Killing For Your Dog

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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 counter 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, or even lethal, force in defense of their pets. By exploring the intersection of criminal defenses and the status of animals, the ambiguities in our common law doctrines of exculpation and the status of animals in America become apparent. 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

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INTRODUCTION

Instances of animal abuse are not uncommon in the United States.[1] Sometimes the abuse targets a pet, or on occasion, the abuse may take the form of a third party abusing the owner's pet in the owner's presence. Such violence, particularly in the context of violent

[1] *See Animal Cruelty Facts and Statistics: Statistics on the Victims and Current Legislative Trends*, HUMANE SOC'Y U.S. (Oct. 29, 2014), 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. *See, e.g.*, *On Trial: Twin Teens Charged with Setting Dog on Fire*, CBS BALTIMORE (Jan. 28, 2011, 5:52 PM), 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. *See, e.g.*, Yanir Yagna, *Rahat Man Videotapes Children Burning Dogs Alive*, HAARETZ (Mar. 8, 2009, 1:22 PM), http://www.haaretz.com/news/rahat-man-videotapes-children-burning-dogs-alive-1.271677 ("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.").

intimate relationships between pet owners, is alarmingly common.[2] To date, the academic commentary regarding violence against animals has largely focused on animal abuse prosecutions. There is emerging literature, however, discussing the appropriate penalties, resources, and investigations needed to deter these crimes,[3] including 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, it considers whether the law should do more to protect defenders of animals. Stated differently, instead of emphasizing the need for increased incarceration, prosecution, or registration, the focus is 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, the following basic fact pattern provides some context and 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 keeps walking, however, one of the boys becomes more aggressive. James tries, but is unable to escape from the teen's attention. The teen orders 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 that his dog is about to be

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2 A study showed that in seventy-one percent of relationships that involve domestic violence where there is a pet, the abuser also attacks the animal. *Animal Cruelty Facts and Statistics: Statistics on the Victims and Current Legislative Trends*, *supra* note 1. 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*, N.Y. TIMES MAG., June 11, 2010, at 42, 44, 47, *available at* 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, 92 (2005).

4 *See* Stacy A. Nowicki, Comment, *On the Lamb: Toward a National Animal Abuser Registry*, 17 ANIMAL L. 197, 200 (2010).

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.[6] But this focus 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? 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. 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.[7] Perhaps even more surprising and unsettling is the realization that the boy who threatened the dog's life and initiated the interaction might be acquitted of James's murder because he would have available certain criminal defenses.[8] 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 study for evaluating the

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5 This factual narrative is very loosely based on actual events. *See Elderly Man Stabs Neighbor Over Cats and Dogs*, HUFFPOST LOS ANGELES, (June 3, 2011, 5:12 AM), 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*, 14 GREEN BAG 113 (2010), *available at* http://www.greenbag.org/v14n1/v14n1_ex_post_orth.pdf.

6 *See, e.g.*, Beth Ann Madeline, Comment, *Cruelty to Animals: Recognizing Violence Against Nonhuman Victims*, 23 U. HAW. L. REV. 307, 311–15 (2000).

7 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. MODEL PENAL CODE § 3.11(2) (1985). "Necessary," however, is the operative term here. Force is only necessary when it is privileged or justified. *See infra* notes 128–29 and accompanying text. 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. *See infra* Part III.B.

8 One can assume for purposes of this discussion that James is not so old and feeble as to present a noncredible threat of serious bodily injury when he waves the knife toward the boy. *Cf.* 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 (describing the following hypothetical: "A unjustifiably assaults B by tickling him behind the ear with a long feather. B, who is confined to a wheelchair, is unable to prevent the tickling except by shooting A. If B shoots A, his response may be necessary to defend himself, but it may nonetheless be held to be a disproportionate response . . . .").

limitations 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 these circumstances, we need to ask whether the criminal law has failed to keep pace with our social values. If the threats of violence had been made to James's son—even if the son was mute, paralyzed, and substantially less emotionally connected than the dog—James would unquestionably avoid criminal sanction.[9] And rightly so. Indeed, James would be celebrated as a hero for defending his defenseless paraplegic son from an imminent attack. 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 nonhuman animal can be surprisingly strong and important.

The question here 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 if the criminal law is to retain its status as a reflection of and inculcator of socially desirable values. If we expect and want people to protect vulnerable animals, then the criminal law should protect persons who do so.

The point here is not to advocate for 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.[10] The old common law defenses (and their 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,[11] this Article provides the vehicle for doing so.

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9 *Cf.* STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS 1–7 (2001) (explaining the difficulty in meaningfully distinguishing between animals and humans in terms of biological functioning).

10 Some commentators have argued that the law should focus more on the violent nature of the crime rather than the human or nonhuman status of the victim. *See* Madeline, *supra* note 6, at 338.

11 *See infra* Part I.

The structure of this Article is divided into three inquiries. First, the case is made for allowing some nontrivial amount of physical force in defense of a pet. Second, the inadequacy of existing law in permitting such force is thoroughly examined. Third, a variety of common law and statutory solutions are proposed. These inquiries are evaluated in four parts.

Part I provides a brief overview of the historical role of the criminal law in reflecting and inculcating social values.

Next, Part II makes the case for a norm in support of defending animals. This discussion contends that such a defense is consistent with our moral values and important to the protection of human health and safety. Humans regard their pets as members of the family, much more than they think of them as property, such as a sofa, and the criminal law ought to reflect this value. Recognizing a norm in support of defending animals is appropriate. Moreover, this Part makes clear that the problem of pet abuse addressed in this Article is sufficiently broad and common as to warrant judicial and legislative attention.

Part III provides a comprehensive description of existing law. 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," which potentially includes injuries to a hand or foot, this Article explains why nondeadly 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 undermine the legality in nearly all circumstances of meaningfully defending one's pet.

Finally, Part IV considers a range of basic revisions to the criminal law, proposing both common law and statutory solutions. Ultimately, this Article concludes that if the criminal law should reflect 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 also to inculcate a societal value structure. The conduct that a society criminalizes generally is regarded as a reflection of the soci-

ety's normative values and goals.[12] Early common law cases, such as the famous *Regina v. Prince*[13] 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 of criminalizing actions that are discordant with social values.[14] Strong theoretical and historical arguments support the view that there is often an inextricable link between our morality and our criminal law.[15]

Leading scholars have observed that the criminal law "serves as an official representation of an important part of the conventional public morality."[16] Similarly, Meir Dan-Cohen has observed that "[o]ne of the functions of criminal laws is to reinforce . . . morality by encouraging behavior in accordance with specific moral precepts."[17] Likewise, another scholar observed that "[a]lthough 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."[18] To the extent

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12 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").

13 R v. Prince, [1875] 2 L.R.C.C.R. 154 at 174 (Bramwell, B.) (Eng.) (emphasizing that criminal statutes should be interpreted to prevent that which is "wrong in itself").

14 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.").

15 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, 577 (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 . . . ." (internal quotation marks omitted)). 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 in the substantive law); *see also* Harris v. Alabama, 513 U.S. 504, 526 (1995) (Stevens, J., dissenting) (discussing the same).

16 Robert F. Schopp, *Verdicts of Conscience: Nullification and Necessity as Jury Responses to Crimes of Conscience*, 69 S. CAL. L. REV. 2039, 2074 (1996); s*ee also* Elaine M. Chiu, *Culture as 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.").

17 Dan-Cohen, *supra* note 12, at 649.

18 John T. Parry, *The Virtue of Necessity: Reshaping Culpability and the Rule of Law*, 36 HOUS. L. REV. 397, 459–60 (1999) (footnote omitted); *see also* Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 217 (2012) ("[F]or 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."); Elaine M. Chiu, *Cul-*

our criminal laws "embody extant moral norms, the possibility of conflict between moral and legal duties is eliminated,"[19] which is important for the long-term credibility and proper functioning of the criminal justice system. As Professors Josh Bowers and Paul H. Robinson have observed, "[a] criminal law with liability and punishment rules that conflict with a community's shared intuitions of justice will undermine its moral credibility."[20]

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 assumption is not unassailable. To be sure, in a pluralistic society there will never be complete moral agreement on all issues.[21] A society with multiple cultures has a high likelihood of moral disagreement.[22] The criminal law, then, is forced to confront questions like: "Whose norms should the law reflect? Which values should the law pursue?"[23] Stated differently, "[t]he fundamental challenge . . . is how to balance respect for cultural heterogeneity against the need to enforce a distinctive and hegemonic set of cultural values."[24] 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

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ture in Our Midst, 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."); Robert Post, *Law and Cultural Conflict*, 78 CHI.-KENT L. REV. 485, 486 (2003) ("The law commonly understands itself as enforcing the common sense of the community, as well as the sense of decency, propriety and morality which most people entertain." (internal quotation marks omitted)).

19 Dan-Cohen, *supra* note 12, at 649 (footnote omitted); *see also* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 471 (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").

20 Bowers & Robinson, *supra* note 18, at 217; s*ee also* Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 350–51 (1997) (discussing the roles of social influence and social meaning in deterring criminal activity).

21 "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 18, at 232 (referring to the view that all laws merely reflect local morality as overaly reductionist, "[g]iven 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?").

22 Chiu, *supra* note 18, at 232.

23 *Id.*

24 Post, *supra* note 18, at 493.

some of the leading scholars in criminal law: there are some norms that transcend most cultural differences and reflect something approximating moral consensus.[25]

Imagine a criminal code that reflects, if somewhat roughly and imperfectly, shared social values.[26] As Paul Robinson and John M. Darley have 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."[27] 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."[28] 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*, whether it merely reflects or also shapes social values. The justifications and desirability of a defense of animals are of substantial import.

Criminal defenses, no less than the definitions of crimes themselves, play an important role in mirroring or developing desirable so-

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25 Kahan, *supra* note 21, at 424 ("[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." (quoting John Rawls, *The Idea of Public Reason*, *in* POLITICAL LIBERALISM 133 (1993))). Even if the assumption of a monolithic national culture is rejected, the cultural defense, though rare, remains viable. *See* James J. Sing, Note, *Culture as Sameness: Toward a Synthetic View of Provocation and Culture in the Criminal Law*, 108 YALE L.J. 1845, 1848 (1999) ("Despite this significant backlash against the cultural defense in the literature, many courts have nevertheless permitted the introduction of cultural evidence in criminal trials.").

26 Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 66 (2007).

27 *Id.* at 66 ("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 and Darley have also stressed that, to the extent the criminal law diverges from widely shared social values, the law itself loses credibility. *Id.* at 28 ("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.").

28 *Id.* at 28 ("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 18, at 489; *see also* Chiu, *supra* note 18, 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 . . . .").

cial norms and serve the overall functions of the criminal law.[29] 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.[30] 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, 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 and 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.[31] Moreover, one body of social science and medical research teaches us that pets improve the well-being of humans, and another body of unrelated social science research demonstrates a strong correlation between animal abuse and human violence. Essentially, 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 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

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29 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* Chiu, *supra* note 16, at 1366.

30 *See* Paul H. Robinson, Criminal Law: Case Studies & Controversies 452 (2d ed. 2008).

31 Leading philosophers are also taking note 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 M. Korsgaard, *Kantian Ethics, Animals, and the Law*, 33 Oxford J. Legal Stud. 629, 630 (2013).

harm directed at one's sofa is materially different than a threat leveled against one's friend.[32] As scholars have argued for the last few decades, however, animals, particularly companion animals, are not well suited for the strict property classification.[33] Other fields of law are slowly developing ways to recognize that pets require unique treatment.[34] 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, nonproperty treatment. Likewise, the law of trusts and estates allows for pets to be treated differently than other personal property.[35] Even a couple of pockets of criminal law recognize the legal significance of the unique status of pets as nonhuman, but also more than property. For example, the anticruelty statutes in every U.S. jurisdiction reflect a legal recognition of the unique status of animals.[36] One can generally destroy his couch without consequence, but harming a pet is criminalized in every state, and each abused animal can be considered a separate victim, rather than a part of a general incident of animal abuse.[37] Violence against a security force's dog can lead to charges of assaulting an officer.[38] 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.[39] 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

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32 *Cf.* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF 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.").

