

WE’VE STILL GOT FEELINGS: RE- PRESENTING PETS AS SENTIENT PROPERTY

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Pets are something special; one only needs to talk to a pet owner for a short time to determine as much. But that special place a pet takes in its owner’s heart is not properly reflected in modern law. Instead, U.S. courts generally regard pets in the same way that they would any other piece of inanimate, personal property—like a book or a smartphone. Such treatment does a grave disservice to both pets and the owners who love them, and it follows that the laws should be changed to mirror current societal perceptions of pet ownership.

However, courts ought to re-categorize carefully. On the one hand, the current laws are insufficient to protect pets. On the other hand, advocating for granting pets rights coterminous with legal personhood is neither realistically achievable nor desirable.

The appropriate solution, then, is a middle ground between property and person: the sentient-property solution. This solution recognizes the value of pets and suitably weighs that value against human interests, and simultaneously avoids the pitfalls of categorizing pets as one extreme or the other. Surprisingly, this solution has been standing ready for over ten years. But based on current common-law trends, the United States only recently seems ready to accept it.

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INTRODUCTION

In 2010, the Oregon Humane Society received a report that Amanda Newcomb was beating and starving her dog, Juno.¹ An animal-cruelty investigator soon visited Newcomb's apartment to find Juno in a severely emaciated condition.² The investigator then legally seized Juno and took him to the vet for treatment.³ As a part of treatment procedure, veterinarian technicians drew blood from Juno, which ruled out parasites or disease as causes for his condition.⁴ Newcomb was subsequently charged with second-degree animal neglect.⁵ In her defense, Newcomb claimed that the blood test violated her Fourth Amendment constitutional right to be free from unreasonable searches and seizures.⁶ She argued that because Juno, as her property, was akin to a closed container, the blood test would require a search warrant for further investigation.⁷ The Oregon Supreme Court, however, disagreed.⁸

Newcomb is only the most recent case to demonstrate the evolution of animals' legal status, but it offers a relatively novel perspective in law. Namely, it offers some insight into how the law should strike a balance between property and personhood when categorizing animals—particularly pets.

Pets are currently categorized as personal property in all U.S. jurisdictions.⁹ Generally, the law protects human owners' right to their property, including the owners' right to use, to exclude others from using, to possess, to transfer, and even to destroy their property.¹⁰ This idea is consistent regardless of whether the property is animate or inanimate.¹¹

But the law protects pets in ways that it does not protect inanimate property. For example, consider animal anti-cruelty laws, which protect animals from neglect

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1. State v. Newcomb, 375 P.3d 434, 436 (Or. 2016).
 2. *Id.*
 3. *Id.* at 437.
 4. *Id.*
 5. *Id.*
 6. *Id.*
 7. *Id.* at 440.
 8. *Id.* at 442–43.
 9. See generally Susan J. Hankin, *Not a Living Room Sofa: Changing the Legal Status of Companion Animals*, 4 RUTGERS J.L. & PUB. POL'Y 314, 321 (2007).
 10. See Denise R. Johnson, *Reflecting on the Bundle of Rights*, 32 VT. L. REV. 247, 253 (2007).
 11. See Erica R. Tatoian, Comment, *Animals in the Law: Occupying a Space Between Legal Personhood and Personal Property*, 31 J. ENVTL. L. & LITIG. 147, 148 (2015).

and cruel and unnecessary pain or death¹²—sensations that a book or a smartphone cannot experience. The difference that leads to such a dichotomy is that pets (and all other animals) have sentience;¹³ that is, pets are conscious beings that can feel pain and experience emotion.¹⁴ Additionally, unlike inanimate objects, pets can form mutual attachments with their owners.¹⁵ Meanwhile, the way that owners view their pets has shifted from that of personal property to that of another family member.¹⁶

In theory, the law should reflect this cultural shift by offering more legal protection for a person's pet than it would for a person's inanimate possessions. While some branches of the law (including tort, family, and criminal law) have begun to evolve—even going as far as to consider some animals as quasi-persons—there are still limits.¹⁷ And even within those branches of law that have begun to evolve, cases that grant pets benefits associated with quasi-personhood are in the minority.¹⁸ This is because, in most cases where an animal's interests collide with those of a human person's, a quasi-person categorization is unlikely to be practical.

This Note suggests that a reasonable middle ground for the legal status of pets is something more than mere property but something less than human. It finds a compromise between recognizing the value of pets and weighing that value against human interests. Part I discusses both the traditional and modern statuses of pets as property. Part II discusses how owners' growing valuation of pets has shaped pet legal status in some branches of the law. Part III analyzes how this shift in status towards quasi-personhood would likely proceed and its impractical implications. Part IV dissects the little-known proposed status that is likely to work best in the

12. See *Animal Protection Laws of the United States of America and Canada*, ANIMAL LEGAL DEF. FUND, <http://aldf.org/resources/advocating-for-animals/animal-protection-laws-of-the-united-states-of-america-and-canada> (last visited Feb. 11, 2018) (providing an inclusive list of anti-cruelty laws and sanctions per state/province).

13. Marc Bekoff, *After 2,500 Studies, It's Time to Declare Animal Sentience Proven*, LIVE SCI. (Sept. 6, 2013, 4:27 PM), <http://www.livescience.com/39481-time-to-declare-animal-sentience.html>.

14. *Id.*

15. See Berit Brogaard, *Can Animals Love?*, PSYCHOL. TODAY (Feb. 24, 2014), <https://www.psychologytoday.com/blog/the-mysteries-love/201402/can-animals-love> (discussing several behavioral and neurological studies that tested pets' capability of feeling attachment to their owners); see also Paul Zak, *Dogs (and Cats) Can Love*, ATLANTIC (Apr. 22, 2014), <https://www.theatlantic.com/health/archive/2014/04/does-your-dog-or-cat-actually-love-you/360784/> (discussing neurochemical research that found that both humans and animals release the same *love hormone*, oxytocin, when interacting with each other). Granted, not everyone agrees with this sentiment. See, e.g., Laura Marcus, *Your Pet Doesn't Love You—It's Just Trapped by You*, GUARDIAN (Feb. 23, 2016, 9:42 AM), <https://www.theguardian.com/commentisfree/2016/feb/23/your-pet-doesnt-love-you-animals>. But this last author does not support her argument with scientific research.

16. See The Harris Poll, *More Than Ever, Pets Are Members of the Family*, PR NEWswire (July 16, 2015, 1:00 PM), <http://www.prnewswire.com/news-releases/more-than-ever-pets-are-members-of-the-family-300114501.html>.

17. See generally Christopher D. Sepe, Note, *Animal Law Evolution: Treating Pets as Persons in Tort and Custody Disputes*, 2010 U. ILL. L. REV. 1339, 1342 (2010).

18. See generally *id.* at 1347.

interest of both animal welfare and fairness of the pursuit of justice—the status of sentient property. Finally, this Note concludes by arguing that this status of sentient property is the most practical course of action and that, in light of recent cases like *Newcomb*, the U.S. legal system is prepared to accept this solution that has otherwise been ignored for over ten years.

