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Animal Consortium

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ANIMAL CONSORTIUM

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INTRODUCTION

Imagine that a seven-year-old Golden Retriever, named Goldie, has been an adopted part of the Jones family. She is an integrated family member, spending evenings with the human members and often going out with them on walks or trips. One day she is out barking in the front yard and a neighbor gets upset at the noise, calls her over, and stabs her five times with a knife; she staggers over to her yard and dies within minutes. Thirty minutes later she is discovered dead by the 16-year-old daughter of the family. The family sues the neighbor for damages, which consist of loss of companionship, comfort and affection. What damages are actually recoverable? Today, in a majority of states, the Jones family could

recover only the fair market value of Goldie at the time of the incident, perhaps the $200 adoption fee, at best.[1]

The nominal recovery available for the loss of a companion animal such as Goldie doesn't sit well with many people. That is because people are increasingly viewing their companion animals less like property, as they are classified in the law, and more like members of the family. When someone kills one of the members of a family unit, it is a harm recognized at common law under the umbrella of loss of consortium.[2] This cause of action, which initially recognized only the economic part of family relationships, has expanded over the past one hundred years to include the social aspect of relationships between humans.[3] But the umbrella of consortium can expand further. It is the proposal of this article that a new cause of action for the intentional killing of a companion animal become available: animal consortium.

The existing tort of loss of consortium doctrine needs to be expanded to include those companion animals who have increasingly become integral parts of our emotional and physical families. While the term family traditionally speaks in term of "persons" living together under one roof,[4] today, many individuals self-define family to include their companion animals.[5] If it can be accepted that four-legged beings are part of the family, at least for some individuals, then the public policy underlying loss of consortium should also support recovery for the intentional killing of a companion animal.

This article will show that sufficient relational interest can exist between a human and companion animal and that this interest is widely accepted in our culture; therefore, financial recovery for the disruption of this relationship is a fair burden to place upon actors in today's world.[6] This proposal does not seek to give any legal rights to companion animals; instead, this is a proposal to allow the law to acknowledge the depth and reality of the bond between humans and animals that exists in millions of families across the country.

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1. *See* Peter Barton & Frances Hill, *How Much Will You Receive in Damages from the Negligent or Intentional Killing of Pet Dog or Cat*, 34 N.Y.L. SCH. L. REV. 411, 411 (1989).

2. This term was defined by a modern Ohio Supreme Court: "Consortium includes services, society, companionship, comfort, love and solace." Gallimore v. Children's Hosp. Med. Ctr., 617 N.E.2d 1052, 1054 (Ohio 1993).

3. *See* discussion *infra* in Section III.a..

4. *Family*, BLACK'S LAW DICTIONARY (4th ed. 1968).

5. *See* discussion *infra* Section III.f..

6. Romero v. Byers, 872 P.2d 840, 843 (N.M. 1994) (holding liability is limited by the "foreseeability of harm" to a close relationship).

First, this article sets out the existing categories of damage for recovery when a defendant's tortious actions result in the death of a companion animal.[7] Integral to this discussion is the reality that companion animals are considered property.[8] Courts most often are unwilling to extend financial recovery to include the emotional loss of the owner of an animal.[9] Second, this article will examine the history of the concept of consortium to show how the legal system has come to accept that the compensable harm is not limited to economic consequences, nor is it limited to husband and wife relationships.[10] Third, this article will present information to support the position that companion animals are emotionally and psychologically important to the human members of many families.[11] Fourth, this article will show that animals have already jumped out of the property box in a number of fact patterns, and therefore, it is appropriate to raise their status in this context as well.[12] Fifth, this article will consider the application of the concept of animal consortium in detail as an extension of the common law cause of action.[13] Finally, acknowledging some of the difficulties that courts may have in implementing this proposal, a legislative draft is proposed to accomplish the recovery sought by this article.[14]

I. PRESENT STATE OF DAMAGE CLAIMS FOR HARM TO COMPANION ANIMALS

The extent of recovery for harm to a companion animal will depend first upon the cause of action utilized, and second, upon the scope of damages allowed under that cause of action. Today, suits arising out of the loss of a companion animal might be brought as claims of negligent or intentional destruction of personal property,

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7. *See* discussion *infra* Part II.

8. *See* Marcella S. Roukas, *Determining the Value of Companion Animals in Wrongful Harm or Death Claims: A Survey of U.S. Decisions and an Argument for the Authorization to Recover for Loss of Companionship in Such Cases*, ANIMAL LEGAL & HIST. CTR. (2007), https://www.animallaw.info/article/determining-value-companion-animals-wrongful-harm-or-death-claims-survey-us-decisions-and.

9. *See* Elaine T. Byszewski, *Valuing Companion Animals in Wrongful Death Cases: A Survey of Current Court and Legislative Action and a Suggestion for Valuing Pecuniary Loss of Companionship*, 9 ANIMAL L. 215, 218–21 (2003).

10. *See* discussion *infra* Sections III.a.–b..

11. *See* discussion *infra* Section III.d..

12. *See* discussion *infra* Section III.f..

13. *See* discussion *infra* Section IV.a..

14. *See* discussion *infra* Section IV.b.–c..

negligent or intentional infliction of emotional distress, or the violation of a civil right.

The most common cause of action is for the negligent or intentional destruction of personal property; however, as will be shown, there are other causes of action available with different measures of damages being used by the courts.[15] Before focusing on the new proposal, this article will contextualize the need for animal consortium by explaining the limitations of existing torts.

A. Destruction of Property

Time and time again plaintiffs file lawsuits to seek recovery for the negligent or intentional injury or death of a companion animal.[16] The present state of the law is unsatisfactory in that there is a disconnect between the public perception of the value of companion animals and the recovery allowed by state supreme courts.[17] For example, under criminal law, the intentional killing of a neighbor's cat may result in a felony conviction and serious jail time, but in a large majority of jurisdictions, the cat killer would be liable at civil law only for the market value of the cat.[18]

This problem arises because all domestic animals, even companion dogs and cats, have historically been categorized as personal property[19], and the damages allowed at common law for harm to property is the reduction in market value caused by the harm.[20] With the exception of some purebred animals and animals

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15. *See Roukas, supra* note 8.

16. *See Byszewski*, supra note 9, at 218–21; Sabrina DeFabritijs, *Barking Up the Wrong Tree: Companion Animals, Emotional Damages and the Judiciary's Failure to Keep Pace*, 32 N. ILL. U. L. REV. 237, 244 (2012); Zachary Paterick, Timothy Paterick & Sandy Sanbar, *A Stepping Stone Toward Companion Animal Protection Through Compensation*, 22 ANIMAL L. 79, 88–89 (2015).

17. The *Washington Post* spoke with people in a dog park in Northern Virginia to inquire what monetary value they would put on their pet. A common answer was "priceless." Monica Akhtar, *Property or priceless: What is the value of a pet?*, WASH. POST (Mar. 13, 2016), http://wapo.st/1TPjiFz.

18. *See Roukas, supra* note 8 ("In line with most states, a decision out of Georgia held that the value of an animal could be proved using the market value, including certain qualities such as the particular breed.") (citing Columbus R. Co. v. Woolfolk, 128 Ga. 631 (1907)).

19. Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 N.Y.U. ENVTL. L.J. 531, 533 (1998). *See generally* Adam P. Karp & Margrit Lent Parker, *Recent Developments in Animal Tort and Insurance Law*, 51 TORT TRIAL & INS. PRAC. L.J. 245 (2016) (providing summary of cases from 2015).

20. *See* Dillon v. O'Connor, 412 P.2d 126, 128 (Wash. 1966) ("[I]t is error to instruct the jury that [dogs] have a value in [a]ddition to 'fair market value.'").

with special training, most companion animals have near zero market value, or such reduced value so as to make the employment of the legal system impractical for recovery for the economic loss.[21]

Some early cases allowed for a more expansive list of damages to include recovery for emotion or pain and suffering by the owners,[22] and a number of trial and intermediate appeals courts have allowed more extensive damages for the plaintiffs.[23] However, over the past twenty years, state supreme courts have consistently rejected attempts to expand either the cause of action available beyond the destruction of property or the claim of damages to humans when their companion animals have been harmed, except for a few allowing reasonable veterinarian cost.[24]

For example, in Texas, a plaintiff sought damages in an action against an employee of an animal shelter, alleging that the employee negligently euthanized their dog; damages were denied by the trial court, allowed by the court of appeals, but denied by the Supreme Court of Texas.[25] The same result occurred in a Vermont case.[26] Although the court understood what was being asked, the court was unwilling to extend relief for noneconomic damages:

> Absent persuasive precedent, plaintiffs propose that this Court extend the common law to recognize a new cause of

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21. *See Kelch*, *supra* note 19, at 533.

22. For example, a Florida case allowed mental suffering recovery for malicious destruction of an animal when a trash collector threw a trash can at the companion animal. La Porte v. Assoc. Indeps., Inc., 163 So. 2d 267, 268 (Fla. 1964). *But see* Kennedy v. Agape Animal Hosp., 867 So.2d 1195 (Fla. Dist. Ct. App. 2004) (distinguishing itself from the prior case as wrongdoing was negligence, not an intentional act).

23. For example, in 2016, for the death of three dogs, a jury in Oregon awarded the plaintiff: $7,500 for replacement value; $100,000 in emotional harm; and $139,500 in punitive damages. Clark v. Johnson, No. 13CV07246, 2016 WL 2653227, at *1 (Or. Cir. Ct. Mar. 8, 2016). The defendants intentionally shot three sheep guard dogs while out in the woods when the dogs responded to the defendants' use of an elk call. *Id. See also* Kelly Fisicaro, *Civil Verdict Reached on Livestock Dogs Killed in 2012*, THE BULLETIN (Mar. 11, 2016, 12:01 AM), http://www.bendbulletin.com/localstate/4101654-151/civil-verdict-reached-on-livestock-dogs-killed-in (providing an account of what happened in case cited above).

24. *See Roukas*, *supra* note 8.

25. Strickland v. Medlen, 397 S.W.3d 184, 191–92 (Tex. 2013) ("Therefore, like courts in the overwhelming majority of other states, the Restatement of the Law of Torts, and the other Texas courts of appeals that have considered this question, we reject emotion-based liability and prohibit recovery for loss of the human-animal bond.") (footnotes omitted).

26. Scheele v. Dustin, 998 A.2d 697, 702–03 (Vt. 2010) (citations omitted) (citing State v. LeBlanc, 540 A.2d 1037, 1040 (Vt. 1987)).

