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Considering the Private Animal and Damages

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CONSIDERING THE PRIVATE ANIMAL AND DAMAGES

RICHARD L. CUPP, JR.*

ABSTRACT

Since 2018, private law damages claims seeking to place animals in the role of plaintiffs have—in dramatic fashion—moved from academic debate to high-profile litigation. Focusing on two recent cases, this short Article asserts that lawsuits seeking to make animals plaintiffs in damages actions are much more than flashy news fodder; they raise profound policy issues that courts will struggle with into the foreseeable future. The most recent prominent case, Justice v. Vercher, is ongoing litigation seeking to designate a severely neglected horse as the plaintiff in a tort damages lawsuit against the horse’s owner. The second case, Naruto v. Slater, unsuccessfully sought to designate a monkey as the plaintiff in a copyright infringement lawsuit. Both cases illuminate significant implications of seeking to designate animals as plaintiffs in private law damages lawsuits. Thankfully, societal concern about animal welfare is rapidly increasing, although more needs to be done to protect animals. But efforts like Vercher and Naruto represent a societally harmful approach to animal protection. Such cases may continue to fail in the short term, but regardless of short-term failure or success, analogous lawsuits are nevertheless likely to proliferate over time because the stakes are so high—success could be a back door to breaking down legal barriers between humans and animals. Further, as societal views regarding animals quickly evolve, the possibility of misguided rulings creating dangerous animal legal personhood through such lawsuits is real.

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INTRODUCTION

This short article analyzes the policy implications and potential impact of two highly publicized recent cases seeking to make animals private law damages plaintiffs.¹ Part I addresses potential implications of *Justice v. Vercher*,² an Oregon case filed in 2018. In *Vercher* an animal rights organization put forward a neglected horse as a plaintiff to sue its former owner for tort damages in Oregon. This Part addresses why this lawsuit, although still in progress, presents dangerously sympathetic facts and is a particularly significant innovation by animal rights activists. This Part also articulates how allowing the horse to serve as a tort damages plaintiff would greatly harm society and why the radical step of making the horse a plaintiff is unnecessary to obtain justice in the case.

Part II addresses how the Ninth Circuit's 2018 ruling in the famous—or perhaps infamous—“monkey selfie” copyright case, *Naruto v. Slater*,³ implicates the viability of future private law animal plaintiff damages lawsuits. This Part analyzes several ways in which the Ninth Circuit's decision will appropriately impede future efforts to make animals damages plaintiffs, both in copyright and in other areas, such as torts. However, the enormous publicity generated by the facts and legal claims in *Naruto* is something of a wild card, and it is possible that this publicity could in some respects benefit animal plaintiff damages claims over time.

The Conclusion concludes that—although future animal plaintiff copyright claims and future animal plaintiff tort claims are likely to follow somewhat different trajectories—they are related in the sense that they represent private law damages actions as a potential path to breaching the legal barrier between humans and animals. Attaining legal personhood for animals is perhaps the “holy grail” for some animal rights activists, and because the societal implications of success would be so dramatic, it seems likely that both *Vercher* and *Naruto* will serve as trailblazers for a growing wave of dangerous animal plaintiff damages lawsuits.

I. *JUSTICE V. VERCHER*: VICTIMHOOD, PERSONHOOD, AND A RENAMED HORSE

At first blush, asserting that abuse victims who can establish a sufficient degree of fault and reasonably foreseeable causation of harm should be

1. This article focuses on animals as plaintiffs in private law damages actions. Animals are, of course, also sometimes relevant in other areas of private law not addressed in this article, such as divorce proceedings, wills, and trusts.

2. *Justice v. Vercher*, No. 18CV17601, 2018 WL 11189952, *1 (Or. Cir. May 1, 2018), *appeal docketed*, No. A169933 (Or. Ct. App. Jan. 22, 2019).

3. *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018).

entitled to tort damages from their abusers hardly seems controversial. But when the “victim” is a horse, allowing such a lawsuit would signal a dramatic change in our tort system and have societal implications well beyond tort law.

In 2018 the Animal Legal Defense Fund (hereafter “ALDF”) filed *Justice v. Vercher* in Washington County, Oregon.⁴ After being dismissed by a trial court for lack of standing, the lawsuit is now progressing through the state’s appellate system.⁵ In the lawsuit, the ALDF asserts that a criminally neglected horse should be permitted to recover tort damages against its former owner.

Scholars have previously debated the idea of tort damages lawsuits naming animals as plaintiffs,⁶ but the *Vercher* case is the most significant effort to date to shift the concept from the academy to the courthouse. For several reasons, the lawsuit has weighty implications.

First, the context is novel and explosive. Most of the controversial lawsuits that have thus far unsuccessfully sought animal legal personhood in the United States in recent years—some of them still working their way through appellate courts—have focused on the particularly strong cognitive abilities of species kept by humans only in relatively small numbers (specifically, chimpanzees, cetaceans, and elephants), rather than focusing on the much broader capacity to suffer that creates the basis for identifying abused animals as victims for some purposes.⁷ If the *Vercher* claim were to succeed, potentially millions of animals’ legal status might change, with enormous financial and societal implications.⁸

4. *Vercher*, 2018 WL 11189952, *1.

5. *Id.* Pro Tem Judge John S. Knowles issued an Opinion Letter dismissing the lawsuit on September 17th, 2018, which is available online. Opinion Letter, *Justice v. Vercher*, No. 18CV17601, 2018 WL 11189952, *1 (Or. Cir. May 1, 2018), http://media.oregonlive.com/washingtoncounty_impact/other/Justice%20ruling.pdf [<https://perma.cc/48H8-PZQ4>]. Given the prominence of the issues the case raises and its potential for creating change, it seems quite likely that regardless of the intermediate appellate court’s ruling, the case will be appealed further to the Oregon Supreme Court.

6. For example, Professor David Favre provided a detailed proposal for allowing animals to be designated as tort lawsuit plaintiffs in David S. Favre, *Judicial Recognition of the Interest of Animals—A New Tort*, 2005 MICH. ST. L. REV. 333 (2005). The author challenged this proposal in Richard L. Cupp, Jr., *A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood as Stepping Stones Toward Abolishing Animals’ Property Status*, 60 SMU L. REV. 3, 34–54 (2007).

7. See, e.g., *Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc.*, 216 A.3d 839 (Conn. App. Ct. 2019) (rejecting legal personhood for elephants); *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 152 A.D.3d 73 (N.Y. App. Div. 2017), *lv denied*, 100 N.E.3d 846 (N.Y. 2018) (rejecting legal personhood for chimpanzees); *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148 (N.Y. App. Div. 2014), *lv denied*, 38 N.E.3d 828 (N.Y. 2015) (also rejecting legal personhood for chimpanzees); *Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Ent., Inc.*, 842 F. Supp. 2d 1259, 1264 (S.D. Cal. 2012) (rejecting legal personhood for orcas).

8. See *infra* notes 71–86 and accompanying text.

Second, the media have highlighted the case due to its unsettling facts and its novel legal theories, enhancing its potential for broad influence.⁹ Third, Oregon's legislature and courts have evidenced distinctive enthusiasm for legal reform that would provide better protection for animals.¹⁰ Thus far the state's evolution has been positive, but this case will test whether Oregon's courts might be tempted to step beyond animal welfare to accept radical animal rights dressed in the comfortingly routine language of following precedents.

Fourth, the ALDF is perhaps the nation's largest and most influential legal organization pressing for animal legal rights.¹¹ The ALDF likely has the resources to pursue this case and perhaps future analogous cases aggressively, and it may have less of a credibility problem with the courts than would some other animal rights groups.

Some jurisdictions have expanded civil remedies against animal abusers in recent years. However, this expansion has focused on awarding damages to pets' owners against third parties who have intentionally abused the owners' pets, rather than on providing civil remedies for the animals themselves.¹² An overwhelming majority of courts deny pet owner emotional distress damages when a pet is negligently harmed or killed by a third party. However, some courts now allow such damages for intentional and malicious harm to another's pet. Although rejecting owner emotional

9. See, e.g., Karin Brulliard, *Seeking Justice for Justice the Horse*, WASH. POST (Aug. 13, 2018), <https://www.washingtonpost.com/news/national/wp/2018/08/13/feature/a-horse-was-neglected-by-its-owner-now-the-horse-is-suing/> [<https://perma.cc/MB9E-E9FB>]; *Neglected Oregon Horse Listed as \$100K Lawsuit Plaintiff*, ASSOCIATED PRESS (May 3, 2018), [https://apnews.com/04442857cc4c4eb09efa72cad4e14cb6/Neglected-Oregon-horse-listed-as-\\$100K-lawsuit-plaintiff](https://apnews.com/04442857cc4c4eb09efa72cad4e14cb6/Neglected-Oregon-horse-listed-as-$100K-lawsuit-plaintiff) [<https://perma.cc/43D7-ZM49>]; Joshua Rhett Miller, *Horse Sues Former Owner for Negligence, Wants \$100K*, N.Y. POST (May 3, 2018), <https://nypost.com/2018/05/03/horse-sues-former-owner-for-negligence-wants-100k/> [<https://perma.cc/A9LA-4UZC>]; Brad Mielke & Pavni Mittal, *A Horse Named Justice Sues Former Owner for More than \$100,000 for Neglect*, ABC NEWS (May 2, 2018, 3:28 PM), <https://abcnews.go.com/US/horse-named-justice-sues-owner-100000-neglect/story?id=54880051> [<https://perma.cc/7CY5-FZVN>].

