tennessee Supreme Court has stated

[p]ublic policy in Tennessee “is to be found in its constitution, statutes, judicial decisions and applicable rules of common law.” Although the determination of public policy is primarily a function of the legislature, the judiciary may determine public policy in the absence of any constitutional or statutory declaration.<sup>268</sup>

Public policy in Tennessee supports the use of a special bailment as a solution to the safe haven conundrum. Property rights are strong in Tennessee, but Tennessee law has evolved to incorporate animal welfare into legal questions involving pets in domestic violence situations. Specifically, the Tennessee constitution provides “[t]hat no man shall be . . . deprived of his . . . property, but by the judgment of his peers or the law of the land.”<sup>269</sup> However, the Tennessee General Assembly and Tennessee courts have provided that human animal owners may be deprived of their animals under certain circumstances. For example, human subjects of protective orders in Tennessee may be

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<sup>267</sup> *Spiegel v. Thomas, Mann & Smith, P.C.*, 811 S.W.2d 528, 530 (Tenn. 1991) (internal citations omitted) (citing *Home Beneficial Ass’n v. White*, 177 S.W.2d 545, 546 (Tenn. 1944); *Nashville Ry. & Light Co. v. Lawson*, 229 S.W. 741, 743 (1921); *Holt v. Holt*, 751 S.W.2d 426, 428 (Tenn. Ct. App. 1988)).

<sup>268</sup> *Alcazar v. Hayes*, 982 S.W.2d 845, 851 (Tenn. 1998) (internal citations omitted) (quoting *Swann v. Pack*, 527 S.W.2d 99, 112 n.17 (Tenn. 1975)).

<sup>269</sup> TENN. CONST. art. I, § 8.

dispossessed of some or all of their ownership rights in a family pet.<sup>270</sup> Moreover, a person convicted under Tennessee's animal cruelty statutes may be required by the court to forfeit possession and ownership of the subject animal.<sup>271</sup> In these cases, the court also "may prohibit the person convicted from having custody of other animals for any period of time the court determines to be reasonable, or impose any other reasonable restrictions on the person's custody of animals as necessary for the protection of the animals."<sup>272</sup> In *State v. Webb*, the Tennessee Court of Criminal Appeals upheld the constitutionality of the reasonableness of the trial court's imposition of a ten-year prohibition on ownership of any animals by the defendant, a person convicted of animal cruelty.<sup>273</sup> Moreover, as the background provided in Parts I and II of this article amply shows, Tennessee law is evolving to incorporate animal welfare concerns in a variety of contexts—especially those involving pets, including pets in domestic violence situations.<sup>274</sup>

Accordingly, we propose that safe haven shelters enter into written bailment agreements<sup>275</sup> that expressly

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<sup>270</sup> TENN. CODE. ANN. § 36-3-606(a)(9) (2016).

<sup>271</sup> *Id.* §§ 39-14-202(e), -212(e) (2016).

<sup>272</sup> *Id.* § 39-14-202(e) (2016); *see also id.* § 39-14-212(e) (2016) ("The court may prohibit the defendant from having custody of other animals for any period of time the court determines to be reasonable, or impose any other reasonable restrictions on the person's custody of animals as is necessary for the protection of the animals.").

<sup>273</sup> 130 S.W.3d 799, 838–39 (Tenn. Crim. App. 2003).

<sup>274</sup> *See, e.g., supra* notes 207 & 208 and accompanying text.

<sup>275</sup> Many safe haven shelters already use written agreements to settle ownership of the pets during sheltering. In Francione's survey, for example, fourteen safe haven shelters (66.7% of the survey) had a policy providing that owners of sheltered pets "would lose custody or ownership of their pets if they failed to retrieve [them]." *See* ASCIONE, SAFE HAVENS, *supra* note 116. At six of the shelters (30% of survey), "ownership was formally transferred to the animal welfare agency" upon the commencement of sheltering, while at three other shelters (15% of

condition the return of pets to their owners on an objective determination that the pet is not returning to a household that puts the pet at significant risk of physical, mental, or emotional harm.<sup>276</sup> That objective determination may be made by the shelter itself or by an independent third party (acting in the nature of “animal protective services” or a guardian *ad litem*) and, in either case, should be based on information supplied to it in good faith by or on behalf of the owner in accordance with an established protocol. Because shelter personnel may be considered to be interested parties in the decision-making process (perhaps having formed their own human-animal bonds with the pets under their care), it is preferable that an independent third party be designated to make the risk determination. The decision maker, the timing and nature of notices between the parties, the standard governing the decision, the evidentiary burdens, and the rest of the decision-making process should be delineated expressly in the written bailment agreement. The shelter should determine its own release policy.<sup>277</sup> Existing forms of bailment used in this context can be modified to include a condition of this kind.

