

CATCHING THE UNIQUE RABBIT: WHY PETS SHOULD BE RECLASSIFIED AS INIMITABLE PROPERTY UNDER THE LAW

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#### I. INTRODUCTION<sup>1</sup>

When billionaire real estate mogul Leona Helmsley died in August 2007, she left behind contradictory images of both a haughty bourgeoisie businesswoman and a generous philanthropist.<sup>2</sup> In her will, Helmsley specifically cut out two of her four grandchildren and made her pampered Maltese, aptly named Trouble, the single largest beneficiary.<sup>3</sup> The pooch was the recipient of twelve million dollars worth of

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<sup>1</sup>In this Note, the terms *pet* or *pets* (unless noted otherwise) refer specifically to the most widely recognized and typical companion animals: dogs and cats. Although humans keep a number of other species as pets, such as rabbits, birds, fish, or other exotic species of animals, this Note argues in further detail that the unique qualities of the domestic cat and dog set them apart from other types of pets or owned animals, such as typical farm animals or livestock.

<sup>2</sup>Alan Feuer, *Helmsley, Through Will, Is Still Calling the Shots*, N.Y. TIMES, Aug. 30, 2007, available at <http://www.nytimes.com/2007/08/30/nyregion/30leona.html?em&ex=1188619200&en=49f49958da2265fc&ei=5087%0A>. Leona Helmsley was married to Harry Helmsley, one of the most prominent figures in American real estate. RICHARD HAMMER, *THE HELMSLEYS: THE RISE AND FALL OF HARRY AND LEONA* 37 (1990). Although widely believed to be the owner of the Empire State Building, Harry is actually credited with successfully running and operating the building for many years. *Id.* at 54. Known for driving a hard bargain, Helmsley owned many large residential structures and amassed a fortune; sometimes, the contributions to his opulence came in the form of evicting elderly tenants who had forgotten to pay their rent. *Id.* at 97-98. Leona was a real estate broker when the two met, and after Harry left his wife of thirty-three years and offered Leona a position as senior vice president in one of his companies, the two were eventually married. *Id.* at 137, 149. In addition to residential properties, Helmsley also owned many hotels in New York and other states. *Id.* at 175. Eventually, Leona became president of all the hotels they owned and earned a nasty reputation herself for her extravagant demands and haughty demeanor. *Id.* at 174, 181. One former associate described Leona's character by stating, "She can exude such warmth and love you feel you are being embraced by this rich, glamorous, sexy lady. Then in an instant, she can turn so vicious and verbally violent that you are left flabbergasted." *Id.* at 182.

<sup>3</sup>See Feuer, *supra* note 2.

caretaking expenses via a trust set up for the pet.<sup>4</sup> Trouble's trust exceeded Helmsley's second largest bequest by \$2 million; the beneficiary for that bequest was her brother.<sup>5</sup> In the very same will, Helmsley also directed that her various residences and belongings were to be sold and the proceeds from the sale were directed to benefit a charitable trust left in both her and her late husband's name.<sup>6</sup> Helmsley's belongings are reportedly worth billions of dollars.<sup>7</sup>

While Helmsley's will appears to be a contradiction of greed and generosity, it is significant in the sense that Helmsley prioritized her beloved dog, her pet,<sup>8</sup> higher than certain human members of her family.<sup>9</sup> Helmsley's attachment to her dog is one example of the important role a pet can play in a family setting. While most pet owners in the United States cannot afford to leave millions to their favorite pets, many pet owners recognize that their pet is part of their family. Just as with other family members, pet owners spend significant sums to ensure their pet's safety, health, and happiness.<sup>10</sup> Because pet owners go to such great lengths to take care of

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<sup>4</sup>See *id.*, *supra* note 2. It is impossible to leave money to a pet directly through a will as this type of bequest will be declared void and the money intended to go the animal would go to either the residuary or a different beneficiary in the will. See MARGARET C. JASPER, PET LAW 47 (2007). Courts will declare these bequests void because animals are still personal property, and one cannot conceivably leave property to another form of property. *Id.* Furthermore, only a little more than half of the states will even allow pet trusts to be established. *Id.* at 87. These states include: Alaska, Arizona, Arkansas, California, Colorado, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Maine, Michigan, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oregon, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming. *Id.*

<sup>5</sup>See Feuer, *supra* note 2.

<sup>6</sup>See *id.* It was not until his later years that Harry Helmsley was more philanthropic. See HAMMER, *supra* note 2, at 220. Although the Helmsley's had contributed to charities before, the amounts were almost always modest. *Id.* One late-in-life stand-out was a gift of \$33 million to a New York hospital that had treated Harry for cardiovascular problems. *Id.* at 221. At the time the gift was made it was one of the "largest gifts ever made by an individual to a single institution." *Id.*

<sup>7</sup>See Feuer, *supra* note 2. During her life, Helmsley was known for mistreating her employees, yet she also donated millions of dollars to Hurricane Katrina relief, September 11th funds, hospitals, and made other large and anonymous donations. CNN, *Leona Helmsley, 'Queen of Mean,' Dies at 87*, <http://www.cnn.com/2007/US/08/20/helmsley.obit/index.html> (last visited Nov. 30, 2007).

<sup>8</sup>The current trend in animal law articles and texts is to use the term *companion animal* instead of *pet*, and *guardian* instead of *pet owner*. Debra Squires-Lee, *In Defense of Floyd: Appropriately Valuing Companion Animals in Tort*, 70 N.Y.U. L. REV. 1059, 1059 n.2 (1995). This author will use the terms *pet* and *companion animal* interchangeably, but because the thrust of the argument in this Note is that pets should remain classified as property, the term *owner* will still be used. *Id.*

<sup>9</sup>See Feuer, *supra* note 2.

<sup>10</sup>See Diane Brady & Christopher Palmeri, *The Pet Economy: Americans Spend an Astonishing \$41 Billion a Year on Their Furry Friends*, BUSINESS WEEK, Aug. 6, 2007, available at [http://www.businessweek.com/magazine/content/07\\_32/b4045001.htm?chan=search](http://www.businessweek.com/magazine/content/07_32/b4045001.htm?chan=search).

their pets, it would seem that these unique living creatures would be valued in the law. In actuality, most owners would be dismayed to learn that should their pet die by being thrown into traffic by an outraged driver,<sup>11</sup> or by suffocation from being left in a sweltering and stifling enclosed area,<sup>12</sup> they could only recover nominal damages for the market value of their pet.<sup>13</sup> They would also be sad to know that should a market even exist, the going rate for an older, previously owned, or impurely bred pet is quite minimal.<sup>14</sup>

This Note introduces a new approach for resolving the issue of inadequate compensation for pet loss by arguing for the adoption of a new classification of

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<sup>11</sup>See *People v. Burnett*, 2 Cal. Rptr. 3d 120, 124 (Ct. App. 2003). Although this is a criminal case, in the state of California an owner is not allowed to recover noneconomic damages for the loss of a pet. See 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, 236-37 (2006). Burnett was convicted of animal cruelty for causing the death of a ten-year old Bichon Frise. *Burnett*, 2 Cal. Rptr. 3d at 123. After the owner of the dog committed a small traffic violation which caused her to bump into Burnett's back bumper he got out of his car and as he approached the car the owner rolled down her window. *Id.* When Burnett got to the car he reached in the open window, grabbed the small lap dog out the owner's lap and threw the small dog into the highway. *Id.* It was raining heavily that night and after being thrown across traffic the dog was disoriented. *Id.* In attempting to get back to his owner's car the Bichon was struck and killed by an oncoming motorist who did not see the small dog. *Id.* at 124. These events took place in front of the distraught owner, who was almost hit by a car when attempting to cross traffic to get to the stranded and bewildered dog. *Id.* at 123-24.

<sup>12</sup>*Gluckman v. Am. Airlines, Inc.*, 844 F. Supp. 151, 163 (S.D.N.Y. 1994). On a camping trip in 1988 Andrew Gluckman found an abandoned golden retriever. *Id.* at 153. Gluckman named the dog Floyd, adopted the dog as his pet, and intended to bring the dog back to New York with him. *Id.* at 154. Gluckman paid an additional \$110.85 for a special crate and carrying charge for Floyd but was never informed that the airline treated dogs like any other type of baggage. *Id.* On the day of Gluckman's flight, his plane was delayed for over an hour due to a mechanical problem. *Id.* During the delay, the plane sat on the ground in a temperature of 115 degrees Fahrenheit. *Id.* The temperature in the baggage hold of the plane, where Floyd was being kept, reached over 140 degrees Fahrenheit. *Id.* When Floyd was brought to Gluckman to be placed on the next flight the dog was "lying on his side panting; his face and paws were bloody; there was blood all over the crate; and the condition of the cage evidenced a panicked effort to escape." *Id.* Floyd died from being kept in these horrific conditions. Gluckman brought suit seeking emotional distress damages and loss of companionship of his pet (among other claims), but his claims were dismissed and he was denied recovery. *Id.* at 154, 163.

<sup>13</sup>Many courts, including those in Arizona, California, Connecticut, Indiana, Kentucky, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, North Dakota, Ohio, Oregon, Pennsylvania, Texas, Virginia, Washington, West Virginia, and Wisconsin have neither allowed a pet owner to figure in their emotional distress when calculating damages for a lost pet, nor allowed the owner to recover under a separate cause of action for intentional or negligent infliction of emotional distress. Schwartz & Laird, *supra* note 11, at 236-37.

<sup>14</sup>One source estimates that over eighty million dogs are put to sleep every year in pounds and animal shelters because of behavioral problems. Dog Scouts of America, *Responsible Dog Ownership*, [http://www.dogscouts1.com/Responsible\\_Ownership.html](http://www.dogscouts1.com/Responsible_Ownership.html) (last visited Dec. 19, 2008). These problems stem from both poor training and abandonment. *Id.* Such a large number of previously owned dogs being put to sleep before a second owner could be found suggests the lack of a healthy market for a previously owned pet. *Id.*

personal property called inimitable property. The new categorization takes into consideration the live, conscious, and unique qualities of pets that distinguish them from other sorts of inanimate property. Part II outlines the historical origins and subsequent shifts in the importance of domestic animals and their status in the law. Part III highlights the existing arguments and suggestions for change and addresses why they ultimately fail. Part IV introduces the requirements and characteristics of “inimitable property” and explains why it could work if applied to domestic pets by courts or the legislature. Finally, Section V briefly reviews and concludes the Note.

## II. ORIGINS OF THE PROPERTY STATUS AND TRANSPOSED IMPORTANCE OF DOMESTIC ANIMALS

### A. *Animals as Personal Property: Cats, Cows, and Chairs*

People for the Ethical Treatment of Animals’ (PETA) rise in popularity, and perhaps infamy,<sup>15</sup> in recent years, may seem to suggest that the concepts of animal rights and animal advocacy are modern developments.<sup>16</sup> However, the question of what rights, if any, animals (and their owners) have has been debated since ancient times.<sup>17</sup> The continuing debate over the legal status of animals is both complex and provocative, as scholars, philosophers, theologians, politicians, and business leaders all weigh in on the subject. There are many explanations and allegations for why animals—namely pets—are classified as personal property.<sup>18</sup> To better understand the current debate over pets and property law it is necessary to briefly review the origin and evolution of personal property rights in animals.

