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Affirmative Acts of Recognition: How Codifications of Animal Sentience Are Ushering Animals into the Focus of US Law

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I. Introduction

The evolution of US animal protection laws enjoys a rich, if complex, history, one whose origins predate the founding of the nation itself. Indeed, more than a century before the American Revolution, the Massachusetts Bay Colony took the historic step of enshrining protections for certain categories of animals by outlawing acts of cruelty toward them and advancing considerations for cattle welfare.[1] Codified in 1641, these provisions constituted the first formal animal protection laws in America,[2] with the US inheriting this legacy upon its founding in 1776.[3] Soon after, individual states began to give rise to a diverse tapestry of animal protection laws, with every state then part of the country featuring an animal protection law on its books by 1907.[4] In the federal context, the US codified its first nation-wide animal protection law in 1873 by providing for the welfare of farmed animals in interstate transport.[5] Notably, what animated these and other early frameworks were complementary yet competing impulses to cultivate a more compassionate society and safeguard living property, with animals themselves marginalised by the very laws that ostensibly provided for their visibility.

[1] Massachusetts Bay Colony Body of Liberties § 92, 93 (1641).

[2] Janet M Davis, 'The History of Animal Protection in the United States' (The American Historian), available at www.oah.org/tah/issues/2015/november/the-history-of-animal-protection-in-the-united-states.

[3] 'The Declaration of Independence: A History' (National Archives), available at www.archives.gov/founding-docs/declaration-history.

[4] Alyssa S Robinson, 'Animal Cruelty Legislation, Part I' (NC State University Libraries, 26 February 2019), available at www.lib.ncsu.edu/news/special-collections/animal-cruelty-legislation-part-i.

[5] Animal Welfare Institute, 'Legal Protections For Farm Animals During Transport' (Animal Welfare Institute), available at awionline.org/sites/default/files/uploads/legacy-uploads/documents/FA-LegalProtectionsDuringTransport-081910-1282577406-document-23621.pdf.

In the 100 years since, the US has seen advocates at the state and federal level strive to bring animals into greater focus with the hope of offering them relief. With that said, the overarching goal of many modern-day advocates has been to not only pass more and strengthen existing animal protection laws but also transform perspectives of animals from objects into subjects, with the latter viewed as having intrinsic interests that the law should secure both procedurally and in substance.[6] Against the backdrop of this decades-long effort to increase the visibility of animals by 'subjectivising' them in the law's eyes, this chapter frames attempts to codify animal sentience as not merely another step towards but rather an inflection point in the effort to elevate the profile of animals, with greater visibility and more robust protections, as well as the prospective affirmation of their personhood, flowing from this recognition. In light of these implications, this chapter frames the codification of animal sentience as a promising, if pragmatic, approach for advocates to advance the status of animals. In doing so, it observes how paradigmatic shifts entailed by such recognitions have destabilised the historically informed anthropocentric foundation of US animal protection laws and interrogates if and how such advancements might usher forth the recognition of animals as legal persons.

Developing this argument, section II interrogates the historical premises of America's early animal protection frameworks, which contemplated animals as their partial and at times even unintended beneficiaries, a view that entrenched their status as legal objects among other forms of property over which legal subjects could otherwise exert dominion. In parallel with this examination, the chapter observes the extra-legal distinction between subjects, who possess sentience, and objects, which do not, as a means to convey how animals have seen their intrinsic interests marginalised vis-à-vis the entrenchment of their legal objectification in animal protection frameworks. Against this backdrop, section III frames recent attempts to formally recognise the sentience of animals as a means to centre their interests, long relegated to the periphery of such frameworks. Scrutinising the impact of this development across three noteworthy cases in Oregon, the only US jurisdiction to have celebrated the passage of an animal sentience bill into law, the chapter attests to how the state's centring of animals in its animal protection laws has increased their visibility and enhanced their protections while disrupting their historical objectification as mere property. Characterising the jurisprudence arising out of these cases as progressive stepping stones, section IV touches upon the monumental *Justice v Vercher* case,[7] which concerned a civil suit brought on behalf of a horse, Justice, against his former owner for the suffering he endured as a result of her neglect.[8] Examining the context of this 'case for Justice', the chapter interrogates the promise that subjectivising animals holds for their prospective

[6] Gary Francione, 'Animal Rights Theory and Utilitarianism: Relative Normative Guidance' (1997) 3 *Animal Law* 75, 83–84.

[7] Just. by and through *Mosiman v Vercher*, 321 Or App 439, 446, 518 P.3d 131 (2022) (*Justice v Vercher*).

[8] ibid, 441–43.

recognition as legal subjects – that is, as legal persons, or rights-bearers, under the law. Observing the concerns raised by the state judiciary, the chapter reassesses Oregon's codification of animal sentience, with a view toward gleaning lessons it offers advocates hoping to shift the status of animals not only from the objects to the subjects of animal protection laws but also, and more broadly, from legal property to legal persons.

