A STEPPING STONE TOWARD COMPANION ANIMAL PROTECTION THROUGH COMPENSATION

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Despite the fact that many Americans view their companion animals as part of the family, the law treats companion animals as personal property. The courts have viewed companion animals as property for over 200 years, however, this precedent no longer adequately accounts for the important role companion animals play in modern day lives, and no longer appropriately compensates for the true value the animal has to the owner. A modified investment approach, stemming from wrongful death precedent, provides both a qualitative and quantitative approach to adequately measure the companionship value these animals have to humans. While courts have entertained various damage theories and causes of action, and a few state legislatures have acted to provide for noneconomic damages or veterinary costs, valuing animals at their market value remains the predominant measure. This is likely due to the overwhelming precedent and various policy concerns around having to both expand and valuate loss of companionship damages. This Article advocates a loss of investment approach, in which the court quantitatively compensates the guardians for the resources they provide for their companion animals during the course of their lives, and uses qualitative criteria that would demonstrate the strength of the relationship that the companion animal had to their owner. This methodology accurately recognizes the relationship that companion animals have with humans and, together with awareness and educational outreach of animal rights, can provide an intermediate mechanism that the courts can use to eliminate the property classification of companion animals once and for all.

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I. INTRODUCTION

Many Americans perceive companion animals to be members of the family. However, current constructs of the law treat companion animals solely as personal property. This dichotomy has resulted in two legal shortcomings: (1) the failure to adequately appreciate and protect the relationship between the companion animal and her guardian; and (2) the failure to deter malicious and negligent behavior toward companion animals. Advocates for animal interests have sought to rectify this misalignment, albeit with little success, through education and common law reform within the courts. Thus, in most states companion animals are still valued merely as the loss of a fungible consumer item, and not based on their true societal value.[1] Since companion animals primarily serve social roles, the problem is accentuated, and their market value is usually determined to be next to none.[2] Guardians and animal advocates have occasional success in bringing tort claims under new valuation methodologies; however, the adoption of such methodologies remains inconsistent and unpredictable.[3] The only consistency

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[1] *See* Elaine T. Byszewski, *Valuing Companion Animals in Wrongful Death Cases: A Survey of Current Court and Legislative Action and a Suggestion for Valuing Pecuniary Loss of Companionship*, 9 ANIMAL L. 215, 240 (2003) (noting how, despite the great value guardians place on the relationship with their companion animals, courts have still treated animals as being compensable for wrongful death only by damages for fair market value); *see also* discussion *infra* Part V (listing Tennessee, Illinois, and Connecticut as the only states to pass legislation allowing for expanding a human companion's ability to recover damages for the loss of their companion animal).

[2] *See* Strickland v. Medlen, 397 S.W.3d 184, 186, 193 (Tex. 2013) (discussing how the Medlens sued a shelter worker for mistakenly euthanizing their mixed-breed dog, Avery, and sought "'sentimental or intrinsic value' damages since Avery had little or no market value . . . ." While the court recognized "that the benefit of most family dogs like Avery is not financial but relational, and springs entirely from the pet's closeness with its human companions[,]" it held that the owners could not recover noneconomic damages for loss of companionship).

[3] *See* Byszewski, *supra* note 1, at 240 ("While guardians occasionally invoke various damage theories and causes of action such as consequential damages, intrinsic value,

remains the utter failure of the law to recognize animals as deserving of rights or protections greater than property.

This Article begins with a review of the origin of the common law's classification of animals as property, a historical survey of when the common law has departed from old traditions and spurred legal growth, and an analysis of whether companion animals qualify under such a standard and are deserving of a new classification. The Article next identifies the law's unwillingness to reclassify animals, addresses the struggle within the courts to adequately address this dichotomy, and discusses the failed acceptance of proposed compromises within the property regime. Finally, the Article proposes an intermediate step toward the recognition of animal rights within the property regime and ends by linking this intermediate step to the actual attainment of greater animal rights.

II. DEVELOPMENT OF THE PROPERTY REGIME

The concept of animals being property, and thus having no rights is one of ancient lineage, rooted in the common law.[4] However, it is not an original creation of the common law: "Its lineage lays in antiquity."[5] Under the ancient Stoic view, "[t]he world was created for the benefit of humans who crown the natural hierarchy."[6] As the dominant force in this "Great Chain of Being,"[7] human beings were "justified and motivated [in] the domination of every earthly creature."[8] Likewise, early Roman law treated animals as property, and only men who were not

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intentional infliction of emotional distress, negligent infliction of emotional distress, and loss of companionship, success with such theories is not the norm.").

[4] Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 N.Y.U. ENVTL. L.J. 531, 532 (1998).

[5] *See* Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. ENVTL. AFF. L. REV. 471, 472, 475 (1996) (noting how the concept of a "legal thinghood" of nonhuman animals, which is "an entity with no capacity for legal rights" that is treated as property, originally arose from ancient laws); Marcella S. Roukas, *Determining the Value of Companion Animals in Wrongful Harm or Death Claims: A Survey of U.S. Decisions and Legislative Proposal in Florida to Authorize Recovery for Loss of Companionship*, 3 J. ANIMAL L. 45, 47 (2007) (quoting Kelch, *supra* note 4, at 534).

[6] Kelch, *supra* note 4, at 534 (discussing the work of Steven Wise in tracing the history of the legal status of animals, which originated with the ancient Stoics); *see also* Steven M. Wise, *How Nonhuman Animals Were Trapped in a Nonexistent Universe*, 1 ANIMAL L. 15, 28, 31 (1995) (explaining the Stoic view that nonhuman animals were for the support of humans, and plants were for the support of nonhuman animals; humans are rational, thus giving them dominion over plants and nonhuman animals, which were deemed irrational).

[7] "The Great Chain of Being was a linear and immutable hierarchy of every entity that existed or could exist in the universe. It was the most widely familiar Western conception of how this universe was organized from Hellenic Greece to the 19th century." Wise, *supra* note 5, at 471 n.1.

[8] *Id.*; *see also* Wise, *supra* note 6, at 17–18 (discussing how Aristotle, the Stoics, and Old Testament writers "[e]nvisioned a hierarchical universe in which everything fell along an immutable 'Great Chain of Being' and was designed for the use of humans.").

slaves occupied a position independent of thing-hood.[9] Additionally, the view of a human centric universe, in which humans maintain the attendant privilege of controlling the environment and its occupants, was the prevalent school of thought in the Old Testament.[10] In order to support this schism between humans and animals, Descartes, an early Catholic philosopher, created a vision of animals as soulless machines, incapable of experiencing emotions.[11] Similarly, Immanuel Kant pronounced: "Animals are not self-conscious and are there merely as a means to an end. That end is man . . . . Our duties towards animals are merely indirect duties towards humanity."[12] This 'machine' view of animals, where they serve only as a means to an end, pervaded philosophy and science for centuries.[13]

Building primarily from the Stoic and religious conceptualization of animals as property, early English and U.S. common law adopted the natural-law rule that animals were things to be possessed and used solely for humans' advantage.[14] Early Americans' primary use of animals as sustenance and resources in the production of other possessions bolstered the natural-law concept of animals as conduits of human legal wellbeing.[15] These uses created commercial value and, as a result, society desired animals as a symbol of wealth.[16] Thus, the rule of capture espoused in Pierson v. Post (1805)—in which physical detainment of the animal attaches property rights in an animal, and

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[9] *See* Wise, *supra* note 5, at 493 ("Those beings who were believed to lack free will—women, children, slaves, the insane, and nonhuman animals—were all at some time classified as property.").

[10] Kelch, *supra* note 4, at 534; *see also* J.J. Finkelstein, *The Ox That Gored*, 71 TRANSACTIONS OF THE AM. PHIL. SOC'Y 5, 7 (1981) (noting that the division between man and nature in Western systems stems from the Bible, and more specifically, the Book of Genesis, which describes man as being made in God's image).

