

## ANIMAL LAW EVOLUTION: TREATING PETS AS PERSONS IN TORT AND CUSTODY DISPUTES

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*Despite the fact that pets play an important and irreplaceable role in the lives of many people in modern society, the law continues to treat all animals—including pets—as property. This treatment is especially troubling in tort and custody cases, where the relationship between a pet and its owner is often at issue. The author examines the inconsistent treatment of animals under the law and the relatively recent developments in society’s view and treatment of animals, ultimately arguing that the law needs to adapt to the changes in the way society views animals by treating pets as persons in particular cases. Specifically, the author proposes that animals be treated as persons only in tort or custody disputes where the animal is an anthropomorphic pet that has formed a strong emotional bond to its owner resulting in the owner’s treatment of the pet as a person.*

### I. INTRODUCTION

When Sergeant Gwen Beberg came home from a tour of duty in Iraq, she was leaving one battle to fight another.<sup>1</sup> But this time she was fighting the U.S. government for permission to bring her best friend named “Ratchet” home with her—a dog that she rescued while on duty.<sup>2</sup> If it had been an Iraqi rug, or a traditional oil lamp, it is unlikely that Sergeant Beberg would have put up much of a fight. After all, those things are just property—she could always buy replacements. Yet she fought tooth and nail for weeks to bring Ratchet home with her,<sup>3</sup> even though he too is considered just another piece of property under the law. Clearly something about this canine companion, this woman’s best friend that “was the savior of her . . . sanity”<sup>4</sup> and saw her through some of the most trying experiences imaginable, differentiates him from other prop-

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1. *Soldier’s Adopted Dog Finally Leaves Iraq for U.S.*, CNN, Oct. 19, 2008, <http://edition.cnn.com/2008/US/10/19/iraq.ratchet.the.dog/index.html>.

2. *Id.*

3. *Id.*

4. *Id.*

erty. Yet the law fails to recognize this distinction. The law continues to classify all animals as property—even those that have shared the most intimate experiences with people, like going through war.

The law attempts to maintain consistency in its treatment of all animals as property,<sup>5</sup> but at the same time the law distinguishes among certain groups of animals. Different laws apply to different animals based on their categorization as wild animals, livestock, research animals, or pets.<sup>6</sup> For example, the Animal Welfare Act sets standards for transportation of livestock and pets, but it imposes even more restrictions on animal researchers.<sup>7</sup> In addition, specific laws apply to the killing of livestock,<sup>8</sup> whereas other laws exist that govern the killing of pets in shelters.<sup>9</sup> Also, animal torture laws do not apply to the treatment of wild animals while hunting, fishing, or trapping.<sup>10</sup> Thus, even though the law purports to retain consistency by treating all animals as property, it clearly applies different laws to different animals, thereby recognizing that not all animals are alike.

Different categorization of animals, and thus the application of laws to different animal groups, is based on humanity's relationship with the animals. A single animal, say, a rabbit, is governed by different laws based on whether it is wild, raised for food, used for its fur, tested with new vaccines, or kept as a pet. Even though the rabbit is the exact same creature, the laws that apply to it are dictated by the extent of human interaction and relationship with the animal.<sup>11</sup>

Not only do people treat individual animals differently in different situations, but society as a whole treats animals differently. Some rare species are revered while others that scurry around underfoot are exterminated. Some produce milk whereas others are used to test pharmaceuticals. Many taste great with barbecue sauce. Some should be swatted away, but others are nurtured, played with, and intentionally kept close-by.

Despite the fact that society recognizes the differences among animals, the law considers them all property.<sup>12</sup> And, despite the fact that the

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5. 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, 31 (2001); see, e.g., *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1071 n.5 (Haw. 1981); *Bueckner v. Hamel*, 886 S.W.2d 368, 370 (Tex. App. 1994).

6. For example, in Illinois, a pet cannot be abused or tortured. 510 ILL. COMP. STAT. 70/3.02-.03 (2008). A support, hearing, or guide dog cannot even be taunted, teased, or harassed. *Id.* at 70/7.15.

7. Animal Welfare Act, 7 U.S.C. § 2143(a)(3) (2006).

8. See, e.g., 510 ILL. COMP. STAT. 75/01-8 (describing prohibited methods of killing live-stock).

9. See, e.g., *id.* at 72/1-180.

10. See, e.g., *id.* at 70/3.03(b)(1).

11. Stated differently: "A mouse as a pet has protection. A mouse as a pest can be killed at will. Research mice have no protection. It is the same animal but it is a matter of context." *Animal Cruelty Laws Among Fastest-Growing*, MSNBC, Feb. 15, 2009, <http://www.msnbc.msn.com/id/29180079/from/ET/>.

12. Epstein, *supra* note 5, at 31; see, e.g., *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1071 n.5 (Haw. 1981); *Bueckner v. Hamel*, 886 S.W.2d 368, 370 (Tex. App. 1994).

law itself recognizes differences among animals by applying different laws to different groups of animals, it fails to recognize these differences in its blanket treatment of all animals as property. Thus, the law is in conflict with itself and with public opinion in the way it treats animals. These two discrepancies have caused inconsistent decisions in the courts.<sup>13</sup> As a result, the traditional categorization of animals as property has started to erode, leaving mixed opinions and little guidance for future decisions.

This Note aims to reconcile these inconsistencies and posits a solution to the property-versus-person battle surrounding the legal status of animals. Part II examines the current legal climate in two areas of the law where the property/person status of animals is most confused and most hotly debated—tort law and custody disputes. Part III analyzes the arguments underlying the differing legal positions that animals should be considered property or should be considered persons. This will be done in an organized fashion: as the arguments progress, the category of animals to which they apply narrows. Thus, the first arguments discussed are anthropocentric in nature and typically are set forth as reasons why *all* animals should or should not be considered persons. The second set of arguments are anthropomorphic in nature and posit that certain types of animals have human characteristics and behaviors, and thus this more narrow class of animals should be considered persons. The third set of arguments are relational-emotional in nature and posit that a still more narrow class of animals—pets—should be considered persons because of the emotional relationships they form with their owners, causing them to be treated as companions and family members. The final category of arguments is economic in nature and debates whether treating pets as persons in tort and custody disputes will have severe economic repercussions such as increased litigation and harm to the veterinary industry. Finally, after these arguments are presented, Part IV of this Note proposes a resolution that integrates the concerns and values of both sides of these arguments: when an animal is (1) an anthropomorphic pet (2) who has forged a strong emotional relationship with its owner, to the extent that the owner treats it as a person, and (3) is the subject of a tort or custody dispute, then the law should treat the pet as a person, within defined limits.

## II. BACKGROUND

The law's treatment of animals is confused and inconsistent. The main confusion, whether animals are considered persons or property un-

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13. Compare *Campbell*, 632 P.2d at 1071 (treating pets as property, but allowing emotional distress damages), and *La Porte v. Associated Indeps. Inc.*, 163 So. 2d 267, 269 (Fla. 1964) (treating pets as having a relationship with their owner and allowing for emotional distress damages), with *Rabideau v. City of Racine*, 627 N.W.2d 795, 798 (Wis. 2001) (treating a pet dog that was killed as property and not allowing any emotional distress damages).

der the law, has existed since biblical times.<sup>14</sup> From the very beginning, humanity assumed a superior role over animals due to humanity's high place in the Great Chain of Being.<sup>15</sup> The book of Genesis describes how God assigned this role when he created man and instructed him to "rule over the fish of the sea and the birds of the air, over the livestock, over all the earth, and over all the creatures that move along the ground."<sup>16</sup> Animals were also frequently sacrificed in the Old Testament, suggesting their lesser place in the world.<sup>17</sup> This portrays humanity's inherent dominance over animals, which contradicts elevating animals to personhood status.

The Bible also recognizes, however, that animals are sometimes more than just property. The book of Second Samuel tells the story of a poor man who raised a single lamb alongside his children, which he shared his food and drink with, and that slept in his arms—"It was like a daughter to him."<sup>18</sup> When a rich man killed the poor man's lamb, King David "burned with anger" and declared that "the man who did this deserves to die! He must pay for that lamb four times over."<sup>19</sup> This suggests that even in biblical times, the law recognized that animals in close relationships with people were considered more than mere property—even akin to children.<sup>20</sup>

The law's treatment of animals is as confused today as it was in biblical times. At the most basic level, every state classifies animals as property.<sup>21</sup> They can be bought, sold, traded, gifted, devised, and bequeathed just like a house, car, or coin collection. This gives animals a monetary value. Yet, certain laws treat animals more like persons. Anti-cruelty laws afford certain animals protection from undue pain, torture, and suffering.<sup>22</sup> Just as people are forbidden under the law from hurting other people, they are also forbidden from hurting certain animals, like pets.<sup>23</sup> In addition, the law allows people to set up trusts to benefit an animal, treating the animal as a person who needs to be supported and cared for

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14. Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 N.Y.U. ENVTL. L.J. 531, 534 (1998).

15. Richard L. Cupp, Jr., *A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood as Stepping Stones Toward Abolishing Animals' Property Status*, 60 SMU L. REV. 3, 9–10 (2007).

16. Genesis 1:26; see also Cupp, *supra* note 15, at 9–10.

17. See, e.g., Genesis 8:20; Numbers 7:88.

18. 2 Samuel 12:3.

19. *Id.* at 12:5–6.

20. See 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, 45 (1998).

21. Epstein, *supra* note 5, at 31; see also, e.g., *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1071 n.5 (Haw. 1981); *Bueckner v. Hamel*, 886 S.W.2d 368, 370 (Tex. App. 1994).

22. See, e.g., 510 ILL. COMP. STAT. 70/3.01–.03 (2008). For a more complete list of state anti-cruelty laws, see Animal Legal & Historical Center, Michigan State University College of Law, Anti-Cruelty: Related Statutes, <http://www.animallaw.info/statutes/topicstatutes/sttoac.htm> (last visited May 13, 2010) [hereinafter *Anti-Cruelty Statutes*].

23. See, e.g., 510 ILL. COMP. STAT. 70/3.01–.03.

after the owner dies.<sup>24</sup> These examples demonstrate how the law's treatment of animals differs based on the area of law in which the animal is considered. In addition, different courts treat animals inconsistently when making decisions regarding the same principles of the law.<sup>25</sup> The confusion is most profound in the two areas discussed *infra*.

#### A. Torts

Two tort law issues are raised when an animal is injured or killed: whether the animal has standing to sue to recover for its injuries, and the amount of damages an animal's owner can recover for the animal's injury or death. The answer to the standing question is "no."<sup>26</sup> Animals cannot bring suit for their own injuries,<sup>27</sup> nor can a person bring suit on an animal's behalf,<sup>28</sup> regardless of whether the person owns the animal or the animal is owned by someone else.<sup>29</sup> However, a person has standing to recover for any damages inflicted upon his animal as his property.<sup>30</sup>

The more interesting question is how courts value animals when their owners bring suit for damage to the animal. The most highly variable area of animal law is the determination of an animal's worth to its owner.<sup>31</sup> Courts have addressed this issue in three different ways. First, animals can be treated as pieces of property and valued at their fair market value at the time of injury, just like any other piece of property.<sup>32</sup> Courts have little guidance in determining the animal's fair market value and tend to consider the species, breed, and pedigree of the animal,<sup>33</sup> resulting in a value that can range from thousands of dollars to nothing.<sup>34</sup>

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24. Illinois Pet Trust Act, 760 ILL. COMP. STAT. 5/15.2 (2008); UNIF. PROBATE CODE § 2-907 (amended 2006); Denise King Garvey et al., *Estate Planning & Probate Law Update*, 18 DCBA BRIEF 18, 18-19 (2006).

25. See cases cited *supra* note 13.

26. David R. Schmahmann & Lori J. Polacheck, *The Case Against Rights for Animals*, 22 B.C. ENVTL. AFF. L. REV. 747, 775 (1995).

27. Citizens to End Animal Suffering and Exploitation, Inc. v. New England Aquarium, 836 F. Supp. 45, 49-50 (D. Mass. 1993); Kelch, *supra* note 14, at 535.

28. Int'l Primate Prot. League v. Inst. for Behavioral Research, 799 F.2d 934, 938 (4th Cir. 1986); Animal Lovers Volunteer Ass'n, Inc. v. Weinberger, 765 F.2d 937, 939 (9th Cir. 1985); Kelch, *supra* note 14, at 535. *But see* *Citizens*, 836 F. Supp. at 52 (suggesting that if a person could prove they would be harmed from the loss of a dolphin at an aquarium because it had been the subject of his interest to the extent that he formed a "relationship," he might have standing to sue for loss of that animal).