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<sup>15</sup>For an example of animal rights being viewed as infamous, see 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, 138 (2006) (“[F]ear of animal rights—and of animal rights activists—is undoubtedly fueled, at least in part, by the violent extremists of the movement and the spectre of direct action, which is also sometimes called animal ‘terrorism.’”).

<sup>16</sup>See American Veterinary Medical Association, *Poll Finds Americans Cool Toward Animal Rights*, *JAVMA NEWS*, July 15, 2003, available at <http://www.avma.org/onlnews/javma/jul03/030715f.asp> (last visited Feb. 7, 2008) (“A Gallup poll testing public reaction to several animal rights goals found that most Americans aren't willing to fundamentally change their views about animals . . . [evidenced by a] majority—71 percent—[of those polled believing] animals are entitled to some protections from harm and exploitation, [while only] 25 percent think that animals deserve the same rights as people.”). This poll shows that the concept of animals having the same amount of rights of humans is too new and foreign in comparison to current popular mentality. *Id.*

<sup>17</sup>Compare Aristotle, *Politics*, in *ANIMAL RIGHTS: A HISTORICAL ANTHOLOGY* 6, (Andrew Linzey & Paul Barry Clarke eds., William Ellis trans., 2004) (stating man is the most excellent of all living creatures, and animals, lacking speech or a political or moral sense of good or evil, are inferior), with NORM PHELPS, *THE LONGEST STRUGGLE: ANIMAL ADVOCACY FROM PYTHAGORAS TO PETA*, 26-27 (2007) (recounting that the ancient philosopher, Pythagoras, most known for his work in geometry, was also well known in ancient times as an advocate for a vegetarian lifestyle and diet because he believed, and taught, that all sentient beings have souls of equal worth).

<sup>18</sup>See generally *ANIMAL RIGHTS: A HISTORICAL ANTHOLOGY* (Andrew Linzey & Paul Barry Clarke eds., 2004).

William Blackstone, a forefather of English and American common law, categorized all animals as either *domitae naturae* (domestic animals) or *ferae naturae* (wild animals).<sup>19</sup> Because domestic animals were tame and generally remained close to their owners' homes, their status was defined by their lack of sporadic and frequent movement across property boundaries.<sup>20</sup> Wild animals, however, roam freely without regard to property boundaries, making it much harder (perhaps impossible) for humans to possess absolute ownership rights of these animals.<sup>21</sup> Since ownership of a domesticated animal is linked by definition to the ownership of real property, domestic animals could be owned absolutely.<sup>22</sup>

This distinction between domestic and wild animals is important in the evolution of the classification of companion animals. Originally, pets were classified as domestic animals. Owners could not recover for wrongful injury or death of a pet because the pet had no intrinsic worth to the owner.<sup>23</sup> Worth, in this sense, was measured by an animal's contribution to livelihood through farm work, as a source of food through byproducts or their flesh, or as a source of clothing materials and other products made from an animal's body.<sup>24</sup> Value was defined solely by monetary worth because these valuable farm animals could be sold or traded for goods.<sup>25</sup> According to animal rights advocate and animal law expert Gary L.

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<sup>19</sup>GARY L. FRANCIONE, *ANIMALS, PROPERTY, AND THE LAW* 41 (2d ed. 2005).

<sup>20</sup>*Id.*

<sup>21</sup>*Id.*

<sup>22</sup>*Id.* Additionally, exclusive ownership was also contingent upon the need of tame animals to have a caretaker. Johann Gottlieb Fichte, *The Science of Rights, in ANIMAL RIGHTS: A HISTORICAL ANTHOLOGY* 79-80 (Andrew Linzey & Paul Barry Clarke eds., Columbia University Press 2004). The domestication of animals created an obligation in the owner to not only reap the benefits of the animal, but also to feed, protect, and perform all the actions that wild animals are capable of that domestic animals are not. *Id.*

<sup>23</sup>FRANCIONE, *supra* note 19, at 42. In a case dating back to 1868 the Supreme Judicial Court of Massachusetts opined:

In regard to the ownership of live animals, the law has long made a distinction between dogs and cats, and other domestic quadrupeds, growing out of the nature of the creatures and the purposes for which they are kept. Beasts which have been thoroughly tamed, and are used for burden or husbandry, or for food, such as horses, cattle and sheep, are as truly property of intrinsic value, and entitled to the same protection, as any kind of goods. But dogs and cats, even in a state of domestication, never wholly lose their wild natures and destructive instincts, and are kept either for uses which depend on retaining and calling into action those very natures and instincts, or else for the mere whim or pleasure of the owner . . . [and that] dogs have always been held by the American courts to be entitled to less legal regard and protection than more harmless and useful domestic animals.

Blair v. Forehand, 100 Mass. 136 (Mass. 1868) (cited by the Supreme Court in *Sentell v. New Orleans & C. R. Co.*, 166 U.S. 698, 703 (1897)).

<sup>24</sup>*See* JULIET CLUTTON-BROCK, *DOMESTICATED ANIMALS FROM EARLY TIMES* 62 (1981).

<sup>25</sup>*See* FRANCIONE, *supra* note 19, at 34. The words chattel, capital, and cattle at one time were all synonymous in European languages. *Id.* The Spanish word for property is also virtually the same as the word for cattle. *Id.* The same holds true in the Latin language where the word for money is a derivative of the word meaning cattle. *Id.*

Francione, “the productive value and the property status of animals are inextricably intertwined” because “[t]he value of animals is dependent on their property status.”<sup>26</sup>

Because cattle could be used in a wide variety of ways to help ensure human survival, their status as valuable personal property entitled the owner to recover a large sum of money after a loss.<sup>27</sup> In contrast, an owner trying to recover for the loss of a cat or dog would not fare well because those animals offered little or no insurance of survival.<sup>28</sup> Despite the status of dogs and cats as personal property, the owner was not entitled to recover for the loss.<sup>29</sup>

*B. Favoring the Cat, the Cow, or the Kids: The Importance of Companion Animals to the Modern American Family*

When these original distinctions of animals and personal property were being drawn, the American farmer comprised ninety percent of the workforce. This made cattle and capital interchangeable.<sup>30</sup> In 1990, the percentage of farmers that comprised the workforce had dwindled to less than three percent.<sup>31</sup> The drastic decline in American farming shows that the justifications for the original property classifications are horribly outdated. No longer is the cow the most important animal in Americans’ lives.<sup>32</sup> With hotels, retailers, insurance companies and other large

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<sup>26</sup>*Id.* at 28.

<sup>27</sup>As recently as 2005, a court in California allowed victims of cattle theft to recover four times the worth of the cattle. *People v. Baker*, 23 Cal. Rptr. 3d 871, 876 (Ct. App. 2005). Ultimately the defendant was held liable in the amount of \$22,521 for depriving the owners of the use of cows that might produce valuable offspring. *Id.*

<sup>28</sup>*See supra* note 23.

<sup>29</sup>*See supra* note 23. In contrast with cats and dogs, cows historically have and presently do provide milk, butter, cream, cheese, and beef. CLUTTON-BROCK, *supra* note 24, at 62. If the cow is primarily a draught animal it is used to plow and can provide small amounts of milk. *Id.* When the animal loses utility as a plow animal it can be used as a source of food. *Id.* While alive, the cow also provides a source of free fertilizer for crops through production of manure. *Id.* In addition, the carcass of a cow serves many purposes, including the use of horns, bones, and hide for weapons and clothing; fat can be used to make into candles for lighting, and the hooves can be used to produce glue. *Id.*

<sup>30</sup>Over the course of the past 100 years the number of Americans farming as a profession has declined, although the latest statistics are only available from 1990, it seems reasonable to assume that in the past nineteen years farming as a profession has remained the same or declined even further. ECONOMIC RESEARCH SERVICE, A HISTORY OF AMERICAN AGRICULTURE, 1607-2000: FARMERS AND THE LAND (2000), available at [http://www.agclassroom.org/gan/timeline/farmers\\_land.htm](http://www.agclassroom.org/gan/timeline/farmers_land.htm).

<sup>31</sup>*Id.*

<sup>32</sup>In 2007, the pet industry was worth \$41.2 billion, almost double what it was worth ten years ago. *See* American Pet Products Association, *Industry Statistics and Trends: Pet Ownership, 2007/2008 APPA NATIONAL PET OWNERS SURVEY* (2008), available at [http://www.americanpetproducts.org/press\\_industrytrends.asp](http://www.americanpetproducts.org/press_industrytrends.asp) (last visited Feb. 1, 2009). On top of an overall increase in the total worth, many companies such as Paul Mitchell (hair care) Harley Davidson (motorcycles) and Old Navy (clothing retail) have product lines available that are specifically designed for family pets. *Id.* Some hotels are beginning to offer plush pet beds and pillows, soft bathrobes for dogs, and treat bags for pets accompanying their owners on vacations. *Id.* There is also a market for high-tech pet gadgets, including electronic

business sectors pandering to pet owners, it is not far-fetched to assume that in the sixty-three percent of American households who own pets, the role of the most important animal in family life has been taken over by a dog or cat.<sup>33</sup>

However much a pet owner may view his or her pet as a member of the family, there is still an element of ownership and detachment in the relationship. This situation is devastatingly apparent for pets caught up in the national mortgage crisis when home owners are being forced to foreclose.<sup>34</sup> As families are forced to abandon homes and seek housing by renting, staying with other family members, or worst of all homeless shelters, it is not surprising that pets get left behind.<sup>35</sup>

In Stockton and nearby Modesto, California, for example, where the foreclosure rates are the highest in the United States, animal shelters and rescue services are swamped with pets that families can longer afford or house.<sup>36</sup> And although many pet owners consider their pets to be children, human adoption services in Stockton are not reported to be as burdened as are animal shelters. From this tragic example one can conclude that pets, although a part of the family, retain subordinate status to human members and therefore retain an element of property and ownership, at least in exigent circumstances.<sup>37</sup>

Although the foreclosure crisis is an extreme example of how pets retain some characteristics and qualities of traditional property, the fact still remains that cattle and companion animals have transposed their positions of importance in most animal owners' households.<sup>38</sup> Despite the significant rise in popularity of domestic animals

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toothbrushes, automatic feeders, touch activated toys, and computerized identification tags. *Id.* Pet health is also a burgeoning new market with pet health insurance coverage, pet massages, and pet dance and yoga classes. *Id.* Executing a quick Google search by typing in "pet health insurance" returns six different companies on the first page that offer insurance services for pets. Google, <http://www.google.com/search?hl=en&q=pets+health+insurance&btnG=Search> (last visited Nov. 19, 2007).

