UNLEASHING PETS FROM DEAD-HAND CONTROL

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[W]hen the last scene of all comes, and death takes his master in its embrace and his body is laid in the cold ground, no matter if all other friends pursue their way, there by his graveside will the noble dog be found, his head between his paws and his eyes sad, but open, in alert watchfulness, faithful and true, even unto death.[1]

INTRODUCTION

Many pet owners feel strongly about their animals. Some feel so strongly that they desire their pets to accompany them to the grave.[2] This Article addresses the validity of pet euthanasia provisions in decedents' wills.

Pet owners generally have the legal power to humanely euthanize their pets. In addition, the primary focus of the law of wills is to effectuate the wishes of the decedent. These two facts seem to counsel in favor of carrying out a testamentary instruction to humanely euthanize a companion animal. Yet courts generally decline to enforce pet euthanasia provisions whenever an objection is raised by someone who is willing to care for the animal. Why is this?

Neither courts nor commentators have converged on a consistent explanation as to why pet euthanasia provisions in wills should not be enforced. Some impose a tortured construction of the language of the will to find that the testator's very clear instruction to euthanize their pet was not their true intent. Others find the euthanization of a healthy animal to violate a public policy in favor of animal welfare. Others find that euthanization of a healthy animal amounts to waste, at least when the animal is purebred or otherwise monetarily valuable. Many analyses combine bits and pieces of numerous approaches to create an analytical potpourri to justify the result.

This Article agrees with the outcome of finding testamentary pet euthanasia provisions unenforceable. It then comprehensively analyzes each of the rationales against enforcement of pet euthanasia provisions that have been offered by courts and commentators to date. In doing so, it finds significant flaws in the multifaceted approach employed by many courts and commentators in the past. Instead, this Article proposes that the anti-waste doctrine should be used as the single, simple, and sufficient rationale against enforcing pet euthanasia provisions in decedents' wills.

To support its thesis, this Article proceeds in four parts. In Part I, this Article provides background on live-hand control of animals, encompassing the legal status of animals and legal limits on a pet owner's treatment of a companion animal. Part II examines dead-hand control and its limits, including an explana-

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[1] 136 CONG. REC. 7,882–83 (1990) (statement of Senator Robert C. Byrd) (orating a version of George Vest's, *Eulogy of the Dog*). For additional context, see ROBERT C. BYRD, 3 THE SENATE, 1789–1989: CLASSIC SPEECHES, 1830–1993, at 437–40 (Wendy Wolff ed., bicentennial ed. 1994).

[2] These testators apparently subscribe to the approach that "sometimes dead is better." *See* STEPHEN KING, PET SEMATARY 144 (1983).

tion of how testamentary intent is determined. Part III discusses influential case law and academic commentary surrounding dead-hand control over pet euthanization. Finally, Part IV sets forth recommendations as to how the law should approach dead-hand control over animals.

I. LIVE-HAND CONTROL OF ANIMALS

During her lifetime, an animal owner has broad freedom to do what she wishes with her animal, as long as she does not treat the animal cruelly. On one end of the spectrum, some animal owners have been known to push their pets in baby carriages, engage in photoshoots of their sleeping pets, and even enroll their pets in daycare. On another end of the spectrum, some animal owners, for a variety of reasons, opt to have their otherwise healthy pets humanely euthanized. This Part examines the legal status of animals as property and the limits to the wide discretion that the law generally affords pet owners over the care and treatment of their animals.

A. Pets Are Personal Property

Despite the unique and sentimental relationship between humans and companion animals,[3] the law consistently treats pets as personal property.[4]

The value and status of companion animals are commonly litigated issues in tort cases involving wrongful death of a pet.[5] In these cases, claims based on loss of companionship are generally not permitted.[6] For example, consider a case in which a county dog warden wrongfully euthanized a family's pet dog.[7]

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[3] As the Texas Supreme Court put it in an oft-quoted passage:

> [C]anine companions are treated—and treasured—not as mere personal property but as beloved friends and confidants, even family members. Given the richness that companion animals add to our everyday lives, losing "man's best friend" is undoubtedly sorrowful. Even the gruffest among us tears up (every time) at the end of *Old Yeller*.

Strickland v. Medlen, 397 S.W.3d 184, 185 (Tex. 2013).

[4] *See* SONIA S. WAISMAN ET AL., ANIMAL LAW: CASES AND MATERIALS 35 (5th ed. 2014) ("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 animal law]."); *see also* Lauren M. Sirois, Comment, *Recovering for the Loss of a Beloved Pet: Rethinking the Legal Classification of Companion Animals and the Requirements for Loss of Companionship Tort Damages*, 163 U. PA. L. REV. 1199, 1199 (2015) ("When a companion animal is negligently or intentionally injured or killed, no matter how beloved the animal is to his or her human companion, the animal is still only viewed as property under the law.").

[5] The issue also arises, for example, in cases involving conversion of an animal or trespass to chattels. *See* ADAM P. KARP, UNDERSTANDING ANIMAL LAW 356–68 (2016).

[6] *See* WAISMAN ET AL., *supra* note 4, at 225 (citations omitted) (stating that disallowing loss of companionship damages is "the majority rule" and listing cases). *But see* Brousseau v. Rosenthal, 443 N.Y.S.2d 285, 286–87 (N.Y. Civ. Ct. 1980) (awarding $550 for the wrongful death of a part-German Shepard dog based on loss of companionship and loss of protective value).

[7] Ammon v. Welty, 113 S.W.3d 185 (Ky. Ct. App. 2002).

The dog, named Hair Bear, was found roaming freely without identification.[8] Rather than wait the seven days that was statutorily required before a stray dog could be euthanized, the warden euthanized Hair Bear with a gunshot to the head.[9] In refusing to recognize a claim premised on loss of consortium, the court succinctly noted that "[t]he loss of love and affection resulting from the loss or destruction of personal property is not compensable."[10]

Similarly, in actions premised on negligence, most jurisdictions disallow recovery of emotional damages for negligent harm to an animal.[11] Thus, plaintiffs in wrongful pet death cases premised on negligence are usually limited to damages based only on economic harms.[12]

Different jurisdictions take different approaches to measuring economic harms in pet-death cases. For example, one court described fair market value of a pet to include the following considerations:

> [A]n owner may seek reasonable replacement costs—including such items as the cost of purchasing a puppy of the same breed, the cost of immunization, the cost of neutering the pet, and the cost of comparable training. Or an owner may seek to recover the original cost of the dog, including the purchase price and, again, such investments as immunization, neutering, and training. Moreover, as some courts have recognized, it may be appropriate to consider the breeding potential of the animal, and whether the dog was purchased for the purpose of breeding with other purebreds and selling the puppies.[13]

In addition, some courts have found that economic harm includes the cost of veterinary care for an injured animal, even when the cost of veterinary care is more expensive than the cost of acquiring a replacement animal.[14] Thus, an animal's compensable fair market value may exceed its replacement cost.[15]

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[8] *Id.* at 186.

[9] *Id.*

[10] *Id.* at 187–88.

[11] KARP, *supra* note 5, at 340 (noting, however, that damages for mental anguish may be recoverable in certain jurisdictions for intentional or malicious injuries to animals or injuries inflicted by veterinarians who maliciously fail to meet accepted standards of care or patently disregard client instructions); *see also* WAISMAN ET AL., *supra* note 4, at 185 ("Depending on the jurisdiction and the facts of the case, property-based intentional tort claims may be a means of obtaining or at least being permitted to seek recovery of emotional distress damages and punitive damages.").

[12] *See, e.g.*, WAISMAN ET AL., *supra* note 4, at 211; Debra Squires-Lee, Note, *In Defense of Floyd: Appropriately Valuing Companion Animals in Tort*, 70 N.Y.U. L. REV. 1059, 1061 (1995) ("Because companion animals are classified as property, most jurisdictions apply 'fair market value' as the measure of damages for their death." (footnotes omitted)).

[13] Mitchell v. Heinrichs, 27 P.3d 309, 314 (Alaska 2001) (holding that the dog owner's concession that the dog had no resale value did not preclude her from recovering anything for the fair market value of the animal); *see also* Lachenman v. Stice, 838 N.E.2d 451, 464 n.12 (Ind. Ct. App. 2005) (holding that the fair market value of a dog is not limited to its replacement value and that "evidence that a specific animal had breeding potential or was a breeder could be relevant to the issue of the fair market value of that specific animal").

[14] *See, e.g.*, Kaiser v. United States, 761 F. Supp. 150, 152–53, 156 (D.D.C. 1991) (awarding $1,786.50 for treating injuries to a mixed-breed Great Dane-Labrador Retriever that was shot by Capitol Police and ultimately died); Hyland v. Borras, 719 A.2d 662, 663–64 (N.J.

Even the strictest determination of damages—the replacement value of the animal—yields some monetary recovery for the wrongful death of a companion animal.[16] For example, in one case, a dog attacked a four-year-old boy, returned home, and was tied in the backyard.[17] The injured boy's father tracked down the dog and shotgunned it to death.[18] The dog's owner, a twelve-year-old boy, sued the injured boy's father for the wrongful death of his pet.[19] Although the only testimony regarding the value of the dog was its owner's own estimation that it was worth $100, the jury returned an award of compensatory damages of $10.[20] The appellate court affirmed, holding that the jury could properly consider the vicious nature of the dog when setting its value.[21] It seems that even a mean dog is worth $10 in the eyes of the law.