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survey), pets were re-licensed so as to no longer appear in the woman’s name. *Id.* at 37–38.

<sup>276</sup> The condition is intended to be a tailored analog to court determinations of the “best interests of the child” in legal proceedings involving child welfare. *See generally* CHILD WELFARE INFORMATION GATEWAY, DETERMINING THE BEST INTERESTS OF THE CHILD (2016), [https://www.childwelfare.gov/pubPDFs/best\\_interest.pdf](https://www.childwelfare.gov/pubPDFs/best_interest.pdf) (summarizing the standard for “best interests” and its definition and use in various states); Tennessee Department of Children’s Services, *Your Client’s Rights* (noting that a parent may lose rights to a child “involuntarily if the Judge of a Chancery, Circuit or Juvenile Court finds there are legal grounds for termination and that termination is in the child’s best interest.”) (last visited Aug. 8, 2017).

<sup>277</sup> To help in creating that policy, we recommend reviewing and considering the general information provided *id.* at 36–40 (describing the results of Ascione’s study pertaining to owner knowledge of release policies and pet ownership issues upon release).

The procedure employed by safe haven shelters to effectuate the special bailment should be carefully designed and executed in a manner that best ensures the agreement will be determined to be valid and enforceable if challenged. Accordingly, we recommend that the safe haven shelter, at a minimum, engage in the following steps in entering into and exercising its rights under the bailment agreement:

- The safe haven shelter should ensure that the pet owner who signs the agreement has the legal capacity to enter into a contract. She must be of the requisite age and have the requisite mental competence under applicable state law in order for a court to determine her to have the requisite legal capacity.<sup>278</sup> Obtain documentary proof, if it is available or can be obtained.
- Similarly, shelter personnel should ensure that the pet owner does not feel threatened or intimidated into signing the agreement by any words spoken or actions taken directly or indirectly by the safe haven shelter or any intermediary (e.g., a social worker working with the pet owner).

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<sup>278</sup> See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 12(2) (1981) (stating that a “natural person” has “full legal capacity to incur contractual duties” unless she is: “under guardianship,” an “infant,” “mentally ill or defective,” or “intoxicated”); 17 C.J.S. *Contracts* § 31 (“It is essential that the parties to a contract have the capacity to contract. . . . The capacity to contract involves a person’s inability to understand the terms of an agreement, and not his actual understanding.”); 17 C.J.S. *Contracts* § 175 (“The test of mental capacity to contract is whether the person in question possesses sufficient mind to understand, in a reasonable manner, the nature, extent, character, and effect of the act or transaction . . . . [T]o invalidate his contract . . . it is sufficient to show that he or she was mentally incompetent to deal with the particular contract in issue.”); *Roberts v. Roberts*, 827 S.W.2d 788, 791 (Tenn. Ct. App. 1991) (stating that “[n]o published Tennessee authority is found which defines degree of mental capacity required to invalidate a contract,” but quoting with approval the above language from 17 C.J.S. *Contracts* § 133(1)(e) (now 17 C.J.S. *Contracts* § 175)).



- The pet owner and representatives of the shelter should discuss and document all facts about violence to the pet, threats made against the pet, violent behavior directed toward the pet, in addition to basic health and care information.
- Shelter personnel should read and describe the standards associated with release of the pet to the owner.<sup>279</sup> Clarify that the animal may not be returned to the owner under the circumstances outlined in the agreement and that the owner surrenders ownership of the pet to the shelter under those circumstances. Offer standard examples of situations that allow for return of a pet to its owner and of situations that do not allow for return.

These steps (and, as necessary or desired, others specific to the shelter) should be set forth in a written protocol that is used by the shelter each time it enters into a safe haven agreement with a pet owner. Other steps specific to the pet owner and related circumstances may be added to the protocol in discrete cases. Any additions of this kind should be documented in writing and included with the file for the resulting agreement.

