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COMMENT

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RECOVERING FOR THE LOSS OF A BELOVED PET:  
RETHINKING THE LEGAL CLASSIFICATION OF  
COMPANION ANIMALS AND  
THE REQUIREMENTS FOR LOSS OF COMPANIONSHIP  
TORT DAMAGES

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*Under U.S. law, animals are considered the property of their human companions. With this classification, individuals are granted the right to own, use, and control their animal property as they see fit. To many, though, the relationship between man and his companion animal fits uncomfortably within the idea of property ownership. To these individuals, companion animals, such as dogs and cats, are more than property: they are best friends, confidants, and integral parts of the family. However, unlike certain familial relationships—such as that of a husband and wife or a parent and child—the bond between a human companion and his or her companion animal is devalued under tort law. When a companion animal is negligently or intentionally injured or killed, no matter how beloved the animal is to his or her human companion, the animal is still only viewed as property under the law. Because of the companion animal’s classification as property, emotional damages related to the bond between the animal and the plaintiff are unavailable, preventing those who have been harmed from fully recovering for their loss.*

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## INTRODUCTION

The bond between a human and a dog or a cat, the two most accepted species of “companion animal,”<sup>1</sup> is anything but novel. The domestication of animals is estimated to have occurred 12,000 to 14,000 years ago.<sup>2</sup> Specifically, the domestication of dogs is thought to have occurred during this time period,<sup>3</sup> while it is estimated that cats became household animals roughly 4500 years ago.<sup>4</sup> Today, over 68 million domesticated dogs are living in U.S. homes,<sup>5</sup> with 39% of the U.S. population owning at least one dog.<sup>6</sup> Many companion animals are “named, nurtured, and treated like

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<sup>1</sup> For the purpose of this Comment, unless otherwise noted, “companion animal” refers to a domesticated dog or cat that was bred for human companionship. Companion animals are commonly considered a subcategory of domesticated animals. See Rebecca J. Huss, *Valuing Man’s and Woman’s Best Friend: The Moral and Legal Status of Companion Animals*, 86 MARQ. L. REV. 47, 69 (2002) [hereinafter Huss, *Valuing Man’s and Woman’s Best Friend*]. In *Valuing a Man’s and Woman’s Best Friend*, Rebecca J. Huss writes that whether an animal is considered a companion animal is determined by evaluating evidence of the relationship between the animal and the human companion. *Id.* The word “pet,” defined as an animal that is “tamed or domesticated and kept as a companion or treated with fondness,” encompasses other common household animals, including rabbits, hamsters, mice and other rodents, fish, birds, lizards, and snakes. Janice M. Pintar, Comment, *Negligent Infliction of Emotional Distress and the Fair Market Value Approach in Wisconsin: The Case for Extending Tort Protection to Companion Animals and Their Owners*, 2002 WIS. L. REV. 735, 738 (citing WEBSTER’S NEW WORLD DICTIONARY 2009 (3d ed. 1991)). This Comment avoids the term “pet.” While the abovementioned animals are arguably no different from a dog or a cat in the sense that they can fit the requirements of a “companion animal,” the arguments for altering the property classification of animals or expanding loss of companionship recovery are stronger when focused solely on dogs and cats.

<sup>2</sup> See Margit Livingston, *The Calculus of Animal Valuation: Crafting a Viable Remedy*, 82 NEB. L. REV. 783, 805 (2004) (“Domestication of non-human animals . . . began 12,000 years ago . . .”); Marcella S. Roukas, *Determining the Value of Companion Animals in Wrongful Harm or Death Claims: A Survey of U.S. Decisions and Legislative Proposal in Florida to Authorize Recovery for Loss of Companionship*, 3 J. ANIMAL L. 45, 51 (2007) (“The domestication of animals began almost 14,000 years ago.”).

<sup>3</sup> Schyler P. Simmons, Comment, *What is the Next Step for Companion Pets in the Legal System? The Answer May Lie with the Historical Development of the Legal Rights for Minors*, 1 TEX. A&M L. REV. 253, 254 (2013); see also Phil Goldberg, *Courts and Legislatures Have Kept the Proper Leash on Pet Injury Lawsuits: Why Rejecting Emotion-Based Damages Promotes the Rule of Law, Modern Values, and Animal Welfare*, 6 STAN. J. ANIMAL L. & POL’Y 30, 65 (2013) (“The domestication of dogs occurred more than 14,000 years ago.”).

<sup>4</sup> Simmons, *supra* note 3, at 254.

<sup>5</sup> Cynthia A. McNeely & Sarah A. Lindquist, *Dangerous Dog Laws: Failing to Give Man’s Best Friend a Fair Shake at Justice*, 3 J. ANIMAL L. 99, 103 (2007).

<sup>6</sup> Simmons, *supra* note 3, at 254; see also *id.* (“[M]ore than 33% of the [U.S.] population own cats.”).

children, siblings, or best friends”<sup>7</sup> and provide their human companions with “faithful, intimate companionship that is unconditional and nonjudgmental.”<sup>8</sup> Companion animals are more than just pets; to many, they are part of the family.<sup>9</sup> Margit Livingston, Professor of Law at DePaul University College of Law, argues that human companions build “sentimental attachment” to their companion animals, an emotional connection based upon the appreciation of their companionship—“their loyalty, their physical proximity, [and] their dependence upon us”—which is similar to the attachment one would have toward another human being.<sup>10</sup>

The death of a companion animal can be emotionally and psychologically devastating for a human companion.<sup>11</sup> In fact, human companions can experience a sense of loss similar to the loss felt when a human family member passes away.<sup>12</sup> Even so, when a companion animal dies due to the negligent or intentional acts of another, the U.S. tort system inadequately compensates the human companion. U.S. law almost universally denies recovery for loss of companionship damages in tort actions when the injured or deceased victim is a companion animal.<sup>13</sup> Why? First, companion animals are classified as the property of their human companions, even though

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<sup>7</sup> Debra Squires-Lee, Note, *In Defense of Floyd: Appropriately Valuing Companion Animals in Tort*, 70 N.Y.U. L. REV. 1059, 1059 (1995).

<sup>8</sup> *Id.* at 1065.

<sup>9</sup> See Christopher D. Seps, Note, *Animal Law Evolution: Treating Pets as Persons in Tort and Custody Disputes*, 2010 U. ILL. L. REV. 1339, 1359 (referencing studies finding that 88% of Australian pet owners and 49% of American pet owners described their dog as a “family member”) (citing Emma Power, *Furry Families: Making a Human-Dog Family Through Home*, 9 SOC. & CULTURAL GEOGRAPHY 535, 536 (2008)).

<sup>10</sup> Livingston, *supra* note 2, at 819.

<sup>11</sup> See Squires-Lee, *supra* note 7, at 1069-70 (“The deep emotional attachment people feel for their companion animals embodies itself in a grief which can be the same in form and intensity as the grief . . . felt when a . . . friend or relative dies.” (internal quotation marks omitted)).

<sup>12</sup> See Sabrina DeFabritiis, *Barking up the Wrong Tree: Companion Animals, Emotional Damages and the Judiciary’s Failure to Keep Pace*, 32 N. ILL. U. L. REV. 237, 243-44 (2012) (“The human companion experiences a deep sense of loss upon the untimely death of the companion animal similar to that which is experienced following the death of a family member.”).

<sup>13</sup> “Loss of companionship” is an element of tort damages awarded to a plaintiff to compensate him or her for the loss suffered after the defendant harms his or her loved one. See Andrew Boxberger, *The Missing Link in the Evolution of Law: Michigan’s Failure to Reflect Society’s Value of Companion Animals*, 5 T.M. COOLEY J. PRAC. & CLINICAL L. 139, 148 (2002) (noting loss of companionship damages were created in an attempt to fill the tremendous void created when a loved one dies); Kelly Wilson, Note, *Catching the Unique Rabbit: Why Pets Should be Reclassified as Inimitable Property Under the Law*, 57 CLEV. ST. L. REV. 167, 178 (2009) (“Loss of companionship can be one element in determining the value of a wrongful death of a family member to a living family member who experiences the loss.”); see also *infra* Part II.

human companions do not think of their companion animals as property,<sup>14</sup> leaving plaintiffs with limited recourse to recover for their loss.<sup>15</sup> Restricted by the property classification, plaintiffs can only recover the “fair market value” of their companion animals,<sup>16</sup> and loss of companionship claims are almost always unanimously dismissed.<sup>17</sup>

Second, under the history of loss of companionship and its predecessor, loss of consortium, recovery is limited to specific relationships. Most states have limited loss of companionship recovery to husbands and wives, with a few providing recovery for parents and children.<sup>18</sup> This treatment contradicts how many humans view their companion animals and the bonds between them. Consequently, it fails to fully compensate those who have been injured.<sup>19</sup>

Fortunately, a minority position is slowly gaining steam. In recent years, a small number of state legislatures and courts have allowed individuals to receive compensation for the loss of companionship of their injured or deceased companion animal. For example, Tennessee’s “T-Bo Act” allows for recovery of up to \$5000 in noneconomic damages for the negligent or intentional killing of a domesticated dog or cat under certain conditions,<sup>20</sup>

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<sup>14</sup> See Simmons, *supra* note 3, at 281 (“[S]eventy-three percent of dog owners and sixty-five percent of cat owners consider their companion animals to be like a child or family member.” (citing Rebecca J. Huss, *Separation, Custody, and Estate Planning Issues Relating to Companion Animals*, 74 U. COLO. L. REV. 181, 181 (2003))).

<sup>15</sup> See Jason R. Scott, Note, *Death to Poochy: A Comparison of Historical and Modern Frustrations Faced by Owners of Injured or Killed Pet Dogs*, 75 UMKC L. REV. 569, 569 (2006) (“[O]wners are limited in their courses of action and recovery should their property/pet/best friend be injured or even killed.”).

<sup>16</sup> See Simmons, *supra* note 3, at 263 (“[D]amages for the death of a companion pet are fixed at . . . market value in most jurisdictions.”).

<sup>17</sup> 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, 241-42 (2006) (discussing how the vast majority of courts “do not permit . . . the pet’s sentimental value or the owner’s loss of companionship” to influence damages); see also Kaufman v. Langhofer, 222 P.3d 272, 279 (Ariz. Ct. App. 2009) (“Expanding Arizona common law to allow a pet owner to recover emotional distress or loss of companionship damages would be inappropriate . . . .”); 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.”).

<sup>18</sup> See *infra* Part II; see also Squires-Lee, *supra* note 7, at 1082 (“[S]everal courts have expanded the traditional consortium claim to other close personal or familial relationships.”).

<sup>19</sup> See Diane Sullivan & Holly Vietzke, *An Animal is Not an iPod*, 4 J. ANIMAL L. 41, 41-42 (2008) (“Our legal system just does not recognize the bond between people and their companion animals, and when that bond is severed, it completely fails to compensate for that loss.”).

<sup>20</sup> TENN. CODE ANN. § 44-17-403 (West 2014).

while an Illinois statute allows plaintiffs to recover emotional and punitive damages for certain acts toward their animals.<sup>21</sup>

Additionally, some courts have also departed from the common law's market value recovery limit for the loss of a companion animal. In *Brousseau v. Rosenthal*, the New York County Civil Court acknowledged that "actual value to the owner" must be assessed, and in doing so, the court must consider loss of companionship.<sup>22</sup> Courts have also expressed their discontent with the property classification of companion animals: in *Corso v. Crawford Dog & Cat Hospital, Inc.*, a New York trial court recognized that "[a] pet is not an inanimate thing that just receives affection[,] it also returns it."<sup>23</sup>

While still a minority position,<sup>24</sup> what do these legislative and judicial actions mean for the legal classification of companion animals as property and the scope of loss of companionship damages claims? Can we justify the minority position within our current legal framework or must we rethink the law? This Comment will explore the recent minority developments, argue that they reflect a growing movement towards recognizing that companion animals are more than just property and that human companions deserve just compensation from our legal system, and consider two proposals outlining how the law could better address the loss of a companion animal.

Part I will review the classification of companion animals as property under U.S. law. After introducing the general concept of legal property, it will address the history and reasoning behind the property classification. Part I will then describe what this categorization means legally for human companions, including what happens during a tort suit for the injury to or killing of a companion animal and how human companions are compensated.

Part II will explore the development of and the intention behind loss of companionship damages claims in tort. This Part will include an overview of the recovery's origin, as well as the majority view of how it extends (or does not extend) to companion animals.

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<sup>21</sup> 510 ILL. COMP. STAT. ANN. 70/16.3 (West 2014).

<sup>22</sup> 443 N.Y.S.2d 285, 286 (N.Y. Civ. Ct. 1980) ("[I]t would be wrong not to acknowledge the companionship and protection that Ms. Brousseau lost with the death of her canine companion of eight years."); see *infra* subsection III.B.1.a.

<sup>23</sup> 415 N.Y.S.2d 182, 183 (N.Y. Civ. Ct. 1979).

<sup>24</sup> For purposes of this Comment, "minority position" refers to the beliefs and rationales of those who advocate for allowing human companions to recover loss of companionship damages for the negligent or intentional injury to or killing of a companion animal. Supporters of the minority position believe human companions should be able to recover loss of companionship damages and advocate for one or both of the proposed solutions this Comment addresses: defining companion animals as "semi-property" and expanding loss of companionship damages for human companions.

With the important background information covered in Parts I and II, Part III will discuss the recent evolution of loss of companionship damages claims for companion animals across the United States. First, Part III will focus on specific laws enacted by state legislatures in Tennessee, Illinois, and Connecticut. Second, Part III will discuss common law court decisions covering both the acceptance and rejection of loss of companionship damages as well as the acceptance of recovery for other emotional damages.