29. See Kelch, *supra* note 14, 535.

30. See *id.* at 533.

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

32. Victor E. Schwartz & Emily J. Laird, *Non-Economic Damages in Pet Litigation: The Serious Need to Preserve a Rational Rule*, 33 PEPP. L. REV. 227, 234-35 (2006); see also, e.g., Johnson v. Douglas, 723 N.Y.S.2d 627, 628 (Sup. Ct. 2001) (refusing to allow recovery for emotional distress based on the destruction of a dog because it is considered personal property).

33. *But see* Bueckner v. Hamel, 886 S.W.2d 368, 373 (Tex. App. 1994) (Andell, J., concurring) ("The value of dogs to the human families they share often has nothing to do with whether the dog has a pedigree that is registered with the American Kennel Club.").

34. Heidi Stroh, *Puppy Love: Providing for the Legal Protection of Animals when Their Owners Get Divorced*, 2 J. ANIMAL L. & ETHICS 231, 237-38 (2007).

This method of valuation is troublesome for pet owners because pets often have no market value at all<sup>35</sup>—mixed breeds are not highly priced<sup>36</sup> and people do not want to purchase another person's pet.<sup>37</sup> Thus, the price that many pets will fetch on the open market is often nothing.

Other courts have considered the “actual cost” or “actual value” of the animal to the owner.<sup>38</sup> Courts that take this approach have done so in response to the problem of pets lacking any fair market value.<sup>39</sup> The amount of damages awarded based on the “actual cost” of the animal to the owner is adjusted based on the cost of the animal, the cost of replacement, money spent on veterinary care, training costs, and loss of potential income from the animal.<sup>40</sup> The “actual value” standard takes into consideration the actual or “intrinsic” value of a pet to its owner.<sup>41</sup> This valuation does not include any sentimental value of the pet and does not allow for a recovery of damages for emotional loss or loss of the relationship that might otherwise be allowed if the pet were considered a person.<sup>42</sup> These courts still value the animals as property but are more sympathetic to the fact that pets may possess some value to the owner even though they lack any market value.<sup>43</sup>

A third possible way to value animals is to treat them like persons and allow owners to recover non-economic damages for injuries to the animal.<sup>44</sup> These types of damages would include loss of consortium<sup>45</sup> (in-

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35. Schwartz & Laird, *supra* note 32, at 240.

36. *Id.*

37. *Mitchell v. Heinrichs*, 27 P.3d 309, 311 (Alaska 2001) (noting that the plaintiff admitted the value of her dog at the time of its death was nothing “because other people are not interested in buying someone else’s dog”). *But see* Geordie Duckler, *On Redefining the Boundaries of Animal Ownership: Burdens and Benefits of Evidencing Animals’ Personalities*, 10 ANIMAL L. 63, 71 (2004) (“[U]nlike inanimate personal property that generally depreciates in value over time, animals appreciate in value.”).

38. *Mitchell*, 27 P.3d at 313–14; Schwartz & Laird, *supra* note 32, at 241; Wise, *supra* note 20, at 65.

39. *See Mitchell*, 27 P.3d at 313–14; *Brousseau v. Rosenthal*, 443 N.Y.S.2d 285, 286 (Civ. Ct. 1980).

40. *Mitchell*, 27 P.3d at 313–14; *Bueckner v. Hamel*, 886 S.W.2d 368, 370–72 (Tex. App. 1994) (awarding the pecuniary value of the killed dogs to the owner based on the usefulness and services of the dog); Schwartz & Laird, *supra* note 32, at 241. Sometimes the dog’s potential breeding capabilities are considered and the loss of income from puppies is accounted for. *See Bueckner*, 886 S.W.2d at 371–72.

41. *Mitchell*, 27 P.3d at 313; *Anzalone v. Kragness*, 826 N.E.2d 472, 477–78 (Ill. App. Ct. 2005); Wise, *supra* note 20, at 65.

42. *Mitchell*, 27 P.3d at 313–14; *Zager v. Dimilia*, 524 N.Y.S.2d 968, 969 (Vill. Ct. 1988); Schwartz & Laird, *supra* note 32, at 241–42. *But see Anzalone*, 826 N.E.2d at 477–78 (using the actual value of the pet, even though it is property, and acknowledging that this encompasses a certain sentimental and emotional value of the pet); *Jankoski v. Preiser Animal Hosp.*, 510 N.E.2d 1084, 1086–87 (Ill. App. Ct. 1987) (acknowledging that the sentimental value of a pet is included in determining the pet’s actual value to the owner).

43. *Mitchell*, 27 P.3d at 314 (“[T]hese damages may more accurately reflect the animal’s actual value to the owner.”); Schwartz & Laird, *supra* note 32, at 242–43.

44. *See* Sonia S. Waisman & Barbara R. Newell, *Recovery of “Non-Economic” Damages for Wrongful Killing or Injury of Companion Animals: A Judicial and Legislative Trend*, 7 ANIMAL L. 45, 73–74 (2001).

cluding loss of love, companionship, society, or affection)<sup>46</sup> and mental or emotional distress.<sup>47</sup> At the time of this publication, only two states— Illinois<sup>48</sup> and Tennessee<sup>49</sup>—allow recovery of non-economic damages for a pet’s injury, and both of these states significantly limit the amount of recovery allowed.<sup>50</sup>

Usually, however, courts do not allow pet owners to recover for mental or emotional distress due to their pets’ injuries because such damages are not available in claims for damage to property, which the pets are considered to be.<sup>51</sup> The biggest obstacles to recovery of emotional damages by pet owners are that they must show that they witnessed an injury to a third person, not a pet, and that their relationship to the victim was a close familial one.<sup>52</sup> Since all animals are typically classi-

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45. *Gluckman v. Am. Airlines, Inc.*, 844 F. Supp. 151, 158 (S.D.N.Y. 1994) (not allowing recovery for loss of companionship when a dog was killed); *Jankoski*, 510 N.E.2d at 1087 (not allowing recovery for loss of companionship when a dog was killed).

46. *Waisman & Newell*, *supra* note 44, at 47–48.

47. *See Knowles Animal Hosp. Inc v. Wills*, 360 So. 2d 37, 38–39 (Fla. Dist. Ct. App. 1978) (allowing the jury to include mental pain and suffering of the pet’s owner in the damages award, but still considering the pet to be property); *Peloquin v. Calcasieu Parish Police Jury*, 367 So. 2d 1246, 1251 (La. Ct. App. 1979) (allowing damages for a pet owner’s mental anguish in the wrongful conversion of a pet, recognizing it as property); *see also City of Garland v. White*, 368 S.W.2d 12, 17 (Tex. Civ. App. 1963) (considering pets as property but allowing recovery of mental pain and suffering damages when a dog is killed).

48. Damages in a civil action for an animal that is injured or killed may include, but are not limited to, the monetary value of the animal, veterinary expenses incurred on behalf of the animal, any other expenses incurred by the owner in rectifying the effects of the cruelty, pain, and suffering of the animal, and emotional distress suffered by the owner. . . . [T]he owner is also entitled to punitive or exemplary damages of not less than \$500 but not more than \$25,000 . . . .

50 ILL. COMP. STAT. 70/16.3 (2008).

49. A person who causes the death of a pet cat or dog may be held “liable for up to five thousand dollars (\$5,000) in noneconomic damages.” TENN. CODE ANN. § 44-17-403 (2007).

50. *Schwartz & Laird*, *supra* note 32, at 247. However, other states have, at times, allowed recovery for emotional distress due to death of a pet. Florida allowed for recovery of emotional distress damages for malicious destruction of a pet in *La Porte v. Associated Independents, Inc.*, 163 So. 2d 267, 269 (Fla. 1964) (“[W]e feel that the affection of a master for his dog is a very real thing and that the malicious destruction of the pet provides an element of damage for which the owner should recover . . . .”). Hawaii allowed for recovery of mental distress damages despite considering pets as property in *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1071 (Haw. 1981), but limited the amount to \$1000. Kentucky allowed for recovery of emotional distress damages totaling \$125,000 due to outrageous conduct that caused the death of the person’s pet horses in *Burgess v. Taylor*, 44 S.W.3d 806, 810 (Ky. Ct. App. 2001). Louisiana allowed for recovery of damages for mental anguish when a person’s dog was lost and put to sleep in *Lincecum v. Smith*, 287 So. 2d 625, 629 (La. Ct. App. 1974). Texas allowed for recovery of mental pain and suffering damages when a dog was killed in *White*, 368 S.W.2d at 16–17.

51. *Epstein*, *supra* note 5, at 38; *see Gluckman v. Am. Airlines, Inc.*, 844 F. Supp. 151, 158 (S.D.N.Y. 1994); *Harabes v. Barkery, Inc.*, 791 A.2d 1142, 1144 (N.J. Super. Ct. Law Div. 2001); *Johnson v. Douglas*, 723 N.Y.S.2d 627, 628 (Sup. Ct. 2001) (holding that plaintiff cannot recover for emotional distress based on the destruction of a dog because it is personal property); *Rabideau v. City of Racine*, 627 N.W.2d 795, 798 (Wis. 2001). *But see Knowles*, 360 So. 2d at 37–38 (allowing the jury to include the pet owner’s mental pain and suffering in the damages awarded for an indifference to property claim, but still considering the pet as property); *Peloquin*, 367 So. 2d at 1251 (allowing damages for a pet owner’s mental anguish in the wrongful conversion of a pet, recognizing it as property).

52. *Epstein*, *supra* note 5, at 40; *see also, e.g., Lachenman v. Stice*, 838 N.E.2d 451, 460–61 (Ind. Ct. App. 2005) (noting that a dog is not considered a family member, and thus refusing to allow emotional distress damages when a bystander witnesses a dog’s death); *Rabideau*, 627 N.W.2d at 798 (bar-

fied as property, even in courts that allow for recovery of damages above the animal's fair market value, a person cannot have a close familial relationship with property and thus cannot recover for non-economic damages.<sup>53</sup>

### B. Custody Disputes

Pets involved in custody disputes when their owners divorce or separate receive very different treatment depending on the jurisdiction where the divorce takes place, with some treating pets as property and others treating pets as persons. "The variations between different jurisdictions or courts can therefore be dramatic, leaving divorcing couples in the unenviable position of seeing their beloved pets distributed between them on an arguably arbitrary basis."<sup>54</sup> Traditionally, pets are treated like other property in the marriage—they are awarded based on whether they are separate or marital property.<sup>55</sup> Courts often consider basic property principles such as who bought the pet and whether it was a gift in order to establish ownership.<sup>56</sup> Pets are usually treated as property in settlement agreements as well, and thus are considered worth their fair market value.<sup>57</sup>

Other courts treat pets more like persons in divorces, recognizing that these custody disputes can be just as malicious as disputes over children.<sup>58</sup> Some courts consider the best interest of the pet, while others are reluctant to do so.<sup>59</sup> Courts that consider the pet's best interests look at the relationship between the pet and each owner, determine who is the primary caregiver, and examine who offers the best living arrangements.<sup>60</sup> While courts that consider the pet's best interests are rare, even those that do not consider the best interests still look out for the pet to a minimal degree by acknowledging that it should not be put in a position

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ring recovery for negligent infliction of emotional distress because such recovery is only allowed if the plaintiff is a spouse, parent or child, grandparent or grandchild, or sibling of the injured).

53. See, e.g., *Johnson*, 723 N.Y.S.2d at 628 (holding that the plaintiff cannot recover for emotional distress based on the destruction of a pet because emotional distress damages are only available if the victim is a family member, not a family pet); *Oberschlake v. Veterinary Assocs. Animal Hosp.*, 785 N.E.2d 811, 815 (Ohio Ct. App. 2003) (barring recovery for loss of companionship when a dog was killed by a negligent veterinarian's surgery because dogs are considered property).

54. *Stroh*, *supra* note 34, at 249.

55. *Bennett v. Bennett*, 655 So. 2d 109, 110 (Fla. Dist. Ct. App. 1995) (treating a dog according to equitable division principles); Eithne Mills & Keith Akers, "Who Gets the Cats . . . You or Me?" *Analyzing Contact and Residence Issues Regarding Pets upon Divorce or Separation*, 36 FAM. L.Q. 283, 292 (2002); *Stroh*, *supra* note 34, at 232.

56. *Akers v. Sellers*, 54 N.E.2d 779, 779 (Ind. App. 1944) (awarding custody of a pet based on property principles, regardless of the interests and desires of the dog); Ann Hartwell Britton, *Bones of Contention: Custody of Family Pets*, 20 J. AM. ACAD. MATRIMONIAL LAW. 1, 4–5 (2006).

57. Rebecca J. Huss, *Separation, Custody, and Estate Planning Issues Relating to Companion Animals*, 74 U. COLO. L. REV. 181, 221–22 (2003).

58. *Id.* at 225.

