
UC DAVIS LAW REVIEW ONLINE

VOL. 52



SEPTEMBER 2018

The “Monkey Selfies”: Reflections on Copyright in Photographs of Animals

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

Paul T. Babie*

*While brief, the two opinions delivered by the United States Court of Appeals for the Ninth Circuit in *Naruto v. Slater* tell us a great deal about what property is, if only we are willing to look. On their face, the opinions consider the role of standing for animals in relation to copyright claims involving photographs. Upon deeper reflection, however, these two short opinions tell us about the nature and content of property, whether it is real or personal, tangible or intangible.*

TABLE OF CONTENTS

INTRODUCTION	105
I. DECISION OF THE NINTH CIRCUIT COURT OF APPEALS	107
A. <i>Majority Opinion of Circuit Judge Bea</i>	107
B. <i>Minority Opinion of Circuit Judge Smith</i>	108
II. REFLECTIONS ON THE NATURE OF PROPERTY AND ITS HOLDER ...	109
A. <i>Creation/Conferral</i>	110

* Copyright © 2018 Paul T. Babie. Adelaide Law School Professor of Property Theory and Law, The University of Adelaide. This essay is dedicated to my children, Catherine and Luke, who enjoyed talking to me about *Naruto*. Thanks to the *UC Davis Law Review Online* editors, Cory Darnell, Mehron Assadi, Lauren Iwasaki, and William Hodge for their careful and gracious editorial assistance; I am deeply grateful to them. Any errors which remain are, of course, entirely my responsibility.

<i>B. Holder</i>	114
CONCLUSION.....	117

Naruto I¹Naruto II²

INTRODUCTION

The two portraits which appear above brought international fame in 2014 to Naruto, a crested macaque living in Northern Sulawesi, Indonesia.³ David Slater, a wildlife photographer working in the reserve in which Naruto lived (and may still live), left a camera unattended with which Naruto allegedly took several photographs or “selfies” which later became known as the “Monkey Selfies.” While

¹ See *File:Macaca nigra self-portrait fully body.jpg*, WIKIMEDIA COMMONS (2008), https://commons.wikimedia.org/wiki/File:Macaca_nigra_self-portrait_full_body.jpg (last accessed Aug. 18, 2018), for a self-portrait of a female Celebes crested macaque (*Macaca nigra*) in North Sulawesi, Indonesia, who had picked up photographer David Slater's camera and photographed herself with it.

² See *File:Macaca nigra self-portrait large.jpg*, WIKIMEDIA COMMONS (2011), https://commons.wikimedia.org/wiki/File:Macaca_nigra_self-portrait_large.jpg (last accessed Aug. 24, 2018), for a self-portrait of a female Celebes crested macaque (*Macaca nigra*) in North Sulawesi, Indonesia, who had picked up photographer David Slater's camera and photographed herself with it.

³ It is unclear whether Naruto is a female or a male macaque; Wikipedia refers to a female. *Id.* (the summary section of the web-sites at notes 1 and 2 refers to a “[s]elf-portrait of a female Celebes crested macaque”), while the decision of the Ninth Circuit Court of Appeals refers to a male. *Naruto v. Slater*, 888 F.3d 418, 420, 429 (9th Cir. 2018).

maintaining that the photographs were taken by Naruto, Slater nonetheless claimed copyright in them, along with Wildlife Personalities, Ltd., in a book published through Blurb, Inc., in December 2014.⁴ In the book, Slater wrote that one of the photographs showed “Naruto . . . ‘[p]osing to take its own photograph, unworried by its own reflection, smiling. Surely a sign of self-awareness?’”⁵

In 2015, People for the Ethical Treatment of Animals (“PETA”) and Dr. Antje Engelhardt filed a complaint for copyright infringement against Slater, Wildlife Personalities, and Blurb, as next friends on behalf of Naruto. While the complaint alleged that Dr. Engelhardt had worked with and known Naruto, it did not allege any history or relationship between PETA and Naruto. Rather, “the complaint allege[d] that PETA is ‘the largest animal rights organization in the world’ and ‘has championed establishing the rights and legal protections available to animals beyond their utility to human beings’”⁶

David Slater, Wildlife Personalities and Blurb sought dismissal of the claim on the grounds that it did not establish either Article III standing under the United States Constitution,⁷ or statutory standing under the United States Copyright Act.⁸ District Judge William Orrick, in the United States District Court for the Northern District of California, granted the motion to dismiss, concluding that regardless of whether Article III standing could be established, Naruto had failed

⁴ *Naruto*, 888 F.3d at 420.

