COMMENT

A DOG IS NOT A STEREO: THE ROLE OF ANIMAL SENTIENCE IN DETERMINING THE SCOPE OF OWNER PRIVACY INTERESTS UNDER OREGON LAW

By
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*In 2011, a relatively routine animal neglect investigation spawned a line of litigation that would eventually reach the Oregon Supreme Court. Along the way, this case—*State v. Newcomb*—raised issues central to both constitutional and animal law, involving inquiry into how animals are situated under the law, the weight of a defendant's privacy versus an animal's interests, and what relevance attaches to animals existing as feeling, sentient creatures. In analyzing* Newcomb*, this Comment discusses the case facts in Part I, before laying out the arguments heard—and decisions rendered—by the trial and appellate courts in Part II. Part III reads the Oregon Supreme Court's* Newcomb *opinion in the context of two earlier Oregon animal criminal cases:* State v. Fessenden *and* State v. Nix*. This Comment argues the three,* Fessenden*,* Nix*, and* Newcomb*, form a trilogy of cases, which in turn reveal a jurisprudence that approaches the legal status of animals critically, rejecting absolutist constructs that insist animals must either be situated analogous to any other property or analogous to humans. Finally, this*

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Comment examines the practical, jurisprudential, and strategic implications of the Oregon Supreme Court's holding in Newcomb*, before outlining as-of-yet unanswered questions the case points toward.*

Outside of a dog, a book is man's best friend. Inside of a dog, it's too dark to read.

—Groucho Marx, as quoted by the Oregon Supreme Court, *State v. Newcomb*[1]

I. INTRODUCTION

Juno was dry-heaving.[2] It was a February afternoon in 2011 in Portland, Oregon, and the one-year-old kiva-lab mix was attempting to eat debris in his owner's yard, but unable to keep anything down.[3] There was no dog food in the house; Juno's owner Amanda Newcomb claimed she had just run out.[4] Special Agent Austin Wallace[5] watched

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[1] State v. Newcomb, 375 P.3d 434, 443 n.14 (Or. 2016).

[2] Transcript of Proceedings at 94, State v. Newcomb, No. 1104-43303 (Multnomah Cty. Cir. Ct. 2011).

[3] *Newcomb*, 375 P.3d at 436; E-mail from Emily Davidsohn, Investigations Dep't Attorney, Oregon Humane Society, to authors (Mar. 30, 2017, 3:41 PST) (on file with Animal Law Review) (describing Juno as approximately one-year old during the events in question).

[4] Wallace testified Newcomb "said that she would get food from WinCo, that it came in four-pound loads in clear bags, and that she had ran out of food and that she was going to get more food that night." *Id.* at 16.

[5] Oregon Humane Society (OHS) officers, such as Special Agent Wallace, are certified police officers commissioned by the governor with full law enforcement powers who are employed by OHS, a nonprofit organization.

Juno through the sliding glass doors of Newcomb's apartment.[6] He noticed that Juno was extremely thin, with "no fat on his body"[7]; veterinarians would later assess his body condition score to be 1.5 on a scale from 1 to 10, with 1 being extremely emaciated.[8] Special Agent Wallace, a humane officer employed by the Oregon Humane Society, had been called to the property in response to a concerned neighbor's complaint[9] of animal neglect of a starving dog.[10] Now, Special Agent Wallace—who had seen "hundreds of emaciated animals" in his ten years of investigating animal cruelty complaints[11]—determined that he had enough evidence to seize Juno on probable cause of violating Oregon's neglect statute.[12] Despite Amanda Newcomb's emotional objections, Special Agent Wallace removed Juno and brought him to the veterinary staff at the Oregon Humane Society.[13]

Juno's ribs and vertebrae were visible[14]—his emaciation was undeniable. But Dr. Zarah Hedge needed to rule out other potential causes of Juno's emaciated condition besides lack of sustenance. She was particularly concerned that, considering that Juno had been attempting to eat various objects in the yard, Juno might have a blockage in his system preventing him from keeping food down.[15] To that end, the veterinary team drew and tested Juno's blood[16]—a standard

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6 Transcript of Proceedings, *supra* note 2, at 16.

7 *Id.* at 21.

8 *Id.* at 111.

9 Neighbor Mariah Phillips testified that she first contacted the Oregon Humane Society on December 16, 2010. *Id.* at 29. Officer Wallace worked with Newcomb by phone and set up the February visit. *Id.* at 15.

10 "[T]he complaint was that the dog was being housed in a kennel for many hours of the day, it was being beaten by the defendant, and also wasn't being fed properly." *Id.* at 14.

11 "I've seen hundreds of emaciated animals and—throughout the 10 years I've been doing this, and I could tell that he was in a near-emaciated condition . . . ." *Id.* at 16.

12 OR. REV. STAT. § 167.325 (2015).

13 Officer Wallace testified that Newcomb's caregiver removed the dog from the yard and brought Juno to his vehicle. Transcript of Proceedings, *supra* note 2, at 18–19. In the context of Officer Wallace's seizure of Juno, and Juno's subsequent examination at OHS, OHS veterinary staff were operating as agents of the state.

14 *Id.* at 116–17.

15 *See* e-mail from Emily Davidsohn to authors, *supra* note 3 (OHS staff were concerned that Juno had a blockage, based on his body condition and Special Agent Wallace's observations). Dr. Hedge testified, "There were no underlying medical conditions that I could find for his—his thin body condition, that led me to believe that it was due to lack of proper nutrition or lack of proper amount of food." Transcript of Proceedings, *supra* note 2, at 107.

16 The OHS veterinary team also weighed Juno and tested a sample of his feces. The Oregon Supreme Court determined it "need not separately discuss or analyze the admissibility of the feces sample," and we follow suit here by focusing our discussion on the blood draw and the legal issues it raised. *See Newcomb*, 375 P.3d at 437 n.5 (discussing Juno's feces sample, noting "[t]he record is unclear on . . . whether [the sample] . . . was actively withdr[awn] from Juno or . . . already expelled," and determining that "even an actively withdrawn feces sample" would not require different analysis than the blood draw issue before the court). We also follow the Oregon Supreme Court's lead in not analyzing OHS staff weighing Juno during intake. *Compare* State v. Newcomb, 324

and necessary diagnostic tool before rendering treatment[17]—which revealed that no other medical abnormalities such as a parasite or disease were contributing to Juno's condition.[18] In short, Juno was starving because he was being deprived of one of his most basic needs—food. Amanda Newcomb was charged with second-degree animal neglect, and convicted by a jury.[19]

For Special Agent Wallace and the Oregon Humane Society Investigations team, Amanda Newcomb's was a fairly typical animal neglect case—an owner failing to provide basic food, resulting in the animal's emaciated state—as was the protocol for rendering Juno's treatment. Yet these very basic facts yielded years of legal argument on the legality of the diagnostic testing. Specifically, the legality of the blood draw subsequent to legal seizure of the animal would be appealed all the way to the Oregon Supreme Court, raising core issues about the way our laws treat animals: Was a dog like Juno mere 'property'? Does a dog's need for medical diagnosis and treatment in such circumstances outweigh an owner's alleged privacy interest in that animal? Does the law recognize animals as sentient beings who suffer, and, if so, is that sentience relevant in determining that animal owner's privacy interests? The State and Amanda Newcomb's attorneys had very different answers to these questions—as did Oregon's high courts.

II. WHAT DOES A DOG CONTAIN? THE TRIAL AND APPELLATE COURTS' ANSWERS

At trial, Amanda Newcomb's attorney Pete Castleberry argued that the blood draw was an illegal search in violation of Amanda Newcomb's privacy rights under article I, section 9 of the Oregon Constitution as well as the Fourth Amendment,[20] and moved to have the blood

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P.3d 557, 566 (Or. Ct. App. 2014) (appellate court holding that OHS vet weighing Juno did not constitute a search), *with Newcomb*, 375 P.3d 434 (Oregon Supreme Court leaving appellate holding concerning weighing unremarked and undisturbed). Similarly, after the appellate court rejected defense arguments that Special Agent Watson's seizure of Juno was illegitimate, the Oregon Supreme Court did not examine the matter—nor do we. *See Newcomb*, 324 P.3d at 564 (upholding trial court's conclusion that Special Agent Watson's seizure of Juno was justified by the plain view exception to the warrant requirement); *Newcomb*, 375 P.3d at 439 n.7, 445 n.17 ("As . . . noted, the lawfulness of Juno's seizure is not an issue at this juncture.").

[17] Dr. Hedge testified at trial that medical diagnosis is imperative prior to commencing treatment: "There can be several different medical conditions that can cause an animal to be underweight. Various intestinal conditions, parasites, different things like that. Even organ conditions, so kidney disease, liver disease. So there's a variety of things that we have to rule out and say that they do not have before I can say that it's simply due to lack of proper nutrition." Transcript of Proceedings, *supra* note 2, at 118.

[18] "The laboratory tests revealed nothing medically wrong with Juno that would have caused him to be thin; Dr. Hedge therefore concluded that Juno was malnourished and placed him on a special feeding protocol." *Newcomb*, 375 P.3d at 437.

[19] *Id.* at 434.

