Introduction

The property status of nonhuman animals, and the correlative felt need to transform that status to some form of personhood, has been a mainstay of animal law scholarship for the last twenty-five years. The debate is usually framed in dichotomous terms: property or person. However, the time is ripe to ask whether there are more than two options and what they may be.

I begin this paper by first sketching the history of animal law in broad brush strokes, paying particular attention to the way in which much animal law seems to be designed to appear as if it is protecting more than it actually is. The second part of the paper will provide some background context for the property/person debate. The third will explain that although nonhuman animals are usually classified legally as property, they are also often legally recognized as more-than-property. The idea is that in some respects the law already recognizes
that because they are living, because they are sentient, because they have a well-being, all nonhuman animals are more than mere property; they are property plus. If nonhuman animals are going to keep being property, they must at least be recognized as a “quasi” form of property. The fourth, and final part of the paper, will argue that given that the plus for nonhuman animals as quasi-property consists of some legally protected rights and interests, even when those rights are weak and interests are badly protected in practice, they can be used to ground a claim to quasi-personhood that may be expanded upon.

The paper concludes with a thought that I must also state at the outset, which everyone who reads, writes or thinks about the legal status of nonhuman animals recognizes, namely, that mere name change cannot do what needs to be done for nonhuman animals in the law. Without significant attitudinal change toward the range of permissible uses of nonhuman animals, any legal status designation (person, property, being, quasi-person, quasi-property) is likely to have negligible impact. However, as attitudes change, it is important for there to be a range of options on offer so that judges, courts, and legislatures and members of the public have a range of ways of thinking and speaking about nonhuman animals that are not based purely in property. The quasi-hood proposal is made with this motivation in mind.

I. History of Animal Law

The history of animal law can be helpfully carved up into at least three distinct moments. First, there are the nineteenth century “small r” rights for nonhuman animals established under animal welfare protection statutes that started in England in the 1820s and spread to other countries like Canada and the United States, primarily through SPCAs, i.e. Societies for the Prevention of Cruelty to Animals. These charitable organizations did not completely oppose the

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use of nonhuman animals. However, their upper and middle class members (who were largely female) did object to what they saw as cruel use or abuse (of certain) animals. The original London SPCA, started just two years after the passage of Martin’s Act in 1822, focused on the “wanton” and “cruel” beating of animals like horses, mules, cows, and sheep. The nonhuman animals who came in for these early protections were the ones subjected to “the ordinary cruelty of everyday life in public places.” They were the most visible and therefore the most likely to distress (or alternatively, worrisomely, have their cruel treatment corrupt) onlookers.

Take, for example, a group called the Metropolitan Drinking Fountain and Cattle Trough Association, founded in 1859, which collected money by public subscription to provide public fountains and troughs in city streets for thirsty humans and animals. Historian Hilda Kean explains that “[t]he priority of the Association was the promotion of temperance and a clean water supply through practical means, as much as alleviating the particular distress of animals.” The hope was that people would drink water rather than alcohol and that clean drinking water would help avoid the devastating cholera outbreaks that happened in 1848-9 and 1853-4. Hence there were powerful human-related motivations that convinced humanitarians to donate the needed funds. “However,” Kean continues, “the kind treatment of cattle and horses witnessed the previous year, he petitioned the legislature in New York for the incorporation of the American Society for the Protection of Animals in 1866), 197 (the Pennsylvania SPCA was created in 1867 and Massachusetts followed in 1868), 198 (within ten years every large city in the Northeast had an SPCA and San Francisco, the first on the west coast, was founded in 1868), 198 (following the British model, the American groups “consciously chose to make animal welfare an upper-class and fashionable cause). See also ERNEST FREEBERG, A TRAITOR TO HIS SPECIES: HENRY BERGH AND THE BIRTH OF THE ANIMAL RIGHTS MOVEMENT (2020).

See also DIANA DONALD, WOMEN AGAINST CRUELTY: PROTECTION OF ANIMALS IN NINETEENTH-CENTURY BRITAIN 66-76, 274 (2020) (noting that while women dominated grassroots membership and were often generous donors, they were frozen out from the ability to influence policy by the male leadership of the original British SPCA). See also HILDA KEAN, ANIMAL RIGHTS: POLITICAL AND SOCIAL CHANGE IN BRITAIN SINCE 1800 34-35 (1998).

Id. at 38.

DONALD, supra note 2, at 61.

KEAN, supra note 3, at 54. See also DONALD, supra note 2, at 102-105 (emphasizing the role women played in supporting this organization).

KEAN, supra note 3, at 57
in public spaces would also act as an impetus towards general kindness to these animals.” 8 “The first simple fountain” erected in 1859 was placed along the cattle drive route to the live animal market on the outskirts of the ancient city of London, Smithfield Market. 9 This market, which had been operating for hundreds of years in West Smithfield, employed drovers who deprived the animals “of water, food and rest and beat them mercilessly towards their destination.” 10 Animals arrived at the market “exhausted, thirsty and hungry. When they collapsed with fatigue, cattle and sheep were harried by savage dogs trained to worry them.” 11 In other words, the point of the drinking fountain was not to liberate these animals or stop the practice of sending them to slaughter but to attempt to alleviate, to a small degree, their suffering along the way, specifically, their thirst. This kindness would help them get them to market alive, even if they just barely survived and were liable to be killed in a gruesome way. Contemporaries noted that the methods of slaughter used made Jewish live animal slaughter look humane (as it used a sharp knife with one incision and the animals were not allowed to be diseased, starved or deprived of drinking water). 12 Those recently banished to New South Wales for breeches of criminal law regulated the slaughter of cattle driven through the streets of Sydney better than the English, whose practices at the market, critics argued, showed that were “failing to lead the way as a seat of empire and centre of a new Enlightened world.” 13

