

COMMENTS

THE FUTURE OF VETERINARY MALPRACTICE LIABILITY IN THE CARE OF COMPANION ANIMALS

By
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The unwillingness of American civil courts to realistically compensate companion animal loss has effectively negated the only independent means of enforcing the veterinary standard of care. In doing so, it has perpetuated an industry-wide market failure by keeping veterinary malpractice insurance rates artificially lower than consumers would be willing to absorb to protect themselves. Given that U.S. pet owners annually spend over \$19,000,000,000 (19 billion) on veterinary care, and make more than 200,000,000 visits to the veterinarian every year, the potential for social and economic loss is considerable. As those who seek greater recovery for intentional and negligent harm to animals are now turning increasingly to state legislatures for relief, they repeatedly are finding such efforts stymied by the arguments of the veterinary community. This article investigates the factual bases of those arguments and of those that support increasing the malpractice liability of veterinarians. Combining law and economics theory with basic mathematics to evaluate the validity of these positions, it then suggests specific measures for legislatively addressing those parties' concerns.

* © Christopher D. Green, 2004. J.D. Harvard Law School 2004; member, American Veterinary Medical Law Association. I would like to thank Steven Wise, my adviser, for his helpful insights; Paul Waldau, my instructor, for his uncommon perspective; Dean Alan Ray for his courage in bringing Animal Law to Harvard; Bob Barker for ensuring that it remains; and Bernard Rollin for his wisdom in demonstrating how being culturally multi-lingual can lead to the enlightened "middle way" of change. I would also like to credit Tom Ulen, Fred Gottheil, and Gregory Dennis for assisting me with their intellectual expertise, while extending my deepest gratitude to Dean Suzanne Richardson, Cristina Lewis, and David Wilkins for enabling my own academic endeavors. Ultimately, this article is dedicated to the late Harold W. Hannah, the true Grandfather of veterinary law whose decades of writings inspired several generations of both attorneys and veterinarians. Remarkably, at age 90, Professor Hannah continued to publish authoritative law review articles on the subject, dictating his final *Legal Briefs* column for the Journal of the American Veterinary Medical Association the day before his passing in 2001.

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I. INTRODUCTION

As the battles regarding the moral significance, legal status, and basic welfare of non-human animals¹ continue to develop on various fronts, the issue of companion animal valuation has emerged to capture a striking share of both public² and scholarly attention.³ One reason is that the valuation debate takes many of these other battles' broader, less tangible elements, and distills them into a circumstance with which most people directly can relate, often providing a convenient springboard for discussing general societal concerns related to animal advocacy.⁴ Beyond mere expediency, though, the degree of attention paid to the animal valuation argument reveals a deeper cultural connection to those living beings with whom we American humans most frequently *inter-relate*—companion animals.⁵

Civil litigation to compensate humans for the unnatural deaths of their companion animals further focuses this valuation discussion through the lens of the legal process. Like it or not, such action forces courts to identify and articulate concrete, justifiable answers to a series of complex, formerly theoretical questions. Among these are: By what metric does one evaluate the human-animal bond? What is the actual worth of a particular companion animal to a particular individual? Should the legal system recognize or respond to these valuations? And if so, how?

¹ In a section entitled “We Are What We Speak,” Professor Paul Waldau succinctly outlines the intricacies of nomenclature, vocabulary usage, and assumptions of agenda-laden bias when discussing issues involving living beings. Paul Waldau, *Will the Heavens Fall? De-Radicalizing the Precedent-Breaking Decision* [hereinafter *Heavens*], 7 *Animal L.* 75, 94 (2001). In this vein, others have noted how use of the frequently criticized terms “pet” and “owner,” rather than “companion animal” and “guardian,” can imply to some that the speaker is staking a position on the fundamental issue of categorizing other beings as legal property. Jerrold Tannenbaum, *Veterinary Ethics* 333, 333–34 (2d ed., Mosby 1995). Accordingly, I will do my best here to use logically consistent language. However, although it may rankle some, the term “pet” is employed because its widespread social connotation actually helps underscore the emotional measure of peoples’ relationships with companion animals. The same will be true for the even more value-pregnant expression, “owner,” as its use can be effective in popularly elucidating an individual’s legal entitlement to compensation for loss.

² In the past few years, major articles concerning companion animal valuation have appeared in the *Boston Globe*, *Chicago Tribune*, *Denver Post*, *L.A. Times*, *Houston Chronicle*, *Newsweek*, *New Yorker*, *New York Times*, *San Francisco Chronicle*, *Wall Street Journal*, *Washington Post*, and *USA Today*, while entire television segments have been devoted to the topic on the news channels CNN and MSNBC.

³ Over 25 scholarly articles and books have directly addressed the companion animal valuation issue.

⁴ In a characteristic example, after a CNN television host introduced a panel of attorneys and veterinarians by giving several examples of human property disputes involving animals, she then began the discussion by asking, “Barbara, let me start with you. What kind of rights should animals have?” CNN Talkback Live (CNN Sept. 13, 2000) (TV broadcast).

⁵ Dogs were the first domesticated animals to appear in what we now know as America. J.F. Smithcors, *The Veterinarian in America 1625–1975* 18 (Am. Veterinary Publications 1975). Contrary to previous belief that they descended from indigenous wolves, recent DNA evidence has indicated that these early canines actually “came along as companions to humans” during the migration across the Bering Strait land bridge 12,000 to 14,000 years ago. David Perlman, *When Dog Became Man’s Best Friend*, *S.F. Chronicle* A1, A22 (Nov. 22, 2002). The same was true with the second American migration as well, as dogs were among the only animals brought over by the European Pilgrims on the *Mayflower* in 1620. Smithcors, *supra*, at 24.

Examining the difficulty with which the American judicial apparatus has attempted to resolve these disputes illuminates several themes: (1) the inadequacy of traditional models to consistently and accurately assess the value of companion animals,⁶ (2) the unique ways and means by which the statutory and common law has adapted to reflect changes in societal viewpoints,⁷ and (3) the fundamental problems of implementing a new paradigm of legally-recognized relationships into an existing institutional framework.⁸

As conflicting judicial opinions of the last few years indicate, modern courts actually are moving further away from consensus on the companion animal valuation question.⁹ In response, aggrieved parties and their advocates increasingly are exploring legislative means to secure the protection of civil redress.¹⁰ This development is not only shifting the traditional terms and forum of the valuation discussion, but it is also opening up the question to broader political interests. The most significant result of this change is that the relatively neglected matter of professional veterinary malpractice has emerged to take the central role in defining and shaping the boundaries of the current valuation debate.¹¹ Most

⁶ 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, 68–73 (1998); 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).

⁷ 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, 53–57, 68–73 (2001); Waldau, *Heavens*, *supra* n. 1, at 80–88, 99–100.

⁸ Lynn A. Epstein, *Resolving Confusion in Pet Owner Tort Cases: Recognizing Pets’ Anthropomorphic Qualities Under a Property Classification*, 26 *S. Ill. U. L.J.* 31, 32 (2001); David Favre, *Equitable Self-Ownership for Animals*, 50 *Duke L.J.* 473, 498–99 (2000); Geordie Duckler, *The Economic Value of Companion Animals: A Legal and Anthropological Argument for Special Valuation*, 8 *Animal L.* 199, 200 (2002).

⁹ Examining cases involving the wrongful death of dogs illuminates this incongruity. For example, New Jersey does not allow emotional distress or loss of companionship damages under *Harabes v. Barkery, Inc.*, 791 A.2d 1142, 1145–46 (N.J. Super. 2001). However, its neighbor to the west, Pennsylvania, has allowed emotional distress damages in several cases, such as *Copenhaver v. Borough of Bernville*, 2003 LEXIS 1315 (E.D. Pa. Jan. 9, 2003), and *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 218–19 (2001). Yet even those cases did not explicitly overrule *Daughen v. Fox*, 539 A.2d 858 (Pa. Super. Ct. 1988), which flatly states that, “Under no circumstances, under the law of Pennsylvania, may there be recovery for loss of companionship due to the death of an animal.” *Id.* at 865. New Jersey’s other neighbor to the north, New York, has flipped its animal valuation jurisprudence multiple times. Most recently, after *Lewis v. Di Donna*, 294 A.D.2d 799, 801 (N.Y. App. Div. 3 Dept. 2002) held that loss of companionship damages were not permitted, and *Johnson v. Douglas*, 289 A.D.2d 202, 202 (N.Y. App. Div. 2 Dept. 2001) held that emotional distress damages could not be recovered, *Mercurio v. Weber*, then quoted a 1980 case to “presume” loss of companionship, stating, “By considering the loss of companionship when a dog is negligently destroyed, the court more accurately values the lost animal, thereby more fairly compensating the owner for her loss in property.” 2003 WL 21497325 at *2 (N.Y. Dist. Ct. June 20, 2003) (citing *Brousseau v. Rosenthal*, 110 N.Y. Misc. 2d 1054, 1055 (1980)). In the midwest, Kentucky allowed emotional distress and punitive damages for the killing of horses in 2001, *Burgess v. Taylor*, 44 S.W.3d 806, 812–13 (Ky. App. 2001), but the next year disallowed such damages for a dog that was shot in the head, *Ammon v. Welty*, 113 S.W.3d 185, 186–88 (Ky. App. 2002).

¹⁰ Byszewski, *supra* n. 6, at 225–31. In the past three years, statutory measures to increase recovery for loss of a companion animal have been introduced in California, Colorado, Illinois, Maryland, Massachusetts, Michigan, Mississippi, New Jersey, New York, Oregon, Rhode Island, and Tennessee. See also Wendy S. Meyers, *The Changing Status of Pets* [hereinafter *Changing Status*], *Veterinary Practice News* 1, 8 (Apr. 2003) (providing a brief overview of several of the state legislative proposals attempted to date).

¹¹ In almost all of the aforementioned legislative efforts, the proposed measures have been vigorously opposed by state veterinary medical associations, with near universal success. Indeed, the only legislative increases in companion animal compensation that have passed, did so only because they either specifically exempted veterinarians (Tennessee), or applied only to carefully defined acts of aggravated cruelty (Illinois). See *Tenn. Code Ann. § 44-17-403(e)* (2000) (statute should not be “construed to authorize any

recently, in Colorado, the protestations of the veterinary community killed a bill to increase civil damages for companion animal loss within two short weeks of its introduction.¹²

Proponents of such legislation maintain that the cheapest way for professionals to avoid the cost of malpractice liability is simply, “Don’t be negligent.”¹³ The essence of the veterinary response, however, is that any legal acknowledgment of companion animal value beyond mere purchase price will cause drastic increases in veterinary insurance and treatment costs—increases it is claimed will be economically cataclysmic for the profession *and* for pet owners.¹⁴ In recent years this resonating argument effectively has become the baby that prevents any state from throwing out the dirty bath water of the previous century’s animal jurisprudence.

Surprisingly, though, the assertion that veterinary costs and prices will dramatically rise as a result of increased compensation is commonly made and accepted without any mathematical verification. Even academic advocates of higher civil damages for animal loss often feel obliged to concede that the potential for ancillary increases in veterinarians’ liability exposure is the Achilles heel of their argument.¹⁵ In actuality, the exact opposite may be true: *The near total absence of veterinary negligence deterrents under current law may turn out to be the strongest economic reason for draining the baby’s bath water as soon as politically possible.*

In light of these legislative showdowns, the need for an examination of the distinctive relationship between veterinary negligence liability and companion animal valuation has been thrust from mere useful exercise, to the very precondition of progress—essential to

award of non-economic damages in an action for professional negligence against a licensed veterinarian”); The Humane Care for Animals Act, 510 Ill. Comp. Stat. § 70/16.3 (2002) (detailing which specific violations of the act qualify for civil damages recovery). The legislator who introduced and sponsored the Tennessee legislation says his bill would not have passed had he not acceded to the demands of the veterinary community and exempted them from the law. Telephone Interview with Tennessee State Senator Steve Cohen (D–Memphis) (Oct. 7, 2003).

¹² Peggy Lowe, *Pet Bill Goes Out With Whimper*, Rocky Mt. News 4A (Feb. 15, 2003) (discussing the fate of Colo. H. 1260, 64th Gen. Assembly, 1st Reg. Sess. § 13-21-1003 (Jan. 31, 2003)). The introduction of this legislation in Colorado last year was reported as far away as Vietnam. *Lawsuits May Be Allowed When Pets are Abused*, Saigon Times Daily (Feb. 13, 2003).

¹³ Richard A. Posner, *Economic Analysis of Law* 201 [hereinafter *Economic Analysis*], (6th ed., Aspen 2003).

¹⁴ Richard L. Cupp, Jr. & Amber E. Dean, *Veterinarians in the Doghouse: Are Pet Suits Economically Viable?* The Brief 43, 48 (Spring 2002).

¹⁵ See e.g. Rebecca J. Huss, *Valuing Man’s and Woman’s Best Friend: The Moral and Legal Status of Companion Animals*, 86 Marq. L. Rev. 47, 104 (2002) (“There are legitimate concerns that changing the liability climate to provide for greater recovery against veterinarians could be disastrous for that profession.”); 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, 444 (2002) (“The concerns of the veterinary profession are valid. It is clear that . . . allowing non-economic damages would have a substantial effect on the profession.”). Other proponents of higher civil damages implicitly concede the point by arguing that a rise in prices might have the “beneficial” market effect of reducing participation in the activity that bears the risk. See Debra Squires-Lee, Notes, *In Defense of Floyd: Appropriately Valuing Companion Animals in Tort*, 70 N.Y.U. L. Rev. 1059, 1087 (1995) (“When service providers are forced to include an appropriate value for companion animals, the overall price of the service will increase and demand for the service will consequently decrease. Fewer accidents will occur as a result.”); Byszewski, *supra* n. 6, at 230–31 (“Thus, pricing some people out of the market is useful to reduce inefficient activity levels.”). Veterinary care, however, is often not an elective activity, but rather a vital necessity to prevent animal suffering. In many states, failure to seek veterinary treatment for an injured companion animal is even a crime. Furthermore, this author is not willing to concede that pricing people out of animal companionship is socially beneficial to any degree.

understanding and advancing the property status quo.

While a fair amount already has been written on the topic of veterinary negligence, nearly all of it has focused either on specific procedural elements of the legal doctrine,¹⁶ or on highlighting a handful of sensational cases to draw overly-broad conclusions about trends—assertions which are often based entirely on anecdotal evidence and the subjective experiences of individual practitioners.¹⁷

So far, very little has been published that objectively attempts to determine: (1) *Quantitatively*, whether the heavens are indeed falling due to increases in veterinary malpractice litigation and damage awards,¹⁸ or (2) *Qualitatively*, whether the end result of such increases would amount either to a net positive or net negative for America in terms of the aggregate economic and social impact.¹⁹

In attempting to answer these two questions, this article seeks to provide the factual investigation necessary for interested parties to frankly and honestly evaluate the major

¹⁶ Orland Soave, *Animals, the Law and Veterinary Medicine* 11–48 (Austin & Winfield 2000); Sonia S. Waisman et al., *Animal Law: Cases and Materials* 175–214 (Carolina Academic Press 2000); David S. Favre & Peter L. Borchelt, *Animal Law and Dog Behavior* 233–45 (Laws. & JJ. Publg. Co. 1999); James F. Wilson et al., *Law and Ethics of the Veterinary Profession* 131–62 (Priority Press 1988); Mary Randolph, *Dog Law* 5/10–5/18 (4th ed., Nolo Press 2001); David S. Favre & Murray Loring, *Animal Law* 113–16 (Quorum Books 1983); H.W. Hannah & Donald F. Storm, *Law for the Veterinarian and Livestock Owner* 68–80 (3d ed., Interstate 1974); William Otis Morris, *Veterinarian In Litigation* 36–94 (VM Publg. Inc. 1976); Henry Bixby Hemenway, *Essentials of Veterinary Law* 69–125 (T.H. Flood & Co. 1916); Joseph H. King, Jr., *The Standard of Care for Veterinarians in Medical Malpractice Claims*, 58 Tenn. L. Rev. 1 (1990); Cheryl M. Bailey, *Veterinarian's Liability for Malpractice*, 71 A.L.R. 4th 811 (1989); Sam A. Mackie, *Veterinary Malpractice*, 32 Am. Jur. 3d Proof of Facts § 351 (1988 & Supp. 2003); Thomas H. Allison, *Use of Experts in Litigation Involving Animals* (Am. Veterinary Med. Law Assn. 1996) [hereinafter AVMLA]; James J. Rumore, *The Doctrine of Informed Consent and its Applicability to the Field of Veterinary Medicine* (Claitor's Publg. Div. 1980); James J. Rumore, *Veterinary Medical Records and the Law* (Claitor's Publg. Div. 1980); Harold W. Hannah, *Loss of Companionship and Emotional Distress—Who Determines Liability?* 220, No. 1 Journal of the American Veterinary Med. Assn. [hereinafter JAVMA] 26 (Jan. 1, 2002); Harold W. Hannah, *Negligence in Use of Medications and Drugs*, 219, No. 9 JAVMA 1210 (Nov. 1, 2001); Harold W. Hannah, *When Can Failure to Inform Support a Malpractice Claim?* 218, No. 9 JAVMA 1419 (May 1, 2001).

¹⁷ See Chris Richard, *Number of Malpractice Cases Spikes . . . for Pets*, Christian Sci. Monitor 2, 2 (July 28, 2003) (the title speaks for itself); Evan Gahr, *Fido Goes to Court: Trial Lawyers Explore New Horizons in Civil Rights Law*, The Am. Spectator 56, 57 (Dec. 2000) (“vets now face a litigation-happy-bar and judges who happily oblige”); Richard Willing, *Under Law, Pets Are Becoming Almost Human*, USA Today 1A, 1A (Sept. 13, 2000) (“Lawsuits against veterinarians are increasing”); Gail Diane Cox, *Pet Suits Yielding Larger Damages for the Owners*, Natl. L. J. A1, A1 (Aug. 10, 1998) (“Five figure recoveries for pets . . . are becoming almost commonplace.”).

¹⁸ One veterinary publication has flatly asserted that “Efforts . . . to boost compensation in cases of wrongful injury, veterinary malpractice and death have in recent years, flooded court dockets throughout the United States . . .” Jennifer Fiala, *Courts Sway Regarding Pets As Property* [hereinafter *Courts Sway*], 32 Dr. of Veterinary Med. Magazine [hereinafter DVM] 1, 1 (Sept. 2001) (emphasis added). This statement will prove to be grossly unfounded. See *infra* nn. 63–69 and accompanying text.

¹⁹ One of the only articles that has explored these macro evaluations did so in the context of drawing an analogy to the medical liability insurance “crises” of the 1970’s and 1980’s. See generally Gregg A. Scoggins, *Note: Legislation Without Representation: How Veterinary Medicine Has Slipped Through the Cracks of Tort Reform*, 1990 U. Ill. L. Rev. 953 (1990) (Although that author acknowledged that no similar liability insurance crisis then existed in the field of veterinary medicine, he pursued the analogy hypothetically for predictive purposes. Unfortunately, the note makes too many assertions regarding key factual elements of the current debate (e.g. degree of rising malpractice rates, increasing number of claims, consumer price elasticity, unavailability of veterinary services) to contribute substantially to the task at hand.). A more recent article does thoroughly explain the various common law causes of action available against veterinarians, outline the existing damage theories for loss compensation, and briefly discuss several arguments for and against increasing that compensation. However, its treatment of those arguments does not go into enough depth to allow an adequate assessment of their validity. See Cupp & Dean, *supra* n. 14, at 47–48.

arguments related to veterinary liability.²⁰ It is hoped that this knowledge will assist those engaged in the valuation debate to identify and anchor into the law any consensus that exists among them. Once the facts are laid bare, and positional rhetoric cast aside, it is likely that all will be amazed to watch as the gulf that currently separates them evaporates.

II. ECONOMICS AND HISTORY OF VETERINARY MALPRACTICE LIABILITY

While many of us can sympathize with the personal loss of a companion animal, at first blush, the topic of veterinary malpractice may seem to be of trivial economic or societal importance.

In sheer financial terms, however, U.S. consumers spent more than *\$19 billion* on veterinary care in 2001,²¹ an amount greater than the attendance receipts of all this country's professional football, baseball, basketball, and hockey teams, and all college teams, and all movie theatres *combined*.²² Remarkably, this annual economic outlay to veterinarians by pet owners generates 65% *more* revenue than the gross sales of the entire U.S. recording industry.²³ Each year Americans also spend another \$90 million on health insurance policies for their pets,²⁴ and such policies are now the number one "most requested corporate employment benefit after health and dental insurance."²⁵

Besides these expenditures for veterinary services, pet owners are forecasted to spend an additional \$31 billion in 2003 purchasing a variety of other products for their pets.²⁶ Together this will amount to an annual contribution of over \$50 billion to the national economy solely as a result of the value that Americans place upon their companion animals.²⁷

²⁰ This paper is concerned with the larger questions regarding the lack of enforcement or civil liability for all types of animal harm that may occur from the actions of veterinarians. Accordingly, although the terms negligence and malpractice are often used interchangeably to refer to unintentional harm, it should be noted that the two concepts involve different legal standards of culpability and proof. Favre & Borchelt, *supra* n. 16, at 236–37. For an overview of the many other types of legal claims to address veterinary harm to animals, *see id.* at 235; Cupp & Dean, *supra* n. 14, at 44–50 (such claims include conversion, breach of bailment, breach of contract, fraud or misrepresentation, loss of companionship, survival of the animal's pain and suffering, strict products liability, and intentional and negligent infliction of emotional distress).

²¹ Am. Veterinary Med. Assn. [hereinafter AVMA], *U.S. Pet Ownership & Demographics Sourcebook* [hereinafter *U.S. Pet Ownership*] 31, 34, 97–99 (AVMA 2002) (the \$19.08 billion in total, annual veterinary expenditures breaks down as follows: \$11.6 billion on dogs, \$6.6 billion on cats, \$608.4 million on horses, \$135.9 million on birds, and \$132 million on exotics (excluding fish)). *See also* Burkhard Bilger, *The Last Meow*, *The New Yorker* 53 (Sept. 8, 2003) ("Americans now spend nineteen billion dollars a year on veterinary care, up from eleven billion just seven years ago.").

²² U.S. Bureau of Economic Analysis, *The National Income and Product Accounts of the United States—Table 2.5 Real Personal Consumption Expenditures by Type of Expenditure*, <http://www.bea.doc.gov/bea/dn/nipaweb/SelectTable.asp?Selected=N> (accessed Feb. 13, 2004).

²³ Recording Industry Association of America, *2002 Yearend Statistics*, <http://www.riaa.com/news/marketingdata/facts.asp> (accessed Jan. 23, 2004) (showing the total value of all retail CD's, Cassettes, Singles, LP's, Music Videos and DVD's in 2002 was \$11,549,000,000).

²⁴ Teresa M. McAleavy, *It's Covering Cats and Dogs; More Companies Offering Pet Insurance to Workers*, *The Record* (Bergen County, NJ) B1 (Dec. 6, 2002) (the nation's largest pet health insurance provider, 23-year-old Veterinary Pet Insurance (VPI), currently issues 400,000 policies amounting to 80% of the total U.S. number).

²⁵ John Lofflin, *Are You Ready for Insured Pets?*, *Veterinary Economics* 33, 33 (July 2001) (quoting a study by the Metropolitan Life Insurance Company). *See also* *Pet Insurance Market Grows 342 Percent Over Five Years*, *Veterinary Practice News* 8 (Oct. 2003) (discussing economic growth of pet insurance).

²⁶ *How Much Will Pet Owners Pay?* *Veterinary Economics* 74, 76 (Aug. 2002) (quoting information provided by the American Pet Products Manufacturers Association).

²⁷ This amount that Americans spend just on their pets each year is greater than the *entire economic output* of 3/4 of the other countries on the planet. World Bank, *Total GDP 2003*,

While the existing limitations on civil recovery reduce the likelihood of veterinary malpractice incidents being recorded, it should be noted that negligence is the most common cause of action in pet suits.²⁸ When one further considers that companion animals in this country made over 200,000,000 visits to veterinarians in 2001,²⁹ even if mistakes occur only a small fraction of the time the potential for loss is substantial.³⁰ For perspective, using the only comparative yardstick available, the National Academy of Sciences calculates that human medical malpractice takes the lives of more Americans than both breast cancer and AIDS, killing between 44,000 and 98,000 people each year.³¹ Even at the low end, this death toll is the equivalent of a jumbo jet crashing every three days,³² or of the 9/11 attacks recurring every three weeks.³³ Correspondingly, there are over half as many companion animals as humans in this country,³⁴ and 79% more U.S. households now have pets than have children.³⁵ Indeed, a substantial 58% of pet owners reported taking time off work to tend to a sick pet in 2002.³⁶

Notwithstanding this economic impact of companion animals in American society, some critics still attempt to characterize veterinary malpractice litigation as simply the latest perversion of a modern tort system run amok.³⁷ Quite to the contrary, however,

<http://www.worldbank.org/data/databytopic/GDP.pdf> (accessed July 19, 2004) (showing that 154 out of the 208 recognized nations in the world have a GDP below \$50 billion). The contribution to our *national* economy by money spent on companion animals is roughly equal to that spent on all travel by air, rail, bus, subway, or taxi. U.S. Bureau of Economic Analysis, *supra* n. 22, at Table 2.5.

²⁸ Cupp & Dean, *supra* n. 14, at 45.

²⁹ AVMA, *U.S. Pet Ownership*, *supra* n. 21, at 3, 31, 34, 43, 92 (the total number is 200,140,800 visits, with nearly 188,000,000 of those just for cats and dogs). One Manhattan veterinary hospital alone treats 62,000 companion animals every year. Lee Gutkind, *The Veterinarian's Touch* 24 (Owl Books 1997).

³⁰ The nation's largest veterinary insurer, the AVMA-Professional Liability Insurance Trust (hereinafter AVMA-PLIT), once reported receiving 14,455 telephone calls from veterinarians regarding professional liability matters in a single year. *Veterinarians Reach Out To Trust Office*, 1, No. 2 Prof. Liability (Newsletter of AVMA-PLIT) (Mar. 1988). Another year, the insurer reported 18 claims for pets sustaining "major injuries" solely from veterinarians' misuse of heating pads. *Heating Pad Alert*, 17, No. 1 Prof. Liability 2 (Winter 2002).

³¹ David Pasztor, *In Malpractice Crisis, A Second Opinion Emerges*, Austin-American Statesman A1, A1 (Jan. 17, 2003).

³² Joanne Wojcik, *Med Mal Reform is Bad Medicine*, Bus. Ins. 12, 12 (Feb. 24, 2003) (quoting J. of the Am. Med. Assn. report). In a new, voluntary and anonymous reporting system for medication mistakes, this year "500 hospitals came forward with 192,000 admissions of error." *The Wrong Drug, The Wrong Dose*, Time 106 (Dec. 1, 2003).

³³ The most recent official figures attribute 2,995 total deaths to the terrorist attacks of September 11, 2001 in New York, DC, and Pennsylvania. Dennis Cauchon, *NYC Removes 40 Names from 9/11 Victim List*, USA Today 7A (Oct. 30, 2003).

³⁴ AVMA, *U.S. Pet Ownership*, *supra* n. 21, at 2, 93 (the number of pets in America in 2001 was 164,836,000—excluding another 49,000,000 pet fish). By comparison the human population was 277,017,622. U.S. Census Bureau, *2001 Supplementary Survey Profile*, <http://www.census.gov/acs/www/Products/Profiles/Single/2001/SS01/Tabular/010/01000US1.htm> (last updated Dec. 16, 2002).

³⁵ U.S. Census 2001 Supplementary Survey Profile, *Table 1: Profile of General Demographic Characteristics*,

<http://www.census.gov/acs/www/Products/Profiles/Single/2001/SS01/Tabular/010/01000US1.htm> (last updated Dec. 16, 2002) (estimated supplemental data from 2000 census). In 2001, the estimated number of households with children under 18 was 34,217,412. *Id.* Comparatively, the number of households with pets was 61,100,000. AVMA, *U.S. Pet Ownership*, *supra* n. 21, at 6.

³⁶ *Pet Owner Vet Expenses Rising, Survey Says*, Veterinary Practice News 11, 15 (Jan. 2003) (quoting survey by the American Animal Hospital Association [hereinafter AAHA]).

³⁷ Richard Marosi, *Every Dog Has His Day in Court*, L.A. Times A1 (May 24, 2000) (quoting the executive director of Citizens Against Lawsuit Abuse referring to veterinary malpractice litigation as "just another avenue to take advantage of the system by people seeking personal gain."); Meyers, *Changing Status*, *supra* n. 10, at 12 (quoting AVMA executive vice-president, Arthur Tennyson: "Trial lawyers have identified veterinary medicine as a growth industry.").

codified statutes specifying both compensatory and punitive damages for veterinary negligence were included in some of humanity's earliest recorded laws and have existed on the books for over 3,800 years! As the Mesopotamian Code of Hammurabi from 1800 B.C. prescribed, "The animal surgeon who has performed a successful operation on a beast or an ass should be given 6 shekels as a fee. If, however, due to the operation, the animal dies, the surgeon must pay compensation for 1/4 of the animal's price to the owner."³⁸

In ancient India, around 2,250 years ago, the edicts of King Asoka also addressed veterinary malpractice and compensation for negligence, mandating, "If a veterinarian was careless in providing treatment to a horse, or found to have used improper medicines, and the condition of the horse worsened, he could be fined double the cost of treatment."³⁹

Along with such early statutory provisions, common law courts in England awarded damages in suits for negligent veterinary care as early as 1370,⁴⁰ with two such actions predating that country's first documented *human* medical malpractice case.⁴¹ In parallel, American courts formally recognized the concept of veterinary negligence liability as far back as 1625,⁴² yet did not record their first human medical malpractice case until another

³⁸ Dénes Karasszon, *A Concise History of Veterinary Medicine* 20 (E. Farkas, trans., Budapest: Akadémiai Kiadó 1988) (quoting Section 224 of the Mesopotamian Code of Hammurabi). Carved into cuneiform tablets, the Hammurabi text was also the first to codify the regulation of human and animal doctors. J.F. Smithcors, *Evolution of the Veterinary Art: a Narrative Account to 1850*, 32 (Veterinary Med. Publ. Co. 1957). The Mesopotamians of Babylonia further viewed dogs as holy and worshipped a healing god Gula who often appeared as, or with, a dog. Karasszon, *supra*, at 20. This canine god was believed to wield the power of rabies, either protecting humans that were righteous or afflicting those who insulted the sacred animal whose form he took. *Id.*

³⁹ Smithcors, *Veterinary Art*, *supra* n. 38, at 18. King Asoka rose to power around 250 B.C. *Id.* Indeed, Indian veterinary science was as advanced thousands of years ago, if not more so, than our own Western methods of treating of animal illness were just a few hundred years back. For example, the 4,000-year-old *Ayur-Veda* (Book of Life), believed to be the world's first treatise on medical science, contained distinct volumes for the medical treatment of several species of nonhuman animals. These books give detailed descriptions of major surgical techniques, therapeutic instructions, toxicology, and medicinal prescriptions. Some of ancient India's veterinary medical treatments included the use of biting ants to suture wounds, nasal tubes to administer drugs directly to the stomachs of horses, disinfecting operating rooms with sulfur smoke, and the cleansing of clothes before surgery. Karasszon, *supra* n. 38, at 28. Compare this with *The Citizen and Countryman's Experienced Farrier*, published in 1764, the first American veterinary work to achieve wide circulation. Some of that book's suggested "cures" for back strain or joint pain include applying the drippings of a puppy that has been killed, gutted, filled with snails and roasted, and slitting a live cat from chin to tail and placing the warm body on the strain for 48 hours. Smithcors, *Veterinarian in America*, *supra* n. 5, at 36–37.

⁴⁰ C.H.S. Fifoot, *History and Sources of the Common Law* 75 (Stevens & Sons 1949). "In *Waldon v. Marshall* in 1370 the plaintiff succeeded in an action against a veterinary surgeon who had undertaken to cure his horse but had negligently killed it; in 1373 a writ of Trespass *en son case* was sustained against a farrier for laming a horse." *Id.* (referring to the cases of *Waldon v. Marshall*, Y.B. Mich. 43 ed. 3, f. 33, pl. 38 (1370), and *The Farrier's Case*, Y.B. Trin. 46 Ed. 3, f. 19, pl. 19 (1373) (both reprinted in Fifoot at 81–82)).

⁴¹ Morris, *supra* n. 16, at 37 (referring to the case of *J. Mort*, recorded in V.B. Hill 48 Edw. 111, f. 6, pl. 11 (1374)). See also Fifoot, *supra* n. 40, at 75 ("[I]n 1375 an action of Trespass *sur son case* failed against a surgeon, who had negligently pursued his undertaking to heal the plaintiff's hand."). Fifoot reprints the case under the citation: *The Surgeon's Case*, Y.B. Hill. 48 Ed. 3., f. 6, pl. 11 (1375). *Id.* at 82.

⁴² Wyndham B. Blanton, *Medicine in Virginia in the Seventeenth Century* 231–32 (William Byrd Press 1930) (quoting from a 1625 case involving the death of a cow after treatment by one William Carter). This episode is believed to be the first record of veterinary services in America, although the term "veterinarian" did not appear in English writing until 1646. Smithcors, *Veterinarian in America*, *supra* n. 5, at 22. Blanton quotes another Virginia veterinary malpractice case from 1642 where a man was hired "to use the best of his skill for the cure of the horse" yet the animal died. The court ruled that because the owner was present "at the opening of the horses [sic] wound," he must "stand the loss and pay for treatment." Blanton, *supra* n. 42, at 232. (citing case from "York County Records, v.6, at 44").

170 years later.⁴³ Beyond merely compensating these animals' obvious economic utility value, U.S. state courts have been awarding punitive or emotional damages for animal harm since 1817,⁴⁴ and American pet owners have been suing for emotional distress from the killing of family dogs since the mid-1800s.⁴⁵

Given that the legal theory of civil compensation for veterinary malpractice is as old as written law itself, and that courts have considered the emotional impact of pet loss for nearly 200 years, the first relevant issue to address is the state of such litigation today.

III. THE QUANTITATIVE QUESTION: IS THE SKY CURRENTLY FALLING DUE TO INCREASED VETERINARY MALPRACTICE LITIGATION AND GREATER DAMAGE AWARDS?

The first of this article's two major questions is relatively easy to answer: No, currently there is no malpractice liability crisis in veterinary medicine.

The most straightforward repudiation of any existing crisis is simply that both of America's primary providers of veterinary malpractice insurance publicly state that they have not experienced a rise in either the number or aggregate dollar amount of claims during the last 10 years.⁴⁶ Backing up these statements is the fact that the price of liability coverage for veterinarians has not risen once in over a decade⁴⁷ and premiums actually dropped in each of the two prior years.⁴⁸ This means that veterinarians are now paying *less* for their malpractice coverage than they were 14 years ago.⁴⁹ If one further adjusts for inflation, the average price of veterinary liability insurance is now 44% *lower* than in 1989⁵⁰—an effect verified by the country's largest veterinary liability insurer who reports

⁴³ *Cross v. Guthery*, 2 Root 90 (Conn. Super. 1794) (involving a gruesome botched mastectomy). Discussed in Morris, *supra* n. 16, at 37.

