

2004

## The Calculus of Animal Valuation: Crafting a Viable Remedy

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### Recommended Citation

Margit Livingston, *The Calculus of Animal Valuation: Crafting a Viable Remedy*, 82 Neb. L. Rev. (2003)

Available at: <https://digitalcommons.unl.edu/nlr/vol82/iss3/6>

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# The Calculus of Animal Valuation: Crafting a Viable Remedy

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## I. INTRODUCTION

For most of recorded history, the majority of legal systems have regarded domesticated animals as a species of property.<sup>2</sup> The classification of animals as property to be owned and used by humans has had ramifications throughout the law—for example, in the permissi-

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\* Professor of Law, DePaul University College of Law. This Article is dedicated to the memory of Max, whose worth, to me, was infinite. The DePaul University College of Law Summer Research Fund, Acting Dean Wayne K. Lewis and Dean Glen Weissenberger, provided much appreciated support for my efforts in writing this Article. I want to thank especially my research assistants, DePaul University law students Janice Alwin, Paige Barr, John Mueller, and Rudolph L. Oldeschulte, for their invaluable contributions to the research for this Article.

1. One scholar has included with the rubric of “ethereal torts” causes of action for “intangible or emotional injuries.” Nancy Levit, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136, 138-39 (1992).

2. See GARY L. FRANCIONE, *ANIMALS, PROPERTY, AND THE LAW* 33-49 (1995) (discussing the property status of animals).

ble degradation of the environment,<sup>3</sup> the sanctioning of hunting,<sup>4</sup> the legal use of animals in scientific experiments,<sup>5</sup> and the underenforcement of anti-cruelty laws.<sup>6</sup> One result of the law's classification of captive animals as private property can be seen in the tort system's valuation of animals.<sup>7</sup>

Most American jurisdictions allow the human owner<sup>8</sup> of an injured or destroyed animal to recover no more than the reasonable fair market value of the animal.<sup>9</sup> Fair market value is normally defined as the amount a willing buyer will pay for an item and the amount a willing seller will accept for the item where neither party is under a compulsion to engage in the transaction.<sup>10</sup> In the case of a purebred show animal, the damages could amount to several hundred dollars.<sup>11</sup> But

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3. For example, before the passage of contemporary environmental protection laws, the widespread use of insecticides resulted in the large-scale destruction of birds and mammals. RACHEL CARSON, *SILENT SPRING* 83-96 (1962).
  4. See, e.g., MICH. COMP. LAWS ANN. § 750.50b(8) (West 1991 & Supp. 2002); N.Y. AGRIC. & MKTS. LAW § 353-a.2 (McKinney 1998); N.C. GEN. STAT. § 14-360(c)(1) (2001).
  5. See, e.g., GA. CODE ANN. § 16-12-4(e) (1999 & Supp. 2001); IOWA CODE ANN. § 717B.2.11 (West Supp. 2002); KAN. STAT. ANN. § 21-4310(b)(2) (1995 & Supp. 2001); LA. REV. STAT. ANN. § 14:102.1A(1)(g) (West 1986 & Supp. 2002); WIS. STAT. ANN. § 951.02 (West 1996).
  6. See Margit Livingston, *Desecrating the Ark: Animal Abuse and the Law's Role in Prevention*, 87 IOWA L. REV. 1, 1-2 (2001).
  7. Some scholars have advocated that animals be no longer legally classified as property to be owned by humans and that they be accorded some minimal legal rights, such as the right to be free from unnecessarily cruel treatment. See generally STEVEN M. WISE, *RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS* (2000); David Favre, *Equitable Self-Ownership for Animals*, 50 DUKE L.J. 473 (2000); Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 N.Y.U. ENVTL. L.J. 531 (1998); Enger McCartney-Smith, *Can Nonhuman Animals Find Tort Protection in a Human-Centered Common Law?*, 4 ANIMAL L. 173 (1998); Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333 (2000).
  8. Throughout this Article, I use the terms "pet owner," "human guardian," "human caretaker," and the like interchangeably to refer to the person who is primarily responsible for the health, well-being, and actions of a domesticated animal that lives in or near the home and is kept largely for non-economic purposes. The term "pet owner," although disfavored by some animal rights advocates, reflects the current legal status of companion animals as personal property.
  9. See *infra* notes 32-37 and accompanying text.
  10. 1 DAN B. DOBBS, *LAW OF REMEDIES* 324 (2d ed. 1993).
  11. See *Clinton Couple Sues Town in Dog's Death*, BANGOR DAILY NEWS, Aug. 17, 2000, available at 2000 WL 22131930 (describing lawsuit seeking damages for \$1,500 as cost of plaintiffs' purebred terrier); Joyce Cohen, *Siamese, if You Please: Finding the Right Pet*, N.Y. TIMES, July 11, 2002, at G4 (noting that going rate for purebred Siamese kitten is \$500); Alexandra Rockey Fleming, *A Breed Apart; Show Dogs Compete for Prizes at Fairfax Event*, WASH. TIMES, Apr. 28, 2002, at D4 (stating that cost of purebred "pet quality" English setter is more than \$500, a show dog even more). Some domesticated animals, such as race horses, have the potential to earn millions in racing purses and breeding fees. See Joe Drape, *Triple Crown Legend is Gone: Seattle Slew Dies at 28*, N.Y. TIMES, May 8, 2002, at

where an ordinary household pet is killed, arguably the fair market value is zero.<sup>12</sup> Thus where an individual deliberately poisons a neighbor's mutt, the injured owner's recovery under tort law is usually minimal (unless the plaintiff can establish that the defendant's conduct was willful, wanton, or malicious, thereby entitling the plaintiff to punitive damages).<sup>13</sup> In this Article, I argue that the role of companion animals has evolved in our society to the point that the law should value a pet's loss at more than fair market value and, in particular, that the law should compensate the human companion of an animal that has been destroyed for the emotional distress and lost companionship that the human experiences because of the animal's death.<sup>14</sup>

Part I of this Article reviews the traditional method of valuing animals in tort cases and notes that some modern courts have expanded beyond the classic fair market value standard and have allowed pet owners to recover for the value of the pet to them or even for loss of affection and companionship.<sup>15</sup> Most courts, however, still value animals according to their fair market value, and Part I asserts that this method of valuation produces severe undercompensation of pet owners in many instances. Part II of this Article explores generally the development of tort recoveries for "ethereal" injuries—injuries to the psychic and the emotions.<sup>16</sup> Specifically, it discusses the evolution of derivative claims for loss of consortium and society, the abolition of certain claims for emotional distress such as alienation of affections and similar actions, and the increased recognition of claims for intentional and negligent infliction of emotional distress. Part II asserts that the same reasoning that led to an expansion of claims for ethereal injuries dictates that the courts afford some compensation for the emotional loss experienced because of the tortious injury to a companion animal.<sup>17</sup> It also notes that pet destruction cases can be analogized to nuisance claims, for which many states allow recovery of damages for mental anguish.<sup>18</sup>

Part III of this Article explores the social science literature that documents the emotional importance of companion animals to their human owners.<sup>19</sup> This section notes the essential companionate function served by domestic animals for people—especially, for those with-

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D1 (noting that famous race horse earned over one million dollars in purses and commanded \$750,000 per breeding).

12. See *infra* note 39 and accompanying text.

13. See *infra* notes 49-54 and accompanying text.

14. See *infra* notes 225-226 and accompanying text.

15. See *infra* notes 29-85 and accompanying text.

16. See *infra* notes 86-128 and accompanying text.

17. See *infra* notes 117-120 and accompanying text.

18. See *infra* notes 121-127 and accompanying text.

19. See *infra* notes 129-172 and accompanying text.

out human companions—and the psychic and physical benefits conferred on individuals who have a close attachment to a pet. Given the palpable benefits experienced by pet owners, Part III asserts that a proper system of tort compensation should afford something more than a minimal recovery for the wrongful death of a companion animal.<sup>20</sup>

Part IV of this Article proposes a new rule of compensation for the tortious destruction of companion animals that will afford a significant recovery to pet owners.<sup>21</sup> Initially, section IV.A addresses the general policy implications of compensating intangible losses in pet death cases and asserts that the fundamental policies of the tort compensation system are well served by recognizing such claims.<sup>22</sup> It explores the tort theories of compensation, deterrence, and reflection of societal values as well as the related remedial policies of corrective justice and economic efficiency. Section IV.B then analyzes the inadequacies of the current legal rules for valuing companion animals, including the fair market value standard and the “value to the owner” concept.<sup>23</sup>

Section IV.C of this Article elaborates on my proposal to compensate animal guardians in pet destruction cases for both the pecuniary and nonpecuniary components of their loss.<sup>24</sup> Under my proposed scheme, which could be adopted judicially or legislatively, human guardians of companion animals would be entitled to recover both for the fair market value (or the replacement cost, in some cases) of their animals and for the mental anguish and grief experienced as a result

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20. See *infra* notes 170-172 and accompanying text.

21. See *infra* notes 173-308 and accompanying text.

22. See *infra* notes 237-258 and accompanying text.

23. See *infra* notes 200-224 and accompanying text.

24. A number of recent articles have explored the issue of animal valuation and have concluded that the traditional market standard of compensation is outmoded. See generally Geordie Duckler, *The Economic Value of Companion Animals: A Legal and Anthropological Argument for Special Valuation*, 8 ANIMAL L. 199 (2002) (arguing that an animal's “special value” to the owner, as distinct from its market value, should be the basis for assigning animals monetary worth); Rebecca J. Huss, *Valuing Man's and Woman's Best Friend: The Moral and Legal Status of Companion Animals*, 86 MARQ. L. REV. 47 (2002) (asserting that veterinarians and other animal service providers should be liable for noneconomic damages, especially if reckless, willful, or wanton conduct is involved); Janice M. Pintar, Comment, *Negligent Infliction of Emotional Distress and the Fair Market Value Approach in Wisconsin: The Case for Extending Tort Protection to Companion Animals and Their Owners*, 2002 WIS. L. REV. 735 (2002) (urging Wisconsin to expand compensation to pet owners to include the actual value of the animal to the owner plus, in extraordinary situations, severe emotional distress); William C. Root, *Man's Best Friend: Property or Family Member? An Examination of the Legal Classification of Companion Animals and Its Impact on Damages Recoverable for Their Wrongful Death or Injury*, 47 VILL. L. REV. 423 (2002) (noting that the market value approach does not adequately compensate many companion animal owners whose pets have been wrongfully injured or killed).

of their animals' premature death.<sup>25</sup> In proving the extent of their mental distress, plaintiffs would be required to show the duration, nature, and quality of their relationship with the now deceased animal, and the court would instruct the trier of fact to consider such elements in setting damages for mental anguish. In addition, plaintiffs would be allowed to recover damages for the loss of companionship of their pet for a reasonable replacement period.<sup>26</sup> If enacted legislatively, this scheme, I argue, should include a cap on the total amount of damages for noneconomic losses associated with a pet's death. A cap would serve to allay concerns about possible excessive awards given by overly sympathetic juries.

Finally, in Section IV.D of this Article, I will also respond to the possible policy objections to my proposal and demonstrate that these objections can be overcome in a properly tailored compensation scheme.<sup>27</sup> In the end, I argue that the basic remedial purpose of compensation for injuries outweighs the proffered policy problems.<sup>28</sup>

## II. TRADITIONAL LEGAL METHODS OF VALUING ANIMALS

Historically, the courts have regarded domestic animals as, at most, a type of personal property like a buggy or a table.<sup>29</sup> In fact, the early common law did not even regard companion animals, such as dogs, as achieving the status of property,<sup>30</sup> though they later evolved to that status.<sup>31</sup> Because of these property-based notions of animals, tort law applied personal property concepts to the valuation of animals. Today, in almost all states, if an individual tortiously destroys another's animal, he or she is liable for the animal's fair market value.<sup>32</sup> Fair market value is generally defined as the price a willing

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25. See *infra* notes 225-231 and accompanying text.

26. See *infra* notes 229-230 and accompanying text.

27. See *infra* notes 259-308 and accompanying text.

28. *Id.*

29. See *Brown v. Eberly*, No. 99-1076, 2002 WL 31528675, at \*4 (E.D. Pa. Nov. 14, 2002); *Bobin v. Sammarco*, No. 94-5115, 1995 U.S. Dist. LEXIS 6671, at \*7-8 (E.D. Pa. May 17, 1995); 2 WILLIAM BLACKSTONE, COMMENTARIES \*390.

30. Under English common law individuals had only a very limited and qualified property interest in companion animals, such as dogs, cats, parrots, and singing birds. These animals were viewed as being kept at the owner's caprice, as having no intrinsic value, and as not being subject to an action for larceny. *Citizens' Rapid Transit Co. v. Dew*, 45 S.W. 790, 791 (Tenn. 1898); 2 WILLIAM BLACKSTONE, COMMENTARIES \*393. See also *Johnson v. McConnell*, 22 P. 219, 220 (Cal. 1889) (noting that dogs have "nearly always been held 'to be entitled to less regard and protection than more harmless domestic animals'").

31. *Altman v. City of High Point, N.C.*, 330 F.3d 194, 202 (4th Cir. 2003); *Roos v. Loeser*, 183 P. 204, 204-05 (Cal. Ct. App. 1919); *Hill v. Micham*, 157 N.E. 13, 14 (Ohio 1927); *White v. State*, 249 S.W.2d 877, 878 (Tenn. 1952).

32. *Richardson v. Fairbanks North Star Borough*, 705 P.2d 454, 456 (Alaska 1985); *Wells v. Brown*, 217 P.2d 995, 997-98 (Cal. Ct. App. 1950); *Nichols v. Sukaro Kennels*, 555 N.W.2d 689, 692 (Iowa 1996); *Uhlein v. Cromack*, 109 Mass. 273,

buyer will offer and a willing seller will accept, where neither is under a compulsion to act<sup>33</sup> and where each party has fairly extensive knowledge about the property being sold.<sup>34</sup> In the agrarian society of the eighteenth and nineteenth century, fair market value accurately reflected the true worth of most animals to their owners.<sup>35</sup> Cattle, oxen, horses, pigs, and other livestock were kept for commercial purposes.<sup>36</sup> The destruction of a head of cattle meant either that the owner had to buy a replacement on the open market, if the particular animal was being held for breeding purposes, or that the owner lost the ability to sell it for its fair market, if it was being held for sale. Even dogs and cats were valued more for their working abilities than as companion animals.<sup>37</sup>

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274 (1872); *Soucek v. Banham*, 524 N.W.2d 478, 481 (Minn. Ct. App. 1994); *Lewis v. DiDonna*, 743 N.Y.S.2d 186, 189 (N.Y. App. Div. 2002); *Melton v. South Shore U-Drive, Inc.*, 303 N.Y.S.2d 751, 752 (N.Y. App. Div. 1969); *Smith v. Palace Transp. Co.* 253 N.Y.S.2d 87, 88 (N.Y. Mun. Ct. 1931); *Green v. Leckington*, 236 P.2d 335, 340 (Or. 1951); *Dillon v. O'Connor*, 412 P.2d 126, 127-28 (Wash. 1966). If there is no market for the animal at the place of destruction, then the plaintiff may recover the animal's fair market value at the nearest market plus the cost of transportation to that market. *Leonard v. Fitchburg R.R.*, 9 N.E. 667, 668 (Mass. 1887); *Greenwald v. Yazoo & Miss. Valley R.R. Co.*, 76 So. 557, 557 (Miss. 1917). In addition, if an animal is merely injured, courts commonly award as damages the difference in the animal's fair market value before and after the injury. *Rosche v. Wayne Feed Div. Cont'l Grain Co.*, 447 N.W.2d 94, 96 (Wis. Ct. App. 1989). See generally *Robin Cheryl Miller, Damages for Killing or Injuring Dog*, 61 A.L.R. 5th 635 (1998) (noting the predominance of the market value standard).

33. *Finkelstein v. Dep't of Transp.*, 656 So. 2d 921, 924 (Fla. 1995); *McCurdy v. Union Pac. R.R. Co.*, 413 P.2d 617, 623 (Wash. 1966).
34. See *Landers v. Municipality of Anchorage*, 915 P.2d 614, 616 (Alaska 1996) (referring to a "fully informed seller" and a "fully informed buyer"); *City of San Diego v. Neumann*, 863 P.2d 725, 728 (Cal. 1993) (referring to both parties' having "full knowledge of all the uses and purposes for which the property is reasonably adaptable and available").
35. Nineteenth century courts were consistent in awarding market value for the loss of any living creature recognized as personal property. See *Ellis v. Welch*, 38 S.C.L. 468 (S.C. 1851) (sustaining award of value of escaped slave).
36. See, e.g., *Baltimore & Ohio R.R. Co. v. Brady*, 32 Md. 333, 339 (1870) (sustaining award of market value of cattle); *Atwood v. Boston Forwarding & Transfer Co.*, 71 N.E. 72, 72 (Mass. 1904) (upholding award of value of horse). Modern courts continue to apply the market value standard for measuring damages for the loss of animals held for commercial purposes, as well as those held as pets. *Snyder v. Bio-Lab, Inc.*, 405 N.Y.S.2d 596, 597 (N.Y. Sup. Ct. 1978).
37. Dogs, of course, served various functions in the rural home – for example, guarding, herding, and hunting. See, e.g., *Heiligmann v. Rose*, 16 S.W. 931, 932 (Tex. 1891) (guarding); *Bowers v. Horan*, 53 N.W. 535, 535 (Mich. 1892) (herding); *Mo. Pac. R.R. Co. v. Chase*, 23 S.W.2d 256, 257 (Ark. 1930) (hunting). Cats were essential in keeping down the rodent population. *Smith v. Steineauf*, 36 P.2d 995, 997 (Kan. 1934).

Today, some pets, in fact, do have a significant fair market value, especially purebred animals used for breeding purposes.<sup>38</sup> But most average cats and dogs have a negligible fair market value.<sup>39</sup> In light of this fact, some courts have hesitantly acknowledged that the plaintiff whose pet has been killed should be allowed to prove the pet's "value to the owner."<sup>40</sup> The concept of "value to the owner" has been recognized in a number of situations where destroyed personal property has no easily ascertainable fair market value or where fair market value produces an unfairly small compensation<sup>41</sup>—such as clothing, trophies, family photographs, and the like.<sup>42</sup> Although "value to the owner" is a substitute for the fair market value concept in tort cases, it is still theoretically predicated on some sort of pecuniary loss.<sup>43</sup> For example, an individual testifying as to the value of his

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38. See *Demeo v. Manville*, 386 N.E.2d 917, 918-19 (Ill. App. Ct. 1979) (awarding \$500 based on dog's "commercial value" as a show dog); *Quave v. Bardwell*, 449 So. 2d 81, 84 (La. Ct. App. 1984) (upholding award of \$2,500 for dog based on its breeding value); *Williams v. McMahan*, No. 26983-0-II, 2002 WL 242538, at \*2-3 (Wash. Ct. App. 2002) (holding that damages for breeding dog should be based on the dog's fair market value, which was said to be \$400).
  39. See *Ammon v. Welty*, 113 S.W.3d 185, 187 (Ky. Ct. App. 2002) ("It is undisputed that Hair Bear, an unregistered mixed breed with no particular training or skill other than as a companion, had no market value."); *Morgan v. Kroupa*, 702 A.2d 630, 632-33 (Vt. 1997) ("A pet dog generally has no substantial market value as such . . . . Like most pets, its worth is not primarily financial, but emotional.");
  40. See *Mitchell v. Heinrichs*, 27 P.3d 309, 313 (Alaska 2001) (adopting value to the owner approach for dog); *Ramey v. Collins*, No. 99CA2665, 2000 Ohio App. LEXIS 2540, at \*8 (Ohio Ct. App. June 5, 2000) (same); *McDonald v. Ohio State Univ. Veterinary Hosp.*, 644 N.E.2d 750, 752 (Ohio Ct. App. 1994) (awarding damages of \$5,000 for dog based on value to the owner standard). Cf. *Williams v. McMahan*, No. 26983-0-II, 2002 WL 242538, at \*2-3 (Wash. Ct. App. Feb. 15, 2002) (disallowing value to the owner approach where dog had a market value).
  41. See *Wall v. Platt*, 48 N.E. 270, 273 (Mass. 1897) ("In some cases there is no market value, properly speaking; and in others, if there is, it plainly would not of itself afford full indemnity.");
  42. See, e.g., *Sarkesian v. Cedric Chase Photographic Lab's, Inc.*, 87 N.E.2d 745, 746 (Mass. 1949) (applying value to the owner standard to destruction of roll of exposed film); *Crisp v. Security Nat'l Ins. Co.*, 369 S.W.2d 326, 328 (Tex. 1963) (holding that damages for household goods, clothing, and personal effects should be measured by their "value to the owner," excluding any fanciful or sentimental attachment).
  43. "Value to the owner" attempts to bridge the gap between fair market value and replacement cost. For household items and clothing, for example, fair market value is usually extremely low, either because there is not much of a market in used household items or because market participants will not pay much for used personal items, such as clothing that has been worn by someone else. The courts have assumed that awarding fair market value in this situation undercompensates the plaintiff because most plaintiffs will not replace their destroyed clothing or lamp in the used market. *Rutherford v. James*, 270 P. 794, 795 (N.M. 1928); *Lane v. Oil Delivery, Inc.*, 524 A.2d 405, 409 (N.J. Super. Ct. 1987). On the other hand, replacement value tends to overcompensate plaintiffs in these cases. A plaintiff who receives the replacement cost of her three-year-old used coat is able

wardrobe to him is expected to refer to the cost of the clothing when new, the age of the clothing when destroyed, the replacement cost, and other economic markers.<sup>44</sup> Hence, even under the "value to the owner" concept, the family pet may again fall short, and its loss may produce a minimal recovery because courts tie "value to the owner" to pecuniary considerations.<sup>45</sup>

Notwithstanding the strictures of traditional common law theories, a few courts have expanded the "value to the owner" concept to include sentimental or emotional attachment to the destroyed object.<sup>46</sup> In some cases, pet owners have been able to plead and prove damages resulting from the sentimental loss experienced upon their pet's death.<sup>47</sup> Even in these cases, however, the appellate courts have been hesitant to validate awards greater than a few hundred dollars.<sup>48</sup>

In addition, where the tortfeasor has intentionally or recklessly killed an animal, the courts have upheld awards of punitive damages,<sup>49</sup> but once again the recoveries have been relatively small. In *Wilson v. City of Eagan*, for example, the jury had awarded a total of \$5,000 in punitive damages against municipal officials who had destroyed the plaintiff's cat before the five-day impoundment period had expired.<sup>50</sup> The trial court reduced the punitive damages to \$500, and the Minnesota Supreme Court affirmed the reduction.<sup>51</sup> The supreme

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to buy a brand new coat, which presumably has a longer useful life and a more up-to-date style than the coat that was destroyed.

44. *Lane v. Oil Delivery, Inc.*, 524 A.2d 405, 409 (N.J. Super. Ct. 1987); *DeSpirito v. Bristol County Water Co.*, 227 A.2d 782, 784 (R.I. 1967).

45. *See McCallister v. Sappingfield*, 144 P. 432, 434 (Or. 1914) (noting that value of a dog to its owner should be based on the pecuniary value of its services or usefulness); *Bueckner v. Hamel*, 886 S.W.2d 368, 371 (Tex. Ct. App. 1994) (suggesting that a dog's value to its owner might be determined by the reasonably expected stud fees over the animal's life, discounted to present value).

46. *See, e.g., Bond v. A.H. Belo Corp.*, 602 S.W.2d 105, 109 (Tex. Ct. App. 1980) (holding that plaintiff could recover "the reasonable special value" of family papers and photographs to her, "taking into consideration the feelings of the owner for such property").

47. *See LaPorte v. Associated Indep's, Inc.*, 163 So. 2d 267, 269 (Fla. 1964) (allowing damages for the affection of an owner for her dog); *Jankoski v. Preiser Animal Hosp., Ltd.*, 510 N.E.2d 1084, 1087 (Ill. App. Ct. 1987) (allowing trial court to include some element of sentimental value for dog).

48. *See Jankoski*, 510 N.E.2d at 1087 ("It appears clear that damages in such cases, while not merely nominal, are severely circumscribed.").

49. *Parker v. Mise*, 27 Ala. 480, 483 (1855); *LaPorte v. Associated Indep's, Inc.* 163 So. 2d 267, 269 (Fla. 1964); *Burgess v. Taylor*, 44 S.W.3d 806, 810 (Ky. Ct. App. 2001); *Rimbaud v. Beiermeister*, 154 N.Y.S. 333, 334 (N.Y. App. Div. 1915); *Bueckner v. Hamel*, 886 S.W.2d 368, 372 (Tex. Ct. App. 1994). *But see Soucek v. Banham*, 524 N.W.2d 478, 481 (Minn. Ct. App. 1994) (disallowing punitive damages because action for death of pet was based on damage to property interest).