I. PETS AS PROPERTY AND AS SOMETHING MORE

Animals are categorized as property throughout both modern common law and modern statutory law. As such, human ownership of domestic animals¹⁹ is treated nearly identically to human ownership of inanimate objects.²⁰ For example, humans have the right to buy, sell, trade, and give away animals.²¹ Humans can leave animals to someone via a will²² or use animals in bailment agreements.²³ Humans can exclude others from using their animals without their permission,²⁴ and animals are subject to theft statutes.²⁵ Humans can even choose to *destroy* their animals just as they could with any other piece of personal property.²⁶

Categorizing animals as property without individual rights is a concept of “ancient lineage.”²⁷ Yet, since that ancient lineage began, the law has shifted to reflect both general societal views of animals as well as specific views of pets.²⁸ For example, before the 1860s, the only animals that the law protected as property were those with clear economic value, like livestock.²⁹ At that time, the law did not similarly protect pets—such as cats and dogs—because pets were considered to lack clear economic value; but this iteration of the law failed to recognize human owners’ inherent interest in their pets.³⁰ The 1860s saw the law transition from merely protecting the owner’s property interest and the economic value of that interest to protecting the animals themselves.³¹

19. For the purpose of this Note, the following analysis will only discuss the legal status of domestic animals (rather than wild animals) and will primarily focus on the legal status of pets (rather than livestock or any other subcategory).

20. Hankin, *supra* note 9, at 321.

21. *Id.*

22. *Id.*

23. *Id.* at 322.

24. Tatoian, *supra* note 11, at 148.

25. Hankin, *supra* note 9, at 322; *see also* Federal Pet Theft Act, 7 U.S.C. § 2131(3) (1976).

26. Hankin, *supra* note 9, at 321. This right does have its limits. But while state statutes might prohibit pet owners from killing their pets in certain ways, they generally do not challenge owners’ rights to humanely euthanize their pets for what might be considered a trivial reason. *See id.* at 321 n.20.

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

28. David Favre, *Living Property: A New Status for Animals Within the Legal System*, 93 MARQ. L. REV. 1021, 1026 (2010).

29. *Id.* at 1026–27.

30. *Id.* at 1027 (“[A]n owner could not call the police if her dog had been stolen or killed.”).

31. *Id.*

In 1867, New York passed a law that provided a conceptual breakthrough,³² which stated that a person shall not “over-drive, over-load, torture, torment, deprive of necessary sustenance, or unnecessarily or cruelly beat, or needlessly mutilate or kill . . . any living creature.”³³ This law served as the model for forthcoming anti-cruelty statutes for other states.³⁴ Those states that followed demonstrated society’s evolution in valuing animals and those animals’ right to be free from unnecessary pain and suffering.³⁵

While this fundamental idea still pervades the modern-day views of pet ownership, it has even further progressed as the normalcy of owning pets has increased. Pets are still legally property, but, in many pet owners’ opinions, this status comes nowhere close to defining a pet’s real value. There are 84.6 million pet-owning houses in the United States, which account for 68% of all U.S. households.³⁶ In these households, the most popular pets include dogs (89.7 million dogs dispersed among 60.2 million homes) and cats (94.2 million cats dispersed among 47.1 million homes).³⁷ Between these pet-owning households, Americans spent \$66.75 billion on their pets in 2016.³⁸ Moreover, 95% of these households consider their pets to be members of the family,³⁹ which brings considerable perks to those pets. For instance, 45% of pet owners buy their pets birthday presents and 31% of pet owners prepare gourmet meals for them.⁴⁰ According to one survey, 80% of pet owners reported that they would even go as far as to risk their own lives for their pets.⁴¹ Some pet owners claim that they feel closer to their pets than to any other member of their family,⁴² and some others view their pets as something akin to their own children.⁴³

However, pet ownership was not always this pervasive, even in relatively recent years. For example, the amount of people who own dogs or cats has quadrupled since the 1960s.⁴⁴ Attitudes surrounding pet ownership have similarly faced dramatic change; pet expenditures doubled since just 2000⁴⁵ and households

32. *Id.* at 1027–28.

33. N.Y. REV. STAT. ch. 375, § 1 (1867) (emphasis added).

34. Favre, *supra* note 28, at 1028.

35. *Id.* at 1028–29.

36. *National Pet Owners Survey*, AM. PET PRODUCTS ASS’N (2017), https://americanpetproducts.org/press_industrytrends.asp.

37. *Id.*

38. *Id.*

39. The Harris Poll, *supra* note 16.

40. *Id.*

41. Rachel Hartigan Shea, *Q&A: Pets Are Becoming People, Legally Speaking*, NAT’L GEOGRAPHIC (Apr. 7, 2014), <http://news.nationalgeographic.com/news/2014/04/140406-pets-cats-dogs-animal-rights-citizen-canine/>.

42. Steven M. Wise, *Recovery of Common Law Damages for Emotional Distress, Loss of Society, and Loss of Companionship for the Wrongful Death of a Companion Animal*, 4 ANIMAL L. 33, 44–45 (1998).

43. *Id.* at 45.

44. Shea, *supra* note 41.

45. *Id.*

that consider their pets to be members of the family increased by at least 7% since 2007.⁴⁶

Society did not always put pets on such a pedestal, which was reflected in the laws of the past.⁴⁷ Today, pet ownership is common, and owners are treating their pets more like family members than ever. Which begs the question: How has this shift in the American attitude toward pet ownership affected modern law?

II. MODERN APPLICATION IN LAW

Just as the nation's growing love for pets has seeped steadily into statutory law over the last few centuries,⁴⁸ it has also begun to invade common law. This is perhaps most noticeable in branches like tort and family-custody law, where the relationship between a pet and its owner is often at issue.⁴⁹ Courts are more likely to recognize the special relationship between owner and pet, and the pet's status as a quasi-person within its family, in these branches of law.⁵⁰ But even then, such opinions remain in the minority.⁵¹

A. Tort Law

Tort claims concerning pets occur when a pet is injured, either by another animal or a human.⁵² Injuries can result from trespass, negligence, state statutory violations, or many other instances too numerous to recite.⁵³ Pets cannot raise their own claims,⁵⁴ and owners cannot raise claims on behalf of their pets.⁵⁵ As such, owners only have standing to raise a claim to recover damages inflicted upon their pets as their property.⁵⁶ So when an injury has been wrongfully inflicted upon a plaintiff's pet, a court's main task is to calculate an award for damages to the owner.⁵⁷

The proper way to calculate damages is a major issue in tort law because there is no clear consensus as to whether pets legally qualify as more than mere property.⁵⁸ In 1979, a New York court held that "a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property," which justifies an award of damages beyond plain fair-market value.⁵⁹ Still, other

46. The Harris Poll, *supra* note 16.

47. See Wise, *supra* note 42, at 36.

48. See Favre, *supra* note 28, at 1026–30.

49. See generally Seps, *supra* note 17, at 1343–47.

50. See generally *id.*

51. See generally *id.*

52. DAVID FAVRE, ANIMAL LAW: WELFARE, INTERESTS, AND RIGHTS 125 (2d ed. 2011).

53. *Id.* at 125–26.