10. See *infra* notes 31–70 and accompanying text.

11. The ALDF asserts that its efforts “are supported by thousands of dedicated attorneys and more than 300,000 members and supporters.” *About Us*, ANIMAL LEGAL DEF. FUND, <https://aldf.org/about-us/> [<https://perma.cc/GB84-FLYC>]. Some other groups promoting animal rights may have more members, but they do not exclusively focus on law.

12. See, e.g., *Womack v. Von Rardon*, 135 P.3d 542 (Wash. Ct. App. 2006) (considering the death of a cat caused by the defendants intentionally setting it on fire and granting plaintiff emotional distress damages based on defendants intentionally harming the cat but rejecting liability for the tort of outrage due to insufficient proof of intent to emotionally harm the plaintiff).

distress damages is wise in negligence cases,¹³ allowing such damages when a pet is, with malice, *intentionally* harmed represents good legal reform.¹⁴

In *Vercher* the ALDF is—with much fanfare—urging Oregon’s courts to push the envelope much further. Utilizing Oregon legislation and case law, the ALDF contends that an animal’s purported “guardian” should be permitted to pursue damages against an animal’s abuser in the animal’s own name.¹⁵ In other words, the lawsuit in effect seeks to treat an animal as a legal person with a right to pursue civil remedies for tortious harms inflicted upon it.

A. *Dangerously Bad Facts*

Vercher’s facts are appalling. According to the complaint, defendant Gwendolyn Vercher owned the horse named as the plaintiff. At that time the horse was named Shadow.¹⁶ A neighbor called a horse rescue organization, requesting that the organization “take custody of [Shadow] because he was underfed and emaciated.”¹⁷ The neighbor also urged Ms. Vercher to take Shadow to a veterinarian to be evaluated. When Ms. Vercher took Shadow to a veterinarian, the veterinarian “observed that [Shadow]’s penis had prolapsed and could not retract because it was so swollen and heavy.”¹⁸ The veterinarian described the horse’s penis as “red [and] raw” and “oozing serum,” and the “skin was chapped and scabbed.”¹⁹

Ms. Vercher later “surrendered” the horse to an organization named Sound Equine Options for care.²⁰ The organization’s director took the horse to an equine hospital, where the horse was found to be 300 pounds underweight and suffering from “extreme emaciation.”²¹ Because the horse had been unable to retract his prolapsed penis into its sheath (“likely due to his severely debilitated body condition”), and was exposed to “chronic cold temperatures,” the horse “developed penile frostbite, which led to severe

13. See Richard L. Cupp, Jr., *Barking Up the Wrong Tree*, L.A. TIMES (June 22, 1998, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1998-jun-22-me-62429-story.html> [<https://perma.cc/XC8A-2KQH>] (addressing reasons for opposing owner emotional distress damages in negligent harm cases).

14. Cases involving intentional harm entail greater moral culpability, and, unlike negligence cases, do not risk causing indirect harm to animals through potentially increasing veterinary medical costs.

15. Oregon has not designated the purported “guardian” named in the lawsuit as the horse’s legal guardian. The purported guardian is described in the complaint as “the Executive Director of Sound Equine Options” and as “the person responsible for Justice’s care and well-being.” Complaint at ¶ 5, *Justice v. Vercher*, No. 18CV17601, 2018 WL 11189952, *1 (Or. Cir. May 1, 2018).

16. *Id.* at ¶ 10.

17. *Id.* at ¶ 11.

18. *Id.* at ¶ 12.

19. *Id.*

20. *Id.* at ¶ 14.

21. *Id.* at ¶ 16.

trauma, infection, and scarring.”²² The treating veterinarian described the horse’s prolapsed penis as the most severe case he had ever treated.²³

Ms. Vercher pleaded guilty under Oregon’s anti-cruelty statute to neglect of the horse in the first degree.²⁴ Her plea agreement included a requirement that she provide restitution to Sound Equine Options for expenses it had incurred for the horse’s care prior to July 6, 2017. However, the lawsuit asserts that “Defendant’s plea agreement does not include restitution for the cost of [the horse]’s care after July 6, 2017.”²⁵ The complaint asserts that, because of its extensive injuries, the horse will require expensive care that would not otherwise be needed, including a likely partial amputation of his penis.²⁶

In a move lacking subtlety, prior to the lawsuit being filed, Shadow’s name was changed to “Justice.”²⁷ The lawsuit pleads negligence per se based on violation of Oregon’s anti-cruelty statute and seeks—among other remedies—past costs of care incurred after July 6, 2017, future costs of care, and noneconomic damages.

The complaint includes a photograph of Justice taken “immediately after he was rescued,”²⁸ in which the horse appears to be in disturbing condition. The appalling facts asserted in the lawsuit make it more difficult and dangerous than a case with milder circumstances would be, because the emotions that bad facts arouse sometimes lead to bad law. Allowing an animal rights organization such as the ALDF to pursue civil remedies in the name of an animal—in effect creating legal personhood for animals—would be exceptionally bad law.

B. Distinguishing Victimhood and Legal Personhood

Courts, of course, decline to grant civil remedies unless the plaintiff has standing to sue.²⁹ The ALDF seeks to build legal personhood for the horse renamed Justice on Oregon case law recognizing that, for some purposes, an animal may be viewed as a crime victim. The ALDF asserts that crime victims have the right to sue their abusers in civil court, and because Oregon

22. *Id.* at ¶¶ 17–18.

23. *Id.* at ¶ 18.

24. *Id.* at ¶ 32.

25. *Id.* at ¶ 33.

26. *Id.* at ¶ 27.

27. *See* Brulliard, *supra* note 9.

28. Complaint at 2, *Vercher*, No. 18CV17601, 2018 WL 11189952, *1.

29. *See, e.g.,* Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc., 216 A.3d 839 (Conn. App. Ct. 2019) (rejecting lawsuit seeking elephant legal personhood because neither the advocacy group seeking recognition of elephants as legal persons nor the elephants themselves had standing to sue).

law views animals as victims in the context of abuse, Justice should be able to assert a tort claim in Oregon.³⁰

Four interesting Oregon cases form the foundation of the ALDF's argument that a horse may pursue tort remedies. In 2014, the Oregon Supreme Court decided *State v. Nix*.³¹ In *Nix*, police officers acted on a tip that animals were being neglected at the defendant's farm. At the farm, they found dozens of emaciated horses and goats, along with the bodies of other animals that had perished.³² A jury convicted the defendant of twenty counts of second-degree animal neglect involving twenty separate animals.³³ At sentencing, the state sought to impose twenty separate convictions, one for each neglected animal.³⁴ The trial judge rejected this request, ruling that under the relevant Oregon animal neglect statute animals cannot be treated as individual "victims."³⁵ An intermediate appellate court and the Oregon Supreme Court disagreed, holding that the legislature intended to protect animals when it enacted the statute and thus that animals may be considered victims under the statute for purposes of obtaining multiple convictions for neglect of multiple animals.³⁶

Nix was later vacated on procedural grounds, but its reasoning was adopted by an Oregon appellate court in *State v. Hess*.³⁷ In *Hess*, the defendant was convicted of forty-five counts of animal neglect for "failure to provide minimum care for her cats."³⁸ At sentencing, the defendant argued that the court should merge all forty-five counts into a single conviction, "because the cats were her property and, thus, not victims, leaving only one victim of her crimes—the public."³⁹ The trial court had rejected this argument, treating each neglected cat as a separate victim and imposing forty-five convictions on the defendant.⁴⁰ The appellate court upheld the trial court's ruling, simply explaining that *Nix* previously addressed the same issue, and that *Nix* was persuasive.⁴¹

Like in *Vercher*, the Oregon Supreme Court's decision in *State v. Fessenden*⁴² involved a neglected horse. In *Fessenden*, the defendants' neighbors reported to the police that the defendants' horse, which was kept

30. Response to Defendant's Motion to Dismiss at 1–2, *Vercher*, No. 18CV17601, 2018 WL 11189952, *1.

31. *State v. Nix*, 334 P.3d 437 (Or. 2014), *vacated*, 345 P.3d 416 (Or. 2015).

32. *Id.* at 438.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 439.

37. *State v. Hess*, 359 P.3d 288 (Or. Ct. App. 2015).

38. *Id.* at 289.

39. *Id.* at 292.

40. *Id.* at 290.

41. *Id.* at 293.

