

The National Agricultural
Law Center



University of Arkansas · System Division of Agriculture
NatAgLaw@uark.edu · (479) 575-7646

An Agricultural Law Research Article

**Valuing Man's and Woman's Best Friend:
The Moral and Legal Status of
Companion Animals**

by

Rebecca J. Huss

Originally published in MARQUETTE LAW REVIEW
86 MARQUETTE L. REV. 47 (2002)

www.NationalAgLawCenter.org

VALUING MAN'S AND WOMAN'S BEST FRIEND: THE MORAL AND LEGAL STATUS OF COMPANION ANIMALS

REBECCA J. HUSS*

I. INTRODUCTION	48
II. PHILOSOPHICAL BASIS FOR THE MORAL STATUS OF ANIMALS.....	52
A. Historical Views.....	53
1. Greek History	53
2. Religious Traditions.....	55
B. Modern Theories on Animal Rights.....	60
1. Contractualism.....	60
2. Utilitarianism	62
3. Inherent Valuation	65
4. Other View Points	67
III. CURRENT LEGAL STATUS OF ANIMALS.....	68
A. Property	68
B. Personhood.....	71
1. Corporations	71
2. Ships	74
3. Other Nonhuman Persons.....	75
4. The "Rights" Issue and Personhood	78
C. Standing	79
D. Criminal Liability	82
E. Distinctions Among Animals	84
IV. VALUATION.....	88

* Associate Professor of Law, Valparaiso University School of Law; LL.M. University of Iowa, 1995; J.D. University of Richmond, 1992. The author wishes to thank Alfred L. Brophy, John D. Mandelbaum, and all the participants of the Valparaiso University faculty colloquium for their comments on this article. Special thanks to my research assistant, Kimberly Connor, and my administrative assistant, Melissa Mundt, for their invaluable assistance. The author dedicates this article in the memory of Tobias Reginold, a dog of great intrinsic value - no matter what the Iowa Supreme Court sets as the legal standard.

A. Case Law	89
1. Valuation	89
a. Market Value.....	89
b. Actual Value vs. Sentimental Value.....	89
2. Emotional Distress	93
B. Statutory Provisions.....	98
V. CONCLUSION.....	103

I. INTRODUCTION

The United States of America is at the forefront in illustrating how the relationship between human beings and companion animals is changing.¹ It is more than socially acceptable to have a dog or cat included in the household.² According to a recent poll, sixty-two percent of U.S. households include pets.³ The amount of money and attention spent on these "family members" can appear staggering to outsiders.⁴ In 2001, Americans spent over \$28.5 billion on everything from talking toys to gourmet food for their companion animals.⁵ Doggy day care centers and pet-sitting services help cope with daily living and the pressures of being in an empty house while the human family members are at school or working.⁶ Many major cities have set aside

1. For purposes of this Article, companion animals will be limited to canines and felines. Please note that in the animal health industry equines and "pocket pets" such as ferrets, birds, and reptiles are sometimes included in the definition of companion animals.

2. An example of the social acceptability of including animals in households is seen by the number of Presidents who have had their pets visible in the daily life of the White House. See *Early Today: Canine Companions of Past and Present US Leaders* (CNBC television broadcast, Jan. 4, 2002) (discussing various presidential pets and the Presidential Pet Museum); see generally NIALL KELLY, *PRESIDENTIAL PETS* (Constance Herndon, ed., Abbeville Press 1992); ROY ROWAN & BROOKE JANIS, *FIRST DOGS: AMERICAN PRESIDENTS AND THEIR BEST FRIENDS* (Algonquin Books of Chapel Hill 1997).

3. American Pet Products Manufacturers Association, Inc., 2000-2001 APPMA National Pet Owners Survey 2 (2001) [hereinafter APPMA] (pets in this category include dogs, cats, fish, birds, reptiles, and other small animals). The survey also reported 39% of U.S. households include at least one dog and 34% of U.S. households include at least one cat. *Id.*

4. In a recent poll, 73% of people with dogs and 65% of people with cats agreed with the statement that the companion animals in their households were like a child or a family member. APPMA, *supra* note 3, at xxxiii; see also Leslie Mann, *Pet's Domain Includes the Hearth as well as the Heart*, CHI. TRIB., Apr. 2, 2000, at 1 (reporting on change of dogs from utility animals to members of families).

5. Azell Murphy Cavann, *Animal Magnetism - Doggone it! Americans Have a Soft Spot for Their Pets*, BOSTON HERALD, June 27, 2001, at 56.

6. Dog-sitting services can be used when a family is out of town or on a daily basis

"dog parks," so dogs can run unleashed without running afoul of city ordinances.⁷ For those who cannot bear to leave their pets at home while they are on vacation, there are camps where humans and their dogs can go to train and bond together.⁸ Individualized herbal treatments are available if a companion animal seems stressed.⁹

Veterinary medicine offers preventive care as well as treatment for major diseases, with holistic treatments also available.¹⁰ There are

whereby a dog-sitter (or cat-sitter) comes by the home and takes the animal for a walk, feeds it, and interacts with it. Generally, for day care the animal is dropped off (or in some cases picked up and taken to a central location) to interact with other dogs and caretakers. Dave Ford, *Bark and Ride*, S.F. CHRON., Feb. 2, 2001, at 1. The costs of these services vary considerably based on the geographic location and level of care. Beth Dolan, *Yappy Days*, TAMPA TRIB., Mar. 23, 2001, at 1. There are organizations that provide information about sitters in various geographic areas. See, e.g., *Petsitters.com*, <http://www.petsitters.com> (last visited Feb. 5, 2002) (providing information on and by the National Association of Pet Sitters).

7. NPR: *Talk of the Nation: Designated Parks for Dogs* (NPR radio broadcast, Aug. 28, 2001); Brian E. Clark, *Dog Park is Possible for Rancho Bernardo: Council's Maienschein Working On Project*, SAN DIEGO UNION-TRIB., Oct. 20, 2001, at N11; Robert E. Misseck, *Dogs Get a Place to Roam at Echo Lake*, STAR-LEDGER (Newark, N.J.), Nov. 9, 2001, at 35; Eileen Rivers, *At New Park, Every Dog Has His Play; Quiet Waters Opens Canine Rumpus Room*, WASH. POST, Dec. 6, 2001, at TO3; Dina Sanchez, *Talk of Dog Park Perks Ears in Winter Springs: Group Wants One Even More Fetching than Sanford's*, ORLANDO SENTINEL, Dec. 21, 2001, at G1; Fred Swegles, *Dogs Will Get Their Day in City's Parks: Council Approves Creating Place For Pooches Only, Access to Three Parks*, ORANGE COUNTY REG. (Cal.), Oct. 12, 2001, at Cover; Annie Sweeney, *Lincoln Parkers Want Place for Their Dogs*, CHI. SUN-TIMES, Aug. 15, 2001, at 23; *Dogpark.com*, <http://www.dogpark.com> (last visited Feb. 5, 2002).

8. Devin Rose, *Camp Dogwood: It's an Outdoor Adventure for Canines and their Companions*, CHI. TRIB., Nov. 4, 2001, at 13-1 (discussing a dog camp north of Chicago and other dog camps).

9. Rebecca Jones, *Holistic Pet Care Taps into the Essence of Mental Health*, ROCKY MOUNTAIN NEWS, June 23, 2001, at 3F (reporting on the use of herbal essences to treat emotional ailments).

10. Frank Bruni, *Acupuncture for the Dog: Alternative Medicine Catches on with Pet Owners*, N.Y. TIMES, Aug. 18, 1998, at B1 (discussing alternative treatments for animals including acupuncture and hydrotherapy). There are now veterinary specialists in a variety of fields, such as ophthalmology and cardiology. Kathleen Kiley, *Healing Pets with a Holistic Approach*, N.Y. TIMES, Aug. 5, 2001, § 14CN, at 7 (discussing holistic veterinary practices including the use of acupuncture); Sam Lubell, *Alternative Medicine for Pets*, N.Y. TIMES, Sept. 2, 2001, § 14WC, at 3 (discussing holistic veterinary practice); Peggy Noonan, *New Tricks for Old Cats and Dogs, Too*, USA WEEKEND, May 11-13, 2001, at 6; see also Jane E. Brody, *V.I.P. Medical Treatment Adds Meaning to a Dog's (or Cat's) Life*, N.Y. TIMES, Aug. 14, 2001, § F, at 4 (discussing medical treatments available for animals including kidney transplants for dogs and cats costing around \$7,000 and \$5,000 respectively); see generally, Alt Vet Med, *Complementary and Alternative Veterinary Medicine*, <http://www.altvetmed.com> (American Holistic Veterinary Medical Association) (last visited Feb. 5, 2002); *American Academy of Veterinary Acupuncture*, <http://www.aava.org> (last visited Feb. 5, 2002).

insurance plans to assist in paying for the cost of this care.¹¹ If the medical treatment cannot save an animal, pet caskets and pet cemeteries provide a fitting end to a companion animal's existence.¹² From a human-to-human relationship standpoint, estate planning and custody disputes over animals are becoming part of the mainstream and receiving more coverage in the legal press.¹³

Popular media reflect the interest and connection that Americans have with animals. From the days of Lassie, Rin Tin Tin, and Benji, there is now an entire network devoted to animals.¹⁴ The Animal Planet™ cable network airs shows focusing on emergency veterinary care, the adjudication of disputes between pet owners, and the work of the American Society for the Prevention of Cruelty to Animals in New York City.¹⁵ The PAX™ network has a series entitled "Miracle Pets" that illustrates a variety of ways in which animals have saved and

11. Christine Winter, *Pet Health Insurance Plans Grow by Leaps and Bounds*, SUN-SENTINEL (Fort Lauderdale), Mar. 26, 2000, at 1A. A survey indicated that 91% of pet owners take their dogs or cats to the veterinarian regularly. *Id.* Traditional health insurance policies have been available for twenty years; HMOs and discount networks have recently been established for veterinary treatment. *Id.*; see also Michelle Leder, *How Much is that \$100 Deductible in the Window?*, N.Y. TIMES, July 22, 2001, § 3, at 10 (discussing pet insurance policies).

12. La Monica Everett-Haynes, *Rest in Peace: Sending Spot to His Reward; Casket Company Tries to Ease Pain of Parting with Pets; Caskets Give People a Way To Honor Pets*, SALT LAKE TRIB., Aug. 4, 2000, at B1; Linda Wilson Fuoco, *Cemetery Offers Resting Place for Pets and Their People*, PITTSBURGH POST-GAZETTE, Feb. 20, 2000, at W4; Andrea Jones, *Pet Cemetery an Idyll to Unconditional Love*, ATLANTA J. & CONST., Dec. 25, 2001, at 16D; John Murawski, *A Quiet Resting Place for Lost Loved Ones*, PALM BEACH POST, Feb. 26, 2001, at 1A; Alex Roth, *No Ghosts, Just Beloved Pets Here*, SAN DIEGO UNION-TRIB., Oct. 31, 2000, at B-1 (referring to "a saying in the pet-cemetery business that people bury people because they have to, but they bury pets because they want to"); Pat Shellenbarger, *Burial Services Help Survivors Mourn Loss of Pets*, SOUTH BEND TRIB., May 21, 2001, at C5 (quoting Brenda Drown, the executive secretary of the International Association of Pet Cemeteries, who notes that there are 750 to 800 pet cemeteries in the United States). The cremation of pet remains is quite common. Dawn Wotapka, *Owners Increasingly Opt to Cremate Deceased Pets*, THE NEWS AND OBSERVER (Raleigh, N.C.), Sept. 14, 2001, at N1.

13. Gerry W. Beyer, *Pet Animals: What Happens When Their Humans Die?*, 40 SANTA CLARA L. REV. 617 (2000); Jennifer R. Taylor, *A "Pet" Project for State Legislatures: The Movement Toward Enforceable Pet Trusts in the Twenty-First Century*, 13 QUINNIPIAC PROB. L.J. 419 (1999). An illustration of how far someone has been willing to go over the disposition of pets in a custody dispute is the case of Lynn Goldstein who received a thirty-day jail sentence in Kentucky for lying to the court and refusing to give up custody of two family pets to her ex-husband. *Pet Peeves Making Her Famous*, PORTER COUNTY POST TRIB. (Ind.), June 9, 2001, at A2; *ABC News: Good Morning America: Lynn Goldstein Explains Why She is in Jail Over a Custody Battle for Two Cats* (ABC television broadcast, June 4, 2001).

14. Animal Planet™ is a Discovery Channel™ spin-off devoted to the animal kingdom.

15. *TV's Animal Crush*, THE KANSAS CITY STAR, July 7, 2001, at E-1.

improved human lives.¹⁶ Unlike cartoon series of the past that anthropomorphized cute animal characters, much of the current media focus upon animal-human interaction.

Even more serious aspects of animal rights issues have infiltrated the popular media. The 2000–2001 season of "Law and Order" included a show based on the issue of animal rights versus human life. The story line focused on an AIDS researcher who died after an animal rights activist opened cages that contained infected primates.¹⁷ Rather than focusing on the familiar issue of animal welfare, the episode provided a meaningful discussion of the legal status of animals.¹⁸ There is greater acceptance of serious study in the area of animal law, with law schools offering classes in the subject and commentators and practitioners in the area receiving wider media exposure.¹⁹

Although it is important to consider the big picture of the treatment of all animals, including those used for food and clothing, most Americans seem to agree that the type of animal being considered is a central component of the value placed on it. For example, it is not socially acceptable to wear a coat made of dog or cat fur in the United States, and the visible mistreatment of those animals generally receives a highly negative response from a significant portion of the public.²⁰

16. *Id.* at E-6. A common theme on "Miracle Pets" is a dog or cat that alerts humans in a house to a fire or other dangerous situation.

17. *Law & Order: Whose Monkey is it Anyway? (a.k.a. Curious George)* (NBC television broadcast, July 25, 2001).

18. *Id.* Note specifically the closing argument of the defense counsel discussing the status of animals as property in U.S. society. *Id.*

19. Peter Huck, *This Man is a Lawyer. On His Desk is Pepe, His Next Client*, THE EVENING STANDARD (London), Nov. 1, 2001, at 25 (stating that, at the time the article was printed, more than twenty law schools offered animal law courses, including Georgetown, Harvard, and UCLA).

20. Jean C. Yasuhara, Comment, "*Cruella de Vil*" Revisited: *The International Dog and Cat Fur Trade*, 22 LOY. L.A. INT'L & COMP. L. REV. 403, 404 (2000) (discussing reactions to a Humane Society of the United States investigation into the use of domesticated dog and cat fur on coats). A few states have laws prohibiting the sale of dog or cat fur. *Id.* at 416–23. Additionally, federal legislation prohibits the importation of dog and cat fur products. 19 U.S.C. § 1308 (1994). It is also not socially acceptable to eat dogs or cats in the United States. ALAN M. BECK & AARON H. KATCHER, BETWEEN PETS AND PEOPLE: THE IMPORTANCE OF ANIMAL COMPANIONSHIP 22–23 (1996) (discussing the moral prohibition in the United States against eating dogs and cats). An example of a case of animal cruelty that received significant public response was the case of "Leo," a Bichon Frise, who died after being thrown into traffic in a road rage incident. *Man Guilty of Animal Cruelty: Convicted of Tossing Dog to Its Death*, NEWSDAY (N.Y.), June 20, 2001, at AO2. A significant reward fund was raised for information leading to the conviction of Leo's killer. Matthew B. Stannard, *Donors Take \$45,000 Back From Reward in Leo Case: Virginia Group Says it Wasn't Consulted*, S.F. CHRON., June 28, 2001, at A13 (leaving a reward in the amount of approximately \$70,000 to

The changing nature of the relationship between people and companion animals has been attributed to the urbanization, industrialization, and isolation of modern society.²¹ Regardless of the reasons for the changing treatment of companion animals, it appears that the trend towards greater integration of these animals into households is likely to continue. The current legal system has not kept up with the reality of the relationship between companion animals and their human caretakers.²²

How society values companion animals is inextricably linked to the moral and legal status of these animals. This Article first provides an overview of the philosophical basis of the allocation (or non-allocation) of moral status to nonhuman animals considering historical and modern views of animals.²³ Second, it analyzes the legal status of animals under the current system and discusses the idea of extending legal "personhood" to such animals.²⁴ Next, it considers the common law and statutory basis for the current valuation of companion animals.²⁵ Finally, this Article supports and promotes the idea that there is a rational basis for changing the way that companion animals should be valued by the legal system and recommends the adoption of statutory provisions to promote consistency and certainty in these cases.²⁶

II. PHILOSOPHICAL BASIS FOR THE MORAL STATUS OF ANIMALS

The animal rights movement was historically based on welfare

be split among several people who provided information in the case). The Leo case received national news coverage. *Good Morning America: Sara McBurnett Talks About Case of Road Rage in Which Her Dog Was Yanked From Her and Thrown into Oncoming Traffic* (ABC television broadcast, Apr. 16, 2001); *Sara McBurnett Discusses Andrew Burnett's Indictment for Killing Her Dog Leo in a Fit Of Road Rage* (NBC television broadcast, Apr. 16, 2001).

21. GAIL F. MELSON, *WHY THE WILD THINGS ARE: ANIMALS IN THE LIVES OF CHILDREN* 25-31 (2001).

22. One commentator divides how we relate to animals in three distinct ways, defining the level of responsibility we have to them. These categories are animals as wild creatures, animals domesticated and reared for human purposes, and animals as pets. ROGER SCRUTON, *ANIMAL RIGHTS AND WRONGS* 82 (3d ed. 2000). Scruton articulates that pets have honorary membership in the moral community and have a claim to our protection. *Id.* at 83. By causing pets to be dependent on humans, Scruton posits that pets have a special claim on us. *Id.* at 82-83. See also *infra* notes 156-64 (discussing the classification of animals under the common law).

23. See *infra* text accompanying notes 27-151. Please note that the references to "animals" throughout this paper refer to nonhuman animals.

24. See *infra* text accompanying notes 152-314.

25. See *infra* text accompanying notes 315-98.

26. See *infra* text accompanying notes 399-403.

ideals.²⁷ In the 1800s, organizations dedicated to the protection of animals began to form, and laws were widely passed to protect animals from cruelty.²⁸ The philosophical platforms of these organizations generally did not extend to the consideration of the legal status of animals.²⁹ Today, much of the discussion on these issues has shifted from this traditional approach concentrating on companion animals, to a more expansive consideration of animals, including the examination of the scientific and agricultural uses of animals.³⁰ The focus of the philosophical basis of animal rights in this Article will be on the theories that have been at the forefront of the movement in recent years.

A. Historical Views

In order to understand the current debate on the valuation of animals, it is necessary to consider the development of some of the prevalent attitudes towards animals throughout history. Often, these are described as theories on "animal rights," although this term does not necessarily denote the granting of legal rights. A complete picture of the historical background of animal rights is beyond the scope of this Article. However, many modern thinkers in this area refer to ancient Greek philosophers, and a brief description of some Greek philosophical ideas is provided. As religion is a strong influence in our modern world, a description of the basis for the treatment of animals in some religious traditions is also included.

1. Greek History

The complex philosophical thinking of ancient Greece³¹ included

27. In fact, the common use of the term animal "rights" has been criticized because the purpose of these organizations was (and is in many cases today) the protection of animals (welfare) without the allocation of any rights to the animals *per se*. GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW (ETHICS AND ACTION) 119-33 (1995) [hereinafter FRANCIONE, PROPERTY].

