



— S T A N F O R D —

Journal of Animal Law and Policy

Volume 2

2009

Making Decisions about Our Animals' Health Care: Does It Matter Whether We Are Owners or Guardians?

Susan J. Hankin*

Introduction	2
I. From "Property Owner" to "Guardian"	5
A. Goals of the Owner-to-Guardian Campaign.....	5
B. Opposition to Language Changes.....	8
C. Responses to Arguments Against Animal Guardianship.....	9
D. What the Arguments Imply about Health Care Decisions for Animals.....	18
II. Human Health-Care Decision-making: Lessons Learned	19
A. Making Decisions for Patients Without Decision Capacity: Substituted Judgment and Best Interests Standards.....	20
B. Health-Care Decision-Making for Minor Children.....	24
C. Potential Application to Animal Care Decision-Making	27
III. Making Health-Care Decisions for Our Companion Animals	28
A. Similarities Between Human Health Care and Veterinary Medicine.....	28
B. Major Differences Between Human Health Care and Veterinary Medicine.....	31
C. Proposed Framework For Veterinary Clinical Decision-Making.....	36
1. <i>Who should decide what level of care an animal receives?</i>	36
2. <i>Factors to include in treatment decisions: toward a modified best interest standard</i>	40
3. <i>Resolving Conflict: Should There Be Any Limits On Owner Choice?</i>	45
Conclusion	51

* Law School Associate Professor, University of Maryland School of Law.

The author would like to thank Inga Rubin and Uyen Phan for their research assistance, Susan McCarty for her research and footnoting assistance, and Deans Karen Rothenberg and Michael Van Alstine for their generous support of this article.

Introduction

In July 2000, Boulder, Colorado, became the first city to replace the term “pet owner” with “guardian” in its municipal code.¹ Two California cities, West Hollywood and Berkeley, soon did likewise,² and in 2001 Rhode Island became the first state to reference pet owners as “guardians.”³ Currently nineteen jurisdictions—the state of Rhode Island, one Canadian city, and seventeen U.S. cities—use this language.⁴ Inspired by a campaign by the animal rights group, In Defense of Animals, the language change to animal “guardian” is aimed at promoting more responsible pet ownership by changing the words people use about their animals.⁵

Notwithstanding these laudable goals, a great deal of opposition has been mounted against legislation that changes the language describing the relationship between people and their animals from “owner” to “guardian.” Groups ranging from veterinary associations⁶ to breed-specific dog clubs,⁷ the Cat Fanciers Association,⁸ and professional aviculturists⁹ have opposed such language, claiming that such changes threaten to undermine, rather than strengthen, the relationship between people and their pets.¹⁰ One of the primary arguments focuses on the claim that pet “guardians” might be faced with more limited health care choices for their pets, and that veterinarians might have

¹ R. Scott Nolen, *Owners or Guardians? Cities Change Identity of Pet Owners, Hoping to Promote Welfare*, J. AM. VETERINARY MED. ASS’N NEWS, Apr. 15, 2001, <http://www.avma.org/onlnews/javma/apr01/s041501b.asp>; BOULDER, COLO., CODE § 6-1-2 (2005) (“‘Guardian’ means owner.”).

² Nolen, *supra* note 1; WEST HOLLYWOOD, CAL., CODE tit. 9, art. 4 (2008), *available at* <http://qcode.us/codes/westhollywood/> (also using the term “custodian”); BERKELEY, CAL., MUN. CODE § 10.04.010(F) (2007) (“Owner/guardian”).

³ Nolen, *supra* note 1; R.I. GEN. LAWS § 4-1-1(a)(4) (Supp. 2006).

⁴ The Guardian Campaign, *Do You Live in a Guardian Community?*, <http://guardiancampaign.org/guardiancity.html> (last visited June 14, 2009) (listing the 20 cities or counties and the state of Rhode Island that include guardianship language in their laws).

⁵ Nolen, *supra* note 1.

⁶ See, e.g., Pennsylvania Veterinary Medical Ass’n, Position Statement on Owner vs. Guardian (Mar. 9, 2005), <http://www.pavma.org/displaycommon.cfm?an=1&subarticlenbr=61>.

⁷ See, e.g., American Rottweiler Club, Anti-Canine Legislation Information, <http://www.amrottclub.org/bsl/bslmain.htm> (last visited Mar. 10, 2009); Weimaraner Club of America, Legislative News, <http://www.erbenhof.com/wcalegislation.html> (last visited Mar. 10, 2009) (reprinting an article entitled *Ownership versus Guardianship* by Rottweiler Society member Jan Cooper); see also American Kennel Club (AKC), Canine Legislation Position Statements 12 (2005), http://www.akc.org/pdfs/canine_legislation/pbleg2full.pdf (“‘Guardian’ v. Owner”).

⁸ Cat Fanciers’ Association, CFA’s Perspective on the Guardian Issue, <http://www.cfa.org/articles/legislative/guardian-perspective.pdf> (last visited Mar. 10, 2009).

⁹ Genny Wall, *Using the Legal Term “Guardian” Rather than “Owner”: Is This Necessary, or Even a Good Idea?*, AFA WATCHBIRD (2002), *available at* <http://www.proaviculture.com/guardian.htm>.

¹⁰ See, e.g., Pennsylvania Veterinary Medical Ass’n, *supra* note 6.

trouble clarifying who should be making the choices regarding an animal's care.¹¹

Choices about veterinary care for companion animals may matter now more than they ever have in the past. Despite their designation as personal property—even under statutes that have replaced “owners” with “guardians”¹²—companion animals are increasingly considered members of their human families.¹³ And when these family members become ill, an increasingly sophisticated range of treatment choices are available for them—in fact, many of the same treatment choices that are available in human medicine.¹⁴ Treatment options for animals have expanded to such an extent that many veterinarians can no longer be considered general practitioners; rather, they specialize in areas such as veterinary oncology, neurology, dermatology, critical care, and sports medicine.¹⁵

This Article explores whether legislating a language change from “owner” to “guardian” has any real impact on the way we make health care decisions for our animal companions. Opponents of such changes seem to fear the implications of importing a term into human-animal relationships that already carries a legally significant meaning in relationships between people.¹⁶ Being appointed the guardian of a person carries with it certain rights and responsibilities, including those involving health care decisions.¹⁷ Whether using the term “guardian” to describe humans' relationship to companion animals affects our ability to make veterinary care choices for those animals will be explored as a way of addressing this central question: As companion animals are treated more like family, and as veterinary medicine is offering more and more

¹¹ See AVMA Opposes ‘Pet Guardianship’: No Evidence ‘Guardianship’ Enhances Relationship Between Owner and Pet, JAVMA NEWS, July 1, 2003, <http://www.avma.org/onlnews/javma/jul03/030701i.asp>.

¹² See, e.g., SAN JOSE, CAL., MUN. CODE § 7.10.125 (2007) (“‘Guardian’ as used in this title means an owner of an animal with the same duties and obligations under this title as an owner.”).

¹³ See Susan J. Hankin, *Not a Living Room Sofa: Changing the Legal Status of Companion Animals*, 4 RUTGERS J.L. & PUB. POL’Y 314, 352 (2007).

¹⁴ See Mary Margaret McEachern Nunalee & G. Robert Weedon, *Modern Trends in Veterinary Malpractice: How Our Evolving Attitudes Toward Non-Human Animals Will Change Veterinary Medicine*, 10 ANIMAL L. 125, 139-40 (2004) (discussing pet owners' desires to pursue sophisticated treatment and high-tech diagnostic tools for their pets).

¹⁵ See, e.g., University of Pennsylvania Veterinary Medicine, Faculty and Departments, <http://www.vet.upenn.edu/FacultyandDepartments.aspx> (last visited Mar. 10, 2009) (listing departments and sections within the school of veterinary medicine); American Veterinary Medical Association, Market Research Statistics: Veterinary Specialists—2008, <http://www.avma.org/reference/marketstats/vetspec.asp> (last visited Mar. 10, 2009) (listing twenty veterinary specialty organizations).

¹⁶ See, e.g., Pennsylvania Veterinary Medical Ass’n, *supra* note 6 (“Guardian is a well-defined legal term that is not appropriate in describing the relationship between owners and their animals.”).

¹⁷ See, e.g., UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT, 8A U.L.A. §§ 207, 208, 313, 314 (1997) (duties and powers of guardians of minors and incapacitated persons).

high-tech solutions to treat animals, to what extent can and should the legal framework for clinical decision-making in human medicine be imported into veterinary medicine to control owners' treatment choices?

Part I of this Article addresses the arguments that have been mounted against the campaign to change pet "owners" into pet "guardians," particularly those arguments that center around making choices regarding an animal's medical care. This part will set out the background surrounding the passage of the owner-to-guardian laws and the reasons that they were enacted. It will next address the various arguments against using the term "guardian" for animals and respond to those arguments, concluding that it is unlikely that such a change will lead to more limited health care choices for pets. By exploring the legal implications of the term "guardian," as it is used in medical-care decision-making, the discussion will show that the term has many different meanings and that limitations on guardian decision-making are built into statute-specific definitions of guardians' powers and duties. No such limitations exist in the animal law statutes. This Part concludes that while some anti-guardian arguments are quite far-fetched, enough others have merit that these arguments need to be taken seriously. Given that using the term "guardian" in the animal context could create some potential for confusion, and given the general resistance to these initiatives, it may be best to come up with alternative models for health care decision-making for companion animals.

Part II of this Article looks at medical care decision-making in human medicine as a background for exploring these questions in veterinary medicine. While the predominant model in human health care decision-making is based on principles of autonomy and informed consent, these concepts are not useful in discussing decisions for animals' care. Instead the focus will be on health care decision-making for those who lack competence to make their own decisions, including formerly competent adults who have become incapacitated, disabled adults who have never had the capacity to make health care decisions, and young children who lack competence to make their own medical decisions. This Part will discuss the substituted judgment and best interest decision-making standards, and will conclude that the best interest standard may have some applicability in the animal law context.

Part III looks more generally at the extent to which the legal framework for clinical decision-making in human medicine can be imported into veterinary medicine and through what mechanisms. As part of this discussion, the Article will address the major similarities as well as major differences between human health care and veterinary medicine. After addressing these similarities and differences, this Part will explore the following questions around veterinary clinical decision-making: Who should decide what level of care an animal receives? What factors should be included in these decisions? To what extent should economic considerations be taken into account in making such decisions? And, finally, should there be any limits on complete owner discretion? The Article concludes by arguing that while the current process is working for most

animal care decisions, there are some extreme cases where owner choices should be checked. The best way of setting these limits is not, however, through statutes changing language from “owner” to “guardian,” but rather by strengthening and clarifying language requiring proper veterinary care in existing animal cruelty statutes.

I. From “Property Owner” to “Guardian”

In the past seven years, one state, one Canadian city, and seventeen U.S. cities have enacted laws that change the language describing the relationship between people and their animals from “owner” to “guardian.”¹⁸ While Rhode Island is the only state to have made such a change to its animal protection laws, as of this writing, at least eighteen cities or towns—including Boulder, Colorado; Berkeley, West Hollywood, and San Francisco, California; St. Louis, Missouri; and Woodstock, New York—have enacted similar language changes.¹⁹ These legal changes have followed an initiative by the California-based In Defense of Animals (IDA), whose Guardian Campaign seeks to “reflect growing public support for a redefined public standard of relating to animals.”²⁰

A. Goals of the Owner-to-Guardian Campaign

IDA’s campaign sets forth a number of goals that it seeks to achieve by changing the language we use to refer to non-human animals. It hopes to reinforce our society’s changing view of animals and to increase the recognition that animals are individual beings “with needs and interests of their own,” rather than objects for our use.²¹ By encouraging the use of different language to effect these changes in attitude,²² the campaign hopes to meet a number of practical goals, which include reducing the amount of animal abuse and abandonment,

¹⁸ See, e.g., R.I. GEN LAWS § 4-1-1(a)(4) (Supp. 2006); BOULDER, COLO., CODE § 6-1-2 (2008); see also The Guardian Campaign, *supra* note 4; National Ass’n for Biomedical Research, Animal Law Section, Ownership v. Guardianship, <http://www.nabrlaw.org/Personhood/OwnershipvGuardianship/tabid/634/Default.aspx> (last visited Mar. 10, 2009).

¹⁹ See The Guardian Campaign, *supra* note 4.

²⁰ The Guardian Campaign, Respecting Our Animal Friends, <http://guardiancampaign.org/campaign.html> (last visited Mar. 10, 2009).

²¹ The Guardian Campaign, What a Difference a Word Makes!, <http://guardiancampaign.org/whatdifferenceword.html> (last visited Mar. 10, 2009) (“Recognize Animals as Individuals, Not Objects Recognize Changing Public Attitudes Toward Animals.”).

²² See Steven Best, Animal Guardianship: Speech for National Homeless Animals Day (Aug. 17, 2002), available at <http://www.drstevebest.org/Essays/AnimalGuardianship.htm> (“The language we use to map the world is extremely important, it shapes and constrains our thinking; if we define the natural world as a machine, we will treat it as an inert assemblage of parts alien to our being. Similarly, if we define animals as property, we tend to regard them as lifeless things, mere commodities, or disposable objects.”).

lessening “puppy mill” breeding²³ by discouraging purchase of animals in pet stores, and lowering the population of animals in shelters.²⁴

The jurisdictions that have enacted laws changing or supplementing “owner” with “guardian” have cited a number of related reasons for the change, suggesting that, for instance, this symbolic language change will educate the public and encourage people to think of and treat their pets more like family and household members and less like disposable property.²⁵ Pet “guardians” will be less inclined to mistreat their animals, less likely to leave them tied up outside, and less likely to abandon them or leave them at shelters.²⁶ Others hope that the change might even encourage more people to adopt²⁷ pets from shelters²⁸ and will have a positive impact on children, who will grow up with a stronger regard for animals and be less likely to abuse them.²⁹ Advocates also hope that this language change will lead to a strengthening of animal cruelty laws and better enforcement of current laws.³⁰

A recently proposed bill in the District of Columbia is clearly aimed at a number of these goals. In addition to amending the animal cruelty law so that references to animal owners will include guardians, the Animal Protection Amendment Act of 2008 is a comprehensive bill that also increases penalties for animal cruelty, animal abandonment, and animal fighting, including for those who are only spectators of fighting.³¹ Further, individuals convicted of any of these offenses could lose their right to possess animals, and the court would have the option of ordering counseling, treatment, or community service for anyone convicted of these felony offenses. Finally, the proposed amendment includes “reporting requirements for known or reasonably suspected animal cruelty,

²³ “Puppy mill” has been defined as “a large scale substandard breeding operation which typically produces animals by the hundreds with minimal regard for the health and welfare of the animals.” Patti Bednarik, *The Evolving Field of Animal Law*, 77 PA. B. ASS’N Q. 88, 89 (2006).

²⁴ See The Guardian Campaign, *supra* note 21; see also The Guardian Campaign, The Guardian Promise, <http://guardiancampaign.org/promise.html> (last visited Mar. 10, 2009).

²⁵ Barbara Williams, *Pet ‘Guardian’ Law a First in N.J.: To Foster Responsibility, Term ‘Owner’ Is Changed*, RECORD (Bergen County, N.J.), May 13, 2004, at L1.

²⁶ See Debra J. Saunders, Editorial, *Going to the Dogs*, S. F. CHRON., Jan. 19, 2003, at D4 (setting out the reasoning, while at the same time poking fun at the city’s ordinance); see also Greg Avery, *Council Adopts “Guardian” Title: Boulder Pet Owners Now Guardians Following Code Change*, BOULDER DAILY CAMERA, July 12, 2000, at 1C (“‘The animals in Boulder really need this help in the change in language,’ said Boulder resident Cathy Comstock, adding that the number one reason pets are left at the animal shelter is because people leave town. ‘That’s just not acceptable.’”).

²⁷ Using the term “adopt” in relation to animals is meant to have a similar effect on attitudes toward pets.

²⁸ Torri Minton, *S.F. Pet Guardian Plan Goes to Supervisors*, S. F. CHRON., Dec. 10, 1999, at A31.

²⁹ See Williams, *supra* note 25.

³⁰ See *id.*

³¹ Animal Protection Amendment Act of 2008, Bill 17-89, 17th D.C. Council (D.C. 2008), available at <http://www.dccouncil.washington.dc.us/images/00001/20080710110513.pdf>.

abandonment, or neglect.”³² Unlike a number of other animal guardian laws, this bill couples the language change with several other significant changes that strengthen D.C.’s animal cruelty laws.

The symbolic language change alone is not intended to have a legal impact,³³ and the drafters of these legislative initiatives have therefore taken care to define and limit the meaning of “guardian” in the companion animal context. In many of the laws, such as Rhode Island’s state law on animal cruelty, the word “guardian” actually supplements, rather than replaces, the term “owner.”³⁴ Furthermore, as the statute’s definition section makes clear, this language change does not alter in any way a person’s legal obligations to her animals:

“Guardian” shall mean a person(s) having the same rights and responsibilities of an owner, and both terms shall be used interchangeably. A guardian shall also mean a person who possesses, has title to or an interest in, harbors or has control, custody or possession of an animal and who is responsible for an animal’s safety and well-being.³⁵

Boulder, Colorado’s law is even more direct: its definition section clearly states, “‘Guardian’ means owner.”³⁶ In addition, the statute’s legislative intent section clarifies that “[n]otwithstanding the use of words such as ‘guardian,’ . . . the city council intends to reflect the common law view that the *property* rights of owners in their animals are qualified by the city’s exercise of its police power over such animals”³⁷ Other statutes have limited the legal effect of such language changes by opting for the term “owner/guardian” rather than simply “guardian.”³⁸

While the language change, by itself, is merely symbolic, this symbolism is an important step toward recognizing that companion animals are fundamentally different from inanimate property. Although still within the “property” construct, the legal status of companion animals has been incrementally changing in recent years in ways that increasingly recognize the value of companion animals.³⁹ Along with these incremental legal changes, the difference between the sentient

³² See *id.*

³³ See, e.g., Avery, *supra* note 26.

³⁴ See R.I. GEN. LAWS § 4-1-1(a)(4), § 4-13-1.2(10), § 4-13.1-2(7), § 4-19-2(28) (Supp. 2006) (adding the definition of “guardian” but not removing “owner keeper”).

³⁵ R.I. GEN. LAWS § 4-1-1(a)(4) (Supp. 2006).