8 Id.
9 Id. at 55.
10 Id. at 58.
11 Id. at 59-60.
12 Kean explains that an inquiry into the conditions at the market was brought by petition to Parliament with the support of Richard Martin, the Member of Parliament behind the 1822 act, in 1828. Local residents reported being distressed by sounds of the animals’ cries, hearing the dreadful blows, and killings that took place in cellars and were reportedly coming on the heels of dropping the animals several feet down, a fall which often broke their jaws and legs. See id. at 62. The market was replaced by a dead animal market in 1868. Id. at 63. However, live animals continued to be brought into London, mostly by rail and sold on the outskirts of the city. Id. at 64. See id. at 61-62, specifically note 110, on the claim that the method of slaughter under Jewish law was more humane than Smithfield market methods.
13 Id. at 61.
This civilizational discourse and implied superiority to those who are “othered” (set apart, for example, by religious difference from the Christian majority) are important to note, especially because this is a constant pitfall in animal advocacy and animal law scholarship.\textsuperscript{14} For example, campaigns that target minority cultural practices can include rhetoric implying the existence of an enlightened West over East (or North v. South), “us” and “them,” which positions the “other” as unenlightened or barbaric in some way.\textsuperscript{15} As Maneesha Deckha has written, nineteenth-century anti-cruelty campaigns “advanced in part by exploiting British fears that the British could not legitimately distinguish themselves from the foreign populations they were colonizing, and thereby justify their civilizing missions” around the world.\textsuperscript{16} The self-understanding many Victorians promulgated of England as the pinnacle of human civilization is ironic in this respect, as it has been suggested that the reason why the humane movement flourished earlier in England than in other countries was because the English were generally regarded by Europeans as the \textit{worst} with respect to their treatment of animals, hardly a showing of civilizational superiority.\textsuperscript{17}

As historian Diana Donald puts it, there was genuine sensitivity to animal suffering alongside the sense that “continuing cruelty to animals was an inexcusable blot on the country’s reputation. Like the continuance of slavery in the West Indies and the savagery of the penal code, it gave lie to the idea that Britain was a truly humane country, advancing in high culture

\textsuperscript{14} See \textsc{Edward W. Said}, \textit{Orientalism} (1978) (the seminal text on “othering”).
\textsuperscript{15} See \textsc{Claire Jean Kim}, \textit{Dangerous Crossings: Race, Species, and Nature in a Multicultural Age} (2015).
\textsuperscript{17} See Ryder, \textit{supra} note 1, at 59-60, 195. See also \textsc{Virginia DeJohn Anderson}, \textit{Creatures of Empire: How Domestic Animals Transformed Early America} (2004) (exploring a similar hypocrisy in European discourse about Indigenous groups in North America demonstrating their inferiority by failing to keep and fence in domesticated animals when the colonists themselves did not fence in their cows, pigs, and other animals, as well as the role those animals played in forcing Indigenous people off their lands and further west).
and enlightened attitudes as fast as it was advancing in industrial technology and wealth.”18 However, the fact that cruelty towards animals seemed to be getting worse rather than better gave rise to the following “dark” question: “was the heartless exploitation of animals an effect of the country’s growing capitalist might, rather than an anomaly that further progress would rectify?”19 Pass-times like hunting and racing grew with affluence.20 The pressures that led working people to beat every bit of work they could out of their working animals only intensified under “uncontrolled urbanisation and a fast-developing capitalist society.”21 Through a Marxist lens, the protest against animal treatment looks like it may have been just a “wish to palliate the crueler effects of capitalism in a meaningless and harmless way,” a way to smooth out some of the rougher edges of laissez-faire economics and even a way to distract attention from the plight of industrial workers.22 Philanthropists came, painfully, to realize that cruelty to animals might well be “intrinsic to the systems of production and commercial competition that provided the prosperity of the nation, and was unlikely to yield to moral persuasion,” either by punishing members of the lower class or trying to get upper class people to live up to their purportedly civilized standards.23 Advances in technology (e.g. transport) “often brought new evils”.24 Here was “[t]he violence intrinsic to imperialism” encoded within the “‘civilized’ culture of the home country.”25

The fact that women often carried the civilizing message is significant, insofar as female activists were perennially attacked as “sentimentalists” and were especially vulnerable to

18 DONALD, supra note 2, at 37.
19 Id. See id. at 45.
20 Id. at 84-85.
21 Id. at 85.
22 Id.
23 Id. at 89-90.
24 Id. at 237.
25 Id. at 267.
charges of hypocrisy as women generally fueled the cruel markets for fur and feathers. The coding of concern for animals was arguably in a way coded as female or “effeminate” in the sense that young boys were being sent “beyond petticoat government” to defy “mother, granny, and governess” to public schools where they would be “toughened up”:

