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AVOIDING THE FATE OF ARGOS: THE DUTY OF PET TRUST PROTECTORS IN CONNECTICUT

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δὴ τότε κείτ' ἀπόθεστος ἀποιχομένοιο ἄνακτος

—Homer¹

1. Introduction

Of the bewildering modern panoply of baubles, piquants, and stimuli that vie for their attention and affection, Americans perhaps most of all love their pets. Americans own, by low estimates, 78 million dogs and 85 million cats.² At least forty-four percent of American households have a dog and thirty-five percent have one or more cats.³ Almost two million Americans own horses, almost four million Americans own birds, almost eight million own fish, and millions more own countless other animals.⁴

Pet ownership has health benefits, and pet ownership has been shown to improve mental health and sense of well-being.⁵ Stress levels in people walking their dogs, as measured by changes in autonomic nervous activity, are lower than

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¹ HOMER, ODYSSEY, XVII.318 (Samuel Butler trans. 1944) (c. 700 B.C.) (“now he has fallen upon evil times, for his master is dead and gone”).

² *Pet Statistics*, AM. SOC’Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, <http://www.aspca.org/animal-homelessness/shelter-intake-and-surrender/pet-statistics> (last visited Mar. 4, 2018).

³ *Id.*

⁴ *U.S. Pet Ownership Statistics*, AM. VETERINARY MED. ASS’N, <https://www.avma.org/KB/Resources/Statistics/Pages/Market-research-statistics-US-pet-ownership.aspx> (last visited Mar. 4, 2018).

⁵ June McNicholas et al., *Pet Ownership and Human Health: a Brief Review of Evidence and Issues*, 331 BRITISH MED. J. 1252, 1253 (2005).

those in people walking alone.⁶ One study demonstrated that simply being in a room with a friendly dog reduced stress.⁷ Interaction with pets reduces symptoms of depression and lowers blood pressure.⁸ “Patients who own[] dogs [are] far less likely to die in the year following a heart attack than patients with no pet”⁹ Pets provide special companionship to the elderly in particular, with elderly pet owners requiring fewer doctor visits, and declining less in mental and physical capacity than their pet-less peers.¹⁰

Pets give their masters so much of their loyalty, love, and devotion that it is only natural that many Americans want to do something to return the favor by making sure that their pets are provided for when they are no longer around. They wish for their pets to avoid the fate of Argos, who fell upon evil times, languishing flea-ridden in the manure-filled stables of Ithaka after Odysseus was presumed dead and gone.¹¹ The most popular and most effective way of making provisions for one’s pet-care if one predeceases the pet is by a testamentary pet trust.

This Note’s purpose is to examine testamentary gifts to pets in their historical context, and to recommend the optimal standard of care to which pet trust protectors should be held. It will begin by charting the law’s treatment of testamentary gifts to pet animals from the grudging acceptance of the English common law, across the Atlantic, to the disfavor of the American courts. It will then trace the eventual, reluctant acknowledgement of honorary pet trusts in the United States over the course of the twentieth century. It will then analyze the sweeping sea-change that the Uniform Probate Code (“UPC”) ushered in by formally endorsing pet trusts in 1990. It will finally look at the recent replacement of UPC § 2-907 pet trusts with state-specific, statutory, enforceable pet trusts at the beginning of the twenty-first century, with particular focus on Connecticut’s pet trust statute.

This Note will then attempt to answer a question upon which Connecticut’s courts have been silent. Under Connecticut’s pet trust statute, what is the trust protector’s duty to the pet beneficiary of a trust? It will derive from several models of animal welfare three possible standards of care which trust protectors could owe to their animals: (1) minimum requisite needs, (2) the felicific calculus, and (3) Aristotelian “best interests.” Finally, it will recommend

⁶ Bruce Headey et al., *Pet Dogs Benefit Owners’ Health: A ‘Natural Experiment’ in China*, 87 SOC. INDICATORS RES. 481, 482 (2007) (citation omitted).

⁷ *Id.*

⁸ *Id.* (citation omitted).

⁹ *Id.*

¹⁰ *Id.*

¹¹ HOMER, *supra* note 1, at XVII.296-300; *see also*, Gilbert P. Rose, *Odysseus’ Barking Heart*, 109 TRANSACTIONS OF THE AM. PHILOLOGICAL ASSOC. 215, 218-20 (1979). Argos was Odysseus’s dog, whom he left behind in Ithaka when he sailed with Menelaus and Agamemnon to Ilium to fight the Trojan War. Upon Odysseus’s return, twenty years later, Argos was the first one to recognize and welcome his master, easily seeing through the pauper’s disguise Odysseus wore.

that the Connecticut legislature and Connecticut Probate Courts adopt the Aristotelian “best-interests” standard of care.

2. History

a. Bequests to Pets under the English Common Law

Testamentary bequests to animals have an interesting and controversial history. English common law traditionally required testamentary bequests to be made to human beneficiaries, or if not to persons, then to some charitable purpose or institution.¹² Nevertheless, there are several cases of bequests that would ordinarily have been invalid under this rule being upheld by the English courts. These exceptional cases fell into two basic categories: (1) bequests made to fund the erection and maintenance of gravestones and posthumous monuments, and (2) bequests to favorite animals. One court described these two narrow exceptions as “troublesome, anomalous, and aberrant cases.”¹³

In the 1842 English case of *Pettingall v. Pettingall*, a testator bequeathed a sum of money to provide for the upkeep of his black mare for as long as it should live.¹⁴ Because the executor did not object to administering the bequest, and no other party contested it, the court held that it was a valid testamentary gift.¹⁵

In the 1889 case of *In Re Dean*, an English court upheld a testamentary trust created for the benefit of a man’s horses and dogs.¹⁶ Unlike in *Pettingall*, adverse parties challenged the validity of the bequest in *Dean*.¹⁷ The court determined that since the bequest was made for the benefit of the testator’s particular animals, not animals generally, it could not be construed as a charitable purpose bequest.¹⁸ The court also held that the bequest did not constitute a gift to the trustee, because the will imposed a number of duties related to the upkeep of the animals, and made the bequest conditional upon his fulfillment of them.¹⁹ The parties contesting the bequest argued that because there was no beneficiary legally capable of suing to enforce the trust, it must fail.²⁰

The court rejected this argument, holding that the bequest was not “illegal or obnoxious to the law,” so long as it did not “last for too long a

¹² E. I. Sykes, *Legal Landmarks 1959-60: Trusts*, 4 UNIV. OF QUEENSLAND L. J. 122, 122 (1961).

¹³ *Id.* at 123 (citation omitted).

¹⁴ *Pettingall v. Pettingall*, 11 L.J. Ch. 176, 177 (1842); see Gerry W. Beyer, *Pet Animals: What Happens When Their Humans Die?*, 40 SANTA CLARA L. REV. 617, 621-22 (2000).

¹⁵ *Pettingall*, 11 L.J. Ch. at 176 (as cited in Beyer, *supra* note 14, at 621).

¹⁶ *In Re Dean*, 41 Ch. D. 552 (1889); see also Beyer, *supra* note 14, at 622-23.

¹⁷ *In Re Dean*, 41 Ch. D. 552.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

period,” affirming that animal trusts were valid, but bound by the Rule Against Perpetuities.²¹ English courts continued, generally, to uphold the “common sense determination [of the *Dean* case] that . . . bequests [for the care of specific animals] do not contravene public morality and the public policy reasons behind the rules of law which require a [beneficiary] and compliance with the rule against perpetuities.”²²

b. The American Courts’ Disfavor Towards Pet Trusts and the Stopgap of the “Honorary Trust”

Although the first reported case in the United States of a bequest to an animal (a Kentuckian testator’s bequest to his dog) was ultimately upheld by the Supreme Court of Kentucky as valid,²³ this encouraging precedent was not subsequently followed by the majority of American courts.²⁴ In the early twentieth century, bequests to pets were generally held to be invalid under American common law because (1) pets were considered property, and property cannot own title to other property; and (2) bequests to pets ran afoul of the Rule Against Perpetuities, since the measuring life must be a human life.²⁵ As Jennifer Taylor summarizes:

[t]he [early twentieth century American] common law has taken the position that pet trusts are invalid. One of the legal requirements of a trust is that it specify a beneficiary which can be identified in definite and certain terms. In addition, the beneficiary must be a human being, a corporation, or the like. A human beneficiary is necessary because the beneficiary holds the power to enforce the trust. An animal is not capable of forcing the trustee to administer the trust and provide distributions in accordance with the settlor’s directions. This system of “checks and balances” is what makes a trust an effective financial arrangement. Simply stated, without a beneficiary, there is no trust.²⁶

Apart from the problem of lacking a human beneficiary capable of enforcing the trust, pet trusts also tended to violate the Rule Against Perpetuities. The Rule Against Perpetuities, in general terms, is “[t]he common-law rule prohibiting a grant of an estate unless the interest must vest, if at all, no later than

²¹ *Id. See generally*, HELENE S. SHAPO ET AL., THE LAW OF TRUSTS AND TRUSTEES § 214 (2017) (The Rule Against Perpetuities).

²² Beyer, *supra* note 14, at 623 (citing James T. Brennan, *Bequests for the Care of Specific Animals*, 6 DUQ. L. REV. 15, 21 (1967)) (alteration in original); *see, e.g., In re Hawkins*, 1 CH. 67, 69 (1942) (upholding a bequest for the upkeep of decedent’s horses and dogs).

²³ *Willett v. Willett*, 247 S.W. 739, 741 (Ky. 1923); *see also* Beyer, *supra* note 14, at 625.

²⁴ Beyer, *supra* note 14, at 625.

²⁵ Jennifer R. Taylor, *A ‘Pet’ Project for State Legislatures: The Movement Toward Enforceable Pet Trusts in the Twenty-First Century*, 13 QUINNIPIAC PROB. L.J. 419, 420-21 (1999).

²⁶ *Id.* (citations omitted).

21 years (plus a period of gestation to cover a posthumous birth) after the death of some person alive when the interest was created.”²⁷ Pet trusts ran afoul of the Rule Against Perpetuities for lack of a measuring life: the life twenty-one years after the end of which the interest must vest or not vest. Taylor explains:

[a]n animal’s life cannot be used as a measuring life. A life in being must be a human life, and it must be the life of a person who can affect the vesting of the interest. A pet trust violates the Rule Against Perpetuities because only the life of the pet would affect the vesting of the interest.²⁸

The American common law, in summary, generally held pet trusts invalid on the grounds of lacking a legally competent beneficiary, and violating the Rule Against Perpetuities.

In 1935, the American Law Institute published the first Restatement of Trusts. Despite affirming that a trust beneficiary must be “[a] person who has capacity to take and hold the legal title to property,”²⁹ the Restatement did allow a trust to benefit “a specific non-charitable purpose,” giving the trustee the “power to apply the property to the designated purpose”³⁰ A trust designating a pet animal as a beneficiary, under the Restatement’s approach, would not be enforceable (the pet would be incapable of asserting its legal rights in court), but so long as the trustee were willing to carry out the wishes of the settlor, the law would not object.³¹ The only limitations the Restatement placed upon a trustee so inclined to carry out the settlor’s wishes would be that the trust property could not be used for the animal’s benefit for longer than the Rule Against Perpetuities allows, and that it could not be used for a “capricious” purpose.³²

Americans continued to try to give testamentary bequests to their pets, despite the disfavor in which the courts held such gifts. Eventually, by the mid-twentieth century, some American courts came to accept the legitimacy of trusts established to benefit pet animals.³³ While these trusts would ordinarily fail in probate for the reasons articulated above, some courts were willing to uphold trusts of which pets were the beneficiaries as “honorary trusts.”³⁴ They were so called because there was no legal beneficiary of the trust (the pet was still property), so the trustee was bound only by his honor (not the law) to carry out

²⁷ *Rule Against Perpetuities*, BLACK’S LAW DICTIONARY (10th ed. 2014).