54. Seps, *supra* note 17, at 1343.

55. *Id.*

56. *Id.*

57. FAVRE, *supra* note 52, at 126.

58. *Id.*

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

courts have concluded differently, finding that pets were simply property and declining to consider any additional value in them.⁶⁰

While damages for the loss of a pet have historically been calculated as the pet's fair-market value—which is consistent with valuing other inanimate personal property⁶¹—some courts have used alternative measures (most often when fair-market value is incalculable, or when the pet does not have a fair-market value).⁶² Other factors that these outlier courts have considered include the intrinsic value of a pet to the owner–plaintiff, emotional distress suffered by the owner–plaintiff, and sometimes punitive damages if intentional or malicious conduct caused the injuries to the pet.⁶³

1. *Intrinsic Value*

When a pet's fair-market value is incalculable or when a pet plainly does not have any market value, damages can be based on the pet's intrinsic value (sometimes called *actual value*).⁶⁴ Intrinsic value includes the value of the relationship between owner and pet,⁶⁵ but should not be confused with sentimental value, which is the emotional value of the pet to its owner.⁶⁶ Intrinsic value can include—but is not limited to—subjective factors such as loss of companionship⁶⁷ or loss of a pet's services.⁶⁸

Because intrinsic value is subjective, damages are often difficult for courts to calculate.⁶⁹ The court in *Zager v. Dimilia* struggled to do just that for the Zagers' family dog, Tucker, after his wrongful demise.⁷⁰ As the court stated, the bonds between humans and their pets are “impossible to reduce to monetary terms.”⁷¹ “The age, health and traits of Tucker [did] not provide an adequate benchmark of Tucker's value, ‘intrinsic’ or otherwise,”⁷² and the court concluded that the reasonable cost of Tucker's veterinary expenses were an adequate award.⁷³ Meanwhile, other courts

60. FAVRE, *supra* note 52, at 126; *see also* Rebecca J. Huss, *Valuing Man's and Woman's Best Friend: The Moral and Legal Status of Companion Animals*, 86 MARQ. L. REV. 47, 89 (2002).

61. FAVRE, *supra* note 52, at 128.

62. Huss, *supra* note 60, at 89.

63. Peter Barton & Francis Hill, *How Much Will You Receive in Damages from the Negligent or Intentional Killing of Your Pet Dog or Cat?*, 34 N.Y.L. SCH. L. REV. 411, 416 (1989); *see also* Huss, *supra* note 60, at 89–97.

64. Barton & Hill, *supra* note 63, at 416. However, an owner–plaintiff cannot claim intrinsic value as an independent cause of action. *Id.*

65. *Id.*

66. *Id.* at 420.

67. *See* Brousseau v. Rosenthal, 443 N.Y.S.2d 285, 286 (Civ. Ct. 1980).

68. *See* Demeo v. Manville, 386 N.E.2d 917, 918 (Ill. App. Ct. 1979).

69. *See* Barton & Hill, *supra* note 63, at 417–18, 420.

70. 524 N.Y.S.2d 968, 969 (N.Y. Just. Ct. 1988).

71. *Id.*

72. *Id.*

73. *Id.* at 970; *see also* Hyland v. Borrás, 719 A.2d 662, 664 (N.J. Super. Ct. App. Div. 1998).

have considered a pet's cost of replacement or a pet's original cost on top of the cost of its immunizations, sterilization, training, and even breeding potential.⁷⁴

Although intrinsic value and sentimental value are not synonymous, drawing a distinct line between them is difficult.⁷⁵ As a result, some courts have acknowledged sentimental value as an additional factor of intrinsic value in their assessment of damages.⁷⁶

The rationale behind assigning intrinsic value in cases involving pets is to recognize the special relationship between a pet and its owner.⁷⁷ But this is not a special consideration granted solely to animal-centered tort actions. For example, courts have been known to assign intrinsic value to family heirlooms, photographs, and trophies in the event of their loss.⁷⁸ Intrinsic value is ultimately used to calculate the replacement cost of whatever item was lost.⁷⁹ In theory, irreplaceable items will lead to a higher award regardless of the sentiment attached to them, which is especially helpful because most courts will not recognize sentimental value as an independent consideration.⁸⁰ In this way, some courts grant pets a slightly elevated property status: still personal property, but personal property with substantially more value than a book or smartphone. This option is, of course, preferable to the alternative—that is, failing to recognize any special value at all—to which most other courts defer.

2. Emotional Distress

Some states recognize a tort cause of action for owners who suffer emotional distress as a result of their pets' injuries.⁸¹ However, this usually depends on whether the forum state recognizes emotional-distress claims for the destruction of inanimate personal property.⁸² Even in cases where courts allow emotional distress damages for property-based claims, most courts will only grant awards if the act that caused the distress was intentional.⁸³ If the act was merely negligent, physical injury to the owner must have occurred as well.⁸⁴

Still, there is the occasional, notable case. The Hawaii Supreme Court, for example, granted a \$1,000 award for the negligent death of a dog in *Campbell v. Animal Quarantine Station*.⁸⁵ This case was particularly notable in that the court did

74. Huss, *supra* note 60, at 90.

75. *Id.*

76. *Id.* at 91.

77. Barton & Hill, *supra* note 63, at 419.

78. *Id.*

79. *See id.* at 416–21.

80. Huss, *supra* note 60, at 91.

81. *See* Barton & Hill, *supra* note 63, at 421; Huss, *supra* note 60, at 93. However, claims of these types are generally unsuccessful. *Id.* at 94.

82. Huss, *supra* note 60, at 94.

83. *See, e.g.,* La Porte v. Associated Indeps., Inc., 163 So.2d 267, 269 (Fla. 1964) (where owner–plaintiff could recover for emotional distress after witnessing garbage man deliberately throw a trash can at plaintiff's small dog, killing her).

84. *See* Barton & Hill, *supra* note 63, at 421; Huss, *supra* note 60, at 95.

85. 632 P.2d 1066, 1067, 1071 (Haw. 1981).

not require the owner–plaintiffs to actually witness their dog’s death to recover damages for emotional distress.⁸⁶ This case demonstrates the continued, uniquely elevated status of animal property that does not apply to most other forms of personal property.

3. Punitive Damages

Depending on the jurisdiction, courts will allow punitive damages in cases where a pet was killed intentionally or maliciously.⁸⁷ For example, in *Wilson v. City of Eagan*, the Minnesota Supreme Court reasoned that punitive damages were not only permissible but necessary in cases where regular “compensatory damages are likely to be small and will not function to deter similar conduct.”⁸⁸ In that case, the city’s animal warden directed a police officer to shoot what he believed to be a stray cat instead of impounding it for the statutorily required five days.⁸⁹ The court ultimately awarded the cat’s owners \$500 in punitive damages.⁹⁰

Some other courts are reluctant to award punitive damages at all for the destruction of any property, including pets.⁹¹ Even the *Wilson* court reduced the amount of punitive damages from the original \$4,500 reward to \$500, finding that it was in the court’s interest not to award an “unreasonably excessive” amount.⁹² As a result, though courts’ evolving recognition of an elevated property status for pets shows promise, it remains unsatisfactory at this point.

While the law has made great progress in allowing owner–plaintiffs to recover damages for injuries to pets in tort law,⁹³ further progress must be made to fully compensate owners for the true value of their pets. The progression and challenges of recognizing elevated property status for pets are not unique to tort law.