> action for the wrongful killing of a pet dog. While this Court has and will "change the common law to meet changing needs of the people of this state," we also recognize instances where the issue presented "is better left for legislative resolution." Plaintiffs have expressly requested any new cause of action be limited to pet dogs, yet beyond a blanket statement that "dogs love you back" and citation to numerous cultural artifacts, they give no basis for such an arbitrary limitation. As in *Goodby*, here "[p]laintiffs fail to demonstrate a compelling reason why, as a matter of public policy, the law should offer broader compensation for the loss of a pet than would be available for the loss of a friend, relative, work animal, heirloom or memento—all of which can be prized beyond measure, but for which this state's law does not recognize recovery for sentimental loss.[27]

As mentioned earlier, a few jurisdictions, while still denying noneconomic damages, do allow for more than loss of market value by allowing the cost of attempts to repair the "property," usually in the form of reasonable veterinary costs, to be considered by the jury. In 2016, a case from the Supreme Court of Georgia stated the following:

> [I]n addition to recovering the fair market value of their deceased dog plus interest, the Monyaks would be entitled to recover the reasonable veterinary [costs] and other expenses they reasonably incurred in trying to save her. Whether the veterinary costs and other expenses incurred by a pet owner in obtaining treatment for an animal negligently injured by another are reasonable will depend on the facts of each case.[28]

The same result was reached by the Massachusetts Appeals Court in a case involving tortious injury to a dog.[29]

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27. *Scheele*, 998 A.2d at 703 (quoting Goodby v. Vetpharm, Inc., 974 A.2d 1269, 1274 (Vt. 2009)).

28. Barking Hound Village, LLC v. Monyak, 787 S.E.2d 191, 198–99 (Ga. 2016).

29. *See* Irwin v. Degtiarov, 8 N.E.3d 296, 301 (Mass. App. Ct. 2014). The court stated:

> Among the factors to be considered are the type of animal involved, the severity of its injuries, the purchase and/or replacement price of the animal, its age and special traits or skills, its income-earning potential, whether it was maintained as part of the owner's household, the likelihood of success

Despite the willingness of some courts to allow recovery of reasonable veterinary costs in destruction of property claims, such recovery still does not compensate the owner of the companion animal for their emotional suffering. A different set of damages—noneconomic damages—may be available under different causes of action. Noneconomic damages might exist if the focus can shift from the property context toward the personal rights context.

B. Infliction of Emotional Distress

Historically a cause of action has always existed for negligent destruction of property; however, almost no court is comfortable with recognizing the tort of negligent infliction of pain and suffering arising out of harm to property, such as companion animal, as a new cause of action. For example, consider this statement of the Supreme Court of Appeals of West Virginia: "Accordingly, for clarification purposes, we now hold that dogs are personal property and damages for sentimental value, mental suffering, and emotional distress are not recoverable for the negligently inflicted death of a dog."[30] The same result occurred in an opinion written by the Wisconsin Supreme Court.[31] The courts do not allow the creation of this cause of action, specifically because it would necessitate a consideration of human-focused, noneconomic harm.

Consider also Connecticut: In *Vaneck v. Drew*, a lower Connecticut court found that a companion animal relationship is of a close enough kind and degree to satisfy the traditional "close relationship prong" of an negligent infliction of emotional distress claim for bystander liability where the plaintiff heard the "thud" of defendant's car hitting and killing plaintiff's dog, Shadow, while the defendant was driving negligently.[32] In contrast with the *Vaneck* case, a prior Connecticut court opinion stated that a relationship with a dog was not a close relationship.[33] Thus, a split of authority exists within the state and has not been resolved by the Connecticut Supreme Court.

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of the medical procedures employed, and whether the medical procedures involved are typical and customary to treat the injuries at issue.

Id. at 301.

30. Carbasho v. Musulin, 618 S.E.2d 368, 371 (W.Va. 2005).

31. Rabideau v. City of Racine, 627 N.W.2d 795, 802 (Wis. 2001).

32. Vaneck v. Cosenza-Drew, No. MMXCV085003942S, 2009 WL 1333918, at *4 (Conn. Super. Ct. Apr. 20, 2009).

33. Coston v. Reardon, No. 063892, 2001 WL 1467610, at *3 (Conn. Super. Ct. Oct. 18, 2001).

While the tort of intentional infliction of emotional distress is available in most jurisdictions,[34] the requirements of the tort are usually not met in the death or injury of a pet. Bringing an intention infliction of emotional distress claim is attractive to those who suffer the loss of a companion animal because the tort usually allows for punitive damages.[35] When punitive damages are available, they can result in substantial damage awards.

Unfortunately for persons with companion animals, a key requirement is that the actor must have an intention to harm the human plaintiff by intending to cause the plaintiff emotional distress.[36] The intent element is typically not satisfied by an intent to harm the companion animal. For instance, a Wisconsin court was not willing to expand the scope of the tort, continuing to require that the intention of the actor must be to cause harm to the plaintiff, not to the animal.[37] In contrast, a Washington court did allow an expanded application of the tort, focusing on whether the harm to the animal was intentional and grievous.[38]

C. Violation of a Civil Right

Two recent cases represent a more creative and flexible approach in the awarding of noneconomic damages. This more creative approach occurs when the courts leave the world of property and enter the world of individual civil rights.

The constitutional right claim arises as a Section 1983 action under the federal Civil Rights Act.[39] The basic purpose of a § 1983 damage award is to compensate persons for injuries caused by the deprivation of their constitutional rights.[40] A 2016 opinion in Michigan clarified that this purpose applied where government agents shot the plaintiffs' dog while performing government functions.[41] In rejecting the position of the defendant that damages should be limited to the Michigan view of the dog's property value, the court allowed that damages could be much broader:

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34. Catherine Palo, *Proof of Intentional Infliction of Emotional Distress*, 136 AM. JUR. 3d *Proof of Facts* 175 § 1 (2013).

35. *See id.* at § 45 (citing Washington v. California City Correction Center, 871 F. Supp. 2d 1010 (E.D. Cal. 2012)).

36. *See id.* at § 15 (citing RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 46).

37. *Rabideau*, 627 N.W.2d at 803.

38. Womack v. Von Rardon, 135 P.3d 542, 546 (Wash. Ct. App. 2006).

39. 42 U.S.C. § 1983 (2012).

40. Smith v. Heath, 691 F.2d 220, 226 (6th Cir. 1982).

41. Moreno v. Hughes, 157 F. Supp. 3d 687, 688 (E.D. Mich. 2016).

> Defendant argues that this matter is akin to the negligence action in *Koester,* and that this is purely a property rights case; however such an argument is unpersuasive because the case herein is a Fourth Amendment unlawful seizure case under § 1983. The federal common law of damages in § 1983 cases was developed with specific policy rationales that are not implicated in negligence actions. Other courts have acknowledged that "the private Fourth Amendment interests involved are appreciable," that "the bond between a dog owner and his pet can be strong and enduring," and some "think of dogs solely in terms of an emotional relationship, rather than a property relationship." ....
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> ... Prohibiting recovery for emotional damages stemming from the loss of, or harm to, an animal caused by a constitutional violation would conflict with the compensatory and deterrence aims of § 1983.... Here, if the Court were to preclude mental and emotional damages attributable to the constitutional violation, including the unlawful seizure of Plaintiffs' dog, Plaintiffs will not be compensated for their "actual losses." Thus, this Court must apply the federal common law and award emotional distress damages arising from Defendant's unlawful seizure of Plaintiffs' dog.[42]

Similarly, in the Maryland case of *Brooks v. Jenkins*, the court held that an officer acted with gross negligence when he shot a companion animal while seeking to serve an arrest warrant at a private residence.[43] The court upheld a jury verdict for $7,500, as capped under Maryland statute for economic harm and veterinary expenses,[44] as well as $100,000 for violation of the Maryland constitutional right prohibiting the state from taking property without due process of law.[45] In allowing the latter award to stand, the court held that the statutory cap only applied to the damage to the plaintiff's property interest in the animal and did not foreclose other categories of damages.[46] In this case, the actions of the officer created a constitutional tort, one deserving separate consideration

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42. *Id.* at 689–90 (quoting Altman v. City of High Point, 330 F.3d 194, 205 (4th Cir. 2003)) (internal citation reference omitted).

43. Brooks v. Jenkins, 104 A.3d 899, 909–10 (Md. Ct. Spec. App. 2014).

44. *Id.* at 910–15 (interpreting MD. CODE ANN. CTS. & JUD. PROC. § 11–110 (West 2013)) .

45. *Id.* at 916–18, n. 20 (applying MD. CONST. art. XIV).

46. *Id.* at 916–18.

by the jury.[47] The court did not address how a jury could arrive at the amount of a $100,000 award for each of the two plaintiffs.[48]

The primary limitation of the civil rights cause of action is that the actor must be an agent of the government when the event occurs.[49] Thus, there can be two very different jury awards for the death of companion animal depending upon whether the bad actor is a neighbor or a local police officer. This discrepancy does not seem appropriate and the adoption of animal consortium as a cause of action will allow for more consistent outcomes.

II. CONSORTIUM – LOSS OF SOCIETY

A. History of Consortium Actions

The history of property rights and non-economic damages surrounding the doctrine of loss of consortium is as tumultuous as it is interesting. Under United States common law of coverture, which was adopted from British common law, a wife used to be considered the personal property of a husband as part of the coverture system.[50] The British common law of coverture, in turn, evolved out of the feudal law system of the middle ages.[51] Under the common law of coverture, a wife was her husband's chattel, and she could not own property, earn a salary, or enter into contracts.[52] Additionally, following marriage, a woman lost her status a *feme sole*, and she was not a citizen of any state; instead, she was held by her husband.[53]

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47. The court distinguished the property claim from the constitutional claim:

> But nothing about CJ § 11–110 vitiated their existing right to recover, on appropriate proof, whatever non-pet damages they could prove, including their noneconomic damages, for the Deputy's grossly negligent violation of their constitutional rights. Put another way, if the Deputy's bullet had missed Brandi, entered the house, and hit an expensive china vase sitting on the mantle, there would be no doubt that the Jenkinses could recover the economic and noneconomic damages they could prove. Because pets are property, CJ § 11–110 defines their property value, but it cannot rationally be read to cabin a grossly negligent official's total liability based on the fortuity that he shot a pet rather than something inanimate.

Id. at 914.

48. *Id.* at 911.

49. 42 U.S.C. § 1983 (2012).

50. *See* John E. Hannigan, *Damages Recoverable by Husband for Injury to Wife*, 16 COLUM. L. REV. 122, 123 (1916).