Part IV will introduce popular arguments for the expansion of loss of companionship damages to compensate human companions. In support of the minority position are the arguments that awarding loss of companionship damages promotes the goals of tort law, is a natural next step, and is rational because companion animals currently receive different protections and treatment under various laws.

Finally, Part V will discuss two proposed solutions that will allow human companions to recover loss of companionship damages. First, this Part will consider a new special “semi-property” classification for companion animals, including oppositional arguments and responses in rebuttal. Second, it will explore a statutory scheme promoting the expansion of loss of companionship, including oppositional arguments and responses in rebuttal.

## I. COMPANION ANIMALS AS PROPERTY UNDER U.S. LAW

*Animals are defined as property because it is convenient—and profitable. This [definition] allows them to be exploited, harmed and used for experimentation and entertainment, all with impunity.*<sup>25</sup>

Whether or not you agree with this statement, animals, including companion animals, are indisputably categorized as property under the law.<sup>26</sup>

### A. *The History of Property and the Classification of Animals*

Property law in the United States is tied to the common law.<sup>27</sup> Under the common law, individuals have a “natural” right to their property, a right

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<sup>25</sup> Sullivan & Vietzke, *supra* note 19, at 44.

<sup>26</sup> See Roukas, *supra* note 2, at 47 (“According to [U.S.] common law, animals are considered personal property.”).

<sup>27</sup> See *id.* (“The U.S. legal framework on the law of property is a creature of the common law.”); see also Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 N.Y.U. ENVTL. L.J. 531, 533 (1998) (“In Anglo-American jurisprudence, the law of property has developed largely as common law.”).

of absolute possession limited only by a few restrictions.<sup>28</sup> Property, as defined by *Black's Law Dictionary*, is “[a]ny external thing over which the rights of possession, use, and enjoyment are exercised.”<sup>29</sup> Specifically, personal property is defined as “[a]ny movable or intangible thing that is subject to ownership” and does not include real property (e.g., land).<sup>30</sup>

Under U.S. common law, non-wild, domesticated animals—including the subcategory of companion animals—are considered to be their human owner’s personal property.<sup>31</sup> The concept of classifying animals as property has roots deep within human history; many ancient cultures treated animals as property or “things.”<sup>32</sup> While the common law did not always consider companion animals as property,<sup>33</sup> this view developed as dogs, specifically, began to be seen as valuable and useful to their owners. The legal status of property was soon thereafter attached;<sup>34</sup> and every state currently classifies companion animals as such.<sup>35</sup> This classification was typically codified by a statute or defined by the courts through the pronouncement that such animals were “chattel.”<sup>36</sup> Therefore, the legal relationship between a

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<sup>28</sup> Huss, *Valuing Man’s and Woman’s Best Friend*, *supra* note 1, at 68.

<sup>29</sup> BLACK’S LAW DICTIONARY 1410 (10th ed. 2014) (defining “property”).

<sup>30</sup> *Id.* at 1411 (defining “personal property”).

<sup>31</sup> See generally Roukas, *supra* note 2, at 47. Under U.S. law, animals are categorized as either “wild” or “domestic,” and companion animals are considered a specific subdivision of domesticated animals. *Id.* at 48-49; see also *supra* note 1.

<sup>32</sup> See McNeely & Lindquist, *supra* note 5, at 109 (“Non-feral, domesticated dogs were treated as human personal property by particular ancient cultures.”); 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, 60 (1998) (“Since Roman times, law has partitioned the material world into things and persons . . . . At one time, women, children, human slaves, and nonhuman animals were all ‘things’ under Roman law.”). The Holy Bible also addresses man’s dominion over animals: “Then God said, Let Us make man in Our image, according to Our likeness; and let them have dominion over the fish of the sea, over the birds of the air, and over the cattle, over all the earth and over every creeping thing that creeps on the earth.” *Genesis* 1:26 (internal quotation marks omitted).

<sup>33</sup> See Harold W. Hannah, *Animals as Property—Changing Concepts*, 25 S. ILL. U. L.J. 571, 575 (2001) (“[D]ogs were not regarded as property at common law . . . because dogs served no purpose but instead were kept merely for the ‘whims and pleasures’ of their owners.”); see also Lisa Kirk, Comment, *Recognizing Man’s Best Friend: An Evaluation of Damages Awarded When a Companion Pet is Wrongfully Killed*, 25 WHITTIER L. REV. 115, 118 (2003) (“The courts reasoned that dogs were not property because they served no specific purpose, being kept solely for the ‘pleasure of their owners.’”).

<sup>34</sup> See McNeely & Lindquist, *supra* note 5, at 110 (“Eventually, dogs came to be legally recognized as the personal property of humans . . . .”).

<sup>35</sup> Seps, *supra* note 9, at 1342.

<sup>36</sup> See Elizabeth Paek, *Fido Seeks Full Membership in the Family: Dismantling the Property Classification of Companion Animals by Statute*, 25 U. HAW. L. REV. 481, 490-91 (2003) (describing chattel as “a term intended to cover every kind of personal property”).



companion animal and a human companion is commonly one of property ownership.<sup>37</sup>

B. *How the Property Classification Impacts Human Companions*

The holder of a property interest is entitled to certain legal rights. The right to use and enjoy one's property is minimally restricted, including a limitation on the use of one's property to harm another.<sup>38</sup> Generally, property can be "bought, sold, traded, gifted, devised, and bequeathed."<sup>39</sup> Like other forms of property, companion animals can be bought or sold, and human companions are granted "nearly unlimited authority" to make decisions regarding their companion animals.<sup>40</sup> Here, the law differentiates animals from other forms of property, affording the former specific protections. The Animal Welfare Act<sup>41</sup> regulates the treatment of animals used in interstate or foreign commerce, including animals involved in research and exhibition, and every state has enacted animal anticruelty statutes.<sup>42</sup>

The classification of companion animals as property impacts the ability of a human companion to recover damages in a tort action for the negligent or intentional injury to or killing of a companion animal. The U.S. tort system allows for recovery against another person who intentionally or negligently injures or destroys one's personal property.<sup>43</sup> Property owners are generally refused noneconomic damages in tort cases<sup>44</sup> but can seek restitution, compensation for the injury or loss, against defendants to

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<sup>37</sup> *Id.* at 491.

<sup>38</sup> See Huss, *Valuing Man's and Woman's Best Friend*, *supra* note 1, at 68 ("[A] person can not use his or her property to harm an innocent person . . .").

<sup>39</sup> Seps, *supra* note 9, at 1342.

<sup>40</sup> Logan Martin, Comment, *Dog Damages: The Case for Expanding the Available Remedies for the Owners of Wrongfully Killed Pets in Colorado*, 82 U. COLO. L. REV. 921, 939 (2011); *see also id.* ("Pet ownership has many things in common with property ownership.").

<sup>41</sup> Animal Welfare Act of 1966, 7 U.S.C. §§ 2131–2159 (2012) (describing the Act's purpose, in part, as "insur[ing] that animals . . . are provided humane care and treatment").

<sup>42</sup> See Pamela D. Frasch et al., *State Animal Anti-Cruelty Statutes: An Overview*, 5 ANIMAL L. 69, 69 (1999) ("[T]hese laws do not afford animals legal rights [but they] provide . . . legal protection . . . to animals in our society."). For a paradigmatic example of a state anticruelty statute, see COLO. REV. STAT. § 18-9-202 (2014) ("A person commits cruelty to animals if he or she knowingly, recklessly, or with criminal negligence overdrives, overloads, overworks, torments, deprives of necessary sustenance, unnecessarily or cruelly beats [an animal], [or] allows [an animal] to be housed in a manner that results in chronic or repeated serious physical harm . . .").

<sup>43</sup> See Adam P. Karp, *Causes of Action in Intentional Tort for Loss of or Injury to an Animal by a Human*, 44 CAUSES OF ACTION 2D 211, at § 30 (2010).

<sup>44</sup> See Goldberg, *supra* note 3, at 44 ("[N]oneconomic damages are generally not permitted for harm to property.").

restore them to the position they were in before the defendants' intentional or negligent act.<sup>45</sup>

In awarding monetary damages, courts look to compensate plaintiffs for "the loss sustained."<sup>46</sup> The most common way courts determine the plaintiff's loss is to price the property, including companion animals, by its fair market value.<sup>47</sup> Normally defined, fair market value is "the amount a willing buyer will pay for an item and the amount a willing seller will accept for the item where neither party is under compulsion to engage in the transaction."<sup>48</sup> If the companion animal is injured but not killed, the fair market value standard would compensate the plaintiff for the difference between the market value of the animal before and after the injury.<sup>49</sup> Courts analyze an animal's market value by looking at factors such as the species, breed, and pedigree.<sup>50</sup> Fair market value is intended to represent the value of what the plaintiff lost and the amount he or she would need to spend to purchase a replacement.<sup>51</sup> Unfortunately, unless a companion animal is a purebred breeding animal,<sup>52</sup> the animal most likely has little or no market value.<sup>53</sup> In such situations, some courts instead use the "actual value" or "intrinsic value" test to measure damages, factoring in previous expenditures and future economic losses to deduce the "actual value" of the animal to the

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<sup>45</sup> See Carole Lynn Nowicki, Note, *The Animal Welfare Act: All Bark and No Bite*, 23 SETON HALL LEGIS. J. 443, 447 (1999) ("[A] property owner [can] seek restitution against anyone who damages his inanimate objects . . ."); see also Livingston, *supra* note 2, at 817 (asserting that the traditional justification for using fair market value as the standard of compensation for destroyed personal property is to make the plaintiff whole).

<sup>46</sup> Karp, *supra* note 43, § 30.

<sup>47</sup> See Roukas, *supra* note 2, at 46 ("[T]he valuation of damages for the loss of a companion animal is measured as personal property and often times the fair market value."); see also Livingston, *supra* note 2, at 787 ("[T]ort law applie[s] personal property concepts to the valuation of animals."). Fair market value is often calculated by the value of the animal at the time of death or injury. Roukas, *supra* note 2, at 49.

<sup>48</sup> Livingston, *supra* note 2, at 784; see also Rebecca J. Huss, *Valuation in Veterinary Malpractice*, 35 LOY. U. CHI. L.J. 479, 514 (2003) [hereinafter Huss, *Valuation*] (citing the same definition of fair market value).

<sup>49</sup> Karp, *supra* note 43, § 30.

<sup>50</sup> Seps, *supra* note 9, at 1343. A court can establish fair market value by looking at the companion animal's purchase price, specialized skills or training, or future earnings the plaintiff could have made off of the animal (e.g., breeding). Huss, *Valuation*, *supra* note 48, at 514-15.

<sup>51</sup> Livingston, *supra* note 2, at 817.

<sup>52</sup> See *id.* at 789 ("[S]ome pets . . . do have a significant fair market value, especially purebred animals used for breeding purposes.").

<sup>53</sup> See *id.* ("[M]ost average cats and dogs have a negligible fair market value."); see also Pintar, *supra* note 1, at 756 (stating that the majority of companion cats and dogs have no market value, especially once a dog is no longer a puppy).

human companion.<sup>54</sup> Regardless of which method is used, most courts exclude sentimental value in their calculations. This Comment concentrates on the instances in which a court or legislature weighs sentimental value and allows recovery for loss of companionship.

## II. THE RECOVERY OF LOSS OF COMPANIONSHIP DAMAGES UNDER U.S. TORT LAW

Under U.S. tort law, loss of companionship has two meanings. First, loss of companionship can be raised as a specific cause of action against a defendant.<sup>55</sup> Second, loss of companionship may be recoverable as an element of damages calculated to award a plaintiff for his or her loss.<sup>56</sup> This Comment focuses on the latter of these two applications, and henceforth, loss of companionship will refer to this category of emotional damages under tort law.

Emotional damages are awarded for pain and suffering,<sup>57</sup> while loss of companionship damages are awarded specifically to help “fill the void” created by the loss of a loved one.<sup>58</sup> The reasons for recognizing this recovery are similar to the reasons supporting recovery for loss of consortium, the sister and predecessor to loss of companionship, and include the “loss of support or services, love, companionship, affection, [and] society” of another.<sup>59</sup> While loss of companionship was not always accepted at common law,<sup>60</sup> it is now generally used as a measure of damages under statutory wrongful death claims and common law loss of consortium claims.<sup>61</sup>

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<sup>54</sup> See Schwartz & Laird, *supra* note 17, at 241. The “actual value” test will be described in greater detail in subsection III.B.1.

<sup>55</sup> See Wise, *supra* note 32, at 60-61 (“Separate from claims for emotional distress is the independent common law tort of loss of companionship.”).

<sup>56</sup> See Wilson, *supra* note 13, at 178 (“Loss of companionship can be one element in determining the value of a wrongful death of a family member to a living family member who experiences the loss.”).

<sup>57</sup> See Simmons, *supra* note 3, at 263 (“The court broadly defines emotional damages as pain and suffering.”).

<sup>58</sup> Boxberger, *supra* note 13, at 148.

<sup>59</sup> Simmons, *supra* note 3, at 263.

<sup>60</sup> Roukas, *supra* note 2, at 51.