In another case, a jury awarded $40 as compensatory damages for the wrongful death of a pet cat.[22] While these damage awards may not be much, they demonstrate a recognition that ordinary housecats and mixed-breed dogs have some minimal compensable property value.[23] Although the deaths of common companion animals such as mixed-breed dogs and cats "may produce a minimal recovery because courts tie 'value to the owner' to pecuniary consid-

Super. Ct. App. Div. 1998) (affirming damage award of $2,500 for treating injuries to a ten-year-old shih tzu even though a new dog of the same breed could be acquired for $500); Nichols v. Sukaro Kennels, 555 N.W.2d 689, 690–91, 693 (Iowa 1996) (affirming damage award of $326.24 for veterinary expenses related to injury to toy poodle even though testimony established that the market value of the animal was no more than $200).

[15] *See, e.g.*, McDougall v. Lamm, 48 A.3d 312, 315–16, 328 (N.J. 2012) (affirming compensatory damage award of $5,000 for the loss of a well-trained Maltipoo where the purchase price of the actual dog had been $200, and a replacement puppy would be $1,395).

[16] *See, e.g.*, Soucek v. Banham, 524 N.W.2d 478, 479, 481 (Minn. Ct. App. 1994) (affirming judgment of $1,500 based on stipulated replacement cost of dog); Richardson v. Fairbanks North Star Borough, 705 P.2d 454, 455, 457 (Alaska 1985) (affirming judgment of $300 based on "the dog's market value or replacement cost"); Shera v. N.C. State Univ. Veterinary, 723 S.E.2d 352, 353–54, 358 (N.C. Ct. App. 2012) (affirming judgment of $350 based on replacement cost of a Jack Russell Terrier dog and refusing to consider the dog's intrinsic value to its owner).

[17] Chalker v. Raley, 37 S.E.2d 160, 160 (Ga. Ct. App. 1946).

[18] *Id.* at 160–61.

[19] *Id.* at 160.

[20] *Id.*

[21] *Id.* at 162.

[22] *See* Wilson v. City of Eagan, 297 N.W.2d 146, 147–48 (Minn. 1980).

[23] *See* Geordie Duckler, *The Economic Value of Companion Animals: A Legal and Anthropological Argument for Special Valuation*, 8 ANIMAL L. 199, 203 (2002) ("As items of material value go, all animals have a particular value similar to that of manufactured commercial objects . . . ."); William A. Reppy, Jr., *Punitive Damage Awards in Pet-Death Cases: How Do the Ratio Rules of* State Farm v. Campbell *Apply?*, 1 J. ANIMAL L. & ETHICS 19, 20–21 (2006) (setting forth an elaborate hypothetical in which the compensatory value of a wrongfully killed dog is deemed to be $25 based on an estimation of the amount that the animal would sell for through a classified ad).

erations" under the strictest tests,[24] loss of these animals still produces some recovery.[25]

Outside of torts, another area of the law that commonly requires the valuation of animals is bankruptcy. Like tort law, bankruptcy law considers animals, including companion animals, as property.[26] Depending on the jurisdiction and the animal's primary use, an animal may, for example, be classified as a household good, a health aid, a commercial instrument, or an agricultural tool.[27] A companion animal, like a pet dog or cat, is generally regarded as personal property and, under the federal framework, receives an exemption when listed as an asset.[28] Thus, debtors are generally permitted to retain their companion animals in bankruptcy proceedings. Importantly, the reasoning is not that the animals are valueless. Instead, bankruptcy law treats pets like other household goods with positive value—while they are assets, they need not be turned over to creditors.[29]

As a type of personal property, the law assigns a positive value to animals.[30] While the value may not always be much, it is something. If animals

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[24] Margit Livingston, *The Calculus of Animal Valuation: Crafting a Viable Remedy*, 82 NEB. L. REV. 783, 790 (2004).

[25] *See id.* at 847 (estimating that the wrongful destruction of most pets would result in "minimal damage recoveries" because "[t]he fair market value of ordinary pets, unless they have special qualities as breeding or working animals, is usually close to zero").

[26] Elizabeth A. Hornbrook, *Barking Up the Wrong Tree: Pet Care Expenses in Bankruptcy*, AM. BANKR. INST. J., Apr. 2014, at 56, 56 ("The Bankruptcy Code tends to relegate pets to generic personal property valued in terms of assets, liabilities, exemptions and expenses.").

[27] *See* KARP, *supra* note 5, at 642–44 (section titled "Animals as Bankruptcy Assets").

[28] *See* 11 U.S.C. § 522(d)(3) (providing bankruptcy exemption for animals "that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor"); *see also* KARP, *supra* note 5, at 642; Hornbrook, *supra* note 26, at 56. Numerous states have similar exemptions for animals listed as household goods. *See* Hornbook, s*upra* note 26, at 57 (listing examples); Samantha Chestney, *Red Rover, Red Rover, Please Let Me Keep Rover: Pet Exemptions in Chapter 7 Bankruptcy Proceedings*, 58 WASH. U. J.L. & POL'Y 297, 308–14 (2019) (same).

[29] *See, e.g.*, Cadle Co. v. Smith (*In re* Smith), 351 B.R. 274, 277 n.6 (Bankr. D. Conn. 2006) (chastising creditor for seeking to seize all of the debtor's household goods, including his pet dog). For background information regarding why debtors are permitted to retain exempted property in bankruptcy proceedings, see Chestney, *supra* note 28, at 304–08.

[30] Numerous commentators have called for expanded legal recognition for animals above and beyond a valuation as personal property. *See, e.g.*, Susan J. Hankin, *Not a Living Room Sofa: Changing the Legal Status of Companion Animals*, 4 RUTGERS J.L. & PUB. POL'Y 314, 376–78 (2007) (advocating for the recognition of a new and distinct legal category of property for companion animals); Diane M. Sullivan et al., *A Modest Proposal for Advancing Animal Rights*, 71 ALB. L. REV. 1129, 1132 (2008) ("It is time for all states to reject the classification of companion animals as property . . . ."); Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 N.Y.U. ENV'T L.J. 531, 532–33 (1998) ("[I]t is an appropriate time for the judiciary to take an evolutionary step in the development of the common law and remove animals from their status as mere property."); Elizabeth Paek, Note, *Fido Seeks Full Membership in the Family: Dismantling the Property Classification of Companion Animals by Statute*, 25 U. HAW. L. REV. 481, 524 (2003) ("While companion animals are proclaimed to be family members, the law fails to embrace this social value and thus, unjustly treats these

had no value, they essentially could not be owned because no legal action can be properly maintained for the conversion or wrongful destruction of valueless chattel.[31] However, their value is not nothing, for "[e]ven in the days of Blackstone, while it was declared that property in a dog was 'base property,' it was nevertheless asserted that such property was sufficient to maintain a civil action for its loss."[32] As one much more recent commentator succinctly put it: "Animals are personal property, and, as personal property, they have value."[33]

B. Limits on the Treatment of Animals by the Living

While the law recognizes animals as personal property, it also sets limits on how animal owners may treat their animal property. Criminal law provisions generally prohibit treating pets cruelly or causing them undue suffering.[34] Such anti-cruelty provisions are common at the state and local levels[35] and, increasingly, at the federal level as well.[36]

Anti-cruelty laws, however, do not prohibit the killing of animals as a general matter. For example, animals are regularly killed for recreation,[37] agricul-

animals as property."); *see also* WAISMAN ET AL., *supra* note 4, at 56 ("[E]ven within the animal protection community there is a continuing debate as to whether animals should be granted rights as 'persons' or should simply be granted an elevated property status.").

[31] Jones v. Craddock, 187 S.E. 558, 559 (N.C. 1936).

[32] *Id.* (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *236).

[33] Duckler, *supra* note 23, at 199.

[34] KARP, *supra* note 5, at 108; WAISMAN ET AL., *supra* note 4, at 72–74 (providing an overview of common provisions and exceptions in state anti-cruelty statutes).

[35] *See* WAISMAN ET AL., *supra* note 4, at 72; Laura A. Reese & Kellee M. Remer, *Best Practices in Local Animal Control Ordinances*, 49 STATE & LOC. GOV'T REV. 117, 118–24 (2017).

[36] The Animal Welfare Act ("AWA") was signed into law in 1966 and is the primary federal animal protection law. *See* 7 U.S.C. §§ 2131–2160. The AWA sets minimum standards for the humane care and treatment of animals that are exhibited to the public, sold for use as pets, used in research, or transported commercially. 7 U.S.C. § 2131. "[T]he law focuses on several specific activities that have been shown in the past to be potential areas of animal abuse, and that have a nationwide [effect]," such as dog fighting and interstate shipment of stolen animals. David Favre, *Overview of U.S. Animal Welfare Act*, MICH. ST. UNIV.: ANIMAL LEGAL & HIST. CTR. (2002), https://www.animallaw.info/article/overview-us-animal-welfare-act [perma.cc/RVQ4-BPL7]. More recently, in 2019 the Preventing Animal Cruelty and Torture Act ("PACT Act") was signed into law. 18 U.S.C. §§ 1 note (Short Title of 2019 Amendment), 48. The PACT Act makes the crushing, burning, drowning, suffocating, impaling, or sexual exploitation of animals a federal crime. § 48; *see also Extreme Animal Cruelty Can Now be Prosecuted as a Federal Crime*, THE HUMANE SOC'Y OF THE U.S. (Nov. 25, 2019), https://www.humanesociety.org/news/extreme-animal-cruelty-can-now-be-prosecuted-federal-crime [perma.cc/8TEE-F82P].

