

Not Quite Property, Not Quite Persons: A ‘Quasi’ Approach for Nonhuman Animals

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This paper challenges an assumption central to animal law, namely, that the legal category ‘property’ must be abolished for nonhuman animals. It argues that it would be better (and more likely to gain traction with judges, legislatures, and the public at large) to reformulate the status of nonhuman animals in terms of both property and personhood, an approach I call quasi-property/quasi-personhood. Nonhuman animals as quasi-property/quasi-persons captures the gains of each concept, namely, securing 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. This approach has the virtue of working with existing and familiar legal categories in a way that is true to their inherent flexibility, rejecting the binary, black/white thinking that has characterized animal law in favor of a pragmatic compromise that has the virtue of being acceptable today and leaving room for the future growth of more progressive attitudes towards nonhuman animals.

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I. Introduction

In an article “Animals as Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy, and Property”, Ani B Satz wrote that “existing [animal law] scholarship is entrenched in a paralyzing debate about whether categorizing animals as ‘persons’ instead of ‘property’ will improve their legal protections”.¹ I agree with Satz that dichotomous thinking about nonhuman animals as either property or persons is unhelpful. However, given that both of these categories are so central to legal thinking, this paper argues that we should move towards and into both of those categories, using them creatively and expansively rather than trying to avoid or supersede them as Satz argued we do. I propose we do just this by adopting the category of quasi-property/quasi-persons as the legal status for nonhuman animals, a concept which this paper explores.

Claude Lévi-Strauss famously wrote that animals were “good to think”² with. I start from the position that the categories we use (*e.g.* property and person) structure and channel much of what we think and, importantly, movement and change in our thinking (and our legal structures) can come from approaching those categories differently *but not so differently* that they will be difficult to identify with (for lawyers and non-lawyers). This paper is motivated by where things currently are in animal law scholarship, specifically from a pragmatic perspective but also from the truth, which seems to go under acknowledged, that nonhuman animals already have some rights, and so are arguably legal persons of a sort, yet they remain property, even if they are a unique form of property due to their status as living sentient beings.

Work like what I propose here has been done on the property side by long-time American animal law scholar David Favre.³ Favre has

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1. Ani B Satz, “Animals as Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy, and Property” (2009) 16:1 *Animal Law* 65 at 71.
 2. Claude Lévi-Strauss, *Totemism* (Boston: Beacon Press, 1965) at 89.
 3. See David Favre, “Time for a Sharper Legal Focus” (1995) 1:1 *Animal Law* 1. This was the inaugural issue of the American journal.

proposed using a “concept of living property”⁴ for nonhuman animals as well as an idea of equitable self-ownership. I believe we should move in the direction Favre recommends but also, crucially, simultaneously expand our thinking on the personhood side using the notion of a quasi-person who has moral and legal interests that deserve legal protection. We should then combine both categories into one blended concept: a quasi-property/quasi-person status for nonhuman animals. In this paper I explain why this proposal makes sense in light of the recent history of animal law in North America, roughly the last twenty or twenty-five years, *i.e.* since the mid-1990s. I offer it as a think piece, gathering together insights from historical work on animals alongside debate in philosophical scholarship and advocacy-oriented writing in the field of animal law. The article argues that quasi-property/quasi-person is a good temporary heuristic to help us organize our rapidly changing ideas about how to structure human relationships with nonhuman animals. ‘Quasi’ is not a qualifier that many animal ethicists and advocates will like, as it has to them a sense of ‘less than’ or inferior built into it; it is a kind of diminishment insofar as it attaches to ‘persons’ and some want to see a complete break with property conceptions. Slaves were in fact a hybrid form of property.⁵ And so, especially to Americans for whom human slavery is not ancient history, ‘quasi’ might sound like a bid to keep animals in a slave status or something not much better (as in the spirit behind the three-fifths compromise in which African Americans counted for only three-fifths of a persons for Congressional representation). ‘Quasi’ does not, I think, have that resonance for Canadians and others

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4. See David Favre, “Living Property: A New Status for Animals within the Legal System” (2010) 93:3 *Marquette Law Review* 1021 [Favre, “Living Property”]; David Favre, “Animals as Living Property” in Linda Kalof, ed, *The Oxford Handbook of Animal Studies* (New York: Oxford University Press, 2017) 65. See also David Favre, “Equitable Self-Ownership for Animals” (2000) 50:2 *Duke Law Journal* 473; David Favre, “A New Property Status for Animals: Equitable Self-Ownership” in Cass R Sunstein & Martha C Nussbaum, eds, *Animal Rights: Current Debates and New Directions* (New York: Oxford University Press, 2004) 234.
 5. Richard A Epstein, “The Dangerous Claims of the Animal Rights Movement” (2002) 10:2 *The Responsive Community* 28 at 30.

outside of the United States, or even for many inside of it.

‘Quasi’ is, as the *Oxford English Dictionary* puts it, “prefixed to a noun”,⁶ such as property or person, with the sense “resembling or simulating, but not really the same as, that properly so termed; having some but not all of the properties of a thing or substance; a kind of”.⁷ This seems to me to capture exactly what we are talking about in relation to nonhuman animals, who are not *merely* property (while they do remain property for many purposes) but are not persons in the same way that human beings are persons. They legitimately fall *in between* two categories, partaking in each and not reducible to either. Our legal way of thinking about nonhuman animals (not just the cognitively advanced nonhuman animals) should be able to capture that truth.

Also, given that we do not yet have a consensus about using an unqualified or non-tiered notion of personhood for nonhuman animals, even for the most cognitively complex nonhuman animals, a qualified conception might do for the time being. This is especially so for nonhuman animals where the goal behind recognizing their interests and legally protecting them is allowing them to have autonomy and lives worth living, not to provide them with equality, as it was in other civil rights movements, *e.g.* for women and male and female members of racialized

6. John Simpson & Edmund Weiner, *Oxford English Dictionary* (Oxford: Oxford University Press, 2000) sub verbo “quasi-”.

7. *Ibid.*

groups, for whom ‘quasi’ would certainly be an insulting diminishment.⁸ This article seeks to highlight the basic point that nonhuman animals already have a ‘quasi’ status on the personhood side, since they *already* have some legal rights, and they are *already* treated as more than mere property.

There are examples of personhood being used without a qualifier for nonhuman animals. Sandra the orangutan in Argentina was given a judicially declared personhood status in 2015.⁹ A court in the state of Uttarakhand in India has very recently ruled that “all members of the animal kingdom [including birds and fish]”¹⁰ should qualify as a ‘legal person or entity’ with similar rights as human beings.¹¹ Citizenship is a

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8. The Canadian *Indian Act*, SC 1876, c 18, excluded Indigenous persons from the category of legal personhood, with the revision, *Indian Act*, RSC 1927, c 98, decreeing that “‘person’ means an individual other than an Indian” at 2(i). This stipulation remained in the Act until 1951. See Janine Brodie, “White Settlers and the Biopolitics of State Building in Canada” in Smaro Kamboureli & Robert Zacharias, eds, *Shifting the Ground of Canadian Literary Studies* (Waterloo: Wilfred Laurier University Press, 2012) 87 at 105, as cited and quoted in Kelly Struthers Montford & Chloë Taylor, “(Bey)On(d) Edibility: Towards a Nonspeciesist Food Ontology” (Presented at “Veganism and Beyond: Food, Animals, Ethics”, Queen’s University, Kingston, Ontario, Canada, 10 June 2017; “Animal Law Lab”, Faculty of Law, University of Toronto, Toronto, Ontario, Canada, 21 January 2019 and forthcoming in Kelly Struthers Montford and Chloë Taylor, eds, *Decolonizing Critical Animal Studies*). “Aboriginal people in Canada did not enjoy the full array of legal rights until 1960, when they became eligible to vote in federal elections”: David R Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World* (Toronto: ECW Press, 2017) at 49.
 9. See Emiliano Giménez, “Argentine Orangutan Granted Unprecedented Legal Rights” (4 January 2015), online: *Cable News Network* <edition.cnn.com/2014/12/23/world/americas/feat-orangutan-rights-ruling/>.
 10. See Vineet Upadhyay, “Animals Have Equal Rights as Humans, says Uttarakhand High Court” (5 July 2018), online: *The Times of India* <timesofindia.indiatimes.com/city/dehradun/members-of-animal-kingdom-to-be-treated-as-legal-entities-ukhand-hc/articleshow/64860996.cms>.
 11. Giménez, *supra* note 9.

broad idea and there is no reason why *prima facie* it cannot be used for nonhuman animals, as Canadian philosopher Will Kymlicka and Sue Donaldson have explored in a nuanced way in their book *Zoopolis*.¹²

Steven Wise and the Nonhuman Rights Project (“NhRP”) have been urging American state courts to recognize the legal personhood of chimpanzees and elephants since 2013.¹³ The NhRP argues that the law gives legal personhood to corporations, to rivers, and to important religious artefacts. This is done as a matter of public policy and moral principle, not because any of these entities resemble human beings.¹⁴ Legal personhood is a legal fiction that is ‘already artificial’.¹⁵ No heartbeat is required. Personhood is a recognition that the entity is capable of holding rights, which rights will depend on the kind of person (*e.g.* a corporation, a ship, a municipality). In that sense, ‘person’ is a mask or a social role

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12. Sue Donaldson & Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford: Oxford University Press, 2013).
 13. “Who We Are” (2018), online: *Nonhuman Rights Project* <www.nonhumanrights.org/who-we-are/>.
 14. Steven M Wise, “The Struggle of the Nonhuman Rights Project to Attain Legal Rights for Nonhuman Animals” (Fifth Annual Oxford Animal Ethics Summer School on Animal Ethics and Law: Creating Positive Change for Animals delivered at St Stephen’s House, University of Oxford, 24 July 2018) [unpublished].
 15. See Angela Fernandez, “Already Artificial: Legal Personality and Animal Rights” in Jody Greene & Sharif Youssef, eds, *Human Rights after Corporate Personhood: An Uneasy Merger* [Toronto: University of Toronto Press, forthcoming] [Fernandez, “Already Artificial”].

and should not be considered to be synonymous with a human being.¹⁶

So far, the NhRP litigation on behalf of chimpanzees and elephants has met with one judge, Justice Barbara Jaffe, a New York Supreme Court judge who understands what they are saying on the legal personhood point. She wrote, summarizing the NhRP's arguments, that "the law accepts in other contexts the 'legal fiction' that nonhuman entities, such as corporations, may be deemed legal persons".¹⁷ This "is a matter of policy and not a question of biology".¹⁸ Justice Jaffe discussed legal personhood in the terms the NhRP urges, namely, that this is about "who counts under our law".¹⁹ And she examined the point that the NhRP always urges, namely that slaves, women, and children were also historically excluded from the category of legal personhood.²⁰ "[T]he

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16. Merriam-Webster Inc, *Webster's Third New International Dictionary* (Merriam-Webster, 2000) sub verbo "person" ("an individual human being" as the first definition of 'person' but notes that the word comes from *persona* or mask) [*Webster's*]. See Mary Midgley, "Persons and Non-Persons" in Peter Singer, ed, *In Defense of Animals* (Oxford & New York: Oxford University Press & Blackwell, 1985) 52–62 at 54 [Singer, *In Defense of Animals*], reproduced in David Favre, *Animal Law: Welfare, Interests, and Rights* 2d (New York: Wolters Kluwer Law & Business, Aspen Elective Series, 2011) 401 at 403 (relying on the *Oxford English Dictionary* to make the mask point) [Favre, *Animal Law*]. See Saru M Matambanadzo, "Embodying Vulnerability: A Feminist Theory of the Person" (2012) 20:45 *Duke Journal of Gender Law & Policy* 45 (Saru Matambanadzo points out that the connection between masks and person was made by both Max Radin in 1932 and Lon Fuller in his book *Legal Fictions* (Palo Alto: Stanford University Press, 1967), who argued that "personhood was originally metaphorical because it meant 'mask'" at 65 nn 119, 120).
17. Barbara Jaffe, *The Nonhuman Rights Project, Inc, on behalf of Hercules and Lep v Samuel L Stanley Jr, MD, as President of State University of New York at Stony Brook aka Stony Brook University and State University of New York at Stony Brook aka Stony Brook University* (NY Sup Ct 2015) at 21–22, online (pdf): *Nonhuman Rights Project* <www.nonhumanrights.org/content/uploads/Judge-Jaffes-Decision-7-30-15.pdf> [*Jaffe Decision*].
18. *Ibid* at 22.
19. *Ibid* at 23.
20. *Ibid*.

issue of a chimpanzee’s right to invoke the writ of habeas corpus is best decided, if not by the Legislature”, Jaffe J writes, “then by the Court of Appeals, given its role in setting state policy”.²¹

Since Jaffe J wrote her opinion in 2015, the New York Court of Appeals has twice denied the NhRP leave to appeal in the chimpanzee cases.²² The most recent time this happened, in May 2018, one of the judges, Justice Eugene Fahey, expressed doubts about whether it had been correct to deny leave three years earlier and wrote some very strong words of support for the organization’s mission.²³ Calling the question whether “an intelligent nonhuman animal who thinks and plans and appreciates life as human beings do have the right to the protection of the law against arbitrary cruelties and enforced detentions visited on him or her... a deep dilemma of ethics and policy that demands our attention”.²⁴ He wrote that relying on the “simple either/or proposition”²⁵ whether a party is a ‘person’ or a ‘thing’ “amounts to a refusal to confront a manifest injustice”.²⁶ Yet even Fahey J was not keen on the personhood argument.²⁷

I think the judges, with the exception of Jaffe J, are hearing ‘human being’ when they hear ‘person’. And in fairness to them, much of the NhRP expert evidence has to do with how cognitively complex and very

21. *Ibid* at 31.

22. Mot for leave to appeal, *The People, The Nonhuman Rights Project Inc, on behalf of Tommy v Patrick C Lavery*, 2014 NY Slip Op 083136 (NY App Div 2015), online: *New York Courts* <www.nycourts.gov/reporter/motions/2015/2015_83136.htm>.

23. Mot for leave to appeal, *In the Matter of Nonhuman Rights Projects, Inc, on Behalf of Tommy, Appellant, v Patrick C Lavery, Respondents; In the Matter of Nonhuman Rights Project, Inc, on Behalf of Kiko, Appellant, v Carmen Presti, Respondents*, No 2018–268 (NY Ct App 2018), online (pdf): *New York Courts* <www.nycourts.gov/ctapps/Decisions/2018/May18/M2018-268opn18-Decision.pdf> [*Fahey Concurrence*].

24. *Ibid* at 5.

25. *Ibid* at 6.

26. *Ibid*.

27. See *ibid* (“[t]he better approach in my view is to ask not whether a chimpanzee fits the definition of a person or whether a chimpanzee has the same rights and duties as a human being, but instead whether he or she has the right to liberty protected by habeas corpus” at 4).

much like human beings chimpanzees are. Even though the judges, and all of us, especially those who are legally trained, should be able to hear the personhood argument and think about nonhuman entities like ships, rivers, trusts, and corporations, I think an emotional part of the brain kicks in, creating a negative reaction, a kind of outrage factor, ‘no, they are not like us’.

In the future, speciesism may come to look no different than the bigotry of racism or sexism. I do not discount that possibility. Justice Fahey, for instance, did call out one of the New York lower court rulings for its speciesism, writing that their “conclusion that a chimpanzee cannot be considered a ‘person’ and is not entitled to habeas relief is in fact based on nothing more than the premise that a chimpanzee is not a member of the human species”.²⁸

Human specialness or distinctiveness is a deeply divisive issue, notwithstanding the ascendancy of post-humanism and growing awareness of the Anthropocene and the need to fundamentally change how we think about the earth, including our attitudes towards its nonhuman animals. This shift in scientific and moral thinking is fundamentally about recognizing the interconnectedness of life, the devastating extent of the impact of human activity, and ultimately conceptualizing the human as *inside* and part of nature rather than *outside* and superior to everything else in it.²⁹ As David R Boyd puts it: “Geologists, a group hardly known

28. *Ibid* at 4.

29. See e.g. Jedediah Purdy, *After Nature: A Politics for the Anthropocene* (Cambridge: Harvard University Press, 2015) (defining the revolution in ideas that the Anthropocene represents “the end of the division between people and nature” at 3; “[t]he history of environmental imagination shows recurrent aliveness to the ways in which the world is full of consciousness, experience, and pattern that are distinct from ours but, in imperfect ways, available to us. How to behave in relation to the vital opacity of other life and of nonhuman order is one of the basic questions for a politics of the Anthropocene. The world we make expresses our alertness or insensibility to these things, and, in turn, shapes us for greater sensitivity or blunts us into indifference. Imperfect as democracy still is as a human thing, part of its challenge now is to make space, in the imagination and sympathy of people, for the nonhuman world” at 50).

for hyperbole, have named this geological era the Anthropocene because of the scope and scale of human impacts on the Earth”.³⁰ As Fahey J wrote about the “profound and far-reaching”³¹ issue of a nonhuman animal’s liberty interest: “It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it”.³²

Charlotte Montgomery has written about the ambiguity in thinking about being “only human”.³³ On the one hand, “we are able to recognize only ourselves and not ourselves in other species”,³⁴ insisting on our position as the ones who rule the planet. Only humans have this special place, a view associated with anthropocentrism, “the widespread human belief that we are separate from, and superior to, the rest of the natural world”.³⁵ On the other hand, Montgomery asks, might we be able to accept “a different kind of *only*” — in which we “are only one version of life on Earth”.³⁶ ‘Only’ in this sense connotes a demotion in which we are *merely* human, a move that those who oppose the expansion of animal rights fear.

As the Assistant State Attorney General representing SUNY University in one of the NhRP chimpanzee cases argued, “I worry about the diminishment of these [*habeas corpus*] rights in some way if

30. Boyd, *supra* note 8 at xxii.

31. *Fahey Concurrence*, *supra* note 23 at 7.

32. *Ibid.*

33. See Charlotte Montgomery, *Blood Relations: Animals, Humans, and Politics* (Toronto: Between the Lines, 2000) at 297–98.

