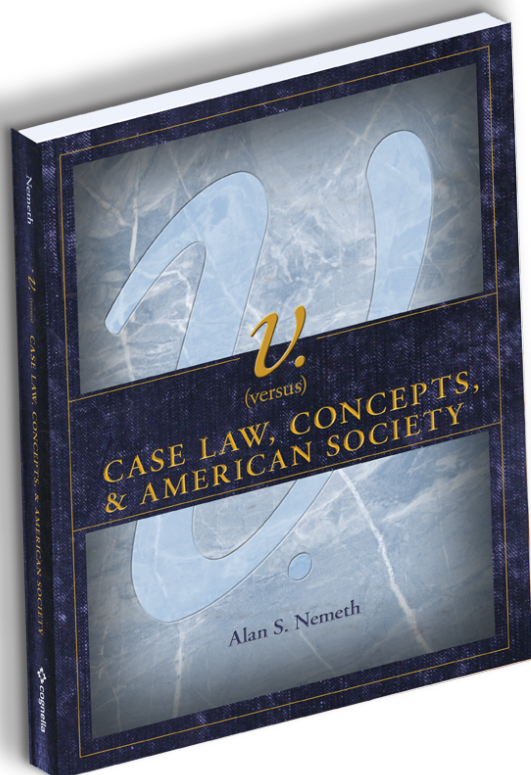




V. (Versus)

Case Law, Concepts, & American Society

By Alan S. Nemeth

Included in this preview:

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- Introduction
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Sneak Preview



v.

(versus)

Case Law, Concepts, & American Society

First Edition

By Alan S. Nemeth

University of Maryland

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❖ Introduction

Law & Society in America

The title of the book is “v.,” which is representative of the v., “versus,” in case names, such as *Marbury v. Madison*, *Roe v. Wade*, etc. Rather than reading about the law and legal concepts through the author’s interpretations, this book relies primarily on actual court opinions to lay out the concepts and highlight their effects on society. As a result, this book is heavy on cases and original documents and short on prose. It uses the cases and documents as a guide through which the reader can view issues of law and their interplay with society and vice versa.

There are many ways to discuss law and society. One can review different topics, such as governmental control, societal change, and how the law drives each. One can review various theories of law and society, the mechanisms of law, the history of law, groups affecting and affected by the law, and so on. This book will instead review American law and society through various different fields of law by examining the legal concepts and case law within those fields. The concepts and cases selected are by no means an exhaustive list. Multiple volumes and more than three years of law school would be necessary to cover every possible legal concept affecting our society. This book is merely designed to be representative of some of the most important legal issues currently affecting our society.

The allure of the law is that it is dynamic and ever-changing despite its well-established framework. Legislatures create the law. Courts interpret that law through the cases brought before them. Society follows the law as its foundation and rules of behavior. It is that simple. The beauty of the law is that as new laws are implemented, society is forced to change or modify its previously established behavior. For example, when legislatures across the country began banning smoking in buildings, smokers were compelled to change their smoking habits due to the change in the law. Change, however, is not unidirectional. Society can demand changes in the law as it evolves and matures over time. The civil rights laws are an example of this. Protests against racial discrimination fostered public interest in the civil rights movement, which eventually forced a change in the law through legislation and court decisions.

Just as law and society change over time, so too do the fields of law in which an attorney can practice. According to HG.org, an online legal information site, there are currently over 260 legal specialties and sub-specialties. These range from the more common fields of corporate law, criminal law, family law, personal injury, wills & trusts, employment law, intellectual property law, tax law, property/real estate law, and so on, to the lesser known fields of veterans law, construction law, election law, administrative/regulatory law, education law, admiralty/maritime law, etc. There are also the newer and growing fields of animal law, environmental law, elder law, health law, cyberspace/e-commerce law, gaming law, disability law, fashion law, and more.

Throughout the book, when possible, the vote count of the Supreme Court justices is included with the case cite. For example in *Kulko*, the Court voted 6–3 in favor of the decision, which the reader can see in the parentheses next to “Supreme Court of the United States.”