B. Family Law

Because pets are typically regarded as property, courts traditionally distribute pets between spouses during divorce settlements the way that they would any other piece of property.⁹⁴ That is, who gets the pet depends on whether the pet is separate or marital property.⁹⁵ Courts consider whether a particular spouse purchased the pet, or whether one spouse purchased the pet as a gift for the other.⁹⁶

86. *Id.* at 1067.

87. Barton & Hill, *supra* note 63, at 435.

88. 297 N.W.2d 146, 150 (Minn. 1980).

89. *Id.* at 150.

90. *Id.* at 147–48.

91. *See, e.g.*, *Richardson v. Fairbanks N. Star Borough*, 705 P.2d 454, 456 (Alaska 1985) (requiring “extreme or outrageous conduct” to recover for punitive damages).

92. *Wilson*, 297 N.W.2d at 148, 151.

93. Barton & Hill, *supra* note 63, at 439.

94. *See generally* Eithne Mills & Keith Akers, “*Who Gets the Cats . . . You or Me?*” *Analyzing Contact and Residence Issues Regarding Pets Upon Divorce or Separation*, 36 FAM. L.Q. 283 (2002); *see also* Seps, *supra* note 17, at 1346.

95. *See* Mills & Akers, *supra* note 94, at 292.

96. Seps, *supra* note 17, at 1346.

Other courts recognize that custody disputes over pets can become as contentious as those over children.⁹⁷ In rare circumstances, courts will go as far as to explore what is in the best interest of the pet, a consideration that is traditionally reserved for deciding custody of children.⁹⁸ These courts will balance the interests of the pet and the divorcing couple by examining which *parent* has the closest relationship with the pet, handles the primary caregiving responsibilities, and can offer the best living situation.⁹⁹ The occasional court will even grant visitation rights or pet alimony.¹⁰⁰ Such a case appeared before an Arkansas trial court, which granted a divorcing couple joint custody of their dog.¹⁰¹ The wife would have primary custodial duties—“subject to reasonable visitation rights by the husband”¹⁰²—while the husband would pay \$150 per month to fund the dog’s care and maintenance.¹⁰³

Cases like these, where courts treat pets in a way comparable to children, are still uncommon. Many courts are hesitant to put animals of any kind on the same plane as humans.¹⁰⁴ But cases like these *are* occurring more frequently than they once did, and, as the societal perception of pets continues to transform, we can reasonably expect them to occur even more frequently.

C. Criminal Law

Like tort and family law, criminal law has not been immune to evolving societal pressures. At the beginning of the nineteenth century, all animals were personal property.¹⁰⁵ They received no more protection than any other item of personal property—like a shovel or plow.¹⁰⁶ As the century progressed, however, “lawmakers began to recognize that an animal’s potential for pain and suffering was real and deserving of protection against its unnecessary infliction.”¹⁰⁷ During the

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

98. *See id.* at 223.

99. *See id.* at 227–28.

100. Which is evidently common enough to be referred to as “petimony.” *See id.* at 223; *see also* Tabby T. McLain, *Knick-Knack, Paddy-Whack, Give the Dog a Home?: Custody Determination of Companion Animals upon Guardian Divorce*, THE ANIMAL LEGAL & HIST. CTR., MICH. ST. UNIV. C. L. (2009), <https://www.animallaw.info/article/detailed-discussion-knick-knack-paddy-whack-give-dog-home-custody-determination-companion>.

101. *Dickson v. Dickson*, No. 94-1072 (Ark. Garland County Ch. Ct. Oct. 14, 1994).

102. Huss, *supra* note 97, at 223.

103. *Dickson*, No. 94-1072.

104. *See, e.g.*, Huss, *supra* note 97, at 225; *Arrington v. Arrington*, 613 S.W.2d 565, 569 (Tex. Civ. App. 1981) (distinguishing between human children and animals by finding that a dog should be treated as personal property).

105. FAVRE, *supra* note 52, at 188.

106. *Id.*

107. *Id.*

latter half of the century, anti-cruelty laws—upon which modern laws would be built—made their debuts.¹⁰⁸

As *Newcomb* demonstrates, contemporary anti-cruelty laws and the way that courts enforce them are still evolving. The police’s initial seizure of Juno, Newcomb’s dog, was entirely legal because the police established probable cause that Juno was being criminally neglected.¹⁰⁹ The principle issue that the *Newcomb* court addressed was the warrantless blood sample taken while treating Juno for his severe emaciation.¹¹⁰ The blood sample ruled out disease or parasites as causes for Juno’s condition, thereby indicating Newcomb’s culpability for failing to properly care for her pet.¹¹¹

The Fourth Amendment protects individuals from unreasonable searches and seizures of their person, house, or effects.¹¹² Juno, as personal property, would typically qualify as one of Newcomb’s effects. Citing the Oregon Constitution,¹¹³ Newcomb argued that dogs were no different than “a folder or a stereo or a vehicle or a boot.”¹¹⁴ She contested that

the state could examine only the exterior of seized property without seeking a warrant . . . [and that] by withdrawing blood from Juno and testing that blood without a warrant, the state intruded into her personal property and revealed information not otherwise open to view, which violated her constitutionally protected privacy.¹¹⁵

The *Newcomb* court reviewed the lawfulness of the blood test and assessed whether Juno’s status as a living animal—rather than an inanimate object or other insentient physical item—could justify a legal distinction between *searching* Juno and searching any other type of personal property.¹¹⁶ In considering this issue, the court stated that

[r]eflected in . . . laws that govern ownership and treatment of animals is the recognition that animals are sentient beings capable of experiencing pain, stress and fear. To be sure, the protection given to animals under Oregon law does not place them on a par with humans The important point for this case, however, is not that Oregon law permits humans to treat animals in ways that humans may not treat other humans. What matters here is that Oregon law prohibits humans from treating animals in ways that humans are free to treat other forms of property. Oregon law also places affirmative obligations on those who have custody of an animal to ensure that

108. *Id.*

109. *State v. Newcomb*, 375 P.3d 435, 437 (Or. 2016).

110. *Id.*

111. *Id.*

112. U.S. CONST. amend. IV.

113. OR. CONST. art. I, § 9. “No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure” *Id.*

114. *Newcomb*, 375 P.3d at 437–38.

115. *Id.* at 438.

