ON REDEFINING THE BOUNDARIES OF ANIMAL OWNERSHIP: BURDENS AND BENEFITS OF EVIDENCING ANIMALS' PERSONALITIES

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What is it about the law's archaic perception of animals that makes it falter on the brink of constructing a modern concept of animal ownership? Were animals as personalty appreciated in their fundamental distinctions from other personal properties, the law might be able to fashion a more sophisticated set of legal responsibilities for, and rewards of, such ownership. Progress toward achieving that refinement requires the law to embrace a set of related concepts: that animals can and do have personalities, as well as that evidence rules allow those personalities to be manifested through testimony in civil actions concerning an animal's intent. As evidence doctrines on character and propensity expand and contract to address boundaries for these concepts, a fuller potential for property law may be effectively promoted as a result. Burdens (such as the new tort of negligent confinement) and benefits (such as a more reasoned acceptance of animal expression) await.

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I. INTRODUCTION

Much has been written about the social recognition and acceptance of relationships between people and their animals. A modest amount has been written about the recognition and acceptance of that relationship under the law.[1] No author to date, however, has specifically articulated the manner in which that relationship may be evidenced in a courtroom. As a practical matter, procedural obstacles to competent and useful proof of owner/animal relationships certainly exist, and they will not be overcome without some recognition of what evidence and procedural rules do and do not allow to be established. In addressing these concerns, this article has a dual purpose. The first is simply to develop support for a jury instruction, which would list factors for determining the value and character of an animal, including testimony on aspects of its personality.[2]

The second purpose of this article is to suggest a sensible and realistic route by which the owner/animal relationship may be given a richer status in the law—the jury instruction merely being one stone to be laid along that route. Ultimately that route involves not only the bestowal of new privileges on animal ownership, but the imposition of new obligations as well. In a sense, the first purpose looks to the intricacies of ushering the nature and value of an owner/animal relationship into the jury room while the second addresses why such issues should be of importance in a legal proceeding. To achieve these purposes, this article specifically argues five points: 1) Animal ownership is circumscribed by the theme of control; 2) Animals form a special subcategory of *animate personal properties*, which can manifest intent and may express that intent by independently removing themselves from the control of an owner; 3) This intent may be characterized as a significant component of the "personality" of the animal; 4) The relatively new tort of negligent confinement is developing to embrace an owner's obligation to understand and account for an animal's personality; and 5) Evidence of an animal's personality on the witness stand is a necessary component of recognizing the full effect of what animal ownership truly is.

This article's sections track those points. Part II describes how the concept of control is bound up with ownership definitions. Part III explores the categories and subcategories of personal property and the special role that animals occupy within those groupings. Part IV examines the theme of animal personalities as reflected by the idea of animal intent. Part V explains the tort of negligent confinement in light of the modern elements of animal ownership. Finally, Part VI assigns some meaning to a few terms concerning mental and physical

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[1] *See e.g.* Debra Squires-Lee, *In Defense of Floyd: Appropriately Valuing Companion Animals in Tort*, 70 N.Y.U. L. Rev. 1059 (1995); Geordie Duckler, *The Economic Value of Companion Animals: A Legal and Anthropological Argument for Special Valuation*, 8 Animal L. 199 (2002).

[2] As adapted from language found in Uniform Civil Jury Instructions 71.03 (2003).

states, and uses those terms as the mechanisms of evidencing animal personalities and value. It concludes by showing the necessity of adding a special jury instruction in order to assist fact-finders in evaluating animal personality and value.

The purpose of presenting these themes is to modernize personal property law with a more contemporary understanding of what animal ownership entails and to which boundaries it must remain subject.

II. ANIMAL OWNERSHIP ARISES FROM THE EXPECTATION, BUT NOT THE COMPLETE ACHIEVEMENT, OF ANIMAL CONTROL

Animals are personal property, and, as personal property, have owners.[3] Animal owners, in turn, are cloaked with benefits and obligations by virtue of ownership and are primarily subject to the rules affecting personalty and trade; animals can and historically have been owned, bought, and sold among persons as trade items.[4] Specifically, many animals are considered to be products on the open market,[5] to be equipment or tools,[6] and to be sources of food and raw materials for production.[7]

Ownership of all personal properties *other* than animals—from the mundane, such as automobiles and clothes, to the less common, such as antique jewelry—is based almost entirely on physical possession of the object, a condition often confirmed by issuance of certificates or documents indicating exclusive rights of possession.[8] The regalia of animal ownership, to the contrary, is traditionally described as "control, confinement and possession" of the acquired object.[9] To pose the query, "What is animal ownership?" is to ask what regulating

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[3] Readers who refuse to accept the premise that animals are personal property may wish to stop here, as that proposition is a foundational assumption of this article, and they may have little interest in seeing it explicated. Readers who merely do not *approve* of the premise, yet understand that it is an accurate statement of the current law and are nevertheless hopeful for change in that regard, may find the balance of this piece more interesting.

[4] *See e.g. Casto v. Murray*, 81 P. 883, 884 (Or. 1905) (noting that possession of a horse carries with it the right to continued control).

[5] *See Sease v. Taylor's Pets, Inc*., 700 P.2d 1054, 1058 (Or. App. 1985) (concluding that a live skunk was a "product").

[6] *See In re Bob Schwermer & Assoc. Inc*., 27 B.R. 304, 308 (Bankr. N.D. Ill. 1983) (finding that horses may be categorized as equipment for the purpose of a bank's security interest).

[7] *See* Frederick Everard Zeuner, *A History of Domesticated Animals*, 36–64 (Harper & Row 1963) (for a discussion of how domesticated animals became a source for food and raw materials).

[8] *See Johnston v. Asbahr*, 350 P.2d 698 (Or. 1960) (holding possession of stock certificate supports proof of ownership).

[9] *Barrow v. Holland*, 125 S. 2d 749, 751 (Fla. 1960). Ownership rules under statute and local ordinance invariably use control terminology, such as "keeps," "has custody of," "is responsible for control and care of," "harbors," "exercises control over," "permits to reside on property," "has ultimate right to make decisions regarding care and disposition of," or "has charge of." (Quoting ordinances discussed in text *infra*).

the behavior of a specific animal would entail, as well as to ask which individual holds himself out to the world as the animal's owner.[10] In answering that question, there is less consensus in the law than one might think.[11] Legal applications of the term "ownership" are as varied as the jurisdictions in which they are articulated. Some legal tests are inconsistent even *within* a jurisdiction: Washington, for example, holds that the assertion of ownership *is* ownership,[12] but also has found that being the "mere keeper or possessor" is insufficient to establish ownership as a matter of law.[13]

Both public responsibility (under state statutes and municipal ordinances) and private civil liability (under common law) for animal behavior flow directly from the concept of direct control of an animal by a person. Care, custody, and control are the key elements that determine liability, even though they may change slightly in their emphasis from jurisdiction to jurisdiction.[14] Of course, some practical truths cannot be ignored about people "controlling" animals. First, true control is illusory in the sense that, for all intents and purposes, it is unattainable as a practical matter. Behavioral and physiological studies suggest that absolute control over any animal would unavoidably compromise its health and well-being.[15] Second, control is a dynamic phenomenon

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[10] *Pippin v. Fink*, 794 A.2d 893, 895 (N.J. Super. App. Div. 2002) (discussing the status of owners, harborers, and temporary custodians for purposes of dog bite liability).