KULKO v. SUPERIOR COURT OF CALIFORNIA

Supreme Court of the United States (6–3)

436 U.S. 84 (1978)

The vote count gives the reader a sense of how closely the Court was divided or united on the issues presented to it in each case. As will be seen throughout the book, the outcome of a particular case often rests on the vote of one justice—a justice who is appointed by the president of the United States and confirmed by the U.S. Senate. Most importantly, however, the vote count serves to remind the reader of the importance of the political process in relation to the law and society. Elections are about more than just getting a particular candidate into office. Elections help to shape the future direction that society will take, since elected officials affect more than mere legislation. They leave a legacy for years to come through the appointment and confirmation of the Supreme Court justices whom they select, as well as judges throughout the judicial system.

The concepts included under the umbrella of law and society pervade every aspect of daily life. From the moment one wakes up in the morning until the moment one goes to sleep at night, an individual is affected by the law. People come into contact with the law in the jobs/professions they perform, in the products they buy, in the entertainment they enjoy, and in the way they choose to live their lives. This book is designed to provide a broad overview of some of the many common legal concepts touching everyday life. There is much more to law and society than one volume can hold. It is this author’s hope, however, that the cases and concepts included herein will provide a good basic introduction to some common legal concepts and the societal issues that they affect.

❖ Chapter 1

Animal Law

Animal law is a relatively new, yet rapidly growing field of law. It cuts across a wide variety of legal subject matter, including essentially every chapter heading in this book, as well as other established fields, such as environmental law, administrative law, and disability law. According to the Animal Legal Defense Fund, as of this writing, at least 136 law schools throughout the United States and Canada offer classes in animal law, and 36 bar associations have animal law sections or committees. The American Bar Association also has an animal law committee. In September 2011, the ABA published *Careers in Animal Law*. With that publication, the ABA recognized animal law as “[o]ne of the fastest growing legal disciplines” and defined animal law as “protecting and improving the lives of animals through city ordinances, state and federal laws, international treaties, and cases that impact animals.”

Animal law is a very broad field of law, but it can be defined simply as the laws and regulations affecting animals. Animal law concerns itself with issues facing domestic animals, farm animals, animals in the wild, endangered species, marine animals, animals used in research, animals used in entertainment, etc., as well as with the relationship between humans and animals. Additionally, animal law examines the link between animal cruelty and violence against humans.

Besides the actual application of law to specific cases and situations, some of the larger or philosophical questions that animal law delves into include:

- What is an animal? (Statutes define animals differently from state to state and from law to law.)
- What rights do animals have? (Do they have the right to be free from cruelty and mistreatment?)
- What rights should they have? (Should they have the right to live their lives as they would without human intervention? Should an animal have the right not to be forced to perform in a circus?)
- Should different animals have different rights? (Does a primate deserve more rights than an amphibian, since they are more like humans? Does a dog or a cat have more rights than a snake, since they are “cuter” and “cuddlier?”)

- Should animals be treated differently in different situations? (Is a mouse kept as a pet different from a mouse that is found running around a pantry?)
- Are animals property? (Should they be treated the same way a couch or a car or a diamond necklace are treated? Are they like any other piece of property?)
- Should animals be considered something other than property? (Does the fact that they are feeling and sentient beings mean anything? Does the fact that people feel that animals are a part of their families change the way that they should be legally viewed? Should animals follow the path of humans who were once treated as property—women, children, slaves—in the development of rights and legal standing?)

According to a March 4, 2009 Congressional Research Service paper, “Brief Summaries of Federal Animal Protection Statutes” (by Henry Cohen), there were over 90 federal statutes relating to animals. More have been passed since then. The Supreme Court has even weighed in on the animal law issue. Most recently, in *U.S. v. Stevens*, 130 S. Ct. 1577, 559 US __, 176 (2010), the Court found a federal statute that banned depictions of animal cruelty to be unconstitutional.

Every state has animal cruelty laws—some stronger than others. A number of states have already passed and others are considering passing legislation to provide protection to animals in domestic abuse situations, since an abusive spouse will often hurt or threaten to hurt the family pets as a way of further abusing or getting back at his/her spouse. Legislation has been proposed to allow judges to grant joint custody and visitation rights to family pets in the case of a divorce, instead of treating the family pet as just another piece of property. The majority of states have passed legislation allowing for pet trusts—trusts that benefit pets after the death of their owners. None of these laws would be applicable to mere property. So, it seems that law and/or society do already recognize animals as something other than “property,” at least in certain states and in certain situations.