³⁶ See BOULDER, COLO., CODE § 6-1-2 (2008), available at <http://www.colocode.com/boulder2/chapter6-1.htm> (last visited July 14, 2008) (“‘Guardian’ means owner”); see also S.F., CAL., HEALTH CODE art. I, § 41(m) (2008) (allowing “guardian” and “owner” to be used interchangeably in the Code).

³⁷ See BOULDER, COLO., CODE § 6-1-1(c) (2008) (emphasis added).

³⁸ See, e.g., BERKELEY, CAL., CODE § 10.04.010 (2007), available at http://www.ci.berkeley.ca.us/bmc/berkeley_municipal_code/title_10/04/010.html (defining “Owner/guardian”).

³⁹ See generally Hankin, *supra* note 13.

animals with which we choose to share our lives and, say, the objects that we use to furnish our homes needs to be reflected in the language we use. An important way to accomplish this goal is to replace the term “owner” in describing our relationship with our companion animals.

B. Opposition to Language Changes

Despite the laudable goals of these changes and the lack of any real legal effect,⁴⁰ the “owner to guardian” laws have generated a good deal of controversy, and a number of campaigns have emerged in opposition to additional changes. Groups that oppose such language changes, including a number of veterinary groups, claim that such changes threaten to undermine, rather than strengthen, the relationship between people and their pets.⁴¹ They claim, for example, that pet “guardians” might be faced with more limited health care choices for their pets, and that veterinarians might have trouble clarifying who should be making the choices regarding an animal’s care.⁴² Codifying this opposition, the American Veterinary Medical Association (AVMA)—the veterinary equivalent of the AMA—has adopted an official position statement against such terminology changes. Approved by their executive board in May 2003, their resolution reads as follows:

Ownership vs. Guardianship

The American Veterinary Medical Association promotes the optimal health and well-being of animals. Further, the AVMA recognizes the role of responsible owners in providing for their animals’ care. Any change in terminology describing the relationship between animals and owners does not strengthen this relationship and may, in fact, diminish it. Such changes in

⁴⁰ *But see* NABR, *supra* note 18 (“While this campaign is marketed as a feel-good exercise, this ‘simple’ change in language elevates animals above their current status as property—with potentially enormous legal implications.”).

⁴¹ *See AVMA Opposes ‘Pet Guardianship’, supra* note 11. Pressure from groups such as the AVMA was presumably behind a resolution recently adopted by the Council of State Governments (CSG) Governing Boards, which sets out its opposition to “legislation that reclassifies pet, livestock or animal owners as guardians or that otherwise alters the legal status of animals.” Council of State Governments, Policy Resolutions: Animal Guardianship and Liability Legislation, Fall 2004, <http://www.csg.org/policy/resolutions.aspx>. The reasons the CSG gives for its resolution include a claim that such statutes would limit owners’ freedom of choice in caring for their animals, permit third parties to petition for a pet’s custody, permit a legal challenge to treatment choices of owners and veterinarians, and generally threaten the legal balance between the rights of pet owners and the well-being of animals. This resolution was adopted in September of 2004. *See id.* Given its adoption, it is unlikely that many states will be following Rhode Island’s lead in supplementing or changing the language of animal “owner” to that of animal “guardian.”

⁴² *See AVMA Opposes ‘Pet Guardianship’, supra* note 11.

terminology may decrease the ability of veterinarians to provide services and, ultimately, result in animal suffering.⁴³

The AVMA's claims are fairly representative of many of the concerns that have been raised in opposing the use of "guardian" in reference to relationships with animals. At first blush, one might expect veterinarians who treat companion animals to embrace such language. The concerns regarding the use of the term "guardian" for pet owners appear to center around fears of where such language could lead. It is this fear that has generated opposition from groups of veterinarians, researchers, and state legislators against the "potentially enormous legal implications"⁴⁴ of what many proponents see as a simple language change to help better educate the public about responsibilities toward pets. Proponents want to see more responsible pet ownership, while opponents seem to fear the implications of moving toward personhood status for pets. As one commentator not so subtly put it, "guardian statutes are proverbial Trojan horses, opening the door for more animal rights legislation to follow."⁴⁵

Still, it seems curious that so much organized opposition has emerged against a change in language that has no current legal effect. The problem seems to lie in the potential legal implications of a term—guardian—that already carries a legally significant meaning, when used in reference to pets.⁴⁶ And while many of the concerns about importing the term guardian into relationships with animals are understandable, if misplaced, some of the arguments that have been raised in favor of the status quo often rely on scenarios that range from the unlikely to the extreme.

C. Responses to Arguments Against Animal Guardianship

Most of the arguments against the use of animal guardian language are premised on this common theme: unintended consequences will occur because courts will confuse the intended meaning of "guardian" in the animal context with its legal meaning in other contexts.⁴⁷ A number of these arguments center

⁴³ *Id.*

⁴⁴ NABR, *supra* note 18.

⁴⁵ 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, 257 (2006).

⁴⁶ See, e.g., Pennsylvania Veterinary Medical Ass'n, *supra* note 6 (opposing the change to guardian language because "[g]uardian is a well-defined legal term that is not appropriate in describing the relationship between owners and their animals"). The concern appears to stem from a perception that using the term guardian for owner will change not only the responsibilities of the owner-guardian, but also turn the animal into a human ward with human rights.

⁴⁷ See, e.g., American Veterinary Medical Law Ass'n, *Ownership of Animals vs. Guardianship of Animals: The Effect of a Change in the Law on Veterinarians in California*, CAL. VETERINARIAN, May/June 2002, at 10, available at <http://www.ncraoa.com/articles/AR/AVMLAWhitePaper.pdf> [hereinafter AVMLA, White Paper].

on the claim that animal “guardians” will have less say in the health care choices for their pets. Such arguments rely on the role of guardians in human relationships,⁴⁸ including their fiduciary relationships to their wards and their corresponding obligation to act in the wards’ best interests.⁴⁹ And some of the opponents of these laws go quite far to make their points. Thus the Dog Federation of Wisconsin (which sets out its mission as “Promoting and Protecting Responsible Dog Ownership”⁵⁰) puts forth the following scare scenes to encourage its members to oppose guardian laws:

Imagine wanting to neuter your six month old puppy, but your neighbor thinks it’s bad for the dog so takes you to court to petition for guardianship.

Imagine that your cousin thinks you should put your dog on life support, even though it’s abundantly clear that at age 14, your dog’s quality of life has greatly diminished.⁵¹

An issue paper prepared by the Animal Health Institute (AHI) takes this latter unlikely scenario even further, claiming that if pet owners become pet guardians, “[i]t could be illegal to spay or neuter a pet because it deprives them of their ‘reproductive rights.’”⁵² The same document also makes the following claim: “[T]he term ‘guardian’ shares the decision-making rights and responsibilities with courts and other third-parties who might be able to claim—under new laws—an interest on the animal’s behalf.”⁵³

Refuting some of these more far-fetched claims is not difficult. Given the strong public policy⁵⁴—and in some cases, laws⁵⁵—in favor of spaying and

⁴⁸ See, e.g., *id.* at 10-11 (raising the question of how courts would treat animal guardians by citing a probate case that resolved a dispute between legatees, one of whom had been named guardian of the decedent, her aunt).

⁴⁹ See generally UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT, 8A U.L.A. § 314 (1997) (delineating the fiduciary relationship between guardian and ward); see also *infra* notes 70-78 and accompanying text.

⁵⁰ Dog Federation of Wisconsin, <http://www.dfow.org> (last visited July 14, 2008).

⁵¹ Dog Federation of Wisconsin, Legislation Issues, <http://www.dfow.org/legis.htm> (last visited July 14, 2008).

⁵² Animal Health Institute, *Pet Owner or Guardian?* (Nov. 2005), available at http://www.avma.org/advocacy/state/issues/owner_guardian_ahi.asp.

⁵³ *Id.*

⁵⁴ See Spay USA, *Benefits of Spay/Neuter for Cats and Dogs*, http://www.spayusa.org/main_directory/02-facts_and_education/benefits_sn.asp (last visited July 15, 2008); Humane Society of the United States, *Why You Should Spay or Neuter Your Pet* (Feb. 19, 2008), http://www.hsus.org/pets/pet_care/why_you_should_spay_or_neuter_your_pet.html.

⁵⁵ See, e.g., SANTA CLARA CITY CODE § 6.30.020 (2008) (limiting households to “one unspayed female” dog or cat); ME. REV. STAT. ANN. tit. 7, § 3939-A (Supp. 2007) (requiring shelters to either spay or neuter an animal before placement with a new owner, or make an appointment with a veterinarian to spay or neuter the animal within thirty days of adoption; in

neutering companion animals, it is hard to imagine that someone trying to oppose a neuter procedure through a guardianship petition would be given any credence, let alone that such an action might be illegal. In fact, Santa Clara, California, one of the few jurisdictions with a mandatory spay-neuter law, also has a law promoting guardianship language,⁵⁶ and no such conflict seems to have arisen there. It is similarly hard to imagine an outsider being able to question an animal guardian's decision not to put a fourteen-year-old dog (or any dog, for that matter) on life support. As for the AHI's claim that animal guardians would share decision-making rights with courts and other third parties, the many differences between human medicine and veterinary medical decision-making, which will be addressed in Part III, would seem to mitigate against this claim. One important point worth noting here is that the basis for challenging human medical care decision-making by guardians is often the state's *parens patriae* power⁵⁷ to protect children and incompetent persons.⁵⁸ No such state power exists for non-human animals. Indeed, the state's power often works in just the opposite fashion: under their police power, states and cities can destroy animals to protect the public.⁵⁹ And this very point is noted in the legislative intent section of the city of Boulder, Colorado's law on animal guardians.⁶⁰

the latter case, the new owner must make a deposit with the shelter equal to 100% of the cost of the surgery and sign a neuter/spay agreement); R.I. GEN. LAWS § 4-24-3 (Supp. 2006) (requiring owners of cats to either spay or neuter their animal or pay an annual "intact animal fee"; no such law for dogs); A.B. 1634, 2007-2008 Reg. Sess. (Cal. 2008) (bill that would mandate spaying or neutering of dogs that have been impounded three times).

⁵⁶ Indeed, both laws have the same purpose: to make pet owners more responsible. See SANTA CLARA CITY CODE § 6.30.020 (2008) (mandatory spay and neuter); SANTA CLARA COUNTY, CAL., ORDINANCE NS-300.745 (Apr. 10, 2006), available at http://www.sccgov.org/SCC/docs/SCC_Public_Portal/keyboard_agenda/BOS_Agenda/2006/April_25_2006/TMPKeyboard201481938.pdf (changing "owner" to "owner/guardian").

⁵⁷ See BLACK'S LAW DICTIONARY 1144 (8th ed. 2004) (defining "*parens patriae*" as "the state in its capacity as provider of protection to those unable to care for themselves" and as "[a] doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen, esp. on behalf of someone who is under a legal disability to prosecute the suit").

⁵⁸ See Jennifer L. Hartsell, Comment, *Mother May I . . . Live? Parental Refusal of Life-Sustaining Medical Treatment for Children Based on Religious Objections*, 66 TENN. L. REV. 499, 516-17 (1999).

⁵⁹ Animals can be destroyed by government mandate because they are dangerous, see, e.g., CAL. FOOD & AGRIC. CODE § 31108.5(b) (West 2001) (vicious or dangerous dog); COLO. REV. STAT. ANN. § 13-21-124(d)(3) (West 2005) (vicious or dangerous dog); N.Y. AGRIC. & MKTS. LAW § 121(3) (McKinney Supp. 2008) (dangerous dogs); or because they may be infected with disease, see, e.g., CAL. HEALTH & SAFETY CODE § 122210(c) (West 2006) (dogs with "disease, illness, or congenital condition"); IDAHO CODE ANN. § 25-618(1)(b) (2000) (diseased bison); KAN. STAT. ANN. § 47-1008(b) (Supp. 2006) (livestock considered "unfit for human consumption").

⁶⁰ See BOULDER, COLO., CODE § 6-1-1(c) (2008) ("Notwithstanding the use of words such as "guardian," "keeper," "owner" or "title" in this chapter, the city council intends to reflect the common law view that the property rights of owners in their animals are qualified by the city's exercise of its police power over such animals, and that summary impoundments and dispositions of animals are two such qualifications of such rights.").

Other arguments against animal guardian laws challenge these laws by raising concerns that seem extremely unlikely to apply in this context. For example, the American Veterinary Medical Law Association (AVMLA), whose 2002 *White Paper* raises numerous legal concerns that could arise for veterinarians if their clients become guardians rather than owners of animals,⁶¹ makes the following claim: if guardianship law were applied to animal “guardians,” then they would be required “to manage and control the estate of the animal and in so doing will be required to use ordinary care and diligence.”⁶² This discussion goes much further in outlining the purported duties that would be required of animal guardians, including requirements of disclosing financial interests in business entities.⁶³ Positing such an application of California’s probate code to animals is puzzling. It is not clear if the argument is meant to conflate the roles of guardian of the person and guardian of the estate, but such an argument seems to be a non-starter. Animal guardians could not be required to manage the estate of animals where the statutes make clear that animals’ status as property remains unchanged. As property, animals cannot have an estate.⁶⁴

The AVMLA white paper raises another puzzling argument. In a section addressing legal issues that might arise for veterinarians if their clients become guardians of animals, it poses the following scenario: “If animal owners become guardians . . . , can a veterinarian decline, indeed even be required to refuse, to return an animal to a guardian . . . whom he or she suspects might be abusing the animal?”⁶⁵ There are several responses to this question. The immediate one that comes to this author’s mind is that it is hard to imagine that a veterinarian would not at least want the *option* of declining to return an animal to someone she suspects is abusing that animal, whether that person is called an owner or a guardian. If guardian language did in fact change the law in this way, wouldn’t this be a good change? The sentiment would certainly be consistent with a number of recent changes that have strengthened animal cruelty laws by allowing courts to order that animal abusers forfeit their animals and their right to own animals in the future;⁶⁶ similar laws have mandated the reporting of animal abuse.⁶⁷

⁶¹ See AVMLA, *White Paper*, *supra* note 47, at 11-14.

⁶² *Id.* at 11 (citing CAL. PROBATE CODE § 2401).

⁶³ *Id.*

⁶⁴ See BLACK’S LAW DICTIONARY 586 (8th ed. 2004) (defining “estate” as “[t]he amount, degree, nature, and quality of a *person’s* interest in land or other property”) (emphasis added).

⁶⁵ AVMLA, *White Paper*, *supra* note 47, at 13.

⁶⁶ See, e.g., ALASKA STAT. § 11.61.140(f)(3) (2006) (after conviction of misdemeanor animal cruelty, court may “prohibit or limit the defendant’s ownership, possession, or custody of animals for up to 10 years”); DEL. CODE ANN. tit. 11, § 1325(d) (2007) (after conviction of felony animal cruelty, cannot own animals for fifteen years, except animals “raised . . . within the State for resale”); ME. REV. STAT. ANN. tit. 17, § 1031(3-B)(B) (Supp. 2007) (if convicted, court may permanently prohibit animal ownership or having animals on the premises).

⁶⁷ See, e.g., ARIZ. REV. STAT. ANN. § 32-2239 (2008) (veterinarian shall report suspected animal fighting or animal abuse); COLO. REV. STAT. § 12-64-121(1) (West Supp. 2007) (requiring

Other arguments against animal guardians focus more directly on the ramifications for making health-care decisions for pets. Opponents claim that animal guardians will have more limited treatment choices than animal owners⁶⁸ and that the legal duties of veterinarians will be less clear.⁶⁹ Many of these arguments depend on the “best interest” standard from the law of guardianship for persons⁷⁰ being applied in the veterinary context. Opponents of animal guardianship raise issues such as whether a “best interest” standard will mean that owners will be more limited in choosing euthanasia for their animals,⁷¹ how veterinarians should determine the best interests of an animal if the owner wants it euthanized,⁷² and whether animal care and control groups will have to change their policies on euthanasia.⁷³

Another set of veterinary-care related arguments looks at the interplay between treatment options and the financial resources of the owner or guardian. These discussions pose questions about what happens when a “guardian” cannot afford treatment that is in the animal’s best interest⁷⁴ and posit that such requirements might lead to increased abandonment of animals.⁷⁵ A best interest standard, it is argued, will require owners to pay for treatment they cannot afford,⁷⁶ and questions therefore arise about who will be responsible for

veterinarian to report suspected animal cruelty or animal fighting); 225 ILL. COMP. STAT. ANN. 115/25 (1)(GG) (LexisNexis 2007) (disciplinary sanction for veterinarian who fails to report suspected cruelty or torture of animal); MINN. STAT. ANN. § 346.37(6) (West 2004) (requiring veterinarian to report “known or suspected cases of abuse, cruelty, or neglect to peace officers and humane agents”); *see also, e.g.*, Animal Protection Amendment Act of 2008, 55 D.C. Reg. 9186 (Dec. 5, 2008); A.B. 2668, 213th Leg., Reg. Sess. (N.J. 2008).

⁶⁸ See Animal Health Institute, *supra* note 52.

⁶⁹ See AVMA Task Force on Legal Status of Animals, *Ownership Versus Guardianship* (June 2005), <http://www.avma.org/advocacy/state/issues/ownership.asp>.

⁷⁰ See *infra* notes 144-147 and accompanying text.

⁷¹ See AVMA Task Force, *supra* note 69.

⁷² See AVMLA, White Paper, *supra* note 47, at 13 (“If the guardian standard of ‘best interest of the animal’ is to be the standard in determining the level of veterinary treatment or care to be provided to an animal, what objective criteria is [sic] to be used in determining what is in the ‘best interest of the animal?’ For example, if a guardian asks a veterinarian to euthanize a dog claiming it is sick, but the veterinarian knows the guardian just does not want the dog anymore, even if the dog is old, but certainly not dying, can the veterinarian legally euthanize the animal without engaging in some other endeavors to maintain the animal’s life?”).

⁷³ See Animal Health Institute, *supra* note 52.

⁷⁴ AVMLA, White Paper, *supra* note 47, at 13.

⁷⁵ AVMA Task Force, *supra* note 69.