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

in a pasture visible to the neighbors, appeared to be starving.⁴³ When an officer with specialized training in animal husbandry and animal cruelty arrived at the scene, he observed the horse from a driveway shared by the neighbors and recognized signs of emaciation and kidney failure.⁴⁴ The officer believed that the horse might fall and suffer a potentially fatal injury if he took the time needed to obtain a warrant to enter the defendants' property.⁴⁵ Thus, the officer entered the property without a warrant and seized the horse to take it to a veterinarian.⁴⁶

The defendants moved that the court should suppress evidence that was obtained after the officer's seizure of the horse because the officer failed to obtain a warrant before entering their property, as required by the Oregon Constitution and United States Constitution.⁴⁷ The state asserted two exceptions to the warrant requirement: the exigent circumstances exception and the emergency aid exception.⁴⁸ The exigent circumstances exception requires the state to prove both probable cause and exigency; the emergency aid exception requires only exigency.⁴⁹

For the emergency aid exception in Oregon to apply, an officer must reasonably believe that a warrantless search, seizure, or entry is necessary "to render immediate aid to persons . . . who have suffered, or who are imminently threatened with suffering, serious physical injury or harm."⁵⁰ The court emphasized that the emergency aid exception requires that the victim be a "person" and promptly punted on addressing whether it applied. The court concluded that it did not need to decide whether the emergency aid exception applied, because it found the officer's warrantless action justified under the exigent circumstances exception.

The court highlighted that, unlike the emergency aid exception, the exigent circumstances exception may be used to prevent serious damage to property.⁵¹ Further, it noted an Oregon statute finding that "[a]nimals are sentient beings capable of experiencing pain, stress and fear."⁵² Although it left open the possibility that "the day may come when humans perceive less separation between themselves and other living beings than the law now reflects,"⁵³ the court made clear that animals are property under the law and

43. *Id.* at 280.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 280, 281–82.

49. *Id.* at 281–82.

50. *Id.* (quoting *State v. Baker*, 260 P.3d 476 (Or. 2011)).

51. *Id.* at 282.

52. *Id.* at 283 (quoting OR. REV. STAT. § 167.305(1) (2019)).

53. *Id.* at 284.

therefore are not treated the same as humans.⁵⁴ However, because Oregon law protects animals from neglect, an animal may be a “victim” in circumstances calling for application of the exigent circumstances exception to the search warrant requirement.⁵⁵ In other words, although an animal may be property, it is not *mere* property under Oregon law. Rather, it is a protected form of property that Oregon recognizes as capable of suffering pain and garnering protection under Oregon’s animal neglect statute.

Finally, in 2016 the Oregon Supreme Court addressed another Fourth Amendment unconstitutional search claim related to a conviction under Oregon’s animal neglect statute. In *State v. Newcomb*, the defendant was convicted of second-degree animal neglect after failing to adequately feed her dog, which had caused the dog to become malnourished.⁵⁶

A police officer had gone to the defendant’s home to investigate a report that she was abusing and neglecting her dog. While at the home, the officer saw the defendant’s dog and reasonably suspected that the dog was malnourished.⁵⁷ He took custody of the dog and asked a veterinarian to examine it.⁵⁸ Acting without a warrant, the veterinarian took a blood sample from the dog to confirm that it was emaciated from malnutrition and not a parasite or other medical condition.⁵⁹

The blood test ruled out other causes of the dog’s emaciation, and the state used this evidence in obtaining an animal neglect conviction against the defendant.⁶⁰ The defendant asserted that this warrantless blood test of her dog constituted an illegal “search” of her property and that the blood test must be excluded from evidence.⁶¹

In rejecting this argument, the Oregon Supreme Court provided its most elegant analysis to date regarding animals’ status as a unique, protected form of property. In reaffirming animals’ property status, the court cited an Oregon statute that expressly states: “Dogs are hereby declared to be personal property.”⁶² However, the court continued, an animal is far different than inanimate property. For example, “[u]nder Oregon law, there are many exceptions to a person’s ability to lawfully own and possess certain animals.”⁶³

54. *Id.* at 283.

55. *Id.* at 286.

56. *State v. Newcomb*, 375 P.3d 434, 435–36 (Or. 2016).

57. *Id.* at 436.

58. *Id.* at 437.

59. *Id.*

60. *Id.*

61. *Id.* at 437–38.

62. *Id.* at 440 (quoting OR. REV. STAT. § 609.020 (2019)).

63. *Id.* at 440 n.9.

Further, the law affords animals many protections that distinguish them from inanimate property. Indeed, “Oregon’s animal welfare statutes impose one of the nation’s most protective statutory schemes.”⁶⁴ This reflects Oregon’s statutory recognition that animals have special status as sentient beings.⁶⁵ Although Oregon law “does not place [animals] on a par with humans,”⁶⁶ the court was careful to note, “[w]hat matters here is that Oregon law prohibits humans from treating animals in ways that humans are free to treat other forms of property.”⁶⁷ Humans’ obligations regarding animal welfare, therefore, “have no analogue for inanimate property.”⁶⁸

Because of animals’ protected status, their owners have no right to block—in the name of privacy—appropriate steps to investigate whether their animals have been unlawfully neglected.⁶⁹ Thus, the court rejected the defendant’s effort to exclude her dog’s blood evidence as a violation of Fourth Amendment privacy protections.

Newcomb may be on the legal frontier, but it is not on the legal fringe. Rather, it is a well-reasoned decision reflecting desirable societal evolution toward providing more protection for animals without falling off the deep end and declaring that animals are legal persons. Indeed, the Association of Prosecuting Attorneys, the National District Attorneys Association, and the Oregon Veterinary Medical Association—hardly fringe animal rights groups—joined the ALDF in an amicus curiae brief urging the court to uphold the defendant’s conviction.⁷⁰

All four of the Oregon cases discussed above reflect well on the state’s appellate courts. Each is thoughtful and innovative rather than reckless or overreaching. Legislation and case law need to evolve to reflect growing societal concern for animals’ welfare, and these cases are exemplary. Because each animal protected by Oregon’s animal neglect laws is capable of suffering, neglecting multiple animals should call for more punishment than neglecting a single animal. Further, although animals are appropriately viewed as a form of property in Oregon, they are the most unique of our multiple forms of property because they require protection from unnecessary suffering. This need to protect animals from unnecessary suffering should influence property search and seizure rules, as they have in these Oregon cases. But seeking to use Oregon’s thoughtful animal welfare evolution as a justification for, in effect, the radical concept of animal legal

64. *Id.* at 440 (quoting *State v. Fessenden*, 333 P.3d 278 (Or. 2014)).

65. *Id.* at 441.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 443.

70. *Id.* at 435.

personhood is quite dangerous, and it risks a step backward for animal protection.

C. A Horse Is a Horse, of Course, of Course—but It Is Not a Table or a Chair

Adopting animal legal personhood as a mechanism to provide for ongoing medical expenses as a damages remedy in the *Vercher* case would represent dramatic overkill and would create harmful societal consequences. It is also unnecessary for the protection of neglected animals. Some aspects of the chaos and harm that would be caused by such a judicial holding may be unforeseeable prior to such a leap in the dark. Some of the most significant foreseeable problems associated with making animals tort plaintiffs are addressed below.

1. Inviting Potentially Massive, Unmanageable, and Societally Harmful Litigation

If courts adopted the ALDF's theory in *Vercher*, a massive pool of other animals as potential plaintiffs would be created. If lawyers then asserted that even some of those animals were neglected or abused, animal rights activists could flood the courts with a huge volume of lawsuits and assert to represent the new legal persons. Further, if animal legal personhood were accepted in this context, litigation would doubtlessly spread quickly to lawsuits challenging biomedical research on such "persons," any commercial use of such "persons," and even pet ownership of such "persons."

Throughout the United States, varying degrees of legal protection against abuse or neglect apply to virtually all mammals (and some non-mammals, such as birds) that are under the control of humans. Not only horses, but dogs, cats, cows, pigs, sheep, mice, rats, and a large range of other animals may thus be viewed as "victims" of neglect or abuse. Viewing them as such is a good thing under Oregon's present approach to animal victimhood; for example, it can facilitate harsher sentencing for the mistreatment of multiple animals than the mistreatment of one animal, regardless of whether the animal is a horse or some other kind of protected animal. However, if courts allow this helpful evolution to bootstrap legal personhood for all animals protected from abuse, they would create a pool of hundreds of millions or perhaps billions of potential new tort law plaintiffs eligible to sue if lawyers allege they were neglected or abused.

The American Society for Prevention of Cruelty to Animals asserts that 250,000 animals are victims of hoarding alone each year in the United

States.⁷¹ But clearly, the scope of potential new plaintiffs is much broader. In 2012, the American Veterinary Medical Association estimated that approximately 149 million pet dogs, cats, and horses live in the United States.⁷² There are approximately 95 million cattle⁷³ and 73 million hogs and pigs in the United States.⁷⁴ These five species alone, all of which are the subject of legal protections against abuse or neglect, exist in the United States in numbers almost equivalent to its human population.⁷⁵ The ALDF estimates that 9 billion animals are raised and used for food in the United States each year.⁷⁶ Opening up the courts to this vast number of potential plaintiffs would invite extreme societal disruption.

