



NOT A LIVING ROOM SOFA:¹ CHANGING THE LEGAL STATUS OF COMPANION ANIMALS

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¹ See *Rabideau v. City of Racine*, 627 N.W.2d 795, 798 (Wis. 2001) (footnote omitted) (“A companion dog is not a fungible item, equivalent to other items of personal property. A companion dog is not a living room sofa or dining room furniture. This term inadequately and inaccurately describes the relationship between a human and a dog.”).

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INTRODUCTION

Veterinary medicine has gone through tremendous changes in the past several decades. Until fairly recently, veterinary practice was viewed primarily as a “service profession to

agriculture,”² that involved many rote practices such as vaccinating herds of cows. In contrast, today’s veterinary practice focuses much more heavily on companion animal³ medicine and includes such specialty areas as veterinary oncology, veterinary orthopedics, veterinary cardiology, and even veterinary ophthalmology.⁴ In the ten years from 1991 to 2001, spending on veterinary care increased nearly three-fold, with expenditures totaling over nineteen billion dollars.⁵

Many of these changes can be attributed to the changing relationship that people have with their animals, and the growing role that our pets, or companion animals, play in our lives. Because of the way we value our pets, we are much more likely to spend money on their care, purchase pet health insurance, and expect that they will receive medical care when they are sick or injured akin to the treatment choices available in human medicine.⁶ In an interesting example of “coming full

² BERNARD E. ROLLIN, AN INTRODUCTION TO VETERINARY MEDICAL ETHICS: THEORY AND CASES 58-59 (1999).

³ *Id.* at 56. See also Christopher Green, Comment, *The Future of Veterinary Malpractice Liability in the Care of Companion Animals*, 10 ANIMAL L. 163, 211 (2004) (reporting that the vast majority of private veterinarians—eighty-three percent—work primarily or exclusively with companion animals). “Companion animal” practice refers to treating animals such as dogs, cats and other small pets. See, e.g., Cornell University College of Veterinary Medicine, Companion Animal Hospital, <http://www.vet.cornell.edu/hospital/companion.htm>. Other categories of practice include equine and “food animal” (bovine, small ruminants, porcine). See Veterinary Medical Teaching Hospital, Department of Veterinary Medicine and Surgery, Food Animal Clinic, <http://www.vmeth.missouri.edu/large.html> (“The food animal clinic maintains a hospital caseload of approximately 2,000 accessions/yr. This constitutes one of the busiest food animal caseloads in North America. The bulk of the caseload consists of traditional agricultural animals, including beef cattle, dairy cattle, swine, sheep and goats.”)

⁴ See, e.g. The Matthew J. Ryan Veterinary Hospital, University of Pennsylvania School of Veterinary Medicine, Welcome, www.vet.upenn.edu/ryan; see *infra* notes 388-389 and accompanying text.

⁵ See Green, *supra* note 3 at 220 n.323; see also Rita Giordano, *The Love of a Healthy Pet? Priceless*, PHILA. INQUIRER, June 20, 2004, at M1, (citing the American Veterinary Medicine Association).

⁶ See Mary Margaret McEachern Nunalee & G. Robert Weedon, *Modern Trends in Veterinary Malpractice: How Our Evolving Attitudes Toward*

circle,” many human medical advances that were first tested in research experiments using animal models are now making their way back into veterinary medicine to treat sick animals.⁷ For example, choices of which chemotherapeutic agents to use to treat cancer in dogs and cats are often informed by which of those drugs have been successful in treating similar cancers in human patients.⁸

The changes in the way we value our animals are just beginning to be reflected in the law. The traditional legal view that treats all animals as property is beginning to give way to an increasing recognition that animals are fundamentally different from inanimate property, and hence the law needs to treat them differently. These legal changes are being seen to a limited extent in tort law — in the way that damages are calculated for lost or injured animals — but to a much greater extent in other

Non-Human Animals Will Change Veterinary Medicine, 10 ANIMAL L. 125, 139-40 (2004) (discussing pet owners’ desires to pursue sophisticated treatment and high-tech diagnostic tools for their pets). See also Giordano, *supra* note 5 (“[I]ncreasingly, pet owners, acting as their animals’ health advocates as they might for any family member, are demanding cutting-edge treatments and sophisticated—and costly—diagnostic procedures . . .”).

⁷ See Giordano, *supra* note 5 (“As the wonders of human medicine make their way into veterinary medicine at an ever-faster rate, animal care experts say pet owners . . . are learning how far they can go—and how much they can spend—to save their animal loved ones.”).

⁸ See, e.g., Fawn Vrazo, *Testing New Drugs, More than a Pet Cause*, RECORD ONLINE, Nov. 16, 2005, available at <http://archive.recordonline.com/archive/2005/11/16/gohe2.html> (“But while more new animal medications are coming to market . . . veterinarians and animal-welfare groups complain about a continuing lack of drugs that have been tested and approved specifically for pets. There are no approved animal cancer chemotherapy drugs or diabetes drugs, for instance. . . .”); Jenny Donelan, *Chemo Can Give a Dog and Owner More Time*, BOSTON GLOBE, May 26, 2005, at H3, available at http://www.boston.com/yourlife/home/articles/2005/05/26/chemo_can_give_a_dog_and_owner_more_time/; Warren King, *What Price a Pet’s Life?: \$45,000 to Treat Comet*, SEATTLE TIMES, Apr. 6, 2005, at A1 available at http://seattletimes.nwsourc.com/html/localnews/2002232414_dogtransplant06m.html (noting that “[p]et owners may pay thousands for treatments once reserved for humans, including kidney transplants, gall-stone removal, hip replacements, and chemotherapy, radiation and surgery for cancer.”). See also Giordano, *supra* note 5 (reporting that University of Pennsylvania researchers are working on a tumor vaccine for both children and for pets).

areas of the law, such as estate planning, custody decisions, and increasing criminal penalties for cruelty to animals.

These legal changes, inspired no doubt by the changes in the way we value companion animals in our society, may have implications for veterinary medicine and education that go beyond the changes in societal values that inspired them. The potential effects on veterinary malpractice liability and damages awards have recently been explored by a number of commentators.⁹ Other potential effects have received less attention, such as how these changes are affecting the professional role of veterinarians, the realities of their practices, and their abilities to exercise their professional judgment.

This article seeks to explore such implications of the legal changes we are beginning to see by focusing on the changing legal status of companion animals. It will advocate for continuing a nascent movement away from the law's traditional approach of treating all non-human animals as property, propose a new legal category for companion animals, and discuss the implications of these changes for the veterinary profession.

Part I will set out the traditional legal view where all animals are treated as property. This status is seen in cases involving an animal that is injured or lost through another's negligence, where the owner¹⁰ is only able to recover the animal's fair market value, and when "lost property" statutes are used to

⁹ See, e.g., Green, *supra* note 3, at 163; Rebecca J. Huss, *Valuation in Veterinary Malpractice*, 35 LOY. U. CHI. L.J. 479 (2004) [hereinafter Huss, *Valuation in Veterinary Malpractice*]; Jayne De Young, Article, *Toward a More Equitable Approach to Causation in Veterinary Malpractice Actions*, 16 HASTINGS WOMEN'S L.J. 201 (2005).

¹⁰ One state and several local jurisdictions have statutorily changed this status from "owner" to "guardian." See, e.g., R.I. GEN. LAWS § 4-13-1.2(6), (10) and § 4-19-2(28) (2006) (adding the definition of "Guardian" but not removing "Owner keeper"); BOULDER, COLO., CODE § 6-1-2 (1985), available at http://www.bouldercolorado.gov/index.php?option=com_content&task=view&id=1856&Itemid=655 ("Guardian" means owner"); BERKELEY, CAL., CODE § 10.04.010 (2001), available at <http://www.ci.berkeley.ca.us/bmc/berkeley%5Fmunicipal%5Fcode/title%5F10/04/010.html> (defining "Owner/guardian"); S.F., CAL., CODE art. I § 41(m) (2003) (allowing "guardian" and "owner" to be used interchangeably in the Code).

resolve disputes between losers and finders of lost animals. Part II will explore some recent changes in both case and statutory law that may be recognizing a different status for some animals.¹¹ This section will conclude, however, that these judicial and legislative changes do not clearly reflect a change in the legal status of companion animals, but may rather merely indicate a different way of valuing this form of property.

Part III will look at other areas where the law more clearly recognizes a different legal status for at least some animals. In some cases, this recognition is seen in the language used by courts, whether or not that language actually affects the outcome of the decision.¹² The article will argue that the language seen in these opinions reflects, at a minimum, an increasing discomfort that judges have with the legal status quo, and an increasing awareness that current laws are in conflict with the reality of how many people view their animals. This part of the article will then turn to case law and statutes that more clearly recognize a change in the legal status of companion animals.¹³ This section will conclude that there is in fact a trend to change the legal status of animals, a trend that more accurately reflects the value of companion animals in our society.

¹¹ There are a number of different ways in which courts have held the value of companion animals to exceed fair market value, including allowing recovery of “reasonable veterinary expenses” even when those expenses far exceed animal’s market value; allowing recovery of “actual or intrinsic” value above market value; allowing recovery for an animal’s companionship and protective value; and allowing recovery of amounts that recognize the loss of companionship and mental suffering of the animal’s owner. See *infra* notes 52-123 and accompanying text.

¹² See *infra* notes 132-145 and accompanying text.

¹³ Examples will include a Vermont case where the majority refused to apply a lost property statute to resolve a dispute between the loser and finder of a dog, despite the language in the statute that specified its application to “stray beasts” (see *infra* notes 150-164 and accompanying text); cases involving the custody of dogs and cats where courts apply a “best interest” standard (see *infra* notes 167-173 and accompanying text); and cases and statutes in the area of Estates and Trusts, including judicial decisions voiding clauses in wills that instruct that pets be destroyed and legislation that allows for the creation of binding pet trusts (see *infra* notes 174-213 and accompanying text).

Part IV of the article proposes that the above-described legal changes be formally recognized by creating a new legal category for companion animals. This section will explore what that legal category might be, and how it could clarify, in ways that our current laws do not, the responsibilities that owners have toward their living property that are fundamentally different from responsibilities toward inanimate property. Such a category should thus take into account the dependence that companion animals have on their human owners, their capacity to suffer if mistreated or neglected, and the bonds that we and our animals form with each other. This section will advocate an incremental change that retains the property status of companion animals but accords them a place above inanimate property. It will also look at the implications of creating additional legal distinctions both between¹⁴ and within¹⁵ species.

The final section, Part V, will look at the implications of such a change on the veterinary profession. The profession has shown some organized opposition to any changes in the legal status of animals. This section will respond to that opposition and will argue that it ultimately is misplaced: while veterinarians have some legitimate fears about increased malpractice awards, these fears are generally overblown, and they are far outweighed by the numerous ways their profession will benefit from enhancing the legal status of companion animals. This section will conclude that it is ultimately in the best interest of the profession to support incremental changes in the legal status of companion animals – above that of inanimate property but not equivalent to personhood.

¹⁴ While many laws, such as the Federal Animal Welfare Act, 7 U.S.C. §§ 2131-2159 (2007), and many state animal cruelty statutes, already treat animals differently by species, most of the recent legal changes apply only in cases of companion animals and will therefore increase the distinctions between species.

¹⁵ To the extent that our legal rules depend on the animals' roles in lives of humans, it is unclear how the law will treat animals within the same species that have different roles.

PART I: TRADITIONAL VIEW OF ANIMALS AS PROPERTY

The law has traditionally treated all non-human animals, including pets, as property.¹⁶ Animals are generally categorized as either wild or domestic. Pets, or companion animals, are one of several types of domestic animals.¹⁷ Wild animals are considered to be owned by the state¹⁸ (although that ownership can, in certain circumstances, be transferred to individuals), while domestic animals have individual owners.¹⁹ In many respects, our ownership of animals is identical to our ownership of inanimate property: we can buy and sell them, bequeath them in our wills, give them away, or choose to “destroy” them.²⁰ Pet

¹⁶ See, e.g., Gary L. Francione, *Introduction: Animals as Property*, 2 ANIMAL L., at *2 (1996) [hereinafter Francione, *Animals as Property*]; Harold W. Hannah, *Animals as Property – Changing Concepts*, 25 S. ILL. U. L.J. 571, 572 (2001). See also *Harabes v. The Barkery, Inc.*, 791 A.2d 1142, 1144 (N.J. Super. Ct. Law Div. 2001) (“A review of decisions from other states reveals that pets are usually classified as personal property . . .”).

¹⁷ See Rebecca J. Huss, *Valuing Man’s and Woman’s Best Friend: The Moral and Legal Status of Companion Animals*, 86 MARQ. L. REV. 47, 69 (2002) (citing JAMES F. WILSON, *LAW AND ETHICS OF THE VETERINARY PROFESSION* 74 (1988)) [hereinafter Huss, *Valuing Man’s and Woman’s Best Friend*]. See also Hannah, *supra* note 16, at 574-75.

¹⁸ See Hannah, *supra* note 16, at 572 (footnote omitted) (“While statutory provisions declare that ownership of wildlife is in the state, that ownership may be transferred to hunters and anglers providing they meet the licensing requirements and abide by hunting and fishing rules established in the state.”). But see David Favre, *New Property Status for Animals: Equitable Self-Ownership*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 234, 237 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) [hereinafter ANIMAL RIGHTS] (arguing that “[i]t is a misperception of existing property law to say that title is in the state when wildlife exists in its natural environment.”).

¹⁹ Gary L. Francione, *Animals – Property or Persons?*, in ANIMAL RIGHTS, *supra* note 18, at 108, 116 [hereinafter Francione, *Property or Persons?*].

²⁰ See *id.* at 117. State statutes prohibiting animal cruelty do, however, place some limits on how we treat our animal property, and while they do place limits on an owner’s choice of how to have an animal killed, they generally do not question an owner’s choice to have an animal humanely euthanized for what may be a trivial reason. See, e.g., ROLLIN, *supra* note 2, at 60 (referring to “euthanizing animals for trivial reasons”).

animals, like other forms of personal property, can be the subjects of theft²¹ and subjects of bailment agreements.²² If we leave our animals at the veterinarian's office beyond a certain period of time, or do not pay our bill, the professionals can take ownership of them in much the same way that a garage can take ownership of our cars.²³

This animal-as-property approach is frequently seen in tort cases involving damages for a negligently lost or injured animal, where courts are only willing to award the "fair market value" as they would for any other form of property. For example, plaintiffs in an Alaska case located their missing dog at a local pound and attempted to retrieve him.²⁴ Told that the pound was closed for the day, they arrived earlier the next day after leaving work early.²⁵ They found, however, that the pound had already killed their dog, in violation of a local ordinance that required a seventy-two hour holding period.²⁶ The pound admitted liability and the only issue at trial was damages.²⁷ In affirming

²¹ See, e.g., 3 PA. CONS. STAT. ANN. § 459-601(a) (West 2007) ("All dogs are hereby declared to be personal property and subjects of theft."). See also the Federal Pet Theft Act, 7 U.S.C. § 2131 (2007) (stating that among the Animal Welfare Act's purposes is "to protect the owners of animals from the theft of their animals.").

²² See, e.g., Price v. Brown, 680 A.2d 1149, 1151 (Pa. 1996) (holding that, while dogs are personal property and can thus be subjects of bailment agreements, "allegations of breach of a bailment agreement are insufficient to state a cause of action against a veterinarian who . . . perform[s] surgery on an animal" that does not survive).

²³ See, e.g., 3 PA. CONS. STAT. ANN. § 459-601(c)(2) (West 2007) (setting forth provision regarding abandonment of animals where an "animal placed in the custody of a licensed doctor of veterinary medicine for treatment, boarding or other care, . . . which shall be abandoned by its owner or his representative for a period of more than ten days after written notice . . . may be turned over to the custody of the nearest humane society.").

²⁴ Richardson v. Fairbanks N. Star Borough, 705 P.2d 454, 455 (Alaska 1985).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

the lower court's jury instructions, the Alaska Supreme Court held that the proper measure of damages was the market value of the dog and not the owner's subjective estimation of the pet's value.²⁸

The legal status of animals as property is also apparent when "lost property" law is used to resolve disputes between losers and finders of lost animals,²⁹ and where property dissolution law is used to determine a pet's fate during a divorce settlement. In a recent Pennsylvania case, for example, former spouses had entered into a property settlement agreeing that their dog would live with the wife, but allowing the husband to visit him.³⁰ When the wife moved and no longer allowed her former husband to visit the dog, he filed a complaint seeking shared custody.³¹ The court dismissed the complaint, holding that any terms in the agreement attempting to award visitation or shared custody were void, because dogs are considered personal property under Pennsylvania law.³² In affirming the trial court's dismissal, the Superior Court agreed that "Appellant is seeking an arrangement analogous, in law, to a visitation schedule for a table or a lamp."³³

²⁸ *Id.* at 456. The court stated that it was, however, 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." *Id.* The court did not find this to be such a case; it affirmed the lower court's determination that the Richardson's emotional distress was not severe enough to warrant this claim. *Id.* See also *Mitchell v. Heinrichs*, 27 P.3d 309, 313 (Alaska 2001) (footnote omitted) ("The majority rule holds that the proper measure of recovery for the killing of a dog is the dog's fair market value at the time of its death."). The *Mitchell* court, however, chose the minority position and awarded damages representing "the actual value of the pet to the owner." *Id.*

²⁹ See, e.g., *Williams v. McMahan*, No. 26983-0-II, 2002 WL 242538 (Wash. Ct. App. Feb. 15, 2002).

³⁰ See *Desanctis v. Pritchard*, 803 A.2d 230, 231 (Pa. Super. Ct. 2002).

³¹ *Id.*

³² *Id.* at 232 (citing 3 PA. CONS. STAT. ANN. § 459-601(a)).

³³ *Id.*

Despite their treatment as property in many areas of the law, there are other ways in which animals have long been treated differently from non-animate property: state statutes prohibiting cruelty to animals have been on the books since as early as the 1800s³⁴ and, by some accounts, go back as early as 1641 to the legal code of Massachusetts Bay Colony.³⁵ No similar laws exist that prohibit “cruelty” to inanimate property. Animals are treated differently from inanimate property in practical ways as well. Unlike other “property,” animals possess an ability to move that can be exercised independently from their owner’s wishes, and certain laws that recognize this ability exist, if for no other reason than to assure an original owner’s property right.³⁶

While valuing animals as property is still the prevailing view, there have been some recent changes in both case and statutory law that may be recognizing a different status for some animals. In cases involving the calculation of damage awards, the changes may not so clearly reflect a change in the legal status of companion animals, but rather may merely indicate a different way of valuing this form of property.³⁷ In other cases, recognition of a different status for companion animals can be seen in the language used by courts, whether or not that language actually affects the outcome of the decision.³⁸ And in yet other examples of changes in both case and statutory law, we

³⁴ Gary Francione cites an 1821 Maine statute as “[t]he first known anti-cruelty statute in the United States.” See Francione, *Property or Persons?*, *supra* note 19, at 135 n.14. Other commentators cite to a New York statute that dates to 1866. See, e.g., William A. Reppy, Jr., *Citizen Standing to Enforce Anti-Cruelty Laws by Obtaining Injunctions: The North Carolina Experience*, 11 ANIMAL L. 39, 46 n.38 (2005) (citing N.Y. REV. STAT. ch. 783, 1-10 (1866)).

³⁵ This “Body of Liberties” prohibited “any Tirrany or Crueltie towards any brute Creature which are usuallie kept for man’s use.” Cass R. Sunstein, *Can Animals Sue?*, in ANIMAL RIGHTS, *supra* note 18, at 251, 252 [hereinafter Sunstein, *Can Animals Sue?*].

³⁶ See GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 41 (1995) (describing the historical legal classes of animals, domestic or wild, and the property rights assigned to each class).

³⁷ See *infra* Part II.

³⁸ See *infra* Part III A.

see results that more clearly recognize a change in the legal status of companion animals.³⁹

PART II: CHANGES IN DAMAGE AWARDS

A great deal of scholarly attention has been paid to the problems with using fair market value as a measure of damages for lost or injured companion animals, and the current approach has been criticized by numerous commentators.⁴⁰ Commentators have asserted, for example, that the current approach has failed to “[keep] up with the reality of the relationship between companion animals and their human caretakers,”⁴¹ because it fails to recognize the value that many people place on their animals, and leads to both under-compensation⁴² and under-deterrence⁴³ in many legal disputes, including the failure to deter veterinarians from harming the animals in their care.⁴⁴

³⁹ See *infra* Part III B.

⁴⁰ See Elaine T. Byszewski, *Valuing Companion Animals in Wrongful Death Cases: A Survey of Current Court and Legislative Action and a Suggestion for Valuing Pecuniary Loss of Companionship*, 9 ANIMAL L. 215, 225 (2003); Geordie Duckler, *The Economic Value of Companion Animals: A Legal and Anthropological Argument for Special Valuation*, 8 ANIMAL L. 199, 200 (2002); Lynn A. Epstein, *Resolving Confusion in Pet Owner Tort Cases: Recognizing Pets’ Anthropomorphic Qualities Under a Property Classification*, 26 S. ILL. U. L.J. 31, 32 (2001); Huss, *Valuing Man’s and Woman’s Best Friend*, *supra* note 17, at 47; Margit Livingston, *The Calculus of Animal Valuation: Crafting a Viable Remedy*, 82 NEB. L. REV. 783 (2004); William C. Root, Note, “Man’s Best Friend”: Property or Family Member? *An Examination of the Legal Classification of Companion Animals and Its Impact on Damages Recoverable for Their Wrongful Death or Injury*, 47 VILL. L. REV. 423, 444 (2002); Debra Squires-Lee, Note, *In Defense of Floyd: Appropriately Valuing Companion Animals in Tort*, 70 N.Y.U. L. REV. 1059, 1087 (1995); Sonia S. Waisman & Barbara R. Newell, *Recovery of “Non-Economic” Damages for Wrongful Killing or Injury of Companion Animals: A Judicial and Legislative Trend*, 7 ANIMAL L. 45, 60 (2001).

⁴¹ Huss, *Valuing Man’s and Woman’s Best Friend*, *supra* note 17, at 52.

⁴² See, e.g., Livingston, *supra* note 40, at 816-17.

⁴³ See, e.g., Byszewski, *supra* note 40, at 232.

⁴⁴ See Green, *supra* note 3, at 168.

The problem with compensating only for the fair market value of companion animals is illustrated by a story that was recently reported in the *Philadelphia Inquirer*.⁴⁵ Warren Clein was standing in his own driveway with his dog, Daisy, when they were attacked by a neighbor's Rottweiler that had gotten loose from its yard.⁴⁶ Daisy, who was badly injured in the attack, was taken to Veterinary Hospital of the University of Pennsylvania (VHUP), where she underwent extensive surgery, and spent five days in intensive care.⁴⁷ The bill from VHUP totaled \$5,265. Even in the likely possibility that the Cleins are able to establish liability on the part of their neighbors, they will not be able to recover the amount they spent on Daisy's surgery and recuperation, because that amount exceeds her "fair market value" by over \$5,000.⁴⁸ The Cleins had adopted Daisy, a mix-breed terrier, from a shelter for a \$50 fee, and Pennsylvania law does not allow recovery above the dog's replacement value.⁴⁹

⁴⁵ See Stuart Ditzen, *Challenging Pa. Law on a Pet's Value: Couple Seek to Recoup Vet Costs after Dog Attack*, PHILA. INQUIRER, Sept. 5, 2004, at A01.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* The approach reported in the article is consistent with a 1988 case where the Pennsylvania Superior Court refused to compensate the owner of a mixed-breed dog who had been negligently killed for loss of companionship or emotional distress:

Under Pennsylvania law, a dog is personal property. The fundamental purpose of damages for an injury to or destruction of property by tortious conduct of another is to compensate the injured party for actual loss suffered. . . . [W]here the property has been destroyed, the measure of damages would be the value of the property prior to its destruction. Appellants, however, claim that their dog was a unique chattel whose value to them exceeded the monetary value of a mongrel dog. While the appellants undoubtedly had a sentimental attachment to their dog, this would not make it unique chattel under the law.