[20] *Newcomb*, 375 P.3d at 437. At trial, the defense also argued that OHS weighing Juno and testing a sample of his feces implicated search issues. *Newcomb*, 324 P.3d at 559. As the resulting litigation focused exclusively on the search impact of the blood

draw and all subsequent evidence suppressed.[21] Castleberry argued that Juno, as a dog, was legally property; therefore, despite his sentience, Juno should be treated just like any other property—"a folder or a stereo or a vehicle or a boot."[22] Furthermore, explained Castleberry, the court should analyze Juno as it would any closed container that did not "announce its contents"; just as persons have a privacy interest in the interior of a closed container, the inner contents of which are not known to public view, so too, the argument went, an animal owner has a privacy interest in the interior of that animal—blood included.[23] Because the results of Juno's blood test, and all that it revealed, could not be known from public view, argued the defense,[24] testing Juno's blood violated Amanda Newcomb's privacy interest in Juno's interior under Oregon and U.S. law. The trial court denied the motion to suppress,[25] and a jury convicted Amanda Newcomb of second-degree neglect.[26]

Amanda Newcomb appealed, and again questioned the legality of the blood draw.[27] The Oregon Court of Appeals agreed with the defense, adopting the 'closed container' analysis and ruling that, despite Juno's sentience,[28] Oregon's strong animal cruelty scheme, and the State's objections that "a dog 'is one thing itself' and 'doesn't contain anything else other than more dog,'"[29] Newcomb had a protected privacy interest[30] in Juno's blood even after he was lawfully seized, and therefore the State needed a warrant or appropriate warrant exception to lawfully conduct the search of extracting and evaluating his blood.[31]

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draw, we likewise forgo further discussion of fecal testing or weighing. *See supra* note 16 (explaining the Oregon Supreme Court's exclusive focus on issues implicated by the blood draw).

[21] *Newcomb*, 375 P.3d at 437.

[22] Transcript of Proceedings, *supra* note 2, at 10.

[23] *Id.* at 37–41.

[24] Castleberry argued: "Dr. Hedge engaged in this testing, revealing all these intimate details about the dog's body chemistry, about its blood levels, about its feeding habits, all of these things were information that was not otherwise exposed to public view . . . ." *Id.* at 10.

[25] *Id.* at 52–53. The trial court judge analogized Juno's medical diagnosis and care to that of a child removed by child services.

[26] *Newcomb*, 375 P.3d at 434.

[27] *See supra* notes 15–18 (discussing the defense also advancing arguments regarding Juno's seizure, fecal testing, and weighing before the appellate court, and explaining our decision not to address those arguments further in this Comment).

[28] *Newcomb*, 324 P.3d at 564. The Court explained: "That animals are sentient beings unlike other property may explain the statutory protections that animals receive, and those protections may otherwise provide support for this court's conclusion in *Nix* that animals are 'victims' under [OR. REV. STAT. §] 161.067(2). But it does not follow—and we do not understand the state to argue—that those statutory protections have a constitutional dimension." *Id.* (emphasis omitted) (citation omitted).

[29] *Id.* at 561.

[30] Under the Oregon Constitution, "A protected privacy interest 'is not the privacy that one reasonably expects but the privacy to which one has a right.'" *Id.* at 563 (emphasis omitted) (citing State v. Campbell, 759 P.2d 1040, 1044 (Or. 1988)).

[31] The Court rejected the State's argument that "when police lawfully seize an animal, the owner's privacy rights must yield to the animal's right to care, such that

The Court of Appeals also noted in passing the potentially dual purpose[32] of the blood draw as teased out from the State's witness testimony at trial: both to ensure and confirm that Juno's condition had resulted from inadequate sustenance (and to subsequently provide an appropriate care and feeding regimen), and to obtain evidence of criminal animal neglect that would inform Officer Wallace's next steps[33] as a law enforcement officer. For the Court of Appeals, an animal's statutory protection from harm could not outweigh an owner's right to privacy—a right which that court determined the owner retained even after lawful seizure of the neglected animal.[34]

The practical implications of the appellate decision on animal victims and their rescuers cannot be overstated. As a matter of protocol, the Oregon Humane Society (OHS) had always provided seized animal victims with immediate, responsive assessment and treatment[35]—to do otherwise would have put OHS in jeopardy of violating Oregon's neglect laws since, post-seizure, OHS has lawful custody and control of those animals and is therefore required by law to provide them with minimum care.[36] After the Court of Appeals' ruling, to avoid potential issues of evidence suppression down the road, the OHS Investigations team had to obtain search warrants before moving forward with the most basic care and treatment—a course of action that was counter both to OHS's role as an emergency responder and to the legal and ethical duties of veterinarians on staff to care for animals in need.[37] From April 2014 to June 2016, OHS and others waited with bated breath as the State petitioned the Oregon Supreme Court for review, argued the case before that court, and awaited the court's decision.

III. INSIDE A DOG IS JUST MORE DOG: THE OREGON SUPREME COURT DECIDES *NEWCOMB*

When it came, the Oregon Supreme Court's decision was favorable to OHS staff and others tasked with rendering necessary aid to mistreated animal victims of criminal abuse or neglect. According to the court, Juno's blood draw did not illegitimately impose on his owner's privacy interests—in fact, Juno's owner had no privacy interest in Juno's blood once Juno had been lawfully seized on probable cause of being subject to cruelty (at least to the extent that Juno's medical

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government actions consistent with veterinary treatment do not invade defendant's privacy rights." *Id.*

[32] *Id.* at 563 n.7. Dr. Hedge testified that her "main goal is for [the animals'] welfare" when conducting examinations of animals brought in by the Investigations officers. Transcript of Proceedings, *supra* note 2, at 118.

[33] *Id.* Wallace testified that he brought Juno "[d]irectly back [to the Oregon Humane Society] for an exam to determine what is wrong with him, to get him vet care." Transcript of Proceedings, *supra* note 2, at 19.

[34] *Newcomb*, 324 P.3d at 566–67.

[35] E-mail from Emily Davidsohn to authors, *supra* note 3.

[36] OR. REV. STAT. § 167.310(7) (2015); OR. REV. STAT. § 167.325(1) (2015).

[37] E-mail from Emily Davidsohn to authors, *supra* note 3.

needs related to that cruelty required his blood to be diagnostically tested).[38] Holding that OHS drawing Juno's blood did not, therefore, pose a problem under either the Oregon or federal Constitutions, the Oregon Supreme Court reversed the Court of Appeals, upholding the trial court's ruling and defendant's conviction.[39] At the core of the Oregon Supreme Court's decision was Juno's unique position: legally classified as property, yet simultaneously a living, breathing, sentient being. To understand the court's ruling, one must first examine two seminal Oregon cases that preceded *Newcomb*.

A. An Oregon Animal Crime Trilogy: Fessenden*,* Nix*, and* Newcomb

Newcomb was not the first time the Oregon Supreme Court had considered the impact of animal sentience on the landscape of criminal law. A pair of cases decided nearly two years prior to *Newcomb* echo throughout the court's *Newcomb* opinion. Examined from the vantage point of *Newcomb*, those two cases—*State v. Fessenden*[40] and *State v. Nix*[41]—inform and reinforce the court's opinion in the latter case. Taken as a whole, *Fessenden*, *Nix*, and *Newcomb* stand as an important jurisprudential trilogy, illustrating how the legal system can practically embrace a more just approach to the interests of animals within the legal boundaries of their current property classification.

1. Summarizing Background for Fessenden *and* Nix

Of the two cases, *Fessenden* is the most factually similar to *Newcomb*, grappling also with article I, section 9 and the Fourth Amend-

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[38] *Newcomb*, 375 P.3d at 442.

[39] *Id.* at 446. *Newcomb* examined the propriety of Juno's blood draw as a matter of both state and federal constitutional law. While the Oregon Supreme Court's analysis is similar for each level, readers should beware of treating the two as interchangeable. *See infra* Appendix A (disambiguating search protections under the Oregon and federal Constitutions).

[40] State v. Fessenden, 333 P.3d 278 (Or. 2014). Note, two defendants were charged in *Fessenden*. *Id.* at 280. We follow the standard convention of referring to the resulting litigation as *Fessenden* rather than *Fessenden/Dicke*.

[41] Note, while the *Nix* decision was subsequently reversed on the strictly procedural basis that the matter was not properly before the court, the substantive reasoning developed in *Nix* was later adopted in *State v. Hess*, so in effect, the *Nix* decision stands. State v. Nix, 334 P.3d 437 (Or. 2014), *vacated on procedural grounds*, 345 P.3d 416 (Or. 2015), *reasoning adopted by* State v. Hess, 359 P.3d 288, 290 (Or. Ct. App. 2015), *review denied*, 367 P.3d 529 (Or. 2016). *See also Hess*, 359 P.3d at 293 ("In *Nix*, the Supreme Court addressed and rejected the same argument that defendant makes on appeal. However, the court ultimately vacated its decision in *Nix* because it concluded that it did not have jurisdiction of the appeal . . . . [W]e nonetheless are persuaded by the *Nix* court's reasoning on the merger question, and we adopt it.") (citing *Nix*, 345 P.3d at 424; *Nix*, 334 P.3d at 447). In an attempt to minimize confusion resulting from this litigation chain, we discuss *Nix* as the case setting out the applicable legal theory, while recognizing *Hess* as the case that, for Oregon, has effectively given that theory precedential value.

ment.[42] The facts giving rise to *Fessenden* tee up search and seizure issues with a clarity rarely found outside of law school exams: A veteran law enforcement officer, with specialized training in animal crimes and who had handled hundreds of animal cruelty cases during his tenure, Deputy Lee Bartholomew of Douglas County, Oregon, responded to a complaint that a horse was being starved.[43] Deputy Bartholomew observed the horse from a lawful vantage point, identifying signs that her health was in a dire state.[44] Based on those plain-view observations,[45] the officer came to believe "the horse was suffering from malnourishment and presented a medical emergency,"[46] and that "defendants[47] were committing the crime of first-degree animal neglect."[48] The officer "also believed it would take between four and eight hours to obtain a warrant to go onto defendant's property and that, during that interval, the horse might fall, resulting in its death."[49] Deputy Bartholomew then went onto the property, seizing the horse and transporting her to a veterinarian for immediate medical treatment.[50]

At trial, the defense moved to suppress on the grounds that the officer had seized the horse without a warrant.[51] Before the Oregon Supreme Court, the State advanced two non-exclusive arguments as to why the seizure was reasonable, despite lacking a warrant. The first argument advanced by the State was that the emergency aid exception allows "warrantless entry, search, or seizure" if "necessary to . . . render immediate aid to persons, or to assist persons who have suffered, or who are imminently threatened with suffering, serious physi-

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[42] *Fessenden*, 333 P.3d at 280.

