COMMENT

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Animals in the Law: Occupying a Space Between Legal Personhood and Personal Property

INTRODUCTION

The law treats our companion animals, for most purposes, the same as other forms of chattel: a pair of shoes, a chair, a cell phone. But how can this be so? How can the law not discern between sentient beings and inanimate objects? How can the animals we dote on, dress up, and

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allow to sleep in our beds receive the same legal treatment as any other type of personal property?

The concept of treating animals as mere property under the law is troubling for many reasons. Nevertheless, human beings have accepted "Cartesian notions of animals as machines, which support both the treatment of animals as property and definitions of humans as 'not-animals.'"[1] Accepting these Cartesian notions justifies using animals for experiments, keeping them caged in zoos, and even mass-producing them in appalling conditions for our own consumption. Another reason for treating animals as mere property stems from the impracticability of giving them full "legal personhood" status. If labeled as "legal persons," animals would have the standing as aggrieved persons, thereby allowing them to bring lawsuits to enforce the laws enacted to protect them.[2] The image of a chimpanzee-plaintiff boggles the mind of many legalists, objections ranging from the inability to communicate to the inability to verify veracity.

However, animals are characteristically different from other types of property. Property law recognizes rights that each property owner holds in her bundle of sticks. These rights include, but are not limited to, the right to possess, the right to use, the right to alienate, and the right to destroy.[3] When applied to animals, the right to destroy, a quintessential stick in a property holder's bundle, is limited. For example, statutory restrictions exist as to how animals may be killed, all emphasizing that if killing is legally permissible, it must be done humanely.[4] Recent statutory interpretations and court decisions have put these notions of animals as property into question. Specifically, there has been a shift towards strengthening the legal status of animals, situating them somewhere between legal personhood and personal property. By occupying a space between legal personhood and personal property, animals have been afforded particular rights and protections, especially in Oregon. One recent Oregon Supreme Court decision interprets criminal statutory provisions to allow animals to be considered legal victims and a companion case extends the exigent circumstances

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1 Tamie L. Bryant, *Living on the Edge: The Margins of Legal Personhood: Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of Animals as Property, and the Presumed Primacy of Humans*, 29 RUTGERS L.J. 247, 263 (2008).

2 *Id.* at 258.

3 Denise R. Johnson, *Reflections on the Bundle of Rights*, 32 VT. L. REV. 247, 253 (2007).

4 *See, e.g.*, OR. REV. STAT. 609.093 (setting forth a list of considerations that a court must consider in determining whether to euthanize a dog that has chased, menaced, or bit someone or something).

exception to the warrant requirement under the Oregon Constitution to encompass rescuing certain kinds of animals.[5]

This Comment begins by explaining the historical development of animal jurisprudence, particularly focusing on the labeling of animals as personal property. Then, this Comment describes the various ways in which legal scholars have approached the concepts of attaining legal status for animals and the successes or practicability of such approaches. Next, this Comment points to recent Oregon court decisions that may be transforming common law conceptions of animals away from mere property status. In all, this Comment demonstrates that while some extreme methods have been suggested in transforming the legal status of animals, animals are instead increasingly recognized as occupying a space between the extremes—between personal property and legal persons.

I
THE HISTORICAL DEVELOPMENT OF ANIMALS AS PROPERTY

While the concept of property dates back to Roman law, providing differing degrees of protection for animals developed within English common law.[6] English common law divided its protection between animals that were "useful" and animals of a base nature (wild animals).[7] Useful animals, such as cattle and sheep, were regarded by the common law as having an intrinsic value and, thus, afforded the same protection as goods. Wild animals were not considered property and, hence, could not be the subject of larceny and criminal action could not be brought for maliciously killing a wild animal.[8] Remarkably, cats and dogs, animals now considered to be companion animals to humans, were considered as animals of a base nature until the early nineteenth century and therefore held a non-property status.[9] "This meant that the keeper

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5 *See* State v. Nix (*Nix II*), 355 Or. 777 (2014), *vacated*, 356 Or. 768 (2015); State v. Fessenden, 355 Or. 759 (2014). As will be discussed, while *Nix* was vacated, *State v. Hess*, 273 Or. App. 26 (2015) readopted the reasoning of *Nix*.

6 David Favre, *Living Property: A New Status for Animals Within the Legal System*, 93 MARQ. L. REV. 1021, 1024–26 (2010).

7 *Id.* at 1026.

8 *Id.*

9 *Id.* at 1026 n.18 (stating that "[a] clear statement of the legal status of dogs and cats did not appear in Virginia law until 1984: 'All dogs and cats shall be deemed personal property and may be the subject of larceny and malicious or unlawful trespass.' VA. CODE ANN. § 3.2-6585 (2008). Connecticut did not change its law until 1949, when the following was adopted: 'All dogs are deemed to be personal property. . . . Any person who steals a dog

of the non-property animal [such as a dog] could not look to the protections of the law; an owner could not call the police if her dog had been stolen or killed. If the human owner's interest in her dog was not recognized by the law, then clearly the interests of the dog were not recognized."[10] In sum, the common law provided protection for farm animals and not pets.

