

NOT YOUR COFFEE TABLE: AN EVALUATION OF COMPANION ANIMALS AS PERSONAL PROPERTY

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I. INTRODUCTION

Often when a chair or coffee table gets too old or out of style, we toss it to the curb or give it away, glad that we had made good use of it. We then run down to our local Pottery Barn and get a new one, with that old table long forgotten. It is only property after all. Why is it then, when our pets get too old we do not toss them to the curb and replace them without second thought? As many state laws and many courts have stated, animals are merely personal property, and thus, should be treated no differently than a coffee table.¹ Yet to most people, their pets *are* much more than personal property.² People have willed their estates to their pets upon

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* I chose to write this comment based on a personal experience involving a defective product that injured my animal. Luckily, my animal was fine, but after further research I discovered that many animals have died or been seriously injured due to this product, and yet it is still on the shelves. Because there are virtually no damages available to animal owners whose pets are injured or killed by third parties, culpable offenders often go unpunished and animal owners uncompensated. Although a defective product prompted me to write on this topic, the article itself is more general and broader in scope. I hope to reflect my sincere belief that animals occupy a special place somewhere between humans and personal property, and that societal values support an expansion of rights for animal owners.

¹ See, e.g., CAL. PENAL CODE § 491 (West 1997); MD. ANN. CODE art. 24, § 11-506 (2005); OHIO REV. CODE ANN. § 955.03 (West 1994); W. VA. CODE ANN. § 19-20-11 (LexisNexis 2007); *Gluckman v. Am. Airlines, Inc.*, 844 F. Supp. 151, 158 (S.D.N.Y. 1994) (holding there is no independent cause of action for loss of the companionship of a pet, which is personal property); *Mitchell v. Heinrichs*, 27 P.3d 309, 313–14 (Alaska 2001) (holding dogs have the legal status of personal property and recovery for the wrongful death of a dog is limited to its market value); *Pantelopoulos v. Pantelopoulos*, 869 A.2d 280, 284 (Conn. Super. Ct. 2005) (holding the owner of an intentionally killed animal could not recover for emotional distress); *Lockett v. Hill*, 51 P.3d 5, 7–8 (Or. Ct. App. 2002) (holding the owner of a negligently killed animal could not recover for emotional distress); *Carbasha v. Musulin*, 618 S.E.2d 368, 371 (W. Va. 2005) (holding sentimental value and emotional distress are not recoverable when a pet is killed because pets are personally property).

² See, e.g., *Carbasha*, 618 S.E.2d at 371 (recognizing the emotional attachment people have to their pets).

death,³ engaged in custody battles over pets when a marriage ends,⁴ and even fought sharks and alligators to save their pets.⁵

However, when a third party's conduct injures an animal, many states do not allow for recovery beyond the market value of the animal.⁶ This means that an animal owner can recover only what a person would pay for an animal of similar breed, age, and health in the marketplace.⁷ For most owners of mutts, strays, or rescue animals, this means little, if any, recovery. Initially, this does not seem completely outrageous, but upon greater examination of the issue, it is. For example, under the law of many states, an angry neighbor can walk into your yard, shoot your dog before your eyes, and you can recover only the fair market value of your dog Fido (depreciated of course). Only after some states' legislatures began to realize the unfairness of this situation did these states begin to put statutes on the books, allowing and expanding both damages and causes of action available to animal owners.⁸

It is well established in many states that damages for sentimental value, mental suffering, and emotional distress are not recoverable for the loss of a pet dog or cat.⁹ Although this is a rule in the majority of jurisdictions, there are many adamant, well-reasoned, and passionate decisions that more appropriately reflect the value society has placed on

³ E.g., Alan Feuer, *Helmsley, Through Will, Still Calling the Shots*, N.Y. TIMES, Aug. 30, 2007, at B2 (bequeathing twelve million dollars to a dog).

⁴ E.g., Hannah Seligson, *Couple Splits Up—Pet Custody Battle Begins*, CNN.com, Oct. 2, 2008, <http://www.cnn.com/2008/LIVING/wayoflife/10/02/lw.pet.custody/index.html>.

⁵ E.g., *Florida Man Punches Shark to Save His Dog*, CBSNews.com, Sept. 30, 2008, <http://www.cbsnews.com/stories/2008/09/30/national/main4490283.shtml>; *Man Sacrifices Finger to Save Dog from Alligator*, WPBF.com, July 21, 2009, <http://www.wpbf.com/news/20136681/details.html>.

⁶ See sources cited *supra* note 1.

⁷ See, e.g., *Mitchell v Heinrichs*, 27 P.3d 309, 313–14 (Alaska 2001).

⁸ See, e.g., CAL. CIV. CODE § 3340 (West 1997); CONN. GEN. STAT. ANN. §§ 22-351 to 22-351a (West Supp. 2009); MD. CODE ANN., CTS. & JUD. PROC. § 11-110 (LexisNexis 2006); TENN. CODE ANN. § 44-17-403 (2007).

⁹ E.g., *Mitchell*, 27 P.3d at 313–14 (holding dogs have the legal status of personal property and recovery for the wrongful death of a dog is limited to its market value); *Pantelopoulos v. Pantelopoulos*, 869 A.2d 280, 284 (Conn. Super. Ct. 2005) (holding the owner of an intentionally killed animal could not recover for emotional distress); *Lockett v. Hill*, 51 P.3d 5, 7–8 (Or. Ct. App. 2002) (holding the owner of a negligently killed animal could not recover for emotional distress); *Carbasha v. Musulin*, 618 S.E.2d 368, 371 (W.Va. 2005) (holding neither sentimental value nor emotional distress are recoverable when a pet is killed because pets are personally property).

animals.¹⁰ One example is Justice Starcher's dissenting opinion in *Carbasha v. Musulin*.¹¹ Her dissenting opinion outlined the points that I will explore in this article, including why the status quo is inappropriate and why we, as part of a more compassionate civilization, need new judicial and statutory standards that abandon the concept of animals as mere personal property. Justice Starcher took issue with the court's decision stating:

This opinion is simply medieval. The majority blithely says that "our case law categorizes dogs as personal property"—that "damages for sentimental value, mental suffering and emotional distress are not recoverable" In coming to this conclusion, the majority overlooks the fact that the "law" in question is the common law which is controlled by this Court When the common law of the past is no longer in harmony with the institutions or societal conditions of the present, this Court is constitutionally empowered to adjust the common law to current needs.¹²

The above quote illustrates the value society places on animals, and it is this societal value which necessitates a change in the general rule. Courts and legislatures need a clear set of guidelines that give animal owners a cause of action to bring against offenders and allow for damages for their genuine and socially understood mental anguish. Although many authors have examined the treatment of companion animals in the law,¹³ this article

¹⁰ See, e.g., *Corso v. Crawford Dog & Cat Hosp., Inc.*, 415 N.Y.S.2d 182, 183 (N.Y. Civ. Ct. 1979) ("[A] pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property."); *Bueckner v. Hamel*, 886 S.W.2d 368, 374 (Tex. App. 1994) (Andell, J., concurring) ("People who love and care for animals should not be forced to accept as compensation for their loss the amount that the animal would bring in the market."); *Carbasha*, 618 S.E.2d at 372 (Starcher, J., dissenting) (arguing that the continued refusal of recovery for sentimental value and emotional distress resulting from the loss of a pet maintains "primitive limits of the common law" and fails "to adjust to the realities of the modern world").

¹¹ 618 S.E.2d 368.

¹² *Carbasha*, 618 S.E.2d at 372 (Starcher, J., dissenting).

¹³ See, e.g., Mary Margaret McEachern Nunalee & G. Robert Weedon, *Modern Trends in Veterinary Malpractice: How Our Evolving Attitudes Toward Non-Human Animals Will Change Veterinary Medicine*, 10 ANIMAL L. 125, 127 (2004); Amie J. Dryden, Comment, *Overcoming the Inadequacies of Animal Cruelty Statutes and the Property-Based View of* (continued)

goes a step further. It outlines the problems and inconsistencies of the current law, proposes a model statute, which provides a cause of action and adequate damages for animal owners, and urges states to adopt the statute. Additionally, the article suggests a guideline for courts to use when assessing damages of the victim-owner.

II. BACKGROUND INFORMATION

A. *The Need for a Clear Standard and Uniformity: The Effects of Split Courts*

In the past decade and even in the past several years, some state courts and legislatures have begun to realize that animals should be valued differently than other kinds of personal property.¹⁴ Although this belief has manifested itself into stricter animal cruelty laws,¹⁵ scholars agree that the harshness of the laws and their selective enforcement is not enough to deter animal cruelty.¹⁶ Some states have begun extending the measure of damages beyond the market value of the animal and allowing damages for loss of companionship and emotional distress.¹⁷ Some have even created

Animals, 38 IDAHO L. REV. 177, 180 (2001); Mark J. Parmenter, Note, *Does Iowa's Anti-Cruelty to Animals Statute Have Enough Bite?*, 51 DRAKE L. REV. 817, 818 (2002).

¹⁴ *E.g.*, *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1067, 1071 (Haw. 1981) (allowing mental distress damages for a dog left in hot van by groomer); *Corso*, 415 N.Y.S.2d at 183 (holding that animals are more than just mere personal property); *Bueckner*, 886 S.W.2d at 374, 377 (Andell, J., concurring) (holding that animals “belong to a unique category of ‘property’ that neither statutory law nor caselaw has yet recognized” and market value could not compensate an animal owner “for a highly valued companion whose would be deeply felt”); *Roemer*, No. 45-09514, slip op. at 3 (awarding thirty thousand dollars for special value of a cat killed by defendant’s dog).

¹⁵ See Charlotte A. Lacroix, *Another Weapon for Combating Family Violence: Prevention of Animal Abuse*, 4 ANIMAL L. 1, 18 (1998).

¹⁶ *Id.* at 15.

¹⁷ See, *e.g.*, CAL. CIV. CODE § 3340 (West 1997) (allowing exemplary damages for injuries to animals “committed willfully or by gross negligence”); CONN. GEN. STAT. ANN. §§ 22-351 to 22-351a (West Supp. 2009) (providing for a civil action and allowing punitive damages where companion animals are intentionally killed or stolen); MD. CODE ANN., CTS. & JUD. PROC. § 11-110 (LexisNexis 2006) (allowing for recovery of reasonable and necessary costs of veterinary care for tortiously injured pets); TENN. CODE ANN. § 44-17-403 (2007) (allowing noneconomic damages for loss of society, companionship, love, and affection of pets).

new causes of action for animal owners whose pets are maliciously injured by a third party.¹⁸

Some may wonder, why not let each state create its own guidelines for the treatment of companion animals? Although any guidelines would be an improvement, states should attempt to do so in a uniform manner. To show why courts need a uniform guideline and why state legislatures need assistance on formulating a guideline, this article highlights actual stories of recovery for companion animal owners.

The first situation involves Yofi. Yofi's owner, Ms. Roemer, adopted her as a kitten when Yofi was near death on a street in Israel.¹⁹ Ms. Roemer nursed Yofi back to health, and after much paperwork, brought her to the United States.²⁰ Yofi was in her backyard when a dog known for attacking neighborhood cats ran into the yard and attacked Ms. Roemer's cats.²¹ Despite Ms. Roemer's attempts to rescue Yofi, the dog grabbed the then twelve year-old Yofi and ran away with her.²² Ms. Roemer found Yofi's body in a neighbor's yard the next day.²³ Ms. Roemer lived in Washington and was awarded more than forty-five thousand dollars in damages when she sued the unapologetic dog owner.²⁴ She was awarded thirty thousand dollars for "intrinsic value" and fifteen thousand dollars for emotional distress.²⁵

Compare Yofi's ordeal to that of another domestic cat. In *Lockett v. Hill*,²⁶ a neighbor's two pit bulls entered the plaintiffs' yard and killed their cat.²⁷ The plaintiffs saw the dogs chasing their cat and, attempting to stop the attack of the two pit bulls, chased and fought the dogs.²⁸ After scaring

¹⁸ E.g., *La Porte v. Associated Indeps., Inc.*, 163 So. 2d 267, 269 (Fla. 1964); *Womack v. Von Rardon*, 135 P.3d 542, 546 (Wash. Ct. App. 2006) ("For the first time in Washington . . . malicious injury to a pet can support a claim for, and be considered a factor in, measuring a person's emotional distress damages.").