[11] Kelch, *supra* note 4, at 556.

[12] Immanuel Kant, *Duties to Animals*, *in* ENVIRONMENTAL ETHICS: DIVERGENCE AND CONVERGENCE 285, 285 (Susan J. Armstrong and Richard G. Botzler eds., 1993).

[13] Kelch, *supra* note 4, at 556.

[14] *Id.* at 534; *see also* Wise, *supra* note 5, at 525–30 (tracing the dominance of Roman and Old Testament natural law notions of human dominion over nonhuman animals first to the prominent *Commentary on the Laws of England* from William Blackstone in English common law, then to James Kent's transplantation of English common law in early nineteenth-century America in his *Commentaries on American Law*).

[15] *See, e.g.*, GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 24 (1995) (referencing certain findings regarding human interaction with animals throughout American history in President Clinton's proclamation of the first week of May as "Be Kind to Animals and National Pet Week" as reflecting the concept that animals' "[v]alue is measured in terms of their usefulness to humans, and not in terms of their own interests . . . ."; *see also* Be Kind to Animals and National Pet Week, 58 Fed. Reg. 27,919 (May 7, 1993) ("Throughout our history, animals have played an important part in our lives. In colonial times, we relied on animals to carry us and our belongings over great distances to our frontier homesteads. When we arrived, they worked with us, sustained us, and helped us earn a living. Today, animals still help us in our economic lives, but they have taken on a greater role as our guardians and companions.").

[16] BRUCE A. WAGMAN ET AL., ANIMAL LAW: CASES AND MATERIALS 74 (4th ed. 2010).

thus the commercial value associated with its control—took hold.[17] Courts have maintained this rule and concept of animals as property since.[18]

III. ADAPTING THE COMMON LAW AND APPLICABILITY TO ANIMALS

The common law is, and has been, a mechanism for change.[19] It is not meant to be rigid, but rather to be flexible so that it may evolve over time.[20] This evolutionary capacity has been used to liken the common law to a living being[21]:

> The common law is not rigid and inflexible, a thing dead to all surrounding and changing conditions, it does expand with reason. The common law is not a compendium of mechanical rules, written in fixed and indelible characters, but a living organism which grows and moves in response to the larger and fuller development of the nation.[22]

Professors P.S. Atiyah and Robert Summers have acknowledged three main bases for modification of the common law rules: (1) changes in circumstances occur such that precedent becomes substantively obsolete; (2) growing moral and social enlightenment shows that substantive values underlying the law are no longer acceptable; or (3) the precedent was substantively erroneous or badly conceived from the beginning.[23]

In regards to changing circumstances, courts have overturned the rule prohibiting a wife from testifying at her husband's criminal trial (because the relationship between husband and wife had evolved) and the rule that deemed children under the age of fourteen as lacking testimonial capacity (in light of scientific evidence establishing that children develop more rapidly than previously had been assumed). Additionally, courts have overturned the rule that one sibling could not sue another sibling (because of the evolution of the modern fam-

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17 Pierson v. Post, 3 Cai. 175 (N.Y. Sup. Ct. 1805).

18 *See, e.g.*, Idaho *ex rel.* Evans v. Oregon & Washington, 462 U.S. 1017, 1029–30 (1983) (O'Connor, J., dissenting) (referring to *Pierson v. Post* for the proposition that "[n]o one owns an individual fish until he reduces that fish to possession," and that Idaho is entitled to an equitable apportionment of anadromous fish); *see also* Clajon Prod. Corp. v. Petera, 854 F. Supp. 843, 846, 852–53 (D. Wyo. 1994) (holding that Wyoming's hunting regulations and status do not constitute a taking of landowners' property on which wildlife is located, and stating that *Pierson v. Post* is instructive as to the issue of who owns the wild animals in this case).

19 Kelch, *supra* note 4, at 545.

20 *Id.*; *see also* Lutwak v. United States, 344 U.S. 604, 615 (1953) ("'[T]he common law is not immutable but flexible . . . .' We therefore hold that in the circumstances of this case, the common-law rule prohibiting antispousal testimony has no application." (quoting Funk v. United States, 290 U.S. 371, 383 (1933))).

21 Kelch, *supra* note 4, at 545–46.

22 Oppenheim v. Kridel, 140 N.E. 227, 230 (N.Y. 1930).

23 P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS 134 (1987).

ily).[24] These examples suggest that changes in circumstances that are strong enough to modify common law rules usually result from one of three situations: a change in the empirical facts or understanding of the world (general knowledge or scientific knowledge), maturation of society (e.g., the changing role of women in society), and change in the law itself.[25]

Society has experienced innumerous changes since courts first held that animals are property. Science has fundamentally altered our understanding of animals and their relationship to humans. We have moved away from a "Great Chain of Being" understanding and a view of the "mechanical" animal, toward an anthropologic understanding.[26] We are no longer as extremely human-centric in our thought processes.[27] This is largely due to substantial evidence in evolution, science, and common sense, which clearly illustrates animals' ability to feel pain, anxiety, and suffering.[28] Furthermore, science has confirmed that humans are but another animal, with no clear distinguishing characteristics, only differences in the degree to which animals and humans have certain characteristics.[29] For instance, in locomotive speed, humans are average on the scale of all members of the *Animalia* kingdom, while humans occupy the high end of the scale in ability to manipulate the physical and biological environment (somewhat above beavers and termites).[30]

Companion animals share particularly striking neurological similarities with humans. Neuroscientists at Emory University trained companion dogs to voluntarily sit in an M.R.I. machine.[31] The neuroscientists studied the activity in the dogs' caudate nucleus, a region of the brain that, in humans, plays a key role in the anticipation of things we enjoy, like food, love, and money.[32] The results indicated that dogs have the ability to experience positive emotions, like love and attachment, and suggested that dogs have a level of sentience and awareness

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[24] Rozell v. Rozell, 22 N.E.2d 254, 256–57 (N.Y. 1939).

[25] Kelch, *supra* note 4, at 549.

[26] *See id.* at 556–57 (noting that although the notion that animals were machines that experienced no pain pervaded for centuries, current science shows that animals do in fact experience pain and suffering).

[27] *See id.* at 580 ("The interests of animals are for the first time being legitimized, not only in academic circles, but in the minds of significant portions of the populace, in the judicial system and in legislative enactments.").

[28] *Id.* at 557–58.

[29] *Id*. at 558; *see also* CHARLES DARWIN, THE DESCENT OF MAN AND SELECTION IN RELATION TO SEX (1871), *reprinted in* CHARLES DARWIN, THE ORIGIN OF SPECIES, MEANS OF NATURAL SELECTION AND THE DESCENT OF MAN AND SELECTION IN RELATION TO SEX 494–95 (Random House 1936) ("Nevertheless the difference in mind between man and the higher animals, great as it is, certainly is one of degree and not of kind.").

[30] Geordie Duckler, *The Economic Value of Companion Animals: A Legal and Anthropological Argument for Special Valuation*, 8 ANIMAL L. 199, 201–02 (2002).

[31] Gregory Berns, *Dogs Are People, Too*, N.Y. TIMES, http://www.nytimes.com/2013/10/06/opinion/sunday/dogs-are-people-too.html?pagewanted=all&_r=0 (Oct. 5, 2013) (accessed Nov. 3, 2015).

[32] *Id.*

comparable to a human child.[33] The scientific evidence we now possess strongly questions, if not dispels, the myth of a special status or uniqueness of humans that justifies a human-centric world.[34]

Likewise, the role of companion animals has developed immensely. Today in the United States, more than 60% of households include pets, and these households spend over $28.5 billion a year in care.[35] After the loss of a pet, guardians now experience similar or greater stress levels than from the death of a family member.[36] Eighty-four percent of American pet guardians refer to themselves as their pet's mom or dad, 86% include their pet in holiday celebrations, and 74% are willing to go into debt to provide care for their pet.[37] Further, pet guardians are using the law to create pet trusts under which the pet can be acknowledged as the primary beneficiary under their wills.[38] Society has truly evolved in regard to the role of companion animals in the home.[39]

The changes in scientific knowledge and the maturation of society with respect to companion animals' role in the home suggest that a modification in the common law classification of companion animals as property is appropriate.