Further, ambitions related to the *Vercher* case may go far beyond allowing animals alleged to be victims to file torts lawsuits. An ALDF press release issued when it initiated *Vercher* stated that “existing laws still lag far behind our current understanding of animal sentience by classifying animals as property.”⁷⁷

This appears to reflect a position not only that abused animals should be legal persons, but also that sentient animals’ property status should be abolished altogether. If animals capable of suffering pain were no longer classified as a form of property, potential implications for food sources, scientific research, animal-based products, and the economy in general would be monumental. If the first proposed jump is made—a mammal is a legal person for purposes of abuse and neglect laws—the second jump to arguing that a legal person cannot be eaten or held “captive” for any human uses is obvious.

A group of law professors filed an amicus curiae brief (hereafter “Professors’ Brief”) in the *Vercher* appeal describing the legal relief sought in this case as “modest, entirely in-step with an emerging jurisprudence of

71. *A Closer Look at Animal Hoarding*, ASPCA, <https://www.aspc.org/animal-cruelty/animal-hoarding/closer-look-animal-hoarding> [https://perma.cc/3AA4-NJEC].

72. *See Market Research Statistics – U.S. Pet Ownership 2012*, AVMA, <https://www.avma.org/resources/reports-statistics/market-research-statistics-us-pet-ownership-2012> [https://perma.cc/KF8K-GLXE].

73. *See* Rob Cook, *Cattle Inventory*, BEEF2LIVE (Nov. 13, 2020), <http://beef2live.com/story-unit-ed-states-cattle-inventory-124-108177> [https://perma.cc/JZ3A-T848].

74. *See United States Hog Inventory Up 3 Percent*, U.S. DEP’T OF AGRIC. (Mar. 29, 2018), https://www.nass.usda.gov/Newsroom/2018/03_29_2018-1.php [https://perma.cc/37KH-BJLB].

75. The combined number of these five species in the United States is approximately 317 million. The United States’ human population is approximately 329 million. *See U.S. and World Population Clock*, U.S. CENSUS BUREAU, <https://www.census.gov/popclock/> (last visited Mar. 3, 2020).

76. *Farmed Animals*, ANIMAL LEGAL DEF. FUND, https://aldf.org/focus_area/farmed-animals/ [https://perma.cc/82JL-2VDX].

77. Press Release, Animal Legal Def. Fund, *Groundbreaking Lawsuit Argues Animals Have the Right to Sue Their Abusers in Ct.* (May 1, 2018), <https://aldf.org/article/groundbreaking-lawsuit-argues-animals-right-sue-abusers-court/> [https://perma.cc/8ERF-5ANW].

animal law, and consistent with the best reading of Oregon’s existing law.”⁷⁸ This is incorrect. As demonstrated above, the legal relief sought in this case has enormous and dangerous policy implications best left to the legislature to consider.⁷⁹

The Professors’ Brief asserts that “the full-scope of personhood protections owed to domesticated animals need not be decided” in this case.⁸⁰ But this effort to minimize the impact of assigning legal personhood to a horse is ineffective. Of course a panoply of extensions would be sought if the barrier between animals and legal persons was breached in a case like *Vercher*, and considering the extent of a legal ruling’s consequences cannot simply be left for later.

Further, even in the short term, the focus of the Professors’ Brief on domesticated animals does not significantly limit the potential impact of animal personhood. As documented above, domesticated animals might number in the billions in the United States. Cattle have been considered domesticated for at least 10,000 years.⁸¹ The *Merriam-Webster Dictionary* lists sheep as an illustration of a domestic animal (defined as “any of various animals (such as the horse or sheep) domesticated so as to live and breed in a tame condition”).⁸² Pigs have been domesticated for approximately 9,000 years.⁸³

In its briefing for the appeal to the Oregon Court of Appeals, the ALDF sought to refute the trial court’s astute observation that allowing this lawsuit to proceed “would likely lead to a flood of lawsuits whereby non-human animals could assert claims we now reserve just for humans and human creations such as businesses and other entities.”⁸⁴ The ALDF alleged that the floodgate-of-litigation concern is unpersuasive because lawsuits would only be available for conduct that is already illegal.⁸⁵ This is far from reassuring.

78. Animal Law Professors *Amicus Curiae* Brief at 3–4, Justice v. Vercher, No. 18CV17601, 2018 WL 11189952, *1 (Or. Cir. May 1, 2018), *appeal docketed*, No. A169933 (Or. Ct. App. Jan. 22, 2019) (on file with author).

79. See *supra* note 71–76 and accompanying text.

80. Animal Law Professors *Amicus Curiae* Brief, *supra* note 78, at 5.

81. See Daniel Pitt et al., *Domestication of Cattle: Two or Three Events?*, 12 EVOL APPL. (SPECIAL ISSUE) 123, 124 (2019).

82. *Domestic Animal*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/domestic%20animal> [<https://perma.cc/F9PF-HB3C>].

83. See Elizabeth Pennisi, *The Taming of the Pig Took Some Wild Turns*, SCIENCE MAG. (Aug. 31, 2015), <https://www.sciencemag.org/news/2015/08/taming-pig-took-some-wild-turns> [<https://perma.cc/GN4M-B7TK>].

84. Opinion Letter, *supra* note 5, at 1.

85. Appellant’s Opening Brief and Excerpt of Record at 25–28, Justice v. Vercher, No. 18CV17601, 2018 WL 11189952, *1 (Or. Cir. May 1, 2018), *appeal docketed*, No. A169933 (Or. Ct. App. Jan. 22, 2019) (on file with author).

There is no assurance that an animal would be considered a legal person and capable of bringing a lawsuit only in cases where there was a correlating criminal *conviction* for abuse or neglect. Sadly, the number of animals abused and neglected is doubtlessly much higher than the number of criminal convictions for such abuse and neglect. Thus, considering the number of criminal abuse and neglect cases prosecuted at present is not a useful predictor of how many civil lawsuits might be brought. If hundreds of millions or billions of beings are granted the potential to stand as plaintiffs, torts lawsuits for even a relatively small percentage of domesticated animals could have a dramatic impact. As noted above, approximately 250,000 animals are victims of animal hoarding alone in the United States.⁸⁶

Finally, particularly for lawyers who morally oppose the use of animals for scientific research or food, an incentive would be created to pursue lawsuits that might have the effect of discouraging such uses in addition to protecting abused or neglected animals. Further, it seems likely that lawyers pursuing such claims will seek to be paid. Of course, most torts lawsuits are pursued on a contingency fee basis. Creating a financial incentive for finding and pursuing abuse or neglect claims—some of which would relate to legitimate abuse or neglect and some of which would perhaps not be meritorious—would further expand the number of potential lawsuits that could arise from a legal-personhood ruling in *Vercher*.

2. Legislatures and “Extraordinary Steps”

The ALDF’s briefing in *Vercher* emphasizes Oregon’s strong animal protection statutes as a foundation for creating animal legal personhood.⁸⁷ But none of these statutes took the “extraordinary step”⁸⁸ of directing that an abused or neglected animal should have standing as a legal person to bring a torts lawsuit. As noted above, the societal implications of assigning legal personhood to animals could be dramatic (to say the least). Policy decisions with broad societal consequences should generally be left to democratically elected legislatures with strong fact-finding resources. The Oregon legislature’s failure—or refusal—to declare that animal neglect victims should be legal persons capable of bringing torts lawsuits speaks loudly. As stated by the Ninth Circuit in an analogous context regarding federal legislation in *Cetacean Cmty. v. Bush*, “if Congress and the President intended to take the extraordinary step of authorizing animals as well as

86. See *supra* note 71 and accompanying text.

87. Response to Defendant’s Motion to Dismiss, *supra* note 30, at 5–6.

88. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1179 (9th Cir. 2004).

people and legal entities to sue, they could, and should, have said so plainly.”⁸⁹

3. *Animals as Property, but Not “Mere” Property*

Oregon’s legislature and courts have not been vague regarding animals’ property status; they have clearly confirmed it. As recently as 2016, the Oregon Supreme Court confirmed in *Newcomb* that “[u]nder Oregon’s statutes, animals . . . are deemed ‘property.’”⁹⁰ Further, as noted above, an Oregon Revised Statute (hereafter “ORS”), section 609.020, expressly states that “[d]ogs are hereby declared to be personal property.”⁹¹ As the ALDF’s press release quoted above reveals, the animal rights organization seems to hope that this case will help eliminate animals’ property status. But this goal is contrary to the will of Oregon’s elected legislature as expressed in ORS § 609.020.

