

We Say “Tomato,” They Say “Woof”: The Argument for Abandoning “Provocation” in Dog Bite Statutes

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I. INTRODUCTION

When a dog bites, state statutes impose liability on his owner for the resulting injuries and/or label the nonhuman animal “dangerous.”¹ What happens next frequently depends on whether the dog was “provoked.” The problem is that humans do not really know what goes on in a canine’s mind, and therefore, whatever the conclusion, it is suspect. In fact, although the number of people who identify themselves as ethologists² continues to grow, neither legislators nor judges seem closer to consistent answers, even when the

* Thanks to the Shepard Broad College of Law for the stipend that helped make this Article possible; UNIVERSAL UCLICK, Raegan Carmona, and Charles Schulz for the cartoon; my friends and colleagues, Kathy Cerminara, Olympia Duhart, Robert M. Jarvis, and Kathryn Webber for their suggestions; my research assistants Kristine Desoiza, Danielle Gittlin, and Nicole Rodolico for their help; NSU librarians Robert Beharriell and Alison Rosenberg for all the interlibrary loans; Mark Coady and Susan Melian for their patience and support while I was working on the Article, and, of course, all dogs everywhere who significantly improve the lives of their companion humans.

1. Although most courts treat animals as property, the Author of this Article believes this is inappropriate because nonhuman animals are not inanimate objects but rather sentient beings who are entitled to respect. As a result, when referring to dogs, this Article uses words like “who,” “he,” and “she,” rather than “that” or “it.” According to one animal expert, “unless discussing a female dog, I usually call the dog ‘him,’ as this is our gender-neutral term. The reputedly more neutral ‘it’ is not an option, for anyone who has known a dog.” ALEXANDRA HOROWITZ, *INSIDE OF A DOG: WHAT DOGS SEE, SMELL, AND KNOW* 12 (2010).

2. Ethologists are scientists who study cognitive ability of nonhuman animals (hereinafter animals), preferably in their natural environment. Marc Bekoff, “Do Dogs Ape?” Or “Do Apes Dog?” *And Does It Matter? Broadening and Deepening Cognitive Ethology*, 3 *ANIMAL L.* 13, 15 (1997).

situations are similar. Some believe the decision depends on what humans want to be true rather than what is actually reality. In other words, when an owner comes home and Fido is wagging his tail wildly, it might mean that Fido is really happy to see his "companion person." But it may not.

Typically, when determining whether a human perpetrator had sufficient justification to avoid liability for the harm he caused, judges look to whether he conducted himself as a reasonable person in his position would have.³ Measuring the conduct of a canine "offender" against "a reasonable dog under the circumstances" standard would mimic that test. Unfortunately, such a test would not make sense, as experts caution that it is difficult for people to get into the mind of someone of a different species.⁴ Because an animal's behavior is a reflection of his training,⁵ this Article concludes that the focus should be on the owner who fails to control his dog through proper training and supervision rather than on the animal.

To that end, Part I provides a brief history of the development over thousands of years of the extraordinary bond that currently exists between humans and their canine companions. Part II explores the literature discussing what scientists believe animals are thinking or even if they are "thinking" at all. Part III discusses general information and data about dog bites. Part IV explains the types of relevant statutes. Part V analyzes cases to highlight problems associated with attempting to evaluate whether a dog was provoked. Based on these difficulties, Part VI suggests that it is time to aban-

3. See, e.g., RESTATEMENT (SECOND) OF TORTS § 283 (AM. LAW INST. 1965). See John Gardner, *The Many Faces of the Reasonable Person*, 131 L. Q. REV. 563 (2015), http://www.law.nyu.edu/sites/default/files/upload_documents/The%20Many%20Faces%20of%20the%20Reasonable%20Person.pdf, for an interesting article on the many ways the law (in the United Kingdom) has used this standard.

4. See JENNIFER ARNOLD, THROUGH A DOG'S EYES 106 (2010) [hereinafter ARNOLD]. Jennifer Arnold has trained service dogs for people with disabilities and special needs for more than two decades. Jennifer Arnold, *Our Founder*, CANINE ASSISTANTS, <http://www.canineassistants.org/about/our-founder.html> (last visited Jan. 5, 2017).

5. See *State v. Anderson*, 566 N.E.2d 1224, 1226 (Ohio 1991) (noting that "as a result of breeding, training, and abuse, there are dogs that pose a grave threat to human health and safety.").

don provocation as the test because it is ineffective and unpredictable.⁶ Instead, an owner should be liable for damage his dog inflicts because he chose to have an animal he did not properly train and/or supervise. As a result, the proximate cause of the injury was the owner's failure to control his canine's behavior. This Article concludes with a proposed uniform statute followed by an Appendix that contains a chart providing information about each state's liability and/or dangerous dog statute(s) and specific language in those that use provocation.⁷

II. BECOMING MAN'S BEST FRIEND

Experts agree that several thousands of years ago, men and dogs (although at that time the animals were actually wolves⁸) banded together, ultimately for, and to, the benefit of both. However, controversy, rather than consensus, exists about exactly when, why, and where this happened.⁹ While it is true that most commentators conclude dogs were domesticated sometime between 14,000¹⁰

6. Although it is possible that someday humans and dogs will "speak" the same language, or at least better understand each other's thoughts and feelings, some ethologists seem to be making progress toward that goal. At this time, though, critical information is neither sufficient nor available to legislators who pass laws or judges who rule on cases.

7. The list is current as of July 1, 2016.

8. JOHN BRADSHAW, *DOG SENSE: HOW THE NEW SCIENCE OF DOG BEHAVIOR CAN MAKE YOU A BETTER FRIEND TO YOUR PET* 6 (2011).

While we are now certain that the grey wolf is the domestic dog's one and only direct ancestor, the dog shares its earlier ancestors with many other still-living relatives The dog's lineage, after all, goes back much further than that of the grey wolf—specifically, to canids that are now extinct but were themselves the ancestors of all of today's living canids.

Id.

9. David Grimm, *Dawn of the Dog*, 348 *SCI.* 274, 275–78 (2015). In fact, when commenting on the heated battles among the factions, one animal researcher explained that "[i]t's a very combative field. . . . More than any other subject in prehistory." *Id.* (quoting Mietje Germonpré, a famous paleontologist who became involved when she concluded a skull thought to be a wolf's was actually a dog's and, therefore, established a much earlier beginning of canines than originally thought). *Id.*

10. HAL HERZOG, *SOME WE LOVE, SOME WE HATE, SOME WE EAT* 104 (2010).

and 32,100¹¹ years ago, anthrozoologists¹² disagree about why this alliance came to be. There are two popular explanations.

According to one hypothesis, early humans were searching for food, brought wolves home, and for some reason, decided to keep them for pets rather than eat them. Proponents note that puppies within litters had different temperaments. Those who possessed the “combination of physique and temperament to make the necessary adjustments that would enable it to survive in a human community . . . probably [were] given preferential treatment.”¹³ They “also had unique characteristics like large eyes, attractive coloring, and curled tails which made them more endearing to humans.”¹⁴ These traits were passed on through generations. Eventually, “a separate animal, the dog, evolved.”¹⁵

The second theory suggests that, as people abandoned a nomadic lifestyle and created stable communities, wolves, who are scavengers, were attracted to garbage that humans generated.¹⁶

11. Monte Morin, *When—and Where—Did Dogs First Become Our Pets?*, L.A. TIMES, Nov. 14, 2013, <http://articles.latimes.com/2013/nov/14/science/la-sci-sn-dogs-domesticated-in-europe-20131114> (referring to recent study where authors concluded domestication probably happened “in Ice Age Europe, between 18,800 and 32,100 years ago—much earlier, and much farther north, than previously believed”).

12. Anthrozoologists are experts who study interactions between humans and other animals. INT’L SOC’Y FOR ANTHROZOOLOGY, <http://www.isaz.net/isaz> (last visited Jan. 5, 2017).

13. Kelly Wilson, Note, *Catching the Unique Rabbit: Why Pets Should Be Reclassified as Inimitable Property Under the Law*, 57 CLEV. ST. L. REV. 167, 188 (2009) (citation omitted).

14. *Id.* For an excellent discussion of “the importance of being cute,” see HERZOG, *supra* note 10, at 37–47.

Our attraction to some animals does seem to be instinctive. . . . The notion that humans are innately drawn to anything that looks like a baby—infants, puppies, ducklings, you name it—is called the “cute response.” The idea was first proposed by the Austrian ethologist Konrad Lorenz. Young animals share features with human infants; large foreheads and craniums, big eyes, bulging cheeks [sic], and soft contours. Lorenz referred to these characteristics as “baby releasers” because they automatically bring out our parental urges.

Id. at 39.

15. Wilson, *supra* note 13, at 188.

16. HERZOG, *supra* note 10, at 106.

Those in the pack who were less afraid began to hang around eating whatever was discarded.¹⁷ With a steady source of food, compared to those who had to depend on whatever they could capture themselves, they became stronger and more fertile.¹⁸ This not only meant they gave birth to a greater number of pups but also that their offspring were genetically likely to be less fearful and were more likely to adapt to living among people.¹⁹

Fortunately, progress on discovering exactly how humans domesticated dogs might be on the horizon. Two scientists, Greger Larson and Keith Dobney, have been researching the domestication of the pig, an animal similar to the dog who “played a crucial role in early human history but whose origins were murky.”²⁰ They decided their analytical system—studying all the samples they can get from all possible places and combining ancient DNA evaluation with geometric morphometrics—could be useful in the canine debate.²¹

Ironically, although it is an intriguing inquiry, the answer is not important for purposes of this Article. How, when, where, or even why the bond was forged between humans and canines is irrelevant. All that matters is the very special and undeniably strong connection that exists now. For many, this not only translates into a belief that humans and their dogs are able to express themselves without words but also that they can understand what the other is thinking and feeling.²² The following section discusses the evolution of these ideas and what researchers are discovering both about canine intelligence and their ability to communicate with their companion humans.

17. *Id.*

18. *Id.*

19. *Id.*

20. Grimm, *supra* note 9, at 277.

21. *Id.* at 277–78. Larson and Dobney also recognized that they needed cooperation from those on both sides of the debate, and several factors seem to have coalesced to achieve substantial participation and collaboration: (1) Larson and Dobney sought and received three million dollars in funding for the project. It is unusual to obtain money for dog research. But cash is a great motivator, so they contacted the others to get involved; (2) Larson has the type of personality that made it possible for him to win the confidence and trust of the others; (3) the natural curiosity and keen interest in finally learning the truth caused scientists to want to be a part of the discovery. *Id.*

22. See generally HEATHER DUNPHY, *THE SECRET LANGUAGE OF DOGS: THE BODY LANGUAGE OF FURRY BODIES* (2011).

III. DO DOGS THINK AND, IF SO, CAN THEY COMMUNICATE THEIR THOUGHTS SO HUMANS UNDERSTAND?

This Part includes two different but related inquiries, each important when considering provocation in dog bite cases. One is whether dogs are capable of abstract thinking, planning, feeling, etc. Here, the analysis focuses on canine intelligence and emotions. The second question is equally important. It concerns whether dogs can communicate their thoughts in such a way that humans can understand what they “say.” This is particularly problematic, as there are frequently miscommunications between and among humans.²³ “Add another species to the mix and you have the potential for significant, even catastrophic, misunderstandings.”²⁴

Some people claim there can be no real thought without language, by which they mean the spoken communications through which most humans converse.²⁵ Based on this belief, they refuse to even consider that animals are thinking, reasoning beings. But others recognize the myriad ways in which animals “talk.”²⁶ For example, Temple Grandin, who is autistic, asserts that animals, similar to

23. *See id.* at 9.

24. ARNOLD, *supra* note 4, at 106.

25. JEFFREY KLUGER, *THE ANIMAL MIND* 70–79 (2014) (on file with author). If dogs cannot understand people’s words “we roll our eyes bemusedly, give the beast a scratch behind the ear, and say to another human nearby, ‘Not exactly Einstein, is he?’” *Id.* at 71. Jeffrey Kluger goes on to illustrate the varied and complex ways in which animals do communicate with each other and with humans who listen. *Id.* at 72–78. A folktale in Zimbabwe has an interesting answer to the question and asserts that dogs know how to speak but choose not to. *See* STANLEY COREN, *HOW DOGS THINK* ix–x (2004) [hereinafter *HOW DOGS THINK*]. The story explains that Nkhango made a deal with a dog named Rukuba that if he would steal fire from the god Nyamurairi, humans would be dogs’ friends forever. *Id.* at ix. But, although Rukuba did provide fire, people later expected their canine companions to perform dangerous tasks, like hunting animals and protecting humans from others. *Id.* However, Nkhango went too far when he attempted to get dogs to become messengers. *Id.* at ix–x. Rukuba, who thought because he had provided fire that “he should be allowed to just lay near it in comfort,” balked. *Id.* at x. “‘People will always be sending me here and there on errands because I am smart and I can speak. But if I can’t speak, then I can’t be a messenger.’” *Id.* Thus, so the story goes, “[f]rom that day since, dogs have chosen not to speak.” *Id.*

26. DUNPHY, *supra* note 22, at 9. Heather Dunphy, a writer and journalist, has published more than 300 articles on all aspects of pet care. She warns that

people with autism, think in pictures rather than words.²⁷ Her explanation “makes a great deal more sense than accepting the notion

“[i]t is easy to forget that we can’t interpret dog behavior as we would a human’s behavior. Although we all communicate through facial expressions, body posture, movement, and vocalization our actions mean different things depending on the language used.” *Id.* Historically, she explains, human and dog languages were much more similar. *Id.* at 8. “Our cave-dwelling ancestors grunted their wishes to each other and relied on body language to communicate, just as our dogs do.” *Id.* However, people evolved and began using words while animals continued using body language. *Id.* Although people supplement speech with body language and dogs vocalize, their barks, growls, whines, and howls are a different “language” than humans’, “one that we can sometimes ‘speak’ and translate accurately, but very often get wrong.” *Id.* Recently, scientists recorded an exchange underwater between dolphins that “resembles a conversation between two people.” Sarah Knapton, *Dolphins Recorded Having a Conversation ‘Just Like Two People’ for First Time*, THE TELEGRAPH, Sept. 11, 2016, 1:08 PM <http://www.telegraph.co.uk/science/2016/09/11/dolphins-recorded-having-a-conversation-for-first-time>.

27. Jill Abramson, *The Tao of Temple*, N.Y. TIMES, Feb. 4 2010, <http://www.nytimes.com/2010/02/02/garden/02puppy.html>. Dr. Temple Grandin is a famous author who has written multiple books, an animal behaviorist, and a strong, life-long advocate for people with autism. *Temple Grandin Biography*, FAMOUS PEOPLE, <http://www.thefamouspeople.com/profiles/temple-grandin-2960.php> (last visited Jan. 6, 2017). Diagnosed as autistic at age two, and unable to talk until she was close to four, with strong support from her mother and important mentors at school, she successfully completed her education, earning a bachelor’s degree in psychology, and master’s and doctoral degrees in animal science. *Id.* She is perhaps best known for her suggestions to slaughterhouses and livestock farms about ways to improve the quality of life for cattle and simple things that can be done to reduce stress as the animals are sent to be killed for food. *Id.* Currently, she is a Professor of Animal Science at Colorado State University. *Id.* She designed a center track restrainer system that is used for almost fifty percent of cattle in North America. *Biography: Temple Grandin, Ph.D.*, GRANDIN, <http://www.grandin.com/temple.html> (last visited Jan. 6, 2017). Her curved chute and race systems are employed worldwide and her research and writings have been utilized to reduce stress on animals before and during slaughter. *Id.*; see also Temple Grandin, *Thinking the Way Animals Do: Unique Insights from a Person with a Singular Understanding*, 62 W. HORSEMAN 140 (1997) (“As a person with autism, it is easy for [Dr. Temple Grandin] to understand how animals think because [her] thinking processes are like an animal’s.”).

that dogs cannot think simply because they lack words.”²⁸ Nevertheless, others insist if humans cannot understand animals, it is irrelevant whether they can think.²⁹

A. *Understanding Dog Intelligence*

Researchers who study dogs devote their professional lives to trying to unlock the mysteries surrounding canine intelligence, including whether and what these animals are thinking.³⁰ But it was not always so as humans’ views have radically changed on these issues. While no one seems to think people were pondering these questions during the domestication period, early Greek philosophers (including Socrates, Plato, and Diogenes who actually adopted a nickname that means “dog”) believed canines were “extremely moral and intelligent.”³¹

However, around the seventeenth century, a significant change occurred. Philosophers like René Descartes completely rejected the notion that dogs might have any kind of awareness.³² At least part of the fear seemed to be based in religion.³³ If dogs were conscious, they had souls.³⁴ If they had souls, they could go to heaven.³⁵ Because the idea of canines in heaven seemed unacceptable, many people concluded that dogs, unlike humans, were non-reasoning, oblivious beings controlled only by reflexes and unthinking responses.³⁶

Charles Darwin precipitated another shift approximately two centuries later. Similar to numerous scientists of his era, he was eager to discover higher intelligence in animals and wrote extensively about emotions in both humans and animals. He concluded

28. ARNOLD, *supra* note 4, at 68.

29. See HOW DOGS THINK, *supra* note 25, at 2.

30. Although these professionals are serious researchers and scholars, one apparent difference between them and other scientists is in the reporting of their findings. Many of these dog or animal books provide information through stories rather than just statistical analysis. See, e.g., FRANS DE WAAL, ARE WE SMART ENOUGH TO KNOW HOW SMART ANIMALS ARE? 5–6 (2016) [hereinafter DE WAAL].

31. HOW DOGS THINK, *supra* note 25, at 2.

32. *Id.* at 4.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

that all animals, including humans, are part of a continuum on which there are different levels of awareness, reasoning, intelligence, and memory.³⁷ Thus, he believed the differences are in degree rather than in kind.³⁸ In other words, animals can be aware of what is happening, but “awareness” in animals likely means something different than “awareness” in humans. Current research supports Darwin’s analysis.³⁹

“Behaviorism” emerged as another perspective in the beginning of the twentieth century. Simply stated, behaviorists believe that speculation about consciousness and related issues is useless, as it is impossible to measure a dog’s awareness, thought, or feelings.⁴⁰ Instead, the only things that can legitimately be studied are aspects of behavior that can be observed and measured by an independent third person.⁴¹ This theory has not really caught on as most researchers are increasingly accepting of the idea that dogs are conscious, complex, and thinking beings.⁴²

37. *Id.* at 5.

