

Second wave animal ethics and (global) animal law: a view from the margins

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Animal law and animal law studies both suffer from shortcomings in their underlying ethics. For the most part, (global) animal law draws from utilitarian welfarism and rights-based approaches to animals. Animal law academics have, thus far, paid little attention to more critical animal ethical studies, although these hold great potential for improving the justness and effectiveness of animal law. This article proposes delineating a 'second wave of animal ethics' consisting of a number of critical ethical lenses that are capable of addressing four key shortcomings in 'first wave animal ethics'. This article draws particularly on feminist, posthumanist and earth jurisprudence studies to draw out four key lessons. First, the need to stop assuming that animals only deserve moral and legal consideration if they are like humans, and instead to accept, celebrate, reward, and legally protect difference. Second, the need to stop assuming that moral and legal consideration should extend to animals and no further. Third, the need to stop over-relying on liberal concepts like rights and start engaging with (intersectionally) marginalized communities to theorize viable alternative paradigms that might work better for animals. Fourth, the need to stop assuming that animal ethics need to be the same everywhere. In making this argument, this article intends to inspire further research on 'second wave animal ethics' ideas amongst animal law scholars.

Key words: animal rights; animal welfare; animal ethics; global animal law; posthumanist ethics; feminist animal ethics; intersectionality; animal law

1 INTRODUCTION

Animals are systemically marginalized and exploited in contemporary society in ways that differ in their particularity, but which are broadly analogous to the treatment of women, ethnic and religious minorities, disabled people, and queer people.¹ The points of intersectionality between animal liberation and other social justice movements stem from resistance to a core belief held by dominant societal groups that 'they' are different from 'us'.² Throughout history, powerful groups have used difference from the dominant norm (male, white, heterosexual, cisgendered and human) as a justification for denying suffrage to, enslaving, going to war with, committing genocide against, or eating members of our earth community that have been 'othered'. The success of social justice movements has frequently turned on proving to those dominant in society that the 'other' is not so different after all and that the moral atrocities inflicted upon them were in fact inflicted upon another self that has equal inherent value.³

This tactic has been replicated (knowingly or unknowingly) by mainstream animal ethics in opposition to the othering of animals in society. In this article I describe this body of work as 'first wave' animal ethics.⁴ 'First wave' animal ethics encompasses heavyweights of the animal

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¹ Maneesha Deckha, 'Toward a Postcolonial, Posthumanist Feminist Theory: Centralizing Race and Culture in Feminist Work on Nonhuman Animals' (2012) 27(3) *Hypatia* 527.

² Section 5.2.1 below.

³ 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, 208.

⁴ This terminology is inspired by the waves of feminism.

liberation movement including Peter Singer, Tom Regan and Gary Francione.⁵ Such first wave ethical systems, focusing on animal welfare and animal rights, are typified by their use of liberal-rational, acontextual theory to justify drawing animals within the circle of moral concern together with humans on the basis of similarities deemed to be relevant, such as cognitive ability, self-consciousness or sentience.

It is not within the scope of this article to comprehensively defend a connection between law and ethics,⁶ beyond noting that animal law relies on its basis in ethical thought as a means to increase its legitimacy and effectiveness.⁷ This article argues that the ideas espoused by first wave animal ethics (some of which are reflected in animal law) are less than optimal and are potentially even harmful, particularly in the context of global animal law. For this reason, this article makes a first, novel effort to demarcate the scope and direction of a new ‘second wave’ of animal ethics.⁸ These arguments are made from the author’s standpoint as a critical, posthumanist and intersectional theorist who lives as an ethical vegan and whose ethics are inspired by experiences of marginalisation as a queer man: I am influenced by feminist and poststructural perspectives that enable deconstructive analyses of the social and political systems that perpetuate animal harm. From this position, this article will argue that second wave animal ethics provides animal law studies with a more effective ethical grounding than does first wave animal ethics.

This article will unfold as follows. Part 1 will define and distinguish first and second wave animal ethics. Thereafter the article provides an analysis of four key limitations of first wave animal ethics, including the problems of the similarity argument (Part 2); the exclusionary force of a circle of moral concern (Part 3); the limitations of the liberal tradition (Part 3); and the ethnocentric universalisation of animal ethics (Part 4). The analysis in these four parts, taken together, will show how second wave animal ethics is more likely to ground effective legal protection for animals and for other ethically considerable beings because it addresses these four key deficiencies of first wave animal ethics. The article shows how second wave animal ethics can respond to these four key deficiencies and, in the process of doing so, reveals the central ideas that define the second wave. While the functioning of first wave animal ethics will be explored in each of these four parts, it will not be discussed at length. This is because first wave animal ethics has already benefitted from extensive treatment in the literature.⁹

The four key deficiencies start, first, with an overly narrow focus on particularly intelligent or able species. This deficiency stems from an overreliance on problematic ‘similarity arguments’ in animal ethics in the first wave which argue that animals, in order to be worthy of moral protection, need to be similar to humans in ways deemed relevant for that purpose.¹⁰ This article proposes, on the basis of second wave animal ethics, affording ethical consideration to animals not because they are similar to humankind but because they are deserving of ethical treatment as the kinds of things that they are. Such a position pushes against, for example, Tom

⁵ Peter Singer, *Animal Liberation* (Harper Perennial ed, 4th edn, 2009); Tom Regan, *The Case for Animal Rights* (University of California Press 2004); Gary L. Francione, *Animals, Property, and the Law* (Temple University Press 1995); Gary L. Francione, *Rain without Thunder: The Ideology of the Animal Rights Movement* (Temple University Press 1996); Gary L. Francione, *Animals as Persons* (Columbia University Press 2008).

⁶ For fascinating insight, see Wibren van der Burg, *The Dynamics of Law and Morality: A Pluralist Account of Legal Interactionism* (Routledge 2014).

⁷ Thomas G. Kelch, ‘The Role of the Rational and the Emotive in a Theory of Animal Rights’ in Josephine Donovan and Carol J. Adams (eds), *The Feminist Care Tradition in Animal Ethics* (Columbia University Press 2007) 273–274.

⁸ Robert Garner comes close to doing this in discussing a ‘second generation’ of post-rights animal ethicists in Robert Garner, *Animals, Politics and Morality* (2nd edn, Manchester University Press 2004) 4; also, Paul Waldau’s call for a ‘second wave animal law’ was inspiring in this regard. See Paul Waldau, ‘Second Wave Animal Law and the Arrival of Animal Studies’ in Deborah Cao and Steven White (eds), *Animal Law and Welfare: international perspectives* (Springer 2016).

⁹ Waldau (n 9) 16; for examples see Simon Brooman and Debbie Legge, *Law Relating to Animals* (Cavendish Publishing Limited 1997) ch 1; Thomas G. Kelch, *Globalization and Animal Law: Comparative Law, International Law and International Trade* (Kluwer Law International ed, 2nd edn, 2017) ch 2.

¹⁰ Bryant (n 3) 208; Francione, *Animals as Persons* (n 5) 137 et seq.

Regan's theory of animal rights, which applies only to mammals over one year in age.¹¹ Secondly, first wave animal ethics seeks to enlarge the circle of moral concern but tells us nothing about how to treat those outside the circle.¹² As an alternative, this article proposes that second wave animal ethics looks outside the circle of moral concern in the first instance in order to prioritize the 'other'. Thirdly, first wave animal ethics stems from the liberal tradition.¹³ It will be argued that liberal ethical concepts of individuality, rights, and obligation are ill-fitting in relation to questions of animal ethics compared to second wave concepts of interconnectedness, relationality, and care. Finally, first wave animal ethics sets out universal, non-contextualized systems of rules.¹⁴ Such frameworks risk perpetuating ethnocentricity and neocolonial patterns of influence on the global scale. Second wave animal ethics instead therefore exposes the problem of ethnocentricity and the harms it can cause to marginalized groups of humans.

Taking such a deep dive into animal ethics is an essential form of reflection for animal law scholars if this discipline is to address its own ethical shortfalls and thereby inspire more effective forms of animal law.¹⁵ This article is primarily intended to speak to and to inspire those who see something lacking in the animal law scholarship that relies on welfarism and animal rights ethics.¹⁶ The ideas forwarded by second wave animal ethics are currently neglected by animal law scholars, and this situation — it will be argued here — ought to change. Accordingly, this article hopes to inspire debate on second wave ideas amongst animal law scholars who currently align with first wave ethics.

The genesis of global animal law (as a scholarly sub-discipline and area of law) adds gravity to this neglect.¹⁷ Global animal law is an emerging area of legal study on the global aspects of law as it relates to animals. The study of global animal law investigates sites of legal development at international, regional, and domestic levels in public and private spheres. It incorporates legal theory and ideas of constitutionalism as well as more concrete black letter legal analyses. Issues including trade, transboundary conservation, and the relationship between animal agriculture and climate change feature prominently in this area of scholarship. However, it should be stressed that global law is not synonymous with universally applied law: It is multi-site and adjectival rather than substantive.¹⁸

These moves toward globally framed research on animal law have increasingly drawn western animal law scholars to promote their policy approaches and, consequently, their ethics, on the global stage. Animal rights arguments are dominating this emerging global conversation and, from a critical standpoint, due consideration is not being given to the ideas presented by the second wave of animal rights scholarship.¹⁹ The genesis of global animal law also provides an opportunity as a moment of reflection and comparison. This article hopes to take advantage of this moment in order to improve the ability of law to positively impact the lives of animals in real terms, in significant ways, in the short, medium and long term.

¹¹ Regan (n 5) 264 et seq.

¹² For example, *ibid* 362–363 and 396.

¹³ Deckha (n 1) 528.

¹⁴ Section 6.1 below.

¹⁵ An animal law scholar is a legal scholar who researches or otherwise works on the treatment of animals by the law. It is assumed here that all those who would self-identify as an animal law scholar would take the suffering of animals seriously and their research would be focused, at least in part, upon changing the law as a means to improve the lives of animals.

¹⁶ On entrenchment of welfarism in animal law, regard the narrative in Ian A Robertson, *Animals, Welfare and the Law: Fundamental Principles for Critical Assessment* (Routledge 2015); On animal rights in law, see Steven M Wise, 'Legal Personhood and the Nonhuman Rights Project' (2010) 17 *Animal Law* 1.

¹⁷ Anne Peters, 'Global Animal Law: What It Is and Why We Need It' (2016) 5(1) *Transnational Environmental Law* 9.

¹⁸ For meta-theoretical insight into the 'global' in law, see Neil Walker, *Intimations of Global Law* (Cambridge University Press 2015).

¹⁹ Anne Peters, 'Liberte, Egalite, Animalite: Human-Animal Comparisons in Law' (2016) 5 *Transnational Environmental Law* 25, 42 et seq.

