

“CUT THE DOG IN HALF”: RESOLVING ANIMAL LAW DISPUTES THROUGH THE USE OF ALTERNATIVE DISPUTE RESOLUTION

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I. INTRODUCTION

The discipline of animal law continues to grow. So does “animal rights,” a distinct and separate matter that, at times, uses animal law principles to try to achieve its goals.¹ Still, when I inform others of my involvement with animal law, almost everyone asks, “What is animal law?” or, “You mean, like animal rights?” I always answer with a variation of the following: “It can encompass everything from animal custody issues and landlord-tenant disputes, to dog-bite cases and animal wills and trusts,” before *ending* by saying “and, of course, some animal rights-type stuff as well.” Not only is my intent to give a fuller explanation of animal law and issues ripe for alternative dispute resolution (ADR), but it is also to decouple the greater body of animal law from the more micro and separate animal rights focus; neither animals, nor the broader field of animal law, nor animal law ADR, benefit from a default fusion with animal rights, a term that also, at times, conjures negative reactions and creates walls of separation.

Conversely, using ADR to address animal law issues allows animals’ interests to reach across, and become intertwined with, almost all segments of society, while still legitimizing animals as parties with substantive needs. ADR also supports the true foundation of animal law by drawing on more pure, neutral animal

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¹ See, e.g., THE ANIMAL LEGAL DEFENSE FUND, <http://aldf.org/about-us/saldf/> (last visited Nov. 12, 2012).

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law principles, as opposed to the advocacy framework used by many animal law practitioners, animal rights proponents, and even animal rights opponents. This support, in turn, advances animal interests much more regularly, even on a daily basis, than isolated court or legislative victories against a societal stream that will almost always, when push comes to shove, run against animals.

I recently spoke at a law school about mediating animal law issues.² Many in the audience were animal-rights supporters, including members of the Student Animal Legal Defense Fund (SALDF).³ Some attendees were vegan, as apparently were many of the refreshments. To make my point that, when push comes to shove, human interests almost always will trump animal interests, I presented an extreme example, but one I felt was needed to make my point in front of this particular audience. I asked how many people in the room would truly decline to both kill and eat an animal if their *only* other option was to starve to death. Furthermore, I posited that almost certainly they would eat an animal before eating a human. Indeed, when push truly comes to shove, animals seldom have a chance versus humans. Furthermore, most people's threshold for choosing human interests over animal interests is much lower than the example I posed. Resolving animal law conflicts through ADR often offers the opportunity to sidestep this zero-sum equation or, depending upon the circumstances, near zero-sum equation, of animal versus human.

Moreover, currently, courts may not have the resources or jurisdiction to address certain animal law issues that ADR can address. For example, some courts have been hesitant to wade far into custody disputes involving animals,⁴ with animals viewed as property⁵ and "legal things."⁶ Judges can be hesitant to devise custody visitation schedules for personal property legally akin to a

² Michael Ploudre Kaiser, the Benjamin N. Cardozo Dispute Resolution Society event: Talk on Animals and Mediation with Michael Kaiser, Esq. (Nov. 7, 2012).

³ *Student Animal Legal Defense Fund*, THE ANIMAL LEGAL DEFENSE FUND <http://aldf.org/article.php?list=type&type=139> (last visited Nov. 12, 2012).

⁴ See, e.g., *Bennett v. Bennett*, 655 So. 2d 109, 110, 111 (Fla. Dist. Ct. App. 1995) (Court stated that the resources do not exist to monitor custody issues involving animals); *Pratt v. Pratt*, No. C4-88-1248, 1988 Minn. App. LEXIS 1113, at *3 (Minn. Ct. App. Nov. 15, 1988) (Court found custody statutes inapplicable in animal context, but did uphold award of dog based upon mistreatment of dogs by losing party); *Nuzzaci v. Nuzzaci*, No. CN94-10771, 1995 WL 783006 (Del. Fam. Ct. Apr. 19, 1995) (The court refused to sign visitation order and stated that it did not have the jurisdiction to enforce visitation involving an animal. The court recommended parties come to private agreement.).

⁵ 4 AM. JUR. 2D ANIMALS §§ 5-7 (1995).

⁶ STEVEN M. WISE, *RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS* (2000).

chair, including an animal. New concepts of potential future rights to be afforded to animals also often track the animals-as-property paradigm.⁷

Using ADR to address animal law issues also invokes a forum in which parties who are often very antagonistic can come together to achieve workable and realistic solutions. For example, mediation offers an avenue to potential solutions to the debate over laboratory testing on animals, a matter that has proven difficult for opposing parties to find consistent common ground. Animal advocates, especially, need those currently not as invested in supporting animals to become willing partners in the mainstreaming of animal law issues. Furthermore, there is little evidence that such issues are soon to appear with markedly more regularity on court calendars. Perhaps, at some point, if animals achieve legal standing or its more encompassing cousin legal personhood,⁸ both uphill endeavors, courts will more regularly address animal interests. Still, as with all legal issues, even if legal standing or legal personhood is granted to animals, only a small fraction of disputes will ever make it into court or be taken up by legal advocates.

In this article, I discuss ADR within the context of three types of animal law issues. In Part I, I discuss animal custody disputes, which I have found to be very well-suited to resolution by means of mediation. In Part II, I discuss the debate surrounding laboratory testing on animals and the reasons why several current approaches to this issue are insufficient and wasteful of resources. I outline how mediation has the potential to bridge differences and find at least short-term workable resolutions to a highly charged issue, which in turn may lead to longer-term resolutions. Lastly, in Part III, I briefly discuss why it may be in veterinarians' best interest to make more liberal use of both mediation and arbitration in cases involving alleged veterinary malpractice.

⁷ See generally, David Favre, *Equitable Self-Ownership for Animals*, 50 DUKE L.J. 473 (2000) (discussing "equitable self-ownership," in which animals still are human property but are capable of having an ownership interest in themselves.); Ani B. Satz, *Animals As Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy and Property*, 16 ANIMAL L. 65, 71–72 (2009) (proposing an Equal Protection of Animals (EPA) framework that focuses on joint interests of humans and animals deserving of a formal protection apparatus. This model does not seek, however, to abridge the classification of animals as property.)

⁸ See, e.g., THE NONHUMAN RIGHTS PROJECT, seeking, *inter alia*, legal personhood for animals, <http://nonhumanrights.org/> (last visited Nov. 21, 2012).

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II. MEDIATING CUSTODY DISPUTES INVOLVING ANIMALS

A. *Overview*

It is somewhat clichéd to state that many people now view pets as children. While this sentiment is perhaps cute, and arguably tethered loosely to certain realities, the truth is that pets are not children, at least as we generally understand the latter term, and perhaps nowhere is that more clearly demonstrated than in custody disputes involving animals.

Animals are legal property, possessed by humans either jointly or individually.⁹ Children are not property. In fact, the whole concept of a custody dispute over property seems facially illogical. People have disputes over property. People have disputes over custody of other humans. These are disputes with which courts are familiar and for which jurisdiction exists. Courts overwhelmingly do not have tradition, experience, or, arguably, jurisdiction even to try to address custody issues involving animals, let alone to monitor a ruling for compliance or address future custodial conflicts between the parties. For example, what is an average family law court to do with an argument by Peter that Sarah did not return canine Tyrone on time after weekend “visitation,” or that Sarah has absconded with Tyrone to another state? Furthermore, in the latter scenario, is it even a theft, given the relationship of the parties to the property? Perhaps. Or, maybe the claim should be addressed as a breach of contract if the parties had previously executed a contract concerning Tyrone’s future. But those scenarios implicate entirely different areas of law than custody or family law.

Examples of courts’ finding problematic the intersection of custody and animals are not difficult to find. In *Desanctis v. Pritchard*, a complainant sought enforcement of an “Agreement” with his ex-wife that addressed custody and visitation issues concerning a dog named Barney. The court stated, “[Complainant] is seeking an arrangement analogous, in law, to a visitation schedule for a table or lamp.¹⁰ 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.”¹¹

⁹ 4 AM. JUR. 2d ANIMALS, *supra* note 5.

¹⁰ *Desanctis v. Pritchard*, 803 A.2d 230, 232 (Pa. Super. Ct. 2002), *appeal denied*, 818 A.2d 504 (Pa. 2003).

