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PARDONING DOGS

Sarah Schindler*

In 1994, the Governor of New Jersey pardoned a dog. In 2017, the Governor of Maine did the same. Each of these dogs had been ordered to be euthanized after killing another dog. While the Governor of New Jersey relied on the property status of the dog in issuing her order, the Governor of Maine relied on his standard pardon power, despite the fact that the being to be pardoned was a dog rather than a human. Both of these cases generated a great deal of popular press and attention, and a few months ago, a New York state senator petitioned his state's Governor to pardon a dog in a similar situation.

Against the backdrop of these novel but increasingly frequent actions, this Article is the first to consider extending the pardon power to nonhuman animals, and the expressive function such an act might carry with it. The Article begins by examining the roots of the pardon power, exploring the breadth of that power based on constitutional text. It also describes the motivations and ideas that animate the pardon power, and ties them to recent cognitive studies showing that many nonhuman animals have the ability to feel emotions like grief and regret. The Article then takes a broader, more normative look at a decision to pardon a dog. It considers what impact that decision could have on the laws and norms that govern the treatment of nonhuman animals. Here, it examines the different expressive functions that are furthered by a true, "full and free" pardon as compared to a form of pardon that relies upon the property status of the nonhuman animal. This comparison animates a key debate in the animal law literature: whether nonhuman animals should be viewed as more akin to property or persons under the law. The Article argues that important values are served when a chief executive publicly states that animals are the proper subjects, and worthy, of pardons. These values—including that nonhuman animals are deserving of moral consideration and forgiveness—could eventually help shift the law toward a paradigm that treats animals more like persons and less like things.

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INTRODUCTION

In 2017, the Governor of Maine pardoned a dog.[1] The dog, a Siberian Husky named Dakota, had gotten loose and killed a neighbor's small dog, and then subsequently got loose again and acted aggressively toward the same neighbor's new dog.[2] After the first attack, there was a hearing at which Dakota was deemed a "dangerous dog."[3] After the second incident, Dakota was picked up as a stray, and was sent to a local humane society.[4] While in the care of the humane society, she was well behaved and passed aggressive dog testing.[5] She was subsequently adopted out.[6]

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[1] *See generally*, Nik DeCosta-Klipa, *Paul LePage Pardons a Dog that was Sentenced to Death*, BOS. GLOBE (Mar. 30, 2017), https://www.boston.com/news/politics/2017/03/30/paul-lepage-pardons-a-dog-that-was-sentenced-to-death [https://perma.cc/PKH7-CGW9] (reporting on Governor's pardon).

[2] *Id.*

[3] *Id.*; When such a determination is made, certain restrictions are put in place with respect to how a dog is to be kept, which was done here. For example, Maine's dangerous dog statute provides that, upon finding a dog to be dangerous, a court may require the owner to post signs, confine the dog in a secure enclosure, only allow the dog out of the enclosure with a muzzle, require the owner to keep liability insurance, or have the dog evaluated by a canine behaviorist or dog trainer. ME. REV. STAT. ANN. tit. 7, § 3952-A(C)–(F), (I)–(J) (West, Westlaw through 2019 2d Reg. Sess.).

[4] Betty Adams, *Dakota the Dog's Life Spared Under Court Deal*, KENNEBEC J. (July 24, 2017), https://www.centralmaine.com/2017/07/24/dakota-the-dogs-life-is-spared/ [https://perma.cc/49D5-Y5DQ].

[5] While at the humane society, Dakota "was 'a model resident,' according to a March 24, 2017 letter from shelter director Lisa Smith, as well as 'extremely people friendly and generally dog friendly.'" *Id.*

[6] *Id.*

In the meantime, and unbeknownst to the humane society or the new adopter,[7] a new dangerous dog hearing had taken place based on the second attack. The court then issued an order imposing a fine on Dakota's previous owner and ordering that Dakota be euthanized.[8] At this point, someone with connections to both the humane society and the state's Governor asked him to intervene.[9] He did so, and issued a pardon wherein he asserted that "Dakota the Dog, was sentenced to death pursuant to" the state's dangerous dog statute, and continued, "I do hereby grant Dakota the Dog a Full and Free Pardon respecting such offense."[10]

Although the use of the pardon power in a case like this might seem odd, Maine's LePage is not the only governor to have overruled a death sentence for a dog. In New Jersey in 1993, a court ordered a dog named Taro to be euthanized under a similar state dangerous dog statute.[11] Taro had purportedly bitten the niece of his guardian, after having previously attacked three dogs, killing one of them.[12] Taro was ordered "destroyed,"[13] and was then kept in a jail

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[7] *Id*. There is some question about the truth of this statement. The new adopter was the mother of the ex-girlfriend of Dakota's former guardian. *Id*. It is unclear whether the former guardian was aware that the dog had been adopted out again.

[8] *Id*. The euthanization order was issued pursuant to Maine's "Dangerous Dog" statute. ME. REV. STAT. ANN. tit. 7, § 3952(1)(B) (West, Westlaw through 2019 2d Reg. Sess.) (amended 2018) ("If, upon hearing, the court finds that the dog is a dangerous dog . . . the court shall impose a fine and shall: . . . Order the dog to be euthanized if it has killed, maimed or inflicted serious bodily injury upon a person or has a history of a prior assault or a prior finding by the court of being a dangerous dog"). Of note, this section was repealed effective Aug. 1, 2018; the new section 3952-A states

> If, upon hearing, the court finds that a dog is a dangerous dog, the court shall impose a fine and may order any one or more of the following that the court determines is appropriate: A. Order the dog to be euthanized if the court finds that the dog: (1) Has killed, maimed or inflicted serious bodily injury upon a person or has a history of a prior assault or a prior finding by the court of being a dangerous dog; and (2) Presents a clear threat to public safety[.]

ME. REV. STAT. ANN. tit. 7, § 3952-A(2) (West, Westlaw through 2019 2d Reg. Sess.).

[9] Adams, *supra* note 4; The humane society was located in Waterville, the town where LePage used to be mayor. *About Governor Paul R. LePage*, MAINE.GOV, https://www.maine.gov/governor/lepage/about/index.html [https://perma.cc/LB7Y-W5VB].

[10] DeCosta-Klipa, *supra* note 1; Governor of the State of Maine, Warrant of Full and Free Pardon for Dakota the Dog (Mar. 30, 2017); *see also* Motion of Governor LePage to Intervene, or, in the Alternative, to File Amicus Brief, and Incorporated Memorandum of Law at 2, State v. Perry, No. VI-17-20053 (Me. Dist. Ct. July 19, 2017) ("the Governor issued an order remitting the euthanization pursuant to Art. 5, pt. 1, § 11 of the Maine Constitution."). The case wound up settling, so the validity of the Governor's pardon was never conclusively determined. *See infra* notes 43–47 and accompanying text (describing the court's handling of LePage's pardon).

[11] *Ready for a Milk-Bone Last Meal?*, PEOPLE MAG. (Dec. 13, 1993, 12:00 PM), https://people.com/archive/ready-for-a-milk-bone-last-meal-vol-40-no-24/ [https://perma.cc/MJ7Y-UDZD]. "An animal control officer is authorized to seize and impound any potentially dangerous dog whose owner fails to comply with the provisions of [N.J. STAT. §§ 4:19–17 *et seq*. (2020)] . . . The municipal court may order that the dog so seized and impounded be destroyed in an expeditious and humane manner." N.J. STAT. ANN. § 4:19–29 (2020).

[12] *Ready for a Milk-Bone Last Meal?*, *supra* note 11.

cell at the Bergen County jail in New Jersey where he was issued a prisoner number during the pendency of appeals in his case.[14] New Jersey's Governor, Christine Todd Whitman, relied upon the pardon provision in the New Jersey Constitution, which is similar to that in Maine.[15] Governor Whitman issued an Executive Order, directing remittitur of the euthanization of the dog,[16] with conditions including removal from the state.[17]

Whitman's action was colloquially referred to in the popular press as a "pardon,"[18] and it had the effect of freeing Taro. However, Whitman relied on the status of dogs as personal property in issuing her order. She asserted that the euthanasia order was akin to a forfeiture order (the forfeiture of the property here being the dog), which she was empowered to remit.[19] Governor Whitman stated, "While I can't pardon the dog, I can forgive the forfeiture taking and under that scenario, Taro can go free."[20] Her spokesperson went further, stating, "There is no clemency for anything other than a two-legged creature . . . [the Governor] wanted to end it. This was a legal way to do it."[21]

In New Jersey, there was no apparent case law on the subject of pardoning an animal. Further, as will be addressed below, nothing in the language of the state constitution appears to limit the pardon power to humans, or persons, or

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[13] Kate Stone Lombardi, *Pardoned in Jersey, Taro Incognito*, N.Y. TIMES (Mar. 20, 1994), https://www.nytimes.com/1994/03/20/nyregion/pardoned-in-jersey-taro-incognito.html [https://perma.cc/V3KW-QHNJ].

[14] *Ready for a Milk-Bone Last Meal?*, *supra* note 11 (describing the jail life of Taro, Prisoner No. 914095).

[15] N.J. CONST. art. V, § 2 ("The Governor may grant pardons and reprieves in all cases other than impeachment and treason, and may suspend and remit fines and forfeitures. A commission or other body may be established by law to aid and advise the Governor in the exercise of executive clemency.").

[16] N.J. EXEC. ORDER No. 7 (Jan. 28, 1994); At the time of Taro's pardon, the local government had spent approximately $60,000 on court fees, boarding expenses, and dog food. Alice Steinbach, *A Death Sentence Is Rescinded, and the Heart Rejoices*, BALT. SUN (Feb. 9, 1994), https://www.baltimoresun.com/news/bs-xpm-1994-02-09-1994040161-story.html [https://perma.cc/K7QF-SK8W].

[17] N. J. EXEC. ORDER No. 7 (Jan. 28, 1994).

[18] *See, e.g.*, Katie Sykes, *Human Drama, Animal Trials: What the Medieval Animal Trials Can Teach Us About Justice for Animals*, 17 ANIMAL L. REV. 273, 302 (2011) (noting that Taro "was eventually pardoned by then-Governor Christine Todd Whitman").

[19] N. J., EXEC. ORDER No. 7 (Jan. 28, 1994) (noting that "N.J.S.A. 2A:167-5 provides that any person who has suffered a forfeiture may make application for the remission of such forfeiture, 'which application the governor may grant by order signed by her!' "); *see also* JOHN A. MCKINSEY & DEBRA D. BURKE, CARPER'S UNDERSTANDING THE LAW 267 (7th ed. 2015) (noting that Whitman used an executive order "in lieu of a 'pardon,' which is a remedy reserved for human beings.").

[20] Jerry Gray, *Dog's Death Sentence is Reduced to Exile*, N.Y. TIMES (Jan. 29, 1994), https://www.nytimes.com/1994/01/29/nyregion/dog-s-death-sentence-is-reduced-to-exile.html [https://perma.cc/QB5G-6XJ2].

[21] *Id.*

those who have committed crimes.[22] Therefore, it seems that the only reason that Governor Whitman believed she could not issue a formal pardon for Taro was because she did not believe that a dog was the proper subject of a pardon.

Thus, both Taro in New Jersey and Dakota in Maine were spared from death, in part, due to the action of the state's governor.[23] The New Jersey approach tread familiar ground, valuing the animal only in relation to its status as the property of a human, while the Maine approach seemed to recognize the inherent value of the animal. Of course, it is quite possible that Maine's Governor LePage issued this pardon not because he holds any particular views with respect to animal rights, but because he holds an expansive view of executive power, or wanted good press. But, intentionally or not,[24] the pardon framing in Maine stands in contrast to the forfeiture framing in New Jersey, and the two approaches present different normative concerns and serve different expressive values, especially considering these differing approaches from an animal rights perspective.

In this Article, I assert that there is both a descriptive and normative case for recognizing the ability of a governor to pardon a dog, and that such an approach will do more to change norms pertaining to animal rights than remitting a forfeiture. Although some might argue that this is not an appropriate use of the pardon power, nor is it the most straightforward path toward pursuing greater rights for animals,[25] it is clear that some elected officials have chosen to pursue this path. Thus, this Article is the first to interrogate the use of the pardon power to free a nonhuman animal.[26]

In Part II, the Article addresses the pardon power generally. It begins with a brief history of the pardon power, and the reasons for its existence. It examines both the federal pardon power and its state level counterparts in considering the power's origin and constraints. It also considers the chief executive's

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[22] *See* N.J CONST. art. V, § 2 (The N.J Constitution allows pardons "in all cases other than impeachment and treason").

[23] *See* Gray, *supra* note 20 ("The 5-year-old Akita was saved from execution by order of the Governor"). Of course, there was never a definitive ruling on the propriety of the Maine Governor's pardon, and the case settled. Thus, it is possible the same result would have occurred even if he had not intervened. However, it is also possible that his pardon caused the public to become aware of the case, caused newspaper articles to be written, and in the end made settlement more likely. However, Dakota's freedom was not a direct result of LePage's pardon.

[24] *See* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2050–51 (1996) (discussing the expressive function of law, and noting that intent is not necessary).

[25] Importantly, this Article does not seek to convince the reader that using the pardon power to free a dog is necessarily the best method of either ensuring that the dog is not killed, or of seeking greater rights for animals. Nor does it seek to argue that the legal case for pardoning a dog is ironclad.

[26] "[T]he expressive function of law has a great deal to do with the effects of law on prevailing social norms. Often law's 'statement' is designed to move norms in fresh directions." Sunstein, *supra* note 24.

power to remit a forfeiture, which is typically found in constitutional provisions governing the pardon power. This Part concludes by addressing some of the problems with reliance on the pardon power.

Part III presents examples of nontraditional pardons that have been issued in the past. These include other animal pardons (such as the pardon of the Thanksgiving turkey), symbolic pardons, mass pardons, and posthumous pardons. These examples are instructive because they present scenarios wherein the standard justifications for the pardon power do not map neatly onto its use.

Part IV considers the relationship between animals and the courts. There is a long history in this country and others of putting animals on trial for wrongs they have purportedly committed. A modern-day corollary to this past practice exists in the form of dangerous dog hearings, such as those to which Dakota and Taro were subjected. This Part examines this history and considers what motivates the law to take action against animals themselves.

Part V provides a normative case for extending the pardon power to nonhuman animals. Here, the Article looks to the future and considers whether, by extending the pardon power, states and their governors could help to normalize the idea that animals are beings worthy of moral and ethical consideration. The Article suggests that the evolution of animal law as a field—which is being taken seriously by commentators and some courts in recent years—along with the broad discretion afforded by the pardon power, provides the legal footing for extending the power in this way. Further, it analyzes the powerful expressive function of the pardon power, and explains that, when used to free nonhumans, it could lead to norm change concerning the place of animals in the law.[27] Thus, the pardoning of nonhuman animals could be another step along the path toward granting something more than mere property status—perhaps even personhood—to all sentient beings.

I. THE PARDON POWER

A. The Federal Pardon Power

The power to pardon others is a broad power.[28] It seeks to find a balance between equity and punishment, with justice as the goal. There are a number of factors animating the decision to pardon someone. These include mercy, for-

[27] Of course, not everyone agrees that laws carry an expressive function that will lead to actual change. *See, e.g.*, *id.* at 2021 ("We are all Expressionists part of the time. Sometimes we just want to scream loudly at injustice, or to stand up and be counted. These are noble motives, but any serious revolutionist must often deprive himself of the pleasures of self-expression. He must judge his actions by their ultimate effects on institutions." (quoting HERBERT A. SIMON, MODELS OF MY LIFE 281 (1991)).

[28] *Ex parte* Garland, 71 U.S. (4 Wall.) 380 (1866) (noting the breadth of the pardon power, which "extends to every offence known to the law, and may be exercised at any time after its commission").

giveness, equity, adaptation, common sense, and good public policy.[29] According to Blackstone, the power allows the chief executive discretion to "extend mercy, wherever he thinks it is deserved . . . [and] soften the rigour of the general law."[30] Alexander Hamilton justified the pardon power in the Federalist Papers by stating that,

> Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favour of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.[31]

The chief executive holds this power, which is derived from the king's clemency power.[32] The power rests there because, according to James Iredell—who would later become a Supreme Court Justice—in certain cases, *someone* would need to make a decision that would relax the strictures of the law.[33] It made sense for that power to be vested in the President due to the peoples' confidence in him.[34] Hamilton agreed, stating that a "single man" would "be a more eligible dispenser of the mercy of government than a body of men."[35]

Since the formation of the country, Presidents have used their pardon power in pursuit of what they deem to be good public policy. For example, George Washington used the power to defuse conflict over the Whiskey Rebellion, expressing his desire to "temper the administration of justice with a reasonable extension of mercy . . . ."[36] In the aftermath of the Civil War, President Andrew Johnson provided a "universal amnesty and pardon" to all those who participat-

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[29] *See, e.g.*, *Statement of James Iredell*, *in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 111 (Jonathan Elliot ed., 2d ed. 1836) ("[T]here may be many instances where, though a man offends against the letter of the law, yet peculiar circumstances in his case may entitle him to mercy. It is impossible for any general law to foresee and provide for all possible cases that may arise; and therefore an inflexible adherence to it, in every instance, might frequently be the cause of very great injustice.").

