

THE ECONOMIC VALUE OF COMPANION ANIMALS: A LEGAL AND ANTHROPOLOGICAL ARGUMENT FOR SPECIAL VALUATION

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The special nature of companion animals can be assigned a monetary worth in the form of an animal's "special value" to the owner distinct from a market value. A legal analysis of the remedy of wrongful death, a sociological analysis of comparable treatment of infants, and an anthropological analysis of the role of domesticated animals all contribute toward constructing criteria for that valuation.

I. INTRODUCTION

Animals are personal property, and, as personal property, they have value.¹ Many animals have a very well-defined value, called "market value"; because humans eat cows, for example, the cost of a cow is whatever the free market will bear. Interesting legal questions rarely arise with queries as to the cost of cows. Because humans do not eat dogs but instead keep them as companions, on the other hand, the cost of a dog is much more difficult to determine; we tend to treat the value of our meals and the value of our friends very differently. Interesting legal questions often arise with queries as to the value of friendship.

Concealed within an assessment of a dog's worth are several complex legal puzzles. One asks just how the value of an animal companion is to be measured or calculated as distinct from the value of an animal as a market good. Another asks whether each different type of

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¹ Humans being animals, of course, it would be most accurate to formally distinguish between "nonhuman animals" and "human animals" throughout the article. In the interest of efficiency, however, I will use the more traditional convention of referring to the first group as "animals" and the second as "humans." The terms "captives," "exotics," and "zoo animals" are used interchangeably as synonyms for "all non-human animals currently maintained by humans in zoological parks and sanctuaries." The terms "pets," "companion animals," and "domestics" are not used synonymously but are distinguished in the article.

animal has a different value. This article attempts to confront at least those two puzzles in particular. It specifically addresses the modern challenge in American law of determining the special economic value of those animals that we do not eat but with whom we tend to surround ourselves in public and private, that is, the animals found in our zoos and in our homes.

It is not necessary to make such an economic appraisal in the form of a polemic for or against keeping pets or maintaining zoological parks, or as an argument for or against animal rights, whatever those might be. Rather, the statement about personal property, and the questions arising out of that statement, may be explored simply in reflection on how two disparate areas of human knowledge, law and biology, often and inescapably intersect. It is in appreciating the concept of special animal value in general where that intersection directly affects us economically as animal owners.²

In this article, I specifically argue for a need to assign monetary worth to commonly held animals in order for the law to be logically and legally consistent with the way we have historically interacted with such objects as our special personal property. To make that argument, I consider two groups—zoo animals and companion animals—whose members' particular financial worth to people has been misapprehended under the law.

Part II describes animals in general and presents captured animals as a model, examining why they have always been generally deemed "valuable" but have rarely been "valued." In addition, I argue for imparting worth to them more as we have done with our infants than as we have done with our prisoners. Part III explores the modern movement to try to elevate two domesticated species, dogs and cats, beyond the realm of property altogether, and asserts that financial value as an element of economic damage can and should be assigned to those species no differently than we have already assigned it to ourselves. I also discuss the doctrine of wrongful death as a route to applying the concept of "special value." Overall, I attempt to coalesce a legal assessment with a scientific assessment of companion animal value.

II. ANIMALS AS SOCIALLY VALUABLE OBJECTS

The origin of menageries dates from the most remote antiquity. Their existence may be traced even in the obscure traditions of the fabulous ages, when the contests of the barbarian leader with his fellow-men were relieved by exploits in the chase scarcely less adventurous, and when the monster-queller was held in equal estimation with the warrior-chief. The spoils of the chase were treasured up in common with the trophies of the fight; and the captive brute occupied his station by the side of the vanquished hero. It was soon discovered that the den and the dungeon were not the only places this link of connection might be advantageously pre-

² I use the terms "economic value," "monetary value," and "financial value" interchangeably.

served, and the strength and ferocity of the forest beast were found to be available as useful auxiliaries.³

How are we different from the animals that we own? Modern taxonomy categorizes all living forms into five major domains (representing what previously had been termed kingdoms). The domain or kingdom *Animalia* is composed of those living things that move independently, respond relatively quickly to external stimuli, possess compact internal organs, and have separate genders.⁴ Within that immense group, a multitude of hierarchies is possible depending on the parameters an observer may be interested in examining at any given moment. Body size, anatomical complexity, biomass, diet, longevity, phyletic history, and utility, among other criteria, have all been utilized to place a wide variety of different members of *Animalia* at different locations along a vast number of human-constructed animal spectra.⁵

Described using their common names, some animal “groupings” overlap while others make any intersection impossible.⁶ Mice, mosquitoes, albatross, angelfish and chimpanzees are all in *Animalia*, and may, if necessary, be compared in terms of raw physical dimensions (for example, surface area to volume ratio), but cannot be constructively compared in terms of their differing social behaviors. The smallest animal and the least complex animal are hardly the same creature, and perhaps could not be, given a firm understanding of morphology and evolution.⁷ Much has been written about comparing animals by their diet and habitat,⁸ but much has been ignored about how often those factors change from moment to moment depending upon changes in environmental conditions. Animal behavior yields to the dynamism of the earth’s environments, as much as humans may pretend that behaviors are permanently fixed from species to species.

Humans are in the kingdom *Animalia* too, and we, as a species, take differing positions on the spectrum with the other members, with our placement depending entirely on the criteria at issue. Is locomotory speed to be measured? Humans occupy an undistinguished spot in the crowded middle. Is the criterion communication by complex vocalization of interest? Humans outdistance any other animal on the chart. Is the indicator mucus secretion, species diversity, or olfactory sensitivity and reception? On those scales, humans hardly register at

³ Edward T. Bennett, *The Tower Menagerie* 7 (Robert Jennings Publ. Co. 1829).

⁴ See generally Alfred S. Romer, *The Vertebrate Body* (4th ed., Saunders Co. 1977).

⁵ John H. Postlethwait & Janet L. Hopson, *The Nature of Life* 331–32 (2d ed., McGraw-Hill 1992).

⁶ See generally Cleveland P. Hickman et al., *Integrated Principles of Zoology* (8th ed., Times Mirror/Mosby College Publ. 1988). The use of common names in this article may not be preventable, but it is unfortunate. Cougars, panthers, mountain lions, and pumas, for instance, are all simply the same animal disguised under different common names, histories, and regional descriptions.

⁷ See generally Romer, *supra* n. 4.

⁸ See e.g. R. F. Ewer, *The Carnivores* (Cornell U. Press 1973).

all. Where the scale specifically has to do with an ability to manipulate the physical and biological environment, humans occupy the high end (somewhat above beavers and termites), and all captive animals are kept captive by virtue of their subordinate position on this scale alone. We have tamed and kept animals in captivity for thousands of years for a variety of bewildering sensible and nonsensical sociopolitical reasons, but primarily do so because we can.

It was not always this way. In human prehistory, natural objects were those things originally held in common, components of a “negative community” which belonged to no one and yet were open to all. The formal concept of “property” slowly arose as a result of humans formulating social rules about coveting, obtaining, and occupying pieces of the world.⁹ The concept expressed the recognition of a “natural” right of the individual to use things for his or her own private purposes.¹⁰ As attainment and occupation rights became enforced socially, laws developed that discriminated between different types of ownership and occupation rights, and between different types of owners and occupiers.¹¹ Along with the concept of items being fixed to or detachable from the land, real and personal property were thereby distinguished.

