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## Getting Under Fido's Skin: Analyzing the Objections to Mandatory Pet Microchipping Laws

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**GETTING UNDER FIDO'S SKIN:  
ANALYZING THE OBJECTIONS TO MANDATORY PET MICROCHIPPING  
LAWS**

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**I. Introduction**

The Humane Society of the United States estimates that shelters euthanize between three and four million dogs and cats each year.<sup>1</sup> While many animal welfare organizations have continuously called for an end to animal euthanasia, the “reality is that shelters [have] . . . limited space and finite resources . . . .”<sup>2</sup> Even so, the number of animals euthanized by shelters has decreased nearly 22% since the 1970s.<sup>3</sup> Still, animal advocates assert that we can do better.<sup>4</sup>

Companies such as HomeAgain and AVID Identification Systems claim they have the solution.<sup>5</sup> Their solution is an implantable microchip about the size of a “grain of rice,” which the companies say provides a more reliable means of reuniting lost pets with their owners.<sup>6</sup> “While collars can fall off and tattoos can be removed, pet microchip identification is a permanent way to ensure that if [someone’s] pet goes missing, the

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<sup>1</sup> *HSUS Pet Overpopulation Estimates*, HUMANE SOC’Y OF THE U.S. (Nov. 23, 2009), [http://www.humanesociety.org/issues/pet\\_overpopulation/facts/overpopulation\\_estimates.html](http://www.humanesociety.org/issues/pet_overpopulation/facts/overpopulation_estimates.html).

<sup>2</sup> *Common Questions About Animal Shelters*, HUMANE SOC’Y OF THE U.S. (Oct. 26, 2009), [http://www.humanesociety.org/animal\\_community/resources/qa/common\\_questions\\_on\\_shelters.html#Why\\_arent\\_all\\_animal\\_shelters\\_nokill\\_she](http://www.humanesociety.org/animal_community/resources/qa/common_questions_on_shelters.html#Why_arent_all_animal_shelters_nokill_she).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *The Lost Pet Reality*, HOMEAGAIN (Feb. 1, 2011), <http://public.homeagain.com/>; *About AVID*, AVID (Feb. 1, 2011), <http://www.avidid.com/stoddard.html>.

<sup>6</sup> Jane McGrath, *How Pet Microchipping Works*, HOW STUFF WORKS, <http://animals.howstuffworks.com/pets/pet-travel/pet-microchip.htm/printable> (last visited Feb. 8, 2010).

authorities can trace the ownership of the animal back to [the owner].”<sup>7</sup> Moreover, the process of “chipping” a dog or cat is relatively simple. The microchips, which utilize a type of technology known as radio frequency identification (RFID), are surgically implanted in a fold of skin between the animal’s shoulder blades, a procedure that advocates say is quick and painless to the animal.<sup>8</sup>

Convinced of the efficacy of RFID technology, a number of cities across the United States, including Los Angeles and El Paso, have instituted, or are considering instituting mandatory microchipping laws.<sup>9</sup> These laws require pet owners to have microchips implanted in their pets, and in some cases pay a fine for failure to do so.<sup>10</sup> In support of such laws, El Paso city councilman Beto O’Rourke noted that his “city’s goal is ‘zero kill’ of animals, ‘which we’re nowhere near right now’ . . . . ‘We’re spending \$2.5 million every year housing, feeding and euthanizing those pets, and then dumping them at the landfill.’”<sup>11</sup> Likewise, Los Angeles councilman Tony Cardenas said that “[i]f animals ‘aren’t chipped, it will [take] longer for them to be returned. It is a cost-saving measure.”<sup>12</sup>

However, not everyone is sold on the idea of mandatory microchipping. There are those who object to mandatory microchipping laws on the grounds that forced

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<sup>7</sup> Jessica Hunter, *Weighing the Benefits of Pet Microchip Identification*, CONSUMER SAVVY TIPS, [http://www.consumersavvytips.org/weighing\\_the\\_benefits\\_of\\_pet\\_microchip\\_identification.html](http://www.consumersavvytips.org/weighing_the_benefits_of_pet_microchip_identification.html) (last visited Mar. 25, 2010).

<sup>8</sup> McGrath, *supra* note 6.

<sup>9</sup> Matthew C. Wright, *Tags and Collars Becoming Passe with New Implants*, WASH. POST, Apr. 9, 2006, at A02; Gerrick D. Kennedy, *Found Pets Might Get Microchips*, L.A. TIMES, Dec. 15, 2009, at A4.

<sup>10</sup> MARION COUNTY, FLA., CODE § 4-10 (2009).

<sup>11</sup> Wright, *supra* note 9.

<sup>12</sup> Kennedy, *supra* note 9.

chipping is unsafe, unnecessary, and in contravention of the rights of pet owners.<sup>13</sup> Accordingly, they argue that “[t]he decision of whether or not to microchip an animal belongs solely to the owner and should not be mandated by any government entity.”<sup>14</sup> This principal argument is buttressed by a variety of legal and policy-based objections to mandatory microchipping laws. This note will conduct a brief overview of several of the most common objections and examine whether those who oppose mandatory microchipping have any legs (or paws?) to stand on.

First, there is the argument that forced pet microchipping will set off an unalterable chain of events that will ultimately lead to forced *human* microchipping.<sup>15</sup> This slippery slope argument is popular because it conjures up chilling visions of Big Brother-style government surveillance. However provocative such notions may be, this note will argue that such fears are ultimately unfounded, largely because of the judicially recognized fundamental right to privacy. The right to privacy includes the right to bodily integrity, protecting people from government invasions of their person.<sup>16</sup>

Second, this note will address the argument that mandatory microchipping laws constitute an unwarranted invasion of privacy. This argument is rooted in an objection to the creation of a database containing pet owners’ names and contact information.<sup>17</sup> This

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<sup>13</sup> *Mandatory Microchipping Makes Its Way From New York to Australia*, FULLY VETTED (Nov. 12, 2008), <http://www.petmd.com/blogs/fullyvetted/2008/november/mandatory-microchipping-makes-its-way-new-york-australia>.

<sup>14</sup> Loretta Baughan, *Declassifying Animals as Property*, SPANIEL J., <http://www.spanieljournal.com/46lbaughan.html> (last updated Apr. 6, 2010).

<sup>15</sup> KATHERINE ALBRECHT & LIZ MCINTYRE, *SPYCHIPS: HOW MAJOR CORPORATIONS AND GOVERNMENT PLAN TO TRACK YOUR EVERY MOVE WITH RFID 218* (2005).

<sup>16</sup> Gowri Ramachandran, *Against the Right to Bodily Integrity: Of Cyborgs and Human Rights*, 87 DENV. U.L. REV. 1, 1 (2009).