Daughen v. Fox, 539 A.2d 858, 864 (Pa. Super. Ct. 1988) (footnote and citations omitted).

Inequities with the “fair market value” approach can be readily seen in the outcome of this case. If Daisy’s “market value” were really the proper measure of her worth to the Cleins, then, upon realizing the extent of her injuries, they would have likely chosen to have her humanely euthanized and then returned to the shelter for another \$50 replacement dog.⁵⁰ But few would criticize the Cleins’ decision to take the course they chose: spending over \$5,000 for Daisy’s surgery and hospitalization so they could have their own dog “made whole.” If the decision to spend the money on the dog’s surgery was a reasonable one, and her injuries were caused by another’s negligence, then it seems to follow that the negligent party should be liable for paying those damages.⁵¹ But that is not often the outcome when pets are lumped into the same category as other personal property, and owners can only recover for their fair market value.

A number of courts, however, are beginning to change their approach. In cases involving injuries to or losses of companion animals, there are a number of different ways in which courts have held their value to exceed “fair market value.” These approaches include allowing recovery of “reasonable veterinary expenses” even when those expenses far exceed an animal’s market value, allowing recovery of “actual or intrinsic” value above market value (including allowing recovery for an animal’s companionship and protective value), and allowing recovery of amounts that recognize the loss of companionship and mental suffering of the animal’s owner.

⁵⁰ See, e.g., Livingston, *supra* note 40, at 792 n.61 (“[G]iven the hundreds of thousands of homeless animals in the United States, it is quite simple to obtain a pet at a relatively low cost.”). But see Green, *supra* note 3, at 208 (noting that the magazine DVM termed the choice of euthanasia over treatment “economic euthanasia” and that owners’ dollar-figure cutoff has been rising, indicating more than simple replacement cost is involved (citing Daniel R. Verdon, *Clients Spending More Before Stopping Treatment*, DVM MAG., June 2003, at 1)).

⁵¹ Holding the Rottweiler’s owner liable would likely serve not only the tort system’s “corrective justice” goals, but also the instrumental goal of risk distribution, since such liability is likely to be covered by one’s homeowner’s insurance.

A. REASONABLE VETERINARY EXPENSES

In a case with facts remarkably similar to the Pennsylvania case described above, a New Jersey court allowed recovery of reasonable veterinary expenses even when those expenses exceeded the animal's market value by fivefold.⁵² Heather Hyland's ten-year-old Shih Tzu was attacked and seriously injured by a neighbor's Bulldog that had trespassed onto her property; Hyland spent \$2,500 on treatment for her dog, five times more than the cost of buying a new Shih Tzu.⁵³ The defendant Bulldog-owners appealed the award of Hyland's veterinary expenses, claiming that the proper measure of damages for personal property, such as the dog, is its replacement cost in cases where the "repair costs outweigh the replacement cost."⁵⁴ The court disagreed with this defense, holding that it was "purely a matter of 'good sense' that defendants be required to 'make good the injury done' as the result of their negligence by reimbursing plaintiff for the necessary and reasonable expenses she incurred to restore the dog to its condition before the attack."⁵⁵ In reaching this decision, the court explicitly recognized that pets belong in a different category from other types of personal property.⁵⁶

⁵² *Hyland v. Borrás*, 719 A.2d 662, 663 (N.J. Super. Ct. App. Div. 1998). See also *Zager v. Dimilia*, 524 N.Y.S.2d 968, 970 (N.Y. Vill. Justice Ct. 1988) (finding that the proper measure of damages in a case involving injury suffered by a pet animal is the "reasonable and necessary cost of reasonable veterinary treatment").

⁵³ *Hyland*, 719 A.2d at 662.

⁵⁴ *Id.* at 663.

⁵⁵ *Id.* at 664. The court went on to say that "[i]mposing these economic losses on defendants not only has the salutary effect of making plaintiff whole, but it deters an owner of an aggressive dog from negligently allowing it to run loose, such as occurred here." *Id.*

⁵⁶ See *id.*:

Most animals kept for companionship have no calculable market value beyond the subjective value of the animal to its owner, and that value arises purely as the result of their relationship and the length and strength of the owner's attachment to the animal. In that sense then, a household pet is not like other fungible or disposable property,

Other states rely on legislative changes to recognize reasonable veterinary expenses as a measure of damages for injured companion animals. For example, in a recently approved amendment to a Maryland statute that otherwise limits damages for the injury or death of a pet to compensatory damages, the legislature expanded the definition of “compensatory damages” to include “the reasonable and necessary cost of veterinary care” in cases involving either the death or injury to a pet.⁵⁷ By recognizing that veterinary expenses, which may greatly exceed an animal’s market value, properly can be recovered when an animal is killed or injured through another’s negligence, both courts and legislators are finding that fair market value, alone, is often not a proper measure of damages.

B. ACTUAL VALUE TO OWNER

Several courts have allowed recovery amounts above an animal’s market value by taking into account the animal’s intrinsic value or its actual value to its owner. In *Brousseau v. Rosenthal*, for example, the court awarded damages when an eight-year-old mixed breed dog was negligently killed at defendant’s boarding kennel.⁵⁸ While finding that the dog had “no ascertainable market value,” the court nevertheless held that, in order to make the owner whole, it must assess the dog’s actual value to its owner.⁵⁹ The owner in this case was an elderly woman who lived alone and relied on the dog for companionship and protection.⁶⁰ The court therefore included loss of companionship⁶¹ and protection value as elements of damages.⁶²

intended solely to be used and replaced after it has outlived its usefulness.

⁵⁷ MD. CODE ANN., CTS. & JUD. PROC. § 11-110(a)(2) (West 2006).

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

⁵⁹ *Id.* at 286.

⁶⁰ *Id.*

⁶¹ Note, however, that courts in various jurisdictions, including New York, have traditionally rejected loss of companionship as an independent

Another approach to calculating the animal's actual value to its owner is to look at what the owners have been willing to spend on the animal, including their investments in the pet's veterinary care. In a case involving one neighbor's shooting of another's dog, the Alaska Supreme Court reversed the trial court's dismissal of the case, which was based on the grounds that no compensatory damages were available because the dog had no market value.⁶³ In reversing, the Alaska Supreme Court held that the court was correct in its conclusion that damages could not include either sentimental or companionship value.⁶⁴ Nevertheless, the court found that the correct measure of compensatory damages was not fair market value, but rather "value to the owner."⁶⁵ The court suggested that there were a number of different ways to calculate value to the owner:

[A]n owner may seek reasonable replacement costs — including such items as the cost of purchasing a puppy of the same breed, the cost of immunization, the cost of neutering the pet, and the cost of comparable training. Or an owner may seek to recover the original cost of the dog, including the purchase price and, again, such investments as immunization, neutering, and training.⁶⁶

cause of action for the loss of a companion animal. See *Gluckman v. American Airlines, Inc.*, 844 F. Supp. 151 (S.D.N.Y. 1994); *Lewis v. Di Donna* 743 N.Y.S.2d 186 (N.Y. App. Div. 2002); see also *Jankoski v. Preiser Animal Hosp., Inc.*, 510 N.E.2d 1084, 1087 (Ill. App. Ct. 1987); *Harabes v. The Barkery, Inc.*, 791 A.2d 1142, 1144 (N.J. Super. Ct. Law Div. 2001); *Oberschlake v. Veterinary Assocs. Animal Hosp.*, 785 N.E.2d 811, 815 (Ohio Ct. App. 2003); *Daughen v. Fox*, 539 A.2d 858 (Pa. Super. Ct. 1988).

⁶² *Brousseau*, 443 N.Y.S.2d at 286.

⁶³ *Mitchell v. Heinrichs*, 27 P.3d 309 (Alaska 2001).

⁶⁴ *Id.* at 312.

⁶⁵ *Id.* at 313.

⁶⁶ *Id.* at 314.

While acknowledging that the standard damages calculation may not adequately compensate the pet owner for the loss,⁶⁷ the court reiterated its refusal to include sentimental value⁶⁸ as a component of actual value.⁶⁹

Using similar reasoning, an Ohio court showed a willingness to adopt an actual value to owner standard when an eight-year-old shepherd was partially paralyzed by negligent surgery.⁷⁰ Citing the great time and effort the plaintiff had invested in training her dog, the years she spent trying to rehabilitate him after his surgery, and the dog's unique nature as "personally suited to showing and for [plaintiff's] personal security," the court awarded \$5,000 in damages to the plaintiff.⁷¹ Like the Alaska court, however, this court would not include "sentimentality" as an element of damages.⁷²

More recent cases have attached even higher amounts to a pet's value to its owner. In a much publicized 2004 veterinary malpractice case from Orange County, California – billed in several news reports⁷³ as the largest damage award to date in a

⁶⁷ The court acknowledged in a footnote that "a small minority of jurisdictions has recognized that the value of a pet dog may include sentimental or companionship value." *Id.* at 313 n.20.

⁶⁸ Even where courts have allowed sentimental value for the loss of a pet, they may not be treating pets differently than other forms of property which have little market value, but great value to the person who owns it. In many ways, this type of valuation mirrors a finding of sentimental value for property such as heirlooms; however, at least one court in N.Y. has explicitly distinguished the value of a companion animal from value of an heirloom. *See Corso v. Crawford Cat & Dog Hosp.*, 415 N.Y.S.2d 182, 183 (N.Y. Civ. Ct. 1979).

⁶⁹ *Mitchell*, 27 P.3d at 314.

⁷⁰ *McDonald v. Ohio State Univ. Veterinary Hosp.*, 644 N.E.2d 750 (Ct. Claims Ohio 1994).

⁷¹ *Id.* at 752.

⁷² *Id.*

⁷³ *See, e.g.*, Jason Riley, *Man Sues Vet Over Dog's Death*, COURIER-JOURNAL (Louisville, Ky.), July 18, 2005, at 1A; Philip Sherwell, *Now Pets Are Really Part of the Family, Thanks to U.S. "Paw Laws"*, SUNDAY TELEGRAPH (London), June 26, 2005, at 27, available at <http://www.telegraph.co.uk> (last visited Jan. 23, 2007); Laura Parker, *When Pets Die at the Vet, Grieving*

veterinary malpractice case – a jury found that a rescued dog with a market value of only \$10 had a unique value to its owner that amounted to \$30,000.⁷⁴ And even more recently, a woman whose cat was mauled by a neighbor's dog was awarded approximately \$45,000: \$30,000 for the pet's special value and \$15,000 for emotional distress.⁷⁵

C. MENTAL SUFFERING OF OWNERS AS AN ELEMENT OF DAMAGES

Courts have shown a general unwillingness to award damages for the owners' mental suffering when their companion animal is injured or killed. In the vast majority of these cases where claims for mental suffering are disallowed, it is often because the courts decline to extend such claims to the injury or death of something that the law considers to be property. In the few cases where courts have allowed mental distress claims, it is almost always in the context of a claim for intentional – and not negligent – infliction of emotional distress, where the behavior of the defendant has been particularly egregious, enough so to meet the outrageousness element of the claim. It is not always clear, in these cases, whether the courts would be similarly willing to extend emotional distress damages to a loss of inanimate property. In at least one case, however, a court made clear that emotional distress damages were in fact available for the negligent destruction of property.⁷⁶

Owners Call Lawyers, USA TODAY, Mar. 15, 2005, at 1A, available at http://www.usatoday.com/news/nation/2005-03-14-pets-malpractice_x.htm (last visited Feb. 18, 2007).

⁷⁴ See William Hageman, *Paw law: Is Your Pet Entitled to his Day in Court? The Answer: Maybe*, CHI. TRIB., June 5, 2005, at Q1. The jury awarded an additional \$9000 in veterinary bills. *Id.*

⁷⁵ Warren Cornwall & Craig Welch, *Judge Awards \$45,480 in Cat's Death*, SEATTLE TIMES, May 9, 2005, available at http://seattletimes.nwsourc.com/html/localnews/2002268301_yofi09m.html (last visited Feb. 9, 2007); Associated Press, *Woman gets \$45K for Cat Killed by Dog*, ABC NEWS, May 9, 2005, <http://abclocal.go.com/wls/story?section=News&id=3053530> (last visited Feb. 9, 2007).

⁷⁶ See *Campbell v. Animal Quarantine Station*, 632 P.2d 1066 (Haw. 1981).

There are numerous examples of cases where courts have disallowed damages for mental suffering precisely because of the property status of the killed or injured animal.⁷⁷ More unusual are cases like *Campbell v. Animal Quarantine Station*, where a Hawaii court allowed an emotional distress claim for the negligent loss of a pet despite the animal's status as property.⁷⁸ The Campbell's family dog, Princess, died from heat prostration when the state Animal Quarantine Station negligently transported her in an unventilated van on a hot day.⁷⁹ After hearing evidence of the family's distress upon learning of their pet's death, the trial court found the state liable and awarded damages both for the loss of the dog and for the family's emotional distress.⁸⁰ Defendants appealed the award of damages for emotional distress, on the grounds that such damages were not proper when the loss involved personal property.⁸¹ Hawaii's Supreme Court rejected this argument, noting that Hawaii's "unique approach to the area of recovery for mental distress allowed recovery for mental distress suffered as the result of the negligent destruction of property."⁸² Not surprisingly, this approach has not been followed in other jurisdictions, which allow negligent infliction of emotional distress claims only in a narrow range of circumstances.

Courts have shown more of a willingness to award emotional distress damages when pets are killed or injured due to intentional, rather than negligent conduct, especially where the defendant's behavior is particularly egregious. In *Burgess v.*

⁷⁷ See, e.g., *Johnson v. Douglas*, 723 N.Y.S.2d 627 (N.Y. Sup. Ct. 2001); *Gluckman v. American Airlines, Inc.*, 844 F. Supp. 151 (S.D.N.Y. 1994); *Harabes v. The Barkery, Inc.*, 791 A.2d 1142 (N.J. Super. Ct. 2001). See also *Myers v. City of Hartford*, 853 A.2d 621, 625 (Conn. App. Ct. 2004) (where an appellate court held that the common law did not recognize emotional distress claims for "injury to such property as a pet.").

⁷⁸ 632 P.2d 1066.

⁷⁹ *Id.* at 1067.

⁸⁰ *Id.*

⁸¹ *Id.* at 1071.

⁸² *Id.* (citation omitted).

Taylor,⁸³ for example, where defendant lied to the plaintiff horse-owner and sold her horses to a known slaughter-buyer,⁸⁴ the court rejected defendant's contention that the award should have been limited to the horses' fair market value because of their status as property.⁸⁵ Rather, the court found that in determining whether there is a viable claim for intentional infliction of emotional distress, it is "the conduct of the offender rather than the subject of the conduct that determines whether the conduct was outrageous."⁸⁶ The court thus found a viable emotional distress claim, despite the horses' status as property.

The same court next addressed the question of emotional distress damages for the loss of a pet animal when plaintiffs brought a claim against the county dog warden for impounding and shooting their family dog.⁸⁷ Citing *Burgess* for the

⁸³ 44 S.W.3d 806 (Ky. Ct. App. 2001).

⁸⁴ *Id.* at 809. The story's details highlight the egregious nature of the defendant's behavior: Plaintiff Taylor owned two Appaloosa horses, Poco and P.J., that she kept as pets. *Id.* When she found herself in circumstances where she could no longer care for her pet horses, Taylor entered into a "free-release agreement" with defendant Burgess. *Id.* Under this arrangement, Burgess, who had a farm with her own horses, would take care of Poco and P.J. in exchange for the enjoyment of having them; Taylor, in turn, would remain the horses' owner and could visit them whenever she liked. *Id.* However, within days of taking possession of the horses, Burgess contacted Jackson, a known slaughter-buyer, and sold the horses to him for \$1000. *Id.* When Taylor contacted Burgess in an attempt to visit her horses about a week later, Burgess lied to her, and invented a story about giving them to Randolph. *Id.* at 810. Randolph, in turn, gave Taylor vague directions to a fictitious location, where she tried in vain to search for her horses. *Id.*

⁸⁵ *Id.* at 812.

⁸⁶ *Id.* at 809. The court went on to find that:

[T]he Burgesses' conduct clearly rises to the level of being outrageous and intolerable in that it offends generally accepted standards of decency and morality, certainly a situation "in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'"

Id. at 811 (quoting the RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965)).

⁸⁷ *Ammon v. Welty*, 113 S.W.3d 185 (Ky. Ct. App. 2002).

proposition that “[s]imply because a claim involves an animal does not preclude a claim for intentional infliction of emotional distress,”⁸⁸ the court nevertheless found that such a claim was not supported here where the required element of intent was not met: there was no evidence that the defendant intended to inflict harm on the family.⁸⁹ The difference between the outcomes of these two cases can be explained by the nature of the respective defendants’ conduct: where the conduct of the defendants in *Burgess* was found to be both intentional and outrageous, the defendant’s conduct in *Ammon* did not meet either of these required elements.⁹⁰

Similar analysis was employed by the Third Circuit, holding that under Pennsylvania law, the wrongful killing of a pet dog could support a claim for intentional infliction of emotional distress.⁹¹ The plaintiff’s pet Rottweiler, Immi, had escaped from its yard and wandered into the next door alley.⁹² A police officer, passing in his patrol car, stopped and confronted the dog.⁹³ Although the dog was not in any way aggressive toward the officer, he reached for his gun.⁹⁴ The plaintiff then saw what was happening and shouted that the dog was hers and not to shoot.⁹⁵ After briefly hesitating, the officer proceeded to shoot

⁸⁸ *Id.* at 188.

⁸⁹ *Id.*

⁹⁰ This distinction easily explains the difference in outcome between the two cases. It is not the case, as one commentator suggested, simply that courts are failing to be consistent in measuring damages for the death of pet animals. See Green, *supra* note 3, at 166 (“modern courts actually are moving further away from consensus on the companion animal valuation question”), and *id.* at 166 n.9 (citing *Burgess* and *Ammon* as examples of such lack of consensus).

⁹¹ *Brown v. Muhlenberg Twp.*, 269 F.3d 205 (3d Cir. 2001).

⁹² *Id.* at 209.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

the dog five times, killing it.⁹⁶ The plaintiff brought multiple claims against the police officer and other defendants, including a claim for intentional infliction of emotional distress.⁹⁷ Despite the defendant's argument that "the killing of a pet under any circumstances would not be recognized by Pennsylvania courts as extreme or outrageous,"⁹⁸ the court upheld the claim:

Given the strength of community sentiment against at least extreme forms of animal abuse and the substantial emotional investment that pet owners frequently make in their pets, we would not expect the Supreme Court of Pennsylvania to rule out all liability predicated on the killing of a pet.⁹⁹

The court distinguished several Pennsylvania cases that found against such claims, on the grounds that these cases involved either negligent behavior or behavior that was not intended to inflict severe emotional distress on the animals' owners.¹⁰⁰ Here, in contrast, the court found that "a reasonable trier of fact could conclude that Officer Eberly shot Immi either intending to cause Kim Brown severe emotional distress or with the knowledge that the infliction of such distress on her would be virtually certain."¹⁰¹

While *Burgess*, *Ammon*, and *Muhlenberg* make clear that a claim for intentional infliction of emotional distress will not fail simply because it involves a pet animal, it is less clear if the courts would have been as likely to find the outrageous element met in a case involving inanimate property rather than pet horses and dogs. The *Muhlenberg* court's language, particularly its reference to the "substantial emotional investment that pet

⁹⁶ *Id.*

⁹⁷ *Id.* at 217.

⁹⁸ *Id.* at 218.

⁹⁹ *Id.*

¹⁰⁰ *Id.* (discussing *Daughen v. Fox*, 539 A.2d 858 (Pa. Super. Ct. 1988) and *Miller v. Peraino*, 626 A.2d 637 (Pa. Super. Ct. 1993)).

¹⁰¹ *Id.* at 219.

owners frequently make in their pets”¹⁰² suggests that animals hold a special place. It is certainly possible, perhaps probable, that the plaintiffs’ relationships with their animals played a significant role in the courts’ findings that behavior which resulted in the animals’ destruction or injury was outrageous. It is also possible, however, to imagine similar findings when defendants behave particularly egregiously in destroying inanimate property – such as irreplaceable family photographs – to which a plaintiff has a strong sentimental attachment. Thus, while numerous courts have categorically denied emotional distress damages for the killing of animals, the few courts that have allowed such damages have generally done so on theories that might apply to inanimate as well as animate property.¹⁰³

D. GOING BEYOND THE CHANGES SEEN IN THE COURTS

Despite the large number of cases where the plaintiffs have challenged the general rule that only allows recovery for an animal’s fair market value, few courts have diverged very far from this standard. While many courts do appear sympathetic to such claims, most also see their choices as being limited by existing law, and few courts seem to see themselves in a position to change that law. In some cases, intermediate appellate courts have deferred to higher courts to make these changes in the laws,¹⁰⁴ while in others the courts defer to legislative bodies to make such changes.¹⁰⁵ Given the unwillingness of most courts to make such changes, it is not surprising that we are beginning to see legislative response in a number of states. It is also

¹⁰² *Id.* at 218.

¹⁰³ See *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1071 (Haw. 1981).

¹⁰⁴ See *Petco Animal Supplies, Inc. v. Schuster*, 144 S.W.3d 554, 565 (Tex. App. 2004).

¹⁰⁵ See, e.g., *Koester v. VCA Animal Hosp.* 624 N.W.2d 209, 211 (Mich. Ct. App. 2001) (holding that emotional distress damages are not available for death of a dog because pets are personal property, but inviting plaintiff and others to urge the Legislature to “visit this issue in light of public policy considerations.”)

unsurprising that many of the proposals set forth by commentators who advocate continuing this trend seek to build on these legislative responses.

1. Changes in Statutory Law

Tennessee was the first state to enact legislation increasing the damages allowed for a lost or injured animal.¹⁰⁶ Known as the T-Bo Act of 2000, and named for the pet Shih Tzu of the state legislator who proposed the bill,¹⁰⁷ the Tennessee statute allows recovery for non-economic damages for the loss of a pet, including “reasonably expected society, companionship, love and affection of the pet.”¹⁰⁸ While going further than most common law extensions by explicitly allowing the recovery of non-economic damages, the Tennessee law contains a number of limitations, including a damages limit of \$5,000,¹⁰⁹ and exemptions for non-profit entities, government agencies, and licensed veterinarians.¹¹⁰ It also limits its application to dogs and cats;¹¹¹ any other lost pet would not be covered by the statute.

A 2004 Connecticut statute is even more limited.¹¹² This enactment limits its coverage to domesticated dogs and cats,¹¹³

¹⁰⁶ See TENN. CODE ANN. § 44-17-403 (2006).

¹⁰⁷ See McEachern Nunalee & Weedon, *supra* note 6, at 144.

¹⁰⁸ TENN. CODE ANN. § 44-17-403(d) (2006).

