UNIVERSITY of DENVER

STURM COLLEGE OF LAW

KILLING FOR YOUR DOG

Justin F. Marceau

University of Denver Sturm College of Law

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ABSTRACT

Legal fields as divergent as family law, torts, contracts, and trusts have each, to varying degrees, addressed the unique legal status of pets. The rights and obligations of pet owners are a topic of increasing legal interest. Even the criminal law has grappled with the uniqueness of animals to a limited extent by criminalizing animal abuse. Legal developments such as these tend to ameliorate the anachronistic view that animals are merely property. However, substantial pockets of the law have not yet grappled with the unique status of animals as something more than property but, perhaps, less than human.

This Article is the first to analyze the operation of the criminal defenses—the doctrines of exculpation—for persons who use serious, and even lethal, force in defense of their pets. By exploring the intersection of criminal defenses and the status of animals, there is much to be learned about the ambiguities in our common law doctrines of exculpation and the status of animals in America. The Article is less an argument for greater animal rights (or increased violence) and more a call to understand how the law's current treatment of pets and pet owners is discordant with our social values and in need of reassessment.

TABLE OF CONTENTS

INTRODUCTION

Instances of animal abuse are not uncommon in the United States.[1] Sometimes the abuse targets a pet, and on occasion the abuse may take the

[1] *See Animal Cruelty Facts and Statistics: Statistics on the victims and current legislative trends*, THE HUMANE SOCIETY OF THE UNITED STATES (July 21, 2011), http://www.humanesociety.org/issues/abuse_neglect/facts/animal_cruelty_facts_statistics.html. In some instances, the depravity of the abuse is shocking. For example, reports of persons setting dogs and cats on fire for amusement can be found in the media. *For Example On Trial: Twin Teens Charged With Setting Dog On Fire*, CBS BALTIMORE (Jan. 28, 2011), http://baltimore.cbslocal.com/2011/01/28/on-trial-twin-teens-charged-with-setting-dog-on-fire/. Of course, abuse of pets is not limited to the United States.

form of a third party abusing the owner's pet in the owner's presence. Such violence, particularly in the context of violent intimate relationships, is alarmingly common.[2] To date, the academic commentary regarding animal violence has largely focused on animal abuse prosecutions. There is emerging literature discussing the appropriate penalties, resources, and investigations needed to deter these crimes.[3] There is even a surging interest in animal abuse registries.[4]

This Article takes a very different approach to the role criminal law might play in deterring animal abuse. Rather than focusing purely on criminalizing the abusers, this Article considers whether the law should do more to protect the defenders of animals. Stated differently, instead of emphasizing the need for increased incarceration, prosecution, or registration, the focus is on the appropriate role, if any, for self-help in defending one's pet.

Recognizing that self-help is a loaded term likely to spur a variety of negative reactions, it is useful to provide some context by starting with a basic fact pattern that will be referenced throughout the Article.

James is a solitary widower who no longer relates well to his peers and has few human friends. His closest companion is his aging dog. One evening while walking his dog in a park, James is accosted by a group of rowdy teens who threaten to take his dog. James tries to ignore them and keep walking, however, one of the boys becomes more aggressive. James tries, but is unable to escape from the teen's attention. The teen tells James, "give me the dog" and when James refuses, the boy becomes angry. In an effort to prove himself to his friends, the boy takes out a knife and threatens to cut the dog. The threat is credible and imminent as he is approaching the dog's throat with a large blade. James has no doubt

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See, e.g.,Yanir Yagna, *Rahat man videotapes children burning dogs alive*, HAAREZ (June 9, 2009) ("During recent months, children in the southern town of Rahat, near Be'er Sheva, have taken up a new and cruel pastime—burning dogs alive.").

[2] Studies have shown that in approximately 75% of relationships that involve domestic violence where there is a pet, the animal is also attacked by the abuser. THE HUMANE SOCIETY OF THE UNITED STATES, (July 21, 2011), http://www.humanesociety.org/issues/abuse_neglect/facts/animal_cruelty_facts_statistics.html. Moreover, *The New York Times Magazine* has documented what it called "Animal Cruelty Syndrome"—discussing the link between animal abuse and other crimes "including illegal firearms possession, drug trafficking, gambling, spousal and child abuse, rape and homicide." Charles Siebert, *The Animal-Cruelty Syndrome*, THE NEW YORK TIMES (June 11, 2010), http://www.nytimes.com/2010/06/13/magazine/13dogfighting-t.html?pagewanted=all&_r=0 (finding that "in homes where there was domestic violence or physical abuse of children, the incidence of animal cruelty was close to 90 percent.").

[3] *See, e.g.*, Andrew N. Ireland Moore, *Defining Animals as Crime Victims*, 1 J. ANIMAL L. 91 (2005).

[4] *See* Stacy A. Nowicki, Comment, *On the Lamb: Toward a National Animal Abuser Registry*, 17 ANIMAL L. 197 (2010).

that his dog is about to be maimed or killed. In response, James pulls out his old army knife and angrily thrusts it in the direction of the boy.[5]

Previous scholarship has focused on questions such as the scope of the boy's criminal liability if he injures the dog, or the extent of his civil damages for such an attack. But this leaves unanswered the most critical questions. First, what if James stabbed the boy to death, just as the boy reached out to stab the dog in the throat? Is James guilty of murder, and if so, does he have a viable defense? Alternatively, what if the boy had stabbed and killed James after James had threatened him with a knife, is the boy guilty of murder, and does the boy have a viable defense?

The juxtaposition of these two alternative scenarios reveals a great deal about the current state of the criminal law's exculpation doctrines. It is surprising to many that under the law of most, if not every jurisdiction in the United States, James would likely be guilty of homicide and he would not have any complete defenses.[6] Perhaps even more surprising and unsettling is the realization that the boy who threatened the dog's life and initiated the interaction might not be guilty of James's murder because of the available criminal defenses.[7] The purpose of this Article is to explain and problematize these results by providing a context for better appreciating the shortcomings in existing criminal law doctrine. The law of pet defense, then, is both an important topic in its own right, and a case

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[5] This factual narrative is very loosely based on actual events. *Elderly Man Stabs Neighbor over Cats and Dogs*, HUFFINGTON POST, (Apr. 2, 2011), http://www.huffingtonpost.com/2011/04/03/elderly-man-stabs-neighbor_n_844115.html. A provocative and well written hypothetical is also presented in John V. Orth, *Self-Defense*, GREEN BAG (Autumn 2010), *available at* http://www.greenbag.org/v14n1/v14n1_ex_post_orth.pdf.

[6] Under the Model Penal Code and the law of many states, if the brandishing of a weapon is done for the limited purpose of "creating an apprehension that he will use deadly force if necessary," then the brandishing is not considered deadly force. MPC 3.11 (2). However, necessary is the operative term here. Force is only necessary when it is privileged or justified. The use of deadly force is never privileged in defense of an animal, and thus the threat of deadly force for purposes of creating an apprehension is not a justified act.

[7] One can assume for purposes of this discussion that James is not so old and feeble as to present a non-credible threat of serious bodily injury when he waves the knife towards the boy. *See* Stuart P. Green, *Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. ILL. L. REV. 1, 8 (1999) (noting that in order to be lawful the act of self-defense must be necessary and proportionate and relying on another scholar's hypothetical to make this point: "[I]f V, an elderly or infirm aggressor, attempts to stab D, D may not kill him if he knows or should know that he could avoid death by disarming V, or by using nondeadly force."). Moreover, most jurisdictions do not impose a duty to retreat, even when the person can easily and safely retreat. DRESSLER, UNDERSTANDING CRIMINAL LAW 229 (5th ed.) ("A majority of jurisdictions today apply a no retreat rule: a [person] is permitted to use deadly force to repel an unlawful deadly attack, even if he is aware of a place to which he can retreat in complete safety."). And the principal of non-retreat applies also to aggressors who use non-deadly force. *See Infra* Part III.

study for evaluating some of the shortcoming of the current doctrines of exculpation. The breadth of deadly force as currently defined, as well as the law's treatment of initial aggressors, are core concerns not only for a pet defense, but also in any context where the question of who may use force and how much force is permitted are at issue.

If current law would treat James as a cold-blooded murderer in the circumstances described above, we need to ask whether criminal law has failed to keep pace with our social values. If the threats of violence had been made to James' son—even if the son was mute, paralyzed, and substantially less emotionally connected than the dog—James would unquestionably avoid criminal sanction.[8] Indeed, James would be celebrated as a hero for defending his defenseless paraplegic son from an imminent attack. And rightly so. The question, then, is whether the criminal law could and should accommodate slight statutory or common law developments such that the social value of protecting one's companion animal is enshrined in the legal doctrine. This Article concludes that such reforms are not only possible but desirable insofar as the criminal law is to retain its status as a reflection of and inculcator of socially desirable values. If as a general rule, we expect and want people to protect vulnerable animals, then as a general matter, the criminal law should protect persons who do so.

The point here is not to advocate for additional violence. Quite the contrary. If a defense of animals affirmative defense is permitted it should be narrowly drawn so as to minimize harm to animals and humans to the greatest extent possible.[9] The old common law defenses (and their

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[8] By saying this I do not intend to imply that dogs and disabled humans are morally equivalent. And more importantly, I do not intend to suggest that the defense of a disabled person is unjust. My point is a much more modest one: the emotional and moral connections between a human and a non-human animal can be surprisingly strong and important. *Cf.* STEPHEN WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS (2001) (explaining the difficulty in meaningfully distinguishing between animals and humans in terms of biological functioning). The disabled child example is also illustrative as to the availability of a defense for a person who seems undeserving, for example, the parent who hopes his disabled son dies. The defenses available to the parent of a disabled child who is threatened with injury would not be diminished because the parent himself wishes ill on the child. Likewise, the bad pet owner who does not particularly like his dog should enjoy the same defense (or lack thereof) for defending his pet from an aggressor.

[9] Some commentators have argued that the law should focus more on the violent nature of the crime rather than the human or non-human status of the victim. *See* Beth Ann Madeline, *Cruelty to Animals: Recognizing Violence Against Nonhuman Victims*, 23 U. HAW. L. REV. 307, 338 (2000). This literature has obvious implications for the question addressed in this Article—whether a defense of animals, like a defense of others ought to be created. However, I take a more modest approach and argue, instead, that the defense of animals might be justified in certain contexts because of the value of pets to humans. That is, my argument is an argument for animal protections growing out of an interest in increased human well being. Nonetheless, this reconceptualization of criminal law is

statutory siblings) were born at a time when the relationship between humans and animals was quite different. If one of the goals of the criminal law is to reflect and enshrine modern values and sensibilities, this Article provides the vehicle for doing so.

On a general level, the structure and thrust of this Article is divided into three inquiries. First, the case is made for allowing some non-trivial amount of physical force in defense of a pet. Next, the inadequacy of existing law in permitting such force is thoroughly examined. And third, a variety of common law and statutory solutions are proposed. More specifically, this Article proceeds in four parts.

In Part I, a brief overview of the historical role of the criminal law in reflecting and inculcating social values is provided.

Next, in Part II, the case for a norm in support of defending animals is made. This discussion contends that such a defense is consistent with our moral values and important to the protection of human health and safety. First, humans regard their pets as members of the family, much more than they think of them like other property, such as an extra sofa, and the criminal law ought to reflect this value. Both in terms of serving the instrumental goals of human health and wellbeing, as well as the general moral norms of our culture, recognizing a norm in support of defending animals is appropriate. Moreover, this Partmakes clear that the problem of pet abuse addressed in this Article is sufficiently broad and common as to warrant judicial and legislative attention.

In Part III, a comprehensive description of existing law is provided. This is the first taxonomy of criminal defenses as they apply to the defense of one's pet. Viable criminal justifications or excuses are discussed and their onerous limitations in this field exposed. Perhaps one of the most important insights of this Article is this Part's exposition of the surprisingly porous definition of "deadly force." By exposing the breadth of "deadly force," including perhaps injuries to one's hand or foot, it is possible to explain why non-deadly force in defense of pets, while conceptually appealing, is pragmatically unworkable. Simply put, the range of force that is considered "deadly" is so vast as to make the legality of meaningfully defending one's pet dubious in nearly all circumstances.

Finally, in Part IV, a range of basic revisions to the criminal law are considered. Both common law and statutory changes are proposed. Ultimately, this Article concludes that if the criminal law should reflect

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worth considering as a theoretical matter. *Id*. (arguing that regardless of "whether the victim is a human being or an animal, a violent crime is a crime against its intended victim as well as a crime against society").

social values and norms, then a comprehensive statutory solution is the best approach, and such a statute is proposed in this final Part.

I. THE CRIMINAL LAW AS A REFLECTION AND INCULCATOR OF VALUES

The criminal law serves not only to protect us from each other, but to inculcate a value structure. The conduct that a society criminalizes is generally regarded as a reflection of the society's normative values and goals.[10] Early common law cases, such as the famous *Regina v. Prince*[11] decision, reflect this notion that the criminal law protects that which is valued and punishes that which is deemed morally blameworthy. Indeed, Professor Peter Brett applauded the *Prince* decision for actualizing the practice criminalizing actions that are discordant with social values.[12] There are strong theoretical and historical arguments in support of the view that there is generally an inextricable link between our morality and our criminal law.[13]

To this end, leading scholars have observed that the criminal law "serves as an official representation of an important part of the conventional public morality."[14] Similarly, Meir Dan-Cohen has observed that "[o]ne of the functions of criminal laws is to reinforce . . . morality by

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[10] Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 630 (1984) (describing the criminal law as "a set of normative messages").

[11] Court of Crowns Reserved L.R. 2 Cr. Cas. Res. 154 (1875) (Bramwell) (emphasizing that criminal statutes should be interpreted to prevent that which is "wrong in itself").

[12] PETER BRETT, AN INQUIRY INTO CRIMINAL GUILT 149 (1963) ("[W]e learn our duties not by studying the statute book, but by living in a community.").

[13] This is not to suggest that an assertion of moral authority will justify any act of criminalization. Sometimes certain acts will be deemed immoral by society, but criminalizing the conduct may nonetheless offend the Constitution. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."). Instead, the point is that as a descriptive and normative matter, the criminal law tends to conform to emerging moral consensus. *See, e.g.*, Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 298 (1996) (explaining that public reaction against a mandatory death penalty scheme led to a change the substantive law); *see also* Harris v. Alabama, 513 U.S. 504, 526 (1995) (Stevens, J., dissenting) (discussing the same).

[14] Robert F. Schopp, *Verdicts of Conscience: Nullification and Necessity as Jury Responses to Crimes of Conscience*, 69 S. CAL. L. REV. 2039, 2074 (1996) ("Insofar as the criminal law represents, reinforces, and shapes the conventional public morality, the expressive function of the criminal law may influence behavior more effectively than does the attempt to direct conduct through enforcement."). *See also* Elaine M. Chiu, *Culture as a Justification, Not Excuse*, 43 AM. CRIM. L. REV. 1317, 1366 (2006) ("The criminal law has the extremely important function of serving as the moral arbiter in a community. Arguably there are other institutions that also serve a similar role. However, the criminal law is unique because it is the most public of these arbiters and even more critically, it has jurisdiction over all.").

encouraging behavior in accordance with specific moral precepts."[15] Likewise, another scholar observed that "although criminal prohibitions have expanded far beyond actions that are 'inherently' wrongful, we still see and experience the task of applying the criminal law as inescapably bound up with making moral judgments."[16]

Moreover, to the extent our criminal laws "embody extant moral norms, the possibility of conflict between moral and legal duties is eliminated,"[17] which is important for the long-term credibility and proper functioning of the criminal justice system. As Professor Josh Bowers has observed, "[a] criminal law with liability and punishment rules that conflict with a community's shared intuitions of justice will undermine its moral credibility."[18]

This Article locates the normative pressure to address the question of criminal implications of defending a pet on the assumption that the law should reflect extant social values. But it must be conceded that this is not an unassailable assumption. To be sure, in a pluralistic society there will never be complete moral agreement on all issues.[19] It has been pointed out that in a society with multiple cultures there is a high likelihood for moral disagreement. The criminal law, then, is forced to confront questions like "Whose norms should the law reflect? Which values should the law pursue?" Stated differently, "[t]he fundamental challenge . . . is

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[15] Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 649 (1984).

[16] John T. Parry, *The Virtue of Necessity: Reshaping Culpability and the Rule of Law*, 36 HOUS. L. REV. 397, 459–460 (Summer 1999); *see also* Josh Bowers, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 217 (Spring 2012) ("for conviction to trigger community stigmatization, the law must have earned a reputation with the community for accurately reflecting the community's views on what deserves moral condemnation."); *see also* Robert Post, *Law and Cultural Conflict*, 78 CHI.-KENT L. REV. 485, 486 (2003); Elaine M. Chiu, *Culture in Our Mist*, 17 U. FLA. J.L. & PUB. POL'Y 231, 233 (2006) ("The criminal law has two basic functions: it serves as an expression of moral condemnation, and it determines formal punishment by the state.").

[17] Dan-Cohen, *supra* note 15, at 649. *See also* Paul H. Robinson & John M. Darlye, *The Utility of Desert*, 91 Nw. U. L. Rev. 453, 468 (1997) (explaining that the criminal law plays a "central role in the creation of shared norms" and noting that internalized norms are among the "most powerful determinants of conduct, more significant than the threat of deterrent legal sanctions).

[18] Bowers, *supra* note 16, at 217. *See also* Dan Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997).

[19] "Society, however, is marked by profound moral dissensus. Accordingly, to the extent that citizens see the positions that the law takes as adjudicating the claims of diverse moral views, we can expect the criminal law to be a site of conflict." Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 421 (1999); *see* Chiu, *supra* note 16, at 232 ("Given multiple cultures, the likelihood of differences in values and moral sensibilities is multiplied. Whose norms should the law reflect? Which values should the law pursue?"); *id.* (referring to the view that all laws merely reflect local morality as overly reductionist).

how to balance respect for cultural heterogeneity against the need to enforce a distinctive and hegemonic set of cultural values."[20] Other scholars have addressed this problem and I will not attempt to recreate much less improve on their summary of the conundrum. Instead, for the sake of simplicity, I will rely on an assumption made by some of the leading scholars in criminal law—that is, there are some norms that transcend most cultural differences and reflect something approximating moral consensus.[21]

As Paul Robinson has explained, "[a]cross individuals in a culture, and often across individuals in different cultures, there is a remarkable degree of consensus in these judgments, particularly in the relative seriousness rankings of the degree of blameworthiness of various moral transgressions."[22] Thus, I take as my starting point the assumption that it is possible to imagine a criminal code that reflects, if somewhat roughly and imperfectly, shared social values.[23] Moreover, even if the criminal law does not always accurately reflect existing moral norms, there are still compelling reasons for considering the normative value of a *defense of animals*. Specifically, the criminal law, even in a pluralistic society, is arguably "unique in its ability to inform, shape, and reinforce social and moral norms on a society-wide level."[24] Accordingly, whether the criminal law merely reflects or instead shapes social values, considering

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[20] Post, *supra* note 16, at 493.

[21] Kahan, *supra* note 19, at 424 (quoting JOHN RAWLS, THE IDEA OF PUBLIC REASON, IN POLITICAL LIBERALISM 113 (1993), "[E]ven in a morally pluralistic society, it is possible to imagine the law expressing only those values on which there is 'overlapping consensus,' and thereby reinforcing liberal accommodation.") . Even if the assumption of a monolithic national culture is rejected, the cultural defense, though rare, remains viable. *Cf.* James J. Sing, *Culture as Sameness: Toward A Synthetic View of Provocation and Culture in the Criminal Law*, 108 YALE L.J. 1845 (1999).

[22] Paul H. Robinson, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 66 (2007) ("This means that a society has available to it a possible principle for doing justice, which is to punish according to this societally shared sense of the moral blameworthiness of the offender."). Robinson has also stressed that to the extent the criminal law diverges from widely shared social values, the law itself loses credibility. *Id.* ("The danger of failing to harmonize criminal codes with intuitions of justice is that the code may lose credibility on a wide array of prohibitions if too many are perceived to be against notions of what is just.").

[23] *Id.*

[24] *Id.* ("In a society as diverse as ours, sustaining moral norms necessitates mechanisms that are able to transcend cultural differences."). Commentators including Robert Post have explicitly noted that some laws serve to inspire certain norms as opposed to merely reflecting existing morals. *See* Post, *supra* note 16, at 486; *see also* Chiu, *supra* note 16, at 233 ("[o]ther criminal offenses such as marijuana possession do not necessarily reflect a societal judgment against low level drug use, but instead represent the need to maintain a distinction between illicit and legal drugs and the need to deter the abuse of even more dangerous drugs. . . . Such drug offenses aspire to create norms, as opposed to reflecting already existing norms.").

the justifications and desirability of a defense of animals is of substantial import.[25]

In short, the criminal law plays an important role in mirroring or developing desirable social norms. And criminal defenses no less than the definitions of crimes themselves serve the overall functions of the criminal law.[26] Just as the definition of a crime tells us what conduct is prohibited, the scope and range of a particular defense—e.g., defense of others or self-defense—informs us when we may or should engage in certain conduct.[27] Accordingly, in assessing whether and to what extent the criminal law ought to recognize a *defense of animals*, a threshold question is the extent of societal agreement about the moral value of vigorously protecting one's companion animal. In light of the sociological evidence relating to these two factors, as set forth below, there is a strong case to be made that the expressive function of the criminal law is not well served by the current defenses available to defenders of companion animals.

II. AMERICAN VALUES REGARDING PETS & THE BENEFITS OF ANIMAL PROTECTION

A growing body of research shows that Americans tend to view their companion animals as cherished members of the family, rather than as valued personal property.[28] Moreover, social science and medical research teach us that pets improve the wellbeing of humans, and another body of unrelated social science research demonstrates a strong correlation between animal abuse and human violence. Stated differently, when pets are thriving in a home, their human families derive physical and mental benefits, and when a person abuses an animal, the likelihood of human injury or death at the hands of that person dramatically increases. Arguably, then, a theory of criminal law that protects animals—and protects those who protect animals—seems most likely to minimize human and animal suffering. This Part summarizes the literature studying

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[25] If the criminal law is a key source of moral inculcation, then advocates for greater animal wellbeing would be remiss to overlook the need for reforms in the criminal law.

[26] Indeed, the importance of the criminal law in enshrining morals has led commentators to conclude that the distinction between excuses and justifications is a function of the criminal law's moral reinforcing function. *See* Chui, *supra* note 14, at 1366 ("If the exclusive purpose of criminal law were to allocate an appropriate amount of punishment to those accused of doing wrong, the law would not need to distinguish between justifications and excuses. But because it reflects and reinforces moral judgments, criminal law should illuminate the moral status of various courses of action, and the community should be concerned with the reason a particular individual goes unpunished.").

[27] PAUL ROBISON, INTRODUCTION TO CRIMINAL LAW § 8.02 (2d ed.).

[28] Leading philosophers are also taking note of that humans are not the only morally significant category of beings on earth, thus lending support to the claim developed through social science in this Article that at least some animals ought to enjoy heightened protections under the criminal law. *See, e.g.*, Christine Korsgaard, *Kantian Ethis, Animals, and the Law*, 33 O.J.L.S. 629 (2013).

the social value of pets and the social harm that flows from animal injury and abuse.