<sup>17</sup> *Is There a Chip in Your Future?*, DOG POLITICS (Dec. 5, 2007), [http://www.dogpolitics.com/my\\_weblog/microchips\\_data\\_privacy/](http://www.dogpolitics.com/my_weblog/microchips_data_privacy/).

objection, while somewhat undercut by the fact that most counties and/or municipalities “already require[] pet owners to license their pets”<sup>18</sup> is not completely without merit.

With licensing, the pet owner’s personal information is stored in a database maintained by the government.<sup>19</sup> With microchipping, however, such information is stored in a database maintained by the manufacturer of the microchip.<sup>20</sup> While it is certainly true that many other private entities (e.g., credit card companies) maintain databases containing customer information, it should be noted that legislation exists which protects against the improper dissemination of that information.<sup>21</sup> With pet microchip databases, however, there is currently no analogous legislation protecting pet owners.<sup>22</sup>

Third, this note will discuss several safety concerns cited by opponents of mandatory microchipping. The first of these is the possible link between implantable microchips and cancer. In several studies, mice implanted with RFID microchips developed malignant tumors.<sup>23</sup> However, the legitimacy of these studies has been called into question by microchip proponents who claim that it is “an urban myth that [microchips] cause cancer.”<sup>24</sup>

The other safety issue concerns the variation of microchip/scanner frequencies. Depending on the manufacturer, pet microchips currently utilize one of three different

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<sup>18</sup> *Mandatory Pet Microchipping*, MENIFEE 24/7 NEWS & VIEWS OF MENIFEE, CA (Jan. 19, 2009), <http://www.menifee247.com/2009/01/mandatory-pet-microchipping.htm>.

<sup>19</sup> See, e.g., *Pet License Information Database*, BROWARD.ORG, <http://www.broward.org/animal/lostandfound/pages/petlicensedatabase.aspx> (last visited Mar. 29, 2010).

<sup>20</sup> *How Microchipping Works*, HOMEAGAIN, <http://public.homeagain.com/microchipping-facts.html> (last visited Feb. 1, 2011).

<sup>21</sup> E.g., Fair Credit Reporting Act, 15 U.S.C. § 1681 (2006).

<sup>22</sup> Kenneth A. Adler, *RFID & Privacy Issues: A Snapshot of Proposed Laws*, THE LEGAL SIDE, [http://www.thelenreid.com/resources/documents/0509\\_RFIDPN1.pdf](http://www.thelenreid.com/resources/documents/0509_RFIDPN1.pdf) (last visited Apr. 4, 2010).

<sup>23</sup> See, e.g., Todd Lewan, AP, *Chip Implants Linked to Animal Tumors*, WASH. POST, Sept. 8, 2007.

<sup>24</sup> William Hageman, *Can Something This Small (Actual Size) Help Bring Him Back Home?; Microchips Reunite Pets and Their People, but There’s a Human Glitch*, CHI. TRIB., Apr. 13, 2008, at C1.

frequencies.<sup>25</sup> This disparity can be fatal if the shelter that takes in a lost pet does not have the right scanner.<sup>26</sup> Universal scanners<sup>27</sup> exist, though many microchip companies have responded by encrypting their microchips, allowing only that company's scanner to read the microchip.<sup>28</sup>

Fourth, this note will address the issue of whether or not mandatory microchipping constitutes a compensable taking. According to Justice Scalia's majority opinion in *Lucas v. South Carolina Coastal Council*, forced microchipping arguably does constitute a taking for which the pet's owner must be compensated.<sup>29</sup> This is due to the fact that the procedure involves a permanent physical invasion of a person's property.<sup>30</sup>

Finally, this note assesses the argument that "[m]andatory microchipping denigrates the role of pets as family members."<sup>31</sup> Although the law has traditionally treated animals as being no different from other types of personal property, a minority of courts have recognized that companion animals are a unique type of property.<sup>32</sup> Based upon this recognition, anti-chipping advocates argue that given the special property status of pets, owners should be given a choice as to how they identify their pets (i.e. the choice between microchip, tattoo, or traditional collar and tag). This note will argue that such arguments, while perhaps persuasive from a public policy standpoint, find little support from the law.

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<sup>25</sup> McGrath, *supra* note 6.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* (explaining that universal scanners are scanners that can read microchips at all frequencies).

<sup>28</sup> *Id.*

<sup>29</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

<sup>30</sup> *E.g.*, *AVID Technology*, AVID, <http://www.avidid.com/technology/index.html> (last visited Feb. 1, 2011).

<sup>31</sup> FULLY VETTED, *supra* note 13.

<sup>32</sup> Susan J. Hankin, *Not a Living Room Sofa: Changing the Legal Status of Companion Animals*, 4 RUTGERS J.L. & PUB. POL'Y 314 *passim* (2007).

## II. What is RFID?

The microchips implanted in dogs and cats utilize what is known as radio frequency identification (RFID) technology.<sup>33</sup> This technology is characterized by several features: “(i) a tag (transponder), which emits a unique identifier through radio waves; (ii) an interrogator (scanner), which receives the signal and identifies the object; and (iii) an associable database.”<sup>34</sup> In addition, tags come in two forms, active and passive.<sup>35</sup>

The type of tag currently used in animals is a form of passive RFID.<sup>36</sup> Passive RFID tags have “no battery and no internal power source. Rather [they] sit completely inert in the animal, waiting to be read.”<sup>37</sup> The tag consists of the actual microchip, encapsulated by a plastic or biocompatible glass material.<sup>38</sup> In addition to the microchip, the capsule also contains “a tuning capacitor and an antenna coil. The capacitor receives power and sends it to the microchip. The microchip’s information can then be picked up through the antenna, which is a copper coil.”<sup>39</sup> In the case of pet microchips, the data stored on the microchip is an identification number.<sup>40</sup> This number “matches [the pet owner’s] name and contact information in a database.”<sup>41</sup>

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<sup>33</sup> McGrath, *supra* note 6.

<sup>34</sup> Ian Kerr, *The Internet of People?*, in LESSONS FROM THE IDENTITY TRAIL: ANONYMITY, PRIVACY AND IDENTITY IN A NETWORKED SOCIETY 337 (Ian Kerr, Valerie Steeves & Carole Lucock eds., 2009).

<sup>35</sup> *Id.*

<sup>36</sup> McGrath, *supra* note 6.

<sup>37</sup> *Id.*

<sup>38</sup> HELEN NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE 32 (2010).

<sup>39</sup> McGrath, *supra* note 6.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

Passive RFID tags are not capable of actively transmitting any information stored on them without the aid of a scanner.<sup>42</sup> The scanner works as follows: “When set to the correct frequency, the scanner ‘interrogates’ the microchip by invigorating the capacitor with electromagnetic power. When energized, the microchip capsule sends radio signals back to the scanner” transmitting the identification number stored on the microchip.<sup>43</sup> The scanner then cross-references the number by syncing with an associable database.<sup>44</sup> If a match is found, the pet owner’s name and contact information is sent from the database back to the scanner and appears on the screen for the user to read.<sup>45</sup> In the best case scenario, Fido’s owner is then called and man, and man’s best friend, enjoy a tearful reunion as scientists and Humane Society staff exchange high fives and pat each other on the back.