⁴⁴ *Wort v. Jenkins*, 14 Johns 352 (N.Y. Sup. 1817) (upholding a jury verdict that awarded \$25 in special damages resulting in a total verdict that was 50% higher than the market-value of the horse). Note that \$25 in 1817 would be worth considerably more in today's currency.

⁴⁵ See e.g. *Renner v. Canfield*, 30 N.W. 435, 436 (Minn. 1886) (holding that the adverse health effects experienced by the pregnant plaintiff after witnessing the shooting of her dog were more likely caused by her proximity to the gunshot than the dog's death).

⁴⁶ Fiala, *Courts Sway*, *supra* n. 18, at 21 (The number of veterinary malpractice claims filed with insurers "has remained stagnant for over a decade." (quoting Mike Ahlert, senior vice-president of Mack & Parker, Inc., administrators of the AVMA-PLIT, the largest veterinary malpractice insurer)); Jennifer Fiala, *Court Rulings Could Up Ante on DVM Malpractice* [hereinafter *Court Rulings*], DVM 1, 32 (May 2001) ("But so far, a rising trend in litigation hasn't struck the brokerage firm." (paraphrasing Jay O'Brien, President of ABD Insurance, the second largest veterinary liability insurer)).

⁴⁷ *PLIT Celebrates 9 Years of Stable Premiums*, 21, No. 4 Prof. Liability 1 (Fall 2002) ("For the 9th consecutive year, premiums for the AVMA PLIT-endorsed Professional Liability Insurance program will remain the same."); *No PLIT Rate Change*, 19, No. 4 Prof. Liability 1 (Fall 2000) ("In fact, the program rates have not increased since 1992."). The AVMA-PLIT insures about 72% of the roughly 44,000 practicing veterinarians. Dennis M. McCurnin, *Boost Your Liability Protection in the Practice*, Veterinary Practice News 24, 24 (Jan. 2003).

⁴⁸ *New, Lower Rates For Professional Liability Insurance*, 10, No. 4 Prof. Liability 4 (Sept. 1991); *Many Insureds To See Lower Insurance Rates For Professional Liability*, 9, No. 4 Prof. Liability 2 (Aug. 1990).

⁴⁹ Comparing the AVMA-PLIT Primary Professional Liability Insurance premiums for 1989, *Many Insureds To See Lower Insurance Rates for Professional Liability*, *supra* n. 48, with the AVMA-PLIT, *Annual Premiums Effective January 1, 2003*, we see that the 2003 premium for Plan 2 (\$300,000 per claim/\$900,000 aggregate) is now \$34 cheaper than in 1989. For Plan 3, the 2003 cost is \$54 *lower* than it was 14 years ago—even after a \$2,000,000 increase in aggregate claims allowance. These represent respective price reductions of 17% and 22%. Although the annual price of basic Plan 1 coverage did increase slightly, it did so only by \$4 over the entire 14-year period.

⁵⁰ U.S. Dept. of Labor Bureau of Labor Statistics, Consumer Price Index Inflation Calculator, <http://www.bls.gov/home.htm> (last accessed Jan. 13, 2004) (providing percentage figure). The other major

that it collected the same total dollar amount in premiums from the 42,000 veterinarians it insured in 2001, as from the 26,000 it insured ten years earlier.⁵¹

Furthermore, not only have veterinary liability insurance prices stayed flat for over a dozen years, but they also were extremely low to begin with. In 2003, basic liability coverage for a companion animal veterinarian still costs only \$147 per year.⁵² For a scant \$41 more, small animal veterinarians can boost their policy to the highest coverage tier of \$1,000,000 per claim and \$3,000,000 in total annual claims—a ten-fold increase in protection for a total premium price of only \$188 per year.⁵³ When one divides the cost of this *maximum* primary coverage by the average number of clients per veterinarian, it becomes apparent that American pet owners currently are paying less than 12¢ each for their portion of veterinary malpractice insurance coverage.⁵⁴

It is worthwhile to note that an increase to a \$1 million in per claim coverage is functionally irrelevant for companion animal veterinarians, as the two highest jury verdicts ever awarded for companion animal loss were \$126,000 in Kentucky,⁵⁵ and \$135,000 in Oregon.⁵⁶ Furthermore, both of these cases involved multiple animals.⁵⁷ In the Kentucky case, the majority of the award also was for punitive damages,⁵⁸ which are not covered under veterinary liability insurance.⁵⁹ Dividing the compensatory portion of these verdicts by the number of animals harmed establishes that the first case awarded \$25,500 for each horse killed, and the second resulted in \$67,500 per poisoned dog—an

veterinary liability insurer also reports that if there has been an increase in litigation, it “has not translated into higher insurance fees.” Marosi, *supra* n. 37, at A1 (quoting Jay O’Brien, President of ABD Insurance which provides malpractice coverage to the California Veterinary Medical Association and 1,850 California veterinary hospitals).

⁵¹ Fiala, *Courts Sway*, *supra* n. 18 at 21 (quoting Mike Ahlert, senior vice-president of Mack & Parker, Inc., administrators of the AVMA-PLIT).

⁵² AVMA-PLIT, *Annual Premiums Effective January 1, 2003*. See also Wendy S. Meyers, *Pet Status Laws Pose Legal Risks: Changes Could Raise Malpractice Premiums* [hereinafter *Pet Status Laws*], *Veterinary Practice News* 1, 17 (June 2003) (reprinting summary of AVMA-PLIT rates). This \$147 premium buys liability coverage of \$100,000 per claim and \$300,000 in annual claims. *Id.*

⁵³ *Id.*; *Review Your Coverage Limits—A Nickel a Day Could Increase Protection Tenfold*, 22, No. 3 *Prof. Liability* 2 (Summer 2003) (“With the PLIT, it is often possible to triple your insurance limits with only a slight increase in your premium.”). Even these low numbers for the price of veterinary malpractice insurance are slightly inflated as the AVMA-PLIT commonly rebates a portion of the premium back to the veterinarian as a “dividend.” Sarah A. Chadwick, *Fewer Liability Claims Mean More Money for Veterinarians*, *Veterinary Economics* 12 (July 1999) (that year the insurer sent out rebate checks totaling over \$1.6 million; it was the fifth straight year of such dividends).

⁵⁴ Calculated as follows: \$188.00 cost of maximum coverage ÷ 1635 average clients per veterinarian = 11.5¢ liability insurance cost per client. American Animal Hospital Assn., *Financial and Productivity Pulsepoints* 114 (2d ed., AAHA 2002) (providing the number of clients per veterinarian).

⁵⁵ *Burgess v. Taylor*, 44 S.W.3d 806, 810 (Ky. App. 2001).

⁵⁶ Jennifer Fiala, *Profession Grapples with Evolving Legal Status* [hereinafter *Profession Grapples*] *DVM* 1, 42 (Apr. 2003) (referring to *Burgess v. Taylor* 44 S.W.3d 806 (Ky. App. 2001), and *Ingwersson v. Whitman*, Curry Co. Cir. Ct. No. 01CV0230 (Oregon 2002)). A 2002 case decided in Federal court in Illinois awarded \$120,000 to a woman whose dog was shot by a police officer entering her home. *Lucyna Mitchell v. City of Chicago et al.*, No. 01-C-458 (N.D. Ill. 2002). However, these damages recovered under a civil rights claim also included her own gunshot injuries and did not specify what portion was specifically for the death of her dog. *Taz. Id.* See generally Kate Schott, *Dog Is Slain By Police Officer; Woman Wins Civil Rights Claim*, *Chic. Daily L. Bull.* 3 (Feb. 27, 2002) (article summarizing incident and subsequent litigation).

⁵⁷ Fiala, *Profession Grapples*, *supra* n. 56, at 42.

⁵⁸ *Burgess*, 44 S.W.3d at 810 (\$75,000 of the verdict was for punitive damages based on the extreme conduct of the offender, \$50,000 was for emotional compensatory damages, and \$1,000 was for the market value of the two horses killed).

⁵⁹ See *infra* nn. 436–37 and accompanying text (for a discussion of punitive damages and veterinary malpractice insurance).

award that was later settled for a lesser amount in lieu of appeal.⁶⁰ Thus it is not surprising that “less than five percent of veterinarians upgrade to excess professional liability insurance,”⁶¹ and between 10% to 20% of veterinarians carry no liability insurance at all.⁶²

The American Animal Hospital Association additionally reports that emotional damages for companion animals have only been awarded in 10 cases of any kind during the last 5 years.⁶³ Considering that there are over 135 million pet cats, dogs, and horses in this country,⁶⁴ this figure is hardly indicative of an explosion in pet loss litigation.⁶⁵ One also must acknowledge that Louisiana, Texas, and Florida each first awarded punitive or emotional damages for companion animal harm in the early 1960s,⁶⁶ yet no deluge from “opening the floodgates of litigation” ever materialized in any of those states during the forty years hence.⁶⁷ Similarly, for two years now Illinois plaintiffs have been enabled by statute to seek *unlimited* emotional distress compensation, and up to \$25,000 in punitive damages in instances of aggravated animal cruelty.⁶⁸ To this day, however, this civil damages provision has not been used even once.⁶⁹

IV. THE QUALITATIVE QUESTION: IF THE SKY IS *NOT* FALLING DUE TO INCREASED VETERINARY MALPRACTICE LITIGATION AND DAMAGE

⁶⁰ Fiala, *Profession Grapples*, *supra* n. 56, at 42. Technically, the \$135,000 judgment was only for two of the four dogs that were killed, but it is somewhat unclear because the jury was still allowed to consider the killing of the other two dogs when deciding on the culpability of the defendant. Telephone Interview with Scott Beckstead, Plaintiff’s Attorney in the *Ingwersson* case (Oct. 17, 2003).

⁶¹ Meyers, *Pet Status Laws*, *supra* n. 52, at 17 (quoting J. Wayne Rehn, Trust Representative for the AVMA-PLIT).

⁶² *Id.* (incidentally, not one of the state veterinary licensing bodies or professional organizations actually requires veterinarians to carry liability insurance policies).

⁶³ Julia C. Martinez, *Fur Flies on Elevating Pets’ Status*, Denver Post B1, B8 (Feb. 9, 2003).

⁶⁴ AVMA, *U.S. Pet Ownership*, *supra* n. 21, at 2.

⁶⁵ Apparently Jerrold Tannenbaum, a professor at Tufts Veterinary School who studies veterinary and animal law was mistaken when he prophesized six years ago that “We may be on the verge of a [litigation] explosion.” Evan Gahr, *Dog Bites Man; Dog Sues Man; Dog Wins*, Wall St. J. A15, A15 (Apr. 6, 1998).

⁶⁶ See *Brown v. Crocker*, 139 So. 2d 779, 782 (La. App. 1962) (upholding an award for mental anguish in the death of a horse); *City of Garland v. White*, 368 S.W.2d 12 (Tex. App. 1963) (sustaining mental pain and suffering damages for policeman’s wrongful killing of owner’s dog); *Wertman v. Tipping*, 166 So.2d 666 (Fla. Dist. App. 1964) (upholding \$1,000 damage award against animal hospital from which boarded German Shepherd escaped and was never found); *LaPorte v. Associated Independents, Inc.*, 163 So. 2d 267 (Fla. 1964) (allowing award for malicious infliction of emotional distress that combined elements of punitive, sentimental and mental suffering damages when plaintiff witnessed killing of her dachshund, Heidi, with garbage can thrown by city worker); *Levine v. Knowles*, 197 So. 2d 329 (Fla. Dist. App. 1967) (allowing claim for punitive damages to proceed against a veterinarian who cremated a dog against the owner’s wishes, allegedly to conceal evidence of previous negligence); *Knowles Animal Hosp. v. Wills*, 360 So. 2d 37 (Fla. Dist. App. 1978) (upholding award of \$13,000 for mental pain and suffering of pet owner in veterinary malpractice action regarding severe burning of dog left on heating pad for several days).

⁶⁷ Telephone Interview with Janice Mogan, Trust Representative for the AVMA-PLIT (Oct. 3, 2003) (stating that the AVMA-PLIT “has not seen any escalation trends anywhere in terms of individual states and the numbers of claims filed”). The Hawaii Supreme Court expressed the same when applying a 1970 decision allowing emotional damages for property loss: “Since our holding in *Rodrigues*, there has been no ‘plethora of similar cases’; the fears of unlimited liability have not proved true.” *Campell v. Animal Quarantine Station*, 632 P.2d. 1066, 1071 (Haw. 1981). Nevertheless, this worry continues to be articulated by other modern courts in cases seeking civil damages for the loss of companion animals. See e.g. *Harabes v. Barkery, Inc.*, 791 A.2d 1142, 1145 (N.J. Super. L. Div. 2001) (“[T]here is the concern that allowing such claims to go forward would open the floodgates to future litigation.”).

⁶⁸ *Illinois Humane Care for Animals Act*, 510 Ill. Comp. Stat. § 70/16.3 (2002).

⁶⁹ Telephone Interview with Ledy VanKavage, Senior Director, ASPCA Legislative Services (Oct. 29, 2003).

AWARDS, SHOULD IT BE?

A. *The Current Problem*

1. *The Market Failure of Veterinary Malpractice Insurance*

While the fact that veterinary malpractice insurance prices are extremely low and have not risen in 14 years may seem like good news, it is not. Whenever the price of a good or service is unaffected even by the rate of inflation for this length of time, it often indicates a disruption in the optimal functioning of the market. In other words, some interference is shielding or protecting the price unnaturally from the fluctuating equilibrium of the marketplace.

From an economic viewpoint, the main problem with controls that artificially immunize the price of a good or service from market forces is that when consumers start placing a higher or lower value upon the good, the price will not reflect its true value to consumers. This protectionism can lead to huge inefficiencies in supply, demand, and in the provision of the good or service itself (think Soviet-era industry or 1970's American auto manufacturers).⁷⁰ Today, the lack of available civil damages for veterinary negligence is having precisely this effect on the market for veterinary liability insurance.

While it is clear that such artificial price controls benefit veterinarians in the short term, it is *pet owners*, not veterinarians, who are the true consumers of malpractice insurance. To explain, professional malpractice insurers invariably recover any lawsuit damages paid out by increasing the premiums charged to those whom they insure—in this instance, veterinarians.⁷¹ In turn, those insured professionals pass these premium increases on to the client consumers of their services—in this case, pet owners. Accordingly, pet owners are both the collective *purchasers* of veterinary liability insurance and the individual *beneficiaries* when negligent accidents occur.

What this means is that any rise in insurance-related financial costs to the veterinary profession resulting from increased compensation for pet loss, ultimately will be paid from the pockets of pet owners themselves. Viewed in this factual light, it becomes apparent that permitting client recovery of increased civil damages for veterinary negligence would be doing nothing more than allowing pet owners to self-insure at the level of risk protection they, as potential victims, deem most appropriate.⁷²

Yet this is precisely where the problem of market failure arises. By refusing to allow recovery of more than nominal damages, courts remove the opportunity for pet-owning consumers to take advantage of their cost spreading numbers and insure themselves at the increased level of compensation that adequately matches their increased valuation of pets.⁷³ In other words, even if pet owners are willing to pay far more than their current

⁷⁰ Fred Gottheil, *Principles of Economics* 131 (3rd ed., Thomson 2004).

⁷¹ L. Leon Geyer, *Malpractice and Liability*, in *Legal Issues Affecting Veterinary Practice* 1041 (James D. McKean, guest ed.) (W.B. Saunders 1993) (“[T]he cost and risk of veterinary malpractice is spread over approximately 60,000 practitioners.”).

⁷² By analogy, if someone values an heirloom they are sending by mail, that person can insure the item against loss or harm at whatever value she chooses. The post office simply charges her a premium scaled to this self-valued amount.

⁷³ For a discussion of the economic function of loss spreading, see *Escola v. Coca-Cola Bottling Co.*, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring) (quoted in Squires-Lee, *supra* n. 15, at n. 196).

12¢ premium in order to purchase greater protection against veterinary malpractice, courts are prohibiting them from doing so and thereby interfering with the forces of the free market economy.

2. *Failure of Existing Mechanisms to Deter Veterinary Harm*

The plight of the Peraino family graphically exposes the inability of current institutional measures to adequately police veterinary malfeasance. What follows is what occurred when the couple left their pet Doberman, Nera, with a veterinarian, Dr. Jordan Miller, to have a tooth pulled. The court's own reporting of the facts in the 1993 case, *Miller v. Peraino*,⁷⁴ leaves little to interpretation:

Miller performed the surgery and Mr. Peraino came to the animal hospital . . . to pick up Nera. Due to the large size of the dog, Mr. Peraino decided to return later with another person to help him carry her. Jamie Sacks and Edythe Harrison, two veterinary assistants, claim that Miller later viciously beat Nera to death because he was having difficulty getting the dog from the basement recovery room to the waiting area upstairs where the dog would be picked up. Sacks claims that Miller kicked Nera and beat her with a pole until she fell backward. Harrison claims that she found the dog dead in a pool of blood in a cage. When the Perainos learned that the dog was dead, they met with Miller who told them that the dog had died of a heart attack. Subsequently, however, Sacks and Harrison, who by this time had quit their jobs because of Miller's alleged treatment of Nera, told the Perainos what they witnessed.⁷⁵

When the couple later confronted the veterinarian about the incident, the court record shockingly alleges that Dr. Miller tried to provoke Mr. Peraino into a fist fight with profanity, said that the dead dog was "*fat and ugly, just like your wife*," and asked the couple if they had yet "*made a rug out of the dead dog's body*."⁷⁶ The Perainos were both 62 years old at the time.⁷⁷

In response, Mrs. Peraino picketed the veterinarian's office under police escort every single day for the next two years. Thirteen years later, she says she still thinks of Nera every day and often has trouble sleeping when she imagines the veterinarian kicking that "member of her family" to death. Indeed, because the whole ordeal was so traumatic, she never replaced Nera with another dog. Moreover, Mrs. Peraino reports that both she and her husband became severely depressed over the incident, and in the midst of the legal proceedings, Mr. Peraino had to undergo emergency angioplasty to prevent a heart attack.⁷⁸

In the minds of both the trial and appeals court judges, however, all of Dr. Miller's actions combined did not amount to the legal definition of outrageousness.⁷⁹ Accordingly, these courts threw out the Perainos' emotional damages claims before any jury was ever

⁷⁴ *Miller v. Peraino*, 626 A.2d 637 (Pa. 1993).

⁷⁵ *Id.* at 638.

⁷⁶ *Id.* at 641.

⁷⁷ Telephone Interview with Florence Peraino, Counter-claim Plaintiff in *Miller v. Peraino* (Oct. 6, 2003).

⁷⁸ *Id.*

⁷⁹ *Miller*, 626 A.2d at 641.

able to hear the facts, much less consider them. .⁸⁰ In justifying their position, the judges declared: “There is no occasion for the law to intervene every time someone’s feelings are hurt.”⁸¹

In a later related suit, a competing veterinarian obtained a substantial financial settlement from the American Veterinary Medical Association Professional Liability Insurance Trust (AVMA-PLIT) after Dr. Miller allegedly put up posters falsely accusing this other veterinarian of being the one who killed the Peraino’s dog.⁸² Threatening calls to the other veterinarian over the lawsuit also were traced to the payphone attached to Dr. Miller’s practice.⁸³ In spite of these actions and the financial liability he posed, the AVMA-PLIT continued to insure Dr. Miller for at least another decade.⁸⁴

End result? Dr. Miller continued to practice veterinary medicine with no official reprimand and the Perainos went home to face thousands of dollars in legal fees generated from this suit which their veterinarian actually had initiated against *them*.⁸⁵

a. Veterinarian Exemption from Criminal Statutes

In nearly every jurisdiction in this country, an average citizen who beat a dog to death in front of witnesses could be prosecuted under existing state animal anti-cruelty laws. Indeed, because state legislatures are able to regularly update such statutes, American criminal laws have evolved relatively quickly to reflect America’s increasing concern towards companion animals.⁸⁶ For instance, 41 states now make animal abuse a felony, up from only seven that did in 1992.⁸⁷ In Illinois, prosecutors can even fine animal abusers up to \$50,000,⁸⁸ and the state recently created the elevated felony of intentional animal torture,⁸⁹ handing down a five year prison sentence in the first case prosecuted under that

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Wellens v. Miller*, No. 930203384 (Pa. 1st Jud. Dist. Ct. Feb. 24, 1993); Telephone Interview with Dr. Howard Wellens, Veterinarian Plaintiff in *Wellens* (Oct. 17, 2003). The evidence against Dr. Miller apparently was so strong that the AVMA-PLIT settled the case without contest. *Id.*

⁸³ *Id.* The Philadelphia courts website lists Dr. Miller as having been involved in 19 civil suits over the years. *The Philadelphia Courts, First Judicial District of Pennsylvania*, <http://courts.phila.gov; search Jordan Miller> (accessed Feb. 13, 2004).

⁸⁴ Telephone Interview with Janice Mogan, *supra* n. 67 (stating that 2003 was the first year that the AVMA-PLIT had ever not renewed a veterinarian because of his claims history, doing so for five veterinarians that year).

⁸⁵ Indeed, the Perainos’ legal claims for the killing of their dog were made only in defense to litigation initiated by Dr. Miller alleging defamation, intentional infliction of emotional distress, and interference with contractual relations. *Peraino*, 626 A.2d at 637. Regarding his initial claim, the record alleges that Dr. Miller further taunted the Perainos by stating he would soon own their truck and their house. *Id.* at 641.

⁸⁶ Geordie L. Duckler & Dana M. Campbell, *Nature of the Beast, Is Animal Law Nipping at Your Heels?* 61 Or. Bull. 15, 18 (June 2001). New Jersey’s criminal law emphasizes the high public valuation of companion animals by placing the theft of a domestic companion animal in the same larceny category as that of a “motor vehicle, vessel, boat, or airplane.” N.J. Stat. Ann. § 2C:20-2(b)(2)(b) (2003). New Jersey is in the process of making the killing or injuring of a companion animal a separate offense: “punishable by a term of imprisonment of three to five years, a fine of up to \$15,000 or both.” N.J. Senate 61, 210th Leg., Reg. Sess. § 3 (Jan. 8, 2002).

⁸⁷ Interview with Pamela D. Frasch, author of *Animal Law* (textbook) and adjunct faculty at Lewis & Clark L. Sch. (Oct. 29, 2003). For two slightly dated snapshots of the status of animal anti-cruelty laws among the various states, see Joseph G. Sauder, *Enacting and Enforcing Felony Animal Cruelty Laws to Prevent Violence Against Humans*, 6 Animal L. 1, 8 (2000); Pamela D. Frasch et al., *State Animal Anti-Cruelty Statutes: An Overview*, 5 Animal L. 69 (1999).

⁸⁸ *Illinois Humane Care for Animals Act*, 510 Ill. Comp. Stat. § 70/16(c)(2).

⁸⁹ *Id.* at § 3.03(a) (“A person commits animal torture when that person . . . knowingly or intentionally inflicts or subjects an animal to extreme physical pain, motivated by an intent to increase or prolong the pain, suffering, or agony of the animal.”).

law.⁹⁰ In 2002, a man in Washington State received nine years in prison for killing a police dog.⁹¹

In the Perainos' ordeal, however, Dr. Miller could not be prosecuted for his actions under any criminal animal protection statutes, no matter how gratuitous or callous his alleged attack may have been. This is because Pennsylvania at the time was 1 of 26 states that flatly exempted all veterinarians from the purview of its animal anti-cruelty laws.⁹² Such categorical removal of an entire profession from the penalty of criminal sanctions unjustifiably nullifies an important legal safeguard, and historically has allowed other incidents of egregious veterinary behavior to go both undeterred and unpunished.⁹³

In those states that *do* allow veterinarians to be prosecuted for animal cruelty, the penalty assessed may be insufficient to serve as a punitive deterrent.⁹⁴ In a Michigan case, a veterinarian was charged with seven counts of animal abuse in 1999 for treatment of his clients' pets.⁹⁵ In just one of those counts, Dr. Steven Ginsburg *admitted* punching a dog with a broken spine that had trouble laying down for an x-ray after being hit by a car.⁹⁶ His own technicians testified to state investigators that he further picked the dog up off the table and threw her across the room when she would not stay still.⁹⁷ Later, after the owner

⁹⁰ Cook County State's Attorney's Office, *Man Pleads Guilty to Animal Torture, Set Pit Bull on Fire When it Lost Dog Fight*, News Release (May 24, 2000) (announcing verdict in *People v. Jermaine Banks*, No. 99-CR-27647 (Cook County Cir. Ct., Crim. Div., Chi., Ill. May 22, 2000); Janice Neumann, *Legal Beagles; More Lawyers are Learning How to Give Abused Animals Their Day in Court*, Chi. Trib. Magazine 17 (July 28, 2002) (defendant "became enraged" when his dog lost an arranged fight, tied the dog to a fence, doused him with flammable liquid, and then set him on fire in front of several witnesses; despite observers' attempts to give aid, the dog was burned so severely he had to be euthanized).

⁹¹ *Judge Gives 9-year Term to Man for Shooting at Cop, Killing Police Dog*, Seattle Times B5 (Sept. 18, 2002) (discussing *State v. Aaron Phillip Williams*, No. 01-1-01098-9 (Kitsap County Super. Ct., Wash. Sept. 16, 2002). During the victim impact statement portion of the sentencing hearing, the wife of the dog's police-officer partner told the judge, "Buddy was not just a dog. He was a living, breathing, loving part of our family. His brutal murder at the hands of Aaron Williams left a huge hole in our lives." Travis Baker, *Lions Field Shooting; Judge Sentences Williams to 9-Plus Years*, The Sun (Bremerton, Wa.) A1 (Sept. 17, 2002).

⁹² Frasch et al., *supra* n. 87, at 76. See also Erik Neely, *Vet Exemption Raises Questions*, The Post and Courier (Charleston, SC) B1 (Aug. 18, 2000) (discussing South Carolina magistrate's ruling that state law prevents veterinarians from being charged with animal abuse that occurs during treatment). The states that exempted veterinarians from anti-cruelty provisions in 1999 were: Alaska, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Indiana, Kansas, Louisiana, Maine, Maryland, Missouri, Nebraska, New Hampshire, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, and Wisconsin. Frasch et al., *supra* 87, at n. 30.

⁹³ It is hard to fathom that professionals who have devoted their lives to caring for animals would commit such acts, but examples are not as uncommon as one would hope. In Texas, one veterinarian was finally charged with animal cruelty after allegedly beating a Miniature Dachshund named Ginger to death with a mallet while the owner screamed at him to stop. The year before, authorities had not charged the same veterinarian when he previously beat to death a Labrador retriever named Coty who also had entered his back yard—demonstrating that when individuals are not held responsible for such actions they are unlikely to change their behavior. Domingo Ramirez Jr., *Vet Indicted in Dog's Death*, Star-Telegram (Ft. Worth, Tx.) B2 (Sept. 5, 2003) (reporting on the pending case: *State of Tex. v. Mircea Volosen*, No. 0895646D (Tx. Crim. Dist. Ct. #3)). In another state with this exemption, a veterinarian *admitted* beating one dog with a pole while it was confined in its kennel, punching another, and repeatedly kicking others while holding them on the ground with restraining poles. See *Me. Dept. of Prof. and Fin. Reg. Case No.: VET-156, John Carmody* (Oct. 3, 2002). Apparently this behavior is also a problem in Canada, as a veterinarian there admitted grabbing a cat by the back legs and repeatedly "*slamming its head onto the floor with maximum force*" to subdue it before euthanization. C.P., *'I Had No Alternative' Vet Admits Slamming 'Unruly' Cat onto Floor*, The Edmonton Sun 3 (Sept. 11, 2000).

⁹⁴ Bernard E. Rollin, *Veterinary Medical Ethics* 34 (Iowa State U. Press 1999).

⁹⁵ Mike Tyree, *Kalamazoo Vet Charged in State Case*, Kalamazoo Gazette A1 (Sept. 13, 2000).

⁹⁶ Mike Tyree, *Local Vet Focus of State Probe*, Kalamazoo Gazette A3 (Nov. 28, 1999).

⁹⁷ "Because the dog wasn't cooperating with us . . . [Dr. Ginsburg] picked it up off the table and threw it into the corner of the x-ray room." Transcript of Investigative Interview with Employee by Animal Control

requested, and paid for the seven-month-old Springer Spaniel, Lucy, to be euthanized, the puppy was left in a kennel to suffer her injuries for an additional week with no further pain medication or control of her bladder.⁹⁸ Instead of criminally prosecuting the veterinarian, however, the state's attorney's office allowed the state board of veterinary medicine to take over the handling of the case.⁹⁹ After reviewing testimony from five of Dr. Ginsburg's former employees about numerous incidents of abuse,¹⁰⁰ the state board suspended his license for only 30 days!¹⁰¹

b. Insufficient Oversight by State Veterinary Boards

As just noted, the penalties assessed by state licensing boards also are often too lenient to meaningfully reprimand veterinarians who cause negligent or intentional animal harm.¹⁰² Furthermore, while these state and professional veterinary licensing boards do provide avenues for individual citizens to file complaints alleging negligence or malpractice, they *do not* allow individual parties to personally recover *any* damages or economic relief from the process.¹⁰³ Even so, because most courts are unwilling to allow damages that economically justify litigation against negligent veterinarians, one commentator has observed that appealing to a state board “may be the only realistic option which an aggrieved individual may possess.”¹⁰⁴

Yet years of disciplinary statistics clearly demonstrate that these regulatory bodies rarely take serious action in instances of negligence or professional incompetence—essentially eliminating the likelihood of any meaningful enforcement of the veterinary standard of care.¹⁰⁵ In California, for example, the state veterinary board received an average of 464 complaints in each of the past five years, yet only imposed an average of

Officer (Oct. 14, 1999) (contained in the case file to *In the Matter of Steven J. Ginsburg, D.V.M.*, (Mich. Bd. of Veterinary Med. Admin. Complaint No. 69-99-2343-00, Aug. 25, 2000); the employee's name was withheld in the file for privacy reasons).

⁹⁸ *Id.* (another dog brought in to be spayed was strangled in her cage while at Dr. Ginsburg's clinic).

⁹⁹ Mike Tyree, *No Criminal Charges Against Veterinarian; State Probe Continues*, Kalamazoo Gazette A3 (Nov. 17, 2000) (“Kalamazoo County prosecutors have denied a warrant request from sheriff's department investigators . . .”).

¹⁰⁰ *In the Matter of Steven J. Ginsburg, D.V.M.*, *supra* n. 97, at 5 (“During the course of the Department's investigation, it was determined that employees observed Respondent slap, hit, punch, throw and otherwise abuse animals.”). One employee testified that when a sick cat that would not lie still for a procedure, Dr. Ginsburg “got mad, grabbed the cat by the scruff of the neck . . . raised his arms as far as he could,” and “slammed its face on the surgery table,” instantly killing the pet. Transcript of Investigative Interview with Employee by Animal Control Officer (Oct. 14, 1999) (contained in state board case file, employee name withheld in file for privacy reasons, file indicates that this interview is with different employee than one quoted *supra* n. 97).

¹⁰¹ Mich. Dept. of Consumer & Indus. Serv. Press Release, *Kalamazoo Veterinarian's License Suspended*, http://www.michigan.gov/cis/0,1607,7-154-10573_11472-49517—M_2001_8,00.html (Aug. 23, 2001) (the state board, however, did fine the veterinarian \$2,000 and gave him 2 years probation).

¹⁰² See *Ray v. Dept. of Reg. and Educ.*, 419 N.E.2d 413, 415 (Ill. App. 1981) (“Department investigators testified that plaintiff practiced out of his home and surgery was performed in the kitchen . . . several dogs had been tied to a tree after receiving medical care . . . instruments lying on the floor . . . maggots in a dog food bowl, the odor of urine-soaked carpeting and dried blood,” and multiple cases of animals receiving improper treatment). The veterinarian was allowed to continue practicing after a 180 day suspension. *Id.* at 414, 417.

¹⁰³ Favre & Borchelt, *supra* n. 16, at 245.

¹⁰⁴ *Id.*

¹⁰⁵ Kimberly Matas, *Animal Malpractice: Veterinary Board is Lax on Discipline, Some Say*, Ariz. Daily Star A1 (June 29, 2003) (quoting the chairman of the Arizona State Veterinary Medical Examining Board who reports that for a veterinarian to lose their license in that state, “Somebody has to really screw up really bad.”).

eight “suspensions, revocations, or voluntary surrenders of licenses” during that time.¹⁰⁶ Similarly, between 1996-2001, the New York State Board took in a total of 1170 complaints yet handed down only 9 actual license suspensions, and *zero* revocations during the entire six year period.¹⁰⁷ Massachusetts likewise formally investigated five out the 77 complaints received in 2001, ultimately putting only one license on probation.¹⁰⁸ Even in the rare disciplinary actions just listed, in most instances the violation sanctioned had nothing to do with professional negligence.¹⁰⁹ Some states do not even keep track of complaints against veterinarians, although apparently, not for lack of need.¹¹⁰

One substantive reason for this lack of enforcement is that many state veterinary practice acts require a showing of “gross malpractice” or “gross negligence” before a state board can reprimand a veterinarian.¹¹¹ The restrictive effect of such requirements has prompted the leading expert in veterinary law to confess: “With this type of wording, convictions for practice act violations for negligence or malpractice are *nearly*

¹⁰⁶ State of California, *The Californian Veterinary Medical Board Enforcement Statistics*, <http://www.vmb.ca.gov/enforcement/enf-stat.htm> (accessed Feb. 13, 2004). Ellen O’Connor, president of the California Board of Veterinary Examiners said in a recent interview that she would like to be more aggressive about looking into potential cases of malpractice, but is limited by funding constraints. She added that the Board itself was three members short and only had a total of three investigators at its disposal to police 9,000 state veterinarians. Cynthia Hubert, *Are Veterinarians Running Too Free?* Sacramento Bee E1 (June 9, 2001).

¹⁰⁷ New York Office of Professional Discipline, *Annual Records of Disciplinary Actions 1996-2001* (copies on file with *Animal Law*, Lewis & Clark L. Sch.).

¹⁰⁸ Division of Professional Licensure, *The Board of Registration in Veterinary Medicine*, <http://www.state.ma.us/reg/boards/vt/> (accessed Jan. 15, 2004) (has since been updated with 2003 data). In 2003, the Massachusetts Veterinary Board took no disciplinary action at all against a race track veterinarian who had continued to certify a greyhound named Willie as “fit to race” even after track workers expressed concern that the dog had been too sick to finish earlier heats. When Willie died two hours after his final race, an autopsy showed that the dog had “collapsed lungs, 2 liters of blood in the right side of his chest, 1 1/2 liters in the left side . . . a blood clot that would have taken weeks to develop,” and “a large fibrous mass” resulting from “a penetrating wound to his stomach.” Despite ignoring these blatant injuries and contributing to Willie’s death, the state board *unanimously* cleared the veterinarian of any wrongdoing. See Stephen Seitz, *Track Vet Cleared of Negligence*, *The Union Leader* (Manchester, NH) A5 (Jan. 18, 2003) (local newspaper article describing the events); Stephen Seitz, *Negligence Alleged Against Hinsdale Track Veterinarian*, *The Union Leader* (Manchester, NH) B2 (Nov. 20, 2002).

