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Barking Up The Wrong Tree: Companion Animals, Emotional Damages and the Judiciary’s Failure to Keep Pace

SABRINA DEFABRITIIS*

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The Companionship of Our Four Legged Family Members: Priceless.¹

I. INTRODUCTION

An increasing number of American households regard their companion animals² as being as much a part of their family as they do their human

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1. See *Burgess v. Shampooch Pet Indus., Inc.*, 131 P.3d 1248, 1250 (Kan. Ct. App. 2006). The court wrote:

[W]hat is the value of a wet face licking received first thing in the morning? To a “cat person” it is probably nothing but to a dog owner who has raised her friend from a puppy it is like the Master Card ad-priceless. What is the value of years of companionship, of training, of shared love? To put a value on a family pet all of this must be considered.

Id.

family members; however, companion animals have not always held this status. The role companion animals serve has evolved from property—whose function was to derive economic benefit—to family members who share a unique emotional bond with their human companions. The judiciary has failed to keep pace with this societal change. The human-animal bond is not extinguished upon the death of the companion animal. Rather, this bond often causes extensive emotional suffering by the human companion when the animal is injured or killed by a third-party's intentional or negligent act. Despite judicial recognition that the role of companion animals has become akin to that of a family member, decisions continue to provide an inconsistent statement of the non-economic damages available to the human companion.³ Recent decisions indicate that the judiciary is ready for the legislature to step in and provide an avenue by which the courts may grant non-economic damages.⁴ Codification by state legislatures may also remedy inconsistent judicial opinions and allow human companions to recover for their emotional suffering when they lose a four-legged family member to the intentional or negligent act of a third-party.

Part I of this article reviews the history of companion animals in American households.⁵ It discusses the changing attitudes towards companion animals with a focus on the anthropomorphism of companion animals in recent decades. Part II reviews a representative selection of judicial opinions rendering inconsistent precedent on the ability of human companions to recover non-economic damages⁶ for their emotional suffering as a result of the loss of their companion animal.⁷ Part III reviews three existing statutes and addresses the present state of legislation that would permit the human companion recovery for emotional damages.⁸ Part IV makes recom-

2. *Definition of Companion Animal*, AM. SOC'Y FOR THE PREVENTION OF CRUELTY, <http://www.asPCA.org/about-us/policy-positions/definition-of-companion-animal.aspx> (last visited Feb. 2, 2011). The terms "companion animal" and "pets" are used interchangeably and commonly defined as domesticated or domestic-bred animals "whose physical, emotional, behavioral and social needs can be readily met as companions in the home, or in close daily relationship with humans." *Id.* For purposes of this article the phrase "companion animal" primarily refers to dogs and cats.

3. See *infra* notes 59-95 and accompanying text.

4. See *infra* notes 96-98 and accompanying text.

5. See *infra* Part I (discussing evolution of status of companion animals in American households).

6. As used in this article the terms "non-economic damages" shall include emotional distress, loss of companionship, love and society.

7. See *infra* Part II (discussing opinions concerning recovery of non-economic damages).

8. See *infra* Part III (discussing legislation concerning recovery of non-economic damages).

mendations for other states to enact similar statutes which codify a human companion's right to recover emotional damages.⁹

II THE EVOLVING STATUS OF COMPANION ANIMALS

Pet keeping is a universal human habit.¹⁰ Over the past three hundred years, however, the human-animal relationship has changed significantly.¹¹ Once beasts of burden kept solely to serve their owners, animals now share the comfort of their owners' homes and offer companionship rather than service.¹²

Historical accounts dating back to the eighteenth century reflect a re-occurring theme of animal as servant.¹³ Present day companion animals provided physical labor in addition to the resources necessary for human comfort, with the breed or size of the animal often determining its job.¹⁴ Small dogs protected the goods of street vendors, turned cooking spits, butter churns, cider presses and generated power for various types of machinery, including cotton gins.¹⁵ Larger, mild-mannered breeds hauled cargo, passenger wagons, and herded cattle before slaughter.¹⁶ Even "ill-tempered dogs" were useful during war times as prison guards.¹⁷ In urban areas, cats were kept or rented to catch mice.¹⁸

After a day's work, these animals were provided only with as much food as their owner's social status allowed.¹⁹ Even if their work required

9. See *infra* Part IV (recommending legislation concerning recovery of non-economic damages).

10. See STEPHEN ZAWISTOWSKI, *COMPANION ANIMALS IN SOCIETY* 6 (2008); see also Debra Squires-Lee, Note, *In Defense of Floyd: Appropriately Valuing Companion Animals in Tort*, 70 N.Y.U. L. REV. 1059, 1064 (1995) (noting research suggests human life included domesticated dogs since 6,300 B.C.).

11. See ZAWISTOWSKI, *supra* note 10, at 3 (discussing varied roles pets have played in American society).

12. See *infra* notes 13-43 and accompanying text.

13. See KATHERINE GRIER, *PETS IN AMERICA, A HISTORY* 159-160 (2006).

14. See GRIER, *supra* note 13, at 160; See also MARY ELIZABETH THURSTON, *THE LOST HISTORY OF THE CANINE RACE, OUR 15,000-YEAR LOVE AFFAIR WITH DOGS* 122 (1996).

15. See THURSTON, *supra* note 14, at 122; MARK DERR, *A DOG'S HISTORY OF AMERICA, HOW OUR BEST FRIEND EXPLORED, CONQUERED, AND SETTLED A CONTINENT* 75 (2004). The services provided by these animals coined the terms, "Turnspits" and "Trek-honds." *Id.* at 122.

16. See THURSTON, *supra* note 14, at 122; DERR, *supra* note 15, at 75.

17. THURSTON, *supra* note 14, at 175; See also DERR, *supra* note 15, at 170-71 (discussing other jobs for dogs from hunters to protectors).

18. GRIER, *supra* note 13, at 35.

19. See, e.g., GRIER, *supra* note 13, at 83, THURSTON, *supra* note 14 at 232; ZAWISTOWSKI, *supra* note 10, at 31-32. Cats and dogs owned by poor families dined on

them to be indoors, they slept outside—in accordance with the customary practice—until the late nineteenth and early twentieth century.²⁰ These conditions affected the animals' health; "animal-specialists" or common day veterinarians were a rarity, and even the best cared for animals did not live as long as their modern-day counterparts.²¹ When not fulfilling the "animal as servant" role, dogs often were considered unwanted pests.²² Abuse was common when the animals failed to perform their work.²³

Over time, mechanical conveniences—and human organizations—put an end to the working cat and dog.²⁴ By the late nineteenth and early twentieth century "civilizing" animals gained popularity.²⁵ The shift in perception of the role of companion animals began with royalty.²⁶ Dogs became more a symbol of luxury than of service. The 1877 Westminster Kennel Club Dog Show's addition of a non-sporting dog category demonstrated the luxury role that dogs obtained within the upper class.²⁷

As pet ownership became more luxurious so did the animals' lifestyles. Owners became more concerned with providing their pets with proper nutrition.²⁸ Pet equipment such as collars and cages—once used

garbage while middle class animals dined on their owner's leftovers. GRIER, *supra* note 13, at 83.

20. GRIER, *supra* note 13, at 62-63.

21. *See id.* at 90 (citing OLIVE THORNE MILLER, *OUR HOME PETS: HOW TO KEEP THEM WELL AND HAPPY* 199-200 (1894)). Animal specialists did not have time for "useless pets" and the reliance by owners on the advice of human druggists resulted in shorter life spans for animals. *See id.* at 88.

22. DERR, *supra* note 15, at 144 (noting when not "ratting" terriers treated as unwanted pests).

23. THURSTON, *supra* note 14, at 127. While abuse was common, even in this early period humans debated the moral qualities of animals, believing that dogs were sage and faithful and, therefore, should not be subject to brutality. This was exemplified by the protests raised when a man wanted to use 40 dogs to power a cotton mill. *See* DERR, *supra* note 15, at 75.

24. *See* THURSTON, *supra* note 14, at 139; *See also* Katherine K. Grier & Nancy Peterson, *Indoor Cats, Scratching and the Debate over Declawing: When Normal Pet Behavior Becomes a Problem*, in *THE STATE OF ANIMALS III: 2005 27* (DJ Salem and AN Rowan, eds. 2005).

25. GRIER, *supra* note 13, at 75-76 (noting appearance on bookshelves of manuals and guides about civilizing animals). Dogs were believed to be the most "trainable" because of their domestication. *Id.* Naturalists Charles Darwin, John Muir, Jack London and their contemporaries believed dogs were sentient beings and not beasts of burden. *See* DERR, *supra* note 15, at 215-16 (discussing the celebration of dogs as companions and experience of nature rather than as workers).

26. ZAWISTOWSKI, *supra* note 10, at 31.

27. *See* DERR, *supra* note 15, at 173; *See also* ZAWISTOWSKI, *supra* note 10, at 37 (noting that the first major American cat show was held in Madison Square Garden in 1895).

28. THURSTON, *supra* note 14, at 233. In 1860, James Spratt sold the first biscuit made just for dogs, "Spratt's Dog Cakes." Its success spurred the development of other

solely to restrain and control animals—became a fashion accessory.²⁹ Luxury pet industries, such as those for grooming and fashion accessories, began to grow.³⁰ By the mid-twentieth century dogs began to live indoors and, in response, luxury pet industries further expanded into selling dog beds and couches.³¹ Following the functional and understated accessories available during the Depression, the 1950s and 1960s saw a rise in whimsical dog clothing including fur coats and gemmed collars.³²

In mainstream American society by the end of the twentieth century, the role of pets had evolved from service to pure companionship.³³ In the first decade of the twenty-first century, the pet industry has grown into a multi-billion dollar enterprise with Americans expected to spend nearly \$47.7 billion on their pets in 2010.³⁴ These numbers are not the result of a thriving economy, but rather, of a shift in societal attitude: pets have become members of the family.³⁵ A recent study indicates that 85% of dog owners consider their pet to be a member of the family, and not just any family member: growing numbers of pet owners are treating their compan-

companies forming the foundation of the pet food industry as it exists today. *See* ZAWISTOWSKI, *supra* note 10, at 138.

29. GRIER, *supra* note 13, at 274-75. Pearls and eighteen-carat gold collars replaced the once understated and leather collars. By the end of the Twentieth Century, high-tech electronic collars designed by NASA engineers replaced simple hand-made collars. *See* THURSTON, *supra* note 14, at 224 (discussing shift to luxurious and technological products).

30. THURSTON, *supra* note 14, at 209.

31. GRIER, *supra* note 13, at 308. *See* Grier & Peterson, *supra* note 24, at 23 (discussing how sale of kitty litter in the 1940s made it easier to keep cats indoors).

32. GRIER, *supra* note 13, at 11. *See also* THURSTON, *supra* note 14, at 222-23.

33. *See* Kathy Haight, *Paradise for pets: 'Resorts' that cater to furry friends*, SEATTLE TIMES (June 14, 2010), available at http://seattletimes.nwsource.com/html/homegarden/2012093973_petsluxury14.html (noting that during the mid-to-late-1990s pets became members of the family).

34. *See* Press Release, American Pet Prods. Ass'n, Pet Industry Grows More than 5% in 2009 and Anticipates Nearly 5% Growth Again This Year (Feb. 8, 2010), available at <http://media.americanpetproducts.org/press.php?include=141525>; *see also* Ellen Warren, *For owners, it's more than puppy love*, CHI. TRIBUNE, Apr. 29, 2010, at 5 (discussing pets taking on role of first child). In 2009, Americans spent \$45.5 billion and despite the slow economy the pet industry is one of the fastest-growing industries experiencing a 5.4% sales increase from 2008. Lana Berkowitz, *Booming pet industry*, HOUS. CHRONICLE (Feb. 23, 2010), available at http://www.mysanantonio.com/business/Booming_pet_industry.html.