¹⁹ Warren Cornwall & Craig Welch, *\$45,480 Ruling in Cat's Death*, SEATTLE TIMES, May 9, 2005, at A1.

²⁰ *Id.* at A9.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at A1.

²⁵ *Roemer v. Gray*, No. 45-09514, slip op. at 3 (Wash. King County Dist. Ct. May 2, 2005).

²⁶ 51 P.3d 5 (Or. Ct. App. 2002).

²⁷ *Id.* at 6.

²⁸ *Id.*

the dogs away, they attempted to drive their ailing cat to the vet, but she died en route in her owner's arms.²⁹ The plaintiffs did not recover any money for special value or for emotional distress even though they could prove that they suffered emotional distress.³⁰ The court ruled this way because the plaintiffs lived in Oregon, a state that allows little recovery for animal owners.³¹

Perhaps the most obvious example of why there needs to be a clear and adequate standard of damages, and a cause of action is the case of *Pantelopoulos v. Pantelopoulos*.³² In this case, Mr. and Mrs. Pantelopoulos were getting divorced when Mrs. Pantelopoulos moved out and left the family's ten-year-old dog in the garage to die slowly of dehydration and starvation.³³ She knew that Mr. Pantelopoulos could not remove the dog from the house because of a routine restraining order, which prohibited him from entering the house during the course of the divorce.³⁴ Mrs. Pantelopoulos did not deny that she purposely left the dog to starve to death, nor did she deny that her intention was to inflict emotional distress on her soon to be ex-husband.³⁵ Mr. Pantelopoulos filed a suit against Mrs. Pantelopoulos containing an intentional infliction of emotional distress claim, and the court stated, "The named defendant's actions evidenced intent to inflict and, in fact, caused extreme emotional distress upon the plaintiff. The dog died of starvation and dehydration, which was caused by the intentional, willful, malicious and reckless conduct of the named defendant."³⁶ However, because Connecticut did not recognize a cause of action for intentional infliction of emotional distress for animal owners, he was unable to recover, and thus, Mrs. Pantelopoulos' actions went unpunished.³⁷

If either of these last two scenarios had occurred in a state that recognized a cause of action, like Washington, not only would recovery have been allowed, but also the plaintiff's recovery could have included

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² 869 A.2d 280.

³³ *Id.* at 281.

³⁴ *Id.*

³⁵ *Id.* at 281–82.

³⁶ *Id.* at 281.

³⁷ *Id.* at 284.

punitive and compensatory damages.³⁸ However, often times, courts are either unwilling to deviate from the common law, or are unable to expand rights because the lack of a statutory cause of action or lack of damages available if a cause of action does exist.³⁹ Given the wide discrepancies, it is clear that courts and state legislatures need some guidance in adopting a standard that allows recovery for animal owners while not promoting litigiousness or overburdening courts' dockets.

B. The Historical Treatment of Cases Involving Injured Animals: Fair Market Value

In the majority of jurisdictions, when an animal owner's companion animal is injured due to the actions of a third party, the recovery available is the fair market value of the animal at the time of loss, or the difference in market value before and after the injury.⁴⁰ Some factors that are taken into consideration include the use of the animal for breeding, or any special purpose, such as if the animal were a show dog.⁴¹ For a substantial number of pet owners though, their animals are strays or rescues, or acquired from their family or friends at little to no cost,⁴² which means their fair market value, and thus the recovery available, would be near zero dollars.⁴³ In fact, not only have owners of adopted strays or rescues been denied recovery (or given very little recovery) for their injured animals, but also some courts have been unwilling to award the cost of veterinary bills when

³⁸ Compare *Roemer v. Gray*, No. 45-09514, slip op. at 3 (Wash. King County Dist. Ct. May 2, 2005) (awarding more than forty-five thousand dollars for emotional distress and lost intrinsic value to the owner of a pet cat, Yofi, after the neighbor's dog killed the cat), with *Pantelopoulos*, 869 A.2d at 284 (refusing to recognize plaintiff's cause of action for emotional distress after his ex-wife intentionally killed his beloved dog).

³⁹ See sources cited *supra* note 1; see also *Sherman v. Kissinger*, 195 P.3d 539, 542 n.1 (Wash. Ct. App. 2008) (holding there is no cause of action for the wrongful death of a dog).

⁴⁰ E.g., *Richardson v. Fairbanks N. Star Borough*, 705 P.2d 454, 456 (Alaska 1985); *Miller v. Econ. Hog & Cattle Powder Co.*, 293 N.W. 4, 10-11 (Iowa 1940); *McPherson v. Schlemmer*, 749 P.2d 51, 53 (Mont. 1988) ("Where the animal has a market value, the market value at the time of the loss, or the difference in market value before and after injury will generally be the measure applied. Any special value, particular qualities, or capabilities are generally considered as factors making up market value.").

⁴¹ See *McPherson*, 749 P.2d at 53 (citing *Snyder v. Bio-lab, Inc.*, 405 N.Y.S.2d 596, 597-98 (N.Y. Sup. Ct. 1978)).

⁴² See ASPCA, *Pet Statistics*, <http://www.aspc.org/about-us/faq/pet-statistics.html> (last visited Oct. 20, 2009).

⁴³ See *Morgan v. Kroupa*, 702 A.2d 630, 633 (Vt. 1997).

dealing with pets that have a low fair market value.⁴⁴ The bills are disallowed as unreasonable to the extent that they would exceed the fair market value of the pet.⁴⁵ However, most jurisdictions now allow recovery for veterinary bills under the theory that they are consequential damages.⁴⁶

In line with allowing consequential damages, courts traditionally have been more willing to recognize damages that reflect the value to the owner.⁴⁷ This includes damages like the loss of protective value that a dog provides to a single elderly woman.⁴⁸ At least one court has also recognized the availability of damages to include not only the fair market value of the pet, but also reasonable replacement costs such as buying a puppy of the same breed, providing the pet's basic immunizations, spaying or neutering, and training the pet.⁴⁹

Some courts have even gone further and taken a more liberal "value to the owner" approach, allowing damages for sentimental or subjective value of a pet.⁵⁰ Here, the owner's testimony about the sentimental value attached to the animal has controlled the amount of the award.⁵¹ This presents numerous objections from courts, some of which include that the subjective "value to the owner" approach could yield outrageous requests

⁴⁴ See, e.g., *Naples v. Miller*, No. 08C-01-093, 2009 WL 1163504, at *2 (Del. Super. Ct. Apr. 30, 2009); *Nichols v. Sukaro Kennels*, 555 N.W.2d 689, 692 (Iowa 1996); *Stettner v. Graubard*, 368 N.Y.S.2d 683, 683 (N.Y. Town Ct. 1975).

⁴⁵ E.g., *Naples*, 2009 WL 1163504, at *2; *Nichols*, 555 N.W.2d at 692 ("There may be other elements of damage such as expense of treatment But whether the animal is injured or destroyed the total damages ordinarily recoverable may not exceed its value prior thereto."); *Stettner*, 368 N.Y.S.2d at 683.

⁴⁶ E.g., *Kaiser v. United States*, 761 F. Supp. 150, 156 (D.D.C. 1991); *Leith v. Frost*, 899 N.E.2d 635, 641 (Ill. App. Ct. 2008); *Burgess v. Shampooch Pet Indus., Inc.*, 131 P.3d 1248, 1252 (Kan. Ct. App. 2006).

⁴⁷ E.g., *Leith*, 899 N.E.2d at 641; *Blauvelt v. Cleveland*, 190 N.Y.S. 881, 883 (N.Y. App. Div. 1921).

⁴⁸ *Brousseau v. Rosenthal*, 443 N.Y.S.2d 285, 286 (N.Y. Civ. Ct. 1980).

⁴⁹ *Mitchell v. Heinrichs*, 27 P.3d 309, 313–14 (Alaska 2001). Although the court considered such quantifiable and tangible costs incurred as a result of the loss of the family's dog, it was unwilling to allow recovery for the dog's sentimental value. *Id.* at 314.

⁵⁰ E.g., *Mieske v. Bartell Drug Co.*, 593 P.2d 1308, 1311 (Wash. 1979) (holding that the concept of actual value to the owner obviously includes some element of sentiment).

⁵¹ *Seidner v. Dill*, 206 N.E.2d 636, 640, 643 (Ind. Ct. App. 1965) (affirming the verdict of six hundred dollars when the plaintiff stated before trial that he would have given five hundred dollars had the dog not been shot), *overruled on other grounds by Puckett v. Miller*, 381 N.E.2d 1087, 1090–91 (Ind. Ct. App. 1978).

and outrageous rewards.⁵² This concern has led some courts to exclude any subjective testimony related to what the animal was worth to the owner.⁵³

C. Courts' Treatment of Recovery for Non-Economic Damages

1. Mental Anguish

Most courts are reluctant to allow recovery for mental anguish.⁵⁴ Few courts have allowed these types of damages,⁵⁵ but only in extraordinary circumstances. A Florida court was the first to allow mental damages for destruction of a companion animal.⁵⁶ In *La Porte v. Associated Independents, Inc.*,⁵⁷ the plaintiff was awarded damages for emotional distress for witnessing the killing of her dog, Heidi.⁵⁸ In the case, a garbage man inexplicably tossed a trash can at the plaintiff's small dog that was tied up in the front yard.⁵⁹ Heidi's owner watched out of her kitchen window as her small dog was smashed by the force of the blow.⁶⁰ She ran to Heidi's aid just in time to see the garbage man laugh and walk away.⁶¹ In this instance, the court allowed punitive damages for emotional distress, citing the willful and malicious nature of the conduct.⁶²

Courts have been extremely polarized on the issue of non-economic damages, specifically whether animal owners can recover. Some courts have been very liberal in their allowance of damages, and some have not

⁵² *E.g.*, *Nichols v. Sukaro Kennels*, 555 N.W.2d 689, 690 (Iowa 1996) (recognizing a trial expert's testimony that "if a pet is thought of as a family member by its owners, its value is whatever the owners think it is This value could be as high as the national debt."); *Harabes v. Barkery, Inc.*, 791 A.2d 1142, 1145 (N.J. Super. Ct. Law Div. 2001).

⁵³ *E.g.*, *Sumner v. Bridge*, No. 04 LM 1489, 2005 WL 2414718, at *4 (Kan. Dist. Ct. May 10, 2005); *Young's Bus Lines, Inc. v. Redmon*, 43 S.W.2d 266, 268 (Tex. App. 1931).

⁵⁴ *See, e.g.*, *Gluckman v. Am. Airlines, Inc.*, 844 F. Supp. 151, 157-58 (S.D.N.Y. 1994); *Fackler v. Genetzky*, 595 N.W.2d 884, 892 (Neb. 1999); *Harabes*, 791 A.2d at 1156.

⁵⁵ *See, e.g.*, *La Porte v. Associated Indeps., Inc.*, 163 So. 2d 267, 269 (Fla. 1964); *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1071 (Haw. 1981); *Corso v. Crawford Dog & Cat Hosp., Inc.*, 415 N.Y.S.2d 182, 183 (N.Y. Civ. Ct. 1979).

⁵⁶ *La Porte*, 163 So. 2d at 267-69.