²⁸ Taylor, *supra* note 25, at 421 (citations omitted).

²⁹ RESTATEMENT (FIRST) OF TRUSTS § 116 (AM. LAW INST. 1935).

³⁰ RESTATEMENT (FIRST) OF TRUSTS § 124.

³¹ *Id.*

³² RESTATEMENT (FIRST) OF TRUSTS § 124 cmt. b.

³³ See Beyer, *supra* note 14, at 625-26.

³⁴ *Id.* at 635; see also, e.g., *In re Searight’s Estate*, 95 N.E.2d 779, 784 (Ohio Ct. App. 1950) (upholding decedent’s bequest of \$1,000 for the upkeep of his dog as an “honorary trust”).

the wishes of the settlor who established the trust.³⁵ While some courts were unwilling to adapt the honorary trust concept to bequests to pets when it would seem appropriate to do so,³⁶ other courts embraced the honorary trust concept to save bequests to pets.³⁷ While honorary trusts were a positive step forwards for pet owners, as the twentieth century drew to a close, there was still no legally binding mechanism for making a bequest to a pet animal.

c. Uniform Probate Code § 2-907

In 1969, the National Conference of Commissioners on Uniform State Laws published the first edition of the UPC, a model act intended for all fifty states. In 1990, a significant revision added a provision specifically addressing pet trusts.³⁸ UPC § 2-907 affirmed that pet trusts were “valid,” and directed probate courts to construe the language of wills liberally in favor of the testator’s intention of creating a pet trust, “presum[ing] against the merely precatory or honorary nature of the disposition, and to carry out the general intent of the transferor.”³⁹

In another great leap forwards for testators making bequests to their pets, the UPC included a proscription that “no portion of the principal or income [of the pet trust] may be converted to the use of the trustee or to any use other than for the trust’s purposes or for the benefit of a covered animal.”⁴⁰ This meant that pet trusts were no longer merely “honorary,” but had binding legal effect (in states that adopted this section of the UPC).

To that end, UPC § 2-907(c)(4) established that “[t]he intended use of the principal or income can be enforced by an individual designated for that purpose in the trust instrument or, if none, by an individual appointed by a court upon application to it by an individual.”⁴¹ Although animals could not legally act to vindicate their rights to their trust income, the trust instrument or the court could designate a third party who could act on the animal’s behalf to prevent malfeasance and embezzlement.

³⁵ See *Trust*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining an *honorary trust* as “[a] noncharitable trust that is of doubtful validity because it lacks a beneficiary capable of enforcing the trust”).

³⁶ See, e.g., *In re Estate of Russell*, 444 P.2d 353, 362-63 (Cal. 1968) (in banc) (holding that a bequest of half the residuum of decedent’s estate to a close friend and the other half to her dog, Roxy, could not be reasonably construed as bequeathing Roxy’s half of the residuum to the close friend to keep in “honorary trust” for the maintenance of the dog).

³⁷ See, e.g., *Searight*, 95 N.E.2d. at 784 (upholding decedent’s bequest of \$1,000 for the upkeep of his dog as an “honorary trust”).

³⁸ See UNIF. PROBATE CODE § 2-907 (amended 1993).

³⁹ UNIF. PROBATE CODE § 2-907(b).

⁴⁰ UNIF. PROBATE CODE § 2-907(c)(1).

⁴¹ UNIF. PROBATE CODE § 2-907(c)(4).

The UPC also created an exception to the perennial problem pet trusts ran into with the Rule Against Perpetuities, stating that pet trusts “[terminate] when no living animal is covered by the trust,” *instead of* the customary twenty-one years after the end of the measuring life.⁴² This provision protects longer-lived pet trust beneficiaries, such as horses, turtles, and parrots.⁴³

The Uniform Trust Code (“UTC”) followed a decade later in 2000, and reaffirmed the Conference of Commissioners’ support for pet trusts with section 408⁴⁴ dedicated to animal trusts.⁴⁵ The UTC’s pet trust provision largely mirrors UPC § 2-907.⁴⁶

Although the UPC was designed as a model probate regime for all fifty states, it has only been adopted by eighteen states.⁴⁷ Approximately one century after the first recorded attempt to bequeath something to a pet in America, the law had still not caught up with the public desire for enforceable pet trusts (except in the states that have adopted section 2-907 and those that have similar statutory provisions).

d. Statutory Pet Trusts

In the early twenty-first century, many states began endorsing the concept behind the UPC’s pet trust provision by enacting statutory pet trust laws, and by 2018, all fifty states and the District of Columbia recognized some form of statutory pet trust.⁴⁸ These laws generally allowed for the creation of *inter*

⁴² UNIF. PROBATE CODE § 2-907(b).

⁴³ See E. Gus Cothran et al., *Horse*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/animal/horse> (last visited Mar. 5, 2018) (“There have been reports made of horses living to their early 60s in age.”); George R. Zug, *Turtle*, ENCYCLOPEDIA BRITANNICA (Jan. 25, 2018), <https://www.britannica.com/animal/turtle-reptile> (“if an individual [turtle] survives to adulthood, it will likely have a life span of two to three decades.”); Frank Gill et al., *Psittaciform-Parrot*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/animal/psittaciform> (last visited Mar. 5, 2018) (Some parrots are said to have lived 80 years.).

⁴⁴ UNIF. TRUST CODE § 408 (amended 2010).

⁴⁵ As of 2016, Alabama, Arizona, Arkansas, District of Columbia, Florida, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming had adopted some form of the UTC. As of 2018, Colorado and Illinois have introduced legislation regarding adopting some form of the UTC. NATL. CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Trust%20Code> (last visited Mar. 2, 2018).

⁴⁶ Compare UNIF. TRUST CODE § 408, with UNIF. PROBATE CODE § 2-907. Both statutes allow for a pet trust, authorize the appointment of a trustee if one is not stated, and require the trust to only be used for its intended use.

⁴⁷ Alaska, Arizona, Colorado, Hawaii, Idaho, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Dakota, Pennsylvania, South Carolina, South Dakota, and Utah have adopted the UPC in some form. NATL. CONFERENCE OF COMM’RS. ON UNIF. STATE LAWS, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Probate Code> (last visited Mar. 2, 2018).

⁴⁸ *Map of States with Companion Animal (Pet) Trust Laws*, ANIMAL LEGAL & HISTORICAL CENTER, <https://www.animallaw.info/content/map-states-companion-animal-pet-trust-laws>, (last visited Mar. 4, 2018).

vivos and testamentary pet trusts with a trustee who would be responsible for administering the trust benefits to the designated animal.⁴⁹ Some of these statutes followed the recent legal trend disfavoring the Rule Against Perpetuities by allowing trusts to last for the duration of the animal's life, even if that lasted longer than twenty-one years after the testator's death (*i.e.* the end of the measuring life).⁵⁰

i. Connecticut

In 2009, Connecticut joined many other states by adopting a specific pet trust statute.⁵¹ This was particularly important to pet owners because Connecticut did not adopt the UPC or the UTC, and, therefore, did not have any legally binding mechanism for testators to leave bequests to their pets until the statute was enacted. Connecticut's pet trust statute, Conn. Gen. Stat. § 45a-489a, creates a blueprint for pet trusts that contemplates three human roles in their operation: the trustee, the caregiver, and the protector.⁵²

ii. Role of the Trustee

Under the Connecticut pet trust statute, the trustee is responsible for managing the trust. He owes a fiduciary duty to prudently⁵³ manage the trust's *corpus* for the benefit of the beneficiary animal.⁵⁴ Trustees are responsible for rendering an annual accounting statement for the trust.⁵⁵ A trustee may be removed by a petition from the protector⁵⁶ to the court, for mismanagement or embezzlement.⁵⁷

iii. Role of the Caregiver

The caregiver is the person the testator chooses to have actual physical custody of the pet animal named in the trust.⁵⁸ This role is formally filled by a testamentary devise of the pet itself (as property) to the devisee-caregiver. The caregiver's role is to essentially assume all of the functions the pet's owner previously held, for example, feeding and sheltering the animal as well as

⁴⁹ See, e.g., MASS. GEN. LAWS ch. 203E, § 408 (2012) (state pet trust law in Massachusetts); N.Y. EST. POWERS & TRUSTS LAW § 7-8.1 (McKinney 2010) (state pet trust law in New York); 20 PA. CONS. STAT. § 7738 (2006) (state pet trust law in Pennsylvania).

⁵⁰ See Beyer, *supra* note 14, at 661 n. 344. *But see* N.Y. EST. POWERS & TRUSTS LAW § 7-8.1 (applying the Rule Against Perpetuities to pet trusts).

⁵¹ CONN. GEN. STAT. § 45a-489a (2017).

⁵² *See id.*

⁵³ RESTATEMENT (THIRD) OF TRUSTS § 77 (AM. LAW INST. 2007).

⁵⁴ *Id.* at § 78.

⁵⁵ CONN. GEN. STAT. § 45a-489a(d).

⁵⁶ *See infra* Section 2.d.iv.

⁵⁷ CONN. GEN. STAT. § 45a-489a(f).

⁵⁸ See Beyer, *supra* note 14, at 666 (on the selection and duties of a pet trust caregiver).

providing veterinary care.⁵⁹

iv. Role of the Protector

The role of the “protector” is somewhat unique to the Connecticut pet trust statute.⁶⁰ The function of the protector is to be the legal representative of the pet’s interests, similar to a *guardian ad litem* for minor children.⁶¹ The protector is empowered to petition the court to remove a trustee for financial mismanagement of the trust.⁶² The protector’s most important function, though, is “to act on behalf of the animal or animals provided for in the trust instrument.”⁶³ This begs the question, if the protector is to act on behalf of the animal, what standard of duty or care does this mean the protector owes the pet?

3. The Connecticut Protector’s Dilemma

The Connecticut pet trust statute does not describe the duty of the protector to the animal any further than saying she shall “act on behalf” of the animal.⁶⁴ Some prudent settlors will include specific instructions on the care of their animals, but many will not, either forgetting to, or trusting the judgment of the caretakers they select. But what if they leave no instructions? What if they exercise poor judgment in selecting a caregiver? And what if some novel situation arises in which neither detailed instructions nor faith in the prudence of the caregiver would ensure that the animal is treated well? The protector is appointed to speak and act on behalf of the pet in all of these cases, but what, specifically, is her duty to the pet? If the pet were being *abused* by the caregiver, then under any interpretation of the statute this would trigger the protector’s duty to act. But what if the caregiver is feeding the animal food that has passed its expiration date? What if the caregiver refuses to give a beneficiary dog of a pet trust the opportunity for physical exercise by going on walks? What if the caregiver takes a pedigreed dressage or racehorse he has been given care of, and puts it to work as a beast of burden on a farm? In any of these cases, does the protector have a duty to intervene on behalf of the animal? Courts have been silent on what duty the protector owes her protected animal in Connecticut,⁶⁵ so

⁵⁹ *Id.*

⁶⁰ See also UNIF. PROBATE CODE § 2-907(c)(4) (providing for an “individual,” designated by the instrument or by the court to enforce “intended use of the principal or income”); UNIF. TRUST CODE § 408(b) (“A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court.”). Compare CONN. GEN. STAT. § 45a-489, with N.Y. EST. POWERS & TRUSTS LAW § 7-8.1 (making the appointment of a “protector” optional).

⁶¹ See CONN. GEN. STAT. § 45a-489a; see also Shidon Aflatooni, *The Statutory Pet Trust: Recommendations for A New Uniform Law Based on the Past Twenty-One Years*, 18 ANIMAL L. 1, 22 (2011).

⁶² CONN. GEN. STAT. §§ 45a-489a(e)-(f).

⁶³ CONN. GEN. STAT. § 45a-489(e).