59. *Akers*, 54 N.E.2d at 779 (electing not to consider the best interests of the pet); *In re Marriage of Stewart*, 356 N.W.2d 611, 613 (Iowa Ct. App. 1984); Huss, *supra* note 57, at 225.

60. Huss, *supra* note 57, at 227–28.

to be abused.<sup>61</sup> Courts have also experimented with granting visitation to a pet owner who does not receive custody because they recognize that pets often have strong relationships with their owners that are worth preserving.<sup>62</sup> A few courts have even awarded “petimony” for the support of the pet.<sup>63</sup>

### III. ANALYSIS

The law has traditionally considered animals to be property.<sup>64</sup> Adhesion to precedent is one of the biggest obstacles that advocates of animal personhood must overcome. Courts and scholars alike repeatedly hide behind the shield of stare decisis to justify animals’ property status.<sup>65</sup> “[H]istorical precedent has supported [an] unquestioned commitment to human dominance and the exploitative use of nonhuman animals as chattel.”<sup>66</sup> Even when courts express remorse and empathy for pets and their owners, they continue to mechanically declare that their hands are tied by common law.<sup>67</sup> One court sympathized that “we are uncomfortable with the law’s cold characterization of a dog . . . as mere ‘property,’” yet the court continued to consider animals as property because it claimed it must apply the “established legal doctrine.”<sup>68</sup> Even after admitting that animals have their own needs, courts defer to antiquated concepts of property law dating back to the colonial era.<sup>69</sup>

Other courts flat-out refuse to seriously contemplate whether animals should be considered persons: “[T]he answer has historically seemed too apparent for serious discussion—a person is a human person.”<sup>70</sup> Many of these courts do not even attempt to provide policy reasons in support of their decisions.<sup>71</sup> Instead, they fall into a rhythm of summarily considering animals as property again and again.<sup>72</sup> “[T]he common law values the past simply for having been.”<sup>73</sup>

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61. See *Stewart*, 356 N.W.2d at 613; Huss, *supra* note 57, at 226.

62. *Arrington v. Arrington*, 613 S.W.2d 565, 569 (Tex. Civ. App. 1981) (allowing a custody agreement and visitation, and assuming that the pet has enough love to share with both spouses); Stroh, *supra* note 34, at 245. *But see* *Bennett v. Bennett*, 655 So. 2d 109, 110 (Fla. Dist. Ct. App. 1995) (not allowing custody or visitation for a pet dog because it is considered property).

63. Huss, *supra* note 57, at 223; Stroh, *supra* note 34, at 244.

64. Schwartz & Laird, *supra* note 32, at 234.

65. *Id.* at 234–36.

66. Steven J. Bartlett, *Roots of Human Resistance to Animal Rights: Psychological and Conceptual Blocks*, 8 ANIMAL L. 143, 152 (2002).

67. *Koester v. VCA Animal Hosp.*, 624 N.W.2d 209, 211 (Mich. Ct. App. 2000); *Rabideau v. City of Racine*, 627 N.W.2d 795, 798 (Wis. 2001).

68. *Rabideau*, 627 N.W.2d at 798.

69. Stroh, *supra* note 34, at 236.

70. Cupp, *supra* note 15, at 23; *see also, e.g., Koester*, 624 N.W.2d at 211.

71. Wise, *supra* note 20, at 86; *see also, e.g., Koester*, 624 N.W.2d at 211.

72. Wise, *supra* note 20, at 86.

73. *Id.* at 38.

Inertia should not perpetuate a legal practice, however, especially one built upon a foundation of archaic and eroded justifications.<sup>74</sup> Advocates of animal personhood point out that the law once categorized women, slaves, and children as property.<sup>75</sup> When society changes, however, the law should change with it.<sup>76</sup> Society has changed to such an extent that some animals are often treated as persons,<sup>77</sup> thus suggesting that the law should conform to society's viewpoint and consider some animals as persons. An example of such legal and societal change is animal cruelty. "[A]s recently as 1994, animal cruelty was a felony in only fifteen states—but it is now a felony in forty-one states and in the District of Columbia."<sup>78</sup> This demonstrates that the law has changed its treatment of animals and is capable of further change in order to mirror society's evolving moral standards. In this vein, the law should continue to change to reflect society's evolving perceptions of animals by treating them as persons. Opponents of animal personhood counter by suggesting that our current society is too anthropocentric to allow animals to be considered persons.<sup>79</sup>

*A. Anthropocentric Justification for Treating Animals as Property*

Society centers around humans who created it, organized it, and control it.<sup>80</sup> Supporters of animals as property routinely argue that society's anthropocentric focus is a reason that *no* animals should be considered persons.<sup>81</sup> They argue that the modern legal structure has developed with human rights held in the highest regard, above those of animals.<sup>82</sup> They contend that every aspect of the legal system is people-oriented and recognizes that humans are more valuable than property, including animals.<sup>83</sup> Thus, supporters of animals as property argue that our anthropocentric society is not ready to surrender its dominant place in the world by acknowledging animals as persons.

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74. Kelch, *supra* note 14, at 546–47.

75. Wise, *supra* note 20, at 60.

76. *Oberschlake v. Veterinary Assocs.* Animal Hosp., 785 N.E.2d 811, 812 (Ohio Ct. App. 2003) (suggesting that the change in animals' status to that of persons may one day occur); *see also* Wise, *supra* note 20, at 62.

77. *See infra* Part III.C.

78. Cupp, *supra* note 15, at 5. For a summary of animal abuse laws in all fifty states, see The Humane Society of the United States, State Animal Cruelty Chart, Aug. 2009, [http://www.hsus.org/web-files/PDF/state\\_cruelty\\_chart.pdf](http://www.hsus.org/web-files/PDF/state_cruelty_chart.pdf).

79. *See, e.g.*, Schmahmann & Polacheck, *supra* note 26, at 773.

80. Cupp, *supra* note 15, at 37.

81. *See, e.g.*, Schmahmann & Polacheck, *supra* note 26, at 747.

82. *Id.* at 773.

83. *Id.*

### 1. *Human Interests Versus Animal Interests*

The law values human interests over animal interests.<sup>84</sup> A human's property rights in owning an animal prevail over any possible interests of the animal.<sup>85</sup> In fact, many laws that appear to purposely benefit animals were actually enacted with human interests in mind.<sup>86</sup> For example, probate laws have recently been amended to allow the creation of pet trusts to provide care for pets after their owners' death.<sup>87</sup> Some scholars suggest that the purpose of permitting such trusts is to ensure that the last wishes of pet owners may be carried out, not because the law is interested in providing for the well-being of animals.<sup>88</sup> Another law, the Endangered Species Act, aims to protect a variety of animal species from extinction.<sup>89</sup> But again, the ultimate purpose of the act—minimizing losses in genetic variation—is in humanity's best interest.<sup>90</sup>

Animal cruelty laws appear to have the purpose of protecting animals and preventing animal suffering, but their real purpose may actually be to prevent violence against humans.<sup>91</sup> Animal cruelty often serves as a gateway to human attacks and desensitizes people to performing acts of violence.<sup>92</sup> By deterring animal violence, the animal cruelty laws aim to curb *human* violence and protect *humans* from harm.<sup>93</sup>

Other laws that seemingly aim to protect animals actually balance human interests against animal interests, but the human interests tend to prevail. The Animal Welfare Act, for example, prohibits research animals from being mistreated, but it allows humans to inflict pain on animals if they have good reason.<sup>94</sup> Animal researchers are even allowed to withhold sedatives and pain killers from animals being subjected to pain if “justified for scientific reasons.”<sup>95</sup> In Wisconsin, a person can legally kill his own dog as long as it is done humanely.<sup>96</sup> An Alaskan statute al-

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84. *Id.* at 760–61.

85. Kelch, *supra* note 14, at 544.

86. See Cupp, *supra* note 15, at 39–40, 42; Schmahmann & Polacheck, *supra* note 26, at 768–69; Cass R. Sunstein, *The Rights of Animals*, 70 U. CHI. L. REV. 387, 387 (2003).

87. See 760 ILL. COMP. STAT. 5/15.2 (2006); UNIF. PROBATE CODE § 2-907 (amended 2006); UNIF. TRUST CODE § 408 (amended 2005).

88. Cupp, *supra* note 15, at 42.

89. 7 U.S.C. § 136 (2006); 16 U.S.C. §§ 1531–1544.

90. Schmahmann & Polacheck, *supra* note 26, at 768–69.

91. Cupp, *supra* note 15, at 39–40; Schmahmann & Polacheck, *supra* note 26, at 762; Sunstein, *supra* note 86, at 387.

92. Kelch, *supra* note 14, at 540.

93. Cupp, *supra* note 15, at 39–40; Schmahmann & Polacheck, *supra* note 26, at 762; Sunstein, *supra* note 86, at 387.

94. Animal Welfare Act, 7 U.S.C. § 2143(a)(3); *N.J. Soc'y for Prevention of Cruelty to Animals v. Bd. of Educ.*, 219 A.2d 200, 206, 209 (N.J. County Ct. 1966) (allowing high school students to conduct experiments on live chickens because the pain inflicted is not needless but rather serves an educational purpose); Schmahmann & Polacheck, *supra* note 26, at 760.

95. 9 C.F.R. § 2.31(d)(1)(iv)(A) (2009).

96. WIS. STAT. § 174.01 (2006).

lows a dog to be killed if it “habitually annoys” livestock.<sup>97</sup> While these laws may recognize that animals have an interest in avoiding pain or death, they allow pain to be inflicted upon the animals if it is in the human’s interest.<sup>98</sup> Thus, the law often serves the interests of humans more than the interests of animals.

In addition, animals’ rights tend to only be enforced when humans are allowed to, and choose to, enforce them. Animals cannot sue on their own behalf and must rely on their owners to protect their welfare.<sup>99</sup> In the case of the Animal Welfare Act, private citizens cannot seek relief from violations of the act.<sup>100</sup> Laws protecting animals from cruelty are only enforceable by the local prosecutor who is likely busy with other cases involving harm to humans.<sup>101</sup> In addition, penalties for animal cruelty are minor even if they are felonies,<sup>102</sup> suggesting that punishing those who harm animals is not a priority of the law.

Even when people choose to enforce animal protection laws, human interests often lie at the root of the decision to take legal action. In a tort action regarding harm to a pet, the evaluation of damages centers around the harm done to the person—the value of her property that is diminished or destroyed—without regard to the animal’s interests.<sup>103</sup> The pet is not compensated for its injury since it is mere property; the true injury is to the animal’s owner.<sup>104</sup> Even though a person can bring a lawsuit against someone who degrades the environment to an extent that the person can no longer view animals,<sup>105</sup> this serves no vindication for the animals but rather focuses on a wrong done to humans.<sup>106</sup> Therefore, the legal system only values animals for their use and enjoyment by humans.<sup>107</sup> Advocates for animal personhood argue that animals have an intrinsic value similar to that of persons which stems from their relationships with humans.<sup>108</sup>

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97. ALASKA STAT. § 03.55.030 (2009); *see also* Mitchell v. Heinrichs, 27 P.3d 309, 312 n.12 (Alaska 2001).

98. *See N.J. Soc’y for Prevention of Cruelty to Animals*, 219 A.2d at 206, 209.

99. Marguerite Hogan, Comment, *Standing for Nonhuman Animals: Developing a Guardianship Model from the Dissents in Sierra Club v. Morton*, 95 CAL. L. REV. 513, 523 (2007).

100. Schmahmann & Polacheck, *supra* note 26, at 767–68; *see, e.g.*, Int’l Primate Prot. League v. Inst. for Behavioral Research, 799 F.2d 934, 940 (4th Cir. 1986); *In Def. of Animals v. Cleveland Metroparks Zoo*, 785 F. Supp 100, 103 (N.D. Ohio 1991).

101. *See* Kelch, *supra* note 14, at 541; *see also* Hogan, *supra* note 99, at 522–23 (noting that animals must rely on humans to vindicate their rights).

102. *See* Kelch, *supra* note 14, at 541.

103. Bartlett, *supra* note 66, at 147–48; *see also, e.g.*, Mitchell v. Heinrichs, 27 P.3d 309, 313–14 (Alaska 2001).

104. Hogan, *supra* note 99, at 522.

105. *Citizens to End Animal Suffering and Exploitation v. New England Aquarium*, 836 F. Supp. 45, 52 (D. Mass. 1993) (“It is clear that the person who observes or works with a particular animal threatened by a federal decision is facing perceptible harm, since the very subject of his interest will no longer exist.” (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992))); Hogan, *supra* note 99, at 521.

106. Hogan, *supra* note 99, at 521.

107. *See* Bartlett, *supra* note 66, at 153.

108. *Id.* at 152–53; *see discussion infra* Part III.C–D.