II. The Anthropocentric Foundations of US Animal Protection Laws

A. Individual Colony and State-Level Protections

More than 100 years before the founding of the US, the Massachusetts Bay Colony had already assumed a vanguard role in providing for the protection of animals under human control. The pair of provisions it enacted in 1641 featured prohibitive and permissive aspects. The first outlawed cruelty toward 'bruite creatures … usuallie kept for man's use',[9] whereas the second entitled herders of cattle to rest and refresh them on another's land under certain conditions.[10] Codified in the *Liberties of the Massachusets Collonie in New England*, the laws are noteworthy, not only representing the first of their kind within the Colonies but also predating England's Dick Martin's Act, which similarly prohibited the cruel treatment of working animals and has been hailed in some circles as the first animal protection law in the West.[11]

Although animals necessarily represented the *subject matter* of these early protections, their incorporation into the body of the law, or *corpus juris*, entrenched their status as objects as opposed to subjects, with the latter enjoying, among other benefits, being seen as the law's intended beneficiaries. While the distinction between legal object and legal subject defies rigid binaries, the estimation of animals as mere objects by the Massachusetts Bay Colony's leadership was encoded into the provisions enacted to protect them. Indeed, their codification as 'bruite' creatures betrays the diminution of their status, with the term's root stemming from the Latin *brutus*, meaning 'dull',[12] or slow to understand or lacking distinct perceptions, if not sensitivity altogether.[13] With its characterisation of animals as having a diminished sensitivity if not lacking sensitivity outright, the law undermines the notion of animals being able to subjectively experience and thus even enjoy their protections.

[9] Massachusetts Bay Colony Body of Liberties § 92 (1641).

[10] ibid, § 93.

[11] Jess Terry, 'Celebrating 200 Years of Animal Welfare Legislation' (World Animal Protection, 29 June 2022), available at www.worldanimalprotection.org.uk/blogs/animal-welfare-legislation-200-years.

[12] 'brute (adj)' (Online Etymology Dictionary), available at www.etymonline.com/word/brute.

[13] 'dull' (Collins), available at www.collinsdictionary.com/us/dictionary/english/dull.

But if not those of animals, then whose interests did the anti-cruelty law have in mind? The answer demands an appreciation of the anxieties of the Puritans,[14] who considered their 'cruel dominion' over animal life to be a consequence of mankind's fall from Eden.[15] In the case of the Massachusetts Bay Colony, its leadership expressed a desire to foster, if not recreate, that Edenic paradise, which did not feature such cruelty.[16] This consideration concerned the depravity of the human heart rather than a concern with the subjective experience of animals, whom the law viewed as having been created for the sake of man and over whom mankind had been granted dominion.[17] With this anti-cruelty protection predicated upon animals being 'kept for man's use', the law served to entrench their status as living commodities. Taking into account even the permissive allowance for cattle to be fed and refreshed, the law's principal concern was the preservation of cattle, who held an instrumental value – not only for the owners of cattle but also for the community as a whole.[18] Together, these and other anthropocentric impulses would give rise to similar provisions after the fight for independence from England and the founding of the US.

Despite this separation, it would be the animal protection movement in England that informed animal protection efforts in numerous states across the US. Similar to the anthropocentric concerns that gave rise to the Massachusetts Bay Colony's anti-cruelty law a century earlier, this historic achievement came off the heels of animal welfare societies calling attention to the link between human and animal violence, as exemplified by William Hogarth's *Four Stages of Cruelty*, a set of printed engravings from 1751 that illustrated how acts of cruelty inflicted upon animals hardened the hearts of society, which would 'graduate', so to speak, from committing acts of cruelty to animals to committing them against fellow humans.[19] To be sure, the view that animals should merit protections regarded the security of humans as its focal point, with animals relegated to being the indirect beneficiaries of mounting calls for the law to safeguard them. After numerous failed attempts, England passed its first animal protection law, Dick Martin's Act, in 1822.[20] Drawing inspiration from the landmark legislation in England,[21]

[14] Massachusetts Bay Colony Body of Liberties § 93 (1641), (after these animal-related protections were provisions that would put people to death if they worshipped another god).

[15] Davis (n 2).

[16] ibid.

[17] ibid. The law likewise prescribed the death penalty for bestiality, a severe punishment that served to protect animals from sexual violence on the one hand yet also demanded that the animal in question be 'slain, buried, and not eaten' on the other. Massachusetts Bay Colony Body of Liberties § 94.7 (1641). Again, viewed holistically, the Massachusetts Bay Colony's animal-related laws predominantly reflect a concern with the debasing of a people rather than an interest in the protection of animals for their own sake.

[18] Charles R Lee, 'Public Poor Relief and the Massachusetts Community, 1620–1715 (1982) 55 *New England Quarterly* 564, 568–69.

[19] 'The Four Stages of Cruelty' (The History Of Art), available at www.thehistoryofart.org/william-hogarth/four-stages-of-cruelty.

[20] Terry (n 11).

[21] Davis (n 2).