IV. COURTS UNWILLING TO MODIFY THE COMMON LAW CLASSIFICATION

Despite evidence suggesting the appropriateness of a modification to the common law classification of companion animals, courts have been unwilling to view companion animals as distinct from other animals and unwilling to regard animals in general as anything other than property.[40]

In some sense, there is a stigma that judges who are sympathetic to the shortcomings of the property classification are afraid to overturn

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[33] *Id.* Courts have shown a proclivity to use neuroscientific findings in their rulings. The United States Supreme Court relied on M.R.I. brain scan evidence suggesting that the human brain was not mature in adolescence when ruling that juvenile offenders could not be sentenced to life in prison without parole or the death penalty. *In re* Stanford, 537 U.S. 968, 971 (2002).

[34] *See, e.g.*, Berns, *supra* note 31 (speculating that if the United States Supreme Court is willing to use neuroscientific findings in their opinions, then a case arguing for a dog's rights based on brain imaging findings might not be far off).

[35] Roukas, *supra* note 5, at 51.

[36] *Id.* at 51–52.

[37] *Our Relationship with Pets*, SW. ASS'N FOR EDUC. IN BIOMEDICAL RESEARCH, http://www.swaebr.org/Our_Relationship_with_Pets.html [http://perma.cc/3YQ7-7MP3] (updated July 1, 2011) (accessed Nov. 3, 2015).

[38] Roukas, *supra* note 5, at 53.

[39] *See* Bernard E. Rollin, *Animal Ethics and Breed-Specific Legislation*, 5 J. ANIMAL L. 1, 8–10 (2009) (describing the rise of the bond between humans and the role of companion animals from one of a practical benefit, to more of an emotional benefit, and as a consequence of societal change from community-oriented to more of a "lonel[y] mode of existence.").

[40] Wagman et al., *supra* note 16 (stating that nonhuman animals are still property under the laws of all fifty states).

200 years of precedent.[41] The duration of the legal classification and sheer quantity of cases decided on a property basis influence judges' decision-making processes and lead to legislature deference, despite the fact that the property label is a common law construct.[42] Additionally, judges may be unwilling to remove the property label from animals due to the belief that there is not a workable alternative.[43] Courts have predominately ignored suggested legal paradigms as judicially unworkable, such as David Favre's suggestion that nonhuman animals have equitable ownership which would give them status in the legal system, while humans still retain legal title to the animal in question.[44] Courts are worried about the potential burden placed on the court because of such a rule.[45] Similarly, there is a major question about the impact such a non-property classification would have on various aspects of society.[46]

Judges have also been unwilling to distinguish between companion animals and animals at large due to line-drawing issues. While scholars argue that legislatures have always made distinctions between and within animals e.g., the Animal Welfare Act regulates the sale and transportation of animals but exempts farm animals,[47] the

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[41] *See* Susan J. Hankin, *Not a Living Room Sofa: Changing the Legal Status of Companion Animals*, 4 RUTGERS J. L. & PUB. POL'Y 314, 388 (2007) ("A number of judges who seemed to be open to the idea of changing animals' legal status have nevertheless claimed to be constrained by precedent . . . .").

[42] *See id.* (noting that while incremental change through common law has appeal in regards to adapting slowly to the times, judges still feel constrained by the weight of precedence). *See also* Richard A. Posner, *Animal Rights: Legal, Philosophical, and Pragmatic Perspectives*, *in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 51, 58 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) (arguing that judges do not wish to expand the law because conventional legal reasoning is backward-looking rather than forward-looking).

[43] *See* Hankin, *supra* note 41 (suggesting a possible alternative, such as the "sentient property" compromise, but noting that judges still feel that they can only defer to the legislature for a change in animal legal status).

[44] *See* Steven M. Wise, *Animal Rights, One Step at a Time*, *in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 19, 28–29 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) (describing his notion of "precedent (rules) judges," who highly value a legal system that is stable, certain, and predictable, thereby condoning the anachronistic view of animals as property). *See also* Posner, *supra* note 42, at 57 (stating that to ask judges to abandon the property view of animals is similar to "[a]sking judges to set sail on an uncharted sea without a compass").

[45] Kelly Wilson, *Catching the Unique Rabbit: Why Pets Should Be Reclassified as Inimitable Property Under the Law*, 57 CLEV. ST. L. REV. 167, 183 (2009).

[46] *Id.*

[47] *See, e.g.*, Sonia S. Waisman, *Noneconomic Damages: Where Does It Get Us and How Do We Get There?*, 1 J. ANIMAL L. 7, 14–15 (noting how there is a limitation to recovering for the few state statutes that allow companion animal noneconomic damages, for example, Tennessee's T-Bo Act, TENN. CODE ANN. § 44-17-403 (2004) as applying only to dogs and cats); Animal Welfare Act, 7 U.S.C. § 2132(g) (1966) (stating that the definition of *animal* for the purposes of the Act excludes birds, rats, mice, horses not used for research purposes, and farm animals, such as, but not limited to, livestock and poultry).

judiciary does not see itself as apt to draw such distinctions.[48] It appears that judges desire to avoid the 'slippery slope' of an alteration solely to a select class of animals.[49]

However, to say judges are unwilling to change the legal classification of companion animals is not to say they do not recognize that a dichotomy exists. For instance, the Wisconsin Supreme Court has compassionately stated:

> At the outset, we note that we were uncomfortable with the law's cold characterization of a dog . . . as mere "property." Labeling a dog "property" fails to describe the value human beings place upon the companionship that they enjoy with a dog. A companion dog is not a fungible item, equivalent to other items of personal property. . . . This term inadequately and inaccurately describes the relationship between a human and a dog.[50]

Nevertheless, the court treated the dog as legal property.[51] Similarly, George G. Vest, in his famous closing argument to the jury in *Burden v. Hornsby*, characterized a dog as "[t]he one absolutely unselfish friend a man can have in this selfish world, the one that never deserts him, the one that never proves ungrateful or treacherous . . . ."[52] This positive sentiment toward companion animals, both by courts and the population at large has led courts and the legislature to stretch the bounds of the property label in search of a means to better protect companion animals and better compensate guardians through civil liability.[53]

Family law similarly pays lip service to American society's perception of companion animals while applying a property label. Although divorce and custody-court decisions highlight the recognition that there is widespread dissatisfaction with courts' application of the strict property model in resolving pet custody issues, the majority of family law courts still adhere to the law's treatment of companion animals as personal property.[54] Commentators note judicial recognition that animals may have rights and should not be classified simply as prop-

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[48] *See, e.g.*, *Strickland*, 397 S.W.3d at 195 (recognizing that finding a logical stopping point for which species of animals deserve preferential treatment is difficult and would resemble judicial legislation).

[49] *Id.*

[50] Rabideau v. City of Racine, 627 N.W.2d 795, 798 (Wis. 2001).

[51] *Id.*

[52] George G. Vest, Closing Argument in *Burden v. Hornsby* (Sept. 23, 1870) (*reprinted in* 101 CONG. REC. S4823 (daily ed. Apr. 23, 1990) (statement of Sen. Byrd).

[53] *See* State v. Harriman, 75 Me. 562, 566 (1884) (Appleton, C.J., dissenting) (arguing that dogs should be considered domestic animals and not vicious beasts for purposes of establishing criminal liability); *see also* Zager v. Dimilia, 524 N.Y.S.2d 968 (N.Y. Vill. Justice Ct. 1988) (holding that the plaintiff was entitled to the reasonable and necessary cost of veterinary treatment for the pet dog).