## 2. *Humans' Superior Importance in Society*

Society's value of human interests over animal interests stems from the belief that humanity is "unique" and "valuable" because evolution placed humans (for the time being) at the top of the Great Chain of Being.<sup>109</sup> Supporters of animals as property rely on Darwinism and theories of "the survival of the fittest" to justify valuing humans over all other creatures since humans have evolved to a superior level above other animals.<sup>110</sup> This notion of "speciesism" causes humans to believe they are fundamentally superior to other animals simply because of their place in evolutionary history.<sup>111</sup>

Evolutionary theories actually support the classification of animals as persons, however, because they show how humans and animals come from the same origins—they are different only in degree, not in kind.<sup>112</sup> In other words, humans and animals are the same kind of creatures, but differ only in the degree that they have evolved.<sup>113</sup> Theories of evolution suggest that man developed from other animals—the genetic makeup of humans is ninety-eight percent similar to that of chimpanzees.<sup>114</sup> The argument that humanity is superior to animals because of its place in evolutionary history ignores this similarity and instead rewards humanity for simply being later in time.<sup>115</sup> This reflects humanity's prejudice in favor of its own species.<sup>116</sup> Because of the evolutionary junction between human and animal, the law should be willing to treat some animals as persons instead of favoring humans over all animals.

Supporters of animals as property contend, however, that society's central concern with the interests of humans precludes granting personhood status to animals because the rights that the animals would gain from such status would diminish human rights.<sup>117</sup> They argue that rights are in competition with one another and that when one creature obtains a right, it creates an obligation for all other creatures to respect that right.<sup>118</sup> This comes at the cost of restricting the rights of the party who must now conform to the newly created obligation.<sup>119</sup> Hence, granting personhood status to animals would give them rights that would obligate humans to acknowledge and respect those rights.<sup>120</sup>

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109. Bartlett, *supra* note 66, at 149, 159; Epstein, *supra* note 5, at 34.

110. Kelch, *supra* note 14, at 560.

111. D. Scott Bennett, Comment, *Chimera and the Continuum of Humanity: Erasing the Line of Constitutional Personhood*, 55 EMORY L.J. 347, 375 (2006).

112. *Id.* at 376; Kelch, *supra* note 14, at 561.

113. See Bennett, *supra* note 111, at 376; Kelch, *supra* note 14, at 561.

114. C. Owen Lovejoy, *The Origin of Man*, 211 SCIENCE 341, 341 (1981).

115. Kelch, *supra* note 14, at 561.

116. Bartlett, *supra* note 66, at 159.

117. Cupp, *supra* note 15, at 27.

118. See *id.* at 16.

119. *Id.* at 27.

120. *Id.*

The crux of this argument exemplifies the very height of humanity's self-serving attitude.<sup>121</sup> Granting rights to animals through their personhood status would not deny any rights to humans because rights are unlimited—simply granting one does not deny one to someone else.<sup>122</sup> In addition, rights granted to animals can be limited and only awarded in specific instances, thus mitigating any possible infringement on human rights.<sup>123</sup>

Supporters of animals as property also argue that animal personhood would diminish the value of human rights by equating humans with animals.<sup>124</sup> Granting traditionally human rights to animals may make humans seem less important<sup>125</sup> and cheapen what it means to be a “person” by granting it to a four legged furry beast who drinks out of the toilet. Instead of elevating animals to the sanctified level of humans, humans might be degraded to the level of beasts; in other words, “the final conclusion is likely to be, not that we ought to treat the brutes like human beings, but that there is no good reason why we should not treat human beings like brutes.”<sup>126</sup> Personhood status could be granted to animals on a limited basis to certain animals in certain situations, however, thus limiting the scope of animal rights.<sup>127</sup> This would allow human life to retain its sanctity.

Additionally, supporters of animals as property argue that society values human sanctity to such a high degree that it may not be willing to part with it by accepting animals as equal creatures in the eyes of the law.<sup>128</sup> They argue that granting animals full personhood status would give them greater rights under the law than infants and mentally incapacitated individuals.<sup>129</sup> The law would then essentially value animals over certain classes of people, something which society may be unwilling to accept.<sup>130</sup> If it would shock society to grant animals personhood, they argue, then courts should not hold in that manner.<sup>131</sup>

Society may not be so unaccepting. The civil rights movement provides an example of the way in which the law changes to accommodate shifting societal attitudes. People were once sold like property, displayed

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121. Bartlett, *supra* note 66, at 169 (suggesting that this elitist attitude lowers man to nothing more than a self-serving parasite who is unafraid of exploiting the environment).

122. Hogan, *supra* note 99, at 517.

123. *See infra* Part IV.B.

124. Cupp, *supra* note 15, at 27–30.

125. *Id.* at 27.

126. *Id.* (quoting A.M. MacIver, *Ethics and the Beetle*, in *ETHICS* 527, 528 (Judith J. Thomson & Gerald Dworkin eds., 1968)).

127. *See infra* Parts IV.A–B.

128. Cupp, *supra* note 15, at 29–30; Jonathan R. Lovvorn, *Animal Law in Action: The Law, Public Perception, and the Limits of Animal Rights Theory as a Basis for Legal Reform*, 12 *ANIMAL L.* 133, 140 (2006).

129. Cupp, *supra* note 15, at 30.

130. *Id.* at 29–30; Lovvorn, *supra* note 128, at 140; *see also* Wise, *supra* note 20, at 76.

131. Wise, *supra* note 20, at 76.

in zoos through the first decade of the twentieth century,<sup>132</sup> and used in medical experiments without consent through the 1970s.<sup>133</sup> As societal mores evolved, such practices were no longer considered acceptable and the law changed to disallow them. Just as society evolved to the level where people are no longer considered property,<sup>134</sup> society has now evolved to a level where it considers animals as more than mere property.<sup>135</sup> The law should thus treat certain animals as persons.

Supporters of animals as property fire back that simply granting personhood status to animals will not give them the rights that animal advocates desire if society is not ready and willing to accept them as persons, just like slaves were not treated as equal persons immediately after the enactment of the 13th Amendment.<sup>136</sup> Even after granting African Americans equal personhood status during the Civil War, the label of “person” did not give them completely equal rights in society.<sup>137</sup> Segregation continued for nearly a century after enactment of the 13th Amendment, until *Brown v. Board of Education* was decided, which only happened after the growth of the civil rights movement and society’s slow acceptance of all races.<sup>138</sup> In the meantime, African Americans endured unequal treatment under Jim Crow and *Plessy v. Ferguson*,<sup>139</sup> even though the 13th Amendment granted them personhood status under the law.<sup>140</sup> Thus, simply changing animals’ status from property to persons, like the 13th Amendment did for slaves, may not stop their systematic oppression nor give them any legal rights if society is not ready and willing to accept their personhood status.<sup>141</sup>

Society may be ready to accept some animals as persons, however, particularly animals such as pets that are often already treated as persons, as discussed *infra*.<sup>142</sup> In addition, laws can be changed to put animals on equal footing with humans even without societal support, just as the Supreme Court did in *Brown v. Board*. The *Brown v. Board* decision was wildly unpopular and unaccepted by society at the time, but this did not stop the court from handing down the decision.<sup>143</sup> Even though the Supreme Court recognized the equality of all people, segregation contin-

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132. Lovvorn, *supra* note 128, at 134 n.4 (citing PHILLIPS VERNER BRADFORD & HARVEY BLUME, OTA: THE PYGMY IN THE ZOO 179–90 (St. Martin’s Press 1992)).

133. *Id.* (citing JAMES H. JONES, BAD BLOOD: THE TUSKEGEE SYPHILIS EXPERIMENT 1–9 (The Free Press 1993)).

134. *Id.* at 134–36.

135. Mills & Akers, *supra* note 55, at 295 (citing Kelch, *supra* note 14, at 580).

136. Lovvorn, *supra* note 128, at 140; *see also* U.S. CONST. amend. XIII.

137. *See* Lovvorn, *supra* note 128, at 140–41.

138. *Id.*; *see also* 349 U.S. 294 (1955).

139. 163 U.S. 537 (1896).

140. Lovvorn, *supra* note 128, at 140.

141. *Id.* at 140–41.

142. *See infra* Part III.C.

143. Ray Sebastian Pantle, Comment, *Blacker than Death Row: How Current Equal Protection Analysis Fails Minorities Facing Capital Punishment*, 35 CAP. U. L. REV. 811, 841 (2007).

ued for over a decade after *Brown*.<sup>144</sup> The Supreme Court in fact acknowledged that it would take time for society to warm up to its decision; it did not implement any strict orders to remedy segregation, but rather left it up to the states to “make a prompt and reasonable start toward full compliance” with “all deliberate speed” and allowed additional time as necessary.<sup>145</sup>

Thus, legal recognition of animals as persons does not have to wait until *all* of society is willing to accept it. Rather, the law can take the first step by declaring animal personhood and allowing society to adjust. Society may already be willing to accept such changes. An indication that society is warming up to the idea of animals as persons is that it recognizes a higher status of cats and dogs over other animals because it does not find it acceptable to eat or wear these animals.<sup>146</sup> In addition, society is beginning to recognize that animals have many human characteristics.

*B. Anthropomorphic Characteristics that Justify Treating Certain Animals as Persons*

Certain animals have many of the same characteristics and display many of the same behaviors as humans. In addition to biological similarities, animals and humans share cognitive, behavioral, and emotional similarities. Advocates of animal personhood have focused on “highlighting as many attributes as possible that [animals] share with humans.”<sup>147</sup> These similarities may justify granting personhood status to animals who exhibit human-like characteristics.<sup>148</sup> One scholar argues that “[t]he goal should not be to draw an arbitrary line between person and nonperson,” but rather to grant personhood status according to “critical human characteristics.”<sup>149</sup> Thus, it is not necessary that *all* animals be characterized as persons, but merely those that exhibit human behaviors and characteristics be treated as persons.

The first characteristic that some animals share with humans is their capacity to suffer.<sup>150</sup> Scientific research has revealed that some animals such as apes, dogs, and cats clearly suffer, whereas the capacity of others to suffer is less clear.<sup>151</sup> The physiology of pain works in animals very much like human pain physiology, suggesting that some animals can

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144. Orley Ashenfelter et al., *Evaluating the Role of Brown v. Board of Education in School Equalization, Desegregation, and the Income of African Americans*, 8 AM. L. & ECON. REV. 213, 243 (2006).

145. *Brown v. Bd. of Educ.*, 349 U.S. 294, 300–01 (1955).

146. Huss, *supra* note 57, at 186.

147. Cupp, *supra* note 15, at 24.

148. Bennett, *supra* note 111, at 382–83.

149. *Id.*

150. Hogan, *supra* note 99, at 518.

151. See Sunstein, *supra* note 86, at 400.

physically feel pain and have the capacity to physically suffer just like humans.<sup>152</sup>

In addition to the scientific support of animals' ability to feel pain, the law recognizes that animals have the capacity to suffer. Animal cruelty laws protect animals from being tortured, mistreated, or inhumanely killed, at least in part to prevent animals from physical suffering.<sup>153</sup> Some courts even acknowledge that pets involved in custody battles may suffer as a result of their decisions.<sup>154</sup> Animal research laws regulate the amount of "discomfort, distress, and pain" suffered by the animals.<sup>155</sup> Also, the Animal Welfare Act permits animal suffering if it is incurred for a good reason,<sup>156</sup> thereby acknowledging that animals have the capacity to suffer but simply excusing the suffering in certain circumstances.<sup>157</sup> The capacity to suffer should be one factor in determining whether the law considers an animal a person.<sup>158</sup>

Some animals also share several cognitive traits with humans. These cognitive traits stem from the similar biological processes of animals and humans.<sup>159</sup> The neurological systems of many mammals are akin to those of humans, including similar brain wavelengths and biochemical processes.<sup>160</sup> Their similar biology allows for animals to exhibit similar cognitive and emotive traits of humans,<sup>161</sup> although animals possess these characteristics to a lesser degree than their human counterparts.<sup>162</sup>

The first cognitive trait that some animals share with humans is the ability to learn and communicate.<sup>163</sup> Many species of animals communicate with one another when they interact in groups, packs, nests, or swarms; even though humans may not understand exactly how they communicate. Specific species such as dogs and primates can communicate with humans.<sup>164</sup> Monkeys can learn to use sign language and remember how different people treat them.<sup>165</sup> Dogs are the only other species of animal that understands that when a human points at an object he is not just making a silly bodily movement but is rather expressing that he is referring to that object.<sup>166</sup> Still, many opponents of animal person-

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152. Kelch, *supra* note 14, at 557.

153. See, e.g., 510 ILL. COMP. STAT. 70/3.01-.03 (2006). For a more complete list of state anti-cruelty laws, see Anti-Cruelty Statutes, *supra* note 22.