⁶⁴ See *id.*

⁶⁵ Research revealed no case that has yet treated this issue. The only Connecticut court to examine it has been the Federal District Court for the District of Connecticut, although it was interpreting New York’s pet trust law. See *Mittasch v. Reviczky*, No. 3:12-cv-01200 (MPS), 2013 WL 2948344, at *6 (D. Conn.

this Note will propose three potential standards of care for protectors to be held to: (1) a minimum requisite needs standard, (2) a felicific calculus standard, and (3) an Aristotelian “best interests” standard. But taking the admonishment of Justice Cardozo:

[I]et us assume . . . that the principle . . . has been skillfully extracted and accurately stated. Only half or less than half of the work has yet been done. The problem remains to fix the bounds and the tendencies of development and growth, to set the directive force in motion along the right path at the parting of the ways.⁶⁶

The remainder of this Note will attempt to meet the challenges Justice Cardozo articulated, by examining each rule, fixing its bounds, and determining whether its “directive force” leads us to weal or to woe.

4. Minimum Requisite Needs

Perhaps the most obvious standard of care to hold a protector to is the simplest one: the one that requires the least of her.⁶⁷ A minimum requisite needs standard would guarantee that an animal’s protector make sure that her animal (whom we shall, in tribute, call Argos⁶⁸) receives the basic necessities of life.

Such a standard will necessarily impose no requirements *sua sponte*, and will be guided only by compliance with the rest of the corpus of the law. Connecticut, for example, has relatively stringent anti-animal cruelty laws.⁶⁹ Conn. Gen. Stat. § 53-247 criminalizes certain intentional, reckless, and negligent conduct towards animals as animal cruelty, which is punishable as a class D felony.⁷⁰ Examples of treatment that is obviously illegal include the torture, mutilation, cruel beating, and intentional and malicious injuring or killing of an animal.⁷¹ An animal may not be “carried in a cruel manner” and

June 14, 2013). *But see* Domenick N. Calabrese, *Pet Trusts*, REGION 22 PROBATE DISTRICT, <http://www.southbury-ct.org/content/353/4260.aspx> (last visited Mar. 28, 2018) (Connecticut Probate Judge Calabrese’s non-judicial writing, where he states that “someone needs to be appointed by the trust to look out for the pet’s interests in case the trustee breaches their duty under the trust”).

⁶⁶ BENJAMIN N. CARDOZO, *CARDOZO ON THE LAW*, 30 (Neill H. Alford, Jr. et al eds., 1982) (1921).

⁶⁷ *See* GAYLE B. WILHELM ET AL., *DRAFTING TRUSTS IN CONNECTICUT* § 5:38 (2d ed. 2017) (describing the “trust protector” as someone “who is not expected to play an active role in trust management but instead to serve as an overseer”).

⁶⁸ *See supra* note 11.

⁶⁹ *See* CONN. GEN. STAT. § 53-247 (2016); Karen Ali, *Pets and Courts: Attorneys See Rise in Animal Advocacy, Pet Custody Disputes*, CONN. LAW TRIBUNE (Oct. 14, 2016) (“While pets are still regarded as property in Connecticut, the courts are increasingly recognizing the rights of pets. . . . [A]nimals who have been the victim of animal cruelty now have their own court-appointed advocates thanks to a new state law . . .”). *But see* Neil Vigdor, *Humane Society Chief: Connecticut Animal Cruelty Laws Lax*, CONN. POST (Aug. 13, 2010) (Connecticut Humane Society Executive Director Gordon Willard “pushing the state to mete out stiffer penalties for animal cruelty”).

⁷⁰ *See generally* CONN. GEN. STAT. § 53-247.

⁷¹ *See generally id.*

may not be “harrass[ed] or worr[ied] . . . for the purpose of making it perform for amusement”⁷² Animals may not be used as “a prize or award in the operation of any game or device”⁷³ A dog’s ears may not be cropped (except by a veterinarian),⁷⁴ and a horse’s tail may not be docked.⁷⁵ Horses may not be transported in an “unnecessarily cruel or inhumane manner.”⁷⁶ “Living chickens, ducklings, other fowl or rabbits” may not be dyed or “otherwise treated so as to import to them an artificial color.”⁷⁷ Animal fights are illegal to conduct, spectate at, and bet on in Connecticut.⁷⁸

Connecticut law protects the basic quality of life of domesticated animals.⁷⁹ Beasts of burden may not be “overdriv[en] . . . overloaded [or] overwork[ed]”⁸⁰ Animals may not be subjected to noxious fumes.⁸¹ Animals that are not allowed by their owners to roam freely must be supplied with “wholesome air, food and water . . . [and] protection from the weather”⁸² The court has held that this broad provision requires that domestic animals be kept safe from extreme temperatures,⁸³ in sanitary conditions,⁸⁴ in sufficient space,⁸⁵ and given proper veterinary care.⁸⁶ Certain special classes of animals are afforded additional protections.⁸⁷

A minimum requisite needs standard of care would therefore require a protector to ensure that the animal under their care is not subjected to cruel bodily harm, that it has access to a comfortable, clean living space, and that it is provided with adequate food, water, veterinary care, and protection from the elements.

There are things, however, that a protector would *not* be required to protect Argos from, some of which may offend the consciences of humane persons. The protector would not be obligated, under a minimum requisite needs

⁷² *Id.*

⁷³ CONN. GEN. STAT. § 53-250 (2012).

⁷⁴ CONN. GEN. STAT. § 22-366 (2012).

⁷⁵ CONN. GEN. STAT. § 53-251 (2016).

⁷⁶ CONN. GEN. STAT. § 22-415 (2007).

⁷⁷ CONN. GEN. STAT. § 53-249a (2010).

⁷⁸ CONN. GEN. STAT. § 53-247(c).

⁷⁹ *See id.*

⁸⁰ *Id.*

⁸¹ *See id.*

⁸² *Id.*

⁸³ *See State v. Acker*, 125 A.3d 1057, 1064 (Conn. App. Ct. 2015).

⁸⁴ *See Town of Waterford v. Two Dogs*, No. KNLCV166027068S, 2016 WL 4543187, at *3 (Conn. Super. Ct. Aug. 5, 2016).

⁸⁵ *See State ex rel. Grogan v. Koczur*, 947 A.2d 282, 290-91 (Conn. 2008) (holding that keeping forty-six cats in a 950 square foot apartment violated Conn. Gen. Stat. § 53-247).

⁸⁶ *See State ex rel. Connors v. Two Horses*, No. HHDCV146052426S, 2014 WL 7495084, at *3 (Conn. Super. Ct. Nov. 24, 2014).

⁸⁷ *See* CONN. GEN. STAT. § 53-247(d)-(e) (dogs in the service of peace officers or on volunteer search and rescue teams receive additional protections).

standard, to prevent her animal from being worked or forced to labor. She would not be obligated to ensure the animal received a varied or palatable diet, so long as the food provided sustenance.⁸⁸ She would not be obligated to ensure that the animal received any amount of exercise or physical activity. She would not be obligated to protect the animal from being used as the subject of medical experiments. She would not be obligated to protect against some of the more barbaric but “commonly accepted animal husbandry practices,” including sometimes gruesome procedures such as “dehorning, castrating, and branding.”⁸⁹ Perhaps most significantly, the protector would not be obligated to protect the animal’s life, under certain circumstances.

Connecticut law prevents animals from being “cruelly” killed, but nothing in the statute requires the protector to ensure that her animal is not killed by its caregiver negligently, recklessly, or intentionally as an uncrue act (*i.e.* euthanasia).⁹⁰ While the term “euthanasia” carries with it connotations of love and mercy, it seems as if there is no legal bar in Connecticut against an animal’s owner shooting it in the head simply because he is bored with it.⁹¹ In fact, Conn. Gen. Stat. § 53-247(b) specifically directs readers to “approved methods of slaughter,” which include “gunshot” or *any other animalicidal technique* approved by the Commissioner of Consumer Protection or by the Secretary of Agriculture, so long as the animal is “restrained by an approved method” during its administration.⁹²

Because of its manifest shortcomings, a minimum requisite needs standard should not be applied to pet trust protectors. Firstly, it would render protectors redundant and otiose. A minimum requisite needs standard defines the outermost actionable bounds of a protector’s duty along the lines of the corpus of animal cruelty laws. In Connecticut, this outer boundary is defined by Connecticut General Statutes §§ 22-366, 22-415, 53-247, 53-248, 53-249a, 53-250, and 53-251. These statutes are all a part of the general criminal law in Connecticut. The police are already empowered to enforce these laws and ensure that animal trust beneficiaries are not treated in ways that violate them. Furthermore, municipal animal control officers are empowered to “take physical custody of any animal when such animal control officer has reasonable cause to believe that such animal is in imminent harm and is neglected or is cruelly treated in violation of [Connecticut animal cruelty laws],” providing another layer of protection for trust beneficiary animals.⁹³ Though the protector’s duty to the animal would arise from the trust and not the criminal code, it would be

⁸⁸ *See id.*

⁸⁹ *See* Pamela D. Frasch et al., *State Animal Anti-Cruelty Statutes: An Overview*, 5 ANIMAL L. 69, 77 (1999) (citations omitted).

⁹⁰ *See* CONN. GEN. STAT. § 53-247(b).

⁹¹ *See id.*

⁹² *See* CONN. GEN. STAT. § 22-272a.

⁹³ CONN. GEN. STAT. § 22-329a (2014).

coextensive and coterminous with the state's duty. To the enforcement of Connecticut's statutory protections of animals by police and municipal animal control officers, the trust protector would add nothing.

Secondly, applying a minimum requisite needs standard may give tacit sanction to cruel behaviors towards animals, on whose behalf a protector is supposed to be acting. Connecticut's animal cruelty laws are under inclusive of practices commonly considered animal cruelty.⁹⁴ As alluded to above, the protector would have no specific duty to act if Argos's caretaker were to fit him with a tight collar that chafed or cut his neck, chain him in place with insufficient slack to move freely or comfortably about, give him no opportunity for exercise, allow him to become infested with fleas or lice, offer him no affection or companionship, and finally, despite the lack of any terminal illness or suffering or demonstrable need, wantonly and capriciously kill him. All of these are considered forms of animal cruelty.⁹⁵ Animal welfare would not be well served by this standard of care.

Thirdly, the testator's intent in making the bequest to the animal must be considered. It is a well-established principle of the law of wills that "[t]he controlling consideration in determining the meaning of a donative document is the donor's intention. The donor's intention is given effect to the maximum extent allowed by law."⁹⁶ A testator's bequest in trust to his pet animal unambiguously manifests his intent that the animal live *well above* the line of demarcating animal cruelty, not crossing, or even straddling it. Argos could languish and suffer at a cruel hand without a trust; it is fair to presume that the existence of the pet trust was to prevent this from occurring and to ensure that there would be better treatment of the pet animal than would occur without such trust.⁹⁷ The very existence of such an instrument is proof that the testator intended something better meeting the animal's welfare. For all of the foregoing reasons, this Note does not recommend adopting a minimum requisite needs standard.

5. Felicific Calculus

So, if we are to hold protectors to a higher standard than minimum requisite needs, in order to determine what standard of care is proper, we might inquire as to what is best for the animal. What sort of life would Argos like to have had he possessed the physiological equipment and mental capacity to tell us

⁹⁴ See *Report Animal Cruelty*, AM. SOC'Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, <http://www.aspc.org/take-action/report-animal-cruelty> (last visited Mar. 27, 2018).

⁹⁵ See *id.*

⁹⁶ RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (AM. LAW INST. 2003).

⁹⁷ See *Hartford-Connecticut Trust Co. v. Eaton*, 36 F.2d 710, 710 (2d Cir. 1929) (A trust's assets should be used as "may be necessary to suitably maintain [the beneficiary] in as much comfort as she now enjoys.") (citation omitted).

himself?