As to detachable objects, certainly human history is in large part a record of people learning how to transform natural objects into artificial ones, i.e. the history of manufacture and production of materials.¹² Humans nevertheless impute the privileges of ownership to *non-manufactured* objects as well, most notably to land itself and the plants and animals embroidering it. Property laws thus had to distinguish early on between two broad categories of personal property ownership: animate versus inanimate objects. As items of economic exchange, living things have odd attributes that inanimate objects do not, the two most valuable among them being the ability to form intent and subsequently manifest it independently by motion and action, and the ability to replicate.¹³ Laws regulating agriculture, animal domestication, and animal husbandry owe much of their genesis to the capacity of plants and animals to independently transport themselves over large distances and to compound their value over time.¹⁴

The notion that usefulness and increased value have fueled our practices of capturing and exploiting animals is a historical fact. It is of

⁹ See generally Oliver Wendell Holmes, *The Common Law* (Mark DeWolfe Howe ed., Belknap Press 1963).

¹⁰ See generally David G. Ritchie, *Natural Rights* (Allen & Unwin Co. 1952).

¹¹ See e.g. William H. Holdsworth, *History of the English Law* vol. 7, 491 (Methuen, Sewt & Maxwell 1925).

¹² See generally Marston Bates, *The Nature of Natural History* (Scribner 1950).

¹³ See generally *Papers in Economic Prehistory* (Eric S. Higgs ed., Cambridge U. Press 1975); C.A.W. Guggisberg, *Man and Wildlife* (Arco Publg. Co. 1970).

¹⁴ See generally Thomas A. Lund, *American Wildlife Law* 19–34 (U. of Cal. Press 1980); Juliet Clutton-Brock, *Domestic Animals in Zoos: The Historical Background to the Domestication of Animals*, 2 Intl. Zoo Year Book 240–43 (1976).

interest predominantly to the recorders of social history. The notion that such utility and worth marks different animals with the imprimatur of different stamps of ownership under our laws, on the other hand, is a matter of jurisprudence, of interest to those who litigate and adjudge the social value of certain types of ownership.

Any system that would require people to refrain entirely from owning or exploiting animals as personal property would be doomed to failure, and a moratorium on ownership has about the same chances of success as the attempted prohibition of alcohol had in our country's past—for some of the same reasons. A large scale view of human behavior in light of the evolution of past behaviors suggests that legislation which tries to absolutely restrain people from using certain objects only raises the actual value of violating those restraints over the long run. Any law compelling humans to *not* treat animals as objects or property at all is a law that, even if it could be enacted, would create many more problems for both humans and animals than either may suffer at present.

Animals are personal property, and, as personal property, have value. As items of material value go, all animals have a particular value similar to that of manufactured commercial objects, but, whether foodstuff or pet, animals are fundamentally distinct from manufactured commercial objects in that value in at least three ways.

First, animals, by their nature, are inherently unique and irreplaceable objects. Concepts of modern genetics command the recognition that every individual sexually-reproducing animal is a distinct fingerprint of nature, each unlike that of any other. It is estimated that as to our own species alone, the number of potentially genetically distinct individuals exceeds a decadillion (that is, one with thirty zeros after it).¹⁵ The awesome power of genetic variation to construct a singular and unique object in the universe cannot be applied to nonliving commercial properties, even handcrafted ones. Any artificially manufactured object can be directly and exactly replaced given enough time, money, and interest, in contrast to the vast majority of living objects.

The contrast between the fundamental composition of animals and of other personal properties is critical, given that nested deep within each animal, be it mite or moose, rests an organic trademark for that creature constructed of astonishingly complex chains of nucleic acids and describing an astonishingly specific natural object.¹⁶ Cow or

¹⁵ R. K. Koehn & T. J. Hiblich, *The Adaptive Importance of Genetic Variation*, 75 *Am. Scientist* 134–41 (1987).

¹⁶ Our newfound ability to clone living creatures hardly changes either the specificity of that biochemical trademark or its larger legal significance. For one thing, the process of cloning does not enable the biologist to construct animals from scratch. Cloning still relies on the preexistence of the unique genetic directive initially constructed by nature. Additionally, cloning, at most, simply increases the quantity of natural objects. For that reason, it may be best to think of cloning primarily as a heightened increase in the possibility of identical twins, an event which formerly had to wait for natural happenstance to occur.

dog, should an article of trade happen to be a living creature, the trader is compelled to operate under the fact that it is the only one of such kind in the entire world which has been or ever will be. Although it is routinely ignored, the condition of inherent irreplaceability is quite appropriately incorporated into the value of all animals as material objects.

Second, animals, as a legally recognized group, are relatively unusual. Most animals are much more novel and noticeable commercial items than are the majority of objects placed into the stream of commerce or woven into our social fabric. As with works of art, market transactions involving larger animals, captives, and companion animals are more pointedly vulnerable to public scrutiny, and under such scrutiny often become cloaked with a notoriety not accompanying non-living goods.¹⁷ That those transactions engage the emotions and strident opinions of the communities of buyers and sellers in which they occur, suggests that the items involved in the exchanges are special goods worthy of more sensitive treatment than that given standard trade items.

Finally, animals have a relatively serious impact on human communities. Most animals, as distinct from inanimate objects, are an integral part of the ecological and psychological health of every community in which they reside. Because overall biological and cultural diversity is increased by the presence, and damaged by the absence, of captive and companion animals, oscillations in our public health transcend the self-interest of just the owners, buyers, and sellers in the marketplace.¹⁸ In other words, more than purely economic interests are at stake in the ownership of animals as personal property because of what animals are. Laws regulating animals as property encroach slowly and surely on the protection and enforcement of our nation's environmental health.

With those three bases for an assignment of special value in mind, it can be argued that certain animals are not *market* goods at all, and never have been. When we discuss the social and legal value of those animals we maintain as our associates in public and private, we do so in the shadow of our own historical and prehistorical past. Dogs were domesticated roughly 15,000 B.C.E.¹⁹ The earliest record of cats being domesticated is 4000 B.C.E.²⁰ At that time, Egyptian royalty kept certain animals confined near temples of worship and in the royal court to

¹⁷ Steve Graham, *Issues of Surplus Animals*, in *Wild Mammals in Captivity: Principles and Techniques* 290–93 (Devra G. Kleiman et. al. eds., U. of Chi. Press 1996). See F. Carlos Lehmann, *The Pet Trade and Extinction*, 2 *Oryx* 120–30 (1967).

¹⁸ See Paul Colivaux, *Why Big Fierce Animals Are Rare: An Ecologist's Perspective* 183–233 (Princeton U. Press 1978).

¹⁹ B.C.E. refers to “before the common era.” As to dog domestication dates, see *Quaternary Extinctions: A Prehistoric Revolution* 55 (Paul S. Martin & Richard G. Klein eds., U. of Ariz. Press 1984). See Ewer, *supra* n. 8.

²⁰ *The Domestic Cat: The Biology of Its Behavior* 152–53 (Davis C. Turner & Patrick Bateson eds., Cambridge U. Press 1988).

signify religious commitment and devotion.²¹ By about 2000 B.C.E., royalty of Sumer, Babylonia and Assyria were confining exotics as a symbol of their political power, representing the ability to dominate subservient entities both in the human community as well as the wild.²²

The primary motivation for the accumulations in ancient animal collections was political power and individual enjoyment, although ostensibly they served public entertainment and education purposes as well.²³ In the common era, from the menageries and deer parks of medieval England and China of the 1200s to the pet stores of today, innumerable species owe their copiousness to the aesthetic pleasure humans have derived from keeping them either tamed or in captivity. Their market value has little or nothing to do with their status as property and everything to do with the way we have viewed and treated ourselves as social creatures. That statement is not true with respect to most market goods.

I desired, above all things, to give the animals the maximum of liberty. I wished to exhibit them not as captives, confined to narrow spaces, and looked at between bars, but as free to wander from place to place within as large limits as possible, and with no bars to obstruct the view and serve as a reminder of captivity.²⁴

Nor are zoo or home animals kept as a *result* of some lack of market value, as if they were a social and economic burden on society such as with prisoners. The image of the zoo animal as a prisoner frequently arises in the literature.²⁵ Comparing zoo animals to prisoners is a com-

²¹ Heini Hediger, *Wild Animals in Captivity* 165 (G. Sircom trans., Butterworths Sci. Publications 1950).