2 THE SWELL PERIOD: CONTEMPLATING THE FIRST WAVE PAST AND THE SECOND WAVE APPROACHING²⁰

2.1 The first wave of animal ethics

Human exceptionalism and dominion have largely defined the human legal relationship with animals in the west. As Steven Wise states, '[f]or animals, the river of injustice that flowed through the West was fed by streams of Hebrew, Greek, and Roman law, philosophy, and religion'.²¹ Western legal and ethical praxes have been heavily influenced by Aristotle's Great Chain of Being²² and by René Descartes's assertion that animals are automatons or 'unfeeling machines'.²³

At the same time, those interested in animal law are well aware of a history of animal care within the western tradition inspired by the likes of Pythagorean vegetarianism,²⁴ Kantian indirect duties to animals,²⁵ Darwinian evolution,²⁶ and Bentham's recognition of animal suffering.²⁷ There have always been those who cared for animals and theorized as to why they matter morally and ought to be legally protected. This strand of protective ethical theory culminated in a mainstreaming of these ideas following the birth of the animal liberation movement in the 1970s, a movement encompassing divergent utilitarian welfarism and deontological rights-based ethics²⁸ which are increasingly being consolidated.²⁹

Of these, Peter Singer's welfarism and Tom Regan's theory of animal rights have had the strongest significance for and influence on the movement.³⁰ Their influence has meant that utilitarianism and deontology have formed the core of animal law scholars' interest in animal ethics.³¹

The features of the first wave identified above as problematic, are also helpful in distinguishing the characteristics of the first wave from those of the second wave. As already noted, first wave ethics are liberal-rational, acontextual, draw animals within a circle of moral concern together with humans, and do this on the basis of similarities deemed to be relevant. Utilitarian and deontological ethics share all of these features and form the core of the first wave.

2.2 The second wave approaching

Waves 'are not predictable, uniform or monolithic. They are, in fact, capable of multiplicity and diversity'.³² Accordingly, second wave animal ethics would be akin to second wave feminism in that it would encompass contrasting and even contradictory theories that are nonetheless temporally related and clustered in relation to an overarching theme or impulse. This wave would, for instance, encompass theories of animal ethics that follow in time from Singer and

²⁰ The ocean narrative is used here, countering critique of its ideas of 'separation' and replacement with recognition of the ocean's 'cross-currents and eddies'. See Prudence Chamberlain, *The Feminist Fourth Wave: Affective Temporality* (Palgrave Macmillan 2017) 23.

²¹ Steven M Wise, *Rattling the Cage: Towards Legal Rights for Animals* (Profile 2000) 24.

²² Aristotle, *The Politics* (Carnes Lord ed, University of Chicago Press 1984) 1256b.

²³ Kelch, (n 7) 33 citing: René Descartes, *A Discourse on Method and Selected Writings* (John Veitch trs, Am ed 1951), 47-51.

²⁴ *ibid* 30 citing Thomas Taylor (trs), *Iamblichus' Life of Pythagoras* (Kessinger Publishing Co 2003), 134-135.

²⁵ *ibid* 35 citing: Immanuel Kant, *The Metaphysics of Morals* (Cambridge University Press 1996), 238.

²⁶ Charles Darwin, *The Descent of Man* (Princeton University Press 1981) 128.

²⁷ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (2nd edn, Clarendon Press 1823) 144.

²⁸ For example, Gary L Francione, 'Reflections on Animals, Property, and the Law and Rain Without Thunder' (2007) 70(1) *Law and Contemporary Problems* 9, 16.

²⁹ Steven P McCulloch, 'On the Virtue of Solidarity: Animal Rights, Animal Welfarism and Animals' Rights to Wellbeing' [2012] *Journal of Animal Welfare* 5.

³⁰ Singer (n 5); Regan (n 5).

³¹ Francione, *Animals, Property, and the Law* (n 5) 6.

³² Chamberlain (n 20) 21-23.

Regan but which depart substantially from utilitarianism and deontology. According to this delineation, Francione's rights-based approach falls within first wave animal ethics even though he is contemporaneous with the likes of feminist ethicists Carol Adams and Josephine Donovan.

This article will set out key ethical ideas characterising the approaching second wave of animal ethics. While the article focuses on feminist and posthumanist animal ethics, this focus is not intended to be exhaustive. For example, Marxist animal ethics and intersecting postcolonial and queer theories also have important insights to contribute to this second wave. Political philosophy, which uses political theory in place of ethics to deal with the animal question, also includes ideas that could prove important to the second wave,³³ though some of this work in political philosophy still subscribes to core first wave ideas (such as the attachment to liberalism).³⁴ Accordingly, while I argue that the four ideas set out in this paper will be important for second wave animal ethics, I do not imagine or assume that all second wave animal ethics thinkers would necessarily agree on all the prepositions or ideas either implied or explicit in this exploration.

In addition to the four key issues of substance to be explored in this article, there are two further fundamental reasons why second wave animal ethics should now be explored in animal law studies. First, the first wave has not yet been able to inspire a sufficiently effective animal law. Many animal law scholars might wish to disagree with this point given that there is now more animal law and welfare protection included in law than was ever the case in the past. However, simultaneously, animal exploitation is currently also more widespread and industrialised than it has ever been. In particular, the western factory-farming model is expanding east and south,³⁵ while the existing welfarist legal protection of animals acquiesces with this factory-farming model and with other extreme forms of exploitation of animals.³⁶ Notwithstanding these problematic forms of complicity, there has been a certain anxiety amongst lawyers about critiquing first wave animal ethics for fear that this will harm the animal liberation project, thereby causing stasis and distraction.³⁷ This underlines the importance of asking whether a commitment to first wave animal ethics has, in reality, slowed down legal progress towards enshrining animal rights. Could it be that second wave animal ethics is more capable of questioning the legal, political and social systems implicated in the glacial pace of legal progress?

Secondly, first wave animal ethics typically includes discrete, closed theories of ethics that foreclose further debate and seek to rationalize themselves into universal application.³⁸ In contrast, contextualised and situated ethical consideration might be more attractive in global forums. This is because securing collaborative advancements in global forums will require responsiveness to and cognisance of the circumstances impacting different communities. An intersectional animal ethic would also favour ethical ideas reached through dialogue between communities rather than those offered by western thinkers without engagement across cultures. I suggest that the kind of frameworks promoted by the first wave of animal ethics are too rigid to facilitate the necessary kind of contextual thinking. Contrastingly, second wave animal ethics provides an alternative 'toolbox' approach to animal ethics in law and offers a number of insightful ethical ideas and concepts to help legal minds tackle the animal question.³⁹

³³ See, centrally, Sue Donaldson and Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford University Press 2013).

³⁴ N 110 below.

³⁵ Danielle Nierenberg, 'Factory Farming in the Developing World' (2003) 16(3) *World Watch* 10; and Felicity Lawrence, 'Factory Farming "Spreading Disease around the World"' (*The Guardian*, 2002).

³⁶ Francione, *Animals as Persons* (n 5) 150.

³⁷ An example of a notable exception is Ellen P Goodman, 'Book Review: Animal Ethics and the Law' (2006) 79 *Templ L Rev* 1291, 1306.

³⁸ Kelch, 'The Role of the Rational and the Emotive in a Theory of Animal Rights' (n 7) 275–276.

³⁹ For example Jessica Eisen, 'Beyond Rights and Welfare: Democracy, Dialogue, and the Animal Welfare Act' (2018) 51(3) *Journal of Law Reform* 469, 469.

3 THE SIMILARITY ARGUMENT

3.1 The problem with the similarity argument

First wave animal ethics relies upon the similarity argument, which affords ethical consideration to marginal subjects when they are deemed relevantly similar to the paradigm case. For example, Regan attributes rights to animals deemed to be ‘subjects of a life’ because they experience things like ‘a sense of the future’, ‘an individual experiential welfare’, ‘beliefs, desires and preferences’.⁴⁰ These are all traits shared by humans (the paradigm case). Accordingly, the only animals deemed by Regan to be sufficiently similar to the paradigm case here are mammals over one year of age.⁴¹

Though Regan’s concept is expandable,⁴² his use of humanistic traits as gatekeepers for moral considerability is problematic. For example, as argued by Thomas Kelch, reliance upon rationality, moral agency, language, or the like, in order to attribute moral significance to animals also excludes ‘marginal cases’ such as certain humans who do not have these attributes.⁴³ This, in turn, risks treating those marginal humans as animals are currently treated and aligns with assumptions underlying arguments that were used to justify centuries of slavery.⁴⁴

In any event, it is important to ask why animals need to be similar to humans in order to be worthy of moral consideration or legal protection.⁴⁵ First wave animal ethics fails to answer this question. Failure to consider this question, however, could frustrate long-term gains for animal protection in law. For example, the Nonhuman Rights Project relies upon the similarity argument to argue for legal rights for the most intelligent, capable animal species.⁴⁶ Yet such relevant similarities to humankind cannot be successfully argued in all cases where animals require legal protection. The similarity approach risks leaving open to exploitation those animals who are not deemed to be relevantly similar to humans.⁴⁷ It also inadvertently promotes harmful research on animals to determine their ability to suffer.⁴⁸

Boundary drawing in ethical theory is understandably very difficult, and rating closeness to the paradigm (human) case has offered an easy but overly simplistic solution. This assumption is evidenced by legal academics, such as Anne Peters, who relegate the question ‘which species should receive legal consideration?’ to the back pages of their work and consider it to be a question ‘which cannot be resolved easily’.⁴⁹ Such relegation acquiesces with the potential infliction of harm in marginal cases by neglecting non-able bodied people and those animals thought to possess fewer relevant capabilities. If one accepts that marginalized people and animals matter, however, then this acquiescence with the potential infliction of harm is reason enough to explore alternatives provided by second wave animal ethics. The next section will explore tools developed by groups of humans not traditionally deemed to fall within the ‘paradigm case’, and which are more appropriate to the needs of marginal groups like animals.

3.2 Second wave animal ethics discrediting the similarity argument

⁴⁰ Regan (n 5) 264.

⁴¹ *ibid* 78.

⁴² Mary Anne Warren, ‘Difficulties with the Strong Animal Rights Position’ (1986) 2(4) *Between the Species* 163, 15–166.

⁴³ Kelch, (n 7) 35–36.

⁴⁴ *ibid* 36.

⁴⁵ On this question, see generally Bryant (n 4); and Catharine A MacKinnon, ‘Of Mice and Men: A Fragment on Animal Rights’ in Donovan and Adams (7).

⁴⁶ Wise, (n 15) 237; Steven M Wise, *Drawing the Line: Science and the Case for Animal Rights* (Perseus Publishing 2002) 37.

⁴⁷ Francione, ‘Reflections’ (n 20) 54.

⁴⁸ Bryant (n 3) 220–224.

⁴⁹ Peters (n 19) 53.

Feminist animal ethicists oppose the similarity argument central to rights-based (first wave) animal ethics.⁵⁰ For example, Catherine MacKinnon recognizes that attributing rights to the most cognitively able animals resembles the feminist movement's beginnings, which focused on the 'rights of elite women'.⁵¹ To avoid exclusion, animals should be seen 'on their own terms' instead of being assimilated with humankind.⁵² This approach facilitates an ascertainment of what an animal would wish for itself, avoiding paternalism.⁵³ Paternalism is problematic because it entails problem solving without proper insight into the experience of the problem by those who suffer because of it. External, theorised opinion does not have the same validity as embodied experience for ethical systems that take suffering (or flourishing) seriously.