### III. First Pets, Then People? Analyzing the RFID Slippery Slope

One of the most provocative arguments put forward by opponents of mandatory pet microchipping is that such legislation will ultimately lead to mandatory microchipping laws for humans; what this note will refer to as the “first pets, then people” argument. While the scenarios envisioned by proponents of this argument certainly make for an entertaining *Blade Runner*-esque cyberpunk film, the likelihood of them actually happening is circumvented by some of the oldest principles of the common law.<sup>46</sup> Nonetheless, such arguments, because they appeal to fears about overzealous

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<sup>42</sup> Kerr, *supra* note 34.

<sup>43</sup> McGrath, *supra* note 6.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Wong Kin Yuen, *On the Edge of Spaces: “Blade Runner”, “Ghost in the Shell”, and Hong Kong’s Cityscape*, 27 SCI. FICTION STUDIES 1, 1 (2000), available at <http://www.jstor.org/pss/4240846> (noting that “[i]t is widely acknowledged that Ridley Scott’s *Blade Runner* (1982/1992) initiated a whole tradition of



government surveillance, permeate the debate over mandatory microchipping. As radio personality and anti-RFID activist Katherine Albrecht has said, “for a lot of people there’s a real worry that if we allow the government to say we must microchip our animals then it’s just a matter of time before that government says we must microchip our children and even ourselves.”<sup>47</sup>

In fact, Albrecht is one of the chief proponents of the idea that mandatory animal microchipping will eventually lead to forced human microchipping.<sup>48</sup> In her book, *Spychips: How Major Corporations and Government Plan to Track your Every Move with RFID*, Albrecht describes quite colorfully the transition from innocuous animal microchipping to invasive human chipping: “Pets and livestock are already being chipped, and there are those who believe humans should be next. . . the end point will be microchips embedded in our flesh.”<sup>49</sup> In Albrecht’s opinion:

[I]t’s just a matter of time before society finds a compelling reason to permanently identify and track ‘captive’ populations with implantable microchips. First, we’ll implant society’s outcasts – like prisoners and the homeless – justifying it as a security measure. When such chipping becomes commonplace and hence ‘acceptable’ in those populations, society may expand those efforts to semi-captive populations like the elderly, school kids, and the military. Next will come government employees and those working for major corporations. After all, the argument will go, no one’s forcing you to do it – although if you don’t go along, you can kiss your paycheck goodbye. Finally, when most everyone else has been signed up, they’ll start coming for the rest of us. Nicely at first, then in earnest.<sup>50</sup>

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cult movies later grouped under the label ‘cyberpunk.’”); In addition to being legal untenable, some say mandatory human microchipping is also highly impractical. The Information Technology Association of American, for example, has stated that “[u]biquitous ‘Big Brother’ surveillance around the world would require billions and billions of readers and antennas within 10 to 30 feet of a tag as well as open access to the data associated with or stored in the tag.” *RFID: Myths and Urban Legends*, INFO. TECH. ASS’N AM., <http://www.rfidinfo.jp/whitepaper/787.pdf> (last visited Feb. 25, 2011).

<sup>47</sup> *Pet Lovers Protest Micro-Chipping Law*, CBN NEWS (Mar. 6, 2009), <http://www.cbn.com/CBNnews/553562.aspx>.

<sup>48</sup> *Id.*

<sup>49</sup> ALBRECHT & MCINTYRE, *supra* note 15.

<sup>50</sup> *Id.*

Albrecht's allusion to Martin Niemöller's "*First they came ...*" is obvious (and not the only reference she makes to Nazi totalitarianism).<sup>51</sup> However, before dismissing Albrecht's grim, Orwellian forecast as the paranoid ramblings of a conspiracy theorist, one needs to examine the slippery slope argument implied by her statement.

As a construct, the slippery slope argument certainly does not suffer from a lack of either supporters or detractors. Many eminent legal thinkers, including James Madison and Hugo Black, have been of the opinion that slippery slopes are "a real cause for concern."<sup>52</sup> Conversely, other jurists "such as Lincoln, Holmes, and Frankfurter have recognized [that] slippery slope objections can't always be dispositive."<sup>53</sup>

Albrecht's slippery slope argument, succinctly summarized, goes like this: Mandatory pet microchipping will change societal norms such that, once people get used to microchips in pets, the step up to microchips in children and the elderly will seem like a less radical step. Once those classes of people have microchips, it will be but a short jump to *everyone* having to have a microchip.

This type of argument is what law professor Eugene Volokh has termed the "attitude-altering slippery slope."<sup>54</sup> The idea is that "[d]ecision A . . . will eventually lead to B . . . because A and similar decisions will slowly change the public's mind . . . 'desensitize' people in preparation for a future step."<sup>55</sup> Logically, this idea seems sound.

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<sup>51</sup> *Id.* at 211. According to Albrecht, "[t]here's little doubt . . . that were the Holocaust to happen today, the Nazi predators would have done more than issue yellow stars to mark their victims. They would almost certainly have tagged every Jew with a mandatory RFID implant." *Id.*

<sup>52</sup> Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1029 (2003).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 1077.

<sup>55</sup> *Id.*

However, there are some problems with the efficacy of this model as applied to

Albrecht's progression, namely the huge leap from animals to humans. As Volokh notes:

Attitudes . . . are altered by the law's justifications as they are *perceived*. Say people conclude that A's enactment means that A is probably good, and that [other proposals are] . . . probably also good if [they are] analogous to A. Whether B is seen as analogous to A turns on which particular justification people ascribe to A, and see as being legitimized by A's enactment.<sup>56</sup>

Thus, if people felt that mandatory pet microchipping was justified by the idea that government surveillance via internal body implant is tolerable regardless of the species being surveilled, then perhaps we are not that far away from a *Brave New World* after all.<sup>57</sup> Fortunately, however, it is safe to say that most people probably do *not* recognize such a justification as being legitimized by mandatory microchipping laws. Rather, if people see pet microchipping as analogous to human microchipping, they do so in a very qualified way. Whether they realize it or not, most people probably perceive an implicit caveat in the justification behind mandatory pet microchipping. That caveat is that there is a fundamental difference between domesticated animals and people; that forced animal microchipping is okay, forced human microchipping is *not* (or as Orwell would say, "four legs good, two legs bad"<sup>58</sup>).

On balance, Volokh says, "[t]he slippery slope is in some ways a helpful metaphor, but as with many metaphors, it starts by enriching our vision and ends by clouding it. We need to go beyond the metaphor, and examine the specific mechanisms

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<sup>56</sup> *Id.* at 1088 (emphasis added).