New York codified the first state-based animal protection law in the US six years later, in 1828.[22] Seven years after that, in 1835, Massachusetts became the second.[23] Other states followed suit, and by 1907, every state then part of the nation featured an anti-cruelty law on its books.[24]

Despite this rich tapestry of animal protection laws, animals found their interests marginalised by courts, who saw it as their duty to simply effectuate the intent of the legislature when the laws were passed. Nearly half a century after New York enacted its first animal protection law, for example, its courts were still neglecting to locate the interests of animals as the law's primary concern. As one judge opined in a decision concerning an act of cruelty against a stage coach horse,

> It is not correct to assert that the policy of this kind of legislation, especially that which has for its purpose the prevention of cruelty to *brutes*, is a regulation of the dominion of the private citizen over his own private property merely. It truly has its origin in the intent to save a just standard of humane feeling from being debased by pernicious effects of bad example – the human heart from being hardened by public and frequent exhibitions of cruelty to dumb creatures, committed to the care and which were created for the beneficial use of man.[25]

Notably, the court's pronouncement expressly affirms that the underlying policy the legislature intended to advance goes beyond the state's interest in regulating the private ownership of animals, whose existence for human use and over whom humans may exert dominion is presumed, if not reinforced. Despite the term failing to appear in the text of the law itself,[26] the court nevertheless renders animals as 'brutes' when addressing the law's underlying purpose. With animals and their interests diminished by virtue of the lack of sensitivity implied by the term, the court hews to an anthropocentric reading of the law's intent as being the prevention of human morals from being debased, or 'hardened'. Again, the dispositive question was not the subjective state or experience of animals themselves but where along the spectrum between humane and inhumane their treatment situated the individual who harmed them. While the suffering inflicted upon animals necessarily constituted part of this assessment, absent a recognition of and concern over their subjective experience, animals served as little more than objective measures of a human-focused assessment.

B. Federal Protections

The rationale driving early animal protection laws at the national level likewise concerned the impact of their poor treatment on society: vis-à-vis both the owners

[22] Robinson (n 4).
[23] ibid.
[24] ibid.
[25] *Christie v Bergh*, 15 Abb Pr (ns) 51 (NY 1873) (emphasis added).
[26] NY Rev Stat Tit. 6, 26 (1829).

of the animals in question and the public generally. The first such law, the Act to Prevent Cruelty to Animals while in Transit by Railroad or Other Means of Transportation within the United States,[27] focused squarely on the treatment of farmed animals being transported by rail across state lines.[28] At the time, animals farmed in western states were transported hundreds and even thousands of miles to slaughterhouses in eastern states.[29] Given that the railroads operated as de facto monopolies, they had little incentive to ensure the welfare of the animals consigned to their care.[30] As a result, many animals lost significant weight, suffered physical injuries, grew sick, or died.[31] While these harms necessarily affected the animals, the principal concern focused on the lost profit of farmers, as well as the cost paid by the consuming public.[32] In response to their complaints, Congress required, among other considerations, that cattle, pigs, and sheep be given at least five consecutive hours of food, water and rest for every 28 hours of live transport.[33] As with state-level developments, the first anti-cruelty measure in the federal landscape saw protections afforded to animals for their owners' economic benefit. As a further testament to the anthropocentric concerns at the heart of the law, subsequent amendments provided for the animals' owner to authorise carriers to extend the time transported animals could be confined without such care by an additional eight hours.[34] Notably, as rail no longer represents the predominant form of transport for farmed animals being sent to slaughter, the agricultural industry today coordinates the trucking of its own animals and proves the primary opponent of the protections provided by the Twenty-Eight Hour Law, as it is commonly known today.[35]

Even more modern laws passed to promote the welfare of animals fail to truly centre their interests. For example, the Animal Welfare Act, which represents the predominant federal animal protection law in the US and addresses the treatment of animals in the context of exhibitors, dealers and research facilities,[36] marginalises the suffering of animals in function. Indeed, in order for an advocate to bring suit to enforce the law, courts require them to demonstrate both that they are suffering the type of harm the law was intended to prevent and that they have actually suffered that harm.[37] To this end, courts have determined that seeing an animal suffering in violation of the Animal Welfare Act constitutes an 'aesthetic

[27] AWI (n 5) (observing that the law is today known as the 'Twenty-Eight Hour Law').
[28] Transportation of Animals, 49 USC § 80502 (a)(1) (Twenty-Eight Hour Law).
[29] S Rep No 41-1, at 1612–14 (1879).
[30] ibid 1614–15.
[31] ibid 1612–13.
[32] ibid 1612–1615.
[33] Twenty-Eight Hour Law (n 28) (a)(1)–(b).
[34] ibid (a)(2)(B).
[35] 'A Review: The Twenty-Eight Hour Law and Its Enforcement' (Animal Welfare Institute) 2–3, available at awionline.org/sites/default/files/uploads/documents/20TwentyEightHourLawReport.pdf.
[36] Animal Welfare Act, 7 USC § 2131 et seq, § 2131(b)(1) (AWA).
[37] *Animal Legal Def Fund, Inc v Glickman*, 154 F.3d 426, 432 (DC Cir 1998).

injury' for the advocate bringing the case.[38] Yet while the suffering of the actual animal matters, it is the impact of that suffering on the person seeking to prevent the harm that determines whether the case can be heard in court.[39] While this may prove an easy threshold to clear in certain circumstances, such as with a captive animal exhibited by zoos, because research facilities are not intended to be open to the public, courts have held that even if an advocate is harmed by witnessing the suffering of a research animal, their injury may not constitute a legal one.[40] Akin to its counterpart in the state context, what this jurisprudence betrays is that absent an impact on humans – and under specified conditions, no less – the subjective experience and suffering of animals matters little to the law.