A. Animals as Valued Members of the Family

The law strongly circumscribes the degree of force that may be used in defense of one's property. And with good reason. A threat of harm directed at one's sofa or stereo is materially different than a threat leveled against one's family member or friend. [29] As scholars have pointed out for the last few decades, however, animals, particularly companion animals, are not well suited for the strict property classification.[30] Other fields of law are slowly developing ways of recognizing that pets require unique treatment.[31] For example, in family law and tort law there is an emerging trend towards recognizing that pets carry special, emotional, and relational value to an individual so as to warrant, special, non-property treatment. Likewise, the law of trusts and estates allows for pets to be treated differently than other personal property.[32] Even a couple of pockets of criminal law recognize the legal significance of the unique status of pets as non-human, but also more than property. For example, the anti-cruelty statutes in every U.S. jurisdiction reflect a legal recognition of the unique status of animals.[33] One can generally destroy his couch without consequence, but harming a pet is criminalized in every state. Likewise, Markus Dubber ingeniously catalogued the defenses available to dog owners under one state's code, finding, among other things a right of self-defense and defense of others, among others.[34] Of course it makes no sense to speak of a right of self-defense for items of property, but the ability of a pet to defend itself or its owner is, among other things, a relevant moral consideration for legal codes. For most Americans the law's gradual disaggregating of pets from basic property is an obvious and intuitive reflection of social norms.

Beyond the legal system's unique treatment of animals, there are increasingly scientific and moral reasons for singling out pets for individual consideration under the criminal law. At least some scientists

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[29] *Cf.* W. PAGE KEETON ET. AL., PROSSER AND KEETON ON TORTS 136 (5th ed. 1984) ("The privilege to harm or destroy property, including killing another's animals, in order to protect and defend property is clearly recognized.").

[30] *See, e.g.,*GARY FRANCIONE, ANIMALS AS PROPERTY (1995).

[31] *See, e.g.*, Jason Parent, *Every Dog Can Have its Day: Extending Liability Beyond the Seller by Defining Pets as "Products" Under Products Liability Theory*, 12 ANIMAL L. 241 (2006).

[32] "A trust for the care of an animal is valid for the life of the animal" can be created. DAVID M. ENGLISH ET. AL., PRINCIPLES OF WILLS, TRUSTS, & ESTATES 479–80 (2nd ed. 2012).

[33] PAMELA D. FRASCH, BRUCE A. WAGMAN & SONIA S. WAISMAN, ANIMAL LAW: CASES AND MATERIALS 180 (4th ed. 2010).

[34] Markus D. Dubber, VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS 44–45 (2006).

who study the brains of dogs are making the claim that dogs are, in many ways, just as human as humans in key aspects of neuro-functioning.[35] This alone might justify revisiting the criminal law's handling of issues regarding certain animals. But even if one is not ready to accept the science suggesting the human-ness of animals, there is still cause to recognize that social norms tend to, at the very least, prioritize animals above other property. After all, pets are routinely given names, their medical and nutritional needs are generally regarded as priorities, and they are often given birthday or Christmas gifts.[36] Moreover, recent empirical and sociological data tend to confirm the intuition that treating pets as mere property is discordant with mainstream American culture.

As an initial matter, the sheer popularity of pets in American culture says something about the social value we derive from pets. A Humane Society study found that there are currently over 77 million dogs and 93 million cats living with American families.[37] In addition, according to one recent survey, over 72 million American households had at least one pet.[38] That is more than 62% of all households in the country.[39] Strikingly, then, more people in the United States share their homes with pets than with children.[40]

More significantly, many pet owners regard the animal as an important part of household. One study found that 70% of owners "considered their companion animals as children."[41] A separate study found that 90% of pet

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[35] Gregory Berns, *Dogs are People, too*, N.Y. TIMES, (Oct. 5, 2013), http://www.nytimes.com/2013/10/06/opinion/sunday/dogs-are-people-too.html?emc=eta1&_r=0.

[36] Phyllis Coleman, *Man['s Best Friend] Does Not Live By Bread Alone; Imposing A Duty to Provide Veterinary Care*, 12 ANIMAL L. 7, 9–10 (2005) (People "share enduring, intense, and deeply emotional relationships with their companion animals. Indeed, most Americans think of their dog or cat as a member of their families. When their pet is sick or hurt, they take him to the veterinarian and generally follow his advice even though doing so may be expensive.") (footnote omitted).

[37] U.S. Pet Ownership Statistics, *The Humane Society of the United States*, (Dec. 30 2009), http://www.humanesociety.org/issues/pet_overpopulation/facts/pet_ownership_statistics.html.

[38] American Pet Product Association, *Industry Statistics and Trends*, http://www.americanpetproducts.org/press_industrytrends.asp (for years 2011–2012) [hereinafter APPA].

[39] This figure is up from 56% of households in 1988. *Id*.

[40] 2011–2012 American Pet Products Association (APPA) National Pet Owners Survey. In 2008, about 35.7 million families (46%) had children under 18 at home. Jack Gillam, *Number of Households with Kids Hits New Low*, USA TODAY, (Feb. 26, 2009), *available at* http://www.usatoday.com/news/nation/census/2009-02-25-families-kids-home_N.htm. (citing the 2008 Census).

[41] Elizabeth Paek, *Fido Seeks Full Membership in the Family: Dismantling the Property Classification of Companion Animals by Statute*, U. HAW. L. REV. 481, 482 (2003).

owners regard their pet as a member of their family.[42] In addition, approximately 69% of owners share their bed with their pet.[43] And nearly two-thirds buy presents for their companion animals during the holiday season.[44] One scholar has even reported data showing that "half of all companion animal owners . . . would prefer the company of their dog or cat over the company of another human being if they were stranded on a desert island."[45] Moreover, divorce disputes over the custody of pets illustrate the value of pets because even though the animal may have little market value, it has been observed that divorcing spouses tend to dispute, for example, the custody of a dog as vigorously as if he was a child.[46]

There are no definitive explanations for the association of animals with the family, but some have concluded that as the size of families are shrinking and "children are moving long distances from their parents, family pets fill an emotional void."[47] Indeed, some parents have remarked that at certain stages of their child's life the animal brought them greater pleasure than their child because the pet offers "what children do not: obedience, loyalty and unconditional love."[48] Moreover, a recent study of college students with strong relationships with a pet showed that many of these students report a closeness to their pet that equals the relationship with loved ones, including their mothers, friends, and siblings.[49] To be sure, one might quarrel with some of the most extreme of these reportings and conclusions, but it is beyond dispute that on the whole the family pet is viewed as an integral part of the family. The family's home, its holidays, and the very definition of family often include the companion

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[42] Regina A. Corso, *Pets Are "Members of the Family' and Two-Thirds of Pet Owners Buy Their Pets Holiday Presents*, HARRISINTERACTIVE (Dec. 4, 2007), http://www.harrisinteractive.com/vault/Harris-Interactive-Poll-Research-Pets-2007-12.pdf. *See also* LYNETTE A. HART, *Dogs as Human Companions: A Review of the Relationship*, *in* THE DOMESTIC DOG: ITS EVOLUTION, BEHAVIOUR, AND INTERACTIONS WITH PEOPLE 161, 163 (James Serpell ed. 1995).

[43] Regina A. Corso, *supra* note 42.\

[44] *Id*. *See also* NORINE DRESSER, *The Horse Bar Mitzvah: A celebratory exploration of the human-animal bond*, *in* COMPANION ANIMALS & US 90 (2000) (studying human involvement of animals in religious ceremonies or traditions, including bar mitvahs); *id*. at 106 (concluding that humans often find something spiritually uplifting about interacting with other species).

[45] William C. Root, *Man's Best Friend: Property or Family Member? An Examination of the Legal Classification of Companion Animals and its Impact on Damages Recoverable for their Wrongful Death or Injury*, 47 VILL. L. REV. 423, 423 (2002).

[46] *See* Jane Porter, *Custody Battles Over Pets Look Like a Dogfight*, CHICAGO TRIBUNE, Oct. 1, 2006, at Q-3; *see also* Ann Hartwell Britton, *Bones of Contention: Custody of Family Pets*, 20 J. AM. ACAD. MATRIMONIAL L. 1 (2006).

[47] Dresser, *supra* note 42, at 103.

[48] *Id*. at 104 (commenting on an interview with a study participant).

[49] Kurdek, *Pet Dogs as Attachment Figures*, 25 J. OF SOCIAL AND PERSONAL RELATIONSHIPS 247–266 (2008).

animal.[50] There does not appear to be anything else that is deemed a possession by the law which holds such a vaunted, familial status in our culture. This familial status ought to be reflected in the law for the moral significance it obviously holds.

Similarly instructive is the data suggesting a strong impulse by many to assist and protect animals. People are willing to go to extreme lengths to protect their pets. According to one survey, around 50% of pet owners reported that they would be "very likely" to risk their lives to save their pets, and another third claimed they would be "somewhat likely" to do the same.[51] These striking numbers tend to be confirmed by other research. Commentators have identified numerous actual examples of this strong protective instinct for one's pet. For example, during the devastation of Hurricane Katrina, many people chose not to evacuate because they were told they would have to leave their pets behind.[52] Similarly, the enactment of legislation conditioning FEMA funding on the willingness of states to accommodate pets as part of their disaster evacuation plans—the so-called PETS Act[53]—illustrate that the protection of one's pets is not a partisan issue.[54] The bill was co-sponsored by a republican and a democrat, unanimously adopted by the Senate and signed into law by President George W. Bush.

The data finding that many Americans regard their pets as family members and the instinct to act for their protection is apparently well placed. Studies tend to confirm that the loss or injury of a pet can exact an enormous emotional toll on the family.[55] Some studies have shown that the "grief reaction following the loss of a pet were comparable to the grief

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[50] Moreover, "In a family setting, pets have been found to increase family adaptability and to reduce stress among family members." Margit Livingston, *The Calculus of Animal Valation: Crafting a Viable Remedy*, 82 NEB. L. REV. 783, 808 (2004) (footnote omitted). Moreover, it has been recognized that the companion animal plays a variety of role's within the family, from comforter, to playmate, to protector. *Id.* at 825.

[51] *Id*.

[52] *See* Casey Chapman, *Not Your Coffee Table: An Evaluation of Companion Animals as Personal Property*, 38 CAP. U. L. REV. 187, 205–07 (2008).

[53] 42 U.S.C.A. § 5196(e)(4).

[54] Chapman, *supra* note 50, at 205–07.

[55] Livingston, *supra* note 48, at 823 ("Obtaining a new pet . . . cannot significantly ameliorate the grief and mental anguish caused by the premature death of the previous pet. Grieving the loss of a loved one is a definable process that goes through a number of stages and takes a certain amount of time. Although a new pet will undoubtedly distract most owners from their grief over the loss of the previous animal, the owner will suffer undeniable mental anguish over the previous animal's death."). The seriousness of the grieving process is also confirmed by the rise of pet cemeteries. According to the International Association of Pet Cemeteries, there are currently over 600 pet cemeteries in the United States. William C. Root, *Man's Best Friend: Property or Family Member? An Examination of the Legal Classification of Companion Animals and its Impact on Damages Recoverable for their Wrongful Death or Injury*, 47 VILL. L. REV. 423, 439–40 (2002).

reactions following the loss of a spouse, parent, or child."[56] It has been concluded by some researchers that the "death of a beloved companion animal induces a grief reaction of comparable severity to the loss of a significant human relationship."[57] Indeed, there is an impressive social science literature documenting the extreme grief that many humans suffer following the loss of a pet.[58] Researchers have found that the loss of the "relationship" with a particular animal can be one of the most devastating experiences in a person's life.[59] As one scholar has summarized the relevant social science research:

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[56] Root, *supra* note 53, at 439–40; *see also* BORIS M. LEVINSON, *Grief at the Loss of a Pet*, *in* PET LOSS AND HUMAN BEREAVEMENT 51–64 (William J. Kay et al. eds., 1984) (compiling studies); LAUREL LAGONI ET AL., THE HUMAN-ANIMAL BOND AND GRIEF 29 (1994) (noting that the death of a companion animal can be one of the "most significant losses" experienced during one's life). *See also* John Archer & Gillian Winchester, *Bereavement Following the Death of a Pet*, 85 BRIT. J. PSYCHIATRY 259 (1994); Quakenbush, J., 1985, *The death of a pet: How it can affect owners, Symposium on the human-companion animal bond*, 15(2):395–01 (concluding that the death of a pet may be fundamentally similar to the death of a human family member).

[57] Wendy Packman et al, *Therapeutic Implications of Continuing Bonds Expression Following the death of a Pet*, OMEA, Vol. 6494 335–356 (2012); *id*. (compiling sources on this point); *see also* James E. Quakenbush & Lawrence Glickman, *Helping People Adjust to the Death of a Pet*, HEALTH & SOCIAL WORK 44 (1984) ("the behavior of pet owners at the time of their animals' death appears to mimic in many ways the stages or phases that have been described as characteristic of bereavement after human death."). The research on this question is not, however, unanimous. Some have found that the loss of a pet does not elicit grief comparable to that experienced when a human dies. *See, e.g.*, Cindy L. Adams et al., *Predictors of Owner Response to Companion Animal Death in 177 Clients from 14 Practices in Ontario*, JAVMA, Vol. 217, No. 9, Nov. 1, 2000; Mary Stewart, *Loss of a Pet—Loss of a Person: A Comparative Study of Bereavement*, *in* NEW PERSPECTIVES ON OUR LIVES WITH COMPANION ANIMALS (Univ. of Penn. Press 1983) ("since the nature of the relationship obviously influences the owner's response to the death of the animal, the intensity of the bereavement will vary accordingly.").

[58] *See, e.g.*, Brenda H. Brown et al., *Pet Bonding and Pet Bereavement Among Adolescents*, J. OF COUNSELING & DEVELOPMENT (May 1996); Millie Cordaro, *Pet Loss and Disenfranchised Grief: Implications for Mental Health Counseling Practice*, 34 J. OF MENTAL HEALTH COUNSELING (October 2012); NIGEL P. FIELD ET. AL., ROLE OF ATTACHMENT IN RESPONSE TO PET LOSS, DEATH STUDIES 334 (2009); Gerald Gosse & Michael Barnes, *Human Grief Resulting From The Death of a Pet*, 7 ANTHROZOOS 103–12 (1994).

[59] Martha Baydak, Human Grief on the Death of a Pet (2000) (unpublished Master of Social Work thesis, University of Manitoba) (reporting on persons who are still grieving a pet loss decades later); *id*. at 4 (noting that because grief over the loss of a pet may be disenfranchised grief, the person's grieving process may be worsened or extended). *See* Margit Livingstone, *The Calculus of Animal Valuation: Crafting a Viable Remedy*, 82 NEB. L. REV. 783, 805–06 (2004) (citing BORIS M. LEVINSON, GRIEF AT THE LOSS OF A PET, IN PET LOSS AND HUMAN BEREAVEMENT 51–64 (William J. Kay et al. eds., 1984); discussing results of several "social science studies" in which it has been determined that "people suffer emotional distress after a pet's demise similar to that endured when a human family member dies"); *see also* Root, *supra* note 54, at 439–40 (noting that in one study "researchers found that the grief responses following the loss of a pet were comparable to the grief reactions following the loss of a spouse, parent, or child").

> Pet owners go through all the stages of grief experienced when close friends or relatives die. The emotional distress is particularly acute when the pet's death is sudden and unexpected, and individuals whose primary relationships are with their pets especially suffer. The reason for the profound sadness felt in these situations is that, as studies have shown, people develop strong and enduring relationships with their companion animals and an individual's bond with a particular animal is unique.[60]

Echoing this sentiment, an article in a veterinarian trade journal reports that the impact of pet death on the family is "fundamentally no different than the impact of [a death] of any other family member."[61] The sleep lost, work missed, and other psychological and physical impacts are often similar between persons who lose a loved human companion and a loved animal companion. Some have even found that pet owners equate loss of a pet with the loss of a spouse.[62] Accordingly, it is not surprising to most Americans when the owner of a murdered pet says something like, "It wasn't just a dog to me . . . for me it was my child."[63]

Of course, one need not agree with the studies finding that the loss of a pet exacts an emotional toll identical to that suffered when a human companion dies in order to agree that the loss of a pet is a powerfully traumatic experience.[64] Among non-human deaths, the death or severe injury of a beloved pet seems to be unique on spectrum of emotional

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[60] Livingstone, *supra* note 58, at 806 (citing BORIS M. LEVINSON, GRIEF AT THE LOSS OF A PET, IN PET LOSS AND HUMAN BEREAVEMENT 51–64 (William J. Kay et al. eds., 1984) and ALTON F. HOPKINS, *Pet Death: Effects on the Client and the Veterinarian*, *in* THE PET CONNECTION: ITS INFLUENCE ON OUR HEALTH AND QUALITY OF LIFE 276–82 (Robert K. Anderson et al. eds., 1984)).

[61] James E. Quackenbush, *The Death of a Pet: How It Can Affect Owners*, 15 VET. CLINICS N. AM.: SMALL ANIMAL PRAC. 395, 396 (1985) (finding that the sleep loss, work missed, and other difficulties can be similar in persons grieving the death of a loved pet or a loved person).

[62] Betty J. Carmacka, *The Effects on Family Members and Functioning after the Death of a Pet*, 8 MARRIAGE & FAMILY L. REV. 149, 149–61 (1985).

[63] Paek, *supra* note 38, at 481 (quoting a news story report). There are countless blog entries where persons explain in detail the way that their animal has become part of the family. *See, e.g.*, *People Say, She's "Just a Dog"*, FAB YOU BLISS BLOG (Jan. 12, 2012), http://fabyoubliss.com/2012/01/12/people-say-shes-just-a-dog/ ("dogs are meant to be a part of the family, to go places *with* the family, to be given just as much love as any other member of the house, otherwise . . . what's the point in having them?").

[64] There does not appear to be any data regarding the likelihood that a family will prioritize a child when the pet is harmful to the child. For example, there does not appear to be studies documenting how common it is for a family to abandon a pet when the child is allergic. My guess is that such data would show overwhelmingly that families chose the animal. It is unclear whether this is because of social pressures or independent judgment, but regardless this does little to undermine the more general point that the loss of a pet is a devastating emotional injury for many Americans.

injury. Moreover, Arnold Arluke has found that the human suffering is particularly acute when the pet is intentionally injured or killed.[65] According to Arluke's research, the "short-term and long-term responses of companion animal owners to animal abuse cases parallel the responses of victims of other crimes."[66]

In short, the claim that humans have a moral right to defend their pets is substantially supported by the social science literature documenting the strength of the human-animal bond and the corresponding injury suffered by a person when his pet is killed or injured.[67] Beyond other humans, there is nothing else for which humans have such unified and strong connections. The bond between a person and his pet will oftentimes transcend the bond that the same person has with many other humans, and it would be strange for the criminal law to fail to reflect this bond by enabling one to defend his pet with sufficient force.

B. Link between Animal Welfare and Human Welfare

Additional support for the view that our shared social mores require a defense of animals can be gleaned from an assessment of the value to humans of animals. In recent decades, scholars and activists have identified a value in preserving the life and dignity of animals for their own sake.[68] However, this country has a much longer history of considering the value to humans of protecting animals. Almost one-hundred and twenty years ago the Colorado Supreme Court explained the need for animal protection laws:

> [A]s incident to the progress of civilization, and as the direct outgrowth of that tender solicitude for the brute

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[65] ARNOLD ARLUKE, *Secondary Victimization in Companion Animal Abuse: The Owner's Perspective*, *in* COMPANION ANIMALS AND US: EXPLORING THE RELATIONSHIPS BETWEEN PEOPLE AND PETS 275, 282–83 (Anthony L. Podberscek et al. eds., 2000) (noting that pet owners found "it was harder to mourn the loss of an abused companion animal than it was to mourn animals that died in more 'natural' ways").

[66] *Id*. at 274–76 (surveying literature regarding secondary victimization in rape and other crimes).

[67] Perhaps the least impressive measurable indicator of the value of pets to Americans is the money spent on the animals. In 2010 alone, Americans spent more than 48 billion dollars on pet products. APPA, *supra* note 368. Other areas of the economy have been severely affected by the economic downturn while the pet industry continues its "unprecedented growth." *New Survey Reveals Pet Ownership at its Highest Level in Two Decades and Pet Owners Are Willing To Pay When It Comes To Pet's Health*, APPA, http://media.americanpetproducts.org/press.php?include=142818. While some other expenses that might be considered luxuries have dropped off, investment in pets continues to grow. *Hollywood Fail: 2010 Earns Worst Box Office Numbers Since 1996*, HUFFINGTON POST (Jan. 3, 2011, 10:15 PM), http://www.huffingtonpost.com/2011/01/03/hollywood-fail-2010-earns-worst-box-office-numbers-since-1996_n_803557.html.

[68] *See, e.g.*, GARY L. FRANCIONE, ANIMALS, PROPERTY AND THE LAW 34 (1995).

> creation which keeps pace with man's increased knowledge of their life and habits, laws, such as the one under consideration, have been enacted by the various states having the common object of protecting these dumb creatures from ill treatment by man. Their aim is not only to protect these animals, but to conserve public morals, both of which are undoubtedly proper subjects of legislation. With these general objects all right-minded people sympathize.[69]

In this subpart some, though certainly not all, of the benefits to humans of a legal system that protects animals from abuse are identified and discussed. Subsequent subparts detail why the current protections in place for the protection of one's pet may be inadequate to safeguard these benefits.

1. Pets Protecting Humans

When pets are safe and healthy, their human companions are better able to thrive. The range of health benefits flowing to families with pets is vast and well documented.[70] A recent study published in the Journal of Pediatrics shows that children who live with a pet during their first year of life are more likely to be healthy.[71] Apparently children also recognize substantial social and emotional benefits from their pets.[72] For adults, the benefits are no less profound. Studies show that having a pet reduces blood pressure,[73] improves heart attack recovery,[74] improves depression,[75]

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[69] Waters v. People, 46 P. 112, 113 (Colo. 1896).

[70] Livingston, *supra* note 48, at 807 ("Several social science studies have demonstrated that companion animals can significantly improve the quality of life for children, non-senior adults, and elderly individuals.") (compiling studies on this point).

[71] Eija Bergroth et al., *Respiratory Tract Illnesses During the First Year of Life: Effect of Dog and Cat Contacts*, PEDIATRICS (Apr. 5, 2012), http://pediatrics.aappublications.org/content/early/2012/07/03/peds.2011-2825.abstract?sid=73a8fcd1-ad41-4099-8e99-afa57ce00e1f; Amanda L. Chan, *Pet Health Benefits: Study Shows Dogs And Cats May Make Kids Healthier*, HUFFINGTON POST (July 9, 2012), http://www.huffingtonpost.com/2012/07/09/health-benefits-pets-respiratory-infection-healthier-kids_n_1659424.html ("It's more support in a growing body of evidence that exposure to pets early in life can stimulate the immune system to do a better job of fighting off infection.").

[72] *See* Gladys F. Blue, *The Value of Pets in Children's Lives*, 63 CHILDHOOD EDUC. 84, 86–87 (1986); *See* Robert H. Poresky & Charles Hendrix, *Differential Effects of Pet Presence and Pet-Bonding on Young Children*, 67 PSYCHOL. REP. 51, 53–54 (1990). For a lucid and insightful summary of the existing literature, *see* Livingston, *supra* note 48, at 807. Moreover, the benefits from pets to disabled children, such as those with autism, may be particularly profound.