Hedonic utilitarianism offers one school of thought on the matter of what is the best life. While the philosophy of hedonism is at least as old as Plato's articulation of it,⁹⁸ its modern originator was eighteenth century English philosopher Jeremy Bentham.⁹⁹ It may be particularly appropriate to try to originate a standard of care for animals from Bentham, a man ahead of his time in his advocacy of animal rights.¹⁰⁰ He wrote, in 1780:

[t]he day *may* come, when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny. The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the caprice of a tormentor. It may come one day to be recognized, that the number of legs, the villosity of the skin, or the termination of the *os sacrum*, are reasons equally insufficient for abandoning a sensitive being to the same fate. What else is it that should trace the insuperable line? Is it the faculty of reason, or, perhaps the faculty of discourse? But a full-grown horse or dog is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day, or a week, or even a month, old. But suppose the case were otherwise, what would it avail? the question is not, Can they *reason*? nor, Can they *talk*? but, Can they *suffer*?¹⁰¹

This passage, surely touching to animal lovers, alludes to the core of Bentham's belief about what the best life consists of. The criterion Bentham selects by which to ennoble the condition of animals is not their capacity for "reason," or for "talk," but for "*suffering*." *Suffering* and its opposite, *pleasure*, are the keys to Bentham's view of what the best life for an animal would be.

Bentham's beliefs about happiness and the ultimate good can most easily be derived from his famously lapidary formulation in *A Fragment on Government*: "*it is the greatest happiness of the greatest number that is the measure of right and wrong . . .*"¹⁰² This moral principle is the cornerstone of

⁹⁸ See PLATO, PROTGORAS, in PLATO: COMPLETE WORKS 351b-358d (Stanley Lombardo & Karen Bell trans., John M. Cooper & D.S. Hutchinson eds., 1997) (c. 380 B.C.) (considering the view that pleasure is the greatest aim in life).

⁹⁹ *Jeremy Bentham*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/bentham/> (last visited Jan. 27, 2018) (Bentham "is the philosopher whose name is most closely associated with the foundational era of the modern utilitarian tradition.").

¹⁰⁰ See PETER SINGER, PRACTICAL ETHICS 56 (2d ed. 1999).

¹⁰¹ JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 310 n.1 (1907) [hereinafter BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION] (citation omitted) (emphasis in original).

¹⁰² JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT 93 (1891) (emphasis in original).

utilitarian philosophy.¹⁰³ Bethamite hedonic utilitarians begin with the principle that “[n]ature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do, as well as to determine what we shall do.”¹⁰⁴ Consequently, for a hedonic utilitarian, “[b]y the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question”¹⁰⁵ This principle gives rise to “felicific calculus,” the means by which the pleasures and pains of any action can be computed, in terms of the hypothetical units of *Hedons* of pleasure and *Dolors* of pain,¹⁰⁶ with regard to its subject.¹⁰⁷ Bentham lays out specific axes along which felicific calculus is to be computed. The pleasure of the act under consideration must be evaluated by:

- “1. Its *intensity*.
2. Its *duration*.
3. Its *certainty* or *uncertainty*.
4. Its *propinquity* or *remoteness*.
5. Its *fecundity*.
6. Its *purity*. And one other; to wit:
7. Its *extent*; that is, the number of persons to whom it *extends*; or (in other words) who are affected by it.”¹⁰⁸

A particularly intense pleasure of a long duration would then be superior to a less intense pleasure that lasted for a shorter time.¹⁰⁹ The same would hold true for a pleasure that is very certain and very propinquitous, over one that is uncertain and remote.¹¹⁰ The object, in any case, for a being to achieve its greatest happiness is to maximize its accumulation of *Hedons* and minimize its accumulation of *Dolors*.

What would the felicific calculus look like as a standard of care imposed upon an animal’s protector? The protector is enjoined “to act on behalf of the animal or animals provided for in the trust instrument.”¹¹¹ It is reasonable to assume that the animal desires its own happiness (or as close a thing to “happiness” that an animal can conceive). Happiness, per Bentham, is computed solely in the currency of *Hedons* and *Dolors*. The protector’s job would be to

¹⁰³ *The History of Utilitarianism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <https://plato.stanford.edu/entries/utilitarianism-history/> (last visited Mar. 5, 2018).

¹⁰⁴ BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION, *supra* note 101, at 1 (emphasis in original).

¹⁰⁵ *Id.* at 2.

¹⁰⁶ MICHAEL DAVID LEVENSTEIN, THE END OF KNOWLEDGE: A DISCOURSE ON THE UNIFICATION OF PHILOSOPHY 91 (2013) (“every life has the capacity for experiencing a finite quantity and intensity of *hedons*, or pleasurable moments (*dolors* being the converse term for displeasurable moments)”).

¹⁰⁷ See BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION, *supra* note 101, at 31-32.

¹⁰⁸ *Id.* at 30 (emphasis in original).

¹⁰⁹ *See id.*

¹¹⁰ *See id.*

¹¹¹ CONN. GEN. STAT. § 45a-489a(a).

expend trust income to ensure *Hedon* maximization and *Dolor* minimization. Every decision on Argos's behalf would come down to the calculus of his pleasures and pains.

To start, protectors would need to ensure that all of the basic necessities of life, described above as components of a minimum requisite needs standard, are available to the animal. These include food, water, fresh air, and shelter from the elements. What is omitted from this list that appears in the minimum requisite needs catalogue of exigencies is veterinary care. To be sure, if Argos is sick, he will be accruing *Dolors*, and a trip to the veterinarian to cure the ailment will increase his net *Hedons*. However, not all trips to the veterinarian can be said to achieve a net *Hedon* increase for the animal. Many animals find trips to the veterinarian frightening, uncomfortable, and at times, painful. Their *Dolors* commensurately increase with these visits.

Perhaps the most obvious example of a veterinary visit whose felicific calculus would be "in the red" would be one during which a dog or cat is neutered or spayed. In females, "[t]he reproductive tract, both ovaries, and the uterus are completely removed through [an] incision."¹¹² In males, "[b]oth testicles are removed through [an] incision."¹¹³ While the thought of this might make us cringe, according to Dr. Elizabeth Lynch, every effort is made to keep the animal from feeling any pain during and after the surgery: "[a]ll animals are given pain medication before surgery starts and then as needed after surgery."¹¹⁴ While Dr. Lynch is clear on the point that veterinarians "have the most modern pain management methods" at their disposal, she still admits that "surgery is not pain-free."¹¹⁵ The protector must therefore add to Argos's *Dolor* count to reflect the measure of pain that will ineluctably accompany the surgery itself.

The surgery also entails a risk of *Dolor*-laden complications. "Healthy young animals," Dr. Lynch states, "are less likely to have any serious complications" from the surgery, but older animals "are more likely to have complications."¹¹⁶ "Complications" can include "adverse reactions to anesthesia, hemorrhage, inflammation, etc."¹¹⁷ At one typical veterinary hospital, the complication rate for female dog spaying was 17.7%,¹¹⁸ at another, it was 23%.¹¹⁹ Any complications from surgery would increase the animal's *Dolor*

¹¹² Dr. Elizabeth Lynch, *Ask a Vet: All You Need to Know About Spay/Neuter Surgery*, MASS. SOC'Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, https://www.mspca.org/pet_resources/ask-a-vet-all-you-need-to-know-about-spayneuter-surgery/ (last visited Jan. 27, 2018).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Laura J. Sanborn, M.S., *Long-Term Health Risks and Benefits Associated with Spay/Neuter in Dogs* 1, 3 (2007), www.naiaonline.org/pdfs/LongTermHealthEffectsOfSpayNeuterInDogs.pdf.

¹¹⁸ *Id.* (citation omitted).

¹¹⁹ *Id.* (citation omitted).

count by a moderate to high amount, depending on the nature of its complication.

There are also long-term complications that can arise from spaying and neutering. The complications to neutering male dogs specifically can include “significantly increase[ing] the risk of osteosarcoma . . . increas[ing] the risk of cardiac hemangiosarcoma by a factor of 1.6 . . . tripl[ing] the risk of hypothyroidism . . . tripl[ing] the risk of obesity . . . quadrupl[ing] the . . . risk . . . of prostate cancer . . . [and] . . . doubl[ing] the . . . risk . . . of urinary tract cancer.”¹²⁰ While the *Dolor* value of these ailments should be discounted, per Bentham’s formula, because of their “uncertainty” and their “remoteness,” for affected animals, these reductions would also be coupled by the “intensity” and “duration” of the suffering that would likely result from one of these serious long-term medical complications, such as any of the types of cancer mentioned.¹²¹ Any sort of long-term cancer would register an extremely high *Dolor* count.

After tabulating the *Dolor*-intensive procedures of neutering and spaying, a protector must look to the other side of the felicific ledger. What *Hedons* can a dog or cat *gain* by being neutered or spayed? There are none.¹²² No dog or cat’s life was made one iota more pleasurable for having been neutered or spayed. The only conclusion that a protector applying a felicific calculus standard of care could draw is that it is her duty to speak “on behalf of the animal,”¹²³ strongly against any such procedure, so fraught with the potential for suffering, and with no potential pleasures (no benefits at all, under any analysis) flowing to the animal. Obviously, the good from neutering and spaying flows to both (human) society generally, and perhaps to any hypothetical unborn, unwanted puppies or kittens who may endure lives of misery and hardship for lack of a loving master. However, the protector’s duty is not to society-at-large, nor is it to hypothetical animals, it is “to act on behalf of the animal or animals provided for in the trust instrument”¹²⁴ to increase *the animal’s* pleasure and limit *the animal’s* suffering. According to this standard, a protector would have to oppose funding any spaying or neutering of her animal on the grounds that the felicific calculus militates against it.¹²⁵

¹²⁰ *Id.* at 2.

¹²¹ See BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION, *supra* note 101, at 30.

¹²² An argument can be made, perhaps, that there is some pleasure to be derived from not feeling the urge to mate, but when weighed against the *Dolor*-laden negative side of the felicific ledger, they are *de minimis*.

¹²³ CONN. GEN. STAT. § 45a-489a.

¹²⁴ *Id.*

¹²⁵ A far-sighted reader may object: does not spaying also *prevent* the *Dolor*-ous process of pregnancy, affecting the net-*Hedon* balance positively? Firstly, this concern would only apply to female animals. For those females it is true that giving birth would tend to affect, in Bentham’s terms, the *purity* of the pleasure, since it would be co-mingled with some amount of pain resulting from the labor and delivery of the animal’s young. It is likely, however, that the felicific calculus would still come out in favor of

Let us now examine some of the other areas on an animal's life that would be affected by the application of the felicific calculus. Take food, for instance. A minimum requisite needs standard, as we have said, would require that the dog be given sufficient food and water. Does the felicific calculus require more than this from the protector? Almost certainly. Food is a great source of pleasure for many animals. If Argos gets *X Hedons* of pleasure from eating two cups of dog food a day, he would probably get *X-plus-some-additional-amount of Hedons* from three cups of dog food. The felicific calculus would require that the protector act on the hungry dog's behalf, to increase his pleasure. Further, many dogs would probably prefer, say, bacon, to dog food. The increase in *Hedons* achieved by upgrading the dog's diet from dog food to bacon might also compel the protector to act for the sake of the animal's pleasure. In fact, there is not a clear limiting principle to this line of reasoning. How much bacon should the dog be given? Enough so that it would cause sufficient *Dolors* to counterbalance the *Hedons* or the gastrointestinal distress that would likely result from consuming the meal? Presumably, this is precisely the balancing test the felicific calculus commands the protector to apply.

Or examine, for another instance, sex. As discussed above, a dog or cat would certainly be on the *Dolorous* end of the felicific calculation that underlies spaying and neutering, but we did not discuss the loss of *Hedons* that would result from the inability to achieve pleasure through sexual intercourse. This amounts to yet another hedonic argument *against* spaying and neutering, but is also an affirmative argument *for* allowing animals to engage in sexual activity. Obviously, there are ethical considerations to be taken into account in the totality of the circumstances (primarily the whelping progeny, which would need caregivers), but the protector owes only a vague, precatory duty to these considerations, while owing a compulsory legal duty to the beneficiary animal and its pleasure.