[11] *See e.g. State v. Garrett*, 564 P.2d 726, 727–28 (Or. 1977) (stating that the existence of defendant's name on dog collar was sufficient to show possession, and holding that it is "reasonable to infer control and possession from the fact of ownership").

[12] *Young v. Estep*, 35 P.2d 80, 81 (Wash. 1934) (finding that a trainer's assertion of chimpanzee ownership, one week prior to an attack, sufficed to prove ownership).

[13] *Beeler v. Hickman*, 750 P.2d 1282, 1286 (Wash. App. 3 Div. 1988) (the fact that a party resided with, cared for, and had exclusive possession over an animal for an extended period of time made ownership a jury question).

[14] Compare two different definitions of "keeper" and "owner" in Oregon:

a. "Keeper." Any person who keeps, has custody of, is responsible for the control or care of, possesses, harbors or controls a dog or other animal or permits a dog or other animal to reside on property owned by the person, without regard as to whether the person has an ownership interest in the dog or other animal. Veterinary hospitals, kennels and pet shops shall not be deemed the keeper of an animal for purposes of this chapter unless expressly provided for herein. In a family situation, the adult heads of the household are presumed to be the keepers, jointly and severally, of the dog.

"Owner." Any person who has a property interest in the animal sufficient to give the person the ultimate right to make decisions regarding the care and disposition of the animal.

Wash. County Code (Or.) § 6.04.020 (1985).

b. "Keeper." Any person or legal entity who harbors, cares for, exercises control over, or knowingly permits any animal to remain on premises occupied by that person for a period of time not less than 72 hours or someone who accepted the animal for the purpose of safe keeping.

"Owner." Any person or legal entity having a possessory property right in the animal or any person who has been a keeper of an animal for more than 90 days.

Multnomah County Code (Or.) § 13.002 (1998).

[15] *See* Heini Hediger, *The Psychology & Behavior of Animals in Zoos & Circuses*, 13–23 (Dover Publications Inc. 1968) (for a discussion of absolute control over an animal).

which is situation- and temporally-specific; an aspect of control which may be established at one time may not be in place at other times and under different conditions.

The propensity rule, discussed *infra*, is a rule that takes the idea of animal control much too seriously: under it, regardless of an animal's actual character, if an owner's animal has hurt another in the past, then that owner is held responsible for failure to control the animal when it harms someone in the present. Control of an animal cannot be that comprehensive. Quite distinct from even the most complicated of machines, an animal's homeostasis (the "maintenance" of an animal) is a phenomenon imposed from within rather than from without.

Regardless of whether animals may be effectively controlled from the outside or not, to whom do individual animals belong *as* property? The two fundamental categories of owner are the state and private individuals. Wild animals are initially deemed the property of the state, and may be transformed into personal property by the act of private parties confining each animal and taking on responsibility for it.[16] Wildlife is considered *ferae naturae* and, being conditioned as the property of the state, cannot be captured without express or implied permission.[17]

Wildlife has historically been considered to have a low social value. Animal value under the law positively correlates with the amount of energy and resources put into an animal's segregation from the wild and its confinement. While that rule holds true for most animals, dogs, within the context of their domestication, have been excluded. A century ago, dogs were distinguished from other animals in their utter worthlessness to the state or to private persons because they engaged in certain behaviors, such that "a ferocious dog is looked upon as *hostis humani generis*, and as having no right to his life which man is bound to respect."[18] Yet the last few decades have witnessed a redemption of sorts.[19]

Once animals are transformed from public to private ownership, private parties tend to maintain ownership by engaging in caretaking and by monitoring a litany of daily animal responsibilities. Certificates or licenses are rarely required (although a certified copy of the brand adopted by owner of livestock can contribute to evidence of ownership).[20] The state, however, does not withdraw its hand entirely: own-

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[16] *State v. Bartee*, 894 S.W. 2d 34 (Tex. App. 1994); *U.S. v. Felter*, 546 F. Supp. 1002 (Utah 1982).

[17] *See Fields v. Wilson*, 207 P.2d 153, 156 (Or. 1949) (finding that beavers are *ferae naturae* and "cannot be captured by anyone without express or implied permission of the State"); Or. Rev. Stat. Ann. § 498.002 (2001).

[18] *Sentell v. New Orleans & C.R. Co*., 166 U.S. 698, 702 (1897).

[19] *See e.g. Westberry v. Blackwell*, 577 P.2d 75, 76 (Or. 1978) (holding that jury should decide whether dog had dangerous propensities).

[20] *Rule v. Bolles*, 41 P. 691, 692 (Or. 1895) (holding that a certified copy of the record of the brand can be "one of the circumstances tending to show a change in possession").

ership obligations imposed upon the private individual have always existed in some form or another. The most pressing are those formulated by the owner's local community, and have no parallel with other types of personal property: municipal ordinances imposing duties on owners to care for their cars are slim, while ordinances requiring owners to care for their dogs and cats are legion.

There is no third alternative to public or private ownership; it is one or the other. All animals are owned by *somebody*. For that reason, changing *terminology*, such as the shift from "owner" to "guardian," does not protect animals more from being treated as personal properties. A dog exempted from one person's ownership does not itself then become an independent entity in the eyes of the law—some constructive owner will still be found to be held responsible for its "free" acts, be it the owner who thinks he or she has divested responsibility (but has not), or the state.[21] While there is thus the law's expectation that someone somewhere is in control of and responsible for each animal, the nagging biological reality remains that even under the best of circumstances, there is something inherent about animals themselves that prevents true control from ever being fully effected.

III. ANIMALS FORM A SPECIAL CATEGORY OF PERSONAL PROPERTY THAT CAN WREST CONTROL AWAY FROM THEIR OWNERS

Under the law, all property may be divided into real and personal property. Personal properties, for their part, are those 1) capable of being possessed and conveyed that 2) are also movable—in order to distinguish them from real properties, such as land and items permanently attached to land, which are immovable.

Personal properties themselves are also often divided by the law into "tangible" personal properties (e.g., furniture or merchandise), and "intangible" personal properties (e.g., stocks or patents). A recently forwarded premise has been that the law might find it fruitful to subdivide even tangible personal properties once more into "animate" and "inanimate" objects. The primary reason for creating a third level distinction is that, as items of economic exchange, animals have certain attributes that inanimate objects do not. The two most significant legal attributes of animals are 1) the ability to form intent and subsequently manifest it independently by motion and action, and 2) the ability to replicate.[22] All of our laws regulating hunting, trapping, agriculture, animal domestication, and animal husbandry owe their ba-

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[21] *Schneider v. Strifert*, 888 P.2d 1244, 1248 (Wash. App. 3 Div. 1995) (determining that owner's failure to restrain dog in chicken pen was negligence).

[22] *See Papers in Economic Prehistory* (E.S. Higgs ed., Cambridge U. Press 1971); C.A.W. Guggisberg, *Man and Wildlife* (Arco Publg. Co. 1970) (for a discussion of the significant legal attributes of animals).

sis to the capacity of animals to independently transport themselves over large distances and to compound their value over time.[23]

The subdivision of animate from inanimate would not please everyone concerned with the subject; some authors consider that all tangible personal properties share sufficiently similar qualities, no matter what each is actually comprised of, to justify treating all the same under the law. "Domestic animals are, as you would expect, as much subject to property rights and ownership as an inanimate object such as a chair or a ring."[24]

Such a broad brush cannot competently paint in the fine details of the story. Animals are the only personal properties with intentions and with the means to express them. Because they are not machines, intentional (as opposed to automatic) behavior is the key to unlocking a significant legal distinction in type between dogs and dishwashers. Intentionality is manifested by the phenomena of expression, and animals express themselves in numerous ways, including showing strong preferences and strong dislikes, slight interests and slight disinterests, seemingly uncontrollable assertions and seemingly unalterable hesitancies, piercing attentions and vague distractions, persistent dispositions and temporary desires.[25] Dishwashers do nothing of the sort.