[73] Karen Allen et al., *Cardiovascular Reactivity and the Presence of Pets, Friends, and Spouses: the Truth about Cats and Dogs*, 64 PSYCHOSOMATIC MED. 727–39 (2002); Karen Allen et al., *Pet ownership, but not ace inhibitor therapy, blunts home blood pressure responses to mental stress*, 38 HYPERTENSION 815–20 (2001).

and may even assist with cancer and AIDS treatment,[76] among many other documented benefits. Moreover, the elderly, like James, the man in the hypothetical at the beginning of the article, are particularly likely to benefit "from the unconditional acceptance offered by companion animals" which has been proven to lead to increased "social interactions, better health, and improved morale."[77]

In short, scientific studies confirm that people who live with pets enjoy a range of benefits that are worth protecting. To be sure, some of these benefits might be replicated through the acquisition of a replacement animal. But other times it is the individual's unique relationship with the animal that spurs the benefits such that a new pet is insufficient. Moreover, the grief reaction to the loss of a particular pet will oftentimes be sufficiently extreme and debilitating as to, at least temporarily, offset any of the benefits of a new pet might offer. There is, then, a tangible benefit to one's own health in protecting one's pet.

2. Violence against Animals Leading to Violence against People

Another possible justification for recognizing a limited defense of animals might lie in the correlation between violence against animals and violence against humans. Like anti-cruelty laws, the establishment of a *defense of animals* has the potential to deter animal violence. Indeed, because many jurisdictions are unable or unwilling to prosecute the abuse itself, the ability of an individual to defend the pet against injury may provide an otherwise unavailable deterrent function.[78] It must be

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[74] R. Lee Zasloff, *Measuring Attachment to Companion Animals: a Dog is Not a Cat is Not a Bird*, 47 APPLIED ANIMAL BEHAVIOUR SCIENCE 47 43–48 (1996).

[75] Ivan Dimitrijević, Animal-Assisted Therapy—A New Trend in the Treatment of Children and Adults, 21 PSYCHIATRIC DANUBINA 236–41 (2009).

[76] Paolo Castelli et al., *Companion Cats and the Social Support Systems of Men with AIDS*, 89 PSYCHOLOGICAL REPORTS 1, 177–87 (2001).

[77] Livingston, *supra* note 48, at 807.

[78] The under enforcement of animal cruelty laws is well documented and tends to undermine the claim that these laws serve as an effective deterrent to animal abuse. *See, e.g.*, Naseem Stecker, *Domestic Violence and the Animal Cruelty Connection*, 83 MICH. B.J. 36, 37 (Sept. 2004) ("But your average everyday cruelty . . . starving your dog to death or beating your dog to death, those things tend to get brushed over . . . ."); *id.* (quoting a leading authority as saying that even persons who burn a pet dog to death may end up with mere probation or a suspended sentence); *see also* Pamela D. Frasch et al., *State Animal Anti-cruelty Statutes: An Overview*, 5 ANIMAL L. 69, 69–70 (1999) ("There is anecdotal evidence, however, to indicate that some prosecutors are less likely to charge or prosecute animal cruelty compared to other violent crimes, except in the most extreme cases."). And some prosecutors have publicly taken the (mistaken) position that they are only permitted to prosecute for cruelty the person who is in control of the animal. Stecker, *supra* note 78, at 37 ("So if you had a cat or a dog and I came over and kicked it three or four times but didn't kill it, there's really no charge for that. It's your dog, your cat. There's no charge because it's not mine."). *See also Why Prosecutors Don't Prosecute*, ANIMAL LEGAL DEFENSE FUND (April 8, 2013),

acknowledged that there is a degree of attenuation in laws that would permit the defense of a particular animal, and studies showing that persons who harm animals generally are prone to commit acts of human violence. A foiled animal abuser could always seek out another animal, such as an abandoned or stray pet to abuse. However, the link between human violence and animal violence is so strong, and the value in preventing harm to companion animals as measured by the social science research discussed above so compelling, that there is a very real possibility that a *defense of animals* might reduce human suffering.[79] In other words, considered in the aggregate with other harms flowing to humans from animal injury, the data linking human and animal violence might tip the scales in favor of creating a defense.[80]

Leading commentators have begun emphasizing that the connection between human and animal violence is something that needs to be taken more seriously. A leading textbook, for example, observed that "sociologists, criminologists, psychologists, and other scholars and practitioners have gone beyond anecdotal or intuitive bases for believing the 'link' exists" between violence to animals and violence to humans."[81] Indeed, link between animal cruelty and human violence is not a new concept: it has been the subject of numerous psychological studies over the last three decades.[82]

One of the first studies evaluating the link between cruelty toward animals and later violence toward humans was conducted in 1966 by

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http://aldf.org/resources/when-you-witness-animal-cruelty/why-prosecutors-dont-prosecute/.

[79] Other commentators have posited that violence against humans can be limited if we are able to limit violence against animals. *See, e.g.*, Charlotte A. Lacroix, *Another Weapon for Combating Family Violence: Prevention of Animal Abuse*, 4 ANIMAL L. 1, 6 (1998); Joseph G. Sauder, *Enacting and Enforcing Felony Animal Cruelty Laws to Prevent Violence Against Humans*, 6 ANIMAL L. 1, 11 (2000).

[80] There is also considerable anecdotal evidence on this question. *See, e.g.*, Stecker, *supra* note 78, at 36 (quoting a long-time prosecutor as saying "[h]istorically, there's been a view that these types of crimes are just not as serious as crimes involving people, but I've seen over the 17 years that I've been a prosecutor that there's a very strong link between other violence and animal cruelty and abuse. To me it's just absolutely proven.").

[81] PAMELA D. FRASCH, BRUCE A. WAGMAN & SONIA S. WAISMAN, ANIMAL LAW: CASES AND MATERIALS 180 (4th ed. 2010). For a full survey of these studies, *see* pages 180–83.

[82] Randall Lockwood, *Animal Cruelty and Violence Against Humans: Making the Connection*, 5 ANIMAL L. 81 (1999) (citing RANDALL LOCKWOOD & FRANK R. ASCIONE, CRUELTY TO ANIMALS AND INTERPERSONAL VIOLENCE: READINGS IN RESEARCH AND APPLICATION (1998), "The idea that cruelty to animals can be associated with antisocial, violent, or criminal behavior is not new. [The authors] . . . compiled nearly fifty classic references from the last two hundred years making this connection in the literature of psychology, psychiatry, anthropology, criminology, and veterinary medicine.").

psychiatrists Daniel S. Hellman and Nathan Blackman.[83] The study found that "the existence of what has been called the 'triad' of symptoms—enuresis [bed wetting], fire setting, and cruelty to animals—can be predictive of adult crime."[84] Of eighty-four prisoners, 75% of the prisoners charged with aggressive crimes exhibited all the symptoms, while only 28% of those charged with non-aggressive crimes exhibited any of the triad symptoms. "Animal cruelty was reported by 52% of the aggressive prisoners but by only 17% of the non-aggressive prisoners."[85] Several subsequent studies tended to confirm these findings. For example, a 1985 study found that of aggressive criminals, 25% reported five or more childhood acts of animal cruelty, as compared to less than 6% of such acts of animal cruelty among non-aggressive criminals and none among non-criminals.[86] Similarly, a 2001 study found "a statistically significant relationship existed between childhood cruelty to animals and later violence against humans." [87]

In addition, the FBI's Behavioral Science Unit and the National Center for the Analysis of Violent Crime have found that "animal abuse is 'prominently displayed in the histories of people who are habitually violent.' FBI surveys of imprisoned multiple murderers showed that at least 46% had abused or tortured animals." [88] Likewise, studies tend to show that animal abuse is particularly common among serial killers. [89] As one sensationalized news story put it, "how do you make a serial killer? Practice, practice, practice—on animals."[90]

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[83] Daniel S. Hellman & Nathan Blackman, *Enuresis, Firesetting, and Cruelty to Animals: A Triad Production of Adult Crime*, 122 AM. J. PSYCHIATRY 1431 (1966). I wish to acknowledge the useful research compiling and summarizing many of these studies available in, Charlotte A. Lacroix, *Another Weapon for Combating Family Violence: Prevention of Animal Abuse*, 4 ANIMAL L. 1, 6 (1998).

[84] *Id*.

[85] Susan Crowell, *Animal Cruelty as It Relates to Child Abuse: Shedding Light on A "Hidden" Problem*, 20 J. JUV. L. 38, 45 (1999).

[86] Stephen R. Kellert & Alan R. Felthous, *Childhood Cruelty Toward Animals Among Criminals and Noncriminals*, 38 HUM. REL. 1113, 1127 (1985); *see also* A. William Ritter, Jr., *The Cycle of Violence Often Begins with Violence Toward Animals*, 30 FB PROSECUTOR 31, at 31 (1997) (finding that violent criminals were more likely to have abused animals than non-violent, non-incarcerated persons).

[87] Linda Merz-Perez, Kathleen M. Heide, & Ira J. Silverman, *Childhood Cruelty to Animals and Subsequent Violence Against Humans*, 45 INT'L J. OF OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY 556 (2001). Some studies were not as conclusive. Karla S. Miller & John F. Knutson, *Reports of severe physical punishment and exposure to animal cruelty by inmates convicted of felonies and by university students*, 21 CHILD ABUSE NEGL. 59 (1997).

[88] Susan Crowell, *Animal Cruelty as It Relates to Child Abuse: Shedding Light on A "Hidden" Problem*, 20 J. Juv. L. 38, 47 (1999) (citing RANDALL LOCKWOOD & ANN CHURCH, AN FBI PERSPECTIVE ON ANIMAL CRUELTY (1996)).

[89] ERIC W. HICKEY, SERIAL MURDERERS AND THEIR VICTIMS 27 (4th ed. 2006).

[90] Pamela Martineau, *Animal Cruelty Often Tied to Human Abuse,* SACRAMENTO BEE, June 15, 1998, at A1 (quoting Sacramento County social worker, Mary Ingram) (quoted in Crowell, *supra* note 86, at n.108).

3. Domestic Violence and the Link to Animal Violence

The correlation between animal abuse and domestic violence is also well documented and uniquely deserving of attention in the context of considering a defense of animals. Several studies have found that when an individual or family suffers domestic abuse, animal abuse is also occurring, and vice versa. Moreover, the animal abuse in these households is often not merely an unhappy coincidence. Instead, the abuser often uses the animal to facilitate his control over the abused.[91] To take but one graphic example, imagine an angry husband and father intent on teaching his wife a lesson who "beats and buries the family dog while it is still alive" only to have neighbors hear a crying dog and call police who are able to do nothing more than dig up a dead family pet.[92]

Recognizing that violence towards animals within an intimate relationship is an effective way for an abuser to "keep the subjects of his perceived realm in his thrall," the implications for domestic violence victims of refusing a meaningful defense of pets is of the utmost importance. Moreover, it is not the case that a defense of animals will merely duplicate the protections afforded to domestic violence victim under a theory of self-defense. As in the above example, abusing an animal does not necessarily place the victim in imminent fear of personal injury. A robustly conceived defense of animals, then, may actually provide broader self-help protections to a marginalized segment of our population.[93]

A 1998 study, one of the first empirical analyses of animal abuse in homes with domestic violence found that out of thirty-eight women surveyed, 71% of abused women who owned pets reported their abusive

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[91] Psychologists have confirmed that in many cases of domestic violence the abuser was using "animal cruelty as a way of controlling the behaviors of others in the home." Charles Siebert, *The Animal-Cruelty Syndrome*, THE NEW YORK TIMES (June 11, 2010), http://www.nytimes.com/2010/06/13/magazine/13dogfighting-t.html?pagewanted=all. *See also* Joseph G. Sauder, *Enacting and Enforcing Felony Animal Cruelty Laws to Prevent Violence Against Humans*, 6 ANIMAL L. 1, 13 (2000) ("An abuser may give the pet to his victim as a gift with the express purpose of using the pet to 'manipulate and control' his victim.").

[92] Stecker, *supra* note 78, at 36. *See also* People v. Kovacich, 201 Cal. App. 4th 86 (2011) (holding that evidence of dog abuse was admissible in a domestic violence trial insofar as the animal abuse was an act of abuse against the wife); People v. Garcia, 812 NY.S.2d 66 (2006) (applying felony abuse statute to abuse of a goldfish).

[93] It may be cringe inducing to imagine that domestic violence victims will gain rights through an effort to better protect animals. But the goal of protecting animals and the anticipated collateral benefit of providing more rights to human victims are both laudable. And if the injury to the pet is in fact also *an injury to the victim*, then the law could be seen as directly empowering victims, a position that is consistent with this Article's aim of establishing a right to protect pets grounded in human rather than animal interests.

partner had also hurt or threatened to hurt their animals.[94] Of those 71%, "[f]ifty-seven percent of the reports involved actual rather than threatened harm to pets."[95]

Other studies have documented similar connections between animal abuse and domestic violence, though it must be acknowledged that the percentages do show substantial variation. On the low end, "In Colorado Springs, Colorado, the Center for Prevention of Domestic Violence conducted a six-month survey and found that 24 percent of the 122 women seeking protection at a battered women's shelter reported their abusers also had abused the family pet."[96] Another study found that "twenty-eight percent of animal abusers were also *charged* with domestic violence."[97] By contrast, a much higher correlation was found in "A New Jersey study [which found] that in 88 percent of families where there had been physical abuse of children, there were also records of animal abuse,"[98] and in Wisconsin, battered women revealed that in four out of five cases, abusive partners had also been violent toward pets or livestock.[99]

There are also national studies documenting the correlation between abuse of loved ones and animal abuse. For example, The National

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[94] Joseph G. Sauder, *Enacting and Enforcing Felony Animal Cruelty Laws to Prevent Violence Against Humans*, 6 ANIMAL L. 1, 11 (2000) (citing Frank R. Ascione, *Battered women's reports of their partners' and their children's cruelty to animals*, 1 J. OF EMOTIONAL ABUSE, no. 1, 1998, at 119).

[95] Ascione, *supra* note 94, at 119. In addition to prevalence of animal abuse existing alongside domestic abuse, the survey began considering the effect of the animal abuse on children who witnessed the relationship. Of those thirty-eight women, "twenty-two . . . had children. . . . Seven of the women reported their children had also hurt or killed pets, and told of some extremely violent acts including pulling a kitten's head out of its socket and sodomizing a cat. Not surprisingly, most of the children who had exhibited violence against animals lived in the homes where the male partners had also been violent toward animals." Susan Crowell, *Animal Cruelty as It Relates to Child Abuse: Shedding Light on A "Hidden" Problem*, 20 J. Juv. L. 38, 47 (1999) (citing Frank R. Ascione, *Domestic Violence and Cruelty to Animals*, LATHAM LETTER, Winter 1996, at 14).

[96] Melissa Trollinger, *The Link Among Animal Abuse, Child Abuse, and Domestic Violence*, COLO. LAW., Sept. 2001, at 30.

[97] Joseph G. Sauder, *Enacting and Enforcing Felony Animal Cruelty Laws to Prevent Violence Against Humans*, 6 ANIMAL L. 1, 11 (2000) (emphasis added).

[98] *Understanding the Link Between Animal Abuse and Family Violence*, AMERICAN HUMANE SOCIETY, http://www.americanhumane.org/interaction/support-the-bond/fact-sheets/understanding-the-link.html (surveying "pet-owning families with substantiated child abuse and neglect." In two-thirds of the cases, it was the abusive parent who was responsible for the killing or injuring of the pet; children were the abusers in the remaining one-third). Crowell, *supra* note 86, at 40 (citing Elizabeth DeViney et al., *The Care of Pets Within Child Abusing Families*, 4 INT'L J. FOR THE STUDY OF ANIMAL PROBLEMS 321 (1983)).

[99] *How is Animal Abuse Related to Domestic Violence*, ASCPA, http://www.aspca.org/fight-cruelty/report-animal-cruelty/domestic-violence-and-animal-cruelty; *see also Help Victims of Domestic Violence—by Saving Their Pets*, OPRAH, http://www.oprah.com/spirit/Sheltering-Animals-of-Abuse-Victims-Animal-Abuse-Domestic-Violence.

Coalition Against Domestic Violence found that 85.4% of women and 63.0% of children reported incidents of pet abuse after arriving at domestic violence shelters.[100] According to this study, women who are abused by a partner are eleven times more likely than women who have not experienced abuse to report that their partner has also hurt or killed animals.[101]

The existing data, though somewhat conflicting, suggests a strong connection between animal abuse and violence toward other people, particularly people within the same household of the animal abuser. [102]Moreover, it would be a serious mistake to think that the abuse of the animal is generally unrelated to the general pattern of abuse within a violent household. [103] As has been observed by researchers, "When an abuser threatens, abuses, or kills an animal, several messages are being relayed to the human victim. The abuse, or even the threat to abuse the animal, displays the domination and control the abuser has over the victim. . . . Not only can abuse of the pet be used to manipulate or coerce a partner or child into compliance with the abuser's wishes, it also can be used to frighten, intimidate, punish, or retaliate."[104] It is important, then, in considering the costs and benefits of creating a formal defense of animals for policy-makers and judges to take a clear-eyed look at the role that animal abuse frequently plays in domestic violence. The inability to

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[100] Frank R. Ascione, Claudia V. Weber, and David S. Wood, *The Abuse of Animals and Domestic Violence: A National Survey of Shelters for Women Who are Battered*, 5 SOCIETY AND ANIMALS 205 (1997); *see also* Trollinger, *supra* note 96, at 29 (citing Charlotte Lacroix, *Another Weapon for Combating Family Violence: Prevention of Animal Abuse*, *in* CHILD ABUSE, DOMESTIC VIOLENCE, AND ANIMAL ABUSE: LINKING THE CIRCLES OF COMPASSION FOR PREVENTION AND INTERVENTION 65 (F.R. Ascione, ed., 1999), "[I]n 1980, a study in England found that in twenty-three families known to have committed abuse against animals, 83 percent also had been identified by social services as having children at risk for abuse.").

[101] *Id.* Not surprisingly, then, domestic violence organizations have worked hard to promote greater options for battered women with pets. *See, e.g.*, Laura Beck, *NYC Gets First Domestic Violence Shelter that Permits Pets*, JEZEBEL (June 20, 2013, 11:49 PM), http://jezebel.com/nyc-gets-first-domestic-violence-shelter-that-allows-pe-510973511.

[102] And according to at least on researcher, Dr. Frank Acione, many of these studies are flawed so as to understate the rate of animal cruelty among violent adults. Ritter, *supra* note 86, at 32.

[103] The problem of domestic violence that includes animal abuse as a form of control and violence is exacerbated in many states because the domestic violence shelters do not permit pets. Many abused women refuse to leave or post-pone leaving domestic violence situations because the shelters will not allow them to bring their pets with them. Amanda Mikelberg, *Hero dog revolutionizes shelter policy to let battered women keep pets*, NY DAILY NEWS (Jan. 14, 2012, 2:50 AM), http://www.nydailynews.com/news/national/hero-dog-revolutionizes-shelter-policy-battered-women-pets-article-1.1006063; *see also* Arluke, *supra* note 63, at 275.

[104] Trollinger, *supra* note 96, at 29–30 (citing Davidson, *The Link Between Animal Cruelty and Child Maltreatment*, ABA CHILD LAW PRACTICE, June 1998, "Additionally, if the animal is the victim's only source of love and affection, killing or injuring the animal further isolates the victim from anyone or anything but the abuser.").

defend a pet with serious force will, in many instances, represent a tool of additional empowerment and control for the abuser.[105]

C. Other Reasons for Recognizing a Moral Duty to Defend Pets

In addition to the reasons discussed above, including the connection between pets and the family unit and the psychological injury resulting from pet deaths, there are additional considerations that strengthen the claim that a moral duty underlies the duty of one to defend his pet. The first and perhaps most obvious additional point is that unlike all other possessions, pets are sentient beings that are capable of suffering. Increasingly, research shows that the brains of animals respond in ways that are remarkably similar to our own brains,[106] and long passed are the days when it was common to question whether we were merely anthropomorphizing to suggest that animals felt pain.[107] Through a combination of science and human experience it is now almost laughable to suggest what was previously conventional wisdom, that a dog merely acts as though it is feeling pain but does not actually experience pain.[108] And once society agrees that animals can suffer, then the door is open for arguing that such pain is a morally relevant consideration.[109] Simply put, the ability of one's pet to suffer pain, excruciating pain, is a potentially relevant consideration when addressing the moral foundation for a defense of animals.

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[105] *Cf.* Sharon L. Nelson, *The Connection Between Animal Abuse and Family Violence*, 17 ANIMAL L. 369, 372 (2011).

[106] Gregory Berns, *Dogs are People, too*, THE NEW YORK TIMES (Oct. 5, 2013), http://www.nytimes.com/2013/10/06/opinion/sunday/dogs-are-people-too.html?emc=eta1&_r=0.

[107] Descartes, for example, is famous for having concluded that animals feel no pain whatsoever, and instead merely act as if they felt pain. N. KEMP SMITH, NEW STUDIES IN THE PHILOSOPHY OF DESCARTES 136 (London: Macmillan, 1952). *But see* John Cottingham, *A Brute to the Brutes: Descartes' Treatment of Animals*, *available at* http://people.whitman.edu/~herbrawt/classes/339/Descartes.pdf (arguing that Descartes' view was less extreme than the conventional wisdom suggests).

[108] *See, e.g.*, GARY FRANCIONE, AN INTRODUCTION TO ANIMAL RIGHTS: YOUR DOG OR YOUR CHILD? 2 (1954) ("A crying dog, Descartes maintained, is no different from a whining gear that needs oil."). *See also* LARRY CARBONE, WHAT ANIMALS WANT: EXPERTISE AND ADVOCACY IN LABORATORY ANIMAL WELFARE POLICY 149 (Oxford Univ. Press 2004) (concluding that it is a now a minority view that animals do not feel pain or feel it in a very different way than humans); PETER SINGER, ANIMAL LIBERATION (1975) ("All the arguments to prove man's superiority cannot shatter this hard fact: in suffering the animals are our equals.").

[109] Utilitarianism, generally speaking, is concerned with maximizing pleasure and minimizing pain or suffering. STANFORD ENCYCLOPEDIA OF PHILOSOPHY ("Utilitarianism is one of the most powerful and persuasive approaches to normative ethics in the history of philosophy."). And for leading philosopher Peter Singer, among others, the pain and pleasure of animals as well as humans must be part of the utilitarian a calculus. *See* Singer, *supra* note 105 ("If possessing a higher degree of intelligence does not entitle one human to use another for his or her own ends, how can it entitle humans to exploit non-humans?").

Related but perhaps even more salient to this discussion is the fact that pet owners, by taking in the pet, took on a responsibility, a moral responsibility for the protection and care of the animal. A feature of pets that makes them different from other property, but also different from all other animals is that they are oftentimes entirely dependent on their human counterparts. Many have been bred so that they are less willing to defend themselves, less intelligent, and generally more dependent.[110] The dependence is both physical and emotional; it is an entirely "asymmetric relationship" in large part because the pets are bred and socialized to "behave in an infantile or subordinate way."[111] For many pet owners the seemingly silly saying that you are a dog's parent becomes an obvious truth when one realizes the scope of the animal's dependence. This dependence, then, suggests a moral responsibility to one's pet. The drive to protect one's pet is instinctive, and the dependence of animals might be understood to shift the moral calculus such that acts of pet protection are more defensible and rational than it might at first blush appear.