154. *In re Marriage of Stewart*, 356 N.W.2d 611, 613 (Iowa Ct. App. 1984) (acknowledging that its custody decision should not put the dog in a position to be harmed).

155. 9 C.F.R. § 2.31(d)(1)(i) (2009).

156. 7 U.S.C. § 2143(a)(3) (2006).

157. Schmahmann & Polachek, *supra* note 26, at 765-66.

158. Sunstein, *supra* note 86, at 400.

159. Kelch, *supra* note 14, at 563.

160. *Id.*

161. Waisman & Newell, *supra* note 44, at 55.

162. See Bennett, *supra* note 111, at 376; Kelch, *supra* note 14, at 560.

163. Kelch, *supra* note 14, at 565, 571.

164. *Id.*

165. *Id.* at 571.

166. Carl Zimmer, *The Secrets Inside Your Dog's Mind*, TIME, Sept. 21, 2009, at 66, 67.

hood point out that the linguistic abilities of many species are in great dispute.<sup>167</sup> They argue that only creatures capable of language should be considered persons.<sup>168</sup> But linguistic skills cannot be the determinative trait of personhood because some humans—like infants, viable fetuses, the comatose, and the insane—cannot communicate but are still considered persons.<sup>169</sup> Yet, the many animals that can communicate are not yet considered persons under the law. Thus, although linguistic abilities should not be determinative of personhood, they should be a factor.

Second, many animals act based on their intentions, desires, and beliefs, not just automatic behaviors.<sup>170</sup> Humans do not have true control over animals the way that they do over other property because animals act based on their own needs and desires.<sup>171</sup> According to one scholar, “intentional (as opposed to automatic) behavior is the key to unlocking a significant legal distinction in type between dogs and dishwashers.”<sup>172</sup> To grant personhood to animals, it is not important to determine *what* the animal thinks, as long as it is clear *that* the animal thinks.<sup>173</sup> Simply knowing that an animal thinks and acts upon intent demonstrates another way that animals and humans are similar, justifying personhood status for certain animals.<sup>174</sup>

Even the current law acknowledges that animals act intentionally. Tort liability is often imposed on pet owners because the law presumes that a pet acts with intent based on the pet’s past conduct and propensity for certain behaviors.<sup>175</sup> If a court determines that an animal did not intend harm based on its past conduct and disposition, then the owner is not liable.<sup>176</sup> Thus, the law acknowledges that animals act upon intent just as humans do. Supporters of animals as property argue, however, that animals are inferior to humans because animals cannot overcome their instincts.<sup>177</sup> This is simply not true; animals can be taught to curb certain behaviors and trained to suppress their instincts, such as when they are given obedience and house training.

Third, animals can feel emotions and have specific personalities.<sup>178</sup> Conflicts between owners can cause a pet to feel stressed and can result in the pet’s nervousness, irritability, and loss of appetite, similar to the way humans react to stress.<sup>179</sup> Animals also exhibit preferences for cer-

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167. Kelch, *supra* note 14, at 569–71.

168. *Id.*

169. *Id.* at 572.

170. *Id.* at 565; *see also* Duckler, *supra* note 37, at 69.

171. Duckler, *supra* note 37, at 66–69.

172. *Id.* at 69.

173. *See id.*

174. *Id.*

175. *Id.* at 74.

176. *Id.* at 75.

177. Mills & Akers, *supra* note 55, at 298.

178. *See* Duckler, *supra* note 37, at 78–81; Stroh, *supra* note 34, at 235.

179. Stroh, *supra* note 34, at 235.

tain people, foods, activities, and toys, showing that they are capable of developing interests and likes.<sup>180</sup>

Similar to the way the law determines an animal's intent, the law often assesses a pet's personality to determine if it is particularly aggressive.<sup>181</sup> Courts consider the animal's breed, testimony about its disposition, and an examination of its past behaviors to determine its personality.<sup>182</sup> Courts also recognize personality characteristics of dogs that are typically only used to describe humans.<sup>183</sup> This demonstrates that the law recognizes how certain animals and humans share emotional and personality characteristics.

The supposed superior cognitive capacity of humans over animals is thus an unreasonable justification for denying animals personhood status. If cognitive capacity is the litmus test of personhood, then some animals should be considered persons because they are cognitively superior to some humans.<sup>184</sup> Certain animals have higher cognitive capacities than infants, viable fetuses, and the mentally disabled, yet all these humans are recognized by the law as persons.<sup>185</sup> Therefore, if cognition is a factor in determining personhood, then animals with higher cognitive capacities than some humans should be granted personhood.

### C. *Relational and Emotional Justification for Treating Pets as Persons*

Although anthropocentric views and the anthropomorphic qualities of animals should be considered in determining animals' legal status, the relationships between animals and humans should also be considered.<sup>186</sup> Likewise, pets hold a different place in society than other animals because of the way they interact with humans. Because of the relationships that they form with humans, pets are more highly valued than other animals. To a rancher, slaughterhouse worker, processor, grocer, or consumer, food animals are all the same; but this is not true for a human and his pet.<sup>187</sup> Pets serve as companions and family members because humans form strong emotional attachments to them.<sup>188</sup> In fact, many pets are bred specifically for human companionship because people recognize their value as unique animals capable of forming meaningful relation-

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180. Duckler, *supra* note 37, at 69.

181. *Id.* at 78–81.

182. *Id.*

183. *Id.* at 80–81; see *Bueckner v. Hamel*, 886 S.W.2d 368, 377 (Tex. App. 1994) (Andell, J., concurring).

184. See Bennett, *supra* note 111, at 369; Cupp, *supra* note 15, at 17.

185. Mills & Akers, *supra* note 55, at 296.

186. Sue-Ellen Brown, *The Human-Animal Bond and Self Psychology: Toward a New Understanding*, 12 SOC'Y & ANIMALS 67, 80 (2004) (stating that anthropomorphizing animals allows people to view them as humans and “derive social, physical, and psychological benefits from” them).

187. Wise, *supra* note 20, at 70.

188. See Lawrence A. Kurdek, *Pet Dogs as Attachment Figures*, 25 J. SOC. & PERS. RELATIONSHIPS 247, 260 (2008); Mills & Akers, *supra* note 55, at 285; Wise, *supra* note 20, at 72.

ships.<sup>189</sup> Since society treats pets like humans, the law should treat this group of animals as persons.

Increasingly, many people rely on pets for companionship, often elevating them to the status of human family members.<sup>190</sup> One explanation for this is that pets exhibit some of humanity's best traits while lacking some of humanity's worst traits,<sup>191</sup> thus making pets more agreeable and pleasant company. Pets are capable of "providing . . . love, friendship, and companionship."<sup>192</sup> At the same time, pets are unable to lie, criticize, and betray a person's trust because they lack linguistic skills to do so.<sup>193</sup> Dogs, for example, have earned the title of "man's best friend" because they commonly display positive personality traits such as "energy, affection, emotional reactivity, and intelligence."<sup>194</sup> In addition, many dogs are not perceived as critical, judgmental, and restrictive in the way many humans perceive their parents or spouses.<sup>195</sup> The abundance of positive traits of pets, as well as the lack of negative traits, makes them easy to get along with yet still emotionally responsive—the perfect companion for humans. These companionship traits possessed by pets allow them to form relationships with humans in the same way humans form relationships with one another.<sup>196</sup>

The ability of pets to form companionships with humans distinguishes them from other property, such as inanimate objects, that humans cannot form companionships with.<sup>197</sup> Some might argue that a person can develop a "relationship" with a prized possession, but clearly a relationship between a human and a Persian cat or Pomeranian dog is very different from one between a human and a pencil.<sup>198</sup> First of all, relationships with pets are bidirectional—meaning that a pet reciprocates the human's actions and emotions—whereas those with inanimate objects are not.<sup>199</sup> Some scholars question whether relationships with inanimate objects are even possible: "Inanimate objects are sometimes items of worship, but not of relationship."<sup>200</sup> In addition, humans have sympathy for their pets that they do not have for inanimate objects, nor

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189. See Sunstein, *supra* note 86, at 397.

190. See Epstein, *supra* note 5, at 35.

191. Bueckner v. Hamel, 886 S.W.2d 368, 377 (Tex. App. 1994) (Andell, J., concurring) ("[Dogs' traits] represent some of the best of human traits, including loyalty, trust, courage, playfulness, and love. This cannot be said of inanimate property. At the same time, dogs typically lack the worst human traits, including avarice, apathy, pettiness, and hatred.")

192. Duckler, *supra* note 37, at 83 (quoting Van Patten v. City of Binghamton, 137 F. Supp. 2d 98, 104 (N.D.N.Y. 2001)).

193. Brown, *supra* note 186, at 80; see also Bueckner, 886 S.W.2d at 377.

194. Kurdek, *supra* note 188, at 251 (citing Samuel D. Gosling, Virginia S.Y. Kwan & Olivia P. John, *A Dog's Got Personality: A Cross-Species Comparative Approach to Personality Judgments in Dogs and Humans*, 85 J. PERSONALITY & SOC. PSYCHOL. 1161, 1161–69 (2003)).

195. *Id.* at 248.

196. See Wise, *supra* note 20, at 47–50.

197. Britton, *supra* note 56, at 20.

198. Bueckner, 886 S.W.2d at 377; Wise, *supra* note 20, at 72.

199. Corso v. Crawford Dog & Cat Hosp., Inc., 415 N.Y.S.2d 182, 183 (Civ. Ct. 1979).

200. Britton, *supra* note 56, at 20.

for other animals with whom they have no relationship.<sup>201</sup> The ability of pets to provide companionship makes pets quite different from other property and more like humans.

Interestingly, even though the law considers all animals, including pets, as property, many courts also recognize the relationships between humans and pets that make them a unique class of animal. For example, courts frequently acknowledge that pets are considered “man’s best friend” and “faithful companion[s].”<sup>202</sup> One court specifically acknowledged that the cold classification of pets as property fails to describe their companionship value to humans: “A companion dog is not a fungible item, equivalent to other items of personal property. A companion dog is not a living room sofa or dining room furniture. This term inadequately and inaccurately describes the relationship between a human and a dog.”<sup>203</sup> In some instances, the tortuous death or injury of a pet that terminates or impairs the pet-owner relationship may allow the owner to recover the value of the lost relationship.<sup>204</sup> Courts have even awarded pet visitation rights to divorcing pet owners because the court acknowledges that the pet may have a strong relationship with both parties that is worth preserving.<sup>205</sup> So even though the law considers pets as pieces of property, courts have begun to acknowledge their companionship value, suggesting that the law is ready to treat pets more like persons and less like property.

Not only are pets capable of being companions, but they are frequently regarded by their owners as members of their families.<sup>206</sup> In one study, more than ninety-five percent of pet owners described their pet dog as a family member.<sup>207</sup> Another study found that, for some individuals, “closeness to pet[] dogs was equal to closeness for mothers, siblings, best friends, and significant others and was higher than that for fathers.”<sup>208</sup> Humans have been found to demonstrate equal “proximity maintenance” with dogs as with fathers and siblings—that is, they keep the attachment figure, the dog, physically nearby and accessible because they enjoy the dog’s presence.<sup>209</sup> This suggests that dogs are particularly

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201. See Kelch *supra* note 14, at 581; Wise, *supra* note 20, at 71.

202. See, e.g., Akers v. Sellers, 54 N.E.2d 779, 779 (Ind. App. 1944); Johnson v. Douglas, 723 N.Y.S.2d 627, 628 (Sup. Ct. 2001).

203. Rabideau v. City of Racine, 627 N.W.2d 795, 798 (Wis. 2001) (internal citations omitted); see also Corso, 415 N.Y.S.2d at 183 (“[A] pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property.”).

204. Brousseau v. Rosenthal, 443 N.Y.S.2d 285, 286 (Civ. Ct. 1980) (permitting recovery for loss of companionship when dog was killed); Duckler, *supra* note 37, at 76.

205. Arrington v. Arrington, 613 S.W.2d 565, 569 (Tex. Civ. App. 1981) (allowing custody agreement and visitation, assuming pet has enough love to share with both spouses); Stroh, *supra* note 34, at 245. But see Bennett v. Bennett, 655 So. 2d 109, 110 (Fla. Dist. Ct. App. 1995) (not allowing custody or visitation for a pet dog because it is property).

206. Kurdek, *supra* note 188, at 247; Emma Power, *Furry Families: Making a Human-Dog Family Through Home*, 9 SOC. & CULTURAL GEOGRAPHY 535, 536 (2008).