A final consideration that a felicific calculus standard might implicate in an animal's life is the use of any sort of discipline or punishment. It is typical, and generally considered acceptable, to firmly (but not abusively) discipline dogs when they, for example, defecate indoors, or scatter the contents of a garbage pail all over the kitchen floor. Modern, humane punishments for dogs may include taking away treats, taking away a favorite toy, a verbal scolding expressing anger, performing a "mimic bite" with one's hand, or performing an "alpha roll."¹²⁶ Obviously the protector's duty to Argos will be triggered if an

sexuality over sterilization. The *Dolors* associated with birth would be discounted by its *remoteness*, while the *Hedons* derived from intercourse would be increased by its *propinquity*. Furthermore, in his hierarchy of pleasures, Bentham gives "pleasures of senses" (i.e. intercourse) the highest possible rank, while in his corresponding hierarchy of pains, "pains of the senses" (i.e. labor) are ranked a full order of magnitude lower. BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION, *supra* note 101, at 33. This suggests that Bentham would have viewed the sex/labor tradeoff as a worthwhile felicific bargain for female animals, and, therefore, reject the practice of spaying.

¹²⁶ See Clarissa Fallis, *Using Negative Punishment to Correct Your Dog*, PETFUL (May 13, 2013),

inhumane form of discipline is employed (striking the dog, for example), under any standard of care. But under a hedonic utilitarian standard, the protector would be compelled to prevent even humane punishments, if they upset the animal's *Hedon/Dolor* balance in a negative way. This would effectively make disciplining a dog beneficiary of a pet trust impossible, if the protector is observing a felicific standard of care.

What, then, is the end-result of an animal's protector applying a felicific calculus standard of care to her animal? The animal would be unspayed or unneutered (as appropriate), if this decision fell to the protector. It would be provided with as much of any sort of food as it wished, with its own gastric distress being the only (temporary) legitimate limiting agent. The *Chicago Tribune* reported a case of a dog that loved to drink beer.¹²⁷ Again, the hangover resulting from the alcohol toxicity would be the only limiting principle to the dog's desire to imbibe. The animal would most likely become obese and anemic from making its pleasure the sole master of its diet. The animal would be permitted to engage in sexual activity with others on an unlimited basis, leading to litter after litter of puppies or kittens who would lack caring homes and loving masters. The felicific calculus demands that the (unneutered/unspayed) animal's sexual desires allow a generation of its unwanted issue to fill the streets, begging for scraps, spreading disease, and refulgent with immiseration. In short, animals protected by the felicific calculus would be ungovernable. Discipline would be forbidden as *Dolorous*, thereby making the caregiver's task an impossible one. "Felicific calculus" ends up a paradiastole for a self-will run riot; the animal protected by the pleasure principle would become the master of the man. Argos would become Lear's dog, barking at a beggar that displeased him: "there thou / mightst behold the great image of authority: a dog's obeyed / in office."¹²⁸ Under the felicific calculus, every dog would become Lear's dog: not obeying, but obeyed by men. For all of the foregoing reasons, this Note does not recommend adopting a felicific calculus standard.

6. Aristotelian "Best Interests"

Another potential standard of care for protectors would be a sort of "best interests" standard. The particular type of "best interests" standard this Note imagines has its roots in Aristotelian notions of function (*ergon*) and excellence (*arête*).¹²⁹

<http://www.petful.com/behaviors/negative-punishment-to-correct-dog/>; Sharon Maguire, *Punishment vs. Correction in Dogs*, THE DOG BREED INFO CENTER, <http://www.dogbreedinfo.com/articles/punishmentvs correction.htm> (last visited Jan. 27, 2018) (explaining ways to correct a dog's behavior, including an alpha roll where "you make a dog lay on [his] side").

¹²⁷ Steve Dale, *Don't Go Overboard Sharing Beers with Your Dog*, CHICAGO TRIBUNE (May 24, 2012), http://articles.chicagotribune.com/2012-05-24/classified/sns-201205221830--tms--petwrlldctnya-a20120524-20120524_1_pet-stores-small-dog-brewski.

¹²⁸ WILLIAM SHAKESPEARE, KING LEAR, act 4, sc. 6.

¹²⁹ See Alfonso Gomez-Lobo, *The Ergon Inference*, 34 PHRONESIS 170, 172 (1989) ("The good of any

According to Aristotle, the ultimate good, the *summum bonum*, of men is happiness.¹³⁰ Happiness is “living well and faring well”¹³¹ Aristotle recognizes that this definition is perhaps *ignotum per ignotius*, and too vaporous to do any heavy intellectual lifting:

[p]resumably, however, to say that happiness is the chief good seems a platitude, and a clearer account of what it is still desired. This might perhaps be given, if we could first ascertain the function of man. For just as for a flute-player, a sculptor, or any artist, and, in general, *for all things that have a function or activity, the good and the ‘well’ is thought to reside in the function*, so would it seem to be for man, if he has a function.¹³²

Aristotle argues that the function (*ergon*) in which “the good and the ‘well’” reside in men is the “rational principle” because that is what is unique and highest in human souls.¹³³ Achieving excellence (*arête*) in this characteristic function (*ergon*) leads to flourishing (*eudaimonia*).¹³⁴

a. Aristotelian Characteristic Functions (*erga*) of Animals

What does Aristotle suggest about what the best life of an animal might consist of?¹³⁵ What is the “function or activity” (*ergon*) of a dog, or cat, in which the “good and ‘well’” reside? According to Aristotle, “[a]n animal is a body with soul in it.”¹³⁶ By virtue of an animal’s body, it is capable of the function of

being (or perhaps any natural or living substance) consists in its exercising its characteristic activity or *ergon*.” (citation omitted); A. W. H. Adkins, *The Connection Between Aristotle’s Ethics and Politics*, 12 POLITICAL THEORY 29, 31 (1984) (“any action is well performed when it is performed in accordance with the appropriate excellence [*arête*]”); *see also* H.G. LIDDELL & R. SCOTT, A GREEK-ENGLISH LEXICON “ἄρετή” and “ἔργον” (9th ed. 1940).

¹³⁰ 2 ARISTOTLE, NICHOMACHEAN ETHICS, in THE COMPLETE WORKS OF ARISTOTLE bk. I, at § 4 (W.D. Ross trans., Jonathan Barnes ed., 1991) (c. 350 B.C.) [hereinafter ARISTOTLE, NICHOMACHEAN ETHICS].

¹³¹ *Id.*

¹³² *Id.* at bk. I § 7 (emphasis added).

¹³³ *Id.*

¹³⁴ *Id.* *See Aristotle’s Ethics*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Apr. 21, 2014), <http://plato.stanford.edu/entries/aristotle-ethics/> (equating “*eudaimonia*” with “happiness” and “flourishing”); CHRISTINE M. KORSGAARD, THE CONSTITUTION OF AGENCY: ESSAYS ON PRACTICAL REASON AND MORAL PSYCHOLOGY 129 (2008) (“everyone calls this good *eudaimonia* (happiness, flourishing, well-being)”; *see also* LIDDELL & SCOTT, *supra* note 129, “εὐδαιμονία.”

¹³⁵ Animals are not capable of the specific type of flourishing Aristotle calls *eudaimonia*. This quality (or “activity,” as Aristotle would term it) is limited to rational beings. ARISTOTLE, NICHOMACHEAN ETHICS, *supra* note 130, at bk. I § 9 (“It is natural, then, that we call neither ox nor horse nor any other of the animals happy [*eudaimon*]; for none of them is capable of sharing in such [rational] activity.”); *see also* Richard Kraut, *Two Conceptions of Happiness*, 88 THE PHILOSOPHICAL REV. 167, 169 n.7 (1979) (“*Eudaimonia*, on the other hand, is attributed only to human and divine persons. (Notice how odd it would be to say that an animal or plant is leading a happy life. Though dogs and cats can be happy, they still do not lead happy lives”). Animals are capable of non-*eudaimon* “flourishing,” however, so that is the locution we will use. *See id.* Animals are capable of non-*eudaimon* “flourishing,” however, so that is the locution we will use. *See id.* (“[w]hen ‘flourishing’ is used in common speech, it is most often attached to nonhuman subjects”).

¹³⁶ 1 ARISTOTLE, ON THE SOUL, in THE COMPLETE WORKS OF ARISTOTLE bk. III § 12 (J. A. Smith trans.,

“nutrition and growth.”¹³⁷ However, plants also possess the function of “nutrition and growth,” and a thing’s “excellence” should “be in conformity with [its] best and most complete” function, not one that it shares with a lower order of creature.¹³⁸

Next, after the function of nutrition and growth, “there would be a life of *perception* . . . common . . . to the horse, the ox, and every animal.”¹³⁹ Perception is one of the functions that elevates animals to a better position than plants in the hierarchy of Aristotle’s natural order, therefore it may be where the “good and the ‘well’” for them is located.

Aristotle also observes that “it is the possession of *sensation* that leads us for the first time to speak of living things as *animals*,” rather than plants.¹⁴⁰ So in addition to perception, sensation is also one of the “best and most complete” functions of animals that allow them to flourish, or develop “excellence.”¹⁴¹ In *On the Soul*, Aristotle writes, “[t]he soul of animals is characterized by . . . the faculty of discrimination which is the work of thought and *sense*”¹⁴² Aristotle later identifies this capacity as a kind of “imagination.”¹⁴³ He summarizes, “[*s*]ensitive *imagination*, as we have said, is found in all animals.”¹⁴⁴ “[S]ensitive imagination produces the mental images that accompany” sensory inputs.¹⁴⁵ Input from the “specific sensibles” (*e.g.* sight, taste, hearing, touch, etc.) are integrated by the mental “common sensibles” (*e.g.* figure, magnitude, number, unity, etc.) to produce imagination.¹⁴⁶

Aristotle also argues that an important function for animals is “the faculty of originating local movement.”¹⁴⁷ Aristotle attempts to locate locomotion in reference to the other faculties of animals:

if it were the nutritive faculty, even plants would have been capable of originating such movement and would have possessed the organs necessary to carry it out. Similarly it cannot be the sensitive faculty either; for there are many

Jonathan Barnes ed., 1991) (c. 350 B.C.) [hereinafter ARISTOTLE, ON THE SOUL].

¹³⁷ ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 130, at bk. I § 7.

¹³⁸ *Id.*

¹³⁹ *Id.* (emphasis added).

¹⁴⁰ ARISTOTLE, ON THE SOUL, *supra* note 136, at bk. II § 2 (emphasis added).

¹⁴¹ ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 130, at bk. I § 7.

¹⁴² ARISTOTLE, ON THE SOUL, *supra* note 136, at bk. III § 9 (emphasis added).

¹⁴³ *Id.* at bk. III § 11.

¹⁴⁴ *Id.* (emphasis added).

¹⁴⁵ Daniel E. Lee, *The Dynamic Role of Imagination: Interaction of the Sensitive and Rational Faculties*, <https://www.dupagetherapy.com/aristotle--on-the-dynamic-role-of-imagination.html> (last visited Jan. 26, 2018).

¹⁴⁶ *Id.*

¹⁴⁷ ARISTOTLE, ON THE SOUL, *supra* note 136, at bk. III § 9.

animals which have sensibility but remain fast and immovable throughout their lives.¹⁴⁸

He concludes that “such a power in the soul as has been . . . called *appetite*, originates movement”¹⁴⁹ So from this, we can conclude that according to Aristotle’s metaphysics, animals possess a part of their soul that is “appetitive,” (which is different from the perceiving and the imagining parts) and it is from this portion of the soul that the power of locomotion derives.