[30] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, BOOK THE FOURTH 390 (4th ed. 1770).

[31] THE FEDERALIST NO. 74, at 553 (Alexander Hamilton) (John C. Hamilton ed., 1864).

[32] State v. Hunter, 447 A.2d 797, 802–03 (Me. 1982).

[33] *Statement of James Iredell*, *supra* note 29.

[34] *Id.* ("Where could [the pardon power] be more properly vested, than in a man" who by election to the highest office in the land "had received such strong proofs of his possessing the highest confidence of the people?").

[35] THE FEDERALIST NO. 74, *supra* note 31 ("As the sense of responsibility is always strongest, in proportion as it is undivided, it may be inferred, that a single man would be most ready to attend to the force of those motives, which might plead for a mitigation of the rigour of the law, and least apt to yield to considerations, which were calculated to shelter a fit object of its vengeance.").

[36] *Presidential Pardon of the Ten Ringleaders of the Whiskey Rebellion, Who Had Been Convicted of High Treason*, THE GILDER LEHRMAN INST. OF AM. HIST., https://www.gilderlehrman.org/collections/911c547e-f8de-449f-a6d5-845432753124 [https://perma.cc/V48H-TUD5].

ed in the Confederate cause during the Civil War.[37] He justified the pardon by claiming that it would "tend to secure permanent peace, order, and prosperity throughout the land, and to renew and fully restore confidence and fraternal feeling among the whole people, and their respect for and attachment to the National Government, designed by its patriotic founders for the general good."[38] In each of these instances, the executive's decision to grant a pardon represents "the determination of the ultimate authority that the public welfare will be better served" by avoiding the punishment.[39]

Part of the reason that the pardon power is so broad is because the executive is vested with nearly unfettered discretion. At least at the federal level, the Founders did not appear to implicitly constrain this power. There is no evidence that they expected the pardon power to be used only in certain circumstances (the exception to this is that the Constitution limits the pardon power to "offenses against the United States").[40] Rather, the purpose of the power was to allow the nation to adapt to unexpected circumstances by allowing the Presi-

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[37] Andrew Johnson, *December 25, 1868—Granting Full Pardon and Amnesty to All Persons Engaged in the Late Rebellion*, LIBR. OF CONG., http://hdl.loc.gov/loc.rbc/rbpe.23602600 [https://perma.cc/22BN-MDRH].

[38] *Id*.; *See also* Gerald R. Ford, *Proclamation No. 4311—Granting Pardon to Richard Nixon*, THE AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/proclamation-4311-granting-pardon-richard-nixon [https://perma.cc/5SZV-8L43] (pardoning ex-President Nixon so as to prevent "prolonged and divisive debate over the propriety of exposing to further punishment and degradation a man who has already paid the unprecedented penalty of relinquishing the highest elective office of the United States"); *See* KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 81–82 (1989) (describing President Carter's pardon of all who had dodged the draft during the Vietnam War as one intended "to bind the wounds that an unpopular war had inflicted on society and on its young people, so that healing could begin").

[39] Biddle v. Perovich, 274 U.S. 480, 486 (1927).

[40] While the pardon power is broad, it is not unlimited. Blackstone stated that the power applied in criminal cases. BLACKSTONE, *supra* note 30. However, the Supreme Court has made a more specific distinction: "An executive may pardon and thus relieve a wrongdoer from the punishment the public exacts for the wrong, but neither executive nor legislature can pardon a private wrong, or relieve the wrongdoer from civil liability to the individual he has wronged." Angle v. Chicago, St. Paul, Minneapolis & Omaha Railway Co., 151 U.S. 1, 19 (1894); *see also* Huntington v. Attrill, 146 U.S. 657, 668 (1892) (noting that private wrongs are "an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed *civil injuries*: [public wrongs] are a breach and violation of public rights and duties, which affect the whole community, considered as a community"). Thus, at base, pardons cannot extinguish civil liability; the President can only pardon offenses against the State, not against individual citizens. *But see* Noah A. Messing, *A New Power?: Civil Offenses and Presidential Clemency*, 64 BUFF. L. REV. 661, 661 (2016) (arguing that presidents may pardon civil offenses as well as criminal ones); Peter L. Markowitz & Lindsay Nash, *Pardoning Immigrants*, 93 N.Y.U L. REV. 58, 63 (2018) (arguing that "the President may pardon any federal civil *penalty* but may not use his pardon power to relieve individuals of applications of civil *regulatory qualifications*."). Further, the President cannot pardon state offenses, be they criminal or civil. *See, e.g.*, Samuel T. Morison, *Presidential Pardons and Immigration Law*, 6 STAN. J. C.R. & C.L. 253, 278 (2010) ("the pardon power extends only to '[o]ffenses against the United States,' as distinguished from civil penalties or state offenses.").

dent, or chief magistrate, to unilaterally prevent punishment from taking place if he or she deemed such measures appropriate.[41]

B. The Pardon Power and the States: The Example of Maine

Just as the pardon power in the U.S. Constitution gives this right to the President, state constitutions generally vest the pardon power in the state's chief executive, the governor.[42] Of importance to this Article, to the extent the pardon power might be extended to nonhuman animals, it will likely happen at the state level rather than the federal, as it has in the two case studies considered here.

As was mentioned above, the Governor of Maine attempted to use his state-constitutionally-derived pardon power to pardon a dog. However, the District Attorney in the case appeared to ignore or reject the Governor's pardon, and continued pursuing execution of Dakota's euthanasia order.[43] The State set forth three reasons for ignoring the pardon: (1) because there had been no conviction in Dakota's case, the Governor lacked the authority to grant a pardon; (2) even if he had the authority, he failed to comply with relevant statutory procedural requirements; and (3) when the court had previously discussed the Governor's pardon power, it had addressed his ability to pardon "a *person* after *criminal conviction*."[44] The court appeared to agree.[45] This failure to take his pardon seriously caused the Governor to intervene in the case.[46] In the end, a

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[41] THE FEDERALIST NO. 74, *supra* note 31 ("[T]he benign prerogative of pardoning should be as little as possible fettered or embarrassed.").

[42] Henry Weihofen, *Legislative Pardons*, 27 CALIF. L. REV. 371, 372 (1939) ("[T]he constitutions of every state except Connecticut specifically confer power to grant pardons upon the governor, either alone or with the help of an advisory pardon board or pardon attorney, or upon a board of which the governor is a member."); *But see* GA. CONST. art. IV, § 2 (executive pardon is handled by a State Board of Pardons and Paroles whose members are appointed by the Governor).

[43] The State asserted that the Governor lacked authority to issue the pardon here because there had been no conviction, and because he failed to follow correct procedure in doing so. *See* State's Objection to Motion to Vacate by Interested Party, State v. Perry, No. 17-20053 (Kennebec Dist. Ct., Apr. 10, 2017).

[44] *Id*. ("[S]ection 11 gives the Governor the power to 'remit after conviction'. Here there has been no conviction so the Governor has no authority to grant such a pardon . . . Assuming that the Governor does have the authority to issue a pardon for a dog, the Governor has failed to comply with the requirements of the statute.").

[45] *See* Adams, *supra* note 4 (noting that Judge ignored LePage's pardon).

[46] *See* Motion of Governor LePage to Intervene, or, in the Alternative, to file Amicus Brief, and Incorporated Memorandum of Law, Maine v. Perry, No. VI-17-20053 (Me. Dist. Ct. 2017); Governor LePage had filed a motion to intervene in order to "defend his full power to grant pardons." Adams, *supra* note 4. In a letter to the state's attorney general requesting to do so, he stated,

> As you know, the ancient power of Executive Clemency is very broad and is a power that the People of the State of Maine have vested in the Chief Executive. With this in mind, I strongly believe it is my constitutional duty and obligation to defend this important power in court.

settlement was reached—so there was no final determination regarding the validity of LePage's pardon—and the court ordered Dakota to be moved to a farm.[47]

Although many states have rejected the U.S. Constitution's broad understanding of the pardon power, Maine has not.[48] An examination of the legislative history of the Maine constitution suggests little concern with the pardon power and does not demonstrate any intent to deviate from the understanding of the Federal power.[49] The Maine power, however, does not include the language of the U.S. Constitution limiting the pardon power to offenses against the United States. Thus, the textual hook, which in the U.S. Constitution is read to restrict the pardon power, is absent in the Maine constitution.

In Maine, the pardon power derives from Article 5, Section 11 of the Maine Constitution:

> The Governor shall have power to remit after conviction all forfeitures and penalties, and to grant reprieves, commutations and pardons, except in cases of impeachment, upon such conditions, and with such restrictions and limitations as may be deemed proper, subject to such regulations as may be provided by law, relative to the manner of applying for pardons. Such power to grant reprieves, commutations and pardons shall include offenses of juvenile delinquency.[50]

Letter from Paul LePage, Governor of Maine, to Janet Mills, Att'y Gen. of Maine (July 10, 2017) (on file with author). According to news reports, the Judge was not interested in the pardon. "At the hearing, [Judge] Stanfill said she wasn't considering the pardon, although it wasn't clear if she merely hadn't seen it or if she thought it was invalid." Michael Shepherd, *Dog Pardon Again Proves LePage is the Alpha in Maine's Power Structure*, BANGOR DAILY NEWS (Apr. 23, 2017), https://bangordailynews.com/2017/04/23/politics/dog-pardon-again-proves-lepage-is-the-alpha-in-maines-power-structure/ [https://perma.cc/FL7V-T29J].

[47] *See* Judy Harrison, *Judge Agrees to Deal That Allows Pardoned Husky to Live*, BANGOR DAILY NEWS (July 24, 2017), https://bangordailynews.com/2017/07/24/news/judge-agrees-to-deal-that-allows-pardoned-husky-to-live/ [https://perma.cc/LR4J-7LLY]. There, Dakota was to be evaluated by an expert who would sign off on her next home. However, her new home could not be in the town where she previously lived. *Id*.

[48] *See generally* John Dinan, *The Pardon Power and the American State Constitutional Tradition*, 35 POLITY 389 (2003) (discussing U.S. rejection of the "Hamiltonian model" of the pardon power and imposition of various restrictions on the power). *See also In re* Pardoning Power of Governor and Council, 27 A. 463, 464 (Me. 1892); Bossie v. State, 488 A.2d 477, 480 (Me. 1985) ("[Section 11] prevents the legislature from controlling, regulating, or interfering with Governor's pardoning powers.").

[49] None of the records of the debates on the original Maine Constitution, or any pardon-related amendments thereto, betray any concern with the pardon power. In most cases, amendments to the pardon power passed without any debate whatsoever. *See generally* THE DEBATES AND JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MAINE, 1819–'20, AND AMENDMENTS SUBSEQUENTLY MADE TO THE CONSTITUTION (1894), https://babel.hathitrust.org/cgi/pt?id=mdp.35112203450061&view=1up&seq=15 [https://perma.cc/4JNR-8T7A] (record of the debates at the Maine Constitutional Convention). Debate on more recent amendments is available at the Maine legislature's website.

[50] ME. CONST. art. V, § 11.

As is apparent, the Governor's power under Section 11 is broad; it relates not just to pardons, but to "forfeitures and penalties" as well.[51] Further, the language "remit after conviction" appears to modify only "forfeitures and penalties," thus there is at least an argument that there need not be a criminal conviction before the Governor may issue a pardon.[52] That said, there are relevant state statutes that seem to assume that pardons relate only to criminal convictions.[53] According to Marshall Tinkle, an expert on the Maine state constitution, "[u]nder this section, governors have complete discretion in exercising *any* power of clemency for whatever reasons they deem appropriate."[54] However, Tinkle also believes that the power to pardon is generally understood to apply only to criminal convictions and not to administrative proceedings.[55] Indeed, the Maine Supreme Judicial Court found that in Maine, "the chief executive, acting for the public welfare and the benefit of the *convict*, has complete discretion and may exercise his [pardon] power for whatever reasons he thinks appropriate."[56]

Thus, the pardon power in the state of Maine is not unlimited, but it is broad in both scope and reach. The commentary surrounding its breadth in combination with the textual ambiguity suggests that a governor could at least arguably attempt to use the power to pardon a nonhuman animal.[57] A governor

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[51] *See, e.g.*, *In re* Pardoning Power of Governor and Council, 27 A. at 463–64 (noting that the pardon power can be used at any time, including long after a sentence or conviction).

[52] It appears, however, that the state believes the entire constitutional provision applies only to criminal offenses. *See* State's Objection to Motion to Vacate by Interested Party, *supra* note 43 ("[Section] 11 gives the Governor the power to 'remit after conviction.' Here, there has been no conviction so the Governor has no authority to grant such a pardon.").

[53] *See, e.g.*, ME. REV. STAT. tit. 15, § 2161 (2020) ("On all petitions to the Governor for pardon or commutation of sentences, written notice thereof shall be given to the Attorney General and the district attorney for the county where the case was tried . . . ."); ME. REV. STAT. tit. 15, § 2163 (2020) ("In any case in which the Governor is authorized by the Constitution to grant a pardon, he may, upon petition of the person convicted, grant it upon such conditions and with such restrictions and under such limitations as he deems proper . . . .").

[54] MARSHALL J. TINKLE, THE MAINE STATE CONSTITUTION 120 (2d ed. 2013) (emphasis added and citation omitted).

[55] Email from Marshall Tinkle, Attorney, Thompson, MacColl, & Bass, to author (Aug. 25, 2019 8:01 AM) (on file with author); *see, e.g.*, Theodoro v. Dep't Liquor Control, 527 S.W.2d 350, 353 (Mo. 1975) (holding that, under the Missouri constitution, the power to pardon did not extend to the administrative revocation of a liquor license, though the Missouri constitution used the term "offense").

[56] State v. Hunter, 447 A.2d 797, 802 (Me. 1982) (emphasis added). This language, of course, assumes a conviction. *See* Bossie v. State, 488 A.2d 477, 480 (Me. 1985) ("[Section 11] prevents the legislature from controlling, regulating, or interfering with Governor's pardoning powers."); State v. Sturgis, 85 A. 474, 477 (Me. 1912) ("[T]he power to pardon, to commute penalties, to relieve from the sentences of the law imposed as punishments for offenses against the state, which power has not been given to the courts [are] confided exclusively to the Governor of the state . . . .").

[57] Dangerous dog hearings sometimes have elements that resemble criminal trials. *See infra* Section III.B. Further, the dog at issue in New Jersey was held in jail and given a prisoner number. *Supra* note 14 and accompanying text.

with a broad conception of executive power would be even more likely to read the power in this way.[58]

C. Remittitur of Forfeiture: The Example of New Jersey

As was mentioned above, constitutional provisions that govern the pardon power also often give chief executives the power to remit a forfeiture. Forfeiture is a process through which a person "lose[s] ownership of an asset because that asset was used to facilitate illicit activity, or [was] received or derived from illicit activity."[59] Some commentators have suggested that the power to remit a forfeiture is *part of* the pardon or clemency power.[60] However, unlike a pardon, the remission of a forfeiture means that the governor has the power to return property that has been taken from a person.[61] The New Jersey Governor's "pardon" of a dog was technically styled as the remittitur of a forfeiture.

New Jersey's relevant constitutional provision reads,

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[58] *See, e.g.*, Marina Villeneuve, *LePage Legal Fights Tested Limits, Cost Maine $900,000*, PORTLAND PRESS HERALD (Jan. 5, 2019), https://www.pressherald.com/2019/01/05/lepage-legal-fights-tested-limits-cost-maine-900000/ [https://perma.cc/P7G3-9CPF] (describing LePage's assertive use of executive power).

[59] U.S. DEPT. OF JUSTICE, ASSET FORFEITURE POLICY MANUAL 37 (2019). The forfeiture of a "dangerous dog" would seem to be a "remedial" forfeiture rather than a punitive one. Scott A. Hauert, Comment, *An Examination of the Nature, Scope, and Extent of Statutory Civil Forfeiture*, 20 U. DAYTON L. REV. 159, 183 (1994) ("One purpose of remedial forfeiture statutes is to confiscate property that is inherently dangerous or illegal to possess." (internal citations omitted)); *cf. id.* at 184 ("Punitive civil forfeiture statutes are those which cannot be explained as having the sole purpose and effect of removing dangerous or illegal property from public . . . . Rather, the purpose of such statutes is to punish the property owner for using the property in an illegal manner."); *but see* City of Cleveland v. Lupica, No. 83912, 2004 WL 2340639, at *2 (Ohio Ct. App. Sept. 30, 2004) ("[The Court is] unpersuaded by appellant's argument that the humane destruction of a vicious dog is equivalent to a forfeiture of contraband requiring compliance with [the forfeiture statute].").