⁵⁷ 163 So. 2d 267.

⁵⁸ *Id.* at 269.

⁵⁹ *Id.* at 267-68.

⁶⁰ *Id.*

⁶¹ *Id.* at 268.

⁶² *Id.* at 268-69.

allowed any at all.⁶³ The concurring opinion in *Bueckner v. Hamel*⁶⁴ put a unique spin on the traditional view of fair market value of the animal as a basis of recovery. The concurring opinion stated:

A domestic pet with no breeding potential might be worth only \$10 in the market to someone else who wants it as a pet. But the animal could be a highly valued companion whose loss would be deeply felt. People who love and care for animals should not be forced to accept as compensation for their loss the amount that the animal would bring in the market.⁶⁵

This concurring opinion also stated, “Because of the characteristics of animals in general and of domestic pets in particular, I consider them to belong to a unique category of ‘property’ that neither statutory law nor caselaw has yet recognized.”⁶⁶

This court properly categorized animals’ value to modern society. If animals are classified as mere personal property, the deeply felt bonds between animals and humans are not acknowledged. Categorizing animals above personal property, but still below humans, is a compromise that even more conservative courts should recognize as reasonable. This categorization allows courts to sidestep current case law, which holds that non-economic damages are not recoverable for personal property.⁶⁷ Society has not yet justified putting animals on the same level as human beings. By thinking of animals as a separate category, as more than mere

⁶³ Compare *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1071 (Haw. 1981) (upholding an award for mental distress when a family’s dog died after being left in a hot van many hours), and *Corso v. Crawford Dog & Cat Hosp., Inc.*, 415 N.Y.S.2d 182, 183 (N.Y. Civ. Ct. 1979) (upholding an award for mental anguish that plaintiff experienced when she opened the casket at her dog’s funeral and found a dead cat instead), with *Gluckman v. Am. Airlines, Inc.*, 844 F. Supp. 151, 157–58 (S.D.N.Y. 1994) (holding there are no causes of action for loss of companionship of a pet or emotional distress for loss of property), and *Fackler v. Genetzky*, 595 N.W.2d 884, 892 (Neb. 1999) (holding the plaintiff could not recover for emotional distress resulting from the negligently inflicted death of racehorses because animals are personal property, and the law does not allow emotional distress damages for destruction of personal property).

⁶⁴ 886 S.W.2d 368 (Tex. App. 1994).

⁶⁵ *Id.* at 374 (Andell, J., concurring).

⁶⁶ *Id.* at 377.

⁶⁷ See *Corso*, 415 N.Y.S.2d at 183 (“[A] pet is not just a thing but occupies a special place somewhere in between a person and a piece of property.”).

personal property but still less than human, animal owners can receive adequate compensation for their losses.⁶⁸ This type of classification is one way that courts have and can justify awarding non-economic damages.⁶⁹

A New York state court, which was particularly receptive to non-economic damages in a period when other states were not, provides guidance to other courts. In *Corso v. Crawford Dog & Cat Hosp., Inc.*,⁷⁰ an elderly woman, who's dead pet's body was misplaced, pursued a claim for emotional distress.⁷¹ The court overruled precedent and held:

[A] pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property In 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 an inanimate thing that just receives affection; it also returns it.⁷²

This case stands for more than just the actionability of a mishandled corpse.⁷³ This case separates and distinguishes personal property, such as family photos or heirlooms, from companion animals by holding that the loss of the right to memorialize an animal is actionable, while the right to memorialize other kinds of personal property is not:

An heirloom while it might be the source of good feelings is merely an inanimate object and 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. Losing the right to memorialize a pet rock, or a pet tree or losing a family picture album is not actionable. But a dog—that is something else. To say it is a piece of personal property

⁶⁸ *See id.*

⁶⁹ *See, e.g., id.*; *Richardson v. Fairbanks N. Star Borough*, 705 P.2d 454, 456 (Alaska 1985).

⁷⁰ 415 N.Y.S.2d 182.

⁷¹ *Id.* at 183. After the death of plaintiff's pet, she arranged for an elaborate funeral for him, including a casket, epitaph, and attendance of a few friends and family. *Id.* During the funeral she opened the casket to find a dead cat instead of her poodle. *Id.* What became of the remains of her poodle is unknown. *Id.*

⁷² *Id.*

⁷³ *See id.*

and no more is a repudiation of our humaneness. This I cannot accept.⁷⁴

This court was the first to hold that animals should be set apart from other kinds of personal property,⁷⁵ but not the last.

A Hawaiian court allowed for damages because of mental distress in *Campbell v. Animal Quarantine Station*.⁷⁶ In *Campbell*, the court upheld an award for mental distress endured by a family whose dog suffered heat stroke when the owner left the dog in a van with no ventilation on a very hot day.⁷⁷ The court upheld an award for one thousand dollars for mental anguish even though the family did not watch the animal die or see the body.⁷⁸ The court did this by eliminating the preconditions of time, place, relationship, and physical injury that are required in other jurisdictions.⁷⁹ Instead, the court substituted these requirements with a test of foreseeability, using time, place, and relationship as factors in determining the level of damages instead of requirements for determining whether a cause of action existed.⁸⁰ It essentially abandoned the elements set out in *Dillon v. Legg*⁸¹ for bystander recovery of negligent infliction of emotional distress.⁸² Although this court is more liberal than one may hope for in terms of awarding damages and providing causes of action, courts should look to this decision as a guide to how they can treat injuries inflicted on animals and their owners.

While the court in *Corso* held that animals are distinguishable from other forms of personal property, and thus, owners are afforded more protections,⁸³ a Nebraska court recognized the differences, but still refused to allow recovery for the plaintiffs.⁸⁴ In *Fackler v. Genetzky*,⁸⁵ the court followed Nebraska precedent in disallowing an emotional distress claim.⁸⁶ The court stated:

⁷⁴ *Id.* at 183.

⁷⁵ *Id.* (explaining that the court's decision overruled prior precedent).

⁷⁶ 632 P.2d 1066 (Haw. 1981).

⁷⁷ *Id.* at 1067.

⁷⁸ *Id.*

⁷⁹ *Id.* at 1068–69.

⁸⁰ *Id.* at 1069–70.

⁸¹ 441 P.2d 912 (Cal. 1968).

⁸² *Id.* at 920–21.

⁸³ *Corso*, 415 N.Y.S.2d at 183.

⁸⁴ *Fackler v. Genetzky*, 595 N.W.2d 884, 892 (Neb. 1999).

⁸⁵ 595 N.W.2d 884.

⁸⁶ *Id.* at 892.

This court has clearly held that animals are personal property and that emotional damages cannot be had for the negligent destruction of personal property. People may develop an emotional attachment to personal property, whether animals or inanimate objects with sentimental value, but the law does not recognize a right to money damages for emotional distress resulting from the negligent destruction of such property.⁸⁷

This court, however, overlooked the ability of courts to expand the common law in light of societal values. It may be inappropriate to allow emotional damages for destruction of personal property no matter how sentimental; however, as the *Corso* court stated, animals are something more than personal property, capable of both giving and receiving affection.⁸⁸

2. *Loss of Companionship*

Some courts have allowed loss of companionship as part of a damage calculation.⁸⁹ Although the court in *Jankoski v. Preiser Animal Hospital, Ltd.*,⁹⁰ failed to recognize an independent cause of action for loss of companionship, it suggested that loss of companionship could be factored into the “actual value” of the animal.⁹¹ The court relied on two cases that led it to this conclusion.⁹² The Washington Supreme Court in *Mieske v. Bartell Drug Co.*⁹³ stated that the concept of actual value to the owner obviously includes some element of sentiment, but it is only “unusual sentimental value” or a “fanciful price” which is inappropriate in assessing damages.⁹⁴ The court in *Jankoski* also pointed to *Brousseau v. Rosenthal*,⁹⁵

⁸⁷ *Id.*

⁸⁸ *Corso*, 415 N.Y.S.2d at 183.

⁸⁹ *See, e.g.*, *Jankoski v. Preiser Animal Hosp., Ltd.*, 510 N.E.2d 1084, 1087 (Ill. App. Ct. 1987) (holding loss of companionship can be included in actual value of animal, but affirming the dismissal of the action for failure to state a claim).

⁹⁰ 510 N.E.2d 1084.

⁹¹ *Id.* at 1087.

⁹² *Id.* at 1086–87.

⁹³ 593 P.2d 1308.

⁹⁴ *Id.* at 1311. In affirming a damages award of seventy-five hundred dollars as compensation for the defendant’s negligent destruction of plaintiff’s home movies, the court recognized the damaged property was irreplaceable and its value to its owner encompassed some level of sentimental value. *Id.*

⁹⁵ 443 N.Y.S.2d 285 (N.Y. Civ. Ct. 1980).

where the court determined that because a non-bred dog has no ascertainable market value, it is appropriate that the measure of damages should be a dog's actual value to its owner and that loss of companionship is a proper element to consider in establishing the actual value of the dog.⁹⁶ The *Jankoski* court concluded:

In line with these cases, we believe that the law in Illinois is that where the object destroyed has no market value, the measure of damages to be applied is the actual value of the object to the owner. The concept of actual value to the owner may include some element of sentimental value in order to avoid limiting the plaintiff to merely nominal damages.⁹⁷

The court took an approach that resembles the value-to-the-owner approach.⁹⁸

In a highly publicized decision, a federal court in New York declined to recognize a cause of action for loss of companionship after American Airlines left a passenger's dog in a sweltering hot cage in an airplane cargo pit for hours with no ventilation.⁹⁹ In *Gluckman v. American Airlines, Inc.*,¹⁰⁰ Mr. Gluckman adopted a dog and was flying it to his home when their plane was delayed.¹⁰¹ When the flight was cancelled and he was reunited with his dog, Floyd, Mr. Gluckman observed that Floyd's paws were bleeding from trying to escape the cage in the plane's cargo pit (later determined to have reached temperatures of one hundred forty degrees Fahrenheit).¹⁰² The court stated that the condition of the cage "evidenced a panicked effort to escape."¹⁰³ Moreover, the court found that the airline, "after an unexplained delay of an additional forty-five minutes, arranged to bring Floyd to a veterinarian. The veterinarian advised Gluckman that Floyd had suffered heat stroke and brain damage. Although Gluckman stayed with Floyd all night in intensive care, Floyd had to be put to sleep the next morning."¹⁰⁴ Despite the obvious and conceded errors made by

⁹⁶ *Id.* at 286.

⁹⁷ *Jankoski*, 510 N.E.2d at 1087.

⁹⁸ *See id.*

⁹⁹ *Gluckman v. Am. Airlines, Inc.*, 844 F. Supp. 151, 154, 158 (S.D.N.Y. 1994).

¹⁰⁰ 844 F. Supp. 151.

¹⁰¹ *Id.* at 153–54.

¹⁰² *Id.* at 154.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

American Airlines, Mr. Gluckman was unable to recover for Floyd's death.¹⁰⁵

The court not only disallowed Mr. Gluckman's claim for loss of companionship, but also disallowed Mr. Gluckman's claim for negligent infliction of emotional distress because Floyd was merely personal property, and the law did not allow recovery for personal property.¹⁰⁶ The court criticized the decision in *Corso*. It stated, "In viewing a pet as more than property . . . the *Corso* opinion, and the few cases that follow it, are aberrations flying in the face of overwhelming authority to the contrary."¹⁰⁷ The *Gluckman* court also stated that "the *Corso* court provides no legal reasoning why prior precedent should be overruled in categorizing pets as more than property."¹⁰⁸

In contrast to the *Gluckman* court's decision, the dissenting opinion in *Carbasha* stated, "[W]hen the common law of the past is no longer in harmony with the institutions or societal conditions of the present, this Court is constitutionally empowered to adjust the common law to current needs."¹⁰⁹ It is clear that the archaic and traditional treatment of animals is not in line with the way modern society views animals, and as such, it is within the power of the courts to adjust the common law to society's current needs. More judges like the ones in *La Porte* and *Corso* are needed to protect animals and animal owners. Conservative judges' fears regarding outlandish damages awards and a multitude of lawsuits are not sufficient reasons to keep animal owners with valid claims from recovering. Instead, courts should create case law and standards of proof, or state legislatures should adopt statutes that can properly distinguish the viable claims from the frivolous ones.