¹⁰⁹ In Maine, for instance, 70% of the state veterinary board’s 2002 disciplinary actions were for “failure to provide proof of satisfactory completion of continuing professional education.” Me. Dept. of Prof. and Fin. Reg., Office of Licensing and Registration, *Adverse Disciplinary Actions*, <http://www.state.me.us/pfr/olr/avda02.htm#40> (last updated Aug. 18, 2003). In one year the California Board of Veterinary Medical Examiners spent seven times more resources investigating such other types of veterinary practice code violations than it did looking into professional incompetence. Debigail Mazor, *Veterinarians at Fault: Rare Breed of Malpractitioners*, 7 U.C. Davis L. Rev. 400, 402 (1974). Veterinary ethicist Bernard Rollin further points out that the AVMA code of ethics similarly devotes its primary attention to professional etiquette, *i.e.*, the size of one’s sign, the format of yellow pages advertisements, conditions of advertising, while failing even to mention many pressing ethical issues that society expects the veterinary profession to address. Rollin, *Veterinary Medical Ethics*, *supra* n. 94, at 14.

¹¹⁰ E-mail from Jennifer McKenzie, Board Administrator, Kentucky Board of Veterinary Examiners (Oct. 14, 2003) (“We receive so many complaints each year that we do not keep record of how many come into our office.”). A statement that is not exactly confidence inspiring.

¹¹¹ For example, Illinois’ *new* Veterinary Medicine and Surgery Practice Act of 2004 still retains the “Gross Malpractice” requirement. 225 Ill. Comp. Stat. 115 § 25 (1)(F) (2004). Demonstrating how this standard results in only the most egregious incidents being addressed by state veterinary boards, the Illinois Administrative Code implementing the act *currently* directs:

b) In determining what constitutes *gross malpractice* resulting in serious injury or death of a patient, the Board or hearing officer shall consider the following standards as they relate to the person who is the subject of the proposed disciplinary action. The standards shall include but not be limited to:

1) A consideration whether the act or acts of the person are of a *flagrant or glaringly obvious nature*, or are *repetitiously committed* and resulted in a breach of the veterinary standards of practice; Ill. Admin. Code tit. 68, pt. 1500.50 (2004) (emphasis added).

*impossible.*¹¹²

Procedural hurdles also contribute to the infrequency of state board penalties. Again, in California, a single complaint against a veterinarian has to be found worthy of further investigation by *five successive review bodies* before it is even presented to the full Board of Veterinary Medical Examiners.¹¹³ For this reason approximately 98% of consumer complaints are never even considered by the Board.¹¹⁴ In those 2% of veterinary complaints that do get through, the State Board still has complete discretion to modify or fully reject the recommendations of the administrative law judge who heard the case at the previous stage.¹¹⁵ Furthermore, if the Board ultimately does choose to take any action against the veterinarian's license or professional standing, that decision itself is subject to external judicial review and can be overturned on procedural grounds.¹¹⁶

Dr. Jordan Miller, however, needed no such judicial review in the regulatory chapter of the Peraino story. In his hearing, the Pennsylvania State Board unilaterally decided that both eye-witnesses simply must have misinterpreted Miller's actions when testifying that they saw him repeatedly kicking and beating Nera with a pole.¹¹⁷ The primary basis for disregarding these assistants' testimony was that Dr. Miller had more experience than they did,¹¹⁸ and that another assistant, not present at the incident, had not seen Miller beat any other dogs in the past.¹¹⁹ The Board then held it would *only consider the testimony of the accused veterinarian himself* to determine whether or not he had kicked and beaten the Perainos' dog to death.¹²⁰ Not surprisingly, the Board took no disciplinary action against Dr. Miller at all.¹²¹ Their 25-page decision did not even address how or why Nera ended up dead after her owner had seen her alive and well several hours after her tooth removal.¹²² Nor did it explain what action of Dr. Miller's the witnesses could have

¹¹² Wilson, *supra* n. 16, at 68 (emphasis added). A former Executive Secretary of the California Board of Veterinary Examiners once openly said regarding incompetency violations that he believed the penalties of license suspension or revocation were too harsh a price to pay for "an error in judgement." Mazor, *supra* n. 109, at 403 (quoting Gary Hill).

¹¹³ Wilson, *supra* n. 16, at 128–29.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ In one such exercise of judicial review involving the death of a horse, the Oregon State Board had found a veterinarian guilty of "professional misconduct" for performing an operation without adequate safety measures, shipping samples to the wrong address, charging the client for the tests which were never done, then pressuring a witness to testify in his favor even though she was unsure of the truthfulness of his statements. Much of the impetus for the Board's finding was based on a letter sent to the Board by this same witness. But because the letter arrived after the passing of a deadline for formal information gathering, the Oregon Appellate Court completely overturned the Veterinary Board's ruling. *Smith v. Veterinary Med. Examining Bd.*, 27 P.3d 1081 (Or. App. 2001).

¹¹⁷ *State Bd. of Veterinary Medicine v. Miller*, 9–11 (Pa. Bd. of Veterinary Med. No. 90–57–02683, July 23, 1992).

¹¹⁸ *Id.* at 17–18 (stating that Miller had been practicing for approximately 32 years and had "a quite stellar reputation until this happened"). Again, Miller has been involved with 19 civil lawsuits over the years. *Supra* n. 83.

¹¹⁹ *Id.* at 11. Relying on the testimony of prior good behavior would seem irrelevant or prejudicial to determining culpability in the case at hand, especially when the source has a vested interest in keeping her employer in business. For example, if a teacher beat a child to death in front of two eye-witnesses, it is highly doubtful whether proof of guilt would be swayed at all by the fact that no one had seen the teacher beat any other children to death in the past.

¹²⁰ *Id.* at 21.

¹²¹ *Id.* at 25. After dismissing the testimony of both eye-witnesses, the Board ruled that "[t]he record is devoid of credible evidence to suggest that the Respondent failed to observe all laws and to uphold the honor and dignity of his profession." *Id.* at 12.

¹²² *Id.* at 19. Testimony indicated that Nera was still groggy and dazed from the anesthetic when the assistants and Mr. Peraino first attempted to get her up the stairs. But because the elderly Mr. Peraino

misinterpreted when testifying that after Nera collapsed from the beating, they saw him drag her 20 feet at the end of a snare pole to the kennel where she died.¹²³

Several commentators have drawn a direct link between the laxity of state professional boards and the incidence of malpractice.¹²⁴ It may indeed be no coincidence that Pennsylvania has both the most lenient record for punishing doctors *and* the highest rate of medical mistakes.¹²⁵ By allowing repeat offenders to continue practicing with no official reprimand, State Boards ultimately cost the profession both reputationally and financially—as was demonstrated by the substantial payout the AVMA-PLIT made on behalf of Dr. Miller in a later lawsuit.¹²⁶ In fact, the Department of Health and Human Services has determined that between 1990 and 2002, a mere 5% of human doctors were responsible for an astonishing 54% of all medical malpractice payouts.¹²⁷ Veterinary liability insurers only exacerbate such problems by not scaling their premiums at all to the number of malpractice claims filed against individual veterinarians.¹²⁸

Another important reality is that only veterinarians are allowed to seek judicial review of state board decisions, as courts have determined that pet owners do not have standing.¹²⁹ This is significant because the state board complaint process often can take three years or more to reach completion.¹³⁰ Thus any aggrieved complainant who chooses to wait for the outcome of a state board decision before deciding to pursue litigation may find that the statute of limitations has run on any legal remedies available.¹³¹ It is thus no

couldn't carry the 110-pound dog on his own, and had to be at work, he decided to return later with a friend.
Id.

¹²³ *Id.* at 17.

¹²⁴ *E.g.* Sidney M. Wolfe, *Bad Doctors Get a Free Ride*, N.Y. Times A25 (Mar. 4, 2003).

¹²⁵ *Id.* Of those Pennsylvania doctors who have had to make payments in five or more malpractice suits, only 5% have been disciplined by the State Medical Board. And although Pennsylvania has only 1/20th of the country's doctors, it is home to nearly 1/5th of American doctors who have made five or more malpractice damage payouts. Still the state's governor had to intervene to prevent those doctors from going on strike over rising malpractice insurance rates. One PA doctor who paid out 24 malpractice claims totaling \$8 million for such mistakes as "operating on the wrong part of the body," and "leaving a foreign object in a patient after surgery," was never disciplined by Pennsylvania authorities. *Id.* In West Virginia, the state with the second-highest over-representation of doctors with five or more malpractice payouts, one doctor settled 36 malpractice suits in just two years, and another paid damages in 40 incidents over a four year period! Rita Rubin, *Putting a Face on Malpractice Insurance Debate*, USA Today 7D (Mar. 5, 2003).

¹²⁶ *See supra* nn. 82–84 and surrounding text (discussing the case of *Wellens v. Miller*).

¹²⁷ Wolfe, *supra* n. 124, at A25 (citing the Department's National Practitioner Data Bank) This payout figure includes both jury trials and out-of-court settlements. *Id.* In 2002, Nevada found that two doctors alone were to blame for over half of the state's \$22 million in damage payouts made that year. Lorraine Woellert, *A Second Opinion on the Malpractice Plague*, Business Week 98–99 (Mar. 3, 2003).

¹²⁸ Telephone Interview with Janice Mogan, *supra* n. 67 (on file with *Animal Law*, Lewis & Clark L. Sch.) (stating that an individual veterinarian's premiums are not at all affected by the number of claims filed against him). This means that an experienced practitioner who has never been accused of malpractice still has to pay as much for his liability insurance as a repeatedly negligent veterinarian.

¹²⁹ The North Carolina Court of Appeals recently justified refusing a pet owner standing to appeal the state Veterinary Medical Board's actions by ruling that none of the owner's legal rights were impaired, and noting that the plaintiff was still free to pursue a civil malpractice suit against the veterinarian. *See Parrot Owner May Not Challenge Vet's Discipline*, The National Law Journal B6 (Oct. 8, 2001) (discussing *In Re Denial of Request for Full Administrative Hearing*, No. COA00-977, 552 S.E.2d 230 (N.C. App. 2001)).

¹³⁰ Mazor, *supra* n. 109, at 403.

¹³¹ *See e.g.* *Haverstock v. Hoge*, 2003 WL 1788787 at *2 (Cal. App. 4th Dist. April 4, 2003) (ruling that no matter how plaintiff attempted to re-frame her cause of action in amended filings, all claims stemmed from veterinarian's professional treatment, and thus were barred by statute of limitations). *See also* Harold W. Hannah, *Bars to a Malpractice Action—Statutes of Limitation and Res Judicata*, 217, No. 5 JAVMA 656 (Sept. 1, 2000) (stating that the average statute of limitations for veterinary malpractice claims is 2 years); Randolph, *Dog Law*, *supra* n. 16, at 7/20 (giving a list of all of the state statutes of limitations for veterinary malpractice). *But see* *Lobrillo v. Brokken*, 837 So. 2d 1059 (Fla. 3d Dist. App. 2002) (holding that

wonder that the president of the Southern California Veterinary Medical Association has remarked, “People aren’t interested anymore in going to the professional agencies to regulate what’s happening in veterinary medicine, they’re going out and suing.”¹³²

c. Current Inability of Litigation to Restrain Veterinary Negligence

The dismissive response of the judges in the Peraino case is unfortunately all too common. The appellate court’s opinion aptly summed up the prevailing judicial attitude by further declaring that it would *never* permit an intentional infliction of emotional distress claim to be based upon a veterinarian’s behavior toward an animal, *no matter how severe*.¹³³ Indeed, in the majority of U.S. jurisdictions, courts continue to view themselves constrained by earlier common law decisions holding that one cannot recover any damages other than economic market value for “things” classified as mere property.¹³⁴

Referring to this phenomenon as “being trapped in a universe that no longer exists,” Professor Steven Wise illustrates that this cycle of judges binding their decisions to previous court rulings (which themselves were bound by even earlier precedents) often results in current law being dictated by the norms and social values of a bygone era. He explains how this contributes to the civil law lagging behind the prevailing social ethic:

Courts that still reject common law claims for noneconomic damages for the unintentionally caused deaths of companion animals rely not upon modern scientific knowledge, public policy, or legal reasoning, but upon decisions that derive from scientific knowledge, public policy, and legal reasoning of the nineteenth century or earlier.¹³⁵

Recent judicial opinions that relied on cases from the 1800s to deny damages for wrongfully killed pets confirm that Wise’s assessment is not mere hyperbole.¹³⁶

The arbitrariness exhibited in the analysis emanating from current courts’ treatment of companion animal valuation has led to substantial legal uncertainty and inconsistency, both among and within jurisdictions.¹³⁷ As Professor Lynn Epstein has noted, “[t]his

if defendant does not specifically plead the defense in his answer, a veterinary malpractice suit can go forward even though the statute of limitations had run); *DiGrazia v. Old*, 900 S.W.2d 499 (Tex. App. 1995) (allowing a tolling of the statute of limitations when defendant took six months to produce veterinary medical records).

¹³² *Fiala, Court Rulings*, *supra* n. 46, at 32 (quoting Dr. William Grant).

¹³³ *Miller*, 626 A.2d at 640. Commenting on this declaration, Professor Lynn Epstein has observed: “Why the court issued a proclamation offering to protect a heretofore-unforeseen class of animal-cidal veterinarians is perhaps an unsolved legal conundrum.” Lynn A. Epstein, *supra* n. 8, at 43.

¹³⁴ *Nichols v. Sukaro Kennels*, 555 N.W.2d 689, 691 (Iowa 1996) (“[A]lthough we are mindful of the suffering an owner endures upon the death or injury of a beloved pet, we resolve to follow the majority of jurisdictions that do not allow recovery of damages for such mental distress.”). *Cupp & Dean*, *supra* n. 14, at 43 (“Thus, when a pet is negligently injured or killed, its owner usually can recover only the animal’s market value.”); *Wise*, *supra* n. 6, at 64; *Squires-Lee* *supra* n. 15, at 1061.

¹³⁵ *Wise*, *supra* n. 6, at 64.

¹³⁶ *See e.g. Lewis*, 743 N.Y.S.2d at 186 (2002 case where court cites 1881 case to hold pets are property under New York law and thus not subject to loss of companionship damages); *Koester v. VCA Animal Hosp.*, 624 N.W.2d 209, 211 (Mich. App. 2000) (quoting 1893 case to find pets property under Michigan law and uphold lower court decision that no emotional damages are recoverable for their loss). *See also* Andrew Boxberger, *The Missing Link in the Evolution of Law: Michigan’s Failure to Reflect Society’s Value of Companion Animals*, 5 T.M. Cooley J. Prac. & Clinical L. 139, 139–43 (Aug. 2002).

¹³⁷ New York and Hawaii have each addressed cases with quite similar factual elements, yet yielded two completely opposite rulings. *See* Lynn A. Epstein, *supra* n. 8, at 48–51 (comparing *Gluckman v. Am. Airlines, Inc.*, 844 F. Supp. 151, 158 (N.Y. 1994) with *Campbell v. Animal Quarantine Station*, 632 P.2d 1066 (Haw. 1981) (both involving the death of dogs, Floyd and Princess, due to heat prostration during

patchwork approach has led to misapplications of damage award theories, lack of reconcilable precedent and confusion among the practicing bar.”¹³⁸ Regardless of these variances, however, the cold reality remains that the vast majority of American jurisdictions still limit pet owners to recovering only market value damages for the negligent or intentional deaths of their companion animals.¹³⁹ With regard to such harm caused by veterinarians, Professor Epstein again emphasizes that this rule is indeed the norm: “In review, the veterinarian malpractice line of case authority evidencing the judiciary’s reluctance to hold these professionals responsible for damages beyond the pet’s fair market value would appear to be the trend.”¹⁴⁰

B. Arguments to Increase Veterinarian Liability for Companion Animal Harm

I. Malpractice Exists

Apart from the need to curb obviously reprehensible behavior such as that alleged in the Peraino case, the most basic argument for increased companion animal liability is simply that veterinarians, like all humans, are prone to being careless.

Examples abound. In the past several years such easily preventable veterinary mistakes have included companion animals dying from surgical sponges left in their bodies,¹⁴¹ and from veterinarians using completely different dogs’ X-Rays for operations.¹⁴² Non-lethal instances include a dog brought in for a grooming and clipping that ended up being castrated,¹⁴³ and another brought in for a teeth cleaning that the veterinarian not only attempted to spay, but which already had been spayed three years earlier!¹⁴⁴ A New Hampshire veterinarian performed an operation on the completely wrong horse.¹⁴⁵

transporting in the care of defendant carriers)). Over the years, Minnesota and Texas appellate courts have vacillated in their decisions regarding recovery of more than market value damages for the loss of a pet. *See e.g., Soucek v. Banham*, 524 N.W.2d 478, 481 (Minn. App. 1994) (Lansing, J., dissenting) where the court directly contravenes the Minnesota Supreme Court’s holding in the factually similar case of *Wilson v. City of Eagan*, 297 N.W.2d 146 (Minn. 1980). In Texas, the court in *Zeid v. Pearce*, 953 S.W.2d 368 (Tex. App. 1997) cites an 1891 case to unequivocally hold that the “longstanding rule” in Texas limits recovery for loss of a pet to market value. The court then bluntly states that “one may not recover damages for pain and suffering or mental anguish for the loss of a pet.” *Id.* at 369. However, another Texas appellate court had specifically allowed mental pain and suffering damages for the killing of a dog 34 years earlier in *City of Garland v. White*, 368 S.W.2d 12 (Tex. Civ. App. 1963).

¹³⁸ Lynn A. Epstein, *supra* n. 8, at 32.

¹³⁹ Root, *supra* n. 15, at 426.

¹⁴⁰ Lynn A. Epstein, *supra* n. 8, at 44.

¹⁴¹ *Bobin v. Sammarco*, 1995 WL 303632 (E.D. Pa. May 18, 1995) (applying Pennsylvania law). *See* Charles Toutant, *Animal Lawyers Do It for Love*, New Jersey Law Journal 1, 18 (Mar. 13, 2000). Articles in the profession’s journals confirm that *Bobin* was not an isolated incident: *Surgery Leaves Sponge in Dog’s Abdomen*, 22, No. 3 Prof. Liability 4 (Summer 2003); *Malpractice Found to be Cause of Abscess*, 19, No. 3 Prof. Liability 4 (Summer 2000) (“The surgical specialist discovered a surgical sponge that was causing the abscessation. The sponge had been left when the dog had been given an ovariohysterectomy three years prior.”).

¹⁴² *Daughen v. Fox*, 539 A.2d 858 (Pa. Super. 1988). In *Daughen*, not only did the veterinarian fail to treat the dog’s underlying condition (a bullet lodged near the liver) but, after realizing his mistake, he allegedly tried to conceal his negligence by discouraging the owners from seeking treatment elsewhere, resulting in the dog’s death. *Id.* at 859–60.

¹⁴³ *Ponder v. Angel Animal Hosp., Inc.*, 762 S.W.2d 846 (Mo. App. 1988) (rejecting all claims for damages because plaintiffs could not demonstrate a “reduction in value” or any evidence of monetary loss).

¹⁴⁴ *Oberschlake v. Veterinary Associates Animal Hospital*, 785 N.E.2d 811 (Ohio App. 2003) (upholding dismissal of emotional distress and loss of companionship claims).

¹⁴⁵ *Durocher v. Rochester Equine Clinic*, 629 A.2d 827 (N.H. 1993) (a lower court had dismissed the

While most of the previous veterinary errors could have been prevented simply with better record keeping, evidence suggests that such organizational laxity is rampant in the veterinary profession.¹⁴⁶ One veterinarian who mistakenly euthanized a client's dog "Charley" instead of another patient named "Carly," actually had the gall to tell Charley's family: "Who knows why these things happen? All I know is that there must be a reason."¹⁴⁷ Well yes, there is a reason. It is called failure to take adequate care.

Equally worrisome, a specialist in veterinary dermatology reports that in a large portion of cases brought to her, the previous veterinarian had recommended euthanasia, for easily treatable skin conditions!¹⁴⁸ Another certified veterinary specialist, who is also an attorney, found that in *over half* of the cases referred to him, "actionable malpractice" occurred while the animal was in the care of the referring veterinarian.¹⁴⁹ The bare fact that these unnecessary and easily preventable blunders are occurring at all indicates that the financial consequence to veterinarians for such lapses is not enough to prevent them from happening. Indeed, in each of the above listed cases except for one, the court rejected each of the plaintiff's claims for damages other than the companion animal's economic worth.¹⁵⁰

Besides careless mishaps and misdiagnosis, though, some veterinarians' behavior extends beyond negligent treatment and into the realm of intentional cruelty. In one particularly alarming 1997 case, a Georgia veterinarian was found to have:

negligence claim because plaintiff did not produce expert testimony regarding this patently obvious blunder!). In the non-companion animal context, veterinary negligence is alleged to be responsible for a string of 23 animal deaths at the National Zoo according to pathologists. In 15 of those deaths, the zoo has acknowledged a host of errors including "failure to keep complete and accurate veterinary records; failure to examine some animals in a timely manner; failure to perform tests that would have more accurately diagnosed some ailments; and failure to closely monitor the care of some animals." Karlyn Barker & James V. Grimaldi, *Zoo Admits Mistakes in Animal Care*, Wash. Post A1 (Jan. 9, 2004) (among the animals that died were two red pandas who ingested rat poison, a young zebra who starved to death after a vet restricted his diet, and an orangutan who was mistakenly euthanized).

¹⁴⁶ See *State of the Industry Report: How Much Do Your Colleagues Refer?*, Veterinary Economics 19 (Aug. 2003) (citing survey of veterinary specialists who found that in cases referred by other veterinarians, the medical records were "clear and complete" only 47% of the time, and that "all communication with the client" was documented only in an abysmal 12% of the cases); Andrew Brownstein, *Law Goes to the Dogs—and Cats*, Trial 12, 13 (Feb. 1, 2003) (quoting veterinary defense attorney Linda Wyner: "To her chagrin, some of her veterinary clients keep informal or sloppy records."); Robert Newman, *Straight Talk Shoots Down Lawsuits* [hereinafter *Straight Talk*], Veterinary Economics 48, 48 (Apr. 2003) ("When clients do bring suits, there's one big reason they're successful: inadequately documented medical records."). See e.g. *Mo. Veterinary Med. Bd. v. Schatzman*, 2003 WL 21790206 (Mo. Admin. Heg. Commn. June 27, 2003) (finding that veterinarian incorrectly noted using a different chemotherapy drug from the one actually used—affecting later treatment by a university veterinary center—and describing other medical record notes as "not legible") (also available at State of Missouri, *Administrative Hearing Commission, Case No. 02-0085VM*, <http://www.oa.mo.gov/ahc/mnth0006.html> (June 27, 2003)).

¹⁴⁷ Robert Newman, *Defend Your Practice from Lawsuits* [hereinafter *Defend Your Practice*], Veterinary Economics 33, 36 (May 2002). Even well-known dogs have not been able to escape being wrongfully killed due to identification mix-ups. *Claims Underscore Veterinarian's Need for Sound Practice*, 7, No. 5 Prof. Liability 1, 2 (Oct. 1988) (describing veterinarian's mistaken euthanization of a dog that "had appeared in commercials and hunting specials on television").

¹⁴⁸ Name withheld for privacy. Because specialists rely on referring veterinarians for their clientele, this speaker and the following one *infra* are hesitant to publicly criticize their colleagues for fear of reprisals. This same motivation often makes it difficult for plaintiffs to find veterinarians who are willing to serve as expert witnesses at trial and testify against colleagues accused of malpractice.

¹⁴⁹ Name withheld for privacy. See *supra* n. 148, for explanation. (finding malpractice to have occurred in 54% of the cases referred to him during a three month period).

¹⁵⁰ In the one case that did allow a claim of emotional distress to go forward, the case settled out of court, preventing the ruling from becoming binding precedent. See Toutant, *supra* n. 141, at 18 (discussing unreported outcome of *Bobin*, 1995 WL 303632 (E.D. Pa. May 18, 1995)).

“sprayed ammonia in the eyes” of animals; “kicked animals in the abdomen” frequently; “duct-taped the mouths of animals shut”—*for days!*; “*routinely* used a leash to suspend animals in the air for extended periods”; and beat a dog to death with a shovel and a piece of wood (in front of his employees).¹⁵¹

Of course, such extreme examples are in no way intended as being representative of the behavior of the veterinary profession as a whole. But think back to how the allegedly abusive veterinarian in the *Peraino* case fell through every crack in the veterinary oversight system. In the face of testimony from multiple witnesses alleging extremely egregious behavior he was immune from prosecution under criminal anti-cruelty laws, not liable for any financial damages to the dog’s owners, and ultimately able to avoid sanctioning by the state board of veterinary medicine. The point is: *If even such outrageous occurrences as these are allowed to go unpunished, then they and many lesser actions will likely continue undeterred.* It is thus worth asking why veterinarians should be the only category of health care professionals that is financially and professionally immune from the consequences of their negligent or intentional behavior.¹⁵²

As evidenced in the preceding examples, the overwhelming refusal of American civil courts to allow more than market value damages in cases of veterinary malfeasance presents two main problems. First, there is the *equity*, or *fairness*, issue: whereby human victims of veterinary negligence are not fully compensated for the emotional and financial investments made in their companion animals.¹⁵³ Second, there is the *efficiency* issue: whereby the inability to recover more than nominal damages financially precludes owners actually harmed by veterinary malpractice from even seeking civil redress in the courts. This preclusion in turn prevents any meaningful judicial oversight to ensure that veterinarians are adequately conforming to the level of care expected by pet owners and the rest of American society.

While the fundamental issues of equity and efficiency are closely interrelated, they involve legal principles that are doctrinally distinct from one another. The equity (or fairness) principle primarily addresses past accidents or wrongs—focusing on the adequacy of compensation for individualized events that have already occurred.¹⁵⁴ The efficiency principle, on the other hand, concerns future accidents and costs—analyzing the

¹⁵¹ *In re Dennis Ray Balduf*, Initial Decision § 25 (Ga. Bd. Veterinary Med. 97–666, Oct. 15, 1997) (emphasis added). When this veterinarian first tried to kick one dog, Max, he missed and kicked his own assistant in the face. *Id.* at § 7. He then “beat Max until Max bled from his mouth and rectum.” *Id.* at § 10. Balduf also starved an overweight cat that had been boarded with him. *Id.* at § 25. His license was suspended and ultimately revoked. *Balduf*, Final Decision (Ga. Bd. Veterinary Med. 97–666, Dec. 22, 1997).

¹⁵² These examples negate the argument that additional oversight is not necessary for veterinarians because of their universal compassion for animals. *See also supra* n. 93 (giving other examples of animal cruelty committed by veterinarians). The fact that these incidents even occurred also counters the argument that mere concern over reputation will keep any veterinary malpractice in check. Indeed, recommendations are a factor for only 8% of pet owners when choosing a new veterinarian. AVMA, *U.S. Pet Ownership*, *supra* n. 21, at 105. Anyone who still believes that reputation is a sufficient deterrent should ask themselves honestly if they have any idea of the true negligence history of *any* of the human physicians from whom they themselves seek treatment. *See Study: Surgery Tools Left in Estimated 1,500 Patients a Year*, Associated Press (Jan. 16, 2003).

¹⁵³ Byszewski, *supra* n. 6, at 239–40 (calculating the average American’s financial investment over the life of a cat or dog).

¹⁵⁴ Posner, *Economic Analysis*, *supra* n. 13, at 25 (“[T]he one question that concerns the victim and his lawyer: Who should bear the costs of *this* accident? . . . The parties to the litigation may have no interest in the future. Their only interest may be in the financial consequences of a past accident.”).

way the law influences aggregate civil behavior to affect social wealth.¹⁵⁵ Because some observers believe that a legal rule's efficiency is of greater import to society than its individual equity,¹⁵⁶ or simply that equity-based legal analyses are overly subjective and less quantifiable,¹⁵⁷ this comment will first address the broader economic implications of the market value limitation on compensation for veterinary negligence.

2. *Economic Efficiency Analysis of Market-Value Limitation on Damages for Veterinary Malpractice*

In appraising the efficacy of a legal rule, one first should look at the rule's effectiveness in achieving its intended objectives, such as preventing harm, protecting property, reducing costs, or compensating loss. One way to do this is to assess the rule's overall *economic efficiency*: the measure of how well it maximizes aggregate societal benefits and reduces aggregate societal costs.¹⁵⁸

The ultimate goal of efficiency theory (the Holy Grail of economists known as *Pareto Optimality*) is to achieve a state of affairs where no-one can be made better off without making someone else worse off—known as “*maximizing the size of the pie.*”¹⁵⁹ If someone still can be made better off *without* reducing the wealth of others, say, by eliminating unnecessary waste, economists label the corresponding circumstance as *not efficient*, or *Pareto Inferior*, and look for ways to correct the deficiency.¹⁶⁰

The law of tort liability seeks to achieve this type of social equilibrium by encouraging individuals to act in a manner that both lowers the likelihood of causing avoidable harm to others, and also reduces the severity of such harm. This is done primarily by requiring those who *do* cause harm to provide adequate compensation to their victims.¹⁶¹ From an economic standpoint, the aim is to get each actor to consider the potential costs and benefits to other individuals that may result from his own future behavior.¹⁶² By holding the actor legally responsible for such externalities, we can ensure that he will have a more complete cost picture when deciding on a particular course of self-interested action—and therefore be more likely to act in a manner that maximizes the aggregate good.¹⁶³

¹⁵⁵ *Id.* (“To the economist, the accident is a closed chapter. The costs it inflicted are sunk. The economist is interested in how to prevent future accidents that are not cost-justified and thus in reducing the sum of accident and accident prevention costs.”).

¹⁵⁶ A. Mitchell Polinsky, *An Introduction to Law and Economics* 127 (2d ed., Aspen L. and Bus. 1989).

¹⁵⁷ Richard A. Posner, *The Problems of Jurisprudence* 360 (Harvard U. Press 1990). (“Although there are other possible goals of judicial action besides efficiency and redistribution, many of these (various conceptions of “fairness” and “justice”) are . . . insufficiently developed to provide judges who desire a reputation for objectivity and disinterest with adequate grounds for their decisions.”).

¹⁵⁸ Polinsky, *supra* n. 156, at 7, n. 4; Posner, *Jurisprudence*, *supra* n. 157, at 362 (“The ultimate test of a rule derived from economic theory is . . . the rule's effect on social wealth.”); *Id.* at 361 (“[T]he common law should seek to maximize society's wealth.”).

¹⁵⁹ Polinsky, *supra* n. 156, at 7 (emphasis added); Posner, *Economic Analysis*, *supra* n. 13, at 12.

¹⁶⁰ Polinsky, *supra* n. 156, at 7 n. 4; William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* 16–17 (Harvard U. Press 1987).

¹⁶¹ Landes & Posner, *supra* n. 160, at 10–14; King, *supra* n. 16, at 6–8.

¹⁶² Richard A. Posner, *A Theory of Negligence*, 1 J. L. Studies 29, 93 (1972) (“The important point . . . is that the total costs of the accidents in which the defendant is negligent be made costs to the defendant.”).

¹⁶³ Polinsky, *supra* n. 156, at 131. Some claim that the conditions for Pareto efficiency are almost never satisfied in the real world and thus employ the more common, but “less austere,” measure of optimizing social wealth known as “Kaldor-Hicks” efficiency. Under this definition, a rule or action is economically efficient simply if it increases aggregate social wealth, regardless of whether loss occurs. Posner, *Economic Analysis*, *supra* n. 13, at 13.

a. Incentives

To determine the extent to which a legal rule satisfies this criterion of economic efficiency, one must examine efficiency's two key aspects: *incentives* and *risk allocation*.¹⁶⁴ The first question to ask is: “Does the legal rule create incentives for the relevant individuals to behave efficiently?”¹⁶⁵

In the law of negligence we acknowledge that a certain degree of risk is inherent in particular, socially beneficial activities, such as the tasks of professions that serve public needs like health care, lawyering, or police work. As a result, we only hold these actors liable for damages when they fail to meet an objectively determined, minimum standard of care.¹⁶⁶ This standard of care serves as an activity-wide stand-in for Judge Learned Hand's famous B<PL formula regarding the proper cost-benefit balance between utility and injury for individualized behavior.¹⁶⁷ In doing so it both clarifies and simplifies the ad hoc determination of negligence by courts to produce a more consistent pattern of judicial results.¹⁶⁸

By categorically pre-determining what behavior will or will not be deemed negligent, the standard of care absolves actors from having to perform time consuming or redundant cost-benefit analyses before every desired action—thereby creating more certainty, and thus more utility.¹⁶⁹ Implementing a more precise definition of the degree to which such risk-laden behavior is socially and legally acceptable also serves to limit actors' potential liability, and thus encourage participation in the beneficial activity.¹⁷⁰

Creating a specific paradigm of proper conduct for these activities also reassures the public that such actors are operating under guidelines that are based on more objective criteria than the actors' own, subjective calculations of risk—which may rely upon imperfect information, or be clouded by self-interest.¹⁷¹

For most professions generally, the common law standard of care evolves collaboratively through codified regulations, prevailing societal notions of reasonableness, and the current consensus of the actor's professional peers.¹⁷² For veterinarians, specifically, the standard of care is defined as the duty “to exercise the degree of care, skill and learning that would be brought to the case by the average, reputable member of

¹⁶⁴ Polinsky, *supra* n. 156, at 130.

¹⁶⁵ *Id.* (emphasis in original) See also Robert Cooter & Tom Ulen, *Law and Economics*, 323 (4th ed., Pearson 2004) (“In general, incentives are efficient when the decision-maker internalizes the marginal costs and marginal benefits of his or her action.”).

¹⁶⁶ Landes & Posner, *supra* n. 160, at 122; Polinsky, *supra* n. 156, at 41; Cooter & Ulen, *supra* n. 165, at 326.

¹⁶⁷ In the case of automobile driving, for example, the legal care requirement is established by traffic laws that pre-determine when the risk from one's behavior exceeds the social benefit from driving, e.g. speeding, tailgating. In contrast, the Hand B<PL formula operates on a case by case basis, determining an actor's course of conduct to be negligent whenever “the cost of avoiding the accident (the burden of avoidance or “B”) is less than the probability of the accident or loss (“P”) multiplied by the magnitude of the loss (“L”).” King, *supra* n. 16, at 6. For a more detailed explanation of the Hand formula, see Posner, *Economic Analysis*, *supra* n. 13, at 167–70.

¹⁶⁸ King, *supra* n. 16, at 11.

¹⁶⁹ *Id.* at 7, 10–11.

¹⁷⁰ Richard A. Epstein, *Cases and Materials on Torts* 165–67 (6th ed., Little, Brown and Co. 1995) (“[T]he negligence theory operates as a *limitation* on a defendant's liability in both theory and practice,” emphasis in original); Posner, *Economic Analysis*, *supra* n. 13, at 202 (“[T]he tendency of tort damages, although so often criticized as excessive, is in fact to under-compensate the victims of serious accidents.”).