The cruel treatment of farm animals has been addressed in recent years. Animal welfare groups have increasingly made society aware of the cruel living conditions under which various farm animals have been forced to live (and, in most cases, still do). Several state legislatures have responded to the subsequent growth in public interest by banning particular farming practices, such as the use of battery cages (small cramped cages in which egg-laying hens are forced to live), gestation crates (small enclosures for pregnant pigs which do not allow the pigs room to move around), and veal crates (similar small enclosures for calves destined to become veal). This legislation has required the factory farming industry to change its commonly accepted practices and is a clear example of how society can affect a change in the law.

As society becomes more aware of these issues, market forces and the force of law will further precipitate change in the current practices of factory farms. For example, as laws against the use of battery

cages proliferate, not only will egg producers not be able to use battery cages in the states that have banned them, but they will no longer be able to sell eggs derived from battery cages interstate to states whose laws have banned the sale of eggs produced in battery cages. Additionally, as more consumers both individually and through large organizations (such as governments, corporations, and universities) choose to buy cage-free eggs over traditional battery cage eggs, supply and demand will force farms to amend their mode of operating or risk losing revenue and ultimately their businesses.

Recent animal law issues explore the intertwining between animal law and another relatively new field of law—that of fashion law. There have been cases where a designer or clothes manufacturer has claimed to be using faux fur on its clothing line when, in fact, it was not faux but real fur. This sort of case can raise a whole host of issues, including animal protection, consumer protection, false advertising, and perhaps even issues in tort (if someone is allergic to fur and s/he suffers an injury due to the fur, because s/he thought s/he was buying faux fur). This type of case is not relegated to the attention of animal welfare activists. In December 2010, President Obama signed the Truth in Fur Labeling Act, which closed a loophole and now requires garments under \$150 to be properly labeled—if a garment contains fur, it must be clearly labeled as such and with the country and animal of origin of the fur.

The following cases (*People v. Voelker* and *People v. Garcia*) represent but a very small sampling of issues involved in the study or practice of animal law.

People v. Voelker raises a number of issues, including cruelty and free speech.

PEOPLE v. VOELKER

Criminal Court of the City of New York, Kings County
658 N.Y.S.2d 180 (1997)

ESTHER M. MORGENSTERN, J.

Can a defendant insulate himself from prosecution on First Amendment grounds by televising the criminal acts of decapitating three live, conscious iguanas in violation of the State's anti-cruelty statute?

Defendant was arrested on October 2, 1996 and charged with three counts of overdriving, torturing and injuring animals pursuant to section 353 of the Agriculture and Markets Law. These charges stem from a videotaped incident wherein defendant is alleged to have cut off the heads of three live, conscious iguanas without justification.

* * *

The complaint in this case alleges, in pertinent part, that on or about and between February 6, 1996 and August 2, 1996 at 85 Havemeyer Street, apartment 1L, in Brooklyn, the defendant allegedly cut off the heads of three live, conscious iguanas without justification. The complaint alleges further that Assistant District Attorney Todd Davis (hereinafter deponent) is in possession of and has viewed a videotape showing the defendant committing the acts alleged. Additionally, the complaint alleges that deponent was informed:

* * *

“by Frank Fitzgerald that informant recorded said videotape on August 9, 1996, from a television broadcast by Manhattan Neighborhood Network of the show entitled ‘Sick and Wrong,’ 566*566 and that informant saw the same incident broadcast on an earlier edition of the show, ‘Sick and Wrong,’ aired on August 2, 1996.”

Defendant maintains that an essential element of Agriculture and Markets Law § 353 is an “unjustifiable act” toward an animal, and that the allegation that defendant cut off the heads of three live iguanas, “without justification,” is conclusory and insufficient. Defendant contends that killing the animals in this case was justified and necessary and that any pain or suffering was temporary, unavoidable and without criminal intent.

The People maintain that the term “without justification” means just what it says, that defendant cut off the heads of three animals without apparent justification. Thus, the allegations in the accusatory instrument provide reasonable cause to believe that the defendant committed the offense charged and establish, if true, every element of the offense charged.

The People maintain further that defendant’s alleged “justification defense” does not support the motion to dismiss and that the issue of justification is a question of fact to be determined at trial. Additionally, the People argue that defendant’s acts were unjustified in that defendant violated the State’s anti-cruelty statute by cutting off the heads of three conscious iguanas and that the mere fact that defendant thereafter allegedly cooked and consumed these animals does not justify defendant’s actions.

