"TO HIS DOG, EVERY MAN IS NAPOLEON": USING CONTINGENT VALUATION TO BRIDGE THE GAP BETWEEN ENVIRONMENTAL NONUSE DAMAGES AND COMPANION ANIMAL DAMAGES[1]

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1. Aldous Huxley, *as quoted in* Robert Andrews, THE CONCISE COLUM. DICTIONARY OF QUOTATIONS 73 (1990).

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INTRODUCTION

One October morning in 2019, hours before dawn would break, a Neapolitan Mastiff named Hurley started crying.[2] Restless, he moved around from two in the morning until six. Hurley suffered immense pain as his stomach hardened, filled with air, and began to flip on itself.

Hurley's human family members followed him throughout the house all night. Hurley laboriously climbed the stairs, went out the back door, back into the kitchen, and down the stairs again all while crying and whimpering. The family was at a loss; they had no idea what was causing his suffering. Around six in the morning the mother of the family came into the living room and guessed, correctly, that Hurley was suffering from gastric dilatation-volvulus—stomach flip.

The family raced Hurley to the nearest animal hospital for emergency care. The technicians there poked a hole into his underside to release air and depressurize his stomach, but the flip would continue until Hurley either had emergency surgery or died. The technicians forewarned that the surgery was costly and recommended another animal hospital forty minutes north where a surgeon and his team could perform the work for half the cost. After making the trip, the surgeon saved Hurley's life within an hour. The surgeon even stapled Hurley's stomach to his rib cage to prevent future stomach flipping.

While the family was overcome with joy that their beautiful, tawny boy had survived the ordeal, they struggled with the financial consequences—the vet bills stacked up in the thousands. They would not have made any other choice though. As with any family member, life-saving medical care is non-negotiable. To pay for the cost of the emergency surgery, the family cancelled their vacation for that year.

This story highlights a key fact about companion animals: they bring a noneconomic use to their families that fair market valuations will never reflect.[3] For example, Hurley's parents bought him as a puppy for a few hundred dollars, which is Hurley's "fair market value." But the cost of the emergency surgery far exceeded his market value—it was the cost of a family vacation. Yet, costs like these occur for millions of families—Americans spend upwards of $16 million per year on vet bills.[4]

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2. The story that follows is based on the author's personal experience.

3. Larissa Parker, *Reconciling the Discrepancies Between Emotional Value of Companion Animals and the Insufficient Legal Remedies for Their Loss*, 45 W. STATE L. REV. 105, 118 (2015).

4. *E.g.*, Jenna Goudreau, *I Spent $7,000 on My Cat's Medical Bills, and I Have Only One Regret*, CNBC: MAKE IT (June 21, 2022, 10:17 AM), https://www.cnbc.com/2017/04/06/i-spent-7000-on-my-cats-medical-bills-and-i-have-only-one-regret.html (explaining Americans spend upwards of 16 million dollars a year on vet bills to ensure the health of their companion animals).

Rules for companion animal damages fail to account for the true value of companion animals. In domineering fashion, anthropocentric courts focus their approach on a companion animal's fair market or economic value to their humans.[5] The idea for this article came from the quote "[t]o his dog, every man is Napoleon."[6] A Texas judge used this quote while denying noneconomic damages for companion animals.[7] The comparison to Napoleon was apt; people use the word "Napoleonic" colloquially to refer to someone who is domineering to overcompensate for a perceived flaw or someone who exerts their will over another in an arrogant way.[8] The common law approach to companion animal damages wholly encapsulates this colloquialism.

State courts generally classify companion animals as personal property despite a general cognizance and flippant quipping about their uniqueness and qualities distinct from typical personal property.[9] Courts often ignore a biocentric perspective and the simple fact that companion animals contribute far more to life than any dollar amount could reflect.[10] Mimicking Napoleon's hubris, state courts continue to overlook a method of valuation that, although imperfect, more accurately reflects the value companion animals bring to life: contingent valuation (CV). This article uses the downfall of Napoleon as a historical parallel to emphasize how the domineering approach courts take in companion-animal cases fails to keep pace with the noneconomic valuations of environmental statutes.

Harm done to companion animals results in abstract and, sometimes, unquantifiable monetary damages to both the nonhuman and human animal. By excluding the noneconomic value of companion animals, traditional damages calculations for torts against property fall short of making injured

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5. Strickland v. Medlen, 397 S.W.3d 184, 198 (Tex. 2013).

6. Huxley, *supra*, note 1.

7. *Strickland*, 397 S.W.3d at 197.

8. *Napoleon Complex*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/Napoleon%20complex (last updated Jan. 20, 2025); *Domineering*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/domineering (last updated Feb. 25, 2025); David E. Sandberg & Linda D. Voss, *The Psychosocial Consequences of Short Stature: A Review of the Evidence*, 16 BEST PRAC. & RSCH. CLINICAL ENDOCRINOLOGY & METABOLISM 449, 450 (2002); Mark J. Kroll et al., *Napoleon's Tragic March Home from Moscow: Lessons in Hubris*, 14 ACAD. MGM'T EXEC. 117, 117 (2000).

9. *See, e.g., Strickland*, 397 S.W.3d at 185 (beginning the opinion with a joke about *Old Yeller* and recognizing dogs for their intrinsic value, but relegating dogs to their market value); Gluckman v. Am. Airlines, Inc., 844 F. Supp. 151, 158 (S.D.N.Y. 1994) (distinguishing a prior case, saying its decision to recognize pets as more than property was an "aberration[] flying in the face of overwhelming authority"); Goodby v. Vetpharm, 2009 VT 52, ¶ 11, 186 Vt. 63, 974 A.2d 1273 (explaining that companion animals have a value being anything markets will give them, but refusing to allow noneconomic recovery for companion animals until the legislature authorizes it).