III. Bringing Animals into Focus: The Impact of Animal Sentience

A. Legislating to Codify Animal Sentience

Whereas the EU and numerous countries have formally enshrined the sentient status of animals into law,[41] the US lacks a similar provision in the federal sphere, and it is in this absence that a small handful of states have attempted to codify this recognition within their respective jurisdictions.[42] To date, however, only Oregon has witnessed the passage of a sentience bill into law, with SB 6 clearing the legislative process in 2013 to subjectivise animals and pave the state's path to becoming one of the most progressive jurisdictions for animal protections globally.[43]

Of course, which animals are recognised as having sentience, how the term itself is defined, and any accompanying policy statements as to its effect offer key insight into a bill's potential impact on a jurisdiction's animal protection landscape. While Oregon's animal sentience law is not explicitly limited to specific species or categories of animal use,[44] its anti-cruelty code defines an 'animal' as 'any nonhuman mammal, bird, reptile, amphibian or fish',[45] thereby excluding

[38] ibid, 445.
[39] ibid.
[40] ibid (observing how in the case of research facilities oversight committees are established with private citizens whose aesthetic injury is considered as part of their representation of the interests of the community). Note, however, that such private citizens serving on oversight committees face incredible difficulty demonstrating that they have actually suffered an aesthetic injury. *Animal Legal Def Fund, Inc v Espy*, 23 F.3d 496, 501 (DC Cir 1994).
[41] Rajesh K Reddy, 'Enshrining Animal Sentience into Law: Global Developments and Implications' (2019) Fall, *American Bar Association Tort, Trial, and Insurance Practice Section Newsletter* 23.
[42] Ross Kelly, 'Recognition of animal sentience on the rise' (VIN News, 14 May, 2020), available at news.vin.com/default.aspx?pid=210&catId=633&id=9639465.
[43] ibid; SB 6, 77th Leg. Assemb, Reg Sess (Or 2013) (enrolled).
[44] OR REV STAT § 167.305 (2023).
[45] OR REV STAT § 167.310 (2023).

from its purview numerous species and taxonomic classes, such as cephalopods, decapod crustaceans and insects, which studies have found to possess markers of sentience.[46] Codified in ORS 167.305, Oregon law declares animals to be 'sentient beings capable of experiencing pain, stress and fear', with the principal policy implication being that animals 'should be cared for in ways that minimise pain, stress, fear and suffering'.[47] Notably, this recognition of animal sentience and its attendant policy impact operate as an inflection point. Indeed, whereas courts in other states may unilaterally cite scientific studies or even common sense to establish that that animals are sentient beings and that it is their interests that animal protection laws principally concern, the Oregon legislature affords its courts a *statutory* foundation to ground such determinations.

While Oregon's sentience statute does not explicitly define 'sentience', a notoriously plastic term whose meaning is contested even within the scientific community,[48] it is noteworthy that the context and accompanying policy impact statement contemplates not just physical but also mental suffering, with this provision attesting to the subjective experiences of animals. That said, both the declaration and policy statement limit its application to the prevention of negative affective states.[49] Despite Oregon's minimum care standards speaking to the need to preserve animal 'well-being',[50] a term considered by some to contemplate positive affective states,[51] this narrow definition of the subjective experiences implicated by sentience arguably limits the ability of courts to advance the interests of animals beyond the prevention of their pain and suffering. Furthermore, it is important to note that Oregon's definition of animal sentience also excludes cognitive capacities, such as self-awareness, self-reflection, and the ability to appreciate the mental states of others. To be sure, this narrowed scope likewise serves to limit what advances might be gained for animals, as discussed below.

[46] Meghan Barrett, 'Short Research Summary: Can insects feel pain? A review of the neural and behavioural evidence by Gibbons et al. 2022,' (Effective Altruism, 22 November 2022), available at forum.effectivealtruism.org/posts/yPDXXxdeK9cgCfLwj/short-research-summary-can-insects-feel-pain-a-review-of-the.

[47] OR REV STAT (1)–(2). Other pronouncements under ORS 167.305 include findings that: the state has a pecuniary interest in reducing the cost to care for impounded animals; the suffering of impounded animals can be alleviated by expediting their disposition while their owners await trial; and requiring unlicensed rescue organisations to follow regulations can likewise reduce animal suffering; among other determinations. ORS 167.305(3)–(6).

[48] Amelia Cornish et al, 'Demographics Regarding Belief in Non-Human Animal Sentience and Emotional Empathy with Animals: A Pilot Study among Attendees of an Animal Welfare Symposium' (2018) 8 *Animals* 174.

[49] This limitation to negative affective states is informed by where the recognition is codified. Located under Oregon's statutory framework regarding 'Offenses Against General Welfare and Animals', its scope is arguably confined to the negative experiential states of animals.

[50] OR REV STAT 167.310(9) (2023).

[51] David Fraser, 'Assessing Animal Well-Being: Common Sense, Uncommon Science' (1993) *Wellbeing International*, 37, 37–38.

B. The Impact of Animal Sentience in Criminal Law Cases

Despite its inherent limitations, Oregon's codification of animal sentience has empowered its judiciary – as exemplified by three high-profile rulings handed down by the highest court in the state – to shape Oregon into a model for other states to draw inspiration from. Taken together, what these three cases affirm is that Oregon takes animals, as opposed to society at large or the owners of animals, as the principal beneficiaries of its animal protection laws. Considering that the centring of human interests in the sphere of animal protections implicates the marginalisation of animals' interests, the decisions handed down by the Oregon Supreme Court privileging the interests of animals has entailed the curtailing of certain human rights and interests – even going so far as to abridge some of society's most fundamental constitutional guarantees.