⁷⁶ See Animal Health Institute, *supra* note 52 (“[C]onsider an elderly dog that has developed a severely arthritic hip. Currently, an owner has several treatment options available, from hip replacement surgery to less invasive and less costly alternatives. While some owners may indeed opt for the hip replacement surgery, other owners may choose less expensive options. However, a ‘guardian’ would be required to act in the ‘best’ interest of the animal; and if a neighbor, the local humane society or a local college professor believes that hip replacement surgery is in the best interest of the animal, the dog’s caretaker could be forced to accept that option—affordable or not.”).

veterinary bills.⁷⁷ This line of arguments also raises questions about the standards that will govern a veterinarian's duty to advise her clients about treatment options, including whether "best interest of the animal" or "best interests of the guardian" will take precedence.⁷⁸

While many of these arguments are more plausible than the ones discussed earlier in this Part, they still rely on an assumption that courts will import the legal meaning of guardian in human relationships into animal law and thus will confuse the intended meaning of "guardian" in the animal context with its legal meaning in other contexts. And, in some cases, this premise has been argued very directly. According to the AHL, "There is no doubt that inserting the word 'guardian' in place of 'owner' in describing the relationship between a human and a pet would be regarded by courts as a meaningful change."⁷⁹ This direct claim that courts would consider it a meaningful change for the term "guardian" to describe the owner-pet relationship does not appear to be based on any legal authority. There is no evidence that any court actually has considered such a change meaningful, and it seems unlikely that any courts would, given the care that has been used in defining this term in animal statutes.

It is not clear why many of the opponents of animal guardian laws seem so sure that courts will consider this change meaningful or why so many arguments seem to be based on the premise that the meaning of "guardian" in human relationships will necessarily be applied to human-animal ones. The drafters of the animal guardian statutes have been very careful to define and limit the meaning of this term in animal law.⁸⁰ In addition, there is certainly a good deal of precedent for a word such as "guardian" to carry different legal meaning in different statutory uses.⁸¹

Many of the more recent statutes that have moved to guardian language in the animal context have sought to avoid any legal confusion by electing to use the term "owner/guardian"⁸²—a joined term that does not carry all the legal baggage of "guardian." But even those statutes that have opted to use "guardian" have carefully defined this term very narrowly and specifically in the context of the statute. Boulder, Colorado, the first jurisdiction to make this

⁷⁷ AVMLA, White Paper, *supra* note 47, at 12 ("If animals are no longer property of an owner but wards of a guardian, will the guardian be required to bear the full cost of veterinary care and treatment of an animal because it is in 'the best interest of the animal,' even though the guardian has directed the treatment not be provided, declined to have the treatment done, or told the veterinarian that [the guardian] will not pay the bill for such treatment?") (citation omitted).

⁷⁸ See *id.* at 12-13.

⁷⁹ Animal Health Institute, *supra* note 52.

⁸⁰ See, e.g., R.I. GEN. LAWS § 4-1-1(a)(4) (Supp. 2006).

⁸¹ See BLACK'S LAW DICTIONARY 725-26 (8th ed. 2004) (defining many of the legal uses of the term "guardian"); see also notes 88-103 and accompanying text.

⁸² See, e.g., SANTA CLARA COUNTY, CAL., ORDINANCE NS-300.745 (Apr. 10, 2006), available at http://www.sccgov.org/SCC/docs/SCC_Public_Portal/keyboard_agenda/BOS_Agenda/2006/April_25_2006/TMPKeyboard201481938.pdf; BLOOMINGTON, IND., CODE § 7.01.010 (2008), available at <http://bloomington.in.gov/code/>; ST. LOUIS, MO., REVISED CITY CODE § 10.04.010(P) (2006), available at <http://www.slpl.lib.mo.us/cco/code/data/t1004.htm>.

change, simply defined “guardian” to mean “owner.”⁸³ Marin County’s Animal Control Code states the following in its definitions: “The use of the word ‘guardian’ for all legal intent and purposes has the same meaning and effect as the term ‘owner/guardian’ with respect to all federal, state and county law, current and/or as modified.”⁸⁴ Nearly identical language can be found in the municipal code of Imperial Beach, California.⁸⁵ According to San Francisco’s Municipal Code, “‘Guardian’ shall have the same rights and responsibilities of an owner, and both terms shall be used interchangeably.”⁸⁶ As the only state jurisdiction to use guardian language in reference to animals, Rhode Island’s animal cruelty law defines “guardian” as someone “having the same rights and responsibilities of an owner.”⁸⁷

The very limited and specific definition of “guardian” in these animal control and protection laws contrasts with the many different ways “guardian” is defined in other laws. It is instructive to compare Rhode Island’s definition of “guardian” in the animal law context with the various ways that word is defined in relationships between people. Under Rhode Island probate law, one can be a guardian of an adult or a guardian of a minor, and the duties of each type of guardian are defined differently.⁸⁸ There is a provision for a limited guardianship for adults, which reflects the legislature’s intent to use the least restrictive form of guardianship when someone is able to care for some, but not all, of their own needs.⁸⁹ In these cases, the guardian will only be authorized to make decisions in areas where the ward lacks the capacity to do so.⁹⁰ The duties of a guardian of a minor are much broader; they generally mirror those of a parent, and allow the guardian to make a broad range of decisions on behalf of the minor.⁹¹ Rhode Island law also has a provision for “Good Samaritan guardian” when the ward’s estate cannot afford to pay for the services of a professional guardian.⁹² This type of guardian is afforded a level of immunity not available to other guardians.⁹³

⁸³ See BOULDER, COLO., CODE § 6-1-2 (2005), available at <http://www.colocode.com/boulder2/chapter6-1.htm> (“‘Guardian’ means owner”).

⁸⁴ MARIN COUNTY, CAL., CODE § 8.04.020(h) (2008), available at <http://municipalcodes.lexisnexis.com/codes/marincounty/>.

⁸⁵ IMPERIAL BEACH, CAL., CODE § 6.04.020 (2008), available at <http://qcode.us/codes/imperialbeach/> (“The use of the term ‘owner/guardian’ for all legal intent and purposes has the same meaning and effect as the term ‘owner’ . . .”).

⁸⁶ SAN FRANCISCO, CAL., HEALTH CODE, art. 1, § 41(m) (2008), available at <http://www.municode.com/Resources/gateway.asp?pid=14136&sid=5>.

⁸⁷ R.I. GEN. LAWS § 4-1-1(a)(4) (Supp. 2006).

⁸⁸ Compare R.I. GEN. LAWS § 33-15-29 (1995) with R.I. GEN. LAWS § 33-15.1-28 (1995).

⁸⁹ R.I. GEN. LAWS §§ 33-15-1, 33-15-2 (1995).

⁹⁰ R.I. GEN. LAWS § 33-15-4 (Supp. 2006).

⁹¹ The guardian of a minor “shall take suitable charge of the person over whom he or she shall be appointed guardian.” R.I. GEN. LAWS § 33-15.1-28 (1995).

⁹² R.I. GEN. LAWS § 33-15-4.1 (Supp. 2006).

⁹³ R.I. GEN. LAWS § 33-15-4.4 (Supp. 2006).

Other jurisdictions have similarly diverse definitions of “guardian.” In Illinois, for example, one can be the guardian of a person, guardian of an estate, or both; there are also limited guardians, plenary guardians, temporary guardians, and successor guardians.⁹⁴ Maryland’s Health-Care Decisions Act provides for the appointment of a guardian “for the limited purpose of making one or more decisions related to the health care of that person.”⁹⁵ California, which has adopted the Uniform Health-Care Decisions Act,⁹⁶ authorizes advance health care directives where one can nominate a guardian of the person, guardian of the estate, or both.⁹⁷ Guardians of the person have different rights and duties from guardians of an estate,⁹⁸ and there do not seem to be any arguments, like we see in the animal law area, that these roles [might] get confused.

Looking specifically at the use of the term “guardian” in the health-care decision-making context, this term has very different implications if the guardian was appointed by a court to make decisions for a previously competent adult, versus a guardian who is acting in the role of a parent to make decisions for a young child. Guardians appointed to make decisions for previously competent adults often have less power in health care decision-making than other decision-makers, such as family members acting as surrogate decision-makers.⁹⁹ Under a number of state statutes, guardians must get court approval for certain decisions while others need not.¹⁰⁰ Such limitations, intended to protect the interests of

⁹⁴ See 20 ILL. COMP. STAT. ANN. 3955/30 (West 2001).

⁹⁵ MD. CODE ANN., EST. & TRUSTS § 13-708(a)(2) (LexisNexis Supp. 2007).

⁹⁶ 1999 Cal. Stat. ch. 658 (Unif. Health-Care Decisions Act, codified at CAL. PROB. CODE §§ 4670-4743).

⁹⁷ See CAL. PROB. CODE § 4672(a) (West Supp. 2008).

⁹⁸ See, e.g., Illinois State Bar Ass’n, Being a Guardian, <http://www.illinoislawyerfinder.com/publicinfo/guardian.shtml> (last visited July 18, 2008) (“A Personal Guardian tends to the personal care of the ward, while an Estate Guardian is the guardian of a person’s estate (real estate, personal property, money, and the like).”).

⁹⁹ See, e.g., ME. REV. STAT. ANN. tit. 18-A, § 5-805 (Supp. 2007) (describing the health-care decision-making capacity of surrogate decision-makers, including decisions to withhold or withdraw life-sustaining treatment, and describing such decisions as effective without prior court approval); ME. REV. STAT. ANN. tit. 18-A, § 5-806 (Supp. 2007) (describing situations where guardian decision-makers must receive court approval).

¹⁰⁰ See, e.g., D.C. CODE § 21-2047.01 (2001) (limiting the powers of a guardian of an incapacitated individual); MD. CODE ANN., EST. & TRUSTS § 13-708(c)(1) (LexisNexis Supp. 2007) (listing the medical procedures where the guardian’s consent or approval must be authorized by the court); WIS. STAT. ANN. § 54.25 (West 2008) (listing the duties and powers of a guardian, as well as “the rights retained by individuals determined incompetent”).

incapacitated adults,¹⁰¹ are built into statute-specific definitions of guardians' powers and duties.¹⁰² No such limitations exist in the animal law statutes.

In contrast to guardians acting on behalf of adult wards, parental guardians generally have fairly broad powers to make health care decisions on behalf of their minor wards. In Rhode Island, for example, guardians of minor wards have the powers of a parent, including the power to consent to medical care and treatment.¹⁰³ And health care decisions of parents for their children generally receive a great deal of deference, since there is a strong presumption that they are acting in the child's best interest.¹⁰⁴ The parent-child decision-making model seems to have more direct application to the animal-owner context. Given the broad decision-making capacity that guardians have for minor children, together with the statute-specific limits on guardians who make decisions for adults, it is very unlikely that calling animal owners "guardians" will really lead to limiting their health care treatment choices.

Another relevant term that can have very different statutory meanings is "animal." This word is defined in a broad range of statutes, from animal control laws to state and federal statutes that protect animals from cruelty and abuse. The definitions of "animal" in different statutes range from the all-inclusive "every living creature except a human being"¹⁰⁵ to the reptile-excluding "every living warm-blooded creature except a human being,"¹⁰⁶ to the considerably narrower definition found in the federal Animal Welfare Act (AWA). The AWA, which regulates the use of animals in research, the commercial sale and transportation of animals, and exhibition of animals, defines "animal" to include only dogs, cats, monkeys, rabbits, and certain rodents.¹⁰⁷ Excluded are birds,

¹⁰¹ See Lawrence A. Frolick, *Legal Implications of Mental Incapacity: Guardianship and Conservatorship*, ALI-ABA CLE: ELDER LAW ISSUES, ANSWERS, AND OPPORTUNITIES 67, 70 (2006) ("The 1980's [sic] saw almost every state revisit its guardianship statute; including amending the definition of incapacity, instituting procedural safeguards for the alleged incapacitated person, and imposing greater judicial scrutiny of the acts of guardians.").

¹⁰² See *id.* at 75 ("[S]tate law determines the extent of the authority of the guardian of the person and may require prior court approval for certain acts.").

¹⁰³ See R.I. GEN. LAWS § 33-15.1-28 (1995).

¹⁰⁴ See discussion *infra* notes 159-171 and accompanying text.

¹⁰⁵ See, e.g., R.I. GEN. LAWS § 4-1-1(a)(1) (Supp. 2006).

¹⁰⁶ See JAMES F. WILSON, *LAW AND ETHICS OF THE VETERINARY PROFESSION* 72 (1988) (citing Wis. Stat. § 947.01(1)).

¹⁰⁷ 7 U.S.C. § 2132(g) (2006) defines the term "animal" for purposes of the Animal Welfare Act:

The term "animal" means any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warm-blooded animal, as the Secretary may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet; but such term excludes (1) birds, rats of the genus *Rattus*, and mice of the genus *Mus*, bred for use in research, (2) horses not used for research purposes, and (3) other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for

mice, rats, and all farm animals except horses, though horses are only “animals” under the act when they are used for research purposes.¹⁰⁸

Thus while opponents of animal guardian laws are correct when they point out that the term “guardian” already has a significant legal meaning, this term, like the term “animal,” actually has many different legal meanings, and there is no reason to think that courts would not be able to assimilate yet another one. Nonetheless, some legitimate arguments against using “guardian” to refer to animals remain.

One of the more well-reasoned arguments against changing from “owner” to “guardian” can be found in an opinion letter written by the Los Angeles Office of the City Attorney, setting forth its reasons for not amending the city’s Municipal Code.¹⁰⁹ While acknowledging that many arguments against this change “seem far fetched” and “carry no legal authority,” the City Attorney nonetheless concluded that the name change might well cause confusion among owners and veterinarians regarding the legal status of animals and corresponding obligations to them.¹¹⁰ The letter sets forth a variety of hypothetical arguments that animal advocates might use to advance animal rights under “guardian” terminology.¹¹¹ And although under state and federal law, such arguments would lack legal authority,¹¹² the city attorney recognized that arguments that an animal guardian must act in the animal’s best interest might “confuse the issue.”¹¹³ The letter further concluded that such confusion could have unintended negative effects on city animal control organizations, veterinarians, and volunteer animal workers.¹¹⁴ In other words, courts might easily understand that the same word can have very different legal meanings depending on the context; however, members of the public—such as animal owners, veterinarians, and animal control officers—might be more likely to be confused by such terminology.

D. *What the Arguments Imply about Health Care Decisions for Animals*

If the confusion about the use of guardian language in reference to animals in fact affects owner and veterinarian perceptions about treatment options for animals, such a result would be an unfortunate, unintended

improving the quality of food or fiber. With respect to a dog, the term means all dogs including those used for hunting, security, or breeding purposes.

¹⁰⁸ *See id.*

¹⁰⁹ Letter from Terree Bowers, Chief Deputy City Attorney of Los Angeles, to the Los Angeles Board of Animal Services Commissioners (Sept. 11, 2002), *available at* <http://www.nabr.org/AnimalLaw/Guardianship/LACityAttorneyMemo.pdf>.

¹¹⁰ *See id.* at 3-4.

¹¹¹ *Id.*

¹¹² One of the reasons cited for the lack of legal effect of the proposed name change was that any city ordinance that attempted to change the status of animals would be preempted by state law that classifies animals as personal property. *See id.* at 4.

¹¹³ *See id.* at 3.

¹¹⁴ *Id.* at 4-5.

consequence. It certainly does not appear that the proponents of these laws intended to limit individuals' abilities to make health care treatment choices for their animals.¹¹⁵ Instead, proponents hoped that by changing the legal language from "owner" to "guardian," public attitudes and understanding about our responsibilities to animals would change for the better.¹¹⁶ The laws were intended to serve a primarily educational role, helping people to see that they have greater responsibilities to their pets than to other property that they own, even if these laws did not actually alter animals' legal status as property.¹¹⁷ But the fact remains that these laws have met with a great deal of opposition—from groups as disparate as state governments, veterinary associations, and animal welfare groups—and such opposition may be hard to overcome.

While some of these anti-guardian arguments are indeed quite far-fetched,¹¹⁸—no one is seriously likely to challenge spay/neuter policies by evoking a pet's "reproductive rights"—other arguments have sufficient merit to be taken seriously. What is not clear, however, is whether the legitimate concerns that have been raised outweigh the potential benefits of these laws. Nonetheless, given the potential for confusion, the various concerns raised, and the general resistance to these initiatives, perhaps it is better to come up with alternative models for health care decision-making for companion animals.

A number of the concerns raised regarding the potential confusion of calling animal owners "guardians" lead to some more interesting normative questions: Are there circumstances under which a veterinarian *should* take an animal's best interest into account? How should the animal's best interest be weighed against the owner's ability to pay? Should owners of animal property be able to make unchecked decisions about their medical treatment, even when those decisions are viewed as clearly harmful to the animal? The next Part of this Article turns to the lessons learned in making difficult health-care decisions in human medicine as a background for exploring these questions in veterinary medicine.

II. Human Health-Care Decision-making: Lessons Learned

In human health-care decision-making, the predominant model is based on the doctrine of informed consent, the notion that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body."¹¹⁹ In the law, the informed consent doctrine is grounded in both common law tort principles¹²⁰ and in constitutional rights to privacy and

¹¹⁵ See, e.g., The Guardian Campaign, *supra* note 21.

¹¹⁶ See Nolen, *supra* note 1.

¹¹⁷ See *supra* notes 21-39 and accompanying text.

¹¹⁸ See Letter from Terree Bowers, *supra* note 109.

¹¹⁹ Schloendorff v. Soc'y of N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914).

¹²⁰ See Walter Wadlington, *Medical Decision Making for and by Children: Tensions Between Parent, State, and Child*, 1994 U. ILL. L. REV. 311, 312 (discussing a physician's duty under the

liberty.¹²¹ In the language of bioethics, this principle is framed as “respect for autonomy” and generally trumps other competing principles in health-care decision-making for competent patients.¹²² Unfortunately, this important starting point for human health-care decisions has virtually no application in the veterinary field, where the animal patients have neither legal nor actual competence to make such choices.¹²³ What may be very relevant, however, are the decision-making models employed for those unable to make their own decisions and whose health-care decisions must be made by others. This Part will start with a discussion of the substituted judgment and best interests standards as it focuses on health-care decision making for three categories of patients who are unable to make their own decisions: formerly competent adults who have become incapacitated, disabled adults who have never had the capacity to make health care decisions, and young children who lack competence to make their own medical decisions. The final category, where parents make decisions for their children, will be examined in further detail, with a particular focus on cases where parents’ decisions have been challenged.