35. *See* Press Release, American Pet Prods. Ass'n, Despite Tough Economic Climate Americans Remain Loyal to Their Pets (Dec. 8, 2009), available at <http://media.americanpetproducts.org/press.php?include=140841> (discussing research reflecting nationwide trend that economic downturn will not affect pet spending). Spending in the majority of low income households has similarly remained unchanged. *See id.* Pet parents will cut back on personal spending before scaling back on purchases for pets. *See id.* (quoting APPA President who attributed this to strength of human-animal bond).

ion animal as a child.³⁶ These so called “pet-parents” practice what they preach by buying their pets holiday gifts,³⁷ dressing them in designer goods, transporting them in designer carriers and strollers,³⁸ scheduling play dates with other dogs,³⁹ and providing health insurance,⁴⁰ as well as the best in day-care.⁴¹

36. April Pedersen, *The DOG Delusion*, THE HUMANIST, Nov.-Dec. 2009, at 25. See Press Release, American Pet Prods. Ass’n, New Survey Reveals that When it Comes to Caring for Our Faithful Companions American Pet Owners are Top Dog (Aug. 31, 2009), available at <http://media.americanpetproducts.org/press.php?include=140291> [hereinafter Press Release, Top Dog] (stating survey results that pet owners appreciate companionship, love, company and affection offered by pets and consider dogs/cats as children and family members). Fifty percent of pet owners consider their pets to be as much a part of the family as any other member of the household. *New Poll Reveals Americans Often Treat Pets Like Humans*, PETSIDE.COM (June 23, 2009), http://www.petside.com/the-sidewalk/ap_pets_poll.php (summarizing Associated Press-Petside.com survey results). See Kristen Levine, *Can Pets Take the Place of Children*, PETSIDE.COM (June 1, 2009), <http://www.petside.com/wellness/can-pets-take-the-place-of-children.php> (discussing over 60% of dog owners believe caring for pet fulfills need to parent according to American Animal Hospital Association survey); see also Lucy Jen Huang Hickrod & Raymond L. Schmitt, *A Naturalistic Study of Interaction and Frame: The Pet as “Family Member,”* 11 URB. LIFE 55, 59 (1982) (“Persons behave toward pets as if they are family members. Pets are named, fed, groomed, photographed, talked to, protected, and mourned. Owners sleep and play with pets. They give them birthday parties [.] . . . [r]ansom has been paid for pets . . . and a dog has participated as the best man in a human wedding.”); Elizabeth Paek, *Fido Seeks Full Membership in the Family: Dismantling the Property Classification of Companion Animals by Statute*, 25 U. HAW. L. REV. 481, 482-83 (2003) (“[M]ore than 80% of companion animal guardians consider their companion animals as family members . . . [a]nother study revealed that 70% considered their companion animals as children.”).

37. See *AP-Petside Poll: Pet Holiday Gift Spending Up in 2009*, PETSIDE.COM (Nov. 23, 2009), http://www.petside.com/the-sidewalk/ap-petside_poll_pet_holiday_gift_spending_up_in_2009.php (summarizing survey results). In 2008, 43% of pet owners planned to buy holiday gifts for their pets, however, by 2009 52% answered yes to the same question reflecting a 9% increase. *Id.* Giving gifts continues to rise in popularity as many pet parents buy gifts without waiting for a special occasion. See Press Release, Top Dog, *supra* note 36.

38. See Berkowitz, *supra* note 34 (noting possible to equip the 2010 Honda Element with cushioned pet bed, fan, seat covers with dog-pattern design and extendible ramp).

39. Laurette Folk, *Yes, That’s My Baby: Who says my husband and I can’t consider our dog part of the family*, THE BOSTON GLOBE MAGAZINE, Dec. 19, 2010, at 34.

40. See Laura Bennett, *Pet Industry Trends for 2010*, SMALL BUSINESS TRENDS (Jan. 14, 2010), <http://smallbiztrends.com/2010/01/pet-industry-trends-for-2010.html> (estimating pet insurance market to reach \$400 million in premiums in 2010).

41. See Pedersen, *supra* note 36. The humanization of pets has resulted in a quickly disappearing gap in the quality of life between humans and pet companions. See Press Release, American Pet Prods. Ass’n, *supra* note 34 (quoting American Pet Products Association president); See also William C. Root, Note, *‘Man’s Best Friend’: Property Or Family Member? An Examination Of The Legal Classification Of Companion Animals And Its Impact On Damages Recoverable For Their Wrongful Death Or Injury*, 47 VILL. L. REV. 423, 435-37 (2002) (discussing how Americans consider in addition to treat their pets like family members). This gap also appears to be disappearing in the afterlife. In 1896, the Hartsdale

This tangible evidence of companion animal integration into the family structure clearly demonstrates the emotional investment human companions make in their companion animals.⁴² Companion animals provide a source of unconditional love for their owners, resulting in an emotional dependence on the animal by the human companion.⁴³ These emotions—as well as the human-animal bond—are not extinguished upon the death of the companion animal.⁴⁴ The human companion experiences a deep sense of

Pet Cemetery, the first cemetery exclusively devoted to pet burial opened in this country in the state of New York. ZAWISTOWSKI, *supra* note 10, at 219. Over one hundred years later this pet cemetery remains open and, in addition to the approximately 75,000 pets that have been buried there, an estimated 700 and growing number of people have chosen to be buried with their pets whom they consider to have been their lifetime companions. Jim Fitzgerald, *Spending more time – say, forever – with your pet*, BOSTON.COM, http://www.boston.com/news/nation/articles/2011/02/05/spending_more_time_say_forever_with_your_pet/ (last visited Feb. 7, 2011).

42. See *supra* notes 34-41 and accompanying text (describing manifestations of affection by human companions); see also Folk, *supra* note 39, at 34 (describing strong emotional bond human companions feel for animal companions with the Random House definition of love “a profoundly tender, passionate affection [and] a personal attachment”).

43. See Press Release, American Pet Prods. Ass’n, *Cats Provide Companionship, Company and Love* (undated), available at <http://media.americanpetproducts.org/press.php?include=141378> (reporting APPA National Pet Owners Survey indicated 89% cat owners reported companionship as benefit to ownership); Press Release, Top Dog, *supra* note 36 (reporting 2009-2010 APPA National Pet Owners Survey results that more than 75% of pet owners appreciate companionship offered by pets); Levine, *supra* note 36 (reporting over 50% of pet owners surveyed by American Animal Hospital Association feel emotional dependence on pets); See also Squires-Lee, *supra* note 10, at 1065 (discussing human-animal bond); See generally Sandra B. Barker, *Therapeutic Aspects of the Human-Companion Animal Interaction*, 16 PSYCHIATRIC TIMES, no 2., Feb. 1, 1999. Barker chronicles the psychological study of the human-animal bond:

Early surveys reported a strong psychological and emotional attachment between people and their pets, and the term *human-animal bond* emerged to represent this attachment. Studies revealed that most pet owners view their pets as both enhancing the quality of family life by minimizing tension between family members and enhancing their owner’s compassion for living things. Using a projective technique to investigate owners’ closeness to their pet dogs, Barer and Barker found that dog owners were as emotionally close to their dogs as to their closest family member. They reported that more than one-third of the dog owners in the study were actually closer to their dogs than to any human family member.

Id. at 45 (internal citations omitted).

44. See Squires-Lee, *supra* note 10, at 1069-71 (discussing grief experienced following death of companion animal); see also Steven M. Wise, *Recovery of Common Law Damages for Emotional Distress, Loss of Society, and Loss of Companionship for the Wrongful Death of a Companion Animal*, 4 ANIMAL L. 33, 47-49 (1998) (discussing human-animal bond and similar grief reactions following death of pet as that follow death of other family member); ZAWITOWSKI, *supra* note 10, at 217 (noting substantial change in grief

loss upon the untimely death of the companion animal similar to that which is experienced following the death of a family member.⁴⁵ Where the death results from an intentional or negligent act, these feelings may become even more pronounced.⁴⁶ Some states have enacted anti-cruelty criminal laws designed to punish and deter acts of cruelty that result in death or injury to a companion animal, however, these laws do not provide any direct form of recovery to the human companion.⁴⁷ Where the animal's death is the result of a third-party's tortious conduct, the feelings of loss are equally as pro-

counseling associated with pet loss in recent decades). The New York legislature has codified its recognition of the loss experienced by human companions:

The legislature hereby finds and declares that the relationships that humans develop with other members of the animal kingdom that are taken into our homes and kept as pets are unique and special. These relationships can enrich our lives and increase our happiness. Even after the death of a pet, human attachment to the memory of the pet often remains very strong and many people feel the need to memorialize their love for their animal

NY GEN. BUS. § 750 (1999).

45. See *Womack v. Von Rardon*, 135 P.3d 542, 544 (Wash. 2006) (noting trial court findings that plaintiff experienced guilt, loss and grief causing sleepless nights and depressive periods after plaintiff's cat was doused with gasoline and set on fire). See generally William Key, *Thanatology: Death of a Pet*, in DYNAMIC RELATIONSHIPS IN PRACTICE: ANIMALS IN THE HELPING PROFESSIONS 107, 109 (Phil Arkow ed., 1984); Sally O. Walshaw, *Contemporary Perspectives on Pets and People*, in DYNAMIC RELATIONSHIPS IN PRACTICE: ANIMALS IN THE HELPING PROFESSIONS 37, 43 (Phil Arkow ed., 1984).

46. See *Womack*, 135 P.3d at 544.

47. See, e.g., CAL. PENAL CODE § 597 (West 2010) (creating punishment of imprisonment and/or up to \$20,000 fine for malicious and intentional killing or wounding of animal); N.Y. AGRIC. & MKTS. LAW § 353-a (McKinney 2004) (defining aggravated cruelty to animals and felony punishment for offense); VA. CODE ANN. § 3.2-6570 (2008) (creating offense of Class 1 misdemeanor for defined acts of cruelty to animals). Senator Robert Byrd shared a poignant anecdote of a pet owner's emotional attachment to her pet during a speech concerning an action that would help strengthen the Human Slaughter Act. See Robert Byrd, Speech on the floor of the United States Senate (July 9, 2001) in DAVID FAVRE, ANIMAL LAW: WELFARE, INTERESTS, AND RIGHTS (2008), at 22-25 (discussing road rage incident where small dog thrown into traffic following minor traffic collision). The owner of the ten-year old Bichon Frise expressed her relationship with the dog as one of a parent and child. *Road-rage dog killer guilty of cruelty*, BBC NEWS (June 19, 2001, 10:19 PM), <http://news.bbc.co.uk/2/hi/americas/1397697.stm> ("It wasn't just a dog . . . for me it was my child . . . he killed my baby right in front of me."). See also Audrey Gillan, *Road Rage Killer Dogged by the Call of Justice*, WATODAY.COM.AU DRIVE (June 18, 2001), <http://watoday.drive.com.au/motor-news/road-rage-killer-dogged-by-the-call-of-justice-20100823-13ho8.html> (describing circumstances of incident); *3 Years for Road Rage Dog Killer*, CBS NEWS (July 13, 2001), <http://www.cbsnews.com/stories/2001/07/12/national/main301135.shtml> (describing criminal action for animal cruelty); *Man gets 3 years for throwing dog in traffic*, CNN.COM (July 13, 2001), http://articles.cnn.com/2001-07-13/justice/roadrage.dog_1_animal-cruelty-andrew-burnett-violent-crime?_s=PM:LAW.

found and cause the type of emotional injuries for which tort law should provide a remedy.⁴⁸

III. THE JUDICIARY'S FAILURE TO KEEP PACE WITH SOCIETY'S CHANGING VIEWS

Despite the change in societal attitudes toward companion animals, the right of human companions to recover for their emotional distress, which results from the death of their pets, has remained unchanged.⁴⁹ The law's purpose is to adapt to society's shifting views.⁵⁰ In the absence of binding authority, courts have the power to consider underlying public policy as a basis for their rulings.⁵¹ Where there has been a change in public policy, courts have the power to create new common law and generally do so by examining the values and viewpoints that are currently important to society.⁵² Where there has been an overwhelming shift in the public view and treatment of pets, courts are duty bound to ensure that the law keeps up with modern society.⁵³ Despite society's changing attitudes toward compan-

48. See RESTATEMENT (SECOND) OF TORTS § 901 (1965) (recognizing goals of tort law as compensation, affirmation of societal values and deterrence); see also Key, *supra* note 45, at 112; Squires-Lee, *supra* note 10, at 1064; Kathleen Boyes, *When Your Beloved Pet Dies, You Don't Have to Grieve Alone*, CHI. TRIB., Mar. 6, 1994, § 15, at 1, 4. Focusing on the goals of tort as stated in the Restatement, Squires-Lee concluded that "[t]he emotional harms wrought by the death of a companion animal must be recognized if these goals of tort law are to be fulfilled." Squires-Lee, *supra* note 10, at 1064.