Before introducing an alternative approach, it is important to note that some first wave ethical theories avoid the similarity argument by identifying sentience as the only condition for moral consideration. For example, Francione's rights-based theory of animal ethics denounces the similarity argument but relies upon sentience as a prerequisite to awarding rights.⁵⁴ Singer also relies on sentience, arguing that sentient beings ought to be included in utilitarian calculi in order to avoid speciesism (which is akin to sexism and racism).⁵⁵ However, these theories are less than ideal for two reasons.

Firstly, sentience can be regarded as a capacity similar to language or rationality. Thus, it is not clear how one could denounce the similarity argument whilst requiring sentience for moral consideration.⁵⁶ If the ethical action is the one that that minimizes suffering, then sentience is a useful benchmark. But, if alternative concepts, such as flourishing, also characterize ethical action, then sentience becomes just one benchmark amongst many. Many things that are not sentient can flourish, and moving beyond the similarity argument could inspire scholars to include conditions for flourishing in ethical contemplation. Contemplating such questions does not necessarily pre-determine action. It does not, for example, entail that humans must stop eating vegetables in order to allow them to flourish. However, such considerations do create an opening that allows scholars to make environmental degradation or other ways in which non-sentient beings lack flourishing to become a subject of ethical consideration. In the light of these reflections, perhaps animal ethics ought to give significance to sentience in a way that does not give it a gatekeeping function.

Secondly, references to animal sentience have focused upon an ability to suffer.⁵⁷ In recognising suffering similar to our own, first wave animal ethics deems it immoral to cause such suffering to animals. However, MacKinnon asks, '[w]hy is just existing alive not enough? Why do you have to hurt?' and argues that men have 'never had to hurt or to suffer to have their existence validated and harms to them be seen as real'.⁵⁸ Perhaps a preoccupation with suffering has blinded animal liberationists to other more useful concepts. Second wave animal ethics provides promising alternatives to an over-focus on suffering as a means by which to assign moral significance.

Martha Nussbaum applies a capabilities approach to animal ethics, which although it falls short in some respects, overall provides the tools necessary to avoid the exclusionary, anthropomorphising and speciesist traps of the similarity argument.⁵⁹ Nussbaum attributes

⁵⁰ Donovan and Adams (n 7) 5.

⁵¹ Catharine A MacKinnon, 'Of Mice and Men: A Feminist Fragment on Animal Rights' in Cass R Sunstein and Martha C Nussbaum, *Animal Rights: Current Debates and New Directions* (Oxford University Press 2006), 263 and 271.

⁵² Donovan and Adams (n 7) 5.

⁵³ Josephine Donovan and Carol J Adams, 'Introduction' in Donovan and Adams (n 7) 4.

⁵⁴ Gary L Francione, *Introduction to Animal Rights: Your Child or the Dog?* (Temple University Press 2000) 137–142.

⁵⁵ Singer (n 5) 9.

⁵⁶ Gary Steiner, *Animals and the Limits of Postmodernism* (Columbia University Press 2013) 148.

⁵⁷ For example, Francione, *Introduction* (n 54) 137–142.

⁵⁸ Catharine A MacKinnon, 'Of Mice and Men: A Fragment on Animal Rights' in Donovan and Adams (n 7) 326.

⁵⁹ Other proposals include the anti-discrimination approach favoured by Bryant (n 3) 233; also see interesting discussion in Donna J Haraway, *When Species Meet* (University of Minnesota Press 2008) 22.

ethical significance to capabilities but transcends the similarity argument by avoiding a hierarchy of capabilities. For Nussbaum, human-like capabilities are no more capable of grounding ethical responsibility than are other capabilities. This argument is significant because the language of capabilities is loaded with a history of exclusion (of women, ethnic minorities, and animals) on the basis of prioritizing capabilities such as language and reason.⁶⁰

Nussbaum's shortcoming remains that, despite avoiding hierarchy, she still utilizes sentience as a gatekeeper for moral consideration, thus ultimately using the similarity argument.⁶¹ This approach forecloses debate about what moral consideration might be owed to sentient life where proof of sentience is lacking, and to non-sentient life. Such foreclosed thinking is deficient as an ethical basis for animal law because animals and marginal humans are neglected precisely due to their marginality in ethical theorising.

Nonetheless, aspects of Nussbaum's approach provide tools with which to deal with marginal cases. Crucial in this regard is Nussbaum's recognition of varying capabilities in different species; things they are 'able to do and to be'.⁶² This focus facilitates the formulation of an ethic that allows beings to flourish 'as the sort of thing they are', affording the 'dignity relevant to that species'.⁶³ Nussbaum's central thesis is that '[m]ore complex forms of life have more and more complex capabilities to be blighted, so they can suffer more and different types of harm'.⁶⁴ Therefore, ethical consideration requires different responses depending upon the capabilities of the subject.⁶⁵

Nussbaum conceptualizes flourishing as the absence of suffering.⁶⁶ Suffering thus retains significance but simultaneously takes a back seat to flourishing. Animal law would benefit tactically by making a similar conceptual move because, to date, the focus on avoiding suffering in lieu of promoting flourishing has contributed to the failure of animal liberation to effectively link with other social justice movements.⁶⁷ Building a greater number of links between movements would, however, increase the ability of each movement to comprehend and to tackle intersecting oppressions.

Another advantage of Nussbaum's ethic is that it can focus on animal interests beyond their basic interest in welfare.⁶⁸ Nussbaum's concept of flourishing can inspire thoughtful reflection on (dis)similarity of being, and thus on the appropriateness of different forms of animal protection, support and encouragement tailored to unique entities. First wave animal ethics has thus far proven incapable of stimulating law and policy approaches that have such strength and breadth: At present, the law still acquiesces with practices such as factory farming that frustrate animals' efforts to flourish.

As the animal liberation movement and wider legal circles begin to consider animals as legal persons and (moral and legal) rightsholders, it is essential to expose human narcissistic assimilative patterns of recognition. Animal rights ought to be conceptualized as being distinguishable from human rights in order to reflect their capabilities and needs. Second wave animal ethics transcends the anthropomorphising tendencies visible in the first wave, whilst also

⁶⁰ Steiner (n 56) 98.

⁶¹ Martha C Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press 2007) 361–362.

⁶² *ibid* 71.

⁶³ Martha C Nussbaum, 'Beyond "Compassion and Humanity": Justice for Nonhuman Animals' in Sunstein and Nussbaum (n 51) 309, 350.

⁶⁴ *ibid* 309.

⁶⁵ A similar idea is expressed by Thomas Berry and Mary Evelyn Tucker (eds), *Evening Thoughts: Reflecting on Earth as Sacred Community* (Sierra Club Books 2006) 149–150.

⁶⁶ For beautiful prose on flourishing, see Chaia Heller, *Ecology of Everyday Life: Rethinking the Desire for Nature* (Black Rose Books 1999) 110.

⁶⁷ Sue Donaldson and Will Kymlicka, 'Make It So: Envisioning a Zoopolitical Revolution' in Paola Cavalieri (ed), *Philosophy and the Politics of Animal Liberation* (Palgrave Macmillan 2016) 89.

⁶⁸ Susana Monsó, Judith Benz-Schwarzburg and Annika Bremhorst, 'Animal Morality: What It Means and Why It Matters' [2018] *Journal of Ethics* <<https://doi.org/10.1007/s10892-018-9275-3>>.

drawing appropriate distinctions, avoiding hierarchy and moving away from a one-size-fits-all approach.

The next section will explore the deficiencies of the circle of moral concern argument, leading to an ethic that rejects anthropomorphisation and which is other-facing.

4 THE CIRCLE OF MORAL CONCERN

4.1 The problem with the circle of moral concern

The circle of moral concern is a problem linked to, but distinct from, the similarity argument. The circle represents the boundary of moral consideration: those inside are subjects of moral consideration while those outside are not. Theorists of first wave animal ethics construct a circle of moral concern whereby inclusion within the circle is determined by the similarity argument.⁶⁹ The circle of moral concern, however, is problematic regardless of how its entry requirements are articulated because it gives inadequate consideration to those entities marginally within the circle and it says nothing about how to treat those entities outside the circle. This neglect has facilitated and justified centuries of oppression of women, racial and religious minorities, queer people and animals. An alternative to constructing a circle of moral concern is developing a boundless other-facing ethic. Such an other-facing ethic arguably could have identified such oppression as problematic much earlier, through ongoing processes of consideration and compassion. The development of such an other-facing ethic can draw on Nussbaum's flourishing and award appropriate, variable consideration to different entities according to their capabilities.

Donna Haraway conceptualizes the problem with utilizing the circle of moral concern well. She writes 'trying to figure out who falls below the radar of sentience and so is killable while we build retirement homes for apes is ... an embarrassing caricature of what must be done'.⁷⁰ The inside/outside dualism that the circle of moral concern depends upon is a dangerous 'hierarchical' iteration of 'centrist' liberal ethics which are not commonly questioned in animal law academia.⁷¹ For example, Anne Peters hints at the inadequacy of the current conception of the moral circle, noting that 'over time, all of [the] purported unique characteristics of humans have been refuted as invalid' when these characteristics are also found in animals.⁷² Thus, Peters claims, it is illegitimate to deny rights to animals based on dissimilarity to humankind. However, this argument still has two key problems. Firstly, Peters assumes similarity is a legitimate basis for extending the moral circle of concern. It was shown above that it need not be. Secondly, Peters argues that the circle's boundary line has previously been drawn incorrectly, implying that a line around all sentient beings would be correct. But the justification for drawing an exclusionary moral circle in the first place remains unclear. Peters describes the '*moral and legal*' dividing line between two species as being 'volatil[e]' and 'socially constructed'.⁷³ To draw a line around humans together with animals would be a further, though more evolved, social construct, which would simply repeat the 'Cartesian gesture of moral dualism'.⁷⁴ Ethical thought ought to do away with the volatile, erroneous circle altogether, in order to deal more quickly and effectively with the perpetuation of unjust oppressions (including those oppressions that are not yet recognised as unjust but which might only later be seen to be condemnable).

⁶⁹ This is a natural consequence of defining similarities as necessary criteria for moral considerability.

⁷⁰ Haraway (n 59) 89.

⁷¹ *ibid*; Val Plumwood, *Environmental Culture: The Ecological Crisis of Reason* (Routledge 2002) 146–147.

⁷² Peters (n 19) 27.

⁷³ *ibid* 26.

⁷⁴ Val Plumwood, 'Integrating Ethical Frameworks for Animals, Humans, and Nature: A Critical Feminist Eco-Socialist Analysis' (2000) 5(2) *Ethics & the Environment* 285, 286.