The first of three high-profile cases to address who – the public or animals – represent the primary beneficiaries of Oregon's animal protection laws reached the Oregon Supreme Court just one year after the legislature formally enshrined the recognition of animal sentience into law.[52] The case in question, *State v Nix*, concerned 20 counts of second-degree animal neglect by the defendant, Nix, who was found guilty of the underlying crimes at the trial level, which saw the 20 misdemeanor offences merged into a single offence.[53] Appealing the trial court's decision to merge the 20 offences into one, the State cited Oregon's anti-merger statute,[54] which provides that where a defendant may have violated a single statute, there are nevertheless 'as many separately punishable offenses as there are *victims*'.[55] With the appellate court reversing the lower court's determination, the lone question before the Supreme Court of Oregon concerned whether, for sentencing purposes, Nix had committed 20 individual offences or just one.[56] Notably, because the underlying events arose in 2009 – four years before Oregon's codification of animal sentience – the Court observed the changes to the State's animal protection framework in 2013 and made clear that it would refer only to the pre-amendment statutes, as codified in 2009.[57] With this context laid bare, the Court stated that it 'express[es] no opinion *about the effect of the 2013 amendments* on the issue presented in this case'.[58] Critically, this refusal to state whether the legislature's subsequent finding and policy declaration that animals, as sentient beings, are capable of feeling pain and thus should be cared for in ways that minimise that pain and suffering affected its decision is telling if only by virtue of what is implied by omission. Indeed, while the Court neglected to state that the amendments to the law constituted a *shift* in Oregon's view that animal protection laws

[52] *State v Nix* 334 P.3d 437, 438 (Or 2014).
[53] ibid.
[54] ibid.
[55] OR REV STAT § 161.067 (2023) (emphasis added).
[56] *Nix* (n 52) 438.
[57] ibid, 438 fn 1.
[58] ibid (emphasis added).

principally concern the interests of animals, the statement potentially serves to clarify that this may have been the state legislature's position all along. As such, while the case technically does not address the impact of Oregon's codification of animal sentience, it would be naïve to dismiss its impact on the court's decision.

As to the substantive matter at issue in *Nix*, whether the offences should be merged into a single offence or remain 20 separate offences under the state's anti-merger statute turned on the question of whether animals are 'victims' under Oregon's animal protection laws. That said, the inquiry itself implicated more fundamental questions. Indeed, as animals have historically been considered mere commodities and thus the objects of animal law crimes as opposed to their subjects, the prospect of recognising their victimisation would entail an acknowledgement that the purpose of the law was to prevent the harm animals subjectively experience. Such a view would render animals the subjects of animal protection laws and thus more than mere objects. To be sure, Nix's defence rested on the historical indelibility of such lines, arguing that the scope of the term 'victim' encompassed only humans and legal 'persons', which he distinguished from animals, whom the law classified as personal property.[59] Turning to the legislative intent of the law to guide its determination,[60] the Court rejected the view that only legal persons could be victims.[61] And while it affirmed that Oregon law classified animals as legal property, it rejected the view that animals could not likewise be victims under the general meaning of the term and as contemplated by the legislature, as well as by prior rulings.[62]

Here, the Court distinguished the foundation of Oregon's current animal protection laws from those of other states. Pointing specifically to statutes modeled after New York's, it observed how, 'In the nineteenth through the twentieth centuries, some states began to pass anti-cruelty laws that were intended to deter immoral conduct; the emphasis still was not on protecting the animals themselves.'[63] While the Court acknowledged that Oregon had also followed New York's lead, passing its first animal protection law in 1885, it observed how its courts had long determined animals to be the focus of its laws,[64] with public moral concern simply reflecting an 'additional' consideration.[65] The focus of its laws was the care of the animals suffering the underlying harm of neglect or abuse. Although it did not cite Oregon's codification of animal sentience the year before to arrive at this holding, the Court affirmed that the state's animal protection laws took the suffering of individual animals, an implicit recognition of their sentience, as their primary concern.[66] As

[59] ibid, 438–39.
[60] ibid, 439.
[61] ibid, 442.
[62] ibid, 444.
[63] ibid, 445.
[64] ibid, 446–47 ('Oregon's animal cruelty laws have been rooted – for nearly a century – in a different legislative tradition of protecting individual animals themselves from suffering.').
[65] ibid, 447.
[66] ibid, 443–44.

such, its decision to uphold the intermediate court's determination that animals represent the focal point of animal protection laws ushered them from the margins of the law to its centre as a means of offering them individual relief. While it should be noted that the Court had to vacate its decision due to a procedural deficiency, it has nevertheless affirmed this holding through subsequent decisions,[67] two of which would limit owners' dominion over the animals in their care and in doing so curtail fundamental constitutional liberties.