A. *Making Decisions for Patients Without Decision Capacity: Substituted Judgment and Best Interests Standards*

Two primary models of health-care decision-making have been used when the patients themselves are unable to make their own decisions: substituted judgment and best interests.¹²⁴ Under the substituted judgment standard, a substitute decision-maker (often referred to as the “surrogate”) tries to base the decision, as closely as possible, on the choice the patient would have made were she competent and able to make the choice herself.¹²⁵ According to one court, “the surrogate first tries to determine if the patient had expressed explicit intent regarding this type of medical treatment prior to becoming incompetent. Where no clear intent exists, the patient’s personal value system must guide the surrogate.”¹²⁶ Courts have also considered factors such as the

doctrine of informed consent).

¹²¹ See *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261 (1990).

¹²² See Jennifer L. Rosato, *Using Bioethics Discourse To Determine When Parents Should Make Health Care Decisions For Their Children: Is Deference Justified?*, 73 TEMP. L. REV. 1 (2000).

¹²³ See, e.g., Jennifer Fiala, *AVMA Redrafts Informed Consent*, DVM, Dec. 2007 (“Rewrite protects DVMs against comparisons to human medicine”); see also *infra* notes 263-267 and accompanying text.

¹²⁴ See BARRY R. FURROW, *BIOETHICS: HEALTH CARE LAW & ETHICS* 287 (6th ed. 2008); see also *In re Conroy*, 486 A.2d 1209 (N.J. 1984).

¹²⁵ See *In re Westchester County Med. Ctr.*, 531 N.E.2d 607, 619 (N.Y. 1988) (Simons, J., dissenting) (“Although courts apply this theory differently, generally the obligation of the court when implementing substituted judgment is to ensure that a surrogate of the patient, usually a family member or a guardian, effectuates as nearly as possible the decision the incompetent would make if he or she were able to state it.”).

¹²⁶ *In re Estate of Longeway*, 549 N.E.2d 292, 299 (Ill. 1989) (citation omitted).

patient's life history and life goals, attitude toward health care, and potential quality of life in upholding decisions based on substituted judgment.¹²⁷

The substituted judgment standard has been codified into many state statutes on health care decision-making. For example, the Florida Health Care Advance Directives Act requires that health care decisions be made which the surrogate "believes the principal would have made under the circumstances."¹²⁸ Similarly, the Maryland Health Care Decision Act provides that "[a]ny person authorized to make health care decisions for another under this section shall base those decisions on the wishes of the patient."¹²⁹ The statute then lists a number of factors to use to determine the patient's wishes, including the patient's expressed preferences, religious and moral beliefs, and reactions to similar treatment for another.¹³⁰

The substituted judgment standard, by directing that decisions be made consistent with the patient's expressed or implied wishes, seeks to respect the autonomy of patients who lack decision-making capacity.¹³¹ This goal of substituted judgment can be clearly seen in the intent section of Florida's statute, which sets out the legislative finding that "every competent adult has the fundamental right of self-determination regarding decisions pertaining to his or her own health," and the statute's purpose as "ensur[ing] that such right is not lost or diminished by virtue of later physical or mental incapacity."¹³²

This model of substituted judgment makes the most sense in cases where the patient formerly had decisional capacity and had at that time expressed some intent about her wishes, either directly or indirectly. In at least one case, however, this approach was used where the patient in question had never had the capacity to make health care decisions. In *Superintendent of Belchertown State School v. Saikewicz*,¹³³ the Supreme Judicial Court of Massachusetts was reviewing a probate court decision not to order potentially life-prolonging chemotherapy to

¹²⁷ See FURROW, *supra* note 124, at 302.

¹²⁸ FLA. STAT. ANN. § 765.205(1)(b) (West Supp. 2008).

¹²⁹ MD. CODE ANN., HEALTH-GEN. § 5-605(c)(1) (LexisNexis Supp. 2007).

¹³⁰ The complete list consists of:

- (i) Current diagnosis and prognosis with and without the treatment at issue;
- (ii) Expressed preferences regarding the provision of, or the withholding or withdrawal of, the specific treatment at issue or of similar treatments;
- (iii) Relevant religious and moral beliefs and personal values;
- (iv) Behavior, attitudes, and past conduct with respect to the treatment at issue and medical treatment generally;
- (v) Reactions to the provision of, or the withholding or withdrawal of, a similar treatment for another individual; and
- (vi) Expressed concerns about the effect on the family or intimate friends of the patient if a treatment were provided, withheld, or withdrawn.

Id. § 5-605(c)(2).

¹³¹ See, e.g., *In re Martin*, 538 N.W.2d 399, 408 (Mich. 1995) ("[T]he right the surrogate is seeking to effectuate is the incompetent patient's right to control his own life . . .").

¹³² FLA. STAT. ANN. § 765.102(1)-(2) (West 2005).

¹³³ 370 N.E.2d 417 (Mass. 1977).

treat the acute leukemia of a 67-year-old man with an IQ of 10 and a mental age of approximately 2 years, 10 months. In upholding the lower court's decision, which was based on the recommendation of a guardian *ad litem*, the Court determined that both were right when they made an effort to base the choice on the patient's "actual interests and preferences."¹³⁴ After acknowledging the state's traditional *parens patriae* power to "protect the . . . 'best interests' of the incompetent person,"¹³⁵ the court nevertheless preferred to use the substituted judgment standard because it evidences respect for individual autonomy.¹³⁶ In setting out how such a standard would work in cases where patients had never had the capacity to make health care decisions, the court came up with the following:

[T]he decision in cases such as this should be that which would be made by the incompetent person, if that person were competent, but taking into account the present and future incompetency of the individual as one of the factors which would necessarily enter into the decision-making process of the competent person.¹³⁷

The speculative nature of this standard has been criticized as unworkable.¹³⁸ In the words of an expert witness in a later case, asking what a never-competent person would choose in such a hypothetical brief window of competence would be similar to asking the question "'if it snowed all summer would it then be winter?'"¹³⁹ For similar reasons, the substituted judgment standard would not likely have any meaningful application in the veterinary context. Animals do not have the capacity to make their own health care decisions. As such, it would make little sense to speculate what an animal might choose if it were somehow competent to make the decision, but taking into account its present and future status as an animal (and the limited ability to understand that goes along with that status) as a factor in making the relevant choice.

What is interesting about *Saikewicz*, however, is the extent to which its substituted judgment standard appears to rely on factors that might better be framed within a best interest standard. Best interest standards, as will be discussed in more detail below, generally weigh the risks and benefits of various treatment options to determine what is best for the individual patient.¹⁴⁰ In upholding the probate court's decision, the *Saikewicz* court noted with approval the factors considered by the lower court that weighed against the chemotherapy

¹³⁴ *Id.* at 431.

¹³⁵ *Id.* at 427.

¹³⁶ *Id.* at 431.

¹³⁷ *Id.*

¹³⁸ See, e.g., FURROW, *supra* note 124, at 287.

¹³⁹ *In re Storar*, 420 N.E.2d 64, 72-73 (N.Y. 1981).

¹⁴⁰ See *infra* notes 144-145 and accompanying text.

treatment.¹⁴¹ The first four factors—the patient’s age, the treatment’s likely side effects, the low probability that the treatment would result in remission, coupled with the certainty it would cause immediate suffering—which the court characterized as “considerations that any individual would weigh carefully,”¹⁴² look very much like the kind of risk/benefit calculus that is the hallmark of the best interest test. The court then discussed a fifth factor, the patient’s inability to cooperate with the treatment because of his inability to understand why he was being subjected to it, framing these considerations as “unique to this individual and . . . therefore . . . essential to the proper exercise of substituted judgment.”¹⁴³ These same points, however, might more accurately be framed as factors that should be weighed into a best interest analysis.

Under a best interest analysis, treatment decisions for those unable to make their own choices are based on a weighing of the burdens and benefits of that treatment.¹⁴⁴ In cases where potentially life-saving treatment may be withheld, the benefits considered can include the patient’s quality of life. Under this risk-benefit calculus, the decision-maker must opt in favor of treatment whenever its benefits outweigh its risks.¹⁴⁵ The best interest standard is used in cases where a formerly competent patient’s wishes are simply not known; it is also the standard most commonly used when a patient has never had decisional competence.

State health care decision-making statutes, which authorize proxy decision-makers to make health-care choices for formerly competent patients, instruct those decision-makers to make the choices in accordance with the patient’s wishes.¹⁴⁶ However, if the wishes of the patient cannot be determined (if they are not known, or in some instances, not clear), the proxy is directed to make the decision according to the patient’s best interests.¹⁴⁷ Some of the statutes even list factors to consider in determining a patient’s best interests, which can include the benefits and risks of the treatment choices; the amount of pain or discomfort that can be expected with and without the treatment; and the

¹⁴¹ *Saikewicz*, 370 N.E.2d at 432.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ See, e.g., MD. CODE ANN., HEALTH-GEN. § 5-601(e) (West 2009) (“‘Best interest’ means that the benefits to the individual resulting from a treatment outweigh the burdens to the individual resulting from that treatment . . .”).

¹⁴⁵ See Rosato, *supra* note 122, at 10 (“The primary focus [of the best interest standard in the context of parental decision-making for children] appears to be the child’s best interests: if the benefits of treatment outweigh its risks, then treatment must be given to the child.”).

¹⁴⁶ See *supra* notes 128-129.

¹⁴⁷ See, e.g., FLA. STAT. ANN. § 765.205(1)(b) (West 2009) (“If there is no indication of what the principal would have chosen, the surrogate may consider the patient’s best interest in deciding that proposed treatments are to be withheld or that treatments currently in effect are to be withdrawn.”); MD. CODE ANN., HEALTH-GEN. § 5-605(c)(1) (West 2009) (“Any person authorized to make health care decisions for another under this section shall base those decisions on the wishes of the patient and, if the wishes of the patient are unknown or unclear, on the patient’s best interest.”).

likelihood of recovery with and without the treatment.¹⁴⁸ Many of these factors included under the best interest standard look surprisingly close to those considered by the *Saikewicz* court under what it purported to call a substituted judgment standard.

In most cases where the patient has never had decisional competence, including those involving developmentally disabled adults and young children, courts use the best interest standard. For example, *In re Storar* came before the New York Court of Appeals when the mother and legal guardian of a 52-year-old man with a mental age of 18 months requested that blood transfusions, part of the treatment for terminal bladder cancer, be discontinued.¹⁴⁹ After determining that it was not realistic to try to determine the wishes of a patient who had never been competent, the court used a best interest standard to decide that the transfusions should be continued.¹⁵⁰ While recognizing that the patient disliked the transfusions and that his mother, who visited him nearly every day, “wanted the transfusions discontinued because she only wanted her son to be comfortable,”¹⁵¹ the court nonetheless made its own best determination about what was in the best interests of the patient. The court thus ordered the transfusions continued because “[they] did not involve excessive pain and . . . without them his mental and physical abilities would not be maintained at the usual level.”¹⁵² By weighing the benefits and burdens of the treatment in question, the court came out on the side of the treatment.

B. *Health-Care Decision-Making for Minor Children*

The best interest model is also the standard used in evaluating treatment choices for young children.¹⁵³ Parents generally have both the right and the

¹⁴⁸ One statute’s complete list is as follows:

- (1) The effect of the treatment on the physical, emotional, and cognitive functions of the individual;
- (2) The degree of physical pain or discomfort caused to the individual by the treatment, or the withholding or withdrawal of the treatment;
- (3) The degree to which the individual’s medical condition, the treatment, or the withholding or withdrawal of treatment result in a severe and continuing impairment of the dignity of the individual by subjecting the individual to a condition of extreme humiliation and dependency;
- (4) The effect of the treatment on the life expectancy of the individual;
- (5) The prognosis of the individual for recovery, with and without the treatment;
- (6) The risks, side effects, and benefits of the treatment or the withholding or withdrawal of the treatment; and
- (7) The religious beliefs and basic values of the individual receiving treatment, to the extent these may assist the decision maker in determining best interest.

MD. CODE ANN., HEALTH-GEN. § 5-601(e) (West 2009).

¹⁴⁹ *In re Storar*, 420 N.E.2d 64, 66, 68-69 (N.Y. 1981).

¹⁵⁰ *Id.* at 72-73.

¹⁵¹ *Id.* at 70.

¹⁵² *Id.* at 73.

¹⁵³ Older children are often able to exercise their own decisional capacity under the “mature

responsibility to make health-care treatment decisions for their children, not only because it is presumed that they will act in the child's best interest, but because they also have a legal duty to do so.¹⁵⁴ But the state, through its *parens patriae* power, also has an interest in the welfare of children.¹⁵⁵ Thus, when a parent's choice about her child's health care appears to go against the child's best interest, the state can intervene to see that the child's interests are met.

The right of parents to make fundamental decisions for their children, including decisions about a child's health care, has been recognized as a common law principle,¹⁵⁶ as well as one that is protected by both statutes and the constitution.¹⁵⁷ Various rationales have been advanced to support this parental authority, including "preserving the integrity of the family [by] maintaining the autonomy of the parent-child relationship,"¹⁵⁸ respecting the parents' interests in raising their children according to their own system of values; and protecting children's interests in being cared for by those who know them best and will be most likely to act in their best interests.¹⁵⁹ However, while courts recognize the importance and value of parental autonomy over minor children, they are also quick to point out that such autonomy is not absolute.¹⁶⁰

Limiting the parents' rights to make decisions for their minor children is the state's duty under the *parens patriae* doctrine to protect minor children from

minors" doctrine. See FURROW, *supra* note 124, at 350 ("Parental rights to make health care decisions for their children . . . may be . . . terminated earlier [than the age of majority] if the child is a 'mature minor,' a condition governed by statute (in some states) or the common law (in other states) or both." Generally, the older the child, the more the child's own choices are taken into account. See *id.* at 349 ("[T]he application of the 'substituted judgment' standard seems appropriate as the children approach majority . . .").

¹⁵⁴ See TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 102 (5th ed. 2001).

¹⁵⁵ See *infra* text accompanying notes 161-163.

¹⁵⁶ See, e.g., *Newmark v. Williams*, 588 A.2d 1108, 1115 (Del. 1991).

¹⁵⁷ See *In re Petra B.*, 265 Cal. Rptr. 342, 346 (Cal. Ct. App. 1989). The U.S. Supreme Court has recognized that the fundamental liberty of the parents to rear their children emanates from the substantive guarantee of liberty found in the Due Process Clause of the Fourteenth Amendment. Pursuant to the Due Process Clause, parents have a constitutional right to the custody, care, and control of their children. See *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (noting that the substantive component of the Due Process Clause of the Fourteenth Amendment encapsulates parents' fundamental liberty interest in the "care, custody, and control of their children," which is one of the "oldest fundamental liberty interests recognized by [the Supreme Court]"); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) (explaining that those who rear the child have the right and the duty to prepare the child for future obligations).

¹⁵⁸ *Newmark*, 588 A.2d at 1115.

¹⁵⁹ See James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371, 1373 (1994).

¹⁶⁰ See, e.g., *In re Petra B.*, 265 Cal. Rptr. at 346; *Newmark*, 588 A.2d at 1116 ("We also recognize that parental autonomy over minor children is not an absolute right.").

harm.¹⁶¹ Thus while courts are reluctant to infringe on the autonomy of parents to make medical care decisions for their children, they will do so when such intervention is necessary to safeguard the child's welfare and to serve his best interests.¹⁶² In determining the child's best interests in medical treatment cases, courts consider factors such as the risks of the treatment, the likelihood that the treatment will be successful, the medical profession's view of the treatment, and the harm that the child may suffer.¹⁶³

In cases in which parental decision-making has been challenged, courts typically start with a presumption of deference to the parent's decision—that is, a presumption that the parents will act in the child's best interests.¹⁶⁴ This presumption is generally overcome only in extreme cases—often where parents, because of religious or philosophical convictions, refuse life-saving therapy for their children. For example, courts will order the administration of blood transfusions for children whose Jehovah's Witness parents refuse the intervention.¹⁶⁵ These cases, where courts order blood transfusions over parents' objections, have been called easy ones to resolve, because the relatively benign intervention happens once, it has a high probability of success, and without the transfusion the child's life may be threatened.¹⁶⁶

The more difficult cases involve choices of whether to treat childhood cancer with chemotherapy, where the treatment is certain to cause the child a great deal of suffering and the chance of success from the treatment is less certain.¹⁶⁷ In such cases, courts are more likely to defer to the decisions of parents when they opt against treatment, even where such a choice will result in the child's death.¹⁶⁸ Thus in *Newmark v. Williams*, for example, the court upheld the choices of a child's Christian Scientist parents who refused to have his Burkitt's lymphoma treated by a chemotherapy regimen that offered a 40% chance of a cure.¹⁶⁹ Without the treatment, the child was expected to die.¹⁷⁰ Nonetheless, after balancing parental autonomy with the state's right to protect minor children, and reviewing the risks and benefits of the offered treatment, the court determined that it was in the child's best interests to remain in his parents' custody and not be treated.¹⁷¹

Whether the courts ultimately choose to uphold or override the parents' choices, the mechanism through which these cases come before the courts are state child protective services statutes—the laws that protect children from abuse

¹⁶¹ See Hartsell, *supra* note 58, at 516-17.

¹⁶² See *In re Petra B.*, 265 Cal. Rptr. at 346.

¹⁶³ See *id.*; *Newmark*, 588 A.2d at 1116-18.

¹⁶⁴ See Rosato, *supra* note 122, at 7.

¹⁶⁵ See, e.g., *J.V. v. State*, 516 So. 2d 1133 (Fla. Dist. Ct. App. 1987).

¹⁶⁶ See Wadlington, *supra* note 120, at 326.

¹⁶⁷ See, e.g., *Newmark*, 588 A.2d 1108.

¹⁶⁸ See *id.*

¹⁶⁹ *Id.* at 1118-19.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 1120.

and neglect through mandated reporting.¹⁷² And courts will override parents' decisions only when the conditions for such statutes are met—that is, when the parents' choices amount to abuse or neglect.¹⁷³ This approach has been challenged by commentators,¹⁷⁴ who question whether such statutes represent the best way to resolve these difficult questions of children's medical care decision-making.¹⁷⁵

C. *Potential Application to Animal Care Decision-Making*

When looking at health care decision-making approaches for those who lack competence to make their own decisions—formerly competent adults who have become incapacitated, disabled adults who have never had the capacity to make health care decisions, and young children who lack competence to make their own medical decisions—those that appear to translate most readily into the animal law context are models of decision-making for someone who has never had decisional capacity. Thus, of the various models discussed above for making health-care decisions for those unable to do so for themselves, the one that seems to have the most relevance for making such decisions for companion animals is the best-interest model: considering the best interests of a patient unable to make the decision herself.