51. *Id.* at 122–25.

52. *Id.* at 125.

53. *Id.* at 132. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *442 ("By marriage, the husband and wife are one person in law: that is, the very being or legal

In the 1800s, any personal and real property that a wife owned or acquired belonged to the husband.[54] The bundle of rights a husband was given upon taking a wife in marriage was robust and included the sole right to sue for damages to a wife's possessions.[55] An 1823 case demonstrates this principle and captures the attitude of the day:

> The dwelling-house, and all the goods and chattels purchased or owned by the wife, belonged to the husband, and for an injury done to that property the husband alone must sue. This doctrine is too well settled to be controverted; and it is not necessary to support it by reference to authority.[56]

Loss of consortium claims first developed to allow a husband to seek recompense after tortious injury to his wife left her unable to perform the household duties and services she would have performed prior to her injury.[57] Initially, the focus was upon the economic value of the wife's services.[58]

The claim subsequently evolved to allow a husband to also recover damages for the loss of sexual congress and companionship.[59] Additionally, in the 17th and early 18th centuries, a husband could sue for loss of consortium for an injury or kidnapping of his daughter, because of the "comfort and delight he has in [her], [and] his anxiety for [her] loss."[60] During this period in

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existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of husband...." (footnotes omitted)).

54. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *442.

55. Moores v. Carter, 17 F. Cas. 714, 714 (Terr. Ark. Super. Ct. 1828).

56. *Id.* (holding that a wife had no right to join her husband's lawsuit for damages to her personal possessions when the husband and wife were separated and bandits had broken into the wife's dwelling and stolen her chests of goods).

57. John Fabian Witt, *From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century Family*, 25 L. & SOCIAL INQUIRY 715, 723–24 (2000).

58. This economic focus was suggested by Lord Coke in the case of *Guy v. Livesey*, when he reported the action being "[a]s the master shall have for the loss of his servant's service." Guy v. Livesey, Cro. Jac., 79 Eng. Rep. 428 (1619). *See also* 3 WILLIAM BLACKSTONE, COMMENTARIES 140 (citing *Livesey*, 79 Eng. Rep. 428):

> [B]ut if the beatings [of the wife] or other maltreatment be very enormous, so that thereby the husband is deprived for any time of the company and assistance of his wife, the law then gives him a *separate* remedy by an action upon the case for this ill-usage, *per quod consortium amisit*, in which he shall recover a satisfaction in damages.

59. *See, e.g.*, Lane v. Steiniger, 156 N.W. 375, 376 (Iowa 1916).

60. Kirkpatrick v. Lockhart, 4 S.C.L. (2 Brev.) 276, 278 (1809).

time, some courts used different language such as "loss of his wife's society" to discuss the doctrine of loss of consortium.[61]

The evolution of the loss of consortium doctrine followed a similar but delayed trajectory for women. First, the courts allowed a wife to bring a claim for economic loss occurring from a tortious injury to her husband, and then, decades later, for loss of love, sex, and companionship.[62] In 1839, Mississippi passed the Married Women's Property Act, giving women the right to own real and personal property apart from their husbands.[63] This statute marked a historic turning point for women's rights, American history, and the expansion of the loss of consortium doctrine. Eventually every state adopted a version of Women's Property Act, and the courts soon began to recognize a loss of consortium claim for wives that partially corresponded to the claim that husbands already had for tortious injury to their wives.[64] However, the early loss of consortium claims brought by wives only permitted their recovery for economic losses that they suffered as a result of their husbands' inability to work. In an 1889 case, *Thomas v. Dansby*, the court held that Mrs. Thomas could sue for the loss of economic support she suffered when her husband had his leg tortiously broken while he was drunk at a saloon, leaving him unable to work or provide for her for three months after the injury.[65]

More than fifty years after the law first recognized a wife's claim for economic losses due to tortious injury to her husband, the loss of consortium doctrine was again expanded to recognize the loss of love, companionship, happiness, and sex that a wife suffers when her husband is tortiously injured or killed. In the 1950 case *Hitaffer v. Argonne Co.*, the court rejected the longstanding argument that a wife had no reciprocal claim to loss of love, companionship, and sex that husbands had long enjoyed and held that a wife has a derivative claim for loss of consortium when her husband is

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61. *Steiniger*, 156 N.W. at 376.

62. *See* Richard Joslyn, *Wife's Right of Action for Loss of Consortium*, 36 A.L.R. 3d 900 (1971).

63. 1839 Miss. Laws 920. The Act consists of only two paragraphs. The first provides for ownership of property regardless of marital status. The second deals with the ownership of slaves, specifically allowing women to have full ownership of them.

64. Linda D. Elrod, *Rights of Spouse*, 1 KAN. L. & PRAC., FAMILY LAW § 8.28 (2016) ("The enactment of the Married Women's Property Acts in the 19th century gave women the right to sue and be sued. Most courts then allowed a wife to maintain an action for loss of her husband's consortium.").

65. Thomas v. Dansby, 41 N.W. 1088, 1090 (Mich. 1889).

negligently injured or killed.[66] This case marks the point in history when the loss of consortium doctrine came to embody most of the tenants of loss of love, sex, and companionship for either spouse that people are familiar with today.[67] Although the loss of consortium doctrine is mostly a judicially-created creature of common law, it has been codified by a number of state legislatures.[68] For example, the Tennessee provision simply states that "There shall exist in cases where such damages are proved by a spouse, a right to recover for loss of consortium."[69]

B. Loss of Consortium Beyond Husband and Wife

For decades after the courts recognized reciprocal rights for husband and wife to sue for loss of consortium, courts struggled to keep the doctrine of loss of consortium tied to marriage partners.[70] Issues that frequently arose included whether unmarried partners in a cohabitating relationship should be afforded claims for loss of consortium,[71] and whether a couple engaged to be married should have access to loss of consortium claims.[72] In some jurisdictions today, the loss of consortium doctrine has expanded far beyond the bond of marriage to encompass the loss of love, society, and companionship of tortiously injured or killed parents, children, siblings, and adult children. In these jurisdictions, the circle of recovery might best be referred to as the intimate family.[73]

Courts have continued to push the parameters of the loss of consortium doctrine to acknowledge the value of various family relationships, such as between parent and child. Although the doctrine of loss of consortium has been expanded in the majority of

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66. Hitaffer v. Argonne Co., 183 F.2d 811, 813–14 (D.C. Cir. 1950).

67. *See generally id.*

68. *See, e.g.*, IOWA CODE ANN. § 633.336 (West 2007); 735 ILL. COMP. STAT. 5/13-203 (West 1993); *see generally* Richard E. Kaye, *Loss of Consortium in Parent-Child Relationship*, 131 AM. JUR. 3D *Proof of Facts* § 187 (2013) Carolyn Kelly MacWilliam, *Cause of Action for Loss of Marital Consortium*, 24 CAUSES OF ACTION 2D 427 (2017).

69. TENN. CODE ANN. § 25-1-106.

70. *See* Alisha M. Carlile, *Like Family: Rights of Nonmarried Cohabitational Partners in Loss of Consortium Actions*, 46 B.C. L. REV. 391, 392 (2005).

71. Elden v. Sheldon, 758 P.2d 582, 584 (1988) (holding that cohabitating couples did not have the right to maintain a claim for loss of consortium).

72. Sawyer v. Bailey, 413 A.2d 165, 169 (Me. 1980) (holding that a cause of action for loss of consortium does not exist where injury to the spouse occurred while the couple was engaged to be married).

73. *See Carlile*, *supra* note 70, at 397–400.

U.S. jurisdictions to permit a parent to bring a cause of action for the tortious injury or death of a minor child, there are some holdouts: the Michigan Supreme Court followed an older view and refused to extend consortium rights to a mother for the negligent injury of her child in a 1988 case.[74] In contrast, five years after the Michigan case, the Ohio Supreme Court decided not to follow the Michigan court and allowed an extension of the concept not only to give the parent a cause of action, but the minor child as well.[75] Although most courts and scholarly articles refer to the claim as "loss of filial consortium" when it involves recovery for the damaged relationship between a parent and minor child,[76] a claim for loss of filial consortium remains under the umbrella of the doctrine of loss of consortium.

The doctrine of loss of consortium has been expanded even further to allow a parent to bring a loss of consortium claim for the tortious injury or death of an *adult* child. In *Masaki v. General Motors Corp.*, the Supreme Court of Hawaii allowed parents to bring a loss of consortium claim against General Motors when a manufacturing defect in a van caused the van to run over their twenty-eight-year-old son, leaving him a quadriplegic.[77]

In 1998, the New Mexico Supreme Court set a national precedent by allowing a grandmother to bring a loss of consortium claim for the negligently inflicted death of her twenty-two-month-old granddaughter.[78] The court emphasized the closeness of the grandmother's relationship to the granddaughter in reaching the holding, and rejected the opposition's argument that allowing the claim would lead to increased insurance costs and litigation.[79] The court also addressed the important issue of avoiding double recovery in overlapping damages between the loss of consortium claim and a wrongful death or personal injury claim.[80] The court stated that double recovery is not an issue because damages for consortium are damages for the plaintiff's emotional distress, and

> [h]er consortium injury arises from her unique relationship with the victim (and not her family title)[, and] . . . [a]ny right to damages for [her] loss of consortium would have to be

74. Sizemore v. Smock, 422 N.W.2d 666, 667 (Mich. 1988).
75. *Gallimore*, 617 N.E.2d at 1053–54.
76. *See, e.g., id.*
77. Masaki v. Gen. Motors Corp., 780 P.2d 566, 577 (Haw. 1989).
78. Fernandez v. Walgreen Hastings Co., 968 P.2d 774, 776, 782 (N.M. 1998).
79. *Id.* at 783–84.
80. *Id.*

> for her loss of society and companionship that is uniquely and singularly felt by virtue of her loss of that relationship.[81]

In 2003, the New Mexico Supreme Court again expanded the availability of loss of consortium, this time to unmarried cohabitating partners who shared "intimate familial relationship[s]."[82] In 2016, an Iowa court clarified that the cause of action was available for a child conceived at the time of the father's death but not yet born, once the child was born.[83]

On the heels of the previously discussed cases, the New Mexico Court of Appeals allowed parents and siblings alike to bring a loss of consortium claim for the wrongful death of twenty-five-year-old Adam Fitzjerrell, who was killed by a negligently-fired bullet from a police officer's service weapon.[84] The court further articulated that the standard for who can bring a loss of consortium claim should be based on the quality and closeness of the relationship, established by the facts and not a legal definition establishing or rejecting one.[85] The court set forth helpful guidelines and factors for determining who should be able to bring a loss of consortium claim based on the quality and closeness of the relationship:

> this Court should consider several factors including, but not limited to: duration of the relationship; mutual dependence; common contributions to a life together; shared experience; living in the same household; financial support and dependence; emotional reliance on each other; qualities of their day to day relationship; and the manner in which they related to each other in attending to life's mundane requirements.[86]

These nine factors currently provide the framework for the types of relationships a person can use to show support for bringing a loss of consortium claim in New Mexico. These factors can also be used to make an exceedingly compelling argument about the existence of the companion animal bond that humans have with their dog or cat.