⁵ *Id.*

⁶ *Id.*

⁷ The U.S. Constitution provides that:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2, cl. 1. Through judicial interpretation, this clause has come to found what is known as “Article III Standing.” See *Flast v. Cohen*, 392 U.S. 83, 94 (1968).

⁸ United States Copyright Act of 1976, 17 U.S.C. §§ 101-1332 (consolidated version of June 2009).

to establish statutory standing under the Copyright Act.⁹ While both PETA and Dr. Engelhardt appealed on Naruto’s behalf, only the former remained as “next friend” at the time the appeal was heard in the United States Court of Appeals for the Ninth Circuit.¹⁰

In a majority decision, the Ninth Circuit Court of Appeals held in *Naruto v. Slater*¹¹ that while a claim brought by a monkey against humans, corporations, and companies for damages and injunctive relief arising from claims of copyright infringement might have Article III standing, “this monkey — and all animals, since they are not human — lacks statutory standing under the Copyright Act[,]” affirming the judgment of the District Court.¹² The decision in *Naruto* deals primarily with the procedural mechanics of “next friend” standing in respect of protecting copyright in images; this is not my concern. Rather, the positions taken by the majority and minority in respect of standing tell us something important about the nature of property of any kind, real or personal. This essay, then, recounts the decision of the Ninth Circuit before turning to some reflections on what that tells us about the nature and existence of property. Part I recounts the majority opinion of Circuit Judge Bea and the minority/concurring opinion of Circuit Judge Smith. Part II reflects upon what both opinions tell us about the nature of property.

I. DECISION OF THE NINTH CIRCUIT COURT OF APPEALS

A. *Majority Opinion of Circuit Judge Bea*

Circuit Judge Bea (District Judge Robreno,¹³ joining) found that while PETA could not establish “next friend” standing to bring the copyright infringement claim against Slater, Wildlife Personalities and Blurb, Naruto nonetheless had Article III standing to sue.¹⁴ But this conclusion only enlivened the central issue of the appeal: could Naruto, an animal, sue for copyright infringement under the Copyright Act? The majority found that the claim failed at that point, basing its conclusion on two aspects of statutory construction.

⁹ *Naruto*, 888 F.3d at 419.

¹⁰ *Id.* at 421.

¹¹ *Id.* at 420.

¹² *Id.*

¹³ The Honorable Eduardo C. Robreno, United States District Judge for the Eastern District of Pennsylvania, was sitting by designation. *Id.* at 419.

¹⁴ *Id.* at 425.

First, the majority rejected statutory standing on the basis of strict interpretation of the language used by Congress in the Copyright Act.¹⁵ Relying upon Ninth Circuit authority in *Cetacean Community v. Bush*,¹⁶ Judge Bea wrote that “if an Act of Congress plainly states that animals have statutory standing, then animals have statutory standing.”¹⁷ Furthermore, “[i]f the statute does not so plainly state, then animals do not have statutory standing [as] [t]he Copyright Act does not expressly authorize animals to file copyright infringement suits under the statute.”¹⁸

Second, Judge Bea found that the use of five specific words in the Copyright Act — “children,” “grandchildren,” “legitimate,” “widow,” “widower” — “imply humanity and necessarily exclude animals that do not marry and do not have heirs entitled to property by law.”¹⁹ As such, as a matter of statutory construction, Judge Bea concluded that “Naruto — and, more broadly, animals other than humans — lack statutory standing to sue under the Copyright Act.”²⁰

B. *Minority Opinion of Circuit Judge Smith*

Judge Smith, in a decision concurring in part and dissenting in part, found that there was no standing for U.S. federal courts to hear this case at all, for “where there is no standing, any further ruling ‘is, by very definition, for a court to act ultra vires.’”²¹ For Judge Smith, the primary point of disagreement with the majority was over whether next-friend standing extends to animals. In concluding that it did not, Judge Smith made an important point about who, or what, may hold property, whatever it might be: “[t]he argument that animals have statutory standing to maintain a Copyright Act claim — or any property right claims — is an easy question. Under the holding in *Cetacean Community v. Bush* . . . the Copyright Act, and basic property law, animals have no such rights.”²²

For Judge Smith, the conclusion about who or what may hold property (whatever it is) is inextricably connected to the issue of

¹⁵ *Id.* at 426.

