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Maneesha Deckha
University of Victoria

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Maneesha Deckha*

Fifty Years of Taking Exception to Human Exceptionalism: The Feminist-Inspired Theoretical Diversification of Animal Law Amidst Enduring Themes

In this article, I attend to the scholarly interventions over the last fifty years that engage with the question of what general subjectivity or protective model the law should apply to animals to combat anthropocentrism and effect widespread positive change for animals. I call this field "animal rights law." The article demonstrates the theoretical diversity and related richness of this scholarship, making three contributions. Most notably, it highlights the prominence of feminist theory to the development of animal rights law. This more recent feminist-inspired work has attempted to bypass the personhood-property debate from earlier decades through theorizing alternative or supplementary animal-friendly frameworks less focused on rights and personhood. The article also shows that throughout the decades and the various legal reform models presented, we see sustained concern about sameness logic (arguments favouring reform for animals perceived to be "human-like") and, at least over the last two decades, attention to the differences among animals themselves.

Dans cet article, je me penche sur les interventions scientifiques des cinquante dernières années qui s'intéressent à la question de la subjectivité générale ou du modèle de protection que le droit devrait appliquer aux animaux pour lutter contre l'anthropocentrisme et provoquer un changement positif généralisé pour les animaux. J'appelle ce domaine le « droit des animaux ». L'article démontre la diversité théorique et la richesse de cette recherche, en apportant trois contributions. Tout d'abord, il souligne l'importance de la théorie féministe dans le développement du droit des animaux. Ces travaux plus récents d'inspiration féministe ont tenté de contourner le débat personne-propriété des décennies précédentes en théorisant des cadres alternatifs ou complémentaires respectueux des animaux, moins axés sur les droits et la personne. L'article montre également qu'au fil des décennies et des différents modèles de réforme juridique présentés, nous constatons une préoccupation constante à l'égard de la logique de similitude (arguments en faveur d'une réforme pour les animaux perçus comme « semblables à l'homme ») et, au moins au cours des deux dernières décennies, une attention portée aux différences entre les animaux eux-mêmes.

* Professor, Lansdowne Chair in Law, University of Victoria Faculty of Law. For their very helpful commentary and close attention to this manuscript, I would like to thank the editors at the Dalhousie Law Journal and two anonymous referees. I am also grateful forcomments from participants at the Brooks Academic Summer Workshop held July 12-13, 2022 in Colorado Springs.

Introduction

Like most state legal systems around the world, Canadian law—defined here as the common law and civil law—does not protect the vast majority of animals (hereinafter "animals") within its jurisdiction from exploitation by humans or corporations.[1] It does not consider the perspectives of animals in, for example, regulating major animal-use industries through legislated standards or rule of law expectations for good governance.[2] Family or estate decisions about who beloved companion animals should live with upon family breakdown or upon death of their human caregiver also do not centre animal needs.[3] Even legislation prohibiting animal cruelty or seeking to preserve endangered species do not target animal exploitation.[4] Canadian law regards animals in deeply anthropocentric terms; through the private and public property rights it codifies and otherwise protects, it enables the killing, torture, maiming, disfigurement, and destruction of animal bodies, families, communities, habitats, and futures.[5]

Efforts to address animals' legal situation have attracted the moniker "animal law," although "animal law" can also be understood as any legal issue involving animals.[6] It may be more precise to label this latter broader understanding of animal law as "animal exploitation law"[7]

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1. Maneesha Deckha, "Initiating a Non-Anthropocentric Jurisprudence: The Rule of Law and Animal Vulnerability under a Property Paradigm" (2013) 50:4 Alta L Rev 783 at 791. A rare and recent exception in the Canadian context is the general prohibition against the future breeding, import, and confinement of cetaceans in Canada. See *Ending Captivity of Whales and Dolphins Act*, SC 2019. I use the shorthand "animals" despite its shortcomings in decentring the human subject given that the alternatives of "nonhuman animals," "more-than-human animals" or "other-than-human" animals also fall short in this regard.

2. Peter Sankoff, "Canada's Experiment with Industry Self-Regulation in Agriculture: Radical Innovation or Means of Insulation?" (2019) 5:1 Can J Comparative & Contemporary L 299; Katie Sykes & Sam Skinner, "Fake Laws: How Ag-Gag Undermines the Rule of Law in Canada" (2022) 28:2 Animal L 229 at 240-246; Maneesha Deckha, "Sup-planting Anthropocentric Legalities" (unpublished manuscript on file with author).

3. Jodi Lazare, "'Who Gets the Dog?': A Family Law Approach" (2020) 45:2 Queen's LJ 287 at 288-289. This speciesism might change soon in British Columbia. See <animaljustice.ca/blog/pet-custody-law>, discussing the changes proposed to how judges should assess who gets companion animals upon separation and divorce through Bill 17, *Family Law Amendment Act*, *2023*.

4. Maneesha Deckha, *Animals as Legal Beings: Contesting Anthropocentric Legal Orders* (Toronto: University of Toronto Press, 2021) at 39-76 [Deckha, *Animals as Legal Beings*]; Andrea Olive, *Land, Stewardship, and Legitimacy: Endangered Species Policy in Canada and the United States* (Toronto: University of Toronto Press, 2014) at 22.

5. Deckha, *Animals as Legal Beings*, *supra* note 4 at 39.

6. For example, tenancy and other housing disputes, assistance animal qualification, dangerous dog offences, custody of animals upon marital breakdown, veterinarian malpractice, exotic animal ownership, breeder or other contracts involving live animals, endangered species classifications, judgment collections, civil and political rights of animal advocates, product labeling, etc. For a comprehensive overview of these topics and more, see Victoria Shroff, *Canadian Animal Law* (Toronto: LexisNexis, 2021).

7. MH Tse, Verbal Comment, Global Animal Law Workshop, 4 April 2022 (online).

or "animal-use law."[8] In this survey article, I attend to the former and narrower connotation of "animal law." I further concentrate on primarily scholarly interventions that engage with the question of what general subjectivity or protective model the law should apply to animals to combat anthropocentrism and effect widespread positive change for animals. I call this socio-legal subfield in which the writings of law professors and philosophers dominate "animal reform law" ("ARL").[9] My aim, in line with this special Symposium volume, is to provide an analytical overview of the developmental trajectory of ARL in English-speaking Canada over the last fifty years. The analysis necessarily integrates Canadian ARL (hereafter "ARL") with Anglo-American ARL more broadly, given that the first animal law course was only offered in Canada in 2004 and ARL authored by law professors at Canadian law schools started to appear only thereafter.[10] This more regional focus is also necessary given the influence of Anglo-American philosophy and legal scholarship on what is taught and known as "animal law" in English-speaking Canada.[11] Relatedly, the discussion deliberately omits ARL trends that are dominant in civilian traditions or more emergent globally, but not yet mainstream in ARL scholarship focused on Canada.[12]

After briefly explaining how Canada's colonial legal systems facilitate animal exploitation in part I, the article moves to its main purpose of demonstrating the theoretical diversity and related richness of ARL given developments over the last several decades that have reshaped the field. In

8. Will Kymlicka, "Social Membership: Animal Law beyond the Property/Personhood Impasse" (2017) 40:1 Dal LJ 123 at 126 [Kymlicka, "Social Membership"].

9. As will become apparent, while "animal rights law" may be more intuitive, not all advocates of favourable systemic change for animals promote rights or personhood. For some, myself included, "reform" does not capture the more ambitious proposals of animal rights law reform, but I use the term nonetheless to discuss these and less ambitious proposals for lack of a better alternative.

10. Shroff, *supra* note 6 at 8; Maneesha Deckha, "The Salience of Species Difference for Feminist Legal Theory" (2006) 17:1 Hastings Women's LJ 1; Maneesha Deckha, "Animal Justice, Cultural Justice: A Posthumanist Response to Cultural Rights in Animals" (2007) 2 J Animal L & Ethics 189.

11. For a sample of the American influence in Canadian textbooks see Lesli Bisgould, *Animals and the Law* (Toronto: Irwin Law, 2011) at 42. See also Angus Taylor, "Philosophy and the Case for Animals" in Vaughan Black, Peter Sankoff & Katie Sykes, eds, *Canadian Perspectives on Animal and the Law* (Toronto: Irwin Law, 2015) 11 at 20, 22-27; Shroff, *supra* note 6 at 28-31, 33-35.

12. An example of a more emergent global perspective that is omitted is ARL developments focused at the international or transnational level such as Charlotte Blattner, *Protecting Animals Within and Across Borders: Extraterritorial Jurisdiction and the Challenges of Globalization* (Oxford: Oxford University Press, 2019); Kristen Stilt, "Rights of Nature, Rights of Animals" (2021) 134:5 Harv L Rev 276. These sources refer to more emergent global perspectives that are omitted in ARL developments focused at the international or transnational level. I also omit discussion of other legal doctrinal areas such as environmental law, Aboriginal law, and Indigenous laws which centrally involve animals but do not focus on them. For the same reason and reasons of space, Earth Jurisprudence is also not discussed.

demonstrating these features of ARL, the article advances three embedded claims about this (primarily Anglo-American) subfield of animal law. The first is uncontroversial and already well-established: questions about legal subjectivity and legal outcomes, particularly personhood and what are known in the field as "abolitionist" outcomes (i.e. bans or prohibitions on, versus regulation of, industries), have been instrumental to early animal law scholarship and debate through the 1990s and 2000s.[13] Part II briefly reviews this debate and notes the impasse it has reached.

It is the second embedded claim that the article newly demonstrates, namely, that feminist theory (specifically, a combination of liberal, ecofeminist, postcolonial, and posthumanist iterations) has been prominent in ARL responses to the personhood-property debate that have appeared over the past two decades. Building upon feminist ARL scholar Jessica Eisen's recent thematic survey of feminist interventions,[14] I show the consistent contributions of feminist analysis—defined here as analysis that is authored by feminist scholars, integrates a gendered analysis, or which draws centrally from other feminist work—in attempts to bypass the personhood-property impasse through theorizing alternative or supplementary animal-friendly frameworks to personhood. Highlighting the increasingly formative contributions of feminist analysis in the world of ARL is important given the systemic devaluation of and structural impediments to women's intellectual work in academia.[15] This occurs in animal studies as well where the feminization of the field is actively resisted by scholars.[16]

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13. Irus Braverman, "Law's Underdog: A Call for More-than-Human Legalities" (2018) 14 Annual Rev L & Soc Science 127 at 129-133 [Braverman, "Law's Underdog"]; Maneesha Deckha, "Critical Animal Studies and the Property Debate in Animal Law" in Jodey Castricano & Lauren Corman, eds, *Animal Subjects 2.0* (Waterloo, ON: Wilfrid Laurier Press, 2016) 45 at 46 [Deckha, "Critical Animal Studies"]; Jessica Eisen, "Of Linchpins and Bedrock: Hope, Despair, and Pragmatism in Animal Law" (2022) 72:4 UTLJ 468; Angela Fernandez, "Not Quite Property, Not Quite Persons: A 'Quasi' Approach for Nonhuman Animals" (2019) 5 Can J Comparative & Contemporary L 155 at 157-173 [Fernandez, "Not Quite Property"]. Given the existing excellent overviews of this debate, the review is brief despite the outsized role the personhood-property debate plays in ARL.

14. Jessica Eisen, "Feminist Jurisprudence for Farmed Animals" (2019) 5 Can J Comparative & Contemporary L 111 at 113 [Eisen, "Feminist Jurisprudence"]. Eisen emphasizes that she is not arguing that a feminist approach to animal law is the ideal approach or that feminist thinking is monolithic. These are points I also wish to stress.

15. Annalise E Acorn, "Discrimination in Academia and the Cultural Production of Intellectual Cachet" (2000) 10:2 UCLA Women's LJ 359 at 369.

16. Susan Fraiman, "Pussy Panic Versus Liking Animals: Tracking Gender in Animal Studies" (2012) 39:1 Critical Inquiry 89 at 93; Fiona Probyn-Rapsey, Siobhan O'Sullivan & Yvette Watt, "'Pussy Panic' and Glass Elevators: How Gender is Shaping the Field of Animal Studies" (2019) 34:100 Australian Feminist Studies 198 at 199, 205-212.