[S]tudy of the bloodiest episodes of Roman history alternated with arbitrary and extreme corporal punishment of the boys, and there was unrestrained bullying and fighting between them, such as to inculcate a respect for naked power and a ruthless struggle for dominance ... hunting and sadistic abuse of animals were normal parts of the conditioning. Animal activist Henry Salt said of Eaton that it was a “nursery of barbarism” in “the twofold cult of sport and soldiership.” Donald writes that “[t]he mentality fostered at the public schools prepared youths for an equally male-dominated life in the colonies, where enslavement of native peoples and appropriation of their land provided the conditions for reckless hunting and shooting of big game – another kind of warfare.” To a considerable degree, the fact that women were protesting and preaching a doctrine of kindness created a “gendered contrast of attitudes and ideals of behavior” in which boys (as they turned into men) internalized the message that, despite the didactic messaging exhorted them in female-written literature and through a variety of clubs and organizations to show kindness and compassion to nonhuman animals, the boys were actually supposed to land on the cruel side. As for the charges of female hypocrisy, Donald thinks that by the 1890s people were able to embrace the notion of spontaneous sentiment as a legitimate female trait, rather than dismissing it, because they had

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26 See id. at 255-275 (on the Royal Society for the Protection of Birds, established in the 1890s and the constant charge of “sentimentalism”).
27 Id. at 148.
28 Id. at 149.
29 Id.
30 Id. at 165.
“a more sophisticated understanding of human psychology.”31 They could see that “human moral behavior was (and is) strikingly inconsistent – ruled not by principle, but by impulses that are scarcely apparent to the conscious mind.”32 In that respect, we can certainly be like our nineteenth-century forebearers, “inured to many cruel practices by the power of tradition, social convention, group dynamics or simply considerations of profit,” as well as inconvenience. They too were “partial and discriminatory in the exercise of their sympathies, selfishly protective of human prerogatives, and hence willfully indifferent to cruelties such as seal hunting, which were not witnessed at first hand in all their physical horror.”33

The second important moment in the history of animal law comes much later in the twentieth century, growing out of the peace or “hippy” culture of the 1960s, alongside the environmental movement, at least in the United States.34 The “new value on compassion,” Richard Ryder wrote, and the “return-to nature” element of this ‘Flower Power’ philosophy helped to blur the dividing line between human and nonhuman, implying that all sentients should be respected.”35 Ryder also thought that “Hippydom” “questioned the priority of the commercial motive and consciously tried to demote the power of the ‘macho’ ideal after the disillusionment of the Vietnam war.”36 Where “a sympathetic interest for animals” had been largely seen as a matter of emotion rather than reason, and even “characteristically infantile or effeminate,” it became possible to see the welfare of animals and the relationship between

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31 Id. 274.
32 Id. 275.
33 Id.
34 The connection to environmentalism was through wildlife and the concern for conservation in the 1960s. Ryder notes that unlike the US, which has seen occasional clashes between “environmentalists and animal rightists deriving, perhaps, from their different ethical positions – the former essentially anthropocentric and the latter concerned for the animals themselves,” in Europe “the two sides of the movement have worked fairly amicably together and the concern for individual animals and the focus on the protection of species have been found, for the most part, to coincide.” Ryder, supra note 1, at 209.
35 Id. at 3.
36 Id.
human and nonhuman animals as “subjects of serious study,” a thought that would have “seemed ridiculous to many scientists and academics.”37 In his words, “anti-speciesism” was the “logical extension of the liberation movements against racism and sexism which flourished in the 1960s and 1970s.”38

Ryder described “speciesism” and its connection to the moral argument for animal rights in the following way:

species alone is not a valid criterion for cruel discrimination. Like race or sex, species denotes some physical and other differences but in no way does it nullify the great similarity among all sentients – our capacity for suffering. Where it is wrong to inflict pain upon a human animal it is probably wrong to do so to a nonhuman sentient. The actual killing of a nonhuman animal may also be wrong if it causes suffering, or more contentiously, if it deprives the nonhuman of future pleasures. The logic is very simple.39

Peter Singer brought attention to the concept of speciesism and made nonhuman animal suffering, the capacity to suffer brought by sentience, central to his wildly influential book Animal Liberation, first published in 1975.40 Singer, an Australian philosopher, became known to Ryder and others in the “the Oxford group” working on animal rights in 1971.41 Ryder wrote that when Animal Liberation was first published in New York it “immediately had an impact on a younger generation, triggering a long public debate on the ethical issues raised by speciesism. Tom Regan became the leading American-born philosopher of animal rights.”42 Ryder explained that Henry Spira, “[i]nspired by Singer’s message,” campaigned in New York by “organizing

37 Id. at 211-12, 211 (“Veterinary science was all very well but the proposal that historians, academic lawyers, zoologists, ethologists, political scientists or psychologists should study such areas appeared absurd”).
38 Id.
39 Id. at 6-7.
40 PETER SINGER, ANIMAL LIBERATION (1975).
41 See Ryder, supra note 1, at 6. See also photo and caption at 111.
42 Id. at 201.
pickets in front of the Museum of Natural History against the cat experiments being performed there. After eighteen months of protest, the research was stopped.43

Like the first, “small r” rights movement, the twentieth-century “Capital R” one emerged in England before the United States. Ryder explained that “[w]hereas Europe followed the USA in its Women’s Liberation and Civil Right movements, it is America which followed Britain in the animal revolution.”44 He noted also the “animal liberation is possibly unique among liberation movements in the extent to which it has been led and inspired by professional philosophers; rarely has a cause been so rationally argued and intellectually well armed.”45