²² *Id.* at 2.

²³ About 350 B.C.E., the zoo at Alexandria was used for biological observations, most notably by Aristotle in his *History of Animals*. The educational use of captive facilities has been trumpeted ever since. See Stephen Bostock, *Zoos and Animal Rights: The Ethics of Keeping Animals* 168–76 (Routledge Publ. Co. 1993).

²⁴ Carl Hagenbeck, *Beasts and Men* 113 (High S. R. Elliott trans., Longmans, Green, & Co. 1911). Hagenbeck spent a good deal of his professional life occupied with proving the assertion that captive animals deserved the benefits of certain liberties, including freedom from what he recognized and despised to be animal prisons. Hagenbeck never felt that animals should be completely liberated; as remarkable a writer and thinker as he was, he was a preeminent zookeeper above all else, and confining, not releasing, animals was his trade.

²⁵ Many menageries in the past displayed humans, usually natives who accompanied acquisitions of animals during wartime or military expeditions. Laplanders, Nubians, Pacific Islanders, and Eskimos composed the most common groups, and often served as the animals' trainers after capture. See e.g. *Stellingen Tierpark Guidebook – National Zoological Park Branch* (Smithsonian Instn. 1913). Mentally disturbed and physically disabled people have been displayed as well. As recently as 1906, the New York Zoological Park exhibited an African pygmy as a playmate for a chimpanzee with information on both displayed on the front of the cage. See Joy Mench & Michael Kreger, *Ethical and Welfare Issues Associated with Keeping Wild Mammals in Captivity*, in *Wild Mammals in Captivity: Principles and Techniques* 5–15 (Devra G. Kleiman et. al. eds., U. of Chi. Press 1996).

mon pastime among social scientists and animal rights authors, due to the numerous superficial similarities between the two groups.²⁶ Zoo animals regularly find themselves in prison-like conditions, surrounded by people who appear to act much like wardens, guards and visitors. Bars and security measures are prevalent and much effort is expended to prevent escape and harm to those on the outside. There is a general feeling inside most zoos that the visitor stands on the margin of a minimum security environment, looking in at the daily life of a prison community whose wardens are concerned about the welfare (at least the psychological welfare) of the visitors above that of the inmates.

While the similarities between zoo animals and prisoners may therefore seem realistic, the comparison is poor in a legal sense. If we examine the basis for the status that real prisoners themselves have and inquire if zoo animals are truly comparable in ways that the law holds to be fundamental to prisoners, we find that zoo animals are not prisoners at all. They were not incarcerated in order to be explicitly punished, to be rehabilitated, or as a deterrent to others seeking to engage in similar conduct, nor are they promised under some social contract to be eventually released when a certain condition, such as a specified period of time, has passed. Zoo animals are confined under conceptually different guidelines than are prisoners, in large part due to the absence of any social obligations to conduct themselves in a particular manner to either avoid or complete the incarceration imposed. In other words, humans reside in prisons on exclusively *on account of* behaviors and *in spite of* their biological status; animals reside in zoos *in spite of* behaviors and *on account of* their biological status. The contrast is fundamental.

Prisoners are kept in prisons on moral grounds, even if the legal terms slightly vary in their moral presumptions from jurisdiction to jurisdiction. Animals in zoos and homes, to the contrary, are not kept in captivity under any moral presumption whatsoever (certainly not explicit, documented ones), and are placed and stay in captivity without any contractual or social relationship to refer to that might justify either their removal from the wild or their reintroduction back into it.

In fact, both zoo and home animals are instead much more on a par with infants when it comes to treatment and evaluation. The equivalence is obviously not in terms of animals having the behavior or appearance of infants, but in terms of their status under the law. In a very real economic and social sense, infants are property, the property of their parents, with the critical caveat that numerous ways of disposing of and conveying them are legally and morally prohibited. In basic terms, a zoo animal or a companion animal may be modeled under the law in the same manner and by the same rules as affect a child in a daycare facility.

²⁶ See Bostock, *supra* n. 23, at 182–85; Heini Hediger, *The Psychology and Behavior of Animals in Zoos and Circuses* 43–46 (G. Sircom trans., Dover Publ. Inc. 1968).

Consider that infant children are placed in and stay in daycare facilities, for instance, regardless of any social obligation to conduct themselves in a particular fashion. Children in daycare may not be relieved of the restraint simply because they comport themselves differently over time, or because time passes (other than that they eventually get too old to be in daycare). They are not in any sense prisoners, and they are “confined” on account of their biological status and in spite of their behaviors, like animals. As with animals in zoos and homes, children in daycare are there because a responsible person has recognized it beneficial to other people to place them there, sometimes even if it is not entirely beneficial to the child. As with animals in zoos and homes, children in daycare have their daily needs met with or without their assistance or even knowledge. The stay is indefinite, regimented, and primarily for ulterior purposes. The adult human is the guardian and caretaker of the child, as owners and keepers are with their captive animals.

We do use, with infants, bars (of a sort), security devices, and escape prevention measures, all to a lesser degree than with prisoners, but our attitude toward why we do so is the reverse of the penal model—it is fiduciary, not adversarial. Neither zoo animals, companion animals, nor children in daycare can effectively communicate with anything near the sophistication and understanding of human adults, thereby making it impractical for each to personally assert any privileges that might benefit them. The concept of parent and guardian carries with it the concept that one is protecting privileges that another has but cannot comprehend or protect. So it is with zookeepers and zoo residents, and with the dogs and cats in our homes. A daycare model makes special value manifest.

III. ANIMALS AS PERSONALLY VALUABLE OBJECTS

Indeed, what about dogs and cats in particular? Start by considering these numbers: roughly 1.5 million species of animal have been identified.²⁷ Of that number, roughly 1.2 million are insects and arthropods.²⁸ Of the 300,000 species remaining, the vertebrates comprise about 25,000.²⁹ Of that number, only 4,000 or so are mammal species.³⁰ Of that 4,000, it is primarily two, dogs and cats, which historically have formed the most special and intimate relations with us as our social companions. Dogs and cats are a minute component of an immense group, yet only those two species are considered to be potential “companions.”

There is a scientific reason for this. A standard definition of domestication contains two components: a cultural component in which humans control the breeding of the animal, and a biological component

²⁷ Postlethwait & Hopson, *supra* n. 5, at 333.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

in which an animal becomes different, in form as well as in behavior, from its wild ancestor.³¹ Because the phenomenon of domestication is an evolutionary strategy mutually beneficial to the survival of both humans and particular animals, only certain animals have become domesticated in spite of the numerous attempts humans have made to domesticate all sorts of species.³²

Two criteria can be identified that make domestication work as a social exchange; that is, that winnow out just which species find it advantageous to exploit social relationships with humans. One is the existence of a well-defined dominance hierarchy. The second is the presence of a high degree of sociality.³³ Wolves, from which dogs developed, exhibit both criteria. Dogs readily transfer their ranking systems, docilities, and subservience to humans; in addition, complex communication and group cooperation are wolf-like traits that have facilitated long-term human/dog interactions.³⁴

While the law recognizes all types of “pets,”³⁵ our companion animals are thus a conceptually and biologically distinct category of pet.³⁶ We own companion animals for different intellectual reasons than we own other animals, even though the general theme of “ownership” nevertheless applies.³⁷ With all sorts of objects of value that we manipulate, catalog, transform, and utilize, our ownership is assigned economic value at two different moments of its tenure: once by society when the ownership is first established, and again by the law if and when the ownership is ever impaired by another.³⁸ The ideal, of course, is that the second valuation is a direct reflection of the first

³¹ Marion Schwartz, *A History of Dogs in the Early Americas* 8–11 (Yale U. Press 1997).