DISCUSSION

* * *

The Constitutional Issue

Defendant also moves for dismissal upon the ground that Agriculture and Markets Law § 353 is being unconstitutionally applied in that the motivation for the prosecution of defendant is that he chose to

televising an act that is normally relegated to the back room of a restaurant, and that such content-based restrictions on speech are unconstitutional.

There is no question that government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the government, contravenes an individual's rights under the First Amendment. (*Turner Broadcasting Sys. v. Federal Communications Commn.*, 512 US 622 [1994].) However, it is well established that a content-neutral restriction on speech will be upheld if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." (*Turner Broadcasting Sys. v. Federal Communications Commn.*, *supra*, at 662, quoting *United States v. O'Brien*, 391 US 367, 377 [1968].)

Contrary to defendant's contention, this court holds that the animal cruelty statute at issue is not a content-based restriction on speech. Rather, it is a restriction against torturing, injuring, maiming, mutilating or killing animals. The statute is not directed at any form of communication. Furthermore, the People correctly point out that although the statute might prohibit the torturing of an animal as a form of expression, such a statute would not be unconstitutional where it serves a legitimate governmental interest (*Barnes v. Glen Theatre*, 501 US 560, 567 [1991]), and that the United States Supreme Court has indicated that a neutral anti-cruelty statute which is limited to the Government's legitimate interest in the prevention of cruelty to animals may be upheld despite its effect on religious observance. (*Church of Lukumi Babalu Aye v. Hialeah*, 508 US 520, 538 [1993].)

Moreover, defendant is not being prosecuted because he televised the decapitation of the iguanas. The televising of the decapitations merely provided law enforcement officials with a way to observe defendant engage in criminal activity. A defendant cannot shelter himself from prosecution by the mere televising of a criminal act. Taking defendant's argument to its logical conclusion, a defendant could televise any criminal act and seek to shield himself from prosecution on First Amendment grounds. Such an argument defies common sense and cannot be sustained.

The court holds that Agriculture and Markets Law § 353 is not being unconstitutionally applied in this case. Accordingly, defendant's motion to dismiss is denied on this ground.



People v. Garcia discusses a common issue, not only within an animal law context, but within the legal field in general. That is, how does one define terms? In this case, the term being examined is “companion animal.”

PEOPLE v. GARCIA

Appellate Division of the Supreme Court of the State of New York, First Department
29 A.D.3d 255 (2006)

CATTERSON, J.

The earliest known domestic animal appears to be the dog, a companion to mankind as early as 15,000 B.C. Goats, sheep, pigs and cows followed in domestication in the next 10,000 years. Horses, however, did not succumb to the lure of mankind’s presence until 4000 B.C. The domestication of fish is believed to have begun much later, in China during the Tang Dynasty, around 620 A.D. The common goldfish (*Carassius auratus*), a member of the carp family that was first domesticated in China, is now the most commonly kept aquarium fish. The goldfish’s leap from domesticated fish to family pet and companion may have happened as early as 1368 during the Ming Dynasty. The goldfish’s popularity in the West began as the first public aquarium opened in London in 1853. Keeping goldfish as companions and pets in the United States has been popular since that time.

Agriculture and Markets Law § 353-a (1), “Aggravated cruelty to animals,” represents the Legislature’s recognition that man’s inhumanity to man often begins with inhumanity to those creatures that have formed particularly close relationships with mankind. (Assembly Mem in Support of L 1999, ch 118, 1999 McKinney’s Session Laws of NY, at 1585.) The scope of section 353-a (1) is a question of first impression for the Appellate Division, and the instant case compels the conclusion that its reach is broad.

On August 2, 2003, Emelie Martinez was living in an apartment with the defendant, her three children, Juan Torres, Crystal and Emaleeann, and Jesus Rabassa, an 18-year-old high school student. Juan was nine years old, Crystal eight and Emaleeann five. Also living in the apartment were two dogs, a cat, and three goldfish named after the children, Junior, Crystal and Emma.

At about 3:00 A.M., Martinez awoke on the sofa to find the defendant standing over her, holding the fish tank. She asked him what he was doing. The defendant threw the fish tank into the television set, saying, “That could have been you.” The fish tank shattered, as did the television screen and a portion of a glass wall unit. The defendant also destroyed Juan’s VCR by ripping it out and throwing it against the wall unit.