### **B. Possible Extralegal Concerns with the Proposal**

We readily acknowledge that the proposal we outline in Part III.A is not without drawbacks. Paramount among them are the effects of the agreement (and the execution of its terms and provisions) on the mental and emotional state of the human pet owner—a victim of domestic violence. In addition, our proposal may raise personal and professional concerns for the social workers serving these domestic

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<sup>279</sup> Of course, the shelter should review *all* of the terms of the bailment with the pet owner to ensure that she understands all aspects of the arrangement.

violence victims. This section briefly addresses these two anticipated critiques of our proposal.

Based on the touching human-pet bond described *supra* Part I, one could argue that it is in the human victim's best interests to retain full ownership of—and complete control over the residence of—her pet. Often, the pet is the only source of unconditional love and constancy that the woman has.<sup>280</sup> Furthermore, research on domestic violence has revealed that leaving a domestic violence situation is a process, meaning that these human victims rarely make a sudden and complete break from their abusers. In a study conducted in 1983, for example, 50% of the victims who fled to a shelter returned to their abusers.<sup>281</sup> Instead of seeing this return as a “failure[,]” however, the authors of the study cast the stay at the shelter as “part of the process of gaining independence.”<sup>282</sup> These women return to their violent homes with new insights and knowledge, so that the time at the shelter was in fact quite useful.<sup>283</sup> One could therefore argue that it would be detrimental for these women to lose their pets in this situation. Perhaps some women would refuse to come to the shelter at all, denying themselves a chance to begin the process of growth and understanding that could ultimately help them leave their abusive situations. Even when safe havens and abuse victims create valid special bailment agreements, a victim could experience a host of unhealthy reactions if the situation were to develop so that the victim had to relinquish her pet. These unhealthy reactions could include an increased sense of isolation, anger toward the safe haven system, or distrust of the social workers tasked with helping these abuse victims. For these

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<sup>280</sup> Flynn, *Symbolic Interaction*, *supra* note 49, at 113.

<sup>281</sup> Kathleen J. Ferraro & John M. Johnson, *How Women Experience Battering: The Process of Victimization*, 30 SOC. PROBS. 325, 336 (1983).

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

and other reasons, we appreciate that a special bailment might not be the best option for every abuse victim and that the invocation of the special bailment would need to be considered on a case-by-case basis.

The process suggested in our proposal also may put additional pressure on social workers working with victims of family violence and create tensions with their obligation of confidentiality to their clients. Clinical social workers typically have stressful jobs.<sup>284</sup> Studies find that the stress social workers suffer may subject them to a significant risk of secondary post-traumatic stress disorder.<sup>285</sup>

Social workers who provide services for domestic violence victims may experience unique types of stress, including vicarious traumatization.<sup>286</sup> The unhealthy physical and emotional reaction to the stresses of clinical social work and related fields—which is associated with secondary post-traumatic stress disorder and vicarious traumatization—has also been termed “compassion fatigue.”<sup>287</sup> This term was first used to describe “burnout in

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<sup>284</sup> See generally CHARLES R. FIGLEY & ROBERT G. ROOP, COMPASSION FATIGUE IN THE ANIMAL-CARE COMMUNITY 2 (2006) (describing how social workers and workers in the animal-care community often engage with their clients “at the cost of [their] own care”); NAT’L ASSOC. OF SOC. WORKERS, STRESS AT WORK: HOW DO SOCIAL WORKERS COPE? (2008), <http://workforce.socialworkers.org/whatsnew/stress.pdf>; Stephanie Baird & Sharon Rae Jenkins, *Vicarious Traumatization, Secondary Traumatic Stress, and Burnout in Sexual Assault and Domestic Violence Agency Staff in Violence and Victims*, 18 VIOLENCE & VICTIMS 1, 71-86 (16) (2003) (study investigating occupational hazards of therapy with trauma sexual abuse victims).

<sup>285</sup> See, e.g., Brian E. Bride, *Prevalence of Secondary Traumatic Stress among Social Workers*, 52 SOCIAL WORK 63 (2007); Shantih E. Clemans, *Understanding Vicarious Traumatization - Strategies for Social Workers*, 4 SOC. WORK TODAY 13 (2004) (internal citations omitted).

<sup>286</sup> Clemans, *supra* note 285, at 13.