Finally, Aristotle identifies reproduction as one of the highest and best functions of which animals are capable.¹⁵⁰ He writes, “the most natural act is the production of another like itself, an animal producing an animal . . . in order that, as far as its nature allows, it may partake in the eternal and divine.”¹⁵¹ Producing offspring is, therefore, not only one of the “best and the most complete” functions of animals, but it is a function that allows them to participate in what Plato called the eternal realm of Forms.¹⁵²

So by way of review, Aristotle believes that what is best for animals is to *flourish*. They exercise excellence (*arête*) in their best and most complete natural functions (*erga*) to achieve their “final cause” or “purpose” (*telos*)¹⁵³ of *flourishing*. Simply put, “it is both by *nature* and for an *end* that the swallow

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at bk. III § 10 (emphasis added).

¹⁵⁰ *See id.* at bk. II § 4.

¹⁵¹ *Id.*

¹⁵² *See* PLATO, PHAEDO, *in* PLATO: COMPLETE WORKS 73a-80a (G.M.A. Grube trans., John M. Cooper & D.S. Hutchinson eds., 1997) (c. 380 B.C.) [hereinafter PLATO, PHAEDO]; PLATO, PHAEDRUS, *in* PLATO: COMPLETE WORKS 248a-266b (Alexander Nehemas & Paul Woodruff trans., John M. Cooper & D.S. Hutchinson eds., 1997) (c. 370 B.C.); PLATO, REPUBLIC, *in* PLATO: COMPLETE WORKS 508a-520a (G.M.A. Grube trans., & D.S. Hutchinson eds., 1997) (c. 380 B.C.) [hereinafter PLATO, REPUBLIC] (on the Theory of the Forms and Plato’s realm of the Divine).

¹⁵³ *See Aristotle on Causality*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/aristotle-causality/#GloAriTer> (last visited Jan. 26, 2018) (“*telos*” meaning “goal” or “end”); 1 ARISTOTLE, THE COMPLETE WORKS OF ARISTOTLE, GENERATION OF ANIMALS, bk. V § 1 (A. Platt trans., Jonathan Barnes ed., 1991) (c. 350 B.C.) (“Everything then exists for a final cause [*telos*], and all those things which are included in the definition of each animal, or which either are for the sake of some end or are ends in themselves, come into being . . . through this cause”); *see also* ARISTOTLE, NICHOMACHEAN ETHICS, *supra* note 130 and accompanying text; Wendy Lee-Lampshire, *Telos and the Unity of Psychology: Aristotle’s De Anima II 3-4*, 25 APEIRON: A J. FOR ANCIENT PHILOSOPHY AND SCIENCE 27, 32 (1992) (“the *telos* of a living thing is characterized in part by its ability to exercise its power(s) . . . toward the realization of the sort of living thing that it is destined to be . . . that is, its final cause”). *But see Aristotle on Causality*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (MAR. 11, 2015), <https://plato.stanford.edu/entries/aristotle-causality/> (“Some have contended that Aristotle explains natural process on the basis of an inappropriately psychological teleological model; that is to say, a teleological model that involves a purposive agent who is somehow sensitive to the end.”); Stephen B. Hawkins, *Desire and Natural Classification: Aristotle and Peirce on Final Cause*, 43 TRANSACTIONS OF THE CHARLES S. PEIRCE SOC’Y 521, 522 (2007) (“[F]inal cause is a concept incompatible with our experience of freedom and novelty. Further, [contemporary philosophers] fear that the ultimate interpretation of final causality will be theological. Lastly, not even common sense seems to endorse final causality.”). *See generally* “τέλος,” LIDDELL & SCOTT, *supra* note 129.

makes its nest and the spider its web”¹⁵⁴ These functions include perception, sensitive imagination, appetite, movement, and reproduction.¹⁵⁵

b. Aristotelian *Flourishing* as “Best Interests”

From this framework of animal *flourishing*, we can derive a legal standard of care for a trust protector. “Best interests” is a commonly used standard in cases concerning child custody.¹⁵⁶ Its use in American courts dates at least as far back as 1834.¹⁵⁷ It is defined by *Black’s Law Dictionary* as making “decisions based on whatever best advances the child’s welfare.”¹⁵⁸ This general definition will not do, however, as the meaning of “best interests”—by the common understanding of the words that compose the phrase—is vague and nebulous. *Black’s Law Dictionary’s* putative clarification that “best interests” means whatever “advances the child’s welfare” does not provide much clearer guidance.

In Connecticut, the best-interests standard is defined by statute. In Title 46b of Connecticut General Statutes, the legislature established a number of factors a court should consider in interpreting what the imprecise imperative of a child’s best interests specifically consists of.¹⁵⁹ While many of these factors are not useful by ways of analogy to cases of pet care (*e.g.* “manipulation by or coercive behavior of the parents in an effort to involve the child in the parents’ dispute”),¹⁶⁰ the very first criterion the law establishes is the importance of the child’s “temperament and developmental needs”¹⁶¹ “Temperament” typically means “constitution or habit of mind, [especially] as depending upon or connected with physical constitution; natural disposition.”¹⁶² In other words, temperament or “natural disposition” corresponds with relative precision to Aristotle’s concept of “nature” and “natural functions.”¹⁶³ “Developmental” most commonly means “of or relating to biological development, [especially]

¹⁵⁴ 1 ARISTOTLE, PHYSICS, in THE COMPLETE WORKS OF ARISTOTLE II § 8 (R.P. Hardie & R.K. Gaye trans., Jonathan Barnes ed., 1991) (c. 350 B.C.) [hereinafter ARISTOTLE, PHYSICS] (emphasis added).

¹⁵⁵ See KORSGAARD, *supra* note 134, at 139-42 (“Animals are distinguished from plants in being alive in a further sense, given by a complex of powers related to the possibility of perception and action . . . [viz.] perception, sensation, locomotion, appetite, and imagination” while their “‘final cause’ or purpose is . . . reproduction.”).

¹⁵⁶ EDWARD J. WINTER & BRIAN R. HERSH, 22 AM. JUR. TRIALS § 347 (1975) (“[T]he contemporary determinative criterion in awarding custody is the best interest of the child.”); *see also* *Finlay v. Finlay*, 148 N.E. 624, 626 (N.Y. 1925) (Cardozo, J.) (affirming the “best interests” standard in a landmark child custody case).

¹⁵⁷ *See Commonwealth v. Briggs*, 33 Mass. 203, 205 (1834) (applying a best interests standard, although not by name).

¹⁵⁸ *Best-Interests-Of-The-Child Doctrine*, BLACK’S LAW DICTIONARY (10th ed. 2014).

¹⁵⁹ CONN. GEN. STAT. § 46b-56(c) (2014).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Temperament*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/198881?rskey=4g4PED&result=1#eid> (last visited Jan. 26, 2018).

¹⁶³ *See* ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 130, at bk. I § 7.

ontogenetic [relating to the development of the individual organism]¹⁶⁴ development;”¹⁶⁵ and a “need” is a “necessity, requirement.”¹⁶⁶ “Developmental needs” therefore mean necessities for biological (especially ontogenetic) development, and corresponds with great accuracy to Aristotle’s conception of developing “excellence” (*arête*) in accordance with one’s “best” and “most complete . . . function[s].”¹⁶⁷

Applying a best-interests standard, informed by the conclusions Aristotle reached, we can arrive at a potential standard of care to which animal protectors may be held. The protector would be required to act in the animal’s best interests, as defined by Aristotle as the *teloi* of demonstrating or achieving excellence in the natural functions of perception, sensitive imagination, appetite, movement, and reproduction.

i. Perceptive Function

Taking each of these in turn, a protector charged with the best interests of an animal would be responsible for ensuring that the Argos led a life of rich perception. This might include being exposed to a variety of different environments, locations, sights, and experiences. The protector might be responsible for making financial arrangements that enable the animal’s caregiver to take it on trips or vacations so it can experience beaches, mountains, and the other natural majesties of the state of Connecticut, or the larger country.

ii. Sensitive Imagination Function

Secondly, a protector would be charged with ensuring that Argos receives a life full of opportunities for sensitive imagination. This may be as simple as exposing the animal to basic sensory feelings, like taking a roll through the mud, or a swim in the ocean. Smells are important to many kinds of dogs, so they should get a chance to experience the smells of the crisp autumn air on top of Sleeping Giant State Park in Connecticut, and the mingled odors of the streets of downtown New Haven. Stimulation of this function may also be more complex, such as giving the animal a chance to develop the excellence of its sensitive imagination by playing with puzzle-type toys and games, or playing interactively with its caregivers and other animal lovers.

iii. Appetitive Function

Thirdly, a protector applying an Aristotelian best-interests standard

¹⁶⁴ *Ontogenetic*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/131542?redirectedFrom=ontogenetic#eid> (last visited Jan. 26, 2018).

¹⁶⁵ *Developmental*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/51435?redirectedFrom=developmental#eid> (last visited Jan. 26, 2018).

¹⁶⁶ *Need*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/125752?rskey=GAdqUa&result=1#eid> (last visited Jan. 26, 2018).

¹⁶⁷ See ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 130, at bk. I § 7.

would be responsible for ensuring that Argos's "appetitive" function is satisfied. Aristotle equates this function with "wish"¹⁶⁸ and "in general the *desiring* element."¹⁶⁹ In *On the Soul*, he explains:

appetite is the genus of which desire, passion, and wish are the species; now all animals have one sense at least, viz. touch, and whatever has a sense has the capacity for pleasure and pain and therefore has pleasant and painful objects present to it, and wherever these are present, there is desire, for desire is appetite of what is pleasant.¹⁷⁰

Aristotle describes the appetitive function in contradistinction to the "rational principle" unique to humans.¹⁷¹ Instead, the appetitive function is exemplified by "the life of enjoyment."¹⁷²

Two of the most fundamental objects of appetitive desire are food and sex. The best interests of an animal would require their satisfaction. Dogs, for example, should be fed enough to maintain a healthy body weight (in accordance with the *ergon* they share with plants: that of nutrition and growth).¹⁷³ But in order to satisfy the appetitive and desiring function, their diets should consist of an ample variety of different types, textures, and tastes of foods. Likewise, unneutered and unspayed animals should be permitted to engage in sexual congress with other animals, as their desire dictates.

A perspicacious reader will note that this line of reasoning veers dangerously close to the chasm of absurdity into which the felicific calculus standard fell, by making Argos' pleasures his only master. Aristotle, by indicating that animals have an appetitive function, does not subscribe (as did Bentham) to the view that the existence of this capacity for satisfaction and pleasure demands its own unmitigated fulfillment. From *Nicomachean Ethics*:

the name self-indulgence is applied also to childish faults
The transference of the name seems not a bad one; for that which desires what is base and which develops quickly ought to be kept in a chastened condition, and these characteristics belong above all to appetite and to the child, since children in fact live at the beck and call of appetite, and it is in them that the desire for what is pleasant is strongest. If, then, it is not

¹⁶⁸ ARISTOTLE, *ON THE SOUL*, *supra* note 136, at bk. III § 10.

¹⁶⁹ ARISTOTLE, *NICOMACHEAN ETHICS*, *supra* note 130, at bk. I § 13 (emphasis added).

¹⁷⁰ ARISTOTLE, *ON THE SOUL*, *supra* note 136, at bk. II § 3.

¹⁷¹ *See id.*, at bk. III § 10 (sometimes "reason and a desire are contrary"); *see also* ARISTOTLE, *NICOMACHEAN ETHICS*, *supra* note 130, at bk. I § 2 (distinguishing "rational principle" from "passions" desires of the appetitive part of the soul).

¹⁷² ARISTOTLE, *NICOMACHEAN ETHICS*, *supra* note 130, at bk. I § 5.