34. *Ibid.*

35. See Boyd, *supra* note 8 at xxiii; Montgomery, *supra* note 33 at 298 [emphasis in original].

36. Montgomery, *supra* note 33 at XX.

we expand them beyond human beings”.³⁷ Both Richard Posner and Martha Nussbaum raised the concern in their reviews of Stephen Wise’s book *Rattling the Cage: Towards Legal Rights for Animals*³⁸ that giving nonhuman animals better rights may result in better treatment of those animals or worse treatment of human beings.³⁹ Nussbaum, who is friendly to the animal agenda in a way that Posner is not, wrote at that

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37. Transcript of the Hearing, *The Nonhuman Rights Project, Inc, on behalf of Hercules and Leo v Samuel L Stanley, Jr, MD, as the President of State University of New York at Stony Brook aka Stoney Brook University and State University Of New York At Stony Brook aka Stony Brook University*, No 152736/15 at 51 (NY Sup Ct 6 October 2015), online (pdf): *Nonhuman Rights Project* <www.nonhumanrightsproject.org/wp-content/uploads/2015/06/Transcript-of-5.27.15-Hearing-Hercules-and-Leo.pdf>. See also *Unlocking the Cage*, 2016, DVD (New York City: First Run Features, 2017) at 01h:23m:03s [*Unlocking the Cage*] (Christopher Coulston making the point before Justice Jaffe).
38. Steven M Wise, *Rattling the Cage: Toward Legal Rights for Animals* (Boston: De Capo Press, 2000, 2d 2014).
39. See Richard A Posner, “Animal Rights” (2000) 110:3 Yale Law Journal 527 (“if 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” at 535); Martha C Nussbaum, “Animal Rights: The Need for a Theoretical Basis” (2001) 114:5 Harvard Law Review 1506 (“[w]e might treat chimpanzees better, or we might treat humans worse” at 1522).

time that she wants to be able to say that human beings are ‘special’.⁴⁰

My thinking here is that, at least for the present time, ‘quasi’ (especially in relationship to ‘person’) has the advantage of not setting off this particular fistfight, namely, whether human beings are special or different from other animals such that those differences (linguistics, rationality or some other feature) entitle humans to use those other animals in ways that would amount to cruelty absent customary and legal exemptions for that treatment.

Justice Jaffe relied on a law review article to discuss the idea of ‘quasi-person’, which suggests she thinks that there is something promising in it.⁴¹ The legal scholar who wrote that article, Saru Matambanadzo, argues that:

In threshold disputes concerning the recognition of novel classes of legal persons...those individuals and entities whose existence mirrors that of an embodied human being should be treated to a presumption of legal recognition...that accords them *at least* the status of quasi-personhood.⁴²

Her proposal takes nonhuman mammals out of being considered property; however, other animals, who do not give birth to live young, would still be considered property.⁴³ In other words, property would still

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40. See Nussbaum, *ibid* at 1521. But see Martha C Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge: Harvard University Press, 2009) 325 (writing that “there seems to be no good reason why existing mechanisms of basic justice, entitlement, and law cannot be extended across the species barrier” at 326; stating that because “[a]ll of our ethical life involves...an element of projection... It does not seem impossible for the sympathetic imagination to cross the species barrier” at 354–55 (quoted in Jessica Eisen, “Animals in the Constitutional State” (2017) 15:4 *International Journal of Constitutional Law* 909 at 952) [Eisen, “Animals in the Constitutional State”]). This chapter of *Frontiers of Justice* is a revised version of Martha C Nussbaum, “Beyond ‘Compassion and Humanity’”: Justice for Nonhuman Animals” in Sunstein & Nussbaum, *supra* note 4, ch 14, first published in 2004).
41. See Matambanadzo, *supra* note 16 (“[a]nimals occupy the status of quasi-persons, being recognized as holding some rights and protections but not others” at 61); See *Jaffe Decision*, *supra* note 17 at 25.
42. Matambanadzo, *ibid* at 76 [emphasis in original].
43. See *ibid* at 82.

be considered appropriate for some animals, even if that property status is not inconsistent with the animal having some rights, similar to the current legal treatment of pets or companion animals, for whom there are limited rights against willful cruelty or neglect or who may be the subject of pet trusts (*e.g.* in New York) or be thought of as belonging to guardians rather than owners in some jurisdictions (*e.g.* Rhode Island).⁴⁴

‘Quasi’ is something lawyers resort to when referring to legal phenomena that are between (often overly) rigid categories. We have the category of quasi contract, the not-quite-contract, which turned into the law of unjust enrichment or restitution, which does not require a promise and is not based on intention.⁴⁵ There are quasi-judicial bodies like the National Labour Relations Board and quasi-legislative agencies such as the Interstate Commerce Commission.⁴⁶ There are many other legal concepts such as ‘quasi admission’ (usually an extra-judicial utterance creating an inconsistency with entered evidence); ‘quasi estoppel’ (where there has been legitimate reliance, a person may not assert a claim inconsistent with a claim previously taken); and ‘quasi in rem jurisdiction’ (a personal action based on a party’s interest in property within the jurisdiction of the court).⁴⁷ The famous property case by the United States Supreme Court *International News Service v Associated Press*⁴⁸ invoked the idea of ‘quasi-

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44. See *ibid* at 61–62. See *Jaffe Decision*, *supra* note 17 at 25 (Justice Jaffe discusses pet trusts in New York). On pet trusts in Canada, see Lesli Bisgould, *Animals and the Law* (Toronto: Irwin Law, 2011) at 157–60 [Bisgould, *Animals and the Law*]. On guardianship, see Susan J Hankin, “Making Decisions about Our Animals’ Health Care: Does it Matter Whether We are Owners or Guardians” (2009) 2:1 *Stanford Journal Animal Law & Policy* 1 [Hankin, “Making Decisions”].
45. Henry Campbell Black, ed, *Black’s Law Dictionary*, 6d (New York: Springer Publishing, 1994) sub verbo “quasi contract” [*Black’s*].
46. Both of these American examples provided in *Webster’s*, *supra* note 16, sub verbo “quasi-judicial” and “quasi-legislative”.
47. *Black’s*, *supra* note 45, sub verbo “quasi admission”, “quasi estoppel”, “quasi in rem jurisdiction”, “quasi-public corporation”, “quasi-traditio”. The entry sub verbo “quasi” lists twenty-three other instances of use in legal doctrines that include quasi-corporation, quasi-delict, quasi-crime, quasi-tort, quasi-trustee, and quasi-usufruct.
48. 248 US 215 (1918).

property’ to characterize a valuable interest, *i.e.* the news, intangible yet deserving of protection. And, ‘quasi’, this paper will argue, is the term that best captures what we are talking about with nonhuman animals, who are importantly different from inanimate property, but it would not be appropriate for them to have the full rights of human persons. As *Black’s Law Dictionary* puts it, ‘quasi’ is a term “used to mark a resemblance”⁴⁹ *but it also* “supposes a difference”.⁵⁰

This route would be a way of securing 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 triggers duties and responsibilities in the humans who own them or come into contact with them. This approach has the virtue of working with existing and familiar legal categories in a way that is true to their inherent flexibility, rejecting the binary black and white thinking that has plagued much of the recent history of animal law.

II. Other Dichotomies — Welfare versus Rights & Pure versus Impure

Closely related to the black and white thinking of property versus persons is the dichotomy between animal welfare versus animal rights. These two ideologies arose at different times and have very different contexts, roughly speaking, the 1860s and 1870s in the United States (the 1820s

49. *Black’s*, *supra* note 45, sub verbo “quasi”.

50. *Ibid.*

in England) versus the 1960s and 1970s hippie or peace movements.⁵¹

The opposition between those approaches — improving existing conditions (welfare) and rejecting any use of animals (rights) has created and continues to create much division amongst those who want a better situation for nonhuman animals.⁵² Gary Francione stands out on this point, going as far as objecting to welfare-based initiatives. Francione explained in the introduction to the second issue of *Animal Law* in 1996, after he wrote both *Animals, Property, and the Law*⁵³ and *Rain Without*

51. Hilda Kean, *Animal Rights: Political and Social Change in Britain since 1800* (London: Reaktion Books, 1998). See Richard D Ryder, *Animal Revolution: Changing Attitudes Towards Speciesism* (Oxford: Bloomsbury Academic, 1989) at 59–60 [Ryder, *Animal Revolution*] (Ryder suggests that the humane movement flourished in England because the English were the worst in Europe to animals; he also points out that unlike other social movements where Europe followed the United States (*e.g.* the women's movement and the Civil Rights movement), the United States followed England on animal rights at 4; this was also true of the earlier movement of animal welfare). See David Favre & Vivien Tsang, "The Development of Anti-Cruelty Laws During the 1800's" (1993) 1:1 *Detroit College Law Review* 1 (Favre & Tsang write that "[t]he British set the stage" at 1; they explain that New Yorker Henry Bergh visited England, learned about the RSPCA, and successfully approached the New York legislator for a charter for the ASPCA in 1866 (at 13)). See Elaine L Hughes & Christiane Meyer, "Animal Welfare in Canada and Europe" (2000) 6:1 *Animal Law* 23 at 26 (the earliest SPCA organized in Canada was in Montreal in 1869, the same year as the first Canada-wide anti-cruelty provision, although apparently Nova Scotia was the first to pass an animal cruelty statute in North America in 1822 with New York following in 1828).
52. Lesli Bisgould, "Animal Oppression and the Pragmatist" (1997) 3:1 *Animal Law* 39 (Canadian animal lawyer Lesli Bisgould, described the conflict between advocates for rights and those for welfare as a "pernicious" one in 1997, "where disagreement is the rule rather than the exception" and animal rights movement as "in a stage of well-acknowledged and lamented in-fighting, which occurs both among and between groups" at abstract, 40).
53. Gary L Francione, *Animals, Property, and the Law* (Philadelphia: Temple University Press, 1995) at 122 [Francione, *Animals, Property, and the Law*].

Thunder.⁵⁴ His position is based on his view that there is no evidence that anti-cruelty laws lead to the abolition of animal abuse and instead reassure society that exploited animals are treated well and there is no cause for concern.⁵⁵

The book Francione co-authored with Anna Charlton in 2015, *Animal Rights: The Abolitionist Approach*, a short manifesto, contains a sustained attack on welfare reforms and ‘single issue campaigns’,⁵⁶ which they call “SICs”. These include anti-fur campaigns, lobbying to end the force feeding of geese or ducks to make foie gras from their livers, pushing to ban gestational crates for pigs, and requiring larger cages for laying hens.⁵⁷ Francione and Charlton write:

For the most part, SICs encourage people to consume *other* animal products or engage in *other* forms of animal exploitation. If people stop eating *foie gras*, they may help the geese used to make *foie gras* but they will not help the cows, pigs, chickens, and fish that people consume when they don’t consume *foie gras*. When people stop wearing fur, they may help the animals who are used to make fur coats. They do not help the sheep, cows, and other animals used to make the products that people buy when they don’t buy fur.⁵⁸

As one of the flashing banners on The Abolitionism Project website puts it: “Animal Welfare Reforms Are Not Baby Steps; They Are Big Steps in

54. Gary L Francione, *Rain Without Thunder: The Ideology of the Animal Rights Movement* (Philadelphia: Temple University Press, 1996) [Francione, *Rain Without Thunder*].

55. See Gary L Francione, “Animals as Property, Introduction” (1996) 2:1 *Animal Law* i at v [Francione, “Animals as Property”].

56. See Gary L Francione & Anna Charlton, *Animal Rights: The Abolitionist Approach* (Exempla Press, 2015) (“Principle Two: Abolitionists maintain that our recognition of this one basic right [of a nonhuman animal to be a moral person and not a thing] means that we must abolish, and not merely regulate, institutionalized animal exploitation, and that abolitionists should not support welfare reform campaigns or single-issue campaigns” at 31).

57. *Ibid.*

58. *Ibid* at 62 [emphasis in original].

a Backward Direction”.⁵⁹

An important problem with the purist or absolutist view is that many people who care about nonhuman animals do not divide neatly between welfare and rights in terms of their thinking and practical interventions (nor do they think much I suspect about whether their position is utilitarian or deontological). One must wonder if the effort parsing utilitarian (welfare) versus deontological (rights and inherent value) is the best way to focus one’s energy.⁶⁰ As Richard Ryder pointed out when he wrote *Animal Revolution: Changing Attitudes Towards Speciesism* in 1993, “animal liberation is possibly unique among the liberation movements in the extent to which it has been led and inspired by professional philosophers”.⁶¹ That might be a good or a bad thing. Both rights and welfare are intermingled in current-day concerns about the treatment of non-human animals. For example, advocates routinely speak of rights (as well as justice) when referring to improvements. And consequences are important even if they are not everything. Changing the conversation is difficult to do because welfare versus rights comes up in very practical ways (even if people are not thinking explicitly in those terms).

Francione has called law and the legal systems of most Western nations the “primary culprits”⁶² in facilitating the exploitation of nonhuman animals. And he thinks that it is “folly” to look to the legal system to lead the way in eradicating the property status of nonhuman

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59. See “Animal Rights: The Abolitionist Approach” (2018), online: *Abolitionist Approach* <www.abolitionistapproach.com/>. The comment also appears in *ibid* at 67. See also Gary L Francione & Robert Garner, *The Animal Rights Debate: Abolition or Regulation* (New York: Columbia University Press, 2010).
60. See e.g. Gary L Francione, “Rights Theory and Utilitarianism: Relative Normative Guidance” (1997) 3:1 *Animal Law* 76 [Francione, “Rights Theory and Utilitarianism”] (attacking Peter Singer’s utilitarianism).
61. Ryder, *Animal Revolution*, *supra* note 51 at 6. See Bernard Williams, *Ethics and the Limits of Philosophy* (Oxford: Routledge, 1993) (Williams wrote persuasively about the problems with using just one of the frames, utilitarian or deontological, for ethical problems generally, what he called the limits of philosophy).
62. See Francione, “Animals as Property”, *supra* note 55 at ii.

animals because neither the common law nor legislated law will ever view animals as having “non-tradeable” interests.⁶³ When the leader of an animal rights organization rejects the all-or-nothing approach of abolition (“[i]f you push for all or nothing, what you get is nothing”⁶⁴), Francione dismisses this as “new welfarism”.⁶⁵ Yet many animal lawyers are (sensibly I think) not willing to walk away from law as a strategy that they can use to challenge that belief system, which like any entrenched belief system is strong but not impenetrable to change. Cass Sunstein has stated that he thinks Francione draws too sharp a distinction between rights and welfare.⁶⁶

Related to welfarism and rights is a disagreement as to whether initiatives must protect animals for their own sake or whether it is acceptable for initiatives to line up with human interests. Satz calls projects that protect animals in a way that lines up with human interests examples of “interest convergence”,⁶⁷ a term borrowed from Derrick Bell who used it in the context of race theory to describe situations where the dominant group protects the interests of the subordinate group only when their interests happen to align.⁶⁸ This is not ideal. Satz calls it

63. *Ibid* at iv–v.

64. See Francione, “Rights Theory and Utilitarianism”, *supra* note 60 at 76 (quoting Henry Spira of Animal Rights International). See Francione, *Rain Without Thunder*, *supra* note 54 at 3 (Francione argues that the long and short-term goals of new welfarism hopelessly conflict). For a more recent statement, see Francione & Charlton, *supra* note 56 (“[v]irtually the entire animal ‘movement’, as represented by the large new welfarist organization, disagrees with me about the structural problems with animal welfare reform and the need for an abolitionist vegan baseline” at 142; setting out disagreements with animal rights organizations at 82–93).

65. *Ibid*.

66. Cass R Sunstein, “Standing for Animals (With Notes on Animal Rights)” (2000) 47:5 University of California Los Angeles Law Review 1333 at 1335, n 9, 364 [Sunstein, “Standing for Animals”].

67. Satz, *supra* note 1 at 68–69.

68. Derrick A Bell Jr, “*Brown v. Board of Education* and the Interest-Convergence Dilemma” (1980) 93:3 Harvard Law Review 518.

“legal gerrymandering for human interest”.⁶⁹ Yet convergence continues to be important in terms of achieving practical and real improvements, raising awareness and motivating people, specifically building resilience in animal advocates, who have thought about the trade-off and need to take wins where they can find them or risk taking home nothing rather than something.

Animal law legal scholar Taimie Bryant has argued that a convergence between human and nonhuman animal interests is not necessarily a bad thing. She provides two examples. First, wildlife corridors that might well be primarily motivated by the desire to reduce human automobile collisions with nonhuman animals.⁷⁰ And, secondly, legislation to protect animals against species extinction motivated by human interest in the animal or their environment rather than preservation of the animals as individuals seen as having individual moral worth.⁷¹ Bryant’s argument is that animal protection is reinforced even if those initiatives were not motivated primarily by the desire to protect animals for their own sake. She writes “it is not true that *only* actions undertaken explicitly to protect animals can reinforce such norms [of animal protection]”.⁷²

Another example of ‘interest convergence’ can be found in scholarship on the connection between human-to-human abuse and nonhuman animal abuse. This topic was a mainstay in the first decade or so of

69. Satz, *supra* note 1 at 70. See Francione, *Animals, Property, and the Law*, *supra* note 53 at 122 (Francione described a similar contrast in terms of direct duties (owed directly to the animal) versus indirect duties (that concern more than the animal).

70. Taimie L Bryant, “Similarity or Difference as a Basis for Justice: Must Animals Be like Humans to Be Legally Protected from Humans” (2007) 70:1 Law and Contemporary Problems 207 at 243–47 [Bryant, “Similarity or Difference”].

71. *Ibid* at 242–43.

72. *Ibid* at 243 [emphasis in original].

the American journal *Animal Law*.⁷³ The American group “Link” was established in 2001 and it is now the “National Link Coalition”.⁷⁴ Director of the Oxford Centre for Animal Ethics, Andrew Linzey, published an edited collection on the topic in 2009.⁷⁵ By 2010, writing and resources on this issue (books, articles, and websites) warranted the appearance of an annotated bibliography.⁷⁶

Director of the Islamic Legal Studies and Animal Law and Policy Programs at Harvard Law School, Kristen Stilt, has written about the role that the link between cruelty towards animals and domestic violence played in the successful efforts of local animal advocates to have a Quran-based “kind treatment of animals”⁷⁷ provision included in the 2014 Egyptian Constitution. The correspondence between animal abuse and human abuse was also invoked in Canadian debate in the late 1990s around changes to the *Criminal Code*⁷⁸ provisions dealing with offences against animals and one of the many (unsuccessful) attempts to move animals out of a property section of the Statute and in later legislative discussion of proposed changes to the Ontario anti-cruelty legislation.⁷⁹

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73. See *e.g.* Charlotte A Lacroix, “Another Weapon for Combatting Family Violence: Prevention of Animal Abuse” (1998) 4:1 *Animal Law* 1; Randall Lockwood, “Animal Cruelty and Violence Against Humans: Making the Connection” (1999) 5:1 *Animal Law* 81; Joseph G Sauder, “Enacting and Enforcing Felony Animal Cruelty Law to Prevent Violence against Humans” (2000) 6:1 *Animal Law* 1; Caroline Forell, “Using *A Jury of her Peers* to Teach about the Connection between Domestic Violence and Animal Abuse” (2008) 15:1 *Animal Law* 53.
74. See “Home” (2018), online: *National Link Coalition* <nationallinkcoalition.org/>.
75. See *The Link Between Animal Abuse and Human Violence*, ed by Andrew Linzey (East Sussex: Sussex Academic Press, 2009).
76. See Sharon L Nelson, “The Connection between Animal Abuse and Family Violence: A Selected Annotated Bibliography” (2010) 17:2 *Animal Law* 369.
77. Kristen A Stilt, “Constitutional Innovation and Animal Protection in Egypt” (2018) 43:4 *Law and Social Inquiry* 1364.
78. *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*].
79. *Ontario Society for the Prevention of Cruelty to Animals Act*, RSO, c 0-36 (1990) [*Ontario SPCA Act*].