PETA, People for the Ethical Treatment of Animals, an American organization founded in 1980 by British-born Ingrid Newkirk, provides many examples of movement for “Capital R” rights for nonhuman animals. Consider, for example, their campaign to educate the public about the horrific conditions in which mink are raised in order to try and persuade people not to wear fur.46 Such a campaign is not about providing water or food for the mink, or better space conditions; it is to argue that mink should not be bred and kept in captivity at all. It was about liberation, as Singer’s book title put it, an idea echoed by Tom Regan’s Empty Cages, arguing for no cages at all, as opposed to just bigger or better cages.47

43 Id.
44 Id. at 4. But see DONALD, supra note 2, at 116 (noting that the U.K. RSPCA magazine Animal World was modelled on the Massachusetts publication Our Dumb Friends), 126 (U.K. followed the U.S. on protecting children along the same lines as the RSPCA), 167 (noting the influence of the American Humane Education edition of Black Beauty). See also RYDER, supra note 1, at 199-200 (on how Bergh carried the New York Society for the Prevention of Cruelty to Children idea back to London through his association with the RSPCA there).
45 RYDER, supra note 1, at 6.
47 See TOM REGAN, EMPTY CAGES: FACING THE CHALLENGE OF ANIMAL RIGHTS (2004). This is not to suggest that Singer and Regan take the same approach to animal ethics. Regan’s approach is deontological (rights based) as opposed to Singer, who is famously (or infamously) utilitarian. On the problems and limitations of both ethical approaches when taken on in their pure forms, see BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY (1985). See also RYDER, supra note 1, at 239-43 (explaining Regan’s inherent value “subject of a life” approach contrasted against Singer’s utilitarianism), 241 (“For me Singer is right in his emphasis upon pain and
Claire Jean Kim writes that “[s]ince the advent of the modern animal liberation movement in the 1970s, animal advocacy has been divided between ‘abolitionists’ calling for an end to the institutionalized exploitation of animals (e.g. PETA) and ‘welfarists’ calling for more humane treatment and a reduction in animal suffering (e.g. HSUS [the Humane Society of the United States]).”

On the abolitionist side are “direct action” groups like the Hunt Saboteurs Association, an organization that started in England in the 1960s. This group took a nonviolent but controversial approach to the disruption of cruel field sports like stag, otter and fox hunting. Loosely-affiliated members of the group ALF (Animal Liberation Front) have engaged in undercover raids on fur farms, animal research laboratories and other animal facilities.

Animal activists are vulnerable to criminal prosecution (e.g. as “terrorists” under the U.S. Animal Enterprise Protection Act (1992) or a trespasser under a state “ag gag” law, which stifles speech by criminalizing what would be the otherwise lawful exposure of animal suffering) but also in terms of civil liability (e.g. under food libel laws, which make it illegal to “disparage” certain foods). The domestic terrorism prosecution of members of the Stop Huntingdon Animal Cruelty (SHAC) under the U.S. Animal Enterprise Terrorism Act (2006) has attracted

pleasure but Regan is right in isolating the importance of the individual; ends, however glorious, can never justify means if the latter themselves entail suffering.”

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48 Kim, supra note 15, at 82.

49 See Ryder, supra note 1, at 167-70, 167 (recounting how the original action was feeding meat to the hounds that were to be used in a Boxing Day stag hunt in 1963), 168 (emphasizing how the methods of the group in its early days were peaceful and legal), 170 (how grave desecrations of two infamous huntsmen in 1977 by a splinter group known as the Hunt Retribution Squad did much to discredit the movement). See also Caroline Blackwood, In the Pink 9-11 (1987), who begins her book on foxhunting in England with the grave desecration of the Duke of Beaufort.

50 See Claire Jean Kim, Moral Extentionism or Racist Exploitation?: The Use of the Holocaust and Slavery Analogies in the Animal Liberation Movement, 33(3) New Pol. Sc. 311, 316 (2011). See Charlotte Montgomery, Blood Relations: Animals, Humans and Politics 37-38 (2000) (explaining how the ALF works). Montgomery explains that the “outlaws” see themselves as creating the space for in-law movements to be taken seriously, as the “less bad” alternative. See 38. See also Ryder, supra note 1, at 217 (questioning how far direct or illegal action can ever be justified even in a good cause). 218 (“[t]he Animal Liberation Front was begun in 1982, and its alleged supporters have since caused considerable damage to property in animal laboratories, factory farms and abattoirs around the world”).

51 Kim, supra note 15, at 67-72.
wide-spread attention in terms of the aggressiveness of the federal law enforcement response to
the group expanding their efforts beyond Huntingdon Life Sciences to the “secondary” or
“tertiary” businesses which the enormous laboratory company used, including banks, delivery
service companies and the like.52

The “outlaw” situation with direct action groups like ALF and even the outspoken no-
compromise approach of PETA does much to fuel the distinction between welfarist and
abolitionist identifications. Many who care about the protection of nonhuman animals and do
work in this space seek to shelter under the welfare umbrella as a way to protect themselves
from the shame, abuse, and ridicule that accompanies the easily acquired label of “extremist” or
“fanatic.” As one of the activists Kim interviewed in her study of the controversies surrounding
live animal markets in San Francisco’s Chinatown put it: “[T]he only reason I call myself a
welfarist is because if you say ‘animal rights,’ all of a sudden you’re like a fanatic, you’re one of
those confrontational PETA types.”53 Another says, ”You talk animal rights and right away you’re
a kook in this country … Most people think it’s a joke … [I]n my work, I never say ‘animal rights.’
I always say ‘animal welfare,’ ‘animal protection,’ ‘environmental protection,’ ‘human health.’ I
want to do what works. ‘Animal rights’ really doesn’t work very well.”54