The dangers of centrist models of justice are further illustrated by John Rawls' work. Rawls argues that '[f]ully able-bodied persons are the paradigm case' of subjects of justice.⁷⁵ He proposes to first decide 'principles of justice' for the 'paradigm group' and then to apply this to '(so-called marginal cases)'.⁷⁶ But people with disabilities and animals have unique interests in justice that are equally deserving of respect. Centrist models of justice are incapable of providing tailored responses to the unique challenges and needs of marginalised groups. Indeed, deprioritising marginal cases meant that Rawls never ended up including animals as subjects or objects of justice.⁷⁷

The next section will highlight the benefits of developing an animal ethic that is not based on an inside/outside dualism. Deconstructing the subjects and boundaries of first wave animal ethics will help reunite animal ethics and environmental ethics in a mutually complimentary fashion.

4.2 Reuniting animal and environmental ethics by disbanding the circle of concern

Deep environmental ethics (particularly earth jurisprudence) hold untapped potential for the modern animal law scholar. This section will discuss what this body of scholarship could offer animal rights discussions. In addition, traditions such as continental philosophy also contain interesting insights that could be drawn on in developing an unbounded ethic.⁷⁸ However, space does not permit an exploration of the insights from that tradition in this article.

Earth jurisprudence is a legal-philosophical position that recognises the interconnectedness of living beings and that attributes rights to nature. This position posits that fundamental laws control the Earth's functioning and that humanmade laws are only valid if they comply with these fundamental laws.⁷⁹

This theory offers a stimulus to encourage animal ethicists to reconsider their use of the moral circle of concern, but does not necessarily explain how that would be workable: On workability, Matthew Calarco argues that 'universal consideration', or a boundless ethic, tells us nothing of what 'count[s]' or 'how' various beings count.⁸⁰ An ethic without a circle of moral concern 'avoids predetermining the limits of moral consideration yet insists on the social and normative dimensions of ethical responsiveness'.⁸¹ This open-textured ethic means that ongoing consideration is necessary in all cases, most especially in those where moral considerability is undetermined. However, Calarco demonstrates that ethical consideration does not necessitate obligation. An open ethical system permits consideration of what is owed to rivers, artificial intelligence, or space matter, without predetermining the ethical action required. Such an approach opens up questions of how to treat others rather than foreclosing them. It therefore also facilitates coexistence of animal ethics and environmental ethics. The potential advantage of such an open ethical system for groups who have been previously, or are currently, excluded from adequate ethical and legal consideration is arguably clear: after all, the harm caused by othering and exclusion is unquantifiable. Despite its potential practical burdens, a boundless, precautionary approach has the potential to significantly reduce such harm through enhanced inclusiveness.

The generally assumed incompatibility between animal ethics and environmental ethics has been over-exaggerated, with many commentators emphasising animal ethics' focus on the individual and environmental ethics' focus on systems — a divergence stimulated by J Baird

⁷⁵ John Rawls, *Political Liberalism* (Columbia University Press 1993) 244–245.

⁷⁶ *ibid.*

⁷⁷ John Rawls, *A Theory of Justice* (Belknap 1971) 504.

⁷⁸ William Edelglass, James Hatley and Christian Diehm (eds), *Facing Nature: Levinas and Environmental Thought* (Duke University Press 2012).

⁷⁹ For further insight, see Peter Burdon, *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press 2011).

⁸⁰ Matthew Calarco, 'Toward an Agnostic Animal Ethics' in Paola Cavalieri (ed), *The Death of the Animal: A Dialogue* (Columbia University Press 2009) 81.

⁸¹ Anat Pick, 'Turning to Animals Between Love and Law' (2012) 76 *New Formations* 68, 68.

Callicott who, in 1980, attacked animal liberation ethics in favour of Leopold's land ethic.⁸² Since then, two central critiques have divided animal ethics from environmental ethics. First, animal ethics has been viewed as more exclusionary and restrictive than environmental ethics because animal ethics cannot incorporate entities such as plants, soil and water.⁸³ Second, it has been argued that animal ethics and environmental ethics stem from 'profoundly different cosmic visions'.⁸⁴ Due to their different bases, animal ethics and environmental ethics have traditionally adopted diverging treatment of environmental pests and domestic species.⁸⁵ Environmental ethics tends to attribute moral value to the preservation of the biotic community, preferring conservation of ecosystems over the integrity of the life of 'pests'.⁸⁶ Animal ethics, conversely, tends to protect the life of the individual animal over the viability of the species or the ecosystem.⁸⁷ Animal ethics rewards higher cognitive functioning while environmental ethics rewards species that have more positive net sum impacts on the biotic community.⁸⁸ Both these critiques can be addressed by second wave animal ethics.

In relation to the first critique, a boundless, other-facing second wave animal ethics could embrace entities such as animals, plants and rivers. It could use consideration of capabilities such as cognitive function and also consideration of factors such as degree of impact on biotic communities in order to make ethical decisions. Such an approach would be particularly useful for global animal law given that it deals with difficult issues of wild animal welfare and with the balancing of individual lives against species conservation, which, to date, neither first wave animal ethics nor environmental ethics have been capable of satisfactorily dealing with because each prioritizes one value to the exclusion of the other. First wave animal ethics provides no tools with which to contemplate ethical obligation towards non-sentient lifeforms, while environmental ethics are inadequate at offering enhanced and appropriate safeguards based on an entity's sentience.

To work with a boundless ethic, it is crucial to determine what is owed to sentient and non-sentient lifeforms. This requires specific consideration and deliberation in individual cases rather than applying a strict overarching and all-encompassing framework. To achieve just results for animals through such a process of deliberation would require that one should avoid the hierarchy and anthropocentricity that is a result of focusing on capabilities that are human-like or beneficial to humankind. Thomas Berry's principles of earth jurisprudence are helpful here. They state that nature has rights which are awarded to individuals because 'species exist only in the form of individuals'.⁸⁹ These rights are unique to the rightholder: '[b]irds have bird rights. Insects have insect rights. Humans have human rights'.⁹⁰ This variegated normativity arguably compliments the capabilities approach and offers the degree of specificity required in order to protect sentience where it is present.⁹¹

On the second critique regarding divergent cosmic visions, second wave animal ethics can represent an effective meeting in the middle between different ethical frameworks. The polarisation of animal ethics and environmental ethics glosses over considerable and significant

⁸² J Baird Callicott, 'Animal Liberation: A Triangular Affair' (1980) 2 *Environmental Ethics* 311; and Aldo Leopold, *A Sand Country Almanac* (Oxford University Press 1949).

⁸³ *ibid* (Callicott) 313.

⁸⁴ *ibid* 315.

⁸⁵ *ibid* 320.

⁸⁶ *ibid*.

⁸⁷ *ibid* 317–320. This is evident in a reading of any of the core animal ethics texts such as Singer (n 5), Regan (n 5), and Francione, *Animals as Persons* (n 5).

⁸⁸ Callicott (n 82) 320.

⁸⁹ Berry and Tucker (n 65) 149–150.

⁹⁰ *ibid*.

⁹¹ For an opposing argument that fails to note the distinctiveness of the rights awarded here, see Glenn Wright, 'Animal Law and Earth Jurisprudence: A Comparative Analysis of the Status of Animals in Two Emerging Discourses' (2013) 9 *Australian Animal Protection Law Journal* 5, 15.

overlap between animal ethics and earth jurisprudence stemming from a common regard and respect for the non-human other. Both ethical approaches reject the use of property status as a legal tool to exploit animals and both recognize the inherent value of animals.⁹² In most cases, a win for either movement constitutes a '[win] for both'.⁹³

The benefit of a second wave animal ethic bringing these streams together is evident in its application to the problem of environmental pests, which has no satisfactory solution drawn from traditional animal ethics or from environmental ethics.⁹⁴ The former would preserve the life of the pest in all circumstances, regardless of impact on bio-sustainability. The latter would have no regard for the possibility of allowing the pest to flourish. Some animal liberationists account for the intuition that 'endangered species are due more than bountiful species' through concepts such as compensatory justice.⁹⁵ However, most of first wave animal ethics regards all animal life as deserving of equal consideration. Second wave animal ethics, by contrast, could weigh individual and systemic interests in balance, thereby reaching conclusions that are arguably more appropriately sensitive to, and calibrated to, particular cases. This approach would consider contributions to the biotic community both as a form of flourishing of individual animals and as part of a balancing of interests between animals and non-animal nature. The possibility of these more tailored ethical considerations is one of the potential benefits of doing away with the moral circle of concern.

Disbanding the moral circle of concern and recognising that nothing is, *prima facie*, morally inconsiderable has, however, raised concerns. Gary Steiner critiques open-ended, deconstructive ethics as committing animal ethicists to an 'indeterminacy of meaning', making 'clear principles that can govern ethical and political decision making' elusive.⁹⁶ Feminist animal scholars are also wary of such indeterminacy.⁹⁷ Steiner argues that it results in an ethic that is 'wide open', refusing 'to make any discriminations for fear of exercising exclusionary violence', thus ending up 'taking no ethical stand at all'.⁹⁸ However, it is not the case that an ethical framework based on radical openness necessitates inaction or indeterminacy. Quite the contrary: such an ethics requires action, and more action. It requires the provision of ethical treatment to those who have been determined to be deserving of ethical treatment, but also deep consideration for those interests typically excluded from ethical consideration. Such a boundless ethics can still contemplate what standard of ethical treatment is owed to whom, but these decisions must be reached through more specific and tailored procedures as opposed to being based on an immovable standard applicable across the board.

Using an other-facing, unbounded ethic to inspire the development of global animal law will also help to avoid the lethargic creep of ethical and legal subjectivity that has forced marginalized groups to wait for centuries for proper ethical and legal recognition of their ability to flourish and of the suffering imposed on them. Further, an other-facing, boundless animal ethic could tackle the supposed incompatibilities between animal ethics and environmental ethics. It would also allow space for insights from environmental ethics like earth jurisprudence to inspire animal ethics. The next section will explore how animal ethics has been restrained from making such a move because of its commitment to liberal individualism. This commitment has made animal ethics difficult to reconcile with concepts of interconnection favoured by feminism, posthumanism and indigenous ways of being with animals.

⁹² *ibid* 18, 21.

⁹³ *ibid* 24.

⁹⁴ For example: Mark Sagoff, 'Animal Liberation and Environmental Ethics: Bad Marriage, Quick Divorce' (1984) 22 *Osgoode Hall Law Journal* 297, 304.

⁹⁵ Tom Regan, 'Animal Rights and Environmental Ethics' in Donato Bergandi (ed), *The Structural Links between Ecology, Evolution and Ethics: The Virtuous Epistemic Circle* (Springer 2013) 124.

⁹⁶ Steiner (n 56) 4.

⁹⁷ Josephine Donovan, 'Animal Rights and Feminist Theory' in Donovan and Adams (n 7) 12.

⁹⁸ Steiner (n 56) 156.

5 THE LIBERAL TRADITION⁹⁹

5.1 The problem with liberal approaches to animal ethics

The scholarship of Singer, Regan and others treats the liberal tradition as the necessary backdrop of animal ethics.¹⁰⁰ But the majority of liberal theorists do not grant justice to animals.¹⁰¹ Relying upon liberal individualism and the utilitarian and deontological ethics that stem from this is a less than optimal approach to animal ethics for three reasons.