¹⁶ 386 F.3d 1169 (9th Cir. 2004).

¹⁷ *Naruto*, 888 F.3d at 426.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 427 (Smith, J., dissenting in part) (quoting *Coal. of Clergy, Lawyers, & Professors v. Bush*, 310 F.3d 1153, 1164 (9th Cir. 2002) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83,102 (1998))).

²² *Id.* at 428 (internal citation omitted).

animal next-friend standing, a doctrine itself “particularly susceptible to abuse.”²³ Why would the extension of such standing to animals be susceptible to abuse? In Judge Smith’s view, because:

We have no idea whether animals or objects wish to own copyrights or open bank accounts to hold their royalties from sales of pictures. To some extent, as humans, we have a general understanding of the similar interests of other humans. In the habeas corpus context, we presume other humans desire liberty. Similarly, in actions on behalf of infants, for example, we presume the infant would want to retain ownership of the property she inherited. But the interests of animals? We are really asking what *another species* desires. Do animals want to own property, such as copyrights? Are animals willing to assume the duties associated with the rights PETA seems to be advancing on their behalf? Animal-next-friend standing is materially different from a competent person representing an incompetent person. We have millennia of experience understanding the interests and desire of humankind. This is not necessarily true for animals. Because the “real party in interest” can actually *never credibly articulate its interest or goals*, next-friend standing for animals is left at the mercy of the institutional actor to advance its own interests, which it *imputes* to the animal or object with *no accountability*.²⁴

In Judge Smith’s opinion, then, it appears very likely that property can never be held by animals or, indeed, by any non-human entity. What do the opinions in *Naruto* tell us about property? The next section turns to that question.

II. REFLECTIONS ON THE NATURE OF PROPERTY AND ITS HOLDER

The brevity of the opinions in *Naruto* deceive; on deeper reflection, they tell us much about the nature of property. Rather than a tension between two competing positions, we might more usefully think of the two opinions as demonstrating two fundamental and inter-related truths about property. For Judge Bea, the issue resolves itself into a simple formula: if the legislature says that property exists, then it exists; if the legislature does not so say, then property does not exist. Judge Smith, assuming the existence of property, focuses instead on

²³ *Id.* at 432.

²⁴ *Id.* at 432 (emphasis in the original) (footnotes omitted).

whether it is possible to locate an entity capable of holding property — howsoever created — in a given resource. The key inquiry becomes whether an entity can be said to be capable of holding whatever property is. Neither position is mutually exclusive.

On the one hand, both opinions, at least implicitly, explore the means by which property comes into existence as a legal vehicle for the allocation of use and control of goods and resources. On the other hand, both opinions also address, at least implicitly, the nature of the entity that might hold and enforce such property, whatever it is, once it has been recognized (created) as a valid means of allocating use and control of a given resource. Read together, both go to the very heart of what property is: the enjoyment of power over both goods and resources and, importantly, in exerting that power, over others. As Morris Cohen put it, in property “we have the essence of what historically has constituted political sovereignty.”²⁵ Here, I reflect briefly on both dimensions of the power identified by Cohen as sovereignty: the creation or conferral of the power contained in property, and the entity which holds it.

A. *Creation/Conferral*

Consider how property in a good or resource comes into existence; in other words, the conferral of the power identified by Cohen as sovereignty. Theorists have long-since rejected the notion that property is something intrinsic or inherent to the ontology of what it means to be human — as concerns property, contemporary scholarship largely rejects both natural and positivist theories of its existence.²⁶ Rather, building upon Cohen and the work of the American legal realists, most serious property theory scholarship today accepts that property is a creation of the state.²⁷ What Bentham

²⁵ Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. REV. 8, 13 (1927).

²⁶ See *infra* notes 27–28. But see RICHARD A. EPSTEIN, SUPREME NEGLECT: HOW TO REVIVE THE CONSTITUTIONAL PROTECTION FOR PRIVATE PROPERTY 163 (Geoffrey R. Stone ed., 2008) (arguing that private property is an “indispensable part of any comprehensive constitutional order that advances long-term social welfare”); RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 331 (1985) (arguing that “eminent domain . . . , as applied both to personal liberty and private property, offers a principled account of both the functions of the state and the limitations upon its powers”).