33 *See, e.g.*, GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 34–35 (1995).

34 *See, e.g.*, Jason Parent, Comment, *Every Dog Can Have Its Day: Extending Liability Beyond the Seller by Defining Pets as "Products" Under Products Liability Theory*, 12 ANIMAL L. 241, 243 (2006) (arguing that pets "are susceptible to products liability theories").

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

36 BRUCE A. WAGMAN ET AL., ANIMAL LAW: CASES AND MATERIALS 90–93 (4th ed. 2010).

37 *See* State v. Nix, 334 P.3d 437, 438 (Or. 2014) (recognizing that the abuse of several horses is a crime with multiple victims, not simply a single crime of animal abuse), *vacated*, CC CRH090155; CA A145386; SC S060875, 2015 WL 927078 (Or. 2015).

38 Michael S. Schmidt, *K-9 "Agents" Lift Spirits of the Secret Service with Heroics at the White House*, N.Y. TIMES, Oct. 24, 2014, at A16 (describing charges for assaulting an officer for attacks against Secret Service guard dogs).

39 MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS 44–45 (2002).

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 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 neurofunctioning.[40] This finding 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 humanness 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.[41] Moreover, recent empirical and sociological data tend to confirm the intuition that treating pets as mere property is discordant with mainstream American culture.[42]

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 83.3 million dogs and 95.6 million cats living with American families.[43] In addition, according to one recent survey, over 79.7 million American households had at least one pet.[44] That is more than sixty-five percent of all households in the

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40 Gregory Berns, *Dogs Are People, Too*, N.Y. TIMES, Oct. 6, 2013, at SR5.

41 *See* 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." (footnotes omitted)); 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 ("Almost two-thirds (65%) [of pet owners] have bought their pet a holiday present and over one-third (37%) have bought their pet a birthday present.").

42 *See* Joseph G. Sauder, *Enacting and Enforcing Felony Animal Cruelty Laws to Prevent Violence Against Humans*, 6 ANIMAL L. 1, 3–10 (2000) (explaining the development of animal anticruelty laws).

43 *Pets by the Numbers*, HUMANE SOC'Y U.S. (Jan. 30 2014), http://www.humanesociety.org/issues/pet_overpopulation/facts/pet_ownership_statistics.html.

44 *Pet Industry Market Size & Ownership Statistics*, AM. PET PRODUCTS ASS'N, http://www.americanpetproducts.org/press_industrytrends.asp (last visited Feb. 22, 2015) (for years 2013–2014) [hereinafter *APPA Statistics*].

country.[45] Strikingly, then, more people in the United States share their homes with pets than with children.[46]

More significantly, many pet owners regard the animal as an important part of the household. One study found that seventy percent of owners "considered their companion animals as children."[47] A separate study found that nearly ninety percent of pet owners regard their pet as a member of their family.[48] In addition, approximately sixty-nine percent of owners share their beds with their pets.[49] And nearly two-thirds buy presents for their companion animals during the holiday season.[50] One scholar has even reported data showing that "half of companion animal owners would prefer a dog or a cat to a human if they were stranded on a deserted island."[51] 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 the custody of a dog as vigorously as if he were a child.[52]

There are no definitive explanations for the association of animals with the family, but some have concluded that as the size of families is shrinking and "children are moving long distances from their parents, family pets fill an emotional void."[53] 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

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45 This figure is up from fifty-six percent of households in 1988. *Id.*

46 In 2008, about 35.7 million families (forty-six percent) had children under eighteen at home, but over sixty percent of homes had a pet. Jack Gillum, *Number of Households with Kids Hits New Low*, USA TODAY, Feb. 26, 2009, at 4D; *APPA Statistics*, *supra* note 44.

47 Elizabeth Paek, Note, *Fido Seeks Full Membership in the Family: Dismantling the Property Classification of Companion Animals by Statute*, 25 U. HAW. L. REV. 481, 482–83 (2003).

48 Corso, *supra* note 41; s*ee 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) (finding that around one-third of the pet owners surveyed ranked their dog on par with family members).

49 Corso, *supra* note 41.

50 *Id.*; s*ee also* Norine Dresser, *The Horse Bar Mitzvah: A Celebratory Exploration of the Human-Animal Bond*, *in* COMPANION ANIMALS AND US: EXPLORING THE RELATIONSHIPS BETWEEN PEOPLE AND PETS 90, 106 (Anthony L. Podberscek et al. eds., 2000) (studying human involvement of animals in religious ceremonies or traditions, including bar mitzvahs; concluding that humans often find something spiritually uplifting about interacting with other species).

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

52 *See* Jane Porter, *It Can Be a Regular Dogfight*, HARTFORD COURANT, July 10, 2006, at D1; *see also* Ann Hartwell Britton, *Bones of Contention: Custody of Family Pets*, 20 J. AM. ACAD. MATRIMONIAL LAW. 1, 1 (2006).

53 Dresser, *supra* note 50, at 103.

"what children do not: obedience, loyalty and unconditional love."[54] Moreover, a recent study of college students who had 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.[55] 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 animal.[56] No other "possession" 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 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 fifty percent 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.[57]

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.[58] 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[59]—illustrates the protec-

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54 *Id.* at 104.

55 Lawrence A. Kurdek, *Pet Dogs as Attachment Figures*, 25 J. SOC. & PERS. RELATIONSHIPS 247, 258 (2008).

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

57 Root, *supra* note 51, at 423; *see also 60 Minutes/Vanity Fair Poll: Pets*, 60 MINUTES (Oct. 30, 2013), http://www.cbsnews.com/news/60-minutes-vanity-fair-poll-pets/2/ (nearly eighty percent of pet owners would save pet from a fire); Sue Manning, *Poll: Majority of Owners Willing to Go Mouth-to-Muzzle to Save Their Pet*, OHIO.COM (Oct. 21, 2009), http://www.ohio.com/pets/pets-blog-1.288326/poll-majority-of-owners-willing-to-go-mouth-to-muzzle-to-save-their-pet-1.289109 (over fifty percent of pet owners would likely give CPR to pet).

58 *See* Casey Chapman, Comment, *Not Your Coffee Table: An Evaluation of Companion Animals as Personal Property*, 38 CAP. U. L. REV. 187, 206–07 (2009).

59 42 U.S.C. § 5196(e)(4) (2012).

tion of one's pets is not a partisan issue.[60] The bill was cosponsored by a Republican and a Democrat, unanimously adopted by the Senate, and signed into law by President George W. Bush.[61]

The moral importance of pets is further confirmed by studies tending to show that the loss or injury of a pet can exact an enormous emotional toll on the family.[62] Some studies have shown 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."[63] Some researchers conclude that the "death of a beloved companion animal induces a grief reaction of comparable severity to the loss of a significant human relationship."[64] Indeed, there is an impressive so-

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60 *See* Chapman, *supra* note 58, at 206–07.

61 *See H.R.3858—Pets Evacuation and Transportation Standards Act of 2006*, CONGRESS.GOV, https://www.congress.gov/bill/109th-congress/house-bill/3858 (last visited Mar. 10, 2015) (providing information on sponsorship and passage); *see also* Press Release, President George W. Bush, President Bush Signs H.R. 3858, the "Pets Evacuation and Transportation Standards Act of 2006" (Oct. 6, 2006), http://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061006-15.html.

62 Livingston, *supra* note 56, 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.").

63 Root, *supra* note 51, at 439–40; *see also* 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); John Archer & Gillian Winchester, *Bereavement Following Death of a Pet*, 85 BRIT. J. PSYCHIATRY 259, 259 (1994) (finding a parallel reaction between grief following the death of a pet and that following human bereavement); Boris M. Levinson, *Grief at the Loss of a Pet*, *in* PET LOSS AND HUMAN BEREAVEMENT 51, 51–64 (William J. Kay et al. eds., 1984) (compiling studies); Jamie Quackenbush, *The Death of a Pet: How it can Affect Owners*, 15 VETERINARY CLINICS N. AM. 395, 396 (concluding that the death of a pet may be fundamentally similar to the death of a human family member).

64 Wendy Packman et al., *Therapeutic Implications of Continuing Bonds Expressions Following the Death of a Pet*, 64 OMEGA 335, 335–36 (2012) (compiling sources on this point); *see also* James E. Quackenbush & Lawrence Glickman, *Helping People Adjust to the Death of a Pet*, 9 HEALTH & SOC. WORK 42, 44 (1984) ("[T]he 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*, 217 JAVMA 1303, 1303 (2000) ("[A]ttempting to explain client response to pet death on the basis of theories derived from analysis of human-human relationships and responses to human death is probably not appropriate."); Mary Stewart, *Loss of a Pet—Loss of a Person: A Comparative Study of Bereavement*, *in* NEW PERSPECTIVES ON OUR LIVES WITH COMPANION ANIMALS 390, 390 (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.").

cial science literature documenting the intense grief that many humans suffer following the loss of a pet.[65] 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.[66] As one scholar has summarized the relevant social science research:

> 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.[67]

Echoing this sentiment, 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."[68] The sleep lost, work missed, and other psychological and physical impacts are often similar between those who lose a loved human companion and those who lose a loved animal companion.[69] Some have even found that pet owners equate the loss of a pet with the loss of a spouse.[70] Accordingly, it is not surprising to most Americans when the owner of a murdered pet says something like, "[f]or me it was my child."[71]

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65 *See, e.g.*, Brenda H. Brown et al., *Pet Bonding and Pet Bereavement Among Adolescents*, 74 J. COUNSELING & DEV. 505, 505 (1996); Millie Cordaro, *Pet Loss and Disenfranchised Grief: Implications for Mental Health Counseling Practice*, 34 J. MENTAL HEALTH COUNSELING 283, 283–84 (2012); Nigel P. Field et al., *Role of Attachment in Response to Pet Loss*, 33 DEATH STUD. 334, 334–35 (2009); Gerald H. Gosse & Michael J. Barnes, *Human Grief Resulting from the Death of a Pet*, 7 ANTHROZOÖS 103, 103 (1994).

66 *See* Livingston, *supra* note 56, at 805–06 (commenting on the substantial loss experienced by humans upon a pet's death); Martha Baydak, Human Grief on the Death of a Pet 74 (Aug. 2000) (unpublished MSW thesis, University of Manitoba) (reporting on persons who are still grieving a pet loss decades later); *see also* Root, *supra* note 51, 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").

67 Livingston, *supra* note 56, at 806 (citations omitted).

68 Quackenbush, *supra* note 63, at 396–97 (1985).

69 *Id.* at 397.

70 *See* Betty J. Carmack, *The Effects on Family Members and Functioning After the Death of a Pet*, *in* 8 MARRIAGE AND FAMILY REVIEW: PETS AND THE FAMILY 149, 150–52 (Marvin B. Sussman ed., 1985).