28. The American Society for the Prevention of Cruelty to Animals was established in 1866. DAVID FAVRE & PETER L. BORCHELT, ANIMAL LAW & DOG BEHAVIOR 258-59 (1999); *see also* STEVEN M. WISE, RATTLING THE CAGE: TOWARDS LEGAL RIGHTS FOR ANIMALS 43-44 (2000) [hereinafter WISE, RATTLING] (discussing the enactment of anticruelty statutes in the United States and the United Kingdom).

29. GARY L. FRANCIONE, RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT 7-12 (1996).

30. Stephen H. Webb, *Pet Theories: A Theology for the Dogs*, 78.2 SOUNDINGS 213, 215 (1995). Webb also discusses the change from the domination of the welfare movement by women to the more radical movement that is dominated by white male philosophers. *Id.*

31. Martha C. Nussbaum, *Animal Rights: The Need for a Theoretical Basis*, 114 HARV. L. REV. 1506, 1514 (2001). Although predominantly a book review of Wise's work, *see supra*

Aristotle's oft-cited discussions of the influential idea that nature is fundamentally organized like a ladder.³² Also referred to as the "Great Chain of Being,"³³ spiritual and divine beings were at the top of the ladder (or end of the chain).³⁴ The most rational human beings occupied the next highest rung, with the progressively lower rungs inhabited by rational beings, sentient beings ("conscious, perhaps able to experience") and "creatures who were barely alive."³⁵ "The lower-rung dwellers were designed to serve the higher-rung dwellers."³⁶

Another influential school of thought in ancient Greece is referred to as the Stoic philosophy.³⁷ One tenet of Stoic thought is that "only rational beings [*i.e.*, humans] can understand the requirements of justice and participate in the community formed by rational beings"; thus, there is no moral obligation to animals, and they can be excluded from the moral community.³⁸ Under this school of thought, the belief that animals are incapable of reasoning means that no ethical concerns are involved in the use of animals.³⁹

Although less well known than Aristotle or the Stoics, other

note 28, Professor Nussbaum also discusses various philosophical theories outside those covered by Wise. *Id.*

32. WISE, RATTLING, *supra* note 28, at 11.

33. *Id.* at 11. Professor Nussbaum criticizes Wise's characterization of Greek history and asserts that "there is no evidence that [Aristotle] believed in [the view that there was] a universal teleology of nature, such as the 'Great Chain of Being.'" Nussbaum, *supra* note 31, at 1517. Professor Nussbaum references the hundreds of statements in Aristotle's biological writings suggesting that each animal's goal is its own life and flourishing to counterbalance Aristotle's oft-cited remark that animals exist for human's sake. *Id.* at 1519. For a selection of Aristotle's writings that include the inferential statements that "[nature] has made all animals for the sake of man," see Aristotle, *Animals and Slavery*, in ANIMAL RIGHTS AND HUMAN OBLIGATIONS 109-10 (Tom Regan & Peter Singer eds., Prentice-Hall, Inc. 1976).

34. WISE, RATTLING, *supra* note 28, at 11.

35. *Id.* Aristotle denied that animals possessed rationality or beliefs but acknowledged that animals were sentient. GARY L. FRANCIONE, INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR THE DOG? 112 (2000) [hereinafter FRANCIONE, INTRODUCTION].

36. WISE, RATTLING, *supra* note 28, at 11.

37. *Id.* at 14.

38. FRANCIONE, INTRODUCTION, *supra* note 35, at 122.

39. WISE, RATTLING, *supra* note 28 at 15; *see also* Nussbaum, *supra* note 31, at 1519. Nussbaum agrees with Wise's basic coverage of the Stoics but also notes the complexity in Stoic philosophy. *Id.* One of the subgroups of Stoicism is Epicureanism, whose followers Nussbaum identifies as "in many ways ancestors of modern Utilitarians, basing ethics above all on sentience, pleasure, and pain." *Id.* Francione also recognizes the Epicureans, and states that they maintained that "justice extends only to those who can make contracts to avoid causing harm or suffering to others—an ability limited to humans." FRANCIONE, INTRODUCTION, *supra* note 35, at 123. Nussbaum also criticizes Wise for not acknowledging the egalitarian nature of Stoic thought which had a significant influence on later philosophers. Nussbaum, *supra* note 31, at 1520.

influential movements in ancient Greece had philosophies supporting the moral status of animals. Pythagoreanism represented one such prominent movement that believed in the kinship of all life and the transmigration of souls.⁴⁰ According to these beliefs, Pythagoreans "attacked all cruelty to animals" and hence practiced a vegetarian lifestyle.⁴¹ Other Greek philosophers, including Plato, Plotinus, and Porphyry, also supported the adoption of a vegetarian diet.⁴²

2. Religious Traditions

Religious philosophies form the core of the views of many people regarding the status of animals. Although religious beliefs vary widely around the world, U.S. culture is viewed as being primarily based on Jewish and Christian beliefs,⁴³ and this discussion will center on some of the arguments made by theologians in these traditions.

The basic precept of the relationship between animals and humans under Jewish law is that humans are to have dominion over animals.⁴⁴ However, this is just the beginning of the analysis of this relationship, as Judaism teaches that people have special responsibilities to animals, as animals are part of God's creation as well.⁴⁵ Not only must humankind

40. Nussbaum, *supra* note 31, at 1514.

41. *Id.* Plutarch, who is defined as a Middle Platonist is cited as a major thinker about vegetarianism and animal entitlements. *Id.* at 1516. For a selection of manuscripts discussing vegetarianism by Plutarch, see Plutarch, *Of Eating of Flesh*, in ANIMAL RIGHTS AND HUMAN OBLIGATIONS, *supra* note 33, at 111.

42. JAMES B. REICHMANN, EVOLUTION, 'ANIMAL RIGHTS,' AND THE ENVIRONMENT 369 (2000). The belief in reincarnation is often at the heart of western philosophies that advocate a vegetarian diet. *Id.*

43. FRANCIONE, INTRODUCTION *supra* note 35, at 106. There are obviously many other traditions that are becoming part of American culture as religious beliefs become more diverse. See *infra* notes 62-70 and accompanying text for a brief description of some other religions' treatment of animals.

44. Roberta Kalechofsky, *Jewish Law and Tradition on Animal Rights: A Usable Paradigm for the Animal Rights Movement*, in JUDAISM AND ANIMAL RIGHTS: CLASSICAL AND CONTEMPORARY RESPONSES 46 (Roberta Kalechofsky ed., 1992). People are to have "dominion over the fish of the sea, and over the fowl of the air, and over every living thing that creeps upon the earth." Richard H. Schwartz, *Tsa'ar Ba'alei Chayim - Judaism and Compassion for Animals*, in JUDAISM AND ANIMAL RIGHTS: CLASSICAL AND CONTEMPORARY RESPONSES, *supra*, at 61 (quoting *Genesis* 1:28) [hereinafter Schwartz, *Tsa'ar*]; see also Richard H. Schwartz, *Questions and Answers in JUDAISM AND ANIMAL RIGHTS: CLASSICAL AND CONTEMPORARY RESPONSES*, *supra*, at 222, 224 [hereinafter Schwartz, *Questions*].

45. Schwartz, *Tsa'ar*, *supra* note 44, at 59. Unlike the emphasis in many Christian traditions of the domination of man over animals, in Jewish thought, the domination of animals is balanced by the obligation to treat animals compassionately. Ze'ev Levy, *Ethical Issues of Animal Welfare in Jewish Thought*, 45 JUDAISM 47 (1996).

"refrain from inflicting unnecessary pain on any animal," a person is also required "to lessen the pain whenever you see an animal suffering, even through no fault of yours."⁴⁶ Several Torah laws mandate the compassionate treatment of animals,⁴⁷ including an obligation to "take care of one's household animals and to treat them well."⁴⁸ Regardless of the compassionate treatment mandated under Jewish law, it is clear that humans and animals are not viewed equally, and that human life is valued more highly than animal life.⁴⁹ The use of animals for food and to save human life is supported under Jewish law, although a number of Jewish scholars are analyzing the ability to follow the basic precepts of Jewish law given the treatment of animals in modern times.⁵⁰

The bases for the treatment of animals under traditional Christian theology may be due to the dual beliefs that, as a moral right, humans have a superior status in the world, and that animals are not legitimately the subject of such moral rights.⁵¹ John Locke, utilizing the Book of

46. Schwartz, *Tsa'ar*, *supra* note 44, at 64-65 (quoting Rabbi Samson Raphael Hirsch). Various rules should be followed in connection with the Kosher slaughtering of animals, including one that the slaughtering must be performed in the most painless and humane way. Ronald L. Androphy, *Shechitah*, in JUDAISM AND ANIMAL RIGHTS: CLASSICAL AND CONTEMPORARY RESPONSES, *supra* note 44, at 76, 76.

47. Examples of these laws include: (1) "A person should not eat or drink before providing for his animals"; (2) "We are forbidden to take the mother bird and its young together. The mother bird must be sent away before its young are taken"; (3) "Thou shalt not plow with an ox and an ass together"; (4) "Thou shalt not muzzle the ox when he treadeth out the corn"; and (5) "Animals should not be allowed to suffer discomfort. 'If thou see the ass of him that hateth thee lying under its burden, thou shalt surely not pass by him; thou shalt surely unload it with him.'" Schwartz, *Tsa'ar*, *supra* note 44, at 61-63 (Biblical citations omitted).

48. Levy, *supra* note 45, at 53 (referencing the treatment of domesticated animals); see also Aviva Cantor et al., *Kindness to Animals: The Soul of Every Living Thing*, in JUDAISM AND ANIMAL RIGHTS: CLASSICAL AND CONTEMPORARY RESPONSES, *supra* note 44, at 26, 32 (discussing the treatment of pets and strays).

49. Schwartz, *Questions*, *supra* note 44, at 238.

50. An example of the changing views of people on the treatment of animals utilizing religious arguments is the discussion by many Jewish scholars over the continued consumption of animals produced by modern factory farming techniques. Due to the methods used to produce these animals, an argument is made that the commandment that one should strive to avoid causing animals pain (*tsa'ar ba'alei chayim*) cannot be fulfilled regardless of whether the laws of *shechita* (the ritual slaughtering of animals) are met. LEWIS G. REGENSTEIN, REPLENISH THE EARTH; A HISTORY OF ORGANIZED RELIGIOUS TREATMENT OF ANIMALS AND NATURE—INCLUDING THE BIBLE'S MESSAGE OF CONSERVATION AND KINDNESS TOWARD ANIMALS 199 (1991). Pleasure hunting is prohibited by Jewish law. Cantor, *supra* note 48, at 30. "The Talmud asserts that early humans were vegetarians, between the time of the creation and the Great Flood" and many Jewish sects followed a vegetarian diet. REGENSTEIN, *supra*, at 199-200.

51. ANDREW LINZEY, ANIMAL RIGHTS: A CHRISTIAN ASSESSMENT OF MAN'S

Genesis, advocated the idea that God granted humans dominion over all of the animals on the Earth.⁵² Locke's interpretation of this grant of human dominion allows humans to utilize animals for their sole benefit and advantage.⁵³ Even though some Christian theologians acknowledged that animals could experience pain or suffering, they often concluded that animals existed only for the benefit of humans.⁵⁴ However, the interpretation of 'dominion' as 'dominance' is not universal, as some theologians theorized that it should be interpreted as a form of stewardship.⁵⁵ This stewardship approach finds support in Biblical passages devoted to kindness towards animals.⁵⁶

Some theologians in the Christian tradition have articulated moral concern for animals, but many have rejected any notion that animals have moral significance.⁵⁷ As animals are not capable of exercising moral choice, they are not in possession of moral rights.⁵⁸ Under certain dogmas the lack of an immortal soul excludes animals from moral consideration.⁵⁹ Notwithstanding the apparently predominant view in Christianity that humans rightfully hold dominance over animals, it is

TREATMENT OF ANIMALS 20 (1976) [hereinafter LINZEY, ANIMAL]. Of course, the same superiority supported the use of slavery and the subjugation of women for many years. Andrew Linzey, *The Theological Basis of Animal Rights*, 108 CHRISTIAN CENTURY 906 (1991) [hereinafter, Linzey, *Theological*].

52. FRANZIONE, INTRODUCTION, *supra* note 35, at 107.

53. *Id.*

54. *Id.* at 108 (referring to Saint Augustine (c. 354–430) and Saint Thomas Aquinas (c. 1225–74), who in turn refer to the apparent indifference of Jesus to animals as described in the New Testament); see also LINZEY, ANIMAL, *supra* note 51, at 9 ("Very few, if any, Catholic or Protestant theologians have questioned man's right to exploit animals and to use animal life for the needs of man.").

55. LINZEY, ANIMAL, *supra* note 51, at 16. If the stewardship approach were to be accepted, humans would have certain responsibilities towards animals. *Id.*

56. BERNARD E. ROLLIN, ANIMAL RIGHTS & HUMAN MORALITY 30 (1992).

57. FRANZIONE, INTRODUCTION, *supra* note 35, at 108 (referring to Saint Basil and Saint Francis of Assisi as exceptions to the general treatment of animals by Christian thinkers). Obviously if animals have no moral significance, humans cannot owe any moral duties to them based on the animals themselves. There are still arguments that animals should be treated without cruelty, but these can be based on the impact upon humans, not on the animals themselves. See *infra* notes 274–78 and accompanying text.

58. LINZEY, ANIMAL, *supra* note 51, at 22 (citing to Peter Green's discussion of the ability of an animal to be considered a person in THE PROBLEM OF RIGHT CONDUCT: A TEXTBOOK ON CHRISTIAN ETHICS (1936)).

59. ROLLIN, *supra* note 56, at 28 (referencing Catholic dogma relating to the lack of an immortal soul). Note that Rollins states that some Catholic theologians drew opposite conclusions and found that animals should be the object of moral concern. *Id.* at 24. In contrast, the "Hebrew term *nefesh chaya* (a 'living soul') was applied in Genesis (1:21, 1:24) to animals as well as people." Schwartz, *Tsa'ar*, *supra* note 45, at 59.

clear that no single attitude towards the treatment of animals has emerged.⁶⁰ Various denominations have formulated distinctions regarding the appropriate limits of what can properly be done with animals.⁶¹

Many of the religions that arose in the East have a strong respect for all living creatures. Hinduism is a way of life that holds a core belief in the unity of all creation.⁶² As with some of the Greek philosophers, one of the tenets of Hinduism is the belief in the transmigration of souls.⁶³ Animals that are kept as pets are "to be cared for particularly well by Hindus."⁶⁴

Under Buddhist teachings, a larger unified life force contains all life forms, and all life forms are thereby interrelated.⁶⁵ By doing harm to any part of this unified life force, persons not only harm themselves, but all life.⁶⁶ Under Buddhism, animals, as well as humans, have the

60. STEPHEN R. L. CLARK, *THE MORAL STATUS OF ANIMALS* 195 (1977) (discussing the positions of a plethora of theologians in the context of the moral status of animals). See generally REGENSTEIN, *supra* note 50.

61. CLARK, *supra* note 60, at 195. Clark discusses the argument that Jesus was a vegetarian and finds that the evidence does support such a proposition. *Id.* at 196; see also Webb, *supra* note 30, at 26-35 (discussing vegetarianism and Christianity). Another commentator reviews Biblical stories relating to Jesus' use of animals and finds that philosophical vegetarianism based on the grounds that eating flesh meat is inherently immoral is incompatible with Christ's teachings. REICHMANN, *supra* note 42, at 368. These include the parable of the prodigal son in which a fattened calf was killed to celebrate the return of a wayward son. *Id.* (citing to *Luke* 15:11). But see REGENSTEIN, *supra* note 50, at 180-82 (discussing the Edenite Society which argues that references to Jesus and his followers as vegetarians were deleted from the Bible). There does appear to be some changes in the viewpoint that humans are morally free to do as they like with animals under the Christian tradition. Linzey, *Theological*, *supra* note 51, at 906. For a parallel view of the recent developments of thought under Judaism see note 50 and accompanying text.

62. REGENSTEIN, *supra* note 50, at 221. Just as with many other religions, there are many organizations and forms of Hindu beliefs. The discussion here will focus on the beliefs that appear to be central to the religion. Hinduism may be best known for considering cows to be holy, but all living creatures are thought "to be worthy of respect and life." *Id.* Hinduism is primarily a religion of India, with 80% of its citizens nominally adhering to its tenets. *Id.*

63. *Id.* at 221. The status of the next life is dependent on the deeds and thoughts of the current life. *Id.* The poor conduct of a person in the current life will result in a lower status in the next life. *Id.*

64. *Id.* at 224. Notwithstanding the teachings of Hinduism, animal welfare in India is not well-developed, and many will eat meat so long as someone else kills the animal. *Id.* at 227. An early offshoot of Hinduism, Jainism, has been described as the religion that is the most strict "in its commitment to avoid harming living creatures." *Id.* at 229. Jains practice vegetarianism, oppose animal sacrifice, and support animal sanctuaries throughout India. *Id.* at 231.

65. *Id.* at 237.

66. *Id.*

potential for attaining enlightenment.⁶⁷

The Koran (*Qur'an*) teaches the followers of Islam "that the bond between man and nature is inseparable."⁶⁸ Animals, as well as natural resources, are always to be treated with reverence and respect, and animals have traditionally been treated with compassion.⁶⁹ Notwithstanding the teachings regarding the benevolent treatment of animals, it is acceptable to kill animals for food so long as the slaughter is done as humanely as possible.⁷⁰

There are indications that certain religious communities have begun to recognize the unique bond between humans and their animal companions. It is not uncommon for churches to host annual events in which humans bring their companion animals to be blessed. For example, many such events are scheduled close to the observance of the Feast of St. Francis of Assisi, the Catholic patron saint of animals.⁷¹ Although it is not common for animals to be welcomed at churches, at least one church allows dogs to attend regular services with their human guardians, and a chapel was recently built specifically for the use of dogs and their human companions.⁷²

Although not connected to a religious school of thought, a

67. Julie B. Bloch, *Preserving Biological Diversity in the United States: The Case for Moving to an Ecosystems Approach to Protect the Nation's Biological Wealth*, 10 PACE ENVTL. L. REV. 175, 191 (1992). Under Buddhism, there is a belief in a cycle of rebirths with devout Buddhists practicing vegetarianism. *Id.* Note that the practice of vegetarianism is not unanimous among all Buddhist sects. REGENSTEIN, *supra* note 50, at 238.

68. Bloch, *supra* note 67, at 193.

69. REGENSTEIN, *supra* note 50, at 249–50 (citing to the teachings of the Koran and the *Hadith*, the collected traditions of the Prophet Mohammed).

70. *Id.* at 253. One authority on Islamic teachings states that, "According to the spirit and overall teachings of Islam, causing *avoidable* pain and suffering to the defenseless and innocent creatures of God is not justifiable under any circumstances." *Id.* at 259 (emphasis added) (quoting Al-Hafiz Basheer Ahmad Masri in Brian Klug, *Network News*, International Network for Religion and Animals, Silver Spring, Md., No. 6, Winter 1988).