Third, the article also shows that throughout the development of ARL and the various proposals presented for how to best make legal improvements for animals, we see sustained concern about sameness logic (arguments privileging sameness to humans) in ARL and, at least over the last two decades, attention to the differences among animals themselves. This attention usually takes the important form of concern about legal advocacy for animals that may entrench intra-animal hierarchies that favour humanized animals at the expense of animalized animals, but also includes more recent concerns about privileging domestic and land animals over wild and aquatic ones.[17] Parts III and IV draw out these trends. Although I certainly have my own views on the desirability of these trends, as well as the outsized influence of feminist analysis in reshaping the field that I have set out in previous work, my focus here is to distill these theoretically diversifying trends and influence in ARL over the course of the last fifty years.[18]

I. *The common and civil law abyss for animals*

What accounts for the legal neglect of animals' interests in Canadian law? One critical component is their property classification under both common law and civil law legal orders, even in Québec where there is concerted legislation explicitly recognizing their sentience.[19] Legal neglect also arises from the lack of regulation of animal-use industries vis-à-vis how they use animals, a situation that generic anti-cruelty statutes do not fix since the latter either explicitly exempt regular industry standards or are read down implicitly to do so; "business as usual" practices do not qualify as "cruel" no matter how brutal and devastating the practice.[20] Legal standards

17. This concern about creating intra-animal hierarchies recalls Cary Wolfe and Jonathan Elmer's schemata of a species grid in human societies wherein cultures humanize certain animals and animalize certain humans to create a 4-step hierarchy that places animalized animals beneath humanized animals, followed by animalized humans who are designated a lower status than humanized humans due to their animalization. See Cary Wolfe & Jonathan Elmer, "Subject to Sacrifice: Ideology, Psychoanalysis, and the Discourse of Species in Jonathan Demme's *The Silence of the Lambs*" in Cary Wolfe, *Animal Rites: American Culture, the Discourse of Species, and Posthumanist Theory* (Chicago: University of Chicago Press, 2003) 97 at 100-101.

18. See especially, Deckha, *Animals as Legal Beings*, *supra* note 4. Here I develop a new theory for animal legal subjectivity grounded in ecofeminist and anti-colonial theory in order to resist the humanizing remit of personhood and develop a legal pathway that can benefit all animals and not just those who we humanize.

19. Deckha, *Animals as Legal Beings*, *supra* note 4 at 55; Black, Sankoff & Sykes, *supra* note 11 at 4; Bill 54, An Act to improve the legal situation of animals, 1st Sess, 41st Leg, Quebec, 2015 (assented to 4 December 2015) SQ 2015, c 35.

20. Sankoff, *supra* note 2 at 330-336; Sykes & Skinner, *supra* note 2. For an analysis as to how existing legislation could be better interpreted in favour of animals, see Delcianna Winders, "Farmed Animal Welfare: Improvements and Developments (North America)" in Anne Peters, Kristen Stilt, & Saskia Stucki, eds, *Handbook on Global Animal Law* (forthcoming in 2023).

about "humane" use across Western jurisdictions all embed "an interest-convergence" or "human-use" logic whereby anti-cruelty expectations do not apply against mainstream human or corporate interests and animals are presumed to exist to serve some sort of function for humans.[21] For example, there is no regulation of the breeding and raising of animals farmed for food that is directed at the conditions in which animals are farmed for the purpose of minimizing animal suffering.[22] There is also no federal regulation of animals in scientific laboratories.[23] Non-enforceable industry codes exist instead.[24] Hence, not only are animal-killing industries legal, but within them, grisly practices involving deliberately cultivated impairment, disease, and intense pain and suffering are normalized because they are standard in the industry.[25]

Even worse, animal-use industries are publicly subsidized at high levels and deploy well-funded lobbies.[26] These industries are also not held accountable for the widespread negative externalities of their activities on "secondary animals," notably those land animals classified as "wild" but displaced by animal agriculture, or those ocean animals who qualify as fishing/trawling "by-catch."[27] This remains the case despite the astonishing pace at which anthropogenic activities seeking to exploit animals and other entities is leading to species extinction.[28] Endangered species

21. For more on these models see Ani B Satz, "Animals as Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy, and Property" (2009) 16:1 Animal L 65; Jessica Eisen, "Liberating Animal Law: Breaking Free from Human-Use Typologies" (2010) 17:1 Animal L 59; and Will Kymlicka's discussion of both in explaining the "ideology of humane use" in Will Kymlicka, "Membership Rights for Animals" (2022) 91 Royal Institute Philosophy Supplements 213 at 216 [Kymlicka, "Membership Rights"].

22. Sankoff, *supra* note 2 at 307-308; Jessica Eisen, "Private Farms, Public Power: Governing the Lives of Dairy Cattle" (2020) 16:2 J Food L & Policy 158 at 159 [Eisen, "Private Farms"].

23. Gilly Griffin & Paul Locke, "Comparison of the Canadian and US Laws, Regulations, Policies, and Systems of Oversight for Animals in Research" (2016) 57:3 ILAR J 271 at 272.

24. Sankoff, *supra* note 2 at 331-332; Laura Janara, "Human-Animal Governance and University Practice in Canada: A Problematizing Redescription" (2015) 48:3 Can J Political Science 647 at 653.

25. See generally Andrew Linzey, ed, *The Global Guide to Animal Protection* (Champaign: University of Illinois Press, 2013).

26. Agriculture and Agri-Food Canada, "Government of Canada Announces Investments to Support Supply-Managed Dairy, Poultry and Egg Farmers" (28 November 2020), online: *Government of Canada* <www.canada.ca/en/agriculture-agri-food/news/2020/11/government-of-canada-announces-investments-to-support-supply-managed-dairy-poultry-and-egg-farmers.html> [perma.cc/DM9X-687T]; Maneesha Deckha, "Something to Celebrate? Demoting Dairy in Canada's National Food Guide" (2020) 16:1 J Food L & Policy 11 at 27-36; Angela Lee, "The Stakes in Steak: Examining Barriers to and Opportunities for Alternatives to Animal Products in Canada" (2018) 41:1 Dal LJ 219 at 244-245.

27. Robert L Fischman, Vicky J Meretsky & Matthew P Castelli, "Collaborative Governance under the Endangered Species Act: An Empirical Analysis of Protective Regulations" (2021) 38:4 Yale J Reg 976 at 991, 996-997.

28. Post-industrial humans are the driving force behind the current mass extinction, in which rates of extinction are 100-1000 times higher than the natural background levels. "Some biologists

statutes do little to pre-empt this scale of harm or regulate the industries that destroy wildlife habitats or create biodiversity loss.[29] They simply focus on species human majorities wish to "save" until the designated animals exist in sufficient numbers again to harm for hunting or other human purposes.[30] Both the frameworks of conservation and anti-cruelty that typify ostensibly pro-animal regulation emanate from an imperial and capitalist 18th-century Western understanding of animals as inferior to humans and available as natural resources to commodify and exploit.[31] Contemporary "protections" within anti-cruelty and endangered species legislation still follow this anthropocentric imperial logic.[32]

Most Canadians are likely unaware of this dismal legal provisioning for animals, particularly the virtual carte blanche that animal-use industries enjoy, the systemic disregard of animal needs within them, or the extent of government subsidies they receive. Values relating to transparency and accountability are not the norm.[33] Except for zoos and aquaria, most for-profit captivity, use, and processing of animals is hidden. Animal research facilities have always been well-guarded, with even publicly funded universities failing to disclose where the animals are kept on campuses.[34] Intensive farming has long been difficult for the general public to observe due to relocation of farming and slaughter to less-urban locations.[35] The trend in recent years is to make such industries even less transparent or accountable in Canada. Several provinces have passed legislation criminalizing whistleblowing in these already difficult-

predict that the [current] extinction may result in a 50% loss of the remaining plants and animals on earth." See Todd J Braje & Jon M Erlandson, "Human Acceleration of Animal and Plant Extinctions: A Late Pleistocene, Holocene, and Anthropocene continuum" (2013) 4 Anthropocene 14 at 14-15, 20. Negative externalities of animal agriculture and aquaculture also damage the planet in general, including affecting the livability of places where socioeconomically marginalized, often racialized, humans live as well as damaging their health and life expectancies. Charlotte Blattner et al, "Covid-19 and Capital: Labour Studies and Nonhuman Animals—A Roundtable Dialogue" (2021) 10:1 Animal Studies J 240 at 242.

29. *Species at Risk Act*, SC 2002, c 29.

30. Olive, *supra* note 4 at 105.

31. Yoriko Otomo, "Critical Legal Theory and Global Animal Law" in Anne Peters, Saskia Stucki & Kristen Stilt, eds, *Oxford Handbook of Global Animal Law* (Oxford: Oxford University Press, forthcoming 2024); J Schauer, *Wildlife Between Empire and Nation in Twentieth-Century Africa* (Cham: Springer International AG, 2018) at 18.

32. Deckha, *Animals as Legal Beings*, *supra* note 4 at 39-76; Maneesha Deckha, "Welfarist and Imperial: The Contributions of Anticruelty Laws to Civilizational Discourse" (2013) 65:3 American Quarterly 515 at 536 [Deckha, "Welfarist and Imperial"]; Olive, *supra* note 4 at 22.

33. Eisen, "Private Farms," *supra* note 22 at 164.

34. Janara, *supra* note 24 at 658-659. I am not aware of any public university that discloses to the public on its website in which facilities animals used for research are housed.

35. Amy J Fitzgerald, "A Social History of the Slaughterhouse: From Inception to Contemporary Implications" (2010) 17:1 Human Ecology Rev 58 at 58, 62.

to-access confined animal feeding operations.[36] The hidden nature of the suffering animals endure helps the legal abyss to continue. But it is not clear that much would change with greater transparency. Even when the public may become aware of animal suffering, those who could opt for less harmful lifestyles vis-à-vis animals often do not change their consumption habits due to psychological and cultural factors.[37] This is particularly so in the realm of identity-laden food choices,[38] making it an uphill battle for animal advocates to generate sufficient political pressure to effect wide-ranging legislative change.[39]

All these political, economic, psychological, cultural, and social factors coalesce to create and sustain the legal abyss for animals. Despite the enormity of the task, there are those who wish to see this legal situation change dramatically.

II. *ARL and the personhood/property fulcrum*

In the 1990s, legal scholars began to focus on animals' legal subjectivity, building on earlier philosophical discussions that took place in the 1970s and 1980s in Anglo-American circles.[40] Mainstream theories in these earlier debates wondered whether animal advocates should pursue animal rights to end all animal instrumentalization or whether welfare campaigns that sought to improve the conditions of animals' exploitation were also defensible.[41] This section presents a nutshell version of the development

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36. These "Ag-gag" (agricultural gag) laws prohibit actions such as trespassing into animal agricultural operations, entering farms under false pretenses, and interfering with farmed animal transportation to slaughter. A constitutional challenge is currently before the courts. See Jodi Lazare, "Ag-Gag Laws, Animal Rights Activism, and the Constitution: What is Protected Speech?" (2020) 58:1 Alta L Rev 83 at 86-87. While it is unknown whether increased visibility of the brutalities of animal food production or experimentation will promote public outrage and social transformation, the trend the other way is indicative of industry desire to avoid public scrutiny.

37. Kristof Dhont & Gordon Hodson, eds, *Why We Love and Exploit Animals: Bridging Insights from Academia and Advocacy* (Abingdon, UK: Routledge, 2020) at 328; Kelly L Markowski & Susan Roxburgh, "'If I became a vegan, my family and friends would hate me:' Anticipating vegan stigma as a barrier to plant-based diets" (2019) 135 Appetite 1 at 1-3.

38. Dhont & Hodson, *supra* note 37 at 172, 175.

39. Emily Patterson-Kane, Michael P Allen & Jennifer Eadie, *Rethinking the American Animal Rights Movement* (New York: Routledge, 2022) at 126.

40. See especially Gary L Francione & Robert Garner, eds, *The Animal Rights Debate: Abolition or Regulation?* (New York: Columbia University Press, 2010). See also Gary L Francione, "Reflections on 'Animals, Property, and the Law' and 'Rain without Thunder'" (2007) 70:1 Law & Contemp Probs 9 at 12 [Francione, "Reflections"].

41. Tom Regan & Peter Singer, eds, *Animal Rights and Human Obligations* (Eaglewood Cliffs, NJ: Prentice-Hall, 1976); Tom Regan, *The Case for Animal Rights* (Berkley: University of California Press, 1983); Robert Garner, *Animals, Politics, and Morality* (Manchester, UK: Manchester University Press, 1993); David DeGrazia, *Taking Animals Seriously: Mental Life and Moral Status* (Cambridge, UK: Cambridge University Press, 1996). Mary Midgely was an Anglo-American philosopher who wrote widely about animals during and before this era, and was critical of much human treatment of animals. She, however, rejected the mainstream forms of animal ethics, namely deontological

and iteration of this "rights-welfare" debate that became the "personhood-property" debate in ARL.[42]

1. *Anglo-American philosophy as a foundation: 1970s, 80s, and 90s*

Drawing primarily from Anglo-American animal moral individualist philosophy,[43] the disputed scholarly impact about the property status of animals and the corresponding lack of rights for them in law emerged as a prominent debate in the 1990s.[44] Utilitarian philosopher Peter Singer's enormously influential text, *Animal Liberation*, first published in 1975, scaffolds the legal debate.[45] Singer emphasized that animals are sentient and can suffer.[46] Singer argued that there is no moral justification to discount their suffering from utilitarian assessments of aggregate pain versus pleasure and that doing so amounts to discrimination against animals.[47] Such an attitude Singer stated, adopting Richard Ryder's term, qualified as "speciesism," and was a prejudice as ethically indefensible as sexism and racism.[48]

Importantly, Singer did not insist that humans stop using animals altogether. He believed that animals that were not "rational or self-conscious" were not harmed by death in the same way that humans typically are; in these cases, advocates should focus on their conditions of

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and utilitarian theories that I discuss in this part, as abstract, justice-obsessed, and fundamentally unnecessary. David E Cooper, "'Removing the Barriers': Mary Midgley on Concern for Animals" (2020) 87 Royal Institute Philosophy Supplement 249 at 250, 255-257. Perhaps due to this rejection (but perhaps also due to her gender), her writings do not feature in the mainstream philosophical animal ethics "rights-welfare" debate that led to the "personhood-property" debate in ARL.