¹⁰⁹ § 44-17-403(a)(1). The original year 2000 non-economic damages cap was raised from \$4,000 to \$5,000 in 2004. See 2004 Tenn. Pub. Acts ch. 957. Interestingly, this damage cap of \$5000 in a statute that increases the allowed *categories* of damages is considerably lower than the \$7500 cap on damages in a Maryland statute that was enacted to *limit* the damages for the death or injury to a pet to compensatory damages. See MD. CODE ANN., CTS. & JUD. PROC. § 11-110(a)(2) (West 2006).

¹¹⁰ TENN. CODE ANN. § 44-17-403 (a) & (e).

¹¹¹ § 44-17-403 (b) (“As used in this section, ‘pet’ means any domesticated dog or cat normally maintained in or near the household of its owner.”).

¹¹² See CONN. GEN. STAT. ANN. § 22-351a (West 2007) (“Liability for intentionally killing or injuring companion animal”).

only applies when a companion animal is intentionally,¹¹⁴ not negligently, killed or injured, and does not expand recovery to non-economic damages.¹¹⁵ The law does, however, expand the range of economic damages that can be recovered: “including, but not limited to, expenses of veterinary care, the fair monetary value of the companion animal and burial expenses for the companion animal.”¹¹⁶ Under this law, an owner whose animal was intentionally injured would presumably be able to recover the costs of treating such injuries, even if those costs were in excess of the animal’s fair market value. This law also allows courts to award punitive damages, but provides exemptions to such awards similar to the exemptions set out in the Tennessee statute.¹¹⁷

Illinois has chosen a somewhat different approach to recognizing awards of non-economic damages, by including such a provision for civil actions in its Humane Care for Animals

¹¹³ § 22-351a (a). The statute explicitly excludes any “dog or cat kept for farming or biomedical research practices.” *Id.*

¹¹⁴ *Id.* § 22-351a (b). The law exempts persons who kill an animal “in defense of such person or another person or as otherwise authorized by law.” *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ § 22-351a (d):

The court shall not assess punitive damages and a reasonable attorney’s fee pursuant to subsection (c) of this section against: (1) A veterinarian licensed pursuant to chapter 384 while following accepted standards of practice of the profession, (2) the state or any political subdivision of the state or any employee, officer or agent thereof while acting within the scope of such employee’s, officer’s or agent’s employment or official duties, or (3) an employee of or volunteer for a nonprofit organization or nonprofit corporation organized and operated exclusively for the prevention of cruelty to animals or the protection of stray, abandoned or mistreated animals while acting within the scope of such employee’s or volunteer’s employment or duties.

Act, the state anti-cruelty statute.¹¹⁸ Section 16.3 of the Act allows an animal's owner to bring a civil action against someone who kills or injures her animal, but only where the defendant commits aggravated cruelty¹¹⁹ or torture¹²⁰ as defined by the Act, or if the defendant kills an animal while acting in bad faith under the Act's sections 3.06 (dealing with the disposition of seized companion animals and animals used for fighting purposes)¹²¹ or section 12 (impounding animals).¹²² As long as these conditions are met, however, the statute allows a broad range of damages:

Damages may include, but are not limited to, the monetary value of the animal, veterinary expenses incurred on behalf of the animal, any other expenses incurred by the owner in rectifying the effects of the cruelty, pain, and suffering of the animal, and emotional distress suffered by the owner. In addition to damages that may be proven, the owner is also entitled to punitive or exemplary damages of not less than \$500 but not more than \$25,000 for each act of abuse or neglect to which the animal was subjected. In addition, the court must award reasonable attorney's fees

¹¹⁸ Humane Care for Animals Act, 510 ILL. COMP. STAT. ANN. 70/1 et. seq. (West 2007).

¹¹⁹ 510 ILL. COMP. STAT. ANN. 70/16-3 (West 2007). The Act defines aggravated cruelty as "intentionally commit[ting] an act that causes a companion animal to suffer serious injury or death." 510 ILL. COMP. STAT. ANN. 70/3-02 (West 2007).

¹²⁰ 510 ILL. COMP. STAT. ANN. 70/16-3 (West 2007). Torture is committed "when that person without legal justification knowingly or intentionally tortures an animal. For purposes of this Section, and subject to subsection (b), 'torture' means infliction of or subjection to extreme physical pain, motivated by an intent to increase or prolong the pain, suffering, or agony of the animal." 510 ILL. COMP. STAT. ANN. 70/3-03(a) (West 2007).

¹²¹ 510 ILL. COMP. STAT. ANN. 70/16-3 (West 2007); 510 ILL. COMP. STAT. ANN. 70/3-06 (West 2007).

¹²² 510 ILL. COMP. STAT. ANN. 70/16-3 (West 2007); 510 ILL. COMP. STAT. ANN. 70/12 (West 2007).

and costs actually incurred by the owner in the prosecution of any action under this Section.¹²³

Illinois thus takes a very expansive stance on the types of damages that can be awarded in a civil action, including even damages for the owner's emotional distress. It places limitations, however, on the situations where such damages are available, by requiring not just intentional behavior but bad faith, torture, and aggravated cruelty.

2. Proposals for Change Set Forth by Commentators

Several of the commentators who have criticized the current approach to the valuation of animals have set forth proposals that build on these legislative models. Waisman and Newell, who criticize the Tennessee statute as "extremely limited in scope, probably due to political exigencies in that particular state,"¹²⁴ propose legislation that would be much more comprehensive in compensating for the injury or loss of a companion animal:

[D]amages shall be recoverable for the human companion's mental anguish, emotional distress, and other non-economic injuries, including the loss of society, companionship, comfort, protection and services; for veterinary and other special care required; for reasonable burial expenses; for court costs and attorney's fees, and other reasonable damages resulting from the willful, wanton, reckless or negligent act or omission.¹²⁵

Another commentator, Margit Livingston, proposes compensating owners for the loss of intangible elements of the human-animal relationship, including "loss of companionship of the animal for a reasonable replacement period," and compensation for the "mental anguish experienced by plaintiffs

¹²³ 510 ILL. COMP. STAT. ANN. 70/16-3 (West 2007).

¹²⁴ Waisman & Newell, *supra* note 40, at 70.

¹²⁵ *Id.* at 72. The proposal also includes punitive damages when willful, wanton, or reckless conduct causes the death or injury of an animal companion. *Id.*

upon the untimely death of their companion animal.”¹²⁶ Yet another proposal builds on approaches taken by the few courts that have been willing to extend damages beyond market value, proposing that courts use a “value to owner” standard, including a loss of companionship component, and advocating for the award of punitive damages “where the conduct of the defendant is particularly heinous.”¹²⁷ Byszewski presents an interesting proposal that builds on an idea first adopted by a court in a wrongful death suit for a negligently killed child.¹²⁸ Applying the court’s “loss of investment” approach to negligently killed animals, she proposes that courts use the expected cost of care over the animal’s life expectancy had it not been killed to estimate the animal’s true value to its owner or guardian, including its companionship value.¹²⁹

All of these proposals, and to a lesser extent the statutes,¹³⁰ take a different approach from the judicial decisions that have allowed for valuation above an animal’s market value. Unlike the case law, these proposals look to change the law by recognizing that the legal status of animals should be different from that of inanimate property, and that the calculation of damages awards should reflect that difference.

¹²⁶ Livingston, *supra* note 40, at 844.

¹²⁷ Epstein, *supra* note 40, at 46-48.

¹²⁸ Byszewski, *supra* note 40, at 233-36.

¹²⁹ *Id.* at 235.

¹³⁰ See TENN. CODE ANN. § 44-17-403(d) (2006): by including damages for the “reasonably expected society, companionship, love and affection for the pet,” the Tennessee statute seems to recognize that humans can form such meaningful relationships with their companion animals, which is not the type of recognition one would expect for “relationships” with inanimate property. . On the other hand, by explicitly using the term “owner” (“pet” means any domesticated dog or cat normally maintained in or near the household of its owner.” § 44-17-403(b)), the statute appears to implicitly recognize the status of pets as property.

PART III: RECOGNIZING A CHANGE IN THE LEGAL STATUS OF COMPANION ANIMALS

Most of the courts that have allowed damage awards above an animal's fair market value do not, ultimately, say anything regarding changing the legal status of animals to something other than property. Rather, these courts merely seem to be looking at different ways of valuing this form of property.¹³¹ In a few cases, however, courts have actually been willing to entertain the idea that animals are in a different legal category from inanimate property. One of the ways we see this recognition is in the language that courts use in deciding cases involving the loss or injury of companion animals. In some cases, this language may actually affect outcome of the court's opinion. In others, however, the language is merely dicta, and effects no changes in the law.

A. CHANGES EVIDENCED BY LANGUAGE USED BY COURTS

Language from *Corso v. Crawford Dog & Cat Hosp., Inc.*,¹³² a case decided by the Queens County Civil Court in New York, has been cited numerous times by courts, commentators, and advocates.¹³³ In awarding emotional distress damages when the body of the plaintiff's fifteen-year-old poodle was mishandled after its death, the court created a special legal status for companion animals:

[T]he court must first decide whether a pet such as a dog is only an item of personal property as prior cases have held. This court now overrules prior precedent and holds that a pet is not just a thing

¹³¹ The only possible exception is the *Brousseau* case, where, by including loss of companionship as an element of damages, the New York court seemed to be saying something about the animal's status that put it in a different category from inanimate property. *Brousseau v. Rosenthal*, 443 N.Y.S.2d 285 (N.Y. Civ. Ct. 1980).

¹³² 415 N.Y.S.2d 182 (N.Y. Civ. Ct. 1979).

¹³³ A Westlaw Key Cite search of *Corso* yields eighty citing references, including several cases in New York and other jurisdictions, numerous secondary sources, and a half dozen trial and appellate petitions, motions, briefs, etc. (last search Feb. 18, 2007).

but occupies a special place somewhere in between a person and a piece of personal property.¹³⁴

The court thus awarded damages for the plaintiff's mental anguish above the market value of the dog. In doing so, it made a special point to narrow its decision to the loss of animals, specifically distinguishing the loss of inanimate property:

This decision is not to be construed to include an award for the loss of a family heirloom which would also cause great mental anguish. An heirloom while it might be the source of good feelings is merely an inanimate object and is not capable of returning love and affection. It does not respond to human stimulation; it has no brain capable of displaying emotion which in turn causes a human response. Losing the right to memorialize a pet rock, or a pet tree or losing a family picture album is not actionable. But a dog — that is something else. To say it is a piece of personal property and no more is a repudiation of our humaneness. This I cannot accept.¹³⁵

Despite this case's strong language, clear message, the effect of that message on the outcome of the case, and all the other courts and commentators who have cited it, *Corso* actually has very little precedential value. Its holding has not been followed by subsequent New York cases. Several recent cases have simply ignored the *Corso* "holding" and have instead asserted that New York law recognizes pets as personal property,¹³⁶ and because pets are personal property, plaintiffs cannot recover emotional distress damages for their loss.¹³⁷ Additionally, a federal court,

¹³⁴ *Corso*, 415 N.Y.S.2d at 183 (citation omitted). This is the precise language that has often been cited by other courts.

¹³⁵ *Id.*

¹³⁶ See *Lewis v. Di Donna*, 743 N.Y.S.2d 186 (N.Y. App. Div. 2002).

¹³⁷ *Mercurio v. Weber*, No. SC1113/03, 2003 WL 21497325 (N.Y. Dist. Ct. 2003). This case further repudiates the *Corso* holding by finding that, "[i]f plaintiff could recover for the emotional distress of losing her dog, such logic could be extended to allow recovery for emotional distress caused by the destruction of other sentimental items like family heirlooms, class rings or old pictures." *Id.* at *1. See also *Jason v. Parks*, 638 N.Y.S.2d 170, 171 (N.Y. App. Div. 1996) ("It is well established that a pet owner in New York cannot

deciding a case under New York law, described *Corso's* holding that a pet was more than property as an “aberration[] flying in the face of overwhelming authority to the contrary.”¹³⁸ The federal district court criticized the *Corso* opinion for providing “no legal reasoning why prior precedent should be overruled in categorizing pets as more than property.”¹³⁹ Thus the *Corso* language, despite its appeal to many, essentially sits on the books as a lower court opinion with little actual clout.

Similarly strong language can be seen in a Wisconsin case, where the plaintiff sought damages for emotional distress when a police officer fatally shot her dog:

At the outset, we note that we are uncomfortable with the law’s cold characterization of a dog . . . as mere “property.” Labeling a dog “property” fails to describe the value human beings place upon the companionship that they enjoy with a dog. A companion dog is not a fungible item, equivalent to other items of personal property. A companion dog is not a living room sofa or dining room furniture. This term inadequately and inaccurately describes the relationship between a human and a dog.¹⁴⁰

While this language has also been cited and quoted by other courts and commentators,¹⁴¹ it remains dicta. The Wisconsin

recover damages for the negligent destruction of a dog.”); *Johnson v. Douglas*, 723 N.Y.S.2d 627, 628 (N.Y. Sup. Ct. 2001) (“[T]he court is not about to recognize a tortious cause of action to recover for emotional distress due to the death of a family pet”).

¹³⁸ *Gluckman v. American Airlines, Inc.*, 844 F. Supp. 151, 158 (S.D.N.Y. 1994).

¹³⁹ *Id.*

¹⁴⁰ *Rabideau v. City of Racine*, 627 N.W.2d 795, 798 (Wis. 2001) (footnotes omitted).

¹⁴¹ *See, e.g., Harabes v. The Barkery, Inc.*, 791 A.2d 1142 (N.J. Super. Ct. 2001).

As recognized by the Wisconsin Supreme Court, “[l]abeling a dog ‘property’ fails to describe the value human beings place upon the companionship that they enjoy with a dog . . . A companion dog is not a living room sofa or dining

court's language in this case had no effect on the outcome of the case. Despite the concern the Wisconsin Supreme Court expressed with the above language, it did not see itself in a position to change "established legal doctrine" and thus refused to award emotional distress damages for loss of a dog.¹⁴²

Judge Andell's concurring opinion in a Texas Court of Appeals case concerning damages for a hunter's negligent killing of the plaintiff's dogs expresses a similar sentiment:

Society has long since moved beyond the untenable Cartesian view that animals are unfeeling automatons and, hence, *mere* property. The law should reflect society's recognition that animals are sentient and emotive beings that are capable of providing companionship to the humans with whom they live. . . .

Losing a beloved pet is not the same as losing an inanimate object, however cherished it may be.

room furniture. This term inadequately and inaccurately describes the relationship between a human and a dog." Nevertheless, there is no authority in this state for allowing plaintiffs to recover non-economic damages resulting from defendants' alleged negligence.

Id. at 1146 (citation omitted).

¹⁴² *Rabideau*, 627 N.W.2d at 798. A very similar result, as well as very similar language can found in a 2004 Connecticut case, where the appellate court found that a plaintiff whose dog was removed and euthanized by animal control officers had failed to state a claim because the common law did not recognize emotional distress claims for "injury to such property as a pet." *Myers v. City of Hartford*, 853 A.2d 621, 625 (Conn. App. Ct. 2004). That court's language sounds very much like that in the *Rabideau* case:

Labeling a pet as property fails to describe the emotional value human beings place on the companionship that they enjoy with such an animal. Although dogs are considered property; see [CONN. GEN. STAT.] [Section] 22-350; this term inadequately and inaccurately describes the relationship between an individual and his or her pet. That having been said, there is no common-law authority in this state that allows plaintiffs to recover noneconomic damages resulting from a defendant's alleged negligent or intentional act resulting in the death of a pet

Myers, 853 A.2d at 626.

Even an heirloom of great sentimental value, if lost, does not constitute a loss comparable to that of a living being.¹⁴³

Andell chose to write separately from the majority in order “to address what I consider to be a more substantial basis for affirming this award, namely, the intrinsic or special value of domestic animals as companions and beloved pets.”¹⁴⁴

All three of these cases express, in strong language, important and meaningful differences between animals and inanimate property. Yet they represent little, if any, actual changes in the law. One is a lower court opinion that has not been followed, even in its own jurisdiction, another is mere dicta, and the third is language in a concurrence. But despite the minimal precedential weight of these cases, the language used in these opinions reflects, at a minimum, an increasing discomfort that some judges have had with the legal status quo – it is clear that this is an area where the established law is in conflict with the reality of how many people view companion animals.¹⁴⁵

B. COURT DECISIONS AND LEGISLATIVE ENACTMENTS THAT RECOGNIZE A CHANGE IN THE LEGAL STATUS OF COMPANION ANIMALS

If valuation of damages for lost or injured animals were the only legal area affected, it might be less important to change an animal’s status. But courts are also called upon to resolve disputes between losers and finders of pet animals, resolve other animal custody disputes, and deal with provisions of wills that request that the animals be destroyed upon the owner’s death. And state legislatures are acting in ways that recognize a change in the status of animals by creating legislation that allows for enforceable trusts to ensure the animals’ care after the owner

¹⁴³ Bueckner v. Hamel, 886 S.W.2d 368, 377-78 (Tex. Ct. App. 1994) (Andell, J. concurring).

¹⁴⁴ *Id.* at 373.

¹⁴⁵ See *infra* notes 276-281 and accompanying text, discussing the numerous ways in which behavior towards pets demonstrates the extent to which our society has come to value companion animals.

dies and by increasing penalties under their animal cruelty statutes.

1. Lost & Found Animal Disputes

Many lost animals end up at local shelters. Shelters have special roles in caring for lost animals and finding new homes for them. As a result, specific laws have developed regulating shelters. State statutes regulate how long a shelter must keep a found animal before adopting it out to another family;¹⁴⁶ whether there needs to be any holding period at all when an owner surrenders an animal to a shelter; and what efforts, if any, the shelter must make to find the animal's original owner.¹⁴⁷ If the shelter complies with the statutory requirements, courts do not interfere with their decision to adopt out an animal.¹⁴⁸ Courts have also declined to require shelters to disclose the identity of the animal's new owner when the original owner requests this information from the shelter that adopted the animal out.¹⁴⁹

But disputes sometimes develop when someone loses a companion animal and a private person takes in that animal – bypassing the shelter system and the laws that apply in that

¹⁴⁶ In addition to the shelter holding periods mandated by state statutes, the Federal Pet Theft Act (a part of the Animal Welfare Act) requires that shelters hold pets for at least five days before selling them to a dealer, a provision that was enacted to minimize the risks of stolen pets being sold for research. See 7 U.S.C. § 2158 (a)(1) (2007).

¹⁴⁷ See generally PATRICIA A. BOLEN, ANIMAL LEGAL & HISTORICAL CENTER, LOST AND FOUND: HUMANE SOCIETIES' RIGHTS AND OBLIGATIONS REGARDING COMPANION ANIMAL OWNERSHIP (2005), <http://www.animallaw.info/articles/dduspetadoption.htm> (last visited Feb. 12, 2007).

¹⁴⁸ *Id.* See also Rebecca J. Huss, *Separation, Custody, and Estate Planning Issues Relating to Companion Animals*, 74 U. COLO. L. REV. 181, 216 (2003) [hereinafter Huss, *Separation, Custody, and Estate Planning*] (“The clear trend among appellate cases is that once an adoption has been made through a recognized humane society, especially if the society followed the standards set forth under relevant law, the adoption will be upheld.”).

¹⁴⁹ See John J. Tiemessen & Jason A. Weiner, Commentary, *The Golden Retriever Rule: Alaska's Identity Privilege for Animal Adoption Agencies and for Adoptive Animal Owners*, 21 ALASKA L. REV. 77, 77-78 (2004).

context. One such case was *Morgan v. Kroupa*, where the Vermont Supreme court recognized that a pet dog's status is different from that of property.¹⁵⁰ In July 1994, Mary Morgan found a dog that had been lost by Zane Kroupa.¹⁵¹ Morgan made several efforts to locate the dog's owner: reporting to the local humane society, posting notices in area parks and stores, and arranging for announcements on a local radio station.¹⁵² When these efforts to locate the dog's owner failed, she took the dog in, took care of it, and "considered it the household pet."¹⁵³ More than a year later, Kroupa, who lived two miles from Morgan, discovered where the dog was and sought to have it returned.¹⁵⁴ He drove to Morgan's house and left with the dog.¹⁵⁵ Morgan brought an action to recover the dog.¹⁵⁶

In affirming the trial court's decision to award possession of dog to Morgan, the Vermont Supreme Court declined to apply Vermont's lost property statute, despite language in the statute covering "stray beasts."¹⁵⁷ The court determined that this language was not intended to apply to lost pets, but rather

¹⁵⁰ 702 A.2d 630 (Vt. 1997).

¹⁵¹ *Id.* at 631.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 632. The court noted:

Vermont's lost property statute provides that a person who finds money or goods, to the value of \$3.00 or more, or takes up a stray beast, the owner of which is not known, shall, within six days thereafter, make two notices, describing such money, goods or beast, with the natural or artificial marks, with the time and place of finding or taking up the same, and post them in two public places in town in which such property was found.

Id. (citing 27 VT. STAT. ANN. § 1101).

“agricultural animals of substantial monetary value.”¹⁵⁸ The court declined to apply the lost property statute to a lost pet because, “pets generally do not fit neatly within traditional property law principles.”¹⁵⁹ In reaching its decision, the court’s language recognized that pets belong in a different category from other forms of property: “Like most pets, [the dog’s] worth is not primarily financial, but emotional; its value derives from the animal’s *relationship* with its human companions.”¹⁶⁰

Instead of applying the lost property statute to this dispute, the court decided to fashion new rules that would recognize “the substantial value that society places on domestic animals.”¹⁶¹ The court further determined that it would be against the public interest not to provide incentives for finders of lost animals to take in, care for and develop relationships with them.¹⁶² The result in this case was that Morgan, who found the dog and cared for it for over a year, was awarded possession of the dog.¹⁶³

An interesting aspect to this case was the approach taken by the trial court. While the lower court opted to treat the case as a simple property case and apply Vermont’s lost property statute (a result that was ultimately rejected by the Supreme Court), it acknowledged that the case might be approached under a number of other legal theories, including weighing the “emotional attachment” of the two parties, and notably, “inquiring into what was in the ‘best interests’ of the dog,” similar to the approach taken in child custody cases.¹⁶⁴ While

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 633. The court went on to cite language from *Corso v. Crawford Dog & Cat Hosp., Inc.*, 415 N.Y.S.2d 182, 183 (N.Y. Civ. Ct. 1979): “[A] pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property.”

¹⁶⁰ *Morgan*, 702 A.2d at 633.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 631.

neither the trial court nor the appellate court opted to take this last approach, both courts at least entertained the possibility.

While the *Morgan* court's approach clearly places companion animals in a different category from other property (including, notably, other *animal* property), this approach is not one that has yet been embraced by other courts, either in process or in result.¹⁶⁵ Nevertheless, the case provides an important example of how traditional property concepts provide an inadequate framework for decisions involving the custody of lost and found pets. The case is also a useful jumping-off point for proposals on how such disputes might be addressed in the future. One commentator, for example, has proposed that a balancing test be used to weigh interests of the pet's original owners with those of the person who found the pet and subsequently bonded with it.¹⁶⁶

2. Pet Custody Cases

Several courts have, in fact, applied a "best interest" standard in resolving custody disputes over companion animals. And while this approach appears to represent a minority position¹⁶⁷ at this time, it indicates another important inroad into the legal system's view of companion animals as something distinct from inanimate property.¹⁶⁸ In one New York case, for example, the court used the best interest standard of child custody cases to determine that it was in the best interests of an elderly cat to remain at the home where he has "lived,

¹⁶⁵ See, e.g., *Williams v. McMahan*, No. 26983-0-II, 2002 WL 242538 (Wash. Ct. App. Feb. 15, 2002) (applying property principles, the trial court ordered a dog returned to its original owner after the person who found the dog had kept and cared for the dog for nine months).