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In short, pets play an important role in the lives of Americans. Our emotional and physical health is improved by their companionship, and their death or injury can exact a proportionately devastating toll. Moreover, the link between animal abuse and human violence generally, and domestic violence in particular, has caused legal scholars and social scientists to observe that safeguarding our fellow humans may require adequate legal protection for animals. As the following Part explains, there is reason to question whether current doctrine adequately protects those people who would safeguard pets from imminent abuse.

III. THE SHORTCOMINGS OF THE CURRENT SYSTEM OF CRIMINAL DEFENSES

The previous Part provided support for the view that animals are not like other things that the law regards as property. Harm to animals is uniquely linked to harm to humans and we tend to recognize a dependent, even familial relationships with animals that are unknown to other things treated as property. That is to say, our moral intuition as well as our own wellbeing tends to suggest that the law ought to protect James, the old man widower from the introductory hypothetical, when he uses force to defend

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[110] Nicholas Wade, *From Wolf to Dog, Yes, But When?*, THE NEW YORK TIMES (Nov. 22, 2002), http://www.nytimes.com/2002/11/22/us/from-wolf-to-dog-yes-but-when.html?pagewanted=all&src=pm ("Wolves, though very smart, are much less adept than dogs at following human cues, suggesting that dogs may have been selected for this ability.").

[111] Marie-Jose Enders-Slegers, *The Meaning of Companion Animals: Qualitative analysis of the life histories of elderly cat and dog owners*, *in* COMPANION ANIMALS AND US 237.

his life companion, a dog. Merely criminalizing animal cruelty has proven an inadequate protection for animals,[112] and as explained below, the current system of criminal defenses tends to leave those who would defend animals from abusers in a state of considerable uncertainty, and in many instances without a viable defense in court.

A. The Surprising Breadth of Deadly Force

It must be acknowledged up front that one can use force in defense of an animal. Indeed, one could use some degree of force in defense of a couch, iPod, or hood ornament. Accordingly, the starting point for understanding whether the criminal law's protections for one who defends his pet are inadequate is an understanding of what the law permits in the context of defending property. Because animals are considered personal property[113] or chattel under the law, the defenses that are relevant to the protection of another person are inapplicable. This means that under current law the defense of one's pet would be limited to force that would not cause serious injury—that is, non-deadly force.[114]

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[112] One might suggest that the goal of general deterrence, if not specific deterrence as to particular instances of violence, is adequately served by the existing animal cruelty crimes. As a practical matter, however, the inability or unwillingness of prosecutors to enforce animal cruelty laws is well documented. *See, e.g.*, Jennifer H. Rackstraw, Comment, *Reaching for Justice: An Analysis of Self-Help Prosecution for Animal Crimes*, 9 ANIMAL L. 243, 246 (2003) (citing studies suggesting a rate of prosecution of less than two or three percent in animal abuse cases). The lack of resources and interest in these crimes has historically left counties unwilling or unable to prosecute in the majority of cases. *Id.*; *see also* 42 Sep Prosecutor 20 (2008). It bears mentioning, however, that in light of the contributions of resources, training, and support from groups like the Animal Legal Defense Fund, animal cruelty prosecutions are on the rise.

[113] The law's treatment of animals as mere property and the resulting consequences of this status are well established in the literature. *See, e.g.*, Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1365 (1993) (linking the beginning of property rights for humans to the need to encourage crop cultization and animal domestication); *see also* Gary L. Francione, ANIMALS, PROPERTY AND THE LAW 34 (1995) ("There is no question that animals are regarded as property under the law and have held the status of property for as long as anyone can recall"); *id*. at 24 (explaining that when the interests of a human conflict with those of an animal, "as far as the law is concerned, it is as if we were resolving a conflict between a person and a lamp, or some other type of personal property."). Francione has explained that the property status of animals is so deeply entrenched that the law refuses to treat animals as anything other than property even when one regards an animal as a member of the family: "For example, if one person negligently kills the dog of another, most courts refuse to recognize the status of the animal as family member" and limit recover to that allowed "if the property were inanimate." *Id*. at 24.

[114] The longstanding view is that the right to use deadly force ought to be limited to the protection of human life. Note, *Justification for the Use of Force in the Crim. Law*, 13 STAN. L. REV. 566, 583 (1961) ("The primary consideration in determining which situations should justify the use of deadly force would seem to be whether society deems the interest at stake more important than the victim's life, and whether the interest might be seriously impaired if the actor awaits his legal remedy. It seems doubtful, in view of this, whether the right to take a human life should be justified except when it is necessary

On its face, such a limitation seems reasonable, and eminently prudent. However, at least in some carefully circumscribed instances, the defense of one's pet from imminent serious injury with only non-deadly force will be inadequate. For one who generally rejects violence, though, a doctrine that would permit additional human violence to go unpunished requires considerable explanation.

Simply put, while violence against all human and non-human animals should be avoided, in the face of a violent aggressor, certain acts of violence are justified. This includes defending one's self from reasonable threats of deadly force, and defending one's spouse or child, or even a stranger on the street.[115] One might be justified in injuring or killing two or more people to save a single human life. And the reason the law accepts deadly force in these instances is not because we want the attackers to suffer serious injury. Instead, the law deems the sort of force capable of causing serious injury or even death appropriate because the use of less force simply will not suffice. In fact, token threats or acts of non-serious injury in these circumstances—kicking someone in the shin—may simply incite the aggressor and assure the injury or death of the victim.[116] Similar reasoning applies when one faces a serious threat to the life of one's companion animal. A threat of non-deadly force—such as a threat to bust the nose of an armed man if he touches your dog—may serve as a catalyst rather than an impediment to escalation.[117] The ability

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for the protection of a competing human interest."); *id*. ("the right to kill in defense of property was restricted to situations where the intruder threatened the lives of the inhabitants, at least where he was not attempting to dispossess the inhabitants. And the right to kill to prevent a felony came to be regarded as a broadening of the right to protect the lives of other persons.").

[115] One may have a valid defense of others claim even if he was in fact wrong in believing that his forceful intervention was required. *See, e.g*., Paul Robinson, *Testing Competing Theories of Justification*, 76 N.C. L. REV. 1095, 1102–1103 (1998) ("All agree that a reasonable mistake as to a justification ought to exculpate fully."); *id*. (noting, however, that it is unclear whether the mistaken actor is justified or merely excused in using force).

[116] *See generally* JOHN R. LOTT, JR., MORE GUNS, LESS CRIME 59, *available at* http://realagenda.files.wordpress.com/2012/12/more-guns-less-crime_-understanding-cri-jr-john-r-lott.pdf ("Convicted American felons reveal in surveys that they are much more worried about armed victims than about running into the police."); Carlisle E. Moody, *Testing for the Effects of Concealed Weapons Laws: Specification Errors and Robustness*, 44 J.L. & ECON. 799, 799–800 (2001); David B. Kopel, *Lawyers, Guns, and Burglars*, 43 ARIZ. L. REV. 345, 345 (2001).

[117] The Model Penal Code generally prohibits deadly force in defense of property; however, such force is permitted in order to prevent a felonious property crime when the use of non-deadly force "would expose the actor or another in his presence to substantial danger of serious bodily harm." MPC 3.06(3)(d) (applying to felonious theft or property destruction so as to permit deadly force if lesser force will put the victim in greater danger). There does not appear to be a single jurisdiction that has enacted this aspect of the MPC's defense of property provision.

to make threats of serious injury to the attacker is, then, a potentially important deterrent.

The sort of non-deadly force envisioned in property defense cases, quite simply, has little practical application in the context of imminent danger to one's animal. Reasonable, non-serious force limitations make sense in the context of a tug of war for your purse. Likewise, reasonable non-serious force might include shoving a person who is attempting to vandalize your new car. However, slapping, shoving, or kicking someone who is armed with a knife, a gun, or a crowbar and threatening your companion animal with death or dismemberment seems more likely to incite than to ameliorate the harm to the animal.[118] Indeed, this is precisely why deadly force is justified when someone is threatening deadly force against a person; nothing else suffices in most instances. Based on the social value of companion animals, the question is whether serious force should be permitted in defense of the animal because, quite simply, nothing else will suffice.

Notably, anyone who protects his pet with anything more than a push, or perhaps a punch is in danger of being deemed to have used deadly force, and as such has subjected himself to criminal charges. The key insight here is that deadly force does not necessarily require an intent to kill, or force sufficient to kill.[119] Indeed, the line between deadly and non-deadly force is generally much less than the terms suggest. In many jurisdictions, the possibility or likelihood that the force would cause death *or serious injury* is considered "deadly force."[120] This definition of deadly

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[118] In the domestic violence context, commentators have pointed out that "the law's insistence on using nondeadly force to combat the threat of nondeadly force—however physically disadvantaged the victim might be—effectively denies most female victims a right of self-defense." Christine R. Essique, *The Use of Deadly Force by Women Against Rape in Michigan: Justifiable Homicide?*, 37 WAYNE L. REV. 1969, 1972–1973 (1991) (citing J. Q. LaFond, *The Case for Liberalizing the Use of Deadly Force in Self-Defense*, 6 U. PUGET SOUND L. REV. 237, 238 (1983)).

[119] The one apparent exception is Colorado, which defines deadly force as requiring both an intent to kill and an actual death. People v. Vasquez, 148 P.3d 326, 329 (Colo. App. 2006) ("Colorado defines 'deadly physical force' as 'force, the intended, natural, and probable consequence of which is to produce death, and which does, in fact, produce death.' Section 18–1–901(3)(d). Unless we were to either eliminate, as surplus, the word 'intended' or construe the statute to include an additional word (*i.e.*, 'or') between 'intended' and 'natural,' we would have to conclude that, in Colorado, an intent element is a necessary ingredient of 'deadly physical force.'").

[120] Black's Law Dictionary, for example, defines deadly force as, "[v]iolent action known to create a substantial risk of causing death or serious bodily injury." *See, e.g.*, NY CLS Penal § 10.00 (Deadly physical force means force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury.); ALA. CODE § 13A–1–2(6) (1975) (defining "deadly physical force" as "[p]hysical force which, under the circumstances in which it is used, is readily capable of causing death or serious physical injury"); Thompson v. County of Los Angeles, 142 Cal. App. 4th 154, 166 (Cal. Ct. App. 2006) (defining deadly force as capable of causing death or serious

force as including force that might cause serious injury, enjoys widespread, super majority support across the federal circuits and the states.[121] Moreover, the definition is grounded in the Model Penal Code,[122] which provides that any actions creating a *substantial risk* of serious injury may amount to deadly force. As explained below, the vague definitions of both substantial risk and serious bodily injury across the states conspire to render an exceedingly capacious definition of deadly force plausible.

First, while there is no universally accepted definition of likely or substantial risk, it seems clear that a risk can be substantial even when the

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bodily injury); Falwell v. State, 88 So. 3d 970, 971 (Fla. Dist. Ct. App. 2012) (Deadly force means force likely to cause death or great bodily harm.); CONN. GEN. STAT. § 53a–3(5) (2005) (defining "deadly physical force" as "physical force which can be reasonably expected to cause death or serious physical injury") Chicago v. Brown, 377 N.E.2d 1031, 1037 (Ill. App. Ct. 1978) (Deadly force is defined as force which is likely to cause death or great bodily harm.); Flores v. State, Nos. 01-10-00531-CR, 01-10-00532-CR, 01-10-00534-CR, 2013 Tex. App. LEXIS 1809, at *78 (Tex. Crim. App. Feb. 26, 2013) (Deadly force is defined as force that is intended or known by the actor to cause, or in the manner if its use or intended use is capable of causing, death or serious bodily injury) (quoting TEX. PENAL CODE ANN. § 9.01(3)); OHIO REV. CODE. ANN. § 2901.01(A)(2) (2005) (defining "deadly force" as "any force that carries a substantial risk that it will proximately result in the death of any person"); 18 PA. CONS. STAT. § 501 (2005) (defining "deadly force" as "[f]orce which, under the circumstances in which it is used, is readily capable of causing death or serious bodily injury"). Even police training manuals define deadly force as any "force that is likely to cause death or serious bodily injury." Joseph J. Simeone, *Duty, Power, and Limits of Police Use of Deadly Force in Missouri*, 21 ST. LOUIS U. PUB. L. REV. 123, 172 (2002) (citing the St. Louis Police Department procedures).

[121] *See* Smith v. City of Hemet, 394 F.3d 689, 693 (9th Cir. 2005) ("We also hold that in this circuit 'deadly force' has the same meaning as it does in the other circuits that have defined the term, a definition that finds its origin in the Model Penal Code."). A leading treatise recognizes that many states take this approach, defining deadly force as force "likely or reasonably likely . . . to cause death *or serious bodily injur*y." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 18.02(A) 225 (5th ed.) (emphasis added). There are currently 44 states that explicitly recognize force that causes serious bodily injury as sufficient to constitute deadly force. *See* Alabama, Arkansas, California, Connecticut, D.C., Florida, Idaho, Indiana, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Wyoming, Alaska, Arizona, Delaware, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Tennessee, Texas, Vermont, Washington, an Wisconsin. *See, e.g.*, TX PENAL § 9.01; ND ST § 12.1-05-12; DC CODE § 24-261.01; IN ST. § 35-31.5-2-85.

[122] MPC 3.11 (3) (defining deadly force as including force that the actor knows creates a substantial risk of death or seriously bodily harm); *see also* SUBCRL § 10.4 ("But merely to threaten death or serious bodily harm, without any intention to carry out the threat, is not to use deadly force, so that one may be justified in pointing a gun at his attacker when he would not be justified in pulling the trigger."). Paul Robinson has identified the MPC definition as a "typical definition of deadly force." PAUL ROBINSON, CRIMINAL LAW 330, at n.18 (2d ed.).

risk of harm is not more likely than not. [123] Moreover, actions that risk serious injury or death to another, given the magnitude of the possible harm, will often be treated as per se examples of substantial risk.[124] Stated differently, the risk of death need not be high in order for the risk to be characterized as substantial. Accordingly, the substantial risk prong of the deadly force analysis limits only minimally the range of conduct that might otherwise be characterized as deadly force.

In addition, the range of injuries that could be considered *serious* is no less broad or vague, and thus fails to appropriately cabin the definition of deadly force. The Texas Penal Code, for example, defines serious bodily injury as bodily injury which "creates a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."[125] Oregon and New York similarly define serious bodily injury.[126] If serious bodily harm includes any impairment in the loss of a bodily member, then breaking or spraining someone's finger or toe could conceivably amount to deadly force.[127] Of course, it is highly unlikely that stomping on someone's toes will ever be held to be deadly force by a court, but there is rarely a clear statutory reason for understanding why this must be the case. [128] If serious injury

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[123] A risk can be substantial without being more likely than not. *See, e.g.*, People v. Hall, 999 P.2d 207 (Colo. 2000) (holding in the context of recklessness a lower court erred when it instructed the jury that in order for a risk to be substantial "it must be at least more likely than not that death would occur"); *id*. at 217 ("risk does not have to be "more likely than not to occur" or "probable" in order to be substantial. A risk may be substantial even if the chance that the harm will occur is well below fifty percent."); New Jersey courts find a substantial risk to be one that is not "minor, trivial or insignificant." Ogborne v. Mercer Cemetery Corp., 963 A.2d 828, 834 (N.J. 2009). *See also* Kenneth W. Simons, *Should the Model Penal Code's Mens Rea Provisions be Amended?*, 1 OHIO ST. J. CRIM. L. 179 (Fall 2013).

[124] *Hall*, 999 P.2d at 218 ("Some conduct almost always carries a *substantial risk* of death, such as engaging another person in a fight with a deadly weapon or firing a gun at another.").

[125] TEXAS PENAL CODE § 1.07(a).

[126] NY CLS PENAL CODE § 10.00(10) (Serious physical injury means physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.); O.R.S. § 161.015 (Serious physical injury means physical injury which creates a substantial risk of death or which causes serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.).

[127] It is not uncommon for states to define substantial bodily injury in such broad terms. *See, e.g.*, State v. Barretto, 953 A.2d 1138, 1141 (Me. 2008) ("Serious bodily injury" means a bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or loss or substantial impairment of the function of any bodily member or organ, or extended convalescence necessary for recovery of physical health.").

[128] Perhaps the most salient limit on the expansive statutory definitions of deadly force is judicial reluctance. Many courts, even when faced with a statute that says deadly force includes any force "likely to cause death or serious bodily injury" will focus on the relationship between the force and the likelihood of death. *See, e.g.*, DeLuge v. State,

enjoys a broad definition, then one risks exceeding the amount of force he may use (other than in defense of a human life) by creating any risk of disfigurement or protracted injury to his attacker.

Combining the vagaries of substantial risk with the potential breadth of serious bodily harm reveals the potentially vast scope of so-called deadly force; the individual need not intend death, he needn't actually cause death, he may only need to risk causing an injury that is not life threatening at all.

As a practical matter, this means that a wide range of defensive force might be deemed deadly. Surely, firing a gun in the presence of others creates a substantial risk of causing death or serious bodily.[129] And equally obvious, stabbing someone with a knife will often be deadly force.[130] This may be true even if the victim is stabbed in an area of the body without sensitive organs, such as the arm. The Maine Supreme Court recently analyzed whether stabbing someone in the shoulder and arm was deadly force and concluded in the affirmative.[131] As the court explained:

> These facts demonstrate that Barretto engaged in conduct that he knew to create a substantial risk of serious bodily injury, *see* 17–A M.R.S. § 2(8), defined as "serious, permanent disfigurement or loss or substantial impairment of the function of any bodily member or organ,". . Such

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710 So. 2d 83, 84 (Fla. Dist. Ct. App. 1998) (applying a Florida statute that includes bodily injury in its definition of deadly force and concluding "[t]hus, a defendant is engaged in the use of deadly force "where the natural, probable and foreseeable consequences of the defendant's acts are death").

[129] *See* MPC § 3.11(2) (Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force.); Miller v. State, 613 So. 2d 530 (Fla. Dist. Ct. App. 1993) (holding that the firing of a firearm into the air, even as a so called warning shot, constitutes the use of deadly force as a matter of law).

[130] Larsen v. State, 82 So. 3d 971, 974 (Fla. Dist. Ct. App. 2011) (holding that the use of a sharp knife constituted deadly force as a matter of law); People v. Benson, 265 A.D.2d 814 (N.Y. App. Div. 1999) (holding that use of a knife constitutes use of deadly force as a matter of law); 5 CTPRAC § 6.1 ("there is no question that intentionally stabbing someone with a screwdriver is the use of deadly physical force, as is then coming at that person with a long kitchen knife"); 4 RUJLPP 504 ("The use of a firearm is deadly force as a matter of law, because by definition, a firearm is a "deadly weapon which fires projectiles likely to cause death or great bodily harm."); *but see Larsen*, 82 So.3d at 975 (recognizing that a "slashing motion with a razor blade towards the victim's hand" might not be deadly force).

[131] State v. Barretto 953 A.2d 1138, 1141–42 (Me. 2008) ("He argues that, because he did not intend to kill the victim and was only using the knife to defend himself against an attack, his actions could reasonably be viewed as having risen only to the level of nondeadly force. Barretto's argument, however, confuses the nature of his intentions with the nature of the force used.").

> intentional use of a knife against another person cannot be construed as anything other than the use of deadly force. Even if Barretto used that level of force only to defend himself, with no intention to kill, these facts do not alter the deadliness of the force used.[132]

Accordingly, while shooting or stabbing someone with an intent to kill them are the paradigmatic examples of deadly force, shooting or stabbing merely to wound or injure someone's hands or legs will also generally constitute deadly force.[133] Stated differently, the use of knives and guns will generally constitute deadly force as a matter of law, even when the injury is directed away from the head or torso. But the range of force that cannot be characterized so easily is vast, leaving individuals with unclear expectations regarding the scope of the legal limits on their defensive actions.

For a wide range of defensive conduct that may strike some as reasonable, then, there is a risk that the force used will be characterized by a jury as deadly.[134] For example, even a forceful headlock might be considered deadly force.[135] So could striking an attacker across the head with your cane,[136] walking stick,[137] or hiking pole.[138] Indeed, striking a

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[132] *Id.* By contrast, Colorado's exceedingly narrow definition of deadly force would produce the opposite result, even if the victim actually died. *See* People v. Ferguson, 43 P.3d 705, 709 (Colo. App. 2001) (holding that force is not deadly force if it did not cause death *or* was not intended to produce death). Thus, if the jury found that defendant did not intend to use his knife to produce death, then in Colorado his use of the knife would not qualify as the use of "deadly physical force" as defined by statute. *Id*.

[133] *See, e.g.*, Commonwealth v. Wolmart, 786 N.E.2d 427 (Mass. App. Ct. 2003) (holding that stabbing someone in the arm with a kitchen knife amounts to deadly force); *see also* Charles E. Rice & John P. Tuskey, *The Legality and Morality of Using Deadly Force to Protect Unborn Children From Abortionists*, 5 REGENT U. L. REV. 83, 104 (1995) ("Like shooting to kill, shooting to wound or breaking the abortionist's hands or arms would constitute deadly force. Deadly force generally is force that a person knows will cause, or is likely to cause, death or serious bodily harm. But there are degrees of deadly force. Shooting somebody and hitting him with a baseball bat with enough force to break his leg are both deadly force.").

[134] Where the evidence at trial does not establish that the force used by the defendant was deadly or non-deadly as a matter of law, the question is a factual one to be decided by the jury, and the defendant is entitled to jury instructions on the justifiable use of both types of force." *Larsen*, 82 So. 3d at 974.

[135] Commonwealth v. Walker, 820 N.E.2d 195, 200 (Mass. 2005) (concluding that whether a headlock constitutes deadly or nondeadly force is a question of fact for the jury).

[136] In *State v. Richmond*, the defendant hit the victim with a stick the "size of a sledge hammer" and was found to have used deadly force. No. 88WM000016, 1990 WL 7988, *1 (Ohio Ct. App. Feb. 2, 1990).

[137] People v. Cleveland, 122 A.D.2d 536, 537 (N.Y. App. Div. 1986) ("Whether the walking stick was capable of causing serious bodily injury or death was a question of fact for the jury, not a matter of law."). The hiking stick example is made vividly relevant in John V. Orth's excellent essay, *Self-Defense*, GREEN BAG (Autumn 2010), *available at*

person with a pole or stick to the arm might constitute deadly force insofar as it may cause serious injury, or broken bones.[139] Courts have recognized such a wide range of acts using objects as weapons as deadly force that it is impossible to fully catalogue them, but suffice to say the range is broad and even if the defendant's actions did not cause serious injury, a court

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http://www.greenbag.org/v14n1/v14n1_ex_post_orth.pdf. Orth describes a hypothetical scenario in which an armed robber shoots the victim's dog and the victim reflexively clubs the attacker on the head with his walking stick. The attacker ended up dying from his injuries and Orth brilliantly conveys the fact that the owner's rational impulse could very well make him a murderer. *Id.* at 119–22 (opining "no sensible prosecutor would bring the case); *Id.* at 122 (the fictional pet owner ends the essay by noting "I do know in my heart of hearts that if the kid had dropped the gun after shooting Milo and turned to run away, I would have hit him just as hard."); *see also* 30 A.L.R. 815 (identifying cases in which the question of whether a cane or walking stick constituted a deadly weapon was held to be one for the jury); People v. Knapp, 191 N.W.2d 155 (Mich. App. 1971) (identifying a broomstick as a weapon capable of causing serious bodily injury); People v. Jordan, 474 N.E.2d 1283 (Ill. App.. 1985) (discussing defendant's use of deadly force by striking another with a cane or stick); State v. Williams, 644 P.2d 889, 893 (Ariz. 1982) (concluding that use of a "three-foot long pointed stick" could cause serious bodily injury or death even when used against persons in riot shields, chest protectors and helmets); Moore v. State, No. 04-94-00648, 1996 WL 23599, at *5 (Tex. App. Jan. 24, 1996) ("use e of the stick to hit Dowd in the head was a use of deadly force"). *See also* 16 INPRAC § 1.5b (recognizing that because deadly an officer's "billy club" or "night stick" could be considered a deadly weapon" insofar as they can create a risk of serious bodily injury.").