Property is a highly flexible legal concept that can be molded for many purposes. Oregon’s case law expanding protections for animals recognizes this. For example, as addressed above, *Newcomb* was unequivocal in affirming that Oregon law “does not place [animals] on a par with humans,”⁹² but it also recognized that “[w]hat matters here is that Oregon law prohibits humans from treating animals in ways that humans are free to treat other forms of property.”⁹³ The special protections afforded to animals, the Oregon Supreme Court determined, “have no analogue for inanimate property.”⁹⁴

Unhappily for reasoned analysis, to many people, the term “property” conjures images of inanimate objects that may be used in any way the owner wishes. Thus, attributing a property status to animals is easily misunderstood as implying heartless disregard for their welfare. In reality, viewing animals as a specially protected form of property permits a balancing of animals’ utilities to humans and animals’ susceptibility to pain and suffering—and their distress if neglected or abused. Problems do not arise because of animals’ property status; they arise at one extreme from failure to protect this quite special form of property and at the other extreme from harmful efforts to reject the entire property paradigm rather than evolve within it.

89. *Id.*

90. *State v. Newcomb*, 375 P.3d 434, 441 (Or. 2016) (quoting *State v. Fessenden*, 333 P.3d 278 (2014)).

91. OR. REV. STAT. § 609.020 (2019).

92. *Newcomb*, 375 P.3d at 441.

93. *Id.*

94. *Id.*

4. *Discouraging Animal Protection Reforms by Legitimizing Slippery Slope Concerns*

Activists' overreach in seeking to use sensible pro-animal legal evolution to leverage radical upheaval strengthens the "give an inch and they'll take a mile" narrative that often seems to underlie opposition to desirable pro-animal reforms. In 2018 I argued against overusing slippery slope concerns to resist many animal-protection legal reforms in an article entitled *Edgy Animal Welfare*.⁹⁵ In the article, I acknowledged the slippery-slope problem that many animal welfare legal reforms could be used as a stepping-stone toward radical and harmful animal legal personhood. However, the article asserted that reforms are needed and that animal welfare proponents should engage in case-by-case balancing of slippery-slope risks and animal-welfare benefits in deciding whether to support or oppose proposed legal changes.⁹⁶ If the benefit of the expanded protection outweighs the likelihood that it would cause us to slip down a slope toward harmful animal legal personhood, animal welfare proponents should support the expansion. In other words, animal welfare proponents need to accept some reasonable risks of overreach to achieve positive evolution that will help animals. They need to support some "edgy" animal welfare proposals.

Oregon's pro-animal protection legislation and the pro-animal Oregon court rulings addressed in this article are, on their own merits, highly laudable animal welfare reforms. But *Vercher* provides a textbook illustration of pushing measured animal welfare court rulings and legislative reforms toward a slippery slope to the radical notion of animal legal personhood. If the court were to find that a horse is a legal person who can file a lawsuit, other states contemplating improvements to animal welfare protection might be discouraged from doing so due to concerns about creating a slippery slope toward radical animal rights.

The benefits of Oregon's pro-animal legislative and common law reforms thus far outweigh their risks. However, if Oregon was to accept the ALDF's dramatic overreach in *Vercher* as an extension of its earlier pro-animal reforms, the author's *Edgy Animal Welfare* thesis would perhaps reflect some degree of naiveté. Such a ruling would likely be pointed to as a cautionary tale by many animal personhood opponents when addressing otherwise sensible reform efforts ostensibly based on animal welfare rather than on animal personhood. Seeking to use thoughtful animal welfare reforms as a springboard to animal legal personhood may harm—rather than help—important animal welfare reform efforts.

95. Richard L. Cupp, Jr., *Edgy Animal Welfare*, 95 DENV. L. REV. 865 (2018).

96. *Id.* at 874–76.

5. *Legal Personhood's Connection to a Norm of Moral Agency
Sufficient to Bear Legal Accountability*

In recent years at least three appellate courts have unanimously rejected animal legal personhood because animals do not possess, individually or as a norm, sufficient moral agency to be legally accountable, and legal rights are intertwined at a broad but deep level with a norm of legal duty.⁹⁷ As Judge N. R. Smith put it simply in his concurrence in the Ninth Circuit's *Naruto v. Slater* "monkey selfie" copyright ruling, "[p]articipation in society brings rights and corresponding duties."⁹⁸ The attribution of legal personhood to infants and other humans with significant cognitive limitations is not pernicious speciesism or irrational biological prejudice; rather, it is anchored in their statuses as members of the human community, where sufficient moral agency to be legally accountable is the norm.⁹⁹ As explained in the 2017 New York intermediate appellate decision *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*:

Petitioner argues that the ability to acknowledge a legal duty or legal responsibility should not be determinative of entitlement to habeas relief, since, for example, infants cannot comprehend that they owe duties or responsibilities and a comatose person lacks sentience, yet both have legal rights. This argument ignores the fact that these are still human beings, members of the human community.¹⁰⁰

Further, the court recognized that corporate personhood does not reflect that the word "person" is a mere term of art, as corporations are proxies for humans.¹⁰¹

97. See *Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc.*, 216 A.3d 839, 846 (Conn. App. Ct. 2019) (rejecting animal legal personhood for elephants and emphasizing that they are "incapable of bearing legal duties, submitting to societal responsibilities, or being held legally accountable for failing to uphold those duties and responsibilities"); *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 152 A.D.3d 73, 78 (N.Y. App. Div. 2017), *lv denied*, 100 N.E.3d 846 (N.Y. 2018) (noting that "nonhumans lack sufficient responsibility to have any legal standing"); *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 151 (N.Y. App. Div. 2014), *lv denied*, 38 N.E.3d 828 (N.Y. 2015) (recognizing that "the ascription of rights has historically been connected with the imposition of societal obligations and duties").

98. *Naruto v. Slater*, 888 F.3d 418, 432 n.6 (9th Cir. 2018) (Smith, J., concurring in part).

99. The author develops this analysis at length in Richard L. Cupp, Jr., *Cognitively Impaired Humans, Intelligent Animals, and Legal Personhood*, 69 FLA. L. REV. 465 (2017) [hereafter *Cognitively Impaired Humans*], and in Richard L. Cupp, Jr., *Children, Chimps, and Rights: Arguments from "Marginal" Cases*, 45 ARIZ. ST. L.J. 1 (2013).

100. *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 152 A.D.3d 73, 78 (N.Y. App. Div. 2017), *lv denied*, 100 N.E.3d 846 (N.Y. 2018).

101. *Id.* at 78–79.

6. *A Straightforward Animal Welfare Solution*

Creating animal legal personhood is not necessary to address the medical care funding problem presented in cases such as *Vercher*. Straightforward solutions are available within an animal welfare paradigm. When the defendant in *Vercher* reached a plea bargain agreement for criminal animal neglect, the court only required that the defendant pay for the medical care and other expenses caused by the neglect up to a specific date.¹⁰² However, the complaint in *Vercher* asserted that further medical care and neglect-related expenses have been incurred since that date and that yet more expenses would be incurred in the future.¹⁰³ The complaint asserted that tort damages, with the horse as a legal-person plaintiff, were needed to obtain the neglect-related expenses that were already incurred and would be incurred after the cut-off date set forth in the criminal sentencing.¹⁰⁴

Simply, the horse owner's payment of medical and other neglect-related expenses should not have been allowed to end as of the date of her plea bargain. Assuming it was within the court's power, the plea bargain should have required the owner to pay future neglect-related expenses in addition to past neglect-related expenses. If, for some reason, courts presently do not have the power under Oregon law to require payment of future neglect-related expenses in plea bargains, the Oregon legislature should explore amending its animal neglect statutes to allow for this. The extraordinary step of creating animal legal personhood, however, is not justified, and it is especially inappropriate when straightforward approaches within our existing legal framework are available.

D. *Oral Argument Before the Oregon Court of Appeals*

In September 2020, a panel of the Oregon Court of Appeals heard oral arguments in the *Vercher* case.¹⁰⁵ Interestingly, many or most of the appellate judges' questions for the attorneys focused on exploring what distinctions exist between animals and humans with little or no moral agency, such as infants, for purposes of considering the boundaries of legal personhood. The panel's questions focused less on some of the more mundane grounds for rejecting the ALDF's appeal—that creating legal

102. Complaint, *supra* note 28, at ¶ 33.

103. *Id.* at 13 (Prayer for Relief).

104. *Id.*

105. Oral Argument, *Justice v. Vercher*, No. 18CV17601, 2018 WL 11189952 (Or. Cir. May 1, 2018), *appeal docketed*, No. A169933 (Or. Ct. App. Jan. 22, 2019), <https://oregoncourts.mediasite.com/mediasite/Play/e92bf836cddb47a98f73c597194129161d?catalog=7451ecdd054e43ee9f338460558f78fe21>. Regardless of how the Court of Appeals rules, it seems quite likely that the losing party will next appeal the case to the Oregon Supreme Court.

personhood is not needed to require an animal abuser to pay for an animal's ongoing medical expenses under existing Oregon law,¹⁰⁶ or that upending Oregon's legal system in the manner sought by the lawsuit would generate a host of complex implications best considered by the state's legislature.