[43] *Id.*; Monique Balas, *Douglas County Deputy Named as One of Nation's 'Top 10 Animal Defenders*,' OREGONLIVE (Feb. 27, 2015), http://www.oregonlive.com/pets/index.ssf/2015/02/douglas_county_deputy_named_as.html [https://perma.cc/5XHS-5GSD] (accessed Apr. 9, 2017); Kat Wolcott, *Deputy Lee Bartholomew: One of a Kind, Literally*, KPIC (Apr. 10, 2012), http://kpic.com/outdoors/deputy-lee-bartholomew-one-of-a-kind-literally [https://perma.cc/L8NM-XARV] (accessed Apr. 9, 2017).

[44] *See Fessenden*, 333 P.3d at 279–80 ("[T]he horse's backbone protruded, her withers stood up, her neck was thin, all her ribs were visible, she had no visible fatty tissue in her shoulders, and she was 'swaying a bit'. . . [and also] straining to urinate, which the officer recognized as a sign of [potentially starvation related] kidney failure . . . .").

[45] *See* State v. Fessenden, 310 P.3d 1163, 1164–65 (Or. App. 2013) (recounting that Deputy Bartholomew first visually assessed the horse's condition from a driveway co-owned by defendants and a neighbor who consented to Deputy Bartholomew's access, and then reached over the fence to perform a physical evaluation).

[46] *See Fessenden*, 333 P.3d at 280 ("The officer testified that the horse was 'literally . . . the thinnest horse I've seen that was still on its feet,' that the horse was at risk of her 'internal organs . . . shutting down,' and that the officer was 'afraid [the horse] was going to fall over and not be able to get back up.' The officer knew than when emaciated horses fall, they frequently have to be euthanized.").

[47] Linda Diane Fessenden and Teresa Ann Dicke co-owned the horse in question, and were both charged with animal neglect. *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

cal injury or harm"—and that, for the purposes of emergency aid, animals were 'persons.'[52] The State's second argument was that the exigent circumstances exception allows warrantless search and seizure when probable cause to believe that a crime has occurred combines with exigencies such as "danger to life or serious damage to property."[53] While the Oregon Supreme Court declined to rule as to whether the emergency aid exception extended to animals, the court resolved *Fessenden* by holding that the exigent circumstances exception applied: "An officer who has probable cause to believe that a perpetrator is in the process of causing unlawful harm [to a victim] has a responsibility to . . . prevent the perpetrator from causing further imminent harm to the victim"—including when the victim is "an animal entitled to statutory protection."[54]

While *Nix* is also a criminal case involving animal law issues, the relevant matters in *Nix* involve neither search, nor seizure, nor privacy. The facts in *Nix* were likewise straightforward: "Acting on a tip, police officers [lawfully] entered defendant's farm and found dozens of emaciated animals, mostly horses and goats, and several animal carcasses in various states of decay."[55] In *Nix*, the question that reached the Oregon Supreme Court did not stem from actions taken by law enforcement officers at the scene, or the State taking custody of the surviving animals. Rather, in *Nix* the question was whether, upon the defendant receiving a jury verdict finding him guilty of twenty separate counts of animal neglect against twenty separate animals, the court ought to recognize twenty separate criminal counts (as it would, for example, had twenty human victims been assaulted) or but a single count (as, for example, would transpire if a defendant were found guilty of stealing twenty candy bars in a single go).[56] More specifically, the issue before the court was whether animals 'count' as victims under Oregon's criminal anti-merger statute.[57] Ultimately, the court concluded that "animals are 'victims' for the purposes of ORS 161.067(2)."[58]

For Oregon anti-merger purposes, crime victim status depends on (1) being able to fall within the anti-merger statute's internally undefined use of the word 'victim';[59] and (2) "whether the legislature regarded [the being seeking victim status] as" a victim of the "underlying substantive criminal statute that defendant has been found to have

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[52] *Id.* at 281 (quoting *Fessenden*, 310 P.3d at 1164).

[53] *Id.* at 282 (quoting State v. Stevens, 806 P.2d 92, 98 (Or. 1991)).

[54] *Id.* at 286.

[55] *Nix*, 334 P.3d at 438.

[56] *Id.*

[57] The statute in question specifies that "when the same conduct or criminal episode violates only one statute, but involves more than one 'victim,' there are 'as many separately punishable offenses as there are victims.'" *Id.* (quoting OR. REV. STAT. § 161.067 (2009)).

[58] *Id.* at 448.

[59] *See id.* at 439 ("We begin with the text of the [anti-merger] statute, in context. . . . At issue in this case is the meaning of the word 'victims' as it is used in that statute.").

violated."[60] The court determined first that animals validly fit within the anti-merger statute's use of the term 'victim.'[61] Second, the court analyzed the underlying substantive criminal statute itself: Oregon's law prohibiting animal neglect.[62] In doing so, the court looked to "who suffers [the] harm that is an element of the offense,"[63] determining that the statute's content "reveals that the legislature's focus was [on] the treatment of individual animals, not harm to the public generally or harm to the owners of the animals."[64] After applying a similar analysis more broadly to Oregon's general animal protection criminal statutes,[65] the court framed its conclusion that animals are crime victims for purposes of the anti-merger statute, a decision based not on policy but "precedent," recognizing that the "legislature regarded . . . animals as the 'victims' [of animal cruelty]."[66]

2. Reading Newcomb *in the Context of* Fessenden / Nix

While *Fessenden* and *Nix* are both rich cases in their own rights,[67] they also inform our reading of—and needless to say, the court's analysis in—*Newcomb*. In both those earlier cases, the Oregon Supreme Court was already grappling with whether the core task before it—resolving legal questions by carefully and consistently developing the law—is better served by analogizing animals to humans or objects. While the *Fessenden/Nix* court[68] did not analyze the issue of how to situate animals vis-à-vis humans and objects as explicitly as the court in *Newcomb* does,[69] an appreciation for the utility of thinking critically about the position of animals in the law runs through their analyses. In *Fessenden*, the court rejects the argument that just because animals are property they are somehow incapable of having the sort of intrinsic value that might justify a warrant exception—a kind of value already

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[60] *Id.* at 438, 442; *see id.* at 442 ("[T]he otherwise undefined reference to 'victim' in ORS 161.067(2) must draw its meaning from some other source. . . . [W]hat counts for the purposes of ORS 161.067(2) is whether they were victims under the substantive criminal statute that the defendant violated.").

[61] *Id.* at 443 ("The ordinary meaning of the word 'victim' as it is used in [the anti-merger statute] can include both human and non-human animals, and nothing in the text, context, or legislative history of the [anti-merger] statute necessarily precludes an animal from being regarded as such.").

[62] *See id.* (analyzing victim status under OR. REV. STAT. § 167.325—Oregon's animal neglect statute).

[63] *Id.* (quoting State v. Glaspey, 100 P.3d 730, 733 (Or. 2004)).

[64] *Id.* The court based this determination specifically on the statute requiring "minimum necessary [care] 'to preserve the health and well-being'" of individual animals, with no exemption for neglect committed by an owner upon their own animals. *Id.*

[65] *See id.* at 444 (analyzing "[o]ther aspects of the larger [animal protection] statutory scheme").

[66] *Id.* at 448.

[67] A deeper analysis of either *Fessenden* or *Nix* is beyond the scope of this Comment.

[68] *Fessenden* and *Nix* were decided on the same day: August 7, 2014. *Fessenden*, 333 P.3d at 278; *Nix*, 334 P.3d at 437.

[69] *See infra* notes 159–160 and accompanying text (discussing the *Newcomb* court choosing to frame their analysis by differentiating animals from objects).

associated with humans.[70] Similarly, in *Nix* the court rejects the defense's argument that because animals are property they may never partake of an attribute—such as victim status—historically associated with humans.[71] In doing so, the *Fessenden/Nix* court does not suggest that animals are legally equivalent to humans. Quite the contrary, the court acknowledges that animals are property under Oregon law, using language the *Newcomb* court would later rely on, in part, to lay out its decision to frame animals as distinct from objects, rather than humans: "Oregon law . . . permits humans to treat animals in ways that humans may not treat other humans."[72] At the same time, however, *Fessenden* approaches animal status critically: that the "law still considers animals to be property," does not impel the conclusion that the law must—or should—treat them like non-sentient objects.[73] Similarly, *Nix* takes a nuanced, non-absolutist stance on crime victim status for purposes of merger. For that court, acknowledging that animals are property under the law does not preclude them from enjoying protections denied to non-sentient objects;[74] likewise, reading animals as victims under Oregon's anti-merger statute does not automatically grant animals *all* human-focused statutory victim rights.[75]

In a maneuver presaging the *Newcomb* court's discussion of sentience and legal and social norms—literally laying the groundwork for the *Newcomb* analysis[76]—*Fessenden* "consider[s] the past and current societal interests in protecting the lives of animals and the peoples' constitutional rights to possession and privacy and to decide in what instances and as to which animals, if any, society's interests are sufficiently compelling to justify a warrantless search or seizure."[77] Indeed, the *Fessenden/Nix* court looked to sentience as a key factor influencing how it situated animals' social value and legal position. Running through the *Nix* decision is "the legislature's focus on the *suffering* of

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[70] The defense argued this insufficiency of animal intrinsic value made both the emergency aid and exigent circumstances exceptions inapplicable to animals. *See Fessenden*, 333 P.3d at 282, 284 ("Defendants respond . . . that *neither exception* now extends to or should be broadened to extend beyond the protection of human life to the protection of property. . . . From the premise that society's interest in protecting animal life is not now equivalent to its interest in protecting human life, defendant contends that an exception to the warrant requirement . . . that is justified by the latter should not extend to the former.") (emphasis added).