³² Richard W. Redding, *A General Explanation of Subsistence Change: From Hunting and Gathering to Food Production*, 7 *J. of Anthropological Archeology* 56–97 (1988). Taming an animal does not make it domesticated, and most wild animals raised as pets either do not reproduce in captivity or become unmanageable as adults.

³³ Animals such as sheep, cows and horses have been domesticated as well, but not for social reasons.

³⁴ Stephen Budiansky, *The Covenant of the Wild* 43–93 (Yale U. Press 1992).

³⁵ See e.g. *Turudic v. Stephens*, 31 P.3d 465 (Or. App. 2001) (holding cougars to be family pets).

³⁶ The fact that we keep, care for, and even train fish, small mammals, and reptiles, for instance, does not mean that we can form a relationship with those animals in the sense that we can and have formed relationships with dogs and cats. A relationship implies mutuality; communication and interchange of emotions in both directions. Humans have been engaging in that interchange with dogs and cats since the end of the last Ice Age. There is nothing in the genetic characteristics of a turtle or goldfish that allows it to engage in bond forming with us no matter how much we may project feelings onto it. The fact that species can be and have been tamed in no way means that they have been domesticated. Domestication is mandated by the effects of very directed development over thousands of generations. Domestic species owe much of their existence to the interference of humans by selective breeding, the manipulation of hereditary characteristics.

³⁷ See generally Juliet Clutton-Brock, *Domesticated Animals From Early Times* (U. of Tex. Press 1981).

³⁸ *Hyland v. Borrás*, 719 A.2d 662 (N.J. Super. App. Div. 1998).

(along with other consequences inherent in damages, such as interest and penalties). In specifically considering companion animals as valuable personal property, our ownership is often assigned value at the second juncture in spite of the fact that no first valuation, the market valuation, may ever occur.³⁹

When companion animals are damaged or destroyed during the course of ownership, the law has attempted to address financial value, albeit weakly. Apart from abuse and neglect statutes, private legal remedies for the loss of our companion animals by the conduct of others have slowly developed that are just now beginning to reflect the special status of companion animals.⁴⁰ There are two general routes by which civil redress may be sought for such injury.

The first is by a lawsuit seeking financial recovery for the animal's owner. The second is by a lawsuit seeking equitable relief for the animal itself. The two routes are fundamentally distinct. In the first, the legal presumption is that animals are the personal property of humans, and thus adopts an anthropological approach; animals and humans are deemed to belong to two fundamentally distinct categories that arose as a function of both groups' prehistorical development.⁴¹ In the second, the legal presumption is that they are not the property of humans, and thus adopts a philosophical approach; animals and humans are deemed to belong to one and the same category, "animals," any division of which is artificial.⁴² The first route is not affected by and does not consider the rights of animals; the second stakes everything on the existence and scope of such rights. Both endeavor to address insults to animal life and value, but in different ways.

As lawsuits go, animal rights suits are problematic, to say the least. They must surmount procedural obstacles such as standing; they tend to encounter substantive problems such as the scarcity of precedential case law; and they all ultimately face social and political barriers.

³⁹ The argument that dogs already have a specific monetary value, that is, the price at which they may have been purchased, ignores the fact that relationships may be formed with them. As trade goods, it is their appreciation, not depreciation, over time which has not been taken into account. See e.g. *Sollenberger v. Cranwell*, 614 P.2d 234 (Wash. App. 1980) (evidence of purchase price is not a measure of value itself).

⁴⁰ See e.g. *McCallister v. Sappingfield*, 144 P. 432 (Or. 1914); *Stull v. Porter*, 196 P. 1116 (Or. 1921); *Melton v. South Shore U-Drive, Inc.*, 303 N.Y.S.2d 751 (N.Y. App. Div. 1969); *Stettner v. Graubard*, 368 N.Y.S.2d 683 (N.Y. Town Ct. 1975); *Rimbaud v. Beiermeister*, 154 N.Y.S. 333 (N.Y. App. Div. 1915); *Kling v. U.S. Fire Ins. Co.*, 146 S.2d 635 (La. App. 1962); *Blauvelt v. Cleveland*, 190 N.Y.S. 881 (4th Dept. 1921); *Gluckman v. American Airlines, Inc.*, 844 F. Supp. 151 (S.D.N.Y. 1994); *Daughen v. Fox*, 539 A.2d 858 (Pa. Super. 1988); *Roman v. Carrol*, 621 P.2d 307 (Ariz. App. 1980); *Jankowski v. Preiser Animal Hosp.*, 510 N.E.2d 1084 (Ill. App. 1987); *Fowler v. Ticonderoga*, 516 N.Y.S.2d 368 (N.Y. App. Div. 1987); *Julian v. DeVincent*, 184 S.E.2d 535 (W. Va. 1971); *Smith v. Palace Transportation Co.*, 253 N.Y.S. 87 (N.Y. Mun. Ct. 1931); *McKinney v. Robbins*, 892 S.W.2d 502 (Ark. 1995); *Bueckner v. Hamel*, 886 S.W.2d 368 (Tex. App. 1994); *City of Canadian v. Guthrie*, 87 S.W.2d 316 (Tex. App. 1932).

⁴¹ See generally Clutton-Brock, *supra* n. 37.

⁴² See e.g. James Rachels, *Created from Animals: The Moral Implications of Darwinism* (Oxford U. Press 1990).

ers such as the psychological reluctance of judges and juries to accept them or take them seriously. Sensitive to those difficulties, owners often choose the more accessible route, the first route, of tort remedies.

Suits for redress would simply not exist were companion animals truly valueless commodities. Civilly, owners have frequently sued under torts such as conversion, trespass to chattels, and the infliction of emotional distress because such torts exemplify the ability to acknowledge some manner of monetary value.⁴³ Three different manners of tort illustrate three different manners of recovering that value.

Liability for conversion is based on one person destroying another's property, and damages focus only on the property itself in terms of its market value and thus the owner's out-of-pocket economic loss.⁴⁴ In some states, plaintiffs are compelled to make a thin choice between proving the animal's market value or its "intrinsic value."⁴⁵ Intrinsic value means that where damaged goods have no market value, the actual worth to the owner is the test.⁴⁶ Because actual worth is objective, however, "intrinsic value" often translates into minimal or non-existent value, depending on the owner's community and its attitudes toward animals.

In turn, liability for infliction of emotional distress is based on one person hurting another person by harming their property, and damages for that tort focus on the psychological and emotional stress (non-economic damages) suffered by the owner with respect to the loss.⁴⁷ The value of the property impaired is inconsequential. The potential to recover *non-economic* damages for personal property comprises an entirely separate set of legal issues not addressed in this article.⁴⁸

Suits under the previous two types of torts are limited by their foci, and animal owner plaintiffs in these types of suits often recover very restricted awards, if they recover them at all. Often the argument

⁴³ See e.g. *Jones v. Craddock*, 187 S.E. 558 (N.C. 1936); *Griffin v. Fancher*, 20 A.2d 95 (Conn. 1941).

⁴⁴ *Carroll v. Rock*, 469 S.E.2d 391 (Ga. App. 1996); *Price v. Brown*, 651 A.2d 548 (Pa. Super. 1994).

⁴⁵ *Young's Bus Lines v. Redmon*, 43 S.W.2d 266 (Tex. Civ. App. 1931).

⁴⁶ See *DeVine v. Buckler*, 603 P.2d 557 (Ariz. App. 1979).

⁴⁷ See generally Debra Squires-Lee, *In Defense of Floyd: Appropriately Valuing Companion Animals In Tort*, 70 N.Y.U. L. Rev. 1059 (1995).