Perhaps these grounds for rejecting the ALDF's lawsuit were not the subject of much questioning because they are more mundane or familiar. In any event, more discussion of the significance of humans' distinctive *norm* of sufficient moral agency to be appropriate subjects of legal accountability as a basis for legal personhood may have been useful in the oral argument. As noted above, ascribing legal personhood to humans with limited moral agency, but not to animals, is not irrational speciesism—rather, it is anchored in the distinctive interconnectedness of the human community, where strong moral agency is the norm.¹⁰⁷ The 2017 New York intermediate appellate decision in *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery* emphasized that membership in the human *community* is what grounds the legal personhood of infants and other humans lacking strong cognitive capacities.¹⁰⁸

For example, when an adult chimpanzee at the Los Angeles Zoo intentionally killed an infant chimpanzee in 2012 by smashing its head, the killer was certainly not prosecuted for murder under our human legal system.¹⁰⁹ As I set forth in a 2017 article:

Among the beings of which we are presently aware, humans are the only ones for whom the norm is capacity for moral agency sufficiently strong to fit within our society's system of rights and responsibilities. It may be added that no other beings of which we are presently aware living today, for example, the most intelligent of all chimpanzees, ever meet that norm. Recognizing personhood in our fellow humans, regardless of whether they meet the norm, is a pairing of like "kind" where the "kind" category has special significance—the significance of the norm being the only creatures who can rationally participate as members of a society with a legal system such as ours.

Morally autonomous humans have unique natural bonds with other humans who have cognitive impairments, and thus denying

106. See *supra* notes 102–104 and accompanying text.

107. See *supra* notes 97–101 and accompanying text.

108. *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 152 A.D.3d 73, 78 (N.Y. App. Div. 2017), *lv denied*, 100 N.E.3d 846 (N.Y. 2018).

109. See *Adult Chimpanzee Kills Baby Chimp in Front of Shocked Los Angeles Zoo Visitors*, CBS NEWS (June 27, 2012, 2:01 PM), <http://www.cbsnews.com/news/adult-chimpanzee-kills-baby-chimp-in-front-of-shocked-los-angeles-zoo-visitors/> [<https://perma.cc/BK83-LL54>]. The author discusses this factual scenario in *Cognitively Impaired Humans*, *supra* note 99, at 483–84, and in other writings.

rights to them also harms the interests of society—we are all in *community* together. Infants are human infants, and persons with severe cognitive impairments are humans who are other humans’ parents, siblings, children, or spouses. We have all been children, and we relate to children in a special way. Further, we all know that we could develop cognitive impairments ourselves at some point in our lives, and this reminds us that humanity is the most defining characteristic of persons with cognitive impairments.¹¹⁰

II. *NARUTO V. SLATER*: DAMNING ANIMAL PLAINTIFFS, BUT PRESENTING MIXED POTENTIAL IMPLICATIONS

Naruto v. Slater,¹¹¹ the famous “monkey selfie” case that garnered even more media attention than *Vercher*, may be an enigma regarding its implications for animals as private law plaintiffs seeking damages. At surface, the case was disastrous for animal copyright lawsuits and harmful to tort damages lawsuits. However, although the case likely destroyed the possibility of animal copyright for the foreseeable future, the lawsuit’s long-term impact on animal tort damages lawsuits may be complex.

In 2011 David Slater, a professional photographer, left his camera unattended in an animal reserve on the island of Sulawesi, Indonesia.¹¹² A crested macaque monkey named Naruto picked up Mr. Slater’s camera and took photographs of himself with it.¹¹³ Mr. Slater and his corporate partners published the “monkey selfies” and claimed copyright ownership of the photographs.¹¹⁴

In 2015 PETA and an individual who later withdrew from the lawsuit sued Mr. Slater and his corporate partners in the Northern District of California for copyright infringement.¹¹⁵ PETA and the individual who initially joined with PETA in the lawsuit claimed to be acting as next friends on behalf of the monkey.¹¹⁶ The court noted that “[t]he complaint does not allege any history or relationship between PETA and Naruto.”¹¹⁷

The District Court dismissed the lawsuit, holding that the complaint did not establish standing under the Copyright Act or under Article III of the

110. *Cognitively Impaired Humans*, *supra* note 99, at 506 (citations omitted).

111. *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018).

112. *Id.* at 420.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* Dr. Antje Engelhardt, the individual who initially joined in the lawsuit with PETA, was asserted to have “studied the crested macaques in Sulawesi, Indonesia for over a decade and has known, monitored, and studied Naruto since his birth.” *Id.* When Dr. Engelhardt later withdrew from the litigation, only PETA remained to assert itself as the monkey’s next friend. *Id.* at 421.

U.S. Constitution,¹¹⁸ and a Ninth Circuit panel unanimously affirmed the dismissal.¹¹⁹

The Ninth Circuit's rejection of PETA's arguments for standing could have been relatively straightforward. The court found itself to be bound by the earlier Ninth Circuit decision *Cetacean Cmty. v. Bush*,¹²⁰ which it interpreted as holding that an Article III case or controversy may exist in a lawsuit brought on behalf of an animal only if standing is granted by a statute.¹²¹

The complaint in *Cetacean* "alleged concrete physical injuries caused by the Navy's sonar systems in a suit brought by the 'self-appointed attorney for all of the world's whales, porpoises, and dolphins.'"¹²² The *Cetacean* court dismissed the lawsuit because the cetaceans lacked standing under the specific environmental statutes at issue in the case, but it stated that "Article III does not compel the conclusion that a statutorily authorized suit in the name of an animal is not a 'case or controversy.'"¹²³

Based on this precedent, the *Naruto* court held that an animal may have Article III standing even without a next friend representative if a statute grants such standing, but Congress did not grant standing to animals in the Copyright Act (and has not in any other statute).¹²⁴ The court also held that PETA lacked standing to serve as the monkey's next friend because Congress has not authorized next friend standing for animals.¹²⁵

The *Naruto* decision was complicated by a disagreement between the panel's judges regarding *Cetacean*'s scope as precedent. As noted above, the court's opinion viewed *Cetacean* as creating binding precedent that an animal may have Article III standing even without a next friend if expressly provided in a statute, but it found that the Copyright Act does not provide such standing.¹²⁶ In his concurring opinion, Judge N.R. Smith agreed that the Copyright Act does not allow standing for animals, but he disputed the majority's determination that *Cetacean* required the court to allow the possibility of Article III standing for animals if a statute were to expressly evidence congressional intent to grant such standing.¹²⁷

In essence, the majority seemed to strongly believe that PETA should lose on multiple grounds: PETA had no standing as a next friend, and

118. *Id.* at 420–21.

119. *Id.* at 427.

120. *Cetacean Cmty. v. Bush*, 386 F.3d 1169 (9th Cir. 2004).

121. *Naruto*, 888 F.3d at 420–21.

122. *Id.* at 424 (quoting *Cetacean*, 386 F.3d at 1171).

123. *Cetacean*, 386 F.3d at 1175; *Naruto*, 888 F.3d at 424.

124. *Naruto*, 888 F.3d at 425–26.

125. *Id.* at 422.

126. *Id.* at 425–26.

127. *Id.* at 427 (Smith, J., concurring in part).

regardless, animals do not have standing under the Copyright Act.¹²⁸ The concurrence asserted, with considerable passion, that PETA should also lose for a third reason: lawsuits with asserted animal plaintiffs do not have case-or-controversy standing under Article III.¹²⁹ Thus, the majority appeared hostile toward PETA's lawsuit, and Judge Smith's concurrence appeared to reflect even stronger hostility. The court awarded attorneys' fees against PETA.¹³⁰ Along with other disparaging commentary, Judge Smith condemned the lawsuit as frivolous and wrote that the majority decision "highlights" that frivolity in its treatment of the merits.¹³¹

A. Naruto's Negative Implications for Animal Plaintiff Damages Lawsuits

Naruto's negative implications for damages lawsuits naming animals as plaintiffs are numerous. Several of the most significant negative implications include:

1. Likely Destroying the Possibility of Animal Plaintiffs in Copyright Lawsuits into the Foreseeable Future

Naruto is likely fatal to any animal rights activists' hopes for animal plaintiff copyright lawsuits, at least into the foreseeable future. Under *Naruto's* holding, animals may stand as copyright plaintiffs only if Congress amends the Copyright Act to expressly allow such standing.¹³² Given current societal views regarding animals' legal status, such an amendment to the Copyright Act seems exceptionally unlikely. The Ninth Circuit denied a request from one of the panel judges to consider the case en banc.¹³³ Further, the Supreme Court and the other federal circuits, all of which are generally viewed as more conservative than the Ninth Circuit, likely would not find Copyright Act standing for animal plaintiffs where the Ninth Circuit has so vigorously rejected it.