[138] Even items that are designed to be non-deadly generate limited controversy. For example, although the better view is surely that pepper spray and mace are non-deadly force, there is even limited disagreement as to these points. *Compare* Eugene Volokh, *NonLethal Self-Defense, (Almost Entirely) Nonlethal Weapons, with the Right to Keep and Bear Arms and Defend Life*, 62 STAN. L. REV. 199, 205 (2009) ("But stun guns and irritant sprays are so rarely deadly that they merit being viewed as tantamount to generally non-deadly force, such as a punch or a shove."); *id.* (noting, however, that there reported instances of deaths from both tasers and pepper spray); 46 No. 1 CRIM. LAW BULL. Art. 3 ("these non-deadly force options include physical contact, holding, hitting; use of pepper spray or mace."); Smith v. City of Hemet, 394 F.3d 689, 701–702 (9th Cir. 2005) (describing pepper spray as the "most severe force authorized short of deadly force") *with* 39 No. 6 CRIM. LAW BULL. Art. 5 ("pepper spray, batons, and firearms. All of these are, or should be, considered a form of deadly force."); Katherine N. Lewis, *Fit to be Tied? Fourth Amendment Analysis of the Hog-Tie Restraint Procedure*, 33 GA. L. REV. 281 (noting that pepper spray is a deadly weapon when the person is also tied up in a particular way).

[139] *See, e.g.*, State v. Napolean, 633 P.2d 547 (Haw. Ct. App. 1981) (holding that deadly force existed when the defendant broke the victims arm with a baseball bat); *id*. (holding that it swinging a bat into someone's arm is per se deadly force under a statute, like many states that defines deadly force as such force as will "create a substantial risk of causing death or serious bodily harm"). In another case the use of a pool cue was found to be deadly force. State v. Sutfin, No. 91AP-305, 1991 WL 224536, at *2 (Ohio Ct. App. 1991) ("Although appellant inflicted only minor injuries upon David Slobodnik, the results could have been fatal. The relevant test is whether the force used creates a substantial risk of causing death. The facts of this case indicate that hitting someone in the head with a pool cue does create a substantial risk of causing death.").

may find deadly force.[140] Using nearly any object to inflict injury, even to parts other than the head or torso, can be deadly force. [141] Moreover, even the use of one's fists could, in certain circumstances, constitute deadly force.[142] Indeed, California has gone so far as to create a jury instruction

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[140] Calbert v. State, 418 N.E.2d 1158 (Ind. 1981) (on the facts of brutal case, the court noted that the deadly force necessary for an aggravated felony conviction does not force need not require actual harm; it is enough "if it created a substantial risk of serious bodily injury").

[141] *See* State v. Barretto, 953 A.2d 1138, 1141–1142 (Me. 2008) (stabbing to the shoulder is deadly force). In *Ferrel v. State*, the defendant hit the victim in the mouth with a beer bottle and the court concluded that this was deadly force. 55 S.W.3d 586 (Tex. Crim. App. 2001). Likewise, in *Escobar v. State*, the defendant hit the victim in the head with a beer mug and such force was deemed sufficient as to be deadly. 799 S.W.2d 502 (Tex. Crim. App. 1990). In *State v. Ware*, the use of clothing iron to strike a person was deemed deadly force. No. 57546, 1990 WL 151499, *1 (Ohio Ct. App. Oct. 11, 1990). *See also* State v. Beal, 638 S.E.2d 541 (N.C. App. 2007) (jabbing at someone with pitchfork is deadly force); People v. Samuels, 198 A.D.2d 384 (N.Y. App. Div. 1993) (stabbing with a screwdriver is deadly force); Hayes v. State, 728 S.W.2d 804 (Tex. Crim. App. 1987) (striking with a Coke bottle is deadly force); Commonwealth v. Sanders, 280 A.2d 598 (Pa. Super. Ct. 1971) (using broken shards of glass to slash at someone is deadly force); Shuck v. State, 349 A.2d 378 (Md. Ct. Spec. App. 1975) (striking with a baseball bat is deadly force); State v. Galicia, 45 A.3d 310 (N.J. 2012) (driving of car can constitute deadly force); People v. Magliato, 496 N.E.2d 856 (N.Y. 1986) (pointing without firing a loaded pistol is deadly force); *id*. (cocking the hammer and leveling the pistol in the victim's direction, with full knowledge of the delicacy of the trigger, constituted deadly force).

[142] In *Stave v. Ortiz*, the court found that bare hands alone (from a large man) could constitute deadly force and that it is up to the fact finder to make the determination. 626 N.W.2d 445 (Minn. Ct. App. 2001); *id*. at 449–50 ("Bare hands, even when not deemed 'dangerous weapons,' can administer 'deadly force' in many situations-for example by choking, pushing a victim into harm's way, or inflicting a severe beating."). Other authorities confirm the possibility of one punching or kicking as deadly force. *See, e.g.*, 16 INPRAC § 1.5b (recognizing that the "use of [one's] hands, fists, or teeth could be considered "deadly force" under appropriate circumstances"); *see* Kipp v. State, No. 03-09-00175-CR, 2009 Tex. App. LEXIS 7884, at *10, (Tex. App. Oct. 9, 2009) (discussing that whether a pipe or a fist was used to hit the victim in the head, either action constituted deadly force given the injury incurred by the victim). Most states permit the use of deadly force—defined as force likely to cause death or serious injury—when the attacker is about to kill or use great bodily injury. *See, e.g.*, MYEREV s 9.10 ("An attack by a powerful person with fists or feet can kill, and such an attack should qualify as deadly force."); 8 TXPRAC § 106.7 (explaining that deadly force may be used in self-defense only to prevent imminent deadly force and defining deadly force" as "force that is intended or known by the person using it to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury"); *see also* SUBCRL § 10.4 (**"**One may justifiably use *nondeadly* force against another in self-defense if he reasonably believes that the other is about to inflict unlawful bodily harm (it need not be death or serious bodily harm) upon him. . . . He may justifiably use *deadly* force against the other in self-defense, however, only if he reasonably believes that the other is about to inflict unlawful death or serious bodily harm upon him."). Accordingly, examining cases in which courts permitted a self-defense instruction based on the attacker's threat of force is revealing. In a variety of cases, courts have permitted deadly force to repel unarmed attacks. For example, court held that an attacker's verbal threats to beat the victim and bash her head, while clenching his fist, raising his arm, and advancing toward the victim, was a threat that a jury could deem to call for the use of deadly force in self-defense.

explicitly recognizing that deadly force may be used repel any unjustified "assault with the fists . . . that is likely to inflict great bodily injury."[143]

In sum, accepting that a defendant may be deemed to have used deadly force even when he lacks a dangerous (or any) weapon,[144] and even when the force is not directed at one's head, it seems that in many jurisdictions only the most unlikely, if not ridiculous, examples of force would *not* constitute deadly force as a matter of law. In the majority of circumstances, it will, thus, be a question left to the jury. A victim may believe he is using non-deadly force to defend an animal and later have a court or jury determine the force is deadly. Accordingly, a cautious citizen must assume that nearly *any* use of force, whether from his own fist, a pipe, a knife, or a firearm, if used in a way that might cause serious injury could constitute deadly force.

Johnson v. State, 271 S.W.3d 359, 367 (Tex. Crim. App. 2008). Similarly, in *Heng v. State*, the court deemed a balled fist and a previous beating sufficient to raise the fear of deadly force necessitating the use of deadly force in self-defense. No. 01-04-00450-CR, 2006 Tex. App. LEXIS 294, at *11 (Tex. Crim. App. Jan. 12, 2006); *see also* Calbert v. State, 418 N.E.2d 1158 (Ind. 1981) (force of biting and slapping was deadly force).

[143] CALJIC No. 5.31. If the person threatened with fists is an initial aggressor, then he might have a duty to retreat or not to use self-defense. However, as explained, infra Section III, quite often the law does not require a non-deadly aggressor to retreat when confronted with deadly force. *See, e.g.*, 4 Cal. Crim. Practice: Motions, Jury Instr. & Sent. § 47:10 (3d ed.) (citing People v. Quach, 116 Cal. App. 4th 294, 10 Cal. Rptr. 3d 196 (4th Dist. 2004)).

[144] *See* Chew v. Gates, 27 F.3d 1432, 1453 (9th Cir. 1994) (Whether a particular instrument of force qualifies as an instrument of deadly force is a question of fact.); Ross Torquato, *When Do Unarmed Encounters Become Deadly Force?* POLICE ONE (Mar. 16, 2012) *http://www.policeone.com/close-quarters-combat/articles/5267702-When-do-unarmed-encounters-become-deadly-force/* (discussing unarmed deadly force from the prospective of a police officer); *see also* Commonwealth v. Walker, 820 N.E.2d 195, 200 (Mass. 2005) (concluding that, as a general matter, force without weapons is non-deadly and force with a weapon is deadly: "The right to use nondeadly force in self-defense arises at a lower level of danger than the right to use a weapon, which is ordinarily considered to be deadly force."). Tangentially related to the issues in this Article are the numerous jurisdictions that have held the use of a trained police dog to not constitute deadly force no matter the outcome. *See e.g.*, Thompson v. Cnty. of Los Angeles, 142 Cal. App. 4th 154, 166 (Cal. Ct. App. 2006); Miller v. Clark Cnty., 340 F.3d 959 (9th Cir. 2003) (holding that officer's ordering police dog to bite suspect's arm or leg and permitting dog to continue biting for up to one minute was not deadly force, but noting that the Circuit court law they were bound to follow had narrowly defined deadly force as force "likely to kill" and had excluded force likely to cause serious bodily injury). Of course, Professor Nancy Leong has insightfully posited that when it comes to the development of legal rules and norms, context matters. Nancy Leong, *Making Rights*, 92 B.U. L.REV. 405, 418 (2012). Accordingly, courts might define excessive force more narrowly when judging the conduct of police officers being sued under the Fourth Amendment.

B. Existing Defenses Permitting Deadly Force Do Not Apply to the Defense of Animals

Although the definition of deadly force is not narrowly confined, as discussed above, the number of defenses that permit the use of deadly force is quite narrow. The result is that defending one's pet is relegated to the largely ambiguous realm of non-deadly force. Criminal defenses that would permit the use of substantial force are largely inapplicable to the defense of animals. The most salient of these criminal defenses and there inapplicability to the defense of pets is the subject of this subsection.

1. Defense of Property

Because the weight of legal authority continues to regard pets as personal property,[145] analyzing the defense of property doctrine serves as a useful starting point in exploring the ineffectualness of existing doctrines of exculpation as applied in the service of protecting one's pet.

The first and most critical reason that the defense of property is likely inadequate is that existing doctrine precludes the use of deadly force.[146] As discussed above, the amount of force necessary to be considered deadly may be surprisingly little, and certainly there need not be an actual death or even likelihood of death.[147] However, courts and commentators routinely explain that the use of deadly force in defense of property is "never reasonable" except when the aggressor attempting to steal property

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[145] *See, e.g.*, Susan J. Hankin, *Not a Living Room Sofa: Changing the Legal Status of Companion Animals*, 4 RUTGERS J.L. & PUB. POL'Y 314 (2007); Elizabeth Paek, *Fido Seek Full Membership in the Family: Dismantling the Property Classification of Companion Animals by Statute*, 25 U. HAW. L. REV. 481 (2003). Occasionally a judicial order will recognize that animals are not easily categorized as mere property. For example, a New York judge's order is oft quoted: "This court now overrules prior precedent and holds that a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property." Corso v. Crawford Dog & Cat Hospital, Inc., 415 N.Y.S.2d 182 (N.Y. Civ. Ct. 1979). However, commentators have observed that despite the symbolic value of such decisions, they seem to be relatively few in number and they have had "very little precedential value." Hankin, *supra* note 145, at 345.

[146] ROBINSON, CRIMINAL LAW 331 (2ed.) ("all American criminal codes bar the use of deadly force solely to defend property"). As one commentator summarized the rule: "The common-law rule clearly allows one in lawful possession of any property to use reasonable but not deadly force to protect that property. . . . Under this rule the use of deadly force need not result in death to constitute an unjustified act, . . . Neither the objective magnitude nor the subjective importance of the threatened loss will justify the use of deadly force solely to protect property; but such factors may be considered in determining whether the threatened interference with property was such provocation that the slayer acted under a violent passion, and thus was guilty only of manslaughter." Comment, *The Use of Deadly Force In The Protection of Property Under The Model Penal Code*, 59 COLUM. L. REV. 1212, 1214–1215 (1959).

[147] *See, e.g.*, MPC 3.11.

threatens deadly force against a person.[148] In defense of this absolutist position, the following mantra is often repeated: "preservation of human life is more important to society than the protection of property."[149] There is good reason to celebrate such a rule as a general matter; this "commitment to proportionality—such as valuing human life, even that of a law breaker, over property interests—is the mark of a civilized society."[150]

Nonetheless, one might vehemently agree with the proposition that human life is more important than property (and perhaps even a pet), without agreeing that "deadly force," as currently defined, is always and in all situations unreasonable in defense of a pet. Stated differently, the term deadly force is being relied on to suggest a clarity that is untenable. We might agree that shooting someone to prevent them from stealing your basketball or stereo is never reasonable, and still think that striking someone on the head with a stick, or cane as they attempt to kill your pet might be reasonable.[151] Or to use the facts of a famous case from California, one might think serious injury is justified when a man snatches your dog and threatens to throw it into oncoming traffic on a busy highway.[152]

Saying that one may use reasonable force short of deadly force in defense of one's property sounds like a prudent, life preserving policy. But the breadth of deadly force—force that may cause serious injury, maybe just broken bones—reveals that this is a false dichotomy. The

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[148] SUBCRL § 10.6. When the aggressor threatens deadly force, the victim is justified in using deadly force, not because of the defense of property, but because of self-defense.

[149] SUBCRL § 10.6.

[150] Robinson, *supra* note 142, at 303 (explaining that deadly force is not permitted in defense of property because it is deemed disproportionate, but noting that the term non-deadly force is rarely defined or understood).

[151] There are a number of reported cases in which an individual killed a person who was trying to steal his livestock, for example one's chickens. These animals were not companion animals and so it is, perhaps, easier for a court to condemn the use of deadly force. But there is no clear reason why the outcome would be different under existing doctrine if one were stealing another's dog. Commonwealth v. Beverly, 34 S.W.2d 941 (Ky. 1931) (upholding homicide conviction for killing man who was stealing defendant's chickens). These animal theft cases are also interesting because they reveal the implicit limits of the aggressor or provoker doctrines. As discussed, *infra* Part III, many states and the MPC provide that one cannot rely on self-defense if they are the initial aggressor or the one who "provoked" the encounter. MPC 3.04(2)(b)(ii). If the chicken stealer is met with unjustified deadly force, then surely he can respond with such force in self-defense.

[152] Ron Harris, *Man Convicted in Dog Road Rage Case*, ABC NEWS (June 19, 2013), http://abcnews.go.com/US/story?id=93066&page=1 (documenting a case where a man throw the dog to its death in front of the victim); *see also Man Throws Dog into Traffic During Robbery In San Francisco*, EXAMINER (Dec. 29, 2012), http://www.examiner.com/article/man-throws-dog-into-traffic-during-robbery-san-francisco (reporting on a case where a robber grabbed the victim's barking dog and hurled it into oncoming traffic).

difference between reasonable and deadly force is often much less than it seems, and the ambiguity in the scope of what constitutes deadly force means that many pet-defenders could be forced to convince a jury that their force was not reasonably likely to cause serious injury, or face an assault or homicide conviction.

For the reader familiar with criminal law, it is worth pausing to acknowledge that in some cases of defense of property, deadly force is justified. If one's defense of property is met with deadly force on the part of the aggressor, then it is well settled that the victim may respond with deadly force. In other words, it is really a self-defense, or defense of others claim, not a defense of property, that justifies the injury to another person. More interesting are situations in which the aggressor threatens the victim with death if he does not turn over an item of property. For example, what if the attacker threatens the victim with death if he does not turn over his dog to the attacker? Might this be a situation in which self-defense principles would allow deadly force? Perhaps surprisingly, under the law of several jurisdictions the use of deadly force may not be permitted. When a dispute over personal property results in deadly threats, the general rule is that the victim should relinquish the disputed property to the aggressor.[153] It has been said that "[t]o reject such a rule . . . would be to cause personal injury that could be avoided by sacrifice of property, and to cause a conflict that might escalate into a defense of self or others with serious injury to all parties."[154]

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[153] As a leading treatise summarizes the issue: "If retreat is to be preferred over use of deadly force, then it might be argued that certain other alternative steps which would terminate the dangerous encounter should likewise be required in lieu of self-defense with deadly force. Thus, the Model Penal Code [Sec. 3.04] expressly provides that deadly force is not permissible if the actor knows he can avoid the necessity for its use 'by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action which he has no duty to take.'" SUBCRL § 10.4 (identifying about ten states with such provisions). Of course, by the plain text of these statutes (and the MPC), the duty to surrender the property seems to arise when the attacker asserts a "lawful right of possession." So one who is threatened to kill if he does not simply relinquish control of his dog might have a right to use deadly force. *See also* CRLDEF § 41. Of course, then, it is strange in the extreme to nullify such a defense so long as the perpetrator uses the magic words "this is my dog," or otherwise claims a right to handle or injure the animal.

[154] CRLDEF § 131 ("the situation is one for which the ultimate potential for serious harm is best avoided by sacrificing the property interest"). The theory behind this exception to the general rule that one may use deadly force when he is threatened with deadly force is that when the threat is conditioned on resolving a property dispute, "it is better to avoid such physical confrontations altogether and to have the matter settled through legal proceedings." CRLDEF § 41. *But see* Francis H. Bohlen & John J. Burns, *The Privilege to Protect Property by Dangerous Barriers and Mechanical Devices*, 35 YALE L.J. 525, 547 (1926) ("This does not mean that a man may not defend himself by force which threatens death or serious bodily injury to his assailant against an attack which threatens similar injury to him, even though his assailant's threat to kill or wound him is conditioned upon his refusal to permit the assailant to enter his dwelling or to rob him of

Such a rule seems reasonable when all that is in dispute is an umbrella, but what if it is your dog? Imagine that someone makes a threat even more hostile than the one in the introductory hypothetical. What if the boy in the park says, "Give me your dog—it is my dog now because you are in my park—or I will kill you." It is a threat to the pet owner's very life, and yet under the Model Penal Code and the prevailing approach of most states, when the necessity of using deadly force can be avoided by "surrendering possession of a thing," the use of deadly force is not permitted.[155]

In short, the defense of property rules provide little comfort to one who wishes to defend his pet from an attack.[156] The promise that one can use reasonable force in defense of one's property rings hollow when one considers the potential breadth of the category of deadly (non-reasonable) force.[157]

2. Self-defense and Defense of Others

The doctrines of self-defense or defense of others as currently constructed will never apply to justify a killing done in defense of animals. The crux of these defenses is that another *person* was in imminent danger

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his property[;] . . . he is not compelled to relinquish either the possession of his chattels or the exclusiveness of the possession of his dwelling house.").

[155] MPC 3.04(2)(b)(ii).

[156] The one possible exception to the above analysis is Texas. TEXAS PENAL CODE §§ 9.41–42. Under these provisions an individual may use deadly force to defend property, including personal property in a variety of statutorily enumerated instances. By in large, the list reflects the sort of dangerous felonies discussed below, *infra* subpart 3 of this Part, but there are some exceptions. For example, deadly force might be permitted to prevent a theft of property at night. As a leading treatise has summarized the law, "To justify the use of deadly force to protect property . . . the defendant [must] reasonably believe[] it is immediately necessary to prevent the imminent commission of arson, burglary, robbery, aggravated robbery, theft at night, or criminal mischief at night, or to prevent an individual from escaping with property after a burglary, robbery, aggravated robbery, or theft at night. [In addition], the use of deadly force is still not justified unless the defendant reasonably believed that the property could not be protected or recovered by any less extreme means or that the use of less than deadly force would expose him or her or another to a substantial risk of death or serious bodily injury." TXPG-CRIM § 15:79.

[157] Moreover, even when non-deadly force is initially used, when the violence escalates it is very difficult to apportion blame. The slippery slope towards deadly forced was aptly noted by a commentator around the time of the Model Penal Code's drafting. Comment, *The Use of Deadly Force in the Protection of Property Under the Model Penal Code*, 59 COLUM. L. REV. 1212, 1215 (1959) ("Difficult issues arise where the privileged use of moderate force gives rise to mounting force on both sides until deadly force becomes necessary to avoid death or serious bodily harm. In such situations, presumably, the use of deadly force by the actor will be justified unless it can be shown beyond a reasonable doubt that the actor was the first to cross the line between reasonable moderate force and deadly force.").

of great bodily harm or death.[158] Stated differently, one can use the sort of force that is likely to cause serious injury to the attacker if, and only if, there is a reasonable apprehension that the attacker is about to cause a death or great bodily injury.[159]

The only way that self-defense or defense of others could be implicated by the defense of one's pet is if the attacker responded with deadly force to the animal defender's use of non-deadly force. That is to say, the pet owner is entitled to use non-deadly force in defense of his pet and if the attacker responds with deadly force, then self-defense would justify using deadly force in response. To use the hypothetical from the introduction, when faced with a threat to his dog, James could push the man with a knife, or hit him in the torso with his cane, and if the aggressor responded with deadly force towards James, then James could protect himself (not his dog) with deadly force. The problem, however, is twofold. First, the pet defender must take care that the initial force he uses is not likely to produce any serious injury to the aggressor. If the pet defender uses force that is likely to cause serious injury, then he has used deadly force and it will be he who is deemed to have escalated the situation to one potentially warranting self-defense by the other party.[160] Second, if the pet defender is older and weaker than the aggressor, then provoking the aggressor with force that is unlikely to cause a serious injury may put the pet defender in a situation in which he cannot effectively defend himself.[161]

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[158] *See, e.g.*, Commonwealth v. Houston, 127 N.E.2d 294 (Mass. 1955).

[159] Christine Emerson, *United States v. Willis: No Room For the Battered Woman Syndrom in the Fifth Circuit?*, 48 BAYLOR L. REV. 317, 323 (1996) ("In general, self-defense permits the use of reasonable force against another person when one reasonably believes that person is threatening her with imminent bodily harm and when such force is necessary to prevent the threatened harm. The law of self-defense "limits the use of deadly force to situations (in which) its use is (immediately) necessary to protect the actor (from imminent) death or serious bodily injury.") (footnote omitted).