²⁷ See J.W. HARRIS, PROPERTY AND JUSTICE 3-14, 139-64 (1996); CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY AND RHETORIC OF OWNERSHIP 1-20 (Robert W. Gordon & Margaret Jane Radin eds., 1994); LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 11-37, 137-64 (2003); Joseph William Singer & Jack M. Beermann, *The Social Origins of Property*, 6 CAN. J.L. & JURIS. 217,

said over 200 years ago remains true today: “Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.”²⁸ The modern constitutional state, through law, may create property either through its legislative or its judicial branch.

While harder to see today, judges have always engaged in the creation of proprietary interests. In modern legal systems, this innovation occurs in relation to moveable and intangible resources, such as university degrees.²⁹ Of much greater significance, though, the courts have historically taken the leading role in acting boldly and creatively to establish new forms of property in land. This happened in at least four ways: tenure and estates, easements, equity, and restrictive covenants. While hidden in the mists of the common law’s origins, the entire framework of the English common law doctrines of tenure and estates, since adopted in every common law jurisdiction the world over, owes its existence to the work of judges.³⁰ Over time, judges supplemented that common law framework with new interests, the easement offering the most recent example.³¹ The historic ameliorating influence of equity continues to operate so as to add to and supplement the common law proprietary interests available in land.³² Most recently, equity was used to add the restrictive covenant to English law,³³ while in Canada, equity founds the proprietary effect

218, 220-28 (1993) (describing the “natural rights ideology which implies that property rights have a built-in inherent structure”).

²⁸ JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 113 (Richard Hildreth trans., 1931) (1802).

²⁹ See, e.g., *Woodworth v. Woodworth*, 126 Mich. App. 258 (1983) (holding, in the United States, that a university degree might constitute property for the purposes of matrimonial property divisions).

³⁰ See 2 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 1-41, 153-206 (2d ed. 1898); see also A.W.B. SIMPSON, *AN INTRODUCTION TO THE HISTORY OF THE LAND LAW* 24-43 (2d ed. 1986).

³¹ See SIR WILLIAM HOLDSWORTH, *AN HISTORICAL INTRODUCTION TO THE LAND LAW* 265-67 (1927); SIMPSON, *supra* note 30, at 261-62 (both sources suggest that in developing the law of easements the English common law courts adopted almost in its entirety the work of Charles James Gale and Thomas Denman Whatley); see also JOHN V. ORTH, *REAPPRAISALS IN THE LAW OF PROPERTY* 57-62 (Robin Paul Malloy ed., 2010) (discussing the “burden” of an easement). See generally CHARLES JAMES GALE & THOMAS DENMAN WHATLEY, *A TREATISE ON THE LAW OF EASEMENTS* (1839) (currently known as JONATHAN GAUNT, *GALE ON EASEMENTS* (20th ed. 2016)) (providing the first treatise on the law of easements).

³² See SIMPSON, *supra* note 30, at 173-207; S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 82-98 (2d ed. 1981).

³³ *Keppell v. Bailey* [1834] 39 Eng. Rep. 1042 (KB); *Tulk v. Moxhay* [1848] 41

of the oil and gas gross royalty trust agreement.³⁴ Even more recently, most post-colonial nations have judicially recognized the proprietary nature of indigenous land-holding in aboriginal³⁵ or native title.³⁶

The expansion of legislative power, however, results in the retreat of judicial innovation in relation to property, with judges taking a much more conservative approach relative to their legislative counterparts.³⁷ In most legal systems today, both common and civilian, the legislature, being sovereign, has assumed the paramount power to create new or to modify or eliminate existing forms of property.³⁸ Subject to any constitutional limitations which may be imposed upon it,³⁹ this legislative power encompasses not only the power of the state to create, but also to redistribute, modify, adapt and even eliminate existing property interests so as to meet the obligations of the state to achieve some minimal level of justice in the allocation of goods and resources. As J.W. Harris⁴⁰ observed, the fact that “governments are

Eng. Rep. 1143 (QB).

³⁴ See *Montreal Trust Co. v. Gulf Securities Corp. Ltd.*, [1978] 1 S.C.R. 708 (Can.); *Scurry-Rainbow Oil v. Galloway Estate* (1993), 138 A.R. 321 (Can. Alta. Q.B.); see also JOHN BISHOP BALLEM, *THE OIL AND GAS LEASE IN CANADA* 178-223 (4th ed. 2008) (discussing royalties, suspended well payments, and taxes).