With the umbrella of the doctrine of loss of consortium already expanded to cover various filial relationships, it seems natural to

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81. *Id.* at 782–83.
82. Lozoya v. Sanchez, 66 P.3d 948, 957 (N.M. 2003).
83. Estate of Gray v. Baldi, 880 N.W.2d 451, 452–53 (Iowa 2016).
84. Fitzjerrell v. City of Gallup, 79 P.3d 836, 838, 841 (N.M. Ct. App. 2003).
85. *Id.* at 841.
86. *Id.* at 840 (citing *Lozoya*, 66 P.3d at 955).

incorporate companion animals into the doctrine as well. The property status of animals should not be considered a hindrance to the application of the doctrine to companion animals. At the beginning of the doctrine, both wives and children did not possess full legal rights and were considered the property of the husband.[87] Yet the doctrine has evolved to allow both the wife and the child to have the right of consortium as their legal status transformed into full personhood. As the courts began to allow wives and then others access to this cause of action, it was an important part in the transformation of their legal status. Likewise, allowing an animal consortium cause of action by courts will be a real step in the legal transformation of the status of animals into living property.[88] While this article does not suggest that any legal rights should be given to companion animals, the importance of the bond should be recognized by giving their human owners a cause of action.

C. Limiting the Scope of Animal Consortium Claims

Before proceeding any further, the limitations of animal consortium should be set out. This article does not seek to establish equality of position with humans for companion animals. Rather, a more limited form of consortium is suggested as a necessary and justifiable middle ground. As explained below, animal consortium is intended to cover only intentional harm for death, not injuries, and does not seek to be a step toward awarding the animal any damages in the form of wrongful death. These limitations are a logical starting point from a practical implementation and a public policy standpoint.

Proposing a tort expansion necessarily requires a balancing of the importance of the harm against the imposition of the duty on the actors. How significant might this duty be in financial terms? How foreseeable is the harm to the human actors? How egregious must be the conduct? Among the problems forestalling inclusion of negligence in a claim for animal consortium is the foreseeability of damages resulting from a tortfeasor's negligence. The law has already concluded that if a tortfeasor is negligently operating a SUV and strikes and kills a man, then it is foreseeable that damages may be

87. *See supra* Section III.A (discussing the history of consortium actions).

88. *See generally* David Favre, *Living Property: A New Legal Status for Animals Within the Legal System*, 93 MARQ. L. REV. 1021 (2010).

done to that man's wife.[89] Extending the same rationale, however, to argue that it is foreseeable that negligently striking a dog with an SUV will cause damages to the dog's owner, does not seem prudent at this time. On the other hand, if a person intentionally kills a companion animal, it should be foreseeable to the actor that there is a human connected to that animal and that a high risk of non-economic damages exists to the humans who are the companions to the killed animal.

The historical derivation of loss of consortium allowed recovery for injury, not just the death, of a spouse.[90] This difference resulted because injury could well cause the real loss of income or services to the other spouse. Injury to a companion animal will not result in the loss of income or services.[91] The injured companion animal will still be available to perform the emotional and social activities that it did before. While fact patterns may vary, this cause of action should be allowed where there is objective evidence of the loss of consortium. The injury of a companion animal might well strengthen the consortium bonds. The death of the animal is objective evidence that there has been a severance of the relationship.

Finally, this expansion of consortium is not meant to support a death claim on behalf of the killed animal. To continue with the above example of a negligent SUV driver striking and killing a man, the man's estate would have a direct claim of wrongful death, or in a case where he was severely injured, he would have a personal injury claim; the wife would have a separate derivative claim for loss of consortium.[92] This distinction highlights how uniquely suited the loss of consortium doctrine is for acknowledging damages of this sort. Dogs and cats will not have a wrongful death action, but the human will have the derivative claim for loss of consortium.

D. Who is Family Within the Law?

Accepting that the concept of consortium has the potential to expand and include new categories of individuals, various jurisdictions, such as New Mexico, have expanded the circle defined

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89. *See generally* Jo-Anne M. Baio, *Loss of Consortium: A Derivative Injury Giving Rise to a Separate Cause of Action*, 50 FORDHAM L. REV. 1344 (1982).

90. *See Carlile*, *supra* note 70, at 395.

91. There is one clear exception to this broad statement. Service animals who perform a specific task for a member of the family could have this function interrupted with an injury. An exception allowing recovery under animal consortium for serious injury to an animal would be justified.

92. *See generally* Baio, *supra* note 89.

as "family."[93] But what is a family? Family is defined in many different contexts such as religious precepts, state law, and personal beliefs. It is important in the legal world as a special status given to people. For example, it can shape the tax return filed with the Internal Revenue Service. Also, the term "single family homes" is omnipresent in zoning codes across the United States and determines where and with whom you live.[94] Historically, a family might be considered the simple heterosexual couple with genetic offspring. In a 1977 case about zoning, the Supreme Court held that the term "family" could not be held to this narrow definition and must allow for an extended definition that would include grandmothers.[95]

In the past, the natural method of human reproduction limited the term family, but medical technology has forced a much more robust definition about who is a parent and when the relationship exists.[96] The DNA of three humans can be combined to produce one child.[97] Who are the parents? Now, children can be born after the death of a sperm donor.[98] There are also issues about surrogate mothers and when they might be considered family.

A 2015 U.S. Supreme Court opinion which held that states could not discriminate against same-sex couples appears to sever the legal and constitutional definition of family from the Christian religious definition which long existed in this country.[99] Even the idea that a child can have only two parents has been stretched into a new

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93. *See Fernandez*, 968 P.2d at 776, 782.

94. *See* Rigel C. Oliveri, *Single-Family Zoning, Intimate Association, and the Right to Choose Household Companions*, 67 FLA. L. REV. 1401, 1407–09 (2015) (discussing two key Supreme Court opinions that deal with the definition of family: Village of Belle Terre v. Boras, 416 U.S. 1 (1974) and Moore v. City of East Cleveland, 431 U.S. 494 (1977)).

95. *Moore*, 431 U.S. at 496–97, 505–06 (setting aside a zoning statute definition limiting the ability of a grandmother to live in the same house with grandchildren from her different children).

96. *See generally* Cynthia E. Tobisman, *The Post-Nuclear Family: Changing Definitions of What Constitutes a Familial Relationship*, STRATEGIES FOR FAMILY LAW IN CALIFORNIA (2016).

97. Tina Hesman Saey, *'Three-Parent Babies' Explained*, SCI. NEWS (Oct. 18, 2016, 2:00 PM), https://www.sciencenews.org/article/three-parent-babies-explained. Besides the usual sharing of DNA from the father and mother, the egg of the mother also has a small set of separate mitochondrial DNA, which has now been shown to be replaceable with DNA from another woman. *Id.* Thus, the DNA of three humans combine for the creation of one human child. *Id.*

98. *See generally* Margaret Ward Scott, Comment, *A Look at the Rights and Entitlements of Posthumously Conceived Children: No Surefire Way to Tame the Reproductive Wild West*, 52 EMORY L.J. 963 (2003).

99. *See generally* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

dimension. For example, California family law now specifically allows for a child to have more than two legal parents.[100] There are even articles promoting the position that the determination of family is personal and private, can consist of multiple adults, and should be respected by the state.[101]

Clearly, the traditional boundaries of the term "family" no longer exist, and the law is in the midst of redefining the boundaries of the term. This article does not seek to engage in any constitutional analysis about the definition of family, but instead considers the term in the context for common law torts as might be modified by statute. The following material will show that many individual humans, or related groups of humans, by self-determination, have now expanded their definition of family, in particular intimate family, to include companion animals. Intimate family is about living together, sharing daily life, committing to the other members, and growing through shared responsibilities and benefits. This article asks that the law acknowledge the reality of these individual decisions about family by allowing damages for harm to family members when the appropriate intimate relationship can be shown to exist, perhaps using the test set out by the New Mexico Supreme Court described above.[102]

E. Scientific Support for the Human–Animal Bond

Domesticated dogs are descendants of the grey wolf.[103] The grey wolf has a highly evolved and sophisticated social structure.[104] Consequently, wolves were "ripe for adaptation to a life with mankind."[105] As wolves turned into dogs, they developed two adaptations.[106] They developed a tolerance for other dogs, unlike wolves who "are aggressive towards all but the members of their own pack," and they "gained a unique sensitivity towards human body language, gaze and gesture."[107] A dog's attachment to his or her

100. CAL. FAM. CODE § 7601 (West 2014).

101. *See generally* J. Boone Dryden, *This Is the Family I Chose: Broadening Domestic Partnership Law to Include Polyamory*, 36 HAMLINE J. PUB. L. & POL'Y 162 (2015).

102. *See Fitzjerrell*, 79 P.3d at 840.

103. John Bradshaw, *The Bond Between Pet and Owner*, PSYCHOL. TODAY (Nov. 19, 2012), https://www.psychologytoday.com/blog/pets-and-their-people/201211/the-bond-between-pet-and-owner.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

owner is "fundamental to [his or her] well-being."[108] A dog's affinity towards his or her owner can also be observed in the dog's anxiety and consternation at his or her owner's absence.

Society's increased affinity for their companion animals is in part the result of companion animals' move indoors. In the not so distant past, it was common for pets to remain outdoors. However, recent developments in veterinary medicine have effectively eradicated companion animal parasites, which used to deter people from housing their companion animals inside.[109] These advancements have fundamentally changed the way people live and bond with companion animals. In a 2015 Tedx talk, Susan Little, a veterinary parasitologist described the effect that successful parasite control has had on availability of the human companion animal bond.[110]

In the last twenty years, effective parasite control for pets has allowed people to become physically closer to their animals than ever before.[111] Little claims that effective parasite control has done more to support the human animal bond by fundamentally changing the proximity and closeness in which people interact with their pets than anything else the veterinary medicine profession has done since the introduction of the rabies vaccine.[112] Effective parasite control of fleas, ticks, and intestinal worms has made household animals healthier and more hygienic.[113] Many of the diseases and infections an animal can contract from parasites, like Lyme disease, are zoonotic, or shared between animals and humans.[114] Providing evidence of physical closeness with animals, a recent study found that over half of pet owners sleep in the same bed as their companion animals, and many pet owners derive a sense of comfort and security from sleeping in the same bed as their companion animals.[115].