207. Power, *supra* note 206, at 539.

208. Kurdek, *supra* note 188, at 261.

209. *Id.* at 260.

well-regarded in the family<sup>210</sup> and demonstrates that “the court of public opinion has elevated the pets’ status to that of human family member[s].”<sup>211</sup> People’s feelings that their pets are family members stem not only from their pet’s anthropomorphic qualities discussed above,<sup>212</sup> but also from their close interactions and cohabitation with their owners.<sup>213</sup>

Humans treat their pets as family members in a variety of ways. They buy their pets presents and grooming products and throw them birthday parties,<sup>214</sup> all of which accentuate pets’ anthropomorphic qualities.<sup>215</sup> Families also include pets in their regular activities and even incorporate special activities into their daily routines that are specifically beneficial to the pets, such as walks around the block.<sup>216</sup> This shows that the needs of pets are often considered just as important as the needs of other family members, making pets seem more like persons than property.

The most pronounced manner in which owners treat their pets as family members is in their caretaking function. Owners continuously care for and protect their pets from harm.<sup>217</sup> They recognize that pets have both physical and psychological needs, and owners assume responsibility for satisfying these needs.<sup>218</sup> By accepting this role as caretaker, owners are morally bound to take these needs into consideration.<sup>219</sup>

Even the law recognizes the importance of caretaking in regard to pets. Laws protect animals from cruelty and neglect,<sup>220</sup> thereby mandating that owners provide a minimum level of care for their pets.<sup>221</sup> Upon divorce, ownership of a pet is often shown by demonstrating that the party undertook the main caretaking responsibilities of the pet.<sup>222</sup> A court may even consider the caretaking of the pet to be more important when awarding custody than property principles such as which spouse was given the pet as a gift.<sup>223</sup> So once again, even though pets are legally regarded as property, some courts have begun to stray from this traditional treatment and consider them more as family-like persons.

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210. *Id.*

211. Epstein, *supra* note 5, at 35.

212. *See supra* Part III.B.

213. Power, *supra* note 206, at 552.

214. Waisman & Newell, *supra* note 44, at 61–62.

215. Epstein, *supra* note 5, at 31.

216. Power, *supra* note 206, at 541–42.

217. Huss, *supra* note 57, at 194; *see also* Britton, *supra* note 56, at 31 (noting that pets must go to the vet and many have health insurance).

218. Stroh, *supra* note 34, at 235, 240.

219. *Id.* at 242.

220. *See, e.g.*, 510 ILL. COMP. STAT. 70/3.01–.03 (2008). For a more complete list of state anti-cruelty laws, *see* Anti-Cruelty Statutes, *supra* note 22.

221. Britton, *supra* note 56, at 33.

222. Duckler, *supra* note 37, at 67–68.

223. *See* Huss, *supra* note 57, at 226–27.

This caretaking role demonstrates that pets are not only treated as part of the family, but that they are often considered children.<sup>224</sup> Pets are often treated as children by their owners<sup>225</sup> because they share many of the same attributes of children: they rely on someone for care, they can be picked up, and they engage in play.<sup>226</sup> Pets are sometimes seen as “perpetual children”<sup>227</sup> because they retain juvenile characteristics into adulthood, a concept known as neotony.<sup>228</sup> Like children, pets are supervised but given freedom to make everyday decisions.<sup>229</sup> In addition, people engage in the same activities with pets as they do with children.<sup>230</sup>

Pets are also similar to children in another regard: the act of obtaining a pet often takes the form of adoption, or something very akin to adoption.<sup>231</sup> The terms used for adopting pets and adopting children are similar—they are housed in a shelter and receive temporary placement with a foster family.<sup>232</sup> Many shelters refer to the process of obtaining a pet as an adoption agreement rather than a sale in order to emphasize that the pet is a living thing, not an inanimate object.<sup>233</sup> Just like adopting a child, families often bring pets home in infancy, raise them, teach them, and care for them.<sup>234</sup> Thus, obtaining a pet is less like buying dishes and more like paying an adoption agency for the service of providing eager parents-to-be the opportunity to raise a living thing—either a child or a pet.<sup>235</sup> Once home, pets can also “perform[ ] a sibling role for children, offering them a form of non-parental, non-judgemental [sic] companionship and care, as well as a playmate.”<sup>236</sup> But even though pets and children are treated similarly by families caring for them, the law does not treat children as property.<sup>237</sup> Since children are not considered property, and pets are treated so similarly, pets should not be considered property, either.<sup>238</sup>

The close relationships that owners have with their pets coincide with their emotional attachment to the pets.<sup>239</sup> Pets can serve as emo-

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224. Power, *supra* note 206, at 541. One woman went a step further and married her pet dog. Andrea Zimmerman, *Woman Marries Her Dog (Seriously)*, LEMONDROP, July 8, 2009, <http://www.lemondrop.com/2009/07/08/woman-marries-her-dog-seriously/>.

225. Huss, *supra* note 57, at 193.

226. See Shaela G. Marks et al., *Pet Attachment and Generativity Among Young Adults*, 128 J. PSYCHOL. 641, 642–43 (1994).

227. *See id.*

228. Huss, *supra* note 57, at 191.

229. Sunstein, *supra* note 86, at 397.

230. Marks et al., *supra* note 226, at 642.

231. *See* Stroh, *supra* note 34, at 239.

232. Britton, *supra* note 56, at 16–17.

233. Huss, *supra* note 57, at 204–05.

234. Stroh, *supra* note 34, at 243.

235. *Id.* at 238–39.

236. Power, *supra* note 206, at 541 (citation omitted).

237. Mills & Akers, *supra* note 55, at 295; Stroh, *supra* note 34, at 240.

238. Mills & Akers, *supra* note 55, at 295–96.

239. *See* Kurdek, *supra* note 188, at 260; Mills & Akers, *supra* note 55, at 285; Wise, *supra* note 20, at 72.

tional substitutes for friends or family members, and they can influence a person's disposition through their ability to give and receive affection.<sup>240</sup> In other words, when a person lacks friends or family with which he can express emotions and receive emotional responses in return, a pet can fill this role. One study found that "pet owners establish attachment bonds with their dogs," especially two specific aspects of attachment: proximity maintenance (keeping the pet close because it is enjoyable to have around) and secure base (the pet is regarded as a dependable source of comfort).<sup>241</sup> Pet attachment is particularly important among people who live alone, such as divorcees, widows, and childless couples.<sup>242</sup>

There are several reasons why owners develop emotional attachments to their pets. The spatial proximity of the pet and owner due to living in the same home helps develop their relationship, something that was lacking prior to the 1950s when pets were often kept outside.<sup>243</sup> Caretaking also serves to increase this proximity and frequent interaction, and it can enhance the emotional attachment between a pet and its owner.<sup>244</sup> Pets "invite nurturance"<sup>245</sup> as a result of their childlike characteristics,<sup>246</sup> and this nurturing can cause a positive emotional response in many people,<sup>247</sup> including people whose "capacity to love and nurture" can be brought out by the act of caretaking.<sup>248</sup> The more time people spend with their pets, the closer these attachments become; this is evidenced by the fact that an owner's sense of emotional attachment grows stronger as the pet grows older.<sup>249</sup>

Owners also become attached to their pets because the pets offer emotional feedback in response to an owner's actions, which promotes the owner's development of a sense of self and emotional well-being.<sup>250</sup> Pets play the same role as humans do in this regard;<sup>251</sup> they can respond by empathizing, soothing, affirming, sustaining, or calming (among other possibilities).<sup>252</sup> People also project their emotions onto a pet and interpret the pet's reactions as emotional responses—pets mirror a person's emotions.<sup>253</sup> After interpreting the pet's actions as emotional feedback, people then internalize the feedback, which helps them shape and under-

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240. Mills & Akers, *supra* note 55, at 285 (quoting Pat Sable, *Pets, Attachment, and Well-Being Across the Life Cycle*, 40 SOC. WORK 334, 337 (1995)).

241. Kurdek, *supra* note 188, at 249, 260–61.

242. Mills & Akers, *supra* note 55, at 285.

243. Power, *supra* note 206, at 536.

244. See Kurdek, *supra* note 188, at 262; Marks et al., *supra* note 226, at 644.

245. Marks et al., *supra* note 226, at 642.

246. Huss, *supra* note 57, at 193–94.

247. Marks et al., *supra* note 226, at 647.

248. Brown, *supra* note 186, at 78.

249. See Duckler, *supra* note 37, at 71.

250. Brown, *supra* note 186, at 69–72.

251. *Id.* at 75.

252. *Id.* at 69.

253. See *id.* at 69–83.

stand their own emotions.<sup>254</sup> In this manner, pets serve as a safe emotional outlet that allows people to display their emotions, which in turn shapes people's behaviors based on their interpretations of the pets' emotional responses.<sup>255</sup> This is especially important in families where emotions are often concealed and not displayed: "[C]hildren may find it safer to explore their emotions with their companion animals" because "companion animals . . . 'do not criticize, retaliate, feel overwhelmed, or reject the child who is expansive in showing off their newly found self.'"<sup>256</sup>

Whether the pet actually feels this emotion and whether the specific emotion can be determined is irrelevant; all that matters is a person's subjective experience of his pet's affection because this shapes a person's feelings about himself.<sup>257</sup> The large role that pets play in shaping a person's sense of self causes owners to develop close emotional attachments with pets and explains why people try to keep a pet alive so long—they are afraid of losing a part of themselves, in a manner similar to the loss of a human companion.<sup>258</sup>

The close emotional relationships that develop between pets and owners are so similar to relationships between humans that the death of the pet often causes grief as if a human were lost.<sup>259</sup> Grief upon the death of a pet can even be greater than grief experienced upon the death of a person,<sup>260</sup> and counseling for such grief is becoming increasingly common.<sup>261</sup> This grief may be explained by the closeness of the relationship that is formed by caring for and living with the pet: "It is a special and unique relationship, built on shared experiences, which is not easy to replace."<sup>262</sup> The death of a pet may cause a person to feel like part of the person's emotional self was lost.<sup>263</sup>

The law also recognizes the closeness of this emotional relationship between pets and their owners.<sup>264</sup> In divorce cases, some courts consider the psychological effects on the owners of awarding custody of a pet, thus recognizing that emotional attachments are formed with the pet and that

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254. *See id.*

255. *See id.*

256. *Id.* at 75 (quoting Lindsey Stroben Alper, *The Child-Pet Bond*, in 9 *THE WIDENING SCOPE OF SELF PSYCHOLOGY: PROGRESS IN SELF PSYCHOLOGY* 257, 259 (Arnold Goldberg ed., 1993)).

257. *Id.* at 71.

258. *Id.* at 76–78; *see also* Wise, *supra* note 20, at 67–68 (discussing Professor Margaret Jane Radin's constitutive property theory as it applies to pets).

259. Epstein, *supra* note 5, at 31.

260. Bartlett, *supra* note 66, at 161; Kurdek, *supra* note 188, at 247.

261. Waisman & Newell, *supra* note 44, at 58.

262. Brown, *supra* note 186, at 77.

263. *Id.*

264. *See* Johnson v. Douglas, 723 N.Y.S.2d 627, 628 (Sup. Ct. 2001) ("There is no doubt that some pet owners have become so attached to their family pets that the animals are considered members of the family."); Rabideau v. City of Racine, 627 N.W.2d 795, 799 (Wis. 2001) ("Humans have an enormous capacity to form bonds with dogs, cats, birds and an infinite number of other beings that are non-human."); Mills & Akers, *supra* note 55, at 293; Wise, *supra* note 20, at 43–44, 82.

these will be affected when only one owner is granted custody.<sup>265</sup> Many more courts have recognized that it is normal for owners to suffer from grief upon the loss of a pet.<sup>266</sup> Some courts go so far as to acknowledge that the grief suffered upon loss of a pet is similar to that suffered upon the loss of a significant other, a best friend, or a non-blood relative.<sup>267</sup> Yet, these very same courts continue to treat pets as property,<sup>268</sup> even after recognizing that their owners are as emotionally invested in these relationships as they are in those with other people.

The close emotional relationships between pets and their owners are justification for distinguishing pets from other animals. These relationships, developed because of the way people treat their pets, demonstrate that many people do not treat pets like other property, but rather as companions and family members; thus they should be treated as persons under the law. Even those opposed to considering animals as persons do not demean these relationships, but instead acknowledge their intimacy.<sup>269</sup> Yet, they still argue for all animals, even pets, to retain their property status, relying on the anthropocentric reasons discussed above,<sup>270</sup> as well as the potentially devastating economic impacts that animal personhood might cause, discussed below.

*D. Economic Arguments Challenging the Treatment of Pets as Persons in Tort and Custody Suits*

Two areas where pet owners would specifically like their pets to be considered persons are in tort suits when their pets are injured or killed and in custody battles pursuant to divorce or separation. However, the potential economic impact of granting personhood to pets in these cases concerns those who support animals' current status as property.