50. 297 N.W.2d 146, 147-48 (Minn. 1980). The jury had also awarded \$40 as compensatory damages. *Id.* at 148.

51. *Id.* at 151.

court stated that lower courts, in determining whether the amount of punitive damages is excessive, should consider "the degree of malice, intent, or willful disregard, the type of interest invaded, the amount needed to truly deter such conduct in the future, and the cost of bringing the suit."<sup>52</sup>

In assessing the appropriateness of punitive damage awards, some courts seemingly use a test of proportionality and examine whether the amount of punitive damages is proportional to the amount of actual damages awarded.<sup>53</sup> Many appellate courts feel uncomfortable with punitive awards that greatly exceed the amount of compensatory damages.<sup>54</sup> Because compensatory damages for loss of a companion animal have historically been so low, punitive damages have tended to be relatively low as well. As such, they may not adequately deter or punish reckless and intentional conduct that leads to a pet's death.

Some inventive plaintiffs have attempted to append a claim for loss of society and companionship<sup>55</sup> or for emotional anguish<sup>56</sup> to their complaints for destruction of their companion animals. Courts have rarely recognized such claims,<sup>57</sup> relying on a number of justifications,

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52. *Id.*

53. Some courts do not allow punitive damages to be awarded at all if there are no actual damages. *Porras v. Craig*, 675 S.W.2d 503, 505 (Tex. 1984). If a pet dog or cat has a negligible legal value, in many cases the plaintiff will receive neither compensatory nor punitive damages.

54. A number of United States Supreme Court cases have suggested that if punitive damages exceed compensatory damages by an extraordinarily large ratio, they may be "grossly excessive" under the Due Process Clause of the Fourteenth Amendment. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW, Inc. v. Gore*, 517 U.S. 559, 574-75 (1996); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 458 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991). Although the Court has consistently refused to recognize a bright line standard for what is an acceptable ratio between punitive and compensatory damages, it has indicated that overwhelmingly large ratios "raise a suspicious judicial eyebrow." *BMW, Inc.*, 517 U.S. at 583 (quoting *TXO Prod. Corp.*, 509 U.S. at 481 (O'Connor, J., dissenting)).

55. *Gluckman v. Am. Airlines, Inc.*, 844 F. Supp. 151, 158 (S.D.N.Y. 1994); *Jankoski v. Preiser Animal Hosp., Ltd.*, 510 N.E.2d 1084, 1085 (Ill. App. Ct. 1987); *Daughen v. Fox*, 539 A.2d 858, 859 (Pa. Super. Ct. 1988).

56. *LaPorte v. Associated Indep's, Inc.*, 163 So. 2d 267, 267 (Fla. 1964); *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1067 (Haw. 1981); *Nichols v. Sukaro Kennels*, 555 N.W.2d 689, 690 (Iowa 1996); *Fackler v. Genetzky*, 257 Neb. 130, 132, 595 N.W.2d 884, 887 (1999).

57. See *Soto v. United States*, No. 1:01-CV-117, 2001 U.S. Dist. LEXIS 10743, at \*8 (W.D. Mich. July 23, 2001), *aff'd*, No. 01-2331, 2003 U.S. App. LEXIS 7292 (6th Cir. Apr. 16, 2003) (denying emotional distress damages in the death of a pet); *Gluckman v. Am. Airlines, Inc.*, 844 F. Supp. 151, 158 (S.D.N.Y. 1994) (disallowing claim for loss of companionship for a pet's death); *Altieri v. Nanavati*, 573 A.2d 359, 361 (Conn. Super. Ct. 1990) (suggesting that emotional distress damages are not available in veterinary malpractice case); *Jankoski v. Preiser Animal Hosp., Ltd.*, 510 N.E.2d 1084, 1085 (Ill. App. Ct. 1987) (same); *Nichols v. Sukaro Kennels*, 555 N.W.2d 689, 691 (Iowa 1996) (denying damages for mental

including the traditional classification of animals as property<sup>58</sup> and the unavailability of noneconomic damages in the state wrongful death act.<sup>59</sup> Because the law classifies animals as personal property, the owner cannot experience a loss of the animal's companionship,<sup>60</sup> just as one cannot suffer the loss of companionship of a sofa or a car. Also, presumably as personal property, animals can be replaced. If one's sofa or car is destroyed, one buys another without much, if any, emotional disturbance. The same can be said of the loss of a pet—i.e., one can also obtain another cat, dog, or bird without any great difficulty, emotional or practical.<sup>61</sup>

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- anguish in the death of a pet); *Ammon v. Welty*, 113 S.W.3d 185, 187 (Ky. Ct. App. 2002) (same); *Fish v. Lyons*, No. 97-4145-E, 1998 Mass. Super. LEXIS 544, at \*13 (Mass. Super. Ct. Sept. 3, 1998) (same); *Krasnecky v. Meffen*, 777 N.E.2d 1286, 1289 (Mass. App. Ct. 2002); *Koester v. VCA Animal Hosp.*, 624 N.W.2d 209, 211 (Mich. Ct. App. 2000) (same); *Fackler v. Genetzky*, 257 Neb. 130, 138-39, 595 N.W.2d 884, 891-92 (1999) (same); *Johnson v. Douglas*, 723 N.Y.S. 2d 627, 628 (N.Y. Sup. Ct. 2001) (same); *Lewis v. DiDonna*, 743 N.Y.S.2d 186, 189 (N.Y. App. Div. 2002) (same); *Buchanan v. Stout*, 108 N.Y.S. 38, 39 (N.Y. App. Div. 1908) (same); *Lockett v. Hill*, 51 P.3d 5, 8 (Or. Ct. App. 2002) (same); *Daughen v. Fox*, 539 A.2d 858, 859 (Pa. Super. Ct. 1988) (same); *Zeid v. Pearce*, 953 S.W.2d 368, 369-70 (Tex. Ct. App. 1997) (same); *Williams v. McMahan*, No. 26983-0-II, 2002 WL 242538 (Wash. Ct. App. Feb. 15, 2002) (same); *Julian v. DeVincent*, 184 S.E.2d 535, 536 (W. Va. 1971). *But see* *McAdams v. Faulk*, No. CA01-1350, 2002 Ark. App. LEXIS 258, at \*13 (Ark. Ct. App. Apr. 24, 2002) (allowing pet owner damages for mental anguish); *Knowles Animal Hosp., Inc. v. Wills*, 360 So. 2d 37, 38 (Fla. Dist. Ct. App. 1978) (same); *Peloquin v. Calcasieu Parish Police Jury*, 367 So. 2d 1246, 1251 (La. Ct. App. 1979) (same); *City of Garland v. White*, 368 S.W.2d 12, 17 (Tex. Civ. App. 1963) (same). One court suggested that the plaintiff could recover for the mental suffering that she experienced upon her cat's wrongful death only if the defendant acted with malice or intent. *Paul v. Osceola County*, 388 So. 2d 40, 41 (Fla. Dist. Ct. App. 1980). *See generally* Jay M. Zitter, *Recovery of Damages for Emotional Distress Due to Treatment of Pets and Animals*, 91 A.L.R. 5th 545 (2001) (noting the split of authority on this issue).
58. *Johnson v. Douglas*, 723 N.Y.S.2d 627, 628 (N.Y. Sup. Ct. 2001) (“dog. . . is deemed to be personal property”).
59. Because the New Jersey wrongful death act did not allow recovery for loss of a child's or spouse's society, the court found it inconceivable that the loss of a pet's society should be compensable. *Harabes v. Barkery, Inc.*, 791 A.2d 1142, 1146 (N.J. Super. Ct. 2001).
60. One court restricted the notion of companionship to the marriage relationship: “[c]ompanionship is included in the concept of consortium, which is a right growing out of a marriage relationship giving to each spouse the right to the companionship, society and affection of each other in their life together.” *Daughen v. Fox*, 539 A.2d 858, 865 (Pa. Super. Ct. 1988).
61. In fact, given the hundreds of thousands of homeless animals in the United States, it is quite simple to obtain a pet at relatively low cost. *See* Rick Marin, *Worst in Show*, N.Y. TIMES, May 13, 2001, at B8 (stating the New York City shelter system alone processes several thousand dogs each year). A typical shelter requires an adoption fee of less than one hundred dollars to assist with operating costs. Sharon Barrett, *Pet Projects*, CHI. TRIB. MAG., July 28, 2002, at 15 (quoting an adoption fee of \$40-60); Joyce Cohen, *Siamese, if You Please: Finding the Right*

The emotional distress the owner feels upon the death of a companion animal is theoretically different from loss of companionship, but most courts have similarly refused claims for emotional distress damages.<sup>62</sup> Emotional distress could be characterized as the anguish and grief that one experiences upon learning of the demise of one's pet, in other words, the negative feelings associated with the unexpected loss.<sup>63</sup> Companionship, however, represents the ongoing positive aspects of the human-animal relationship, the friendship, attachment and pleasant experiences that are part of the relationship.<sup>64</sup> One could compensate for both elements, neither element, or one but not the other. Most courts have been no more willing to award damages for emotional distress in animal death cases than they have been inclined to give damages for loss of companionship.<sup>65</sup> Courts again ground this position in the status of animals as property<sup>66</sup> and the concern that awarding emotional distress damages for one species of property might lead to claims for mental anguish associated with the destruction of other types of property, such as cars, furniture, and clothing.<sup>67</sup> Just as one can have a favorite pet, one can also have a favorite pair of shoes.<sup>68</sup>

In addition to regarding animals as personal property, modern courts have also observed that actions for human decedents are governed strictly by statute, and if a novel remedy for animal destruction is to be created, the legislature is the appropriate body to fashion such

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*Pet*, N.Y. TIMES, July 11, 2002, at G4 (\$80). In addition, web-based pet-finding services now place homeless animals online. *Id.*

62. *Jason v. Parks*, 638 N.Y.S.2d 170, 170 (N.Y. App. Div. 1996).

63. *See Moore v. Lillebo*, 722 S.W.2d 683, 687 (Tex. 1986) ("Mental anguish represents an emotional response to the death itself").

64. *See* 3 JEROME H. NATES ET AL., DAMAGES IN TORT ACTIONS § 22.05[1] (2000) ("The loss of [society] represents a loss of the positive benefits that flowed to the family from the deceased's having been part of it.").

65. *See supra* note 57 and cases cited therein.

66. *Fackler v. Genetzky*, 257 Neb. 130, 138-39, 595 N.W.2d 884, 891 (1999).

67. Courts have not totally disallowed mental suffering damages associated with injuries to property. Some states have allowed plaintiffs to recover in trespass and nuisance actions for the emotional anguish endured as a result of the invasion of their interest in real property. *See, e.g., Fontenot v. Magnolia Petroleum Co.*, 80 So. 2d 845, 850 (La. 1955) (affirming damages for mental anguish where defendants' use of explosives on nearby property caused damage to the plaintiffs' property as well as disturbing them).

68. One court, however, had no difficulty distinguishing between attachment to a companion animal and attachment to other types of personal property: "An heirloom while it might be the source of good feelings is merely an inanimate object and is not capable of returning love and affection. It does not respond to human stimulation; it has no brain capable of displaying emotion which in turn causes a human response." *Corso v. Crawford Dog & Cat Hosp., Inc.*, 415 N.Y.S.2d 182, 183 (N.Y. Civ. Ct. 1979) (allowing plaintiff to recover for mental anguish associated with the wrongful disposal of her dog's body).

a remedy and to weigh the competing policy considerations.<sup>69</sup> Insofar as the wrongful death acts do not provide for a particular type of damages or a particular type of claimant, courts have been loath historically to expand the act to include novel claims.<sup>70</sup> Because traditional common law never recognized claims based on the wrongful death of humans,<sup>71</sup> judges are perhaps understandably reluctant to create a common law cause of action for the wrongful death of a pet.

In an attempt to sidestep the constraints of the traditional recoveries for destruction of personal property, some pet-owning plaintiffs have pursued another totally distinct type of claim—negligent<sup>72</sup> or intentional<sup>73</sup> infliction of emotional distress. In these claims, the plaintiffs are arguing that the defendants either deliberately or negligently inflicted emotional harm upon them through their wrongful actions. Both negligent and intentional infliction claims, however, often founder for different reasons. A claim for intentional infliction of emotional distress requires that the defendant deliberately or recklessly inflicted severe emotional harm upon the plaintiff, that the defendant engaged in “outrageous” conduct, and that such conduct caused the

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69. *Krasnecky v. Meffen*, 777 N.E.2d 1286, 1289-90 (Mass. App. Ct. 2002); *Koester v. VCA Animal Hosp.*, 624 N.W.2d 209, 211 (Mich. Ct. App. 2000); *Harabes v. Barkery, Inc.*, 791 A.2d 1142, 1146 (N.J. Super. Ct. 2001); *Rabideau v. City of Racine*, 627 N.W.2d 795, 807 (Wis. 2001) (Abrahamson, J., concurring).
70. For example, most jurisdictions hold that plaintiffs may not recover for the mental anguish suffered at the decedent's death, primarily because the federal and state wrongful death acts often authorize compensation for only “pecuniary loss.” *Miles v. Apex Marine Corp.*, 498 U.S. 19, 31-32 (1990); *Lundman v. McKown*, 530 N.W.2d 807, 829 (Minn. Ct. App. 1995); *Nelson v. Dolan*, 230 Neb. 840, 853-54, 434 N.W.2d 25, 29 (1989); *Carey v. Lovett*, 622 A.2d 1279, 1291 (N.J. 1993). Interestingly, however, many of the same courts allow wrongful death plaintiffs to recover for loss of the decedent's affection, companionship, and society even though those elements are nonpecuniary in nature. 3 JEROME H. NATES ET AL., *DAMAGES IN TORT ACTIONS* § 22.06[3] (2002).
71. 2 DAN B. DOBBS, *THE LAW OF TORTS* 803 (2001).
72. *Gluckman v. Am. Airlines, Inc.*, 844 F. Supp. 151, 157 (S.D.N.Y. 1994); *Kaiser v. United States*, 761 F. Supp. 150, 156 (D.D.C. 1991); *Roman v. Carroll*, 621 P.2d 307, 308 (Ariz. Ct. App. 1980); *Rees v. Flaherty*, No. CV010077316, 2003 Conn. Super. LEXIS 289, at \*2-3 (Conn. Super. Ct. Feb. 6, 2003); *Perry v. Valley Cottage Animal Hosp.*, 690 N.Y.S.2d 617, 618 (N.Y. App. Div. 1999); *Fowler v. Town of Ticonderoga*, 516 N.Y.S.2d 368, 370 (N.Y. App. Div. 1987); *Rabideau v. City of Racine*, 627 N.W.2d 795, 800 (Wis. 2001).
73. *Brown v. Muhlenberg Township*, 269 F.3d 205, 217 (3rd Cir. 2001); *Snyder v. Seidelman*, No. 5:94:CV:90, 1995 U.S. Dist. LEXIS 11582, at \*10 (W.D. Mich. July 7, 1995); *Mitchell v. Heinrichs*, 27 P.3d 309, 311 (Alaska 2001); *Katsaris v. Cook*, 225 Cal. Rptr. 531, 537 (Cal. Ct. App. 1986); *Burgess v. Taylor*, 44 S.W.3d 806, 811 (Ky. Ct. App. 2001); *Sprague v. Batchelder*, No. 94-231, 1995 Me. Super. LEXIS 110, at \*2 (Me. Super. Ct. Mar. 17, 1995); *Kautzman v. McDonald*, 621 N.W.2d 871, 876 (N.D. 2001); *Miller v. Peraino*, 626 A.2d 637, 640 (Pa. Super. Ct. 1993); *Daughen v. Fox*, 539 A.2d 858, 864 (Pa. Super. Ct. 1988).

plaintiff severe emotional distress.<sup>74</sup> Often, it is difficult for plaintiffs to show that the defendant had the requisite intent. In one case, for example, the court found that a defendant veterinarian's misconduct was focused on the plaintiffs' dog, not upon the plaintiffs themselves.<sup>75</sup> Moreover, the defendant's conduct may not be considered "outrageous" in many instances – e.g., the defendant kills the plaintiff's dog who is chasing the defendant's livestock on the defendant's own property.<sup>76</sup> Pet owners have occasionally succeeded in pressing intentional infliction claims where the defendant's actions in killing the plaintiff's animal were particularly vicious and malicious.<sup>77</sup>

Jurisdictions vary widely in the exact requisites for a claim for negligent infliction of emotional distress.<sup>78</sup> Most states require that plaintiffs pressing "bystander" claims<sup>79</sup> have witnessed the accident

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74. *Miller v. Peraino*, 626 A.2d 637, 640 (Pa. Super. Ct. 1993); RESTATEMENT (SECOND) OF TORTS § 46(1) (1965). In judging whether particular conduct is outrageous, courts normally consider the sensibilities of the average member of the community. *Brown v. Muhlenberg Township*, 269 F.3d 205, 218 (3rd Cir. 2001). Some cases hold that, additionally, the "outrageousness of the conduct may arise instead . . . from the actor's knowledge of the plaintiff's particular susceptibility." *Katsaris v. Cook*, 225 Cal. Rptr. 531, 537 (Cal. Ct. App. 1986).
75. *Daughen v. Fox*, 539 A.2d 858, 864 (Pa. Super. Ct. 1988).
76. *Mitchell v. Heinrichs*, 27 P.3d 309, 312 (Alaska 2001); *see also Kautzman v. McDonald*, 621 N.W.2d 871, 877 (N.D. 2001) (holding that the deputy sheriff's conduct in shooting some free-roaming dogs could not be considered "outrageous" where the dogs appeared aggressive); *Fish v. Lyons*, No. 97-4145-E, 1998 Mass. Super. LEXIS 544, at \*12 (Mass. Super. Ct. Sept. 3, 1998) (holding that, as a matter of law, the defendant's statement to the plaintiff that he, after killing the plaintiff's dog, had the "dog's head in a bucket ready to go to the state lab for testing" was not outrageous or "utterly intolerable in a civilized community").
77. *See, e.g., Burgess v. Taylor*, 44 S.W.3d 806, 809-11 (Ky. Ct. App. 2001) (sustaining an award of compensatory and punitive damages based on intentional infliction of emotional distress where the defendants, after agreeing to care for the plaintiff's horses, sold them to a "known slaughter-buyer"); *Lawrence v. Stanford*, 655 S.W.2d 927, 930 (Tenn. 1983) (noting that the plaintiff's veterinarian's threat to "do away" with the plaintiff's dog was "outrageous and extreme and . . . not tolerable in a civilized society").
78. 2 DAN B. DOBBS, *THE LAW OF TORTS* 836-38 (2001). California, for example, recognizes three categories of claims for negligent infliction of emotional distress: (1) those founded on a special relationship between the plaintiff and the defendant – e.g., patient-therapist; (2) those where the plaintiff is the direct object of some aspect of the defendant's conduct; and (3) bystander cases, where the plaintiff witnessed a physical injury to a close relative caused by the defendant's negligence. *Christensen v. Superior Ct.*, 271 Cal. Rptr. 360, 374 (Cal. Ct. App. 1990).
79. Those states allowing "direct victim" claims for negligent infliction of emotional distress normally have stringent requirements for such claims. They often require that the plaintiff's emotional distress have manifested itself in some concrete and definable physical injury. *Stites v. Sundstrand Heat Transfer, Inc.*, 660 F. Supp. 1516, 1516 (W.D. Mich. 1987). Under this standard, mere emotional anguish without corresponding physical symptoms would be insufficient. *See Soto v. United States*, No. 1:01-CV-117, 2001 U.S. Dist. LEXIS 10743, at \*8 (W.D. Mich. July 23, 2001), *aff'd*, No. 01-2331, 2003 U.S. App. LEXIS 7292 (6th Cir.

in which the loved one was killed, or at least the accident's immediate aftermath.<sup>80</sup> As a result, many pet-owning plaintiffs would have no claim if the pet were killed outside of their presence.<sup>81</sup> Even if the plaintiff had observed the accident, many courts would not consider a pet to be within the class of "close relatives" whose injury might produce compensable emotional distress in the plaintiff-bystander.<sup>82</sup>

In sum, then, the fair market value standard of compensation arguably has left many pet-owning plaintiffs with the prospect of minimal recoveries where a defendant negligently or intentionally destroys their companion animals.<sup>83</sup> Although a few courts have adopted the "value to the owner" standard in an effort to compensate plaintiffs more fully, recoveries overall remain low. Most courts refuse to recognize any liability for emotional anguish or loss of companionship in these cases, and claims for intentional or negligent infliction of emotional distress have largely failed as well.

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Apr. 16, 2003) (denying plaintiff-dog owner's claim for negligent infliction of emotional distress because of a lack of physical injury). A few courts recognize direct claims for negligent infliction where the plaintiff and the defendant have a special relationship, such as patient-physician. *Burgess v. Superior Ct.*, 831 P.2d 1197, 1204 (Cal. 1992). The "special relationship" criterion conceivably opens the door to pet owners' asserting negligent infliction claims based on their relationship with their veterinarian.

80. *See Bowen v. Lumbermens Mut. Cas. Co.*, 517 N.W.2d 432, 444-45 (Wis. 1994) (rejecting the "zone of danger" rule but requiring that the plaintiff have "observed an extraordinary event" – in this case, her fatally injured son trapped in the automobile wreckage).
81. *See Sprague v. Batchelder*, No. 94-231, 1995 Me. Super. LEXIS 110, at \*4 (Me. Super. Ct. Mar. 17, 1995) (denying the plaintiff's claim for negligent infliction of emotional distress under the bystander rule).
82. *See Zeid v. Pearce*, 953 S.W.2d 368, 369 (Tex. Ct. App. 1997) (disallowing a bystander claim for mental anguish caused by veterinary malpractice); *Rabideau v. City of Racine*, 627 N.W.2d 795, 801 (Wis. 2001) (denying a negligent infliction claim based on the lack of familial relationship between the plaintiff and her dog).
83. Given the legal classification of companion animals as property, some plaintiffs have asserted claims under the Fourteenth Amendment Due Process Clause where animal control or police officers have killed their animals. They have argued that where a government official destroys their pets, they have been deprived of their property without due process of law. Courts have unanimously rejected such claims. Because most pet killings result from the random conduct of local authorities, the state has no opportunity to provide a pre-deprivation process. As long as the government provides some post-deprivation process, such as an action for conversion, there is no due process violation. Instead, a plaintiff would have a constitutional claim, if at all, for unreasonable seizure of personal property under the Fourth Amendment. *Brown v. Muhlenberg Township*, 269 F.3d 205, 213-14 (3rd Cir. 2001); *Bell v. City of Louisville*, No. 3:00CV-311-S, 2000 U.S. Dist. LEXIS 21674, at \*26-28 (W.D. Ky. Nov. 6, 2000); *Newsome v. Erwin*, 137 F. Supp. 2d 934, 943 n.9 (S.D. Ohio 2000); *Ivey v. Hamlin*, No. M2001-01310-COA-R3-CV, 2002 Tenn. App. LEXIS 404, \*14-15 (Tenn. Ct. App. June 7, 2002).

Much of the courts' unease with acknowledging the intangible losses associated with a pet's death and giving some meaningful compensation for them stems from the traditional policy objections conferred whenever expanded tort liability is looming.<sup>84</sup> But these policy concerns have not ultimately prevented courts and legislatures from providing compensation for noneconomic injuries in appropriate circumstances. In the next part of this Article, I examine what circumstances have been deemed "appropriate" and "inappropriate" and argue that at least some compensation for the intangible losses stemming from a companion animal's destruction falls on the "appropriate" side of the ledger.<sup>85</sup>

### III. THE GROWING RECOGNITION OF ETHEREAL CLAIMS<sup>86</sup>

Anglo-American law has always had an uneasy relationship with claims based on an emotional or relational injury. For at least two hundred years American courts have recognized emotional anguish as a proper element for compensation in cases involving physical injury.<sup>87</sup> The common law, on the other hand, was much more reluctant to award damages for mental suffering that was not associated with a direct physical injury to the plaintiff.<sup>88</sup> Only gradually did courts come to recognize emotional injury by itself as a properly compensable injury.<sup>89</sup>

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84. See *infra* note 259 and accompanying text.