<sup>61</sup> See Wilson, *supra* note 13, at 178-79 (“[L]oss of companionship is . . . generally used as a measure in wrongful death and loss of consortium claims.”); see also Anzalone v. Kragness, 326 N.E.2d 472, 475 (Ill. 2005) (“[The] loss of companionship of a spouse is recognized both pursuant to the Wrongful Death Act and at common law for loss of consortium resulting from nonfatal injuries to the spouse.”); Vasiliki Agorianitis, Comment, *Being Daphne’s Mom: An Argument for Valuing Companion Animals as Companions*, 39 J. MARSHALL L. REV. 1453, 1470 (2006) (“Loss of

The history of loss of companionship damages begins with the recovery of loss of consortium. Arising out of the marriage relationship,<sup>62</sup> loss of consortium was recognized early on as “the legal right of a husband to his wife’s company.”<sup>63</sup> Recovery was limited to husbands who had lost the “companionship and services of their wives due to the negligent or intentional acts” of a third person.<sup>64</sup> Over time, the recovery expanded to embrace the *emotional loss of either spouse* and to include the loss of affection and companionship.<sup>65</sup> Companionship came to be viewed as an “element of consortium,” giving both spouses the right to enjoy the company and affection of their partner.<sup>66</sup>

More recently, some states and courts have recognized that loss of companionship recovery should extend to other important relationships, such as that of a parent and child.<sup>67</sup> At first, recovery was available only to a parent and only for economic damages (including a child’s services or earning capacity).<sup>68</sup> This approach to recovery was seen as inadequate<sup>69</sup>

companionship is an element of damages traditionally included in the concept of consortium . . . .”).

<sup>62</sup> See Agorianitis, *supra* note 61, at 1459 (“Loss of companionship is based on the concept of consortium, which arises out of the marriage relationship.”); see also Wise, *supra* note 32, at 61 (“Loss of companionship is intimately related to traditional claims for loss of consortium derived from the marriage relationship . . . .”).

<sup>63</sup> Kirk, *supra* note 33, at 130; see also Wise, *supra* note 32, at 60 (“Loss of consortium existed because a wife was considered her husband’s servant, and both servants and wife were his chattels.”).

<sup>64</sup> Wilson, *supra* note 13, at 179; see also Huss, *Valuing Man’s and Woman’s Best Friend*, *supra* note 1, at 91 (“Loss of consortium claims were originally limited to the material services that a wife provided in the home.”).

<sup>65</sup> See Huss, *Valuation*, *supra* note 48, at 526 (“A more sentimental concept later developed that considered a spouse’s loss of affection and companionship.”); Squires-Lee, *supra* note 7, at 1082 (“Although historically based upon conjugal rights, a loss of consortium claim now includes the loss of companionship and affection as well.”); Wilson, *supra* note 13, at 179 (“The right to recover on a loss of consortium claim has only been extended to wives within the last sixty years.”).

<sup>66</sup> Kirk, *supra* note 33, at 122; see also Martin, *supra* note 40, at 943 (“[A] tortfeasor who causes the death of the plaintiff’s spouse can be required to compensate the plaintiff for the loss of the spouse’s ‘affection, society, companionship, and aid and comfort.’”).

<sup>67</sup> See Agorianitis, *supra* note 61, at 1459-60 (“[S]ome courts have . . . include[d] recovery based on such other relationships as parent and child.”); see also Villareal v. Dept. of Transp., 774 P.2d 213, 216 (Ariz. 1989) (“Today, we . . . recognize a child’s right to recover for the loss of parental consortium.”); Norvell v. Cuyahoga Cnty. Hosp., 463 N.E.2d 111, 114 (Ohio Ct. App. 1983) (“The legislatively announced public policy now permits recovery by the parent for loss of [a] deceased child’s society.”).

<sup>68</sup> See Simmons, *supra* note 3, at 264 (“[C]ourts limited damages to economic losses—those losses that could be measured by a monetary standard.”).

<sup>69</sup> Limiting recovery solely to economic damages was seen as inadequate because “the worth of a child decedent’s life equates primarily with the value of that child’s affection and companionship” instead of the services the child renders to his or her parents. Livingston, *supra* note 2, at 802.

during the last half-century,<sup>70</sup> leading some courts and legislatures to decide that parents could recover for the loss of a deceased or injured child's companionship.<sup>71</sup> Children may also recover for the loss of parental consortium.<sup>72</sup> Today, scholars argue that loss of companionship should be extended to include the negligent or intentional killing of or injury to a companion animal.<sup>73</sup>

### III. THE EVOLUTION OF LOSS OF COMPANIONSHIP DAMAGES FOR COMPANION ANIMALS

Most jurisdictions deny human companions loss of companionship damages for the negligent or intentional killing of or injury to a companion animal. However, legislatures and courts have varied in how they address emotional damages for human companions.<sup>74</sup> This Part delves deeper into recent developments and discusses specific legislative actions and judicial decisions that are pushing, and in some instances breaking, the barriers of the old common law denial of recovery.

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<sup>70</sup> For example, in Michigan, the Supreme Court first awarded loss of companionship damages for the death of a child in 1960. Boxberger, *supra* note 13, at 143-45. The right to receive such damages was later codified by the legislature in 1971. *Id.* In Illinois, the state Supreme Court allowed such damages first in 1984 in *Bullard v. Barnes*, 468 N.E.2d 1228, 1233 (Ill. 1984). In its decision, the Supreme Court of Illinois noted that fourteen states then allowed recovery by a parent. *Id.* at 1232.

<sup>71</sup> See Simmons, *supra* note 3, at 264 ("It was not until 1988 . . . that a growing number of states began recognizing that parents could have a claim of . . . loss of consortium for a child's injury or death."); see also Kirk, *supra* note 33, at 130-31 ("[C]ourts in a growing number of states have held that a parent's claim for loss of a child's comfort, society and companionship may be maintained where a minor child has been injured.")

<sup>72</sup> See Huss, *Valuation*, *supra* note 48, at 526 ("[S]everal states have recognized a child's claim for the loss of parental consortium."); Huss, *Valuing Man's and Woman's Best Friend*, *supra* note 1, at 92 (recognizing the same extension of recovery). The Supreme Court of Kentucky decided in 1997 that children should be allowed to recover damages for the loss of a parent. *Giuliani v. Guiler*, 951 S.W.2d 318, 319 (Ky. 1997). The court stated: "It is a natural development of the common law to recognize the need for a remedy for those children who lose the love and affection of their parents due to the negligence of another. It is necessary for this Court to conform the common law so as to provide a remedy for loss of consortium for children . . ." *Id.*

<sup>73</sup> See, e.g., Agoriantis, *supra* note 61, at 1470-71 (advocating for the expansion of loss of companionship recovery to cover companion animals).

<sup>74</sup> Compare Wise, *supra* note 32, at 69 ("Historically, owners of companion animals were denied common law damages for emotional distress and loss of society for the wrongful deaths of their companion animals . . ."), with Kirk, *supra* note 33, at 120 ("Courts have been inconsistent in their recognition of the sentimental value of a pet to an owner who has lost his or her companion."), and McNeely & Lindquist, *supra* note 5, at 110 ("Currently, there is an undeniable philosophical shift emerging within the judicial system which is struggling with whether or not it should continue to treat dogs as the personal property of humans, and if not, just exactly how should they be legally treated.").

### A. Legislative Developments

*If a change in the law is to occur, it is up to the Legislature, not the Courts, to decide that a dog named Fido, a cat named Boots, a hamster named Harry, or a fish called Wanda can have some new species of personal injury action brought on their behalf.*<sup>75</sup>

Courts and advocates alike have noted that state legislatures are best suited to address the expansion of tort recovery. Denying recovery for negligent infliction of emotional distress for the plaintiff's deceased dog in *Rabideau v. City of Racine*, the Supreme Court of Wisconsin noted that the legislature was the proper forum 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."<sup>76</sup> A few state legislatures have made such policy judgments, enacting statutes expanding a human companion's ability to recover emotional damages.

#### 1. Tennessee

In 2000, Tennessee became the first state to pass a law allowing for the recovery of noneconomic, emotional damages, including the loss of companionship, for the intentional or negligent killing of a companion animal.<sup>77</sup> Known as the "T-Bo Act," the original bill was introduced after State Senator Steve Cohen's shih tzu, T-Bo, was killed by another dog.<sup>78</sup> After learning that his recovery was limited to the market value of T-Bo and his veterinary expenses, Cohen introduced the bill that would later become law.<sup>79</sup>

Recovery is allowed when a pet<sup>80</sup> dog or cat is killed due to the "unlawful and intentional, or negligent, act of another."<sup>81</sup> If the act was

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<sup>75</sup> *Naples v. Miller*, No. 08C-01-093, 2009 WL 1163504, at \*3 (Del. Super. Ct. Apr. 30, 2009).

<sup>76</sup> 627 N.W.2d 795, 807 (Wis. 2001).

<sup>77</sup> W.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 (2002); see also DeFabritiis, *supra* note 12, at 256 ("Tennessee was the first state to adopt a statute expressly authorizing the recovery of non-economic damages for the death of a companion animal.").

<sup>78</sup> *Honoring Animal Victims: Landmarks in Legislation*, ANIMAL L. DEF. FUND (Feb. 10, 2009), [http://www.aldf.org/downloads/ALDF\\_Honoring\\_Animal\\_Victims\\_Landmarks.pdf](http://www.aldf.org/downloads/ALDF_Honoring_Animal_Victims_Landmarks.pdf), archived at <http://perma.cc/H24N-C86L>.

<sup>79</sup> *Id.*; see also Scott, *supra* note 15, at 588 (telling the story behind the enactment of the T-Bo Act).

<sup>80</sup> Under Tennessee law, "pet" is defined as "any domesticated dog or cat normally maintained in or near the household of its owner." TENN. CODE ANN. § 44-17-403(b) (2014).

negligent, the incident must have occurred on the plaintiff's property or while under his or her "control or supervision."<sup>82</sup> Recovery of noneconomic damages, including "compensation for the loss of the reasonably expected society, companionship, love and affection of the pet," is capped at \$5000.<sup>83</sup> While revolutionary in many respects, the statute contains strict applicatory restrictions. Besides applying only to killed or fatally injured dogs and cats and capping recoverable damages, the T-Bo Act exempts not-for-profit organizations and governmental agencies, including their employees, acting for the public health or animal welfare, and negligent killings by licensed veterinarians.<sup>84</sup> Nevertheless, the T-Bo Act is viewed as the first statute of its kind advancing the rights of human companions to recover for the loss of their pets' companionship.<sup>85</sup>

## 2. Illinois

Illinois is the only other state besides Tennessee that currently allows the recovery of noneconomic, emotional damages after the loss of a companion animal.<sup>86</sup> Illinois's Humane Care for Animals Act,<sup>87</sup> codified two years after the enactment of Tennessee's T-Bo Act,<sup>88</sup> covers *all* animals<sup>89</sup> that are subject to acts of cruelty, torture, or impounded in bad faith.<sup>90</sup> An individual may recover, "but [is] not limited to, the monetary value of the animal, veterinary expenses [, and] . . . any other expenses [to] rectify[] the effects of the cruelty, pain, and suffering of the animal, and *emotional*

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<sup>81</sup> *Id.* § 44-17-403(a)(1) ("If a person's pet is killed or sustains injuries that result in death caused by the unlawful and intentional, or negligent, act of another or the animal of another, the trier of fact may find the individual causing the death or the owner of the animal causing the death liable . . .").

<sup>82</sup> *Id.*; see also Goldberg, *supra* note 3, at 60-61 ("Tennessee's statute applies only to pets negligently injured or killed on the property of their owners, such as in their backyards, or under the owner's control, such as on a leash.").

<sup>83</sup> TENN. CODE ANN. § 44-17-403(a)(1), (d). Section (c) clarifies that the cap on damages does not cover claims for intentional infliction of emotional distress. *Id.* § 44-17-403(c).

<sup>84</sup> *Id.* § 44-17-403(e).

<sup>85</sup> See Root, *supra* note 77, at 435 ("The T-Bo Act is a positive development for companion animal owners because it expands available damages.").

<sup>86</sup> Goldberg, *supra* note 3, at 60.

<sup>87</sup> 510 ILL. COMP. STAT. ANN. 70/16.3 (West 2014).

<sup>88</sup> DeFabritiis, *supra* note 12, at 257.

<sup>89</sup> The statute does not limit its application to "pets," "companion animals," or "dogs and cats." *Id.* ("[I]n 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.").

<sup>90</sup> 510 ILL. COMP. STAT. ANN. 70/16.3.

*distress suffered by the owner.*<sup>91</sup> Plaintiffs are also entitled to punitive damages ranging from \$500 to \$25,000 for each covered act.<sup>92</sup>

The Illinois law is more expansive than the Tennessee statute in some respects while more restrictive in others. On one hand, the Illinois law allows recovery for human companions of animals other than dogs and cats, provides recovery even if the companion animal is non-fatally injured,<sup>93</sup> and includes recovery not only for emotional distress but also for veterinary and other financial expenses.<sup>94</sup> On the other hand, the Illinois law is more restrictive in that it specifies only certain acts of an aggressor for which recovery is available<sup>95</sup> and does not allow recovery for injuries resulting from a third party's negligence.<sup>96</sup>

### 3. Connecticut

Because they permit recovery for emotional damages in some pet lawsuits, the Tennessee and Illinois statutes are unique among state laws. However, other states have taken small steps along the road to expanding recovery for human companions mourning the loss of their companion animals. One of those states is Connecticut.