Charlotte Montgomery describes how animal activists in the late 1990s campaigned for changes to the criminal law by stressing the link between animal cruelty and domestic abuse of humans and that “this theme – histories of violent criminals repeatedly showed a background of animal abuse – was credited with pushing the Justice Department into its discussion paper”⁸⁰ and into proposing changes to the law in the fall of 1998. The summer of 1999 saw a series of very public incidents in Ontario of dogs sustaining terrible injuries as a result of being dragged behind their owners’ cars. Public opinion was galvanized when it became known that one of the men who did this would have his dog returned to him if he was willing to pay the high vet bills.⁸¹ While the amendments to the *Criminal Code* did not pass, the government’s discussion paper has been cited authoritatively in subsequent case law involving animal protection.⁸² And members of the Ontario legislature invoked the link between human and animal abuse in legislative debate in 2008 over amendments to the *Ontario SPCA Act*.⁸³

The connection between human-to-human and human-to-nonhuman animal abuse has come under increasing scrutiny from feminist literatures on domestic violence, as well as those critical of what Justin Marceau calls “carceral animal law”.⁸⁴ Marceau argues that we should move away from the ‘link’ for purposes of policy and law-making

80. See Montgomery, *supra* note 33 at 225; Canada, Department of Justice, *Crimes Against Animals: A Consultation Paper* (Book) (Ottawa: Department of Justice, 1998).

81. Montgomery, *ibid* at 225.

82. See *e.g.* *R v White*, [2012] 326 Nfld & PEIR 225 (PC) at para 9.

83. See *e.g.* Ontario, Legislative Assembly, *Official Reports of Debates (Hansard)*, 39th Parl, 1st Sess, (5 May 2008) (MPP (Brant) Dave Lavac, speaking of individuals who harm animals — “and research tells us the next step is people” at 1586; and MPP (Dufferin-Caledon) Sylvia Jones who said “if an individual is inclined to abuse their animal, they are more likely to abuse their spouse or child” at 1589) as cited in *Bogearts v AG Ontario* [2013] Court File No 749–13 (ONSC) at para 164 [*Bogearts* (Applicant Factum)].

84. See Justin Marceau’s piece in this issue and his book *Beyond Cages: Animal Law and Criminal Punishment* (Cambridge: Cambridge University Press, 2019).

given what we know about tough-on-crime initiatives (offender registries, mandatory arrests, harsher sentences) and the resulting social injustices and ineffectiveness of such approaches. Marceau argues that the “Link” research has not just been oversold; it is deliberately misleading because it is not true that a person who hurts animals will hurt humans. Even if individuals who harm animals or set fires, or set fire to animals, are reliable red flags to social workers and others who work in the criminal justice system, Marceau argues that putting people who do those things in jail does not solve the problem. Incarceration will strip an individual of empathy rather than building it up and so it will not break a chain of violence in much the same way that imprisoning those who commit domestic abuse often makes a bad situation worse. He also points out that in the area of American animal law state legislatures explicitly traded agricultural farming exemptions for felony laws for animal cruelty and so the history of those harsher laws is sordid indeed.⁸⁵

Notwithstanding, the “Link” example shows just how prone we are to ‘interest convergence’ when it comes to nonhuman animals and concerns on the human agenda and these are the issues that have some chance of being legislatively addressed. The idea that cruelty to animals is bad because that cruelty hurts us (de-sensitizes us, leads to a loss of empathy, habituates cruelty and leads to its denial), found its classic

85. Justin Marceau, “Against Animal Carceral Law” (Fifth Annual Oxford Animal Ethics Summer School on Animal Ethics and Law: Creating Positive Change for Animals delivered at St Stephen’s House, University of Oxford, 24 July 2018) [unpublished]. See *e.g.* Mary Louise Peterson & David P Farrington, “Types of Cruelty: Animals and Childhood Cruelty, Domestic Violence, Child and Elder Abuse” in Linzey, *supra* note 75 (concluding that “the existing research is methodologically poor” and “tends to be based on small, unrepresentative samples, with no or poor sample controls, and it relies on retrospective accounts which may be biased by knowledge of more recent events” at 30); Jack Levin & Arnold Arluke, “Reducing the Link’s False Positive Problem” in Linzey, *supra* note 75 at 164 (acknowledging in other words that there is a false positive problem, namely that many people who harm animals do not go on to harm humans).

expression in Lord Erskine's *Cruelty to Animals Bill* in 1809.⁸⁶ It has in fact been a mainstay long before this and ever since. Mary Midgley summarizes this view by saying that "it is only because cruelty to animals may lead to cruelty to humans, or degrade us, or be a sign of a bad moral character, that we have to avoid it".⁸⁷ It is not the most inspiring message. As Montgomery put it in relationship to the Canadian experience in the late 1990s: "It was as if there had to be something in this for humans".⁸⁸

It is certainly possible to take the purist/Francione view — only initiatives with purely animal-based interests, only rights, and only persons, no property. Yet one must wonder if *contra* Francione perfection is the enemy of the good. As Favre has put it, "[i]t is a burden of the animal rights movement that so many of its leaders will support only the purest philosophical position, regardless of political feasibility".⁸⁹

Francione would say that any association with property is a mistake, especially in an American context where property is constitutionalized under the Fifth Amendment.⁹⁰ That known quantity is irredeemably corrupted and impure or compromised. Think of Audre Lorde's famous claim that the master's tools will never dismantle the master's house.⁹¹

I think for lawyers the tools are the lawyer's tools; but they can be refitted and repurposed. This is especially true in Canada where property

86. See Andrew Linzey, "Does Animal Abuse Really Benefit Us?" in Linzey, *supra* note 75 at 1 (quoting from the preamble to the Bill, cited to Lord Erskine, Second Reading of the Bill for Preventing Malicious and Wanton Cruelty to Animals, Hansard, House of Lords (May 15, 1809) at 277).

87. Mary Midgley "Persons and Non-Persons" in Singer, *In Defense of Animals*, *supra* note 16 at 57 (in the context of discussing Kant's view of nonhuman animals).

88. Montgomery, *supra* note 33 at 225.

89. David Favre, "A New Property Status for Animals" in Sunstein & Nussbaum, *supra* note 4, ch 10 at 236.

90. See Francione, *Animals, Property, and the Law*, *supra* note 53 at 46–48 (on property and the American Constitution).

91. Audre Lorde, "The Master's Tools Will Never Dismantle the Master's House" in Cherrie Moraga & Gloria Anzaldúa, eds, *This Bridge Called My Back* (New York: Third Woman Press, 1983) reprinted in Reina Lewis & Sara Mills, eds, *Feminist Postcolonial Theory: A Reader* (New York: Routledge, 2003) at 25.

is not explicitly part of our constitutionally protected liberty.⁹² Depriving a person who is treating an animal inappropriately of their ‘property’ does not sound in the same register it does in the United States.⁹³ When Canadians are thinking about the constitution, American-style original intent bends to the idea of the constitution as a ‘living tree,’ an idea (appropriately enough) introduced in Canadian constitutional law in ‘the Persons case,’⁹⁴ which gave women the right to sit in the Canadian senate. Flexibility, growth, a pragmatic balancing approach to rights has characterized Canadian jurisprudence since the 1980s, including our rules on standing as these might apply to nonhuman animals and their human representatives. Chief Justice Catherine Fraser of the Court of Appeal of Alberta wrote the following, in a footnote in her dissent, in *Reece v City of Edmonton*,⁹⁵ a case brought on behalf of an elephant named Lucy in the Edmonton Zoo: “[I]t arguably remains an open question whether the common law has now evolved to the point where, depending on the circumstances, an animal might be able to sue through its litigation

92. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982 [*Charter*] (Section 7 protects life, liberty, and security of the person except where this is incompatible with the principles of fundamental justice).

93. But see Bisgould, *Animals and the Law*, *supra* note 44 at 49 (pointing out that the property arguments are nonetheless analogous in Canada and adding that property comes in at another level because most harm to animals is happens on private property).

94. See *Edwards v Canada (AG)* [1930] AC 124 (UK PC); Robert J Sharpe & Patricia I McMahon, *The Persons Case: The Origins and Legacy of the Fight for Legal Personhood* (Toronto: University Toronto Press, 2007).

95. *Reece v Edmonton (City)*, 2011 ABCA 238 [*Reece*].

representatives to protect itself”.⁹⁶

There have been so many attempts to amend the cruelty provisions of the Canadian *Criminal Code*, they are difficult to count. The provisions have not been successfully amended since the 1950s and really have not changed appreciably since 1892, with the exception of dramatic changes in sentencing in 2008 from the previously available six months summary conviction.⁹⁷ A ten-fold increase in the available penalties has been taken as a signal of Parliament acknowledging that “the *Criminal Code* provisions concerning cruelty to animals had fallen drastically out of step with current social values”.⁹⁸

Canadian animal rights advocate and animal law scholar Lesli Bisgould counts thirteen attempts to modernize the provisions between

96. See *ibid* at para 179, n 143. See Leah Edgerton of Animal Charity Evaluators “What is the Most Effective Way to Advocate Legally for Nonhuman Animals” (29 August 2016), online: *Animal Charity Evaluators* <animalcharityevaluators.org/blog/what-is-the-most-effective-way-to-advocate-legally-for-nonhuman-animals/> [Wise, Deckha, Pippus Debate] (Edgerton posted a debate between Steven Wise, Maneesha Deckha, and Anna Pippus; Anna Pippus of Animal Justice Canada notes since the *Reece* case the Supreme Court of Canada has expanded its concept of standing in *Canada (AG) v Downtown Eastside Sex Workers United Against Violence*, 2012 SCC 45).

97. See Bisgould, *Animals and the Law*, *supra* note 44 at 58, 68, 282. The change in 2008 was from summary convictions to hybrid offences, which can include imprisonment as an indictable offence (the Canadian equivalent of an American felony offence) up to five years and a fine up to \$10,000, and/or up to eighteenth months imprisonment as a summary conviction).

98. *R v Munroe*, 2010 ONCJ 226 at paras 1–2. See Bisgould, *Animals and the Law*, *supra* note 44 at 66 (Bisgould notes that the amendments were passed over widespread public objection because there was not much point increasing penalties for crimes for which few were ever convicted).

1999 and 2011.⁹⁹ The most recent, Bill C-246 *The Modernizing Animal Protection Act*¹⁰⁰ a private member's bill introduced by Liberal MP Nathaniel Erskine Smith, failed in 2016 when Liberal party leader Prime Minister Justin Trudeau failed to support it.¹⁰¹

Section 445.1 of the Canadian *Criminal Code*, which contains the animal cruelty provisions, are in a section entitled “Wilful and Forbidden Acts in Respect of Certain Property”.¹⁰² Moving them out of this section has come to be seen as very important to animal activists, who want to see the link between nonhuman animals and property broken. However, Canadian animal use industries (including agriculture, hunting and fishing groups, and fur groups) lobby hard against making this proposed change every time it is made given how significant they also see the continued connection to property to be.¹⁰³ In other words, it is a serious sticking point, even a lightning rod issue, which both sides see as a game changer. We might do well here to look at what the experience has been delinking property and nonhuman animals in other jurisdictions.

Spain, for example, has seen a very successful recent campaign around ‘animals are not things’ (*animales non cosas*).¹⁰⁴ Countries like

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99. See Bisgould, *ibid* at 58, 87–91 (reviewing some of the thirteen attempts). See also Christina G Skibinsky, “Changes in Store for the Livestock Industry? Canada’s Recurring Proposed Animal Cruelty Amendments” (2005) 68:1 Saskatchewan Law Review 173 (giving what turned out to be an overly optimistic forecast of Bill C-22 in 2004 and explaining that it was the fourth attempt to amend the provisions in four years).
100. Bill C-246, *Modernizing Animal Protections Act*, 1st Sess, 44nd Parl, 2015 (Bill defeated on 5 October 2016).
101. See Ryan Maloney, “Nathaniel Erskine-Smith’s Animal Cruelty Bill Defeated” (6 October 2016), online: *The Huffington Post Canada* <www.huffingtonpost.ca/2016/10/06/nathaniel-erskine-smith-animal-cruelty-bill-c-246_n_12371614.html>.
102. *Criminal Code*, *supra* note 78, s 445.1.
103. See Bisgould, *Animals and the Law*, *supra* note 44 at 94–96.
104. Teresa Giménez-Candela & Nuria Menéndez, “The Changing Legal Paradigm for Animals in Spain: From Things to Sentient Beings” (Fifth Annual Oxford Animal Ethics Summer School on Animal Ethics and Law: Creating Positive Change for Animals delivered at St Stephen’s House, University of Oxford, 24 July 2018) [unpublished].

Portugal and Columbia have adopted sentient statutes since France used the language of “living beings endowed with sensibility”¹⁰⁵ in their Civil Code in 2015. 2015 also saw Quebec and New Zealand recognizing the sentience of nonhuman animals.¹⁰⁶ Switzerland uses a dignity concept in relation to nonhuman animals in its Constitution (and India has the dignity concept in its jurisprudence).¹⁰⁷ Germany, Switzerland, and Austria (all of which protect animal welfare in their constitutions) have

105. *Ibid.* See also “Animals in France Finally Recognized as ‘Living Sentient Beings’” (29 January 2015), online: *Russian Times* <www.rt.com/news/227431-animals-sentient-furniture-parliament/>.

106. See e.g. Sophie McIntyre, “Animals are Now Legally Recognized as ‘Sentient’ Beings in New Zealand” (17 May 2015), online: *Independent* <www.independent.co.uk/news/world/australasia/animals-are-now-legally-recognised-as-sentient-beings-in-new-zealand-10256006.html>. In Quebec, Agriculture Minister Pierre Paradis said he was inspired by the French law. See Boyd, *supra* note 8 at 29.

107. See Jessica Eisen & Kristen Stilt, “Protection and Status of Animals” in Rainer Grote, Frauke Lachenmann & Rüdiger Wolfrum, eds, *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford: Oxford University Press, 2017) at paras 31–32 (Switzerland), 17, 70 (India), online: <oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e71?prd=MPECCOL>.

also included a ‘not things’ provision in their Civil Codes.¹⁰⁸ Nonhuman animals continue to be treated as property in these jurisdictions. What is happening is probably best understood as social and legal (specifically legislative) expressions of the idea, which finds widespread and popular support given the attachment people have to their pets, namely, that animals are not *merely* things. They have sentience, they have dignity even as they continue to be treated as property. Yet they should not be treated *as if* they are mere property. As Fahey J put it in the closing words of his concurrence: “While it may be arguable that a chimpanzee is not a ‘person’, there is no doubt that it is not *merely* a thing”.¹⁰⁹

Many advocates will say they cannot live with the continued connection to property, as the pitched Canadian debates over the *Criminal Code* section placement routinely demonstrate. However, if reforms that break the link to property (in a similarly symbolic way) have not really managed to avoid a continued property status for nonhuman animals, should there not be some continued recognition of that fact in

108. See *ibid* at paras 18–25 (Germany), 26–35 (Switzerland), 42–45 (Austria). See also Gieri Bolliger, “Legal Protection of Animal Dignity in Switzerland: Status Quo and Future Perspectives” (2016) 22:2 Animal Law 311 [Bolliger, “Legal Protection”] (explaining that the Swiss Civil Code was amended in 2003 to explicitly state “animals are not objects” but stating that they are still subject to the provisions pertaining to objects when no “special provisions” exists, *i.e.* animal welfare legislation (at 359); Austria’s amendment happened in 1988 — “[a]nimals are not things; they are protected by special laws. The provisions in force for things... apply to animals only if no contrary regulation exists” (at 359); Germany’s happened in 1990 — “[a]nimals are not things. They are protected by special statutes. They are governed by the provisions that apply to things, with the necessary modifications, except insofar as they are modified otherwise” at 359–60, n 356). The Quebec *Civil Code* adopted in 2015, strikes a similar compromise (“[a]nimals are not things. They are sentient beings and have biological needs” at Art 898.1 CCQ; however, the article goes on to state that the provisions of the *Civil Code* and any other act concerning property nonetheless apply to animals, in addition to the provisions of special acts. It also must be noted that the article appears in the book on Property). See French and English, online: *Espace CAIJ* <elois.caij.qc.ca/CCQ-1991/article898.1>.

109. *Fahey Concurrence*, *supra* note 23 at 7 [emphasis in original].

the way that we refer to the status of nonhuman animals? Would 'living property' or 'quasi-property' be better to use as a reminder of the reality that the property status has not really changed unless or until it does in fact change?¹¹⁰ Do we not need some kind of conception of property in order to establish a relationship of connection and responsibility or obligation to a domesticated animal? Or would it be better to trade in ownership for a notion like guardian?¹¹¹

The worry with sentience statutes or successful campaigns to break the explicit link to property is that people think they have accomplished something significant for nonhuman animals but everything actually stays exactly the same.¹¹² Nothing really follows from the recognition that animals feel pleasure and pain, which is probably why legislatures feel comfortable giving a declaration of sentience. Peter Singer's

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110. 'Living' does not work very well for religiously or environmentally significant objects or for sophisticated artificial intelligence systems, which would be living in metaphor only, as in full of life or meaning or significance (either to themselves or human groups) in a way that distinguishes them from inert objects. Quasi-property/Quasi-personhood would leave open the possibility of including those kind of entities if it comes to be thought that they should be legally protected as a kind of person (*i.e.* an entity with legally protectable interests).
111. See Favre, *Animal Law*, *supra* note 16 ("it is not clear to this author that a paramount interest of animals is to not be the property of human beings. For what is the alternative for their continued existence within our community... It will be in the interest of animals for humans to acknowledge that unlike other personal property, an owner of an animal has a legal obligation to the animal, thus creating a relationship closer to the nature of a guardianship" at 417).
112. Switzerland has probably gone the furthest here, recognizing the dignity of animals in their Constitution, explicitly adopting that animals are 'not things' in the *Civil Code*, and moving beyond the parameters of pain and sentience ("pathocentric") considerations to include the "biocentric," e.g. disrespectful or humiliating treatment of living and dead animals, which violates their inherent worth. See Bolliger, "Legal Protection", *supra* note 108 at 354–55. Despite all this, Bolliger writes that "no essential change in the human-animal relationship has been observed in practice" at 314.

enormously influential *Animal Liberation*¹¹³ focused on sentience and suffering following Jeremy Bentham's famous observation that what is important about animals is not whether they can reason or speak but that they suffer.¹¹⁴ Bryant points out that a focus on suffering carries a negative association that can either invoke compassion or disdain.¹¹⁵ Indigenous perspectives in which nonhuman animals figure as powerful actors arguably command more respect.¹¹⁶ Dignity would imply certain treatments would become illegal; but it does not itself make them so. And worse, legislatures now think they have dealt with 'the animal issue' and whatever limited attention there was evaporates along with a feeling that the work is done. Jessica Eisen and Kristen Stilt note with regard to animal protections at a constitutional level that countries with some

113. Peter Singer, *Animal Liberation: A New Ethics for our Treatment of Animals* (New York: Random House, 1975).

114. See Bisgould, *Animals and the Law*, *supra* note 44 at 25–26 (placing Bentham's famous quote in context).

115. See *e.g.* Bryant, "Similarity or Difference", *supra* note 70 (pointing out that using the capacity to suffer runs "the risk of provoking disdain, since the capacity to suffer is a quality that many see as a source of weakness in themselves or in humans generally" at 222).