A case that addresses courts' concerns about allowing a cause of action for loss of companionship is *Harabes v. Barkery, Inc.*¹¹⁰ In *Harabes*, the plaintiffs sued a dog groomer when their dog died after the groomer left him in an extremely hot and unventilated room for more than ten hours.¹¹¹ In denying recovery, the court stated it would be poor public policy to allow owners of animals to recover damages for negligent infliction of

¹⁰⁵ *Id.* at 157–58.

¹⁰⁶ *Id.* at 157. The court also disallowed his claim for intentional infliction of emotional distress because American Airlines' conduct was not aimed at Gluckman. *Id.* at 158.

¹⁰⁷ *Id.* at 158 (emphasis added).

¹⁰⁸ *Id.*

¹⁰⁹ *Carbasha v. Musulin*, 618 S.E.2d 368, 372 (W. Va. 2005) (Starcher, J., dissenting).

¹¹⁰ 791 A.2d 1142.

¹¹¹ *Id.* at 1143.

emotional distress and loss of companionship.¹¹² Among the cited concerns are the number of possible litigants who could bring a cause of action for loss of companionship and the number and category of animals under which people could bring claims.¹¹³ The court stated that people can form bonds with an “infinite number of other beings that are non-human. Were we to recognize a claim for damages for the negligent loss of a dog, we can find little basis for rationally distinguishing other categories of animal companion.”¹¹⁴

In other words, the court reasoned that if it allowed damages for dogs, it would have to allow damages for all types of animals. This argument is simply unfounded. Courts frequently draw arbitrary bright line tests to determine when plaintiffs can and cannot recover.¹¹⁵ Simply because people can form bonds with “an infinite number of other beings”¹¹⁶ does not mean that plaintiffs should be prohibited from recovering; rather, courts or legislatures should draw a line limiting who can recover. In a situation where a companion animal is injured or killed, recovery should be limited to animals that are traditionally kept and recognized as companion animals, and which are capable of both giving and receiving affection—namely cats and dogs.¹¹⁷ Cats and dogs are different than other pets because of their known companionship and capability to show affection.¹¹⁸

¹¹² *Id.* at 1145.

¹¹³ *Id.*

¹¹⁴ *Id.* (quoting *Rabideau v. City of Racine*, 627 N.W.2d 795, 799 (Wis. 2001)).

¹¹⁵ *See, e.g.*, *Thing v. La Chusa*, 771 P.2d 814, 828–29 (Cal. 1989) (allowing bystander negligent infliction of emotional distress damages for only certain family members, including parents, grandparents, or family members who live with the person, but not including best friends, boyfriends, or girlfriends.); *Cash v. City of Cincinnati*, 421 N.E.2d 1275, 1277–78 (Ohio 1981) (holding that if there is a defect in a sidewalk of two inches or less, then the landowner is not liable for any injuries incurred by a person who may trip and fall on that defect).

¹¹⁶ *Rabideau*, 627 N.W.2d at 799.

¹¹⁷ *See Bueckner v. Hamel*, 886 S.W.2d 368, 377 (Tex. App. 1994) (Andell, J., concurring) (stating dogs and other mammals share similar emotional and cognitive characteristics with humans); TENN. CODE ANN. § 44-17-403(a)–(b) (2007) (authorizing pet owners to recover for a pet’s death caused by a third party, but limiting the term “pet” to dogs and cats).

¹¹⁸ *See Bueckner*, 886 S.W.2d at 377; TENN. CODE ANN. § 44-17-403(a)–(b) (2007).

People commonly keep cats and dogs for companionship,¹¹⁹ and thus, limiting recovery to these animals is reasonable.

Additionally, the court reasoned that it would be unfair to place a large financial burden upon a negligent defendant.¹²⁰ This is illogical for many reasons. To say that culpable offenders should not be liable for their blameworthy conduct merely because it is a large financial burden hardly seems in line with justice or notions of fairness. If one party is at fault and the other is innocent, it is illogical to hold the innocent party responsible for any losses incurred due to the negligence of the offending party. Plaintiffs are compensated for their losses regardless of the wrongdoers' personal wealth.

3. *Punitive Damages*

Courts have also been reluctant to allow punitive damages because animals are classified as personal property, and at common law, punitive damages were not available for destruction of personal property.¹²¹ Punitive damages could be an effective way for courts to accomplish the goal of punishing and deterring the disregard for the rights of animal owners. Additionally, punitive damages would alleviate concerns that defendants would be overburdened because each defendant could be penalized according to his or her wealth and conduct. This allows courts the option of using precedent to recognize emotional distress damages, yet still allows animal owners to be adequately compensated. Moreover, this would allow courts to punish and deter behavior that is severely under

¹¹⁹ Elizabeth Paek, Comment, *Fido Seeks Full Membership in the Family: Dismantling the Property Classification of Companion Animals by Statute*, 25 U. HAW. L. REV. 481, 484–85 (2003); see also HUMANE SOCIETY OF THE UNITED STATES, *U.S. Pet Ownership Statistics*, <http://www.hsus.org/ace/11831> (last visited Sept. 14, 2009).

¹²⁰ *Harabes v. Barkery, Inc.*, 791 A.2d 1142, 1145 (N.J. Super. Ct. Law Div. 2001).

¹²¹ *E.g.*, *Mitchell v. Heinrich*, 27 P.3d 309, 312 (Alaska 2001); *Soucek v. Banham*, 524 N.W.2d 478, 480–81 (Minn. Ct. App. 1994). In *Soucek*, the defendant intentionally shot and killed the plaintiff's dog. *Id.* This Minnesota court did not allow a claim of punitive damages because it was based upon damage to property rather than damages to a person. *Id.* Just a few years later, however, a different Minnesota state court did allow punitive damages for destruction of personal property. *Molenaar v. United Cattle Co.*, 553 N.W.2d 424, 428–30 (Minn. Ct. App. 1996). This disparity illustrates how confused and split courts are even within the same state as to what is allowed and what is not because of companion animals' classification as property.

prosecuted in the criminal sector¹²² and represent the value that society places on relationships between companion animals and their owners.

One example of how courts effectively use punitive damages awards to balance the low fair market value of animals is the case of *Burgess v. Taylor*.¹²³ In this case, Judy Taylor was no longer able to provide daily care for her horses, so she free-leased them to the Burgesses.¹²⁴ The Burgesses agreed that if they decided they no longer wanted to care for the horses, they would tell Ms. Taylor and she would take them back to find them a new home.¹²⁵ Soon after they took the horses, the Burgesses sold them to a slaughter house.¹²⁶ The court determined that the defendants' actions were "heartless, flagrant, and outrageous"¹²⁷ and awarded seventy-five thousand dollars in punitive damages even though the fair market value of the horses was only one thousand dollars.¹²⁸

This case illustrates a prime situation where fair market value of an animal is not enough to adequately penalize defendants' outrageous conduct, or to adequately vindicate animal owners' rights. Only through the punitive damages award was justice carried out.¹²⁹ When criminal charges are not available, a punitive damages award, like the one in *Burgess*, can serve as a reminder to defendants that their actions were wrong and deserving of punishment.

However, a few problems could arise with this punitive damages approach. One is the uncertainty of damages awards in light of the

¹²² See Jennifer H. Rackstraw, *Reaching for Justice: An Analysis of Self-Help Prosecution for Animal Crimes*, 9 ANIMAL L. 243, 245–47 (2003); see also Lacroix, *supra* note 15, at 15.

¹²³ 44 S.W.3d 806 (Ky. Ct. App. 2001).

¹²⁴ *Id.* at 809.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 812 (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. F (1965)).

¹²⁸ *Id.* at 810 (awarding an additional fifty thousand dollars to the plaintiff because of the defendants' "outrageous conduct").

¹²⁹ See *Propes v. Griffith*, 25 S.W.3d 544 (Mo. Ct. App. 2000), for another example where punitive damages were able to make up for a low fair market value. In this case, an angry woman had her neighbor's dogs euthanized after driving them around for two hours trying to find a veterinarian who did not recognize the dogs. *Id.* at 546–47. The court upheld a punitive damages award of four thousand dollars, stating that it was necessary because the defendant's "actions were outrageous, show[ed] reckless indifference for the rights of others, and to deter defendant Sarah Griffith and others from like conduct in the future." *Id.* at 551.

Supreme Court's decision in *State Farm Mutual Auto Insurance Co. v. Campbell*.¹³⁰ *State Farm* suggested that punitive damages awards that exceed single digit ratios could be in violation of due process.¹³¹ Although *State Farm* laid out a smallness exception where this ratio can be abandoned,¹³² there has been speculation by scholars that problems still may be presented for animal owners seeking punitive damages.¹³³ One potential problem posed is the question of what effect uncompensated damages (like emotional distress in many jurisdictions) will have on the ratio rules. Uncompensated damages can be taken into account in applying ratio rules,¹³⁴ but it is not yet known whether defendants can use these uncompensated damages to push plaintiffs' damages out of the smallness exception.¹³⁵ One author stated that utilizing uncompensated damages will have the ability "to bring the punitive damages awarded within . . . four-to-one or nine-to-one ratios," thereby maintaining a punitive damages award, or to eliminate the smallness exception, thereby limiting the award.¹³⁶

¹³⁰ 538 U.S. 408 (2003).

¹³¹ *Id.* at 425.

¹³² The exception is comprised of three elements: (1) the misconduct must be "particularly egregious," causing (2) "economic damages" in (3) "only a small amount." *Id.* However, the court declined to define "small amount." *Id.*

¹³³ *E.g.*, Margit Livingston, *The Calculus of Animal Valuation: Crafting a Viable Remedy*, 82 NEB. L. REV. 783, 791 (2004); 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, 52-54 (2006).

¹³⁴ Reppy, *supra* note 133, at 50.

¹³⁵ *See id.* at 52-54. The author gives us an illustration:

Thus in a pet-killing case, the court might award \$100 in economic damages, the market value of a dog killed by the defendant, \$1,000 for grief suffered by the pet's owner, and \$100,000 in punitive damages. It would be sound for the court to declare that the total compensatory damages award, \$1,100 was "small" under the Campbell exception focusing, as written, on economic damages so that the ratios did not apply.

Id. at 54.

¹³⁶ *Id.* at 52.

III. RECENT DEVELOPMENTS

A. *Recent Developments That Reflect Changes in Societal Values*

One recent development that has attracted much attention and highlighted the changes that society has undergone is the PETS Act that was passed after Hurricane Katrina.¹³⁷ During Hurricane Katrina, many people refused to leave their pets behind.¹³⁸ People that attempted to evacuate with their pets were told upon boarding evacuation busses that they would not be able to bring their pets.¹³⁹ Many chose not to evacuate because they did not want to leave their companion animals, and instead, remained in their homes.¹⁴⁰ For those who made the difficult decision to evacuate without their pets, there were extreme feelings of guilt and fear that their animals would drown.¹⁴¹ The PETS Act was passed unanimously in the Senate and by an overwhelming margin in the House in response to Hurricane Katrina, and the Act ensures that state and local emergency plans address the needs of individuals with household pets following a major disaster or emergency.¹⁴² One of the bill's sponsors, Rep. Christopher Shays, stated:

This bipartisan legislation is necessary because it became evident during Hurricane Katrina, when asked to choose between abandoning their pets or their own personal safety, many pet owners chose to risk their lives and remain with their pets, and some of them perished. This is first a public safety issue, but also an animal welfare issue.