49. See *infra* notes 67-92 and accompanying text.

50. Sonia S. Waisman & Barbara R. Newell, *Recovery of Non-Economic Damages for Wrongful Killing or Injury of Companion Animals: A Judicial and Legislative Trend*, 7 ANIMAL L. 45, 73 (2001). "[T]he law is a reflection of norms and values in society. These norms and values evolve from a complex combination of knowledge bases in society, both learned and experienced." Kathy Hessler, *The Role of the Animal Law Clinic*, 60 J. LEGAL EDUC. 263, 280 (2010).

51. See Dan L. McNeil, *Judicially Determined Public Policy: Is "The Unruly Horse" Loose in Michigan?*, 13 T.M. COOLEY L. REV. 143, 144 (1996) (discussing judicial lawmaking when judiciary looks to public policy when statutory and constitutional direction exists).

52. See *Carbasha v. Muslin*, 618 S.E.2d 368, 372 (W. Va. 2005) (Starcher, J., dissenting) (characterizing majority opinion as "medieval" and recognizing power of courts to adjust common law to reflect current needs when common law of the past no longer in harmony with present institutions or societal conditions); see also RESTATEMENT (SECOND) OF TORTS § 901 (1965); Stanley Ingber, *Rethinking Intangible Injuries: A Focus On Remedy*, 73 CAL. L. REV. 772, 772 (1985) (stating as one goal of tort law "vindicate[ing] important societal and personal values").

53. See *Gallimore v. Children's Hosp. Med. Ctr.*, 617 N.E.2d 1052, 1057 (Ohio 1993) (recognizing right of parent to recover damages for loss of filial consortium). The court relied specifically on the fact that the common law is "ever-evolving" and it had the duty, absent action by the legislature, "to be certain that the law keeps up with the ever-changing needs of a modern society." *Id.* See also Kathy Hessler, *The Role of the Animal*

ion animals, courts have been reluctant to allow recovery for the emotional distress which results from the negligent or intentional death of a companion animal.⁵⁴

Historically, the recovery for the death of a companion animal was limited to a loss of property claim with damages calculated by the fair market value of the animal.⁵⁵ In over one hundred years of judicial decisions, little has changed as courts continue to fall back on the archaic principle that animals are property, and the sole measure of recovery for damage to property is its fair market value.⁵⁶ This fallacy results in human companions left with minimal, if any, recovery after their pets' injury or death, because most companion animals have a negligible market value.⁵⁷

For a time, the award of damages resulting from the death of a companion animal appeared that it would remain consistent with the rising familial status of companion animals.⁵⁸ In *La Porte v. Associated Independents, Inc.*,⁵⁹ the Florida Supreme Court upheld a \$1,000 punitive damage

Law Clinic, 60 J. LEGAL EDUC. 263, 280 (2010) (identifying the possibility "that the legal analysis of the value of animals in society is flawed, lagging behind that of other significant parts of society, and should be updated").

54. See *Carbasha*, 618 S.E.2d at 372 (recognizing that nothing prevented majority from changing common law other than lack of concern for pet owners and emotional bonds existing between owners and pets); see also *infra* note 70 and accompanying text (discussing decisions critical of valuing pets beyond market value).

55. See generally Rebecca J. Huss, *The Pervasive Nature of Animal Law: How the Law Impacts the Lives of People and Their Animal Companions*, 43 VAL. U. L. REV. 1131, 1149-50 (2009) (discussing common law recovery for death of companion animal limited to fair market value).

56. See, e.g., *Lachenman v. Stice*, 838 N.E.2d 451, 467 (Ind. Ct. App. 2005) ("[T]he bottom line is that a dog is personal property, and the measure of damages for the destruction of personal property is the fair market value thereof at the time of the destruction."); *Monroe v. Lattin*, 25 Kan. 251 (1881); *Klein v. St. Louis Transit Co.*, 93 S.W. 281, 283 (Mo. Ct. App. 1906) (holding jury instruction in error by failing to state measure of damages calculated by actual value of dog); *Schrage v. Hatzlacha Cab Corp.*, 788 N.Y.S.2d 4, 5 (N.Y. App. Div. 2004) (holding that there was no recovery for emotional injury following negligent death of dog because dogs are personal property); *Jason v. Parks*, 638 N.Y.S.2d 170, 171 (N.Y. App. Div. 1996) (noting that it is well established that no recovery allowed for emotional distress caused by negligent destruction of a dog); *Zeid v. Pearce*, 953 S.W.2d 368, 369 (Tex. App. 1997) (relying on long-standing rule that recovery for a dog is limited to market value or special pecuniary value to owner ascertained by reference to dog's utility (citing *Heiligmann v. Rose*, 16 S.W. 931, 932 (Tex. 1891))).

57. See *Jankoski v. Preiser Animal Hosp., Ltd.*, 510 N.E.2d 1084, 1086 (Ill. App. Ct. 1987) (characterizing pets as personal property similar to heirlooms which generally have no market value); see also *Burgess v. Shampoo Pet Indus., Inc.*, 131 P.3d 1248, 1251 (Kan. Ct. App. 2006) (noting that a pet's monetary value is "usually close to zero" (quoting Margit Livingston, *The Calculus of Animal Valuation: Crafting a Viable Remedy*, 82 NEB. L. REV. 783, 847 (2004))).

58. See *infra* notes 58-67 and accompanying text.

59. *La Porte v. Associated Indeps., Inc.*, 163 So. 2d 267 (Fla. 1964).

jury award to the owner of Heidi, a miniature dachshund, after a garbage collector maliciously, and with extreme indifference, hurled an empty trash can at her and killed her.⁶⁰ The *LaPorte* court expressly declined to limit damages to the pet's market value.⁶¹ The court stopped short, however, of analogizing the human animal bond to that of parent and child even though it expressly recognized that the "affection of a master for his dog is a very real thing," and recovery should be allowed irrespective of fair market value.⁶²

Years later, a New York court expressly renounced the characterization of a dog as a piece of personal property.⁶³ The defendant euthanized a dog but failed to turn over its body, instead placing a cat in the casket, causing severe mental and emotional distress to the dog's owner.⁶⁴ In awarding damages above the dog's market value, the court rejected the historic rule that animals are property, stating "a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property."⁶⁵

Courts were taking notice of America's changing attitude towards companion animals.⁶⁶ The more companion animals became integrated into the family structure, the further courts were willing to go when awarding

60. *Id.* at 268.

61. *Id.* at 269.

62. *Id.*

63. *See Corso v. Crawford Dog & Cat Hosp., Inc.*, 415 N.Y.S.2d 182, 183 (N.Y. Civ. Ct. 1979) ("To say [a dog] is a piece of personal property and no more is a repudiation of our humaneness.").

64. *Id.* Crawford planned an elaborate funeral for her fifteen year old poodle including a headstone and attendance by Crawford's family and friends. She also planned to visit the grave following the funeral.

65. *Id.* (awarding damages for mental anguish and despondency caused by wrongful destruction and loss of dog's body). Importantly, the court found a pet to be distinct from an inanimate object that simply receives affection, because it returns the affection. *See id.* (noting decision should not be construed to include award for loss of family heirloom that causes great mental anguish).

66. *See Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1071 (Haw. 1981) (awarding emotional damages resulting from death of family dog question of fact for jury); *Petco Animal Supplies, Inc., v. Schuster*, 144 S.W.3d 554, 564 (Tex. App. 2004) ("[T]here are myriad examples that Texans today view dogs more as companions, friends, or even something akin to family than as an economic tool or benefit."); *Bueckner v. Hamel*, 886 S.W.2d 368, 373 (Tex. App. 1994) (Andell, J., concurring) (considering general market value rule as inadequate when assessing damages for loss of a domestic pet); *see also* Sonia S. Waisman, *Non-Economic Damages: Where Does It Get Us and How Do We Get There?*, 1 J. ANIMAL L. 7, 9-10 (2005) (discussing argument that increase in number of judicial opinions acknowledging companion animals as different than inanimate property will result in increased acceptance within legal system and society).

damages for the human companion's emotional suffering.⁶⁷ Recovery for the loss of a companion animal seemed poised to follow a similar course as that for loss of a child.⁶⁸ As the societal role of companion animals continued to evolve, however, the judiciary inexplicably stopped keeping pace.⁶⁹

The decisions that characterized animals as "more than property" were denounced as aberrations and criticized for lacking precedent to support their conclusions.⁷⁰ Courts regressed to valuing companion animals as they

67. See, e.g., *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 219 (3d Cir. 2001) (predicting that Pennsylvania courts would allow jury to award damages for intentional infliction of emotional distress where "the malicious behavior is directed to the owner as well as to the pet"); *Richardson v. Fairbanks N. Star Borough*, 705 P.2d 454, 456 (Alaska 1985) (recognizing intentional infliction of emotional distress cause of action because loss of pet can be especially distressing in egregious situations); *Gill v. Brown*, 695 P.2d 1276, 1278 (Idaho Ct. App. 1985) (allowing claim for intentional infliction of emotional distress when the negligent or reckless killing of donkey caused extreme mental anguish and suffering); *Jankoski v. Preiser Animal Hosp., Ltd.*, 510 N.E.2d 1084, 1087 (Ill. App. Ct. 1987) (allowing sentimental value to be considered when assessing actual value of pet); *City of Garland v. White*, 368 S.W.2d 12, 17 (Tex. Civ. App. 1963) (holding that evidence of plaintiff's mental and emotional suffering sufficient to sustain award for wrongful killing of a dog); *Womack v. Von Rardon*, 135 P.3d 542, 546 (Wash. 2006) (holding in a case of first impression that malicious injury to a pet may support a claim for emotional distress damages).

68. See *Anzalone v. Kragness*, 826 N.E.2d 472, 476 (Ill. App. Ct. 2005) (recognizing as creature of statute the right to recover for loss of companionship of child and drawing analogy between loss of child and loss of companion animal); *Carbasha v. Muslin*, 618 S.E.2d 368, 372 (W. Va. 2005) (Starcher, J., dissenting) ("[L]ike the children of the pre-industrial revolution, the majority opinion chooses to categorize those pets as nothing more than chattel."). Compensation for loss of the companionship of a child was not traditionally recognized by the common law. The damages a surviving parent could recover for the intentional or negligent killing of a child were "limited to the pecuniary value of the child's services and financial contributions, minus the cost of his care, support and education." *Sanchez v. Schindler*, 651 S.W.2d 249, 251 (Tex. 1983). The common law rule many courts used to deny a parent the right to recover for their child's society and companionship originated when children were treated as servants. *Shockley v. Prier*, 225 N.W.2d 495, 499 (Wis. 1975). Judicial decisions changed as the role children played in the household changed: the companionship children provided was more representative of their significance than their financial contributions. See *First Trust Co. of N.D. v. Scheels Hardware & Sports Shop, Inc.*, 429 N.W.2d 5, 10-11 (N.D. 1988). Today, the majority of jurisdictions, whether by common law or statute, allow parents to recover for the society and companionship of their child. Todd R. Smyth, Annotation, *Parent's right to recover for loss of consortium in connection with injury to child*, 54 A.L.R. (4th) 112 (1987).