[71] *Nix*, 334 P.3d at 438–39.

[72] *Fessenden*, 333 P.3d at 283.

[73] *Id.*

[74] *See Nix*, 334 P.3d at 438–39, 447–48 (summarizing defendant's argument that victim status and property status are mutually exclusive, discussing animal suffering and sentience, and concluding that "defendant is incorrect" despite "Oregon law regard[ing] animals as the property of their owners," "animals are 'victims' for the purposes of ORS 161.067(2) . . . .").

[75] *Id.* at 442.

[76] "As to the nature of the property involved—here, a living animal—we are aided by our analysis in *Fessenden/Dicke*." *Newcomb*, 375 P.3d at 440. *See also, e.g.*, *id.* at 440–42 (citing *Fessenden* throughout).

[77] *Fessenden*, 333 P.3d at 285.

individual animals": the severity of animal crimes inform "the relative degree of harm to or suffering" of the individual animals who "suffer[ ] the neglect, injury, cruelty, torture, or death" prohibited by law.[78] The suffering with which Oregon's animal protection laws concern themselves is sentience by any other name. Without being sentient, animals cannot suffer; sentience is therefore implicitly at the root of Oregon's animal protection laws—and, thus, *Nix*'s limited-purpose designation of animals as crime victims.[79] Similarly, in *Fessenden*, the court rejects the defense's position that "society's interest in protecting animals . . . derive[s] not from a recognition that animal life is inherently worthy of protection, but from various benefits that humans receive" by simply citing its analysis in *Nix*[80]: "Although early animal cruelty legislation may have been directed at protecting animals as property of their owners or as a means of promoting public morality, Oregon's animal cruelty laws have been rooted—for nearly a century—in a different legislative tradition of protecting individual animals themselves from suffering."[81]

In its treatment of sentience, however, *Newcomb* does differ subtly from *Fessenden/Nix*. The *Newcomb* court explicitly flags Juno's sentience (an attribute shared by all other animals) as a critical factor in its analysis of the larger Constitutional issues.[82] For *Newcomb*, the connection between an animal's sentience and the existence of a privacy right in a seized animal's blood (for diagnostic purposes) is clear and relatively direct: there is neither a socially legitimate expectation of privacy nor an objective privacy right in a lawfully seized animal—believed to be suffering from criminal cruelty—who undergoes a subsequent diagnostic test necessary for rendering medical care and treatment.[83] In contrast, *Fessenden* complicates its sentience analysis by digressing to discuss the divergent treatment of animals: "some animals, such as pets, occupy a unique position in people's hearts and in

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[78] *Nix*, 334 P.3d at 444 (emphasis added).

[79] *See The Idea That Only Humans Are Sentient*, ANIMAL ETHICS, www.animal-ethics.org/the-idea-that-only-humans-are-sentient [https://perma.cc/ASX4-C2FH] (accessed May 19, 2017) ("Sentience is the capacity to have positive and negative experiences . . . .").

[80] *Fessenden*, 333 P.3d at 282–83.

[81] *Nix*, 334 P.3d at 447.

[82] *Newcomb*, 375 P.3d at 439.

[83] This logic functions by determining that society is not prepared to accept as legitimate expectations that such information regarding an animal's health be private (for Fourth Amendment purposes) and that an owner has no objective privacy right to that information under those circumstances (for article I, section 9 purposes). *Infra* Section III.B (discussing in depth the *Newcomb* court's reasoning).

the law."[84] All animals are sentient,[85] and so sentience alone cannot be responsible for the enhanced position of such animals, which include dogs,[86] horses,[87] chimpanzees,[88] dolphins,[89] and companion animals[90] (potentially regardless of species).[91] Perhaps this tangent is best read with the sentiment with which the court closes its discussion of special animals: "We do not need a mirror to the past or a telescope to the future to recognize that the legal status of animals has changed and is changing still . . . ."[92] Those legal status changes may occur with varying degrees of speed between different circumstances (including between different classes of animals).[93] Those status changes also take place against a legal backdrop "that, at this moment in time . . . does not protect animal life to the same extent or in the same way that it protects human life."[94] Nearly two years into the *Fessenden/Nix* court's future, *Newcomb* would provide an example of just such a change—and, in doing so, illustrate how shrewd legal framing can produce more just outcomes.

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84 *Fessenden*, 333 P.3d at 284. That the law does treat different animals differently is clear from, for example, a read of animal cruelty statutes: depending on an animal's species or relationship with humans it may receive more or less protection. *See, e.g.*, Or. Rev. Stat. § 167.335 (2015) (exempting various animals from protection under Oregon's cruelty statutes—including "commercially grown poultry," "vermin or pests" subject to reasonable control activities, and animals lawfully fished, hunted, or trapped).

85 Marc Bekoff, *A Univeral Declaration on Animal Sentience: No Pretending*, PSYCH. TODAY (June 20, 2013), https://www.psychologytoday.com/blog/animal-emotions/201306/universal-declaration-animal-sentience-no-pretending [https://perma.cc/R55W-H8RB] (accessed Apr. 9, 2017).

86 "We are uncomfortable with the law's cold characterization of a dog . . . as mere property." *Fessenden*, 333 P.3d at 284 (quoting Rabideau v. City of Racine, 627 N.W.2d 795, 798 (Wis. 2001)).

87 "Horses also hold a special place in human affection . . . ." *Id.*

88 "Ongoing litigation in the United States seeks to establish legal personhood for chimpanzees . . . ." *Id.*

89 "[D]olphin[s] should be seen as 'non-human persons' and as such should have their own specific rights . . . ." *Id.* at 284 n.12 (quoting Facsimile Circular from B.S. Bonal, Member Sec'y, Cent. Zoo Auth., Ministry of Env't & Forests, Gov't of India, to Chief Sec'y to All States and Union Territories et al. 2 (May 17, 2013), http://cza.nic.in/ban%20on%20dolphanariums.pdf [https://perma.cc/Q77H-WULP] (accessed May 19, 2017)).

90 *Id.* at 284.

91 *Fessenden* identifies the affection humans hold for dogs and horses as being—at least in part—responsible for those animals holding special status. The court simply notes the developing legal position of dolphins and chimpanzees, without exploring the logic behind those animals being treated differently than, for example, other primates or cetaceans. *Id.*

92 *Id.*

93 *See supra* notes 88–89 and accompanying text (discussing developments in the concept of animal sentience).

94 *Fessenden*, 333 P.3d at 284.

B. Distinctive Facts & Legal Differences: A Deeper Analysis of Newcomb

Keeping in mind the court's seminal analyses in *Fessenden* and *Nix*, a deeper look at *Newcomb* is warranted. The overarching issue the Oregon Supreme Court focused on in *Newcomb* is "the lawfulness of testing Juno's blood."[95] Specifically, in untangling the otherwise mundane legal issues implicated by the blood test (e.g., if a search has transpired, what sort of privacy interest defendants have in lawfully seized property, and so forth),[96] the court framed its task by acknowledging that "the seized property was a living animal . . . not an inanimate object or other insentient physical item."[97] For the court, Juno's sentience as an animal became the critical issue: the core question running through the court's analysis is "whether that distinctive fact makes a legal difference."[98]

The court grounded its decision to focus on Juno's *animalness*—his status as a living creature, and a sentient one at that[99]—in the analytic structure of constitutional search jurisprudence. Because "[n]ot all things that can be owned and possessed as personal property merit the same constitutional protection in the same circumstances,"[100] in order to determine if (and if so, the extent to which) state action invades a defendant's constitutionally protected privacy interest in a piece of property, courts must interrogate the property's nature and the circumstances of the state's interaction with that property.[101] As *Newcomb* illustrates, a living animal's sentience is relevant to both levels of analysis.

In its inquiry into "the nature of the property involved—here, a living animal"[102]—the court described Juno's relevant attributes, i.e.

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95 *Newcomb*, 375 P.3d at 438; *see id.* at 445 (framing the question as whether "defendant [has] a protected privacy interest in the withdrawal and testing of her dog's blood for [the] purposes of medical treatment after the dog had been lawfully taken into custody on probable cause to believe that he had been criminally neglected."); *see also supra* notes 16–17 (explaining that seizure, fecal testing, and weight-taking were not considered by the Oregon Supreme Court).

96 "The general issue that this case presents is one that has come before the court with some frequency before: the extent to which the state may examine property without a warrant after it has lawfully seized that property [in] the course of a criminal investigation." *Newcomb*, 375 P.3d at 439.

97 *Id.*

98 *Id.*

99 *See id.* at 440–41 (noting that Juno specifically, and animals more generally, are living and "sentient beings capable of experiencing pain, stress and fear").

100 *Id.* at 440.