38. CHARLES DARWIN, *THE DESCENT OF MAN* 105 (2d ed. 1972) (1871) (“The difference in mind between man and the higher animals, great as it is, is certainly one of degree and not of kind.”).

39. *HOW DOGS THINK*, *supra* note 25, at 4–5. For example, in comparing a poodle to a human, the recent dog genome project revealed “more than a seventy-five percent overlap between the genetic codes.” *Id.* at 5–6. Stanley Coren, a well-known psychologist, dog trainer, and author, ranked breeds by obedience and working intelligence based on scores from 100 or more judges. STANLEY COREN, *THE INTELLIGENCE OF DOGS* xi, 192–93 tbl.10.1 (rev. ed. 2006) [hereinafter *INTELLIGENCE OF DOGS*]. Poodles were number two, and border collies were number one. *Id.* at 192 tbl.10.1.

40. *How Dogs Think*, *supra* note 25, at 6.

41. *Id.*

42. In a recently released study, scientists demonstrated individual personality differences in sharks for the first time. E.E. Byrnes & C. Brown, *Individual Personality Differences in Port Jackson Sharks *Heterodontus portusjacksoni**, 89 J. FISH BIOLOGY 1142, 1142–43 (2016), <http://onlinelibrary.wiley.com/doi/10.1111/jfb.12993/full>. In fact, according to the lead author, “[o]ver the past few decades, personality research has shown that nearly 200 species of animals demonstrate individual personality. Personality is no longer considered a strictly human characteristic, rather it is a characteristic deeply engrained in our evolutionary past.” *Study Shows Sharks Have Personalities*, PHYS.ORG (May 27, 2016), <http://phys.org/news/2016-05-sharks-personalities.html>; see also ARNOLD, *supra* note 4, at xiv (noting that, although some sci-

We hear that rats may regret their own decisions, that crows manufacture tools, that octopuses recognize human faces, and that special neurons allow monkeys to learn from each other’s mistakes. We speak openly about culture in animals and about their empathy and friendships. Nothing is off limits anymore, not even the rationality that was once considered humanity’s trademark.⁴³

In fact, arguably all dogs are geniuses based on “how successfully they have managed to survive and reproduce in as many places as possible”—the definition of “intelligence” according to some cognitive scientists.⁴⁴ Brian Hare is a dog researcher, evolutionary anthropologist, and founder of the Duke Canine Cognition Center. While experimenting with his dog in his parents’ garage, he discovered their “extraordinary kind of intelligence” and the reason it is so important that humans study canines⁴⁵— “[n]ot because they have become complacent compared with their wild cousins, but because they were smart enough to come in from the cold and become part of the family.”⁴⁶

entists do not think conclusive evidence exists that dogs have thoughts or emotions, and “[w]hile it may be difficult to prove such a thing scientifically, to those who live with dogs, these assertions are a given”).

43. DE WAAL, *supra* note 30, at 4. “Ordinary” people frequently post video examples of amazing animal cognition on the internet. *Id.*

44. BRIAN HARE & VANESSA WOODS, *THE GENIUS OF DOGS: HOW DOGS ARE SMARTER THAN YOU THINK 3* (2013). In this excellent, entertaining book, Brian Hare and Vanessa Woods, who, besides being co-authors, are husband and wife, provide “a comprehensive review of dog cognition, or ‘dognition.’” *Id.* at xi. Explaining that “[m]any of the same concepts used to study dog intelligence are being applied to human intelligence,” they conclude “[p]erhaps the greatest gift our dogs will give us is a better understanding of ourselves.” *Id.*

45. *Id.* at 14.

46. *Id.* A brief explanation of the experiment: It started in Hare’s parents’ garage with his dog, Oreo. *Id.* at 33–61. At age 10, Hare, being “obsessed with baseball,” was practicing his pitching (for his career as an Atlanta Braves starting pitcher) with Oreo, who would retrieve the baseballs. *Id.* at 34. Nine years later, although he made the Emory University baseball team, Hare became more enamored with one of his professor’s research—Mike Tomasello was trying to answer the question “what makes us human.” *Id.* at 35. Hare started working with Tomasello and, the following year, when the teacher suggested that “only humans understand communicative intentions,” which meant animals do not use gestures

While, “[i]n the last 10 years, there has been something of a revolution in the study of canine intelligence,” and more has been learned than in the previous century,⁴⁷ the debate continues and probably will for some time. But, even if it were resolved and everyone agreed dogs are smart, sentient beings, it would not validate using provocation as the test. It does not matter if a dog bites because he evaluated his choices and decided biting was his best option or because he is the automaton Descartes thought he was and so was simply reacting on some physiological level. If the animal is not able to communicate so that humans understand why he did what he did and whether there were extenuating circumstances, dog bite cases will continue to be decided without sufficient information to provide consistent, equitable results.

B. Exploring Communication

Even if irrefutable scientific evidence that dogs are capable of complex thought and planning existed and was universally accepted, it would still be necessary to address the follow-up, two-pronged question of (1) whether dogs are capable of communicating what they are thinking and (2) whether humans have the capacity, and willingness, to understand what they “say.”

Alexandra Horowitz, a well-known animal researcher and author, addresses the first part of the inquiry. She explains that when she was in graduate school, her professors and other scientists considered dogs so familiar and understood that no one thought of studying them to find skills and cognitive abilities similar to those of humans.⁴⁸ Instead, according to conventional wisdom at the time, it was necessary to turn to primates to learn more about the animal mind.⁴⁹ But Horowitz eventually concluded conventional wisdom was wrong.⁵⁰

As she continued her studies and learned “the science of careful observations, data gathering, and statistical analysis,” she realized she was using her newly acquired skills and ways of relating

like pointing, Hare explained how his dog could do that. *Id.* at 40. Tomasello challenged him to prove it. *Id.* Using some baseballs and a video camera, Hare recorded that Oreo could do that. *Id.* at 41. He went wherever Hare pointed. *Id.*

47. *Id.* at x.

48. HOROWITZ, *supra* note 1, at 4.

49. *Id.*

50. *Id.* at 4–5.

to the world as she observed her pet at dog parks.⁵¹ Thus, as she watched Pumpernickel play with other animals, she discovered a “new sensitivity to the possible richness of social interactions in an entirely non-linguistic world, all of these once ordinary activities now seemed to . . . be an untapped font of information.”⁵² And so, she says, she “was unwittingly part of a sea change taking place in science’s attitude toward studying dogs.”⁵³

While the shift toward studying dog behavior is interesting and important, the relevant point is that, in addition to recognizing that dogs are thinking and conscious beings, Horowitz notes that they are communicating with each other despite the absence of what people think of as “language.”⁵⁴ And, by watching many hours on tape of her dog interacting with other animals, she determined “simple play frolicking between two dogs became a dizzying series of synchronous behaviors, active role swapping, variations on communicative displays, flexible adaptation to others’ attention, and rapid movement between highly diverse play acts.”⁵⁵ She described what she was seeing as “snapshots of the minds of the dogs, visible in the ways they communicated with each other and tried to communicate with the people around them—and, too, in the way they interpreted other dogs’ and people’s actions.”⁵⁶ What this means is that, in addition to the fact that dogs can and do think, they also communicate what they are thinking.

In trying to complete the second prong of the inquiry concerning whether *humans* have the ability and open-mindedness to understand what their canine companions are “telling” them, it is helpful to look to another, very well-known ethologist and author,

51. *Id.* at 5.

52. *Id.*

53. *Id.* at 6.

54. *Id.* at 5–6.

55. *Id.* at 5.

56. *Id.* at 5–6.

Dr. Frans B.M. de Waal.⁵⁷ Noting that “humans *are* animals,”⁵⁸ he explains his view that “[t]he comparison is not between humans and animals”; instead, he concludes, human cognition is simply “a variety of animal cognition.”⁵⁹ Although he recognizes humans “attach immense importance to abstract thought and language (a penchant that I am not about to mock while writing a book!),” he explains there are a plethora of “ways to process, organize, and spread information” and that, depending on the task, certain animals are actually much better suited to accomplish certain goals than humans.⁶⁰ So, for example, he says when comparing animal and human cognition, “[i]t is not even clear how special ours is relative to a cognition distributed over eight independently moving arms, each with its own neural supply, or one that enables a flying organism to catch mobile prey by picking up the echoes of its own shrieks.”⁶¹

57. *Frans de Waal, Ph.D., EMORY: LIVING LINKS*, http://www.emory.edu/LIVING_LINKS/people/dewaal.shtml (last visited Jan. 7, 2017). Although de Waal’s work primarily deals with the behavior and social intelligence of primates, his theories about evolutionary cognition in both humans and other animals cross species. *Id.* In fact, his current research “concerns empathy and cooperation, inequity aversion and social cognition in chimpanzees, bonobos, and other species.” *Id.* In addition to his pioneering work with primates, including how behavior is culturally transmitted and how well these animals “spontaneously cooperate,” he has studied whether elephants recognize themselves in mirrors. *Id.* Thus, his theories about animal behavior and cognition, which have pushed people to rethink everything they thought they knew about intelligence, are also applicable to dogs and all other animals. *Id.* His work has been published in hundreds of articles in prominent journals and other publications specializing in animal behavior. *See id.* (click on CV hyperlink). “His popular books—translated into twenty languages—have made him one of the world’s most visible primatologists.” *Id.* Not only is he recognized by significant academic and scientific prestigious positions, he was selected by *Time* magazine in 2007 one of “The Worlds’ [sic] 100 Most Influential People Today, and in 2011, by Discover as among 47 (all-time) Great Minds of Science.” *Id.*

58. DE WAAL, *supra* note 30, at 5.

59. *Id.*

60. *Id.*

61. *Id.* Albert Einstein made a similar point: “Everybody is a genius. But if you judge a fish by its ability to climb a tree, it will live its whole life believing that it is stupid.” Ariela Pelaia, *Albert Einstein Quotes*, ABOUT RELIGION, <http://judaism.about.com/od/jewishpersonalities/a/Albert-Einstein-Quotes.htm> (last visited Jan. 8, 2017).

So there is good news and bad. According to de Waal, humans are “smart enough to appreciate other species but it has required the steady hammering of our thick skulls with hundreds of facts that were initially poo-pooed by science.”⁶² In other words, people have the capacity to understand, but for a variety of reasons, many fight the notion that humans are not unique in being able to engage in complicated, complex, and analytical reasoning. He suggests people have underestimated the intelligence of other animals and uses recent scientific studies to dispel the myths that humans are the only beings who design and use tools, have a sense of self, or grasp the concepts of past and future.⁶³ A note from one of his collaborators about being back in the Congo with the bonobos seems to sum up his views: “[T]he more I come to know them, the more I find there is to learn.”⁶⁴

Because there is so much left to learn in terms of animal intelligence and communication between and among species, judges, legislators, lawyers, and jurors really do not know enough about what is happening in a dog’s mind to use provocation as the standard. While this information might someday be available to provide an answer to how a reasonable dog would have acted under specific circumstances, that day is too far away to be a viable solution.

IV. A PRIMER ON DOG BITES

Because much of the dog bite research is old, it is difficult to be sure of the exact magnitude of the problem.⁶⁵ Most experts estimate that dogs bite more than 4.5 million people in the United States

62. DE WAAL, *supra* note 30, at 5.

63. *Id.*

64. Frans de Waal – Public Page, *Timeline Photos: Moment of Zen*, FACEBOOK (May 17, 2016), https://www.facebook.com/99206759699/photos/a.138830229699.109404.99206759699/10154222138764700/?type=3&comment_id=10154224166254700&comment_tracking=%7B%22tn%22%3A%22R0%22%7D (quoting Zanna Clay).

65. For example, when Kenneth Phillips refers to “[t]he most recent USA survey of dog bites conducted by CDC researchers” on his website, he is talking about a 2003 update to a similar 1994 study. *All Dog Bite Statistics*, DOG BITE L., <https://dogbitelaw.com/dog-bite-statistics/all-dog-bite-statistics> (last visited Jan. 7, 2017). Phillips, whose comprehensive site is widely cited, states he is “the only attorney in the USA who represents dog bite victims full time.” *“Aren’t You Too Busy to Handle Cases?” and Other FAQ About Mr. Phillips: What Makes*

every year.⁶⁶ However, to put these statistics in context, an astonishing 77.8 million pet dogs⁶⁷ lived in 54.4 million homes in 2015.⁶⁸ While the numbers vary depending on the source and despite the fact that everyone agrees the majority of victims are children,⁶⁹ the numbers of bites among minors are actually decreasing.⁷⁰ Seniors represent the next largest group who are bitten.⁷¹ Some injuries are insignificant but approximately 900,000 require emergency medical treatment.⁷² In 2014, only forty-two were fatal.⁷³

You Different From Other Lawyers Who Handle Dog Bites?, DOG BITE L., <https://dogbitelaw.com/meet-kenneth-phillips/arent-you-too-busy-to-handle-cases-and-other-faq-about-mr-phillips> (last visited Jan. 7, 2017); see also Madeleine Gabriel, *Dog Bite Statistics: Do the Math Before You Freak Out*, DOGS & BABIES (July 18, 2011), <http://www.dogsandbabieslearning.com/2011/07/18/dog-bite-statistics-do-the-math-before-you-freak-out> (noting that the most frequently cited dog bite statistics are the Centers for Disease Control and Prevention's 1994 phone survey, updated 2001–2003).

66. *Preventing Dog Bites*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/features/dog-bite-prevention> (last updated May 18, 2015); see also *2014 Dog Bite Fatalities*, DOGSBITE.ORG, <http://www.dogsbite.org/dog-bite-statistics-fatalities-2014.php?gclid=CI717ePXnccCFcwXHwodzZ0MZg> (last modified Jan. 1, 2017).

67. *Number of Dogs in the United States from 2000 to 2015 (In Millions)*, STATISTA, <http://www.statista.com/statistics/198100/dogs-in-the-united-states-since-2000> (last visited Jan. 7, 2017).

68. *Pet Industry Market Size & Ownership Statistics*, AM. PET PRODUCTS ASS'N, http://www.americanpetproducts.org/press_industrytrends.asp (last visited Jan. 7, 2017). Interestingly, adults with two dogs in the household are five times more likely to be bitten. Am. Veterinary Med. Ass'n, *Dog Bites by the Numbers: An Infographic from the AMVA*, GOOD DOG IN A BOX, <https://www.gooddoginabox.com/dog-bites-numbers-infographic-avma> (last visited Jan. 7, 2017) [hereinafter *Dog Bites by the Numbers*].

69. *Dog Bite Prevention*, AM. VETERINARY MED. ASS'N, https://www.avma.org/public/Pages/Dog-Bite-Prevention.aspx?utm_medium=widget&utm_content=infographic (last visited Jan. 7, 2017).

70. JANIS BRADLEY, *DOG BITES: PROBLEMS AND SOLUTIONS* 7 (rev. 2014) (citations omitted) (“Dog bite injuries affecting children decreased between 1994 and 2003. . . . [and] data show this trend has continued.”).

71. Cheslie Pickett, *Tips to Prevent Dog Bites*, CANINE CHRON. (May 27, 2014), <http://caninechronicle.com/health-training/tips-to-prevent-dog-bites>.

72. See *Dog Bites by the Numbers*, *supra* note 68.

73. *2014 Dog Bite Fatalities*, *supra* note 66. Although, on one hand, even one fatality is too many, some people argue, in context, the number is very small.

Surprisingly, only a relatively small percentage of bites are inflicted by errant, stray dogs.⁷⁴ In fact, seventy-seven percent of dog bite victims are either family members or friends of the owner.⁷⁵ Moreover, sixty-one percent of bites occur in the home or a familiar place.⁷⁶ Most owners seem shocked when their pet bites.⁷⁷ Therefore, they blame the victim, which might explain why legislators created provocation; it is consistent with what owners believe must have happened.

Obviously, in addition to the human suffering and canine euthanasia, there is a huge financial cost resulting from dog bites. Such claims represent one third of all homeowners’ liability insurance payouts.⁷⁸ In fact, the average payment was more than \$37,000 in 2015, at a total cost of close to \$570 million.⁷⁹

Although disagreement exists as to whether these figures represent a dog bite “epidemic,” they certainly highlight a problem that needs to be addressed.⁸⁰ To reduce the number of humans who

See, e.g., JANIS BRADLEY, *DOGS BITE: BUT BALLOONS AND SLIPPERS ARE MORE DANGEROUS* (2005) [hereinafter BRADLEY].

74. Ron Hines, *When Your Dog Bites—Understanding and Correcting Aggressive Behavior*, 2ND CHANCE, <http://www.2ndchance.info/aggressivedog.htm> (last visited Jan. 7, 2017). Dr. Hines, DVM, PhD, notes that “[f]ew people realize that the dogs involved tend to be family pets and not strays. Also, more than two-thirds of dog bites happen to people who are acquainted with the dog. More than half the dog bites occur to the very young and the very old.” *Id.*

75. Pat Miller, *What to Do If Your Dog Bites*, WHOLE DOG J. (2002) http://www.whole-dog-journal.com/issues/5_4/features/5444-1.html.

76. *Id.*

77. *Id.*

78. *Dog Bites Accounted for More Than One-Third of All Homeowners Liability Payouts Last Year As Cost Per Claim Soars to More Than \$37,000 Per Bite*, INS. INFO. INST. (May 11, 2016), <http://www.iii.org/press-release/dog-bites-accounted-for-more-than-one-third-of-all-homeowners-liability-payouts-last-year-as-cost-per-claim-soars-to-more-than-37000-per-bite-050916>; *see also* *Mason v. Hallowell*, No. L-12-1239, 2013 WL 872436 (Ohio Ct. App. Mar. 8, 2013) (applying provocation exception to insurance policy).