Eventually, the defendant and Martinez began cleaning up the mess. Juan came out of his room, with the girls behind him, crying. The defendant turned to Juan and said, "You want to see something awesome?" and stomped on Juan's fish, killing the fish. Martinez had to calm the children before she could continue cleaning up the mess.

* * *

The trial court also convicted the defendant of aggravated cruelty to animals, a felony. The court determined that the pet goldfish of Martinez and her children was a companion animal within the meaning of Agriculture and Markets Law § 353-a (1) and § 350 (5), and that the statute is not unconstitutionally vague.

"ALL CREATURES GREAT AND SMALL"^[*]

The defendant argues that his "stomping of young Juan's pet goldfish" is a misdemeanor pursuant to Agriculture and Markets Law § 353 (unjustifiable killing of any animal, whether wild or tame), and not a felony because a fish is not a "companion animal" and his "stomping" did not constitute "aggravated cruelty" within the meaning of the statute.

Agriculture and Markets Law § 353-a (1) provides:

"A person is guilty of aggravated cruelty to animals when, with no justifiable purpose, he or she intentionally kills or intentionally causes serious physical injury to a companion animal with aggravated cruelty. For purposes of this section, 'aggravated cruelty' shall mean conduct which: (i) is intended to cause extreme physical pain; or (ii) is done or carried out in an especially depraved or sadistic manner."

The term "companion animal" is defined in section 350 (5):

"'Companion animal' or 'pet' means any dog or cat, and shall also mean any other domesticated animal normally maintained in or near the household of the owner or person who cares for such other domesticated animal. 'Pet' or 'companion animal' shall not include a 'farm animal' as defined in this section."

The defendant contends that a fish is not a companion animal because it is not domesticated and because there is no reciprocity or mutuality of feeling between a fish and its owner, such as there is between a dog or a cat and its owner.

In the absence of a definition in the statute, the defendant, citing 4 Am Jur 2d, Animals § 2 (at 346 [Lawyers Coop Publ 1995]), defines “domesticated animals” as those that “no longer possess the disposition or inclination to escape,” and claims that “if dropped in a pond and offered the opportunity to swim away, a goldfish will do so without any hesitation and not look back.” He maintains that the statute’s reference to “any other” domesticated animal limits “companion animal[s]” to those that are similar to dogs or cats, that is, those with a degree of sentience sufficiently elevated to enable them to enter into a relationship of mutual affection with a human being. Furthermore, “[b]eloved household pets (fish) may be, but ‘companion animals’ in the same vein as dogs or cats they are not.”

The defendant’s contention that all household pets are equal but some are more equal than others is manifestly not derived from the statute. The Legislature simply did not require a reciprocity of affection in the definition of “companion animal.” To the contrary, the statutory language is consistent with the People’s contention that, “domesticated” is commonly understood to mean “to adapt (an animal or plant) to life in intimate association with and to the advantage of humans.” Thus, a goldfish such as the one herein is a domesticated rather than a wild animal within the common meaning of the term. Moreover, the goldfish was, as the statute requires, “normally maintained in or near the household of the owner or person who cares for [it].” Indeed, acknowledging that the goldfish is one of the most common household pets, defense counsel stipulated at trial that there are “millions of fish owners throughout the country.”

The defendant’s argument that goldfish are not domesticated animals because given the opportunity they would leave home is without merit. While this trait arguably distinguishes fish from dogs and, probably to a lesser extent cats, it fails to take into account that many other animals commonly considered pets, such as hermit crabs, gerbils, hamsters, guinea pigs and rabbits, would depart for less confining venues and greener pastures if given the opportunity. Loyalty, if that is what it is, is merely another characteristic urged by defendant—but not included by the Legislature—as a defining feature of a companion animal.

* * *

While the defendant maintains that the statute’s definition of “companion animal” is unconstitutionally vague, we find, as did the trial court, the statute sufficiently clear to apprise a person of ordinary intelligence that the sort of conduct in which the defendant engaged comes within the statute’s prohibition. (See *United States v. Harriss*, 347 US 612, 617 [1954].)