71. STEPHEN H. WEBB, ON GOD AND DOGS: A CHRISTIAN THEOLOGY OF COMPASSION FOR ANIMALS 173 (1998); see also Zaz Hollander, *It's a Blessed Event; Patron Saint's Day Special for Animals of All Kinds*, SPOKESMAN-REV. (Spokane, Wash.), Oct. 8, 2000, at B1; Arturo A. Marroquin, *Some Blessed Come on All Fours/Garden City Cathedral Holds Service for Pets*, NEWSDAY (N.Y.), Oct. 9, 2000, at A23; Robert Sanchez, *Doggone Devotion: Pet Blessings a New Tradition for Local Churches*, CHI. DAILY HERALD, Jan. 6, 2002, at Neighbor-1; *Blessing of the Animals*, TAMPA TRIB., Oct. 11, 2001, at Northwest-1.

72. Sonia S. Waisman & Barbara R. Newell, *Recovery of "Non-Economic" Damages for Wrongful Killing or Injury of Companion Animals: A Judicial and Legislative Trend*, ANIMAL L. 2001, at 45, 60. Before the 17th Century, dogs were common in many English churches and the practice of allowing dogs in churches did not end until the 19th Century. WEBB, *supra* note 71, at 173. The "dog chapel" is nondenominational. *All Dogs go to Chapel*, 66 U.S. CATHOLIC 5 (2001).

frequently cited philosopher in the animal rights debate is Descartes, who argued that animals are devoid of mind or consciousness and merely function mechanically.⁷³ Those that follow the Cartesian theory of pain would argue that the sounds made by animals during vivisections are merely the noise of breaking machinery.⁷⁴ Although with scientific support from pain studies on animals, the belief that animals, specifically mammals, cannot experience pain is diminishing, some philosophers still argue that the pain experienced by animals is not equivalent to a human's reaction to the same stimulus.⁷⁵ In a sense, Descartes provides a preview of how animals would be treated under the contractualist theory discussed below.⁷⁶

B. *Modern Theories on Animal Rights*

Three primary theories are commonly discussed in the debate over the treatment of animals in modern society. The proponents of contractualism (*i.e.*, contractualists) generally find that animals should not be allocated rights.⁷⁷ The results of advocates of the utilitarian theory can be mixed depending on the type of utilitarianism discussed. A third theory, one that is used to support animal rights, is described as inherent valuation. As stated above, "rights" is often used as a catchword for a variety of issues related to animals (usually welfare issues) and does not necessarily mean that the proponents advocate legal rights for animals.

1. Contractualism

Immanuel Kant's ideas can be viewed as providing the historical

73. LINZEY, ANIMAL, *supra* note 51, at 13. For a reading by Descartes, see René Descartes, *Animals are Machines*, in ANIMAL RIGHTS AND HUMAN OBLIGATIONS, *supra* note 33, at 60. See also DAISIE RADNER & MICHAEL RADNER, ANIMAL CONSCIOUSNESS (1989) (discussing Descartes's and other philosophers' views on animal consciousness and the legacy of those views).

74. LINZEY, ANIMAL, *supra* note 51, at 13; see also FRANCIONE, INTRODUCTION, *supra* note 35, at 2 (describing experiments performed by Descartes and his followers). Note the idea that Descartes rejected animal consciousness in its entirety is not universally held. FRANCIONE, INTRODUCTION, *supra* note 35, at 193 n.2; TOM REGAN, THE CASE FOR ANIMAL RIGHTS 8 (1983) [hereinafter REGAN, THE CASE] (discussing Descartes theory denying consciousness to animals).

75. LINZEY, ANIMAL, *supra* note 51, at 13.

76. See *infra* notes 78-88 and accompanying text.

77. But see *infra* notes 89-96 and accompanying text (discussing Rowland's argument that contractualism can be used to support the moral claims of non-humans).

Mark Rowlands argued that contract protection of the social contract b Rowlands distinguishes between the contract and finds that the recipients rational individuals as well as rational this argument, Rowlands reinterpre writings and highlights the importance to contractualism.⁹² Under the intuitive undeserved, it is morally arbitrary and it.⁹³ Rationality can be viewed a rationality is undeserved (it is nature or not), it is a restriction that cannot those beings from the benefits of th beings would, therefore, not fall o morality, and principles of morality w non-rational beings.⁹⁶

2. Utilitarianism

Utilitarianism is viewed as a cons consequentialists measure ethics by an a particular goal.⁹⁸ This is in contra ethics as a ranked system of ru utilitarianism must be made with a referred to as "the principle of eq Equal weight in moral deliberations all affected by actions under this prin

90. *Id.* at 123.

91. *Id.* Carruthers would disagree and fin rational agents would destroy the coherence of c at 102.

92. ROWLANDS, *supra* note 89, at 132.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

is through a process of rational
⁸² Moral duties are owed only to
stand the requirements of justice and
formed by rational beings.⁸³

porary and influential proponent of
e duties of justice are owed only to
nse of justice, which would exclude
re of contractualism, and many of its
e not capable of reciprocity.⁸⁵ An
ed setting out the rules that govern
ants in the development of this social
As animals are not able to participate
ract (because they presumably do not
re not rational), there is no moral

a viewed as providing an argument
w is not universal.⁸⁹ In a recent book,

ALS ISSUE: MORAL THEORY IN PRACTICE 36

a note 35, at 3. An example commonly given is
someone harm an animal. Not only could the
e painful to humans, but the act itself could be
hings and, thus, the behavior may slip over to

a note 35, at 122. Note the same discussion is
nd accompanying text.

a note 35, at 122.

a note 35, at 122.

reatment of humans who lack the rational agency
RUTHERS, *supra* note 78, at 114. Carruthers finds
n the sense necessary to secure them direct rights

TS: A PHILOSOPHICAL DEFENCE 3 (1998).

principle as "an interest is an interest, whosever's interest it may be."¹⁰² Equal treatment is not required by the principle of equal consideration of interests.¹⁰³ Ultimately, the use of the principle should result in a more egalitarian outcome even if unequal treatment must be applied to accomplish that end.¹⁰⁴

Jeremy Bentham can be viewed as the "first major philosophical theorist of animal entitlements."¹⁰⁵ Bentham's utilitarian doctrine provides the basis of one of the most significant modern theories for animal rights.¹⁰⁶ Utilitarianism, according to Bentham, can be described as "pure hedonistic Utilitarianism, asserting the supreme value of pleasure and the disvalue of pain."¹⁰⁷ Bentham viewed "the capacity for suffering . . . and/or enjoyment or happiness" as the characteristic that is most vital in determining whether a being is entitled to equal consideration.¹⁰⁸ Under this premise, if a being suffers, it is necessary to take that suffering into consideration when analyzing the results of each act.¹⁰⁹ Obviously, in the application of utilitarian theory to animal rights, an initial question must be whether animals have the ability to suffer.¹¹⁰ Under Bentham's analysis, if animals were not self-aware, it was possible to continue to treat animals as property so long as animals did not suffer in the process.¹¹¹ Essentially, animals have no interest in continuing to exist using this theory.¹¹² This quantitative dissimilarity between humans and animals allows for the treatment of animals as

102. *Id.*

103. *Id.* at 21.

104. *Id.* The economic principle of declining marginal utility can be used to illustrate this idea. Essentially, under declining marginal utility, for "a given individual, a set amount of something is more useful when the individual has little of it than when he has a lot." *Id.* at 22. Singer uses the example of a person struggling to survive on two-hundred grams of rice per day and then provided with an extra fifty grams. *Id.* That person's position has improved significantly. *Id.* Compare that situation with a person who has a kilo of rice per day. *Id.* Adding an extra fifty grams does not significantly improve that person's position. *Id.* Singer recognizes that countervailing factors can override this principle of declining marginal utility. *Id.*

105. Nussbaum, *supra* note 31, at 1523.

106. *Id.* at 1525.

107. *Id.* at 1529.

108. SINGER, PRACTICAL, *supra* note 97, at 50. Bentham's viewpoint is often cited: "The question is not, Can they reason? nor Can they talk? but, Can they suffer?" *Id.*

109. *Id.*

110. See *supra* notes 73-75 and accompanying text (discussing Descartes' theory that animals do not have the ability to feel pain).

111. FRANCIONE, INTRODUCTION, *supra* note 35, at 134.

112. *Id.* at 133.

resources.¹¹³ Animals could be treated as things in the context of their lives, but not as things with regards to their interest in not suffering.¹¹⁴

In Peter Singer's view of "preference utilitarianism," the "consequences we ought to aim to produce... are those that, on balance, 'further the interests... of those affected.'"¹¹⁵ Singer recognizes that the differences between humans and animals make the analysis of "suffering" difficult.¹¹⁶ Certainly, animals may have different pain thresholds, just as there are differences in how individual humans experience pain.¹¹⁷ The mental capacities of humans may also provide for a relatively greater level of suffering because of the ability of humans to anticipate pain.¹¹⁸ Singer recognizes that humans' ability to anticipate pain, their more detailed memory, and the ability of humans to have greater knowledge regarding the reason for the pain can be used to argue either that humans have greater suffering or less suffering than animals because animals may not have the tools to process the purpose of the pain.¹¹⁹ Even though comparisons between species cannot be made precisely, Singer believes that the utilitarian analysis can be used to provide for an interest balancing approach.¹²⁰

Under preference utilitarianism, it is a direct wrong to kill an individual if the individual has a specific preference to continue living.¹²¹ Like Bentham, Singer would not view animals as being self-aware, with a few exceptions.¹²² Animals that are self-conscious or self-aware are aware of time (past and future, existing over time) and have a sense that they are distinct from other entities.¹²³

113. *Id.* at 134.

114. *Id.* Obviously, it would be necessary to somehow extinguish the lives of animals without suffering. This ability to kill without suffering would be dependant upon the presumed inability of animals to anticipate their deaths.

115. REGAN, *THE CASE*, *supra* note 74, at 206.

116. SINGER, *PRACTICAL*, *supra* note 97, at 52.

117. Differences can occur because of species (a horse versus a small dog) or by age (a human baby versus an adult).

118. *Id.* Singer provides the example of humans being randomly abducted from public parks for scientific experiments. Humans in parks would be fearful of being kidnapped, thus adding to their suffering. Under Singer's analysis, animals would not have the anticipatory dread of the experimentation. *Id.*

119. *Id.* at 53.

120. *See generally id.*

121. REGAN, *THE CASE*, *supra* note 74, at 207.

122. FRANCIONE, *INTRODUCTION*, *supra* note 35, at 136-37. The exceptions would include various animals that tests have shown reflect self-awareness, such as chimpanzees, orangutans, and gorillas. *Id.*

123. REGAN, *THE CASE*, *supra* note 74, at 207.

Animals that are not self-aware may still suffer, and as such are due moral consideration. Although Singer deplors modern factory farming, animals, as non-self-conscious beings, can be viewed as replaceable resources, while humans, as self-conscious beings, are generally irreplaceable resources.¹²⁴ In addition, Singer's analysis of the use of animals for food would consider the issue of whether this is the best use of animal resources, and the inability to know whether the animals suffered in the context of modern farming practices.¹²⁵ There is a relatively minor interest in humans' use of animals as food, especially in developed countries (e.g., humans like the taste), balanced against the lives of the animals involved.¹²⁶ Utilizing the principle of equal consideration of interests, major interests cannot be sacrificed for minor interests leading to the result that animals should not be used for food (at least using modern farming methods).

One criticism of Singer's justification for vegetarianism is that it does not take into account the interests of the humans involved in food production.¹²⁷ The ability of utilitarianism by its very nature to support animal rights has been criticized because of its inadequate understanding of the concept of equal consideration.¹²⁸

3. Inherent Valuation

The final theory used in support of animal rights to be considered herein is most often attributed to Tom Regan's book, *The Case for Animal Rights*.¹²⁹ Regan's arguments can be viewed as being based on the doctrine of natural rights.¹³⁰ Regan rejects the utilitarian and contractalist viewpoints and argues that certain nonhuman animals possess moral rights because they have inherent value. The utilitarian concept of the lack of value of individuals is reversed to find that each individual has value.¹³¹ Individuals are not merely receptacles; each has

124. SINGER, PRACTICAL, *supra* note 97, at 54-56; see also FRANCIONE, INTRODUCTION, *supra* note 35, at 136-37.

125. SINGER, PRACTICAL, *supra* note 97, at 55 (stating: "[W]ith the exception of animals raised entirely on grazing land unsuitable for crops, animals are eaten neither for health, nor to increase our food supply. Their flesh is a luxury, consumed because people like its taste.").

126. *Id.*

127. REGAN, THE CASE, *supra* note 74, at 222 (discussing the number and non-trivial interests of people involved in food production).

128. ROWLANDS, *supra* note 89, at 8.

129. *Id.* at 1.

130. *Id.* at 7.

131. Tom Regan, *The Case for Animal Rights*, in IN DEFENSE OF ANIMALS 13, 21 (Peter Singer ed., 1985) [hereinafter Regan, DEFENSE].

a moral right to be treated as having independent value.¹³² If this view is accepted, the usefulness of the individual to others is irrelevant to the individual's value.¹³³ If an individual is treated as possessing inherent value, it is impossible to be treated in a way that reduces it to the status of a thing or to exist as a resource for others.¹³⁴ Under this theory, all forms of discrimination based on race, gender, or other social classifications are intolerable.¹³⁵ All who possess inherent value possess it equally.¹³⁶ Certainly, many would agree that the results of an application of this theory to humans would have a positive impact on society. The difficulty arises when the application of inherent value status is extended to animals.¹³⁷

Regan recognizes that animals do not have many of the abilities that the average human possesses.¹³⁸ The fact that most people do not view humans without these abilities as somehow lacking inherent value is the beginning of the analysis that can extend this status to animals.¹³⁹ Regan considers the similarities between humans with and without many of the abilities that are generally possessed as the key to determining value.¹⁴⁰ The similarity is that each individual is the "subject-of-a-life," defined as "a conscious creature having an individual welfare that has importance to us whatever our usefulness to others."¹⁴¹ To be a subject-of-a-life

132. *Id.* at 21. Regan does not attempt to deal with the controversial ethical issue of who has an immortal soul. *Id.* at 23.

133. *Id.*

134. *Id.* Inherent value is equally possessed by all under this theory, regardless of skills, personality, or of course, the common designations of gender, race, religion and wealth. *Id.*

135. *Id.*

136. *Id.* at 21, 23. Regan makes this point when discussing the inherent value of humans and the inherent value of animals. *Id.*

137. Rodger Schlickeisen, *Protecting Biodiversity for Future Generations: An Argument for a Constitutional Amendment*, 8 TUL. ENVTL. L.J. 181 (1994). Schlickeisen discusses an ecosystemic moral philosophy and the fact that some commentators in the environmental area would substitute a more holistic approach to the valuation of nature (versus an anthropocentric one) that would "grant moral consideration to even nonhuman entities." *Id.* at 192.

138. Regan, DEFENSE, *supra* note 131, at 22.

139. *Id.* This acceptance that all humans have value, regardless of abilities or traits that have been used to define "humanness" in the past, such as the ability to communicate, make it unnecessary to consider the issue of marginal cases. It is obviously unnecessary to also utilize theories such as the "slippery slope" in order to protect humans that are incapable of protecting themselves. See generally DANIEL A. DOMBROWSKI, *BABIES AND BEASTS: THE ARGUMENT FROM MARGINAL CASES* (1997) (discussing the argument from marginal cases which concludes that no morally relevant characteristics distinguish some human beings from other animals).

140. Regan, DEFENSE, *supra* note 131, at 22.

141. *Id.*

means more than being conscious.¹⁴² Individuals are subjects-of-a-life when they have a sense of the future, perceptions, memories, beliefs, and desires.¹⁴³ Regan proposes that "normal mammalian animals, aged one or more," meet these criteria.¹⁴⁴ Regan uses a cumulative argument to provide the basis for allocating the burden of proof to those who would deny these animals the status of being treated as a subject-of-a-life.¹⁴⁵ The cumulative argument begins with common sense and ordinary language (making a distinction between the arguments for consciousness and merely anthropomorphism).¹⁴⁶ Evolutionary theory and behavior analysis provide additional evidence that these mammalian animals have beliefs and desires.¹⁴⁷ Obviously, if an animal is the subject-of-a-life and thus has inherent value, there can be no moral justification for using the animal as a resource for humans.

Regan's position has been criticized for resting on dubiously coherent metaphysical assumptions.¹⁴⁸ Regardless of the criticism of Regan's theory, his analysis has nevertheless brought significant attention to the issue of animal rights and is considered an important contribution to the scholarship in this area.

4. Other Viewpoints

Many other commentators in the animal rights debate have developed their own theories on the moral status of animals. Although many are based on one of the three major approaches discussed above, new viewpoints are being raised, such as Francione's principle of "equal consideration" which focuses on the status of animals as property. Once the status of animals as property is extinguished, there would naturally be an obligation to abolish animal exploitation.¹⁴⁹

Several animal rights activists make analogies to slavery and the civil rights struggles of the last century.¹⁵⁰ Some opponents of animal rights

142. REGAN, *THE CASE*, *supra* note 74, at 243.

143. *Id.*

144. *Id.* at 239. Regan develops his argument thoroughly in earlier chapters of his book. *See id.* at 1-81.

145. *See id.* at 78. It is rational to believe that animals have beliefs and desires unless there are better reasons to show that they do not. *Id.*

146. *See id.* at 7.

147. *Id.* at 78.

148. ROWLANDS, *supra* note 89, at 9.

149. FRANCIONE, *INTRODUCTION*, *supra* note 35, at 184. Francione would not restrict the class of protected animals to those who are the subject-of-a-life as Regan does. *Id.* at xxxiii.

150. Richard A. Epstein, *The Next Rights Revolution?*, 51 NAT'L REV. 21, Nov. 8, 1999,

find the analogy of the development of rights of African-Americans and women to the development of rights for animals inappropriate, as well as distasteful.¹⁵¹ Notwithstanding the rhetoric of the various viewpoints, how animals are viewed in current society is clearly changing. To many people sharing their lives with animal companions, it is irrelevant whether a contractualist, utilitarian, or inherent value approach is used to measure the value of their companion; it is only important that the animal and their relationship is respected.

III. CURRENT LEGAL STATUS OF ANIMALS

A. Property

Notwithstanding the philosophical discussions about the appropriate treatment of animals, under the current U.S. legal framework, animals are clearly treated as a form of personal property.¹⁵² The idea of a person's legal right to own and control property is long-standing in the common law tradition.¹⁵³ The right to property is generally seen as a "natural" right—not one that must be created by law.¹⁵⁴ Although there may be some restrictions on the use of personal property (for example, a person can not use his or her property to harm an innocent person), the common law generally supports the idea of "absolute" possession of this type of property.¹⁵⁵

In the context of animals, the common law was required to analyze property rights in animals in a different context due to the fact that animals have the ability to move.¹⁵⁶ The analysis focused on the

at 44 (arguing that the treatment of animals as morally equal to human beings would undermine the liberty and dignity of humans). One commentator compares John Stuart Mill's social movement theory that characterizes every social movement "by three stages: ridicule, discussion, and ultimately, adoption" to the animal rights movement. Al Johnson, *Animal Rights Cause Gains Credibility*, ANIMAL L. 1995, at 11.