Connecticut law dictates that one who "intentionally kills or injures a companion animal," defined as a dog or cat,<sup>97</sup> is liable for *economic damages* including veterinary care, fair value of the animal, and burial expenses.<sup>98</sup> A court may also award punitive damages and attorneys' fees following statutory limits; however, these may not be imposed upon a licensed veterinarian, a state employee or officer, or an animal cruelty or animal protection volunteer if the defendant was acting within the scope of his or

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<sup>91</sup> *Id.* (emphasis added).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*; see also Rebecca J. Huss, *Recent Developments in Animal Law*, 40 TORT TRIAL & INS. PRAC. L.J. 233, 248 (2005) [hereinafter Huss, *Recent Developments*] (describing the scope of the Illinois law).

<sup>94</sup> 510 ILL. COMP. STAT. ANN. 70/16.3; see also Scott, *supra* note 15, at 588 (discussing the contents of the Illinois law).

<sup>95</sup> 510 ILL. COMP. STAT. ANN. 70/16.3; see also Huss, *Recent Developments*, *supra* note 93, at 248 ("[T]he animal must have been subject to an act of aggravated cruelty or torture or have been impounded in bad faith.").

<sup>96</sup> 510 ILL. COMP. STAT. ANN. 70/16.3; see Goldberg, *supra* note 3, at 60 ("In Illinois, the law applies only to acts of aggravated cruelty, torture, or bad faith, not negligence.").

<sup>97</sup> CONN. GEN. STAT. ANN. § 22-351a(a) (West 2014) ("[C]ompanion animal' means a domesticated dog or cat that is normally kept in or near the household of its owner or keeper and is dependent on a person for food, shelter and veterinary care . . . .").

<sup>98</sup> *Id.* § 22-351a(b).



her employment.<sup>99</sup> Unlike the Tennessee and Illinois statutes, the Connecticut statute does not allow for the recovery of noneconomic, emotional damages.<sup>100</sup> However, the Connecticut statute still represents a step in the right direction.

Though statutes like those in Tennessee, Illinois, and even Connecticut are few and far between, there has been an increase in proposed state legislation pushing for emotional damages for the injury to or killing of a companion animal.<sup>101</sup> The statutes discussed here may inspire more states to expand human companions' ability to recover emotional damages.

### B. Common Law Developments

The vast majority of courts have ruled that damages should be limited to the fair market value of the companion animal and have denied the recovery of emotional damages, including compensation for loss of companionship.<sup>102</sup> A few courts have broken from this tradition and allowed damages to reflect the sentimental value of the companion animal, with some courts specifically including damages for loss of companionship. This Section will review important cases that have pushed the boundaries of recovery as well as cases where courts have maintained the status quo.

#### 1. The Acceptance of Loss of Companionship Damages as Part of the "Actual Value" of a Companion Animal

When a court rejects the fair market value test, it often turns to an "actual value" or "intrinsic value" measurement of damages.<sup>103</sup> The court may then factor in the animal's original purchase price, money spent during

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<sup>99</sup> See *id.* § 22-351a(c)-(d) (stating that to escape possible punitive damages, licensed veterinarians must have followed "accepted standards of practice").

<sup>100</sup> See Goldberg, *supra* note 3, at 61 (defining the allowable damages).

<sup>101</sup> See Agorianitis, *supra* note 61, at 1461 (describing legislative proposals that would allow for damages in the wrongful death or injury of companion animals). For a review of proposed legislation in other states, 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, 226-30 (2003) (discussing proposed legislation, at the time of publication, in states such as California, Colorado, New York, and Rhode Island, as well as failed bills in Maryland, Oregon, and Connecticut).

<sup>102</sup> See *supra* Section I.B.

<sup>103</sup> See Huss, *Valuing Man's and Woman's Best Friend*, *supra* note 1, at 89 ("A state may allow for the elevation of damages based on the 'actual or intrinsic value of the animal.'"); see also Kirk, *supra* note 33, at 119 ("In some jurisdictions, where the dog is found not to have market value, courts look to its actual, intrinsic value to the owner."); Schwartz & Laird, *supra* note 17, at 240-41 (stating that some courts may allow recovery of the value to the owner if market value cannot be calculated).

the animal's life (e.g., veterinary bills), training costs, and loss of future income from the animal (e.g., special services or breeding) into the damages calculation.<sup>104</sup> The actual value standard recognizes that companion animals have value beyond the open market.<sup>105</sup> A vast majority of courts using "actual value" will exclude sentimental value—including the loss of companionship—from their damages calculations.<sup>106</sup> Other courts, however, include sentimental value, "the feelings or emotions in connection with 'normal' feelings of loss,"<sup>107</sup> with some courts going as far as to explicitly factor in loss of companionship as part of the actual value of the companion animal.<sup>108</sup>

a. *New York*

In computing damages for the death of an eight-year-old dog, the trial court in *Brousseau v. Rosenthal* held that "actual value" to the owner was the correct measurement of damages.<sup>109</sup> In finding for the plaintiff, who had depended greatly on the dog given to her as puppy after she lost her husband, the court held that it "must consider [loss of companionship] as an element of the dog's actual value" to the plaintiff.<sup>110</sup> To the *Brousseau* court, ignoring the companionship and protection the deceased animal provided to the plaintiff would be "wrong."<sup>111</sup> *Brousseau* has long been cited as an exemplary case modeling the acceptance of damages for loss of companionship of a companion animal.<sup>112</sup>

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<sup>104</sup> Schwartz & Laird, *supra* note 17, at 241.

<sup>105</sup> *See id.* at 242 (calling this method of calculation a "more elastic standard").

<sup>106</sup> *See id.* (citing the justification that these factors are "inherently subjective, easily inflatable, and potentially astronomical").

<sup>107</sup> Huss, *Valuing Man's and Woman's Best Friend*, *supra* note 1, at 90; *see also* Livingston, *supra* note 2, at 819 ("When a pet dies prematurely because of another's wrongful act, we experience the loss of [the companionship of our pet] as a genuine injury.").

<sup>108</sup> *See* Huss, *Valuation*, *supra* note 48, at 527 ("A few cases have held that loss of companionship can be one factor in calculating the actual value of an animal."); *see also* Casey Chapman, Comment, *Not Your Coffee Table: An Evaluation of Companion Animals as Personal Property*, 38 CAP. U. L. REV. 187, 194 (2009) ("Some courts have even gone further and taken a more liberal 'value to the owner' approach, allowing damages for sentimental or subjective value of a pet.").

<sup>109</sup> 443 N.Y.S.2d 285, 286 (N.Y. Civ. Ct. 1980) ("[T]he fact that Ms. Brousseau's dog was a gift and a mixed breed and thus had no ascertainable market value need not limit [her] recovery to a merely nominal award.").

<sup>110</sup> *Id.* ("The testimony indicates that plaintiff relied heavily on this well-trained watch dog and never went out into the street alone at night without the dog's protection. Since the dog's death, plaintiff does not go out of her apartment after dark.").

<sup>111</sup> *Id.* at 286-87.

<sup>112</sup> *See, e.g.*, Agorianitis, *supra* note 61, at 1460 (highlighting *Brousseau* as an example of a court allowing loss of companionship damages to a human companion).

In calculating damages for a negligently killed Yorkshire terrier, Dexter, a New York state court in *Mercurio v. Weber* embarked on a similar analysis as in *Brousseau*.<sup>113</sup> Stating that *Brousseau*'s analysis was "preferable" to others, the court decided that "considering the loss of companionship . . . more accurately values the lost animal" and provides for proper compensation.<sup>114</sup> Here, the court accepted the "replacement" price of Dexter offered by plaintiff; although the amount (\$1513.58) was "substantially higher" than Dexter's purchase price, the court presumed loss of companionship was factored into the figure and agreed it was still a reasonable estimate of Dexter's value.<sup>115</sup> *Mercurio* thus reflects the proposition that loss of companionship can be factored into the replacement cost of a companion animal.<sup>116</sup>

b. *Illinois*

*A recurring problem in cases of this sort is whether and to what extent the owner of an item of personal property having no market value should be allowed to recover for the sentimental value which he attached to the item.*<sup>117</sup>

In the 1987 case of *Jankoski v. Preiser Animal Hospital*, the plaintiffs sued to recover damages for loss of companionship after the death of their German Shepard due to the negligent administration of anesthesia.<sup>118</sup> Acknowledging *Brousseau*, the *Jankoski* court was unwilling to recognize loss of companionship as an independent cause of action but stated that, in calculating damages, an object without market value should be measured under the "actual value" standard and "may include some element of sentimental value."<sup>119</sup>

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<sup>113</sup> No. 1113/03, 2003 WL 21497325, at \*2 (Nassau Cnty. Dist. Ct. June 20, 2003).

<sup>114</sup> *Id.*

<sup>115</sup> *See id.* ("[T]he cost of replacing Dexter . . . is not an unreasonable estimate of Dexter's market value . . . [T]he record indicates that plaintiff grew highly attached to Dexter, and was subsequently deprived of his companionship. Pricing companionship is inherently difficult, but since plaintiff has presented us with a figure that reasonably approximates the cost of replacing Dexter . . . the court accepts that as the fair market price of Dexter.")

<sup>116</sup> *See Huss, Recent Developments, supra* note 93, at 240 (explaining that "the replacement cost of the dog encompassed the loss of companionship" in *Mercurio*).

<sup>117</sup> *Jankoski v. Preiser Animal Hosp.*, 510 N.E.2d 1084, 1086 (Ill. App. Ct. 1987) (internal quotation marks omitted).

<sup>118</sup> *Id.* at 1084-85.

<sup>119</sup> *Id.* at 1087 (hoping to avoid awarding only "nominal" damages to deserving plaintiffs).

## 2. The Rejection of Loss of Companionship Damages Under the Actual Value Test and Due to the Property Classification of Animals

While New York and Illinois courts, in *Brousseau*, *Mercurio*, and *Jankoski*, accepted loss of companionship as an element of either actual value or replacement value, other courts applying the “actual value” theory of recovery have explicitly rejected the recovery of damages for sentimental value.<sup>120</sup> Instead, these courts factor only “the cost of replacement, money spent on veterinary care, training costs, and loss of potential income” into damages.<sup>121</sup>

### a. *Ohio*

In *McDonald v. Ohio State University Veterinary Hospital*, an Ohio court dealt with assigning damages for a German Shepherd that suffered paralysis after surgery.<sup>122</sup> The dog, Nemo, had won awards at various dog shows and his pedigree had made him desirable for breeding.<sup>123</sup> Deciding that the proper test for damages was value to the owner, the court held that sentimentality was not a recoverable element under this standard.<sup>124</sup> Instead, the court took into account the time and money spent training Nemo,<sup>125</sup> potential lost earnings, and Nemo’s “uniqueness” to conclude the plaintiff suffered damages of \$5000.<sup>126</sup>

### b. *Alaska*

In *Mitchell v. Heinrichs*, the Supreme Court of Alaska held that actual value to the owner, instead of market value, might sometimes be the proper measurement of damages for a companion animal.<sup>127</sup> The court listed

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<sup>120</sup> See Huss, *Valuing Man’s and Woman’s Best Friend*, *supra* note 1, at 90 (“Some of these courts assessing the actual value of animals have specifically stated that the value does not include the subjective emotional or sentimental value of the animal.”); see also Goldberg, *supra* note 3, at 35 (“[C]ourts have been clear that [actual or intrinsic value] include[s] only economic factors, not sentiment or emotion.”).

<sup>121</sup> Seps, *supra* note 9, at 1344.

<sup>122</sup> 644 N.E.2d 750, 751 (Ohio Ct. Cl. 1994).

<sup>123</sup> *Id.* (noting that Nemo’s puppies earned the plaintiff \$350-500 each).

<sup>124</sup> See *id.* at 752 (“Sentimentality is not a proper element in the determination of damages caused to animals.”).

<sup>125</sup> See *id.* (“Plaintiff invested great time and effort to train Nemo, a unique pedigree, in a particular and personalized fashion—the rigorous Schutzhund training.”).

<sup>126</sup> *Id.*

<sup>127</sup> 27 P.3d 309, 310-11, 313 (Alaska 2001) (involving the death of the plaintiff’s dog by defendant’s gun shot after the dog threatened the defendant’s livestock and her own personal safety).

potential items eligible for recovery under this theory: original cost and cost of replacement, including cost of immunization, neutering, and training of a replacement animal.<sup>128</sup> The court held that sentimental value was not a component of actual value.<sup>129</sup>

c. *Texas*

In *Petco Animal Supplies v. Schuster*, the trial court originally awarded the plaintiff \$10,000 for “intrinsic value—loss of companionship,” as well as additional recovery for mental anguish, emotional distress, and economic damages for the loss of her dog, Licorice.<sup>130</sup> On appeal, the court decided the plaintiff could not recover for loss of companionship.<sup>131</sup> Citing to *Heiligmann v. Rose*, the court held that a plaintiff could only recover the market value or “special or pecuniary value to the owner” related to the animal’s services.<sup>132</sup> Although the court conceded that intrinsic value was “a personal or sentimental value,” the intrinsic value of a companion animal was confined to the usefulness and services of the animal by Texas precedent.<sup>133</sup> The court noted: “[W]e 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. Thus, we follow *Heiligmann* . . . .”<sup>134</sup>

d. *Indiana*

In *Lachenman v. Stice*, the property classification of companion animals hindered the plaintiff from offering evidence regarding the deceased dog’s sentimental value.<sup>135</sup> While the court accepted that companion animals might have “worth” beyond market value, the court ultimately concluded that “a dog is personal property, and the measure of damages for the

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<sup>128</sup> *Id.* at 313-14.

<sup>129</sup> *See id.* at 314 (“Mitchell may not recover damages for her dog’s sentimental value as a component of actual value to her as the dog’s owner.”).

<sup>130</sup> 144 S.W.3d 554, 558 (Tex. Ct. App. 2004).