¹⁶⁶ See Huss, *Separation, Custody, and Estate Planning*, *supra* note 148, at 218-19.

¹⁶⁷ See *id.* at 221 ("Usually, animals are treated in property settlements as just another form of personal property and assigned a monetary value."). See also *id.* at 225, discussing *Nuzzaci v. Nuzzaci*, No. CN194-10771, 1995 WL 783006 (Del. Fam. Ct. Apr. 19, 1995), where a Delaware court "declined to apply the best interests of the animal approach."

¹⁶⁸ See Barbara Newell, *Animal Custody Disputes: A Growing Crack in the 'Legal Thinghood' of Nonhuman Animals*, 6 ANIMAL L. 179 (2000).

prospered, loved and been loved for the past four years.”¹⁶⁹ In another, there was a dispute over a cat’s legal custody after two unrelated roommates separated.¹⁷⁰ In awarding custody to one of the roommates, the judge took into account what was in the best interest of the cat.¹⁷¹

The cases using a “best interest” standard to determine pet custody have generated a fair bit of coverage in the popular media,¹⁷² not all of it positive, but the idea is becoming more and more mainstream. One legal commentator, for example, has recently proposed the development of statutory provisions to determine pet custody using a “best interests of the animal” approach and modeling the provisions on child custody statutes.¹⁷³ Such an approach makes good sense given the ways in which many human families regard their pets as part of the family and how most people regard their pets in ways very different from the way they regard their inanimate property.

¹⁶⁹ Raymond v. Lachmann, 695 N.Y.S.2d 308, 309 (N.Y. App. Div. 1999).

¹⁷⁰ See Brooke A. Masters, *In Courtroom Tug of War Over Custody, Roommate Wins the Kitty*, WASH. POST, Sept. 13, 1997, at B1 (describing Arlington, Virginia’s Judge Kendrick’s resolution of the struggle between Andrew Zovko and Kovar Gregory over the possession of their cat, Grady).

¹⁷¹ See Newell, *supra* note 168, at 180 (“According to the *Washington Post*, ‘for [Judge] Kendrick, Grady’s happiness took priority Kendrick said he would decide ‘what is in the best interest of Grady’” (quoting Masters, *supra* note 170)).

¹⁷² See, e.g., Angelica Martinez, *Kitty Custody – What Happens to Pets When Owners Separate*, CAT FANCY, Apr. 2004, at 34. This article explains that because people are treating their companion animals like family members, and often like children, pet custody battles are becoming more prevalent in divorce cases. *Id.* at 34, 36. To decide these cases, some courts are using the best interest standard to decide which person should receive custody, much like they do in child custody cases. *Id.* at 36. Additionally, some courts are now taking into account the care of the animal, such as by looking into which individual actually cared for the pet. *Id.* at 36-37. In some cases, parties are using experts, pet therapists, and specialist to make these arguments. Couples have been granted joint custody, and the court can award visitation rights and financial support – a process which has been dubbed, “petimony.” *Id.* at 36.

¹⁷³ See Huss, *Separation, Custody, and Estate Planning*, *supra* note 148, at 227-29.

3. Estates and Trusts

Estate Planning and Administration is another area of law that demonstrates important differences in the ways both courts and legislatures are treating animate versus inanimate property. There are a number of examples of judicial decisions where clauses in wills that instruct that pets be destroyed are voided as “against public policy.” A more recent, and perhaps much more far-reaching development is the adoption of legislation in a number of jurisdictions that allows for the creation of binding pet trusts that are set up to insure that a companion animal is well cared for after its owner’s death.

a. Judicial Decisions Voiding Clauses Instructing That Animals Be Destroyed

The *Estate of Howard Brand* is a frequently cited example of a court’s willingness to void a testamentary clause calling for the destruction of animals.¹⁷⁴ Perhaps this case is so often cited because it so well exemplifies the difference between animals and inanimate property, both in the public reaction to clauses calling for destruction and in the legal remedies that courts are willing to fashion. Brand’s will included a provision that, upon his death, his Cadillac be crushed and his horses be destroyed.¹⁷⁵ When the provisions of his will became known there was very little concern expressed about crushing the car, but a great deal of public outcry about the fate of horses.¹⁷⁶ A neighbor of

¹⁷⁴ Abigail J. Sykas, Note, *Waste Not, Want Not: Can the Public Policy Doctrine Prohibit the Destruction of Property by Testamentary Direction?*, 25 VT. L. REV. 911, 934 (2001) (citing *In re Brand’s Estate*, No. 28473 (Vt. Chittenden Cty. Prob. Ct. Mar. 17, 1999)).

¹⁷⁵ *Id.* “The court acknowledged the fact that Mr. Brand was attempting to thwart any possibility that the animals would be mistreated after his death.” *Id.* at 934 n.217.

¹⁷⁶ “[W]hile the court received more than fifty letters regarding the outcome of this case, none of them addressed the destruction of a perfectly good Cadillac.” SUZETTE DANIELS, ANIMAL LEGAL & HISTORICAL CENTER, AN INTRODUCTION TO PET IN WILLS AND PET EUTHANASIA (2004), available at <http://www.animallaw.info/articles/arusdanielssuzette2004.htm> (last visited Feb. 12, 2007) (citing Findings of Fact, Conclusions of Law and Order, *In re Estate of Howard H. Brand*, (Mar. 17, 1999), available at http://www.animallaw.info/pleadings/pb_pdf/pbusvtbrandorder.pdf (last visited Feb. 12, 2007)).

Brand's sought a way to contest his will, and the story was reported in a local newspaper, which eventually led to the formation of "The Coalition to Save Brand's Horses."¹⁷⁷ The group, which included organizations such as the Vermont Humane Federation and the Student Animal Legal Defense Fund of the Vermont Law School, filed a motion for Preliminary Injunction and a Motion to Intervene.¹⁷⁸ Numerous people contacted the coalition offering to adopt the horses if their lives were spared.¹⁷⁹

While Brand's attorney argued that the will provision was legal, represented his client's final wishes, and should therefore be upheld,¹⁸⁰ the court sided with the coalition and refused to allow the horses to be killed.¹⁸¹ Instead, it voided the provision stipulating their destruction as against public policy.¹⁸² While acknowledging that the testator's intentions were to prevent the animals from suffering after his death by having them humanely euthanized, the court applied the doctrine of *cy pres*, and found that the horses could better be saved from inhumane treatment by saving their lives and letting them be taken in by someone else willing to care for them.¹⁸³

Similar results were seen in several other American cases and one Canadian case. In *In re Capers Estate*,¹⁸⁴ a

¹⁷⁷ See Daniels, *supra* note 1766 (citing Pamela Loring, *Horses Await Brand New Life after Rescue From a Willed Death*, HORSIN' AROUND (1999)).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ See Memorandum in Opposition to Motion for Preliminary Injunction, *In re Estate of Howard H. Brand*, (Mar. 4, 1999), available at http://www.animallaw.info/pleadings/pb_pdf/pbusvtbrandmemoopp.pdf (last visited Feb. 12, 2007).

¹⁸¹ See Findings of Fact, Conclusions of Law and Order, *In re Estate of Howard H. Brand* (Mar. 17, 1999), available at http://www.animallaw.info/pleadings/pb_pdf/pbusvtbrandorder.pdf (last visited Feb. 12, 2007). See also Sykas, *supra* note 174, at 934.

¹⁸² Sykas, *supra* note 174, at 934.

¹⁸³ See *id.*

¹⁸⁴ 34 Pa. D. & C.2d 121 (Pa. Orphans' Ct., Allegheny County 1964).

Pennsylvania court found that a will instruction to destroy two Irish Setters¹⁸⁵ was void “as not being within the purview of the Wills Act of the Commonwealth of Pennsylvania” and also as being against the public policy of the Commonwealth.¹⁸⁶ Instead of following the testator’s instructions that the animals be killed, the court gave the dogs to the couple who had been caring for them since her death.¹⁸⁷ A California court similarly voided a testator’s instruction, through a provision in her will to destroy her pet dog, Sido.¹⁸⁸ The court found that the provision violated public policy and was potentially illegal under California law (because of specific provisions authorizing conditions under which dogs may be euthanized).¹⁸⁹ The court fashioned a remedy where the dog passed under the will’s residuary clause to an organization called Pets Unlimited, which allowed Sido to stay in its custodial home, subject to inspection by the court.¹⁹⁰

A Canadian court voided a similar clause in the will of Clive Wishart, who directed that after his death his four horses, Barney, Bill, Jack, and King, be “shot by the Royal Canadian Mounted Police and then buried.”¹⁹¹ The Royal Canadian

¹⁸⁵ *Id.* A clause in Ida Capers’ will instructed: “I direct that any dog which I may own at the time of my death be destroyed in a humane manner and I give and grant unto my Executors hereinafter named full and complete power and discretion necessary to carry out the same.” *Id.* at 122.

¹⁸⁶ *Id.* at 141; see also Harold W. Hannah, *Wills Requiring the Destruction of Pets—the Veterinarian’s Position*, 199 J. AM. VETERINARY MED. ASS’N 1156, 1158 (1991).

¹⁸⁷ *In re Capers’ Estate*, 34 Pa. D. & C.2d at 141.

¹⁸⁸ See Sykas, *supra* note 174, at 932 (citing Rep. Tr. at 6, Smith v. Avanzino, No. 225-698 (Cal. Super. Ct., S.F. City & County, June 17, 1980)).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* The court made its decision despite being notified that the issue was moot because of legislative action. “California S. Bill 2059, which included a provision to save Sido specifically, had been unanimously passed and signed into law before the close of court proceedings.” Waisman & Newell, *supra* note 40, at 57 n.52.

¹⁹¹ *In re Wishart*, 129 N.B.R.2d 397 at ¶ 2 (1992).

Mounted Police refused to carry out this instruction without a court order, and the court ultimately declined to give such an order.¹⁹² Like the *Brand* case, there was a great deal of public outcry against the destruction of the horses, both in the United States and Canada.¹⁹³ In refusing to carry out Wishart's instructions, the court found the provision to be void as contrary to public policy.¹⁹⁴ It also found that the testator's wishes, which it determined to be preventing the mistreatment of the horses after his death, could better be effected by directing the New Brunswick Society for the Prevention of Cruelty to Animals (S.P.C.A.) to find a new home for the horses.¹⁹⁵

This last point highlights some of the potential difficulties with cases where courts find clauses directing animals' destruction upon the testator's death void as against public policy. If the court truly is aiming to find a better way to effect the testator's intent that the animals not suffer after his death, it is not clear how far courts are actually willing to go to see that the animals are in fact properly cared for – for the remainder of their lives.¹⁹⁶ In its efforts to address these concerns, the

¹⁹² *Id.* at ¶ 3, 23. See also Daniels, *supra* note 176.

¹⁹³ See *Wishart*, 129 N.B.R.2d at ¶ 5 (discussing the public reaction to the clause of the will); Daniels, *supra* note 176.

¹⁹⁴ "It is my conclusion that to destroy Barney, Bill, Jack and King as directed in the will at this time and in the present circumstances would be contrary to public policy. The direction in the will is therefore void." *Wishart*, 129 N.B.R.2d at ¶ 23.

¹⁹⁵ See *Wishart*, 129 N.B.R.2d at ¶ 18.

¹⁹⁶ This was a point that arose with some emphasis in a discussion of these cases with a group of veterinarians at Intern-Resident Rounds at the University of Pennsylvania Veterinary School on May 17, 2005, at which this author was present. A number of the veterinarians present expressed concern at the courts' intervention and argued that courts should only prevent such killings if they are prepared to insure the animals' proper care for the rest of their lives. A similar sentiment can be seen in the opposition of the American Veterinary Medical Association (AVMA) to the American Horse Slaughter Prevention Act (AHSPA), a proposed federal bill that would prohibit the selling of horses for slaughter. While one might expect the AVMA to support such a bill, they explain their opposition in the following way: "The AVMA and AAEP recognize that the processing of unwanted horses is currently a necessary aspect of the equine industry, and provides a humane alternative to allowing the horse to continue a

Canadian court set out the following conditions for the disposition of the horses:

- (1) Prior inspection and approval by the New Brunswick S.P.C.A.;
- (2) A written agreement between the Estate and the New Brunswick S.P.C.A. and the new owner or owners that he, she or it will cooperate with the New Brunswick S.P.C.A. after acquiring ownership, which agreement will include:
 - (a) Permission for regular inspection of the horses . . . ;
 - (b) An undertaking to provide and pay for veterinary services . . . ;
 - (c) An undertaking to properly feed and care for the horse or horses in accord with accepted practices and not to abuse the horse or horses;
 - (d) Such other reasonable conditions as the parties may agree upon and the Court approve to ensure that the horses are not abused¹⁹⁷

By setting out these conditions, the *Wishart* court recognized that in order to properly carry out the testator's intent, the horses must be taken care of properly for the remainder of their lives. It is not clear, however, to what extent the *Brand* court took the rest of the horses' lives into account in deciding who

life of discomfort and pain, and possibly inadequate care or abandonment." American Veterinary Medical Ass'n, AVMA Legislative Alerts and Updates, American Horse Slaughter and Prevention Act, <http://www.capwiz.com/avma/issues/alert/?alertid=7130716&type=CO> (no longer available online; on file with author). The organization further states that it will not support the legislation unless it adequately addresses the issue of animal welfare:

The AHSPA does not address the welfare of horses that will not be slaughtered. Many of these unwanted horses will be donated to horse rescue and retirement facilities, which are not regulated by any governmental body. While many of these facilities are well run, regulations must be put in place to establish standards of care to ensure the humane care of these unwanted horses.

Id.

¹⁹⁷ *Wishart*, 129 N.B.R.2d at ¶ 30.

would care for them after it voided the testator's instruction to have them humanely euthanized. No such concerns arise, of course, in the disposition of inanimate property upon a testator's death, further highlighting distinctions between these different types of "property."

If the courts in these cases were right, and the testators' true intent was to prevent mistreatment of their animals, then testators (and, arguably, their animals) are better served if they can make these choices directly. For many years, there was no way to enforce a will provision to assure that an animal was properly cared for after its owner's death. In recent years, however, a better way of assuring an animal's care after its owner's death has come about, a legislative solution that allows for the creation of binding trusts to insure an animal's proper care.

b. Legislation Creating Binding Pet Trusts

For many years, people who wished to provide for their animals after their death had no way of insuring that such provisions would be carried out. Property could not be left directly to an animal, and attempts to create trusts to benefit an animal could not be guaranteed success. In an historical section of his 2000 article, *Pet Animals: What Happens When Their Owners Die*, Gerry Beyer sets out the numerous ways "courts have frustrated an owner's intent to provide long-term care for the pet after the owner's death."¹⁹⁸ These include findings that gifts to care for specific animals were not charitable, and were therefore unenforceable;¹⁹⁹ finding that such gifts violated the rule against perpetuities (because an animal's life could not count as the "measuring life" to satisfy the Rule's requirement that the gift vest no later than twenty-one years after the death of a measuring life);²⁰⁰ finding the amount of money left to care for the animals to be excessive and therefore reducing those

¹⁹⁸ Gerry W. Beyer, *Pet Animals: What Happens When Their Owners Die*, 40 SANTA CLARA L. REV 617, 629 (2000).

¹⁹⁹ *Id.* at 631.

²⁰⁰ *Id.* at 631-32.

amounts;²⁰¹ and finding that a testator failed to select a proper legal mechanism to transfer the funds for the animal's care.²⁰²

The testators' wishes to care for their pets had a better chance of being realized once courts began recognizing and permitting honorary trusts to provide for pets.²⁰³ However, because these trusts were honorary, and therefore not enforceable, there was no way of guaranteeing that their provisions would actually be carried out. "Since these trustees were permitted to exercise an enormous amount of discretion, the recipient pets were completely at their mercy. The courts did not step in to enforce the provisions and ensure that trustee was properly caring for the animals."²⁰⁴

Recent statutory changes have removed this uncertainty in many jurisdictions. While a few pet-trust statutes still only recognize honorary trusts for the care of pets,²⁰⁵ many other state laws recognize enforceable pet trusts. Such recognition initially came with the adoption of Section 2-907 of the Uniform Probate Code (UPC), which provides for the enforcement of a

²⁰¹ *Id.* at 633.

²⁰² *Id.* at 633-34.

²⁰³ *See id.* at 635-39 (discussing the creative ways in which courts have upheld honorary pet trusts and have construed them so they would not be in violation of the Rule Against Perpetuities).

²⁰⁴ Daniels, *supra* note 176.

²⁰⁵ *See, e.g.*, CAL. PROB. CODE § 15212 (West 2007) ("A trust for the care of a designated domestic or pet animal may be performed by the trustee for the life of the animal, whether or not there is a beneficiary who can seek enforcement or termination of the trust and whether or not the terms of the trust contemplate a longer duration."); Wis. Stat. Ann. § 701.11 (1) (West 2007) ("where the owner of property makes a testamentary transfer in trust for a specific noncharitable purpose, and there is no definite or definitely ascertainable human beneficiary designated, no enforceable trust is created; but the transferee has power to apply the property to the designated purpose, unless the purpose is capricious."). *But see* discussion at Estate Planning for Pets Foundation, Legal Primer: The Law of Trusts for the Care of Pets (Oct. 1, 2004), <http://www.estateplanningforpets.org/> (this version is no longer available online; on file with author): "However, the current trend in recent state laws has veered away from this approach, as two states (Missouri and Tennessee) that had originally enacted honorary trust statutes have recently enacted versions of the UTC §408." *Id.*

pet trust by “an individual designated for that purpose in the trust instrument or, if none, by an individual appointed by a court upon application to it by an individual.”²⁰⁶ In adding this

²⁰⁶ UNIF. PROBATE CODE § 2-907(c)(4) (2001). The National Conference of Commissioners on Uniform State Laws initially promulgated the UPC in 1969 and last amended Section 2-907 in 1993. Other relevant portions of Section 2-907 read as follows:

(b) [Trust for Pets.] Subject to this subsection and subsection (c), a trust for the care of a designated domestic or pet animal is valid. The trust terminates when no living animal is covered by the trust. A governing instrument must be liberally construed to bring the transfer within this subsection, to presume against the merely precatory or honorary nature of the disposition, and to carry out the general intent of the transferor. Extrinsic evidence is admissible in determining the transferor’s intent.

(c) [Additional Provisions Applicable to Honorary Trusts and Trusts for Pets.] In addition to the provisions of subsection (a) or (b), a trust covered by either of those subsections is subject to the following provisions:

(1) Except as expressly provided otherwise in the trust instrument, no portion of the principal or income may be converted to the use of the trustee or to any use other than for the trust’s purposes or for the benefit of a covered animal.

(2) Upon termination, the trustee shall transfer the unexpended trust property in the following order:

(i) as directed in the trust instrument;

(ii) if the trust was created in a nonresiduary clause in the transferor’s will or in a codicil to the transferor’s will, under the residuary clause in the transferor’s will; and

(iii) if no taker is produced by the application of subparagraph (i) or (ii), to the transferor’s heirs under Section 2-711.

(3) For the purposes of Section 2-707, the residuary clause is treated as creating a future interest under the terms of a trust.

(4) The intended use of the principal or income can be enforced by an individual designated for that purpose in the

section, the drafters recognized the “concern of many pet owners by providing them a means for leaving funds to be used for the pet’s care.”²⁰⁷ There is a similar provision in Section 408 of the Uniform Trust Code: a pet trust may be enforced by “a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court.”²⁰⁸ The comments to this section go on to clarify its meaning:

trust instrument or, if none, by an individual appointed by a court upon application to it by an individual.

(5) Except as ordered by the court or required by the trust instrument, no filing, report, registration, periodic accounting, separate maintenance of funds, appointment, or fee is required by reason of the existence of the fiduciary relationship of the trustee.

(6) A court may reduce the amount of the property transferred, if it determines that that amount substantially exceeds the amount required for the intended use. The amount of the reduction, if any, passes as unexpended trust property under subsection (c)(2).

(7) If no trustee is designated or no designated trustee is willing or able to serve, a court shall name a trustee. A court may order the transfer of the property to another trustee, if required to assure that the intended use is carried out and if no successor trustee is designated in the trust instrument or if no designated successor trustee agrees to serve or is able to serve. A court may also make such other orders and determinations as shall be advisable to carry out the intent of the transferor and the purpose of this section.]

²⁰⁷ U.P.C. § 2-907 cmt.

²⁰⁸ UNIF. TRUST CODE § 408(b) (2003), as originally promulgated by the National Conference of Commissioners on Uniform State Laws in 2000 and last amended in 2003. *See* U.T.C. § 408 (Trust For Care Of Animal):

(a) A trust may be created to provide for the care of an animal alive during the settlor’s lifetime. The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than one animal alive during the settlor’s lifetime, upon the death of the last surviving animal.

(b) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person

Section 110(b) grants to the person appointed the rights of a qualified beneficiary for the purpose of receiving notices and providing consents. If the trust is created for the care of an animal, a person with an interest in the welfare of the animal has standing to petition for an appointment. The person appointed by the court to enforce the trust should also be a person who has exhibited an interest in the animal's welfare. The concept of granting standing to a person with a demonstrated interest in the animal's welfare is derived from the Uniform Guardianship and Protective Proceedings Act, which allows a person interested in the welfare of a ward or protected person to file petitions on behalf of the ward or protected person.²⁰⁹

The parallels that this comment draws between persons interested in the welfare of a human ward and persons interested in the welfare of an animal make clear that this law treats animals very differently from inanimate property. In fact, this provision comes closer than any currently codified law to giving the animals it covers a status that is similar to that of persons. The laws that create binding pet trusts have thus gone a long way toward recognizing a new status for companion animals.

is so appointed, by a person appointed by the court. A person having an interest in the welfare of the animal may request the court to appoint a person to enforce the trust or to remove a person appointed.

(c) Property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor's successors in interest.

²⁰⁹ U.T.C. § 408 cmt (2000).

A total of twenty-six states now have statutes that authorize the creation of binding pet trusts.²¹⁰ Nine of these states have chosen to enact Section 2-907 of the Uniform Probate Code;²¹¹ ten states have adopted a version of the more recent Uniform Trust Code (UTC) Section 408;²¹² and seven others that have not adopted either of the uniform codes have opted to enforce pet trusts through independent statutes.²¹³

In addition to these increased legal protections, there are numerous resources to help pet owners provide for their animals' care after their death. One organization, The Estate Planning for Pets Foundation, offers a website containing "information resources for conscientious pet owners and professionals who assist them."²¹⁴ The site offers a range of resources, including links "for pet owners," "for lawyers," and "for skeptics," a legal primer, sample language for pet trusts, links to the relevant statutes in each state, information on tax

²¹⁰ See Statutory Pet Trusts, <http://www.estateplanningforpets.org/legal-primer-statutes.htm> (last visited Jan. 23, 2007).

²¹¹ States using UPC Section 2-907: ALASKA STAT. § 13.12.907 (2006); ARIZ. REV. STAT. ANN. § 14-2907 (2007), COLO. REV. STAT. ANN. § 15-11-901 (West 2006); 760 ILL. COMP. STAT. ANN. 5/15-2 (West 2007), MICH. COMP. LAWS ANN. § 700.2722 (West 2006); MONT. CODE ANN. § 72-2-1017 (2007); N.C. GEN. STAT. § 36C-4-408 (2006); TEXAS PROP. CODE ANN. § 112.037(2007); UTAH CODE ANN. § 75-2-1001 (2006).