<sup>57</sup> In Aldous Huxley's classic dystopian novel *Brave New World* the entire planet is controlled by the so-called World State, an invasive totalitarian government very similar to the one personified by Big Brother in George Orwell's *Nineteen Eighty-Four*. ALDOUS HUXLEY, *BRAVE NEW WORLD* *passim* (1932); GEORGE ORWELL, *ANIMAL FARM* *passim* (1945).

<sup>58</sup> ORWELL, *supra* note 57, *passim*.

that cause the phenomenon that the metaphor describes . . . .”<sup>59</sup> In the case of mandatory human microchipping, such mechanisms, no matter how much grease were to be added to the gears, would inevitably come to a grinding halt, obstructed by the overwhelming weight of legal precedent protecting people against such an odious invasion of their persons.

The number of methods by which the government keeps tabs on its citizens is numerous. Indeed, the government has information about people via driver’s licenses, social security numbers, court documents, deeds to houses, pet licenses, and a plethora of other documents maintained as public records. However, a clear line can be drawn at the human body. As Judge Cardozo once said, “[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body . . . .”<sup>60</sup>

The integrity of the human body is a deeply engrained part of our common law history. For instance, “[t]he fundamental principle of medical jurisprudence [is] that a patient must consent to any surgical procedure.”<sup>61</sup> Consent, in turn, “is derived from a fundamental common law principle that *volenti non fit injuria* (‘to one who is willing, no wrong is done.’).”<sup>62</sup> Indeed, any “surgeon who performs an operation without his patient’s consent, commits an assault, for which he is liable in damages.”<sup>63</sup> Without a doubt, the implantation of a microchip into a person’s body constitutes a surgical procedure, defined as “a medical procedure involving an incision with instruments.”<sup>64</sup> A

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<sup>59</sup> Volokh, *supra* note 52, at 1137.

<sup>60</sup> *Schloendorff v. Soc’y of N.Y. Hosp.*, 211 N.Y. 125, 129 (1914).

<sup>61</sup> CHARLOTTE L. LEVY, *THE HUMAN BODY AND THE LAW: LEGAL & ETHICAL CONSIDERATIONS IN HUMAN EXPERIMENTATION* 50 (2d ed. 1983).

<sup>62</sup> *Id.* at 16.

<sup>63</sup> *Schloendorff*, 211 N.Y. at 129-30.

<sup>64</sup> *Surgical Procedure Definition*, WORDNET: A LEXICAL DATABASE FOR ENGLISH, <http://wordnetweb.princeton.edu/perl/webwn?s=surgical%20procedure> (last visited Jan. 31, 2011).

medical procedure, in turn, is defined as “a procedure employed by [a] medical or dental practitioner[.]”<sup>65</sup>

Moreover, the right to bodily integrity, which emanates from the right to privacy, has long been considered to be a fundamental right.<sup>66</sup> In 1891, the Supreme Court decided *Union Pacific Railway Co. v. Botsford*.<sup>67</sup> Writing for the majority, Justice Gray made clear that “[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”<sup>68</sup>

As the right to bodily integrity is a fundamental right, any law restricting it will be subject to strict scrutiny review by the courts.<sup>69</sup> In order to pass this highest of standards, any law requiring mandatory human microchipping would only be upheld if it were “proved necessary to achieve a compelling government purpose.”<sup>70</sup> In addition, the government would have to show “that it cannot achieve its objective through any less discriminatory alternative.”<sup>71</sup> Thus, any law requiring people to have microchips implanted in their bodies would likely fail strict scrutiny analysis. As patent attorney Dr.

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<sup>65</sup> *Medical Procedure Definition*, WORDNET: A LEXICAL DATABASE FOR ENGLISH, <http://wordnetweb.princeton.edu/perl/webwn?s=medical+procedure&sub=Search+WordNet&o2=&o0=1&o7=&o5=&o1=1&o6=&o4=&o3=&h=0> (last visited Jan. 31, 2011).

<sup>66</sup> Ronald W. Jenkins, RECENT DEVELOPMENT: *Constitutional Law--Due Process--Fundamental Right to Bodily Integrity--Protective Services for Elderly Persons*, 46 TENN. L. REV. 425, 427 (1979); Ramachandran, *supra* note 16, at 1 (“Creating a list of fundamental human rights is a controversial project, but there is one right that appears in many lists - a right to bodily integrity, security, or control over one’s own body.”).

<sup>67</sup> 141 U.S. 250 (1891).

<sup>68</sup> *Id.* at 251.

<sup>69</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 (1978); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 319 (1976) (Marshall, J., Dissenting).

<sup>70</sup> ERWIN CHERMERINKSY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 645 (Vicki Beenet et al. eds., 2d ed. 2002).

<sup>71</sup> *Id.*

Elaine M. Ramesh notes, “[a]lthough the compelling governmental interest might be evident, microchip implantation is not the least restrictive means to achieve objectives. Hence, mandatory implantation would not be legal.”<sup>72</sup> Thus, in the absence of a radical Constitutional amendment, we can consider the idea of forced human microchipping short-circuited.

#### **IV. Is Forced Pet Microchipping an Invasion of the Owner’s Privacy?**

Another one of the arguments promulgated by anti-chippers is the idea that mandatory microchipping constitutes a derogation of pet owners’ privacy rights. While RFID critics acknowledge that “[t]here is no right not to be observed . . . ,” opponents of mandatory chipping maintain that “surveillance, regardless of whether or not it is technologically assisted, assaults human dignity and changes behavior patterns, thereby reducing self-determination.”<sup>73</sup> Such assertions, while undoubtedly sincere, ignore the fact that county and municipal government authorities were in the practice of storing pet owner identification information in databases long before the advent of RFID microchips.<sup>74</sup>

Most cities in the United States have pet licensing laws which require pet owners to register their dog or cat, acquire tags and pay a licensing fee.<sup>75</sup> County and municipal authorities have the power to enact and enforce such regulations because they “partake of

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<sup>72</sup> Elaine M. Ramesh, *Time Enough? Consequences of Human Microchip Implantation*, RISK: HEALTH, SAFETY & ENVIRONMENT, No. 8, 1997, at 373, available at <http://law.unh.edu/risk/vol8/fall/ramesh.htm>.

<sup>73</sup> Anne Uteck, *Ubiquitous Computing and Spatial Privacy*, in LESSONS FROM THE IDENTITY TRAIL: ANONYMITY, PRIVACY AND IDENTITY IN A NETWORKED SOCIETY 90 (Ian Kerr, Valerie Steeves & Carole Lucock eds., 2009).

<sup>74</sup> Diane E. Bandy, *Collecting Antique Dog Tags*, THE BARK, <http://www.thebark.com/content/collecting-antique-dog-tags> (last visited Feb. 1, 2011).