85. One court observed that pet owners do not view their animals in economic terms: "[W]e are mindful that anyone who has enjoyed the companionship and affection of a pet will often spend far in excess of any possible market value to maintain or prolong its life." *Paul v. Osceola County*, 388 So. 2d 40, 40 (Fla. Dist. Ct. App. 1980).

86. One scholar has included with the rubric of "ethereal torts" causes of action for "intangible or emotional injuries." Nancy Levit, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136, 138-39 (1992).

87. *Plummer v. Webb*, 19 F. Cas. 894, 896 (D. Me. 1825); *Seffert v. L.A. Transit Lines*, 364 P.2d 337, 342-43 (Cal. 1961); *Linsley v. Bushnell*, 15 Conn. 225, 236 (1842); *Worster v. Proprietors of Canal Bridge*, 33 Mass. 541, 547 (1835); *Jones v. Commonwealth*, 40 Va. 748, 753 (1842).

88. See, e.g., *Canning v. Inhabitants of Williamstown*, 55 Mass. 451, 452 (1848) (noting that mere fright and mental suffering without a physical injury were not compensable injuries).

89. See Levit, *supra* note 86, at 140-45; see also CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 319-22 (1935); Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CALIF. L. REV. 772, 772-73 (1985); Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1067 (1936). Some early cases, however, appear to provide recovery in special circumstances for mental anguish without an accompanying physical injury. See *Chamberlain v. Chandler*, 5 F. Cas. 413, 415 (D. Mass. 1823) ("[The law] gives compensation for mental sufferings occasioned by acts of wanton injustice, equally whether they operate by way of direct, or of consequential injuries."); *Reed v. Davis*, 21 Mass. 216, 218-19 (1826) (awarding damages for mental anguish where plaintiffs were wrongfully evicted from their home); *Vanhorn v.*

As the common law expanded to encompass emotional and relational injuries, courts began to allow claims for intentional and negligent infliction of emotional distress. The stringent requirements for those claims, however, limited their utility. Plaintiffs in intentional infliction cases had to show that the defendant's conduct was intentional or reckless and was "outrageous," namely beyond the bounds of decency in a civilized society.<sup>90</sup> Negligent infliction claims were cabined by requiring that plaintiffs have some sort of physical proximity to the scene of the tortfeasor's negligence and/or some kind of relational proximity to the physically injured victims.<sup>91</sup>

Disturbance of emotional tranquility was at the heart of both intentional and negligent infliction claims. In allowing these claims, courts acknowledged that individuals suffer a genuine injury when their peace of mind is unjustifiably disturbed and that the law should protect not only interests in bodily integrity and private property, but also psychic interests.<sup>92</sup> Humans are emotional creatures, and a civi-

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Freeman, 6 N.J.L. 322, 327-28 (1796) (allowing a father to recover for the "debauching" of his daughter and the mental suffering associated with it).

90. To prove a claim for intentional infliction of emotional distress, plaintiffs typically have to show four elements: (1) the wrongdoer's conduct must be intentional or reckless; (2) the conduct must be outrageous and intolerable; (3) the conduct must have caused the plaintiff's emotional distress; and (4) the emotional distress must be severe. *Humana of Ky., Inc. v. Seitz*, 796 S.W.2d 1, 2-3 (Ky. 1990). In assessing whether or not defendant's conduct was outrageous, courts are directed to consider whether "the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" RESTATEMENT (SECOND) OF TORTS § 46, cmt. d (1965).
91. Many negligent infliction claims have been brought by bystanders – those who witnessed the physical injury to another but were not physically injured themselves. In the beginning, courts restricted such claims to those bystanders who either received some physical impact, however slight, or who were in the "zone of danger" and conceivably could have been physically injured. See *Keck v. Jackson*, 593 P.2d 668, 670 (Ariz. 1979) (applying the "zone of danger" rule); *Reynolds v. State Farm Mut. Auto. Ins. Co.*, 611 So. 2d 1294, 1297 (Fla. Dist. Ct. App. 1992) (applying the impact rule). Some courts also required that the emotional distress be manifested in physical symptoms. *Ver Hagen v. Gibbons*, 177 N.W.2d 83, 86 (Wis. 1970). Many modern courts have abandoned the "impact" and "zone of danger" limitations but still, as one court stated, "have imposed relational, temporal, and spatial limits on the scope of liability for emotional harm." *Migliori v. Airborne Freight Corp.*, 690 N.E.2d 413, 415 (Mass. 1998). In refusing a negligent infliction claim by an attempted rescuer of an unrelated injured victim, that court limited bystander claims for negligent infliction to a "plaintiff who is closely related to a third person directly injured by defendant's tortious conduct, and suffers emotional injuries as a result of witnessing the accident or coming upon the third person soon after the accident." *Id.* In addition, a number of contemporary courts no longer require that the plaintiff suffer physical symptoms as a result of the emotional distress. *Bowen v. Lumbermens Mut. Cas. Co.*, 517 N.W.2d 432, 443 (Wis. 1994).
92. One court observed that by recognizing emotional distress claims, courts have "accepted both freedom from emotional distress as an interest worthy of protection in its own right, and the proposition that it is possible to quantify and com-

lized society should safeguard mental wellbeing as well as physical health.<sup>93</sup> Mental anguish also has wider social ramifications and can lead to physical ills, lost productivity, family disruption, and even death.<sup>94</sup>

At the same time, by imposing fairly stringent requisites on emotional distress claims, the courts are expressing some hesitancy in allowing unfettered recoveries for the emotional ills that beset us, even if those ills can be traced to another's negligent or intentionally wrongful act. A number of traditional justifications for this hesitancy have been put forward, many of which are discussed in greater detail below.<sup>95</sup> These justifications include fear of fraudulent claims, concerns about disproportionate liability and excessive compensation, and the difficulty of accurately quantifying the loss.<sup>96</sup> At bottom, courts refusing or limiting emotional distress claims may simply dislike the idea of the defendant's having to recompense the plaintiff for the latter's mental anguish untethered to any physical injury. Everyone's life has its share of woes, and it is unclear when someone's hurtful actions toward another should result in liability for the latter's injured feelings.<sup>97</sup> Each individual, it can be argued, is responsible for maintaining his/her own psychic equilibrium.

This view of self-responsibility is certainly part of the reason that the most common claims for intangible loss in the nineteenth century, namely alienation of affections<sup>98</sup> and criminal conversation,<sup>99</sup> had all

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pensate for the invasion of that interest through an award of monetary damages." *Thing v. La Chusa*, 771 P.2d 814, 817 (Cal. 1989).

93. Professor Ingber has noted that "this broadening of liability for psychic injuries [is] parallel to the growth of a 'me-generation' striving for self-awareness, personal well-being, health, and psychic security. This cultural focus on the need for 'inner peace' and the value of psychological therapy suggests that society perceives intangible injuries as real and that fairness demands that the tort system should provide some method of redress to victims of such injuries." Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 773 (1985) (footnotes omitted).
94. *See, e.g.*, *Dziokonski v. Babineau*, 380 N.E.2d 1295, 1296 (Mass. 1978) (stating that the mother and father of a child injured in an automobile accident allegedly died as a result of the emotional shock of their child's accident).
95. *See infra* notes 260-308 and accompanying text.
96. *See Dillon v. Legg*, 441 P.2d 912, 917 (Cal. 1968) (summarizing the policy objections to claims for negligent infliction of emotional distress).
97. One court thoughtfully observed: "Emotional distress is an intangible condition experienced by most persons, even absent negligence, at some time during their lives . . . . That relatives [of injured persons] will have severe emotional distress is an unavoidable aspect of the 'human condition.'" *Thing v. La Chusa*, 771 P.2d 814, 828-29 (Cal. 1989).
98. In an action for alienation of affections, the plaintiff needs to show that the defendant caused the destruction of an affectionate relationship between the plaintiff and the plaintiff's spouse. RESTATEMENT (SECOND) OF TORTS § 683 (1977).
99. Criminal conversation is the defendant's adulterous liaison with the plaintiff's spouse. *Id.* § 685.

but disappeared by the mid-twentieth century. By the end of the twentieth century, the vast majority of states had legislatively abolished the so-called "heart balm" tort actions.<sup>100</sup> Although these claims sprang from the notion of marriage as embodying property rights – particularly, of the husband in his wife's affections – the damages awarded were based, at least in part, on the loss of the emotional tie between the spouses. The plaintiff could recover for the loss of his spouse's consortium in the criminal conversation action, and the loss of her affections in the alienation action.<sup>101</sup>

In urging the abolition of heart balm torts, commentators cited several policy concerns. Noting that these torts originated from outmoded property-based concepts of marriage, they argued that the modern view of marriage as a voluntary association between a man and a woman was incongruent with the injured spouse's ability to recover damages from a third party for "luring away" his spouse.<sup>102</sup> The heart balm actions could have survived in a different form, as recompense for the wounded feelings of the faithful spouse. But, perhaps on the theory that the law cannot realistically compensate everyone for the hurtful emotions engendered by others' behavior, legislatures and courts chose to abolish such claims.<sup>103</sup>

While heart balm actions foundered and negligent and intentional infliction claims developed slowly, the law has expanded fairly rapidly and consistently with respect to compensating for the loss of a spouse or child. Originally, English and American law did not award any damages to the survivors of an individual wrongfully killed by another.<sup>104</sup> Thus, it was said to be cheaper for the tortfeasor to finish off his/her victim than to allow that person to live and press a suit for

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100. Jill Jones, Comment, *Fanning an Old Flame: Alienation of Affections and Criminal Conversation Revisited*, 26 PEPP. L. REV. 61, 69-70 (1998).

101. Marshall L. Davidson, III, Comment, *Stealing Love in Tennessee: The Thief Goes Free*, 56 TENN. L. REV. 629, 640-42, 653 (1989).

102. See *Fundermann v. Mickelson*, 304 N.W.2d 790, 794 (Iowa 1981) (stating that "spousal love is not property which is subject to theft").

103. See Jennifer E. McDougal, Comment, *Legislating Morality: The Actions for Alienation of Affections and Criminal Conversation in North Carolina*, 33 WAKE FOREST L. REV. 163, 183-84 (1998) (noting the incongruity of providing monetary compensation for this type of emotional injury). See also *Nelson v. Jacobsen*, 669 P.2d 1207, 1228-29 (Utah 1983) (observing that the law has never recognized a cause of action by one spouse against the other for "failure to love").

104. The roots of the English common law prohibition against wrongful death claims can be found in the felony-merger doctrine. See W.S. Holdsworth, *The Origin of the Rule in Baker v. Bolton*, 32 L.Q. REV. 431, 432 (1916). Under this doctrine a tort that also constituted a felony merged into the felony, essentially eliminating the civil action for damages. See *Smith v. Sykes*, 89 Eng. Rep. 160, 160 (K.B. 1677). The punishment for a felony was generally the death of the felon and the forfeiture of his property to the Crown. Thus, any tort action against the felon would have produced no recovery. As a result of the classification of all negligent and intentional homicides as felonies, the felony-merger doctrine eliminated all

personal injury.<sup>105</sup> Great Britain acknowledged this anomaly in the law with the passage of Lord Campbell's Act in 1846.<sup>106</sup> Lord Campbell's Act created the first cause of action for wrongful death and allowed a statutory class of survivors to recover for their pecuniary loss.<sup>107</sup> Most often, this "pecuniary loss" took the form of earnings and services that the decedent would have contributed to the household had he or she lived.<sup>108</sup>

Initially, courts were reluctant to interpret the wrongful death acts as authorizing any recovery for the emotional attachment that the plaintiffs had enjoyed with the decedent and that had been severed by the defendant's wrongful act.<sup>109</sup> Some courts, however, allowed husbands to recover for the loss of their wives' consortium, which included affection, companionship, sexual relations, and the like.<sup>110</sup> Eventually, most states recognized the consortium claim and equalized it to allow wives to seek the lost consortium of their husbands who were wrongfully killed.<sup>111</sup> The consortium claim also came to be recognized where the injured victim survived with debilitating injuries.<sup>112</sup>

Over the years, plaintiffs in wrongful death actions began to press for expansion of the consortium claim to include other family members. They argued that where individuals are killed, their children, as well as their spouse, experience the loss of their affection, companion-

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civil suits for wrongful death. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 382 (1970).

105. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 945 (5th ed. 1984).
106. Lord Campbell's Act (Fatal Accidents Act), 1846, 9 & 10 Vict., c. 93 (Eng.).
107. The action was "for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused." *Id.*
108. See, e.g., *Lustick v. Hall*, 403 N.E.2d 1128, 1131 (Ind. Ct. App. 1980) (defining pecuniary loss under Indiana law as "the reasonable expectation of pecuniary benefit from the continued life of the deceased, to be inferred from proof of assistance by way of money, services or other material benefits rendered by the deceased prior to his death").
109. See *Green v. Bittner*, 424 A.2d 210, 211 (N.J. 1980); *Kaplan v. Sparks*, 596 N.Y.S.2d 279, 280 (N.Y. App. Div. 1993).
110. Initially, the claim for lost consortium was restricted to husbands alone and was predicated on the theory that husbands possessed a kind of property interest in their wives: "This, then, is the soil in which the doctrine took root; the abject subservience of wife to husband, her legal nonexistence, her degraded position as a combination vessel, chattel, and household drudge whose obedience might be enforced by personal chastisement." *Montgomery v. Stephan*, 101 N.W.2d 227, 230 (Mich. 1960).
111. As early as 1899, a state supreme court recognized that wives as well as husbands should be allowed to recover for the loss of their spouse's society caused by the spouse's wrongful death. *Florida Cent. & P. R. Co. v. Foxworth*, 25 So. 338, 348 (Fla. 1899).
112. See *Ferriter v. Daniel O'Connell's Sons, Inc.*, 413 N.E.2d 690, 702-03 (Mass. 1980); *Millington v. Southeastern Elevator Co., Inc.*, 239 N.E.2d 897, 902-03 (N.Y. 1968).

ship, guidance, and counsel.<sup>113</sup> Similarly, parents whose child dies because of another's negligence lose the society of that child.<sup>114</sup> Particularly where the decedent was a child, the traditional wrongful death recovery predicated on a pecuniary loss became increasingly meaningless. Although children may have had some economic value to the family unit as farm or factory workers in the nineteenth century, in modern society children are frequently an economic liability to their parents, requiring years of education and other financial support.<sup>115</sup> Many states began to accept the argument that, especially in the context of the wrongful death acts, the worth of a child decedent's life equates primarily with the value of that child's affection and companionship within the family.<sup>116</sup>

Like the position of children in society, the place of animals has changed dramatically over the last one hundred years. Originally valued almost exclusively for their income-producing capacity, animals are now often regarded as members of the family and esteemed for the love, loyalty, and companionship that they provide.<sup>117</sup> Certainly, many domestic animals, such as cattle, sheep, and chickens, are still

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113. See *Todd v. Sauls*, 647 So. 2d 1366, 1382 (La. Ct. App. 1994); *Fibreboard Corp. v. Pool*, 813 S.W.2d 658, 684 (Tex. Ct. App. 1991).

114. See, e.g., *Hancock v. Chattanooga-Hamilton County Hosp. Auth.*, 54 S.W.3d 234, 236 (Tenn. 2001) (recognizing a claim for loss of filial consortium in a wrongful death case).

115. One scholar noted the obviously fictional nature of damages for loss of a child's services:

Honest application of a pecuniary standard does not, in today's world, allow adequate recovery for child-death. The cost-accounting technique for measuring damages (value of services less cost of support) is archaic in a society which is not structured on child labor and the family chore framework of an agricultural community . . . . [B]oth court and legislature have recognized that today the injury sustained by a parent on the death of his child is not primarily economic . . . [but] emotional and mental . . . .

Note, *Wrongful Death of a Minor Child: The Changing Parental Injury*, 43 WASH. L. REV. 654, 655-656, 668 (1968) (footnotes omitted).

116. See *Poyser v. United States*, 602 F. Supp. 436, 440 (D. Mass. 1984); *Gillispie v. Beta Constr. Co.*, 842 P.2d 1272, 1273-74 (Alaska 1992); *Johnson v. Washington County*, 506 N.W.2d 632, 640 (Minn. Ct. App. 1993); *Hopkins v. McBane*, 427 N.W.2d 85, 92 (N.D. 1988). Some state wrongful death statutes explicitly provide for recovery of a minor child's society. See, e.g., VT. STAT. ANN. tit. 14, § 1492(b) (2002) ("where the decedent is a minor child, the term pecuniary injuries shall also include the loss of love and companionship of the child and for the destruction of the parent-child relationship").

117. Although pet-keeping has often been viewed as "a largely western phenomenon, fostered by modern urbanization, material affluence and bourgeois sentimentality," this view is inaccurate. Many traditional hunting and gathering societies keep certain animals as "social companions, as honorary members of the human family." James Serpell & Elizabeth Paul, *Pets and the Development of Positive Attitudes to Animals*, in ANIMALS AND HUMAN SOCIETY: CHANGING PERSPECTIVES 127, 129-30 (Aubrey Manning & James Serpell eds., 1994).

valued primarily for their economic worth, but companion animals that live in or near the family home contribute much more in terms of their society than they do in terms of their services.<sup>118</sup> When an animal dies, the human caretaker often experiences considerable grief and anguish.<sup>119</sup>

Courts and legislatures may choose whether to expand the remedies available in pet destruction cases or to retain the status quo. In making that choice, they inevitably will be guided by the perceived wisdom of affording pet owners some compensation for their emotional attachment to their pets in light of the general reluctance to afford damages for mental suffering without physical injury. Policymakers might ask themselves whether the loss of one's companion animal, even through another's negligent or intentional act, is one of those emotional traumas that one simply must endure, such as the loss of one's spouse's affections to another or the breaking off of an engagement. Or is it more akin to the anguish felt upon the negligent death of a child or the witnessing of a profound injury to a loved one? At the crux of the alienation of affections claim, one finds the severance of a formerly close bond through the presumably voluntary actions of one of the partners.<sup>120</sup> It is perhaps difficult to see the purpose in awarding damages to the injured partner in a relationship that presupposes the willingness and mutual participation of both parties.

But plaintiffs whose animals are destroyed by the tortfeasor suffer the involuntary disruption of their bond with their pets. In that sense, they are more closely akin to the plaintiff who endures emotional distress because of the wrongful death of their spouse or child or because of witnessing a devastating accident to a loved one. Both the plaintiff and the physically injured person presumably wished to continue their relationship, which the tortfeasor ended in wrongful death situations or damaged in non-death cases.

Even if courts and legislatures stubbornly adhere to the idea of pets as property of their human companions, one could still justify awarding damages for mental anguish and lost companionship in pet destruction cases by analogizing them to nuisance actions. Although the common law rule states that intangible damages are not available

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118. See ALAN BECK & AARON KATCHER, *BETWEEN PETS AND PEOPLE: THE IMPORTANCE OF ANIMAL COMPANIONSHIP* 9-33 (1996) (recounting all the main social activities shared by individuals and their animals – eating, sleeping, playing, conversing, and so forth).

119. See *infra* notes 133-138 and accompanying text.

120. In the typical situation involving alienation of affections, one spouse begins an affair with a third person, subsequently leaves the family home, obtains a divorce, and often marries the third person. See generally Jennifer E. McDougal, Comment, *Legislating Morality: The Actions for Alienation of Affections and Criminal Conversation in North Carolina*, 33 WAKE FOREST L. REV. 163, 177-78 (1998) (describing litigated cases).

for injuries to property interests,<sup>121</sup> there is one notable exception. In nuisance actions, the plaintiff-landowner can recover in many jurisdictions for the mental distress, annoyance and inconvenience, and interference with use and enjoyment of the property experienced because of the nuisance's noxious effects.<sup>122</sup> The awards for intangible damages are often given in addition to pecuniary damages for the property's lost rental value or lost market value.<sup>123</sup>

Like nuisances, pet destruction can involve intentional, reckless, or negligent conduct on the defendant's part. Like nuisances, pet destruction, under the classic theory, involves an injury to the plaintiff's property interest.<sup>124</sup> Unlike ordinary personal property, companion animals and real property share the common feature of uniqueness or at least quasi-uniqueness. Both pets and houses often engender deep attachments between them and their owners. As a result, both nuisances and pet destruction can produce considerable mental anguish in those affected.<sup>125</sup>

Nuisance law already recognizes that humans, as sentient beings, experience significant distress when exposed day after day to noxious odors, unbearable noise, or other unreasonable interferences with the quiet enjoyment of their land.<sup>126</sup> Awarding damages for the pecuniary injury to the plaintiff's property interest does not fully compensate the plaintiff for the emotional stress that the nuisance has caused.

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121. See *Bernhardt v. Ingham Reg'l Med. Ctr.*, 641 N.W.2d 868, 871 (Mich. Ct. App. 2002) ("Compensatory damages are not given for emotional distress caused merely by the loss of the things . . ."). But see *Quealy v. Paine, Webber, Jackson & Curtis, Inc.*, 475 So. 2d 756, 762 (La. 1985) (allowing mental anguish damages in tortious conversion cases).
  122. *Weinhold v. Wolff*, 555 N.W.2d 454, 465 (Iowa 1996); *Currier v. Essex Co.*, 189 N.E.835, 837-38 (Mass. 1934); see generally Tracy A. Bateman, Annotation, *Nuisance as Entitling Owner or Occupant of Real Estate to Recover Damages for Personal Inconvenience, Discomfort, Annoyance, Anguish, or Sickness, Distinct from, or in Addition to, Damages for Depreciation in Value of Property or Its Use*, 25 A.L.R. 5th 568 (1994).
  123. Bateman, *supra* note 122, at 589.
  124. Nuisance is generally defined as an unreasonable interference with the plaintiffs' use and enjoyment of their property. *Bates v. Quality Ready-Mix Co.*, 154 N.W.2d 852, 857 (Iowa 1967).
  125. In a curious intersection between nuisance and pet destruction, one court held that a landowner was justified in killing the plaintiff's trespassing dog, who "worried" the landowner's sheep and barked incessantly, disturbing the landowner and his family. *Brill v. Flagler*, 23 Wend. 353, 359-60 (N.Y. Sup. Ct. 1840). The dog, in essence, constituted a nuisance that the landowner could abate through self-help. *Id.* at 357.
  126. See, e.g., *Taylor v. Leardi*, 502 N.Y.S.2d 514, 516 (App. Div. 1986) (describing tremors resulting from the defendant's nearby blasting operation); *Lunda v. Matthews*, 613 P.2d 63, 66 (Or. Ct. App. 1980) (describing intolerable dust, noise, and diesel fumes emanating from the defendant's cement plant); *Greer v. Lennox*, 107 N.W.2d 337, 338 (S.D. 1961) (describing the rats, flies, and noxious odors invading the plaintiff's property).

Thus, many courts allow nuisance plaintiffs, particularly those in residential settings, to recover an additional sum for their emotional pain and suffering.<sup>127</sup>

The apparent analogies between nuisance and pet destruction cases suggest that some award for mental anguish in the latter would be appropriate. Homeowners in nuisance cases could presumably end their own mental anguish by selling their property and recovering the diminution in the fair market value of their property caused by the nuisance. But the law does not require them to do that. It recognizes that plaintiffs may have particular attachments to their homes, that each piece of real property has its own unique features, and that plaintiffs should not be required to move to get relief from the nuisance.

As will be discussed more fully in the next section,<sup>128</sup> pet owners often have intense and deep attachments to their animals. As in a nuisance situation, the plaintiffs in pet destruction cases will frequently suffer considerable disturbance of their emotional tranquility because of the defendant's tortious conduct. As with real property, each animal has its unique qualities that cannot be replicated entirely in a replacement companion. Full and complete compensation of a pet owner requires that there be some recompense for the plaintiff's intangible losses.

#### IV. THE PSYCHOLOGICAL SIGNIFICANCE OF THE HUMAN-ANIMAL BOND

Domestication of non-human animals, it is believed, began 12,000 years ago, most likely through communal hunting and scavenging activities by humans and wolves or wolf-like ancestral dogs.<sup>129</sup> Cats were much more recently domesticated, becoming an essential part of Egyptian society by 1600 B.C.<sup>130</sup> In addition to being valued for their companionship, dogs, cats, and other domestic animals were also working animals serving a variety of functions from guarding to herding and even pest control.<sup>131</sup>

Modern social science research bolsters the intuitive notion that companion animals hold great significance for their human guardians, provide a host of psychosocial and medical benefits to their owners, and produce considerable feelings of grief and loss in their human

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127. See, e.g., *Weinhold*, 555 N.W.2d at 466 (upholding \$45,000 award for the plaintiffs' annoyance, discomfort, and loss of full enjoyment of their property caused by the defendants' hog feeding operation).