¹¹ *Id.*

In *Bennett v. Bennett*, a Florida appellate court overruled a trial court that in a divorce proceeding had awarded a wife visitation rights to a dog. The court found that the trial court lacked jurisdiction to order visitation with property.¹² The court, with a nod to judicial economy, also stated, “Determinations as to custody and visitation lead to continued enforcement and supervision problems []. Our courts are overwhelmed with the supervision of custody, visitation, and support matters related to the protection of our children. We cannot undertake the same responsibility as to animals.”¹³ The court remanded the case for proceedings in keeping with the state’s equitable distribution statute.¹⁴

In *Nuzzaci v. Nuzzaci*, a Delaware court stated that while it had jurisdiction to award a divorcing couple’s dog to one of the parties, it did not have jurisdiction to sign a stipulated order providing for visitation rights involving the animal.¹⁵ However, unlike the court in *Desanctis*, the *Nuzzaci* court encouraged the parties to come to a private “agreement.”¹⁶ However, whether the *Nuzzaci* court would then have been willing to revisit the matter if the parties had reached an agreement that later broke down appears questionable at best.

In *Desanctis*, *Bennett*, and *Nuzzaci*, one can see courts’ unwillingness to engage in divorce or post-divorce proceedings involving animal custody issues. As the court in *Nuzzaci* said, “[T]his court is simply not going to get into the flora or fauna visitation business.”¹⁷ The court in *Bennett* spoke of “the morass a trial court may find itself in by extending the right of visitation to personal property.”¹⁸

Although some courts have been more willing to venture into custody disputes involving animals, the results have been inconsistent. In 2002, the Alaska Supreme Court upheld a final modification of a dissolution agreement involving a Labrador.¹⁹ The 1993 dissolution agreement, a property settlement incorporated into the original marital dissolution decree, had originally called for joint custody of the dog, but seven years later the husband was granted sole custody as part of an initial modification in which the wife

¹² *Bennett*, 655 So. 2d 109.

¹³ *Id.* at 110, 111.

¹⁴ *Id.* at 111.

¹⁵ *Nuzzaci v. Nuzzaci*, No. CN94-10771, 1995 WL 783006, at *2.

¹⁶ *Id.*

¹⁷ *Nuzzaci*, 1995 WL 783006, at *2.

¹⁸ *Bennett*, 655 So.2d at 110.

¹⁹ *Juelfs v. Gough*, 41 P.3d 593 (Alaska, 2002).

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retained visitation rights.²⁰ This sole custody for the husband followed the wife's filing a motion seeking review of the dissolution decree based on the husband's alleged failure to allow the wife time with the dog.²¹ The husband alleged that the wife's boyfriend had mistreated the dog in question, as well as other dogs at the wife's residence.²² The wife argued, "[a] pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property."²³ The court, apparently, was not moved.

Several months after this first modification, and following an "altercation" between the parties that occurred when the husband tried to regain custody of the dog after the wife took the dog without permission, both parties sought restraining orders and the wife filed a motion asking again for review of the dissolution decree.²⁴ The lower court noted the failure of the visitation plan and ruled that the wife no longer had any visitation right, ordering the parties to remain apart for at least six months.²⁵ At no point in these proceedings did it appear that a court formally addressed, let alone agreed with, the wife's contention that the dog was more than simply property.

However, a Virginia court stated in 1997 that a cat's happiness took priority over property rights.²⁶ The court also took the "best interests" of the cat into consideration when awarding it to the party who had devoted the most time to it.²⁷ Conversely, an Iowa Appeals Court has stated that a dog is personal property and that, while courts should not place pets in a "position to be abused or uncared for," a court "[does] not have to determine the best interests of a pet."²⁸ The court left undisturbed a lower court's decision to award a dog to the veterinarian husband instead of the wife, to whom the husband originally had given the dog as a Christmas present.²⁹ The lower court noted that following the breakup, the dog remained with the husband and even accompanied the husband to

²⁰ *Id.* at 594, 595, 599.

²¹ *Id.* at 595.

²² *Id.* at 595.

²³ *Id.* at 594.

²⁴ *Id.* at 595.

²⁵ *Juelfs*, 41 P.3d 593.

²⁶ *Zovko v. Gregory*, No. Ch 97-544 (Va. Cir. Ct. 1997).

²⁷ *Id.*

²⁸ *In re Marriage of Stewart*, 356 N.W. 2d 611, 613 (Iowa Ct. App. 1984).

²⁹ *Id.* at 613.

work.³⁰ A Minnesota appeals court overruled a trial court that based its dissolution decision, which determined custody of two Saint Bernard dogs, on the state's child custody best interests statute.³¹ However, the appeals court upheld the trial court's discretion to award the dogs to the wife based on the husband's alleged mistreatment of the dogs.³²

In a New York case, a court upheld the custody award of Lovey, a ten-year-old cat, based on Lovey's limited life expectancy and the fact he had "lived, prospered, loved and been loved for the past four years" at the residence-at-issue.³³ The trial court originally had allowed the non-possessory party visitation in what was deemed a property dispute between former roommates.³⁴ The trial court later decided it was not in the cat's best interests to be shuffled back and forth and so awarded the non-possessory party full custody in a "straight property analysis."³⁵ However, a lower appellate court felt, as indicated above, that the cat's welfare was best served staying with the original possessory party.³⁶

As one can see, courts vary, sometimes widely, in their approaches to custody issues involving animals. The reality is that as long as animals are considered legal property, it will be extremely difficult for courts to fashion a consistent approach to animal custody issues. Thus, parties venturing into courtrooms seeking resolution of custody issues involving animals are taking a substantial risk that their aims will be thwarted. Furthermore, custody issues of any kind that do not resolve well in a courtroom often are bad candidates for extra-judicial resolution, especially as compared to custody matters that never failed in the courtroom to begin with.

Certainly one can argue that there is an opportunity for establishing precedence in taking these matters to court, but this rather slim chance of substantive reward does not outweigh the cost in resources or the untaken opportunity to find an extra-judicial outcome much more beneficial to the animal. If we continue to push these matters into court, do we—perhaps inadvertently—indicate a greater interest in our anthropocentric notions of what benefits animals, an interest that might be at such animals' expense? As we

³⁰ *Id.*

³¹ Pratt v. Pratt, No. C4-88-1248, 1988 Minn. App. LEXIS 1113 at *1 (Minn. Ct. App. Nov. 15, 1988).

³² *Id.*

³³ Raymond v. Lachmann, 695 N.Y.S.2d 308, 309 (N.Y. App. Div. 1999).

³⁴ *Id.* at 308.

³⁵ *Id.*

³⁶ *Id.*

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will see, mediation allows parties to sidestep this uncertainty within the court system and to craft custody agreements more likely to benefit all parties, including the animals.

B. *Crafting the Custody Agreement*

In mediation, there are several elements involved in crafting a custody agreement involving an animal. First, the parties are creating a contract, not a custody agreement in the traditional sense, with implications to be discussed further. Unlike the constraints that a court may place on parties, a more creative solution can be sought by the parties, such as framing the case as a pursuit for what is in the animal's "best interests." The parties can also define by themselves what those "best interests" are. The procedural flexibility of the mediation setting allows for unique methodologies, including those necessary to keep the parties focused. In animal custody matters, the parties must address issues of fitness in addition to the invariable "shared custody" issue. Due to the agreement's contractual nature and existence within a society with few societal mechanisms in place to ensure compliance, drafting potential penalties also can be important. I address all of these issues below.

1. Procedural Bonuses

Mediation's general allowance for procedural experimentation can have even greater effect when animals are involved. For example, bringing an animal into a mediation conference can have a great benefit. Having the animal in the room can give everyone the opportunity to observe whether the animal appears more comfortable with a certain party or desires to be near a certain party. This also can give the mediator the opening to say, "Gosh, Tyrone sure seems comfortable with Sarah; is this customary?" To get the animal into the conference setting a mediator may simply say, "Why don't you bring Tyrone, so he can be part of this process? That would also give me the chance to see this dog we are talking about."

Having the animal in a mediation conference also seems to loosen up the parties, while making it easier for the mediator to compel the parties to focus on Tyrone's needs at points of impasse. Any skilled mediator should have a much easier time softening the edges and bringing about consensus when he or she has the animal

in the room. This is another area in which matters of animal custody differ from those of human custody. It is presumed that animals understand little to almost nothing substantive of human conversation. It is obviously safe to have animals “participate” at all times in the mediation without fear they will internalize what they hear. With a child, it is a different matter.

Observing an animal in various settings also can be beneficial in determining its best interests. Obviously, our ability to communicate with animals is limited, and so personal observation carries added importance. A mediator can bring multiple animals together, using caution, of course, if there is a question as to how an animal might function in a setting with unfamiliar animals. A mediator might suggest to the parties that an animal behaviorist or, possibly, a veterinarian observe the animal to help in determining how the animal might function in certain settings. Observing the animal in a proposed or existing setting can help particularly if the animal is elderly: Does the setting allow for adequate mobility? Is the setting near a busy area or street? Do the neighbors have animals that may have access to the animal-at-issue? Are there children on the premises or in the neighborhood?