[60] Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power From the King*, 69 TEX. L. REV. 569, 577 (1991) ("The clemency power also embraces remission of fines and forfeitures."); WILLIAM J. RICH, 3 MODERN CONSTITUTIONAL LAW: GOVERNMENT STRUCTURE § 38:27 (3d ed. 2019) ("The pardoning power extends . . . to the remission of fines, penalties, and forfeitures. The power to pardon should not be limited by distinctions between 'civil' and 'criminal' penalties; property which has been seized by the government can be restored so long as third-party interests in the property have not vested." (citations omitted)); Messing, *supra* note 40, at 712 ("[A] 'pardon' can include the remission of a fine or forfeiture that is unrelated to any criminal act."); Pollock v. Bridgeport Steam-Boat Co. (The Laura), 114 U.S. 411, 414 (1885) ("[T]he President, under the general, unqualified grant of power to pardon offenses against the United States, may remit fines, penalties, and forfeitures of every description arising under the laws of [C]ongress."); *Executive Revision of Judicial Decisions*, 109 HARV. L. REV. 2020, 2033 (1996) ("When used to remit fines, penalties, and forfeitures, the pardon power can restore property as well as liberty . . . ."); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1498 (1833) ("[T]he power of pardon is general and unqualified, reaching from the highest to the lowest offences. The power of remission of fines, penalties, and forfeitures is also included in it . . . .").

[61] N.J. STAT. ANN. § 2A:167–5 (2020).

> The Governor may grant pardons and reprieves in all cases other than impeachment and treason, and may suspend and remit fines and forfeitures. A commission or other body may be established by law to aid and advise the Governor in the exercise of executive clemency.[62]

As with the language in the Maine Constitution, the language here is vague. There is an argument that in Maine, the Governor could only remit criminal forfeitures, as the constitutional language there states that the power exists "to remit *after conviction* all forfeitures . . . ."[63] That type of limiting language is not present in New Jersey. Thus, it seems likely that the Governor's power is applicable to both civil *in rem* forfeitures and criminal *in personam* forfeitures, which are brought in conjunction with a defendant's criminal prosecution.[64]

In the case of a dangerous dog determination, the dog would be forfeited by his or her guardian not in conjunction with a criminal prosecution of that guardian, but because of a dangerous dog determination due to a harm committed by the dog him or herself.[65] Assuming the dog is not capable of committing a criminal act, requiring the euthanization of a dog would seem to be a civil forfeiture.[66] Indeed, one dangerous dog statute expressly stated that, "[i]f, upon

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[62] N.J. CONST. art. V, § 2.

[63] ME. CONST. art. V, § 11 (emphasis added).

[64] *See* N.J. STAT. ANN. § 2A:167–5 (2020) (Restoration of right of suffrage and other rights; suspension or remission of fine: "Any person who has been convicted of a crime and by reason thereof has been deprived of the right of suffrage or of any other of his civil rights or privileges, *or upon whom there has been imposed a fine or who has suffered a forfeiture* . . . may make application for the restoration of the right of suffrage or of such other rights or privileges or *for the suspension or remission of such fine or forfeiture*, which application the governor may grant by order signed by him." (emphasis added)).

[65] *See* Hauert, *supra* note 59, at 159–60 ("The enduring fictional aspect of civil forfeiture that had allowed it to prosper was its 'ascribing to the property a certain personality.' This personified property included 'a power of complicity' and the ability to be found 'guilty.' Actions against personified property are *in rem*. Historically, *in rem* actions were considered to be strictly against the 'guilty' property, not the owner." (internal citations omitted)); *see also* Amy A. Breyer, Comment, *Asset Forfeiture and Animal Cruelty: Making One of the Most Powerful Tools in the Law Work for the Most Powerless Members of Society*, 6 ANIMAL L. REV. 203, 207 (2000) ("The notion that the property itself was guilty simply evolved into the belief that the forfeiture is justified 'on the notion that the owner has been negligent in allowing his property to be misused and that he is properly punished for that negligence.' Modern scholars offer a somewhat more practical, if not mundane, explanation: the purpose of an *in rem* forfeiture is to ask the court to recognize a change in the ownership of the property." (internal citations omitted)).

[66] *See* Settle v. Commonwealth, 685 S.E.2d 182, 186 (Va. Ct. App. 2009) (finding that forfeiture of a dog in a dangerous dog proceeding was a civil forfeiture of the animal). Animals are property under the law, but they have agency, and thus present a unique situation in the context of forfeiture. One commentator has noted the same problems in the context of robots:

> But civil asset forfeiture is a different case than robot forfeiture because civil forfeiture more often involves objects (money, cars, goods) rather than agents (animals and robots). A robot is the cause of harm in a way that a (human-driven) car cannot be. The car is a mere tool of a human who intends or negligently does harm, but an autonomous robot is not merely a tool of another

hearing, the court finds that the dog is a dangerous dog . . . the court may impose a civil forfeiture and shall: . . . Order the dog to be euthanized . . . ."[67] This statutory language suggests that a euthanization order would generally be viewed as a form of civil forfeiture. Thus, the New Jersey Governor appears to have believed that the state constitutional provision, quoted above, gave her the power to remit civil forfeitures (and thus halt the euthanization), but that it did not give her the power to issue a full and fair pardon for a dog.[68]

D. Institutional Design

As was discussed above, the pardon power is vested in the Executive Branch because the Chief Executive was deemed more capable of making the sophisticated public-policy determinations that the pardon power demands than the judiciary or the legislature.[69] Thus, the arguments and ideas presented in this Article are those that the Executive should have the chance to sort through in determining who is deserving of the pardon. As commentators have noted, the fact that the pardon power is so broad "creates grave risks that the democratic process can be subverted through the discretionary and potentially self-serving actions of the president."[70] Indeed, at the Virginia Ratifying Convention, George Mason voiced such concerns, stating that the President

> ought not to have the power of pardoning, because he may frequently pardon crimes which were advised by himself. It may happen, at some future day, that he will establish a monarchy, and destroy the republic. If he has the power of

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> but is itself an agent. Just as the law sometimes sanctions euthanizing dangerous dogs over the objections of their owners, the law might reasonably say that robots who have caused certain kinds of harm are also forfeit from their owners.

Christina Mulligan, *Revenge Against Robots*, 69 S.C. L. REV. 579, 594 (2018) (citation omitted). Further, dangerous dog statutes that require inquiry into whether a dog's conduct was justified or reasonable seem to be engaging in some combination of *mens rea* and affirmative defense analysis, as would be applicable to an agent, not an object.

[67] ME. REV. STAT. ANN. tit. 7, § 3952(1)(B) (West, Westlaw through 2019 2d Reg. Sess.) (amended 2007) (containing language from a former version of Maine's dangerous dog statute); *see* Griggs v. Mayor, Etc., of Macon, 30 S.E. 561, 562 (Ga. 1898) ("[T]he power to regulate the keeping of dogs, and to enforce such regulations by forfeitures, fines, and penalties, is recognized as within the police power." (quoting 1 DILL MUN. CORP. 212 (4th ed.))).

[68] *Supra* notes 20, 21 and accompanying text (discussing the Governor's statements surrounding why she could not pardon the dog).

[69] The legislature is involved in these decisions in some states. *See, e.g.*, ALA. CONST. art. V, § 124 (West, Westlaw through Dec. 2018) (as amended by Amendment 38). Though some concern was raised at the Constitutional Convention, it was decided that the president would not break the law or commit an act of treason against the country, and thus the power was not limited. *See* James N. Jorgensen, *Federal Executive Clemency Power: The President's Prerogative to Escape Accountability*, 27 U. RICH. L. REV. 345, 345 (1993); William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 503 (1977) ("The probability of the President of the United States committing an act of treason against his country is very slight . . . ." (quoting James Iredell in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 351–52 (Paul Ford ed., 1968)).

[70] Jorgensen, *supra* note 69, at 367.

> granting pardons before indictment, or conviction, may he not stop inquiry and prevent detection? The case of treason ought, at least, to be excepted.[71]

However, the framers determined that those concerns were remedied by the existence of the impeachment power,[72] and that they were outweighed by the determination that granting the pardon power to the Executive would result in an appropriate, efficient system of pardons.[73]

With respect to the examples in Maine and New Jersey, Governors LePage and Whitman each made a considered judgment that pardoning Dakota and Taro, respectively, would have benefits in excess of costs. They each seem to have decided that the moral weight of the dogs' interest in life was sufficiently strong to outweigh the costs of their continued presence. In the case of Taro, it is possible that the public outrage and media involvement swayed Governor Whitman, yet she still decided that Taro should live, even if there was a risk that he might attack again. Even if a judge or legislature might weigh those considerations differently, the underlying presupposition of the pardon power (and the power to remit a forfeiture) is that the President or Governor is *better placed* to engage in that balancing process and get to the best overall result.

E. Problems with the Pardon Power: Why Pardoning Dogs Might Not Be the Best Way to Respond to Euthanization Orders

It is important to pause here to acknowledge certain problems with the pardon power broadly, and the potential problems that could arise when using it in conjunction with the pardon of a nonhuman animal. First, some scholars believe that the use of the pardon power means that something went wrong in the criminal justice system: "the person convicted was not actually guilty, or he or she was punished too harshly, or the punishment no longer fits the crime."[74] Thus, the use of a pardon means the system has failed in some way. This concern is also reflected in earlier origins of the pardon power. Historically, monarchs would see to it that minor offenses were deemed punishable by death.[75]

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[71] 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 497 (2d ed. 1836).

[72] *Id*. at 498.

[73] A delegate explained that it was better to have the power in the hands of the executive because "[a] legislative body is utterly unfit for the purpose. They are governed too much by the passions of the moment. In Massachusetts, one assembly would have hung all the insurgents in that state: the next was equally disposed to pardon them all." *Id*. at 519.; *see also* Kristen H. Fowler, *Limiting the Federal Pardon Power*, 83 IND. L.J. 1651, 1669 (2008).

[74] Chad Flanders, *Pardons and the Theory of the "Second-Best,"* 65 FLA. L. REV. 1559, 1559 (2013) (describing pardons as a "safety valve"); *see also* James P. Goodrich, *Use and Abuse of the Power to Pardon*, 11 J. CRIM. L. & CRIMINOLOGY 334, 335 (1921) ("The exercise of clemency by the executive through pardon, parole or the remission of fine, without any appeal or review of his action is intended to be the last resort to correct injustices that must arise in the administration of criminal laws, which . . . are fixed and inflexible . . . .").

[75] *See* Duker, *supra* note 69, at 476–77.

Then, when the monarch used his or her power to pardon a person convicted of such an offense, he or she received adulation for being so kind, generous, and forgiving.[76] This seems to be more a manipulation of the criminal justice system than a way to impart mercy and forgiveness.[77]

Further, the pardon power is often not applied fairly or with an even hand; this is a problem that is connected to racial bias and disparities in criminal punishment and incarceration more broadly.[78] As one commentator noted, "[p]ardons can all too often reflect patterns of racial bias, favoritism, and sheer randomness, both when they are given too generously and when they are not given generously enough."[79] For example, Mississippi's Governor, Haley Barbour, issued two-thirds of his pardons to white, well-connected prisoners, although two-thirds of people in the state who are convicted of crimes are African American.[80] Similarly, the former Governor of Kentucky recently pardoned a number of low-level drug offenders; however, subsequent investigation revealed that they were mostly white.[81] This critique leads some to argue that governors should hesitate before using the pardon power.[82]

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[76] *See id*. at 476–78 (describing kings in the Middle Ages using pardons because the punishments for small crimes were harsh and in order to enrich themselves).

[77] This, of course, is not the only explanation. If the justification for punishment is anything other than retribution, then pardons could be understood not as a manipulation of the criminal justice system, but as a fair application of state violence. For example, if a defendant is found guilty of a crime, but there are important mitigating circumstances, a jury might nullify. It is also possible that the guilty verdict itself accomplishes desired punitive functions: deterring future wrongdoing because people are now on notice; sending an expressive message that the conduct is bad; or aiding in rehabilitation if the criminal process helps the defendant appreciate the wrongfulness of their conduct and the magnitude of the harm done. The verdict itself might also carry with it stigma and collateral consequences. Thus, traditional punitive ends would be served, and further punishment might be both unnecessary and unjustified. Thanks to Ben Levin for this insight.

[78] Although a discussion of this important issue is beyond the scope of this Article, for an overview of racial disparities in incarceration, *see generally*, Alfred Blumstein, *On the Racial Disproportionality of United States' Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259 (1982); Scott Christianson, *Legal Implications of Racially Disproportionate Incarceration Rates*, 16 CRIM. L. BULL. 59 (1980); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 276–77 (Kimberlé Crenshaw et al. eds., 1995); Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL'Y REV. 257, 260–61 (2009); Ryan D. King & Michael T. Light, *Have Racial and Ethnic Disparities in Sentencing Declined?*, 48 CRIME & JUST. 365 (2019); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1273 (2004).

[79] Flanders, *supra* note 74, at 1559.

[80] *Id*. at 1561; Campbell Robertson & Stephanie Saul, *List of Pardons Included Many Tied to Power*, N.Y. TIMES (Jan. 27, 2012), https://www.nytimes.com/2012/01/28/us/many-pardon-applicants-stressed-connection-to-mississippi-governor.html [https://perma.cc/LCB6-KU6M].

[81] Matt Mencarini & Jonathan Bullington, *Matt Bevin Granted Commutations to 336 Kentucky Drug Offenders. Nearly All Were White*, LOUISVILLE COURIER J. (Jan. 9, 2020, 8:52 AM), https://www.courier-journal.com/story/news/crime/2019/12/20/bevin-commutations-nearly-all-drug-offenders-released-were-white/2677651001/ [https://perma.cc/YW9Y-2BL

This ties into concerns shared by some commentators that the pardon power can easily be abused, due in part to the "potential for arbitrary decision-making that inheres in the unfettered clemency power."[83] In the Maine example examined in this Article, Dakota the dog was from the town where Governor LePage used to be the Mayor.[84] It is possible that he was friendly with some of the people involved in her story and wanted to remain in their favor. Or perhaps they were donors. It is also possible that LePage sought public accolades and positive headlines for his pardoning of this dog, hoping that it would distract from the fact that many humans, whom he had not pardoned, remained in prison.[85]

This dovetails with specific concerns that might arise from using the pardon power to pardon a dog. First is a potential apprehension that some might have with using the terminology and legal apparatus of criminal law pardons to achieve that result for nonhuman animals. Some might fear that this will create perverse effects with regard to incarcerated humans, downplaying real problems with the criminal justice system. Similarly, perhaps the gubernatorial use of the power to free a nonhuman animal cheapens the power, suggesting that it is not in fact a serious power, and rather is to be used for photo opportunities.[86]

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[82] Such an argument implicates a larger debate in criminal policy scholarship about whether the best way to address inequality in the criminal system is to level-up or level-down. For example, should all defendants be treated as well as privileged, wealthy, white defendants often are, or as poorly as poor defendants of color typically are? *See generally*, Aya Gruber, *Equal Protection Under the Carceral State*, 112 NW. U. L. REV. 1337 (2018); Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745 (2016); Benjamin Levin, *Mens Rea Reform and Its Discontents*, 109 J. CRIM. L. & CRIMINOLOGY 491 (2019).

[83] Coleen E. Klasmeier, *Towards a New Understanding of Capital Clemency and Procedural Due Process*, 75 B.U. L. REV. 1507, 1535 (1995); *See also* Kathleen Dean Moore, *When Mercy Weakens Justice*, N.Y. TIMES (Aug. 10, 1989), https://www.nytimes.com/1989/08/10/opinion/when-mercy-weakens-justice.html [https://perma.cc/8EC5-L3QA] ("Because pardons single people out for special treatment, every pardon is potentially . . . a violation of the principle of equal treatment under the law.").

[84] *Paul LePage*, BALLOTPEDIA, https://ballotpedia.org/Paul_LePage [https://perma.cc/C2S3-LGEC].

[85] In Maine, although Black people make up 1 percent of the state's population, they represent 7 percent of the incarcerated population. *See Maine Profile*, PRISON POLICY INITIATIVE, https://www.prisonpolicy.org/profiles/ME.html [https://perma.cc/3WPF-SSQZ]. Further, LePage gained national notoriety for making statements that were widely viewed as racist. *See, e.g.*, Amber Phillips, *LePage Doubles Down: 'The Enemy Right Now' is 'People of Color or People of Hispanic Origin'*, WASH. POST (Aug. 27, 2016, 10:00 AM), https://www.washingtonpost.com/news/the-fix/wp/2016/08/26/this-is-gov-paul-richard-lepage-i-would-like-to-talk-to-you-about-your-comments-about-my-being-a-racist-you-expletive/ [https://perma.cc/R743-JJ5D].