The defendant further asserts that because the fish’s death was instantaneous, it was not accompanied by “extreme physical pain” or accomplished with “especial[]” depravity or sadism, and that therefore the killing was not accomplished with any heightened level of cruelty. The trial court correctly observed that the legislative history of the statute indicates that the crime was established in recognition of the correlation between violence against animals and subsequent violence against human beings. (*People*

v. Garcia, 3 Misc 3d 699, 702 [Sup Ct, NY County 2004].) Thus, it must be inferred that the Legislature's concern was with the state of mind of the perpetrator rather than that of the victim.

* * *

[*] "All things bright and beautiful, all creatures great and small, all things wise and wonderful: The Lord God made them all." (Cecil F. Alexander, *Hymns For Little Children* [1848].)



The following concurrence from *Bueckner v. Hamel* is included, as it provides a sense of the growing societal recognition of the importance of animals to the lives of individuals in our society.

BUECKNER v. HAMEL
Court of Appeals of Texas, Houston (1st Dist.)
 886 S.W.2d 368 (1994)

ANDELL, Justice, concurring.

I agree that the majority's analysis and disposition of this case is correct. I write separately, however, to address what I consider to be a more substantial basis for affirming this award, namely, the intrinsic or special value of domestic animals as companions and beloved pets. The issue is whether bereaved pet owners must accept the market value of their pets as the measure of actual damages for their pets' wrongful killing, or if they have the option of accepting either the market value or the special value. I consider the general rule of market value to be inadequate for assessing damages for the loss of domestic pets. For the reasons in the following analysis, I would hold that the pet owners have the option of accepting either measure of damages. Hence, I would affirm, but on different grounds.

In this case, Bueckner challenges the sufficiency of the evidence to support the award of \$1450 in actual damages to compensate Hamel and Collins for the loss of their beloved pets. The trial court's findings consisted of five separate categories of value: (1) market value; (2) pecuniary value to Hamel and Collins; (3) value to Hamel and Collins of prospective litters of puppies; (4) *intrinsic value* of the dogs to Hamel and Collins and the *value of the dogs as companions* to Hamel and Collins; and (5) special value to Hamel and Collins *as beloved pets*.

* * *

The majority cites *Arrington v. Arrington*, 613 S.W.2d 565, 569 (Tex.Civ.App.—Fort Worth 1981, no writ), for the proposition that animals are treated as property in the eyes of the law. I agree that this is an established principle of law. But animals are not *merely* property. *Arrington* was a divorce case. Among many other items of “property” to be divided, it involved the question of which spouse would be the “managing conservator” of their pet dog, Bonnie Lou. The court decided that issue on the grounds that Bonnie Lou was the property of Mrs. Arrington. But the court spoke in terms that show how our society loves and appreciates dogs as domestic pets, or even as family members:

Bonnie Lou is a very fortunate little dog with two humans to shower upon her attentions and genuine love frequently not received by human children from their divorced parents. All too often children of broken homes are used by their parents to vent spite on each other or they use them as human ropes in a post divorce tug-of-war. In trying to hurt each other they often wreak immeasurable damage on the innocent pawns they profess to love. Dogs involved in divorce cases are luckier than children in divorce cases—they do not have to be treated as humans. The office of “managing conservator” was created for the benefit of human children, not canine.

A dog, for all its admirable and unique qualities, is not a human being and is not treated in the law as such. A dog is personal property, ownership of which is recognized under the law. There was testimony that Bonnie Lou was given to Mrs. Arrington over ten years ago.

Mr. Arrington agreed to Mrs. Arrington’s custody of the dog if he could have reasonable visitation. He does not complain of lack of visitation; only that he was not appointed managing conservator. We overrule point of error no. 7 with the *hope that both Arringtons will continue to enjoy the companionship of Bonnie Lou for years to come* within the guidelines set by the trial court. *We are sure there is enough love in that little canine heart to “go around.”* Love is not a commodity that can be bought and sold—or decreed. It should be shared and not argued about.

Id. (emphasis added; citations omitted).

This language is strikingly different from that used in disposing of inanimate property. This could only have been because animals are so different from other types of property. The Arringtons contended for the companionship of Bonnie Lou. While their conflict was easy to resolve under simple property concepts, simple property concepts cannot reflect the complex reality of the relationships between humans and their pets. Because of the characteristics of animals in general and of domestic pets in particular, I consider them to belong to a unique category of “property” that neither statutory law nor caselaw has yet recognized.