2. Framing the Agreement

It is important to ascertain from the beginning how the parties wish to frame the matter. Is the animal to be viewed as simply property to be divided or as something more? If the parties view the animal as something more than mere property, the mediator can frame the issue as a search for a solution in the “best interests” of the animal. In situations in which a party is unwilling to frame the search in this manner, a mediator should look closely at whether that party is simply retaliating against the other party. Parties who are acting in good faith in an animal custody matter typically are in dispute because they are deeply emotionally attached to the animal. Thus, typically and with little prodding, they will agree that the paramount concern is what is best for the animal.

3. Fitness of the Parties

When looking at the best interests of a companion animal, the mediator needs to ascertain, without offending the parties, their respective fitness. However, the mediator in an animal custody matter does not have the leverage to push too hard into certain areas of fitness unless there is unequivocal up-front evidence in those

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areas that there is a lack of fitness. Mediation of animal custody issues takes more finesse than does mediation of human custody issues. One or both parties in an animal custody matter can simply terminate involvement, and seldom is there societal impetus, as in child custody issues, for an ultimate resolution.

For example, my experience is that at times in a divorce or separation, the mediator may be facing various forms of dysfunction that can damage substantive personal relations. Yet these parties are asking to be granted an exclusive, or guaranteed, relationship with an animal. Parties who have had difficulty maintaining long-term relationships would present no obvious assertion to support the idea that they will bring anything more to a relationship with an animal than they did to their relationship with their former partners. A mediator must consider, of course, the fact that maintaining an intimate, long-term relationship with a human being may involve more dynamics than maintaining a close, long-term relationship with an animal, although there are certain skills needed to maintain a healthy relationship with an animal that are different and may be more challenging than those needed to maintain a healthy relationship with another human being. Clearly, human beings can more fully articulate their needs to other human beings than animals can to human beings, and vice-versa. Thus, there is a need for more intuitiveness and attention to the animal by the human being.

Another type of relevant dysfunction seen in some relationship-breakups is domestic abuse. For example, studies indicate significant correlations between domestic violence and animal abuse.³⁷ A history of domestic violence, or other legal troubles, may be easier to draw out of the parties in mediation than other types of dysfunction. A mediator might simply ask if either party has any pending or past legal issues that may implicate the parties'

³⁷ *The Connection Between Domestic Violence and Animal Cruelty*, AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS (ASPCA), <http://www.aspc.org/fight-animal-cruelty/domestic-violence-and-animal-cruelty.aspx> (last visited Nov. 22, 2012) (National Coalition Against Domestic Violence has found that 85.4% of women and 63.0% of children arriving at domestic violence shelters reported pet abuse); *Facts About Animal Abuse & Domestic Violence*, AMERICAN HUMANE ASSOCIATION, available at <http://www.americanhumane.org/interaction/support-the-bond/fact-sheets/animal-abuse-domestic-violence.html> (last visited Feb. 15, 2013) (70% of animal abusers in one study had criminal records for other crimes); *Animal Cruelty and Human Violence*, THE HUMANE SOCIETY OF THE UNITED STATES, http://www.humanesociety.org/issues/abuse_neglect/qa/cruelty_violence_connection_faq.html (last visited Feb. 15, 2013) (46% of those who committed multiple murders admitted committing acts of animal torture as adolescents, 100% of boys involved in seven school shootings between 1997 and 2001 had previously committed acts of animal cruelty).

fitness or ability to care for the animal, such as issues with “domestic violence, alcohol or substance abuse, or other criminal matters.” A mediator will most often be able to quickly perceive if he have hit the spot; furthermore, an opposing party may also reveal or elicit the other party’s transgressions. A mediator always can remind the parties, “We have agreed that we are putting Tyrone’s needs first and foremost, and we want to make sure he is not in an environment in which his welfare might be jeopardized by someone’s slips, even by someone who is trying her best.”

Another component of fitness is financial status. A good way to elicit the financial status of the parties, as it relates to the animal, is to ask the parties if they have the means today to pay \$2,000 in veterinary bills. Two thousand dollars is not an excessive amount to expect to have to potentially spend on a veterinary bill;³⁸ however, certainly \$2,000 represents a measurable amount of money, especially because very few people have veterinary insurance³⁹ and those who do have policies lacking in coverage. Furthermore, this question gives the mediator the opportunity to ensure the future care of the animal by guiding the parties toward agreeing on at least one veterinarian visit per year. My own experience in the veterinary field is that caregivers often go much longer than that between vet visits, often waiting until a condition gets quite serious, and frequently due to lack of preventive care. In fact, the American Veterinary Medical Association reports that among horse-owning households, which are often thought by the veterinary industry to be more concerned with the health of their animals than other types of pet owners, only 53.8% availed themselves of veterinary services in 2011, a decrease of 11.9% from

³⁸ Walecia Konrad, *Containing the Costs of Pet Care*, N.Y. TIMES (Apr. 29, 2011), http://www.nytimes.com/2011/04/30/health/30patient.html?_r=0 (discussing how a dog’s treatment for renal failure cost \$2,300 and how spending, overall, for veterinary care has risen from \$8.2 billion a year in 2006 to \$12.2 billion in 2011); *Veterinary Care Without the Bite*, CONSUMERREPORTS.ORG (July 2003), <http://www.consumerreports.org/Pets/> (reports that it cost \$1,674 to treat a greyhound’s broken leg and \$1,400 for chemotherapy for a Rottweiler); Franny Syufy, *The Cost of Responsibility for a Cat—And the Higher Toll For Irresponsible Ownership*, ABOUT.COM/CATS, available at http://cats.about.com/od/responsibleownership/a/care_costs.htm (last visited Feb. 11, 2013)(recommends setting aside \$1-2,000 for emergencies); Karen Collier & Dana McCauley, *Sick As a Dog as Vet Bills Soar by 500 Per Cent*, HERALD SUN (Sept. 28, 2011), <http://www.news.com.au/money/cost-of-living/sick-as-a-dog-as-vet-bills-soar-by-500/story-fnagkbpv-1226148801851>.

³⁹ *Pet Health Care Statistics*, PET INSURANCE REVIEWS (2008) available at, <http://www.petinsurancereviews.org/pet-statistics.html> (it is estimated that 3% of pet owners in the United States have pet insurance).

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2006.⁴⁰ While this decrease is emblematic of a potential increase in horse neglect, which in turn might be attributable to the downturned economy, it also serves as a stark reminder of a general rarity of regular veterinary visits.

4. Shared Custody

My experience is that parties approach mediation involving animal custody issues with one of several goals, all of which typically encompass a shared-custody component. Parties might be in outright dispute over custody of an animal, with both sides asking for full custody. My perception, based on parties' actions over the course of a mediation session, is that the parties also come to the table with the fallback position, at least in their minds, of at least shared custody if full custody cannot be achieved. Or parties might come to the table with shared custody first and foremost in their minds, but they might then encounter difficulty in arriving at an agreement. One of the most challenging elements of animal custody mediation for the mediator is getting one of the parties to accept that as much as he may love the animal, it appears that allowing the other party to take or keep full possession of the animal is in the animal's best interests. I have seen no studies that indicate that animals benefit from being moved back and forth regularly between homes. I also am not including any citations to studies involving human custody matters that have addressed this issue: this article is examining animal custody matters, and to my knowledge there are no studies that establish sufficient physical and psychological similarity between animals and children to warrant the assumption that the same issues will affect both children and animals.

5. Contractual Aspect

It is important to remember that the agreement reached between the parties is a contract, not a traditional custody agreement. There also are strong arguments for not filing this contract with the court as part of a larger separation or divorce action. As can be seen above, many courts have no inclination to adjudicate or facilitate animal custody agreements. Furthermore, it might be even worse when courts do have such an inclination: invariably the court

⁴⁰ *U.S. Pet Ownership & Demographics Sourcebook (2012)*, AMERICAN MEDICAL VETERINARY ASSOCIATION, available at <https://www.avma.org/KB/Resources/Statistics/Pages/Market-research-statistics-US-Pet-Ownership-Demographics-Sourcebook.aspx> (last visited Nov. 22, 2012).

will have little to no experience in animal custody issues, animal law, or any other animal-related issues. The potential harm caused would substantially outweigh any hoped-for benefits.