⁴⁸ At least fourteen separate and well-reasoned decisions within the last three decades have indicated that the emotional distress associated with the death of a companion animal is a properly considered measure of damages. See *Campbell v. Animal Quarantine Station*, 632 P.2d 1066 (Haw. 1981); *Peloquin v. Calcasieu Parish Police Jury*, 367 S.2d 1246 (La. App. 1979); *Lincecum v. Smith*, 287 S.2d 625 (La. App. 1973); *Gill v. Brown*, 695 P.2d 1276 (Idaho App. 1985); *Knowles Animal Hosp. v. Wills*, 360 S.2d 37 (Fla. Dist. App. 1978); *Animal Hosp. v. Gianfrancisco*, 418 N.Y.S.2d 992 (N.Y. Dist. Ct. 1979); *Richardson v. Fairbanks N. Star Bureau*, 705 P.2d 454 (Alaska 1985); *Brousseau v. Rosenthal*, 443 N.Y.S.2d 285 (N.Y. 1980); *La Porte v. Associated Independents, Inc.*, 163 S.2d 267 (Fla. 1964); *Corso v. Crawford Dog and Cat Hosp., Inc.*, 415 N.Y.S.2d 182 (N.Y.C. Cir. Ct. 1979); *Morgan v. Kroupa*, 702 A.2d 630 (Vt. 1997); *Paul v. Osceola County*, 388 S.2d 40 (Fla. Dist. App. 1980); *Soucek v. Banham*, 524 N.W.2d 478 (Minn. App. 1995); *Johnson v. Wander*, 592 S.2d 1225 (Fla. Dist. App. 1992).

depends on whether non-economic damages, that is, emotional distress damages, are even available under the law. Furthermore, it may little matter what type of animal was harmed or what type of owner was impacted. The animal is assumed to simply be a commodity that has been damaged.

Liability under the tort of loss of companionship, on the other hand, is based on one person hurting or destroying the relationship another had with his or her companion animal in causing the companion's death. Damages for the tort focus neither solely on the owner nor solely on the animal, but instead are directed to the affinity and association between the two as having its own independent economic value. It is a tort independent from negligence because it concerns harm to an entity, a relationship, that is something separate from the person himself or herself.⁴⁹

Everything that has been adversely affected by a tortfeasor in severing that relation is thus considered in assessing the harm suffered at both ends: initial outlay, upkeep, loss of use, sentiment, the distress of each entity, their longevity and proximity—in sum, the very nature and extent of how the animal and its owner acted and lived and worked with each other is given its relative financial importance.⁵⁰ Courts across the nation have acknowledged that the damage and destruction of companion animal relationships reflect an important aspect of the status of companion animals as “special” personal property:

The restriction of the loss of a pet to its intrinsic value in circumstances such as the ones before us is a principle we cannot accept. Without indulging in a discussion of the affinity between “sentimental value” and “mental suffering,” we feel that the affection of a master for his dog is a very real thing and that the malicious destruction of the pet provides an element of damage for which the owner should recover, irrespective of the value of the animal because of its special training.⁵¹

again,

⁴⁹ In that sense, it is a tort similar to those that concern the impairment of relationships, that is, intentional interference with contract, or intentional interference with prospective business advantage. See e.g. *Fox v. Country Mut. Ins. Co.*, 7 P.3d 677 (Or. App. 2000); *Logan v. W. Coast Benson Hotel*, 981 F. Supp. 1301 (D. Or. 1997); *Northwest Nat. Gas Co. v. Chase Gardens, Inc.*, 982 P.2d 1117 (Or. 1999); *Uptown Heights Assoc. Ltd. Partn. v. Seafirst Corp.*, 891 P.2d 639 (Or. 1995).

⁵⁰ Compare *Brock v. Rowe* (No. C002535CV, Washington Co. Cir. Ct. Or.) (tort of loss of companionship allowed) with *Gluckman v. Am. Airlines, Inc.*, 844 F. Supp. 151 (S.D.N.Y. 1994) (under New York law, no individual cause of action for loss of companionship of a pet exists, or for the pain and suffering of the animal); *Daughen v. Fox*, 539 A.2d 858 (Pa. Super. 1988) (no right to tort of “loss of companionship” is recognized since it only comes out of loss of consortium, which is in marital relationship). The tort's evolution in Oregon stemmed from dicta in *Norwest v. Presbyterian Intercommunity Hosp.*, 652 P.2d 318 (Or. 1982).

⁵¹ *La Porte*, 163 S.2d at 268.

This court now overrules prior precedent and holds that a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property.⁵²

and again,

As loss of companionship is a long recognized element of damages in this state . . . the court must consider this an element of the dog's actual value to his owner Resisting the temptation to romanticize the virtues of a "human's best friend," it would be wrong not to acknowledge the companionship and protection that Ms. Brousseau lost with the death of her canine companion of eight years. The difficulty of pecuniarily measuring this loss does not absolve defendant of his obligation to compensate plaintiff for that loss.⁵³

and again,

Like most pets, [the worth of a mixed breed dog] is not primarily financial but emotional; its value derives from the animal's relationship with its human companions.⁵⁴

How is companionship to be calculated in terms of money? Translating lives into dollar amounts is a classic political game, time-honored and well-tested. The arguments against engaging in such a game are also time-honored and well-tested: that the practice is immoral, impossible, unrealistic and insufficient.⁵⁵ Those arguments notwithstanding, American law favors such a currency conversion. To effect such an exchange requires a number of things, not the least of which is the ability to mathematically determine monetary value, a task which in turn requires using a specific valuation method.⁵⁶ All people tend to value human life as a general precept. When the law considers the value of human lives, courts are frequently compelled to translate lives into current dollars, and thus to apply some sort of valuation rules and parameters.

Our laws recognize that the premature termination of human life is worth money to those people who associated with, and had a personal history with, the decedent. With respect to companion animal valuation, numerous similarities between our animals and ourselves should be considered in inquiring as to whether companion animal lives are worth money as well. As to similarities in their associations, at least four favorable comparisons may be made that enhance the idea that neither humans nor companion animals are free market com-

⁵² *Corso*, 415 N.Y.S.2d. at 182.

⁵³ *Brousseau v. Rosenthal*, 443 N.Y.S.2d 285, 286–87 (N.Y. 1980).

⁵⁴ *Morgan v. Kroupa*, 702 A.2d 630, 633 (Vt. 1997).

⁵⁵ See generally Steven M. Wise, *Recovery of Common Law Damages for Emotional Distress, Loss of Society, and Loss of Companionship for the Wrongful Death of Companion Animals*, 4 *Animal L.* 33 (1998); Sonia S. Waisman & Barbara R. Newell, *Recovery of Non-Economic Damages for Wrongful Killing or Injury of Companion Animals: A Legislative Proposal*, 7 *Animal L.* 45 (2001).

⁵⁶ *Value* is a social (and therefore "legalistic") concept, while *valuation* is a mathematical (and therefore "scientific") concept.

modities: 1) both groups exclusively contain members who are alive; 2) the members of both groups can provide useful services to others; 3) the members of both groups can have valid relationships with others; and 4) others can be psychologically affected by the loss of a member of either group.

On the other hand, the differences as to treatment (again in conducting valuation only) are certainly staunch. When human lives are converted into dollars, a quartet of rules seem to have been developed: 1) no single life can ever be scientifically converted into an exact value; 2) there simply is no recognized "market" for human life, and there never will be; 3) all lives must be valued differently based upon who is being evaluated; and 4) each life has high value, so that no life, no matter how average, is considered either cheap or without value altogether.