<sup>131</sup> *See id.* at 560 (“Petco asserts that the district court could not, as a matter of law, award Schuster damages for . . . loss of companionship . . . . We agree.”).

<sup>132</sup> *Id.* at 561 (citing *Heiligmann v. Rose*, 16 S.W. 931, 932 (Tex. 1891)).

<sup>133</sup> *Id.* at 563-64 (“Schuster relies on *Porras v. Craig* for the proposition that she can recover the intrinsic value of Licorice as a beloved companion. But . . . *Heiligmann*’s true rule permitted recovery of a dog’s special or pecuniary value ascertained solely by reference to the usefulness and services of the dog.” (citing *Heiligmann*, 16 S.W. at 932) (internal quotation marks omitted)).

<sup>134</sup> *Id.* at 565.

<sup>135</sup> *See* 838 N.E.2d 451, 466 (Ind. Ct. App. 2005) (affirming that case law does not support the plaintiff’s claim that she may recover damages in excess of the fair market value of her dog).

destruction of personal property is the fair market value thereof at the time of the destruction.”<sup>136</sup> Therefore, a trial court could exclude evidence relating to the sentimental value of a companion animal.<sup>137</sup>

### 3. The Acceptance of Other Emotional Damages

The next two cases, while not specifically addressing loss of companionship damages, acknowledged sentimental value and allowed plaintiffs to recover noneconomic, emotional damages. Thus, they are positively related to this Comment’s purpose.

#### a. *Florida*

In one of the most well-known companion animal cases, the plaintiff in *La Porte v. Associated Independents, Inc.* filed suit after witnessing a garbage collector hurl a garbage can at her miniature dachshund, inflicting injuries from which the dog died.<sup>138</sup> After the trial judge instructed the jury that the plaintiff could recover for mental suffering from the incident, the Florida Supreme Court was faced with the question of whether the trial court erred in giving out these instructions.<sup>139</sup> The court rejected the District Court of Appeal’s remarks that sentimental value had no place in damages calculations and reinstated the original judgment.<sup>140</sup> Writing that “the affection of a master for his dog is a very real thing and . . . the malicious destruction of the pet provides an element of damage for which the owner should recover,”<sup>141</sup> the court held that the plaintiff could recover for mental suffering as an element of her damages.<sup>142</sup>

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<sup>136</sup> *Id.* at 467.

<sup>137</sup> *See id.* at 467-68 (“A family dog may well have sentimental value . . . [but] we cannot say that the trial court’s ruling . . . was in error.”).

<sup>138</sup> 163 So. 2d 267, 267-68 (Fla. 1964).

<sup>139</sup> *Id.* at 267.

<sup>140</sup> *Id.* at 268-69.

<sup>141</sup> *Id.* at 269 (“The restriction of the loss of a pet to its intrinsic value in circumstances such as the ones before us is a principle we cannot accept.”).

<sup>142</sup> *Id.*; *see* Byszewski, *supra* note 101, at 219-20 (“The court’s holding recognized that companion animals do have special value, unlike traditional property, based on the value their guardians appropriately place on them.” (internal quotation marks omitted)). The judgment reinstated by the Florida Supreme Court was for \$2000 in compensatory damages, “primarily emotional in nature,” and \$1000 in punitive damages. William A. Reppy, Jr., *Punitive Damage Awards in Pet-Death Cases: How do the Ratio Rules of State Farm v. Campbell Apply?*, 1 J. ANIMAL L. & ETHICS 19, 30 (2006).

b. *Hawaii*

A Hawaiian circuit court in *Campbell v. Animal Quarantine Station* awarded the grieving family of a negligently killed dog \$1000 in damages, which included recovery for emotional distress.<sup>143</sup> On appeal to the Supreme Court of Hawaii, defendant argued the plaintiffs could not recover for mental injury from the loss of personal property.<sup>144</sup> Admitting that it was following a minority view, the court rejected this argument, stating that a plaintiff could recover for mental distress due to the “negligent destruction of property,” and upheld the original damages award.<sup>145</sup> *Campbell* reflects the coexistence of an unlikely pairing: the property classification of companion animals and the approval of emotional compensation.<sup>146</sup>

#### IV. THE MINORITY TREND: ARGUMENTS FOR EXPANDING LOSS OF COMPANIONSHIP DAMAGES TO COVER COMPANION ANIMALS

*[A] pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property.*<sup>147</sup>

This Part addresses three major arguments in support of the minority position and the expansion of tort law to allow the recovery of loss of companionship damages for a companion animal.

##### A. *Expansion Promotes the Goals of Tort Law*

Three major goals of tort law are to deter wrongful conduct, compensate victims, and reflect society’s values.<sup>148</sup> First, to deter potential wrongdoers, the law must present a punishment harsh enough to evoke deterrence. Tort law will not deter wrongful conduct toward companion animals unless

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<sup>143</sup> 632 P.2d 1066, 1067 (Haw. 1981).

<sup>144</sup> *Id.* at 1071; Root, *supra* note 77, at 433-34.

<sup>145</sup> *Campbell*, 632 P.2d at 1071 (“Hawaii has devised a unique approach to the area of recovery for mental distress.”).

<sup>146</sup> See Root, *supra* note 77, at 434 (“This case might be used as a springboard for other courts to adopt the same or similar legal reasoning to expand the damages recoverable for the wrongful injury to or death of a companion animal.”).

<sup>147</sup> *Corso v. Crawford Dog & Cat Hosp., Inc.*, 415 N.Y.S.2d 182, 183 (N.Y. Civ. Ct. 1979).

<sup>148</sup> See Squires-Lee, *supra* note 7, at 1099 (listing “compensation, deterrence, and the reflection of societal values” as tort law’s three objectives); see also Boxberger, *supra* note 13, at 142 (“Two of the main objectives of tort law are the affirmation of societal values and the compensation for people’s injuries.”).

courts appropriately value the animal.<sup>149</sup> An appropriate valuation must involve emotional harm; without it, plaintiffs will recover negligible damages under both the fair market value and actual value standards, which will not deter future wrongdoers. Economic deterrence functions successfully only if compensation is high enough to curb the punishable conduct. For companion animals, compensation therefore must include emotional damages, including loss of companionship.<sup>150</sup>

Second, to properly compensate tort victims for their actual loss, courts must award loss of companionship damages. Fair market value is not a sufficient measurement of damages for the true loss suffered by human companions.<sup>151</sup> Proponents demand that the unique relationship humans have with their companion animals requires greater compensation than that given for the damage or destruction to other forms of property: “[T]he most fundamental rule of damages [is] that every wrongful injury or loss . . . should be adequately and reasonably compensated[,] requir[ing] . . . compensation for the reasonable special value of such articles to their owner taking into consideration the feelings of the owner for the property.”<sup>152</sup> Human companions suffer emotional distress, grief, depression, and loss of society when their companion animal is injured or killed.<sup>153</sup> The loss experienced is “substantial and genuine,” and studies have found this emotional distress is similar to that experienced when a human family member dies.<sup>154</sup> These are real harms that deserve emotional damages for plaintiffs to recover fully for their injury.<sup>155</sup> Without such recognition, the

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<sup>149</sup> See Squires-Lee, *supra* note 7, at 1087 (“Appropriately valuing companion animals . . . results in deterrence by reducing consumption.”).

<sup>150</sup> See *id.* at 1086 (“[E]conomic deterrence requires compensation for emotional harm . . .”).

<sup>151</sup> See *id.* at 1062-63 (“Market value is incommensurate with the loss suffered by animal guardians because the market value of a cat or dog, neither pedigreed nor kept for a purpose other than love and affection, is negligible.”).

<sup>152</sup> Wise, *supra* note 32, at 66.

<sup>153</sup> See *id.* at 39 (“[A]n overarching principle of tort law is that victims should be compensated for all damages proximately caused by a tortfeasor’s wrongful conduct; human companions suffer proximately caused emotional distress and loss of society when their companion animals are wrongfully killed; therefore, owners should be compensated for this emotional distress and loss of society.”); see also Martin, *supra* note 40, at 941 (“Owners . . . can be expected to go through all of the classic stages of grief when their pets die, including denial, bargaining, anger, guilt, sorrow, and resolution.”).

<sup>154</sup> Livingston, *supra* note 2, at 806 (“Upon a pet’s death, humans generally experience a substantial and genuine loss . . .”); Pintar, *supra* note 1, at 741 (“Individuals grieving over the loss of a pet will experience the same symptoms as those grieving over the loss of a person, though not necessarily to the same degree.”).

<sup>155</sup> See Boxberger, *supra* note 13, at 142 (“Michigan’s refusal to compensate companion animal guardians for loss of companionship for the loss of a companion animal is a failure to compensate for a very real and devastating injury.”); *id.* at 150 (“That destruction and loss is evident by the



law “awards damages for a loss that the owner of a companion animal *does not actually suffer* (economic value) and refuses to compensate an owner for the damages that [he or she] actually *does suffer* (emotional distress and loss of society).”<sup>156</sup>

The third goal of tort law is to reflect society’s values.<sup>157</sup> Proponents argue that the current law does not reflect society’s attitudes: people do not view their companion animals as property.<sup>158</sup> Studies indicate that many human companions view their companion animals as members of the family, with some even viewing their beloved animals as akin to children.<sup>159</sup> Furthermore, the idea that society values companion animals as more than property is reflected by the concept of “replacement.” One standard of tort compensation for property harm is awarding the plaintiff the cost of replacement. However, a companion animal is irreplaceable, and the actions of a human companion after his or her loss do not match those of a person dealing with damaged or destroyed property.<sup>160</sup> With other forms of property, when the item is rendered useless, the owner seeks to replace it, an act that makes the owner “whole again.” However, purchasing a new companion animal does not make the human companion whole.<sup>161</sup> Even more telling, if companion animals were viewed like property, the animal would be replaced once the cost of upkeep surpassed the animal’s market value. However, the opposite occurs: human companions see their animals as *more valuable* as they age and will pay to keep the animal alive as long as possible.<sup>162</sup>

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extreme pain felt by the human companion.”); *see also* Chapman, *supra* note 108, at 203 (“[I]t is illogical to hold the innocent party responsible for any losses incurred due to the negligence of the offending party.”).

<sup>156</sup> Wise, *supra* note 32, at 72.

<sup>157</sup> *See* Huss, *Valuation*, *supra* note 48, at 530 (“The law should reflect the values of society.”).

<sup>158</sup> *See supra* note 14 and accompanying text. Some proponents go as far as to say companion animals should be treated as persons under the law. *See* Seps, *supra* note 9, at 1358 (“Since society treats pets like humans, the law should treat this group of animals as persons.”).

<sup>159</sup> DeFabritiis, *supra* note 12, at 241-42; *see also* Livingston, *supra* note 2, at 802 (“[A]nimals are now often regarded as members of the family and esteemed for the love, loyalty, and companionship that they provide.”).

<sup>160</sup> *Cf.* Wilson, *supra* note 13, at 196 (noting that a companion animal is of “irreplaceable value” to the human companion).

<sup>161</sup> *See* Livingston, *supra* note 2, at 817 (“[P]rocur[ing] a new animal will not erase the mental anguish and grief experienced when the previous animal was killed.”).

<sup>162</sup> *See* Seps, *supra* note 9, at 1365 (“[A]s pets age they become more valuable to their owners as a result of having spent more time with their owners and thus developing a closer emotional relationship with them.”); *see also* Simmons, *supra* note 3, at 265 (“If animals were truly seen as property[,] veterinarians and other animal healthcare providers would be nonexistent. Pet owners would not need their services because they would simply abandon their pets and replace

### B. *Expansion Is a Natural Next Step*

In many ways, allowing for the recovery of loss of companionship damages under tort law makes sense as the next natural development in the law. Over time, more relationships have been declared eligible to receive loss of companionship damages.<sup>163</sup> Currently, the common law and state statutes conflict with how the public views and values companion animals. To address this inconsistency, states must recognize loss of companionship damages for human companions.<sup>164</sup> “As long as tort law compensates for emotional losses stemming from other relationships, it should compensate for emotional losses stemming from the death of companion animals.”<sup>165</sup>

### C. *Expansion Is Rational Because Companion Animals Already Receive Protection Unique to “Property” Under the Law*

Although classified as property, animals receive various forms of protection under U.S. law, which differentiates them from other forms of property. For example, animals receive unique protection through animal cruelty and welfare laws.<sup>166</sup> The Animal Welfare Act of 1966 was enacted in part to “insure that animals intended for use inside research facilities . . . or . . . as pets are provided humane care and treatment” and “assure the humane treatment of animals during transportation in commerce.”<sup>167</sup> As author Debra Squires-Lee argues in her 1995 article, *In Defense of Floyd: Appropriately Valuing Companion Animals in Tort*, “[i]f animals were truly property, there would be little reason for Congress to pass such a law protecting their interests . . . .”<sup>168</sup> Squires-Lee also notes that all fifty states have passed laws criminalizing animal cruelty, torture, the overworking of animals, and the deprivation of necessary sustenance.<sup>169</sup>

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them . . . rather than seeking treatment.” (quoting Paek, *supra* note 36, at 489) (internal quotation marks omitted)).

<sup>163</sup> See *supra* Part II.

<sup>164</sup> See Kirk, *supra* note 33, at 131 (“[I]t is time for the courts to recognize that many members of society have emotional bonds with their companion animals.”); see also Boxberger, *supra* note 13, at 150 (“Michigan is willing to award loss of companionship damages for the loss of a family member and any break up in the family unit. Accordingly, Michigan must award loss of companionship damages for the loss of a companion animal. Not allowing such damages is hypocritical and unjust.”).