6. Penalties

There is a role for courts in animal custody contracts when penalties for violation of the custody contract are at issue. The drafting of penalties must be approached delicately with the parties. For example, one might say, “You know, often we get pressured in various ways, and at times what keeps us from veering off-course are rules, or the penalties associated with breaking the rules. We have agreed that Tyrone’s interests are at the top of our list of concerns, and we have spent a good deal of time crafting a solution that we think works best for everyone; we sure would not want to see all of these good intentions go for naught, would we?” At that point rarely, if ever, will the parties disagree, at least not openly.

The penalties probably should be financial, and they need to be sufficiently substantial to enforce the desired arrangement. Going into court to enforce specific non-monetary terms of an animal custody agreement is, as discussed above, an unreliable proposition at best. The parties could walk out of court with a court-crafted solution that neither party wants. However, a recent case found that certain property, such as an animal, can have “special subjective value” to one party and require another party’s specific performance of a promise to relinquish possession of that property upon termination of the parties’ relationship.⁴¹ While this finding can be interpreted as including the enforcement of an animal custody contract, certainly the ultimate decision would depend on the court.

Financial penalties can address a party’s failure to adequately care for the animal, to return the animal if visitation is a component of the agreement, and to inform the other party of issues involving the animal. The penalties also should be substantial enough that a party does not simply view them as a buy-out option, unless that is what the parties truly want. However, this option must be juxtaposed with what is in the best interests of the animal, a factor that, as indicated above, the parties will typically be striving for if focus is maintained. Often, to ensure potential penalties’

⁴¹ Houseman v. Dare, 966 A.2d 24, 27 (N.J. Super. Ct. App. Div. 2009).

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lasting impact, it is useful to set such penalties equal to a percentage of assets or income.

7. Maintaining the Parties' Focus

Facilitating the resolution of a dispute involving animals requires keeping the parties focused. If the parties have agreed to frame the matter as encompassing, first and foremost, a search for what is best for the animal, one challenge will be keeping the parties on that path. In a child custody matter, it is assumed, at least officially, that the child's interests come first. As disagreements arise in animal custody matters, however, it is not uncommon for parties to default to concern for only their own interests. To have parties to an animal-related conflict agree to put the interests of the animal first is far from the norm in my experience. It is a mediator's job to reinforce and nurture parties' commitment to the animal's welfare. To do so, the mediator must remind the parties, "We agreed that the most important issue for us in framing a solution is to find a solution that serves the best interests of Tyrone. Are we all still on-board with that goal?" No one will say 'no.' Perhaps someone might say, "But . . .," followed by a variation of his position, but from that point it still is relatively easy to bring the parties back to center. This might also be a good time to give Tyrone a pat on the head if he is the room, an action that would help bring the focus back to the animal. As discussed above, the procedural freedom of mediation allows for many unique elements that are arguably especially beneficial when mediating animal law matters.

C. Conclusion

No, animals are not children. Furthermore, our legal system is not designed at present, and probably not for at least the foreseeable future, to consistently address matters involving animal custody in a manner in which parties can approach courts with confidence that traditional concepts of due process, as well as the interest of animals, will be optimally served.

Parties in mediation, however, can craft solutions that serve all interests, including the animals', also without being forced to incorporate many aspects of the legal apparatus. Our legal system debates whether there should be a more formal acceptance of a "best interests" test for animals and, if so, what "best interests" could be

standardized. Conversely, parties have a much clearer idea of what is in the animal's best interests, feel free to determine their own "best interests" test, and expend their own time and resources without the pressure of legal-mandated deadlines.

While animals are not children, they are many people's true best friends. Thus, custody issues involving animals can be heart-wrenching for both parties. A mediator who understands the emotional nature of animal-related disputes and the elements that must be considered in mediation can succeed in enabling a process that brings peace and resolution to both parties. There is not a plethora of opportunities in the legal field, or in mediation, that presents the opportunity to bring true satisfaction to both sides while offering almost unlimited freedom. Mediation of animal custody matters does present this opportunity.

III. LABORATORY TESTING OF ANIMALS

Few disputes involving animals reach the heated level that those over laboratory testing of animals do. In one corner are those who feel that under almost all circumstances testing on animals is permissible. In another corner are abolitionists.⁴² Toward the middle are those who believe that animal testing is permissible under certain conditions and for certain reasons.⁴³ For example, some might feel that testing cosmetics on animals is wrong but that testing veterinary products is justifiable. Others might focus on the overall condition of the laboratory or whether the testing procedures minimize animals' suffering.

Australian animal rights pioneer and attorney Katrina Sharman, Director of Australian think-tank Voiceless: The Animal Protection Institute and member of the steering committee of the Counsel for Animals International, states that the question of whether a *particular* experiment is necessary is now the threshold question in the testing debate.⁴⁴ However, those who wish to enter the discussion must be prepared for a highly technical and scientific

⁴² TOM REGAN, *DEFENDING ANIMAL RIGHTS* 4 (2001); GARY L. FRANCIONE, *RAIN WITHOUT THUNDER—THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT* 119 (1996).

⁴³ Arthur Birmingham LaFrance, *Animal Experimentation: Lessons From Human Experimentation*, 14 *ANIMAL LAW* 29, 32 (2007) ("the death of animals but never their 'abuse' may be justified in experiments which themselves are justified by human necessity").

⁴⁴ Katrina Sharman, *Opening the Laboratory Door: National and International Legal Responsibilities For the Use Of Animals In Scientific Research—An Australian Perspective*, 2 *J. ANIMAL L.* 67, 69 (2006).

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debate,⁴⁵ something for which the average citizen, and even attorney, is unprepared.

It also is clear that the abundant resources expended by abolitionists trying, at least, to curtail or modify testing bought less than was desired. At the same time, supporters of animal testing also have done a less than stellar job of positioning themselves in this debate, as demonstrated by the heated positions and actions taken by opponents. Overall, however, a societal consensus that supports testing endures, with recent polls indicating that anywhere from 59% to 64% of Americans support testing.⁴⁶

Further demonstrating the scope of societal acceptance of testing, the United States Department of Agriculture (USDA) reports that in fiscal year 2010 there were 1,136,567⁴⁷ animals covered by the Animal Welfare Act (AWA)⁴⁸ that were used in laboratory research.

The USDA is charged with administering the AWA, which provides the legal framework that governs substantive aspects of the testing apparatus involving certain animals.⁴⁹ However, the AWA does not cover, for example, mice, rats, birds, or fish bred for testing.⁵⁰ The Humane Society of the United States estimates that, overall, more than twenty-five million vertebrates are used in laboratory research every year.⁵¹

Furthering the argument that there is solid societal acceptance of testing, the USDA reports that of the 1,027,450 animals covered by the AWA that were subjected in fiscal year 2007 to testing, 557,471 of them felt pain or distress, which was purportedly “allevi-

⁴⁵ *Id.*

⁴⁶ David W. Moore, *Public Lukewarm on Animal Rights*, GALLUP (May 21, 2003), available at <http://www.gallup.com/poll/8461/Public-Lukewarm-Animal-Rights.aspx> (64% of Americans reject banning all medical research on laboratory animals and 61% oppose banning all product testing on laboratory animals); Heather Mason Kiefer, *Americans Unruffled by Animal Testing*, GALLUP (May 25, 2004), available at <http://www.gallup.com/poll/11767/Americans-Unruffled-Animal-Testing.aspx> (62% of Americans believe that medical testing on animals is morally acceptable); Lydia Saad, *Four Moral Issues Sharply Divide Americans*, GALLUP (May 26, 2010), available at <http://www.gallup.com/poll/137357/Four-Moral-Issues-Sharply-Divide-Americans.aspx> (59% of Americans feel medical testing on animals is morally acceptable).

⁴⁷ U.S. Dep't of Agric. (USDA), Animal and Plant Health Inspection Service (APHIS), *Annual Report Animal Usage by Fiscal Year: 2010* (July 27, 2011), available at http://speakingofresearch.files.wordpress.com/2008/03/2010_animals_used_in_research.pdf.

⁴⁸ 7 U.S.C. §§ 2131–2159 (2000).

⁴⁹ 7 U.S.C. § 2132(b) (2000).

⁵⁰ 7 U.S.C. § 2132(g) (2000).