116. See *e.g.* John Borrows, *Drawing Out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 2010) at 40–41 (describing animals in his family scrolls as the otter, snakes, water lion, bear, and thunderbird); John Borrows, "Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education" (2016) 61:4 McGill Law Journal 795 at 827–28 (describing some Anishinaabe heroes such as the turtle who gave his back to house the earth and the muskrat who sacrificed himself to bring up soil to lodge on the turtle's back; referring to heroic deeds by eagles, cranes, robins, seagulls, woodpeckers and other birds at 830); Struthers Montford & Taylor, *supra* note 8 at 13–16 (describing Indigenous perspectives on nonhuman animals as kin, as person, not object, who speak, are able to change into humans, marry and have children with humans and are powerful and deserve respect); Heidi (Kiiwetinepinesiiik) Stark, "Respect, Responsibility, and Renewal: The Foundations of Anishinaabe Treaty Making with the United States and Canada" (2010) 34:2 American Indian Culture and Research Journal 145 at 145–47, 157 (explaining the story of *The Woman Who Married a Beaver* and how it applies to treaty-making).

of the strongest *de facto* legal animal protections have no constitutional animal protection provision (Chile and the Netherlands); while Egypt, which does have constitutional protection has some of the weakest *de facto* protections.¹¹⁷

Canada is light years behind the European Union in terms of animal welfare and is generally lumped in with the United States in terms of its approach to nonhuman animals, specifically on the tendency to defer to industry practice for farm animals.¹¹⁸ According to one source:

As a generalization, existing Canadian law tends to place relatively heavy weight on human proprietary and economic interests, and the convenience of generally accepted practices. In Europe (especially in more recent times) the law tends to put greater weight on maintaining animal health and welfare

117. See Eisen & Stilt, *supra* note 107 at para 8.

118. See *e.g.* David J Wolfson & Mariann Sullivan, “Foxes in the Hen House: Animals, Agribusiness, and the Law: A Modern American Fable” in Sunstein & Nussbaum, *supra* note 4 (quoting from the Israeli Supreme Court “[o]ne tendency, dominant in the US and Canada, is to exempt accepted farming practices from the applicability of cruelty to animals” at 223).

per se.¹¹⁹

Unlike the United States, Canada has no equivalent of the federal *Animal Welfare Act*.¹²⁰ Federal criminal law is the only prosecutorial force operating in many provinces, specifically the most populated provinces of Ontario and Quebec.¹²¹ The *Ontario SPCA Act*¹²² sets out no cruelty offences, so officers can move in to alleviate distress but cannot prosecute.¹²³ With the exception of British Columbia, which has a special prosecutor for animals, animal cases, which may be diligently prepared by the Society for the Prevention of Cruelty to Animals (“SPCA”) officers, are sent to the regular prosecutor, for whom nonhuman cases are

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119. See Hughes & Meyer, *supra* note 51 at 48. See also Elaine Hughes, *Animal Welfare Law in a Canadian Context* (Edmonton: University of Alberta Faculty of Law, 2006). Montgomery is more openly critical than Hughes. See *e.g.* Montgomery, *supra* note 33 (describing the Canadian Council on Animal Welfare, which is not subject to Federal access to information law as “a public relations ploy”, and the Animal Care Committees used to regulate animal research, concluding that these bodies are an easily manipulated and industry dominated system that are the best that any business or researcher could hope for, operating as the equivalent of “an off-shore tax shelter” for animal research (at 80–127); describing the norms of cost-saving and partnership that result in an agricultural regulation system in which industry is regarded as a collection of clients for whom rules are tailored and fees collected and which relies heavily on voluntary self-policing with limited regulation on transport to slaughter and conditions in the abattoirs, which is hands-off, after-the-fact surveillance rather than on-site monitoring, policies that emerged in the national codes adopted in the 1980s and in the 1990 federal *Health of Animals Act* (at 128–74)). See also Bisgould, *Animals and the Law*, *supra* note 44 at 174–86 (on the Canadian Council on Animal Care at 208–14; on the *Health of Animals Act* and the *Health of Animals Regulations*).
120. *Animal Welfare Act*, 7 USC §2132–2159 (2015).
121. Hughes & Meyer, *supra* note 51 at 29. See *Criminal Code*, *supra* note 78, s 444–447.
122. *Ontario SPCA Act*, *supra* note 79.
123. Hughes & Meyer, *supra* note 51 at 29, n 46. Manitoba, New Brunswick, the Northwest Territories/Nunavut are also primarily or completely reliant on the *Criminal Code* for prosecution. The other provinces passed anti-cruelty acts in the 1990s. See Hughes & Meyer, *supra* note 51 at 29, n 47.

a low priority.¹²⁴ Camille Labchuk, Executive Director of Animal Justice Canada, argues that the dominance of industry written codes for farm animals and reliance on the diligence of a charitable organization like an SPCA in Ontario results in an unacceptable level of privatization of animal protection in Canada.¹²⁵

One solution here would be to focus on legislative reform that would give animal protection groups the ability to bring civil actions on behalf of nonhuman animals or private prosecutions of the criminal law when the state authority refuses to act.¹²⁶

The majority of the Alberta Court of Appeal in the case of Lucy the elephant did not reach the standing issue because they could not get (or would not go) past the point that the proceedings were an abuse of process for usurping the authority of the Humane Society of Edmonton (charged with enforcing the Alberta *Animal Protection Act*¹²⁷), the Attorney General (who is ultimately responsible for criminal prosecutions), the jurisdiction of the criminal courts, and zoo licensing bodies.¹²⁸ Zoocheck and People

124. Alexandra Janse, Ari Goldkind & Crystal Tomusiak, “Crimes Against Animals: The Value of Specialized Cruelty Prosecutors” (Program delivered at Ontario Bar Association Animal Law Section, Twenty Toronto Street Conferences and Events, Toronto, Ontario, 26 May 2015) [unpublished]. Alexandra D Janse, Crown Counsel for the Ministry of Justice in the Province of British Columbia, has been the animal cruelty resource Crown in Kamloops, British Columbia since 2011.

125. Camille Labchuk, “The Creeping Privatization of Animal Protection Lawmaking and Enforcement” (Fifth Annual Oxford Animal Ethics Summer School on Animal Ethics and Law: Creating Positive Change for Animals delivered at St Stephen’s House, University of Oxford, 23 July 2018) [unpublished]. See also Bisgould, *Animals and the Law*, *supra* note 44 at 197–200 (describing the industry written codes, which endorse intensive agriculture including many of its most harmful practices).

126. See Sophie Gaillard & Peter Sankoff, “Bringing Animal Abusers to Justice Independently: Private Prosecutions and the Enforcement of Canadian-Animal Protection Legislation” in Peter Sankoff, Vaughan Black & Katie Sykes in eds, *Canadian Perspectives on Animals and the Law* (Toronto: Irwin Law, 2015) 307.

127. *Animal Protection Act*, RSA 2000, c A-41 [*Animal Protection Act*].

128. See *Reece*, *supra* note 95 at paras 30–32.

for the Ethical Treatment of Animals (“PETA”) were asking for a civil declaratory judgment ordering Lucy to be transferred to an elephant sanctuary in a warmer climate where she could be with other elephants, something akin to the NhRP litigation, at least in terms of the desired outcome for the animal.

The two judges who disagreed with Chief Justice Catherine Fraser of the Alberta Court of Appeal expressed concerns about granting civil declarations based on the violation of a penal statute at the request of a non-state actor. The worries included circumventing the criminal burden of proof, a lower standard of proof, loss of rights such as the presumption of innocence and other evidentiary and procedural protections.¹²⁹ Chief Justice Fraser pointed out that “a private citizen can bring an action to enforce the criminal law”¹³⁰ and to the extent that this was the rationale for finding an abuse of process it was an error in the chambers judge’s decision to strike the pleadings. She noted that the Attorney General may stay the proceedings or elect to participate.¹³¹ It is also worth emphasizing that Zoocheck and PETA were not asking for the City of Edmonton to be punished as per the anti-cruelty statute, *The Animal Protection Act*.¹³² They were using the prohibition against causing “distress” to an animal in the Act to justify an order to have Lucy removed and relocated to a better environment.¹³³

Where nonhuman animal interests are not being effectively protected by the criminal anti-cruelty enforcement due to scarce resources, a failure to value nonhuman animals’ interests or for whatever other reason, something else is needed. David Favre explains that North Carolina has

129. See *ibid* at para 29.

130. *Ibid* at para 142.

131. *Ibid* at n 115.

132. *Animal Protection Act*, *supra* note 127, s 2(1), 2(1.1) (“[n]o person shall cause or permit an animal of which the person is the owner or the person in charge to be or to continue to be in distress” at s 2(1)).

133. *Ibid* (which sets out that a person contravening the act is guilty of an offence and liable to a fine of not more than \$20,000 and if found guilty “the Court may make an order restraining the owner from continuing to have custody of an animal for a period of time” at s 12).

a statute that gives standing to any “real party in interest”¹³⁴ to bring an action based on harm to the animal. Relief is limited to injunctive remedies, under which ownership of the harmed animal may be severed without compensation.¹³⁵ The scope of the law was successfully tested at the trial and appeal level in a hoarding case by the Animal Legal Defense Fund.¹³⁶ Favre categorizes this statute as an example of a *strong* legal right (as opposed to the *weak* legal right that exists when only the state may assert or protect animal interests, or *preferred* legal rights where the interests can be asserted directly by the animal — through its human representatives, as the Chief Justice alluded to in her now famous footnote in Lucy’s case).¹³⁷ Nonhuman animals who are given access to such a strong legal right remain property, even if such a right nudges them further along towards legal (not human) personhood.

An Ontario Supreme Court judge has agreed that Ontario SPCA (“OSPCA”) investigations violate section 7 of the *Canadian Charter of Rights and Freedoms* (protecting life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice) and they cannot be saved by section 1.¹³⁸ The judge held that “law enforcement bodies must be subject to reasonable standards of accountability and transparency.”¹³⁹ As a privately run charitable organization it lacks this and that is unacceptable, and unconstitutional.¹⁴⁰ The judge adopted intervenor Animal Justice Canada’s argument that “although [it is] charged with law enforcement responsibilities, the OSPCA is opaque, insular, unaccountable, and potentially subject to external influence, and as such Ontarians cannot

134. Favre, *Animal Law*, *supra* note 16 at 342 (setting out the text of the statute).

135. See *ibid.*

136. *Ibid.* See also William Reppy Jr, “Citizen Standing to Enforce Anti-Cruelty Laws by Obtaining Injunctions: The North Carolina Experience” (2005) 11:1 *Animal Law* 39 (giving a history of changes to the statute up to 2005).

137. See Favre, *ibid* at 415.

138. *Charter*, *supra* note 92, s 7.

139. *Bogearts v Attorney General of Ontario*, 2019 ONSC 41 at para 86.

140. *Ibid* at para 90.

be confident that the laws it enforces will be fairly and impartially administered.”¹⁴¹ The government has been given one year to rethink its approach to animal protection in the province.¹⁴²

III. Is Property the Problem?

Stephen Wise agrees with Gary Francione that “the interests of nonhuman animals can only be protected by the eradication of their legal property status”.¹⁴³ However, Wise disagrees with the abolitionist perspective. Wise writes: “Today’s New Welfarists can help alleviate the immediate suffering of nonhuman animals. This is itself a laudable goal”.¹⁴⁴ For instance, Wise disagrees where Francione says water given on compassionate grounds to a thirsty cow on its way to slaughter is contributing to and helping to support that slaughter (for Canadians, think Anita Kranjc of Toronto Pig Save and the overheated pig she gave water to on its way to slaughter).¹⁴⁵ He points out that lawyers (and others we might add) must work within the (compromised) world as it exists, doing what they can.¹⁴⁶ Wise also disagrees with Francione’s pessimism about the law, specifically on the notion of personhood and the role it can play in animal advocacy. Wise thinks that Francione is wrong to use a moral notion of personhood rather than a legal one.¹⁴⁷ It is indeed striking (to lawyers) that when Francione uses the idea of a person, in contrast to property, he almost

141. *Ibid* at para 91.

142. *Ibid* at para 98.

143. Stephen M Wise, “Thunder Without Rain: A Review/Commentary of Gary L Francione’s Rain Without Thunder: The Ideology of the Animal Rights Movement” (1997) 3:1 *Animal Law* 45 at 47 [Wise, “Thunder Without Rain”].

144. *Ibid* at 54.

145. *Ibid* at 53. See *R v Kranjc*, 2017 ONCJ 281 (Kranjc was acquitted of the charge of mischief for giving the pig water). See Maneesha Deckha in this volume and Maneesha Deckha, “The ‘Pig Trial’ Decision: The Save Movement, Legal Mischief, and the Legal Invisibilization of Farmed Animal Suffering” (2019) 50:1 *Ottawa Law Review* 65.

146. Wise, “Thunder Without Rain”, *supra* note 143 at 59.

147. *Ibid* at 47.

always means a moral rather than a legal person.¹⁴⁸ This is consistent with the position he and Charlton advocate that the way to move forward on animal issues is to adopt a vegan lifestyle and try to get others to do the same using grassroots nonviolent education.¹⁴⁹ Hence, the purism means only veganism, all the time, and no vegetarianism or ‘happy meat’.¹⁵⁰ They also state that they think events like VegFest and Veggie Parade are confusing and should be avoided because they promote vegetarianism as well as veganism.¹⁵¹

Starting in the mid-1990s Wise began writing extensively in law review articles about the need to reject the property status of nonhuman animals, for example, referring to “the legal thinghood” of nonhuman animals and how it trapped them in “a nonexistent universe”.¹⁵² He called the distinction between property and persons rooted in Roman law the “Great Legal Wall”, with every human a legal person possessing legal rights on one side and every other non-human thing with no rights on

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148. See *e.g.* Francione & Charlton, *supra* note 56 (animals are not things, they “matter morally”, “to be property is to be *something*, not *someone*” at 12; animals “have the right to be a moral person and not a thing” at 29). See also Gary L Francione, “Animal Welfare and the Moral Value of Nonhuman Animals” (2010) 6:1 *Law, Culture and the Humanities* 24. Sometimes legal personhood is discussed. See *e.g.* Francione, *Animals, Property, and the Law*, *supra* note 53 at 110. However, the work never advocates for the use of that status, as far as I can tell.
149. See Francione & Charlton, *supra* note 56 at 69–96.
150. See *ibid* and also Gary L Francione, “Animal Welfare, Happy Meat, and Veganism as a Moral Baseline” in David Kaplan, ed, *The Philosophy of Food* (Berkeley: University of California Press, 2012) 169.
151. See Francione & Charlton, *supra* note 56 at 78.
152. See Steven M Wise, “The Legal Thinghood of Nonhuman Animals” (1996) 23:3 *Boston College Environmental Affairs Law Review* 471; Stephen M Wise, “How Nonhuman Animals were Trapped in a Nonexistent Universe” (1995) 1:1 *Animal Law* 15. See also Steven M Wise, “Hardly a Revolution – The Eligibility of Non-Human Animals for Dignity-Rights in a Liberal Democracy” (1998) 22:3 *Vermont Law Review* 793.

the other.¹⁵³ He used that idea again in the influential book he published in 2000, *Rattling the Cage: Toward Legal Rights for Animals*.¹⁵⁴ In 2013–14, Wise’s organization, the Nonhuman Rights Project (NhRP), brought the chimpanzee law suits in New York State using writ of *habeas corpus* in state court with the following hope: if the statute and writ applies to chimpanzees then they are persons in some sense and this will have been recognized by an American court.¹⁵⁵

The strategy is controversial. There is the risk (not insignificant) of creating adverse precedent, a risk Wise has acknowledged.¹⁵⁶ Others like Jesse Donahue point out that sanctuaries are not necessarily better places for animals to go to than (at least some) zoos and, in any case, sanctuaries cannot be an across-the-board solution for all captured exotic animals given the sheer number of these animals currently living in inappropriate

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153. Steven M Wise, “Animal Thing to Animal Person – Thoughts on Time, Place, and Theories” (1999) 5:1 Animal Law 61 at 61 [Wise, “Animal Thing to Animal Person”].
154. Steven M Wise, *Rattling the Cage: Toward Legal Rights for Animals* (Boston: De Capo Press, 2000, 2d 2014) at 4, 270.
155. See Fernandez, “Already Artificial”, *supra* note 15 (discussing Wise’s work, the NhRP approach in the chimp cases, and the 2016 documentary *Unlocking the Cage*); Angela Fernandez, “Legal History and Rights for Nonhuman Animals: An Interview with Steven M Wise” (2018) 41:1 Dalhousie Law Journal 197 [Fernandez, “Legal History and Rights for Nonhuman Animals”].
156. See *e.g.* Wise, “Animal Thing to Animal Person”, *supra* note 153 (“[i]f these early cases are brought at the wrong time, in the wrong place, or before the wrong judges, they may strengthen the Great Legal Wall” at 68). See also Fernandez, “Legal History and Rights for Nonhuman”, *ibid* (discussing the adverse precedent concern).

conditions.¹⁵⁷ Also, there are good and bad sanctuaries.¹⁵⁸ Then there is the moral issue of focusing on the cognitively advanced nonhuman animals, which draws criticism particularly from feminist animal scholars.