10. *Strickland*, 397 S.W.3d at 198.

people whole again.[11] Companion animals, like the environment in general, fill a unique role in everyday life that cannot be reduced to fair market value. This article will compare environmental damages statutes with companion animal damages at common law and argue that injuries suffered by companion animals can and should include nonuse valuation estimated through CV.

This article consists of three main components. First, it examines the relevant background, including the common law rule for damages in companion animal cases and the statutory and regulatory rules for damages in environmental statutes. Second, it analyzes the disjunct between companion animal damages and environmental damages. This section also analyzes potential areas of compatibility between the two, including how CV may fit into both. Finally, this article provides policy arguments supporting the use of CV in companion animal damages calculations.[12]

I. A BRIEF BACKGROUND OF COMPANION ANIMAL LAW AND ENVIRONMENTAL LAW

Companion animal law and environmental law, despite some intuitive similarities, have wound up on vastly different paths. Companion animal law, as a common-law construct, generally draws no authority from state or federal legislatures.[13] Most jurisdictions have soundly rejected the concept of noneconomic or nonuse values in damages calculations.[14] In contrast, environmental law is a creature of statute, and courts rely on this statutory language to award damages. Though flaws exist, environmental statutes like the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) carve out a path for including noneconomic values in damages calculations.[15] To understand the various methods for calculating damages, one must understand what nonuse values and CV involve.

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11. *See e.g.,* Mary Randolph, *When a Pet Is Injured or Killed: Compensating the Owner*, NOLO (Jan. 31, 2023), https://www.nolo.com/legal-encyclopedia/free-books/dog-book/chapter9-6.html (explaining that many states disallow noneconomic damages even if a companion animal's fair market value is zero).

12. Note that, while the better long-term solution would include freeing animals of their "property" classification, this paper focuses on reforming the domineering approach taken by courts through contingent valuation.

13. While federal and state animal cruelty laws do exist, they fall outside the scope of this paper. This paper focuses on common law causes of action and court-developed methods of valuing damages for injuries to companion animals.

14. *Goodby*, 2009 VT 52, ¶ 11; *Strickland*, 397 S.W.3d at 198; Burgess v. Shampooch Pet Indus., Inc., 131 P.3d 1248, 1249–50 (Kan. Ct. App. 2006).

15. 42 U.S.C. § 9651(c)(2).

A. Contingent Valuation Primer

Nonuse values and CVs are methods economists use to infer a nonmonetary value. A nonuse value, also referred to as noneconomic, bequest, or existence value, is the monetary value associated with the conviction that parts of the natural world should remain unaltered.[16] Nonuse values represent the value people place on knowing that a resource exists unaltered.[17] The resource remains valuable regardless of whether somebody will consume, mine, produce, or use it. As such, nonuse values implicate an individual's willingness to pay[18] for a resource to continue to exist without having a productive economic use.[19] Failing to consider nonuse values leads to inefficiencies in court-awarded damages and a failure to truly reflect a resource's intrinsic value.[20]

The most common way to measure noneconomic values is CV. In a CV, economists create a contingent or hypothetical market for a resource and ask individuals how they would act in that hypothetical market.[21] Consumer answers to the hypotheticals help economists infer how much nonuse value a resource might have.[22] For example, an economist may poll tourists at a national park to uncover how much a typical person would spend or has spent to see the national park.[23] The amount of money one spends or the tax increase one will stomach to see a national park contributes to the park's noneconomic value.[24] A tourist cannot utilize the national park for an economic end, like mining, so the nonuse value a consumer places on visiting a park is, approximately, the amount of money they spend on a trip to that national park.[25] With that in mind, the next two sections provide a brief history of relevant companion animal law and environmental law.

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16. Jeffrey C. Dobbins, *The Pain and Suffering of Environmental Loss: Using Contingent Valuation to Estimate Nonuse Damages*, 43 DUKE L. J. 879, 902 (1994).

17. *Id.*

18. "Willingness to Pay" is a term of art in behavioral economics. Its use in environmental economics refers to how much consumers would pay to see a resource protected or for a resource's continued existence. TOM TIETENBERG & LYNNE LEWIS, ENV'T & NAT. RES. ECON. 81 (11th ed. 2018).

19. *Id.* at 75.

20. Dobbins, *supra* note 16, at 940.

21. *Id.* at 899 (noting that some CV studies also find nonuse value by measuring the amount of real money people have spent in the past to enjoy a resource, rather than creating a hypothetical market).

22. 43 C.F.R. § 11.83(d)(5)(i) (1992) ("The contingent valuation methodology includes all techniques that set up hypothetical markets to elicit an individual's economic valuation of a natural resource.").

23. TIETENBERG & LEWIS, *supra* note 18, at 87.

24. *Id.*

25. A 2016 study approximated the value of the United States' National Parks to be, at minimum, $92 billion using a contingent valuation method like this, though much more complicated. That figure does not account for the value international visitors place on US National Parks. Michelle Haefele et al.,

B. Background of Companion Animal Common Law

Compensatory rules for companion animal damages stem from each state's common law, but the general rule is consistent across jurisdictions: most state courts do not allow noneconomic damages for harm to companion animals and consider companion animals "personal property."[26] Courts developed this rule to fill the gap in state statutes because states do not always have laws for damage to personal property.[27] The general rule exists because judges often say that placing monetary value on emotional attachment can lead to undisciplined or irrational damage amounts, or because judges would feel more comfortable with legislatures answering the question instead.[28] This judicial reluctance hints at the difficulty of calculating the value of noneconomic or abstract interests.