79. Worters, *supra* note 78.

80. Compare Kenneth M. Phillips, *Canine Homicides and the Dog Bite Epidemic: Do Not Confuse Them*, DOG BITE L., <http://dogbitelaw.com/dog-bite-statistics/canine-homicides-the-dog-bite-epidemic-do-not-confuse-them> (last visited Jan. 8, 2017) (arguing that “[t]he dog bite epidemic involves all dogs and all dog owners. While pit bulls and Rottweilers inflict a disproportionate number of serious and even fatal injuries, the dog bite epidemic involves many different

are bitten, thereby avoiding a lifelong fear of dogs (and the concomitant inability to enjoy the pleasure and health benefits of a canine companion) as well as varying degrees of disfigurement and even death, legislators need to revise dangerous dog and dog bite laws by recognizing that “provocation” is an unworkable standard.

V. STATE STATUTES ON DOG BITES AND PROVOCATION.

There are actually three types of state statutes that may include “provocation”: (1) owner liability for dog’s actions, (2) dangerous dog, and (3) hybrid (dangerous dog and owner liability).⁸¹

breeds, and results from many different causes”), with BRADLEY, *supra* note 73, at 15, 20 (arguing that, although “[d]ogs are dangerous” they are “[n]ot as dangerous, of course, as front-porch steps or kitchen utensils or five-gallon water buckets or bathtubs or strollers or stoves or lamp cords or coffeetable [sic] corners or Christmas trees or balloons or bedroom slippers. Not nearly as dangerous as playground equipment or skateboards or bikes or baseballs or soccer fields or parked cars or swimming pools. . . . Here’s the reality. Dogs almost never kill people. A child is more likely to die choking on a balloon or falling off a swing than being bitten by a dog. . . . Your chances of being killed by a dog are roughly one in 18 million. That means you are twice as likely to win a super lotto jackpot on a single ticket than to be killed by a dog. That means you are five times as likely to be killed by a bolt of lightning” and pointing out that the supposed epidemic numbers of dog bites splashed across the media are absurdly inflated by dubious research and by counting bites that don’t actually hurt anyone). See also Gabriel, *supra* note 65, where, in an interesting blog post, Gabriel, who is a dog trainer that has been teaching “dogs and babies” classes since 2001, uses the same numbers to also conclude Phillips and those who agree with him are seriously overreacting. She demonstrates that not only is there not an “epidemic” of dog bites, but also the way the statistics are reported “leaves no doubt to the casual reader that this is a huge, dramatic problem. *Fear-mongering* is what it is because these slick, oft-quoted statistics make people think things are out of control.” *Id.* However, by “crunching the numbers,” she illustrates that the perception is completely wrong and, for example, “of all the estimated [numbers] of dog bites every year, [only] .2% require hospitalization . . . or you could say that 99.8% of dog bites do not require a stay in the hospital.” *Id.*

81. See, e.g., CAL. CIV. CODE § 3342(a) (West 1997) (for a statute pertaining to owner liability). Certain rules are different for police and/or military dogs but the statutes that specifically address such animals are beyond the scope of this Article. See, e.g., CAL. CIV. CODE § 3342(b) (West 1997) (providing that “[n]othing in this section shall authorize the bringing of an action [for liability for damages from dog bite] against any governmental agency using a dog in military or police work if the bite or bites occurred while the dog was defending itself from

Notably, reference to “provocation” is not dependent on which kind of law it is but can be found in any of these depending on the jurisdiction.

Ironically, no matter which type of statute is involved, the language is generally quite simple. For example, the Illinois “liability” statute provides:

If a dog . . . *without provocation*, attacks, attempts to attack, or injures any person who is peaceably conducting himself or herself in any place where he or she may lawfully be, the owner of such dog or other animal is liable in civil damages to such person for the full amount of the injury proximately caused thereby.⁸²

As is true of many of these laws, “provocation” is not defined. But, even in those statutes that do attempt to explain what is meant by the term, judicial interpretations create confusion.⁸³ Thus,

an annoying, harassing, or *provoking* act . . .”) (emphasis added). It is also important to note that, while this Article focuses on statutes, many municipalities have their own local ordinances dealing with dog bites. *See, e.g.*, BROWARD COUNTY, FL. CODE §§ 4-12 (2011) (dangerous dog classification), -14 (reporting bites), -14.5 (dog bites with injuries), -15 (bites without injuries). In 2010, an earlier version of § 4-12 came under attack and, eventually, was overturned. Brittany Wallman, *Broward Euthanized 56 Dogs, Mostly Pit Bulls and Rottweilers, Records Show*, SUN SENTINEL, Dec. 20, 2010, http://articles.sun-sentinel.com/2010-12-20/news/fl-broward-deaddogs-20101220_1_pit-bulls-dangerous-dog-law-euthanize-dogs. The previous provision sentenced dogs to die after one serious attack or killing of someone else’s pet. *Id.* Between passage of that ordinance in 2008 and 2010, the county euthanized fifty-six dogs. *Id.* That ordinance was repealed and the current version adopted in January 2011. Brittany Wallman, *Broward Overturns Tough Dog-Attack Law*, SUN SENTINEL, Jan. 26, 2011, http://articles.sun-sentinel.com/2011-01-26/news/fl-dangerous-dogs-20110125_1_dog-law-dog-park-rottweilers.

82. 510 ILL. COMP. STAT. ANN. 5/16 (West, Westlaw through 2016 Reg. Sess. 2016) (emphasis added). This statute is not limited to dog bites but others are. *See, e.g.*, CAL. CIV. CODE § 3342(a) (West 1997) (“The owner of any dog is liable for the damages suffered by any person who is *bitten by the dog* while in a public place or lawfully in a private place, including the property of the owner of the dog, regardless of the former viciousness of the dog or the owner’s knowledge of such viciousness.”) (emphasis added).

83. *See infra* Part V.

for example, the Florida “dangerous dogs” statute provides that “[u]nprovoked” means that the victim who has been conducting himself or herself peacefully and lawfully has been bitten or chased in a menacing fashion or attacked by a dog.”⁸⁴ Nevertheless, this definition has not protected dog owners or insurance companies from often expensive and frequently lengthy litigation. Indeed, according to State Farm Insurance Company, in 2012, Florida recorded the highest average amount (\$38,400) per dog bite insurance claim in the country with 146 payments totaling \$5.6 million.⁸⁵ Although the number of claims nationwide vacillates, the average value of each has climbed higher every year.⁸⁶ Not surprisingly, then, whether the statutes expressly clarify the term or not, a review of the cases from across the country reveals that judges, like legislators, practicing attorneys, and juries, are perplexed when trying to untangle this unnecessarily complicated inquiry.⁸⁷

A. *Dangerous Dogs*

Some states believe labeling a canine as “dangerous” is the best way to prevent dog bites and protect potential victims. As these laws are typically criminal, they primarily focus on punishing and

84. FLA. STAT. ANN. § 767.11(2) (West, Westlaw through 24th Leg., 2d Reg. Sess. 2016); *see also* Marcy LaHart, *Defending Allegedly Dangerous Dogs: The Florida Experience*, in A LAWYER’S GUIDE TO DANGEROUS DOG ISSUES 61, 62 (Joan Schaffner ed., 2009) (discussing the Florida statute and actual procedure).

85. Damian Dovarganes, *State Farm Pays \$ 109 Million for Dog Bite Claims*, USA TODAY (May 17, 2012), <http://usatoday30.usatoday.com/news/nation/story/2012-05-17/dog-bite-insurance-claims/55037444/1>. “Florida has placed among the top ten for the last few years.” Phyllis Coleman, *Dog Bites Human: Why Florida Lawyers Should Care and What They Need to Know*, 88 FLA. B. J. 26, 26 (2014).

86. *Dog Bites Accounted for More Than One-Third of All Homeowners Liability Pay Outs Last Year as Cost Per Claim Soars*, INS. INFO. INST. (May 13, 2015), <http://www.iii.org/press-release/dog-bites-accounted-for-more-than-one-third-of-all-homeowners-liability-pay-outs-last-year-as-cost-per-claim-soars-051315>. This press release explains that an average cost per claim skyrocketed more than sixty-seven percent from 2003 to 2014 “due to increased medical costs as well as the size of settlements, judgments and jury awards given to plaintiffs, which are still on the upswing.” *Id.*; *see also supra* note 78 and accompanying text (noting the total cost in 2015 was close to \$570 million).

87. *See infra* Part IV.

detering such behavior in the future rather than compensation. Thus, based on this categorization, penalties generally include fines and even possible jail time for the owner. For the nonhuman "perpetrator," sentences range from severe restrictions, including muzzling and containment to euthanasia.

Arkansas is illustrative. Although the state does not have a dog bite liability statute,⁸⁸ a dangerous dog law classifies an "unlawful dog attack" as a Class A misdemeanor.⁸⁹ A person commits the offense if: (1) he owns a dog who he "knows or has reason to know has a propensity to attack, cause injury, or endanger the safety of other persons *without provocation*"; (2) he "negligently allows the dog to attack another person"; and (3) "[t]he attack causes the death of or serious physical injury to the person attacked."⁹⁰

B. Dog Bite Statutes

Arizona provides that if a dog bites a human who is either on public land or lawfully in a private place, the owner is liable for damages.⁹¹ Although this is a relatively common provision, a legitimate question could be raised as to just how a dog is supposed to know if the person is "lawfully" in a private place and, equally problematic, how humans are supposed to know whether the animal knew, or should have known, that the person was not breaking the law by his presence. Indeed, humans sometimes have difficulty in making this distinction. In *Belcher Yacht, Inc. v. Stickney*, the Supreme Court of Florida once remarked that it could "easily envision situations where a jury might be called upon to decide whether the

88. Kenneth M. Phillips, *Arkansas Dog Bite Law*, DOG BITE L., <http://dog-bitelaw.com/one-bite-state/arkansas-dog-bite-law> (last visited Jan. 14, 2017).

89. ARK. CODE ANN. § 5-62-125(b) (West, Westlaw through 90th Ark. Gen. Assemb., 2d. Extraordinary Sess., Fiscal Sess., 3d Extraordinary Sess. 2016). Although Arkansas continues to require that the owner either has knowledge, or should have had knowledge, of his dog's propensity to bite, many states have eliminated this common law condition to recovery. *See infra* Appendix.

90. *Id.* § 5-62-125(a) (emphasis added).

91. ARIZ. REV. STAT. ANN. § 11-1025(A) (2012). As is true in much of the current legislation, the common law prerequisite for consideration of former viciousness and the knowledge of the owner of that propensity are no longer required. Instead, this statute specifically imposes liability for the bite "regardless of the former viciousness of the dog or the owner's knowledge of its viciousness." § 11-1025(A).

victim was lawfully on the land,”⁹² but, in reality, this question seems to be rarely addressed in cases where provocation is the issue.⁹³

*C. Dangerous Dogs and Owner Liability in the Same Chapter,
Different Sections*

Some states have both types of laws. Florida, for example, chose to combine these issues into one statutory chapter. Section 767.04 of the Florida Statutes provides that an owner is responsible for damages if his dog “bites any person.”⁹⁴ However, he is only liable if the victim was “on or in a public place, or lawfully on or in a private place, including the property of the owner.”⁹⁵ Although this part of the statute fails to mention provocation, it does list defenses.⁹⁶ Thus, if a victim was the proximate cause of his own injury, the owner’s liability is reduced “by the percentage that the bitten person’s negligence contributed to the biting incident,” except as to a person under the age of six.⁹⁷ Still another way the owner who had not “proximately caused” the damages “by a negligent act or omission” can avoid liability is “if at the time of any such injury

92. 450 So. 2d 1111, 1113 (Fla. 1984).

93. See, e.g., *Flick v. Malino*, 374 So. 2d 89, 90 (Fla. Dist. Ct. App. 1979) (stating the pleadings apparently “raise[d] a factual dispute as to whether [the victim] and her mother had been invited . . . prior to the dog bite,” but the Fifth District simply “note[d] in passing” that the statute required she was on the premises “lawfully”); *Stroop v. Day*, 896 P.2d 439, 443 (Mont. 1995), *overruled in part by Giambra v. Kelsey*, 162 P.3d 134, 139 (Mont. 2007) (rejecting, without discussion, defendants’ claim that plaintiff was not lawfully on or in the [defendants’] private property at the time of the incident).

94. FLA. STAT. ANN. § 767.04 (West, Westlaw through 2016 Second Regular Session of the Twenty-Fourth Legislature).

95. *Id.*

96. *Id.* Notably, without explanation, legislators eliminated the following language from the statute in 1993: “no owner of any dog shall be liable for any damages to any person or his property when such person shall *mischievously or carelessly provoke or aggravate the dog* inflicting such damage.” FLA. STAT. § 767.04 (1992) (emphasis added); see also *Animals – Dogs – General Amendments*, 1993 Fla. Sess. Law Serv., ch. 93-13 (West).

97. § 767.04.

the owner had displayed in a prominent place on his or her premises a sign easily readable including the words ‘Bad Dog.’”⁹⁸

However, another part of the statute specifically states that “dangerous dogs are an increasingly serious and widespread threat to the safety and welfare of the people of this state because of *unprovoked* attacks which cause injury to persons and domestic animals.”⁹⁹ The legislation also explicitly notes “such *attacks are in part attributable to the failure of owners to confine and properly train and control their dogs[,]*” after which it acknowledges “existing laws inadequately address this growing problem,” and, as a result, “it is appropriate and necessary to impose uniform requirements for the owners of dangerous dogs.”¹⁰⁰

Section 767.11 of the Florida Statutes defines a “dangerous dog” as an animal who, “when *unprovoked*, chased or approached a person upon the streets, sidewalks, or any public grounds in a menacing fashion or apparent attitude of attack”¹⁰¹ Further, unlike many other state statutes,¹⁰² Florida legislators attempt to explain the term, noting it means the victim “ha[d] been conducting himself or herself peacefully and lawfully” when “bitten or chased in a menacing fashion or attacked by a dog.”¹⁰³ Unfortunately, despite the statutory definition, ambiguity still exists because the focus is on the victim instead of the real problem—the “failure of owners to confine and properly train and control their dogs.”¹⁰⁴

98. *Id.* Notably, a Florida appellate court concluded that the requirement that the sign be “easily readable” did not mean that “any possible victim[sic] . . . be ‘capable of reading’” it. *Registe v. Porter*, 557 So. 2d 214, 216 (Fla. Dist. Ct. App. 1990). Nevertheless, to address this problem, some owners now include a picture of a vicious-looking dog. *See, e.g., Benton v. Aquarium, Inc.*, 489 A.2d 549, 549 (Md. Ct. Spec. App. 1985) (finding that a victim assumed the risk where the warehouse had a sign with a “drawing of a bulldog with its mouth wide open as it sneeringly displayed a grid of sharp, large canines. The sign boldly proclaimed ‘TRESPASSERS WILL BE EATEN.’”).

99. § 767.10 (emphasis added).

100. *Id.*

101. *Id.* at § 767.11(1)(c) (emphasis added). The statute requires the actions be “attested to in a sworn statement by one or more persons and dutifully investigated by the appropriate authority.” *Id.*

102. *See infra* Appendix.

103. § 767.11(2)

104. *Id.* at § 767.10.

However, although state statutes vary, for purposes of this discussion, the differences do not matter because provocation is a standard that raises more questions than it resolves. It leads to such inconsistent verdicts that it is almost impossible for the responsible dog owner to figure out the rules and just as difficult for a competent attorney to provide appropriate, helpful advice to a client whether he represents the owner or the victim.¹⁰⁵

VI. CASE ANALYSIS ON DOG BITES AND PROVOCATION

Many state statutes provide that an owner is liable and/or his dog is dangerous if the animal “bites without provocation.” A brief review of representative cases demonstrates why this test does not work. Although the rules sound simple, the difficulty is in establishing what constitutes provocation of a dog. Despite the fact that laws in almost all jurisdictions cling to the idea that animals are property,¹⁰⁶ most people, especially those who live with companion

105. See *infra* Part VI.

106. The law currently views animals as property and awards damages accordingly. Thus, if a dog (or anyone else) injures or kills a companion animal, the owner will be awarded the “value” of his pet, typically what he paid rather than the “real” value to him, which would include noneconomic damages. For further discussion, see Lauren M. Sirois, Comment, *Recovering for the Loss of a Beloved Pet: Rethinking the Legal Classification of Companion Animals and the Requirements for Loss of Companionship Tort Damages*, 163 U. PA. L. REV. 1199 (2015).

Recently there have been a few cases and statutes where judges or legislators recognize that limiting damages to the animal’s pre-injury “fair market value,” typically measured by cost to purchase, is not sufficient. See, e.g., TENN. CODE ANN. § 44-17-403 (2007) (permitting the trier of fact to “find the individual causing the death or the owner of animal causing the death” of “a person’s pet . . . liable for up to five thousand dollars (\$5,000) in noneconomic damages; provided, that if the death is caused by the negligent act of another, the death or fatal injury must occur on the property of the deceased pet’s owner or caretaker, or while under the control and supervision of the deceased pet’s owner or caretaker”); *Barking Hound Village, LLC. v. Monyak*, 787 S.E.2d 191, 199 (Ga. 2016) (holding that although “damages representing an animal’s sentimental value to its owner are not recoverable . . . descriptive evidence, both qualitative and quantitative, is admissible to establish an animal’s attributes for determining its fair market value, as well as for determining the reasonableness of an owner’s expenditures for veterinary expenses”).

Interestingly, as far back as 1964, the Supreme Court of Florida concluded it was appropriate for the jury to consider Phyllis LaPorte’s mental suffering in determining damages for the death of her miniature dachshund. *La Porte v. Associated Indeps., Inc.*, 163 So. 2d 267, 267–68 (Fla. 1964). The facts were unusual. Heidi was outside when the garbage collector arrived. *Id.* LaPorte actually saw him empty the can and then throw it at her dog. *Id.* at 268. When she went to help her pet, the man laughed and drove away. *Id.* She was awarded \$2,000 compensatory damages and \$1,000 in punitive damages. *Id.* at 267. However, it is important to note that, although some courts do not seem to be aware of the distinction, this case does not apply to negligent conduct:

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

.....
Id. at 269.