Paradoxically, the English common law seems to juxtapose the way in which contemporary law characterizes animals as property. Today, the law affords more protection to pets and companion animals than it does to farm animals because of the socially recognized value associated with pets. This transformation began in 1867 with a New York law.[11] The New York law was highly promoted by the founder of the American Society for the Prevention of Cruelty to Animals ("ASPCA").[12] The law defined an "animal" as *every* living creature except a human being and provided:

> A person who overdrives, overloads, tortures or cruelly beats or unjustifiably injures, maims, mutilates or kills any animal, or deprives any animal of necessary sustenance, food or drink, is guilty of a misdemeanor, punishable by imprisonment for not more than one year, or by a fine of not more than one thousand dollars, or by both. Exclusions include properly conducted scientific tests, experiments or investigations, involving the use of living animals approved by the state commissioner of health.[13]

The New York law expanded the common law by providing protections for all animals, requiring owners to provide adequate food and water, and providing an anti-cruelty provision that, if violated, would subject the owner to criminal penalties. Shortly thereafter, other states, including Oregon, began to adopt similar statutes following the New York model.[14] "Besides the benefits to humans, the existence of these laws clearly reflects the legislatures' acceptance of the proposition that an animal's interest in being free from unnecessary

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may be prosecuted. . .' CONN. GEN. STAT. ANN. § 22-350 (West 2001)."); *see also* DAVID FAVRE & PETER L. BORCHELT, ANIMAL LAW AND DOG BEHAVIOR, 10–11 (1999).

10 Favre, *supra* note 6, at 1026−27.

11 Act of Apr. 12, 1867, ch. 375, § 1, 1867 N.Y. LAWS 86 (current version at N.Y. AGRIC. & MKTS. LAW § 353 (McKinney 2015)); *see also* N.Y. AGRIC. & MKTS. LAW §§ 331–379 (McKinney 2015); N.Y. PENAL LAW § 130.20 (McKinney 2015).

12 Favre, *supra* note 6, at 1028.

13 N.Y. AGRIC. & MKTS. LAW § 353 (McKinney 2015).

14 Favre, *supra* note 6, at 1028.

pain and suffering should be recognized as a value within the legal system."[15]

Over the next several decades, the common law expanded state statutes to afford better protection for animals. "The requirement in the original New York law for providing food and water has been expanded significantly in many states to include food, water, shelter, and veterinary care."[16] Moreover, the punishment for violating these statutes has increased. Today, forty-six states, the District of Columbia, Puerto Rico, and the Virgin Islands all contain felony provisions in their anti-cruelty statutes.[17]

II
LEGAL PERSONHOOD AND ATTAINING NON-PROPERTY STATUS

Black's Law Dictionary defines a legal person as "an entity, such as corporation, created by law and given certain legal rights and duties of a human being; a being, real or imaginary, who for the purpose of legal reasoning is treated more or less as a human being."[18] However, animal advocates and legal scholars have attempted to expand and redefine the definition of legal personhood and its applicability towards animals for decades. As will be discussed, these legal scholars have articulated various ways in which legal personhood may be modified to encapsulate animals.

A. A Narrow Approach to Legal Personhood

Tamie Bryant, a legal scholar in animal law, argues that there are two definitions of legal personhood that may be applicable to animals.[19] One definition defines legal personhood broadly as "legal recognition of the extent to which animals should be considered 'persons' entitled to inclusion in the moral community such that humans cannot commit acts on animals that humans cannot commit on equally situated humans."[20] Bryant criticizes this broad definition of legal personhood

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15 *Id.*

16 *Id.* at 1030.

17 *Oregon's Felony Animal Cruelty Law–The "Kittles Bill*," ANIMAL LEGAL DEF. FUND, http://aldf.org/resources/laws-cases/oregons-felony-animal-cruelty-law-the-kittles-bill/ (last visited Nov. 28, 2015).

18 *Legal Person*, BLACK'S LAW DICTIONARY (10th ed. 2014).

19 Bryant, *supra* note 1, at 253.

20 *Id.*

and its applicability to animals by arguing that such a definition requires proof that animals are substantially similar to humans, which fails for two reasons. First, humans are heavily invested in defining themselves in opposition to animals; and second, humans are heavily invested in using and consuming animals.[21] Further, Bryant argues that such an approach would allow for only select species to gain legal personhood status, reinforcing a hierarchy between those species that qualify for status and those that do not.[22]