128. See *infra* notes 133-169 and accompanying text.

129. Margaret Sery Young, *The Evolution of Domestic Pets and Companion Animals*, 15 VETERINARY CLINICS NO. AM. SMALL ANIMAL PRACTICE 297, 302-03 (1985).

130. *Id.* at 306.

131. *Id.* at 304.

caretakers when they die or disappear. Such research argues for at least some meaningful legal compensation when a companion animal is negligently or intentionally destroyed. Upon a pet's death, humans generally experience a substantial and genuine loss—a loss of both the positive benefits of the relationship and a certain amount of emotional tranquility.<sup>132</sup>

A number of social scientific studies have found that people suffer emotional distress after a pet's demise similar to that endured when a human family member dies.<sup>133</sup> Pet owners go through all the stages of grief experienced when close friends or relatives die.<sup>134</sup> The emotional distress is particularly acute when the pet's death is sudden and unexpected,<sup>135</sup> and individuals whose primary relationships are with their pets especially suffer.<sup>136</sup> The reason for the profound sadness felt in these situations is that, as studies have shown, people develop strong and enduring relationships with their companion animals<sup>137</sup> and an individual's bond with a particular animal is unique.<sup>138</sup> As a result, procuring another companion animal does not entirely assuage the grief suffered as a result of the previous animal's death.

Further, investigators have reported that companion animals serve a myriad of functions in humans' lives: they are playmates,

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132. One pet owner poignantly described her intimate bond with her cat:

When asked why she was so upset and crying, she stated that her cat, Fluffy, had died that morning. "Oh," said the therapist, "I am sorry to hear that." "But you do not realize how close Fluffy was to me," said the patient. "She was just like my own fur and bones."

James M. Harris, *Nonconventional Human/Companion Animal Bonds*, in *PET LOSS AND HUMAN BEREAVEMENT* 31, 33 (William J. Kay et al. eds., 1984).

133. See Boris M. Levinson, *Grief at the Loss of a Pet*, in *PET LOSS AND HUMAN BEREAVEMENT* 51-64 (William J. Kay et al. eds., 1984) (citing several studies).

134. See Alton F. Hopkins, *Pet Death: Effects on the Client and the Veterinarian*, in *THE PET CONNECTION: ITS INFLUENCE ON OUR HEALTH AND QUALITY OF LIFE* 276-282 (Robert K. Anderson et al. eds., 1984) (discussing Elizabeth Kubler-Ross' classic work on the stages of grief in the context of pet loss).

135. LAUREL LAGONI ET AL., *THE HUMAN-ANIMAL BOND AND GRIEF* 76 (1994). The grief experienced by pet owners can be particularly intense when someone killed their pet intentionally. One owner interviewed by a researcher stated: "[i]t's bad enough when you lose a dog, but it's even more upsetting to lose a dog for no good reason. What do you expect if your animal is murdered? You hurt so much for so long." Arnold Arluke, *Secondary Victimization in Companion Animal Abuse: The Owner's Perspective*, in *COMPANION ANIMALS AND US: EXPLORING THE RELATIONSHIPS BETWEEN PEOPLE AND PETS* 275, 282-83 (Anthony L. Podberscek et al. eds., 2000).

136. Michael Stern, *Exploring the Bond: Psychological Elements of Attachment to Pets and Responses to Pet Loss*, 209 J. AM. VETERINARY MED. ASS'N 1707, 1708 (1996).

137. See Betty J. Carmack, *The Effects on Family Members and Functioning After the Death of a Pet*, in *PETS AND THE FAMILY* 149 (Marvin B. Sussman ed., 1985) (referencing social science studies describing the closeness of the human-animal bond).

138. *Id.* at 152-54 (citing examples of unique relationships with pets).

friends, confidants, helpers, and protectors, among other roles.<sup>139</sup> They are often regarded as members of their human families,<sup>140</sup> and they confer measurable benefits upon their human caretakers. Several social science studies have demonstrated that companion animals can significantly improve the quality of life for children, non-senior adults, and elderly individuals.<sup>141</sup>

In particular, pets can facilitate emotional and social development in children by providing uncritical and nonjudgmental affection and by fostering nurturing skills.<sup>142</sup> Some clinicians working with children have posited that pet ownership assists children in fulfilling several of Erik Erikson's classic stages of psychosocial development:<sup>143</sup> trust, autonomy, industry, and identity.<sup>144</sup> In addition, children with pets have scored higher, in some studies, on measures of empathy, self-esteem, and self-concept than those without companion animals.<sup>145</sup> Researchers have also discovered that pet ownership during childhood can ameliorate the effects of sexual abuse. Some childhood sexual abuse survivors report that a companion animal was the only supportive creature in their lives as children.<sup>146</sup> Further, researchers have found that sexual abuse survivors who had pets as children were less likely to become abusers themselves and exper-

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139. Bernard E. Rollin, *The Moral Status of Animals*, in *PET LOSS AND HUMAN BE-REAVEMENT* 3, 9-10 (William J. Kay et al. eds., 1984).
140. See Lynette A. Hart, *Dogs as Human Companions: A Review of the Relationship*, in *THE DOMESTIC DOG: ITS EVOLUTION, BEHAVIOUR, AND INTERACTIONS WITH PEOPLE* 161, 163 (James Serpell ed., 1995).
141. See *infra* notes 142-157 and accompanying text.
142. See COUNCIL FOR SCIENCE AND SOCIETY, *COMPANION ANIMALS IN SOCIETY* 25-28 (1988).
143. For a description of Erikson's stages of psychosocial development in children, see ERIK H. ERIKSON, *CHILDHOOD AND SOCIETY* 247-63 (2d ed. 1963).
144. A pet's constancy and affection promote trust; its willingness to interact and play with a child encourages autonomy and initiative; its trainability enables a child to develop a sense of industry; and its ability to provide emotional support and companionship strengthens a child's identity. See Gladys F. Blue, *The Value of Pets in Children's Lives*, 63 *CHILDHOOD EDUC.* 84, 86-87 (1986); Brenda H. Brown et al., *Pet Bonding and Pet Bereavement Among Adolescents*, 74 *J. COUNSELING & DEV.* 505, 505 (1996); Brenda K. Bryant, *The Richness of the Child-Pet Relationship: A Consideration of Both Benefits and Costs of Pets to Children*, 3 *ANTHROZOÖS* 253, 255 (1990); Michael Robin & Robert ten Bonsel, *Pets and the Socialization of Children*, 11 *LATHAM LETTER* 1, 17 (1990).
145. See Robert H. Poresky & Charles Hendrix, *Differential Effects of Pet Presence and Pet-Bonding on Young Children*, 67 *PSYCHOL. REP.* 51, 53-54 (1990); Beth A. Van Houtte & Patricia A. Jarvis, *The Role of Pets in Preadolescent Psychosocial Development*, 16 *J. APPLIED DEV. PSYCHOL.* 463, 476-77 (1995).
146. Sandra B. Barker et al., *The Use of the Family Life Space Diagram in Establishing Interconnectedness: A Preliminary Study of Sexual Abuse Survivors, Their Significant Others, and Pets*, 53 *INDIVIDUAL PSYCHOL.* 435, 445 (1997).

enced less anger than those victims of abuse who did not have a strong bond with an animal as children.<sup>147</sup>

The benefits of pet ownership extend also to adults, both seniors and non-seniors. With adults, domestic animals can provide companionship, engender emotional expression, and break down barriers to trust.<sup>148</sup> In a family setting, pets have been found to increase family adaptability<sup>149</sup> and to reduce stress among family members.<sup>150</sup> In the wider world, pets facilitate interaction among strangers and reduce the anonymity and isolation that characterize contemporary urban living.<sup>151</sup>

The elderly, in particular, benefit from the unconditional acceptance offered by companion animals, and pets can keep older adults active and engaged in life by giving them someone for whom to care.<sup>152</sup> Social science research has shown that elderly individuals, both those living in nursing homes and those living in the community, enjoy increased social interactions,<sup>153</sup> better health,<sup>154</sup> and improved

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147. Sandra B. Barker, *Therapeutic Aspects of the Human-Companion Animal Interaction*, 16 *PSYCHIATRIC TIMES*, at <http://www.psychiatrictimes.com/p990243.html> (1999).
148. See generally E.K. Rynearson, *Humans and Pets and Attachment*, 133 *BRIT. J. PSYCHIATRY* 550, 553-54 (1978) (discussing the significance of pets as attachment figures); R. Lee Zasloff & Aline H. Kidd, *Loneliness and Pet Ownership Among Single Women*, 75 *PSYCHOL. REP.* 747, 750 (1994) (demonstrating that women living entirely alone are lonelier than women living with either pets or other people). One author described the uninhibited nature of the human-cat relationship: "... the stroking, cuddling and the exchange of 'caresses' are in no way taboo. There are no dictates or prohibitions standing in the way of letting go of feelings; there is no need to repress anything - one is free to admit to one's emotions . . . ." REINHOLD BERGLER, *MAN AND CAT: THE BENEFITS OF CAT OWNERSHIP* 54 (1989).
149. Ruth P. Cox, *The Human-Animal Bond as a Correlate of Family Functioning*, 2 *CLINICAL NURSING RES.* 224, 228-29 (1993).
150. See Karen M. Allen et al., *Presence of Human Friends and Pet Dogs as Moderators of Autonomic Responses to Stress in Women*, 61 *J. PERSONALITY & SOC. PSYCHOL.* 582, 587 (1991); Janet Haggerty Davis, *Pet Ownership and Stress Over the Family Life Cycle*, 5 *HOLISTIC NURSING PRAC.* 52, 54-55 (1991).
151. See Susan J. Hart et al., *Role of Small Animals in Social Interaction Between Strangers*, 132 *J. SOC. PSYCHOL.* 245, 253-55 (1992); Douglas M. Robins et al., *Dogs and Their People, Pet-Facilitated Interaction in a Public Setting*, 20 *J. CONTEMP. ETHNOGRAPHY* 3, 21-23 (1991).
152. ODEAN CUSACK & ELAINE SMITH, *PETS AND THE ELDERLY: THE THERAPEUTIC BOND* 35-41 (1984). The authors observed that "[a] dog doesn't care if its master is beautiful, rich, young, or healthy; it will accept a tender stroke from an aged trembling hand as enthusiastically as from that of a young and able athlete." *Id.* at 36.
153. See Katharine M. Fick, *The Influence of an Animal on Social Interactions of Nursing Home Residents in a Group Setting*, 47 *AM. J. OCCUPATIONAL THERAPY* 529, 532 (1993); Peter O. Peretti, *Elderly-Animal Friendship Bonds*, 18 *SOC. BEHAVIOR & PERSONALITY* 151, 154-55 (1990); Anne Winkler et al., *The Impact of a Resident Dog on an Institution for the Elderly: Effects on Perceptions and Social Interactions*, 29 *GERONTOLOGIST* 216, 222-23 (1989).

morale<sup>155</sup> when they own pets or have them as regular visitors. In one nursing home study, the home's director had created a humane environment in which the residents had various birds living in their rooms and also had the company of several resident animals, including cats, dogs, rabbits, and chickens.<sup>156</sup> In comparison with a control group consisting of residents in a nearby home, these residents dramatically decreased their dependence on psychotropic drugs and had a lower mortality rate over a two-year period.<sup>157</sup>

Several social science studies have demonstrated that companion animals have beneficial effects on human health, both physical and mental. Studies of patients with coronary disease have shown that those with pets generally survived longer than those without pets.<sup>158</sup> An Australian study of over 5,700 pet owners found that male pet owners had significantly lower systolic blood pressure and triglyceride and cholesterol levels than male non-pet owners.<sup>159</sup> In another study, the mere act of petting one's own dog had the effect of significantly lowering the subject's blood pressure.<sup>160</sup>

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154. See Karen Allen, *Social Support and Resting Blood Pressure Among Young and Elderly Women: The Moderating Role of Dogs and Cats*, 59 *PSYCHOSOMATIC MEDICINE* 94, 94 (1997); Diane Dembicki & Jennifer Anderson, *Pet Ownership May be a Factor in Improved Health of the Elderly*, 15 *J. NUTRITION FOR THE ELDERLY* 15, 28-29 (1996); Dan Lago et al., *Companion Animals, Attitudes Toward Pets, and Health Outcomes Among the Elderly: A Long-Term Follow-Up*, 3 *ANTHROZOÖS* 25, 29 (1989).
  155. See generally Peter O. Peretti, *Elderly-Animal Friendship Bonds*, 18 *SOC. BEHAVIOR & PERSONALITY* 151, 154 (1990) (demonstrating that pets provide elderly persons living alone with friendship and seem to fulfill a human need to nurture); Judith M. Siegel, *Stressful Life Events and Use of Physician Services Among the Elderly: The Moderating Role of Pet Ownership*, 58 *J. PERSONALITY & SOC. PSYCH.* 1081, 1084-85 (1990) (showing that elderly persons without pets have more doctor contacts during stressful life events than those with pets).
  156. WILLIAM H. THOMAS, *THE EDEN ALTERNATIVE: NATURE, HOPE AND NURSING HOMES* 35-45 (1994).
  157. *Id.* at 47-67; see also WILLIAM H. THOMAS, *LIFE WORTH LIVING: HOW SOMEONE YOU LOVE CAN STILL ENJOY LIFE IN A NURSING HOME: THE EDEN ALTERNATIVE IN ACTION* 47-59 (1996).
  158. ALAN BECK & AARON KATCHER, *BETWEEN PETS AND PEOPLE: THE IMPORTANCE OF ANIMAL COMPANIONSHIP* 2-6 (1996); Erika Friedman et al., *Animal Companions and One-Year Survival of Patients After Discharge from a Coronary Care Unit*, 95 *PUB. HEALTH REP.* 307, 310-11 (1980). Drs. Beck and Katcher stated that "[t]he mortality rate among people with pets seemed to be one-third that of patients without pets." BECK & KATCHER, *supra*, at 4. Even adjusting for the possibility that individuals with less severe coronary disease were more likely to own pets, the study still concluded that pet ownership decreased the likelihood of death by about three percent. *Id.* at 4-5.
  159. W.P. Anderson et al., *Pet Ownership and Risk Factors for Cardiovascular Disease*, 157 *MED. J. AUSTRALIA* 298, 300 (1992).
  160. Mara M. Baun et al., *Physiological Effects of Petting Dogs: Influences of Attachment*, in *THE PET CONNECTION: ITS INFLUENCE ON OUR HEALTH AND QUALITY OF LIFE* 162, 168 (Robert K. Anderson et al. eds., 1984).

For years, highly trained companion animals have assisted persons with physical disabilities by enabling them to participate more fully in the workplace, in daily living, and in society in general. Service dogs function as "eyes" for the blind, warn epileptics of impending seizures, and perform tasks for individuals with muscular or arthritic conditions.<sup>161</sup> Canine companions can also aid hearing-impaired persons by alerting them to household sounds such as the telephone or a crying baby,<sup>162</sup> and equine therapy is routinely used to build strength and coordination in individuals with cerebral palsy and other neuromuscular conditions.<sup>163</sup> Capuchin monkeys can even be trained to assist quadriplegics with routine household tasks.<sup>164</sup>

In addition, pets can ameliorate the condition of individuals with mental health problems and mental disabilities.<sup>165</sup> Animal-assisted therapy has been found useful in treating autistic children,<sup>166</sup> as well as children with attention deficit and conduct disorders.<sup>167</sup> Researchers have also discovered that such therapy reduces anxiety in patients with mood and other psychiatric disorders.<sup>168</sup> In traditional psychotherapy sessions, companion animals can serve as a bridge between therapist and patient by reducing the threat and pain of the therapy session.<sup>169</sup>

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161. See Susan L. Duncan & Karen Allen, *Service Animals and Their Roles in Enhancing Independence, Quality of Life, and Employment for People with Disabilities*, in HANDBOOK ON ANIMAL-ASSISTED THERAPY: THEORETICAL AND GUIDELINES FOR PRACTICE 303, 308-10 (Aubrey H. Fine ed., 2000).
  162. Bonita M. Bergin, *Companion Animals for the Handicapped*, in DYNAMIC RELATIONSHIPS IN PRACTICE: ANIMALS IN THE HELPING PROFESSIONS 191, 198-200 (Phil Arkow ed., 1984).
  163. Karen P. DePauw, *Therapeutic Horseback Riding in Europe and North America*, in THE PET CONNECTION: ITS INFLUENCE ON OUR HEALTH AND QUALITY OF LIFE 141-53 (Robert K. Anderson et al. eds., 1984).
  164. Steven H. Foskett, Jr., *Helping the Disabled: Group Raises Capuchin Monkeys to Aid Quadriplegics*, WORCHESTER TELEGRAM & GAZETTE, Apr. 24, 2002, at B1.
  165. See *Janush v. Charities Hous. Dev. Corp.*, 169 F. Supp. 2d 1133, 1134 (N.D. Cal. 2000) (noting psychiatrist's testimony that plaintiff's two birds and two cats lessened the effects of her mental health disability). For a general description of animal-assisted therapy ("AAT"), see ALAN BECK & AARON KATCHER, BETWEEN PETS AND PEOPLE: THE IMPORTANCE OF ANIMAL COMPANIONSHIP 125-159 (1996).
  166. See Boris M. Levinson, *The Dog as a "Co-Therapist,"* 46 MENTAL HYGIENE 59, 59-65 (1962).
  167. Aaron Katcher & Gregory G. Wilkins, *Helping Children with Attention-Deficit Hyperactive and Conduct Disorders Through Animal-Assisted Therapy and Education*, 12 INTERACTIONS 5, 7-8 (1994).
  168. Sandra B. Barker & Kathryn S. Dawson, *The Effects of Animal-Assisted Therapy on Anxiety Ratings of Hospitalized Psychiatric Patients*, 49 PSYCHIATRY SERV. 797, 800-01 (1998).
  169. See BORIS M. LEVINSON & GERALD P. MALLON, PET-ORIENTED CHILD PSYCHOTHERAPY 67-75 (2d ed. 1997); Alan M. Beck et al., *Use of Animals in the Rehabilitation of Psychiatric Inpatients*, 58 PSYCHOL. REP. 63, 63-66 (1986); Margaret S. Mason & Christine B. Hagan, *Pet-Assisted Psychotherapy*, 84 PSYCHOL. REP. 1235, 1240-42 (1999).

The depth, uniqueness, and multi-dimensional quality of the human-pet relationship all suggest that legal compensation for the tortious destruction of companion animals should account for the relationship's intangible aspects. Just as tort law has evolved to compensate for the intangible aspects of other family relationships,<sup>170</sup> it should now be modernized to allow recoveries for the emotional ties lost when a pet dies prematurely. The argument in favor of compensation for emotional loss is strengthened in the companion animal context because of the extremely low pecuniary damages sustained by most pet owners.<sup>171</sup> In contrast, a surviving spouse suing for the wrongful death of her husband can expect, in many cases, to recover substantial sums for the loss of his earnings and the value of his lost services.<sup>172</sup>

## V. A PROPOSAL FOR VALUING COMPANION ANIMALS

### A. General Policy Considerations

Undoubtedly, both judicial and legislative lawmakers will greet with skepticism any proposal to expand the intangible damages available to plaintiffs whose companion animals are tortiously killed. Thus, any concept of "appropriate legal valuation" of companion animals that I might develop must be supportable through reason and policy and must also address several policy concerns. As a society, we could value our bonds with companion animals but decide that social policy considerations militate against awarding damages for the intangible losses that pet owners suffer upon their animals' tortious destruction.<sup>173</sup>

One of the traditional objections to recognizing expanded awards for the loss of pet animals that include an emotional distress component is that it will open the proverbial Pandora's box and result in inflated and even fraudulent claims for the death of a pet.<sup>174</sup> A related objection is that large damage awards for pets are simply over-compensatory and have an economically distorting effect. In other words, defendants may be deterred from pursuing economically useful

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170. See *supra* notes 110-116 and accompanying text.

171. See *supra* notes 39, 50-51, and accompanying text.

172. For calculations as to the future lost earnings of individuals in various professional and business-related occupations, see STUART M. SPEISER & JOHN MAHER, *RECOVERY FOR WRONGFUL DEATH AND INJURY: ECONOMIC HANDBOOK*, chs. 8 & 9 (4th ed. 1995).

173. Cf. *Sizemore v. Smock*, 422 N.W.2d 666, 670-71 (Mich. 1988) (arguing that the inherent value of the parent-child relationship does not mean that a cause of action for loss of filial society should be recognized).

174. See *Harabes v. Barkery, Inc.*, 791 A.2d 1142, 1145 (N.J. Super. Ct. 2001); *Johnson v. Douglas*, 723 N.Y.S.2d 627, 628 (Sup. Ct. 2001); *Rabideau v. Racine*, 627 N.W.2d 795, 798-99 (Wis. 2001).

activities because of the specter of having to pay substantial sums to pet owners for their emotional distress when the pet owners can simply ameliorate their loss by procuring another cat or dog at nominal expense.<sup>175</sup> In addition, it is difficult to avoid gross inconsistencies in awards from case to case, given the nebulous nature of emotional attachment.<sup>176</sup>

In addition, one possible difficulty in analogizing a claim for pet loss to those for wrongful death is that the class of wrongful death claimants is generally limited by statute, usually to immediate family members. In other words, the law does not currently afford compensation for friends, co-workers, cousins, and other non-immediate relatives of the decedent who is wrongfully killed by another.<sup>177</sup> If my best friend, who has no immediate family, is killed because of another's negligent, reckless, or intentional act, ordinarily, I will receive no compensation for the emotional distress that I suffer because of the loss of my friend. In fact, if an individual has no immediate family at the time of his/her death, there may be no statutory plaintiff to bring a wrongful death action, and the death of that individual may go largely uncompensated.<sup>178</sup>

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175. Veterinarians, in particular, worry about the increased cost of malpractice insurance if they can be held liable for a pet owner's emotional distress. See Julie Scelfo, *Good Dogs, Bad Medicine?*, NEWSWEEK, May 21, 2001, at 52, 53. They argue that veterinary malpractice is rare and that incompetent veterinarians are weeded out by state licensing boards. See Bonnie Beresford, *Letter to the Editor*, NEWSWEEK, June 11, 2001, at 14, 16.
176. See *Harabes*, 791 A.2d at 1145 (N.J. Super. Ct. 2001) (observing the "difficulty in quantifying the emotional value of a companion pet and the risk that a negligent tortfeasor will be exposed to extraordinary and unrealistic damage claims").
177. Wrongful death statutes typically designate particular relatives of the decedent – usually, spouse, children, parents, and/or siblings – who are entitled to compensation for their relative's death. More remote relatives and non-relatives are generally excluded. See, e.g., *In re Estate of Poole*, 767 N.E.2d 855, 861 (Ill. App. Ct. 2002) (stating that the decedent's grandparents were not entitled to bring wrongful death action); *Henderson v. Fields*, 68 S.W.3d 455, 464 (Mo. Ct. App. 2001) (same). But see *Shelton v. DeWitte*, 26 P.3d 650, 654 (Kan. 2001) (allowing the decedent's grandparents to bring a wrongful death action where the decedent's mother was dead and her natural father chose not to pursue the action). See also Elizabeth Trainor, Annotation, *Who, Other Than Parent, May Recover for Loss of Consortium on Death of Minor Child*, 84 A.L.R. 5th 687, 687 (2000) (noting that a minority of courts have allowed siblings and grandparents to recover under wrongful death acts for loss of consortium).
178. See, e.g., *Hindry v. Holt*, 51 P. 1002, 1004 (Colo. 1897) (holding that the niece of the decedent, a thirty-eight-year old unmarried laborer, could not bring a wrongful death action even though she was the decedent's only heir). In an effort to value more completely an individual's life, some attorneys have argued that in death cases the decedent's estate or survivors should recover "hedonic damages," representing the value of the decedent's life to himself. *Sherrod v. Berry*, 629 F. Supp. 159, 163-64 (N.D. Ill. 1985), *aff'd*, 827 F.2d 195 (7th Cir. 1987), *rev'd en banc on other grounds*, 856 F.2d 802 (7th Cir. 1988). They have proffered theories for valuing an individual's life based on the wages paid to workers in hazard-

Given those limitations on wrongful death recovery, it is debatable whether awarding wrongful death-type damages in pet destruction cases is consistent with current wrongful death schemes. If a pet is considered simply another friend (albeit nonhuman), then wrongful death theory would dictate no recovery. But pets arguably occupy a role greater than that of friend—they are intimate companions, members of the human companion's family.<sup>179</sup> If my friend dies, in most cases there will be a surviving spouse, children, or parents to seek compensation for lost companionship under the state wrongful death statute.<sup>180</sup> If a companion animal dies, the most logical plaintiff is the animal's primary caregiver. Or if the animal was a family pet, then arguably the damages should be based on the loss to the family unit, without distinguishing among individual members of the family.<sup>181</sup>

Traditionally, courts have been reluctant to recognize claims for emotional distress and mental anguish in a variety of contexts. As mentioned above,<sup>182</sup> they have advanced various policy concerns to justify this reluctance – concerns that I will explore more deeply later.<sup>183</sup> Thus, in many cases, the courts either have refused to recognize a particular type of claim for emotional distress<sup>184</sup> or have confined such claims to a certain limited class of plaintiffs.<sup>185</sup>

Counterbalancing these concerns are the traditional tort law policy justifications of compensation, deterrence, and reflection of societal values.<sup>186</sup> Ideally, damages should compensate injured parties in such a way as to make them whole—i.e., without overcompensating

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ous occupations and on the prices that consumer will pay for additional safety devices. Stanley V. Smith, *Hedonic Damages in Wrongful Death Cases*, 74 A.B.A. J. 70 (1988). Only a few courts have recognized such claims, and the federal courts exclude testimony based on these theories as unscientific and unreliable. See *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1245 (10th Cir. 2000) (collecting cases).

