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# Carter's Dissent in Simpson v. City of Los Angeles: A Precursor to the Animal Rights Movement

Janice E. Kosel

*Golden Gate University School of Law*, [jkosel@ggu.edu](mailto:jkosel@ggu.edu)

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# THE GREAT DISSENTS OF THE “LONE DISSENTER”

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*Justice Jesse W. Carter’s Twenty Tumultuous  
Years on the California Supreme Court*

*Edited by*

David B. Oppenheimer

Allan Brotsky

*Contributions by*

Jessica L. Beeler • Michele Benedetto Neitz  
Justice William J. Brennan, Jr. • Justice Jesse W. Carter  
Helen Y. Chang • Markita D. Cooper • Janet Fischer  
Judge William A. Fletcher • Marc H. Greenberg  
Justice Joseph R. Grodin • J. Edward Johnson • Janice Kosel  
Cliff Rechtschaffen • Susan Rutberg • Marci Seville  
Marc Stickgold • Rachel A. Van Cleave • Frederic White  
Michael A. Zamperini • David Zizmor

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# CARTER'S DISSSENT IN *SIMPSON* V. *CITY OF LOS ANGELES*: A PRECURSOR TO THE ANIMAL RIGHTS MOVEMENT

By Janice Kosel\*

In *Simpson v. City of Los Angeles*, resident taxpayers who owned licensed dogs who had recently gone astray sought to restrain the enforcement of a city ordinance.<sup>1</sup> Los Angeles Municipal Code section 53.11 (h) allowed the city to surrender for medical research dogs that had been impounded for a period of at least five days.<sup>2</sup> Subsection (h) of the ordinance did not contain any provision for notice to the owner of the impounded dog.<sup>3</sup> As a result, plaintiffs contended that the ordinance was invalid because it constituted an unlawful taking of private property.

In a six-to-one decision, the majority of the California Supreme Court disagreed. Subsection (b) of the ordinance required that before the animal could be sold, notice had to be given to the owner, if known, of every impounded dog within one day after the dog was impounded.<sup>4</sup> “The courts, whenever possible adopt that interpretation of a statute which will render it constitutional, and, therefore, the subsections should be read together for the purpose of avoiding any question of invalidity arising from the lack of a specific notice requirement in subsection (h). When considered together the subsections re-

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\* Professor of Law, Golden Gate University School of Law. This comment is written in loving appreciation of the companionship of Chuckles, Dottie, Houdini, Howard, Lucifer, Nelson, Purrl, Puz, Ratsy, Samantha, Spotty, Sydney, Tessa, Topper and Winston.

1. *Simpson v. L.A.*, 40 Cal. 2d 271 (1953).

2. L.A., Cal., L.A. Municipal Code §53.11.

3. *Id.*

4. *Id.*

quire that the city must act to give notice to the owner, if known, within one day after a dog is impounded and that the owner must have at least five days after receipt of such notice in which to reclaim the animal.”<sup>5</sup>

If a dog were not wearing a license tag when impounded, the majority held that no notice to the owner was required. “By prescribing a system of licenses and requiring dogs to wear a numbered tag at all times when at large on the streets, the city has done all it can to make sure that it will know the owner’s identity.... If a dog is not wearing a license tag when impounded, its owner will not have any ground to complain of a failure to receive notice, because the ordinance places upon him the duty to make sure that the dog wears its license tag at all times except when it is indoors or in an enclosed yard or pen.”<sup>6</sup>

## DISSENT

CARTER, J. I dissent.

I cannot agree with the construction placed by the majority on the sections of the ordinance in question or that the notice provisions contained in those sections are sufficient to afford due process of law. Subsection (b) of section 53.11 provides that an owner must be notified within one day after a dog is impounded and that the animal may be *sold* thereafter if notice of sale is posted for two days; under subsection (h) it is provided that no dog may be *surrendered to a certified institution for experimental purposes* unless it has been impounded for at least five days. The majority of this court indulges in some legerdemain in the field of judicial legislation and comes up with the startling result that these two sections must be read together: that the one day notice provision in subsection (b) applies to subsection (h). By reading them together, the majority rewrites the ordinance so that it provides that an owner has five days after *receipt of actual notice* in which to reclaim his dog before it is surrendered for experimental purposes. This is done, we are informed, “for the purpose of avoiding any question of invalidity *arising from the lack of a specific notice requirement in subsection (h)*.” Using reasoning such as this, *any* statute could be “interpreted” in such a way as to render it constitutional.