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108. *Id.*

109. Susan Little, *The Human-Animal Bond*, TEDX TALKS (Apr. 15, 2015), https://www.youtube.com/watch?v=jjxAewIBYJk.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. Erica Friedmann & Heesook Son, *The Human-Companion Animal Bond: How Humans Benefit*, 39 VETERINARY CLINICS OF N. AM.: SMALL ANIMAL PRAC. 293, 293–326 (discussing zoonosis as a potential concern for people coming into contact with companion animals and addressing ways to minimize risk of disease and infections to vulnerable individuals at health care and long-term care facilities.).

115. *See* Lois Krahn, *Are Pets in the Bedroom a Problem*, 90 MAYO CLINIC PROC. 1663 (2015); Meghan Holohan, *Should Your Pets Sleep in the Bed with You? A New*

Further, in recent decades, there has been an increasing trend of more Americans owning companion animals, and studies show that people are spending more money on their animals.[116] According to a 2017–2018 report by American Pet Products Association, 68% of U.S. households own a pet, which equates to a pet in 84.6 million American homes.[117] This survey illustrates a 21% increase in the number of American households that own pets since the first year the survey was conducted in 1988.[118] The increase in companion animal ownership in the U.S. demonstrates the affinity people have towards companion animals.

Perhaps even more telling is the increase in overall spending on companion animals in recent years. In 1994, Americans spent 17 billion dollars on companion animals; by 2004, that number had doubled to 34 billion dollars.[119] In 2015, Americans spent a staggering 60 billion dollars on companion animals.[120] These numbers reflect the aggregate annual spending of U.S. owners of companion animals on food, supplies, vet care, and live animal purchases.[121] These trends support the increased value people place on companion animals.

The increased affinities Americans have for their companion animals have caused an increase in the academic and scientific study of how people interact, live, and are impacted by companion animals. The scientific community refers to this area of study as the human–companion animal bond.[122] The most common framework for researching the dimensions of the human companion animal bond is Bowlby's Theory of Attachment.[123] Bowlby's Theory of Attachment uses anxiety and avoidance as gauges of how people interact with each other in response to various circumstances to determine the

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Study's Surprising Answers, TODAY (Sept. 12, 2017, 9:56 AM), http://www.today.com/health/should-your-pets-sleep-bed-you-new-studys-surprising-answers-t61266.

116. *Pet Industry Market Size & Ownership Statistics*; AM. PET PRODS. ASS'N, http://www.americanpetproducts.org/press_industrytrends.asp (last visited Feb. 10, 2017).

117. *Id.*

118. *Facts + Statistics: Pet Statistics*, INSURANCE INFORMATION INSTITUTE, http://www.iii.org/fact-statistic/pet-statistics (last visited Sept. 23, 2017).

119. *Pet Industry Market Size*, supra note 116.

120. *Id.*

121. *Id.*

122. David C. Anderson, *The Human-Companion Animal Bond*, 41 THE REFERENCE LIBRARIAN 7, 8 (2004).

123. *See generally* Marga Vicedo, *The Social Nature of the Mother's Tie to Her Child: John Bowlby's Theory of Attachment in Post-War America*, 44 BRITISH J. FOR THE HIST. OF SCIENCE 401 (2011).

degree of bonding, attachment, and reliance a person has on another, or, in this case, on a companion animal.[124] Using Bowlby's Attachment Theory, the scientific community has found that people bond with their companion animals in a similar manner as with human family members.[125] The human companion animal bond has been observed to have positive effects on the physical, social, and emotional well-being of the humans.[126]

The strongest areas of research evidence demonstrating the human companion-animal bond are the positive health benefits of pet ownership.[127] Pet ownership has been consistently correlated with positive physiological measures, such as lower blood pressure, serum triglycerides, and cholesterol levels.[128] "[T]he presence of a pet was found to be more effective than a spouse or friend in ameliorating the cardiovascular effects of stress."[129] "Interactions with companion animals increase neurochemicals associated with relaxation and bonding and improves human immune system functioning."[130] "Overall, a broad range of investigations have found that animal–human interactions reduce anxiety, depression, and loneliness, as they enhance social support and general well-being."[131] A large study conducted in Germany and Australia spanning two decades with a sample size of over 10,000 people found that continuous pet owners were the healthiest group of people.[132] The study found the positive health benefits of pet ownership remained significant after controlling for a variety of variables associated with health, such as gender, age, marital status, and income.[133] The study also found that people who no longer had a pet or never had one were the least healthy groups of people.[134]

In addition to the positive physiological effects of companion animal ownership, a wealth of studies also demonstrates positive psychophysiological and psychosocial effects of human–animal

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124. *Id.* at 407.

125. Elyssa Payne & Paul Bennett, *Current Perspectives on Attachment and Bonding in the Dog-Human Dyad*, 8 PSYCHOL. RES. BEHAV. MGMT. 71, 71-72 (2015).

126. *Id.* at 76.

127. Froma Walsh, *Human-Animal Bonds I: The Relational Significance of Companion Animals*, 48 FAM. PROCESS 462, 466 (2009).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 467.

132. *Id.*

133. *Id.*

134. *Id.*

interactions.[135] Companion animals provide owners with social attention, interpersonal interactions, and elevated mood.[136] Positive stress-related parameters such as lower cortisol and decreased heart rate and blood pressure have been scientifically measured and positively correlated with companion animal ownership.[137] Additionally, qualitative studies of companion animal owners report positive effects on fear, anxiety, depression, and well-being from ownership of a dog or cat.[138] A significant number of studies have replicated the positive effects that interactions with companion animals have on blood pressure and heart rate for more than thirty years.[139]

Further, a significant body of scientific literature describes the positive effects of companion animals on people's hormonal indicators and neurotransmitters.[140] These studies provide direct evidence that interactions with a companion animal positively affect endocrine responses as indicated by changes in the levels of cortisol, epinephrine and norepinephrine.[141] This evidence scientifically demonstrates the widely supported conclusion that human interactions with companion animals have a positive influence on human stress responses. Decreased stress during an interaction with another living being indicates bonding and is closely related with both the anxiety and avoidance prongs of Bowlby's Attachment Theory.

The mounting scientific evidence and literature have prompted the medical, psychology, and counseling fields to utilize the positive effects of interactions with companion animals by implementing animal assisted therapy to help patients deal with depression and anxiety.[142] Animal assisted therapy is increasingly utilized in nursing homes to provide companionship, security, and comfort for elderly people, and many college campuses provide therapy dogs outside the classrooms during finals week to help reduce students'

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135. *See, e.g.*, Andrea Beetz et al., *Psychosocial and Psychophysiological Effects of Human-Animal Interactions: The Possible Role of Oxytocin*, 3 FRONTIERS PSYCHOL. 234 (2012).

136. *Id.* at 235.

137. *Id.*

138. *Id.*

139. *Id.* at 236–39.

140. *Id.* at 240.

141. *Id.*

142. *See* Sandra Barker et al., *Effects of Animal-Assisted Therapy on Patients' Anxiety, Fear and Depression Before ECT*, 19 J. OF ECT 38, 39 (2003) (demonstrating that 77% of participants responded that the therapy dog lessened their anxiety, 55% had lessened depression, and 55% had reduced fear).

anxiety and stress levels.[143] The application for animal-assisted therapy is a continually growing arena that includes time with a professional counselor and a therapy animal, the presence of therapy animals in schools to help children socialize and interact, and therapy animals to put children at ease during forensic interviews regarding sexual abuse.[144]

The majority of studies measuring the physiological, psychophysiological, and psychosocial benefits associated with companion animals examine human–animal interaction rather than companion-animal ownership.[145] Although many of these findings are the same bonding hallmarks exhibited in positive relationships between people, the research arguably demonstrates positive health benefits of being around animals rather than the existence of a bond or relationship with that animal. However, in addition to the research using the Bowlby's Attachment Theory of human bonding to show a human companion animal bond, elevated oxytocin and dopamine releases in humans provide empirical evidence that people form social bonds with their companion animals.[146]

The Peptide hormone oxytocin is the primary neurochemical associated with human affiliation and bonding.[147] Oxytocin is released in the hypothalamus and creates a neurochemical response that is associated with affiliation, attachment, and love.[148] The largest natural releases of oxytocin occur during child birth and sexual intercourse.[149] Oxytocin is also released in smaller quantities when humans hug, kiss, and look into each other's eyes; consequently, oxytocin is often referred to as the "cuddle chemical."[150] From an evolutionary stand point, oxytocin has been invaluable to humans as a means to encourage procreation and care of children, friends, and partners. Dopamine is a chemical that is also released during intimate contact, exercise, and eating. It is most often associated as the reward output for activities that are biologically and evolutionarily valued.

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143. *See* Melinda Stanley-Hermanns & Julie Miller, *Animal-Assisted Therapy*, 102 AM. J. OF NURSING 69, 71 (2002).

144. Tori Rodriquez, *Animal-Assisted Therapy Linked to Psychological Benefits*, PSYCHIATRY ADVISOR (Feb. 10, 2016), http://www.psychiatryadvisor.com/therapies/animals-therapy-psychological-mental-health-benefits-depression-anxiety-ptsd/article/473330.

145. *See, e.g.*, *Beetz*, *supra* note 135 at 235.

146. *Id.*

147. *Id.* at 244.

148. *Id.*

149. *Id.*

150. *Id.*

Numerous studies have been conducted to document the increase of plasma oxytocin levels in humans after petting and close proximity with companion animals.[151] Interestingly, studies conducted tests using unfamiliar dogs and then again with the test subject's own dog, and plasma oxytocin levels rose significantly higher with a person's own dog.[152] "This indicated that the increase in [oxytocin] depends on the quality of the human–animal relationship—the closer the relationship, the more oxytocin is released."[153] The same reaction also occurs with releases in response to the closeness of relationships between people; the hypothalamus releases more oxytocin when greeting a daughter than a good friend.[154]

Additionally, significant prolactin, phenyl acetic acid, and dopamine increases have been documented with interactions between people and their pets.[155] The increase of these neurochemicals and oxytocin has been measured in both people and their dogs during and shortly after interactions.[156] The fact that dogs have corresponding changes in the same neurochemicals provides support for an inference that reciprocal bonding takes place in a companion animal's brain.[157] Given that dogs have been selectively bred for thousands of years to be human companions, this evidence is not entirely surprising. Empirical evidence of oxytocin and dopamine positively associated with ownership of companion animals, along with the physical benefits and self-reports of pet owners, supports the conclusion that a real and significant bond can exist between people and their companion animals.