Note that recognizing those differences does not require our acceptance that we also know what animals must think in general, or that they always have thoughts, or what their particular thoughts might be in a certain situation, only that their expression of intent can often be shown. Since Descartes, many have been concerned about whether animals do or do not have "thoughts hidden in their bodies,"[26] yet whatever that answer is, it should not constrain evidentiary proof that equates particular behaviors with particular intents. "[T]he idea that we cannot determine whether dogs have thoughts *in* them is a dreadful confusion . . . . The relevant question is whether they *express* thoughts."[27]

Moreover, it is not simply legal theory but legal practice that is affected by a third-level distinction among personal properties as well.

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[23] *See generally* Thomas A. Lund, *American Wildlife Law*, 19–34. (U. of Cal. Press 1980); Juliet Clutton-Brock, *Domestic Animals in Zoos: The Historical Background to the Domestication of Animals*, in 2 Intl. Zoo Year Book, 240–43 (Zoological Society of London 1976).

[24] Ray Andrews Brown, *The Law of Personal Property* §§ 2.1, 13 (Walter B. Raushenbush ed., 3d ed., Callaghan & Co. 1975).

[25] *See generally* Daniel C. Dennett, *The Intentional Stance*, 106–16 (MIT Press 1998).

[26] "Since thought and extension constitute the essence of mind and body, respectively, a mind is merely rationally distinct from its thinking and a body is merely rationally distinct from its extension." Lawrence Nolan, *Descartes' Ontological Argument*, The Stanford Encyclopedia of Philosophy, Edward N. Zalta (ed.), http://plato.stanford.edu/archives/sum2001/entries/descartes-ontological/ (Jun. 18, 2001).

[27] Donald R. Griffen, *The Question of Animal Awareness: Evolutionary Continuity of Mental Experience* (Rockefeller U. Press 1976) (quoting N. Malcolm, *Thoughtless Brutes*).

Certainly, the divestiture of ownership is different with animals than it is with other forms of personal property. Abandoned property rules, for instance, define abandonment by an owner of a piece of personal property as the voluntary relinquishment of right, title, claim and possession with an intention of not reclaiming it or resuming possession.[28] With abandoned property, the finder is considered to have primary position.[29] To find true abandonment, there must be a specified *act* of abandonment; mere statements that relinquish ownership are not sufficient.[30] Property intentionally abandoned by the original owner is deemed restored to the common stock and becomes the property of the person who first discovers and takes it into his or her possession.[31]

With animals, however, abandonment is not as synonymous with the concept of "loss of control" as it often is with the concept of "loss of possession." A relationship between an owner and his or her animal may well survive the attempt to abandon the animal. Does the failure to care for an animal constitute its abandonment? Is the only question whether the owner has abandoned the animal, or may the law allow us to ask, as we recognize, that an animal can abandon its owner? Society already treats one's abandonment of a dishwasher and the abandonment of a dog with significant distinction; legal rules about the treatment of property can lag only so far behind.

Rules about lost property point out another distinction. Lost property rules hold that the true owner is considered in primary position, and the finder is in secondary position as to ownership.[32] The original owner normally has a duty to attempt to locate the lost property, lest it be considered abandoned.[33] When animals are lost, those rules often prove to be useless—the ability to regain control of a lost animal, the burden of taking care of a lost animal, and the reward of finding and establishing a relationship with a lost animal wreak havoc with normal property rules developed only with an eye toward inanimate properties.

Finally, rules as to mislaid property—where the landowner on whose real property the personal property has been found is put in primary position, and the finder is again in secondary position[34]—could not even apply to animals. Animals cannot realistically become "mislaid." Because location determines position in the chain of owner-

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[28] *Foulke v. N.Y. Consol. R. Co*, 127 N.E. 237, 274 (N.Y. 1920); *Dober v. Ukase Investment Co*., 10 P.2d 356, 356 (Or. 1932).

[29] *Roberson v. Ellis*, 114 P. 100, 102 (Or. 1911).

[30] *Rich v. Runyon*, 627 P.2d 1265, 1269 (Or. App. 1981) (holding that intent to abandon trailer must be made clear); *Wright v. Hazen Investments, Inc*., 632 P.2d 1328, 1333 (Or. App. 1981) (finding no "clear voluntary act to abandon leasehold"), *rev'd on other grounds,* 648 P.2d 360 (Or. 1982).

[31] *Roberson*, 114 P. at 102.

[32] Griffen, *supra* n. 27.

[33] *State v. Pidrock*, 749 P.2d 597, 599 (Or. App. 1988) (where a defendant's failure to reclaim property constituted abandonment in the criminal context).

[34] *Hill v. Schrunk*, 292 P.2d 141, 142–43 (Or. 1956) (awarding ownership of mislaid money to the legal representative of owner of land).

ship, the place where the property was initially found is critical to determining respective ownership rights.[35] The fact that animals can and do relocate themselves so easily hampers any realistic application of that rule.

In addition, unlike inanimate personal property that generally depreciates in value over time, animals appreciate in value. Animals can replicate themselves over their lifetimes, may foster deeper and more meaningful bonds with their owners as their history with the owner lengthens, and may reveal more interesting and worthwhile facets to their character as they mature. Inanimate personal property cannot do any of this. As the social relationship is enriched, the law must take this new emphasis into account.[36]

In thinking about how animals are classified as property, one tends to reflect on how animals are classified at all. While animals have been classified in innumerable ways, three major branches regularly occur: political, cultural, and taxonomic. Statutory or legislative classifications, what may be termed "political," are classification schemes that recognize fundamental differences between animals and other properties, but simply are not sure what to do about those differences. Like much that is politically organized, such classifications operate out of an unfortunate mixture of myopia and convenience. Using Oregon's statutory scheme as the example, one can identify two separate subcategories of political classification of animals.[37] Seven groups have been segregated based on the animal's use by, or effect on, people (or the absence of use):

1. Predatory/noxious/dangerous/vicious/pest animals
2. Livestock/farm/meat/market animals
3. Assistance or service animals
4. Domestic or companion animals
5. Fighting animals
6. Neglected/abused/abandoned animals
7. Dead animals

Two other groups have been segregated based on the physical location of the animal:

8. Wildlife
9. Exotic animals

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[35] *See e.g. Roberson*, 114 P. at 102 (Or. 1911) (concluding that money found in a warehouse could be considered abandoned, given the purposes of the structure).

[36] Brian Seymour Vesey-Fitzgerald, *The Domestic Dog: An Introduction to Its History*, 126–63 (Routledge & Kegan Paul 1957).

[37] *See* Or. Rev. Stat. Ann, §§ 167.310, 433.340, 167.355, 167.310, 609.20, 167.360, 30.687 (2001) (Animals in general); Or. Rev. Stat. Ann. §§ 346.680, 167.352 (2001) (Assistance animals); Or. Rev. Stat. Ann. §§ 596.010, 596.615, 599.205, 604.005, 607.005, 603.010, 609.125 (2001) (Livestock); Or. Rev. Stat. Ann §§ 610.002, 610.105 (2001) (Predatory animals); Or. Rev. Stat. Ann. §§ 609.305, 609.335, 609.992, 609.205 (2001) (Exotic animals); Or. Rev. Stat. Ann. §§ 496.004, 496.375, 496.380–496.390, 496.007, 496.009, 498.002 (2001) (Wildlife).