Firstly, liberal ethics have failed for centuries to ground effective legal protection of animal interests. Welfarist legal reform, grounded in utilitarian ethics, continues to permit gross violations of animal integrity in industries such as livestock farming and research. Theorizing about the moral rights of animals has mostly failed to translate into recognition of legal rights.¹⁰² Moving away from moral rights does not necessitate abandoning legal rights; the two are not synonymous. Instead, it is valuable to require more specificity about the kinds of rights legal systems award and the reasons why.

Secondly, liberalism has entailed individualism and anthropocentrism, which has harmed various marginalized groups over time, as is evidenced by the shifting circle of moral concern. In part this exclusory dynamic is due to the liberal construction of moral subjects as being individuals ‘with appropriately individualized interests’.¹⁰³ The moral concept of an individual is quite exacting and its requirements of consciousness, interests, sentience and so on have frequently resulted in animals being excluded.¹⁰⁴ Thus, the ‘humanist conception of rights is inherently exclusionary’ and relying upon such ‘abstract universals ... simply preserve[s] existing disparities of power’.¹⁰⁵

Thirdly, liberalism is intricately tied up with modern conceptions of property and, in consequence, with animals’ status as property.¹⁰⁶ Despite these issues, animal law academics appear too entrenched within the liberal legal tradition to consider transcending it.¹⁰⁷ Drawing on feminist and posthumanist ideas as part of a second wave of animal ethics could inspire such transcendence.

5.2 An intersectional, second wave animal ethic to transcend liberalism

5.2.1 Individualism and intersectionality

Liberal animal ethics focuses on individuality, neglecting the interconnectedness of species and individuals.¹⁰⁸ This approach relies on agency even though it has proven difficult to achieve animal liberation this way.¹⁰⁹ Sue Donaldson and Will Kymlicka argue that liberal individualism tied with ‘capitalism [and] enlightenment rationalism’ are not to blame for ‘animal exploitation’.¹¹⁰ They argue that such exploitation is not the inevitable consequence or ‘logic’ of liberalism.¹¹¹ While there may be some value in this position, it is also the case that little attention

⁹⁹ I am indebted to Maneesha Deckha’s work for alerting me to the nuances of the issues in this section. Her work deserves the closest attention: Deckha (n 1).

¹⁰⁰ Donaldson and Kymlicka (n 67) 73; Deckha (n 1) 528.

¹⁰¹ Garner (n 8) 37.

¹⁰² *ibid* 21.

¹⁰³ Marcel Wissenburg, ‘An Agenda for Animal Political Theory’ in Marcel Wissenburg and David Schlosberg (eds), *Political Animals and Animal Politics* (Palgrave Macmillan UK 2014) 32.

¹⁰⁴ *ibid* 34.

¹⁰⁵ Kelly Oliver, *Animal Lessons: How They Teach Us to Be Human* (Columbia University Press 2009) 30.

¹⁰⁶ Garner (n 8) 36.

¹⁰⁷ Those in other fields have considered this though, for example *ibid* 36 et seq.

¹⁰⁸ Sue Donaldson and Will Kymlicka, ‘Animals in Political Theory’ in Linda Kalof (ed), *The Oxford Handbook of Animal Studies* (Oxford University Press 2017) 46.

¹⁰⁹ Gregory Smulewicz-Zucker, ‘Bringing the State into Animal Rights Politics’ in Cavalieri (n 67) 251.

¹¹⁰ Donaldson and Kymlicka (n 67) 78.

¹¹¹ *ibid* 79.

has been paid to critical animal ethics that adopts an anti-liberal or anti-capitalist position in legal research, and that there remains a wealth of untapped potential there.¹¹² This section explores how an intersectional, feminist care-based animal ethic could inspire legal developments that are sceptical of dualisms and deeply critical of animals' property status.

Before discussing intersectionality, individuality should be deconstructed. Donna Haraway's conceptualisation of interconnectedness could fundamentally shift the work of animal law scholars. She writes that '[h]uman genomes can be found in only about 10 percent of all the cells that occupy the mundane space I call my body ... To be one is always to *become with* many'.¹¹³ Haraway prefers considering 'multispecies sociality' over individuality.¹¹⁴ There would be no 'other', just the world as 'a knot in motion'.¹¹⁵ Haraway argues that the divisions between humanity, animals and nature are 'social constructs' and that all sentient life exists along an 'animal continuum'.¹¹⁶ Thus, humankind should be conceptually reintegrated into nature and ethics would be determined from a base position of togetherness rather than of detachment. This approach contrasts with the similarity argument, which retains separation and hierarchy but pulls animals 'up' the hierarchy with humans.

There is not sufficient space to fully explore Haraway's ideas here. It will suffice to note that an exploration of interconnectedness could transform human ethical and legal relationships with animals. However, the feminist ideology to be outlined below benefits from relying on a more interconnected view of the world and interconnection is also a theme in intersectional studies.

There is much insight to be gleaned from the experiences of marginalized groups, including women, who are prominent members of the animal liberation community.¹¹⁷ Socially marginalized animal liberationists have less motivation to 'distort the truth to perpetuate the status quo' than do dominant societal groups, because they see a reality of 'pain and need'.¹¹⁸ They can use their own lived experience to expose the damage a lack of recognition causes (to animals).¹¹⁹

By understanding 'interconnecting dominations', it is possible to better understand each of them 'sufficiently and correct[ly]'.¹²⁰ Intersectionality also helps to expose interconnected empathies and protections. This sort of ethic can help to demonstrate that acts of caring are not 'hostile to each other' and that a 'conservative economy of compassion', which assumes 'there is not enough to go around', is false.¹²¹

Drawing on intersectional ethical ideas also allows for a 'political analysis of the reasons why animals are abused in the first place' within patriarchal society.¹²² Whilst this sort of analysis does occur in first wave animal ethics, it is generally marginalized and is not as central and essential to the operation of animal ethics as it could be for second wave animal ethics:

¹¹² Kelch, (n 9) 85–87; see, similarly Garner (n 8) 39–41; note Kelch has given more considered treatment to feminist animal ethics in a contribution to an edited collection: Kelch, (n 7).

¹¹³ Haraway (n 59) 3–4.

¹¹⁴ *ibid* 207.

¹¹⁵ Donna J Haraway, *The Companion Species Manifesto: Dogs, People, and Significant Otherness* (Prickly Paradigm Press 2003) 6.

¹¹⁶ Smulewicz-Zucker (n 109) 246.

¹¹⁷ Garner (n 8) 39–40.

¹¹⁸ Josephine Donovan, 'Attention to Suffering: Sympathy as a Basis for Ethical Treatment of Animals' in Donovan and Adams (n 7) 189.

¹¹⁹ Christie Smith, 'Articulating Ecological Injustices of Recognition' in Wissenburg and Schlosberg (103) 63–65.

¹²⁰ Deborah Slicer, 'Your Daughter or Your Dog? A Feminist Assessment of the Animal Research Issue' in Donovan and Adams (n 7) 120.

¹²¹ Carol J Adams, 'The War on Compassion' in Donovan and Adams (n 7) 21–22.

¹²² Donovan and Adams (n 53) 3. For an example of how this is done, see Carol J Adams, 'Caring About Suffering: A Feminist Exploration' in Donovan and Adams (n 7) 201 and Donovan, 'Attention to Suffering: Sympathy as a Basis for Ethical Treatment of Animals' (n 118) 187–188.

intersectional animal ethics would, by definition, investigate ‘debate and social change’ without being hindered by a fear of unseating societal privilege.¹²³

Feminist animal ethics is the most advanced intersectional dialogue on animal protection.¹²⁴ Carol Adams pioneers an oppression strand of feminist animal ethics. Her approach recognizes how both women and animals have been treated as ‘objects rather than subjects’ in a ‘patriarchal world’,¹²⁵ and she argues that ‘vegetarianism without feminism is incomplete’.¹²⁶ The iterations of overlapping oppression here are numerous: ‘animaliz[ing] women and sexualis[ing] and feminiz[ing] animals’;¹²⁷ men using the denial of meat as a ‘pretext for brutalising women’;¹²⁸ meat-eating by men symbolising their asserted dominance;¹²⁹ and the double oppression of female animals who provide dairy in their life and meat in their death.¹³⁰ This kind of theorization is important, precisely because intersecting oppressions reinforce one another and, suggest, therefore, that cohesive rather than ‘fragmented’ activism is optimal.¹³¹

These ideas have been given little critical attention by animal law and policy experts. For example, Robert Garner dismisses the insights of feminist animal ethics as being of minimal relevance given that the formal legal oppression of women is now outlawed in most jurisdictions, while this is not the case for animals.¹³² However, substantive oppression of women continues even where it has been formally outlawed, and moreover, women live with the history of oppression, and legal systems worldwide still continue to permit the oppression of women.¹³³ The animal liberation movement, in the light of these and other realities, needs diverse voices capable of pointing out multiple interconnecting oppressions.

Feminism also provides many reasons to think beyond rights.¹³⁴ Rights are conceptualized by many critical thinkers as patriarchal leftovers of masculinist, liberal society, which exist to protect an ‘elite of white property-holding males’ in market economies.¹³⁵ Rights, conceptualized thus, favour ‘separateness’ and ‘competitiveness’ over ‘interconnectedness and synthesis’.¹³⁶ The holders of such rights are highly individualized ‘rational, autonomous, independent agents’.¹³⁷ Adams regards this conception of actors in society as fraudulent because it ‘depends on the invisibility of women’s caring activities’:¹³⁸ women traditionally enabled property-holding, vote-casting men to participate in society by taking care of the home, while being denied their own socio-political agency. Further, many feminists blame the justice-based approach to ethics for subordinating women as well as animals and nature.¹³⁹

¹²³ Eisen (n 39) 495; Kelch (n 7) 262.

¹²⁴ Advancements followed Adams’ pioneering work first published in 1990: Carol J Adams, *The Sexual Politics of Meat: A Feminist-Vegetarian Critical Theory* (Continuum 2010). Other intersections with race, sexuality and disability have begun to build more momentum more recently in works like Deckha (n 1), Luis Cordeiro-Rodrigues and Les Mitchell, *Animals, Race and Multiculturalism* (Palgrave Macmillan 2017) and Susan McHugh, ‘Queer and Animal Theories’ (2009) 15(1) *GLQ: A Journal of Lesbian and Gay Studies* 153.

¹²⁵ *ibid* (Adams) 219.

¹²⁶ *ibid* 30; for a similar argument regarding environmental protection, see Deane Curtin, ‘Toward an Ecological Ethic of Care’ in Donovan and Adams (n 7) 88.

¹²⁷ Adams, (n 124) 4, 16.

¹²⁸ *ibid* 220.

¹²⁹ *ibid* 56.

¹³⁰ *ibid* 113.

¹³¹ *ibid* 15.

¹³² Garner (n 8) 40.

¹³³ Lane K Bogard, ‘An Exploration of How Laws Tend to Maintain the Oppression of Women and Animals’ (2017) 38(1) *Whittier Law Review* 1, 4, 10–31.