71 Paek, *supra* note 47, at 482 (quoting Sherry F. Colb, *FindLaw Forum: The Highway Dog-Killing and Animal Rights*, CNN LAW CENTER (Aug. 31, 2001, 2:21 PM), http://www.cnn.com/2001/LAW/08/columns/fl.colb.dogkilling). There are countless blog entries where people explain in detail the way their animal has become part of the family. *See, e.g.*, Stephanie

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. Among nonhuman deaths, the death or severe injury of a beloved pet seems to be unique on the spectrum of emotional injury. Moreover, Arnold Arluke has found that the human suffering is particularly acute when the pet is intentionally injured or killed.[72] According to his research, the "short-term and long-term responses of companion animal owners to animal abuse cases parallel the responses of victims of other crimes."[73]

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.[74] Except for other humans, there is nothing else for which humans have such unified and strong connections. The bond between a person and his pet often will transcend the bond that the same person has with many other humans, and it is strange for the criminal law to fail to reflect this bond by not 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 of animals to humans. In recent decades, scholars and activists have identified a value in preserving the life and dignity of animals for their own sakes.[75] However, this country has a much longer history of considering the value to humans of protecting animals. Almost 120 years ago the Colorado Supreme Court explained the need for animal protection laws:

Saul, *People Say, She's "Just a Dog,"* FAB YOU BLISS (Jan. 12, 2012), http://fabyoubliss.com/2012/01/12/people-say-shes-just-a-dog/ ("[D]ogs 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?").

72 Arnold Arluke, *Secondary Victimization in Companion Animal Abuse: The Owner's Perspective*, *in* COMPANION ANIMALS AND US, *supra* note 50, at 275, 282–83 (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").

73 *Id.* at 288; *see also id.* at 275–77 (surveying literature regarding secondary victimization in rape and other crimes).

74 *See, e.g.*, Carmack, *supra* note 70, at 149–61; Quackenbush, *supra* note 63, at 396.

75 *See, e.g.*, FRANCIONE, *supra* note 33, at 35 (arguing that the law needs to develop to match people's expectations of animal protection).

> [A]s incident to the progress of civilization, and as the direct outgrowth of that tender solicitude for the brute 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.[76]

This Subpart identifies and discusses some, though certainly not all, of the benefits to humans of a legal system that protects animals from abuse. 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.[77] A recent study published in the Journal of the American Academy of Pediatrics shows that children who live with a pet during their first year of life are more likely to be healthy.[78] Apparently, children also recognize substantial social and emotional benefits from their pets.[79] For adults, the benefits are no less profound. Studies show that having a pet reduces blood pres-

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76 Waters v. People, 46 P. 112, 113 (Colo. 1896).

77 Livingston, *supra* note 56, at 809 ("Several social science studies have demonstrated that companion animals can significantly improve the quality of life for children, non-senior adults, and elderly individuals."); *id.* (compiling studies on this point).

78 Eija Bergroth et al., *Respiratory Tract Illnesses During the First Year of Life: Effect of Dog and Cat Contacts*, 130 PEDIATRICS 211, 211 (2012) (studying the protective effect of pets on infectious respiratory illnesses), *available at* 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*, HUFFPOST HEALTHY LIVING (July 9, 2012 11:49 PM), 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." (internal quotation marks omitted)).

79 *See* Gladys F. Blue, *The Value of Pets in Children's Lives*, 63 CHILDHOOD EDUC. 85, 86–87 (1986); 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 56, at 807–09. Moreover, the benefits from pets to disabled children, such as those with autism, may be particularly profound. *Id.* at 810.

sure,[80] improves heart attack recovery,[81] improves depression,[82] and may even assist with cancer and AIDS treatment,[83] among many other documented benefits. Moreover, the elderly, like James, from 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."[84]

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 the individual's unique relationship with the animal may spur the benefits such that a new pet is insufficient.[85] Moreover, the grief reaction to the loss of a particular pet will often be sufficiently extreme and debilitating as to, at least temporarily, offset any of the benefits of a new pet might offer. Pets are not fungible. 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. Studies show that persons who harm animals generally are prone to commit acts of human violence.[86] Like anticruelty laws, the establishment of a *defense of animals* has the potential to deter animal violence. Because many jurisdictions are unable or unwilling to prosecute the abuse itself, the ability of an individual legally to defend the pet against injury may provide an otherwise unavailable deterrent function.[87] It must be acknowledged that

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80 Karen Allen et al., *Cardiovascular Reactivity and the Presence of Pets, Friends, and Spouses: The Truth About Cats and Dogs*, 64 PSYCHOSOMATIC MED. 727, 727 (2002); Karen Allen et al., *Pet Ownership, but Not ACE Inhibitor Therapy, Blunts Home Blood Pressure Responses to Mental Stress*, 38 HYPERTENSION 815, 815 (2001).

81 R. Lee Zasloff, *Measuring Attachment to Companion Animals: A Dog Is Not a Cat Is Not a Bird*, 47 APPLIED ANIMAL BEHAV. SCI. 43, 47 (1996).

82 Ivan Dimitrijevic, *Animal-Assisted Therapy—A New Trend in the Treatment of Children and Adults*, 21 PSYCHIATRIA DANUBINA 236, 238–40 (2009).

83 *E.g.*, Paolo Castelli et al., *Companion Cats and the Social Support Systems of Men with AIDS*, 89 PSYCHOL. REP. 177, 177, 185 (2001).

84 Livingston, *supra* note 56, at 808–09 (citations omitted).

85 *Id.* at 817.

86 *See infra* notes 92–100 and accompanying text.

87 The underenforcement 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*, MICH. B.J., Sept. 2004, at 36,

there is a degree of attenuation in laws that would permit the defense of a particular animal to a deterrence of animal abuse, leading to a deterrence of violence against humans. 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) is so compelling that there is a significant possibility a *defense of animals* might ultimately reduce human suffering.[88] In other words, considered in the aggregate with the 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.[89]

Leading commentators have begun emphasizing that the connection between human and animal violence is something that needs to be taken more seriously. One 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.[90] Indeed, the 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.[91]

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

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36–37 ("'But your average everyday cruelty thing—starving your dog to death or beating your dog to death, those things tend to get brushed over . . . .'" (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). 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. *See* Stecker, *supra*, at 37.

88 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); Sauder, *supra* note 42, at 11.

89 There is also considerable anecdotal evidence on this question. *See, e.g.*, Stecker, *supra* note 87, at 36 (quoting a longtime 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.").

90 WAGMAN ET AL., *supra* note 36, at 180. For a full survey of these studies, see *id.* at 180–83.

91 Randall Lockwood, *Animal Cruelty and Violence Against Humans: Making the Connection*, 5 ANIMAL L. 81, 81–82 & n.3 (1999) (citing CRUELTY TO ANIMALS AND INTERPERSONAL VIOLENCE: READINGS IN RESEARCH AND APPLICATION (Randall Lockwood & Frank R. Ascione eds., 1998)).

1966 by psychiatrists Daniel S. Hellman and Nathan Blackman.[92] 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.[93] Of 84 prisoners, 74% of the prisoners charged with aggressive crimes exhibited all or some of the triad symptoms, while only 28% of those charged with nonaggressive crimes exhibited any of the triad symptoms.[94] "Animal cruelty was reported by 52% of the aggressive prisoners but by only 17% of the non-aggressive prisoners."[95]

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 nonaggressive criminals and no acts among noncriminals.[96] Similarly, a 2001 study found "a statistically significant relationship existed between childhood cruelty to animals and later violence against humans."[97]

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 . . . ."[98] Likewise, studies

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92 Daniel S. Hellman & Nathan Blackman, *Enuresis, Firesetting and Cruelty to Animals: A Triad Predictive 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 Lacroix, *supra* note 88.

93 *See* Hellman & Blackman, *supra* note 92, at 1434.

94 *Id.*

95 Susan Crowell, Note, *Animal Cruelty as It Relates to Child Abuse: Shedding Light on a "Hidden" Problem*, 20 J. JUV. L. 38, 45 (1999) (citing Hellman & Blackman, *supra* note 92, at 1432–33).

96 Stephen R. Kellert & Alan R. Felthous, *Childhood Cruelty Toward Animals Among Criminals and Noncriminals*, 38 HUM. REL. 1113, 1119–20 (1985); *see also* A. William Ritter, Jr., *The Cycle of Violence Often Begins with Violence Toward Animals*, PROSECUTOR, Jan.-Feb. 1996, at 31, 31 (finding that violent criminals were more likely to have abused animals than nonviolent, nonincarcerated persons).

97 Linda Merz-Perez, Kathleen M. Heide & Ira J. Silverman, *Childhood Cruelty to Animals and Subsequent Violence Against Humans*, 45 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 556, 556 (2001). Some studies were not as conclusive. *See* 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 & NEGLECT 59, 74 (1997) ("Although clinical lore and the work of some researchers suggest that violent criminal acts would be associated with animal cruelty, the present study provides virtually no support for that position." (citations omitted)).

98 Crowell, *supra* note 95, at 47–48 (1999) (quoting and citing RANDALL LOCKWOOD & ANN CHURCH, AN FBI PERSPECTIVE ON ANIMAL CRUELTY (1996)).

tend to show that animal abuse is particularly common among serial killers.[99] As one sensationalized news story put it, "'[h]ow do you make a serial killer? . . . Practice, practice, practice—on animals.'"[100]

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 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.[101] 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.[102] 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.[103]

A 1998 study, one of the first empirical analyses of animal abuse in homes with domestic violence, found that out of 38 women surveyed, 71% of abused women who owned pets reported their abusive partner had also hurt or threatened to hurt their animals.[104] Of that percentage, 57% of the reports involved actual rather than threatened harm to pets.[105]

Other studies have documented similar connections between animal abuse and domestic violence, although the percentages do show substantial variation. On the low end, "[i]n Colorado Springs, Colorado, the Center for Prevention of Domestic Violence conducted a six-month survey and found that 24% of the 122 women seeking protection at a battered women's shelter reported their abusers also

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99 ERIC W. HICKEY, SERIAL MURDERERS AND THEIR VICTIMS 26–27 (4th ed. 2006).

100 Pamela Martineau, *Animal Cruelty Often Tied to Human Abuse*, SACRAMENTO BEE, June 15, 1998, at A1 (quoting Sacramento County social worker, Mary Ingram).

101 Sauder, *supra* note 42, at 12.

102 *See* Sauder, *supra* note 42, at 13; Melissa Trollinger, *The Link Among Animal Abuse, Child Abuse, and Domestic Violence*, COLO. LAW., Sept. 2001, at 29, 30 ("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.").

103 Stecker, *supra* note 87, at 36; s*ee also* People v. Kovacich, 133 Cal. Rptr. 3d 924, 931–32 (Cal. Ct. App. 2011) (describing an incident in which the family dog was kicked to death); People v. Garcia, 812 N.Y.S.2d 66, 67 (N.Y. App. Div. 2006) (applying felony abuse statute to a defendant who "stomped on" a pet goldfish).

104 Frank R. Ascione, *Battered Women's Reports of Their Partners' and Their Children's Cruelty to Animals*, 1 J. EMOTIONAL ABUSE 119, 125 (1998).

105 *Id.*; *see also* Frank R. Ascione, *Domestic Violence and Cruelty to Animals*, LATHAM LETTER, Winter 1996, at 1, 14.

had abused the family pet."[106] Another study found that 28% of animal abusers "were also *charged* with domestic violence."[107] By contrast, a much higher correlation was found in a New Jersey study, finding that in 88% of families in which there had been physical abuse of children, there were also records of animal abuse,[108] and in Wisconsin, battered women revealed that in 68% of cases, abusive partners had also been violent toward pets or livestock.[109]

There are also national studies documenting the correlation between abuse of loved ones and animal abuse. For example, The National Coalition Against Domestic Violence found that, out of shelters surveyed, 85.4% said women reported such abuse and 63.0% said children did.[110] 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.[111] 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.[112]

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. As has been observed by researchers,

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106 Trollinger, *supra* note 102, at 30.