¹⁷³ *Id.* at bk. I § 7.

going to be obedient and subject to the ruling principle, it will go to great lengths; for in an irrational being the desire for pleasure is insatiable and tries every source of gratification, and the exercise of appetite increases its innate force, and if appetites are strong and violent they even expel the power of calculation. Hence they should be moderate and few, and should in no way oppose reason—and this is what we call an obedient and chastened state—and as the child should live according to the direction of his tutor, so the appetitive element should live according to reason. Hence the appetitive element in a temperate man should harmonize with reason; for the noble is the mark at which both aim, and the temperate man craves for the things he ought, as he ought, and when he ought; and this is what reason directs.¹⁷⁴

Argos, who we may analogize to the “children” in Aristotle’s example, may be motivated primarily by desires, but these desires must, like an unruly child, be rendered into a “chastened state” by the animal’s caregiver. The protector may contribute to this effort by using trust income to pay for obedience and behavior classes, which function to limit the appetites as well. The caregiver, the protector, and the animal’s instructors or coaches (Aristotle’s temperate men) will do this as the parent in Aristotle’s example chastens the child: by the application of “reason” to derive “moderation” as a limiting principle governing desire.

The concept of “the moderate” with regard to appetitive desires is important, because it cuts the Gordian Knot of pleasure-seeking’s perverse consequences, and is the limiting principle that saves the Aristotelian standard from the fate of Bentham’s felicific calculus. Aristotle writes:

we must notice that in everything continuous and divisible there is excess, deficiency and the mean, and these in relation to one another or in relation to us *In all cases the mean in relation to us is the best*; for this is as knowledge and reason direct us. And this everywhere also makes the best habit. This is clear both by induction and by reasoning. For opposites destroy one another, and extremes are opposite both to one another and to the mean; for the mean is to either extreme the other extreme, e.g. the equal is greater to the less, but less to the greater. Therefore . . . excellence must have to do with the mean and be a sort of mean.¹⁷⁵

¹⁷⁴ *Id.* at bk. III § 12.

¹⁷⁵ 2 ARISTOTLE, EUDEMIAN ETHICS, *in* THE COMPLETE WORKS OF ARISTOTLE bk. II § 3 (J. Solomon trans., Jonathan Barnes ed., 1991) (c. 350 B.C.) [hereinafter ARISTOTLE, EUDEMIAN ETHICS].

The idea, then, is that there is an *aurea mediocritas*, a virtuous middle, on any spectrum of behaviors. The example Aristotle proceeds to give is that on a spectrum, one end of which is *cowardice* and the other end of which is *foolhardiness*; *courage* exists in the virtuous middle.¹⁷⁶ The same analysis would apply to an animal's desires. To starve Argos is a wicked thing, but so too is allowing him to glut himself. A path of moderation of the appetitive function charts the safer course between the Scylla of malnourishment and the Charybdis of gluttony. Therefore, the Aristotelian standard succeeds in finding a limiting principle to an animal's appetitive desires where the felicific calculus would admit none.

Though some might object, the child in the example from *On the Soul* has a soul capable of developing reason, while a dog does not. However, the analogy does not crumble under this distinction, for so long as the child remains a child, driven by the appetites, he will need the "chastening" of the "temperate man." Likewise, so long as a dog remains a dog, governed in part by desire, it will require the chastening adult to correct it. The dog is just a child who does not grow up but remains a child forever, and is forever in need of temperate men to moderate its desires. A loving but firm permanent caregiver fulfills this role, and a protector, applying the Aristotelian best-interests standard, will facilitate the caregiver's demonstration of that love and firmness, because they are in the animal's best interests.¹⁷⁷

iv. Locomotive Function

Next, one of Argos's characteristic functions (*erga*) is locomotion. Animals should thus be given as free a range of movement as possible. Horses and cattle should be put to pasture in wide-open spaces. Fish should have the largest tanks practicable. Dogs should be given the opportunity to walk and run in large, open spaces, or should be taken to such places if one does not exist at the home estate of the caregiver. A protector would be obligated to expend trust funds on expenses such as these. Locomotion should be as unlimited and natural as possible, which would militate against the use of leashes except when required by law. Dogs should not be kept indoors for too long a time, and when they are restricted to the indoors, they should not be crated. The ability to locomote, to move about freely, is one of an animal's *erga*, the animal must be allowed to develop excellence (*arête*) in it under an Aristotelian best-interests standard.

¹⁷⁶ *Id.*

¹⁷⁷ Per the principle of the virtuous middle, a protector would be compelled to act on behalf of her animal both if the animal's appetitive function were being denied sufficient fulfillment, but also if the animal were being *overindulged* by a caregiver whose philosophy of animal welfare erred too close to the hedonic model. Aristotelian best interests neither demand that Argos self-abnegate nor voluptuate.

v. Reproductive Function

Finally, the last of Argos's general *erga* is reproduction. According to Aristotle, this is not only a characteristic function of animals, but also one through which they may participate in the divine.¹⁷⁸ Firstly, this would, like the felicific calculus standard, weigh against the spaying or neutering of pet animals. It would further require that the animal be given a chance to whelp young, to bring more of its kind into the world.

There is a present problem of pet animal overpopulation in the United States.¹⁷⁹ As such, this is one of Aristotle's characteristic functions (*erga*); the pursuit of which has the potential to generate perverse consequences. Under a different set of circumstances, it might be possible to simply elide this *ergon* and continue with our business, but Aristotle makes it very clear that this is no ordinary *ergon*. It is the only *ergon* that allows animals to "partake in the eternal and divine."¹⁸⁰

"The divine," if we take Aristotle to be a follower of his teacher Plato, is the realm of the Forms,¹⁸¹ a sort of heavenly plane of perfection, from which the

¹⁷⁸ ARISTOTLE, ON THE SOUL, *supra* note 136, at bk. II § 4; *see also* ARISTOTLE, PHYSICS, *supra* note 154, at bk. II § 4; 1 ARISTOTLE, ON THE HEAVENS, *in* THE COMPLETE WORKS OF ARISTOTLE bk. I § 9 (J. L. Stocks trans., Jonathan Barnes ed., 1991) (c. 350 B.C.) [hereinafter ARISTOTLE, ON THE HEAVENS] (on the nature of "the divine").

¹⁷⁹ *Companion Animal Overpopulation*, People for the Ethical Treatment of Animals (PETA), <http://www.peta.org/issues/companion-animal-issues/overpopulation/> (last visited Jan. 26, 2018) ("Every year in the U.S., more than 6 million lost, abandoned, or unwanted dogs and cats enter animal shelters.").

¹⁸⁰ ARISTOTLE, ON THE SOUL, *supra* note 136, at bk. II § 4.

¹⁸¹ It is controversial to what extent Aristotle believed in Plato's Theory of the Forms. *See* 2 ARISTOTLE, METAPHYSICS, *in* THE COMPLETE WORKS OF ARISTOTLE bk. VII § 11 (W.D. Ross trans., Jonathan Barnes ed., 1991) (c. 350 B.C.) (Aristotle appearing to subscribe to the Theory of the Forms, using the example of the Form of a circle to illustrate the general metaphysical principle: "[i]n the case of things which are found to occur in specifically different materials, as a circle may exist in bronze or stone or wood, it seems plain that these, the bronze or the stone, are no part of the essence [Form] of the circle, since it is found apart from them. Of things which are *not* seen to exist apart, there is no reason why the same may not be true, e.g. even if all circles that had ever been seen were of bronze (for none the less the bronze would be no part of the form)."); *id.* at bk. VII § 8 (affirming the intangible, metaphysical nature of the Forms: "the Forms need not . . . be self-subsistent substances"); ARISTOTLE, ON THE HEAVENS, *supra* note 178, at bk. I § 9 (asserting that "heaven" (perhaps "the divine") corresponds to the unchanging nature of Plato's Forms: "the heaven is one, . . . more than one heaven is impossible, and, further . . . exempt from decay and generation, the heaven is eternal"); *see also* SREEKUMAR NELICKAPPILLY, ASPECTS OF WESTERN PHILOSOPHY 46, http://nptel.ac.in/courses/1_09106051/ (last visited Jan. 26, 2018) ("Plato proposes an uncompromising idealism and monism, which posit essences or forms as the only realities and treated everything else as unreal and relegated the material world to the realm of mere appearances. Aristotle's theory retains some of his teacher's insights, as he too considers the forms as ultimate realities, but rejects the master's transcendentalism and makes the forms immanent to the objects of the material world."); Robert Heinaman, *Review: On Ideas: Aristotle's Criticism of Plato's Theory of Forms*, 92 THE J. OF PHIL. 658, 659 (1995) (reviewing GAIL FINE, ON IDEAS: ARISTOTLE'S CRITICISM OF PLATO'S THEORY OF FORMS) ("Thus, Aristotle's criticisms challenge Plato to clarify his views [on the Theory of Forms] but do not refute his position."); Majid Fakhry, *Al-Farabi and the Reconciliation of Plato and Aristotle*, 26 J. OF THE HIST. OF IDEAS 469, 476 (1965) ("With regard to the Forms or Ideas, Aristotle was relentless in his criticism of Plato, as is well-known. However, in his *Theology*, he reaffirms the existence of 'Spiritual

soul originates, and of which all earthly things are imperfect reflections.¹⁸² It is important to note that Aristotle believes that reproduction is a way for animals to participate in the Forms, because, following Plato, generally only rational creatures (i.e. humans) are capable of accessing and knowing the Forms.¹⁸³ Animals, as creatures without reason, are capable of “partaking in” the Forms only through reproduction, making this function particularly important, and not easily passed over.¹⁸⁴

While companion animal overpopulation is a serious concern, two points must be noted about Aristotle’s treatment of reproduction. Firstly, cultivating excellence (*arête*) in this function would *not* be tantamount to endless, unceasing reproduction. As is the case with all of his philosophy, Aristotle’s notion of the *aurea mediocritas* would be a limiting principle on how many young animals should be permitted to whelp.¹⁸⁵ Unlike the felicific calculus, which would have animals reproducing so long as sexual reproduction had a pleasure value, an Aristotelian best-interests standard would apply the reins of moderation to animals’ reproduction.¹⁸⁶

The second point to note is that the ultimate aim (*telos*) of Aristotle’s philosophy of well-being is *flourishing*. This philosophy would be myopic and nonsensical if it did not take into account the needs of an animal’s progeny to also achieve *flourishing* in their own lives. An overabundance of kittens and puppies—with no loving masters to take them—would have no chance at achieving *flourishing*, and hence, should not be brought into the world. Protectors following the Aristotelian standard should be aware of this concern, and act on their animal’s behalf accordingly. This, therefore, would be a second substantial constraint on the prolificacy of an animal’s reproductive function.

Forms’ in the ‘divine world.’”). Aristotle’s authorship of the THEOLOGY, however, is disputed. *The Theology of Aristotle*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/theology-aristotle/> (last visited Jan. 26, 2018) (attributing authorship of the THEOLOGY to Plotinus). Barnes does not include the *Theology* in his authoritative THE COMPLETE WORKS OF ARISTOTLE). See generally THE COMPLETE WORKS OF ARISTOTLE (Jonathan Barnes ed., 1991).

¹⁸² See PLATO, REPUBLIC, *supra* note 152, at 514a-520d (Plato’s depiction of the cave); see also PLATO, PHAEDO, *supra* note 152, at 73a-76a; ARISTOTLE, ON THE HEAVENS, *supra* note 178, at bk. I § 9. See generally W. D. ROSS, PLATO’S THEORY OF IDEAS (1951).

¹⁸³ 2 PAUL HENRY MATY, ANCIENT METAPHYSICS : OR, THE SCIENCE OF UNIVERSALS—CONTINUED, in A NEW REVIEW: WITH LITERARY CURIOSITIES AND LITERARY INTELLIGENCE 137, 141 (1782) (contrasting the mind “which perceives only the perishable forms incorporated with matter,—is conversant only with individual things, [which] employs itself in the direction of animal life” and the human mind, “that which contemplates the eternal and unchangeable forms of things”).

¹⁸⁴ See ARISTOTLE, ON THE SOUL, *supra* note 136, at bk. II § 4; see also KORSGAARD, *supra* note 134, at 139 (considering Aristotle’s view of “plants and animals, whose ‘final cause’ or purpose is essentially to preserve their specific form of functioning, through their own survival and reproduction”).