¹³⁴ Conversely, some feminist work pursues specific rights for women.

¹³⁵ Donovan, (n 118) 187.

¹³⁶ Liz Rivers, ‘Nature in Court’ in Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press 2011) 222.

¹³⁷ Donovan and Adams (n 53) 5–6.

¹³⁸ Adams, ‘Caring About Suffering: A Feminist Exploration’ (n 122) 200.

¹³⁹ E.g. Grace Clement, ‘The Ethic of Care and the Problem of Wild Animals’ in Donovan and Adams (n 7) 301.

Ethical tools that better recognize interconnectedness would therefore have certain benefits. Such ethics would help animal law to recognize that domesticated animals require human support and that wild animals require certain actions from humans to protect animal habitats, such as, for example, through climate change mitigation initiatives.¹⁴⁰ Such ethics would also see animals on their own terms, in contrast to rights-based approaches that overemphasize similarity to humans.¹⁴¹ Of course, rights theorists reject this view by arguing that rights are not per se patriarchal or oppressive.¹⁴² It remains the case, however, that rights that exist to combat oppression may still be applied in a way that further entrenches oppression.¹⁴³

Thus, it is important to avoid paternalistic policies which speak ‘for the nonhuman other’ rather than listening to them, seeing them on their own terms and more faithfully voicing their desires and needs.¹⁴⁴ This suggests that the solution to animals’ issues must ‘be theirs’, which means moving beyond an ‘enforced anthropocentric standard’ for understanding animals in law.¹⁴⁵ This kind of shift starts with ‘listening’ to animals when they ‘dissent from human hegemony’, when ‘[t]hey vote with their feet by running away. They bite back, scream in alarm, withhold affection, approach warily, fly and swim off’.¹⁴⁶ Care theory might provide a better basis for such ethical listening than can rights-based approaches.¹⁴⁷

5.2.2 Rejecting rights in favour of a feminist care ethic

The feminist care ethic, originated by Carol Gilligan, conceptualizes morality as care involving ‘responsibility and relationships’ in contrast with a rights-based, autonomy-centric ‘morality as fairness’.¹⁴⁸ Gilligan states that the ‘moral problem arises from conflicting responsibilities rather than competing rights’, requiring resolution that is ‘contextual and narrative’ rather than ‘formal and abstract’.¹⁴⁹ This position contrasts with much first wave animal ethics by conceptually, linguistically and procedurally foregrounding responsibilities rather than rights.¹⁵⁰

Justice-based ethics have been taken as ‘*the* moral point of view’ in the west.¹⁵¹ Turning towards care reveals justice to be one moral option amongst others. Working with care theory is important because it offers insights into characteristically feminist ethical thinking, namely into a ‘more contextual mode of judgement and a different moral understanding’ which have been dismissed and disparaged for little reason other than their difference to the male norm.¹⁵² Yet, such theorizations offer real potential to inform how animal law is developed.

The central elements of a care ethic that this article proposes can improve the development of animal law are: balancing responsibilities before rights, putting others’ interests before our own; contextual rather than abstract analyses of right and wrong; and validating emotion as a form of knowledge that is not necessarily dichotomous with rationality.¹⁵³ It is not necessary, moreover, to abandon the mechanism of legal rights in order to draw from the insights provided by a feminist ethic of care, notwithstanding the fact that questions concerning

¹⁴⁰ Donovan and Adams (n 53) 5; Opi Outhwaite, ‘Neither Fish, nor Fowl: Honeybees and the Parameters of Current Legal Frameworks for Animals, Wildlife and Biodiversity’ (2017) 29 *Journal of Environmental Law* 317, 340.

¹⁴¹ MacKinnon (n 58) 317.

¹⁴² Kelch, (n 7) 263; Francione, *Animals as Persons* (n 5) 20.

¹⁴³ Section 6.1 below.

¹⁴⁴ See above at text to n 53. Also see MacKinnon (n 58) 324.

¹⁴⁵ *ibid*; Josephine Donovan, ‘Interspecies Dialogue and Animal Ethics’ in Kalof (n 108) 208.

¹⁴⁶ MacKinnon (n 58) 324.

¹⁴⁷ Moreover, a productive future line of inquiry might be to explore ideas of interconnectedness in collective rights of indigenous peoples: Miodrag A Jovanovic, *Collective Rights: A Legal Theory* (Cambridge University Press 2012).

¹⁴⁸ Carol Gilligan, *In A Different Voice: Psychological Theory and Women’s Development* (Harvard University Press 1982) 17–23. For further references, see Donovan and Adams (n 7), 2.

¹⁴⁹ *ibid* (Gilligan) 19.

¹⁵⁰ Kelch, (n 9) 431; Curtin (n 126) 93.

¹⁵¹ Clement (n 139) 301.

¹⁵² Gilligan (n 148) 18–19 and 22.

¹⁵³ *ibid* 17–23. Also see section 5.2.3 below.

how such an ethics might be implemented and operationalized in law require further exploration. Here, however, I focus on countering key critiques raised about utilising feminist care theory to inspire animal law.

Firstly, Francione and others argue that feminist care theory is incapable of preventing forms of abusive or violent treatment without relying on something like rights because, otherwise, legal interventions would continue to treat humans differently to animals.¹⁵⁴ Care theory's contextualisation is also argued to preclude it from providing a 'guide to action' that would be capable of precluding meat eating¹⁵⁵ or forbidding the 'institutional exploitation of animals'.¹⁵⁶ Such arguments neglect the core commitment within feminist animal ethics, which argues that it is wrong to harm sentient creatures; that humans have an obligation to care for animals that cannot care for themselves; and that humans ought to intervene to stop animal abuse.¹⁵⁷ Additionally, critiques of the care ethic's efficacy also overlook or downplay certain challenges facing rights-based approaches — including the fact that rights compete and must be balanced against one another. Accordingly, there is questionable authority for arguing that rights (and no other ethical device) are capable of protecting animals.¹⁵⁸

Francione and others have also failed to respond to the feminist counterargument that follows this defence. This counterargument critiques the acontextual *methods* of doing ethical work used by first wave animal ethics thinkers. First wave thinkers have responded by implying that the purity of their results justifies the acontextuality of their methods. Accordingly, they counterargue that feminist care theory must be faulty because it cannot reach the same a-contextual results.¹⁵⁹ This argument is circular and does not satisfactorily meet the feminist counterargument. Further, first wave thinkers cannot prove that contextual thinking precludes feminist care theory's ability to ground serious ethical and legal protection for animals.

Secondly, some theorists have sought to counter care theory by arguing that people simply do not care about animals.¹⁶⁰ In response, a number of animal ethicists, discussing feminist care theory, provide a wealth of evidence to show that this approach is 'oversimplistic' and that caring for animals is the 'normal state of humans', citing as examples: animal companions; animal rescue; and guilt and expiation over hunting and slaughtering.¹⁶¹ For example, Brian Luke provides a rich account of different cultural practices that support this view.¹⁶² This is useful exploration because it permits second wave animal ethics to question more fundamentally *why* animal cruelty is perpetuated in all societies across the globe.¹⁶³ In some cases, the answer is that animals are an 'absent referent', whereby they are turned into 'meat', as if something entirely distinct from a living animal, through 'butchering' and renaming.¹⁶⁴ This construction of an absent referent is particular to industrialized animal agriculture, which utilizes masking language and practices to frustrate natural human empathetic tendencies.¹⁶⁵ In contrast to the way in which industrialized animal agriculture depends on abstractions, every other animal can 'see and hear their victims before they eat them'.¹⁶⁶ It is important to understand why animal

¹⁵⁴ Francione, *Animals as Persons* (n 5) 203–204; Francione, *Rain without Thunder* (n 5) 20; Steiner (n 56) 1–2.

¹⁵⁵ Garner (n 8) 40.

¹⁵⁶ Francione, *Animals as Persons* (n 5) 188.

¹⁵⁷ Donovan and Adams (n 53) 4.

¹⁵⁸ This sort of argument is made by Robert Garner, 'Animal Welfare: A Political Defense' (2006) 1 *J Animal L & Ethics* 161, 169.

¹⁵⁹ Francione, *Animals as Persons* (n 5) 188.

¹⁶⁰ Brian Luke, 'Justice, Caring, and Animal Liberation' in Donovan and Adams (n 7) 134–135.

¹⁶¹ *ibid.*

¹⁶² *ibid* 135–136.

¹⁶³ *ibid* 136.

¹⁶⁴ Adams, (n 124) 66.

¹⁶⁵ Luke (n 160) 138 et seq.

¹⁶⁶ Adams, (n 124) 77.

cruelty takes place in order to develop effective policies toward change. It is not enough to simply assert that animal suffering is bad and that we should not partake of it.

Thirdly, Grace Clement and other critics of the care ethic argue that an emotional, care-based approach to animals would lead humans to be ‘biased toward those close to us’ such as pets, neglecting wild animals.¹⁶⁷ However, Clement problematically essentializes wild animals in her argument, dichotomising nature and culture when in reality human culture is part of, rather than distinct from, nature — and animals such as house spiders or wild animals that wander into domestic settlements operate across ‘cultured’ and natural spaces. Clement promotes focusing on ‘individual animals’ in the domestic sphere but, ‘outside that realm, it is appropriate to think more holistically’.¹⁶⁸ This approach troublesomely implies that it is proximity to humans that awards lifeforms with individuality. Clement thinks humans cannot feel empathy for a rabbit eaten by a snake in the wild, but that we can feel empathy for an animal in a zoo.¹⁶⁹ In contrast, I argue that domestication is not necessarily linked with empathy in this way but, rather, that humans recognize ‘eating and *being eaten*’ as a ‘fundamental fact of life’ in the wild and that therefore we do not, and indeed mostly should not, interfere.¹⁷⁰ Eleni Panagiotarakou, on the other hand, has argued that an empathy shortfall would arise because of ‘physical distance’, ‘psychological distance’, fear or disgust (of mosquitoes, rats, spiders, etc) and because of ‘short attention spans’.¹⁷¹ Responding to this argument requires a more detailed engagement than space permits here. However, key to rebutting this argument could be recognising the false dichotomisation of emotion and rationality, thus nuancing our understanding of how a care ethic might operate. It is to this possibility that the argument here now turns.

5.2.3 Feminism and care theory allow the incorporation of emotion as a form of knowledge

Alongside its focus on situatedness and interconnection, another vital advantage of drawing on feminist ethics is its introduction of emotion as a valid form of knowledge and basis for responsibility.¹⁷²

The rejection of emotion as a valid form of ethical knowledge is common in first wave animal ethics (including Singer and Regan)¹⁷³ and animal law research,¹⁷⁴ a trend that was instigated by Immanuel Kant.¹⁷⁵ Singer, who is credited with popularising the rational turn in animal activism,¹⁷⁶ also argues that perceived sentimentalism amongst animal liberationists has excluded them from ‘serious political and moral discussion’.¹⁷⁷ However, first wave animal ethics typically also finds that rationality has a limit and, thus, also resorts to ‘intuition, feeling or common sense’.¹⁷⁸ It is important — and ultimately inescapable (as will become clear) — in doing ethics to acknowledge that reason and emotion are intricately tied up.¹⁷⁹ It is also important to recognize that taking a detached ‘neutral’ approach to describing animal harm is *also* to ‘express an emotionally charged value’: to fail to condemn something *is* to take a position.¹⁸⁰

¹⁶⁷ Clement (n 139) 303; Eleni Panagiotarakou, ‘Who Loves Mosquitoes? Care Ethics, Theory of Obligation and Endangered Species’ (2016) 29(6) *Journal of Agricultural and Environmental Ethics* 1057, 1062–1063.