¹³⁷ Pets Evacuation and Transportation Standards Act of 2006, 42 U.S.C.A. §§ 5196b, 5170b(a)(3)) (West 2008); 152 CONG. REC. H6807 (daily ed. Sept. 20, 2006) (statement by Rep. Shuster) (discussing how the aftermath of Hurricane Katrina uncovered the need to account for household pets and service animals in state and local emergency preparedness plans).

¹³⁸ Anita Manning, *Rescuers Scramble to Reach Animals Left in Dire Straits*, USA TODAY, Sept. 7, 2005, at 6D.

¹³⁹ Rebecca Simmons, *No Pet Left Behind: The PETS Act Calls for Disaster Plans to Include Animals*, HUMANE SOCIETY OF THE UNITED STATES, Apr. 20, 2006, http://www.hsus.org/pets/pets_related_news_and_events/no_pet_left_behind_the_pets.html.

¹⁴⁰ *With Hurricane Season upon Us, Congress Passes Landmark Bill to Leave No Pet Behind*, HUMANE SOCIETY OF THE UNITED STATES, Aug. 2, 2006, http://www.hsus.org/press_and_publications/press_releases/with_hurricane_season_upon.html.

¹⁴¹ *Id.*

¹⁴² *Id.*; see also 42 U.S.C.A. §§ 5196b, 5170b(a)(3).

Roughly two-thirds of American households own pets. We need to ensure owners and their pets are protected.¹⁴³

Another supporter, Rep. Dennis Kucinich, stated:

Among the injustices incurred in the gulf coast were citizens forced to choose between their own safety and that of their pet or service animals Some chose to compromise their own safety, unwilling to evacuate without their pet, despite the great risk to themselves and their families. Others were forced to leave these important friends behind, abandoned and alone. Animals were left to survive on their own with little hope of survival, causing the very understandable human emotions of pain and agony that accompanied this choice.¹⁴⁴

By passing the PETS Act, the federal government recognized that people are willing to sacrifice their well-being and lives for their animals,¹⁴⁵ so it is not unreasonable to ask state legislatures and courts to recognize that people can experience real emotional distress and real loss when third parties injure their animals. Societal changes necessitate the need for reform in the civil liability context.¹⁴⁶ Hurricane Katrina rallied the federal government to publicly recognize the need for legislation to protect the interests of animals and their owners in this specific type of situation. In this situation, the government issued the cure after the problem. Society should not wait for an emotional event to stir our passions and persuade government to act. The federal government has recognized that animal owners have deeply felt bonds with their animals.¹⁴⁷ Governments and courts should not wait for a tragedy to occur before recognizing animal owners' need for available causes of action and damages.

In addition to federal legislation recognizing a change in societal values, courts' increasing willingness to assign harsher penalties in animal

¹⁴³ 152 CONG. REC. H6806 (daily ed. Sept. 20, 2006) (statement of Rep. Shays).

¹⁴⁴ 152 CONG. REC. H6807 (daily ed. Sept. 20, 2006) (statement of Rep. Kucinich).

¹⁴⁵ *Id.*

¹⁴⁶ *See Carbasho v. Musulin*, 618 S.E.2d 368, 372 (W. Va. 2005) (Starcher, J., dissenting).

¹⁴⁷ *See* 152 CONG. REC. H6806 (daily ed. Sept. 20, 2006) (statement of Rep. Shays).

cruelty cases has also signaled a change in societal values.¹⁴⁸ Only within this past decade have states begun to take animal cruelty seriously.¹⁴⁹ “Beginning in the mid 1990s, 37 states enacted felony criminal penalties against those who engage in serious . . . acts of animal cruelty.”¹⁵⁰ As of September 2008, there are only five states that do not have felony laws involving animal cruelty.¹⁵¹

Even with criminal deterrents available, civil remedies are still needed. Seeking retribution in criminal courts is not a viable remedy for most companion animal owners whose animals have been injured. The problem is that there is skepticism among prosecutors (and some judges) in pursuing animal cruelty cases because of concerns like crowded dockets, precious tax dollars, and time constraints on the prosecutors themselves in trying to pursue a case that often has no testifying witness.¹⁵² When faced with the decision, prosecutors choose to prosecute a case involving a human victim in lieu of an animal victim.¹⁵³

One case where the plaintiff was fortunate enough to receive a compassionate prosecutor and judge is *Garcia v. Rivera*.¹⁵⁴ This case properly illustrates the direction in which society is headed. In *Garcia*, the defendant was sentenced to two years in prison for cruelty to animals for stomping on his girlfriend’s son’s pet goldfish in front of him.¹⁵⁵ The court stated that “severe pain was caused to the fish” and that it was both “sadistic” to the fish and “sadistic” to the little boy watching the defendant crush his fish.¹⁵⁶ It seems counterintuitive that a defendant can receive two years in prison for stomping on a pet goldfish because of the pain inflicted

¹⁴⁸ Allie Philips, *The Few and the Proud: Prosecutors Who Vigorously Pursue Animal Cruelty Cases*, 42 THE PROSECUTOR 20, July 2008, at 20–22. (noting that penalties are becoming harsher and the number of prosecutions higher, but the instances of prosecution based on animal cruelty is still remarkably low); See Rackstraw, *supra* note 122, at 245–47.

¹⁴⁹ Philips, *supra* note 148, at 20.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 20, 22.

¹⁵³ See Rackstraw, *supra* note 122, at 250–51 (arguing that many prosecutors believe that animal cruelty involves “‘just an animal’ and is thus not worthy of time or resources”).

¹⁵⁴ No. 07 Civ. 2535, 2007 WL 2325928 (S.D.N.Y. Aug. 16, 2007).

¹⁵⁵ *Id.* at *1, *5 (denying the federal habeas corpus petition of a defendant sentenced to a total of seven and a half to fifteen years by a state court for a number of offenses, including criminal possession of a weapon and endangering the welfare of a minor, with two years of sentence attributed to animal cruelty charge).

¹⁵⁶ *Id.* at *5.

on the little boy owner who witnessed it, but the boy would not be able to recover damages in a civil case. It is inconsistent that criminal courts recognize and validate an animal owner's experience of extreme emotional grief, but the civil courts say, "It's just personal property!"¹⁵⁷

Garcia not only shows that courts have begun to recognize the societal value of an animal's life and the severity of animal cruelty, but also it hints at the severity of emotional distress that can be inflicted on the pet owner.¹⁵⁸ In *Garcia*, it was just a goldfish that was harmed and goldfish can neither receive nor give affection in the same manner as a cat or dog can.¹⁵⁹ The court may have given the defendant a more severe sentence if he had killed a dog or cat in front of the little boy.¹⁶⁰ The fact that the court has recognized and punished not only the injury to the animal, but also has taken into account the emotional injury experienced by the child, reflects an understanding that this behavior should be punishable.

Another recent illustration of how society's values and views have evolved involves the dog fighting case surrounding the famous football

¹⁵⁷ Compare *Garcia*, 2007 WL 2325928, at *13–15 (upholding a defendant's sentence for "sadistic" animal cruelty), with *Johnson v. Douglas*, 723 N.Y.S.2d 627, 628 (N.Y. Sup. Ct. 2001) (holding that New York does not recognize a cause of action for emotional distress for loss of companion animals). The *Johnson* court stated:

The extension of such thinking would permit recovery for mental distress caused by other personal property; i.e., a family heirloom or prized school ring. Although we live in a particularly litigious society, the court is not about to recognize a tortious cause of action to recover for emotional distress due to the death of a family pet. Such an expansion of the law would place an unnecessary burden on the ever burgeoning caseloads of the court in resolving serious tort claims for injuries to individuals.

Id.

¹⁵⁸ See *Garcia*, 2007 WL 2325928, at *5–6.

¹⁵⁹ See STEPHEN M. WISE, DRAWING THE LINE, 35–38 (Basic Books) (2003) (explaining cognitive differences among animals); see also *Bueckner v. Hamel*, 886 S.W.2d 368, 377 (Tex. App. 1994) (Andell, J., concurring) (stating dogs and other mammals share similar emotional and cognitive characteristics with humans).

¹⁶⁰ Compare *Garcia*, 2007 WL 2325928, at *13–15 (sentencing a defendant to two years incarceration for aggravated cruelty to animals after killing a goldfish), with *People v. McKnight*, 302 N.W.2d 241, 242 (Mich. Ct. App. 1980) (affirming the conviction of a defendant who was sentenced to two to four years imprisonment after kicking a dog to death).

player, Michael Vick.¹⁶¹ Vick pled guilty to dog fighting charges, and rather than have the pit bulls destroyed (as they are now dangerous personal property), the dogs were rehabilitated.¹⁶² It is inconsistent to claim that dogs are personal property, yet punish their owner when he mistreats them. And if dogs are “personal property,” then how can they be rehabilitated? We do not punish people for abusing other types of personal property, such as furniture or computers, so why did Vick lose his football contract and receive a sentence of twenty-three months in a federal penitentiary?¹⁶³ The answer is that society looks poorly upon the abuse of animals¹⁶⁴ because they are more than mere personal property.¹⁶⁵ It is time for state legislatures and courts to remedy this blatant inconsistency between the civil and criminal systems.

B. Expanding Causes of Action for Animal Owners

Some courts have become more creative and liberal in their attempt to vindicate the rights of animal owners. In *Womack v. Von Rardon*,¹⁶⁶ a Washington court created a cause of action for malicious injury to an animal, which allowed for emotional distress damages.¹⁶⁷ In this case, Ms. Womack’s cat, Max, was taken from her front porch by three teenage boys.¹⁶⁸ The boys poured gasoline on Max, and then lit him on fire.¹⁶⁹ Although onlookers came to Max’s aid, he had to be euthanized because of

¹⁶¹ Eddie Pells, *Once Left For Dead, Vick’s Pit Bulls Recovering*, SEATTLE TIMES, Feb. 7, 2009, http://seattletimes.nwsources.com/html/2008718226_zliv07vickspitbulls.html.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ See *supra* text accompanying notes 137–52.

¹⁶⁵ *Corso v. Crawford Dog & Cat Hosp., Inc.*, 415 N.Y.S.2d 182, 183 (N.Y. Civ. Ct. 1979) (holding that animals are more than just mere personal property); *Roemer v. Gray*, No. 45-09514, slip op. at 3 (Wash. King County Dist. Ct. May 2, 2005) (awarding thirty thousand dollars for special value of a cat killed by defendant’s dog); *Bueckner v. Hamel*, 886 S.W.2d 368, 374, 377 (Tex. App. 1994) (Andell, J., concurring) (holding that animals “belong to a unique category of ‘property’ that neither statutory law nor caselaw has yet recognized,” and market value could not compensate an animal owner “for a highly valued companion whose would be deeply felt”); *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1067, 1071 (Haw. 1981) (allowing mental distress damages for a dog left in a hot van by a groomer).

¹⁶⁶ 135 P.3d 543 (Wash. Ct. App. 2006).

¹⁶⁷ *Id.* at 546.

¹⁶⁸ *Id.* at 543.

¹⁶⁹ *Id.*

his extensive injuries.¹⁷⁰ When the boys were only sentenced to community service at the local pet shelter, Ms. Womack sued the boys and their parents on several claims, including emotional distress.¹⁷¹ Although the appeals court disallowed many of Ms. Womack's other claims, it held the lower court did not err in allowing her to recover damages for emotional distress.¹⁷² The court held that the "general allegations included sufficient facts to find both malicious conduct toward Ms. Womack's pet and her resulting emotional distress."¹⁷³ The court stated, "For the first time in Washington, we hold malicious injury to a pet can support a claim for and be considered a factor in measuring a person's emotional distress."¹⁷⁴ When laws do not address the rights of animal owners, this judicial remedy is an appropriate measure.