116. *Id.* at 439.

animal's basic welfare; those obligations have no analogue for inanimate property.¹¹⁷

Because the investigating officer had probable cause to seize Juno from Newcomb, the court found that, at that time, Newcomb had at least temporarily lost her rights of dominion and control over her dog.¹¹⁸ In addition, the blood test was necessary to medically diagnose and to treat Juno, a living animal capable of pain and suffering.¹¹⁹ As such, Juno's blood test did not technically qualify as a *search* that violated Newcomb's privacy interests,¹²⁰ and Juno's blood test was admissible evidence at trial.¹²¹

But the *Newcomb* court took its analysis a step further by rejecting Newcomb's insistence that Juno was analogous to an opaque, closed container in which private information was concealed.¹²² Specifically, the court noted:

Juno's "contents" . . . were the stuff that dogs and other living mammals are made of: organs, bones, nerves, other tissues, and blood . . . inside Juno was just "more dog." The fact that Juno had blood inside was a given; he could not be a living and breathing dog otherwise. And the chemical composition of Juno's blood was a product of physiological processes that go on inside of Juno, not "information" that defendant placed in Juno for safekeeping or to conceal from view.¹²³

The court recognized that this reasoning "[had] significance in the context of the legal and social norms for the care and welfare of animals,"¹²⁴ and noted that "[a] dog owner simply has no cognizable *right*, in the name of her privacy, to countermand [her] obligation" of providing minimum care to the animal in her charge.¹²⁵ The court then concluded that

[a]n examination of the dog's physical health and condition in that circumstance, pursuant to a medical judgment of what is appropriate for diagnosis and treatment, is not a form of governmental scrutiny that, under legal and social norms and conventions, invades a dog owner's protected privacy rights under [the Oregon or U.S. Constitutions].¹²⁶

Though the court never explicitly said so, it took a unique step in implying that dogs—and, subsequently, other animals—qualified as more than mere property. Animal-welfare groups across the nation responded accordingly by heralding

117. *Id.* at 441 (internal quotations and citations omitted).

118. *Id.* at 442.

119. *Id.*

120. *Id.*

121. *Id.* at 446.

122. *Id.* at 442.

123. *Id.* at 442–43.

124. *Id.* at 443.

125. *Id.*

126. *Id.* at 443.

Newcomb as a landmark decision.¹²⁷ The Animal Legal Defense Fund (which filed an amicus brief in *Newcomb*) stated that the decision had “enormous practical implications for those working tirelessly on the ground every day to rescue animals,” and expressed its hope that the ruling will ensure “that animals lawfully seized during criminal investigations will be able to receive necessary, prompt medical attention without evidence suppression issues potentially jeopardizing the criminal cruelty case.”¹²⁸

Newcomb, decided in 2016, is the most recent case to come through the Oregon legal system that grants improved legal protection for animals. Still, the *Newcomb* decision is consistent with other animal-welfare cases that precede it.

Before *Newcomb* was *State v. Fessenden*, another animal-welfare case decided by the Oregon Supreme Court.¹²⁹ In *Fessenden*, the defendants’ neighbors called authorities to investigate a horse that appeared to be starving.¹³⁰ The responding officer discovered the horse in plain view in the pastures next to one of the defendants’ homes.¹³¹ The officer observed that the horse demonstrated signs of emaciation (including having no visible fat on her body, bones that were visible through her skin, and a sway in her stance).¹³² The officer also recognized that the horse was straining to urinate, a sign of kidney failure.¹³³ Believing that the horse was suffering from malnourishment, which presented a medical emergency, the officer determined that an exigent circumstance existed, which allowed him to enter the property and seize the horse to transfer her to a veterinarian.¹³⁴

The defendants were criminally charged with, and eventually convicted of, varying degrees of animal abuse and neglect.¹³⁵ At trial, they argued that the officer violated their right to be free from unreasonable searches and seizures.¹³⁶ They also argued that, while “two exceptions to that [right]—the emergency aid and the exigent circumstances exceptions—permitted the officer’s entry and seizure . . . neither exception permits an officer to act without a warrant to provide aid to an animal.”¹³⁷ On appeal, the Oregon Supreme Court held that the exigent-

127. See Merritt Clifton, *Stepping in Poop without a Warrant: Oregon Supreme Court Rules*, ANIMALS 24-7 (June 21, 2016), <http://www.animals24-7.org/2016/06/21/stepping-in-poop-without-a-warrant-oregon-supreme-court-rules/>; Lora Dunn, *Oregon Supreme Court: Blood Draw Is Not a “Search”*, ANIMAL LEGAL DEF. FUND (June 21, 2016), <http://aldf.org/blog/oregon-supreme-court-blood-draw-is-not-a-search/>.

128. Dunn, *supra* note 127.

129. 333 P.3d 278 (Or. 2014) (en banc).

130. *Id.* at 280.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 280–81.

136. *Id.* at 281 (citing OR. CONST. art. I, § 9).

137. *Id.*

circumstances exception extended to the protection of certain animals, including horses, and affirmed the defendants' convictions.¹³⁸

Then, in 2015, the Oregon Court of Appeals ruled on *State v. Hess*.¹³⁹ In *Hess*, police performed a welfare check at the defendant's residence and discovered 38 cats living in uninhabitable conditions.¹⁴⁰ Seven cats were already dead.¹⁴¹ After the defendant willingly relinquished her cats, the police transported them to the veterinarian, who found that the living cats were underweight, anemic, and severely flea infested.¹⁴² The seven cats that died perished from a combination of these conditions.¹⁴³ The state later charged the defendant with 7 counts of first-degree animal neglect (for the cats that died) and 38 counts of second-degree animal neglect (for the cats that lived).¹⁴⁴

Having been convicted on all 45 counts, the defendant contended during her sentencing hearing that "all of the guilty verdicts should merge into a single conviction because the cats were her property and, thus, not victims, leaving only one victim of her crimes—the public."¹⁴⁵ The Court of Appeals rejected this argument¹⁴⁶ and cited the Oregon Supreme Court's decision in *State v. Nix*¹⁴⁷ that held that animals are not barred from being categorized as victims for the purposes of the specific Oregon anti-merger statute.¹⁴⁸

Animal-advocacy groups praised *Fessenden* and *Hess* for their progressiveness just as they praised the *Newcomb* decision.¹⁴⁹ However, all of these cases occurred in Oregon, making Oregon's animal-welfare statutes some of the nation's most protective statutory schemes.¹⁵⁰ Accordingly, animals may not enjoy such protections in the remaining 49 states.

138. *Id.* at 288. Although the court did not analyze whether the emergency-aid exception applied when the victim of a crime is an animal, it did not rule it out. "We simply exercise judicial restraint and leave for another day questions unnecessary to the resolution of this case, such as whether the emergency aid exception extends to animals." *Id.* at 287.

139. 359 P.3d 288 (Or. Ct. App. 2015).

140. *Id.* at 290.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 292.

146. *Id.* at 293.

147. 334 P.3d 437 (Or. 2014). Although the *Nix* court eventually vacated its decision for lack of jurisdiction, the *Hess* court found the arguments made in *Nix* persuasive. *Hess*, 359 P.3d at 293.

148. *Nix*, 359 P.3d at 448; *see also* OR. REV. STAT. § 161.067 (1985).

149. *See, e.g.*, Scott Heiser & Lora Dunn, *Two Great Legal Victories for Animals in Oregon*, ANIMAL LEGAL DEF. FUND (Aug. 11, 2014), <http://aldf.org/blog/two-great-legal-victories-for-animals-in-oregon/>.

150. *State v. Fessenden*, 333 P.3d 278, 283 (Or. 2014).

Still, assuming that the decisions made in Oregon courts can influence the rest of the United States,¹⁵¹ the next question is whether this pattern can be pragmatically maintained or whether it will eventually come to odds with human interests.

III. THE POTENTIAL FUTURE STATUS OF PETS

Anticipating the future legal recognition of a quasi-person status for pets is not difficult. One merely needs to examine two similar examples: the expansion of rights for children and the evolution of welfare systems.