Catherine MacKinnon has argued that the ‘like us’ model of sameness is as bad an idea for animals as it was for women.¹⁵⁹ Bryant has written about how the ‘similarity’ approach “creates a hierarchy of worthiness”¹⁶⁰ in which “humans are the standard against which other animals are measured”.¹⁶¹ Bryant also points out that the cognition

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157. Jesse Donahue, “Back to the Future: The New Politics of Elite Access to Exotic Animals” (Paper delivered at Zoo Studies and New Humanities: A Workshop, Hamilton, Ontario, 2–3 December, 2016) (pointing out that moving animals to sanctuaries is not a panacea when there are good and bad sanctuaries just as there are good and bad (or worse) zoos and there are pros and cons to sanctuaries). See Jesse Donahue, “Introduction: The Legal Landscape and Possibilities for Change” & Ron Kagan, “Sanctuaries: Zoos of the Future?” in *Increasing Legal Rights for Zoo Animals: Justice on the Ark*, Jesse Donahue, ed. (Lanham: Lexington Books, 2017) at xiii–xxv, 131–45 [Donahue, *Increasing Legal Rights for Zoo Animals*].
158. Kathy Hessler, “Legal and Ethical Issues for Sanctuaries” (Fifth Annual Oxford Animal Ethics Summer School on Animal Ethics and Law: Creating Positive Change for Animals delivered at St Stephen’s House, University of Oxford, 23 July 2018) (distinguishing a ‘true’ sanctuary from a ‘false’ one on the grounds that a true one is: designed for animals, not people (as opposed to being designed for people to see or interact with animals as evidenced by things like rides, photo ops, and opportunities to touch animals); it does not breed animals (or sell or trade them); it commits to maintaining animals for the rest of their lives; it does not take animals to fairs or other events; it provides them with medical care; it maintains appropriate habitat, groupings, and food; habitat is not designed for easy viewing and interaction; and it protects animals from people by reducing contact with people to what is necessary for medical and other purposes).
159. See Catharine A MacKinnon, “Of Mice and Men: A Feminist Fragment on Animal Rights” in Sunstein & Nussbaum, *supra* note 4, ch 12 (“[w]omen are the animals of the human kingdom, the mice of men’s world” at 265).
160. Bryant, “Similarity or Difference”, *supra* note 70 at 215–216.
161. *Ibid.*

studies used as evidence in such cases are often obtained from just the kind of confinement and experiments animal advocates are horrified by and wish to see end.¹⁶²

Francione considers the focus on ape cognition, which he traces to Peter Singer’s “Great Ape Project” in the early 1990s, to be an inappropriate ‘SIC’ and speciesist to boot.¹⁶³ The ‘similar-minds’ argument is, furthermore, he and Charlton claim “hopelessly elitist”.¹⁶⁴

My intervention here is a different one. ‘The Great Legal Wall’, while compelling for the sweeping (and in many ways accurate) nature of its description, misleads in the context of nonhuman animals in a particular way. Specifically, Wise’s approach generally (like Francione’s) draws too sharp a distinction between property and personhood, branding one as necessarily bad (underestimating what property can be and its flexibility), while simultaneously privileging personhood (which risks an over-promise in terms of what rights can or will bring without other things about the world changing).

First, property is not a simple concept. Our concept of ownership is not synonymous with absolute dominion, whatever William Blackstone

162. *Ibid* at 220–23.

163. See Francione & Charlton, *supra* note 56 (“SICs are speciesist in a particular way in that they create a hierarchy in which certain animals are favored over other animals... For example, campaigns that concern nonhuman great apes, dolphins and other marine animals, and elephants all focus on how similar these animals are cognitively and emotionally (and in the case of nonhuman great apes, genetically) to humans. This approach results in the creation of a hierarchy that privileges certain animals and falsely portrays them as being more worthy of consideration and protection” at 49); see also at 99–100.

164. *Ibid* at 103.

said.¹⁶⁵ Just because I own something does not mean I can do whatever I want with it. I can own an old dirty emissions-producing car but in order to drive it, I must bring it up to emissions-producing standards for vehicles in the jurisdiction in which I live. The state routinely interferes with property ownership. In the developed West, we live in a highly regulated environment in which the state imprints itself on countless aspects of our lives, a trade off that makes sense given our needs, as vulnerable individuals, for things like safety and communal care and responsibility (taxes for roads, public libraries, and social services). Property ownership exists against the background of those limitations and responsibilities. Property can permit abuse but property is also limited. There are many things you cannot do even when you have ownership of something (destroy and waste, abandon, etc).¹⁶⁶ So the status is not necessarily inconsistent with non-abuse and the status certainly does not necessarily involve or permit abuse.

Secondly, personhood and legal rights will not necessarily or automatically lead to better treatment of nonhuman animals. We need look no further than human rights, routinely violated with impunity *despite* the consensus that all human beings have equal moral worth and the enshrinement of that principle in various legal instruments, domestic and international. Vulnerability is a universal feature of the

165. See “Book the Second: The Rights of Things – Chapter the First: Of Property in General” *Blackstone’s Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765–69), online: *The Avalon Project* <avalon.law.yale.edu/18th_century/blackstone_bk2ch1.asp> (“[t]here is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe” at 2).

166. In the context of animal law, there are cases having to do with owners who give directives in their wills for their animals to be destroyed after their death, which are voided by courts once they come to public attention. See Taimie L Bryant, “Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of Animals as Property, and the Presumed Primacy of Humans” (2008) 39:2 *Rutgers Law Journal* 247 at 301–10.

human condition.¹⁶⁷ It is accentuated for the weak and powerless, who have much less of a chance in having violations of their rights redressed. As Jessica Eisen has put it, echoing work like Satz's, the vulnerability of nonhuman animals is "radical" due to their "voicelessness"¹⁶⁸ As Fraser CJ of the Alberta Court of Appeal put it in Lucy's case, "[a]nimals over whom humans exercise dominions and control are a highly vulnerable group. They cannot talk — or at least in a language we can readily understand".¹⁶⁹ Simply giving legal personhood to nonhuman animals will not automatically make them less vulnerable.

Sandra the orangutan in Argentina after her court-acclaimed personhood designation in 2015 continues to languish in the now-closed zoo in Buenos Aires.¹⁷⁰ Donahue notes that despite the 2008 Spanish Parliament's declaration granting rights to nonhuman primates (specifically chimpanzees, orangutans, gorillas, and bonobos) and making it illegal to do experiments on them or confine them arbitrarily, apes can remain in captivity for conservation purposes and so the Barcelona Zoo continues to house orangutans.¹⁷¹ Declarations of legal personhood will not, contrary to the sense one gets reading Wise's work (or watching the film *Unlocking the Cage*¹⁷² about the NhRP 2013 chimpanzee cases), lead

167. Martha Fineman, "The Vulnerable Subject" (2008–2009) 20:1 Yale Journal of Law & Feminism 1.

168. See Eisen, "Animals in the Constitutional State", *supra* note 40 at 911, 942–46, 953. See also Satz, *supra* note 1 at 78–80; ("animals are rendered hyper vulnerable to changing human desires" at 89); Carter Dillard, "Empathy with Animals: A Litmus Test for Legal Personhood" (2012) 19:1 Animal Law 1 at 12 (referring to the theories of Fineman and Satz and the 'extreme' vulnerability of nonhumans) [Dillard, "Empathy with Animals"]; See also Maneesha Deckha, "Vulnerability, Equality, and Animals" (2015) 27:1 Canadian Journal of Women and the Law 47.

169. *Reece*, *supra* note 95 at 88.

170. See "Sad Plight of Sandra the Orangutan: Two Years After Being Granted Human Rights in a Landmark Ruling, She Still Remains Locked Up in her Cage Inside an Abandoned Zoo" (29 September 2016), online: *Daily Mail* <www.dailymail.co.uk/news/article-3812992/In-Argentina-freedom-distant-Sandra-orangutan.html>.

171. Donahue, *Increasing Legal Rights for Zoo Animals*, *supra* note 157 at 151.

172. *Unlocking the Cage*, *supra* note 37.

to an immediate or guaranteed unlocking of the cage.

A. Why Quasi-property?

*A “pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property”.*¹⁷³

It is routinely noted that nonhuman animals are very different than other forms of personal property like tables and chairs.¹⁷⁴ This makes intuitive sense to most people who, for example, do not think of their pets as being the same as their other possessions. Nonhuman animals move on their own power, communicate, and of course, feel pain and discomfort, as well as pleasure and comfort, and they can have significant emotional, psychological, and social lives that are bound up with their human owners.

Wild animals have long been thought of in terms of ‘qualified property’ not owned until reduced to possession.¹⁷⁵ Domestic animals are usually legally differentiated from wild animals given their “habit of

173. *Corso v Crawford Dog and Cat Hospital*, 415 NYS 2d 182 (NY Civ Ct 1979), quoted in Favre, *Animal Law*, *supra* note 16 at 126.

174. See *e.g.* Cass R Sunstein, “Enforcing Existing Rights” (2002) 8:1 *Animal Law* i (“[m]ost people, on reflection, do not consider animals that they ‘own’ to be things or objects. People who have dogs, or horses, or cats are most unlikely to have the same attitude toward living creatures that they have towards books, tables, and chairs” at vii) [Sunstein, “Enforcing Existing Rights”]. See also Susan J Hankin, “Not a Living Room Sofa: Changing the Legal Status of Companion Animals” (2006–2007) 4:2 *Rutgers Journal of Law and Public Policy* 314 at 380, 369 (proposing the category of ‘companion animal property’ to reflect the way that judicial and legislative trends in estates and trusts, criminal law, and tort law demonstrate support for the idea that companion animals — primarily dogs and cats — are being treated less like property or at least less like inanimate forms of property) [Hankin, “Not a Living Room Sofa”].

175. See *Pierson v Post*, 3 Cai R 175 (NY Sup Ct 1805). See also Angela Fernandez, *Pierson v. Post, The Hunt for the Fox: Law and Professionalization in American Legal Culture* (New York: Cambridge University Press, 2018).

returning” (*animus revertendi*).¹⁷⁶ There has long been an interest in the property status of domesticated animals given the work and investment that goes into breeding and caring for them.¹⁷⁷ Historians have noted that domestication was the game-changer. As Morris Berman put it:

The fundamental categories that presented themselves were now two – Wild and Tame – and eventually all forms of thought...came to be based on this model (the raw and the cooked, in Lévi-Strauss’ terminology). It is a coarse model, and one lacking in subtlety, especially in the West.¹⁷⁸

Domestic animals are those that humans own and control, either as pets or have been created or captured and are destined for industry use (research, entertainment, food, fur, etc.). Pets are ‘favorites’ and are thereby spared (if they are lucky) from abuse.¹⁷⁹ In many countries, pets are protected (to a limited extent) by anti-cruelty laws which prohibit harming them, at least gratuitously. The ‘non-favored’ are those nonhuman animals who are generally not being thought of and treated as individuals with moral worth (*e.g.* cows, chickens, pigs, sheep, goats, ducks, and geese). These are the animals raised to be eaten or used for their ability to produce commodities like milk, eggs, wool, feathers, etc. and are then used for human food or food for other animals. They vastly outnumber all other animals killed in research, testing, dissections, fur production, and

176. John H Ingham, *The Law of Animals: A Treatise on Property in Animals, Wild and Domestic, and the Rights and Responsibilities Arising Therefrom* (Philadelphia: T & JW Johnson & Co, 1900) at 6–8.

177. See *e.g.* Alan Mikhail, *The Animal in Ottoman Egypt* (New York: Oxford University Press, 2014) (emphasizing the way in which cattle, specifically the ox, operated as the most important form of capital in Ottoman Egypt given a restrictive land-owning regime).

178. Morris Berman, *Coming to Our Senses: Body and Spirit in the Hidden History of the West* (New York: Bantam Books, 1989) at 71.

179. See Katherine C Grier, *Pets in America: A History* (Chapel Hill: University of North Carolina Press, 2006) (Grier explains that ‘pet’ was originally used to describe “an indulged or spoiled child; any person treated as a favorite” and that in the eighteenth century writing about pet animals almost always used the word ‘favorite’ instead of ‘pet’. Grier writes: “This usage suggests the most fundamental characteristic of pet keeping, the act of choosing a particular animal, differentiating it from other animals” at 6).

pounds.¹⁸⁰ Farm animals are usually exempt from anti-cruelty animal protection laws, either expressly or implicitly and great deference is given to industry custom, even where those practices would be considered cruel in the minds of many or most people (*e.g.* debeaking chickens, castration and tail docking large animals without anesthetic, conditions of extreme confinement and food and light deprivation to manipulate egg laying in chickens).¹⁸¹ Great apes, elephants, and cetaceans are coming into their own and their status scientifically and in popular culture is changing. It is becoming more widely understood and recognized that private ownership of exotic animals such as lions and tigers must be prohibited or otherwise regulated (and perhaps also reptiles).¹⁸² Fish are in a unique category, as they are both wild and tame, pet and food; however, they are sentient and can feel pain.¹⁸³ They are also the frontline animal (along

180. See the graph at Figure 9.1 for 2001 numbers in Wolfson & Sullivan, *supra* note 118 at 207.

181. See *ibid.*

182. In Canada, we have had at least two sad and tragic incidents that should have pushed this issue forward in the last decade or so — two young boys strangled by an escaped African Rock Python in New Brunswick and a woman mauled in front of her child by her boyfriend's Siberian tiger in British Columbia and who subsequently died of her injuries. See "Snake Kills 2 N.B. Boys after Escaping Store, RCMP say" (5 August 2013), online: *CBC News* <www.cbc.ca/news/canada/new-brunswick/snake-kills-2-n-b-boys-after-escaping-store-rcmp-say-1.1340560>; "Woman Mauled to Death by Tiger in B.C. Interior" (11 May 2007), online: *CBC News* <www.cbc.ca/news/canada/british-columbia/woman-mauled-to-death-by-tiger-in-b-c-interior-1.635094>. Incidents in the United States are manifold, the most large-scale in recent years being the man in Zanesville, Ohio, who hoarded large exotics, turned them loose and then shot himself. Law enforcement shot fifty or so of these animals. See "Muskingum County Animal Farm" (last edited 8 October 2018), online: *Wikipedia* <en.wikipedia.org/wiki/Muskingum_County_Animal_Farm>. See also Matt Ampleman & Douglas A Kysar, "Living with Owning" (2016) 92:1 *Indiana Law Journal* 327.

183. See David Cassuto in this issue arguing for fish sentience. See also Jonathan Balcombe, *What a Fish Knows: The Inner Lives of Our Underwater Cousins* (New York: Scientific American/Farrar, Straus and Giroux, 2017).

with other marine life) that face contamination and ultimately extinction due to the plastics crisis in our oceans, which international instruments are doing little to combat.¹⁸⁴

In other words, quasi-property would resonate with how most people think about nonhuman animals — they are not like tables and chairs, whether favored or unfavored, wild or tame. They are something different. As Cass Sunstein has put it, “the rhetoric of ownership really does misdescribe people’s conceptions of and relationships to other living beings”.¹⁸⁵ Moreover, given the changes we have seen in how nonhuman animals are viewed, it becomes less and less plausible for the law to label all nonhuman animals property *tout court* and for that to be the end of the discussion.¹⁸⁶ ‘Quasi’ better captures that flux. If history teaches us anything, it tells us: firstly, ideas will continue to wax and wane; secondly, we do not know how this will unfold.

Think of cows. Virginia Anderson has written an extremely eye-opening book about the role that cattle and other domesticated animals of the European settlers played as agents of colonization.¹⁸⁷ While Pulitzer prize-winning *Guns, Germs, and Steel*¹⁸⁸ has brought the silent weapon perspective of conquest to some public consciousness, the view of cow-as-weapon is difficult to wrap one’s head around. This is

184. Kimberly Moore, “Oceans in Crisis and Global Initiatives to Address Plastic Pollution” (Fifth Annual Oxford Animal Ethics Summer School on Animal Ethics and Law: Creating Positive Change for Animals delivered at St Stephen’s House, University of Oxford, 23 July 2018) [unpublished].

185. Sunstein, “Enforcing Existing Rights”, *supra* note 174 at vii.

186. See *e.g.* the Ikea Monkey case and discussion of it in Fernandez, “Already Artificial”, *supra* note 15.

187. See Virginia DeJohn Anderson, *Creatures of Empire: How Domestic Animals Transformed Early America* (New York: Oxford University Press, 2004). Alan Greer explores the same phenomenon in New France drawing on Anderson’s work. See Allan Greer, “Commons and Enclosure in the Colonization of North America” (2012) 117:2 *American Historical Review* 365 at 381–86. See also John Ryan Fischer, *Cattle Colonialism: An Environmental History of the Conquest of California and Hawaii* (Chapel Hill: University of North Carolina Press, 2015).

188. Jared Diamond, *Guns, Germs, and Steel: The Fates of Human Societies* (New York: WW Norton & Company, 1999).

especially so from an animal rights perspective in which the animal today is factory farmed (lives and is slaughtered) in horrible and very tightly controlled conditions (hence the need for all the antibiotics) and is for many an object of pity, artificially inseminated, destined to produce milk for another species rather than their own babies, from whom they are separated soon after birth to serve the veal industry.¹⁸⁹ However, in Anderson's work, we see that same animal being used to grab more land from Indigenous peoples in early America. In order to do this, Anderson explains, it was essential that European settlers *not* follow the English practices of good husbandry, *i.e.* fencing in and caring carefully for the animals but letting them roam and trample Indian fields and crops, as harassment was often an effective way to push Indigenous people further inland.¹⁹⁰

Building on Anderson's work on animal colonialism, Mathilde Cohen expands the idea to focus on two other components: "milk colonialism" and "breastfeeding colonialism".¹⁹¹ Cohen explains the way that cow milk was at the center of American global state-building projects, turning China, a non-dairy consuming culture, into what is now the third largest cow milk producer in the world.¹⁹² International food aid programs that began in the 1960s "allowed Europe and the United States to dispose of their milk surpluses [to maintain] stable prices at home".¹⁹³ A program

189. The veal industry is a direct by-product of the dairy industry because the cows must be impregnated and give birth in order to produce milk. See Montgomery, *supra* note 33 at 140–42 (describing conditions for veal calves in Canada).

190. "Free-range style of husbandry" was year-round in the Chesapeake and seasonal, given the cold weather, in New England. See Anderson, *supra* note 187 (on the Chesapeake domestic animals that essentially went wild but colonists insisted on maintaining their status as private property through earmarks and legislating that they could not become *ferae naturae* at 114–40); on New England at 152–71; on the use of domesticated animals as weapons of colonization at 208–42).

191. See Mathilde Cohen, "Animal Colonialism: The Case of Milk" (2017) 111:1 *American Journal of International Law Unbound* 267 at 268.

192. *Ibid* at 269.