Although the law tends to treat pets as only worth their fair market value, advocates of treating pets as persons in tort and custody disputes argue that pets' anthropomorphic qualities and emotional relationships with humans render them worth more than their fair market value.<sup>271</sup> They argue that pets should be treated as persons and their non-

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265. Mills & Akers, *supra* note 55, at 293; *see, e.g.*, Arrington v. Arrington, 613 S.W.2d 565, 569 (Tex. App. 1981) (stating that a pet had enough love to share with both owners upon divorce).

266. Wise, *supra* note 20, at 43, 82; *see, e.g.*, Richardson v. Fairbanks N. Star Borough, 705 P.2d 454, 456 (Alaska 1985); Nichols v. Sukaro Kennels, 555 N.W.2d 689, 691 (Iowa 1996); Harabes v. Barkery, Inc., 791 A.2d 1142, 1143 (N.J. Super. Ct. Law Div. 2001); Johnson, 723 N.Y.S.2d at 628.

267. Harabes, 791 A.2d at 1146 (finding that just as loss of companionship damages and emotional distress damages are unavailable for the loss of a child or spouse, they are not recoverable for the loss of a pet); Johnson, 723 N.Y.S.2d at 628 ("It is not inconceivable that pet owners would seek some remuneration for the death of a faithful and loyal friend.").

268. Wise, *supra* note 20, at 43, 82; *see Harabes*, 791 A.2d at 1146; Johnson, 723 N.Y.S.2d at 628.

269. Harabes, 791 A.2d at 1143–46; Wise, *supra* note 20, at 44.

270. *See supra* Part III.A.

271. *See Kurdek, supra* note 188, at 260–61; Wise, *supra* note 20, at 47, 72.

economic value should be recognized by the law.<sup>272</sup> First, if a pet's value was simply economic, then the pet would be discarded when worn or outdated, and the owner would replace it with a new pet instead of paying for its upkeep.<sup>273</sup> But pet owners often spend more to keep an elderly pet alive than it would cost to simply purchase a new younger pet. The fact that pets are cared for into old age and are not normally euthanized in exchange for younger replacements demonstrates that they are unlike other property and worth more than their market value.<sup>274</sup>

In the pet world, "there is no such thing as replacement."<sup>275</sup> This is because as pets age they become more valuable to their owners<sup>276</sup> as a result of having spent more time with their owners and thus developing a closer emotional relationship with them.<sup>277</sup> Interestingly, a pet's emotional value appreciates even though its economic value plummets—the fair market value of an aged pet is nothing because people do not want to buy someone else's pet.<sup>278</sup> Thus, a pet's close relationship with its owner gives it a distinct emotional value that other non-pet animals do not possess<sup>279</sup>—not even other domesticated animals.<sup>280</sup> This emotional value justifies treating pets as persons in certain instances.

In addition, a pet's emotional value causes its owner to suffer an emotional loss when a pet is killed, but courts fail to compensate for this loss.<sup>281</sup> Instead, they compensate for the economic loss of the pet, which is often next to nothing.<sup>282</sup> Tort theory is about making a person whole,<sup>283</sup> which can only be accomplished by compensating pet owners for the emotional loss of their pets in a manner similar to the loss of a human, not for an economic loss as if a lamp had been broken. Treating a pet as solely worth its economic value is equivalent to awarding a parent damages in the amount it would cost to adopt a child rather than compensating the parent for the emotional distress suffered as a result of the destroyed relationship when his child is killed. Legally treating a pet like a

272. See, e.g., *Bueckner v. Hamel*, 886 S.W.2d 368, 370 (Tex. App. 1994) (noting the owners' argument that their two dogs were worth more to them than the dogs' simple fair market value).

273. *Wise*, *supra* note 20, at 47.

274. *Id.*; see also *Stroh*, *supra* note 34, at 240.

275. *Van Patten v. City of Binghamton*, 137 F. Supp. 2d 98, 105 (N.D.N.Y. 2001).

276. *Brousseau v. Rosenthal*, 443 N.Y.S.2d 285, 287 (Civ. Ct. 1980).

277. See *Duckler*, *supra* note 37, at 71.

278. See *id.*

279. See *Bueckner v. Hamel*, 886 S.W.2d 368, 378 (Tex. App. 1994) (Andell, J., concurring) ("The law should reflect society's recognition that animals are sentient and emotive beings that are capable of providing companionship to the humans with whom they live."); *Kurdek*, *supra* note 188, at 260–61; *Stroh*, *supra* note 34, at 238; *Wise*, *supra* note 20, at 47, 72.

280. Domestication is surely one of the reasons that pets are emotionally valuable, but it is only a part of what sets them apart from wild animals. See *Huss*, *supra* note 57, at 192. Other domesticated animals such as work animals, and animals raised for food, do not share the same bond with humans as pets do. *Id.*; see *Bartlett*, *supra* note 66, at 154. In fact, the emotional value of an animal is inversely proportionate to its utilitarian value: "[T]he deaths of farm animals and barn cats are seldom mourned with extreme sorrow." *Bartlett*, *supra* note 66, at 154.

281. See *Wise*, *supra* note 20, at 64–65.

282. *Id.*

283. *Id.* at 39.

child will recognize the emotional value of a pet, rather than just its economic value.<sup>284</sup>

Opponents of treating animals as persons argue that compensating an owner for emotional distress suffered because of the death of a pet elevates pet relationships above some human relationships.<sup>285</sup> For instance, close non-family friends and engaged couples often cannot recover for these emotional distress damages even though they clearly have strong emotional relationships as well.<sup>286</sup> On the other hand, if the pet is treated like a family member by its owners, then the law should also treat it like a family member.

Additionally, opponents of animal personhood argue that if pets are treated as persons in tort and custody disputes, then their owners will be more inclined to sue for recovery of emotional damages and to battle over custody of the pet.<sup>287</sup> Pet owners who would not otherwise bring a lawsuit for an injury to a pet because the damages they could recover would be minimal fair market value damages would now have more incentive to sue because the payout will be larger, as it could include non-economic damages for emotional harm to the pet's owner.<sup>288</sup> In terms of custody disputes, more pet owners might challenge the ownership of the pet if they know the court will do more than simply award the pet based on property principles. Based on the number of pets<sup>289</sup> and divorces<sup>290</sup> in this country, the courts could face severe clogging if divorcees were allowed to argue the merits of custody for pets the same way they do for children.<sup>291</sup>

Opponents of animal personhood then contend that the legal treatment of pets as persons might open the floodgates of litigation in an already litigious society.<sup>292</sup> One court fears that "were such a claim to go forward, the law would proceed upon a course that had no just stopping

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284. Cupp, *supra* note 15, at 32; Wise, *supra* note 20, at 34.

285. Cupp, *supra* note 15, at 33; *see* Wise, *supra* note 20, at 54.

286. Cupp, *supra* note 15, at 33; *see* Wise, *supra* note 20, at 54; *see, e.g.*, Rabideau v. City of Racine, 627 N.W.2d 795, 801, 807 (Wis. 2001) (barring recovery for negligent infliction of emotional distress when the victim is a human best friend or an animal best friend). Even when the group of related individuals is expanded to include other loved ones, pets are still not included. Lachenman v. Stice, 838 N.E.2d 451, 460–61 (Ind. Ct. App. 2005).

287. *See* Cupp, *supra* note 15, at 43–45.

288. *See* Schwartz & Laird, *supra* note 32, at 261–63.

289. Americans own over 170 million pets. *See* American Veterinary Medical Association, Market Research Statistics: U.S. Pet Ownership—2007, <http://www.avma.org/reference/marketstats/ownership.asp> (last visited May 13, 2010).

290. Over 950,000 divorces occurred yearly in the United States in 1998, 1999, and 2000. *See* Americans for Divorce Reform, Divorce Rates, <http://www.divorcereform.org/rates.html#anchor1135809> (last visited May 13, 2010).

291. Bennett v. Bennett, 655 So. 2d 109, 110–11 (Fla. Dist. Ct. App. 1995) (denying custody and visitation for a pet and recognizing that courts are clogged with custody and visitation hearings for children); Stroh, *supra* note 34, at 233–34.

292. Harabes v. Barkery, Inc., 791 A.2d 1142, 1145 (N.J. Super. Ct. Law Div. 2001); Johnson v. Douglas, 723 N.Y.S.2d 627, 628 (Sup. Ct. 2001) (arguing that allowing emotional recovery for owners of injured pets would allow recovery for damage to other prized possessions, thereby increasing the burden on the court); Cupp, *supra* note 15, at 43–45.

point.<sup>293</sup> Not only might strong emotional attachments to pets cause owners to more willingly pursue these types of legal claims, but many animal advocates could fuel the fire by eagerly taking on cases for little or no compensation.<sup>294</sup> Animal rights supporters might simply want to make a difference for their cause<sup>295</sup> and others might attempt to test the waters to see how far the courts will extend the animal personhood treatment.<sup>296</sup> Given the number and resources behind animal rights activists and organizations, not to mention their history of radical actions,<sup>297</sup> many more cases related to animals' status might be filed. Potentially fewer of these cases would settle because settling would preempt advocates from pushing the envelope in court in order to determine how far animal rights can be expanded.<sup>298</sup> And even if pet owners were willing to settle, more people might bring these actions knowing they can force a settlement in their favor.<sup>299</sup>

Increased litigation would not only impose costs on the parties and society for use of the courts, but it would impose costs on the defendants, many of whom might be veterinarians. Allowing greater damages to owners by treating their pets as persons might increase the losses veterinarians incur in lawsuits.<sup>300</sup> Both their insurance rates and prices charged for services may increase in order to offset the costs of these lawsuits and remain in business.<sup>301</sup> At the very least, pet owners could face higher veterinary bills because even small increases in veterinary costs lead to higher prices.<sup>302</sup> Veterinarians may also practice defensive medicine in order to avoid being sued,<sup>303</sup> and others may leave the industry altogether, resulting in fewer veterinarians to provide care.<sup>304</sup> Veterinary medicine producers may also be targeted by lawsuits that will discourage the production of new medications.<sup>305</sup> All of these effects of animals being treated as persons could harm the very pets that personhood status was intended to benefit.

However, these concerns may be unfounded. First, litigation has not spiraled out of control from the time when courts first began permitting awards of emotional damages for harm to humans.<sup>306</sup> Courts pro-

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293. Rabideau v. City of Racine, 627 N.W.2d 795, 798–99 (Wis. 2001) (emphasis omitted).

294. Cupp, *supra* note 15, at 50.

295. *Id.*

296. *See id.* at 47; Schwartz & Laird, *supra* note 32, at 259; Sunstein, *supra* note 86, at 392.

297. *See Animal Rights Activist: 'Kill the Researchers,'* WORLDNETDAILY, Oct. 27, 2005, [http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=47096](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=47096).

298. *See* Cupp, *supra* note 15, at 47; Sunstein, *supra* note 86, at 392.

299. *See* Schwartz & Laird, *supra* note 32, at 261–63.

300. *Id.* at 266–68.

301. *Id.* at 260–61, 266–68.

302. *Id.* at 272.

303. *Id.* at 266–67.

304. *Id.* at 260–61.

305. *Id.* at 263–65.

306. *See* Waisman & Newell, *supra* note 44, at 67; Wise, *supra* note 20, at 71; *see also* Campbell v. Animal Quarantine Station, 632 P.2d 1066, 1071 (Haw. 1981) (“[T]he fears of unlimited liability have not proved true.”).

ceeded with caution when loss of consortium first became a viable claim, and they used their discretion to choose which cases to hear because of the fear that courts would be burdened.<sup>307</sup> The same can be done for pet cases.<sup>308</sup> Thus, there is little reason to think that the amount of litigation involving pets will dramatically increase if they are treated as persons. In addition, a cap on damages would limit the incentive to bring tort suits and would limit the financial harm done to veterinarians,<sup>309</sup> who often make significant amounts of money sufficient to cover these costs and still operate profitably.<sup>310</sup> Finally, it is contradictory for veterinarians to provide elaborate medical care for pets as if they were persons, but then scoff at the idea of incurring higher damages in a lawsuit when the law treats these injured pets as persons.<sup>311</sup>

Opponents of treating pets as persons also contend that in addition to the increase in quantity of litigation, personhood status for pets in tort and custody cases may also cause an increase in the complexity of litigation. It would be difficult to determine, measure, and value an owner's emotional damages suffered due to her pet's injury.<sup>312</sup> The key factor in determining these damages would be determining whether a person and her pet were sufficiently close to one another to allow for recovery of emotional damages.<sup>313</sup> Even more difficult would be trying to determine pain and suffering incurred by a pet.<sup>314</sup>

These concerns may also be unfounded. It would be no more difficult to prove that a human suffered emotional damages due to the death or injury of his pet than due to the death or injury of another human.<sup>315</sup> Simple testimony regarding the emotional bond between the pet and owner would provide sufficient evidence of their closeness,<sup>316</sup> which would then become a question for the jury, just as in a case of human injury.<sup>317</sup> Such claims would be difficult to fake because medical and psy-

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307. See *Lejeune v. Rayne Branch Hosp.*, 556 So. 2d 559, 563 (La. 1990) ("The fear that the courts may be flooded with litigation is not sufficient justification to disallow those claims that are legitimate. It is the duty of the courts to discern valid claims from fraudulent ones."); *Waisman & Newell*, *supra* note 44, at 49.