<sup>287</sup> FIGLEY & ROOP, *supra* note 284, at 11.

nurses exposed to traumatic work-related experiences”<sup>288</sup> but has now also been applied to doctors, social workers, veterinarians, and animal shelter workers. Their work requires these professionals “to feel the emotional needs and experiences” of their clients (human or animal), but this empathic response makes the caregiver susceptible to trauma.<sup>289</sup> Symptoms of compassion fatigue include “[a] sense of powerlessness,” “fear,” “numbness,” and the feeling of being on “[a]n emotional roller coaster.”<sup>290</sup>

Compassion fatigue is the result of “prolonged exposure to suffering” coupled with “traumatic memories” of “unresolved conflicts and distress” related to the suffering of clients.<sup>291</sup> A study of animal-care workers conducted by the HSUS between 2003 and 2004 found that about 68% of animal shelter workers surveyed were at “high” or “extremely high” risk of developing compassion fatigue, which could manifest itself through symptoms such as self-doubt, numbness, fear, depression, hyper-vigilance, and sleep disturbances.<sup>292</sup> Similarly, a 2008 survey conducted by the National Association of Social Workers indicates that 25% of social workers in child welfare/family practices “experience sleep disorders,” 37% report psychological problems, and 65% suffer from fatigue.<sup>293</sup> Undoubtedly, social work and related fields produce highly stressful work environments. Accordingly, when reasonable, efforts should be made to avoid creating new policies that would further burden these workers.

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<sup>288</sup> *Id.* at 22 (citing C. Joinson, *Coping with Compassion Fatigue*, 22 NURSING 116, 116-22 (1992)).

<sup>289</sup> FIGLEY & ROOP, *supra* note 284, at 12.

<sup>290</sup> *Id.* at 5.

<sup>291</sup> *Id.* at 13.

<sup>292</sup> *Id.* at 23, 48. The study also noted that this percentage of at-risk animal shelter workers (about 68%) was much higher than the percentage of at-risk veterinarians (about 30%), presumably because there is more trauma present in animal shelters. *Id.* at 53.

<sup>293</sup> NAT’L ASSOC. SOC. WORKERS, *supra* note 284, at 5.

Moreover, social workers, like psychologists and attorneys, have a professional obligation to keep client relations and communications confidential absent consent from the client or other compelling professional reasons.<sup>294</sup> Tennessee law treats this confidential information as privileged to the same extent that psychologist-patient and attorney-client confidences are privileged.<sup>295</sup> In all likelihood, a pet owner who chooses to place her pet in safe haven under our proposed form of special bailment would need to give consent to her social worker to supply necessary information to the person charged with determining whether the owner's pet can be returned to her under the terms of the bailment agreement (the shelter or the third-party decision maker).<sup>296</sup> Under applicable ethical rules governing social workers, this requires that the social worker inform the client, "to the extent possible, about the disclosure of confidential information and the potential consequences, when feasible before the disclosure is made."<sup>297</sup> Workers must offer this information in addition to general counseling about "the nature of confidentiality and limitations of clients' right to confidentiality."<sup>298</sup> Although there is some precedent in the cross-reporting context for exempting

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<sup>294</sup> NAT'L ASSOC. SOC. WORKERS, CODE OF ETHICS § 1.07 (1996) [hereinafter NASW CODE OF ETHICS].

<sup>295</sup> See TENN. CODE ANN. §§ 23-3-105 (providing for attorney-client privilege), 63-11-213 (providing for psychologist-patient privilege) & 63-23-109 (providing for social worker-client privilege); *Kirchner v. Mitsui & Co.*, 184 F.R.D. 124, 126 (M.D. Tenn. 1998).

<sup>296</sup> The express exception allowing for disclosure of confidential information does not strictly apply here, since the "serious, foreseeable, and imminent harm" anticipated under the conditional bailment is not "to a client or other identifiable person," but rather to a pet. See NASW CODE OF ETHICS § 1.07(c) ("The general expectation that social workers will keep information confidential does not apply when disclosure is necessary to prevent serious, foreseeable, and imminent harm to a client or other identifiable person.").

<sup>297</sup> *Id.* § 1.07(d).

<sup>298</sup> *Id.* § 1.07(e).

certain communications from these confidentiality strictures,<sup>299</sup> the management of confidential information is already complicated and burdensome for social workers, and a special bailment like that proposed here would add to that complexity and burden.

### C. Potential Extralegal Benefits of the Proposal

Yet, the proposal we make in Part III.A also may assist social workers and their clients in dealing with the difficult circumstances and decisions emanating from domestic violence. For example, the existence of a special bailment may provide the social worker with a means of helping the client to relieve additional stress associated with providing care to a pet as he or she attempts to better care for herself and may provide the social worker with healthy additional leverage in communications with client victims of domestic violence. This section addresses these two potential benefits.