<sup>33</sup>See American Pet Products Association, *Industry Statistics and Trends: Pet Ownership*, [http://www.americanpetproducts.org/press\\_industrytrends.asp](http://www.americanpetproducts.org/press_industrytrends.asp) (last visited Feb. 1, 2009). See also Elizabeth Paek, *Fido Seeks Full Membership in the Family: Dismantling the Property Classification of Companion Animals by Statute*, 25 U. HAW. L. REV. 481, 482-83 (2003) ("[M]ore than 80% of companion animal guardians consider their companion animals as family members . . . [a]nother study revealed that 70% considered their companion animals as children."); Lucy Jen Huang Hickrod & Raymond L. Schmitt, *A Naturalistic Study of Interaction and Frame: The Pet as "Family Member"*, 11 URB. LIFE 55, 59 ("Persons behave toward pets as if they are family members. Pets are named, fed, groomed, photographed, talked to, protected, and mourned. Owners sleep and play with pets. They give them birthday parties[,] . . . [r]ansom has been paid for pets . . . and a dog has participated as the best man in a human wedding.").

<sup>34</sup>Evelyn Nieves, *Foreclosures Lead to Abandoned Animals*, FOX NEWS, Jan. 29, 2008, available at <http://www.foxnews.com/wires/2008Jan29/0,4670,ForeclosurePets,00.html>.

<sup>35</sup>*Id.* ("The problem is exacerbated because most people grappling with foreclosure are returning to rental housing or moving in with relatives—two situations where it can be difficult or impossible to bring pets").

<sup>36</sup>*Id.* ("The abandoned pets are overwhelming animal shelters . . . [in] Stockton and Modesto [which] have some of the nation's highest foreclosure rates.").

<sup>37</sup>*Id.*

<sup>38</sup>See Paek, *supra* note 33.

and the trend to include cats, dogs and other pets as family members, law continues to value pets in a manner that suggests they are utterly worthless to an owner. The law does this by classifying pets in the same category as a wooden table or used clothing. Classifying pets in this manner limits pet owners' recovery in situations of negligent or intentional destruction of their "property" to the fair market value of their pet.<sup>39</sup> Rarely is there a remedy for the distraught pet owner, grieving over the death of their "family member," that adequately compensates the owner for his or her loss.

In recent years several states have tried to resolve this problem by either expanding non-economic damage options to pet owners or creating a remedy through statute.<sup>40</sup> In addition to the expansion of legal remedies for pet owners, the last two decades have also witnessed a push to make animal law more scholarly and a worthwhile subject in legal education.<sup>41</sup> Since 2000, the number of law schools offering courses in animal law has increased from nine to eighty-nine.<sup>42</sup> Some schools even host animal law conferences, moot court competitions, seminars, and fellowships all centering on issues in animal law.<sup>43</sup> Some programs were funded in part by former celebrity host of *The Price is Right*, Bob Barker,<sup>44</sup> who was famous for reminding viewers to have their pets spayed or neutered.<sup>45</sup> These educational opportunities, including competitions and clinics, are located in some of the most prestigious and influential U.S. law schools, such as Harvard, Stanford University, Columbia University, Duke, Georgetown, and the University of California, Los Angeles.<sup>46</sup> These developments demonstrate that significant changes may be forthcoming in the area of animal law.<sup>47</sup>

Despite efforts to change the current system of compensation by expanding legal remedies and educating tomorrow's attorneys and judges in the nuances of animal

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<sup>39</sup>See Rebecca J. Huss, *Valuing Man's and Woman's Best Friend: The Moral and Legal Status of Companion Animals*, 86 MARQ. L. REV. 47, 89 (2002). See also William C. Root, Note, *Man's Best Friend: Property or Family Member? An Examination of the Legal Classification of Companion Animals and its Impact on Damages Recoverable for Their Wrongful Death or Injury*, 47 VILL. L. REV. 423, 426-28 (2002) (stating that the fair market value of the pet is assessed before injury or death and is based on the amount a stranger at arm's length would be willing to pay for the pet based on pedigree, purchase price, general health and unique traits).

<sup>40</sup>See Schwartz & Laird, *supra* note 11, at 243-46.

<sup>41</sup>Paria Kooklan, *Animal Law: Gaining Ground in the United States*, 36 STUDENT LAW at 14, 15 (February 2008).

<sup>42</sup>*Id.*

<sup>43</sup>*Id.* at 16.

<sup>44</sup>*Id.*

<sup>45</sup>Gary Richard Collins II, *Biography for Bob Barker*, <http://www.imdb.com/name/nm0054837/bio> (last visited Feb. 12, 2008).

<sup>46</sup>See Kooklan, *supra* note 41, at 16.

<sup>47</sup>*Id.* at 19 (noting one animal law expert, Stephen Wise, believes that as more people get on the bench who have been exposed to animal law those judges may be more willing to adopt newer ideas about animals without embarrassment).

law, many state courts have refused to adopt new measures or expand damages for injured pets.<sup>48</sup> Arguments that have not yet been presented to these courts, however, may eventually prove persuasive. The next section is devoted to understanding the current arguments and strategies for change and explains why these fail to correct the under-valuing of injuries to pet owners.

### III. CURRENT SUGGESTED SOLUTIONS AND THEIR INADEQUACIES

#### A. *Why Allowing Emotional Distress Damages for Pet Loss Fails*<sup>49</sup>

Allowing a pet owner to recover for his or her emotional distress<sup>50</sup> over the loss of a pet is one primary focus of current reform efforts aimed at fully compensating pet owners.<sup>51</sup> But emotional distress,<sup>52</sup> either as a category of recoverable damages or as a separate cause of action, in most jurisdictions fails to compensate the pet owner for his or her loss.<sup>53</sup> The reason that the emotional distress argument fails to provide a remedy for pet owners is that the three standard tests used to evaluate emotional distress claims are not well suited to address pet loss or injury claims.

Under the traditional test, or impact test, damages can be recovered for emotional distress only where the defendant's misconduct has resulted in physical contact with

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<sup>48</sup>See Schwartz & Laird, *supra* note 11, at 236-37.

<sup>49</sup>Although "emotional distress" can refer to either a measure of damages in personal injury tort cases or a separate tort cause of action, the term, unless otherwise noted, is used here to encompass both definitions.

<sup>50</sup>In *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), the U.S. Supreme Court reviewed and explained the concept of emotional distress in relation to a Federal Employers' Liability Act (FELA) claim. *Id.* at 544. The Court explained that it must review the claim in light of common law principles and defined emotional distress as an injury that is, "mental or emotional harm (such as fright or anxiety) that is caused by the negligence of another and that is not directly brought about by a physical injury." *Id.* Although emotional distress is usually a state issue, for the purposes of this note an exhaustive review on a state by state basis of emotional distress laws is not necessary or prudent. As such, the use of a Supreme Court case which pre-empts state law is meant to be general enough to encompass the scope of the issue.

<sup>51</sup>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, 50-56 (1998) (arguing that emotional distress is calculable and applicable as a measure of loss in wrongful death actions for the loss of a pet); Janice M. Pintar, *Negligent Infliction of Emotional Distress and the Fair Market Value Approach in Wisconsin: The Case for Extending Tort Protection to Companion Animals and Their Owners*, 2002 WIS. L. REV. 735, 761-70 (2002) (arguing that the separate cause of action of negligent infliction of emotional distress should be extended to pet owners who have experienced the loss of a pet due to another's negligence).

<sup>52</sup>The term "emotional distress" as a separate and distinct cause of action (as opposed to a category of damages) as used here encompasses both the tort of negligent infliction of emotional distress and intentional infliction of emotional distress.

<sup>53</sup>With the exception of a few jurisdictions such as Hawaii and Alaska, many state courts have rejected arguments on the issue of expanding non-economic damages, or more specifically, rejected claims of emotional distress damages for pet owners who have experienced a loss. See Schwartz & Laird, *supra* note 11; Pintar, *supra* note 51, at 736.

the victim (i.e. plaintiff), causing fear and anxiety as well as a physical injury, no matter how slight.<sup>54</sup> Under the impact test, a plaintiff could only then recover for his or her own mental distress affiliated with the contact, not the derivative fright or grief because their pet was touched.

Under the second test, the zone of danger test, the plaintiff does not have to prove an actual touch or impact, but instead has to show that he or she was placed in immediate risk of harm due to the defendant's misconduct.<sup>55</sup> Here, again, the stress is on the plaintiff's fear of harm to *his or her own body* and not the fear or grief over injury to a pet.<sup>56</sup> If, for example, a person was walking a dog and the dog was injured by a car while both the owner and dog were in the cross walk, the owner could recover for his or her own emotional injury. But the owner could not pursue a cause of action or claim as an element of damages for the emotional distress resulting from the injuries to the dog per se.

The most viable argument that supports extension of a negligent infliction of emotional distress claim to pet owners involves the use of the bystander test, which allows the plaintiff to recover if the defendant could have foreseen that his or her conduct would cause emotional distress to bystanders.<sup>57</sup> In this test, the plaintiff can only recover for emotional distress as the result of witnessing, or by physically experiencing, the injury or death of another person.<sup>58</sup> To prevail under the bystander test, plaintiff must prove that he or she was physically in a position to witness the injury, that the resulting shock and mental distress were caused by the contemporaneous observance of the event, and that the plaintiff and the victim were closely related.<sup>59</sup>

At first blush it appears that an owner of an injured pet might be able to recover under the bystander test. Most courts, however, limit the last factor so that only very close (human) relatives can recover.<sup>60</sup> If, for example, a plaintiff was barred from pursuing an emotional distress claim due to the loss of a grandchild or sibling in a particular jurisdiction, allowing a pet owner to recover for the loss of his or her *pet* family member would never work. In short, the conservative pace of common law advancement of personal injury remedies will not allow most courts to adopt measures with such specifically human elements for application to personal property, despite the overwhelming emotional reactions inspired by pets in the modern American family.

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<sup>54</sup>The physical impact test is only used in a very small minority of American jurisdictions. *Gottshall*, 512 U.S. at 547.

<sup>55</sup>The zone of danger test is followed in a minority, although not a small minority, of jurisdictions, and was the test adopted by the Supreme Court in the case at hand. The court chose this test because of historical considerations and the reduced possibility that claims could be falsified. *Id.* at 547-48, 554-58.

<sup>56</sup>*Id.* at 547-48.

<sup>57</sup>The relative bystander test comes from the California Supreme Court case of *Dillon v. Legg*, 441 P.2d 912 (1968), and the majority of jurisdictions in America have adopted this test. *See also Gottshall*, 512 U.S. at 548.

<sup>58</sup>*See Dillon*, 441 P.2d at 920-21.

<sup>59</sup>*Gottshall*, 512 U.S. at 549.

<sup>60</sup>*Id.*

B. *The Problems with Extending a Wrongful Death Cause of Action or Loss of Companionship Damages for Pet Loss*

The arguments for extending either the wrongful death cause of action or loss of companionship action are similar to arguments for a cause of action or category of damages for emotional distress.<sup>61</sup> Loss of companionship can be one element in determining the value of a wrongful death of a family member to a living family member who experiences the loss.<sup>62</sup> Even though one is a cause of action and the other is a measure of damages, the reasons that both will be unsuccessful are closely related.