³⁵ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (Can.).

³⁶ *Mabo v. Queensland [No. 2]* (1992) 175 CLR 1 (Austl.).

³⁷ See Paul Babie, *Completing the Painting: Legislative Innovation and the ‘Australianness’ of Australian Real Property Law*, 6 PROP. L. REV. 157, 157 (2017).

³⁸ See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 60-68 (2000); see also Babie, *supra* note 37. One sees the negative reflection of this power in the principle of legality. See AUSTRALIAN LAW REFORM COMM’N, *TRADITIONAL RIGHTS AND FREEDOMS — ENCROACHMENTS BY COMMONWEALTH LAWS: INTERIM REPORT* 127, at 189 (2015) (showing that with clear and unambiguous language, parliament can take away a common law right); Dan Meagher, *The Common Law Principle of Legality in the Age of Rights*, 35 MELB. U. L. REV. 449, 453-61 (2011) (showing legality’s potential effect on the rights to freedom of speech and non-discrimination).

³⁹ Such as the U.S. CONST. amend. V, which provides, “nor shall private property be taken for public use, without just compensation.” Or the Constitution of Australia which reads:

51. Legislative powers of the Parliament

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to . . . (xxxii) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws

Australian Constitution s 51(xxxii).

⁴⁰ A deceased friend, mentor and scholar at Oxford University, who taught Property Law. *Professor Jim Harris: Legal Scholar with a Deep Knowledge of Property*

entitled to expropriate [(i.e., take)] the property of citizens for the purpose of discharging some justice costs is hardly controversial” as this “fund[s] the discharge by the State of functions which it has rightly undertaken”⁴¹ for “justice has inevitable costs.”⁴²

Legislative innovation, both in creating and in eliminating property, takes many forms. In some jurisdictions, it has revoked judge-made riparian rights in water, replacing them with a system of state ownership. In other jurisdictions, it has altered the way in which proprietary interests in land, established by judges, can be held.⁴³ Moreover, the very existence of copyright as a form of “intellectual” property is the child of the state acting through its legislative branch.⁴⁴ Each of these legislative interventions confirms a central point: property, far from intrinsic, emerges from and is modified or eliminated by the state. Charles A. Reich best captured that role as played by the legislature:

The institution called property guards the troubled boundary between individual man and the state. It is not the only guardian; many other institutions, laws, and practices serve as well. But in a society that chiefly values material well-being, the power to control a particular portion of that well-being is the very foundation of individuality.

One of the most important developments . . . [in contemporary liberal states] has been the emergence of government as a major source of wealth. Government is a gigantic syphon. It draws in revenue and power, and pours forth wealth: money, benefits, services, contracts, franchises, and licenses. Government has always had this function. But while in early times it was minor, today’s distribution of largess is on a vast, imperial scale.

The valuables dispensed by government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth — forms which are held as private property. Social insurance substitutes for savings; a government contract replaces a businessman’s customers and

Law and a Delightful Style, TIMES (Apr. 5, 2004, 1:00 AM), <https://www.thetimes.co.uk/article/professor-jim-harris-mlh8fnsq6s7>.

⁴¹ Harris, *supra* note 27, at 93.

⁴² *Id.* at 38.

⁴³ On innovations in relation to water and land, see Babie, *supra* note 37, at 157.

⁴⁴ See ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 102-38, 289-311 (2011); MICHAEL SPENCE, INTELLECTUAL PROPERTY 1-6 (2007).

goodwill. The wealth of more and more [people] depends upon a relationship to government. Increasingly, [people] live on government largess — allocated by government on its own terms, and held by recipients subject to conditions which express “the public interest.”

The growth of government largess, accompanied by a distinctive system of law, is having profound consequences. It affects the underpinnings of individualism and independence. It influences the workings of [fundamental rights and freedoms]. It has an impact on the power of private interests, in their relation to each other and to government. It is helping to create a new society.⁴⁵

As the state creates this new society, the question arises: who, or what, can enjoy its benefits, whatever they may be; who, or what, can hold property, whatever it is said by the state to be?