⁵¹ THE HUMAN SOCIETY OF THE UNITED STATES, *Questions and Answers About Biomedical Research*, (Sept. 28, 2009), available at http://www.humanesociety.org/issues/biomedical_research/qa/questions_answers.html (last visited Jan. 11, 2013).

ated.”⁵² Another 77,766 were classified as feeling pain or distress in which no drugs were provided to alleviate the pain or distress.⁵³ Thus, in 2007 a clear majority of the animals used in testing that fell under the USDA’s jurisdiction experienced pain or distress, with a measurable number of the animals not receiving drugs to alleviate the pain or distress. These numbers are not small, yet a majority of those who are aware of them consider them acceptable. However, there likely would be substantial pushback if just *one* person was subjected unwillingly to a regimen of testing that knowingly caused pain or distress, regardless of whether that person were provided with medication to alleviate his ensuing pain or distress. However, animal advocates invoking moral or ethical justifications against testing are frequently labeled “extreme.”⁵⁴ In fact, both within and beyond the testing community, the equation of animals as property subject to laboratory testing has become even more entrenched with the advent of genetic engineering, stem cell research, xenotransplantation, and bioterrorism defense.⁵⁵ The designation of certain animals as a type of property is further ensuring acceptance of animal testing.⁵⁶

A. *Two Responses to Animal Testing*

The public’s response to animal testing has taken several forms, including statutory and extra-legal. The statutory approach, as alluded to above and discussed below, has been guided, largely, by the AWA. The extra-legal approaches, also discussed below, have been less centralized. Neither the statutory nor extra-legal approaches have served any party well.

1. Animal Welfare Act (AWA)

The AWA, established in 1966 and originally called the Laboratory Animal Welfare Act until 1970, establishes guidelines and regulations for laboratory testing of certain animals in the United

⁵² USDA, APHIS, APHIS 41-35-075, *Animal Care Annual Report of Activities-Fiscal 2007* (Sept. 2008), at 13, available at <http://www.scribd.com/doc/39200615/Animal-Care-Annual-Report-of-Activities-2007>.

⁵³ *Id.*

⁵⁴ Sharman, *supra* note 44, at 69.

⁵⁵ Darian M. Ibrahim, *Reduce, Refine, Replace: The Failure of the Three R’s and the Future of Animal Experimentation*, 2006 U. CHI. LEGAL F. 195, 197 (2006).

⁵⁶ Sharman, *supra* note 44, at 69.

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States.⁵⁷ However, the AWA is focused primarily on issues of transportation and husbandry.⁵⁸ The USDA, Animal and Plant Health Inspection Service (APHIS), Animal Care Program is charged with enforcement.⁵⁹ Research facilities subject to regulation include hospitals, universities and colleges, and private firms in the biotechnology and pharmaceutical industries.⁶⁰ The USDA conducts unannounced inspections to ensure compliance.⁶¹ If violations are found, the facility is instructed to promptly correct the deficiencies.⁶² If the violations remain uncorrected, legal action may follow,⁶³ including animal confiscation, fines, cease-and-desist orders, and license suspensions or revocations.⁶⁴

Research facilities must also establish an Institutional Animal Care and Use Committee to oversee experiments, ensure compliance with the AWA, minimize animals' pain and suffering, and report compliance to the USDA.⁶⁵ The Committee must be comprised of at least three members, including a veterinarian and someone unaffiliated with the facility.⁶⁶ Inspectors can issue citations if a laboratory fails to follow the internal protocols established by the committees.⁶⁷ Researchers are also required to report negligence or errors to their oversight committees.⁶⁸

However, some claim that the existing framework is both deficient and rarely enforced.⁶⁹ They assail the deference to laboratories' self-monitoring.⁷⁰ Others claim that there exists too cozy a relationship between the USDA and the laboratory industry it

⁵⁷ USDA, NAT. AGRIC. LIBRARY, <http://awic.nal.usda.gov/government-and-professional-resources/federal-laws/animal-welfare-act> (last visited Jan. 1, 2013).

⁵⁸ 7 U.S.C. § 2143(a)(1) (proposed Feb. 27, 2013).

⁵⁹ *Animal Welfare, Animal Welfare Act Information*, USDA, APHIS, available at http://www.aphis.usda.gov/animal_welfare/awa_info.shtml (last visited Jan. 4, 2013).

⁶⁰ *Program Aid No. 1867—The Animal Welfare Act: An Overview* (rev. June 2008), USDA, APHIS, available at http://www.aphis.usda.gov/publications/animal_welfare/content/printable_version/Animal_Welfare_6-08.pdf

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ 9 C.F.R. § 2.31 (1998).

⁶⁶ 9 C.F.R. § 2.31(b)(2), (b)(3)(i)(ii) (1998).

⁶⁷ Nanette Asimov, *UCSF Lapses Mean Research Animals Suffer*, SF GATE (Nov. 25, 2012), available at <http://www.sfgate.com/education/article/UCSF-lapses-mean-research-animals-suffer-4065881.php>.

⁶⁸ *Id.*

⁶⁹ See, e.g., GARY L. FRANCIONE, *ANIMALS, PROPERTY, AND THE LAW* 208, 211 (1995).

⁷⁰ Collette L. Adkins Giese, Comment, *Twenty Years Wasted: Inadequate USDA Regulations Fail To Protect Primate Psychological Well-Being*, 1 J. ANIMAL L. & ETHICS 221, 235–38 (2006).

monitors.⁷¹ Some even claim the USDA has been “captured” by the entities it is charged with regulating,⁷² although it should be noted that such a claim has been leveled at many regulatory agencies at various times.

The National Institutes of Health (NIH) also plays a role in laboratory monitoring and include in their definition of animal “[a]ny live, vertebrate animal,” shielding under a protective health umbrella from federally funded laboratories rats, mice, birds, and certain fish.⁷³ However, the NIH does not conduct regular inspections, instead relying on self-reporting by laboratories.⁷⁴

Those wishing to initiate legal action on behalf of animals against the USDA and other relevant entities are consistently hampered by legal standing requirements. Constitutional standing requires the plaintiff to establish causation and redressability, as well as an injury-in-fact to the plaintiff, *not a third party*.⁷⁵ Parties wishing to challenge the government must also establish prudential standing, which requires a showing that the claimed right or injury is within the zone of interests that Congress intended to address, and that the claimed right or injury is being asserted by a party actually harmed or denied a right.⁷⁶ Animals, however, essentially have no individual legal rights that can be asserted by any party.

An example of the lengths to which plaintiffs must go to litigate against animal testing facilities was demonstrated in a lawsuit filed by the Animal Legal Defense Fund (ALDF) on January 17, 2013, against Santa Cruz Biotechnology, alleging violations of California’s animal cruelty law and of standards governing fair competition.⁷⁷ ALDF filed the suit on behalf of Stop Animal Exploitation Now (SAEN), seeking a permanent injunction to prevent Santa Cruz Biotechnology from continuing their alleged violation of animal welfare regulations by providing inadequate and

⁷¹ *Id.* at 244.

⁷² *Id.* at 244, 245.

⁷³ U.S. Dep. of Health & Human Serv., Nat. Inst. of Health, Office of Laboratory Animal Welfare, *Public Health Service Policy on Humane Care and Use of Laboratory Animals* (rev. Aug. 2002), at 8, available at <http://grants.nih.gov/grants/olaw/references/PHSPolicyLabAnimals.pdf>.

⁷⁴ U.S. Dep. of Health & Human Serv., National Inst. of Health, Office of Extramural Research, Grants and Funding, <http://grants.nih.gov/grants/olaw/tutorial/terms.htm> (last visited Jan. 11, 2013).

⁷⁵ *Davis v. Fed. Election Comm’n*, 128 S.Ct. 2759 (2008).

⁷⁶ *Lance v. Coffman*, 127 S.Ct. 1194, 1196 (2007).

⁷⁷ *First-Ever Lawsuit Under California Cruelty Law Filed Against Animal Research Lab in Santa Cruz*, ANIMAL LEGAL DEFENSE FUND (Jan. 17, 2013), available at <http://aldf.org/article.php?id=2298>.

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improper medical treatment to unhealthy animals.⁷⁸ SAEN, an Ohio-based nonprofit, argues that Santa Cruz Biotechnology has caused SAEN financial injury because SAEN was “compelled” to divert resources from Ohio to California to stop the alleged abuse.⁷⁹

Still, the USDA reports that the overall level of testing-facility compliance with regulations in fiscal year 2007 was 68% and averaged 69% among fiscal years 2002 through 2006.⁸⁰ In 2007, a new measuring stick called “substantial compliance” was introduced by the agency.⁸¹ According to the USDA, in fiscal year 2007 substantial compliance was 97%, which means that under the USDA’s framework, 97% of facilities had no documented violations of the AWA, or only minor noncompliance issues, such as gaps in perimeter fencing or improper storage of supplies.⁸² Notwithstanding the sufficiency of the AWA’s teeth or enforcement, one thing is apparent: according to measuring sticks used by the USDA in its enforcement of the AWA, conditions could not be any better for animals subjected to experimentation. However, this reality also highlights the gap between various viewpoints. Those opposed to testing, or those who wish to curtail it, would almost certainly argue against the view that conditions could not be any better currently for animals subjected to experimentation. Still, with the USDA’s assertion that almost all laboratories are in “substantial compliance,” opponents of testing have an uphill climb if they wish solely to try to enact change.