[54] Eric Kotloff, *All Dogs Go to Heaven . . . Or Divorce Court: New Jersey Unleashes a Subjective Value Consideration to Resolve Pet Custody Litigation in* Houseman v. Dare, 55 VILL. L. REV. 447, 449, 457 (2010).

erty.[55] Although not pervasive in modern pet custody opinions, the question posed by some commentators is whether pets in divorce cases should have a test analogous to the "best-interests-of-the-child" standard when addressing pet custody and visitation.[56] At least one court, the intermediate appellate court of New York, appeared to take this approach in *Raymond v. Lachmann* when it awarded custody of a cat based upon the cat's age of ten years and where it had "lived, prospered, loved and been loved for the past four years."[57]

The emotional needs of divorcing couples are such that the comfort of the pet may be part of the healing process. Treating the companion pet as property does not recognize these human needs. Judicial recognition of these needs would be a major step toward understanding the companionate importance of pets. The law has developed specific statutory and judicial standards for resolution of parental disputes over childcare and custody; such standards are lacking as to the resolution of pet custody disputes.

V. LEGISLATION GRANTING COMPANIONSHIP DAMAGES FOR COMPANION ANIMALS

The reluctance of the courts to alter the common law's definition of companion animals as personal property, in light of their clear recognition of animals' greater value to humans, cries for the enactment of legislation. Denying recovery for negligent infliction of emotional distress for a plaintiff's deceased dog in *Rabideau v. City of Racine*, the Supreme Court of Wisconsin noted that legislation was the correct forum to "make a considered policy judgment regarding the societal

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[55] *See* David S. Favre, *Judicial Recognition of the Interest of Animals—A New Tort*, 2005 MICH. ST. L. REV. 333, 345 (2015) (listing several areas of law in which courts acknowledge animal rights beyond their status as property: criminal law, civil law, and administrative law); Lacy L. Shuffield, *Pet Parents—Fighting Tooth and Paw for Custody: Whether Louisiana Courts Should Recognize Companion Animals as More than Property*, 37 S.U. L. REV 106–07 (2009) (stating that courts vary in the amount of damages given based on the judge's or jury's interpretation of the human and animal relationship, and that some courts have even rendered animals as "quasi-human").

[56] *See, e.g.*, Heidi Stroh, *Puppy Love: Providing for the Legal Protection of Animals When Their Owners Get Divorced*, 2 J. ANIMAL L. & ETHICS 231, 243–44 (2007) (noting that scholars have discussed making the "best interests of the animal" standard the norm in divorce actions where the custody of the animal is at issue, and that courts are already doing something similar to this standard by considering which household will best meet a pet's needs in custody and visitation arrangements); Rebecca J. Huss, *Separation, Custody, and Estate Planning Issues Relating to Companion Animals*, 74 U. COLO. L. REV. 181, 227 (2003) (advocating that, in pet custody disputes, the courts should borrow factors such as the best interest of the animal, primary caretaker, and stability of living arrangements from child custody statutes); David Favre, *Equitable Self-Ownership for Animals*, 50 DUKE L.J. 473, 501 (2001) ("Just as the parents of the child must sort out what is in the best interests of their children, so the animal guardians must, in the first instance, decide what is in the best interests of the self-owned animal for whom they are responsible.").

[57] Raymond v. Lachmann, 695 N.Y.S.2d 308, 309 (N.Y. App. Div. 1999).

value of pets as companions and to specify the nature of the damages to be awarded in a lawsuit."[58]

Yet, few state legislatures have enacted statutes expanding a human companion's ability to recover damages for the loss of their companion animal. In 2000, Tennessee became the first state to pass legislation allowing for recovery of noneconomic, emotional damages, including loss of companionship, for the negligent or intentional killing of a companion animal.[59] Recovery is allowed when a domesticated dog or cat normally maintained in or near its owner's household is killed by an "unlawful and intentional, or negligent act of another or the animal of another."[60] If the act was negligent, the incident must have occurred on the plaintiff's property or while under his "control and supervision."[61] Recovery of noneconomic damages is capped at $5,000.[62] This legislation is viewed as the first statute advancing the rights of human companions to recover for the loss of their pet's companionship.[63]

Illinois also allows for recovery of noneconomic, emotional damages after the injury or loss of a companion animal, defined broadly as "an animal that is commonly considered to be, or is considered by the owner to be, a pet."[64] It also covers all animals that are subject to acts of cruelty, torture, or impounded in bad faith.[65] Plaintiffs are entitled to punitive damages up to $25,000 for each covered act.[66]

Connecticut law dictates that an individual who "intentionally kills or injures a companion animal," defined as a dog or cat, is liable for economic damages including veterinary care, fair market value of the animal, and burial expenses.[67] The Connecticut statute does not allow for the recovery of noneconomic emotional damages.[68]

The legislation in Tennessee, Illinois, and Connecticut is encouraging and hopefully will inspire more states to increase a human companion's ability to recover noneconomic, emotional damages. There has

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58 Rabideau v. City of Racine, 627 N.W.2d 795, 807 (Wis. 2001).

59 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, 435 (2002); TENN. CODE ANN. § 44-17-403 (2014).

60 TENN. CODE ANN. § 44-17-403(a)(1) (2014).

61 *Id.*

62 *Id.*

63 *Honoring Animal Victims: Landmarks in Legislation*, ANIMAL LEGAL DEF. FUND, http://www.aldf.org/wp-content/uploads/2014/02/HonoringAnimalVictims2014.pdf [http://perma.cc/54QV-RFJE] (accessed Oct. 13, 2015).

64 510 ILL. COMP. STAT. 70/2.01a (2014).

65 510 ILL. COMP. STAT. 70/16.3 (2014).

66 *Id.*

67 CONN. GEN. STAT. § 22-351(a)–(b) (2014).

68 *See id.* (No provisions within the Connecticut statute allow for noneconomic damages).

been proposed legislation in various states with variable outcomes.[69] The need for statutes expanding a human companion's ability to recover for emotional damages will require broad-based community input, support, and action.[70]

VI. EXPANSION OF VALUATION MECHANISMS AND NONECONOMIC DAMAGES

Historically, courts settled civil suits for malicious or negligent harm to companion animals as they would any other kind of property, by allowing recovery of market value.[71] The market value of companion animals has generally been determined to be near zero, given their roles as companions and not a market or economic producing good.[72] For example, the Alaska Supreme Court reiterated the traditional award of market value for the wrongful death of a companion animal in *Richardson v. Fairbanks N. Star Borough*.[73] After an unsuccessful search for their missing dog, the Richardsons called the pound and discovered he was there.[74] The family showed up and saw their dog chained up in the back of the pound, but employees told them that they had closed for the night.[75]

The family arrived the next day, only to find out that the pound killed the dog in violation of a local ordinance requiring the pound to hold the animal for seventy-two hours.[76] Despite the egregious act, the court found that the family could only recover the market value of the dog.[77] Mixed-breed dogs and cats have lower market values than their pure-bred counterparts, thereby exacerbating the problem.[78] For in-

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[69] *See* Byszewski, *supra* note 1, at 226–30 (surveying proposed bills as of 2003 in California, Colorado, Massachusetts, Mississippi, New Jersey, New York, and Rhode Island, and discussing the failed bills in Maryland, Oregon, and Connecticut).

[70] *See* discussion *infra* Part IX (discussing the importance of education and awareness when pushing for legislative enactment of statutes that allow noneconomic damages for companion animals).

[71] Nathan J. Winograd et al., *Damages for Death or Injury of an Animal*, ANIMAL LEGAL DEF. FUND, http://www.aldf.org/resources/when-your-companion-animal-has-been-harmed/damages-for-death-or-injury-of-an-animal/ [http://perma.cc/7W6W-P5WK] (Feb. 2001) (accessed Oct. 13, 2015).

[72] *See, e.g.*, Naples v. Miller, No. 08C-01-093 PLA., 2009 WL 1163504, at *2, *6 (Del. Super. Ct. Apr. 30, 2009) (holding that the plaintiff could recover only the market value for her pound dog, despite the fact that it would be near zero because the court noted, "[w]hile a dog may be loved as any other family member, in the eyes of the law, this case is no different from any other property damage claim . . . .").