The second definition that Bryant proposes for legal personhood of animals is narrower: "legal standing as an 'aggrieved person' entitled to sue to enforce laws ostensibly enacted to protect that aggrieved person from the harm he or she alleges."[23] Currently, animals lack legal standing and must rely on animal advocates to bring forth claims on their behalf, which creates a myriad of problems, particularly because the animal advocates are fighting against the property owners of the harmed animals in question. Bryant argues this definition is more acceptable because of "the idea that injured parties should have access to the courts to enforce existing law should, as a matter of logic, result in the recognition of standing for both the human and the animal to their respective injuries."[24] However, Bryant argues that accepting such an approach would only lead to the victimization of animals by creating ideas of superiority and entitlement of humans.[25] According to Bryant's view, then, even if animals were recognized as plaintiffs, the laws themselves would be interpreted as they currently are, and, therefore granting animals legal standing would not be helping them at all.[26] Further, Bryant argues that personhood cannot be pursued without addressing the status of animals as property.[27]

B. Shifting Towards a Non-Property Status

Another animal jurisprudence theorist, Thomas Kelch, points to the shift in both judicial decisions and legislative enactments away from regarding animals as mere property—a shift towards a non-property

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21 *Id.*
22 *Id.*
23 *Id.*
24 *Id.* at 254.
25 *Id.*
26 *Id.*
27 *Id.* at 293.

status.[28] For example, the non-property status theory points to the fact that "some courts have moved away from always using a market value measure of damages for injuries to and killing of animals."[29] In *Corso v. Crawford Dog and Cat Hospital., Inc.*,[30] the court assessed the proper measure of damages for mishandling the body of a euthanized dog and stated that companion animals should be seen as occupying a status above that of ordinary property.[31] The court stated, "[t]his court now overrules prior precedent and holds that a pet is not just a thing but occupies a special place somewhere in between a person and personal property . . . . A pet is not an inanimate thing that just receives affection; it also returns it."[32] Kelch notes that the court was careful to distinguish its ruling from cases that allow special damages for loss of an heirloom. "Rather, the court recognized that pets are something more than property, due to the fact that animals are living creatures with feelings, emotions, and affection, and are more than just objects."[33]

It is important to note that the *Corsco* court narrowed its holding to pets as companion animals, but the holding has more recently been applied in New York. In *Hennet v. Allan*,[34] the court reemphasized the holding in *Corsco* by stating, "[t]oday, we should take the next step in recognizing that pets are more than just 'personal property' when it comes to resolving a dispute between owners. . . . [P]ets should be recognized as a 'special category of property.'"[35] Again, the court emphasized that pets hold a unique status, and such a result demonstrates the willingness of courts to depart from applying a strict property characterization to companion animals. If other courts follow the New York courts' approach, animal advocates could more easily argue that other animals, such as chimpanzees, dolphins, and elephants, which have been proven to have complex cognitive abilities, fit within the special category and deserve a non-property status.

As for legislative enactments, the non-property theory points to few advancements in shifting notions of animals as property, despite the

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28 Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 N.Y.U. L.J. 531, 536 (1998).

29 *Id.*

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

31 *Id.* at 183; Kelch, *supra* note 28, at 538.

32 *Id.* (quoting *Corso*, 415 N.Y.S.2d at 183).

33 *Id.*

34 Hennet v. Allan, 981 N.Y.S.2d. 293, 297 (2014).

35 *Id.* at 297.

advances in common law. In order to continue the advancement in the common law, Kelch proposes that animals be deemed as holders of certain legal rights.[36] "These rights would be based on the fact that animals have interests; that their lives can fare well or badly based upon how they are treated."[37] Kelch argues that the mechanism for asserting animal interests should be entrusted to animal groups or concerned individuals who would be the "guardians" of the interests of animals, much like guardians are routinely appointed for children and those who are not competent to assert their own claims.[38] Accordingly, such guardians could acquire standing through the test proposed in *Animal Lovers Volunteer Ass'n v. Weinberger*,[39] where "the court appeared to suggest that an organization [could] have standing when there is a longevity of commitment in the organization to preventing inhumane treatment of animals."[40] This approach to providing standing for guardians of animal interests would allow animal welfare organizations, such as the Animal Legal Defense Fund and the Nonhuman Right Project, to more easily advocate on behalf of animals.

C. Legal Personhood via the Capacity to Possess a Legal Right

Another approach towards moving away from a property status has been suggested by Steven Wise. According to Wise, "legal personhood is the capacity to possess at least one legal right; accordingly, one who possesses at least one legal right is a legal person."[41] Wise explains the theory of animal rights jurisprudence through the use of an "Animal Rights Pyramid":

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36 Kelch, *supra* note 28, at 582.

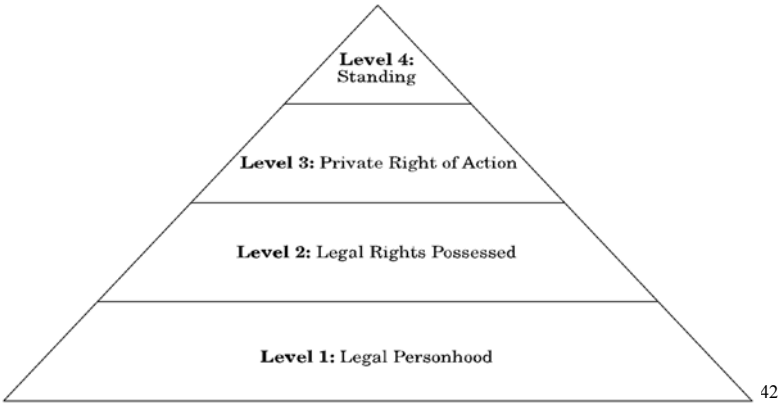
37 *Id.*

38 *Id.* at 584.