193. *Ibid*.

started in India in 1970 helped transform that country into the world's largest milk producer that resulted in the replacement of Indian bovine breeds with "quick fattening, high yield European breeds".¹⁹⁴ Cohen writes:

By taking milk from animals and feeding it to humans, particularly human babies, dairying severs the nursing relationship twice: between lactating animal mothers and their offspring and between human mothers and their offspring.¹⁹⁵

These varying historical (including global) contexts make us realize that we are not dealing simply with the biological entity and some essentialness, 'cow', but the role the animal plays in the human world, *e.g.* as mass produced hamburger, unthinkable not so long ago.¹⁹⁶ Long-view historians like Berman emphasize how enormous the change in our relationship to nonhuman animals has been in just a handful of generations, as animals have virtually disappeared from the lives of most Western urban people, *e.g.* no more pigs in the streets or horses for transport.¹⁹⁷ Children eat chicken without any sense that it is a chicken.¹⁹⁸ British historian Hilda Kean has emphasized the role of visibility in motivating nineteenth century British humane initiatives, specifically narrating how ordinary upper and middle class Londoners grew tired of stepping out of their houses and seeing neglected horses that desperately needed water and donkeys often brutally beaten by their owners whose cart of goods they pulled, and they formed protection societies and demanded mainstream politicians respond with protective legislation, *e.g.* water troughs for horses in the streets.¹⁹⁹ The most recent example of

194. *Ibid* at 269–70.

195. *Ibid* at 270.

196. On the natural world generally and how our ideas of it are constructed by humans for human culture, see Keith Thomas, *Man and the Natural World: A History of the Modern Sensibility* (New York: Pantheon Books, 1983).

197. See Berman, *supra* note 178 at 85.

198. Jonathan Foer, *Eating Animals* (New York: Little, Brown and Company, 2009) (recounting an interaction with a babysitter who asked him and his brother when they were kids, "[y]ou know that chicken is chicken, right?" at 6).

199. Kean, *supra* note 51.

a personhood declaration from India came from a case brought on behalf of mules. It sets out that mules must not work in extreme temperatures or carry overly heavy loads, and they must receive veterinary care, pull carts that are marked safely for traffic, be given a right of way in traffic, and be given limited working hours with regular food and water.²⁰⁰

Cows in India have an especially complex status since they are considered a sacred animal by Hindus, who constitute the majority religion. However, buffalo meat is an enormous industry in India, eaten not just by the minority Muslim population but also by meat-eating Hindus, who see buffalo as an exception to the prohibition on beef or who do not follow the religious belief. The export of buffalo meat — many people are surprised to learn — makes India one of the largest beef exporters in the world.²⁰¹ There is a massive illegal slaughtering industry that is almost certainly killing cows that are supposed to be protected as sacred, including the purchase and mistreatment of sacred cows for the leather industry.²⁰² These questions have become extra-political, as Muslims in India claim that they are subject to ethnically-targeted discrimination due to the stricter enforcement of cow protections, there is a growing problem of ‘sacred’ cows who are simply abandoned when owners can no longer pay to keep them but are prohibited from killing them, and concerns are raised about adequate nutrition for poor children for whom

200. See Upadhyay, *supra* note 10.

201. Along with Brazil, which interestingly, like India, has constitutional protection for animals. See Eisen & Stilt, *supra* note 107 at paras 11–17 (India) 36–38 (Brazil).

202. See *e.g.* Sena Desai Gopal, “Selling the Sacred Cow: India’s Contentious Beef Industry” (12 February 2015), online: *The Atlantic* <www.theatlantic.com/business/archive/2015/02/selling-the-sacred-cow-indias-contentious-beef-industry/385359/>. See Shaun Monson, “Earthlings” (2005) at 46:43–50, online (video): *YouTube* <www.youtube.com/watch?v=BrlBSuuy50Y> (to see how cows that are supposed to be protected as sacred are treated in order to obtain their skins for the leather industry).

beef is a cheap source of protein.²⁰³ There are also the competing religious claims of Muslims and the ritual sacrifice of cows during the holiday of Bakr-Id.²⁰⁴ Viewed through the lens of the Anthropocene “[t]he contrast between what is nature and what is not no longer makes sense”.²⁰⁵ There is no cow in nature separate from human uses and meanings, which are inescapably artificial and political.

According to Berman, we have come to have little reason to associate shrink wrapped meat in a supermarket with animal life because in the modern industrial West we have become so disconnected from organic nonhuman otherness.²⁰⁶ Berman calls this “a psychic bombshell”²⁰⁷ because we have lost our nonhuman other to see reflecting our humanness back to us. The two institutions that have developed in order to compensate

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203. See e.g. Annie Gowen, “Cows are Sacred to India’s Hindu Majority. For Muslims Who Trade Cattle, That Means Growing Trouble” (16 July 2018), online: *The Washington Post* <www.washingtonpost.com/world/asia_pacific/cows-are-sacred-to-indias-hindu-majority-for-muslims-who-trade-cattle-that-means-growing-trouble/2018/07/15/9e4d7a50-591a-11e8-9889-07bcc1327f4b_story.html?utm_term=.b781ec540a56>; Annie Gowen, “Why India has 5 Million Cows Roaming the Country” (16 July 2018), online: *The Washington Post* <www.washingtonpost.com/world/2018/07/16/amp-stories/why-india-has-million-stray-cows-roaming-country/>; Sonia Faleiro, “Saving the Cows, Starving the Children” (28 June 2015), online: *The New York Times* <www.nytimes.com/2015/06/28/opinion/sunday/saving-the-cows-starving-the-children.html>.
204. See Aurélien Bouayad, “Law and Ecological Conflicts: The Case of the Sacred Cow in India” (2016) 12:2 Socio-Legal Review 105. In both Germany and Switzerland, in addition to animal advocacy groups, the constitutional protections for animals were supported by those motivated by anti-Semitic and anti-Muslim sentiment against kosher and halal slaughter in which animals are not stunned before slaughter. See Eisen & Stilt, *supra* note 107 at para 22 (Germany), 27 (Switzerland).
205. Purdy, *supra* note 29 at 15. Purdy explains how nature and different varieties of environmental imagination powered a peculiarly American anti-politics.
206. See Berman, *supra* note 178 at 85 (referring to Frederick Wiseman’s film *Meat*, 1976, DVD (Cambridge: Zipporah Films, 1976).
207. *Ibid* at 84.

for the absence of nonhuman animal life — the zoo and pet keeping — are woefully inadequate. Berman writes: “The fallacy of the zoo is that a species can be removed from an ecosystem and still remain the same species... Once in captivity, wild animals get imprinted by their human keepers in such a way that makes it impossible for them to return to the wild, where they would die”.²⁰⁸ The pet also fails to work as a nonhuman mirror.²⁰⁹

Despite this, pet keeping is at an all-time high. A recent article in *The Guardian* newspaper reports that 90% of pet-owning Britons (an industry worth £10.6 billion) consider their pet to be a family member, “with 16% listing their animal in the 2011 census”.²¹⁰ The same article cited a survey that found 12% of British pet owners love their pet more than they love their partner and 9% more than they love their children.²¹¹ Yet the article goes on to explain that the more people think of their pets as people and equal (or higher order) family members, the more problematic it will become to keep them as pets, controlling every aspects of their lives. It quotes Hal Herzog, author of *Some We Love, Some We Hate, Some We Eat*, who predicts that “pet keeping might fall out of fashion; I think it is possible that robots will take their place, or maybe pet owning will be for small numbers of people. Cultural trends come and go. The more we think of pets as people, the less ethical it is to keep them”.²¹²

Yet the pet industry shows no signs of abating. Kathy Hessler of the Lewis and Clark Law School reports that in 2017, 84.6 million households in the United States had a pet — that is 68% of households, constituting 393.3 million animals on which US \$86 billion dollars

208. *Ibid* at 89.

209. *Ibid* at 90–91.

210. Linda Rodriguez McRobbie, “Should We Stop Keeping Pets? Why More and More Ethicists Say Yes” (1 August 2017), online: *The Guardian* <www.theguardian.com/lifeandstyle/2017/aug/01/should-we-stop-keeping-pets-why-more-and-more-ethicists-say-yes>.

211. *Ibid*.

212. *Ibid*. See also Yi-Fu Tuan, *Dominance and Affection: The Making of Pets* (New Haven: Yale University Press, 1984).

was spent, which 91–99% of people consider to be family members.²¹³ Perhaps most striking here is the amount of money people now spend on their pets for items that include special food, clothing, bedding, housing, jewelry, advanced medical care, vacation, insurance, spa days, funeral/burial cremation, gifts, and parties.²¹⁴ Hessler describes how people now use activity trackers to monitor health, activity, and the location of their pet via internet video camera; treat dispensers that allow for care and interaction (including two-way communication) when the owner is not at home; and uber-like apps for pet sitting, walking, and boarding.²¹⁵

If treatment of pets is becoming more intense and more humanized and something people are very enthusiastic about, the circus and the aquarium are moving in the other direction, falling into disfavour, at least insofar as they rely on large sentient and cognitively complex creatures like elephants and orcas for entertainment. Ringling Brothers announced in May 2017 that it would stop its elephant shows, thereby ending 146 years of “the Greatest Show on Earth.”²¹⁶ A bi-partisan bill that would prohibit the use of nonhuman animals in travelling circuses in the United States was introduced just a few months earlier.²¹⁷ The aquarium is coming under more intense scrutiny, as the film *Blackfish*²¹⁸ on killer whales at Sea World so aptly demonstrates.

Susan Davis wrote her book about Sea World and the orca shows

213. Kathy Hessler, “Animal Custody: Alaska and Illinois and Beyond” (Animal Ethics and Law: Creating Positive Change for Animals delivered at Oxford Centre for Animal Ethics, Fifth Annual Oxford Summer School on Animal Ethics, 25 July 2018) at 5 [unpublished] [Hessler, “Animal Custody”].

214. *Ibid* at 6.

215. *Ibid* at 10.

216. See Carey Wedler, “Ringling Bros. and Barnum & Bailey Circus Just Officially Closed Down” (24 May 2017), online: *The Anti-Media* <theantimedia.com/ringling-bros-barnum-bailey-circus/>.

217. See US, Bill HR 1759, *Travelling Exotic Animal and Public Safety Protection Act* (TEASPA), 115th Cong, 2017, (introduced in Congress on 28 March 2017), online: *Congress.Gov* <www.congress.gov/bill/115th-congress/house-bill/1759/text>. On travelling circuses in Canada, see Bisgould, *Animals and the Law*, *supra* note 44 at 264–66.

218. *Blackfish*, 2013, DVD (Los Angeles: Magnolia Pictures, 2013).

there in 1997.²¹⁹ She describes the pleasure the corporation was able to successfully manufacture in its audiences by putting ‘spectacular’ nature on display, an underwater world that would be largely otherwise inaccessible to its human visitors. The killer whale filled “the grandiose novelty role elephants played in the nineteenth century”,²²⁰ Davis wrote, presented “just as Africa and Asia were for nineteenth-century Europeans”.²²¹ She described in detail Sea World’s success at bringing “parts of an invisible world into public view and elevat[ing] them to iconic status”.²²² Yet now Sea World has announced that they are no longer going to breed their orcas.²²³ Attendance has dramatically decreased, as people choose to put their entertainment dollars elsewhere. In other words, what looked like an iconic institution just ten years ago has bowed in the face of public opinion, to the point that a mainstream Top-40 pop radio host discussing the end of the breeding program pointed out how inhumane it is to keep animals that are meant to swim hundreds of miles a day in a swimming pool.²²⁴

219. See Susan G Davis, *Spectacular Nature: Corporate Culture and the Sea World Experience* (Berkeley: University of California Press, 1997).

220. *Ibid* at 97.

221. *Ibid*.

222. *Ibid* at 98.

223. See Renee Montagne & Greg Allen, “SeaWorld Agrees to End Captive Breeding of Killer Whales” (17 March 2016), online (radio): National Public Radio <www.npr.org/sections/thetwo-way/2016/03/17/470720804/seaworld-agrees-to-end-captive-breeding-of-killer-whales>. See Davis, *ibid* at 78–81 (on attendance numbers; they are so important they are looked at hourly). I have heard anecdotally that the Shamu show at the California Park has changed considerably to try and make it less demeaning to the animals. I met a man in a waiting room who saw me reading the Davis book and asked if I had seen *Blackfish*. When I said yes, he reported to me that he had also and was just back from visiting the park in Florida the previous weekend and was shocked by how few people were there. It had not occurred to me until that moment that the film, as damning as it is of Sea World, might actually attract those interested in witnessing the demise of the park or perhaps in seeing where the tragic accident involving Dawn Brancheau occurred in 2010.

224. SiriusXM Hits 1 co-host Nicole Ryan of *The Morning Mash Up*.

The Park Board in Vancouver has voted to ban the Vancouver Aquarium from acquiring any new whales or dolphins and from using certain cetaceans in its live shows.²²⁵ There is also a documentary, *Vancouver Aquarium Uncovered*, which has helped bring the situation at that aquarium to public awareness.²²⁶ Ontario banned the possession or breeding of any new orcas in 2015.²²⁷ The Canadian government has likewise passed a ban on further cetacean captivity.²²⁸ Other documentary films, like Academy award-winning *The Cove* on the dolphin drive hunt in Taiji Japan (a source for dolphins sold to aquariums) and the Canadian director Rob Stewart's *Sharkwater* film on the illegal international shark finning industry (the fins are sold to be used for shark fin soup), have brought the plight of hunted marine animals to wide-spread public attention.²²⁹

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225. See Wendy Stueck, "New Whales, Dolphins Banned from Vancouver Aquarium" (16 May 2007), online: *Globe and Mail* <www.theglobeandmail.com/news/british-columbia/park-board-approves-bylaw-banning-whales-dolphins-at-vancouver-aquarium/article35004004/>.
226. "Vancouver Aquarium Uncovered" (10 April 2016), online (video): *Vancouver Aquarium Uncovered* <www.vancouveraquariumuncovered.com/vancouver-aquarium-uncovered/>. The documentary has been the subject of litigation, with the Vancouver Aquarium suing the filmmaker for breach of contract and copyright infringements. A court order resulted in excerpts of the film being clipped until those issues have been resolved. See *Vancouver Aquarium Marine Science Centre v Charbonneau*, 2016 BCSC 625. The British Columbia Court of Appeal overturned the injunction. See *Vancouver Aquarium Marine Science Centre v Charbonneau*, 2017 BCCA 395. The edited version of the film can be viewed online: *Youtube* <www.youtube.com/watch?v=hs4FtZSLyc8>.
227. See Bill 80, *Ontario Society for the Prevention of Cruelty Amended Act, 2015*, 1st Sess, 41st Leg, Ontario, 2015, online: *Legislative Assembly of Ontario* <www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=3213>.
228. See Laura Howells, "A More Humane Country': Canada to Ban Keeping Whales, Dolphins in Captivity" (10 June 2019), online: *CBC News* <www.cbc.ca/news/canada/hamilton/whales-1.5169138>.
229. *The Cove*, DVD (Beverly Hills: Diamond Docs, 2007); *Sharkwater*, DVD (Glendale: DreamWorks Pictures, 2006) (created from footage Stewart shot before his death).

I have argued elsewhere that YouTube videos and other forms of documentary films widely available on services like Netflix are our new day-to-day equivalent of late eighteenth and early nineteenth-century street visibility when it comes to the abuse and mistreatment of nonhuman animals.²³⁰ David Wolfson and Mariann Sullivan write that “farmed animals live out their short lives in a shadow world. The vast majority never experience sunshine, grass, trees, fresh air, unfettered movement, sex, or many other things that make up most of what we think of the ordinary pattern of life on earth”.²³¹

These unfair conditions of life can easily be seen in a range of documentary films, some of which draw connections between meat-eating and the environment (e.g. *Cowspiracy: The Sustainability Secret*²³²) and others between meat-eating and human health (e.g. *Food, Inc.*²³³). Some of the more animal-welfare/rights oriented films aim for shock value, showing very graphic cruelty towards animals considered normal industry practice (e.g. Mercy for Animals’ *From Farm to Fridge*²³⁴). Others deliberately eschew showing too much graphic violence and instead harness the power of the aesthetic and the connective such as Liz Marshall’s documentary, *The Ghosts in Our Machine*,²³⁵ which follows animal rights photographer Jo-Anne McArthur. Other made-for-TV movies like *Animal Farm*²³⁶ are fictional but can compellingly convince

230. See Fernandez, “Already Artificial”, *supra* note 15.

231. Wolfson & Sullivan, *supra* note 118 at 217.

232. *Cowspiracy: The Sustainability Secret*, 2014, DVD (Santa Rose, Cal: AUM Films & Media, 2014).

233. *Food, Inc.*, 2008, DVD (New York: Magnolia Pictures, 2009).

234. Mercy for Animals, “Farm to Fridge” (3 February 2011), online (video): *Youtube* <www.youtube.com/watch?v=THIODWTqx5E>.

235. See *The Ghosts in Our Machine*, 2013, DVD (Toronto: IndieCan Entertainment, 2014); Jo-Anne McArthur, *We Animals* (New York: Lantern Books, 2013). See also Jo-Anne McArthur, *Captivity* (New York: Lantern Books, 2017).

236. *Animal Farm*, TV Film (Los Angeles: Hallmark Films, 1999) based on the 1945 novel by George Orwell. A young woman at the University of Essex conference reported when I presented an earlier version of this paper that this was her experience.

a person not to eat animals because they have emotions. Others harness celebrity talent such as *Earthlings*, in which narration by Joaquin Phoenix and music by famous artists such as Moby accompany very graphic footage of humans mistreating nonhuman animals across a wide variety of contexts.²³⁷

Academic books are now using some of the same strategies we see in the films. For instance, political scientist Timothy Pachirat's gut-wrenching book *Every Twelve Seconds*, documenting his experience of what it was like to work in an American slaughterhouse, has a graphic photograph of a white blood-covered factory worker's boots and coat on its cover.²³⁸ Novelist Jonathan Foer's *Eating Animals*²³⁹ uses a combination of personal memoir and investigative reporting to explore eating animals in a new and powerful way.

Not seeing has worked for slaughterhouses and industry for a long time because if people do not see what goes on, it does not exist for them in a very real way. The films and books drag that fantasy out into the light, gently and not so gently, forcing us to look at the 'shadow world' of nonhuman animals. What these authors, academics and artists all understand is how important a role emotion plays in the movement people make when they decide to no longer eat animals or substantially reduce their nonhuman animals use. As Foer puts it, "[f]acts are important, but they don't, on their own, provide meaning... But place facts in a story, a story...about the world we live in and who we are and who we want to be",²⁴⁰ now that can prompt much needed reflection. In other words, it is not all emotion; but it is not all logic either. If it were all logic, all anyone would need to hear is the argument about the health impact or the environmental impact or what conditions are like once and that would be it. Most people though probably find themselves engaged in a multifaceted process evolving their position on their relationship to nonhuman animal use over a period of time. Some of the information used

237. *Earthlings*, *supra* note 202.

238. Timothy Pachirat, *Every Twelve Seconds: Industrialized Slaughter and the Politics of Sight* (New Haven: Yale University Press, 2011).