2. Highlighting the Connection between Rights and a Norm of Duty that Plagues Animal Personhood Lawsuits

The connection between rights and a norm of duties for legal persons has beleaguered several lawsuits seeking animal legal personhood, and both the

128. *Id.* at 421–26 (majority opinion).

129. *Id.* at 427–28 (Smith, J., concurring in part).

130. *Id.* at 427 (majority opinion).

131. *Id.* at 428 (Smith, J., concurring in part). Judge Smith asserted that the majority agreed: "As the Majority opinion highlights in its treatment of the merits, PETA brought a frivolous lawsuit here." *Id.*

132. *See supra* note 124 and accompanying text.

133. *Naruto v. Slater*, 916 F.3d 1148 (9th Cir. 2018).

majority and concurrence in *Naruto* supported this criticism.¹³⁴ Judge Smith's concurrence asked: "Are animals willing to assume the duties associated with the rights PETA seems to be advancing on their behalf?"¹³⁵ In a footnote, he expanded on his question by noting that "[p]articipation in society brings rights and corresponding duties."¹³⁶ Further,

[t]he right to own property is not free from duties. One must pay taxes on profits from a royalty agreement for use of a copyrighted image. Are animals capable of shouldering the burden of paying taxes? Similarly, all people have a duty to obey the law and, for example, not commit intentional torts. Should animals be liable for intentional torts as well? The concept of expanding actual property rights—and rights broadly—to animals necessitates resolving what *duties* also come with those rights and, because animals cannot communicate in our language, *who* stands in their shoes?¹³⁷

The majority recognized Judge Smith's concerns about the connection between rights and duties—and other problems with Article III standing for animals—and it noted that "Judge Smith reaches the reasonable conclusion that animals should not be permitted to sue in human courts. As a pure policy matter, we agree."¹³⁸ Although the majority disagreed with Judge Smith's argument about the precedential value of *Cetacean*, it expressed approval of his substantive concerns—including his concern that the interconnection between rights and duties is problematic for those seeking to make animals rights-bearing plaintiffs.

This language from the majority and the concurrence in *Naruto* add weight to the conclusions of a growing number of appellate courts that have recently decided cases regarding animal legal personhood. These courts have determined that animals cannot be legal persons because they do not have humans' norm of sufficient moral agency to accept the responsibilities that are related to rights in human society.¹³⁹ Because only legal persons (including human proxies, such as corporations) may be plaintiffs in

134. The capacity for legal duties is a human norm. Although children and individuals with significant cognitive limitations may lack the capacity to assume legal duties, their personhood is anchored in the human community. They are a significant part of the human community that is distinctive in its capacity for legal duties as a norm. See *supra* notes 97–101 and accompanying text.

135. *Naruto*, 888 F.3d at 432 (Smith, J., concurring in part).

136. *Id.* at 432 n.6.

137. *Id.* (emphasis in original).

138. *Id.* at 423 n.5.

139. See *Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc.*, 216 A.3d 839, 846 (Conn. App. Ct. 2019); *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 152 A.D.3d 73, 78 (N.Y. App. Div. 2017), *lv denied*, 100 N.E.3d 846 (N.Y. 2018); *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 151 (N.Y. App. Div. 2014), *lv denied*, 38 N.E.3d 828 (N.Y. 2015); see also *supra* notes 97–101 and accompanying text.

damages lawsuits, this language from *Naruto* will doubtlessly be cited in opposition to future attempts to name animals as plaintiffs in damages lawsuits.

3. *Strongly Condemning the Assumption that Animal Rights Groups May Effectively Serve as Animals' Next Friends*

Naruto strongly condemned the assumption that animal rights groups may effectively serve as animals' next friends in lawsuits seeking to name animals as damages plaintiffs. Once again, Judge Smith's concurring opinion was stinging. He highlighted that "[a]nimal-next-friend standing is particularly susceptible to abuse"¹⁴⁰ and that allowing it would provide "no means or manner to ensure the animals' interests are truly being expressed or advanced."¹⁴¹ He believed that

[s]uch a change would fundamentally alter the litigation landscape. Institutional actors could simply claim some form of relationship to the animal or object to obtain standing and use it to advance their own institutional goals with no means to curtail those actions. We have no idea whether animals or objects wish to own copyrights or open bank accounts to hold their royalties from sales of pictures. To some extent, as humans, we have a general understanding of the similar interests of other humans.¹⁴²

Judge Smith's concerns were not merely theoretical; he brought his argument home by applying it specifically to PETA's conduct in the lawsuit. With an artfully placed footnote following the final word of his concurrence, Judge Smith tore into PETA's treatment of the monkey for whom it had asserted next-friend status.¹⁴³ Although PETA had asserted it would "fulfill the duties of a next friend" to *Naruto*, after experiencing a presumably hostile reception at oral argument before the Ninth Circuit, PETA "changed its tune."¹⁴⁴ After this oral argument experience, PETA moved to dismiss the appeal and vacate the lower court's judgment. A settlement had been agreed upon, but Justice Smith stated that it was "unlike a normal settlement," because the plaintiff—*Naruto*—was not a part of the agreement.¹⁴⁵ Rather, "his purported next friend, PETA, *settled its own claims*."¹⁴⁶ Judge Smith continued:

140. *Naruto*, 888 F.3d at 432 (Smith, J., concurring in part).

141. *Id.*

142. *Id.*

143. *Id.* at 437 n.11.

144. *Id.*

145. *Id.*

146. *Id.* (emphasis in original).

It remains a mystery to me what “claims” PETA (a non-party) could settle. Nevertheless, even though PETA only settled its *own* claims, it maintained that “the settlement also renders moot the appeal filed on behalf of the Plaintiff Naruto.” Indeed, PETA went so far as to claim “[t]here is thus no longer any live case or controversy before this Court.”

Though it had previously attested it would “fulfill[] the duties of a next friend,” PETA forgot its self-appointed role. “A ‘next friend’ *does not [itself] become a party to the ... action* in which [it] participates, but *simply pursues the cause on behalf of [the party in interest].*” Whatever PETA did or did not do for Naruto (it only made representations to this court regarding what *it* obtained), PETA made sure to protect itself and with the [motion to dismiss the appeal and vacate the lower court’s judgment] sought to manipulate this court to avoid further negative precedent contrary to its institutional objectives.¹⁴⁷

Judge Smith bitingly concluded: “It is clear: PETA’s real motivation in this case was to advance its own interests, not Naruto’s,” and therefore that “PETA used Naruto as a ‘pawn to be manipulated on a chessboard larger than his own case.’”¹⁴⁸

On this issue, the majority’s opinion slammed PETA even harder than Judge Smith. After echoing Judge Smith’s criticism by stating that PETA had “abandoned Naruto’s substantive claims in what appears to be an effort to prevent the publication of a decision adverse to PETA’s institutional interests,”¹⁴⁹ the majority went even further. It addressed the possibility of a lawsuit against PETA by Naruto: “Were he capable of recognizing this abandonment, we wonder whether Naruto might initiate an action for breach of confidential relationship against his (former) next friend, PETA, for its failure to pursue his interests before its own.”¹⁵⁰

In addition to painting an unflattering picture of PETA, this unusually harsh take-down by a federal appellate court could be harmful to future animal rights groups’ efforts to utilize next-friend standing in future damages lawsuits. It will remind courts of the danger introduced in *Naruto*: a purported next friend might be tempted to put its agenda interests ahead of a specific animal’s interests. It will also remind courts of the difficulty in ascertaining what a member of a different species would want in many—or any—situations.

147. *Id.* (citations omitted) (some alterations in original).

148. *Id.* (quoting *Lenhard v. Wolff*, 443 U.S. 1306, 1312 (1979)).

149. *Id.* at 421 n.3 (majority opinion).

150. *Id.*

4. *Criticizing the Cetacean Decision and Calling for a Ninth Circuit En Banc Decision or for the Supreme Court to Overrule It*

Although *Naruto*'s majority opinion interpreted the Ninth Circuit's 2004 *Cetacean* decision to hold that animals may have standing under Article III if Congress clearly evidences intent to confer statutory standing, the panel made clear that it disapproved of *Cetacean*. The majority bemoaned that it could not overrule *Cetacean*, but it noted that "[w]hat we *can* do is urge this court to reexamine *Cetacean*."¹⁵¹

In the short term, this plea for removing any possibility of animal standing seems likely to fail. As noted above, the Ninth Circuit declined one of the *Naruto* judge's requests to hear the case en banc,¹⁵² thus obviating the immediate threat of a decision that would potentially overrule *Cetacean*. Further, *Naruto* was not appealed to the United States Supreme Court, similarly avoiding any danger that the Supreme Court would overrule *Cetacean*. However, animal standing cases will doubtlessly arise again in the federal courts. Even if *Naruto* could not overrule *Cetacean*'s generous interpretation of potential animal standing, its powerful rebuke of *Cetacean* may influence future cases addressing this issue.