<sup>165</sup> Squires-Lee, *supra* note 7, at 1082-83.

<sup>166</sup> See Goldberg, *supra* note 3, at 45 (pointing out that animal cruelty and welfare laws show that companion animals are valued even though they are classified as legal property).

<sup>167</sup> 7 U.S.C. § 2131 (2012).

<sup>168</sup> Squires-Lee, *supra* note 7, at 1072.

<sup>169</sup> See *id.* at 1071-72 (“[T]he legislatures of the fifty states have essentially acknowledged that animals are more than property and more than inanimate objects.”).

The protection of companion animals in these respects fundamentally conflicts with the lack of recovery for emotional damages under tort law.<sup>170</sup>

#### V. PROMOTING THE MINORITY VIEW: APPROACHES TO EXPANDING TORT RECOVERY TO INCLUDE LOSS OF COMPANIONSHIP DAMAGES TO HUMAN COMPANIONS

For those supporting the growing minority view, two approaches are often proposed to change the law. First, the legal status of companion animals must be elevated from pure property to a semi-property classification more attuned with the realities of companion animals' characteristics and their relationships with their human companions. Second, tort law itself must expand to allow for the recovery of loss of companionship damages to human companions.

Advocates of the minority position encourage one or both of these proposed solutions and, in many cases, the two solutions are proposed together. Each proposal approaches the issue from a different angle; the first focuses on the legal classification of companion animals, and the second on the expansion of accepted tort recovery. This Comment advocates for the use of both solutions to allow human companions to recover loss of companionship damages. Used together, these reforms will allow the classification of companion animals in a manner more consistent with societal values, and human companions will receive damages properly compensating them for their loss. However, for the purpose of clarity, these two approaches will be discussed in separate Sections.

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<sup>170</sup> See Seeps, *supra* note 9, at 1343 (“[T]he law’s treatment of animals differs based on the area of law in which the animal is considered.”). On a similar note, in arguing that expanding recovery for the loss of companionship of a companion animal is justified even under a property classification, comparisons can be drawn to the treatment of corporations under U.S. law. The U.S. Supreme Court gave corporations “corporate personality” by deciding that they were “a kind of person and resident of a state” and therefore should receive state citizenship. See Huss, *Valuing Man’s and Woman’s Best Friend*, *supra* note 1, at 71-72. In *Trustees of Dartmouth College v. Woodward*, Chief Justice Marshall expressed a caveat: “[b]eing the mere creature of law, [a corporation] possesses only those properties which the charter of its creation confers upon it . . . .” 17 U.S. 518, 636 (1819). Similarly, allowing for recovery of emotional damages for companion animals can be restricted solely to that specific purpose, as a creature of statutory or common law. If corporations are viewed as legal “persons”—although technically they are not—then companion animals, though property, can be viewed as entities for which the recovery of emotional damages by their human companions is allowed if they are damaged or destroyed.

A. *Where Should Change Occur? Advocating for the Legislature*

The first obstacle to both approaches is *how* to make the necessary legal change. However, the answer is quite clear: the change must come from the legislature. While more courts are expressing sympathy for claimants by recognizing the real loss felt by human companions and acknowledging changing social attitudes, legal precedent ties their hands.<sup>171</sup> Scholars noted that “judges are extremely reluctant to adopt any approach that radically contradicts centuries of well-developed jurisprudence.”<sup>172</sup> Many opinions expressly state that courts are helpless to extend loss of companionship damages to worthy plaintiffs without proper legal action by their state’s legislature.<sup>173</sup> This position is valid for many reasons. The legislature can weigh policy considerations,<sup>174</sup> structure laws that properly address social needs,<sup>175</sup> and speak to opposing arguments<sup>176</sup> when enacting a statute. Statutory action will moreover enact change faster than if made through the judiciary.<sup>177</sup>

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<sup>171</sup> See DeFabritiis, *supra* note 12, at 238, 247-48 (“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.”).

<sup>172</sup> Wilson, *supra* note 13, at 183.

<sup>173</sup> See Pickford v. Mason, 98 P.3d 1232, 1235 (Wash. Ct. App. 2004) (“[Plaintiff], with good reason, maintains that [his dog] is much more than a piece of property; we agree. Still, no Washington case has recognized the claims Pickford urges us to find. Such an extension of duty and liability is more appropriately made by the legislature.”); see also Naples v. Miller, 08C-01-093, 2009 WL 1163504, at \*3 (Del. Super. Ct. Apr. 30, 2009) (explaining that these issues are “up to the Legislature, not the Courts”); DeFabritiis, *supra* note 12, at 253 (“Absent action by the legislature, the court [in *Scheele v. Dustin*, 998 A.2d 697 (Vt. 2010)] 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.”).

<sup>174</sup> See Livingston, *supra* note 2, at 793-94 (“[T]he legislature is the appropriate body to fashion such a remedy and to weigh the competing policy considerations.”).

<sup>175</sup> See Wilson, *supra* note 13, at 194 (“Legislatures are . . . able to structure laws around the current needs of society.”).

<sup>176</sup> Susan J. Hankin, *Not a Living Room Sofa: Changing the Legal Status of Companion Animals*, 4 RUTGERS J.L. & PUB. POL’Y 314, 389 (2007) (“[L]egislation can . . . address the concerns of those who seem most opposed . . .”).

<sup>177</sup> See Root, *supra* note 77, at 448 (“[Such] statutes could preempt the settled case law . . .”). Furthermore, the legislative path was used to enact wrongful death statutes, another significant shift in tort law. See Goldberg, *supra* note 3, at 59 (“[A] liability expansion of this magnitude should be made through legislatures, just as with wrongful death acts for spouses and children.”).

B. *A Special Status of Companion Animals: Creating a Unique Semi-Property Classification*

1. A New Semi-Property Classification

The first popular solution encouraged by those supporting the recovery of loss of companionship damages to human companions involves replacing the legal property status of companion animals with a new classification.<sup>178</sup> Proponents argue that the law should reflect society's recognition of companion animals as sentient, emotive, and capable of forming real bonds with their human companions.<sup>179</sup> Therefore, companion animals deserve to be separated from other forms of personal property to reflect these unique characteristics.<sup>180</sup>

Most scholars supporting this line of thought propose to classify companion animals as a special, distinct segment of legal property. While the name of the new classification may vary—from “companion animal property”<sup>181</sup> to “sentient property”<sup>182</sup> or “inimitable property”<sup>183</sup>—the category recognizes what makes companion animals different from other

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<sup>178</sup> Proponents of this solution believe that “property” is an inadequate and incorrect categorization of companion animals because it fails to take into account the relationship between the animal and the human companion and the value the human companion places upon the animal. See *Rabideau v. City of Racine*, 627 N.W.2d 795, 798 (Wis. 2001) (“Labeling a dog property fails to describe the value human beings place upon the companionship that they enjoy with a dog.” (internal quotation marks omitted)). The property classification essentially compares a companion animal to any other piece of personal property—considering it no more or no less than a table or a chair. *But see id.* (“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.”).

<sup>179</sup> 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, 55 (2001). As mentioned in previous Parts, many human companions see their companion animals as family members. See *Seps*, *supra* note 9, at 1370 (describing custody disputes and tort cases concerning companion animals).

<sup>180</sup> Hankin, *supra* note 176, at 377; see also Wilson, *supra* note 13, at 187 (“Companion animals’ unique qualities and unique ability to straddle the line between family member and chattel require[] a unique classification in property law . . . .”). Furthermore, altering the classification of companion animals will “help to make sense of [the minority] judicial and legislative trends that have been emerging in the past decade or more.” Hankin, *supra* note 176, at 380.

<sup>181</sup> Hankin, *supra* note 176, at 379.

<sup>182</sup> *Id.* at 385-86 (reviewing one definition of sentient property: “any warm blooded, domesticated nonhuman animal dependent on one or more humans for food, shelter, veterinary care, or compassion and typically kept in or near the household of its owner, guardian, or keeper” (internal quotation marks omitted)); see also Sullivan & Vietzke, *supra* note 19, at 44 (“Sentient property has the capacity to feel pain . . . .”).

<sup>183</sup> Wilson, *supra* note 13, at 170-71.

types of property.<sup>184</sup> This includes taking into account their “dependence on their human owners, their capacity to suffer if mistreated or neglected, and the bonds that we form with [them] and that they form with us.”<sup>185</sup>

One of the most important questions involving this unique property classification is which animals will fall within its reach. Tennessee’s T-Bo Act covers only domesticated dogs and cats and has been criticized for the seemingly arbitrary line it draws between these companion animals and others.<sup>186</sup> The Animal Legal Defense Fund takes a more inclusive approach, defining companion animal as a “warm-blooded, domesticated nonhuman animal” that depends on a person for “food, shelter, veterinary care, or companionship.”<sup>187</sup> Nevertheless, many proponents still limit their semi-property classifications to dogs and cats,<sup>188</sup> perhaps to diffuse oppositional arguments claiming the new classification is too expansive and would lead to extreme results.

## 2. Oppositional Arguments and Responses in Rebuttal

As with any proposal for change, a new semi-property classification for companion animals has its critics. This subsection will address common arguments against a new property status for companion animals and will respond to them.

First, opponents argue that the current property classification is the correct categorization of companion animals under the law. Over a century’s worth of precedent reflects that, under common law, animals are classified as property. As the Indiana Court of Appeals noted in *Lachenman v. Stice*, “[h]owever unfeeling it may seem, the bottom line is that a dog is personal property . . . .”<sup>189</sup> The law has consistently treated all animals as property; to change the legal status of only some animals would result in undesirable and inconsistent treatment of the same species of animal depending on the

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<sup>184</sup> See Hankin, *supra* note 176, at 381 (“Creating a new legal category for companion animals . . . recognizes their important differences from inanimate property . . .”).

<sup>185</sup> *Id.* at 379.

<sup>186</sup> See Agorianitis, *supra* note 61, at 1467-68 (“While it is true that dogs and cats are the most common type of companion animal, the statutory limitation of the definition of ‘pet’ is an arbitrary distinction that wrongfully excludes [other] relationships . . . .”); see also Root, *supra* note 77, at 448 (“The statute should include a broader definition of ‘pet’ because humans can form companion relationships with animals besides dogs and cats, including birds and rabbits.”).

<sup>187</sup> Sonia S. Waisman, *Non-Economic Damages: Where Does it Get Us and How Do We Get There?*, 1 J. ANIMAL L. 7, 20 (2005).

<sup>188</sup> See Hankin, *supra* note 176, at 386 (proposing a “companion animal property category” limited to dogs and cats).

<sup>189</sup> 838 N.E.2d 451, 467 (Ind. Ct. App. 2005).

situation.<sup>190</sup> Furthermore, opponents argue that such a change will interfere with the scientific research community's ability to use these species of animals in their research.<sup>191</sup>

In rebuttal, proponents of a new classification for companion animals argue that the property classification is outdated and does not accurately reflect the way human companions and society in general view companion animals.<sup>192</sup> Differential treatment of animals in specific legal contexts is both commonplace and desirable.<sup>193</sup> Currently, there are certain U.S. laws that provide differential treatment to some animals based on their species, while other laws treat the same animal species differently depending on circumstance.<sup>194</sup> Distinctive laws are applied to wild animals, livestock, companion animals, and animals used for research.<sup>195</sup> For example, the Animal Welfare Act includes different provisions and restrictions depending on whether an animal is used in research, as livestock, or as a pet.<sup>196</sup> Moreover, changes to the property classification of companion animals can be written in a way to only impact domesticated, household pets, and not members of the same species kept and used for research.<sup>197</sup> Creating a legal classification that gives certain animals a different status and protection in certain situations is not out of the ordinary.

Second, opponents warn that any progressive development away from the strict property classification of companion animals is the first step towards granting companion animals a "legal status akin to personhood," a

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<sup>190</sup> See Seps, *supra* note 9, at 1340 ("The law attempts to maintain consistency in its treatment of all animals as property . . .").

<sup>191</sup> See Hankin, *supra* note 176, at 389 (arguing, in rebuttal, that narrowly defining the change to the status of companion animals could alleviate opposition from the research community).

<sup>192</sup> See *id.* at 377, 379-80 ("A separate legal category for companion animals has both intuitive appeal and would better reflect the way in which we value companion animals in our society."); Schwartz & Laird, *supra* note 17, at 235 (emphasizing the unique value humans place on companion animals); Kirk, *supra* note 33, at 129 ("The law must acknowledge that for many people losing a pet is emotionally devastating.").

<sup>193</sup> See Seps, *supra* note 9, at 1340 ("Different laws apply to different animals based on their categorization as wild animals, livestock, research animals, or pets."). See generally Hankin, *supra* note 176.

<sup>194</sup> See Seps, *supra* note 9, at 1340 ("Different categorization of animals, and thus the application of laws to different animal groups, is based on humanity's relationship with the animals.").

<sup>195</sup> See *id.* ("[A]nimal torture laws do not apply to the treatment of wild animals while hunting, fishing, or trapping.").

<sup>196</sup> See *id.* ("In addition, specific laws apply to the killing of livestock, whereas other laws exist that govern the killing of pets in shelters.").