<sup>75</sup> H.W. HANNAH & DONALD F. STORM, LAW FOR THE VETERINARIAN AND LIVESTOCK OWNER 141 (1959).

police power inherent in the state.”<sup>76</sup> Police powers allow local government authorities to “pass ordinances [aimed at] protect[ing] the health, welfare or convenience of [their] residents.”<sup>77</sup> As long as the ordinances passed are “reasonable, they will be held constitutional as a valid exercise of police power.”<sup>78</sup>

Assuming for the moment that a particular mandatory microchipping law *is* a reasonable exercise of the city or county’s police power, the question must be asked: how is an RFID database any different than the pet-licensing databases already in existence? Both contain the same information about the pet owner. For example, in Broward County, Florida, section 4-11 of the county’s Animal Care and Regulation Ordinance states that “[a]ny person who owns or keeps in Broward County a dog or cat two (2) months of age or older shall have such dog or cat licensed by and in Broward County.”<sup>79</sup> Every dog or cat is required to wear its county license.<sup>80</sup> After purchasing a license from the county, the pet owner’s personal information is entered into a database maintained by the Broward County Animal Care and Regulation Division.<sup>81</sup>

The difference between pet license databases and pet microchip databases is that with licenses, it is the county/municipality that maintains the database containing owner’s personal information. With microchips, it is a private entity, the microchip manufacturer, which maintains the information database. In this regard, a potential privacy threat exists from “the entity responsible for the [chip] and in control of the database . . . and from

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<sup>76</sup> *Id.* at 20.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 141.

<sup>79</sup> BROWARD COUNTY, FLA., CODE OF ORDINANCES art. 11, § 4 (2009).

<sup>80</sup> *Animal Laws*, BROWARD.ORG, <http://www.broward.org/ANIMAL/RESOURCES/Pages/AnimalLaws.aspx> (last visited Mar. 26, 2010).

<sup>81</sup> *Pet License Information Database*, *supra* note 19.

anyone else that has gotten database access.”<sup>82</sup> However, it is the same kind of threat that exists with regard to any commercial entity that keeps records of its customers. As the Information Technology Association of America put it, “bar codes, credit cards, and loyalty cards already enable stores to link personally identifiable information to purchases — with the approval of consumers. . . . RFID does not change the equation . . . .”<sup>83</sup>

A counter argument would be that there are no laws that *force* people to get credit cards or loyalty cards. Furthermore, consumer protection laws, such as the Fair Credit Reporting Act (FCRA),<sup>84</sup> exist which regulate the “privacy of information in the files of consumer reporting agencies.”<sup>85</sup> In the case of the FCRA, for example, “[a] consumer reporting agency may provide information about [the consumer] only to people with a valid need.”<sup>86</sup> Those who object to mandatory pet microchipping on privacy grounds might point to the lack of any analogous federal or state legislation protecting against the improper dissemination of pet owner information.

This may simply be due to the relative novelty of RFID technology. As noted by James X. Dempsey of the Center for Democracy & Technology, privacy law often has trouble “[keeping] pace with technical innovation.”<sup>87</sup> This is partly due to the constant evolution of technology, but it is also a result of the mechanics of American government.

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<sup>82</sup> Jonathan Weinberg, *RFID and Privacy*, in SECURING PRIVACY IN THE INTERNET AGE 256 (Anupam Chander, Lauren Gelman & Margaret Jane Radin eds., 2008).

<sup>83</sup> *RFID: Myths and Urban Legends*, *supra* note 46.

<sup>84</sup> Fair Credit Reporting Act, *supra* note 21.

<sup>85</sup> *A Summary of Your Rights Under the Fair Credit Reporting Act*, YALE UNIV., <http://www.yale.edu/hronline/careers/screening/documents/FairCreditReportingAct.pdf> (last visited Mar. 1, 2011).

<sup>86</sup> *Id.*

<sup>87</sup> James X. Dempsey, *Digital Search and Seizure: Updating Privacy Protections to Keep Pace with Technology*, in CONTROVERSIES IN SCIENCE AND TECHNOLOGY: FROM CLIMATE TO CHROMOSOMES 169, 169 (Daniel Lee Kleinman et al. eds., 2008), available at <http://www.liebertonline.com/doi/abs/10.1089/9780913113424.169?cookieSet=1> (subscription only).



As the United States Supreme Court has noted, “[a] scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority;”<sup>88</sup> “[c]onvenience and efficiency are not the primary objectives – or the hallmarks – of democratic government.”<sup>89</sup> In other words, the founders purposely designed our government to be slow and burdensome, fraught with annoyances they considered essential to protect against abuses of power. With this sort of system, it seems the law is destined to always be one step behind the latest technological advancement.

Nonetheless, consumer privacy advocates, such as Consumers Against Supermarket Privacy Invasion and Numbering (CASPIAN), fully intend on holding Congress’ feet to the proverbial fire. Several years ago, CASPIAN drafted the RFID Right to Know Act of 2003, a proposal “which seeks amendments to the Fair Packaging and Labeling Program, the Federal Food, Drug, and Cosmetic Act Relating to Misbranding, and the Federal Alcohol Administration Act (Title 15, Chapters 36 and 94).”<sup>90</sup> This Act would prohibit businesses “from: 1) combining or linking an individual’s non-public personal information with RFID tag identification information beyond what is required to manage inventory; 2) disclosing such information to a non-affiliated third party; or 3) using RFID tag identification information to identify an individual.”<sup>91</sup>

In addition, although efforts at the federal level have been sluggish, a number of states are proposing their own legislation, “address[ing] privacy concerns raised by the

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<sup>88</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 613 (1952) (Frankfurter, J., concurring).

<sup>89</sup> *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 944 (1983).

<sup>90</sup> Adler, *supra* note 22.

<sup>91</sup> *Id.*

implementation of RFID technology . . . .”<sup>92</sup> For example, in 2004 Representative David Hogue proposed a bill in the Utah State House of Representatives that “would modify the Utah Consumer Sales Practices Act to protect against misuse of personal information transferred through RFID.”<sup>93</sup> Such efforts are a good sign that RFID privacy laws are on the horizon.

Privacy advocates argue that surreptitious scanning of microchips by unauthorized third parties poses another potential threat.<sup>94</sup> This fear can be calmed, however, because the type of microchips currently used in dogs and cats are a variety of passive RFID that “[does] not broadcast personal identifying information directly. Instead . . . [the chips] broadcast pointers to entries in a limited-access database containing the [pet owner’s] personal identifying information.”<sup>95</sup> As noted earlier, when a pet’s microchip is scanned it conveys to the scanner a unique identification number, which is then cross-referenced to a database containing the pet owner’s personal information.<sup>96</sup> Only those authorized to access the database are able to obtain the owner’s information.<sup>97</sup> Thus, as long as limited-access chips are used, the privacy threat posed by surreptitious scanning should remain minimal.