Sensitivity to charges of extremism and fanaticism have had an enormous influence on the
movement. Ryder, for example, explains that the twentieth-century RSPCA became “almost
fanatical” in its determination “not to be fanatical” and was “almost paralyzed by its fear of
appearing sentimental or extreme.”55 Charges that “extreme left-wing conspirators” had

52 See THE ANIMAL PEOPLE (Casey Suchan & Denis Henry Hennelly dirs., 2019). See also John E. Law, Deputy Assistant Director,
Federal Bureau of Investigation, Senate Judiciary Committee, Washington D.C. (18 May 2004),
could not deal with the SHAC strategy and the general threat caused by “animal rights extremists” and “eco-terrorists”).
53 KIM, supra note 15, at 77.
54 Id.
55 RYDER, supra note 1, at 142, 163.
infiltrated the organization abounded, specifically that is was being taken over by Marxist Communists.\footnote{Id. at 186.} This “hysteria about ‘reds under the bed’” was in keeping with the “charge frequently flung at anyone who tried to change anything in post-war Britain.”\footnote{Id.} The 1980s and Margaret Thatcher’s conservatism ushered in an era of “right-wing paranoia which condemned out of hand liberal reformers in almost every field.”\footnote{Id. at 202.} Ryder suggests that the distinction between welfare and rights is part-and-parcel of this divide and conquer mentality, an artificial distinction purposely designed “to castigate the latter as an extreme minority view.”\footnote{Id. at 140.} However, rights do not have to be viewed in this way.\footnote{In offering this suggestion, I am aware that what is “extreme” or “radical” depends very much on the eye of the beholder. Like the designation “middle class,” which people tend to see themselves as belonging to even when objectively they do not, it might be that most people do not see themselves as “radical” or “extreme” even if perhaps they would be considered such by many (or most) others. Ryder, who was President of the RSPCA in the 1970s, clearly felt that the internal reforming group he belonged to, who “succeeded in dragging the RSPCA, yelping and caterwauling, into the twentieth century,” were being unfairly painted as “radicals” when they were sought to expand the organization beyond a concern for stray cats and dogs. See Ryder, supra note 1, at 188, passim. Yet any questioning of animal experimentation or hunting with hounds would automatically make any person “radical” in the eyes of many.} 

I have deliberately avoided framing the debate in welfare/abolitionist terms in order to avoid falling into the ideological side-lining Ryder warns against, namely, that there is a “moderate” welfare position and an “extreme” rights position, choosing to emphasize instead that both moments and movements were talking about rights in terms of creating or recognizing legally protected interests of nonhuman animals to be protected from harm, even if they historically had (and still have) very different orientations.\footnote{See e.g. Kean, supra note 3, at 11 (objecting to the conflation of animal welfare in the nineteenth century and animal rights in the twentieth).} Consider “The Five Freedoms” developed by the Farm Animal Welfare Council in the United Kingdom:

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\footnote{Id. at 202. Ryder notes that the situation was better in the United States, at least on a philosophical level, and progress was made on continental Europe. See id. at 202-203. In his opinion, the 1990s were better. See id. at 203-207. British Prime Minister John Major declared in 1992 that “animal welfare is no longer a fringe issue.” Quoted in id. at 203.}
1. Freedom from hunger and thirst;
2. Freedom from discomfort;
3. Freedom from pain, injury or disease;
4. Freedom to express normal behaviour;
5. Freedom from fear and distress.\(^{62}\)

These freedoms are usually associated with “welfare” rather than “rights” because they do not protect against the right to be free from exploitation, and they have been used to guide mainstream welfare advice for regulating or tempering animal use, to make it less cruel, where possible to do so (usually interpreted to be not possible where there is any adverse economic impact created by, for instance, providing more space or opportunity to engage in normal species-specific behaviors). However, these freedoms can also be thought about as rights, “small r” rights, setting out a moral (or legal) minimum treatment for all nonhuman animals, including farmed animals, for whom they were designed.\(^{63}\) Saskia Stucki has called these “simple” rights as opposed to “fundamental” rights.\(^{64}\)

The third moment that should be flagged in the history of animal law is the emergence of the field of animal law, by which I mean its existence as a subject taught in law schools by professors who focus on it in their research and writing. A good way to date this moment is to ask when a specialized journal on animal law appeared. That was the journal *Animal Law*, published by the Lewis and Clark Law School in 1995.\(^{65}\) The first courses in animals law were offered at Harvard and Georgetown in 1999.\(^{66}\) Kim wrote in 2017 that “[t]here has been an


\(^{63}\) See id. at 649 (arguing that the Five Freedoms should be used to break down “the stubborn division between ‘animal welfare’ and ‘animal rights’”).


\(^{65}\) See ANIMAL L. 1 (1995).

\(^{66}\) Kim, *supra* note 15, at 68.
explosion of scholarly interest in human-animal studies in the past decade, reflected in the emergence of new think tanks, journals, anthologies, book series, conferences, and list serves.”

Animal law and policy is a large and robust field at this state in time.