[160] Part III *infra*. It is worth noting that even a credible threat of deadly force—i.e., a threat that is reasonably believable—justifies the use of deadly force. Wayne R. LaFave, 2 SUNST. CRIM. L. § 10.4 (2d ed.). That is to say, even if the man defending his dog merely threatens to kill the attacker, if such a threat conveys a reasonable likelihood of bodily injury, then a defense is justified. *Id*. (treating a "threat to inflict such harm" as equivalent to attempting to cause bodily injury for purposes of a self-defense analysis).

[161] Like the victim of domestic abuse who faces only non-deadly force, he or she may be effectively deprived of self-defense. If they use deadly force, they are likely guilty of murder. And as the weaker party, if they use non-deadly force, they are likely to only incite more violence. Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting A Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11, 53 (1986) ("One must suffer nondeadly harm if use of deadly force would be the only way to avoid it.").

3. Deadly Force to Prevent Felonies

The Model Penal Code's self-defense provision provides that deadly force is permitted when "such force is necessary to protect [one's self] against death, serious bodily harm, kidnapping, or sexual intercourse compelled by force or threat."[162] A number of states have adopted an even broader version of this approach and permitted deadly force to prevent forcible felonies.[163] At first blush, then, it would seem that at least in those states that recognize a form of felony animal abuse, which is a majority of states at this point,[164] the use of deadly force to prevent the injury of one's pet might be permitted.

Upon closer examination, however, the lists of felonies for which deadly force can be used is narrowly circumscribed so as to largely replicate the sort of force permitted under self-defense.[165] If one is facing threats of serious physical injury, for example through an armed robbery, then deadly defensive force is permitted. But when one is threatened with death or serious injury, they do not need a special felony prevention defense because self-defense covers the same ground. Likewise, in most

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[162] MPC 3.04 (2)(b).

[163] FLA. STAT. § 776.012 (providing for deadly force to stop a forcible felony); O.C.G.A. § 16-3-24 (allowing deadly force in defense of property when a forcible felony is underway); 720 ILCS 5/7-1 (allowing deadly force to prevent a forcible felony); § 563.031 R.S.MO. (allowing for deadly force when preventing a forcible felony against "himself, or herself or her unborn child, or another"); MONT. CODE ANN. § 45-3-102 (allowing for deadly force to prevent the commission of a forcible felony); 21 OKL. ST. § 1289.25(D) (codifying a "stand your ground" law that allows for the use of deadly force "to prevent the commission of a forcible felony" when the person using deadly force is not engaged in unlawful activity).

[164] *See e.g.*, Kara Gerwin, *There's (Almost) No Place Like Home: Kansas Remains in the Minority on Protecting Animals from Cruelty*, 15 KAN. J. L. & PUB. POL'Y 125 (2005).

[165] *See* Green, *supra* note 7, at 37–39 (1999) ("At early common law, a citizen was thought to be justified in using deadly force whenever the use of such force was necessary to prevent the commission of a felony. It should be understood, however, that, at common law, most felonies involved danger to life, and most were punishable by death. By committing, or attempting to commit, a felony, the felon 'forfeited' his right to life."). *Id.* ("In place of the common law rule, there developed a rule, adopted in a majority of jurisdictions, that limited the use of deadly force to the prevention of 'forcible,' 'deadly,' 'atrocious,' or 'violent' felonies, when such force is necessary to prevent such a felony. Thus, according to the majority rule, a proprietor of a store would be justified in shooting an aggressor who was committing armed robbery, but not a mere shoplifter."); J. David Jacobs, *Privileges For the Use of Deadly Force Against a Residence-Intruder: A Comparison of the Jewish Law and the United State Common Law*, 63 TEMP. L. REV. 31, 49–50 (1990) ("there is no longer a right to kill in order to prevent *any* felony."); *see also* State v. McIntyre, 477 P.2d 529, 535 (Colo. 1970) (recognizing that there is no right "to shoot another simply because that other person is committing an act which under the statutes might be considered a felony," rather a true and reasonable fear of death or grave bodily injury is required); *see also* Green, *supra* note 7, at 37–39 (1999) ("When a person is directly threatened with a violent crime such as murder, rape, aggravated battery, or armed robbery, the privilege she has to prevent such crime overlaps with the basic self-defense or defense of others privilege.").

instances the sort of force or threat necessary for forcible rape would involve threats of serious physical harm that would also justify self-defense.[166] Moreover, even as the list of felonies that might qualify expands in some jurisdictions, it is always limited to so-called atrocious or forcible felonies—things like carjacking, bombing, arson, and robbery.[167] The common denominator is that the felonies for which their prevention may justify deadly force tend to involve the very sort of threats to one's safety and security that would justify self-defense or defense of others.[168] Illustrative is the Missouri statute which permits deadly force to prevent forcible felonies and defines forcible felony as "any felony involving the use or threat of physical force or violence against any individual, including but not limited to murder, robbery, burglary, arson, kidnapping, assault, and any forcible sexual offense."[169]

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[166] Don B. Kates & Nancy Jean Engberg, *Deadly Force Self-Defense Against Rape*, 15 U.C. DAVIS L. REV. 873, 903–04 (1982).

[167] In Florida, for example, a forcible felony is: "treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; and any other felony which involves the use or threat of physical force or violence against any individual." FLA. STAT. § 776.08; *see also* 720 ILCS 5/2-8 (limiting in a similar manner the range of felonies for which deadly force is appropriate). Some states make the redundancy with self-defense even more clear. Georgia, for example, has a concise definition of forcible felony: "any felony which involves the use or threat of physical force or violence against any person." And Montana adopts a similarly succinct definition of forcible felony that requires the felony to include "violence against any individual." MONT. CODE ANN., § 45-2-101(24).

[168] A prominent exception that commentators have seized on is kidnapping. Depending on the statutory definition of kidnapping it is possible that there would be no threat of serious, imminent physical injury. *See, e.g.*, Dressler, *supra* note 117, at 254 (citing the MPC comments and noting that when one parent in a custody dispute unlawfully takes the child, there may not be any threats of death or great bodily injury). *See also* Gree, *supra* note 7, at 37–39 ("The relevant question, though, is whether one is justified in using deadly force to prevent the commission of a crime even when such commission poses no direct threat of death or serious bodily injury. For example, should the privilege apply in circumstances involving a simple theft or nonviolent burglary? Would it be justifiable to use deadly force to prevent an arsonist from burning a deserted building in an otherwise empty field?"). Other cases have even noted that when the rapist is not actually threatening physical harm beyond the sexual act itself, deadly force is not permitted. Christine R. Essique, *The Use of Deadly Force by Women Against Rape in Michigan: Justifiable Homicide?*, 37 WAYNE L. REV. 1969, 1980–82 (1991) (discussing a Michigan Supreme Court decision and noting that although the court acknowledged that "[o]nly an archaic system of justice would suggest that a woman cannot use deadly force to defend herself against common-law rape," the court ultimately held that "the authorization of deadly force in self-defense to repel a criminal sexual assault [applied] only "when confronted with force that the person reasonably believes could result in imminent death or serious bodily harm").

[169] § 563.011 R.S.Mo. Describing the sanctioning of deadly force by Model Penal Code to fend off crimes other than murder, commentators have noted that the Code's focus really is on protecting human life. *See, e.g.*, Comment, *The Use of Deadly Force in the Protection of Property Under the Model Penal Code*, 59 COLUM. L. REV. 1212, 1225-26 (1959) ("If the presence of violence were used to define the occasion for the privilege

In sum, even in those states that recognize certain forms of animal abuse as an aggravated felony,[170] there is no right to use force likely to cause serious bodily injury to prevent these crimes.

IV. REFORMS TO BRING THE LAW INTO ACCORD WITH OUR VALUES

As the discussion in Part III emphasized, the existing criminal defenses do not countenance an opportunity for one to use serious force in defense of his pet.[171] Self-defense, defense of property and even the ability to use force to prevent felonies all fail to provide one with a realistic opportunity to use substantial force in defense of a pet.[172] Because animals are property in the eyes of the law and because the protection of property does not justify deadly force, one who uses deadly force in defense of his pet is guilty of murder if the attacker dies, or aggravated assault if he lives. This Part considers a range of possible doctrinal responses to this state of affairs.

A. Leave the Law as Is

One response to the law's failure to provide a readily available defense for someone who defends his pet with force likely to cause serious injury to another person is to do nothing. On this view, violence in the defense of an animal, even one's most cherished pet, is always disproportionate. And, of course, there is something to this notion that we ought to shape the law to avoid violence to the greatest extent possible. If we think that resorting to physical violence that is likely to cause another person serious injury is not justified in the service of protecting a pet, then the law is in accord with our sense of justice.

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it would seem that the focus would be shifted from the defense of property, to which the circumstances of the taking are irrelevant, to the danger to human life manifested by this sort of behavior. The code as drafted clearly maintained this distinction by sanctioning the use of deadly force only where the actor believed that its use was necessary to prevent immediate or future peril to life or great bodily harm to the actor or others.").

[170] *See, e.g.*, FLA. STAT. § 828.12(2); 510 ILCS 70/3.02(c); and ARIZ. REV. STAT. ANN. § 13-2910.

[171] In some states the possibility of a viable defense would increase if the attacker was confronting the victim in his home. If for example, an attacker unlawfully entered one's home to steal or injure an animal, then there may be a defense of dwelling defense. In New York, for example, deadly force may be used when stopping a trespasser from committing burglary. NY CLS PENAL Law § 35.20. Even more relevant, in Colorado deadly force may be used within one's home upon any unlawful entrant that the citizen reasonably believes has or will commit any crime in addition to the unlawful entry. COLO. REV. STAT. § 18-1-704.5 (requiring that the victim reasonably believe that the entrant will use some force, no matter how slight, against one of the occupants). Moreover, some states include within the definition of residence "any dwelling, motor vehicle, or place of business." O.C.G.A. § 16-3-24.1.

[172] Other defenses such as necessity and duress are even less likely to provide a viable defense.

As was acknowledged early in this Article, there is no true moral consensus in a morally pluralistic society, and perhaps it could be considered a misuse of the criminal law to manipulate its doctrine so as to facilitate the protection of non-humans. Under this view, we ought to combat animal violence through existing (or additional) cruelty crimes and refuse to allow persons to exercise serious physical force in defense of a pet. The consequences of such an approach, however, should not be soft-pedaled. Legislators and courts should take a clear eyed look at the current state of the law, the value of pets in American society, and consider whether prohibiting serious force, even when one's pet is in imminent danger of death, is appropriate.

B. Common Law Solutions

If one believes that despite the absence of complete moral consensus, there is some transcendent moral agreement among Americans about the importance of pets, then it is appropriate to consider possible doctrinal fixes. There are a variety of common law and statutory developments that courts and legislatures could undertake to eliminate or minimize the risk that a reasonable pet defender will not be guilty of murder.

1. Recognize Animals as a Unique Type of Property

One potential legal reform would be the recognition of pets as unique property deserving of a correspondingly unique defense of property defense. Instead of a general defense of property that permits only reasonable, non-deadly force, the law would permit more substantial, serious force in defense of one's pets.[173]

By recognizing animals as a unique type of property—animate property[174]—the law would permit more force than that allowed in defense of ordinary property, but perhaps, less force than is allowed in defense of another human being.[175] In other words, even as property,

[173] Recent neuroscience research has found that dog brains function in ways that are surprisingly similar to human brains, leading one neuroscientist to say, "But now, by using the M.R.I. to push away the limitations of behaviorism, we can no longer hide from the evidence. Dogs, and probably many other animals (especially our closest primate relatives), seem to have emotions just like us. And this means we must reconsider their treatment as property." *Dogs are People, Too*, THE NEW YORK TIMES (Oct. 5, 2013), http://www.nytimes.com/2013/10/06/opinion/sunday/dogs-are-people-too.html?pagewanted=2&_r=0&emc=eta1.

[174] Scholars have coined the term animate property in other contexts, such as tort law, to describe the unique nature of the injuries to animals that pet owners may suffer. *See, e.g.*, David Favre, *Living Property: A New Status for Animals Within the Legal System*, 93 MARQ. L. REV. 1021, 1029 (2010).

[175] On the other hand, such a reform would do nothing to improve the status of animals as something more than property in the eyes of the law. For the many scholars who

animals would be deserving of a status that entitles them to greater protection than basic personal property.

A slight variation to the hypothetical presented in the introduction illustrates this point. Imagine that James was walking through the park when another man confronted him and told him to give him his new shoes. When James refused to give up his shoes, the troublemaker announced, "You give me the shoes or I am going to throw paint on them. Either I get the shoes or neither of us does." Assume that the threat of a paint attack was credible and imminent. James loves his new shoes and has every right to protect them from defacement; however, certainly the law should not permit the efforts to kill another person by, for example, the use of firearm to protect the shoes. Indeed, even a substantial amount of non-lethal force in the protection of shoes—property that is replaceable—will almost always be disproportionate. A modified defense of property that recognizes animals as a distinct property deserving heightened force in their defense, however, might justify the use of serious force that would not be permitted in defense of one's shoes. Striking one with a walking stick or the use of a knife might, for example, be permissible in defense of one's pet under a modified defense of property scheme.

Moreover, it might not be a radical departure to go so far as to recognize animals as a distinct type of property deserving of deadly force protection. Certain types of property already benefit from heightened protections under the law.[176] For example, even the Model Penal Code, permits deadly force (without a duty to retreat) when one's dwelling is threatened.[177] Under this rule, there is "no requirement that the homeowner be in danger, or even apprehension, of receiving any physical harm" from the home invasion, it is enough that his interest in real property is threatened.[178] Several states follow this approach, and Georgia law goes so far as to treat one's car as a dwelling.[179] In recent years, the

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recognize the property status of animals as one of the greatest impediments to general legal reforms that would benefit animal welfare, then, such a defense would be substantially unappealing. *See, e.g.*, Gary Francione the failure of our laws to ensure the safety and well being of non-human animals by relegating them to the status of personal property. GARY FRANCIONE, ANIMALS AS PROPERTY (1995).

[176] *See, e.g.*, BRUCE WAGMAN, ANIMAL LAW CASES AND MATERIALS 58 (Carolina Press 2010).

[177] Model Penal Code § 3.06(3)(d)(i).

[178] Green, *supra* note 7, at 17 (1999) (explaining that Model Penal Code and states following the approach allow one to "use deadly force against an intruder whenever the intruder intends to dispossess a person entitled to possession of his dwelling").

[179] Outside of Georgia, it appears to be rare for the law to recognize any property as deserving of deadly force protection. Even in states where the law defines burglary as including a car, it does not typically follow that deadly force can be used in defense of the vehicle. As explained in Part II(b)(3), deadly force to prevent felonies that involve a threat to one's life. *Supra* text accompanying notes 163-166. California is a striking

rise of so-called make-my-day laws have further entrenched this view of one's home as entitled to heightened protection. For example, Colorado law provides:

> Any occupant of a dwelling is justified in using any degree of physical force, including deadly physical force, against another person when that other person has made an unlawful entry into the dwelling, and when the occupant has a reasonable belief that such other person has committed a crime in the dwelling in addition to the uninvited entry, or is committing or intends to commit a crime against a person *or property* in addition to the uninvited entry, and when the occupant reasonably believes that such other person might use any physical force, no matter how slight, against any occupant.[180]

One's home, in other words, is recognized as a special class of property for which, in a broader range of circumstances,[181] deadly force may be used in its defense. Building on this notion that some property is entitled to heightened protection under the law, perhaps animals could also be recognized as a unique category of property such that, at least in certain circumstances, the use of heightened or even deadly force would be permitted. Deadly force must not be the first reaction, and it would not be justified in all circumstances, but a modified defense of property might recognize that when one is unable to retreat and no lesser force will ensure the safety of the pet, serious force is permissible.

2. Expand Self-defense

Another option for legislatively or judicially enhancing the robustness of a defense of animals would be to recognize that injuring one's pet justifies an act in self-defense. Under existing self-defense doctrine, the

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example of this principle because burglary is broadly defined. As a leading treatise explains:

> Examples of forcible and atrocious crimes [that would justify homicide] are murder, mayhem, rape, and robbery. Burglary has been included in the list of such crimes, but in view of the wide scope of burglary under the California Penal Code, it cannot be said that under all circumstances burglary constitutes a forcible and atrocious crime. Where the character and manner of the burglary do not reasonably create a fear of great bodily harm, there is no cause for exaction of human life or for the use of deadly force.

1 Witkin & Epstein, CAL. CRIMINAL LAW (3d ed. 2000); *id.* (Defenses §§ 80, 81).

[180] COLO. REV. STAT. § 18-1-704.5 (emphasis added).

[181] Catherine L. Carpenter, *Of the Enemy Within, the Castle Doctrine, and Self-Defense*, 86 MARQ. L. REV. 653 (2003).

question is whether the injury or death of one's animal could ever sufficiently harm the person so as to justify defensive action on behalf of the person.

There are rare instances where the answer is certainly yes. Most straightforward are examples where the killing or stealing of an animal is intended to cause serious physical injury to the person in light of the circumstances. For example, the killing of certain service animals may be done with this intent and with a potentially lethal effect. If a legally blind person's dog is killed while she is hiking in the wilderness with no one around to assist her, then the death of the dog could reasonably and foreseeably result in her death. Likewise, if a service dog trained to alert someone of an impending seizure is killed, then the seizure may surprise the person and prove fatal.[182] In a narrow range of circumstances, then, it is conceivable that injuring or stealing one's service animal[183] might trigger a right to self-defense in defense of the animal.

A more difficult question is whether self-defense could serve as a plausible justification for the use of serious force in defense of a pet even when the pet is not a service animal linked directly to one's survival. The question is probably best framed as whether self-defense is ever permitted so as to avoid a serious mental or emotional injury. For unrelated reasons, some prominent commentators have concluded that self-defense must evolve such that, at least in certain circumstances, the use of serious or deadly force is permitted even when no immediate physical injury is likely. Professor Stephen Gilles, for example, has eloquently critiqued the narrow conception of self-defense:

> The problem then is that, as usually stated, the right to use deadly force in self-defense requires that one be threatened with death or serious bodily harm. Nevertheless, it is exceedingly difficult to defend a conception of self-defense that categorically bars persons from defending themselves against threats of serious mental injury. Imagine, for example, that someone is attempting to shoot you with a tiny drug-laden dart that poses no risk of serious physical injury, but will make you irreversibly schizophrenic or

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[182] "Service dogs function as 'eyes' for the blind, warn epileptics of impending seizures, and perform tasks for individuals with muscular or arthritic conditions. Canine companions can also aid hearing-impaired persons by alerting them to household sounds such as the telephone or a crying baby, and equine therapy is routinely used to build strength and coordination in individuals with cerebral palsy and other neuromuscular conditions." Livingston, *supra* note 48, at 810 (footnote omitted).

[183] Service animals are not all dogs. *See* Rebecca Skloot, *Creature Comforts*, THE NEW YORK TIMES (Dec. 31, 2008), http://www.nytimes.com/2009/01/04/magazine/04Creatures-t.html?pagewanted=all&_r=0.

> psychotic. There would be something seriously amiss with a conception of self-defense that prohibited you from using deadly force to defend yourself from an attack of this dangerousness. Consistent with that intuition, self-defense law has long allowed persons who are imminently threatened with rape to use deadly force against their attackers—whether or not they expect to suffer serious physical injuries—because of the grave emotional and dignitary injuries rape typically inflicts. And in any event, serious mental illnesses often do involve a serious 'physical' or 'bodily' injury, namely, an injury to (or dysfunction of) the brain.[184]

A capacious view of self-defense doctrine is particularly salient among scholars who have sought to reduce the criminalization of spouses who ultimately kill their abusers. For example, Charles Ewing famously argued that self-defense doctrine should be reformed to account for the extreme "psychological injury" that battered spouses suffer.[185] Self-defense, according to Ewing, ought to be available when the psychological injury will cause the victim to feel that his life has "little if any meaning or value."[186] Other scholars have advanced similar arguments in favor of a capacious form of self-defense that protects one against egregious emotional injuries.[187]

Of course, no one would advocate that any psychological injury warrants deadly force, or hurt feelings will result in justifiable homicides. But the death of a companion animal is documented as producing severe psychological injury. If self-defense is conceived of broadly so as to protect against certain emotional or dignitary harms, then, the defense of animals may come within the umbrella of self-defense. The social science data is clear "that companion animals promote the emotional wellbeing of their human caregivers in a number of different ways and that emotional wellbeing is often seriously disrupted when a companion animal dies, especially in a premature or violent manner."[188] Accordingly, to the extent that scholars have advocated a broader notion of self-defense that

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[184] Stephen G. Gilles, *Roe's Life-or-Health Exception: Self-Defense or Relative-Safety?*, 85 NOTRE DAME L. REV. 525, 559 (2010) (footnote omitted). For additional discussion of the view that emotional harm may be no less damaging than physical harm, *see* Marian Allsopp, EMOTIONAL ABUSE AND OTHER PSYCHIC HARMS 91 (2013).

[185] C. EWING, BATTERED WOMEN WHO KILL: PSYCHOLOGICAL SELF-DEFENSE AS LEGAL JUSTIFICATION 41–43 (1987).

[186] *Id.* at 80. *See also* David L. Faigman, *Review Essay: Discerning Justice When Battered Women Kill*, 39 HASTINGS L.J. 207, 227 (1987) ("Ewing recognizes that his proposal would provide a defense to other defendants and cites battered children who kill their battering parents as one possible example.").

[187] *See e.g.*, Charles P. Ewing, *Psychological Self-Defense: A Proposed Justification for Battered Women Who Kill*, 14 LAW & HUM. BEHAV. 579, 586 (1990).

[188] Livingston, *supra* note 48, at 829.

accounts for severe psychological or dignitary injury, such a conception might permit the use of deadly force to protect one's pet.[189]

C. Statutory Solutions

Although courts enjoy the inherent authority to create criminal defenses,[190] there are a variety of prudential concerns that counsel in favor of a legislative solution. Statutes can be vague and unworkable if poorly drafted, but a well drafted statute provides clarity that is often unavailable in a judicial holding. A statute provides a single isolated set of text that governs the circumstance in question, whereas a court decision might be distinguished, or contain seemingly conflicting statements as to the nature and scope of the rule. Moreover, a statute as opposed to a court decision on a controversial topic such as defending animals may be more likely to enjoy public acceptance.[191] This subpart will briefly consider two potential statutory solutions. The first reflects a general clarification to the deadly force definition, and the second is a comprehensive defense of animals provision. While both are imperfect, the proposed statutes would seem to better reflect the value of pets in our society without sanctioning substantially more human violence.

1. The Colorado (Partial) Solution

Perhaps the most important contribution that this foray into animal law could have for criminal law doctrine is to expose the oft chimerical nature of the distinction between deadly force and non-deadly force. A professional kickboxer might kick someone in the face and kill him but be deemed to have used non-deadly force. Another person might hit someone with a hiking stick and not kill them but be deemed to have used deadly force. Asking a court to decide whether someone used deadly force, and if so, depriving them of a defense to charges of murder or assault puts many would be pet defenders at risk of serious convictions.