101 *See, e.g.*, *id.* ("Whether defendant had a protected privacy interest that was invaded by the withdrawal and testing of Juno's blood requires us to examine the nature of the property involved and the circumstances of the governmental intrusion into that property.").

102 *Id.*

the relevant attributes of animals, as (1) being sentient;[103] (2) being "deemed property";[104] and (3) benefiting from unique "protections that are distinct to animals and do not apply to inanimate property"[105]—the latter of which includes imposition of "affirmative obligations on those who have custody of an animal to ensure that animal's basic welfare."[106] The *Newcomb* court's analysis of what constitutes a 'search' does not limit an animal's nature to its property status, but rather includes the recognition that an animal—unlike any other sort of property—is sentient. Moreover, the court's analysis indicates animals are normatively positioned in ways distinct from other property. A different set of "social and legal norms" apply to animals—particularly animals owned and possessed by humans.[107] One of the methods the court deploys to map the contours of those norms is examining the sort of statutory protections that exist around animals[108]: laws meant to shield animals from cruelty, whether in the form of active abuse or passive neglect.[109] To be clear, those laws themselves do not shift the boundaries of constitutional privacy protections.[110] Rather, those laws exist as a reflection of social mores: that animals are *different* is attested to, in part, by the existence of laws which offer them levels and types of protection unknown to non-sentient objects.[111] The implication of the court recognizing the different norms attendant to animals is that the nature of an animal as property for search protection purposes prevents mere rote application of the legal analysis used where non-living objects are involved. Evaluating the level of protection in

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103 "[A]nimals 'are sentient beings capable of experiencing pain, stress and fear[.]'" *Id.* at 441 (citing *Fessenden*, 333 P.3d at 283).

104 *Id.* at 440 (citing *Fessenden*, 333 P.3d at 283; OR. REV. STAT. § 609.020 (2015)).

105 *Id.*

106 *Id.* at 441 ("[T]hose obligations have no analogue for inanimate property."); *see also id.* ("Significantly, the obligation to provide minimum care arises for anyone who has custody or control of an animal. 'Minimum care,' in turn, means 'care sufficient to preserve the health and well-being of an animal' and includes, in addition to adequate nutrition, '[v]eterinary care deemed necessary by a reasonably prudent person to relieve distress from injury, neglect or disease.'" (quoting OR. REV. STAT. § 167.310(7)).

107 *Id.* at 434.

108 The Court largely focuses on Oregon-specific statutory animal protections, in the context of its analysis of Oregon Constitutional search jurisprudence. *See id.* at 440 (describing legal position of animals under Oregon statutes: "Oregon's animal welfare statutes impose one of the nation's most protective statutory schemes[.]" (quoting *Fessenden*, 333 P.3d at 283)). Similarly, the court finds that legal backdrop relevant for Fourth Amendment purposes. *Id.* at 446 ("And the laws and social norms of behavior that we have discussed as they pertain to animal welfare generally, and minimum care in particular, are significant under the Fourth Amendment analysis . . . .").

109 *See, e.g.*, *id.* at 440–41 (listing various Oregon statutes protecting animal welfare).

110 *Id.* at 441–42.

111 *See id.* at 441 ("Reflected in those and other laws that govern ownership and treatment of animals is the recognition that animals 'are sentient beings capable of experiencing pain, stress and fear[.]'") (citing *Fessenden*, 355 Or. at 768); *see also id.* at 443 ("Oregon law simultaneously limits ownership and possessory rights [of animals] in ways that it does not for inanimate property. Those limitations, too, are reflections of legal and social norms.").

the constitutional 'search' context afforded to a defendant's animal property involves examining "the nature of the relationship of humans to the animals that they own and possess, as well as the social and legal norms that attend to that relationship."[112]

For the *Newcomb* court, that dynamic between humans, animals, and society gives rise to the "abstract proposition . . . that a person who owns or lawfully possesses an animal, and who thus has full rights of dominion and control over [that animal], has a protected privacy interest that precludes others from interfering with the animal in ways and under circumstances that exceed legal and social norms."[113] As a tautological summary of the current position of animals within the law ('can be owned as property—therefore if owned, treat as property') this statement suffices. Within the context of search and seizure jurisprudence, however, the statement calls to be unpacked further—which is just what the *Newcomb* court proceeds to do.[114] As the court illustrates through a pair of hypotheticals involving 'dogs on the street,'[115] that an animal is owned as property does not resolve the degree to which state interaction with that animal impinges upon the animal owner's privacy interests. Property status may be relevant, but is hardly dispositive.

Having acknowledged the role of Juno's property status in its search analysis, the *Newcomb* court proceeds to consider the context in

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[112] *Id.* at 440. The court's decision to treat being an animal as a relevant property attribute which demands to be considered as part of a protected privacy analysis (as opposed to Juno's other attributes, which the court apparently did not consider relevant for those purposes, such as Juno being mobile, or a quadruped, or the like) builds on the court's earlier rulings in *State v. Fessenden* and *State v. Nix*. *See supra* Part III.A (analyzing the treatment of sentience and animal status by the *Fessenden/Nix* court).

[113] *Newcomb*, 375 P.3d at 441.

[114] *See id.* at 441–42 ("Those observations alone are not enough to resolve the issue before us. . . . [D]etermining the existence of a constitutionally protected privacy right in property depends not only on the nature of the property itself, but also on the nature of the governmental intrusion and the circumstances in which it occurred. We must consider those, too, in resolving the issue before us.").

[115] "[F]or example, if a dog owner walks his dog off-leash down the street, and the friendly dog runs over to greet a passerby who pets it, that act of petting the dog would invade no possessory or privacy interest; a contact of that kind would fall well within social norms and conventions, even if by petting the dog the passerby discovers something concealed from plain view (e.g., that under the dog's thick fur coat, the dog is skin and bones to the point of serious malnourishment). On the other hand, if the passerby produces a syringe and expertly withdraws a sample of the dog's blood in the time that it would take to greet and pet the dog, that contact would violate the owner's possessory and privacy interests, even if the passerby did so for a valuable scientific study (e.g., whether local animals were infected with an easily-transmitted virus); such a contact would fall well outside social norms and conventions." *Id.* at 441. The *Newcomb* court's dog-walking hypotheticals function better to illustrate the sort of social norms and conventions relevant to search analysis than they do as exhaustive heuristics describing the contours of those norms and conventions. By way of example, that the dog in both hypotheticals is off-leash does not seem determinative; petting an approaching friendly dog (leashed or not) seems as socially normative as swiftly conducting a blood draw on the same dog would be socially aberrant.

which the state interacted with Juno. Doing so, the court looks to "the nature of the governmental intrusion and the circumstances in which it occurred"[116]—including the degree to which the state's properly contextualized interaction with Juno falls within the bounds of "legal and social norms."[117] Here, again, Juno's animal status—his being a living, sentient creature—matters. The court describes the context of Juno's blood draw: he had been lawfully seized by an officer who had probable cause to suspect he was suffering from starvation in violation of criminal law,[118] a "condition [which] appeared serious and required medical attention."[119] Specifically, the medical attention Juno required included blood work to "ensure appropriate medical care" by ruling out other "medical condition[s] that might cause his malnourishment."[120] Critically, what the state was doing for Juno was medical diagnosis and treatment[121]—the sort of action undertaken on behalf of a living, feeling creature, not an inanimate object.[122] This was not a matter of a state agent seeing that a piece of seized property was in some way damaged and, consumed with curiosity as to how it came to be that way, running a series of diagnostic tests. Rather, what *Newcomb* deals with is an animal in state custody who was suffering from a physical malady, and who would continue to suffer that malady until he re-

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116 *Id.* at 442.

117 *Id.* at 441. The court's legal and social norm inquiry runs throughout its analysis of the state's interaction with Juno: "[A] protected privacy interest . . . precludes others from interfering with the animal *in ways and under circumstances* that exceed legal and social norms." *Id.* (emphasis added).

118 *Id.* at 442.

119 *Id.*

120 *Id.*

121 *Id.* Note, the *Newcomb* court was under no illusion regarding OHS veterinary staff's near-certain awareness that those medically-motivated tests would *also* surely prove relevant in any subsequent criminal trial. In acknowledging that tests performed on animals seized on probable cause of cruelty will, as a practical matter, often serve this "dual purpose," the court finds no constitutional defect. *Id.* at 442 n.12. What matters is that animal is examined "for medical reasons," not that the results of that examination may also be relevant at trial. *Id.* ("A medical professional who examines a victim of criminal abuse for purposes of diagnosis and treatment—whether the victim is human or animal—no doubt realizes that the results may have evidentiary value if a criminal prosecution ensues, but that reality does not alter the medically appropriate nature of the testing."). Framing veterinary "diagnosis and treatment" in this fashion, the court keeps the focus of their analysis on the well-being of the sentient victim at hand: the animal. *Id.*

122 *See id.* (discussing parallels between medical treatment of human crime victims and medical treatment of Juno: "A medical professional who examines a victim of criminal abuse for purposes of diagnosis and treatment—whether the victim is human or animal—no doubt realizes that the results may have evidentiary value if a criminal prosecution ensues. But that reality does not alter the medically appropriate nature of the testing. . . . [T]he trial court, in denying the motion to suppress, at least implicitly found that Dr. Hedge performed the tests for medical reasons by analogizing this case in its ruling to one in which an abused child taken into custody is medically examined for purposes of diagnosis and treatment.").

ceived appropriate medical treatment[123]—treatment whose appropriateness, in turn, depended upon "a 'battery of laboratory tests.'"[124] The difference is that "distinctive fact" earlier identified by the court: Juno's sentience.[125]

As a result, for the *Newcomb* court, animal sentience is relevant not only at the nature of property analytical level, but also informs the nature and context of the state's interaction with that property. Animals, again, implicate different contours of privacy jurisprudence than do unfeeling objects—at least to the extent that an animal's insides can reveal information relevant to the animal's well-being.[126] When the State seeks to view the interior[127] of an animal in its custody for the purposes of medical examination and treatment, that interaction takes place in the context of a social agreement, reflected in animal cruelty law, that unnecessary animal suffering should be avoided—and that those with control over live animals are obligated to provide for their minimum care needs.[128]

Newcomb's core question, then, appears at every crucial point of the court's privacy and search analysis. Under article I, section 9, the distinctive fact of animal sentience *does* make a difference to both the nature of the animal as property and the context of the state's interaction with the animal. Similarly, animal sentience is relevant to Fourth Amendment search protections: an animal's status as a "[living creature] not ordinarily . . . used as a repository [for] other property" inclines against an expectation of privacy vis-à-vis the animal's interior;[129] society's recognition and valuation of the ability of animals to feel—as illustrated by laws designed to shield animals from suffering at human hands—speaks to society rejecting as illegitimate the

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123 *Id.* at 442 ("Juno was not beyond danger simply because he had been removed for the time from defendant's dominion and control . . . .").