With animals, in contrast, each rule seems to have been replaced by its opposite: 1) single lives can be very easily converted into exact market values and often are; 2) there is an obvious market for most animal life; 3) particularities have no place and all animals of the same "type" are treated as if each individual was identical; and 4) each animal life, apart from the rare instance of a celebrity animal, typically has a low value, with the majority being presumably valueless other than as food or apparel commodities.⁵⁷

The monetary value of human lives has been confronted legislatively, and although there is no exact mathematical formula, certain criteria have been used effectively. The criteria are definitely human-specific, for obtaining value is governed by state statutes that rely specifically on the term "person."⁵⁸ In Oregon, for example, four specific categories of compensation are available for a person's wrongful death: 1) medical and funeral expenses; 2) any disability, pain, suffering or loss of income suffered between the time of the injury and of the death; 3) pecuniary loss to the estate, which is the amount that the decedent would have saved during the remainder of his or her natural life had he or she lived;⁵⁹ and 4) loss of decedent's companionship by the decedent's spouse, children, and parents.

Damages for the mental suffering to the surviving family are *not* recoverable under Oregon law, although evidence of such suffering goes to proof of lost society and companionship. All the above elements go to financial value; as mentioned, the exact valuation method is not mandated nor described, but simply left up to the fact-finder.

As to companion animals, state statutes have only infrequently attempted to address the need for valuation. Washington, for instance,

⁵⁷ See e.g. *Madison v. Hood*, 223 N.W. 178 (Iowa 1929) (cows); *S. A. Gerrard Co. v. Fricker*, 27 P.2d 678 (Ariz. 1934) (bees). See generally Magnus Pyke, *Man and Food* (McGraw-Hill Book Co. 1970).

⁵⁸ See e.g. Or. Rev. Stat. Ann. § 30.020 (1995).

⁵⁹ At issue is what wages the decedent would have earned, what his or her spending and saving habits were like, and support they provided to others. Care and attention to services around the home are also taken into account. See *id.*

provides that tortfeasors are liable for “the amount of damages sustained and the costs of collection” by virtue of their conduct in killing another’s dog.⁶⁰ The highest potential to construct a complex valuation method, however, is via the common law. For over a century, courts have set the path by allowing the owner as the injured party to plead and recover the “special value” of the companion animal that was harmed, as opposed to recovering only its market value.⁶¹ The term “special” is most often equated with the idea of providing a service.

Wrongful death verdicts obtained in trial courts over time indicate that amounts awarded for people varies between nothing and millions of dollars, depending on numerous factors, including whether comparative fault has been assessed against the decedent, thus reducing or eliminating the amounts of the verdict obtained. As to companion animals, a few verdicts indicate how poorly the comparison of value currently stands.⁶² If those amounts are ever to change, the change must reflect the degree of companionship dogs and cats bring to people as a measure of their economic worth, in a manner similar to that which humans have brought to each other.

It is difficult to know just what elements should be given significance in determining a concept such as “loss of companionship,” whether animal or human. Guidance exists in the form of wrongful death case law—most directly, from a 1974 federal opinion, *In re Farrell Lines, Inc.*,⁶³ which relied on a 1966 legal treatise on wrongful death damages that set out eight criteria to be considered in determining both a right to, and an amount of recovery for, the loss of society of

⁶⁰ Wash. Rev. Code § 16.08.010 (1999).

⁶¹ See *Stull v. Porter*, 196 P. 1116 (Or. 1921); *Fredeen v. Stride*, 525 P.2d 166 (Or. 1974); *Jones v. Craddock*, 187 S.E. 558 (N.C. 1936); *Griffin v. Fancher*, 20 A.2d 95 (Conn. 1941); *Hyland v. Borrás*, 719 A.2d 662 (N.J. Super. App. Div. 1998); *Soucy v. Wysocki*, 96 A.2d 225 (Conn. 1953); *Wertman v. Tipping*, 166 S.2d 666 (Fla. Dist. App. 1964); *Levine v. Knowles*, 197 S.2d 329 (Fla. Dist. App. 1967); *Brown v. Crocker*, 139 S.2d 779 (La. App. 1962); *Quave v. Bardwell*, 449 S.2d 81 (La. App. 1984); *Fritts v. NY & N.E.R. Co.*, 26 A. 347 (N.Y. 1902); *City of Garland v. White*, 368 S.W.2d 12 (Tex. Civ. App. 1963); *Wilson v. City of Eagan*, 297 N.W.2d 146 (Minn. 1980); *Paguio v. Evening J. Assn.*, 21 A.2d 667 (N.J. Super. 1941).

⁶² E.g. *Fredeen v. Stride*, 525 P.2d 166 (Or. 1974) (\$500 value for sick German Shepherd carelessly euthanized by a veterinarian); *Stull v. Porter*, 196 P. 1116 (Or. 1921) (\$125 value for Collie intentionally shot while chasing deer); *Green v. Leckington*, 236 P.2d 335 (Or. 1951) (\$250 value for German Shepherd intentionally shot while chasing chickens); *McCallister v. Sappingfield*, 144 P. 144 (Or. 1914) (\$200 value for Scotch Collie intentionally shot in confrontation with horse); *City of Garland v. White*, 368 S.W.2d 12 (Tex. Civ. App. 1963) (\$300 value for Boxer intentionally shot by policeman); *Kling v. U.S. Fire Ins. Co.*, 146 S.2d 635 (La. App. 1962) (\$100 value for toy Fox Terrier killed by another dog); *Griffin v. Fancher*, 20 A.2d 95 (Conn. 1941) (\$100 for mixed breed carelessly struck by motorist); *Hyland v. Borrás*, 719 A.2d 662 (N.J. Super. App. Div. 1998) (\$500 value for Shi Tzu killed by another dog); *Lincecum v. Smith*, 287 S.2d 625 (La. App. 1973) (\$50 value for sick Pekingese puppy carelessly euthanized by veterinarian); *Wertman v. Tipping*, 166 S.2d 666 (Fla. Dist. App. 1964) (\$1,000 value for German Shepherd carelessly lost by kennel).

⁶³ 378 F. Supp. 1354, 1363 n. 5 (S.D. Ga. 1974).

one who has been wrongfully killed.⁶⁴ The eight criteria have been used several times since then,⁶⁵ most importantly by the United States Supreme Court in *Sea-Land Services, Inc. v. Gaudet*.⁶⁶ The criteria, sometimes referred to as the *Gaudet* list, are as follows:

1. Relationship of husband and wife, or of parent and child (or similar relationship between collateral relatives);
2. Continuous living together of parties at and prior to time of wrongful death;
3. Lack of absence of deceased or beneficiary for extended periods of time;
4. Harmonious marital or family relations;
5. Common interest in hobbies, scholarship, art, religion, or social activities;
6. Participation of deceased in family activities;
7. Disposition and habit of deceased to tender aid, solace, and comfort when required; and
8. Ability and habit of deceased to render advice and assistance in financial matters, business activities, and the like.⁶⁷

Here is a thought experiment. Assume that a close relation has died. First, use the *Gaudet* list to determine the right to a recovery. In that sense, the list is being used *qualitatively*. Therefore, with a decedent in mind, transform each category into a question about the quality of the connection between them and yourself. Without assigning specific points or numerical value, do your best to credit yourself higher for highly applicable answers, and lower for less applicable answers.

It is probably most appropriate to start this morbid game by applying it to one's own spouse, child or parent. Under *Gaudet*, would you have a right to compensation for his or her death? Now, try it again, only this time by applying it to a companion animal. Do you have a right to compensation for his or her death? Trying to fit the eight *Gaudet* factors to the circumstances of a companion animal is a good balancing test for delineating just what companion animals are to humans. The second, third, fourth, sixth and seventh factors, for instance, give a fairly accurate depiction of just what a dog or cat "does" for a human.⁶⁸ The first, fifth, and eighth factors, on the other hand, illustrate real constraints and limitations on how dogs (or cats) and humans can and ever will manage to interact.⁶⁹ In essence, our anthropological heritage may be inserted between the lines of *Gaudet*,

⁶⁴ Stuart M. Speiser, *Recovery for Wrongful Death* 233 (Laws. Coop. Publ. Co. 1966).