One of these cases considered whether the state has an interest in conducting a blood test on a legally seized animal thought to be abused, and, if so, whether that state interest implicated and overcame the owner's constitutional rights to be secure in their property against warrantless searches. The case, *State v Newcomb*, concerned a dog named Juno, who was reported to have been beaten and underfed.[68] Arriving at the residence of the defendant, Newcomb, an animal welfare officer observed Juno's near-emaciated state and suspected him to be the victim of criminal neglect.[69] Determining Juno to be in need of medical care, the officer seized him without a warrant.[70] As part of the medical testing performed to understand Juno's condition and provide any necessary medical care, the State procured a blood test, which helped determine that he was malnourished, a key piece of evidence used to convict Newcomb of criminal neglect.[71]

With the case arriving at the Oregon Supreme Court, Newcomb, who had refused to sign a medical release form for the authorities to conduct an examination of Juno, argued that the blood drawn from Juno amounted to a warrantless search of her property and thus constituted a violation her right to be secure in her effects under both the US Constitution, as well as its counterpart in Oregon's law.[72] To buttress her argument, she asserted that because Oregon classified animals as personal property, they were 'no different [from] a folder or a stereo or a vehicle or a boot', alongside other forms of personal property.[73] Seeking to uphold Newcomb's conviction, the State asserted that Newcomb's right to be free from warrantless searches had not been implicated because a 'search' had not been conducted; in particular, they observed how an animal was 'one thing [in] itself', with a dog not containing anything other than 'more dog'.[74] But even if a search had been conducted, the State said, warrantless searches were prohibited only if unreasonable, and the State's statutory protections calling for animals to be cared for, they argued, trumped an owner's privacy interest in their property.[75]

[67] 'Update: Each Animal Counts!' (Animal Legal Defense Fund, 20 August 2015), available at aldf.org/article/update-each-animal-counts.
[68] *State v Newcomb* Or 375 P.3d 434, 437 (Or 2016).
[69] ibid, 436–37.
[70] ibid, 437.
[71] ibid.
[72] ibid.
[73] ibid, 437–38.
[74] ibid, 438.
[75] ibid.

Informing its determination, the Court began with the observation that not everything that can be owned and possessed as property merits the same constitutional protections in the same circumstances.[76] With regard to animals, and domestic pets in particular, it said, Oregon recognised that 'some animals, such as pets, occupy a unique position in people's hearts and in the law', a position not well-reflected in the 'cold characterization of a dog as *mere* property'.[77] As to whether owners have a privacy interest that is invaded by the withdrawal and testing of their animal's blood, the answer, the Court said, turns on the nature of the property in question.[78] Citing the state's recognition of animals as sentient beings, the Court stressed that the law affords them additional considerations in that they are the actual subjects of animal protection laws.[79] The question, therefore, was not whether the law allows humans to treat animals in ways they are prohibited from fellow humans; rather, it was whether the law prohibits humans from treating animals in ways that they are free to treat other forms of personal property.[80] While preserving the fundamental property status of animals, the Court maintained that those having custody over animals have an obligation to secure their welfare needs – a duty with no analogue in the realm of inanimate property.[81] As such, when animals are *lawfully seized*, as was the case with Juno, the State's examination of them to in order provide medical treatment does not constitute a 'search' of the owner's property. The dividing line carved out by the Court in this case, then, was informed by the sentient nature of the property in question. Owners may hold property rights over animals; however, due to the state's recognition of the sentient status of animals, who, again, are the subjects of animal protection laws, those property interests are qualified in the context of warrantless *searches*.

The concern over animal well-being moved Oregon's Supreme Court to chip away at an owner's dominion over the animals in their care in the context of warrantless seizures as well. The underlying case, *State v Fessenden*, concerned reports of an emaciated horse on the property of the defendant, Fessenden.[82] Observing the horse's condition, with the time needed to obtain a warrant threatening to see the horse collapse, the animal welfare officer entered Fessenden's property and seized the animal without a warrant.[83] Here, the defendant sought to suppress the evidence, arguing that it was obtained in violation of both Oregon and US constitutional protections against warrantless seizures.[84] Acknowledging that exceptions to the warrant requirement exist in cases of exigent circumstances,[85]

[76] ibid, 440.
[77] ibid (emphasis added).
[78] ibid.
[79] ibid.
[80] ibid, 441.
[81] ibid.
[82] *State v Fessenden* 333 P.3d 278, 280 (Or 2014).
[83] ibid.
[84] ibid, 280–81.
[85] ibid, 281.

such as to prevent danger to life, Fessenden argued that its scope should be limited to human life – not property, even living property at that.[86] Even if the Court considered animals to be 'sentient life' and not 'property', Fessenden continued, the constitutional right to be secure in one's effects nevertheless trumped society's interest in protecting animals.[87] Supporting this view, Fessenden characterised society's interest in animal protection as 'deriving not from a recognition that animal life is *inherently* worthy of protection, but from various benefits that humans receive by protecting animals'.[88] Rather, Fessenden argued, the protection of animals flowed only from their property value to their owners and the impact of animal cruelty on society at large.[89]

In its review, the Court scrutinised whether, under Oregon law, the exigent circumstances exception to the warrant requirement – which required the State to establish that swift action was necessary to prevent the danger to life – overcame Fessenden's constitutional guarantees.[90] Arguing that whose life mattered should be informed by modern developments, the State observed that the exception should include interventions to protect animal life.[91] Siding with the State, the Court found that an officer acts in concert with the legislative intent of the animal protection laws when they determine that a 'specific animal *deserves* and is *in need of* aid or protection'.[92] Holding that the exception to prevent danger to life was not limited to human life, the Court found that the officer had acted with probable cause to prevent further 'imminent harm to the *victim* of the crime', with animals qualifying as 'victims' under its previous ruling in *Nix*.[93]