¹⁷¹ For example, all society benefits by not allowing individual drivers to make their own cost versus probability assessments of when it is justifiable to drive through red lights.

¹⁷² James A. Henderson, Jr. et al., *The Torts Process* 232–35 (5th ed. Aspen 1999).

the profession.”¹⁷³ In this context, our first question then becomes: *Does the existing rule create incentives for veterinarians to comply with the professional standard by taking the appropriate amount of care?*¹⁷⁴

In the majority of jurisdictions that cap civil recovery at a companion animal’s commercial value when it is harmed by veterinary malpractice, the answer definitively is “No.”

b. Deterrence

Like any rule, the veterinary standard of care is only effective to the degree that it is enforced. Within the legal system, it can only be enforced by tort damages awarded in civil actions for negligence, and by penalties imposed through the professional licensing bodies.¹⁷⁵ As outlined earlier, though, the objective record of state veterinary boards clearly demonstrates that they rarely take meaningful disciplinary action in instances of negligence.¹⁷⁶ This leaves client litigation as the sole *formal* means by which to enforce the veterinary standard of care.

The market value of the typical companion animal, however, seldom equals the bare costs of *filing* a civil lawsuit, let alone fees for mandatory expert witnesses,¹⁷⁷ attorneys, and evidence gathering.¹⁷⁸ Accordingly, even those few “successful” malpractice lawsuits that meet the high evidentiary burdens at trial, and unanimously convince a jury that negligence has occurred, at best will result in the recovery of damages that are but a

¹⁷³ Soave, *supra* n. 16, at 14. See also Favre & Borchelt, *supra* n. 16, at 238. Courts have defined the veterinary standard of care as “the exercise of the care and diligence as is ordinarily exercised by skilled veterinarians.” *Posnien v. Rogers*, 533 P.2d 120, 121 (Utah 1975). Veterinarians who are certified as specialists in particular areas of practice, or who represent themselves to the public as such, may be held to a higher standard of care than general practitioners based on their level of additional training or experience.” Wilson, *supra* n. 16, at 140–41.

¹⁷⁴ See Polinsky, *supra* n. 156 and accompanying text. One commentator on veterinary liability has said: If one shares the view that the primary goal of negligence law is to maximize resources, the standard of care should promote economic efficiency. To do so, it should encourage conduct that reduces the costs of accidents, thereby producing the most efficient (or nearly optimal) allocation of resources. King, *supra* n. 16, at 6.

¹⁷⁵ Remember that veterinarians are categorically exempted from the majority of state and federal anti-cruelty statutes. Frasch et al., *supra* n. 87, at 76.

¹⁷⁶ See *supra* nn. 99–132 and accompanying text (discussing disciplinary action by veterinary boards).

¹⁷⁷ Expert witness testimony is nearly always required to demonstrate a violation of the standard of care for veterinary negligence actions in all but the most obvious *res ipsa loquitur* situations. Allison, *supra* n. 16, at I-3; Soave, *supra* n. 16, at 112–15; Randolph, *supra* n. 16, at 5/14–5/15; King, *supra* n. 16, at 43; Favre & Loring, *supra* n. 16, at 115; Wilson et al., *supra* n. 16, at 137–41. In 16 states, plaintiffs are required to obtain an affidavit from another veterinarian alleging negligence before a claim can proceed, see *infra* nn. 357–59 and accompanying text. In other states, the expert witness requirement remains a common law development. See *McGee v. Smith*, 107 S.W. 3d 725, 727 (Tex. App. 2003) (wherein court held that mere failure to provide water for several days resulting in death of horses was still a matter of professional care that required the testimony of an expert); *Zimmerman v. Robertson*, 854 P.2d 338, 341 (Mont. 1993) (veterinarian entitled to directed verdict in absence of expert testimony); *Southall v. Gabel*, 293 N.E.2d 891, 894 (Ohio Misc. 1972) (proximate cause must be established by expert medical testimony); *Brockett v. Abbe*, 206 A.2d 447, 449 (Conn. Cir. 1964) (*res ipsa loquitur* is inapplicable to cases involving diagnosis and scientific treatment); *But see Spilotro v. Hugi*, 417 N.E.2d 1066, 1069–70 (Ill. App. 1981) (reversing a directed verdict for veterinarian and holding that if negligence can be determined by resort to common knowledge ordinarily possessed by an average person, then expert testimony as to standard of care may not be essential).

¹⁷⁸ The plaintiff’s expenses for pursuing a veterinary malpractice lawsuit through to trial typically cost around \$25,000. Telephone interview with Garry Kaplan, attorney (Oct. 4, 2002) (Mr. Kaplan litigates around 100 canine death cases a year for the AVMA-PLIT).

fraction of the cost of the lawsuit itself.¹⁷⁹ Professor Richard Cupp illustrates the problem: “the market value of most pets is likely exceeded by their owners’ weekly dog biscuit or catnip bill—even purebred dogs and cats are rarely worth more than one or two thousand dollars. Thus, pet injury claims seldom justify an attorney’s fee.”¹⁸⁰ Lacking the mere potential to break even, few rational actors choose to pursue malpractice suits against veterinarians.¹⁸¹ Those victims that do decide to seek legal redress for veterinary negligence, in turn often find themselves unable to find attorneys willing to take such low yield cases.¹⁸²

This result is severely problematic according to the reasoning of Law and Economics’ reigning guru, Judge Richard Posner,¹⁸³ who states, “to give the victim an incentive to sue . . . is essential to the maintenance of the tort system as an effective, credible deterrent to negligence.”¹⁸⁴ To put Posner’s analysis in the parlance of aggregate social efficiency: *One of the primary purposes of fully compensating individual victims’ losses is to provide an incentive to bring those lawsuits that will produce the public advantage of deterrence.*¹⁸⁵ With no suits against veterinarians, there can be no damage awards to enforce their standard of care. With no enforcement of the standard, there is no legal incentive for veterinarians to take the appropriate *amount* of care.

Furthermore, in those rare instances when a plaintiff does pursue a veterinary

¹⁷⁹ In a representative example, upheld by the Alaskan Supreme Court, plaintiffs were awarded \$300 in market value damages for the loss of their dog, then ordered to pay \$3,763 of the negligent animal shelter’s legal fees because they had turned down an earlier settlement offer of \$2,000. This left the “successful” plaintiffs awarded with a *net loss* of \$3,463, not including their own trial costs. *Richardson v. Fairbanks North Star Borough*, 705 P.2d 454, 455 (Alaska 1985). More recently, an Iowa Appellate court upheld a similar ruling in which the plaintiffs were awarded \$326.24 for the kennel’s negligence but still ordered to pay the court costs and all the defendant’s legal fees generated after an offer to settle for \$642.44. *Nichols*, 555 N.W.2d at 693.

¹⁸⁰ Cupp & Dean, *supra* n. 14, at 43. The availability of small claims court relief does not cure the problem either because plaintiffs are still limited to the market value of the animal—which is likely less than the expense of missing a day’s work to appear in court. Also many states limit recovery to a few thousand dollars which may quickly be eaten up simply by compensating the veterinary bill of the deceased companion animal. See Randolph, *supra* n. 16, at 7/20 (providing list of the state limits on small claims court recovery). In addition, some small claims courts still require expert testimony to prove veterinary malpractice. *Id.* at 5/15. However, in other claims courts the formal rules of evidence may be relaxed. See *Lewis v. Hendrickson*, 2003 Ohio LEXIS 3374 at *12–13 (Ohio App. June 27, 2003) (allowing plaintiff to introduce hearsay evidence of university hospital veterinarian’s remarks that undiagnosed tumor in dog’s ear was clearly visible to the naked eye).

¹⁸¹ The Minnesota Supreme Court stressed its concern on precisely this issue, stating that due to the small amount of compensatory damages plaintiffs may not sue, and thus, “citizens and attorneys are not likely to take action to redress the wrongs.” *Wilson*, 297 N.W.2d at 150–51 (upholding award of punitive damages against an animal control officer for brutally destroying a cat). See also Favre & Borchelt, *supra* n. 16, at 233 (“One factor that has kept the number of lawsuits at a minimum level in the past is the low amount of damages awarded for the injury to animals.”).

¹⁸² This point has not been lost on the veterinary community. As one speaker at a conference on veterinary legal issues explained, “At least in small animal practice, the general rule remains that the damages for the loss or injury of a dog or cat will be quite limited, making the time and expense of a suit less attractive to contingent fee lawyers.” Mark D. Samson, Presentation, *A Potpourri of Issues in Veterinary Regulatory and Malpractice Law* (Pitt., Pa., July 8, 1995) (transcript available from the AVMLA). The effect is also borne out by the comments of a leading figure in animal legal issues, Rutgers Law School Professor Gary Francione who has said he gets 20 calls a week to do veterinary malpractice cases but he does not take any of them: “They’re not interesting cases for me. There’s just not enough money out there.” Toutant, *supra* n. 141, at 18.

¹⁸³ Chief Judge, U.S. Court of Appeals for the Seventh Circuit; Senior Lecturer, U. of Chicago L. Sch.; and author of numerous books and articles on the subject.

¹⁸⁴ Posner, *Economic Analysis*, *supra* n. 13, at 192.

¹⁸⁵ Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?* 42 UCLA L. Rev. 377, 442 (1994).

negligence suit contrary to her own economic well-being, *and additionally* succeeds in winning damages, the market value judgment is likely to be too low to have any effect on the veterinarian's *future* behavior. The Minnesota Supreme Court affirmed this fact in *Wilson v. City of Eagan*, stating that in cases of companion animal harm, "compensatory damages are likely to be small and will not function to deter similar conduct."¹⁸⁶ The Florida District Court of Appeals in *Levine v. Knowles* likewise determined that restricting damages to market value for companion animals in veterinary negligence cases would be an insufficient deterrent, concluding, "the payment of compensatory damages only would not handicap the defendant sufficiently to discourage such conduct in the future."¹⁸⁷

Consequently, the existing legal rule of allowing only market value damages for incidents of veterinary malpractice flunks the first, crucial, *incentive* test of economic efficiency.¹⁸⁸ In such an environment where potential victims are financially precluded from suing, and any awarded damages are trivial, the probability of loss increases because the veterinarian actor has little legal incentive to take adequate precautions.¹⁸⁹ This scenario is anathema to economists because when veterinarian actors take less than the optimal standard of care, they are likely to have more accidents. Those added accidents then unnecessarily increase aggregate societal costs without increasing societal benefits—thereby, *reducing the size of the societal pie*.¹⁹⁰

A proven example of this theory occurred in New Zealand when that country shifted to a state-administered compensation program of no-fault liability standards for all accidents.¹⁹¹ Several subsequent studies showed that reducing individual liability in this manner caused the number of fatal traffic accidents to jump by as much as 20%.¹⁹² In Quebec, a similar no-fault plan caused the number of auto injuries to soar by almost 32%.¹⁹³ Regarding the effect on professional malpractice in New Zealand, several observers "believe that the elimination of liability has led to laxer standards of medical care."¹⁹⁴ This lack of personal liability also has had an identifiable economic impact on overall social wealth—in just 6 short years the amount of civil compensation paid out by the New Zealand government actually *doubled* when actors were not held responsible for their actions.¹⁹⁵ As Richard Posner again has noted: "Few commentators think that

¹⁸⁶ *Wilson*, 297 N.W.2d at 150.

¹⁸⁷ *Levine*, 197 So. 2d at 331. Because the negligence in that case (cremating a dog's body to prevent an autopsy) was done possibly to cover up evidence of other malpractice, the Florida court further stated that such negligent conduct "would tend to put the defendant in as good a position, or a better one than that which he occupied prior to the commission of the tort if it results in the assessment of only compensatory damages." *Id.* at 332.

¹⁸⁸ As some commentators have contended "Since most aggrieved pet owners probably will not bring suit for these nominal amounts, the value the law is placing on the relationship is zero." Peter Barton & Frances Hill, *How Much Will You Receive in Damages from Negligent or Intentional Killing of Your Pet Dog or Cat?* 34 N.Y.L. Sch. L. Rev. 411, 421 (1989).

¹⁸⁹ Cooter & Ulen, *supra* n. 165, at 324, 327 ("[T]he rule of no liability gives the injurer no incentive to take precaution . . . a negligence rule with perfect compensation and the legal standard equal to the efficient level of care gives the injurer incentives for efficient precaution."); Polinsky, *supra* n. 156, at 56.

¹⁹⁰ See Landes & Posner, *supra* n. 160, at 58–62. Posner, *Theory of Negligence*, *supra* n. 162, at 33.

¹⁹¹ Richard A. Epstein, *Materials on Torts*, *supra* n. 170, at 1071–79; Schwartz, *supra* n. 185, at 496.

¹⁹² Schwartz, *supra* n. 185, at 420 (describing two studies showing increased fatalities of 20% and 16%); Landes & Posner, *supra* n. 160, at 11 (describing a study that indicated traffic fatalities increased 15%).

¹⁹³ Schwartz, *supra* n. 185, at 396.

¹⁹⁴ *Id.* at 420.

¹⁹⁵ Richard A. Epstein, *Materials on Torts*, *supra* n. 170, at 1079. (Between 1981 and 1987 the total amount of claims paid out jumped from \$127,000,000 to \$259,000,000).

medical malpractice . . . liability has no effect on the behavior of doctors.”¹⁹⁶

c. Risk Allocation

The other, primary factor by which to evaluate a legal rule’s economic efficiency is *risk allocation*. To explore this parameter one must ask the question: “*Does the legal rule efficiently allocate risk among the relevant individuals?*”¹⁹⁷

The most important economic truism to consider when determining the efficient allocation of risk among parties is: *It is more efficient to allocate the risk of loss to the party most able to reduce that risk in the least costly manner (also known as the cheaper preventer)*.¹⁹⁸ To explain, imagine a motorist and a pedestrian who is properly crossing a road. By altering his speed and level of care the motorist has the better ability to affect both the probability and potential magnitude of an accident.¹⁹⁹ Societally, it is also less expensive for the driver simply to take greater care than it is for all pedestrians to physically protect themselves against potential collisions with cars.²⁰⁰ Since economic theory argues for the minimization of unnecessary social costs, it is therefore more efficient to allocate the cost of an accident (risk of loss) to the motorist—which we do.²⁰¹

For our present purposes, the choice of whether to allocate the risk of loss to the veterinarian or to the pet owner is relatively simple because the veterinarian is the sole party with the ability to control the degree of care taken during diagnosis, treatment, and custodial care. Accordingly, whereas the car driver was in the *better* position to reduce the risk, the veterinarian is the *only* party who is able to reduce the likelihood or potential magnitude of negligent loss.²⁰²

Like drivers, though, veterinarians may protect themselves further by shifting any allocated risk of loss onto a third-party liability insurer. In that instance, the insurer would then gain the incentive to reduce the accident rate through indirect means.²⁰³ Veterinary

¹⁹⁶ Posner, *Economic Analysis*, *supra* n. 13, at 203. One Harvard study has determined that holding doctors liable for malpractice reduces the rate of negligent patient injuries by as much as 30%. Paul C. Weiler et al., *A Measure of Malpractice* 131 (Harvard U. Press 1993). The inter-disciplinary study headed by Professor Weiler is said to be one of the most comprehensive examinations of the true state of malpractice in human medicine. Schwartz, *supra* n. 185, at 404–05.

¹⁹⁷ Polinsky, *supra* n. 156, at 132 (emphasis in original).

¹⁹⁸ Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 Yale L.J. 499, 506–07 (1961). See also Landes & Posner, *supra* n. 160, at 89; Cooter & Ulen, *supra* n. 165, at 328–31 (both discussing contributory negligence).

¹⁹⁹ Polinsky, *supra* n. 156, at 71.

²⁰⁰ To illustrate, imagine all pedestrians buying and wearing expensive suits of armor versus the cost of drivers simply taking more care.

²⁰¹ Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law* 10 J. Legal Stud. 187, 201 (1981).

[If] B receives no compensation for his injury, he may be induced to adopt in the future precautions which by hypothesis . . . are more costly than the precaution that A failed to take. B’s precautions will reduce the number of accidents, thus partially offsetting the adverse consequences of A’s continuing failure to take the precaution, but aggregate social welfare will be diminished by this allocation of care between parties.

Id.

²⁰² Cooter & Ulen, *supra* n. 165, at 322, 325 (“Sometimes only the potential injurer can take precaution as when a surgeon operates on an unconscious person.”). In such instances where only unilateral precaution can prevent the occurrence of accidents we often hold actors strictly liable: “[A] rule of strict liability is preferable when only the injurer can take precaution against accidents.” *Id.* at 325. But, as explained earlier, because we want to encourage participation in the risk inherent activity, we hold doctors and veterinarians only to the negligence standard. See *supra* nn. 166–70 and accompanying text (discussing veterinary liability for negligent practices).

²⁰³ Landes & Posner, *supra* n. 160, at 13; *Loss Control Is Emphasized*, 9, No. 1 Prof. Liability 3 (Dec. 1989) (“[The AVMA-PLIT and its underwriters] are applying proven loss control methods to help

malpractice insurers currently do this by promoting practice guidelines, setting procedural standards for approved claims, and engaging in educational activities to increase compliance with the proper standard of care.²⁰⁴ Needless to say, the greater the assumed risk of loss faced by the insurer, the greater the incentive to spend resources to reduce the probability of loss in this manner.

However, because the market value limitation economically obstructs legal access for plaintiffs seeking compensation for veterinary mistakes, it de facto places all the monetary and emotional costs of negligence solely on the victim client, rather than on the veterinarian or his insurer. By doing so, the rule allocates the entire risk of loss to the party that has no affordable legal mechanism to influence the degree of care taken, and therefore, no ability to reduce either the likelihood or magnitude of loss. This outcome of the current common law is exactly the opposite of what is economically optimal.²⁰⁵

Some commentators may suggest that one cure for the current lack of compensation for veterinary harm would be for risk-averse pet owners simply to insure against the risk of loss by purchasing one of the generally available “pet health insurance” policies.²⁰⁶ For several reasons, though, this approach is fundamentally flawed as an answer to the veterinary negligence problems presented by the market value limitation rule.

The most basic point is that pet health insurance has absolutely no relevance if a companion animal dies as a result of veterinary malpractice. Because pet health insurance provides no compensation for a companion animal’s death, it can do little to re-allocate or reduce the risk aversion of pet owners concerning the most significant potential harm caused by veterinary negligence: the wrongful death of their pet.²⁰⁷ Indeed, the ability to have future veterinary bills paid will do little to assuage the loss of someone whose pet is

practitioners avoid malpractice situations and to improve the safety of the workplace.”) (quoting former Trust Chairman William A. Grant); *Mike Ahlert, Insurance Professional Serves AVMA Trust*, 9, No. 2 Prof. Liability 3 (Mar. 1990) (“Our role is . . . to concentrate efforts in helping [veterinarians] avoid situations that might give rise to a claim.”).

²⁰⁴ Karen Katz, *Twenty-five Years of Professional Service*, 191, No. 11 JAVMA 1382 (Dec. 1, 1987) (The AVMA-PLIT defines one of its primary duties as: “Educating members on claim avoidance through published guidelines, articles in the JAVMA, and the Trust’s newsletter, *Professional Liability*.”); *The Trust Celebrates 30 Years of Service*, 11, No. 4 Prof. Liability 2, 2 (Sept. 1992) (“Educational materials such as the video, ‘The Facts of Life’ . . . are made available to help veterinarians maintain a safe practice for staff, animals and their owners.”); *Forty Years of Veterinarians Serving Veterinarians*, 21, No. 1 Prof. Liability 1 (Winter 2002) (“The Trust Representatives visit all U.S. colleges of veterinary medicine each year to discuss malpractice issues with veterinary students.”). As an example of such efforts, one recent Trust newsletter advised members to: “Initiate surgical protocol to standardize the number of surgical sponges and instruments per pack” in order to simplify accounting for these items upon completion of surgery. *Take Action*, 21, No. 3 Prof. Liability 2, 2 (Summer 2002). After two of the AVMA-PLIT’s largest single settlements resulted from injury to human clients, the organization also distributed posters for members to display, advising pet owners: “For Your Safety, Please Do Not Ask to Restrain Your Animal.” King, *supra* n. 16, at n. 140. Human injuries annually account for 18% of veterinary liability payouts. *Id.* at 30.

²⁰⁵ “[W]henver one party is in fact in a better position to allocate the cost of the particular loss to the appropriate activity . . . allocation of resources requires that party to bear the original burden of the loss.” Calabresi, *supra* n. 198, at 506–07.

²⁰⁶ Similar arguments have been formulated in the context of our automobile accident example. See Posner, *Economic Analysis*, *supra* n. 13, at 201 (putting forth the argument that deficiencies of liability systems could be remedied by wider purchase of accident insurance); Posner, *Corrective Justice*, *supra* n. 201, at 202–03 (discussing the hypothesis that a combination of criminal penalties and mandatory personal accident insurance might be more cost efficient in controlling accidents than tort liability); Polinsky, *supra* n. 156, at 73. For an overview of the various types of pet health insurance policies available, see Lofflin, *supra* n. 25, at 36.

²⁰⁷ A recent veterinary journal article reported that the number one reason clients pursue lawsuits against veterinarians is because “The pet dies because the veterinarian made a mistake.” Newman, *Straight Talk*, *supra* n. 146, at 52.

already dead. Furthermore, in the case of injured pets that live, such coverage simply may not be good enough to affect pet owners' aversion to risk—as indicated by the recent denial of a treatment claim for the lead search and rescue dog from the World Trade Center recovery.²⁰⁸

The second, and economically more important, point is that by serving only to pay a client's veterinary bill when a companion animal is harmed, pet health insurance does nothing to increase the incentive for veterinarians to comply with the appropriate standard of care. Although one element of financial loss may be reduced by such coverage, the situation is no different than when pedestrians insure themselves against reckless drivers. For the same reason that we hold drivers liable in that instance, efficiency rationale demands that we still address the rule's inability to deter the *occurrence* of veterinary negligence. As Judge Posner has explained: "The negligence system's *economic* function is not compensation but the *deterrence* of inefficient accidents."²⁰⁹ The goal is to reduce unnecessary loss.

To summarize, the market value limitation on civil damages for losses caused by veterinary negligence definitively fails both generally accepted measures of a legal rule's economic efficiency: *incentives* and *risk allocation*. By allocating risk improperly and arranging incentives imprudently, the dominant common law rule currently results in a near total lack of legal enforcement of the veterinary standard of care. According to the fundamentals of efficiency theory, the logical outcome of such a scenario will be a rise in the number of unnecessary accidents—causing an increase in aggregate societal costs without any countervailing social benefits. Such analysis ultimately demonstrates that an inflexible adherence to the market value rule for veterinary negligence will continue to produce a quantitative net negative for the American public in aggregate economic terms.

3. Considerations of Equity

The equity questions and fairness concerns embodied in the theory and practice of American tort law have been well addressed in the prior literature regarding civil compensation of companion animal loss.²¹⁰ But the point should be re-emphasized here to draw the distinction. To clarify once more, the economic-based "efficiency theory of the common law" is concerned with maximizing the aggregate good by implementing legal

²⁰⁸ Bill Hoffmann, *Hero Dog Dissed: Pet Insurer Rejects Medical Claims for WTC Search Pooch*, N.Y. Post 9 (July 19, 2002). Publicly stating that "This effort is intended as an expression of pride and appreciation for the dedication and tireless efforts of the canine heroes," VPI chief executive officer, Jack Stephens, initially scored great press by offering free, lifetime pet health policies to the 300 dogs who spent months searching through toxic rubble following the 9/11 attacks. *Free Health Coverage Offered to Sept. 11 Search Dogs*, Winnipeg Free Press D5 (Aug. 27, 2002). Apparently thinking no one would notice, however, the company later committed PR suicide by denying several claims and refusing to pay \$3000 in medical expenses for "Bear"—the celebrated 12-year-old golden retriever who worked 18 hours a day to locate many WTC survivors and bodies, including that of New York's beloved Fire Chief. After attempting to defend its action by claiming Bear's ailments weren't incurred in his recovery work but due to "pre-existing conditions," VPI quickly realized its folly and agreed to compensate Bear and 5 other rescue dogs for whom VPI previously had denied claims. Richard Pyle, *Insurer Ready to Pay Search Dog's Vet Bills*, Times Union (Albany) B4 (July 20, 2002). Nevertheless, the mere fact that VPI was willing to risk denying a claim for the "canine hero" who led the New York's Columbus Day parade and was listed by the Guinness Book of Records as "the most celebrated dog in the world" doesn't bode well for the average household pup. *Id.*

²⁰⁹ Posner, *Economic Analysis*, *supra* n. 13, at 201 (emphasis added).

²¹⁰ See Squires-Lee, *supra* n. 15, at 1081–84 (supporting tort law compensation for losses caused by a companion animal's death).

standards that affect future public behavior on a societal scale.²¹¹ By calling for the creation of rational incentives and proper allocation of risk, it strives to prevent the occurrence of negligent accidents that cause the inefficient waste of social resources.

No legal system can achieve perfect deterrence, however, and many achieve far from so.²¹² As a consequence, individuals still will suffer losses through no fault of their own. When this happens, the potential modification of other's future behavior may be of little consolation to victims bearing the financial and emotional burdens of accidents that already have occurred.²¹³ Hence efficiency icon Richard Posner's keen reminder: "there is more to justice than economics."²¹⁴

Aristotle wisely recognized the need to address such inequitable wrongs in cultures that deign to structure a civilized society rooted in justice.²¹⁵ In this vein we maintain our adherence to his theory of "Corrective Justice" and require that individuals be fully compensated for losses caused by others' negligent actions.²¹⁶ To quote Prosser, the famed oracle of tort law: "The purpose of the law of torts is to adjust these losses, and to afford compensation for injuries sustained by one person as the result of the conduct of another."²¹⁷ Similarly, when the American Law Institute outlined the fundamental purposes of tort law in the voluminous Second Restatement of Torts, the very first goal it listed was: "*to give compensation, indemnity or restitution for harms.*"²¹⁸ Even economic efficiency advocates concede, "most tort lawyers, judges, and scholars would if asked say that the basis of tort law was the notion of fairness"²¹⁹

The problem is that the concept of fairness is thought by many to be inherently too subjective.²²⁰ It is precisely for this reason that we have sought to design our legal system so that the determination of what is fair is placed in the hands of a jury of peers selected from among the citizenry. When an individual is found to be legally at fault, the jury typically determines what is fair by the representative dollar amount they award as compensation for the victim's loss. As Judge Posner has described: "The only question in

²¹¹ Posner, *Economic Analysis*, *supra* n. 13, at 26.

²¹² Posner, *Corrective Justice*, *supra* n. 201, at 202.

²¹³ Posner, *Economic Analysis*, *supra* n. 13, at 25.

²¹⁴ *Id.* at 28.

²¹⁵ Posner, *Corrective Justice*, *supra* n. 201, at 189.

²¹⁶ *Id.* Aristotle outlined his restorative or corrective justice theory in Book V, Chapter 4, of his *Nicomachean Ethics*. *Id.* In the relevant passage on restoring the condition of the sufferer by compensating her loss, Aristotle states that, "the judge tries to equalize things by means of the penalty. . .when the suffering has been estimated . . . the just . . . consists in having an equal amount before and after the [injury]." *Id.*

²¹⁷ William L. Prosser & W. Page Keeton, *Prosser and Keeton on the Law of Torts* 6 (5th ed., West 1984).

²¹⁸ Restatement (Second) of Torts § 901 (American Law Institute 1977) (emphasis added). The Restatement's commentary to this section historically reinforces the theory that fully compensating victims is a fundamental function of tort law:

Originally, the primary purpose of the law of torts was to induce the injured party, and members of his family or clan, to resort to the courts for relief, rather than taking the law into their own hands by attempting to wreak vengeance on the wrongdoer or by resorting to violent means of self-help.

Restatement (Second) of Torts § 901 (Tentative Draft No. 19, Mar. 30, 1973). Consistent with this analysis, the other three purposes of tort law listed by the Institute are: "(b) to determine rights; (c) to punish wrongdoers and deter wrongful conduct; and (d) to vindicate parties and deter retaliation or violent and unlawful self-help." Restatement (Second) of Torts § 901. It is self-evident that in order for this last objective to be realized, any civil compensation received by individuals harmed must equal their actual sense of loss.

²¹⁹ Landes & Posner, *supra* n. 160, at 19.

²²⁰ *Id.* (the authors still point out that the fairness view of the purpose of tort law remains universal even though the aforementioned lawyers, judges, and scholars are "unable to agree on what fairness requires.").

which the parties and their lawyers are interested and the only question the judge and jury will decide is whether the [compensation] is ‘just’ or ‘fair’”²²¹

The market value rule for companion animal loss, however, blatantly defies this social endeavor for justice by directly usurping the jury’s right to determine what is fair and full compensation. It instead allows the judge to unilaterally reduce the full spectrum of a victim’s suffered loss to the crude assessment of a beloved companion’s often non-existent commercial worth. All other real, tangible, and quantifiable losses are completely excluded from the jury’s consideration. Professor Wise again crystallizes the irrationality and unfairness of the current common law restriction, stating: “It awards damages for a loss that the owner of a companion animal *does not actually suffer* [commercial value] and refuses to compensate an owner for the damages that an owner *actually does suffer* [economic/emotional investment, and loss of companionship].”²²²

To again paraphrase Posner, the very credibility of the tort system requires that if a defendant is found liable, he must pay damages at least as great as the victim’s magnitude of loss.²²³ According to the economic tenet of consumer sovereignty, “these dollar values should be determined by the affected individuals,”²²⁴ for the reason that, “everyone who owns a good, except the marginal purchaser of it, values it above the market price.”²²⁵

C. Determining Value

A recent Gallup poll found that 66% of U.S. pet owners would not trade one of their pets for \$1 million!²²⁶ Last year, one wealthy businessman did not even blink at paying his wife \$30 million in a divorce settlement, yet still fought to win the court-ordered return of the pet parrot he personally had taught to speak.²²⁷

Many Americans have sacrificed far more than money, though, to prevent the loss of an animal’s companionship. For example, a Kentucky woman chose to endure a 30-day jail sentence for contempt of court rather than turn her two cats over to her ex-husband.²²⁸ Another woman similarly risked jail for contempt after disobeying the direct orders of a judge by taking her sick cat to the veterinarian while sequestered as a juror during one of the nation’s most high-profile death penalty cases.²²⁹ Studies have shown further that “7 out of 10 victims of domestic violence will remain in their abusive situation rather than leave their pet behind.”²³⁰ This is in line with an American Animal Hospital Association

²²¹ Posner, *Economic Analysis*, *supra* n. 13, at 25.

²²² Wise, *supra* n. 6, at 72.

²²³ Posner, *Economic Analysis*, *supra* n. 13, at 192 (“Maintaining the credibility of the tort system requires that if a defendant is found liable, he must pay damages at least as great as L in the Hand Formula.”).

²²⁴ Polinsky, *supra* n. 156, at 135.

²²⁵ Posner, *Economic Analysis*, *supra* n. 13, at 19.

²²⁶ *How Much Will Pet Owners Pay?*, *supra* n. 26, at 77 (quoting survey sponsored by the Iams Co.).

²²⁷ *Keep the 30 million Dollars but Return the Parrot, Divorcee Told*, Agence France-Presse, 2002 WL 23622343 (Oct. 11, 2002).

²²⁸ Huss, *supra* n. 15; see also *Good Morning America*, “Lynn Goldstein Explains Why She is in Jail Over a Custody Battle for Two Cats” (ABC June 4, 2001) (television broadcast).

²²⁹ See *Abu-Jamal v. Horn*, 2001 WL 1609690 at *109 (E.D. Pa. Dec. 18, 2001) (denying defendant’s claim that the court’s subsequent dismissal of the juror violated his constitutional right to a fair trial).

²³⁰ Chris Lydgate, *Going to the Dogs*, Willamette Weekly 16 (July 4, 2000). A 1997 survey of 50 battered women’s shelters found that 85% reported incidents of pet abuse in clients’ homes. Understanding Animal Cruelty 9 (Bill DeRosa et al., eds., Natl. Assoc. for Humane and Env. Educ. 2002) (reprinted at http://www.humaneteen.org/understanding/pdf/uac_revised.pdf (accessed Jan. 28, 2004) (citing F.R. Ascione, C.V. Weber, & D.S. Wood, *The Abuse of Animals and Domestic Violence: A National Survey of Shelters for Women Who are Battered*, 5(3) *Society of Animals* 205-28 (1997)).

determination that 83% of pet owners would be “likely to risk their lives for their pets.”²³¹

In assessing accident costs, economists suggest two methods of determining the actual value that humans ascribe to the loss of non-standardized items, such as one’s life, limb, heirloom, or companion. One method asks the person: “How much would you be *willing to pay* to prevent the particular loss?”; the other method asks: “How much would you *have to be paid* to allow the loss to be imposed upon you?”²³²

The first question implicitly assumes that the loss *will occur* unless the person pays to avoid it—in essence, threatening an involuntary transaction. Some critics claim this skews the analysis by providing a lower than accurate valuation due to what are called “wealth effects.”²³³ In this scenario, even if a person places an extremely high value on preventing the loss, she may still view herself as limited by her actual means and scale her response relative to her overall wealth.²³⁴

Conversely, the second question implicitly assumes that the loss will *not occur* unless the person is willing to accept money to endure it—the classic voluntary transaction. However, many people consider it either absurd or morally repugnant to agree to such calamity at any price, and thus either refuse to answer the question or give a figure that is likely to be larger than accurate.²³⁵

Typically any such ex-ante calculation is purely academic, as few circumstances come up whereby someone actually has to decide how much she wants to pay, or be paid, not to have her arm cut off. In the realm of animal companionship, however, people frequently do face the choice of spending a specific amount of money to maintain their relationships with their pets. Consequently, even under this more conservative “willingness to pay” method of calculation, the sizable dollar value that humans place on their companion animals is clearly substantiated.

I. Pet Owners’ “Willingness to Pay”

Veterinary Economics magazine reports that 47% of surveyed pet owners “*would spend any amount necessary*” on veterinary care to save a pet’s life.²³⁶ A full 73% said

²³¹ Sarah A. Chadwick, *Pet Owners Reveal Strong Feelings for Animal Companions*, 14 *Veterinary Economics* (Mar. 1999) (quoting 1999 AAHA survey). Hypothetical proclamations like these repeatedly have proven accurate when put to the test in extremely dangerous real-life situations—as verified by one veterinarian’s study of the behavior of pet-owners in war-ravaged Beirut during the early 1980s. Squires-Lee, *supra* n. 15, at 1066.

²³² Polinsky, *supra* n. 156, at 136 (emphasis added).