151. David R. Schmahmann & Lori J. Polacheck, *The Case Against Rights for Animals*, 22 B.C. ENVTL. AFF. L. REV. 747, 780 (1995).

152. See generally FRANCIONE, PROPERTY, *supra* note 27. The first judicial decision in the United States that recognized a property right in dogs occurred in 1871. ORLAND SOAVE, ANIMALS, THE LAW AND VETERINARY MEDICINE 159 (4th ed. 2000). Many cases dealing with the valuation of animals reference an animal's status as property. See *infra* notes 317-70 and accompanying text.

153. FRANCIONE, PROPERTY, *supra* note 27, at 38.

154. *Id.* A right that must be created by law is referred to as a "positive" right. *Id.*

155. *Id.* at 41.

156. *Id.*

classification of animals so as to determine the property rights in them.¹⁵⁷ Animals were classified as either "wild" or "domestic."¹⁵⁸ If an animal was classified as wild, a human would only be able to obtain a qualified property right in such animal through taming or confinement.¹⁵⁹ Once a wild animal left the control of a human, the person no longer maintained a qualified property right in the animal.¹⁶⁰ In contrast, the ownership of a domestic animal is not lost if the animal escapes.¹⁶¹

Companion animals can be considered a subcategory of domestic animals.¹⁶² To determine whether an animal fits within this subcategory it is necessary to focus "on evidence of the relationship between the animal and its owner."¹⁶³ If an animal is considered to be a companion animal, a person may have more rights in the animal, but also will likely be subject to more statutory responsibilities.¹⁶⁴

Proposals have been made to change the property status of animals.¹⁶⁵ One proposal by David Favre uses existing property laws as its core¹⁶⁶ and advocates a system in which the concept of property ownership is retained for certain purposes while providing animals the status of "juristic persons."¹⁶⁷ An important premise under this proposed property system is that living objects have "self-ownership."¹⁶⁸

157. *Id.*

158. JAMES F. WILSON, *LAW AND ETHICS OF THE VETERINARY PROFESSION* 74 (1988).

159. FRANCIONE, *PROPERTY*, *supra* note 27, at 41.

160. *Id.* at 42.

161. WILSON, *supra* note 158, at 74; *see also* SOAVE, *supra* note 152, at 158. *See generally* Eric W. Neilsen, *Is the Law of Acquisition of Property by Find Going to the Dogs?*, 15 T.M. COOLEY L. REV. 479 (1998).

162. WILSON, *supra* note 158, at 74.

163. *Id.* Note that the legal owner of a pet (such as a parent) may not have the requisite relationship to designate the animal as a pet—but one could look to other family members, such as children, to determine whether the relationship arises to the level that the animal will be classified as a pet. *Id.*

164. *Id.* Some common statutory responsibilities for companion animals include licensing, vaccination, and confinement. *Id.* These statutory responsibilities may arise out of local, state, or federal law. Statutes that relate to companion animals have been challenged frequently, but such challenges have generally been unsuccessful. SOAVE, *supra* note 152, at 164.

165. *See generally* FRANCIONE, *PROPERTY*, *supra* note 27.

166. David Favre, *Equitable Self-Ownership for Animals*, 50 DUKE L.J. 473 (2000). This is in contrast to some animal rights philosophers who would advocate a more radical change to the existing property law system by eliminating the concept of title for animals. *Id.* at 495.

167. *Id.* at 502.

168. *Id.* at 480. Favre explains self-ownership in the following quote: "[U]nless a human has affirmatively asserted lawful dominion and control so as to obtain title to a living object, then a living entity will be considered to have self-ownership." *Id.*

The distinction between living and non-living property is already seen in the application of laws relating to cruelty to animals.¹⁶⁹

Essentially, under Favre's system, the relationship between an owner and animal is to be treated similarly (but not identically) to the custodial relationship between a human parent and child.¹⁷⁰ In order to implement this system, it is necessary to divide the legal and equitable components of property as it relates to animals.¹⁷¹ The equitable title to the animal would be transferred to the animal itself.¹⁷² The ability to transfer the equitable title to the animal is supported by the current legal system, which allows the legal and equitable owner of an animal to change the title status of the animal by intentional acts.¹⁷³ The transfer of equitable title could be accomplished by the individual owner's execution of documents that articulate the intention of creating a new legal status for the animal, or by operation of law.¹⁷⁴

Once the animal has equitable title, the legal title owner would have an obligation to take its interests into account.¹⁷⁵ Responsibility for the animal would remain with the legal owner of the animal.¹⁷⁶ The holder of the legal title could be viewed as a guardian to the animal with the parameters of the duties of the guardian being set by existing anti-cruelty laws in addition to the laws governing the relationship between parents and children.¹⁷⁷ The civil enforcement of these interests could be

169. *Id.* at 483. Favre also uses an infant as an example of a living being that has self-ownership and one that is not subject to being owned by another. *Id.* at 482.

170. *Id.* at 484.

171. *Id.* at 490. It is "within the legal mainstream to create and transfer equitable interests in property." *Id.*

172. *Id.*

173. *Id.* at 490-91.

174. *Id.* at 492-94. In order to distinguish animals with equitable self-owned status, a document could be filed at a specific depository identifying such animal or the animal could be marked in some other way. *Id.* at 492. Although Favre discusses tattooing animals, another identification procedure that is already common is the implementation of a microchip in the animal containing contact information. Suzanne Hively, *Pet ID Devices Growing, but None are Foolproof*, PLAIN DEALER (Cleveland, Ohio), Jan. 10, 2002, at E1; Michael Rubinkam, *Implanted Microchips Help Owners Quickly Retrieve Lost Dogs and Assist Vets in Making Medical Decisions*, COMMERCIAL APPEAL (Memphis, Tenn.), Dec. 31, 2001, at B3.

175. Favre, *supra* note 166, at 494. Professor Favre uses the trust concept merely as a bridge concept and uses the term guardian rather than trustee to reflect the difference between this relationship and a non-living asset trust. *Id.* at 496-97.

176. *Id.* at 495. This includes the duty to care for the animal as well as the responsibility for any damages that the animal causes.

177. *Id.* at 497-98. An example of treatment of the animal similar to that of a human child is dealing with the animal upon the divorce in the family. *Id.* at 501.

done by the government or by private parties.¹⁷⁸

If an animal has self-owned status, it could be treated as a juristic person similar to an entity with legally recognized interests.¹⁷⁹ These interests could include, among other things, the ownership of property and availability of tort law remedies.¹⁸⁰

As seen below, corporations and ships have been viewed as persons for limited purposes regardless of their status as nonhumans and forms of property.¹⁸¹ Corporations and ships, like animals, are subject to the direct ownership of humans (or, more specifically, indirectly through the ownership of entity interests).

B. Personhood

The legal meaning of "person" has changed over time.¹⁸² The elevation of certain animals to personhood status for particular purposes is supported by the granting of similar status to other nonhumans. Several examples illustrate that nonhumans, including corporations, ships and other entities, have been allocated this status.

1. Corporations

Various theories support the concept of corporate personality.¹⁸³ A corporation can be viewed "as an artificial entity, as an aggregate of persons, and as a real entity."¹⁸⁴ These theories have been used to argue for and against the treatment of corporations initially as citizens (for jurisdictional purposes) and as persons.¹⁸⁵ For example, using the theory

178. *Id.* at 499. Given the limited nature of governmental resources, Favre acknowledges that it is more likely that private parties, perhaps through the appointment of equitable guardians ad litem, would be needed to protect these interests. *Id.*

179. *Id.* at 501.

180. *Id.*

181. See *infra* notes 183–210 and accompanying text.

182. One way to consider the legal meaning of "person" is to define a person as someone subject to legal rights and duties. Lawrence B. Solum, *Legal Personhood for Artificial Intelligences*, 70 N.C. L. REV. 1231, 1238–39 (1992). Solum points out that although corporations and natural persons are legal persons, they have "different sets of legal rights and duties." *Id.* at 1239. Solum also cites JOHN CHIPMAN, *GRAY'S THE NATURE AND SOURCES OF THE LAW* (Roland Gray ed., MacMillan 1921) (1909), which states that inanimate things have possessed legal rights in the past. Examples of things that possessed legal rights include temples in Rome and church buildings in the Middle Ages. *Id.*

183. Sanford A. Schane, *The Corporation is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563, 564 (1987).

184. *Id.*

185. *Id.* at 574 (discussing the philosophical background and major constitutional controversies relating to the treatment of corporations as persons). Some of the more recent

that the corporation is an aggregate of persons (group theory), the United States Supreme Court first brought corporations within the Article III diversity of citizenship requirements.¹⁸⁶ As it became clear that the group theory would preclude diversity of citizenship in many cases, the Supreme Court adopted the theory that the corporation was an artificial entity created by the state.¹⁸⁷ The Supreme Court made the analogy that a corporation created and doing business in a state was similar to an individual born and living in that state.¹⁸⁸ By beginning with the premise that a corporation is a kind of person and a resident of a state, the Court concluded that citizenship should follow.¹⁸⁹ In the case of corporations, the attributes of both personhood and citizenship are essential for the Supreme Court's purpose of finding diversity.¹⁹⁰ The Supreme Court ultimately utilized combined elements of the group and person theories that emphasized the state of incorporation to complete its analysis.¹⁹¹

The diversity issue has now been resolved by Congress: "[A] corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business."¹⁹² The status of a corporation as a citizen is just one part of the personhood puzzle. The Supreme Court also considered whether a corporation should be treated as a person for purposes of due process and equal protection.¹⁹³ In the context of determining the treatment of foreign corporations, the Supreme Court found that private corporations would be included "[u]nder the designation of person."¹⁹⁴

theories have de-emphasized the importance of the fiction of the corporation as a person. One of these theories is the "nexus of contracts" view which describes the corporation in the context of the relationships between all the participants in the corporation's activities. David Millon, *The Ambiguous Significance of Corporate Personhood*, 1 STAN. AGORA 2, ¶ 46 (2000), at http://www.law.Stanford.edu/agora/cgi-bin/article2_corp.cgi?library=millon.

186. Schane, *supra* note 183, at 574 (discussing *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809)).

187. *Id.* at 575-77 (discussing *Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497 (1844)).

188. *Id.* at 577.

189. *Id.* The Supreme Court "decreed that a corporation *shall* be a citizen." *Id.*

190. *Id.* at 578.

191. *Id.* at 580-81 (discussing *Marshall v. Baltimore & Ohio R.R. Co.*, 57 U.S. (16 How.) 314 (1853)).

192. 28 U.S.C. § 1332(c) (1994). This statutory provision became effective in 1958. Schane, *supra* note 183, at 583.

193. *Id.* at 586.

194. *Pembina Consol. Silver Mining and Milling Co. v. Pennsylvania*, 125 U.S. 181, 189 (1888).

In a 1910 opinion, the Court stated: "[A] corporation is a person, within the meaning of the Fourteenth Amendment."¹⁹⁵

The treatment of corporations as persons is limited in scope. An oft-cited characterization of corporations as creatures is Chief Justice John Marshall's statement that "[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it."¹⁹⁶ If a corporation is a creature of the state, restrictions on corporate activities by the state can flow directly from that mandate. Although the creature theory is no longer the universally held view of the corporation, due to the differences between corporations and natural persons, the law treats corporations as persons for only limited purposes. Corporations may be sued and sue, enter into contracts, buy and sell land, and commit torts, among other activities.¹⁹⁷ Corporations can also be held criminally liable and are subject to tax liability.¹⁹⁸ Some limits on corporations include the fact that corporations cannot vote in elections, hold public office, or marry.¹⁹⁹ Although the rights of corporations are limited, the Supreme Court has found that corporations can have other rights generally attributed only to humans, such as First Amendment free speech rights.²⁰⁰ Although the basis for corporate personhood may have changed from the initial theory that the corporation was created by the state, the analysis restricting rights,

195. *Southern Ry. Co. v. Greene*, 216 U.S. 400, 412 (1910).

196. *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819); see also Schane, *supra* note 183, at 565 n.10 (stating that "Marshall's characterization has become one of the classic definitions of the corporation as a 'creature'").

197. Schane, *supra* note 183, at 563.

198. Steven Walt & William S. Laufer, *Why Personhood Doesn't Matter: Corporate Criminal Liability and Sanctions*, 18 AM. J. CRIM. L. 263, 265 (1991). Walt and Laufer also articulate the ways that a corporation can be held liable under federal and state law—including direct or derivative liability. *Id.* at 266; see also Millon, *supra* note 185; F. Joseph Warin and Michael D. Bopp, *Corporations, Criminal Contempt and the Constitution: Do Corporations have a Sixth Amendment Right to Trial by Jury in Criminal Contempt Actions and, if so, Under What Circumstances?*, 1997 COLUM. BUS. L. REV. 1 (1997) (discussing the right to a jury trial for corporations). Note that corporations that have been designated as Subchapter S corporations under the Internal Revenue Code have pass-through tax treatment similar to the treatment of partnerships.

199. Schane, *supra* note 183, at 563, & n.1.

200. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) cited in Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1442 n.2 (1987) (considering the various theories that have been used in the discussion of corporate personhood and the adoption and rejection of such theories by the Supreme Court as it developed its jurisprudence relating to the issue of corporations as persons).

because of the different characteristics of the corporate person (over a human being), continues to be valid.²⁰¹

2. Ships

A second type of personhood granted to nonhumans is established by the "admiralty doctrine of personification" that treats a ship in an *in rem* action as the true defendant.²⁰² Under this doctrine, a ship will have "rights and obligations separate from those of its owners."²⁰³ The adherence of the United States to the doctrine of personification is unique.²⁰⁴ Although disputes have arisen about the historical justifications for the doctrine of personification, "the development of . . . substantive *in rem* liability can be based on maritime liens."²⁰⁵ Under the doctrine, a claimant asserting *in rem* jurisdiction does not have to identify the party personally responsible for the damage caused by the ship—just the ship itself.²⁰⁶ This aids prospective plaintiffs, as it may be difficult to determine the ownership of the ship and the actual responsible parties.²⁰⁷

Though the personification doctrine is firmly established in the United States, it is still criticized.²⁰⁸ The doctrine of personification has been used in response to concerns about the violation of due process in connection with the assertion of jurisdiction by courts if the owners of the ship are not residents of the United States.²⁰⁹ In addition, the doctrine has been used in dealing with the arrest of the vessel without prior notice to the owners.²¹⁰ Just as with corporations, ships are only treated as persons for limited purposes.

201. Millon, *supra* note 185, at ¶ 37.

202. Martin Davies, *In Defense of Unpopular Virtues: Personification and Ratification*, 75 TUL. L. REV. 337, 338 (2000).

203. *Id.*

204. *Id.* at 339. Although the doctrine has been traced to the English 16th century admiralty courts, the English courts abandoned the doctrine in the 19th century. *Id.* at 341.

205. *Id.* at 345.

206. *Id.* at 349. The owners of the ship would identify the parties actually liable or those who have assumed the risk of losses. *Id.* at 350.

207. *Id.* at 349. The ways that ships are financed, even for legitimate reasons, can create a maze of ownership interests. *Id.* at 364.

208. *Id.* at 350.

209. *Id.* at 351.

210. *Id.* The *in rem* jurisdiction of the court is perfected by either the "arrest" of the ship by the Admiralty Marshal or the owners' and operators' consent to the court's jurisdiction. *Id.* at 366-67. "[J]urisdiction in admiralty and maritime cases is principally vested in the federal courts." *Id.* at 344.

3. Other Nonhuman Persons

Other examples of the treatment of nonhumans as persons for limited purposes include universities, agencies, and cities.²¹¹ Unlike the development of the personhood status of corporations and ships, the designation of universities and cities as persons has generally come about due to specific statutory language.

Examples of federal statutes that provide for nonhuman entities to be treated as persons include the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), Resource Conservation and Recovery Act (RCRA), and section 1983. CERCLA treats municipalities, counties, or state agencies as private persons if they own or operate a disposal site.²¹² Municipalities, tribes, and federal agencies are treated as persons under RCRA.²¹³

Liability issues under section 1983 have led to clarification of who will be treated as a person for purposes of the statute. Section 1983 provides that persons who under color of state statute or regulation deprive someone of his or her federally protected rights will be civilly liable.²¹⁴ In 1978, the Supreme Court found that local governments could be held liable under section 1983.²¹⁵ Courts have also treated

211. The focus in this Article is on domestic law, but note that in international relations, individual countries are treated as persons. Joshua S. Baugnher, *State Sovereignty and the Globalizing Effects of the Internet: A Case Study of the Privacy Debate*, 26 BROOK. J. INT'L L. 689, 692 (2000) (citing to the Montevideo Convention, December 26, 1933 entered into force December 26, 1934). There is an ongoing debate regarding the treatment of a foreign sovereign as a person under the Due Process Clause. S. Jason Baletsa, *The Cost of Closure: A Reexamination of the Theory and Practice of the 1996 Amendments to the Foreign Sovereign Immunities Act*, 148 U. PA. L. REV. 1247, 1275 (2000).

212. 42 U.S.C. § 9601(21) (1994); see also Steven Ferrey, *Allocation and Uncertainty in the Age of Superfund: A Critique of the Redistribution of CERCLA Liability*, 3 N.Y.U. ENVTL. L.J. 36, 49 (1994) (citing 42 U.S.C. § 9601(21) (1988) and relevant case law).

213. 42 U.S.C. § 6903(15) (1994); Chris M. Amantea & Stephen C. Jones, *The Growth of Environmental Issues in Government Contracting*, 43 AM. U. L. REV. 1585, 1608 (1994) (citing the Federal Facility Compliance Act of 1992, Pub. L. No. 102-386, 106 Stat. 1505 (codified as amended in scattered sections of 42 U.S.C.)); Jeffrey W. Walbridge, *State Minimum Environmental Standards on the Native American Reservation*, 68 S. CAL. L. REV. 1075, 1082 (1995) ("[T]ribes are treated as municipalities for purposes of [RCRA] and municipalities are treated as persons.").

214. 42 U.S.C. § 1983 (1994).

215. *Monell v. Dept. of Soc. Servs. of New York*, 436 U.S. 658, 659 (1978). Local governments may be sued under Section 1983 if the execution of a government's policies inflict an injury on a person. *Id.* at 694; see also Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 HASTINGS L.J. 499 (1993) (analyzing Supreme Court decisions construing § 1983 and decisions that clarify the possibility of liability for municipalities under § 1983).

school districts as persons under section 1983.²¹⁶ In contrast, states are not persons within the meaning of section 1983.²¹⁷

Some state statutes also contain language that treats nonhumans as persons. For example, a court has found that a state university is a person under the Tennessee Human Rights Act.²¹⁸ The Tennessee Human Rights Act defines "person" in the statute to include "governments," "government agencies," and "public authorities."²¹⁹ In several cases, the United States has even been deemed a person for the purpose of determining water appropriation.²²⁰

A few cases have specifically considered the issue of an animal being treated as a person.²²¹ A recent case found that a police dog was not a person subject to liability under section 1983.²²² In this 2001 case, the Seventh Circuit began its analysis by considering the definitions of "person" under the Dictionary Act.²²³ Dogs are not included in the definition of "person" and "whoever" under that Act.²²⁴ The Seventh

216. *Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303, 1306 n.2 (8th Cir. 1997).

217. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) (stating that state officials being sued in their official capacity are the same as the state and are not persons for purposes of Section 1983).