C. Background of Environmental Statute Damages Provisions

Compensatory rules for environmental damages, on the other hand, include alternative methods for calculating harm, opening the door for noneconomic valuation. Since the landmark 1989 case *State of Ohio v. United States Department of the Interior*,[29] courts, agencies, and private citizens alike have struggled with valuing abstractions like "the environment." Congress and regulators have attempted to deal with such abstractions through the damages provisions of statutes like CERCLA and the Oil Pollution Act (OPA) and their respective regulations.[30]

In *Ohio v. U.S. Dept. of the Interior*, the D.C. Circuit considered the Department of the Interior's (DOI) regulations allowing for CV under CERCLA.[31] CERCLA provides a broad foundation for measuring natural resource damages by requiring damages calculations to "take into consideration factors including, but not limited to, replacement value, use

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Total Economic Valuation of the National Park Service Lands and Programs: Results of a Survey of the American Public, 71 HARV. ENV'T ECON. PROGRAM 1, 3 (2016).

26. Sentell v. New Orleans, 166 U.S. 698, 701 (1897); Goodby v. VetPharm, Inc., 2009 VT 52, ¶ 11, 186 Vt. 63, 974 A.2d 1269; Morgan v. Kroupa, 702 A.2d 630, 631–32 (1997); Strickland v. Medlen, 397 S.W.3d 184, 198 (Tex. 2013); Burgess v. Shampooch Pet Indus., Inc., 131 P.3d 1248, 1250 (Kan. Ct. App. 2006); McDougall v. Lamm, 48 A.3d 312, 326 (N.J. 2012).

27. *E.g.*, *McDougall*, 48 A.3d at 324–25 (explaining that damages for trespass to chattel or conversion stem from common law causes of action).

28. Scheele v. Dustin, 2010 VT 45, ¶ 15, 188 Vt. 36, 998 A.2d 697 ("[W]e also recognize instances where the issue presented 'is better left for legislative resolution.'" (quoting State v. Leblanc, 149 Vt. 141, 145, 540 A.2d 1037, 1040 (1987)).

29. Ohio v. Dep't of Interior, 880 F.2d 432 (D.C. Cir. 1989).

30. 42 U.S.C. § 9651(c)(2); 33 U.S.C. § 2706(d)(1).

31. *Ohio*, 880 F.2d 432.

value, and ability of the ecosystem or resource to recover."[32] This implies that other values, such as noneconomic values, may hold significance.[33] CERCLA further provides that damages "shall not be limited" by restoration costs.[34] This language "carries with it the implication that restoration costs are the basic floor measure, not a ceiling," and noneconomic valuation can find purchase under CERCLA claims.[35] The D.C. Circuit held that DOI incorrectly assumed that "natural resources are fungible goods," which economists can measure,[36] and recognized "that natural resources have value that is not readily measured by traditional means."[37] The D.C. Circuit ultimately allowed CV as a measurement methodology when economists could not determine values otherwise.[38] This case illustrates two key points: (1) the simple, but controversial, idea that abstractions like "the environment" have value beyond their economic uses, and (2) courts are cognizant of this fact.

The OPA similarly opens the door to CV. The statute provides for damages equal to the "cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources" and "the diminution in value of those natural resources pending restoration."[39] The National Oceanic and Atmospheric Administration (NOAA), the agency implementing the OPA, has had panels studying CV since the OPA's enactment in 1990.[40] NOAA's interest in CV stems not only from the OPA's language, which is fairly broad, but from committee reports too. In a 1989 Senate Committee Report, one Senator remarked that the OPA highlights how "forests are more than board feet of lumber, and that seals and sea otters are more than just commodities traded on the market."[41] The OPA, while flawed, illustrates how federal environmental damages provisions allow CV where standard market valuation methods do not work.

Companion animal and environmental damages have developed along divergent paths. Companion animal common law limits companion-animal value to just fair market value. Environmental damages statutes have begun to accept the abstract nature of damage valuations, opening the door to CV

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32. 42 U.S.C. § 9651(c)(2).

33. Judith Robinson, *The Role of Nonuse Values in Natural Resource Damages: Past, Present, and Future*, 75 TEX. L. REV. 189, 198 (1996).

34. 42. U.S.C. § 9607(f)(1).

35. Robinson, *supra* note 33, at 198.

36. *Ohio*, 880 F.2d at 456.

37. *Id.* at 457.

38. *Id.* at 476–77.

39. 33 U.S.C. § 2706(d)(1).

40. Ronald M. Pierce, *Valuing the Environment: NOAA's New Regulations Under the Oil Pollution Act of 1990*, 22 PEPP. L. REV. 167, 170 (1994).

41. S. REP. NO. 101-94, at 15 (1989).

methods. Having defined CV and examined the divergent approaches to calculating damages, the next section analyzes the disparity between companion-animal damages and the environmental statute damages identified above.

II. TYRANT OR GENIUS: THE DISPARITY BETWEEN COMPANION-ANIMAL DAMAGES AND ENVIRONMENTAL STATUTE DAMAGES

> "The man who gives France power over the world today only to trample her underfoot, this man whose genius I admire and whose despotism I abhor, this man encircles me with his tyranny as with a second solitude. . . ."[42]

In the 200 years since Napoleon's death, historians and the public have debated his legacy as a nation-builder, but also as a tyrant.[43] He is, at once, the savior of France and plunderer of Europe.[44] This dichotomy parallels the diverging paths of animal law and environmental law. Neither nonhuman animals nor the environment fits the label "property." They both take on their own class as something other than property.[45] Yet, they have developed since the 19th century down diametrically opposed paths, much like Napoleon's legacy.[46]

This section analyzes the differences in policy that created the disparity between companion-animal damages and environmental damages, and ends with common ground from which the divergent policies could converge. The difference largely rests in the public's diverging conception of "pets" and "the environment."[47] Historically, and to this day, companion animals are legally considered the "personal property" of their "owners."[48] On the other

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42. FRANÇOIS-RENÉ DE CHATEAUBRIAND, MEMOIRS FROM BEYOND THE GRAVE: 1768–1800, at 10 (Alex Andriesse trans., N.Y. Rev. Books 2018) (1849).

43. Sudhir Hazareesingh, *Napoleonic Memory in Nineteenth-Century France: The Making of a Liberal Legend*, 120 MLN 747, 773 (2005).