A recent Texas decision is more consistent with the typical case and the law in most American jurisdictions. In *Strickland v. Medlen*, 397 S.W.3d 184 (Tex. 2013), a shelter “accidentally” euthanized a dog, the state supreme court refused to allow noneconomic damages:

Under Texas common law, the human-animal bond, while undeniable, is uncompensable, no matter how it is conceived in litigation—as a measure of property damages (including ‘intrinsic value’ or ‘special value’ . . . derived from the attachment that an owner feels for his pet), as a personal-injury claim for loss of companionship or emotional distress, or any other theory. The packaging or labeling matters not: Recovery rooted in a pet owner’s feelings is prohibited. We understand that limiting recovery to market or actual value seems incommensurate with the emotional harm suffered, but pet-death actions compensating for such harm, while they can certainly be legislated, are not something Texas common law should enshrine.

Id. at 198; *but see* *State v. Newcomb*, 375 P.3d 434, 438–39 (Or. 2016). The Supreme Court of Oregon rejected defendant’s argument that “dogs are ‘no different than a folder or a stereo or a vehicle or a boot’ or other items of personal property” and, therefore, the State would need a warrant to draw the animal’s blood in an alleged animal cruelty case. *Newcomb*, 375 P.3d at 437–38. However, the trial judge had found that the veterinarian performed the tests for medical reasons as is done when an abused child is taken into custody, which meant the warrantless search was valid. *Id.* at 442. “[A] dog, although personal property, is not a container and is not legally analogous to one because, as the prosecutor put it, a dog ‘doesn’t contain anything’; instead, inside a dog is just ‘more dog.’” *Id.* at 438.

canines, reject the idea that dogs are equivalent to inanimate objects.¹⁰⁷ Indeed, companion animals are “named, nurtured, and treated like children, siblings, or best friends” and “to many, they are part of the family.”¹⁰⁸ People who believe their dogs are more comparable to their relatives than their toasters recognize that their pets are sentient beings who experience, and can communicate, a whole range of feelings, emotions, and thoughts.¹⁰⁹ However, unfortunately, the available research demonstrating that humans can understand what these animals are saying is currently inadequate to provide legislators and judges the information they need to make laws and interpret them when the question is whether the reasonable dog would have been provoked in a similar situation. Thus, neither the statutes nor the cases applying them provide a satisfactory or predictable answer. Indeed, the Supreme Court of Montana, in *Stroop v. Day*, concluded provocation must be considered on a “case-by-case basis.”¹¹⁰ While this method is sometimes appropriate, it is wrong in dog bite cases as it leaves too much room for inconsistent and inequitable results. Consequently, the time has come to abandon this approach.

A. Question of Fact or Law

Typically, determining whether provocation exists is a question of fact.¹¹¹ *Bailey v. Morris* is illustrative.¹¹² Defendants had dogs who had recently given birth.¹¹³ Children who visited were cautioned to be careful as mother dogs are generally nervous about

107. HOROWITZ, *supra* note 1, at 12.

108. Sirois, *supra* note 106, at 1201–02 (citation omitted).

109. MARC BEKOFF, THE EMOTIONAL LIVES OF ANIMALS: A LEADING SCIENTIST EXPLORES ANIMAL JOY, SORROW, AND EMPATHY—AND WHY THEY MATTER xx–xxi (2007).

110. 896 P.2d 439, 441 (Mont. 1995), *overruled in part by* *Giambra v. Kelsey*, 162 P.3d 134, 139 (Mont. 2007).

111. *See, e.g.,* *Engquist v. Loyas*, 803 N.W.2d 400, 406 (Minn. 2011) (stating that “[t]he question of whether a dog was provoked within the meaning of the statute in a given case is primarily a question of fact for the jury”); *Brans v. Extrom*, 701 N.W.2d 163, 167 (Mich. Ct. App. 2005) (noting that “provocation is a question of fact to be determined by the jury on the basis of the circumstances of each case”).

112. 323 N.W.2d 785 (Minn. 1982).

113. *Id.* at 786.

their puppies.¹¹⁴ Nevertheless, although the dog growled and other kids backed off, the minor plaintiff was bitten when she tried to pet one of the mother dogs.¹¹⁵ The Supreme Court of Minnesota held that whether the child provoked the dog was a “fact question, which was resolved by the jury’s finding [that] there *was* provocation.”¹¹⁶

B. Need Sufficient Custody and Control for Liability

Generally, owners are responsible if their dog bites.¹¹⁷ However, if the animal is in the custody of someone else when the incident occurs, liability questions may arise. A number of statutes attempt to resolve the issue by using terms, sometimes interchangeably, like “owner,” “keeper,” or “harborer.”¹¹⁸ In addressing this ambiguity, the Supreme Court of Michigan, in *Trager v. Thor*, concluded that to be fair when imposing liability, the possessor “must have sufficient custody and sufficient control” to evaluate the risk an animal poses.¹¹⁹ “It is this proprietary control, akin to ownership,” that must exist “to deem a party a keeper[] and potentially” strictly liable.¹²⁰ Because the defendant in *Trager* was only babysitting, he “did not *possess* the dog with the requisite proprietary control to be deemed the dog’s owner or *keeper* that would justify strict liability.”¹²¹

114. *Id.* at 786–787.

115. *Id.*

116. *Id.* at 787.

117. *See, e.g.*, FLA. STAT. ANN. § 767.04 (West, Westlaw through 2016 Second Regular Session of the Twenty-Fourth Legislature) (stating that “[t]he owner of any dog that bites any person . . . is liable for damages suffered by persons bitten”).

118. *See, e.g.*, MASS. GEN. LAWS ANN., ch. 140 § 155 (2002) (for an example of a statute using both “owner” and “keeper”); John P. Ludington, Annotation, *Who “harbors” or “keeps” dog under animal liability statute*, 64 A.L.R. 4th 963 (originally published 1988). *But see* Pawlowski v. Am. Family Mut. Ins. Co., 777 N.W.2d 67, 73 (Wis. 2009) (quoting Pattermann v. Pattermann, 496 N.W.2d 613 (Wis. Ct. App. 1992)) (noting that, “[k]eeping’ . . . generally requires ‘exercising some measure of care, custody, or control over the dog,’ while ‘harboring’ is often defined as sheltering or giving refuge to a dog. Thus, ‘harboring’ apparently lacks the proprietary aspect of keeping.”).

119. 516 N.W.2d 69, 73 (Mich. 1994).

120. *Id.*

121. *Id.* at 71 (emphasis added). As an aside, the court noted that a person in temporary possession might be liable under a negligence claim. *Id.* at 76; *see*

The fact that the defendant was a temporary caretaker was considered only because it indicated he did not have the requisite control over the dog, not because his role was brief. Neither length of time nor relationship to the owner are dispositive. Thus, in *Abraham v. Ibsen*, both the facts that the dog (who was owned by defendant's sons fraternity) had been brought home just the day before he bit the plaintiff and that the father did not affirmatively consent to having the animal in his apartment but "merely acquiesced," were immaterial.¹²² "[C]ourts have held that roommates, family members, employers, and landlords of a person who had been entrusted with the care of an animal were not owners and keepers for the purposes of liability despite their close association to the entrusted person and the animal."¹²³ Instead, the requirement is whether the person had an obligation and opportunity to control the dog at the time he bit.¹²⁴

C. Elements

Notably, despite numerous and important differences in interpretation, much of the statutory language creating the requirements for provocation is actually very similar. For example, *Wells v. Cooper* provides a framework for when a victim's conduct would shield an owner from liability and/or keep the dog who bit someone off "death row": "any action or activity"; "intentional or unintentional";¹²⁵ (3) "that would reasonably be expected to cause a normal

also *Spirlong v. Brown*, 336 P.3d 779, 783–84 (Ariz. Ct. App. 2014) (reviewing the definition of owner and ultimately quoting *Trager* about the need for "proprietary control, akin to ownership . . . to deem a party a keeper, and potentially liable, under the common-law strict liability principle").

122. 213 Ill. App. 210, 219–20 (Ill. App. Ct. 1919).

123. Jonathan R. Shulan, Note, *Animal Law—When Dogs Bite: A Fair, Effective, and Comprehensive Solution to the Contemporary Problem of Dog Attacks*, 32 U. ARK. LITTLE ROCK L. REV. 259, 267 (2010).

124. See, e.g., *Fire Ins. Exch. v. Cincinnati Ins. Co.*, 610 N.W.2d 98, 104, 106 (Wis. Ct. App. 2000) (quoting *Armstrong v. Milwaukee Mut. Ins. Co.*, 549 N.W.2d 723, 727 (Wis. 1996)) (explaining that the "person in question 'must exercise some measure of custody, care or control over the dog'").

125. Disagreement exists about whether the person's action must be intentional. See *infra* notes 197–219 and accompanying text.

animal”; (4) “in similar circumstances”; (5) “to react in a manner similar to that shown by evidence.”¹²⁶

Trena Wells was visiting her friends, Matthew and Amy Cooper, when the couple’s lab-husky mix, Tank, escaped for the second time that day, ran into the street, and was run over by a truck.¹²⁷ Wells knew Tank, so, after he was hit, both women ran outside and called him.¹²⁸ When Tank started back towards the street, Wells put her arms around him.¹²⁹ In pain, and no doubt frightened, Tank “tore plaintiff’s right thumb apart and put two puncture marks into plaintiff’s left thumb” before he died.¹³⁰ Wells required four surgical procedures.¹³¹ In addition to a scar, her wounds “limited plaintiff’s ability to care for her newborn child and participate in activities she formerly enjoyed.”¹³²

Conceding that Tank attacked and caused Wells’ injuries while she was lawfully on their property, defendants claimed they were not liable because she provoked Tank; addressing the question whether plaintiff’s actions, or the vehicle that hit him, provoked the normally friendly dog, the appellate court explained that the jury verdict should not be disturbed if, viewing the facts in the light most favorable to Wells, she could have won.¹³³

While the statute does not adopt strict liability, it does encourage “tight control of animals in order to protect the public from harm.”¹³⁴ The Act was designed to facilitate recovery for injury caused by a dog.¹³⁵ However, if “provocation could be established

126. *Wells v. Cooper*, No. 5-12-0074, 2013 WL 1197789, at *5 (Ill. App. Ct. Mar. 25, 2013) (citation omitted).

127. *Id.* at *1.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at *2–3, 6. Defendants also argued plaintiff was Tank’s “custodian” at the time of the bite, which meant she, like an “owner,” could not recover. *Id.* at *2. The Illinois appellate court had little trouble rejecting this claim. *Id.* Noting Wells argued Defendants waived the issue by not preserving it, the opinion stated, after a review on the merits, even if the Coopers had properly raised it, the judge had appropriately instructed the jury on the issue, which was a question of fact, and, thus, the conclusion should stand. *Id.* at *4.

134. *Id.* at *2.

135. *See id.*

merely by showing that an animal's attack resulted from some outside stimulus and was not merely spontaneous," contrary to the statute's purpose, "a plaintiff would almost never be able to prevail."¹³⁶ Thus, it was reasonable for the jury to conclude that the victim's attempt to prevent Tank from getting hit a second time did not amount to provocation. Instead, the reason the plaintiff was injured was that the defendants failed to exercise control over their dog.¹³⁷

In fact, a recurring theme in many of the cases, as well as canine training and psychology books, is the idea that a dog's misbehavior is much more likely attributable to the owner's inability or unwillingness to properly train and supervise him than it is that there is something wrong with the animal himself.¹³⁸ While the oft-quoted statement that "there are no such thing as bad dogs, only bad owners" is not 100% true, in many, if not most, cases, it is.¹³⁹

D. Perspective Matters

The standard used with a human "perpetrator" is what the reasonable person in his position would have done under similar circumstances. *Kirkham v. Will* comes close to adopting a comparable test for dogs.¹⁴⁰ Mary Kirkham sued when defendants' dog attacked her and caused her to trip.¹⁴¹ She sought damages because, "as a

136. *Id.* at *5 (quoting *Robinson v. Meadows*, 561 N.E.2d 111, 114 (Ill. App. Ct. 1990)).

137. *See id.* at *2.

138. This does not mean domination, but appropriate training and supervision, so that dogs know what people expect. While there was a time when trainers believed that an owner had to show he was the alpha male by dominating his dog, most have abandoned that approach. PATRICIA B. MCCONNELL, *THE OTHER END OF THE LEASH: WHY WE DO WHAT WE DO AROUND DOGS* 137 (2002) ("Even the Monks of New Skete, whose book *HOW TO BE YOUR DOG'S BEST FRIEND* inspired me and at least a million other people, advised owners to act like wolves and do 'alpha rollovers'—to throw dogs down onto their backs to ensure that their dogs would accept them as leaders. The book's main author, Job Michael Evans, later said that he deeply regretted this advice.").

139. Lynn A. Epstein, *There Are No Bad Dogs, Only Bad Owners: Replacing Strict Liability with a Negligence Standard in Dog Bite Cases*, 13 *ANIMAL L.* 129, 131 (2006) (noting "potential for a dog to cause harm is often the greatest due to conditions created by the owner").

140. 724 N.E.2d 1062 (Ill. Ct. App. 2000).

141. *Id.* at 1063.

direct and proximate result of the dog’s bite and the fall,” she fractured her ankle, necessitating surgery and hospitalization.¹⁴²

The trial judge refused to give a jury instruction that was based on “the view of a reasonable person” because it was not an accurate statement of the law.¹⁴³ “[C]ourts have consistently pointed out that it is not the view of the person who allegedly provoked the dog that must be considered, but rather it is the reasonableness of the dog’s response to the action in question that actually determines whether provocation exists.”¹⁴⁴ After assessing “how an average dog, neither unusually aggressive nor unusually docile, would react to an alleged act of provocation,” the court affirmed the jury’s verdict for defendants.¹⁴⁵

Cases like *Stehl v. Dose* are consistent with the provocation from the animal’s point of view line of cases.¹⁴⁶ Richard Stehl needed a guard dog for his business and decided to take a German shepherd defendant was giving away because he feared the animal might harm his young son.¹⁴⁷ When the dog arrived, Stehl gave the

142. *Id.* at 1063. Plaintiff sought damages pursuant to the Animal Control Act, which stated, “If a dog or other animal, without provocation, attacks or injures any person who is peaceably conducting himself in any place where he may lawfully be, the owner of such dog or other animal is liable in damages to such person for the full amount of the injury sustained.” *Id.* (quoting 510 ILL. COMP. STAT. 5/16 (West 1994)).

143. *Id.* at 1065. Pursuant to the Supreme Court of Illinois Rules, the Illinois Pattern Jury Instructions (IPI) “shall be used *unless the court determines that it does not accurately state the law.*” *Id.* The important language was: “the owner of a dog is liable in damages for injuries sustained from any attack by the dog on a person who did not provoke the animal and who was peaceably conducting himself in a place where he may lawfully be.” *Id.* Plaintiff alleged she met all the requirements as she did not provoke the dog, was “peaceably conducting” herself, and was lawfully on the property. *Id.* at 1065–66.

144. *Id.* at 1065. The court reviewed a number of other Illinois opinions and concluded they all “focused on provocation from the perspective of the animal.” *Id.* at 1067.

145. *Id.* at 1067, 1069.

146. 403 N.E.2d 1301 (Ill. App. Ct. 1980); *see, e.g.*, *Johnson v. Johnson*, 898 N.E.2d 145, 171–72 (Ill. App. Ct. 2008) (citing *Kirkham*, 724 N.E.2d at 1065) (noting that “whether an animal is provoked . . . is not judged from the perspective of the plaintiff,” but instead, because the animal in this case was a horse, provocation must be considered from the perspective of a “normal” horse).

147. *Stehl*, 403 N.E.2d at 1302.

animal food scraps he had brought with him.¹⁴⁸ During the time the dog was eating, inside the perimeter of his twenty-five foot chain, several times he came over and licked plaintiff, who petted him.¹⁴⁹ But Stehl turned his head, and “the dog attacked, sinking his fangs into plaintiff’s right forearm.”¹⁵⁰ In “pulling loose from the dog, plaintiff’s arm was ripped open in two places.”¹⁵¹ Concluding that the victim clearly established the other elements necessary to recover, the court stated he also had the burden of proving the absence of provocation.¹⁵²

As the question is “whether plaintiff’s actions would be provocative to the dog,” whether the victim had the owner’s permission to approach the animal or was complying with what the employee said he could do were irrelevant.¹⁵³ The court said “reasonable men would differ” because “the evidence would support a finding either way.”¹⁵⁴ Therefore, this was an appropriate issue for the jury, so defendant’s verdict was affirmed.¹⁵⁵

Despite the fact that logically it makes sense to consider provocation from the animal’s viewpoint, not all states agree. Indeed, Arizona’s statute expressly provides the issue “shall be determined by whether a reasonable person would expect that the conduct or circumstances would be likely to provoke a dog.”¹⁵⁶ In Minnesota, the dangerous dog statute includes similar language, as it defines provocation as “an act that an adult could reasonably expect may cause a dog to attack or bite.”¹⁵⁷

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 1303; *see also infra* notes 160–196 and accompanying text.

153. *Stehl*, 403 N.E.2d at 1303.

154. *Id.*

155. *Id.* at 1303–04.

156. ARIZ. REV. STAT. ANN. § 11-1027 (2012).

157. MINN. STAT. ANN. § 347.50(8) (West 2012). The statute specifically limits this definition to sections about dangerous dogs rather than also including the sections earlier in the statute concerning civil liability for dog bites. § 347.50 (noting that “[f]or the purpose of sections 347.50 to 347.56, the terms defined in this section have the meanings given them”).

Recently, an arbitrator in Washington also focused on the human victim: “A provocation defense refers to conduct by the injured person that a reasonable person would recognize as involving a risk of harm from a normal dog.”¹⁵⁸ He explained that “[i]t is not enough that a person’s conduct in fact provokes the attack,” it is also necessary that a reasonable person would be able to foresee the result of “the provoking conduct.”¹⁵⁹

E. Conflict on Burden of Proof

Most judges who have faced the issue determined that the absence of provocation is an element of the plaintiff’s cause of action rather than finding provocation is an affirmative defense.¹⁶⁰ For example, in *Bradacs v. Jacobone*, the Michigan appellate court placed the burden on the twelve year old victim.¹⁶¹ Stephanie Bradacs accidentally dropped her football approximately two feet from where her friend’s dog was eating.¹⁶² When she bent down to retrieve the ball, Bear bit her leg.¹⁶³ She needed six stitches and, although the wound healed and she resumed normal physical activity, she has two scars.¹⁶⁴ After she turned eighteen, she sued claiming Bear’s owners were strictly liable.¹⁶⁵

Noting the Michigan dog bite law establishes an “almost absolute liability,” the opinion explained an exception exists if plaintiff provoked the animal.¹⁶⁶ Acknowledging that what “constitutes provocation under the statute has not been settled in this state,”¹⁶⁷ the court indicated it was not necessary to decide whether unintentional conduct can satisfy the test because, “[w]hile Bear may have

158. *Anaka v. Pond*, No. 13-2-29793-1 SEA, 2014 WL 8771042, at *3 (Arbitration Award) (Wash. Super. Ct. Dec. 23, 2014) (on file with the author).