218. *Roberson v. Univ. of Tenn.*, 912 S.W.2d 746 (Tenn. Ct. App. 1995).

219. *Id.* at 747 (citing to The Tennessee Human Rights Act, TENN. CODE ANN. § 4-21-102(14)). The definition of person also specifically includes corporations, partnerships and other organized groups of persons. *Id.*

220. *State v. Morros*, 766 P.2d 263, 268 (Nev. 1988); see also Nicholas Targ, *Water Law on the Public Lands: Facing a Fork in the River*, 12 NAT. RESOURCES & ENV'T. 14, 16 (1997) (citing to several cases in states that found the federal government must use the same procedures as any other appropriator to acquire rights to use water).

221. *Bass v. State*, 791 So.2d 1124 (Fla. Dist. Ct. App. 2000) (finding that a dog was not considered an individual for purposes of a Prison Releasee Reoffender sentence). This court found that the "common legal usage" of the word "individual" was that of a person. *Id.* at 1124. As the statutes do not treat dogs the same as humans, dogs will not be treated as persons or individuals for purposes of criminal law. *Id.* at 1124-25; see also Craig Ian Scheiner, *Statutes with Four Legs to Stand On?: An Examination of "Cruelty to Police Dog" Laws*, ANIMAL L. 2000, at 177, 203-05 (discussing the general treatment of police dogs as property).

222. *Dye v. Wargo*, 253 F.3d 296, 300 (7th Cir. 2001). *But see* OKLA. STAT. tit. 21, § 649.2 (West Supp. 2001) (including penalties for killing or harming police dogs and horses in Title 21 Crimes and Punishments, Part II Crimes Against the *Person* (italics added)). See *supra* notes 214-17 and accompanying text for a discussion of how municipalities and schools have been treated as persons for purposes of section 1983.

223. *Dye*, 253 F.3d at 299 (citing 1 U.S.C. § 1, which states: "[T]he words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals"). The Dictionary Act sets out rules regarding the interpretation of words denoting "number, gender and so forth" in determining the meaning of any Act of Congress. 1 U.S.C. § 1 (1994).

224. *Dye*, 253 F.3d at 299. The Seventh Circuit specifically stated that "dogs are not on

Circuit also raised other problems with designating a dog as a person, including issues of process, appointment of counsel, ability to exercise the right of self-representation, relief, and whether the dog could claim qualified immunity.²²⁵ Although the court took a rather lighthearted view of the potential problems involved in treating the dog as a person, none of these issues were insurmountable if the court had decided to allocate personhood status to animals for limited purposes. Just as new rules have been developed to provide for process and appointment of counsel for corporations and associations, the same could be done for animals.

Another case found that a cat was not a "person" under the Bill of Rights.²²⁶ The owners of the cat at issue were attacking a municipal ordinance that imposed a business license tax on the promotion of a cat that had the ability to "talk."²²⁷ The court found that the statute was valid and declined to hear a claim that the talking cat's right to free speech had been infringed.²²⁸ Although the court recognized that the cat may have possessed a very unusual ability, the cat would not be considered a "person."²²⁹

Not every plaintiff has argued that a pet should be treated as a person. In a 1994 case in the Ninth Circuit, the plaintiffs alleged that the killing of their dog constituted a Fourth Amendment seizure.²³⁰ The court agreed and found that "[a] dog is an effect or property which can be seized."²³¹ Therefore, one of the types of destruction that may be recognized as a seizure under the Fourth Amendment is the killing of a dog.²³²

this list, whether or not they act under color of state law." *Id.*

225. *Id.*

226. *Miles v. City Council of Augusta*, 710 F.2d 1542, 1544 n.5 (11th Cir. 1983).

227. *Id.* at 1543. Blackie the cat "spoke, for a fee, on radio and on television shows such as 'That's Incredible.'" *Id.* The judge in this case reported that Blackie purred "I love you" to him. *Id.*

228. *Id.* at 1544 & n.5.

229. *Id.* at 1544 n.5. A recent unreported Ohio Court of Appeals case rejected an argument that it was unconstitutional to treat a dog as personal property. *Ramey v. Collins*, No. 99CA2665, 2000 WL 776932, at *2 (Ohio Ct. App. Jan. 5, 2000). The Rameys argued that they perceived their dog as a family member and that their constitutionally protected rights of association and expression had been violated. *Id.* The *Ramey* court rejected these claims and found the trial court acted properly in not anthropomorphizing the dog. *Id.*

230. *Fuller v. Vines*, 36 F.3d 65, 68 (9th Cir. 1994).

231. *Id.*

232. *Id.*; see also *Gall v. City of Vidor*, 903 F. Supp. 1062, 1067 (E.D. Tex. 1995) (discussing claim for deprivation of dogs as a form of property in violation of the Due Process Clause of the Fourteenth Amendment).

Just as with corporations, ships, and other nonhumans who have not always been treated as persons, it is possible to change the personhood status of animals. The ability to treat these entities as persons in some ways but not in others provides one basis for providing certain animals with personhood status for limited purposes. Given the difficulties inherent in developing a consistent treatment of animals using the common law, the best way to establish the personhood status of animals is through the adoption or revisions of statutes that can define persons as including nonhuman animals.²³³

4. The "Rights" Issue and Personhood

"Rights" is a loaded term in the world of legal philosophy. The concept, as it relates to the relationship among human beings, can be considered in many ways. However, additional issues arise when animals are involved.²³⁴ Rights can be viewed as correlative with duties.²³⁵ Rights can also be viewed as remedies, rhetoric, reasons, or goals.²³⁶ Some commentators theorize that rights are founded in interests.²³⁷ Given this complexity, there is an ongoing discussion regarding whether rights can be grounded in a single concept or should be considered as a composite.²³⁸

Only if the property status of animals was changed, or if animals were treated as legal persons for specified purposes, could animals hold legal rights.²³⁹ Fortunately, it is unnecessary to resolve this debate on

233. This has already begun in part in the area of estate planning with the allowance of enforceable trusts for the care of animals under the Uniform Probate Code revision. See generally Jennifer R. Taylor, *A "Pet" Project for State Legislatures: The Movement Toward Enforceable Pet Trusts in the Twenty-First Century*, 13 QUINNIPIAC PROB. L. J. 419 (1999).

234. Steven M. Wise, *Hardly a Revolution-The Eligibility of NonHuman Animals for Dignity-Rights in a Liberal Democracy*, 22 VT. L. REV. 793 (1998) (articulating the basis for granting "dignity-rights" to some nonhuman animals).

235. Thomas G. Kelch, *The Role of the Rational and the Emotive in a Theory of Animal Rights*, 27 B.C. ENVTL. AFF. L. REV. 1, 22 (1999) (referring to his discussion on the theory of Wesley Hohfeld in which legal relations are described in terms of various opposites and correlatives); see also *id.* at 6; see generally L.W. SUMNER, *THE MORAL FOUNDATION OF RIGHTS* (1987) (discussing "rights" generally).

236. Kelch, *supra* note 235, at 22.

237. *Id.* For a discussion on a variety of issues relating to rights theory in the context of animal rights, see ANIMAL RIGHTS AND HUMAN OBLIGATIONS, *supra* note 33.

238. Kelch, *supra* note 235, at 23. Kelch states that rights are founded on various "moral, policy, societal, and cultural ideas." *Id.* at 24. Kelch also advocates that emotion should be considered as part of the analysis of animal rights issues as there is a role of emotion in moral theory which is also relevant to legal theory. *Id.* at 41.

239. FRANCIONE, *PROPERTY*, *supra* note 27, at 35 ("Most legal theorists argue that there cannot be any legal relations between persons and things and that things cannot have

rights in the context of determining the appropriate valuation of animals because, although inexorably intertwined with legal personhood (after all, legal persons are granted certain rights), the human "owners" will clearly have a property right in the animal.

In the context of this Article, the legal status of animals as persons (and thus right holders) could change the valuation debate. Certainly, if animals were granted personhood status and were allocated legal rights, it is possible that their representatives could bring suits for breaches of those rights. A hypothetical example helps to illustrate this point: selected animals have been granted legal personhood status by statute and have specifically been granted the right to be free from experimentation causing permanent physical damage or loss of life. An animal that has been granted that status, Fido, was captured by a researcher and lost a limb through a mistake during the research. Fido, through his representatives, could argue that his limb had value to him for which he should be compensated.²⁴⁰

C. Standing

Another legal barrier in the ability of an animal to have enforceable rights is the requirement of standing.²⁴¹ A party must have standing in order to bring a lawsuit in court. Courts will consider both the constitutional limitations on federal court jurisdiction, as well as prudential considerations which may limit the exercise of that jurisdiction.²⁴² One way to think about standing is that a plaintiff must first show interference with his or her legal rights.²⁴³ As animals do not

rights."). Until there is consensus on the theoretical basis for humans to hold rights (which appears unlikely), there is room to argue that nonhumans may hold rights. Whether this is appropriate will be an issue for the "rights" theorists to decide and is beyond the scope of this Article.

240. A proposed Massachusetts statute relating to the injury or death of a companion animal provides recompense for the pain and suffering of that animal. Any damages recovered on behalf of the animal are payable into a trust for the care of the animal. *See infra* notes 391-96 and accompanying text.

241. This requirement is derived from Article III of the United States Constitution, which provides that federal jurisdiction extends "only to those situations in which a plaintiff can demonstrate a 'case or controversy' between himself and the defendant." Joseph Mendelson, III, *Should Animals Have Standing? A Review of Standing Under the Animal Welfare Act*, 24 B.C. ENVTL. AFF. L. REV. 795, 802 (1997). Plaintiffs also must satisfy "prudential elements" that have been established for standing. *Id.* at 804. Essentially a plaintiff must show that they are within a "zone of interest" that the statute intended to protect. *Id.*

242. *Bennett v. Spear*, 520 U.S. 154, 162 (1997).

243. Mendelson, *supra* note 241, at 802. There must also be a causal connection between

yet have independent legal rights, it is impossible for them to obtain standing.²⁴⁴ Of course, human owners have standing to assert their legal rights in the case of harm to his or her property—the animal. Thus, if someone harms a person's animal, the owner has standing to bring an action.

The way courts describe the constitutional requirement of standing is that a plaintiff must demonstrate "that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision."²⁴⁵ The most important test to determine whether prudential standing is satisfied looks to whether the injury asserted by the plaintiff falls within the "zone of interests" that the statute is intended to protect or regulate.²⁴⁶ In the area of animal welfare and rights two "kinds of injury are generally relevant."²⁴⁷ These injuries are "aesthetic harm" and the "deprivation of information."²⁴⁸ Plaintiffs alleging aesthetic harm must show that "the unlawful treatment of animals imposes some type of aesthetic or recreational injury on the plaintiff."²⁴⁹ "[A]n ideological interest in a dispute" is not sufficient to show such injury.²⁵⁰ In order to adequately allege an injury based on the deprivation of information, a statute must first provide a right to obtain information.²⁵¹

Animals could have rights that are similar to humans if such rights were provided by statute.²⁵² Statutes in every state provide for protection for animals, and over fifty federal statutes protect species and animals.²⁵³ Currently, such statutes are only enforceable by public officials; there is no private right of action to enforce such statutes.²⁵⁴ In a few cases in which there was no challenge by an opposing party, an

the injury (interference with a right) and action, and it must be likely that such injury could be redressed by the court's decision. *Id.*

244. See *infra* note 252 and accompanying text (discussing rights arising out of statutes).

245. *Bennett*, 520 U.S. at 162. These elements can be referred to as injury, causation and redressibility.

246. *Id.*; see also Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1343 (2000).

247. Sunstein, *supra* note 246, at 1343.

248. *Id.*

249. *Id.* at 1347.

250. *Id.*

251. *Id.* at 1343.

252. *Id.* at 1337.

253. *Id.* at 1337, 1339.

254. *Id.* at 1337.

animal species was successfully named by default as a plaintiff in a suit.²⁵⁵

In many cases, however, the issue of standing has served to restrict an animal's or animal species' ability to act as a plaintiff.²⁵⁶ One of the most important statutes in the animal welfare area is the Animal Welfare Act (AWA).²⁵⁷ The AWA includes a wide array of provisions dealing with the humane treatment of animals.²⁵⁸ A long line of cases raise the issue of standing in connection with the AWA.²⁵⁹ Ultimately, the ability to enforce the AWA in each case remained exclusively within the discretion of the United States Department of Agriculture (USDA).²⁶⁰

The plaintiffs in many of the lawsuits regarding the enforcement of the AWA have been animal rights or welfare organizations.²⁶¹ Commentators were excited when a recent case granted standing to an individual who claimed that the USDA failed to satisfy a statutory requirement to set minimum standards for primates that were being kept on a game farm.²⁶² Although a later proceeding found that the regulations met the statutory guidelines, the ability of an individual to assert a claim based on animals not owned by that individual provides a small window for standing in similar cases.²⁶³

255. See Mendelson, *supra* note 241, at 805.

256. *Id.*

257. 7 U.S.C. §§ 2131-2159 (2000); see also Sunstein, *supra* note 246, at 1340-41.

258. 7 U.S.C. §§ 2131-2159. The animals that are the subject of the AWA include the following: "[L]ive or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warm-blooded animal" used for specified purposes. § 2132(g). These specified purposes include the use of animals for research, testing, experimentation, exhibition purposes, or as a pet. *Id.* Recently there have been lawsuits to extend the enforcement of the AWA by the United States Department of Agriculture (USDA) to mice, rats, and birds. *Animal Legal Def. Fund, Inc. v. Espy*, 23 F.3d 496 (D.C. Cir. 1994). The plaintiffs in this case lacked standing. *Id.* at 503. But see *infra* note 264 and accompanying text (discussing a case where a student was found to have standing to challenge the USDA).

259. Mendelson, *supra* note 241, at 810.

260. The USDA is responsible for enforcing the provisions of the AWA. 7 U.S.C. § 2151 (2000).

261. *Espy*, 23 F.3d at 496; *Int'l Primate Prot. League v. Inst. for Behavioral Research*, 799 F.2d 934 (4th Cir. 1986). In contrast to many environmental statutes, the AWA does not contain any version of a citizen suit provision. Joshua E. Gardner, *At the Intersection of Constitutional Standing, Congressional Citizen-Suits, and the Humane Treatment of Animals: Proposals to Strengthen the Animal Welfare Act*, 68 GEO. WASH. L. REV. 330, 332 (2000); Rob Roy Smith, Note, *Standing on their own Four Legs: The Future of Animal Welfare Litigation After Animal Legal Defense Fund, Inc. v. Glickman*, 29 ENVTL. L. 989, 1024 (1999).

262. *Animal Legal Def. Fund v. Glickman*, 154 F.3d 426, 445 (1998). The injury in fact that the individual, Mr. Jurnove, alleged was an aesthetic injury. *Id.* at 432.

263. *Animal Legal Def. Fund v. Glickman*, 204 F.3d 229, 230 (2000) (finding that the

A recent case illustrates the circumstances in which an individual was found to have standing over non-owned animals. In *Alternatives Research and Development Foundation v. Glickman*,²⁶⁴ a psychology student participating in course-required laboratory experiments involving rats successfully argued that she had standing to sue the USDA for failure to include birds, mice, and rats in the regulations promulgating the AWA. In order to fulfill the constitutional standing requirements in cases involving non-owned animals, it is necessary for a specific set of facts to be in place.²⁶⁵ Although some recent cases have illustrated a greater willingness to allow individuals to bring actions to enforce the AWA, there has been no indication that an animal will be able to satisfy standing requirements on its own in the near future.

Unless a statute allows for animals to bring causes of action on their own behalf, animals will not have standing.²⁶⁶ Currently, no federal statute provides that right.²⁶⁷ However, there does not appear to be an insurmountable constitutional barrier to Congress providing for such a right.²⁶⁸ As with the status of an animal as a person, it is possible to create mechanisms that would enable animals to assert standing on their own behalf.

D. Criminal Liability

From the Ninth to the Nineteenth Century, it was not uncommon to find cases in which animals "were put on trial and held responsible for a

regulations met the statutory and Administrative Procedure Act tests).

264. 101 F. Supp. 2d 7, 13 (D.D.C. 2000) (rejecting the motion to dismiss as to Ms. Gausz on the grounds that she lacked constitutional standing). As part of the settlement of this case, the USDA changed its policy and agreed to promulgate regulations on the care of rodents and birds. David Malakoff, *Researchers Fight Plan to Regulate Mice, Birds; Laboratory Animals Now Classified as "Animals" by Government*, SCIENCE, Oct. 6, 2000, at 23. Through language in appropriations bills, Congress has prevented the USDA from actually spending any money on the enforcement of any such rules. Ron Southwick, *Researchers Score Modest Win over Animal Rights Activists, At Least for Now*, CHRON. OF HIGHER EDUC., Nov. 23, 2001, at A22.

265. One commentator describes these factors as a plaintiff that "(1) observes an animal in a habitat unsatisfactory to his educated but personal concept of a proper animal environment, (2) demonstrates only negligent government supervision, rather than affirmative government requirement, of this inadequate environment, and (3) provides non-specific evidence that the requested relief will redress his injury." Fiona M. St. John-Parsons, *"Four Legs Good, Two Legs Bad": The Issue of Standing in Animal Legal Defense Fund, Inc. v. Glickman and its Implications for the Animal Rights Movement*, 65 BROOK. L. REV. 895, 897 (1999).

266. Sunstein, *supra* note 246, at 1359.

267. *Id.*

268. *Id.* at 1361.

variety of crimes."²⁶⁹ Currently, animals are generally not found to have the requisite intent to violate a criminal statute, but that does not mean that animals are not sanctioned for what would be criminal acts if performed by humans.²⁷⁰ The most widely publicized cases have usually involved the mauling or biting of a human by a dog.²⁷¹ Several states have adopted laws to specifically deal with what are referred to as "dangerous dogs."²⁷² The "sentence" for a violation can require confinement of the dog, muzzling when in public, or in cases of multiple offenses or serious injury, the death of the dog. Courts may also hold human owners criminally liable if their dogs cause serious injury or death to another human.²⁷³

Criminal liability for acts by humans against animals is often imposed by anti-cruelty or welfare legislation. For example, in 1821, a Maine statute provided that it was a violation to cruelly beat a horse or cattle.²⁷⁴ During the next forty years, several states passed anti-cruelty laws.²⁷⁵ Many of the early welfare laws only applied to animals that were considered commercially valuable and focused on the harm caused to the property by the action.²⁷⁶ The issue was not the prevention of the infliction of pain upon these animals.²⁷⁷ Some commentators argue that the purpose of the welfare laws was not to prevent pain to the animals,

269. Adam Kolber, Note, *Standing Upright: The Moral and Legal Standing of Humans and Other Apes*, 54 STAN. L. REV. 163, 179 (2001). The attribution of criminal liability happened throughout Europe as well as other areas of the world. *Id.* See generally Walter Woodburn Hyde, *The Prosecution and Punishment of Animals and Lifeless Things in the Middle Ages and Modern Times*, 64 U. PA. L. REV. 696 (1915-1916).

270. Even acts that might be considered a misdemeanor if performed by a human can be considered a serious offense if performed by an animal, usually a dog. Perhaps the best examples of this are statutes that allow for the killing of a dog that harasses livestock. FAVRE & BORCHELT, *supra* note 28, at 207-10. The definition of livestock varies by statute, but often includes cattle, sheep, horses, and sometimes poultry. *Id.* at 209. The basis for the severity of the punishment was the status of livestock as an economic asset versus a dog, which historically was seen as having no value. *Id.* at 207.