[37] Approximately 11.5 million U.S. residents aged sixteen and older hunt every year. U.S. FISH AND WILDLIFE SERV. & U.S. CENSUS BUREAU, 2016 NATIONAL SURVEY OF FISHING, HUNTING, AND WILDLIFE-ASSOCIATED RECREATION 4 (2018); *see also* KARP, *supra* note 5, at 470–71 (noting that many anti-cruelty statutes either exempt wildlife or are preempted by separate fish and wildlife laws).

ture,[38] and religious reasons.[39] Many anti-cruelty statutes also expressly exempt humane killings of animals from their scope. Indeed, non-therapeutic (or "convenience") euthanasia is commonly used to end the lives of unwanted companion animals.[40] One commentator put the scale of convenience euthanasia into perspective:

> At thousands of shelters throughout America, after public viewing hours have ended, shelter workers are responsible for making several "Sophie's Choices" as to which dog or cat, old or young, ill or healthy, of good or bad temperament, will be killed the next morning for no reason other than supply exceeds demand. Each year, millions of shelter animals pass into the designated area of the facility where a technician administers a lethal injection and places their bodies in a round barrel for rendering or group cremation.[41]

While humane euthanization is legal,[42] certain methods of euthanization have been deemed inhumane and therefore criminalized.[43] Indeed, in certain instances, it may be considered a criminal act to not euthanize a sick or injured animal that is suffering.[44] For example, in dogfighting cases, euthanization is recognized as the appropriate disposition of seized animals.[45]

The American Veterinary Medical Association ("AVMA") is one of the main governing bodies for veterinarians. It has developed guidelines to encourage veterinarians to use their professional and ethical judgment prior to eu-

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[38] KARP, *supra* note 5, at 107 ("[S]laughterhouses slay billions of birds and mammals each year."); *see also* 7 U.S.C. § 1901 (declaring a federal policy that livestock shall be slaughtered humanely).

[39] KARP, *supra* note 5, at 111–16 (discussing religious slaughter of animals).

[40] *Id.* at 468 (labeling nontherapeutic euthanasia "a deeply unfortunate though necessary practice"). Even in California, which by statute states that the state's policy is that "no adoptable animal should be euthanized if it can be adopted into a suitable home" and that "no treatable animal should be euthanized," abandoned animals may be humanely euthanized if no one adopts them within ten days of their abandonment. CAL. CIV. CODE §§ 1834.4, 1834.5(a) (West 2021).

[41] KARP, *supra* note 5, at 107.

[42] *See, e.g.*, OKLA. STAT. tit. 4, § 501(A) (2021) (providing that "[a]ny dog, cat, or other animal which is kept for pleasure rather than utility" may be disposed of by adoption into a suitable home, delivery to a licensed facility, or euthanasia by a suitable method).

[43] KARP, *supra* note 5, at 109 (providing examples of inhumane methods of euthanasia from various state statutes, such as intracardiac euthanasia by injection on conscious animals, use of carbon monoxide gas, high-altitude decompression chambers, and nitrogen gas). States generally regulate who may legally access certain agents that are routinely used in humane euthanization. *See, e.g.*, ALA. CODE § 34-29-130(a) (2021) (restricting access to sodium pentobarbital and similar agents); ALASKA STAT. § 08.02.050 (2021) (same).

[44] *See* KARP, *supra* note 5, at 119 ("If the veterinarian believes that failure to euthanize constitutes animal cruelty, she may be inclined to report the client to law enforcement or animal control.").

[45] *See* WAISMAN ET AL., *supra* note 4, at 151 ("Dogs in dogfighting operations are routinely euthanized because of uncertainty about their demeanors and aggressiveness, coupled with the significant resource investment it may take to rehabilitate fighting dogs.").

thanizing an animal.[46] According to the AVMA, the "[k]illing of healthy animals . . . , while unpleasant and morally challenging, is a practical necessity. The AVMA recognizes such actions as acceptable if those carrying out euthanasia adhere to strict policies, guidelines, and applicable regulations."[47] The AVMA guidelines suggest that a rehoming agency should be pursued prior to opting for euthanasia and that "[e]uthanasia of healthy pets should be considered only when alternatives are not available."[48] However, as long as the methods used to carry out euthanasia comply with applicable federal, state, and local regulations, a pet owner may opt to have a healthy companion animal euthanized.

In short, a living individual may not treat her companion animal cruelly, but she generally possesses the power over whether it lives or dies. Indeed, millions of companion animals are legally euthanized every year, and vastly more non-companion animals are legally slaughtered by humans annually.

II. DEAD-HAND CONTROL AND ITS LIMITS

Testamentary freedom is the foundation of the modern law of succession. Testators enjoy substantial discretion to decide who should receive estate property and how much should be given to each recipient. While the law typically defers to the testator's wishes, there are well-defined exceptions to testamentary freedom. This Part describes the importance of testamentary freedom, exceptions to testamentary freedom, and how courts determine testamentary intent.

A. The Dominance of Testamentary Freedom

"The most fundamental guiding principle of American inheritance law is testamentary freedom—that the person who owns property during life has the power to direct its disposition at death."[49] American inheritance law is centered around freedom of disposition.[50] As such, it "does not grant courts any general authority to question the wisdom, fairness, or reasonableness of the donor's decisions about how to allocate his or her property."[51]

The law of succession prioritizes testamentary freedom for several reasons. Testamentary freedom is thought to incentivize "individuals to act in ways that,

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[46] AM. VETERINARY MED. ASS'N, AVMA GUIDELINES FOR THE EUTHANASIA OF ANIMALS: 2020 EDITION 4 (2020).

[47] *Id.* at 8.

[48] *Euthanasia*, AM. VETERINARY MED. ASS'N, https://www.avma.org/resources/pet-owners/petcare/euthanasia [perma.cc/H8MA-6E4B].

[49] Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 882 (2013).

[50] *See* JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 1 (9th ed. 2013).

[51] RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 10.1 cmt. c (AM. L. INST. 2003).

on the whole, benefit society at large."[52] Because individuals may designate who they intend to pass their wealth to, they are motivated to earn, save, and amass wealth.[53] If individuals lacked control over their estates after death, they would be more prone to engage in suboptimal behavior. Instead of accumulating sizable estates to pass on to their selected beneficiaries, "they would actually be incentivized to spend their wealth down to zero or to take back control by giving away their wealth through *inter vivos* transfers."[54]

Additionally, allowing broad freedom of disposition has been shown to increase the happiness of both donors and donees.[55] Moreover, it incentivizes potential donees to care for aging or ailing friends and relatives who may potentially leave them estate assets.[56] And, compared to others who could control the disposition of property, donors usually have the best understanding of how estate property should be distributed in order to maximize the utility of the estate.[57] If freedom of disposition was eliminated, property may be distributed less optimally, reducing both social welfare and donor happiness.[58]

B. Exceptions to Testamentary Freedom

Although American law favors robust testamentary freedom and generally allows testators to do what they wish in their wills, the law places some limits on a decedent's control over the distribution of her estate. Dead-hand control is not absolute. Exceptions to testamentary freedom take the form of prescriptive restrictions, which require certain transfers to be made, and proscriptive restrictions, which prohibit certain transfers from being made.[59]

Compelling transfers through prescriptive restrictions is uncommon. The law generally requires a decedent to transfer some portion of their estate to

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[52] Kevin Bennardo, *The Madness of Insane Delusions*, 60 ARIZ. L. REV. 601, 605 (2018); *see also* Daniel B. Kelly, *Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications*, 82 FORDHAM L. REV. 1125, 1135 (2013) (stating that the law of succession seeks to "create the best incentives for the donor, donees, and other parties that a donor's disposition of property may affect").

[53] Mark Glover, *Freedom of Inheritance*, 2017 UTAH L. REV. 283, 291.

[54] Bennardo, *supra* note 52, at 606; *see also* Glover, *supra* note 53, at 291 ("The knowledge that one has the ability to direct the disposition of property at death provides individuals an incentive to be productive during life and to save and invest, rather than to consume.").

[55] Glover, *supra* note 53, at 289–90.

[56] *Id.* at 291 ("The possibility of disinheritance incentivizes the provision of family caregiving, which in turn promotes overall social welfare.").

[57] Kelly, *supra* note 52, at 1136 ("[C]ompared to legislatures or courts, donors may possess better information about the circumstances of family members and other donees. This informational advantage may allow donors to select the highest-valued donee (e.g., a gifted or disabled child.)" (footnote omitted)).

[58] *See id.* at 1137–38.