42. Deckha, "Critical Animal Studies," *supra* note 13 at 49-50.

43. Eva Bernet Kempers, "Animal Dignity and the Law: Potential, Problems and Possible Implications" (2020) 41:2 Liverpool L Rev 173 at 175 [Kempers, "Animal Dignity"].

44. Deckha, "Critical Animal Studies," *supra* note 13 at 46; Francione & Garner, *supra* note 40 lays out two of the main arguments in this debate.

45. Peter Singer is widely seen as the father of the modern animal rights movement even though he is himself a utilitarian thinker. Mark Rowlands, *Animal Rights: Moral Theory and Practice*, 2nd ed (London, UK: Palgrave MacMillan, 2009) at 1. His 1975 book, Peter Singer, *Animal Liberation* (New York: Avon Books, 1975) [Singer, *Animal Liberation*], is credited with reviving the animal protection movement in the United States and elsewhere. See Robert Garner & Yewande Okuleye, *The Oxford Group and the Emergence of Animal Rights: An Intellectual History* (New York: Oxford University Press, 2021) at 2-3. Singer's work extends a history of utilitarian engagement with human animal relations that includes notable 19th-century British liberal philosophers such as Jeremy Bentham and John Stuart Mill. For a recent discussion of Singer's ideas in relation to this other Utilitarian engagement see Martha Nussbaum, "The Utilitarians: Pleasure and Pain" in *Justice for Animals: Our Collective Responsibility* (New York: Simon & Schuster, 2022) at 40-56.

46. Peter Singer, *Practical Ethics,* 3rd ed (Cambridge, UK: Cambridge University Press, 2011) at 12, 50-51 [Singer, *Practical Ethics*, 3rd].

47. *Ibid* at 51.

48. Singer, *Animal Liberation*, *supra* note 45 at 9; Peter Singer, "Animal Liberation or Animal Rights?" (1987) 70:1 Monist 3 at 4; Peter Singer, "Foreword" in Richard Ryder, *Speciesism, Painism and Happiness: A Morality for the Twenty-First Century* (Luton, Bedfordshire: Andrews UK, 2011) at v-vi.

life.[49] Moral philosopher Tom Regan's deontological writings became an influential counterpoint to Singer's approach.[50] Regan also set a cognitive awareness and consciousness threshold, but he took a rights-based view that everyone who met this threshold (in that they were what he called a "subject of a life") had intrinsic value.[51] Regan believed animals were harmed by premature deaths and opposed animal-use industries.[52]

2. *The personhood-property debate in ARL: Mid-1990s to early 2000s*

a. *The abolitionist perspective—championing anti-exploitation, personhood, and fundamental legal rights for animals*

Since Regan believed that meaningful reform cannot be achieved through simply regulating industries, Regan qualified as an "abolitionist."[53] The definitive account for this rights-based ARL position is Gary Francione's 1995 book, *Animals, Property and Law*, which explicitly added a devastating critique of property as a legal classification for animals to the abolitionist viewpoint. In this and other work, Francione argued that animal anti-cruelty statutes, long part of the American legal landscape, are grossly ineffective in protecting animals and actually counterproductive.[54] Francione acknowledged that many people already distinguish animals from the realm of mere things and that anti-cruelty laws also connote this elevated status from the realm of other entities classified as property.[55] Yet, he argued that their property status "militates strongly against significant improvement in our treatment of animals, and animal welfare will do little more than make animal exploitation more economically efficient

49. Singer, *Practical Ethics*, 3rd, *supra* note 46 at 53, 103, 105; Peter Singer, "Utilitarianism and Vegetarianism" (1980) 9:4 Philosophy & Public Affairs 325 at 331, 335. Singer did advocate vegetarianism and opposed intensive farming because he did not believe such industrial conditions could offer painless killing conditions. See discussion in Raffael Fasel and Sean Butler, *Animal Rights Law* (Oxford: Hart, 2022) at 56-58.

50. Rowlands, *supra* note 45 at 1, 93.

51. Tom Regan, *The Case for Animal Rights* (Berkeley: University of California Press, 1983) at 243.

52. *Ibid* at 244 (however, he generally saw human death as worse given his regard for "higher" human mental and psychosocial complexity). Gary L Francione, *Animals as Persons: Essays on the Abolition of Animal Exploitation* (New York: Columbia University Press, 2008) at 228 [Francione, *Animals as Persons*].

53. *Ibid* at 2.

54. David Favre & Vivien Tsang, "The Development of Anti-Cruelty Laws During the 1800's" (1993) 1993:1 Detroit College L Rev 1; Deckha, "Critical Animal Studies," *supra* note 13 at 49; Francione & Garner, *supra* note 40 at 26, 29.

55. Francione, *Animals as Persons*, *supra* note 52 at 34-35; Gary L Francione, "Animals—Property or Persons?" in Cass R Sunstein & Martha C Nussbaum, eds, *Animal Rights: Current Debates and New Directions* (Oxford: Oxford University Press, 2004) 108 at 115; Gary L Francione, "Animals, Property and Legal Welfarism: 'Unnecessary' Suffering and the 'Humane' Treatment of Animals" (1994) 46:2 Rutgers L Rev 721 at 753.

and socially acceptable."[56] For Francione, any connotation of non-thing status by anti-cruelty laws or other animal welfare laws is dulled by the overarching property paradigm that applies to animals and inherently marks them as inferior and unequal. For Francione (like Singer), this speciesist logic is as objectionable as "using any other morally irrelevant characteristic such as race or sex to justify slavery or otherwise fail to accord equal consideration to others."[57]

"Humane" animal laws, then, cannot overcome the equality-denying legal effects of a property categorization. They are also overpowered by the backdrop of staunch legal protection of property rights that enforce this inferior animal status, an outcome Francione demonstrated through a review of the tepid legal scope of anti-cruelty statutes across the fifty United States.[58] These laws invariably outlaw only "unnecessary" suffering through codifying the specific term "unnecessary suffering" or some other such phrase denoting a similarly qualified vision that "necessary" suffering is legal.[59] What is more, Francione's analysis revealed that the human or corporate person's interests are always already privileged against the animal's in considering what is "unnecessary suffering" and thus "cruel" in any particular case.[60] This is a phenomenon that Francione termed "legal welfarism."[61] It is a legal assessment which leads to the underwhelming outcome that almost every human use of animals is explicitly authorized by legislators in drafting such statutes or by judges in interpreting them. My own review of federal anti-cruelty laws in Canada confirms Francione's argument regarding the "welfarist" nature of anti-cruelty laws.[62] For Francione, the proper corrective for property's outsized subordinating force and denial of equal protection for animals is not more robust "humane" laws. The remedy, instead, is animal rights, of which the most important is the "right not to be treated as property."[63]

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56. Francione, "Reflections," *supra* note 40 at 12.
57. Gary L Francione & Anna E Charlton, "Why We Must Respect the Rights of All Sentient Animals" (28 January 2018), online: *Open Democracy: Transformation* <www.opendemocracy.net/en/transformation/why-we-must-respect-rights-of-all-sentient-animals/> [perma.cc/S8UB-T6VV].
58. Gary L Francione, *Animals, Property and the Law* (Philadelphia: Temple University Press, 1995) at 139-142 [Francione, *Animals, Property and the Law*].
59. *Ibid* at 142; Deckha, *Animals as Legal Beings*, *supra* note 4 at 45-52.
60. Francione, *Animals, Property and the Law*, *supra* note 58 at 3-14; Francione, *Animals as Persons*, *supra* note 52 at 37-44, 67-106, 153-64; Gary L Francione, *Introduction to Animal Rights: Your Child or the Dog?* (Philadelphia: Temple University Press, 2000) at 50-80.
61. Francione, *Animals, Property and the Law*, *supra* note 58 at 3-4.
62. Deckha, *Animals as Legal Beings*, *supra* note 4 at 39-76.
63. Gary L Francione, "Animals, Property, and Personhood," in Marc D Hauser, Fiery Cushman & Mathew Kamen, eds, *People, Property, or Pets?* (West Lafayette: Purdue University Press, 2006) 77 at 92; Gary L Francione, "Christine Overall, ed, Pets and People: The Ethics of Our Relationships with Companion Animals" Book Review of *Pets and People: The Ethics of Our Relationships with*

Other rights-based ARL scholars/practitioners agree and have actively sought legal personhood through the courts for animals. Steven Wise directs the Nonhuman Rights Project ("NhRP"), seeking to make legal personhood a reality for animals through advancing test-case litigation involving animals that curry majority public sympathy, namely nonhuman primates, elephants, and orcas in zoos and aquariums.[64] Wise's writing from 2000 onward and current advocacy reflected through the NhRP's website and legal submissions do not highlight the problems with property as Francione does but very much centre the equal consideration principle that Francione champions.[65] The NhRP seeks to convince courts of the need for animals who are self-aware to be seen as legal persons due to their interests in autonomy.[66] The core argument is that the common law has always accorded dignity rights to those who are autonomous beings and that withholding these rights from animals violates the law's cherished equality principles.[67]

Comparing these two abolitionist approaches, a tension even in this first decade of ARL relating to the humanization of animals and differences among animals is evident. Francione points to sentience as the reason animals deserve to not be considered property.[68] His approach differs from moral philosophers who embrace *moral* personhood for all conscious animals, but accept *legal* personhood only for animals with a higher level of cognitive capacity and who, as a result, are seen to be closer to humans.[69] Notable in this realm, as Francione has observed, is

Companion Animals by Christine Overall (2018) 52:4 J Value Inquiry 491 at 503. Angela Fernandez importantly observes that it is not clear from Francione's writing whether the "right not to be treated as property" means that he is an advocate of *legal* personhood given Francione's repeated emphasis on moral personhood in his writings and on veganism as the best pathway to stop animal exploitation and not legal change: Fernandez, "Not Quite Property," *supra* note 13 at 191-192, n 148. Notwithstanding the lack of explicit avowal for legal personhood, Francione's support for legal personhood has been inferred. See Fasel and Butler, *supra* note 49 at 93.

64. Nonhuman Rights, "Our Story" (last visited 16 March 2023), online: *Nonhuman Rights Project* <www.nonhumanrights.org/our-story/> [perma.cc/UCR8-7WRP].

65. Steven M Wise, *Rattling the Cage: Toward Legal Rights for Animals* (Cambridge, MA: Perseus, 2000) at 82, 85; Steven M Wise, *Drawing the Line: Science and the Case for Animal Rights* (Cambridge, MA: Perseus Books, 2002) at 232 [Wise, *Drawing the Line*].

66. Steven M Wise, "Nonhuman Rights to Personhood" (2013) 30:3 Pace Envtl L Rev 1278 at 1283, 1286 [Wise, "Nonhuman Rights"].

67. *Ibid* at 1286-1287.

68. Gary L Francione, "Animal Welfare and the Moral Value of Nonhuman Animals" (2010) 6:1 L Culture & Humanities 24 at 32 [Francione, "Animal Welfare"].