²³³ *Id.*

²³⁴ For example, a parent with total assets of \$20,000, might say she would pay every cent she had to prevent the loss of her child—even though she may actually value the life of her child at a level much greater than \$20,000. To explain the distortion of wealth effects in analyzing willingness to pay, Posner gives a hypothetical of how a rare growth extract could cure dwarfism in the child of a poor family, yet a wealthy family purchases it for a fortune merely so that their child may grow an extra couple of inches taller. Posner, *Economic Analysis*, *supra* n. 13, at 11. If we were to measure value only by each family’s “willingness to pay” the wealthy family would be described as valuing the extract greatly, whereas the poor family would be regarded as not valuing the extract at all because they could not afford it—even though the substance would confer an immensely greater amount of happiness in the hands of the poorer child. *Id.*

²³⁵ Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 *Mich. L. Rev.* 779, 839 (1994) (quoted in Squires-Lee, *supra* n. 15, at 29). Sunstein has described companion animal owners as being “insulted” when hypothetically asked how much they would accept to allow their animals to be used in laboratory experimentation. He states that typical “pet owner’s ordinary attitude toward his pet is incompatible with treating the pet as an object” and that “[t]he very idea of sale for the purpose of experimentation seems illegitimate.” *Id.*

²³⁶ *Weighing the Value of Each Client*, *Veterinary Economics* 96, 97 (Aug. 2003) (quoting 2002 AAHA annual survey).

they would spend at least \$1,000 to keep their pet alive.²³⁷ The value of companion animals may even supersede wealth effects, as the American Animal Hospital Association has further found that 75% of pet owners would go into debt to care for their pet.²³⁸ More precisely, a 700-page economic study commissioned by the veterinary profession determined that dog and cat owners would spend an average of \$92 a month to maintain their companion animal's health.²³⁹ This would equate to over \$13,250 in veterinary expenditures alone during the pet's lifetime.²⁴⁰

These assessments are confirmed by the actual dollar amounts that Americans do spend on veterinary treatment and care.²⁴¹ In raw dollars, the majority of dog owners each spent more than \$350 on veterinary care in 2001,²⁴² with nearly one out of four households spending over \$1,000.²⁴³ This is not surprising, as the average veterinary treatment price for each of the three most common pet injuries is over \$1,200, with the most prevalent, a fracture, costing \$1,774.²⁴⁴

Some pet parents spend years paying off thousands of dollars in credit card charges for such emergency veterinary care.²⁴⁵ One New Jersey man went so far as to take out a second mortgage to pay for his mixed-breed dog's \$25,000 kidney transplant.²⁴⁶ For more basic needs, many working pet owners are spending up to \$400 per month taking their canine companions to doggie day-care centers.²⁴⁷ Over the average life of a dog, this expense will add up to over \$50,000.²⁴⁸

Pet owner expenditures on veterinary care continue to rise rapidly as the societal value of companion animals deepens. In just the last 10 years, while the number of pets increased only modestly, the nation's total veterinary expenditures actually *doubled* for dogs and *tripled* for cats.²⁴⁹ Between 1991 and 2001, a dog owner's average expenditure

²³⁷ *Id.* One in five pet owners also say they would travel more than 1,000 miles to obtain specialty veterinary treatment if necessary. *How Much Is Too Much?* Veterinary Economics 26, 26 (Apr. 2003).

²³⁸ *Pet Owner Vet Expenses Rising, Survey Says, supra* n. 36, at 11.

²³⁹ John P. Brown & Jon D. Silverman, *The Current and Future Market for Veterinarians and Veterinary Medical Services in the United States—Executive Summary* (KPMG Economic Consulting Services May 1999) (reprinted in 215, No. 2 JAVMA 161, 173). This massive survey of the economics of veterinary practice was commissioned by the AVMA, AAHA, and the Association of American Veterinary Medical Colleges, and is generally regarded to be the most comprehensive such analysis ever produced. The study similarly determined that horse owners would likely spend an average of \$165 a month on keeping their animal healthy. *Id.* at 174.

²⁴⁰ The life expectancy of dogs is now over 12 years. Deborah Stoudt, *Long Live Cats and Dogs, Owners Say*, Baltimore Sun N1 (Jan. 23, 2000).

²⁴¹ John Paul Getty flew a veterinary specialist to Europe when his dog developed cancer, he reportedly cried for three straight days when his dog finally succumbed to the disease. Bilger, *supra* n. 21, at 46, 48.

²⁴² *How Much Will Pet Owners Pay? supra* n. 26, at 75 (Fig. 2).

²⁴³ *Pet Owner Vet Expenses Rising, Survey Says, supra* n. 36, at 11 (the number of pet owners spending more than \$1,000 a year has more than doubled in just the last 3 years).

²⁴⁴ *Top 10 Pet Injuries*, Veterinary Practice News 12, 12 (May 2003).

²⁴⁵ Catherine Trevison, *The Cost of Puppy Love*, The Oregonian (Portland, Or.) C1 (Mar. 29, 2001).

²⁴⁶ Sarah Collins, *To Cure Pets' Maladies, Some Spare No Expense*, Wall St. J. B1 (Feb. 1, 2002). A recent New Yorker article followed a working-class couple through their similar decision to spend \$15,000 on a kidney transplant for one of their three cats, who was also blind and asthmatic. Bilger, *supra* n. 21, at 46–53. The cable channel *Animal Planet* also regularly airs the documentary “Murphy's Last Chance,” which chronicles how one woman spent \$85,000 treating her dog's spinal tumor. Julie V. Iovine, *It's Now Public: Pet Owners Do Cry*, N.Y. Times Sect. 9, 1 (Sept. 9, 2001).

²⁴⁷ Jennifer Martin, *Profitably Pampering Pets; Entrepreneurs Tap Demanding Owners with Luxury Goods, High-End Services*, Crain's Chi. Bus. SB14 (Oct. 13, 2003) (Chicago has “at least a dozen” of such facilities as well as a separate pet taxi service that boasts over 600 clients who pay \$36 per round trip).

²⁴⁸ \$400 x 12 months x 12 years = \$57,600.

²⁴⁹ *U.S. Pet Ownership, supra* n. 21, at 31, 34 (pet ownership rose 16% during this 10 year period).

per veterinary visit increased from \$49.90 to \$99.10—a 99% rise.²⁵⁰ For cat owners, the average price of a visit rose 107%, from \$44.80 to \$92.90, over the same 10-year period.²⁵¹ These figures significantly confirm that during the past decade, the price of veterinary care has grown at a rate *three times greater* than that of the Consumer Price Index.²⁵²

Correspondingly, DVM Magazine also determined that the dollar-figure cutoff for “economic euthanasia,” the point when treatment is suspended because of cost, rose 67% between 1997 and 2003.²⁵³ Veterinarians now euthanize fewer pets for economic reasons than for the animal’s old age, behavioral problems, and the death or disability of the owner.²⁵⁴ This dramatic reduction in such euthanasia verifies that pet owners increasingly are “willing to pay” whatever it takes to maintain their relationships with companion animals.²⁵⁵

2. Direct Benefits to the Veterinary Profession of Expanded Companion Animal Valuation

Not surprisingly, American pet owners’ willingness to spend these increased amounts on companion animal care has translated into an enormous economic benefit for veterinarians. In the last 10 years alone, the gross revenue of companion animal exclusive practices has more than doubled,²⁵⁶ with 60% of this increase occurring just in the last four years.²⁵⁷ Even in the midst of a national economic downturn, three out of four veterinary practices expect to see further growth, both in the number of transactions and in gross revenue, again this year.²⁵⁸

These greater professional revenues in turn are translating into greater profits for individual veterinarians. The most recent AVMA statistics confirm that the average companion animal practitioner’s income rose 25% in the last four years recorded.²⁵⁹

²⁵⁰ *Id.* at 31.

²⁵¹ *Id.* at 34.

²⁵² The CPI comparatively grew by only 30% between 1991 and 2001. U.S. Bureau of Labor Statistics, *Consumer Price Index, All Urban Consumers, U.S. City Average, All Items, 1913-Present*, <http://www.bls.gov/cpi/home.htm#data> (accessed Jan. 11, 2003).

²⁵³ Daniel R. Verdon, *Clients Spending More Before Stopping Treatment, DVMs Say*, DVM 1, 1 (June 2003).

²⁵⁴ *Id.* at 29.

²⁵⁵ *How Much Will Pet Owners Pay?*, *supra* n. 26, at 74 (Responding to its own question, this veterinary journal article begins with the sentence: “For more and more pet owners, the answer is ‘whatever it takes.’”). A New York veterinarian describing how a client spent \$50,000 to treat her cat’s cancer, said frankly: “I have many clients like that. I am always honest with them. I’ll say ‘To get your animal from here to there, say six months of life, will cost ten thousand dollars,’ something like that. People will go for it. Money is not an issue in this practice.” Gutkind, *supra* n. 29, at 30–31 (quoting Gene Solomon).

²⁵⁶ AVMA, *Economic Report on Veterinarians & Veterinary Practices—2003 Edition* 151 (AVMA 2003) [hereinafter *2003 Economic Report*] (small Animal Exclusive median gross practice revenue increased 119% between 1991 and 2001, from \$269,126 to \$590,000).

²⁵⁷ *Id.* (in 1997, Small Animal Exclusive median gross practice revenue was \$368,250); Dennis M. McCurnin, *6 Steps for Further Practice Growth*, *Veterinary Practice News* 20, 20 (Jan. 2004) (“The majority of companion animal practitioners [are experiencing] 10 to 20 percent growth in gross income per year.”).

²⁵⁸ Mark Opperman, *Business Slow? Try these 10 Recovery Tips*, *Veterinary Economics* 65, 65 (Sept. 2003) (citing 2003 Veterinary Economics Business Practices Study). *See also Barks Worth the Bucks*, *Veterinary Economics* 8 (Feb. 2004) (“More than 90 percent of respondents to AAHA’s 2003 Pet Owner Survey said that the recession hasn’t affected the healthcare services they provide for their pets.”); Collins, *supra* n. 246, at B1 (“But now that the economy has slowed, some owners apparently don’t feel they can just back off doing everything medically possible for an ailing kitty or pooch.”).

²⁵⁹ AVMA, *2003 Economic Report*, *supra* n. 256, at 45. U.S. Department of Labor figures support the AVMA findings. Jack O. Walther, *Veterinary Medicine—A Profession in Transition*, *Veterinary Practice*

Individually, in 2001, veterinarians who worked exclusively with pets earned an average of \$84,447,²⁶⁰ while board-certified specialists commanded an average of \$142,174.²⁶¹ Pet veterinarians who own their practices saw their income increase another 10% in 2002, and now earn \$215,000 every single year.²⁶²

For just one year of care, and sometimes a single visit, veterinarians currently bill American pet owners considerably more than their animals' economic market value. As the Dean of Veterinary Medicine at Texas A&M University has explained: "The reality is that individuals that own companion animals like dogs, cats and horses are willing to pay far beyond the actual utilitarian value of the animal. Their pets are part of the family."²⁶³

This willingness of pet owners to spend more than market value on care has not only increased veterinarians' income, it has provided them with limitless opportunities to expand the practice of their craft.²⁶⁴ Indeed, our cultural valuation of pets has allowed the development of practices, techniques, and procedures that would have been thought pure fantasy just a few decades ago.²⁶⁵ For example, Colorado State University's College of Veterinary Medicine has a new \$10 million center for animal oncology and orthopedics,²⁶⁶ where it is "not uncommon" for clients to pay six-figure sums on chemotherapy, radiation treatments, and bone marrow transplants for their cancer-stricken animal companions.²⁶⁷ Today, providing hip replacements to aging family dogs has become almost routine,²⁶⁸ and veterinary neurological surgeons now remove tumors from

News 6, 6 (Feb. 2003) (quoting labor report that between 1998 and 2001, the actual income of veterinarians rose over 20%).

²⁶⁰ AVMA, *2003 Economic Report*, *supra* n. 256, at 37 (this number is up from \$67,562 in 1997).

²⁶¹ *Id.* at 137.

²⁶² Denise L. Tumblin, *Doctor Compensation: A Sign of Practice Health*, *Veterinary Economics* 42 (Sept. 2003); *Owner Compensation Rising*, *Veterinary Practice News* 11 (Jan. 2004) (quoting 2003 Well-Managed Practice Study).

²⁶³ Bill Hanna, *A Vanishing Breed—Rural Texas Suffers Shortage of Veterinarians*, *Houston Chronicle* 32, 32 (Jan. 27, 2002) (quoting Dean Richard Adams).

²⁶⁴ "We're achieving levels of skill and service that no one would have imagined 10 years ago to meet the demands of our clients." Marnette Denell Falley, *Looking Ahead a Decade*, *Veterinary Economics* 4, 13 (Special Ed. Summer 2001) (quoting Dr. Kathy Mitchener).

²⁶⁵ A veterinarian who recently performed her school's first \$7,500 canine heart bypass said "Who'd ever dreamt there'd be cardiovascular veterinary medicine for pets? It's part of the evolution of veterinary medicine." Jennifer Fiala, *A&M Successful with First Heart Bypass*, *DVM* 1, 30 (Dec. 2001) (quoting Dr. Sonya Gordon). These advances in care have led to companion animals living much longer lives. In 1983, 24% of cats lived at least six years, while that percentage nearly doubled to 47% in 1996; the life expectancy of dogs is now over 12 years, up from seven years in the 1930's. Stoudt, *supra* n. 240, at N1.

²⁶⁶ Rebecca Jones, *CSU Vet Program Top Dog*, *Rocky Mt. News* (Denver, Colo.) 7D (Nov. 25, 2002). CSU's new, 35,000-square-foot wing houses the largest and most comprehensive animal cancer center in the world and is the only veterinary school in North America to have a gamma camera which helps identify the location of cancer in its earliest stages. *Id.* The school is also the only one in North America to have a veterinary acupuncture program. *Id.* One Michigan couple whose dogs were treated at CSU's Animal Cancer Center personally donated \$4 million dollars toward the new facility which bears their name. *Id.*

²⁶⁷ Bernard E. Rollin, *Veterinary Ethics, Social Ethics, and Animal Welfare*, in *Ethics; Welfare, Law and Market Forces: The Veterinary Interface*, Proceedings of a Royal College of Veterinary Surgeons and U. Fed. for Animal Welfare Symposium [hereinafter *The Veterinary Interface*] 39, 49 (A.R. Mitchell & R. Ewbank eds., U. Fed. for Animal Welfare 1998). Professor Rollin elsewhere correlates the phenomena stating, "In my view it is no accident that veterinary oncology in the U.S. has risen roughly contemporaneously with the new moral concern for animals." Rollin, *Veterinary Medical Ethics*, *supra* n. 94, at 68. See also Stoudt, *supra* n. 240, at N1.

²⁶⁸ See e.g. Mike Stobbe, *They're Not Just Animals Anymore*, *Charlotte Observer* 1E (June 9, 2003); Rebecca Jones, *Beastly Bills; Pet Owners' Costs Rise with Quality of Veterinary Care*, *Rocky Mt. News* 4D (June 2, 2003); Collins, *supra* n. 246 at B1; Becky Beaupre, *Where Do You Draw Line With Pet Care Costs?*, *Chi. Sun-Times* 12 (Dec. 29, 2002); Nina Munk, *A Modest Proposal*, *Forbes* 66, 66 (Apr. 11, 1994).

the brains of cats and dogs with high rates of success.²⁶⁹ In this new climate, even cosmetic surgery has emerged as a specialty veterinary practice.²⁷⁰ Significantly, the AVMA currently recognizes 36 such veterinary medical specialties or board certifications,²⁷¹ up from only 16 in 1989,²⁷² and zero in 1950.²⁷³

Underscoring the financial and professional rewards of caring for peoples' pets, over 83% of veterinarians in private practice now work either exclusively or predominantly with companion animals—as contrasted with the 12% who work exclusively with agricultural animals and the 4% who care exclusively for horses.²⁷⁴ This shift in the demographic of veterinary clientele also has contributed to a corresponding metamorphosis in the demographics of veterinary medicine itself: from a profession that has been traditionally male to one that will soon become predominantly female.²⁷⁵ With female enrollment at U.S. veterinary colleges now at 72%, it is estimated that women will make up 50% of the profession by 2004 (up from only 36% in 2001), and 67% by 2015.²⁷⁶ By contrast, in 1967 there were only 318 women veterinarians in America—now there are over 22,000.²⁷⁷

The significant sums that American pet owners are willing to spend on sustaining the health of their companion animals additionally has inspired unparalleled growth in the absolute, quantitative size of the veterinary profession. Between 1980 and 1990 alone, the overall number of U.S. veterinarians grew by 48.7%, a growth rate four times that of the general population.²⁷⁸ In sheer numbers, during the past two decades, the total number of practicing veterinarians has more than doubled: from 32,734 in 1980, to over 68,000 today.²⁷⁹ In the last 50 years, the number of veterinarians in America has *quintupled*.²⁸⁰

²⁶⁹ Lauran Neergaard, *Vets Pushing the Boundaries of Medicine for Anxious Owners*, Chi. Trib. A13 (Dec. 28, 2002). In 2003, MIT scientists began a \$50 million project to sequence the genome of the dog. Carmen Fleetwood, *Dog Drugs Aren't Just Pet Projects*, Wall St. J. B3C (Aug. 6, 2003).

²⁷⁰ Examples of companion animal cosmetic procedures include tummy tucks, wrinkle removal and even hair transplants. Randolph, *supra* n. 16, at 5/9. Over 39,000 people have even had synthetic testicle prostheses implanted in their companion animals to ease “post-neutering trauma.” Lydgate, *supra* n. 230, at 16 (referring to “Neuticles” developed by the CTI corporation of Buckner, Mo.).

²⁷¹ *Serving in All Capacities*, Veterinary Economics 36 (Aug. 2002). The role of social factors in pushing this growth in veterinary specialization was summarized at a recent AVMA convention, where the speaker declared “Demographics, economics, values—they are all on your side. The demand for specialties in veterinary medicine will know no limits in the future.” Dean J. Monti, *Catlett Predicts Bright Future for Veterinarians*, 217, No. 5 JAVMA 623, 631 (Sept. 1, 2000) (quoting Lowell Catlett’s address to the AVMA Convention).

²⁷² King, *supra* n. 16, at 17, n. 68.

²⁷³ Carol Marie Cropper, *Strides in Pet Care Come at Price Owners Will Pay*, N.Y. Times A16 (Apr. 5, 1998) (showing that between 1984 and 1998 the number of veterinarians who had taken the additional schooling and examinations to become board certified in one of these specialties more than doubled).

²⁷⁴ An even higher 90% of all private practices treat over 50% companion animals, and 69% of all veterinary practices treat companion animals exclusively. *Serving In All Capacities*, *supra* n. 271, at 36. (quoting the 2001 AVMA Veterinary Market Research Study).

²⁷⁵ Karen E. Felsted, *Gender Shift on the Horizon*, Veterinary Economics 18 (Special Ed. Summer 2001).

²⁷⁶ *Id.* at 18.

²⁷⁷ Daryl D. Buss, *Changing Demographics* 217, No. 3 JAVMA 327, 327 (Aug. 1, 2000); American Veterinary Medical Association, *Veterinary Demographic Data Reports*, Vol. 6, Part 1, at 1–8 (1999). Although the lifting of gender quotas at veterinary colleges also contributed greatly to the growth during this period, women continued to enter the profession in increasingly greater numbers long after such restrictions were gone. Bruce Fogle, *The Changing Roles of Animals in Western Society: Influences Upon and From the Veterinary Profession*, 12(4) *Anthrozoös*, 234, 235 (1999).

²⁷⁸ AVMA, *Demographic Data Reports*, *supra* n. 277, at 1–4.

²⁷⁹ *Are There Enough Associates*, Veterinary Economics 16, 16 (Aug. 2002). “To ease a statewide veterinarian shortage and encourage out-of-state doctors to apply for job openings,” California recently eased its criteria under which out-of-state veterinarians can become licensed. Sarah A. Chadwick,

The U.S. Department of Labor projects an additional 19,000 jobs for veterinarians by 2010—a 32% increase in employment opportunity, and one that places veterinary medicine in the projected category of “faster than average industry growth.”²⁸¹ Officially validating the influence of America’s escalating valuation of companion animals, the Department’s report succinctly states: “Demand should grow because of owners’ increasing willingness to spend money on their pets, especially for advanced care.”²⁸² Other employment forecasts for private practice have calculated that by the year 2015, demand for small animal veterinarians will increase at a rate 10 times higher than the demand for large animal veterinarians, affirming that companion animal care will almost exclusively drive this future expanded opportunity.²⁸³

3. *Veterinary Profession’s Complicity in Increased Value of Companion Animals*

It is crucial for all to understand that veterinarians are not mere bystander beneficiaries of pet owners’ increased economic valuation of companion animals, but rather have spent decades actively developing this bond as a means of professional survival.²⁸⁴ As one veterinary historian has described, there is a greater story “in how veterinarians contributed to and manipulated animal value in order to claim a place as indispensable mediators of human-animal relationships.”²⁸⁵

As early as 1926, the veterinary profession was recognizing the potential of cultivating the market for companion animal care. In fact, JAVMA articles from this period directly declare that the value of these new patients was not economic, but sentimental—and that this very sentimentality itself would become the source of the new veterinarian’s profit.²⁸⁶

On a larger, societal scale, the increase in companion animals’ recognized value has led to veterinary services even being required by law—both through humane care

Veterinary Licensing Opportunities Broadened in California, *Veterinary Economics* 12 (May 1999).

²⁸⁰ *American Veterinary Medical Association Directory* 19 (AVMA 1950) (calculating there were 12,784 veterinarians in the United States in 1950). For the past 10 years there have been roughly three times more applicants than available seats in U.S. veterinary colleges. Assoc. of Am. Veterinary Med. Colleges, *Veterinary Medical School Admission Requirements* 146–47 (Purdue U. Press 2002).

²⁸¹ U.S. Dept. of Labor, *Occupational Outlook Quarterly*, Vol. 46, No. 1, 23 (Spring 2002).

²⁸² *Id.* at 23. *Veterinary Economics* magazine elaborates further: “As the world becomes faster-paced and more technology centered, pets give their owners steadfast companionship and unconditional love and they accent the nurturing part of our nature. All of this will open unsurpassed opportunities for veterinarians, because we are the critical link between the precious animal world and the human world.” Falley, *supra* n. 264, at 13 (quoting Dr. Kathy Mitchener).

²⁸³ KPMG Megastudy, *supra* n. 239, at 164 (in terms of actual veterinarians in private practice, small animal practitioners are estimated to see a 32% increase compared with only a 3% increase in the number of practicing large animal veterinarians).

²⁸⁴ Marsha I. Heinke, *Prepare for the Inevitable: Reduce Liability from Human-Animal Bond*, *DVM* 44, 45 (Apr. 2003) (“The veterinary profession has worked hard to ensure that the human-animal bond would be engrained in the fabric of the world and American society.”).

²⁸⁵ Susan D. Jones, *Valuing Animals: Veterinarians and Their Patients in Modern America* [hereinafter *Valuing Animals*] 6 (Johns Hopkins U. Press 2003) (describing how the profession needed to identify a new market for its services as mechanization was increasingly replacing horses in the cities and work animals on the farms). Professor Jones is one of only two licensed veterinarians in the U.S. with a Ph.D in History; she teaches at the University of Colorado, Boulder. Rebecca Jones, *supra* n. 268, at 4D.

²⁸⁶ *Id.* at 123. “Canny practitioners, however, had already noticed the development of a new business opportunity: translating the sentimental value that Americans attached to companion animals, or pets, into a mandate for medical care . . . professional leaders and practitioners worked in the mid-twentieth century to support and shape Americans’ interest in pets.” *Id.* at 8.

mandates²⁸⁷ and compulsory vaccination schedules.²⁸⁸ Historically, the veterinary community has been instrumental in pushing for the legal requirement of many of these vaccinations,²⁸⁹ which are now the number one most frequently purchased veterinary service for cats, and the second most common for dogs.²⁹⁰ Even as science is showing that over-vaccination can be deadly for some pets, many veterinarians still are fighting against updating legislative vaccination protocols.²⁹¹ Indeed, Colorado's attempt at civil damages legislation in 2002 was spurred and funded by an aggrieved pet owner whose aging dog, Moolah, died within days of receiving a vaccination that a veterinarian insisted was legally required, but which, in fact, was not.²⁹²

The journals of the veterinary profession unabashedly tout the financial benefits of promoting the human-animal bond to an even greater degree today.²⁹³ By enhancing this bond, "veterinarians helped to create the 'priceless pet'—an animal whose owners' affection for it dictated that they spend more money on its care than the creature's economic worth."²⁹⁴ As a direct result, Americans are now spending more money caring for their companion animals than at any other point in history.²⁹⁵

Undeniably the societal valuation of these beings at levels far greater than their market worth has been a multi-faceted boon to the veterinary profession.²⁹⁶ This force has

²⁸⁷ See *Buskey v. Commonwealth*, 2003 WL 1873643 at *4 (Va. App. April 15, 2003) (finding that dog owner's failure to obtain necessary veterinary care warranted conviction under animal cruelty statute). Often this requirement is specifically spelled out in the statute. See *Illinois Humane Care for Animals Act*, 510 Ill. Comp. Stat. Ann. § 70/3 (West 2003) ("Owner's duties. Each owner shall provide for each of his animals: (c) veterinary care when needed to prevent suffering.").

²⁸⁸ The mandated frequency of vaccinations is one of the most hotly debated topics in veterinary medicine today. See Leigh Hopper, *Vaccine Regimen for Pets in Doubt/Experts Say Annual Shots Waste Money, Can Be Risky*, *Houston Chron.* 1 (Apr. 22, 2002) ("Veterinarians are charging customers \$36 million a year for vaccinations that are not necessary Not only are these vaccines unnecessary, they're causing harm to pets.") (quoting Texas veterinarian Bob Rogers).

²⁸⁹ Jones, *Valuing Animals*, *supra* n. 285, at 130–34.

²⁹⁰ AVMA, *U.S. Pet Ownership*, *supra* n. 21, at 32, 35 (70.5% of feline office visits involved a vaccination, as did 63.8% of visits by dogs.). Although the actual dollar amount of profit from the vaccine itself only makes up around 14% of the veterinarian's income, it is seen as the most effective tool to get clients through the door for exams and other services. See Hopper, *supra* n. 288, at 1 ("I know some vets feel threatened because they think, 'People won't come back to my office if I don't have the vaccine as a carrot.'") (quoting Alice Wolf, professor of small-animal medicine at Texas A&M).

²⁹¹ See Michael Merrithew, *Dialogue: Show Him the Data*, *DVM* 6, 15 (July 2003) ("I am more than a little irritated that "they" are trying to ram this down our throats and magazines are buying into this garbage."); Hopper, *supra* n. 288, at 1 (So far, 34 states have switched from an annual to a triennial rabies vaccination requirement).

²⁹² Valerie Richardson, *Bill Targets Excess Vaccination of Pets*, *Wash. Times* A13 (Feb. 19, 2003). Over the concerns of the pet owner that his ailing dog might not be able to handle the vaccine, the veterinarian insisted it was required annually. In fact, though, the law only required vaccination every three years and the label clearly stated the vaccine was only to be given to healthy animals. *Id.*

²⁹³ *Veterinary Economics* magazine has a monthly feature entitled "Building the Bond" and has stated flatly: "Bottom line: Everyone agrees that the bond is a driving force for veterinary medicine." Falley, *supra* n. 264, at 13 (quoting Dr. Kathy Mitchener). See also W. Bradford Smith, *Bonding Owners and Pets*, *Veterinary Economics* 50, 52 (Aug. 1997) (stressing the importance of the pet/owner relationship in the marketing of services, and describing how enhancing the bond between clients and their pets will improve veterinarians' "bottom line").

²⁹⁴ Jones, *Valuing Animals*, *supra* n. 285, at 137.

²⁹⁵ See *supra* n. 21 (American spending has exploded from \$11 billion to \$19 billion just in the last 6 years).

²⁹⁶ Lowell Catlett, *Clients' Pockets are Deeper Than You Think*, *Veterinary Economics* 42, 42 (June 2003); R. Scott Nolen, *The Golden Age of Veterinary Medicine* 218, No. 9 *JAVMA* 1401, 1401 (May 1, 2001) ("the unique bond between people and their pets is fast becoming a cultural norm," and exhorting veterinarians to "reap the harvest" of the current "unprecedented period . . . when consumers are willing to spend more on their companion animals").

driven astounding advances in veterinary medical science, increased both the demand and remuneration for veterinary services, and elevated the social stature of veterinarians themselves.²⁹⁷

4. *Inherent Contradiction of Veterinary Opposition to Value Recognition*

Considering the wealth of benefits the veterinary community has gained from society's increased valuation of companion animals, one might find it surprising that the profession has fought relentlessly against any legislative or common law efforts to recognize that these "priceless pets" have identifiable value beyond fungible market worth.²⁹⁸ Such opposition has jeopardized the very credibility of the veterinary profession and left it exposed to charges of flat-out hypocrisy.²⁹⁹ The inherent contradiction and self-serving appearance of the position also has been well-noted by many in the veterinary community itself.³⁰⁰ Veterinary consultant and author Dr. James Wilson sums up the incongruity:

Veterinarians must accept that they can no longer promote expenditures of time, money and emotional energy by owners [on care], and then when something goes awry simply say, "Oh well, tough luck Mrs. Jones. It's just an animal under the law. Animals are merely personal property; therefore, you may not collect damages for your loss, other than the market value of your pet."³⁰¹

Some veterinary commentators even admit that the profession's duplicitous posture itself could provide the most potent argument to increase the legal liability of negligent veterinarians.³⁰²

²⁹⁷ Professor of Veterinary Ethics Bernard Rollin has observed, "As the value of animals rises in society, so will the value of those who treat animals, and so too will the opportunities to actualize the scientific medicine veterinarians have evolved." Rollin, *Veterinary Medical Ethics*, *supra* n. 94, at 68.

²⁹⁸ State veterinary associations have publicly opposed legislative attempts to increase recovery beyond market value in California, Colorado, New Jersey, and Oregon. *See also* Garry R. Kaplan, Presentation, *Defending a Veterinarian Against a Client's Claim for Emotional Pain & Suffering Damages for Loss of or Injury to a Pet* (AVMLA Annual Meeting Nashville, Tenn., July 14, 2002) (paper on file with *Animal Law*, Lewis & Clark L. Sch., or available through the AVMLA). It is also worth noting that the vast majority of American pet owners paid no purchase price for their dogs and cats because they were adopted from a family member, friend, neighbor, shelter, or found as a stray. *Who Owns Pets?* *Veterinary Economics* 70, 73 (Aug. 2002). Given the fact that five million companion animals are euthanized in shelters each year in this country a strong argument could be made that the average companion animal has no market value at all. Jennifer Fiala, *Shelter Euthanasia Rates Drop to Historic Lows*, *DVM* 26 (July 2003).

²⁹⁹ *See* Byszewski, *supra* n. 6, at 230 (Because veterinarians make their living from the relationship between human guardians and their companion animals, it is morally bankrupt for veterinarians to insist that companion animals be valued as mere property."); Wise, *supra* n. 6, at 46, 76–80:

Small animal veterinarians literally bank on the treatment of companion animals by their human companions as members of their families Companion animals killed by veterinary negligence were being treated by those veterinarians precisely because their [clients] cared more about their welfare than the cost of treating them or of obtaining a free replacement."

Id.

³⁰⁰ *See e.g.* Tannenbaum, *supra* n. 1 at 190 (Veterinarians "cannot promote the human-companion animal bond as a vital part of their clients' lives and at the same time tell pet owners that they cannot collect for their pain and suffering because animals are merely articles of personal property.").

³⁰¹ Meyers, *Changing Status*, *supra* n. 10, at 9 (quoting Dr. James Wilson).

³⁰² *See* Jeannie Perron, *The Law of Veterinary Liability and the Human-Animal Bond*, 210, No. 2 *JAVMA* 184, 184 (Jan. 15, 1997) (stating there could be no better way for plaintiffs to convince courts and state legislatures that there is compensable worth inherent in the companionship of a pet than by invoking quotes from the profession's own policy statements promoting the Human-Animal bond); Douglas C. Jack, *Lawsuits, the Human-Animal Bond and Veterinarians*, *Veterinary Practice News* 12, 12 (Apr. 2001) ("In the

D. Arguments Against Increasing Civil Damages for Veterinary Malpractice

Why would veterinarians want to bite the proverbial hands of pet owners that have personally and professionally fed them so well? And why would they fight against formal recognition of their patients' social and economic value—indeed the very root of their income? As with other beings who bite those upon whom they depend, veterinarians fighting against civil compensation for companion animal loss are probably motivated not by malice or greed, but rather simple fear: fear of limitless liability, of replicating the human medical malpractice “crisis;” of inviting frivolous lawsuits; or even of being forced out of business.³⁰³ Scare stories and conclusive assertions that appear in the public media³⁰⁴ and various veterinary journals³⁰⁵ only exacerbate these fears, as do comments of the profession's governing officers.³⁰⁶

The most prevalent of the arguments against allowing higher civil compensation for veterinary negligence warns that the move will cause drastic increases in malpractice insurance rates, and that these higher premiums in turn will cause equally drastic increases in the price of veterinary care.³⁰⁷ This contention is frequently promulgated by members of the profession's organizational leadership, such as Dr. James Harris, who

sees the issue as potentially exposing practitioners to a flurry of malpractice suits for allegedly failing to deliver the appropriate medical care In this scenario, practitioners would have to raise their rates to compensate for skyrocketing liability coverage; some clients would then be unable to afford even basic veterinary care for their pets.³⁰⁸

face of this research [on the human-animal bond], it may be more difficult for veterinary defense attorneys to successfully argue against the award of [companionship] damages.”); R. Scott Nolen, *The Human-Animal Bond: A Legal Liability for Veterinarians?* 221, No. 6 JAVMA 762, 762 (Sept. 15, 2002) (the legal system soon might force a reconciliation of these logically inconsistent positions).

³⁰³ See Paul Winston, *Pet-Loss Lawsuits a Dog-Gone Shame*, Bus. Ins. 6, 6 (Feb. 17, 2003) (“But if veterinarians suddenly faced a greatly expanded liability exposure, many could not afford to continue. They would be bled to death by frivolous lawsuits and the cost of defensive medicine and have their pockets emptied by the high cost of liability insurance.”).

³⁰⁴ See e.g. Bilger, *supra* n. 21, at 51 (“veterinarians could face million-dollar malpractice suits in the future.”).

³⁰⁵ See e.g. Jennifer Fiala, *Human-Animal Bond Steps Up Legal Exposure* DVM 34, 34 (July 2003) (“Sweeping legal and legislative allowances for more than an animal's fair market value in cases of wrongful death or malpractice promise to open the floodgates, exposing the profession to costly litigation and heightened critique.”). Another article quoted the head of the Southern California Veterinary Medicine Association as saying “Harvard Law School is now teaching a course on how to treat veterinary cases. That speaks for itself.” Fiala, *Court Rulings*, *supra* n. 46, at 32 (quoting Dr. William Grant). Grant's comment is intriguing because this author's research was spurred by the very reason that the word “veterinarian” was not even mentioned while taking the course to which he refers.