107 Sauder, *supra* note 42, at 11 (emphasis added).

108 *See* Elizabeth DeViney et al., *The Care of Pets Within Child Abusing Families*, 4 INT'L J. FOR STUDY ANIMAL PROBS. 321, 327 (1983).

109 *Domestic Violence and Animal Cruelty*, ASCPA, http://www.aspca.org/fight-cruelty/report-animal-cruelty/domestic-violence-and-animal-cruelty (last visited Jan. 26, 2015); *see also* Susan Hauser, *Help Victims of Domestic Violence—By Saving Their Pets*, OPRAH, http://www.oprah.com/spirit/Sheltering-Animals-of-Abuse-Victims-Animal-Abuse-Domestic-Violence (last visited Jan. 26, 2015).

110 Frank R. Ascione, Claudia V. Weber & David S. Wood, *The Abuse of Animals and Domestic Violence: A National Survey of Shelters for Women Who Are Battered*, 5 SOC'Y & ANIMALS 205, 211 (1997); *see also* Lacroix, *supra* note 88, at 10 ("In 1980, a pilot study conducted in England found . . . that of the twenty-three families that had a history of animal abuse, eighty-three percent had been identified by human social service agencies as having children at risk of abuse or neglect.").

111 *Domestic Violence and Animal Cruelty*, *supra* note 109. 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 Allows Pets*, JEZEBEL (June 2, 2013, 11:49 PM), http://jezebel.com/nyc-gets-first-domestic-violence-shelter-that-allows-pe-510973511.

112 And according to at least one researcher, Dr. Frank Ascione, many of these studies are flawed so as to understate the rate of animal cruelty among violent adults. Ritter, *supra* note 96, at 31–32.

> [w]hen 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 against a partner or child.[113]

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 not allowing a meaningful defense of pets is of the utmost importance.[114] A defense of animals will not merely duplicate the protections afforded to domestic violence victim under a theory of self-defense, because in the example of the abuser burying the dog, 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.

It is important, then, in considering the costs and benefits of creating a formal defense of animals for policymakers and judges to take a clear-eyed look at the role that animal abuse frequently plays in domestic violence. The inability to defend a pet with serious force can, in many instances, represent a tool of additional empowerment and control for the abuser.[115]

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 to defend one's 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

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113 Trollinger, *supra* note 102, at 30 (footnote omitted). "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." *Id.*

114 Siebert, *supra* note 2.

115 *Cf.* Sharon L. Nelson, *The Connection Between Animal Abuse and Family Violence: A Selected Annotated Bibliography*, 17 ANIMAL L. 369, 372 (2011) (discussing research connecting animal and domestic abuse).

respond in ways that are remarkably similar to our own brains,[116] and long passed are the days when it was common to question whether we were merely anthropomorphizing animals to suggest that they felt pain.[117] 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.[118] And once society agrees that animals can suffer, then the door is open for arguing that such pain is a morally relevant consideration.[119] 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.

Related, but perhaps even more salient, to this discussion is the fact that pet owners, by taking in the pet, take on a moral responsibility for the protection and care of the animal. A feature of pets that makes them not only different from other property, but also different from all other animals, is that they often entirely depend on their human counterparts. Many animals have been bred so that they are less willing to defend themselves, less intelligent, and generally more dependent.[120] The dependence is both physical and emotional; it is an

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116 Berns, *supra* note 40.

117 Descartes, for example, is famous for having concluded that animals feel no pain whatsoever, and instead merely act as if they felt pain. John Cottingham, *'A Brute to the Brutes?': Descartes' Treatment of Animals*, 53 PHIL. 551, 551–52 (1978), *available at* http://people.whitman.edu/~herbrawt/classes/339/Descartes.pdf (acknowledging Descartes's belief that animals lacked feelings or awareness, but arguing that Descartes's view was less extreme than the conventional wisdom suggests).

118 *See, e.g.*, GARY L. FRANCIONE, INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR THE DOG? 2 (2000) ("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 149–51 (2004) (concluding that it is now a minority view that animals do not feel pain or feel it in a very different way than humans).

119 Utilitarianism, generally speaking, is concerned with maximizing pleasure and minimizing pain or suffering. *The History of Utilitarianism*, STAN. ENCYCLOPEDIA PHIL., http://plato.stanford.edu/entries/utilitarianism-history/ (last updated Sept. 22, 2014) ("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 calculus. *See* SINGER, *supra* note 118, at 6–7 ("If possessing a higher degree of intelligence does not entitle one human to use another for his own ends, how can it entitle humans to exploit nonhumans for the same purpose?").

120 *See* Nicholas Wade, *From Wolf to Dog, Yes, But When?*, N.Y. TIMES, Nov. 22, 2002, at A20 ("Wolves, though very smart, are much less adept than dogs at following human cues, suggesting that dogs may have been selected for this ability."); *Havanese*, DOGCHANNEL.COM, http://www.dogchannel.com/havanese-dogs-breed-profiles.aspx (last visited Mar. 1, 2015) ("Happy, affectionate, gregarious and very dependent on human companionship, the Havanese can be quite vocal, especially in groups."); Terry Hurley, *Ragdoll Cats*, LOVETOKNOW, http://cats.lovetoknow.com/Ragdoll_Cats (last visited Mar.1, 2015) ("Most Ragdolls are so docile it can be dangerous to

entirely "asymmetric relationship" in large part because the pets are bred and socialized to "behave in an infantile or subordinate way."[121] 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,[122] 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 appear at first blush.

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 defend 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 dependent, even familial, relationships with animals that are unknown to other things treated as property.[123] Our moral intuition as well as our own well-being tend to suggest the law ought to protect James, the old man widower from the introductory hypothetical, when he uses force to defend his companion, a dog. Merely criminalizing animal cruelty has proven to be an inadequate protection for animals,[124] and

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let them go outside since most do not hunt and some don't seem to understand how to defend themselves if attacked by another animal.").

121 Marie-José Enders-Slegers, *The Meaning of Companion Animals: Qualitative Analysis of the Life Histories of Elderly Cat and Dog Owners*, *in* Companion Animals and Us, *supra* note 50, at 237, 238.

122 *See Woman Defends Dog Against Bear Attack*, abcNEWS, http://abcnews.go.com/GMA/video/woman-defends-dog-bear-attack-mauled-defence-love-pet-animals-us-14939206 (last visited Oct. 26, 2014) ("[A] woman from Pennsylvania's recovering from wounds she got when a bear mauled her after she tried to stop the bear from attacking her dog.").

123 *See supra* Part II.A.

124 *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

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.[125]

A. The Surprising Breadth of Deadly Force

One can use force in defense of an animal. Indeed, one could use some degree of force in defense of a couch, an iPod, or a hood ornament. 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 under the law,[126] the defenses that are relevant to the protection of another person are inapplicable. Therefore, under current law, the defense of one's pet would be limited to force that would not cause serious injury—that is, nondeadly force[127]—because that is the force allowed in defense of property.

Such a limitation seems reasonable and eminently prudent. In at least some carefully circumscribed instances, however, the defense of one's pet from imminent serious injury with only nondeadly force will be inadequate. A doctrine that would permit human violence to go unpunished requires considerable explanation.

While violence against all human and nonhuman animals should be avoided, in the face of a violent aggressor, certain acts of violence are justified. These justifiable acts include defending one's self from reasonable threats of deadly force, and defending one's spouse or child, or even a stranger on the street.[128] One might be justified in

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rate of prosecution of less than 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. *See id.* at 250–51; *see also* Allie Phillips, *The Few and the Proud: Prosecutors Who Vigorously Pursue Animal Cruelty Cases*, PROSECUTOR, July-Sept. 2008, at 20, 20 ("Too often a prosecutor [who specializes in animal cruelty cases] will face insufficient evidence from the investigation, lack of support within the office, and apathy from the bench . . . .").

125 *See infra* Part III.B.

126 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 cultivation and animal domestication); *see also* FRANCIONE, *supra* note 33, at 34 ("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.").

127 The longstanding view is that the right to use deadly force ought to be limited to the protection of human life. *See* Note, *Justification for the Use of Force in the Criminal Law*, 13 STAN. L. REV. 566, 583 (1961).

128 *See* MODEL PENAL CODE §§ 3.04(2)(b), 3.05(1) (1985). One may have a valid defense

injuring or killing two or more people to save a single human life. 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.[129] In fact, token threats or acts of nonserious injury—kicking someone in the shin—in these circumstances may simply incite the aggressor and assure the injury or death of the victim.[130] Similar reasoning applies when one faces a serious threat to the life of one's companion animal. A threat of nondeadly 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.[131] The ability to make threats of serious injury to the attacker is, then, a potentially important deterrent.

The sort of nondeadly force envisioned in property defense cases, quite simply, has little practical application in the context of imminent danger to one's animal. Reasonable, nonserious force limitations make sense in the context of a tug-of-war for your purse. Likewise, reasonable, nonserious 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.[132] Indeed, this is precisely why deadly force is justified when

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even if he was in fact wrong in believing that his forceful intervention was required. *See, e.g.*, Paul H. Robinson & John M. Darley, *Testing Competing Theories of Justification*, 76 N.C. L. REV. 1095, 1102–1103 (1998).

129 *See infra* note 178 and accompanying text.

130 *See generally* JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS 5 (3d ed. 2010), *available at* http://realagenda.files.wordpress.com/2012/12/more-guns-less-crime_-understanding-cri-jr-john-r-lott.pdf ("Criminals are motivated by self-preservation, and handguns can therefore be a deterrent. . . . Convicted American felons reveal in surveys that they are much more worried about armed victims than about running into the police."); David B. Kopel, *Lawyers, Guns, and Burglars*, 43 ARIZ. L. REV. 345, 345 (2001) (quoting a burglar as stating that he looked for houses where it did not appear the owner had guns or weapons); Carlisle E. Moody, *Testing for the Effects of Concealed Weapons Laws: Specification Errors and Robustness*, 44 J.L. & ECON. 799, 799–800 (2001) ("[A]llowing citizens to carry concealed weapons deters violent crime. . . . Potential criminals are deterred because the probability of effective resistance is higher.").

131 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 nondeadly force "would expose the actor or another in his presence to substantial danger of serious bodily injury." MODEL PENAL CODE § 3.06(3)(d)(ii)(B).

132 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

someone is threatening deadly force against a person; nothing else suffices in most instances.[133] 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.

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, potentially subjecting 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.[134] Indeed, the line between deadly and nondeadly force is generally much less clear than the terms suggest. In many jurisdictions, the possibility or likelihood that the force would cause death *or serious injury* is considered "deadly force."[135] This definition of deadly force as including force that might cause serious injury enjoys widespread, supermajority support across the federal

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disadvantaged the victim might be—effectively denies most female victims a right of self-defense." Christine R. Essique, Note, *The Use of Deadly Force by Women Against Rape in Michigan: Justifiable Homicide?*, 37 WAYNE L. REV. 1969, 1973 (1991).

133 *See supra* notes 129–30 and accompanying text.

134 *See infra* note 135 (listing definitions of deadly force that do not require intent and only need to cause serious injury, not death).