Like animals, children were once legally classified as the mere property of their *owners*, otherwise known as their parents.¹⁵² Children were not even considered particularly valuable property.¹⁵³ For example, child abduction was only technically a theft, in the legal sense, if the child was wearing clothes at the time of abduction, in which case the thief was only charged with having stolen the clothes.¹⁵⁴ Children simply were not considered legal persons until they reached adulthood.¹⁵⁵

The first child-abuse case did not occur until 1874 in New York.¹⁵⁶ At that time, laws that protected children from physical abuse by their parents did not yet exist.¹⁵⁷ It was actually the Society for the Prevention of Cruelty to Animals (“SPCA”) that brought an action against a ten-year-old girl’s adoptive mother after neighbors noticed the child’s severely battered and neglected appearance.¹⁵⁸ The

151. It could happen, provided that relevantly similar cases make it to the appellate courts of other states and that these other states find Oregon’s decisions sufficiently persuasive. Consider also that Oregon has led other states in passing divisive laws before. See, for example, the right-to-die debate, which discusses whether people are entitled to end their own lives or to undergo voluntary euthanasia. See generally Roger S. Magnusson, *The Sanctity of Life and the Right to Die: Social and Jurisprudential Aspects of the Euthanasia Debate in Australia and the United States*, 6 PAC. RIM L. & POL’Y J. 1 (1997). Oregon was the first state to legislatively legalize physician-assisted suicide in 1994 with its Death with Dignity Act, followed by Washington in 2008, Vermont in 2013, California in 2015, and Colorado in 2016 with their own modified versions. OR. REV. STAT. §§ 127.800–995 (1995); WASH. REV. CODE § 70.245 (2009); VT. STAT. ANN. tit. 18, §§ 5281–93 (West 2013); CAL. HEALTH & SAFETY CODE § 443 (2016); COLO. REV. STAT. §§ 25-48-101 to 123 (2016). In 2009, meanwhile, the Montana Supreme Court ruled that nothing in state precedent or in the state’s constitution indicated that “physician aid in dying [was] against public policy.” *Baxter v. State*, 224 P.3d 1211, 1222 (Mont. 2009). As it stands, certain Oregon laws might be considered idealistic and their progression throughout the rest of the United States might be slow. But still, their progression is possible.

152. Judith Enew, *The History of Children’s Rights: Whose Story?*, CULTURAL SURVIVAL (June 2000), <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/history-childrens-rights-whose-story>.

153. *Id.*

154. *Id.*

155. *See id.*

156. Howard Markel & M.D., *Case Shined First Light on Abuse of Children*, N.Y. TIMES (Dec. 14, 2009), <http://www.nytimes.com/2009/12/15/health/15abus.html>.

157. *Id.*

158. *Id.*

SPCA presented the girl as a vulnerable member of the animal kingdom that required the state's protection, and the New York Supreme Court found her adoptive mother guilty of several counts of assault and battery.¹⁵⁹ The case set legal precedent for a child to be "at least entitled to the justice of a cur on the streets," even if that child still had "no rights as a human being under the law."¹⁶⁰ In 1874, the Society for the Prevention of Cruelty to Children was founded.¹⁶¹

It was not until 1988, however, that U.S. courts began to recognize that parents could make a tortious claim of emotional damages and loss of consortium for the wrongful injury or death of a child.¹⁶² Today, U.S. courts recognize that a child's injury or death can lead to two categories of causes of action: (1) pain and suffering, permanent injury, and impairment of earning capacity after majority¹⁶³ on behalf of the child; and (2) loss of services or consortium during the child's minority and any medical expenses on behalf of the parents.¹⁶⁴

The treatment of children in custody law, too, has shifted dramatically. During the seventeenth and eighteenth centuries, U.S. courts applied paternal preference in divorce custody cases.¹⁶⁵ During the nineteenth century, the pattern shifted to a maternal presumption of custody, stemming from the logic that it was a father's job to work and a mother's exclusive job to care for children.¹⁶⁶ By the mid-1970s, courts moved away from determining custody based entirely on the parents' genders and towards considering the child's needs and interests.¹⁶⁷ Courts began to consider the child's gender in combination with that child's physical, moral, intellectual, and psychological needs, as well as each parent's ability to meet those needs.¹⁶⁸

Societal perception and legal categorization of pets evolved similarly to that of children. Thus, the idea that the law could protect pets the same as human children is not so ludicrous. However, this prediction begs the question of whether categorizing animals as persons is practical.

The answer is probably not. To reclassify pets as persons is a small step away from legally requiring animals to have the same rights that are, so far, reserved for humans. Such a requirement is neither pragmatic nor desirable.

159. *Id.*

160. Kirsten Anderberg, *NY's First Child Abuse Trials: Based on Animal Rights, Not Children's Human Rights*, RESIST!CA (Sept. 23, 2008), <https://users.resist.ca/~kirstena/pagespcachildabuse.html>.

161. Markel & M.D., *supra* note 156.

162. Schyler P. Simmons, Comment, *What Is the Next Step for Companion Pets in the Legal System? The Answer May Lie with the Historical Development of the Legal Rights for Minors*, 1 TEX. A&M L. REV. 253, 264 (2013).

163. That is, after the child becomes a legal adult.

164. Simmons, *supra* note 162, at 264.

165. Joan B. Kelly, *The Determination of Child Custody*, 4 FUTURE CHILDREN 121, 122 (1994).

166. *See id.*

167. *Id.* at 121.

168. Simmons, *supra* note 162, at 269.

There are movements that nonetheless pursue this objective in the hopes of ending animal suffering once and for all. For example, *animal rights* is a phrase used to describe a social movement with principal aims that include the following: (1) ending the strict moral and legal distinctions between humans and animals; (2) declassifying animals as property and reclassifying them as persons; and (3) ending the use of animals in food, clothing, research, and entertainment.¹⁶⁹ Some animal-rights activists even reject the practice of keeping animals as pets.¹⁷⁰

Initially, the main theories behind animal rights seem relatively sound. For example, almost all defenders of animal rights rely on a *marginal-human* argument to contradict the common idea that a human's ability to rationalize is what affords them rights of personhood.¹⁷¹ The marginal-human argument states:

There are normal paradigmatic humans; they have the features and capacities that we think of when we think of humans: reasoning ability, normal emotional responses, and so forth. Then there are those outside of that paradigm—marginal humans—that lack some or all of these capacities. These include infants, young children, the severely mentally retarded, the permanently comatose, and probably the senile If normal, adult humans have rights by virtue of being rational beings, then, according to the marginal-humans argument, infants and severely retarded humans cannot have rights on this basis because they are not capable of being rational. So, either rationality is not the sole basis for rights, or these marginal humans do not have rights.¹⁷²

The only response to this point is to either admit that marginal humans do not deserve the rights that paradigmatic humans have, or that those rights must encompass marginal humans and, by extension, some “higher-order” animals.¹⁷³

But the marginal-human philosophy fails in the logical fallacies it presents. One could respond to the marginal-human argument by pointing out that infants and young children will one day become paradigmatic humans. The mentally disabled were, but for some genetic or environmentally caused deformity, supposed to be paradigmatic humans. The permanently comatose and the senile were presumably once paradigmatic humans.¹⁷⁴ Accordingly, the marginal-human philosophy cannot properly erase the line between the human species and animal species, none of which have ever qualified or will ever qualify as paradigmatic humans per the above definition.