³⁰⁶ AVMA assistant executive vice-president, Arthur Tennyson, asks: “Should people be able to sue for \$2 million or \$3 million if a cat died because something went wrong? I don't think so.” (quoted in Julie Scelfo, *Good Dogs, Bad Medicine?* Newsweek 52, 52 (May 21, 2001). Elsewhere Tennyson has said “We need to tie this issue to parallels in human medicine. Physicians are refusing to do obstetrics because of increasing malpractice costs. Do we want to bring that to veterinary medicine?” (quoted in Meyers, *Changing Status*, *supra* n. 10, at 8).

³⁰⁷ See e.g. Richard L. Cupp, Jr., *Barking Up the Wrong Tree*, L.A. Times B5 (June 22, 1998).

³⁰⁸ R. Scott Nolen, *Owners or Guardians? Cities Change Identity of Pet Owners, Hoping to Promote Welfare*, 218, No. 8 JAVMA 1240, 1240 (Apr. 15, 2001) (paraphrasing Dr. James M. Harris, vice chairman of the AVMA Committee on the Human-Animal Bond). See also R. Scott Nolen, *Pet Owners in San Francisco Become ‘Pet Guardians’*, 222, No. 5 JAVMA 561, 562 (Mar. 1, 2003) (“Faced with increased litigation and bigger awards, malpractice premiums will go up, resulting in more expensive veterinary care that pet owners might not be able to afford.”) (quoting Dr. Richard Schumacher, Executive Director of the California Veterinary Med. Assn.).

These claims have been repeated so often that eventually they just became accepted as true.³⁰⁹

While some of the veterinary community's fears over increased liability may be valid, some may not. The problem is no one has done the math to determine the factual grounds of such concerns—or if they have, the findings have not been released publicly. This lack of hard evidence has resulted in both sides of the debate basing their consequence-related arguments upon mere conjecture. Because such uninformed fear of an uncalculated unknown is not an adequate basis for determining economic, legal, or professional policy, it is imperative that the math of veterinary negligence liability first be examined before moving on to the more substantive arguments.³¹⁰

1. The False Premise of the Liability Insurance Argument

The arguments that increased insurance costs will price some people out of pet ownership, cause greater pet suffering due to unattainable care, or lead to increases in economic euthanasia, do seem to follow logically from the assumed premise that the corresponding price of veterinary care will increase substantially.³¹¹ However, it is precisely this premise—that veterinary prices will need to rise beyond people's ability or willingness to pay—which has never actually been demonstrated or factually scrutinized.

Until recently.

In expectation of an impending judicial or legislative increase in civil compensation for veterinary malpractice, the president of the second largest veterinary liability insurer, ABD Insurance, instructed his company's actuarial experts to calculate the bottom-line cost of a legislative increase in damages for veterinary malpractice. After crunching all the relevant proprietary figures—the percentage of claims that settle, the litigation expenses of those that go to trial, the administrative costs of coverage, and the factor by which the number of claims would rise—the company calculated exactly how much they would have to increase veterinary liability premiums if emotional damages for companion animal loss were allowed in California, but capped at \$25,000.³¹²

The answer was that each veterinarian's annual premiums would rise by only \$212.³¹³

³⁰⁹ Sandy Banks, *No Way to Treat a Loyal Pet Owner*, L.A. Times § 5, 1, 1 (July 14, 2002) (“[Vets fear] that challenges to animals’ medical care will fuel malpractice suits and result in skyrocketing liability costs that could push veterinary care out of reach of all but the most affluent pets and their check-writing guardians.”); Willing, *supra* n. 17, at 1A (“[More suits] will lead vets to raise fees, discouraging low-income pet owners from seeking care”); Gahr, *supra* n. 65, at A15 (“But if lawsuits increase, so will insurance rates. That means higher fees for pet owners, which could push some services beyond their reach.”).

³¹⁰ One commentator has reached a similar conclusion in the human medical malpractice debate: “[P]roponents of caps simply aren’t coming up with the facts to make their case. Instead, they’re relying on scare stories—always bad starting point for making serious policy decisions.” Woellert, *supra* n. 127, at 98–99.

³¹¹ Each of these potentialities is articulated by Professor Richard Cupp in Kathleen Burge, *Appeals Court Weighs the Value of Family Pets*, Boston Globe B1 (Nov. 25, 2001).

³¹² Telephone Interview with Jay O’Brien, President of ABD Insurance (Oct. 20, 2003) (ABD Insurance provides coverage to roughly 80% of practicing California veterinarians).

³¹³ Jennifer Fiala, *CVMA Covets Heightened Legal Status for Pets*, DVM 36, 39 (Feb. 2004) (quoting Dr. Ed Branam, Managing Director of ABD Insurance); Telephone Interview with Jay O’Brien, *supra* n. 312 (discussing preliminary finding that premiums would rise by \$188). These preliminary findings were previously disclosed by James F. Wilson, Presentation, *\$250,000 in Emotional Distress Damages for the Loss of a Pet? What’s this Bond Coming To?* (AVMLA Annual Meeting, Denver, Colo., July 20, 2003). See also Meyers, *Changing Status*, *supra* n. 10, at 12 (reporting that a Feb. 2003 veterinary workshop on the issue indicated that changing the legal status of animals would result in “most likely doubling the current

Again dividing this price increase by the average number of clients per veterinarian demonstrates that allowing up to \$25,000 recovery for emotional compensation of companion animal loss would only increase each pet owner's annual veterinary costs by less than 13¢.³¹⁴

This 13¢ rise in annual care cost is hardly enough to price anyone out of pet ownership or veterinary care—and is a figure so low that it makes such arguments laughable.

But suppose the insurance company is wrong.

Suppose they are really wrong. Even though ABD Insurance is one of only two organizations in the nation with the relevant data to calculate how much veterinarians' premiums would rise from an increase in allowable damages, let's suppose their experts are wrong by an entire order of magnitude.

In other words, instead of merely doubling, what if each companion animal veterinarian's liability insurance premium increased to *10 times* its current amount—for an annual total of \$1,880?³¹⁵ Again, dividing this increase by the number of each veterinarian's clients equates to an annual care cost increase of \$1.15 per pet household.³¹⁶ When one further factors in that 61% of these households have more than one companion animal,³¹⁷ (and that dogs and cats account for 95% of all household veterinary costs³¹⁸), this *10 fold* increase in insurance premiums equates to an annual added veterinary cost of only 52¢ per American cat and dog.³¹⁹

But suppose the ABD Insurance actuary experts are not just really wrong: suppose they are really, *really* wrong. Suppose, indeed, that veterinary liability insurance rates truly “skyrocketed” by *100 times* their current level to a whopping \$18,800 (an amount that is three times what the average human family practitioner pays for malpractice coverage).³²⁰ Even then, when one does the math, that total premium comes out to an annual veterinary care cost increase of \$11.50 per pet owning household.³²¹ As a percentage, this \$11.50 per year equates to a 4% increase over the current \$261.30 spent annually by dog owners on veterinary expenditures, and a 7% increase over the current

rates” for professional liability insurance).

³¹⁴ The \$212 annual cost increase ÷ 1,635 average clients per veterinarian = 12.9¢ liability insurance cost per client per year. See AAHA, *supra* n. 54. This math can be checked another way by multiplying the \$212 increase by the total number of companion animal veterinarians, and then dividing that amount by the total number of pet-owning households: ($\$212 \times 37,000$) ÷ 61,100,000 = 12.8¢. See *Serving In All Capacities*, *supra* n. 271, at 36 (providing the number of companion animal veterinarians); AVMA, *U.S. Pet Ownership*, *supra* n. 21, at 6 (providing the number of pet owning households).

³¹⁵ The most expensive primary liability insurance plan for companion animal veterinarians through the AVMA-PLIT costs \$188 annually for \$1 million per claim and \$3 million total claims coverage. AVMA-PLIT, *2003 Annual Premiums*, *supra* n. 52. Multiplying the cost of this maximum coverage by 10 yields the figure \$1,880. The AVMA-PLIT rates are used for these cost projections because that company insures 72% of practicing veterinarians. See *supra* n. 47.

³¹⁶ The \$1,880 annual cost increase ÷ 1635 average clients per veterinarian = \$1.15 liability insurance cost per client per year. See AAHA, *supra* n. 54, at 114 (source of average clients per veterinarian).

³¹⁷ AVMA, *U.S. Pet Ownership*, *supra* n. 21, at 9.

³¹⁸ *Id.* at 31, 34.

³¹⁹ ($(\$1,888 \text{ premium increase} \times 36,000 \text{ companion animal veterinarians}) \times 95\% \text{ total veterinary expenditures attributed to cats and dogs}$) ÷ 130,500,000 total cats and dogs = 52¢ per cat and dog portion of annual liability premium increase. See *id.* at 2 (source of total number of cats and dogs).

³²⁰ Peter Eisler et al., *Hype Outpaces Facts in Malpractice Debate*, USA Today 1A, 3A (Mar. 5, 2003) (reporting that in 2001 the average family practitioner paid \$5,895 annually in malpractice insurance premiums).

³²¹ \$18,800 annual cost increase ÷ 1635 average clients per veterinarian = \$11.50 liability insurance cost per client per year. See AAHA, *supra* n. 54, at 114 for source of average clients per veterinarian figure.

average of \$156.90 spent by cat owners.³²²

To evaluate whether these 4% and 7% price increases are approaching the point of being relevant regarding what pet owners are willing or able to pay for treatment, let us revisit the recent trends in consumer spending on veterinary care. During the 10-year period from 1991–2001 (the most recent figures available) consumer spending on veterinary care increased by 169%, outpacing the rate of new pet ownership by an entire order of magnitude.³²³ On an individual level, although the number of visits to the veterinarian per household stayed constant from 1991–2001,³²⁴ the amount of spending per household *doubled* during the same period.³²⁵ Indeed, the price of an average veterinary visit increased by 9% in each of the past 10 years.³²⁶

Moreover, several of the veterinary profession's own studies have found that 74% of American pet owners would continue to use their present veterinarian if she raised prices by 10%, and 58% would be willing to pay up to 20% more for their veterinary care.³²⁷ Relevantly, only 14.25% of pet owners currently choose their current veterinarian based on fees.³²⁸

Thus, to repeat for the record, the actuarial experts at the second largest veterinary malpractice insurer calculate that allowing up to \$25,000 in compensation for the negligent killing of a companion animal would only increase the average pet owner's veterinary expenses by less than 13¢ per year. Yet, even if veterinary liability insurance premiums (which haven't risen in 14 years) suddenly shot up astronomically to 100 times their current level, and even if every cent was passed immediately on to consumers, this yearly 4% to 7% increase of \$11.50 would still be less than the amount that veterinarians already are raising their annual fees.³²⁹

Faced with these truths, this author defies anyone to continue claiming that veterinary liability insurance premium increases will prevent even the most impoverished pet owner currently purchasing veterinary care from doing so in the future. Furthermore, any group or individual who persists in asserting that increased civil compensation for companion animal loss will lead inevitably to such insurance effects either is misinformed or attempting to mislead.

Honest members of the veterinary community who have done such calculations,

³²² AVMA, *U.S. Pet Ownership*, *supra* n. 21, at 4 (For these calculations the author is using the more conservative expenditure figures of the AVMA).

³²³ *Id.* at 95–98 (total veterinary expenditures on dogs, cats, horses and birds increased from \$7.25 billion in 1991 to \$19.08 billion in 2001, over 2.5 times the 1991 amount). In contrast to this 169% increase in veterinary expenditures, the number of pets increased only 16% during the same period. *Id.* at 2.

³²⁴ *Id.* at 2 (in 1991 the average number of veterinary visits per dog owner was 2.6, in 2001 it was 2.7. For cat owners the figure increased only slightly from 1.6 to 1.8 visits per year).

³²⁵ *Id.* at 4 (annual household veterinary expenditures for the decade increased from \$132.90 to \$261.30 for dog owners and from \$79.80 to \$156.90 for cat owners).

³²⁶ *Supra* nn. 250–51 and accompanying text.

³²⁷ KPMG *Megastudy*, *supra* n. 239, at 167; William L. Cron et al., *Impact of Practice Management and Business Behaviors on Small Animal Veterinarians' Incomes* 17 (Brakke Consulting 1998) (another AVMA-commissioned economic survey of the veterinary profession that found many veterinarians under-priced their services or offered less aggressive treatments based on incorrect pre-judgments of clients' willingness to pay).

³²⁸ AVMA, *U.S. Pet Ownership*, *supra* n. 21, at 105. *See also* Nolen, *Golden Age*, *supra* n. 296, at 1401 (“A number of corporate and professional studies on the spending habits of pet owners over the past 20 years show people tend not to be price sensitive when it comes to their pets. People will pay for quality care and service . . .”).

³²⁹ Elizabeth A. Brown, *Clients are Happier Paying More*, *Veterinary Economics* 24, 24 (Feb. 2001); Karen E. Felsted et al., *Happy Clients Pay More*, *Veterinary Economics* 44, 44 (Mar. 2001).

readily confess that the insurance cost argument is fallacious. For this reason, Ralph Johnson, the executive director of the Colorado Veterinary Medicine Association, refused to push the point when working to defeat that state's proposed companion animal valuation legislation. As he concluded: "the costs of liability coverage . . . truly are negligible as a cost of doing business for most veterinarians, and would likely remain so even if those costs increased significantly."³³⁰

2. *Defensive Medicine*

Mr. Johnson and his organization still predicted that substantial veterinary care price increases would result from the proposed Colorado legislation—and cause all the same negative consumer repercussions outlined earlier—but they instead maintained these underlying price increases would spring from a different source.³³¹ "Our point was that this bill would precipitate a move toward the practice of defensive medicine, which is more expensive for consumers and which would reduce the accessibility of veterinary care due to economic reasons."³³² One veterinary commentator summarizes the phenomenon:

The practice of defensive medicine is essentially the management of a patient's care in a way that not only weights the patient's best interests, but is also calculated to reduce the likelihood of the patient instituting or prevailing in a malpractice case in the event of an unfavorable outcome of treatment. Manifestations of defensive medicine may include excessive diagnostic tests, unnecessary antibiotics and surgical intervention, premature or inordinately long hospitalizations, and excessive specialist referrals for medical consultation.³³³

This is probably the strongest of the arguments against increasing the negligence liability of veterinarians. However, the relevant question to ask is: *Is it strong enough to override the will of pet owners who may decide that state-sanctioned negligence deterrence, and protection of their companion animal assets, is worth risking any speculative, potential increase in prices?* Moreover, the veterinary community may find it politically problematic to argue that the reason pet owners' prices might rise after gaining such legal protections is because veterinarians themselves would start implementing unnecessary procedures.³³⁴

Another practical point is that instead of ordering expensive, redundant diagnostics or treatments, veterinarians could protect themselves adequately through the increased use of consent forms commonly utilized in the practice of human medicine.³³⁵ Far from de-personalizing the provision of care, or overly formalizing the treatment process, some

³³⁰ Ralph Johnson, Presentation, *Legislation Regarding Recovery of Non-Economic Damages in Veterinary Malpractice Suits* 7 (AVMLA Annual Meeting Denver, Colo., July 20, 2003) (paper on file with *Animal Law*, Lewis & Clark L. Sch., or available through the AVMLA).

³³¹ "It was feared that the legislation would result in the higher cost of veterinary services and animal care, making appropriate care unobtainable by some pet owners and would therefore ultimately result in higher incidences of animal neglect and/or relinquishment to animal shelters." Meyers, *Changing Status*, *supra* n. 10, at 8 (quoting Ralph Johnson, Executive Director of the Colorado Veterinary Medicine Association).

³³² Johnson, *supra* n. 330, at 7.

³³³ King, *supra* n. 16, at 43.

³³⁴ Meyers, *Changing Status*, *supra* n. 10, at 12 ("[V]eterinarians must also consider the political pitfalls of battling the popular public perception that pets are family members.").

³³⁵ See generally James Wilson & Charlotte LaCroix, *Legal Consent Forms for Veterinary Practices* (3d ed., AAHA Press 2001) (discussing the use of consent forms as protection against malpractice).

studies show that consent acquisition actually improves communication with clients and more appropriately informs them about the risks and options involved with particular courses of treatment.³³⁶ Failure in this very duty of communication with the client is itself a leading instigator of veterinary malpractice claims.³³⁷

Veterinarians also may discover that what they now refer to as defensive medicine may be viewed by consumers as simply providing optimal care.³³⁸ For example, if a client's cat died and she later learned that the problem could have been detected and successfully treated with additional diagnostic testing, that consumer would probably feel that she received less than adequate care.³³⁹

Professor Gary Schwartz has discussed this difference between appropriate and excessive defensive medicine to show how the increased legal liability of human doctors has led to astonishing advances in diagnosing and treating disease.³⁴⁰ He describes a Journal of the American Medical Association study that examined how pressure from its medical liability insurer led Harvard Medical School to implement a "meticulous monitoring system" that "sharply reduced the rate of anesthetic-related accidents."³⁴¹ The study concluded: "the best way" to counter the increasing cost of malpractice insurance "is to work even harder on patient safety and medical care quality assurance."³⁴² Significantly, Harvard's measures were "then adopted and incorporated into guidelines promulgated by the American Society of Anesthesiologists, proving 'so effective' that malpractice insurers reduced the premiums of anesthesiologists that implemented the protocol."³⁴³ In other words, the practice of "defensive medicine" actually lowered doctors' liability insurance premiums.

Moreover, the veterinary literature is filled with articles that describe how providing

³³⁶ See Schwartz, *supra* n. 185, at 400–01 (discussing studies at Harvard and in Canada which show that 78% of physicians spent more time "explaining risks to patients" after several high-profile judicial holdings broadened doctors' obligation to obtain informed consent); Heinke, *supra* n. 284, at 44 (describing how tablet PC's can significantly increase the quality of care, and protect veterinarian liability by allowing clients to sign such forms on the portable screen where they are kept with the relevant patient history and records). It should be noted, though, that switching entirely to electronic records poses its own legal problems. Karlyn Barker and James V. Grimaldi, *Pattern of Mistakes Found in Zoo Deaths: Review Shows Some Veterinary Records Were Changed*, Wash. Post A1, A1 (Dec. 7, 2003); Dean C. Crowe, *An Appeal for Better Automated Medical Records*, 223, No. 11 JAVMA 1566, 1567 (Dec. 1, 2003).

³³⁷ *Approximately 75% of Malpractice Claims Triggered by Communications Failure*, 15, No. 3 Prof. Liability 1 (July 1996); Fiala, *Court Rulings*, *supra* n. 46, at 33 ("Grant estimates 90 percent of his cases stem from communication breakdowns.") (quoting S. Cal. Veterinary Med. Assn. president Dr. William Grant); Newman, *Defend Your Practice*, *supra* n. 147, at 34 ("Virtually every case I've taken could have been minimized or avoided with better communication between the client and team members."). In human medicine, some institutions have found that simply admitting when a mistake has occurred, and offering fair compensation for injuries, dramatically reduces the incidence of litigation and malpractice expenses. Julie Appleby, *Insurer, Hospitals Try Apologies for Errors*, USA Today 5B, 5B (Mar. 5, 2003). One veterinarian finds that using similar frankness with pet owners achieves the same ends. Franklin D. McMillan, *How I Stay Out of the Courtroom*, *Veterinary Economics* 57, 57 (Apr. 2003).

³³⁸ Mary Ann Vande Linde, *Get to Yes in the Exam Room*, *Veterinary Economics* 64, 66 (May 2003).

³³⁹ According to the CEO of the largest pet health insurer: "What we're seeing is a tremendous increase in the number of people accepting diagnostic testing and treatment. People are choosing to do more for their pets. Without diagnostics, you can't set up the proper regime early enough. Then the problem gets worse. Really, testing makes sense for your pet and your pocketbook." Spring Suptic, *Lessons from Consumer Reports*, *Veterinary Economics* 72, 76 (Sept. 2003) (quoting Jack Stephens CEO of Veterinary Pet Insurance).

³⁴⁰ Schwartz, *supra* n. 185, at 402–04.

³⁴¹ *Id.* at 404 (quoting John H. Eichhorn et al., *Standards for Patient Monitoring During Anesthesia at Harvard Medical School*, 256 JAMA 1017 (1986)).

³⁴² *Id.*

³⁴³ *Id.*

such increased levels of care will benefit veterinarians financially. One veterinarian who added an ultrasound machine to his practice to help give more accurate diagnoses found that it generated nearly \$80,000 in additional profit in just the first year.³⁴⁴ Importantly, the General Accounting Office has been unable to find a link between the practice of defensive medicine and price increases in human medical care.³⁴⁵

3. Replicating Problems of the Human Medical Malpractice “Crisis”

This commonly repeated analogy fails to take into account both the facts behind human medical malpractice insurance price increases, and the unique realities of providing veterinary liability insurance through a collective trust administered by the profession itself.³⁴⁶ The main benefit of such an industry-wide, professional insurance trust is that, unlike most other insurers, it is not motivated exclusively by profit. As such, the AVMA-PLIT can safeguard against premium price increases that are unrelated to the cost of providing coverage.³⁴⁷ This is one key factor that will always prevent the veterinary profession from experiencing the woes that have plagued the human medical industry.

To compare, although “*The size of damage claims paid out by (human) physician insurers has been more or less steady since 1991,*”³⁴⁸ and “*Claims against the (medical) industry as a whole have actually been flat since 1996,*”³⁴⁹ human doctors still are seeing unprecedented increases in their malpractice insurance prices.³⁵⁰ Therefore, while the underlying claims trends are the same in both human and veterinary medicine, the less-profit driven AVMA-PLIT has been able to ensure that veterinarians’ premiums more accurately reflect the reality of coverage costs.³⁵¹ Because these numbers clearly show that physician’s insurance price spikes have no correlation to increased litigation or damage awards, any “crisis” that exists in human medicine has nothing to do with compensating plaintiffs or capping damages.³⁵² Thus to argue these points by analogy in

³⁴⁴ *Three Services You May Want to Add*, Veterinary Economics 88, 90 (Aug. 2003) (leasing the ultrasound machine costs \$8,568 per year, the revenue generated is \$88,140 per year, the average fee to client is \$113, and the veterinarian performs about 15 per week.).

³⁴⁵ U.S. Gen. Accounting Off., *Medical Malpractice: Implications of Rising Premiums on Access to Health Care* 26 (Aug. 2003).

³⁴⁶ See e.g. Charles Ober, *Editorial Letter*, L.A. Daily News N16 (July 31, 2002) (“Due to the cost of malpractice insurance for doctors, half of our population cannot afford medical treatment. With the change in legal status for animals, you can make it that 90 percent of the pet population’s guardians won’t be able to provide the animals with veterinarian care.”).

³⁴⁷ *Forty Years of Veterinarians Serving Veterinarians*, supra n. 204, at 1 (“One of the first of its kind, the founding veterinarians provided a means for veterinarians to pool their resources and leverage their insurance dollar.”); *No PLIT Rate Change*, supra n. 47, at 1 (“The PLIT’s objective is to keep premiums stable.”).

³⁴⁸ Woellert, supra n. 127, at 98 (reporting the findings of the Department of Health and Human Services’ National Practitioner Data Bank showing that human malpractice payouts between 1990 and 2001 rose by “almost exactly the rate of medical inflation.”).

³⁴⁹ *Id.* at 99 (reporting the findings of the National Center for State Courts).

³⁵⁰ U.S. Gen. Accounting Off., supra n. 345, at 1 (in certain states, some specialists’ premiums rose 100% between 2001 and 2002).

³⁵¹ It is worth noting that in 2001, the nation’s combined human medical malpractice pay-outs by physicians and their insurers amounted to less than 1/3 of 1% of the country’s total expenditures on health care. Woellert, supra n. 127, at 99 (quoting Journal of Health Affairs finding that total claim payments, settlements, and jury awards for human malpractice is 0.32 % of total spent on health care).

³⁵² In 1999 and 2000, human doctors’ malpractice insurance rates actually rose more in states with caps on damage amounts. *Id.*; see also Jim Ritter, *Malpractice Costs Driving Doctors Out*, Chi. Sun-Times 5 (Nov. 11, 2002) (News Spe. Ed.) (“Some experts said the insurance industry and the economy are more to blame

the veterinary liability debate is doubly disingenuous.

4. *Encouraging Frivolous Lawsuits, Clogging the Courts, and Excessive Damage Awards*

These three arguments are routinely advanced as reasons not to increase plaintiffs' ability to recover significant damages—or as justifications for preventing cases from ever getting to juries.³⁵³ At the outset, it would seem that each of those two goals seems to violate the very democratic soul of our civil law that endeavors to award compensation for loss, the adequacy of which is to be determined by citizens randomly chosen from among the general populace.

Nevertheless, the point remains that increasing the amount of compensation an aggrieved plaintiff can recover for companion animal loss does nothing to affect the elements of proof necessary to successfully *pursue* a claim of malpractice against a veterinarian. Those elements are: (1) That a duty to care existed; (2) That the veterinarian breached that duty by failing to conform to the veterinary standard of care; and (3) That the specific failure itself proximately caused the injury at issue.³⁵⁴ If a negligence suit does not have enough evidence to prove every one of those three elements, then it is eligible for summary dismissal by a judge.³⁵⁵ On the other hand, if enough evidence exists to convince a judge to allow a case to proceed, who is to say it is frivolous until some impartial party has heard the facts?

If this does not seem like enough deterrence to greedy trial lawyers looking to make their riches off of animal law,³⁵⁶ an easily implemented, additional safe-guard would be to require plaintiffs wishing to file civil suits for professional negligence simply to obtain a “certificate of merit” before being allowed to proceed.³⁵⁷ Such certificate requirements give plaintiffs 60 days from the date their claim is filed to obtain an affidavit from a licensed veterinarian stating: “that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or

than trial attorneys and juries. Insurance companies make money by investing premiums in stocks, bonds and other investments. To compensate for the recent drops in stock prices and interest rates, insurance companies are hiking premiums. The same thing happened in the mid-'70s and mid-'80s.”)

³⁵³ The editorial staff at the Denver Post combined these points when it weighed in on the Colorado companion animal compensation bill, declaring, “With courts already backlogged for years with civil lawsuits, this bill would only add to the burden and encourage frivolous filings. A better title would be ‘The Tort Lawyers’ Income Relief Act of 2003.’” Editorial, *Pet Law Barks Up Wrong Tree*, Denver Post B6 (Feb. 12, 2003).

³⁵⁴ Soave, *supra* n. 16, at 15–17; Favre & Borchelt, *supra* n. 16, at 237–38; King, *supra* n. 16, at 5–6; Wilson et al., *supra* n. 16, at 133–45.

³⁵⁵ See e.g. *Fackler v. Genetzky*, 638 N.W.2d 521, 527 (Neb. 2001) (exploring difficulty of proving proximate cause). In *Fackler*, multiple expert testimony confirmed that veterinarian’s habit of re-using needles intended for one-time use and failing to properly clean an injection site could have caused the bacterial infection that resulted in one of two horse deaths. Yet the court still upheld a lower judge’s dismissal of the case before evidence could be heard by a jury, stating that the plaintiffs had not met their burden of proof regarding proximate cause. *Id.* Relevantly, approximately 61% of human medical malpractice cases are similarly dismissed or dropped before trial. Eisler et al., *supra* n. 320, at 3A.

³⁵⁶ Nolen, *Pet Guardians*, *supra* n. 308, at 562 (“Tinkering with the legal status of pets might make veterinarians vulnerable to malpractice suits brought by . . . lawyers all too eager to cash in on an overemphasis of the human-animal bond.”); Gahr, *supra* n. 17, at 56–57; Meyers, *Changing Status*, *supra* n. 10, at 12 (quoting AVMA vice-president Arthur Tennyson).

³⁵⁷ See *Pennsylvania Supreme Court: No Merit, No Lawsuit*, DVM 12, 12 (Apr. 2003) (“Without a doubt” such legislation will stop “frivolous lawsuits” against veterinarians—quoting Pennsylvania Veterinary Med. Assn. lobbyist George Wolfe).

treatment practices.”³⁵⁸ Currently, 16 states have adopted the certificate of merit requirement, which trial lawyer’s associations do not seem to mind.³⁵⁹

The additional oft-repeated concern of “clogging an already overburdened court system”³⁶⁰ similarly is not grounded in any factual basis. To illustrate, in the county that is home to Houston’s Texas Medical Center, one of the largest concentrations of specialized hospitals in the Southwest, annual human medical malpractice litigation accounts for less than 2% of all civil court cases—a figure that is far from sclerotic.³⁶¹ Accordingly, even if Americans in the future pursue veterinary negligence claims to the same degree that they do human ones, these suits will have no appreciable impact on the load of our judicial system. Just in case, though, an effective filter against any prospective courthouse clogging would be to simply require mandatory arbitration before a veterinary malpractice case can proceed to the courts—as did the Colorado companion animal valuation bill.³⁶²

With regard to any worry over “excessive damage awards” in cases where veterinary malpractice is conclusively proven, such concern should be the primary reason why the veterinary community would want to get involved in the formulation of companion animal valuation legislation and ensure that reasonable caps are put in place.

Indeed, many in the veterinary realm are convinced that it is only a matter of time before legislation allowing greater civil damages is passed.³⁶³ If that train truly is leaving the station, veterinarians appear to have only two choices: they either can get on board and have a say in what track it takes, or they can remain on the platform only to panic later when they realize the train has traveled faster and farther than they ever anticipated. Keep in mind that legislative bills introduced in both Oregon and Michigan would have allowed up to \$250,000 dollars in recovery for companion animal loss.³⁶⁴ Yes, the veterinary community has been lucky so far in defeating these measures, but if one day they should lose, they could lose big.

Like it or not, the price of a ticket for inclusion in the legislation formation process is the concession that companion animals are worth at least something beyond bare market value. Several of the more enlightened officials and scholars within the veterinary camp have recognized this fact and are pushing their professional organizations to draft model legislation that would allow limited recovery of “non-economic” damages for companion animal loss—yet still protect veterinarians’ basic interests. As veterinary legal expert and

³⁵⁸ *Affidavit Required in Certain Actions Against Licensed Persons*, N.J. Stat. Ann. § 2A:53A-27 (1995).

³⁵⁹ *Pennsylvania Court Rules: Governor Is Happy About New Paperwork, But Will It Slow Medical Malpractice Cases?* Allentown Morning Call A16 (Jan. 31, 2003) (quoting Pennsylvania Trial Lawyers Association legislative counsel, Mark Phenicie).

³⁶⁰ *Johnson*, 723 N.Y.S.2d at 628 (“Such an expansion of the law would place an unnecessary burden on the ever burgeoning caseloads of the court in resolving serious tort claims for injuries to individuals.”).

³⁶¹ Jo Ann Zuniga, *Malpractice Awards Questioned: Critics Seek Lower Limits, But Lawyers, Judges Say There Is No Need*, Houston Chron. A13, A16 (Jan. 2, 2003) (quoting Steve Stuchlik, operations coordinator for the Administrative Office of the District Courts).

³⁶² Colo. H. 1260, 64th Gen. Assembly, 1st Reg. Sess. § 13-21-1003(2) (Jan. 31, 2003).

³⁶³ See Fiala, *Bond Legal Exposure*, *supra* n. 305, at 34 (“There’s just a prevailing attitude that the legal status of pets will change; it’s not how, but when.”) (quoting Rick Alampi, Executive Director of the New Jersey Veterinary Medicine Association); Heinke, *supra* n. 284, at 44 (“Even though the most recent attempt in Colorado was defeated, it is just a matter of time.”); Nolen, *Bond: Legal Liability?*, *supra* n. 302, at 762 (quoting former president of the AVMLA, Douglas Jack who “believes the writing is on the wall, however, and veterinarians will find themselves confronted with increased levels of exposure to liability.”).

³⁶⁴ Or. Sen. 166, 71st Leg. Assembly, 2001 Reg. Sess. § 1(2)(b) (Jan. 8, 2001); Mich. Sen. 1379, 91st Leg., 2002 Reg. Sess. § 1 (June 18, 2002).

consultant Dr. James Wilson has professed:

[I]t is my opinion that changes regarding the law's historic view of animals as nothing more than property are more likely to occur through legislative action than through court decisions and precedents. Should that be the case, I believe the only way to influence this movement is for the veterinary profession to develop model legislation that considers the detriments to the providers of animal care and the benefits to pets and the pet loving public.³⁶⁵

Others, however, continue to feel that any concession of non-market value is a defeat that will only lead down a slippery slope.³⁶⁶ Maintaining such a reactive approach, though, could be extremely risky, even if successful in defeating future legislative proposals, as one strong decision from one appellate court could still completely flip a state's civil damages jurisprudence and set binding precedent for expanded companion animal recovery.³⁶⁷ Indeed, California, Texas, and Illinois all seem poised for just such a reversal.³⁶⁸

In the reflective aftermath of "dodging the bullet" in Colorado, Ralph Johnson reached some of these same conclusions, and now believes that the profession needs "to lead the way in developing a resolution to the issues."³⁶⁹ He states further: "A proactive approach has its risks, certainly, but so does an approach that is solely reactive."³⁷⁰ Calling the valuation question "the most important issue facing the veterinary profession in 2004," the California Vet. Med. Assn. similarly has formed a task force of veterinary doctors, lawyers, and animal activists that will discuss the need for legislation to address the civil law's inconsistent treatment of companion animals.³⁷¹

³⁶⁵ James F. Wilson, Presentation, *\$250,000 in Emotional Distress Damages for the Loss of a Pet? What's This Bond Coming To?* 8–9 (AVMLA Annual Meeting Denver, Colo., July 20, 2003) (paper on file with *Animal Law*, Lewis & Clark L. Sch., or available through the AVMLA). Elsewhere Dr. Wilson has professed: "Vets should support emotional-distress damages for owners of pets that suffer cruelty. They should do a better job policing colleagues who provide substandard care. And, before it erupts as a costly problem, they should lobby for caps on medical malpractice damages." Stobbe, *supra* n. 268, at 1E (quoting Dr. James Wilson).

³⁶⁶ See Fiala, *Profession Grapples*, *supra* n. 56, at 42 (quoting veterinarian Robert Greenwald who believes: "That'll just get us into trouble, admitting to the courts that pets are worth more. They have a hard time suing us now, so if it ain't broke don't fix it. Isn't that what they say?").

³⁶⁷ Underscoring this risk, in Maryland the plaintiff in a current veterinary malpractice case is seeking \$600,000 in damages for a still-born litter of puppies. Alisa Bralove, *Dog Breeder Files Veterinary Malpractice Suit*, *The Daily Record* (Baltimore, Md.) 1B (Nov. 12, 2003).

³⁶⁸ See Jean-Paul Renaud, *Jury Awards Dog Owner \$39,000 in Malpractice Suit*, *L.A. Times* B5 (Feb. 24, 2004) (referring to the recent case, *Bluestone v. Bergstrom et al.*, No. 00CC00796 (Orange County Sup. Ct. Feb. 21, 2004), in which the court ordered judgment awarding \$30,000 for "the dog's unique value to his owner" in the veterinary negligence case; Claire Osborn, *High Price Put On Dog's Life*, *Austin American–Statesman* B1 (Nov. 16, 2003) (reporting on a Texas judge who awarded \$47,000 in damages for loss of a dog against Petco, including \$10,000 *each* for "emotional anguish, loss of companionship, and punitive damages"). Also, in November 2003, one Illinois court refused to dismiss a claim of intentional infliction of emotional distress in a veterinary malpractice case asking \$150,000 in compensatory and \$300,000 in punitive damages. Telephone Interview with Amy Breyer, Plaintiff's Attorney in the Case (Feb. 15, 2003) (discussing judge's ruling in motion to dismiss hearing for *Kuczora v. Malin, et al.*, No. 03–L–003530 (Cook County Cir. Ct. March 24, 2003)). See also Janice Neumann, *Veterinarian Faces Malpractice Lawsuit in Cat's Death*, *Chi. Trib.* A5 (Apr. 10, 2003) (describing the specific details of the case).