²¹² States using UTC Section 408: ARK. CODE ANN. § 28-73-408 (2007); D.C. CODE § 19-1304.08 (2007); KAN. STAT. ANN. § 58a-408 (2005); ME. REV. STAT. ANN. tit. 18-B, § 408 (2007); MO. ANN. STAT. § 456.4-408 (West 2007); NEB. REV. STAT. § 30-3834 (2007); NEV. REV. STAT. ANN. § 163.0075 (LexisNexis 2007); N.H. REV. STAT. ANN. § 564-B:4-408 (LexisNexis 2006); N.M. STAT. ANN. § 46A-4-408 (LexisNexis 2007); TENN. CODE ANN. § 35-15-408 (2007); WYO. STAT. ANN. § 4-10-409 (2006).

²¹³ States using independent versions of pet trusts: FLA. STAT. ANN. § 737.116 (West 2006); IOWA CODE ANN. § 633A.2105 (West 2006); N.J. STAT. ANN. § 3B:11-38 (West 2007); N.Y. EST. POWERS & TRUSTS LAW § 7-8.1 (McKinney 2007); OR. REV. STAT. § 128.308 (2003) (repealed); WASH. REV. CODE ANN. § 11.118.020 (West 2007). In addition, Idaho adopts a "Purpose Trust," which appears to include pet trusts. IDAHO. CODE ANN. § 15-7-601 (2006).

²¹⁴ Estate Planning for Pets Foundation, Estate Planning for Your Pet, <http://www.estateplanningforpets.org/> (last visited Jan. 23, 2007).

considerations, and methods for calculating the amount of funds needed for future care.²¹⁵ Another organization, Pet Guardian, offers its “PetGuardian Plan,” which provides a pet trust document, a cost analysis to help determine how much to set aside for pets, a set of sample pet care instructions, and emergency identification cards to be posted at home and kept in wallets.²¹⁶ In addition, this organization has teamed up with Best Friends, a large animal sanctuary in Kanab, Utah to provide what they call “The Best Friends ‘backup’ service,” which helps to locate alternate caregivers in cases where the originally designated caregivers become unavailable.²¹⁷

Similar resources are now being offered by a number of veterinary schools. The School of Veterinary Medicine at U.C. Davis recently began offering a program called “Tender Loving Care for Pets” through its Center for Animals in Society.²¹⁸ This program gives animal owners — through a bequest to the veterinary school — assurance that their pet will be placed in a “permanent loving home” and will receive life-time health care at the school’s veterinary hospital if the owner predeceases her pet.²¹⁹ The program promises to identify and monitor new homes for enrolled pets.²²⁰ The Veterinary School at Texas

²¹⁵ See *id.* at Site Map.

²¹⁶ See Pet Guardian, About Our Service: Introducing the PetGuardian Pet Trust Program, http://www.petguardian.com/common.php?v_section=2&v_page=2 (last visited Feb. 9, 2007).

²¹⁷ “If you have designated two potential caregivers and set aside appropriate funds, Best Friends will help locate an alternate caregiver should anything happen to the initial two designated caregivers.” *Id.*; see also Best Friends Animal Sanctuary, <http://www.bestfriends.org/> (last visited Feb. 9, 2007).

²¹⁸ See Heather Bloch, *Teaching Skill and Compassion*, THE BARK, Fall 2005, at 53, 56.

²¹⁹ *Id.*; see also Center for Animals in Society, Tender Loving Care for Pets (TLC), http://www.vetmed.ucdavis.edu/Animals_in_Society/tlc/default.htm (last visited Jan. 23, 2007).

²²⁰ Center for Animals in Society, *supra* note 219 (navigate to “About TLC for Pets”).

A&M University goes even further, providing an on-campus “Companion Animal Life-Care Center” which “provides the physical, emotional, and medical needs of companion animals whose owners are no longer able to provide that care.”²²¹ According to the Center’s web site, its clients include pet owners who predecease their pet.²²² In addition to its full-time staff, the center houses veterinary students who “live on site to ensure 24 hour care and company for our residents.”²²³ Resources such as these make clear the perceived need to help pet owners provide for their pets’ care after their death. The proliferation of laws providing for binding pet trusts, together with resources that take advantage of those laws, demonstrates the magnitude of this need.

4. Increased Penalties and Protections in Animal Cruelty Statutes

Criminal laws prohibiting cruelty to animals — which includes both abuse and neglect — have provided the primary way in which our legal system has protected animals.²²⁴ These enactments highlight one of the few ways in which the law has traditionally treated animals differently from other forms of property, and perhaps has not treated them as “property” at all. State anti-cruelty statutes, by some accounts, are older than the country itself²²⁵ and date back at least as far as the time of the

²²¹See Texas A&M University, Stevenson Companion Animal Life-Care Center, The Center, <http://www.cvm.tamu.edu/petcare/center.htm> (last visited Jan. 23, 2007).

²²² *Id.*

²²³ See Texas A&M University, Stevenson Companion Animal Life-Care Center, Staff, <http://www.cvm.tamu.edu/petcare/staff.htm> (last visited Jan. 23, 2007).

²²⁴ See Pamela D. Frasch et al., *State Animal Anti-Cruelty Statutes: An Overview*, 5 ANIMAL L. 69, 69 (1999).

²²⁵ Several sources cite a 1641 law enacted by the Massachusetts Bay Colony as the first American animal anti-cruelty statute, which stated that “No man shall exercise any Tirranny or Crueltie towards any Bruite creature which are usuallie kept for man’s use.” See, e.g., Sunstein, *Can Animals Sue?*, *supra* note 35, at 252; Animal Protection Institute, *State Animal Cruelty Laws* (Dec. 14, 2004), formerly available at

Civil War.²²⁶ At the federal level, animal protection law is more recent. The Animal Welfare Act was enacted in 1966, and it has been amended several times since then to strengthen some of the protections of the animals that it covers.²²⁷

The Animal Welfare Act is fairly limited in scope. The law aims to insure the humane treatment of animals used in research, for exhibition purposes, or as pets.²²⁸ But its regulations on research only apply to certain warm-blooded animals, thus excluding farm animals such as livestock and poultry from protection, and only protecting horses if they are used for research purposes.²²⁹ One provision of the Animal Welfare Act, known as the “Pet Theft Act,” sets out a series of rules that aim to prevent pet animals from being stolen and sold for research.²³⁰ Historically, state anti-cruelty laws have been similarly limited. In the past, both state and federal laws prohibiting cruelty to animals have been criticized for their limited coverage, insufficient penalties, numerous exemptions, and low enforcement rates.²³¹

What is notable about the state animal cruelty laws, however, is the extent to which they have been strengthened in the past

<http://www.api4animals.org/47.htm> (on file with author). See also U.S. DEPARTMENT OF AGRICULTURE, NATIONAL AGRICULTURAL LIBRARY, ANIMAL WELFARE INFORMATION CENTER, <http://www.nal.usda.gov/awic/pubs/HumanAnimalBond/HumanAnimalBond.htm> (last visited Jan. 23, 2007); and Big Cat Rescue, State Animal Cruelty Laws, <http://www.bigcatrescue.org/animalwelfarelaws.htm> (last visited Jan. 23, 2007)

²²⁶ See *supra* note 34.

²²⁷ Animal Welfare Act, 7 U.S.C. § 2131-2156 (2007) (amended in 1970, 1976, 1985 and 1990).

²²⁸ 7 U.S.C. § 2131(1) (2007).

²²⁹ *Id.* § 2132 (g).

²³⁰ *Id.* § 2158.

²³¹ For limitations of anti-cruelty statutes, see Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 N.Y.U. ENVTL. L.J. 531, 540-41 (1988). The article, however, was published in 1988, and a number of changes, including increased penalties, have occurred since then. See *infra* notes 232-242 and accompanying text.

decade or so. As recently as 1993, almost all state animal cruelty laws provided for offenses that were, at most, misdemeanors.²³² Only seven states at that time had felony animal abuse laws on their books.²³³ By 1999, twenty-three states had at least one form of felony law for animal abuse.²³⁴ As of the end of 2004, a total of forty-one states and the District of Columbia consider at least some types of animal abuse a felony.²³⁵ In addition to increasing penalties, state animal cruelty statutes have strengthened their reach by expanding the definition of animals covered by the statute and by broadening the range of offenses to include, for example, animal fighting and ear-cropping of dogs.²³⁶ Many states have amended their statutes to allow courts to impose additional penalties, such as requiring reimbursement for the cost of caring for the injured animal,

²³² See Stephan K. Otto, *State Animal Protection Laws—The Next Generation*, 11 ANIMAL L. 131 (2005).

²³³ See *id.* at 132 n.1: “California, Florida, Massachusetts, Montana, Oklahoma, Rhode Island, and Wisconsin had all enacted felony animal abuse provisions by 1993.”

²³⁴ See Frasch et al., *supra* note 224, at 69.

²³⁵ See HUMAN SOCIETY OF THE UNITED STATES, STATE ANIMAL ANTI-CRUELTY PROVISIONS (2005), http://www.hsus.org/web-files/PDF/State_cruelty_chart_June05-pdf.pdf (last visited Jan. 23, 2007). See also Otto, *supra* note 232, at 132. Note, however, the limitations to the felony laws:

[S]tates are currently reserving felony status for the most egregious, affirmative acts of abuse, and are requiring a high degree of criminal culpability. Many states are also restricting felony status to only subsequent offenses. Others are further restricting felonies to include only those crimes committed against certain species of animals, typically those either defined as, or generally considered to be, companion animals.

Id. at 137.

²³⁶ See, e.g., WYO. STAT. ANN. § 6-3-203(c)(ii) and (g) (2006) (defining cruelty to animals as owning dogs with the intent to allow the dogs to engage in fights, or being knowingly present at such a fight); 18 PA. CONS. STAT. ANN. § 5511(h) (West 2007) (requiring a licensed veterinarian to perform any ear-cropping surgery).

requiring behavioral counseling, and seizing the animals that are being mistreated or neglected.²³⁷ Courts may also enjoin defendants from owning animals during a probation period, and some may even order defendants to forfeit their right to possess animals in the future.²³⁸

State anti-cruelty statutes not only prohibit abusive treatment of animals, but many of these state laws impose affirmative duties on people who care for animals.²³⁹ For example, California law makes it a misdemeanor for an owner to permit the animal to be without “proper care and attention.”²⁴⁰ Another provision requires animal depositaries to “provide the animals with necessary and prompt veterinary care, nutrition, and shelter, and treat them kindly.”²⁴¹ While the “treat them kindly” provision may be unique to California, laws imposing affirmative duties for proper housing, veterinary care, and feeding of animals are becoming increasingly common.²⁴²

Another interesting feature of the state anti-cruelty laws is how much their coverage can vary by state. Unlike the area of enforceable pet trusts, where most state laws are adopted either from the Uniform Probate Code or Uniform Trust Code, there is no uniform law of animal protection. Rather, each state has its own unique statute prohibiting cruelty to animals, and while there may be some commonalities among these statutes, there are also important differences in the acts prohibited, animals covered, penalties, and exemptions. Thus, in addition to the

²³⁷ See, e.g., Paige M. Tomaselli, *International Comparative Animal Cruelty Laws*, available at <http://www.animallaw.info/articles/ddusicacl.htm> (“Commonly seen provisions in these laws are: counseling, community service, restitution, seizure, reimbursement for cost of care, forfeiture of the animal, veterinary reporting, and arrest policies.”) See also Corwin R. Kruse, Comment, *Baby Steps: Minnesota Raises Certain Forms of Animal Cruelty to Felony Status*, 28 WM. MITCHELL L. REV. 1649 (2002).

²³⁸ See Tomaselli, *supra* note 237.

²³⁹ See Sunstein, *Can Animals Sue*, *supra* note 35, at 252.

²⁴⁰ CAL. PENAL CODE § 597f(a) (West 2007).

²⁴¹ CAL. CIV. CODE § 1834 (West 2007).

²⁴² See Sunstein, *Can Animals Sue*, *supra* note 35, at 252-53.

limited protections of the Animal Welfare Act, which applies across all states, individual states, through their own animal cruelty statutes, are able to provide protections that can respond to the unique needs of that state. In Tennessee, for example, the crime of cruelty to animals includes “inflict[ing] burns, cuts, lacerations, or other injuries or pain, by any method, including blistering compounds, to the legs or hooves of horses.”²⁴³ This provision is a specific response to the local practice of “soring” (as in “making sore”), in various ways, the feet of Tennessee Walking Horses to exaggerate the high-stepping gait for which these horses are valued.²⁴⁴

State law prohibiting animal cruelty is extremely dynamic. In addition to the many changes seen in the past decade, many more are in the works. In a number of jurisdictions, there are numerous proposed bills pending approval which would further strengthen current animal cruelty laws.

Several features of these newly enhanced animal cruelty statutes are worth noting because they resemble the features of laws prohibiting child abuse in a number of ways. Such provisions provide another indication that animals are being treated less like property, or at least less like inanimate forms of property. In 1999, there were nine states that either required the reporting of animal abuse or provided immunity for veterinarians who report such abuse.²⁴⁵ Currently, ten states have such features in their laws.²⁴⁶ Such reporting features,

²⁴³ TENN. CODE ANN. § 39-14-202(a)(5) (2007).

²⁴⁴ “[T]his breed has suffered from cruel and abusive shoeing and training tactics to make the horses achieve their high step. ‘Soring’ is the application of stinging or burning agents to the back of the foot to encourage the horse to raise its feet up.” eHow, How to Choose a Tennessee Walker, http://www.ehow.com/how_9044_choose-tennessee-walker.html (last visited Feb. 9, 2007).

²⁴⁵ Frasch et al, *supra* note 224, at 75.

²⁴⁶ See COLO. REV. STAT. ANN. § 12-64-121 (West 2006); ME. REV. STAT. ANN. tit. 7, § 4018 (2007); MASS. GEN. LAWS ANN. ch. 112, § 58B (West 2006); MISS. CODE ANN. § 73-39-87 (2006); N.Y. EDUC. LAW § 6714 (McKinney 2007); TEX. OCC. CODE ANN. § 801.3585 (Vernon 2007); VT. STAT. ANN. tit. 26, § 2404 (2006); VA. CODE ANN. § 3.1-796.76 (2007); and MD. CODE REGS. 15.14.15.01 (2005) (all providing veterinarian reporting immunity). Illinois also requires veterinarians to report abuse. See 225 ILL. COMP. STAT. ANN. 115/25-19 (West 2007).

especially in states where reporting is mandated, are notable in the way they resemble child abuse reporting statutes. Another feature of interest is the potential for court-ordered counseling for offenders. At least sixteen states have provisions in their animal cruelty statutes that allow courts to order offenders to undergo psychological or behavioral counseling.²⁴⁷ These provisions recognize that people who abuse animals are not only more likely to do so again, but that they are also more likely to engage in violent crimes against people. Provisions that allow courts to mandate counseling are aimed at preventing both types of abuse.

Another way in which animal cruelty laws are recognizing the connection between violence toward animals and violence toward people is by including provisions such as those in a 2001 amendment to the Oregon animal cruelty statute.²⁴⁸ This amendment allows for increased penalties for those convicted of animal cruelty if the offender has a prior conviction of animal abuse, domestic violence, or an offense committed against a minor child.²⁴⁹ The provision also allows for increased penalties for offenders who knowingly commit the animal abuse in the presence of a minor child.²⁵⁰ The Oregon statute, therefore, not only ties animal abuse together with domestic violence and child abuse, but it appears to create a special category of abuse that

²⁴⁷ See ARK. CODE ANN. § 5-62-101(c) (2007); COLO. REV. STAT. ANN. § 18-9-202(2)(a.5)(II), (III) (West 2006); FLA. STAT. ANN. § 828.12(2)(a) (West 2006); 510 ILL. COMP. STAT. ANN. 70/3-02 (West 2007); IOWA CODE ANN. § 717B.3A(3)(a)(1) (West 2006); ME. REV. STAT. ANN. tit. 17, § 1031 (3-B) (2007); MD. CODE ANN., CRIM. LAW § 10-606(b)(2) (LexisNexis 2006); MICH. COMP. LAWS ANN. § 750.50b(4) (West 2006); MINN. STAT. ANN. § 343.21(10)(4) (West 2007); N.J. STAT. ANN. § 4:22-17(d) (West 2007) (counseling for adjudicated juvenile delinquents), N.M. STAT. ANN. § 30-18-1(G) (LexisNexis 2007), OR. REV. STAT. § 167.350(4) (2006); TENN. CODE ANN. § 39-14-212(f) (2007), UTAH CODE ANN. § 76-9-301(9)(a) (2006), VT. STAT. ANN. tit. 13, § 353(b)(4) (2006); VA. CODE ANN. § 3.1-796.122(F) (2007).

²⁴⁸ OR. REV. STAT. ANN. § 167.320 (4)(a) (West 2006).

²⁴⁹ *Id.*

²⁵⁰ *Id.* § 167.320 (4)(b) (West 2006) (“For purposes of this paragraph, a minor child is in the immediate presence of animal abuse if the abuse is seen or directly perceived in any other manner by the minor child.”). See also Otto, *supra* note 232, at 146 (citing OR. REV. STAT. ANN. § 167.320).

bridges both animal abuse and child abuse, that is, animal abuse in the presence of a child.

State cruelty laws, at a minimum, recognize that animals have the capacity to suffer, and these laws seek to reduce that suffering. In states where a particular type of animal suffering is prevalent, such as the abuse of Tennessee Walking Horses, state laws recognize and specifically prohibit that form of abuse. Moreover, animal cruelty laws in a number of states recognize a connection between abusing animals and abusing people. Taken together, these various features of anti-cruelty statutes lead to the unmistakable conclusion that the means by which such laws protect animals goes a long way towards recognizing a legal status for animals that is significantly different from that of other forms of property under the law.

5. Language Shift from “Owner” to “Guardian”

There is one additional statutory change that is worth noting, although its significance is more symbolic than legally meaningful. One state law and fifteen local ordinances have changed the language describing the relationship between people and their animals from “owner” to “guardian.”²⁵¹ Some of these laws, such as Rhode Island’s state law on animal cruelty, have actually supplemented, rather than replaced “owner” terminology with the word “guardian.”²⁵² Furthermore, as the statute makes clear, this language change does not alter in any way a person’s legal obligations to her animals:

²⁵¹ See R.I. GEN LAWS § 4-1-1(a)(4) (2006); See also National Ass’n for Biomedical Research, Animal Law Section, Ownership v. Guardianship, <http://www.nabr.org/AnimalLaw/Guardianship/index.htm> (last visited Jan. 23, 2007) (listing the 15 cities or towns and the state of Rhode Island that include guardianship language in their laws).

²⁵² See R.I. GEN. LAWS § 4-1-1(a)(4), § 4-13-1.2(10), and § 4-19-2(28) (2006) (adding the definition of “guardian” but not removing “Owner keeper”); BOULDER, COLO., CODE § 6-1-2 (2005) (“Guardian” means owner), available at http://www.bouldercolorado.gov/index.php?option=com_content&task=view&id=1856&Itemid=655 (last visited Feb. 1, 2007); BERKELEY, CAL., CODE § 10.04.010 (2001) (defining “Owner/guardian”), available at http://www.ci.berkeley.ca.us/bmc/berkeley_municipal_code/title_10/04/010.html (last visited Feb. 1, 2007); SAN FRANCISCO, CAL., CODE art. I § 41(m) (2003) (allowing “guardian” and “owner” to be used interchangeably in the Code).

“Guardian” shall mean a person(s) having the same rights and responsibilities of an owner, and both terms shall be used interchangeably. A guardian shall also mean a person who possesses, has title to or an interest in, harbors or has control, custody or possession of an animal and who is responsible for an animal’s safety and well-being.²⁵³

Although Rhode Island is the only state to have made such a change to its animal protection laws, there are a total of fifteen cities or towns – including Boulder, Colorado; Berkeley, West Hollywood, and San Francisco, California; St. Louis, Missouri; and Woodstock, New York – that have enacted similar language changes.²⁵⁴

While it appears that these language changes have no real legal effect,²⁵⁵ the laws have generated a good deal of controversy, and two sides have emerged, staking out opposing positions. Proponents hope that by changing the legal language from owner to guardian, the attitudes and understanding about our responsibilities to animals will change for the better.²⁵⁶ Those who promoted such laws hope that they will serve an educational role, and will help people see that they have greater responsibilities to their pets than to other property that they own, even though these laws do not actually alter animals’ legal status as property.²⁵⁷ Groups that oppose such language changes, including a number of veterinary groups, claim that

²⁵³ R.I. GEN. LAWS § 4-1-1(a)(4) (2006).

²⁵⁴ See National Ass’n for Biomedical Research, Animal Law Section, *Ownership v. Guardianship*, *supra* note 254.

²⁵⁵ *But see id.*: “While this campaign is marketed as a feel-good exercise, this ‘simple’ change in language elevates animals above their current status as property – with potentially enormous legal implications.”

²⁵⁶ See R. Scott Nolen, *Owners or guardians? Cities change identity of pet owners, hoping to promote welfare*, J. AM. VETERINARY MED. ASS’N, April 15, 2001, <http://www.avma.org/onlnews/javma/apr01/s041501b.asp> (last visited Jan. 23, 2007).

²⁵⁷ See Huss, *Separation, Custody, and Estate Planning*, *supra* note 1488, at 197-99 and accompanying text.

such changes threaten to undermine, rather than strengthen, the relationship between people and their pets.²⁵⁸ They claim, for example, that pet “guardians” might be faced with more limited health care choices for their pets, and that veterinarians might have trouble clarifying who should be making the choices regarding an animal’s care.²⁵⁹ Codifying this opposition, the American Veterinary Medical Association (AVMA) – the veterinary equivalent of the AMA – has adopted an official position statement against such terminology changes. Approved by their executive board in May 2003, their resolution reads as follows:

Ownership vs. Guardianship

The American Veterinary Medical Association promotes the optimal health and well-being of animals. Further, the AVMA recognizes the role of responsible owners in providing for their animals’ care. Any change in terminology describing the relationship between animals and owners does not strengthen this relationship and may, in fact, diminish it. Such changes in terminology may decrease the ability of veterinarians to provide services and, ultimately, result in animal suffering.²⁶⁰

The AVMA may have additional concerns with the implications of the changes in terminology for their member veterinarians that are not expressed in their official position statement. Similar opposition has been expressed by the American Veterinary Medical Law Association (AVMLA), whose “White Paper” raises numerous legal concerns that could arise for veterinarians if their clients become guardians rather than owners of animals.²⁶¹

²⁵⁸ See *AVMA Opposes ‘Pet Guardianship’: No Evidence ‘Guardianship’ Enhances Relationship between Owner and Pet*, JAVMA NEWS, July 1, 2003, <http://www.avma.org/onlnews/javma/jul03/030701i.asp> (last visited Jan. 23, 2007).