Twentieth-century movements (for both “small r” welfare and “Capital R” rights) have come under criticism, especially in the first decades of this twenty-first century, for the purportedly race-neutral or color-blind approach they (largely) take, a fact that has tended to result in a predominately white membership and white leadership. As Luis Rodrigues puts it, “Animal advocacy within white dominated nations like the USA and Europe is comprised primarily of white people,” whether intentional or not, “mainstream movements comprised mostly of white people will, by default, shape their campaigns through [...] ‘white racialized consciousness.’” PETA in particular has been targeted for what Rodriques calls the “white normativity” of its campaigns. Starting in the 2010s, the white privilege in the movement has been challenged directly by “black veganism.”

Scholars and others have brought attention specifically to the way in which white animal activists often seem to care more about nonhuman animals than Black people. Consider the response of Black feminist Roxane Gay to the uproar created by the trophy-hunting killing of Cecil the Lion in 2015, when she wrote in the New York Times: “I’m personally going to start

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67 Id.


69 See id. at 71. See also Kim, supra note 15, at 283-87 (explaining how she changed her mind about the acceptability of PETA’s 2005 traveling exhibit “We are all Animals”). Rodrigues examines the exhibits “Are Animals the New Slaves?” (2005) and “Glass Walls” (2011). See also Angela P. Harris, Should People of Color Support Animal Rights? 5 J. ANIMAL L. 15, 15, 18-21 (2009) (explaining why the animal rights movement is seen by many African-Americans as “a white thing” and discussing the problematic nature of the 2005 PETA campaign).

wearing a lion costume when I leave my house so if I get shot, people will care.” Kim points to reactions to animal welfare rescues of cats and dogs during Hurricane Katrina, which led Black commentators to note, “with anguish and anger, that poor Black residents were dying [in New Orleans] in large numbers as these pets were whisked to safety.” These images communicated that Black people were located “not just between whites and animals, but [they were] below animals – that whites care more about ‘pets’ than they did about Black people.” The shooting of the silver-backed gorilla Harambe at the Cincinnati Zoo was accompanied by a lot of disparagement expressed towards the family of the young Black boy who was saved in the incident, specifically his mother, for not properly supervising him, playing into stereotypes about poor Black parenting. Kim argues that the nearness between Blackness and animality in such incidents creates “a closed loop of meaning” in which “the two are dynamically interconnected all the way down,” and exist against “the antiblack social order that props up the “human.” In this “zoologo-racial order” humanness is reserved for whites and is defined as “both not-animal and not-black.”

A similar reaction has come from other marginalized groups, pointing to exclusion and cultural and racial insensitives amongst animal advocates. For example, when Indigenous people have negative encounters with anti-hunting protests that are insensitive about treaty-protected hunting and fishing rights, they are unlikely to want to associate themselves with the movement. Heated conflicts have arisen over single-issue campaigns such as the commercial

72 Kim, supra note 15, at 284.
73 Id.
74 See Claire Jean Kim, Murder and Mattering in Harambe’s House 3 Politics & Animals 1, 7-8 (2017).
75 Id. at 10.
76 Id. at 10, 9 (emphasis in the original).
seal hunt. See e.g. Irena Knezevic, Julie Pasho & Kathy Dobson, Seal Hunts in Canada and on Twitter: Exploring the Tensions Between Indigenous Rights and Animal Rights with #Sealfie, 43 Can. J. Commun. 421, 427 (2018) (listing the animal rights groups who have been involved in the issue since the 1970s, pointing out that the World Wildlife Fund and Greenpeace do not oppose the hunt, with Greenpeace even apologizing for its past opposition; however the hunt is opposed by PETA, Sea Sheppard Society, the International Fund for Animal Welfare, and Humane Society International), 428 (pointing out the success of the activism, which resulted in a European Union ban on sale of seal products in 2009, and a largely meaningless exemption on seal products from Nunavut in 2015 given the collapse of the market for seal products in Europe).

78 Id. at 433.


80 See Kim, supra note 15, at 193-97. See also her excellent chapter on the Makah revival of whale hunting off the coast of Washington State at 205-52.

81 See id. at 207 (framing the problem of “the ecological Indian” who “sees animals as respect-worthy and important but still edible” ... “For Native Americans like the Makah, recognizing the whale’s subjectivity, understanding human-whale continuities, and respecting the whale logically allowed for hunting the whale”).

It should also be specifically noted that there is now a sub-field of international law called “Global Animal Law,” which burst on the scene in the mid-2010s, motivated by the recognition that “virtually all aspects of (commodified) human-animal interactions (ranging from food production and distribution, working animals, animal use in research, to breeding and keeping of pets) possess a transnational dimension.” As Anne Peters writes, “the welfare of animals, which is inevitably affected by these [transnational] interactions, is a global issue per se calling for a global response.” Peters asks us to think about the breadth of problems flowing from human-animal relations and interactions: “health costs often ascribed to excessive intake of animal-based food; global warming induced, inter alia, by the abundance of cattle waste; the loss of genetic information through the extinction of species; or the fuelling of armed conflict by wildlife poaching.” The World Organization for Animal Health (OIE) has adopted health codes for both terrestrial and aquatic animals. However, they are not binding on member states and are really just suggestions or recommendations. Like the welfare regulation in European Union countries, starting in the 1980s, these international and regional initiatives are “piecemeal .. fragmented, often qualified, often inconsistent, unenforceable, and moreover unknown to most lawyers, law enforcers and legal scholars alike.”