[73] Richardson v. Fairbanks N. Star Borough, 705 P.2d 454, 454 (Alaska 1985).

[74] *Id.* at 455.

[75] *Id.*

[76] *Id.*

[77] *Id.* at 456–57 (stating that the state of Alaska recognizes a cause of action for intentional infliction of emotional distress for the intentional or reckless killing of a pet animal, but the plaintiffs did not meet those elements in this case, therefore, they could only recover market value of their pet).

[78] *See, e.g.*, Ammon v. Welty, 113 S.W.3d 185, 187 (Ky. Ct. App. 2002) (discussing how an unregistered mixed-breed dog has no market value); Morgan v. Kroupa, 702

stance, Daisy, a mixed-breed terrier, was adopted from a rescue pound for a $50 fee.[79] One day, while Daisy was in her guardian's driveway, she was attacked by the neighbor's Rottweiler and badly injured.[80] Daisy underwent extensive surgery and amassed a total bill of $5,265.[81] However, the family was unable to recover the costs of the veterinarian bills because the cost exceeded Daisy's fair market value by over $5,000.[82] The inadequacy in these decisions is blatant; if Daisy's market value was the proper gauge of her worth, her guardians may not have elected the expensive surgery to save her life. Here, tort law is failing to properly apportion fault and forcing Daisy's owners to subsidize the defendant's negligence.

Recognizing the inadequacy of the property label and its failure to keep up with the reality of the reciprocal guardian relationship between animals and humans, some judiciaries have changed their approach and searched for alternative valuation methods within the property regime.[83] These approaches often include allowing recovery for reasonable veterinary expenses, actual or intrinsic value, mental suffering of the animal's guardian, and loss of companionship.[84]

A. Reasonable Vet Expenses

A few courts have sought to rectify cases like Daisy's by allowing for the recovery of reasonable medical expenses in the event of negligent or intentional harm to companion animals, even if those expenses exceed the animal's current market value. In a case similar to Daisy's, the plaintiff's dog suffered significant harm when the neighbor's dog attacked him.[85] The court considered the alternatives for awarding damages and decided that the proper measure of damages was the reasonable and necessary cost of veterinary treatment.[86] In *Hyland v. Borras*, the court rebutted the defendants' attempts to argue that market value is the appropriate valuation methodology by holding that "[i]t is purely a matter of 'good sense' that the defendants be required to 'make good the injury done' as the result of their negligence by reim-

A.2d 630, 632–33 (Vt. 1997) (discussing that a mixed-breed dog does not have a fair market value of any significance; "like most pets, its worth is not primarily financial, but emotional."); *but see* Kimes v. Grosser, 126 Cal. Rptr. 3d 581, 582 (Cal. Ct. App. 2011) (noting that a cat has little to no value; however, the court held that the owner can recover the reasonable and necessary costs and care for injuries).

79 L. Stuart Ditzen, *Challenging Pa. Law on a Pet's Value: Couple Seek to Recoup Vet Costs After Dog Attack*, PHILLY.COM, http://articles.philly.com/2004-09-05/news/25377169_1_huge-dog-rottweiler-daisy [http://perma.cc/A3Z3-ZPUC] (Sept. 5, 2004) (accessed Oct. 12, 2015).

80 *Id.*

81 *Id.*

82 *Id.*

83 Hankin, *supra* note 41, at 327.

84 *Id.*

85 Zager v. Dimilia, 524 N.Y.S.2d 968, 969 (N.Y. Vill. Justice Ct. 1988).

86 *Id.* at 970.

bursing plaintiff for the necessary and reasonable expenses she incurred to restore the dog to its condition before the attack."[87]

B. Actual or Intrinsic Value

Several other courts allow recovery for amounts greater than market value on the theory of the animal's actual or intrinsic value to the guardian.[88] For instance, when an 8-year-old mixed-breed dog was negligently killed at defendant's boarding kennel, the court determined the dog had no ascertainable market value, but nonetheless held that the guardian was entitled to the dog's actual value to her owner.[89] The court allowed the owner, an elderly woman, to recover for both the companionship value and protective value in the award of damages against the defendant.[90]

C. Intentional and Negligent Infliction of Emotional Distress

Courts are rarely willing to award damages for the owner's mental suffering when their companion animal is injured or killed.[91] Where these claims fail, it is often because the court declines to extend mental suffering to the death of something the law considers property.[92] In the few cases where mental distress claims have succeeded,[93] it has almost always been under the guise of intentional infliction of emotional distress, where the behavior of the defendant has been particularly egregious—enough so to meet the outrageous element of the claim.[94] The court in *Burgess v. Taylor* focused on the conduct of the

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[87] Hyland v. Borras, 719 A.2d 662, 663–64 (N.J. Super. Ct. App. Div. 1998); *see also* Main St. Corp. v. Eagle Roofing Co., Inc., 168 A.2d 33, 35 (N.J. 1961) (using "good sense" as the correct method of valuing property in both cases).

[88] Hankin, *supra* note 41, at 329.

[89] Brousseau v. Rosenthal, 443 N.Y.S.2d 285, 287 (N.Y. Civ. Ct. 1980).

[90] *Id.* (finding that the plaintiff relied on her 8-year-old German shepherd as a watchdog and, had the dog not died due to the defendant's negligence, a burglar would not have entered her apartment and stolen her watch).

[91] *See, e.g.*, Campbell v. Animal Quarantine Station, 632 P.2d 1066, 1066 (Haw. 1981) (upholding the trial court's award for mental distress to five members of a family whose dog was killed); Barrios v. Safeway Ins. Co., 97 So. 3d 1019 (La. Ct. App. 2012) (upholding the lower court's award for mental anguish to a dog owner whose dog was killed).

[92] *See, e.g.*, *Richardson*, 705 P.2d at 456 (discussing that dogs have the legal status of personal property and courts generally limit damage awards to the animal's value at the time of death); Soucek v. Banham, 524 N.W.2d 478, 481 (Minn. Ct. App. 1994) (discussing that compensatory damages for the death of a dog, as an item of personal property, are limited to fair market value of the animal); Daughen v. Fox, 539 A.2d 858, 864 (Pa. Super. Ct. 1988) (discussing that when property, a dog, has been destroyed, the measure of damages would be the value of the property prior to its destruction, and the owner's sentimental attachment to the dog does not make it unique chattel under the law).

[93] *See, e.g.*, Burgess v. Taylor, 44 S.W.3d 806, 806 (Ky. Ct. App. 2001) (upholding the lower court's award for intentional infliction of emotional distress to a horse owner whose horse was slaughtered).

[94] Hankin, *supra* note 41, at 332.

offender rather than the target of the conduct when determining whether it was outrageous.[95] As such, they have not relied upon the fact that the target was technically property under the law. For instance, the Third Circuit Court of Appeals allowed recovery for intentional infliction of emotional distress when the plaintiff's Rottweiler escaped and wandered into the next-door alley.[96] A passing police officer stopped and confronted the dog.[97] Although the dog was not aggressive in any way and the plaintiff had identified the dog as belonging to her, he shot the dog five times, thereby killing it.[98] The court upheld the claim, "[g]iven the strength of community sentiment against at least extreme forms of animal abuse and the substantial emotional investment that pet owners frequently make in their pets."[99]

VII. RESISTANCE TO NONECONOMIC DAMAGES

Some lawmakers believe that recovery for veterinarian expenses and noneconomic costs can successfully compensate guardians for their loss and deter negligent and malicious behavior toward companion animals.[100] However, courts' willingness to entertain such damages remains sparse.[101] Thus, the success of such complaints may depend not only upon the court in which the action is brought, but also by the judge who hears the case.[102] Opponents of damages above market value argue that noneconomic damages are "[s]o subjective that they are beyond the capacity of the legal process to investigate and evaluate, so that to entertain claims based thereon would open the door to fraud and greatly swell the burden of litigation."[103] Many courts have taken similar stances. For instance, a New York state court, in forbidding recovery of noneconomic damages for the loss of a pet, emphasized the realities of a legal system that cannot allow for unbounded recovery for every harm in people's lives:

> While it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world. Every injury has

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95 *Burgess*, 44 S.W.3d at 806.