In extreme cases, criminal charges have been brought against testing facilities. In 1981 in the famous Silver Spring, Maryland, case, Dr. Edward Taub was found guilty of one state count of animal cruelty related to the conditions under which seventeen monkeys used for medical research were kept.⁸³ The conviction was later overturned based upon a finding that the Maryland animal cruelty statute did not apply to federally funded research.⁸⁴

⁷⁸ Jessica M. Pasko, *Animal Rights Organization Files Suit Against Santa Cruz Biotech*, SANTA CRUZ SENTINEL (Jan. 17, 2013), available at http://www.santacruzsentinel.com/localnews/ci_22397883/animal-rights-organization-files-suit-against-santa-cruz.

⁷⁹ *Id.*

⁸⁰ USDA, *supra* note 52, at 15.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Chronology of Events Leading To Multiple Counts Of Criminal Animal Cruelty Filed Against the “Alamogordo Primate Facility” Operator*, IN DEFENSE OF ANIMALS (Sept. 7, 2004), available at http://www.nihchimpercruelty.com/nih_chronology_2.html.

⁸⁴ *Id.*

In 2004, the Alamogordo Primate Facility (APF) in New Mexico was charged with, but not convicted of, multiple counts of animal cruelty under state law.⁸⁵ Not only are criminal prosecutions for abuse of animals in research facilities obviously rare, but also convictions are essentially never obtained.

2. Extra-Legal Methodologies

On November 28, 2012, the *Wall Street Journal* posted an article online entitled *Arrests Made Among Animal Lab's Foes*⁸⁶ and detailing how individuals had been arrested for alleged "animal-rights extremism."⁸⁷ The story described alleged illegal actions by those opposed to laboratory testing on animals, such as blackmail against certain pharmaceutical companies and Huntingdon Life Sciences, a major entity in the biological testing industry and a long-time target of those opposed to animal testing.⁸⁸ It was also alleged that animal rights activists had dug up the ashes of the mother of Daniel Vasella, the chairman and former chief executive of Swiss pharmaceutical company Novartis AG.⁸⁹

Historically, "direct actions" were brought against research laboratories.⁹⁰ However, since 2007 actions have been directed increasingly at researchers themselves,⁹¹ including death threats, bomb threats, mailing of suspicious packages, letters stuffed with razor blades, attempted home invasions, attempted arson, and the use of bombs against residences and vehicles.⁹² These actions have been carried out by, among others, the Animal Liberation Front (ALF), the Animal Liberation Brigade, the UCLA Primate Freedom Project, and SHAC (Stop Huntingdon Animal Cruelty).⁹³

To see this tactical evolution, one can look, for example, at two events nearly twenty years apart. In July 1989, the ALF entered a laboratory at Texas Tech's Health Sciences Center in Lubbock, Texas, that specialized in research on sleeping disorders. The

⁸⁵ *Id.*

⁸⁶ Jeanne Whalen, *Arrests Made Among Animal Lab's Foes*, WALL ST. J. (Nov. 28, 2012), http://online.wsj.com/article/SB10001424127887323751104578147373341168916.html?mod=ITP_marketplace_1.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ James Ottavio Castagnera, *All Species Are Created Equal? The Legal and Illegal Efforts of Animal-Rights Activists to Secure Lower-Order Civil Rights and Liberties*, 4 *HOMELAND SECURITY REV.* 13, 14 (2010).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

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ALF damaged and disabled equipment, spray-painted slogans on the walls, and removed five cats being used in experiments.⁹⁴ The laboratory was shut down for forty-five days with damage, both direct and indirect, estimated at over one million dollars.⁹⁵ Nineteen years later, in 2008, the home of UCLA's Dr. Edythe D. London, who uses primates in her study of addiction, was firebombed by the ALF.⁹⁶

The ALF is a loose body of individuals united purportedly under a philosophy designed to improve the condition of animals, especially those subject to laboratory testing. The first of five ALF guidelines is to liberate animals from laboratories.⁹⁷ The second is to inflict economic damage on those "who profit from the misery and exploitation of animals."⁹⁸ The third is to reveal the "horror and atrocities" inflicted against animals behind closed doors, by performing non-violent and "direct actions" and liberations.⁹⁹

But are the ALF and its loose brethren achieving what they wish? UCLA's Dr. London says she knows of a UCLA researcher who abandoned his studies of the visual system because of threats and fear of physical violence.¹⁰⁰ Almost certainly there are other researchers who have managed to reduce testing. However, another effect of actions such as those carried out by the ALF was the 1992 passage of the Animal Enterprise Protection Act (AEPA),¹⁰¹ which was subsequently amended in 2002 and then again in 2006 when it was rebranded the Animal Enterprise Terrorism Act (AETA).¹⁰² The AETA has had far reaching consequences: it has had a stifling effect on certain animal rights-based actions such that, *inter alia*, the Equal Justice Alliance was formed to "defea[t] the Animal Enterprise Terrorism Act (AETA)."¹⁰³ The Equal Justice Alliance is supported by two hundred organizations including the American Society for the Prevention of Cruelty to Animals, the

⁹⁴ *About ALF/History - Costs Run to Millions as Others Cope with Arson, Bombs, and Animal Releases*, ANIMAL LIBERATION FRONT, http://www.animalliberationfront.com/ALFront/Premise_History/ALFTXTer.htm (last visited Dec. 31, 2012).

⁹⁵ *Id.*

⁹⁶ Richard Monastersky, *UCLA Professor's House Is Firebombed*, THE CHRON. OF HIGHER EDU. (Feb. 6, 2008), available at <http://chronicle.com/article/UCLA-Professors-House-Is/40396/>.

⁹⁷ *The ALF Credo and Guidelines*, ANIMAL LIBERATION FRONT, http://www.animalliberationfront.com/ALFront/alf_credo.htm (last visited Nov. 29, 2012).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Monastersky, *supra* note 96.

¹⁰¹ Animal Enterprise Protection Act, Pub. L. No. 102-36 (1992).

¹⁰² Animal Enterprise Terrorism Act, 18 U.S.C. § 43 (2006).

¹⁰³ EQUAL JUSTICE ALLIANCE, <http://www.noaeta.org/index.htm> (last visited Dec. 31, 2012).

Humane Society of the United States, the Natural Resources Defense Council, the National Lawyers Guild, and the New York City Bar Association.¹⁰⁴ The thrust of the opposition's argument is that not only does the AETA label somewhat benign acts of protest or sabotage as terrorism, with the sanctions that accompany such a severely classified act, but also that the AETA stifles freedom of speech and organization by criminalizing damage or interference with an animal enterprise that brings about economic loss or bodily injury or fear of injury, an arguably broad baseline on which to base criminal sanctions.¹⁰⁵

A stated impetus for these provisions in the AETA was a desire to blunt the actions of SHAC, which reported on its website "direct actions," including illegal acts, taken by parties against companies doing business with Huntingdon Life Sciences.¹⁰⁶ It was felt, perhaps naturally, by AETA drafters that such "reporting" by an organization formed to oppose the very target of the reported "direct actions" instigated further "direct actions."¹⁰⁷ However, there are adherents to the argument that such "reporting," even if it has an spurring effect, is speech protected by the United States Constitution.¹⁰⁸

Another effect of extra-legal attempts to curb animal testing is that the United States Federal Bureau of Investigation (FBI) can state that certain types of animal activists are "[o]ne of today's most serious domestic terrorism threats."¹⁰⁹ Furthermore, United States Senator James M. Inhofe has even labeled the ALF—together with the Earth Liberation Front—as an organization posing the "#1 domestic terror concern over the likes of white

¹⁰⁴ *Id.*

¹⁰⁵ Kimberly E. McCoy, *Subverting Justice: An Indictment of the Animal Enterprise Terrorism Act*, 14 *ANIMAL L.* 53, 62, 63 (2007).

¹⁰⁶ *Animal Rights: Activism vs. Criminality: Hearing Before the U.S. Senate Committee on Environment and Public Works*, 109th Cong. (May 18, 2005), available at <http://www.fbi.gov/news/testimony/addressing-the-threat-of-animal-rights-extremism-and-eco-terrorism> (statement of John E. Lewis, Deputy Assistant Director: Counterterrorism Division: Federal Bureau of Investigation) [hereinafter Statement of John E. Lewis].