Tennessee also is on the cutting edge of reform when it comes to recovery for animal owners. In 2004, the T-Bo Act was passed after the sponsoring Senator's dog was killed by another dog.¹⁷⁵ The T-Bo Act provides:

If a person's pet is killed or sustains injuries that result in death caused by the unlawful and intentional, or negligent, act of another or the animal of another, the trier of fact may find the individual causing the death or the owner of the animal causing the death liable for up to five thousand dollars (\$5,000) in noneconomic damages; provided, that if the death is caused by the negligent act of another, the death or fatal injury must occur on the property of the deceased pet's owner or caretaker, or while under the control and supervision of the deceased pet's owner or caretaker.¹⁷⁶

Although the law is a step in the right direction, it is flawed in many ways. The law recognizes a cause of action and recovery based on a very

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 546–47.

¹⁷³ *Id.* at 546.

¹⁷⁴ *Id.*

¹⁷⁵ TENN. CODE ANN. § 44-17-403 (2007); ANIMAL LEGAL DEFENSE FUND, *National Justice for Animals Week Honorees, Congressman Steve Cohen*, <http://www.aldf.org/article.php?id=860> (last visited Sept. 7, 2009).

¹⁷⁶ § 44-17-403(a)(1).

narrow set of circumstances.¹⁷⁷ The law, although it expands owners' rights, is still very limited in that it excludes veterinarians from liability,¹⁷⁸ allows for recovery of only five thousand dollars in non-economic damages,¹⁷⁹ and does not provide for punitive damages.¹⁸⁰ Although this Act is on the forefront of expanding the recovery available to plaintiffs, like many others, it falls too short.

1. Laws That Fall Too Short

Many states have tried to expand the recovery and causes of action for animal owners; however, many of these states have not been able to provide any meaningful recovery for animal owners.¹⁸¹

Connecticut is one of the states with a statute permitting recovery for injury to companion animals.¹⁸² The statute provides:

Any person who intentionally kills or injures a companion animal . . . shall be liable to the owner of such companion animal for economic damages sustained by such owner In addition to any economic damages awarded . . . the court may award punitive damages in an amount not to exceed the jurisdictional monetary limit established by subsection (d) of section 51-15 together with a reasonable attorney's fee.¹⁸³

The statute is adequate in that it allows recovery for economic damages, such as the fair market value of the animal, burial expenses, and veterinary expenses.¹⁸⁴ Although this statute allows for punitive damages, they are limited to only five thousand dollars.¹⁸⁵

This statute does not fully compensate animal owners for violations of their rights. A five thousand dollar limit on punitive damages does not

¹⁷⁷ *Id.*

¹⁷⁸ § 44-17-403(a)(2)(3).

¹⁷⁹ § 44-17-403(a)(1).

¹⁸⁰ *See* § 44-17-403(2)(d) (limiting noneconomic damages to "compensation for the loss of reasonably expected society, companionship, love and affection of the pet").

¹⁸¹ *See, e.g.*, CAL. CIV. CODE § 3340 (West 1997); CONN. GEN. STAT. ANN. §§ 22-351 to 22-351a (West Supp. 2009); MD. CODE ANN., CTS. & JUD. PROC. §11-110 (LexisNexis 2006); TENN. CODE ANN. § 44-17-403 (2007).

¹⁸² §§ 22-351 to 22-351a.

¹⁸³ § 22-351a(b)–(c).

¹⁸⁴ § 22-351a(b).

¹⁸⁵ § 22-351a(c).

allow courts to sufficiently address and deter culpable behavior, especially if the behavior is particularly egregious or the defendant has particularly deep pockets.¹⁸⁶ Some view the punitive damages limitation as appropriate because they are concerned about overburdening individuals; however, this statute fails to make an exception that allows a higher punitive damages award for culpable corporations.¹⁸⁷ Under the statute, companies could potentially conduct a cost-benefit analysis and determine that the risk of selling defective and dangerous animal products outweighs the relatively low punitive damages.

Maryland passed a similar statute in 2005, which provides:

A person who tortiously causes an injury to or death of a pet while acting individually or through an animal under the person's direction or control is liable to the owner of the pet for compensatory damages The damages awarded under paragraph (1) of this subsection may not exceed \$7,500.¹⁸⁸

The statute also defines compensatory damages as only those expenses that are “the reasonable and necessary cost of veterinary care.”¹⁸⁹ This means that if the animal lives, only “reasonable” veterinary bills are recoverable.¹⁹⁰ Statutes like Connecticut’s and Maryland’s, as well as most judicial courts’ interpretations of the common law, are exactly the sort of policies that states need to change to expand the compensation available to animal owners.¹⁹¹

Current laws are inconsistent and insufficient, and courts and legislatures need guidelines for what causes of action and damages are appropriate to adequately address these problems.

¹⁸⁶ An example where this amount would be insufficient is the case of *Propes v. Griffith*. In this case, the defendant, upset with her neighbors, took the neighbors’ dogs to several veterinarians until she found one that would euthanize them. *Propes v. Griffith*, 25 S.W.3d 544, 546–47 (Mo. Ct. App. 2000).

¹⁸⁷ See CONN. GEN. STAT. ANN. §§ 22-351 to 22-351a, 51-15(d).

¹⁸⁸ MD. CODE ANN., CTS. & JUD. PROC. §11-110(b)(1)–(2).

¹⁸⁹ § 11-110(a)(2)(i)–(ii).

¹⁹⁰ § 11-110(a)(2)–(b)(1).

¹⁹¹ CONN. GEN. STAT. ANN. §§ 22-351 to 22-351a; MD. CODE ANN., CTS. & JUD. PROC. §11-110; See, e.g., *Naples v. Miller*, No. 08C-01-093, 2009 WL 1163504, at *2–3 (Del. Super. Ct. Apr. 30, 2009); *Burgess v. Shampooch Pet Indus., Inc.*, 131 P.3d 1248, 1253 (Kan. Ct. App. 2006); *Zager v. Dimilia*, 524 N.Y.S.2d 968, 970–71 (N.Y. Vill. Ct. 1988).

IV. EXPANDING CAUSES OF ACTION AND DAMAGES RECOVERABLE FOR COMPANION ANIMAL OWNERS

A. *Judicial Concerns with Expanding Damages*

Even courts that have limited the rights of animal owners acknowledge that society views animals differently than other forms of personal property.¹⁹² Because courts acknowledge this difference, actions should be taken to expand the available causes of action and recovery.

Most courts, however, are cautious about allowing recovery beyond fair market value and expanding causes of action for animal owners because this might open the floodgates to a barrage of litigation and outrageous awards.¹⁹³ The possibility of excessive awards and many lawsuits is a legitimate concern that can be addressed with well-fashioned rules and statutes.

Many, if not most, courts have expressed concerns, other than burdening defendants, that have prevented expanding recovery for animal owners.¹⁹⁴ In *Harabes*, the court explained its reasoning for denying recovery by stating that public policy considerations prevented pet owners from recovering emotional distress and loss of companionship damages in connection with the loss of a pet.¹⁹⁵ The court reasoned that it would be difficult to define the limit of the class of individuals who fit into the human companion category and to identify the class of animals for which a pet owner could recover.¹⁹⁶ The court expressed concern that allowing such claims would open the floodgates to future litigation by stating, “Such an expansion of the law would place an unnecessary burden on the ever burgeoning caseloads of the court in resolving serious tort claims for injuries to individuals.”¹⁹⁷ Although courts and legislatures are reluctant to

¹⁹² *E.g.*, *Hyland v. Borrás*, 719 A.2d 662, 664 (N.J. Super. Ct. App. Div. 1998) (“[A] household pet is not like other fungible or disposable property, intended solely to be used and replaced after it has outlived its usefulness.”).

¹⁹³ *Harabes v. Barkery, Inc.*, 791 A.2d 1142, 1145 (N.J. Super. Ct. Law Div. 2001); *Johnson v. Douglas*, 723 N.Y.S.2d 627, 628 (N.Y. Sup. Ct. 2001).

¹⁹⁴ *See, e.g.*, *Koester v. VCA Animal Hosp.*, 624 N.W.2d 209, 211 (Mich. Ct. App. 2000) (“There are several factors that must be considered before expanding or creating tort liability, including, but not limited to legislative and judicial policies.”); *Oberschlake*, 785 N.E.2d at 815 (citing *Harabes*, 791 A.2d at 1145).

¹⁹⁵ *Harabes*, 791 A.2d at 1145.

¹⁹⁶ *Id.* (citing *Rabideau v. City of Racine*, 627 N.W.2d 795, 799–802 (Wis. 2001)).

¹⁹⁷ *Id.* (quoting *Johnson*, 723 N.Y.S.2d at 628).

extend recovery, there are a number of available solutions that would alleviate their concerns.

B. Dispelling and Remediating Judicial Concerns

Although some courts argue that expanding the measure of damages available to companion animal owners places an unfair burden on defendants,¹⁹⁸ it is important to remember that juries and courts are able to assess damages awards that reflect the culpability of the defendant, and therefore, they can limit, or “cap,” the damages as appropriate.¹⁹⁹ This way, defendants would not be unfairly burdened, but rather, they would be held responsible in a way that reflects the nature of their conduct. Public policy dictates that people who act with disregard to the rights of animal owners and inflict pain on companion animals should be responsible for more than just the fair market value of the animal, which is usually nominal.²⁰⁰

¹⁹⁸ See, e.g., *Harabes*, 791 A.2d at 1145 (“Another policy consideration is the need to ensure fairness of the financial burden placed upon a negligent defendant.”); *Nichols v. Sukaro Kennels*, 555 N.W.2d 689, 690 (Iowa 1996) (denying emotional distress damages premised on owners’ emotional attachments to their dog after an expert witness testified that the value of a pet “is whatever the owners think it is . . . [and] could be as high as the national debt”); *Oberschlake*, 785 N.E.2d at 812 (following *Harabes* and denying a dog owners’ claims for negligent infliction of emotional distress and loss of companionship for injuries allegedly caused by a veterinarian).

¹⁹⁹ See, e.g., *Womack v. Von Rardon*, 135 P.3d 542, 546 (Wash. Ct. App. 2006) (“[D]amages questions are usually discretionary and therefore for the trier of fact, so long as damages fall within the range of relevant evidence.”).

²⁰⁰ See, e.g., Steven M. Wise, *Recovery of Common Law Damages for Emotional Distress, Loss of Society, and Loss of Companionship for the Wrongful Death of a Companion Animal*, 4 ANIMAL L. 33, 93 (1998) (“[I]f human companions of companion animals are not compensated for the injuries they actually suffer . . . the overarching principle of full compensation for tortious injury will be undermined by an irrationality and arbitrariness that should not be part of the common law.”); Debra Squires-Lee, Note, *In Defense of Floyd: Appropriately Valuing Companion Animals in Tort*, 70 N.Y.U. L. REV. 1059, 1080–81 (1995) (“The tort system strives to compensate victims, affirm societal values, and deter wrongful conduct. The emotional harms wrought by the death of a companion animal must be recognized if these goals of tort law are to be fulfilled.”) (citations omitted); see also RESTATEMENT (SECOND) OF TORTS § 901 (1979) (listing the goals of tort law).