179. See Cecelia J. Soares, *The Companion Animal in the Context of the Family System*, in *PETS AND THE FAMILY* 49-62 (Marvin B. Sussman ed., 1985).

180. In a recent case involving the priest held captive by Islamic radicals for ten months, the priest's nieces and nephews have sought to recover damages under a federal statute authorizing relatives of terrorism victims to recover for their mental anguish and grief. William Glaberson, *Court Case Seeks to Define a Catholic Priest's Family*, N.Y. TIMES, July 6, 2001, at A10. The plaintiffs are arguing that because a priest normally will not have any children, they are the theoretical and actual substitute and should be within the circle of relatives entitled to damages. *Id.*

181. See *infra* notes 217-220 and accompanying text.

182. See *supra* notes 173-176 and accompanying text.

183. See *infra* notes 259-308 and accompanying text.

184. See *supra* notes 57-68 and accompanying text.

185. See *supra* notes 80-82 and accompanying text.

186. See ALAN BRUDNER, *THE UNITY OF THE COMMON LAW: STUDIES IN HEGELIAN JURISPRUDENCE* 202 (1995) (“[W]e must assess [tort law] as an instrument of compensation, deterrence, and public admonition.”) (footnote omitted).

them or undercompensating them.<sup>187</sup> Additionally, damages should deter the tortfeasor and others similarly situated from engaging in the tortious conduct that produced the injury in the first place.<sup>188</sup> Finally, tort law in general seeks to effectuate social values and goals by encouraging certain types of behavior, discouraging other types of behavior, and providing redress for those who have been injured by conduct that society deems wrongful in some way.<sup>189</sup>

Woven into these traditional tort policy justifications are the policies underpinning damages theory,<sup>190</sup> which are primarily corrective justice and economic efficiency. Proponents of corrective justice, first espoused by Aristotle in the *Nicomachean Ethics*,<sup>191</sup> argue that injured victims are entitled to be placed in their original position—i.e.,

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187. Warren A. Seavey, Book Review, 45 HARV. L. REV. 209, 211-12 (1931) (“Tort liability . . . exists chiefly to compensate an individual, as nearly as may be, for loss caused by the defendant’s conduct, either by making the financial position of the plaintiff as good as it was before, or would have been if the defendant had not acted, by giving balm for his wounded pride or damaged body or by doing both.”). However easily stated, this principle is much more difficult to put into practice. Courts and legislatures must determine what are legally recognized injuries, and judges and juries must figure out a way of measuring loss. See Jules L. Coleman, *The Practice of Corrective Justice*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 57 (David G. Owen ed., 1995).

188. See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 220 (5th ed. 1998) (stating that the economic function of the negligence system is “the deterrence of inefficient accidents”).

189. See P.S. ATIYAH, ACCIDENTS, COMPENSATION, AND THE LAW 467 (1970) (observing that negligence law always begins with the question “has the defendant done something wrong?”); GUIDO CALABRESI, THE COST OF ACCIDENTS 301 (1970) (noting that one of the principal underpinnings of tort law has been the notion that “acts that we deem wrong and immoral” be suitably punished); Richard Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625, 689 (1992) (stating that “[t]he law requires us to practice virtue and avoid vice in all our relations with others by commanding some acts and forbidding others”).

190. Damages theory, of course, encompasses damages afforded in a variety of substantive claims – e.g., tort, contract, statutory causes of action, and so forth. See DOUG RENDLEMAN, CASES AND MATERIALS ON REMEDIES 1-4 (6th ed. 1999). Tort theory, in some sense, concerns the imposition of legal liability whereas damages (or remedial) theory focuses on the measurement of that liability once it has been imposed.

191. ARISTOTLE, NICOMACHEAN ETHICS, bk. V, ch. 2, at 85 (Roger Crisp trans. & ed., 2000) (stating that corrective justice “plays a rectifying part in transactions”). Aristotle lays out his theory of corrective justice in more detail in chapter 4 of Book V of the *Nicomachean Ethics*:

What is just in transactions is nevertheless a kind of equality, and what is unjust a kind of inequality . . . . For it makes no difference whether it is a good person who had defrauded a bad or a bad person a good . . . . The law looks only to the difference made by the injury, and treats the parties as equals, if one is committing injustice, and the other suffering it—that is, if one has harmed and the other been harmed. So the judge, since this kind of injustice is an inequality, tries to equalize it.

*Id.* bk. V, ch. 4, at 87.

their position before the injury.<sup>192</sup> In cases where direct pecuniary harm has occurred, an award of money damages will serve readily to put the victim in that position.<sup>193</sup> The damages, however, must be calibrated to restore plaintiffs only to their pre-injury position, no more or less. To do less would result in leaving the plaintiff's injury not fully redressed; to do more would produce an unjustified shift of resources from the defendant wrongdoer to the plaintiff—i.e., a windfall gain.<sup>194</sup>

The theory of economic efficiency views the law as a tool to promote beneficial activities by encouraging those that are economically efficient and discouraging those that are economically inefficient.<sup>195</sup> Economic efficiency, in this view, is a close proxy for societal good. Actors in the economic marketplace can produce a profit only by providing a good or service for which individuals are willing to pay a certain amount. Buyers will pay that amount only if they perceive the commodity being sold as producing a benefit<sup>196</sup> to them that equals or

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192. See, e.g., Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 IOWA L. REV. 515, 530 (1992) (noting that corrective justice, in contemporary thought, concerns itself with the "rectification of violations of entitlements caused by persons in their interactions with each other"); Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403, 408 (1992) (observing that corrective justice "focuses on a quantity that represents what rightfully belongs to one party but is now wrongly possessed by another party and therefore must be shifted back to its rightful owner"); Richard W. Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625, 692 (1992) (pointing out that Aristotle's theory of corrective justice requires judges to restore the preexisting equality between two parties by "imposing a duty on the injurer to disgorge any unjust gain and to compensate the injured for any unjust loss").

193. In a simple example, if A converts \$50 in cash belonging to B, then A can restore B to his ex ante position by paying him \$50 (plus interest). *Haines v. Parra*, 239 Cal. Rptr. 178, 182 (1987).

194. See 1 DAN B. DOBBS, *LAW OF REMEDIES* 281 (2d ed. 1993) ("The stated goal of the damages remedy is compensation for legally recognized losses. This means that the plaintiff should be fully indemnified for his loss, but that he should not recover any windfall.") (footnote omitted).

195. Economic efficiency is often defined according to the Kaldor-Hicks theory in which "a policy change is said to be efficient if the winners from the change could compensate the losers, that is, if the winners gain more from the change than the losers lose, whether or not there is actual compensation." WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 16 (1987); see also Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1094 (1972) (discussing economic efficiency in terms of Pareto optimality).

196. The benefit produced may not be strictly pecuniary; it could be emotional or psychological. See Richard A. Posner, *Wealth Maximization and Tort Law: A Philosophical Inquiry*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 99 (David G. Owen ed. 1995) (including in his theory of "wealth maximization" the value of non-economic goods such as "life, leisure, family, and freedom from pain and suffering").

exceeds the purchase price.<sup>197</sup> In applying economic efficiency ideas to legal remedies, commentators have argued that the main purpose of compensatory damages is to force individuals to pay for the unjust harms they have inflicted on others—by so doing, they more fully bear the true cost of their activity.<sup>198</sup> If they can still make a profit even after paying for those harms, then, theoretically, they should be allowed to continue their activity—i.e., the total benefit of their activity presumably outweighs its total cost.<sup>199</sup>

Any scheme that provides compensation for the emotional attachment that humans feel for their companion animals should reflect the traditional policy justifications and answer the policy concerns outlined above. Emotional distress damages for pet loss advance the goals of compensation, deterrence, and reflection of societal values. They also can be harmonized with the theories of corrective justice and economic efficiency. At the same time, a damages remedy for pet loss that includes an intangible component can be fashioned so as to reduce the possibility of fraudulent claims, keep overall tort liability in proportion to fault, provide guidance to triers of fact in assigning an appropriate monetary amount, and address the impact on the cost of veterinary care and other activities.

## B. The Inadequacy of the Current Legal Rules for Animal Valuation

As mentioned above,<sup>200</sup> the current majority rule for valuing companion animals at their fair market value produces significant undercompensation of the guardians of such animals. Apart from purebred animals or those with special skills,<sup>201</sup> such as service dogs,

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197. See DAVID N. HYMAN, *PUBLIC FINANCE: A CONTEMPORARY APPLICATION OF THEORY TO POLICY* 35 (4th ed. 1993) (discussing the concept of consumer surplus as “the total benefit of a given amount of a good less the value of money given up to obtain the monthly quantity”); JOHN M. LEVY, *ESSENTIAL MICROECONOMICS FOR PUBLIC POLICY ANALYSIS* 23 (1995) (noting that the consumer, “whom we assume to be rational and self-interested . . . will continue to buy the item as long as the value (to the consumer) of the marginal item is greater than the price”).

198. See Harold Demsetz, *When Does the Rule of Liability Matter?*, 1 *J. LEGAL STUD.* 13, 13-14 (1972) (describing the conventional economic analysis of social cost versus private cost).

199. See Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *YALE L.J.* 499, 544 (1961) (noting that the prices of goods are too low when they fail to reflect accident costs); Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 *CALIF. L. REV.* 772, 793-94 (1985) (observing that “[f]ailure to internalize all accident costs, then, amounts to a subsidy for high-risk goods and services, and an indirect subsidy for accidents”).

200. See *supra* notes 83-85 and accompanying text.

201. See, e.g., *Paguio v. Evening Journal Ass'n*, 21 A.2d 667, 668 (N.J. Super. Ct. 1941) (awarding plaintiff \$500 for loss of dog that originally cost \$100 but had been specially trained to perform on stage).

most companion animals have negligible fair market value. Most owners would not sell their mature companion animals at any price,<sup>202</sup> and most individuals seeking to acquire a young animal need pay nothing or only a nominal amount to obtain, say, a puppy or kitten, from a neighbor, friend, or animal shelter. In other words, humans who are deeply attached to their animals will not part with them for any sum of money,<sup>203</sup> and because of the excess supply of unwanted animals, most would-be buyers can pay virtually nothing to obtain one. Given that fair market value is defined as what a willing seller would accept for an item and what a willing buyer would give for that item, arguably the typical companion animal has no fair market value.

There are several traditional justifications for using fair market value as the standard of compensation for destroyed personal property. First, it usually represents the amount that the plaintiff will have to pay to replace the lost property. As such, it constitutes true compensation because the plaintiff may go into the market place and buy substitute property to replace the item that was converted or destroyed. Thus, tort plaintiffs are restored to their pre-tort position. Second, even if the plaintiff does not choose to replace the lost item, fair market value represents the loss to the plaintiff's net worth. For example, before the tort, the plaintiff may have owned an automobile worth \$5,000 in the marketplace, whereas after the tort, the plaintiff's "balance sheet" has been diminished by that amount. Once again, awarding the fair market value of the automobile restores the plaintiff's *ex ante* economic position.

These traditional justifications for the fair market value standard do not apply to compensation for companion animals. If the fair market value of the typical companion animal is close to zero, the plaintiff whose animal has been destroyed can procure a substitute in the marketplace for a nominal sum. But procuring a new animal will not erase the mental anguish and grief experienced when the previous animal was killed. In addition, it may take some time before the plaintiff can acquire a suitable replacement animal and develop the same depth of bond that the plaintiff enjoyed with the previous animal. In some sense, each animal-human relationship is unique and carries with it individualized feelings and ways of communicating.

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202. See *Nichols v. Sukaro Kennels*, 555 N.W.2d 689, 690 (Iowa 1996) (noting that plaintiff's expert testified that the value of a pet who is regarded as a family member "could be as high as the national debt").

203. In addition, most people would not be interested in buying someone else's pet, unless it were a purebred animal or one with special skills. *Mitchell v. Heinrichs*, 27 P.3d 309, 311 (Alaska 2001).

In the same vein, the current wrongful death cases recognize the uniqueness of certain types of human relationships. In most states, a man whose wife is wrongfully killed by another may recover for the loss of his wife's consortium even though post-tort he is able to remarry.<sup>204</sup> Similarly, parents may receive damages for the loss of their child's society even though they have other children or they now have, because of their child's death, the economic wherewithal to have another child.<sup>205</sup> The premise behind these rules is that one human being does not substitute for another and that one relationship does not replace another. The same premise holds true to some extent for companion animal-human relationships: one animal does not entirely replace another though a subsequent animal can fulfill many of same companionate functions served by the previous animal.

Courts that have recognized the inadequacy of the fair market value standard in animal destruction cases have often adopted the "value to the owner" approach outlined above. Courts using this approach attempt to gauge how much destroyed personal property is worth to its owner apart from the item's value in the marketplace. But even under this approach, the focus is most often on economic considerations. Courts attempt to determine a chattel's value to its owner by examining its cost when new, the extent of its depreciation, its replacement cost, its incoming producing capacity, and so forth. This approach is most useful for chattels that have economic value but whose fair market value cannot be measured precisely because of the market's small size.<sup>206</sup>

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204. Under the majority rule, the defendant in a wrongful death action may not introduce evidence of the surviving spouse's remarriage to mitigate damages. *Benwell v. Dean*, 57 Cal. Rptr. 394, 402-03 (Cal. Ct. App. 1967); *Hardware State Bank v. Cotner*, 302 N.E.2d 257, 263 (Ill. 1973); *Dubil v. Labate*, 245 A.2d 177, 178-79 (N.J. 1968); *Wiesel v. Cicerone*, 261 A.2d 889, 891 (R.I. 1970); *Addair v. Bryant*, 284 S.E.2d 374, 379-80 (W. Va. 1981).
205. Courts routinely uphold six-figure awards for loss of a child's society in wrongful death actions, regardless of the size of the family or the parents' ability to have additional children. See *DiRosario v. Havens*, 242 Cal. Rptr. 423, 431 (Cal. Ct. App. 1987); *Barnes v. Bott*, 615 So. 2d 1337, 1341-42 (La. Ct. App. 1993); *Guzman v. Guajardo*, 761 S.W.2d 506, 511 (Tex. Ct. App. 1988). One court reversed as shocking and clearly inadequate an award of zero damages for the plaintiffs' loss of society of their seventeen-year-old son and suggested an additur of \$400,000 for lost society: "It is a rare life that is momentarily worthless and does not trigger some type of measurable sorrow in a surviving parent." *Donaldson v. Anderson*, 862 P.2d 1204, 1207 (Nev. 1993).
206. In one case, the court found that an outsized barge's fair market value could not be precisely determined because of the small number of such barges in existence worldwide and the correspondingly small number of sales transactions involving such barges. *King Fisher Marine Service, Inc. v. NP Sunbonnet*, 724 F.2d 1181, 1185-86 (5th Cir. 1984). The court used "value to the owner" as a more appropriate way to measure the plaintiff's loss. *Id.*

Given its economic component, the “value to the owner” approach arguably has limited utility in animal destruction cases. Certainly, some highly trained companion animals might be valued appropriately for their worth to the owner. For example, a dog specially trained to perform in movies might have an extremely uncertain market value, but one might ascertain the dog’s value to the owner by examining its income earning potential<sup>207</sup> or the cost of training. Similarly, a purebred dog that had placed in dog shows might have a value to the owner based on the future stud fees to be earned from breeding the dog.<sup>208</sup> But once again the typical household pet ends up being undervalued using this approach. Factors like replacement cost or earning capacity lead to only a nominal recovery.

Some courts using the “value to the owner” approach have considered the sentimental elements associated with certain objects.<sup>209</sup> Recognizing that some chattels, such as family heirlooms, photographs, and trophies, have virtually no value apart from sentiment, these courts have allowed the trier of fact to consider the owner’s understandable and normal attachment to such items in setting damages.<sup>210</sup> Often, the owner’s testimony as to the item’s value to him/her serves as the principal basis for the damage award.<sup>211</sup>

This expanded “value to the owner” approach moves a step closer to recognizing that the largest part of the value of household pets to their human companion stems from the humans’ sentimental attachment to them. “Sentimental attachment” may be equated in some sense to the concept of society. We become emotionally attached to companion animals because we appreciate their companionship – their loyalty, their physical proximity, even their dependence upon us. Just as people value the society of their spouses, children, and other intimates, they rely upon the society of their pets. When a pet dies prematurely because of another’s wrongful act, we experience the loss of that society as a genuine injury. Therefore, insofar as the “value to the owner” concept attempts to compensate for the loss of the animal’s

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207. *See, e.g.*, *Paguio v. Evening Journal Ass’n*, 21 A.2d 667, 668 (N.J. Super. Ct. App. Div. 1941) (awarding plaintiff \$500 for loss of dog seemingly based on loss of earnings from the dog’s participation in a stage act).
208. *See, e.g.*, *McDonald v. Ohio State Univ. Veterinary Hosp.*, 644 N.E.2d 750, 751-52 (Ohio Ct. Cl. 1994) (awarding plaintiff \$5,000 in part based on projected mating fees of deceased dog).
209. *See Landers v. Municipality of Anchorage*, 915 P.2d 614, 619 (Alaska 1996); *Campins v. Capels*, 461 N.E.2d 712, 721 (Ind. Ct. App. 1984); *Bond v. A.H. Belo Corp.*, 602 S.W.2d 105, 106 (Tex. Ct. App. 1980).
210. *See Bond*, 602 S.W.2d at 109 (stating that adequate compensation for items with no value except that derived from sentiment should take into account “the reasonable special value of such articles to their owner taking into consideration the feelings of the owner for such property”).
211. *See Campins*, 461 N.E.2d at 722 (basing damages award for lost trophy rings on the dollar value set by the plaintiff in his testimony).

presence in the owner's life, it more accurately quantifies the actual injury to the owner because of the animal's demise.

This approach, however, poses some conceptual and practical difficulties. "Sentimental attachment," on some level, may imply mawkish or saccharine feelings and perhaps does not afford human emotions toward companion animals the full dignity that they deserve. Courts considering the sentimental value of companion animals, moreover, normally predicate the ultimate award of damages on the owner's testimony as to the value of the animal to him/her.<sup>212</sup> Unless forced to be more specific, plaintiffs may be inclined to set entirely arbitrary figures on their animals' value, increasing the risk of inconsistent and inaccurate damages awards.<sup>213</sup>

Those courts that have awarded damages for loss of a companion animal's society are attempting to value companion animals in a way that more accurately reflects their true worth in modern society. Humans keep and care for household pets largely for their companionate function.<sup>214</sup> Just as the law has evolved to value children in wrongful death actions largely for their society, the law, it may be argued, should value companion animals for their companionship in the household.

But at least two differences exist between children and animals as part of the family unit. Wrongful death cases typically examine the lost society experienced by particular members of the family. In other words, the parents had one type of relationship with the now deceased child; the child's siblings had a different type of relationship. In states that allow wrongful death recoveries by parents, siblings, and children of the victim, each plaintiff must establish the nature of his/her relationship with the deceased and the extent of the lost society.<sup>215</sup> Often,

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212. See, e.g., *Missouri Pac. R.R. Co. v. Chase*, 23 S.W.2d 256, 257 (Ark. 1930) (affirming verdict of \$150 where the plaintiff had testified that the dogs killed were worth \$75 to \$100 each); *Seidner v. Dill*, 206 N.E.2d 636, 640 (Ind. App. 1965) (affirming verdict of \$600 where the plaintiff had testified that he would have given \$500 if the defendant had not killed his dog), *overruled by* *Puckett v. Miller*, 381 N.E.2d 1057 (Ind. App. 1978).

213. *Harabes v. Barkery, Inc.*, 791 A.2d 1142, 1145 (N.J. Super. Ct. 2001) (noting expert's testimony that "in the mind of a pet owner, the value of a pet could be as high as the national debt.") (quoting *Nichols v. Sukaro*, 555 N.W.2d 689 (Iowa 1996)).

214. See James Serpell & Elizabeth Paul, *Pets and the Development of Positive Attitudes to Animals*, in *ANIMALS AND HUMAN SOCIETY: CHANGING PERSPECTIVES* 130 (Aubrey Manning & James Serpell eds., 1994) ("[P]ets are not normally expected to perform useful functions . . . [A]nd the idea of putting them to work is typically greeted with a sort of baffled amusement.").

215. See, e.g., *Barnes v. Bott*, 615 So. 2d 1337, 1341-1342 (La. Ct. App. 1993) (awarding mother of a deceased child \$200,000, but giving no damages to the father where the father saw his son rarely and had no meaningful relationship with him).

each plaintiff recovers damages separately for the loss of the victim's society and companionship.<sup>216</sup>

Where a companion animal has died, on the other hand, arguably it is difficult to disaggregate the loss of society experienced by different members of the household.<sup>217</sup> Considerations of judicial economy and avoidance of excessive awards might dictate that when an animal is wrongfully killed, the family in which the animal lived may recover a single award for the loss of the animal's society.<sup>218</sup> One advantage of this method is that the plaintiffs need not establish "ownership" of the animal by one person. Property-based approaches of valuing chattels demand that the plaintiff be the titleholder or owner of the destroyed or damaged item. With respect to companion animals, ownership by one person may be difficult to establish. Often, the animal is not purchased as such,<sup>219</sup> and even if it has been, the original owner may have made an express or implied gift of the pet to another member of the household.<sup>220</sup>

In addition, by making a single award of damages to the household, one may be able to avoid repetitious testimony by each family member seeking his/her own recovery about the importance of the pet

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216. See, e.g., *Jones v. Jones*, 641 N.E.2d 98, 100 (Ind. Ct. App. 1994) (affirming the trial court's allocation of wrongful death damages: 65 percent to the deceased child's mother, 35 percent to the father based on the mother's custody of the child and the greater amount of time spent with him); *LeJeune v. Allstate Ins. Co.*, 373 So. 2d 212, 215-16 (La. Ct. App. 1979) (awarding varying amounts for lost society to the decedent's spouse, one minor child, and three adult children).
217. One court described this problem: "[I]t is difficult to define with precision the limit of the class of individuals who fit into the human companion category. Is the particular human companion every family member? The owner of record or primary caretaker? A roommate?" *Rabideau v. City of Racine*, 627 N.W.2d 795, 802 (Wis. 2001).
218. The single award could be divided equally among the various members of the household. For example, in a family of four living in the same household, each member would receive one-fourth of the total damages for loss of the pet's society. See, e.g., *Pannell v. Guess*, 671 So. 2d 1310, 1314 (Miss. 1996) (dividing insurance proceeds in wrongful death action equally among the deceased's surviving beneficiaries as required by the Mississippi statute). See generally 3 JEROME H. NATES ET AL., *DAMAGES IN TORT ACTIONS* § 22.02 [3] (2002) (describing various wrongful death apportionment schemes used in different states).
219. A significant number of companion animals are found as strays or are acquired from a neighbor or friend at no cost and with no bill of sale or transfer of title. See, e.g., Aline H. Kidd & Robert M. Kidd, *Children's Attitudes Toward Their Pets*, 57 PSYCHOL. REP. 15, 21 (1985) (stating that 30% of the children surveyed in their study reported that a friend or neighbor had given them the family pet); Hawke Fracassa, *Philip James Tocco: Restaurateur Enjoyed Teaching Culinary Arts*, DETROIT NEWS, May 23, 2002, at 2C (describing the deceased as someone who took in stray dogs and cats); Russell Jenkins, *Cat Found After Trip of 63,000 Miles*, TIMES (London), July 19, 2002, at 7 (Home News) (noting that a cat lost in an airline cargo hold had been taken in as a stray).
220. For example, a parent may buy a puppy at a pet store and then informally designate the animal as belonging to a son or daughter in the household.

to that person and the loss of society experienced. One or two family members could testify as to the animal's significance in the household. By limiting the family to a single recovery, moreover, one decreases the chances of excessive awards: the jury will make one assessment of damages for the loss of society to the household, rather than a multitude of individual awards. A single award is likely to be more moderate than a collection of separate assessments of damages for each family member.