## V. Safety Concerns

Another objection to forced microchipping concerns the supposed health risks associated with microchips. The safety of pet microchipping has been called into

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Washington Lawmaker Vows Fights Against RFID*, PERS. LIBERTY DIG. (Jan. 8, 2009), <http://www.personalliberty.com/news/washington-lawmaker-vows-fight-against-rfid-18964309>.

<sup>95</sup> Weinberg, *supra* note 82, at 255-56.

<sup>96</sup> McGrath, *supra* note 6.

<sup>97</sup> *How Microchipping Works*, *supra* note 20. In addition, passage of the RFID Right to Know Act would make improper dissemination of pet owner information illegal. Adler, *supra* note 22.

question on at least two different grounds. The first ground is the possibility that microchips cause cancer in the animals into which they are implanted.

In 2004, the FDA approved implantable RFID microchips for human use.<sup>98</sup> The agency based its approval on “‘reasonable assurance’ [that] the device was safe.”<sup>99</sup> However, soon after the FDA’s approval, a number of studies surfaced which suggested that microchips might *not* be safe.<sup>100</sup> As reported in the *Chicago Tribune*, “[a] series of veterinary and toxicology studies dating to the mid-1990s, stated that the chip implants had ‘induced’ malignant tumors in some lab mice and rats.”<sup>101</sup> In one study, more than 10% of the mice implanted with microchips developed cancer.<sup>102</sup> Furthermore, in nearly every case in which cancer developed, “the malignant tumors, typically sarcomas, arose at the site of the implants and grew to surround and fully encase the devices. In several cases the tumors also metastasized or spread to other parts of the animals.”<sup>103</sup> However, the results and implications of these studies have been called into question.<sup>104</sup>

One explanation for the occurrence of the tumors, according to Ohio State University veterinarian oncologist Dr. Cheryl London, may be that “it’s easier to cause cancer in mice.”<sup>105</sup> Dr. London further explained that “[t]ens of thousands of dogs have been chipped . . . and veterinary pathologists haven’t reported outbreaks of related sarcomas.”<sup>106</sup> Echoing London’s view, Dr. Larry McGill of the American College of

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<sup>98</sup> Todd Lewan, AP, *Chip Implants Linked to Animal Tumors*, WASH. POST, Sept. 8, 2007.

<sup>99</sup> Lewan, *supra* note 23.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> Katherine Albrecht, *Synopsis of “Microchip-Induced Tumors in Laboratory Rodents and Dogs: A Review of the Literature 1990-2006,”* ANTICHIPS.COM, <http://www.antichips.com/cancer/albrecht-microchip-cancer-synopsis.pdf> (last visited Mar. 26, 2010).

<sup>104</sup> Lewan, *supra* note 98.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

Veterinary Pathology stated, “[w]e looked at three or four thousand cats in 2003, and there wasn’t a single instance of sarcoma induced by a microchip.”<sup>107</sup> Thus as of yet, there is no final consensus as to whether implantable microchips cause cancer. As a matter of public policy, pet owners not keen on having their pets chipped might argue that more research needs to be done to determine the safety of microchips before owners are forced to have the devices implanted into their pets.

The second alleged safety problem with pet microchipping is purportedly irreconcilable frequency variation.<sup>108</sup> Currently, there is no one standard frequency at which pet microchips operate.<sup>109</sup> Some microchips work at 125 kHz, while others use 128 kHz and 134.2 kHz.<sup>110</sup> The scanners “need to be able to read the correct frequency” in order to detect the microchip and read the identification number stored thereon.<sup>111</sup> This means that if the person performing the scan does not have the right scanner, no microchip will be detected and the technology’s purpose will be defeated. In one case, this sort of technological hiccup had tragic consequences. In California, personnel at an animal shelter euthanized a dog after the shelter’s scanner, which only read 125 kHz microchip, failed to detect the dog’s 134.2 kHz microchip.<sup>112</sup> To make matters even worse, the dog’s “owner called [the] shelter literally half an hour after it had put her microchipped dog to sleep.”<sup>113</sup>

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<sup>107</sup> Steve Dale, *Microchipped Pets Likely OK*, SUN SENTINEL (Fla.), Sept. 24, 2007, at 2F.

<sup>108</sup> McGrath, *supra* note 6.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*; see also *Frequently Asked Questions About Microchipping of Animals*, AM. VETERINARY MED. ASS’N, [http://www.avma.org/issues/microchipping/microchipping\\_faq.asp](http://www.avma.org/issues/microchipping/microchipping_faq.asp) (last visited Mar. 26, 2010).

One solution to the multiple frequency problem is a type of scanner, known as a universal scanner, which can read microchips at any frequency.<sup>114</sup> However, because of encryption, “even the so-called universal scanners don’t always read every chip.”<sup>115</sup> Encryption is the “process of encoding information in such a way that only the person (or computer) with the key can decode it.”<sup>116</sup> Using this method, microchip companies encrypt their microchips, making it such that “only their scanners can read their microchips,” thus creating an effective monopoly and ensuring a hefty profit from scanner sales.<sup>117</sup>

The second Bush administration attempted to remedy this problem by way of a provision in the 2006 Agriculture Appropriations bill that commanded the Animal and Plant Health Inspection Service to “develop regulations that would require all scanners to read all chips.”<sup>118</sup> Although a good start, an inherent problem with this legislation was that the “APHIS only exercises authority over organizations that are regulated by the Animal Welfare Act (AWA), which means it does not have the power to dictate what private pet owners and retail businesses do.”<sup>119</sup> Thus, until all microchips operate at the same frequency, or shelters have unfettered access to universal scanners, the dangers associated with frequency variation will remain a legitimate safety concern.

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<sup>114</sup> McGrath, *supra* note 6.

<sup>115</sup> Hageman, *supra* note 24.

<sup>116</sup> Jeff Tyson, *How Encryption Works*, HOW STUFF WORKS, <http://computer.howstuffworks.com/encryption.htm> (last visited Feb. 1, 2011).

<sup>117</sup> McGrath, *supra* note 6.

<sup>118</sup> Maryann Mott, *Pet Microchip IDs Need Standardized Tech, U.S. Government Says*, NAT’L GEOGRAPHIC NEWS (Nov. 15, 2005), available at <http://news.nationalgeographic.com/news/pf/50361627.html>.

<sup>119</sup> McGrath, *supra* note 6.

## VI. Does Mandatory Microchipping Constitute a Taking?

The Fourteenth Amendment declares that no State may “deprive any person of life, liberty, or property, without due process of law.”<sup>120</sup> Additionally, the Fifth Amendment, incorporated to the States via the Fourteenth Amendment,<sup>121</sup> mandates that private property shall not “be taken for public use, without just compensation.”<sup>122</sup> Although mandatory microchipping arguably does not constitute a deprivation of property, it is a type of regulation that may amount to a taking, and thus require that compensation be paid to the animal’s owner.