Taken together, the legislature's codification of animal sentience and the progressive jurisprudence coming out of Oregon's highest court attest to the impact of this recognition for animals, a series of developments that merit revisiting to establish the new paradigm they have engendered. Notably, it is unclear whether the codification of animal sentience represented a clarification of or shift in the legislature's position as to the purpose of animal protection laws. That said, its determination that animals are sentient beings with the capacity to 'feel pain, stress and fear' and the view that they should thus be cared for in ways to prevent such suffering has affirmed the standing of animals as the primary beneficiaries of Oregon's animal protection laws. As exemplified by the decisions handed down by the Supreme Court of Oregon, the implications of this determination have proved far-reaching. Beyond this centring of animals as the primary beneficiaries of the state's animal protection laws, what the Oregon trilogy – *Nix*, *Newcomb* and *Fessenden* – dismantle is the historical view of animals as mere objects within

[86] ibid, 281, 286–87.
[87] ibid, 282–83.
[88] ibid, 283 (emphasis added).
[89] ibid, 282–83.
[90] ibid, 285.
[91] ibid, 285.
[92] ibid, 287 (emphasis added).
[93] ibid, 286 (emphasis added).

the law. Indeed, despite being property, animals are the 'victims' of the crimes committed against them, and compelling interest in preventing their suffering has abridged some of society's most fundamental liberties, even those grounded in constitutional property guarantees. To follow the arc of these cases, then, the codification of animal sentience has enabled animal protection laws to make 'justice' for animals possible.

That said, while the jurisprudence coming out of the Oregon trilogy has cemented the view that animals are not *mere* property, it did not provide that animals represent something *more or other than* property. As discussed in the next section, the case to test whether these holdings might serve as jurisprudential stepping-stones to find that animals can be legal persons would arrive in 2018.[94]

IV. The Case for Justice

In light of the progressive decisions handed down by Oregon's highest court, advocates sought to argue that animals should be able to sue their abusers for damages under a negligence per se claim, a cause of action arising under Oregon common law.[95] Broadly, to succeed under a negligence per se claim, the plaintiff must demonstrate four prima facie elements: first, the defendant must have violated a criminal statute defining the duty of care; second, the plaintiff must have suffered serious and permanent injuries; third, the plaintiff must be a member of the class of 'persons intended to be protected by the statute in question'; and, finally, the injuries suffered must have been of the type the statute was enacted to prevent.[96] Notably, the question of who constitutes a 'person' under relies on the state's definition of a 'victim', or a 'person … against whom the defendant committed the criminal offense, if … the person … has suffered … as a result of the offense'.[97] Given the Supreme Court of Oregon's determination in *Nix* that 'In any reasonable sense of the word, the "victim" of [animal cruelty] offenses is the individual animal that suffers the neglect',[98] animals necessarily qualify as 'persons' for these purposes because they are the ones whom animal protection laws are intended to protect. With this prospect of animal neglect victims being legal persons in a negligence per se action under the precedent established by Oregon's highest court, it was simply a matter of finding a compelling victim of animal neglect.

This prospective 'person' would come in the form of Justice,[99] a horse who suffered life-threatening injuries, including frostbite, malnourishment and other

[94] 'Justice the Horse Sues Abuser' (Animal Legal Defense Fund, 7 March 2023), available at aldf.org/case/justice-the-horse-sues-abuser.

[95] Brief of Petitioner-Appellant at 2, Just by and through *Mosiman v Vercher*, 321 Or App 439, 446, 518 P.3d 131, 135 (2022) (Appellant Brief).

[96] ibid, 10.

[97] OR REV STAT § 137.103(4)(a).

[98] *Nix* (n 52) 444.

[99] *Justice v Vercher* (n 7) 441.

harms at the hands of his former owner, Gwendolyn Vercher, who pled guilty to criminal neglect in 2017.[100] On its face, Justice met the state's statutory definition of a 'victim' given that he 'suffered' as a result of Vercher's violation of Oregon's animal neglect laws – an argument bolstered by the Oregon Supreme Court's own determination that animals constitute the victims of such offences because they are the ones suffering from the neglect. With precedent weighing in Justice's favour as to this third element, the primary question was whether Oregon courts would uphold the presumed right of an animal who otherwise met the other prima facie elements to sue their abuser in court, just as a human crime victim could.[101]