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ See AMERICAN VETERINARY MEDICAL LAW ASS’N, OWNERSHIP OF ANIMALS VS. GUARDIANSHIP OF ANIMALS: THE EFFECT OF A CHANGE IN THE LAW ON VETERINARIANS IN CALIFORNIA (2002), available at

Pressure from groups such as the AVMA and AVMLA was presumably behind a resolution recently adopted by the Council of State Governments (CSG) Governing Boards, which sets out its opposition to “legislation that reclassifies pet, livestock or animal owners as guardians or that otherwise alters the legal status of animals.”²⁶² The reasons the CSG gives for its resolution include a claim that such statutes would limit owners’ freedom of choice in caring for their animals, permit third parties to petition for a pet’s custody, permit a legal challenge to treatment choices of owners and veterinarians, and generally threaten the legal balance between the rights of pet owners and the well-being of animals.²⁶³ This resolution was adopted in September of 2004.²⁶⁴ Given its adoption, it is unlikely that many states will be following Rhode Island’s lead in supplementing or changing the language of animal “owner” to that of animal “guardian.”²⁶⁵

It may seem curious that there is so much organized opposition to a change in language that has no current legal effect. At first blush, one might expect veterinarians who treat companion animals to embrace such language. The concerns regarding the use of the term “guardian” for pet owners appear to center around fears of where such language could lead. It is this fear that has generated opposition from groups of

<http://www.nabr.org/AnimalLaw/Guardianship/AVMLAWhitePaper.pdf>
(last visited Jan. 23, 2007).

²⁶² The same resolution also sets out the CSG’s opposition to any legislation that allows recovery of non-economic damages for the loss or injury of a pet, including its opposition to recovery for loss of companionship and negligent infliction of emotional distress. See Council of State Governments, *Policy Resolutions*, Fall 2004, available at <http://www.csg.org/CSG/Policy/CSG+policy+positions/default.htm> (last visited Feb. 1, 2007).

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵As one commentator has noted, however, it may matter less whether more states and localities ultimately change language in their animal protection laws from owner to guardian, and more that such debates are happening at all. See Huss, *Separation, Custody, and Estate Planning*, *supra* note 1488, at 199-200.

veterinarians, researchers, and state legislators against the “potentially enormous legal implications”²⁶⁶ of what many proponents see as a simple language change to help better educate the public about responsibilities toward pets. Proponents want to see more responsible pet ownership, while opponents seem to fear the implications of moving toward personhood status for pets. The problem seems to lie in the potential legal implications of a term – guardian – that already carries a legally significant meaning, when used in reference to pets.²⁶⁷ Because of the legal implications of the term “guardian” in relationships between people,²⁶⁸ those who take a more conservative approach to any changes in the legal status of pets fear the implications of legislating the use of this term to describe pet owners.

Educating pet owners about their responsibilities appears to be a laudable goal and certainly not a controversial one. If that goal is going to be accomplished through changes in statutory language or other changes to the legal status of pets, it needs to be done through a new legal category and through terminology that is not already fraught with legal meaning that will raise the concerns and fears of people who work with animals. The next part of this article proposes just such a category.

²⁶⁶ See National Ass’n for Biomedical Research, *supra* note 254.

²⁶⁷ In fact, this very concern is explicitly addressed in the March 9, 2005 position statement of the Pennsylvania Veterinary Medical Association (PVMA), setting out its opposition to the change to guardian language: “Guardian is a well-defined legal term that is not appropriate in describing the relationship between owners and their animals.” See Pennsylvania Veterinary Medical Ass’n, Position Statements, (Mar. 9, 2005), http://www.pavma.org/Images/05_Position_Stmnts_UNP.pdf (last visited Feb. 1, 2007).

²⁶⁸ See BLACK’S LAW DICTIONARY 725 (8th ed. 2004) (defining guardian as “one who has the legal authority *and duty* to care for another’s person or property”) (emphasis added).

PART IV: THE ABOVE DESCRIBED LEGAL CHANGES SHOULD BE FORMALLY RECOGNIZED BY CREATING A NEW LEGAL CATEGORY FOR COMPANION ANIMALS

As the above sections demonstrate, public attitudes and many of our current laws already reflect the numerous ways in which non-human animals, and especially companion animals, are treated fundamentally differently from inanimate property. Cruelty statutes recognize that animals can suffer from inhumane treatment. Accordingly, more and more states are making such treatment a felony offense. Many animal protection statutes go even further, imposing a number of affirmative duties on owners or guardians to care for their animals properly. Other areas of law, ranging from estates and trusts, to marriage dissolution and tort law, are increasingly recognizing a different status for companion animals by acknowledging the bond that can exist between humans and the animals they care for. In many states, companion animals can now benefit from enforceable trusts after an owner's death, courts are showing an increasing willingness to consider an animal's interest in custody decisions, and both courts and legislatures are finding ways of awarding damages above "fair market value" when a companion animal is killed or injured.²⁶⁹

Despite these trends, the differences between animals and inanimate property need to be more clearly reflected in our laws, because there are still too many cases where the results under current laws are inconsistent with this understanding of the status of companion animals. Many courts continue to struggle with appropriate damage awards in tort cases.²⁷⁰ While some recent cases have seen awards as high as \$30,000 on "actual value to owner" theories,²⁷¹ other courts (even those that seem quite sympathetic to arguments that companion animals are simply different from other fungible property) feel that their hands are tied by existing laws that define animals as

²⁶⁹ See *supra* Parts II and III.

²⁷⁰ See *supra* Part II.

²⁷¹ See *supra* notes 74-75.

property.²⁷² Such problems could be alleviated by formally creating a new legal status for companion animals – a category that recognizes that, while animals are not persons, there are many reasons for the law to treat them differently from fungible personal property.

A separate legal category for companion animals has both intuitive appeal and would better reflect the way in which we value companion animals in our society. First, the category would appeal to the intuitive notion that many judges have expressed: that “[pets occupy] a special place somewhere in between a person and a piece of personal property,”²⁷³ and that the property label “inadequately and inaccurately describes the relationship between a human and a dog.”²⁷⁴ There is a tremendous amount of evidence that our society values companion animals in a way that is fundamentally different from the way we value other property. For example, we spend large amounts of money on their veterinary care, give pets birthday presents, get them pet sitters or leave them in “doggie day care,”²⁷⁵ take pets on vacations with us,²⁷⁶ and make serious efforts to provide for their care after our death.²⁷⁷ An even more vivid reminder of just how highly people value their animals was demonstrated by all of those who refused to evacuate Hurricane

²⁷² See, e.g., *supra* notes 140-142 and accompanying text.

²⁷³ *Corso v. Crawford Dog & Cat Hosp., Inc.*, 415 N.Y.S.2d 182, 183 (N.Y. Civ. Ct. 1979).

²⁷⁴ *Rabideau v. City of Racine*, 627 N.W.2d 795, 798 (Wis. 2001).

²⁷⁵ See, e.g., Sharene Azimi, *Move Over Subway, Dog Day Care is the Hot New Franchise*, COLUMBIA NEWS SERVICE, March 1, 2005, <http://jscms.jrn.columbia.edu/cns/2005-03-01/azimi-doggydaycare> (last visited Jan. 23, 2007).

²⁷⁶ See, e.g., *Pets on the Go, Pet Travel Unleashed*, <http://www.petsonthego.com/> (last visited Feb. 1, 2007); *Pets Welcome, It's a Pet Friendly Universe Out There*, <http://www.petswelcome.com/> (last visited Feb. 1, 2007); *Pet Travel, U.S.*, <http://www.pettravel.us/> (last visited Feb. 1, 2007).

²⁷⁷ See *supra* notes 205-217 and accompanying text.

Katrina-damaged New Orleans without their animals.²⁷⁸ These refusals caused so many problems that the evacuation policy was quickly changed, and those boarding the buses evacuating Texas residents as Hurricane Rita approached were allowed to bring their pets along.²⁷⁹

A legal approach recognizing companion animals as falling somewhere between persons and inanimate property would be consistent with the most conservative scientific and moral theories of animals' status. While there is much disagreement about the extent of animal intelligence, ability for self-recognition, theory of mind, intentionality, and autonomy,²⁸⁰ no one seriously questions the capacity of companion animals such as dogs and cats to suffer, or to feel pain.²⁸¹ This agreement can in part be seen in the frequency with which is quoted a famous line of Jeremy Bentham: "the question is not, Can they reason? Nor, Can they talk? But, Can they suffer?"²⁸² This capacity to suffer, a capacity that is certainly not shared by inanimate property, provides another reason to create a distinct legal category for companion animals.

²⁷⁸ See, e.g., Craig Guillot, *Not Without My Dog: For Many, Leaving Four-Legged Companions Behind wasn't an Option*, THE BARK, Winter 2005, at 85.

²⁷⁹ See Gina Spadafori, *Including Pets in Evacuation Plans Could Save Human Lives*, BOSTON GLOBE, Oct. 13, 2005, at C6, available at http://www.boston.com/yourlife/home/articles/2005/10/13/including_pets_in_evacuation_plans_could_save_human_lives/ (last visited Jan. 23, 2007).

²⁸⁰ See generally Lesley J. Rogers & Gisela Kaplan, *All Animals Are Not Equal: The Interface between Scientific Knowledge and Legislation for Animal Rights*, in ANIMAL RIGHTS, *supra* note 18, at 175.

²⁸¹ See, e.g., Cass R. Sunstein, *The Rights of Animals*, 70 U. CHI. L. REV. 387, 388 (2003) [hereinafter Sunstein, *The Rights of Animals*]. "Almost everyone agrees that people should not be able to torture animals or to engage in acts of cruelty against them." *Id.* at 389.

²⁸² JEREMY BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION 310-11 n.1 (Prometheus Books, 1988) (1823), quoted in Sunstein, *The Rights of Animals*, *supra* note 284; Patrick Lee, *Soul, Body, and Personhood*, 49 AM. J. JURIS. 87, 117 (2004); Martha C. Nussbaum, *Animal Rights: The Need for a Theoretical Basis*, 114 HARV. L. REV. 1506, 1524 (2001) (reviewing STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS (2000)) (describing Bentham's language as "a famous footnote").

A. A NEW LEGAL CATEGORY: COMPANION ANIMAL PROPERTY

This article proposes the legislative creation of a new status that formally recognizes companion animals as a distinct legal category: “companion animal property.” This proposal takes up Judge Andell’s call that “[t]he law should reflect society’s recognition that animals are sentient and emotive beings that are capable of providing companionship to the humans with whom they live.”²⁸³ The “companion animal property” category would thus take into account companion animals’ dependence on their human owners, their capacity to suffer if mistreated or neglected, and the bonds that we form with our animals and that they form with us. The resulting legal category would clarify, in ways that our current laws do not yet achieve, that we therefore have certain responsibilities toward our living property that we simply do not have toward inanimate property.

The companion animal property category acknowledges the capacity for humans to form strong bonds with their animal companions. Evidence of these bonds is already seen in a number of ways within the veterinary profession. For example, the amounts of money that people are willing to spend on treating their companion animals has given rise to the growth of many specialty areas within the field of small animal medicine.²⁸⁴ And a large number of veterinary schools now have bereavement programs that help people deal with the loss of

²⁸³ Bueckner v. Hamel, 886 S.W.2d 368, 378 (Tex. Ct. App. 1994) (Andell, J. concurring).

²⁸⁴ See Green, *supra* note 3, at 170, 210 (reporting that pet owners spend more than \$19 billion annually on veterinary care and that such spending has provided veterinarians with “limitless opportunities to expand the practice of their craft.”). The American Veterinary Medical Association formally recognizes thirty-six veterinary specialties. *Id.* at 211. It is likely that somewhat different forces are driving the growth of specialty areas in other parts of veterinary practice. In equine medicine, for example, owners are often willing to spend large amounts on animals for a variety of reasons, sometimes because of the bonds they have formed with pet horses, but often because of the high market value of race horses. See, e.g., Julie Rovner, *Q&A: Modern Medicine for Barbaro*, NPR.ORG, May 24, 2006, <http://www.npr.org/templates/story/story.php?storyId=5428731> (last visited March 2, 2007).

their companion animal.²⁸⁵ Other schools have programs that specifically study the human-animal bond.²⁸⁶

In addition to recognizing the bonds between humans and animals, formally creating a new legal category for companion animals leads to more consistency in the law and would help to make sense of a number of judicial and legislative trends that have been emerging in the past decade or more. As discussed above, changes are occurring in areas of law as diverse as estates and trusts, criminal law and tort law, but these changes are happening in an uneven fashion, which can lead to a variety of anomalous results. Within the same jurisdiction, for example, an animal might be the subject of an enforceable trust that is funded with a large amount of money, but if that same animal is negligently killed, its guardian may not be able to recover more than its minimal market value. In one state, owners of a negligently injured animal might not even be able to recover veterinary expenses to pay for treatment made necessary by the injury. Yet in other states, the same owner might be able to recover treatment expenses, along with compensatory damages for emotional distress and punitive damages.²⁸⁷ Officially recognizing these changes by creating a legal category for companion animals will lead to more consistency both within and across these various areas of law.

²⁸⁵ See, e.g., Colorado State University, Argus Institute for Families and Veterinary Medicine, <http://www.argusinstitute.colostate.edu/grief.htm> (last visited Jan. 23, 2007); Cornell University College of Veterinary Medicine, Pet Loss Support Hotline, <http://www.vet.cornell.edu/Org/PetLoss/> (last visited Jan. 23, 2007); and University of Illinois at Urbana-Champaign, College of Veterinary Medicine, C.A.R.E. Pet Loss Helpline, <http://www.cvm.uiuc.edu/CARE/> (last visited Jan. 23, 2007).

²⁸⁶ See, e.g., Animal Medical Center, Hospital Services – Counseling, <http://www.amcny.org/department/counseling.htm> (last visited Jan. 23, 2007); Penn Veterinary Medicine, Clinical Services, <http://www.vet.upenn.edu/ryan/services/socialwork/> (last visited Jan. 23, 2007); Purdue University School of Veterinary Medicine, Center for the Human-Animal Bond, <http://www.vet.purdue.edu/chab/index.htm> (last visited Jan. 23, 2007).

²⁸⁷ While it is true having different approaches in different states is a cornerstone of federalism, it may well be problematic when neighboring states have such disparate approaches.

B. COMPARISONS TO OTHER PROPOSALS ON ANIMALS' LEGAL STATUS

Creating a new legal category for companion animals that treats them as an enhanced type of property – one that recognizes their important differences from inanimate property – would likely gain greater acceptance and avoid much of the controversy generated by other proposals that can be grouped into the “animal rights” camp. The most controversial of these proposals are those that aim to completely change the property status of animals, seeking instead a form of legal “personhood” for animals.²⁸⁸ Less controversial proposals range from one that would create a different type of property status where animals retain an “equitable self-ownership” in their own title,²⁸⁹ to an argument that animal rights already exist, but they need to be better enforced by allowing actions by private citizens and by animals represented by human beings.²⁹⁰

A number of commentators would eliminate animals' property status altogether and grant them a legal status akin to personhood. Steven Wise asserts that humans enjoy rights that are not available to nonhuman animals because of “speciesism,” discrimination against other animal species that cannot be justified by any meaningful differences between humans and other animals.²⁹¹ Instead, he sets out a quality that he calls “practical autonomy,”²⁹² which he argues is sufficient to entitle

²⁸⁸ See *infra* notes 295-300 (discussing the theories of Steven Wise and Gary Francione).

²⁸⁹ See *infra* notes 301-306 (discussing the David Favre proposal).

²⁹⁰ See *infra* notes 307-312 (discussing the theories of Cass Sunstein).

²⁹¹ See, e.g., Steven M. Wise, *Animal Rights, One Step at a Time*, in ANIMAL RIGHTS, *supra* note 18, at 19 [hereinafter Wise, *One Step at a Time*]. “To avoid speciesism, we must identify some objective, rational, legitimate, and nonarbitrary quality possessed by every *Homo sapiens* that is possessed by no nonhuman that should entitle all of us, but none of them, to basis liberty rights. But none exists.” *Id.* at 27.

²⁹² Wise defines “practical autonomy” as the ability to desire, intentionally try to fulfill the desire, and possess “a sense of self sufficiency to allow her to understand, even dimly, that she is a being who wants something and is trying to get it.” *Id.* at 32. See also STEVEN M. WISE, DRAWING THE LINE: SCIENCE AND THE CASE FOR ANIMAL RIGHTS 32 (2002).

any species to basic liberty rights.²⁹³ Gary Francione also advocates for eliminating the property status of animals and granting them legal personhood.²⁹⁴ Francione rejects any compromise proposals that retain animals' legal status as property.²⁹⁵ He advocates extending to animals "the right not to be property" and sees the only other option to be making them moral persons.²⁹⁶ Francione agrees with Wise that it is unjustifiable speciesism, rather than any morally justifiable difference, that accounts for the property status of nonhuman animals.²⁹⁷

David Favre takes issue with animal activists like Wise and Francione who want to eliminate animals' property status, claiming that such a stance is both unwise and unnecessary.²⁹⁸ Favre not only sees such a change in the status of animals as highly unlikely, but he also believes that such a change is a bad idea, especially if it leads to the elimination of domesticated animals.²⁹⁹ Furthermore, Favre believes that eliminating property status for animals is unnecessary because, in his view, there is another way to improve the legal status of animals: by retaining animals' status as property but dividing their title into legal and equitable components, creating a form of self-

²⁹³ Wise, *One Step at a Time*, *supra* note 294, at 27.

²⁹⁴ See Francione, *Animals as Property*, *supra* note 16, at i, and Francione, *Persons or Property?*, *supra* note 19, at 108.

²⁹⁵ GARY L. FRANCIONE, *RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT 1* (1996).

²⁹⁶ Francione, *Persons or Property?*, *supra* note 19, at 131 ("Nor can we use animal welfare laws to render animals 'quasi-persons' or 'things plus.' . . . There is no third choice.").

²⁹⁷ *Id.* at 130-31. "In the end, the only difference between humans and animals is species, and species is not a justification for treating animals as property any more than is race a justification for human slavery." *Id.* at 131.

²⁹⁸ See David Favre, *Integrating Animal Interests into Our Legal System*, 10 *ANIMAL L.* 87, 90 (2004) [hereinafter Favre, *Integrating Animal Interests*].

²⁹⁹ *Id.* at 91.

ownership that he calls “equitable self-ownership.”³⁰⁰ With his proposal, Favre hopes to “shift the nature of the relationship between the owner and the animal from that which is like the ownership of [a] rock to that which is more like, but not identical to, the custodial relationship of the human parent and the human child.”³⁰¹ Favre seeks to achieve this goal by blending the previously separated categories of property ownership and juristic persons.³⁰² He envisions that this new status will lead to changes in the legal obligations that humans have to the animals in their care, and that the nature of these duties will arise primarily from two sources: (1) animal protection (anti-cruelty) statutes and (2) legal concepts that define the relationship between parents and children.³⁰³

Cass Sunstein’s approach is similar in some respects to Favre’s. Sunstein argues that animals already enjoy many rights, if we understand “rights” to mean legal protections against harm.³⁰⁴ State anti-cruelty laws, along with the federal laws such as the Animal Welfare Act, provide these rights to animals.³⁰⁵ Sunstein, like Favre, thus focuses on the role of existing laws to provide protections for animals. The problem is not that animals lack protections or rights, but that these rights

³⁰⁰ See David Favre, *Equitable Self-Ownership for Animals*, 50 DUKE L.J. 473, 476 (2000) [hereinafter Favre, *Equitable Self-Ownership*]. See also David Favre, *A New Property Status for Animals: Equitable Self-Ownership*, in ANIMAL RIGHTS, *supra* note 18, at 234, 237 [hereinafter Favre, *A New Property Status*].

³⁰¹ Favre, *A New Property Status*, *supra* note 303, at 238-39.

³⁰² *Id.* at 245. Cf. Jessica Berg, *Owning Persons: The Application of Property Theory to Embryos and Fetuses*, 40 WAKE FOREST L. REV. 159 (2005) (proposing a combined property and person framework for analyzing disputes relating to embryos and fetuses).

³⁰³ Favre, *A New Property Status*, *supra* note 303, at 245.

³⁰⁴ Sunstein, *Introduction: What are Animal Rights?*, in ANIMAL RIGHTS, *supra* note 18, at 3, 5 [hereinafter Sunstein, *What are Animal Rights?*].

³⁰⁵ Sunstein, *Can Animals Sue?*, *supra* note 35, at 252. Sunstein goes as far as to suggest that these federal laws might be seen as a bill of rights for animals. *Id.* at 255.

are not adequately enforced.³⁰⁶ Sunstein proposes closing this “enforcement gap” by allowing private parties to bring actions directly against those who violate state or federal laws.³⁰⁷ He additionally advocates allowing animals to bring suits against such violators through human representatives.³⁰⁸ Animals’ status can best be improved by first improving enforcement of their existing rights. Sunstein is less concerned over whether animals are classified as property or persons and more concerned with the specific rights and duties that such labeling might suggest.³⁰⁹

C. A SUGGESTED STARTING POINT TO DEFINING COMPANION ANIMAL PROPERTY

The goal of this section is to suggest a starting point for defining the new legal category, “companion animal property.”³¹⁰ The hope is that the ideas proposed here will begin a conversation of how the legal status of companion animals can be changed incrementally to better recognize the bonds between

³⁰⁶ See Sunstein, *What are Animal Rights?*, *supra* note 307, at 7 (discussing the “enforcement gap”).

³⁰⁷ Sunstein, *Can Animals Sue?*, *supra* note 35, at 261.

³⁰⁸ *Id.* at 252.

³⁰⁹ Sunstein, *What are Animal Rights?*, *supra* note 307, at 11.

What does it mean to say that animals are property and can be “owned”? . . . Ownership is just a label, connoting a certain set of rights and perhaps duties A state could dramatically increase enforcement of existing bans on cruelty and neglect without turning animals into persons, or making them into something other than property. . . . It might, in these circumstances, seem puzzling that so many people are focusing on the question of whether animals are property.

Id.

³¹⁰ The ideas proposed here are only the beginnings of what I hope will be an ongoing discussion. In my next article I expect to further flesh out the proposal I have begun here.

humans and their companion animals, to continue legal trends that have already begun, and to gain broader acceptance than the proposals that would grant personhood status to animals.

This article's proposal of creating a legal category of "companion animal property" would, like Sunstein's proposal, retain the property status of animals and not take on the battle of changing their status to one approaching that of persons. The proposal advocates an incremental change in the legal status of companion animals to more accurately reflect the direction that our laws, especially the recent developments in trust law,³¹¹ are going.

There are a number of ways to define and limit the companion animal property category so as to avoid various parade-of-horrors scenarios³¹² put forth by those who object to anything that smacks of "animal rights."³¹³ One limitation would focus on the animal's role and its relationship with its human owner or guardian. Such a limitation can be found in Carolyn Matlack's proposed legal category for companion animals that she calls "sentient property."³¹⁴ Matlack, an attorney who is the president and managing editor of Animal Legal Report Services, sets forth her "sentient property"

³¹¹ *But see* Favre, *Integrating Animal Interests*, *supra* note 301, at 94 (describing the recent changes in trust law as "a conceptual breakthrough for the United States Legal System. Animals have been granted legal personhood for the purposes of trust enforcement.")

³¹² Objections to changes in the legal status of animals range from claims that people will no longer be able to keep animals as pets, to claims that we'll no longer be able to kill the rats and mice (or even cockroaches) that invade our homes, to the end of all research involving animals. *See, e.g.*, Center for Consumer Freedom, *Here Come the Animal Activists. Hide the Bug Spray*, Sept. 26, 2006, available at http://www.consumerfreedom.com/news_detail.cfm/headline/3137 (last visited March 2, 2007). This proposal would not affect any of these scenarios.

³¹³ One commentator who has come out strongly against animal rights admits that "it would be simply insane to insist that animals should be treated like inanimate objects." Richard A. Epstein, *Animals as Objects, or Subjects, of Rights*, in *ANIMAL LAW*, *supra* note 18, at 143, 156.