The *only* notice provision applies to dogs about to be *sold*. There is no notice provision in the subsection providing for surrender of such dogs for experimental purposes. The sale of a dog and its surrender for experimental purposes are two entirely different things and there is no basis in logic for the

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5. See *Simpson*, 40 Cal. 2d at 280.

6. *Id.* at 281.

statement of the majority that these two subsections must be read together and that the notice provision of the sale subsection applies to the surrender subsection. Subsection (b) deals specifically and exclusively with the sale of impounded dogs; subsection (h) deals only with the surrender of unclaimed, impounded animals for experimental purposes. ...

... I cannot understand how the one day provision in subsection (b) can possibly be construed to mean that the owner of the dog must be given actual notice which must be received, and that he thereafter (subsection (h)) has five days within which to reclaim his dog. However, by such reasoning, a majority of this court has now placed the constitutional stamp of approval upon the ordinance. In my opinion the notice provisions are insufficient to afford due process of law.

In judging what is due process of law, the sufficiency of the notice must be determined in each case from the particular circumstances of the case in hand, respect being had to the cause and object of the taking (*Wulzen v. Board of Supervisors*, 101 Cal. 15; *Imperial Water Co. v. Board of Supervisors*, 162 Cal. 14). While it is impossible to define with precision "due process of law," it means, broadly speaking, that before a man's property may be taken by the state, he must be given notice of the proceedings which may terminate in the taking, and be given an opportunity to be heard. It means further that the notice shall be a real and reasonable one. ... "[U]pon the question of the length of such notice there is a singular dearth of judicial decision. It is manifest that the requirement of notice would be of no value whatever, unless such notice were reasonable and adequate for the purpose." [*Roller v. Holly*, 176 U.S. 398, 404 (1900) (citing *Davidson v. New Orleans*, 96 U.S. 97; *Hagar v. Reclamation District*, 111 U.S. 701–12)]. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is *notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections*, *Milliken v. Meyer*, 311 U.S. 457; *Grannis v. Ordean*, 234 U.S. 385; *Priest v. Las Vegas*, 232 U.S. 604; *Roller v. Holly*, 176 U.S. 398. The notice must be of such nature as reasonably to convey the required information, *Grannis v. Ordean*, *supra*, and it must afford a reasonable time for those interested to make their appearance.... But when notice is a person's due, process which is a mere gesture is not due process." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S.306, 314. ...

If the dog is not wearing a license tag, the majority says that "its owner will not have any ground to complain of a failure to receive notice, because the ordinance places upon him the duty to make sure that the dog wears its license tag at all times except when it is indoors or in an enclosed yard or pen." Ap-

parently we now forget about the one-day notice, actual and received, and the dog is held for the prescribed period of five days before being surrendered to a hospital or institution for experimental purposes. Under reasoning of the type indulged in by the majority, we can read the ordinance as circumstances warrant. So now, no notice being practicable, we just look to the five-day provision. This period of time is unreasonable. It does not take into consideration the fact that duly licensed dogs may lose their tags after straying; that they may, and do, break their collars thereby losing their tags; that strangers may remove either collar or tag; that dogs may escape from enclosed pens, or get out of the houses of their owners (where they are not required to wear tags) and wander far afield. It does not take into consideration the not-unusual cases of theft of valuable, registered dogs. It does not take into consideration the size of the city of Los Angeles with its five pounds, and four private shelters, and 19 pounds and animal shelters in Los Angeles County, or the fact that the owner of the dog might be out of the city when his dog escapes from his home and the person caring for it, or from a kennel where he has left it to be cared for.

The majority, in placing its approval upon this five-day period, has failed to consider that when a dog is missing, the owner assumes, often correctly, that the dog will come home the next day and therefore does nothing for a one-day period; that the dog may be a "wanderer" who has always returned from his prior wanderings; and that dogs do not seek the nearest pound or shelter upon running away. No consideration is given to the obvious fact that the owner of the dog may advertise for his lost pet, that he may for the first few days of the dog's absence call at the pounds and shelters with no success, only to have the dog picked up later when he has started to advertise for its return. In my opinion, due process of law requires that the ordinance provide for some type of notice in cases where the dog is not wearing a license tag. That notice could be by newspaper advertisement giving the description of the dogs impounded, or by radio announcement, or by posting descriptions in various places throughout the city.