B. Holder

Just as it may create, modify, or eliminate it, so too may the state determine the holder of property; the state can not only create, but also provide for who and how it can be held and enforced. By premising their decisions on the very issue of statutory standing under the Copyright Act, both of the opinions delivered by the Ninth Circuit in *Naruto* assume as much. While it makes sense to suggest that animals cannot hold property for all the reasons given by Judges Bea and Smith, both opinions are, nonetheless, to some extent, disingenuous. The law in fact recognizes many instances where entities which are not of themselves “human” are nonetheless legal entities capable of holding or owning property.

Consider the corporation in Anglo-American law,⁴⁶ or the Whanganui River in New Zealand.⁴⁷ Each represents an example of a

⁴⁵ Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 733 (1964).

⁴⁶ See *Salomon v. A. Salomon & Co. Ltd.* [1896] UKHL 1 (Eng.) (the first English case to recognize the legal “personality” of the corporation); see also THE RT. HON. LORD COOKE OF THORNDON, K.B.E., TURNING POINTS OF THE COMMON LAW 1-27 (1997); Rudolf Huebner, *Man, Right, and Association*, in ANTHROPOLOGY AND EARLY LAW 237-99 (Lawrence Krader ed., 1966); Frederick Pollock & Frederic W. Maitland, *Corporation and Person*, in ANTHROPOLOGY AND EARLY LAW, *supra* note 46, at 300-36. In the United States, the parallel to *Salomon* is found in *Santa Clara County v. Southern Pacific R.R.*, 118 U.S. 394 (1886). Although, some protections were extended to the corporation as a legal “person” as early as 1819 in *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819). More recently, the rights to free speech and of religious liberty have also been

non-human entity recognized by law which is capable of holding a form of property created by the state, either judicially or legislatively. Thus, in addition to the natural person, the law can be said to recognize purely legal entities (the corporation) and legal territorial/environmental entities (rivers, etc.) as capable of holding forms of property. Indeed, while it may seem unexceptional to those of us in systems which continue to recognize the English monarch as the head of state, there was even a time when “the Crown” itself, as a separate entity from the physical person of the Monarch, was something unknown to English law, until “found” by medieval political theology.⁴⁸ As Pollock and Maitland wrote:

Every system of law that has attained a certain degree of maturity seems compelled by the ever-increasing complexity of human affairs to create persons who are not men, or rather (for this may be a truer statement) to recognize that such persons have come and are coming into existence, and to regulate their rights and duties. In the history of medieval Europe we have to watch on the one hand the evolution of groups (in particular, religious groups and groups of burgesses) which in our eyes seem to display all or many of

found to extend to the corporation in American law. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 371-72 (2010); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2784-85 (2014). Joel Bakan demonstrates the dangers inherent in treating the corporate entity as a legal person. JOEL BAKAN, *THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER* 139-67 (2004) (discussing the retreat of “greater democracy and humanity” due to corporate dominance). More recently, other scholars have further analyzed this danger. See, e.g., *CORPORATIONS AND AMERICAN DEMOCRACY* (Naomi R. Lamoreaux & William J. Novak eds., 2017) (discussing, through various essays, the history of the recurring challenges corporation pose for American democracy); Jonathan A. Knee, *Review: How Corporate America Won Its Civil Rights*, N.Y. TIMES (Feb. 23, 2018), <https://www.nytimes.com/2018/02/23/business/dealbook/review-we-the-corporations.html> (reviewing ADAM WINKLER, *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS* (2018) which argues that corporations have civil rights much like human individuals, which have “largely been won in the courts, not in the streets, and have developed largely without much public scrutiny”).

⁴⁷ Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (N.Z.), <http://www.legislation.govt.nz/act/public/2017/0007/latest/whole.html> (establishing the Whanganui River in New Zealand as a legal territorial/environmental person).

⁴⁸ See ERNST H. KANTOROWICZ, *THE KING'S TWO BODIES: A STUDY IN MEDIEVAL POLITICAL THEOLOGY* 3-6 (1957); Frederic William Maitland, *The Crown as Corporation*, in 3 *THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND* 244-70 (H.A.L. Fisher ed., 1911); see also George Garnett, *The Origins of the Crown*, in *THE HISTORY OF ENGLISH LAW: CENTENARY ESSAYS ON 'POLLOCK AND MAITLAND'* 171-214 (John Hudson ed., 1996).

the characteristics of corporations, and on the other hand the play of thought around that idea of an *universitas* which was being slowly discovered in the Roman law books.