96 Brown v. Muhlenberg Twp., 269 F.3d 205, 209, 219 (3d Cir. 2001).

97 *Id.* at 209.

98 *Id.*

99 *Id.* at 218.

100 *See* Hankin, *supra* note 41, at 341–42 (discussing several proposals that allow for valuation above the traditional market value for an animal by looking to change the law so that animals have a legal status different than that of other types of property).

101 Victor E. Schwartz & Emily J. Laird, *Noneconomic Damages in Pet Litigation*: *The Serious Need to Preserve a Rational Rule*, 33(2) PEPP. L. REV. 227, 235–37 (2006) (noting that in the vast majority of states considering the issue, courts often list various policy reasons for forbidding noneconomic damages to companion animals).

102 *See* Wise, *supra* note 44, at 28 ("Common law judges with 'formal visions' inflexibly marinate their decisions in the past. They think judges should decide the way judges have decided because judges have decided that way.").

103 W. E. Shipley, Annotation, *Recovery for Mental Shock or Distress in Connection with Injury to or Interference with Tangible Property*, 28 A.L.R.2d 1070 § 2 (1953).

> ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree.[104]

Similarly, an Ohio appellate court held that pet owners cannot recover for emotional distress for the loss of a pet, in part because of "the difficulty in defining classes of persons entitled to recover, and classes of animals for which recovery should be allowed. In addition, courts have expressed concern about quantifying the emotional value of a pet and about increasing potential burdens on the court system."[105] When considering the appropriateness of noneconomic damages in one pet-death case, a New Jersey appellate court cited testimony regarding the value of the pet with estimates of the pet's worth ranging from $100–$200 to "as high as the national debt."[106]

Those against implementation of noneconomic damages have also pointed to two recent negligence cases: in *Bluestone v. Bergstrom*, a 2004 veterinary malpractice case from Orange County, California, a jury found that a rescued dog with a market value of only $10 had a unique value to its owner that amounted to $30,000;[107] and more recently, a woman whose cat was mauled by a neighbor's dog was awarded over $45,000 in damages for the pet's special value and the emotional distress she suffered.[108] Critics argue that cases like these are exemplary of unbounded damages that serve as an over-deterrent.[109] These critics also argue that uncapped damages unduly impact those who aim to protect companion animals' health, viz., veterinarians.[110] The argument is as follows: Increasing exposure of veterinarians to liability from uncapped, noneconomic damages pre-

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104 Schwartz & Laird, *supra* note 101, at 237 (quoting Johnson v. Douglas, 723 N.Y.S.2d 627, 628 (N.Y. Sup. Ct. 2001)).

105 Pacher v. Invisible Fence of Dayton, 798 N.E.2d 1121, 1126 (Ohio Ct. App. 2003).

106 Harabes v. The Barkery, Inc., 791 A.2d 1142, 1145 (N.J. Super. Ct. Law Div. 2001) ("On cross-examination, the expert testified that in the mind of a pet owner, the value of a pet 'could be as a high as the national debt.' Such testimony illustrates 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.").

107 Bluestone v. Bergstrom, No. 00CC00796 (Cal. Super. Ct. Apr. 20, 2004) (holding that "$30,000 is entirely appropriate given the $20,000 veterinarian bill, the notation that when it came to [the dog] 'money was no object,' and the time and devotion Defendant Bergstrom watched Mr. Bluestone give to [the dog].").

108 Craig Welch & Warren Cornwall, *Judge Awards $45,480 in Cat's Death*, THE SEATTLE TIMES, http://www.seattletimes.com/seattle-news/judge-awards-45480-in-cats-death/ [http://perma.cc/4HML-XEXS] (updated May 9, 2005, 12:03 PM) (accessed Oct. 29, 2015).

109 *See, e.g.*, Schwartz & Laird, *supra* note 101, at 260 (stating that there would be drastic public policy effects if courts were to allow noneconomic damages for companion animals, most notably, it would likely harm veterinarians, pet medication manufacturers, pet owners, and, in turn, pets themselves).

110 *See, e.g.*, *id.* at 260, 263 (explaining that veterinarians are at the highest risk for liability of possibly very large noneconomic damages, which could lead some quality veterinarians to leave the business); Julian Lee, *Woof, Woof: A Call for Legislative Action to Help Companion Animals and Those Who Care for Them*, 32 W. ST. U. L. REV. 141, 151 (2004) (discussing the high overhead of running a veterinary practice and the

vents the insurer's ability to objectively predict a veterinarian's liability cost.[111] As a result, insurers must increase their reserves for potential claims, resulting in an increase in premiums and deductibles, and those costs are then wrongfully passed on to other companion-animal guardians.[112] Schwartz and Laird compare this situation to medical malpractice and argue that the parallel availability of non-capped damages has resulted in premium increases of 36%–113%, and that imposing limits on these damages would reduce the amount of taxpayers' money the federal government spends by up to $50.6 billion per year.[113]

It is this unpredictability and perceived over-compensation by juries that has limited the judiciary's adoption of such noneconomic damage remedies.

VIII. AN ECONOMIC APPROACH TO VALUING DAMAGE

As has been demonstrated, judges seem to be searching for the appropriate method for valuing companion animal civil cases. Guardians plead various damages and causes of action, including: fair market value, consequential damages, intrinsic value, intentional infliction of emotional distress, negligent infliction of emotional distress, and loss of companionship.[114] Yet, courts seem highly reluctant to allow claims in which a dollar figure cannot be readily assigned.[115] Thus, the default mode of measuring damages remains fair market value. Courts are unsure of how to measure the intrinsic worth of companion animals or their companionship; therefore, they have hesitated to permit such damages.[116] However, borrowing from the lessons learned in wrongful death law, it is possible to develop an improved, quantifiable approach to valuing companion animals, and thus, one that can gain acceptance in the courts.

A. Establishing a Quantifiable Range Through the Principles of Loss of Investment

The Michigan Supreme Court first adopted the "loss of investment" approach to child wrongful death suits in *Wycko v. Gnodtke*.[117] In this case, the court acknowledged the prevailing sentiment that valuing a life was not quantifiably possible, but declared "we cannot shirk

economic harm that could arise from increased liability for noneconomic damages in running these practices).

111 Schwartz & Laird, *supra* note 101, at 261.

112 *Id.*

113 *Id.* (citing U.S. DEP'T OF HEALTH & HUMAN SERVS., ADDRESSING THE NEW HEALTH CARE CRISIS: REFORMING THE MEDICAL LITIGATION SYSTEM TO IMPROVE THE QUALITY OF HEALTHCARE (2003) (available at http://aspe.hhs.gov/sites/default/files/pdf/72871/medliab.pdf [http://perma.cc/ZCM3-62HC] (accessed Oct. 29, 2015))).