Originally, “compensation was mandated only when the government physically took property.”<sup>123</sup> However, over time, the meaning of the Takings Clause has evolved to include not only physical appropriations of property, but also government regulation thereof.<sup>124</sup> As the Supreme Court found in *Pennsylvania Coal Co. v. Mahon*, “the general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”<sup>125</sup> The question post- *Pennsylvania Coal* remains “how far is too far?”

The Court partially answered this question in *Lucas v. South Carolina Coastal Council*, in which Justice Scalia noted:

[The Court’s] decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going ‘too far’ for purposes of the Fifth Amendment. In 70-odd years of succeeding ‘regulatory takings’ jurisprudence, we have generally eschewed any “set

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<sup>120</sup> U.S. CONST. amend. XIV, § 1.

<sup>121</sup> *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 241 (1897).

<sup>122</sup> U.S. CONST. amend. V, § 1.

<sup>123</sup> Christopher S. Kiefer, Note, *Reconciling the Internal Inconsistency and Resolving the Denominator Problem in Takings Law*, 10 B.U. PUB. INT. L.J. 171, 172 (2000).

<sup>124</sup> William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782 (1995).

<sup>125</sup> *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

formula” for determining how far is too far, preferring to ‘engage in . . . essentially ad hoc, factual inquiries.’<sup>126</sup>

Justice Scalia went on to state that the Court has:

However, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical ‘invasion’ of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation.<sup>127</sup>

To be sure, mandatory microchipping unassailably constitutes a permanent physical invasion of the pet owner’s property.<sup>128</sup> Thus, it seems fairly clear that, based upon the Court’s finding in *Lucas*, pet owners must be compensated. This, of course, is not the current state of affairs. As it stands now, it is the *owners* who must pay to have the microchips implanted.

## **VII. Do Microchipping Laws Inappropriately Disregard the Unique Property Status of Companion Animals?**

Another argument espoused by opponents of mandatory microchipping is that because companion animals are a unique type of property, “the final decision about identification – whether by collar, tattoo or microchip – should be made by the owner, not the government.”<sup>129</sup> Traditionally, the law has treated animals as chattel,

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<sup>126</sup> *Lucas*, 505 U.S. at 1015 (quoting *Pa. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124).

<sup>127</sup> *Id.*

<sup>128</sup> *How Microchipping Works*, *supra* note 20 (stating that pet microchips are “permanent ID for your pet. . . The microchip will last your pet’s lifetime”).

<sup>129</sup> American Kennel Club, *Mandatory Microchipping and Fees Proposed in Indiana*, AM. KENNEL CLUB (Feb. 1, 2007), [http://www.akc.org/news/blocks/print\\_article.cfm?article\\_id=3124](http://www.akc.org/news/blocks/print_article.cfm?article_id=3124).

indistinguishable from inanimate property “like backpacks or bicycles.”<sup>130</sup> However, a growing minority of courts have come to recognize that “a pet . . . is not just a thing but occupies a special place somewhere in between a person and a piece of personal property.”<sup>131</sup> If ever a majority of courts came to adopt the latter view, one wonders what the legal ramifications might be.

The idea of animals as property is as old as the common law. In fact, at common law “dogs were either not considered as property, or were considered as property of an inferior sort entitled to less protection than other types of personal property.”<sup>132</sup> Over time, however, all domestic animals have come to be universally regarded, via statutes and court decisions, as personal property.<sup>133</sup> And just like other types of personal property, “we can buy and sell [animals], bequeath them in our wills, give them away or choose to destroy them” (so long as the animal’s owner does not run afoul of applicable anti-cruelty statutes).<sup>134</sup> However, beginning in the 1960s, a small number of courts began acknowledging a distinction between companion animals and inanimate forms of property.<sup>135</sup>

In 1964, the Supreme Court of Florida decided *La Porte v. Associated Independents, Inc.*<sup>136</sup> In *La Porte*, the court dealt with the question of whether a jury could consider a plaintiff’s mental suffering when assessing damages arising from the wrongful destruction of a pet.<sup>137</sup> Phyllis La Porte was cooking breakfast one morning

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<sup>130</sup> MARC BEKOFF, *THE ANIMAL MANIFESTO: SIX REASONS FOR EXPANDING OUR COMPASSION FOOTPRINT* 29 (2010).

<sup>131</sup> *Corso v. Crawford Dog & Cat Hosp., Inc.*, 97 Misc. 2d 530, 530 (1979).

<sup>132</sup> HANNAH & STORM, *supra* note 75, at 138.

<sup>133</sup> *Id.*

<sup>134</sup> Hankin, *supra* note 32, at 321.

<sup>135</sup> *Id.* at 327-29, 343.

<sup>136</sup> 163 So. 2d 267 (1964).

<sup>137</sup> *Id.* at 269.



when a trash collector stopped in front of her house to pick up the garbage.<sup>138</sup> The garbage man, after emptying La Porte’s garbage bins, hurled one of the empty bins toward La Porte’s miniature dachshund, Heidi, who was “tethered” in front of the house.<sup>139</sup> The bin struck Heidi with such a force that the dog died shortly thereafter.<sup>140</sup> La Porte responded by bringing an action for damages against the garbage man’s employer, in which the jury found in La Porte’s favor awarding her both compensatory and punitive damages.<sup>141</sup> The employer appealed the judgment claiming that it was error for the judge to instruct the jury to consider mental suffering.<sup>142</sup> The Second District Court of Appeals agreed, stating that “[i]t is improper to include an allowance for sentimental value of the dog to its owner.”<sup>143</sup>

The Florida Supreme Court ultimately rebuked the finding of the district court, holding:

The restriction of the loss of a pet to its intrinsic [fair market] value in circumstances such as the ones before us is a principle we cannot accept. Without indulging in a decision of the affinity between ‘sentimental value’ and ‘mental suffering,’ we feel that the affection of a master for his dog is a very real thing and that the malicious destruction of the pet provides an element of damage for which the owner should recover.<sup>144</sup>

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<sup>138</sup> *Id.* at 267-68.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 268.

<sup>141</sup> *Id.* at 267.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 269.

<sup>144</sup> *Id.*; *see also* Knowles Animal Hosp., Inc. v. Wills, 360 So. 2d 37 (Fla. 3d DCA 1978); Johnson v. Wander, 592 So. 2d 1225 (Fla. 3d DCA 1992).