159. *Id.*

160. Occasionally, a statute establishes who has the burden of proof. *See, e.g.*, WASH. REV. CODE ANN. § 16.08.060 (West 2006) (stating that “[p]roof of provocation of the attack by the injured person shall be a complete defense to an action for damages”).

161. 625 N.W.2d 108, 110 (Mich. Ct. App. 2001).

162. *Id.* at 109.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 110.

167. *Id.* at 111–12 (addressing the specific question of whether an unintentional act could constitute provocation).

perceived plaintiff's movements within the zone of his food to be threatening, his reaction was unusually aggressive under the facts of this case."¹⁶⁸ Thus, this court and others, when determining if a dog was provoked by an unintentional act, look not only to the act but also to whether the reaction was out of proportion to whatever triggered the response.¹⁶⁹ Because there was insufficient evidence to even send the issue to the jury, the court reversed, directed a verdict for plaintiff on provocation, and remanded for a new trial.¹⁷⁰

Although the court in *Bradacs* was able to avoid deciding whether unintentional conduct could constitute provocation, others have had to face the issue head on.¹⁷¹ The court in *Brans v. Extrom*, for example, determined that the definition did not consider the actor's intent and agreed with the *Bradacs* court that the focus should be on the nature of the act and the relationship of that act to the outcome.¹⁷² As a result, a dog bite victim could unintentionally do something that would be "sufficiently provocative" to relieve the owner of liability.¹⁷³ Plaintiff and her husband were helping relatives clean their yard for a wedding.¹⁷⁴ She stepped on defendants'

168. *Id.* at 113.

169. *Id.* at 113–15; *see also* *Stroop v. Day*, 896 P.2d 439, 442 (Mont. 1995), *overruled in part by* *Glambra v. Kelsey*, 162 P.3d 134 (Mont. 2007) (stating unintentional acts can be provocation if the dog's reaction is not grossly out of proportion to the conduct). In other words, even assuming the "reasonable dog" would have been provoked by whatever was the irritant, the response must not be out of proportion to the stimulus.

170. *Bradacs*, 625 N.W.2d at 115.

171. *Id.* at 115–16 (Sawyer, J., concurring). Judge David H. Sawyer agreed with the result but argued the court needed to reach the issue of whether provocation must be intentional or unintentional. He explained:

[T]here [were] three potential variations: (1) the victim intentionally provoked the do (e.g., he kicked the dog), (2) the victim intentionally did an act that unintentionally provoked the dog (e.g., he intentionally petted the dog, not believing that the dog would take exception to being petted), and (3) the victim committed an unintentional act that provoked the dog (e.g., the victim accidentally tripped and fell, landing on the dog).

Id. Concluding this case fell within the third category, and that he believed the legislature intended such situations to constitute provocation, he agreed with the majority's decision reversing the trial court. *Id.*

172. 701 N.W.2d 163, 165 (Mich. Ct. App. 2005).

173. *Id.* at 166.

174. *Id.* at 164.

elderly dog, Pepe, who “yelped and bit Kathleen on her leg.”¹⁷⁵ Claiming defendants could only escape liability if Kathleen had intentionally provoked Pepe, which everyone agreed she had not, the Brans sued.¹⁷⁶ However, defendants requested and received a jury instruction stating that provocation includes both intentional and unintentional acts under the dog bite statute, and the court affirmed the verdict against plaintiffs.¹⁷⁷

Recently, in *Russo v. Zeigler*, a case of first impression in Delaware, there was “neither statutory support nor any justification” for imposing the burden of proving provocation on dog owners.¹⁷⁸ At approximately 2 a.m., Anthony Russo entered Ellen and Michael Zeigler’s home with their adult daughter, Stephanie.¹⁷⁹ Russo leaned down to their Akita who bit him on the face.¹⁸⁰ After looking to other states for guidance, the trial judge determined that “[g]iven the consequence for a dog owner to whom the statute applies, placing the burden of proving this element on the one who seeks such application is appropriate.”¹⁸¹ In other words, plaintiff “must prove by a preponderance of the evidence that he was not a provocateur.”¹⁸²

In contrast, in *Harris v. Moriconi*,¹⁸³ where there was no factual dispute; a Florida court held that provocation is “in the nature of an affirmative defense, casting the burden of proof upon the dog

175. *Id.*

176. *Id.* at 165 n.3.

177. *Id.* at 165 n.4, 167. The jury instruction said that “[p]rovocation means any action or activity, whether intentional or unintentional, which would reasonably be expected to cause a normal dog in similar circumstances to react in a manner similar to that shown by the evidence.” *Id.* at 165 n.4.

178. 67 A.3d 536, 540 (Del. Super. Ct. 2013).

179. *Id.* at 538.

180. *Id.*

181. *Id.* at 540.

182. *Id.* at 541.

183. 331 So. 2d 353 (Fla. Dist. Ct. App. 1976), *overruled by* Reed v. Bowen, 512 So. 2d 198 (Fla. 1987). Although the case was overruled on other grounds, this part of the opinion has not been addressed further. Additionally, earlier precedential cases on this issue have not been reversed. *See, e.g.,* Donner v. Arkwright-Boston Mfrs. Mut. Ins. Co., 358 So. 2d 21, 23 (Fla. 1978) (noting that mischievously or carelessly provoking or aggravating the dog is a statutory defense); Freire v. Leon, 584 So. 2d 98, 99 (Fla. Dist. Ct. App. 1991) (stating that “[p]rovocation is an affirmative defense that must be proved by the defendant”).

owner.”¹⁸⁴ Ruby Nell Gorman was five-and-a-half when she rode her bicycle to Mary Elizabeth Moriconi’s house to play with her cousins.¹⁸⁵ While on the property, she accidentally ran over defendant’s large German shepherd’s tail.¹⁸⁶ She rode a little further and then walked back to Comfort King, who attacked and bit her in the face.¹⁸⁷ This case was complicated by Ruby’s age, as this court joined those that believe a child under six cannot be liable for carelessly provoking a dog.¹⁸⁸ As a result, the court held that the motion for a directed verdict on liability should have been granted.¹⁸⁹ Consequently, there was no need to determine whether the child’s act of walking back to the dog to comfort him constituted provocation and thus, would have protected the owner from liability.¹⁹⁰

Even considering the many conflicting burden of proof issues for provocation in civil cases, it should come as no surprise that there are additional issues with burden of proof in criminal cases. For example, the defendant in *State v. Bereday* was convicted of two counts of “negligent failure to control a dangerous dog” when her Rottweiler bit two children in separate incidents at a beach in Kahala five days apart.¹⁹¹ The Hawaiian appellate court noted that “[i]t seems odd to define a criminal offense in a way that would require the prosecution, as part of its case in chief, to prove the non-existence of [provocation]”¹⁹² But, in this case there was no need to decide who had the burden because, even if it had been the prosecutor, he could have easily shown the absence of provocation.¹⁹³ The only contact either child victim had with Bobo was that one of them

184. *Harris*, 331 So. 2d at 355.

185. *Id.* at 354.

186. *Id.*

187. *Id.* at 354–55.

188. *Id.* at 355. In fact, the Florida Legislature amended the statute in 1993 to explicitly provide that the owner’s protection from liability does not apply to “a person under the age of [six].” Act of Oct. 1, 1993, ch. 93-13, § 1, 1993 Fla. Sess. Law Serv. 1 (West). For further discussion of the issue concerning a young child’s capabilities to provoke a dog, see *infra* notes 220–25 and accompanying text.

189. *Harris*, 331 So. 2d at 355.

190. *Id.* at 355–56.

191. 210 P.3d 9, 12–13 (Haw. Ct. App. 2009).

192. *Id.* at 19.

193. *Id.* at 20. The victims were a two-year-old boy and a five-year-old girl bitten five days apart at the same beach. *Id.* at 13.

attempted to pet him earlier in the day.¹⁹⁴ However, he withdrew his hand without even touching the dog when told to do so.¹⁹⁵ The youngster “did not say or do anything to Bobo immediately before being chased and bitten.”¹⁹⁶ As a result, the court did not even need to discuss provocation.

F. Disputes on Whether and When Unintentional Conduct Can Be Provocation

Although there may be disagreement as to what constitutes provocation, it is likely most people believe a human can intentionally provoke a dog. Moreover, there is probably also consensus that a “victim” who tormented an animal should not be able to recover for his injuries if a dog bites him. However, the cases and statutes do not provide a clear answer where the question is whether an inadvertent act can qualify as provocation. Nevertheless, the majority of courts that have addressed this issue have decided that it could.¹⁹⁷

According to *Koivisto v. Davis*, for example, provocation does not consider the actor’s intent but, rather, focuses on the nature of the act itself.¹⁹⁸ “Thus, an unintentional act could constitute provocation within the plain meaning of the statute. . . .”¹⁹⁹ The “two large husky dogs” came onto Kathy Koivisto’s property while she was eating breakfast on her deck with her declawed cats.²⁰⁰ When her first attempts to stop the dogs failed, she poked one of the huskies in the eye.²⁰¹ The dogs countered by biting her multiple times as she tried to defend her pets.²⁰² The court concluded “responding to or reacting to a dog’s vicious and aggressive behavior

194. *Id.* at 13, 20.

195. *Id.* at 13.

196. *Id.* at 20.

197. *See infra* notes 198–219 and accompanying text.

198. 745 N.W.2d 824, 827 (Mich. Ct. App. 2008); *see also* Adam P. Karp & Julie I. Fershtman, *Recent Developments in Animal Tort and Insurance Law*, 44 TORT TRIAL & INS. PRAC. L.J. 185, 210–12 (2009) (noting that the dogs were already provoked when they bit and injured plaintiff as she tried to protect her declawed cats and, so, “she had no obligation to retreat to ‘submit to the will of these dogs’”).

199. *Koivisto*, 745 N.W.2d at 829 (quoting *Bran v. Extrom*, 701 N.W.2d 163, 165 (Mich. Ct. App. 2005)).

200. *Id.* at 826.

201. *Id.*

202. *Id.* at 827.

does not constitute provocation under [the statute] because a dog behaving in that manner is already in a provoked state.”²⁰³ In other words, dogs who are attacking “—the most extreme provoked state—cannot *become* provoked.”²⁰⁴ Therefore, because the issue was whether plaintiff provoked the dogs and as she clearly did not, she was entitled to damages whether she was defending her cats or protecting a “neighbor’s baby, the newspaper, or a rose bush.”²⁰⁵

Although the court in *Fagan v. Lomupo* agreed provocation could include unintentional conduct, the dog owner, for whom the Michigan statute imposes “almost absolute liability,” would only be protected if the inadvertent behavior was directed at the dog or the animal’s response was “proportional” to the victim’s act.²⁰⁶ Thus, where the evidence showed plaintiff extended a magazine over the gate to allow him to rest his arm on the fence so his conduct was not directed toward the German shepherd, and the animal’s response of biting the plaintiff’s shirt and leg “was out of proportion” to the victim’s motion, defendants were liable for damages.²⁰⁷

However, the Supreme Court of Minnesota bucked the trend on this issue in *Engquist v. Loyas*.²⁰⁸ Citing opinions as far back as 1878, it relied on its decision in *Bailey v. Morris*, which concluded “knowledge of the danger is an element of the ‘voluntariness’ necessary for the plaintiff’s conduct to constitute provocation.”²⁰⁹ This

203. *Id.* 829.

204. *Id.* at 828 (emphasis added).

205. *Id.*

206. No. 264270, 2007 WL 778047, at *1 (Mich. Ct. App. Mar. 15, 2007) (citing *Bradacs v. Jacobone*, 625 N.W.2d 108, 115 (Mich. Ct. App. 2001)).

207. *Id.* at *3.

208. 803 N.W.2d 400, 406 (Minn. 2011).

209. *Id.* at 406. *Muller v. McKesson*, 73 N.Y. 195, 201 (1878), quoted in *Engquist*, explains that if a person knows a dog is dangerous but, nonetheless, provokes him, he brought the injury on himself and is not entitled to recover because “it cannot be said, in a legal sense, that the keeping of the animal, which is the gravamen of the offence, produced the injury.” *Engquist*, 803 N.W.2d at 404. Moreover, discussing *Bailey v. Morris*, 323 N.W.2d 785 (Minn. 1982), the court in *Engquist* explained nine-year-old Amber met Bruno for the first time the day she was bitten. *Engquist*, 803 N.W.2d at 402. She was playing at her friend’s house when the lab mix, who had always been good with children and had never bitten before, came into the crawl space during a game of hide and seek. *Id.* When

means the test focuses on the victim's conduct and thus, requires that a plaintiff have "direct knowledge of the danger and . . . [have] voluntarily exposed herself to that danger."²¹⁰ Because the legislature did not amend the statute in response to *Bailey*, according to *Engquist*, the owner's liability "is absolute" absent provocation.²¹¹ Although the court does not go so far as to require that the victim must have actually intended to provoke the animal, it shifts the focus to the human's viewpoint rather than the dog's.²¹² In other words, in Minnesota, "provocation involves voluntary conduct by the plaintiff-victim that exposes the plaintiff-victim to a risk of harm from the dog of which the plaintiff-victim had knowledge at the time of the incident."²¹³

Similarly, in *Wade v. Rich*, when an eighteen-month-old fell onto a dog sleeping in the sun, the animal bit him on the face and head; the injury was so severe that the child needed twenty-three stitches.²¹⁴ Applying the Illinois statute to prove liability, plaintiff had to establish the "absence of provocation."²¹⁵ Although the evidence conflicted, no one witnessed exactly what happened; even the child's mother and grandmother "testified that they did not actually see the events immediately prior to the attack," but it appeared the

Amber reached over to pet him, he growled so she backed away. *Id.* Nevertheless, Bruno "lunged" at her. *Id.* Her eyesight was not affected but, because the dog had not been vaccinated, Amber had to have rabies shots. *Id.*

210. *Id.*

211. *Id.* at 405.

212. *Id.* For additional discussion and comparison of whether, in determining if there was provocation, judges and legislators should use the perspective of the animal or the "victim," see *supra* notes 160–96 and accompanying text.

213. *Engquist*, 803 N.W.2d at 407.

214. 618 N.E.2d 1314, 1315 (Ill. App. Ct. 1993).

215. *Id.* at 1319. In a colorful and strong dissent, Justice Lewis noted that so many people, including Shakespeare and Charles Dickens, have warned to "let sleeping dogs lie" that *Webster's New World Dictionary* includes the phrase without attribution. *Id.* at 1322 (Lewis, J., dissenting). Further, even while admitting if a dog bit his child, "I would be ready to shoot the dog," Justice Lewis pointed out that everyone knows dogs bite when "suddenly awakened." *Id.* Moreover, "whenever you commingle small children and dogs, one or the other is going to be hurt. The legislators and jurors do not live in a vacuum; they are aware of the nature of dogs and children." *Id.*; see *supra* notes 160–96 and accompanying text for discussion concerning who has the burden of proof on provocation.

child “accidentally fell onto the dog.”²¹⁶ Nevertheless, the court opined that “an unintentional or accidental act can constitute provocation.”²¹⁷ However, in the end, in this case and others,²¹⁸ defendant lost the statutory protection because the viciousness of the animal’s attack was “out of proportion to the unintentional act.”²¹⁹

G. Young Children and Provocation

Under the common law, a child younger than seven was legally incapable of negligence.²²⁰ As a result, several cases question whether anyone within that age group could be legally capable of provoking a dog. When they initially encountered the issue, Florida courts reached contradictory conclusions. Explaining that the common law applies “[i]n the absence of a legislative declaration,” the court addressed the conflict in *Reed v. Bowen*.²²¹ Because the statute provided that an owner is not liable to “any person” who provokes the dog, “the legislature . . . made the affirmative defense available without regard to the age (or other disability) of the person committing the act.”²²² Thus, the justices decided that, “as [the statute] modifies the common law[,]” the defense was valid.²²³ Notably, however, in 1993, the Florida legislature added another exception to

216. *Wade*, 618 N.E.2d at 1319.

217. *Id.* at 1320.

218. *See, e.g.*, *Bradacs v. Jacobone*, 625 N.W.2d 108, 114 (Mich. Ct. App. 2001); *Fagan v. Lomupo*, No. 264270, 2007 WL 778047, at *3 (Mich. Ct. App. Mar. 15, 2007).

219. *Wade*, 618 N.E.2d at 1320.

220. *See, e.g.*, *Woodman v. Kera, LLC*, 785 N.W.2d 1, 15–17 (Mich. 2010) (noting that “under the common law, a minor under seven years old was incapable of contributory negligence”). The age for this protection “has varied in the courts’ case-by-case applications of the doctrine; generally the “tender years” are those below the age of seven.” T. Edward Icenogle, Comment, *Capacity of Minors to Be Chargeable with Negligence and Their Standard of Care*, 57 NEB. L. REV. 763, 766–67 (1978). Some jurisdictions use different ages. *See, e.g.*, FLA. STAT. ANN. § 767.04 (West, Westlaw through 2016 Second Regular Session of the Twenty-Fourth Legislature) (“[T]he owner is not liable except as to a person under the age of 6[.]”).

221. 512 So. 2d 198, 200 (Fla. 1987) (quoting *Swindell v. Hellkamp*, 242 So. 2d 708, 710 (Fla. 1970)).

222. *Id.* (citation omitted).