44. *Id.*

45. Angela Fernandez, *Not Quite Property, Not Quite Persons: A 'Quasi' Approach for Nonhuman Animals*, 5 CANADIAN J. COMPAR. & CONTEMP. L. 155, 198 (2019).

46. The 1899 Rivers and Harbors Act "often is considered the first" U.S. environmental statute (this statute covers environmental crimes specifically). David M. Uhlmann, *Environmental Crime Comes of Age: The Evolution of Criminal Enforcement in the Environmental Regulatory Scheme*, 4 UTAH L. REV. 1223, 1223 (2009). As for animal law, *Pierson v. Post*, decided in 1805, represented one of the first U.S. cases dealing with animals as property. Pierson v. Post, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

47. *See* Strickland v. Medlen, 397 S.W.3d 184, 198 (Tex. 2013) (explaining that pets are no more than personal property); for the "environment," the concept typically manifests as the "tragedy of the commons." *See* Nat. Res. Def. Council, Inc. v. Costle, 568 F.2d 1369, 1378 (D.C. Cir. 1977) (explaining the tragedy of the commons).

48. Sentell v. New Orleans, 166 U.S. 698, 701 (1897); *Strickland*, 397 S.W.3d at 198.

hand, policymakers view the environment as a public good and their approach to fixing environmental damage involves restoring the harms done.[49] Despite these varying conceptions, companion animals and the environment do share common ground that could serve as the foundation for elevating nonuse and CV to the forefront of damages calculations.

A. Living Up to the Name: The Domineering Companion-Animal Approach to Damages Fails to Reflect the Importance of Nonhuman Family Members

> "Napoleon was able to convince himself that, despite all the obvious obstacles, he could, through force of will, succeed in bringing Russia and especially Emperor Alexander I, the sole power on the continent that refused to pay him homage, to their knees."[50]

People draw on the imagery of Napoleon Bonaparte as an autocratic ruler to characterize a person as domineering.[51] Napoleon's arrogant exertion of his will onto others led to his failed march on Moscow and defeat at Waterloo.[52] Napoleon's vices parallel the majority approach to companion animals—including rules for damages—because courts flippantly dismiss plaintiffs who would deign to assign a noneconomic value to companion animals.[53] This section illustrates the ways courts trivialize companion animals, then examines the three foundational reasons courts exert their will on companion animals: (1) the fair market value limitation for personal property, (2) the owner as the focus of restoration, and (3) the impermanence of the injury.

The remedy for damage to companion animals is compensation for the reduction in fair market value of the companion animal, also known as the "property," as a result of the damage.[54] This results in courts rarely considering the life they call "property," but instead treating that life like common machinery needing repairs.[55] Sometimes judges even quip throughout their opinions or fail to take seriously legal arguments for companion animals.[56] In many cases, judges show reverence for the value

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49. 42 U.S.C. § 9651(c)(2).
50. Kroll et al., *supra* note 8.
51. *Id.*
52. *Id.*
53. *See Goodby*, 2009 VT 52, ¶ 11; *Strickland*, 397 S.W.3d at 198; Burgess v. Shampooch Pet Indus., Inc., 131 P.3d 1248, 1249–50 (Kan. Ct. App. 2006).
54. Gluckman v. Am. Airlines, Inc., 844 F. Supp. 151, 158 (S.D.N.Y. 1994).
55. *Id.*
56. *See, e.g.,* Strickland v. Medlen, 397 S.W.3d 184, 185 (Tex. 2013) ("Even the gruffest among us tears up (every time) at the end of *Old Yeller*.").

companion animals bring to their families, just to dismiss that value in favor of arcane precedent.[57] For example, then-Justice Don Willett of the Texas Supreme Court cited the quote in the title of this article. Justice Willet lauded the relationship between human and companion animals as one of great importance in society but lacking enough "sober-mindedness" for a brightline rule that could overturn a 122-year-old precedent.[58] By trivializing actions for companion-animal damages while acknowledging their ability to reform the common law, state courts exemplify the vices of arrogance and hubris many historians attribute to Napoleon's downfall.

The first reason the companion-animal approach precludes noneconomic valuation is the severe limitation on courts to award damages for the fair market value of personal property. The common law rule provides that the appropriate measure of damages for personal property equals the property's market value at the time of the loss, or the difference in its market value before and after taking damage.[59] When personal property has seemingly no market value, as is often the case with companion animals, courts look to other factors like cost of repair, original cost, loss of use, and cost of replacement, but limited still by market value.[60] Proponents of the fair market approach argue that the market provides consistency and allows courts to objectively measure and apply a dollar figure.[61] The rigidity of fair market value, however, hinders any attempt to recognize the noneconomic value companion animals bring to their families. This means courts cannot give effect to the important role companion animals play in the lives of their families without overturning precedent.

The second reason the companion animal approach precludes a noneconomic valuation method involves the focus on the companion animal's owner, rather than the companion animal as its own being. This issue manifests in two ways. Courts will not find for plaintiffs if the damage to their companion animal was directed at the companion animal rather than the plaintiffs themselves.[62] For example, a veterinary clinic in Vermont was

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57. *See, e.g.*, *Strickland*, 397 S.W.3d. at 197-98 ("[N]o one disputes that a family dog . . . is a treasured companion. But it is also personal property . . . . "); Goodby v. VetPharm, Inc., 2009 VT 52, ¶ 8, 186 Vt. 63, 974 A.2d 1269 (citing *Morgan v. Kroupa*, 167 Vt. 99, 103, 702 A.2d 630, 633 (1997) (citing *Morgan v. Kroupa*, 167 Vt. 99, 103, 702 A.2d 630, 633 (1997) (emphasizing the proposition that pets are unique because of their emotional value to humans, yet still limiting recovery for noneconomic damages).

58. *Strickland*, 387 S.W.3d at 197–98.