The second broad classification scheme comprises popular divisions of animals which may be termed "cultural." Such classifications are entirely based on historical and social qualities people have assigned to certain animals relating to both their use and their location. Cultural classifications may mimic, stray from, or disregard political divisions entirely, and altogether comprise the non-scientist, non-lawyer's attempt to make cultural sense of a complex biological world. Five divisions seem to be the most standard:

1. Pets—dogs and cats
2. Zoo animals
3. Farm animals
4. Wild animals
5. Lab animals

Cultural classifications are fortuitous, inconstant, and often nonsensical. That said, one is much more likely to find them employed by jurists than any other scheme, for, at the very least, they are also the most familiar, having been developed and reinforced throughout childhood and early education. Until recently, the law had tended to accept them in principle.[38] Neither the political nor cultural classification schemes are in any way all-encompassing; innumerable animals are simply not addressed in either, ranging from earthworms to blue whales.

Scientific classification, the third broad scheme, termed "taxonomic," is a system of organization and nomenclature that at the very least does encompass all animals, and does so based on anatomical, behavioral, physical, zoogeographical, and evolutionary characteristics of animals. Taxonomy uses nested groups, each division falling within the other, from kingdom to species.

While an organism's physical location has a little bit to do with its role in a taxonomic scheme, the relations between animals and people have absolutely no effect—where an animal is placed on the taxonomic chart is entirely independent of the activities or concerns of people about the animal. Taxonomic classification is the least utilitarian. In delineating the three major classification schemes, it is interesting to note that neither political nor cultural schemes utilize natural groupings; the categories are artificial because they are not reflected in nature. While the majority of the categories in the taxonomic scheme are also artificial, such a scheme does use the natural grouping of species.[39] For example, dog breeds are not natural groups, nor are dogs and cats together, nor are dogs only as pets. But *Canis familiaris*, the common dog, *is* a naturally occurring group. Domesticated animals, as

[38] Arthur Allen Leff, *The Leff Dictionary of Law: A Fragment*, 94 Yale L. J. 1855 (1985).

[39] Ernst Mayr, *Populations, Species, and Evolution; an Abridgment of Animal Species and Evolution* (Belknap Press of Harvard U. Press 1970) (species are the fundamental units of evolution and are described by biological criteria, the primary one being reproductive isolation of one population of organisms from another).

contrasted with wild animals, is not a natural classification, and its legitimacy is subjective, founded entirely on whether a certain group of people in a given geographic region at a particular time consider a certain set of animals to be tame or not. Yet the law relies on the political and cultural schemes when treating animals as properties and in applying evidence rules to them.

The political and cultural schemes gloss over the panoply of character traits of animals; the taxonomic scheme embraces them. The political and cultural schemes are static and will become outmoded with time; the taxonomic scheme is dynamic and can change as animals themselves change. If more scientifically based classifications were to be used, real distinctions may well be illuminated that point out the value of animals as animate properties, and as objects in nature with personalities.

IV. EVIDENCE OF ANIMAL INTENT IS THE DOORWAY TO EVIDENCE OF ANIMAL PERSONALITY

Lawyers are well acquainted with the difficulty of verbally expressing the internal experience of another—about his heart or mind—in a systematic way that relates his experience to everyone else's:

> What we call explaining behavior requires a certain kind of generalization: I tell you what someone did by describing his mind, and we all have minds, so you understand his experience and can compare it with your own experience and the described experience of others. The pressure to keep unfolding the unique is resisted in favor of an explanation that connects, that makes experience common. So it is that we have theories of psychology and morality, images or models that enable us to speak of the normal mind and the abnormal. In what such way does the law talk about the mind?[40]

Purely in a legal context, explaining animal behavior rarely employs such overt generalizations. For one thing, we are not so certain that animals other than ourselves even *have* minds, and we become uncomfortable, at least in a formal legal setting, suggesting that people share generalized mental experiences with any group other than people themselves. While we are fairly certain that animals such as dogs probably have *some* manner of internal experience, we are not at all sure what manner it is, and whether we personally would be able to identify or relate to the experience in any like manner.[41] Theories of psychology and morality are nearly exclusively theories of *human* psychology and morality; it has been the rare philosopher that has attempted to assess animal psychology or animal morality as a subset of the human realm.[42] Judges and legislators, for their part, consistently resist applying to animals the evidentiary rules that regulate wit-

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[40] James Boyd White, *The Legal Imagination*, 181 (U. of Chi. Press 1973).

[41] *See* T. Nagel, *"What is it Like to Be a Bat?"* 83 Philosophical Rev. 435 (1974).

[42] *Cf.*, Daniel C. Dennett, *Consciousness Explained*, 448–54 (Little, Brown & Co. 1991) *with* Stephen Walker, *Animal Thought*, 383–88 (Routledge & Kegan Paul 1983).

nesses speaking of another's internal experiences, the primary mental experience being that of intent.

To that end, courts historically have forbidden parties from assessing animal intentionality. Any attempt to determine a dog's present intent would apparently mire decision-makers in a "morass of subjectivity."[43] Instead, an animal's intent is *presumed* under the law and presumed almost entirely as an extension of the animal's past conduct. Evidence rules in nearly all states currently require that an animal's intent be determined solely from its "propensity" for engaging in certain types of behaviors.[44]

As to dogs specifically, the start of the presumption for the last few decades has been that dogs have a natural propensity for being good. Judicial determinations of dog intent, for instance, are often based on the fairly pedestrian assumption that dogs are, in general, harmless animals: "Dogs as a class are not considered dangerous to humans[;]" [45] "[i]t is not a common trait of dogs to run into people[;]"[46] "[a]ctivities commonly expected of dogs are defecating, urinating, digging, and harassing other animals."[47]

People, to the contrary, are not assumed to be "naturally good" creatures, and do not appear to have a judicially determined propensity for anything nearly as straightforward as digging or running. Human intent is simply stated to be whatever the actor in question says it is, and the validity of the statement may be challenged by showing the actor's nonconforming conduct. Evidence of other acts, while admissible to show motive, opportunity, intent, plan, knowledge, identity, or absence of mistake, is *not* admissible to prove the character of a person in order to show that he or she acted in conformity.[48] In the context of personality traits and overall character, the propensity rule that governs canine conduct is specifically disallowed for humans.

Recently a federal court allowed factual disputes as to the "playfulness" and "maliciousness" of two dogs to go to the jury.[49] Animal intentionality, at least for dogs, apparently now *has* become a proper subject for percipient witnesses to address. This new development seems appropriate; the subject of whether a dog's intent could truly be ascertained had in the past been relegated entirely to the domain of the philosophizing field biologist, the armchair animal behaviorist, or the itinerant veterinarian. Perhaps the question belongs in a court-

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[43] *Eritano v. Commw.*, 690 A. 2d 705, 708 (Pa. 1997) (holding that certain traits can indicate a "vicious propensity"); *Lewellin v. Huber*, 456 N.W.2d 94, 95 (Minn. App. 1994) (finding that a dog's known tendency to be "frisky" could go to liability in vehicular homicide case).

[44] *See e.g. Westberry*, 577 P.2d at 76 (owner is strictly liable for injuries caused by that animal if owner "knows or has reason to know of the animal's dangerous propensities).