Many people who love and admire dogs as family members do so because of the traits that dogs often embody. These represent some of the best of human traits, including loyalty, trust, courage, playfulness,

and love. This cannot be said of inanimate property. At the same time, dogs typically lack the worst human traits, including avarice, apathy, pettiness, and hatred.

Scientific research has provided a wealth of understanding to us that we cannot rightly ignore. We now know that mammals share with us a great many emotive and cognitive characteristics, and that the higher primates are very similar to humans neurologically and genetically. It is not simplistic, ill-informed sentiment that has led our society to observe with compassion the occasionally televised plights of stranded whales and dolphins. It is, on the contrary, a recognition of a kinship that reaches across species boundaries.

The law must be informed by evolving knowledge and attitudes. Otherwise, it risks becoming irrelevant as a means of resolving conflicts. Society has long since moved beyond the untenable Cartesian view that animals are unfeeling automatons and, hence, *mere* property. The law should reflect society's recognition that animals are sentient and emotive beings that are capable of providing companionship to the humans with whom they live. In doing so, courts should not hesitate to acknowledge that a great number of people in this country today treat their pets as family members. Indeed, for many people, pets are the *only* family members they have.

Losing a beloved pet is not the same as losing an inanimate object, however cherished it may be. Even an heirloom of great sentimental value, if lost, does not constitute a loss comparable to that of a living being. This distinction applies even though the deceased living being is a nonhuman.

Bueckner contends that under existing Texas case law, if an animal has a market value, then that market value *alone* constitutes the proper measure of damages for the killing of the animal. No Texas Supreme Court case cited by either party, nor any that I have found, has held precisely on this point. I would disagree with *Redmon* and with any other appellate cases that are restrictive on this issue and hold that Hamel and Collins could recover *either* the market value *or* the special or intrinsic value of their beloved pets. Accordingly, I would affirm if the finding of \$1825 in actual damages is supported by *either* the evidence of the market or pecuniary value of Freckles and Muffin *or* the evidence of the intrinsic or special value of Freckles and Muffin.

As stated above, I concur in the analysis and disposition of the majority opinion. I hasten to add, however, that testimony that an animal is a beloved companion should generally be considered sufficient to justify a finding of damages well beyond the market value of the animal and its yet-unborn progeny.

[Footnotes Omitted.]



Administrative/Regulatory Law

Animal law is a good example of an area of the law where administrative and regulatory law can be important. Legislatures pass laws but then rely upon administrative agencies to establish rules and regulations to put those laws into effect. Generally, it is considered that regulations are comprised of rules. Examples of where animal law can be impacted through administrative and regulatory law can be found within the Department of Agriculture and the Department of the Interior. Each of these agencies has its own regulatory powers and Freedom of Information Act (FOIA) processes. Furthermore, each of these agencies has its own processes for enforcing its rules and regulations and adjudicating any issues that fall under its purview. Once a party exhausts all of the opportunities to adjudicate her/his claim within the agency, s/he can then take her/his case to a court for a determination.

As mentioned, legislatures pass laws but then rely upon agencies to put into place the rules and regulations to implement those laws. The concept behind the delegation of rulemaking is that the agencies are the experts in their particular fields and will be in a better position than the legislature to craft the specific details to carry out the law. An agency can only act within the powers that it has been granted. Anything beyond those granted powers is considered *ultra vires*, or beyond the scope of its powers. If one believes that an agency is acting *ultra vires*, one can challenge the agency in court.

There are specific procedures that each agency must follow when creating rules. Any proposed rule must be published, there must be a period for the public to comment on the rule, and the final decision regarding the rule must be based on the whole record. One can research rules and regulations at both Regulations.gov (www.regulations.gov) and the Federal Register (<http://www.gpoaccess.gov/fr/>).

A sample proposed rule from the Fish and Wildlife Service of the Department of the Interior as posted on the Federal Register site follows.