59. Averett v. Shircliff, 237 S.E.2d 92, 95–96 (Va. 1977).

60. Burgess v. Shampooch Pet Indus., Inc., 131 P.3d 1248, 1250 (Kan. Ct. App. 2006).

61. 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, 231 (2003).

62. Goodby v. VetPharm, Inc., 2009 VT 52, ¶ 12, 186 Vt. 63, 974 A.2d 1269; Daughen v. Fox, 539 A.2d 858, 864 (Pa. Super. Ct. 1988).

sued for negligent infliction of emotional distress when it prescribed a lethal dose of amlodipine to a pair of cats.[63] The court found the clinic not liable because it prescribed the amlodipine to the cats and not to the cats' owners; the owners, not the cats, were protected from negligence.[64] Courts also will not award damages based on the companion animal's injury or that injury's impact on the health of the family as a whole.[65] Rather, the award compensates the owner's economic injury to the extent of the companion animal's fair market value.[66] The common-law focus on the owners of companion animals, rather than the animals themselves, impedes any consideration of the noneconomic value of companion animals.

Finally, the companion-animal approach precludes noneconomic valuation because the fleeting nature of tort-type damages makes true restoration of noneconomic value impossible. Fair market valuations emphasize quick remedies to make the property owner economically whole again. Personal property is typically easily liquified and gets replaced all the time as part of the usual cost of business.[67] This approach fails to consider the noneconomic value of companion animals, and also of dear personal property.[68] The impermanence of companion-animal damages means monetary and market-based compensation look like the ideal form of restitution, when a market-based approach, in truth, lacks the equipment to deal with noneconomic values.

State courts have rejected noneconomic valuation of companion animals as too unprincipled, despite acknowledging the importance of companion animals to their families.[69] This domineering approach allows courts—humans—to exert their will on companion animals without due respect for the animals' noneconomic value. In contrast to the environmental approach, examined next, courts limit companion animal damages to fair market value while focusing on the owner and the impermanence of the injury.

B. Consolidating Around Wellington: How Environmental Statutes Integrate Nonuse Values into Damages

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63. *Goodby*, 2009 VT 52, ¶ 13.
64. *Id.*
65. *Id.* ¶ 11.
66. *Id.* ¶¶ 7, 11.
67. Alexandra Twin, *What is Replacement Cost and How Does It Work?,* INVESTOPEDIA, (June 28, 2024), https://www.investopedia.com/terms/r/replacementcost.asp.
68. For example, some courts express sympathy for plaintiffs who have lost family heirlooms and items of incredible personal importance that fetch nominal amounts in fair markets. *E.g.,* Strickland v. Medlen, 397 S.W.3d 184, 192 (Tex. 2013) ("Texas law would permit sentimental damages for loss of an heirloom but not an Airedale.").
69. *Strickland*, 387 S.W.3d at 198.

> "Wellington's largely inexperienced army had withstood the shock and awe of a nineteenth-century battlefield . . . . The French had again and again attacked Wellington's chosen strong position without any significant successes to encourage them . . . ."[70]

Arthur Wellesley, 1st Duke of Wellington and former Prime Minister of the United Kingdom, was also the focal point of the allied counterattack on Napoleon during the Battle of Waterloo.[71] British, Dutch, German, and Prussian forces teamed up, and under the leadership of General Wellington, defeated Napoleon.[72] This historical convergence of interests, in the face of overwhelming odds, highlights how animal advocates and state courts could consolidate around the environmental approach to nonuse valuation. This section examines two reasons the environmental approach has more flexibility to use nonuse valuation: calculating an abstraction like environmental damage necessitates nonuse values, and statutory restoration costs are vague enough to allow nonuse valuation.[73]

Congress, in drafting CERCLA, had the unique challenge of providing damages provisions for the environment—an abstraction that does not fit neatly into a category like "property." The general conception of "environment" revolves around the public's use of natural resources rather than an object somebody owns—it is held to exist for common use and enjoyment by human and nonhuman animals.[74] Environmental statutes like CERCLA provide for damages that would help *restore* the environment to its pre-injured state.[75] While this often includes fair market value calculations, it also gives agencies the latitude to use other valuation methods, such as CV.[76]

The first reason the environmental approach has the flexibility to use CV is that environmental damages involve such abstract elements that using

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70. DAVID KIRKPATRICK, FIGHTING IN THE FOG OF WAR: DECISION-MAKING UNDER EXTREME UNCERTAINTY IN THE WATERLOO CAMPAIGN 70 (Royal United Servs. Inst., 2015).

71. *Id.*

72. *See generally, id.* at 61–72 (explaining the stages of the Battle of Waterloo).

73. While federal environmental statutes may indirectly support nonuse valuation methods, it is important to note that federal law fails in many respects to protect the environment, keep the public healthy, and properly weigh ecosystem and abiotic interests, especially on multigenerational timescales. For example, 26 U.S.C. § 162(f)(2) allows businesses to deduct from gross income costs associated with restitution, so businesses can end up writing off otherwise taxable income when cleaning up business-related environmental damages. MOLLY F. SHERLOCK, CONG. RSCH. SERV., R41365, TAX DEDUCTIBLE EXPENSES: THE BP CASE 1 (2010).

74. This idea typically manifests as the "tragedy of the commons." *See* Nat. Res. Def. Council, Inc. v. Costle, 568 F.2d 1369, 1378 n.19 (D.C. Cir. 1977) (explaining the tragedy of the commons).

75. 42 U.S.C. § 9651(c)(2) (emphasis added).

76. Ohio v. Dep't of Interior, 880 F.2d 432, 457 (D.C. Cir. 1989) ("[N]atural resources have value that is not readily measured by traditional means.").

nonuse valuation methods becomes necessary to restore the damaged ecosystem. As the *Ohio* court mentioned, Congress understood that "natural resources have value that is not readily measured by traditional means."[77] Beyond the fact that natural resources have a noneconomic intrinsic value, environmental damages also impact humans differently than companion animal damages. For example, environmental damages often occur globally, such as with greenhouse gas emissions, and courts cannot handle damages for this kind of untraceable environmental harm.[78] Additionally, no individual suffers from environmental damages in isolation because environmental damages harm everybody generally and take their toll over generations.[79] Unlike companion animal damages, courts cannot usually immediately calculate environmental damages.