69. See *Koester v. VCA Animal Hosp.*, 624 N.W.2d 209, 211 (Mich. Ct. App. 2000) (noting pets have evolved in modern society to status not consistent with the characterization as chattel but case law remains inconsistent and unpersuasive when considering public policy and societal sentiment on treatment of pets).

70. See *Gluckman v. Am. Airlines, Inc.*, 844 F. Supp. 151, 158 (S.D.N.Y. 1994) (characterizing *Corso* and opinions following it as "aberrations flying in face of overwhelming authority to the contrary."); *Oberschlake v. Veterinary Assocs. Animal Hosp.*, 785 N.E.2d 811, 813 (Ohio Ct. App. 2003) (denying plaintiffs' claim for loss of consortium and declining to follow *Corso* because it contradicts legislature's characterization of dogs as

had in the nineteenth century.⁷¹ When calculating damages for a dislocated hip suffered by a Yorkshire Terrier, a Kansas court sought guidance from a one-hundred and twenty-five year old decision involving a runaway working horse and buggy.⁷² Similarly, in calculating damages for the death of a toy poodle the *Sherman v. Kissinger*⁷³ court relied on a then forty-two year old opinion for the measure of damages for loss of property.⁷⁴ The court did not expressly limit the damages to market value, instead holding that where a piece of property cannot “be reproduced or replaced, then its value to the owner may be considered in fixing damages.”⁷⁵ The *Sherman* court, how-

property); *see also* Lachenman v. Stice, 838 N.E.2d 451, 467 (Ind. Ct. App. 2005) (“[T]he bottom line is that a dog is personal property, and the measure of damages for the destruction of personal property is the fair market value thereof at the time of the destruction.”); Schrage v. Hatzlacha Cab Corp., 788 N.Y.S.2d 4, 5 (N.Y. App. Div. 2004) (holding that there was no recovery for emotional injury following negligent death of dog because dogs defined as personal property); Jason v. Parks, 638 N.Y.S.2d 170, 171 (N.Y. App. Div. 1996) (noting that it is well established that there is no recovery for emotional distress caused by the negligent destruction of a dog); Zeid v. Pearce, 953 S.W.2d 368, 369 (Tex. App. 1997) (relying on Texas rule that recovery for a dog is limited to the market value or special pecuniary value to the owner, ascertained by reference to the dog’s utility (citing Heiligmann v. Rose, 16 S.W. 931, 932 (Tex. 1891))).

71. *See, e.g.*, *Burgess v. Shampoo Pet Indus., Inc.*, 131 P.3d 1248, 1251-52 (Kan. Ct. App. 2006) (relying on 1881 opinion) (citing *Monroe v. Lattin*, 25 Kan. 251 (1881)); *Zeid*, 953 S.W.2d at 369 (relying on 1891 opinion) (citing *Heiligmann v. Rose*, 16 S.W. 931 (Tex. 1891))).

72. *See Burgess*, 131 P.3d at 1252 (recognizing difficulty and potential impossibility to determine value of dog in purely economic market value terms). While recognizing that a horse for hire is conducive to an economic valuation more easily than a Yorkshire Terrier companion animal, the *Burgess* court followed the market-value approach and limited recovery to the amount spent on veterinary bills. *Id.* at 1252-53. In contrast, the Supreme Court of Vermont refused to apply the state’s lost property statute dating from the late-eighteenth and early-nineteenth centuries to a replevin action concerning a lost dog. *Morgan v. Kroupa*, 702 A.2d 630, 632-33 (Vt. 1997) (noting value of dog is primarily emotional and not financial and “derives from the animal’s *relationship* with its human companions.”) (emphasis in original).

73. *Sherman v. Kissinger*, 195 P.3d 539 (Wash. Ct. App. 2008).

74. *Id.* at 547-48 (citing *McCurdy v. Union Pac. R.R. Co.*, 413 P.2d 617 (Wash. 1966)).

75. *Id.* at 547 (quoting *McCurdy*, 413 P.2d at 623). Fifteen years earlier, an Ohio court calculating damages for a prize show dog, articulated a similar standard:

Market value is the standard which the courts insist on as a measure of direct property loss, where it is available, but that is a standard not a shackle. When market value cannot be feasibly obtained, a more elastic standard is resorted to, sometimes called the standard of value to the owner. This doctrine is a recognition that property may have value to the owner in exceptional circumstances which is the basis of a better standard than what the article would bring in the open market.

McDonald v. Ohio State Univ. Veterinary Hosp., 644 N.E.2d 750, 752 (Ohio 1994) (quoting *Bishop v. E. Ohio Gas Co.*, 56 N.E.2d 164, 166 (Ohio 1944)). Like the *Sherman* court, the

ever, narrowly defined value to the owner by excluding consideration of “sentimental or fanciful value.”⁷⁶ Under *Sherman* and similar cases, when assessing value to the owner a jury is not bound by the owner’s testimony and may be guided by the dog’s utility.⁷⁷ In effect, the human companion is left with minimal, if any, recovery.⁷⁸

This apparent back-peddling by the courts was not for lack of judicial recognition of the familial status that companion animals had achieved.⁷⁹

McDonald court similarly declined to include sentimentality in what it defined as “a more elastic standard.” *McDonald*, 644 N.E.2d at 752.

76. *Sherman*, 195 P.3d at 547 (citing *Mieske v. Bartell Drug Co.*, 593 P.2d 1308 (Wash. 1979)). In doing so, the court affirmed prior decisions holding that “a pet owner has no right of emotional distress damages or damages for loss of human-animal bond based on negligent death or injury to a pet.” *Sherman*, 195 P.3d at 548 (holding that a pet owner is not entitled to damages for negligent infliction of emotional distress or loss of companionship or the guardian-companion animal relationship where her small dog was mauled and injured by Rottweiler dogs (citing *Pickford v. Masion* 98 P.3d 1232, 1235 (Wash. Ct. App. 2004))). See *Brinton v. Codoni*, No. 59956-9-I, 2009 WL 297006, at *2 n.5 (Wash. Ct. App. Feb. 9, 2009) (following the *Sherman* ruling that intrinsic value does not include “sentimental value,” and limiting recovery to fair market value where neighbors dog entered the yard and killed plaintiff’s dog); see also Richard L. Cupp, Jr. & Amber E. Dean, *Veterinarians in the Doghouse: Are Pet Suits Economically Viable?*, THE BRIEF, Spring 2002, at 46-47 (recognizing that while some courts may differ as to whether market value or actual value is the appropriate measure of damages, the majority of courts do not allow human companions to recover sentimental value).

77. *Sherman*, 195 P.3d at 548 (citing *Stephens v. Target Corp.*, 482 F. Supp. 2d 1234 (9th Cir. 2007)).

78. See *Jankoski v. Preiser Animal Hosp., Ltd.*, 510 N.E.2d 1084, 1087 (Ill. App. Ct. 1987) (recognizing that the “concept of actual value to the owner may include some element of sentimental value in order to avoid limiting” recovery to nominal damages but holding that damages severely circumscribed because recovery for loss of companionship of dog not permitted in Illinois); *Carbasha v. Muslin*, 618 S.E.2d 368, 371 (W. Va. 2005) (holding that damages for sentimental value or mental suffering are not recoverable for death of dog). But see *Womack v. Von Rardon*, 135 P.3d 542, 546 (Wash. 2006) (awarding \$5,000 in damages for emotional distress where neighborhood children set cat on fire because the conduct amounted to more than negligence, and thereby supported award).

79. See *Petco Animal Supplies v. Schuster*, 144 S.W.3d 554, 564 (Tex. App. 2004) (“[T]here are myriad examples that Texans today view dogs more as companions, friends, or even something akin to family than as an economic tool or benefit.”). A California judge best summarized how essential companion animals have become to the family unit:

[T]he value of pets in daily life is a matter of common knowledge and understanding as well as extensive documentation. People of all ages, but particularly the elderly and the young, enjoy their companionship. Those who suffer from serious disease or injury and are confined to their home or bed experience a therapeutic, even spiritual, benefit from their presence. Animals provide comfort at the death of a family member or dear friend, and for the lonely can offer a reason for living when life seems to have lost its meaning. . . . Single adults may find certain pets can afford a feeling of security. Families benefit from the experience of sharing that having a pet encourages. While pet ownership may not be a

Decisions continue to recognize the prominent role played by companion animals in the hearts and homes of their human companions, even as they reluctantly decline to extend the recovery of emotional damages accordingly.⁸⁰ Judicial frustration with the “emotionless economic calculus of

fundamental right as such, unquestionably it is an integral aspect of our daily existence

Nahrstedt v. Lakeside Vill. Condo. Ass’n, 878 P.2d 1275, 1295 (Cal. 1994) (Arabian, J., dissenting).

80. See, e.g., *Nichols v. Sukaro Kennels*, 555 N.W.2d 689, 691 (Iowa 1996) (declining to allow damages for mental distress even though mindful of the suffering owners endure upon death or injury of a beloved pet); *Burgess v. Shampooch Pet Indus., Inc.*, 131 P.3d 1248, 1250 (Kan. Ct. App. 2006) (allowing damages only for veterinary bills); *Strawser v. Wright*, 610 N.E.2d 610, 612 (Ohio Ct. App. 1992) (sympathizing with pain owner endures upon the death of companion animal but denying recovery for loss of property); *Morgan v. Kroupa*, 702 A.2d 630, 633 (Vt. 1997) (noting a pet’s value derives from its relationship with human companions); See also *Zager v. Dimilia*, 524 N.Y.S.2d 968, 970 (N.Y. Vill. Ct. 1988) (holding the proper measure of damages is the reasonable and necessary cost of veterinary treatment because too difficult to calculate ethereal intrinsic value for pet); *Kondaurov v. Kerdasha*, 629 S.E.2d 181, 186-87 (Va. 2006) (holding recovery is limited to diminution of value of a pet because of its status at law as personal property); *Rabideau v. City of Racine*, 627 N.W.2d 795, 798 (Wis. 2001) (recognizing the long-standing association between dog and human but limiting recovery due to the law’s characterization of a dog as personal property). The *Zager*, *Kondaurov*, and *Rabideau* courts highlighted the special relationship between an owner and a pet, however, each were constrained by the classification of a pet as personal property. Specifically, *Zager* stated:

[a pet’s] relationship to [his owner] and members of his family does have value separate and distinct from sentiment, [but this is] an element which the law precludes from consideration in ascertaining damages. However, it is impossible to reduce to monetary terms the bond between man and dog, a relationship which has been more eloquently memorialized in literature and depicted on the motion picture screen.

524 N.Y.S.2d at 969 (citations omitted). Similarly, the *Rabideau* court noted that a description of a dog as mere personal property fails to recognize the value placed by owners on their companionship with their dogs: “A companion dog is not a fungible item, equivalent to other items of personal property. A companion dog is not a living room sofa or dining room furniture. This term inadequately and inaccurately describes the relationship between a human and a dog.” 627 N.W.2d at 798. Although courts recognized the sentimental attachment human companions have toward their companion animals, they continued to hold that this attachment does not make the animals unique pieces of chattel under the law. See *Daughen v. Fox*, 539 A.2d 858, 864 (Pa. Super. Ct. 1988). This sentiment was echoed by the Supreme Court of Virginia:

It is beyond debate that animals, particularly dogs and cats, when kept as pets and companions, occupy a position in human affections far removed from livestock. Especially in the case of owners who are disabled, aged or lonely, an emotional bond may exist with a pet resembling that between parent and child, and the loss of such an animal may give rise to grief approaching that attending the loss of a family member. The fact remains, however, that the law in Virginia, as in most states that have decided the question, regards animals, however beloved, as personal property.

property law” as applied to companion animals is demonstrated by the text of recent decisions.⁸¹ In *Scheele v. Dustin*,⁸² the Vermont Supreme Court declined to allow recovery beyond \$155 of economic damages for the malicious killing of a family dog with a pellet gun.⁸³ When declining to permit recovery for the human companion’s emotional suffering, the court relied on the legislature’s province to shape the law that governs the treatment of animals.⁸⁴ The court acknowledged that issues concerning a human companion’s recovery for emotional damages—including loss of companion-

Kondaurov, 629 S.E.2d at 186-87.