¹⁸⁵ See ARISTOTLE, EUDEMIAN ETHICS, *supra* note 175, at bk. II § 3 and accompanying text (“excellence must have to do with the mean and be a sort of mean”).

¹⁸⁶ See *id.*

vi. Particularized Functions

While so far we have examined the characteristic functions (*erga*) of animals *in general*, it is important to consider that particular animals will have *erga* unique to their circumstances, of which a protector will need to be mindful. Aristotle noted that certain military horses, to achieve the *telos* of *flourishing*, must achieve excellence (*arête*) in both their characteristic functions as horses generally, and excellence in their specialized functions as *military* horses in particular. Their excellence lay not only in “the excellence of the horse mak[ing] a horse . . . good in itself” but also the excellence “at running and at carrying its rider and at awaiting the attack of the enemy,” making the horse “good.”¹⁸⁷

Therefore, an animal’s particularized *erga* must be taken into account in order to allow the animal to fully *flourish*. For example, certain Alaskan Husky dogs have been bred and trained for hundreds of years to pull sleds (as a means of conveyance) in the Arctic North.¹⁸⁸ They have been selectively bred to cultivate “their desire to pull in harness and their abilities to run well within a team.”¹⁸⁹

This is a special sort of *ergon*, one that is not common to all animals, or even to all dogs. It is unique to sled-bred Alaskan Huskies. This *ergon*, then, is almost certainly the “best and the most complete” of their characteristic functions,¹⁹⁰ comparable to the war horse’s ability to “[await] the attack of the enemy.”¹⁹¹ The protector of such an animal, under an Aristotelian best-interests standard, would be required to ensure that such an animal is given a chance to develop excellence (*arête*) at its most particular and characteristic function. Protectors would need to ensure that a sled dog has opportunities to *flourish* by practicing its sled pulling.

The same requirements would apply to any animal with a similarly specialized function. Racehorses have their most characteristic *ergon* in the ability to run swiftly. To *flourish* in the Aristotelian sense, they must be able to race. Service dogs for the disabled, likewise, have a number of specialized *erga*. Some can guide their blind masters safely through basic environmental hazards. According to the nonprofit, Guide Dogs for the Blind, of San Rafael, California, a trained service dog’s functions (*erga*) include “[l]eading a [blind] person in a straight line from point A to point B, stopping for all changes in elevation (including curbs and stairs), stopping for overhead obstacles (such as tree limbs),

¹⁸⁷ ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 130, at bk. II § 6.

¹⁸⁸ *The Modern Sled Dog*, YUKON QUEST, <http://www.yukonquest.com/about/sled-dogs/modern-sled-dog> (last visited Jan. 26, 2018).

¹⁸⁹ *Id.*

¹⁹⁰ ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 130, at bk. I § 7.

¹⁹¹ *Id.* at bk. II § 6.

and avoiding obstacles in their path.”¹⁹²

A protector applying an Aristotelian best-interests standard would ideally provide an opportunity for service dogs to practice their skills and to achieve the corresponding excellence (*arête*). The same analysis would apply to any animal with a particularized function that could be considered among its “best and . . . most complete.”¹⁹³ Racehorses should be allowed a chance to run, sheep dogs a chance to shepherd, oxen a chance to pull a plow, and Argos a chance to hunt wild animals through the forests and scrublands of Ithaka. “All by the name of dogs . . . The housekeeper, the hunter, every one / According to the gift which bounteous nature / Hath in him closed” must be allowed to practice his specialized gift.¹⁹⁴ This sort of activity is necessary for their *flourishing*.¹⁹⁵

7. The Teleological, Consequentialist, and Holistic Arguments in Favor of an Aristotelian Standard

An Aristotelian best-interests standard has much to recommend it. It is teleologically¹⁹⁶ sound because it aims at appropriate ends, and it is consequentially¹⁹⁷ sound because it tends to produce desirable consequences. In determining the worth of a standard one must ask: (1) what is the aim we are trying to achieve by applying this standard, and (2) what are the likely effects (intended and unintended) of applying this standard? A minimum requisite needs standard, for instance, aims at ensuring compliance with Connecticut’s animal cruelty laws; and achieves the end result of compliance, and of placing the minimum legally permissible burden on the protector. Its first aim and corresponding result are shared with local police and animal control, so they are redundant; and minimizing the legal burden on the protector is not a desirable consequence of a pet trust.

Similar scrutiny finds the felicific calculus deficient. Its aim is pleasure *exclusis omnibus aliis*. One could say that this is a sybaritic, but not inherently impermissible aim; and the pleasure achieved seems to be a desirable consequence. That analysis is overly reductive, however, and can only be arrived at by applying a willfully monomaniacal and solipsistic variety of hedonic consequentialism.¹⁹⁸ In order for that analysis to prevail, the consequences or

¹⁹² FAQ, GUIDE DOGS FOR THE BLIND, <http://www.guidedogs.com/explore-resources/faq> (last visited Jan. 26, 2018).

¹⁹³ ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 130, at I § 7.

¹⁹⁴ WILLIAM SHAKESPEARE, MACBETH, act 3, sc. 1.

¹⁹⁵ See ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 130, at bk. I § 7; *id.* at bk. II § 6.

¹⁹⁶ *Teleology*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/topic/teleology> (last visited Mar. 6, 2018) (defining *teleology* as “explanation by reference to some purpose, end, goal, or function”).

¹⁹⁷ *Consequentialism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (OCT. 22, 2015), <http://plato.stanford.edu/entries/consequentialism> (“Consequentialism = whether an act is morally right depends only on *consequences* (as opposed to the circumstances or the intrinsic nature of the act or anything that happens before the act).”).

¹⁹⁸ *Id.* (Hedonic consequentialism positing that “the value of the consequences depends only on the

effects of anything beyond Argos's immediate level of pleasure at the moment must be ignored. Because it is a purely consequentialist analysis, it commits the moral fallacy of assuming that the ends justify the means. By that logic, the inquisition and the torture chamber are morally legitimate in so far as they tend to reduce heresy. Nevertheless, even by the terms of its own consequentialist analysis, the felicific calculus is a largely fatuous doctrine. The necessary *universalist* consequences¹⁹⁹ of an aim towards pleasure alone—however worthy the animating impulse that begat it—is the creation of pets that, empowered by the intervention of their protectors, become masters of their impotent caregivers. A caregiver would be held by the protector powerless to limit the dog's pleasure-seeking. He would come to regard Argos "with holy dread, / For he on honey-dew hath fed, / And drunk the milk of Paradise."²⁰⁰

The Aristotelian standard, by ways of contrast, has as its aim (*telos*) animal *flourishing*. It is not a redundant aim, like minimum requisite needs, and it is not an aim that works perverse consequences, like the felicific calculus.

An Aristotelian standard is also a holistic one. A minimum requisite needs standard considers only that Argos be treated in accordance with the law. A felicific calculus standard considers only the subjective pleasure of Argos (his *Hedons*), and nothing else. An Aristotelian standard of *flourishing*, like minimum requisite needs, considers compliance with animal cruelty laws. Like hedonic utilitarianism, it considers the animal's subjective pleasure by recognizing the appetitive function, but also achieves the virtue of moderation of those appetites. It recognizes deontological duties to animals (they must be allowed to pursue *arête* to achieve their *teloi*), but it *also* recognizes when consequentialist repercussions outweigh a rigid application of those duties (the Aristotelian principle of the virtuous middle compels a philosophical balancing test in such cases).²⁰¹ The Aristotelian standard therefore encompasses: (1) compliance with the law, (2) reasonable satisfaction of an animal's pleasure, (3) a level of deontological autonomy and dignity, (4) a countervailing consequentialist regard for ultimate outcomes, and (5) an harmony with Connecticut's pre-existing statutory "best interests" standard. It therefore succeeds along five different axes, incorporating the best virtues of the first two standards, tempering their flaws, and aligning with Connecticut's statutory

pleasures and pains in the consequences (as opposed to other supposed goods, such as freedom, knowledge, life, and so on).").

¹⁹⁹ *Id.* ("Universal Consequentialism = moral rightness depends on the consequences for *all* people or sentient beings (as opposed to only the individual agent, members of the individual's society, present people, or any other limited group).").

²⁰⁰ Samuel Taylor Coleridge, *Kubla Khan*, in *THE POEMS OF SAMUEL TAYLOR COLERIDGE* 297, 298 (Ernest Hartley Coleridge ed., 1912) (1798).

²⁰¹ The *telos* of *flourishing* compels consequentialist analysis in certain circumstances. For example, while a deontological duty is owed to allow Argos to practice his characteristic *ergon* of running down a fox, if such a pursuit posed a danger to his safety (for example, guns are being discharged nearby), then his master would be obligated to restrain him from following his natural urges to pursue the fox into danger, for a dead dog cannot *flourish*.

criteria for custody of minor children.²⁰²

For all the aforementioned reasons, this Note encourages that either (1) the Connecticut state legislature amend Conn. Gen. Stat. § 45a-489a to include the statutory requirement that protectors observe an Aristotelian best interests standard towards their animals, or (2) the Connecticut Probate courts apply an Aristotelian best interests standard when deciding any future cases arising from a protector's duty under section 45a-489a.

8. Concluding Thoughts

Bequests to animals have a long legal history, one that has generally moved from judicial disapproval to statutory endorsement. While English common law courts were inclined to grudgingly respect bequests made to pets, American courts were resistant to the idea of a legally binding pet trust until the UPC revision of 1990, and the ensuing gallimaufry of state statutory pet trusts laws in the last two decades.

Connecticut's pet trust statute, reflecting the provisions of the UPC § 2-907 (and UTC § 408), requires the appointment of a protector, whose sole duty is to act on behalf of the animal. The legislature did not prescribe a specific standard of care the protector owes to the animal, and Connecticut courts have not yet had an opportunity to clarify the nature or extent of this duty.

This Note examines the philosophy of animals, and derives three potential definitions of the protector's duty to her animal: (1) a minimum requisite needs standard, (2) a felicific calculus standard, and (3) Aristotelian best-interests standard.

This Note dismisses the minimum requisite needs standard because it would render the protector's role redundant, ill-serve animal welfare, and likely not reflect the wishes of the testator. This Note also dismisses the felicific calculus standard, because it would render a caregiver powerless to exercise reasonable prudence, moderation and authority in his care for the pet.

This Note then derives an Aristotelian best-interests standard of care from a combination of the collected *oeuvre* of Aristotle and Connecticut's "best interests" child custody law. It examines what the practical implications of this standard would be, and finds them to be rational, judicious, humane, and sensible.

²⁰² An argument can be made, although this Note does not attempt to make it, that pet animals should be treated by probate courts as minor children (fixed in a perpetual state of minority). *See generally* Schyler P. Simmons, *What Is the Next Step for Companion Pets in the Legal System? The Answer May Lie with the Historical Development of the Legal Rights for Minors*, 1 TEX. A&M L. REV. 253, 256 (2013) (given the "legal rights minors and companion animals have come to share, . . . the next logical step would be towards furthering the rights of companion pets as compared to the progression of minors' rights").

This Note formally recommends that either (1) the Connecticut state legislature amend the pet trust statute to include some iteration of the Aristotelian best-interests standard, or (2) the Connecticut Probate Courts apply an Aristotelian best-interests standard when deciding any future cases arising from Connecticut's pet trust statute. Such a standard would ensure that pet trust beneficiary animals enjoy full, rich lives, even in the absence of their masters.

As the tale turned out, Argos was eventually reunited with his master, who came back from the land of the dead.²⁰³ Should we all not be so lucky as thrice-great Odysseus in our travels; pet trusts, with vigilant protectors applying an Aristotelian best-interests standard, will ensure that our pets are provided for, and that every Argos will remain in "such in form and deeds / As when Odysseus left him" until the end of his days.²⁰⁴

²⁰³ HOMER, ODYSSEY, *supra* note 1, at XI.635-40.

²⁰⁴ *Id.* at XVII.313-14.