39 Animal Lovers Volunteer Ass'n v. Weinberger, 765 F.2d 937 (9th Cir. 1985).

40 Kelch, *supra* note 28, at 584 (paraphrasing court in *Animal Lovers*, 765 F.2d. at 939, where the court stated, "ALVA lacks the longevity and indicia of commitment to preventing inhumane behavior which gave standing to Fund for Animals, and which might provide standing to other better known organizations.").

41 Steven M. Wise, *Legal Personhood and the Nonhuman Rights Project*, 17 ANIMAL L. 1, 1 (2010).



Steven Wise's Animal Rights Pyramid[43]

In determining how animals are perceived in the legal context, the pyramid helps to demonstrate the ways in which standing is acquired. The pyramid can be viewed as if each base is a rung on a ladder, in that each base must be met before proceeding to the next base level. Thus, standing (level 4) cannot be achieved unless one has a private right of action (level 3), possesses legal rights (level 2), and is considered a legal person (level 1). Currently, animals do not even exist within the pyramid scheme, as they are not deemed to be legal persons. Wise founded the Nonhuman Rights Project, which focuses on shifting the paradigm so that common law recognizes that animals have the capacity to be declared a legal person (level 1).[44] According to Wise, "[t]his nonhuman animal need not actually possess a legal right. But she must have the capacity to possess one."[45] Such capacity would acquire level 2 status, and the animal would progress to level 3, and so on. Wise argues that the legal right that allows animals to climb the pyramid is that of dignity. "[D]ignity is one sufficient generator of fundamental legal rights and that autonomy is at least one sufficient generator of dignity."[46] In asserting that autonomous animals possesses dignity through their autonomy, the Nonhuman Rights Projects is beginning to litigate on behalf of chimpanzees, elephants, dolphins, and whales because they are the most cognitively complex animals and

42 *Id.* at 2.

43 *Id.*

44 *Id.* at 5.

45 *Id.*

46 *Id.* at 6.

most similar to human beings. These animals in particular are complex individuals who have deep emotions, understand each other's minds, live in complicated societies, transmit culture, use sophisticated communication, solve difficult problems, and even mourn the loss of their loved ones.[47]

It appears as though the Nonhuman Rights Project's plans to have animals declared as legal persons have not ultimately failed, but rather cases have been dismissed on other grounds.[48] For example, Wise's most recent published case arose from his Nonhuman Rights Project on behalf of Kiko, a chimpanzee, for whom Wise sought a writ of habeas corpus.[49] According to the complaint, a primate sanctuary was improperly imprisoning Kiko, and the Nonhuman Rights Project sought to have him transferred to another facility. The Nonhuman Rights Project, during oral argument, explained that Kiko was being kept in a cemented storefront with chains around his neck.[50] The Nonhuman Rights Project based its habeas corpus petition on the need for Kiko's self-determination and autonomy to be respected.[51] In its argument, the Nonhuman Rights Project asserted that Kiko is a legal person, and not property, for purposes of habeas corpus:

> Because, if Kiko is a common law . . . person within the meaning of a writ of habeas corpus, then at that point that would override it. That was exactly what occurred, for example, in the momentous case of . . . the Somerset case, where you had a slave, James Somerset, who was then held to be a person, and then [the court] . . . said, you are free, even though his owner did not want him to be free.[52]

The lower court dismissed and the appellate court affirmed the dismissal of the petition based on grounds other than whether Kiko can be considered a legal person. The court based its dismissal on the fact that the Nonhuman Rights Project, while petitioning for habeas corpus, did not seek Kiko's immediate release, nor did the petition allege that

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47 *What is the Nonhuman Rights Project?*, NONHUMAN RIGHTS PROJECT, http://www.nonhumanrightsproject.org/overview/ (last visited Nov. 28, 2015).

48 *See generally* NONHUMAN RIGHTS PROJECT, Court Cases, http://www.nonhumanrightsproject.org/category/courtfilings/ (last visited Nov. 28, 2015).

49 *In re* The Nonhuman Rights Project, Inc. v. Presti, 2015 NY slip op. 00085 (App. Div.); Nonhuman Rights Project, Inc., ex rel. Kiko v. Presti, 999 N.Y.S.2d 652, 653 (2015).

50 Transcript of Record at 2, *In re* The Nonhuman Rights Project, Inc. v. Presti, 2015 NY slip op. 00085 (App. Div.); 2015 N.Y. App. Div. LEXIS 148, http://www.nonhumanrightsproject.org/wp-content/uploads/2015/01/Kiko-Appellate-Court-Transcript-120214.pdf.