[45] *Newport v. Moran*, 721 P.2d 465, 466 (Or. App. 1986).

[46] *Id*.

[47] *Id.*

[48] Fed. R. Evid. 404.

[49] *Johnson v. Lindley*, 41 F. Supp. 2d 1021, 1025 (D. Neb. 1999).

room, along with the ancillary questions of who exactly has the wherewithal to make such an evaluation, and who is going to rebut, challenge or impeach them at their word? The *Johnson* decision provides for the possibility that propensity evidence will be subsumed by evidence of a dog's particular personality or character.[50] It is difficult to determine what is being eroded in *Johnson*, the character evidence rule for people or the propensity rule for animals, and it may simply be that the two are coming closer together. What *is* apparent is that what used to be satisfactory as a presumption or a judicially noticeable "fact" about the animal world is not satisfactory anymore; animal intent is being arrayed as a pure fact determination without any preconditioned presumption or assumption remaining attached to it at all.

The determination of animal intent is legally significant because it is requisite to the determination of owner responsibility for animal behavior. If one's animal did not *intend* to hurt someone, then one cannot be held responsible for being its owner when the harm occurred. An animal owner's legal responsibilities are founded on the idea of the capacity for control. It is curious that an owner's ability to control or direct an animal's behavior is intrinsic to the imposition of legal liability. As noted, no other category of personal property focuses on whether the object can be controlled; rules regarding responsibility for other types of personal property are, in distinction, all based on the ability to exclusively *possess* the object.

A control analysis makes common law tort liability dependent on an individual animal's history and the owner's knowledge of the history: the "propensity" test derives its power from the significance of past conduct. History and its appreciation thus tie an object and its owner together tightly. Levels of dangerousness of an animal—the picky distinctions between a dangerous dog, a vicious dog, an aggressive dog, etc.—all have to do with predictions of an individualized dog's future behavior based on what the dog has done in the past. Past behavior, in turn, is deemed a reflection of what the owner has allowed or enabled the dog to do.

The injury from a dog bite is not considered to be within the area of risk addressed by running at large ordinances.[51] Negligence per se is not allowed in a dog bite case just because the dog was doing what dogs do, including actions in violation of what dogs are supposed to be controlled from doing under ordinance. Bite liability requires bite history. Bite history is in essence a selected chronology of the history of the dog's personality and character in relation to its owner and to other people and animals around it. Any demonstration would logically require establishing the tenure and quality of the animal/owner relationship, as well as establishing the owner's knowledge and awareness

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[50] *Id.*

[51] *See e.g. Lange v. Minton*, 738 P.2d 576, 579 (Or. 1987) ("injury from dog bite is not within area of risk running at large provision was designed to avoid").

of his own pet's peculiar nature. Courts thus view a fully functioning relationship over time to be fundamental to ownership responsibilities.

When that relationship is breached by a third party, the owner is entitled to recover the relationship's compromised value.[52] When the relationship is breached by either the animal or the owner themselves, the owner bears the responsibility alone. In either case, owners and keepers are obligated under the law to know their animals or suffer the consequences: "The principal danger of [an animal's] escape comes from human error."[53] The principal danger of human error itself comes from an ignorance of an animal's personality.

V. THE NEGLIGENT CONFINEMENT OF AN ANIMAL IMPOSES INCREASED RESPONSIBILITIES ON OWNERS TO ACCOUNT FOR ANIMAL PERSONALITIES

Prevention of escape, or the involuntary divestiture of an animal from an owner's control, is an unavoidable owner obligation. Since the 1980s, certain courts have explicated a common law duty of owners to provide for restraining and confining their animals.[54] To prevent owners from having *too* large a burden in that regard, some conditions have been put on that duty: "The presence of domestic animals in a place where they have a right to be, especially in the absence of any actual knowledge of their vicious nature, does not give rise to a duty . . . to prevent a possible injury by the animal."[55]

By the late 1990s, the new tort of negligent confinement had evolved from further tinkering with the duty-to-contain rule.[56] The tort in its current form appears to have six essential elements for which liability will attach:

1. Where an owner places an animal in confinement;
2. Knows or should know that the confinement would be ineffective;
3. The confinement is a type from which the owner can reasonably foresee that the animal would likely escape;

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[52] *See generally Norwest v. Presbyterian Intercommunity Hosp.*, 652 P.2d 318, 333 (Or. 1982); *see also Brock v. Rowe*, No.C002535CV (Wash. Ct. Crt 2000) (trial court denied motions to dismiss the tort based on its "non-existence in Oregon law" and allowed the tort to go forward to trial); *Smith v. Cook*, No. CCV0303790 (Clackamas Cty. Crt. 2003) (subsequent to motions to dismiss a claim for loss of companionship based on the tort's non-existence, the trial court denied the motions and allowed such a claim to go forward to trial).

[53] *Turudic v. Stephens*, 31 P.3d 465, 472 (Or. App. 2001).

[54] *See e.g. Blake v. Dunn Farms, Inc*., 413 N.E.2d 560, 563 (Ind. 1980) (holding that the "keeper of an animal has the duty and responsibility to provide for the restraining and confinement of that animal").

[55] *See generally Royer v. Pryer*, 427 N.E.2d 1112, 1119 (Ind. App. 1981) (finding landlord's knowledge of the presence of tenant's dog did not impose a duty to restrain or confine).

[56] Initially, at least one state thought the concept had absolutely "no merit," but the court then recanted and accepted the tort anyway. *Compare Evancho v. Baker*, 397 S.E.2d 166 (Ga. App. 1990) *with Supchak v. Pruitt*, 503 S.E.2d 581 (Ga. App. 1998); *Hortman v. Guy*, 529 S.E.2d 182, 184 (Ga. App. 2000).

4. The animal actually escapes;
5. The owner takes no reasonable steps to recapture the animal; and,
6. The animal hurts someone.[57]

Taken as a whole, liability for the tort presupposes an owner/animal relationship to exist in its full capacity. Indeed, the second and third elements specifically address an owner's need to evaluate past behaviors, present dispositions, and the future intent of the animal. Unlike garden-variety negligence, the tort expands owners' specific obligations to encompass a relationship developed with the animal whether desired or not. Possessing no knowledge of the animal's personality has become a liability risk, and the owner's obligations extend outward to his or her immediate communities. Animal "guardians" do not evade that obligation by virtue of some new designation. The tort advances the notion that animal owners do not simply have relationships with their animals; they have relationships with their neighbors *on account* of having animals. The animal/owner relationship affects the social expectations and the legal rights of other people around the pair.

For that reason, "animals-in-the-yard" scenarios may well be moving toward an analysis similar to "gun-in-the-drawer" and "keys-in-the-ignition" type cases.[58] The latter two scenarios revolve around the premise that, if one can reasonably foresee another's misconduct which takes advantage of a threshold act of carelessness, one will be held responsible for the extent of that misconduct. Negligent confinement goes a step further to provide that the responsibility adheres even if the bad actor is an animal.

In sum, animal personalities are becoming as important as their legal classifications. It is not just horses, or just dogs, for instance, that are impacted by the manner of obligations that negligent confinement suggests should come into play. It is escapee-type or rambunctious-type animals, regardless of species or group that are impacted. The political and cultural classification schemes described above treat owners unequally in that respect; the taxonomic scheme (or even the absence of any classifications at all) would make it material only that there are owners and animals in general. The essential elements of negligent confinement elevate *any* owner's need to be aware of the personality of his or her animal, whatever species or category of animal it might be, as long as the requisite control and history has been shown. With that premise, carelessness—not just in confinement, but also in

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[57] *Briggs v. Finley*, 631 N.E.2d 959, 965 (Ind. App. 1994).