[59] Mark Glover, *A Social Welfare Theory of Inheritance Regulation*, 2018 UTAH L. REV. 411, 424.

their surviving spouse.[60] A decedent's outstanding creditors also have priority to estate property before it is distributed according to the decedent's wishes.[61] But aside from surviving spouses and creditors, the law generally does not require any affirmative transfers.[62]

Prohibitions against certain transfers through proscriptive restrictions, while still relatively uncommon, are decidedly more numerous than prescriptively compelled transfers. The slayer rule, for example, disallows a decedent to transfer property to her slayer.[63] The rule against perpetuities, as another example, limits the duration of time over which a decedent can exert control over her estate property.[64]

The law also disallows transfers that would violate an established public policy. For example, public policy prohibits a decedent from using her estate to further an illegal cause or to break up a marriage.[65] Invalidating a devise based on public policy, however, is not done lightly. As one court put it, unless a will provision contravenes "some positive, well-defined expression of the settled will of the people of the state or nation, as an organized body politic," courts demonstrate reluctance to invalidate devises for violating public policy.[66]

Through what is called the anti-waste doctrine, decedents also cannot require estate property to be destroyed.[67] Such wasteful destruction of property serves no useful purpose and undermines the public good.[68] It functions only to reduce the wealth of the living and incur economic costs on society. Moreover, the decedent does not suffer the economic consequences of the property de-

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[60] *See* UNIF. PROB. CODE § 2-202 (UNIF. L. COMM'N 2019); *see also* Bennardo, *supra* note 52, at 608, 627–28. Like any beneficiary, a surviving spouse may refuse to accept a testamentary transfer. *See, e.g.*, Adam J. Hirsch, *Disclaimers and Federalism*, 67 VAND. L. REV. 1871, 1872 (2014) ("Under most circumstances today, beneficiaries are free to accept or reject an inheritance as they see fit.").

[61] *See* Glover, *supra* note 59, at 425.

[62] For example, the law does not require a decedent to transfer any portion of her estate to her children, even if they are minors. *See* Glover, *supra* note 59, at 442 ("The donor's discretion to disinherit children stands in stark contrast with her legal obligation to support her minor children during life.").

[63] *See* Kevin Bennardo, *Slaying Contingent Beneficiaries*, 24 U. MIA. BUS. L. REV. 31, 34–40 (2015) (explaining the slayer rule).

[64] Glover, *supra* note 59, at 428–29.

[65] *See* Bennardo, *supra* note 52, at 607–08; Ronald J. Scalise, Jr., *Public Policy and Antisocial Testators*, 32 CARDOZO L. REV. 1315, 1326–27 (2011).

[66] Teresa Wear, Recent Case, Eyerman v. Mercantile Trust Co. Nat'l Assoc., 41 MO. L. REV. 309, 310 (1976) (quoting *In re* Rahn's Estate, 291 S.W. 120, 123 (Mo. 1927)).

[67] Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 783, 796, 838 (2005) ("As a general matter, the law recoils at the idea of allowing the dead hand to destroy property.").

[68] *See, e.g.*, Eyerman v. Mercantile Tr. Co., 524 S.W.2d 210, 214 (Mo. Ct. App. 1975) ("To allow an executor to exercise such power [to destroy] stemming from apparent whim and caprice of the testatrix contravenes public policy."); *see also* John H. Langbein, *Burn the Rembrandt? Trust Law's Limits on the Settlor's Power to Direct Investments*, 90 B.U. L. REV. 375, 376 n.8 (2010) (collecting cases).

struction and thus lacks many of the normal incentives that constrain living individuals from destroying their own property.[69] The anti-waste doctrine applies to all attempts by decedents to destroy property.[70] Even a decedent's instruction to be buried in a particular suit of clothes or piece of jewelry is rendered non-mandatory by the anti-waste doctrine because it calls for the destruction of estate property.[71] Such instructions are routinely followed by the living out of respect for the dead, not because the law requires it.[72] It is the decedent's beneficiaries who possess the power to decide whether to bury—and thus destroy—a decedent's suit of clothes or piece of jewelry.[73] The dead hand simply lacks the power to destroy.

C. The Will as Evidence of Testamentary Intent

While the decedent's preferences are given primary importance in the distribution of their estates, the living need to be able to reliably determine what the decedent's preferences were. By definition, decedents are no longer around when it is time for their estates to be probated. Decedents are unavailable to testify regarding whether a particular document was meant to be treated as their legal will. They are also unavailable to testify regarding what a particular provision in a will was intended to mean. Thus, courts must look elsewhere for evidence of testamentary intent.[74]

Certain formalities are required to make a valid will.[75] These formalities serve multiple purposes, but a major one is to evidence that the decedent intended the document to serve as their will at the time of their death.[76] The idea is that someone would be unlikely to comply with the formalities unless they

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[69] *See* Strahilevitz, *supra* note 67, at 839–41; RESTATEMENT (THIRD) OF TRS. § 47 cmt. e (AM. L. INST. 2003) ("Although one may deal capriciously with one's own property, self-interest ordinarily restrains such conduct.").

[70] Bennardo, *supra* note 52, at 624 (stating that the anti-waste doctrine applies "in situations in which assets are literally destroyed," which "is a fairly bright-line inquiry that leaves very little room for judgment—and therefore little room for bias").

[71] *Id.* at 623 n.130.

[72] Some decedents' burial instructions even call for their internment in their automobile. *See* RAY D. MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 14, 158 n.4 (2010) (describing such circumstances).

[73] Bennardo, *supra* note 52, at 623 n.130 ("[T]his practice is best viewed as an acquiescence by the living rather than a power of the dead.").

[74] This evidentiary challenge is frequently called the "worst evidence" problem. *See, e.g.*, John H. Langbein, *Will Contests*, 103 YALE L.J. 2039, 2046 (1994) (book review).

[75] *See, e.g.*, UNIF. PROB. CODE § 2-502(a), (b) (UNIF. L. COMM'N 2019) (detailing the formalities necessary to execute a valid will); *see also* John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 490 (1975) ("The provisions of the will must be in writing, be it print, typescript or handwriting. The testator must sign the will in the presence of two (in a few states three) witnesses, who must then attest to the signing by their own signatures.").

[76] Langbein, *supra* note 75, at 492 ("The primary purpose of the Wills Act has always been to provide the court with reliable evidence of testamentary intent and of the terms of the will; virtually all the formalities serve as 'probative safeguards.' ").

deliberately set out to do so: "It is difficult to complete the ceremony and remain ignorant that one is making a will."[77] As such, the formalities diminish the risk of accidental wills. Because decedents are not around to testify regarding their actual intent, the law infers that documents that comply with certain formalities were meant to be wills.[78] Put differently, it is by complying with the formalities that a testator communicates that she wishes a document to serve as her legal will.

When construing the language of a will, courts are reluctant to admit evidence beyond the document itself. Indeed, a majority of states bar the admission of extrinsic evidence to determine the terms of a will through two interconnected rules.[79] The first rule is the "plain meaning" or "no extrinsic evidence" rule.[80] This rule only allows extrinsic evidence to resolve ambiguities in the language of the will but will not allow extrinsic evidence to disturb the plain meaning of the words the testator wrote in the will.[81] This rule does not allow the plain meaning of the words to be disturbed by evidence that the testator intended another meaning.[82]

The second rule is the "no reformation" rule.[83] Under this rule, courts may not reform a will to correct a mistaken term to reflect what the testator intended the will to say.[84] Thus, extrinsic evidence generally is not permitted to show that a testamentary provision was based on a mistake of fact on the part of the testator.[85] There is simply no way to know what the testator would have intended if she had known the truth. Would a particular man wish to disinherit his child if he knew the truth about the child's paternity? Would a particular parent wish to disinherit her child if she knew the truth about the child's irresponsible lifestyle? Was the mistaken factual belief so material that it would change the

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[77] *Id.* at 495.

[78] *Id.* ("Compliance with the Wills Act formalities for a witnessed will is meant to conclude the question of testamentary intent.").

[79] *See* DUKEMINIER & SITKOFF, *supra* note 50, at 328.

[80] *Id.*

[81] *Id.*; Andrea W. Cornelison, *Dead Man Talking: Are Courts Ready to Listen? The Erosion of the Plain Meaning Rule*, 35 REAL PROP., PROB. & TR. J. 811, 814 (2001) ("The plain meaning rule appears simple: courts shall not admit extrinsic evidence to contradict or add to the plain meaning of the words in a will.").

[82] DUKEMINIER & SITKOFF, *supra* note 50, at 328; *see also* Glover, *supra* note 59, at 419 ("When probate courts apply [the plain meaning] rule, they attribute the plain or ordinary meaning to the donor's words, and they do not consider extrinsic evidence that suggests that the donor intended an idiosyncratic meaning.").

[83] DUKEMINIER & SITKOFF, *supra* note 50, at 328.

[84] *See id.* ("Courts have no power to reform wills. . . . [M]istakes of testators cannot be corrected. Omissions cannot be supplied. Language cannot be modified to meet unforeseen changes in conditions. The only means for ascertaining the intent of the testator are the words written and the acts done by him." (quoting Sanderson v. Norcross, 136 N.E. 170 (Mass. 1922))).

[85] *See* WILLIAM M. MCGOVERN ET AL., PRINCIPLES OF WILLS, TRUSTS & ESTATES 324 (2d ed. 2012) ("American courts do not usually give relief when a will is alleged to have been made under a mistake of fact, such as the paternity of a child.").

way the testator wished to distribute her estate? Maybe yes or maybe no.[86] There is simply no way for courts to know with confidence; thus, they refrain from guessing. Instead, they follow the testator's instructions as written in the will, even if those instructions were premised on a mistaken belief on the part of the testator.[87]

The justification for these rules is to safeguard the decedent from fraud or error.[88] Again, the decedent is no longer available at the time that a will is being interpreted. It would simply be unfair for a decedent's testamentary intent to be determined based on extrinsic evidence when the decedent herself is unable to refute the evidence.[89] As explained above, testamentary freedom is the core of American estate law.[90] If testators lost confidence that their instructions would be followed after their death, there would be little incentive for decedents to make wills at all.[91] Thus, to safeguard the principle of testamentary freedom, the law of wills safeguards the instructions that a testator wrote in a will.[92] Indeed, liberally admitting extrinsic evidence would undermine the purpose of the required formalities because the words of a will were executed in compliance with the required formalities, while extrinsic evidence was not.[93] Thus, extrinsic evidence is generally not permissible to show that the testator meant something other than what they wrote.