Second, environmental damages statutes lend themselves to nonuse valuation methods because Congress has left restoration costs vague, allowing for variable methodologies. The OPA and CERCLA both provide for damage measurements by requiring agencies to consider a non-exhaustive list of factors.[80] Critics harp on this fact and scholars argue relentlessly about the proper valuation methodology.[81] Such broad authority for determining what damages calculation will best restore the environment opens the door to nonuse valuation of all types. This broad authority also allows evolution as new methodologies emerge and, perhaps, better serve the interests of the public.[82] Most importantly, statutory vagueness allows agencies to account for abstractions in the environment with unknowable fair market values.

Environmental statutes, though imperfect, allow for nontraditional valuation of noneconomic interests. The public's conception of the "environment" and abstractions associated with such a broad term reinforces the importance of nonuse valuation methods. Animal advocates can consolidate around the valuation methods agencies use—much like the allied forces did with General Wellington—to overcome the common law

77. *Ohio*, 880 F.2d at 457.

78. *See* City of New York v. Chevron Corp., 993 F.3d 81, 92 (2d Cir. 2021) (explaining that a suit to hold greenhouse gas emitters liable for the effects of emissions globally falls "beyond the limits" of state and common law).

79. *Our Natural Resources at Risk: The Short- and Long-Term Impacts of the Deepwater Horizon Oil Spill (Part 1 of 3) Before the Subcomm. on Insular Affs., Oceans and Wildlife of the Comm. on Nat. Res.*, 111th Cong. 17–26 (2010) (statement of Jane Lyder, Deputy Assistant Secretary for Fish and Wildlife and Parks, U.S. Department of the Interior).

80. 33 U.S.C. § 2706(d)(1); 42 U.S.C. § 9651(c)(2).

81. *See, e.g.*, Martin Desjardins, *Ecosystem Services: Unifying Economic Efficiency and Ecological Stewardship Via Natural Resource Damage Assessments Under CERCLA*, 21 GEO. MASON L. REV. 717, 741 (2014) (arguing that a methodology called "habitat equivalency analysis" implements the principles of CERCLA better than CV).

82. *Id.*

restriction on noneconomic values. The failure of courts to adopt a modern approach to this issue is a major blunder on the part of a judicial system that purports to institutionalize evolving social values.

C. Capitalizing on a Blunder: From an Ill-Fitting Label, the Companion Animal and Environmental Approaches Could Converge

"Both armies fought in conjunction, to both went the honours of victory . . . . Neither army beat Napoleon alone."[83]

Historians generally view Napoleon's delay in attacking at Waterloo as his major blunder.[84] Napoleon delayed because a recent storm made the ground too soft for his offensive; he wanted to let the ground dry first.[85] By delaying his attack, Napoleon gave General Wellington an opportunity to consolidate British forces, rendezvous with the Prussian General Blücher, and launch a counterattack.[86] This major historical event gives insight into the current animal rights movement: animal and environmental advocates must capitalize on the broadening of damages calculations in environmental statutes. Like the allied opposition to Napoleon, these advocates must convert their advantage into a substantial step forward for their campaigns.

Companion animals and the environment fill special niches without neatly fitting into the "property" category. In fact, some legal scholars have started labeling companion animals "quasi-property."[87] It is from this ill-fitting categorization that the companion animal approach could converge with the environmental approach. This section explains how contingent valuation could work for companion animal damages, address gaps in the literature that overlook the utility of CV, and rebut criticisms about CV.

Economists and valuation experts can use CV to fill in the gaps left behind by common law and statutory damages provisions. As mentioned earlier, CV works by measuring how much consumers are willing to spend to ensure something continues to exist, or how much consumers are willing to spend on an experience.[88] Statistical figures exist for how much nonuse

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83. ROGER PARKINSON, THE HUSSAR GENERAL: THE LIFE OF BLÜCHER, MAN OF WATERLOO 240 (Wordsworth Editions Ltd. 2001) (1975).

84. *Id.* at 238.

85. John F. Fuller, *Weather and War*, 23 AEROSPACE HISTORIAN 24 (1976).

86. *Id.*

87. Fernandez, *supra* note 45, at 167–68.

88. TIETENBERG & LEWIS, *supra* note 18, at 79.

value an average person places on their companion animal, just as they do for how much nonuse value a person places on the environment.[89]

The statistical figures for the value humans place on their nonhuman companions are staggering. According to the Pet Advocacy Network, the U.S. pet industry exceeded $221.1 billion of total economic output in 2022, including $32.3 billion spent on food and $14.5 billion spent on pet products.[90] Studies indicate that annual costs for dog owners range from $1,000 to $7,080, not including benefits outside typical "pet spending" categories (such as shelter, energy, heating, etc.).[91] These figures do not reflect additional costs associated with more exotic companion animals.[92] Hurley's story highlights the main message of this section: nonuse valuation works for companion animals because the large amounts of money families spend on their companion animals reflects the noneconomic value companion animals bring to their households.

CV in state courts would not completely invalidate other valuation methods. Critics may argue that CV would lead to enormous damages. Critics may also say this method would hurt lower income people who cannot spend as much on companion animals. Values derived from CV do not have to be determinative, however. This article suggests, rather, that CV methods should inform court-awarded damages to better reflect the value companion animals bring to society. Damage amounts do not necessarily have to reach the high amounts spent by wealthy households on their companion animals. Damage awards should, at minimum, afford companion animals the respect they are due as esteemed and loving members of the family.