[58] *See Mezyk v. Natl. Repossessions, Inc*., 405 P.2d 840, 842 (Or. 1965) (party who negligently leaves keys in ignition creates the likelihood of harm that someone will negligently use vehicle and cause an injury to a third person); *Vining v. Avis Rent-A-Car Sys., Inc*. 354 S.2d 54, 56 (Fla. 1977) (leaving a rental car with key in ignition in high crime area creates risk of harm); *Hendeles v. Sanford Auto Auction*, 364 S.2d 467, 468 (Fla. 1978) (where owner leaves car unlocked and unattended with key in ignition, it is foreseeable a thief will use without permission and cause injury).

caretaking and handling an animal—should become actionable as well.[59]

VI. EVIDENCING ANIMAL PERSONALITY IS AN OWNER PRIVILEGE IN A CIVIL ACTION

Currently, the law on whether and how an animal's personality can be presented to the fact-finder is a confused muddle. In most cases, testimony is simply about an animal's particular acts or behaviors, rather than about what those behaviors might signify as to larger aspects of its personality. In criminal nuisance actions brought by municipalities against dangerous animals, courts have allowed consideration of some basic traits of an animal, but would probably be loathe to consider too many others.[60] Many courts have indicated that at least the "habits, characteristics, and instincts" of domestic animals may be judicially determined.[61] How a particular animal may behave or manifest its character has developed into a pertinent question in adjudicating municipal ordinance violations regarding animal control; expert witnesses have testified regarding a dog's "dominant personality" and that, when the owner fails to show dominance, the dog will view the owner as subservient.[62] The general nature of pet dog behavior has been within the realm of judicial notice.[63]

In civil cases, witnesses have described the personality of a dog at the time it was sold, in circumstances commenting on whether a seller may or may not warranty changes in a dog's future personality. In doing so, one court noted that such a warranty would be inappropriate given that "animals are exposed to an ever-changing environment and may also change, themselves, accordingly."[64] Courts recognize that individual personalities are dynamic. Usually, a person must be sufficiently acquainted with an animal to testify as to its particular qualities.[65] Some courts, on the other hand, find "breed personalities" to *subsume* any individual personality of a dog, the capacity of an individual to change notwithstanding:

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[59] *See Moore v. Moore*, 2001 WL 1360014 at *2 (Tex. App. Nov. 7, 2001) (owner can be held liable for negligent handling if on actual or constructive notice of risk of harm).

[60] *See Cullinane v. Bd. of Selectmen of Maynard*, 742 N.E.2d 83, 86 (Mass. App. 2001) (looking at dog's vicious tendencies with other animals, but finding current psychological state "imponderable").

[61] *Mitchell v. Newsom*, 360 S.W.2d 247, 250 (Mo. App. 1962) (finding that a dog's habit of "barking violently" at garbage man does not indicate a vicious tendency).; *Jarvis v. Koss*, 427 A.2d 364, 365 (Vt. 1981) (holding that pigs are "rooting animals").

[62] *Rothenbusch-Rhodes v. Mason*, 2003 WL 22056565 at *8 (Ohio App. Sept. 4, 2003).

[63] *See e.g. Bogan v. New London Hous. Auth.*, 366 F. Supp. 861, 870 (Conn. 1973) (court took judicial notice of the general nature of a dog's behavior).

[64] *Blaha v. Stuard*, 640 N.W.2d 85, 91 (S.D. 2002); *see also Whitmer v. Schneble*, 331 N.E.2d 115, 118 (Ill. App. 1975) (finding no warranty by a seller that a dog's personality would not change in the future).

[65] *See Graves v. Moses*, 13 Minn. 335 at *2 (1868) (court excluded testimony because witness failed to show that he "was sufficiently acquainted with the mare").

> The pit bull dog or pit bull terrier dog does have a personality not normally found in other dogs. This includes the capacity to change from being docile to extreme aggression toward other animals and humans. This may occur within seconds and without warning. Pit bull terriers do not normally growl or snarl before attacking. Unlike most other dogs, pit bull terriers are known to have the capacity to continue an attack until forced to stop. Once aroused, pit bull terriers will not normally back off from a fight and often continue the combat even after accumulating serious injuries, and have been known to fight to their deaths. A pit bull terrier has great strength in its body and can maintain its hold while tearing its prey with great force. These dogs have a unique fighting ability which can cause very serious injury or death.[66]

In those cases, what a dog actually intended, or is actually like in character, is apparently unavailing under the influence of the public's perception of the breed. The idea of breed profiling has gained some legitimacy even though it reduces dog status back to that of uncontrollable automatons. Given the precept of control, one would think that the common law presumption about dog behavior—that all dogs are presumptively "*harmless*"[67]—is reasonable, and should be unassailable. Nevertheless, trial courts have now made forays into shifting the burden such a rule had established; in at least two recent cases, the "vicious propensities" of certain breeds of dog has been accepted.[68] Rather than the complaining party having to meet the burden of production on whether a specific dog was dangerous, the owner of the targeted breed has the burden to prove that his or her dog was *not* dangerous.

The question is whether *any* breed can be legally determined to be "innately vicious" or whether the focus is on those with culturally tarnished reputations. While the *idea* of breed profiling appears to be a step backward from the concept that animal personalities should be relevant to animal actions, the *practice* of breed profiling nevertheless accomplishes the same goal. The only difference is that owners, rather than victims, will be compelled to utilize such testimony to contest animal ethology experts and evolutionary biologists enlisted to prove that animals cannot overcome certain innate qualities.

To complicate matters further, some jurisdictions allow both profiling, and testimony contrary to profiling:

> What does the testimony demonstrate as far as the demeanor and behavioral characteristics of Kilo [the dog]? The evidence presented at trial was incontrovertible that Kilo was of gentle and friendly demeanor . . . . [Various witnesses testified] Kilo was "just like a baby" and never attacked anyone . . . . Kilo never barked at him and that he would frequently play with

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[66] *City of Akron v. Tipton*, 559 N.E.2d 1385, 1386 (Ohio 1989).

[67] *See Cook v. Whitsell-Sherman*, 796 N.E.2d 271, 275 (Ind. 2003) (disregarding presumption of "harmlessness" and applying statutory strict liability in context of letter carriers and dog bites).

[68] *Gaffney v. Kennedy*, 2003 WL 22149640 at *1 (N.Y. Sept. 2, 2003); *Cayetano v. New York City Hous. Auth.*, 2003 WL 21355410 at *1 (N.Y. June 4, 2003).

> Kilo when Kilo was inside the fence . . . . Kilo was very gentle with . . . little boy, and that he never saw Kilo growl or exhibit any vicious tendencies . . . quite often his little boy would get on Kilo's back and go for a ride. When Kilo or the boy tired of that, they would lay down and play in the grass. Indeed, because of Kilo's amiable behavior, [witnesses] would often remark . . . that Kilo was "too friendly to be a german shepherd." . . . [Veterinarian] asserted that simply because a male dog's otherwise gentle demeanor may change around a female dog in heat, this did not, *ipso facto*, mean that an otherwise mild-mannered dog would always exhibit a change of personality. In the veterinarian's view, whether a dog's personality would change around a female dog in heat was an open question to which he could not provide a definitive or expert opinion. [A]ppellant testified that Kilo was not used for a watchdog . . . Thus, the evidence in the record is overwhelming that, while Kilo was a german shepherd, nevertheless, he exhibited a very gentle and friendly disposition around children, adults, and other dogs.[69]

In a case in which testimony from an experienced dog trainer concerning the characteristics of boxer dogs was allowed, the expert testified that boxers are a protective type of dog and have a propensity for jumping, yet admitted that he was not familiar with the specific dog at issue and noted that dogs have different personalities within their own breed.[70] In allowing that testimony, the review court stated that "while jurors undoubtedly have some knowledge about the characteristics of dogs in general, they may not be familiar with the propensities of a particular breed."[71] More and more detail as to what an animal's conduct "means" (both to itself and to people) is being required.