³⁶⁹ Johnson, *supra* n. 330, at 7

³⁷⁰ *Id.*

³⁷¹ Fiala, *CVMA Covets*, *supra* n. 313, at 36 (quoting California Veterinary Med. Assn. executive director Dr. Richard Schumacher); Claire Booth, *Lawsuit Determines Pets Are Not Just Property*, *Contra Costa Times* A29 (Nov. 2, 2003).

The California veterinary organization's executive director has said he personally would like to see a separate class of property designated for pets,³⁷² and has hinted at such a move, stating: "I'm not saying where we'll end up on this, but I do think we must do something to start a dialogue regarding the status of animals and find a solution."³⁷³ In Colorado, Ralph Johnson says that his group has "made no decision yet about formulating and advancing a specific bill," but adds, "we're doing our homework."³⁷⁴

These moves are extremely promising, as is the change in rhetoric by the leadership of several state veterinary associations. Astonishingly, California's executive director has even gone so far as to say publicly: "I don't think there's anybody that doesn't agree that pets are more than property."³⁷⁵ Likewise, the head of the New Jersey Vet. Med. Assn. has acknowledged: "The concept of veterinarians positioning themselves as integral to the human-animal bond while claiming immunity from malpractice awards is a pipe dream. You can't have it both ways."³⁷⁶ Hopefully, these organizations' new words reflect a fundamental shift from their not so distant deeds.³⁷⁷

V. POSSIBLE SOLUTIONS TO THE IMPASSE

A. *Lessons of History*

A little over a hundred years ago, the U.S. Supreme Court unilaterally declared that most dogs lacked *any* utility value and subsequently excluded them from being considered property at all.³⁷⁸ Accordingly, "owners" of unregistered dogs, were barred from recovering even a dog's cost or market value if it was negligently or intentionally killed.³⁷⁹ This view was responsible for such absurd outcomes as dog thieves being civilly liable for the value of a dog's collar, but not the dog itself,³⁸⁰ or able to be prosecuted for

³⁷² Booth, *supra* n. 371, at A29.

³⁷³ Fiala, *Courts Sway*, *supra* n. 18, at 21 (quoting California Veterinary Med. Assn. executive director Dr. Richard Schumacher).

³⁷⁴ Johnson, *supra* n. 330, at 8.

³⁷⁵ Booth, *supra* n. 371, at A29 (quoting California Veterinary Med. Assn. executive director Dr. Richard Schumacher).

³⁷⁶ Fiala, *Bond Legal Exposure*, *supra* n. 305, at 34 (quoting Rick Alampi, executive director of the New Jersey Veterinary Med. Assn.).

³⁷⁷ The executive director's comment notwithstanding, the New Jersey Veterinary Med. Assn. is currently expending considerable resources to defeat or eviscerate proposed New Jersey legislation that would allow increased civil recovery for pet loss—even though the bill caps damages for loss of companionship at a mere \$500, and would apply only to intentional acts of cruelty not negligence. Meyers, *Pet Status Laws*, *supra* n. 52, at 17; Charlotte A. LaCroix, Presentation, *Property, Guardians, Companions: Oh Yes! Oh No!!* (AVMLA Annual Meeting Denver, Colo., July 20, 2003) (paper on file with *Animal Law*, Lewis & Clark L. Sch., or available through the AVMLA). Similarly, in 2002, the California Veterinary Med. Assn. successfully fought to kill a legislative provision that would have allowed \$5,000 in civil damages for loss of a companion animal. Duane Flemming, *President's Message*, AVMLA Newsletter 2 (June 2002) (describing CVMA-influenced amendments to Cal. Assembly 1774, 2001–2002 Reg. Sess. 1 (Jan. 9, 2002) completely gutting the bill of its initial intent). The bill ended up transforming into an act about coastal waterways, not even mentioning animals.

³⁷⁸ *Sentell v. New Orleans and Carrollton Railroad Co.*, 166 U.S. 693, 701 (1897). Ironically, this ruling was made one year after the first American pet cemetery was founded in 1896 at Westchester County, New York. Waisman & Newell, *supra* n. 7, at 61.

³⁷⁹ *Sentell*, 166 U.S. at 693–94 (at issue in *Sentell* was the constitutionality of a Louisiana statute mandating that dogs could only be considered property if they were registered with local government assessors and their taxable value declared.).

³⁸⁰ *Blair v. Forehand*, 100 Mass. 136, 139 (1868) ("the collars had a value distinct and separate from the dogs; they were a kind of property . . . Such a taking and use of them as is shown by the facts was a conversion; and made the defendant a trespasser from the beginning.").

stealing a dead dog, but not a live one.³⁸¹ As justification, the Supreme Court in *Sentell* selectively quoted William Blackstone's 1766 summary of English law,³⁸² written more than 130 years earlier, which stated that it was not a common law felony to steal animals, "if they are only kept for pleasure, curiosity, or whim, [such] as dogs, bears, cats, apes, parrots, and singing birds; because their value is not intrinsic, but depending only on the caprice of the owner"³⁸³

Plaintiffs who petitioned the state courts at the time occasionally got lucky by finding a judge willing to apply novel legal theories to overcome such illogic.³⁸⁴ However, the lack of consistency in such decisions often was not worth the gamble.³⁸⁵ Meanwhile, other American judges of the era expressly admonished that until the state legislatures took action to make dogs property by statute, they would not be found so under the common law.³⁸⁶

How ironic that a century later our society finds itself in the exact same predicament.

Now that the utility of companion animals is understood as one of companionship,³⁸⁷ the very victory of winning their recognition as property has itself become the primary obstacle preventing courts from again recognizing the value of these beings in our society. This rule too has led to its own share of absurd judicial justifications. One modern court even tried with a straight face to reconcile its denial of intrinsic value damages for harm to a dog with its earlier decision to compensate the intrinsic value of trees.³⁸⁸ Paradoxically, even colonial-era British law recognized the compensable *civil* value of companion animals to their owners.³⁸⁹ Indeed, Blackstone's often-quoted sentence fragment itself

³⁸¹ *Citizens Rapid-Transit Co. v. Dew*, 45 S.W. 790, 791 (Tenn. 1898) (summarizing the previous precedent: "The rule of the common law was technical in the extreme, for, while it was not larceny by it to steal a dog while living, it was larceny to steal his hide after he was dead.").

³⁸² *Sentell*, 166 U.S. at 701.

³⁸³ William Blackstone, *Commentaries on the Laws of England, Book II: Of the Rights of Things* 393 (1766). This larceny exclusion in British law was somewhat understandable, in context, because the theft of property in England was punishable by death at the time Blackstone's Commentaries were written. See *Mullaly v. People*, 86 N. Y. 365, 367 (1881) (referring to Coke's Third Institute of Law 109).

³⁸⁴ See e.g. *People v. Maloney*, 1 Parker's Cr. Rep. 593 (1854) (holding that while dogs were not covered under the *common law* definition of larceny, because the state statutorily subjected them to taxation they de facto became property which had value if stolen). Another court used similar reasoning to overturn a lower court's oxymoronic ruling that it would be a crime to steal any item *other than a dog* from inside a dog-house on someone's property! *State v. Langford*, 33 S.E. 370, 372 (S.C. 1899). In dicta, that court described at length the benefits of dog ownership, declaring: "such crude application of the principles of the common law must yield to common sense. The fitness of an animal for food is not the only test of its value to mankind." *Id.* at 371.

³⁸⁵ See *Ward v. State*, 48 Ala. 161, 161 (1872) (quoting Blackstone to hold that dogs are not considered property under larceny statute); *State v. Lymus*, 26 Ohio St. 400, 401-02 (Oh. 1875) (refusing to recognize common law larceny for dogs).

³⁸⁶ *State v. Marshall*, 13 Tex. 55 at *2-3 (1854) ("And in some of the States, dogs are by statute placed upon the same footing as other personal property. We have in this State no statute upon the subject.").

³⁸⁷ Nolen, *Golden Age*, *supra* n. 296, at 1401 ("[P]ets. . . are no longer valued primarily for practical utility, but for companionship," quoting AAHA Executive Director John W. Albers); *Mercurio*, 2003 WL 21497325 at *2 ("While the bond between man and dog has always been strong . . . only recently has a dog's chief purpose become companionship.").

³⁸⁸ *Nichols*, 555 N.W.2d at 692. Iowa apparently has a statute providing treble damages for the *willful* injury of trees. The court dismissed the dog owner's claim by reasoning: (1) "There is no similar statute relating to injury to dogs," and (2) trees have utility besides sentimental value, such as providing "shade." *Id.*

³⁸⁹ See *Wheatley v. Harris*, 36 Tenn. 468, at *1 (1857) (quoting several early British sources to hold that "upon the question whether the owner of a dog has such a property as will entitle him to maintain an action for killing or injuring the dog there can be no doubt."); Joel Prentiss Bishop, *Bishop on Criminal Law* 593 (9th ed., T.H.Flood & Co. 1923) ("Though the criminal law is otherwise . . . animals of this class may, when reclaimed, have a recognized value, and the right of property in them be protected by civil process.").

goes on to say: “though, [the theft of these animals] is such an invasion of property as may amount to a civil injury, and be redressed by a civil action.”³⁹⁰

Despite this forgotten jurisprudential wrinkle, today, as 100 years before, judges who believe their hands to be tied by common law precedent on companion animal valuation still are pointing plaintiffs towards the state legislatures as the only bodies legitimately able to make such major changes in the law.³⁹¹

B. Modern Moves Towards State Legislation

Given the widely inconsistent state court jurisprudence on the valuation issue, state legislation that specifically decrees the circumstances, requirements, and limits of compensating companion animal harm would appear to be the most fair, transparent, and democratic manner of effecting any material shift in the way our legal system evaluates such loss.³⁹² Considering the reluctance of the judges in the Peraino case to recognize *any* damages against veterinarians for causing harm to animals, state legislation is also likely to be the most sovereign manner of forcing the civil law to catch up with the prevailing social ethic towards companion animals.

Commentator Elaine Byszewski has done an excellent job of surveying the state legislative measures introduced to date that have attempted to address compensation for companion animal loss.³⁹³ Sonia Waisman and Barbara Newell also have effectively examined the various components of such legislation and made recommendations for future proposals,³⁹⁴ some of which already have been implemented.³⁹⁵ Yet any observer must acknowledge the reality that almost every one of these legislative forays either has publicly gone down in flames, as in Colorado,³⁹⁶ or died a quiet, procedural death, as in Oregon.³⁹⁷

³⁹⁰ Blackstone, *supra* n. 383, at 393–94.

³⁹¹ *Oberschlake v. Veterinary Assoc. Animal Hosp.*, 785 N.E.2d 811, 815 (Ohio App. 2003) In his concurring opinion, Justice Young, stated:

“I reluctantly agree that under the current state of Ohio law, the owners of a pet animal have no claim for noneconomic injuries to their pet. The General Assembly should at least consider recognizing pets as companion animals and allow owners to recover reasonable damages for their loss of or injury to a much-loved pet.”

Id.; *Rabideau v. City of Racine*, 627 N.W.2d 795, 807 (Wis. 2001) (Abrahamson, C.J., concurring) (calling on “the legislature to make a considered policy judgment regarding the societal value of pets as companions and to specify the nature of the damages to be awarded in a lawsuit.”); *Koester v. VCA Animal Hosp.*, 624 N.W.2d 209, 211 (Mich. App. 2000):

Although this Court is very sympathetic to plaintiff’s position, we defer to the legislature to create such a remedy. [P]laintiff and others are free to urge the Legislature to visit this issue in light of public policy considerations, including societal sentiment and treatment of pets, and the prospect of public perception that Michigan law does not provide a just and fair remedy to pet owners who pay veterinarians to perform specialized services for their pets with the legitimate expectation that their pets will receive the appropriate treatment, but instead suffer when their pets are further or fatally injured because of a veterinarian’s negligence.”

Rabideau and *Koester* opinions quoted in Byszewski, *supra* n. 6, at 224–25.

³⁹² See Byszewski, *supra* n. 6, at n. 125 (“To the extent that the bills allow noneconomic damages or emotional damages, the values are inherently arbitrary, and the legislature is certainly an appropriate body to make estimates about the emotional value their constituents derive from their companion animals.”).

³⁹³ *Id.* at 225–30.

³⁹⁴ Waisman & Newell, *supra* n. 7, at 69–73.

³⁹⁵ Byszewski, *supra* n. 6, at n. 86.

³⁹⁶ Julia C. Martinez, *Pet Bill Killed by House Sponsor, Move Outrages Senate Backer*, Denver Post B1 (Feb. 16, 2003).

³⁹⁷ Scott Beckstead, Presentation, *Advancing Protections for Animals Through the Common Law* (11th Annual Animal Law Conference, Portland, Or. (Oct. 26, 2003)) (copy on file with *Animal Law*, Lewis &

Many of these defeats were due in large part to an underestimation of the organized might of the veterinary profession,³⁹⁸ or to a tactical failure to take that community's perspective into account from the outset.³⁹⁹ Indeed, many parts of Colorado's proposed legislation were extremely well crafted,⁴⁰⁰ yet at the same time sabotaged by other elements that were perceived, quite correctly, as specifically singling out veterinarians for some vindictive purpose.⁴⁰¹

Regardless of these previous setbacks, the fact remains that pet owners have a long history of active political engagement. Proving this point, the United States Congress received more letters, telegrams, and phone calls on animal related issues than on *any* other topic in the ten-years spanning the late 1980's and early 1990's—a period that included the first Gulf War, Iran-Contra scandal, and the fall of the Socialist European regimes.⁴⁰² At the all-important state level, this pattern of extensive political engagement regarding companion animal issues has been consistently repeated in the experiences of Governors, legislatures, judges, and private entities.⁴⁰³

Consequently, as the economics of the veterinary malpractice issue are brought to light, it likely will not be long before the political will emerges to address our current legal absurdity of allowing veterinarians to exploit companion animals' value at the cash

Clark L. Sch.) (The attorney who drafted the Oregon civil damages legislation described being astonished at how the measure was killed in committee “with just one phone call from veterinary and insurance interests.”).

³⁹⁸ *Id.*

³⁹⁹ Ralph Johnson, executive director of the Colorado Veterinary Med. Assn., describes how the veterinary community learned of last year's legislation:

House Bill 1260 was introduced on Friday afternoon, Jan. 31, 2003. I call it a stealth bill—we had no knowledge of its development, no opportunity for input, no information from our lobbyists that it was on the horizon, no comment from an allied organization that they'd heard about something in the brew. Its development was a total secret, at least to our intelligence networks.

Johnson, *supra* n. 330, at 3.

⁴⁰⁰ One forward thinking element of the Colorado legislation was a provision for mandatory arbitration before any claim could proceed to trial. Colo. H. 1260, 64th Gen. Assembly, 1st Reg. Sess. § 13-21-1003 (Jan. 31, 2003).

⁴⁰¹ See Richardson, *supra* n. 292, at A13 (in which the retired millionaire backing the legislation makes clear that he was on a crusade against veterinarians after his dog died from a reaction to a vaccination he was misled into giving).

⁴⁰² Rollin, *The Veterinary Interface*, *supra* n. 267, at 43 (quoting studies by the National Institute of Health and the National Cattleman's Association); see also Gary L. Francione, *Animals as Property*, 2 Animal L. 1, n. 16 (1996) (for the last fifteen years legislators at the state and federal levels report that animal issues generate the most significant amount of constituency concern); see also Peter Singer, *Animal Liberation* 29 (3d ed., Ecco 2002) (according to the Department of Defense, when it became public that the Army and Air Force were planning to use several hundred beagle puppies to test poison gas, American citizens sent the Pentagon more correspondence and complaints than it had received on any other, single issue *ever*, including the entire Vietnam War); 'Barney Cam' Seen as Holiday Smash, Chi. Trib. A39 (2002) (*During just one day last December, 24 million people visited the White House web-site just to watch video from a camera strapped to President Bush's pet Scottish terrier, Barney. The event set a record for the third most daily visitors ever in the history of the White House web-site—behind only Sept. 11, 2001, and the launch of the virtual tour.*).

⁴⁰³ Lydgate, *supra* n. 230, at 16 (Oregon Governor John Kitzhaber received several hundred complaints after the State Health Plan denied one woman a life-saving transplant. By comparison when a dog was ordered to be put to death for chasing a horse in 1996, he was deluged with over 10,000 requests for canine clemency or sentence commutation. Overall the Governor experienced more calls about the dog's case than any other single issue of his six-year tenure.) See Randolph, *supra* n. 16, at 10/16–10/17 (describing California S.B. 2509, signed June 16, 1980 and how vast public outcry spurred emergency legislation to prevent the killing of a dog that was mandated in one man's last will and testament); *A Five Out of Six Record-Winning Votes for Animals*, allanimals-HSUS Animal Update 2 (Winter 2002) (American voters also frequently exercise their animal concern more directly by passing ballot initiatives aimed specifically at increasing animal protection at the state level, as they did in five states during the 2002 elections.).

register, yet pretend this value does not even exist in the courtroom. Given that pet owners outnumber veterinarians by nearly 4000-to-1, and make up the majority of U.S. households, once this sentiment is catalyzed, it also will not take long for vote-conscious politicians to do the relevant math and choose the winning side.⁴⁰⁴

Indeed, this point may be closer than many realize. A deeper inspection of the quick defeat of the Colorado civil damages legislation shows that the outcome easily could have gone the other way. When the freshman representative who introduced the bill withdrew it without notifying fellow legislators, he infuriated his much higher-ranking Republican co-sponsors who reported being “bombarded” with *positive* calls, faxes, e-mails and letters from supporters.⁴⁰⁵ The bill’s primary Senate sponsor went so far as to publicly call the junior congressman and his advisers “a bunch of gutless worms.”⁴⁰⁶ Notably, Colorado’s senior Republican Senator added: “I would have fought for this bill to the end. No one is going to tell me that pets are mere property.”⁴⁰⁷

C. Legislative Recommendations

My interaction with figures on both sides of the veterinary negligence compensation issue has afforded a useful perspective and provided some insight as to the sincere concerns of the various parties. Because this vantage may be useful in bringing those groups closer to consensus, I will conclude by giving my own opinions on the elements of future legislative measures that are vital to: (a) achieving the necessary goal of increasing social welfare efficiency by more appropriately compensating companion animal loss; and (b) having any pragmatic hope of passage in the face of an organized veterinary establishment, which is not only the strongest,⁴⁰⁸ but often the *only* organized group with the power and funding to nullify such legislation.

I. Changing Legal Status Not the Immediate Answer

The first, and most controversial, subject is the issue of “guardianship versus ownership”: a battle that is being waged in state and local governments all over the country.⁴⁰⁹ While the intentions of the guardianship juggernaut may be noble at heart, the

⁴⁰⁴ AVMA, *U.S. Pet Ownership*, *supra* n. 21, at 6 (Ratio was calculated by multiplying the proportion of pet owning households by the overall population, and then dividing that sum by the number of private practice veterinarians (58.3% x 287, 973, 924 ÷ 44,000 = 3815). 2002 U.S. population figure: U.S. Census Bureau, *population estimates*, <http://eire.census.gov/popest/data/states/tables/NST-EST2003-01.php> (accessed Feb. 27, 2004). Number of private practice veterinarians: McCurnin, *supra* n. 47, at 24. All figures used are from 2002.

⁴⁰⁵ Martinez, *Pet Bill*, *supra* n. 396, at B1 (quoting chief senate sponsor Sen. Ken Chlouber). Although the freshman state representative who introduced the civil damages bill succumbed to pressure to pull it before it even reached committee, the bill was co-sponsored by both the ranking Republican and President of the Colorado Senate.

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.* (that all three backers of the Colorado civil damages legislation were Republicans underscores Judge Posner’s observation that animal issues typically transcend any partisan political valence); Richard A. Posner, *Book Review of Rattling the Cage: Toward Legal Rights for Animals*, 110 Yale L.J. 527, 536 (Dec. 2000) (“[Animal concerns] are as compatible with right-wing as with left-wing views.”); Gahr, *supra* n. 17, at 57 (It also counters the unfounded ranting of some that the companion animal valuation issue is an attempt by “left-wing advocates to infringe on individual property holders and government alike.”). Richardson, *supra* n. 292, at A13 (quoting James Schwartz) (Indeed, the Republican citizen whose loss inspired the Colorado legislation pointedly observed, “[t]his isn’t a liberal boo-hoo issue This is a Republican issue of personal responsibility.”).

⁴⁰⁸ Byszewski, *supra* n. 6, at 230.

⁴⁰⁹ Nolen, *Pet Guardians*, *supra* n. 308, at 561 (examining the issues and venues of the guardianship

practical implementation and potential repercussions of such a categorical shift need to be exhaustively investigated to make sure that any positive benefits gained are not outweighed by unforeseen negative consequences.⁴¹⁰ For example, if a legal conflict does arise over an animal's best interest, who will be the arbiter of any decision?⁴¹¹ The courts that currently are extremely reluctant to value companion animals more than their purchase price? Or, as with children, a governmental agency such as the U.S.D.A., which is notorious for its lack of oversight and poor policing of animal welfare regulations?⁴¹² Moreover, if one of these arbiters does ultimately decide that a companion animal's interest trumps the "ownership" rights of a "guardian," could that qualify as an unconstitutional taking of private property without just compensation?⁴¹³

For these reasons and others, the veterinary community is extremely wary of any statutory shift in the legal relationship between humans and companion animals.⁴¹⁴ This wariness is not eased by the Trojan Horse-evoking comments of the Guardianship project's leader Elliot Katz, who states: "Our immediate goal is to expand on existing laws to recognize a respectful relationship between two individuals of different species . . . our ultimate goal is to elevate the status of animals from that of property to that of individuals with needs and rights of their own."⁴¹⁵ Accordingly, any companion animal compensation bill that mandates a shift in terminology from owner to guardian will be strenuously opposed by the veterinary profession.

This is well worth noting because such a shift in nomenclature or legal status is not necessary to accomplish the social goal of achieving adequate compensation for intentional or negligent harm to companion animals.⁴¹⁶ As in Tennessee and Illinois,

debate).

⁴¹⁰ See Duane Flemming, *Ownership of Animals vs. Guardianship of Animals: The Effect of a Change in the Law on Veterinarians in California*, California Veterinarian 10, 11–14 (May/June 2002) (this White Paper, commissioned by the California Veterinary Med. Assn. and prepared by the AVMLA, provides an insightful list of non-obvious potential problems embedded in the issue (also available online, California Veterinary Medical Association, *Ownership of Animals vs. Guardianship of Animals*, <http://www.cvma.net/images/cvmapdf/ownerguardian.pdf> (accessed Feb. 14, 2004)).

⁴¹¹ As a hypothetical problem under a guardianship model, what should properly happen if a client asked a veterinarian to continue with highly invasive treatments, such as bone-marrow transplants and chemotherapy, to prolong the life of a companion animal, but which would continue to cause it great suffering? To whom would the custodial veterinarian have the legal duty in that instance? Further, could a veterinarian be not only morally, but perhaps legally, obligated to euthanize a companion animal being subjected to such distress if the primary motivation for treatment is merely prolonging the emotional benefit of the guardian? For an excellent moral and practical discussion of the role of veterinarians in the competing interests of humans and their companion animals, see generally Bernard E. Rollin, *The Use and Abuse of Aesculapian Authority in Veterinary Medicine*, 220, No. 8 JAVMA 1144 (Apr. 15, 2002). For a brief summary of the veterinary oncology debate see Alice Villalobos, *Empathy, Economics and Ethics Drive Treatment*, Veterinary Practice News 29, 29 (Jan. 2003).

⁴¹² Joby Warrick, *They Die Piece By Piece*; *In Overtaxed Plants, Humane Treatment of Cattle Is Often a Battle Lost*, The Washington Post A1 (Apr. 10, 2001) (describing video footage from the world's largest USDA inspected slaughterhouse in Wallulla, Washington showing *fully conscious* cows being skinned alive and having their legs cut off).

⁴¹³ Flemming, *supra* n. 410, at 11.

⁴¹⁴ LaCroix, *supra* n. 377 (for example, the opening presentation at the 2003 AVMLA Annual Meeting was entitled *Property, Guardians, Companions: Oh Yes! Oh No!!*); Nolen, *Owners or Guardians?*, *supra* n. 308, at 1240.

⁴¹⁵ Elliot Katz, *Pet Peeve: Do We Own Our Pets, Or Just Supervise Them?* S.F. Chronicle A29 (Sept. 2, 1999).

⁴¹⁶ Harold W. Hannah, *Animals as Property—Changing Concepts*, 25 S. Ill. U. L. J. 571, 576 (2001) ("In view of the fact that a few courts have allowed recovery for emotional distress without reference to the property concept indicates that this result can be accomplished without changing that concept."); Lynn A. Epstein, *supra* n. 8, at 46.

states enacting such legislation can simply ordain the terms of how the new law will be applied—either through creating entirely new causes of action, or allowing existing ones to be extended to other animals.⁴¹⁷

2. Compensation Must Include Injuries Incurred During Veterinary and Other Custodial Care

Veterinarians have been explicitly exempted from companion animal compensation bills introduced in California, Connecticut, Maryland, Oregon, Rhode Island, and Tennessee.⁴¹⁸ The Oregon and Rhode Island bills further restricted damage awards by adding language similar to a New York act which requires that the death or injury at issue occur: “*While that companion animal is on the premises of its owner . . . or . . . under the direct control and supervision of its owner.*”⁴¹⁹ Such conditions essentially eliminate all incidences of veterinary harm from being compensated under these statutes.

As with the sweeping veterinary exemption from criminal prosecution under anti-cruelty statutes, these unwarranted exclusions have the serious potential to exacerbate the current economic inefficiencies caused by the lack of legal deterrence for veterinary acts of negligence.⁴²⁰ To repeat, though, there should be no worry about increased amounts of frivolous litigation as a result of higher damage potentials. This is because any animal harm that occurs in the process of diagnosing, treating, or preventing animal disease is a matter of professional negligence that triggers the rigorous proof requirements of the veterinary standard of care.⁴²¹ Furthermore, recent courts have been willing to invoke these restrictions in extremely broad circumstances—thereby protecting veterinarians from liability should there be an increase in illegitimate claims.⁴²² Demonstrating the

⁴¹⁷ See Tenn. Code Ann. 44-17-403(a) (2000); 510 Ill. Comp. Stat. 70/16.3 (2002) (both of which statutorily created civil remedies for the loss of a companion animal without having to alter the property status of pets).

⁴¹⁸ Cal. Sen. 225 § 1(g)(3), 2003-2004 Leg., Reg. Sess. (Feb. 13, 2003) (“This section does not apply to . . . [a]ctions against a licensed veterinarian for professional negligence.”); Conn. H. 5571, 2002 Reg. Sess. § 1(d)(1) (Feb. 26, 2002) (“[T]his section shall not apply to . . . [a] licensed veterinarian . . . while following accepted standards of practice of the profession”); Md. H. 907 § 1 11-110(C)(1), 415th Gen. Assembly, 2001 Reg. Sess. (Feb. 9, 2001) (“This section may not be construed to apply to any person who negligently causes the injury or death of a pet and who is . . . [a] licensed veterinarian who was providing medical assistance to the pet.”); Or. H. 3298 § 1(7)(b), 71st Leg. Assembly, 2001 Reg. Sess. (Jan. 8, 2001) (“An action may not be brought under this section against . . . [a] licensed veterinarian or licensed veterinary technician.”); R.I. Sen. 159 § 4-23-2(e), 2003-2004 Leg., Reg. Sess. (Jan. 28, 2003) (“nor shall this section be construed to authorize any award of noneconomic damages in an action for professional negligence against a licensed veterinarian.”); Tenn. Code Ann. § 44-17-403(e) (2000) (“nor shall this section be construed to authorize any award of noneconomic damages in an action for professional negligence against a licensed veterinarian.”).

⁴¹⁹ N.Y. A.B. 4545 § 1(1), 2003–2004 Reg. Sess. (Feb. 19, 2003) (emphasis added) (unlike the Oregon and Rhode Island bills, the New York act also compensates injuries that occur “after unlawfully removing that companion animal from the premises of its owner,” yet fails to address supervision by lawful caretakers). See Or. H. 3298 § 1(3), 71st Leg. Assembly, 2001 Reg. Sess. (Jan. 8, 2001) (allowing claim “only if the conduct causing the death of the pet occurs on real property belonging to the plaintiff or to a person that cares for the pet, or while the pet was under the control and supervision of the owner or the pet’s caretaker.”); R.I. Sen. 159 § 4-23-2(a), 2003-2004 Leg., Reg. Sess. (Jan. 28, 2003) (“provided that if such death is caused by the negligent or intentional act of another, the death or fatal injury must occur on the property of the deceased pet’s owner or caretaker, or while under the control and supervision of the deceased pet’s owner or caretaker.”).

⁴²⁰ Posner, *Corrective Justice*, *supra* n. 201, at 202 (“But not all negligent injuries would be deterred, so some victims of wrongful injury would go uncompensated.”).

⁴²¹ See *supra*, nn. 354–55 and accompanying text (discussing the proof requirements of the veterinary standard of care).

⁴²² See *McGee v. Smith*, 107 S.W.3d 725, 726 (Tex. App. 2003) (The court in McGee ruled that

difficulty of proving these required elements, one attorney who has defended veterinarians for the AVMA-PLIT for over 10 years claims never to have lost a jury trial.⁴²³

Importantly, almost counter-intuitively, these exemptions from civil damages legislation also may not be in the best interest of the veterinary profession itself. This is because: *When veterinarians are exempted from legislation allowing damages for animal harm, by definition they correspondingly are not protected by any cap on such awards.* As a result, because the Tennessee T-Bo law does not apply to veterinarians, there is now nothing to stop a court in that state from allowing damages in a veterinary malpractice case far in excess of the act's existing legislative limit of \$4,000 for other types of companion animal harm.⁴²⁴

Restrictions that require animal injuries to be sustained while under the direct control of owners also are unnecessarily broad if the goal is to protect average citizens from being subjected to lawsuits for accidents such as vehicular collisions with dogs running loose. To retain these protections, yet still reprimand custodial negligence, proposed bills should simply include legislative language that specifically compensates injuries sustained while animals are in the direct care of others, such as veterinarians, kennels,⁴²⁵ shelters,⁴²⁶ and grooming facilities.⁴²⁷ As the cases show, because under-compensated harm frequently afflicts companion animals during such custodial care, any such legislative absolution from meaningful civil penalties is contrary to the economic interests of society.

3. Cause of Action Must Be Narrowly Tailored to Compensation for Animal Harm

The language and standard used by any civil damages legislation needs to be direct enough to provide effective guidelines to judges still confounded by property precedent,

veterinarians' failure to provide food and water to a foal and mare over a hot Texas, three-day weekend—who both then died as a result—was not ordinary negligence but a matter of professional care that required expert testimony. The appellate court subsequently overturned a \$45,000 lower court judgment obtained by the plaintiff. In a sharp dissent, one judge protested that this was the equivalent of turning every civil action happening to involve a physician as a defendant into a medical malpractice case.) (Dauphinot, J., dissenting).

⁴²³ Telephone Interview with Garry R. Kaplan, *supra* n. 178. (Notably, *more than three out of four* human medical malpractice trials result in the jury finding *no* fault and awarding *no* damages whatsoever to the plaintiff), Bureau of Justice Statistics, *Civil Justice Survey of State Courts, 1996*, 1, Table 1, <http://www.ojp.usdoj.gov/bjs/pub/pdf/ttvlc96.pdf> (accessed Feb. 14, 2004) (examining data from nation's 75 largest counties).

⁴²⁴ Many veterinarians who study this issue have privately admitted to the author that demanding this exemption in Tennessee was probably a mistake in hindsight, given the relatively low cap on damages.

⁴²⁵ See *Rees v. Flaherty*, 2003 WL 462868 at *2 (Conn. Super. Feb. 6, 2003) (denying negligent infliction of emotional distress to plaintiff whose dog was lost while boarded at a kennel that failed to search for dog and did not notify owner for eight days); *Nichols*, 555 N.W.2d at 692 (involving dog whose front leg was torn off by another dog while being boarded at the kennel).

⁴²⁶ See *Tarpy v. County of San Diego*, 1 Cal. Rptr. 3d 607 (Cal. App. 4th 2003). (In this wrenching case of preordination, the court rejected the duress claim of a plaintiff against a county animal shelter that would not allow him to retrieve his dog (which had been picked up at large) until he consented to having it neutered at their facility. The owner eventually signed the consent form "because he felt he had no other choice," but wrote the words "under duress" next to his signature and warned that he would sue if anything happened to his dog. That night, his dog bled to death alone in the shelter because of a loose suture from the procedure. The duress claim arose because the shelter was otherwise protected by governmental immunity.) See also David Hasemyer & David Washburn, *Man Sues Over Dog's Death in Animal Shelter*, San Diego Union-Tribune B1 (May 11, 2001) (local newspaper article about incident).

⁴²⁷ See *Mercurio*, 2003 WL 21497325 at *2 (presuming loss of companionship in award for a Sept. 11, 2001 widow whose dog died after receiving burns from dryer at grooming facility). In a similar instance a 12-week old puppy died from being left in a dryer overnight at a veterinary boarding facility. *Death of Puppy Causes Embarrassment to Clinic*, 17, No. 1 Prof. Liability 2 (Winter 1998).

yet still simple enough to be understood by jurors charged with deciding to what degree non-market value damages are warranted in a particular instance. This language also needs to be adequately specific to address the concern that any cause of action for companion animal loss might later be used expansively to award damages to multiple plaintiffs,⁴²⁸ or to permit damages for other losses not currently compensated—such as that of an inanimate object of property,⁴²⁹ or even a human best friend.⁴³⁰ State legislative attempts also should avoid bundling the civil damages issue with any other type of mandate, like dictating specific guidelines for the practice of veterinary medicine. Ambitious over-inclusiveness in Colorado regarding vaccination schedules and consent requirements was but another nail in that bill's eventual coffin that negatively diverted attention away from the fundamental issue of inadequate available compensation.⁴³¹

As several commentators have noted, employing loss of companionship as the legislative basis of greater civil compensation for companion animal harm produces a rule that is much clearer to define, understand, and determine.⁴³² Such language also overcomes the severe problems resulting from different jurisdictions' conflicting

⁴²⁸ See *Rabideau*, 627 N.W.2d at 799, 802 (expressing unease over the number of humans that could potentially be affected by animal's loss, and the many types of animals able to be companions to humans, stating, "We are particularly concerned that were such a claim to go forward, the law would proceed upon a course that had no *just* stopping point.") (emphasis in original). In accordance with this concern, the categories of covered animals should be specifically defined in any civil damages legislation. However, a recent snapshot of the companion animals being treated at New York's largest animal hospital indicates this category should be somewhat broad. See Bilger, *supra* n. 21, at 51:

On a recent day, the exotics unit treated a ferret with a hair ball, an anorexic bearded dragon, a pigeon with a fracture, two wild Canada geese that had got tangled in fishing line, a four-year-old guinea pig awaiting five-thousand-dollar surgery on a ureteral stone, and a hummingbird with a broken wing.