223. *Id.*

owner liability “as to a person under the age of 6.”²²⁴ Therefore, as is true with many of these issues, the answer depends on the jurisdiction. While Florida now follows the common law rule by statute, other states do not.²²⁵

VII. ABANDON “PROVOCATION,” ADOPT LEGAL CAUSATION

Using provocation to determine whether a dog is dangerous or whether his owner should be liable for injuries the dog caused has produced unpredictable and inconsistent outcomes. It is simply too difficult to decide if whatever incited a dog to bite “provoked” him, and then assess whether the severity of the injury was appropriate to the action that triggered it. Fortunately, an alternative, fairly straightforward fix exists. It begins with an explicit recognition that dogs can seriously injure or even kill people.²²⁶ Someone must pay for those losses. The responsible “person” cannot be the dog, so, ordinarily, it should be the owner.²²⁷ Indeed, the trend is toward holding the owner strictly liable, although some states still use a negligence standard. Regardless, the idea is that having a dog means accepting accountability, including liability, if the animal harms someone.²²⁸

Attempting to determine if a dog was provoked is neither necessary, nor even helpful, in accomplishing this goal. A much better solution is to look to legal causation, a concept that is well-established in the common law and is already used to determine whether an owner is liable for non-bite-related damage resulting from his dog’s actions.

Turning to the cases, in *Lewellin v. Huber*, a nine-year-old’s heirs sued the dog’s owner under the absolute liability statute when a puppy distracted the driver, causing her to lose control of the car

224. Florida Animal Enterprise Protection Act, 1993, ch. 93-13, § 1, Fla. Sess. Law Serv. 1 (West).

225. See *infra* Appendix.

226. Of course, it is also important to acknowledge that dogs may damage property including other animals. See *supra* note 106 and accompanying text for a discussion of how the law treats animals as property.

227. See *supra* notes 138–39 and accompanying text and *infra* notes 254–61 and accompanying text.

228. Arguably, people who do not want, or cannot afford, these obligations should not have a dog.

and kill the child.²²⁹ Acknowledging that “there may be causation in fact here,” the Supreme Court of Minnesota decided “this chain of events is too attenuated to constitute legal causation for the radical kind of liability that the statute imposes.”²³⁰ This is because “legal causation for absolute liability . . . must be direct and immediate, *i.e.*, without intermediate linkage.”²³¹ Imposing liability seems “justified” as “a policy matter” when legal responsibility is limited like this.²³² Restricting the required proximate cause to “direct and immediate results of the dog’s actions” best serves legislative intent as well because these laws were designed to protect people who dogs might attack and injure.²³³

Similarly, in *Knake v. Hund*, when a housekeeper tripped and fell after defendants’ “unrestrained farm dog” cut in front of her to get to the garage before she did, her admission that she would not have fallen had it not been for the ice proved “the icy sidewalk was clearly an attenuating link in the causal chain.”²³⁴ Thus, as was true in *Lewellin*, “the dogs’ conduct may have been a ‘cause in fact’ but was not the direct and immediate cause of the victims’ injuries.”²³⁵ Consequently, defendants were not liable.

More than twenty years after *Lewellin*, the Minnesota high court, in *Anderson v. Christopherson*, reiterated that the dog’s actions must “constitute an affirmative act that injures someone immediately implicated by the act[] and that the act [has to] be the proximate cause of the injuries.”²³⁶ Gordon Anderson was walking his twenty pound miniature schnauzer on a leash when an unattended dog approximately two and a half times Tuffy’s weight ran out of his house and bit her in the stomach.²³⁷ Anderson sued because he fell and broke his hip while trying to separate the animals.²³⁸

229. 465 N.W.2d 62, 63 (Minn. 1991).

230. *Id.* at 66.

231. *Id.* at 65.

232. *Id.* (quoting William Prosser, *The Minnesota Court on Proximate Cause*, 21 MINN. L. REV. 19, 22 (1937)).

233. *Id.*

234. No. A10-278, 2010 WL 3119506, at *1 (Minn. Ct. App. 2010).

235. *Id.* at *3.

236. 816 N.W.2d 626, 631 (Minn. 2012).

237. *Id.* at 628–29.

238. *Id.* at 629.

As part of a review of the law since *Lewellin*, the opinion discussed *Mueller v. Theis* and its “two-pronged test:” (1) “the dog’s conduct [must] be focused on the [victim] and (2) . . . the injury is the direct and immediate result of that focus.”²³⁹ The court rejected the focus requirement and explained the correct question is “whether the dog’s conduct was the proximate cause of the plaintiff’s injuries such that injury was the direct and immediate result.”²⁴⁰

Contrast *Morris v. Weatherly*, a consolidated appeal of two cases where both defendants claimed the statute did not apply because their dogs did not touch plaintiffs.²⁴¹ Leonard Morris was on his bicycle on a public road when Lawrence Weatherly’s collie came at him “at ‘a dead run,’ ‘running low to the ground’ with ‘his ears laid back.’”²⁴² When Morris got off the bike, his left leg collapsed, he fell, and he tore his rotator cuff.²⁴³ The dog stopped several feet from Morris and just walked away.²⁴⁴ The trial court found that, although the dog did not have any physical contact with Morris, his “aggressive ‘attacking’ pursuit proximately caused Morris’ injuries and fell within the statute.”²⁴⁵

The second case involved a mailman, John A. Hinman, who noticed a large dog barking at him from across the street.²⁴⁶ But then he saw another dog running toward him “flying through the air.”²⁴⁷ A witness stated “the dog ran ‘past’ Hinman, causing him to spin around” without touching him.²⁴⁸ The jury found the dog “attacked or injured” Hinman.²⁴⁹ Even though there was no “physical contact with Hinman’s person or mailbag,” the trial court held the dog’s owners strictly liable for Hinman’s back injury.²⁵⁰

239. *Id.* at 631 (citing *Mueller v. Theis*, 512 N.W.2d 907 (Minn. Ct. App. 1994)).

240. *Id.* Proximate cause is usually a question of fact for the jury. *Id.*

241. 488 N.W.2d 508, 509 (Minn. Ct. App. 1992), *review denied* (Oct. 28, 1992).

242. *Id.* at 509.

243. *Id.*

244. *Id.*

245. *Id.* at 509–10.

246. *Id.* at 510.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

Noting that whether physical contact is required for liability was a question of first impression, the Minnesota appellate court concluded it is not necessary for the animal to actually touch the victim.²⁵¹ “[T]he statutory phrase ‘attacks or injures’” refers to “‘action by a dog that directly and immediately produces injury to the person the dog attacks or injures.’”²⁵² “[H]owever, legal causation is too attenuated” in cases “[w]here there is ‘intermediate linkage’ between the dog’s action and the injury.”²⁵³

In determining if an owner should be responsible when his dog bites someone, applying the legal causation test already used for non-bite related injuries offers an easy and effective alternative to provocation. Instead of attempting to decide what a dog was thinking when he bit someone, judges or juries need only look to whether the owner’s failure to properly train and/or supervise his dog was the proximate cause of the injury. Thus, the answer is a properly drafted statute that provides a clear standard that produces consistent, predictable results.

VIII. CONCLUSION

Adopting the analysis from cases interpreting owner liability statutes based on behavior other than bites provides an excellent alternative to the flawed provocation standard. Rather than trying to determine (1) if a dog was “provoked,” and (2) if his response was out of proportion to the provocation, the question should be whether the canine’s actions were the factual cause of the injury and the owner’s failure to properly train and supervise his animal, the legal cause. Factual causation is typically not the deciding factor in whether an action succeeds.²⁵⁴ Instead, the real inquiry involves proximate cause, which is when “the link between the act and the damage is sufficiently close that the damage may be imputed to the [owner].”²⁵⁵ If the damage is not too remote, and there was direct contact (although not necessarily physical impact) between the dog and the victim, the injury can and should be imputed to the owner.

251. *Id.* at 510–11.

252. *Lewellin v. Huber*, 465 N.W.2d 62, 65 (Minn. 1991).

253. *Morris*, 488 N.W.2d at 510.

254. J.C. Knobel, *Remnants of Blameworthiness in the Actio de Pauperie*, 74 J. CONTEMP. ROMAN-DUTCH L. 633, 641 (2011).

255. *Id.* at 640.

This is because, as the court said in *Wells*, “[h]ad defendants exercised better control over [their dog], plaintiff would not be injured.”²⁵⁶ What this means is that the bite is the factual cause of the damage,²⁵⁷ and when the damage is not too remote, the owner’s failure to properly train and/or supervise his dog is “the proximate cause of the plaintiff’s injuries such that injury was the direct and immediate result.”²⁵⁸

The theory is that, absent extraordinary circumstances, a properly trained dog will not bite. And, even if he tries, the owner who is appropriately supervising his animal would stop him before he hurt an innocent victim. Thus, both training and supervision are critical because, if for some reason the former fails, the latter will still prevent injury.²⁵⁹ This means dog ownership includes not only the many joys and very real health benefits²⁶⁰ pet owners enjoy but

256. *Wells v. Cooper*, No. 5-12-0074, 2013 WL 1197789, at *6 (Ill. App. Ct. Mar. 25, 2013).

257. *Knobel*, *supra* note 254, at 640. The author makes an interesting distinction:

[There is] a fundamental difference between an animal and other dangerous things a person may own, such as, for instance, a motor car. A person creates a much higher risk that others will be prejudiced by owning a car than by owning an animal. However, a human act or omission is needed to set the car in motion, and if damage arises, that human conduct is the cause of the damage. An animal, on the other hand, can cause damage by itself, without human intervention.

Id. While, at first glance, this may appear to be true, this Article suggests that, by the act of owning a dog, the human *has* intervened and accepted certain responsibilities, including to properly train and supervise his animal and to be liable for damage his canine causes.

258. *Anderson v. Christopherson*, 816 N.W.2d 626, 631 (Minn. 2012). “[P]roximate cause is [usually] a question of fact for the jury. *Id.*”

259. This proposal has the added benefit of simplifying the legal proceedings. This is because there will be no need to get mired in a discussion of contributory or comparative negligence. Under this theory, if the owner’s failure to control his dog is the proximate cause of the damage, he is liable.

260. Numerous studies have documented the physical and mental benefits of dog ownership. *See, e.g., Benefits of the Human-Animal Bond*, PET PARTNERS, <https://petpartners.org/learn/benefits-human-animal-bond> (last visited March 3, 2017). This website lists some of the “emerging body of research” that demonstrates the bond “is a mutually beneficial and dynamic relationship between people and animals that positively influences the health and well-being of both.” *Id.*

also the responsibility to control their companion animals at all times and liability for failure to do so.

It is important to note, however, that the analysis cannot stop at this point as it would be neither equitable nor reasonable to hold the owner liable if his dog was acting in response to certain misconduct by the person who is the alleged “victim.” Consequently, behavior that would justify self-defense or defense of others if the animal were human should shield the owner from liability. So, for example, an owner would avoid civil damages if the threatening behavior of the person bitten created the dog’s need to defend himself or others. In other words, this section contemplates situations in which the dog is acting in reasonable defense of himself and/or a person who is in danger of immediate harm from the alleged “victim.” In addition, it would be a defense to the dangerous dog law if the animal’s behavior was warranted by the situation, including that the dog was: (1) protecting himself from being tormented, abused, or otherwise mistreated by the person he bit; (2) protecting his owner, another family member, or person from attack or assault by such person; or (3) responding to severe pain or serious injury. This is because, under those circumstances, the owner’s conduct was too remote and, therefore, an “intermediate linkage”²⁶¹—that he was not the proximate cause—would protect him from liability or criminal responsibility.

A. Proposed Uniform State Statute

Chapter __. Damage by Dogs

Definitions. As used in this Chapter, unless the context clearly requires otherwise:

- (1) “Factual cause” means the dog’s conduct produced the resulting injury or death.

Examples include “higher one-year survival rates following heart attacks,” “lowers blood pressure,” “reduction in cardiovascular disease risk,” “reduced risk for Non-Hodgkin’s lymphoma and diffuse large cell lymphoma,” increased exercise, “antidote for loneliness,” and “significantly increase positive social behaviors among children with autism spectrum disorder.” *Id.*

261. *Lewellin v. Huber*, 465 N.W.2d 62, 65 (Minn. 1991); *see also supra* notes 228–56 and accompanying text.

(2) “Lawfully on or in a private place” means the person is on such property, including the property of the dog’s owner, upon the owner’s invitation, expressed or implied, or in performance of any duty imposed upon him or her by the laws of this state or by the laws or postal regulations of the United States.

(3) “Proximate cause” means the link between the act and the damage is sufficiently close that the damage may be imputed to the dog and his owner. When the damage is not too remote, it can be imputed to the animal’s behavior, and, therefore, the owner’s failure to properly train and/or supervise his dog is the legal cause of the damage.

Owner’s Liability.—The owner of any dog who bites any person²⁶² while such person is on or in a public place, or lawfully on or in a private place, including the property of the owner of the dog, is liable for damages suffered by the person bitten if the dog is the factual cause and his owner’s failure to properly train and/or supervise his dog is the legal cause of the injury or death. This is true regardless of the former viciousness of the dog or the owner’s knowledge of such viciousness. However, the owner is not liable if the actions of a person, who is not the owner, caused his dog to bite. This includes situations in which the dog is acting in reasonable defense of himself and/or a person who is in danger of immediate harm from the person bitten. Under those circumstances, even though the dog was the factual cause of the injury or death, his behavior was justifiable. This means his owner either did not fail in his duty to properly train and/or supervise or, even if he did, he was not the proximate cause of the damage because his dog’s conduct was not the result of that failure and, therefore, was too remote to impose liability.

262. Some state statutes limit liability for dog bites to injuries to people, while others include animals and even inanimate property. *See infra* Appendix. Jurisdictions that wish to do so could easily modify this law by adding either or both additional categories.

Dangerous Dog.—In recognition of the fact that there are dogs who, primarily because of their inadequate training and/or lack of supervision, but also possibly an innate disposition for aggression or other predatory behavior, may be a serious danger to humans, owners must properly train and supervise their dogs. Failure to do so may not only lead to legal responsibility to pay for any injury or death pursuant to the previous section on owner liability but may also lead to substantial restrictions on ownership of the animal as well as criminal prosecution.

(1) This law only applies to dogs who are a serious risk to humans.

(2) It is a defense to the dangerous dog law if the animal's behavior is warranted by the situation, including that the dog was:

(a) protecting himself from being tormented, abused, or otherwise mistreated by the person he bit;

(b) protecting his owner, another family member, or person from attack or assault by the person he bit;

(c) responding to severe pain or serious injury.

(3) In determining if a dog is dangerous, owners must be given the following protections:

(a) an adequate, timely opportunity to challenge charges brought against their dogs or themselves;

(b) the right to a hearing, generally, prior to removal of the dog, except in a situation where leaving the dog at home would pose a risk of harm to humans or the alleged biter;

(c) to appeal a dangerous dog finding;

(d) to obtain a stay of the proposed disposition pending an appeal.

However, reasonable restrictions can be imposed including limited confinement, mandating use of leash, and/or muzzle.

(4) Upon a finding that a dog is a dangerous dog, a court may

- (a) determine no further action is necessary;
- (b) order certain restrictions including continued confinement, restrictions on movement, the need to always be on a leash when off the owner’s property, and/or muzzling;
- (c) require “retirement” to a sanctuary where the dog can live out his life without being a danger to any human;
- (d) order euthanasia only if there is a reasonable possibility that the dog will be a danger to humans otherwise and there are no viable alternatives.

APPENDIX. STATE STATUTES AND PROVOCATION

Statute	Provocation?
<p>ALA. CODE § 3-6-1 (LexisNexis 1996).</p>	<p>“If any dog shall, without provocation, bite or injure any person who is at the time at a place where he or she has a legal right to be, the owner of such dog shall be liable in damages to the person so bitten or injured, but . . . only when the person . . . is upon property owned or controlled by the owner of such dog at the time such bite or injury occurs or . . . has been immediately prior to such time on such property and has been pursued therefrom by such dog.” ALA. CODE § 3-6-1 (LexisNexis 1996).</p>
<p>ALASKA STAT. § 03.55.020 (2012).</p>	<p>“Any dog which when unprovoked has ever bitten or attacked a human being is considered vicious” ALASKA STAT. § 03.55.020 (2012).</p>

ARIZ. REV. STAT. ANN. § 11-1027 (2012).	“Proof of provocation of the attack by the person injured shall be a defense to the action for damages. The issue of provocation shall be determined by whether a reasonable person would expect that the conduct or circumstances would be likely to provoke a dog.” ARIZ. REV. STAT. ANN. § 11-1027 (2012).
ARK. CODE ANN. § 5-62-125 (West, Westlaw through 2016 Second Extraordinary, 2016 Fiscal, and 2016 Third Extraordinary Sessions of the 90th Arkansas General Assembly).	“(a) A person commits the offense of unlawful dog attack if: (1) The person owns a dog that the person knows or has reason to know has a propensity to attack, cause injury, or endanger the safety of other persons without provocation” ARK. CODE ANN. § 5-62-125(a)(1) (West, Westlaw through 2016 Second Extraordinary, 2016 Fiscal, and 2016 Third Extraordinary Sessions of the 90th Arkansas General Assembly).
CAL. CIV. CODE §§ 3342, 3342.5 (West 1997).	No.
COLO. REV. STAT. § 13-21-124 (2012).	“(5) A dog owner shall not be liable to a person who suffers bodily injury, serious bodily injury, or death from being bitten by the dog . . . (d) As a result of the person knowingly provoking the dog” COLO. REV. STAT. § 13-21-124(5)(d) (2012).
COLO. REV. STAT. § 18-9-204.5 (2012).	“(3) . . . (h)(I) An affirmative defense to the violation of this subsection (3) shall be: . . . (E) That the person who was the victim of the attack by the dangerous dog tormented, provoked , abused, or inflicted injury upon the dog in such an extreme manner which resulted in the attack.” COLO. REV. STAT. § 18-9-204.5(3)(h)(I)(E) (2012).
CONN. GEN. STAT. ANN. § 22-357 (West, Westlaw through 2016 February Regular Session, the 2016 May Special Session, and the 2016 September Special Session).	Does not specifically mention “provocation” but includes words typically used to define the term. “If any dog does any damage to either the body or property of any person, the owner or keeper, or, if the owner or keeper is a minor, the parent or guardian of such minor, shall be liable for the amount of such damage, except when such damage has been occasioned to the body or property of a person who, at the time such damage was sustained, was committing a trespass or other tort,