81. *Scheele v. Dustin*, 998 A.2d 697, 700 (Vt. 2010) (summarizing past decisions); *See also* *Oberschlake v. Veterinary Assocs. Animal Hosp.*, 785 N.E.2d 811, 815 (Ohio Ct. App. 2003) (Young, J., concurring) (agreeing reluctantly that pet owners may not recover non-economic damages for injuries to pet but suggesting that “[t]he General Assembly should at least consider recognizing pets as companion animals and allow owners to recover reasonable damages for their loss of or injury to a much-loved pet.”). The *Scheele* court stated:

[C]ategorizing a beloved pet as mere property fails to recognize that such an animal’s worth is not primarily financial[;] . . . its value derives from the animal’s *relationship* with its human companions. Indeed, we have suggested that the emotionless economic calculus of property law may not fully compensate a mourning pet owner. . . .

Scheele, 998 A.2d at 700 (first ellipses in original) (emphasis in original) (internal quotation omitted). Judicial frustration with the current state of the common law has been expressed, particularly well, by one Connecticut court:

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

Myers v. Hartford, 853 A.2d 621, 626 (Conn. App. Ct. 2004). Animal law scholars have also voiced their dissatisfaction with the inadequate calculation of damages when animals are characterized as property:

The “animals as property” syllogism arbitrarily, irrationally, unfairly, and formalistically limits recovery of noneconomic damages for the wrongful deaths of companion animals. It ignores the fact that the relationship between a human and his companion animal is no more based upon economics than is any other family relationship. It perversely permits the award of damages for an economic loss that a human companion does not suffer and refuses to compensate for the emotional distress and loss of society and companionship that he actually does suffer.

Wise, *supra* note 44, at 93.

82. *Scheele*, 998 A.2d 697 (Vt. 2010).

83. *Id.* at 698-99.

84. *Id.* at 704 (citing *Goodby v. Vetpharm, Inc.*, 974 A.2d 1269 (Vt. 2009)).

ship—would best be presented to the legislature.⁸⁵ Absent action by the legislature, the court was left to rely on outdated precedent that categorized a companion animal as property for which the sole measure of damages is its fair market value.⁸⁶ Following *Scheele*, other courts have similarly noted that it is the task of the legislature to expand recovery for loss of a pet.⁸⁷

In addition to citing a lack of precedent supporting recovery of non-economic damages, some courts express concern about permitting damage awards fearing that, once allowed, there would be no clear or reasonable point to limit recovery—by animal class or amount of recovery.⁸⁸ In *John-*

85. *Id.* (recognizing the duty of the legislature to shape body of law regarding animals and duty of courts to look to that body of law for guidance). The *Scheele* court also recognized that the Vermont legislature has previously enacted legislation for the recovery of specific damages for the destruction of property and, therefore, has the power to do the same for animals. *Id.* at 703 n.4 (citing VT. STAT. ANN. tit. 13, § 3606 (West 2010) (allowing for the recovery of treble damages for conversion of a tree)).

86. See *Scheele*, 998 A.2d at 704; see also A.2711-Memorandum in Support of Legislation (Apr. 13, 2009), 232nd Leg., Reg. Sess. (N.Y. 2009), http://assembly.state.ny.us/leg/?default_fld=&bn=A02711&term=2009&Memo=Y&Text=Y (discussing the need for New York to enact statute allowing recovery for emotional injuries). The bill's justification included specific reference to courts departing from the traditional concept of animals as property:

Brutal violence against animals, so often a precursor to violence against humans, goes on largely undeterred - and entirely uncompensated . . . our civil tort law still treats animals the same as inanimate property: like table and chairs. Although several courts in New York have departed from the traditional approach, many are hesitant, absent legislative guidance, to relinquish the common law's antiquated, scientifically obsolete assumption that animals are just "things."

Id.

87. See *Koester v. VCA Animal Hosp.*, 624 N.W.2d 209, 211 (Mich. Ct. App. 2000) (failing to find Michigan precedent that would allow for the recovery of emotional injuries suffered for the loss of a pet, and deferring to the legislature to create such a remedy); *Goodby v. Vetpharm, Inc.*, 974 A.2d 1269, 1274 (Vt. 2009) (lacking a compelling reason to usurp the role of the legislature and expanding the common law to allow for recovery of mental anguish for the loss of a pet). See also *infra* note 101 (quoting Justice Abrahamson's concurring opinion in *Rabideau*, 627 N.W.2d 789 (Wis. 2001)); *Shoan v. Barnett*, 289 S.W. 204, 206 (Ky. 1926) (conceding within legislature's police powers to enact laws governing dogs).

88. See *Lachenman v. Stice*, 838 N.E.2d 451, 461 (Ind. Ct. App. 2006) (equating the loss of pet dog to lost heirlooms and photos and holding that these economic losses do not support claim for negligent infliction of emotional distress); *Pacher v. Invisible Fence of Dayton*, 798 N.E.2d 1121, 1126 (Ohio Ct. App. 2003) (rejecting recovery of emotional damages due to the difficulty to define classes entitled to recovery and animal classes for which recovery allowed); *Rabideau v. City of Racine*, 627 N.W.2d 795, 799 (Wis. 2001) (fearing allowing recovery for loss of dog would extend *ad infinitum* because of inability to rationally distinguish other categories of companionship). Courts have expressed concern about quantifying the emotional value of a pet and increasing potential burdens on the court system. See *Myers v. Hartford*, 853 A.2d 621, 626 (Conn. App. Ct. 2004) (citing public policy concerns related to "flooding the courts with spurious and fraudulent claims" when affirming common

son v. Douglas,⁸⁹ the plaintiffs were walking their dogs when the defendant, allegedly driving her vehicle at an excessive rate of speed, crushed one of the dogs.⁹⁰ When denying the plaintiffs' claims for emotional distress, the court conceded that many pet owners consider their pets members of the family.⁹¹ Although the court sympathized with the plaintiffs and acknowledged how traumatic it must have been for them to witness the death of a family dog, the court declined to extend recovery for emotional damages for the destruction of property—even when the property is a living, breathing, and loving dog.⁹² The court theorized and feared that allowing these claims for pets would necessarily cause an extension of claims for the tortious destruction of other types of property such as family heirlooms or prized possessions.⁹³

Courts find their hands tied, lacking the precedent on which they may base recovery for emotional damages.⁹⁴ Scholars have similarly recognized this impasse many courts have reached.⁹⁵ Even as courts recognize a need

law denial of emotional damages for death of a pet). *But see* *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1071 (Haw. 1981) (noting that the *Rodrigues* decision permitted recovery for mental distress suffered following negligent destruction of property but that a floodgate of similar cases has not opened in ten years following decision (citing *Rodrigues v. State*, 472 P.2d 509 (1970))); *Brousseau v. Rosenthal*, 443 N.Y.S.2d 285, 286 (Sup. Ct. 1980) (noting uncertain damages or lack of absolute mathematical accuracy should not be a bar to recovery). Courts rejected similar arguments that were raised in the context of filial consortium claims. *See* *Gallimore v. Children's Hosp. Med. Ctr.*, 617 N.E.2d 1052, 1058 (Ohio 1993) (ruling "difficulty in measuring damages for a parent's loss of filial consortium is no justification for denying the right to pursue the claim.").

89. *Johnson v. Douglas*, 723 N.Y.S.2d 627 (N.Y. Sup. Ct. 2001).

90. *Id.* at 627.

91. *Id.* at 628.

92. *Id.* ("Although we live in a particularly litigious society, the court is not about to recognize a tortious cause of action to recover for emotional distress due to the death of a family pet.").

93. *Id.*

94. *See, e.g., Koester v. VCA Animal Hosp.*, 624 N.W.2d 209, 211 (Mich. Ct. App. 2000) ("Case law on this issue from sister states is not consistent, persuasive, or sufficient precedent. We refuse to create a remedy where there is no legal structure in which to give it support."); *Petco Animal Supplies, Inc., v. Schuster*, 144 S.W.3d 554, 565 (Tex. Ct. App. 2004) (reversing trial court's \$47,000 damage award when \$10,000 of award was attributed to emotional damages and loss of companionship after finding no support for awarding mental anguish damages for loss of dog under Texas law); *Kondaurov v. Kerdasha*, 629 S.E.2d 181, 186-87 (Va. 2006) (specifically stating that Virginia law considers animals as personal property no matter how beloved and changing); *Mansour v. King Country*, 128 P.3d 1241, 1247 (Wash. Ct. App. 2006) ("[A]lthough we have recognized the emotional importance of pets to their families, legally they remain . . . property."). The *Petco* court recognized that it was bound by precedent—or lack thereof—stating "[a]n intermediate appellate court, we are not free to mold Texas law as we see fit but must instead follow the precedents of the Texas Supreme Court unless and until the high court overrules them or the Texas Legislature supersedes them by statute." *Petco*, 144 S.W.3d at 565.

95. *See* *Waisman & Newell supra* note 50, at 68.

for the recovery of emotional damages, courts consider their hands to be tied because they lack the precedent on which they may base recovery for emotional damages. This impasse has a plain solution: state legislators must take action and change the law of recoverable damages.⁹⁶

IV. THE T-BO ACT AND ITS PROGENY: EXISTING AND PROPOSED LEGISLATION

In the past decade, three states have enacted statutes expressly permitting non-economic damages for the loss of a pet.⁹⁷ The statutes share a similar framework with each defining what constitutes a “companion animal” or “pet,” the actionable tortious conduct, recoverable damages, and parties exempt from liability.⁹⁸ There are also dramatic differences among the statutes, but the grants and limitations imposed by each may be instructive to the legislatures of other states contemplating a statute that recognizes the unique position of companion animals.⁹⁹

The time clearly has come for legislatures to step in to guide the courts and memorialize by statute what most professionals and companions to animals already know—animals are now clearly and unequivocally members of the family to many individuals who suffer (psychologically and possibly physically as well) at their loss. Where harm to one’s animal companion is the result of the intentional or negligent act of another, the damages must reflect the depth and scope of the loss—as with any other wrongful death or loss of companionship claim.

Id. See also Victor E. Schwartz & Emily J. Laird, *Non-Economic Damages in Pet Litigation: The Serious Need To Preserve A Rational Rule*, 33 PEPP. L. REV. 227, 243 (2006) (“[I]t is clear that when courts allow non-economic damages in pet cases, they undertake fundamental changes to the common law that are better left to the legislature.”).

96. See *Anzalone v. Kragness*, 826 N.E.2d 472, 476 (Ill. App. Ct. 2005) (deferring to legislature to fashion an appropriate cause of action and provide guidance about appropriate measure of damages); *Kransnecky v. Meffen*, 777 N.E.2d 1286 (Mass. App. Ct. 2002) (holding that in absence of statutory authority recovery for loss of consortium for death of sheep precluded such recovery); *Koester*, 624 N.W.2d at 211 (“We refuse to create a remedy where there is no legal structure in which to give it support. However, plaintiff and others are free to urge the Legislature to visit this issue in light of public policy considerations, including societal sentiment and treatment of pets. . . .”); *Kondaurov*, 629 S.E.2d at 187 (recognizing that change in law of damages is a subject matter properly left to legislative consideration); *infra* note 85 and accompanying text (recognizing role of legislature).