51 *Id.* at 3.

52 *Id.* at 4.

Kiko's detention was unlawful. Rather, the court found that the Nonhuman Rights Project merely sought to have Kiko transferred to a different facility. The court concluded:

> Consequently, even assuming, arguendo, that we agreed with [The Nonhuman Rights Project] that Kiko should be deemed a person for the purpose of this application, and further assuming, arguendo, that [The Nonhuman Rights Project] has standing to commence this proceeding on behalf of Kiko, this matter is governed by the line of cases standing for the proposition *that habeas corpus does not lie where a petitioner seeks only to change the conditions of confinement rather than the confinement itself*.[53]

Thus, while denying relief on habeas corpus grounds, the appellate division of New York declined to decide the issue of whether Kiko could be considered a legal person.

III
EQUITABLE SELF-OWNERSHIP: BETWEEN PROPERTY & LEGAL PERSONHOOD

David Favre proposes the theory of equitable self-ownership, an alternative approach of providing animals with more legal status while still following the common law approach of maintaining their property status.[54] Favre describes this theory as "a legal paradigm in which a nonhuman animal has equitable self-ownership . . . status within the legal system, while a human retains legal title to the animal in question."[55] While the law recognizes only two distinct categories, property or juristic persons, equitable self-ownership would define animals as juristic persons without entirely severing the concept of property ownership.[56]

Favre begins the approach of conceptualizing equitable self-ownership by distinguishing the fact that:

> [T]oday the ownership of personal property can . . . be separated into legal and equitable title. All owners have the lawful ability to separate the title of their personal property into its two components and convey those components to others. . . . This relationship is like that of a trust in that the equitable title holder has possession and

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53 *Id.* at 2 (emphasis added).

54 David Favre, *Equitable Self-Ownership for Animals*, 50 DUKE L.J. 473, 473 (2000).

55 *Id.* at 476.

56 *Id.* at 502.

> control . . . without having the ability to dispose of the legal title of the [property].[57]

In describing how such a method would work, Favre points to history, specifically the use of slavery in Rome and the United States.[58] "In both systems, methods existed by which humans in the status of property could be transformed into legal persons . . . within the legal system. This could occur by legal instrument done by the owner, or by operation of law, even if it was against the will of the owner."[59] Thus, Favre argues that if we apply the same methodology used to provide slaves legal status to animals, the two methods of dividing legal title and equitable title are through explicit action by the owner or by operation of the law.

In the first instance, equitable self-ownership can be accomplished by explicit action of the existing title owner;[60] this could be accomplished "when an individual owner of an animal signs a carefully drafted instrument which transfers the equitable title of the animal to the animal."[61] Such an instrument should make clear the owner's intention of creating a new legal status for the animal as well as stipulate the owner's acknowledgment of the legal consequences that may follow from signing the document.[62] The theory acknowledges drawbacks of dividing title by such an approach. For one, animals cannot understand the importance of such a document giving them equitable title.[63] However, equitable self-ownership suggests various ways to cope with such a drawback, such as tattooing a unique symbol on the animal or filing the document in a place in which the legal status of the animal could be ascertained.[64] However, in reality, both of these suggestions appear to be extreme and impracticable because they imply that third persons will automatically know what the tattooed symbol represents or will take the time to ascertain the status of the animal by looking for a filed document.

A second method by which property could be divided into legal title and equitable title under equitable self-ownership is to create "a new legal status for domestic animals [through] operation of law, which can

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57 *Id.* at 487–89.
58 *Id.* at 491.
59 *Id.* at 491–92.
60 *Id.* at 492.
61 *Id.*
62 *Id.*
63 *Id.* at 493.
64 *Id.*

occur either by the actions of the judiciary or by adoption of new legislation."[65] According to equitable self-ownership theory, such methodology is already in practice, pointing to the fact that "a wild animal under the personal ownership of a human will gain equitable (and legal) title if she is released back into her natural habitat."[66] Legislatures could adopt legislation that would cause the involuntary transfer of equitable ownership to a class or species of animals.[67] By doing so, the "nature of having legal title will change, as the legal title holder must recognize and take into account the interests of the equitable title holder."[68] Thus, Favre argues that such an obligation would be similar to that in established in trust law. Because human animal owners are currently only subjected to the restrictions of anti-cruelty and licensing laws, a duty only owed to the state, granting an animal equitable title would create an obligation for the legal title owner to both the self-owned animal as well as the state.[69]

The second proposal is more practicable than the first. Because animal owners already owe a duty to the state, for example in anti-cruelty and licensing contexts, if a state legislature were to adopt the equitable title distinction, the change would essentially just extend that duty owed to the state to the animal itself. While not overly burdensome on any actor, either the legislature or the owner, such a change would allow for animals to be protected not only by the state which imposes regulations on owners, but would essentially place an affirmative duty on the legal title owner to the animal, the equitable title owner.