Indeed, many of the problems Peters identifies related to fragmentation, qualifications, inconsistencies, and lack of enforcement are replicated on the domestic or national level. Perhaps shockingly to many people, including lawyers, is the way that much “animal law,”

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83 Anne Peters, Global Animal Law: What Is It and Why We Need It, 5 TRANSNATL. ENVIRON. LAW. 9, 16 (2016).
84 Id.
86 Peters, supra note 83, at 14.
87 Id. at 14-15.
88 Id. at 15.
rather than operating as a protection against the use and abuse of nonhuman animals, actually facilitates it. I flag this point specifically because, as a law professor who did not research or teach animal law for the first ten years of my career, I thought that the treatment of nonhuman animals could not be that bad. I only very vaguely knew (and mostly just assumed) that there must be laws or regulations that protected them. I just did not know a lot about it. This kind of assumption was not purely a personal failing or individual ignorance, as laws relating to nonhuman animals have a number of tricky ways in which they appear to be beneficial to nonhuman animals but really are not, a structure which is not always easy to appreciate, even upon closer examination. I discuss briefly here five different but related ways in which the structure of much animal law helps to create the vague false assurance I used to have, or at least does little to dispel it, with the result that the law appears to be protecting nonhuman animals when it is not.

First, there is the straightforward regulation that expressly facilitates the use of nonhuman animals as food such as legislation relating to “humane” slaughter or live animal transport. These laws sound like they would set up meaningful minimum standards, but they are perfectly consistent with a great deal of abuse. Moreover, they exempt the vast majority of animals. For example, the United States *Humane Methods of Slaughter Act* excludes ninety-eight percent of the ten billion animals sent to slaughter annually in the United States for food because it explicitly excludes birds, which means it does not apply to chickens.89 It also implicitly excludes fish, whose numbers vastly exceed those of terrestrial animals.90

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90 See Kelly Levenda, *Legislation to Protect the Welfare of Fish*, 20 ANIMAL L. 119, 135-36 (2013-2014) (the chicken exclusion happened after the original act in 1906). Levenda explains that the “Twenty-Eight Hour Law,” the other significant piece of federal legislation applicable to farmed animals, the U.S. federal law that regulates transport, also explicitly excludes poultry and would implicitly exclude fish. See 128-29.
Second, even legislation that purports to protect nonhuman animals in a more active way rather than just facilitating the conversion of nonhuman animals into food applies to very few nonhuman animals. Consider the *Animal Welfare Act*, which applies to just a few categories of animals in the United States, primarily dogs, cats, monkeys, guinea pigs, hamsters and rabbits used in research but also animals in exhibition and wholesale pet trade.\(^91\) It was photographs provided by an activist named Christine Stevens to *Life* magazine on February 4, 1966, which sparked the public outrage to provide protection to laboratory animals.\(^92\) The statute was first called the *Laboratory Animal Welfare Act*, the name was changed in 1970.\(^93\) The shortened form of the title implies that is a general animal welfare statute, creating what Justin Marceau has called “a false promise of welfare for all types of animals and all types of human interactions with animals.”\(^94\) Marceau thinks that it should have been called “something truer to its purpose such as the ‘Prevent Dog Kidnapping for Research Law,’” or because it does include zoo and other animals kept for the purposes of exhibition, the “Animal Welfare in Research and Exhibition Act.”\(^95\) Even for research animals, the statute explicitly excludes the majority of research animals, rodents (rats and mice), as well as birds.\(^96\) And like the *Humane Methods of Slaughter Act* it would implicitly exclude an increasingly popular research animal such as zebrafish, “a highly-social species of freshwater fish, [that] are widely studies across many fields

\(^92\) See Ryder, supra note 1, at 201.
\(^93\) Id.
\(^94\) Id.
\(^95\) Id.
\(^96\) Id. at 930 n. 14, citing to Anni B. Satz, *Animals as Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy, and Property*, 16 *Animal L.* 65, 87 (2009).
of laboratory science including developmental biology, neuroscience, and genomics."\(^97\) This is because the *Animal Welfare Act* only applies to “warm blooded” research animals.\(^98\)

Third, there is something peculiarly “deceptive” about statutes that purport to protect but do so little protecting, not just because of the “statistically insignificant” number of animals they apply to, but also because they actively mislead people, members of the public as well as lawyers, into thinking protection exists when it does not.\(^99\) As Marceau explains in relation to the *Animal Welfare Act*, this is “not only ineffective, but worse, counterproductive.”\(^100\) Why? In the case of the *Animal Welfare Act*, its licensing system operates to “quell public concern” when it arises, “causing more harm than good,”\(^101\) as the public is led to believe “that federal law is safeguarding animal welfare.”\(^102\) Marceau writes that this “prophylactic veneer” has operated in many instances as “a silver bullet for quelling unease over the condition of confined animals.”\(^103\) He damningly concludes:

In effect, the system creates the worst of all worlds – researchers, zoos, and breeders are afforded something akin to a presumption of humanness because they are licensed by the AWA, and yet the AWA has minimal substantive standards, trivial enforcement effects, and a formal policy of rubberstamping all license renewal requests. The AWA approaches the status of being all benefit and no burden for many of these operations. Simply by waving the flag of AWA-compliance, breeders, researchers, and exhibitors quell discontent and bypass the scrutiny that befalls them in the wake of a tragic accident or an undercover


\(^100\) *Id.* at 927.

\(^101\) *Id.* at 928.

\(^102\) *Id.* at 939.