135 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 harm." BLACK'S LAW DICTIONARY 718 (9th ed. 2009). Many states have adopted this definition. *See, e.g.*, ALA. CODE § 13A–1–2(6) (LexisNexis 2005) (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"); CONN. GEN. STAT. ANN. § 53a–3(5) (West 2012) (defining "deadly physical force" as "physical force which can be reasonably expected to cause death or serious physical injury"); N.Y. PENAL LAW § 10.00(11) (McKinney 2009) ("'Deadly physical force' means physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury."); OHIO REV. CODE. ANN. § 2901.01(A)(2) (West 2006) (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. ANN. § 501 (West 1998) (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"); Thompson v. Cnty. of L. A., 142 Cal. App. 4th 154, 166 (Cal. Ct. App. 2006) (defining deadly force as capable of causing death or serious 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."); City of Chicago v. Brown, 377 N.E.2d 1031, 1037 (Ill. App. Ct. 1978) ("Deadly force is defined as: . . . [f]orce which is likely to cause death or great bodily harm . . . ." (internal quotation marks omitted)); 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) (West 2011))). 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).

circuits and the states.[136] Moreover, the definition is grounded in the Model Penal Code, which provides that any actions creating a *substantial risk* of serious injury may amount to deadly force.[137]

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 risk of harm is not more likely than not to occur.[138] 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.[139] 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.

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136 *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 expected' to cause death *or serious bodily injury*." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 18.02[A], at 225 (5th ed. 2009) (emphasis added). Currently forty-three states and the District of Columbia explicitly recognize force that causes serious bodily injury as sufficient to constitute deadly force: 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, and Wisconsin. *See, e.g.*, D.C. CODE § 24-261.01(2) (2001); IND. CODE § 35-31.5-2-85 (2013); N.D. CENT. CODE § 12.1-05-12(1) (2012); TEX. PENAL CODE ANN. § 9.01(3); *see also* People v. Vasquez, 148 P.3d 326, 328–29 (Colo. App. 2006) (collecting state statutes and caselaw that define deadly force in this manner).

137 MODEL PENAL CODE § 3.11(2) (1985) (defining deadly force as including force that the actor knows creates a "substantial risk" of death or seriously bodily harm).

138 *See, e.g.*, People v. Hall, 999 P.2d 207, 217, 221 (Colo. 2000) (finding in the context of recklessness that a lower court erred when it dismissed a felony reckless manslaughter charge on the grounds that for a risk to be substantial "it must 'be at least more likely than not that death would result'"; "A 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) (quoting Kolitch v. Lindedahl, 497 A.2d 183, 187 (N.J. 1985)); *see also* Kenneth W. Simons, *Should the Model Penal Code's Mens Rea Provisions Be Amended?*, 1 OHIO ST. J. CRIM. L. 179, 189–92 (2003) (discussing issues of substantial risk and recklessness).

139 *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." (emphasis added)).

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 that creates a substantial risk of death, . . . serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."[140] New York and Oregon define serious bodily injury similarly.[141] If serious bodily harm includes any impairment in or the loss of a bodily member, then breaking or spraining someone's finger or toe could conceivably amount to deadly force.[142] 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. If serious injury enjoys a broad definition, then one risks exceeding the amount of force he may permissibly 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 supposed deadly force; the individual need not intend death, he need not 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 injury.[143] And equally obvious, stabbing someone with a knife will often be deadly force.[144] This may be true even if the victim is stabbed in an

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140 TEX. PENAL CODE ANN. § 1.07(a)(46).

141 *See* N.Y. PENAL LAW § 10.00(10) (McKinney 2009); OR. REV. STAT. ANN. § 161.015(8) (West 2013).

142 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.").

143 *See* MODEL PENAL CODE § 3.11(2) (1985) ("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."); *see also* Miller v. State, 613 So. 2d 530, 531 (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).

144 Larsen v. State, 82 So. 3d 971, 975 (Fla. Dist. Ct. App. 2011) (holding that the use of a sharp knife constituted deadly force as a matter of law); 5 DAVID M. BORDEN ET AL., CONNECTICUT PRACTICE SERIES: CRIMINAL JURY INSTRUCTIONS § 6.1 (4th ed. 2013) ("'[T]here 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.'" (quoting State v. Singleton, 974 A.2d

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.[145] As the court explained:

> These facts demonstrate that Barretto engaged in conduct that he knew to create a substantial risk of serious bodily injury, defined as "serious, permanent disfigurement or loss or substantial impairment of the function of any bodily member or organ." . . . Such 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.[146]

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.[147] Essentially, 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.

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679 (Conn. 2009))); Christine Catalfamo, *Stand Your Ground: Florida's Castle Doctrine for the Twenty-First Century*, 4 RUTGERS J. L. & PUB. POL'Y 504, 537 n.152 (2007) ("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).

145 *Barretto*, 953 A.2d at 1140 ("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.").

146 *Id.* at 1141–42 (citations omitted). 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 the 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. *See id.*

147 *See, e.g.*, Commonwealth v. Wolmart, 786 N.E.2d 427, 431 (Mass. App. Ct. 2003) (holding that stabbing someone in the arm with a 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 . . . ." (footnote omitted)).

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.[148] For example, even a forceful headlock might be considered deadly force.[149] So could striking an attacker across the head with your cane,[150] walking stick,[151] or hiking pole.[152]

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148 "'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 (quoting Cruz v. State, 971 So. 2d 178, 182 (Fla. Dist. Ct. App. 2007)).

149 *See* 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).

150 In *State v. Richmond*, the defendant hit the victim with a stick the "size of a sledge hammer handle" and was found to have used deadly force. State v. Richmond, No. 88WM000016, 1990 WL 7988, at *1, *4 (Ohio Ct. App. Feb. 2, 1990).

151 People v. Cleveland, 504 N.Y.S.2d 900, 901 (N.Y. App. Div. 1986) (Boomer, J., dissenting) ("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*. *See* Orth, *supra* note 5. 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. *See id.* at 116. 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; 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* 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); People v. Jordan, 474 N.E.2d 1283, 1285 (Ill. App. Ct. 1985) (discussing defendant's use of deadly force by striking another with a cane or stick); People v. Knapp, 191 N.W.2d 155, 159–60 (Mich. Ct. App. 1971) (identifying a broomstick as a weapon capable of causing serious bodily injury); Moore v. State, No. 04-94-00648-CR, 1996 WL 23599, at *5 (Tex. App. Jan. 24, 1996) (holding "use of the stick to hit Dowd in the head was a use of deadly force"); 16 WILLIAM ANDREW KERR, INDIANA PRACTICE: CRIMINAL PROCEDURE PRETRIAL § 1.5b (1991) (recognizing that "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 (footnotes omitted)); Annotation, *Cane as a Deadly Weapon*, 30 A.L.R. 815–16 (reprt 1960) (identifying cases in which the question whether a cane or walking stick constituted a deadly weapon was held to be one for the jury).

152 Even items that are designed to be nondeadly generate limited controversy. For example, although the better view is surely that pepper spray and mace are nondeadly force, there is even limited disagreement as to these points. *Compare* 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"), R. Paul McCauley et al., *The Police Canine Bite: Force, Injury, and Liability*, 46 CRIM. L. BULL. 62, 63 (2008) ("These non-deadly force options include physical contact, holding, hitting; use of pepper spray or mace . . . ."), *and* Eugene Volokh, *Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, and the Rights to Keep and Bear Arms and Defend Life*, 62 STAN. L. REV. 199, 205 (2009) (noting "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" while also conceding there are reported instances of deaths from both tasers and pepper spray), *with* Katherine N. Lewis, Note, *Fit to be Tied? Fourth Amendment Analysis of the Hog-Tie*

Striking a person with a pole or stick to the arm might constitute deadly force insofar as it may cause serious injury or broken bones.[153] 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 may find deadly force.[154] Using nearly any object to inflict injury, even to parts other than the head or torso, can be deadly force.[155] Even the use of one's fists could, in certain circumstances, constitute deadly force.[156] Indeed, California

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Restraint Procedure, 33 GA. L. REV. 281, 283 (1998) (noting that pepper spray is a deadly weapon when the person is also tied up in a particular way), *and* Lisa J. Steele, *Defending the Self-Defense Case*, 39 CRIM. L. BULL. 659, 683 (2003) ("[P]epper spray, batons, and firearms. All of these are, or should be, considered a form of deadly force.").

153 *See, e.g.*, State v. Napoleon, 633 P.2d 547, 549 (Haw. Ct. App. 1981) (holding that deadly force existed when the defendant broke the victim's arm with a baseball bat and that swinging a bat into someone's arm is per se deadly force under the Hawaii assault statute, like many states that define deadly force as such force that will "create a substantial risk of causing death or serious bodily harm" (internal quotation marks omitted)), *overruled by* State v. Van Dyke, 69 P.3d 88 (Haw. 2013). 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. Aug 29, 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.").

154 *See* Calbert v. State, 418 N.E.2d 1158, 1160 (Ind. 1981) (noting on the facts of the brutal case that the deadly force necessary for an aggravated felony conviction does not require actual harm; it is enough "if it created a substantial risk of serious bodily injury").

155 *See* State v. Barretto, 953 A.2d 1138, 1141–42 (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. Ferrel v. State, 55 S.W.3d 586, 589, 592 (Tex. Crim. App. 2001). In *State v. Ware*, the use of a clothing iron to strike a person was deemed deadly force. State v. Ware, No. 57546, 1990 WL 151499, at *1, *5–6 (Ohio Ct. App. Oct. 11, 1990); *see also* State v. Galicia, 45 A.3d 310, 325 (N.J. 2012) (driving of car can constitute deadly force); People v. Magliato, 496 N.E.2d 856, 859–60 (N.Y. 1986) (pointing without firing a loaded pistol is deadly force; cocking the hammer and leveling the pistol in the victim's direction, with full knowledge of the delicacy of the trigger, constituted deadly force); People v. Samuels, 603 N.Y.S.2d 344, 345 (N.Y. App. Div. 1993) (stabbing with a screwdriver is deadly force); State v. Beal, 638 S.E.2d 541, 544–45 (N.C. Ct. App. 2007) (jabbing at someone with pitchfork is potentially deadly force); Commonwealth v. Sanders, 280 A.2d 598, 601 (Pa. Super. Ct. 1971) (using broken shards of glass to slash at someone is deadly force); Hayes v. State, 728 S.W.2d 804, 808 (Tex. Crim. App. 1987) (striking with a Coke bottle is deadly force).

156 In *State 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. State v. Ortiz, 626 N.W.2d 445, 449–50 (Minn. Ct. App. 2001) ("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.*, Kipp v. State, No. 03-09-00175-CR, 2009 WL 3230795, at *4 (Tex. Crim. App. Oct. 9, 2009); KERR, *supra* note 151, § 1.5b (recognizing that the "use of [one's] hands, fists, or teeth could be considered 'deadly force' under appropriate

has gone so far as to create a jury instruction explicitly recognizing that deadly force may be used repel any unjustified "assault with the fists . . . that . . . is likely to inflict great bodily injury."[157]

In sum, accepting that a defendant may be deemed to have used deadly force even when he lacks a dangerous (or any) weapon,[158] and even when the force is not directed at one's head or torso, it seems that in many jurisdictions only the most unlikely, if not ridiculous, ex-

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circumstances"); 2 JOHN E.B. MYERS, MYERS ON EVIDENCE IN CHILD, DOMESTIC AND ELDER ABUSE CASES § 10.02[D] (2005) ("An attack by a powerful person with fists or feet can kill, and such an attack should qualify as deadly force . . . ."); *see also* 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 10.4(b), at 145 (2d ed. 2003) ("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 . . . ." (footnotes omitted)); 8 MICHAEL J. MCCORMICK ET AL., TEXAS PRACTICE SERIES: CRIMINAL FORMS AND TRIAL MANUAL § 106.7 (11th ed. 2005) (no weapon required to be deadly force). 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, one 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. *See* Johnson v. State, 271 S.W.3d 359, 366–67 (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. *See* Heng v. State, 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, 1159–60 (Ind. 1981) (force of biting and slapping was deadly force).