	<p>or was teasing, tormenting or abusing such dog . . . CONN. GEN. STAT. ANN. § 22-357 (West, Westlaw through 2016 February Regular Session, the 2016 May Special Session, and the 2016 September Special Session).</p>
<p>DEL. CODE ANN. tit. 16, § 3079F (West, Westlaw through 80 Laws 2016, ch. 430).</p>	<p>“(d) After a dog has been declared dangerous under . . . this title, only a dog that, without provocation, kills, attacks, or inflicts physical injury or serious physical injury upon a human being or domestic animal shall be seized and impounded by the Department and disposed of by euthanasia For purposes of this subsection, ‘provocation’ means any of the exceptions to finding a dog dangerous or potentially dangerous contained in § 3074F(a) or (b) of this title.” DEL. CODE ANN. tit. 16, § 3079F(d) (West, Westlaw through 80 Laws 2016, ch. 430).</p>
<p>DEL. CODE ANN. tit. 16, § 3074F (West, Westlaw through 80 Laws 2016, ch. 430).</p>	<p>Does not specifically mention “provocation” but includes words typically used to define the term. “(a) Notwithstanding § 3073F of this title, no dog shall be considered dangerous or potentially dangerous if a physical injury or serious physical injury was sustained by any of the following: (1) A human being who, at the time the injury was sustained, was . . . teasing, tormenting, abusing, or assaulting the dog (2) A domestic animal which, at the time the injury was sustained, was teasing, tormenting, abusing, or assaulting the dog.” DEL. CODE ANN. tit. 16, § 3074F (a)(1)–(2) (West, Westlaw through 80 Laws 2016, ch. 430).</p>
<p>D.C. CODE ANN. § 8-1902 (West, Westlaw through September 19, 2016).</p>	<p>“(b)(1) A dog shall not be determined to be a potentially dangerous or dangerous dog if the dog injured: (B) A person who, at the time of injury, was provoking, tormenting, abusing, or assaulting the dog or has repeatedly, in the past, provoked, tormented, abused, or assaulted the dog.” D.C. CODE ANN. § 8-1902(b)(1)(B) (West, Westlaw through September 19, 2016).</p>
<p>FLA. STAT. ANN. § 767.04 (West, Westlaw through 2016 Second</p>	<p>No. Eliminated “provocation” in 1993. <i>See</i> Act of Oct. 1, 1993, ch. 93-13, 1993 Fla. Sess. Law</p>

Regular Session of the Twenty-Fourth Legislature).	Serv. C.S.H.B. No. 103 (eliminating “provocation”).
FLA. STAT. ANN. § 767.13 (West, Westlaw through 2016 Second Regular Session of the Twenty-Fourth Legislature).	“(1) If a dog that has previously been declared dangerous attacks or bites a person or a domestic animal without provocation , the owner is guilty of a misdemeanor of the first degree” FLA. STAT. ANN. § 767.13(1) (West, Westlaw through 2016 Second Regular Session of the Twenty-Fourth Legislature).
GA. CODE ANN. § 51-2-7 (2000).	“A person who owns or keeps a vicious or dangerous animal of any kind and who, by careless management or by allowing the animal to go at liberty, causes injury to another person who does not provoke the injury by his own act may be liable in damages to the person so injured. . . .” GA. CODE ANN. § 51-2-7 (2000).
HAW. REV. STAT. ANN. § 663-9.1 (LexisNexis 2012).	Does not specifically mention “provocation” but includes words typically used to define the term. “(c) . . . [A]ny owner or harbinger of an animal shall not be liable for any civil damages resulting from actions of the animal where the trier of fact finds that: (1) The animal caused such damage as a proximate result of being teased, tormented, or otherwise abused without the negligence, direction, or involvement of the owner or harbinger.” HAW. REV. STAT. ANN. § 663-9.1(c)(1) (LexisNexis 2012).
IDAHO CODE ANN. § 25-2810 (West, Westlaw through the 2016 Second Regular Session of the 63rd Idaho Legislature).	“(1) For purposes of this act: (a) ‘At-risk dog’ means any dog that without justified provocation bites a person without causing a serious injury . . . (b) ‘Dangerous dog’ means any dog that: (i) Without justified provocation has inflicted serious injury on a person; or (ii) Has been previously found to be at risk and thereafter bites or physically attacks a person without justified provocation . (c) ‘ Justified provocation ’ means to perform any act or omission that a reasonable person with

	<p>common knowledge of dog behavior would conclude is likely to precipitate a bite or attack by an ordinary dog.</p> <p>....</p> <p>(3) No dog may be declared to be a dangerous or at-risk dog when at the time an injury or damage was sustained, the precipitating cause constituted justified provocation. Justified provocation includes, but is not limited to, the following:</p> <p>(a) The dog was protecting or defending a person within the immediate vicinity of the dog from an attack or assault;</p> <p>(b) The person was committing a crime or offense upon the property of the owner or custodian of the dog;</p> <p>(c) The person was at the time, or had in the past, willfully tormented, abused or assaulted the dog;</p> <p>(d) The dog was responding to pain or injury or protecting its offspring;</p> <p>(e) The dog was working as a hunting dog, herding dog or predator control dog on the property of, or under the control of, its owner or keeper, and the damage or injury sustained was to a person who was interfering with the dog while the dog was working in a place where it was lawfully engaged in such activity, including public lands;</p> <p>(f) The dog was a service animal individually trained to do work or perform tasks for a person with a disability; or</p> <p>(g) The person was intervening between two (2) or more animals engaged in aggressive behavior or fighting.</p> <p>....</p> <p>(10) Any dog that physically attacks, wounds, bites or otherwise injures any person who is not trespassing, when such dog is not physically provoked or otherwise justified pursuant to subsection (3) of this section or as set forth in section 25-2808, Idaho Code, subjects either its owner or any person who has accepted responsibility as the possessor, harbinger or custodian of the dog, or both, to civil liability for the injuries caused by the dog. A prior determination that a dog is dan-</p>
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	gerous or at-risk, or subject to any court order imposing restrictions or requirements pursuant to the provisions of this section, shall not be a prerequisite to civil liability for injuries caused by the dog.” IDAHO CODE ANN. § 25-2810(1)(a)–(c), (3), (10) (West, Westlaw through the 2016 Second Regular Session of the 63rd Idaho Legislature).
510 ILL. COMP. STAT. ANN. 5/16 (West, Westlaw through P.A. 99-904 of the 2016 Reg. Sess.).	“Animal attacks or injuries. If a dog or other animal, without provocation , attacks, attempts to attack, or injures any person who is peaceably conducting himself or herself in any place where he or she may lawfully be, the owner of such dog or other animal is liable in civil damages to such person for the full amount of the injury proximately caused thereby.” 510 ILL. COMP. STAT. ANN. 5/16 (West, Westlaw through P.A. 99-904 of the 2016 Reg. Sess.).
510 ILL. COMP. STAT. ANN. 5/2.05a (West, Westlaw through P.A. 99-904 of the 2016 Reg. Sess.).	“‘Dangerous dog’ means (i) any individual dog anywhere other than upon the property of the owner or custodian of the dog and unmuzzled, unleashed, or unattended by its owner or custodian that behaves in a manner that a reasonable person would believe poses a serious and unjustified imminent threat of serious physical injury or death to a person or a companion animal or (ii) a dog that, without justification , bites a person and does not cause serious physical injury.” 510 ILL. COMP. STAT. ANN. 5/2.05a (West, Westlaw through P.A. 99-904 of the 2016 Reg. Sess.).
510 ILL. COMP. STAT. ANN. 5/15.1 (West, Westlaw through P.A. 99-904 of the 2016 Reg. Sess.).	Does not specifically mention “provocation” but includes words typically used to define the term. “(b) A dog shall not be declared dangerous if the Administrator, or his or her designee, or the Director determines the conduct of the dog was justified because: <p style="text-align: center;">. . . .</p> (2) the threatened person was abusing, assaulting, or physically threatening the dog or its offspring ; (3) the injured, threatened, or killed companion animal was attacking or threatening to attack the dog or its offspring ;

	<p>....</p> <p>(c) Testimony of a certified applied behaviorist, a board certified veterinary behaviorist, or another recognized expert may be relevant to the determination of whether the dog’s behavior was justified pursuant to the provisions of this Section.” 510 ILL. COMP. STAT. ANN. 5/15.1(b)–(c) (West, Westlaw through P.A. 99-904 of the 2016 Reg. Sess.).</p>
IND. CODE ANN. § 15-20-1-3 (LexisNexis 2008).	<p>“If a dog, without provocation, bites a person . . . the owner of the dog is liable for all damages suffered by the person bitten.” IND. CODE ANN. § 15-20-1-3(a) (LexisNexis 2008).</p>
IOWA CODE ANN. § 351.28 (West 2001).	No.
KAN. STAT. ANN. § 47-645 (2000).	No.
KY. REV. STAT. ANN. § 258.235 (LexisNexis 2013).	<p>Does not specifically mention “provocation” but does include provision that states the dog has bitten “without cause.”</p> <p>“(5) (a) Any person who has been attacked by a dog . . . may make a complaint . . . charging the owner or keeper of the dog with harboring a vicious dog. A copy . . . shall be served upon the person so charged . . . directing him to appear for a hearing If the person fails to appear at the time fixed, or if upon a hearing . . . the court finds the person so charged is the owner or keeper of the dog in question, and that the dog has viciously and without cause, attacked a human being when off the premises of the owner or keeper, the person shall be subject to . . . penalties . . . and the court shall further order the owner or keeper to keep the dog securely confined . . . or the court may order the dog to be destroyed.” KY. REV. STAT. ANN. § 258.235(5)(a) (LexisNexis 2013).</p>
LA. CIV. CODE ANN. art. 2321 (West, Westlaw through 2016 First Extraordinary, Regular, and Second Extraordinary Sessions, for all laws effective through December 31, 2016).	<p>“[T]he owner of a dog is strictly liable for damages for injuries to persons or property caused by the dog and which the owner could have prevented and which did not result from the injured person’s provocation of the dog. . . .” LA. CIV. CODE ANN. art. 2321 (West, Westlaw through 2016 First Extraordinary, Regular, and Second Extraordinary Sessions, for all laws effective through December 31, 2016).</p>

<p>LA. STAT. ANN. § 14:102.14 (West, Westlaw through 2016 First Extraordinary, Regular, and Second Extraordinary Sessions, for all laws effective through December 31, 2016).</p>	<p>“‘[d]angerous dog’ means: (1) Any dog which when unprovoked, on two separate occasions within the prior thirty-six-month period, engages in any behavior that requires a defensive action by any person to prevent bodily injury when the person and the dog are off the property of the owner of the dog; or (2) Any dog which, when unprovoked, bites a person causing an injury; or (3) Any dog which, when unprovoked, on two separate occasions within the prior thirty-six-month period, has killed, seriously bitten, inflicted injury, or otherwise caused injury to a domestic animal off the property of the owner of the dog.” LA. STAT. ANN. § 14:102.14(A) (West, Westlaw through 2016 First Extraordinary, Regular, and Second Extraordinary Sessions, for all laws effective through December 31, 2016).</p>
<p>LA. STAT. ANN. § 14:102.15 (West, Westlaw through 2016 First Extraordinary, Regular, and Second Extraordinary Sessions, for all laws effective through December 31, 2016).</p>	<p>“‘[V]icious dog’ means any dog which, when unprovoked, in an aggressive manner, inflicts serious bodily injury on or kills a human being and was previously determined to be a dangerous dog.” LA. STAT. ANN. § 14:102.15(A) (West, Westlaw through 2016 First Extraordinary, Regular, and Second Extraordinary Sessions, for all laws effective through December 31, 2016).</p>
<p>ME. REV. STAT. ANN. tit. 7, § 3961 (2002).</p>	<p>No.</p>
<p>ME. REV. STAT. ANN. tit. 7, § 3907 (Supp. 2012).</p>	<p>“‘Dangerous dog’ does not include a dog or wolf hybrid that bites or threatens to assault an individual who is on the dog or wolf hybrid owner’s or keeper’s premises if the dog or wolf hybrid has no prior history of assault and was provoked by the individual immediately prior to the bite or threatened assault.” ME. REV. STAT. ANN. tit. 7, § 3907 12-D (Supp. 2012).</p>
<p>MD. CODE ANN., CRIM. LAW § 10-619 (Lex- isNexis 2012).</p>	<p>“(a)(1) In this section the following words have the meanings indicated. (2) ‘Dangerous dog’ means a dog that: (i) without provocation has killed or inflicted severe injury on a person; or</p>

	<p>(ii) is determined . . . to be a potentially dangerous dog and, after the determination is made:</p> <ol style="list-style-type: none"> 1. bites a person; 2. when not on its owner’s real property, kills or inflicts severe injury on a domestic animal; or 3. attacks without provocation. <p>. . . .</p> <p>(c) An appropriate unit of a county or municipal corporation may determine that a dog is potentially dangerous if the unit:</p> <p>(1) finds that the dog:</p> <p>. . . .</p> <p>(iii) has attacked without provocation; and</p> <p>(2) notifies the dog owner in writing of the reasons for this determination.” MD. CODE ANN., CRIM. LAW § 10-619(a)(1)–(2), (c)(1)(iii), (c)(2) (LexisNexis 2012).</p>
<p>MASS. GEN. LAWS ANN. ch. 140, § 155 (West 2002).</p>	<p>Does not specifically mention “provocation” but includes words typically used to define the term. “If any dog shall do any damage to either the body or property of any person, the owner or keeper, or if the owner or keeper be a minor, the parent or guardian of such minor, shall be liable for such damage, unless such damage shall have been occasioned to the body or property of a person who, at the time such damage was sustained . . . was teasing, tormenting or abusing such dog. If a minor . . . is under seven years of age at the time the damage was done, it shall be presumed that such minor was not . . . teasing, tormenting or abusing such dog, and the burden of proof thereof shall be upon the defendant in such action.” MASS. GEN. LAWS ANN. ch. 140, § 155 (West 2002).</p>
<p>MASS. GEN. LAWS ANN. ch. 140, § 157 (West Supp. 2016).</p>	<p>“(a) . . . no dog shall be deemed dangerous: . . .</p> <p>(iii) if the dog was reacting to another animal or to a person and the dog’s reaction was not grossly disproportionate to any of the following circumstances:</p> <p>. . . .</p> <p>(3) the person attacked or threatened by the dog was engaged in teasing, tormenting, battering, assaulting, injuring or otherwise provoking the dog; or</p>

	<p>(4) at the time of the attack or threat, the person or animal that was attacked or threatened by the dog had breached an enclosure or structure in which the dog was kept apart from the public and such person or animal was not authorized by the owner of the premises to be within such enclosure . . . provided, however, that if a person is under the age of 7, it shall be a rebuttable presumption that such person was not . . . provoking the dog . . .” MASS. GEN. LAWS ANN. ch. 140, § 157 (West Supp. 2016).</p>
<p>MICH. COMP. LAWS ANN. § 287.351 (West 2003).</p>	<p>“If a dog bites a person, without provocation while the person is on public property, or lawfully on private property, including the property of the owner of the dog, the owner of the dog shall be liable for any damages suffered by the person bitten” MICH. COMP. LAWS ANN. § 287.351(1) (West 2003).</p>
<p>MICH. COMP. LAWS ANN. § 287.321 (West 2003).</p>	<p>“Sec. 1. As used in this act:</p> <p>(a) ‘Dangerous animal’ means a dog or other animal that bites or attacks a person, or a dog that bites or attacks and causes serious injury or death to another dog while the other dog is on the property or under the control of its owner. However, a dangerous animal does not include any of the following:</p> <p>. . . .</p> <p>(ii) An animal that bites or attacks a person who provokes or torments the animal.</p> <p>. . . .</p> <p>(d) ‘Provoke’ means to perform a willful act or omission that an ordinary and reasonable person would conclude is likely to precipitate the bite or attack by an ordinary dog or animal.</p> <p>. . . .</p> <p>(f) ‘Torment’ means an act or omission that causes unjustifiable pain, suffering, and distress to an animal, or causes mental and emotional anguish in the animal as evidenced by its altered behavior, for a purpose such as sadistic pleasure, coercion, or punishment that an ordinary and reasonable person would conclude is likely to precipitate the bite or attack.”</p>

	MICH. COMP. LAWS ANN. § 287.321(1)(a)(ii), (d), (f) (West 2003).
MINN. STAT. ANN. § 347.22 (West 2012).	“If a dog, without provocation , attacks or injures any person who is acting peaceably in any place where the person may lawfully be, the owner of the dog is liable in damages to the person so attacked or injured to the full amount of the injury sustained.” MINN. STAT. ANN. § 347.22 (West 2012).
MINN. STAT. ANN. § 347.50 (West 2012).	<p>“Subd. 2. Dangerous dog. ‘Dangerous dog’ means any dog that has:</p> <p>(1) without provocation, inflicted substantial bodily harm on a human being on public or private property;</p> <p>(2) killed a domestic animal without provocation while off the owner’s property; or</p> <p>....</p> <p>Subd. 3. Potentially dangerous dog. ‘Potentially dangerous dog’ means any dog that:</p> <p>(1) when unprovoked, inflicts bites on a human or domestic animal on public or private property;</p> <p>(2) when unprovoked, chases or approaches a person, including a person on a bicycle, upon the streets, sidewalks, or any public or private property, other than the dog owner’s property, in an apparent attitude of attack; or</p> <p>(3) has a known propensity, tendency, or disposition to attack unprovoked, causing injury or otherwise threatening the safety of humans or domestic animals.</p> <p>....</p> <p>Subd. 8. Provocation. ‘Provocation’ means an act that an adult could reasonably expect may cause a dog to attack or bite.” MINN. STAT. ANN. § 347.50 Subd. 2, 3, 8 (West 2012).</p>
Mississippi	Mississippi has neither a dangerous dog nor dog bite statute.
MO. ANN. STAT. § 273.036 (West Supp. 2014).	“The owner or possessor of any dog that bites, without provocation , any person while such person is on public property, or lawfully on private property, including the property of the owner or