Favre's two equitable self-ownership's focus on the division of title into legal and equitable is crucial because, unlike other scholars arguing for a complete transition into non-property status, he points to the fact that human retention of legal title is vital vis-à-vis the duty of care.[70] Under our present property system, full responsibility comes with ownership and because "[m]ost animals within the domestic control of humans are not capable of self-care . . . it is important that legal ownership continues to exist so that responsibility for the care of the self-owned animal can be squarely placed on a specific human."[71]

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65 *Id.* at 494.
66 *Id.*
67 *Id.*
68 *Id.*
69 *Id.*
70 *Id.* at 495.
71 *Id.*

Equitable self-ownership is a helpful concept in that it recognizes that the drastic shift away from animals being personal property is not really feasible. Rather, equitable self-ownership allows for animals to gain more legal status without granting them complete legal personhood. Equitable self-ownership recognizes that the duty to care for animals by their owners is a critical facet that needs to be maintained; a method to maintain that duty is to divide the title of animals into legal title and equitable title. By doing so, the legal titleholder owes affirmative duties to the equitable titleholder rather than just to the state.

IV
ALTERING THE COMMON LAW WITH *FESSENDEN* & *NIX*

In August of 2014, the Oregon Supreme Court decided two cases that arguably expand the rights of animals in a way that shifts farther away from notions of animals as purely property. First, in *State v. Nix*,[72] the court, through statutory interpretation, recognized for the first time that animals could be legal victims. The facts of *Nix* are as follows:

> Acting on a tip, police officers entered defendant's farm and found dozens of emaciated animals, mostly horses and goats, and several animal carcasses in various states of decay. Defendant owned those animals. Defendant was indicted on 23 counts of first-degree animal neglect, ORS 167.330, and 70 counts of second-degree animal neglect, ORS 167.325. Each separate count identified a different animal and charged conduct by defendant toward that animal. All of the separate counts were alleged to have occurred within the same span of time. A jury convicted defendant of 20 counts of second-degree animal abuse. At defendant's sentencing hearing . . . [the trial court] merged the guilty verdicts into a single conviction, explaining that . . . animals are not victims as defined by [ORS 161.067(2)] . . . Defendant was sentenced to 90 days in jail and three years of bench probation; the trial court suspended imposition of the jail sentence, and the state appealed.[73]

On appeal, the issue before the court was whether animals could be considered victims within Oregon's anti-merger statute. The anti-merger statute provides, in pertinent part, that "when the same conduct or criminal episode, though violating only one statutory provision involves two or more victims, there are as many separately punishable offenses as there are victims."[74] The state argued that the text, context,

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72 State v. Nix (*Nix II*), 355 Or. 777 (2014), *vacated*, 356 Or. 768 (2015).

73 State v. Nix (*Nix I*), 251 Or. App. 449, 451-52 (2012), *aff'd*, 355 Or. 777 (2014), *vacated*, 356 Or. 768 (2015).

74 OR. REV. STAT. § 161.067(2) (2013).

and legislative history of the second-degree animal neglect statute make clear that the legislature intended the neglected animals to be the victims of the offense.[75] The defendant responded arguing that the ordinary meaning of the term "victim" does not include nonhuman animals and, under Oregon law, animals are treated as the property of their owners.[76]

The court then engaged in statutory interpretation to determine whether animals could be considered victims under the anti-merger statute. In its opinion, the court stated:

> Oregon's anti-merger statute provides that, when a defendant is found guilty of committing multiple crimes during a single criminal episode, those guilty verdicts 'merge' into a single conviction, unless they are subject to one of a series of exceptions. One of those exceptions is ORS 161.067(2), which provides that, "[w]hen the same conduct or criminal episode, though violating only one statutory provision [,] involves two or more victims, there are as many separately punishable offenses as there are victims."[77]

The court explained that in the text of the statute, the ordinary meaning of the word "victim" was capable of referring either to human beings, animals, or both.[78] The court went on to say that "the phrasing of the statute—which refers to the violation of another statutory provision—suggests that *the meaning of the word 'victim' will depend on the underlying substantive statute that the defendant violated*."[79]

Thus, whether animals could be considered victims within the anti-merger statute depended on the underlying substantive statute, which in *Nix* was second-degree animal neglect. Oregon's second-degree animal neglect statute provides, in pertinent part, that "a person commits the crime of animal neglect in the second degree if, except as otherwise authorized by law, the person intentionally, knowingly, recklessly or with criminal negligence fails to provide minimum care for an animal in such person's custody or control."[80] In examining the underlying substantive statute, the court found that "the phrasing of the offense reveal[ed] that the legislature's focus was the treatment of individual animals, not harm to the public generally or harm to the

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75 *Nix II*, 355 Or. at 789–90.

76 *Id.* at 790.

77 *Id.* at 782.

78 *Id.* at 783.

79 *Id.* at 784 (emphasis added).