124 *Id.* at 442 n.12.

125 *Id.* at 439.

126 Here, we refer to an animal containing information in the most general of senses. Whether in the parlance of medical science or commonplace discussion, phenomena are represented and communicated in terms of information: what is seen, heard, measured, and so forth. In terms of an animal's well-being, the phenomena in question is the animal itself, and so the information sought is simply greater detail about the animal. As the *Newcomb* court puts it, "Juno's 'contents'—in terms of what was of interest to Dr. Hedge—were the stuff that dogs and other living mammals are made of: organs, bones, nerves, other tissues, and blood. As the prosecutor argued at trial, inside Juno was just 'more dog.' *Id.* The fact that Juno had blood inside was a given; he could not be a living and breathing dog otherwise. And the chemical composition of Juno's blood was a product of physiological processes that go on inside of Juno, not 'information' that defendant placed in Juno for safekeeping or to conceal from view." *Id.* at 442–43.

127 For Juno, this interior view is metaphorical via blood draw. The logic of *Newcomb*'s holding would seem to apply equally to literally interior views—such as endoscopic examinations—undertaken for the purposes of medical diagnosis and treatment.

128 *Newcomb*, 375 P.3d at 443.

129 *Id.* at 445.

expectation that an animal's physical being would be private once lawfully seized in this particular context.[130]

Having determined that Juno's sentience is a distinctive fact that makes a legal difference, the *Newcomb* court arrives at its conclusion. While animals are susceptible to being held as "personal property . . . a status that gives a[n] . . . owner rights of dominion and control," the same legal scheme "simultaneously limits ownership and possessory rights in ways that it does not for inanimate property."[131] In particular, animals "are subject to statutory welfare protections that ensure their basic minimum care . . . . The obligation to provide that minimum care falls on any person who has custody and control of . . . [an] animal. [An animal] owner simply has no cognizable *right*, in the name of her privacy, to countermand that obligation."[132] This specific phrasing reflects the *Newcomb* court's holding under the Oregon Constitution. While the court forewent a detailed discussion of Fourth Amendment protections, in the interests of not "repeating [them]selves," its analysis indicates that an equivalent statement for Fourth Amendment purposes would be along the lines of 'an animal owner simply has no legitimate expectation of privacy that countermands that obligation.'[133] Certainly, the court's Fourth Amendment holding is "that defendant had no protected privacy that was violated by the withdrawal and testing of Juno's blood without a warrant."[134]

The *Newcomb* court, following the classic jurisprudential practice of "observ[ing] the wise limitations on our function [by] confin[ing] ourselves to deciding only what is necessary to the disposition of the immediate case,"[135] describes its holding narrowly. *Newcomb*'s placement of an animal qua animal beyond the bounds of privacy search protections applies as written when (1) probable cause exists to believe an animal is subject to cruelty; (2) the animal has been lawfully seized pursuant to that probable cause; and (3) motivated by diagnosing or treating the animal's ill-health,[136] the state employs "medically

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130 *See id.* at 445–46 ("In particular, the different nature of that property that this case involves—a living animal, one that is not ordinarily and was not here used as a repository into which other property was placed—would have bearing on the Fourth Amendment analysis . . . . And the laws and social norms of behavior that we have discussed as they pertain to animal welfare generally, and minimum care in particular, are significant under the Fourth Amendment analysis in determining what expectations of privacy society will recognize as legitimate.").

131 *Id.* at 443.

132 *Id.* (italics in original).

133 *See id.* at 445–46 (discussing Supreme Court Fourth Amendment jurisprudence and citing specific passages regarding legitimacy of privacy expectations).

134 *Id.* at 446.

135 *Id.* at 444 (citing *Fessenden*, 333 P.3d at 285).

136 *Id. But see supra* note 121 and accompanying text (explaining that while diagnosis and treatment must be motivated by medical need, the state need not blind itself to the potential evidentiary value of medical information generated by that diagnosis and treatment).

appropriate procedure[s]" on the animal.[137] When those three conditions are met, under *Newcomb*, the defendant does not have a legally recognizable privacy interest in the animal and the state's medical interaction with the animal is not a constitutional search; therefore evidence uncovered by those interactions need not be excluded from a defendant's criminal trial.

While the *Newcomb* holding is narrow by design, it is weighty nonetheless. The holding itself represents, first, an acknowledgment that a legally recognizable interest in animal well-being exists. Specifically, *Newcomb* grounds that interest in an animal's legally cognizable well-being in animal sentience. The court does not base its decision on Juno's specific subspecies (*Canis lupus familiaris*—a dog) or the use to which his owner put him (being a companion animal),[138] but rather on Juno's ability to feel and suffer—a capacity shared by all animals, and that the Oregon legislature has recognized as extending to all animals.[139] Conversely, the court's holding does not extend beyond animals to non-sentient property, regardless of how highly that non-sentient property might be valued.[140] Again, sentience—*animalness*—matters. Moreover, *Newcomb* suggests that interest in animal well-being can—at least in certain circumstances—incline against human privacy rights, themselves a fundamental right, at least where such a right has not yet been recognized.[141]

C. Implications of Newcomb

1. Newcomb*'s Practical Implications*

The most immediate of *Newcomb*'s practical implications is that explicitly announced by the Oregon Supreme Court's holding. In Oregon, blood draws and similar procedures do not pose a constitutional

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[137] *Newcomb*, 375 P.3d at 444 ("Consequently, our holding is confined to circumstances in which the state has *lawfully* seized a[n] . . . animal on probable cause to believe the animal has been neglected or otherwise abused. It is also confined to the general kind of intrusion that occurred in this case—a medically appropriate procedure for diagnosis and treatment of an animal in ill-health." (emphasis in original)); *see also id.* at 446 (using the same factors to describe the court's Fourth Amendment holding: "withdrawal and testing of [an animal's] blood for purposes of medical treatment after the [animal] had been lawfully taken into custody on probable cause to believe that he had been criminally neglected.").

[138] *But see supra* notes 85–91 and accompanying text (analyzing the special status of certain animals).

[139] *See* OR. REV. STAT. § 167.305(1) (2015) ("Animals are sentient beings capable of experiencing pain, stress and fear . . . ."); *see also* OR. REV. STAT. § 167.310(3) ("'Animal' means any nonhuman mammal, bird, reptile, amphibian or fish.").

[140] *See Newcomb*, 375 P.3d at 441 ("Oregon law . . . places affirmative obligations on those who have custody of an animal to ensure that animal's basic welfare; those obligations have no analogue for inanimate property.").

[141] *Id.* at 443 ("Live animals under Oregon law are subject to statutory welfare protections that ensure their basic minimum care, including veterinary treatment . . . . A dog owner simply has no cognizable *right*, in the name of her privacy, to countermand that obligation." (emphasis in original)).

search and seizure problem when undertaken for the purpose of diagnosing or treating an animal lawfully seized on probable cause of neglect or abuse.[142] The direct result of that holding is that law enforcement officers, county animal control officers, Oregon Humane Society staff, and others working to protect animals and enforce Oregon's animal cruelty laws need not delay seeing to the basic health and safety needs of animals lawfully seized pursuant to suspicion of animal cruelty.[143] Notably, the analysis deployed by the *Newcomb* court refers to such lawfully seized animals as being "in ill-health."[144] In the context of the case before the court, this proviso reads as a check against pretextual claims of medical need. In order for a veterinary procedure to be legitimate under *Newcomb*, the state must have a sincere medical reason to conduct the procedure in the first place (or, similarly, to order the procedure conducted). While the "in ill-health" portion of the court's holding is in practice an unlikely linchpin for litigation,[145] it is best understood as a requirement that the seized animal presents an apparent health concern, which in turn calls for "[a]n examination of the [animal's] physical health and condition . . . ."[146] To the extent that other jurisdictions find the *Newcomb* court's analysis persuasive, this holding may have utility outside of Oregon.[147]

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142 *Id.* at 443–44 ("An examination of the dog's physical health and condition . . . pursuant to a medical judgment of what is appropriate for diagnosis and treatment, is not a form of governmental scrutiny that, under legal and social norms and conventions, invades a dog owner's protected privacy rights under [the Oregon Constitution] . . . . [O]ur holding is confined to circumstances in which the state has *lawfully* seized a dog or other animal on probable cause to believe the animal has been neglected or otherwise abused.").