114 Byszewski, *supra* note 1, at 231.

115 *Id.*

116 *Id.*

117 *Id.* at 233.

from this difficult problem of valuation."[118] The court chose instead to look at the lost investment in child rearing costs and considered the expenses of birth, food, clothing, health care, education, nurture, and shelter as part of the pecuniary value of the child.[119] It then added to the lost pecuniary value an assessment of the lost companionship of the child to reach total damages.[120] In adopting this new approach, the court rejected the traditional market value approach, which determined the value based on the child's future earning prospects.[121] The court concluded that society no longer considered the child a breadwinner, but a blessed expense.[122] Under this theory, the "funds spent in bringing a child into the world and raising him represent an investment, which is lost by the death of the child and should be recoverable."[123]

Thomas R. Ireland and John O. Ward refined the loss of investment theory in hopes of quantifying the lost companionship costs of a child's death concurrently with the pecuniary costs.[124] The scholars recognized that the loss of investment theory espoused by the Michigan Supreme Court increased damages linearly with the child's age.[125] Thus, a parent would be compensated more for the death of a 13-year-old child than an 11-year-old child. However, they hypothesized that parental loss is not greater for an older child than a younger child; loss does not follow such a linear relationship.[126] Ireland and Ward stepped back to the time when parents make the economic choice to have the child, knowing that there would be significant costs and flows of future expenditures associated with the decision.[127] They concluded that, logically, if the parents decide to have the child, the value of the child must be greater than or equal to the cost of having a child.[128] Ireland and Ward state that these costs represent the minimum value that parents place on the loss of their child.[129] While we recognize that, in losing a child, parents give up much more than the costs associated with raising the child, the methodology provides a quantifiable solution, and thus prevents unbounded, unpredictable verdicts.

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118 Wycko v. Gnodtke, N.W.2d 118, 122 (Mich. 1960).

119 *Id.*; *see* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 198 (4th ed. 1992) ("Although there may be no basis for estimating lost earnings, a minimum estimate of the parents' loss, which can be used as the basis for awarding damages to them, is their investment of both money and time (the latter monetizable on the basis of market opportunity costs) in the rearing of the child up to the date of his death.").

120 *Wycko*, N.W.2d at 122–23.

121 *Id.* at 123.

122 *Id.*

123 Byszewski, *supra* note 1, at 234.

124 Thomas R. Ireland, *Compensable Nonmarket Services in Wrongful Death Litigation: Legal Definitions and Measurement Standards*, 7 J. LEGAL ECON. 15, 22 (1997).

125 Byszewski, *supra* note 1, at 236–37.

126 *Id.*

127 *Id.* at 237.

128 *Id.*

129 *See id.* ("Indeed, many parents would give up everything they have to save a child . . . .").

Thus, under the evolved theory, a child's pecuniary and companionship value is equal to at least the flow of expenditures the parents have made up to the death of the child, plus the flow of expenditures on the child the parents would have made in the future.[130] However, critics note that the Ireland and Ward methodology does not discount damages by the value of the companionship gained by the parent before death.[131] In other words, critics argue that the lifetime value of a child's companionship should be depreciated by the years of companionship the parent received.[132] Proponents may point out that the Ireland and Ward test represents the minimum possible value a parent places on the relationship with her child, and therefore the true value may negate such companionship depreciation; however, it still may trouble courts, which prefer quantifiable metrics, not to account for such previously incurred companionship.

The court can apply the loss of investment theory to companion animals.[133] Even though most companion animals will never generate income, guardians invest serious resources, including food, shelter, nurturing, training, grooming, and medical expenses for their care.[134] In *Quave v. Bardwell*, the court showed a propensity to accept the loss of investment theory.[135] In this case, the court affirmed an award of $2,500, in part because the guardian lost her original investment—her expenses incurred in taking care of her dog, Kilo—until he died.[136] Yet, cases like *Quave v. Bardwell* still undervalue companion animals because they do not account for the value of lost companionship.[137]

Courts could also apply the Ireland–Ward loss of investment approach to the valuation of companion animals. However, given the judiciary's persistent reservations toward companion-animal damages, courts might be inclined to weigh the criticisms of such an approach strongly and therefore choose to deny its implementation. We suggest an approach based on an amalgamation of the Michigan Supreme Court's loss of investment approach and Ireland and Ward's enhanced theory. Under this approach the court would provide the jury discretion in awarding damages within a range beginning with the loss of investment approach adopted by the Michigan Supreme Court and extending to the refined approach of Ireland and Ward.

Applying this new approach to companion animals would require an estimation of total guardian expenditures over the life of the com-

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130 *Id.* (quoting Thomas R. Ireland & John O. Ward, *Family Loss Assessment: Conceptual Issues of the Investment Approach*, *in* VALUING CHILDREN IN LITIGATION: FAMILY AND INDIVIDUAL LOSS ASSESSMENT 5, 11(Thomas R. Ireland & John O. Ward eds. 1995).

131 Byszewski, *supra* note 1, at 237–38.

132 *Id.* at 238 (noting however, that this calculation lies outside the realm of economics and should be determined by juries).

133 *Id.* at 234.

134 *Id.*

135 Quave v. Bardwell, 449 So. 2d 81, 84 (La. Ct. App. 1984).

136 *Id.*

137 Byszewski, *supra* note 1, at 236.

panion animal.[138] The American Pet Products Manufacturing Association reported that the average dog guardian spends $1,138 a year on pet expenses and, multiplying this by eleven, a dog's average lifespan, spends $12,518 over the course of a dog's life.[139] Thus, if we assume the grossly negligent death of Fido, a loyal and loving 5-year-old black Labrador retriever, the range of potential damages submitted to the jury would be $5,690 ($1,138 multiplied by 5) to $12,518 ($1,138 times 11).

B. Implementing Qualitative Analysis to Home in on Damages

After establishing the range of damages, it is necessary to determine the factors a jury should consider when reaching a dollar figure within that range. Once again, guidance exists in the form of wrongful death case law. The court in *In re Farrell Lines, Inc.* relied on a 1966 legal treatise on wrongful death damages that set out eight criteria to be considered in determining both a right to, and an amount of recovery for, the loss of society of one who has been wrongfully killed.[140] Courts have used these criteria several times since then and are now known as the Gaudet list.[141] The criteria are as follows:

1. Relationship of husband and wife, or of parent and child;
2. Continuous living together of parties at and prior to time of wrongful death;
3. Lack of absence of deceased or beneficiary for extended periods of time;
4. Harmonious marital or family relations;
5. Common interest in hobbies, scholarship, art, religion, or social activities;
6. Participation of deceased in family activities;
7. Disposition and habit of deceased to tender aid, solace and comfort when required; and
8. Ability and habit of deceased to render advice and assistance in financial matters, business activities, and the like.[142]

It is easy to see that many of these same criteria easily translate to relationships between guardians and companion animals. Here, all but the first, fifth, and eighth factors translate relatively well. Accordingly, the criteria for companion animal wrongful death cases would be as follows:

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[138] *Id.* at 238.

[139] *See id.* at 238–39 (citing *Fact Sheets, Pet Industry Facts*, AM. PET PRODS. MFRS. ASS'N, http://www.appma.org/press/fact_sheets/fact_sheet_03.asp (accessed Oct. 29, 2015)). The average amount of money spent by a cat guardian is $930 per year or $11,625 over the cat's life. *Id.*

[140] Duckler, *supra* note 30, at 214 (citing *In re* Farrell Lines Inc., 378 F. Supp. 1354, 1358 (S.D. Ga. 1974)).

[141] Duckler, *supra* note 30, at 215.

[142] *In re Farrell Lines*, 378 F. Supp. at 1358.

1. Continuous living together of guardian and companion animal at and prior to time of wrongful death;
2. Lack of absence of companion animal or guardian for extended periods of time;
3. Harmonious relations;
4. Participation of the companion animal in family activities; and
5. Disposition and habit of the companion animal to tender aid, solace, and comfort.

These qualitative factors are an effective balancing test for delineating just what companion animals are to humans.[143] The transferability of the *Gaudet* list illustrates that humans form relational bonds with companion animals similar to those formed with human family members and illustrates the anthropologic comparability of companion animals and humans.[144] Thus, not only do the factors serve as an excellent way to judge the loss of companionship suffered by the guardian and as a tool for allocating proper damages, but the factors also force the jury to face and acknowledge the non-property-like properties of companion animals.[145]

Returning to the example above, the plaintiff could introduce evidence about the propinquity of the relationship between herself and Daisy. For instance, she could introduce the family Christmas card that depicts Daisy with the family, a picture of Daisy lying in plaintiff's lap, and she could testify that Daisy has lived with her since she was a 2-month-old puppy. Thus, she would be speaking to Daisy's participation in family activities, the harmonious relationship between the two, and the lack of absence of Daisy or the plaintiff from the household for extended periods of time. The jury would hear the evidence presented and apply the above factors. The jury would then determine, based on these qualitative factors, where in the range of $5,690 to $12,518 damages should lie.