Then, there is the sheer unreasonableness in achieving some animal-rights-oriented goals. These goals could require completely ending the use of animals for

169. See FAVRE, *supra* note 52, at 392–430.

170. See *Animal Rights: Uncompromised 'Pets'*, PETA, <http://www.peta.org/about-peta/why-peta/pets/> (last visited Jan. 20, 2017).

171. Shawn E. Klein, *The Problem of Animal Rights*, ATLAS SOC'Y (June 22, 2004), <http://atlassociety.org/objectivism/atlas-university/deeper-dive-blog/3710-the-problem-of-animal-rights>.

172. *Id.*

173. See *id.* (“[A]pes, dogs, cats, and so forth . . .”).

174. See *id.*

food, clothing, research, and entertainment. They could require every person to become vegan. They could forever preclude the use of goods like leather and wool, and force testing of potentially dangerous products to be performed on people. They could ban pets from all forms of entertainment—TV, movies, exhibitions, circuses, etc. Granted, these results *could* very well be the best course of action in the interest of animal safety and happiness, but as long as the lawmakers in the United States are exclusively of the human species, human interests will undoubtedly outweigh those of animals.

Still, pets are inarguably special, and it is impossible to be wholly satisfied with the limited protections that they are granted under their current status as personal property. It follows that the legal system should neither reclassify pets as individual persons, nor keep pets in their current category as regular personal property. Instead, pets should be placed somewhere in between: as sentient property.

IV. THE SENTIENT-PROPERTY SOLUTION

The most appropriate way to balance human and animal interests was first mentioned in a brief footnote in *Petco Animal Supplies, Inc. v. Schuster*.¹⁷⁵ There, the Texas appellate court acknowledged an Animal Legal Reports Services amicus brief, which urged the court to classify pets as *sentient property*—“a status that recognizes the animal’s own feelings and emotions.”¹⁷⁶ Though the court declined to further discuss the idea of pets as sentient property, it did not reject the idea outright.

The idea of sentient property was further fleshed out in July 2004 at an American Veterinary Medical Law Association meeting.¹⁷⁷ Carolyn B. Matlack, a North Carolina animal-law attorney, headed the main presentation.¹⁷⁸ She admonished the current personal-property category for animals as antiquated, and discussed increased activity in both animal-rights and animal-welfare groups.¹⁷⁹ She noted pets’ new roles as members of the family.¹⁸⁰ In short, Matlack articulated a principal argument of this Note: societal perception of animals has changed, and the law should reflect that change accordingly. “We’re living in an ‘Animal Planet’ world but with horse-and-buggy laws,” she remarked.¹⁸¹

But Matlack recognized that pursuing animal rights in that way was not a practical course of action.¹⁸² She accepted the fact that animals’ place in society is not equal to humans. She argued: “Our society is comprised of meat eaters,

175. 144 S.W.3d 554, 561 n.6 (Tex. App. 2004).

176. *Id.*

177. R. Scott Nolen, *Sentient Property: A Novel Animal Law Proposal*, AVMA: JAVMANEWS (Sept. 1, 2004), <https://www.avma.org/News/JAVMANews/Pages/040915j.a.spx>.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *See id.*; *see also* CAROLYN B. MATLACK, WE’VE GOT FEELINGS TOO! PRESENTING THE SENTIENT PROPERTY SOLUTION 72 (2006).

poachers, hunters and researchers. Right now we *use* animals. That's not going to end overnight. Meanwhile I'm seeing animals suffer. We need a compromise."¹⁸³

Matlack suggested an alternate course of action: a new classification of property called *sentient property*.¹⁸⁴ This category includes any warm-blooded, domesticated, nonhuman animal dependent on one or more humans for food, shelter, veterinary care, or compassion and typically kept in or near the household of its owner, guardian, or keeper.¹⁸⁵ The theory behind this category was based on recognizing animal sentience (hence the name) and protecting pets' interest in avoiding suffering.¹⁸⁶ The doctrine of substituted judgment, which allows an individual to make a decision about medical treatment on behalf of another who is unable to do so, heavily influences the concept of sentient property.¹⁸⁷ Matlack reasoned that "courts of law create legal protections when protections are necessary . . . It is the duty of the courts and our laws to protect those unable to protect themselves—the greatest fundamental principle in our judicial system."¹⁸⁸

Through the concept of sentient property, Matlack provides the middle-ground solution to classify pets, at least in tort and custody cases. For example, whether a pet qualifies as sentient property for the purposes of any civil case is determined by assessing the depth of an owner-pet relationship.¹⁸⁹ To determine such a bond and its monetary value, courts can consider the following:

- (1) The duration and continuity of the relationship between owner and animal;
- (2) Unique behavioral characteristics and special needs of the animal;
- (3) Special needs of the owner;
- (4) Multiple events or occurrences demonstrating the bond of friendship, trust, and loyalty;
- (5) Evidence that the animal in question has: (a) Been examined at appropriate intervals by a veterinarian, provided with preventative medical care, and treated for any illnesses, injuries[,] or conditions requiring medical care[;] (b) Been fed, groomed, housed, and maintained in a safe environment and in good physical condition unless it has or has had an injury or illness not brought about by the owners' negligence, and the owner has followed medical advice to provide any requisite treatment[;] (c) Had no less than weekly contact and interaction on average with the animal's owner[;]
- (6) The classification of an animal as a service or therapy animal shall be presumed to establish the existence of a strong human-animal bond, unless evidence can be introduced to the contrary;
- (7) Medical evidence that the owner suffered emotional distress or mental anguish

183. MATLACK, *supra* note 182, at 72.

184. Nolen, *supra* note 177. *See generally* MATLACK, *supra* note 182.

185. Nolen, *supra* note 177; MATLACK, *supra* note 182, at 72. Farm animals and animals regulated by the federal Animal Welfare Act do not fall under the sentient-property classification. MATLACK, *supra* note 182, at 72. Though such animals do deserve property classifications of their own, it will not be discussed within the confines of this Note.

186. *See* Nolen, *supra* note 177.

187. *Id.*

188. MATLACK, *supra* note 182, at 86.

189. *Id.* at 87–88.

as a result of an act(s) of cruelty or inhumane treatment of an animal.¹⁹⁰

In situations where a court concludes that an animal is sentient property and then must determine whether to use the substituted-judgment doctrine in an animal case, Matlack proposes a three-part test.¹⁹¹ “Teddy’s Test,” which she named for her deceased collie.¹⁹² Under Teddy’s Test, the doctrine is applicable when

(1) [t]he owner of sentient property needs to redress a harm that caused or may cause pain and suffering or emotional distress of the animal; (2) [t]he owner of sentient property needs to redress a harm for personal pain and suffering or emotional distress due to the loss of or harm to their animal; or (3) [t]he interests of the sentient . . . property need be weighed between that of the owner and that of the greater good of society.¹⁹³

In setting such achievable parameters, Matlack’s proposal succeeds in affording pets and their owners a greater legal recognition and improved relief for harms. It accomplishes this improved outcome without putting courts in the awkward position of having to draw a distinct line between a dog and a smartphone or between a cat and the common house fly.