80 OR. REV. STAT. § 167.325 (2013).

owners of the animals. The offense is committed by failing to provide required care to 'an animal,' regardless of who owns it."[81] Therefore, reading the text of the anti-merger statute in context with the underlying substantive statute, the court found that the legislature's focus was on the treatment of individual animals. The court concluded, "in any reasonable sense of the word, the 'victim' of those offenses is the individual animal that suffers the neglect, injury, cruelty, torture, or death."[82] In holding that animals could be considered victims within the anti-merger statute, the court found that the trial court had erred by merging the 20 counts of second-degree animal neglect into a single conviction and reversed for resentencing.[83] Thus, an animal could be a legal victim of its owner's abuse or neglect.

The *Nix* court noted the shift from animals as mere property in context of anti-cruelty statutes, explaining that "the focus of the statute was the treatment of the animals themselves, with no mention of proof of economic loss to the owner or harm to the public."[84] However, the court also cautioned the decision was not one of policy about whether animals are deserving of such treatment under the law, reserving that decision for the legislature.[85]

In any event, the holding of *Nix* extended the rights of animals to be treated as individual victims within the anti-merger statute. Thus, if the underlying statute for which a defendant is charged presumes that animals can be victims for that offense, that defendant's sentence does not qualify for a "merged" sentence, but rather the defendant will face a sentence for each individual count of guilt. While such application is seemingly narrow to statutes such as animal neglect and animal abuse, the ability for animals to be deemed victims is a far cry from animals holding mere property status. In no other context would property be deemed a victim; for example, the law school favorite Blackacre could not be considered a victim if its owner decided to burn it down.

Remarkably, *Nix* was vacated by the Oregon Supreme Court for a procedural error. Namely, it was brought to the Court's attention that the state lacked the authority to appeal the defendant's conviction because the conviction was for a misdemeanor. Luckily, the Oregon Court of Appeals adopted the *Nix* principles in *State v. Hess*, 273 Or

81 *Nix II*, 355 Or. at 790.

82 *Id.*

83 *Id.* at 798.

84 *Id.* at 794.

85 *Id.* at 798.

App 26, 35 (2015). The court acknowledged that *Nix* was vacated for procedural reasons and stated, "we nonetheless are persuaded by the *Nix* court's reasoning on the merger question, and we adopt it."[86]

The companion case to *Nix* was *State v. Fessenden*.[87] *Fessenden* was unique in that the Oregon Supreme Court applied the exigent circumstances exception to animals, which allowed for a police officer to seize an emaciated horse without a warrant. The facts of *Fessenden* were as follows:

> [A neighbor] called the sheriff's office to report that the horse appeared to be starving. An officer with specialized training in animal husbandry and in investigating animal cruelty was dispatched to investigate. . . . From the driveway, the officer observed that the horse's backbone protruded, her withers stood up, her neck was thin, all of her ribs were visible, she had no visible fatty tissue in her shoulders, and she was "swaying a little bit," all of which the officer recognized as signs of emaciation. . . . At that point, before entering defendant's property, the officer believed that the horse was suffering from malnourishment and presented a medical emergency. . . . He therefore entered the property, seized the horse, and immediately took her to a veterinarian.[88]

Fessenden, the co-owner of the horse, was charged with second-degree animal neglect. At trial, the officer testified that the horse was the thinnest horse he had ever seen and he was afraid that if the horse fell over, it would not be able to get back up and would need to be euthanized.[89] Believing that it would take between four to six hours before he could obtain a warrant, and that the horse could fall over in between that time, the officer testified that he believed he was faced with a medical emergency.[90] The defendants, co-owners of the horse, moved to suppress evidence obtained as a result of the officer's seizure, arguing that the officer's acts violated the warrant requirement of Article I, Section 9 of the Oregon Constitution and the Fourth Amendment to the United States Constitution.[91] In response, the state argued that the emergency aid and exigent circumstances exceptions to the warrant requirement permitted the officer's entry and seizure of the

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86 State v. Hess, 273 Or. App. 26, 35 (2015).

87 State v. Fessenden, 355 Or. 759 (2014).

88 *Id.* at 761–62.

89 *Id.* at 761.

90 *Id.* at 761–62.

91 *Id.* at 762–63.

horse.[92] The trial court denied defendants' motion to suppress and the jury convicted defendants as charged.[93]

On appeal, the Court of Appeals held that the officer's warrantless entry and seizure were lawful under the emergency aid exception to the warrant requirement.[94] The Court of Appeals explained its finding based on the emergency aid exception as follows:

> [T]he societal interest in protecting nonhuman animals from unnecessary pain, injury, trauma, and cruel death can justify . . . a warrantless search or seizure aimed at preventing or alleviating that suffering. . . . We hold that a warrantless search or seizure is justified when law enforcement officers have an objectively reasonable belief, based on articulable facts, that the search or seizure is necessary to render immediate aid or assistance to animals that have suffered, or which are imminently threatened with suffering, serious physical injury or cruel death, unless that injury or death is being inflicted lawfully.[95]