First, the removal of the animal victim from the cycle of violence could reduce the emotional trauma for both human and non-human victims. Domestic violence victims experience an emotional roller coaster that is similar in origin and manifestation to the phenomenon known as compassion fatigue, as described above in Part III.B. Several studies, for example, have described the “climate of fear”

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<sup>299</sup> See, e.g., Phil Arkow, *Confidentiality Concerns and Solutions in Cross-Reporting Animal Abuse and Other Forms of Family Violence*, NATIONAL LINK COALITION (June 13, 2017) (copy on file with author); Kevin S. Doyle & Maureen J. Walls-McKay, *Confidentiality in Question: The Erosion of the Cornerstone of Counseling?*, VISTAS ONLINE (2017), <https://www.counseling.org/knowledge-center/vistas/by-year2/vistas-2017/docs/default-source/vistas/confidentiality-in-question>; Kathryn S. Krase, *Social Workers as Mandated Reporters: Conflicted Over Confidentiality? Part IV*, THE NEW SOCIAL WORKER, <http://www.socialworker.com/feature-articles/practice/social-workers-as-mandated-reporters%3A/> (last visited August 1, 2017).

experienced by the victims of violence.<sup>300</sup> One study found that women who chose to go to a shelter were actually more fearful than their counterparts who were not at shelters.<sup>301</sup> Women who reach out for help—the sort of women who shelter their pets while they themselves are in a shelter—are in a state of extreme fear. Battered women have been described as being in “a numbed shock,” while they may also experience a wide and varying range of emotions ranging from happiness and excitement to anger and fear.<sup>302</sup> These emotional reactions raise questions about the ability of these human victims to care for their pets and may suggest that, at least in certain circumstances, the separation of human and pet could help break the cycle of fear and numbness or otherwise provide some emotional relief.

Similarly, the special bailment agreement could provide healthy leverage that hastens the human victim along the path of emotional evolution that will ultimately compel the victim to leave the violent situation. Before victims become willing to sever a violent relationship, they must move from rationalization of the violence—a stage where the victims view the violence as “normal, acceptable, or at least justifiable”—to victimization, a stage where “a variety of catalysts” have forced the victim to “redefin[e] abuse” and no longer regard the abuse as acceptable.<sup>303</sup> The catalysts that lead a victim to stop rationalizing the violence include: “a [sudden] change in the level of violence[,] . . . a change in resources [for the victim,] . . . a change in the relationship [with the batterer,] . . . [the onset of] despair[,] . . . [an increase in the public nature of the violence,] . . . and

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<sup>300</sup> Alfred DeMaris & Steven Swinford, *Female Victims of Spousal Violence: Factors Influencing Their Level of Fearfulness*, 45 FAM. REL. 98, 98 (1996).

<sup>301</sup> *Id.* at 103.

<sup>302</sup> Ferraro & Johnson, *supra* note 281, at 334–35.

<sup>303</sup> *Id.* at 328, 331.

[being confronted with] external definitions of the violent relationship.”<sup>304</sup>

The possible removal of a pet could trigger several of these dimensions of the victimization stage. One obvious example would be with respect to “the interjection of external definitions of abuse.”<sup>305</sup> Ferraro and Johnson describe how victims react positively to “genuine concern” shown to them by others.<sup>306</sup> This reasoning could be extended to a situation that involves the potential removal of the pet. The removal of the pet would highlight the level of concern that is felt by outside observers of the situation, which in turn might alter the paradigm in which the human victim views the violence. Similarly, despite a lack of “systematic research,” researchers emphasize that a child’s desire to leave an abusive situation has a dramatic impact upon a mother in her contemplation of leaving a violent home.<sup>307</sup> Although pets cannot vocalize desires to leave abusive circumstances, the forced relinquishment of the pet could be analogous to a child’s request not to return to a violent home.

Women often are propelled to act when they reach a point of despair and lose all hope that a situation will improve.<sup>308</sup> Observers note that the victim must hit rock bottom before she will leave a domestic violence situation.<sup>309</sup> The possible or actual relinquishment of a pet could push a woman closer to the realization that she herself is a victim and that her situation will not improve unless she removes herself from the violent household. Specifically, a social worker could use the special bailment agreement as a tool in educating a domestic violence victim to the danger of

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<sup>304</sup> *Id.* at 331.