³¹⁴ *See* Letter from Carolyn Matlack to the Texas Third Circuit Court of Appeals, (Apr. 13, 2004) (on file with author) (proposing and defining the category "sentient property") [hereinafter Matlack, Letter].

category as a compromise on the legal status of pets that would recognize them as living, feeling companions but would not give them anything approaching the rights of persons.³¹⁵ Matlack defines sentient property as “any warm blooded, domesticated nonhuman animal dependent on one or more humans for food, shelter, veterinary care, or compassion and typically kept in or near the household of its owner, guardian, or keeper.”³¹⁶ Her definition thus focuses on the animal’s dependence on its owner and the closeness of its living arrangements. The only limitation on the type of animal would be that it is warm-blooded and domesticated.

This article proposes a companion animal property category that would be even more limited. First, it would focus on the animal’s role and would clarify that the category only applies to companion animals, or pets, and not to domesticated farm animals that might live near their owner’s home. Second, instead of applying to any warm-blooded animal, this category would limit, by species, the types of animals to which it would apply. As a starting point, the category would be limited to animals that are typically kept as pets: dogs and cats.³¹⁷ While this new legal category would begin with this very narrowly defined class of animals, it might also be reasonable to set out ways in which the definition could start with a presumption that it only applies to dogs and cats, but allow for evidence that other animals could qualify as companion animals if certain criteria

³¹⁵ See R. Scott Nolen, *Sentient Property: A Novel Animal Law Proposal*, JAVMA NEWS, Sept. 15, 2004, <http://www.avma.org/onlnews/javma/sep04/040915j.asp> (last visited Feb. 1, 2007). Matlack has proposed this category in a letter to the Texas Third circuit court of appeals (letter on file with author), and the court made reference to it in a 2004 case. See *Petco Animal Supplies, Inc., v. Schuster*, 144 S.W.3d 554, 561 n.6 (Tex. App. 2004), and Matlack, Letter. Matlack expands on her ideas in her book, *We’ve Got Feelings Too* (Log Cabin Press 2006).

³¹⁶ See Matlack, Letter, *supra* note 317. In her letter to the Texas court, Matlack explains: “This reclassification allows an incremental increase in the legal status of companion animals, recognizing that they have feelings and emotions without upsetting the judicial system and the rest of the scientific and legal communities that currently classify animals as plain property.” *Id.*

³¹⁷ A similar limitation can be found in Tennessee’s T-Bo Act, TENN. CODE ANN. § 44-17-403(b) (2007).

were met.³¹⁸ Additional companion animals might include backyard horses, parrots and other tropical birds, “pocket pets,” such as ferrets, guinea pigs, hamsters, rabbits, and pot-bellied pigs.

Once this new category is defined by the animals to which it would apply, its legal effect needs to be shaped. In many ways, this category would simply conform to legal trends that have already occurred in areas of animal cruelty law and estates law. In other ways, and in other areas of law, the category would have additional legal effects of its own. Statutes that make cruelty to animals a criminal offense, that create affirmative duties to the animals we keep in our homes, and that allow us to leave enforceable trusts to our pets already recognize that these animals are in a different legal category from inanimate property, even if that category has not yet been named. The companion animal property category would encourage these legal trends to continue and would provide a more rational terminology to support these trends in the law.

The new category will create additional legal effects in areas such as tort law, lost and found animal disputes, and custody upon marriage dissolution. Courts would no longer need to be constrained by the “mere property” label in awarding damages that recognize the bond between people and their companion animals.³¹⁹ Decisions about who gets custody of a lost and found animal would be based on principles that are not about property ownership, but would rather look at who has formed a closer bond to the animal, or who can provide a better home for it. Following the lead of the Vermont Supreme Court,³²⁰ these decisions could take into account the importance of encouraging finders of lost animals to care for and develop relationships with them. And custody awards could take into account the animal’s attachment to each spouse and the animal’s best interest, avoiding decisions such as the recent Pennsylvania one denying a visitation and shared custody request because it was

³¹⁸ Such criteria could include evidence of the animal’s bond with its human owner, where it lives, how often the person and animal interact, and veterinary records that show how the animal has been cared for.

³¹⁹ See *Bueckner v. Hamel*, 886 S.W.2d 368, 377-78 (Tex. App. 1994).

³²⁰ See *Morgan v. Kroupa*, 702 A.2d 630, 633 (Vt. 1997).

“analogous, in law, to a visitation schedule for a table or a lamp.”³²¹

D. SHOULD COURTS OR LEGISLATURES ENACT CHANGES TO ANIMALS’ LEGAL STATUS?

A debate exists among those who advocate changing the legal status of animals about whether such changes ought to be judicially or legislatively enacted.³²² Matlack, for example, presents her “sentient property” proposal as a compromise for judges who want to move beyond laws that treat animals as inanimate property.³²³ Other commentators have suggested various options for legislative change.³²⁴ While the notion of incremental judge-made changes has certain appeal, experience has shown that such change with regards to the status of animal happens slowly, if at all. A number of judges who seemed to be open to the idea of changing animals’ legal status have nevertheless claimed to be constrained by precedent; some have directly deferred to the legislature to enact new laws.³²⁵ For this and other reasons, legislative change seems to make the most sense. The experience with legislatively-enacted enforceable trusts and with legislation that increases animal cruelty offenses to felonies shows that legislation protecting the interests of companion animals can be effective.

³²¹ See *Desanctis v. Pritchard*, 803 A.2d 230, 232 (Pa. Super. Ct. 2002).

³²² See, e.g., Wise, *One Step at a Time*, *supra* note 294, at 28-29; see generally ANIMAL RIGHTS, *supra* note 18.

³²³ See Carolyn B. Matlack, *The Sentient (Feeling) Property Solution: Unleashing Sensible Legal Respect for Companion Animals* (unpublished manuscript, on file with author) (“While our ‘judge-made’ or ‘common law’ prides itself in being able to change and grow with the times, the actual process is replete with fits and starts Without suggestion of another acceptable way to do it, judges are compelled by existing case law precedent to come to the same old outdated decisions.” *Id.* at 1).

³²⁴ See, e.g., Waisman & Newell, *supra* note 40, at 71-73.

³²⁵ See, e.g., *Koester v. VCA Animal Hosp.* 624 N.W.2d 209, 211 (Mich. Ct. App. 2001); *Petco Animal Supplies, Inc. v. Schuster*, 144 S.W.3d 554, 565 (Tex. App. 2004).

Another reason to favor legislative change is that the legislation can at the same time address the concerns of those who seem most opposed to any formal change in the legal status of animals. There has been some organized opposition to changing the legal status of animals by the veterinary community, much of which seems to be driven by malpractice concerns. If the source of this opposition can be alleviated by addressing the fear of increased malpractice premiums by including caps on damage awards in any legislative change, then perhaps much of the opposition would dissipate. Similarly, the opposition to change that has come from the research community³²⁶ would likely be alleviated if changes to the status of companion animals were narrowly defined in a way that did not affect their research interests. Limiting the animals to which such changes would apply both by species and by their roles in the lives of humans would respond, at least in part, to many of the concerns raised by the research community.³²⁷

One obstacle to legislative change that might be difficult to overcome is the Council of State Government's recently adopted *Resolution on Animal Guardianship and Liability*

³²⁶ See, e.g., National Ass'n for Biomedical Research, Animal Law Section, <http://www.nabr.org/AnimalLaw/index.htm> (last visited Feb. 12, 2007); Steve Michael, *Animal Personhood – A Threat to Research?*, 47 *PHYSIOLOGIST* 447, 449 (2004), available at <http://www.the-aps.org/publications/tphys/images/tphys12x04.pdf> (last visited Feb. 12, 2007).

³²⁷ Organizations representing animal researchers perceive many of the recent changes in various areas of animal law as a “clear threat to animal research.” See Michael, *supra* note 329, at 449. To respond to this threat, a number of scientific organizations have initiated a project that is coordinated through the National Association for Biomedical Research. *Id.* The project's stated goal “is to be fully prepared when and if a significant ‘personhood’ or other ‘animal law’ case is brought before a federal or state court.” *Id.* Because this article's proposed change does not suggest that animals be given personhood status, it may be of less concern to this community. This group seems opposed, however, to what it sees as the “long-term, step-by-step strategy” of the animal rights movement to move toward legal personhood, citing changes from non-economic damage awards to enforceable trusts for pets to changes from “owner” to “guardian” language.” *Id.* at 447. Given this view, it is likely that these researchers would view any incremental change as suspect, even if it were narrowly constructed to avoid any conflicts with their interest in animal research.

*Legislation.*³²⁸ Asserting that the proper balance between responsible animal care and the rights of pet owners and livestock producers can already be found within the existing legal framework, and that this balance is being threatened by those who want to give personhood rights to animals and who advocate for the recovery of non-economic damages in tort cases involving injured animals, the Council formally opposes two types of legislative change: (1) “legislation that reclassifies pet, livestock or animal owners as guardians or that otherwise alters the legal status of the animals,” and (2) “legislation permitting the recovery of non-economic damages for the loss or injury of a pet, livestock or other animal.”³²⁹

Given their stated opposition to legislation that “alters the legal status of animals,” it is hard to imagine that this group would not oppose the creation of a new legal category: companion animal property. It would be important to present the proposal as one that does not really effect actual change, but merely codifies changes that are already occurring. In fact, the argument should be that these are the very changes that have created the current “healthy balance”³³⁰ between the rights of animals and the rights of those who care for them. Formally creating a category for companion animal property would help to ensure that we do not return to the time when companion animals were more likely to be viewed as fungible, throw-away property, when penalties for animal abuse were less harsh and even less likely to be enforced.

Overcoming opposition to legislative change will not necessarily be easy. But if the legislation can be tailored to address the major concerns of those who are most likely to oppose it, and its passage can be presented as a logical next step in protecting the interests of animals and reflecting the values of those who care for and work with them, then the creation of the legal category companion animal property might be feasible. Contrasting this proposal with those that would go much farther in extending rights to animals could help to garner additional support.

³²⁸ See Council of State Governments, *supra* note 265.

³²⁹ *Id.*

³³⁰ See *id.*

E. EFFECTS OF ADDITIONAL DISTINCTIONS BETWEEN AND WITHIN SPECIES

Defining the legal category, companion animal property, both by types of animal and by the animal's role could admittedly create additional distinctions both between and within animal species. But it is important to realize that such distinctions have always existed in our laws protecting animals, and it is likely that they always will. There are good reasons for many of the legal differences that exist between animal species.³³¹ The differences that exist based on how we use the animals³³² may be harder to justify, but they are a reality of our current legal system that are unlikely to change anytime soon.

Many current laws already treat animals differently by species. The Federal Animal Welfare Act, for example, regulates the use of animals in research, the commercial sale and transportation of animals, and exhibition of animals.³³³ These animal protection provisions, however, only apply to certain warm-blooded animals; all farm animals are exempted.³³⁴

³³¹ See James Rachels, *Drawing Lines*, in ANIMAL RIGHTS, *supra* note 18, at 163, and Rogers & Kaplan, *supra* note 283, at 175-176.

³³² See discussion on different ways of classifying animals, including classifying by use, in Duckler, *supra* note 40, at 216-20.

³³³ 7 U.S.C. §§ 2131-59 (2007).

³³⁴ 7 U.S.C. § 2132(g) (2007) defines the term animal for purposes of the Animal Welfare Act:

The term "animal" means any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warm-blooded animal, as the Secretary may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet; but such term excludes (1) birds, rats of the genus *Rattus*, and mice of the genus *Mus*, bred for use in research, (2) horses not used for research purposes, and (3) other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber. With respect to a dog, the term means all dogs including those used for hunting, security, or breeding purposes.

Horses are covered by the Act, but only if they are used for research purposes. Another provision of the Act, known as the “Pet Theft Act,” aims to prevent pet animals being stolen and sold for research; these sections only apply to dogs and cats.³³⁵ This law, therefore, makes clear distinctions among animal species, and, in the case of horses, by how the animal is used.

Different treatment of animals can also be seen in a number of states’ animal cruelty statutes. In Pennsylvania, for example, recent amendments to the animal protection law apply harsher penalties for harm to dogs and cats, whether the animal belongs to the offender or someone else.³³⁶ While some would propose applying these increased penalties to all animals, one specific proposed bill would further increase penalties for harm to a guide dog,³³⁷ not only maintaining the distinction by species, but adding an additional distinction based on how the animal is used.

Most of the recent changes in the law apply only to cases of companion animals. Creating a legal category to codify those changes would additionally codify the different treatment of animals both between and within species. And, while some judges have expressed concern about creating additional distinctions both within and between species,³³⁸ many courts,

³³⁵ 7 U.S.C. § 2158 (2007).

³³⁶ 18 PA. CONS. STAT. ANN. §§ 5511(a)(1), (2.1) (2006).

³³⁷ H.R. 1911, 189th Leg., 2005-2006 Reg. Sess. (Pa. 2005).

³³⁸ In several of the cases cited in Parts II and III, courts have expressed concern about these distinctions both within and between species. In *Morgan v. Kroupa*, one judge dissented from the majority’s holding that the “stray beast” language in Vermont’s property law statute did not apply to pet dogs:

[A] clear line cannot always be drawn between animals kept for economic reasons and those kept as pets. Many people who keep livestock become emotionally attached to individual animals. Conversely, dogs may be owned primarily or solely for their economic value as work dogs or breeding stock. And there are animals that fall somewhere in between, such as pleasure horses —livestock that are not kept for their economic value, but are, in effect, large pets. To separate some species of domesticated animals from

legislatures,³³⁹ and commentators³⁴⁰ accept both the need for and the inevitability of such distinctions.³⁴¹ Thus, the additional distinctions that this new category would create between and within species should not stand in the way of moving forward with these legal changes.

PART V: THE IMPACT OF A NEW LEGAL STATUS FOR COMPANION ANIMALS ON THE VETERINARY PROFESSION

This section explores the implications that the creation of a new legal category, companion animal property, might have on the veterinary profession. Since there has already been some

others on an attempted livestock-pet dichotomy is a purely arbitrary interpretation of the statute.

Morgan v. Kroupa, 702 A.2d 630, 636 (Vt. 1997) (Gibson, J., dissenting). Similarly, one of the reasons that the Wisconsin Supreme Court gave for refusing to extend emotional distress damages for the loss of a dog was that it saw “no just stopping point”: “Were we to recognize a claim for damages for the negligent loss of a dog, we can find little basis for rationally distinguishing other categories of animal companion.” Rabideau v. City of Racine, 627 N.W.2d 795, 799 (Wis. 2001).

³³⁹ See also Tennessee’s T-Bo Act, TENN. CODE ANN. § 44-17-403 (West 2006).

³⁴⁰ See, e.g., Huss, *Valuing Man’s and Woman’s Best Friend*, *supra* note 17, at 84-88 (discussing various laws that distinguish among animals based on their value to humans); Huss, *Valuation in Veterinary Malpractice*, *supra* note 9, at 533-535 (discussing different legal treatment of companion animals and food-producing animals, and proposing a new statutory provision for non-economic damages in veterinary malpractice actions that continues to treat animals differently by species).

³⁴¹ A New York bill proposed in January 2003 that would have allowed pets to recover damages for pain, suffering and loss of faculties was limited to dogs, cats, and “domestic animals receiving regular care.” These limitations were justified, in part, by the greater political support for dogs and cats over farm animals and the fewer economic interests at stake. See R. Scott Nolen, *Legislation Presses Limits of Animal Status in New York: Harmed Pets Would be Entitled to Compensation*, JAVMA NEWS, May 15, 2004, available at <http://www.avma.org/onlnews/javma/may04/040515q.asp> (last visited Feb. 17, 2007).

organized opposition in the veterinary community to changing the legal status of animals,³⁴² and since strong veterinary opposition is likely to impede any real change in this area,³⁴³ it is important to look at how such a change might actually affect veterinarians. This group would be less inclined to oppose such changes, and might even support them, if it sees that it is ultimately in the best interests of the profession to raise the status of companion animals above that of inanimate property.

Certainly, changes in the way we value companion animals in our society are already having both positive and negative impacts on the profession. Owners of companion animals are more likely to spend money on both preventative and curative veterinary care, and this increased willingness has helped to support the increased specialization in veterinary medicine.³⁴⁴ But such owners are also more likely to have higher expectations for what veterinary medicine can accomplish, and they may be more likely to bring a malpractice claim if they are unhappy with the outcome.³⁴⁵ The profession will continue to experience these effects whether or not the legal status of companion animals changes. This section will address the ways in which changing the law to reflect society's changing values may affect veterinary medicine and education in ways that go beyond the changes in societal values themselves.

A. VETERINARY OPPOSITION TO CHANGING THE LEGAL STATUS OF ANIMALS

The American Veterinary Medical Association (AVMA) has expressed its opposition to changes in the legal status of animals in several position statements and resolutions. As discussed in Section III(B)(5) above, the AVMA adopted a resolution in 2003

³⁴² See *supra* notes 261-265 and accompanying text.

³⁴³ See Green, *supra* note 3, at 167.

³⁴⁴ See Green, *supra* note 3, at 209. See also Huss, *Valuation in Veterinary Malpractice*, *supra* note 9, at 484-86, and McEachern Nunalee & Weedon, *supra* note 6, at 138-39.

³⁴⁵ Huss, *Valuation in Veterinary Malpractice*, *supra* note 9, at 494-495; McEachern Nunalee & Weedon, *supra* note 6, at 138.

opposing any legislation that changes the terminology describing a person's relationship with her animals from "owner" to "guardian."³⁴⁶ The resolution claims that such change could weaken individuals' relationships with their animals, limit veterinarians' ability to provide services, "and, ultimately, result in animal suffering."³⁴⁷ And in a 2003 statement setting out the AVMA's position on whether damage awards for injured animals should exceed their property value, the organization declared its support for the legal concept of animals as property, while recognizing that "some animals have value to their owners that may exceed the animal's market value."³⁴⁸ This statement apparently received limited support from the AVMA Executive Board, passing only after the Board's Chair cast a tie-breaking vote.³⁴⁹

Given all that veterinarians have gained, and will continue to gain, from the increased valuation of pets, it might seem curious that there is so much organized opposition to both changes in pets' legal status and to their valuation above fair market value. The most likely explanation for this opposition seems to lie in the profession's concerns that increased status and valuation of animals will lead to an increased exposure to large malpractice awards against veterinarians.³⁵⁰ Veterinarians seem to be concerned that increasing the status and value of animals will

³⁴⁶ See *supra* note 263 and accompanying text.

³⁴⁷ See *AVMA Opposes 'Pet Guardianship'*, *supra* note 263.

³⁴⁸ See *Executive Board Coverage: Several Factors at Play when Determining Compensatory Value of Animals*, *AVMA Says*, *JAVMA NEWS*, July 1, 2003, available at <http://www.avma.org/onlnews/javma/jul03/030701j.asp> (last visited Feb. 12, 2007). The position statement goes on to suggest factors to consider in determining an animal's monetary value, all of which are essentially of an economic nature.

³⁴⁹ *Id.* The dissenters opined that "the statement focused too much on economic factors while not adequately accounting for the relationship between people and animals." *Id.*

³⁵⁰ See Green, *supra* note 3, at 216 (discussing the veterinarian profession's "fear of limitless liability, of replicating the human medical malpractice 'crisis,' of inviting frivolous lawsuits; or even of being forced out of business").

mean that pet owners are more likely to bring suits when their pets are injured or killed, and that the amounts of damage awards will continue to increase.³⁵¹ Both of these phenomena, they claim, will lead to a rise in malpractice premiums that will make the cost of veterinary care prohibitive to the average pet owner.³⁵²

B. RESPONSES TO VETERINARY OPPOSITION

There are several responses to this position. One argument is that it is simply disingenuous for veterinarians, whose profession has achieved so much because of the increased status of animals, to say that these animals are really just property.³⁵³ The awkwardness of such a position has not been lost on the veterinary profession itself, as seen in this statement of veterinarian James Wilson:

Veterinarians must accept that they can no longer promote expenditures of time, money and emotional energy by owners . . . and then when something goes awry simply say, "Oh well, tough luck Mrs. Jones. It's just an animal under the law. Animals are merely personal property; therefore you may not collect damages for your loss, other than the market value of your pet."³⁵⁴

A similar understanding can be found in the charge of a recently approved AVMA Task Force on the Legal Status of Animals, which will recommend an AVMA policy position on animals' status and valuation.³⁵⁵ Apparently meant to update and amend the 2003 resolution and policy statements discussed

³⁵¹ See Huss, *Valuation in Veterinary Malpractice*, *supra* note 9, at 493-495 (discussing reasons for increases in veterinary malpractice claims).

³⁵² See McEachern Nunalee & Weedon, *supra* note 6, at 159-60.

³⁵³ See Waisman & Newell, *supra* note 40, at 70-71.

³⁵⁴ Green, *supra* note 3, at 215 (quoting Dr. James Wilson).

³⁵⁵ See *Executive Board Coverage: Task force on Legal Status of Animals Approved*, JAVMA NEWS, July 15, 2004, <http://www.avma.org/onlnews/javma/jul04/040715j.asp> (last visited Feb. 12, 2007).

above, the task force is charged with looking at both the pros and cons of non-economic damage awards, determining when such awards are appropriate, and developing a list of legal protections that would be needed should guardianship laws be applied to animals.³⁵⁶ The creation of the task force was driven, at least in part, by concerns about how the public will perceive veterinarian opposition to initiatives changing the status and valuation of animals.³⁵⁷ The profession seems rightly concerned that such opposition could easily damage its credibility.³⁵⁸

Some critics of such veterinary opposition go even further, arguing that veterinarians have engaged in professional complicity to increase the public's perceived value of companion animals, actively promoting the human-animal bond,³⁵⁹ and they are therefore in no position to deny that such a bond exists when advocating against change in animals' legal status. Evidence of the veterinary profession's recognition of the importance of the human-animal bond can be seen in the curricula of a number of veterinary schools (some of which have even established centers on the human-animal bond), and on the amount of research studying this bond.³⁶⁰

A further argument against such veterinary opposition is that its conclusion – that increasing animals' status and value will lead to increased malpractice premiums that will either drive them out of business or make the cost of veterinary care prohibitive – is based on a faulty premise. One commentator who has researched and crunched the numbers concludes that the effect of higher damage awards on malpractice premiums – especially if those awards are subject to a legislative cap – is likely to be negligible.³⁶¹ Veterinarians seem to be using the

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ See Green, *supra* note 3, at 215.

³⁵⁹ See Green, *supra* note 3, at 212-213.

³⁶⁰ See *supra* notes 288-289.

³⁶¹ See Green, *supra* note 3, at 218. In one scenario, if non-economic damages were allowed, but capped at \$25,000, each veterinarian's annual premiums would rise by only \$212, which would translate to an annual increase of only thirteen cents for each pet owner. Using the same figures,

“malpractice crisis” in human medicine as their guide. But while there is hardly universal agreement that malpractice has reached crisis proportions in human medicine, there is even less evidence that such will be the case in veterinary medicine if the valuation or status of companion animals formally changes.