Thus, the court implicitly pronounced that there is something fundamentally distinctive about companion animals; that the wanton destruction of one's pet is somehow different than the wanton destruction of someone's living room sofa.<sup>145</sup>

Judge Seymour Friedman rendered a similar, but more expansive, holding in *Corso v. Crawford Dog & Cat Hospital, Inc.*<sup>146</sup> In *Corso*, the owner of a fifteen-year-old poodle brought the dog in to the defendant's animal hospital.<sup>147</sup> The attending veterinarian recommended euthanasia, and the dog was put down.<sup>148</sup> The malfeasance complained of by the plaintiff arose from the allegation that the hospital had wrongfully disposed of the dog, and that this disposal frustrated elaborate funeral plans which the plaintiff had made "including a headstone, an epitaph, and attendance by plaintiff's two sisters and a friend."<sup>149</sup> Instead of receiving her beloved, late poodle, plaintiff received a small casket containing a dead cat.<sup>150</sup>

After noting the significant "mental distress and anguish" suffered by the plaintiff, the court ruled that in an action for damages involving the wrongful destruction of a dog, the amount of damages receivable by the plaintiff is not limited by the fair market value of the animal.<sup>151</sup> Judge Friedman poignantly explained the basis for his ruling: "[i]n ruling that a pet such as a dog is not just a thing I believe the plaintiff is entitled to damages beyond the market value of the dog. A pet is not just an inanimate thing that

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<sup>145</sup> Hankin, *supra* note 32, at 321.

<sup>146</sup> 97 Misc. 2d 530, 530 (1979).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 531.

<sup>151</sup> *Id.*

just receives affection; it also returns it.”<sup>152</sup> The court also distinguished the anguish one might feel at the loss of a family heirloom:

An heirloom . . . is not capable of returning love and affection. It does not respond to human stimulation; it has no brain capable of displaying emotion which in turn causes a human response. . . . But a dog – that is something else. To say it is a piece of personal property and no more is a repudiation of our humaneness.<sup>153</sup>

Of course, there is no shortage of case law contravening the court’s findings in *Corso*. For instance, the Supreme Court of New Jersey held in *Harabes v. Barkery* that “[p]ublic policy considerations prevent pet owners from recovering emotional distress and loss of companionship damages in connection with the loss of a pet dog.”<sup>154</sup> This suggests that companion animals are no different than other pieces of personal property; that emotional distress damages for their destruction cannot be had.

However, piggy-backing on the ideas espoused in cases like *Corso*, that companion animals *are* a distinct and unique type of property, is the argument that pet owners, because of this special property status, should have a choice when it comes to the method they use to identify their pets (microchip, tattoo, or traditional tag and collar).<sup>155</sup> There are two theoretical bases for such an argument, one from law, the other from public policy; the legal argument being that if the law recognizes the special property status of companion animals, the government should have a correspondingly heightened burden in justifying any regulation of such property.<sup>156</sup>

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.*; see also *Morgan v. Kroupa*, 167 Vt. 99, 103 (1997) (finding that “pets generally do not fit neatly within traditional property law principles, and recognizing the “unique [property] status” of pets).

<sup>154</sup> *Harabes v. Barkery, Inc.*, 791 A.2d 1142, 1146 (N.J. Super. Ct. 2001).

<sup>155</sup> FULLY VETTED, *supra* note 13.

<sup>156</sup> Hankin, *supra* note 32, at 376-88.

While such an argument seems reasonable, the fact remains that property is property, and thus, from a substantive due-process standpoint, the government can impose whatever regulations it sees fit upon a person's property, as long as those regulations are not unreasonable.<sup>157</sup> Pursuant to its police powers, the "government may act to promote 'the public health, safety, morals, or general welfare,'" and "[s]uch actions are constitutional unless found to be 'clearly arbitrary and unreasonable, having no substantial relation' to such goals."<sup>158</sup> Flowing from these police powers is the government's "ability to regulate and restrict property use."<sup>159</sup> Because mandatory microchipping laws *are* substantially related to legitimate goals, namely the promotion of public welfare by attempting to reduce the number of dogs and cats euthanized each year, it is not likely that one could successfully convince a court that such laws are unreasonable.<sup>160</sup> That being said, "[n]o government in history ever admitted that any of its laws were unreasonable . . . ."<sup>161</sup>

However, if more courts eventually come to recognize the special property status of companion animals, a strong public policy-based argument could be made that it should be the owner's prerogative, and not that of the government, to choose the method by which his or her pet is identified. However, as with any argument based on public policy, the omnipresent, albeit usually unspoken, question exists: what exactly does public policy mean? The Supreme Court has been reluctant to state a precise

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<sup>157</sup> Kiefer, *supra* note 123, at 173.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> HANNAH & STORM, *supra* note 75, at 21.

definition.<sup>162</sup> Nevertheless, although public policy is an amorphous concept, “impossible to define with accuracy,”<sup>163</sup> arguments based on public policy generally advocate that a certain proposal is in “the best interest of the populace.”<sup>164</sup> However, whether a proposal is determined to be in the best interest of the populace is significantly affected by those lobbying for or against that proposal.<sup>165</sup> As Professor Dean G. Kilpatrick has noted, “public policy debates occur over proposed legislation” and “public policy priorities are influenced by advocacy.”<sup>166</sup> Thus, it is probably in the anti-chippers’ interest to make as much racket as possible.

### VIII. Conclusion

It does not require knowing that 27% of “pet owners buy birthday gifts for their dogs” to realize most owners genuinely care about their pets.<sup>167</sup> In many households, the resident dog or cat is as much a part of the family as any of the human members. Thus, a mandate from the government telling pet owners that they *must* have a potentially cancer-inducing microchip permanently implanted into their pet’s body is likely to be met with a fair amount of skepticism. Of the objections promulgated by opponents of mandatory microchipping, some have been shown to be rather unfounded, namely the “first pets, then people” argument. Other arguments, like the need for legislation protecting against the improper dissemination of pet owner information, the idea that mandatory chipping

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<sup>162</sup> Richard H.W. Maloy, *Public Policy-Who Should Make It in America's Oligarchy?*, 1998 DET. C.L. MICH. ST. U. L. REV. 1147, 1145.

<sup>163</sup> *Pope Mfg. Co. v. Gormully*, 144 U.S. 224, 233 (1892).

<sup>164</sup> Maloy, *supra* note 162, at 1146.

<sup>165</sup> Richard Briffault, *Lobbying and Campaign Finance: Separate and Together*, 19 STAN. L. & POL’Y REV. 105, 111 (2008) (making the point that “[l]obbying is intended to influence governmental action”).

<sup>166</sup> Dean G. Kilpatrick, *Definitions of Public Policy and the Law*, MED. UNIV. S.C., <http://www.musc.edu/vawprevention/policy/definition.shtml> (last visited Mar. 26, 2010).

<sup>167</sup> BEKOFF, *supra* note 130, at 31-32.

amounts to a compensatable taking, the notion that companion animals are a unique type of property, and concerns over the safety of implantable RFID microchips, have all been shown to present reasonably colorable claims in support of the argument that pet owners, and not the government, should have the choice over whether to chip their pets.