The ordinance here involved is, in my opinion, unconstitutional in that it constitutes a taking of property without due process of law as the courts have defined that guarantee in both the Constitution of the United States and of California.

I would therefore reverse the judgment.

## Comment

The central premise of both the majority and dissenting opinions is the idea that a pet dog is property. Hence, the owner is entitled to due process protec-

tions under the fourteenth amendment of the Federal Constitution prior to being deprived of that property. A key element of due process is, of course, notice. Justice Carter relied on a case familiar to all first year law students—*Mullane v. Central Hanover Bank & Trust Co.*<sup>7</sup>—as the foundation of his argument that the ordinance’s notice provisions were unconstitutional. Other jurisdictions at about the same time were unwilling to accept the fundamental premise that the owner of a stray dog was entitled to due process. For example, in *Massachusetts Society for the Prevention of Cruelty to Animals v. Commissioner of Public Health*, the court emphasized that the rights of animals are not protected by the Constitution as are the rights of people.<sup>8</sup> In upholding the constitutionality of a statute authorizing the surrender of lost and stray animals for research after ten days of impoundment without notice to the owner, the court reasoned that the lost cats and dogs were abandoned property. The former owner had no remaining property interest for the Constitution to protect.<sup>9</sup>

Perhaps in keeping with the notion that a lost pet is abandoned property, Congress, in 1967, enacted a statute requiring a pound or animal shelter to hold a dog or cat for a period of not less than five days to enable it to be recovered by its original owner.<sup>10</sup> No notice is required by federal statute. However, notice is typically required by state statute or local ordinance. Today, California state law provides that no impounded dog shall be killed or otherwise disposed of without notice to the owner, if known.<sup>11</sup> Generally, the required holding period for a stray dog is three business days before adoption, and six business days before euthanasia.<sup>12</sup>

As a charter city, Los Angeles is not bound by that statute.<sup>13</sup> Los Angeles Municipal Code section 53.11 (b) currently provides that stray dogs must be held for one day during which time the owner shall be notified.<sup>14</sup> After one day, the animal may be sold after notice is posted for two days on the bulletin

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7. See *Mullane v. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

8. *Mass. Society for the Prevention of Cruelty for Animals v. Comm’r of Public Health*, 158 N.E. 2d 487, 495 (Mass. 1959).

9. *Id.* at 493.

10. 7 U.S.C. §2158 (1967).

11. CAL. FOOD & AGRIC. CODE §31,107 (West 2009).

12. CAL. FOOD & AGRIC. CODE § 31,108 (West 2009). Under the Supremacy Clause of the Federal Constitution, state and local governments are required to follow the federal standard of holding a dog a minimum of five days.

13. CAL. CONST. art. XI, §5.

14. L.A., Cal., L.A. Municipal Code §53.11, *supra* note 3.

boards at the pound, city hall and the central police station.<sup>15</sup> Actual practice is to hold a stray animal for four days.<sup>16</sup> An animal with an identification tag or license is held for ten days.<sup>17</sup> The owner is notified by phone or mail.<sup>18</sup> Photos and descriptions of lost and found animals are posted on the website of the Los Angeles Department of Animal Services.

The basic distinction between the majority and dissenting opinions in *Simpson* is phrased as a disagreement over what due process means for the owner of an impounded dog—what notice is due. At bottom, though, the controversy is more profound. It is rooted in Justice Carter's keen understanding of human nature and animal behavior, and his appreciation of the relationship between a person and her pet.<sup>19</sup> His analysis was confined by the traditional notion that animals are property—even the most activist judge is limited by the tools at hand. That was the only theory by which he could offer protection to an impounded pet and her owner. But surely Justice Carter's opinion evinces the conviction that animals are something more than property. In a very real sense, Justice Carter's impassioned dissent augured the birth of the animal rights movement. Today, animal law courses are offered at more than thirty law schools including Boalt, Duke, Harvard, Yale, and Golden Gate University.<sup>20</sup>

The idea that animals are merely the property of their owners is reflected in the traditional measurement of damages for the wrongful death or injury of a pet—the market value of a deceased animal or diminution in market value of an injured animal.<sup>21</sup> Modernly, however, a number of courts are willing to value the emotional relationship between a person and a pet in the calculation of damages.<sup>22</sup> Thus, in *Brooks v. U.S.*,<sup>23</sup> a ranger continued to point a gun at the family dog after he had shot and wounded it. Despite the fact that the ranger's conduct was distressing to nearby family members, the court found that the ranger's conduct was reasonable until he could assure himself the dog

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15. Cal. Const. art. XI, §5.