IX. LINKING GREATER DAMAGES TO INCREASED COMPANION ANIMAL RIGHTS

Under this modified approach to damages, companion animals will benefit from increased harm deterrence, and higher damage awards will more appropriately compensate guardians. Additionally, courts will be able to explicitly recognize the attributes that make companion animals unique and important and to quantifiably value these

143 Duckler, *supra* note 30, at 215.

144 *Id.* at 215–16.

145 *See* Byszewski, *supra* note 1, at 241 ("This method will provide courts and legislatures with an accurate, concrete way to calculate damages. Moreover, it recognizes that the majority of Americans have companion animals, share significant relational bonds with them, and appropriately valuate their companion animals at much more than fair market value.").

attributes.[146] Lastly, the qualitative aspects of the test illuminate the important role companion animals play in the family hierarchy.[147]

However, under this approach, the law will still classify animals as property. Thus, it is not an end in and of itself, but an intermediary step. This test exerts force from within the current confines of the law. It challenges courts and juries to recognize the unique characteristics of companion animals that make them distinct from property. However, a similar force from outside of the system must buttress this effort.[148] One way to accomplish this is through community outreach.[149] Increased effort and funding must be spent educating society on the important value of companion animals. Programs such as the Humane Society of Huron Valley's at-risk youth program, in which volunteers work with at-risk youth to educate them on the proper care of companion animals and to hopefully stop the cycle of animal cruelty,[150] must become commonplace. School children should learn proper animal care techniques and study the neuroscientific similarities between animals and humans.

It is through progress within the confines of the system and external challenges to the property regime, through education and awareness, that animals can achieve greater rights.[151]

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146 *Id.*; Duckler, *supra* note 30, at 221.

147 Byszewski, *supra* note 1, at 216–17 (stating that since companion animal owners frequently celebrate their pet's birthdays and grieve their pet's loss similar to that of a human family member, the investment approach accurately accounts for both the pecuniary and companionship value that these animals provide).

148 *See* Atiyah & Summers, *supra* note 23, at 134 (noting that for courts to overrule longstanding precedent, among other things, outside the legal system there must be a "[g]rowing moral and social enlightenment indicat[ing] that the substantive values underlying the precedent are no longer acceptable.").

149 *See, e.g.*, *Our Mission*, PETS ARE WONDERFUL SUPPORT, http://www.pawssf.org/page.aspx?pid=389 [http://perma.cc/J3LF-FV2M] (accessed Oct. 31, 2015) (showing that organizations such as Pets Are Wonderful Support (PAWS) are currently working to promote awareness of the importance of companion animals to their owners and state that their mission is to "[p]reserve, support and nurture the human-animal bond for those most vulnerable in our community."); *PVMA Position Statements*, PA. VETERINARY MED. ASS'N, http://pavma.org/positionStatements.aspx [http://perma.cc/W3XH-53BL] (accessed Oct. 31, 2015) (taking a stance on legislative issues on behalf of animal welfare and veterinarians, the PVMA notes that it is "[d]edicated to the advancement of animal welfare and . . . feels very strongly that animals are not property in the same way that tables, lamps, or cars are property. [It] further believe[s] that owners should be allowed to prove that pet animals have economic values above their purchase price or fair market value. Because of current common law precedents, legislative changes most likely will be necessary to allow for expansion of these economic values.").

150 *Humane Society of Huron Valley: Youth Programs*, HUMANE SOC'Y OF HURON VALLEY, http://www.hshv.org/site/PageNavigator/education/kids.html [http://perma.cc/7WVN-ED2N] (accessed Oct. 13, 2015).

151 *See* Hankin, *supra* note 41, at 407–08 (noting that awareness of a non-property status for companion animals would help owners and potential owners of pets to realize that they have more responsibilities to their pets than just another piece of property, and also it might reduce the number of unwanted dogs and cats in animal shelters).

X. CONCLUSION

Companion animals occupy an important role in modern day families. Guardians place great value on these relationships and invest significant resources in the development and care of their companions. However, the legal labeling of companion animals as property has curtailed the protections available. Despite evidence suggesting that the common law justification for the treatment of animals as property is no longer apt, courts have unanimously refused to modify the classification,[152] and few legislatures have acted.[153] This is likely due to the 200 years of precedent to the contrary,[154] and the unavailability of an easily applied alternative.[155] This is not to say that some courts are not sympathetic to the impact a property label has on our furry friends. Numerous courts have proclaimed the inadequacy of treating companion animals as mere property.[156] This has led guardians to invoke, and some courts to adopt, various damage theories and causes of action, such as intrinsic value, intentional infliction of emotional distress, negligent infliction of emotional distress, and loss of companionship.[157] However, success with such theories is not the norm, and valuing animals at market value remains the predominant measure.

Courts have been unwilling to adopt differing noneconomic valuation methodologies due to the inherent difficulty in quantifying such damages.[158] The suggested modified investment approach, building off

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152 *See* Peter Barton & Frances Hill, *How Much Will You Receive in Damages for the Negligent or Intentional Killing of Your Pet Dog or Cat?*, 34 N.Y.L. SCH. L. REV. 411, 412 (1989) (observing that in all states that have reported cases on damages for the loss of a companion animal, the court has classified the deceased animal as personal property).

153 *See supra* Part V (discussing the legislation of Connecticut, Illinois, and Tennessee, all of which allow for more than market value of the companion animal: recovery of veterinary and burial costs, noneconomic damages up to $25,000, and noneconomic damages up to $5,000, respectively).

154 *See, e.g.*, *Strickland*, 379 S.W.3d at 198 (noting that although companion animals are treasured companions, the court cannot depart from the 122-year-old precedent of the state, and most of America, because the law simply cannot draw a sensible policy-based distinction between different types of property).

155 *See id.* at 195 (discussing the policy impacts of allowing noneconomic damages for companion animals: courts have cabined loss of companionship damages to the husband-wife and parent-child relationships, and to extend it to companion animals would be arbitrary, since many other human-human relationships would be excluded, and the nature of such open-ended liability is problematic).

156 Morgan v. Kroupa, 702 A.2d 630, 633 (Vt. 1997) ("[M]odern courts have recognized that pets generally do not fit neatly within traditional property law principles. '[A] pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property.'" (quoting Corso v. Crawford Dog & Cat Hosp., Inc., 415 N.Y.S.2d 182, 183 (N.Y.C. Civ. Ct. 1979))).

157 *See generally* Byszewski, *supra* note 1, at 217–24 (discussing various valuation methodologies that courts have looked to in valuing a companion animal's death).

158 *See* Rabideau v. City of Racine, 627 N.W.2d 795, 798–99 (Wis. 2001) (justifying denial of claim for recovery for emotional distress on the basis that such an award would lead to unpredictable results given humanity's enormous capacity for emotional attachment).

wrongful death precedent, provides a quantitative and qualitative solution that can be a stepping stone toward increased companion animal protections. Under this approach, courts can accurately and semi-concretely quantify pecuniary loss, including the loss of companionship. Furthermore, this methodology yields increased damages, compared to the current market value approach, resulting in a more appropriate private action deterrence power. Lastly, the methodology recognizes the relational bonds between guardians and companion animals, thus serving as a means by which an understanding of companion animals as more than property can slowly traverse the judiciary. However, it must be understood that this is only an intermediary step. External pressure must reinforce internal progress. The external pressure must come from our communities forcing the legislative bodies to enact statutes that recognize the true value of animals in our society. Through educational outreach, society can create the pressure for change and reach the ultimate goal of recognizing companion animals outside the classification of property.