III. CONFLICTING APPROACHES TO DEAD-HAND CONTROL OVER PET EUTHANIZATION

Typically, animals have short lifespans and predecease their owners. In the event an animal does not predecease its owner, an animal owner may take steps to control the disposition of their companion animal upon the owner's death. For example, a testator may devise an animal to a specific beneficiary as part of

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[86] *Id.* (explaining that "[m]ateriality is the great difficulty").

[87] *Id.* However, certain well-defined mistakes of omission are presumed to be material. For example, when a testator omits a child from a will under a mistaken belief that the child is deceased, the Uniform Probate Code awards a share of the estate property because there "is a strong case for believing that a mistake was material." *Id.* (citing UNIF. PROB. CODE § 2-302(c) (UNIF. L. COMM'N 2010)).

[88] *See* DUKEMINIER & SITKOFF, *supra* note 50, at 328.

[89] *See id.*

[90] *See supra* Section II.A.

[91] *See* Glover, *supra* note 59, at 419 ("If the court routinely interprets the dispositive provisions of wills in ways that do not conform with the donor's intended estate plan, then freedom of disposition is undermined because property is distributed in an unintended manner.").

[92] *See id.* at 420 ("[T]he plain meaning rule's overarching purpose is to facilitate freedom of disposition by providing courts a reliable and consistent way to interpret the meaning of wills.").

[93] *See* DUKEMINIER & SITKOFF, *supra* note 50, at 328.

an estate.[94] After all, animals are property.[95] However, there are limits. A testator may not legally require that an animal be treated cruelly. After all, animal cruelty is illegal, and the dead hand cannot break the law.[96]

There is one type of testamentary instruction, however, that has not been met with a consistent response: an instruction to humanely euthanize an animal upon the death of the testator. First, it is empirically unknown how common such provisions are, and it bears noting that these provisions generally only make their way into the case law when they are challenged. There is reason to believe that the majority of testamentary pet euthanasia provisions are simply carried out without objection.[97]

When these provisions are challenged, they are often found to be legally unenforceable. However, neither courts nor commentators have converged on a stable line of reasoning as to why these instructions are legally unenforceable. This Part summarizes the scattershot approaches that have been employed by the courts as well as those put forward in the academic literature.

A. A Case Study: In re Capers' Estate

If there is one case to best illustrate the various lines of reasoning applied to invalidate pet euthanization provisions, it is *In re Capers' Estate*, a 1964 decision of the Pennsylvania Orphans' Court.[98] The court's reasoning in *Capers' Estate* has been immensely influential in defining the way that subsequent courts and commentators have framed the discussion of dead-hand control over pet euthanasia. It literally is the textbook case—as in, it is in the leading animal law casebook.[99]

Capers' Estate centered around a testator's directive in her will that read as follows:

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[94] Gerry W. Beyer, What if Your Parrot Outlives You? Preparing for Your Bird's Future, Address at the Phoenix Landing Foundation Webinar 22 (Oct. 10, 2020) (manuscript available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3708429) [perma.cc/Y2H3-W9YX]. Not only may an animal be devised as estate property, but a trust may be created to provide for the care of a domestic or pet animal. *See* UNIF. TR. CODE § 408 (UNIF. LAW COMM'N 2010); UNIF. PROB. CODE § 2-907(b) (UNIF. LAW COMM'N 2019); *see also* KARP, *supra* note 5, at 556–60; DUKEMINIER & SITKOFF, *supra* note 50, at 420–26; Beyer, *supra*, at 7–8.

[95] *See supra* Section I.A.

[96] *See supra* note 65 and accompanying text.

[97] *See* Frances Carlisle, *The Sido Case and Beyond: Destruction of Pets by Will Provision*, CAL. VETERINARIAN, July 1981, at 26, 27 ("[M]ost pet destruction provisions in wills are carried out without the threat of litigation."). For example, in one reported opinion of the Supreme Court of Texas, the court didn't appear to bat an eye at a testator's instruction that "[m]y dog shall be put to sleep by Dr. Linam [a]t home and and [sic] buried in my yard." City of Austin v. Austin Nat'l Bank, 503 S.W.2d 759, 760 (Tex. 1973). The matter was apparently uncontested. *See id.*

[98] *In re* Capers' Estate, 34 Pa. D. & C.2d 121, 141 (Orphans' Ct. 1964).

[99] *See* WAISMAN ET AL., *supra* note 4, at 563–68. The *Capers' Estate* decision has been summarized elsewhere, including in Gerry W. Beyer, *Pet Animals: What Happens when Their Humans Die?*, 40 SANTA CLARA L. REV. 617, 661–63 (2000).

> I direct that any dog which I may own at the time of my death be destroyed in a humane manner and I give and grant unto my Executors hereinafter named full and complete power and discretion necessary to carry out the same.[100]

At the time of her death, the testator owned two Irish Setter dogs, Sunny Burch and Brickland.[101] The executors of the estate filed a petition for declaratory judgment because they were unsure of whether they should follow the testator's prescribed course of action.[102] The court ultimately held that the specific provision calling for the humane death of the two dogs was void.[103] To support this conclusion, the court relied on three distinct lines of analysis: (1) the purpose and intent of the testator, (2) public policy considerations surrounding the euthanization of animals, and (3) public policy considerations related to anti-waste.[104]

To support its invalidation of the euthanization provision, the court first identified the testator's supposed intent behind the provision in her will. According to the court, the testator wished for her dogs to be given the same level of care after her death as they received during her lifetime.[105] The court found that her instruction to euthanize the dogs stemmed not from a desire for the dogs to die but from a fear that "either they would grieve for her or that no one would afford them the same affection and kindness that they received during her life."[106]

The court found that the testatrix was "mistaken" in her concerns because, upon her death, the dogs were taken and cared for by a kennel keeper.[107] Indeed, the dogs' veterinarian testified that the dogs were happier in their situation with the kennel keeper, which afforded them ample space to run, than they had been under the testatrix's care in an urban setting.[108] Finding that there was "no doubt" that the testatrix "would rather see her pets happy and healthy and alive than destroyed," the court found "that the basis for the provision of the will has been eliminated."[109]

To summarize, despite very clear language, the court opined that the testatrix's true intent behind the will provision was something other than what she had written. The court rendered the provision applicable only if the dogs were uncared for subsequent to the testatrix's death, despite no such qualification appearing on the face of the will.

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[100] *In re Capers' Estate*, 34 Pa. D. & C.2d at 122.
[101] *Id.* at 121.
[102] *See id.* at 122.
[103] *Id.* at 141.
[104] *Id.* at 125–41.
[105] *Id.* at 126.
[106] *Id.*
[107] *Id.* at 126–27.
[108] *Id.* at 129.
[109] *Id.*

Second, the *Capers' Estate* court found that carrying out the testatrix's instruction to euthanize the dogs would violate a public policy in favor of preservation of all lives, including non-human life. In support of this finding, the court noted "the upward development of the humane instinct in mankind for the preservation of life of all kinds, not only of human life but of the life of lesser species."[110] Thus, according to the court, to "confiscate the life of the two setters for no purpose" would run counter to human's "ethical duty to preserve all life, human or not, unless the destruction of such other life is an absolute necessity."[111]

As evidence of this ethical duty in preserving life, the court pointed to the public outcry in the form of letters to the court and media attention regarding the testatrix's instruction.[112] In the court's view, the public's attention on the matter demonstrated "a positive, well-defined and universal public sentiment, deeply integrated in the customs and beliefs of the people of this era, opposed to the unnecessary destruction of animals."[113] Indeed, the court noted "a unanimity of opinion that to destroy the two Irish setters that have displayed nothing but fidelity and affection, would be an act of gross inhumanity."[114] Accordingly, the court found that the provision in the testatrix's will instructing that her dogs be destroyed was void for violating a public policy against taking an animal's life unnecessarily.

Third, the *Capers' Estate* court found that a decedent does not possess the right to destroy property through testamentary instruction. Consistent with prior case law, the court found that while a decedent has the right to "dispose" of her estate in the sense that she may "settle" it, a decedent has no right to order the destruction of estate property.[115]

In sum, the court found the testatrix's instruction to destroy the dogs was first, not her true intent; second, in violation of a public policy against the unnecessary killing of animals; and third, beyond the scope of a decedent's authority because it called for the destruction of property rather than the distribution of it. As a result, the dogs passed to the residuary beneficiary of the will, which was the Western Pennsylvania Humane Society.[116] The court further found that the estate owed the kennel keeper roughly $2,500 for caring for the dogs for almost two years but noted that he had offered to waive the fee in ex-

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[110] *Id.* at 130.
[111] *Id.* at 130, 132.
[112] *Id.* at 134.
[113] *Id.*
[114] *Id.* at 133.
[115] *Id.* at 136–38 (quoting the brief of the Attorney General's office with approval) ("There is no definition or any interpretation to be found in any cases which enlarges the meaning of the word 'dispose' to include destroy." (emphasis omitted)).
[116] *Id.* at 139–40.

change for ownership of the dogs.[117] The court urged the estate that it would be a "prudent disposition" for the estate to accept the kennel keeper's offer.[118]

B. A Second Case Study: Smith v. Avanzino

A second oft-mentioned case is the 1980 matter of *Smith v. Avanzino*, a case that is preserved through a transcript of the court's hearing rather than a written opinion.[119] The case garnered national media exposure[120] and, as explained below, legislative attention. In *Smith*, the testatrix included a provision in her will instructing that her Collie-Sheepdog, Sido, be euthanized upon her death.[121]

On the day before the matter was scheduled to be argued in court, the governor of California signed into a law a piece of special legislation that specifically targeted the *Smith* testatrix's instruction.[122] While the legislation did not identify the *Smith* testatrix by name, it applied only to testamentary documents "executed by a testator who died on December 21, 1979,"[123] which happened to be the date of the *Smith* testatrix's death. The legislation invalidated any testamentary provision "whereby the testator sought to compel or require the destruction of a pet dog."[124] The law noted that "special facts and circumstances" were applicable to such a will necessitating special legislation:

> [T]he testator, having the best interests of her pet dog in mind, would not wish her instructions for the destruction of the pet dog carried out were she cognizant of the present circumstances assuring the well being and happy future for the dog, occurring as the result of unexpected developments following her death.[125]

Through this special legislation, the California legislature and governor apparently thought they knew the testatrix's preferences better than she was able to communicate them herself.