As described above, a relationship with a companion animal has numerous health benefits and is accompanied by the neurochemical markers of attachment and social bonding, but the most profound evidence for pet owners' emotional attachment to their companion animals occurs after the death of their animal. According to Loren King and Paul Werner, "It has been demonstrated that the impact on physical and emotional well-being from the death of a companion animal can be substantial. In this regard it has been consistently found that the degree of bonding to a companion animal that has

151. *Id.* at 244–45.
152. *Id.* at 244.
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*

died is positively correlated with grief-related symptoms."[158] Froma Walsh adds that "[p]ets often live their full lives with their human companions, and profound bereavement at the loss of a cherished pet is normal and commonly as strong as for a significant human companion."[159]

A 2013 study used Bowlby's Attachment Theory and Kubler-Ross' Model of Grief to analyze owners' attachments to their companion animals and grief after the animals died.[160] The findings suggested that owners formed true attachment bonds with their companion animals.[161] The presence of grief was comparable to the loss of a human family member, and resolution of the grief was similarly influenced by the individual's community and positive support systems in the same ways people cope with the death of a human member.[162] The study concluded the attachment bond influenced the grief response after the loss of a pet, and "without such bond the grief would simply not exist." [163] These findings have been replicated in numerous similar studies.[164]

The human–companion animal bond provides people with many health, social, and emotional benefits, including companionship, security, and love. People should have a right to protect this interest by receiving just compensation when their companion animals are intentionally killed by another. The law recognizes the value of a continually growing multitude of relationships in the claim for loss of consortium—including spouses, children, grandchildren, parents, and adult children. The most recent addition in 2015 was expanding the loss of consortium claim to include same sex couples.[165] In light of these expansions, people should be afforded the cause of action of animal consortium to protect the interest in the bond they have with

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158. Loren King & Paul Werner, *Attachment, Social Support, and Responses Following the Death of a Companion Animal*, 64 OMEGA 119, 120 (2011).

159. Walsh, *supra* note 127, at 471.

160. Michelle Kay Crossley, *Pet Loss and Human Bereavement: A Phenomenological Study of the Grieving Process*, N.C. STATE REPOSITORY (2013), https://repository.lib.ncsu.edu/bitstream/handle/1840.16/8451/etd.pdf?sequence=2.

161. *Id.*

162. *Id.*

163. *Id.*

164. *See generally* Caroline Hewson, *Grief for Animal Companions and an Approach to Support Their Bereaved Owners*, 33 BEREAVEMENT CARE 103 (2014); Hellen Kemp, *The Lived Experience of Companion-Animal Loss: A Systematic Review or Qualitative Studies*, 29 ANTHROZOOS 533 (2016); Bronwen Williams, *Experiences of Bereavement Following the Death of Animals*, 19 MENTAL HEALTH PRAC. 29 (2016).

165. *See Obergefell*, 135 S. Ct. at 2636.

their companion animal when someone intentionally kills their dog or cat. The acknowledgment of this legal remedy should act as a deterrent on those otherwise willing to harm companion animals.

F. Companion Animals Integrated as Family

Beyond the science considered above, a number of examples exist which show the present extent of the integration of companion animals into the family unit. For example, individuals are increasingly willing to include their dogs and cats in their wedding festivities.[166] In a 2016 *New York Times* article, a wedding photographer based in Vermont reported that more than half of the weddings at which he works would include a pet.[167] One such wedding included four of the couple's dogs, and the bride explained, "The moment they walked in, I thought, 'My family is here.'"[168] At another wedding a dog was the ring bearer.[169]

Recently not only have companion animals played a role in their owner's marriages, but also in their divorces. In *Travis v. Murray*, a New York court held a one-day hearing to determine custody of a dog named Joey during a divorce proceeding using the standard of the "best [interest] for all concerned."[170] *Travis v. Murray* is an example of a court's willingness to revisit legal distinctions to further animals' interests and people's interest in animals. For example, in *Travis v. Murray* the court said, "a strict property analysis is neither desirable nor appropriate," and "[the pet] is decidedly more than a piece of property, material or otherwise."[171] The court reasoned that "[w]here once a dog was considered a nice accompaniment to a family unit, it is now seen as an actual member of that family, vying for importance alongside children."[172] Additionally, the court noted that "[c]ourts in other states have also had occasion to deviate from

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166. Lois Smith Brady, If Anyone Here Objects to This Union, Bark, N.Y. TIMES (Apr. 29, 2016), https://www.nytimes.com/2016/05/01/fashion/weddings/dogs-cats-and-other-pets-at-weddings.html.

167. *Id.*

168. *Id.*

169. Perry A. Farrell, *Awww! Arson Dog Daisy Is Ring Bearer for Ann Arbor Couple*, DETROIT FREE PRESS (May 30, 2017), http://www.freep.com/ story/news/local/ michigan/2017/05/30/daisy-dog-lab-ring-bearer-wedding/354414001/ ("She was an integral part of the growth of their relationship, and that's why it was important for them to have her at the wedding.").

170. Travis v. Murray, 977 N.Y.S.2d 621, 631 (Sup. Ct. 2013).

171. *Id.* at 628.

172. *Id.* at 625.

the strict pets-equal-property viewpoint to find that household pets have a special status surpassing ordinary personality or chattel."[173]

Finally, *Vox Media* reports that half of all pet owners feel their pet is as much a part of the family as any other person; one-third let their pet sleep in their bed.[174] Perhaps comically, one research study asked pet owners: "If a bus was hurtling toward your pet and a foreign tourist, which would you save?"[175] Forty percent of pet owners reported they would save their pet.[176] Some research even suggests dogs offer more support than humans by: (1) "[p]roviding a reliable and lasting relationship;" (2) "[b]eing a better receiver of care;" and (3) "[b]eing a better source of companionship.[177] The author concludes that is why we love our dogs so much, and why we grieve so deeply when we lose them.[178]

G. Animal within the Legal Context of Family

There are several fact patterns where our legal system presently acknowledges that companion animals are a full member of a family and not just cute and fuzzy property of the human family members. No member of a court or legislature should be discouraged from expanding the visibility and protections for companion animals within families, as it is being done in small steps all over the country.

1. Trust and Estates

The primary example deals with human-created trusts for the care of animals, usually companion animals. As a parent wishes to provide for their children when they die, so too do human guardians wish to provide for their companion animals. It was not possible to formally do this until the laws started to change in the 1990s. The

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173. *Id.* at 627.

174. Alvin Chang, *When My Dog Died, I Didn't Understand Why It Felt like a Human Had Died. Then I Read the Research*, VOX (July 11, 2016, 8:20 AM), http://www.vox.com/2016/7/11/12109786/dog-death-research.

175. *Id.* (citing Harold Herzog, *Would You Save a Puppy or a Child From A Burning Building?*, PSYCHOLOGY TODAY (June 17, 2013), https://works.bepress.com/harold-herzog/55/).

176. *Id.*

177. *Id.* (citing *Herzog, supra* note 175).

178. *Id.* (citing Sheila Bonas, June McNicholas, and Glyn M. Collis, *Pets in the Network of Family Relationships: An Empirical Study*, COMPANION ANIMALS AND US: EXPLORING THE RELATIONSHIPS BETWEEN PEOPLE AND PETS 209 (Anthony L. Podberscek, et al., ed. 2005)).

drafters of the Uniform Trust Code started the process with the drafting of Section 408 of the Model Law. Under this section, a trust for the care of an animal is specifically allowed, along with the authorization for courts to appoint someone to enforce the trust.[179] Parallel language was subsequently made part of the Uniform Probate Code.[180] Thus, as a beneficiary of a trust, a companion animal becomes a legally visible being, one who can claim equitable title in the income and assets of a trust. The companion animal must be a specific living being, and the trust cannot include unborn offspring of the named companion animal. After the last-named animal dies, the funds of the trust are distributed to humans or placed in a human-focused trust.[181]

The animal beneficiary is a limited legal personhood, going beyond animal welfare concerns to actually provide a legally protected asset for animal well-being. The result of these provisions is that the animal is the functional beneficiary of the trust; therefore, if issues arise, the trustee could be sued by the animal, through a court-appointed attorney, to enforce the provisions of the

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179. UNIF. TRUST CODE § 408 (UNIF. LAW COMM'N 2000) (last revised and amended in 2010).

> (a) A trust may be created to provide for the care of an animal alive during the settlor's lifetime. The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than one animal alive during the settlor's lifetime, upon the death of the last surviving animal.
>
> (b) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court. A person having an interest in the welfare of the animal may request the court to appoint a person to enforce the trust or to remove a person appointed.

Id.

180. *Compare id., with* UNIF. PROB. CODE § 2-907(b) (UNIF. LAW COMM'N 1969) (last revised and amended in 2010).

> [A] trust for the care of a designated domestic or pet animal is valid. The trust terminates when no living animal is covered by the trust. A governing instrument shall be liberally construed to bring the transfer within this subsection, to presume against the merely precatory or honorary nature of the disposition and to carry out the general intent of the transferor. Extrinsic evidence is admissible in determining the transferor's intent.

Id.

181. See *In re Copland*, 988 N.Y.S.2d 458, 461 (Sur. Ct. 2014), for an example of a disputed trust, where the court refused to reduce the corpus within the pet trust.

trust. As of this writing, every state has enacted a law permitting pet trusts.[182]

While the trust laws have been changing, the Internal Revenue Code has not. As has been pointed out by one tax attorney, in the eyes of the Internal Revenue Service, the tax treatment of animal trusts is different from any other trust in that, as an animal is not a "person," the animal cannot be required to pay income taxes. Therefore, income normally taxable to the beneficiary of a trust must be handled in other ways.[183] It should be noted that each state has the opportunity to define which animals may be made part of a trust. The scope of the term varies between the states and can be just companion animals, or domestic animals, or any animal, which would include wildlife.