A large part of the problem appears to be plain semantics, and a set of definitions needs to be established. The terms courts use overlap frequently, as well as fail to intersect at crucial junctures.[72] The *Cullinane* decision illustrates this point: An experienced veterinarian held an "evaluation session" with a Rottweiller and its mixed breed daughter, and testified simply that "[t]he pair had a predatory aggression . . . toward other animals, but did not have an aggression or vicious disposition toward humans."[73] The court, for its part, nevertheless accepted and relied upon observations that the two dogs in the case were, respectively, "dominant" and "a follower," that one dog was "sweet and docile," and that one was "tougher" whereas the other was "readier to back off."[74] The terms used are a mixture of human psychological and regionally colloquial phrases, neither internally consistent with each other, nor externally consistent with the expert's own limited determi-

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[69] *Quave v. Bardwell*, 449 S.2d 81, 83 (La. App. 1 Cir. 1984).

[70] *Chance v. Ringling Brothers Barnum & Bailey Combined Shows Inc.*, 478 P.2d 613, 618 (Or. 1970).

[71] *Id*.

[72] For a particularly egregious example, see *Arnold v. Laird*, 621 P.2d 138, 140 (Wash. 1980) (using "tendencies," "disposition," "demeanor," "condition," and "propensities" interchangeably).

[73] *Cullinane*, 742 N.E. 2d at 85.

[74] *Id*.

nation. Though it is not uncommon for a court to rephrase an expert's technical characterizations, the laxity with which intentionality terms are applied to animals, when compared to the rigor with which they are applied to people, is striking, and unsupportable.

One might work toward defining "personality" with the goal of using it as a legal term to apply evidence rules for purposes of assessing animal actions and animal value. To that end, consider the not unusual suggestion that personalities are composed of traits, consisting of two primary types:[75]

A. Traits expressed through *physical* acts (what the law calls "behaviors"):
   1. *Genetically programmed* behaviors (what the law calls "instinctual acts").
   2. *Learned* behaviors (what the law calls "intentional acts"),
      a. Spontaneous or unique learned behaviors,
      b. Certain *patterned* learned behaviors (what the law calls "habits").
B. Traits expressed through *symbolic* acts (what the law calls "demeanor"):
   1. *Genetically programmed* demeanor (what the law calls "propensities").
   2. *Learned* demeanor (what the law call "character").

In sum, personalities manifest themselves through an individual's physical and symbolic acts, acts that may be either innate or learned. With some effort, legal terms can be identified that accommodate witness testimony on personality. *All of these terms may be comfortably applied to both persons* and *other animals*.[76] In that vein, reconsider concepts such as "playful" and "vicious." A word, such as "vicious" which is quite prevalent in case law on animals,[77] is really only a descriptor, a free-floating adjective that may be applied throughout the above analysis in different ways. One can engage in a vicious act, that is behave viciously, or, alternatively, one can have a vicious demeanor, that is, appear vicious in attitude without specifically doing anything

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[75] The definitions relied upon in this section may be set out formally as follows:
Personality: complex of personal and social traits that distinguish one individual from another
Trait: one of the several distinguishing qualities that make up a personality
Behavior: to conduct oneself in a particular way
Instincts: inheritable and unalterable tendency to specifically respond to stimuli without involving reason
Intent: having the purpose, aim or design to conduct oneself in a particular way or engage in a particular act
Habits: pattern of intentional behavior acquired by frequent repetition
Demeanor: conduct or bearing expressed symbolically, a.k.a. attitude
Propensity: inheritable and unalterable inclination for a certain type of behavior toward others, aka disposition
Character: complex of mental and ethical traits marking a person formed from the influence of one's environment
Webster's Dictionary (Merriam-Webster Publg. Co. 1991).

[76] William Homan Thorpe, *Learning & Instinct in Animals* (2d. ed., Harvard U. Press 1966); *see also* Donald Redfield Griffin, *Animal Thinking*, 154–64 (Harvard U. Press 1984).

[77] *See e.g. Jeffrey v. Caesar*, 1998 WL 106240 (Terr. V.I. Jan. 14, 1998).

vicious. In either case, the reason for doing so may be that the person is programmed to have done so (he is "innately vicious") or that the person has learned to do so from others or his environment (he is "intentionally vicious"), yet in both cases, viciousness is still considered part of his personality. In the former scenario—being innately vicious—the conduct is outside the person's control, whereas in the latter scenario—being intentionally vicious—the conduct is under some manner of control. True, the control may be impaired by a universe of circumstances, from the ingestion of organic substances to the evil influence of others, but at least control may be presumed to exist at the inception.

The court in *Hill* stated that judicial notice of animal habits is allowed for domestics.[78] Apart from being a tautology, the rule is based first on a cultural classification of "domestic animals," which the court would have difficulty defining, and second, in disregard of the complicated interactions which occur between people and animals in modern society. People, as a group, often do not have a good handle on the true nature of most animals' "habits," "instincts," or "impulses." This ignorance extends to the habits of domestic animals, and exists despite the fact that the law presumes otherwise:

> Knowledge of habits of animals. A reasonable man is required to have such knowledge of the habits of animals as is customary in his community. Thus, he should know that certain objects are likely to frighten horses and that frightened horses are likely to run away. He should know that cattle, sheep and horses are likely to get into all kinds of danger unless guarded by a human being, that bulls and stallions are prone to attack human beings and that even a gentle bitch, nursing her pups, is likely to bite if disturbed by strangers.[79]

The select group of people that *do* have a good handle on an animal's "habits," "instincts," or "impulses" are invariably the owners and those in control of the animal. They are most familiar with an animal's past, present, and likely future and they are most aware of what it took to obtain the animal, what it took to control the animal, what it took to tamp down the animal's instincts and propensities, and what it took to raise up the animal's habits and character.[80] Domestic or exotic, tame or wild, endemic or captive, it should not matter which category of animal one posits. For those reasons, the tendency to allow proof of any personality trait walks in tandem with the tendency to appreciate a fundamental distinction in *valuing* all animals distinctly from other types of personal properties:

> Although, on the one hand, pets are considered personal property and, as such, are replaceable, the fact of the matter is that they are property with

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[78] *Hill v. Pres. & Trustees of Tualatin Acad. & P. U.*, 121 P. 901, 905 (Or. 1912).

[79] *Restatement (Second) of Torts* § 290, comment g (1965).

[80] *See e.g.* Konrad Lorenz, *Man Meets Dog* 21 (Kodansha Intl., 1953) ("Everybody who has owned more than one dog knows how widely individual canine personalities differ from each other.").