69. It is important here to distinguish between moral and legal personhood. Philosophers have extended moral personhood to animals but not legal personhood. Notably, Peter Singer has defined moral personhood for animals as possible where animals are rationale and self-aware, but his utilitarian framework for animals does not ascribe them rights or legal personhood. See Peter Singer, *Practical Ethics*, 2nd ed (Cambridge, UK: Cambridge University Press, 1993) at 110-111.

the example of the Great Ape Project, co-founded by moral philosophers Paola Cavalieri and Singer.[70] This campaign sought national declarations regarding fundamental rights of Great Apes.[71] Francione has clarified that preserving personhood for only "humanized" animals due to their "higher" mental abilities contradicts his abolitionist position.[72]

Although Francione has not levelled the same critique at the NhRP, the website of the NhRP reveals a clear privileging of these humanized animals in their litigation strategies.[73] Wise explains that the NhRP is indeed concerned about the suffering of all animals, but due to the limits of the current legal framework, the organization is focused on obtaining legal personhood for animals that are "self-aware and autonomous."[74] The organization recently advanced this argument on behalf of a female elephant living alone at the Bronx Zoo in a landmark hearing before the New York Court of Appeals.[75] Wise has also clarified in his scholarly writings that he believes that the legal strategy of focusing on the "humanizeable" animals such as primates and elephants will eventually "open [the] door" for all sentient animals to be afforded basic fundamental rights to life, liberty, and bodily integrity and have their moral status appropriately protected by law.[76] It seems to be a pragmatic concession to working within the confines of the common law while still seeking to make legal breakthroughs for animals.[77]

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70. Francione, "Animal Welfare," *supra* note 68 at 28-30 (Francione has classified Singer as a "new welfarist" given Singer's writings that animals lack the mental capacity to anticipate what they are going to lose when they die in animal-exploitation industries).
71. *Ibid* at 30.
72. *Ibid* at 34.
73. Maneesha Deckha, "Humanizing the Nonhuman: A Legitimate Way for Animals to Escape Juridical Property Status?" in Atsuko Matsuoka & John Sorenson, eds, *Critical Animal Studies: Towards Trans-species Social Justice* (London, UK: Rowman & Littlefield, 2018) at 209-223 [Deckha, "Humanizing the Nonhuman"].
74. "Frequently Asked Questions" (last visited 31 May 2022) online: *Nonhuman Rights Project* <www.nonhumanrights.org/frequently-asked-questions/> [perma.cc/WV96-3S94].
75. The NhRP lost the appeal by 5 to 2. See *Matter of Nonhuman Rights Project v Breheny*, 38 NY (3d) 555 (NY Ct App 2022), online: <casetext.com/case/nonhuman-rights-project-inc-v-breheny-22> [perma.cc/7WQY-SMF5] [*Matter of Nonhuman Rights Project*].
76. Wise, "Nonhuman Rights," *supra* note 66 at 1286.
77. Deckha, "Humanizing the Nonhuman," *supra* note 73; Joe Willis, "Animal Rights, legal personhood and cognitive capacity: addressing 'levelling-down' concerns" (2020) 11:2 J Human Rights & Environment 199 at 223. Willis also defends the NhRP's arguments from a disability rights perspective.

b. *The welfarist perspective—classic and newer responses to "humane" use*

Although Wise favours rights and personhood for animals, he is not opposed to welfare initiatives occurring alongside property reform.[78] Recall that Francione views any welfarist campaign, even those launched as incremental reform on the road to personhood which he has termed "new welfarism," as counterproductive.[79] Unlike their "old" counterparts, new welfarists are not necessarily against moral or legal personhood for animals and may indeed join abolitionists in hoping for an anti-exploitation endpoint, at least for some animal uses.[80] But new welfarists have insisted that animal welfare measures (the banning of the "cruelest" practices, which in agriculture, for example, include hot-iron branding,[81] unanesthetized chicken debeaking, maceration of "useless" baby male chicks,[82] incredibly cramped battery cages for chickens,[83] and gestation crates for pigs[84]) can help animals' quality of life despite their ongoing captivity and exploitation.[85] New welfarists believe that working within the current legal framework to achieve better living conditions for animals is an effective and pragmatic reform strategy and may eventually lead to fundamental rights of life, freedom, and bodily integrity for animals.[86]

Proposals by ARL scholar David Favre are the most prominent model of this property-tolerant approach, advocating a "living property" status for animals to help signal to legislators and judges that animals deserve a higher treatment of care in these animal-use industries.[87] For companion animals, Favre proposes splitting the incidents of ownership such that human owners would retain the legal title in the animals they own, but

78. Steven M Wise, "Thunder Without Rain: A Review/Commentary of Gary L Francione's Rain Without Thunder: The Ideology of the Animal Rights Movement" (1997) 3:1 Animal L 45.

79. Francione, "Reflections," *supra* note 40 at 72-96, 106-116.

80. Deckha, "Critical Animal Studies," *supra* note 13 at 49.

81. Jason K Ahola, "Animal Welfare Implications of Beef Industry Practices Including Dehorning, Castration, and Branding" (2015) 344 Range Beef Cow Symposium XXIV, University of Nebraska 55.

82. Geoff Regier, "The State of Animals Used in the Food Industry: In-Depth" (January 2021), online (video): *Animal Justice Academy* <training.animaljusticeacademy.com/products/animal-justice-academy/categories/4373644/posts/15242941> [perma.cc/DKX3-YVT2].

83. *Ibid.*

84. Sara Shields, Paul Shapiro & Andrew Rowan, "A Decade of Progress toward Ending the Intensive Confinement of Farm Animals in the United States" (2017) 7:5 Animals 40 at 43.

85. See also Alasdair Cochrane, *Animal Rights without Liberation* (New York: Columbia University Press, 2012) at 137.

86. Deckha, "Critical Animal Studies," *supra* note 13 at 49, 54; Francione & Garner, *supra* note 40 at 48.

87. Deckha, "Critical Animal Studies," *supra* note 13 at 46-47, 56-61; David Favre, "Living Property: A New Status for Animals within the Legal System" (2010) 93:3 Marq L Rev 1021 at 1022 [Favre, "Living Property"].

that the equitable title would belong to the animal.[88] Companion animals could then benefit from the trust obligations that would newly attach to human ownership of animals even though they are still formally owned as property.[89] Favre has not proposed the extension of the "equitable self-ownership" model to curb animal exploitation in animal-use industries.

3. *A middle ground—simultaneously property and persons: More recent proposals*

Although ARL advocate Steve Wise is fundamentally opposed to the property status of animals, in an interview with ARL scholar Angela Fernandez he acknowledged that in the common law system it would be possible for animals to be recognized as legal persons while still remaining property. This would occur if the law recognized their capacity for a legal right to sue in their own name or provide for some other similar discrete right.[90] Wise, however, remained adamant that animals' property status should be eliminated.[91]

Fernandez shares Wise's desire for an anti-exploitation endpoint for animals but is less categorical about property's power to subordinate. She has recently articulated a hybrid approach to reach a non-welfarist endpoint for animals, connecting to Favre's "living property approach" referenced above, but also extending significantly from it.[92] Fernandez calls her model "quasi-property/quasi-personhood," and offers this category as "a good temporary heuristic to help us organize our rapidly changing ideas about how to structure human relationships with nonhuman animals."[93] She joins with several other scholars who believe that animals already have

88. Favre, "Living Property," *supra* note 87 at 1038-1039.
89. *Ibid* at 1068.
90. Angela Fernandez, "Legal History and Rights for Nonhuman Animals: An Interview with Steven M. Wise" (2018) 41:1 Dal LJ 197 at 210.
91. *Ibid*.
92. Fernandez, "Not Quite Property," *supra* note 13; Angela Fernandez, "Animals as Property, Quasi-Property or Quasi-Person" (working draft and accompanying video, available at <thebrooksinstitute.org/ALF-Fernandez-Presentation> [perma.cc/M3AV-N4Q7] [Fernandez, "Animals as Property"]). Some scholars who advocate for an abolitionist endpoint for animals through liberal deontological arguments about moral individualism, and thus also seek to distance themselves from welfarists like Fernandez does, blur the property/personhood binary another way. Instead of arguing that animals can hold rights as property and being property-tolerant similar to Favre and Fernandez, they promote rights for animals but reject personhood. Moral philosopher Christine Korsgaard has offered this position. See Christine M Korsgaard, "Kantian Ethics, Animals, and the Law" (2013) 33:4 Oxford J Leg Stud 629.
93. Fernandez, "Not Quite Property," *supra* note 13 at 158.

rights,[94] however "limited"[95] and "admittedly weak."[96] Fernandez refers, as an important example, to anti-cruelty statutes' requirements that animal owners or their delegates ensure animals do not go hungry, thirsty, without shelter, etc., as evidence of this.[97] For Fernandez, this means that animals should not only be seen as a special type of property as Favre advocates, but also as quasi-persons.[98]

With the idea of quasi-personhood, Fernandez's work also builds on an earlier continuum proposal from feminist legal scholar Saru M Matambanadzo. Taking some of her cues from Emmanuel Levinas' face-based ethic of Otherness, Matambanadzo charts a feminist reworking of personhood that transcends the human realm as to who should count as a legal subject.[99] Her feminist theory of personhood "takes the vulnerability of bodies and vulnerable embodiment as a starting place for thinking about what and who is entitled to legal recognition as a person."[100] Matambanadzo's account of the person seeks to inject concepts that challenge conventional bases for personhood within legal liberalism (i.e. rationality and autonomy).[101] Yet, perhaps revealing of personhood's gravitational pull toward the human, as well as Matambanadzo's desire to prevent corporations from claiming certain human rights,[102] her account valorizes human embodiment as a touchstone for all other personhood claims. Matambanadzo would accord a "presumption of personhood…to all those entities, individuals or collectives whose existence mirrors *prima facie* that of a human being in terms of body and embodiment."[103]

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94. *Ibid* at 157, 214-215. Fernandez acknowledges that her approach to retaining some type of property status for animals aligns with Favre's.
95. *Ibid* at 169.
96. *Ibid*. Fernandez references Favre and Cass Sunstein in this regard. See Favre, "Living Property," *supra* note 87; David Favre, "Equitable Self-Ownership for Animals" (2000) 50:2 Duke LJ 473; David Favre, "A New Property Status for Animals: Equitable Self-Ownership" in Sunstein & Nussbaum, *supra* note 55 at 234; Cass R Sunstein, "Enforcing Existing Rights" (2002) 8:1 Animal L i. See also the recent work of two European scholars. First, Stucki who calls the protections conferred by anti-cruelty statutes "simple" rights: Saskia Stucki, "Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights" (2020) 40:3 Oxford J Leg Stud 533 at 543-545. Also offering a non-binary, continuum theory of legal personhood is Visa Kurki in Visa Kurki, *A Theory of Legal Personhood* (Oxford: Oxford University Press, 2019). For a fulsome discussion of whether "weak" or "thin" rights are really rights, see Fasel & Butler, *supra* note 49 at 83-91.
97. Fernandez, "Not Quite Property," *supra* note 13 at 189-190. For further examples, please see her discussion in Fernandez, "Animals as Property," *supra* note 92.
98. Fernandez, "Animals as Property," *supra* note 92 at 157-158, 160.
99. Saru M Matambanadzo, "Embodying Vulnerability: A Feminist Theory of the Person" (2012) 20:1 Duke J Gender L & Pol'y 45.
100. *Ibid* at 71, 78.
101. *Ibid* at 48, 71-72, 77.
102. Her purpose is two-fold: to extend the law's protection to certain nonhumans as well as limit the rights of corporations. *Ibid* at 45.
103. *Ibid* at 76 (emphasis in original).

In her schemata, nonhuman mammals would benefit from "the presumption of quasi-personhood" and thus would not be seen as property or quasi-property as Fernandez proposes.[104] Although more-than-mammal animals can qualify as quasi-persons under Fernandez's proposal, Fernandez would also consider animals as quasi-property from a pragmatic desire to work with the existing legal system. Fernandez underscores that most people, judges included, are anthropocentrically minded and balk at the equivalence between animals and humans that the term "personhood" implies (even while we know legal personhood is not always tethered to humanity—consider corporations and ships).[105] For Fernandez, attaching a "quasi" qualifier to the property category connotes, in line with some recent judicial rulings and legislation,[106] that animals "are a nuanced form of property that triggers duties and responsibilities in the humans who own them or come into contact with them,"[107] productively moving us away from a binary paradigm and expanding options for ARL reform.

4. *Summary*

Exploring Fernandez's hybrid account and Matambanadzo's feminist continuum contesting the boundedness of property and personhood categories, we are reminded that the personhood-property debate that was formative to the emergence of ARL in the mid-1990s and through the early 2000s worked within the confines of the two legal subjectivities available in the common law and the rights versus welfare ethos they reflect. Yet, we also see that this binary framing has given rise to a middle path, namely qualified personhood proposals for some or all animals that is intended to go beyond welfarist models to obtain non-exploitative endpoints for animals.

Other ARL scholars who view the personhood-property debate as no longer productive seek to sidestep the focus on property and personhood altogether in thinking about how the law should develop in relation to

104. *Ibid* at 78, 82. Under a 9-point schemata, Matambanadzo, exhorts judges to set out a framework under which nonhumans can presumptively be quasi-persons, indicating that animals who are not mammals could have some rights while remaining property; they would not be quasi-persons.

105. Fernandez, "Not Quite Property," *supra* note 13 at 164-167.

106. *Ibid* at 163. Also fitting in with the cases cited is the very recent ruling by the New York Court of Appeal in *Matter of Nonhuman Rights Project*, *supra* note 75. For the leading Canadian judicial affirmation, albeit in dissent, that animals are a special type of property, namely a sentient type, see *Reece v Edmonton (City)*, 2011 ABCA 238 at 39, Fraser J, dissenting. For international examples see discussion of Stucki, *supra* note 96 at 535.

107. Fernandez, *supra* note 13 at 169. She also observes that widespread social attitudes must change. As a result, for Fernandez, animals' legal classification as property is not the crux of their subordination (*ibid* at 197).

animals.[108] New proposals have come forward after 2000 regarding "transformative" reform for animals and have amplified the depth and range of animal law beyond personhood. The remainder of this article discusses these proposals, noting the feminist thinking underpinning many of them and the increasing integration of critical social theories in general into ARL. The discussion also notes the continuation of the concern highlighted by Francione early on regarding the legitimacy of humanizing some animals to procure legal recognition and the repercussions of such "sameness logic" for "animalized animals."