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[189] It has been observed that the use of force that causes the loss of more human lives than it saves can still be justified. For example, one person might kill two or more people as an act of self-defense. As Paul Robinson has explained, "Permitting the actor to cause greater physical harm than he avoids does not mean that the balancing of harms of the general justification defense has been rejected. [O]ne may properly add to the evil of physical harm to an innocent, a variety of intangible evils that arise from such aggression, evils that may well be more significant to society than the physical harm threatened. In the case of the thugs, for example, the lives of the three thugs are balanced against the lives of the three townspeople *plus* the compelling societal interest in preserving the right of bodily autonomy and condemning unjustified aggression." CRLDEF § 131. In other words, important social values are part of the balancing in assessing how much force may be used against human actors. If there is a strong social interest in protecting pets, then this should emerge as a relevant feature of the balancing for various defenses, including self-defense.

[190] *See, e.g.*, United States v. Dixon, 509 U.S. 688 (1993); Dripps, *infra* note 226.

[191] *See, e.g.*, JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH (2006).

One substantial fix for the conundrum presented in this Article, then, is to carefully limit the definition of deadly force and allow all reasonable force, short of deadly force, to be used in defense of animals. That is to say, rather than altering the common law defenses, one could simply amend the statutory definition of deadly force, which serves as the trigger for determining whether a defendant is entitled to a defense. A defendant is entitled to an instruction on, for example, a defense of property defense where he uses non-deadly force.[192] And thus narrowing the definition of deadly force may allow many defendants the opportunity to raise a defense when someone is seriously injured while attempting to kill or maim a pet.

Colorado's statutory definition of deadly force may be a useful model in this regard. Colorado Revised Statute § 18-1-706 provides:

> A person is justified in using ***reasonable*** and appropriate physical force upon another person when and to the extent that he reasonably believes it necessary to prevent what he reasonably believes to be an attempt by the other person to commit theft, criminal mischief, or criminal tampering involving property, but he may use ***deadly*** physical force under these circumstances only in defense of himself or another as described in section 18-1-704.[193]

So up to this point, the Colorado law is largely identical to the majority rule. All "reasonable force" is permitted in defense of property, but deadly force can only be used in defense of one's self or another person. However, the key difference is the Colorado definition of deadly force. Under Colorado law, deadly force is defined as only that force "the intended, natural, and probable consequence of which is to produce death, and which does, in fact, produce death."[194] In other words, force is treated as deadly only if it is intended to kill, and does in fact result in death.[195]

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[192] Where the trial court finds that deadly force was used, then the defendant is not entitled to a defense instruction. Accordingly, there are numerous cases where the defendant appeals, for example, the absence of a self-defense instruction; however, where the defendant used an amount of force that is per se unreasonable—deadly force against non-deadly force, for example—the instruction is not permitted.

[193] COLO. REV. STAT. § 18-1-706. Notably criminal mischief occurs when a person "knowingly damages the real or personal property of one or more other persons." COLO. REV. STAT. § 18-4-501. And one is guilty of criminal tampering with property if "he tampers with property of another, with intent to cause injury, inconvenience or annoyance . . . ." COLO. REV. STAT. 18-4-506 (1973).

[194] COLO. REV. STAT. § 18-1-901(3)(d) (2005).

[195] People v. Vasquez 148 P.3d 326, 328 (Colo. App. 2006) ("the manner in which the word 'intended' is used in Colorado's 'deadly physical force' definition suggests that it is to be given effect independent of the assessment of the natural and probable consequences of one's acts."); People v. Ferguson, 43 P.3d 705, 709 (Colo. App. 2001)

Accordingly, under Colorado law all reasonable force may be used in defense of property, and only truly lethal force—force which is accompanied by an intent to kill and which does in fact kill—is strictly prohibited. Under such a statute, any defensive force used in protection of a pet that was deemed reasonable would be lawful. Under the Colorado framework, the problem of line drawing regarding what constitutes deadly force is averted and the inquiry becomes one of pure reasonableness in the circumstances.[196] This approach is similar to the prevailing approach for defending property insofar as the ultimate question is generally left to the jury. But the question that the jury must answer under the two approaches is very different. In most jurisdictions, the dispositive question in a defense of animal case will be whether the defendant used deadly force. That is, the jury's emphasis will be on whether force was likely to cause serious injury or death, and if so, the pet defender is guilty of a crime. By contrast, under a narrow definition of deadly force, like that employed in Colorado, the dispositive question is simply whether the force used by the defendant in guarding his pet was "reasonable" under the circumstances.[197] As long as one does not intend to kill and actually kill another human being, reasonable force in defense of one's pet would be permitted under the defense of property framework.[198]

The Colorado statutory solution, however, is not without its problems. First, many might find Colorado's definition of deadly force shockingly broad. The notion that one only uses deadly, and therefore unjustified force, in defense of property when he *intends* and *actually causes* death has the effect of replacing the opaqueness of other state statutory formulations with a surprisingly narrow general rule. Under the Colorado rule, because it is not uniquely cabined to animal defense, a defendant who kills another person in defense of some item of personal property will not be deemed to have used deadly force unless he intended to kill the

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(holding that physical force is not deadly force if the force used by a defendant either did not cause death *or* was not intended to produce death).

[196] It is likely that a reasonableness analysis in the context of defense of animals would result in a system whereby persons were permitted to use the least amount of force necessary to actually protect their pet. This is consistent with the use of force policies for many police departments where "Officers are directed and ordered to 'use the least amount of force reasonably necessary to accomplish their lawful objective while safeguarding their own lives and the lives of others.'" Joseph J. Simeone, *Duty, Power, and Limits of Police Use of Deadly Force in Missouri*, 21 ST. LOUIS U. PUB. L. REV. 123, 172 (2002).

[197] CO-JICRIM 7:21.

[198] The line remains slippery. But asking a jury to assess whether there was reasonable force as opposed to merely non-deadly force would provide animal defenders more confidence that they will not face criminal convictions when they act with force not intended to kill in defense of their pet.

victim.[199] Accordingly, a defendant in Colorado is entitled to an acquittal for killing a person in defense of any item of property so long as he did not intend that death would result. More people who kill in defense of property under such a regime will be entitled to a possible defense. One could, therefore, imagine a legislature preferring a trifurcation of the concept of force such that one could use deadly force (including intentional killing) only to save human life, one could use serious force (perhaps the Colorado definition of deadly force) in defense of pets and one could use non-deadly, minimal force in defense of property. Such a scheme would offer the benefit of valuing animals as, at the very least, something more than chattel, and yet this formulation also reserves a heighted lethal amount of force for those situations where it is necessary for the protection of human life. Of course, such fine tuning of the force definition is difficult—it is desirable in theory, but difficult to implement in practice.

A related problem concerns the scope of ordinary force permitted in defense of a pet under a statutory scheme like that in Colorado. When a pet defender is told that he must act "reasonably" in the circumstances, very little additional guidance about what he is able to do is available. On the one hand, if the social value of pets is really as high as social science studies suggest, then the amount of force a jury will find to be reasonable in defense of a pet is probably rather robust. It might be easier to convince a jury that hitting an aggressor with a bat or hiking stick is reasonable, than it would be to convince them that such an action is unlikely to cause serious injury. But on the other hand, by simply asking the jury whether the pet defender's actions were reasonable, the law begs the ultimate question—what is the value of pet protection. Reasonableness and proportionality are inherent in all justifications, but there is a baseline assumption that killing to protect one's self, for example, is proportionate. Under a statute that permitted reasonable force in defense of a pet, the question of what is reasonable, proportionate force is much less certain. [200]

Simply put, a reasonableness standard in this context—the context of life or death for one's pet—may place to great of a risk on the defendant who wishes to forcefully defend his pet. We might think that such reasonableness tests are appropriate when a would-be iPod thief ends up dead. But, perhaps, the different status of pets justifies a correspondingly greater degree of certainty such that the pet defender has a higher degree of confidence that he will not be going to prison for defending his animal.[201]

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[199] People v. Vasquez, 148 P.3d 326, 329 (Colo. App. 2006) (specifying that an intent to kill is a necessary element of deadly force).

[200] COLO. REV. STAT. § 18-1-706 (permitting reasonable defense of one's property).

[201] In Colorado, it seems that one could be guilty of murder if he uses an "unreasonable" amount of force, even if that force is ordinary rather than deadly force. Colorado no

2. A Comprehensive Statutory Solution

A clearer statutory definition of deadly force, like that adopted in Colorado, would ameliorate some of the uncertainty, but it would also create new questions about the scope of one's right to defend his pet. Further clarifying the scope of one's right to defend a pet, just as the law clarifies one's right to use force in defense of a person or home, would better protect pet defenders and enshrine an emerging moral consensus about the social value of pets. What is reasonable force in the context of pet defense? When is pet defender required to retreat? This subpart proposes a statutory solution that seeks to comprehensively address many of the concerns that are likely to reoccur in the context of forceful pet defense. By identifying problems of doctrine in the defense of animals context, it is also possible to better understand gaps or flaws in criminal law doctrine more generally.

One possible statutory solution would be to enact the following statute:

§X.xxx Use of Force in Defense of One's Pet

(1) The general assembly hereby recognizes that the citizens of STATE have a right to protect their pets from imminent death or serious injury. As used herein, the term "pet" means a domesticated animal kept for pleasure rather than utility, and which the human owner has a close and intimate relationship.

(2) Notwithstanding the provisions governing self-defense and defense of property more generally, when a person has a reasonable belief that another is about to cause serious injury or death to a pet, unless the threat to the animal was a lawful based on a reasonable belief that the animal was going to imminently harm another person he or she is permitted to threaten deadly force in defense of the pet. Except as provided in sections (5) and (6) the initial response to an aggressors

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longer recognizes a defense of imperfect self-defense. And moreover, imperfect self-defense, like self-defense, is limited to circumstances where the person is defending himself or another person, though doing so in an inappropriate manner, for example with excessive force. *See* Laurie J. Taylor, *Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense*, 33 UCLA L. REV. 1679, 1708 (1986) ("when available, imperfect self-defense offers the jury an opportunity to recognize that the defendant's circumstances at least partially determined her reaction to the victim's violence"). CRLDEF § 132.50 ("A defendant's actions in imperfect self-defense (or the defense of others) can result in a conviction for voluntary manslaughter if he intentionally kills a human being based upon an unreasonable but honest belief that circumstances existed that justified deadly force. In the alternative, a defendant's actions in imperfect self-defense can result in a conviction for involuntary manslaughter if he or she unintentionally killed a human being by committing the lawful fact of self-defense in an unlawful manner through the use of excessive force.").

threat of harm to one's pet can be a threat, but not the actual use of deadly force.

(3) The person whose pet is threatened with serious injury or death must, whenever he or she can do so without putting herself or her pet in danger, retreat from the situation. The legality of the threat of deadly force provided for in (2), and the use of such deadly force as provided for in (5) and (6) is conditioned on a reasonable effort to retreat, when possible, by the pet owner.

(4) Any person who initiates or attempts to cause serious injury to the pet of another must retreat when threatened with deadly force. The pet abuse aggressor shall not have a right of self-defense against a threat of deadly force, even if he perceives the threat to be credible unless: (a) he has retreated sufficiently so as to eliminate any objective risk to the pet or the pet owner and is nonetheless pursued with deadly force; or (b) the threat to the animal was a lawful threat based on a reasonable belief that the animal was going to imminently harm another person. A threat of harm to an animal in order to avoid damage to real or personal property shall generally be considered an unjustified threat of pet abuse. Only where the animals potential harm to property would threaten serious imminent injury to a human—e.g., the destruction of an oxygen machine—is the threat of harm to an animal in order to avoid property damage justified.

(5) When a pet abuse aggressor fails to fully retreat or, instead, threatens physical injury, no matter how slight, to the pet owner, the pet owner may use force likely to cause serious bodily injury or death, but must not intend death.

(6) There shall be an exception to the requirement that one threaten or warn of deadly force without using it if the aggressor's threat to the animal is so severe and so imminent that only action and not threats could prevent the harm to the pet. In these circumstances a person has the right to defend his pet immediately with force likely to cause serious bodily injury or death, but must not intend death.

a. Explaining the Statutory Provisions

The key features of such a statutory reform are: (1) not requiring the owner to witness injury to his animal; (2) insisting on a duty to retreat by the aggressor, even when threatened with deadly force; (3) requiring, in most cases, that the pet owner not resort to violence unless he himself is threatened or the animal is in such danger that the violence is absolutely necessary to ensure the safety of the pet.

To be sure, the statute is subject to a variety of critiques and can no doubt be improved upon to suit the needs of a particular jurisdiction. But each section attempts to address one of the key practical problems with the criminal law's current application in this context. The remainder of the paper elaborates on the merits and acknowledges the controversial aspects of each of the proposed statutory provisions.

i. An Absolute Duty of Aggressor Retreat

Although not the first provision of the statute, the statutory duty to retreat imposed on the would-be pet abuser, section (3), is of seminal importance and deserves to be discussed first. This provision is designed to address one of the most shocking aspects of the criminal law's application in this context, and that has gone undiscussed thus far in this Article: The prospect that the animal abuser could kill the pet owner and have an affirmative defense. Setting aside for a moment whether the pet defender should enjoy a unique right to defend his pet, under the law of some jurisdictions it is possible that the pet defender could end up dead, and his killer—the animal abuser—may not be guilty of murder. The rigid duty to retreat imposed on the pet abuser is designed to ensure that this is not possible.

A bit of background is necessary. Surely it strikes many readers as incorrect that the "bad guy," aggressor would not be guilty of murder in these scenarios. Many would assume the "aggressor" cannot benefit from an equitable exception to the law of murder. But as a general matter, it is illegal to use deadly force against a human who does not threaten deadly force against another human. As Wayne LaFave has authoritatively summarized this issue:

> It is generally said that one who is the aggressor in an encounter with another—i.e., one who brings about the difficulty with the other—may not avail himself of the defense of self-defense. Ordinarily, this is certainly a correct statement, since the aggressor's victim, defending himself against the aggressor, is using lawful, not unlawful, force; and the force defended against must be unlawful force, for self-defense. Nevertheless, there are . . . situations in which an aggressor may justifiably defend himself. [Specifically,] [a] nondeadly aggressor (i.e., one who begins an encounter, using only his fists or some nondeadly weapon) who is met with deadly force in defense may justifiably defend himself against the deadly attack. This is so because the aggressor's victim, by using

> deadly force against nondeadly aggression, uses unlawful force.[202]

Perhaps the same point is made more simply by noting that generally one may use deadly force to repel an *unjustified* threat of deadly force.[203] If a pet owner's threatened or attempted defense of his animal is beyond that permitted by law and thus unjustified, the aggressor may have right to respond with equal force to defend his person.[204]

This is not to suggest that the initial aggressor (pet attacker) is permitted to use deadly force in every instance and across all jurisdictions. If the jurisdiction imposes a general duty to retreat, then such a duty would, at least in some instances, apply so as to prevent the initial aggressor from responding to a pet defense with deadly force.[205] Stated differently, a *non-deadly aggressor* who is confronted with deadly force is in the same position regarding his ability to use deadly force as a *non-aggressor*—that is to say, if there is a duty to retreat in the jurisdiction,

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[202] SUBCRL § 10.4 (footnote omitted). Some courts appear to disagree with this general principle. *See, e.g.*, Garcia v. United States, 826 F.2d 806, 812 (9th Cir. 1987) ("One who provokes another's use of force may not assert self-defense, even if the other's use of force is unlawful."). Notably, however, the term "provoke" as it is used in the Model Penal Code is defined as using force "with the purpose of causing death or serious bodily harm." MPC 3.04(2)(b).

[203] *Cf.* CRLDEF § 131 (noting that self-defense generally requires that the individual be facing unlawful or unjustified force from another).

[204] As one commentator explained,

> Although the homicide will not be justified if the original assault threatened the victim with death or serious bodily harm, it will be justified if the assault did not threaten him with such danger. The ALI has adopted this position by prohibiting the use of deadly force if, "with the purpose of causing death or serious bodily harm, [the actor] provoked the use of force against himself in the same encounter." The effect of this modification is to allow a person who makes a simple assault on another to kill if the victim responds by threatening the aggressor's life. This obviates the extreme hardship of depriving the aggressor of his privilege of self-defense when his victim responds with more force than necessary to repel the aggression. There seems more reason to protect the aggressor than the victim in such a case, especially since the aggressor can be held liable for the original criminal assault. It would be best to place the risk of nonwithdrawal on the actor only where his original assault threatened the victim with serious physical injury, for it is inconceivable that the actor should be justified in killing to overcome resistance which he made inevitable.

Note, *Justification for the Use of Force in the Criminal Law*, 13 STAN. L. REV. 566, 588–89 (1961) (footnotes omitted).

[205] This reflects my understanding of the Model Penal Code approach. The Code bars an aggressor from using deadly force only if he initiated the dispute by engaging in actions with the "purpose of causing death or serious bodily injury." MPC 3.04(2)(b)(i). However, the Code also imposes a rigid duty to retreat. 3.04(2)(b)(ii).

then that duty should apply equally to a non-aggressor and a non-deadly aggressor confronted with deadly force.[206]

Accordingly, imposing a more robust duty to retreat in all circumstances would substantially cure the problem of aggressors killing without consequence when confronted with deadly force.[207] But given that an absolute duty to retreat is a minority rule, and one that seems to be losing traction, it is not likely that the best way to reform the field of pet defense is by hoping for a generalizable duty to retreat. Unfortunately, there is also considerable uncertainty as to the extent of the duty to retreat for aggressors even in states that do not recognize a general duty to retreat.

At least some jurisdictions have recognized a relatively rigid form of the retreat rule when the initial aggressor is threatening harm to the individual's "person."[208] So, if an aggressor is threatening personal injury, then the duty to retreat is relatively absolute. And some courts seem to go farther and imply that any wrongful incitement of the ultimately violent incident strips one of a right to use self-defense.[209] But upon reflection, this simply cannot be the rule. It is not the case that kicking someone in the shin, or cursing and berating them without cause completely deprives one of self-defense or imposes an otherwise nonexistent duty to retreat if the victim returns the minimal force with deadly force.[210] Instead, the dominant rule seems to be that a *non-deadly*

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[206] The duty to retreat is a minority rule. Eugene Volokh, *Duty to Retreat and Stand your Ground: Counting the States*, THE VOLOKH CONSPIRACY (July 17, 2013), http://www.volokh.com/2013/07/17/duty-to-retreat/ ("The substantial majority view among the states, by a 31-19 margin, is no duty to retreat.").

[207] The duty to retreat before using deadly force is minority rule. Richard A. Rosen, *On Self-Defense, Imminence, and Women who Kill Their Batterers*, 71 N.C. L. REV. 371, n.14 (1993) ("Most jurisdictions in this country do not require retreat . . . ."); Wayne R. LaFave, 2 SUBST. CRIM. L. § 10.4 (2d ed.) (explaining that a minority of jurisdictions impose a duty to retreat before using deadly force, so long as one knows he can retreat with "complete safety").

[208] *Id*. at n.69.1 (citing State v. Carridine, 812 N.W.2d 130 (Minn. 2012)). In *Carridine*, the Minnesota Supreme Court concluded, "if a person begins or induces an assault that leads to the necessity of using force in that person's own defense, that person must attempt to retreat, regardless of whether the victim escalates the situation by using deadly force." State statutes provide similar limits on the ability of an aggressor to engage in self-defense. 18 PA. CONS. STAT. ANN. §§ 505(b)(2)(i), 506(a)(1) (Purdon 1973) (for defense of others actor must not provoke force with intent of causing serious injury or death); *see also* Paul H. Robinson, *Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1, n.89, 90 (1985) (compiling statutes).

[209] The rule is oft stated in stark terms, "Aggressors who wish to defend themselves are required to retreat even in no-retreat jurisdictions." Dressler, *supra* note 117, at 229, n.34. However, upon closer examination, a non-deadly aggressor is generally treated like a non-aggressor. *See, e.g.*, *id*. at 227 (explaining that a non-deadly aggressor has an *immediate* right to self-defense when confronted with deadly force).

[210] Illustrative is Colorado. State courts and treatises report that an initial aggressor has an absolute duty to retreat, and this seems to include non-deadly aggressors, not just

aggressor is treated the same as *non-aggressor*; when either is confronted with deadly force, he or she probably has a right to use deadly force without retreating, at least in no-retreat, majority jurisdictions. Or as Paul Robinson has put it, "Consider the case of the passenger whose push to get on the bus is met with an excessive response. . . . [T]he initial aggressor may have been initially at fault, but denying a right of self-defense seems inappropriately harsh."[211] Surely the pushy public transportation user need not retreat if he is being threatened with death at the hands of an armed person when the state otherwise does not impose a duty to retreat.[212]

The point, then, is that the common law recognizes instances where deadly force is appropriate even for the initial aggressor.[213] The question is simply one of proportionality—that is, whether the initial aggression is met with violence (or threats) so disproportionate as to justify deadly force by the initial aggressor.[214] Of course, such a proportionality formula does

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deadly aggressors. People v. Toler, 9 P.3d 341, 351–52 (Colo. 2000) ("non-aggressors have no duty to retreat and initial aggressors must retreat before using force in self-defense"). But in practice, as the degree of initial aggression goes down, so too does the willingness of a court to refuse a right to self-defense without retreat. *See* People v. Manzanares, 942 P.2d 1235 (Colo. App. 1996) (holding that insults and disparagements do not justify an initial aggressor instruction).

[211] Robinson, *supra* note 204, at 9.

[212] Of course, if the person could retreat in complete safety, then in a minority of states, the duty of retreat—that is, the general rule of retreat—would still apply.

[213] *See, e.g.*, Watkins v. State, 555 A.2d 1087, 1088 (Md. App. 1989) ("The appellant requested an instruction to the effect that even if he were found to be the initial aggressor at the nondeadly level but it was the victim who escalated the fight to the deadly level, he would still be entitled to invoke the law of self-defense. That is a correct statement of the law."); People v. Townes, 218 N.W.2d 136 (Mich. 1974) (describing when initial aggressor can regain the right to self-defense: (1) where the initial aggressor retreats, or (2) where a non-deadly aggressor is met with deadly force); State v. Hendrickson, No. 08CA12, 2009 WL 2682158, at *8 (Ohio. Ct. App. 2009) ("Yet, Blankenship responded to Hendrickson's non-deadly 'aggression' by using deadly force, i.e. by stabbing him twice in the abdomen with a knife. . . . Because Blankenship's use of deadly force against Hendrickson was not lawful, Hendrickson was justified in defending himself against a deadly attack. In other words, a 'non-deadly aggressor' who begins an encounter may justifiably defend himself against a deadly attack. He may do so because the use of deadly force by the victim in response to non-deadly aggression is an unlawful use of force. . . . To adopt [a contrary] policy would be to encourage victims to overreact with deadly force rather than restricting the victims to only the degree of force necessary to repel the initial attack.").