Wrongful death actions are created by state legislatures rather than courts.<sup>63</sup> The remedial legislation is enacted to provide surviving family members with compensation for the economic and emotional loss they experience when a family member dies due to the wrongful actions of the defendant.<sup>64</sup> The statutes contain detailed provisions that dictate who has standing to sue and the type of damages available. Like emotional distress claims, wrongful death causes of action are firmly grounded in human relationships and traditional definitions of family, thus preventing courts from extending their reach to people emotionally scarred through the death of a pet.<sup>65</sup> Even though loss of companionship is not solely a creature of

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<sup>61</sup>See Margit Livingston, *The Calculus of Animal Valuation: Crafting a Viable Remedy*, 82 NEB. L. REV. 783, 825 (2004); Vasiliki Agorianitis, Comment, *Being Daphne's Mom: An Argument for Valuing Companion Animals as Companions*, 39 J. MARSHALL L. REV. 1453, 1470-71 (2006).

<sup>62</sup>See OHIO REV. CODE ANN. § 2125.02(B)(3) (West 2001).

<sup>63</sup>Originally, when the victim of tortious conduct died, all related personal injury causes of action died with them. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 125 (5th ed. 1984). However, this precedent was presumed to give potential plaintiffs incentive to back up and run over a victim again if the victim was still alive in order to avoid liability. *Id.* Legislatures remedied this situation by enacting wrongful death statutes and survival claims legislation so that family members may recover for both their loss stemming from the wrongful injury, and the loss to which the decedent would have been entitled, had he or she not passed away. See also *McDavid v. United States*, 584 S.E.2d 226, 231-32 (2003).

<sup>64</sup>Wrongful death statutes vary from state to state, but in a majority of jurisdictions, are only reserved for relatives related by blood or marriage. See David D. Siegel, *Wrongful Death Pleading and Procedural Disputes*, in WRONGFUL DEATH ACTIONS 1967, at 1, 4 (PLI Torts & Personal Injury Law, 1967); *McDavid*, 584 S.E.2d at 231 (“[G]eneralizations are not easy to draw among the fifty-one wrongful death statutes [in the United States], they are capable of being grouped into two major classifications: those representing the majority . . . determine damages based on the loss to the survivors of the decedent or statutory beneficiaries . . .”). Using Ohio as an example, the right of recovery is extended to “the surviving spouse, children, and parents of the decedent.” *Clark v. Scarpelli*, 744 N.E.2d 719, 731 (Ohio 2001). Also, these named people who are entitled to recover are “rebuttably presumed to have suffered damages by reason of the wrongful death . . . [and the right to recover] arises as a result of the suffering incurred by reason of the wrongful death of the decedent.” *Id.*

<sup>65</sup>See Siegel, *supra* note 64, at 2. Even though most wrongful death statutes are remedial in nature and thus generally entitled to liberal construction, courts often constrain their interpretations of the legislations based on legislative intent. See *McDavid*, 584 S.E.2d at 231-32. Because the purpose of wrongful death statutes is to reverse the harsh common law

statute, it is generally used as a measure in wrongful death and loss of consortium claims.<sup>66</sup> Such claims were originally only available to husbands who lost the companionship and services of their wives due to the negligent or intentional acts of a third person.<sup>67</sup> The right to recover on a loss of consortium claim has only been extended to wives within the last sixty years.<sup>68</sup>

Because these two suggested solutions involve causes of action or terms for the measurement of damages involving close family members, it is unlikely that such humanized concepts would be extended for the pet owner who has lost a pet, no matter how much the owner is convinced the pet is his or her child.

*C. Applying the Campbell Exception to Allow a Large Punitive Damage Award in Pet Loss Cases Is Not a Viable Solution*

In the majority of pet loss cases where the court uses the market value approach to assess damages for the loss of a pet, that amount, if any, will be very small.<sup>69</sup> Should the pet's death arise in a malicious manner that justifies an award for punitive damages, it is also likely that this award, even if relatively modest (for instance under \$3,000), will violate U.S. Supreme Court standards that require an appropriate ratio between actual and punitive damage awards.<sup>70</sup> However, two exceptions may apply that can suspend the strict application of the ratios.<sup>71</sup> The first exception applies in cases where the misconduct is egregious and either causes economic damages in a very small amount, or where the actual injury itself is not easy to

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doctrine that would deny recovery for the decedent's estate or family, it is unlikely that any court would construe a wrongful death statute to extend to pets or pet owners.

<sup>66</sup>Using Ohio as an example, as defined in the wrongful death statute, compensatory damages in a wrongful death action can include "[l]oss of the society of the decedent, including loss of companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, and education, suffered by the surviving spouse, dependent children, parents, or next of kin of the decedent. . . ." Action for Wrongful Death: OHIO REV. CODE ANN. § 2125.02(B)(3). For loss of consortium, see D. Richard Joslyn, Annotation, *Wife's Right of Action for Loss of Consortium*, 36 A.L.R.3d 900 (1971) ("Most courts agree that consortium includes such items as love, companionship, affection, society, comfort, solace, support, sexual relations, and services.").

<sup>67</sup>Joslyn, *supra* note 66, at 900.

<sup>68</sup>*Id.*

<sup>69</sup>See Geordie Duckler, *The Economic Value of Companion Animals: A Legal and Anthropological Argument for Special Valuation*, 8 ANIMAL L. 199, 213 (2002) ("[E]ach animal life, apart from the rare instance of a celebrity animal, typically has a low value, with the majority being presumably valueless other than as food or apparel commodities.").

<sup>70</sup>In the defining punitive damage award case the Supreme Court refused to set a precise acceptable ratio for the value of punitive damages compared to compensatory damages. *State Farm v. Campbell*, 538 U.S. 408, 425-26 (2003). The Court did, however, hold that "[o]ur jurisprudence and the principles it has now established demonstrate . . . few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process." *Id.*

<sup>71</sup>William A. Reppy, Jr., *Punitive Damage Awards in Pet-Death Cases: How Do the Ratio Rules of State Farm v. Campbell Apply?*, 1 J. ANIMAL L. & ETHICS 19, 47, 57 (2006).

detect.<sup>72</sup> The second exception is applicable where the non-economic harm is difficult to evaluate in terms of monetary value.<sup>73</sup>

The argument that these exceptions entitle the pet owner to a larger recovery makes a lot of sense. However, the first problem that blocks the effectiveness of this solution is that the exception to the limit on punitive damages only applies in cases of extreme misconduct by the defendant.<sup>74</sup> Punitive damages by nature are meant to punish the type of conduct that is reprehensible not only to the plaintiff, but is also so outlandish that the court wishes to discourage similar conduct in the future.<sup>75</sup>

To determine whether a defendant's conduct warrants punitive damages, courts will consider a number of factors. These include whether the harm caused was physical or economic, if the defendant acted with indifference or with reckless disregard for the health and welfare of others, if the target of the conduct was financially vulnerable, if the conduct was repeated or isolated, and if the harm resulted from intentional malice or deceit or if from negligent behavior.<sup>76</sup> The application of these factors to pet loss cases will yield disappointing results for most pet owners.

Regarding the first factor, the likeliness that the harm will be physical is very low, as generally the harm to a pet will be categorized as a loss of property, which is considered an economic loss.<sup>77</sup> The second factor will also be thwarted because the conduct in question will most likely not reflect a disregard for human health or safety, as the pet—personal property—will be the primary target.<sup>78</sup> The third factor focuses on whether the victim is financially vulnerable; however a pet's financial vulnerability seems to be a non-issue.<sup>79</sup> The only possible factor that may favor the owner is if defendant has a prior history of targeting or killing pets.<sup>80</sup>

Therefore, punitive damages may only be feasible in a limited number of pet loss cases. For instance, in 1964 a court in Florida allowed a pet owner to recover punitive damages when a garbage collector flung an empty garbage can at the

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<sup>72</sup>*Id.* at 47.

<sup>73</sup>*Id.* at 57.

<sup>74</sup>Defendant's misconduct on which punitive damages are based must be heinous because such damages carry criminal punishment connotations. *State Farm*, 538 U.S. at 417. The Court has held that excessive punitive awards constitute an "irrational and arbitrary deprivation of the property of the defendant." *Id.* at 429. The Court has articulated three guideposts for determining the reasonableness of a punitive award, "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Id.* at 418.

<sup>75</sup>*Id.* at 416.

<sup>76</sup>*Id.* at 419.

<sup>77</sup>*Id.*

<sup>78</sup>*Id.*

<sup>79</sup>*Id.*

<sup>80</sup>*Id.*

owner's small dog who was tied in the front yard.<sup>81</sup> Hearing the dog yelp, the owner went outside and saw the garbage collector laughing at his actions as he left.<sup>82</sup> The small dog died as a result of the garbage collector's actions.<sup>83</sup> Recovery of punitive damages in this case was due to the wanton and malicious actions of the collector. More than four decades after this decision, only a handful of cases have succeeded on the punitive damage theory.<sup>84</sup> The limited application renders the punitive damages remedy an unlikely solution for pet owners.

*D. Why the Declassification of Pets as Property Cannot Work in Contemporary America*

Another approach advocated by reformers is derived from focusing more on the rights of the animal rather than the owners. Animal rights advocates suggest that domestic animals should no longer be classified as personal property.<sup>85</sup> The justifications for declassification are varied, but most stress two common themes. The first is that many people today view pets as family members.<sup>86</sup> The second stresses that sentient animals have inherent worth outside of our property system and have more than just an interest, indeed a *fundamental right*, in being declassified as chattel.<sup>87</sup> At the outset, this seems like a great way to remedy the problem because limits on non-economic damages would no longer apply to the *guardian*—not owner—of a pet. This suggested solution, however, raises too many practical problems to be deemed a viable remedy.<sup>88</sup>

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<sup>81</sup>La Porte v. Associated Indeps., Inc., 163 S.2d 267, 269 (Fla. 1964).

<sup>82</sup>*Id.* at 268.

<sup>83</sup>*Id.*

<sup>84</sup>Alaskan courts have recognized that punitive damages are recoverable in an action for the death of a pet, however only a handful of other states allow the action at all, and many of the decisions are archaic. *See, e.g.*, Landers v. Municipality of Anchorage, 915 P.2d 614, 620 (Alaska 1996); Parker v. Mise, 27 Ala. 480, 481-82 (1855); Mendenhall v. Struck, 224 N.W. 95, 98 (Iowa 1929); Loeser v. Axtin, 12 Ky. L. Rptr. 636, 636 (1890); Tenhopen v. Walker, 55 N.W. 657, 657-58 (Mich. 1893).

<sup>85</sup>*See* Ariel Simon, *Cows as Chairs: Questioning Categorical Legal Distinctions in a Non-Categorical World*, in *PEOPLE, PROPERTY, OR PETS? 7* (Marc D. Hauser et al., eds., 2005) (“An ethical approach to animal rights, in other words, would defy any type of gross generalization, whether it comes in the form of treating animals all as rights-bearing equals or as a morally impoverished form of property. Animals are better understood as dependents . . .”); Paek, *supra* note 33; Root, *supra* note 39.