III. *Sidestepping the personhood/property debate—The last two decades*

Sharply critical of the welfare paradigm but also mindful of the poor prospects that jurists will abandon anthropocentrism soon and inaugurate personhood for animals, other animal law scholars working also within a liberal tradition have sought what may be termed a "third way" forward over the last two decades. This "third way" approach in ARL scholarship sidesteps the personhood-property debate altogether to emphasize different concepts and values regarding how law should structure human-animal relations. Some in this camp contend that legal subjectivity and corresponding terminology—whether the law refers to animals as "property" or "persons"—is not critical to advancing animals' interests if we foreground these other concepts. However, others endorse personhood and condemn property but highlight other rights animals need.[109] In this part, I discuss these various "alternative" approaches seeking to exit the personhood-property impasse but still adhering to liberal tenets, proceeding in chronological order, and pointing out the influence of feminist theory on them.

1. *Animal capabilities over rights or suffering (2004 onward)*

In proposals advanced in the mid-2000s, American feminist legal scholars Martha Nussbaum and Ani Satz, like Francione and Wise, also draw upon Western individual moral philosophical traditions to advance arguments to transform animals' lives. However, unlike Francione and Wise, they both downplay personhood and rights as a necessary or appropriate corrective to ameliorating animals' property status, advancing instead the concept

108. *Ibid* at 157. Fernandez indicates her sympathy with sidestepping the impasse. Rather than circumvent the binary terms altogether, however, she "argues that we should move towards and into both of those categories, using them creatively and expansively" as they "are so central to legal thinking" (*ibid*).

109. Still others identify the underlying system of capitalism, or liberal individualism, as the greater impediment. This latter scholarship is integrated into the next part (part IV), which discusses scholarship critical of liberalism.

of animal capabilities and the chance for animals to function as per their ontological norms.

a. *Capabilities and dignity—a new legal principle to respect animal natures*

Capabilities theory is a prominent approach to understanding and monitoring human development.[110] The theory was cumulatively developed by economist Amartya Sen and liberal feminist legal scholar Martha Nussbaum, and is aimed at promoting human flourishing by cultivating the abilities of individuals to express and enjoy certain capacities identified as important to human beings (for example, the capability for nutrition, play, rest, and companionship).[111] Instead of legal and political institutions oriented toward classic liberal values of human equality, autonomy, and dignity, or assessments of nations' progresses with respect to Gross Domestic Product, the capabilities approach zeroes in on the abilities that people have and whether a nation is providing them with the means to cultivate those abilities.[112] Nussbaum, an ARL scholar,[113] first extended her capabilities approach to the question of animal flourishing in the mid-2000s.[114] She argued that the typical liberal legal pathway toward advancing human equality, dignity, and autonomy—the social contract model—is not viable for animals who cannot dialogue with humans about their needs.[115] Nussbaum argued that a capabilities-oriented legal framework based on dignity would be a better model.[116] Nussbaum has recently reinforced this view in her monograph-length text addressing

110. Simon Deakin & Aristea Koukiadaki, "Capability Theory, Employee Voice, and Corporate Restructuring: Evidence from U.K. Case Studies" (2012) 33:3 Comp Lab L & Pol'y J 427 at 433.

111. Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge, UK: Cambridge University Press, 2000) [Nussbaum, *Women and Human Development*]; Amartya Sen, "Human Rights and Capabilities" (2005) 6:2 J Human Development 151; Amartya K Sen, "Well-Being, Capability and Public Policy" (1994) 53:7/9 Giornale degli Economisti e Annali di Economia 333; Amartya Sen, *Inequality Reexamined* (Oxford: Oxford University Press, 1992); Martha Nussbaum & Amartya Sen, eds, *The Quality of Life* (Oxford: Oxford University Press, 1993); Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge, MA: Harvard University Press, 2011) [Nussbaum, *Creating Capabilities*].

112. Nussbaum, *Women and Human Development*, *supra* note 111 at 69-70.

113. *Ibid*; Nussbaum, *Creating Capabilities*, *supra* note 111; Martha C Nussbaum & Alison L LaCroix, eds, *Subversion and Sympathy: Gender, Law, and the British Novel* (Oxford: Oxford University Press, 2013).

114. Martha C Nussbaum, "Beyond 'Compassion and Humanity': Justice for Non-Human Animals" in Sunstein & Nussbaum, *supra* note 56 [Nussbaum, "Beyond 'Compassion"]; Martha C Nussbaum, *Frontiers of Justice: Disability, Nationality, and Species Membership* (Cambridge, MA: Harvard University Press, 2006) [Nussbaum, *Frontiers of Justice*].

115. Nussbaum, *Frontiers of Justice*, *supra* note 114 at 9-14, 103-104. Nussbaum has also discussed the inadequacy of the model for humans living in poverty and with disabilities that also prevent a proper reciprocal dialogue. See Chapters 2-3 in *Frontiers of Justice*, *supra* note 114.

116. *Ibid* at 179.

human-animal relations through the capabilities approach. She outlines in this contribution why the capabilities approach should be preferred to other dominant approaches, discussing Wise's "same as us" deontological approach, Singer and other's utilitarian approaches, and also the recent theory articulated by philosopher Christine Korsgaard.[117]

Eva Bernet Kempers has harnessed Nussbaum's dignity-based capabilities approach to present "animal dignity" as a standalone promising "normative principle"[118] to influence the legal system in favour of animals.[119] Civil law developments in Europe and elsewhere in jurisprudence over the last two decades,[120] as well as in ARL and posthumanist studies, motivate her proposal to avoid "the current stalemate between animal welfare versus animal rights [to]… lead the central debate [in ARL] in a new direction."[121] For Kempers, respect for animal "'dignity' would simply mean that the criteria that define the conditions for a dignified life should be given due consideration in the legal balancing of interests."[122] Kempers offers Nussbaum's capabilities list as a tool to identify what these "conditions for a dignified life" would look like.[123] The approach is meant to go beyond a pain and pleasure calculus, as Nussbaum has also emphasized,[124] to a more ontological inquiry. Kempers states that "what dignity entails for an individual depends on what that individual needs to flourish as the kind of being it is."[125] Kempers differentiates a dignity model from a welfare one as the former is not targeted at only avoiding suffering and also makes animals "intrinsically relevant for law."[126]

Importantly though, this legal approach does not disturb the property categorization of animals,[127] nor correlate dignity with rights as under Wise's abolitionist approach.[128] It also does not strive for legal personhood.[129] Kempers views such non-correlation positively, as it does

117. Martha Nussbaum, *Justice for Animals: Our Collective Responsibility* (New York: Simon & Schuster, 2022) at 19-79 [Nussbaum, *Justice for Animals*]. The specific text of Christine Korsgaard that Nussbaum discusses is *Fellow Creatures: Our Obligations to the Other Animals* (New York: Oxford University Press, 2018).
118. Kempers, "Animal Dignity," *supra* note 43 at 174, 177.
119. *Ibid*.
120. *Ibid* at 184.
121. *Ibid* at 174.
122. *Ibid* at 177.
123. *Ibid* at 178.
124. Nussbaum, "Beyond 'Compassion," *supra* note 116 at 299-300; Nussbaum, *Justice for Animals*, *supra* note 117 at 56.
125. Kempers, "Animal Dignity," *supra* note 43 at 178.
126. *Ibid* at 181. See also discussion at 187-188.
127. *Ibid* at 192.
128. *Ibid* at 181.
129. *Ibid* at 182. Kempers affirms the non-necessity of legal personhood and a more hybrid, gradual

not necessitate "an entirely different legal paradigm but rather a shift of emphasis from welfare to dignity."[130] Kempers points out that "animal dignity" is an emerging concept in multiple jurisdictions, which is yet another reason it seems promising as a "normative principle" for the law to adopt.[131] Kempers acknowledges that "animal dignity" as a concept lends itself to "conceptual vagueness," much like human dignity.[132] She also concedes it may repel secular-minded individuals who understandably worry about the religious overtones "dignity" carries.[133] But following a "neo-pragmatist perspective,"[134] Kempers downplays such vagueness.[135] Also, she suggests that the conceptual openness of "animal dignity" may better attend to differences amongst animals, thereby avoiding intra-animal hierarchies. She believes dignity as a concept does not create an "in" or "out" group based on who possesses moral worth, which Kempers observes to be typical of moral individualist approaches.[136] She also sees it as leaving room for the law to remain open to the interests of non-animal nonhumans (such as robots).[137] Kemper also credits a dignity approach as more responsive to the needs of wild animals given both the welfarist and abolitionist focus on the suffering of domestic animals.[138]

b. *Capabilities and vulnerability—a new animal equality model*

Feminist legal scholar Ani Satz has also mobilized capabilities theory into a different alternative to animals' property categorization but sees limits to the dignity approach.[139] Preferring Sen's capability-maximizing approach rather than Nussbaum's dignity-based version, Satz proposes a model of equality for animals that draws from the idea of American Equal Protection and is based on the concept of vulnerability.[140] For a variety of reasons, Satz sees her proposal as more promising than Francione or Wise's

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approach for animals in Eva Bernet Kempers, "Transition rather than Revolution: The Gradual Road towards Animal Legal Personhood through the Legislature" (2022) Transnational Environmental Law.

130. Kempers, "Animal Dignity," *supra* note 43 at 182 citing Anne Lansink, "Technological Innovation and Animal Law: Does Dignity do the Trick?" (2019) 10:1 European J Risk Regulation 80.
131. Kempers, "Animal Dignity," *supra* note 43 at 184-191.
132. *Ibid* at 192-193.
133. *Ibid* at 193.
134. *Ibid.* Kempers adopts the neo-pragmatist approach of John Hadley to animal law reforms. John Hadley, *Animal Neopragmatism: From Welfare to Rights* (Cham: Palgrave Macmillan, 2019).
135. Kempers, "Animal Dignity," *supra* note 43 at 177, 193.
136. *Ibid* at 175.
137. *Ibid* at 182-183. Kempers also sees the model as responsive to posthuman legal scholar Irus Braverman's call for "more-than-human legalities" discussed in part IV of this article (*ibid* at 183, 192).
138. *Ibid* at 192.
139. Satz, *supra* note 21 at 107.
140. *Ibid* at 110-115.

right-based proposals aimed at personhood to transform the legal status of animals.[141] First, she notes that personhood for animals will not settle the question of how to proceed in law when rights and interests among persons conflict.[142] Second, Satz points out that legal recognition is only one ingredient in ameliorating animals' marginalization; the underlying religious and cultural devaluation of animals will have to change for their alterity to lose its negative associations.[143] Satz also observes that "lower animals" are unlikely to qualify as persons in law.[144]

As an alternative, Satz proposes a new model that she calls "Equal Protection of Animals" that "combines vulnerability and capability theory and the principle of equal protection."[145] Satz's orientation to vulnerability, like Matambanadzo's reworking of personhood, explicitly borrows much of its substantive content from another leading liberal feminist legal scholar, Martha Fineman, and Fineman's influential theorizations on the subject.[146] Fineman describes vulnerability as "a universal, inevitable, enduring aspect of the human condition that must be at the heart of our concept of social and state responsibility."[147] If the law approached humans as vulnerable subjects because of shifting dependencies across the lifespan, then legal and other institutions would be differently oriented and more responsive to people's actual needs by providing material care.[148] In harnessing the vulnerability paradigm to inform her Equal Protection of Animals paradigm, Satz's model affirms the woundability and mortality that sentient animals share with humans. But she also underscores the vulnerability that arises from the overarching legal and other norms that allow humans to instrumentalize animals.[149] Satz incorporates a capabilities approach into her dependency-attuned and affirmative care model to avoid the hierarchical valuations that have characterized deontological and utilitarian approaches where, as discussed above, animals with "higher" level capacities are given more regard.[150] Satz would set a baseline for

141. Satz's critique of Favre's living property model identifies limitations that I have discussed in detail elsewhere. *Ibid* at 108. See also Deckha, "Critical Animal Studies," *supra* note 13.
142. Satz, *supra* note 21 at 107.
143. *Ibid.*
144. *Ibid*.
145. *Ibid* at 110.
146. *Ibid* at 78-79; Martha Albertson Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition" (2008) 20:1 Yale JL & Feminism 1. Fineman's writings also informed Matambanadzo's account discussed earlier. See Matambanadzo, *supra* note 99 at 74-75.
147. Fineman, *supra* note 146 at 8.
148. *Ibid* at 11-12.
149. Satz, *supra* note 21 at 79. Satz further notes that because domestic animals are made permanently dependent on humans that their vulnerability is the most heightened (*ibid* at 80).
150. *Ibid* at 76, 78.

all sentient animals to have their basic capabilities covered.[151] This is the equality quotient of her approach.[152]

In this vein, Satz's approach differs from Nussbaum's extension of capabilities theory to animals.[153] As I have discussed elsewhere in relation to Nussbaum's mid-2000s writings on animals, despite a conceptual scheme that does not automatically privilege human interests to have their capabilities met over animal interests, Nussbaum's application of her capabilities approach to real-life examples of animal-human conflict reflects an anthropocentric mindset.[154] Satz also detects such limitations in Nussbaum's earlier applications.[155] And, as noted above, she shies away from Nussbaum's dignity-oriented version of capabilities theory.[156] Satz is attracted to Sen's functionings-oriented version in part because of its flexibility to recognize general and very specific capabilities and thus a diversity of functioning levels.[157] In implementing Sen's version, Satz argues for the protection of all of sentient animals' basic capabilities, noting that most current institutional use of sentient animals would have to be outlawed as a result.[158] Thus, in her extension of capabilities theory to animals, Satz reaches an abolitionist endpoint for vulnerable animals much more decisively than Nussbaum did (or Kempers).