308. Hogan, *supra* note 99, at 531.

309. *Waisman & Newell*, *supra* note 44, at 67. But caps often do not last long, are sometimes unconstitutional, and are eventually set aside. Schwartz & Laird, *supra* note 32, at 269–72.

310. Wise, *supra* note 20, at 79–80.

311. See *id.* at 48, 80.

312. *Harabes v. Barkery, Inc.*, 791 A.2d 1142, 1145 (N.J. Super. Ct. Law Div. 2001); Wise, *supra* note 20, at 40–41.

313. Wise, *supra* note 20, at 54.

314. *Gluckman v. Am. Airlines, Inc.*, 844 F. Supp. 151, 159 (S.D.N.Y. 1994) (holding that no cause of action allows pets to recover for pain and suffering); Cupp, *supra* note 15, at 52–53.

315. Wise, *supra* note 20, at 80.

316. *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1069–71 (Haw. 1981) (using testimony about the relationship of the owner and his pet, their daily routines, and the owner's feelings of loss from the death of the pet in determining damages); *Bueckner v. Hamel*, 886 S.W.2d 368, 378 (Tex. App. 1994) (Andell, J., concurring) ("[T]estimony that an animal is a beloved companion should generally be considered sufficient to justify a finding of damages well beyond the market value of the animal and its yet-unborn progeny.").

317. *Waisman & Newell*, *supra* note 44, at 66.

chological tools exist that can detect such fraudulent claims, again, just as is done when evaluating a plaintiff for emotional damages incurred because of injury to a human.<sup>318</sup>

Similarly, in custody cases the argumentation and documentation necessary to determine custody of a pet under standards now used to determine custody of children would not be any more arduous than that which is required to determine whether a pet is marital or separate property and who is the proper owner.<sup>319</sup> Also, courts could simply order binding arbitration of custody disputes regarding pets.<sup>320</sup> Thus, the economic fears of treating pets as persons are unsubstantiated.

#### IV. RESOLUTION

The property status of some animals must change, but the change does not need to be as drastic or have the catastrophic consequences that opponents of this change fear. The first step in changing animals' legal status is to confine the category of animals that the law might treat as persons to only pets that display anthropomorphic qualities. Second, we must narrow the class of anthropomorphic pets that the law will treat as persons to those that are treated as persons by their owners. Third, we must narrow the areas of the law in which anthropomorphic pets might be treated as persons to torts and custody disputes. Finally, instead of granting this small class of animals actual legal personhood status, we should merely "treat" them as persons for these limited purposes.

##### A. *Classes of Animals that Should Be Eligible for Possible Personhood Treatment—Anthropomorphic Pets*

Only certain animals should qualify for personhood status. Clearly not all animals are created equally. Thankfully, the Equal Protection Clause does not apply to animals, so not all animals must be treated equally by the law.<sup>321</sup> The anthropocentric concerns raised earlier in regards to valuing animals more than human beings are valid concerns. Surely the law should not treat a mosquito and a human equally. So not *all* animals should be treated as persons.

But the anthropomorphic arguments raised are valid as well. There is no denying that some animals are extraordinarily similar to humans and display many human traits, behaviors, and emotions. They are not "soulless machines without pain, feelings, or emotions" as described by Descartes in the 17th century.<sup>322</sup> Therefore, those animals that manifest such anthropomorphic traits should be differentiated from other animals.

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318. *Id.*

319. Mills & Akers, *supra* note 55, at 292.

320. Stroh, *supra* note 34, at 250–51.

321. U.S. CONST. amend. XIV.

322. Kelch, *supra* note 14, at 556.

Furthermore, the relationships formed between humans and certain animals such as pets are unmistakable. These relationships often closely mirror human relationships. Thus, the animals that should be eligible for possible personhood treatment are anthropomorphic pets.

*B. Specific Anthropomorphic Pets that Should Be Treated as Persons in Tort and Custody Disputes*

Even in the realm of anthropomorphic pets, not all are alike. Some are considered part of the family, some are strictly for breeding purposes, others are for protection, and still others are for show. A per se rule that treats all pets as persons in all tort and custody suits would ignore these distinctions. It would also leave open the possibility of the flood of litigation that the economic-minded opponents fear, because of the guarantee that a pet will be given certain treatment under the law. People who may otherwise forego legal action may look to use the courts even if their attachment to their pet is less than emotional if they know that they are guaranteed increased damages with the pet being treated as a person. Thus, anthropomorphic pets should not be recognized as persons per se in tort and custody disputes. Rather, courts should consider the circumstances of each pet-owner relationship and examine the manner in which the owner treats the pet. If the owner treats the pet as a person, so should the court. Simple testimony and other evidence would suffice at a hearing to determine the extent of the relationship and the manner in which the pet will be treated for that claim.<sup>323</sup>

Economic-minded scholars may scoff at the extra work this creates for the courts and might claim that the amount of evidence required to determine the nature of the pet-owner relationship will clog the courts and waste resources. But this type of testimony often occurs even when a pet is treated as property in a legal dispute.<sup>324</sup> Custody hearings involve the presentation of evidence regarding the financial and physical care of the pet and the history of who purchased or gave the pet as a gift.<sup>325</sup> And tort cases already require an assessment of the extent of damages incurred according to the pet's injury and its value to the owner. The more common use of "actual damages" to the owner requires evidence to be presented regarding the pet's cost, veterinary care, special training, breeding possibilities, and pedigree.<sup>326</sup> Thus, presenting evidence regard-

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323. *Bueckner v. Hamel*, 886 S.W.2d 368, 378 (Tex. App. 1994) (Andell, J., concurring); *see also*, e.g., *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1069–71 (Haw. 1981).

324. *See* *Mills & Akers*, *supra* note 55, at 292.

325. *See id.*

326. *Mitchell v. Heinrichs*, 27 P.3d 309, 313–14 (Alaska 2001); *Bueckner*, 886 S.W.2d at 370–72 (awarding the pecuniary value of the killed dogs to the owner based on the usefulness and services of the dog); *Schwartz & Laird*, *supra* note 32, at 241. Sometimes the dog's potential breeding capabilities are considered and the loss of income from puppies is accounted for. *See Brousseau v. Rosenthal*, 443 N.Y.S.2d 285, 286–87 (Civ. Ct. 1980); *Bueckner*, 886 S.W.2d at 371–72.

ing the closeness of the pet and the owner is not an overly burdensome task.

Economic-minded scholars might also argue that all pet owners will be able to present enough evidence to show that they were sufficiently close to their pets for the court to treat them like persons. In tort suits, this is a valid concern, but judges will most certainly be able to weed out those plaintiffs who are blatantly trying to profit from their pet's demise.<sup>327</sup> This will limit the number of defendants who will face the burden of increased damages when the pet is treated as a person. In addition, the lack of a per se rule will cause potential claimants to hesitate in bringing a claim if they know that their relationships will be scrutinized and may not stand up to the requisite level of closeness required for pets to receive personhood treatment. This will deter claimants who had less than emotional relationships with their pets, as well as claimants who would only take legal action if their pets were guaranteed treatment as a person. Under the scrutiny of this proposed rule, there is no such guarantee. Even a small chance that a pet will not be treated as a person will deter many risk averse people.

In custody disputes, the argument that a close relationship between a pet and its owner will almost always be present is insignificant. If there are even hints of a close relationship between a pet and owner, the anthropomorphic qualities of the pet support the notion that its best interest should be considered. A pet that can suffer, learn, and form an emotional relationship should have its interests considered by the court. In fact, some would argue that a pet's interests should be considered in custody disputes regardless of its closeness to its owner.<sup>328</sup> Perhaps a custody hearing that takes into account the same factors for a pet as for a child may take longer, but once the status of the pet is determined by the court to be that of a person for custody purposes, the court could order binding arbitration or mediation to determine custody of the pet.<sup>329</sup> Therefore, anthropomorphic pets should be eligible to be treated as persons in tort and custody disputes, but should only be treated as persons if the owners provide sufficient evidence to prove that they treated the pet as a person.

*C. Areas of the Law in Which Anthropomorphic Pets Should Qualify for Possible Personhood Treatment—Torts and Custody Disputes*

Pets should only be considered for personhood treatment in two areas of the law—tort and custody disputes. Anthropocentrists fear that animals' status as persons would degrade the rights of humans by granting animals a plethora of rights they should not have, such as standing to sue their owners or the right to vote. Admittedly, granting full person-

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327. *Lejeune v. Rayne Branch Hosp.*, 556 So. 2d 559, 563 (La. 1990).

328. *See Stroh, supra* note 34, at 241, 250–53.

329. *See id.* at 250–51.

hood status to even a limited class of animals such as anthropomorphic pets might give some animals more rights than some humans (like children) and also create the possibility of the ever-feared flood of litigation. If pets are eligible for personhood treatment only in tort and custody disputes, however, this limits the flood of litigation and limits the rights that animals can obtain. In addition, allowing personhood treatment to pets in these areas of the law recognizes the emotional value of a pet-owner relationship and thereby gives it the bolstered protection of a person-person relationship. Thus, allowing pets to be eligible for personhood treatment solely in tort and custody disputes highlights the value of these relationships and aims to protect them and compensate for harm done to them.

*D. "Treatment" of Anthropomorphic Pets as Persons in Tort and Custody Disputes*

Finally, anthropomorphic pets should only be treated as persons, not actually receive full personhood status. In fact, these pets should continue to be considered property by the law for general purposes. However, when an anthropomorphic pet is involved in a tort or custody dispute and sufficient evidence is provided for the court to determine that the pet should be considered a person for that dispute, it should be treated as a person under the law for the purposes of that dispute only.<sup>330</sup> The law's treatment of the pet should change for these specific purposes only, but it should still be considered property for all other purposes.

Therefore, the law should change its treatment of certain animals under certain circumstances: when the animal is (1) an anthropomorphic pet, (2) who has formed a strong emotional relationship with its owner, to the extent that the owner treats him as a person, and (3) is the subject of a tort or custody dispute, then the law should treat the pet as a person, within defined limits.

The way society treats animals varies, so the law should not treat all animals the same according to some rigid classification system. The law should be flexible and treat certain animals according to the way people treat them. When an owner treats a pet like a person, the law should treat the pet like a person, too. As most dogs would agree, it all comes down to the treats.

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330. This treatment is similar to the manner in which the Internal Revenue Code treats certain kinds of property for tax purposes. Specifically, ordinary income can be "treated" as capital gains in certain situations, and vice versa. I.R.C. §§ 1231, 1245, 1250 (2006). The property's status remains, at its essence, ordinary income, but its treatment under the law changes. Also, the Internal Revenue Code "treats" terminally and chronically ill taxpayers as deceased for life insurance purposes. I.R.C. § 101(g)(1)(A)-(B).

## V. CONCLUSION

Animals are treated inconsistently under the law. While they can be bought and sold as property, they are also protected from pain and inhumane treatment like persons.<sup>331</sup> Anthropocentrism is abundant in society and modern law, thus denigrating animals to nothing more than property.<sup>332</sup> But society has come to acknowledge the anthropomorphic qualities of many animals that support their treatment as persons.<sup>333</sup> A certain class of animals, pets, displays another similarity to persons in the way they form relationships with humans and are frequently treated as family members.<sup>334</sup> The special treatment these pets receive sets them apart from other animals. Yet, classifying them all as persons per se raises economic fears,<sup>335</sup> thereby necessitating the courts to treat pets as persons in the limited circumstances of tort and custody disputes only upon substantial evidence that these pets were treated as persons by their owners. Such a test eliminates the anthropocentric and economic fears that any per se categorization of all animals as persons raises, yet it allows the law to acknowledge what much of society has come to recognize: that the anthropomorphic qualities and relationships formed with pets distinguish them from other animals and make them more valuable than their fair market prices. These unique qualities of pets justify the law's treatment of them as persons.

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331. *See supra* Part III.B.

332. *See supra* Part III.A.

333. *See supra* Part III.B.

334. *See supra* Part III.C.

335. *See supra* Part III.D, IV.B.