⁶⁵ See *Thompson v. Offshore Co.*, 440 F. Supp. 752, 764 (S.D. Tex. 1977); *Voelker v. Frederick Bus. Properties Co.*, 465 S.E.2d 246, 251 (W. Va. 1995).

⁶⁶ 414 U.S. 573 (1974).

⁶⁷ *Id.* at 579.

⁶⁸ See generally Richard Fiennes & Alice Fiennes, *The Natural History of Dogs* (Bonanza Bks. 1968).

⁶⁹ See generally *Animals and People Sharing the World* (Andrew N. Rowan ed., U. Press of New England 1988); *The Evolution of Domesticated Animals* (Ian L. Mason ed., Longman Press 1984).

addressing all of our relations, including those between us and other animals, not just the artificially constrained relations of us only among ourselves.

In a qualitative analysis, there may be difficulty in applying the categories objectively. Figuring the amount may therefore help in that regard. Second, then, use the *Gaudet* list to determine the amount of recovery to be calculated, a sense in which the list is used *quantitatively*. To do so may likely require the employment of some manner of worksheet that would generate quantities by utilizing algebraic “equations” for each category (with each category adjusted as to relative weight). Once some sort of sum is reached, it is interesting to posit: 1) how realistic the final number is in terms of the personal value of a death; 2) how difficult it is to assess some of the categories numerically at all; 3) what factors, if any, seem to be overlooked category-wise; and 4) if applying the categories is a good overall proof of what people consider an object’s money value to be.

In rough parallel with *Gaudet*, *McCallister v. Sappingfield* (the controlling legal authority on animal death value in Oregon)⁷⁰ uses the following very brief methodology to calculate the monetary value of a dead companion animal: “The owner of a dog wrongfully killed is not circumscribed in his proof to its market value, for, if it has no market value, he may prove its special value to him by showing its qualities, characteristics and pedigree.”⁷¹

Quite different than *Gaudet* in both scope and emphasis, the *McCallister* test currently has two competing interpretations. Those interpreters friendly to companion animal owners consider the phrase “qualities, characteristics, and pedigree” to refer, respectively, to 1) physical attributes (e.g. gender, breed, measured dimensions); 2) psychological attributes (e.g. personality, friendliness, demeanor); and 3) personal history (e.g. lineage, breeding, specialized training). Those interpreters less friendly to companion animals claim that the three criteria (and thus the term “special value” itself) translate solely into a single compressed brute concept: utility.⁷²

Ignore for a moment the question of whether utility is in fact the true interpretation of *McCallister*, and attempt to apply it to the loss of a companion animal. The standard dictionary definition of utility incorporates the twin ideas of “fitness to some purpose” and “worth to some end.” Are dogs meant to be used for a purpose, and if so, what would that purpose be? As we have related, animals in general have been traditionally used by humans toward the achievement of very

⁷⁰ *McCallister v. Sappingfield*, 144 P. 432 (Or. 1914).

⁷¹ *Id.* at 434. Many use the term “special value.” See e.g. *Wertman v. Tipping*, 166 S.2d 666 (Fla. Dist. App. 1964); *Levine v. Knowles*, 197 S.2d 329 (Fla. Dist. App. 1967).

⁷² See e.g. *Richardson v. Fairbanks N. Star Borough*, 705 P.2d 454 (Alaska 1985) (holding that the value of the dead animal is not the owner’s subjective estimation of its value as a pet, but only includes the animal’s utility).

specific ends, primarily as food, but also occasionally as objects of study and amusement.⁷³

What is the *purpose*, however, of a person's dog? It stands to reason that if a dog or cat is used to accomplish a task that the owner or a machine would otherwise do, then it is probably questionable whether one would even call that type of animal a "pet" or companion at all.⁷⁴ Given that the majority of companion dogs and cats (other than hunting or fetching breeds of dogs) do not do what we would term real "work," nor do we select or maintain them on the basis of whether they do work or not, then the literal application of the strict view of *McCallister* would have to be that no companion animal has *any* value, special or otherwise, and that all companion animals by definition are essentially valueless in the context of compensation for their loss.

On the other hand, if we do not restrict ourselves to the most rigid definition of "utility," and instead apply the concept of "usefulness" in terms of not just work value or the provision of services, but also aesthetic or enjoyment value, then the use of animals as personal property, including the use of companion animals to enable humans to enjoy their lives more fully is a component of utility— and thus is at least measurable toward some number or mathematical equation under either interpretation of *McCallister*.⁷⁵

Harmony, commonality of interests, longevity of time together—do those things include or disinclude utility? Do they include or disinclude qualities, characteristics and pedigree? There is a good argument that the second, pet-friendly, interpretation of the *McCallister* test is much more in line with *Gaudet* than is the strict utility interpretation. *Gaudet* and *McCallister* treat animals and humans differently—but what is the logical basis for the distinction? It is not sufficient to say that it is simply because animals are personal property. Jackets and snowcones are personal property too, but there is no developed rule or case law on the qualities, characteristics and pedigree of those objects, or even on their usefulness to humans. In property law outside that subset dealing with animals, the only measure mentioned is the market value of the property, and there is literally no litigation on the "interpretation" of market value (the concept is straightforward: whatever a reasonable person would buy or sell the object for on the open market is the amount for which the tortfeasor pays for causing its loss). Yet, under the law, the lack of a market for certain personal

⁷³ Rowan, *supra* n. 69. See *Missouri P. Ry. Co. v. Edwards*, 14 S.W.2d 230 (Ark. 1929) ("the value of the dog [harmed in the case] is shown by the prizes it won").

⁷⁴ Cf. *Jones v. Walker*, 433 S.E.2d 726 (Ga. App. 1993) (family purpose doctrine does not extend to cases involving animals).

⁷⁵ Loss of use has been given for animals that cannot be "used" at all. See e.g. *City of Canadian v. Guthrie*, 87 S.W.2d 316 (Tex. Civ. App. 1932). Numerous things, including animals, have been given "value" based on the "comfort and well-being" they impart to their owners who now suffer from their deprivation. See e.g. *Featherston v. Hartford Fire Ins. Co.*, 146 F. Supp. 535 (E.D. Ark. 1956); *Crisp v. Security Natl. Ins. Co.*, 369 S.W.2d 326 (Tex. 1963).

properties does not extinguish the right to recover—indeed, it may well enhance it:

The fact that damages are difficult to ascertain and measure does not diminish the loss to the person whose property has been destroyed. Indeed, the very statement of the rule suggests the opposite. If one's destroyed property has a market value, presumably its equivalent is available on the market and the owner can acquire that equivalent property. However, if the owner cannot acquire the property in the market or by replacement or reproduction, then he simply cannot be made whole.⁷⁶

Perhaps the logical basis for the distinction is that science treats animals and humans differently. Undeniably that general statement is true, and science recognizes that the two “groups” act differently in nature, have recognizably and materially different types of bodies and minds, and in general, have different natural relationships. The law, as the formal study of social relationships, treats humans and animals differently in part based on how the two groups relate to each other socially. Yet law relies on social distinctions drawn between different groups, and for the law to have substance, the distinctions need to be substantial. When a law relies upon a weak distinction between groups, the law itself is weak, and becomes exploited or ignored, or its rationale is challenged and changed.

On what substantial social basis should the law make an economic value distinction between a human's life and a companion animal's life? It goes without saying that dogs are distinguishable from their owners in innumerable respects—but to support an economic distinction, which of the multitude of differences are valid and which are not? Some distinctions are absolutely baseless as far as real social relations are concerned, and employ criteria that bear no rational connection to the day-to-day relations between the two groups' members.⁷⁷ While laws are not required in any way to be scientific, they do seem to have to comport with and be based upon reasoned observations—which is at least the starting point for scientific reasoning. Given what we know about animal/human relations, one could “test” for a rational social distinction between humans and animals by describing both groups as broadly as possible and then straining the definition down through narrower and narrower divisions to observe where the groups may most fundamentally fall away from each other.