Scholarship on companion animal damages generally recognizes that the current valuation methods are flawed, but scholars do not argue for CV.[93] Some articles argue for measurements based off models for the wrongful

89. *See* Lindsay Johnson et al., *How Valuable Are National Parks? Evidence from a Proposed National Park Expansion in Alaska*, 37 PUBMED CENT. 1, 2 (2020) (finding that US citizens have a "willingness to pay" of over $79 billion for a proposed Alaskan National Park expansion using CV).

90. *Economic Impact of the U.S. Pet Industry*, PET ADVOCACY NETWORK, https://petadvocacy.org/wp-content/uploads/2022/02/National_PetCare_Economic_Impact.pdf (last visited Feb. 16, 2025).

91. Heidi Gollub & Kara McGinley, *Cost of Dog Ownership Statistics 2025*, USA TODAY, https://www.usatoday.com/money/blueprint/pet-insurance/how-much-does-a-dog-cost-per-year/ (Sept. 25, 2024, 4:39 PM).

92. PET ADVOCACY NETWORK, *supra* note 90.

93. One interesting article does take a novel approach, suggesting that companion animal representation in court may develop similarly to guardianship rules for minor children, helping with proper valuation. Schyler P. Simmons, *What Is the Next Step for Companion Pets in the Legal System? The Answer May Lie with the Historical Development of the Legal Rights for Minors.*, 1 TEX. A&M L. REV. 253, 284 (2013).

death of children,[94] others would expand Tennessee's "T-Bo"[95] model to other states,[96] and others still call for various statutory reforms.[97] But these models ignore the similarities between the environment and animals as unique entities, or "quasi-property." The wrongful-death-of-children approach retains its anthropocentric focus as it emphasizes the recovery of lost investment put into a companion animal.[98] The T-Bo approach has a statutory cap of $5,000, further limited when the harm stems from negligence.[99] Rather than reinvent the wheel, courts should look to environmental statutes and expert economists who have developed methods like CV to measure minimum noneconomic values without regard to one's actual investment.

Critics of CV often repeat some variation of the floodgate or slippery slope argument along with a handful of substantive critiques.[100] The floodgate concerns do not rise above mere public clamor. A well-implemented CV program would benefit companion animals and their families while increasing deterrence by increasing potential damages.[101] A well-implemented CV program could also mitigate fraudulent or frivolous cases by establishing guidelines for CV use and the role of expert economists. In addition, litigants must still make a case for tortious conduct that harmed their companion animal; using CV does not create a blank check for opportunistic plaintiffs. A vague threat of potential litigation should not preclude affording companion animals the value they bring to families.

Critics of CV also express concerns about its accuracy. Opponents of CV generally take one or more of the following stances: CV does not accurately predict behavior or reflect rational choice; CV leads to implausible

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94. Byszewski, *supra* note 61, at 234.

95. The T-Bo Act is a Tennessee statute that allows a plaintiff to sue for up to $5,000 for noneconomic damages in the case of a death of a companion animal. That figure is reduced for negligent actions. The statute is helpful but lacks the nonuse valuation that makes a CV study so helpful. The arbitrary $5,000 damages cap does not consider as wide a range of factors as a CV study could. Death of Pet Caused by Negligent Act of Another (T-Bo Act), TENN. CODE ANN. § 44-17-403 (2025).

96. Sabrina DeFabritiis, *Barking up the Wrong Tree: Companion Animals, Emotional Damages and the Judiciary's Failure to Keep Pace*, 32 N. ILL. UNIV. L. REV. 237, 256 (2012).

97. Parker, *supra* note 3, at 123; Morgan Phelps, *Damages for Tortious Harm to Pets: Minnesota's Market Value Approach Severely Undercompensates Plaintiffs*, 49 MITCHELL HAMLINE L. REV. 778, 796 (2023).

98. Note that this approach is different than contingent valuation because it is based on one's investment in their companion animal, while contingent valuation measurements attempt to reflect a companion animal's true noneconomic value *regardless* of one's investment. Byszewski, *supra* note 61, at 234.

99. T-Bo Act, TENN. CODE ANN. § 44-17-403 (2025); DeFabritiis, *supra* note 96, at 257.

100. *See, e.g.*, Strickland v. Medlen, 397 S.W.3d 184, 195 (Tex. 2013) ("There seems to be no cogent stopping point, at least none that doesn't resemble judicial legislation.").

101. Margit Livingston, *The Calculus of Animal Valuation: Crafting a Viable Remedy*, 82 NEB. L. REV. 783, 829 (2004).

responses; CV leads to a lack of budgetary constraints; and consumers lack understanding about the contingent market presented to them, leading to inaccurate valuations.[102] Critics have used such arguments since NOAA first considered using CV under the OPA, and their arguments have merit.[103]

Two arguments, working together, should address these concerns. First, courts must allow tort damage measurements to evolve as societal values evolve; second, CV methods attain scientific credibility when implemented carefully. As to the first, this article does not posit that CV should remain the default valuation method. Valuation methods, tort law, and common law should continue to adapt with time and societal interests.[104] Second, even with its flaws and imperfections, CV methods already designed by agencies under environmental statutes provide a scientifically valid and more accurate estimate of companion animal damages than the current approach.[105] By borrowing from CV methods designed to administer federal statutes, state courts can begin proving how much they respect the relationship between companion animals and humans with noneconomic damages.

Companion animals fall outside the property classification in popular conception but remain trapped within it for legal purposes. CV offers a means to reflect the true value families and the courts place on companion animals. Accurate and updated statistics on companion animal spending can inform noneconomic valuation. While CV critics and legal scholars overlook the utility of CV, federal agencies have developed scientifically valid models that courts and advocates can adapt to common law damages. The frameworks exist, and public policy supports such an adaptation.