157 WEST'S COMM. ON CAL. CRIMINAL JURY INSTRUCTIONS, CALIFORNIA JURY INSTRUCTIONS: CRIMINAL No. 5.31 (2013). If the person threatened with fists is an initial aggressor, then he might have a duty to attempt retreat unless the other person responds with "sudden and deadly counter-assault." *See, e.g.*, 4 EDWARD A. RUCKER & MARK E. OVERLAND, CALIFORNIA CRIMINAL PRACTICE, MOTIONS, JURY INSTRUCTIONS AND SENTENCING § 47:10 (3d ed. 2004) (citing People v. Quach, 10 Cal. Rptr. 3d 196 (Cal. Ct. App. 2004)).

158 *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?*, POLICEONE.COM (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. Noble, 707 N.E.2d 819, 821 (Mass. 1999) (concluding that, as a general matter, force without weapons is nondeadly 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 is that there are numerous jurisdictions that have held the use of a trained police dog to not constitute deadly force, no matter the outcome. *See, e.g.*, Miller v. Clark Cnty., 340 F.3d 959, 961 (9th Cir. 2003); Thompson v. Cnty. of L.A., 47 Cal. Rptr. 3d 702, 711 (Cal. Ct. App. 2006). 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.

amples of force would *not* constitute deadly force as a matter of law. In the majority of circumstances, it will be a question left to the jury. A victim may believe he is using nondeadly 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.

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

Although the definition of deadly force is not narrowly confined, 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 nondeadly 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 their inapplicability to the defense of pets is the subject of this Subpart.

1. Defense of Property

Because the weight of legal authority continues to regard pets as personal property,[159] analyzing the defense of property doctrine serves as a useful starting point in exploring how ineffectual the existing doctrines of exculpation are 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.[160] As discussed above, the amount of force necessary to be considered deadly may be surprisingly little: there need not be an actual

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159 *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, 321 (2007); Paek, *supra* note 47, at 483. 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 Hosp., Inc., 415 N.Y.S.2d 182, 183 (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*, at 344.

160 PAUL H. ROBINSON & MICHAEL T. CAHILL, CRIMINAL LAW 331 (2d ed. 2012) ("[A]ll American criminal codes bar the use of deadly force solely to defend property . . . ."); Comment, *The Use of Deadly Force in the Protection of Property Under the Model Penal Code*, 59 COLUM. L. REV. 1212, 1214–15 (1959).

death or even likelihood of death.[161] However, courts and commentators routinely explain that the use of deadly force in defense of property is "never reasonable" except when the aggressor, who is attempting to steal property, threatens deadly force against a person.[162] 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."[163] 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,"[164] and there is good reason to celebrate such a rule as a general matter.

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 but still think that striking someone with a stick or a cane as they attempt to kill your pet might be reasonable.[165] 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.[166]

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[167]—reveals this is a false dichotomy. The difference between reasonable and deadly force is often much less than it seems, and the ambiguity in the scope of what constitutes

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161 *See, e.g.*, MODEL PENAL CODE § 3.11(2) (1985).

162 2 LAFAVE, *supra* note 156, § 10.6, at 165.

163 *Id.* at § 10.6(a), at 166–67.

164 ROBINSON & CAHILL, *supra* note 160, at 303.

165 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. *See* Commonwealth v. Beverly, 34 S.W.2d 941, 942 (Ky. 1931). 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.

166 *See* Ron Harris, *Man Convicted in Dog Road Rage Case*, ABCNEWS (June 19, 2001), http://abcnews.go.com/US/story?id=93066&page=1 (documenting a case where a man threw the dog to its death in front of the victim); *see also* Penny Eims, *Man Throws Dog into Traffic During Robbery in San Francisco*, EXAMINER.COM (Dec. 29, 2012, 6:42 PM), 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).

167 *See supra* notes 134–42 and accompanying text.

deadly force means that many pet-defenders could be required to convince a jury that their force was not reasonably likely to cause serious injury, otherwise face an assault or homicide conviction.[168]

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.[169] 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.[170] 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."[171]

Such a rule seems reasonable when all that is in dispute is an umbrella, but not necessarily 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

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168 *See supra* Part III.A.

169 *See, e.g.*, MODEL PENAL CODE § 3.06(3)(d)(ii)(A) (1985).

170 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." 2 LAFAVE, *supra* note 156, § 10.4(f), at 157.

171 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES: CRIMINAL PRACTICE SERIES § 131(e)(4) (1984) ("[T]he 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." *Id.* § 41(d). *But see* Francis H. Bohlen & John J. Burns, *The Privilege to Protect Property by Dangerous Barriers and Mechanical Devices*, 35 YALE L.J. 525, 546–47 (1926) (describing deadly force in protection of occupied dwellings).

of using deadly force can be avoided by "surrendering possession of a thing," the use of deadly force is not permitted.[172]

In short, the defense of property rules provide little comfort to one who wishes to defend his pet from an attack.[173] The promise that a person can use reasonable force in defense of her or his property rings hollow when one considers the potential breadth of the category of deadly (i.e., unreasonable) force.[174]

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 of great bodily harm or death.[175] 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 to a human being.[176]

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 nondeadly force. That is to say, the pet owner is entitled to use nondeadly force in defense of

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172 *See* MODEL PENAL CODE § 3.04(2)(b)(ii).

173 The one possible exception to the above analysis is Texas. Under the relevant Texas provisions, an individual may use deadly force to defend property, including personal property, in a variety of statutorily enumerated instances. *See* TEX. PENAL CODE ANN. §§ 9.41–42 (West 2011). By and large, the list reflects the sort of dangerous felonies discussed below, see *infra* Part III.B.3, but there are some exceptions. For example, deadly force might be permitted to prevent a theft of property at night. *See* TEX. PENAL CODE § 9.42(2)(A)–(B). 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.

2 D. MARK ELLISTON & TERRENCE W. KIRK, TEXAS PRACTICE GUIDE: CRIMINAL PRACTICE & PROCEDURE § 15:79 (2013) (citation omitted).

174 Moreover, even when nondeadly force is initially used, when the violence escalates, it is very difficult to apportion blame. The slippery slope toward deadly force was aptly noted by a commentator around the time of the Model Penal Code's drafting. Comment, *supra* note 160, at 1213–15.

175 *See, e.g.*, Commonwealth v. Houston, 127 N.E.2d 294, 296 (Mass. 1955).

176 *See* Christine Emerson, Note, United States v. Willis*: No Room for the Battered Woman Syndrome in the Fifth Circuit?*, 48 BAYLOR L. REV. 317, 323 (1996).

his pet, and if the attacker responds with deadly force against the pet owner, then the owner would be entitled to use deadly force under the self-defense doctrine. To use the hypothetical from the introduction, when faced with a threat to his dog, James could push the man, 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 he will be deemed to have escalated the situation to one potentially warranting deadly force by the attacker.[177] Second, if the pet defender is older and weaker than the aggressor, then provoking the aggressor with force that is unlikely to cause serious injury may put the pet defender in a situation in which he cannot effectively defend himself.[178]

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 injury, kidnapping or sexual intercourse compelled by force or threat."[179] A number of states have adopted an even broader version of this approach and permitted deadly force to prevent forcible felonies.[180] At first blush then, it

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177 *See supra* Part III.A. 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. *See* 2 LAFAVE, *supra* note 156, § 10.4, at 142. 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. *See id.*

178 Like the victim of domestic abuse who faces only nondeadly force, he or she may be effectively deprived of self-defense. If he uses deadly force, he is likely guilty of murder. *See* 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, 36 (1986) (describing three situations in which the attacker was not using deadly force, so a response of deadly force in self-defense would lead to a murder conviction). And as the weaker party, if they use nondeadly force, they are likely to only incite more violence. *See id.* at 53 ("One must suffer nondeadly harm if use of deadly force would be the only way to avoid it.").

179 MODEL PENAL CODE § 3.04(2)(b) (1985).

180 *See* FLA. STAT. ANN. § 776.012(1) (West 2010) (providing for deadly force to stop a forcible felony); GA. CODE ANN. § 16-3-24(b) (2011) (allowing deadly force in defense of property when a forcible felony is underway); 720 ILL. COMP. STAT. ANN. 5/7-1 (West 2002) (allowing deadly force to prevent a forcible felony); MO. REV. STAT. § 563.031 (West 2012) (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 (2013) (allowing for deadly force to prevent the commission of a forcible felony); OKL. STAT. ANN. tit. 21, § 1289.25(D) (West 2011) (codifying a

would seem that at least in those states that recognize a form of felony animal abuse, which is a majority of states,[181] 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.[182] 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 instances the sort of force or threat necessary for forcible rape would involve threats of serious physical harm that would also justify self-defense.[183] 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.[184] The common denominator is that the felonies, the prevention of which 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.[185] Illustrative is the Missouri statute that permits deadly force to prevent forcible felonies and defines for-

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"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).

181 *See e.g.*, Kara Gerwin, Note, *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, 125 (2005) (explaining that, as of 2005, Kansas is "one of only six states where animal cruelty can never rise to the level of a felony").

182 *See* Green, *supra* note 8, at 37–39; J. David Jacobs, *Privileges for the Use of Deadly Force Against a Residence-Intruder: A Comparison of the Jewish Law and the United States Common Law*, 63 TEMP. L. REV. 31, 49–50 (1990) ("[T]here is no longer a right to kill in order to prevent *any* felony.").

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

184 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 (2014); *see also* 720 ILL. COMP. STAT. 5/2-8 (2012). 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) (2013).

185 A prominent exception on which commentators have seized 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 136, § 18.06[A][2][b], at 254 (citing the Model Penal Code 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* Green, *supra* note 8, at 37–39.

cible 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."[186]

In sum, even in those states that recognize certain forms of animal abuse as an aggravated felony,[187] 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 all fail to provide one with a realistic opportunity to use substantial force in defense of a pet.[188] Self-defense, defense of property, and even the ability to use force to prevent felonies do not countenance an opportunity for one to use serious force in defense of his pet.[189] 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.[190] This Part considers a range of possible doctrinal responses to this state of affairs.

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186 Mo. Rev. Stat. §563.011(3) (West 2012). Describing the sanctioning of deadly force by the 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, *supra* note 160, at 1225–26.

187 *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-2910 (Supp. 2014); Fla. Stat. § 828.12(2); 510 Ill. Comp. Stat. Ann. 70/3.02 (West 2014).

188 *See supra* Part III.B. Other defenses such as necessity and duress are even less likely to provide a viable defense. The Model Penal Code allows for a necessity defense when "the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented." Model Penal Code § 3.02(1)(a) (1985). Therefore, a pet defender would have to show that killing another human being is a lesser evil than allowing the injury or death of animal. The Model Penal Code also provides "[i]t is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist." Model Penal Code § 2.09(1). A pet defender, however, is not threatened with the use of force against his person; he or she is concerned by the use of force against his animal.

189 In some states the possibility of a viable defense would increase if the attacker were 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. N.Y. Penal Law § 35.20(3) (McKinney 2009).

190 *See, e.g.*, *id.* § 35.20(2) (noting that force, but not deadly force, is justified in preventing criminal trespass to a premises).

A. *Leave the Law as Is*

One response to the law's failure to provide a 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 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.

As this Article acknowledges, 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 nonhumans.[191] Under this view, we ought to combat animal violence through existing (or additional) anticruelty statutes 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 or aggravated assault.

1. *Recognize Animals as a Unique Type of Property*

One potential legal reform would be to recognize pets as unique property deserving of a correspondingly unique defense of property defense.[192] Instead of a general defense of property that permits only reasonable, nondeadly force, the law would permit more substantial, serious force in defense of one's pets.[193] By recognizing animals as a

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191 *See supra* note 21 and accompanying text.

192 *See* David Favre, *Living Property: A New Status for Animals Within the Legal System*, 93 MARQ. L. REV. 1021, 1043–47 (2010) (proposing a new category of property for animals).