With her very recent arguments in *Justice for Animals: Our Collective Responsibility*, Nussbaum has deepened her convictions that animals should not be used instrumentally or dominated. At multiple instances, she laments the complete human domination of animals.[159] Nussbaum offers her capabilities approach to tackle the thwarting of sentient animals' chances for species-typical behaviours and agency in multiple current contexts and industries, presenting it as an ideal overall theoretical tool to figure out the contours of our "collective responsibility to vindicate the

151. Satz, *supra* note 21 at 121-122.
152. *Ibid* at 111.
153. Nussbaum, *Frontiers of Justice*, *supra* note 114, ch 6.
154. Maneesha Deckha, "Feminism, Intersectionality and the Capabilities Approach for Animals" in Martine LaChance, ed, *The Animal within the Sphere of Humans' Needs* (Montreal: Yvon Blais, 2010) 337.
155. Satz, *supra* note 21 at 112.
156. *Ibid* at 111.
157. *Ibid* at 113.
158. *Ibid* at 116.
159. Nussbaum opens her monograph by observing: "Animals are in trouble all over the world. Our world is dominated by humans everywhere: on land, in the seas, and in the air. No non-human animal escapes human domination." Nussbaum, *Justice for Animals*, *supra* note 117 at 5. See also, for example, *ibid* at 186 (… "there is not group of intelligent and sentient beings more dominated and less respected in today's world than are non-human animals"). And in considering her endorsement of eating fish, Nussbaum still takes care to consider the dangers of this position in terms of "dull(ing) our moral alertness" and that "it is still a kind of domination over…other life." *Ibid* at 170-171.

rights of animals."[160] She emphasizes widespread human duties to facilitate animals' flourishing and the need for animals to have standing to enforce interests and rights.[161] Notably, Nussbaum appears to have narrowed the scope of what she views as acceptable animal use in animal agriculture by now calling for an immediate end to factory farming (when her earlier work did not).[162]

However, Nussbaum's updated capabilities approach still continues to allow, at least for the time being in the absence of new evidence about certain animals' sentience, for considerable commercial animal use. She would permit, for example, "humane" fishing of adult fish,[163] sheep-shearing,[164] captivity for animals in zoos and fish in aquaria,[165] and human profiting from animals' labour where the work overall "adds meaning and richness ot the animal's life."[166] Nussbaum also continues to exempt painful and fatal animal experimentation as a "tragic dilemma."[167] In terms of death-causing industries, she identifies the factory food industry, the use of animals for fur, and the hunting of animals for sport, as the animal uses which should be immediately banned and in which we should refuse to participate.[168] Satz's Equal Protection for Animals paradigm would halt the exploitation of animals more broadly, but through a different pathway than personhood.

2. *Examining human entitlement, not animal ontology—a duties-based path to equality that challenges sentience-based models (2006–2007)*

Satz's Equal Protection for Animals paradigm adopts a "presumption against animal exploitation."[169] This is a legal presumption first proposed by feminist legal scholar Taimie Bryant.[170] Bryant, like Satz, is desirous of a world without animal exploitation and approaches that endpoint through a de-emphasis on rights and emphasis on pro-active care attending to animals' needs. Like Satz, she condemns anti-cruelty models and is

160. *Ibid* at 314.
161. *Ibid* at 288-295.
162. *Ibid* at 172.
163. Nussbaum excepts adult fish as she believes they are not harmed by a painless death although she acknowledges several continuing concerns with her position. *Ibid* at 168-170.
164. *Ibid* at 170-171.
165. *Ibid* at 242.
166. *Ibid* at 218.
167. *Ibid* at 177-183.
168. *Ibid* at 171-172. Nussbuam ultimately concludes that other "non-harmful killing of animals…are still instances of instrumental use and domination…from which we ought to shrink." She thus calls for a transition away from this type of killing. *Ibid* at 172.
169. *Ibid* at 110.
170. Taimie L Bryant, "Animals Unmodified: Defining Animals/Defining Human Obligations to Animals" (2006) U Chicago Legal F 137 [Bryant, "Animals Unmodified"].

equivocal about personhood.[171] And Bryant agrees with abolitionist scholars that property is at the heart of animal exploitation.[172] Bryant, however, articulates the importance of establishing duties prior to and even in place of rights. She argues that simply removing animals from the realm of commodification will not secure guarantees from the state that animals will be able to live autonomous lives free from harm or exploitation.[173] What will provide for greater protections are positive direct duties on the part of humans to respect animals as non-instrumental beings who have their own lives to live on their own terms.[174] And such reforms can be had independent of any conferral of personhood.[175]

This supplement to decommodifying animals as a precursor to any rights claims that might follow is critical for Bryant because of the drawbacks of the rights model that she identifies. Bryant is wary of rights as a focus for animal campaigns because of the model's proclivity to focus attention on which animals count, which then typically leads to the marshalling of anthropocentric sameness logic and exclusionary line-drawing among animals to be persuasive.[176] Most animal advocates seek to establish that animals can suffer just like humans and so draw this line at sentience (a threshold we find in Nussbaum and Satz' capabilities models as well),[177] a move that Bryant identifies as exclusionary and counterproductive.[178] Bryant is keen to achieve meaningful non-exploitative outcomes for animals without advancing sameness logic.[179] Like Francione, Nussbaum, and Satz, she objects to line-drawing between humanized and non-humanized animals.[180] She also points out that line-drawing denies the diversity of animals as well as the interdependence of all life, making the strategy

171. *Ibid* at 147-148, 155-156, citing in the last, Ngaire Naffine, "Who are Law's Persons? From Cheshire Cats to Responsible Subjects" (2003) 66:3 Mod L Rev 346 at 356, n 55; Satz, *supra* note 21 at 101, 105.

172. Bryant, "Animals Unmodified," *supra* note 170 at 153-154. She also explicitly supports Francione in his view that welfarist animal advocacy measures are counter-productive because they permit the property status to endure and that advocacy efforts should be directed at campaigns that seek to stop the exploitative use of animals (*ibid* at 147-148).

173. *Ibid* at 154.

174. *Ibid* at 177.

175. *Ibid* at 153-155.

176. *Ibid* at 175-179.

177. Francione, "Animal Welfare," *supra* note 68 at 31-32; Nussbaum, *Frontiers of Justice*, *supra* note 114 at 371, 393; Nussbaum, *Justice for Animals*, *supra* note 117 at 137-140; Satz, *supra* note 21 at 114.

178. Taimie Bryant, "Similarity or Difference as a Basis for Justice: Must Animals Be like Humans to Be Legally Protected from Humans" (2007) 70:1 Law & Contemp Probs 207 at 208-209 [Bryant, "Similarity or Difference"].

179. *Ibid* at 208. Bryant identifies multiple concerns with sameness logic (*ibid* at 212-226).

180. *Ibid* at 216.

of protecting some animals through sameness logic self-defeating.[181] She views such humanizing benchmarks for animals in a similar problematic vein as masculinist benchmarks are for women.[182]

But Bryant does not start from sentience and consider which animals qualify.[183] Instead, drawing on the writings of radical feminist legal scholar Catharine MacKinnon and pioneering ecofeminist scholar Carol Adams,[184] Bryant challenges advocates to shift from defining criteria for animals' worthiness to prove why animals should matter to law, to encouraging scrutiny of human claims to harm animals.[185] As she puts it: "We must focus on the violence and oppressive conduct itself in order to reduce violence and oppression, rather than deciding who among those being treated violently and oppressively is worthy of legal recourse."[186] The way to reduce harm for Bryant is to place duties on humans and to generate more discussion in animal circles about what these duties should be.[187] These steps need not await the abolition of animals' property status, but can proceed even within the current system.[188]

Although Bryant departs from capabilities approaches (whether grounded in animal sentience, dignity, or vulnerability) to operationalize an anti-exploitation model for animals, she joins Nussbaum, Kempers, and Satz in their vision to advance dramatic change for animals within a liberal legal order where animals are property by shifting our focus. Their proposals rework concepts of equality and dignity through alternative feminist theory-informed conceptual frameworks (capabilities, vulnerability, duties) that comparatively de-emphasize rights and personhood and emphasize affirmative human obligations. All proposals also object to legal models that would value humanized sentient animals over other sentient animals, with Bryant further challenging sentience as too exclusionary a threshold in this regard.

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181. *Ibid* at 217. Bryant asks how the humanized animals can flourish if they are dependent on the non-humanized animals who remain unprotected (*ibid* at 217).
182. Bryant, "Animals Unmodified," *supra* note 170 at 161.
183. Nussbaum has recently canvassed animals (and plants) in this way. Nussbaum, *Justice for Animals*, *supra* note 117 at 140-153.
184. *Ibid* at 1, 161-162; Bryant, "Similarity or Difference," *supra* note 178 at 222.
185. Bryant, "Animals Unmodified," *supra* note 170 at 173.
186. *Ibid* at 162.
187. *Ibid* at 174.
188. *Ibid* at 146-147. Although she acknowledges that the creation of duties would be incremental and difficult, Bryant encourages advocates to look for opportunities in current regulation where there is an opportunity to make non-welfarist arguments for animals that challenge animal users to defend their exploitative use (*ibid* at 187-188).

3. *Social membership through family and labour relations (2011 onward)*

Over the last decade, and accelerating in the past five years, a new "third way" framework has taken shape that embraces rights. Other scholars working within the liberal tradition sidestep the personhood debate by investing fully in animal rights due not only to claims about animals' intrinsic moral worth (a staple of ARL personhood arguments), but also because of animals' contributions to society. Liberal political philosopher Will Kymlicka has argued that the family and labour contributions of animals suggest pathways toward rights and justice recognition that do not depend on animals achieving legal personhood although such an endpoint is still necessary for a just interspecies society.[189] He opposes the property classification of animals.[190] He also explicitly and strongly endorses personhood.[191] However, he suggests that it is necessary to also consider animals' social membership rights. And similar to the capabilities, vulnerability, and duties paradigm proponents discussed in the preceding section, Kymlicka affirms animals' corresponding positive entitlement to human care in addition to the negative rights not to be killed or tortured that inhere in personhood.[192] Kymlicka views the social membership model as a political and legal approach that "could radically disrupt the prevailing ideology of humane use."[193]

Kymlicka and co-author Sue Donaldson first proposed this social membership recognition model for companion animals who are widely seen by humans to be part of their families.[194] Recognizing the crucial need to address non-familial domesticated animals, namely animals in sites of farming and research, the model has extended into the realm of labour over the last decade.[195] This extension responds to the concern about eclipsing legal reform for animals farmed for food, who are feminized and

189. Kymlicka, "Social Membership," *supra* note 8 at 124.
190. Charlotte E Blattner, Kendra Coulter & Will Kymlicka, "Introduction: Animal Labour and the Quest for Interspecies Justice" in Charlotte E Blattner, Kendra Coulter & Will Kymlicka, eds, *Animal Labour: A New Frontier of Animal Justice* (Oxford: Oxford University Press, 2019) 1 at 3, 11.
191. Kymlicka, "Social Membership," *supra* note 8 at 125.
192. *Ibid* at 126.
193. Kymlicka, "Membership Rights," *supra* note 21 at 215.
194. Kymlicka and Donaldson have also suggested membership rights for what they call "liminal animals" (those living independently but among humans). For wild animals, they have suggested self-government rights.
195. Sue Donaldson & Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford: Oxford University Press, 2011); Kendra Coulter, *Animals, Work and the Promise of Interspecies Solidarity* (Basingstoke, UK: Palgrave Macmillan, 2016); Charlotte E Blattner, "Animal Labour: Toward a Prohibition of Forced Labour and a Right to Freely Choose One's Work" in Blattner, Coulter & Kymlicka, *supra* note 190, 91.

animalized, rather than humanized.[196] As ARL scholar Charlotte Blattner along with feminist animal labour theorist Kendra Coulter and Kymlicka collectively comment, "[a]ccess to the social role of 'worker,' and to the rights that go with this status, could play a transformative role in shifting from our current relations of instrumentalization and exploitation to relations of shared membership and cooperation."[197] Coulter, particularly, emphasizes the insights of feminist political economy to advance her call for an intersectional interspecies solidarity and good labour opportunities for humans without exploiting animals or humans.[198] Blattner, Coulter, and Kymlicka are aware of the risks of this model for suggesting the consent of animals to certain working conditions when none exists.[199] They maintain that the abolitionist position that would seek to abolish all animal labour situations to avoid this risk does not allow for the possibility that some labouring relationships between humans and animals might promote genuine animal flourishing, dignity, and justice.[200]