2. Restraining Orders

Another area where companion animals have legal visibility is as part of personal restraining orders. In the fall of 2016, the state of Alaska modified existing divorce law to allow victims of domestic violence to seek a restraining order for protection of property including "a pet, regardless of the ownership of those items."[184] The definition of pet is rather sweeping: "'pet' means a vertebrate living creature maintained for companionship or pleasure."[185] The new provisions also allow a court, in the context of a protection order request, to order the payment of funds by the named party for not only support for the adult victim and minor children, but also for pets in the care of the petitioner.[186] So, in this context, the companion animal is treated as a child in the eyes of the law.

As of the end of 2016, a strong majority of thirty-two states had protective order provisions that included animals.[187] In Wisconsin,

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182. Michigan State University College of Law, *Map of States with Companion Animal (Pet) Trust Laws*, ANIMAL LEGAL & HIST. CTR., https://www.animallaw.info/content/map-states-companion-animal-pet-trust-laws.

183. *Tax Man's Best Friend: An Overview of the Tax Issues Affecting Pet Trust*, ANIMAL L. SEC. NEWSL. (State Bar Mich.), Summer 2016, at 1.

184. ALASKA STAT. §18.65.520(a) (2016).

185. ALASKA STAT. §18.65.590(2) (2016).

186. ALASKA STAT. §18.66.100(c)(12) (2016).

187. *See* Rebecca F. Wisch, *Domestic Violence and Pets: List of States that Include Pets in Protection Orders*, ANIMAL LEGAL & HIST. CTR. (2016), https://www.animallaw.info/article/domestic-violence-and-pets-list-states-include-pets-protection-orders. For example, in Michigan a judge may enter a personal protection order to restrain or enjoin a spouse... from doing 1 or more of the following:

the scope of protection for animals within a family extends beyond just the protection orders, but also includes restraining orders and injunctions in child abuse, individual-at-risk, and harassment situations.[188]

3. Divorce

The property status of companion animals is also a hindrance to their consideration by courts in the context of human divorces.[189] The Alaska law discussed above also allows the relevant court to make specific determinations about companion animals in a final divorce order: "the court may provide...for the ownership or joint ownership of the animal, taking into consideration *the well-being of the animal.*"[190]

This statute clearly acknowledges that animals have interests independent of the spouses and that animals have legal personalities to be considered by the legal system when a divorce proceeding impacts their lives. This statute also acknowledges that animals within a family are in the conceptual position of children, and courts have an independent duty to consider the best outcome for the animal in addition to the parties' wishes and property ownership.

4. Miscellanies of Examples

Beyond the actions of the legislature, the courts have also, on occasion, acknowledged the legal existence of specific animals. For example, a guardian was appointed to a chimpanzee for purposes of the animal's interests in a trust,[191] to a dog for purposes of

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(j) Any of the following with the intent to cause the petitioner mental distress or to exert control over the petitioner with respect to an animal in which the petitioner has an ownership interest:

(i) Injuring, killing, torturing, neglecting, or threatening to injure, kill, torture, or neglect the animal.

(ii) Removing the animal from the petitioner's possession.

(iii) Retaining or obtaining possession of the animal.

MICH. COMP. LAWS ANN. § 600.2950 (West 2017).

188. WIS. STAT. § 813.122(4)(a), (5) (West 2017).

189. Amy B. Wang, *A Divorcing Couple Asked a Judge to Treat Their Dogs like Children. Here Is His Reply.*, WASH. POST (Dec. 21, 2016), https://www.washingtonpost.com/news/animalia/wp/2016/12/21/a-divorcing-couple-asked-a-judge-to-treat-their-dogs-like-children-here-was-his-reply/?utm_term=.1eaf5263a4ea.

190. ALASKA STAT. §25.24.160(a)(5) (2016) (emphasis added).

191. *In re* Fla. Chimpanzee Care Trust, No. CP-02-1333-IY (Fla. Cir. Ct., Apr. 1, 2002) (order appointing guardian ad litem) ("It is hereby ordered: 1. [C.S.] is

placement,[192] and the fifty Michael Vick pit bulls were placed under the guardianship of an attorney.[193]

III. IMPLEMENTATION

All the information provided above supports the existence of the real and important relationship that exists between a human and their companion animal. It is time to proceed to the specific consideration of how to expand the existing cause of action under consortium to encompass companion animals. As consortium is a long-standing common law concept, this expansion can be accomplished either by the courts or the legislature.

A. By the Courts

For a court to adopt the concept of animal consortium, it must first believe that there is a real harm which deserves the attention of social consideration. While the legal system is most comfortable with damages awarded for economic harm, it is beyond dispute that economic recovery for non-economic harm is allowed in our

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appointed as guardian ad litem to represent the interests of the beneficiaries of the Trust in all future matters involving the Trust; and 2. [C.S.'s] reasonable fees for serving as guardian ad litem for the Trust beneficiaries shall be paid from the assets of the trust.").

192. *In re* Estate of Ronald W. Callan Jr., No. D-2252 (Tenn. Cir. Ct. Mar. 20, 2007) (order appointing guardian ad litem) ("It is therefore Ordered Adjudged and Decreed that: 2. The Guardian Ad Litem owes a duty to this Honorable Court to impartially investigate and to determine the facts to the Court. The Guardian Ad Litem is not an advocate for the dog, but has the duty to determine what is best for the dog's welfare.").

193. Second Order as to Disposition and Appointing Guardian/Special Master at 2, United States v. Approximately 53 Pit Bull Dogs, No. 3:07CV397 at *2 (E.D. Va. Oct. 15, 2007), http://www.animallaw.info/pleadings/pb_pdf/pbusvick_order_appointing_guardian.pdf. The Order provided that:

> 1. Rebecca J. Huss is hereby appointed as guardian/special master to consider appropriate options for a final disposition of the remaining 48 pitbull dogs previously forfeited to the United States.
>
> 2. Professor Huss shall have the following powers and duties to fulfill her obligations:
>
> (a) Consider available disposition and placement options as she deems appropriate for the final disposition of the remaining dogs; . . . .

Id. *See also* Motion for Second Order as to Disposition and Appointing Guardian/Special Master, United States v. Approximately 53 Pit Bull Dogs, No. 3:07CV397 (E.D. Va. Oct. 15, 2007), http://www.animallaw.info/pleadings/pb_pdf/pbusvick_motion_to_appoint_guardian.pdf.

system.[194] There are a number of policy reasons why now is the time to bring animal consortium under the umbrella to be recognized by the courts. Smaller family sizes and the exploding popularity of pets have made companion animals important emotional components in the daily lives of millions of Americans.[195] Those persons who invade this family core and intentionally kill a member should be subject to civil damages beyond the property value of the animal.

Is it fair to put this risk of punishment on defendant actors? If an actor kills a human family member, then they will be liable both in criminal law and in civil law under existing definitions of consortium. That society has already judged that the intentional, unjustified killing of an animal can result in a felony conviction in criminal courts out of concern for the lives of the animals themselves, it is time to also allow for the civil recovery for the family members harmed by the intentional acts of the defendant.

The risk of punishment is a fair burden to put on individuals because, in today's world, if someone kills a dog or cat, it is foreseeable that the animal was a part of someone's family, and society values and protects this family relationship.[196] To prove that the defendant actor should be liable under loss of consortium, the first element should be that the actor intended to harm a companion animal. The second element should be that the animal must die as a result of the actor's harm. While injury of a companion animal may well cause pain and suffering to the human family members, the bond is still present and functional as long as the companion animal is alive. The death of an animal provides certainty of a severance of the bond. Additionally, the third element should be that the plaintiff must prove the existence and extent of the bond between the human and the companion animal. The bond must be more than the fact that the human and the animal co-inhabited the same dwelling. As discussed in Part II.b., the New Mexico Supreme Court has set out a list of factors that are appropriate to use in this circumstance.[197]

Over time, the courts have expanded the availability of consortium by expanding the definition of who is within a family.[198] In order to limit slippery slope arguments, the courts should be able

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194. *See generally* Harry Zavos, *Monetary Damages for Nonmonetary Losses: An Integrated Answer to the Problem of the Meaning, Function, and Calculation of Noneconomic Damages*, 43 LOY. L.A. L. REV. 193 (2009) (discussing the validity of non-economic damages and arguing for a rational way to calculate them).

195. *Payne*, *supra* note 125, at 76.

196. *See, e.g.*, *Brady*, *supra* note 166.

197. *See supra* note 86 and accompanying text.

198. *See Fernandez*, 968 P.2d at 782.

to limit this extension of consortium by the species of the animal. Both by practice and by support of empirical studies, the emotional bond being discussed in this article can be limited to domestic dogs and cats.[199] There is no reason why a court could not limit the extension of the consortium claim to these two species of animals at this time. Intentional acts of harm most often occur against these two species. Accordingly, no cause of action should exist for the intentional killing of a goldfish or a lizard.

One other troubling issue should be mentioned: runaway jury awards. Putting a monetary value on noneconomic damages is an inherent difficulty for plaintiff attorneys and juries. One author did an economic analysis which suggested the top amount of monetary recovery for loss of an animal would be in the range of $25,000.[200] While real harm has been done and some level of economic punishment is appropriate, noneconomic awards can sometimes become excessive. Under the general powers of the courts, excessive jury awards can be controlled.[201]

B. Existing Legislation

If the courts of a particular state are unwilling to allow animal consortium, then the legislative route is possible. Indeed, as of 2016, five states have adopted modest laws that provide some level of damages beyond market value for injury or death of animals.[202] However, their provisions are diverse, and there is no attempt to tie into the concepts of consortium. Table 1 provides some side-by-side comparisons of the provisions from the five states.

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199. *See infra* Table 1 in Part III.b..

200. See Sebastien Gay, *Companion Animal Capital*, 17 ANIMAL L. 77, 90–91 (2010), for one economic analysis, including formulas that this author is not capable of following.

201. *See, e.g.*, Turner v. Lyons, 867 So.2d 13, 26 (La. Ct. App., 2004) (allowing children to recover for loss of consortium and reducing an excessive jury award from $150,000 to $50,000.).

202. CONN. GEN. STAT. ANN. § 22-351(a) (West 2017); 510 ILL. COMP. STAT. ANN. § 70/16.3 (West 2017); MD. CODE ANN. CTS. & JUD. PROC. § 11-110 (LexisNexis 2013); NEV. REV. STAT. § 41.740 (2015); TENN. CODE ANN. § 44-17-403(a)(1) (2016). See *Byszewski*, *supra* note 9, at 225–30, for a discussion on the history of several of these statutes.