239. Foer, *supra* note 198.

240. *Ibid* at 14.

in this transitioning is visual, some classically factual, and those images and information probably need to be heard and seen multiple times in order to penetrate the many deep layers of custom, habit, convenient denial or outright disbelief, internal and external. Many people probably think, as I did before I became interested in animal issues, that the conditions for farm animals cannot be that bad because there must be laws and regulations that would prohibit cruel treatment. It is quite hard to believe, I mean really take it in, that cruel practices, things that could not legally be done to a companion animal, are perfectly legal to do to farm animals simply because those practices are industry custom.²⁴¹

Morris Berman would call what is needed or required somatic or body-based, something that transcends the mind-body dualism we use to organize and understand so much in Western culture. When it rings true, it rings true to both mind and body, emotions and reason. Berman's book *Coming to Our Senses*²⁴² powerfully and convincingly describes how badly conventional history has accounted for the role of the body in Western thought, *e.g.* religious history.²⁴³ When the time comes to write the history of the animal movement, it will have to be a somatic history that questions rather than accepts the mind-body distinction that I suspect cannot accurately account for why people make the switch when they do (and of course why they switch back, which many do, and then switch out again, much as it is with other damaging addictions or bad habits we engage in).²⁴⁴

Given the many and varied contexts and understandings of nonhuman animals and human relationships to them, it is too crude

241. See Wolfson & Sullivan, *supra* note 118 at 215–16 (discussing how people are misled in exactly this way).

242. Berman, *supra* note 178.

243. See *e.g. ibid* at 138–41 (explaining how heretical practice is “first and foremost a body practice” and without understanding this and how that direct access to transcendence challenges religious orthodoxy it is impossible to understand what was at issue in religious purges, wars, and doctrinal disagreements fought over fiercely for hundreds of years, which will otherwise appear to be about insignificant semantics).

244. See Foer, *supra* note 198 at 5–10 (for what is probably a fairly typical account of switching back and forth).

to gather all that together under the simple label ‘property’. The law is often not good at nuance, but we can do better than that. It would be better to recognize that nonhuman animals are not like other forms of non-sentient property and make that explicit with a categorization shift: quasi-property. ‘Quasi’ is a good designator in terms of recognizing that the kind of property nonhuman animals are is constantly changing, as our ideas about what duties those lives are owed change and will continue to change. Property is probably an indelibly neo-liberal value but civil rights movements can successfully push it more to the margins, shrinking and decentering it where justice demands.²⁴⁵

B. Why Quasi-person?

*“[A]t least some individuals presently within the legal system accept that animals have interests deserving of consideration by courts, whether or not they are full ‘legal persons’. Perhaps it is helpful to think of animals as partial legal persons.”*²⁴⁶

There is a pragmatic reason to switch to quasi-person, which I discussed in the introduction, namely, the outrage factor: ‘What, persons like us!’ — driven by religious or cultural beliefs about human superiority to all other species and a long history of animal exploitation as normal.

The naming and now wide-spread use of the idea of the Anthropocene (in science and in the humanities, *e.g.* in post-humanism) to capture the catastrophic effects of human activity on the planet, along with serious doubts about the ability to keep (and the desirability of keeping) humans at the center of the universe raise ‘inconvenient truths’ have probably mitigated this sense of superiority and entitlement.²⁴⁷ That sense has certainly become more intense since the 1990s when animal law first starting finding its feet in the United States and when Berman wrote about the serious consequences of humans living without a genuine nonhuman

245. See *e.g.* AJ van der Walt, *Property in the Margins* (Portland: Hart Publishing, 2009).

246. Favre, *Animal Law*, *supra* note 16 at 347.

247. *An Inconvenient Truth*, 2006, DVD (Hollywood: Paramount Studios, 2006).

other that reflects back to humans who they are.²⁴⁸ Yet there is no doubt that even with a heightened understanding of what kind of shape the world is in due to intensive human activity, *e.g.* agriculture (and, in this context, farmed animals, growing the grain needed to feed them and the damage done by their waste to rivers and oceans), the outrage factor persists. Understandably people resent being told, as Berman puts it, that the modern world has come to an end.²⁴⁹

I recall a visiting Spanish judge at my university reacting to a paper I presented to my faculty on Wise's work and the *Unlocking the Cage* documentary by saying "we are not animals; animals act on instinct", *i.e.* other animals cannot be persons (moral or legal). Even the qualifier 'quasi' would probably not satisfy the holder of such a view. However, there are other reasons, less strategic and more substantive, for thinking quasi-person, like quasi-property, might better capture what we are talking about in connection to non-human animals, *i.e.* it captures a set of important truths.

First, as Cass Sunstein repeatedly emphasizes, at least some nonhuman animals do indeed have rights under the legislatively passed anti-cruelty statutes.²⁵⁰ These rights are routinely violated and are often more expressive than real but they are rights.²⁵¹ The issue is that enforcement of those statutes is at the discretion of the state or its delegated SPCA who are underfunded, often do not prosecute, or in the case of Canada press for the prosecution of cases, given the burden and standard of proof for criminal law cases and the need to prove intent,

248. See Berman, *supra* note 178 (on the scenario "Why the Modern World Came to an End" at 98).

249. See *ibid.*

250. See *e.g.* Sunstein, "Enforcing Legal Rights" *supra*, note 174. See also Cass R Sunstein, "Introduction: What Are Animal Rights?" in Sunstein & Nussbaum, *supra* note 4 ("[i]f we understand 'rights' to be legal protection against harm, then many animals already do have rights" at 5). This point that animals do indeed already have some rights was affirmed in *Tilikum ex rel PETA, Inc v Sea World Parks and Entmt Inc*, 842 F Supp 2d 1259, 1264 (SD Cal 2012).

251. Sunstein, "Standing for Animals", *supra* note 66 at 1339.

or are all too willing to unnecessarily destroy seized animals.²⁵² Hence, the rights exist, at least for non-farmed animals and those caught under other anti-cruelty exceptions, *e.g.* research animals and entertainment animals, depending on the statute and jurisdiction. However, the rights, such as they are, are dependent on humans for their vindication, and those humans are not always thinking of the animals first.²⁵³ In other words, the remedy is highly discretionary and not something the animals are in a position to assert on their own behalf. It would be appropriate to recognize what they do possess, a kind of in-between status with ‘quasi’ — they have a proto-right as it were, dependent on humans to realize it in terms of enforcement and advocacy. This situation is a feature of their voicelessness or extreme vulnerability — or as Carter Dillard, Senior Policy Advisor with the Animal Legal Defense Fund, put it, their relative weakness (to humans) and their unfortunate usefulness which makes their vulnerability extreme.²⁵⁴ However, as Sunstein writes, “as a matter of positive law, animals have rights in the same sense that people do, at least under many statutes that are enforceable only by public officials”.²⁵⁵

Second, ‘quasi’ is also the right kind of designator or qualifier given the fact that the rights of nonhuman animals are probably not going to be and should not be the same as humans. As Favre has noted, nonhuman animals cannot have complete freedom of movement.²⁵⁶

252. For one activist’s account of the Chatham dog seizure in Ontario by the OSPCA and victory for most of the dogs, see Emily Mallet, “Rescued at Last: The Chatham Dogs are Saved” (26 July 2017), online (blog): *Indiana Jane* <indianajane.ca/2017/07/26/rescued-at-last-the-chatham-dogs-are-saved/>.

253. See *Naruto v Slater*, 888 F (3d) 418 (9th Cir 2018), online (pdf): *United States Courts* <cdn.ca9.uscourts.gov/datastore/opinions/2018/04/23/16-15469.pdf>.

254. Dillard, *supra* note 168 at 13.

255. Sunstein, “Standing for Animals”, *supra* note 66 at 1337.

256. Favre, “Living Property”, *supra* note 4 at 1050. But see Donaldson & Kymlicka, *supra* note 12 at 126–32 (arguing for freedom of movement and the sharing of public space for domesticated animals to the extent possible, pointing out that the human right to mobility is only a right to adequate or sufficient mobility, not unlimited mobility given international borders and the like).

Francione frequently points out that the rights will not be the same as humans', calling this a question of 'scope' – nonhuman animals will not get to drive, to vote, to obtain a scholarship to attend college.²⁵⁷ He even concedes that when a human and a nonhuman life conflict in a true emergency, it is right to save the human.²⁵⁸ As Wise has put it, “[s]ometimes people think we’re trying to get human rights for chimpanzees. We’re not. We’re trying to get chimpanzees rights for chimpanzees.”²⁵⁹ Sue Donaldson and Will Kymlyka divide the kinds of citizenship rights they believe nonhuman animals could and should have based on whether the animal is wild, domestic, or what they term a “denizen”,²⁶⁰ *i.e.* living among humans. Donahue makes the pragmatic point that:

[e]ven if animals are granted personhood, it is highly likely they will not be granted the exact same legal status as humans and will need additional and different laws that apply to them just as we apply different laws to children even though they are people. Thus, the animals are likely to remain in zoos or sanctuaries.²⁶¹

Think Sandra. Or the NhRP chimps who, if the applications were successful, were going to go to Save the Chimps, a sanctuary in Florida.²⁶²

As animal lawyers have recognized, one relevant comparator for the kind of legal personhood that might be available to nonhuman animals is the corporation. Eric Glitzenstein, for instance, has argued that personhood is not:

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257. See Francione, “Rights Theory and Utilitarianism”, *supra* note 60 at 86; Francione, *Animals, Property, and the Law*, *supra* note 53 at 110–12; Francione, *Rain Without Thunder*, *supra* note 54 at 179–80; Francione & Charlton, *supra* note 56 at 23.
258. Gary L Francione, “Animals – Property or Persons?” in Sunstein & Nussbaum, *supra* note 4, ch 5 at 133–34 [Francione, “Animals – Property or Persons?”]. See “Killing of Harambe” (page last edited 22 August 2018), online: *Wikipedia* <en.wikipedia.org/wiki/Killing_of_Harambe>. See also Gary L Francione, *Introduction to Animal Rights: Your Child or The Dog* (Philadelphia: Temple University Press, 2000).
259. Quoted in Boyd, *supra* note 8 at 39.
260. See Donaldson & Kymlicka, *supra* note 12.
261. Donahue, *Increasing Legal Rights for Zoo Animals*, *supra* note 171 at 151.
262. See “Save the Chimps, Inc” (2018), online: *Save the Chimps* <www.savethechimps.org/>.

[a]n all or nothing proposition...[C]orporations [in the United States] have certain limited First Amendment rights, and certainly due process rights when it comes to property, but they obviously do not have the right to vote. Corporations do not have full liberty rights; there are all kinds of rights they do not have.²⁶³

As Dillard puts it, there are a variety of conceptions of legal personhood and being a person can be a matter of degree.²⁶⁴ Minors have a bundle of rights that do not include voting; corporations also cannot vote but they can own property.²⁶⁵

Sunstein has written that he thinks that Wise and Francione are correct to reject the rhetoric of property because he thinks that it tends to undermine and undervalue the interests that we already acknowledge nonhuman animals possess.²⁶⁶ Is property the problem? Yes and no. It is *a* problem and, indeed, classifying animals as property has facilitated their instrumental use and treatment as objects (rather than subjects) tremendously.²⁶⁷ However, beyond classification, the bigger problem is the social attitude that normalizes nonhuman animal use (and abuse). In a legal system in which subjects generally need to be speaking subjects in order to be heard, the inability of the animals to speak for their own interests and to protect themselves creates another problem. De-classifying nonhuman animals as property will not in-and-of-itself solve those problems. And it will, at least in common law Canada,

263. See Dillard et al, "Animal Advocacy and Causes of Action: Third Panel of the New York University Symposium" (2006) 13:1 *Animal Law* 87 at 103 (in which Glitzenstein was one of the panelists) [Glitzenstein, "Panel"].

264. Dillard, "Empathy with Animals", *supra* note 168 at 2.

265. *Ibid* at 5.

266. Sunstein, "Enforcing Existing Rights", *supra* note 174 at vii.

267. See Wendy A Adams, "Human Subjects and Animals Objects: Animals as 'Other' in Law" (2009) 3:1 *Journal of Animal Law and Ethics* 29.

face tremendous resistance.²⁶⁸ Given our dichotomous thinking about persons and property, the perception is that making nonhuman animals ‘not property’ would mean making them persons like human beings. We must transcend that dichotomous thinking in order to move forward.

I take inspiration from what Anna Pippus, Director of Farmed Animal Advocacy at Animal Justice Canada, has said in a debate with Wise and feminist animal law scholar Maneesha Deckha: “[W]elfare and rights, personhood and property exist on a spectra rather than as strict binaries”.²⁶⁹ As Pippus puts it, “[b]eing property and being persons aren’t mutually exclusive”.²⁷⁰ Wise says in an interview that he agrees with Pippus: “[i]f a person is simply an entity that has the capacity for legal rights, it would be theoretically consistent for a nonhuman animal person to have say the right to bodily integrity but not the right not to be considered property, though the NhRP would hammer away at that property status”.²⁷¹

Wise and Favre were on a Roundtable at the Oxford Centre of Animal Ethics Summer School, and the two long-time advocates were delighted to find themselves agreeing that animals can have rights and be

268. The fact that civil law jurisdictions have a category of law called ‘the law of the person’ and that civil codes based on the French Civil Code have a book on the person perhaps make manipulations of personhood, sentience, and dignity less strange to the legal mindset than it is for those steeped in the English common law system. See Angela Fernandez, “Albert Mayrand’s Private Law Library: An Investigation of the Person, the Law of Persons, and ‘Legal Personality’ in a Collection of Law Books” (2003) 53:1 University of Toronto Law Journal 37, cited by Matambanadzo, *supra* note 16 at n 118.

269. Wise, Deckha, Pippus Debate, *supra* note 96. Like ‘quasi’, a ‘spectrum’ is a common legal device and idea in Canadian law. See *e.g.* *Transport North American Express Inc v New Solutions Financial Corp* [2004] 1 SCR 249 at paras 6, 40.

270. Wise, Deckha, Pippus Debate, *ibid.*

271. See Fernandez, “Legal History and Rights for Nonhuman Animals”, *supra* note 155 at 210.

property.²⁷² Favre, for example, explains in his casebook that it may not be necessary to eradicate the property status of nonhuman animals in order to create legal rights in the sense of acknowledgement within the law of individual interests that deserve protection.²⁷³ Sunstein also emphasizes that property can have rights.²⁷⁴ We are beginning, in other words, to break down the binary approach and to climb ‘the Great Legal Wall’.²⁷⁵ As Pippus states, “[e]ven while non-human animals are still property, we must develop their personhood so that they can enforce, through their advocates, whatever legal protections are available to them”.²⁷⁶ So what we are talking about is less like a wall than a spectrum or a continuum.

Using ‘quasi-property’ ensures we do not forget that nonhuman animals still have the property status (it has not gone away) even while their capacity for legal rights increases due to the recognition by judges and legislatures that though they are not exactly like human beings, or even in the cases of many species sufficiently similar, their ‘quasi-personhood’ status makes it appropriate to render the rights that they do have explicit and to expand them where that would be appropriate. If nonhuman animals are property with some rights then we cannot keep referring to them as property, not persons, or holding that they cannot be persons until they are no longer property. That binary thinking is both unhelpful and untrue.

Glitzenstein points out that when corporations were recognized as

272. Dillard, et al, “Roundtable: Property, Personhood and Rights” (Animal Ethics and Law: Creating Positive Change for Animals delivered at Oxford Centre for Animal Ethics, Fifth Annual Oxford Summer School on Animal Ethics, 25 July 2018) [unpublished].

273. Favre, *Animal Law*, *supra* note 16 at 417.

274. Sunstein, “Enforcing Existing Rights”, *supra* note 174 at vi, vii.

275. Ironically, ‘the Great Legal Wall’, is based on Roman law, which has a much more direct connection to civil law than to the common law. Perhaps rigid common law thinking about the division between property and persons is an example of a transplant cut off from the original parent plant and the roots of its system, which makes it difficult to re-run the logic of that system for new categories or entity of beings.

276. Wise, Deckha, Pippus Debate, *supra* note 96.

persons in the United States in 1886²⁷⁷ it was without much fanfare. It was done, as he puts it, “without almost any analysis or any argument”.²⁷⁸ As he puts it, “the courts for more than one hundred years have had no trouble having a fairly nuanced flexible notion of what personhood can mean”.²⁷⁹ “[C]ourts have proven themselves to be rather adept in engaging in that kind of fine line drawing when they regard it as necessary”,²⁸⁰ or desirable. The comparison of nonhuman animals with corporations is important and lends support to the idea that quasi-person/quasi-property is a concept that would track how we already carve up and use the legal personhood concept even if there are nuances over the use of the analogy of which we should be aware.²⁸¹ It would not be impossible in other words. It shows that we can handle mixing up the concepts of property and persons.²⁸² The problem of course is that unlike the corporation, nonhuman animal legal personhood goes against long-standing and convenient human use and interest.

Francione thinks a designation of “quasi-person” or “things plus” will not work because “the moral universe is limited to only two kinds of

277. *Santa Clara Co v South Pacific Railroad Co*, 118 US 394 (1886).

278. Glitzenstein, “Panel”, *supra* note 263 at 102.

279. *Ibid* at 103–4.

280. *Ibid* at 104.

281. Animal law scholar and teacher of corporate law, Katie Sykes, points out that unlike nonhuman animals, corporations are not property and are not owned. Shareholders own shares, a form of intangible property made up of rights set out in the corporate documents. They do not, however, own the assets of the corporation (although they do have a residual claim on the assets if the corporation is dissolved once all the creditors are paid). Although we colloquially say that shareholders own the corporation; legally they do not own its assets. The corporation owns the assets and has a separate legal personality from the shareholders.

282. Thanks to Katie Sykes for making this and the point in the above note in reacting to an earlier draft of this article, specifically the claim which Pippus makes that corporations are a mix of property and persons. I suppose the better way to put it would be to say that corporations are persons, which exist for the purpose of distributing to their shareholders profits made from the corporation’s assets or property.

beings: persons and things”.²⁸³ It is not clear that this is true. Even if it is true (or tends to be true) of the moral universe given the complicated way that the dualism of mind and body has pervaded Western thought and human psychology, it is certainly not true of the legal universe. The law has already shown long ago that it is perfectly prepared to abandon the dualism of property and person (as in human being) and work creatively with those concepts when there is a strong desire to do so. Shareholders are human beings. However, the legal entity that owns the property, which is used to make profits for the shareholders, the corporation itself is not a human being. It is a legal person with some (limited) rights.

Is the proposal for a quasi-property/quasi-person legal status for nonhuman animals simply a question of semantics? It is not merely semantics, as the concepts we use lead us to marshal and organize facts in a certain way.²⁸⁴ The words we use channel our thought in some directions and not others, they point towards some truths and obscure others.