143 Indeed, to the extent that attention to an animal's health and safety is necessary for provision of minimum care, OHS staff or others having custody and control of an animal are required to provide that attention. *See id.* at 443 (explaining that the Oregon statutory obligation to provide basic minimum care to an animal falls on any person who has custody or control of the animal).

144 *Id.* at 444.

145 In practice, when an animal has been properly seized on probable cause of being subject to neglect or abuse, the facts giving rise to probable cause themselves almost by definition also call for medical investigation. The seizure of Juno provides an example of just this dynamic: "[Special Agent Wallace] concluded that he had probable cause to believe that defendant had neglected Juno . . . . [He] therefore took custody of Juno . . . both as evidence of the neglect and because of the 'strong possibility' that Juno needed medical treatment." *Id.* at 437.

146 *Id.* at 443. That is, if the subsequent medical investigation reveals that the animal was in fact healthy, despite initially presenting as ill, *Newcomb*'s logic does not necessarily call for results of that investigation being excluded as a constitutional matter. As a practical matter, of course, in that circumstance a defendant charged with animal cruelty is likely to welcome the results of the state's medical investigation.

147 Certainly the Oregon Supreme Court understands its holding as being equally valid under the search and seizure protections afforded by the Fourth Amendment to the Constitution of the United States as it is under those of Oregon's state constitution. *See id.* at 776 (explaining the force of the court's Oregon constitutional search and seizure analysis applies equally under "Fourth Amendment jurisprudence . . . [and] no purpose would be served by repeating ourselves.").

Beyond Oregon, law enforcement officials, state animal care staff, and prosecutors seeking to avoid complicating their cases with *Newcomb*-style litigation may heed the case's second practical lesson. As the criminal justice system evolves to more consistently protect animals, defense attorneys may turn to creative arguments such as analogizing dogs to stereos or footwear for search purposes.[148] One method of forestalling such defense arguments—while still meeting the medical needs of seized animals—is to implement procedures that routinize application for search warrants that include medical diagnosis of seized animals, when feasible and supported by probable cause.[149] To the degree that technological progress expedites the search warrant application process, erring on the side of securing warrants covering seized animals is likely to have increasing utility, as a practical, if not jurisprudential, matter.[150]

2. Newcomb*'s Jurisprudential and Strategic Implications*

Beyond its implications for those engaged in day-to-day animal criminal work, *Newcomb* offers a broader set of lessons relevant for all those interested in how the law may be used to protect animals from harm and improve their position in the legal system. The legislative backdrop against which *Newcomb* was decided—a backdrop which proved critical to the Oregon Supreme Court's opinion—highlights the ways in which decisions from different branches of government can build upon each other, resulting in bolstered protections for animals.

In 2013, the Oregon Legislature passed an omnibus animal protection measure, Senate Bill 6.[151] The purpose of the bill was multifold: in the wake of an especially egregious mass neglect situation by a so-called 'rescue' group,[152] the bill aimed to, inter alia, strengthen pen-

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148 *See id.* at 437–38 ("[D]efendant . . . took the position that dogs are 'no different than a folder or a stereo or a vehicle or a boot . . . .'").

149 To be clear, in Juno's case the Oregon Humane Society had no inkling that seeking a search warrant for Juno's blood would be necessary—for the simple reason that the defense's argument that an animal's blood was protected by privacy rights had not yet been suggested. In the wake of *Newcomb*, however, state agents caring for animals in jurisdictions which have not yet adopted the *Newcomb* holding should be aware that those arguments might lie in their future and could be avoided by proactively seeking warrants inclusive of medical diagnosis, even if the strict necessity of those warrants is unclear.

150 *Cf.* Missouri v. McNeely, 133 S. Ct. 1552, 1562–63 (2013) (evaluating the impact on warrant exceptions for human blood draws due to "technological developments that enable police officers to secure warrants more quickly, and do so without undermining the neutral magistrate judge's essential role as a check on police discretion"). Indeed, the Oregon Supreme Court has discussed the technology-facilitated ease of securing search warrants as cutting against "extend[ing] or broadly apply[ing] exceptions to the warrant requirement" in the specific context of animal search and seizure cases. Fessenden, 333 P.3d at 285; *see also supra* Section III.A.2 (discussing *Newcomb* in the context of *Fessenden*).

151 S.B. 6, 77th Legis. Assemb., Reg. Sess. (Or. 2013).

152 *See* Lynne Terry, *Animal Advocates, Lawmakers Celebrate Bills Stepping Up Punishment, Stemming Abuse*, OregonLive (Nov. 21, 2013), http://www.oregonlive.com/pa-

alties for certain types of animal cruelty committed against ten or more animals in one criminal episode.[153] The findings portion of the bill identified some key reasons for these added protections for animals—among these were the recognition of animals as sentient beings:

> The Legislative Assembly finds and declares that:
> (1) Animals are sentient beings capable of experiencing pain, stress and fear;
> (2) Animals should be cared for in ways that minimize pain, stress, fear and suffering.[154]

This language codified the then-recent pronouncements from the Oregon Court of Appeals' handling of *State v. Nix* regarding animal sentience and how sentience factored into that court's decision to consider animals as crime victims for sentencing purposes.[155] Coming full-circle, prosecutors in Oregon can now point to this statute to ground their arguments around animal sentience and suffering where appropriate in animal cruelty cases.

The *Newcomb* court also acts instructively in its choice of how to frame the animal issues involved in the case. Those who advocate for the legal interests of animals are frequently met with the oft-familiar refrain that doing so wrongly and necessarily means equating animals and humans—leading to a parade of horribles.[156] Opponents of animal interests can invoke these slippery-slope fears to counsel against even the most modest efforts to protect animals: "To [animal advocacy] groups, a rat is a dog is a boy . . . on the same level emotionally, ethically, morally, legally, or spiritually as our children or grandchildren . . . . [T]hat is where making animal abuse cases felonies is

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cific-northwest-news/index.ssf/2013/11/animal_advocates_lawmakers_cel.html [https://perma.cc/KWL9-FQK7] (accessed Apr. 9, 2017) ("The bill was largely spurred by the seizure in January of more than 149 starving dogs from a Brooks warehouse. The dogs, housed in deplorable conditions without food or water, were kept by a group called Willamette Animal Rescue that received shipments of canines from shelters in California.").

153 *See* Or. S.B. 6, *supra* note 151 (imposing recordkeeping and licensure requirements on animal rescues, and updating Oregon's process for pre-conviction forfeiture of animals).

154 Or. S.B. 6.

155 *Nix*, 334 P.3d at 444 ("[T]he 'victim' of [animal abuse] offenses is the individual animal that suffers the neglect, injury, cruelty, torture, or death.").

156 *See, e.g.*, Richard A. Posner, *Animal Rights: Legal, Philosophical, and Pragmatic Perspectives* (drawing on his previous arguments advanced in his review of Steven Wise's *Rattling the Cage: Toward Legal Rights for Animals*, his session at an animal rights symposium hosted by the University of Chicago Law School, and his open letter dialog with Peter Singer, Judge Posner suggests the debate at hand—or, at least, the animal rights debate—is about whether to "treat animals in approximately the same way we treat the human residents of our society"), *in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 51, 51 (Cass R. Sunstein & Martha C. Nussbaum eds., 2005). In Posner's estimation, the legal efforts of animal advocates—or, again, at least those animal advocates doing legal work around rights—risk "fail[ing] to maintain the bright line between animals and human beings, [and as a result] we may end up treating human beings as badly as we treat animals." *Id.* at 61.

leading."[157] Much ink has been spilt and words uttered pushing back against these catastrophic fears—and, surely, much effort will be spent debunking those concerns in the future. The *Newcomb* court, however, sidesteps this slippery-slope debate by making a subtle but critical framing choice. For the court, the correct way to approach the animal issues raised in *Newcomb* is not by analyzing the degree to which the law draws distinctions between humans and animals: the court declines to discuss the human/animal comparison as irrelevant to the matter at hand.[158] Rather, the court focuses on distinctions—impelled by the logic of existing law—between animals and all other kinds of legally classified property:

> The important point for this case . . . is not that Oregon law permits "humans to treat animals in ways that humans may not treat other humans." What matters here is that Oregon law prohibits humans from treating animals in ways that humans are free to treat other forms of property.[159]

Framing the legal issue at a paradigmatic level as (sentient) animals versus (inanimate) objects allows the court to advance Juno's interests in this case—and, subsequently, the interests of other animals in similar circumstances—without having to immediately grapple with slippery-slope concerns.

This method of framing offers strategic utility to animal advocates for the same reasons: the legal position of animals can be effectively advanced—and greater practical protections for animals achieved—by choosing to fight on argumentative grounds that speak to the specific issues at hand (issues that, here, happen to take place within the property paradigm), rather than broaden the argument to a more general ground upon which those advocates' opponents may prefer to argue.[160] Further, this approach highlights the law's existing recognition of a salient fact underlying efforts to improve the legal position of animals: sentience. The legally implicated distinction between animals and all

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[157] Gary Truitt, *Sliding down the Slippery Slope*, HOOSIER AG TODAY (Oct. 2, 2016), https://www.hoosieragtoday.com/sliding-down-the-slippery-slope/ [https://perma.cc/32VD-3KD7] (accessed Apr. 9, 2017). The founder and president of Hoosier Ag Today, Gary Truitt was named the National Association of Farm Broadcasting's Broadcaster of the Year in 2015. *Gary Truitt Named Farm Broadcaster of the Year, Others Honored by NAFB*, AGRIMARKETING (Nov. 16, 2015), http://www.agrimarketing.com/s/99913 [https://perma.cc/EN7X-95PF] (accessed Apr. 9, 2017).