Besides the arguably collective nature of the relationships that companion animals have with their human owners, pets are different from human family members in another way. When a parent or a sibling dies, the surviving child or sibling realistically cannot replace the deceased relative. Adult plaintiffs will not normally acquire another parent, sister, or brother. Obviously, when a child dies, the surviving parents theoretically could have or adopt another child. But human relationships are so complicated and human beings vary so much in their individual personalities that another child does not replace the deceased child. Similarly, although a plaintiff whose spouse was killed could remarry, the wrongful death law in most states, nonetheless, allows the plaintiff to recover for the loss of the deceased spouse's consortium.<sup>221</sup> This law embraces the idea that human relationships are not interchangeable and that a person with whom one has shared an intimate relationship is essentially irreplaceable.

Companion animals, although unique in their own way, arguably can be replaced. Because of selective reproduction by breeders, purebred cats and dogs may vary little in temperament, intelligence, and abilities within a particular breed. Relationships between animal companions and their humans, while somewhat complex and nuanced, are at bottom perhaps more straightforward than those among humans.<sup>222</sup> Given the abundance of unadopted companion animals, people whose pets are killed can acquire another, similar animal without too much difficulty. Although companion animals are not fungible creatures by any means,<sup>223</sup> any number of substitutes can successfully fill their role in the household.

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221. See *supra* note 204 and cases cited therein.

222. That straightforwardness is undoubtedly part of the reason that humans find relationships with pets so appealing. One does not have to deal with the myriad of petty jealousies, unspoken resentments, and difficult behavior characteristic of even good human relationships. The famous animal trainer Gunther Gebel-Williams once observed, "[i]f you do right by [animals] . . . and do not become careless and lax, they will do the right thing in return. One can never be 100 percent certain about people." Richard Severo, *Gunther Gebel-Williams, Circus Animal Trainer, Dies at 66*, N.Y. TIMES, July 20, 2001, at A21.

223. One court described dogs as "property with personality," and suggested that "while we can buy another pet that may fill some of the voids caused by loss of a pet, there is no such thing as replacement." *Van Patten v. City of Binghamton*, 137 F. Supp. 2d 98, 104-05 (N.D.N.Y. 2001).

This partial interchangeability argues that companionship may not be at the crux of what the injured plaintiff has lost when the tortfeasor kills the plaintiff's companion animal. Certainly, companionship has been temporarily lost, but in some sense, it can be replaced by the acquisition of a new animal. The new animal will provide many of the same elements of affection, playfulness, and general companionship that the previous animal did. Obtaining a new pet, however, cannot significantly ameliorate the grief and mental anguish caused by the premature death of the previous pet. Grieving the loss of a loved one is a definable process that goes through a number of stages and takes a certain amount of time. Although a new pet will undoubtedly distract most owners from their grief over the loss of the previous animal, the owner will suffer undeniable mental anguish over the previous animal's death.

Inevitably, pet owners suffer some mental pain when their pet dies a natural death after a full life. But several factors may compound the emotional suffering endured when a tortfeasor wrongfully kills an animal companion. First, presumably the defendant's wrongful act caused the animal's premature death.<sup>224</sup> The human plaintiff's anticipation of several more years of his/her pet's company ends suddenly and thus intensifies the person's mental suffering. Second, the manner of the animal's death may be particularly disturbing to the owner. The knowledge that the tortfeasor deliberately tortured or mutilated the animal before killing it may devastate the owner, producing extreme mental anguish. Even if the death was negligently caused, the owner may be anguished to learn that the animal suffered considerable pain before its demise. Third, the wrongdoer's apparent mental attitude may also increase the plaintiff's negative feelings. If the wrongdoer intentionally attacked and killed the pet, the plaintiff may suffer feelings of revulsion and disgust at the thought that someone would harm a virtually defenseless creature in that way.

### **C. Compensating for the Intangible Elements of the Human-Animal Relationship**

Based on the intensified mental anguish that a human guardian experiences upon the wrongful death of a companion animal, I propose that the law recognize a claim on behalf of pet owners for the emotional distress suffered when the defendant tortfeasor wrongfully kills their pet. In addition, the plaintiff should be able to recover the fair market value or, in some cases, the replacement cost of the animal.<sup>225</sup>

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224. Sometimes the extent to which the animal's death is premature may be slight – for example, where a veterinarian negligently causes the death of an elderly, ill animal that would have died in a few days.

225. Replacement cost should include the cost of acquiring a substitute animal, the cost of having it examined by a veterinarian, immunized, and spayed or neutered,

The plaintiff should also receive compensation for the loss of the animal's companionship for a reasonable time period in which to acquire a new pet.<sup>226</sup> If the defendant's wrongful act was carried out intentionally or maliciously, then punitive damages should be available. And finally, if legislatively enacted, the compensation scheme for the wrongful death of companion animals should include a cap on noneconomic damages.

My proposal satisfies the traditional tort policy objectives of compensation, deterrence, and reflection of social values as well as the traditional remedial policy objectives of corrective justice and economic efficiency.<sup>227</sup> It also answers the classic objections to recognizing new claims based upon a purely emotional injury, namely concerns about fraudulent claims, disproportionate liability, the impact on the cost of veterinary care and other goods and services, and the difficulties of assessing damages in an accurate, consistent, and fair way.

As argued previously, the current common law method for assessing damages for a destroyed companion animal based on his/her fair market value undercompensates many human guardians of such animals, particularly animals that have no particular pedigree or skills.

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and the cost of at least basic training (e.g., housebreaking, walking on a leash, and so forth). See *Mitchell v. Heinrichs*, 27 P.3d 309, 313-14 (Alaska 2001).

226. The limitation on lost companionship to a reasonable replacement period also dovetails with the traditional remedial requirement that a plaintiff may not recover damages that could have been avoided by plaintiff's own actions (i.e., the plaintiff's "duty" to minimize his/her own damages, also known as the avoidable consequences rule). 1 DAN B. DOBBS, *LAW OF REMEDIES* 380-81 (2d ed. 1993). If a new companion animal could provide reasonable substitute companionship, then the plaintiff's claim for lost companionship would be properly cut off after a reasonable replacement period. What constitutes a reasonable replacement period will depend on the availability of another similar animal (e.g., a pot-bellied pig may be harder to obtain than a dog) and the plaintiff's financial resources (e.g., pretrial, the plaintiff may not be able to afford another purebred dog). In evaluating reasonableness, the trier of fact generally will consider the plaintiff's circumstances (i.e., what would a reasonably prudent person do to minimize damages in the plaintiff's circumstances). *Williams v. Bright*, 658 N.Y.S.2d 910, 915-16 (N.Y. App. Div. 1997). In addition, a reasonable replacement period may include a period of time in which to mourn the deceased pet. Some therapists do not advise immediate replacement of the deceased animal if the owner does not feel entirely ready to do so. Kathleen Boyes, *When Your Beloved Pet Dies, You Don't Have to Grieve Alone*, CHI. TRIB., Mar. 6, 1994, at D1.
227. Although corrective justice and economic efficiency are often said to be opposing views of remedial policy, some have argued that in fact they are related. See Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1048 (2001) (pointing out that "one could stipulate that wrongful acts are those acts by A that injure B and are inefficient") (footnote omitted); Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187, 201 (1981) ("Once the concept of corrective justice is given its correct Aristotelian meaning, it becomes possible to show that it is not only compatible with, but required by, the economic theory of law.").

The "value to the owner" approach and the recognition of loss of society claims move closer toward a level of true compensation, but they both suffer from certain deficiencies outlined above. My proposal identifies three separate elements that represent genuine losses by the pet owner and that require individual compensation.

First, the plaintiff would be awarded the animal's fair market value if one existed or the animal's replacement cost if the animal had no market value. Presumably, purebred animals or those with special skills or training would have an ascertainable market value. In some cases, that market value will be higher than replacement cost, in some cases lower.<sup>228</sup> Ordinary household pets, however, usually have only a nominal fair market value, but it may cost the plaintiff something to replace the deceased pet (e.g., the adoption fee at an animal shelter or the cost of having a "free" pet checked out by a veterinarian). Proper compensation of the human plaintiff dictates that the cost of acquiring another animal be awarded so that the plaintiff at least can choose to replace the destroyed animal with a new companion.

My proposal's second component involves awarding damages for loss of companionship for a reasonable replacement period after the companion animal's death. This component seeks to compensate for the lost society experienced by the pet owner during the period between the animal's death and the acquisition of a new pet.<sup>229</sup> Because of the animal companion's typical role in the family as comforter, playmate, and protector, the plaintiff suffers a genuine injury upon losing the animal's society. By giving damages for that lost society, the law acknowledges the injury and becomes more truly compensatory.

By limiting loss of society damages to a reasonable replacement period, this proposal acknowledges that, to some extent, one pet can replace another. Unquestionably, each companion animal has his/her own unique qualities and special place in the human owner's heart.

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228. For an animal whose market value diminishes with age, replacement of an elderly animal might involve purchasing a young animal at a higher cost than the older animal's fair market value. On the other hand, certain animals that undergo special training may acquire additional value as they mature. Thus, a mature animal's fair market value might exceed the cost of replacing the animal with a younger, untrained one. See *Stettner v. Graubard*, 368 N.Y.S.2d 683, 685 (N.Y. Town Ct. 1975) ("[M]anifestly, a good dog's value increases rather than falls with age and training.").

229. In some cases, replacement of the animal may not be feasible. For example, elderly plaintiffs may choose not to replace their deceased pet on the assumption that they may not be able to care for a young animal in a few years. See Lynette A. Hart, *Dogs as Human Companions: A Review of the Relationship*, in *THE DOMESTIC DOG: ITS EVOLUTION, BEHAVIOUR, AND INTERACTIONS WITH PEOPLE* 173 (James Serpell ed. 1995). Where the plaintiff demonstrates the inadvisability of replacing the pet, the court should award damages for the loss of the deceased pet's society for the remainder of the pet's projected life expectancy or the owner's projected life expectancy, whichever is shorter.

But because of the fundamental similarities among members of the same breed in particular, a person can reasonably replace the basic functions served by a pet by acquiring another similar one.<sup>230</sup> The goal of any compensation scheme is to restore the plaintiff as nearly as possible to his/her pre-tort position, not to overcompensate or undercompensate the plaintiff. The restriction of lost society damages to a reasonable replacement period reduces the chances of overcompensation by recognizing that a subsequent animal companion can serve many of the same roles that the previous one did.

The final compensatory element of my proposal involves awarding damages for the plaintiff's emotional distress caused by the premature demise of his/her companion animal.<sup>231</sup> The social scientific evidence discussed earlier establishes the depth of the human-animal bond and the profound grief experienced by humans when their companion animals die. The circumstances of a tortious death, it has been argued, will typically intensify that grief. Complete compensation of the plaintiff, whose pet the defendant has wrongfully killed, demands that the plaintiff receive damages for his/her emotional suffering. In many ways, the essence of the injury to the plaintiff is the wrenching feelings of grief, sorrow, and depression caused by the defendant's wrongful act. Recognition of mental distress damages in this context evolves logically from the tort law's acknowledgment of such damages in situations where the plaintiff has sustained significant psychic harm.

One of the traditional objections to affording greater compensation to the prospect of "opening the floodgates" of litigation,<sup>232</sup> not only to

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230. See *Van Patten v. City of Binghamton*, 137 F. Supp. 2d 98, 104-05 (N.D.N.Y. 2001) ("[W]e can buy another pet that may fill some of the voids caused by the loss of a pet . . .").

231. Other scholars have noted the incongruity of awarding economic damages for companion animals that often have no economic value, while denying damages for the intangible losses that constitute the crux of the pet owner's injury. See Sonia S. Waisman & Barbara R. Newell, *Recovery of "Non-Economic" Damages for Wrongful Killing or Injury of Companion Animals: A Judicial and Legislative Trend*, 7 ANIMAL L. 45, 53-64 (2001); Steven M. Wise, *Recovery of Common Law Damages for Emotional Distress, Loss of Society, and Loss of Companionship for the Wrongful Death of a Companion Animal*, 4 ANIMAL L. 33, 93 (1998); Debra Squires-Lee, Note, *In Defense of Floyd: Appropriately Valuing Companion Animals in Tort*, 70 N.Y.U. L. REV. 1059, 1096-99 (1995); William C. Root, Note, *"Man's Best Friend": Property or Family Member? An Examination of the Legal Classification of Companion Animals and Its Impact on Damages Recoverable for Their Wrongful Death or Injury*, 47 VILL. L. REV. 423, 427-28 (2002).

232. In discussing the disadvantage of recognizing a claim for emotional distress from the death of a family pet, one court observed: "Such an expansion of the law would place an unnecessary burden on the ever burgeoning case loads of the court in resolving serious tort claims for injuries to individuals." *Johnson v. Douglas*, 723 N.Y.S.2d 627, 628 (N.Y. Sup. Ct. 2001); see also *Rabideau v. City of Racine*, 627 N.W.2d 795, 798-99 (Wis. 2001) ("We are particularly concerned that were such a claim [for emotional distress for the death of a dog] to go forward, the law would proceed upon a course that had no just stopping point.").

distressed pet owners but also to other individuals claiming emotional anguish over the loss of inanimate objects that have sentimental value, such as family photographs and heirlooms. Currently, pet owners have little incentive to sue tortfeasors responsible for the injury or death of their pets; the permitted recovery in most states is simply too low to cover attorneys' fees and other litigation costs. Allowing recovery for emotional distress damages in these cases would boost awards significantly, and presumably, more claims would be brought and litigated.

To allay fears of possibly excessive awards and disproportionate liability, I propose a cap on the amount of noneconomic damages that can be awarded in animal death cases.<sup>233</sup> A cap would prevent juries from being overcome with sympathy for the plaintiff and thus inflating the emotional distress damages beyond all reasonable bounds. Even though courts have the power to reduce damages through remittitur,<sup>234</sup> a legislative cap would ultimately be more effective in ensuring uniformity of awards.<sup>235</sup> A cap would also send a message that

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233. Several states have legislatively imposed caps on noneconomic damages. The statutes vary significantly in a couple of important features. Some caps apply only to medical malpractice actions; others limit noneconomic damages in all personal injury cases. *See, e.g.*, ALASKA STAT. § 09.17.010 (2000) (imposing a cap in all personal injury or death cases); MICH. COMP. LAWS ANN. § 600.1483(1) (1996) (imposing a cap in medical malpractice actions); MONT. CODE ANN. § 25-9-411 (2001) (same). Some caps are set at a fixed sum, such as \$250,000; others are calculated from a formula using the injured party's life expectancy. *See, e.g.*, ALASKA STAT. § 09.17.010 (2000) (imposing a cap of \$400,000 or the injured person's life expectancy in years multiplied by \$8,000, whichever is greater); COLO. REV. STAT. ANN. § 13-21-102.5 (Supp. 2001) (imposing a basic cap of \$250,000 on noneconomic damages); CAL. CIVIL CODE § 3333.2(b) (1997) (imposing a cap of \$250,000); MD. CODE ANN., CTS. & JUD. PROC. § 11-108 (b)(1) (1998 & Supp. 2001) (imposing a cap of \$350,000 on noneconomic damages); MICH. COMP. LAWS § 600.1483(1) (1996) (imposing a basic cap of \$280,000 on noneconomic damages); UTAH CODE ANN. § 78-14-7.1(1)(b) (1996 & Supp. 2001) (imposing a cap of \$400,000 on noneconomic damages for claims arising between July 1, 2001 and July 1, 2002).

234. The device of remittitur allows judges to require plaintiffs to accept either a reduction in a favorable jury verdict or a new trial. Courts must generally find that the verdict was under the influence of "passion or prejudice" or that it shocks the court's conscience. David Fink, Note, *Best v. Taylor Machine Works, the Remittitur Doctrine, and the Implications for Tort Reform*, 94 Nw. U. L. REV. 227, 243-44 (1999).

235. The appropriate amount of the cap, of course, is open to debate. Tennessee recently became the first state in the country to enact a statute, known as the "T-Bo Act," expressly providing for recovery of noneconomic damages resulting from the intentional or negligent destruction of a pet. TENN. CODE ANN. § 44-17-403 (2000). The statute defines "pet" as "any domesticated dog or cat normally maintained in or near the household of its owner." TENN. CODE ANN. § 44-17-403 (b) (2000). Noneconomic damages are limited to "compensation for the loss of the reasonably expected society, companionship, love and affection of the pet," and are capped at \$4,000. *Id.* at § 44-17-403 (a), (d). The act excludes, among others,

although the human-animal bond is worthy of significant compensation, the law still recognizes that the bonds among humans are at the heart of our existence and our social organization.<sup>236</sup>

By including a component for loss of society and for mental anguish, my proposal more fully compensates the human caregivers of companion animals than does the current majority scheme of awarding only the fair market value of destroyed animals.<sup>237</sup> It attempts to

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licensed veterinarians and rural areas. *Id.* at. § 44-17-403 (e), (f). Its application to negligent acts is limited, as well, to those occurring on the property of the deceased pet's owner or caretaker or occurring while the pet was under the owner or caretaker's control or supervision. *Id.* at. § 44-17-403 (a).

Following Tennessee's lead, Illinois recently passed a law allowing pet owners to recover damages for their pet's death or injury caused by another's aggravated cruelty, torture, or other abusive act. 510 ILL. COMP. STAT. ANN. 70/16.3 (Supp. 2001). Damages include, but are not limited to, "the monetary value of the animal, veterinary expenses incurred on behalf of the animal, any other expenses incurred by the owner in rectifying the effects of the cruelty, pain, and suffering of the animal, and emotional distress suffered by the owner." *Id.* Emotional distress damages are not capped, but punitive damages are limited to a minimum of \$500 and a maximum of \$25,000 for each act of abuse or neglect. *See also* H.B. 5571, 2002 Gen. Assem., Reg. Sess. (Conn. 2002) (authorizing action for economic damages relating to the killing or injuring of a companion animal, punitive damages up to \$3,500, and reasonable attorney's fees).

Similar bills have been introduced in Colorado and Massachusetts. *See* H.B. 1260, 64th Gen. Assem., Reg. Sess. (Colo. 2003); S.B. 932, 183rd Gen. Ct., Reg. Sess. (Mass. 2003). One of the Colorado bill's sponsors moved to withdraw it shortly after its introduction, possibly because of lobbying efforts by "veterinarians and opponents of trial lawyers." Julia C. Martinez, *Pet Bill Killed by House Sponsor*, DENVER POST, Feb. 16, 2003, at B1.

236. Legislative caps have come under attack and been overturned in a number of states on various constitutional grounds, such as equal protection, due process, right to jury trial, and open courts provisions. Fink, *supra* note 234, at 267-68. One court suggested that a cap is essentially a "legislative remittitur," without the case-by-case deliberation and tailoring that underpin the traditional judicial remittitur. *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1079 (Ill. 1997). But many states have upheld their statutory caps on noneconomic damages in personal injury actions. Fink, *supra* note 234, at 268-71. Given that my proposal involves creating a legislative remedy that did not exist before and applying it to all actions involving tortious destruction of a pet, the cap component might more readily survive constitutional challenges than did caps on noneconomic damages in traditional common law actions for product liability or medical malpractice.

237. My proposal does not purport to deal with the equally vexing question of how to compensate plaintiffs whose companion animals have been injured, but not killed. Traditionally, where the cost of repairs of personal property exceeds its diminution in fair market value, the plaintiff may recover only the diminution in fair market value. 1 DAN B. DOBBS, *LAW OF REMEDIES* 853 (2d ed. 1993). Some courts, however, have allowed animal owners to recover the veterinary expenses associated with treating the animal (and sometimes saving its life) even though those expenses exceed the animal's diminution in fair market value. *See Atwood v. Boston Forwarding & Transfer Co.*, 71 N.E. 72, 72 (Mass. 1904) (awarding expenses of treating horse that died along with its fair market value); *Hyland v. Borrás*, 719 A.2d 662, 664 (N.J. Super. Ct. App. Div. 1998) (upholding award of \$2,500 in veterinary expenses where replacement dog could be purchased for

identify the core injury suffered by pet owners when a tortfeasor negligently or intentionally kills their companion animal, namely the loss of the bond with a particular animal and the often intense mental suffering experienced when an animal dies prematurely. It recognizes that, as with children, the value of companion animals in human society ceased to be economic some time ago and now derives principally from the loyalty, affection, and companionship that these animals offer.

Similarly, my proposal furthers the traditional tort goal of deterrence. Arguably, the current fair market value standard of compensation insufficiently deters certain types of tortious behavior. Given that the fair market value of most household pets is close to zero, the civil law offers virtually no disincentive to the negligent, reckless, or intentional killing of an animal companion. Because animal cruelty laws are often vague or underenforced,<sup>238</sup> the criminal law rarely fills in the gap in deterrence.

Inevitably, compensation and deterrence are interwoven with the third traditional objective of tort law: the reflection of accepted social values. As a society, we desire to compensate for injuries that we accept as worthy of acknowledgment and compensation. Similarly, we want to deter activities that we regard as socially undesirable or harmful. Society has come more and more to recognize emotional injuries as genuine harms deserving of compensation. Our vision of a humane and civilized society now encompasses protection of individuals' emotional tranquility along with their physical integrity and property interests. Social science data establish that companion animals promote the emotional wellbeing of their human caregivers in a number of different ways and that emotional wellbeing is often seriously disrupted when a companion animal dies, especially in a premature or violent manner.<sup>239</sup> To properly acknowledge and protect the emotional sustenance furnished by such animals, the tort law should award damages for its loss.<sup>240</sup>

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\$500). One court, in allowing recovery of veterinary expenses, noted that to limit plaintiffs to only fair market value would encourage them to not treat their animals and allow them to die. This result would be decidedly "inhuman." *Zager v. Dimilia*, 524 N.Y.S.2d 968, 970 (N.Y. Justice Ct. 1988). *But see Stettner v. Graubard*, 368 N.Y.S.2d 683, 685 (N.Y. Town Ct. 1975) (capping recoverable veterinary expenses at the dog's fair market value).

238. Margit Livingston, *Desecrating the Ark: Animal Abuse and the Law's Role in Prevention*, 87 IOWA L. REV. 1, 4, 29-42 (2001).

239. *See supra* notes 133-169 and accompanying text.

240. In recognizing the need to modernize the basis for child wrongful death recoveries, one court eloquently described the legal anachronism of valuing children for their labors:

Yet there still exists in the law this remote and repulsive backwash of time and civilization, untouched by the onward march of society, where precedents we alone honor tell us that the value of the life of a child

Just as compensation of this particular emotional injury reflects certain contemporary social values, deterrence of tortfeasors in animal death cases also furthers these values. In many animal cruelty cases, the perpetrator acts with deliberate intent to harm the animal. Certainly, the desirability of deterring the purposeful torture and killing of inoffensive companion animals is self-evident. Perhaps the prospect of civil damages for the wrongful killing of such animals offers more theoretical than actual deterrence; many tortfeasors in deliberate cruelty cases may be judgment proof.<sup>241</sup> Nonetheless, some of these tortfeasors will have the assets to pay a significant judgment, and even if they do not, it is important that the law reinforce the message that deliberate cruelty to animals is unacceptable.

More often the actor kills the animal negligently or recklessly, rather than intentionally (e.g., a motorist hits a dog in the street or a veterinarian fails to treat adequately a sick cat). Even if companion animals are regarded as merely property, unquestionably, a defendant owes an animal's owner the duty to exercise reasonable care to prevent injury to the owner's property.<sup>242</sup> The tortfeasor breaches that duty whether he/she, while driving at an excessive rate of speed, hits and destroys the plaintiff's dog or the plaintiff's fence.<sup>243</sup> In veterinary negligence cases, courts are divided about whether the action should proceed on a theory of bailment, simple negligence, or professional malpractice.<sup>244</sup> But despite this doctrinal division, courts basically agree that a veterinarian owes the pet owner some duty of

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must be measured solely by the standards of the day when he peddled the skill of his hands and the strength of his back at the factory gates.