271. John Woolfolk, *Law Toughens Penalties Against Pet Owners for Animal Bites*, SAN JOSE MERCURY NEWS, Jan. 10, 2002, at State and Regional News (discussing various mauling cases and reporting that five million people are bitten by dogs each year, of which 350,000 need emergency care).

272. FAVRE AND BORCHELT, *supra* note 28, at 203.

273. *Id.* at 206 (citing to Florida and Michigan laws that address the human owner's criminal liability if a dangerous dog causes severe injury or death); see also Jaxon Van Derbeken, *Joint Trial for Couple in Dog-Mauling Case*, S.F. CHRON., Jan. 16, 2002, at A15.

274. FAVRE AND BORCHELT, *supra* note 28, at 255. In 1822, an act to prevent the cruel treatment of cattle was passed in Great Britain. *Id.* at 253.

275. *Id.* at 257.

276. *Id.* at 255.

277. *Id.*

but rather to prevent the pain to those humans who find the activity distressing.²⁷⁸

E. Distinctions Among Animals

Any change to the current valuation system must be predicated on drawing distinctions among animals. The allocation of higher value to some animals based on their value to humans is troubling to many animal rights advocates.²⁷⁹ Providing additional protection or different treatment to certain animals is an integral part of the network of laws relating to animals under the existing legal system.

The Endangered Species Act (ESA) is an example of legislation that has provided animals with protection subject to the animals' status in a particular species.²⁸⁰ "The ESA . . . comes into play any time a private individual or corporation engages in any activity that constitutes a 'take' of an animal species."²⁸¹ Every federal agency has a "substantive duty" to conserve the designated species regardless of the level of impact on such species.²⁸² The ESA articulates several justifications including the finding that certain species are of recreational value to the nation and its people.²⁸³ This utilitarian approach is in conflict with the fact that the utility to humans of a species "is not a criteria for listing."²⁸⁴

There have been a variety of views, some controversial, used to

278. FRANCIONE, PROPERTY, *supra* note 27, at 123.

279. See *supra* notes 129-49 and accompanying text.

280. 16 U.S.C. §§ 153-32. (2000). There were earlier statutes designed to protect endangered species, but such protections were ineffective. Tina S. Boradiansky, Comment, *Conflicting Values: The Religious Killing of Federally Protected Wildlife*, 30 NAT. RESOURCES J. 709, 723 (1990).

281. Joe Mann, Student Article, *Making Sense of the Endangered Species Act: A Human-Centered Justification*, 7 N.Y.U. ENVTL. L.J. 246, 249 (1999) (citation omitted).

282. *Id.* at 248. This can result in significant wasted expenditures once it is determined that a species is at risk. See *id.* at 250 (discussing the expenditure of \$100 million on the Tellico Dam and problems with the snail darter). Note that further legislative efforts provided an exemption for the builders of the Tellico Dam. *Id.*; Boradiansky, *supra* note 280, at 726.

283. 16 U.S.C. § 1531(a)(3) (2000). Other findings include references to species which are extinct or threatened with extinction and the pledging of the United States to various international treaties relating to species facing extinction. *Id.*; see also Jared des Rosiers, *The Exemption Process Under the Endangered Species Act: How the "God Squad" Works and Why*, 66 NOTRE DAME L. REV. 825 (1991). Des Rosiers describes several arguments used to support the preservation of species including "direct benefits, indirect benefits, aesthetic considerations, and moral or ethical considerations." *Id.* at 827.

284. Boradiansky, *supra* note 280, at 722. Note the apparent use of both the utilitarian philosophy and the idea of intrinsic value discussed at *supra* notes 97-148 and accompanying text.

justify the broad mandate of the ESA. One nature-centered interpretation of the purpose of the ESA is that it establishes "legal rights for plant and animal species that obtain independently of any value that humankind may place on the conservation of these species."²⁸⁵ One commentator has stated that, under the ESA, "a listed nonhuman resident of the United States is guaranteed, in a special sense, life and liberty."²⁸⁶ Another approach views the justification for the ESA using a human centered approach.²⁸⁷ Under this viewpoint, the benefits to humanity for saving species outweigh the disadvantages in such legislation.²⁸⁸ These benefits include the protection of genetic resources for the benefit of future generations, the maintenance of a healthy ecosystem, and the security of aesthetic benefits for the future.²⁸⁹

The United States has used specific animals to support its cultural identity. The first animal provided statutory protection under federal law was the bald eagle.²⁹⁰ The bald eagle is the national symbol and is protected by the Eagle Protection Act.²⁹¹ The bald eagle is viewed as a symbol of the American ideal of freedom and is accorded a different status than other animals threatened with extinction.²⁹² As one judge has stated, the purpose of the Eagle Protection Act "is to prevent the extinction of the bald eagle, the emblem of the nation, rather than merely to conserve a resource."²⁹³ The Eagle Protection Act provides, in part, that a person can be assessed a civil penalty, fined, or imprisoned for the sale or transport of any bald or golden eagle.²⁹⁴

Various other animals have also been singled out for special

285. Mann, *supra* note 281, at 246.

286. Boradiansky, *supra* note 280, at 722 (citing J. PETUALLA, AMERICAN ENVIRONMENTALISM: VALUES, TACTICS, PRIORITIES 51 (1980)).

287. Mann, *supra* note 281, at 253.

288. *Id.*

289. *Id.* at 254-58.

290. Boradiansky, *supra* note 280, at 719. The earliest effort to protect wildlife came in an unsuccessful effort to protect the remainder of the buffalo herds on the great plains in the 1870s. *Id.* at 713.

291. Kenneth P. Pitt, *Eagles and Indians: The Law and the Survival of a Species*, 5 PUB. LAND L. REV. 100, 109 (1984).

292. 16 U.S.C. § 668 (2000).

293. Pitt, *supra* note 291, at 170 n.60 (citing *United States v. Fryberg*, 622 F.2d 1010, 1014 (9th Cir. 1980)).

294. 16 U.S.C. § 668(a) (2000) (providing for fines for initial violations of no more than \$5000 and/or imprisonment for not more than one year). Civil penalties of no more than \$5000 may also be assessed for each violation of the Act. § 668(b). Furthermore, a person convicted of a violation under the subchapter can have their lease or other agreement authorizing the grazing of domestic livestock on federal lands terminated. § 668(c).

treatment. Often, these animals are viewed as special or beautiful.²⁹⁵ An example is the protection of dolphins, porpoises, seals, sea lions, sea otters, and other sea animals under the Marine Mammal Protection Act (MMPA).²⁹⁶ The stated purpose of the MMPA includes the protection of species that have "resources of great international significance, esthetic and recreational as well as economic."²⁹⁷ Significant penalties can be assessed against violators of the MMPA.²⁹⁸

The emphasis on animals with charisma means that certain other less charismatic animals, which otherwise may be important from an ecological perspective, will receive less protection.²⁹⁹ An example of this is the balancing test provided in the ESA for insects.³⁰⁰ Even restoration projects highlight the "poster creatures" of the movements, such as wolves and grizzly bears.³⁰¹

The United States has also supported efforts on a worldwide basis to protect certain animals with the ratification of several international treaties. Although the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is the most well-known of these treaties, the United States has ratified several other treaties providing special protection for specific animals.³⁰² Some examples include treaties regulating and protecting whales, Antarctic

295. Elise Miller, *The Fox Guarding the Henhouse: Conflicting Duties Under the Marine Mammal Protection Act*, 31 SANTA CLARA L. REV. 1063 (1991). Miller cites to the gracefulness and beauty of these animals, as well as their intellectual and communication abilities. *Id.* at 1063.

296. Nina M. Young & Suzanne Iudicello, *Blueprint for the Whale Conservation: Implementing the Marine Mammal Protection Act*, 3 OCEAN & COASTAL L. J. 149, 151-52 (1997) (citing to 16 U.S.C. § 1362(6)).

297. 16 U.S.C. § 1361(6) (2000).

298. 16 U.S.C. § 1375 (2000) (providing for civil penalties of fines of not more than \$10,000 and criminal penalties of fines not more than \$20,000 and/or imprisonment of not more than one year). A vessel that is employed in the unlawful taking of any marine mammal can have its cargo or the monetary value thereof seized. 16 U.S.C. § 1376 (2000). A vessel may also be subject to a civil penalty of not more than \$25,000 if it is employed in the unlawful taking of any marine mammal. *Id.*; see *supra* notes 202-10 and accompanying text (discussing the doctrine of personification which treats vessels as legal persons for limited purposes).

299. Jim Chen, *Diversity and Deadlock: Transcending Conventional Wisdom on the Relationship Between Biological Diversity and Intellectual Property*, 31 ENVTL. L. REP. 10625 (2001).

300. 16 U.S.C. § 1532(6) (2000).

301. Holly Doremus, *Restoring Endangered Species: The Importance of Being Wild*, 23 HARV. ENVTL. L. REV. 1, 8 (1999).

302. Gary D. Meyers & Kyla Seligsohn Bennett, *Answering "The Call of the Wild": An Examination of U.S. Participation in International Wildlife Law*, 7 PACE ENVTL. L. REV. 75 (1989).

marine animals, migratory birds, and African elephants.³⁰³

An example that is more closely connected with the companion animals targeted in this Article is the treatment of service animals. Service animals are used to assist persons with physical and mental disabilities.³⁰⁴ Through the application of the Americans with Disabilities Act of 1990 (ADA) and the Fair Housing Amendments Act of 1988, housing providers are required to make reasonable accommodations for the disabled.³⁰⁵ One of the possible accommodations is to make exceptions to no-pets policies to allow the disabled to live with dogs and cats acting as service animals.³⁰⁶ Facilities that adopt "no-animal" rules may need to show that service animals "pose a direct threat to the health of others"; otherwise, an exception should be made for service animals in order to accommodate persons with disabilities.³⁰⁷ The status of the dog or cat acting as a service animal means that the animal is not treated as merely a pet under these laws.³⁰⁸ In order to be designated as a service animal, "the animals must be trained and must work for the benefit of a disabled person" who has a demonstrated medical need.³⁰⁹ Several state statutes provide special penalties for injuring service animals.³¹⁰ These penalties may include increased criminal liability as well as double or treble damages.³¹¹

303. *Id.* at 77-105 (describing several conventions that the United States has enacted relating to international wildlife).

304. Elizabeth Blandon, *Reasonable Accommodation or Nuisance? Service Animals for the Disabled*, 75 FLA. B.J. 12 (2001). Although the use of service dogs to assist persons with physical disabilities is well known, recently, the use of animals to assist persons with mental disorders such as depression, panic disorder, and bipolar disorder has generated attention. *Id.* at 14.

305. *Id.* at 12 (citing 42 U.S.C. § 12101 and 42 U.S.C. § 3601 (the ADA and Fair Housing Amendments Act respectively)).

306. *Id.* There has been concern about the impact of widening the definition of service dog, and the Coalition of Assistance Dog Organizations has contacted the Department of Justice to propose changes to ADA regulations relating to services dogs, including the creation of a new definition for assistance dog: "[A]n animal specifically trained to perform a physical task to mitigate an individual's disability." Beth Finke, *Keeping the Skies Friendly – The Importance of Minding the ADA Standards*, BARK, Fall 2001, at 69.

307. Robert Silverstein, *Emerging Disability Policy Framework: A Guidepost for Analyzing Public Policy*, 85 IOWA L. REV. 1691, 1724 (2000).

308. Blandon, *supra* note 304, at 14.

309. *Id.* at 16.

310. GA. CODE ANN. § 30-1-6 (2001); NEV. REV. STAT. ANN. 426.790 (Michie 2001); R.I. GEN. LAWS § 4-13-16.1 (2001).

311. GA. CODE ANN. § 30-1-6 (applying if an individual is asked to discontinue conduct or interferes with duties performed by the dog, and results in imprisonment for not more than 90 days and/or a fine of up to \$500); NEV. REV. STAT. ANN. 426.790 (depending on the conduct, a person could be found to commit a misdemeanor or felony); R.I. GEN. LAWS § 4-

The specialized treatment currently provided to companion animals is demonstrated by the adoption of the Pet Theft Act of 1990.³¹² The Pet Theft Act applies to dogs and cats.³¹³ The stated intent of the Pet Theft Act is to prohibit the use of stolen pets in research and to provide an adequate opportunity for pet recovery and adoption before an animal is sold to a dealer.³¹⁴

IV. VALUATION

There is an ongoing debate regarding the appropriate value of companion animals in the United States. Under the common law, canines and felines were not accorded the same protection as other domestic animals.³¹⁵ Domestic animals that had economic value, such as cattle, horses, and sheep were afforded the most protection.³¹⁶ As is illustrated below, case law and statutory provisions in this area have exclusively focused on the value of companion animals to their human owners.

13-16.1 (providing double or treble damages to be recovered in a civil suit); *see also* ALASKA STAT. §§ 11.56.705, 11.56.710 (Michie 2000); ARIZ. REV. STAT. ANN. § 13-2910 (West 2001); CAL. PEN. CODE § 600.2, 600.5 (Deering 2000); GA CODE ANN. § 16-11-107 (1999); 740 ILL. COMP. STAT. ANN. 13/10 (West Supp. 2002); IND. CODE ANN. § 35-46-3-11.5 (Michie 1998); IOWA CODE ANN. § 717B.9 (West Supp. 2002); KY. REV. STAT. ANN. §§ 525.200, 525.205 (Banks-Baldwin 2001); LA. REV. STAT. ANN. §14:102.8 (West 1986); MASS. GEN. LAWS ANN. ch. 272, § 77A (West 2000); MICH. COMP. LAWS ANN. §§ 750.50a, 750.50c (West Supp. 2002); MISS. CODE ANN. § 97-41-21 (1999); N.M. STAT. ANN. § 30-18-13 (Michie 1978); N.Y. GEN. OBLIG. LAW § 11-107 (Consol. Supp. 2002); OHIO REV. CODE ANN. § 2921.321 (Anderson 2001); OR. REV. STAT. §§ 30.822, 346.687 (2001); S.D. CODIFIED LAWS § 40-1-38 (Michie 2001); UTAH CODE ANN. §§ 76-9-306, 78-20-102, 78-20-103 (2001); WASH. REV. CODE ANN. § 9A.76.200 (West 2000) (providing for remedies for injury or harm to service animals and police service animals).

312. *See* Nancy Goldberg Wilks, *The Pet Theft Act: Congressional Intent Plowed Under by the United States Department of Agriculture*, ANIMAL L. 1995, at 103 (citing the Animal Welfare Act, 7 U.S.C. § 2131 (1994)). The Pet Theft Act refers to amendments to the Animal Welfare Act. *Id.*

313. *Id.* at 103.

314. *Id.* at 116. Wilks argues that the United States Department of Agriculture (USDA) erred in its interpretation of the law and rendered its provisions ineffective. *Id.* at 124. One example of this misinterpretation that Wilks provides is congressional language suggesting that a five day holding period prior to sale was intended to apply to all dogs and cats and the USDA regulations only mandate such holding period for dogs and cats sold to dealers. *Id.* at 117. Obviously a longer holding period prior to euthanasia increases the chance that an animal's owners would find them, supporting the stated intent of supporting the reunification of such animals.

315. S. Joseph Piazza, *Liability for the Injury and Destruction of Canines*, 26 U. FLA. L. REV. 78, 78 (1973).

316. *See supra* note 270 and accompanying text (citing to statutes that allow for the killing of a dog if found to be "harassing" livestock).

A. Case Law

1. Valuation

a. Market Value

Historically, the fair market value of an animal was used to determine damages for the loss of the animal.³¹⁷ Animals were viewed as just another form of property.³¹⁸ The calculation of damages using the fair market value of an animal, while still a strong argument, has been eroded by cases in several states, and more recently by statutory provisions that have allowed for damages to be assessed using different methods.³¹⁹

b. Actual Value vs. Sentimental Value

Alternate methods of valuation have been used when it has not been possible to calculate the fair market value of the animal or when the animal does not have a fair market value. A state may allow for the elevation of damages based on the "actual or intrinsic value of the animal."³²⁰ The actual or intrinsic value of an animal is used to adjust the market based damages.³²¹ This type of damage calculation has been

317. Debra Squires-Lee, Note, *In Defense of Floyd: Appropriately Valuing Companion Animals in Tort*, 70 N.Y.U. L. REV. 1059, 1061 (1995). In fact, an early Supreme Court case found that dogs had no intrinsic value, unlike other animals that could be used as beasts of burden or as food. *Sentell v. New Orleans & Carrollton R.R. Co.*, 166 U.S. 698, 701-06 (1897) (discussing a case upholding a Louisiana statute and New Orleans city ordinance requiring the reporting of the value of the dog for tax assessment purposes in order to recover that value if the dog is destroyed and the licensing of dogs, respectively). Market value can be defined as "the amount of money which a purchaser willing, but not obliged, to buy the property would pay to an owner willing, but not obligated, to sell it, taking into consideration all uses to which the property is adapted and might in reason be applied." *Dillon v. O'Connor*, 412 P.2d 126, 127 (Wash. 1996) (citing to *Ozette Railway Co. v. Grays Harbor Coun.*, 133 P.2d 983 (Wash. 1943)) (discussing the damage calculation for the loss of a dog).

318. Sonia S. Waisman & Barbara R. Newell, *Recovery of "Non-Economic Damages for Wrongful Killing or Injury of Companion Animals: A Judicial and Legislative Trend*, ANIMAL L. 2001, at 45, 46.

319. See *infra* notes 372-98 and accompanying text. Note that most of the cases dealing with valuation and emotional distress have involved the injury or death of a dog; however, there is no reason the same analysis could not be used if a cat was the subject of a suit.

320. Peter Barton & Frances Hill, *How Much Will You Receive in Damages From the Negligent or Intentional Death of Your Pet Dog or Cat?*, 34 N.Y.L. SCH. L. REV. 411, 416 (1989) (discussing New York law allowing damages based on the intrinsic value of an animal).

321. *Id.* at 419. A description of the intrinsic value of pets is found in the concurring opinion of *Bueckner v. Hamel*, 886 S.W.2d 368, 373-78 (Tex. Ct. App. 1994). Justice Andell would find that either the market value or the intrinsic, or special value, of an animal could be

used for other items of sentimental value such as heirlooms and photographs.³²² Damages based on intrinsic value can be difficult to prove. Arguments can be made that the actual or intrinsic value of an animal increases as it ages or if it has special training.³²³ The subjective element of the damages is described as the "sentimental value" attached to the property.³²⁴ Sentimental value is considered to be the feelings or emotions in connection with "normal" feelings of loss.³²⁵

Several courts have taken the step to allow the "actual" value of the pet to the owner to be used for valuation purposes. Some of these courts assessing the actual value of animals have specifically stated that the value does not include the subjective emotional or sentimental value of the animal.³²⁶ Actual value may be calculated as the replacement cost of the animal, including costs related to the purchase of a new animal of the same breed, immunization, neutering, and comparable training.³²⁷ In the alternative, an owner could calculate damages using the original cost of the animal and the investments in the animal, including immunizations, neutering, and training.³²⁸ It may also be appropriate to consider the breeding potential of the animal.³²⁹

It is sometimes difficult to establish the line to be drawn between actual and sentimental value. An early and often reported case in Florida found that where a garbage can was thrown at a dog and the dog

sufficient to support damages. *Id.* at 378.