[214] There are numerous examples of variations among state laws regarding the duty to retreat when the issue of deadly versus non-deadly aggressors is considered. For example, in Kentucky "there is no obligation to retreat when faced with a threat of death." KY. PRAC. SUBSTANTIVE CRIM. L. § 5:25. It is well established that even an aggressor using deadly force regains the privilege of self-defense if the "initial aggressor withdraws from the encounter and effectively communicates to the other person his intent to do so." KYPRAC-SCL § 5:25. In other words, an aggressor using deadly force must retreat in order to rely on self-defense. *Id*. Notably, however, a non-deadly aggressor need not retreat. *Id.* ("even when the defendant was the aggressor by initially using *non-*

not produce many hard and fast rules, and, once again, simply begs the question of how much force is appropriate in defense of an animal. [215] Pulling a knife on someone in response to being pinched might easily be disproportionate so as to excuse an aggressor's resort to deadly force, but what about pulling a knife in response to a lethal threat to one's pet?[216]

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deadly physical force, he is permitted to use physical force if the force returned by the ultimate victim is such that the defendant believes himself to be in imminent danger of death or serious physical injury."). *See also* John S. Baker, Jr., *Criminal Law*, 45 LA. L. REV. 251, 260 (1984) (summarizing Louisiana case law and explaining "that the *non-deadly aggressor is no longer the aggressor* when he meets an excessive response threatening his life") (emphasis added).

[215] An analogous debate about the reasonableness of using deadly force comes up in the context of determining when an initial victim need not "retreat" from an aggressor even in a jurisdiction that typically requires one to retreat before resorting to force. Summarizing the law, one commentator has observed that

> the more unreasonable and dangerous the demand of the aggressor, the more reasonable self-defense becomes. If the demand greatly endangers or limits the liberty of the non-aggressor, then retreat and compliance are less necessary. . . . For example, when an assailant is threatening rape, the non-aggressor need not comply, but is able to protect herself to the death because of the severe infringement on her liberty and life. Whereas, if the assailant is robbing the non-aggressor of his money, the infringement on his liberty is not so great and therefore killing the aggressor in self-defense is less justified.

Robert Stephens, *Life and Liberty: Seven Factors that will Better Evaluate Self-Defense in Nevada's Common Law on Retreat*, 8 NEV. L.J. 649, 660 (2008). Moreover, a number of codes explicitly recognize that deadly force may be used in order to prevent the commission of certain felonies, particularly rape. *See, e.g.*, Model Penal Code § 3.04(2)(b). On the other hand, a defense of property with deadly force would be deemed unnecessary and disproportionate. Note, *Justification for the Use of Force in the Criminal Law*, 13 STAN. L. REV. 566, 590 (1961) ("A property owner cannot defend his property by threatening the life of a person who attempts to interfere with his possession. If he attempts to do so, he should be in no better position than the person who is not acting on behalf of any interest. It seems unsound to prefer the aggressive property owner by granting him the privilege to kill if there is no opportunity for him to withdraw, since this privilege is withheld from other persons who feloniously assault their victims."). The question of whether and to what extent we value animals above and beyond mere property, then, is central to the question of whether force in their defense is justified.

[216] The problem is that the question of whether one must retreat is bound up in whether one is truly an aggressor. SUBCRL § 10.4 ("The majority of American jurisdictions holds that the defender (who was not the original aggressor) need not retreat.") (footnote omitted). Is a non-deadly aggressor who merely stomps on the toe of his rival fairly considered an "aggressor" or cause of the incident if the victim responds by swinging a knife at his throat? It seems unlikely that any court would treat such trivial act of instigation as sufficient to deprive one of an immediate right to self-defense when he is threatened with deadly force. Thus, as noted above, the question is simply how seriously a court would take the threat of injury or death to one's pet – is it more like an armed robbery or like a verbal insult? *Cf.* Commonwealth v. Doucette, 720 N.E.2d 806 (Mass. 1999) ("[A]n armed home invader (by definition a person who has unlawfully entered a dwelling while armed with the knowledge of persons therein) cannot invoke self-defense

The common law doctrine, then, provides precious little guidance as to how much force one may appropriately use or threaten against a pet aggressor.

By contrast, the proposed statute, section (3), recognizes an absolute duty of retreat for an initial aggressor who is threatening serious injury to a pet. As such, the risk of a pet owner being "justifiably" murdered is largely avoided.[217] Under the statute, threats to one's animal that provoke violent threats from the pet owner would not justify a retaliatory response; instead, the aggressor would be required to retreat from the situation.[218]

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when an occupant of a dwelling uses force to repel him."); Commonwealth v. Johnson, 396 N.E.2d 974 (Mass. 1979).

[217] The jury instructions in some states are arguably broad enough to require a duty of retreat by a person who threatens injury to one's pet. *See, e.g.*, *Carridine*, 812 N.W.2d at 145 (explaining that the aggressor is the one who "began or induced the incident"). But the practice seems to be less clear when the aggressor is not engaging in deadly force. *See* notes 85–87 *supra*. Moreover, Paul Robinson has convincingly argued that limiting defenses to aggressors who "cause" or are at fault for the incident is untenable:

> A greater difficulty, present in all provisions that bar a justification defense based on the actor's fault in creating the justifying circumstances, is that it is unclear what it means to be 'at fault' in causing the justifying circumstances. The process of creating a threat that requires some justified response involves a series of events. The actor must engage in some conduct, which then produces a condition that constitutes a threat, which then requires a justified response. With respect to which element(s) must the actor be at least negligent to be disqualified from a justification? . . . Even if the focus of the fault inquiry were clear, there is a further, and greater, difficulty in an approach that excludes a defense because the actor was at fault in causing the defense: such an approach does not distinguish among different levels of fault in causing the conditions of the defense. The person who negligently starts the forest fire that justifies his later conduct receives the same treatment as the person who does so intentionally.

Robinson, *supra* note 204, at 9–10.

[218] The most thoughtful commentary seems to acknowledge that "Courts are split on how to handle nondeadly aggressors." Cynthia K.Y. Lee, *The Act-Belief Distinction in Self-Defense Doctrine: A New Dual Requirement Theory of Justification*, 2 BUFF. CRIM. L. REV. 191, 207 (1998); *see also* Dressler, *supra* note 117, at 227 (noting a split in the case law but concluding that "most courts" hold that a non-deadly aggressor has a right to self-defense without retreat); *see also* Adil Ahmad Haque & Paul H. Robinson, *Advantaging Aggressors: Justice & Deterrence in Int'l Law*, 3 HARV. NAT'L SEC. J. 143, 154 (2011) ("the victim escalates the conflict by responding with deadly force or force unnecessary for self-defense, however, then the initial aggressor may use necessary and proportionate force in self-defense. The initial aggressor would remain liable for the initial use of non-deadly force, while the victim would be liable for the disproportionate use of deadly force."). *See also* People v. Quach, 116 Cal. App. 4th 294, 301–02 (Cal. Ct. App. 2004) ("If the victim uses such force, the aggressor's right of self-defense arises . . . ." (1 Witkin & Epstein, Cal.Criminal Law (3d ed.2000) Defenses § 75, p. 410), or its corollary, 'If, however, the counter assault be so sudden and perilous that no opportunity be given to decline or to make known to his adversary his willingness to decline the strife, if he cannot retreat with safety, then as the greater wrong of the deadly assault is upon his opponent, he would be justified in slaying, forthwith, in self-defense.' (People v. Hecker,

This would represent a break from the common law rule applicable in most jurisdictions.[219] Indeed, scholars have noted that "most courts provide that when the victim of a nondeadly assault responds with deadly force, the original aggressor *immediately* regains his right of self-defense."[220] By way of a counter-example, in California—a no-retreat state[221]—a leading Practice Guide laconically summarizes the retreat issue as to aggressors:

> Where an original aggressor initiates the encounter with non-deadly force, such as a simple assault, the victim of the simple assault has no right to use deadly or other excessive force. If the victim uses such force, the aggressor has the right of self-defense. An original aggressor who initiated the encounter with non-deadly force, such as a simple

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109 Cal. 451, 463–64, 42 P. 307 (1895))." At least according to some authorities, this is the dominant rule. 3 AMJUR POF 2d 705 ("the general rule is that the initial aggressor has assumed the risk that the conflict would reach deadly proportions, and he cannot completely justify a homicide on the grounds of self-defense unless he has withdrawn, although the degree of the homicide may be reduced.").

[219] The Model Penal Code, for example, holds an initial wrongdoer "accountable for his original unlawful act but not for his defense against a disproportionate return of force by the victim." *See* State v. Edwards, 717 N.W.2d 405, 412 (Minn. 2006) (discussing the Model Penal Code). In some instances, however, a duty to retreat before using deadly force in self-defense exists even if the aggressor merely starts a "nondeadly conflict." Dressler, *supra* note at 117, at 226. *See also* Robinson, *supra* note 204, at 27; *id.* at 13 (criticizing statues under which one would lose a self-defense claim when his "verbal harassment" intended to spur a fight "is met with deadly force rather than the fight that he anticipates"). Professor Donald A. Dripps has also discussed the oddity of a system that deems an aggressor—even a non-deadly aggressor—to have forefeited his defenses. Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 VAND. L. REV. 1383, 1413 (2003).

[220] Dressler, *supra* note 117, at 227 (contrasting circumstances in which the aggressor takes calculated actions designed to induce an assault from the victim, and circumstances in which the initial aggressor uses deadly force against the victim). In short, the current rule, as best it can be summarized, seems to be nothing more than a proportionality principle. When the victim's response is disproportionate—e.g., intending serious bodily injury in defense of property—the initial aggressor may use deadly force in response. *Id.* (citing Watkins v. State, 555 A.2d 1087, 1088 (Md. Ct. Spec. App. 1989)). And even if a jurisdiction did not permit the non-aggressor to use deadly force without retreating when threatened with deadly force, if the aggressor does kill the victim, he may have his conviction reduced to manslaughter; *see also* MPC Section § 3.04 (permitting a defense of one's self by an aggressor who is confronted with disproportionate force). *See, e.g.*, Dressler, *supra* note 117, at 228. Some courts have deferred the question of whether a retreat is necessary before an aggressor has a right to self-defense based on excessive defensive force by a victim. *See, e.g.*, Commonwealth v. Evans, 454 N.E.2d 458 (Mass. 1983) (noting excessive force by a victim would restore the initial aggressor's right of self-defense).

[221] 1 B. E. WITKIN, CAL. CRIM. LAW 4th (2012) Defenses, § 77, p. 518.

> assault, *need not withdraw* if the victim of the simple assault responds in a sudden and deadly counter-assault.[222]

Other leading criminal treatises confirm that this is the prevailing view.[223] The rule seems to be that aggressors have a right to self-defense if they retreat, *or* if they are non-deadly aggressors. Stated differently, the default rule is that non-deadly (human) aggressors do not have a duty to retreat before relying on self-defense.

Accordingly, one important fix that would make the law less discordant with our moral intuitions would be to recognize a more absolute duty to retreat for those who are non-deadly initial aggressors, at least in certain contexts.[224] Perhaps it is preferable to impose a general duty to retreat in all instances, but barring such a radical reform it is important to recognize that an initial aggressor, pet abuser should have an

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[222] CACRIMMJIS § 47:10. Other practice guides tend to confirm this rule. *See, e.g.*, KYPRAC-SCL § 5:25 ("The denial of self-defense to the initial aggressor is subject to two exceptions. First, even when the defendant was the aggressor by initially using *non-deadly* physical force, he is permitted to use physical force if the force returned by the ultimate victim is such that the defendant believes himself to be in imminent danger of death or serious physical injury. Assuming that the defendant initially used non-deadly force, the amount of force returned by the victim determines whether self-defense is reinstated. The rationale for this provision is that, while the initial aggressor is accountable for his original unlawful force, he is not criminally liable for defending himself against a disproportionate return of force by the victim."); GA. CRIM. OFFENSES & DEFENSES S17 (ed. 2013).

[223] *Id.*; Lisa J. Steele, *Defending the Self-Defense Case*, CHAMPION, Mar. 2007, at 34, 39 ("if the client was only the first to use deadly force in response to an imminent danger of serious injury or death, he or she is not necessarily the initial aggressor") (footnote omitted). *See also* MD-ENC HOMICIDE § 37 ("The right to arm oneself in order to be able to defend in the event of an attack or threat of an attack by another is qualified by the proviso that the person so armed should not in any sense be seeking an encounter. Thus, the defense of self-defense is unavailable under the felony-murder statute to an aggressor engaged in the perpetration of a felony. However, a person can claim self-defense even if he or she was the initial aggressor in an altercation, if his or her initiation was at a nondeadly level and the victim then escalated the altercation to a deadly level.") (footnote omitted); CACRIMMJIS § 47:10 (explaining that "when the victim of a simple assault responds in a sudden and deadly counter-assault, the original aggressor need not attempt to withdraw and may use deadly force in self-defense") (citing People v. Quach, 116 Cal. App. 4th 294, 301 (Cal. Ct. App. 2004)).

[224] A variety of states use jury instructions that deprive aggressors of an immediate right to self-defense without retreat. *See, e.g.*, 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 16.04 (3d ed.) ("No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense *[or][defense of another]* and thereupon *[kill][use, offer, or attempt to use force upon or toward]* another person."). These instructions, however, typically impose a duty to retreat on an aggressor only when the aggression triggers a right to self-defense. Were the aggressor only to be committing a property crime, the status of aggressor required to retreat likely would not apply. *Cf.* State v. Dennison, 801 P.2d 193, 197 (Wash. 1990) ("Dennison also characterizes his crime as a property crime and argues that during the commission of a property crime, one does not lose all rights to self-defense. Dennison mischaracterizes his crime. He was armed with a lethal weapon while breaking into a house—not a simple property crime.").

absolute duty to retreat, even if confronted with a threat of deadly force. Section (3) accomplishes this end. Of course, such a fix does nothing to prevent the old man from the original hypothetical, from being convicted of murder if he in fact kills the aggressor; it only prevents the aggressor from escaping murder charges. [225]

ii. The Pet Owner's Duty to Retreat

Much less controversial is the provision in Section (4) requiring reasonable efforts to retreat by the pet owner before making threats of deadly force. Although the duty to retreat appears to be a shrinking minority position across the states, its application in this context is straightforward. The proposed defense of animals statute is permitting a threat and potentially the use of deadly force in defense of a non-human life. The use of deadly force outside of the protection of humans is relatively rare,[226] and thus conditioning such force on reasonable efforts to retreat whenever possible is an effort to minimize the potential for increased human violence as a result of this defense. In short, this is not a repudiation of a state's otherwise expressed preference against a duty to retreat because it requires such a retreat *only* to protect one's pet or property, not his person.[227]

iii. Lawfully Threatening Deadly Force in Defense of a Pet

Ordinarily, one is entitled to use deadly force when he is reasonably in fear that an attacker is about to use deadly force on him or another. However, self-defense is unavailable when the attacker's use of force is lawful.[228] The reasonable use of force by law enforcement, for example, is the quintessential example of legal force that may not be the predicate for self-defense.[229] Accordingly, an act of the legislature explicitly

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[225] *Cf.* Dripps, *supra* note 226, at 1413. In criticizing the forfeiture approach to defenses, Dripps explains, "For purposes of illustration, consider the case of an attempted murder or aggravated assault defendant who started the fight with non-deadly force, and whose adversary raises the ante by drawing a knife. The defendant draws a gun and wounds the victim. Under the forfeiture model, the defendant may not raise self-defense at all. Yet had the deceased prevailed in the struggle, he too would be guilty of attempted murder or aggravated assault, for the escalation from reasonable to deadly force would forfeit his self-defense claim. In the eyes of the law, whoever survives bears the blame more properly apportioned between the combatants." *Id.* at 1413–14.

[226] It is not unheard of, however. *See*, *supra* notes and text discussing defense of home.

[227] Presently there is no right to use or threaten deadly force in defense of property. So the statute provides a sort of quid pro quo—it allows for additional force or threats but it conditions such force on a duty to retreat.

[228] The force must be, or reasonably believed to be unreasonable in order to justify self-defense. *See*, *e.g.*, 2 SUBST. CRIM. L. § 10.4. More precisely, self-defense is not permitted when the force to be resisted is justified. (*See*, *e.g.*, Paul Robinson, *supra* note 204).

[229] *See*, *e.g.*, Commonwealth v. Meoli, 452 A.2d 1032 (Pa. Super. 1982); 43 TXPRAC § 43:38 ("Thus, unless the defendant reasonably believed the force to be unlawful at the

making certain force or threats of force permissible insulates one from being lawfully killed under a theory of self-defense.[230]

Where a threat of deadly force is made without lawful authority, it is possible for the recipient of the threat to respond with force. That is to say, if the pet attacker is threatened with an unlawful amount of force, he may be able to respond with deadly force. Some might argue that a mere threat without the intention of using deadly force is permitted; however, it has been said that the "prevailing modern position . . . is that a person may not threat do to that which he is not permitted to do."[231] Accordingly, section (2) of the statute resolves the ambiguity by explicitly permitting threats of deadly force by the person whose pet is threatened. This provision is intended to further reinforce the goal of avoiding an affirmative defense for the initial pet aggressor. As with imposing a strict duty to retreat, by making threats of serious, even deadly force lawful, the pet attacker is deprived of any right to respond with lawful force.

As a treatise has explained in a related context, "the excessive use of deadly force by [a] nonaggressor is *unlawful*, thus placing the aggressor within the general rule of the defense—the right to protect against unlawful force."[232] The proposed statute would convert the force used by the pet defender from unlawful to *lawful*, and thereby have the effect of stripping the pet attacker from a right to use force or threats of force in defense.

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time of attack, a claim of self-defense is not valid."); People v. Hayward, 55 P.3d 803 (Colo. App. 2002) ("In this case, whether the victim used unlawful physical force (as asserted by defendant) turned on the question whether defendant unlawfully entered the dwelling with intent to commit a crime against her by means of physical force (as asserted by the victim)").

[230] *Hayward*, 55 P.3d at 803 (recognizing that there was a statutory right for one to stand her ground in her home, and thus if she did so, the use of force was legal and could not trigger a right to self-defense by the other party).

[231] Dressler, supra note __, at 265.

[232] GA. CRIM. OFFENSES & DEFENSES S17 (ed. 2013) ("The use of deadly force by the "victim" against the nondeadly aggressor simply is unlawful."). The non-aggressor versus non-aggressor rules, then, tend to apply what Mark Kellman call "broad time framing" such that the entire transaction surrounding the death are considered. Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 93–94 (1981). Or, as prominent scholar Paul Robinson has put it, "Where conduct is justified because it avoids a net harm for society, it provides little basis on which to fasten blame and it is against society's interest to deter it." Robinson, *supra* note 204, at 9, 27 ("Where a forest fire has been set, for whatever reason, society wants any and all persons to set a firebreak and save a threatened town. To withdraw a defense for such conduct [to the fire-starter/aggressor] is to punish and to discourage it.") (footnote omitted). Of course, Robinson has also acknowledged that "The problem of how to treat an actor who causes the conditions of his own defense has not yet received thoughtful or comprehensive treatment by judges or lawmakers." *Id.* at 26.

iv. Permitting the Pet Defender to Use Serious Force

The final two provisions of the proposed statute, sections (5) and (6), permit the use of serious force against a pet attacker. This provision deliberately permits serious force—defined as force likely to cause serious bodily injury, but it bars one from using force intended to kill. The goal here is to protect the pet, not to give license to kill another human being. The statutory text, ideally, is designed to permit a person to use a great deal of force, but to preclude attempts to kill the other person. A proper jury instruction under this provision would permit an acquittal even if the pet attacker dies, but the hope is that by precluding attempts to kill from the statutory protection, pet defenders will exercise greater regard for human life than is required in the context of self-defense. If nothing else, there is likely a symbolic and signaling value that derives from describing the force permitted in defense of a pet as a lesser force than that permitted in the protection of a person.[233]

More significant than the difference between serious and deadly force is the fact that sections (5) and (6) of the statute permit one to use force likely to cause serious bodily injury against an individual who does not threaten any harm to a person. Both provisions represent a departure from the common law and statutory rules in every jurisdiction insofar as they explicitly permit serious human injury in defense of an animal. The deviations from existing law, however, are necessary if the law wishes to enshrine the moral value of pets in American society. And both deviations are, in context, relatively modest.

First, under section (5), substantial force is permitted when the pet aggressor refuses to retreat and instead insists on injuring the pet, or diverts his attention to injuring the pet owner. Returning to the initial hypothetical, if James brandishes a gun and threatens the attacking youth with death and the youth calls his bluff and suggests that he knows James will not actually shoot, then there are good reasons why we might want the law to protect James' right to use such force as is necessary, assuming he has already attempted to retreat. If a threat of deadly force does not deter a would be animal abuser, then this may represent the extraordinarily rare circumstance where a pet defender should be justified in using serious force.

Similarly, but even more controversially, section (6) opens the door to a possible use of serious force against a pet defender even without first threatening such force. Section (6) goes somewhat farther and is designed to provide pet owners protection in those instances of spontaneous harm to

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[233] *See* Dan-Cohen, *supra* note 10 (emphasizing the value of having some legal rules that are directed to the public even when the rules actual, judicial impact is something quite different).

a pet that cannot be prevented through means other than serious force. In essence, it allows acts of serious force in defense of a pet without a prior threat or other less aggressive action. Examples like those where a person suddenly snatches a passerby's dog and throws it onto a highway might trigger this provision. Its application is likely rare, but for those instances where it would be at issue, there would likely be no other viable option for a pet owner hoping to save his pet's life. Of course, it should be said that even without section (6), the remainder of the statute would substantially advance the goals for a defense of animals discussed throughout this Article.

In addition, as with the explicit statutory authority permitting a pet defender to threaten deadly force, the statutory authority to use serious force likely to cause great injury not only protects the pet from injury, but guarantees that the pet attacker will not have a claim of right to have used force. Without a defense of animals statute, the pet attacker could assert that his killing of the pet owner was justified whenever the pet owner used force likely to cause him serious injury. Sections (5) and (6) codify the rule that such force is lawful, and thus prevent the pet attacker from using retaliatory potentially lethal force against the pet owner.

CONCLUSION

Pets have a cherished place in the American family. Presently, however, the criminal defenses afford a level of protection to defenders of animals that fail to reflect this vaunted status. This Article identifies the most salient deficiencies and offers alternative substantive reforms that would ameliorate this disconnect between moral values and the criminal law.

The point is not that killing people who attempt to harm animals is always, or ever desirable. Rather, the argument is simply that criminalizing the use of force in protection of one's pet may serve to chill the protection of animals in a way that is inconsistent with our normative values. We place considerable value on the lives of our companion animals and to the extent the criminal law treats a serious threat to one's dog as legally equivalent to stealing hubcaps or vandalizing a fence post, the law has missed the mark. Stated differently, a careful study of the defense of animals reveals uncertainties in current criminal law doctrine as well as questions about the status of animals in our culture. Questions about the meaning of deadly force and the rights of non-deadly aggressors, no less than questions about the status of non-human animals inform the analysis of whether and to what extent one may defend his pet from a violent attack. Commentators and courts interested in either animal law or criminal law would do well to think seriously about the scope of one's right to defend his pet.

Of course, if the law seeks to provide for a defense of animals in appropriate circumstances, then it is advisable to think carefully about the best source for such a revision, and the ideal contours of such a defense. Having surveyed existing common law doctrines, this Article suggests that a statutory reform is needed. Seeking to capitalize on the twin benefits—clarity and comprehensiveness—of a statutory reform, a Defense of Animals statute is proposed and explained. The proposed statute seeks to minimize, to the greatest extent possible, human violence, while also recognizing the harm that befalls humans when their pets are injured or killed. By insisting on new rules regarding the duties to retreat of both parties, and recalibrating the amount of force that is justified in these circumstances, the proposed statute represents a novel approach to the defense of animals conundrum that current doctrine is ill equipped to manage.