1. Overburdening Defendants

At least one legislature fears that allowing non-economic valuation of pets would overburden the tortfeasor.²⁰¹ However, legislatures can cap recoveries and require a high burden of proof to insure that plaintiffs' injuries are actually as severe as they may claim. This way, defendants would be responsible for only the reasonable damages that their actions have caused. For example, in *Pantelopoulos*, the court did not overburden the defendant's ex-wife by holding her accountable for the emotional harm that she intentionally inflicted on her ex-husband by starving their ten-year-old family dog to death.²⁰² The court even found that she had calculated her behavior and intended this result.²⁰³ Ms. Pantelopoulos was not overburdened because the results of her actions were foreseeable, and she intended to inflict harm. Additionally, similar statements can be made about *Gluckman*, where American Airlines knowingly held Mr. Gluckman's dog in a cage with no ventilation and temperatures of up to one hundred forty degrees for more than two hours.²⁰⁴ It is reasonable to assume that caging an animal in these conditions will result in harm not only to the animal, but also to the owner who cared enough to pay to fly the animal across the country. Conduct of this type and nature foreseeably causes emotional harm to the animal owner, and thus, it should be actionable and allow more than nominal recovery.

2. Extending Recoverability to Too Many Types of Animals

Another potential issue is that if courts allow recovery for injured cats or dogs, then they will have to allow recovery for injured turtles, fish, squirrels or other animals.²⁰⁵ The Colorado and Tennessee legislatures have addressed this concern by limiting the definition of what constitutes a companion animal.²⁰⁶ The definition can be limited to include those

²⁰¹ H.B. 03-1260, 64th Leg., 1st Reg. Sess. (Colo. 2003) (not enacted), available at http://www.leg.state.co.us/2003a/inetcbill.nsf/fsbill%20cont%20/AF1FC02E0A1D6C7C87256C91004C9EE3?Open&file=1260_01.pdf.

²⁰² *Pantelopoulos v. Pantelopoulos*, 869 A.2d 280, 281 (Conn. Super. Ct. 2005).

²⁰³ *Id.*

²⁰⁴ *Gluckman v. Am. Airlines, Inc.*, 844 F. Supp. 151, 154 (S.D.N.Y. 1994).

²⁰⁵ *E.g.*, *Harabes v. Barkery, Inc.*, 791 A.2d 1142, 1145 (N.J. Super. Ct. Law Div. 2001) (quoting *Rabideau v. City of Racine*, 627 N.W.2d 795, 799 (Wis. 2001)).

²⁰⁶ *See* TENN. CODE ANN. § 44-17-403(2)(b) (2007) ("As used in this section, 'pet' means any domesticated dog or cat normally maintained in or near the household of its owner."); H.B. 03-1260 § 13-21-1002(1), 64th Leg., 1st Reg. Sess. (Colo. 2003) (not enacted) (limiting civil liability to injury to companion dogs and cats), available at (continued)

animals that are commonly kept for the purpose of companionship and are capable of giving and receiving affection—namely cats and dogs.²⁰⁷ Courts often draw bright line tests to limit recovery to the most deserving plaintiffs to prevent massive amounts of litigation.²⁰⁸ Recovery should be limited to dogs and cats for this same reason.

3. *Burdening the Courts*

Some courts fear that creating new causes of action will produce a large amount of lawsuits.²⁰⁹ However, there is little evidence to support this because only a handful of animal owners have pursued this type of claim.²¹⁰ Lack of lawsuits could exist for two reasons: either animal owners do not have available causes of action,²¹¹ or animal owners realize that they will be fighting a futile battle because their animal does not have a fair market value high enough to validate a pricey lawsuit.²¹² Additionally, if a large number of plaintiffs were to emerge, the courts should not restrict the rights of these animal owners because of large caseloads, nor should these owners be discouraged from asserting their rights because of the few remedies available.

http://www.leg.state.co.us/2003a/inetcbill.nsf/fsbill%20cont%20/AF1FC02E0A1D6C7C87256C91004C9EE3?Open&file=1260_01.pdf.

²⁰⁷ See *WISE supra* note 159, at 35–38 (explaining cognitive differences among animals); see also *Bueckner v. Hamel*, 886 S.W.2d 368, 377 (Tex. App. 1994) (Andell, J., concurring) (stating dogs and other mammals share similar emotional and cognitive characteristics with humans).

²⁰⁸ See sources cited *supra* note 115 and accompanying text.

²⁰⁹ *Harabes*, 791 A.2d at 1145; *Johnson v. Douglas*, 723 N.Y.S.2d 627, 628 (N.Y. Sup. Ct. 2001).

²¹⁰ See *Livingston, supra* note 133, at 791–92 (explaining that these types of suits are rare because courts traditionally have not allowed recovery of damages beyond the market value of a killed or injured animal).

²¹¹ *E.g.*, *Gluckman v. Am. Airlines, Inc.*, 844 F. Supp. 151, 158 (holding there is no independent cause of action for loss of the companionship of a pet, which is personal property); *Mitchell v. Heinrichs*, 27 P.3d 309, 313–14 (Alaska 2001) (holding dogs have the legal status of personal property, and recovery for the wrongful death of a dog is limited to its market value); *Pantelopoulos v. Pantelopoulos*, 869 A.2d 280, 284 (Conn. Super. Ct. 2005) (holding the owner of an intentionally killed animal could not recover for emotional distress); *Lockett v. Hill*, 51 P.3d 5, 7–8 (Or. Ct. App. 2002) (holding the owner of a negligently killed animal could not recover for emotional distress); *Carbasha v. Musulin*, 618 S.E.2d 368, 371 (W. Va. 2005) (holding sentimental value and emotional distress are not recoverable when a pet is killed because pets are personally property).

²¹² See *Livingston, supra* note 133, at 834.

For example, a class action was brought against Menu Foods as the result of selling cat and dog food, which the company knew was contaminated before the food was shipped.²¹³ The contaminated food resulted in the deaths of approximately nineteen hundred cats and twenty-two hundred dogs.²¹⁴ Although the pet owners settled for twenty-four million dollars, they were only allowed recovery for their economic losses, such as veterinary bills and burial costs, and only up to nine hundred dollars a person, regardless of whether they had incurred additional costs.²¹⁵ One member of the class, whose thirteen-year-old Sheltie died after eating the tainted food, stated:

I feel that the \$24 million is less than a slap on the wrist. It's a sad state of affairs and just goes to prove that until pet owners who really care about their pets push their government for stronger laws, these companies will continue to hold our pets at little or no regard.²¹⁶

Although the reasons for this low settlement amount are purely speculative, the lack of any meaningful recovery was surely a factor.²¹⁷ It is unlikely that a court would limit plaintiffs' recoveries and allow a culpable corporation to escape liability in exchange for a lighter caseload.

C. Policy Arguments in Favor of Allowing Additional Causes of Action and Recovery

There are many public policy arguments for expanding causes of action and recoverability beyond the fair market value for the destruction of a companion animal. There is a strong connection between animals and humans, and it is a bond that can promote emotional well-being.²¹⁸

²¹³ *In re Pet Food Prod. Liab. Litig.*, No. 07-2867, 2008 WL 4937632, at *1-2 (D.N.J. Nov. 18, 2009).

²¹⁴ Laura Allen, *Pet Food Industry Faces Court Challenge*, ANIMAL LAW COALITION, June 26, 2008, <http://www.animallawcoalition.com/animals-and-politics/article/546>.

²¹⁵ *In re Pet Food Prod. Liab. Litig.*, 2008 WL 4937632, at *1-2.

²¹⁶ Lisa Wade McCormick, *Pet Owner's Eligible for \$24 million in Landmark Melamine Settlement*, ConsumerAffairs.com, May 24, 2008, http://www.consumeraffairs.com/news04/2008/05/pet_food_recalls96.html.

²¹⁷ See discussion *supra* Part II.B.

²¹⁸ The Fair Housing Amendments Act of 1988, Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act allow people with emotional and mental health issues to be exceptions to landlord policies that prohibit pets because it aids in their mental welfare. See *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995)

(continued)

People who adopt animals from the humane society or take in strays from the street do not receive the same level of recovery as people who purchase their dogs from breeders. The current legal system penalizes these generous people by limiting the damages available to these pet owners.²¹⁹ A person who buys a pedigreed animal is compensated a greater amount of money through the fair market value approach than a person who adopts a stray in need of a home who would otherwise be exterminated, simply because this stray's market value is zero dollars. Although this fair market value technique may be fair in terms of reimbursing the owner, animal owners who sue over their injured or killed pets are not looking for replacements, but rather vindication of their rights and punishment of the offenders.²²⁰

It is reasonable to assume that an owner whose bichon frise is intentionally killed feels no more emotional loss than an owner whose rescue animal is killed. Yet, a higher dollar amount of liability is imposed on the tortfeasor who injures the pedigree dog than on the tortfeasor who injures or kills the rescue animal because of the fair market value approach.²²¹ Animal owners are not suing to replace their dog or cat like they would replace their coffee table, but rather, they are suing to compensate them for their emotional loss.

V. PROVIDING ANIMAL OWNERS WITH A REASONABLE AND JUST RECOVERY

Society has a responsibility to address the needs of animal owners whose companion animals have been injured by negligent or culpable third parties. The measure of damages for conduct that results in the animal's death or injury should include foreseeable damages. These include expenses such as veterinary bills, reasonable replacement costs, loss of companionship, and any mental anguish suffered by the animal owner.

(interpreting Fair Housing Act, § 804, as amended, 42 U.S.C. § 3604 (1994), to prohibit enforcement of a no-pet provision of a lease against a deaf individual who required companionship of a hearing dog); *Majors v. Hous. Auth. of DeKalb County Ga.*, 652 F.2d 454, 457 (5th Cir. 1981) (interpreting Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C. § 794 (1976), to prohibit enforcement of a no-pet provision of a lease against a mentally disabled woman who required companionship of her dog); *see also* 42 U.S.C. § 12132 (2006) (containing similar wording as the Fair Housing Act and Rehabilitation Act).

²¹⁹ See sources cited *supra* note 211 and accompanying text.

²²⁰ See Brief of Appellant at 2, *Carbasha v. Musulin*, 618 S.E.2d 368 (W. Va. 2005) (No. 32288).

²²¹ See discussion *supra* Part II.B.

Increasing damages and creating new causes of action for animal owners would help protect animal owners' rights, especially in cases where the person acted with any level of conduct above mere negligence.

A. *Statutory Solutions*

To adequately address animal owners' rights, every state needs to have a statutory cause of action and damages available that award more than just the animal's fair market value.

1. *Current Statutes to Modify*

A few states have statutes that lay the groundwork for legislatures that are looking to expand the rights of companion animal owners. One example is a California statute that allows exemplary damages for malicious conduct or gross negligence that results in the injury of a companion animal.²²²

Another example, and one that addresses courts' concern of overburdening dockets, is the once-proposed Colorado Companion Animal Bill.²²³ Even though this bill did not become law in Colorado, it would have required parties to use a form of alternative dispute resolution ("ADR") before litigating the case.²²⁴ If they were not able to reach an agreement using ADR, then they were permitted to go to court.²²⁵ The bill included a cause of action for loss of companionship and allowed parties to recover up to one hundred thousand dollars in damages.²²⁶ Additionally, the bill provided:

Current laws do not adequately address the recovery of damages for harm caused to companion dogs and cats by animal cruelty or by the negligent acts of animal health care professionals or veterinarians, and current laws do not deter that harm; . . . [c]urrent laws fail to make the owner of the injured companion dog or cat whole, and they do not accurately reflect society's favorable attitude toward companion dogs and cats; . . . [c]ompanion dogs and cats

²²² CAL. CIV. CODE § 3340 (West 1997).

²²³ H.B. 03-1260, 64th Leg., 1st Reg. Sess. (Colo. 2003) (not enacted), available at http://www.leg.state.co.us/2003a/inetcbill.nsf/fsbill%20cont%20/AF1FC02E0A1D6C7C87256C91004C9EE3?Open&file=1260_01.pdf.

²²⁴ H.B. 03-1260 § 13-21-1003(1) (Colo. 2003).