<sup>197</sup> Of course, this argument depends on the specific language used in the new semi-property classification of companion animals. See *supra* subsection V.B.1. Other issues surrounding animal research are beyond the scope of this Comment.

situation challengers strictly oppose.<sup>198</sup> Strengthening this position, some proposals recommend the law should grant a narrow class of animals personhood status,<sup>199</sup> and the relationship between a human and a companion animal should be treated similarly to a custodial parent–child relationship.<sup>200</sup>

However, classifying companion animals as “semi-property” will not bring such dramatic results. As mentioned in Section V.A., changes to the property status of companion animals should be effectuated by state legislatures, not through the courts or common law. This way, legislatures can specifically clarify which companion animals are covered, what protections they will receive, and under what circumstances they can be legally classified as semi-property. Acting through the legislature will guarantee that the new legal classification reflects societal values and addresses policy concerns, including those voiced by the opposition. The legislature can also ensure that companion animals are not given “personhood” status or other rights normally granted only to human beings.

### C. *A New Subset of Loss of Companionship Damages Claims*

#### 1. Description of a New Recovery Statute

A second proposal looks to expand tort law to allow human companions to recover loss of companionship damages. To do so, advocates suggest state legislatures should follow the lead of the Tennessee T-Bo Act and enact statutes that expressly expand loss of companionship damages to cover injured or killed companion animals. To create a successful statute, a legislature must first address questions such as who can sue and for what acts, which animals are covered, what factors should be analyzed in deciding the financial award, will there be a cap on damages and what should it be, and will there be any exceptions? This subsection will offer answers to these questions.

First, the statute should expressly limit its application to specific individuals. In many cases, a companion animal is a “family pet” who bonds with multiple family members. In order to eliminate the likelihood of

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<sup>198</sup> See Hankin, *supra* note 176, at 381 (noting that some advocate that animals *should* have a status analogous to people); see also Agorianitis, *supra* note 61, at 1466 (“One of the biggest concerns with the abrogation of animals’ status as property has been the idea that the elimination of that status will lead to granting animals independent rights as individuals . . .”).

<sup>199</sup> See Seps, *supra* note 9, at 1369 (confining those animals the law should treat as persons to “anthropomorphic pets”).

<sup>200</sup> Huss, *Valuing Man’s and Woman’s Best Friend*, *supra* note 1, at 69.



repetitive claims and excessive damages awards,<sup>201</sup> some have argued that only one claimant should be able to claim loss of companionship damages either by representing himself or herself (if he or she is the sole owner of the companion animal or the household does not include other human companions) or, in the case of a family, as a “family unit.”<sup>202</sup>

Next, the statute would need to clarify which outcomes and acts would occasion loss of companionship damages. The range of options includes injuries not claiming the life of the pet, injuries resulting in death, or the killing of the companion animal (as well as negligent or intentional acts). For example, the T-Bo Act only covers companion animals that were killed or sustained injuries resulting in death,<sup>203</sup> while other proposed statutes allow for recovery for injuries that do not result in death.<sup>204</sup> Most believe recovery should apply to both negligent and intentional acts,<sup>205</sup> while some demand additional requirements for negligence or gross negligence when “the [injurious or fatal act] . . . occur[red] on the property of the deceased pet’s owner or caretaker, or while under the control and supervision of the deceased pet’s owner or caretaker.”<sup>206</sup>

Next, the statute must identify which animals are to be considered “companion animals.” As discussed in subsection V.B.1, many statutes either limit the category of recoverable companion animals to just dogs and cats<sup>207</sup> or warm-blooded, domesticated nonhuman animals dependent on their owners,<sup>208</sup> to the exclusion of livestock or farm animals.<sup>209</sup>

<sup>201</sup> A popular oppositional argument is that multiple claimants will sue for a singular event involving the same companion animal causing an increase in court caseloads and excessive overcompensation. See Livingston, *supra* note 2, at 843 (mentioning the concern that “in a single family several claimants will come forward and seek noneconomic damages, . . . resulting in possible overcompensation”).

<sup>202</sup> See Chapman, *supra* note 108, at 222 (“[T]he family unit . . . shall recover as one companion animal owner . . . .” (internal quotation marks omitted)).

<sup>203</sup> TENN. CODE ANN. § 44-17-403(a)(1) (West 2014); see also Roukas, *supra* note 2, at 57 (proposing legislation allowing for recovery only if an animal is killed or its injuries result in death).

<sup>204</sup> See Chapman, *supra* note 108, at 223-24 (proposing a model statute for recovery). Others believe recovery should be limited to only those injuries that are “severe.” See DeFabritiis, *supra* note 12, at 264 (“[A]ctionable conduct should include both intentional and negligent acts or omissions that result in the severe injury or death of a companion animal.”).

<sup>205</sup> DeFabritiis, *supra* note 12, at 264.

<sup>206</sup> Roukas, *supra* note 2, at 57; see also Chapman, *supra* note 108, at 223 (requiring the same criteria for negligent action). The T-Bo Act also includes a similar provision. See TENN. CODE ANN. § 44-17-403(a)(1).

<sup>207</sup> TENN. CODE ANN. § 44-17-403(b); see Chapman, *supra* note 108, at 202 (“[R]ecovery should be limited to those animals that are traditionally kept and recognized as companion animals, and which are capable of both giving and receiving affection—namely cats and dogs.”).

<sup>208</sup> DeFabritiis, *supra* note 12, at 264.

Furthermore, if damages for the loss of companionship of a companion animal were allowed, how would a court decide if the plaintiff deserved recovery, and for what amount? While guidelines would help courts apply the law, claims would need to be viewed on a case-by-case basis to determine the nature of each particular animal–human relationship.<sup>210</sup> Since the theory behind recovery is that human companions suffer a real loss of companionship when their companion animal dies, plaintiffs will first have to sufficiently show that they suffered a legally recognizable loss due to the injury to or death of their companion animals.

Many suggest that courts ought to require extensive testimony on the companionship between the plaintiff and the companion animal sufficient to establish the bond that existed between the two.<sup>211</sup> Plaintiffs should introduce evidence on the nature of the relationship,<sup>212</sup> including testimony on its duration, any special training or distinctive uses of the animal, the animal's unique personality, the animal's participation in family activities, and the general family-type attachment to the animal.<sup>213</sup> The court should also take note of special circumstances enhancing the human companion's dependence on the animal and the human–companion animal bond. For example, the plaintiff in *Mercurio v. Weber* purchased her companion animals to provide comfort and companionship after she lost her husband on September 11.<sup>214</sup> Similarly, in *Morgan v. Kroupa*, the court emphasized how

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<sup>209</sup> However, some argue that drawing the line at farm animals is also arbitrary as an increasing number of people keep farm animals as pets. See Goldberg, *supra* note 3, at 48 (“[W]ith many communities increasingly permitting farm animals as pets, drawing a line even broadly at companion animals can be exceedingly difficult.”). Susan L. Hankin, in *Not a Living Room Sofa*, proposes a solution to this problem. Hankin suggests that “companion animals” should include only defined species, initially including only cats and dogs. See Hankin, *supra* note 176, at 386–87. However, the definition of “companion animal” would also include a mechanism to add other species under its label if certain criteria are met. *Id.*

<sup>210</sup> See Wilson, *supra* note 13, at 193 (noting the process courts use for valuing pets after their injury or destruction “will be . . . judged on a case-by-case basis”); see also Seps, *supra* note 9, at 1370 (“[C]ourts should consider the circumstances of each pet-owner relationship . . .”).

<sup>211</sup> See 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, 46–47 (2001) (“Courts should demand to hear testimony as to the companionship value of a particular pet.”); see also Martin, *supra* note 40, at 951–52 (“[A] court must be cautious of inviting frivolous or fraudulent claims . . . [and thus] extensive proof . . . should be required of plaintiffs.”).

<sup>212</sup> See Livingston, *supra* note 2, at 837 (recommending plaintiffs to “establish the depth and duration of their relationship with the decedent and the specific ways in which they were connected to the decedent and are now deprived of his/her companionship and society”).

<sup>213</sup> See Wilson, *supra* note 13, at 194 (listing a variety of factors courts could consider with these claims).

<sup>214</sup> No. 1113/03, 2003 WL 21497325, at \*1 (N.Y. Dist. Ct. June 20, 2003).

the plaintiff had his dog since he was a puppy.<sup>215</sup> Courts must be confident of the degree to which a plaintiff suffered grief and loss to ensure that the injury is as severe as the plaintiff claims.<sup>216</sup>

Another important inquiry involves capping damages awards. Many advocate for a cap on loss of companionship (or other emotional) damages to guarantee uniform awards, prohibit excessive recovery or jury over-sympathy, match recovery to the real loss at hand, and pay respect to the belief that the loss of a companion animal does not validate awards equivalent to the loss of a spouse, child, or parent.<sup>217</sup>

While most advocates agree damages should be limited, there is little consensus on what the exact cap should be. Proposals for a statutory cap on emotional or noneconomic damages have suggested \$15,000,<sup>218</sup> \$25,000,<sup>219</sup> and \$100,000 cap amounts.<sup>220</sup> The most notorious statute allowing for loss of companionship damages, the T-Bo Act, caps noneconomic damages for the loss of “expected society, companionship, love and affection” at \$5000.<sup>221</sup> Advocates for increased damages awards argue low caps, like the T-Bo Act’s cap, will “detract lawyers from accepting cases,”<sup>222</sup> are not well thought-out (given the high cost of litigation),<sup>223</sup> and do not appropriately punish the defendant or compensate the plaintiff.<sup>224</sup>

Next, should specific individuals be exempt from the reach of such statutes? Veterinarians are major opponents of noneconomic damages recovery, and rightfully so, as allowing it would dramatically increase financial verdicts against them and animal hospitals for veterinary malpractice or negligence. Veterinarians also argue that such a change would negatively impact pet owners because veterinarians would be forced to

<sup>215</sup> 702 A.2d 630, 631 (Vt. 1997) (emphasizing the duration of the relationship).

<sup>216</sup> See Chapman, *supra* note 108, at 215 (“[L]egislatures can . . . require a high burden of proof to insure that plaintiffs’ injuries are actually as severe as they may claim.”).

<sup>217</sup> See Livingston, *supra* note 2, at 827-28 (“A cap would [] send a message that although the human-animal bond is worthy of significant compensation . . . the bonds among humans are [still] at the heart of our existence and social organization.”).

<sup>218</sup> Chapman, *supra* note 108, at 223.

<sup>219</sup> Roukas, *supra* note 2, at 57.

<sup>220</sup> See Martin, *supra* note 40, at 953 (citing a 2003 Colorado bill capping loss of companionship damages at \$100,000).

<sup>221</sup> TENN. CODE ANN. § 44-17-403(a)(1), (c), (d) (West 2014).

<sup>222</sup> Wilson, *supra* note 13, at 195.

<sup>223</sup> Root, *supra* note 77, at 448 (arguing that a cap of \$4000 for noneconomic damages is “extremely low considering the amount of damages awarded in modern courts and because of high litigation costs”).

<sup>224</sup> See Chapman, *supra* note 108, at 214-15 (“[J]uries and courts are able to assess damages awards that reflect the culpability of the defendant, and therefore, they can limit, or ‘cap,’ the damages as appropriate.”).

change practices, perform “defensive medicine,” and potentially increase prices to account for liability costs and increases in veterinary insurance.<sup>225</sup> Therefore, opponents of these laws advocate for the complete exemption of veterinarians from liability.<sup>226</sup> The T-Bo Act explicitly states its inapplicability to licensed veterinarians in professional negligence actions as well as to not-for-profit organizations and government entities and employees acting for the public health or animal welfare.<sup>227</sup> Deciding which individuals or entities should be exempt and under what conditions is another task best suited for legislatures.

## 2. Oppositional Arguments and Responses in Rebuttal

Expanding tort law recovery to allow the recovery of loss of companionship damages for the injury to or death of a companion animal is not without opposition. One of the most common arguments against such expansion rests on the idea that if damages for loss of companionship are awarded for certain companion animals, they will soon be available for other animals as well.

If we are to allow recovery for an injured or killed dog or cat, why not also allow it for a rabbit, hamster, snake, or lizard?<sup>228</sup> In holding that a plaintiff could not recover emotional distress damages for her deceased dog, the Supreme Court of Wisconsin warned that “[h]umans have an enormous capacity to form bonds with dogs, cats, birds, and an infinite number of other beings that are non-human. Were we to recognize a claim . . . [here], we can find little basis for rationally distinguishing other categories of animal companion.”<sup>229</sup> Bringing the argument further, what about domestic

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<sup>225</sup> Huss, *Valuation*, *supra* note 48, at 531; *see also* Schwartz & Laird, *supra* note 17, at 261 (“As a result of the increasing exposure of veterinarians to liability, the costs of veterinary insurance are likely to rise.”).

<sup>226</sup> One author suggests exempting veterinarians from liability for professional negligence but not for gross negligence. Chapman, *supra* note 108, at 221.

<sup>227</sup> TENN. CODE ANN. § 44-17-403(e) (West 2014). Other proposed statutory schemes include language similar to that found in the T-Bo Act. *See* Chapman, *supra* note 108, at 224 (proposing a model statute with a provision, similar to the Tennessee statute, which explicitly excludes its application to not-for-profit organizations and government agencies or employees acting to benefit public health or animal welfare but does not include veterinarians as an exempt class of individuals).

<sup>228</sup> *See* Chapman, *supra* note 108, at 216 (“[I]f courts allow recovery for injured cats or dogs, then they will have to allow recovery for injured turtles, fish, squirrels or other animals.”).

<sup>229</sup> *Rabideau v. City of Racine*, 627 N.W.2d 795, 799 (Wis. 2001). The court asserted that public policy rests on the side of denying emotional recovery, questioning how lines would be drawn concerning who could receive damages as a human companion and what species of animals would be permitted. *Id.* at 802 (“[T]he public policy concerns . . . compel the conclusion that . . . Rabideau cannot maintain a claim . . .”).

farm animals? Opponents contend that the fair market standard is the proper form of recovery for animals whose worth is primarily economic.<sup>230</sup> If recovery for companion animals were to be based on sentimental value, then recovery for *all* animals should be based on sentimental value and this standard would incorrectly remedy owners of domestic farm animals.