Sentient beings as a distinct branch of property law echoes court opinions discussed in Parts I, II, and III. For example, there was the New York civil court that found “a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property.”¹⁹⁴ Thirty-seven years later, there was the *Newcomb* court, which recognized that

animals are sentient beings capable of experiencing pain, stress and fear To be sure, the protection given to animals under Oregon law does not place them on a par with humans What matters here is that Oregon law prohibits humans from treating animals in ways that humans are free to treat other forms of property.¹⁹⁵

Matlack’s specific tests might not properly cover the intricacies of protecting pets as victims in criminal cases. But with *Newcomb* and the other notable Oregon cases, Matlack’s tests provide a cornerstone from which the common law can progress. Using sentient-property analysis, the legal system will better protect pets. It would punish those who neglect or abuse pets more. It could also establish a special duty of care between owner and pet—perhaps one similar to the special duty of care between parent and child—and could even lead to sanctions against pet owners for failing to protect their pets from harm.

190. *Id.* at 88.

191. *Id.* at 88–89.

192. Nolen, *supra* note 177.

193. MATLACK, *supra* note 182, at 88–89.

194. *Corso v. Crawford Dog and Cat Hosp.*, 415 N.Y.S.2d 182, 183 (N.Y. Civ. Ct. 1979).

195. *State v. Newcomb*, 375 P.3d 434, 441 (Or. 2016) (internal quotations and citations omitted).

Simultaneously, sentient-property analysis avoids the pitfalls of complete animal liberation that many animal-rights movements pursue. It does not seek to reshape the entire legal-classification system and the way that humans use animals in their day-to-day lives. Rather, it provides a compromise between owners' love for their pets and owners' own interests.

Given that the American judiciary and legislature are wholly made up of humans and assuming that both branches are made up of 65% pet owners—a cross section of the general population—sentient-property analysis offers the most attractive course of action and is therefore the most likely to align our evolving perception of pets with common and statutory law.

However, despite the clear benefits to categorizing pets as sentient property, little information is available on the subject. The *Petco* decision was published in 2004,¹⁹⁶ the same year that Matlack first presented her tests.¹⁹⁷ In 2006, Matlack published a book, *We've Got Feelings Too! Presenting the Sentient Property Solution*.¹⁹⁸ Since then, no visible progress has been made in the sentient-property movement.

The reasons for this are unclear. There are no particularly severe critiques that effectively discredit Matlack's proposal.¹⁹⁹ One explanation is that the movement simply never gained traction, either for lack of awareness or for lack of a case in which to apply the theory.²⁰⁰

However, in October 2016, *Rego v. Madalinski* became the first case since *Petco* to use the term *sentient property* in its decision.²⁰¹ While the Ohio Court of Appeals did not explicitly suggest reclassifying pets as sentient property, it did consider sentience as a factor for determining whether to award the appellant more than fair-market value for his injured dog.²⁰² Additionally, a Canadian province recently went so far as to remove all domestic animals and some wild animals from the property category altogether; they now reside under a new category: sentient

196. *Petco Animal Supplies, Inc. v. Schuster*, 144 S.W.3d 554, 554 (Tex. App. 2004).

197. Nolen, *supra* note 177.

198. MATLACK, *supra* note 182.

199. There was a recent paper that briefly criticized the sentient-property solution for excluding animals that were not pets (among other complaints), but it has no relevance to the scope of this Note. See Richard L. Cupp, Jr., *Animals as More Than "Mere Things" But Still Property: A Call for Continuing Evolution of the Animal Welfare Paradigm* 20–22 (Pepp. U. Sch. of L. Legal Stud. Res. Paper Series, Paper No. 2016/19, 2016), <https://ssrn.com/abstract=2788309>.

200. A sizeable section of Matlack's own book dissects a fictional case and hearing in which she could have presented her sentient-property solution to a court. MATLACK, *supra* note 182, at 83–100.

201. 63 N.E.3d 190, 192, ¶ 10 (Ohio Ct. App. 2016).

202. See *id.* at 192, ¶ 11. The court, however, did reject an owner's claim for damages based on "his or her own hurt feelings, emotions, or pain . . . [or] for the loss of the animal's companionship or society." *Id.* at 192–93, ¶ 11 (internal citation omitted).

beings.²⁰³ Under this label, animals enjoy increased protection while still not acquiring the same rights afforded to human persons.²⁰⁴

Consider these facts along with the cases outlined throughout this Note, like the tort cases that recognized a pet's special place somewhere between person and property, or the family-law cases that recognized the similarities between pets and children. Cases like these have become more frequent since the 1960s, finally spilling into the criminal realm in the last three years and culminating in the Oregon decisions. *Newcomb*, the most recent of these cases, is perhaps the greatest indicator of where pet categorization is headed.

The *Newcomb* decision and its predecessors have become sensationalized by animal-law interest groups and have drawn national attention. The next step—in recognizing animal sentience, in recategorizing animals into a sentient-property subgroup, and in affording pets and their owners the legal protection that they deserve—is to act before the excitement expires. Matlack's solution has been waiting idly for over ten years. These cases indicate that the United States is finally ready to use her solution.

CONCLUSION

Newcomb is only the most recent case to reiterate what people have felt for a long time: pets are something special. Juno the dog was more than mere property and more than just a container for his own DNA. His owner should not treat Juno like he was mere property, and neither should the law. But the Oregon Supreme Court also recognized that Juno was not quite human either.

Continually classifying animals as mere property is at odds with the way society perceives the value of pets. This classification is an ancient relic of outdated views that failed to properly evolve. Even though courts have begun to reshape the status of animals outside of this insufficient category, some animal-rights advocates' push towards quasi-personhood fails to solve the issue.

Thus, pets should be classified as something between property and personhood. Sentient-property analysis solves this dilemma by recognizing the value of animal sentience while not ignoring human interest in using animals for various purposes. The cases discussed throughout this Note, having gained traction over the last 50 years (and especially within the last 4), suggest that the United States might finally be ready to accept such a solution.

In her book, Matlack concludes that “[s]entient . . . property is the next reasonable legal step toward greater fairness and justice for animal owners and the

203. Amanda Froelich, *Animals Now Listed As “Sentient Beings” Rather Than Property in Quebec*, TRUE ACTIVIST (June 12, 2016), <http://www.trueactivist.com/animals-now-listed-as-sentient-beings-rather-than-property-in-quebec/>; *Canada Just Declared That Animals Are Now Considered “Sentient Beings” and Not Just Property*, VEGAN ENTHUSIASTS (Aug. 26, 2016), <https://veganenthusiasts.com/2016/08/26/canada-just-declared-that-animals-are-now-considered-sentient-beings-and-not-just-property/>.

204. See *Canada Just Declared That Animals Are Now Considered “Sentient Beings” and Not Just Property*, *supra* note 203.

animals themselves and recognizes the important, critical roles they play in today's society."²⁰⁵ Unfortunately, Matlack's proposal was before its time. Now, over ten years after the book's release, this Note closes with the same sentiment. Sentient property is finally timely and hopefully, in ten years more, it will not require repeating again.

205. MATLACK, *supra* note 182, at 90.