We have become so familiar with the idea of “a corporation aggregate of many” that we have ceased to wonder at it. When we are told by statute that the word “person” is to include “body politic,” that seems to us a very natural rule. Nevertheless, this idea was gradually fashioned, and when we attempt to analyze it we find that it is an elastic because it is, if we may so say, a very contentless idea, a blank form of legal thought.⁴⁹

What is important about *Naruto*, then, is that although standing to enforce may have been absent in this case, that does not mean that is impossible for the type of property involved — intellectual property — to be held by animals. Both opinions assume that the legislature could, if it so chose, make clear that copyright cannot only be held, but also enforced by other entities. Such entities could be legal territorial/environmental, such as rivers, purely legal, such as corporations, or non-human and/or non-legal, but nonetheless sentient, such as animals.

And we might go further still. Today, we live in a world in which the future development of Artificial Intelligence (“AI”) presents the same challenges of classification canvassed in *Naruto*: can an artificial consciousness or intelligence constitute a legal personality?⁵⁰ Furthermore, if so, will this legal personality retain all of the attendant rights and obligations/duties of a natural person?⁵¹ This is a very real question for us today, but what we find in thinking deeply about the issues raised in *Naruto* is that it is not a question which humanity and law has not faced many times before, nor is it one for which history fails to provide guidance. Rather, *Naruto* merely raises this question in a particularly novel way: whether another sentient being, rather than a human creation of some kind, can constitute a legal entity/personality with attendant rights and obligations/duties.

⁴⁹ Pollock & Maitland, in *ANTHROPOLOGY AND EARLY LAW*, *supra* note 46, at 300-01.

⁵⁰ See DAVID GELERNTER, *THE TIDES OF MIND: UNCOVERING THE SPECTRUM OF CONSCIOUSNESS* 241-59 (2016) (discussing AI and consciousness).

⁵¹ For a classic science-fiction account of how AI might develop consciousness, such as to attract legal personality and thus liability, see Erik Larson, *House Arrest*, in *JULY 20, 2019: LIFE IN THE 21ST CENTURY* 170-85 (Arthur C. Clarke ed., 1986); Marion Long et al., *Murder by House: Law in 2019*, 8 *OMNI*, no. 12, Sept. 1986, at 46.

CONCLUSION

Recall the words of Pollock and Maitland: “when we are told by statute.”⁵² Their guidance matters. For when the legislature creates, through statute, a new form of property, it can just as easily, as it has many times before and in many other contexts, say who or what it is that might hold that property and enforce its privileges or rights. Today it could be animals; tomorrow it could be AI. In short, once created, how property can be held and enforced is simply a matter of re-configuring the fundamental rights of property sometimes referred to as the liberal triad: use, exclusivity and alienability.⁵³ Once the three are created in respect of any given resource, it must also be determined who or what can hold them.

Naruto ought not to surprise us. In relation to both what property is and who or what may hold it, the law is constantly evolving, both judicially and legislatively. Put another way, law is constantly “speaking,” making pronouncements as to what constitutes the law and what does not,⁵⁴ what is property and what is not, who or what may hold that property and who or what may not. And as law speaks as to what counts as property and its holder, as Reich told us, it creates a new society around us.⁵⁵ This process may, at times, seem to take on a life of its own; but the truth is that law always “speaks,” either through positive pronouncement or through its silence: what seems to be “inaction [on the part of a legal system] is [in fact] a policy” in the sense that law always “could have made it otherwise.”⁵⁶

And so, rather than surprise us, the opinions in *Naruto* ought to serve as a reminder of how property speaks anew over time to changing economic, political and social circumstances, and it ought to alert us to the sorts of questions we must ask of law as it does so. We can control the evolution of property, but only if we remain vigilant, asking always: how do we want property to look, who or what should hold it, and how should it be held?

⁵² Pollock & Maitland, in ANTHROPOLOGY AND EARLY LAW, *supra* note 46, at 300-36.

⁵³ MARGARET JANE RADIN, REINTERPRETING PROPERTY 121-22 (1993).

⁵⁴ See DUNCAN KENNEDY, SEXY DRESSING ETC.: ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY 89-92 (1995).

⁵⁵ Reich, *supra* note 45, at 733.

⁵⁶ KENNEDY, *supra* note 54, at 91.