[86] *See also infra* note 97–102 and accompanying text (addressing the pardon of a Thanksgiving turkey). For example, some readers might find it ironic that President Bush and Governor LePage—both of whom implemented punitive policies and were viewed as "tough on crime"—are associated with nonhuman animal pardons. *See* Philip V. McHarris, *Why Does the Minneapolis Police Department Look Like a Military Unit?*, WASH. POST (May 28, 2020, 3:00 AM), https://www.washingtonpost.com/outlook/2020/05/28/explaining-militarized-poli

There could be related unease because pardoning a dog is a "humanizing" act,[87] while there is a long history in the U.S. of dehumanizing (and racializing) those who are convicted of crimes.[88] Indeed, Professor Dorothy Roberts has asserted that the U.S. criminal punishment system functions "to maintain forms of racial subordination that originated in the institution of slavery . . . . Criminal punishment has been instrumental in reinstating the subjugated status of black people and preserving a racial capitalist power structure."[89] Seen in this light, it seems perverse that a dog might be pardoned while a person is executed. These are important and valid concerns.[90]

That said, the Article posits that these are not "either/or" considerations. One can show concern for the plight and treatment of animals under the law, while also condemning human-centered systems of oppression and violence; one can tout the benefits that might flow from pardoning dogs while decrying the racist structural problems that inhere in the human criminal justice system and pardons more broadly.[91] Indeed, this Article does not focus on the wisdom of the pardon power writ large, nor is it about criminal justice reform more broadly.[92] Rather, it seeks to concentrate on the role that pardons might play in

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ce-response-protesters-after-killing-george-floyd/ [https://perma.cc/KTT9-8WNS]; Associated Press & Marina Villeneuve, *Main Gov. Paul LePage Leaves Obscene Voicemail, Talks of Shooting Lawmaker*, E. BAY TIMES (Aug. 26, 2016, 11:34 AM), https://eastbaytimes.com/2016/08/26/maine-gov-paul-lepage-leaves-obscene-voicemail-talks-of-shooting-lawmaker/ [https://perma.cc/KY7E-KCSZ].

[87] However, an animal law scholar might argue that the goal is not to humanize the dog, but to encourage others to see the inherent value and worth in the dog him or herself, *without* comparing him or her to a human. *See, e.g.*, SUE DONALDSON & WILL KYMLICKA, ZOOPOLIS: A POLITICAL THEORY OF ANIMAL RIGHTS 4 (2011) ("The only truly effective protection against animal exploitation requires shifting . . . to a moral framework that acknowledges animals as the bearers of certain inviolable rights . . . [which] is a natural extension of the conception of moral equality underpinning the doctrine of human rights.").

[88] *See* Blumstein *supra* note 78, at 1259 (discussing the racial disparities in incarceration). "[W]e animalize or *dehumanize* certain folks, . . . thereby justifying their violation." APH KO & SYL KO, APHRO-ISM: ESSAYS ON POP CULTURE, FEMINISM, AND BLACK VEGANISM FROM TWO SISTERS 45 (2017); *see also infra* note 96 (discussing the problems with "the dreaded comparison" literature, which compares the systems of oppression underlying slavery to those underlying modern treatment of certain nonhuman animals).

[89] Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 4 (2019).

[90] *See* Richard A. Posner, *Animal Rights*, 110 YALE L.J. 527, 535 (2000) (reviewing STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS (2000)) ("[I]f we fail to maintain a bright line between animals and human beings, we may end up by treating human beings as badly as we treat animals, rather than treating animals as well as we treat (or aspire to treat) human beings."); *see also supra* note 82 (discussing leveling-up and leveling down).

[91] *See* JUSTIN MARCEAU, BEYOND CAGES: ANIMAL LAW AND CRIMINAL PUNISHMENT 97–98 (2019) (taking issue with the way the animal protection movement has furthered carceral goals by pushing for greater criminal penalties for those who abuse animals).

[92] It is worth noting, however, that some emerging criminal justice scholars view the move to employ the pardon power as a cause for at least modest celebration, viewing it as a way to further decarceration goals in the face of a racially biased system. *See generally* Rachel E.

furthering rights for *nonhumans*. At base, the goal of this Article is not to argue that the pardon power *should* be used to free a nonhuman animal any time that animal has been sentenced to die. Rather, it looks at this issue, as presented by the two case studies examined herein, and examines the questions and possibilities that are raised by using the pardon power in this way. And that is the key here: not that the pardon power is the most elegant or suitable tool to save a dog who has been deemed dangerous, but rather, by using the pardon power to free those nonhuman animals, could governors further certain goals of the animal protection movement?[93] This Article suggests that the answer is yes. As the final Part of this Article will address, the law has slowly, and in a variety of different substantive areas, been applying provisions meant for humans to nonhuman animals.[94] As this continues to happen, it is possible that the public perception of those nonhuman animals will shift sufficiently so that they begin to occupy a more powerful place within our legal hierarchy.

II. NONTRADITIONAL PARDONS

To be sure, there has not been much written about the use of the pardon power as it relates to nonhuman animals, because pardons aren't typically used to free nonhuman animals.[95] However, as this Article has discussed, at least two governors have wielded their pardon power in this way. Further, there are other examples of "nontraditional pardons," including the pardoning of the Thanks-

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Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1 (2015). *See also* Cortney Lollar, *Criminal Justice System Is Often Flawed. The Pardon Power Provides a Much-Needed Check*, LEXINGTON HERALD LEADER (Dec. 16, 2019, 5:05 PM), https://www.kentucky.com/opinion/op-ed/article238421473.html [https://perma.cc/X8Z9-DNF9] ("[T]hough I may doubt the wisdom of several of the pardons or commutations Bevin granted, I fully support the governor's pardon power. We have a deeply flawed system. Innocent people are wrongfully convicted. People of lesser means go to jail for behavior committed equally often by those with money and power who remain unencumbered by the shackles of the criminal system. Racial disparities in arrests, charging decisions, and punishment are well-documented and pervasive . . . . Mercy in the form of pardons and commutations can correct some of these injustices, right some of these imbalances. The criminal legal process needs this check.").

[93] *See infra* Section IV.B (describing the expressive function of pardoning dogs).

[94] *See infra* Section IV.B.

[95] Of note, pardons for all defendants, humans included, are extremely rare. In modern times, pardons are rarely used, even by executives who purport to critique the harshness of the criminal justice system. *See, e.g.*, Rachel E. Barkow & Mark Osler, *Designed to Fail: The President's Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387, 425 (2017) ("While President Obama's [clemency] grants were laudable, it is also important to note that he denied nearly twice as many petitions as at least the past five Presidents combined."); Dafna Linzer, *Obama Has Granted Clemency More Rarely than Any Modern President*, PROPUBLICA (Nov. 2, 2012, 9:00 AM), https://www.propublica.org/article/obama-has-granted-clemency-more-rarely-than-any-modern-president [https://perma.cc/VB3L-V37K]; Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1348 (2008) ("At both the state and federal level, grants of executive clemency have plummeted in recent decades."); Barkow & Osler, *supra* note 92, at 1.

giving turkey, symbolic pardons, mass pardons, and posthumous pardons, which are worth discussing.[96]

[96] Another historical example that some readers might find relevant to this discussion is the pardoning of enslaved people. *See, e.g.*, A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The "Law Only As an Enemy": The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 987 (1992) ("[A] jailed [enslaved person] who had been condemned to die . . . was recommended for a pardon . . . ." (citing ARTHUR P. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 310 n.65 (1930))); George Lardner, Jr. & Margaret Colgate Love, *Mandatory Sentences and Presidential Mercy: The Role of Judges in Pardon Cases, 1790-1850*, 16 FED. SENT'G REP. 212, 214 (2004) (noting that, after an enslaved man was convicted and sentenced to be hanged in 1805, "[f]ive prominent Alexandria lawyers, joined by the clerk of the court, asked for a pardon, saying the evidence had been 'barely sufficient' to justify a guilty verdict, much less a death sentence" and that President "Jefferson jotted a note at the bottom of the petition, directing the State Department to 'let a pardon issue' "); *see also id.* at 220 n.28 ("Some years later, when President Tyler was asked to commute another [enslaved person's] prison sentence, he asked his Attorney General whether [an enslaved person] could properly be imprisoned since he was someone else's property. Attorney General Nelson responded that the law made no distinction between [enslaved] and free, and that [an enslaved person] could also be pardoned. The President ordered the [enslaved person's] release to his owner. . . . (pardon of [enslaved person] named Pleasant, aka Daniel Jenkins, on condition of transportation from the District)." (citations omitted)); *see also* Angela P. Harris, *Compassion and Critique*, 1 COLUM. J. RACE & L. 326, 344–45 (2012) ("Slaves were not governed solely as things, of course; they could be prosecuted and punished for crimes. Moreover, some states imposed duties on owners not to abuse their slaves . . . . But these protections were not couched as individual rights belonging to the slave; they were reflections of the view that slaves, like children, were vulnerable, helpless, and incompetent, requiring the master's protection and control."). I want to be careful to situate this example and its relevance here. Often referred to as "the dreaded comparison," there is a body of literature that discusses the property status of nonhuman animals in comparison to the property status of formerly enslaved people. *See* MARJORIE SPIEGEL, THE DREADED COMPARISON: HUMAN AND ANIMAL SLAVERY (1988). This literature looks at the comparative roles of subordination, oppression, exploitation and violence, as well as the property status of the victims (rather than equating the history of slavery with the current treatment of animals, or suggesting commensurate suffering or moral wrong). *See, e.g.*, Marya Torrez, *Combatting Reproductive Oppression: Why Reproductive Justice Cannot Stop at the Species Border*, 20 CARDOZO J.L. & GENDER 265, 269 (2014) ("Most feminists now recognize that oppressions are interrelated and that oppression is experienced as a result of and through any number of intersecting identities."). But even this type of comparison has the potential to be problematic. *See* Angela P. Harris, *Should People of Color Support Animal Rights?*, 5 J. ANIMAL L. 15, 17 (2009) ("The version of animal rights that people of color ought to support is rooted in a deep understanding of the linkages between all forms of subordination. Racism and what is sometimes called 'species-ism' have a common origin and a common logic. And opposition to racism should lead one to oppose species-ism as well. The relationship between these two -isms, however, is far from [simple]."). As Professor Harris noted, it "implicitly constructs a gaze under which slaves and animals appear alike." *Id.* at 26. She continues, "what's wrong with the analogy is that it ignores the history . . . . [I]t is tone-deaf in a way that covertly exploits the very racism that animal liberationists claim to reject. Precisely because of the close relationship between colored people and animals in the white imagination, the invocation of the dreaded comparison—the chained slave next to the chained animal in a sinister visual rhyme—itself calls out the structures of feeling that have undergirded racism for so long." *Id.* at 25–26; *see also* Andrea Freeman, Address at Association of American Law Schools 2019 Annual Meeting (Jan. 4, 2019) (discussing the problems with "the dreaded comparison," and ways that it can be discussed with more nuance). Similarly, Professor Cassandra Newby-Alexander stated, "You can't compare the systematic dep-

Perhaps the most famous example of the pardon of a nonhuman animal is the symbolic turkey pardoning at Thanksgiving. The reason that this pardon is symbolic is because the turkey has done nothing wrong—other than, perhaps, being born into a world where people view turkeys as food rather than as beings entitled to the right to be free from harm and oppression. However, when addressing the pardoning of nonhuman animals, the turkey is probably what first comes to mind for many people. Presidents going back to George H.W. Bush, and—in a less formal way—even earlier, have symbolically "pardoned" a turkey or two each Thanksgiving.[97] Some credit President Lincoln with the tradition, going back to 1863 when a White House reporter "noted, 'a live turkey had been brought home for the Christmas dinner, but [Lincoln's son Tad] interceded in behalf of its life. . . . [Tad's] plea was admitted and the turkey's life spared.'"[98] But President Bush, the elder, began the tradition as we know it today, stating of the bird, "[h]e's granted a presidential pardon as of right now—and allow him to live out his days on a children's farm not far from here."[99] Presidents make a show of the fact that the lives of these particular

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rivation of people's rights, their culture and heritage to animals that don't have an understanding of things. Doing so belittles the legacy and horrors of slavery." Angela P. Harris, *Should People of Color Support Animal Rights?*, 5 J. ANIMAL L. 15, 20–21 (2009) (quoting Amecia Taylor, *Campaign Equating the Treatment of Animals and Slaves Is Halted*, NNPA (Aug. 29, 2005), https://web.archive.org/web/20171125051545/https://news.newamericamedia.org/news/view_article.html?article_id=2d0b9436b761aae71f5d8a45d62a4690 [https://perma.cc/3GFD-L4MN]). Thus, scholars must acknowledge these concerns and avoid these types of comparisons. *See* Maneesha Deckha, *Animal Justice, Cultural Justice: A Posthumanist Response to Cultural Rights in Animals*, 2 J. ANIMAL L. & ETHICS 189, 196 (2007) (discussing "how difficult it is to elicit a recognition of comparable animal suffering from marginalized humans who have inculcated an anthropocentric order because they fear (for good reasons) being compared, and thus demoted, to the status of 'mere' animals."). *Cf.* MARJORIE SPIEGEL, THE DREADED COMPARISON: HUMAN AND ANIMAL SLAVERY 25 (1988) ("Those who are offended by comparison to a fellow sufferer have fallen for the propaganda spewed forth by the oppressors. To deny our similarities to animals is to deny and undermine our own power. It is to continue actively struggling to prove to our oppressors, past or present, that we are similar to our oppressors, rather than those whom our oppressors have also victimized. It is to say that we would rather be more like those who have victimized us, rather than like those who have also been victims." (emphasis omitted)). *But see* Tucker Culbertson, *Animal Equality, Human Dominion and Fundamental Interdependence*, 5 J. ANIMAL L. 33, 37 (2009) ("analogies among subordinated groups perpetuate the homogenizing essentialism of subordinating ideologies, thereby failing to apprehend and intervene against the intersectional multidimensionality of subordinating practices").

[97] Ronald G. Shafer, *Presidents Didn't Always Pardon Turkeys. Some Birds Became Dinner.* WASH. POST (Nov. 20, 2018, 4:00 AM), https://www.washingtonpost.com/history/2018/11/20/presidents-didnt-always-pardon-turkeys-some-became-dinner/ [https://perma.cc/GR7P-DBEP].

[98] *See Which President Started the Tradition of Pardoning the Thanksgiving Turkey?*, THE WHITE HOUSE HIST. ASS'N, https://www.whitehousehistory.org/questions/which-president-started-the-tradition-of-pardoning-the-thanksgiving-turkey [https://perma.cc/6B8H-YV9S].

[99] Kenzie Bryant & Jordan Amchin, *The Long, Absurd History of Presidential Turkey Pardonings*, VANITY FAIR (Nov. 20, 2018), https://www.vanityfair.com/style/photos/2018/11/donald-trump-presidential-turkey-pardoning-photos-history [https://perma.cc/7L83-7DQY].

birds will be spared, and rather than being eaten for Thanksgiving, they will be able to live full lives.[100] This, however, is a bit disingenuous; because the pardoned turkeys are bred to be eaten, they have short lifespans, and thus likely will not live more than a few years after the reprieve.[101] Further, despite the "pardon" of these lucky birds, approximately forty-five million turkeys are killed for food each year.[102]

It is possible that Governor LePage got the idea for Dakota's pardon from the turkey pardoning. Indeed, a press release from the Governor's office stated, "[a]s the President of the United States pardons a turkey every November, Governor Paul R. LePage today announced a pardon in an effort to shed light on the case of Dakota the Dog."[103] Indeed, one could argue that LePage was using the term and concept of pardon symbolically in Dakota's case, and was instead asserting his executive authority—which he views as being quite broad—by declining to enforce a judgment.[104] However, unlike the turkeys, Dakota was sentenced to die because she inflicted harm upon another dog, and thus her case is less pure symbolism, and more akin to a scenario where a criminal is punished after having committed a crime.

Recently, mass pardons have been in the news. For example, the Democratic Governor of Illinois recently pardoned over 11,000 individuals who were guilty of low-level marijuana offenses in advance of a new marijuana legalization law in that state.[105] The expungements are part of that new law, and are intended to "repair some of the damage caused by efforts to combat sale and use

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[100] Stepping back, it might strike the reader as odd that our society pardons turkeys and executes people, but this rests in large part on the dehumanization of prisoners—especially non-white prisoners—as well as the humanization of turkeys (and dogs). *See generally* Akwasi Owusu-Bempah, *Race and Policing in Historical Context: Dehumanization and the Policing of Black People in the 21st Century*, 21 THEORETICAL CRIMINOLOGY 23, 24, 28 (2017); DAVID LIVINGSTONE SMITH, LESS THAN HUMAN: WHY WE DEMEAN, ENSLAVE, AND EXTERMINATE OTHERS 2 (2011).

[101] "[A] pardoned bird will be lucky to live two years after it's saved by the President." NCC Staff, *The Real Story Behind the Presidential Turkey Pardon*, NAT'L CONST. CTR.: CONST. DAILY (Nov. 27, 2019), https://constitutioncenter.org/blog/the-real-story-behind-the-presidential-turkey-pardon [https://perma.cc/BCZ6-2NDF].

[102] Shafer, *supra* note 97.

[103] Press Release, Office of Governor Paul R. LePage, Governor LePage Advocates for Life of Dakota the Dog (Mar. 30, 2017), https://www.maine.gov/governor/lepage/newsroom/article.html?id=735322 [https://perma.cc/7NK2-GVFW].

[104] *See, e.g.*, Justin Walker, *What Will Guard the Guardians?: Combating Threats to an Independent Judiciary Through Lessons Learned from Theories of Inherent Executive Power*, 85 U. CIN. L. REV. 923, 932 (2018) (explaining that unitary executive theorists have pointed to things that the President can do that Congress cannot—such as issue pardons—as illustrative of the singular power of the President, rather than of intended separation of powers).