At the hearing the following day, the court was notified that the special legislation protecting Sido had been signed into law the previous day.[126] At one point, the hearing was halted somewhat dramatically so that the court could

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[117] *Id.* at 138–39.

[118] *Id.* at 139.

[119] Reporter's Transcript, Smith v. Avanzino, No. 225-698 (Cal. Super. Ct. June 17, 1980) [hereinafter Smith v. Avanzino Transcript].

[120] The decision was covered by the CBS Evening News with Walter Cronkite. *See* Rachid Haoues, *1980 Flashback: The Legal Battle for a Dog's Life*, CBS NEWS (June 18, 2015, 7:37 PM), https://www.cbsnews.com/news/the-greatest-dog-sido-1980-will-animal-rights/ [perma.cc/4RK5-BNFM].

[121] See Joyce Tischler, *The History of Animal Law, Part I (1972–1987)*, 1 STAN. J. ANIMAL L. & POL'Y 1, 12–13 (2008) for an existing account of *Smith v. Avanzino* in the academic literature.

[122] Act of June 16, 1980, ch. 182, 1980 Cal. Stat. 402.

[123] *Id.* § 1, 1980 Cal. Stat. at 403.

[124] *Id.*

[125] *Id.* § 2, 1980 Cal. Stat. at 403.

[126] Smith v. Avanzino Transcript, *supra* note 119, at 2, 4.

take a phone call from the governor's office confirming that the special legislation was in effect.[127] While noting that the special legislation "perhaps render[ed] the whole issue moot," the court went ahead with its ruling on the validity of the will provision notwithstanding the legislation.[128]

In support of invalidating the provision, one attorney offered for the record 3,000 letters, over 200 offers to adopt the dog, and a file of media coverage.[129] While noting that such evidence was "somewhat unusual," the attorney noted that similar evidence had been entered into the record in the *Capers' Estate* case.[130]

The court opined that euthanizing the dog would be unlawful under a municipal ordinance that vested the power to decree and carry out the death of an animal in the Animal Control Officer.[131] The court further found that the public "look[ed] with disfavor and [did] not accept the decree that the decedent had for her dog" and expressly relied on the public policy rationale adopted by the *Capers' Estate* court.[132] The court then further justified its reasoning by opining that, although the testatrix undoubtedly "thought she was doing the very best that in her mind could be done for her favorite companion," she suffered from a "troubled mind" that caused her to execute a provision that was contrary to both law and public policy.[133] As a result, the court awarded the dog to the residuary beneficiary of the testatrix's estate, an organization called Pets Unlimited.[134]

C. Subsequent Commentary on Pet Euthanization Provisions

In the forty years since *Smith*, courts have generally followed some combination of the three lines of reasoning developed in *Capers' Estate*. Commentators have been generally quite supportive of the concept that testamentary pet euthanasia provisions need not be followed; however, they have expressed reservations about the legal effectiveness of all three of the *Capers' Estate* lines of reasoning.[135] This Section chronicles the evolution of each of the three lines of

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[127] *Id.* at 4.

[128] *Id.*

[129] *Id.* at 3.

[130] *Id.* The attorney also offered to bring the dog into the courtroom. *Id.*

[131] *Id.* at 9.

[132] *Id.* at 10.

[133] *Id.* at 10–11.

[134] *Id.* at 12, 14, 16. Among other things, Pets Unlimited operated a no-kill shelter, and in 2014 it merged with the San Francisco SPCA. *The History of Pets Unlimited*, SF SPCA, https://www.sfspca.org/about/history/pets-unlimited/ [perma.cc/ZU6B-3KZT]. To this day, the San Francisco SPCA runs the "Sido Program," which allows pet owners to appoint the SPCA as a pet's guardian upon the death of the pet's owner. *Sido Program: Give Yourself Peace of Mind*, SF SPCA, https://www.sfspca.org/get-involved/donate/plan-your-pets-future/ [perma.cc/5333-3F4T].

[135] As a result of these reservations, at least two commentators have pressed for a legislative solution in the form of a statute that clearly prohibits testamentary pet euthanasia provisions.

reasoning espoused in *Capers' Estate*: (1) euthanization as against the testator's "true" intent, (2) euthanization as violative of a public policy in favor of preserving animals' lives, and (3) euthanization as violative of the anti-waste doctrine.

First, the *Capers' Estate* approach of reimagining the testator's true intent to nullify a pet euthanization provision has continued in the case law and commentary. Indeed, one commentator labeled interpreting "the intent of the pet owner" as "the most common means" used by courts to invalidate such provisions.[136] In one New York case, the testatrix directed in her will that her two cats be "put to sleep as soon after my decease as is practicable" by a local veterinarian.[137] Rather than interpret the instruction according to the words chosen by the decedent, the court determined that the testatrix's true intent was for the cats to be euthanized only if no suitable home was found for them.[138] Thus, according to the court, "the testat[rix] would have preferred her friends to assume the care of said cats" rather than see them euthanized.[139] This decision was based solely on construction of the will rather than on public policy or any finding regarding the legality of euthanizing the cats.[140]

Commentators have again cautioned against relying on courts to construe pet euthanasia provisions so creatively. Commentators noted that courts would have difficulty interpreting their way out of a pet euthanasia provision in which the testator is amply clear that the pet should be euthanized regardless of any other intervening circumstances.[141]

Second, courts have been particularly attracted to the reasoning that provisions directing the destruction of animals are void for violating a public policy in favor of preserving animals' lives.[142] For example, a Vermont court found a public policy in favor of "allow[ing] animals the opportunity to continue liv-

See Philip Jamieson, *The Family Pet: A Limitation on the Freedom of Testamentary Disposition?*, 9 U. TAS. L. REV. 51, 59–60 (1987) (Austl.) (alteration to original) (calling for "legislative clarification" given the unclear validity of testamentary pet destruction provisions); Frances Carlisle, Note, *Destruction of Pets by Will Provision*, 16 REAL PROP., PROB. & TR. J. 894, 901–03 (1981); Carlisle, *supra* note 97, at 27 ("As the California law enacted to save Sido applies only to that one dog, a more general law to cover all pets is needed.").

136 Carlisle, *supra* note 97, at 27.

137 Carlisle, *supra* note 97, at 27 (describing *In re* Reed, No. 206602 (N.Y. Sur. Ct. Mar. 12, 1981)); Abigail J. Sykas, Note, *Waste Not, Want Not: Can the Public Policy Doctrine Prohibit the Destruction of Property by Testamentary Direction?*, 25 VT. L. REV. 911, 932–33 (2001) (same).

138 Sykas, *supra* note 137, at 932–33.

139 *Id.* at 932 (quoting *In re* Reed, No. 206602 (N.Y. Sur. Ct. Mar. 12, 1981)).

140 *Id.* at 933.

141 *E.g.*, Jamieson, *supra* note 135, at 58–59; Carlisle, *supra* note 135, at 901; Carlisle, *supra* note 97, at 27.

142 *See* Sykas, *supra* note 137, at 934 (2001) (stating that public policy is "the primary rationale" supporting courts' decisions in nearly all cases dealing with testamentary instructions to euthanize animals).

ing."[143] In doing so, the court relied directly on both *Capers' Estate* and *Smith v. Avanzino*.[144] Thus, when faced with a "clear directive" in which the testator instructed the executor of his estate to destroy any animals owned by the testator at the time of his death, including his horses and mule, the court found the provision legally unenforceable.[145]

While commentators have been generally supportive of the concept of a public policy in favor of preserving animals' lives,[146] they have also expressed caution about the effectiveness of this approach. One commentator noted that "[w]hat is considered unethical at any given time depends on the public mores prevalent in the community" and that "animals are killed daily in pounds, laboratories and for food without any unified public outcry against these practices."[147] As a result, the commentator estimated that a court "could just as easily" find that a testamentary pet euthanasia provision does not violate public policy as it could find the opposite.[148] Another commentator noted that public policy is "elusive" and not "clearly defined" and that decisions based on public policy rationales rest on "legal fiction rather than the law."[149] Thus, this commentator suggested that public policy should be employed only as an "acceptable backup" to other approaches more solidly grounded in law.[150]

Finally, the anti-waste doctrine has been used only sparingly in judicial approaches to testamentary pet euthanasia provisions since *Capers' Estate*. In one instance, a Canadian court relied on the anti-waste doctrine to find that a testator's instruction that his four "horses [be] shot by the Royal Canadian Mounted Police and then buried" was not valid.[151] The court noted that the instruction had incited a strong public protest, although it also noted that such an outcry would have been unlikely if the animals had been pigs rather than horses.[152] In its opinion, the court noted its doubt that the testator truly would have wanted the horses killed if he had known that the horses would have been properly

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143 *In re* Estate of Brand, No. 28473, slip op. at 6 (Vt. Prob. Ct. Mar. 17, 1999).