¹⁶⁸ *Ibid* (Clement) 307.

¹⁶⁹ *ibid* 305.

¹⁷⁰ *ibid* 305–306.

¹⁷¹ Panagiotarakou (n 167) 1063–1064.

¹⁷² See, for example Donovan and Adams (n 53) 6.

¹⁷³ *Ibid*. See Singer (n 5) ii–iii, ix–x; Regan (n 5) xii, 123–124; Kelch, (n 7) 86.

¹⁷⁴ Robertson (n 16) 32 et seq. For a rare exception, see Thomas G Kelch, ‘Toward a Non-Property Status for Animals’ in Donovan and Adams (n 7) 241.

¹⁷⁵ Donovan, (n 118) 175 citing Immanuel Kant, *Fundamental Principles of the Metaphysics of Morals* (1785).

¹⁷⁶ Marti Kheel, ‘The Liberation of Nature: A Circular Affair’ in Donovan and Adams (n 7) 45.

¹⁷⁷ Singer (n 5) ix–x.

¹⁷⁸ Kheel (n 176) 46–47.

¹⁷⁹ *ibid* 48.

¹⁸⁰ Cathryn Bailey, ‘On the Backs of Animals: The Valorization of Reason in Contemporary Animal Ethics’ in Donovan and Adams (n 7) 348.

Many feminist animal ethicists argue that ‘there is no morality’ without emotion.¹⁸¹ David Hume attributes similar weight to ‘passions’ as the ‘basis for all moral thought’.¹⁸² Indeed, it has been argued by Donovan that emotionally deficient hyperrationality is often used to commit and to defend animal abuse and that an a-emotional ethical response is unlikely to be effective.¹⁸³ A purely rationalist approach also denies the role of ‘important sensory stimuli’: we ought to visit factory farms or slaughterhouses to observe how we *feel*.¹⁸⁴ Second wave animal ethics ought explicitly to reject a view of rationality and emotion as ‘opposite dualities’.¹⁸⁵ While first wave animal ethics texts have accepted the conceptualisation of emotion as ‘irrational, uncontrollable, and erratic’,¹⁸⁶ abundant work demonstrates empathy to be a ‘complex intellectual as well as emotional exercise’ and an ‘imaginative exercise that requires judgement and evaluation’¹⁸⁷ as well as ‘observation and concentration’.¹⁸⁸ These arguments, moreover, span back to David Hume and even to Plato and Aristotle.¹⁸⁹

Of course, emotion-conscious animal ethics is not without its detractors. For example, Robert Garner argues that rights theory is adequate and that it is not devoid of ‘care, sympathy and compassion’ because it promotes animal protection.¹⁹⁰ However, Garner arguably overlooks the central contention of a feminist care ethic-based critique, which is that rights-based conceptions of ethics have been *unable to recognize the webbed moral connections* (including emotional connections) between beings in the way that feminist care theory does.¹⁹¹

Other commentators have criticized the way in which empathy requires seeing ‘individual worth’ and, thus, only applies to ‘sentient beings’¹⁹² This critique suggests that there is further work to be done to explore what care — short of empathy or even by expanding empathy — might be applicable to non-sentient lifeforms. Haraway’s rejection of individuality could be helpful in countering this critique, and in answering the questions it raises, though detailed exploration of this question is beyond the scope of this article. Hume’s identification of an ‘innate sense of compassion’ in humans might, with development, go some way to dealing with this critique, but, again, such a conceptualization requires further elaboration.¹⁹³

Kelch has argued that there is a role for emotion in law and, specifically, in grounding legal rights for animals.¹⁹⁴ The rejection of emotion goes hand in hand with the use of abstract, universal approaches to animal ethics. Over-rationality requires abandoning what ‘our imaginations or hearts or the simple facts are telling us’ in order to awkwardly fit particular scenarios into ill-fitting frameworks.¹⁹⁵ Thus, the final piece of the puzzle making up a second wave animal ethic to ground animal law is contextualisation.

6 ETHNOCENTRIC UNIVERSALISATION OF ANIMAL ETHICS

6.1 The problem with universalized animal ethics

¹⁸¹ Kelch, (n 7) 277.

¹⁸² *ibid* 278 citing David Hume, *A Treatise of Human Nature* (Oxford University 1978), 509-510.

¹⁸³ Donovan, (n 118) 59 and 63; Donovan and Adams (n 53).

¹⁸⁴ Kheel (n 176) 49.

¹⁸⁵ Kelch, (n 9) 86.

¹⁸⁶ Donovan, (n 118) 176.

¹⁸⁷ For references, see *ibid* 176 and 223.

¹⁸⁸ *ibid* 179–180; Lori Gruen, ‘Empathy and Vegetarian Commitments’ in Donovan and Adams (n 7) 388.

¹⁸⁹ Kelch, (n 7) 279.

¹⁹⁰ Garner (n 8) 40.

¹⁹¹ Kelch, (n 9) 86 citing Kheel (n 176), 17-18.

¹⁹² Donovan, (n 118) 183 citing Philip Mercer, *Sympathy and Ethics: A Study of the Relationship Between Sympathy and Morality with Special Reference to Hume’s Treatise* (Oxford University Press 1972), 8.

¹⁹³ Kelch, ‘The Role of the Rational and the Emotive in a Theory of Animal Rights’ (n 7) 280–281.

¹⁹⁴ *ibid* 281–285.

¹⁹⁵ Slicer (n 120) 111–112.

Each of the problems addressed above have skirted around the difficulties associated with a universalized, acontextual animal ethics. Feminist theory and posthumanist theory both prefer contextuality and seek to expose universality as a western hegemonic myth. Drawing on these frameworks, it is important for animal law scholars, particularly those working in global contexts, to address the possibility that animal liberation might take on a neocolonial, eco-imperialist tone.¹⁹⁶

First wave animal ethics has been accused of being ‘aggressively ethnocentric’ and ignorant of indigenous ways of being that are tied up with animals and animality.¹⁹⁷ This argument has two strands. Firstly, that western society encourages ‘imperialist extensions’ of theory from ‘privileged western perspectives’ where harmful factory farming models are the norm, without taking care to look for conflict with non-western worldviews.¹⁹⁸ Secondly, that western theoretical traditions encourage ‘dualistic conceptual structures and assumptions’.¹⁹⁹ Maneesha Deckha foregrounds such concerns when she describes her fear that the animal rights movement might become ‘yet another Western crusade against the practices of the rest of the world, claiming universality for what are simply its own standards’ because of the ‘privileging of western viewpoints and peoples’.²⁰⁰

There is ample evidence of the negative effect of the privileging of western viewpoints on marginalized communities. If one accepts the importance of addressing intersecting oppressions, the need to avoid such epistemic hierarchy ought to be taken seriously by animal liberationists. The battle between Canadian Inuits and animal liberationists is an obvious example. Animal liberationists led by Humane Society International (with support from Ellen DeGeneres and other Hollywood figures) campaigned against seal hunting and, as a result, challenged the Inuit way of life.²⁰¹ Emiliano Battistini highlights how seals have become the ‘friction point’ between opposing ontologies and ‘politics of food’.²⁰² A key problem here is that the seal hunt is visible, it is ‘red blood on the white ice’, while factory farming is ‘abattoirs’, ‘hidden away’, and treated as invisible.²⁰³

This contrast in visibility explains but does not justify the disparity in public outrage at the treatment of animals in both circumstances. While there is nothing ‘*inherently* discriminatory’ about focusing upon minority practices like sealing because ‘solving all the problems in the world should not be a prerequisite for a particular social justice campaign’,²⁰⁴ it is nevertheless ‘difficult to ignore the pattern of western critique of non-Western practices without an attendant reflection and criticism of cultural practices marked as “Western”’.²⁰⁵ Battistini, for example, highlights insightful anger displayed by Inuit Tanya Tagaq at ‘fancy people who have a perfect roof over their head and lots of food because they can afford organic tofu and walk down the street to a market with all the vegetables there are in the world’.²⁰⁶ She bemoans the hypocrisy of those who ‘eat meat’ but ‘are disgusted at the thought of a dead animal’ whilst noting that the veganism of those who criticize her lifestyle makes sense in their western environments.²⁰⁷

¹⁹⁶ Deckha (n 1) 534.

¹⁹⁷ Plumwood (n 74) 286.

¹⁹⁸ *ibid* 291.

¹⁹⁹ *ibid*.

²⁰⁰ Maneesha Deckha, ‘Animal Justice, Cultural Justice: A Posthumanist Response to Cultural Rights in Animals’ (2007) 2 *Journal of Animal Law & Ethics* 189, 199 and 219–220.

²⁰¹ Emiliano Battistini, “Sealfie”, “Phoque You” and “Animism”: The Canadian Inuit Answer to the United-States Anti-Sealing Activism’ (2018) 31 *International Journal for the Semiotics of Law* 561.

²⁰² *ibid* 588.

²⁰³ *ibid* 579–580.

²⁰⁴ Deckha (n 200) 222.

²⁰⁵ *ibid*.

²⁰⁶ Battistini (n 201) 583 citing Tanya Tagaq, ‘Eating Seal Meat Is a Vital Part of Life in My Community’ (VICE, 21 Oct 2014) <https://munchies.vice.com/en_us/article/z4gdjy/eating-seal-meat-is-a-vital-part-of-life-in-my-community> Accessed 18 October 2018.

²⁰⁷ *ibid* 580.

A central problem is that westerners equate ‘animal use with animal abuse’ because of the patterns of animal exploitation in the west and because of the “‘hands off’ perspective of an urban population remote from its food production sources’; western consumers have ‘forgotten the possibility and dynamics of loving and even respectful use and interaction’.²⁰⁸ The desire of the Inuit for a ‘different kind of animal rights activism’ that is tailored to different environments must be taken seriously by animal ethicists, particularly in the context of global animal law. It is both unjust and ineffective to impose change from the west. This practice inevitably fails to recognise and adapt to different circumstances and to respect the independence and sovereignty of other nations and their peoples. Western animal liberationists do not need to abandon their missions in order to recognise this. They do, however, need to go about achieving change at a global level in a way that fosters greater interaction and conversation across cultural boundaries.