5. *Equating "Persons" with Humans and Their Proxies*

The *Naruto* court at least implied that a legal person is a human or a human proxy, such as a corporation. For example, Judge Smith's concurrence noted that

the Federal Rules only authorize next friend suits on behalf of "a minor or an incompetent *person*." Per the text, this can only apply to human persons, not any "minor" or "incompetent" corporations or animals. Importantly, the historical background of [the next friend statute] limits the use of next friends to only human persons.¹⁵³

Of course, corporations are also legal persons, but the court recognized that they are merely proxies for humans: "[C]orporations and unincorporated associations are formed and owned by humans; they are not formed or owned by animals."¹⁵⁴

Naruto's apparent nod to the exclusively human foundation of legal personhood impliedly precludes the treatment of animals as legal persons in private law damages actions. The Nonhuman Rights Project, Inc., an

151. *Id.* at 423 n.5 (emphasis in original).

152. *Naruto v. Slater*, 916 F.3d 1148 (9th Cir. 2018). *See supra* note 133 and accompanying text.

153. *Naruto*, 888 F.3d at 431 (Smith, J., concurring in part) (emphasis in original) (citations omitted).

154. *Id.* at 426 n.9 (majority opinion).

organization focused on expanding legal personhood to at least some animals, acknowledged and complained about *Naruto*'s implicit limitation of personhood—contending, of course, that the court was wrong.¹⁵⁵ But despite complaints from animal rights activists, this aspect of *Naruto* adds to a growing body of cases that point out the centrality of humanity to legal personhood in response to efforts to name animals as plaintiffs.¹⁵⁶

B. Naruto's Nuanced Potential for Emboldening Animal Plaintiff Damages Lawsuits

Although *Naruto*'s more obvious implications for animals as private law damages plaintiffs are negative, only time will tell whether the case's impact is completely one-sided. The possibility, albeit questionable, that a case so strongly rejecting animal damages actions might ultimately further them in some respects is interesting to consider.

1. Bad Publicity as Good Publicity?

For better or for worse, the *Naruto* case garnered enormous attention. As stated by one writer: “*Naruto*'s case raised intriguing legal questions and stole the public's attention.”¹⁵⁷ Although PETA lost the case and was chastised by the court, the organization was unapologetic. After the litigation concluded, a PETA spokesperson said that “PETA's groundbreaking ‘monkey selfie’ case sparked a massive international discussion about the need to extend fundamental rights to animals for their own sake, not in relation to how they can be exploited by humans.”¹⁵⁸

PETA is open about using “controversial tactics” to gain media attention.¹⁵⁹ The organization asserts that “[i]t is sometimes necessary to shake people up in order to initiate discussion, debate, questioning of the status quo, and, of course, action.”¹⁶⁰

155. *Nonhuman Rights Project Statement on Naruto v. Slater (the “Monkey Selfie” case)*, NONHUMAN RIGHTS PROJECT (Apr. 24, 2018), <https://www.nonhumanrights.org/blog/nhrp-statement-monkey-selfie-case/> [https://perma.cc/R5JZ-3PAR] (“The court also claimed implicitly and repeatedly that the word ‘person’ is synonymous with ‘human being,’ when that has never been true, is not true today, and will never be true.”).

156. See *supra* notes 97–101 and accompanying text.

157. Matthew P. Hooker, *Naruto v. Slater: One Small Step for a Monkey, One Giant Lawsuit for Animal-Kind*, 10 WAKE FOREST L. REV. ONLINE 15 (2020), <http://wakeforestlawreview.com/2020/02/naruto-v-slater-one-small-step-for-a-monkey-one-giant-lawsuit-for-animal-kind/> [https://perma.cc/WT4R-NKPT].

158. Nicolas Iovino, *Ninth Circuit Declines to Revisit Feud Over Monkey Selfies*, COURTHOUSE NEWS SERV. (Aug. 31, 2018), <https://www.courthousenews.com/ninth-circuit-declines-to-revisit-feud-over-monkey-selfies/> [https://perma.cc/FJA7-GFTJ].

159. *Why Does PETA Use Controversial Tactics?*, PETA, <https://www.peta.org/about-peta/faq/why-does-peta-use-controversial-tactics/> [https://perma.cc/8QR8-RQAY].

160. *Id.*

Thus, although the Ninth Circuit strongly criticized PETA and awarded attorneys' fees against the organization, PETA can assert that it succeeded in drawing attention to its perspective on animals' legal status. If the maxim that no publicity is bad publicity is correct, PETA may have—in this regard—won. However, the maxim's validity is subject to debate, and measuring the long-term impact of publicity is nearly impossible. The possibility that the lawsuit's publicity could, over time, advance the argument for animals as damages plaintiffs seems unlikely, but is worthy of acknowledgement.

2. *Power to File—and Lose—Lawsuits Claiming to Represent Animals*

Finally, the *Naruto* case could be interpreted as empowering animal rights groups to file lawsuits with animal plaintiffs—even though those lawsuits will likely fail absent express congressional intent to allow them. Judge Baker decried this empowerment of activists—who may not, in his view, be relied upon to act as appropriate next friends—as harm caused by the majority's approach in *Naruto*. He complained that the majority's broad interpretation of *Cetacean* “allows PETA (with no injury or relationship to the real party in interest) to sue on *Naruto*'s behalf, because it obtained legal counsel to allegedly represent *Naruto*.”¹⁶¹ Although the court ruled that even with Article III standing, animals do not have statutory standing absent express congressional intent to grant it, Judge Baker remained concerned about allowing advocacy groups to bring more animal plaintiff lawsuits. “Unfortunately,” he concluded, “PETA's actions could be the new normal under today's holding.”¹⁶²

Regardless of whether actions such as those PETA took in *Naruto* become the “new normal,” advocates seeking to make animals plaintiffs in damages lawsuits will certainly cite the case's acceptance of Article III standing for animals in future cases.¹⁶³ How much impact the case will have on that point remains to be seen—it is much easier for a court to say animals have potential standing in a case like *Naruto*, which presented other grounds for rejecting such standing, than in a case for which Article III standing would be determinative.

161. *Naruto v. Slater*, 888 F.3d 418, 437 (9th Cir. 2018) (Smith, J., concurring in part).

162. *Id.* at 437 n.11.

163. See Joel B. Stronberg, *A Horse is a Horse of Course, Unless Given the Right to Sue—Which Could Be Good for the Environment*, CIVIL NOTION BLOG (Aug. 21, 2018), <https://civilnotionblog.weebly.com/home/a-horse-is-a-horse-of-course-unless-given-the-right-to-sue-which-could-be-good-for-the-environment> [https://perma.cc/8T4E-83H3].

CONCLUSION

Vercher and *Naruto* seem to presage different but related trajectories for animal tort damages lawsuits and animal copyright damages lawsuits. Even if *Vercher* fails at the Oregon Court of Appeals and/or the Oregon Supreme Court, efforts to name animals as plaintiffs in state law tort lawsuits will probably expand in its wake. One state's rejection of a torts claim does not preclude other states from eventually allowing such a claim. Recognition of the momentous "payoff" for animal rights activists that would result from an animal torts plaintiff being recognized as a legal person—breaching a presently insurmountable divide between humans and animals—is sufficiently dramatic to incentivize activists to continue bringing such lawsuits in the meantime, despite low odds for success in the short term.

Naruto seems to close the door more definitively for animal copyright damages claims in the foreseeable future, although such claims were highly dubious even before the decision. However, as with *Vercher*, the potential for radical change in animals' legal status if a federal law damages claim were to prevail is likely sufficiently enticing for animal rights activists, that future federal statutory lawsuits should be expected. In several respects, the *Naruto* decision appropriately pushed the concept of animal plaintiff damages lawsuits backward rather than forward. However, whether the publicity generated by the *Naruto* lawsuit will soften opposition to animal legal personhood over time remains to be seen. In any event, the court's determination that animals have Article III standing will be citation-fodder for future lawsuits initiated by animal rights activists.

Courts should continue to reject efforts to make animals private law damages plaintiffs. As stated in the theme song to the 1960's sitcom *Mr. Ed*, "A horse is a horse, of course, of course"—but that is not a slight to horses.¹⁶⁴ And treating a monkey like a monkey is likewise not a slight. Horses, monkeys, and other animals are much different from tables, chairs, and other inanimate property. Animals capable of suffering require vigorous protection, and our legal system needs to continue evolving to create better animal welfare laws and enforcement. But unless courts continue their appropriately evolving focus on human responsibility for thoughtful animal welfare reform, rather than succumbing to a rising tide of lawsuits seeking to treat animals as if they were persons, the future could be a jungle.

164. A video playing the theme song is available online. See, e.g., Deila Taylor, *Mr. Ed the Talking Horse Theme Song*, YOUTUBE (Dec. 20, 2014), <https://www.youtube.com/watch?v=91LRPk8x14s> (last visited Nov. 20, 2020).