[158] *Newcomb*, 375 P.3d at 438 (mentioning, but not taking up, the trial court's analogy of Juno's blood draw to a medical examination performed on a child taken into custody upon suspicion of abuse).

[159] *Id.* at 441 (quoting *Fessenden*, 333 P.3d at 283).

[160] *See* Jerrold Tannenbaum, *What Is Animal Law?*, 61 CLEV. ST. L. REV. 891, 891 (2013). Notably, this strategic choice is available to animal advocates, regardless of whether they consider themselves aficionados of animal welfare, animal rights, or other more esoteric animal-legal paradigms. Framing an argument on the grounds that the law already recognizes animals as unlike any other form of property is neither an advocacy for an animals-as-property paradigm or an animals-as-not-property approach.

other property is intimately bound up with the recognition that animals' capacity to feel *is* the difference—and that difference matters.

IV. LOOKING TOWARDS UNRESOLVED QUESTIONS

Newcomb suggests a novel search and seizure issue at the intersection of animal law and criminal law practice. In prudently crafting a narrow holding, the *Newcomb* court almost inevitably invites future litigation arising from cases that fall outside the narrow boundaries set by the court's consideration of Juno's case. Specifically, *Newcomb*'s very language hints that its holding may be applicable in circumstances where an animal has been lawfully seized and is in apparent medical need—whether or not the lawful seizure was rooted in probable cause to suspect animal cruelty. In discussing the obligation to provide minimum care which "falls on any person who has custody and control of . . . [an] animal" (which in the *Newcomb* case included OHS, the seizing agency), the court moves immediately to reject the notion that Amanda Newcomb had a privacy interest in conflict with such an obligation.[161] Only *after* making that statement does the court note "[t]hat conclusion flows with *equal or greater force* when, as here, the [animal] is in the state's lawful protective custody on probable cause that the [animal] is suffering injury as a result of neglect . . . ."[162] Throughout its holding, the court emphasizes lawful seizure and medical need as two crucial factors in its decision-making. By *Newcomb*'s logic, once the state has custody and control over an animal—by definition possessed of sentience, the distinction that makes a difference—the state's obligation to provide that animal with minimum care is triggered, regardless of what generated the initial reason for seizure. While in Juno's situation, the reasons giving rise to lawful seizure were also those giving rise to a sincere concern for Juno's medical well-being, the *Newcomb* court's analysis suggests that the otherwise non-existent privacy interests of an animal's owner do not somehow appear *ex nihilo* in a circumstance where separate valid reasons support lawful seizure and sincere medical concern.[163]

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[161] *Newcomb*, 375 P.3d at 443.

[162] *Id.* (emphasis added).

[163] While this logic might seem to imply that the *Newcomb* court's insistence on lawful seizure is similarly dispensable, this would fatally misread the issue. The argument outlined here for being able to introduce evidence resulting from sincerely undertaken medical diagnosis and treatment of a lawfully seized animal, regardless of why the animal was seized, evaluates the animal's legal interest in its own well-being (and the legal obligation of the animal's custodian to provide for that well-being) to determine that no constitutional search took place. In contrast, when those same diagnostics or treatments are applied to an illegitimately seized animal, whether that medical work constitutes a constitutional search or not is irrelevant: the unlawful seizure precludes admission of the medical results as fruit of the poisonous tree.

V. CONCLUSION

"[T]he legal status of animals has changed and is changing still . . . ."[164] The Oregon Supreme Court's words echo through *Fessenden*, *Nix*, and *Newcomb*, and presage as yet unresolved—in some cases, as yet unasked—legal questions. For their part, those three cases stand as specific markers in the evolving legal status of animals. Moreover, read together, they illustrate a more fundamental truth lying at the foundation of animal law: sentience—the essential element of animalness—is legally relevant. Being an animal should matter under the law. The distinction, in short, *does* make a difference.

[164] *Fessenden*, 333 P.3d at 284.

APPENDIX A: FEDERAL AND OREGON CONSTITUTIONAL SEARCH PROTECTIONS

The constitutional search issue[165] *Newcomb* grapples with operates on parallel Oregon state and federal levels: the defense argued that the blood draw was an illegitimate search under both article I, section 9 of the Oregon Constitution and the Fourth Amendment to the U.S. Constitution.[166] While Oregon and federal constitutional search and seizure protections share similar language,[167] divergent jurisprudential development calls for distinct and separate analyses.[168] As a result, while the Oregon Supreme Court in *Newcomb* pursued functionally similar lines of inquiry in reaching an identical holding under both federal and state constitutional levels of analysis,[169] readers should beware of treating the court's legal reasoning as absolutely interchangeable between the two constitutions.

In an effort, therefore, to disambiguate Fourth Amendment search protections from those offered by Oregon's Constitution, we briefly digress to outline how search protections are applied under each of these constitutional schemes. For federal purposes, a search is implicated

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165 By the time *Newcomb* reached the Oregon Supreme Court, the defense had abandoned earlier arguments suggesting that Juno had not been lawfully seized. *Newcomb*, 375 P.3d at 438–39, 438 n.7. As such, constitutional seizure protections are not implicated by *Newcomb*, under either the Oregon or federal constitutions.

166 *Id.* at 436.

167 *Compare* OR. CONST. art. I, § 9 ("No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."), *with* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

168 In *The Search for the Meaning of Oregon's Search and Seizure Clause*, then Oregon Appellate Judge—now Oregon Supreme Court Justice—Jack Landau describes early Oregon jurisprudence as treating article I, section 9 as a close analog of the Fourth Amendment. Jack L. Landau, *The Search for the Meaning of Oregon's Search and Seizure Clause*, 87 OR. L. REV. 819, 840, 844 (2008). "By the 1970s, however, the Oregon courts began to acknowledge at least the possibility that Fourth Amendment decisions did not control their interpretation and application of article I, section 9. . . ." *Id.* at 849. In 1982's *State v. Caraher*, the Oregon Supreme Court . . . openly declared independence from the Fourth Amendment: '[W]e remain free . . . to interpret our own constitutional provision regarding search and seizure and to impose higher standards on searches and seizures under our own constitution than are required by the federal constitution. This is part of a state court's duty of independent constitutional analysis.'" *Id.* at 850. Subsequently, "Oregon courts [have] often departed from Federal Fourth Amendment analysis and concluded that article I, section 9 affords greater protections to individual rights than does its federal counterpart." *Id.* at 851.

169 *See Newcomb*, 375 P.3d at 446 ("In short, the guidance available to us from current Fourth Amendment jurisprudence leads us to the same factors that we have considered in analyzing the issue under article I, section 9. No purpose would be served by repeating ourselves.").

when (1) a party has an expectation of privacy; (2) which "society is prepared to consider reasonable;" (3) and that expectation of privacy is infringed by state action.[170] In contrast, Oregon's constitutional search protections look "not [at] the privacy that one reasonably *expects* but [at] the privacy to which one has a *right*."[171] For purposes of the Oregon constitution, "privacy interests protected from unreasonable searches . . . are defined by an objective test of whether the government's conduct 'would significantly impair an individual's interest in freedom from scrutiny, i.e., his privacy.'"[172] That objective test, in turn, involves an assessment of relevant "social and legal norms of behavior."[173] If (1) a particular privacy interest in freedom from scrutiny, inclusive of social and legal norms, objectively exists; and (2) that interest is invaded by a state action, then—as far as the Oregon Constitution is concerned—a search has taken place.[174]

For the issue at hand in *Newcomb*—extraction of Juno's blood—the distinction between federal- and Oregon-specific search analysis is, then, not measured in the facts considered, but in their framing. In evaluating Juno's blood draw under article I, section 9 of the Oregon Constitution, the court looks first to whether a human holds an objective privacy interest, informed by social and legal norms, in the blood of a lawfully seized dog. Had the court found the existence of such a privacy interest, it would then have asked whether the blood draw unreasonably invaded that privacy interest. For Fourth Amendment purposes, the court investigates whether there can be an expectation that the blood of a human's lawfully seized dog is private—and whether society is prepared to accept such an expectation as reasonable. While it is hardly inevitable that dual analysis under the Oregon and Federal Constitutions should track each other so closely that they "reduce to the same question,"[175] here that is exactly what transpired: the court resolves constitutional search issues under both article I, section 9 and the Fourth Amendment by dealing with the key issue of Juno's sentience.

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170 United States v. Jacobsen, 466 U.S. 109, 113 (1984).

171 *See* State v. Campbell, 759 P.2d 1040, 1044 (Or. 1988) ("This court has expressed doubts about the wisdom of defining article I, section 9, searches in terms of 'reasonable expectations of privacy.' Because the phrase continues to appear so often in arguments, we here expressly reject it for defining searches under article I, section 9. The phrase becomes a formula for expressing a conclusion rather than a starting point for analysis . . . . Moreover, the privacy protected by article I, section 9, is not the privacy that one reasonably *expects* but the privacy to which one has a *right*." (emphasis in original)).

172 State v. Wacker, 856 P.2d 1029, 1033 (Or. 1993) (quoting State v. Dixson, 766 P.2d 1015, 1023 (Or. 1988)).

173 *Campbell*, 759 P.2d at 1047.

174 State v. Barnthouse, 380 P.3d 952, 958 (Or. 2016) ("A search occurs when the government invades an individual's privacy interest . . . .").

175 *Newcomb*, 375 P.3d at 445. *See also* Landau, *supra* note 168, at 845–47.