- Wycko v. Gnodtke, 105 N.W.2d 118, 121 (Mich. 1960). The court's comment can be analogized, of course, to the changing role of companion animals in society.
241. See, e.g., *State v. Picard*, No. 38116-4-1, 1996 Wash. App. LEXIS 621, at \*4 (Wash. Ct. App. Nov. 4, 1996) (indicating that defendant who cruelly killed several cats was a juvenile).
242. In one of the classic injury-to-property cases, *United States v. Carroll Towing Co.*, Judge Learned Hand applied his famous formula of  $B < PL$  to determine the parties' liability in negligence where a barge broke loose from its moorings, dumped its cargo, and sank. 159 F.2d 169, 173 (2d Cir. 1947). B stands for the burden of preventing a particular injury, P for the probability of the injury occurring, and L for the magnitude of the injury. *Id.*
243. Of course, in many automobile accident cases involving companion animals, it may be difficult for the plaintiff to prove negligence. For example, most drivers would be unable to stop in time if an unleashed dog or cat dashed into the street without warning. See Randal C. Archibold, *Buddy Clinton, Friend to President and Nemesis of Socks, Is Dead at 4 1/2*, N.Y. TIMES, Jan. 4, 2002, at A20 (noting that in the death of President Clinton's dog who was chasing a vehicle, the "police have ruled the incident an accident and do not anticipate filing charges against the driver."). An animal's "contributory negligence," if you will, might preclude a number of claims.
244. Cheryl M. Bailey, Annotation, *Veterinarian's Liability for Malpractice*, 71 A.L.R.4th 811, 816 (1989).

care.<sup>245</sup> By allowing for substantial recoveries for the negligent destruction of animals, the law acknowledges that animals, even if viewed strictly as property, are worthy of significant protection.

Arguably, an expanded damages remedy for the wrongful destruction of companion animals should serve not only the traditional tort policies of compensation, deterrence, and effectuation of social goals, but also the classic remedial policies of corrective justice and economic efficiency. Corrective justice is intimately related to compensation;<sup>246</sup> it mandates that the wrongdoer restore the injured parties to their pre-injury position as nearly as possible.<sup>247</sup> Because it is difficult, if not impossible, to remove or cure the mental anguish that some tort plaintiffs suffer, they cannot be restored to their pre-tort position except through an award of damages. Because the law cannot accomplish a literal restoration, it offers a substitutionary restoration.

As demonstrated above, most human guardians of companion animals suffer considerable mental anguish if their animal is negligently or intentionally killed. This suffering arguably goes beyond the normal sadness experienced when the animal dies a natural death. To place plaintiffs in their pre-tort position is literally impossible, but an award of damages for emotional anguish provides a reasonable, if imperfect, substitute. In an effort to avoid overcompensating plaintiffs, on the other hand, my proposal recognizes that in some ways a new companion animal can substitute for the deceased one and, thus, limits damages of lost society to a reasonable replacement period.

The remedial goal of economic efficiency seeks to promote the efficient allocation of resources. Any activity has the potential to injure

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245. In a bailment, the bailee is required to exercise due care in the handling of the property bailed, and if the bailee fails to return the property to the bailor in sound condition, it is presumed that the bailee did not exercise due care. *Price v. Brown*, 680 A.2d 1149, 1152 (Penn. 1996). In negligence and professional malpractice cases, of course, the crux of the action is breach of a duty to exercise reasonable care. *Id.* As one court phrased it, a veterinarian is "duty bound to bring to his service the learning, skill and care which characterizes the profession generally." *Ruden v. Hansen*, 206 N.W.2d 713, 715 (Iowa 1973).

246. Professors Kaplow and Shavell have criticized theories of corrective justice as essentially incomplete because "they do not themselves furnish a theory of wrongfulness." Louis Kaplow & Steven Shavell, *Fairness versus Welfare*, 114 HARV. L. REV. 961, 1095 (2001) (footnote omitted). They advocate the application of welfare economics in evaluating legal rules: "[L]egal rules should be selected entirely with respect to their effects on the well-being of individuals in society." *Id.* at 967.

247. One author described corrective justice as, in essence, "putting things right": "[I]t requires those who have without justification harmed others by their conduct to put the matter right. This they must do on the basis that harm-doer and harm-sufferer are to be treated as equals, neither more deserving than the other. The one is therefore not entitled to become relatively better off by harming the other. The balance must be restored." TONY HONORÉ, *RESPONSIBILITY AND FAULT* 73-74 (1999) (footnotes omitted).

others. In some cases, it is less costly for the injurer to cease or modify the activity than it would be for the victims to avoid the injury.<sup>248</sup> In other cases, the reverse will be true, for it will be cheaper for the victim to avoid the injury than for the injurer to change or modify the activity. But unless one accounts for the full cost of an activity, including the costs imposed on victims, it is impossible to determine whether a particular activity is genuinely profitable and thus economically efficient.<sup>249</sup> In other words, the cost of an activity is determined by the cost of the labor and materials devoted to it and also by the cost of the externalities produced by it. Suppose I engage in a manufacturing process that produces a high-pitched noise that only dogs can hear. Additionally, suppose that as a result of continuous exposure to this noise, dogs in neighboring communities become insane and have to be euthanized to the family members' distress. One of the costs of my activity is the destruction of a certain number of dogs. It is impossible to judge the true profitability of my activity without accounting for the harm caused by the injury to the animals and their human companions.

Under the current majority rule, if I were found liable in tort for the damages caused by my activity, I would have to pay the pet owners the fair market value of their animals. But the majority rule, as discussed above, does not fully account for the true value of the animals to their owners. Most pet owners experience considerable mental anguish at their animals' premature demise. As a result, they would not accept the modest sum offered by the fair market value standard in exchange for having their animals undergo a painful or needless death. Part of the utility that pet owners attach to their pets is reflected in the substantial sums of money that many owners are willing to pay to prolong their pets' lives,<sup>250</sup> to contribute toward the rescue of another's pet,<sup>251</sup> and to bequeath them in their wills.<sup>252</sup> In

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248. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 48-49 (1987) (giving examples in the nuisance context).

249. See Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669, 670 (1979) ("In economic terms, [legal] rules force one producer to internalize the external costs he imposes on others . . .").

250. See Jane E. Brody, *V.I.P. Medical Treatment Adds Meaning to a Dog's (or Cat's) Life*, N.Y. TIMES, Aug. 14, 2001, at D4 (noting that some pet owners spend "thousands of dollars to keep [their pets] alive and enjoying a reasonable quality of life").

251. See Jaymes Song, *Effort to Rescue Dog Adrift Unleashes Questions*, CHI. TRIB., Apr. 26, 2002, at N8 (recounting that the Hawaiian Human Society expended \$48,000 garnered from the Humane Society of the United States and private donations in attempt to rescue a dog stranded on a crippled tanker). See also Pam Belluck, *Stranded Whales Dying Despite Rescuers' Efforts*, N.Y. TIMES, July 31, 2002, at A12 (describing extensive efforts by volunteers to save numerous beached whales).

addition, many humans invest a significant amount of time, energy, and money to care for and train their animals on a day-to-day basis. That investment is presumably lost when the animal is killed unnecessarily.

Many animal owners, one might assume, would be willing to pay for at least some increase in the cost of certain activities to assure a greater degree of safety for their pets.<sup>253</sup> Because many of these activities involve direct interaction with animals, it is also likely that pet owners, as opposed to non-pet owners, would bear the increased cost of these activities. Non-pet-owners, for example, rarely purchase veterinary services, obedience classes, and pet toys, all of which might lead to the injury or death of an animal. For activities affecting the entire consuming public, greater safety precautions undertaken because of increased damages for animal destruction, will often benefit non-pet owners as well. For example, if automobile owners drive more carefully because of their increased liability for injuring animals, this careful behavior presumably benefits all pedestrians (human and non-human) on the roadways. Similarly, if window manufacturers construct their windows so as to minimize the danger of a screen accidentally popping out, the improved construction will reduce accidents involving children as well as pets.

Part of the total cost of accidents involves the cost of enforcing one's compensatory rights. If injured parties must sue to recover damages, they incur attorneys' fees and other litigation expenses. Under the American Rule, litigants bear their own litigation costs, and fee shifting does not occur.<sup>254</sup> One justification for the award of pain and suffering damages to personal injury plaintiffs is that the awards help to defray the cost of litigation for which plaintiffs are otherwise uncompensated.<sup>255</sup>

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252. See Gerry W. Beyer, *Pet Animals: What Happens When Their Humans Die*, 40 SANTA CLARA L. REV. 617, 618 (2000) (stating that between 12% and 27% of pet owners provide for their animals in their wills); Judith T. Younger, *Paying Our Debts to Our Pets*, 2001 UNIV. MINN. LAW ALUMNI NEWS 13 (explaining that the Uniform Probate Code allows pet owners to set up valid and enforceable trusts for the posthumous care of their animals).

253. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 184 (5th ed. 1998) ("Customers should be willing to pay higher prices for the industry's product or service up to the point where the last dollar spent buys just one dollar in accident cost reduction.")

254. *Alyeska Pipeline Serv. Co. v. Wilderness Soc.*, 421 U.S. 240, 247 (1975); *Union Fidelity Life Ins. Co. v. McCurdy*, 781 So. 2d 186, 189 (Ala. 2000); *Quealy v. Paine, Webber, Jackson & Curtis, Inc.*, 475 So. 2d 756, 763 (La. 1985); *Hickey v. Griggs*, 738 P.2d 899, 902 (N.M. 1987).

255. See Jeffrey O'Connell, *A Proposal to Abolish Defendants' Payment for Pain and Suffering in Return for Payment of Claimants' Attorneys' Fees*, 2 U. ILL. L. REV. 333, 351-52 (1981) (suggesting that pain and suffering damages would be unnecessary if the defendant covered the plaintiff's attorneys' fees).

The same justification applies, but even more so, to actions for the wrongful death of a companion animal. The core recovery for destruction of a companion animal, namely the animal's fair market value, remains the same, even under my proposal. Thus, the pecuniary damages in this instance are quite low, even lower than in a typical wrongful death or survival action for a human.<sup>256</sup> Without the prospect of recovering nonpecuniary damages, pet owners will have little incentive to sue for the destruction of their animals, knowing that attorneys' fees per se are not recoverable from the defendant.

The remedial goal of economic efficiency also aims to place any loss on the party who can avoid it most cheaply. It is debatable to what extent pet owners can take cost effective steps to avoid injury to their pets caused by defective products and veterinary negligence.<sup>257</sup> But after the injury, plaintiffs can ameliorate the ongoing harm of lost companionship, my proposal assumes, by acquiring a replacement companion animal within a reasonable period of time. Although one companion animal cannot completely replace another, there are enough common features among species and breeds that a substitute animal can provide, to a large extent, the same type of companionship provided by the deceased animal.<sup>258</sup>

#### D. Objections to Allowing Recovery of Intangible Losses

As alluded to previously,<sup>259</sup> there are a number of traditional objections to recognizing claims for emotional distress and loss of society, and any proposal to expand the available damages in pet destruction cases must meet them: (1) the inappropriateness of commodifying through damages awards the intangible benefits of a close relation-

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256. In the typical wrongful death action the statutory plaintiffs may recover for the financial contributions that the decedent would have made to them. 3 JEROME H. NATES ET AL., *DAMAGES IN TORT ACTIONS* § 22.03 (2002). In the case of decedents gainfully employed at the time of death, damages may easily run into the thousands and even millions, depending on the decedent's projected work-life expectancy. See, e.g., *Kimberlin v. DeLong*, 637 N.E.2d 121, 130 (Ind. 1994) (affirming wrongful death damages that included over one million dollars in projected lost income).

257. Pet owners can superficially inspect supplies and toys bought for their animals, but they will have little way of knowing, for example, if the stuffing inside a toy is harmful if ingested. And as lay persons, most owners will have to simply trust the advice given by their veterinarian. With respect to automobile accidents and intentional animal abusers, owners can take some relatively cheap steps to reduce the chances of injury by simply keeping their animals inside, on a leash, in a fenced yard, or otherwise under supervision.

258. A brief glance at any dog or cat breed book reveals that particular breeds have their own special characteristics of physical appearance and personality. See, e.g., *THE BOOK OF THE CAT* 53 (Michael Wright & Sally Walters eds., 1980) (noting that Maine Coon cats are thought to be "the perfect domestic pets, with their clown-like personality, amusing habits and tricks, and easily-groomed coat").

259. See *supra* notes 173-176 and accompanying text.

ship; (2) the possibility of overwhelming numbers of fraudulent claims diverting judicial resources; (3) imposition of damages awards disproportionate to a tortfeasor's fault; (4) an undue increase in the cost of certain goods and services produced by higher damages awards; (5) the essentially unquantifiable nature of mental anguish damages; and (6) the prospect of multiple, overlapping claims flowing from the same incident. I will address each of these concerns in turn and demonstrate that my proposal either dispels or lessens them.

As a threshold matter, one must consider the appropriateness of giving a monetary recovery for the destruction of what was presumably a close and affectionate relationship. Some scholars have questioned the wisdom of attaching a dollar amount to personal relationships. Professor Richard Abel has argued that the expansion of tort remedies to encompass loss of society and the like "commodifies love."<sup>260</sup> Commodification in this context sends several, perhaps undesirable, messages. For example, that "[a]ll relationships have a monetary value and hence can be bought and sold."<sup>261</sup> In addition, awarding damages for lost society conveys the notion that a relationship with an "impaired" individual (e.g., a wheelchair-bound spouse) is less valuable than one with an "unimpaired" person.<sup>262</sup>

In applying this argument to pet destruction cases, one could argue that allowing owners of companion animals to recover for their emotional anguish and loss of the animal's society commodifies the human-animal bond.<sup>263</sup> It promotes the American fantasy that somehow money can rectify human suffering and that one relationship can replace another. The response to this argument is twofold: first, the law has already commodified the human-animal relationship, even more so than the human-human relationship, by basing damages on a pet's fair market value, and second, although money will not bring back the deceased human (in a wrongful death case) or the deceased animal (in a pet destruction case), it is the only reasonable mechanism that society has by which to acknowledge the importance of the bond that has been severed.<sup>264</sup>

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260. Richard L. Abel, *Torts*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 195 (David Kairys ed. 1982).

261. *Id.* at 196.

262. *Id.* Awards for loss of consortium imply that the uninjured spouse should discard her impaired partner and purchase a replacement with her monetary damages. *Id.*

263. One non-lawyer friend, upon learning of this Article's topic, remarked that she, an extremely devoted pet owner, would not want any money if one or both of her animals were wrongfully killed: how could one possibly put a price tag on her loving relationship with her animals, and, in addition, what real purpose would money serve?

264. Professor Radin has observed that it is possible to conceive of compensation for intangible injuries in a "noncommodified way": "[I]f we are clear that it is not a quid pro quo, but rather a symbolic action that reinforces our commitments about

One of the most frequently cited difficulties with judicial or legislative recognition of claims for mental anguish or emotional suffering is the fear of fraudulent claims.<sup>265</sup> As Dean Prosser once observed, “[i]t is now more or less generally conceded that the only valid objection against recovery for mental injury is the danger of vexatious suits and fictitious claims . . . . The danger is a real one, and must be met. Mental disturbance is easily simulated.”<sup>266</sup> In the context of animal destruction cases, many courts seem concerned that plaintiffs will exaggerate the emotional anguish felt upon learning of a pet’s death and thereby recover undeserved damages. Undoubtedly, some plaintiffs have the ability to fabricate mental suffering that, in fact, was not experienced upon the pet’s demise. Some pet owners may not have a strong bond with their animals; a few may welcome the death of a troublesome dog or cat.

The potentially legitimate concerns about fraudulent claims may be overcome in a couple of ways. First, these concerns plague any action for emotional distress or loss of society based on interference with a relationship. An individual whose spouse has been injured by another’s negligence may recover for the loss of the spouse’s consortium in most states.<sup>267</sup> A parent whose child has been negligently killed may receive damages for the loss of the child’s society under many wrongful death statutes.<sup>268</sup> In neither instance is there any guaran-

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rights and wrongs . . . .” Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 85 (1993); see also Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CALIF. L. REV. 772, 781-82 (1985) (“Although money damages may not be an equivalent to the injury experienced, they can serve an important symbolic means of preserving the entitlement of personal security and autonomy against infringement.”).

265. One author dismissed the concern about fraudulent claims as more illusory than real:

This cry [about possible fraudulent claims] has been raised against every innovation in tort litigation. It is an insult to the whole judicial process dedicated as it is to the winnowing of true claims from false ones. To refuse to entertain valid claims because others might be fraudulently brought is an argument of expediency rather of justice. Courts have already shown that they are quite capable of marking out the bounds.

- 12 F.F. STONE, LOUISIANA CIVIL LAW TREATISE: TORT DOCTRINE §170, at 217 (1977). See also *Dillon v. Legg*, 441 P.2d 912, 919 (Cal. 1968) (“Undoubtedly, ever since the ancient case of the tavern-keeper’s wife who successfully avoided the hatchet cast by an irate customer [in 1348], defendants have argued that plaintiffs’ claims of injury from emotional trauma might well be fraudulent.”) (citation omitted).
266. WILLIAM L. PROSSER, THE LAW OF TORTS § 54, at 328 (4th ed. 1971).
267. 2 DAN B. DOBBS, LAW OF REMEDIES § 8.1(5), at 400 (2d. ed. 1993). For cases equalizing the consortium claim between husbands and wives, see *Rodriguez v. Bethlehem Steel Corp.*, 525 P.2d 669, 686 (Cal. 1974); *Diaz v. Eli Lilly & Co.*, 302 N.E.2d 555, 564 (Mass. 1973); *Millington v. Southeastern Elevator Co.*, 239 N.E.2d 897, 902-03 (N.Y. 1968).
268. 3 JEROME H. NATES ET AL., DAMAGES IN TORT ACTIONS § 24.03 (2002).

tee that the plaintiff, in fact, had a close relationship with the deceased spouse or child.<sup>269</sup> Even in intact families, one spouse could be emotionally estranged from the other; a child might be emotionally distant from his parents at the time of his death. Nonetheless, the law recognizes that in most cases, an individual will experience at least some loss of consortium upon his/her spouse's death, and a parent will endure some lost society upon a child's death.<sup>270</sup> The plaintiffs in these situations must adduce evidence at trial to support their claims for intangible damages. They must establish the depth and duration of their relationship with the decedent and the specific ways in which they were connected to the decedent and are now deprived of his/her companionship and society.

The relationship between human and companion animal may be analogized in many ways to that between spouses and parents and children. Some human-pet relationships are superficial and not particularly emotionally profound. But, as with other family relationships, one may assume that most pet owners experience some emotional distress and loss of companionship upon the death of a pet. The law presumes that the severance of a close familial relationship, in most instances, produces grief, sadness, and a loss of the relationship's positive attributes. It remains then for the plaintiff to prove the exact extent of the mental anguish and lost society. Similarly, given our common experience of human-companion animal relationships, one can assume that the unwanted severance of such a relationship results in emotional distress. But to recover any significant amount of damages, the plaintiff should be required to prove the nature and duration of the relationship with the animal and the extent of the mental suffering experienced upon the animal's death.<sup>271</sup>

My proposed cap on intangible damages in pet destruction cases also serves as some guard against fraudulent claims. Frivolous plaintiffs seeking to recover for falsified emotional anguish would have

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269. Although the plaintiffs in wrongful death actions must show the nature and quality of their relationship with the decedent to recover for lost society, much of this proof will flow from the plaintiffs' own testimony about their relationship with the decedent. *See, e.g., Samco Props., Inc. v. Cheatham*, 977 S.W.2d 469, 480-81 (Tex. App. 1998) (noting the testimony of decedent's wife that he had a special relationship with his five-year-old daughter, having shared in her feeding, diaper changing, and bathing). No doubt some plaintiffs will exaggerate the depth of the bond in hopes of increasing the damage award.

270. *See Bullard v. Barnes*, 468 N.E.2d 1228, 1234 (Ill. 1984) (holding that under the Illinois Wrongful Death Act, "parents are entitled to a presumption of pecuniary injury in the loss of a [minor] child's society"). *See also Ballweg v. City of Springfield*, 499 N.E.2d 1373, 1379 (Ill. 1986) (same for adult child).

271. One Illinois Appellate Court noted that although pecuniary injury would not be presumed for plaintiffs claiming the loss of their sibling's society under the Wrongful Death Act, they at least should be given the opportunity to prove their losses. *Schmall v. Village of Addison*, 525 N.E.2d 258, 265 (Ill. App. Ct. 1988).

their ambitions tempered by the knowledge that they could not recover damages above the amount of the legislative maximum. Without the prospect of enormous recoveries, many fraudulent plaintiffs presumably would be deterred from pressing suit whereas legitimate plaintiffs, motivated by their genuine feeling of injury, would still go forward, despite the relatively modest damages.

Two related fears concerning emotional distress and lost society claims are disproportionate liability and the increased cost of goods and services. Critics of such claims argue that awards for intangible damages may increase the overall damage awards in certain cases many times over. In some instances, this increase may result in monetary liability greatly in excess of the tortfeasor's wrongdoing. For example, if a veterinarian committed relatively slight negligence but that negligence caused the death of a dearly beloved dog, the emotional distress and loss of society damages might be significant. But the prospect of disproportionate damages is an inevitable feature of any tort compensation system. The driver of a motor vehicle may have a low level of fault, but, nonetheless, the driver's actions may be the proximate cause of severe injuries to the plaintiff. The driver or the driver's insurance company will be liable for the full extent<sup>272</sup> of the plaintiff's medical and rehabilitation expenses, which could easily run into millions of dollars. Similarly, a relatively careful but somewhat negligent defendant could be liable for thousands of dollars in lost wages damages for injuring a well-paid plaintiff whereas a much more culpable defendant might be responsible for modest damages for hitting an unemployed person.

The disjunction between fault and damages is similarly present in pet destruction cases.<sup>273</sup> A veterinarian could be only modestly negligent in causing the death of an adored family dog, but because of the close relationship between the dog and the owners, the trier of fact might be inclined to award substantial damages. The same doctor could be grossly negligent in caring for a homeless animal and have no liability at all because of the absence of a proper plaintiff. But certainly, any tort compensation system that attempts to be truly com-

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272. If the plaintiff were at fault as well, the defendant's share of the damages would be reduced or eliminated in comparative and contributory negligence jurisdictions. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 65, at 451-52, § 67, at 468-74 (5th ed. 1984).

273. Of course, current state laws may restrict the circumstances under which the law deems the destruction of an animal "wrongful." Some states eliminate liability where an individual kills or injures an animal threatening property such as livestock. See, e.g., Ga. Code Ann. § 16-12-4(f) (2003) (abolishing civil and criminal liability on the part of an individual who humanely kills or injures "an animal reasonably believed to constitute a threat for [sic] injury or damage to any property, livestock, or poultry").

pensatory will produce its share of seemingly "disproportionate" damages.

Once again, the proposed cap on noneconomic damages resulting from the death of a companion animal as well as the restricted nature of the lost companionship damages should lessen the chances of disproportionate liability. A defendant whose negligence causes the death of a much beloved family pet, particularly where the owner witnessed the event, would likely be liable for a substantial amount of noneconomic damages, whether or not the defendant was only slightly negligent or more extensively so. The cap, however, on noneconomic damages would insure that the award did not exceed a certain level deemed appropriate for the loss of a pet.<sup>274</sup> In addition, my proposal restricts loss of society damages to a suitable replacement period. In the case of a common household pet, replacement could occur within a matter of days or at most a few weeks. The restricted period for lost companionship also reduces the likelihood of excessive awards.

Related to the objection of disproportionate liability is the argument that expanding damage awards in pet destruction cases will dramatically increase the cost of certain goods and services, particularly veterinary care and pet-related products and services. There is little doubt that the cost of particular goods and services would increase with the advent of increased damage awards. As medical malpractice and product liability awards have risen over the past twenty-five years, there has been a sometimes startling increase in insurance and manufacturing costs, which are inevitably passed on to the consuming public.<sup>275</sup>

The response to this argument is threefold. First, as discussed earlier, many of the increased costs will be borne by pet owners, not by the consuming public in general. Pet owners presumably are the main consumers of veterinary services, animal supplies and toys, and training classes, all of which might cause injury to companion animals.<sup>276</sup>

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274. Professors Calfee and Rubin have argued that compensation for nonpecuniary losses have adverse economic effects, such as price distortion and the disparity between damages and optimal prevention. John E. Calfee & Paul H. Rubin, *Some Implications of Damage Payments for Nonpecuniary Losses*, 21 J. LEGAL STUD. 371, 402 (1992). They contend that in contractual settings, liquidated damages for nonpecuniary losses may "provide some deterrence while avoiding the extreme effects of overcompensation." *Id.* at 403. Certainly, in a noncontractual setting, a cap on nonpecuniary damages can serve much the same function as liquidated damages by providing a ceiling on recovery.

275. DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 169-75 (3rd ed. 2002) (discussing the sometimes disputed assertion that higher damages awards have driven up the cost of products and insurance).

276. In 2001, Americans spent approximately \$28.5 billion on pet-related goods and services, including food, grooming, and medical care. Michelle Leder, *Personal Business: How Much Is That \$100 Deductible in the Window?*, N.Y. TIMES, July 22, 2001, § 3, at 10.

One might assume that such individuals would tolerate some increase in the cost of animal-related goods and services to augment the safety of their animals. To avoid the increased tort liability, purveyors of veterinary services and other animal-related goods and services theoretically should take at least some steps to reduce the quantity and extent of injuries to companion animals.<sup>277</sup> In general, non-pet owners do not purchase such goods and services and would thereby be insulated from the price increases.<sup>278</sup>

Second, sellers of goods and services that cause injury and death are unable to pass along all of the costs of liability to consumers.<sup>279</sup> In a free market, to remain competitive, sellers cannot raise their prices to absorb completely the cost of damage awards.<sup>280</sup> Thus, some accident-prone sellers will not survive and will be driven from the market. The demise of the more careless providers of goods and services will presumably raise the overall standard of safety within an industry. The greater level of safety will result in fewer injuries to companion animals.

Third, whenever the system for imposing civil liability attempts to become more truly compensatory to injured individuals, there is the possibility of some increase in the costs of goods and services. That increase may render certain goods and services unaffordable by some members of the public. For example, higher prices for veterinary services may render those services unavailable to less wealthy individuals. As a result, these individuals may forego pet owning or provide less care for their animals. A lower frequency of pet owning will mean more homeless animals, many of whom will be destroyed.<sup>281</sup> Less veterinary care will result in more animals enduring a certain degree of suffering or being euthanized because the owner cannot afford the expense of prolonged treatment.

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277. Cf. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 73-75 (1970) (discussing the correlation between accident costs and general deterrence in tort liability). Professor Priest has pointed out that manufacturers, when faced with tort liability, can either invest in additional safety precautions or increase their insurance coverage. In either case, "product costs will increase and the product price will increase." George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 *YALE L.J.* 1521, 1565 (1987).

278. Obviously, some non-pet owners buy pet toys and supplies as gifts for pet owners, but the portion of their total expenditures devoted to these items would be relatively small.

279. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 184 (5th ed. 1998) (noting that a seller's inability to pass along tort liability costs to its customers especially in situations where the accidents occurring involve mainly non-customers).

280. See *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 452 (Wis. 1980) (pointing out that sellers are not always in a position to pass along all of the costs of tort liability to consumers and may have to accept lower profits instead).

281. See Margit Livingston, *Desecrating the Ark: Animal Abuse and the Law's Role in Prevention*, 87 *IOWA L. REV.* 1, 70, n.437 (2001) (noting statistics on the high number of animals euthanized in animal shelters across the country).

With a possible lower incidence of pet owning, society would need to address the problem of surplus companion animals in other ways, such as more aggressive attempts to sterilize animals.<sup>282</sup> The impact of higher prices for veterinary services can be diffused by the greater availability of pet insurance, which has only recently been developed.<sup>283</sup> Veterinarians may make the ethical choice to offer lower fees to poorer clients and to have their wealthier clients subsidize the less affluent ones.<sup>284</sup>

In the end, the tort compensation system must always make a choice between placing the full cost of accidents on the tortfeasor or forcing the tort victim to bear some or all of that cost. But, ultimately, the system's avowed primary goal is to compensate the tort victim for the injury received. In cases of pet destruction, the principal injury is the emotional anguish experienced by the human companion. Most pets do not contribute economically to the household, nor do they have even the prospect of contributing economically, as do children when they mature. In addition, unlike inanimate objects such as cars and furniture, companion animals can have genuine relationships with humans; relationships that are severed and at least partially irreplaceable when the animal is killed. Most people experience considerable grief, sorrow, and other types of mental anguish upon the untimely and needless death of their pets. A tort system that purports

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282. Over a period of two decades, spay and neuter programs have reduced by one-third the number of dogs in the New York City shelter system. Rick Marin, *Worst in Show*, N.Y. TIMES, May 13, 2001, § 9, at 1. See also Sharon Barrett, *Pet Projects*, CHI. TRIB. MAG., July 28, 2002, at 30 (noting that a burgeoning number of stray dogs and cats could be reduced through sterilization); Sally Kestin, *Too Late for Too Many*, SUN-SENTINEL (Fort Lauderdale), June 23, 2002, at 1A (same).

283. See Michelle Leder, *Personal Business; How Much Is That \$100 Deductible in the Window*, N.Y. TIMES, July 22, 2001, § 3, at 10 (recounting the growing demand for pet insurance in the U.S. and its widespread acceptance in parts of Europe); Judy Mandell, *Pet Health Plans and Pet Insurance*, CAT FANCY, June 2002, at 24 (describing various pet insurance plans). Some pet health insurers currently offer plans with premiums starting at less than ten dollars per month, depending upon the pet's age and species and the extent of coverage. Veterinary Pet Insurance, *There Are Times When Love Isn't Enough*, at <http://www.petinsurance.com> (last visited Jan. 6, 2004); PetCare Pet Insurance Programs, *Quick Care for Indoor Cats*, at <http://www.petcareinsurance.com/us/cat/indoor/index.asp> (last visited Jan. 6, 2004).

284. The American Veterinary Medical Association encourages pro bono service to the profession by giving an annual award for contributing to animal welfare. *Davis' Aid to Impoverished Animals Earns Welfare Award*, J. AM. VETERINARY MED. ASS'N, at <http://www.avma.org/onnews/javma/feb00/s020100b.asp> (last visited Jan. 6, 2004). In addition, the American Animal Hospital Association's executive director recently called for veterinarians to donate some of their services to poorer clients and homeless animals. "The Golden Age of Veterinary Medicine," J. AM. VETERINARY MED. ASS'N, at <http://www.avma.org/onnews/javma/may01/s050101e.asp> (last visited Jan. 6, 2004).

to compensate for the loss suffered by plaintiffs should provide for damages for the emotional suffering sustained.

Another commonly voiced objection to awarding intangible damages resulting from the negligent killing of a companion animal is the difficulty of assessing such damages in a fair and consistent manner. Because intangible damages are just that, intangible, there are no market or other economic standards upon which to base them. Juries are often instructed to give a "fair and reasonable compensation" for pain and suffering, emotional distress, mental anguish, and the like.<sup>285</sup> Mental anguish that one jury views as worth \$1,000, another might value at \$100,000. The specter of unpredictable and inconsistent damage awards has caused a number of courts to balk at extending tort liability for intangible losses.

The amorphous nature of intangible damages, however, is not ultimately a sufficient reason to deny the claim altogether. Any time the law allows recovery of damages for emotional distress or lost society, the measurement difficulty emerges. By their very nature, such damages cannot be measured with precision.<sup>286</sup> They do not and are not intended to compensate for economic harm. As mentioned previously, they are a substitute for actual restoration of psychic tranquility.<sup>287</sup>

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285. Graeff v. Baptist Temple of Springfield, 576 S.W.2d 291, 301-02 (Mo. 1978); DeMaris v. Whittier, 569 P.2d 605, 607 (Or. 1977); Lockett v. Martin Fein Interests, Inc., No. 01-98-01333-CV, 2001 Tex. App. LEXIS 6995, at \*14 (Tex. App. Oct. 18, 2001).

286. Scholars have wrestled with the fairness problems posed by widely inconsistent awards for noneconomic damages and have suggested possible methods of creating greater uniformity. One suggested solution is the creation of legislative categories of pain and suffering with prescribed dollar amounts for each category. Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 Nw. U. L. REV. 908, 940-45 (1989). Under this scheme, juries would be asked to render a special verdict, indicating the precise amount of noneconomic damages awarded. Special verdicts would assist both in trial and appellate review of the award and in the creation of a database of awards for noneconomic losses. *Id.* at 962; see also James F. Blumstein et al., *Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury*, 8 YALE J. ON REG. 171, 178-79 (1991) (proposing that based on a comprehensive data base of prior damage awards, juries should be instructed as to presumptive ranges of appropriate awards in particular cases).

Another proposal centers on the notion of "ex ante full-compensation award." Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 773, 804-810 (1995). Under this proposal, juries would be instructed to determine the maximum amount that a reasonable person would have been willing to pay to eliminate the risk that existed in the case of the person's incurring the severity of pain and suffering that the plaintiff now experiences. *Id.* at 842-43. The jury would be instructed to multiply the amount determined by the risk of injury and to award damages for pain and suffering based on that product. *Id.*

287. See *supra* note 264 and accompanying text.

They serve as imperfect compensation and also as a means of deterring negligence and intentional wrongdoing.

Finally, some courts have balked at enlarging recoveries for mental anguish and loss of society for fear of duplicative claims flowing from a single incident. These concerns generally take two forms: first, the possibility that juries will overcompensate plaintiffs if they are allowed to award damages both for mental distress and for loss of companionship,<sup>288</sup> and second, the danger that in a single family several claimants will come forward and seek noneconomic damages, again resulting in possible overcompensation.<sup>289</sup> The first concern focuses on the inherent difficulty of distinguishing among types of emotional injury. An individual whose spouse is killed experiences a constellation of emotions, including grief, sorrow, loneliness, isolation, and so forth. In awarding damages, the trier of fact may not be able to differentiate adequately between mental anguish and lost society so as to give appropriate compensation for each.<sup>290</sup> Thus, many states refuse to allow a separate award for mental anguish and roll it into the category of lost companionship and society.<sup>291</sup>

In addition, in non-death cases, courts have been worried about the potential overlap between the intangible damages awarded to the injured victim and those given in derivative claims to relatives of the

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288. See *Wardlow v. City of Keokuk*, 190 N.W.2d 439, 448 (Iowa 1971) (allowing damages for loss of society but not for mental anguish or grief); *Moore v. Lillebo*, 722 S.W.2d 683, 687 (Tex. 1986) (stating that “[s]ome have suggested that these damages necessarily overlap”); *Wilson v. Lund*, 491 P.2d 1287, 1292 (Wash. 1971) (allowing mental anguish to be recovered as a component of loss of companionship and noting that separating the two concepts involves “a totally unrealistic and conceptually indefensible surgical scalpel technique to distinguish . . . damage to the parent-child relationship from emotional damage”).
289. See *Russell v. Salem Transp. Co.*, 295 A.2d 862, 864 (N.J. 1972) (“Magnification of damage awards to a single family derived from a single accident might well become a serious problem to a particular defendant as well as in terms of the total cost of such enhanced awards to the insured community as a whole.”).
290. See *Green v. Bittner*, 424 A.2d 210, 216 (N.J. 1980) (“[T]he loss of the prospective emotional satisfaction of the companionship of a child when one is older is but one example of the innumerable similar prospective losses occasioned by the child’s death – all of which, plus much more, is included in the emotional suffering caused by the death.”).
291. 3 JEROME H. NATES ET AL., *DAMAGES IN TORT ACTIONS* § 24.03[2] (2002). Based on similar reasoning, many courts do not allow a separate recovery for loss of enjoyment of life in non-death cases, but instead consider lost enjoyment to be one element of pain and suffering. *McDougald v. Garber*, 536 N.E.2d 372, 376 (N.Y. 1989) (“[S]uffering . . . can easily encompass the frustration and anguish caused by the inability to participate in activities that once brought pleasure.”); *Willinger v. Mercy Catholic Med. Ctr.*, 393 A.2d 1188, 1191 (Pa. 1978) (“[T]his Court has never held that loss of life’s pleasures could be compensated other than as a component of pain and suffering.”).

victim for loss of affection, companionship, and society.<sup>292</sup> In non-death cases, injured victims will normally receive substantial awards for their own pain and suffering, including, in many states, an amount for loss of enjoyment of life.<sup>293</sup> If, indeed, the victim's children can recover as well for the loss of their injured parent's society, there is a considerable possibility of duplicative damages. Within a single family unit, an award both for the injured victim's loss of enjoyment of a full relationship with her children and also for the children's loss of their mother's society may be viewed as compensating twice for the same injury (the destruction of the family relationship as it existed before the accident).<sup>294</sup>

The prospect of duplicative recoveries does not exist under my proposal because the companion animals do not themselves have a claim for their own pre-death or post-injury pain and suffering. Unlike the human victim who will recover (or whose estate will recover in a survival action) for pain and suffering, there is no thought that the injured or destroyed animal will have a claim on its own behalf.<sup>295</sup> The crux of my proposal is to compensate the human caregivers of companion animals for their economic and psychological injuries.

My proposal calls for compensation for the mental anguish experienced by plaintiffs upon the untimely death of their companion animal as well as for the loss of companionship of the animal for a reasonable replacement period. Under my proposal, both types of noneconomic damages would be capped at a statutory limit. My proposal addresses the concern about overlapping recoveries in two ways. First, the cap ensures that the overall award of intangible damages would be cabined and would not exceed a reasonable amount.

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292. See *Borer v. Am. Airlines, Inc.*, 563 P.2d 858, 866 (Cal. 1977) (pointing out potential overlap between primary and derivative claims in personal injury cases); *Berger v. Weber*, 303 N.W.2d 424, 436 (Mich. 1981) (Levin, J., dissenting) (observing that "[w]hen a close link between two persons is disrupted, it is difficult to distinguish the injury suffered by each.").

293. 2 DAN B. DOBBS, *LAW OF REMEDIES* § 8.1(4), at 385-88 (2d. ed. 1993).

294. See *Mendillo v. Bd. of Educ.*, 717 A.2d 1177, 1193 (Conn. 1998) (noting the difficulty of distinguishing between the damage to the injured plaintiff's relationship with her children and the damage to their relationship with her); *Dralle v. Ruder*, 529 N.E.2d 209, 213 (Ill. 1988) (pointing out the difficulty of distinguishing between the injured child's claim for pain and suffering and the "legally distinct but factually similar claim by the parents for loss of the child's society and companionship").

295. See *Gluckman v. Am. Airlines, Inc.*, 844 F. Supp. 151, 159 (S.D.N.Y. 1994) (dismissing the plaintiff's claim for his dog's pre-death pain and suffering). For the view that animals should have standing to enforce their own interests, see David Favre, *Equitable Self-Ownership for Animals*, 50 *DUKE L.J.* 473, 501-02 (2000); Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 *UCLA L. REV.* 1333, 1359-60 (2000).

Second, my proposal recognizes that mental anguish and loss of society are in fact conceptually distinct and time limited.<sup>296</sup> Mental anguish represents the often intense negative emotions experienced upon the loss of something valuable (i.e. health, freedom, a significant other, and so forth), especially a loss that comes about suddenly and in a particularly disturbing manner. It is characterized by feelings of sadness and grief.<sup>297</sup> If the loss is not compounded by some ongoing crisis, grief follows a prescribed course and duration.<sup>298</sup> Loss of society, on the other hand, flows from the absence of the positive aspects of a relationship,<sup>299</sup> specifically the joy, comfort, companionship, and solace that are an essential part of a good relationship with another living creature.<sup>300</sup> Although the lost society could conceivably be felt for the rest of the plaintiff's life, my proposal allows plaintiffs to recover loss of society only for a reasonable replacement period unless it would be infeasible for the plaintiff to replace the pet.<sup>301</sup>

A second concern revolving around mental anguish/lost society claims is that multiple family members will press individual claims, resulting in excessive damage awards.<sup>302</sup> For example, where a child is severely injured or killed, conceivably the child's parents, grandparents, siblings, and any stepparents could all seek damages for the loss

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296. For a good discussion of the difference between mental anguish and loss of companionship, see *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 29-32 (D.D.C. 1998).

297. Mental anguish has been described as "a deep inner feeling of pain and hurt often borne in silence." *Connell v. Steel Haulers, Inc.*, 455 F.2d 688, 691 (8th Cir. 1972).

298. See ELISABETH KUBLER-ROSS, *ON DEATH AND DYING* 34-121 (1969) (describing the five stages of grief).

299. Society includes "a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection." *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 585 n.17 (1974).

300. As an example of the difference between mental anguish and lost society, consider the situation of a pet owner who decides to give her pet to another caregiver because the current owner can no longer care for the animal or is moving to an apartment that does not allow pets. See, e.g., *Burgess v. Taylor*, 44 S.W.3d 806, 809 (Ky. Ct. App. 2001) (noting that plaintiff gave over her horses to new caregivers when her physical disability prevented her from caring for the horses). This pet owner may experience some sadness and grief at losing the pet, but the predominant loss will be that of the pet's companionship. On the other hand, a pet owner whose pet is violently killed in an automobile accident will feel not only the loss of companionship but also intense anguish at the manner of the pet's death, particularly if the pet suffered some period of time before death. *Id.* at 812 (discussing the anguish felt by a horse owner upon hearing about the violent death of her former pet).

301. As mentioned earlier, an elderly or disabled plaintiff may not be able to take on the burdens of caring for a new pet. See *supra* note 229.

302. See *Norwest v. Presbyterian Intercommunity Hosp.*, 652 P.2d 318, 321 (Or. 1982) (pointing out the difficulty of limiting the class of plaintiffs entitled to recovery for loss of an injured person's consortium).

of the child's society as well as their mental suffering caused by the injury or death.<sup>303</sup> Such multiple claims could result in overcompensation, some judges have argued, and could place an unwarranted level of liability on the defendant.<sup>304</sup> My proposal answers this argument by allowing the family unit only one recovery for the destruction of a family pet. The "single recovery" concept has several advantages, many of which were outlined above.<sup>305</sup> In this context, however, it reduces the chances of overcompensation and excessive liability. The members of the household in which the animal resided receive a single recovery of damages for their collective emotional anguish and lost companionship.

The "single recovery" concept coupled with the cap on intangible damages in my proposal turns these damages into a kind of solatium, a more-or-less fixed award for the plaintiffs wounded feelings.<sup>306</sup> Civil law countries have traditionally allowed a defined sum to compensate the plaintiff for the intangible losses flowing from the plaintiff's injuries,<sup>307</sup> and some American wrongful death statutes have followed this model by providing a set amount for emotional injuries to the decedent's survivors.<sup>308</sup> The idea of solatium damages for intangible losses has a certain appeal in this context because it limits dam-

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303. See *Villareal v. State*, 774 P.2d 213, 219 (Ariz. 1989) (specifically excluding the injured person's "siblings, grandparents, other relatives, or friends" from the class of plaintiffs entitled to bring a lost consortium claim); *Dralle v. Ruder*, 529 N.E.2d 209, 213 (Ill. 1988) (noting that "[g]randparents, siblings, and friends suffering similar losses of society and companionship would also seek to bring claims, if recovery were to go unchecked"); *Garrett v. City of New Berlin*, 362 N.W.2d 137, 145 (Wis. 1985) (denying a stepfather any recovery for the loss of society of his injured stepson where the boy had a living biological father).
304. *Baxter v. Superior Ct.*, 563 P.2d 871, 873 (Cal. 1977); *Borer v. Am. Airlines, Inc.*, 563 P.2d 858, 863-64 (Cal. 1977). In contrast, a California appellate court had no difficulty in defining broadly the permissible plaintiffs in a case where the defendant funeral homes had allegedly mishandled human remains. *Christensen v. Superior Ct.*, 271 Cal. Rptr. 360, 380 (Cal. Ct. App. 1990), *modified* 820 P.2d 181 (Cal. 1991). Those plaintiffs alleging negligent infliction of emotional distress could include any close family member, namely "relatives residing in the same household, or parents, siblings, children, [grandchildren,] and grandparents of the victim." *Id.* at 375 (quoting *Thing v. La Chusa*, 771 P.2d 814, 829 n.10 (Cal. 1989)). Plaintiffs alleging intentional infliction of emotional distress could include all family members and close friends of the deceased. *Id.* at 376-77.
305. See *supra* notes 217-220 and accompanying text.
306. Professor Jaffe, referring to noneconomic harms, noted that "though money is not an equivalent it may be a consolation, a solatium." Louis L. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROBS. 219, 224 (1953).
307. See Stuart M. Speiser & Stuart S. Malawer, *An American Tragedy: Damages for Mental Anguish of Bereaved Relatives in Wrongful Death Actions*, 51 TUL. L. REV. 1, 9-13 (1976) (discussing solatium damages in civil law countries).
308. See, e.g., COLO. REV. STAT. § 13-21-203.5 (1997) (allowing certain wrongful death plaintiffs to elect a solatium award of \$50,000 in lieu of proving actual noneconomic damages).

ages, in particular, damages about which our society may have some ambivalence. Whereas almost any person can understand the mental anguish experienced by someone whose close relative is suddenly and perhaps brutally killed, not everyone can appreciate the extreme sorrow and loss of companionship felt by those whose pet dies because of another's negligent or intentional act. The proposed limit on intangible damages perhaps more accurately reflects the overall state of societal views about the worth of companion animals than would a proposal for unrestricted recovery.

## VI. CONCLUSION

Companion animals have played a myriad of important roles in their human caregivers' lives since prehistoric times. More than inanimate objects, they provide companionship, affection, solace, and uncritical acceptance of their human guardians. The law, however, has valued them as commodities by restricting recovery for their destruction or injury to their fair market value. The fair market value of ordinary pets, unless they have special qualities as breeding or working animals, is usually close to zero and, as a result, plaintiffs whose pets are destroyed through another's negligent or intentional act are left with minimal damage recoveries.

Given the significance of companion animals in our lives, the market value standard of recovery arguably is grossly undercompensatory.<sup>309</sup> Some courts have attempted to avoid the undercompensation of the traditional standard by awarding damages based on "value to the owner" or even giving some recovery for mental anguish. But "value to the owner" is ultimately grounded in pecuniary loss, and courts allowing mental anguish damages are few and far between, again leaving most plaintiffs without adequate compensation.

In this Article, I proposed that the law, either judicially or legislatively, compensate human plaintiffs for several different elements of the human-animal relationship. My proposal provides for recovery of replacement cost of the animal to cover the pecuniary cost of acquiring a new pet. For purebred animals, replacement cost can be substantial whereas the cost of replacing mixed breed pets will be, in most cases, nominal. Awarding replacement cost allows plaintiffs to be restored to their pre-tort position by procuring a substitute animal.

My proposal goes further, however, in allowing plaintiffs to seek damages for emotional distress and lost companionship. Emotional

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309. See Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 851 (1994) (arguing that with respect to companion animals and certain other goods, the "objection to the use of markets in certain areas must depend on the view that markets will have adverse effects on existing kinds of valuation").

distress damages would compensate pet owners for the immediate shock, grief, and anguish that they experience upon learning of the untimely death of their animals. Damages for loss of society would recompense plaintiffs for the loss of the positive aspects of their relationship with their animals – the companionship and affection provided by a given animal. Under my proposal, lost society damages would cover only a reasonable period in which to replace the pet. This limited award for lost society recognizes that in many respects, a new companion animal can serve many of the companionate functions of the previous one.

In addition, both kinds of noneconomic damages, those for emotional distress and those for lost society, would be capped, if my proposal were to be enacted legislatively. The cap serves several purposes: to avoid excessive awards in pet destruction cases, to avert dramatic rises in the cost of veterinary services, to make the award for intangible losses in these types of cases more socially and politically acceptable, and to acknowledge that pets, while significant members of a family, do not carry the same worth as a human member of that family.

Finally, besides replacement, emotional distress, and lost companionship damages, my proposal allows for punitive damages if the defendant's actions were malicious or intentional. Similar to other torts, pet destruction should lead to liability to exemplary damages if the defendant consciously and deliberately chose to injure another. As in other contexts, punitive damages would provide an additional level of deterrence of tortious conduct.

In the end, my proposal hinges primarily on the overarching goal of tort damages: to compensate victims of tortious conduct for their injuries. In modern American society, the value of most companion animals to their human guardians derives from the emotional tie between animal and human. By continuing to categorize domestic animals as property, tort law ignores the true role played by these creatures in our lives. Just as the law has evolved to recognize psychic injuries suffered in a number of contexts, it should now acknowledge that Fluffy is worth more than a toaster or a telephone to her human guardians.