144 *Id.* at 4–6.

145 *Id.* at 3–7.

146 *See, e.g.*, Sykas, *supra* note 137, at 939 ("Although animals are still legally accorded the status of mere property, it is both morally and legally wrong to consider killing a living creature because of the sheer desire to do so. Therefore, courts have correctly refused to allow the destruction of animals by will provision, despite the fact that without exception, testators' reasons for doing so are carefully thought out."); Carlisle, *supra* note 135, at 902 (labeling testamentary pet euthanasia provisions "offensive to the public").

147 Carlisle, *supra* note 135, at 897–98 ("[W]hile a court could invalidate an animal destruction provision on this or another public policy ground, it could just as easily find the provision enforceable.").

148 *Id.* at 898.

149 Sykas, *supra* note 137, at 934–35, 941.

150 *Id.* at 943–44 (advocating that testamentary pet euthanasia provisions should be invalidated as illegal under criminal laws targeting cruelty to animals).

151 *In re* Wishart Estate (1992), 129 N.B.R. 2d 397, 400, 419–20 (Can. N.B.Q.B.).

152 *Id.* at 401.

cared for and not abused.[153] Regardless of the testator's preferences, the court found that the provision was without legal effect because it would amount to "a waste of resources and estate assets even if carried out humanely."[154] As a wasteful provision, the court declared the instruction void.[155]

For their part, commentators have generally opined that the anti-waste doctrine only has limited applicability to testamentary pet euthanasia provisions:

> Pets are considered personal property and where they have economic value, for example because of their breed or pedigree, the policy against waste should prevent their destruction. However, most pets are mixed-breed animals with no market value. Indeed, as they must be fed and otherwise cared for, they may be considered to have a negative value. Presumably it does not violate the public policy against waste to destroy estate property with no pecuniary value. Therefore, unless someone wishing to adopt the animal offered to purchase it from the estate, its destruction would not affect the pecuniary value of the estate and so would not be wasteful.[156]

The prevailing view among commentators has been that only the destruction of a monetarily valuable animal would run afoul of the anti-waste doctrine and that a testamentary instruction to euthanize a mixed-breed animal, that is, most ordinary pets, would not amount to waste.[157]

IV. HOW THE LAW SHOULD APPROACH DEAD-HAND CONTROL OVER PET EUTHANIZATION

While the living are generally free to humanely euthanize their companion animals, the dead should not be afforded the same power. The ability to euthanize an animal is simply not a power that the dead hand should possess. While courts to date have generally reached the correct result when confronted with the validity of a pet euthanization provision in a testamentary document, the reasoning they have used to reach this result leaves much to be desired.[158]

The law's approach to testamentary pet euthanasia provisions would benefit from consistency and certainty. Each time a court applies a mishmash of legal doctrines in an undisciplined way to reach a particular result, the law be-

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[153] The court expressly noted that since others had stepped forward to care for the horses since the testator's death, it had "the benefit of information that [the testator] did not have when he made his will." *Id.* at 407.

[154] *Id.* at 419–20.

[155] *Id.* at 420.

[156] Carlisle, *supra* note 135, at 896.

[157] *E.g.*, Jamieson, *supra* note 135, at 56, 59 (noting that pet euthanization would amount to waste of estate assets "at least in the case of a pedigreed animal"); Carlisle, *supra* note 97, at 27 (noting that courts may find that "[t]he animal is worthless property and there are no specific prohibitions against the destruction of property with no value").

[158] *See supra* Part III.

comes distorted.[159] These mutated doctrines elevate the risk that the law will be misapplied in other situations.[160] While courts have reached the correct result regarding pet euthanasia provisions, they have muddied the waters to get there, and the existing academic commentary on the issue has only stirred the pot to produce even murkier results.[161] It is time for some clarity.

Some commentators have gone so far as to say that legislation is the only way to produce consistent results when a will includes a pet euthanasia provision.[162] It is not. While it is true that legislation that clearly invalidates (or validates) such provisions is one way to clarify the legal landscape, it is an unnecessary one. The law of wills already has a clear answer for pet euthanization provisions. No additional legislation is needed to address this recurring fact pattern.

A. Testamentary Pet Euthanasia Provisions are Void for Wastefulness

The clear answer is that pet euthanasia provisions should consistently be invalidated using the anti-waste doctrine. Some courts have applied the anti-waste doctrine appropriately, but others have bypassed it for less sturdy analytical footing. This should not be so. When faced with a pet euthanasia provision, all courts should begin and end the analysis with the anti-waste doctrine. It is the most appropriate vehicle to invalidate these provisions. Thus, it is most unfortunate that the anti-waste doctrine has not been favored in the case law in this area.[163] This problem is only exacerbated by certain existing academic commentary that erroneously implies or flat-out states that the anti-waste doctrine is inapplicable to most pets because they are not financially valuable.[164]

As explained earlier, the anti-waste doctrine is a limitation on dead-hand control.[165] Testators may not destroy from the grave what they preserved in life. The anti-waste doctrine does not have a minimum dollar amount.[166] A testamentary instruction to burn a one-dollar bill is as invalid as an instruction to sink the *Queen Mary* into Long Beach Harbor.

Previous commentators have opined that most pets have negative value because they demand food, shelter, and care.[167] This approach simply does not square with how animals are treated elsewhere in the law. If someone negligently causes the death of Kaity's dog or Kevin's cat, we can recover in tort for

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159 *See, e.g.*, KEVIN BENNARDO, THINKING AND WRITING ABOUT LAW 46–56 (2021) (explaining the evolution of legal doctrines, including their mutation through judicial misapplication).

160 *Id.*

161 *See supra* Section III.C.

162 *See supra* note 135.

163 *See supra* Section III.C.

164 *See supra* notes 156–57 and accompanying text.

165 *See supra* Section II.B.

166 *See supra* notes 67–73 and accompanying text.

167 *See supra* notes 156–57 and accompanying text.

the loss of our personal property.[168] The damages may not be very much—indeed, damages may be limited to the replacement cost of the animal from the local shelter.[169] But the law is not going to tell us that someone did us an economic favor by causing the death of our pet.[170]

The law does not deem companion animals to possess a negative value simply because they require care and attention. Even adopting the strictest view of animals as property, animals have some positive value.[171] If it costs $50 to adopt a cat, then the cat is worth $50. A testator cannot command the destruction of a $50 cat any more than she can command the destruction of a $50 bill. Because companion animals are assets of the estate, the anti-waste doctrine prevents testators from euthanizing them from beyond the grave.

It is true that the anti-waste doctrine is generally not judicially applied to low-value assets. However, this is a consequence of practicality, not of legality.[172] When a decedent requests that she be buried in a certain outfit of clothing or piece of jewelry, that is waste.[173] The living need not abide the instruction under the anti-waste doctrine, but they generally go along with it anyway.[174] Most beneficiaries are not going to make a fuss about the decedent taking a pair of shoes or other low-value items with her to the grave. Thus, the issue does not get litigated very often for non-living, low-value items.

Animals, however, are a different kind of low-value property. If the executor follows a testator's instruction to burn a $50 bill, beneficiaries are rarely going to expend the effort to challenge the legality of that decision in court. But if the executor intends to put a living animal to death, that occasionally will raise some hackles. Animals are a peculiar type of low-value property precisely because some individuals assign a greater value to them than their replacement cost. That is why there are numerous instances in the case law of challenges to testamentary provisions seeking to destroy monetarily low-value animals but few or no challenges to testamentary provisions seeking to destroy other low-value property.[175] It is not that the anti-waste doctrine is inapplicable to low-

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[168] *See supra* Section I.A.

[169] Remember that even a mean dog is worth $10 in the eyes of the law. *See supra* notes 17–21 and accompanying text. We can assure you that no reasonable finder of fact could conclude that either Kaity's dog or Kevin's cat is mean.

[170] Similarly, if someone steals one of our cars, the law is not going to tell us that the thief did us an economic favor by relieving us from the expense of buying gasoline and insurance and paying for repairs and maintenance.

[171] *See supra* Section I.A.

[172] *But see* Strahilevitz, *supra* note 67, at 822 (opining that the law should tolerate the testamentary waste of estate assets as long as the waste "does not harm third parties *substantially*" (emphasis added)).

[173] *See supra* notes 70–73 and accompanying text.

[174] *See supra* notes 70–73 and accompanying text.

[175] *See, e.g.*, DUKEMINIER & SITKOFF, *supra* note 50, at 14–15 (focusing on testamentary destruction of high-value property).

value property; rather, it is that usually no one cares enough about low-value property to bother to raise it.

Thus, the single, simple, and uniform solution to pet euthanasia provisions in testamentary documents is to declare them invalid under the anti-waste doctrine. It matters not whether the object of the provision is a thoroughbred horse, a designer dog, or a common housecat. The law clearly assigns value to all companion animals.[176] Because companion animals are estate assets and the dead hand cannot waste estate assets, the dead hand has no legal power to order the euthanization of a companion animal. The analysis really needn't be any more complicated than that.