322. Barton & Hill, *supra* note 320, at 419.

323. *Id.* at 417.

324. *Id.* at 420.

325. *Id.*

326. *Mitchell v. Heinrichs*, 27 P.3d 309, 312 (Alaska 2001) (finding that the actual value of the animal can be used to calculate damages, including the services provided by the animal, cost of replacement, original cost, and cost to reproduce, as well as other investments made in the animal or the breeding potential of the animal); *see also Brousseau v. Rosenthal*, 443 N.Y.S.2d 285, 286 (Civ. Ct. 1980) (providing that the actual value of an animal would be used to calculate damages including the element of loss of companionship). *See generally* 1 DAN B. DOBBS, LAWS OF REMEDIES DAMAGES – EQUITY – RESITUTION 898–901, 907–08 (2d ed. 1993).

327. *Mitchell*, 27 P.3d at 314; *cf. United States v. Hatahley*, 257 F.2d 920, 923 (10th Cir. 1958) (providing that the market value or replacement cost is the measure of damages of horses and burros that were destroyed by agents of the U.S. Bureau of Land Management); *Ridenour v. Furness*, 546 N.E.2d 322 (Ind. Ct. App. 1989) (discussing the measure of damages for the loss of sport fish).

328. *See, e.g., Ridenour*, 546 N.E.2d 322.

329. *Id.*; *see also McDonald v. Ohio State Univ. Veterinary Hosp.*, 644 N.E.2d 750, 752 (Ohio Ct. Claims 1994) (upholding the use of an actual value standard and finding that damages were supported in the amount of \$5,000, considering the training, rehabilitation, and breeding of an animal).

later died of her injuries, the mental suffering of the owner could be included as an element of the damages.³³⁰

A few courts have found that reasonable veterinary expenses are the appropriate measure of damages.³³¹ For example, a recent New Jersey case found that if market value cannot be ascertained, the damages rule for the negligent destruction of personal property consisting of the difference between the market value before and after an injury would not necessarily apply.³³² In *Hyland*, a Shih Tzu was attacked by another dog and required extensive veterinary treatment that cost \$2500.³³³ The *Hyland* court took a flexible approach to the calculation of damages and found that it was a matter of "good sense" to require the defendant to "make good the injury done," and allowed the plaintiff to be reimbursed for her veterinary expenses.³³⁴ This court distinguished household pets from other fungible or disposable property in allowing for the calculation of damages.³³⁵

An additional claim that could be made for the loss of an animal is that there has been loss of companionship, similar to claims based on a human's loss of consortium.³³⁶ As loss of consortium claims have developed over the years, a loss of consortium/companionship claim for the loss of an animal may be a viable claim in the future.³³⁷

Loss of consortium claims were originally limited to the material services that a wife provided in the home.³³⁸ A more sentimental concept later developed that considered a spouse's loss of affection and

330. *La Porte v. Associated Indep., Inc.*, 163 So.2d 267, 269 (Fla. 1964) (stating, "Without indulging in a discussion of the affinity between 'sentimental value' and 'mental suffering', we feel that the affection of a master for his dog is a very real thing and that the malicious destruction of the pet provides an element of damages for which the owner should recover.").

331. *Barton and Hill*, *supra* note 320, at 418 (citing *Zager v. Dimilia*, 524 N.Y.S.2d 968 (Village Justice Ct. 1988)). Damages had initially been set at ten dollars, so the increase to three-hundred dollars based on the veterinary damages is significant. However, damages measured by veterinary costs alone are unlikely to cover the fees and costs involved in the lawsuit itself. See *infra* note 398 and accompanying text (describing Maryland statutory provision that provides for veterinary expenses to be the measure of damages for the injury or death of a pet).

332. *Hyland v. Borrás*, 719 A.2d 662, 663 (N.J. Super. Ct. App. Div. 1998).

333. *Id.*

334. *Id.* at 664.

335. *Id.*

336. See *infra* notes 345-46 and accompanying text (analyzing cases discussing loss of companionship).

337. *Waisman & Newell*, *supra* note 318, at 47.

338. *Id.*

companionship.³³⁹ Finally, parents' claims relating to the loss of a child were allowed, and several states have recognized a child's claim for the loss of parental consortium.³⁴⁰ Loss of consortium was originally supported by the injury of a spouse or parent, but wrongful death statutes that apply after death may allow recovery on the same grounds.³⁴¹

Surveys have shown that many companion animals are treated as if they are family members.³⁴² Studies examining the nature of the relationship between humans and companion animals have shown that there is a significant impact on the humans that share their lives with a companion animal.³⁴³ This is not an argument that companion animals should be treated as if they are human children or siblings; this argument illustrates only that some companion animals take on a similar role to some people. Proving the existence of a relationship is necessary for damages for loss of companionship. Clearly, a distinction can be made between animals that are treated as members of the family (in that they live in the home, their birthdays are celebrated, they are in the middle of family photos, the best of veterinary care is provided) and animals that have little contact with human family members.³⁴⁴

A few cases have held that loss of companionship can be one factor in the calculation of the actual value of an animal.³⁴⁵ Note, however, that several cases have held that the separate claim for loss of

339. *Id.* Some courts treat these material and sentimental aspects of consortium indivisibly. *Id.*

340. *Id.* at 47, 50.

341. *Id.* at 48. Note that wrongful death claims are often restricted by state statute. An example is the various Indiana code provisions for wrongful death claims if the decedent is not married, does not have children, or is a child. Tammy J. Meyer & Kyle A. Lansberry, *Tort Law: Recent Development in Indiana Tort Law*, 34 IND. L. REV. 1075, 1075-80 (2001).

342. *See supra* notes 4-7.

343. *See generally* COMPANION ANIMALS IN HUMAN HEALTH (Cindy C. Wilson & Dennis C. Turner eds., 1998) (discussing a variety of studies done on the impact of companion animals in human health); GAIL F. MELSON, WHY THE WILD THINGS ARE: ANIMALS IN THE LIVES OF CHILDREN (2001) (discussing the relationship between animals and children and the impact on children of having contact with animals).

344. The same type of proof is necessary in any loss of consortium claim. *See* Susanne Cetrulo, *A Practitioner's Analysis of the Loss of Parental Consortium in Kentucky*, 26 N. KY. L. REV. 1, 13 (1999) (discussing factors considered in determining the amount of damages for a loss of consortium claim by a child, including the child's relationship with the parent).

345. *Jankoski v. Preiser Animal Hosp., Ltd.*, 510 N.E.2d 1084, 1087 (Ill. App. Ct. 1987) (affirming that the loss of companionship could be used as an element to determine damages in a property damage case, similar to the treatment of other items of sentimental value such as heirlooms and photographs).

companionship would not be allowed for the loss of an animal.³⁴⁶ In addition to receiving damages based on the market or actual value of an animal, a few jurisdictions have awarded punitive damages for the killing of a pet.³⁴⁷

2. Emotional Distress

Although not specifically based on the value of the animal, another claim that is being raised with greater frequency is a claim for intentional or negligent infliction of emotional distress in connection with the injury or death of a companion animal. Under tort law, a person who proximately causes harm is required to pay for damages, regardless of their nature.³⁴⁸ Although more difficult to quantify, damages for emotional distress are sometimes included in the

346. *Id.* (declining to extend an independent cause of action for loss of companionship for the death of a dog allegedly resulting from veterinary malpractice); *Gluckman v. Am. Airlines, Inc.*, 844 F. Supp. 151, 158 (S.D.N.Y. 1994) (distinguishing the *Brousseau* case which allowed a pet's companionship to be used as a factor to assess a dog's actual value to an owner). The *Gluckman* court also dismissed a cause of action for an animal's pain and suffering. *Id.* at 159 (citing acknowledgment by *Gluckman* that "there is not a [sic] yet a cause of action recognized for the pain and suffering of an animal"); see also *Koester v. VCA Animal Hosp.*, 624 N.W.2d 209, 211 (Mich. Ct. App. 2000) (declining to create an independent cause of action for loss of companionship); *Daughen v. Fox*, 539 A.2d 858, 865 (Pa. Super. Ct. 1988) ("Under no circumstances, under the law of Pennsylvania, may there be recovery for loss of companionship due to the death of an animal"). Note that a circuit court judge in Oregon recently ruled against a motion to dismiss all causes of action, including a claim for loss of companionship of an animal. *Geordie L. Duckler & Dana M. Campbell, Nature of the Beast: Is Animal Law Nipping at Your Heels*, OR. STATE B. BULL., June 2001, at 15, 17 (discussing *Brock v. Rowe* (Washington County, Oregon, C002535CV)).

347. *Mitchell v. Heinrichs*, 27 P.3d 309, 311-12 (Alaska 2001) (discussing the type of offensive conduct that would support punitive damages); *Wilson v. City of Eagan*, 297 N.W.2d 146, 150-51 (Minn. 1980) (finding that punitive damages were appropriate in a case against an animal warden who had intentionally killed a cat in violation of an ordinance and statute, although the jury verdict of \$2,000 in punitive damages was reduced to \$500); *Molenaar v. United Cattle Co.*, 553 N.W.2d 424, 426, 428-30 (Minn. Ct. App. 1996) (discussing the availability of punitive damages in a personal property action where sixty-five heifers were converted and punitive damages in the amount of \$400,000 were awarded by the jury); *Propes v. Griffith*, 25 S.W.3d 544, 547, 550-51 (Mo. Ct. App. 2000) (upholding award of \$2,000 in actual damages and \$4,000 in punitive damages for the euthanization of two dogs by a person who was untruthful about her ownership of the dogs and other malicious, willful and intentional conduct). Note that there have been several unreported cases discussed in the media that have discussed significant monetary awards for injury or death to animals. Julie Scelfo, *Good Dogs, Bad Medicine? More Pet Owners Sue for Malpractice - and Win*, NEWSWEEK, May 21, 2001, at 52 (stating, "[I]n 1997, a Kentucky jury awarded \$15,000 to an owner whose German shepherd . . . bled to death from a botched surgery," and an award of \$26,699 by a California judge in 2000 to a woman due to the suffering of her dog caused by bungled dental repairs).

348. *Squires-Lee*, *supra* note 317, at 1062.

compensation of victims.³⁴⁹

Plaintiffs have generally been unsuccessful in arguing that damages for emotional distress should be granted when their animals have been injured or killed.³⁵⁰ There have been a few cases in which damages have been granted or the possibility of emotional distress damages has been recognized. The willingness of a court to allow claims for emotional distress due to the injury or death of an animal is often based on the general rules relating to recovery for emotional distress in the forum state.³⁵¹ States view emotional distress claims in a significantly different manner. For example, some states allow claims based on damage to property, while others have clearly held that the destruction of property will not support a claim.³⁵² Usually conduct must be extreme and outrageous to support a claim of intentional infliction of emotional distress.³⁵³ In some states, in order to recover under the negligent infliction of emotional distress, third parties must be close relatives of the victim or fear physical harm to themselves.³⁵⁴

349. *Id.*

350. For clarification purposes, the claim based on emotional distress relates to the distress of the humans.

351. As put by one Connecticut judge, "There is no reason to believe that malpractice on the family pet will receive higher protection than malpractice on a child or spouse." *Altieri v. Nanavati*, 573 A.2d 359, 361 (Conn. Super. Ct. 1989) (discussing a recent ruling of the Connecticut Supreme Court that "held there could be no bystander emotional disturbance claims arising from medical malpractice on another person").

352. *Compare* *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1068 (Haw. 1981) (allowing distress claims based on harm to property), *with* *Fackler v. Genetzky*, 595 N.W.2d 884, 891-92 (Neb. 1999) (stating that Nebraska law does not allow recovery for emotional damages resulting from the negligent destruction of property and more specifically "damages for mental suffering or emotional distress may not be recovered in the negligently inflicted death of an animal") *and* *Strawser v. Wright*, 610 N.E.2d 610, 612 (Ohio Ct. App. 1992) (stating that Ohio law does not permit recovery for emotional distress caused by the negligent injury or destruction of property).

353. *Katsaris v. Cook*, 225 Cal. Rptr. 531 (Cal. Ct. App. 1986) (discussing the test of extreme and outrageous conduct in a case where two dogs were shot and remanding to determine if post-shooting conduct supported the claim); *Carroll v. Rock*, 469 S.E.2d 391, 394 (Ga. Ct. App. 1996) (discussing the level of conduct required to support an intentional infliction of emotional distress claim). The *Katsaris* case had an extremely strong dissenting opinion interpreting the statute that provided immunity from the killing of animals harassing livestock. 225 Cal. Rptr. at 538, 539 n.2 (Sabraw, J., dissenting). "Not only [are dogs] more than property today, [they are] the subject of sonnets, the object of song, the symbol of loyalty. Indeed, [they are] man's best friend." *Id.* at 538-39.

354. *See* *Langford v. Emergency Pet Clinic*, 644 N.E.2d 1035, 1037-38 (Ohio Ct. App. 1994) (providing that you must be a bystander to an accident or be in fear of physical harm to your own person to present a claim for negligent infliction of emotional distress in a case relating to the improper burial of a dead dog); *Rowbotham v. Maher*, 658 A.2d 912, 912-13 (R.I. 1995) (finding that a third party may only recover if they are a close relative of the

The Hawaii Supreme Court allowed a small recovery for a claim of emotional distress based on the death of a dog due to negligence.³⁵⁵ Hawaii had previously allowed claims of emotional distress for the negligent or intentional infliction of damage to personal property and did not require that the plaintiffs actually witness the tortious event in order to recover damages.³⁵⁶ A Kentucky Court of Appeals found that punitive damages or claims based on intentional infliction of emotional distress would not be precluded simply because the underlying facts involved an animal.³⁵⁷

The Vermont Supreme Court indicated that a future case seeking recovery for emotional distress, resulting from the negligent handling of an impounded animal, could be successful.³⁵⁸ Similarly, the Alaska Supreme Court stated that it was "willing to recognize a cause of action for intentional infliction of emotional distress for the intentional or reckless killing of a pet animal in an appropriate case."³⁵⁹

victim and because the victim in the case was a dog, it would not be considered a relative).

355. *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1067 (Haw. 1981) (discussing the negligence of the Animal Quarantine Station where dogs were left in a hot van for at least an hour causing a dog to die of heat prostration). The damages for the loss of the dog totaled \$1000. *Id.*

356. *Id.* at 1068–69. Hawaii was the first jurisdiction to allow recovery for mental distress without a showing of physically manifested harm. *Id.*

357. *Burgess v. Taylor*, 44 S.W.3d 806, 812–13 (Ky. Ct. App. 2001) (holding that in a case involving the sale of horses for slaughter a claim for intentional infliction of emotional distress was supported). The facts supporting this claim included repeated lying on the part of the defendants as to the status of the horses. *Id.* at 809–10.

358. *Lamare v. N. Country Animal League*, 743 A.2d 598, 605 (Vt. 1999) (stating, "[T]his is not to say that a future case seeking recovery for the emotional distress or other damages resulting from the negligent handling of an impounded animal—a claim not alleged here—would be unsuccessful"). The *Lamare* case can be distinguished from many of the other cases in this section because no injury was actually done to the animal. *Id.* at 599–60. In *Lamare* an animal was allowed to be adopted even though an owner had been identified and had taken measures to reclaim the dog. *Id.* at 599–600. North Dakota's Supreme Court has analyzed the conduct of police officers who shot and killed five dogs for a claim of intentional infliction of emotional distress. *Kautzman v. McDonald*, 621 N.W.2d 871, 876–77 (N.D. 2001). The *Kautzman* court did not find that the actions of the officers were within the parameters of the tort of intentional infliction of emotional distress but did not dismiss the claim based on the status of the animals. *Id.* at 877.

359. *Richardson v. Fairbanks N. Star Borough*, 705 P.2d 454, 456 (Alaska 1985) (finding that the severity of the emotional distress did not support a claim of intentional infliction of emotional distress). The Alaska Supreme Court reaffirmed its willingness to support a claim of emotional distress for the loss of a pet in 2001. *Mitchell v. Heinrichs* 27 P.3d 309, 311–12 (Alaska 2001) (recognizing a cause of action for the intentional infliction of emotional distress for the killing of a pet animal but finding that the facts of the case did not support this claim); see also *Gill v. Brown*, 695 P.2d 1276, 1277 (Idaho Ct. App. 1985) (finding that a lower court erred in striking the Gills' claim for damages caused by mental anguish for the alleged killing of a pet donkey); *Koester v. VCA Animal Hosp.*, 624 N.W.2d 209, 211 (Mich. Ct. App. 2000)

Numerous decisions have rejected claims for emotional distress caused by the injury or death of an animal.³⁶⁰ There have been several cases raising this issue in the State of New York. These courts have consistently found that the laws of New York do not permit recovery for mental suffering and emotional distress in connection with the loss of an animal.³⁶¹ Some confusion has arisen due to a finding in an oft-cited and criticized 1979 New York case, in which an owner of a poodle who had made elaborate arrangements for the burial of her dog instead found the remains of a dead cat in the casket.³⁶² The court found that losing the right to memorialize a pet dog (versus a pet rock or losing a family photo album) would be actionable.³⁶³ Judge Friedman held that "a pet is not just a thing but occupies a special place somewhere in between a

(expressing sympathy for the plaintiff's position regarding emotional distress but deferred to the legislature to create such a remedy); *Soto v. United States*, No. 1:01-CV-117, 2001 U.S. Dist. LEXIS 10743, *8 (W.D. Mich. July 23, 2001) (citing to the *Koester* case as precedent that Michigan does not allow for recovery of emotional distress damages resulting from the loss of a pet).

360. See *Coston v. Reardon*, No. 063892, 2001 Conn. Super. LEXIS 3188 (Conn. Super. Ct. Oct. 17, 2001) (finding that the "closely related to the injury victim requirement" for establishing emotional distress would not be fulfilled by the relationship to the animal and noting that Connecticut does not allow recovery for negligent infliction of emotional distress resulting from an injury to property); *Rabideau v. City of Racine*, 627 N.W.2d 795, 802, 806 (Wis. 2001) (finding that claims for emotional distress cannot be maintained due to the negligent damage of property though recognizing that the argument set forth was made in good faith for an extension of existing law and was not frivolous); see also *Roman v. Carroll*, 621 P.2d 307, 308 (Ariz. Ct. App. 1980) (finding that damages are not recoverable for negligent infliction of emotional distress from witnessing injury to property, in this case a dog that was dismembered by another dog).

361. *Gluckman v. Am. Airlines, Inc.*, 844 F. Supp. 151 (S.D.N.Y. 1994) (providing an example in a case where a dog died allegedly due to the negligence of an airline); *Johnson v. Douglas*, 734 N.Y.S.2d 847 (N.Y. App. Div. 2001); *Jason v. Parks*, 638 N.Y.S.2d 170, 170 (N.Y. App. Div. 1996); *Young v. Delta Air Lines, Inc.*, 432 N.Y.S.2d 390, 391 (N.Y. App. Div. 1980) (finding no emotional distress for loss of property); see also *Brown v. Muhlenberg Township*, 269 F.3d 205, 219 (3d Cir. 2001) (discussing a distinction in Pennsylvania law between claims of emotional distress based on behavior toward animals versus behavior that is focused on humans); *Daughen v. Fox*, 539 A.2d 858, 864 (Pa. Super. Ct. 1998) (declining to state that complaints for emotional distress could be based on the veterinarian's treatment of an animal); *Miller v. Peraino*, 626 A.2d 637, 640 (Pa. Super. Ct. 1993) (distinguishing between claims of intentional infliction of emotional distress as a result of a veterinarian's treatment of a dog which is not allowed and claims of intentional infliction of emotional distress based on outrageous behavior).