The Oregon Supreme Court did not decide *Fessenden* under the emergency aid exception,[96] but rather focused its holding under the exigent circumstances exception. In its opinion, the court stated that "Oregon law still considers animals to be property"[97] and that "[d]omestic animals . . . receive special consideration under Oregon law" because they "occupy a unique position in people's hearts and in the law."[98] The court continued in dicta by saying, "[a]s we continue to learn more about the interrelated nature of all life, the day may come when humans perceive less separation between themselves and other living beings than the law now reflects."[99] In its exigent circumstances analysis, the court explained "[the exception] permits warrantless action when necessary to prevent serious damage to 'property'" but that "[the court] has not yet applied that exception to permit warrantless measures to protect property."[100] Even more compelling, the court concluded its opinion by stating that while the holding of this case may appear narrow, the court does not suggest that the circumstances in

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92 *Id.* at 763.

93 *Id.*

94 State v. Fessenden, 258 Or. App. 639, 646 (2013), *aff'd*, 355 Or. 759 (2014).

95 *Id.* at 763–64.

96 By not deciding the case under the emergency aid exception, the court did not decide whether the exception could or could not be used for animals in future instances.

97 *Fessenden*, 355 Or. at 767.

98 *Id.* at 768–69.

99 *Id.* at 769–70.

100 *Id.* at 771.

Fessenden are "the only ones in which an officer may take warrantless measures to prevent serious harm to or the death of an animal."[101] Such a statement suggests that the court may be willing to expand its holding to allow for warrantless entries and seizures of animals in other circumstances.

V
IMPLICATIONS OF *FESSENDEN* & *NIX* IN CHANGING NOTIONS OF ANIMALS AS PROPERTY

While the holdings of *Fessenden* and *Nix* may appear to conflict, in one the court concludes that animals may be deemed property while in the other explicitly states that animals are still considered property, in conjunction the two holdings may be a great leap for animal rights in Oregon. While the *Fessenden* court based its ruling on exigent circumstances to protect property, the fact that the property in question was a living creature, and not an inanimate object, was given great weight in the court's decision. So, while the court continues to accept the common law notion of the horse being property, it allowed for an expansion in warrantless search and seizure cases where the property in question was a living animal. The *Nix* holding (adopted by *Hess*) is critical because it provides a further incentive for animal owners to provide adequate care for their animals; no longer will an owner neglecting more than one animal have their sentence clumped together, rather that owner will face separate sentences for each animal he neglected. The *Nix* holding will affect the way in which judges may sentence those prosecuted under animal welfare statutes in Oregon in a way that will provide justice for each animal harmed.

Together, these holdings may be laying the foundation for equitable self-ownership because they allow for sentient beings to carry greater worth than mere property. *Fessenden* may be read to expand a person's duty to not neglect living sentient property. Whereas the anti-neglect statutes provide duties owed to the state, equitable self-ownership would place affirmative duties owed to the living sentient property itself. Similarly, in *Nix*, where the court recognized that animals could be legal victims, the concept of equitable self-ownership is applicable. While the owner owes affirmative duties to the state to not neglect the animals, the holding that each animal is a victim for sentencing can easily transition into the owner owing affirmative duties to the animal

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101 *Id.* at 774.

as well. Although not exactly in line with Favre's equitable self-ownership theory, *Nix* and *Fessenden* may be laying the foundation to the ability to provide animals with duties owed to them by their legal titleholders.

Fessenden and *Nix* provide a critical step in the right direction towards attaining better protection for animals, which may not be too surprising considering that Oregon has been ranked third in the nation for animal protection laws.[102] Oregon appears to be on the leading side of animal welfare statutes, affording more protection for animals and greater punishment for those that mistreat them. Oregon's legislature has already created felony penalties for animal cruelty, fighting, and neglect.[103] Now, Oregon's judicial law is continuing to expand animal jurisprudence by ensuring that those statutes are interpreted in a way that create greater implications for those who violate them.

CONCLUSION

Continuing changes in statutory enactments and judicial interpretations of statutory law have created a space where animals no longer hold merely a property status. Instead, they occupy a space somewhere in between inanimate personal property and legal personhood. While that space may not be defined as of yet, it is obvious that the trend in most states has moved away from perceiving animals the same way intangible objects of personal property are perceived. Rather, expansions in statutory protections and subsequent judicial law interpretations of those statutes suggest that animals can be afforded more justice. While it is unlikely that animals will ever attain full legal personhood similar to humans, it is likely that state legislatures and courts will be more willing to ensure animal safety and wellbeing via a different route. Rather than having the ability to sue for their own freedom or damages, animals are slowly being afforded more and more protections to ensure that those who mistreat them are punished to the fullest extent. With such statutes on the books, there will be less of an incentive for, or a greater fear from, people who mistreat animals.

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102 ANIMAL LEGAL DEFENSE FUND, *2014 U.S. Animal Protection Laws Rankings*, 7, http://aldf.org/wp-content/uploads/2014/12/2014-United-States-Animal-Protection-Laws-Rankings.pdf.

103 *Id.* at 10.