One of the primary places we see the best-interest model employed in human medicine is when parents make decisions on behalf of their children.¹⁷⁶ Parents are presumed to act in their child's best interest, and this presumption usually is not challenged unless the decision violates a child abuse or neglect law.¹⁷⁷ Using child abuse and neglect statutes as a way of challenging parents' medical decisions for their children has been criticized on a number of counts,¹⁷⁸

¹⁷² See, e.g., *id.* at 1110 (concluding that the child was not abused or neglected under state law); see also FURROW, *supra* note 124, at 348.

¹⁷³ See Wadlington, *supra* note 120, at 322-23 (“The child abuse reporting statutes have special relevance to children’s medical care for two reasons. First, the ways in which the statutes encourage the reporting of potential abuse illustrate a very strong public policy regarding the need to protect children from some parental conduct. . . . The second relevant facet of the child abuse reporting laws is that the definition of what qualifies as reportable conduct has increasingly been extended to cases of medical neglect.”).

¹⁷⁴ See *id.*; see also Rosato, *supra* note 122, at 2 (criticizing the cases challenging parents’ authority to make medical decisions for their children as “inappropriately considered under the legal rubric of abuse or neglect”).

¹⁷⁵ See Wadlington, *supra* note 120, at 336.

¹⁷⁶ See BEAUCHAMP & CHILDRESS, *supra* note 154, at 102.

¹⁷⁷ *Id.* (“It was assumed in law that parents generally do act in their children’s best interests and that the state should not interfere except in extreme circumstances in which the state and the parents disagree about some decision with potentially serious consequences for the child . . .”).

¹⁷⁸ See, e.g., Jana C. Merrick, *Spiritual Healing, Sick Kids and the Law: Inequities in the American Health Care System*, 29 AM. J. L. & MED. 269, 279 (2003) (arguing that because states are “not required to . . . find[] abuse or neglect in cases where medical care was withheld based on a parent’s religious beliefs,” the best interests of children may not be met); Stephen A. Newman, *Baby Doe, Congress and the States: Challenging the Federal Treatment Standard for Impaired Infants*, 15

and such criticism is certainly warranted. Interestingly, however, it may be that a similar approach of using animal cruelty laws to challenge questionable decisions made on behalf of companion animals is exactly the way to strike the right balance for owners, animals, and the veterinarians who treat them. This question and others concerning treatment choices for companion animals will be explored in the next Part.

III. Making Health-Care Decisions for Our Companion Animals

This Part will look at how helpful the legal framework for clinical decision-making in human medicine can be in answering similar questions in veterinary medicine. Some important similarities between the two fields suggest that many of the lessons learned in human medical encounters may have something to teach us about how to answer these questions in the veterinary context.¹⁷⁹ Nonetheless, enough differences exist between the two fields—and between humans and non-human animals—that the principles of decision-making in human medicine will at least need to be modified for the veterinary field. After discussing both similarities and differences between the fields of human and veterinary medicine, this Part will propose a framework for veterinary clinical decision-making by addressing a series of questions: Who decides what level of care an animal receives? What factors are included in these decisions and to what extent can economic concerns be considered? And finally, how might changes in the law affect the way these decisions are made?

A. *Similarities Between Human Health Care and Veterinary Medicine*

One of the reasons that it makes sense to turn to human medicine as a guide for making difficult decisions in veterinary medicine is the simple fact that many people consider their companion animals to be part of their family.¹⁸⁰ And as such, they make choices about treating their animals in similar ways to the choices they make for their human family members.¹⁸¹ The evidence that companion animals are considered family members can be seen in all sorts of ways: more and more people take their animals on vacations with them,¹⁸² give

AM. J. L. & MED. 1 (1989).

¹⁷⁹ See Rebecca Coombes, *Do Vets and Doctors Face Similar Ethical Challenges?*, 331 BRIT. MED. J. 1227 (2005).

¹⁸⁰ See Rebecca J. Huss, *Valuation in Veterinary Malpractice*, 35 LOY. U. CHI. L.J. 479, 481 (2004) (citing an American Pet Products Manufacturers Association National Pet Owners Survey).

¹⁸¹ *Id.* at 483-84.

¹⁸² See, e.g., Pet Travel, <http://www.pettravel.com/> (last visited Feb. 9, 2009); Pets on the Go, Pet Travel Unleashed, <http://www.petsonthego.com/> (last visited Feb. 9, 2009); Pets Welcome, It's a Pet Friendly Universe Out There, <http://www.petswelcome.com/> (last visited Feb. 9, 2009).

them birthday presents,¹⁸³ get them pet sitters or leave them in “doggie day care” while at work,¹⁸⁴ and make serious efforts to provide for the animals’ care after their human owner’s death.¹⁸⁵ An even more vivid reminder of just how highly people value their animals was demonstrated by all of those who refused to evacuate Hurricane Katrina-damaged New Orleans without their animals.¹⁸⁶ These refusals caused so many problems that the evacuation policy was quickly changed, and those Texas residents boarding the buses to evacuate as Hurricane Rita approached were allowed to bring their pets along.¹⁸⁷ Legislation codifying this change soon followed in the form of the Pets Evacuation and Transportation Standards Act of 2006 (PETS), which requires state and local authorities to consider the needs of people’s pets and service animals in evacuation plans.¹⁸⁸

Paralleling these developments are the expanded expectations that many people have about the kind of veterinary care that their companion animals should receive. Because of the way we value our pets, we are much more likely to spend money on their care and expect that they will receive medical care when they are sick or injured akin to the treatment choices available in human medicine.¹⁸⁹ Dogs and cats now benefit from increasingly sophisticated diagnostic techniques including ultrasound, MRIs, digital radiography, and CT scans.¹⁹⁰ Treatment options include surgery, chemotherapy, and radiation treatments for cancer; hip replacements and other complicated surgeries for orthopedic problems; and even dialysis and kidney transplants to treat kidney disease.¹⁹¹

In similar ways to human medicine, having more treatment options available in veterinary medicine means being faced with increasingly difficult choices concerning an animal’s treatment. Veterinary journals and texts

¹⁸³ See, e.g., Perky Paws Café, Dog and Cat Birthday Gifts, <http://www.perkypawscafe.com/items/holiday~special-occasion/dog~cat-birthday-gifts/list.htm> (last visited Feb. 9, 2009).

¹⁸⁴ See, e.g., Sharene Azimi, *Move Over Subway, Dog Day Care Is the Hot New Franchise*, COLUM. NEWS SERVICE, Mar. 1, 2005, available at <http://jscms.jrn.columbia.edu/cns/2005-03-01/azimi-doggydaycare>.

¹⁸⁵ See Hankin, *supra* note 13, at 358-65 & nn.198-223 (discussing enforceable trusts and other ways of assuring that our pets are cared for after we die).

¹⁸⁶ See, e.g., Craig Guillot, *Not Without My Dog: For Many, Leaving Four-Legged Companions Behind Wasn’t an Option*, 33 BARK 85 (2005).

¹⁸⁷ See Gina Spadafori, *Including Pets in Evacuation Plans Could Save Human Lives*, BOSTON GLOBE, Oct. 13, 2005, at C6, available at http://www.boston.com/yourlife/home/articles/2005/10/13/including_pets_in_evacuation_plans_could_save_human_lives/.

¹⁸⁸ See Pets Evacuation and Transportation Standards Act of 2006 (PETS), Pub. L. No. 109-308, § 2, 120 Stat. 1725, 1725 (amending the Robert T. Stafford Disaster Relief and Emergency Assistance Act to ensure that “[s]tate and local emergency preparedness operational plans” address “the needs of individuals with household pets and service animals prior to, during, and following a major disaster or emergency.”).

¹⁸⁹ See Nunalee & Weedon, *supra* note 14, at 139-40 (discussing pet owners’ desires to pursue sophisticated treatment and high-tech diagnostic tools for their pets).

¹⁹⁰ See Mary Battiata, *Whose Life Is It Anyway?*, WASH. POST, Aug. 29, 2004, at W16.

¹⁹¹ *Id.*

increasingly address questions such as how aggressively to treat dogs with cancer.¹⁹² Owners of animals with cancer are faced with choices that include no treatment or palliative treatment only; standard surgery, chemotherapy, or radiation therapies that are often thought to produce disappointing results; or clinical trials that aim to bring state-of-the-art medicine into the veterinary arena.¹⁹³ Veterinary hospice care for animals at the end of life is common enough that the American Veterinary Medical Association (AVMA) has published hospice care guidelines.¹⁹⁴ And at many veterinary hospitals, intensive care is available, and reports of animals being kept alive on “life support” are not uncommon.¹⁹⁵ While this last example may be seen as extreme, it is another illustration of the extent to which knowledge gained in human medicine is being imported into veterinary medicine.

A wider range and greater sophistication of treatment options also means that more money is being spent on veterinary treatment.¹⁹⁶ A 2003 article in *Consumer Reports* details a number of expensive treatment options available for dogs and cats, including cardiac pacemakers, expensive joint surgeries, and expensive drugs to treat a wide range of ailments.¹⁹⁷ The article also reports that veterinary spending nearly tripled from 1991 to 2001, to over \$18 billion, and that cost of veterinary treatment since 1997 has increased at more than twice the rate of overall inflation.¹⁹⁸ The increased expenditure is, in part, attributed to improvements in veterinary medicine that give owners more choices, albeit expensive ones, for treating their animals.¹⁹⁹

An additional measure of the growing acceptance of spending significant amounts on veterinary care is the increasing judicial recognition of reasonable veterinary expenses as a measure of damages when an animal is tortiously injured or killed. In the past, damages in tort cases involving injured animals were generally limited to the animal’s “replacement value.”²⁰⁰ Owners of an

¹⁹² See BERNARD E. ROLLIN, AN INTRODUCTION TO VETERINARY MEDICAL ETHICS: THEORY AND CASES 167-70 (1999) (Case 23: Clients who insist on continuing treatment for failing dog with cancer); see also Coombes, *supra* note 179; AAHA Senior Care Guidelines Task Force, *AAHA Senior Care Guidelines for Dogs and Cats*, 41 J. AM. ANIMAL HOSP. ASS’N 49 (2005), available at http://www.aahanet.org/PublicDocuments/Senior_Care_final.pdf [hereinafter AAHA, *Senior Care Guidelines*].

¹⁹³ See, e.g., Penn Veterinary Medicine, Veterinary Clinical Investigation Center, <http://research.vet.upenn.edu/vcic/CurrentClinicalTrials/tabid/94/Default.aspx> (last visited Feb. 9, 2009).

¹⁹⁴ See AAHA, *Senior Care Guidelines*, *supra* note 192, at 56.

¹⁹⁵ See Jon Katz, *When Should You Put Your Dog Down? How to Make a Decision You Never Want to Make*, SLATE, Oct. 28, 2003, <http://www.slate.com/id/2090327> (“Researching my last book, I visited an emergency-care clinic that had six dogs on respirators at a cost of nearly \$1000 per week per dog.”).

¹⁹⁶ See *Veterinary Care Without the Bite*, CONSUMER REP., July 2003.

¹⁹⁷ *Id.* (reporting on \$3000 pacemakers for dogs with cardiac problems, \$8000 kidney transplants for cats, and the wide range of pharmaceuticals used in veterinary care).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ See, e.g., *Daughen v. Fox*, 539 A.2d 858, 864 (Pa. Super. Ct. 1988) (“Under Pennsylvania

injured dog were thus unable to recover expenses from those responsible for the dog's injury whenever the cost of treating the dog exceeded its fair market value.²⁰¹ Increasingly, however, courts are departing from this harsh approach and allowing the recovery of "reasonable veterinary expenses," even when those expenses far exceed an animal's market value.²⁰² Some states have even passed legislation recognizing reasonable veterinary expenses as a measure of damages in injured animal cases. A Maryland statute, for example, expands the definition of allowed compensatory damages for the injury of a pet to include, "the reasonable and necessary cost of veterinary care" up to a \$7,500 limit.²⁰³ This approach is likely to expand even further in the wake of the many cases being brought by owners whose animals became sick or died from eating contaminated pet food.²⁰⁴

B. *Major Differences Between Human Health Care and Veterinary Medicine*

Despite the growing similarities between human health care and veterinary medicine, important differences remain—differences that are significant enough that decision-making models cannot be imported wholesale into the veterinary context. The primary difference, of course, is the moral²⁰⁵ and legal status of animals. As much as we might consider our companion animals to be part of our families, the simple fact remains that they are animals. As non-human animals they may not be morally entitled,²⁰⁶ and are certainly not legally entitled to the same rights as humans. Legally, animals are still considered property, though there are trends in a number of areas of law that treat animals

law, a dog is personal property. The fundamental purpose of damages for an injury to or destruction of property by tortious conduct of another is to compensate the injured party for the actual loss suffered.”).

²⁰¹ See, e.g., *id.*

²⁰² See, e.g., *Hyland v. Borrás*, 719 A.2d 662 (N.J. Super. Ct. App. Div. 1998) (allowing recovery of reasonable veterinary expenses even when those expenses exceeded the animal's market value by fivefold); see also *Burgess v. Shampooch Pet Indus., Inc.*, 131 P.3d 1248, 1252 (Kan. Ct. App. 2006) (“[W]hen an injured pet dog with no discernable market value is restored to its previous health, the measure of damages may include, but is not limited to, the reasonable and customary cost of necessary veterinary care and treatment.”).

²⁰³ MD. CODE ANN., CTS. & JUD. PROC. § 11-110(a)(2) (LexisNexis 2006).

²⁰⁴ See, e.g., A.B. 1965, 213th Leg., Reg. Sess. (N.J. 2008), available at http://www.njleg.state.nj.us/2008/Bills/A2000/1965_I1.PDF (authorizing civil action for certain damages when a pet animal “becomes ill, is injured, or dies from ingesting or coming into contact with adulterated pet food”; damages may include, but are not limited to “veterinary expenses incurred in treating the animal”).

²⁰⁵ For a discussion of the moral status of animals, see Martha C. Nussbaum, *Beyond “Compassion and Humanity”: Justice for Nonhuman Animals*, in *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* 299 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

²⁰⁶ See Jerrold Tannenbaum, *Veterinary Medical Ethics: A Focus of Conflicting Interests*, 49 J. SOC. ISSUES 143, 147 (1993) (discussing the moral value of animals in terms of “what is morally owed” to them).

quite differently from inanimate property.²⁰⁷ However, when it comes to making decisions about an animal's health care, and even its life, there have been few checks on an owner's unlimited discretion to make those decisions, however harmful they might be to the animal.²⁰⁸

Another important difference in veterinary medicine is the acceptance of euthanasia as a treatment option. Humane euthanasia is not only a common practice in veterinary medicine; it is specifically mentioned as an ethical choice in the profession's code of ethics.²⁰⁹ There is even a 1905 California law, still on the books, that *requires* that certain "unfit" animals be euthanized, though the law does provide exemptions for an "owner keeping any old or diseased animal belonging to him on his own premises with proper care."²¹⁰ There is a wide range of reasons why euthanasia is chosen in veterinary medicine, some more problematic than others. The most problematic, often dubbed, "convenience euthanasia," occurs when the decision seems to be made purely for the convenience of the client owners—because they are moving and no longer have space for the animal or because the cute puppy has grown into a not-so-cute dog.²¹¹ Less problematic, but sometimes troubling nonetheless, are choices made for economic reasons. "Economic euthanasia" is the term used to describe instances where the animal has a treatable condition, but the client cannot afford (or chooses not to spend the money on) the treatment and requests instead that the animal be humanely euthanized.²¹² More justifiable reasons for euthanasia center on the animal's quality of life, and decisions to euthanize animals are regularly made when animals are at the end of life, in pain, or otherwise unable to enjoy their lives.²¹³

²⁰⁷ See generally Hankin, *supra* note 13.

²⁰⁸ See *infra* Part III.C. for a discussion of whether these choices should be limited.

²⁰⁹ See AMERICAN VETERINARY MEDICAL ASS'N, PRINCIPLES OF VETERINARY MEDICAL ETHICS OF THE AVMA § XI (rev. Apr. 2008), available at <http://www.avma.org/issues/policy/ethics.asp> ("Humane euthanasia of animals is an ethical veterinary procedure.") [hereinafter AVMA, PRINCIPLES]; see also Clinton R. Sanders, *Killing with Kindness: Veterinary Euthanasia and the Social Construction of Personhood*, 10 SOC. F. 195 (1995).

²¹⁰ See Cal. Penal Code § 599e (West 1999); see also WILSON, *supra* note 106, at 102 (referring to this law as "interesting, though perhaps archaic").

²¹¹ See Sanders, *supra* note 209, at 204; see also ROLLIN, *supra* note 192, at 62.

²¹² See Christopher Green, Comment, *The Future of Veterinary Malpractice Liability in the Care of Companion Animals*, 10 ANIMAL L. 163, 208 (2004) (citing Daniel R. Verdon, *Clients Spending More Before Stopping Treatment, DVMs Say*, DVM: THE NEWSMAGAZINE OF VETERINARY MEDICINE, July 2003, at 1 (noting that the dollar-figure cut-off for such decisions has been rising as people are willing to spend more and more money on their companion animals' health care)); see also American Veterinary Medical Ass'n, *Equine Euthanasia*, <http://www.avma.org/careforanimals/animatedjourneys/goodbyefriend/equineuth.asp> (last visited July 21, 2008) ("[I]f the financial or emotional cost of treatment [of your horse] is beyond your means, you may need to consider euthanasia.").

²¹³ See Sanders, *supra* note 209, at 203 n.7 ("Studies indicate that the vast majority of euthanasia decisions—from 70 to 80%—are precipitated by the animal's age and infirmity.").