Thinkers such as Francione (who categorizes the killing of animals in any circumstance as wrong) have been critiqued for foreclosing discussion on this issue. Discussion of justifying killing is uncomfortable for abolitionist animal ethicists, however these are conversations that must be engaged with in order to research global animal law. As Deckha argues, any ethical assessment of animals’ situations should ‘come only after a process of attentive listening and consideration of divergent perspectives’.²⁰⁹

6.2 Second wave animal ethics as contextualized and in opposition to neocolonial, ethnocentric tendencies

For many animal liberationists, dietary choices ‘reflect and reinforce our cosmology, our politics’.²¹⁰ For this reason, veganism has, in practice, been adopted as a ‘moral baseline’ of personal action for inclusion in the animal rights movement.²¹¹ However, such a position has marginalized communities where veganism is less attainable or has not been regarded as necessary due to the means of sourcing animal food.²¹² Therefore, investigating ethical veganism is core to a growing movement toward more contextual animal ethics. Such discussions resonate with feminist arguments against demands of veganism ‘from an external source’ because of the ‘elitist, classist, and racist’ undertones that such calls have displayed in the past.²¹³ The alternative is to engage in conversations and to promote the benefits of avoiding meat, the consumption of which can be understood as a ‘form of patriarchal domination’ whose elimination can help ‘dismantle the structures of oppression’.²¹⁴ This section will outline arguments in favour of more contextualized approaches, particularly in discussions of global animal law, before addressing some of the concerns that such an approach is unpalatable to western animal liberationists.

As is implicit in the argument offered earlier, feminist care ethics favour ‘a particularized, situational response’ rather than ‘abstract and formalistic’ rules or judgements.²¹⁵ This resistance to abstraction and formalism emerges from feminist recognition of the ‘masculinism, the white-Anglo ethnocentrism, the heterosexism – lurking behind what parades as universal’.²¹⁶ Related to this, is the idea that the adoption of a universalizing approach could threaten the early development of global animal law by enabling a related ethnocentric imposition of western ideology.

²⁰⁸ Plumwood (n 74) 297.

²⁰⁹ Deckha (n 200) 220.

²¹⁰ Adams, (n 124) 245.

²¹¹ Donaldson and Kymlicka, ‘Make It So: Envisioning a Zoopolitical Revolution’ (n 67) 92.

²¹² *ibid* 93.

²¹³ Gruen (n 188) 334.

²¹⁴ *ibid*.

²¹⁵ Donovan and Adams (n 53) 2, 6; Slicer (n 120) 111; David Eaton, ‘Incorporating the Other: Val Plumwood’s Integration of Ethical Frameworks’ (2002) 7(2) *Ethics and the Environment* 153, 154–156 notes that abolitionist vegan feminism has been accused of universalism but this has been effectively countered.

²¹⁶ Smith (n 119) 66–67.

Careful thought is required to think through how contextualisation would work in practical legal settings.²¹⁷ Of course, the law relies on precedent and predictability, and it is also true that individual assessments are made by courts applying statutory rules — but contextualisation is arguably of more immediate significance when addressing global contexts and discussing transnational law and legal discourse. The need for cross-cultural contextualization seems relatively clear in such contexts. However, it may also be that second wave animal ethics could regard the application of situational, contextual judgements as beneficial in domestic legal settings. This question requires further exploration, which is beyond the scope of this article. For now, it is significant to note that contextual ethical thought is minimally required in order to counter charges of ethnocentricity in animal law in global settings — and in order to deal with two accompanying problems.

The first problem is the tendency of particular and context-appropriate ideas to be portrayed as universal and rational in first wave animal ethics. Such conclusions are faulty if reached without engagement with non-western and indigenous communities.

The second problem is that an acontextual approach to animal ethics lends itself to the troubling pattern of extending ‘individual human sanctity’ to a wider group by treating certain animals, along with humans, as being ‘above nature’.²¹⁸ While rationality and universalism have gone hand in hand with the similarity argument and with the moral circle of concern within first wave animal ethics, a core problem with relying on individual human sanctity is that this foundation is also used to justify all manner of harm caused to non-sentient nature.

Haraway provides ideas that could inspire moves towards a more contextual animal ethics that, in turn, could enable a more sensitive and adaptive, contextualised global animal law. Haraway is adamant that ‘nurturing and killing [is] an inescapable part of moral companion species entanglement’ and that to reject that fact would be to perpetuate human exceptionalism.²¹⁹ She points out that it is a ‘factual, semiotic, and material’ point that ‘[t]here is no way to eat and not to kill, no way to eat and not to become with other mortal beings to whom we are accountable, no way to pretend innocence and transcendence’.²²⁰ Haraway rejects efforts of ethical vegans like Francione to entirely remove themselves from the food chain as being an ‘exterminationist nonsolution’, because this relies upon a false dichotomization of nature and culture.²²¹ Haraway rejects the nature-culture divide and human exceptionalism, arguing that humans too are food and are killable.²²² Relying upon more abolitionist rights frameworks dodges this question of killing.²²³ For Haraway, the alternative is to command ‘thou shalt not make killable’ in place of ‘[t]hou shalt not kill’.²²⁴ This alternative would require that humans should ‘live responsibly within the multiplicitous necessity and labor of killing’.²²⁵ Killing ‘does not end the question; it opens it up’.²²⁶

Haraway’s position seems to be a logical consequence that emerges when the similarity argument and the moral circle of concern are dismissed as the basis for animal ethics. The difficulty with Haraway’s idea, however, when thinking of law, is that it would be unthinkable for any enactment of a commandment not to ‘make killable’ to do away with the force of the ‘thou shalt not kill’ commandment folded into the law of murder. It might even be the case that doing away with ‘thou shalt not kill’ potentially makes it more difficult to reduce the unnecessary killing

²¹⁷ My gratitude extends to an anonymous reviewer for encouraging me to explore this interesting and consequential point.

²¹⁸ Plumwood (n 74) 293–294.

²¹⁹ Haraway (n 59) 105–106.

²²⁰ *ibid* 294–295.

²²¹ *ibid* 105–106.

²²² Plumwood (n 74) 294 et seq.

²²³ For example, Francione, *Animals as Persons* (n 5) 149 and 157.

²²⁴ Haraway (n 59) 80.

²²⁵ *ibid*.

²²⁶ *ibid* 92.

of animals because it opens up space for instrumentalization. Indeed, Haraway herself considers that some ‘instrumental relations’ between humans and animals should be ‘nurtured’ rather than snuffed out.²²⁷ She thinks humans ought to decide what is acceptable instrumental use by being ‘nonmechanical and morally alert [to the] consequences for all the parties, human and not, in the relation of unequal use’.²²⁸ Perhaps this kind of thinking could excuse animal killings that appear more innately justifiable, such as the killing involved in Inuit subsistence seal hunts, while condemning the majority of less justifiable western animal killing. However, a danger remains: it might be the case that the flexibility in this kind of approach, and especially its refusal to rule out all animal killing, could convince animal liberationists that a much-needed move away from liberalism and its underlying suppositions is, in the final analysis, undesirable.²²⁹

Debates that engage with these kinds of complexities are taking place amongst those who take animal suffering very seriously and who also stand firm against western hegemonic understandings, and there needs to be extensive discussion amongst animal lawyers in transnational forums about what, if any, killing could be justified in order to respond to calls for contextualized animal ethics. Thus, it could be useful for animal liberationists to engage with the ‘nonmechanical and morally alert’ ethical consideration Haraway recommends, as opposed to over-rationalized systems of ethical reasoning that foreclose further thinking.

Haraway does not explore the idea that killing and eating animals in most western contexts might be unnecessary. It could be that the contextual thinking she requires could be used to condemn most animal-eating in western contexts. (Certainly, from my posthumanist and intersectional standpoint, I suggest that ethical veganism makes sense in such contexts.) In any event, one does not need to agree with Haraway’s conclusions in order to pursue the kind of thinking she promotes. At first blush, Haraway’s conclusion reads like yet another justification of human dominion. But, in reality, it is an attempt at something more elevated than that. Haraway shows that accepting interconnectedness means accepting the instrumentality of eating.²³⁰ This acceptance may be the necessary upshot of a contextual animal ethic. If so, it is a conclusion that will be difficult for western (and other) hard-line animal liberationists to accept. In the context of global animal law, this does not matter. The core value of thinking in this way with contextualization is that any kind of legislating on animal issues in a globalized world where views on the treatment of animals diverge *necessitates* legitimization. That is to say, global animal law will need to be context-responsive, nuanced and to embrace space for difficult conversations. First wave animal ethics is not able to recognize that ‘one size doesn’t fit all’ in the way that second wave animal ethics can.²³¹ It is not clear what the *right* outcome of this on-going engagement will be, but it *is* clear that this approach, of engaging with different epistemologies and ontologies, is the right way through which to seek answers.

7 CONCLUSION

The aim of this article was to identify key failings of first wave animal ethics and show how these have limited and restricted animal law studies. The article advanced four key ideas. First, animal liberationists ought to stop assuming animals only deserve moral and legal consideration if they are like humans. Instead, we should accept, celebrate, reward, and legally protect difference. Second, animal liberationists ought to stop assuming that moral and legal consideration should extend to animals and no further. Third, animal liberationists ought to stop over-relying on liberal concepts like rights and start engaging with (intersectionally) marginalized communities to theorize viable alternatives that might work better for animals. Fourth, animal liberationists ought to stop assuming that animal ethics needs to be the same everywhere. This fourth

²²⁷ *ibid* 77.

²²⁸ *ibid*.

²²⁹ Donovan and Adams (n 53) 13.

²³⁰ Haraway (n 59) 87.

²³¹ Donovan and Adams (n 53) 3.

suggestion arguably poses the biggest challenge for animal ethicists, particularly for those committed to universalising assumptions. Universalization, as argued above, is problematic for a range of reasons, and it seems vital now to question the universalizing ethics produced from a western standpoint, and to recognise the reality of contextual diversity and multiple forms of knowing.

An associated aim of this article was to identify a second wave of animal ethics as part of an effort to move away from approaches to animals (in ethics and in law) that attempt to shoehorn all cases into the narrow framework of one particular theory. While many of the ideas presented here call for further elaboration in the future, this article has set out to provide a toolbox of ideas and approaches that might be drawn on in developing alternatives.

This article does not, and cannot, set out the full extent of second wave animal ethics, either in its present or potential future manifestations. Indeed, not all second wave animal ethicists will agree with the four key ideas put forward in this article. However, I suggest that the four key ideas discussed here are critically important to consider, and I also suggest that at least some of them will feature in most second wave animal ethics work. This article merely attempts to persuade thinkers of the ‘animal turn’ (in ethics and in law) that the direction proposed here is a good direction to be moving in. My hope is that the reflections offered here will inspire animal law academics to engage in more self-reflection regarding their underlying ethics and, as a result, the conclusions they reach regarding what are appropriate protections for animals in law. This self-reflection is of particular consequence for the emerging conversation surrounding global animal law which, in order to have legitimacy, will require deeper reflection and justification of its underlying ethics: All animal law has some kind of basis in ethical thought, whether this is acknowledged or not. Second wave animal ethics recognises that avoiding the ethical in animal law amounts only to a false objectivity that forecloses engagement with opposing and marginalized worldviews. It is high time that more animal law scholars admitted the foreclosures operative in the first wave and began the process of taking intersecting marginalisations seriously.