193 Recent neuroscience research has found that dog brains function in ways that are sur-

unique type of property—animate property[194]—the law would permit more force than that allowed in defense of ordinary property, but less force than in defense of another human being. In other words, even as property, animals would be deserving of a status that entitles them to greater protection than a couch.

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 effort to kill another person with, for example, the use of firearms to protect the shoes. Indeed, even a substantial amount of nonlethal 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 someone with a walking stick or using a knife for example, might be permissible in defense of one's pet under a modified defense of property scheme.

Certain types of property already benefit from heightened protections under the law;[195] therefore, it might not be a radical departure to recognize animals as a distinct type of property deserving of deadly force protection. For example, the Model Penal Code permits deadly force (without a duty to retreat) when one's dwelling is threatened.[196] 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

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prisingly similar to human brains, leading one neuroscientist to say, "[b]ut 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." Berns, *supra* note 40, at SR5.

194 Scholars have coined the term animate property in other contexts, such as in tort law, to describe the unique nature of the injuries to animals that pet owners may suffer. *See, e.g.*, Favre, *supra* note 192, at 1029.

195 *See, e.g.*, WAGMAN ET AL., *supra* note 36, at 58 (describing the evolution of protection of married women's property).

196 MODEL PENAL CODE § 3.06(3)(d)(i) (1985).

threatened.[197] Several states follow this approach, and Georgia law goes so far as to treat one's car as a dwelling.[198] In recent years, the 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:

> [A]ny 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.[199]

One's home, in other words, is recognized as a special class of property for which, in a broader range of circumstances,[200] 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, 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

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197 Green, *supra* note 8, at 17 (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").

198 GA. CODE ANN. § 16-3-24.1 (2011). 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 to include a car, it does not typically follow that deadly force can be used in defense of the vehicle. *See* Nicole Flatow, *Three Self-Defense Laws that Could Be Even Worse than Stand Your Ground*, THINKPROGRESS (July 24, 2013, 12:00 PM), http://thinkprogress.org/justice/2013/07/24/2345901/three-self-defense-laws-that-could-be-even-worse-than-stand-your-ground/ (noting that stand your ground laws may, in many states, authorize disproportionate force in crimes involving injury to a person, but contrasting Texas law, which has allowed the use of deadly force in car burglaries). As explained in Part III.B.3, deadly force can be used to prevent felonies that involve a threat to one's life. *See supra* notes 179–87 and accompanying text; *see also* 1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW §§ 90–91 (4th ed. 2012).

199 COLO. REV. STAT. § 18-1-704.5(2) (2013) (emphasis added).

200 *See* Catherine L. Carpenter, *Of the Enemy Within, the Castle Doctrine, and Self-Defense*, 86 MARQ. L. REV. 653, 665–66 (2003) (noting that deadly force in defense of habitation may become self-defense in the home if intruder enters home).

retreat and no lesser force will ensure the safety of the pet, serious force is permissible.

2. Expand Self-Defense

Another option would be to recognize that injuring one's pet justifies an act in self-defense. Under existing self-defense doctrine, the 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, 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.[201] In a narrow range of circumstances, then, it is conceivable that injuring or stealing one's service animal[202] 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

201 *See* Livingston, *supra* note 56, at 810.

202 Service animals are not all dogs. *See generally* Rebecca Skloot, *Creature Comforts*, N.Y. TIMES MAG., Dec. 31, 2008, at 34, *available at* http://www.nytimes.com/2009/01/04/magazine/04Creatures-t.html?pagewanted=all&_r=0.

> dart that poses no risk of serious physical injury, but will make you irreversibly schizophrenic or 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.[203]

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 abuse" that battered spouses suffer.[204] Self-defense, according to Ewing, ought to be available when the psychological injury will cause the victim to feel that his or her life has "little if any meaning or value."[205] Other scholars have advanced similar arguments in favor of a broader form of self-defense that protects one against egregious emotional injuries.[206]

Of course, no one would advocate that any psychological injury warrants deadly force; hurt feelings do not justify homicides. But the death of a companion animal is documented as producing severe psy-

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203 Stephen G. Gilles, Roe*'s Life-or-Health Exception: Self-Defense or Relative-Safety?*, 85 NOTRE DAME L. REV. 525, 559 (2010) (footnotes 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: INVISIBLE WOUNDS AND THEIR HISTORIES 91 (2013).

204 *See* CHARLES PATRICK EWING, BATTERED WOMEN WHO KILL: PSYCHOLOGICAL SELF-DEFENSE AS LEGAL JUSTIFICATION 35–36, 40–46 (1987).

205 Charles Patrick Ewing, *Psychological Self-Defense: A Proposed Justification for Battered Women Who Kill*, 14 LAW & HUM. BEHAV. 579, 587 (1990); *see also* David L. Faigman, *Discerning Justice When Battered Women Kill*, 39 HASTINGS L.J. 207, 218 n.44 (1987) (reviewing CHARLES PATRICK EWING, BATTERED WOMEN WHO KILL (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.").

206 *See, e.g.*, Ewing, *supra* note 205, at 586 & n.45 (citing CARL ROGERS, CLIENT-CENTERED THERAPY: ITS CURRENT PRACTICE, IMPLICATIONS AND THEORY 510–517 (1951); R.D. LAING, THE DIVIDED SELF: AN EXISTENTIAL STUDY IN SANITY AND MADNESS 39–61 (1970); Jack D. Douglas, *The Emergence, Security, and Growth of the Sense of Self*, *in* THE EXISTENTIAL SELF IN SOCIETY 69 (Joseph A. Kotarba & Andrea Fontana eds., 1984).

chological injury.[207] 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."[208] Accordingly, to the extent that scholars have advocated a broader notion of self-defense that accounts for severe psychological or dignitary injury, such a conception might permit the use of deadly force to protect one's pet.[209]

C. Statutory Solutions

Although courts enjoy the inherent authority to create criminal defenses,[210] 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.[211] 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 better reflect the value of pets in our society without sanctioning substantially more human violence.

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207 *See* Livingston, *supra* note 56, at 806–10, 829.

208 *Id.* at 829.

209 *See* Margaret Raymond, *Looking for Trouble: Framing and the Dignitary Interest in the Law of Self-Defense*, 71 OHIO ST. L.J. 287, 320 (2010).

210 *See, e.g.*, United States v. Dixon, 509 U.S. 688, 695–97 (1993) (discussing the development of double jeopardy law by the Court); Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 VAND. L. REV. 1383, 1406–16 (2003) (discussing the common law development of certain criminal defenses).

211 *See, e.g.*, JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA 185–86 (2006).

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 nondeadly force.[212] A professional kickboxer might kick someone in the face and kill him but be deemed to have used nondeadly 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, thereby, depriving him of a defense to charges of murder or assault, puts many would-be pet defenders at risk of serious convictions.

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 nondeadly force.[213] Thus narrowing the definition of deadly force may allow many defendants the opportunity to raise a defense when an attacker 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.[214]

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

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212 *See supra* Part III.A.

213 *See* Sarah A. Pohlman, Comment, *Shooting from the Hip: Missouri's New Approach to Defense of Habitation*, 56 ST. LOUIS U. L.J. 857, 861–63 (2012) (discussing Missouri cases concerning self-defense jury instructions).

214 COLO. REV. STAT. § 18-1-706 (2013) (emphasis added).

another person.[215] However, the key difference is Colorado's 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."[216] In other words, force is treated as deadly only if it is intended to kill and does in fact result in death.[217]

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.[218] 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.[219] This approach is similar to the prevailing approach for defending property insofar as the ultimate question is generally left to the jury.[220] 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.[221] 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.[222]

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215 *See id.*

216 COLO. REV. STAT. § 18-1-901(3)(d).

217 *See* People v. Vasquez, 148 P.3d 326, 328 (Colo. App. 2006); People v. Ferguson, 43 P.3d 705, 709 (Colo. App. 2001).

218 *See* COLO. REV. STAT. § 18-1-706.

219 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. *Cf.* Simeone, *supra* note 135, at 172 (citing St. Louis City police use of force policy that directs officers to "use the least amount of force reasonably necessary to accomplish their lawful objective").

220 *See* COLO. SUPREME COURT COMM. ON CRIMINAL JURY INSTRUCTIONS, COLORADO JURY INSTRUCTIONS, CRIMINAL No. 7:21 (1983) (model jury instruction on use of force in defense of property).

221 *See id.*

222 The line remains slippery, but asking a jury to assess whether there was reasonable force as opposed to merely nondeadly force would provide animal defenders more confidence that

The Colorado statutory solution, however, is not without its problems. First, many might find Colorado's definition of nondeadly 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 victim.[223] 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 nondeadly, 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 heightened 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—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,[224] 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 ac-

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they will not face criminal convictions when they act with force not intended to kill in defense of their pets.

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

224 *See supra* Part II.A, II.B.1.

tions 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 from death, 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.[225]

Simply put, a reasonableness standard in this context—the context of life or death for one's pet—may place too 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 can have a higher degree of confidence that he will not be going to prison for defending his animal.

2. A Comprehensive Statutory Solution

A clearer statutory definition of deadly force, like that adopted in Colorado, would ameliorate some of the uncertainty, but as discussed above, it would also create new questions about the scope of one's right to defend his pet.[226] 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 a pet defender required to retreat? This Subpart proposes a statutory solution that seeks to comprehensively address many of the concerns that are likely to recur 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:

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225 *See, e.g.*, COLO. REV. STAT. § 18-1-706 (2013) (permitting reasonable defense of one's property but not defining what is reasonable); *see also supra* Part III (highlighting the difficulties in distinguishing deadly and nondeadly force and of defining reasonableness).

226 *See supra* Part IV.C.1.

§ XX-xx: Use of Force in Defense of One's Pet[227]

(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 companionship rather than utility, and with which the human owner has a close relationship and emotional bond.

(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 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 aggressor's threat of harm to one's pet must 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 with his or her pet from the situation. The legality of the threat of deadly force provided for in section (2), and the use of such deadly force as provided for in sections (5) and (6) is conditioned on a reasonable effort to retreat, when possible, by the pet owner with his or her pet.

(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 animal's 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.

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227 The following statute and this Article reserve some questions for future analysis. Among these are: whether the defense extends to the defense of another's pet and whether the pet can be used as a weapon in its own defense. While pertinent to the topic, they are beyond the scope of this Article.

(5) When an aggressor against a pet 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.

3. 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 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 this Article elaborates on the merits and acknowledges the controversial aspects of each of the proposed statutory provisions.

a. 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 foundational 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: 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, as mentioned in the introdcutory hypothetical. The rigid duty to retreat imposed on the pet abuser is designed to ensure that this result 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.[228]

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.[229] 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 the right to respond with equal force to defend his person.[230]

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,[231] 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. Stated differently, a *nondeadly aggressor* who is confronted with deadly force is in the same position regarding his ability to use deadly force as a *nonaggressor*—that is to say, if there is a duty to retreat in

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228 2 LaFave, *supra* note 156, § 10.4(e), at 153–54 (footnotes omitted); *see also* Model Penal Code § 3.04(2)(b) (1985).

229 *Cf.* 2 Robinson, *supra* note 171, § 131(b)(2) (noting self-defense generally requires that the individual be facing unlawful or unjustified force from another).

230 *See* Note, *supra* note 127, at 588–89.