[105] Associated Press in Chicago, *Illinois Governor Pardons 11,000 for Low-Level Marijuana Convictions*, GUARDIAN (Dec. 31, 2019, 4:25 PM), https://www.theguardian.com/us-news/2019/dec/31/illinois-governor-jb-pritzker-pardons-11000-marijuana-convictions [https://perma.cc/TT3H-UWEM].

of the drug, particularly in minority communities."[106] Indeed, people of color are much more likely to be the targets of drug law enforcement, and to receive longer sentences, than white people.[107] In another perhaps less lauded example, the Governor of Kentucky commuted the sentences of a number of individuals, including 336 who had been sentenced for drug possession, on his last day of-fice.[108] However, approximately 95 percent of them were white, although peo-ple of color made up 20 percent of the prison population being held on a prima-ry charge of drug possession.[109] At the federal level, Presidential candidate Andrew Yang recently stated, "I'm going to mass pardon everyone who is in jail for nonviolent marijuana-related offenses."[110] Many applaud this sweeping use of the pardon power.[111] Indeed, the pardon power has been called "one of the most effective tools for reducing mass incarceration."[112] And if our justice system is a tool of oppression and systemic violence, as many have argued,[113]

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[106] *Id*.

[107] *See, e.g*., Benjamin Mueller et al., *Surest Way to Face Marijuana Charges in New York: Be Black or Hispanic*, N.Y. TIMES (May 13, 2018), https://www.nytimes.com/2018/05/13/ny region/marijuana-arrests-nyc-race.html [https://perma.cc/8Y7W-N4S5] (noting that, across New York City, "black people were arrested on low-level marijuana charges at eight times the rate of white, non-Hispanic people over the past three years"). "[A]mong neighborhoods where people called about marijuana at the same rate, the police almost always made arrests at a higher rate in the area with more black residents." *Id*.; *see also* U.S. SENT'G COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 BOOKER REPORT (2017) (noting that "Black male offenders received sentences on average 19.1 percent longer than similarly situated White male offenders").

[108] These pardons received media attention in part because they included those who were convicted of child rape and murder. *See* Andrew Wolfson & Joe Sonka, *Bevin Pardons In-clude Convicted Killer Whose Brother Hosted Campaign Fundraiser for Him*, LOUISVILLE COURIER J. (Dec. 12, 2019), https://www.courier-journal.com/story/news/politics/2019/12/11 /bevin-issued-hundreds-pardons-and-commutations-final-day/4399770002/ [https://perma.cc /AT9J-5EFB].

[109] Mencarini & Bullington, *supra* note 81.

[110] Brooke Seipel, *Andrew Yang Promises Mass Pardon to Those Imprisoned for Nonviolent Marijuana Offenses*, THE HILL (Aug. 17, 2019, 2:03 PM), https://thehill.com/homenews/cam paign/457821-andrew-yang-promises-mass-pardon-to-those-imprisoned-for-nonviolent [http s://perma.cc/V3MX-7LUU].

[111] Barkow & Osler, *supra* note 92, at 4; *see, e.g*., Cortney E. Lollar, *Opinion: Pardons Show Matt Bevin's Compassion. These People Are More Than Their Crimes*, LOUISVILLE COURIER J. (Dec. 16, 2019), https://www.msn.com/en-us/news/opinion/opinion-pardons-show-matt-bevin-s-compassion-these-people-are-more-than-their-crimes/ar-BBY3aRS?ocid =msn360 [https://perma.cc/X8P5-CMAZ].

[112] Matt Ford, *Why Aren't Democratic Governors Pardoning More Prisoners?*, NEW REPUBLIC (Jan. 4, 2019), https://newrepublic.com/article/152847/arent-democratic-governor s-pardoning-prisoners [https://perma.cc/LP7W-7K7R].

[113] *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); Radley Balko, *The Case for Releasing Violent Offenders*, WASH. POST (Aug. 14, 2017, 8:23 AM), https://www.washingtonpost.com/news/the-watch/w p/2017/08/14/the-case-for-releasing-violent-offenders/ [https://perma.cc/SSP3-AHK4] ("We want to punish criminals. We want them to suffer. We create hostile prison environments rife with violence, racial resentment and rape.").

then the pardon is a way of responding to a fundamentally unjust system. Using the pardon power in this way certainly advances public policy goals, including decarceration. However, some might view the use of the pardon power en masse to be an abuse of power, violative of separation-of-powers principles, or failing to further the typical aims of the pardon power. But the Supreme Court has upheld these categorical pardons, explaining that the Executive can pardon "by classes, conditionally or absolutely."[114] And mass, categorical pardons can also advance standard goals of pardons, including mercy, forgiveness, equity, and adaptation.[115] Although these determinations are being made on a large, rather than individualized, scale, the goal of the chief executive's action is to adapt to changes in laws and morality, and forgive the violation of laws that are perhaps no longer thought to be valid or current.

Thus, some might argue that if a governor or citizen does not want dangerous dogs to be euthanized, they should work with the legislature to change the dangerous dog statute, or to change the status of animals within the state from property to something more substantial. However, it is no secret that legislative change is often difficult. Thus, if a governor that believes that the property status of animals is not appropriate, he or she might instead decide to issue a mass pardon for all animals being held, seeking to further public policy goals while also showing mercy to those animals and forgiving them for any wrongful acts they may have committed.

Another example of an odd pardon is the posthumous pardon.[116] The idea that mercy animates the pardon power does not square with the idea of a posthumous pardon; there can be no mercy for the dead person, who has already been punished without reprieve. And while it is possible to forgive a person who has died, that forgiveness has more of an impact on others—for example, the dead person's family or friends—than on the person him or herself. Further,

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[114] *Ex parte* Grossman, 267 U.S. 87, 120 (1925) (citing *Ex parte* Garland, 4 Wall. 333, 380 (1866)); *see* Markowitz & Nash, *supra* note 40, at 99 ("The Court has explained that broad pardons, or 'amnesties,' are simply a permissible extension of the President's power to pardon an individual.").

[115] *See* Markowitz & Nash, *supra* note 40, at 106 ("Presidents have, for centuries, issued categorical pardons [as a use of] their inherent power of mercy and duty to promote the national interest to alleviate the toll of harsh laws on politically unpopular groups.").

[116] The first Presidential posthumous pardon was issued by President Clinton in 1999 for Lt. Henry Ossian Flipper. Darryl W. Jackson et. al., *Bending Toward Justice: The Posthumous Pardon of Lieutenant Henry Ossian Flipper*, 74 IND. L.J. 1251, 1251, 1277 (1999) (recognizing that, at the time of the writing, nine states had granted posthumous pardons). "[L]awyers for the Flipper family noted that the stigma of Lt. Flipper's conviction had discouraged inclusion of his statute in a 'Walk of History' under consideration by the City of El Paso . . . They urged that pardon be granted to remove 'the unjust blot upon his outstanding reputation and character,' for 'Lieutenant Flipper and his descendants, for the good of the military justice system, and for the good of our country . . . .'" Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to Be Merciful*, 27 FORDHAM URB. L.J. 1483, 1498–99 n.55 (2000) (citing Darryl W. Jackson et al., *Bending Toward Justice*: *The Posthumous Pardon of Lieutenant Henry Ossian Flipper*, 74 IND. L.J. 1251, 1291 (1999)).

although the person to be pardoned was a human, it is not clear that they are still a "person" in the traditional or legal sense of the word.[117] In this way, the pardon of a person who has died is similar to the pardon of a nonhuman animal: both beings exist somewhere on a spectrum between person and thing, unable to own property of their own,[118] but something more than a mere inanimate object.

Moreover, both a posthumous pardon and the pardon of a nonhuman animal serve an expressive function.[119] For example, the former Governor of New York, George Pataki, issued a posthumous pardon to the comedian Lenny Bruce in 2003, thirty-nine years after his conviction for using obscenity during a standup comedy act.[120] In issuing the state's first posthumous pardon, the Governor said it was "a declaration of New York's commitment to upholding the First Amendment" and that the pardon was to "serve[] as a reminder of the precious freedoms we are fighting to preserve."[121] Thus, the pardon served not to aid Bruce or his relatives, but to express a commitment to the First Amendment (or at least to give the appearance of such a commitment).

More recently, President Trump pardoned a former heavyweight boxing champion, Jack Johnson.[122] Johnson was convicted in 1913 under the Mann Act for transporting a white woman across state lines (Johnson was Black).[123] Of note, President Obama failed to issue a pardon to Johnson, though there had been a congressional resolution calling for his pardon during Obama's presi-

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[117] *See* Ellen Stroud, *Law and the Dead Body: Is a Corpse a Person or a Thing?*, 14 ANN. REV. L. & SOC. SCI. 115, 115 (2018) ("The central puzzle of the law of the dead is that a corpse is both a person and a thing."); Brian Morris, *You've Got to Be Kidneying Me! The Fatal Problem of Severing Rights and Remedies from the Body of Organ Donation Law*, 74 BROOK. L. REV. 543, 548 (2009) (noting that courts recognize "a 'quasi-property right' in a corpse where the corpse was negligently mishandled or defaced.").

[118] Haynes's Case (1614), 12 Co. Rep. 113, 77 E.R. 1389 (a corpse cannot own anything). *But see* Matter of Nonhuman Rights Project, Inc. v. Stanley, No. 152736/15, 2015 N.Y. Misc. LEXIS 2816, at *29–32 (N.Y. Sup. Ct. July 29, 2015) (In a case about extending habeas rights to chimpanzees, the Court stated, " 'Legal personhood' is not necessarily synonymous with being human . . . . Not very long ago, only caucasian male, property-owning citizens were entitled to the full panoply of legal rights under the United States Constitution.").

[119] *Infra* Section IV.B (discussing the expressive function of law). On the related topic of posthumous exoneration, *see, e.g.*, Samuel Wiseman, *Innocence After Death*, 60 CASE W. RSRV. L. REV. 687, 687 (2010) ("The exoneration of a deceased defendant may appear, at first glance, to be a mostly empty gesture . . . . The posthumous exoneration has an essential corrective justice function, however, for individuals, communities, and societies. At the individual level, posthumous exonerations . . . ensure belated justice." (citation omitted)).

[120] John Kifner, *No Joke! 37 Years After Death Lenny Bruce Receives Pardon*, N.Y. TIMES (Dec. 24, 2003), https://www.nytimes.com/2003/12/24/nyregion/no-joke-37-years-after-death-lenny-bruce-receives-pardon.html [https://perma.cc/S7X6-99GD].

[121] *Id.*

[122] John Eligon & Michael D. Shear, *Trump Pardons Jack Johnson, Heavyweight Boxing Champion*, N.Y. TIMES (May 24, 2018), https://www.nytimes.com/2018/05/24/sports/jack-johnson-pardon-trump.html [https://perma.cc/J3U3-4C8M].

[123] *Id.*

dency.[124] Apparently, the Obama Justice Department recommended against issuing a pardon "because it was their policy to focus on grants of clemency that could still have a positive effect on people who are still living."[125] Occasionally, for example, certain survivor benefits might be conditioned on the criminal status of a deceased spouse,[126] but that was not the case with Johnson. And while Johnson himself felt no positive effects from the pardon, it is possible that his family did. Linda Haywood, who was related to Johnson, said that she was appreciative for the pardon, stating that her "family can go forward knowing the pain and the shame has been replaced."[127] Above all else, however, the pardon serves an expressive function—recognizing that the conviction was racially motivated and unjust—and could open the door to preventing similar future injustices carried out by racial animus within the police force or the criminal justice system more broadly.[128] Similarly, the pardon of nonhuman animals could serve the expressive function of recognizing that dogs have feelings and emotions, and that they are worthy of mercy, forgiveness, and moral consideration.[129]

III. NONHUMAN ANIMALS AND THE COURTS

A. A Long History of Animal Trials

Although the idea of pardoning a dog might seem preposterous to some, animals have received pardons since ancient times.[130] And more than that, put-

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[124] *Id*.

[125] *Id*.; *See also* Barkow & Osler, *supra* note 95, at 425–26; Linzer, *supra* note 95; Barkow, *supra* note 95 and accompanying text (discussing President Obama's use of the pardon power).

[126] *See, e.g*., 38 U.S.C. §§ 6101–08 (deductions and cancellation of benefits for veterans and sometimes their spouses and dependents when certain crimes are committed by the veteran).

[127] Eligon & Shear, *supra* note 122.

[128] Jessica R. Pliley, *A Pardon Arrives 105 Years Too Late*, ATLANTIC (May 30, 2018), https://www.theatlantic.com/ideas/archive/2018/05/a-pardon-arrives-105-years-too-late/561407/ [https://perma.cc/JU3K-EYEN]; *see* Christopher Man & Jacob Laksin, *Applying the Presidential Pardon Power in the Context of an Investigation of the Executive Branch*, 33 CRIM. JUST. 12, 14–15 (2018) ("As well as giving justice to individuals who had been denied it in their lifetimes, the posthumous pardons reinforced the Supreme Court's view . . . that a pardon need not be accepted to be valid . . . .").

[129] *See infra* Section IV.B. *See generally* Sunstein, *supra* note 26 (noting that the expressive function of a law can lead to a shift in social norms, which may then influence the creation of new or different laws); *see also* Shyamkrishna Balganesh, *Debunking Blackstonian Copyright*, 118 YALE L.J. 1126, 1148 (2009) (reviewing NEIL W. NETANEL, COPYRIGHT'S PARADOX (2008)) (describing the expressive function as "the notion that law plays a role in symbolically reinforcing certain values, independent of its ability to regulate behavior linked to those values.").

[130] Paul Schiff Berman, Note, *Rats, Pigs and Statues on Trial: The Creation of Cultural Narratives in the Prosecution of Animals and Inanimate Objects*, 69 N.Y.U. L. REV. 288, 301 (1994) (Historically, "[a]s with human beings, animals also could receive a pardon prior to punishment.").

ting animals on trial and punishing them by death was historically quite common.[131] Although much of this history is quite old, animal prosecutions were reported as late as 1916 in Kentucky and Tennessee.[132]

According to Professor Jen Girgen, medieval trials of animals fell into one of two categories: (1) ecclesiastical courts considered animals who caused a public nuisance, as well as groups of wild animals; and (2) secular courts considered the cases of animals who caused physical harm or death to a person, and transgressions by domesticated animals.[133] Accused animals were provided with a public defender, paid for by the community; trials involved witnesses and evidence; the accused often spent time in human jail cells; and if they were executed, the action was undertaken by a professional hangman.[134]

Although the animals were usually found guilty and executed, on occasion the secular judges found in favor of the animal.[135] Further, upon a conviction, the animal's lawyer might appeal, which would on occasion result in a lighter verdict. For example, Girgen describes a case where a pig and a donkey had been sentenced to hang, but after an appeal and a new trial, they "were each resentenced 'to be simply knocked on the head.' "[136] If the animal were executed, it was typically buried alongside executed human criminals.[137]

Sometimes, though, the animals were pardoned. One commentator describes a situation where two herds of pigs were sentenced as accomplices after three of their number killed a boy.[138] Although the majority of the pigs did not directly take part in the killing, they were deemed accomplices because they "had hastened to the scene of the murder and by their cries and aggressive actions showed that they approved of the assault, and were ready and even eager to become *participes criminis*."[139] In this instance, the Duke of Burgundy is-

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[131] Jen Girgen, *The Historical and Contemporary Prosecution and Punishment of Animals*, 9 ANIMAL L. REV. 97, 98 (2003) (noting that "animal trials and executions . . . were a regular part of our Western jurisprudential history.").

[132] *Id*. at 122. For a discussion of other animal prosecutions, *see also* E.P. EVANS, THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS 332–34 (1906) (noting that there were prosecutions of animals throughout Europe in the 18th and 19th centuries); Walter W. Hyde, *The Prosecution and Punishment of Animals and Lifeless Things in the Middle Ages and Modern Times*, 64 U. PA. L. REV. 696, 705–06 (1916); Piers Beirnes, *The Law Is an Ass: Reading E.P. Evans'* The Medieval Prosecution and Capital Punishment of Animals, 2 SOC'Y & ANIMALS 27–44 (1994).

[133] Girgen, *supra* note 131, at 99.

[134] *Id*.; EVANS, *supra* note 131, at 140–42.

[135] Girgen, *supra* note 131, at 109.

[136] *Id*. at 110–11 (quoting EVANS, *supra* note 132, at 140).

[137] *Id*. at 113.

[138] Sykes, *supra* note 18, at 306 (recounting the story of the pigs as told in EVANS, *supra* note 129, at 144).