²²⁵ *Id.*

²²⁶ H.B. 03-1260 § 13-21-1003 (4) (Colo. 2003).

are often treated as members of a family, and an injury to or the death of a companion dog or cat is psychologically and emotionally significant and often devastating to the owner.²²⁷

Many legislatures agree with the Colorado bill, but they have not embraced it because they are afraid that high damages awards will be imposed on merely negligent defendants.²²⁸

The Connecticut statute is a good model for more conservative states, because it limits punitive damages to a mere five thousand dollars.²²⁹ It addresses the rights of companion animal owners, as well as courts' concerns. The statute limits the definition of "companion animal" to include only cats and dogs, and requires that the defendant must have intended to cause the harm.²³⁰ This is a good starting point for states that are trying to give companion animal owners rights; however, negligence should be the minimum culpability standard.

The Connecticut statute is effective because it allows plaintiffs to recover veterinary bills, the fair market value of the animal, and burial expenses.²³¹ Additionally, the statute allows up to five thousand dollars in punitive damages.²³² States should consider deviating from this part of the statute. Courts should have the discretion to increase or decrease punitive damage awards to better fit the offense.²³³ For example, if a large pet food company continued to sell food they knew contained rat poison, it is not likely that a mere five thousand dollars in punitive damages will adequately serve the purpose of punishing and deterring further similar behavior.

2. *Exceptions to Implement*

Statutes concerning companion animals should include exceptions. For example, veterinarians who harm animals by committing professional

²²⁷ H.B. 03-1260 § 13-21-1001(1)(b)–(c), (d) (Colo. 2003).

²²⁸ See, e.g., CAL. CIV. CODE § 3340 (West 1997); CONN. GEN. STAT. ANN. § 22-351a (West Supp. 2009); TENN. CODE ANN. § 44-17-403 (2007).

²²⁹ CONN. GEN. STAT. ANN. §§ 22-351 to 22-351a (West Supp. 2009); CONN. GEN. STAT. ANN. § 51-15(d) (West 2005).

²³⁰ § 22-351a(a)–(b).

²³¹ § 22-351a(b).

²³² §§ 22-351a(c); § 51-15.

²³³ See *Browning Ferris Indus. of Vt., Inc., v. Kelco Disposal Inc.*, 492 U.S. 257, 275 (1989).

negligence should be exempt. However, this exception should not include gross negligence. In *Knowles Animal Hospital, Inc. v. Wills*,²³⁴ a dog was severely burned and disfigured when an animal hospital did not monitor a heating pad that was left on for several days.²³⁵ The court upheld an award of thirteen thousand dollars, partially for mental anguish, because of the vet's great indifference towards the owner's of the dog.²³⁶

Additionally, there should be an exception for people whose animals inflict harm on other animals. If an animal owner acts reasonably and diligently to control the animal while in his or her possession, the owner should not be held liable. This is in line with the rationale that only offenders who have disregarded an injured animal owner's rights should be held liable.

This exception would have to include exceptions of its own. First, where a person continuously lets their animal freely roam a neighborhood and the person has actual or constructive knowledge that the animal has killed other animals in the past, the owner is on notice, and therefore, should be liable for any damages his or her animal causes. Second, the exception should not apply where, for example, the dog owner intentionally commanded his dog to attack another dog or cat. This of course would be culpable conduct, as the owner would be deliberately disregarding the rights of the other animal's owner.

3. *Model Statute*

Based on the policy concerns and exceptions proposed above, I have developed a model statute that strikes a balance between adequately expanding animal owners' rights and not overburdening courts or producing extremely high damages awards. This proposed model is a collection of the Colorado Companion Animal Bill, the T-Bo Act, Connecticut's statute, California's statute, and case law. States should expand or alter their statutes as necessary to allow recovery for animal owners, to adequately address animal owners' needs, and to reflect society's values placed on companion animals. The model statute is as follows:

(1) *Definitions*

²³⁴ 360 So. 2d 37 (Fla. Dist. Ct. App. 1978) (per curiam).

²³⁵ *Id.* at 38.

²³⁶ *Id.*

(a) As used in this section, “companion animal” means any domesticated dog or cat normally maintained, in or near, the household of its owner and that is dependent on a person for food and shelter.

(b) “Companion animal owner” shall be limited to one family. Each individual family member shall not be able to recover damages, but rather, the family unit, whether that be one or more persons, shall recover as one “companion animal owner,” and the damages available to that family shall be capped by the limits of this statute.

(2) *Alternative Dispute Resolution*

An owner must assert a claim through alternative dispute resolution to recover economic and non-economic damages for the loss or injury of his or her companion animal when a third party negligently, recklessly, or intentionally injures or kills such companion animal. If, in good faith, alternative dispute resolution is unsuccessful, the owner may bring a civil action to recover damages.

(3) *Economic Damages*

(a) Any person who negligently, recklessly, or intentionally kills or injures a companion animal shall be liable to the companion animal’s owner, unless the injuring party was acting in defense of his person or another person or as otherwise authorized by law.

(b) Such person shall be liable to the companion animal owner for damages, including, but not limited to, expenses of veterinary care, the fair monetary value of the companion animal, reasonable burial expenses for the companion animal, and reasonable attorneys’ fees. Such person shall also be liable for any costs associated with replacing the lost companion animal, including reasonable health care and training associated with obtaining a new companion animal.

(4) *Punitive Damages*

In addition to any economic damages awarded, the court may award punitive damages when the defendant’s acts toward the companion animal were committed by

negligent, reckless, or intentional conduct. The court may take into account the defendant's wealth when determining the punitive damages award, and the court shall award punitive damages in a fashion that punishes and deters without being overly financially burdensome.

(5) Emotional Damages

(a)(1) If a person's companion animal is killed or injured by the negligent, reckless, or intentional act of another, or the animal of another, the court may find the responsible party liable for up to fifteen thousand dollars in noneconomic damages. If such death is caused by the negligent act of another (as opposed to reckless or intentional), the death or fatal injury must occur on the property of the deceased pet's owner or caretaker, or while under the control and supervision of the deceased pet's owner or caretaker.

(a)(2) The owner of the injured animal will be required to prove his or her noneconomic damages for loss of companionship, and the award shall be based on factors, including, but not limited to: age of the companion animal, relationship and interaction with the companion animal, and effect of the loss of the animal on the animal owner's daily life. Noneconomic damages awarded pursuant to this section shall be limited to compensation for the loss of the reasonably expected society, companionship, love, and affection of the pet.

(b) Limits for noneconomic damages set out in subsection (a) shall not apply to causes of action for intentional infliction of emotional distress or any other causes of action available to the animal owner.

(7) Exceptions

(a) This section shall not apply to any not-for-profit entity or governmental agency, or its employees, negligently causing the death of a pet while acting on behalf of public health or animal welfare.

(b)(1) This section shall not apply to any animal owner of an animal that kills a companion animal, unless the animal

owner intentionally caused his or her animal to fight or kill the injured animal.

(b)(2) This section shall not apply if the animal owner of the animal that caused the injury has actual or constructive knowledge that his animal has a propensity to kill or injure other animals.

B. Case Law

Another important guide is case law from state supreme courts. Given the potential for large class action lawsuits, especially in cases involving poisonous pet food,²³⁷ state supreme courts need to set a standard to determine the causes of action and damages available to animal owners. Menu Foods' class action settled for twenty-four million dollars, which may seem like a great deal of money;²³⁸ however, one has to remember the great number of animals that were killed by this food. This was a situation where plaintiffs needed adequate remedies and the availability of punitive damages to insure a similar situation does not happen again.

A possible guide for the courts is the opinion in the *Knowles* case.²³⁹ The court determined that juries can award damages for the mental suffering of a companion animal owner whose animal is injured.²⁴⁰ This was allowed because the defendant's actions were such that there was a great indifference for the rights of the animal owners.²⁴¹

Another option is to follow the *Corso* case. In *Corso*, the court held that companion animals are more than personal property, but still less than human, and as such, normal rules of personal property did not apply.²⁴² This court encouraged other jurisdictions to deviate from the common law, which generally categorized companion animals as personal property.²⁴³

²³⁷ *In re* Pet Food Prod. Liab. Litig., No. 07-2867, 2008 WL 4937632, at *2 (D.N.J. Nov. 18, 2008) (approving the settlement of a case consolidating more than 100 class actions).

²³⁸ *Id.* at *2-3.

²³⁹ *Knowles Animal Hosp.*, 360 So. 2d 37.

²⁴⁰ *Id.* at 38-39.

²⁴¹ *Id.*

²⁴² *Corso v. Crawford Dog & Cat Hosp., Inc.*, 415 N.Y.S.2d 182, 183 (N.Y. Civ. Ct. 1979).

²⁴³ *See id.*

Womack is another example of expanding the damages available to animal owners whose animals are maliciously killed by third parties.²⁴⁴ This is a viable alternative for states who only want to expand rights for those animal owners who are in the most severe categories. In *Womack*, the court created a cause of action based on malicious injury to a companion animal.²⁴⁵

A more conservative and traditional approach that courts could follow is *Mitchell v. Heinreichs*.²⁴⁶ The *Mitchell* court allowed expenses such as burial expenses and costs of obtaining and training a new puppy, but disallowed damages for sentimental value.²⁴⁷ Although the court did not find reason to award punitive damages or damages for intentional infliction of emotional distress in this situation because the defendant's conduct was not outrageous enough, the court left those possibilities open and within the court's discretion because it did not prohibit punitive damages for personal property like other courts have done.²⁴⁸ Case law already in existence provides courts with the framework on how to award reasonable damages, while still having the option to award punitive damages in the most severe cases.²⁴⁹

Whatever case law courts choose to follow, it is important that they choose one which expands damages, especially if the state legislatures do not act. Now that thousands of pets have died due to contaminated pet food,²⁵⁰ it is important for state legislatures to come together, as representatives of the federal legislature came together after Hurricane Katrina,²⁵¹ to address the concerns that are plaguing animal owners. When politicians saw the devastating emotional effects that losing animals had on the people involved in Hurricane Katrina, they acted immediately and with overwhelming support.²⁵² In situations where these devastating effects

²⁴⁴ *Womack v. Von Rardon*, 135 P.3d 543, 546 (Wash. Ct. App. 2006) (affirming an award of emotional distress damages to plaintiff whose cat was stolen from a porch by teenagers and burned alive).

²⁴⁵ *Id.* ("For the first time in Washington, we hold malicious injury to a pet can support a claim for and be considered a factor in measuring a person's emotional distress damages.").

²⁴⁶ 27 P.3d 309 (Alaska 2001).

²⁴⁷ *Id.* at 313–14.

²⁴⁸ *Id.* at 312–14.

²⁴⁹ *Id.* at 311–14.

²⁵⁰ Allen, *supra* note 214.

²⁵¹ See discussion *supra* Part III.A.

²⁵² See discussion *supra* Part III.A.

were brought upon by a corporation, who may have knowingly poisoned animals with the food that was bought to nurture them,²⁵³ legislatures must act.

VI. CONCLUSION

Currently, case law and statutes are inconsistent and insufficient, which is problematic because they leave the rights of animal owners unprotected. The recent changes in both the law and our society reflect the shift that the United States has taken towards seeing animals as more than personal property. As values shift, society needs to adequately and consistently reflect the changes. There are several examples of statutes and case law that adequately address the rights of companion animal owners whose animals are injured by culpable third parties, and have addressed courts' concerns regarding expanding these rights.

Animals are more than property, and are not as easily replaced as coffee tables. People attach reasonable connections and emotions with companion animals, and as recent developments have taken place, it is each state legislature's responsibility, and each court's responsibility, to find the remedy and cause of action that best suits their residents' needs.

²⁵³ See *In re Pet Food Prod. Liab. Litig.*, No. 07-2867, 2008 WL 4937632, at *1-2 (D.N.J. Nov. 18, 2009).