¹⁰⁷ *Id.*

¹⁰⁸ See, e.g., Jared S. Goodman, Note, *Shielding Corporate Interests from Public Dissent: An Examination of the Undesirability and Unconstitutionality of "Eco-Terrorism" Legislation*, 19 *J.L. & POL'Y* 823 (2008); Dara Lovitz, *Animal Lovers and Tree Huggers Are the New Cold-Blooded Criminals?: Examining the Flaws of Ecoterrorism Bills*, 3 *J. ANIMAL L.* 79 (2007); Andrew N. Ireland Moore, *Caging Animal Advocates' Political Freedoms: The Unconstitutionality of the Animal and Ecological Terrorism Act*, 11 *ANIMAL L.* 255 (2005); McCoy, *supra* note 105; EQUAL JUSTICE ALLIANCE, *supra* note 103.

¹⁰⁹ Statement of John E. Lewis, *supra* note 106.

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supremacists, militias, or anti-abortion groups.”¹¹⁰ These and other similar characterizations of the ALF almost certainly benefit neither animal-rights supporters nor animals, regardless of the statements’ accuracy. The freedom for the FBI and Senator Inhofe, among others, to make statements like these has been supplied, in large part, by ammunition of extra-legal activists. Certainly it is possible that, over time, the tables will turn and these activists will be regarded as similar to abolitionists in the time of human slavery. However, that is not the case today. The public’s acceptance of such activists’ being labeled as terrorists is, overall, obviously solid, as evidenced by the democratic process’s bringing about the transformation of the Animal Enterprise Protection Act, already an act with teeth, into the Animal Enterprise “Terrorism” Act. Given the argument that organizations like the ALF and SHAC have accomplished few positive and even substantial negative outcomes, perhaps it is time to attempt alternative means.

B. *Mediation as a Tool*

As noted above, there are those who would like to abolish animal testing.¹¹¹ There are also those who feel that the AWA’s and NIH’s approaches to monitoring testing are inadequate.¹¹² However, the USDA would argue that it is continually improving monitoring, as evidenced by its recent introduction of the “substantial compliance” measuring stick.¹¹³ Furthermore, parties who attempt to challenge the USDA through the legal process face many obstacles, often including the inability to gain standing to even attempt to pursue their goals. Animals themselves obviously have no ability or current legal right to help shape the debate.

Extra-legal organizations like the ALF operate under a different paradigm. Such organizations are less interested in parsing the intricacies of legal approaches; however, they thereby inadvertently invite the full power of law enforcement against themselves while weakening themselves in the public’s eyes. By extension, the

¹¹⁰ *Oversight on Eco-Terrorism specifically examining the Earth Liberation Front (“ELF”) and the Animal Liberation Front (“ALF”): Hearing Before the U.S. Senate Committee on Environment & Public Works, 109th Cong. (May 18, 2005) (Statement of Senator James M. Inhofe), available at http://epw.senate.gov/hearing_statements.cfm?id=247266 (last visited Dec. 31, 2012).*

¹¹¹ REGAN, *supra* note 42; FRANCIONE, *supra* note 42.

¹¹² Giese, *supra* note 70.

¹¹³ USDA, *supra* note 52, at 15.

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way more “mainstream” animal proponents are viewed has been weakened.

Still, those engaged in testing also often find themselves under fire or scrutiny, with their research disrupted as a result. Furthermore, substantial resources are often required for researchers to respond to their opponents, whether in courts of law or courts of public opinion. The resources involved in rebuilding facilities or reconstructing research damaged by opponents engaged in extra-legal actions also can be substantial. In addition, while society currently sanctions most testing, that is not necessarily because there is a societal consensus that particular aspects of animal testing are acceptable.

In fact, the rhetoric on both sides of the testing debate appears more designed to appease the public than lead to any constructive dialogue. Each side demonizes the other to the ultimate detriment of both sides. Too often in this dispute, the parties lose sight of what should matter—namely, for opponents of animal testing, should be the animals, and, for researchers, should be efficient and valuable research.

While gains in this debate can be made through litigation, legal “direct actions,” and even public shaming, the fact is that if these methods are not combined with some level of goodwill on the other side, or true acceptance by the other side of new ideas, “victories” will be hard-fought and ever in danger of being subverted. Furthermore, the substantive resources for victories’ maintenance may simply not exist in a society that cannot find resources for the maintenance of human self-improvement.

By being placed on the defensive, researchers cannot feel safe bringing out their own existing concerns about animal testing, for fear of the societal consequences.

Likewise, those who are opposed to aspects of animal testing are not necessarily all strict abolitionists intent on bringing all higher research involving animals to an end. Even those who are abolitionists might welcome an opportunity to engage in a dialogue that might bring about some positive change. Only the most delusional of abolitionists deny that animal testing is not going away soon.

The director of a respected, national animal rights-type organization recently said to me that those engaged in extra-legal activities act of anger and a sense of powerlessness. Conversely, participation in mediation brings participants a sense of power over the direction of a dispute. A desire for power to affect change is

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the core motivation for the formation and activities of groups like the ALF and SHAC.

The exact contours of mediation, as it applies to the animal-testing realm, can be based upon the particular testing setting at issue. Neither side should come to mediation expecting to pursue larger agendas regarding the general legitimacy of testing unless it is clear the other side is also willing and prepared to do so. Changes in the paradigm of testing that will benefit both sides must come incrementally.

Mediation could lead to researchers allowing the other side into the laboratory to observe. This only could improve the welfare of animals. Frank discussion, as opposed to litigation, regarding the necessity of a particular regimen of animal testing could cause a sharpening of focus on how much testing of animals is truly necessary and whether there are other alternatives in specific cases that generate more credible testing results. This only will ensue, however, if some level of goodwill exists between the parties. Through mediation, opponents of testing might discover that not all testing is harmful to the subject animals and, furthermore, that some testing might even benefit animals. Certainly, animal rights proponents arguing for legal personhood for animals could also probably envision some good that can come to animals from testing. Mediation could also allow parties to go beyond the more baseline focus of the AWA. Laws, in almost all instances, have a substantive constraining component. Mediation allows parties to step beyond these artificial constraints.

For those interested in a hybrid mediation/confrontational approach, further action can be pursued if mediation is not joined, or mediation can be incorporated into action already commenced. Threats have served neither side of the animal rights debate, whether the threats have been launched by animal proponents or by those aligned with researchers, such as law enforcement and legislators. If parties commence mediation free of other issues and the mediation proves unsuccessful, then further action can always be commenced at a later time.

Laboratory testing of animals will probably always be a contentious issue. Still, the approaches of both sides in this debate have, at times, been lacking, as evidenced by the results: destroyed laboratories and research, prison sentences, government agencies and their representatives under fire, parties on both sides living in fear, loss of public esteem for both sides, the waste of tremendous amounts of resources, legislative action that is arguably draconian,

researchers leaving the field, and society's having paid its own price. Mediation of issues involving laboratory testing of animals has the potential to bring progress to this stalled, endless debate. Furthermore, even short-term solutions generated by mediation may lead to long-term answers.

IV. VETERINARY MALPRACTICE

As with many other conflicts involving animals, allegations of veterinary malpractice tend to bring out high emotions. What catches an owner's eye is either the death of an animal or another equally apparent—and, thus, often serious—condition.

I have spoken to some grieving or distraught animal owners as they relayed their angst. Often there is a mix of anger and guilt—anger at the veterinarians and the circumstances the owners find themselves in, and guilt that somehow the owners themselves could have done something to prevent the problem at issue. I recently spoke with one owner who said that before he dropped off his pet at the veterinarian's office, he had had a premonition that his animal would suffer serious harm. The case involved what should have been a simple procedure, a dog's teeth cleaning; the dog died several days thereafter. However, as with all medical procedures, nothing ever should be classified as simple. Another incident from when I worked at a veterinary clinic many years ago involved a dog brought in for a nail trim. A co-worker and I were charged with the task and, in the process of attempting to trim the nails, the hyper-excited dog died. It remains unclear exactly what caused the death. It may have been a heart attack, it may have been the pressure exerted on the dog's chest to try to keep him still, or it may have been something else entirely. Animals have minds of their own, and the inability of humans and animals to substantively communicate presents hazards for everyone involved.

In the case of the dog brought in for a teeth cleaning, the owner had taken many actions prior to contacting me for mediation. He had attempted to stop credit card payments made to the veterinarian for treatment related to the incident at issue. He had had two necropsies performed, one by a leading university veterinary hospital. Because his contentions were that an overdose of a certain type of drug had killed his dog, or, alternatively, that the particular drug at issue should never have been used to anesthetize his dog for the teeth cleaning, he had also been in discussions with

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the drug company. He had communicated, or at other times attempted to make contact, with the veterinarian, but not to his satisfaction. Perhaps what had bothered him most was his perception that the veterinarian had not responded adequately, especially at the time his dog began showing alarming symptoms.