16. See [www.laanimalservices.com](http://www.laanimalservices.com).

17. *Id.*

18. *Id.*

19. His grandson Scott Carter reports that, over his lifetime, Justice Carter owned a succession of pet dogs who often ran free with the horses.

20. Graduate Althea Kippes initiated the course at Golden Gate in 2001. It was the first animal law course in the Bay Area.

21. 4 AM. JUR.2d Animals § 162.

22. See Jay M. Zitter, *Recovery of Damages for Emotional Distress Due to Treatment of Pets and Animals*, 91 A.L.R.5th 545 (2001).

23. *Brooks v. U.S.*, 29 F. Supp. 2d 613 (N.D. Cal. 1998).

did not pose a threat to himself or others. Implicit in the court's decision is the idea that, had the ranger's conduct been unreasonable, he might be liable for the infliction of emotional distress on the pet's family.

The California Food and Agricultural Code section 31,103 authorizes a landowner to kill a dog entering property upon which livestock are confined; the statute specifies that no civil action shall be maintained against the landowner or employee for the killing of such dog. In *Katsaris v. Cook*,<sup>24</sup> an employee of a livestock owner shot several dogs that had gotten loose. The court held that the statute did not protect the livestock owner who made false assertions after the shooting that she knew nothing about the dogs or their whereabouts. The court remanded the case to the trial court for a determination of damages for the emotional distress suffered by the dogs' owner.

In the intervening fifty years since Justice Carter's dissent, significant legislation has been enacted in recognition of the evolving status of animals in law and society. State criminal statutes prohibiting cruelty to animals were first enacted in the nineteenth century.<sup>25</sup> In 1967, nearly one hundred years later, Congress adopted and then in 1985 expanded the Animal Welfare Act to ensure that animals used in research facilities or exhibited in circuses and zoos are provided humane care and treatment.<sup>26</sup> In particular, the Secretary of Agriculture is directed to promulgate regulations to minimize the pain and distress of animals in research facilities.<sup>27</sup> If those standards are violated, a penalty in the amount of \$2,500 per day may be imposed and the license of the facility may be revoked.<sup>28</sup> Protected animals include only dogs, cats, monkeys, guinea pigs, hamsters, and rabbits; birds, rats, mice, horses, and farm animals are specifically excluded.<sup>29</sup>

As part of the emerging environmental movement, in 1973, Congress enacted the Endangered Species Act which recognized that human activities were placing living things at risk of extinction. The legislation seeks to conserve endangered and threatened fish and wildlife.<sup>30</sup> In particular, it is illegal to import, sell, or possess endangered or threatened species.<sup>31</sup>

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24. *Katsaris v. Cook*, 180 Cal. App. 3d 256 (1986).

25. See CAL. PENAL CODE §597 (West 2009).

26. 7 U.S.C. §2131 (1985).

27. *Id.* §2143.

28. *Id.* §2149.

29. *Id.* §2132(g).

30. 16 U.S.C. §1531 (1973).

31. *Id.* §1538.

In 2000, Congress enacted the Chimpanzee Protection Act to provide retirement sanctuaries for animals no longer needed for federal research, a costly but moral alternative to euthanasia.<sup>32</sup>

The Uniform Trust Code of 2002 specifically authorizes the creation of a trust for the care of an animal.<sup>33</sup>

In 2005, the cities of Los Angeles and San Francisco enacted ordinances establishing specific standards for guardians in the proper care, maintenance, and tethering of dogs, including requirements for shelter, water and caging.<sup>34</sup>

Much has been accomplished. But, animal rights advocates believe much work remains to be done. We may have taken giant strides to protect vanishing species, our pets and primates who are so closely akin to humans. But what of other lab animals?

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32. 42 U.S.C. §§287a–3a.

33. UNIF. TRUST CODE §408 (2000).

34. L.A., Cal., L.A. Municipal Code §53.70; San Francisco Health Code §41.12.