231 *See generally* Eugene Volokh, *Duty to Retreat and Stand Your Ground: Counting the States*, Volokh Conspiracy (July 17, 2013, 10:11 AM), http://www.volokh.com/2013/07/17/duty-to-retreat/ (defining duty to retreat and listing states that adhere to this rule).

the jurisdiction, then that duty should apply equally to a nonaggressor and a nondeadly aggressor confronted with deadly force.[232]

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. 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.[233] If an aggressor is threatening personal injury, then the duty to retreat is relatively absolute.[234] 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.[235] 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. Instead, the dominant rule seems to be that a *nondeadly* aggressor is treated the same as *nonaggressor*; 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.[236] As Paul Robinson has put it, "[c]onsider . . . 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

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232 The duty to retreat before using deadly force is a minority rule. *Id.* ("The substantial majority view among the states, by a 31–19 margin, is no duty to retreat."); Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371, 379 & n.14 (1993) ("Most jurisdictions in this country do not require retreat . . . ."); *see also* 2 LAFAVE, *supra* note 156, § 10.4(f), at 155–57.

233 *See* State v. Carridine, 812 N.W.2d 130, 145 (Minn. 2012); *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, 24 nn.89 & 90 (1985) (compiling statutes).

234 *See Carridine*, 812 N.W.2d at 145 ("[I]f 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.").

235 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 136, § 18.02[C][2], at 229 n.34.

236 *See, e.g.*, *id.* § 18.02, at 227 ("[W]hen the victim of a nondeadly assault responds with deadly force, the original aggressor immediately regains his right of self-defense.").

right of self-defense seems inappropriately harsh."[237] 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.[238]

The point, then, is that the common law recognizes instances where deadly force is appropriate even for the initial aggressor.[239] The question is simply one of proportionality: whether the initial aggression is met with violence (or threats) so disproportionate as to justify deadly force by the initial aggressor.[240] Of course, such a proportionality formula does 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.[241] 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?[242] The common law doctrine,

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237 Robinson, *supra* note 233, at 9.

238 Of course, if the person could retreat in complete safety, then in a minority of states, the duty to retreat—that is, the general rule of retreat—would still apply. *See* DRESSLER, *supra* note 136, § 18.02[C][2], at 229 n.34.

239 *See, e.g.*, Watkins v. State, 555 A.2d 1087, 1088 (Md. Ct. Spec. 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, 141 (Mich. 1974).

240 *See* John S. Baker, Jr., *Criminal Law*, 45 LA. L. REV. 251, 260 (1984) (summarizing Louisiana caselaw and explaining "that the *non-deadly aggressor is no longer the aggressor* when he meets an excessive response threatening his life" (emphasis added)).

241 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) (1985). On the other hand, a defense of property with deadly force would be deemed unnecessary and disproportionate. Note, *supra* note 127, at 590. The question of whether and to what extent we value animals above and beyond mere property, then, is central to the question whether force in their defense is justified.

242 The problem is that the question whether one must retreat is bound up in whether one is truly an aggressor. *See* 2 LAFAVE, *supra* note 156, § 10.4(f), at 155 ("The majority of American jurisdictions holds that the defender (who was not the original aggressor) need not retreat . . . ."). Is a nondeadly aggressor who merely stomps on the toe of his rival fairly considered an "aggressor" or a cause of the incident if the victim responds by swinging a knife at his throat? It seems unlikely that any court would treat such a 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, 812 (Mass. 1999) ("[A]n armed home invader (by definition a person who has unlawfully entered a dwelling while armed with knowledge of persons therein) cannot invoke self-defense when an occupant of a dwelling uses force to repel him."); Commonwealth v. Johnson, 396 N.E.2d 974, 976 (Mass. 1979) (no privilege self-defense of a robber where he did not withdraw first).

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.[243] 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.[244] This would represent a break from the

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243 The jury instructions in some states are arguably broad enough to require a duty to retreat by a person who threatens injury to one's pet. *See, e.g.*, State v. Carridine, 812 N.W.2d 130, 145 (Minn. 2012) (explaining that the aggressor is the one who "began or induced the incident" (internal quotation marks omitted)). But the practice seems to be less clear when the aggressor is not engaging in deadly force. *See supra* notes 138–58 and accompanying text (explaining the difficulties in defining deadly force and the possibility that a pet defender may be deemed to have used unjustified deadly force in response to an aggressor). 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 233, at 9–10 (footnotes omitted).

244 The most thoughtful commentary seems to acknowledge that "[c]ourts 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* People v. Quach, 10 Cal. Rptr. 3d 196, 201–02 (Cal. Ct. App. 2004) ("If the victim uses such force, the aggressor's right of self-defense arises. 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." (internal quotation marks and citations omitted)); DRESSLER, *supra* note 136, § 18.02[B][2][b], at 227 (noting a split in the caselaw but concluding that "most courts" hold that a nondeadly aggressor has a right to self-defense without retreat); Paul H. Robinson & Adil Ahmad Haque, *Advantaging Aggressors: Justice & Deterrence in International Law*, 3 HARV. NAT'L SECURITY J. 143, 154 (2011) ("If 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."). At least according to some authorities, this is the dominant rule. *See* Jimmie

common law rule applicable in most jurisdictions.[245] Indeed, scholars have noted "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."[246] By way of a counterexample, in California—a no-retreat state[247]—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 assault, *need not withdraw* if the victim of the simple assault responds in a sudden and deadly counter-assault.[248]

E. Tinsley, *Withdrawal by Aggressor Reviving Right of Self-Defense*, *in* 3 AMERICAN JURISPRUDENCE: PROOF OF FACTS NO. 2, 705, 711 (1974) ("[T]he 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.").

245 The Model Penal Code, for example, holds an initial wrongdoer "accountable for his original unlawful use of force but not for his defense against a disproportionate return of force by his victim." MODEL PENAL CODE § 3.04 cmt. 4(b) (1985). 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." *See* DRESSLER, *supra* note 136, § 18.02[B][1], at 226; *see also* Robinson, *supra* note 233, at 13, 27 (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 fist fight that he anticipates"). Professor Donald A. Dripps has also discussed the oddity of a system that deems an aggressor—even a nondeadly aggressor—to have forfeited his defenses. Dripps, *supra* note 210, at 1413–14.

246 DRESSLER, *supra* note 136, § 18.02[B][2][b], at 227 (emphasis added) (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. *See id.* (citing Watkins v. State, 555 A.2d 1087, 1088 (Md. Ct. Spec. App. 1989)). And even if a jurisdiction does not permit the nonaggressor 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* MODEL PENAL CODE § 3.04 cmt. 4(b) (permitting a defense of one's self by an aggressor who is confronted with disproportionate force); *see also* DRESSLER, *supra* note 136, § 18.02[B][2][b], at 228. Some courts have deferred the question 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, 463 (Mass. 1983) (noting excessive force by a victim would restore the initial aggressor's right of self-defense).

247 1 WITKIN & EPSTEIN, *supra* note 198, § 77.

248 4 RUCKER & OVERLAND, *supra* note 157, § 47:10 (emphasis added).

Other leading criminal treatises confirm that this is the prevailing view.[249] The rule seems to be that aggressors have a right to self-defense if they retreat, *or* if they are nondeadly aggressors. Stated differently, the default rule is that nondeadly 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 nondeadly initial aggressors, at least in certain contexts.[250] Perhaps it is preferable to impose a general duty to retreat in all instances, but barring such a radical reform,

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249 *See, e.g.*, 10 LESLIE W. ABRAMSON, KENTUCKY PRACTICE: SUBSTANTIVE CRIMINAL LAW § 5:25 (3d ed. 2010) ("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." (footnote omitted)); ROBERT E. CLEARY, JR., KURTZ CRIMINAL OFFENSES AND DEFENSES IN GEORGIA 1611 (2013) ("The right of self-defense is generally extended to (1) a nondeadly aggressor who is met with deadly force and (2) an aggressor who effectively withdraws from the fray and takes reasonable steps to notify his opponent of his intent to withdraw."); 4 RUCKER & OVERLAND, *supra* note 157, § 47:10 cmt. (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 *Quach*, 10 Cal. Rptr. 3d at 201–02)); 12 MARYLAND LAW ENCYCLOPEDIA § 37 (West 2011) ("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.") (footnotes omitted); *see also* Steele, *supra* note 152, at 687 ("[I]f 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.").

250 A variety of states use jury instructions that deprive aggressors of an immediate right to self-defense without retreat. *See, e.g.*, 11 WASH. SUPREME COURT COMM. ON JURY INSTRUCTIONS, WASHINGTON PRACTICE SERIES: PATTERN JURY INSTRUCTIONS CRIMINAL WPIC 16.04 (3d ed. 2008) ("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." (emphasis added)). 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.").

it is important to recognize that an initial aggressor in pet abuse should have an 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.[251]

b. 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 permits a threat and potentially the use of deadly force in defense of a nonhuman life. The use of deadly force outside of the protection of humans is relatively rare,[252] 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.[253]

c. 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.[254] The reasonable use of force by law enforcement,

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251 *Cf.* Dripps, *supra* note 210, at 1413–14 (explaining the doctrine of forfeiture where a defendant is the initial, if nondeadly, aggressor). In criticizing the forfeiture approach to defenses, Dripps explains, "[f]or 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.*

252 It is not unheard of, however. *See supra* Part III.B.1 (discussing defense of home as specialized defense of property).

253 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.

254 The force must be, or reasonably believed to be, unreasonable in order to justify self-defense. *See, e.g.*, 2 LAFAVE, *supra* note 156, § 10.4, 142–43. More precisely, self-defense is not

for example, is the quintessential example of legal force that generally cannot be the predicate to use self-defense.[255] Accordingly, an act of the legislature explicitly making certain force or threats of force permissible insulates one from being lawfully killed under a theory of self-defense.[256]

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 threaten to do that which he is not permitted to do."[257] 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."[258] The proposed statute would convert the

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permitted when the force to be resisted is justified. *See, e.g.*, Paul Robinson, *supra* note 233, at 4–7.

255 *See, e.g.*, Commonwealth v. Meoli, 452 A.2d 1032, 1035 (Pa. Super. Ct. 1982); 43 GEORGE E. DIX & JOHN M. SCHMOLESKY, TEXAS PRACTICE SERIES: CRIMINAL PRACTICE AND PROCEDURE § 43:38, at 930 (3d ed. 2011) ("Thus, unless the defendant reasonably believed the force to be unlawful at the time of attack, a claim of self-defense is not valid."); *see also* People v. Hayward, 55 P.3d 803, 805 (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).").

256 *See Hayward*, 55 P.3d at 805 (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).

257 DRESSLER, *supra* note 136, § 20.02[B][4], at 265.

258 CLEARY, *supra* note 249, at 1613 (emphasis added) ("The use of deadly force by the 'victim' against the nondeadly aggressor simply is unlawful."). The nonaggressor versus nondeadly aggressor rules, then, tend to apply what Mark Kelman calls "broad time-framing" such that the entire transaction surrounding the death is considered. Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 611 (1981). Or, as prominent scholar Paul Robinson has put it, "[w]here 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 233, at 27 ("Where a forest fire has been set, for whatever

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.

d. 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. These provisions deliberately permit serious force—defined as force likely to cause serious bodily injury—but bar 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.[259]

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 harm to a person. Both provisions represent a departure from common law and statutory rules in every jurisdiction insofar as they explicitly permit serious human injury in defense of an animal.[260] 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 at-

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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 "[t]he 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.

259 *See* Dan-Cohen, *supra* note 12, at 630–34 (emphasizing the value of having some legal rules that are directed to the public even when the rule's actual judicial impact is something quite different).

260 *See supra* Part III.B.

tacking 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's 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 further and is designed to provide pet owners protection in those instances of spontaneous harm to 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.[261] 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 right to use 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 by the pet owner 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

261 *See supra* note 166 and accompanying text.

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. 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 nondeadly aggressors, no less than questions about the status of nonhuman 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.

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 solution, 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.