The owner was faced with the same issue that almost all owners in similar situations face. The expected payout in a veterinary malpractice case is not high, especially in relation to the resources that must be expended by a plaintiff. In fact, payouts of any size are so infrequent that 2013 malpractice insurance premiums offered to veterinarians through the American Veterinary Medical Association (AMVA), which provide \$100,000 of coverage per claim and \$300,000 of aggregate coverage, range from \$1536 for an equine practice to \$173 for a small animal practice.¹¹⁴ For \$222, a small animal practice can obtain \$1,000,000 of coverage per claim and \$3,000,000 of aggregate coverage.¹¹⁵ Coverage for a food animal practice ranges from \$571 to \$822 depending whether the practitioner obtains the 100,000/300,000 tier of coverage or the 1,000,000/3,000,000 tier.¹¹⁶

The owner also considered filing a complaint with the state veterinary board. However, state veterinary boards generally are not strong regulators of veterinarians' behavior.¹¹⁷ Years of statistics demonstrate that state veterinary boards rarely impose serious sanctions and thereby essentially eliminate substantive enforcement.¹¹⁸ Some states do not even keep track of complaints against veterinarians.¹¹⁹ Thus, the owner, perhaps rightfully, concluded that there was a strong likelihood that he would not find any real satisfaction with the state veterinary board.

So, at the request of the owner, I drafted a letter to the veterinarian offering my services as a mediator. The veterinarian declined. On the surface, it must have appeared to her that there was little incentive, monetarily at least, to engage in mediation.

In fact, in the absence of a sea change in the amounts awarded in veterinary malpractice cases, there would appear little monetary

¹¹⁴ *AVMA/PLIT Annual Premiums Effective Jan. 1, 2013*, AVMA/PLIT, http://avmaplit.com/uploadedFiles/AVMAPLIT/Top_Navigation/Shared_Resources/2013%20Rate%20Card%20and%20App.pdf, (last visited January 18, 2013).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Christopher Green, Note, *The Future of Veterinary Malpractice Liability in the Care of Companion Animals*, 10 *ANIMAL L.* 163, 183 (2004).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 184.

incentive for veterinarians or their insurance companies to do anything other than force plaintiffs to expend resources pursuing a trial. Few lawyers will take veterinary malpractice cases on contingency.¹²⁰ The resources needed for a plaintiff to engage in litigation often are not markedly exceeded by the expected return, even in a best-case scenario.¹²¹ The cost of bringing a veterinary malpractice case was estimated in 2002 at \$25,000, and awards frequently are limited to the market value of the animal, which is less than the filing fee to bring a malpractice suit.¹²² However, in spite of this, there are reasons that veterinarians should consider employing ADR.

The veterinarian in the teeth-cleaning case was situated in a rather small town. The aggrieved owner told me he had taken it upon himself to discuss his feelings about the veterinarian with many of the people with whom he came into contact. Many of these people apparently shared his negative opinion of the veterinarian. I considered that an angry and hurt owner was relaying these anecdotes to me, but I did recognize the importance of his narrative. It is not hard for me to imagine that the veterinarian's reputation had probably been tarnished, with the only question being to what extent. Reputational damage can occur to a larger extent in a city. Veterinarians are much scarcer than human physicians,¹²³ and thus more easily noted.

Time and time again, we hear in human medical malpractice cases that the conflict could have been averted had the physician apologized or simply shown an interest in finding common ground with the injured. Unfortunately, as happened in the teeth-cleaning case, providers can be perceived as unresponsive or unfeeling. In fact, such a perception was arguably the overriding issue: the owner felt that the veterinarian had been unresponsive not only in the dog's time of need, but also following the dog's death. This feeling was underscored by the veterinarian's unwillingness to par-

¹²⁰ Gerald L. Eichinger, *Veterinary Medicine: External Pressures On An Insular Profession and How Those Pressures Threaten to Change Current Malpractice Jurisprudence*, 67 MONT. L. REV. 231, 236 (2006).

¹²¹ Green, *supra* note 117, at 196.

¹²² *Id.* at n. 178.

¹²³ United States Department of Labor, Bureau of Labor Statistics, Occupational Outlook Handbook, Healthcare, Physicians and Surgeons, available at <http://www.bls.gov/ooh/healthcare/physicians-and-surgeons.htm> (last visited June 13, 2013) (In 2010 there were 691,000 physicians and surgeons in the United States); United States Department of Labor, Bureau of Labor Statistics, Occupational Outlook Handbook, Healthcare, Veterinarians, available at <http://www.bls.gov/ooh/Healthcare/Veterinarians.htm#tab-6> (last visited June 13, 2013) (In 2010 there were 61,400 veterinarians in the United States).

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ticipate in mediation. If veterinarians began making more frequent use of mediation, scenarios like the one above could result more in lasting, positive resolution for all parties. My experience is that most pet owners understand that treating an animal is not always easy, and many owners appear to be looking simply for a veterinarian who seems to care.

Furthermore, there will come a day when veterinarians and their insurance companies will be faced with much more substantive damage awards in veterinary malpractice matters, at least for those involving companion animals. Damage awards, and the way in which damages involving animals are measured, are increasing in breadth. For example, while it was once almost unthinkable for a plaintiff to have any chance at receiving compensation for emotion-based damages involving the loss of, or injury to, an animal, owners are now pushing for—and, in some cases, receiving—damage awards considering the intrinsic or special value of a particular animal.¹²⁴

If the veterinary industry takes the lead in using ADR as a preferred method of conflict resolution—and especially if veterinarians make ADR a mandatory method—much of the expected future losses might be averted or lessened. Veterinarians can require their clients to agree to ADR in the event of a mishap. Animals are legal property, and mandatory mediation and arbitration are common in property disputes of all kinds. At the very least, mandating mediation would slow down the plaintiffs' bar and provide a much smaller incentive for the brightest of animal law attorneys to put forth effort attempting to set precedent in court or knock down various barriers to obtaining sizeable veterinary malpractice awards. Furthermore, in many rural areas, those seeking veterinary care would have one choice—agree to the use of ADR or receive no veterinary care at all, or receive care only in the most dire of emergencies. Simply put, ADR may offer veterinarians and the insurance industry the ability to take much more control over the contours of the veterinary malpractice apparatus at a time when the apparatus has yet to be used.

¹²⁴ Medlen v. Strickland, 353 S.W.3d 576 (Tex. App. 2011); Roemer v. Gray, Case No. 45-09514 slip op. (Wash. Dist. Ct. King Cty. May 2, 2005); Bluestone v. Bergstrom, Case No. 00CC00796 (Cal. Sup. Ct. Orange Cty. 2004); Brousseau v. Rosenthal, 443 N.Y.S.2d 285 (1980); Corso v. Crawford Dog and Cat Hospital, Inc., 415 N.Y.S.2d 182 (N.Y. City Civ. Ct. 1979).

V. CONCLUSION

As Edmund Burke surveyed, with disdain, the wreckage of the French Revolution, he spoke of society as a contract between, “those who are living, those who are dead, and those who are to be born.”¹²⁵ The developments in our own country over the past half-century also evince a revolution in various forms; concurrently, the institutionalization of a methodology of merciless attack on one’s opponents has become commonplace. This methodology seeps more and more into not only large group conflicts, but also individual disputes. Society, continually in transition, does not operate at peak efficiency when swirling constantly in heated, attack-based disputes.

By choosing to employ ADR to address animal law issues, as opposed to turning to courts, litigation, illegal actions, or legal attacks, disputing parties can help lead to a new paradigm through example. This approach can also elevate animals and the resolution of conflicts involving animals to greater societal respect. For those looking to improve the state of animals, the attainment of this goal stands a much better chance when animals are viewed as part of a solution to particular societal problems.

For those who find themselves positioned against animal interests, there is also much to be gained by participating in ADR. When a community sees an entity attempting to forge peaceful resolution, it is harder for that community to demonize that entity. In fact, when promoted properly, participation in ADR can become a tremendous public relations asset.

The exchange of ideas that occurs in ADR also is of paramount value in situations involving animals. Because animals are incapable of providing substantive input, it is incumbent on human parties that there be as much discussion as possible, for the benefit of both the humans’ interests and the animals’. Disputes over animal issues are in a class by themselves and deserve such careful treatment. ADR offers the clean slate needed to make this possible.

¹²⁵ EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 96 (L.G. Mitchell ed., Oxford University Press 2009) (1790).