97. CONN. GEN. STAT. § 22-351a (2009) (originally enacted in 2004); 510 ILL. COMP. STAT. 70/16.3 (2010) (originally enacted in 2002); TENN. CODE ANN. § 44-17-403 (West 2010) (originally enacted 2000).

98. See CONN. GEN. STAT. § 22-351a (2009); 510 ILL. COMP. STAT. 70/16.3 (2010); TENN. CODE ANN. § 44-17-403 (West 2010); see also LITIGATING ANIMAL LAW DISPUTES A COMPLETE GUIDE FOR LAWYERS 446-47 (Joan Schaffner & Julie Freshman eds., 2009).

99. See CONN. GEN. STAT. § 22-351a (2009); 510 ILL. COMP. STAT. 70/16.3 (2010); TENN. CODE ANN. § 44-17-403 (West 2010); see also *infra* notes 103-122 and accompanying text (describing provisions and limitations of statutes).

A. EXISTING LEGISLATION

Tennessee was the first state to adopt a statute expressly authorizing the recovery of non-economic damages for the death of a companion animal.¹⁰⁰ Shortly after its codification, one court commented that this is the way non-economic damages for death or injury to a companion animal should be handled.¹⁰¹ Commonly referred to as the “T-Bo Act,”¹⁰² the statute was enacted to compensate the human companion upon the unlawful, intentional, or negligent act “of another or animal of another.”¹⁰³ The Tennessee statute uses the term “pet” and applies to “domesticated dog[s] or cat[s] normally maintained in or near the household of [their] owner.”¹⁰⁴ It permits recovery for non-economic damages related to “the loss of the reasonably expected society, companionship, love and affection of the pet.”¹⁰⁵ When enacting the T-Bo Act, the Tennessee legislature recognized that emotional distress and loss of companionship are appropriate forms of relief following the intentional or negligent killing of a companion animal and, at least implicitly, adopted society’s view that companion animals occupy a special place in the family structure.¹⁰⁶

The T-Bo Act, while a step in the right direction, is not an ideal solution. The form of recovery created by the statute does not apply when a human companion brings a professional negligence action against a licensed veterinarian.¹⁰⁷ Similarly, non-profit groups, governmental agencies, and the employees of each are expressly exempt from liability when they

100. TENN. CODE ANN. § 44-17-403 (West 2010).

101. See *Rabideau v. City of Racine*, 627 N.W.2d 795, 807 (Wis. 2001) (Abrahamson, J., concurring). Justice Abrahamson praised the legislature for acting:

At least one state has enacted a law that allows up to \$4,000 recovery for non-economic damages such as loss of the reasonably expected companionship, love, and affection of a pet resulting from the intentional or negligent killing of the pet. Such a statute allows the legislature to make a considered policy judgment regarding the societal value of pets as companions and to specify the nature of the damages to be awarded in a lawsuit.

Id.

102. SONIA WAISMAN, PAMELA FRASCH & BRUCE WAGMAN, *ANIMAL LAW CASES AND MATERIALS* 77 (3d ed. 2006). Tennessee Senator Steve Cohen proposed the bill after his Shitzu, T-Bo, was wrongfully killed by another dog. See Paek, *supra* note 36, at 517. Senator Cohen sued in small claims court and was only allowed to recover T-Bo’s medical expenses. *Id.* The Senator was unable to bring a claim based on his emotional distress caused by T-Bo’s death because companion animals were considered property. *Id.* at 517-18.

103. TENN. CODE ANN. §44-17-403(a)(1) (West 2010).

104. *Id.* § 44-17-403(b).

105. *Id.* § 44-17-403(d).

106. See *id.*; see also *supra* notes 33-41 and accompanying text (discussing integration of companion animals into family).

107. TENN. CODE ANN. § 44-17-403(e) (West 2010).

are acting in their professional capacity on behalf of the public health or animal welfare.¹⁰⁸ The statute places a \$5,000 cap on recovery for the loss of the pet's companionship, love, and affection.¹⁰⁹ Recovery is further restricted when negligence is the cause of the pet's death or injury—it must occur on the human companion's property or while the pet was under the human companion's control and supervision.¹¹⁰

The Illinois statute—codified two years after the T-Bo Act—provides for broader recovery by human companions, but limits the availability of a cause of action.¹¹¹ A successful claim must allege that the putative defendant subjected the companion animal to an act of aggravated cruelty or torture, or engaged in bad faith that resulted in the companion animal's injury or death.¹¹² Unlike the T-Bo Act, in Illinois a human companion may recover for *any animal* to which a person has a right of ownership—recovery is not limited to dogs and cats.¹¹³ Illinois permits recovery for a broad array of actual damages and permits the award of punitive damages of not less than \$500, but not more than \$25,000 for *each act* of abuse or neglect suffered by the animal.¹¹⁴ The punitive damage provision of the Illinois statute, alone, allows for the potential recovery of up to five times the T-Bo Act's cap on damages for one injurious act committed by a third-party.¹¹⁵ A further benefit offered by the Illinois statute is the mandatory award of attorney's fees and costs actually incurred by the human companion when prosecuting his claim.¹¹⁶ Further expanding the availability of recovery, the Illinois legislature did not expressly exempt any specific agency or individual from liability under the section.¹¹⁷

The most recently enacted statute, in Connecticut, is in some ways the most restrictive.¹¹⁸ Like the T-Bo Act, it limits its application to domesti-

108. *Id.*

109. *Id.* § 44-17-403.

110. *Id.* § 44-17-403(a)(1).

111. *See* 510 ILL. COMP. STAT. 70/16.3 (2010).

112. *Id.*

113. *Compare id.* (applying to any person with right of ownership in an animal), *with* TENN. CODE ANN. § 44-17-403(b) (West 2010) (defining pet as domesticated dog or cat).

114. *See* 510 ILL. COMP. STAT. 70/16.3 (2010) (describing damages sustained by human companion). Damages are defined by the statute to include, but not be limited to, the animal's monetary value, incurred veterinary expenses, expenses incurred rectifying effect of cruelty pain and suffering of the animal and expenses incurred rectifying emotional distress suffered by human companion. *Id.*

115. *Compare id.* (describing punitive damage awards), *with* TENN. CODE ANN. § 44-17-403(a) (West 2010) (limiting recovery for non-economic damages to \$5,000).

116. 510 ILL. COMP. STAT. 70/16.3 (2010).

117. *See id.*

118. *See* CONN. GEN. STAT. § 22-351a (2009).

cated dogs and cats normally kept in or near households.¹¹⁹ It further limits recovery by imposing liability only after the intentional killing or injuring of a companion animal.¹²⁰ The statute does not provide for non-economic damages suffered by the human companion, but identifies the types of economic damages that may be recovered and provides for the award of punitive damages.¹²¹ Although attorney's fees are awarded as of right in Illinois, a Connecticut court may award reasonable attorney's fees to a prevailing human companion.¹²² Further limiting the recovery available to human companions, Connecticut does not permit an award of punitive damages or attorney's fees against certain broad classes of defendants.¹²³

B. PROPOSED LEGISLATION

In the ten years since the first of these statutes was enacted, many states have attempted to pass legislation similar to the T-Bo Act and its progeny.¹²⁴ In 2009, at least six states proposed bills related to expanding

119. *Id.* (defining companion animal); *see also supra* note 104 and accompanying text (describing pet as defined by T-Bo Act).

120. *Id.*

121. *See id.* (stating economic damages recoverable include but not limited to veterinary care, fair monetary value of companion animal and burial expenses); CONN. GEN. STAT. § 22-351a(c) (2009) (limiting award of punitive damages to the jurisdictional monetary limit established in small claims proceedings). In 2009 Connecticut declined to enact additional legislation that would have increased owner liability for damages caused by a dog. The favorable report from the Environmental Committee provides guidance concerning the explanation of the failure to enact the legislation with its summary of the opposition: "If we begin enumerating the types of items covered pursuant to the statute, the statute will likely have to be amended to provide the same for any and all potential damaged subjects of the statute [sic]." CONN. GEN. ASSEMB. ENVTL. COMM., JOINT FAVORABLE REP., S.B. 743 (2009), available at www.cga.ct.gov/2009/JFR/S/2009SB-00743-R00ENV-JFR.htm.

122. *Compare* 510 ILL. COMP. STAT. 70/16.3 (2010) ("[T]he court must award reasonable attorney's fees"), *with* CONN. GEN. STAT. § 22-351a(c) (2009) ("[T]he court may award . . . a reasonable attorney's fee.").

123. CONN. GEN. STAT. § 22-351a(c)-(d) (2009). Licensed veterinarians, the state or state employee acting within his capacity, and employees or volunteers of non-profits operated for the prevention of cruelty to animals are exempt from punitive damages and attorney fees. *Id.* § 22-351a(d) (2009).

124. *See* Elaine T. Byszewski, *Valuing Companion Animals in Wrongful Death Cases: A Survey of Current Court and Legislative Action and a Suggestion for Valuing Pecuniary Loss of Companionship*, 9 ANIMAL L. 215, 226-30 (2003) (discussing Tennessee's T-Bo Act and surveying proposed legislation in other states). *But see* NEV. REV. STAT. § 41.740 (2007) (expressly precluding punitive and non-economic damages for intentionally, willfully, recklessly or negligently injuring or killing the pet of another). The development of pet trusts provides further evidence of the rising familial status of companion animals. *See* Susan J. Hankin, *Not A Living Room Sofa: Changing the Legal Status of Companion Animals*, 4 RUTGERS J.L. & PUB. POL'Y 314, 358-65 (2007) (discussing growing number of jurisdictions adopting legislation that permits creation of binding pet trusts to provide for care of companion animals after death of human companion). When Hankin's article was

damages recoverable for death or injury to a companion animal.¹²⁵ All but one of these proposed bills have been quietly rejected by the state's legislatures.¹²⁶ The existence of these bills, however, provide guidance as these

published in 2007, twenty-six states had enacted binding pet trust statutes. *Id.* at 363. As of early 2011, the number of states permitting pet trusts had increased to 44. *Pet Trusts, ANIMAL LEGAL & HISTORICAL CENTER*, <http://www.animallaw.info/articles/armpuspettrusts.htm> (last visited Feb. 2, 2011). Further evidence of legislatures recognizing the changing status of companion animals can be found by codes, county ordinances and legislation that use the term “guardian” instead of “owner” when referring to companion animals. See *Guardian Communities*, THE GUARDIAN CAMPAIGN, <http://www.guardiancampaign.com/guardiancity.html> (last visited Feb. 2, 2011). As of 2008, the state of Rhode Island and eighteen cities and counties across the United States have incorporated the term “guardian” into their animal-related ordinances. *Id.* In Defense of Animals created the Guardian Campaign in 1999 and promotes using the term “guardian” because the term more accurately connotes the responsibility for the care, welfare, treatment and quality of life of the animal. See *Benefits of the Guardian Language*, THE GUARDIAN CAMPAIGN, <http://www.guardiancampaign.com/guardianlanguage.html> (last visited Feb. 2, 2011) (recognizing term does not change animal’s legal status).