<sup>86</sup>*See* Paek, *supra* note 33, at 483 (“The relationship between an animal guardian and a companion animal is similar to a parent and child . . . the law recognizes and protects the relationship between family members . . . and . . . courts should recognize that the established legal doctrine of companion animals as property is archaic . . .”).

<sup>87</sup>*See* Gary L. Francione, *Taking Sentience Seriously*, 1 J. ANIMAL L. & ETHICS 1, 17 (2006) (“There is no non-speciesist reason not to recognize that full membership in the moral community requires that we reject the slavery of nonhumans just as we rejected the slavery of humans. This would require that we abolish—and not merely regulate—our exploitation of nonhumans . . .”).

<sup>88</sup>*See infra* notes 90-99 and accompanying text.

### 1. Activists are Starving to Get Animals Declassified as Property

The first major obstacle to the recognition of animals as possessing fundamental rights to not be considered chattel is that as guardians of animals, livestock owners could not allow their animals to be killed as a source of food.<sup>89</sup> There is also a question about whether guardians of animals such as dairy cows could allow their wards to be milked to produce food, or chickens allowed to produce eggs. One theory predicts that such actions would threaten the health and safety of humans because the current state of food production could not support such a large number of vegetarians, or perhaps vegans, and would lead to malnutrition.<sup>90</sup> Although there could be a distinction drawn between animals traditionally used as food sources and animals used as companions or for other services, it is unlikely that the proponents of declassification would accept such a distinction. The major arguments supporting the declassification of animals as property is that *all* animals have intrinsic rights not to be exploited by humans.<sup>91</sup> This presumption is central to this proposed solution, so that if adopted, no distinction could be made between companions and food sources, and would likely have a negative effect on humans.<sup>92</sup>

### 2. The Disease of Declassification

Another practical problem affecting the health of humans is the end of medical advancements based on animal research.<sup>93</sup> Although a very sensitive subject with animal rights activists and others, animal research yields benefits to not only humans, but also animals themselves.<sup>94</sup> Great advancements have been made in recent years regarding diseases that affect humans and animals, such as diabetes, that are attributed to biomedical animal research.<sup>95</sup> Furthermore, for the same reasons that distinctions could not be made between food source animals and companion animals, a distinction between laboratory mice and other types of animals also would not be feasible.<sup>96</sup> This would prove fatal to the benefits of animal research because over ninety-five percent of all animal testing is conducted on laboratory mice and rats.<sup>97</sup> Animal testing remains a very controversial issue, however with many horrible terminal diseases, such as HIV/AIDS, still killing humans, the potential

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<sup>89</sup>Neha Jadeja, *Why the Status of Animals Should Remain as Property*, in PEOPLE, PROPERTY, OR PETS? 17-18 (Marc D. Hauser et al., eds., 2005).

<sup>90</sup>*Id.* at 18.

<sup>91</sup>See Francione, *supra* note 87.

<sup>92</sup>See Jadeja, *supra* note 89.

<sup>93</sup>*Id.*

<sup>94</sup>Foundation for Biomedical Research, *Survivors: Animal Research Saves Lives*, <http://www.fbresearch.org/survivors/about/> (last visited Feb. 12, 2008).

<sup>95</sup>Foundation for Biomedical Research, *Survivors: The Truth about Cats and Dogs*, <http://www.fbresearch.org/survivors/truth.htm> (last visited Feb. 12, 2008).

<sup>96</sup>See Jadeja, *supra* note 89 and accompanying text.

<sup>97</sup>Foundation for Biomedical Research, *Survivors: Quick Facts About Animal Research*, <http://www.fbresearch.org/survivors/quickfacts.htm> (last visited Feb. 12, 2008).

advancements to be garnered from biomedical research seem to outweigh the benefit to laboratory mice of shedding their personal property status.<sup>98</sup>

### 3. Animal Activists Seeking Progressive Judges

The last practical problem with granting animals autonomy is that judges are extremely reluctant to adopt any approach that radically contradicts centuries of well-developed jurisprudence.<sup>99</sup> Even if adopted by a legislature, it is easy to foresee problems with enforcement and regulation. No longer would the standard be to avoid and punish cruelty. The declassification of animals may include a higher standard of well-being and could very possibly place a heavy burden on both courts and executive branch employees.

In sum, the declassification of animals as property might benefit animals, but would arguably do so at the risk of human health, safety, and well-being, and would present practical problems in both enforcement and regulation. Therefore, the declassification of animals as property is not a practical solution for today's pet owner.

## IV. CREATING A VIABLE SOLUTION THAT CAN COEXIST WITH CONTEMPORARY JURISPRUDENCE AND ADEQUATELY COMPENSATE PET OWNERS: ADOPTING INIMITABLE PROPERTY

To be *inimitable* is to be so rare as to surpass or defy imitation.<sup>100</sup> Additionally, to be inimitable means to be without compare and not deserving of imitation.<sup>101</sup> The choice of this word to describe a new, hybrid classification of personal property is important because it conveys the unique personal characteristics of pets that the law currently overlooks. This section first addresses the shortfalls of leaving pets classified as mere personal property and highlights the need for a new classification system. The section then details the features and advantages of inimitable property as a new classification for pets.

### A. *The Need for Inimitable Property*

#### 1. Why Dogs and Cats Are Different from Tables and Chairs

The first obvious distinction that property law fails to take into account is the clear difference between living pets and inanimate objects. A pet is a sentient being,

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<sup>98</sup>AVERT, HIV Drugs, Vaccines and Animal Testing, <http://www.avert.org/hiv-animal-testing.htm> (last visited Feb. 2009) (suggesting that all antiretroviral AIDS drugs were tested at some point on animals). In 2007, HIV/AIDS caused over two million deaths worldwide, and it is estimated that 30.8 million adults are currently living with HIV/AIDS. AVERT, Worldwide HIV & AIDS Statistics, <http://www.avert.org/worldstats.htm> (last visited Feb. 1, 2008).

<sup>99</sup>*See, e.g.*, *Sentell v. New Orleans & C.R. Co.*, 166 U.S. 698, 701 (1897). (“The very fact that they are without the protection of the criminal laws shows that property in dogs is of an imperfect or qualified nature, and that they stand, as it were, between animals *ferae naturae*, in which, until killed or subdued, there is no property, and domestic animals, in which the right of property is perfect and complete.”).

<sup>100</sup>THE OXFORD ENGLISH DICTIONARY 1122 (2d ed. 1989).

<sup>101</sup>*Id.*

capable of feeling pain, fear, aggression, loyalty, and arguably even love.<sup>102</sup> Pets are conscious beings and demonstrate their consciousness through their versatility and ability to respond to changing conditions, neurobiological activity which is similar to human brain activity, and their ability to communicate.<sup>103</sup> Pets also display preferences and can make choices based on what they want; these choices are not just instinctive responses.<sup>104</sup>

Animals can also adapt their demeanors and personalities depending on the type of environment in which they are raised.<sup>105</sup> For instance, if a kitten is exposed to people and handled frequently by humans when it is two to seven weeks old, it will likely remain an affectionate and friendly cat as it continues to grow through adulthood.<sup>106</sup> Conversely, if a kitten at the same age is subjected to a lack of human interaction it may remain unsociable for the duration of its life.<sup>107</sup>

Another feature of pets that is often overlooked, but that sets them apart from other items of property, is that they are named.<sup>108</sup> Often, pet names reflect unique characteristics of the pet itself, such as Spot, Fluffy, Red, Princess, or Socks.<sup>109</sup> Naming pets sets them apart from wild animals, or even most other types of domestic

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<sup>102</sup>See Simon, *supra* note 85, at 6 (stating animals can experience “pain, suffering, fear, preference”). See also Herman Daggett, *The Rights of Animals: An Oration (1791) in ANIMAL RIGHTS: A HISTORICAL ANTHOLOGY* 131 (Andrew Linzey & Paul Barry Clarke eds., 2004) (speaking on the rights of animals in 1791, Daggett argued that animals are “sensible beings, and capable of happiness” and that this sentience was deserving of “proportionable tenderness”).

<sup>103</sup>Robbie Silverman, *The Thoughts and Feelings of Animals, in PEOPLE, PROPERTY, OR PETS?* 119-20 (Marc D. Hauser et al., eds., 2005).

<sup>104</sup>*Id.* at 120-21.

<sup>105</sup>ANMARIE BARRIE, *CATS AND THE LAW* 9 (TFH Publications 1990).

<sup>106</sup>*Id.*

<sup>107</sup>*Id.*

<sup>108</sup>LESLIE IRVINE, *IF YOU TAME ME: UNDERSTANDING OUR CONNECTION WITH ANIMALS* 33 (2004). Boats and ships are also a type of personal property that are named. Leonard O. Townsend, Note, *Love Lies Bleeding: Brownfields in the New Millennium*, 11 *FORDHAM ENVTL. L.J.* 873, 894 (2000). One maritime author suggests that “[a] ship is the most living of inanimate things...every one gives a gender to vessels.” *Id.* Even if the ship’s name has to do with physical characteristics of the ship, i.e., H.M.S. Titanic, the ship lacks the ability to respond to its name. The distinction between companion animals and ships is obvious.

<sup>109</sup>The name selected by the owner often reflects the uniqueness of each pet. In a recent study of dog and cat owners, a majority of respondents who lived and worked with their pets defined them as “thoughtful, reciprocating, emotional beings with uniquely individual tastes and personalities.” IRVINE, *supra* note 108, at 57, 126. As stated in the text, naming often reflects the “individual tastes and personalities” of the animal and reinforces the animal’s identity, or self, to their owner. Although naming does not always reflect unique characteristics, it is often the case. This is important because the melding of the animal and owner occurs simultaneously and is dependent upon interaction. *Id.* at 126.

animals that generally remain nameless.<sup>110</sup> Domestic pets also can be trained to respond to their names and make them their own.<sup>111</sup>

The ability of pets to adapt to environments, respond to their names, display affection, and make calculated decisions regarding individual preferences has a significant effect on owners.<sup>112</sup> Some owners, faced with losing their unique pet, wish to not only replace their pet with another, but to also recreate their pet's special personality by cloning.<sup>113</sup> While the ground-breaking pet cloning company Genetic Savings and Clone [GSC] was in operation, only a handful of cats were cloned and sold to paying customers.<sup>114</sup> Since the company stopped offering pet cloning services, thousands of pet owners have paid over \$1,000 to store their pets' DNA in gene banks hoping that one day the process will be more affordable than the original \$50,000 price tag.<sup>115</sup> Although original efforts in 2001 resulted in a clone that looked substantially different from the DNA donor, the later cats sold by GSC were literal copycats in both appearance and in personality according to the owners of the clones.<sup>116</sup> The existence of some owners willing to pay large sums of money to duplicate or bank their pets DNA for potential duplication demonstrates that pets are far removed from other types of property.