362. *Corso v. Crawford Dog and Cat Hosp., Inc.*, 415 N.Y.S.2d 182, 183 (Civ. Ct. 1979). But see *Gluckman*, 844 F. Supp. at 158 (criticizing the *Corso* case).

363. *Corso*, 415 N.Y.S.2d at 183. Judge Friedman distinguished between inanimate objects and pets which return love and affection, respond to human stimulation, and have brains capable of displaying emotion which cause a human response. *Id.*

person and a piece of personal property."³⁶⁴ The court found that the "plaintiff [was] entitled to damages beyond the market value of the dog" due to the shock, mental anguish, and despondency caused by the wrongful destruction and loss of the dog's body.³⁶⁵ Although this case is sometimes cited to support claims of emotional distress, the New York court treated the mental anguish suffered by the plaintiff as merely a component of the damages due to the wrongful destruction and loss of the dog's body, not as a separate claim of emotional distress.³⁶⁶

Another example is a 1996 Iowa Supreme Court case that refused to allow the owners of a dog that was injured during the dog's stay at a boarding kennel to recover damages for mental distress based on sentimental attachment to the dog or damages for replacement cost or for the pet's special value.³⁶⁷ Although the court recognized that there had been some cases where damages for mental distress had been allowed in actions based on the killing of a dog, the court found that Iowa law would not support such a claim.³⁶⁸ As with some other states, Iowa law required that a plaintiff must actually witness a tortious event in order to recover damages for emotional distress. Furthermore, there must be a close relationship between the plaintiff and the victim.³⁶⁹ The court decided to follow the majority of jurisdictions that did not allow the recovery of damages for this type of mental distress.³⁷⁰

364. *Id.*

365. *Id.* The court found that reasonable compensation for the loss suffered by the plaintiff was \$700. *Id.*

366. *Id.*; cf. *Fredeen v. Stride*, 525 P.2d 166, 168 (Or. 1974) (providing that conversion does not ordinarily cause the property owner sufficient mental anguish for pain and suffering, but mental distress may be considered as an element of the damages).

367. *Nichols v. Sukaro Kennels*, 555 N.W.2d 689, 691-92 (Iowa 1996). The injured dog was a toy poodle that had her left front leg and shoulder blade torn off by the kennel owner's dog. *Id.* at 690.

368. *Id.* at 691.

369. *Id.* Iowa law requires that "the plaintiff and victim [be] husband and wife or [are] related to within the second degree of consanguinity or affinity." *Id.* As much as a beloved pet may be considered a member of the family, under current law the animal would not fall within this definition. *Id.*

370. *Id.* The Supreme Court of Iowa also found that the intrinsic value of the dog would not be considered in awarding damages for injuries to the dog. *Id.* at 692. Not only did the court find that there was no evidence the dog had a special purpose, but the court also found that the Nichols still enjoyed the companionship of their pet (with the market value of a three-legged dog and four-legged dog being the same). *Id.* at 690, 692. The court had previously recognized the intrinsic value of trees if the trees were standing for a special purpose, such as sentimental and historic reasons, maintained for shade and windbreaks or for environmental, wildlife, and special landmark purposes. *Id.* at 692 (citing *Bangert v. Osceola County*, 456 N.W.2d 183, 190 (Iowa 1990)). The court cited to an Iowa Code provision that allows for treble damages for the willful injury of trees and the lack of such a

B. Statutory Provisions

As discussed above, many statutes have already provided for specific penalties and recovery if designated animals are harmed.³⁷¹ The adoption of statutes related to damages for the injury or death of companion animals has just begun. Tennessee is at the forefront of the statutory revolution relating to the appropriate valuation of companion animals. In 2000 Tennessee passed the first statute specifying that damages up to \$4000 can be awarded to an owner for the emotional distress due to the loss of a pet through the "negligent[] act of another."³⁷² Tennessee's statute is a logical first step in the valuation debate. It balances the ability of an owner who has lost a companion animal to receive appropriate compensation in a situation where another person has been negligent with the serious concerns of the veterinary industry and non-profit and government welfare agencies.³⁷³

Waisman and Newell have proposed legislation that would "remedy the injuries suffered by humans whose companion animals have been wrongfully harmed."³⁷⁴ Waisman and Newell's provision would apply only if a "warm-blooded, domesticated nonhuman animal" that shares a "demonstrable bond of companionship" with a person is killed or injured.³⁷⁵ The proposal states that if the injury or death is the result of another person's willful, wanton, reckless, or negligent act or omission, specific damages shall be recoverable.³⁷⁶ The damages include mental anguish, emotional distress, and other non-economic damages, as well as

statute, as well as the lack of evidence that the dog had a special purpose or intrinsic value, to find that intrinsic value should not be used to measure damages in this case. *Nichols*, 555 N.W.2d at 692.

371. See *supra* notes 280–314 and accompanying text (discussing distinctions among animals and some of the statutes providing specific penalties and remedies). Special provisions have also been made to protect structures and plants. 16 U.S.C. § 413 (2000) (establishing penalties for injuries to structures or plants within national military parks); § 423f (providing fines for damages to monuments in national military parks); § 433 (providing fines and prison terms for damages to objects of antiquity situated on lands owned by the U.S. government); IOWA CODE ANN. § 658.4 (West 2001) (providing for treble damages for the willful injury of any "timber, tree, or shrub on the land of another").

372. TENN. CODE ANN. § 44-17-403(a) (2000).

373. See *infra* notes 380–86 and accompanying text (comparing the Tennessee statute and a proposed statute).

374. Waisman & Newell, *supra* note 318, at 71.

375. *Id.* at 72. The statute of limitations for bringing the action in tort would be three years from the "date of death or injury or from the date when the human companion knew, or in the exercise of reasonable diligence should have known, of the factual basis for a cause of action." *Id.* at 73.

376. *Id.* at 72.

veterinary, burial expenses, court costs, and attorney's fees.³⁷⁷ The damages would need to be proven by the plaintiff using a preponderance of the evidence standard.³⁷⁸ Punitive damages of not less than \$2500 would also be available if the death or injury is due to willful, wanton, or reckless acts or omissions.³⁷⁹

As the following table illustrates, Waisman and Newell's provision is broader than the Tennessee statute in several ways.³⁸⁰

377. *Id.* Non-economic injuries include the "loss of society, companionship, comfort, protection and services." *Id.*

378. *Id.*

379. *Id.*

380. The Waisman and Newell proposal is compared to the Tennessee statute because the Tennessee statute was the first of its kind, and these provisions appear to be the basis for other state statutes that are being proposed.

Provision	Tennessee Statute ³⁸¹	Waisman and Newell ³⁸²
Types of Animals Covered	Domesticated dogs and cats normally maintained in or near the household of the owner.	Warm-blooded domesticated nonhuman animal sharing a demonstrable bond of companionship.
Injury Required	Death or Fatal Injury	Death or Injury
Where Death or Injury Occurs	Death or fatal injury must occur on the property of the owner/caretaker or while the pet is under the control and supervision of the owner/caretaker. ³⁸³	No restriction on where or under what circumstances the death or injury occurs.
Types of Non-Economic Damages	Non-economic damages limited to loss of reasonably expected society, companionship, love and affection of pet.	Non-economic damages include loss of society, companionship, comfort and services. ³⁸⁴
Amount of Damages	Non-economic damages capped at \$4000. ³⁸⁵ No provision for punitive damages.	No cap for non-economic damages. Punitive damages of at least \$2500 if willful, wanton or reckless conduct.
Exceptions to Application of Provision	Does not apply to not-for profit entities, governmental agencies and employees or veterinarians (in actions for professional negligence). Only applies in incorporated areas of counties with a population in excess of 75,000. ³⁸⁶	None.

381. TENN. CODE ANN. § 44-17-403 (2000).

382. Waisman & Newell, *supra* note 318, at 71-73.

383. § 44-17-403(a).

384. Damages are also available for veterinary care, burial costs, court costs, and attorneys fees. Waisman & Newell, *supra* note 318, at 72.

385. The limits for non-economic damages do not apply to "causes of action for intentional infliction of emotional distress or any other civil action other than the direct and sole loss of a pet." § 44-17-403(c).

386. § 44-17-403(e), (f).

Bills proposed in other states would provide for a possible monetary remedy in the event of the intentional or negligent killing of an animal.³⁸⁷ In New York, a bill has been introduced that is similar to the Tennessee statute in that it provides a cap on non-economic damages.³⁸⁸ The non-economic damages are limited to compensation for the loss of the "reasonably expected society, companionship, love and affection" of the companion animal. The cap in the proposed New York Act is \$5000 and would apply if death or serious injury of a companion animal is unlawfully caused by the intentional, reckless, or negligent act of a person that is not the owner of the animal.³⁸⁹ As with the Tennessee statute, companion animals that are covered by the New York Act must be harmed when they are under the control and supervision of the owner.³⁹⁰

A statute regarding economic damages has also been proposed in the Massachusetts legislature.³⁹¹ The Massachusetts statute allows for punitive damages of not less than \$2500 if a person by willful, wanton, or reckless act or omission injures or kills an animal companion.³⁹² This statute is similar to the Waisman and Newell proposal in that it does not require the companion animal to be under the control of the owner at the time of the act.³⁹³ The Massachusetts statute also provides for a wide range of damages to be available including:

387. Waisman and Newell, *supra* note 318, at 68.

388. A07610, 2001-2003 Reg. Sess. (N.Y.) (amending the agricultural and markets law). This bill was referred to the agriculture committee on January 9, 2002. *New York State Assembly Bill Summary – A07610*, <http://assembly.state.ny.us/leg/?bn=A07610> (last visited on Feb. 19, 2002).

389. A07610, 2001-2003 Reg. Sess. (N.Y.).

390. A07610, 2001-2003 Reg. Sess. (N.Y.).

391. S. 2000, 182nd Gen. Ct., Reg. Sess. (Mass. 2001). This bill was filed "by request." According to Article XIX of the Constitution of the Commonwealth of Massachusetts, citizens of Massachusetts have the right to request that a bill be presented to the legislature on a matter of interest to them. If a bill is denoted as "by request" it will name the citizen who has made such request along with their congressional representative. The result of this system is that there are many proposed bills that do not necessarily have the backing of members of the legislature. This bill was discharged to the Judiciary Committee on January 14, 2002. *Commonwealth of Massachusetts Bill Tracking*, <http://www.state.ma.us/legis/history/st02000.htm>. (last visited on Feb. 19, 2002). An attorney working with the the Judiciary Committee indicated that it was probable that a hearing on the bill would be scheduled later in the Spring of 2002. Telephone interview with Thomas Brophy, attorney with the committee of the Judiciary Committee, Commonwealth of Massachusetts Senate (Feb. 19, 2002).

392. S. 2000, 182nd Gen. Ct., Reg. Sess., § 85B(d) (Mass. 2001).

393. S. 2000, 182nd Gen. Ct., Reg. Sess., § 85B(b) (Mass. 2001).

[T]he expenses of veterinary and other special medical care required; the loss of reasonably expected society, companionship, comfort, protection and services of the injured animal to his or her human companions; pain, suffering, emotional distress and consequential damages sustained by the animal's human companion; pain, suffering and loss of faculties sustained by the animal; court costs and attorney's fees.³⁹⁴

A unique aspect of the Massachusetts Act is that damages for injuries sustained by the animal are to be recovered in a tort action by a guardian ad litem or "next friend," and any damages recovered are to be payable into a trust for the care of the animal.³⁹⁵ If any trust funds are still in existence at the death of the animal, they are required to be distributed to a "non-profit organization dedicated to the protection of animals."³⁹⁶

There are advantages and disadvantages to each of these provisions. Clearly, the Massachusetts Act is consistent with many aspects of the Waisman and Newell proposal, but the open-ended damages will likely make it impossible to enact at this time. It appears unrealistic to have widespread adoption of a provision that does not take into account the role of governmental agencies and not-for-profit organizations involved in animal welfare. It also appears unrealistic in this age of tort reform to adopt a measure that does not cap the non-economic damages that could be recovered, especially if veterinarians could be liable in any capacity.³⁹⁷

It may be more likely that states will pass statutory language that

394. S. 2000, 182nd Gen. Ct., Reg. Sess., § 85B(c) (Mass. 2001).

395. S. 2000, 182nd Gen. Ct., Reg. Sess., § 85B(f) (Mass. 2001). Note that there is a distinction in the Act for injuries sustained by an animal's human companion and injuries to the animal itself.

396. *Id.*

397. Because any statute would essentially be a combination of creating rights with tort reform, other general issues will need to be considered. One difficulty will be the passage of a statute that will withstand judicial scrutiny. *See generally* Roselyn Bonanti, *Tort 'Reform' in the States*, TRIAL, Aug. 2000, at 28 (viewing tort reform as an effort to curb civil justice); Terry Carter, *Piecemeal Tort Reform*, ABA J., Dec. 2001, at 50 (discussing incremental tort reform measures passed by the U.S. Congress and the likelihood of additional tort reform targets.); William Glaberson, *State Courts Sweeping Away Laws Curbing Suits for Injury*, N.Y. TIMES, July 16, 1999, at A1 (discussing the trend of judicial nullification of new liability laws); Stephen Labaton, *Added Rush on Revising Tort System*, N.Y. TIMES, Dec. 13, 2001, at C1 (discussing federal legislation that in specific instances would cap attorneys fees and eliminate punitive damages); James D. Zirin, *Roadblocks to Tort Reform*, FORBES, Jan. 11, 1999, at 80 (discussing tort reforms and state court nullification of many of the reforms).

simply restricts the measure of damages for tortious injuries or the death of a companion animal. Maryland provides an example of this type of statute that appears to codify common law, and specifically states that the measure of damages in the tortious injury or death of a pet is "the market value of the pet before the injury or the reasonable cost of veterinary care, but not more than \$5,000 if such charge is greater."³⁹⁸

V. CONCLUSION

Although some may deride the value that is placed on companion animals by many individuals in American society, it is clear that a substantial proportion of people spend a great deal of time and money on what is treated by the legal system as just another piece of personal property. The injury or loss of such animals can be devastating to their human companions.³⁹⁹ There is growing evidence that this grief is real and is beginning to be recognized as part of our culture.⁴⁰⁰ Theologians are writing about the changing emphasis on the welfare of animals in our society. The adoption of philosophies that, at a minimum, require humans to consider animals as an integral part of a theory or that assign inherent value to animals are beginning to permeate society. It is

398. MD. CODE ANN. CTS. & JUD. PROC. § 11-110(b) (2000). Even the Maryland code provision has recently been amended to more adequately reflect the potential value of animals or cost of veterinary care by increasing the cap from \$2,500 to \$5,000. *Id.* Several state statutes that protect service dogs also specifically provide for restitution to the disabled person assisted by the dog. CAL. PENAL CODE. §§ 600.2, 600.5 (Deering 2001) (providing restitution in the amount of the veterinary bills and replacement costs of the dog if the dog is disabled or killed); 740 ILL. COMP. STAT. 13/10 (West Supp. 2001) (allowing for damages including veterinary costs and temporary and permanent replacement costs); N.Y. GEN. OBLIG. LAW § 11-107 (Consol. Supp. 2001) (providing for damages of veterinary costs, retraining or replacement cost and lost wages or damages due to the loss of mobility incurred while retraining or replacement is taking place), OR. REV. STAT. § 346.687 (2001) (allowing economic damages including temporary replacement services, veterinary expenses, and any other cost and expenses incurred as a result of the theft of or injury to the animal); UTAH CODE ANN. § 78-20-102 (2001) (providing for damages to include veterinary expenses, replacement services, and costs incurred in recovering the assistance animal).

399. Veterinarians and other professionals recognize that there can be significant impact on humans if a companion animal dies. Waisman & Newell, *supra* note 318, at 58. There are pet-loss support hotlines and internet memorial sites that deal with this issue. *Id.* at 59 (reporting that by 1998 nine veterinary schools in the United States offered pet-loss support hotlines). The loss for some people is similar to the loss of a person. *Id.* at 58.

400. 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*, ANIMAL L. 1988, at 33, 48. The stereotype that only those without close human bonds will be impacted by a companion animal's death is no longer true. TODAY (NBC television broadcast, Jan. 4, 2002) (interviewing Dr. Susan Phillips Cohen, the director of counseling at Babst Hospital, Animal Medical Center in New York City).

possible to alter the legal system so that the special status of these animals is recognized. It is time to set up a structure that will take into account all of these considerations and provide for equitable damages if such animals are injured or killed.

There are legitimate concerns that changing the liability climate to provide for greater recovery against veterinarians could be disastrous for that profession.⁴⁰¹ Other services, such as boarding and transportation, would increase in cost as well.⁴⁰² It would be inefficient for society as a whole to take measures that would price veterinary or other services out of the market and provide for a significant difference in quality of care based on the affordability of the services.⁴⁰³

Notwithstanding the concern about a substantial increase in cost of their services, it does not make sense to totally exclude veterinarians and other providers from liability in the event injury or death has resulted from their acts or omissions. It is reasonable to hold these providers liable for damages, including non-economic damages, especially if such damages are due to reckless, willful, or wanton conduct. It is actually to veterinarians' and other service providers' advantage to support the establishment of a structured system in order to provide certainty and avoid any surprises from judicial decisions that may place a significant value on an animal. It is clearly rational to provide for damages for the intentional acts of persons that cause harm to companion animals. Existing welfare laws already provide for greater criminal penalties, and it makes sense that the individuals personally harmed by a wrongdoer's actions should have the ability to be compensated for their loss. The first step would be the adoption of statutory language by the states using the best of the statutory provisions already proposed or enacted, as well as reflecting thoughtful consideration for the interests of the affected parties in order for courts to have clear guidelines in the treatment of these cases.

There are certainly animal rights activists that would deride the adoption of any such system as merely a perpetuation of the idea that

401. Gregg A. Scoggins, *Legislation Without Representation: How Veterinary Medicine Has Slipped Through the Cracks of Tort Reform*, 1990 U. ILL. L. REV. 953, 954 (1991).

402. Squires-Lee, *supra* note 317, at 1094.

403. Attempts have been made to provide some veterinary services to lower income pet owners. Generally the purpose of the services is primarily to accomplish a public health or safety goal, such as the vaccination of animals to prevent rabies or the spaying or neutering of pets to deal with an overpopulation problem. See Claudia Kawczynska, *Taking it to the Streets*, BARK, Fall 2001, at 30 (describing a mobile veterinary clinic used in Los Angeles to provide spaying or neutering services to low-income residents' pets).

these animals only have value due to their value to humans. It is true that such a system does reflect a property relationship; however, that is the legal status of animals at this time. Perhaps in the future, statutory provisions will be unnecessary, but until that time, humans who care about these animals should have the right to recover a reasonable amount for their loss.