That is why many advocates want to leave property behind for nonhuman animals and shift to notions like dignity, sentience, and personhood, believing that such shifts will move things along in the right direction (and those who disagree oppose such changes). The guardianship idea for pets uses a similar logic. It leaves the legal status of a pet unchanged, the animal is still owned property, but the hope is that the ‘symbolic language change’²⁸⁵ will help educate people to think of their pets more like family members than pieces of (disposable) inanimate property. This proposal has been adopted by the legislature in Rhode Island and in twenty-one American cities since 2000 (as well as

283. See Francione, “Animals – Property or Persons?”, *supra* note 258 at 131. This essay is reprinted in Gary L. Francione, *Animals as Persons: Essays in the Abolition of Animal Exploitation* (New York: Columbia University Press, 2008) 25.

284. See Purdy, *supra* note 29 (“[s]aying we live in the Anthropocene is not like saying the earth is 4.5 billion years old rather than 6,000. It’s more like saying the United States is a secular country, or a religious one. It’s not a statement of fact as much as a way of organizing facts to highlight a certain importance that they carry” at 2).

285. See Hankin, “Making Decisions”, *supra* note 44 at 6.

one Canadian city, Windsor, Ontario).²⁸⁶ The guardianship example is instructive, as it is not just those who want to see the change in language occur who believe it will have an impact on how nonhuman animals are viewed. Those who disagree with such a change (it must be said, on some very weak arguments), must also believe that there is power in the approach otherwise why would they put so much energy into opposing it.²⁸⁷

Changing up the concepts is a tricky strategy for animal advocates because our language should not get too ahead of where most people are in terms of their attitudes towards nonhuman animals (at least judges and legislatures, who tend generally to be conservative in the sense of leaning towards keeping things the same). If personhood is counter-intuitive given the conflation with human being or worse, causes an outraged shutdown, then it might be too much, too soon. Hence, the plethora of proposals to use categories like Favre's "living property",²⁸⁸ e.g. "sentient property" (Carolyn Matlack) and "companion animal property"²⁸⁹ (Susan Hankin), which disclaim personhood (as Hankin's does).

What might look like insignificant battles over semantics operate as proxies for very significant differences. For instance, Kathy Hessler explains the way that the language of 'custody' and 'best interests of the animal' are difficult for judges and legislatures to accept when thinking

286. See "Guardian Cities" (2018), online: *In Defense of Animals* <www.idausa.org/campaign/guardian-initiative/guardian-cities/>.

287. See Hankin, "Making Decisions", *supra* note 44 (explaining veterinary opposition to guardianship language (at 8–18), evaluating the arguments and concluding that "they often rely on scenarios that range from the unlikely to the extreme" at 9).

288. Favre, "Living Property", *supra* note 4.

289. Hankin, "Not a Living Room Sofa", *supra* note 174 at 379–88 (on 'companion animal property' and how it differs from Matlack's 'sentient property', which would apply to all warm blooded domesticated animals that live near those upon whom they are dependent rather than focusing on dogs and cats and perhaps other warm blooded pets — Hankin does not want to include domesticated farm animals that might live near who care for them, (disclaiming personhood at 320)). See Carolyn B Matlack, *We've Got Feelings Too: Presenting the Sentient Property Solution* (Winston-Salem: Log Cabin Press, 2006).

about issues surrounding pets and marital breakdown (including whether visitation of what was the family pet after spousal separation can be ordered).²⁹⁰ Property is a strikingly inadequate way to decide which spouse should have the family pet in divorce disputes. Why? Because these disputes are not well resolved by giving the spouse who no longer lives with the dog half of the dog's dollar value (or worse having the animal sold and splitting the dollar value between the spouses).²⁹¹ The problem here is similar to how to arrive at appropriate damages in tort cases where pets are killed or injured and it is unsatisfactory to use the (often nominal) market value of the animal (some courts have expanded this to include reasonable veterinary expenses, or the intrinsic value of a dog, as measured by costs and time invested, and, very occasionally, damages for mental distress, easier to find where there has been an intentional killing of the animal).²⁹² Hessler explains that for situations of marital breakdown, something more like a 'best for all concerned' or a 'well-being of the animal' test is more promising and the latter has been used successfully legislatively (in Illinois and Alaska) precisely because it avoids connoting the comparison to children and 'the best interests of the child' test used for custody disputes involving children.²⁹³

The sensitivity around the comparison to children is worth pausing on. Historically, cruelty towards children and animals were fought by the same philanthropic organizations in both England and the United States given the very common idea that those who are cruel to one are

290. Hessler, "Animal Custody", *supra* note 213. See Bisgould, *Animals and the Law*, *supra* note 44 at 154–57 (canvassing Canadian cases).

291. Hessler, "Animal Custody", *ibid* at 14.

292. See Hankin, "Not a Living Room Sofa", *supra* note 174 at 325–42.

293. Hessler, "Animal Custody", *supra* note 213 at 15–16. But see Bisgould, *Animals and the Law*, *supra* note 44 at 112 (describing a case from British Columbia in 1997 in which 'custody' language in the statute led a court to apply a 'best interests' test to a dog named Jasper, who had been neglected and abandoned by his owners and the court held that he should remain in the custody of the SPCA with the owners having access or visitation rights until the case was resolved).

cruel to the other.²⁹⁴ This was also true in Canada in the early days of the Toronto Humane Society, the Nova Scotia SPCA (which continued as late as 1932), and the Winnipeg Humane Society (which retained its focus on women in difficult domestic situations, children, and animals until 1911).²⁹⁵ Leaving intervention and regulation to private charities rather than the police or the kind of specialized social services that would develop for these vulnerable human populations in the twentieth century, probably demonstrates the historical failure to prioritize violence against women and children. Separation from nonhuman animals was a way to signal women and children are more important, or at least different.

Yet today the kinds of augmented care for pets Hessler describes indicates that nonhuman companion animals are for many “surrogate children”.²⁹⁶ We all know what someone means when they say they have to get home to their ‘fur baby’. There is research challenging the idea that only humans have language and so only humans are capable of symbolic interaction. Clifton Flynn writes:

[T]his new perspective argues that animals are minded, social actors who have selves, can role-take, can create shared meanings with humans (and sometimes other animals) with whom they interact, and thus are also capable of interacting symbolically.²⁹⁷

Caregivers of the severely disabled construct a social identity for the disabled person, seeing them as minded and attribute personhood to them even though they are non-verbal based on features like their unique personalities and their ability to be reciprocating partners in the relationship who are afforded a social place in the family.²⁹⁸ People who attribute personhood to their companion animals tend to see them as having this kind of ‘mindedness’, engaging in intentional, reciprocal, and thoughtful behaviour.²⁹⁹

294. Sabrina Tonutti, “Cruelty, Children, and Animals: Historically One, Not Two, Causes” in Linzey, *supra* note 75.

295. See Bisgould, *Animals and the Law*, *supra* note 44 at 97–98.

296. Clifton P Flynn, “Women-Battering, Pet Abuse, and Human-Animal Relationships” in Linzey, *supra* note 75 at 117.

297. *Ibid* at 120.

298. *Ibid*.

299. *Ibid* at 121.

There is such a sensitivity around human specialness — whether that be invoking comparisons between nonhuman animals and children or the disabled who cannot speak or using the idea of ‘personhood’, even the nonhuman legal personhood of entities like corporations. The language we use for our legal ideas for animal protection matters for this reason (and others). Comparisons to human beings that are too explicit come too close for comfort and can simply cause shut down, which for people who are not vegetarians or vegans might be as basic as, “they can’t be like humans; I eat them”.³⁰⁰ It is a lot to expect people to absorb the psychic dissonance caused by the thought that what they are doing at meal time is a kind of cannibalism, that classic and paradigmatic social taboo. Some people might stop eating meat; most will probably just stop listening (or in the case of a judge say no to what is being requested). ‘Quasi’ might be the way to avoid that shutdown, keeping property for the idea of a nonhuman animal to attach to, while tempering what is meant by person, to make it clear that it does not mean human being.³⁰¹

300. People generally do not eat their pets and so pets are given more latitude in terms of human comparisons. But see the sad case of a Vancouver couple who ate their pet pig. See Lindsay William-Ross, “B.C. Couple Kill and Eat Adopted Rescue Pet Pig” (27 February 2018), online: *Vancouver Courier* <www.vancourier.com/news/b-c-couple-kill-and-eat-adopted-rescue-pet-pig-1.23186305>. I recently met a one-year-old pet pig named Truman being walked by his (vegan) owner at the beaches in Toronto, along with one of the dogs he lives with. This owner emphasized how different Truman is than her dogs, how he does his own thing most of the time and is very intelligent and affectionate and will live for thirty years. When we talked about what the pig owners in Vancouver did, she thought that this is probably more common than we would like to think especially given how long pigs live.

301. Purdy, *supra* note 29 (Purdy paraphrases Max Weber writing famously that “ideas are not generally the engines of history, but they are its switchmen” at 67). See also Bisgould, *Animals and the Law*, *supra* note 44 at 9 (I think it is fair to say that everyone offering ideas for how to legally classify nonhuman animals in what Lesli Bisgould calls “the second wave” of legal attention to animals (namely, going beyond the traditional limits of anti-cruelty legislation to recognize “the right of animals to have their own interests considered in law” at 9) is hoping to provide the thing that will be able to make the switch).

Perhaps the language we use or the categorization (property or person) at the end of the day matters much less than having a legal system in which nonhuman animals have legally cognizable and recognizable interests, *i.e.* a legal system in which they have standing (either in the preferred sense of an action brought in their own name by their human representative, or the strong sense of a private action or prosecution by someone other than the state, where the state is failing in its duty to adequately protect them).³⁰² Yet once there is standing, there has to be a way of thinking about the legal status of the animal that does not cause outrage (and be perceived as a threat to human specialness) but nonetheless recognizes the moral interests of the animal in question and its rights. ‘Living property’ or ‘quasi-property’ status pushes nonhuman animals closer to being the kind of entity that deserves legal standing and a representative to defend their interests (required by their voicelessness), nudging them further along the continuum between ‘mere property’ and ‘full human person’. ‘Quasi-personhood’ makes it clear that there will be no conflation of nonhuman animals with human beings, if this is the reassurance that it seems people need.

Belief systems only continue their hold on us as long as we allow them too. If we keep saying over and over again that animals will never have non-tradeable interests as long as they are property or they have no rights unless they are persons in the same way (or close to the same way) as human beings, are we not helping to make it so, to further entrench those beliefs such that alternatives become unthinkable? Should we not be trying to make new ways forward thinkable rather than using overdrawn dichotomies to make things sound impossible when they are not, and, indeed, they are anyway already partly true when regarded in a slightly different light? Our human tendency is to see the world in black and white dichotomies rather than the shades of grey that are more true to reality.³⁰³ And, culturally, we will defend codes or grids of discontinuities like masculine/feminine, animal/human tenaciously and even

302. Thanks to Nick Wright, Founder & Chair of the Board of Animal Justice Canada, for pressing me on this point.

303. Berman, *supra* note 178 at 54.

ferociously.³⁰⁴ Indeed, it is just this tendency that probably contributes to the psychological resistance many people feel about moving towards less nonhuman animal use ('us/not them' and 'me/not it').

It is true that 'quasi' retains the binary categories while it simultaneously mixes them. One might say that this is not really leaving them behind, as Satz, for example, recommends.³⁰⁵ I do not discount that we might be able to do that in our thinking about nonhuman animals one day. My thinking, however, is that quasi-property/quasi-person is a helpful short-term heuristic that can provide enough of a shake-up to create new ways of immediately moving forward. As Glitzenstein points out, nonhuman animals do not care what their legal status is or whether initiatives that benefit them are adopted for pure or mixed motives.³⁰⁶ What they would care about (if they could speak) is that they be protected from harm — not just pain (although this is of course most immediate) but even if we could make their industry uses painless or more comfortable, being used or being eaten. I agree with Satz that a pure motive would be preferable; but I do not see it as essential.

As Foer puts it, there is no solution in going into one of "the logical extremes",³⁰⁷ *e.g.* being a purist activist or a hater of activists, "rather than [living with] the practical realities".³⁰⁸ If you are pescaterian, vegetarian, or vegan, think of all the times you have probably found yourself, in Foer's words, "defending a position far more extreme than you actually believe or could live by".³⁰⁹ Whether pro or con using animals, we are usually, as Foer puts, thinking "only about the edges of the arguments".³¹⁰ This "all-or-nothing framework"³¹¹ is "a way of thinking that we would never apply to other ethical realms".³¹² And to that extent quasi-property/

304. *Ibid* at 78.

305. Satz, *supra* note 1.

306. Glitzenstein, "Panel", *supra* note 263 at 106; *ibid.*

307. Foer, *supra* note 198 at 32.

308. *Ibid.*

309. *Ibid* at 13–14.

310. *Ibid* at 32.

311. *Ibid.*

312. *Ibid.*

quasi-person will not be popular with either extreme. I am prepared to accept this, as I believe that there are probably fewer people living there than in the in-between, trying to do some good in their consumption habits but are not prepared, say, to always wear vegan shoes. Insofar as our thinking, including our moral and cultural thinking about this complex topic will certainly change and in ways that we cannot predict, quasi-property/quasi-person might be a temporary legal categorization. I offer it as a way to capture new thinking that we can use to get us out of the binary approach in which, as Satz pointed out, we have become stuck to the massive detriment to nonhuman animals and to ourselves as failed stewards of our environment and its living entities.

As Fraser CJ of the Alberta Court of Appeal put it, we must deepen the “understanding of our place in the universe. Humans may be at the top of the evolutionary chain. But...we are [also] stewards of the environment”,³¹³ which includes the nonhuman animals “with whom we share the Earth”.³¹⁴ We are only human, after all, one species amongst many; and only humans can do what needs to be done at this delicate juncture by creating the requisite shifts in thinking.

IV. Conclusion

This paper has argued that the property/persons and welfare/rights dichotomies tend to obscure the ‘quasi’ in between space, operating as if no rights exist until the full personhood status is won and this is just not true. Why should animal advocates surrender that important truth?

Neither pure or full property nor pure or full personhood map onto what most people think or, in the case of personhood, are probably prepared to accept. Nonhuman animals are not like standard inanimate forms of property that are interchangeable and replaceable as exchange commodities. Blunt declarations that they are simply forms of property are unconvincing and do not match onto our experience. On the other hand, other animals are not the same as humans and so it is difficult to argue in a sustained and across-the-board convincing way from the

313. *Reece, supra* note 95 at para 58.

314. *Ibid.*

counter-intuitive premise that they should be given a full personhood status like humans.

Quasi-person status akin to corporate status (*e.g.* partial but not full range of rights) could be recognized judicially or legislatively and advocated for politically. ‘Quasi’ is a perfectly inhabitable space even if it is not perfect in terms of what all animal advocates want. It accepts an imperfect state of existence, working with it. It is not pure but it might be good enough.

Perhaps when the heresy (caring about nonhuman animals other than our pets) becomes orthodoxy, the Francione-based heresy (it should not be on utilitarian grounds) will then become orthodoxy, and who knows what the new heresy from that orthodoxy will be. We only know there will be one.³¹⁵ There will be influx and change as ideas about what is right (*e.g.* around pet-keeping) and what is possible come and go. For example, lab-grown meat or ‘clean meat’ (currently possible but not yet commercially viable) might be the game-changer animal advocates are waiting for.³¹⁶ Once doing the right thing for animals does not require people who want to eat meat to give it up, it becomes much more likely that they will turn and really see what producing that food in the body and life of a living sentient creature costs those animals and the environment.

Two Oxford researchers released a report in June 2018 showing the

315. Berman, *supra* note 178 at 147–50 (where Berman explains how the orthodoxy, heresy cycle works).

316. Jeff Sebo, “The Future of Meat” (Paper presented at “Veganism and Beyond: Food, Animals, Ethics”, Queen’s University, Kingston, Ontario, Canada, 10 June 2017) [unpublished]. See Director Liz Marshall’s film *Meat the Future* (trailer available at <meatthefuture.com/>). The Oxford Summer School included two presentations on the topic of ‘clean meat’: Rebecca Jenkins, “Lab Grown Meat: The Final Frontier for Agricultural Animal Law” (Animal Ethics and Law: Creating Positive Change for Animals delivered at Oxford Centre for Animal Ethics, Fifth Annual Oxford Summer School on Animal Ethics, 24 July 2018) [unpublished]; Christopher Bryant, “Cellular Agriculture: The Future of Animal Products?” (Animal Ethics and Law: Creating Positive Change for Animals delivered at Oxford Centre for Animal Ethics, Fifth Annual Oxford Summer School on Animal Ethics, 25 July 2018) [unpublished].

incredible gap between the agricultural land used to produce calories and protein using meat and dairy (given all the land required to grow animal feed) and what would be required if humans were to meet those needs by eating plant-based products directly. The conclusion of this research is that the very best thing anyone can do to reduce their environmental impact is eat plant-based foods and eliminate meat and dairy (the very best cow's milk they found is worse than the very worst soy milk).³¹⁷

The law needs to be able to move, grow, and change with these important scientific findings and cultural shifts in moral thinking. A conception like quasi-property/quasi-person will be able to grow with these changes as we search for sustainable and ethical ways to live a healthy and humane human existence. Yes, the categories are vague but this is, I suggest, a virtue given that we do not know yet what we will fill them with. Which animals and which rights, where human property rights must give way to the nonhuman animals' rights, and whether we need to embrace the idea that nonhuman animals are their own property in much the same way that human beings enjoy a kind of practical self-ownership. The goal would be for nonhuman animals to be treated *as if* they are persons, for the purposes of respecting the rights they have, which are appropriate to their situation; and *as if* they are not merely property, in the sense of having their own existence and interests.³¹⁸ This

317. The study showed that meat and dairy consumption provide just 18% of calories and 37% of protein use but use the vast majority of agricultural land — 83%, which produces 60% of agricultural greenhouse gas emissions. See Damian Carrington, "Avoiding Meat and Dairy is 'Single Biggest Way' to Reduce Your Impact on Earth" (31 May 2018), online: *The Guardian* <www.theguardian.com/environment/2018/may/31/avoiding-meat-and-dairy-is-single-biggest-way-to-reduce-your-impact-on-earth>. The study is by J Poore & T Nemecek, "Reducing Food's Environmental Impacts through Producers and Consumers" (1 June 2018) 360:6392 *Science* 987, online (pdf): <science.sciencemag.org/content/sci/360/6392/987.full.pdf>.

318. The first definition of "quasi" in Webster's is "as if". See *Webster's*, *supra* note 16, sub verbo "quasi" ("as if: as it were: in a manner: in some sense or degree"). See also *Black's*, *supra* note 45, sub verbo "quasi" (where 'as if' is the first definition).

is a set of legal fictions; but they are ones that track important under-acknowledged truths, specifically, that neither their property nor their personhood is an all-or-nothing affair.