Pets are also distinct from other types of property in their ability to reciprocate emotion. Marc Bekoff, a noted professor of biology and observer of animal behavior, has written:

[d]ogs and other companion animals (hereinafter companions) are amazing beings. Our companions with whom we share our lives typically

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<sup>110</sup>Excluding horses, which generally are named, most species are not routinely named regardless of their intended use by humans. For example, pigs or cows are rarely named unless starring in a Disney movie. *Id.* at 33. Owners do name other types of household pets, such as birds, fish, ferrets, rabbits, turtles, gerbils, etc. However, these pets are not comparable in history of domestication or frequency of ownership. The sentience and emotional reciprocity and sophistication of pets such as birds and fish is also a topic for another paper.

<sup>111</sup>BARRIE, *supra* note 105, at 11. They are also independent enough to often ignore an owner using the pet's name in an effort to convince it to do something or stop doing something.

<sup>112</sup>Companion animals' unique qualities inspire owners to go to great lengths to care for and please their pet. *See* American Pet Products Association, *supra* note 32.

<sup>113</sup>Maryann Mott, *Cat Cloning Offered to Pet Owners*, NATIONAL GEOGRAPHIC NEWS, Mar. 25, 2004, <http://news.nationalgeographic.com/news/pf/57853507.html> (last visited Dec. 19, 2008).

<sup>114</sup>Wade Roush, *Genetic Savings and Clone: No Pet Project*, TECHNOLOGY REVIEW, Mar. 2005, available at <http://www.technologyreview.com/Biotech/14215/>.

<sup>115</sup>*Id.*

<sup>116</sup>For testimonials and pictures about the cloned pets provided by GSC, see Genetic Savings and Clone, [http://web.archive.org/web/20060615200352/savingsandclone.com/clients/and\\_cats.html](http://web.archive.org/web/20060615200352/savingsandclone.com/clients/and_cats.html) (last visited Feb. 1, 2009) (on file with author). Genetic Savings and Clone went out of business but the last home site posted for the company can be viewed at Genetic Savings and Clone, <http://web.archive.org/web/20060627103935/savingsandclone.com/clients/index.html> (last visited Feb. 1, 2009).

have unqualified trust in us—they believe we will always have their best interests in mind, they love us unconditionally when they choose to love us, and they would do almost anything for us. And, indeed, often they do, taking care of us and causing themselves harm in selflessly doing so.<sup>117</sup>

Although Professor Bekoff also discusses the emotional capacities of other species in his article, companion animals are unique in the sense that they express their emotions toward humans, a quality that many other animals do not possess.<sup>118</sup>

All these unique biological and social traits that pets possess enable them to essentially become members of a family.<sup>119</sup> The results of one study identify several prominent attitudes held by owners, ranging from pets functioning as family members to occupying “an overlapping but different space from humans in a family.”<sup>120</sup> Even though owners refer to, or think of, their pets as family members, they realize the pet is not human. And yet, many people consider their pets as members of their family based on the way that a pet functions in their households.<sup>121</sup>

While a pet may be able to become a part of the family, it can never attain the same status as a child or human family member.<sup>122</sup> This places the pet in quite an

<sup>117</sup>Marc Bekoff, *The Evolution of Animal Play, Emotions, and Social Morality: On Science, Theology, Spirituality, Personhood, and Love*, 36 ZYGON 615, 645 (2001).

<sup>118</sup>*Id.* at 634-40.

<sup>119</sup>See Susan Phillips Cohen, *Can Pets Function as Family Members?*, 24 WESTERN J. NURSING RESEARCH 621, 624 (2002). In modern America, families extend beyond genetic ties. *Id.* Today, the definition of family extends to the choice of family members, who are considered “functional kin.” *Id.* Functional kin become members of a family network and provide services or supplement the services of the biological family members. *Id.* They also can be perceived as “psychological kin,” a status that focuses more on the feelings and behaviors of family members toward non-genetic family members. *Id.* These types of functional and psychological kin concepts are far removed from legal concepts that recognized de facto relationships, or from doctrines of equity that recognize a legally protected relationship even though the relationship does not meet all the traditional legal requirements. Such recognition occurs when courts determine that it would be unfair or unjust to not recognize such a relationship. For instance, the doctrine of “equitable adoption” which allows a guardian to stand in as a parent in cases where four elements are met:

The natural parents of the child have disclaimed or abandoned parental rights to the child;

The one claiming to be parent has performed the obligations of parenthood for a substantial period of time;

The child and the one claiming to be parent have held themselves out to be parent and child for a substantial period of time; and

The relationship between the child and the one claiming to be parent has been publicly recognized.

*Lawson v. Atwood*, 536 N.E.2d 1167, 1170 (Ohio 1989).

<sup>120</sup>See Cohen, *supra* note 119, at 633.

<sup>121</sup>*Id.*

<sup>122</sup>Although one pet, Helmsley’s Maltese, Trouble, received the largest bequest in the billionaire real estate mogul’s will, the dog is still not considered a family member. See Feuer, *supra* note 2. Also, even though eighty percent of pet owners consider their pet a family member, Paek, *supra* note 33, when faced with a choice over whom to abandon, pet owners

uncertain place in the law.<sup>123</sup> A pet's half-human, half-property position, however, should not automatically relegate them to the same status as inanimate property owned by humans. Companion animals' unique qualities and unique ability to straddle the line between family member and chattel requires a unique classification in property law, as well as a feasible, yet distinct, valuation process. Classification of pets as "inimitable property" recognizes this hybrid status, and at the same time creates a measurement process specifically tailored to value the specific relationship between companion animal and owner.

## 2. Why Previously Owned Dogs and Cats Cannot Be Sold in a Fair Market

The next argument supporting the need for a new classification system challenges the fiction used by the courts in pet loss cases—i.e., that a market exists for previously owned pets. With so many previously owned pets being abandoned and put to death, there can hardly be a market in which courts can fairly assess a market value.<sup>124</sup> The lack of market for a previously owned pet suggests a serious need to update and reconfigure the valuation process in pet loss cases. This update would guarantee that pet owners could be adequately compensated by basing recovery on the true value of the loss to the pet owner rather than a fictitious market.<sup>125</sup>

## 3. Why Dogs and Cats Are Different from Pigs and Cows

Another reason pets cannot be classified as mere personal property is that placing companion animals in the same legal category as domestic farm animals and livestock fails to recognize crucial differences in the ability of pets to bond with humans and their unique and separate histories of domestication.<sup>126</sup> The history of the domestication of dogs is especially enlightening and offers reasons why these animals should not be categorized as personal property.<sup>127</sup>

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almost uniformly choose to retain their children and abandon their dogs. *See Nieves, supra* note 34.

<sup>123</sup>The rules allowing pet owners to recover an adequate amount of compensation vary from state to state. *See Schwartz & Laird, supra* note 11, at 236-37.

<sup>124</sup>*Id.* at 240-41.

<sup>125</sup>*See Duckler, supra* note 69, at 221 ("Companion animals, to the extent that they have a social 'purpose' created by humans, are most emphatically non-commercial objects valued entirely for the comfort and well-being they impart to their owners as a benefit of ownership.").

<sup>126</sup>Attorney and doctor of biology, Geordie Duckler, explains the unique nature of companion animals in that:

[r]oughly 1.5 million species of animal have been identified. Of that number, roughly 1.2 million are insects and arthropods. Of the 300,000 species remaining, the vertebrates comprise about 25,000. Of that number, only 4,000 or so are mammal species. Of that 4,000, it is primarily two, dogs and cats, which historically have formed the most special and intimate relations with us as our social companions. Dogs and cats are a minute component of an immense group, yet only those two species are considered to be potential "companions."

*Id.* at 207.

<sup>127</sup>*See supra* note 18 and accompanying text.

Evidence of the early domestication of dogs dates back to at least 15,000 years ago.<sup>128</sup> Alliances between dogs and humans began out of necessity, but have been successful because of the animal's unique characteristics that lend themselves to domestication and the development of social relationships.<sup>129</sup> Although the original domestication took place with wolves, Juliet Clutton-Brock, noted author on domestication and archaeozoology, explains that within litters each pup would have a different temperament.<sup>130</sup>

It was the occasional pup with just the right "combination of physique and temperament to make the necessary adjustments that would enable it to survive in a human community, live to be an adult, and even to breed. . . . [Those offspring] could be protected by people . . . and probably [were] given preferential treatment."<sup>131</sup> These pups also had unique characteristics like large eyes, attractive coloring, and curled tails which made them more endearing to humans.<sup>132</sup> Over time these traits were passed on to new litters, and thus a separate animal, the dog, evolved.<sup>133</sup>

The domestication and history of the cat is also enlightening because it sets the species apart from other types of farm animals. Although there are a variety of theories and dates on when cat domestication began, a recent study suggests the process began over 9000 years ago and coincides with the early agricultural endeavors of peoples in the fertile crescent.<sup>134</sup> As farmers began producing and storing grain, cats were instrumental in controlling the rodent population who fed on grain stores.<sup>135</sup> Over time the wild cats dropped their aggressive instinctive behaviors and were incorporated into societies through religious worship, were protected by threat of criminal punishment, and became common in typical ancient households.<sup>136</sup>

As with dogs, what began as a mutually beneficial relationship between humans and cats gave way over time to incorporation into an important place in society, human protection, and cohabitation.<sup>137</sup> Even though the domestication of dogs and

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<sup>128</sup>JULIET CLUTTON-BROCK, *A NATURAL HISTORY OF DOMESTICATED ANIMALS* 49 (2d ed. Cambridge Univ. Press 1999).

<sup>129</sup>*Id.* Animal characteristics that facilitate domestication include hardiness, an inclination to like humans, a comfort-loving nature, utility to humans, unimpeded fertility, and relative ease of care. *Id.* at 2. Because even wolves residing in the wild possess these qualities, wolf cubs can be reared by humans and live as domesticated animals. *Id.* at 50.

<sup>130</sup>*Id.* at 51.

<sup>131</sup>*Id.*

<sup>132</sup>*Id.*

<sup>133</sup>*Id.*

<sup>134</sup>A recent genetic assessment of nearly 1000 cats and their wild ancestors concluded that domestic cats derive from five different wild cats that originated in the Near East and spread to other regions through human movement or migration. Carlos A. Driscoll et al., *The Near Eastern Origin of Cat Domestication*, 317 *SCIENCE* 519, 521-22 (2007).

<sup>135</sup>*Id.* at 523.

<sup>136</sup>*Id.* See also BARRIE, *supra* note 105, at 11-12.