Critical animal studies scholar Dinesh Wadiwel is more circumspect about the labour model given the capitalist emphasis on hyper-productivity. Wadiwel importantly notes that "work," however positively conceived and uplifting, detracts from "leisure time," which actually might be a better guarantor of flourishing for all beings.[201] Blattner, Coulter, and Kymlicka share such concerns,[202] and offer that "animal labour, properly recognized and regulated, could serve as a potentially valuable site of social membership, personal meaning, and material security, and an exemplary case of how to secure both rights and relationships with animals."[203] They adopt feminist ARL scholar Jessica Eisen's term calling this position the "labour-recognition transformation thesis."[204] Under this thesis, the desire is not only to cultivate a labour model that prevents exploitation, but one

196. See Carol J Adams, "*Why Feminist-Vegan Now?*" (2010) 20:3 Feminism & Psychology 302 [Adams, "Feminist-Vegan"].
197. Blattner, Coulter & Kymlicka, *supra* note 190 at 5.
198. Coulter, *supra* note 195 at 3, 8. For further feminist animal labour analysis see Erika Cudworth, "Labours of love: Work, labor, and care in dog-human relations" (2022) 29:3 Gender Work & Organization 830 at 833-835.
199. Coulter, *supra* note 195 at 3.
200. *Ibid.*
201. Dinesh Wadiwel, "The Working Day: Animals, Capitalism, and Surplus Time" in Blattner, Coulter & Kymlicka, *supra* note 190, 181 at 201-202.
202. Coulter, *supra* note 195 at 160 as cited in Wadiwel, *supra* note 201 at 184; Sue Donaldson & Will Kymlicka, "Animal Labour in a Post-Work Society" in Blattner, Coulter, & Kymlicka, *supra* note 190, 207 at 207-208 [Donaldson & Kymlicka, "Animal Labour"].
203. Blattner, Coulter, & Kymlicka, *supra* note 190 at 4.
204. *Ibid* at 15, citing Jessica Eisen in the same volume. See Jessica Eisen, "Down on the Farm: Status, Exploitation, and Agricultural Exceptionalism" in Blattner, Coulter & Kymlicka, *supra* note 190 at 139, 140.

that also provides positive entitlements to animals.[205] Labour rights are thus also directed at the conditions of work that animals experience as well as provisions and benefits for their post-retirement lives.[206] Further, how animals can take an active role and participate in the development of a transformative labour regime in which they benefit is a recurring current of animal labour studies scholarship.[207]

This thesis has thus produced a growing conversation in ARL that is considerably informed by feminist critiques about proper labour valuation and consent about animals in relation to democracy, social membership, and "post-work societies."[208]

4. *Summary*

The significantly feminist theory-inflected ARL "third path" proposals that have emerged since the mid-2000s onward direct attention to a variety of new conceptual frameworks to dramatically advance animal protections, even rights, *within the existing property framework*. Although Nussbaum's very recent deliberation of how to re-organize human animal relations so that animals can be free to be themselves through the Capabilities Approach permits considerable "humane" animal use, others do not. The proposals discussed above from Satz, Bryant, and animal labour scholars (models based on capabilities, vulnerability, harm, and social membership) are clearly non-welfarist in their denouncement of the reining legal model of interest-convergence and humane use. Kemper's animal dignity model, though tolerant of the continuing property status of animals and corresponding instrumentalization, departs from the welfarist focus on suffering and harm and impugns welfarist legislation that does not recognize animals' interests. While not ultimately opposed to personhood, the proposals steer away from a singular focus on personhood and sustain Francione's critique about legal discourse that privileges those animals who approach human benchmarks of cognitive complexity and autonomy. The final branch of ARL explored below shares this concern about cognitive exceptionalism but more fully brings out a critique of *liberal humanism* within ARL through either an intersectional analytic that most ARL forego or a rejection of liberal legalism itself.

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205. Blattner, Coulter & Kymlicka, *supra* note 190 at 2, 4.
206. *Ibid*.
207. *Ibid* at 6-8.
208. *Ibid* at 9; Donaldson & Kymlicka, "Animal Labour," *supra* note 202 at 207. See also Alasdair Cochrane, "Labour Rights for Animals" in Robert Garner & Siobhan O'Sullivan, eds, *The Political Turn in Animal Ethics* (London, UK: Rowman & Littlefield, 2016) 15.

IV. *Questioning ARL's liberal humanism and the promise of law: The past two decades*

"Critical ARL" is my term to refer to ARL that is grounded in theory that impugns foundational principles of liberalism by deploying an intersectional or multilayered lens to examine animals' legal treatment. This part reviews how critical ARL scholars, working within a sub-branch of ARL, have used ecofeminist, postcolonial, critical race, and posthuman theory to think through what a legal paradigm shift for animals should look like. As the discussion below adduces, such thinking typically involves: 1) questioning the liberatory limits of human laws, however well-intentioned, for animals; 2) illuminating how legal discourses constitute the concepts "animal" and "human"; or 3) emphasizing that the social vectors of difference (such as gender, culture, and race) and the systemic stratifications to which they have given rise are intricately connected to ARL issues. Such scholarship argues that the personhood-property debate and previous ARL responses must advert to the liberal humanist underpinnings of law or "human" social justice issues in conceptualizing law's anthropocentrism and ultimately improving the legal plight of animals. This section sets out these perspectives and the centrality of ecofeminist, postcolonial, and posthumanist feminist thinking within them, as well as their attention to the diversity of animals and perils of humanization.

1. *A deeper feminist critique of representation, recognition, and reason*

Previous parts of this article have discussed the work of Matambanadzo, Nussbaum, Satz, and Bryant and their interventions into ARL using primarily liberal feminist legal theory or radical feminist legal theory. As noted earlier, in a recent survey article, Eisen (herself a critical ARL scholar) has adeptly thematized the growing body of feminist ARL, both in liberal and critical iterations.[209] This section, extending the themes Eisen has highlighted (specifically a desire within feminist analysis for law to be able to see, hear and apprehend the animal's perspective as well abjure sameness logics that require animals to be like humans to matter),[210] reveals critical feminist ARL contributions to complicating the benign nature of representation, recognition, and reason norms in ARL leading to alternative proposals to personhood for animals.

One theme that Eisen discusses in relation to the work of what I have termed critical feminist ARL scholars is heightened attention to legal representation. Critical ARL feminist scholars see a problem that most

209. Eisen, "Feminist Jurisprudence," *supra* note 14 at 113.
210. *Ibid* at 114.

ARL scholars do not: that ethical issues related to power arise when even the most anti-speciesist humans *represent* animals in legal matters or are their proxies.[211] Other ARL points to inattention to animals in law, but these feminists deepen the general ARL insight about the law's anthropocentric bias by highlighting that animals' voices or standpoints, similar to women's voices or subjective perspectives, can easily be eclipsed in an ostensibly objective accounting of legal facts.[212] This legal representation concern integrates insights from ecofeminist and postcolonial feminist theory that asks how we can ever properly know what a subordinated Other or subaltern wishes for themselves, and how presuming that we do when we seek to represent them may be a form of epistemic violence.[213] It is a foundational challenge to the liberal legal culture that presumes representing others is an innocuous act.[214]

The concern is also related to perils of legal *recognition* that posthumanist feminist ARL scholars have highlighted. If, say, (human) law ever recognizes animals through personhood, posthumanist feminist ARL reminds us not to gloss over the subordination inherent to an act of a dominant group (here humans) validating the claims, interests, and alterity of a subaltern group (here animals).[215] All of these feminist ARL strands argue that it is important not to minimize the fact that any application of *human* law to animals, even transformative legal recognition, can be read as a colonizing or imperial act.[216]

This insight, then, shows what is at stake with humanizing campaigns or strategies within ARL, and, in particular, the emphasis on showing that animals are like humans because of their reasoning ability, cognitive awareness, or intelligence.[217] Put differently, critical feminist worries about representation and recognition compel a deeper excavation of reason as

211. *Ibid* at 128-130.
212. *Ibid*.
213. Josephine Donovan, "Feminism and the Treatment of Animals: From Care to Dialogue" (2006) 31:2 Signs 305 at 324-325; Gayatri Chakravorty Spivak, "Can the Subaltern Speak?" in Rosalind C Morris, ed, *Can the Subaltern Speak? Reflections on the History of an Idea* (New York: Columbia University Press, 2010) 21. See also citations in Eisen, "Feminist Jurisprudence," *supra* note 14 at 129, n 55.
214. Alyse Bertenthal, "Standing Up for Trees: Rethinking Representation in a Multispecies Context" (2020) 32:3 L & Literature 355 at 357-358.
215. See generally Yoriko Otomo & Ed Mussawir, eds, *Law and the Question of the Animal: A Critical Jurisprudence* (Abingdon, UK: Routledge, 2013).
216. Victoria Ridler, "The legal subjectivation of the non-human animal" in Otomo & Mussawir, *ibid*, 102 at 109, 113; Deckha, *Animals as Legal Beings*, *supra* note 4 at 20-25.
217. Eisen, "Feminist Jurisprudence," *supra* note 14 at 130-133. See also the extended discussion of this problem in relation to Wise's writings and the Nonhuman Rights Project in S Marek Muller, *Impersonating Animals: Rhetoric, Ecofeminism, and Animal Rights Law* (East Lansing: Michigan State University Press, 2020) at 33-58.

the basis for ARL, a problem that the leading ecofeminist work of Carol Adams, Josephine Donovan, Greta Gaard, and Lori Gruen have helped critical ARL feminist scholars excavate.[218] Ecofeminist theorists have long objected to similarity-based approaches in advocacy for animals and, in fact, have done much to highlight the exploitation of the feminized animals farmed for food who are not seen to meet the human benchmarks based on reason.[219] Ecofeminists underscored that those beings associated with the mind and reason (read: white men of property) let to the feminization and devaluation of all others associated with culture and the body.[220] In the animal realm, this ideology particularly burdened the feminized animals.[221]

My own ecofeminist and postcolonial/anti-colonial feminist-informed work as a critical ARL scholar has shown how the law's exaltation of reason precludes proper understanding of the dynamics of Othering and difference in liberal legal cultures so much so that respecting animal alterity becomes a remote possibility.[222] Other feminist legal scholars have reached similar conclusions against cognitive exceptionalism while engaging with the work of Carol Adams and other ecofeminist theorists who note the pernicious Othering effects of Western Cartesian dualisms.[223] Others have contested cognitive exceptionalism through the lens of posthumanist feminist theory.[224]

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218. See generally Carol J Adams, *Sexual Politics of Meat: A Feminist-Vegetarian Critical Theory* (New York: Continuum International, 2010); Greta Gaard, "Toward a Feminist Postcolonial Milk Studies" (2013) 65:3 American Q 595; Carol J Adams & Josephine Donovan, eds, *The Feminist Care Tradition in Animal Ethics* (New York: Columbia University Press, 2007); Carol J Adams & Lori Gruen, *Ecofeminism: Feminist Intersections with Other Animals & the Earth*, 2nd ed (New York: Bloomsbury, 2022). Ecofeminists objected to the advocacy of Singer and Regan who exalted reason as the method of their argument and disavowed emotions as a useful analytical tool from which to advocate for animals. This rejection of emotions as an ethical guide is one of the reasons ecofeminists consider these "hyper-rational" theories "masculinist." See Muller, *supra* note 217 at 4.

219. Carol J Adams & Lori Gruen, *supra* note 218 at 10-12.

220. Lisa Kemmerer, "The Interconnected Nature of Anymal and Earth Activism" (2019) 63:8 American Behavioral Scientist 1061 at 1062-1063.

221. Adams, "Feminist-Vegan," *supra* note 196 at 304-305, 312-313.

222. Deckha, *Animals as Legal Beings*, *supra* note 4 at 88-90; Deckha, "Humanizing the Nonhuman," *supra* note 73 at 221-222; Maneesha Deckha, "Critical Animal Studies and Animal Law" (2012) 18:2 Animal L 207 at 234-235.

223. See early pieces by Marie Fox, "Re-thinking Kinship: Law's Construction of the Animal Body" (2004) 57:1 Current Leg Probs 469 at 477-480; Marie Fox, "Reconfiguring the Animal/Human Boundary: The Impact of Xeno Technologies" (2005) 26:2 Liverpool L Rev 149 at 158-162 [Fox, "Reconfiguring"]. For a specific indictment of the Nonhuman Rights Project in this regard see Robyn Trigg, "Intersectionality—An Alternative to Redrawing the Line in the Pursuit of Animal Rights" (2021) 26:2 Ethics & Environment 73. S Marek Muller has housed these types of insights under a framework she calls "Ecofeminist Legal Theory": Muller, *supra* note 217 at 1-32.

224. Anna Grear, "Deconstructing *Anthropos*: A Critical Legal Reflection on 'Anthropocentric' Law and Anthropocene 'Humanity'" (2015) 26 L & Critique 225 at 235.