<sup>305</sup> *Id.* at 332.

<sup>306</sup> *Id.* at 333.

<sup>307</sup> *Id.*

<sup>308</sup> *Id.* at 332.

<sup>309</sup> *Id.*



returning herself, as well as any dependent children or nonhuman animals, to a violent household. Many social workers express frustration that they cannot adequately portray to domestic violence victims the risks associated with a return to the very household in which they experienced violence.<sup>310</sup> The assessment and communication of potential harm to both children and pets—as well as potential harm to the victim herself—may help a victim of domestic violence in assessing the merits and risks of returning to a living situation in which violence can be expected.

To confirm what we earlier stated, we appreciate that our special bailment proposal is not an airtight solution or panacea for all of the problems associated with animal abuse and domestic violence in a safe haven setting. Nonetheless, we believe that implementation of our proposal could be another way to help “move the ball down the field.” If safe haven shelters and social workers were given the tools and ability to actively and realistically consider special bailments as an option to implement on a case-by-case basis, the mere act of thinking through the utility and appropriateness of the bailment alternative could, itself, have a positive impact on specific cases and on the overall state of human and animal welfare.

## Conclusion

The issues involved in family violence situations are multifaceted. As we learn more about them and begin to work at resolving them, additional issues present themselves for resolution. In the past twenty years or so, a number of these emerging issues have arisen out of our increasing awareness of the link between animal violence and human

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<sup>310</sup>See, e.g., HSUS, SAFE HAVENS, *supra* note 102, at 6 (acknowledging that a woman’s choice to return to an abusive home is “frustrating” to shelter staff).

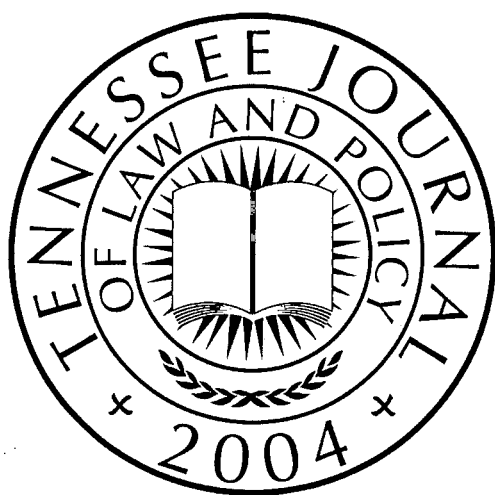
violence in the home. As humans have developed closer, family-like relationships with their pets, these animals have been unmistakably and unwittingly brought into the cycle of family violence. Among other things, we now know that all of these living, sentient beings are at risk of harm as dependents or cohabitants of a perpetrator of domestic violence.

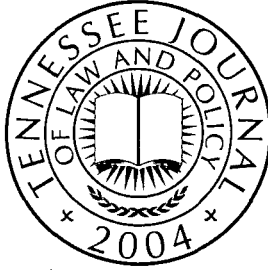
Both the social service system and the law have responded to changes in the social and moral conception of animals and their role in family violence. The development and operation of safe haven programs for the pets of domestic violence victims who are transitioning temporarily to shelter life is one of those responses. Overall, the installation of safe haven shelters for pets in these circumstances has been a positive development. However, the potential that a domestic violence victim will reclaim her pet and return the pet to a violent household highlights a shortcoming in the social services system's response to family violence: nonhuman animal family members are left without advocates in the process. Although domestic violence victims and their children are assisted and protected by specialized counselors, the pets in these households continue to be treated not as family members but rather as inanimate, insentient property under the control of an owner. While this has been the historic legal conception of pets, law has begun to acknowledge that this conception is outdated and incomplete.

We suggest that practices, in addition to positive law, need to evolve further to protect pets involved in family violence situations and disputes. In particular, we propose that safe haven shelters use a conditional bailment when they take in and care for the pets of domestic violence victims. This bailment would prevent return of the pet to its owner if the pet would be at significant risk of physical, mental, or emotional harm. Through the condition and the essential related procedures, animals that have witnessed or been

victims of domestic violence receive some protection—  
protection at a level commensurate with their position as  
nonhuman family members.







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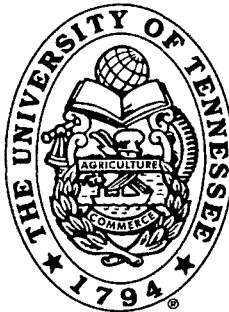
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