Finally, returning to this author’s proposal that companion animal property become a recognized legal category, it is not clear that simply creating such a category will have an effect on veterinary malpractice separate from the societal values and legal trends that already exist. The recent cases that have allowed high damage awards for negligent harm to companion animals have not depended on any change in the animal’s legal status. Courts have shown a willingness to value this type of property well above its “fair market value” by allowing recovery of reasonable veterinary expenses (which seems ultimately to be a benefit to the veterinary profession) and by looking at the animal’s actual value to its owner – a valuation that does not depend on a status different from other property.³⁶²

If veterinary malpractice premiums are in fact destined to rise, the increase will be only partly attributable to changes in the law. Much of any increase in malpractice may simply be due to the fact that animal owners are valuing their animal more and expecting more from veterinary care.³⁶³ And if the real concern is increased damages, then any legislative change to companion animals’ legal status can be accompanied by a cap on damage awards, which will go a long way toward alleviating any pending veterinary malpractice “crisis.” More importantly, however, being driven by malpractice concerns seems to be a very short-sighted way to stake out a position on whether there should be a change in the legal status of animals. Veterinarians would likely reap numerous other benefits from such changes in status.

but posing a much more drastic increase in malpractice premiums of ten times the current amount, would only yield a fifty-two cent increase for each companion animal in the U.S. *See id.* at 219.

³⁶² *See supra* notes 52-66 and accompanying text. In other contexts, however, there have been enough court decisions where judges seem to be constrained by the property label that there may be value, separate from its potential effect on malpractice awards, in changing that label. *See, e.g.*, footnotes 104-105 and accompanying text.

³⁶³ *See Huss, Valuation in Veterinary Malpractice, supra* note 9, at 494.

C. POTENTIAL BENEFITS TO THE VETERINARY PROFESSION OF CHANGING THE LEGAL STATUS OF COMPANION ANIMALS

The formal opposition that veterinarians and veterinary associations have raised to any change in the legal status of companion animals may say more about how deeply ingrained are their fears of litigation and the “malpractice crisis” than about how most veterinarians view their role with regard to the animals they treat. If malpractice concerns were alleviated, with, for example, legislative caps on damages or other “tort reform” measures that have been proposed with regard to human medicine, it is likely that many more veterinarians would favor changing the legal status of companion animals.

Veterinarians, particularly the majority who treat companion animals, have a great deal to gain from a formal recognition that the animals they treat have a status that is fundamentally different from inanimate property. Such a change would likely have a positive effect on the professional role of veterinarians, raising both the prestige of the veterinary profession and the remuneration of practitioners. This change would lead to more consistency both in the way that veterinarians view themselves as professionals and with the realities of their practice, and it would help to eliminate many of the problems they can face when their professional judgment is constrained by the sometimes irrational choices of animal owners.

The veterinarian’s professional role has been described as being somewhere along a spectrum that compares the veterinarian’s role, on one end, to that of the garage mechanic, and on the other end, to a pediatrician.³⁶⁴ This garage mechanic vs. pediatrician model has been set out by Bernard Rollin, a philosopher who teaches Veterinary Ethics at Colorado State Veterinary School.³⁶⁵ As Rollin explains the choices:

If a person brings a car to a mechanic and the mechanic determines that the vehicle will cost five thousand dollars to repair, it is perfectly permissible for the owner to declare “Five thousand dollars? The hell with it! Junk it!” On the other hand, if a parent brings a child to a

³⁶⁴ See ROLLIN, *supra* note 2, at 32.

³⁶⁵ See ROLLIN, *supra* note 2.

pediatrician and the physician determines that the child needs five thousand dollars' worth of surgery, the pediatrician certainly doesn't allow the parent to say, "The hell with the kid! Junk 'em! I can make another one."³⁶⁶

The reality of course, is that veterinarians are neither garage mechanics nor pediatricians. Their professional role is somewhere in between these two extremes, and where on the spectrum it falls may depend on the nature of their practice.³⁶⁷ The point of Rollin's analogy, however, is clear. As society's view of companion animals' status increases, and as more pet owners view their animals like members of the family, the more appropriate the pediatrician model seems. But our current laws that view animals as simply another form of personal property are more in line with the garage mechanic model.³⁶⁸ The profession stands to gain in a number of ways if veterinarians are treated more like pediatricians.

Raising the legal status of companion animals to something more valued than inanimate property can raise the prestige of the veterinary profession in a number of ways. Veterinary training is similar, in many respects, to medical training.³⁶⁹ In

³⁶⁶ *Id.* at 32. Rollin's analogy describes precisely the dilemma with which pet owners, treating veterinarians, and sometimes courts are faced when an animal with little or no market value requires expensive treatment to repair harm that results from a wrongdoer's negligence.

³⁶⁷ To extend Rollin's analogy a bit further and at the same time risk oversimplifying, if veterinarians who treat companion animals are seen as closer to the pediatrician model, and those who treat food animals are viewed as closer to the garage mechanic model, then those who treat very valuable race horses are like garage mechanics who work on very expensive luxury cars.

³⁶⁸ *See, e.g.,* Daughen v. Fox, 539 A.2d 858 (Pa. Super. Ct. 1988). When animal owners cannot even recover veterinary expenses to treat animals harmed by the tortious conduct of others because the law says they cannot recover more than the animal's "replacement value," then veterinarians are essentially being treated like garage mechanics.

³⁶⁹ *See* Price v. Brown, 680 A.2d 1149, 1551-1552 (Pa. 1996) (holding that professional negligence standards, not bailment law, apply to allegations of negligence against a veterinarian because, like the practice of medicine, "the vocation of veterinary medicine involves specialized education, knowledge, and skills.").

fact, there are many ways in which veterinarians see themselves as more skilled than physicians who practice human medicine. Physicians, unlike veterinarians, only need to know how to treat one species. Additionally, it is harder to get into a veterinary school than to get into medical school.³⁷⁰ Despite these differences, salaries of veterinarians lag well behind those of physicians, which fact likely has much to do with the legal status of the “patients” they treat. If this status were to change, even incrementally, the prestige and remuneration of veterinarians would likely improve.

A similar improvement was seen in both the social status and compensation of lab animal veterinarians in the wake of federal laws regulating the treatment of laboratory animals.³⁷¹ When changes to the Animal Welfare Act were being considered that would regulate the treatment of lab animals through the use of institutional animal care committees and other efforts to minimize the pain and suffering of these animals, the proposed changes initially met with opposition from laboratory animal veterinary associations.³⁷² After the Animal Welfare Act was amended, however, the salaries of laboratory animal veterinarians increased markedly, as did their job satisfaction and job security.³⁷³ They also reported that after the law’s passage, their advice was more often heeded.³⁷⁴ In this case, it was the legal changes that improved the status – through

³⁷⁰ Much of the difficulty of getting in to veterinary schools can be explained by the fact that there are only a total of 32 veterinary schools in both the U.S. and Canada combined. See Association of American Veterinary Medical Colleges, Students & Admissions, Member Institutions, http://www.aavmc.org/students_admissions/vet_schools.htm (last visited March 2, 2007). See also Association of American Veterinary Medical Colleges, Veterinary Medical School Admission Requirements (VMSAR), http://www.aavmc.org/vmcas/VMSAR_publications.htm (last visited March 2, 2007) (Veterinary Medical School Admission Requirements (VMSAR) contains admission requirements and contact information for all 32 U.S. and Canadian veterinary medical colleges.”)

³⁷¹ See ROLLIN, *supra* note 2, at 48.

³⁷² See *id.*

³⁷³ *Id.* at 49.

³⁷⁴ *Id.*

improved protections – of laboratory animals that precipitated the improvement in both the status and compensation of the veterinarians who treated these animals.

Some improvements in the status and salaries of companion animal veterinarians are already resulting from the expansion in the way society values companion animals. Pet owners' increased willingness to spend money on their animals' care is, not surprisingly, resulting in increased remuneration,³⁷⁵ and likely increased regard toward veterinarians who treat companion animals. Not only are these practitioners benefiting financially, the therapeutic options they can offer are also expanding because of the increased valuation of animals.³⁷⁶ And, despite the fact that farm animals greatly outnumber pets and companion animals,³⁷⁷ the vast majority of veterinarians practice only or mostly with companion animals.³⁷⁸ A change in

³⁷⁵ See Green, *supra* note 3, at 209 (reporting that “[i]n the last 10 years alone, the gross revenue of companion animal exclusive practices has more than doubled, with 60% of this increase occurring just in the last four years.” (footnote omitted)).

³⁷⁶ See *id.* at 210. See also ROLLIN, *supra* note 2, at 68 (“As the moral status, and moral worth, of animals in society increase, there will be ever greater social pressure and expectations to treat animals – at least companion animals. . . . As the value of animals rises in society, so will the value of those who treat animals, and so too will the opportunities to actualize the scientific medicine veterinarians have evolved.”).

³⁷⁷ See NAT'L AGRIC. STATISTICS SERVICE, U.S. DEP'T. AGRIC., 2002 CENSUS OF AGRICULTURE. pt. 51, at 6 tbl.1, 23 tbl.27, 23 tbl.29 (2004), available at <http://www.nass.usda.gov/census/census02/volume1/us/USVolume104.pdf> (last visited Feb. 12, 2007) (listing the livestock inventory in the United States in 2002 as almost 2 billion animals, consisting in part of 95,497,994 cattle, 60,405,103 hogs and pigs, 334,435,155 layer hens, 1,389,279,047 broiler chickens, 93,028,191 turkeys, and 6,341,799 sheep), and American Veterinary Medical Association, Veterinary Market Statistics, http://www.avma.org/membshp/marketstats/comp_exotic.asp (last visited Jan. 27, 2007) (listing the companion animals in the United States in 2001 as over 147 millions animals, consisting in part of 61,572,000 dogs, 70,796,000 cats, 10,105,000 birds, and 5,107,000 horses).

³⁷⁸ See Green, *supra* note 3, at 211 (reporting that “over 83% of veterinarians in private practice now work either exclusively or predominantly with companion animals – as contrasted with the 12% who work exclusively with agricultural animals and the 4% who care exclusively for horses.”).

the legal status of companion animals that codifies society's increased regard for these animals can only continue to improve the status and salaries of companion animal veterinarians.

Raising the legal status of companion animals to something above that of inanimate property would also be more consistent with way veterinarians view themselves as professionals. When Rollin has presented his pediatricians vs. truck mechanic model to veterinarians, he has found that over ninety percent lean toward the pediatrician model.³⁷⁹ This is perhaps not surprising, given that most veterinarians work in companion animal rather than agricultural practices. The law's treatment of animals as property, however, treats veterinarians, in many respects, more closely to the way it treats others who repair inanimate property.

Recognizing that the status of animals should be different from other forms of property is also consistent with the view of the veterinary profession reflected in the code of ethics of the American Veterinary Medical Association (AVMA).³⁸⁰ The code contains a number of references to the principle that a practitioner's primary obligation is to her animal patients. The first provision of the Professional Behavior section of the code sets out the following obligation: "Veterinarians should first consider the needs of the patient: to relieve disease, suffering or disability while minimizing pain or fear."³⁸¹ This provision, not unlike the Hippocratic Oath's "first, do no harm," highlights the important role that veterinarians, like doctors, play in treating their patients' diseases and injuries. Considering the needs of the patient first is certainly different from any kind of obligation or ethic that a professional whose work involves repairing inanimate property would have.

Another provision of the AVMA ethics code, regulating influences on judgment, sets out a similar obligation: "The choice of treatment or animal care should not be influenced by

³⁷⁹ ROLLIN, *supra* note 2, at 33.

³⁸⁰ AMERICAN VETERINARY MEDICAL ASS'N, PRINCIPLES OF VETERINARY MEDICAL ETHICS OF THE AMERICAN VETERINARY MEDICAL ASSOCIATION (2003), available at <http://www.avma.org/issues/policy/ethics.asp> (last visited Feb. 12, 2007) [hereinafter PRINCIPLES OF VETERINARY MEDICAL ETHICS].

³⁸¹ *Id.* at § II(A).

considerations other than the needs of the patient, the welfare of the client, and the safety of the public.”³⁸² While recognizing that public safety concerns, along with the client-owner’s welfare (which presumably includes inability to pay for expensive treatments) can influence treatment choices, this provision begins, however, by considering the “needs of the patient.” The language choices alone are instructive: the code’s use of the term “patient” certainly envisions a professional role that is closer to its counterpart in human medicine than to the mechanic who works on a car or truck.

Elevating the legal status of animals is not only more consistent with most veterinarians’ view of their own professional role, it is also more consistent with the reality of today’s veterinary practice. No longer primarily serving the utilitarian needs of the agricultural industry,³⁸³ the current face of veterinary medicine involves practices that serve primarily companion animals, with an increasing reliance on specialty practices.³⁸⁴ Dogs and cats now benefit from increasingly sophisticated diagnostic techniques including MRIs and digital imaging.³⁸⁵ Treatment options include surgery, chemotherapy, and radiation treatments for cancer, hip replacements and other complicated surgeries for orthopedic problems, and even dialysis and kidney transplants to treat kidney disease.³⁸⁶ Clearly, neither the pet owners who choose these sophisticated and expensive treatments, nor the veterinarians who practice them, are regarding the animals being treated as just another form of property. The legal status of animals needs to better reflect this perception, giving it more credibility, better intuitive appeal, and all-around coherence.

³⁸² *Id.* at § V(A).

³⁸³ See ROLLIN, *supra* note 2, at 58-59; McEachern Nunalee & Weedon, *supra* note 6, at 138.

³⁸⁴ See Green, *supra* note 3, at 210-11; McEachern Nunalee & Weedon, *supra* note 6, at 138-139.

³⁸⁵ See Mary Battiata, *Whose Life Is It Anyway?*, WASH. POST, Aug. 29, 2004, at W16 (Magazine), available at <http://www.washingtonpost.com/wp-dyn/articles/A30131-2004Aug24.html> (last visited Feb. 12, 2007).

³⁸⁶ *Id.*

Academic veterinary practice recognizes the non-property status of animals in even more direct ways. A number of veterinary schools now include departments or centers that focus on the human-animal bond. At the University of California at Davis, for example, the Center for Animals in Society supports research on areas such as therapeutic and health effects of pets and their role in human development,³⁸⁷ and includes resources such as the Program for Veterinary Family practice.³⁸⁸ Highlighted on the Center's main web page is the declaration, "the inspiration for our activities is the ongoing evolution of the roles animals play in our complex human society."³⁸⁹ A similar program was established at the University of Pennsylvania's School of Veterinary Medicine in 1997. Penn's Center for the Interaction of Animals and Society (CIAS) describes itself as a multi-disciplinary research center whose goal is

to promote understanding of human-animal interactions and relationships across a wide range of contexts . . . [by] [s]tudy[ing] the positive and negative influence of people's relationships with animals on their physical and mental health and well being . . . [and] [i]nvestigat[ing] the impact of these relationships on the behavior and welfare of the animals involved.³⁹⁰

³⁸⁷ See University of California, Davis, Center for Animals in Society, Research, http://www.vetmed.ucdavis.edu/Animals_in_Society/Research.htm (last visited Feb. 12, 2007).

³⁸⁸ See University of California, Davis, Center for Animals in Society, About the Center, http://www.vetmed.ucdavis.edu/Animals_in_Society/about.htm (last visited Feb. 12, 2007).

³⁸⁹ University of California, Davis, Center for Animals in Society, Home Page, http://www.vetmed.ucdavis.edu/Animals_in_Society/main.htm (last visited Feb. 12, 2007).

³⁹⁰ University of Pennsylvania School of Veterinary Medicine, Center for the Interaction of Animals & Society, About the Center, <http://www2.vet.upenn.edu/research/centers/cias/> (last visited Feb. 12, 2007).

Clearly, the development and support for such centers reflects a recognition within the academic veterinary community that the animals they treat are very different from the cars and trucks that mechanics repair. Creating a legal category that recognizes this different status would bring the law more in line with a reality that veterinary schools have long understood.

Veterinarians could also benefit from an improved legal status of companion animals because such a status could help to alleviate some of the problems they face when their treatment options are controlled by the sometimes irrational and harmful choices that client-owners can make. When animals are viewed as property by the law, any choice of how to treat (or not to treat) an animal is basically the owner's to make, even if that choice is very much against the animal's interest. Only in the rare case where the owner's treatment choice violates an animal cruelty statute³⁹¹ can that choice be overridden. And because humane euthanasia is considered a standard, and in fact ethical, treatment choice in veterinary medicine,³⁹² there is ultimately little that a veterinarian can do when a client requests that a healthy animal be euthanized, even for the most trivial of reasons.³⁹³ While courts have found ways to invalidate such requests as "against public policy" when they come in the form of testamentary provisions,³⁹⁴ there is little that can be done under current laws to dissuade living clients from finding someone who will perform what has been dubbed "convenience euthanasia."³⁹⁵

³⁹¹ If, for example, a horse owner, against her veterinarian's advice, wanted to transport a sore-footed horse to a different location, the veterinarian who fears that such a decision would be harmful to the horse would have little recourse unless the transportation would be so harmful that it would violate a provision of that state's cruelty statute against transporting any animal in a cruel or inhumane manner. *See, e.g.*, 18 PA. CONS. STAT. ANN. § 5511(e) (West 2006).

³⁹² *See* PRINCIPLES OF VETERINARY MEDICAL ETHICS, *supra* note 383, § X ("Humane euthanasia of animals is an ethical veterinary procedure.").

³⁹³ *See* ROLLIN, *supra* note 2, at 33, 59, 62.

³⁹⁴ *See supra* notes 174-1977 and accompanying text (discussing judicial decisions voiding testamentary clauses instructing that animals be destroyed).

³⁹⁵ *See* ROLLIN, *supra* note 2, at 62.

Rollin reports that the request to euthanize healthy animals is the most stressful and demoralizing part of companion animal practice.³⁹⁶ Some of the real examples of convenience euthanasia that he cites are just horrific: “clients going on vacation and not wanting to pay boarding fees, or clients tired of an adult dog and wanting a puppy, or clients who have redecorated and the dog doesn’t match the color scheme.”³⁹⁷ Choices such as these, awful as they may sound, are essentially supported by our current legal scheme that regards animals just like other pieces of personal property. But while few would question the choice to get rid of a couch because it doesn’t match the dog, there just seems to be something wrong about killing a dog because it doesn’t match the new couch. One way to limit such choices is by elevating the legal status of companion animal so that they cannot be treated just like any other form of property.

A new legal category for companion animal property could respond to the need to better educate people who might choose to have pets when it is convenient, but who would then choose to euthanize them when it is not. This goal is consistent with the educational goals of the “owner-to-guardian” campaign – helping pet owners to understand that they have greater responsibilities to their pets than to their inanimate property.³⁹⁸ Such understanding would be beneficial to the veterinary profession because it could help to reduce the stress they face when asked to euthanize healthy animals.³⁹⁹

³⁹⁶ *Id.*

³⁹⁷ *Id.*

³⁹⁸ See *Corso v. Crawford Dog & Cat Hosp., Inc.*, 415 N.Y.S.2d 182 (N.Y. Civ. Ct. 1979).

³⁹⁹ Although part of the opposition raised by veterinary groups to the use of guardianship language was the concern that owners would have less control over medical decision-making for their pets, it is unlikely that such decision-making would face interference unless the owner were making unreasonable choices. If we look to pediatric decision-making as a model, parents’ decisions regarding their children’s medical care are rarely interfered with, and then only if they are putting their children in danger.

[P]arents generally “have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations.” Surely, this includes a “high duty” to

Another beneficial effect of this educational role might be to reduce the number of unwanted dogs and cats in animal shelters. While many members of the public view their animals as family members, establishing strong bonds with them and taking good care of them, there are others whose behavior indicates that they still see companion animals as disposable property.⁴⁰⁰ Our current laws do little to dissuade people from this attitude. An understanding of pets as “companion animal property” and the increased responsibilities that would come with that understanding could go far in stopping both “convenience euthanasia,” and revolving-door shelter adoption.

Veterinarians thus stand to gain in a number of ways from a new legal status for companion animals. And there is likely to be more support for this position if it can be accomplished in ways that do not implicate their concerns of increased malpractice liability or decreased control over their professional choices. Carving out a new legal category such as “companion animal property” could alleviate many of the concerns expressed by those who oppose the language change from owner to guardian. Unlike the term “guardian,” this new category has no established legal meaning, and it could be precisely tailored so that it achieves the beneficial effects that the veterinary

recognize symptoms of illness and to seek and follow medical advice. The law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions.

Parham v. J.R., 442 U.S. 584, 602 (1979) (citations omitted).

There is no reason to expect any difference in the owner-animal relationship. If anything, even with a legal status elevated above mere property, but well short of personhood, it is likely that there will continue to be much more deference to pet owners’ choices. The only choice that will be interfered with will be those that are simply unjustifiable. Ultimately it should be a benefit to veterinarians who treat companion animals to be able to limit precisely these kinds of choices.

⁴⁰⁰ These behaviors include adopting animals from shelters, only to return them at the slightest behavior problem, not taking adequate care of their animals, and choosing humane euthanasia for trivial reasons. See, e.g., ELIZABETH HESS, LOST AND FOUND: DOGS, CATS, AND EVERYDAY HEROES AT A COUNTRY ANIMAL SHELTER (Harvest Books 2006).

profession would support, without the unintended consequences that might come with an established legal term. In fact, some veterinary groups that have opposed guardianship status have, at the same time, registered their support for some change in the legal status of animals. The Pennsylvania Veterinary Medical Association, for example, approved several position statements on March 9, 2005.⁴⁰¹ One of these statements sets out their opposition to the use of the term guardian.⁴⁰² But the *Position Statement on Pets as Property*, approved on the same day, sets out their support for changing the property status of pets:

[W]e feel very strongly that animals are not property in the same way that tables, lamps or cars are property.

...

We further believe that an appropriate definition of a pet must be developed prior to any changes or expansions in the laws on damages for pet loss. In our search of PA law and the laws of other states, we have been unable to find an adequate definition for a “pet” or “companion animal” that would allow us to reach a consensus on the subject of pets as property. PVMA is developing a definition and welcomes comments from all interested parties.⁴⁰³

This forward-looking group realizes that the profession, the animals they treat, and the owners who care for those animals all have much to gain from developing a new legal definition that better captures the way that we as a society value our companion animals.

⁴⁰¹ See PENNSYLVANIA VETERINARY MEDICAL ASSOCIATION, POSITION STATEMENTS (2005), http://www.pavma.org/Images/05_Position_Stmnts_UNP.pdf (last visited Feb. 12, 2007).

⁴⁰² See *id.*

⁴⁰³ *Id.* In an August 11, 2005 position statement, the PVMA did, in fact, put forward a definition of “pet.” See PENNSYLVANIA VETERINARY MEDICAL ASSOCIATION, DEFINITION OF A PET (2006), available at http://www.pavma.org/Images/06_Definition_of_Pet.pdf (last visited March 2, 2007).

CONCLUSION

Although the law has traditionally treated all animals as property, there are an increasing number of areas where the legal system is beginning to recognize that companion animals are fundamentally different from other forms of property. These changes in the law are just beginning to catch up with the way in which our society values companion animals. We should formally recognize these changes by creating a new legal category for companion animals that better reflects their status as somewhere between property and persons. Creating this new category will help lead toward more consistent treatment of animals across various areas of law, and treatment by the legal system that will better reflect the way we value our animals. While the veterinary community has in the past opposed any change to the legal status of animals, professional veterinary groups are now beginning to realize that such a change is not only inevitable, but also desirable. Veterinary groups will benefit by the creation of such a new legal category and by helping to shape its parameters. It is in the profession's best interests to support and develop changes in the legal status of companion animals because these changes will have a positive effect on the professional role of veterinarians, will lead to more consistency with the realities of their practices, and will give them better opportunities to exercise their professional judgment.