[139] Evans, *supra* note 132, at 144.

sued "a pardon for all the pigs except the three perpetrators."[140] He did this perhaps in part because one herd was the common property of a village, and it was forbidden to eat an animal that had been executed. Therefore, if all the pigs had been executed, they would have been valueless and the village would have suffered.[141]

Commentators have proposed a number of motivations behind these ancient animal trials, including some of the same reasons that we try and convict humans: eliminating a social danger, deterring others (human and nonhuman) from repeating similar behavior, warning animal guardians that they are responsible for their animals, denunciation, and even revenge.[142] This speaks to the fact that criminal law has both emotional underpinnings (including mercy and grief), as well as intellectual and expressive aspects (including the message that the courts and the government want to communicate). Here, it is useful to consider the varied purposes of criminal penalties—including retribution, removal/safety/incapacitation, deterrence, and rehabilitation—in thinking about animal trials of old and their more modern analogues.[143] Of these purposes, it is hard to see how punishing nonhuman animals for their transgressions could lead to their rehabilitation or deter their future actions.[144] It is possible that retribution might apply in the context of nonhuman animals—a person who was harmed wants payback and for the offender to suffer—though commentators generally do not believe that this alone is a good reason for imposing punishment.[145] The most common modern reason for killing animals who have been deemed dangerous would be removal and safety, as will be discussed in more detail below.[146]

In the context of human punishment, the goals are multifaceted; if society seeks more than just safety and removal, it may sometimes justify harsher punishments. However, in the context of nonhuman animals, there are fewer reasons to punish the animal and the emotional underpinnings are strong. Because

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[140] Sykes, *supra* note 18, at 306. Query whether the pigs who were allowed to live noticed that the three perpetrators were no longer present, and whether this might have served a deterrent function!

[141] *Id.*; *see* Girgen, *supra* note 131, at 112 ("If the offending animal was particularly valuable . . . a judge might have been more receptive to the defense counsel's plea to spare her life.").

[142] Girgen, *supra* note 131, at 118–20; Nicholas Humphrey, *Foreword* to EVANS, *supra* note 132, at vii–viii.

[143] ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 45 (1976).

[144] While ancient animal trials were often about punishing the animal him or herself, it is less clear that current day animal trials (and specifically, dangerous dog hearings) serve to punish the animal. This will be discussed in more detail *infra* Section III.B.

[145] Martin R. Gardner, *The Renaissance of Retribution—An Examination of Doing Justice*, 1976 WIS. L. REV. 781, 784–85.

[146] This parallels similar penological shifts regarding humans. *See* Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 458 (1992) (discussing incapacitation as a justification).

there will almost universally be a lack of culpability, a merciful response, such as a pardon, might make sense.

B. Modern Day Animal Trials: Dangerous Dog Hearings

Undergirding the preceding section was the ancient notion that nonhuman animals were morally responsible for criminal acts, like murder.[147] Humans had other misguided notions about criminal justice in those times as well, many of which have changed over time. And although formal prosecutions of animals before a tribunal is mostly the stuff of the past, in some sense, these animal trials continue today in the form of dangerous dog hearings. Although these hearings often sound in forfeiture, and are really more about protecting the public and/or punishing the *guardian* of the dog,[148] the hearings are in some ways analogous to prosecutions,[149] and even evoke older animal trials.[150]

Although the details vary from state to state, generally these proceedings begin when a dog bites, mauls, or kills a human or nonhuman animal. "The definition of 'dangerous dog' usually refers to an act or actions taken by a dog that makes him or her a risk to the public welfare."[151] If it is a first offense, the government might place certain restrictions on the dog. For example, the dog's guardian might have to hang a sign on her home stating that a vicious dog lives on the premises, the dog might need to be muzzled when in public, or the dog might need to undergo behavioral training.[152] If the dog subsequently gets loose or attacks again, it might be required to leave the jurisdiction, or be sentenced to death.[153] Such a determination will follow from a hearing, at which the sins

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[147] As will be discussed below, new research suggests that some animals do know right from wrong and feel emotions like regret when they have acted badly. Whether this equates to the commission of a moral wrong will be discussed in more detail below. *See infra* Section IV.A.

[148] "Modern proceedings take place precisely because a dog is someone's property; an aggressive dog that did not belong to anyone would, of course, be destroyed without any kind of hearing." Sykes, *supra* note 18, at 303.

[149] Dangerous dog hearings are criminal proceedings in four states. COLO. REV. STAT. § 18-9-204.5 (2018); OR. REV. STAT. § 609.098 (2020); 3 PA. STAT. AND CONS. STAT. ANN. § 459-502-A (West, Westlaw through 2020 Reg. Sess. Act 95); VA. CODE ANN. § 3.2-6540 (West, Westlaw through end of the 2020 Reg. Sess.). However, it is the guardian who is the criminal, not the dog.

[150] Girgen, *supra* note 131, at 122–27.

[151] 128 AM. JUR. 3D *Proof of Facts* 3d § 291, Westlaw (database updated July 2020).

[152] *See supra* text accompanying note 3 (referencing ME. REV. STAT. ANN. tit. 7, which lists some of these types of requirements).

[153] Of note, the fact that dangerous dogs are locked up and then, often, sentenced to die suggests that "carceral logic"—where punishment reigns supreme—has reached beyond humans. The first instinct is often to incarcerate or eliminate anyone who has committed an action deemed unfit by society. Rather than work toward reforming the offensive behavior, the law has instead decided that a dangerous dog should be killed. This carceral logic is pervasive and has been addressed by a number of criminal law and civil rights scholars. *See* Roberts, *supra* note 89, at 18 ("As carceral logics take over ever-expanding aspects of our society, so does the cruelty that government agents visit on people who are the most vulner-

of the animal are on display, along with evidence presented about whether the victim had instigated the attack or aggravated the animal.[154]

Animal-control and dangerous dog laws are not traditionally viewed as "criminal" in nature.[155] That said, four states use a criminal proceeding to declare a dog dangerous: Colorado, Oregon, Pennsylvania and Virginia.[156] Further, in three of those states, "harboring, maintaining, or owning a dangerous dog" is a crime.[157] After an attack, dog DNA evidence is sometimes collected.[158] Of course, it is not the dog who would be considered the criminal in these instances. More commonly, however, these proceedings are administrative or civil.[159] Indeed, at first glance, dangerous dog hearings often seem to be based on forfeiture, abating a nuisance, or other civil wrong.

The reason the state can order the dog to be put to death is because dogs are currently considered property in all fifty states, and the police power affords states the right to regulate in furtherance of public health, safety, welfare, and morals.[160] As the Supreme Court stated over a century ago,

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able to state surveillance and confinement."). *See generally* Sarah Deer & Abigail Barefoot, *The Limits of the State: Feminist Perspectives on Carceral Logic, Restorative Justice and Sexual Violence*, 28 KAN. J.L. & PUB. POL'Y 505, 505–25 (2019); KITTY CALAVITA & VALERIE JENNESS, APPEALING TO JUSTICE: PRISONER GRIEVANCES, RIGHTS, AND CARCERAL LOGIC (2015). The treatment of dogs deemed dangerous suggests that this way of thinking impacts nonhumans as well. MARCEAU, *supra* note 91, at 1–2, 21 (2019) (extending carceral logic to the animal protection movement). Indeed, thinking about carceral politics more broadly, animals are nearly universally caged: in zoos, on farms, in slaughterhouses, in shelters, and even, as we have seen in New Jersey, in jails themselves. The pardon power is one method that can be used to target this carceral mindset—both with respect to humans and nonhumans. And part of its expressive function might suggest a change in norms that allows people to think about reform and rehabilitation before caging and execution. *See infra* Section IV.B (addressing the expressive function of the pardon power).

[154] CAL. AGRIC. CODE § 31621 (Deering, Lexis through 2020 Reg. Sess.).

[155] However, a book about Dangerous Dog laws called *A Lawyer's Guide to Dangerous Dog Issues* contains a chapter titled, "Prosecuting Dangerous Dog Cases," which addresses "offending dogs," "accused dog[s]," "perpetrating dog[s]," "Witnesses for the Prosecution," victim statements, and uses other criminal law terminology. *See* Michelle Welch, *Prosecuting Dangerous Dog Cases*, *in* A LAWYER'S GUIDE TO DANGEROUS DOG ISSUES 39–46 (Joan Schaffner ed., 2009).

[156] *See* COLO. REV. STAT. ANN. § 18-9-204.5 (West, Westlaw through 2020 Extraordinary Sess.); OR. REV. STAT. § 609.098 (2020); 3 PA. STAT. AND CONS. STAT. ANN. § 459-502-A (West, Westlaw through 2020 Reg. Sess. Act 95); VA. CODE ANN. § 3.2-6540 (West, Westlaw through end of the 2020 Reg. Sess.).

[157] *See* Charlotte Walden, *State Dangerous Dog Laws*, MICH. STATE UNIV.: ANIMAL LEGAL & HIST. CTR. (2019), https://www.animallaw.info/topic/state-dangerous-dog-laws [https://perma.cc/P7WZ-778Y]; *see also* COLO. REV. STAT. § 18-9-204.5 (2012); OR. REV. STAT. § 609.098 (2020); 3 PA. STAT. AND CONS. STAT. ANN. § 459-502-A (West, Westlaw through 2020 Reg. Sess. Act 95).

[158] Welch, *supra* note 155, at 42–43 (also noting, "The dog may have the victim's blood on it or a piece of the victim's clothing in its mouth. State labs may or may not have the resources to analyze the blood on the dog but should do so if necessary.").

[159] *See* Walden, *supra* note 157.

[160] Sentell v. New Orleans, 166 U.S. 698, 702, 703–04 (1897); BRUCE A. WAGMAN ET AL., ANIMAL LAW: CASES AND MATERIALS 71 (6th ed. 2019) ("As of the publication of this edi-

> [Dogs] have, from time immemorial, been considered as holding their lives at the will of the legislature, and properly falling within the police powers of the several states . . . . Even if it were assumed that dogs are property in the fullest sense of the word, they would still be subject to the police power of the state, and might be destroyed or otherwise dealt with, as in the judgment of the legislature is necessary for the protection of its citizens. That a state, in a bona fide exercise of its police power, may interfere with private property, and even order its destruction, is as well settled as any legislative power can be which has for its objects the welfare and comfort of the citizen.[161]

Thus, a dangerous dog determination could result in a forfeiture order, as well as destruction of the "property" that has been forfeited. And although that is the applicable, technical legal structure given the current property status of dogs, they are sometimes treated more like prisoners than property. For example, as was mentioned above, Taro was kept in a jail cell in New Jersey and given a prisoner number after his dangerous dog determination.[162] Thus, dangerous dog hearings and their outcomes can sometimes blur the lines between civil and criminal actions in terms of public expectations.

In analyzing dangerous dog statutes and hearings, and in thinking about whether they might be fertile ground for the use of the pardon power, it is instructive to consider whom these statutes seek to punish, and whom they seek to protect. Although most dangerous dog statutes are not criminal *per se*, they do reflect certain punitive aspects. And, as the Animal Legal Defense Fund stated,

> If animals cannot commit crimes, should they be punished in such a severe and irreversible manner for triggering a dangerous dog law they are not even aware of (but their owners should be)? There is an inherent contradiction in sentencing an animal to die—the most severe penalty in our legal system—while at the same time claiming she cannot be pardoned because she has not been convicted of a crime.[163]

Thus, we must examine who these laws are punishing, and why. Some might argue that these statutes punish the dogs who are deemed vicious or dangerous themselves—as was often the case with the animal trials of the past. Indeed, these dogs must either live with restrictions, or be put to death, due to actions they committed.[164] Others might argue that the statutes seek to punish the offending dog's guardian for failing to control the actions of the dog. Under

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tion, nonhuman animals are still property under the law of all fifty states, and that status seems to be entrenched.").

[161] *Sentell*, 166 U.S. at 702, 704.

[162] *Ready for a Milk-Bone Last Meal?*, *supra* note 11.

[163] Nicole Pallotta, *After Judge Denies Maine Governor's "Pardon," Last-Minute Appeal Temporarily Saves Dog Sentenced to Death*, ANIMAL LEGAL DEF. FUND (May 8, 2017), https://aldf.org/article/after-judge-denies-maine-governors-pardon-last-minute-appeal-temporarily-saves-dog-sentenced-to-death/ [https://perma.cc/S787-YCRC].

[164] For a discussion of dangerous dog laws, *see generally* Cynthia A. McNeely & Sarah A. Lindquist, *Dangerous Dog Laws: Failing to Give Man's Best Friend a Fair Shake at Justice*, 3 J. ANIMAL L. 99 (2007).

this analysis, the dog is merely unfortunate collateral damage; he or she is the property of the guardian, and the state punishes the guardian by taking away their property. For example, consider a scenario where a dog injures or kills another, as was the case in Maine where Dakota killed another dog. A person might believe that Dakota and/or her guardian should be punished because the dog committed harm against another dog as well as against the other guardian whose dog was harmed. Reasoning in this way would suggest that Dakota committed an offense against a fellow citizen.[165]

However, if dangerous dog statutes are really about civil wrongs—about forfeiture or nuisance—then the better line of inquiry looks at whom these statutes seek to protect, and considers the broader purpose or instrumental end that the legislature was seeking to further by enacting these statutes. In general, these statutes exist because the legislature wants dog guardians to be responsible for their own dogs, and to prevent them from harming others.[166] The overriding policy goal of these statutes is to protect society—including humans and other animals—from potential future harm carried out by a "dangerous dog." Indeed, Maine's Assistant Attorney General wrote a letter to the Judge who was hearing Dakota's case on behalf of the Department of Agriculture, Conservation and Forestry, which said, "[t]he intent of the dangerous dog statute is to protect the public by deterring owners of dangerous dogs from letting them loose. It is not intended as a punishment for a dog . . . ."[167] Thus, these laws seek to control and remove "dangerous dogs" from a community, ostensibly in order to protect the community as a whole,[168] rather than to punish or protect a discrete or particular person or group of persons from harm.[169]

Applying the legal rules about the pardon power's limitations to the world of animal law is not straightforward. Here, if dangerous dog statutes really are forfeiture statutes, then it is likely more legally appropriate to act as Governor Whitman did in remitting the forfeiture of Taro, relying on Taro's property status. However, as will be discussed below, there is an important expressive

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[165] Thus, it could be argued, this should not be a pardonable offense (at least at the federal level) because it is not a crime against the State but against an individual.

[166] For example, in Maine's most recent amendment to its dangerous dog statute, the legislature increased or created licensing fees for possession of dangerous dogs, fines for owners who failed to abide by the laws about dangerous dogs, and available civil penalties for owners who fail to follow court orders. Comm. on Agric., Conservation, & Forestry, 128th Cong., C-A (H-706) to H.P. 607, L.D. 858 (Me. 2018), https://legislature.maine.gov/legis/bills/getPDF.asp?paper=HP0607&item=2&snum=128 [https://perma.cc/2TU7-ZNUK].

[167] Letter from Mark A. Randlett, Assistant Att'y Gen., to the Hon. Valerie Stanfill, Maine Dist. Ct. J. (Apr. 7, 2017), https://www.maine.gov/dacf/about/news/DACF-Dakota.pdf [https://perma.cc/RB6P-D79T].

[168] Of note, this mirrors a move in human penology toward a justification of removal and safety rather than retributivism. Some criminal law scholars have argued that one way to understand mass incarceration and current punitive policies is to view incapacitation itself as the justification. *See* Feeley & Simon, *supra* note 146, at 458.

[169] Thus, one might argue that the violation of such a statute is more akin to a public wrong than a private or civil wrong, and so is properly within the purview of the pardon power.

function that accompanies the use of the pardon power. Thus, by issuing a "full and free pardon" following a dangerous dog hearing, a governor could express his or her belief that the dog should not be punished, and that the public can still be protected, even if the dog is set free.

Finally, although this Article is focused primarily on gubernatorial power in the aftermath of a dog's euthanization order, these "death sentences" are sometimes commuted through less public and dramatic means by individuals or processes other than the governor. Local government entities, including town boards, city councils, mayors, or animal control officers might be given this power through local ordinances.[170] For example, a New York dog named Luna was recently declared a dangerous dog under the City of Troy's local ordinance, which required euthanization after a single bite.[171] A state senator from the area petitioned Governor Cuomo to take action and pardon the dog (or at least the dog's owner).[172] However, before the Governor's office could act, the City reached a settlement with the dog's guardian that placed the dog on probation, but did not declare her "dangerous" or require her death.[173] Further, the case caused the City to modify its dangerous dog ordinance to be more lenient in the future.[174] While these local actions might not get as much press coverage, they can still have the effect of sparing the animal's life.

Given all this, some might suggest that perhaps the problem is just the dangerous dog laws themselves. Might it not be easier and less controversial to simply seek legislative change, rather than using the pardon power in this potentially unorthodox way? First, legislative change is not always easier than a pardon, wherein the chief executive can act unilaterally. And even the best dangerous dog laws—which are often set at the city or county level—might still need a safety valve and a means of avoiding inconsistent outcomes. Further, as the following Part will suggest, the pardon carries with it a powerful expressive function, which may lead to a change in norms when the underlying laws are slow to change.

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[170] For example, a "town police department and the mayor's office were flooded with phone calls protesting [a dog named] Prince's sentence." Girgen, *supra* note 131, at 126 (discussing a "dangerous dog" in New Hampshire whose life was spared).

[171] *Tedisco to Cuomo: Pardon Dog*, TIMES UNION (Dec. 13, 2018, 3:53 PM), https://www.timesunion.com/news/article/Tedisco-asks-Cuomo-to-pardon-Luna-the-dog-13464400.php [https://perma.cc/7MFW-ZBQV].