Unlike human medicine, where standards of care tend to be uniform,²¹⁴ in veterinary medicine, standards of care often differ by animal species, the use of the animal, and locality.²¹⁵ Veterinarians not only have to know how to treat a number of different species (unlike medical doctors, who only treat one species), but the animal's species often dictates the available treatment choices.²¹⁶ The use of the animal can also affect treatment choices in a number of ways. When the animal's value is primarily economic, it is more likely that treatment choices will be governed by cost of the treatment measured against the likelihood of recovery.²¹⁷ Additionally, when animals are raised to be slaughtered for food, there may be fewer choices of drugs that can be used to treat that animal because of the risks of those drugs ending up in the food chain.²¹⁸ And while the locality rule has lost favor in medical malpractice cases, there are good arguments that such a rule should continue in veterinary malpractice cases, particularly in areas where owners customarily treat or assist in treating their own animals.²¹⁹

Another important difference between veterinary and human medicine is the role of cost in veterinary treatment. While many of the treatment choices in human medicine are also available in veterinary medicine, the comparative cost of these treatments can be dramatically lower in veterinary medicine.²²⁰ Despite

²¹⁴ See BARRY R. FURROW ET AL., HEALTH LAW § 6.2(a), at 267 (2d ed. 2000) ("The development of practice standards and guidelines by national medical organizations is accelerating the process of moving all medical practice toward national standards.").

²¹⁵ See Nunalee & Weedon, *supra* note 14, at 141-42 (noting that the locality rule has historically applied in veterinary malpractice cases, but positing that courts may be less likely to apply this rule as information and technology becomes more available).

²¹⁶ See ORLAND SOAVE, ANIMALS, THE LAW AND VETERINARY MEDICINE 15 (4th ed. 2000).

²¹⁷ See *id.*

²¹⁸ See Nunalee & Weedon, *supra* note 14, at 149.

²¹⁹ For example, Patrick Holscher provides the following discussion:

However, given the nature of veterinary specialties and practice in the rural West, it is at least reasonable to speculate on whether the locality rule might, or should, apply in some instances. The standards of practice applicable to small animals are probably justifiably relatively uniform. However, perhaps the law might justifiably regard those that apply to large animals and livestock in another fashion. At least arguably, the standards of practice that apply to livestock in the rural West, where the owners still administer a great deal of veterinary care themselves, or even assist the veterinarian, may be quite different from those in other areas. A person familiar with livestock care in Wyoming, for example, might be shocked by the level of veterinary care depicted in James Herriot's *All Creatures Great and Small* series. No Wyoming cattleman could afford to call out a veterinarian for the ailments the English farmer did.

Patrick T. Holscher, *Pets and Professional Liability*, WYOMING LAW., Apr. 2006, at 20. *But see* WILSON, *supra* note 106, at 136 (suggesting that the same standards applied in medical malpractice cases are likely to be applied in veterinary malpractice cases).

²²⁰ See Eichinger, *supra* note 45, at 237 (citing examples of dramatic cost difference of comparative medical procedures such as spay surgeries in animals vs. hysterectomies in humans (\$100 compared to over \$15,000) and the cost of a typical five-day hospital stay for a medical condition (\$1000-1500 for veterinary hospital vs. \$20,000 in a human hospital)).

these lower costs, and despite many owners' desire to choose the most promising treatments, many available treatment options can be beyond the financial means of a majority of pet owners.²²¹ Thus the expenses themselves become a part of treatment decisions.²²² One of the ethical questions that veterinarians sometimes find themselves faced with is whether to even tell an owner-client the full range of options for treating an animal if the veterinarian knows that the owner cannot afford it.²²³ Compounding these cost concerns is the fact that third-party payment for pets' health care is still relatively rare.²²⁴ Even when pet health insurance is available, it often comes with high deductibles and incomplete coverage.²²⁵ A 2007 *Consumer Reports* article concluded that most pet health insurance policies offered little more than forced savings that rarely covered the entire bill; the article thus advised readers that they would be better off putting the money they would spend on premiums into an interest-bearing savings account.²²⁶

Veterinary medical practice necessitates a sometimes challenging three-way relationship—among the treating veterinarian, the owner-client, and the animal-patient—that is typically not present in human medical encounters. The sometimes varying interests of the owner and the animal can lead to interesting and often difficult questions regarding to whom the veterinarian owes a duty.²²⁷ Under veterinary licensing statutes, veterinarians owe a number of legal duties

²²¹ See Todd W. Lue et al., *Impact of the Owner-Pet and Client-Veterinarian Bond on the Care That Pets Receive*, 232 J. AM. VETERINARY ASS'N 531, 537-38 (2008) (reporting that twenty-nine percent of pet owners surveyed had been "unable to afford veterinary services at one time or another").

²²² See Sanders, *supra* note 209, at 199 ("[A]s opposed to human medicine, the cost of potential treatments is a prime consideration in veterinary decisions with the euthanizing of the patient as a viable final option should the client determine that the expense of treatment outweighs the medical and emotional consequences one may reasonably expect.").

²²³ Clinton Sanders, *Annoying Owners: Routine Interactions with Problematic Clients in a General Veterinary Practice*, 17 QUALITATIVE SOC. 159, 162 (1994); cf. WILSON, *supra* note 106, at 34 (reporting that "[s]ome veterinarians have said that they regularly lie to clients who are financially secure when it is in the best interest of the animal. These veterinarians present clients only with the best therapeutic modality if they fear that the clients may opt for the cheapest option despite the consequences for the animal.").

²²⁴ See Bonnie Brewer Cavanaugh, *The British Invasion*, BEST'S REV., Jan. 1, 2008, at 62 (noting that in 2006, 3% of American pets had veterinary insurance, compared to 20% of pets in the U.K., and 50% in Sweden). Of course, the pervasiveness of third-party payment in human medicine, coupled with extremely high costs, leads to a different way that costs become part of treatment decisions. A vivid reminder of this phenomenon was highlighted in Michael Moore's film, "Sicko." In the early press for the film, one of the most discussed segments was the congressional testimony of Dr. Linda Peeno, a former insurance company physician for Humana, who "confesses" to making a decision to deny payment that cost a patient his life. See, e.g., Peter Rainer, 'Sicko' Prescribes Stronger Medicine, CHRISTIAN SCIENCE MON., June 29, 2007, available at <http://www.csmonitor.com/2007/0629/p15s01-almo.html>.

²²⁵ See *Why Pet Insurance Is Usually a Dog*, CONSUMER REP., July 2007.

²²⁶ *Id.*

²²⁷ See Nunalee & Weedon, *supra* note 14, at 128.

to the owner-clients, such as duties of confidentiality of communications²²⁸ and, in some jurisdictions, duties that are called informed consent.²²⁹ Other legal duties, notably duties to report suspected cases of animal abuse under some recent amendments to animal cruelty statutes, appear to be owed to the animal patient.²³⁰ These tensions can be seen by comparing different sections in the code of ethics of the veterinary profession: there is an entire section of the code devoted to the veterinarian-client-patient relationship.²³¹ Another section of the code, on professional behavior, begins with a principle that places the animal patient in the forefront: "Veterinarians should first consider the needs of the patient: to relieve disease, suffering, or disability while minimizing pain or fear."²³² These tensions become particularly challenging when the needs and desires of the human client diverge from the interests of patient.²³³

A final difference between veterinary and human medicine is based on differences between the natures of human and non-human animals. In making decisions for animals, we tend to think that they differ from us in their perception and anticipation of pain, and in their understanding of the need for short-term pain in exchange for a healthier future.²³⁴ Other differences include the shorter life span of many companion animals²³⁵ and how that shorter life expectancy might affect treatment choices. Put together, all of these differences suggest that while human medical decision-making may help to provide a framework for making similar decisions for our animals, the lessons learned from human medicine will need to be adjusted in a number of ways for the different features and needs of animals. The next Part sets out a proposed framework for making clinical decisions in veterinary medicine.

²²⁸ See Sarah L. Babcock & Christine Pfeiffer, *Laws and Regulations Concerning the Confidentiality of Veterinarian-Client Communication*, 229 J. AM. VETERINARY MED. ASS'N 365 (2006).

²²⁹ See D. Duane Flemming & John F. Scott, *The Informed Consent Doctrine: What Veterinarians Should Tell Their Clients*, 224 J. AM. VETERINARY MED. ASS'N 1436 (2004). *But see infra* notes 248-258 and accompanying text.

²³⁰ See, e.g., COLO. REV. STAT. § 12-64-121(1) (West Supp. 2007) (requiring veterinarian to report suspected animal cruelty or animal fighting).

²³¹ See AVMA, PRINCIPLES, *supra* note 209, § III.

²³² See *id.* § II.A.

²³³ See Nunalee & Weedon, *supra* note 14, at 149 ("[V]eterinarians have to deal with the sometimes unreasonable expectations of their often irrationally emotional human clients while at the same time keeping their animal patients' best interests at heart. The desires of the human client are often incongruous with the best interests of the animal patient.").

²³⁴ See, e.g., MICHAEL POLLAN, THE OMNIVORE'S DILEMMA 316 (2006) (citing DANIEL C. DENNETT, KIND OF MINDS: TOWARD AN UNDERSTANDING OF CONSCIOUSNESS (1998)).

²³⁵ The average life expectancy of a dog is between 7 and 16 years, depending on the breed. Cats can be expected to live 12 to 18 years. See Pet Years, Pet Life Expectancy & Vet Costs, <http://petmd.org/PetYearsLifeExpectancyVetCosts/tabid/83/Default.aspx> (last visited Apr. 1, 2009).

C. *Proposed Framework For Veterinary Clinical Decision-Making*

A helpful starting point to framing normative questions around animal care decision-making is the status quo. By looking at who is currently making such decisions, how they are made, what factors are taken into account, and how conflict is resolved, it will be easier to see where changes need to be made and how that might be done. It may well be that the status quo is working the majority of the time. But, as in human medicine, the more difficult cases are often the ones that prompt change. A proper framework for decision-making will be one that not only works for the easy decisions, but for the most challenging ones as well.

1. *Who should decide what level of care an animal receives?*

Decision-making in veterinary care is typically divided between the animal's owner and the treating veterinarian. And these veterinarians and animal owners are faced with difficult choices every day in caring for sick, injured, and dying animals. To some extent, those choices are guided by the legal²³⁶ and professional ethical²³⁷ obligations of the veterinarian. While the animal owner faces fewer legal restrictions,²³⁸ her choices will be guided by a number of factors, including emotional attachment, a sense of duty, an understanding of the animal's condition and the various options for treating it, the cost of the treatment choices, and her ability to pay for it.²³⁹ Challenges may arise when no obvious "right" choice presents itself, especially where there may be disagreement between the animal's owner, the treating veterinarian, and other interested parties concerning what should be done. But perhaps even greater challenges occur when a treating veterinarian is certain that an animal's owner is making the wrong choice and sees little she can do to influence the outcome.

In some respects, it appears that animal owners have almost complete discretion in making treatment choices for their animals. Animals are still considered the legal property of their owners (or "guardians"), and the only legal limits, if any, on veterinary treatment choices may reside in an animal cruelty statute's requirement for "proper veterinary care."²⁴⁰ On the other hand, owner choices are often directed by the information they receive from veterinarians, who have superior understanding of the animal's condition, the available

²³⁶ See discussion on informed consent, *infra* notes 248-258 and accompanying text.

²³⁷ See AVMA, PRINCIPLES, *supra* note 209.

²³⁸ *But see infra* notes 312-340 and accompanying text discussing requirements in animal cruelty laws for proper veterinary care.

²³⁹ See, e.g., *Why Pet Insurance Is Usually a Dog*, *supra* note 225 (discussing the high costs of veterinary care).

²⁴⁰ E.g., DEL. CODE ANN. tit. 11, § 1325(a)(11) (2007); see also Bernard E. Rollin, *Veterinary Medical Ethics*, 48 CAN. VET J. 239, 240 (2006), available at <http://www.pubmedcentral.nih.gov/picrender.fcgi?artid=1800952&blobtype=pdf> ("Ethical dilemmas in veterinary practice arise sometimes because animals are legally defined as property. Veterinarians have no authority to change inappropriate care by pet owners, unless it is deemed negligent or cruel.").

treatment options, and the likely outcome of various treatment choices.²⁴¹ Veterinarians may therefore be able to manipulate owner choice by withholding or selectively presenting this information.²⁴² In fact, an ethical dilemma that is sometimes cited by treating veterinarians is whether to present owners with the full range of treatment options.²⁴³

Similar to the medical profession, however, veterinary medicine is moving away from the traditional model of paternalism, where the doctor is the primary decision-maker, to one involving more of a partnership between the owner and the veterinarian. In a recent article, veterinarian Richard Lerner describes being introduced to this “old model, one in which doctors reigned supreme” on his first day of veterinary school.²⁴⁴ He rejects such “old model” thinking in his own practice, working instead on forming a partnership with his clients.²⁴⁵ Veterinarians who try to control owner choices by withholding information may also be violating their ethical and legal obligations of “informed consent.”²⁴⁶ While this term clearly has a different meaning in veterinary practice than it does in human medicine, where informed consent is based on patients’ rights to make their own decisions, it is used with surprising frequency in the veterinary context—in articles addressed to veterinarians, in veterinary association policies, and even in state laws regulating veterinary practice.²⁴⁷

The term “informed consent” is often used in veterinary medicine to describe the legal and ethical obligations that veterinarians have to inform animal owners about treatment options for their animals. For example, a 2007 article in the *Journal of the Veterinary Medical Association*, titled, “The Informed Consent Doctrine: What Veterinarians Should Tell Their Clients” refers to a number of states having “mandatory informed consent statutes as part of their veterinary practice acts.”²⁴⁸ Such language does in fact appear in some state regulations, such as Missouri’s Rules of Professional Conduct for Veterinarians, which requires licensed veterinarians to “obtain the informed written consent of the client” before performing surgery or using anesthesia on an animal, unless it is an emergency.²⁴⁹ And, as recently as 2007, the AVMA formally adopted a policy on informed consent.²⁵⁰

²⁴¹ This situation is not, of course, limited to the veterinary context. Compare the discussion in Coombes, *supra* note 179, at 1227 (“We say we deal with fully informed consent with our human patients. I think a doctor does retain a certain amount of power in the therapeutic relationship according to how much information is given and the way it is nuanced.”).

²⁴² See *supra* note 223 and accompanying text.

²⁴³ See *supra* note 223.

²⁴⁴ See Richard Lerner, *Mutual Aid: Understanding Your Vet’s Role and Your Own Is Key to a Successful Partnership*, BARK, May/June 2007, at 53, 54.

²⁴⁵ *Id.*

²⁴⁶ See, e.g., Flemming & Scott, *supra* note 229, at 1437.

²⁴⁷ *Id.* at 1436-37.

²⁴⁸ See Flemming & Scott, *supra* note 229, at 1436; see also Charlotte A. Lacroix, *Informed Consent – Boring Until You Get Sued*, http://www.michvma.org/documents/MVC_Proceedings/Lacroix2.pdf (last visited Apr. 1, 2009).

²⁴⁹ See Flemming & Scott, *supra* note 229, at 1436 (citing MO. CODE REGS. ANN. tit 20, § 2270-

Despite its frequent use, the term “informed consent” implies a very different set of obligations in the veterinary context than in the human medical context. Perhaps for these reasons, there has been a recent movement away from the use of this term in veterinary medicine, joined with arguments that mirror the objections to the term “guardian” in the owner-animal context. Six months after the Executive Board of the American Veterinary Medical Association (AVMA) approved a policy on informed consent,²⁵¹ the same body voted to replace the term with “owner consent” in all of its official documents.²⁵² In fact, one reason cited for the change was to take away the opportunity of “animal guardian proponents” to use any implications of the veterinary use of the term “informed consent” in support of arguments that the veterinary association rejects.²⁵³

The AVMA’s movement against using the term “informed consent” is well grounded in a legal sense as well. In reality there are few actual legal requirements regarding informed consent, as that term is understood in human medicine.²⁵⁴ Legally, in the veterinary context, the obligations are derived from the owners’ right to control their *property* and the fiduciary responsibilities that veterinarians, as professionals with specialized knowledge, have to their clients.²⁵⁵ While a number of statutes and regulations do in fact set out some consent requirements, they tend to be specific to limited types of treatment, such as surgery and anesthesia, and most of these laws do not actually require “informed consent.”²⁵⁶ Some legal advice aimed at veterinarians is more openly

6.011 (2008)).

²⁵⁰ AVMA *Adopts Policy on Informed Consent*, JAVMA NEWS, May 15, 2007, available at <http://www.avma.org/onlnews/javma/may07/070515e.asp> (“Informed consent better protects the public by ensuring that veterinarians provide sufficient information in a manner so that clients may reach appropriate decisions regarding the care of their animals. Veterinarians, to the best of their ability, should inform the client or authorized agent, in a manner that would be understood by a reasonable person, of the diagnostic and treatment options, risk assessment, and prognosis, and should provide the client or authorized agent with an estimate of the charges for veterinary services to be rendered. The client or authorized agent should indicate that the information is understood and consent to the recommended treatment or procedure.”).

²⁵¹ See *id.*

²⁵² See “*Informed Consent*” Versus “*Owner Consent*”, JAVMA NEWS, Dec. 15, 2007, available at <http://www.avma.org/onlnews/javma/dec07/071215d.asp>. In approving this change, the board noted that “because the informed consent doctrine in human medicine evolved from a cause of action for an unauthorized touching or invasion of the body, it would be wise to preclude the use of this term in veterinary medicine and the potential legal precedents to which it could be linked. Since animals are still property under law, guidelines from the AVMA, the Animal Health Institute, and other veterinary legal advocates should explain this legal difference and seek to keep it that way.” *Id.*

²⁵³ *Id.*

²⁵⁴ See BEAUCHAMP & CHILDRESS, *supra* note 154, at 79 (listing the analytical components of informed consent as consisting of “(1) competence, (2) disclosure, (3) understanding, (4) voluntariness, and (5) consent.”).

²⁵⁵ See Flemming & Scott, *supra* note 229, at 1436.