<sup>137</sup>See Driscoll, *supra* note 134, at 523; BARRIE, *supra* note 105, at 11-12.

cats began around the same time that other species were being domesticated,<sup>138</sup> it is only these two animals that have evolved to the point of companionship and cohabitation with humans.<sup>139</sup>

The fact that small cats and dogs could be kept inside the house during ancient times further sets them apart from the much larger ancient ancestor of cattle.<sup>140</sup> The first key difference is that rather than assisting humans in hunting like dogs,<sup>141</sup> or protecting grain stores from rodents like cats,<sup>142</sup> cows were domesticated to bear loads and help plow.<sup>143</sup> It was the smaller animals, cats and dogs, that were the “easiest to handle and the easiest to house” in ancient societies.<sup>144</sup>

Keeping cows also posed problems for ancient peoples attempting to tame cattle. These difficulties included an increased risk of attracting large and dangerous predatory species and the challenge of controlling such large animals that can destroy undergrowth, trample crops, and taint natural sources of water.<sup>145</sup> Facing all these disadvantages, the ancient owners of cattle began the practice of herding the cattle into corrals, or keeping them in enclosed structures *adjacent to*, not *inside of*, the home when not in use.<sup>146</sup>

The existence of cows, dogs, and cats in ancient societies help explain these animals’ demeanors and their ability to connect with humans on differing levels. Whereas cattle were kept outside and only interacted with humans while in use, cats and dogs interacted with humans not only while serving human needs, but also when the work day was done.<sup>147</sup> It is these interactions—the formation of symbiotic relationships—that truly sets cats and dogs apart from other livestock. One expert on archaeozoology explains “[t]he domesticated cat extracts from its human partner a home, warmth, affection, and play, whilst humans can assuage their natural inclination to nurture a warm, soft furry animal . . . .”<sup>148</sup>

Another reason pets deserve to be classified separately from inanimate personal property and livestock is because of their unique personalities<sup>149</sup> and genetic structures that cannot be duplicated or replaced through the purchase of another

<sup>138</sup>Driscoll, *supra* note 134, at 523.

<sup>139</sup>See Duckler, *supra* note 69.

<sup>140</sup>See CLUTTON-BROCK, *supra* note 128, at 59-60, 87, 140.

<sup>141</sup>*Id.* at 56.

<sup>142</sup>*Id.* at 140.

<sup>143</sup>*Id.* at 81. Although cattle may also have been domesticated for the production of milk, this aspect is limited to only certain areas of the world. For instance, a large percentage of African people are lactose intolerant because no tradition existed of milking cows and consuming dairy products. *Id.* at 81-82.

<sup>144</sup>See CLUTTON-BROCK, *supra* note 128, at 88.

<sup>145</sup>*Id.* at 87-88.

<sup>146</sup>*Id.* at 88.

<sup>147</sup>See *infra* note 152 and accompanying text; *infra* note 150 and accompanying text.

<sup>148</sup>See CLUTTON-BROCK, *supra* note 128, at 140.

<sup>149</sup>See IRVINE, *supra* note 108.

animal of the same breed, age, color, weight, etc.<sup>150</sup> Tied in with unique personalities is the unique history of domestication and unique qualities that enable them to respond to and reciprocate human emotions.<sup>151</sup> All of these characteristics mean that pets can create social bonds and foster social and emotional developments in families. Because pets have such unique characteristics, they deserve to be classified as inimitable property.

The same factors that fostered domestication of cats and dogs but not other animals are the same traits that allow modern humans and their pets to develop unique relationships and bonds distinct from other human-animal interactions. Notably, this special relationship is exemplified by the types of activities that humans engage in with their pet that they could not do with livestock, such as sleeping together.<sup>152</sup> The fact that dogs and cats have been domesticated for so long for the express purpose of living and interacting with humans justifies differential and arguably preferential treatment to farm and wild animals.

#### 4. *Anzalone v. Kragness*: The \$100,000 Example

In 2005, Mary Ann Anzalone lost her beloved pet cat, Blackie.<sup>153</sup> Anzalone loved her pet so much that hearing of Blackie's death both demolished her emotional stability, and prompted her to bring suit seeking \$100,000 in damages from the boarder who was responsible for the cat's demise.<sup>154</sup> Anzalone's case epitomizes the inadequate contemporary judicial response to a pet owner's claim and highlights the need to recognize the inimitable property model in such cases.

*Anzalone* begins with the typical story of a doting pet owner, Mary Ann Anzalone, who was enamored with her pet and considered her cat, Blackie, to be her only immediate family and somewhat of a child to her.<sup>155</sup> Anzalone boarded Blackie at a local animal hospital, and twelve days later while the cat was let out of her cage for exercise, Blackie was killed by a Rottweiler.<sup>156</sup> After hearing of Blackie's horrific death, Anzalone experienced extreme symptoms of distress including weight gain, loss of sleep, and severe feelings of guilt manifested in dreams about the defenseless declawed cat being "ripped apart by a [R]ottweiler."<sup>157</sup>

Despite these and other examples of suffering and guilt, the trial court found that Anzalone failed to state a cause of action for intentional infliction of emotional

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<sup>150</sup>Duckler, *supra* note 69, at 203 ("[A]nimals, by their nature, are inherently unique and irreplaceable objects. Concepts of modern genetics command the recognition that every individual sexually-reproducing animal is a distinct fingerprint of nature, each unlike that of any other.").

<sup>151</sup>*See supra* text accompanying note 118.

<sup>152</sup>*See* Cohen, *supra* note 119, at 622 (citing that as of 2002, 65% of cats and 39% of dogs slept with a family member in their bed).

<sup>153</sup>*Anzalone v. Kragness*, 826 N.E.2d 472, 473 (Ill. App. Ct. 2005).

<sup>154</sup>*Id.* at 473.

<sup>155</sup>*Id.* at 474. Plaintiff was an unmarried woman with no children. *Id.*

<sup>156</sup>An employee of the animal hospital left the door open where Blackie was exercising, which allowed another boarded pet, the Rottweiler, to enter the room and kill Blackie. *Id.*

<sup>157</sup>*Id.*

distress and struck her amended complaint for a failure to adequately plead damages.<sup>158</sup> The court's decision seemed to center on the fact that Anzalone was requesting \$100,000 in damages in her amended complaint, a seemingly excessive amount for loss of personal property as Illinois law clearly classifies dogs as property.<sup>159</sup> The appellate court reversed the lower court's dismissal of Anzalone's claims because complaints should not be dismissed for a valuation or calculation error in damages, and Anzalone met the applicable requirement of proving the existence of damages.<sup>160</sup>

At this point *Anzalone v. Kragness* may seem like any other case, yet beneath the technical requirements, the court's analysis ventures further into the history and future of recovery for pet owners.<sup>161</sup> Although Anzalone's claim for intentional infliction of emotional distress was thrown out, she still claimed the loss of her pet, the loss of the pet's *society and companionship* and other financial losses.<sup>162</sup> Regarding the loss of companionship claim, the court decisively concluded that "no Illinois statute provides for a 'wrongful death'-type action for the negligent killing of a pet."<sup>163</sup> The court observed that because of the peculiar history of wrongful death actions "courts have been reluctant to create a new common law cause of action for the wrongful death of a pet and defer to the legislature the decision to fashion the appropriate cause of action and . . . appropriate measure of noneconomic damages."<sup>164</sup>

The Illinois appellate court also recounted the state's history of valuation standards for pets, spanning from fair market value, commercial value, and loss of services.<sup>165</sup> The *Anzalone* court then took a progressive stance on the fair market value by noting that in some instances the pet has no market value.<sup>166</sup> The court also supported the use of a different standard, the value to the owner, and referenced a comment to the Restatement (Second) of Torts that recommends "where the subject matter cannot be replaced, the measure of the 'value to the owner' is left largely to the discretion of the trier of fact."<sup>167</sup> Lastly, the court noted that the actual owner is entitled to demonstrate the value by such proof as the circumstances admit.<sup>168</sup>

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<sup>158</sup>*Id.* at 474-75.

<sup>159</sup>*Id.* at 476, 478.

<sup>160</sup>*Id.* at 479.

<sup>161</sup>*Id.*

<sup>162</sup>*Id.* at 476.

<sup>163</sup>*Id.*

<sup>164</sup>*Id.* This quote further reinforces the arguments laid out in both *supra* Part III section B and *infra* Part IV section B.

<sup>165</sup>*Anzalone*, 826 N.E.2d at 476.

<sup>166</sup>*Id.* at 477.

<sup>167</sup>*Id.*

<sup>168</sup>*Id.* Although there is some question as to whether the use of "value to owner" is a legal fiction purporting to exclude sentiment while allowing for emotional loss in the damage calculation this terminology is often used in small cases where complex monetary calculations "would be unwelcome as too elaborate for the modest occasion. Perhaps the value to owner

One lesson that can be taken from *Anzalone* is that courts are wary of extending existing causes of action that traditionally deal with human injury or death to cases of companion animal death.<sup>169</sup> More importantly, this case suggests that some courts are willing to explore new ways to compensate pet owners who are grieving over the loss of their pseudo-family members.<sup>170</sup> Lastly, this case demonstrates that many of the current arguments advanced for pet owners seeking adequate compensation are just not viable, and that a new solution is necessary to both fit into the existing framework and update outdated legal notions.

*B. Implementing a Solution By Adopting the Inimitable Property Status for Pets:  
How and Why It Will Work*

Functionally, inimitable property will create a hybrid status for pets in the law. It will entitle pets to a higher status than ordinary personal property, but will not vest the animals with fundamental rights reserved exclusively to human beings in our civil justice system. Such reclassification will work because it is not based on sentience, inherent rights, or anthropomorphic features. Rather, it is based on the uniqueness of pets both as independent beings and as creatures that hold irreplaceable positions in our lives and families.<sup>171</sup> Although the law already recognizes some forms of special property because of its irreplaceable nature,<sup>172</sup> a classification as merely unique is still insufficient for pets because it fails to account for the living and interactive aspect of pets. A rare piece of art may be priceless and irreplaceable, but a piece of art cannot create a special interactive bond with a human. The creation of a third category of inimitable property, separate from real property or personal property, would allow courts to use a different measure of valuation which takes in to account a real, factual value that reflects what a pet is worth to an owner.

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rule suffices to invite some help from the jury and to the same time to provide a tool for control if the award becomes too generous; if so, maybe no more should be demanded.” *Id.* (quoting Dan D. Dobbs, *Law of Remedies* § 5.16(3) 907 (West 1993)). As with most damage calculations, the “value to the owner” model is not perfect, but it does present the requisite legal form and practical guidance for a jury or judge to make a monetary determination when the item being valued—in this case a pet—is difficult if not impossible to calculate with precision. *Id.*

<sup>169</sup>*Anzalone*, 826 N.E.2d at 476.

<sup>170</sup>By deferring to the legislature, this court recognizes that the issue is both complex and has strong support in contemporary society, and also displays a willingness to help along victims of pet loss by applying the value to owner standard, over the traditional and favored fair market value standard. *Id.* at 476-77.

<sup>171</sup>See Bekoff, *supra* note 117, and accompanying text.

<sup>172</sup>In Ohio, the Supreme Court has held value to the owner may be used when fair market value can not be determined. *Bishop v. East Ohio Gas Co.*, 56 N.E.2d 164, 166 (Ohio 1944). Generally, this value to the owner model is used in cases of used personal items such as clothing, but can also be employed in cases of unique or irreplaceable items such as manuscripts, personal photographs, family keepsakes and videotapes.