[172] *Id*.

[173] *Luna the Dog Saved, Prepares to Head Home for the Holidays*, SPECTRUM NEWS (Dec. 18, 2018, 6:34 PM), https://spectrumlocalnews.com/nys/central-ny/news/2018/12/13/effort-to-save-luna [https://perma.cc/ZWS9-WGUB].

[174] *Id*.; *see* TROY, N.Y. CODE § 124–9 (2006), https://ecode360.com/11131031 [https://perma.cc/XG2P-BBVP].

IV. THE NORMATIVE CASE FOR APPLYING THE PARDON POWER TO NONHUMAN ANIMALS

Given both the long past and more recent history of subjecting nonhuman animals to trial and pardon, it is clear that it *can* be done. But should it? This Part presents two potential reasons that a governor, state, or citizens[175] might choose to extend the pardon power to nonhuman animals. The first relates to the history and motivations behind the pardon power, and the moral status of animals. The second relates to the expressive function of the pardon power.

A. History and Morality, Culpability and Capacity

As was discussed above, there are many motivations and justifications that give force to the pardon power, including mercy, forgiveness, equity, adaptation, common sense, and good public policy.[176] Some might view the idea of assigning moral weight to animals as anthropomorphic and old-fashioned (after all, the animal trials of old existed because people believed animals should be punished for their sins).[177] And, if animals are not morally responsible for their actions, then what is there to forgive?

While this argument holds some appeal, recent research into animal emotions suggests that animals in fact experience pleasure, pain, anger, hope and grief.[178] For example, scientists have recently documented practices of grief and mourning in species as diverse as dolphins, elephants, and giraffes.[179] Some scientists also posit that nonhuman animals can feel regret for their actions.[180]

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[175] This could be done, for example, through a Constitutional Amendment, popular referendum, or citizens' initiative.

[176] *See supra* note 29.

[177] *See generally* Sykes, *supra* note 18 (describing Medieval animal trials); *see also* Girgen, *supra* note 131 and accompanying text; EVANS, *supra* note 132 and accompanying text.

[178] *See, e.g.*, MARC BEKOFF, MINDING ANIMALS: AWARENESS, EMOTIONS, AND HEART 4 (2002); Barbara J. King, *Animal Mourning: Précis of* BARBARA J. KING, HOW ANIMALS GRIEVE (2013), 4 ANIMAL SENTIENCE 1, 2–3 (2016) (examining mourning and grief in nonhuman animals); FRANS DE WAAL, MAMA'S LAST HUG: ANIMAL EMOTIONS AND WHAT THEY TELL US ABOUT OURSELVES 1 (2019) (examining animal emotions). *But cf*. Pim Martens et al., *The Emotional Lives of Companion Animals: Attachment and Subjective Claims by Owners of Cats and Dogs*, 29 ANTHROZOÖS 73, 74 (2016) ("relatively sparse" evidence that dogs experience secondary emotions like shame and compassion, though some consensus that they experience basic emotions like anger and sadness).

[179] Barbara J. King, *When Animals Mourn*, 309 SCI. AM. 63, 63–64 (2013) ("cetaceans, great apes, elephants, and a host of other species ranging from farm animals to domestic pets may, depending on circumstances and their own individual personalities, grieve when a relative or close friend dies.").

[180] Benjamin Y. Hayden et al., *Fictive Reward Signals in the Anterior Cingulate Cortex*, 324 SCI. 948, 948–50 (2009), https://docs.wixstatic.com/ugd/498b35_6c8640c6a9e2407dab6c4b8be6c3d21f.pdf [https://perma.cc/Z4B7-LUHA]; *Monkeys Feel Regret like Humans, Study Shows*, TELEGRAPH (May 14, 2009, 10:13 PM), https://www.telegraph.co.uk/news/science/5

And the "basic emotional circuits" within the brain that govern emotional development in humans appear to have close analogues in other vertebrates as well.[181] Although animal emotions might not in all cases be as advanced or developed as those of some humans, the emotions are there. According to famed primatologist and Professor Frans de Waal,

> For the longest time, science has depicted animals as stimulus-response machines while declaring their inner lives barren. This has helped us sustain our customary "anthropodenial": the denial that we are animals. We like to see ourselves as special, but whatever the difference between humans and animals may be, it is unlikely to be found in the emotional domain.[182]

We afford moral status to all human beings, including people who are severely mentally disabled and infants, although they often cannot cogitate with sophistication about what they desire, nor can they plan for the future.[183] Thus, these features do not appear to be necessary for moral status.[184] Further, we typically do not hold infants or severely mentally disabled adults responsible for their actions under the law, and to the extent they are held responsible, the death penalty is not applied to them (although it was in the not so distant past).[185] For example, in *Roper v. Simmons*, the Court held that it is unconstitu-

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324357/Monkeys-feel-regret-like-humans-study-shows.html [https://perma.cc/P5TD-PR47]; MARC BEKOFF & JESSICA PIERCE, WILD JUSTICE: THE MORAL LIVES OF ANIMALS 7–8 (2009); John Tierney, *What Do Animals Regret?*, N.Y. TIMES (June 1, 2009, 5:56 PM), https://tierneylab.blogs.nytimes.com/2009/06/01/what-do-animals-regret/ [https://perma.cc/T5TR-EG2V].

[181] *See* Jaak Panskepp, *The Basic Emotional Circuits of Mammalian Brains: Do Animals Have Affective Lives?*, 35 NEUROSCIENCE & BIOBEHAVIORAL REVS. 1791, 1791–1802 (2011) (summarizing evidence on neurological function in nonhuman animals).

[182] Frans de Waal, *Your Dog Feels as Guilty as She Looks*, N.Y. TIMES (Mar. 8, 2019), https://www.nytimes.com/2019/03/08/opinion/sunday/emotions-animals-humans.html [https://perma.cc/VD7F-R9L4].

[183] *But see* SUNAURA TAYLOR, BEASTS OF BURDEN: ANIMAL AND DISABILITY LIBERATION 67–68 (2017) ("One of the most prevalent lines of argument in defense of animals rights is structured around ableist assumptions about cognitive capacity coupled with a rhetorical instrumentalization of disabled people . . . . [A] focus on specific human and neurotypical 'morally relevant abilities' harms both [animals and intellectually disabled humans].").

[184] *See, e.g.*, Tom Regan, *The Case for Animal Rights*, *in* IN DEFENSE OF ANIMALS 13, 15 (Peter Singer ed., 1985); But, on the significance of higher-order desires for moral status, *see, e.g.*, Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 J. PHILOSOPHY 5 (1971). On the significance of planning or agency, see, for example, Michael Smith, *A Constitutivist Theory of Reasons: Its Promise and Parts*, 1 LAW, ETHICS, & PHIL. 9 (2013).

[185] While some children and mentally disabled adults may be tried and punished for their crimes, they cannot be executed. *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002) ("We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty . . . . [W]e therefore conclude that such punishment is excessive . . . ."); *see also* Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding that it is unconstitutional to impose capital punishment for crimes committed while under eighteen years old). *But see* Penry v. Lynaugh, 492 U.S. 302, 302 (1989) ("Petitioner was charged with capital murder in Texas state court. He was found competent to stand trial,

tional to impose capital punishment for crimes committed while under the age of eighteen.[186] That holding was based on evidence founded in science and sociology about the diminished culpability of juvenile offenders.[187] Studies suggest that the parts of the brain that govern things like reasoning, judgment, and impulse control are not completely developed until a person is in their early twenties.[188] To this point, the Court stated,

> The susceptibility of juveniles' to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult."[189] . . . Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.[190]

Although the same should likely hold true for nonhuman animals, they often experience harm at the hands of our legal system: for example, dogs deemed to be dangerous are ordered euthanized, and animals that are used in certain crimes—such as dog fighting—often must be held in captivity pending the outcome of a trial.[191] Although there is generally no need to pardon a baby or severely mentally disabled adult because, as was discussed above, they are typically not held responsible for their crimes or actions in modern times,[192] the reasons that we grant pardons would apply with equal force to these humans. Thus, those same justifications should also apply to nonhuman animals, who

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although a psychologist testified that he was mildly to moderately retarded and had the mental age of a 6 1/2-year-old."). The law has recently evolved in this area.

[186] *Roper*, 543 U.S. at 578.

[187] *Id*. at 573–74.

[188] *Id*. at 570, 573.

[189] *Id*. at 570.

[190] *Id*.; *see also* Miller v. Alabama, 567 U.S. 460, 472, 477, 479 (2012) (banning mandatory life without parole for juvenile offenders, noting that features of juveniles include "immaturity, impetuosity, and failure to appreciate risks and consequences" and that these and other "distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders").

[191] *See, e.g*., KAN. STAT. ANN. § 21-6414(e) (2019) ("a law enforcement agency may take into custody any dog on the premises where the dog fight is alleged to have occurred and any dog owned or kept on the premises of any person arrested for unlawful conduct of dog fighting"). Of course, some would assert that this is less about punishment of the animal, and more about punishment of the person who was using the animal in the commission of a crime. *See supra* Section III.B.

[192] Colorado Governor Bill Ritter posthumously pardoned a man who was executed in 1939. *See* Associated Press, *Disabled Man Executed in 1939 Pardoned in Colorado*, DESERET NEWS (Jan. 7, 2011, 2:56 PM), https://www.deseret.com/2011/1/7/20165526/disabled-man-executed-in-1939-pardoned-in-colorado [https://perma.cc/69AM-JXTU]. The man had been deemed "mental defective" with an IQ of 46. *Id*.; *see also* Elizabeth Rapaport, *Straight Is the Gate: Capital Clemency in the United States from* Gregg *to* Atkins, 33 N.M. L. REV. 349, 354 (2003) ("Of the forty-eight capital clemencies granted in the interest of justice or mercy [from 1977 to 2002], only nine have been granted to juveniles, the mentally retarded, or the mentally ill because they fell into one (or more than one) of these three categories." (citations omitted)); Ford v. Wainwright, 477 U.S. 399, 409 (1986) ("For today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life.").

might have more agency than some babies or mentally disabled adults, and who *are* often caused to suffer within the legal system, either due to their own actions or the actions of their guardians.[193] Indeed, these arguments carried to their logical conclusions would suggest that, given their diminished capacity, vulnerability, and lack of control, no dog should be sentenced to death for harming another being. Thus, the use of the pardon power would always be appropriate in the aftermath of dangerous dog determinations.

In crafting public policy, lawmakers take into account morality and public welfare. The goal of public policy is often to ensure more well-being and satisfaction, and to avoid suffering and dissatisfaction. Thus, there is no clear reason for limiting policymakers' consideration to the well-being of humans only.[194] Indeed, at least with respect to the evolution of *human* rights, we have seen a "repudiat[ion of] any limitation based on the rationality or autonomy of the beings involved."[195] Further, in what Peter Singer calls an "expanding circle," we have tended to relax, rather than strengthen, the criteria for moral status over time.[196] Put differently, rights-denying arguments, in general, are eventually likely to fail. Indeed, some recent court cases embracing the rights of nonhuman animals support this viewpoint.[197] Thus, the history of punishing animals, combined with motivations and reasons behind the pardon power suggest a logical extension of that power to nonhuman animals.[198]

B. The Expressive Function of Pardoning Nonhumans: Norm Change and Something More Than Mere Property

This Article has laid out some basic arguments that a governor could use in seeking to pardon a dog. It has also considered reasons that a governor might *want* to use the pardon power in this way. But perhaps more important than these facets of the discussion is *why* it matters; what difference does it make if a governor chooses to use the pardon power in this way? The answer, I pro-

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[193] *But see* TAYLOR, *supra* note 183, at 67–68.

[194] The legislative findings in Oregon's animal cruelty statutes seem to support this assertion:

> 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; (3) The suffering of animals can be mitigated by expediting the disposition of abused animals that would otherwise languish in cages while their defendant owners await trial. . .

OR. REV. STAT. § 167.305 (2020).

[195] Will Kymlicka & Sue Donaldson, *Animals and the Frontiers of Citizenship*, 34 OXFORD J. LEGAL STUD. 201, 202 (2014).

[196] PETER SINGER, THE EXPANDING CIRCLE: ETHICS, EVOLUTION, AND MORAL PROGRESS 119, 121 (2011).

[197] *Supra* Section IV.B.

[198] *See* Martha C. Nussbaum, *Animal Rights: The Need for a Theoretical Basis*, 114 HARV. L. REV. 1506, 1526–46 (2001) (reviewing Steven M. Wise, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS (2000)) (discussing a variety of different bases for legal claims for nonhuman animals).

pose, is that pardoning dogs could work to change norms and further certain goals of the animal rights movement, including pursuing a legal status for nonhuman animals that is something more robust than mere property.

As Professor Cass Sunstein stated in a famous article on the topic, the expressive function of law focuses "on the particular issue of how legal 'statements' might be designed to change social norms."[199] Thus, in considering the expressive function of the pardon power, it is important to distinguish between the approaches used in Maine and New Jersey. As has been stated previously, Governor Whitman used her power to remit a forfeiture to free Taro.[200] Thus, the Governor acted in reliance on Taro's legal status as the property of his guardian, and the dog was let out of jail (literally) because of that status.[201] Whitman's approach was fairly straightforward from a legal perspective. If dogs are property, and property can be forfeited, the Governor can use her remittitur power in deciding to give that property back to its owner.

However, Whitman's approach does little to push the boundaries of animal law as a substantive field. Relying on forfeiture seems more like an animal welfarist tact than an animal rights one;[202] as Angela Harris stated, it "accommodates rather than challenges the fundamental demarcation between human and non-human."[203] Whitman's action treads within the existing legal waters of animals-as-property, despite the fact that the headline "Governor Pardons Dog" might turn some heads.[204] To be sure, the direct result of her action was that the dog was able to live; in that way, perhaps her action bolstered a norm that recognizes the value of nonhuman animal life. However, it does not recognize that life as having value separate and apart from its role as the property of a human. This is interesting, given that it was two professors who ran an Animal Law Clinic at Rutgers Law School—and who are opposed to the animals-as-property paradigm—who persuaded Governor Whitman to exercise her power of remittitur to spare Taro's life.[205]

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[199] Sunstein, *supra* note 24, at 2024–25.

[200] *Supra* notes 18–21 and accompanying text.

[201] N. J. Exec. Order No. 7 (Jan. 28, 1994).

[202] Animal welfare proponents believe humans can use animals for food, clothing, and work, provided the treatment of those animals falls within "humane" guidelines. Animal rights proponents advocate that animals should not be used for human benefit and have rights in the same way as humans. *What Is the Difference Between "Animal Rights" and "Animal Welfare"?*, PETA, https://www.peta.org/about-peta/faq/what-is-the-difference-between-animal-rights-and-animal-welfare [https://perma.cc/6UPU-GZHQ].

[203] Harris, *supra* note 96, at 345.

[204] Again, the assumption here is that to remit a forfeiture is the exercise of the pardon power. *See supra* notes 18–21 and accompanying text.

[205] Gary L. Francione & George C. Thomas III, *The Wind Was at Our Backs: The Third Golden Period of Rutgers Law School*, 61 RUTGERS L. REV. 471, 476 (2009) ("Francione and Charlton succeeded in persuading Governor Christine Whitman to 'pardon' Taro, and the publicity was nothing short of remarkable."). This is even more interesting, given that Professor Francione is an "abolitionist" who does not support measures that perpetuate the ani-

Based on the foregoing analysis, it should be clear that Whitman's action carries a very different expressive function than the "full and free pardon" used in Maine. In Maine, the dog was treated as any other being whose punishment is struck down by the chief executive. LePage's action showed a willingness to treat this nonhuman animal with mercy, and as someone deserving of forgiveness. (Of course, this is not to say that LePage actually intended his action to carry this meaning.)[206] Because the focus of the pardon was on the animal herself, and her right to continue to live, the pardon expresses and supports values held by animal rights advocates: specifically, affording moral consideration, value, and worth to the animal in her own right, independent of her connection to a human.[207]

The problem with LePage's approach, of course, is that although it carries a powerful expressive message, it is on legally shaky ground.[208] Indeed, the Judge in Dakota's case ordered the euthanization to be carried out in spite of LePage's pardon.[209] Dakota was set free because the case settled while it was being appealed, not as a direct result of the gubernatorial pardon.[210] Thus, it is possible that the remittitur of forfeiture approach might more certainly result in a given dog's freedom, but without leading toward norm change regarding animals as property.

Thus, one must consider which is more important: greater certainty in gaining the freedom of a single dog without challenging existing norms, or the expressive function of the pardon that might lead to norm change. This Article has laid out some arguments that could bolster the legal authority of a governor to issue a pardon for a dog, but this is a calculus that each individual would have to make. Further, from a structural perspective, while saving one dog through remittitur might raise awareness of dangerous dog laws, it does nothing to address the vast numbers of animals that are killed for food every day, or those that are not the property of a human. Thus, I suggest that the expressive function of the full and free pardon is more important from a societal standpoint.[211] As many commentators have argued, in order for there to be real, sys-

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mals-as-property paradigm. *See* Gary Steiner, *Foreword* to GARY L. FRANCIONE, ANIMALS AS PERSONS: ESSAYS ON THE ABOLITION OF ANIMAL EXPLOITATION, at x (2008).