²⁵⁶ One of the examples of a “mandatory informed consent statute” in the Flemming & Scott article is actually an Idaho licensing regulation that, at the time the article was written, in fact

aimed at addressing liability fears, such as the aptly titled paper, “Informed Consent—Boring Until You Get Sued.”²⁵⁷ The only actual authority for specific informed consent requirements in this piece, however, is extrapolated from state common law on physicians’ informed consent obligations to their patients.²⁵⁸

It is fair to say, then, that a certain lack of clarity remains around just what is required regarding consent for veterinary treatment and exactly what the requirements ought to be called. These uncertainties go to the heart of the question of how the decision-making responsibility ought to be allocated between an animal’s owner and the treating veterinarian. Ambivalence on this question can be seen within the veterinary profession itself, as becomes clear when comparing various sections of the AVMA’s Principles of Veterinary Medical Ethics²⁵⁹ and its adopted policies. Some of the AVMA principles and policies recognize the client’s right as a property-owner to make treatment decisions.²⁶⁰ In other instances, the principles almost go in the other direction, embracing the model of the veterinarian as the primary decision-maker by emphasizing her professional role as the one who has the knowledge and judgment to make the decision, with the client in the role of “agreeing to follow the veterinarians [sic] instructions.”²⁶¹ And yet other AVMA principles appear to be motivated by concerns over potential liability.²⁶²

Unlike human medical decision-making, where patient autonomy is paramount and informed consent is a clear legal requirement,²⁶³ veterinary decision-making tends to be more of a negotiation between the owner and the treating veterinarian.²⁶⁴ The client-owner tends to know and understand her

required the veterinarian to obtain “written consent from the patient’s owner” for surgery or general anesthesia “where possible.” *See id.* (citing IDAHO ADMIN. CODE r. 46.01.01.152.12 (1992)). The current version of the Idaho regulation only mentions consent (and not informed consent) in one specific context: “Consent for Transporting. A veterinarian shall obtain written consent from a patient’s owner or other caretaker before transporting a patient to another facility for veterinary medical care or any other reason, unless circumstances qualifying as an emergency do not permit obtaining such consent.” IDAHO ADMIN. CODE r. 46.01.01.152.11 (2007).

²⁵⁷ *See* Lacroix, *supra* note 248.

²⁵⁸ *See id.* at 2 n.4 and accompanying text.

²⁵⁹ The AVMA’s *Principles of Veterinary Medical Ethics* has been called “the profession’s definitive statement of its most fundamental values.” *See* Tannenbaum, *supra* note 206, at 153.

²⁶⁰ *See, e.g.,* AVMA, PRINCIPLES, *supra* note 209, § II.E (“The decision to accept or decline treatment and related cost should be based on adequate discussion of clinical findings, diagnostic techniques, treatment, likely outcome, estimated cost, and reasonable assurance of payment.”).

²⁶¹ *See id.* § III.A.1 (noting as one requisite to the establishment of a Veterinarian-Client-Patient Relationship that “[t]he veterinarian has assumed responsibility for making clinical judgements [sic] regarding the health of the animal(s) and the need for medical treatment, and the client has agreed to follow the veterinarians [sic] instructions.”).

²⁶² *See, e.g., id.* § II.B.

²⁶³ BEAUCHAMP & CHILDRESS, *supra* note 154, at 77 (“Virtually all prominent medical and research codes and institutional rules of ethics now hold that physicians and investigators must obtain the informed consent of patients and subjects prior to any substantial intervention.”).

²⁶⁴ *See* Sanders, *supra* note 209, at 199.

animal best and—one would hope—want what is best for it.²⁶⁵ Few animal owners or guardians are likely to want to make treatment decisions for their animals without the input of a veterinarian, who has superior knowledge of treatment options and the technical ability to perform them.²⁶⁶ How much input they want or need is likely to be as varied as patients' desires in the doctor-patient context. What is clear, however, is that the best decision-making happens when veterinarians and owner-clients work in partnership with one another, concerned not with reducing liability of one or the other, but concerned with doing what is best, under the circumstances, for the animal patient.²⁶⁷

While it is not hard to see why such a veterinarian-owner partnership would be ideal, it is in areas of conflict where this ideal is most challenged. What happens when an animal's owner insists on treatment that a veterinarian considers futile? Or, as more often happens, when an owner requests that the veterinarian euthanize a healthy pet for reasons that appear to be based on the owner's convenience? To whom does the veterinarian owe a primary duty—to the owner-client or the animal-patient?²⁶⁸ The veterinarian's ethical obligations are not easily resolved within the current system, though the law provides a fairly straightforward answer: because animals remain the legal property of their owners, it is the owner who has the ultimate say,²⁶⁹ however wrong that decision may seem to the veterinary professional. The question that remains is whether there should be any limits on such owner discretion; that is, are there any circumstances under which a veterinarian can, or should be able to, legally override the owner's choice? In order to address that question, it is helpful to first consider what factors are and should be included in such decisions.

2. *Factors to include in treatment decisions: toward a modified best interest standard*

The many similarities between human and veterinary medicine²⁷⁰ suggest that veterinary decision-making might draw, to some extent, from human medical decision-making for those unable to make their own decisions. Unlike competent human patients, who can express their treatment preferences, animals are completely dependent on others to make treatment decisions. As suggested above, the best interest standard—which is used for those who never had decisional capacity, and which weighs the benefits of a proposed treatment

²⁶⁵ See Sanders, *supra* note 223, at 160.

²⁶⁶ See *id.*

²⁶⁷ Or, as put in the sociology literature: “[T]he client calls upon his or her everyday, intimate experience with the animal while the veterinarian primarily employs technical expertise. Ideally, the sharing of these rather differently derived types of information leads to a cooperative interaction and mutually satisfactory clinical outcome.” *Id.*

²⁶⁸ See also *supra* note 78 and accompanying text.

²⁶⁹ See Gary L. Francione, *Animals—Property or Persons?*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS, *supra* note 205, at 108, 116-17.

²⁷⁰ See *infra* Part III.A.

against its burdens or risks—therefore seems to offer the best potential fit.²⁷¹ Indeed, many discussions of veterinary treatment decisions sound very much like best interest determinations.²⁷² What may differ, however, based on fundamental differences between humans and animals, are the factors to include in such a risk-benefit calculus, whether to consider factors outside of the animal's immediate interests, and how to weigh the various factors against one another.

Both veterinarians and animal owners typically approach decision-making from a best interest standard. The AVMA's *Principles of Veterinary Medical Ethics* places at its forefront something that sounds very much like a best interest standard, with primary consideration given to "the needs of the patient: to relieve disease, suffering, or disability while minimizing pain and fear."²⁷³ On a more micro level, one veterinarian described the "perfect client" as one who "cares about the welfare and well-being of the animal as much as they care about their own need for that animal to be part of their life."²⁷⁴ And certainly the behavior of many animal owners, in seeking veterinary care and often opting for state-of-the-art treatment choices, appears to be based on doing what is best for the animal.²⁷⁵

A best interest standard thus sounds like an appealing starting point for veterinary treatment decisions, but the factors that weigh in to the benefits-risk calculus may be different from those for human patients. There is little question that sentient non-human animals experience pain and pleasure,²⁷⁶ and thus the pain or discomfort entailed in any treatment choice must be taken into account. However, unlike a competent human patient or even a young child, an animal is not able to understand that it may have to be subjected to a painful or uncomfortable procedure "for its own good."²⁷⁷ This distinction argues for factoring such inability to understand into treatment choices²⁷⁸ and could weigh in favor of opting against a treatment that could cause short-term pain even where there is a long-term benefit. On the other hand, if an animal does not have the ability to anticipate or dread a painful or uncomfortable procedure, and less

²⁷¹ See *supra* Part II.C.

²⁷² See, e.g., AAHA, *Senior Care Guidelines*, *supra* note 192, at 53 ("The veterinarian has a responsibility to *recommend* what is best for the pet . . ."); see also *Veterinary Care Without the Bite*, *supra* note 196, at 17 ("The overriding decision should be based not on what medical treatments are possible, but on how well-off the pet will be during and after treatment.").

²⁷³ AVMA, *PRINCIPLES*, *supra* note 209, § II.A.

²⁷⁴ See Sanders, *supra* note 223, at 164.

²⁷⁵ See *supra* notes 189-191 and accompanying text.

²⁷⁶ See generally *MENTAL HEALTH AND WELL-BEING IN ANIMALS* (Franklin D. McMillan ed., 2005).

²⁷⁷ See POLLAN, *supra* note 234, at 316 ("[L]anguage and all that comes with it can . . . make some kinds of pain *more* bearable. A trip to the dentist would be an agony for an ape that couldn't be made to understand the purpose and duration of the procedure.") (emphasis in original).

²⁷⁸ Cf. *Superintendent of Belchertown v. Saikewicz*, 370 N.E.2d 417, 432 (Mass. 1977) (ruling that a mentally incompetent patient should not be subjected to chemotherapy, in part because the patient could not understand the long-term goals of the regimen and would only perceive the treatment as painful and frightening).

ability to remember and thus relieve the discomfort,²⁷⁹ then perhaps the decision-maker might weigh the long-term benefit more heavily against the short-term discomfort. While it may not be clear where this balance comes out, or how it will be weighed differently for different animals, what is apparent is that these differences between humans and non-human animals need to be accounted for when choosing and weighing the various factors to apply in a best-interests test.

The short life-span of most companion animals must also be weighed into any best interest analysis. In human medical decision-making, courts have been much more willing to uphold choices against life-prolonging therapy when the patient is an older adult who lacks decision-making capacity than for a young child who does not yet have such capacity.²⁸⁰ This comparison suggests that the potential benefits of a treatment include both the number of years that it can offer as well as what capacity can be expected to develop in those years. Companion animals, of course, will never develop the decisional capacity of an ill child who, with proper treatment, can one day mature into a competent adult. And even a very young animal has, in human terms, a limited number of years ahead of it. People making treatment decisions for animals still, of course, often take their age into account, but the much shorter life span of the animals we care for will likely be factored into most treatment decisions.

Another, and perhaps more important, limit on using the best interest standard for animal treatment decisions is the frequency with which what is best for the animal bumps up against the reality of what the owner is able or willing to pay.²⁸¹ Treatment costs and the ability to pay for that treatment are much more at the forefront of veterinary care decisions than they are in human medicine.²⁸² Though there are certainly many instances where an insurance denial or lack of insurance can determine what treatment a human patient receives,²⁸³ rarely does such a blatant discussion of “how much will it cost” take place between doctors and patients as it does between veterinarians and owners.²⁸⁴ Parties to this

²⁷⁹ See POLLAN, *supra* note 234, at 316 (distinguishing “between pain, which a great many animals obviously experience, and suffering, which depends on a degree of self-consciousness only a handful of animals appear to command”).

²⁸⁰ Compare Saikewicz, 370 N.E.2d at 417, with pediatric cases cited *supra* Part II.B.

²⁸¹ For a discussion of the role of cost in veterinary treatment, see *supra* notes 220-226 and accompanying text.

²⁸² See Sanders, *supra* note 209, at 199.

²⁸³ On third-party payment in the U.S., see Rainer, *supra* note 224, and Alex Berenson, 2 *Lymphoma Drugs Go Unused, and Backers Cite Market Forces*, N.Y. TIMES, July 14, 2007, at A1 (explaining that two effective drugs that combat non-Hodgkins lymphoma are too rarely used because insurers do not pay doctors’ offices for prescribing them). Compare discussion in Coombes, *supra* note 179, at 1227, where an animal owner’s ability to pay is contrasted to patient-doctor interactions because “there is no NHS [national health service] for animals.”

²⁸⁴ See, e.g., Sanders, *supra* note 223, at 166-67 (citing clients who are overly concerned with the cost of recommended treatment as among the most problematic to veterinarians); see also Lerner, *supra* note 244, at 55 (“Unless there is no shortage of money, it is impossible to make medical decisions without putting a price tag on them.”).

discussion have come to accept this reality, though they are sometimes troubled by it.²⁸⁵

The reality of economic considerations driving veterinary treatment decisions is not going to change any time soon. Third-party payment is still rare in veterinary practice, and what pet insurance is available is of limited value.²⁸⁶ Even before sophisticated and expensive treatment was common in veterinary practice, cost considerations often determined whether a pet animal was treated or euthanized.²⁸⁷ The more useful question is to what extent *should* costs be considered? Ethicist Jerrold Tannenbaum puts the question this way: “Is a veterinary client morally obligated to make economic sacrifices to help a pet that has given the family love and enjoyment over the years? If so, are there limits to those sacrifices?”²⁸⁸ The AVMA Code of Ethics similarly recognizes these concerns by allowing only the following factors to influence treatment choices: “the needs of the patient, the welfare of the client, and the safety of the public.”²⁸⁹ It is fair to surmise that “the welfare of the client” includes her ability to pay for the animal’s treatment.

Any meaningful ability to use a best interest standard in veterinary medicine would have to include a qualification that allowed the animal’s interests to be balanced against those of its owner, including consideration of the owner’s ability to pay. Similar to the way parental decision-making for children can balance the interests of the child, the parents, and the state,²⁹⁰ animal care decision making must balance the interests of the animal and its owner.²⁹¹ While the opponents of “guardian” language for animals have argued that using the best interest standard will require owners to pay for treatment they cannot afford,²⁹² this argument fails to take into account the legitimate balancing that can occur between the best interests of an animal and the owner’s financial interests. This compromise is precisely what this Article suggests for veterinary decisions: a modified best interest standard that takes into account the many differences between humans and non-human animals, including the increased need to consider costs in making treatment choices.

In considering how best to balance the owner’s ability to pay with the animal’s medical needs, there are good reasons why veterinary medical decision-

²⁸⁵ See Lerner, *supra* note 244, at 55.

²⁸⁶ See *supra* note 225.

²⁸⁷ See, e.g., *Fredeen v. Stride*, 525 P.2d 166 (Or. 1974) (holding that plaintiff, who had requested that her sick dog be euthanized because treatment was too expensive, had a right to recover against defendant veterinarian, who had given the dog away instead of terminating its life).

²⁸⁸ Tannenbaum, *supra* note 206, at 145.

²⁸⁹ AVMA, *PRINCIPLES*, *supra* note 209, Part V.A.

²⁹⁰ See Rosato, *supra* note 122, at 11 (citing the Delaware Supreme Court’s identification of “the tripartite balancing approach” in *Newmark v. Williams*, 588 A.2d 1108, 1115 (Del. 1991)).

²⁹¹ While there may be no similar state interest in preserving life in the animal care context, the state’s interest in preventing cruelty to animals, expressed through statutory animal cruelty prohibitions, will be addressed below.

²⁹² See AVMA Task Force, *supra* note 69.

making ought *not* to follow the human health care model. On a societal level, we certainly do not need to see the costs of veterinary care spiraling upward and out of reach in the way that human health care costs have done.²⁹³ One way to prevent such spiraling costs is to avoid importing into veterinary care a presumption that expensive treatment options should always be chosen simply because they are available. Similarly, at a more micro-level, the availability of an expensive, high-tech veterinary treatment option should not mean that an animal owner is expected to choose that option.²⁹⁴ Indeed, many animal owners *will* choose to pay for expensive services,²⁹⁵ but this certainly does not mean that all owners should be expected to do so.²⁹⁶ At this point, neither the veterinary profession²⁹⁷ nor individual veterinarians²⁹⁸ seem to expect owners to pay as much for their animal's care as they pay for their own—in fact, most veterinarians have accepted the reality of “economic euthanasia,” the decision to euthanize an animal not because it is suffering and nothing more can be done, but because the treatment options are beyond the owner's financial means.²⁹⁹ And there are many reasons why this expectation of animal owner discretion on how much to spend on their animals ought to continue.

While animal owners' reliance on costs, alone, may not be a significant area of conflict in veterinary treatment decisions, there are times when such conflicts do arise. A veterinarian may, for example, believe that the owner is relying too heavily on expenses in making treatment decisions or may otherwise find the owner's choice to be unreasonable.³⁰⁰ The next Part turns to the question of how such conflicts should be resolved and if complete owner discretion can or should ever be challenged.

²⁹³ See, e.g., Congressional Budget Office, Director's Blog, Dec. 18, 2008, <http://cboblog.cbo.gov/?p=193> (“The rising costs of health care and health insurance pose a serious threat to the future fiscal condition of the United States.”).

²⁹⁴ See, e.g., *People v. Arroyo*, 777 N.Y.S.2d 836, 844 (2004) (citing the owner's ability to pay the cost of veterinary treatment as one justification for the court's refusal to find, in a state animal cruelty statute, a duty to provide veterinary care, reasoning that “[r]eading into A.M.L. § 353 an affirmative duty to provide medical care in all cases, regardless of the expenses or the owner's ability to meet them, implies a standard of morality and decency that the court is not persuaded society has adopted”).

²⁹⁵ See Lue et al., *supra* note 221, at 540 (“Only 2 in 10 clients said they were apt to decline care because they could not afford it.”).

²⁹⁶ Cf. David Favre, *How Much “Care” Does the Law Require?*, in TAMIE L. BRYANT, REBECCA J. HUSS & DAVID N. CASSUTO, *ANIMAL LAW AND THE COURTS: A READER* 162 (2008) (“[I]t is not appropriate to have a legal system that requires a human to provide an animal with more medical care than that human can provide for him or herself.”).

²⁹⁷ See *supra* note 289 and accompanying text, discussing the recognition of “the welfare of the client” in the AVMA Code of Ethics.

²⁹⁸ See *supra* note 222 and accompanying text.

²⁹⁹ See Sanders, *supra* note 222, at 199 (discussing euthanasia as a “viable final option” as weighed against the cost of expensive treatment); see also Green, *supra* note 212, at 208.

³⁰⁰ See Sanders, *supra* note 265, at 161-67.

3. *Resolving Conflict: Should There Be Any Limits On Owner Choice?*

The first Part of this Article argued that animal law statutes that replace “owner” with “guardian” will not, as opponents have claimed, limit in any way the health care choices that we can make for our animals.³⁰¹ While owner-guardian language may help pet owners better understand their responsibilities toward their animals and perhaps in this way may ultimately influence the choices they make, the language change has no legal effect and no enforcement role.³⁰² What remains unanswered is the question of whether there *should* be any legally enforceable limits on veterinary care decisions, and if so, how the law can best effect these limits. Some choices that animal owners make can be truly egregious, and it is not hard to see why we might want to limit these behaviors. Given that we already limit certain behaviors toward animals through animal cruelty laws, perhaps these statutes could be used to enforce some limits on veterinary care choices.

Legally, animal owners have almost complete discretion in making choices for their animal’s health care, and in most cases, this presumption in favor of owners is warranted. The deference to animal owners in making treatment decisions is typically much stronger than the deference given to parents when they make treatment decisions for their children.³⁰³ The assumption that parents will act in the best interests of children is typically only overcome in extreme cases, such as the rejection of life-saving treatment.³⁰⁴ Animal care generally starts with a similar presumption—that the owners will act in the animal’s best interest, though the animal’s interest can more often be overridden by interests of the owner. But, perhaps like the presumption in favor of parents’ discretion, this presumption might also be overridden in extreme cases, with a higher bar on what constitutes “extreme.” Given all of the differences between animal and human health care, it may not be appropriate to question an owner for opting against life-saving treatment, even when that choice is driven by financial concerns. Still, it may be justifiable to limit some owner choices, and a likely starting place to impose such limits is the decision to euthanize a healthy animal for the owner’s convenience.³⁰⁵

³⁰¹ See *supra* Part I; see also Rollin, *supra* note 240 (“Ethical dilemmas in veterinary practice arise sometimes because animals are legally defined as property. Veterinarians have no authority to change inappropriate care by pet owners, unless it is deemed negligent or cruel. If animal ownership is redefined as animal guardianship, this could change. Veterinarians would then have greater authority/responsibility to insist on appropriate care for injured or ailing pets. Will changing the legal definition of animal owner to animal guardian reduce or increase the number of ethical conflicts that occur in companion animal practice?”).