	<p>possessor of the dog, is strictly liable for damages suffered by persons bitten, regardless of the former viciousness of the dog or the owner's or possessor's knowledge of such viciousness." MO. ANN. STAT. § 273.036 (West Supp. 2014).</p>
<p>MONT. CODE ANN. § 27-1-715 (West 2011).</p>	<p>"The owner of a dog that without provocation bites a person while the person is on or in a public place or lawfully on or in a private place, including the property of the owner of the dog, located within an incorporated city or town is liable for damages that may be suffered by the person bitten regardless of the former viciousness of the dog or the owner's knowledge of the viciousness." MONT. CODE ANN. § 27-1-715 (West 2011).</p>
<p>NEB. REV. STAT. § 54-601 (West 2010).</p>	<p>No.</p>
<p>NEB. REV. STAT. § 54-617 (West 2010).</p>	<p>"(3)(a) Dangerous dog means a dog that, according to the records of an animal control authority: (i) Has killed a human being; (ii) has inflicted injury on a human being that requires medical treatment; (iii) has killed a domestic animal without provocation; or (iv) has been previously determined to be a potentially dangerous dog by an animal control authority, the owner has received notice from an animal control authority or an animal control officer of such determination, and the dog inflicts an injury on a human being that does not require medical treatment, injures a domestic animal, or threatens the safety of humans or domestic animals.</p> <p>(b)(i) A dog shall not be defined as a dangerous dog . . . and the owner shall not be guilty . . . if the individual was tormenting, abusing, or assaulting the dog at the time of the injury or has, in the past, been observed or reported to have tormented, abused, or assaulted the dog.</p> <p>. . . .</p> <p>(7) Potentially dangerous dog means (a) any dog that when unprovoked (i) inflicts an injury on a human being that does not require medical treatment, (ii) injures a domestic animal, or (iii)</p>

	<p>chases or approaches a person upon streets, sidewalks, or any public grounds in a menacing fashion or apparent attitude of attack or (b) any specific dog with a known propensity, tendency, or disposition to attack when unprovoked, to cause injury, or to threaten the safety of humans or domestic animals.” NEB. REV. STAT. § 54-617(3), (7) (West 2010).</p>
<p>NEV. REV. STAT. ANN. § 202.500 (West, Westlaw through the end of the 78th Regular Session (2015) and the 29th Special Session (2015) of the Nevada Legislature and all technical corrections received by the Legislative Counsel Bureau).</p>	<p>“1. For the purposes of this section, a dog is: (a) ‘Dangerous’ if: (2) Without provocation, on two separate occasions within 18 months, it behaved menacingly, to a degree that would lead a reasonable person to defend himself or herself against substantial bodily harm (b) ‘Provoked’ when it is tormented or subjected to pain. (c) “Vicious” if: (1) Without being provoked, it killed or inflicted substantial bodily harm upon a human being” NEV. REV. STAT. ANN. § 202.500 (West, Westlaw through the end of the 78th Regular Session (2015) and the 29th Special Session (2015) of the Nevada Legislature and all technical corrections received by the Legislative Counsel Bureau).</p>
<p>N.H. REV. STAT. ANN. § 466:19 (West, Westlaw through Chapter 330 (End) of the 2016 Reg. Sess., not including changes and corrections made by the State of New Hampshire, Office of Legislative Services).</p>	<p>No.</p>
<p>N.J. STAT. ANN. § 4:19-22 (West 1998).</p>	<p>“b. A dog shall not be declared vicious for inflicting death or serious bodily injury . . . upon a person if the dog was provoked. The municipality shall bear the burden of proof to demonstrate that the dog was not provoked.” N.J. STAT. ANN. § 4:19-22 b. (West 1998).</p>

<p>N.M. STAT. ANN. § 77-1A-3 (West 2012).</p>	<p>“A dog shall not be declared a dangerous or potentially dangerous dog if:</p> <p>....</p> <p>B. the threat, injury or damage was sustained by a person or domestic animal who was:</p> <p>....</p> <p>(2) provoking, tormenting, abusing or assaulting the dog or had repeatedly, in the past, provoked, tormented, abused or assaulted the dog” N.M. STAT. ANN. § 77-1A-3 (West 2012).</p>
<p>N.Y. AGRIC. & MKTS. LAW § 123 (McKinney Supp. 2014).</p>	<p>“4. A dog shall not be declared dangerous if the court determines the conduct of the dog . . . (b) was justified because the injured, threatened or killed person was tormenting, abusing, assaulting or physically threatening the dog or its offspring, or has in the past tormented, abused, assaulted or physically threatened the dog or its offspring Testimony of a certified applied behaviorist, a board certified veterinary behaviorist, or another recognized expert shall be relevant to the court’s determination as to whether the dog’s behavior was justified” N.Y. AGRIC. & MKTS. LAW § 123(4) (McKinney Supp. 2014).</p>
<p>N.C. GEN. STAT. § 67-4.1 (West 2011).</p>	<p>“(a) . . . [U]nless the context clearly requires otherwise and except as modified in subsection (b) of this section, the term:</p> <p>(1) “Dangerous dog” means</p> <p>a. A dog that:</p> <p>1. Without provocation has killed or inflicted severe injury on a person” N.C. GEN. STAT. § 67-4.1(a)(1) (West 2011).</p>
<p>N.D. CENT. CODE § 36-21-11 (LexisNexis 2004).</p>	<p>No.</p>
<p>OHIO REV. CODE ANN. § 955.28 (LexisNexis 2013).</p>	<p>Does not specifically mention “provocation” but includes words typically used to define the term. “(B) The owner, keeper, or harbinger of a dog is liable in damages for any injury, death, or loss to person or property that is caused by the dog, unless the injury, death, or loss was caused to the person or property of an individual who, at the time . . . was teasing, tormenting, or abusing the dog on the owner’s, keeper’s, or harbinger’s</p>

	<p>property. Additionally, the owner, keeper, or harbinger of a dog is liable in damages for any injury, death, or loss to person or property that is caused by the dog if the injury, death, or loss was caused to the person or property of an individual who, at the time of the injury, death, or loss, was on the property of the owner, keeper, or harbinger solely for the purpose of engaging in door-to-door sales or other solicitations regardless of whether the individual was in compliance with any requirement to obtain a permit or license . . . provided that the person . . . was not teasing, tormenting, or abusing the dog.” OHIO REV. CODE ANN. § 955.28(B) (LexisNexis 2013).</p>
<p>OHIO REV. CODE ANN. § 955.11 (LexisNexis 2013).</p>	<p>“(A) As used in this section: (1)(a) ‘Dangerous dog’ means a dog that, without provocation . . . has done any of the following: (i) Caused injury, other than killing or serious injury, to any person; (ii) Killed another dog; (3)(a) . . . ‘nuisance dog’ means a dog that without provocation and while off the premises of its owner, keeper, or harbinger has chased or approached a person in either a menacing fashion or an apparent attitude of attack or has attempted to bite or otherwise endanger any person. (6)(a) “Vicious dog” means a dog that, without provocation . . . has killed or caused serious injury to any person. (7) ‘Without provocation’ means that a dog was not teased, tormented, or abused by a person” OHIO REV. CODE ANN. § 955.11(A)(1)(a), (3)(a), (6)(a), (7) (LexisNexis 2013).</p>
<p>OKLA. STAT. ANN. tit. 4, § 42.1 (West, Westlaw through September 1, 2016).</p>	<p>“The owner or owners of any dog shall be liable for damages to the full amount of any damages sustained when his dog, without provocation, bites or injures any person while such person is in or on a place where he has a lawful right to be.” OKLA. STAT. ANN. tit. 4, § 42.1 (West, Westlaw through September 1, 2016).</p>
<p>OKLA. STAT. ANN. tit. 4, § 42.4 (West,</p>	<p>“A. It is unlawful for the owner of any dog that previously has:</p>

Westlaw through September 1, 2016).	<p>1. When unprovoked inflicted bites on any person or severely injured any person either on public or private property; or</p> <p>2. When unprovoked created an imminent threat of injury or death to any person, to permit such dog to run at large or aggressively bite or attack any person while such person is lawfully upon public or private property.” OKLA. STAT. ANN. tit. 4, § 42.4(A) (West, Westlaw through September 1, 2016).</p>
OR. REV. STAT § 609.115 (West 2011).	<p>“(2) . . . [I]f a court has determined . . . a dog is a potentially dangerous dog, and subsequent to that determination the dog causes physical injury to a person or damage to real or personal property, the keeper of the dog is strictly liable to the injured person or property owner for any economic damages resulting from the injury or property damage.</p> <p>(3) Subsection (2) . . . does not apply if a physical injury is to a person provoking the dog”</p> <p>OR. REV. STAT. § 609.115(2), (3) (WEST 2011).</p>
3 PA. STAT. AND CONS. STAT. ANN. § 459-502-A (West 2008 & Supp. 2013).	<p>“(a) Summary offense of harboring a dangerous dog.--Any person who has been attacked by one or more dogs, or anyone on behalf of the person, a person whose domestic animal, dog or cat has been killed or injured without provocation, the State dog warden or the local police officer may file a complaint . . . charging the owner or keeper of the a dog with harboring a dangerous dog. The owner or keeper of the dog shall be guilty of the summary offense of harboring a dangerous dog if the magisterial district judge finds beyond a reasonable doubt that the following elements of the offense have been proven:</p> <p>(1) The dog has done any of the following:</p> <p>(i) Inflicted severe injury on a human being without provocation on public or private property.</p> <p>(ii) Killed or inflicted severe injury on a domestic animal, dog or cat without provocation while off the owner’s property.</p> <p>(iii) Attacked a human being without provocation.</p> <p>. . . .</p>

	<p>(2) The dog has either or both of the following: (i) A history of attacking human beings and/or domestic animals, dogs or cats without provocation. (ii) A propensity to attack human beings and/or domestic animals, dogs or cats without provocation. A propensity to attack may be proven by a single incident of the conduct described (3) The defendant is the owner or keeper of the dog.” 3 PA. STAT. AND CONS. STAT. ANN. § 459-502-A(a) (West 2008 & Supp. 2013).</p>
<p>4 R.I. GEN. LAWS § 4-13-16 (1998 & Supp. 2012).</p>	<p>No.</p>
<p>S.C. CODE ANN. § 47-3-110 (West, Westlaw through 2016 Session).</p>	<p>“(A) If a person is bitten or otherwise attacked by a dog while the person is in a public place or is lawfully in a private place, including the property of the dog owner or person having the dog in the person’s care or keeping, the dog owner or person having the dog in the person’s care or keeping is liable for the damages suffered by the person bitten or otherwise attacked. . . . (B) This section does not apply if, at the time the person is bitten or otherwise attacked: (1) the person who was attacked provoked or harassed the dog and that provocation was the proximate cause of the attack” S.C. CODE ANN. § 47-3-110 (West, Westlaw through 2016 Session).</p>
<p>S.C. CODE ANN. § 47-3-710 (West, Westlaw through 2016 Session, subject to technical revisions by the Code Commissioner as authorized by law before official publication).</p>	<p>“(A) As used in this article ‘dangerous animal’ means an animal of the canine or feline family: (1) which the owner knows or reasonably should know has a propensity, tendency, or disposition to attack unprovoked, cause injury, or otherwise endanger the safety of human beings or domestic animals; (2) which: (a) makes an unprovoked attack that causes bodily injury to a human being” S.C. CODE ANN. § 47-3-710(A) (West, Westlaw through 2016 Session, subject to technical revisions by the Code Commissioner as authorized by law before official publication).</p>

<p>S.D. CODIFIED LAWS § 40-34-14 (West, Westlaw through 2016 Session Laws and Supreme Court Rule 16-67).</p>	<p>“For the purposes of §§ 40-34-13 to 40-34-15, inclusive, a vicious dog is:</p> <p>(1) Any dog which, when unprovoked, in a vicious or terrorizing manner approaches in apparent attitude of attack, or bites, inflicts injury, assaults, or otherwise attacks a human being upon the streets, sidewalks, or any public grounds or places; or</p> <p>(2) Any dog which, on private property, when unprovoked, in a vicious or terrifying manner approaches in apparent attitude of attack, or bites, or inflicts injury, or otherwise attacks a mailman, meter reader, serviceman, journeyman, delivery man, or other employed person who is on private property by reason of permission of the owner or occupant of such property or who is on private property by reason of a course of dealing with the owner of such private property.” S.D. CODIFIED LAWS § 40-34-14 (West, Westlaw through 2016 Session Laws and Supreme Court Rule 16-67).</p>
<p>TENN. CODE ANN. § 44-8-413 (2007 & Supp. 2016).</p>	<p>“(a)(1) The owner of a dog has a duty to keep that dog under reasonable control at all times A person who breaches that duty is subject to civil liability for any damages suffered by a person who is injured by the dog</p> <p>(b) Subsection (a) shall not be construed to impose liability upon the owner of the dog if:</p> <p>. . . .</p> <p>(5) The injury occurred as a result of the injured person enticing, disturbing, alarming, harassing, or otherwise provoking the dog.” TENN. CODE ANN. § 44-8-413(a)(1), (b)(5) (2007 & Supp. 2016).</p>
<p>TEX. HEALTH & SAFETY CODE ANN. § 822.005 (West 2010).</p>	<p>“(a) A person commits an offense if the person is the owner of a dog and the person:</p> <p>(1) with criminal negligence . . . fails to secure the dog and the dog makes an unprovoked attack on another person that occurs at a location other than the owner’s real property . . . and that causes serious bodily injury . . . or death to the other person; or</p> <p>(2) knows the dog is a dangerous dog . . . and the dangerous dog makes an unprovoked attack on another person that occurs at a location other than a secure enclosure in which the dog is restrained .</p>

	. . . and that causes serious bodily injury . . . or death to the other person.” TEX. HEALTH & SAFETY CODE ANN. § 822.005(a) (West 2010).
UTAH CODE ANN. § 18-1-1 (West, Westlaw through 2016 Third Special Session).	No.
VT. STAT. ANN. tit. 20, § 3546 (2011).	“(c) If the domestic pet or wolf-hybrid is found to have bitten the victim without provocation , the municipal officials shall make such order for the protection of persons as the facts and circumstances of the case may require, including, without limitation, that the domestic pet or wolf-hybrid is disposed of in a humane way, muzzled, chained, or confined.” VT. STAT. ANN. tit. 20, § 3546(c) (2011).
VA. CODE ANN. § 3.2-6540 (Supp. 2013).	“C. . . . No animal shall be found to be a dangerous dog if the threat, injury, or damage was sustained by a person who was . . . (iii) provoking , tormenting, or physically abusing the animal, or can be shown to have repeatedly provoked , tormented, abused, or assaulted the animal at other times.” VA. CODE ANN. § 3.2-6540(C) (Supp. 2013).
VA. CODE ANN. § 3.2-6540.1 (Supp. 2013).	“C. . . . No animal shall be found to be a vicious dog if the threat, injury, or damage was sustained by a person who was . . . (iii) provoking , tormenting, or physically abusing the animal, or can be shown to have repeatedly provoked , tormented, abused, or assaulted the animal at other times.” VA. CODE ANN. § 3.2-6540.1(C) (Supp. 2013).
WASH. REV. CODE ANN. § 16.08.060 (West 2006).	“Proof of provocation of the attack by the injured person shall be a complete defense to an action for damages.” WASH. REV. CODE ANN. § 16.08.060 (West 2006).
WASH. REV. CODE ANN. § 16.08.070 (West 2006).	“Unless the context clearly requires otherwise, the definitions in this section apply throughout RCW 16.08.070 through 16.08.100. (1) ‘Potentially dangerous dog’ means any dog that when unprovoked : (a) Inflicts bites on a human or a domestic animal either on public or private property, or (b) chases or approaches a person upon the streets, sidewalks, or any public grounds in a menacing fashion or apparent atti-

	<p>tude of attack, or any dog with a known propensity, tendency, or disposition to attack unprovoked, to cause injury, or to cause injury or otherwise to threaten the safety of humans or domestic animals.</p> <p>(2) ‘Dangerous dog’ means any dog that (a) inflicts severe injury on a human being without provocation on public or private property, (b) kills a domestic animal without provocation while the dog is off the owner’s property, or (c) has been previously found to be potentially dangerous because of injury inflicted on a human, the owner having received notice of such and the dog again aggressively bites, attacks, or endangers the safety of humans.” WASH. REV. CODE ANN. § 16.08.070(1)–(2) (West 2006).</p>
<p>WASH. REV. CODE ANN. § 16.08.100 (West 2006).</p>	<p>“(2) If a dangerous dog of an owner with a prior conviction under this chapter attacks or bites a person or another domestic animal, the dog’s owner is guilty of a class C felony It is an affirmative defense . . . that he or she was in compliance with the requirements for ownership of a dangerous dog . . . and the person or domestic animal attacked or bitten . . . provoked the defendant’s dog without justification or excuse. . . .</p> <p>(3) The owner of any dog that aggressively attacks and causes severe injury or death of any human, whether or not the dog has previously been declared potentially dangerous or dangerous, shall, upon conviction, be guilty of a class C felony It is an affirmative defense . . . that the human severely injured or killed by the defendant’s dog . . . provoked the defendant’s dog without justification or excuse” WASH. REV. CODE ANN. § 16.08.100(2)–(3) (West 2006).</p>
<p>W. VA. CODE ANN. § 19-20-13 (LexisNexis 2007).</p>	<p>No.</p>
<p>WIS. STAT. ANN. § 174.02 (West, Westlaw through 2015 Act 392).</p>	<p>“(1) Liability for injury. . . .</p> <p>(b) After notice. . . . [T]he owner of a dog is liable for 2 times the full amount of damages caused by the dog biting a person with sufficient force to</p>

	<p>break the skin and cause permanent physical scarring or disfigurement if the owner was notified or knew that the dog had previously, without provocation, bitten a person with sufficient force to break the skin and cause permanent physical scarring or disfigurement.” WIS. STAT. ANN. § 174.02(1)(b) (West, Westlaw through 2015 Act 392).</p>
<p>Wyo. Stat. Ann. § 11-31-301 (2013). W. VA. CODE ANN. § 19-20-13 (LexisNexis 2007).</p>	<p>No.</p>
<p>Wyo. Stat. Ann. § 11-31-301 (LexisNexis 2013).</p>	<p>No.</p>