125. See S.743, 2009 Conn. Gen. Assemb., Jan. Sess. (2009), available at <http://www.cga.ct.gov/2009/TOB/s/pdf/2009SB-00743-R00-SB.pdf>; S.743-25, Reg. Sess., at 1 (Haw. 2009), available at http://www.capitol.hawaii.gov/session2009/bills/SB73_.pdf; S.1550-186, Gen. Ct. Reg. Sess., at 2-4 (Mass. 2009), available at <http://www.malegislature.gov/Bills/186/Senate/S1550>; S.B.1689-186, Gen. Ct. Reg. Sess., at 2-4 (Mass. 2009), available at <http://www.malegislature.gov/Bills/186/Senate/S1689>; H.1250186, Gen. Ct. Reg. Sess., at 2 (Mass. 2009), available at <http://www.malegislature.gov/Bills/186/House/H1250>; H.1309-186, Gen. Ct. Reg. Sess., at 2 (Mass. 2009), available at <http://www.malegislature.gov/Bills/186/House/H1309>; A.2711-232, Reg. Sess., at 1-2 (N.Y. 2009), available at <http://assembly.state.ny.us/leg/?sh=printbill&bn=A02711&term=2009>; H.2209-52, 1st Sess., at 3-4 (Okla. 2009), available at <http://www.oklegislature.gov/AdvancedSearchForm.aspx>; H.1150-61, Reg. Sess. at 1-2 (Wash. 2009), available at <http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bills/House%20Bills/1150.pdf>; See also S.838, 75th Legis. Assemb., Reg. Sess. (Or. 2009), available at <http://www.leg.state.or.us/09reg/measpdf/sb0800.dir/sb0838.intro.pdf> (proposing legislation to create crime of hindering assistance animals as defined by existing Oregon law).

126. Washington House Bill 1150 passed favorably through the Judiciary Committee in early 2009. It was re-introduced in the same status during the 2010 regular session and the 2010 1st Special Session. See *History of Bill*, WASH. STATE LEGISLATURE (Jan. 9, 2011 2:11 PM), <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=1150&year=2009>. House Bill 1150 is the most restrictive of the proposed bills—allowing only for the recovery of exemplary damages, up to three times actual damages, and attorney’s fees. H.1150-61, Reg. Sess. at 1-2 (Wash. 2009), <http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bills/House%20Bills/1150.pdf>. The Judiciary Committee Bill Analysis provides little guidance concerning the type of damages that would constitute actual damages for the injury or death of a companion animal, because Washington law characterizes pets as personal property for which a jury may not consider its sentimental value. See Courtney Barnes, *Bill Analysis HB 1150*, JUDICIARY COMM. WASH. STATE H.R. OFFICE OF PROGRAM RESEARCH, available at <http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bill%20Reports/House/1150%20JUDI%2009.pdf>; see also *supra* notes 73-77 and

states, and others, continue to struggle with the unique and evolving position of companion animals in society as they attempt to codify right to recover non-economic damages.

Currently, Hawaii precludes recovery for negligent infliction of emotional distress if the distress arises from the destruction of personal property.¹²⁷ The proposed bill would have amended the statutory language limiting recovery of emotional damages for the destruction of personal property to expressly exclude domestic animals maintained solely for personal enjoyment and companionship.¹²⁸ The amendment would have limited recovery for negligent infliction of emotional distress suffered by the owner of a companion animal as a result of injury to the domestic animal to \$25,000.¹²⁹

In Massachusetts, four proposals were presented to the House and Senate, two seeking to amend an existing statute to expressly allow for the recovery of damages for wrongful injury or death to a companion animal, and two seeking to allow recovery of non-economic damages for malicious injury to pets.¹³⁰ Senate Bills 1550 and 1689 defined an “animal-companion” to include “dog[s], cat[s] or any warm-blooded, domesticated non-human animal dependent on one or more human persons for food, shelter, veterinary care, or companionship.”¹³¹ Perhaps the most expansive of

accompanying text (discussing Washington court opinion excluding consideration of sentimental value when calculating value of toy poodle).

127. HAW. REV. STAT. §663-8.9(a) (2007). *See* Campbell v. Animal Quarantine Station, 632 P.2d 1066, 1071 (Haw. 1981) (classifying pets as personal property).

128. S.73-25, Reg. Sess. (Haw. 2009), *available at* http://www.capitol.hawaii.gov/session2009/bills/SB73_.pdf. (defining domestic animals as, “dogs, cats, rabbits, birds, and other beasts which are maintained on the premise of a dwelling unit and kept by the resident . . . solely for personal enjoyment and companionship”)

129. *Id.* The bill passed its first reading in May 2009 before being carried over to the 2010 Regular Session where it was not acted upon or carried over to the 2011 Regular Session. *See* SB73 Measure History, HAW. STATE LEG., 2009 Reg. Sess. (last visited Jan. 9, 2011), http://www.capitol.hawaii.gov/session2009/lists/measure_indiv.aspx?billtype=SB&billnumber=73.

130. S. 1550-186, Gen. Ct. Reg. Sess., at 2-4 (Mass. 2009), *available at* <http://www.malegislature.gov/Bills/186/Senate/S1550> (seeking to amend General Laws chapter 272 section 85A regarding injury to domesticated animals or boards); S.1689-186, Gen. Ct. Reg. Sess., (Mass. 2009), *available at* <http://www.malegislature.gov/Bills/186/Senate/S1689> (same); H. 1250-186, Gen. Ct. Reg. Sess., (Mass. 2009), *available at* <http://www.malegislature.gov/Bills/186/House/H1250> (seeking to insert section into General Laws chapter 140 permitting recovery of emotional distress and loss of companionship for malicious injury to a pet); H. 1309-186, Gen. Ct. Reg. Sess., (Mass. 2009), *available at* <http://www.malegislature.gov/Bills/186/House/H1309> (same).

131. S. 1550-186, Gen. Ct. Reg. Sess., at 2 (Mass. 2009), *available at* <http://www.malegislature.gov/Bills/186/Senate/S1550>; S.1689-186, Gen. Ct. Reg. Sess., at 2 (Mass. 2009), *available at* <http://www.malegislature.gov/Bills/186/Senate/S1689>. The definition in the bills is identical to a definition in “Proposed Legislation to Address the Wrong-

any proposed or codified legislation, the Massachusetts bills would have allowed damages for the intentional or negligent acts or omissions resulting in the injury or death of an animal companion.¹³² The bill made little distinction in the type of damages recoverable for the injury or death of a companion animal.¹³³ Damages for death would have included:

fair monetary value of the deceased animal to his or her human companions, including damages for the loss of the reasonably expected society, companionship, comfort, protection and services of the deceased animal to his or her human companions; reasonable burial expenses of the deceased animal; court costs and attorney's fees; and other reasonable damages¹³⁴

Similarly, damages for injury would have included:

damages for the expenses of veterinary and other special medical care required; the loss of the reasonably expected society, companionship, comfort, protection and services of the injured animal to his or her human companions; pain, suffering . . . and loss of faculties sustained by the animal; court costs and attorney's fees; and other reasonable damages.¹³⁵

ful Injury or Killing of Animal-Companion" authored by the Animal Legal Defense Fund. See Waisman, *supra* note 66, at 20. The 2010 Model Animal Protection Laws published by the Animal Legal Defense Fund does not include a definition of a "companion animal." See generally ANIMAL LEGAL DEFENSE FUND, MODEL ANIMAL PROTECTION LAWS (Stephan K. Otto, 15th ed. 2010), available at http://www.aldf.org/downloads/ALDF_Model_Laws_v15_0.pdf (defining animal but not companion animal) [hereinafter ALDF].

132. S. 1550-186, Gen. Ct., Reg. Sess. (Mass. 2009); S.1689,186, Gen. Ct., Reg. Sess. (Mass. 2009).

133. S. 1550-186, Gen. Ct., Reg. Sess. (Mass. 2009), available at <http://www.malegislature.gov/Bills/186/Senate/S1550>; S. 1689,- 186, Gen. Ct., Reg. Sess. (Mass. 2009), available at <http://www.malegislature.gov/Bills/186/Senate/S1689>.

134. S. 1550-186, Gen. Ct., Reg. Sess., at 3 (Mass. 2009), available at <http://www.malegislature.gov/Bills/186/Senate/S1550>; S.1689,- 186, Gen. Ct., Reg. Sess., at 3 (Mass. 2009), available at <http://www.malegislature.gov/Bills/186/Senate/S1689>.

135. S. 1550-186, Gen. Ct., Reg. Sess. (Mass. 2009), available at <http://www.malegislature.gov/Bills/186/Senate/S1550>; S. 1689,- 186, Gen. Ct., Reg. Sess. (Mass. 2009), available at <http://www.malegislature.gov/Bills/186/Senate/S1689>. The proposed Oklahoma Pet Protection Act is similar in scope to Massachusetts Senate Bills 1689 and 1550 because it expressly creates a right to bring a civil action against a person, who intentionally or negligently causes physical injury to, or the death of, an animal. See H. 2209-52, 1st Reg. Sess. (Okla. 2009), available at <http://www.oklegislature.gov/AdvancedSearchForm.aspx>. Oklahoma's proposed act permits

Courts would also be required to award at least \$2,500 in punitive damages for death or injury to the animal-companion.¹³⁶ Proposed House bills 1250 and 1309—relating to recovery for malicious injury to pets—were equally broad in scope but narrower in text, by simply seeking to add a new section to the General Laws that would allow for the recovery of emotional distress and loss of companionship in suits brought for malicious injury or killing of a pet.¹³⁷

New York Bill A02711 is similar to both the T-Bo Act and the language used in the Connecticut statute because it defines a companion animal as “any dog or cat, and any other domesticated animal normally maintained in or near the household.”¹³⁸ Similar to Massachusetts Senate Bills 1550 and 1689, it allows recovery for “the reasonably expected society, companionship, comfort, protection and services of the injured companion animal to his or her owner; court costs and reasonable attorney’s fees; and other reasonable damages,” for the intentional or negligent death of a companion animal.¹³⁹ Courts have the option of imposing punitive damages if

the human companion to recover not only the pecuniary value of the animal and veterinary expenses incurred, but also other expenses incurred attempting to reduce the effects of, or as a consequence of, the pain, suffering or injuries sustained by the animal; emotional distress and loss of companionship suffered by the human companion; and any other reasonable damages that resulted from the death or injury to the animal. *Id.*

136. S.1550-186, Gen. Ct. Reg. Sess., at 3 (Mass. 2009), available at <http://www.malegislature.gov/Bills/186/Senate/S1550>; S.1689-186, Gen. Ct. Reg. Sess., at 3 (Mass. 2009), available at <http://www.malegislature.gov/Bills/186/Senate/S1689>. The similarity with the proposed Oklahoma Pet Protection Act continues with regard to the punitive damage provision. See H.2209-52, 1st Reg. Sess., at 3 (Okla. 2009), available at <http://www.oklegislature.gov/tomshell.aspx> (setting minimum of \$1,000 recoverable punitive damages for every intentional act).

137. See H. 1250-186, Gen. Ct. Reg. Sess., at 2 (Mass. 2009), available at <http://www.malegislature.gov/Bills/186/House/H1250>; H.1309-186, Gen. Ct. Reg. Sess., at 2 (Mass. 2009), available at <http://www.malegislature.gov/Bills/186/House/H1309>. Each sought to insert section 174E in chapter 140 of the General Laws that would state: “In suits for damages for malicious injury or the killing of a pet, such damages may include emotional distress and loss of companionship.” H.1250-186, Gen. Ct. Reg. Sess., at 2 (Mass. 2009), available at <http://www.malegislature.gov/Bills/186/House/H1250>; H.1309-186, Gen. Ct. Reg. Sess., at 2 (Mass. 2009), available at <http://www.malegislature.gov/Bills/186/House/H1309>.

138. A.2711-232, Leg. Reg. Sess. (N.Y. 2009), available at <http://assembly.state.ny.us/leg/?bn=A02711&term=2009>; see *supra* note 104 and accompanying text (discussing T-Bo Act definition); *supra* note 119 and accompanying text (discussing Connecticut definition).