³⁰² See *supra* notes 80-87.

³⁰³ Compare Sanders, *supra* note 209, at 204, and Rollin, *supra* note 192, at 62 (convenience euthanasia), with BLACK’S LAW DICTIONARY 1144 (8th ed. 2004) (parents patriae power of the state).

³⁰⁴ See BEAUCHAMP & CHILDRESS, *supra* note 154, at 179.

³⁰⁵ See Annamaria Passantino et al., *Euthanasia of Companion Animals: A Legal and Ethical Analysis*, 42 ANN. IST. SUPER SANITÀ 491, 494 (2006), available at http://www.iss.it/binary/publ/cont/491-ANNALI_06_53.1172835128.pdf (arguing that

Even though humane euthanasia is an accepted and ethical treatment option in veterinary medicine,³⁰⁶ not all decisions to euthanize are acceptable or ethical. The veterinary professionals who perform these procedures on animals tend to judge owners' requests for euthanizing animals on a continuum of legitimacy.³⁰⁷ The majority of euthanasia decisions are made for reasons that are considered the most legitimate: to relieve pain or infirmity caused by illness or injury.³⁰⁸ Further down the scale, but still acceptable to most veterinarians, are decisions that focus on owner interests—financial interests as well as interests in not making the effort to remedy animal behavior problems, given the limited time, energy, and knowledge that may be available to a particular owner.³⁰⁹ The least justifiable reason, troubling to the veterinarians who are asked to perform it as well as most others who hear about it, is what has been called “convenience euthanasia.”³¹⁰ And while current laws put few if any limits on such choices,³¹¹ perhaps this is where intervention should occur.

Laws against animal cruelty provide the best basis for challenging such owner treatment choices. These laws already provide the place where we, as a society, have determined that certain behavior towards animals—whether framed as protecting the animal's interests³¹² or protecting society's interest in the way it treats its animals—will not be tolerated.³¹³ It therefore makes sense to look here, and not to laws that simply change “owner” terminology to “guardian” as a place to challenge the complete discretion that owners of companion animals have had to decide when their animals will live or die.

The appropriateness of using animal cruelty laws to challenge owner treatment decisions is based on important differences between animal and human health care. In the context of parents making health care decisions for

policymakers should “limit the vast discretion” that owners of companion animals currently have to euthanize their animals.).

³⁰⁶ See *supra* Part III.B.

³⁰⁷ Sanders, *supra* note 209, at 203.

³⁰⁸ *Id.*

³⁰⁹ See *id.*; see also American Veterinary Medical Ass'n, *supra* note 212 (approving of equine euthanasia in financial hardship cases).

³¹⁰ See *infra* note 335.

³¹¹ See Hankin, *supra* note 13, at 406 n.393 (citing ROLLIN, *supra* note 192, at 33, 59, 62-63). While courts have found ways to invalidate requests to euthanize healthy animals as “against public policy” when they come in the form of testamentary provisions, current law rarely interferes with such choices by living owners. See *id.* at 353-58.

³¹² These interests have even been characterized as animal rights. See Cass Sunstein, *Introduction: What Are Animal Rights?*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS, *supra* note 205, at 3, 5-6 (describing animal cruelty statutes as supporting a “minimalist” animal rights position, where “rights” entail legal protection against harm, because the coverage and application of state laws are quite narrow).

³¹³ Animal cruelty statutes have undergone a significant transformation in the past decade, increasing penalties, broadening the range of included offenses, and imposing additional affirmative duties to care for animals. See Hankin, *supra* note 13, at 365-68 and accompanying notes; see also Sunstein, *Can Animals Sue?*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS, *supra* note 205, at 251, 252.

their children, there has been some well-founded criticism of using child abuse and neglect statutes as a mechanism for challenging those decisions.³¹⁴ Decisions owners make for their companion animals are different enough, however, that those objections do not apply in this context. Health care decision-making for children involves a balancing of various rights, interests, and duties: the best interests of the child, the right of parents to make decisions about their child's health care, state interests in preserving life, and state *parens patriae* duties to protect children from harm.³¹⁵ These interests are often aligned; when they are not, challenging parental decision-making through abuse and neglect laws is often not the best way to achieve the proper balance. In the animal care context, however- where clinical interactions of a "triangular nature" involve veterinarians, human clients, and animal patients³¹⁶ - cruelty or abuse laws provide precisely the right way to strike the proper balance in challenging owner discretion in animal care decision-making.

The interests and duties involved in making animal care decisions are very different from those in the parent-child context. Animals may have some moral and legal interests,³¹⁶ but those interests cannot be compared to those of a child. Where parents and children are both human beings with similar legal rights, the same cannot be said of animals and owners.³¹⁷ The primary interest recognized by law is that of the owner to control what is in most cases considered property.³¹⁸ And unlike with children, there is no analogous state interest in preserving the life of animals and no *parens patriae* duties to protect them from harm. We have, however, recognized societal interests in protecting at least some animals from some harm, as well as interests that these animals have in being protected from harm.³¹⁹ The very place where society's and animals' interests coalesce is in statutes that exist in every state prohibiting animal cruelty, abuse, and neglect. Animal treatment decisions might also implicate interests of individual veterinarians and of the veterinary profession.³²⁰ Those interests can also be protected through use of animal cruelty statutes.³²¹

³¹⁴ See Wadlington, *supra* note 120, at 336 (questioning "whether child abuse reporting statutes, at present one of the few formal measures for channeling medically deprived children into the health-care system, are the appropriate approach either in terms of effectiveness or timing."); see also Rosato, *supra* note 122, at 26 ("Medical neglect is simply an inappropriate paradigm for determining decision-making authority.").

³¹⁵ See *supra* Part II.B.

³¹⁶ See Tannenbaum, *supra* note 206, at 144-45 (discussing and weighing conflicts between human and animal interests).

³¹⁷ See *id.* at 147 (noting that "[h]uman medical ethics begins with the principle that . . . all medical patients are, in some sense, of equal value" and contrasting the position in veterinary medical ethics, where there can be substantial disagreement about the value of a veterinarian's patients").

³¹⁸ See *supra* note 200.

³¹⁹ See GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 119-133 (1995) (discussing the purposes of animal cruelty statutes).

³²⁰ Veterinarians have a strong interest in limits on convenience euthanasia. See ROLLIN, *supra* note 192, at 62 (describing the request to kill healthy animals as "the most demoralizing part

Using animal cruelty statutes as a vehicle to challenge owner discretion in veterinary decision-making provides the best way to challenge these sometimes competing interests while at the same time giving guidance as to which decisions are subject to challenge: those that fit within the rubric of abuse or neglect. Unlike the parent-child decision-making context, where use of abuse and neglect statutes to challenge parental decision-making has been appropriately criticized, the reasons for such criticisms are not applicable in the animal context—another difference between owner-animal and parent-child decision-making. As one commentator has aptly noted, most challenges to parental authority in denial-of-treatment cases do not properly fall within the spirit, even if they are within the technical language, of abuse and neglect statutes.³²² Parents who are challenged on whether they possess the moral authority to refuse treatment on their child's behalf are usually acting in good faith, even if misguided; they are typically trying to do what they believe is best for the child while "adher[ing] to the dictates of the parent's or child's religion."³²³ Such parents are not, however, abusive or neglectful in the way we typically understand that term.³²⁴ In contrast, under the framework set out above, the choices of animal owners would only be challenged under animal abuse and neglect statutes in the extreme case where they request that their healthy companion animal be euthanized—a situation that falls squarely within the spirit of abuse and neglect statutes. And while such decisions may not yet be within the letter of most current animal cruelty laws, they do fall within some current laws; other statutes could and should be revised to include euthanizing a healthy animal as a form of abuse.

Animal cruelty laws could be used to limit owner treatment choices by including, strengthening, and clarifying provisions that require proper veterinary care.³²⁵ Currently, few of the cruelty statutes even address veterinary

of companion animal practice"). The interests of the veterinary profession are harder to document. In a 26-page report, the AVMA Guidelines on Euthanasia, the authors recognized, but declined to address, the ethical concerns around euthanizing healthy animals. See AVMA GUIDELINES ON EUTHANASIA 3-4 (2007), available at http://www.avma.org/issues/animal_welfare/euthanasia.pdf. In contrast, the Association of Veterinarians for Animal Rights (AVAR) has taken a clear position on the issue: "[V]eterinarians should refuse on principle to be the instrument of death of nonhuman animals for reasons other than those of mercy, the situation in animal control facilities being a notable exception." See Association of Veterinarians for Animal Rights, Position Statement: Euthanasia of Nonhuman Animals, http://avar.org/publications_position.asp#p14 (rev. June 1997).

³²¹ See *infra* notes 322-340 and accompanying text.

³²² See Rosato, *supra* note 122, at 26-27.

³²³ See *id.*

³²⁴ See *id.* ("This image [of the parent acting in good faith] stands in contrast to the prototypical 'neglectful' parent, whose omissions violate the social consensus of good parenting and thus warrant state intervention under the traditional neglect statutes.").

³²⁵ See Phyllis Coleman, *Man[']s Best Friend] Does not Live by Bread Alone: Imposing a Duty to Provide Veterinary Care*, 12 ANIMAL L. 7 (2005) (proposing "uniform legislation that creates an explicit obligation to provide health care to companion animals, imposes a duty on veterinarians to report cruelty, and establishes strict penalties for violations").

care³²⁶ and many of those that do specifically exempt owner choices for humane euthanasia. For example, Nebraska's statute on offenses against animals requires animal caretakers to provide "care as is reasonably necessary for the animal's health," but specifically allows "humane killing . . . upon the owner's request."³²⁷ Recent amendments to Michigan's statute on crimes against animals require that animals receive "adequate care" which includes "veterinary medical attention in order to maintain an animal in a state of good health."³²⁸ Unlike Nebraska's law, Michigan does not contain an exemption for owner-requested euthanasia; it does prohibit abandoning animals without providing adequate care, but it is unclear if the statute could be used to prevent the euthanizing of a healthy animal.

At least one statute does contain language that could support an argument that convenience euthanasia violates anti-cruelty law. Delaware, like other states, requires animal owners to provide "proper veterinary care."³²⁹ But, unlike in other states, a person in Delaware is guilty of cruelty when he "unnecessarily kills . . . any animal whether belonging to [him] or another."³³⁰ The statute expands on "unnecessarily" to include killing "if the act is not required to terminate an animal's suffering, to protect the life or property of the actor or another person or if other means of disposing of an animal exist which would not impair the health or well being of that animal."³³¹ This language appears to contain a clear prohibition of killing a healthy animal merely for the owner's convenience ("not required to terminate . . . suffering")³³² while allowing the flexibility to make such choices to prevent a true financial hardship ("to protect . . . property"). The final clause, despite the unfortunate choice of the term "disposing," can be read as encouraging owners to find other homes for their unwanted animals or at least to take them to a shelter that will provide better care for them.³³³ The statute also contains an exception for scientific research and

³²⁶ See *id.*

³²⁷ See NEB. REV. STAT. §§ 28-1008(1), 28-1013(6) (1995); see also ALA. CODE § 13A-11-246(2) (LexisNexis 2005) (exempting from its cruelty laws "any owner of a dog or cat who euthanizes the dog or cat for humane purposes"). Although an argument might be made that euthanizing an animal for the owner's convenience does not constitute "humane purposes," this argument is not likely to gain much traction when a provision in the same section of the statute allows people to shoot dogs or cats with a BB gun if they catch the animals urinating on their property, provided that the gun is "not capable of inflicting serious injury." See ALA. CODE § 13A-11-246(4) (LexisNexis 2005).

³²⁸ MICH. COMP. LAWS ANN. § 750.50(1)(a), (2)(a) (Supp. 2008).

³²⁹ DEL. CODE ANN. tit. 11, § 1325(a)(11) (2007).

³³⁰ DEL. CODE ANN. tit. 11, § 1325(b)(4) (2007). Note, however, that the provision exempts the killing of food animals from this prohibition on unnecessary killing, so long as it is done humanely.

³³¹ *Id.*

³³² Cf. Passantino et al., *supra* note 305, at 493 (citing a law in Italy's Abruzzo Region that explicitly decrees that "putting down animals should be done only on the owner's request for valid health reasons" and allows for an owner to give her animal to a kennel if maintenance of the animal has become impossible).

³³³ Cf. Coleman, *supra* note 325, at 35 (giving a proposed animal cruelty law containing the warning that "[g]uardians who do not want to pay for needed treatment can only protect

“accepted veterinary practices.”³³⁴ While at first this exception may appear to sanction the killing of a healthy animal at the owner’s request, it more likely allows for input from the veterinary profession—and even for evolving standards—as to what is deemed acceptable. If most veterinarians truly object to performing convenience euthanasia, as has been reported,³³⁵ then the procedure cannot easily be characterized as an “accepted veterinary practice.” If nothing else, such language could certainly support a veterinarian’s objections to, or refusal to comply with, an owner’s request to euthanize a healthy animal.³³⁶

One argument against this interpretation is that it raises the specter of what happens to unwanted animals. Some veterinarians reluctantly acquiesce to owner-requested euthanasia of a healthy animal because they cannot take on caring for the animals that the owner no longer wants and they do not want to be responsible for what may happen to these unwanted animals.³³⁷ Here, again, animal cruelty statutes’ penalty provisions provide some useful guidance. In Delaware, for example, violators of the cruelty prohibitions, including that against unnecessary killing, are prohibited from owning or possessing an animal for five or fifteen years, depending on whether the crime is a felony or a misdemeanor.³³⁸ A number of other cruelty statutes states allow courts to require the forfeiture of abused animals or, similarly, to remove animals from owners who abuse them.³³⁹ Animals that are removed from abusive owners can be rehomed through shelters or animal rescue groups.³⁴⁰ Thus, denying an owner the

themselves from legal responsibility for failure to do so if they find someone who adopts the companion animal or a no-kill shelter that will take the companion animal.”).

³³⁴ DEL. CODE ANN. tit. 11, § 1325(b) (2007).

³³⁵ See Sanders, *supra* note 209, at 204 (describing veterinarians’ views of clients who request euthanasia “for the simple convenience of the owner” as “morally suspect”); Tannenbaum, *supra* note 206, at 145 (“[A]n increasing proportion of veterinarians view . . . ‘convenience euthanasia’ as unethical”).

³³⁶ See Sanders, *supra* note 209, at 204-05 (recounting instances of veterinarians who refuse such requests or attempt to persuade the owner away from the decision to euthanize).

³³⁷ For similar reasons, veterinary groups have paradoxically opposed federal laws banning horse slaughter, on the grounds that slaughtering unwanted horses may be a more humane option than the abuse or neglect they might otherwise face. See Hankin, *supra* note 13, at 356 n.196.

³³⁸ See DEL. CODE ANN. tit. 11, § 1325(c), (d) (2007). Felony crimes include intentional killing in violation of the section prohibiting killing “unnecessarily.” See also ALASKA STAT. § 11.61.140(f) (2006) (authorizing the court to prohibit persons convicted of animal cruelty from owning or possessing animals for up to ten years).

³³⁹ See, e.g., ALASKA STAT. § 11.61.140(f) (2006). This law also specifies that the court may require defendants to reimburse “the state or a custodian for all reasonable costs incurred in providing necessary shelter, care, veterinary attention, or medical treatment for any animal affected.”

³⁴⁰ Indeed, Discovery Channel’s Animal Planet has an entire series of television shows documenting the removal, shelter care, and subsequent adoption of abused and neglected animals in various cities: Animal Precinct (New York), Animal Cops (Houston), Miami Animal Police, and Animal Planet Heroes: Phoenix. See Animal Planet Fansite, <http://animal.discovery.com/fansites/animalprecinct/animalprecinct.html> (last visited Feb. 7, 2009).

choice to euthanize a healthy animal and then finding another home for the animal is essentially another way of confiscating an animal to protect it from what can be characterized as a form of abuse: viewing that animal as disposable property and treating it accordingly.

The Delaware statute could serve as a model of how to use cruelty laws to challenge the truly egregious owner choice of euthanizing a healthy animal. The statute's language contains enough leeway to allow owner interests, even financial ones, to trump the animal's interest, while discouraging the killing of a healthy animal when other options exist for the animal. It allows for veterinarians to challenge owner choices that go against accepted practices, and it contains provisions to protect animals from being owned by people who would treat them in this way. Prohibiting egregious behavior through cruelty statutes requires a careful balance: leaving room for other options where euthanasia choices or decisions not to treat are more of a judgment call or are based on an inability to pay for treatment. In these cases that involve more of a "gray area," it would be better for all concerned to work to remove economic barriers and otherwise to help owners treat and keep their animals.

Conclusion

State and local laws that change the designation from pet "owner" to "guardian" will not, as opponents have argued, affect in any way our ability to make veterinary care choices for our companion animals. Behind these arguments against guardian language is the premise that no one should interfere with an owner's authority to make decisions for her animal's health care. This debate raises questions about whether such ultimate discretion on an owner's part should ever go unchecked. In most cases of veterinary care decision-making, the status quo—where owners and veterinarians work in partnership to make decisions that balance the animal's interest with that of the owner—is working fine and does not need to be changed. The primary exceptions, where more limits on owner discretion are needed, are in cases of "convenience euthanasia:" companion animal owners who request that their veterinarians euthanize healthy animals simply because it is no longer convenient to keep them.³⁴¹ The best way to challenge and limit such choices is not through owner/guardian language changes, which have no legal effect, but rather by strengthening animal cruelty laws. These state statutes should all include language requiring proper veterinary care; if necessary, such language should be modified to make it clear that requesting the euthanasia of a healthy companion animal solely for the owner's convenience is a form of animal abuse and is therefore prohibited.

³⁴¹ See ROLLIN, *supra* note 192, at 62.