In rebuttal, proponents argue that laws limiting recovery to certain species of companion animals reflect the views of society and public policy and therefore would not be expanded unless further legislative action was deemed necessary.<sup>231</sup> In essence, the legislature would act as a gatekeeper, deciding whether public policy and societal values dictate expanding the definition of “companion animal” to include a greater number of species. Without further legislative action, animals with primarily economic worth, like domesticated farm animals, would still be evaluated under the fair market value standard. However, “[s]imply because people can form bonds with an infinite number of other beings *does not mean* that plaintiffs should be prohibited from recovering [for certain animal relationships].”<sup>232</sup>

On a somewhat similar note, what effect would opening the doors to loss of companionship damages for companion animals have on recovery for other inanimate forms of personal property?<sup>233</sup> Opponents argue that allowing recovery for loss of companionship damages for companion animals legally classified as property under the law would mean that plaintiffs will soon be able to recover such damages for other lost or destroyed property items holding sentimental or emotional value, such as heirlooms.<sup>234</sup>

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<sup>230</sup> See Huss, *Valuation*, *supra* note 48, at 533 (“The value of food producing animals appears to be adequately measured under the current system.”); see also Livingston, *supra* note 2, at 802-03 (“[M]any domestic animals, such as cattle, sheep, and chickens, are still valued primarily for their economic worth . . .”).

<sup>231</sup> See, e.g., Chapman, *supra* note 108, at 216 (noting that this issue can be addressed by defining the animals covered by the statute).

<sup>232</sup> *Id.* at 202 (emphasis added) (internal quotation marks omitted).

<sup>233</sup> See Mark Sadler, Comment, *Can the Injured Pet Owner Look to Liability Insurance for Satisfaction of a Judgment? The Coverage Implications of Damages for the Injury or Death of a Companion Animal*, 11 ANIMAL L. 283, 287 (2005) (“The rationale for [the reluctance to award damages for emotional distress] has been based upon a fear that recognition of these damages would open unlimited possibilities with regard to other items of personal property.”).

<sup>234</sup> Cf. *Mercurio v. Weber*, No. 1113/03, 2003 WL 21497325, at \*1 (N.Y. Dist. Ct. June 20, 2003) (“If plaintiff could recover for the emotional distress of losing her dog, such logic could be extended to allow recovery for emotional distress caused by the destruction of other sentimental items like family heirlooms, class rings or old pictures.”). In fact, a few states have created a “property law exception” allowing for the recovery of sentimental value for destroyed heirlooms and memorabilia. Goldberg, *supra* note 3, at 53. The theory of recovery is based on the idea that “unlike any other type of personal property, heirlooms and memorabilia never had a market value . . . and [are] kept only for sentimental reasons, and cannot be replaced with anything

In rebuttal, proponents of recovery argue that heirlooms and other forms of personal property are highly distinguishable from companion animals and cannot justifiably be compared because such objects are nonliving, cannot show love, affection, and emotion, and cannot respond to human stimulation.<sup>235</sup> In 2013, the Supreme Court of Texas addressed this issue in *Strickland v. Medlen*, holding that it would neither overrule the state's narrow heirloom exception nor "broaden it to pet-death cases."<sup>236</sup> The Court listed differences between heirlooms and companion animals. It determined that the fondness for an heirloom is "sentimental," while the attachment to a companion animal is "emotional" and that the reasons behind the attachment to the object differ.<sup>237</sup> Highlighting these differences, proponents argue that expanding loss of companionship recovery to encompass companion animals will not impact the law's view of destroyed heirlooms.

Next, opponents of recovery argue that expanding loss of companionship damages is undesirable because it would allow for a greater recovery for a plaintiff whose claim involved the loss of a companion animal than a plaintiff whose claim involved the loss of a human relative. The extension of loss of companionship recovery for the loss of a child and parent is still fairly new and not universally recognized.<sup>238</sup> Because many filial relationships are not recognized under tort law, opponents are left

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similar." *Id.* Courts have therefore valued these items of property under the "value to the owner" theory. See Schwartz & Laird, *supra* note 17, at 242 (noting that for certain items without market value, such as heirlooms, a better method of valuation would be calculating the value to the owner).

<sup>235</sup> See *Corso v. Crawford Dog & Cat Hosp., Inc.*, 415 N.Y.S.2d 182, 183 (N.Y. Civ. Ct. 1979) ("An heirloom . . . is merely an inanimate object and is not capable of returning love and affection. It does not respond to human stimulation; it has no brain capable of displaying emotion . . . But a dog—that is something else."); see also Martin, *supra* note 40, at 955 ("[I]t is possible to meaningfully distinguish pets from other forms of personal property . . .").

<sup>236</sup> 397 S.W.3d 184, 192 (Tex. 2013). But see Squires-Lee, *supra* note 7, at 1076 ("Some courts that have valued companion animals appropriately have drawn an analogy to the common law regarding especially valuable personal property with no calculable market value, such as a wedding album or family heirloom, to hold that the intrinsic value of a companion animal to his or her guardian is the proper measure of damages.").

<sup>237</sup> See *Strickland*, 397 S.W.3d at 190 ("Pets afford here-and-now benefits—company, recreation, protection, etc.—unlike a passed-down heirloom kept around chiefly to commemorate past events or passed family members.").

<sup>238</sup> See Agoriantis, *supra* note 61, at 1459-60 ("[S]ome courts have extended the concept of loss of companionship to include recovery based on such other relationships as parent and child."); see also Waisman & Newell, *supra* note 179, at 50 ("Before 1977, no jurisdiction in the United States recognized common law loss of parental consortium as a viable claim or element of recoverable damages . . . . By early 1997, a total of sixteen state courts had recognized a child's claim for loss of parental consortium.").

uncomfortable with the idea of expanding loss of companionship to cover companion animals before covering these other relationships:

[W]e do not believe it reasonable to expand tort law to allow a pet owner to recover emotional distress or loss of companionship damages when such damages cannot be recovered for . . . close human friends, siblings, and nonnuclear family members such as grandparents, grandchildren, nieces, nephews, aunts, and uncles.<sup>239</sup>

Opponents view the bonds a person forms with a companion animal as inferior to those one forms with another human being. Why, then, should the law deem the inferior relationship more worthy of recovery?

While opponents raise a very strong argument here, others argue that those who lose a companion animal grieve similarly to those who lose a close family member.<sup>240</sup> The death of a companion animal is distressing to the point that advocates argue “most animal guardians who have bonded with their companion animals experience intense grief at the death of the[ir] companion animal[.]”<sup>241</sup> To a mourning human companion, the relationship with his or her beloved animal is not “inferior.” Furthermore, advocates for the expansion of loss of companionship recovery to human companions should not be perceived as opposing the idea that other human relationships also deserve greater respect under U.S. tort law. Proponents’ theories support the general idea that the law should recognize real, emotional connections and bonds between two living beings—animal or human. By bringing the mistreatment and devaluation of animal–human relationships under the law to the legislature’s attention, proponents may also trigger the legislature to rethink its view on traditional familial relationships and, for example, extend loss of companionship recovery to human relationships not already covered.

Opponents’ next argument warns that allowing for such a recovery will cause a flood of claims into the court system, including fraudulent and frivolous claims.<sup>242</sup> In rebuttal, proponents argue that courts can use a variety of measures to guarantee that claims are legitimate and that the recovery matches the injury. For example, courts could place a high burden of proof on the plaintiff to show a sufficient bond with the injured or

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<sup>239</sup> Kaufman v. Langhofer, 222 P.2d 272, 279 (Ariz. 2009).

<sup>240</sup> See *supra* notes 11-12 and accompanying text.

<sup>241</sup> Squires-Lee, *supra* note 7, at 1069 (explaining that the grieving process includes “feelings of denial, anger, [and] depression”).

<sup>242</sup> See Agorianitis, *supra* note 61, at 1464 (calling this the “floodgates” argument); see also Martin, *supra* note 40, at 951 (“[A] court must be cautious of inviting frivolous or fraudulent claims . . .”).

deceased animal and the duration and depth of the relationship.<sup>243</sup> Furthermore, this fear is unfounded because only a minimal number of plaintiffs pursue such claims to begin with.<sup>244</sup> Creative solutions could also lessen any potential overburdening of the courts; claims could first filter through a form of alternative dispute resolution or mediation and only if such a process failed would parties be able to litigate a civil action.<sup>245</sup>

Finally, opponents argue that an expansion of damages to cover the loss of companionship of a companion animal unfairly burdens the tortfeasor.<sup>246</sup> Some suggest that tortfeasors will be forced to pay “extraordinary and unrealistic” judgments, disproportionate to their degree of fault,<sup>247</sup> and that such an outcome is “unfair.”<sup>248</sup> Loss of companionship, like other emotional damages involving sentimental value, is “inherently subjective, easily inflatable, and potentially astronomical,” and therefore must be excluded from the calculation of tort damages.<sup>249</sup>

In response, proponents argue that since tort law is guided by the concepts of just compensation for victims and the requirement that a tortfeasor should “pay for all the damages proximately caused by her conduct,” awards should (and will) match the egregiousness of the defendant’s actions and the plaintiff’s loss suffered.<sup>250</sup> If a defendant is found civilly liable for the injury to or death of a companion animal, he

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<sup>243</sup> See *supra* subsection V.C.1 for a full discussion.

<sup>244</sup> See Chapman, *supra* note 108, at 217 (“[T]here is little evidence to support [the floodgate argument] because only a handful of animal owners have pursued this type of claim.”); *cf.* Seeps, *supra* note 9, at 1367 (“[L]itigation has not spiraled out of control from the time when courts first began permitting awards of emotional damages for harm to humans.”).

<sup>245</sup> See Chapman, *supra* note 108, at 220, 222 (proposing a model statute requiring owners to assert claims first through alternative dispute resolution); see also Huss, *Valuation*, *supra* note 48, at 549 (“Given the emotional nature of a claim[,] . . . mediation could play an essential role in reducing the number of claims that are litigated.”).

<sup>246</sup> See Chapman, *supra* note 108, at 215 (mentioning the opponents’ fear that “allowing non-economic valuation of pets would overburden the tortfeasor”).

<sup>247</sup> See *Kaufman v. Langhofer*, 222 P.3d 272, 278 (Ariz. 2009) (citing other courts’ reasoning in refusing to award emotional damages to plaintiffs); see also Livingston, *supra* note 2, at 834-35 (listing objections to expanding recovery including the “imposition of damages awards disproportionate to a tortfeasor’s fault”).

<sup>248</sup> See Chapman, *supra* note 108, at 203 (describing a court’s reasoning that “it would be unfair to place a large financial burden upon a negligent defendant”).

<sup>249</sup> Schwartz & Laird, *supra* note 17, at 242.

<sup>250</sup> Squires-Lee, *supra* note 7, at 1062, 1085 (“[V]aluing accident costs accurately promotes efficient—and lower—levels of consumption, and as a result, fewer accidents occur.”); see also Boxberger, *supra* note 13, at 142 (naming “compensation for people’s injuries” as one main objection of tort law).



must pay the damages as pronounced by the factfinder.<sup>251</sup> Furthermore, many proponents of recovery agree that damages can and should be capped by the legislature.<sup>252</sup> Therefore, damages for loss of companionship will never exceed what public policy and societal values deem acceptable.

#### CONCLUSION

Every day citizens turn to the law and the courts for redress from the harms they have suffered. In cases surrounding an injury to or the death of a companion animal, human companions look to tort law to fulfill its purpose: to justly compensate victims for their injuries.<sup>253</sup> However, the system fails those it was created to serve. Because companion animals are classified as property and loss of companionship claims cover only specific human relationships, human companions are not able to recover the true damages sustained for their loss. For many, the loss of a pet is the loss of a best friend, a family member, and a true companion. The refusal to allow recovery of damages for the loss of companionship leaves plaintiffs incomplete.

Fortunately, a minority position advocating for changes to the strict rules of companion animal classification and valuation and the expansion of loss of companionship recovery is growing in the United States. The changes proponents of this view advocate for are rational and in line with changing societal beliefs. Part IV discussed arguments reinforcing the minority position and Part V covered two reasonable changes to the law that would allow for a new classification of companion animals and a statutory scheme providing for loss of companionship damages to human companions. Only time will tell whether courts and legislatures will increasingly acknowledge society's shift in the treatment of human-animal relationships and whether the laws classifying animals as property and those confining loss of companionship damages to specific human relationships will change. For now, those advocates supporting the minority position will continue to fight for proper recognition of human-animal relationships. "To say [a dog] is a piece of personal property and no more is a repudiation of our humanness. This I cannot accept."<sup>254</sup>

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<sup>251</sup> See Chapman, *supra* note 108, at 203 ("To say that culpable offenders should not be liable for their blameworthy conduct merely because it is a large financial burden hardly seems in line with justice or notions of fairness.").

<sup>252</sup> *Id.* at 215. However, many disagree as to just where noneconomic damages should be capped.

<sup>253</sup> See Squires-Lee, *supra* note 7, at 1062 ("Tort, at its most fundamental level, should compensate victims . . .").

<sup>254</sup> Corso v. Crawford Dog & Cat Hosp., Inc., 415 N.Y.S.2d 182, 183 (N.Y. Civ. Ct. 1979).