Table 1

Provisions	Illinois [203]	Maryland [204]	Connecticut [205]	Tennessee [206]	Nevada [207]
Which animal?	An animal	Domestic animal,not livestock	Household dog or cat	Household dog or cat	Household dog or cat
Which human?	Ownership in animal	Owner of pet	Owner of companion animal	A person	Natural person
Which Δ action?	Aggravated cruelty & torture that injures or kills	Tortiously causes injury or death[208]	Intentionally kills or injures	Unlawfully and Intentionally or negligently kills[209]	Intentionally, recklessly or negligently injures or kills
Damages allowed?	Veterinary cost; other expenses; emotional distress; attorney fees; and punitive	Veterinary care	Veterinary cost; burial cost; attorney fees; and punitive	Non-economic [210]	Veterinary cost; burial; and attorney fees; Excludes noneconomic and punitive
Maximum award	Punitive damages shall be $500 to $25,000 for each act of cruelty	Compensa-tory damages not to exceed $7,500	Punitive damages limited to a judicial ceiling	Non-economic damages not to exceed $5,000[211]	Total award not to exceed $5,000

203. 510 ILL. COMP. STAT. ANN. § 70/16.3 (West 2017).

204. Md. Code Ann. Cts. & Jud. Proc. § 11-110 (LexisNexis 2013).

205. CONN. GEN. STAT. ANN. § 22-351(a) (West 2017). One court reflected on this new statute and stated that "the legislature has also acknowledged that a household pet such as Shadow holds with a distinct, identifiable and legally protected place within the human family unit." *Vaneck*, 2009 WL 1333918, at *4.

206. TENN. CODE ANN. § 44-17-403(a)(1) (2016).

207. NEV. REV. STAT. § 41.740 (2015).

208. Harm may also be "through an animal under the person's direction or control." MD. CODE ANN. CTS. & JUD. PROC. § 11-110 (LexisNexis 2013).

209. Statute also specifically includes harm by the "animal of another." TENN. CODE ANN. § 44-17-403(a)(1) (2016). If the harm is caused by the negligence of the other pet owner, the incident must have occurred on the property of the owner or when the animal was under the control of the owner. *Id.*

210. Defined as "reasonably expected society, companionship, love and affection of the pet." TENN. CODE ANN. § 44-17-403(d) (2016).

211. Professional negligence against a veterinarian is specifically excluded from allowing noneconomic damages. *Id.*

As seen in the table above, four out of five states limit the species of companion animals to dogs and cats; all five states identify the possible plaintiff as "owner," but the term is never defined in the family setting; four of the five states allow statutory recovery for injury of a companion animal; all five states allow statutory recovery for death of a companion animal; all five states apply to intentional torts, with two states also allowing recovery for negligence; four of the five specifically allow reasonable veterinary cost; three of the five states allow reasonable attorney fees; Tennessee is the only state allowing compensation for "expected society, companionship, love and affection of the pet;"[212] Illinois allows for emotional distress; all five have some limitation on the amount of the award, although different categories are capped in different states.[213] While these statutes are helpful in allowing a plaintiff more than property value for the harm to a companion animal, four of the statutes do not acknowledge the long-term loss of a family member as contemplated under this article's animal consortium proposal.[214]

C. Amending an Existing Consortium Statute

State statutes dealing with civil claims of consortium vary greatly in comprehensiveness and clarity. This article does not seek to analyze these differences; instead, it seeks to show how animal consortium can be inserted into such statutes. Our reference point will be the Florida statute,[215] which is well organized and comprehensive. The Florida statute does not cover injury to a family member, only the consequences that flow from the death of a family member.[216] As this article is asserting a cause of action only when the companion animal dies, this limitation is acceptable.

There are several aspects of the statute that are important to note. First, wrongful death is separate from claims of loss of consortium and is set out in section 1 of the act.[217] Second, section 2 has two distinct categories of non-economic damages for the surviving spouse: "companionship and protection," and "pain and suffering."[218] The first category can be thought of as the long-term claim of loss of society and companionship, part of a traditional loss of consortium claim. The second category refers to the negative, immediate consequences of the

212. TENN. CODE. ANN. § 44-17-403(d) (2016).
213. *See supra*, Table 1 in Part IV.b..
214. *Id.*
215. FLA. STAT. ANN. § 768.21 (West 2017) (fully set out in Appendix A).
216. *Id.*
217. *Id.*
218. *Id.*

wrongful act when emotionally dealing with the harm to a loved one.[219] Third, minor children also receive two categories of damages in section 3 for loss of a parent.[220] Finally, parents may recover for loss of a child, but, in this case, the category of damages is denoted as "mental pain and suffering."[221] Curiously, loss of companionship is not provided for the parent when a child is loss.[222]

It would be relatively easy to amend this statute to allow an action for companion animals. Bracketed language is provided as optional language:

> (Sec.3a) For the intentional harm of a companion animal that results in the death of the animal, surviving intimate family members may recover for loss of companionship and the mental pain and suffering associated with the death. Companion animals are defined as the domestic species of dogs and cats that live their daily lives as part of the family. [There can be only one action filed for each deceased companion animal.] [The total recovery for an action under this section shall not exceed [$50,000].][Intimate family members are those who interacted with the animal on a regular basis so as to form an emotional bond with the animal.] [Damages for loss of companionship shall relate to the strength of the bond with the deceased which existed at the time of the harm to the companion animal.]

The bracketed language is suggested as confining language which will limit attempts to abuse the process and avoid runaway jury awards.

CONCLUSION

The loss of consortium doctrine is the ideal mechanism for addressing civil damages for the intentional killing of a companion animal in terms of history, malleability, and application. It is worth reiterating that the early history of consortium actions evidence that a companion animal's legal status as property is not a barrier to recovery under consortium. Married women were the property of their husbands, before the Married Women's Property Acts, and loss

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219. See Joellen Lind, *Valuing Relationships: the Role of Damages for Loss of Society*, 35 NEW MEX. L. REV. 301 (2005), for an excellent discussion of these non-economic damages.

220. FLA. STAT. ANN. § 768.21(3) (West 2017).

221. FLA. STAT. ANN. § 768.21(4) (West 2017).

222. *See id.*

of consortium claims already granted compensation for loss of companionship to their husbands before the legal status of married women changed.[223] Additionally, the law already allows juries to quantify the damages for loss of certain family members, such as husbands, wives, children, grandparents, adult children, and even siblings in some jurisdictions.[224] The umbrella of relationships covered by consortium has been expanding for the last one hundred years.[225] Dogs and cats can fit comfortably under the consortium umbrella of intimate family members. Finally, animal consortium provides a ready answer to the very real problem that a person can intentionally and violently kill someone's companion animal and only owe the owner the nominal replacement cost of a new pet.

The law has started to recognize the special interest people place in their companion animals. These changes can be seen in the Uniform Probate Code allowing pet trusts,[226] restraining orders protecting victims and their pets,[227] and divorce proceedings considering the best interest of all concerned for companion animal custody.[228] Pets are truly a key fountain of emotional support, love, and friendship for family members. Science has empirically proven the human–companion animal bond exists by neurochemical data showing increases of dopamine and oxytocin with people and their pets, and positive physiological responses of heart rate, blood pressure, and triglycerides.[229] This proposal does not seek to give any legal rights to companion animals; instead, this article calls for the law to acknowledge the depth and reality of the bond between humans and animals that exists in millions of families across the land and to substantiate the pain and loss that occurs when a pet is violently torn from a family's life.

Judges have the power to adapt the common law by expanding the loss of consortium doctrine to address the issue of appropriate damages for intentionally killing a person's pet. Just as judges can empower juries to value lost relationships, legislatures may do the same by codifying the common law with the adaptions suggested above. For all of the above reasons, a cause of action for animal consortium under the loss of consortium doctrine should be made available to any owner whose companion animal is intentionally killed.

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223. *See supra* notes 114, 88–91 and accompanying text.
224. *See supra* notes 109–118 and accompanying text.
225. *See* discussion *supra* in Part III.a..
226. *See* discussion *supra* in Part III.g.1..
227. *See* discussion *supra* in Part III.g.2.
228. *See* discussion *supra* in Part III.g.3.
229. *See* discussion *supra* in Part III.e..

APPENDIX A

Effective: September 15, 2003
West's F.S.A. § 768.21
768.21. Damages

All potential beneficiaries of a recovery for wrongful death, including the decedent's estate, shall be identified in the complaint, and their relationships to the decedent shall be alleged. Damages may be awarded as follows:

(1) Each survivor may recover the value of lost support and services from the date of the decedent's injury to her or his death, with interest, and future loss of support and services from the date of death and reduced to present value. In evaluating loss of support and services, the survivor's relationship to the decedent, the amount of the decedent's probable net income available for distribution to the particular survivor, and the replacement value of the decedent's services to the survivor may be considered. In computing the duration of future losses, the joint life expectancies of the survivor and the decedent and the period of minority, in the case of healthy minor children, may be considered.

(2) The surviving spouse may also recover for loss of the decedent's companionship and protection and for mental pain and suffering from the date of injury.

(3) Minor children of the decedent, and all children of the decedent if there is no surviving spouse, may also recover for lost parental companionship, instruction, and guidance and for mental pain and suffering from the date of injury. For the purposes of this subsection, if both spouses die within 30 days of one another as a result of the same wrongful act or series of acts arising out of the same incident, each spouse is considered to have been predeceased by the other.

(4) Each parent of a deceased minor child may also recover for mental pain and suffering from the date of injury. Each parent of an adult child may also recover for mental pain and suffering if there are no other survivors.

(5) Medical or funeral expenses due to the decedent's injury or death may be recovered by a survivor who has paid them.

(6) The decedent's personal representative may recover for the decedent's estate the following:

(a) Loss of earnings of the deceased from the date of injury to the date of death, less lost support of survivors excluding contributions in kind, with interest. Loss of the prospective net

accumulations of an estate, which might reasonably have been expected but for the wrongful death, reduced to present money value, may also be recovered:

1. If the decedent's survivors include a surviving spouse or lineal descendants; or

2. If the decedent is not a minor child as defined in § 768.18(2), there are no lost support and services recoverable under subsection (1), and there is a surviving parent.

(b) Medical or funeral expenses due to the decedent's injury or death that have become a charge against her or his estate or that were paid by or on behalf of decedent, excluding amounts recoverable under subsection (5).

(c) Evidence of remarriage of the decedent's spouse is admissible.

(7) All awards for the decedent's estate are subject to the claims of creditors who have complied with the requirements of probate law concerning claims.

(8) The damages specified in subsection (3) shall not be recoverable by adult children and the damages specified in subsection (4) shall not be recoverable by parents of an adult child with respect to claims for medical negligence as defined by § 766.106(1).