Despite this precedent established by the state's highest court, it was arguably unlikely that either the trial or intermediate court would embrace prospect of legal personhood for animals due to its novelty. In 2019, the trial court held that Justice could not bring the cause of action simply because animals are not legal persons.[102] Notably, its decision simply stated that because animals could not bear duties, they were ineligible to enjoy rights.[103] Engaging with the case more critically, the intermediate court cited the state's recognition of animal sentience and its implications in cases such as *Nix* and *Newcomb*.[104] In doing so, it reiterated that the law considered animals to be 'a special form of property', which entailed additional considerations as to their treatment compared to inanimate forms of property.[105] With respect to the prospect of their legal personage, however, it distinguished between animals on the one hand and human beings and legislatively created entities, such as corporations, on the other.[106] What distinguished the two groups, the intermediate court said, was that the former possessed the 'capacity' to sue whereas the latter lacked it.[107] According to the court, the incapacity of animals 'exists in perpetuity such that it would be difficult to say that a court – or any human being – may actually discern the animal's own interests in pursuing a legal action'.[108] Contrasting this perceived incapacity of animals to the incapacity of a minor or a human with a severe cognitive disability, the court argued that the former's lack of 'self-determination' was 'inherent' and 'distinctive'.[109] As such, it concluded that animals were not legal persons for the purposes of the law.[110] Although the ruling

[100] ibid, 442.
[101] The first element is satisfied, as Vercher pled guilty to the offence of animal neglect, which established the duty of care. The second element is also satisfied given the serious and permanent injuries Justice suffered as a result of Vercher's violation. As noted, the third element is satisfied by virtue of Justice belonging to the class of persons that intended to be protected by the state's animal neglect laws, which extend to mammals. Finally, the injuries Justice sustained, including frostbite and malnourishment, were of the nature the statute was intended to prevent. Appellant Brief (n 95) 10.
[102] Washington County Circuit Court, Case No 18CV17601, A169933 (2018).
[103] ibid.
[104] *Justice v Vercher* (n 7) 454.
[105] ibid, 451–52.
[106] ibid, 458.
[107] ibid.
[108] ibid, 446.
[109] ibid.
[110] ibid.

was appealed, the Supreme Court of Oregon declined to take up the case, with its order denying review neglecting to offer a reason why.[111] In doing so, it left the intermediate court's holding in place as current law, yet not itself cementing it as such.

V. Conclusion

To be sure, the unfolding of the *Justice* saga in the US's most progressive state raises the question of whether justice for animals, as exemplified by the affirmation of their legal personage, has been delayed, denied or both. As it concerns the codification of animal sentience that helped pave the path to the *Justice* case, what the intermediate court's decision attests to are the ramifications of the codification of 'animal sentience' being limited to pain and suffering. Although the intermediate court did not explicitly state what cognitive capacities animals would need to possess in order to be received as legal persons, a broader definition of what sentience entails as it concerns animals could one day incline courts to determine that they do. Indeed, broadly conceived, sentience implicates aspects of metacognition, such as the ability to self-reflect and empathise with and appreciate the perspectives and viewpoints of others,[112] elements that, if formally recognised by a legislature, might provide a pathway to 'capacitate' animals like Justice into legal persons.

As of June 2023, only a small minority of states have considered legislation to codify the sentience of animals in law. The first state to enact statutory protections for animals over 100 years ago, New York has witnessed the introduction of a bill in its 2022–23 legislative session to declare animals sentient beings capable of 'experiencing pain, stress, and fear' and who should therefore be 'treated humanely', as well as be 'considered the victims of animal cruelty crimes' by courts.[113] To be sure, the bill's definition of sentience echoes Oregon's sentience legislation and aspires to codify what Oregon's courts have expressly affirmed: that animals are the victims and thus intended beneficiaries of the state's animal protection laws. Yet, as with Oregon's sentience law, the New York bill's narrow definition contemplates only negative affective states and arguably limits its impact where the prospect of animals as legal persons is concerned. Conversely, Oklahoma's proposed sentience bill, likewise introduced in 2023, offers a more expansive definition of sentience yet ostensibly narrows the category of animals to whom it would apply.[114] Referred to as the 'Dog and Cat Bill of Rights Act', the Oklahoma bill states that 'Dogs and

[111] Animal Legal Defense Fund, 'Oregon Supreme Court Denies Petition to Review Case Involving Lawsuit on Behalf of Abused Horse' (Animal Legal Defense Fund, 7 March 2023), available at aldf.org/article/oregon-supreme-court-denies-petition-to-review-case-involving-lawsuit-on-behalf-of-abused-horse.

[112] Lori Marino, 'Introduction and Definitions' (2010) *Encyclopedia of Animal Behavior* 132, 132–38.

[113] AB 0041 2022–2023 Leg Assemb, Reg Sess (NY 2023).

[114] Dog and Cat Bill of Rights Act, HB 1992, 59th Reg Sess (OK 2023).

cats have the right to be respected as sentient beings that experience complex feelings that are common among living animals while being unique to each individual animal.'[115] In speaking to the 'complex feelings' that dogs and cats possess, the bill offers a more expansive conception of what sentience entails, contemplating both negative and positive affective states while also not disclosing the prospect of cognitive capacities. Notably, while the Oklahoma bill appears to afford this consideration to cats and dogs alone, by observing the commonality of these capacities among living animals, it extends this consideration to other species. Although Oklahoma's animal sentience bill has yet to be enacted, it offers insight into how jurisdictions, even those considered less progressive, may shift historical views as to whom animal protection laws are intended to benefit, as well as expand the implications of that recognition. Ultimately, while codifications of animal sentience may not transform the legal classification of animals in the near future, what is clear is that they are ushering animals into the focus of animal protection frameworks. In doing so, they are redressing the flawed foundations of those frameworks so that new gains for animals might be scaffolded from them.

[115] ibid.