Id.; see also Hannah, *supra* n. 416, at 573 ("Companion animals cannot be defined strictly along species lines because individual human beings may develop a fondness for an individual animal from almost any species."); 16(2) *Anthrozoös*, 98–134 (2003) (featuring articles by seven different authors addressing the question: "What is a pet?").

⁴²⁹ See *Johnson*, 723 N.Y.S.2d at 628 (holding that if emotional distress were allowed for companion animal loss, "[t]he extension of such thinking would permit recovery for mental stress caused by the malicious or negligent destruction of other personal property; i.e., family heirloom or prized school ring.").

⁴³⁰ This concern over damages for companion animal loss being used to increase damages for human harms is not as peculiar as it seems. See *Rowe v. Sisters of Pallottine Missionary Society*, 560 S.E.2d 491, 501–03 (W.Va. 2001) (arguing the prejudicial nature of closing argument in a personal injury case that resulted in a \$880,186 award for plaintiff's injured leg: "if (plaintiff) was a horse, I could come in here and say, well, that horse's leg's worth—a Kentucky Derby winner, millions and millions of dollars. You wouldn't have any problem. This young man is certainly worth as much as a horse."). Such expanded application, however, is not necessarily always a negative for society. See Marjorie Spiegel, *The Dreaded Comparison* 57 (Mirror Books 1996) (discussing early case where damages were awarded for future slaves killed during middle passage under theory that "the case of slaves was the same as if horses had been thrown overboard."); Lela B. Costin, *Unraveling the Mary Ellen Legend: Origins of the "Cruelty" Movement*, *Social Service Rev.* 203, 213 (June 1991) (analyzing the tale of how ASPCA founder Henry Bergh used New York's animal anti-cruelty law to prosecute the country's first ever child abuse conviction in 1874).

⁴³¹ See Martinez, *Pet Bill*, *supra* n. 396, at B1.

⁴³² Huss, *supra* n. 15, at 92:

Proving the existence of a relationship is necessary for damages for loss of companionship. Clearly, a distinction can be made between animals that are treated as members of the family (in that they live in the home, their birthdays are celebrated, they are in the middle of family photos, the best of veterinary care is provided) and animals that have little contact with human family members.

Id.; Lynn A. Epstein, *supra* n. 8, at 47 ("Courts should also require testimony as to the quality of the time spent together, examples of the important role the pet played in the owner's life, and the "uniqueness" of that relationship."); see *Louisiana Farm Bureau Mut. Ins. Co. v. Dunn*, 484 So. 2d 853, 856 (La. Ct. App. 1st Cir. 1986) (disallowing emotional trauma damages of farmer for herd of cattle hit by truck after he admitted his distress was from worrying about the financial loss rather than the thought or sight of his dead and injured cattle).

standards for demonstrating infliction of emotional distress. Among such factors are: contrasting requirements for medical proof of physical trauma to the plaintiff, differing criteria for whether the plaintiff witnesses the injury or not, and divergent parameters regarding the degree of intentionality involved in causing the harm.⁴³³

These complex, yet often nebulously subjective, elements of proof further magnify the potential cost of litigation for all parties involved, while increasing the level of difficulty for fact-finders attempting to reach uniform and consistent decisions. As these are two of the primary problems sought to be corrected by legislation addressing companion animal valuation, any attempt to base such legislation on emotional distress or pain and suffering claims would be counterproductive. Loss of companionship also is a more accurate characterization than the terms “non-economic” or “sentimental” damages, because those labels implicitly ignore the fact that the human-companion animal bond has a significant economic component.⁴³⁴

Punitive damages, too, should play a role in legislation to enforce the veterinary standard of care, especially in those states that explicitly exempt veterinarians from the ambit of animal anti-cruelty statutes.⁴³⁵ However, because punitive damages are not covered by veterinary malpractice insurance,⁴³⁶ and in many states such coverage is illegal,⁴³⁷ veterinarians are likely to fight hard against their inclusion in any proposed legislation.⁴³⁸ It would therefore not be wise to make punitive provisions the centerpiece of any civil recovery legislation.

Furthermore, regarding enforcement of the veterinary standard of care, many veterinarians’ actions deemed negligent for purposes of malpractice simply may not rise to the level of intentionally inflicted emotional distress, or trigger punitive damages.⁴³⁹ Thus, any civil damages provisions that relied on these components to justify recovery would not be very effective in regulating veterinary negligence. The same is true for negligent infliction of emotional distress, as courts have used their considerable discretion to be especially hostile towards any attempts to demonstrate the elements necessary to prove such a claim against veterinarians.⁴⁴⁰

⁴³³ Lynn A. Epstein, *supra* n. 8, at 46 (“Recovery for mental distress as an element of fair market value has proved elusive and unsuccessful.”); *see also Johnson*, 723 N.Y.S.2d at 627 (plaintiff had to dive out of the way of a speeding automobile that killed her dog Coco in front of her—satisfying both the ‘zone of danger’ and ‘witnessing bystander’ requirements—yet court still dismissed all claims for emotional distress because dog was not a “family member.”); *Rabideau*, 627 N.W.2d at 795 (the same reasoning applied when neighbor shot plaintiff’s dog multiple times in front of her).

⁴³⁴ *See Nichols*, 555 N.W.2d at 692 (relying on the “sentimental” and “intrinsic” value language of the plaintiffs claim to ignore the obvious utility of companionship of a dog in relation to aforementioned trees).

⁴³⁵ Lynn A. Epstein, *supra* n. 8, at 48 (“The purpose of awarding punitive damages is to compensate victims for losses that standard compensatory damages do not cover, to act as punishment for bad acts, and to supplement the deterrent functions of both tort and criminal law.”).

⁴³⁶ Telephone Interview with Janice Mogan, Trust Representative of the AVMA-PLIT, *supra* n. 67.

⁴³⁷ Telephone Interview with Jay O’Brien, President of ABD Insurance, *supra* n. 312.

⁴³⁸ It might be difficult, though, for veterinarians to win the argument that any act deemed extreme enough to warrant punitive damages in the eyes of a jury, should not be worthy of such. Furthermore, by comparison, punitive damages are only awarded in 1% of human medical malpractice cases, indicating that this worry may be overblown. Bureau of Justice Statistics, *supra* n. 423, at 7, Table 7. Interestingly, Juries are actually *three times less likely* to award punitive damages to plaintiffs than are judges, and the median punitive damage amount awarded by judges is *more than double* the punitive amount awarded by juries. *Id.* at 7.

⁴³⁹ Cupp & Dean, *supra* n. 14, at 48–49 (“In the context of veterinarian malpractice, it is difficult for a plaintiff to prevail. Even when pet owners can prove extreme and outrageous behavior, courts may reject their claims if the veterinarian’s misconduct is directed at the animal rather than the owner.”).

⁴⁴⁰ *Id.* at 49. Apparently, Great Britain has experienced the same conflict with regard to such damages.

In view of these procedural problems, it becomes apparent that loss of companionship is the most uniform, consistent, and administrable of all the existing causes of action for loss of a companion animal due to veterinary negligence.⁴⁴¹ Moreover, because the human-animal bond is indeed the very entity from which the veterinary community both personally and professionally profits, it is only logical, and equitable, that any compensation for such loss correspondingly is determined by the value of that companionship bond.⁴⁴² Clearly, veterinarians at this juncture who are found negligent no longer can reasonably assert that an animal's companionship value was "unforeseeable"⁴⁴³ prior to their committing the negligent act in question.⁴⁴⁴

4. Maximum Dollar Amount of Non-Market Value Recovery Must Be Specified

Placing a cap on damages is another necessary political reality for any companion animal valuation legislation potentially applicable to veterinarians and their insurers.⁴⁴⁵ So far, proposed legislative caps for animal loss have varied radically from \$500 for loss of companionship in New Jersey,⁴⁴⁶ to \$250,000 for "noneconomic" damages in Michigan and Oregon.⁴⁴⁷ In Colorado, an attempt to split the difference and allow up to \$100,000 for "loss of companionship damages" ended up being a huge political miscalculation that exposed the bill to serious ridicule once it became apparent the cap amount was \$55,000 *greater* than the state's statutory damage limit for wrongful death of

William T. Jackson, Presentation, *Emotional Pain and Suffering Claims for Loss of Animals in England and Wales*, (AVMLA Annual Meeting, Nashville, Tenn., July 14, 2002) (paper on file with *Animal Law*, Lewis & Clark L. Sch., or available through the AVMLA).

⁴⁴¹ Loss of companionship is also a concept that American courts have recognized for 90 years now regarding the killing of companion animals. See *McCallister v. Sappingfield*, 144 P. 432 (Or. 1914) (allowing testimony of companionship value to determine damages of dog when it was shown to have no market value, and extolling canine virtues at length in dicta). If there is concern about the companionship cause of action being applied to other humans, such as fiancés, roommates, or best friends, its recovery could be predicated on specific language allowing recovery only for "loss of non-human companionship."

⁴⁴² Indeed, the majority of cat and dog owners believe "companionship is the greatest benefit of owning their pet." Ralston-Purina, *The State of the American Pet, A Study Among Pet Owners* 6 (Oct. 2000) (the statement on companionship is the first sentence that appears in the 114 page document); Rollin, *Veterinary Medical Ethics*, *supra* n. 94, at 32–33 ("[T]here is a bonding between human beings and animals intrinsic to the companion animal relationship, in the absence of which there is little point to keeping companion animals. The nature of the relationship . . . is one of reciprocity.").

⁴⁴³ Mazor, *supra* n. 109, at 411 ("[A] veterinarian, whose livelihood is based upon the love and affection an owner feels for his or her pet, should reasonably foresee the owner's emotional distress where there is negligent injury to the pet."). One of the fundamental principles in tort law is that "a victim should be compensated for all foreseeable injuries tortiously caused," unless there is a "rational and sufficiently weighty countervailing public policy" against doing so. Wise, *supra* n. 6, at 36.

⁴⁴⁴ 93% of veterinary practices send flowers or sympathy cards after euthanizing a client's pet. *Helping Pet Owners Say Goodbye*, *Veterinary Economics* 13, 13 (Jan. 2003). Tufts Veterinary Library, indeed, has an entire shelf devoted to books dealing with human grief over the loss of a pet, and now nearly half of all veterinary colleges offer "pet-loss support hotlines" to counsel grieving clients of their companion animal clinics. The American Veterinary Medical Association, *Care for Animals, Grief Counseling, Pet Loss Support Hotlines*, <http://www.avma.org/careforanimals/animatedjourneys/goodbyefriend/plhotlines.asp> (accessed Feb. 23, 2004). See also Waisman & Newell, *supra* n. 7, at 59 (at the time, only 1/3 did so).

⁴⁴⁵ Granted, Illinois successfully enacted legislation that only put a cap on its punitive damages while setting none on the "emotional distress suffered by the owner." But several factors distinguish it: (1) It applies only to intentional acts of cruelty, (2) Hardly anyone knew about it until long after it was passed, and (3) Many of those that were aware assumed mistakenly that the \$25,000 cap on punitive damages was the maximum damage amount allowed under the entire section. Telephone Interview with Ledy Van Kavage, *supra* n. 69.

⁴⁴⁶ N.J. Assembly 3339, 210th Leg., 2d Reg. Sess. § 1 (Feb. 13, 2003).

⁴⁴⁷ Or. Sen. 166, 71st Leg. Assembly, 2001 Reg. Sess. § 1(2)(b) (Jan. 8, 2001); Mich. Sen. 1379, 91st Leg., 2002 Reg. Sess. § 1 (June 18, 2002).

a child.⁴⁴⁸ At the same time, setting such low limits as in New Jersey⁴⁴⁹ is unlikely to have any effect whatsoever on deterring intentional or negligent harm to animals in the future—nor is it likely to compensate the real value of a plaintiff’s loss.

What is the value of a particular companion animal to a particular human in today’s society? That’s a tough question to answer accurately, but not an impossible one to approximate. One commentator has demonstrated that in strictly financial terms, a companion animal is worth at least what the owner would reasonably expect to pay for care over the animal’s lifetime.⁴⁵⁰ For American pet owners, the average financial investment over the life of a companion animal has been calculated at \$12,518 for each dog, and \$11,625 for each cat.⁴⁵¹

Because these figures represent a fairly accurate “minimum estimation of entire pecuniary loss” when an owner suffers the loss of a companion animal due to veterinary negligence, any fair compensation for that loss would need to provide at least this much in civil recovery.⁴⁵² Yet, if this is the expected amount a person would be willing to pay at the very outset to start a relationship with a companion animal, surely that dollar value would rise over time as the companionship bond deepened.⁴⁵³ This fact is reflected in the additional amounts that pet owners do spend on veterinary care as their animal ages.⁴⁵⁴

One figure that both sides of the debate seem to accept as both sufficient and reasonable non-market civil compensation for negligent companion animal loss is the sum of \$25,000. This is the damage cap amount that the second largest veterinary liability insurer calculated would only raise premiums by \$212 per veterinarian per year—equating to less than a 13¢ annually cost increase per pet owning household.⁴⁵⁵ Capping sentimental damages for veterinary harm at \$25,000 also has been endorsed by leading animal legal advocate Steven Wise,⁴⁵⁶ who agreed in a recent article that a figure in this neighborhood would be an acceptable amount as long as attorney’s fees could also be awarded.⁴⁵⁷ Any limitation on damages also should include a periodic adjustment for

⁴⁴⁸ *Pet Law Barks Up Wrong Tree*, *supra* n. 353, at B6 (stating the Colorado’s statutory damage limit for wrongful death of a child is \$45,000).

⁴⁴⁹ N.J. Assembly 3339, 210th Leg., 2d Reg. Sess. § 1.

⁴⁵⁰ Byszewski, *supra* n. 6, at 240 (“That is, when a person decides to become a guardian to a companion animal, the value she places on her companion animal is at least equal to the financial expenditures she expects to make over the lifetime of the animal.”). *Id.* at 234; *see* Posner, *Economic Analysis*, *supra* n. 13, at 197 (the economic wisdom of this investment approach for minimum valuation has been validated by efficiency sentinel Richard Posner).

⁴⁵¹ Byszewski, *supra* n. 6, at 239–40.

⁴⁵² *Id.* at 240.

⁴⁵³ No one is more aware of this fact than veterinarians. One journal article discusses how maximizing a pet’s longevity and lengthening the animal’s “special relationship” with its owner precisely translates to increased profit for the veterinarian: “[e]ach dog and cat that visits your hospital is worth thousands over its lifetime. Learn how much income you could be throwing away by not recommending necessary services.” Fritz Wood, *What’s a Pet Really Worth?* *Veterinary Economics* 32 (Fall Supp. 1999). Elsewhere the author directs veterinarians to “Learn how to calculate a pet’s lifetime value and provide optimal care that bonds clients for life.” *Id.* (the illustration at the beginning of this article features a cat and dog each made out of dollar bills).

⁴⁵⁴ *Id.* at 33 (“Each geriatric dog contributes 50 percent more (in veterinary revenue) than an adult dog.”).

⁴⁵⁵ *Supra* nn. 312–314 and accompanying text.

⁴⁵⁶ Former president of the Animal Legal Defense Fund, and author of the animal legal rights tome *Rattling the Cage* (Perseus 1999), the only book ever to be simultaneously reviewed in both the *Yale Law Journal* and *Harvard Law Review*.

⁴⁵⁷ Cassio Furtado, *Lawsuits Blame Vets for Harm to Pets*, *Tampa Trib.* 1 (May 24, 2003) (proposing \$20,000 cap).

inflation to prevent such compensation from being devalued over time.⁴⁵⁸

Even more pragmatically pertinent, Illinois already has demonstrated the feasibility of passing legislation with at least this much recovery for loss of a companion animal. By including a civil damages provision in its anti-cruelty act, the Illinois legislature enacted law that permits reimbursement of all relevant economic expenses, punitive damages of up to \$25,000, uncapped compensation for emotional distress, plus reasonable attorney's fees.⁴⁵⁹ The awarding of attorney's fees and court costs also adequately solves the main economic efficiency problem caused by the existing financial disincentive for plaintiffs to litigate compliance with the veterinary standard of care.⁴⁶⁰

In closing, because the point has been so frequently made, I feel I must address a final argument against increased compensation for companion animal loss in instances of veterinary negligence. Namely, that allowing greater civil damages, even on a straight property status basis, will reduce the primacy of human beings in contemporary American society. Professor Richard Cupp has been the primary proponent of this notion, declaring: "Society's placement of pets on the same level as humans by compensating their loss . . . would devalue humanity."⁴⁶¹ Elsewhere Cupp has opined:

Most religions and cultures regard human life as uniquely sacred. If this is so, developing excessive emotional attachments to pets may be undesirable and focusing primarily on human relationships, healthier. Treating humans and pets in the same way regarding emotional distress might legitimize and encourage valuing pets as much as or more than humans.⁴⁶²

To this point I would say simply that history has shown the exact opposite to be true. That is, those cultures and religious traditions which historically have placed a higher value on the lives and welfare of other animals also have been the ones that tended to place a higher emphasis on the value on human life—particularly as expressed through the science of healing. In the Third Century BC, for example, King Asoka of India proclaimed that because the souls of all animals had value, there should be built two kinds of hospitals in every district of the empire: one for humans and one for other animals.⁴⁶³

⁴⁵⁸ For example, California capped its pain and suffering damages for human medical malpractice with 1975's Medical Injury Compensation Reform Act (MICRA), yet provided no adjustment provision. Consequently, as a result of natural inflation, the cap is now worth only 1/3 of its originally intended amount. Martin Kasindorf, *California's Awards Cap Lowered Premiums, But Some Patients Paid Cost*, USA Today 3A, 3A (Mar. 5, 2003). This means that California's initial \$250,000 cap on pain and suffering damages is now worth only \$72,700 in 1975 dollars (value figured using the Consumer Price Index Inflation Calculator located on the U.S. Dept. of Labor – Bureau of Labor Statistics web-site: U.S. Dept. of Labor, www.bls.gov, *Inflation Calculator*, <http://www.bls.gov/home.htm> (accessed Feb. 14, 2004)). Because doctors and insurance lobbies have twice defeated attempts to restore the cap to its original value, Kasindorf, *supra*, at 3A, and because completely re-visiting the cap amount after a long period of stasis could result in an unpredictable outcome, rather than having to continually re-fight such battles, it is in the interests of both sides to include a provision that automatically adjusts the civil damages cap to the consumer price index every five years.

⁴⁵⁹ 510 Ill. Comp. Stat. 70/16.3 (2002).

⁴⁶⁰ Posner, *Theory of Negligence*, *supra* n. 162, at 93 ("The important point, viewing the negligence system as a system for bringing about an efficient quantum of safety and accidents, is that the total costs of the accidents in which the defendant is negligent be made costs to the defendant. Those costs include not only the injury to the victim but the expenses of both plaintiff and defendant in processing the claim.").

⁴⁶¹ Cupp, *supra* n. 307, at B5.

⁴⁶² Cupp & Dean, *supra* n. 14, at 48.

⁴⁶³ Smithcors, *Veterinary Art*, *supra* n. 38, at 18. Under his order, hundreds of well-equipped animal hospitals were built throughout India and staffed with state funded veterinarians who treated almost every type of animal imaginable. *Id.* These hospitals predated any other veterinary facility by over half a

Conversely, those historical cultures and religious epochs that *devalued* the lives of non-human animals, in turn showed little respect for the sanctity of human life and the medical science that could improve it. As a grisly example, in just one exhibition before 40,000 spectators, Roman gladiators drove 18 elephants, 500 lions, and 410 other animals of prey against one another, then tortured those animals that survived.⁴⁶⁴ In similar fashion, that same Roman society also publicly pitted *human* prisoners against various exotic animals that had been captured by its wide-ranging armies.⁴⁶⁵ Tellingly, Rome resisted the introduction of any formal doctors for 600 years,⁴⁶⁶ mistrusting the new science of healing as a Greek conspiracy to kill Romans whom they could not defeat in battle.⁴⁶⁷

One should note also that at around the same time and place that Descartes was giving an intellectual booster-shot to St. Augustine's earlier decree that other animals were not deserving of moral consideration,⁴⁶⁸ the Spanish Inquisition was torturing and killing thousands of humans who disagreed with such a world-view.⁴⁶⁹ The zealotry of the era apparently cared so much for human life that it burned Michael Servetus at the stake for the heresy of discovering pulmonary circulation, and threatened Leonardo da Vinci with the same for his contribution to anatomical scholarship—the Pope also labeling him a heretic and banning him from city hospitals.⁴⁷⁰

Evidence abounds in current society of how those who abuse other animals often go on to cause significant harm to human beings.⁴⁷¹ Correspondingly, other examples

millennium. *Id.* The current Constitution of India declares “[i]t shall be the duty of every citizen of India . . . to have compassion for living creatures,” section 51A(g). Waldau, *Heavens, supra* n. 1, at 100. To this day, India is said to be the only country that provides sanctuaries for ill and aging animals as part of a fundamental, national animal ethic. *Id.* In the United States, Texas A&M Veterinary College has established a retirement home for orphaned companion animals, but the cost is a considerable \$25,000 per cat or dog, underscoring the investment valuation theory. Squires-Lee, *supra* n. 15, at 1067.

⁴⁶⁴ Karasszon, *supra* n. 38, at 100.

⁴⁶⁵ *Id.*

⁴⁶⁶ Smithcors, *Veterinary Art, supra* n. 38, at 57.

⁴⁶⁷ Karasszon, *supra* n. 38, at 88.

⁴⁶⁸ Paul Waldau, *The Specter of Speciesism* 59 (Cambridge Univ. Press. 2002). The historian J.F. Smithcors poignantly describes the effect of the church's intellectual domination on veterinary medical science after the fall of Rome:

Veterinary medicine, along with the other arts and sciences, sank into the morass of incredible ignorance and superstitious stupidity with hardly an occasional voice crying in the wilderness until long after reform was overdue. Nearly a thousand years were to pass before anyone worthy of the name appeared upon the veterinary horizon. The years from 500 BC to 500 AD were as fruitful as the previous thousand had been in India. But the giants of the past had become a race of pygmies, and the next millennium of veterinary medicine can be compressed into a capsule.

Smithcors, *Veterinary Art, supra* n. 38, at 109.

⁴⁶⁹ *The New Encyclopaedia Britannica* vol. 6, 528–29 (15th ed., Encyclopaedia Britannica 1989). Paradoxically, Descartes himself doted upon his own dog, Monsieur Grat (Mr. Scratch), lavishing much affection upon him, speaking to him as one would a child, and often privately speculating on what his pet was “thinking.” Geneviève Rodis-Lewis, *Descartes: His Life and Thought* 181 (Cornell U. Press 1998); Stanley Coren, *The Intelligence of Dogs* 65 (Bantam 1995); Peter Harrison, *Descartes on Animals*, 42 *Philosophical Quarterly* 219, 220 (1992).

⁴⁷⁰ Smithcors, *Veterinary Art, supra* n. 38, at 145. Da Vinci himself has been quoted as saying, “[t]he time will come when men such as I will look upon the murder of animals as they now look upon the murder of men.” Colin Spencer, *The Heretic's Feast* 343 (U. Press of New England 1995).

⁴⁷¹ Rollin, *Veterinary Medical Ethics, supra* n. 94, at 34 (“scientific research has confirmed the close connection between animal abuse and the abuse of children and women.”); LaCroix, *supra* n. 377, at 21 (quoting 1999 study showing that individuals prosecuted for animal abuse are 300 to 500% more likely to be arrested for violent offenses against humans, property crimes, and drug offenses); *Understanding Animal Cruelty, supra* n. 230, at 9 (discussing study finding that among New Jersey families being treated for child abuse, in 88% of the cases the animals in the home had also been abused).

repeatedly demonstrate that caring for and developing relationships with companion animals may deepen humanity's emotional well and foster a sense of compassion that itself *spills over* into the way we treat our fellow humans.⁴⁷² As Mahatma Gandhi poignantly observed, "the greatness of a nation and its moral progress can be judged by the way its animals are treated."⁴⁷³

VI. CONCLUSION

Human society has been legislatively determining damages for veterinary malpractice for over 3,800 years. Yet today, when one considers the near non-existent negligence oversight of state licensing boards, along with the disparity between the modern cost of litigation and the common law's market value damages cap, it becomes clear that current society is left with no cost-effective means of enforcing the veterinary standard of care. Given the added professional exemption from animal cruelty statutes, the result is that veterinarians can commit malpractice with almost absolute impunity.

When a whole class of individuals is shielded from the financial cost of their mistakes in this manner, the number of accidents increases—as was proven with car drivers in New Zealand and Quebec. These additional, unnecessary mistakes inevitably reduce the overall social and economic wealth. Yet whenever American pet owners and their advocates try to correct the inefficiency by updating state legislation, the veterinary community responds by vehemently opposing their efforts with fear-based arguments that are factually insupportable.

This cannot continue. If veterinarians persist in clinging to the paradoxical position that their patients are worth less than the cost of one veterinary visit, they will be viewed as motivated by self-interested hypocrisy and excluded from the legislative formation process. Marginalizing themselves in this manner will effectively guarantee that companion animal valuation bills will continue to be written exclusively by only one side of the debate. While it is true that veterinary organizations have been lucky so far playing a state-by-state game of legislative whack-a-mole whenever a civil damages measure is introduced, betting everything on such a reactive stance will simply allow others to carry on dictating the terms, timing, and forum of that debate.⁴⁷⁴

⁴⁷² See Bernard E. Rollin, *Animal Rights and Human Morality* 214–16 (Prometheus Books 1992) (discussing the "triggering of empathy" phenomenon). This point is strongly supported by a multitude of programs that involve prisoners in training and caring for various animals, such as assistance dogs for the blind, or animals not yet socialized enough for adoption. Emilie Lounsberry, *Puppies Behind Bars and Similar Programs are Helping Inmates, Experts Find*, Philadelphia Enquirer B3 (May 10, 2002). One inmate serving a life sentence for murder eloquently describes his experience caring for cats, "Every time I feed them, I learn about responsibility and understand compassion. It has completely changed me. Instead of taking lives, I'm trying to save lives." Peter Pae, *Caring for a Prison's Cats*, Washington Post A1, A8 (June 1, 1999) (quoting Frank Scherer (emphasis added)). At a Wisconsin prison that implemented an inmate dog-training program in 1997, not one of the 68 participants has returned to incarceration. Lounsberry, *supra* at B3. In December 2003, the *Animal Planet* television channel premiered "Cell Dogs," (Animal Planet Dec. 2003) (television broadcast) (a television series devoted entirely to such prisoner-canine interaction programs. The first episode described how overall inmate violence dropped 40% at one prison after starting one such training program.).

⁴⁷³ Waldau, *Heavens, supra* n. 1, at 114 (quoting Mohandas K. Gandhi, *The Moral Basis of Vegetarianism*). Primatologist Jane Goodall has said that it was her childhood dog, Rusty, who first taught her that animals "have personalities, intelligence, and feelings." When recently asked to prioritize between shutting down two research facilities where one was abusing primates and the other being cruel to dogs, Goodall unequivocally stated, "I'd choose the dogs." Bilger, *supra* n. 21, at 52.

⁴⁷⁴ Stephanie Davis, *Consumer Reports Raises Profession's Ire*, DVM 1, 1 (July 2003). The veterinary community is frothing over a July 2003 Consumer Reports article "Veterinary Care Without the Bite,"

Even opponents of increasing damages for companion animal loss admit it is inevitable that the civil law eventually will catch up with the social consensus. If that inevitable event happens to occur in an Oregon or a Michigan, then veterinarians will have lost a costly gamble. As many in the profession already realize, the only way to avoid such an outcome is for veterinarians to acknowledge the value of this human-animal bond that they not only actively foster, but from which they personally and professionally have profited so well. Because the industry's own calculations show that the increased premium costs from such legislative recognition would pale in comparison to these financial gains, one veterinary insurer has proclaimed: "The human-animal bond is what is driving this profession's unprecedented growth. For [veterinarians] not to trade that for \$400 a year would be insane."⁴⁷⁵

Rather than fanning the flames of fear, the professional leadership needs to explain the realities of this dilemma to its constituency. That constituency then needs to decide if it wants the professional benefits of pediatricians, or the legal liability of garage mechanics.⁴⁷⁶ It cannot continue to have both. As in California, once this is done the veterinary community will earn its place at the table and restore its public credibility.⁴⁷⁷ Indeed, as the profession's most comprehensive self-examination recently concluded: "our future success will be judged by our responsiveness to the changing needs and expectations of society."⁴⁷⁸

At the same time, the fact remains that the veterinary community still currently enjoys considerable political favor. Therefore, any advocates who seriously wish to succeed in securing adequate compensation for victims of veterinary malpractice, or in hastening that change, must formulate realistic legislation that not only acknowledges, but *actively addresses* veterinarians' concerns—many of which may be quite valid.⁴⁷⁹ As the

complaining that their perspective was not adequately represented. However, the consumer reports author contacted the AVMA's communications office seven times, but was never put through to, or called back by, any member of the AVMA leadership. By not taking the reporter seriously, the AVMA ended up having to scramble for damage control after the article was already published, rather than getting their perspective included at the outset. *Id.*

⁴⁷⁵ Fiala, *CVMA Covets*, *supra* n. 313, at 39 (quoting Dr. Ed Branam, Managing Director of ABD Insurance) (emphasis added).

⁴⁷⁶ See Rollin, *Veterinary Medical Ethics*, *supra* n. 94, at 32–33 (discussing the professional transition between these two models).

⁴⁷⁷ Highly-publicized recent critiques of veterinarians' business practices certainly have exposed that the profession's trusted position in American society cannot be taken for granted, but rather exists at the sole discretion of pet owners whom it now opposes. See Davis, *supra* n. 474, at 1; Brian Hutchins, *Trust Fades as Cost of Care Rises*, *Veterinary Practice News* 1, 1, 8 (May 2002) (Question: "Is the public's respect for veterinarians waning?" Answer: "I'm afraid it's beginning to. The struggle is to find ways to charge more."). Historically, the veterinary profession has severely misjudged public opinion and chosen the losing side on many past animal welfare issues, such as the legality of humane societies' spay/neuter clinics, use of leg-hold traps and gestation crates, live terminal lab classes in veterinary colleges, regulation of laboratory animal care, and farmed animal welfare legislation. *Veterinarians: For or Against Animal Rights?* *Animals Agenda* 12, 13–23 (Feb. 1989).

⁴⁷⁸ *KPMG Megastudy*, *supra* n. 239, at 161 (emphasis added). The sponsor of a recent veterinary symposium on the legal status of companion animals forthrightly cautioned: "The last thing we want is to be viewed by the public as a profession that had to be dragged—kicking and screaming—to confront this important issue. We have a duty to ourselves and our clients to do far more than that." Meyers, *Changing Status*, *supra* n. 10, at 12 (quoting Dr. Neil G. Shaw).

⁴⁷⁹ An attempt at statewide California legislation to outlaw the de-clawing of cats proved a prime example of the folly of not consulting with the veterinary community. Only after the bill was introduced did its sponsors learn that language in the veterinary practice act would result in the proposed bill only preventing veterinarians from performing the procedure, while allowing any other citizen with far less training still to de-claw cats. Jennifer Conrad, Presentation, *Building Coalitions Between Attorneys and Veterinarians* (Lewis & Clark L. Sch., Oct. 26, 2003) (video on file with *Animal Law*, Lewis & Clark L. Sch.).

experience in Colorado starkly demonstrated this past year, those who ignore or underestimate the role of the veterinary profession in companion animal valuation legislation do so at their peril.⁴⁸⁰ Only by sitting down together will the parties realize the extensive consensus that exists among them.⁴⁸¹

So now the proverbial cat is out of the bag. People really love their pets, invest sizable emotional and financial sums in caring for them, and want to do everything they can to reduce the chance that such beloved companions will endure unnecessary harm. This is not some normative opinion of what should be, but simply a recognition of what currently is.⁴⁸² As the facts frankly demonstrate, permitting emotional damages of up to \$25,000 will cost each pet-owning household about the price of a two-minute phone call, or at absolute most, about 4% of what they are already paying per year in veterinary care. Because the potential for such compensation will reduce the number of unnecessary accidents—and actually improve the standards of veterinary care—that profession, the courts, and legislators should all just get out of the way and allow pet parents to pay this paltry premium.⁴⁸³

In the wise words of Jurist and professor Richard Epstein, because “the *actual* losses to the owner exceed the market value” in veterinary malpractice cases, allowing civil recovery for loss of companionship to the owner is both “good law and solid economics.”⁴⁸⁴

It is time we all collectively moved past the (un)Fair Market Value Rule.

⁴⁸⁰ For a discussion of the failed Colorado bill, review *supra* notes 10, 12, 292, 298, 330–32, 353, 362–63, 369–70, 374, 396–401, 405–407, 431, 448 and accompanying text.

⁴⁸¹ One such discussion at the 2003 AVMLA Annual Meeting in just two hours resulted in the organization nearly voting to draft model legislation conceding emotional damages for companion animal loss. A similar hour-long debate at Lewis and Clark L. Sch. between an attorney and a veterinarian ended with them agreeing on most major issues and hammering out the key provisions of hypothetical legislation on the spot.

⁴⁸² See LaCroix, *supra* n. 377, at 13 (“Greater than 50% of dog owners are more attached to their pet than at least one other human being,” quoting 2001 American Pet Association Poll); Rollin, *Animal Rights and Human Morality*, *supra* n. 472, at 217 (“It is hard to imagine a more vivid and pervasive example of a social contract . . . than that obtaining between humans and dogs.”).

⁴⁸³ One veterinarian plainly sums up the potential beneficial effects of increasing the liability of the profession:

Veterinarians may become more careful about how they practice medicine and surgery. We may work harder to do a better job, and be more careful to avoid mistakes. We may be more likely to buy newer equipment. We may be more likely to avail ourselves of good-quality continuing education opportunities. These are all good things, of course.

David T. Roen, *Malpractice Suits Change How Veterinarians Do Business*, Lewiston Morning Tribune (Idaho) 5A (Apr. 14, 2003).

⁴⁸⁴ Richard A. Epstein, *The Next Rights Revolution?* 51 Natl. Rev. 44, 45–46 (Nov. 8, 1999) (emphasis in original). This endorsement is all the more potent because Judge Epstein is in all other senses extremely critical of the movement towards granting rights to other animals. See generally Richard A. Epstein, *The Dangerous Claims of the Animal Rights Movement*, in 10(2) *The Responsive Community* 28 (2000) (discussing civil recovery for the loss of companionship).