[Federal Register: May 5, 2011 (Volume 76, Number 87)]

[Proposed Rules]

[Page 26085-26145]

From the Federal Register Online via GPO Access [wais.access.gpo.gov]

[DOCID:fr05my11-34]

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Part III

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Proposed Rule To Revise
the List of Endangered and Threatened Wildlife for the Gray Wolf (*Canis
lupus*) in the Eastern United States, Initiation of Status Reviews for
the Gray Wolf and for the Eastern Wolf (*Canis lycaon*); Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS-R3-ES-2011-0029; 92220-1113-000; ABC Code: C6]
RIN 1018-AX57

Endangered and Threatened Wildlife and Plants; Proposed Rule To
Revise the List of Endangered and Threatened Wildlife for the Gray Wolf
(*Canis lupus*) in the Eastern United States, Initiation of Status
Reviews for the Gray Wolf and for the Eastern Wolf (*Canis lycaon*)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule, initiation of status reviews.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service or USFWS) are re-evaluating the listing of the Minnesota population of gray wolves (*Canis lupus*) and propose to revise it to conform to current statutory and policy requirements. We propose to identify the Minnesota population as a Western Great Lakes (WGL) Distinct Population Segment (DPS) of the gray wolf and to remove this DPS from the List of Endangered and Threatened Wildlife. We propose these actions because the best available scientific and commercial information indicates that the WGL DPS does not meet the definitions of threatened or endangered under the Act.

This proposed rule, if made final, would remove the currently designated critical habitat for the gray wolf in Minnesota and Michigan and the current special regulations for gray wolves in Minnesota. We also propose to revise the range of the gray wolf (the species *C. lupus*) by removing all or parts of 29 eastern states that we now recognize were not part of the historical range of the gray wolf. New information indicates that these areas should not have been included in the original listing of the gray wolf.

In this proposed rule, we recognize recent taxonomic information indicating that the gray wolf subspecies *Canis lupus lycaon* should be elevated to the full species *C. lycaon*. Given that a complete status review of this newly recognized species has never been conducted, we are initiating a rangewide review of the conservation status of *C. lycaon* in the United States and Canada. This rule also constitutes the initiation of our five-year review of the status of gray wolves under section 4(c)(2) of the Act, as well as the initiation of status reviews specific to gray wolves in the Pacific Northwest and Mexican wolves in the Southwest United States and Mexico.

DATES: Comment submission: We will accept comments received or postmarked on or before July 5, 2011.

Public hearings: We will hold two public hearings on this proposed rule scheduled on May 18, 2011 and on June 8, 2011. Informational meetings will be held from 6 p.m. to 7:15 p.m., followed by the public hearings from 7:30 p.m. to 9 p.m.

ADDRESSES: Comment submission: You may submit comments by one of the following methods:

Electronically: Go to the Federal eRulemaking Portal: <http://www.regulations.gov>. In the Enter Keyword or ID box, enter FWS-R3-ES-2011-0029, which is the docket number for this rulemaking. Then, in the Search panel at the top of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on "Submit a Comment."

By hard copy: Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS-R3-ES-2011-0029; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042-PDM; Arlington, VA 22203.

We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

Public hearings: We have scheduled an informational meeting followed by a public hearing in Ashland, Wisconsin, on May 18, 2011, at the Northern Great Lakes Center, 29270 County Highway G. We have scheduled an informational meeting followed by a public hearing in Augusta, Maine, on June 8, 2011, at the Augusta Civic Center, 16 Cony Street. See the Public Hearings section below for more details.

FOR FURTHER INFORMATION CONTACT: Laura Ragan, 612-713-5350. Direct all questions or requests for additional information to: GRAY WOLF QUESTIONS, U.S. Fish and Wildlife Service, Federal Building, 1 Federal Drive, Ft. Snelling, Minnesota 55111-4056. Additional information is also available on our Web site at <http://www.fws.gov/midwest/wolf>.

Individuals who are hearing-impaired or speech-impaired may call the Federal Relay Service at 1-800-877-8337 for TTY assistance.



The Freedom of Information Act (FOIA)

The following is from the introductory paragraph to the U.S. Department of Agriculture's FOIA Reference Guide (http://www.dm.usda.gov/foia_guide.htm).

The Freedom of Information Act (FOIA), which can be found in Title 5 of the United States Code, section 552, was enacted in 1966 and provides that any person has the right to request access to federal agency records or information. All agencies of the United States government are required to disclose records upon receiving a written request for them, except for those records that are protected from disclosure by the nine exemptions and three exclusions of the FOIA. This right of access is enforceable in court. The federal FOIA does not, however, provide access to records held by state or local government agencies, or by private businesses or individuals. All states have their own statutes governing public access to state and local records; state agencies should be consulted for further information about them.