[206] *See* Sunstein, *supra* note 24, at 2022 ("[W]hat the agent will be communicating, or be taken to mean, may or may not have a great deal to do with his particular intentions. In this sense, the meanings of actions are not fully within the agent's control."). It is also interesting to consider whether governors would continue to pardon dogs if they knew it meant they might help animals break free from the property paradigm.

[207] *See, e.g.*, TOM REGAN, THE CASE FOR ANIMAL RIGHTS 150–94 (2004) (exploring the inherent value of animals and universal rights). *See generally* PETER SINGER, ANIMAL LIBERATION (2009) (generally acknowledging that animals should be given equal consideration to avoid suffering).

[208] *See supra* Section I.B.

[209] Shepherd, *supra* note 46.

[210] Harrison, *supra* note 47.

[211] One counterpoint is that promoting the pardon of a dog might in fact serve to reinforce hierarchy among species, suggesting that companion animals like dogs are worthy of par-

temic change, and for animals to gain greater rights under the law, we must change the current system in which they are treated as property under the law.[212] That is unlikely to happen if we continue to enforce and rely upon legal apparatus that treat them as such.

Although animals are viewed as property in all fifty states, commentators have long suggested alternative paradigms,[213] including viewing animals as "living property"[214] or "property plus," or even as persons.[215] For example, Professor Gary Francione has argued for an abolitionist approach, arguing that the treatment of animals will not meaningfully change unless and until their property status is rescinded.[216] In contrast, Professor David Favre has suggested that animal ownership can be transformed into something more akin to guardianship, thus allowing the interests of nonhuman animals to be accommodated within a modified version of the property paradigm.[217] More recently, scholars such as Sue Donaldson and Will Kymlicka have argued that certain animals, like domesticated dogs, should be seen as citizens of their local polity, and that citizenship—membership in a specific political community—is morally significant and itself generates rights.[218] A recent article, authored by Angela Fernandez, suggests a legal status of "quasi-property/quasi-persons," as a way to,

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dons, but the billions of animals killed for food each year are not. Further, it is unclear whether members of the general public would understand the technical differences between a true pardon and the remittitur of a forfeiture, especially if all of the newspaper headlines refer to the acts using the identical term "pardon." Thus, it is questionable whether the two forms of action would in fact carry vastly different expressive functions.

[212] *See, e.g.*, Petra Renée Wicklund, *Abrogating Property Status in the Fight for Animal Rights*, 107 YALE L.J. 569, 570 (1997) (reviewing GARY L. FRANCIONE, RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT (1996), and stating that "Francione now maintains that activists will achieve no progress toward legal rights for animals so long as animals remain property").

[213] At least one commentator has referred to this debate as "paralyzing," suggesting that the goal is the same regardless of how it is reached. Ani B. Satz, *Animals as Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy, and Property*, 16 ANIMAL L. 65, 71 (2009).

[214] *See* Carter Dillard et al., *Animal Advocacy and Causes of Action*, 13 ANIMAL L. 87, 95 (2006) (proposing the categorization of animals as "living property").

[215] *See generally*, Cass R. Sunstein, *The Rights of Animals*, 70 U. CHI. L. REV. 387, 389–400 (2003) (describing different views about animal rights and treatment under the law); David Favre, *Integrating Animal Interests into Our Legal System*, 10 ANIMAL L. 87 (2004) (describing animal rights movement and personhood arguments); STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS (2000) (discussing animals as legal persons); GARY L. FRANCIONE, RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT (1996) (discussing animals as legal persons). *See also* TOM REGAN, ANIMAL RIGHTS, HUMAN WRONGS: AN INTRODUCTION TO MORAL PHILOSOPHY (2003); GARY STEINER, ANIMALS AND THE MORAL COMMUNITY: MENTAL LIFE, MORAL STATUS, AND KINSHIP (2008). For a discussion of animals being treated as property and "the dreaded comparison," *see* SPIEGEL, *supra* note 96 and accompanying text.

[216] *See, e.g.*, Gary L. Francione, *Animal Rights Theory and Utilitarianism: Relative Normative Guidance*, 3 ANIMAL L. 75, 95–96 (1997).

[217] *See* David Favre, *Equitable Self-Ownership for Animals*, 50 DUKE L.J. 473, 496–97 (2000) (proposing a model whereby equitable title is awarded to animals themselves).

[218] DONALDSON & KYMLICKA, *supra* note 87, at 13–14.

> secur[e] for nonhuman animals (some of) the rights of persons and validating the (admittedly weak) ones they already have while leaving intact their current legal categorization as property, recognizing and emphasizing that they are a nuanced form of property that trigger certain duties and responsibilities in the humans who own them or come into contact with them.[219]

Although there is a great deal of debate surrounding these questions, commentators agree that treating animals as purely property is unacceptable.

Further, some courts have begun to recognize that nonhuman animals are distinct from typical, inanimate property, and perhaps even more akin to persons.[220] For example, in 2013, the Oregon appellate court was considering whether the emergency aid exception to the state's constitutional search warrant requirement applies to animals in need.[221] Although the state supreme court had described the exception in a way that related to "persons," the appellate court stated,

> the court's description of the exception in human terms is understandable, perhaps inevitable, given that the few emergency aid cases it has addressed all have turned on perceived threats to human safety. The court simply has not been presented with the question of whether the exception extends to the protection of animals . . . .[222]

The appellate court noted that the exception was about protecting societal interest, and that interest with respect to animals is reflected in numerous state animal abuse and neglect statutes.[223] Thus, the court held that "the societal interest in protecting nonhuman animals from unnecessary pain, injury, trauma, and cruel death can justify—at least in some circumstances—a warrantless search or seizure aimed at preventing or alleviating that suffering."[224]

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[219] Angela Fernandez, *Not Quite Property, Not Quite Persons: A 'Quasi' Approach for Nonhuman Animals*, 5 CANADIAN J. COMPAR. & CONTEMP. L. 155, 155 (2019).

[220] Steven Wise and the Nonhuman Rights Project have argued for legal personhood of elephants and chimpanzees in a number of court cases. *See, e.g.*, Nonhuman Rts. Project, Inc. *ex rel*. Hercules & Leo v. Stanley, No. 152736/15, at *21–27 (N.Y. Sup. Ct. July, 29, 2015), www.nonhumanrights.org/content/uploads/Judge-Jaffes-Decision-7-30-15.pdf [https://perma.cc/A3S2-WQSV].

[221] State v. Fessenden, 310 P.3d 1163, 1166–67 (Or. Ct. App. 2013). For a discussion of the way that the Oregon Court seems to be expanding animals' legal status as agents (rather than objects) in a fashion that is largely agnostic regarding a distinction between property and personhood, see Lora Dunn & David B. Rosengard, Comment, *A Dog Is Not a Stereo: The Role of Animal Sentience in Determining the Scope of Owner Privacy Interests Under Oregon Law*, 23 ANIMAL L. 451, 460–61 (2017).

[222] *Fessenden*, 310 P.3d at 1167 (upholding the warrantless seizure on the basis of generalized exigent circumstances, declining to rule on emergency aid, and embracing the notion of animals as valid agents, with legally cognizable interests).

[223] *Id*. at 1168.

[224] *Id*. at 1169. Some commentators might argue that, although this court decision appears to prop up the status of animals, it does so at the cost of eroding Fourth Amendment and criminal procedure protections for defendants. *See generally* MARCEAU, *supra* note 91 (describing carceral animal law). That said, the *Fessenden* Appellate holding does not require any criminal activity or a criminal defendant to allow animals in dire straits to receive emergency aid.

The same court also recently held that animals qualify as "victims" under a state statute.[225] In that case, a defendant was found guilty of twenty counts of second-degree animal abuse; each count identified a different animal who was harmed.[226] While the state requested that the trial court impose twenty separate convictions, the trial judge determined that "animals are not victims, as defined by the statute" because they were not "persons."[227] On appeal, the court reversed, finding that the meaning of the word victim was "governed by the legislature's intent with regard to the underlying substantive criminal statute" and in this case, the court found that the legislature sought to protect animals by creating the crime at hand: second-degree animal abuse.[228] The court noted that it had, in the past, determined that the legislative intent was for the public as a whole, rather than a person or persons, to be the victim of a crime.[229] Here, the court declined to find that the owner of the animals-as-property was the victim, because it would not make sense, given that the owner was the person who abused the animals.[230]

There are other examples wherein courts and legislatures have extended rights or granted special treatment to nonhuman animals that go beyond what typical "property" would receive. For example, there are state statutes providing that an animal can be the beneficiary of a will.[231] Similarly, courts have approved many custody agreements involving pets.[232] Animal anti-cruelty laws exist in all states, which prohibit the killing or harming of certain animals under certain circumstances.[233] Some tort cases have given special consideration to the death of or harm to an animal.[234] Thus, an extension of the pardon power to

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[225] State v. Nix, 283 P.3d 442, 448 (Or. Ct. App. 2012); *aff'd*, State v. Nix, 334 P.3d 437, 448 (Or. 2014), *vacated on procedural grounds*, 345 P.3d 416, 424 (Or. 2015), *reasoning adopted by* State v. Hess, 359 P.3d 288, 289–90 (Or. Ct. App. 2015). The statute at issue was OR. REV. STAT. § 161.067(2).

[226] *Nix*, 283 P.3d at 443.

[227] *Id*. at 444 (regarding OR. REV. STAT. § 161.067(2)).

[228] *Id*. at 444, 449.

[229] *Id*. at 446.

[230] *Id*. at 447.

[231] *See, e.g.*, CAL. PROB. CODE § 15212 (West, Westlaw through Ch. 27 of reg. Sess.).

[232] *See, e.g.*, Houseman v. Dare, 966 A.2d 24 (N.J. Super. Ct. App. Div. 2009); Rebecca J. Huss, *Separation, Custody, and Estate Planning Issues Relating to Companion Animals*, 74 U. COLO. L. REV. 181, 224 (citing *In re* Marriage of Fore, No. DW 243974 (Minn. Dist. Ct. Nov. 9, 2000)); Vargas v. Vargas, No. 0551061, 1999 WL 1244248 (Conn. Super. Ct. Dec. 1, 1999).

[233] Some statutory schemes distinguish between cruelty to farmed animals and non-farmed animals. *See, e.g.*, TEX. PENAL CODE ANN. §§ 42.09–42.092 (West, Westlaw through 2019 Reg. Sess.). Others distinguish between animals and birds in their laws. *See, e.g.*, ME. REV. STAT. ANN. tit. 7, §§ 4011–12 (West, Westlaw current through the 2019 2d Reg. Sess.). Still others dedicate entire chapters to one type of animal, such as horses. *See, e.g.*, CAL. PENAL CODE §§ 597.2 (West, Westlaw through 2020 Reg. Sess.).

[234] *See, e.g.*, Richardson v. Fairbanks N. Star Borough, 705 P.2d 454, 455 (Alaska 1985); Campbell v. Animal Quarantine Station, 632 P.2d 1066, 1067 (Haw. 1981); Johnson v. Wander, 592 So. 2d 1225, 1226 (Fla. Dist. Ct. App. 1992).

nonhuman animals serves as another example of animals being treated more like persons than property. The more examples like this we are able to gather, and the more people become aware of these changes, the more likely it is that we will see a change in the norms that surround our views of animals. And that type of norm change may lead to a legal paradigm shift toward greater protection of, and thus rights for, animals.

CONCLUSION

The relationship between humans and animals has evolved over time. In the United States, people are having fewer children, but welcoming more companion animals into their families.[235] People are also spending more money on their pets, who have taken on greater importance as members of the family.[236] Indeed, laws often treat companion animals differently from (and better than) their counterparts who are used for food and other agricultural products.[237] That said, Americans are also eating fewer animals than they once did.[238] Thus, as our relationship with nonhuman animals changes, we can expect the norms and laws that are informed by that relationship to change as well.[239] And though the animals-as-property paradigm is deeply embedded in our jurisprudence, we are starting to see some cracks in its foundation.

This Article has argued that, even if there are some legal questions surrounding its validity, the pardon power serves an important expressive function when it is used to free a nonhuman animal. Specifically, by pardoning a nonhuman animal, a state is suggesting that mercy toward animals is an important societal norm, that animals—like humans—can be forgiven, and that we can

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[235] *See* David Favre, *Twenty Years and Change*, 20 ANIMAL L. 7, 8 (2013); *see also* Abha Bhattarai, *Millennials Are Picking Pets over People*, WASH. POST (Sept. 13, 2016, 8:57 AM), https://www.washingtonpost.com/news/business/wp/2016/09/13/millennials-are-picking-pets-over-people/ [https://perma.cc/7R2Q-TE66]; JONATHAN V. LAST, WHAT TO EXPECT WHEN NO ONE'S EXPECTING: AMERICA'S COMING DEMOGRAPHIC DISASTER 2 (2013) ("American pets now outnumber American children by more than four to one.").

[236] LAST, *supra* note 235, at 2.

[237] Many statutory schemes separate animal cruelty laws into two sections: livestock and non-livestock. Others include the distinctions within their definitions and in the nature of the prohibited activities. *See, e.g.*, HAW. REV. STAT. § 711–1100 (2020) (including "pet animal" as a distinct definition, meaning "a dog, cat, domesticated rabbit, guinea pig, domesticated pig, or caged birds . . . so long as not bred for consumption"); TEX. PENAL CODE ANN. §§ 42.09–42.092 (West, Westlaw through 2019 Reg. Sess.); COLO. REV. STAT. ANN. §§ 18-9-202, 35-42-101 to 35-42-115 (West, Westlaw through 2020 Reg. Sess.).

[238] Roni A. Neff et al., *Reducing Meat Consumption in the USA: A Nationally Representative Survey of Attitudes and Behaviours*, 21 PUB. HEALTH NUTRITION 1835, 1835 (2018) (noting that "[w]hile only a small portion of the population is vegetarian, surveys suggest many Americans may be reducing their meat consumption").

[239] *See* Mike Baker, *Pets Are Just 'Property,' So Owners Can't Do Much When Vets Harm Them*, N.Y. TIMES (Feb. 4, 2020), https://www.nytimes.com/2020/02/04/us/vets-daniel-koller-pets.html [https://perma.cc/G5JJ-S9DZ] (bemoaning the fact that animals are property, and thus veterinarians are subject to lesser penalties when a pet is harmed in their care as compared to a doctor's human patient).

free animals from a too-harsh penalty using the same tool that is sometimes used for humans. The New Jersey approach, which involved the nullification of a forfeiture, lacks that same expressive function of the norm because it relies on the fact that animals are property; it fails to recognize the inherent agency and value of nonhumans.

Although the Article recognizes the limitations of using the pardon power in this way, governors have begun to do so, and there are signs that such use might be expanding.[240] By using his or her pardon power to aid nonhuman animals, governors can also aid in the evolution of both norms and laws surrounding the way that we view animals.[241] The result might well be a future where animals are treated less like property and more like persons.

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[240] The idea of pardoning a dog might even become a trend. As was discussed earlier, a state senator in New York recently petitioned that state's Governor to pardon a dog who had been ordered to be euthanized after biting another dog. The Senator stated the following:

> In the constitution, it allows for one person to pardon in the state and that's the Governor of the state. He has pardoned 23,000 felons earlier in the year, made that decision. I think he has a dog himself, Captain, which I'm sure he loves and I think he understands that, he's signed a lot of my animal advocacy bills and I think he's an animal advocate himself and I think he's got an opportunity if he really looks at this case and if he comes and visits Luna, he'll understand that a pardon would be well accepted and most appropriate in this particular case[.]

Michael Gwizdala, *Tedisco Asks Cuomo for 'Pardon' of Luna*, TROY REC. (Dec. 13, 2018), https://www.troyrecord.com/news/local-news/tedisco-asks-cuomo-for-pardon-of-luna/article_4b0e95b0-ff12-11e8-8f9b-9339cec3b21a.html [https://perma.cc/GV5B-UV77]. And across the ocean, a campaign is underway in the U.K. seeking the royal prerogative of mercy—effectively a pardon—for a dog who was sentenced to die after biting a woman and her dog. *See* Ross Dunn, *Kilmarnock Dog Owner Begs the Queen to Issue Royal Pardon for Her Pooch Sentenced to Death*, DAILY REC. (July 25, 2019, 9:36 AM), https://www.dailyrecord.co.uk/ayrshire/kilmarnock-dog-owner-begs-queen-18672434 [https://perma.cc/768Z-2UCE].

[241] *See, e.g.*, Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 929 (1996); Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 607–08 (2000); Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1712–13 (1996); Mark A. Edwards, *Acceptable Deviance and Property Rights*, 43 CONN. L. REV. 457, 461 (2010). *But see* Sarah B. Schindler, *Banning Lawns*, 82 GEO. WASH. L. REV. 394, 420 (2014) ("Norms are often slow to change, however, even with the aid of informational campaigns. Sticky norms often persist even when they do not make much sense or are harmful to the community.").