If we are to enact positive legal change for all animals, especially farmed animals, I and other feminist ARL scholars have called for revisiting our fidelity to humanizing campaigns, legal positivism, and personhood.[225] All of these campaigns and concepts are viewed as too tethered to liberal humanism that exalts the ability to reason at a complex level as the marker of who should count in law.[226] My own work has proposed the alternative legal subjectivity of "beingness" for animals, a new status foregrounding animals' embodiment, vulnerability, and relationality that is meant to be even better than personhood for protecting all animals.[227] Other critical ARL feminist scholars have put forth other conceptual or philosophical bases for animals' legal address. This includes revisioning rights relationally.[228] It also includes generating a legal ethic based in compassion and love.[229] Another emphasis is to deploy a decolonizing and otherwise intersectional ethic wary of Western epistemologies.[230]

2. *A deeper excavation of the relevance of patriarchy and colonialism to ARL and a sharper critique of the common law*

Concerns regarding the law's exaltation of reason and the pressure it exerts to make animals (and other humans) fit a patriarchal, class-based, and Western idea of what is valuable about humans, form part of the argument within critical ARL that law's anthropocentrism is iteratively related to patriarchy and colonialism. These forces are not simply running in historical or even contemporary parallel (as writings of Singer, Francione, and Wise have suggested).[231] This ARL line of analysis, again marshalling either ecofeminist or posthumanist insights, has been foundational in my own scholarship. I have examined how the logic of animality is fundamental to the common law, colonial, and gendered ideologies justifying Enlightenment-era civilizing missions as well as meanings of the "human."[232] ARL in this vein also explores how animals

225. Fox, Reconfiguring, *supra* note 223 at 158-160; Deckha, *Animals as Legal Beings*, *supra* note 4 at 121-142; Muller, *supra* note 217 at 129, 135, 139.
226. Deckha, *Animals as Legal Beings*, *supra* note 4 at 12-15.
227. *Ibid* at 122-123.
228. Eisen, "Feminist Jurisprudence," *supra* note 14 at 146-147.
229. Angela P Harris, "Should People of Color Support Animal Rights?" (2009) 5:1 J Animal L 15.
230. Muller, *supra* note 217 at 130.
231. See Francione, "Animal Welfare," *supra* note 68 at 26; Wise, *Drawing the Line*, *supra* note 65 at 23-34; Singer, *Practical Ethics*, 3rd, *supra* note 46 at 49-51 (these authors have drawn parallels between speciesism and racism to illuminate the wrongness of any ethical or legal divide premised on a biological distinction).
232. Maneesha Deckha, "Intersectionality and a Posthuman Vision of Equality" (2008) 23:2 Wisconsin JL Gender & Society 249; Maneesha Deckha, "Salience of Species Difference for Feminist Theory" (2006) 17:1 Hastings Women's LJ 1; Deckha, "Welfarist and Imperial," *supra* note 32 at 536; Eisen, "Feminist Jurisprudence," *supra* note 14 at 120-123.

were vital to empire-building and the creation of intra-human inequalities today. Postcolonial and posthumanist feminist legal analyses by Mathilde Cohen, Eisen, and Yoriko Otomo stand out here, particularly addressing the common law's role in the imperial ascent, nationalizing proclivities, and constitution-defining capacities of milk and the dairy industry.[233]

Some posthumanist scholarship in this cohort is most concerned with critical inquiry rather than proposing legislative reform or litigation strategies.[234] This work focuses on unearthing how our relations with animals, and conceptualization of the "animal" itself in law, is central to modernist institutions like the common and civil law and our social and legal understandings of the "human."[235] Leading critical ARL posthuman feminists such as Otomo and Irus Braverman eschew the property/personhood question due to a deep dissatisfaction with its liberal humanist framing and the presumed faith in liberal legal institutions it professes.[236] Both are skeptical of personhood's potential to help animals who are not humanizeable, as well as the ability of a liberal rights framework to deal with the magnitude of the Earth's biodiversity, especially aquatic animals who live in an entirely different medium than humans.[237] Theirs is a call for a "more-than-human legality" that does not carve out one absolutist principle such as "personhood," but allows for plural approaches in refashioning laws in relation to animals and their diverse circumstances.[238] Other scholars in this vein are highly circumspect that securing any form of rights-bearing legal subjectivity for animals will decentre patriarchal or anthropocentric logics due to the Western metaphysical traditions influencing the shape of legal subjectivity pursuits.[239]

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233. See sources cited by Eisen, "Feminist Jurisprudence," *supra* note 14 at 119, as well as Jessica Eisen, "Milked: Nature, Necessity, and American Law" (2019) 34 Berkeley J Gender L & Just 71.

234. Yoriko Otomo & Ed Mussawir, "Law's Animal" in Otomo & Mussawir, *supra* note 215 at 1, 2 [Otomo & Mussawir, "Law's Animal"].

235. See generally Otomo & Mussawir, *supra* note 215; Braverman, "Law's Underdog," *supra* note 13 at 9, 136-137, 140.

236. This questioning of liberal legal orders vis-à-vis-animals is apparent across the body of their work. See Otomo & Mussawir, "Law's Animal," *supra* note 234 at 3; Irus Braverman, ed, *Animals, Biopolitics, Law: Lively Legalities* (New York: Routledge, 2016) at 3-4.

237. Braverman, "Law's Underdog," *supra* note 13 at 141. See also Irus Braverman & Elizabeth R Johnson, eds, *Blue Legalities: The Life and Laws of the Sea* (Durham, NC: Duke University Press, 2020) (Braverman has expressed worry about the individualist focus of liberalism, wondering how it can help shed light on questions at the species or oceanic level such as the staggering scale of species extinction and aquatic life destruction or the place of humans in ecosystems).

238. Braverman, "Law's Underdog," *supra* note 13 at 134-136; Braverman & Johnson, *supra* note 237.

239. Jan-Harm de Villers, "Metaphysical Anthropocentrism, Limitrophy, and Responsibility: An Explication of the Subject of Animal Rights" (2018) 21 PER/PELJ 1.

As I have noted elsewhere, posthumanist interventions (feminist or otherwise) in ARL do not consistently oppose animal exploitation the way ecofeminist ARL scholarship does (joining on this point with abolitionist, vulnerability, questioning entitlement to harm, and social membership approaches discussed earlier).[240] The focus on exploring jurisprudential questions rendered peripheral or invisible by mainstream ARL can also lead to a disappointing refusal to condemn animal captivity or legal positions that involve sacrifices by animals for the collective good that humans are not asked to bear.[241] Tensions exist between these two forms of feminist thinking, as they do amongst other feminist ARL scholarship canvassed above.[242] Generally, however, both feminist and posthumanist critical ARL scholars who spotlight connections and synergies between anthropocentrism, colonialism, sexism, and/or dominant Western ways of thinking call for a greater integration of the values of less anthropocentric, non-Western legal systems.[243] In my own critical ARL writings, I have argued for more integration of Indigenous legal orders that do not classify animals as property into the common law to counter the multispecies effects of colonization.[244]

3. *Toward more systemic awareness within ARL of the harms of state sanction*

Recognizing the synergies between systemic violence against animals and violence against marginalized humans has led some to highlight the adverse effects of legal sanction in certain instances for non-dominant human communities as well as animals. This awareness about the disproportionate effect of the application of any state laws regulating animal use is more visible in ecofeminism and critical animal studies where an intersectional approach to animal rights organizing is a founding norm, but this critical filter has also emerged in ARL.[245] Prominent here is writing that scrutinizes the imperial remit of anti-cruelty statutes as part of these statutes' suite of deficits vis-à-vis animals.[246] Also noteworthy is scholarship that questions recourse to criminal law and incarceration in general as part of an abolitionist ARL agenda. Regarding the latter,

240. Deckha, *Animals as Legal Beings*, *supra* note 4 at 19-20.
241. Irus Braverman, *Zooland: The Institution of Captivity* (Stanford, CA: Stanford University Press, 2013) at 24; Braverman, "Law's Underdog," *supra* note 13 at 141; Ridler, *supra* note 216 at 113.
242. Eisen, "Feminist Jurisprudence," *supra* note 14 at 153.
243. This approach is combined in Grear, *supra* note 224; Braverman, "Law's Underdog," *supra* note 13 at 141.
244. Maneesha Deckha, "Unsettling Anthropocentric Legal Systems: Reconciliation, Indigenous Laws, and Animal Personhood" (2020) 41:1 J Intercultural Studies 77.
245. See discussion in Muller, *supra* note 217 at 133-138.
246. Deckha, "Welfarist and Imperial," *supra* note 32.

Justin Marceau has marshalled the insights of critical race feminist animal scholar Breeze Harper and critical race theory in general to spotlight the disproportionate impact a carceral approach to prosecutions of anti-cruelty cases has on racialized and lower-income populations in the United States.[247] He notes the failure of such a carceral response to redress the deficits in empathy and resources that lead to such crimes in the first place and the "palliative" effect such an approach has in deflecting attention from corporate and governmental exploitation of animals.[248] Marceau calls for a much more intersectionally oriented animal advocacy as a result.[249]

Leading ecofeminist and empathy scholar Lori Gruen writes about the harms of captivity for animals and humans at length.[250] She has joined with Marceau to edit a collection detailing the intersectional harms of carceral responses for animals and society in general.[251] Other critical ARL scholars also feature in this collection to caution against incarceration as part of any ARL vision.[252] Others have also questioned the excesses of non-criminal regulatory responses towards humans who cause animals harm in the context of lamenting the lack of attention within liberal legalism to animal interests. Alongside a fulsome critique of the human control involved, some have noted the lacuna of wider community supports for those struggling to take care of the many animals the law lets them own as part of capitalist, liberal individualist property regimes.[253]

Such perspectives against law enforcement and incarceration for animal abuse are not without their critics, of course, within ARL.[254] Again, whether this or another iteration of critical ARL is an improvement upon traditional ARL is beyond the scope of this paper. What I highlight here is that while not specifically addressing the issue of legal subjectivity or questioning the overall promise of Western legal systems for animals, these writings invite ARL to contest liberal legalism's compartmentalization. They situate the legal Othering of animals in a context of human community vulnerability to inform ARL, particularly legislative responses, meant

247. Justin Marceau, *Beyond Cages: Animal Law and Criminal Punishment* (Cambridge, UK: Cambridge University Press, 2019).
248. Justin Marceau, "Palliative Animal Law" (2021) 134:5 Harv L Rev 250 at 251.
249. *Ibid* at 252.
250. Lori Gruen, *The Ethics of Captivity* (New York: Oxford University Press, 2014).
251. Lori Gruen & Justin Marceau, eds, *Carceral Logics: Human Incarceration and Animal Captivity* (Cambridge, UK: Cambridge University Press, 2022).
252. The volume includes two Canadian critical ARL scholars: Maneesha Deckha, "Juvenile Smokescreens: Softening the Harm of Zoos, Aquaria, and Prisons through (Human) Children" in Gruen & Marceau, *ibid*, 238; and Jessica Eisen, "Litigating Animal Captivity: Habeas Corpus in the Carceral State" in Gruen & Marceau, *ibid*, 343.
253. Matt Ampleman & Douglas A Kysar, "Living with Owning" (2016) 92 Ind LJ 327 at 347-348.
254. See generally the multiple chapters in Part 1 of Gruen & Marceau, *supra* note 251.

to curb animal harm. This step is not meant to put the spotlight back on humans (although perhaps it does), but to illuminate the harms that flow to animals themselves and ARL when we miss the larger social picture.

4. *Summary*

Critical ARL challenges the underlying liberal humanism of ARL and the legal system in general. Such scholars argue that ARL should interrogate foundational liberal assumptions, particularly since they lead to privileging humanized animals over animalized animals when liberalism's exaltation of reason goes unquestioned. They also argue that ARL should consider intra-human power asymmetries in its theorizations and strategies, phenomena that liberal legalism generally presumes are irrelevant to illuminating the dynamics of animal oppression or corresponding legal problems and solutions. These are newer perspectives within ARL. Ecofeminist and posthumanist feminist thought influences much of this scholarship connecting systemic injustices; it also highlights the need to attend to animalized animals by avoiding humanizing campaigns focusing on those animals perceived to be human-like.

Conclusion

This article canvassed the diversity of scholarly perspectives and corresponding theoretical richness within Canadian ARL. The article provided a glimpse into the property/personhood debate that has been so formative to ARL over the last three decades. The article also highlighted the multiple proposals that have materialized in the last two decades seeking to mediate or avoid the impasse the debate has created, noting these proposals' considerable indebtedness to feminist theorizing about legal personhood, capabilities, dignity, vulnerability, harm, relationality, labour, and liberal humanism. In addition to sustained feminist input throughout the three decades spanned of concerted ARL scholarship, we also see early and recurring concerns about the emphasis on sameness to humans in operationalizing legal strategies. In the last two decades we see more integration of critical theoretical insights probing the common law's general ability to deliver transformative results for animals given its liberal human orientation and highlighting synergies connecting the legal treatment of animals to intra-human inequities. Both have come about from the filtering of animal law issues through ecofeminist, postcolonial/anti-colonial, and posthumanist feminist perspectives.

It is uncertain whether such diversification will lead to less anthropocentrism within the common law and civil law systems as virtually all ARL scholars desire to elevate animals from their current abyss. But it is fair to say that at this juncture, the breadth and depth of the

divergent perspectives within ARL reveal not simply the innovation and momentum in this field; they also indicate ARL's growing legal import and social relevance, amidst unfathomable and ever-rising levels of animal and animalized exploitation, to human conversations about what justice is and who is entitled to it.