III. LEAVING NAPOLEON IN WATERLOO: POLICY ARGUMENTS SUPPORTING CONTINGENT VALUATION IN COMPANION ANIMAL DAMAGE AWARDS

"Then all the world flamed up in wrath;
Europe at last threw off her yoke;
And straight upon the tyrant's path
The curse of all the nations broke.
The people's vengeful hand upraised
The giant sees across his track,
And every wrong is now appraised,

102. Pierce, *supra* note 40, at 179–81.

103. *Id.* at 190.

104. Livingston, *supra* note 101, at 813 (noting that tort law seeks to effectuate social values).

105. Pierce, *supra* note 40, at 190, 212 (explaining that NOAA, under the OPA, crafted a scientifically valid CV with guidelines for survey instrument design and development, survey administration, and the nature of CV results, which state courts, state bar associations, or animal advocate groups could adapt to court systems).

And every injury paid back."[106]

Alexander Pushkin wrote the poem excerpted above on the day of Napoleon's death in 1821.[107] The selected passage critiques Napoleon's legacy. This critique is especially telling given that Pushkin was a contemporary of Napoleon; it did not take long for Napoleon's legacy as a tyrant to crystallize.[108] As the poem asserts, the appraisal and paying back of injuries caused by past mistakes was the next step after Napoleon's reign. This section of the article draws on that parallel, presenting policy rationales for adopting CV and attempting to repay the harm caused by failing to properly value companion animals. The onus may fall on state legislatures to implement these policy objectives, as courts have made clear their reluctance to change common law, regardless of the benefits.[109] The three policy arguments examined in this section include: (1) coming to terms with abstractions, (2) turning toward a new idea of "personhood," and (3) garnering more respect for animal movements through serious damage provisions.

First, using the CV method for companion animal damages will enable policymakers and legal scholars to accept that abstractions incompatible with market valuations do exist. Courts use the fair-market-value metric to avoid unprincipled rationalizations for monetary relief.[110] This metric does not account for abstract concepts that fair market values cannot reflect. For example, emotional attachment as it relates to companion animals, or aesthetic beauty as it relates to national parks, have no commensurate market value. CV allows policymakers and experts to attribute some value to the abstract variables that matter to consumers.

Second, using CV would enable policymakers and the wider public to start looking toward a new conception of personhood. By taking a stance on where companion animals fall on the person-to-property spectrum, legislatures and state courts can force people to reconsider where all nonhuman animals fall on that spectrum. If policymakers continue to view companion animals as personal property and reject the fact that companion animals have an intrinsic and noneconomic value, animals will remain legally undervalued. The small step of implementing methods of valuation that account for noneconomic and intrinsic uses can open the door for legislatures to completely reorganize the nonhuman hierarchical structure.

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106. Alexander Pushkin & Bernard Pares, *Napoleon*, 15 SLAVONIC & E. EUR. REV. 493, 496 (1937).
107. *Id.* at 493.
108. *Id.*
109. Scheele v. Dustin, 2010 VT 45, ¶¶ 14–15, 188 Vt. 36, 998 A.2d 697.
110. Strickland v. Medlen, 397 S.W.3d 184, 198 (Tex. 2013).

Finally, recognizing the noneconomic value of companion animals through CV will afford nonhuman animals more respect than they currently garner. Allowing noneconomic damage valuations would solidify the growing movement toward animal rights by recognizing that companion animals and all nonhuman animals demand respect, and judicial enforcement reflects this respect. Human and nonhuman animals may not share a language, but in a market-based societal structure, policymakers can use money to make humans consider the nonhuman animal's perspective.

Just as France moved on from Napoleon, state courts can move on from market-based assessments. The natural world contains complexities incomprehensible to free markets. By using nontraditional valuation methods, policymakers can shed their dismay of abstractions, the legal system can move toward a reorientation of personhood, and human animals can finally look upon nonhuman animals with the respect they have earned over the last few millennia. Companion animals, like Hurley, are cherished family members and sentient beings, not replaceable trinkets or tools.

CONCLUSION

Napoleonic parallels and personal anecdotes aside, using contingent valuation in tort damage valuations is not radical or dramatic. This article does not call for a fundamental restructuring of the speciesist hierarchy.[111] This article does not even argue to explicitly remove nonhuman animals from the "property" label and recognize them as entities with personas—that is, as persons. This article instead calls for an extremely specific reform to state court damage calculations that better reflects the importance of companion animals. Such a narrow reform was born of pragmatism, not a just resolve; state courts have made clear a reluctance to shake up centuries of precedent. But the narrowness of this reform also means it has staying power. Advocates and judges alike can argue for its application and smooth out the wrinkles along the way.

This article contains three components: the relevant companion animal law and environmental law background; the disjunct between the public conceptualization of companion animals and the environment broadly, and where specific commonalities could justify new damages valuation methods; and the policy arguments for using CV. Courts exert their will on companion animals because courts view those nonhuman animals strictly as property. Courts focus on the owner of the property, and damages in general emphasize the impermanence of the injury. As opposed to environmental statutes, which

111. By this term the author refers to a hierarchy of earth's creatures in which humans are considered, by their own estimation, superior to all other species.

attempt to give value to an abstraction far removed from the property-ownership conception.

The main thesis of the article involves the use of CV in companion animal damages. CV, while not a perfect measurement method, reflects the true value of companion animals better than the fair-market method. Economists and policymakers create new valuation methods all the time, so CV will not remain the best method. Courts should continually evolve along with measurement methods to reflect social values more accurately. CV currently works best with companion animals because so much data exists that shows the noneconomic value humans place on their nonhuman family members. CV also maintains scientific credibility and has more utility than other solutions offered in the scholarship reviewed.

When Aldous Huxley wrote "to his dog, every man is Napoleon," perhaps he meant not that dogs see their humans as Napoleon, but that humans see themselves through the dog's eyes as Napoleon. Whatever he meant, humans can change that narrative and offer their nonhuman family members a first step toward proper recognition. By rejecting the historically domineering approach in favor of a more cooperative, open-minded valuation method, humans can consolidate around noneconomic values and leave market valuation behind.