The broadest possible description that encompasses both groups is “all living things.” Living things are most commonly categorized in terms of their organization.⁷⁸ The most logical divisions to make in the description, therefore, are those based on “features.” “Feature numer-

⁷⁶ *Mieske v. Bartell Drug Co.*, 593 P.2d 1308, 1311 (Wash. 1979).

⁷⁷ For example, criteria could include the number of letters in the common names of the two groups, or the color of the skins of the members of the two groups. A “letter numerosity” distinction-based rule or a “skin color” distinction-based rule employ irrational criteria.

⁷⁸ Postlethwait & Hopson, *supra* n. 5, at 331–32.

osity” is fundamentally different from, for example, “letter numerosity” in that the reality of social relations is preserved, not ignored, when we examine features. As we sift, we could count similarities and differences between dogs and humans at each level, both qualitatively and quantitatively, just as *Gaudet* and *McCallister* encourage us to do. For example, “capacity to learn new behaviors” may be a worthwhile feature to consider, or, perhaps, “number of legs,” or “cellular structure,” or “appreciation of sports.”

By doing so, we can strain using a qualitative sieve (with outcome measured as a strata of complexity) and a quantitative sieve (with outcome measured as the pure number of similarities and differences). Were a ratio and then a graph to be generated, a quasi-scientific test for observable *social* distinctions between humans and dogs could be developed in which both micro (i.e., molecular and anatomical) as well as macro (i.e., behavioral and cultural) comparisons could be made. Companion animals’ role throughout history could be assigned legal meaning in being assigned a scaled dollar value that coincides with their associational and biological value.⁷⁹

Even without actually making such a chart, one could at least imagine that it will be the cultural end of the graph which will be deemed more critical to people. Humans made policy decisions early on in our history in attending to the value of animals that higher levels of organization are afforded more weight than lower ones; that the macro world is more economically justifiable to others than the micro world. In strict evolutionary terms, the attempt of humans to place themselves “above” other animals on a scale of development is ludicrous; humans are no more developed or complex than any other animal, nor any more evolved or higher on a chain of life than any other animal. In evolutionary terms, all extant animals are well adapted for their own circumstances by definition. In strict social terms, on the other hand, the placement of humans “above” other animals on a scale of development is perfectly reasonable; we are much more developed in a social sense than any other creature on the face of the planet, regardless of how complex their systems may be. No species has transformed the planet in the manner that we have or has intricately altered the communal and physical environments in the manner that we have.⁸⁰

The concept of utility seems to be a hidden plea to see ourselves in other animals and to look for human values—of being alive, of having friends, of providing a living, and of providing purpose in daily routine—in non-humans. As an axiom of the translation of life into dollars, the spectrum or continuum of objects of value repeatedly use these criteria: irreplaceability, communication, bonding behavior, and cooperation. Even *Gaudet* admits as much, and a test for dogs should

⁷⁹ See generally Tim Megarry, *Society in Prehistory: The Origins of Human Culture* (N.Y. U. Press 1995).

⁸⁰ See Jerome R. Ravetz, *Scientific Knowledge and Its Social Problems* (Oxford U. Press 1971).

include within it a recognition that they have associational and relational value that extends far beyond the economic value of their status as commercial items.⁸¹

Do companion animals and captive animals have a purpose? That is a terribly loaded question. On the one hand, animals are all objects in nature, and therefore have no more “purpose” than do volcanoes or mudflats. Natural objects are not “designed” by anyone, other than evolution by natural selection.⁸² Do companion animals and captive animals have value? At least certain types of animals, notably companion dogs and cats, are very definitely the result of 15,000–20,000 years of artificial selection by humans and certainly have been designed or fashioned in a real sense by humans to accomplish a certain end—to achieve a personal value to owners.⁸³ Captive animals in zoos, as collections in and of themselves, have been fashioned to accomplish similar ends to human communities.⁸⁴

The law has stated that domestic animals are those “naturally tame and gentle, or that by long association with humans have become thoroughly domesticated and are now reduced to such state of subjection to their will that they no longer possess disposition or inclination to escape.”⁸⁵ The test for domestication under the law is whether the animals, as a class, are recognized as devoted to the service of humans.⁸⁶ *Gaudet* and *McCallister*, in a nutshell, together envision a valuation scheme in which service to humans would be synonymous with, or at least include, the price of companionship, and exclude the lack of market value.

IV. CONCLUSION

The concept of ownership is deeply imbedded in our feelings for dogs. They are “our” dogs; we are their masters. To own an exotic breed of dog enhances our status in the same way that our other possessions do. We announce our rank. We may or may not treat our dogs well, but we never consider them beings that should be “set free.”⁸⁷

To appreciate the true economic value of animals, we must appreciate that throughout history, private ownership by humans of material objects—including of manifestations of natural resources such as land—has logically resulted in the creation of numerous classes of

⁸¹ See generally *Nichols v. Sukaro Kennels*, 555 N.W.2d 689 (Iowa 1996).

⁸² See generally *Romer*, *supra* n. 4.

⁸³ Juliet Clutton-Brock, *Man-Made Dogs*, 197 *Science* 1340–42 (1977); Juliet Clutton-Brock, *Origins of the Dog: Domestication and Early History*, in *The Domestic Dog: Its Evolution, Behaviour, and Interactions with People* 8–20 (James Serpell ed., Cambridge U. Press 1995).

⁸⁴ See Colin Tudge, *Last Animals at the Zoo: How Mass Extinctions Can Be Stopped* (Island Press 1992).

⁸⁵ *Warren County Combined Health Dist. v. Rittenhouse*, 689 N.E.2d 1036 (Ohio App. 1997).

⁸⁶ *Id.*

⁸⁷ Schwartz, *supra* n. 31, at 122.

owners and non-owners. By definition, private ownership is an exclusive activity: those who do not own the object that you own must necessarily be treated differently under the law, and prevented from enjoying the same rights you enjoy with respect to those objects.

We divide ourselves, animals though we are, from the rest of *Animalia* in large part because we claim we can possess property and other animals cannot, and that we can give broad meaning to such possession and other animals cannot. A great deal of what is termed human nature, including our tendencies toward aggression and competition with each other, is enhanced by the belief that we possess things exclusively and value certain things highly. Those things include the animals that we want to be close to us, the animals in our zoos and in our homes. Their value stems, in primary part, from the comfort and well-being we derive from their presence in our homes and communities.

The zoological menagerie, for its part, has been primarily intertwined with the symbolic role of animals within our culture. No one eats, harvests, employs, or truly imprisons animals in zoos; they are mostly urban luxuries, representing the city dweller's aesthetic perception of and romantic nostalgia for the wild. The family pet, for its part, has been primarily intertwined with our insatiable need for social companions of all stamps. Companion animals, to the extent that they have a social "purpose" created by humans, are most emphatically non-commercial objects valued entirely for the comfort and well-being they impart to their owners as a benefit of ownership.

In turn, from its inception in prehistory to today, the law has been primarily concerned with the symbolic role of human interactions within each culture that maintains it. No one physically creates or entirely destroys legal relationships—they are either recognized or ignored, caringly recorded and attended to, or carelessly forgotten and abandoned. Outside the law, animals stand representative of a variety of cultural forms. They may be at one and the same time entertainment devices, educational displays, museum curiosities, research subjects, dangerous instruments, pets on their way to being domesticated, or wild things simply passing through an artificial enclosure soon on their way to being wild once more. Within the law, nevertheless, animals are foremost the personal and business property of people, and the potential sophistication of such a role carries with it a mandate to consider more particularized legal classifications as to their economic worth as psychologically usable and useful objects derived from nature.