B. Courts Should Abandon Other Approaches to Pet Euthanasia Provisions

We mentioned earlier that courts tend to apply other rationales to invalidate pet euthanasia provisions rather than the anti-waste doctrine.[177] What of them? Well, courts should simply stop using them. They are not a good fit.

1. Stop Reforming Pet Euthanasia Provisions Contrary to Testators' Expressed Intent

First, it is simply improper for a court to "interpret" (wink-wink) a testamentary provision to arrive at a particular preferred result. When a testator includes a provision that commands that all of the testator's pets be humanely euthanized, there is no further interpretation needed. The provision is clear. It says that the testator wants the animals to be dead. It does not say that the testator wants the animals to be alive *unless* they are going to be mistreated or abandoned.

To arrive at such a tortured construction, courts often find that the testator included the pet euthanasia provision based on a mistake of fact. Courts find that the testator mistakenly believed that no one would care for their pet, and, based on this mistaken belief, the testator believed that euthanasia was the best available option.[178] When someone steps forward to care for the animal, courts then label the euthanasia provision unnecessary and disregard it.

This analysis misapplies the law surrounding mistakes of facts. Remember that courts generally will not reform a will based on a testator's mistake of fact.[179] Courts simply are not in a position to know whether the mistake of fact was material to the testamentary instruction or not.[180] They won't rewrite an instruction that states, "I leave my ranch to my son, Jim" to mean "I leave my ranch to my son, Jim, *but only if he is actually my biological son*."

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[176] *See supra* Section I.A.

[177] *See supra* Section III.C.

[178] *See, e.g.*, *supra* notes 107–09 and accompanying text.

[179] *See supra* Section II.C.

[180] *See* MCGOVERN ET AL., *supra* note 85, at 324 ("Materiality is the great difficulty.").

Likewise, courts should not rewrite a testator's instruction "to euthanize my dog Bonniewinkle as soon as feasible after my passing" to mean an instruction "to euthanize my dog Bonniewinkle as soon as feasible after my passing *only if no one steps forward to care for her*." The testator could have included such conditional language in the will but did not. The law of wills requires courts to resist the temptation to write it in.[181]

After all, the law of wills is concerned with effectuating the decedent's preferences, not the court's preferences or anyone else's.[182] Testamentary dispositions are not democratic.[183] Rather, testamentary freedom requires the law to validate bequests that the majority of society views to be ill-considered or bizarre.[184] Freedom of testation requires that it is the testator's preferences that are paramount. What anyone else thinks of the testator's choices is, for the most part, irrelevant.

Consulting extrinsic evidence to determine a decedent's preferences, no matter how tempting, is problematic.[185] Extrinsic evidence substitutes the voices of the living for the decedent's voice at the crucial moment when the decedent is no longer around to refute it.[186] Courts should not consider extrinsic evidence that a decedent truly wanted her dog or cat to live in the face of a painfully clear directive in the decedent's will that she desired the animal to be euthanized. The decedent's will, executed according to all of the necessary formalities for making a will, is how the decedent communicated her preferences regarding the disposition of her estate.

Each time the words of a will are not given their natural meaning, the value of wills as a concept is diminished.[187] Every misconstrued will cheapens the values of wills in general. To safeguard the enterprise of will-making, courts should be more protective of the words chosen by the testator. Well-intentioned courts do no favors when they rewrite a testator's chosen prose. While such judicial line editing or rewriting may appear preferable in certain individual cases, the result is a weakened incentive for individuals to create wills in general.

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181 *See supra* notes 83–93 and accompanying text.

182 *See supra* Section II.A.

183 "One has a right to distribute property upon death solely according to the dictates of one's own desires, unfettered by the constraints of society's moral code or the claims of others." Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 235 (1996).

184 *See id.*; *see also* Bennardo, *supra* note 52, at 602; Irene D. Johnson, *There's a Will, But No Way—Whatever Happened to the Doctrine of Testamentary Freedom and What Can (Should) We Do to Restore It?*, 4 EST. PLAN. & CMTY. PROP. L.J. 105, 105–06 (2011); E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RSRV. L. REV. 275, 276, 278 (1999).

185 *See supra* Section II.C.

186 *See supra* notes 88–89 and accompanying text.

187 *See supra* notes 91–93 and accompanying text.

After all, if the court is not going to take your verbiage seriously, why bother to make a will at all?

The same rules of interpretation should be applied to pet euthanasia provisions as are applied to other provisions in a will. Manipulating the interpretation of a pet euthanasia provision to arrive at a contorted construction of the decedent's intent because others find it more palatable undermines the bedrock principle of testamentary freedom and creates bad precedent.

2. Stop Pretending There is a Public Policy in Favor of Preserving the Lives of Animals

Second, the idea that there is a public policy in favor of preserving all animals' lives is simply unfounded in our society. While our society generally abhors cruelty to animals or inhumane treatment, it does not recoil at the humane killing of animals.[188] When courts quote purple prose about the sanctity of all forms of life, they are not espousing a public policy. They are espousing a personal belief or perhaps even an idealized version of a personal belief.[189]

Proof is all around us. Animals are killed every day.[190] Some are our food. Others are our laboratory subjects. Others are hunted for sport. Others are pets who have simply outlived their utility to their owners. We wear them as our clothes. We lace them into footballs. All of that is perfectly legal. Yes, a certain segment of society raises objections to every instance of eating animals, performing tests on animals, or humanely euthanizing unwanted animals. But most of society does not bat an eye at it. It is not the sort of widespread belief that would support a finding of a public policy.[191]

Moreover, courts should not find a public policy in favor of preserving the lives of all animals simply because there is public outcry over the killing of a particular animal. While the concern over Sido the Dog's life spurred thousands of people to write letters in his support,[192] that does not mean that the public in general believes that the life of every animal should be preserved. If the public felt that way, there would be laws against humanely euthanizing animals. There are not.[193] Even Sido only prompted the California legislature to enact a special piece of legislation that applied to him and him alone.[194] The law does not simi-

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[188] *See supra* Section I.B.

[189] For example, the *Capers' Estate* court quoted extensive passages about the meaning of the phrase "reverence for life" from Albert Sweitzer's 1931 autobiography, *Out of My Life and Thought*. *In re* Capers' Estate, 34 Pa. D. & C.2d 121, 130–32 (Orphans' Ct. 1964).

[190] *See supra* notes 37–41 and accompanying text.

[191] As one example, only 1 to 2 percent of Americans self-describe as vegans. *See* Matthew Zampa, *How Many Vegans Are There Really in the U.S.?*, SENTIENT MEDIA (May 20, 2019), https://sentientmedia.org/how-many-vegans-are-there-in-the-u-s/ [perma.cc/F4WA-L86K] (aggregating results from twenty-four separate studies).

[192] *See supra* Section III.B.

[193] *See supra* Section I.B.

[194] *See supra* Section III.B.

larly prioritize the lives of all other canines.[195] Public outcry over one dog does not create a public policy favoring the preservation of every animal's life.

Courts that recognize a generalized public policy seemingly are compelled to do so by public pressure and a desire to reach a particular result. Neither are appropriate reasons to invent a public policy. As explained above, majoritarian public sentiment and testamentary freedom do not mix.[196] A commitment to one comes at the exclusion of the other. In terms of strict testamentary freedom, it matters not that thousands of people wanted Sido to live. The only relevant input is that the testatrix expressed an unambiguous desire for him to die. While a court may shudder at the thought of euthanizing a particular dog or a cat, especially when an offer of adoption is pending, such sentiments do not provide a solid foundation for recognizing a public policy in favor of preservation of all creatures great and small. A court that manufactures a public policy into existence merely to reach its preferred ends in a particular case does damage to the law.

CONCLUSION

Courts and commentators have done a poor job with testamentary provisions ordering a pet's death. They know that they do not want to enforce them, but they have struggled to identify a single, consistent, legally defensible reason why. To reach their preferred result, they do silly things. Some have reformed the testator's words into something they deem more palatable based on a supposed mistake of fact. Others have invented an unwieldy public policy in favor of preserving the life of every living creature. These approaches misapply and distort existing legal doctrines. Thus, they should be abandoned.

We do not fault the intuitions of these courts and commentators. They were right that testamentary pet euthanasia provisions are not legally enforceable; they just stumbled when attempting to explain why. Thankfully, there is one consistent, legally defensible reason why decedents lack the power to make life and death decisions on their pets' behalf. Quite simply, pets are estate assets, and decedents lack the power to waste estate assets. Assigning a positive value to pets is consistent with how companion animals are treated in other areas of the law, such as torts and bankruptcy. Once the law of wills accepts the premise that even mixed-breed pets have value, the rest of the analysis is uncomplicated: decedents cannot order the deaths of their pets because doing so is wasteful. This single, simple analysis should be applied to testamentary pet euthanasia provisions in the future.

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[195] As but one example, California law permits livestock owners to kill on sight any dog that trespasses on their property. *See* CAL. FOOD & AGRIC. CODE § 31103 (West 2021) ("[A]ny dog entering any enclosed or unenclosed property upon which livestock or poultry are confined may be seized or killed by the owner or tenant of the property or by any employee of the owner or tenant. No action, civil or criminal, shall be maintained against the owner, tenant, or employee for the seizure or killing of any such dog.").

[196] *See supra* notes 182–84 and accompanying text.

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