### 1. Why Inimitable Property Will Work

Inimitable property will succeed where other proposed solutions fail for several key reasons. The first is that it eschews reliance on the fictitious market value for previously owned pets,<sup>173</sup> and instead focuses on the value to the owner, a concept which is already recognized in the law.<sup>174</sup> This type of damage calculation can more adequately reflect both compensation for the loss of a pet, and also the loss of what that pet meant—sentimentality aside—to the specific owner.<sup>175</sup> Furthermore, adoption of inimitable property would also perform better than other proposed solutions in that it would eliminate the humanized or emotional based framework necessary to evaluate emotional distress claims.<sup>176</sup> Based instead on a highly fact-specific, but not easily falsified, factor-balanced analysis, windfalls and fraudulent claims could easily be avoided.

Another reason inimitable property can work is the fact that it will not disrupt or contradict established jurisprudence. Inimitable property leaves pets as property, instead of declassifying pets as property altogether. Declassification is blatantly at odds with many centuries of precedent that has firmly established pets as a form of property.<sup>177</sup> Also, courts would not need to extend any existing causes of action that may already be treated suspiciously, such as negligent or intentional infliction of emotional distress, to make them applicable in pet loss cases. Because inimitable property leaves pets classified as a form of personal property, the courts would simply need to apply established torts like trespass to chattel, conversion, or destruction of property.

### 2. How Inimitable Property Will Work

The need for inimitable property is apparent, but how then will it work? If all pets are classified as inimitable property, the process for valuing them after their injury or destruction due to the negligence or the intentional acts of another party will be based on factors and judged on a case-by-case basis. Valuing pets based on a multi-factor test also gives courts and legislatures the opportunity to tailor or modify the factors to fit the policy and existing law of a specific jurisdiction. The goal of the

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<sup>173</sup>See sources cited *supra* note 14.

<sup>174</sup>Value in tort law is defined as “the exchange value or the value to the owner if this is greater than the exchange value.” RESTATEMENT (SECOND) OF TORTS § 911 (1979). Value to the owner refers to the “existence of factors apart from those entering into exchange value that cause the article to be more desirable to the owner than to others,” even further, a dog trained to obey only one master, will have substantially no value to anyone other than the owner. RESTATEMENT (SECOND) OF TORTS § 911 cmt. e (1979).

<sup>175</sup>Although traditionally the value to owner method is evaluated on an objective basis, the proposed solution can involve both objective and subjective elements to further prevent against windfalls and fraud.

<sup>176</sup>See Cohen, *supra* note 119.

<sup>177</sup>Gary L. Francione, *Animals, Property and Personhood*, in PEOPLE, PROPERTY, OR PETS?, 96 n.15 (Marc D. Hauser et al., eds., 2005) (“The status of animals as property has existed for thousands of years.”).

inimitable property designation is to value the animal based on its inherent qualities, not the fair market value as with other personal property.<sup>178</sup>

The point of considering various factors is to determine the uniqueness of the animal and the uniqueness and strength of the bond between the pet and the owner. Factors to consider include:

- Length of time the pet has been residing with the owner
- Examples of the personal preferences and behavioral traits exhibited by the pet
- Special training or special uses of the pet
- Evidence of the familial-type attachment between the owner and the pet including: photos of the pet paid to be taken or snapshots displayed, extraneous expenditures (treats, massages, birthdays, holidays, etc.), sleep patterns (special bed or with owner).
- Participation in family activities: attending family vacations, shopping trips, or other outings
- Ability of the pet to provide protection, or feelings of safety and wellbeing for the owner
- Ability of the pet to provide comfort, depression reduction or anti-anxiety effects, or other therapeutic effects
- Other aspects of the unique personality of the animal<sup>179</sup>

These elements are able to be easily assessed by juries or fact finders on both a subjective level by focusing on how the particular pet owner and pet interact, and on an objective level by focusing on whether the claims and arguments advanced by the pet owner are reasonable and typical of other similarly situated pet owners in society.

Ideally, this classification scheme would be adopted by legislatures.<sup>180</sup> Legislatures are better able to structure laws around the current needs of society.<sup>181</sup> Because inimitable property is a relatively simple idea, law makers would not

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<sup>178</sup>See Huss, *supra* note 39 and accompanying text; Root, *supra* note 39 and accompanying text.

<sup>179</sup>Although not exactly a perfect fit, the factors described by Carolyn B. Matlack in her suggested solution to this problem, which she entitled "Sentient Property," provided guidance for the structuring of these factors. CAROLYN B. MATLACK, WE'VE GOT FEELINGS TOO: PRESENTING THE SENTIENT PROPERTY SOLUTION 88-89 (2006). Matlack bases her solution on the rights due to animals because they are sentient beings. *Id.* She also suggests that the guardian can speak for the animal using the Doctrine of Substituted Judgment. *Id.*

<sup>180</sup>As of 2003, seven states proposed legislation that purported to fix the problem of under compensating owners in pet loss cases. Elaine T. Byszewski, *Valuing Companion Animals in Wrongful Death Cases: A Survey of Current Court and Legislative Action and a Suggestion for Valuing Pecuniary Loss of Companionship*, 9 ANIMAL L. 215, 226-30 (2003). The states with proposed legislation were California, Colorado, Massachusetts, Mississippi, New Jersey, New York, and Rhode Island. *Id.*

<sup>181</sup>See, e.g., *id.* at 225 ("[P]laintiff and others are free to urge the Legislature to visit this issue [extending an existing cause of action to pet owners] in light of public policy considerations, including societal sentiment and treatment of pets, and the prospect of public perception that . . . [the] law does not provide a just and fair remedy to pet owners . . . [who] suffer when their pets are . . . fatally injured . . .") (quoting *Koester v. VCA Animal Hosp.*, 624 N.W.2d 209, 211 (Mich. Ct. App. 2000)).

struggle with complex legal theories or elements, and inimitable property also lends itself to modification and legislatively imposed limitations. For instance, Tennessee already has legislation that allows a pet owner to recover noneconomic damages if his or her pet died due to the negligent or intentional acts of a third party.<sup>182</sup> Tennessee's statute exemplifies that legislatures need not be weary of crafting such legislation because the statute itself limits the maximum award for each pet to \$5,000, excludes any other type of pet than a dog or a cat, and exempts veterinarians, and other government agencies or nonprofit agencies that generally act in the public interest.<sup>183</sup> Although the Tennessee statute is very forward thinking in creating a statutory remedy for pet owners and increasing the amount that they can recover from basically nothing to \$5,000 the statute should most likely be modified and updated. Setting the amount of recovery to \$5,000 may seriously detract lawyers from accepting cases. This problem could be corrected by either upping the maximum recovery or by allowing for punitive damages based on the level of the misconduct.

Finally, although it is recommended that legislatures adopt the inimitable property reclassification scheme, courts will find that it is not such a radical divergence from the current law as to preclude adoption by judicial decision. For instance, inimitable property uses established causes of action like destruction of property or trespass to chattel.<sup>184</sup> Also, the value to owner standard that is the basis for valuing inimitable property is also derived from a measure already used by courts, although it is updated to reflect the value of the modern pet.<sup>185</sup>

Whether adopted by legislatures or courts, the reclassification of companion animals as inimitable property is necessary to achieve the dual goals of preserving existing framework in the law, while updating severely outdated concepts of pets as personal property. The benefits realized by this reclassification will not only be reserved for the pet owner, but will also be an advancement for the pets themselves. By compromising between the extremely progressive ideals of animal rights activists and the conservative categorization of the common law, the inimitable property valuation model can succeed.

## V. CONCLUSION

Although some people may cringe at the adoption of any reclassification that leaves any animal classified as property,<sup>186</sup> the solution proffered in this Note is not

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<sup>182</sup>TENN. CODE ANN. § 44-17-403 (2000); 2000 Tenn. Pub. Acts, ch. 762 § 1; 2004 Tenn. Pub. Acts, ch. 957 § 7.

<sup>183</sup>Among adding provisions for guide dogs and deleting a size requirement for the county in which this action can be brought, the Tennessee legislature also increased the maximum amount recoverable from \$4,000 to \$5,000 in 2004. 2004 Tenn. Pub. Acts, ch. 957 § 3, 7.

<sup>184</sup>Edward H. Ziegler, *Partial Taking Claims, Ownership Rights in Land and Urban Planning Practice: The Emerging Dichotomy Between Uncompensated Regulation and Compensable Benefit Extraction Under the Fifth Amendment Takings Clause*, 22 J. LAND RESOURCES & ENVTL. L. 1, 3 (2002).

<sup>185</sup>See RESTATEMENT (SECOND) OF TORTS § 911 (1979); *supra* note 128.

<sup>186</sup>See Francione, *supra* note 87; Paek, *supra* note 33, at 524 ("Companion animals, like all animals, deserve to be treated with dignity and respect as emotional and sentient beings. The

meant to be an elucidation on animal rights, or a discourse on human domination of animals. It is proposed as a workable and reasonable solution to a problem that will affect nearly every pet owner who suffers the loss of his or her pet at the hands of another.<sup>187</sup>

The practical problems facing the current suggested solutions require a more modest workable solution that will provide results, yet complement the existing schematic structure of traditional categories in the law.<sup>188</sup> Instead of focusing solely on noble, yet ethereal, issues like the sentience of animals, the rights of animals, or emotional bonds between humans and their pets, inimitable property focuses on the unique and scientifically based nature of each individual pet.<sup>189</sup> Even though inimitable property focuses on unique traits, the arguments framed here do not deny the possibility that in the future those other solutions might work. However, as it stands now, those theories are far too advanced and contradictory to provide results for today's pet owners suffering and grieving over the loss of their companions.

This proposal also works to more justly compensate the owner for his or her very real loss by stressing the irreplaceable value of the pet to the owner, rather than relying on the fair market value. The creation of the category of inimitable property for living pets will take into account the unique nature and personality of each pet and from these deductions will allow for a damage award that is an arguably fair compensation for loss. Inimitable property will also function to exclude fraudulent cases by incorporating both subjective and objective elements into the factored analysis that also serves the benefit of limiting windfalls.<sup>190</sup>

The way that humans interact with pets has changed drastically since animals were classified as personal property.<sup>191</sup> Advancements in science, namely emotional and sentience studies and analyses of social networks and familial relationships, have shown the evolved nature of pets within the family and demand that a reevaluation of our *family members* be completed in our legal framework.<sup>192</sup> The time is now, and the only answer acceptable to most judges and workable in our existing system is the inimitable property valuation model.

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property classification of all animals should be completely abrogated . . . the notion of awarding all animals 'rights' is an issue that must continue to be explored.”).

<sup>187</sup>See Duckler, *supra* note 69.

<sup>188</sup>*Supra* Part IV.A.

<sup>189</sup>*Supra* Part IV.B.

<sup>190</sup>*Id.*

<sup>191</sup>*Supra* Part II.

<sup>192</sup>*Supra* Part IV.A.