

Animal Law
Cases and Materials

SIXTH EDITION

SUPPLEMENT

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Two items were inadvertently left out of the Sixth Edition when it went to press. They are:

- 1. The 1.5 page introduction to Chapter 2, which sets the stage for the discussions expected regarding that chapter.**
- 2. The detailed Table of Contents.**

Chapter 2: Property and Beyond: The Evolution of Rights

Introduction

Animals are property. These three words — and their legal implications and practical ramifications — are at the core of the most significant doctrines and cases in this book, and a telling reality for current practitioners of animal law. It is the property concept that, in large part, has kept nonhumans from being plaintiffs in lawsuits, a crucial requirement to increase one's protections under the law. More importantly, because nonhumans are property, they are denied virtually all of the rights and privileges accorded to humans.

This historical property status has forced animal lawyers to develop creative new strategies to: (1) try to ensure that the protections for animals that are written into the law are actually enforced; (2) provide their nonhuman "clients" some substitute for their day in court when they are injured; (3) enable their human clients to bestow testamentary gifts on their animals; and (4) increase the amount of damages available for the wrongful death or injury of a plaintiff's animal.

The property status of nonhumans presents a significant hurdle for animal advocates to clear in their efforts to increase certain protections for animals under the law. Some say that to change this status is an insurmountable barrier, unprecedented and impossible, and that the most valuable successes for animals will come about by working within the property paradigm; others believe that unless the property status is changed, they will never be accorded sufficient protection. In addressing the legal consequences of the law that says animals are property, commentators and practitioners have searched for comparable and analogous situations. The notion that sentient nonhumans, with the capacity for pain, emotional lives, familial connections, and who demonstrate loyalty and sadness, are deserving of some formal legal status greater than inanimate property leads one to consider other sentient beings who at one point or another may have been considered property. This Chapter is intended to stimulate thought and discussion on that notion.

This Chapter provides an historical and legal basis to explain how changes in thinking have ultimately led to a change in laws regarding the rights of certain groups — whether from property to non-property, or simply from a truncated set of rights to a broader one. It also demonstrates that, even today, notions of property affect one of the nation's most compelling debates — how the law treats, or should treat, the status of a fetus, and how that status is determined by courts and legislatures. Each of the sections herein is intended to stimulate thought and encourage debate on some or all of the following questions, which should serve as discussion points for the entire Chapter:

1. What is property? How is it defined?
2. Can a person be property? If so, what is the legal and ethical basis for that classification? How might that classification be changed? Is the change based in some transformation of an immutable or mutable characteristic, or simply on societal shifts?
3. What are the benefits and disadvantages of being classified as property?
4. Even for people not considered property, how are the groups of rights that are accorded to certain classes of people decided? How are they changed, and for what reason?
5. Do nonhumans' status as property necessarily preclude possession of any rights? Or do nonhumans already have some rights? If so, what are they, and how could the protection and degree of rights be increased within the current structure, based on the developments discussed here?
6. Compare the arguments for and against expanding the protections, rights and privileges of nonhumans now, and the arguments that have been made (as explained below) for and against expanding the protections, rights and privileges of different

groups of humans over the last 200 years of American history.

7. Is there some third category, besides property and person, that could apply to nonhumans?

One obviously key question to be addressed is this: Can nonhumans be granted greater rights, privileges and protections, in line with the legal doctrines and transformations described in this Chapter, given their property status? Or must the property status be abolished first, before any further progress is made? For the view that abolition of property status is a prerequisite to rights, see Lee Hall & Anthony Jon Waters, *From Property To Person: The Case Of Evelyn Hart*, 11 SETON HALL CONST. L.J. 1, 3 (Fall 2000) ("Because the property classification treats non-human apes as instruments, tools, and toys, their interests can be protected only by reclassifying them as persons. Our present knowledge about their abilities compels this reclassification."); Alan Watson, *Rights of Slaves and Other Owned-Animals*, 3 ANIMAL L. 1, 6 (1997) ("When animals are regarded as property, adequate legal protection is impossible."). Others believe that nonhumans currently have rights that may be expanded within the present structure. See, e.g., Cass Sunstein, *Standing for Animals (With Notes on Animal Rights)*, 47 UCLA L. REV. 1333 (2000); David Favre, *Integrating Animal Interests Into Our Legal System*, 10 ANIMAL L. 87 (2004).

In 1996, the United States Supreme Court recognized that "[a] prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded." *United States v. Virginia*, 518 U.S. 515, 557 (1996). At its essence, this Chapter explores the legitimate legal possibilities that present themselves so that the "people" mentioned in that case may someday include nonhumans.

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