139. A.2711-232, Leg. Reg. Sess. (N.Y. 2009), available at <http://assembly.state.ny.us/leg/?bn=A02711&term=2009>; see *supra* note 134 and accompanying text (discussing recovery available under proposed Massachusetts Senate Bills 1550 and 1689). Under the proposed law, recovery for the intentional or negligent injury to a companion animal would include the loss of reasonably expected society, companionship, comfort, protection and services of the injured companion animal to the owner in addition to

the act was committed “with no justifiable purpose intentionally or recklessly.”¹⁴⁰ The justification for the proposed New York Bill provided in its sponsors memorandum is perhaps more notable than the language of the bill itself. In the justification, the bill’s sponsors cite the need for legislative guidance so that the judiciary may “relinquish the common law’s antiquated, scientifically obsolete assumption that animals are just ‘things.’”¹⁴¹

V. A PROPOSAL FOR FUTURE LEGISLATION

The existing statutes and the language of the proposed bills create a solid foundation for lawmakers to build upon enacting similar that would allow for the recovery of non-economic damages for the death or injury of a companion animal.¹⁴² While statutes may vary to account for state-specific customs and practices, lawmakers should ensure that each statute includes four basic components: (1) the definition of a “companion animal” or “pet”; (2) a description of the actionable tortious conduct; (3) the recoverable damages; and (4) parties exempt from liability or subject to limited liability.¹⁴³

Existing case law suggests that dogs and cats will be the primary beneficiaries of a statute that allows for the recovery of non-economic damages that arise as a result of death or injury to a companion animal or pet.¹⁴⁴ The

the expenses for veterinary care, court costs and reasonable attorney’s fees. A.2711-232, Leg. Reg. Sess., at 2 (N.Y. 2009), available at <http://assembly.state.ny.us/leg/?bn=A02711&term=2009>.

140. *Id.*

141. A.2711-232, Leg. Reg. Sess., A02711 Memorandum in Support of Legis. (N.Y. Apr. 13, 2009), available at [http://assembly.state.ny.us/leg/?bn=A02711&term=2009](http://assembly.state.ny.us/leg/?default_fld=&bn=A02711&term=2009&Summary=Y&Memo=Y, 232, Leg. Reg. Sess., (N.Y. 2009), available at http://assembly.state.ny.us/leg/?bn=A02711&term=2009; see supra note 86 (quoting bill’s justification). In support of the position that companion animals should be considered more than property, the bill’s sponsors stated that “Americans entering the 21st century recognize the importance of our relationships with animals which has been demonstrated in study after study” and provided statistics to demonstrate the integration of pets into the family structure. A.2711-232 Memorandum in Support of Legis. (Apr. 13, 2009), Leg. Reg. Sess., (N.Y. 2009), available at <a href=). A similar sentiment was expressed by lawmakers in Colorado upon introduction of a bill that would allow people to sue veterinarians and animal abusers. *See Paek, supra note 36*, at 518 (discussing Colorado House Bill 03-1260).

142. *See supra* notes 97-141 and accompanying text (summarizing existing and proposed legislation).

143. *See supra* notes 97-141 and accompanying text (describing components of existing and proposed legislation).

144. *See supra* notes 50-96 and accompanying text (discussing judicial decisions regarding companion animals).

statutory definition, however, should not be limited to dogs and cats.¹⁴⁵ The proposed legislation from the Animal League Defense Fund (ALDF) provides a good starting point for an appropriate definition.¹⁴⁶ The ALDF defined a companion animal as, “a dog; a cat; or any warm-blooded, domesticated nonhuman animal dependent on one or more human persons for food, shelter, veterinary care, or companionship.”¹⁴⁷ Lawmakers may also include language similar to that used in the Connecticut statute by requiring that the animal “normally [be] kept in or near the household.”¹⁴⁸ A definition of this kind would not be overly limiting so as to create the presumption that dogs and cats are the only classes of animal companions that warrant recovery by the human companion, but would still exclude livestock and animals kept for research.

The actionable conduct should include both intentional and negligent acts or omissions that result in the severe injury or death of a companion animal.¹⁴⁹ Judicial precedent has failed to “[keep] up with the reality of the relationship between companion animals and their human caretakers.”¹⁵⁰ This failure has resulted in under-compensation and under-deterrence.¹⁵¹ Recoverable damages should include compensation for the loss of the reasonably expected society, companionship, comfort, protection, and services of the deceased or severely injured animal to his or her human companion(s); for reasonable burial expenses of the deceased animal; for court costs and attorney’s fees; and for other reasonable damages resulting from the willful, wanton, reckless, or negligent act or omission.¹⁵²

145. Waisman & Newell, *supra* note 50, at 70 (“The animal companion should be defined to include a dog, a cat, or any warm-blooded, domesticated nonhuman animal sharing a demonstrable bond of companionship with one or more persons.”).

146. The ALDF’s model statute no longer includes a definition of companion animals. See ALDF, *supra* note 131.

147. Waisman, *supra* note 66, at 20.

148. See CONN. GEN. STAT. § 22-351a(a) (2009).

149. See Waisman & Newell, *supra* note 50, at 71 (noting that there are likely to be relatively few instances where a jury would consider injury not resulting in death as meriting recovery of non-economic damages).

150. Rebecca J. Huss, *Valuing Man’s and Woman’s Best Friend: The Moral and Legal Status of Companion Animals*, 86 MARQ. L. REV. 47, 52 (2002); *Accord supra* notes 67-94 and accompanying text.

151. See Elaine T. Byszewski, Comment, *Valuing Companion Animals in Wrongful Death Cases: A Survey of Current Court and Legislative Action and a Suggestion for Valuing Pecuniary Loss of Companionship*, 9 ANIMAL L. 215, 225, 228, 232-40 (2003); Hankin, *supra* note 124, at 325 (citing Margit Livingston, *The Calculus of Animal Valuation: Crafting a Viable Remedy*, 82 NEB. L. REV. 783 (2004)); Cases cited *supra* note 78 (recognizing but not allowing recovery for emotional loss).

152. See S. 1550-186, Gen. Ct., Reg. Sess. (Mass. 2009); S.1689-186, Gen. Ct., Reg. Sess. (Mass. 2009); ANIMAL LEGAL DEFENSE FUND, MODEL ANIMAL PROTECTION LAWS § VI (B) (Stephan K. Otto ed., 15th ed. 2010), available at http://www.aldf.org/downloads/ALDF_Model_Laws_v15_0.pdf (describing civil action for

In contrast to the existing legislation, no cap should be imposed on the amount of damages that may be awarded by a judge or jury for the third-party's tortious conduct.¹⁵³ Further, like the proposed Massachusetts and Oklahoma legislation, a requirement for punitive damages should exist for intentional acts.¹⁵⁴ As evidenced by the evolving roles of companion animals, American households are more likely to spend money on medical

wrongful injury or death of animal); *see also* Waisman & Newell, *supra* note 50, at 70 (“[I]n addition to the ‘reasonably expected society, companionship, love and affection’ of the animal that have been lost, compensation should be authorized for other reasonable damages such as burial expenses.”); *supra* note 68 (discussing the evolution of recovery for parental consortium). *But see* Victor E. Schwartz & Emily J. Laird, *Non-Economic Damages in Pet Litigation: The Serious Need to Preserve a Rational Rule*, 33 PEPP. L. REV. 227, 260-68 (2006) (advocating against award of emotional damages for death or injury to companion animals because of potential negative effects on veterinarians, animal medical manufacturers, pet owners, and pets). Burial or funeral expenses are often expressly listed as an element of recoverable damages under wrongful death statutes. *See, e.g.*, IND. CODE § 34-23-2-1 (2008) (permitting recovery of expenses for child’s funeral and burial following wrongful death of child); MASS. GEN. LAWS ch. 229, § 2 (2010) (permitting recovery of reasonable funeral expenses); N.Y. EST. POWERS & TRUSTS LAW § 5-4.3 (McKinney 2010) (permitting recovery of reasonable funeral expenses).

153. *See* Waisman, *supra* note 66, at 15 (“There appears to be general agreement . . . that while the T-Bo Act will remain noteworthy as the first statute of its kind, a four-figure cap is unacceptable and, indeed, would have a negative impact on litigation (from the plaintiffs’ perspective)”). When state legislatures first departed from the common law to create new statutory rights to recover for wrongful death they typically imposed limitations on the amount plaintiffs could recover. 2 STUART M. SPEISER ET AL., RECOVERY FOR WRONGFUL DEATH AND INJURY § 7.1 (3d ed. 1992) (describing legislative origin of wrongful death actions and caps on recovery). Many of these early caps, however, were repealed. *Id.* at §§ 7.1-7.2 (stating that in 1893 twenty-two states limited recovery in wrongful death actions; however, currently no states impose limits for pecuniary damages). In the context of tort reform, damage caps are frequently imposed on non-economic damages and cited as a means by which awards may be made more predictable. *See* Joanna M. Shepherd, *Tort Reforms’ Winners and Losers: The Competing Effects of Care and Activity Levels*, 55 UCLA L. REV. 905, 915-17 (2008). Commentators and scholars have criticized these caps both on the grounds of their constitutionality and their lack of efficacy. *See generally* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005) (arguing that the Due Process Clause of Fourteenth Amendment creates duty for each state to provide law for redress of private wrongs that should be judicially enforced by establishing limits on how and why legislatures undertake plaintiff-unfriendly tort reform); Robert S. Peck, *Violating the Inviolable: Caps on Damages and the Right to Trial by Jury*, 31 U. DAYTON L. REV. 307 (2006) (arguing caps on damages violate jury-trial right); Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damage Caps*, 80 N.Y.U. L. REV. 391 (2005) (arguing when non-economic damages are limited by caps plaintiff’s attorneys more vigorously pursue and juries award larger uncapped economic damages).

154. *See* S.1550-186 Gen. Ct., Reg. Sess. (Mass. 2009); S.1689-186, Gen. Ct., Reg. Sess. (Mass. 2009); H.B. 2209, 52d Leg., 1st Reg. Sess. (Okla. 2009); Lynn A. Epstein, *Resolving Confusion in Pet Owner Tort Cases: Recognizing Pets’ Anthropomorphic Qualities Under a Property Classification*, 26 S. ILL. U. L.J. 31, 32, 48 (2001) (advocating for the award of punitive damages “where the conduct of the defendant is particularly heinous”).

care and purchase pet health insurance.¹⁵⁵ As a result the human companions expect that their animals will receive medical care when they are sick or injured not unlike the treatment available in human medicine.¹⁵⁶ While lawmakers should not expressly exclude from the statute licensed veterinarians, governmental agencies, state employees acting within their capacity, and non-profits operated for the prevention of cruelty to animals, they may limit exposure to these groups by limiting exposure to punitive damages for intentional, wanton and reckless acts.¹⁵⁷ This limitation should strike a fair balance between the interest in adequately compensating for the loss experienced by human companions and the interest of opponents who fear reducing the risk of exposing veterinarians to liability for non-economic damages resulting in excessive damage awards.¹⁵⁸

VI. CONCLUSION

The role companion animals serve has evolved from property to family member. No longer beasts of burden kept solely to serve their owners, animals now share in all the comforts of their human companion's home. A majority of American households consider their pet to be a member of the family with a growing numbers of pet owners treating their companion animal as a child. Despite these changes, the judiciary has failed to keep pace with society's changing attitudes resulting in inconsistent precedent on the recovery of emotional damages for the severe injury or death of a companion animal. Allowing human companions to recover for their emotional suffering will more accurately reflect society's current view of companion animals. It is time for state legislatures to act: to follow and improve upon Tennessee's lead and statutorily permit recovery of non-economic damages for wrongful injury to or death of companion animals.

155. See *supra* notes 34-41 and accompanying text. See also Mary Margaret McEachern Nunalee & G. Robert Weedon, *Modern Trends in Veterinary Malpractice: How Our Evolving Attitudes Toward Non-Human Animals Will Change Veterinary Medicine*, 10 ANIMAL L. 125, 139-40 (2004).

156. Hankin, *supra* note 124, at 316.

157. See CONN. GEN. STAT. § 22-351a(d) (2009). See also Waisman & Newell, *supra* note 50, at 70 (discussing punitive damages and recognition that veterinarians ability to perform valuable services should not be unduly burdened).

158. See Waisman, *supra* note 66, at 11 (noting that opponents argue veterinary malpractice insurance premiums will increase if awards for emotional distress permitted resulting in higher fees for veterinary care).