> personality. No two dogs are the same. Pets are capable of providing invaluable love, friendship, and companionship—things that other types of personal property simply cannot provide. This has led to the familiar adage that "dogs are a man's best friend." In this regard, pets are distinguishable from what we normally consider as personal property. Thus, while we can buy another pet that may fill some of the voids caused by the loss of a pet, there is no such thing as replacement.[81]

An appropriate way to inform a fact-finder of how animal personality affects responsibility as well as how it affects value is through the use of jury instructions. An appropriate jury instruction could contain language such as the following:

A. In determining the value of an animal, you may consider factors that include, but are not limited to:
   1. any love, affection, guidance, or assistance the animal might reasonably have been expected to provide to its owner;
   2. any services the animal customarily performed for its owner in the past;
   3. any services the animal might reasonably have been expected to perform for its owner in the future;
   4. the animal's age, breed, abilities, life expectancy, health, habits, and character.

B. In determining the character of an animal, you may consider factors that include, but are not limited to:
   1. lay or expert witness testimony on the animal's intent, instincts, and general demeanor;
   2. your own observations of specific conduct and disposition.

While the context may be somewhat new, the words placed within such an instruction are not: apart from innumerable provisions in the case law for jury instructions on assessing witness testimony, jury instructions on laws of nature, including those regarding animals in general, have been allowed in the past.[82] The evidentiary factors referenced in the instruction simply seek to bring evidence rules as to animals both up to date and more in comport with the evidence rules affecting people. Nor does the giving of such an instruction then somehow command an evaluation of an animal's "good" personality or a "high" valuation of an animal; the instruction is non-directional such that viciousness, stupidity, or uselessness of an animal may be displayed by the evidence and considered under the instruction, just as well as their complements.[83]

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[81] *Van Patten v. City of Binghamton*, 137 F. Supp. 2d 98, 104–05 (N.Y.N.D. 2001).

[82] *See e.g. Marshall v. Martinson*, 518 P.2d 1312, 1315 (Or. 1974) (regarding official records of wind velocity as admissible evidence under certain circumstances in driving accident); *Big Butte Horse & Cattle Assn. v. Anderson*, 289 P. 503, 507 (Or. 1930) (regarding judicial notice of the effects of sheep grazing on cattle land).

[83] Though the instruction would not prohibit such testimony or evaluation, human predilections might. *See* Daniel C. Dennett, *Kinds of Minds*, 115 (Basic Books 1996) ("Tales of intelligence in pets have been commonplace for millennia . . . . People are less fond of telling tales of jaw-dropping stupidity in their pets, and often resist the implications of the gaps they discover in their pets' competences. Such a smart doggie, but can

The rules on personality evidence pertaining to people are quite different. Generally, evidence of a person's character is not admissible to prove that he or she engaged in certain conduct on a certain occasion.[84] The exceptions to this rule are limited to evidence of habit, plan, or scheme.[85] "Propensity" evidence of a person's history of bad acts is normally excluded due to the danger of unfair prejudice, confusion of issues, and misleading the jury.[86] In the context of evidence law alone, there does not appear to be a fundamental difference between people and animals in the way they each express their respective traits that requires rejecting propensity evidence for one and demanding it for the other.

Outside evidence law, and in the separate realm of social behavior, it is true that one major difference between people and other animals is that people expect themselves to be able to *restrain* instinctual behaviors and propensity, while animals are expected to be subservient to them. People are socially obligated to control all aspects of their personality, programmed or not.[87] Animals do not have social obligations, and are only expected to control learned behaviors and demeanor. Animal rights advocates tend to overlook this distinction, and in seeking to grant privileges to animals, fail to account for the animal's exclusion from the bulk of social expectations. Animal rights advocates look expectantly to rights being granted to animals, but tend to ignore that fairness would require obligations being imposed in conjunction with such rights. Animals with rights would be expected to restrain instinctual behaviors and propensity, and be socially obligated to control all aspects of their personality, programmed or not. Animal rights advocates do not mention the possibility of incarceration or punishment of animals for violation of those social obligations, even though the concept of "animal jail" would appear to be a mandatory by-product of a granted privilege.

In any event, as objects without rights, and with a much less onerous set of social obligations imposed upon them currently, animals nevertheless *do* exhibit personalities and can do so in quite complicated fashions. Whatever traits are being expressed, they are subject to the same strictures of relevancy, materiality, privilege, competency, and credibility that expression of other phenomena is subject to in

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he figure out how to unwind his leash when he runs around a tree or a lamppost? This is not, it would seem, an unfair intelligence test for a dog–compared, say, with a test for sensitivity to irony in poetry . . . .").

84 S*ee e.g. Rich v. Cooper*, 380 P.2d 613, 615 (Or. 1963) (holding evidence of violent reputation to be admissible despite general exclusion of character evidence).

85 *Charmley v. Lewis*, 729 P.2d 567, 568 (Or. 1986) (evidence of habitual use of crosswalk admitted); *Karsun v. Kelley*, 482 P.2d 533, 537 (Or. 1971) (admitted evidence of representations to others which supported showing of a "plan or scheme").

86 *Portland Mobile Home Park v. Wojtyna*, 736 P.2d 604, 606 (Or. App. 1987).

87 Lorenz, *supra* n. 80, at 194 ("In contrast to the wild animal, the cultivated human being . . . can no longer rely blindly on his instincts; many of these are so obviously opposed to the demands made by society on the individual that even the most naïve person must realize that they are anticultural and antisocial.").

courtrooms. While the proposed jury instruction may not be employable as to a full determination of a *person's* value or character, it does support and is supported by property law concepts, ownership abilities, and appropriate classification schemes, all in relation to each other, and all in relation to animals.

In addition, it seems appropriate to place the proof of those traits in front of the fact-finder directly, rather than through another's indirect testimony; that is, a comprehensive evaluation of personality, were it at issue, appears to mandate that the animal itself be in the courtroom.[88]

VII. CONCLUSION

People and other animals have personalities, composed of all the myriad and sundry traits to which any personality is potentially subject, albeit learned or genetic. Under that definition, the "personality" of an earthworm does exist, regardless of the fact that it may be expressed as the sum of one single trait, the relatively boring, genetically-programmed instinctual behavior of digging; the personality of an Irish Setter as well exists, and in turn may be more complex, with many traits acting in concert. A setter's act of digging will comprise a smaller piece to a much larger puzzle than that presented by an earthworm, reflective of a host of interesting forces stemming from both nature and nurture. Biology and ownership jointly contribute to animal personalities.

Animal ownership, a function of animal control, must include as an essential element a knowledge of the animal's particular personality. Animals are *animate* personal properties, and they *do* manifest intent and they *do* at times remove themselves from the control of an owner in expressing that intent. Because owners are socially bound to carefully confine their animals, and to understand and account for their animal's personality in prevention of loss or escape, they must be allowed to evidence what they know personally about the animal's mind as well as about its body. It is not hard to adjust rules already in place that protect the relevance and materiality of facts elicited from the witness stand, even though the issue is of an animal's character, behavior, or value as opposed to a person's. The fact-finder must be allowed to hear it.

If the concept of animal intent is freed from the confines of judicial presumptions, and placed into the more mature care of evidentiary rules regulating witness testimony, then animal ownership may be on the verge of being freed from the pretense that the real relationship between people and animals is subject to control and nothing more. The subjectivity morass may not be as bad as previously thought. Since the most likely witness to gauge an animal's intent or character

[88] *See e.g. Arnold v. Laird*, 621 P.2d 138, 141–42 (Wash. 1980) (jury allowed to observe dog on courthouse lawn to judge nature of interactions).

is its owner, an acknowledgment of, and responsibility for, the personality of an owned animal sits poised on the cusp of becoming a valuable facet of legal ownership rights.