\(^103\) *Id.* at 944, 948.
whistleblowing expose. The paradoxical effect of the AWA is that it creates a space for federal law to be deployed in defense of the mistreatment of animals.\textsuperscript{104}

This paradoxical effect of using what purports to be protective law in order to defend the mistreatment of animals also operates on the level of state (or in Canada provincial) anti-cruelty welfare statutes, which sound like they are supposed to protect animals from cruel treatment (e.g. distress) but often explicitly exempt customary “farming” practices, many of which are undeniably cruel (e.g. tail docking cows and pigs and debeaking chickens without anesthetic).\textsuperscript{105}

Fourth, purportedly protective statutes can also silently exclude certain animals by incorporating by reference other pieces of legislation that are either difficult to find or to interpret. Consider, for example, in Canada, the province of Newfoundland’s \textit{Animal Health and Protection Act} and its provision of a broad definition of the animals it protects, in terms of all vertebrates, casts a wide net (forgive the pun) which would seem to include fish.\textsuperscript{106} However, the part of the act that includes the prohibition against causing an animal to be in distress, does not apply to fish as defined in the \textit{Wild Life Act}.\textsuperscript{107} The \textit{Wild Life Act}, in turn, defines fish as either “fresh water” or those “which run up from the sea into inland water.”\textsuperscript{108} The definition would seem to apply to anadromous fish such as salmon. Arguably, however, \textit{farmed} salmon do not meet the definition because they are (apart from escapees) prevented from actually engaging in this migration from the sea back up inland rivers. Either way, the protection from distress

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\textsuperscript{104} Id.
\textsuperscript{105} Marceau has documented the way that these exemptions were often enacted at the same time as felony cruelty laws used to target (already marginalized) individual workers and do nothing to address systemic industry-level abuse. See MARCEAU, BEYOND CAGES, supra note 71 at 98-110 (1995) (explaining that this happened in twelve of the forty states and of these twelve, ten were enacted in 1998 or later). \textit{But see} Delcianna J. Winders, \textit{Beyond the Law? Interrogating the Scope of Common Farming Exemptions} (arguing that the conventionally accepted wisdom that common farming practices put farmed animals beyond the law is incorrect). Paper presented in the Scholar’s Track at the Second Annual Canadian Animal Law Conference (September 12, 2020).
\textsuperscript{107} See id. § 2(4) & 18.
\textsuperscript{108} Wild Life Act, RSNL 1990, Chapter W-8, § 2(b) (Can.) https://www.assembly.nl.ca/legislation/sr/statutes/w08.htm.
provision states that the prohibition does not apply “in respect of a class of animals prescribed by regulation, or animals living in circumstances or conditions prescribed by regulation, or where the distress is a result of a treatment, process or condition that occurs in the course of an accepted activity.”

Fishing would be considered “an accepted activity” and fish are regulated under the provincial Wild Life Act, the Fish Inspection Act, and the Aquaculture Act. This is very complicated. Even someone with a legal background might have difficulty working out whether or not farmed salmon are protected by the animal welfare statute. This kind of run-around makes for the same kind of misleading situation Marceau highlights, by suggesting, at first glance, that any animal with a vertebrae is protected when the reality is that they are not.

Fifth, and finally, the incorporation by reference can also operate by way of regulations that are completely discretionary. These are true “paper tiger” statutes, that purport on their face to be fiercely defending or protecting but are broken through as easily as a piece of paper by the routine discretionary approval of the purportedly prohibited activity. Consider again another example relevant to fish farms in Canada. S.36(3) of the federal Fisheries Act prohibits anyone from depositing “a deleterious substance of any type in water frequented by fish.” The Department of Fisheries uses a separate set of rules, the Aquaculture Activities Regulations, in applying this statute, and the Regulations include pest control products in the list of “deleterious substances.” Hence, the prohibition should apply to the antibiotics routinely used to control sea lice outbreaks on fish farms, a horrendous welfare situation created by the close conditions in which salmon (a wild not domesticated animal) are kept (unnaturally) penned up check by jowl. However, under the Regulations, the Minister may and routinely does permit this use, despite the fact that there are obvious effects on other wild sea life such as lobsters and generally

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109 An Act Respecting the Health and Protection of Animals, § 18(3) (Can.).
111 See Aquaculture Activities Regulations, SOR/2015-177, § 2 (Can.).
unknown environmental effects. The provincial *Environmental Protection Act* has a similar structure, prohibiting the unauthorized release of a substance into the environment that might cause an adverse effect, with one hand, and then allowing the Minister to “classify or allow the releases of substances” with the other. One hand is the tiger, seemingly fiercely protecting, good for public relations and making people feel reassured, the other is the fist going through the paper in terms of what ministers routinely permit. This “bait and switch” is also actively misleading in the way that Marceau describes.

Given all these structural shortcomings with animal law, obviously more needs to happen than simply switching out or updating the legal status of nonhuman animals. However, once the eye-opening or ground-clearing occurs, it becomes increasingly difficult to believe that the binary black and white approach of property/person is going to be able to adequately address the challenges before us, the sheer range of animals involved, the numbers that are either being caught in the wild or have been brought into existence through forced and controlled reproduction of domesticated species, and what would need to happen in order to genuinely protect them from cruel treatment and being in distress. At the very least, we need a legal status that can work for more non-human animals than those we already recognize as cognitively complex (primates, elephants, and cetaceans) and it needs to be able to move, much as a sliding scale does, both across species and also within a particular species over time, as attitudes towards that species change. Only a flexible legal status will be able to move in a direction that is

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112 See David L. VanderZwaag, *Aquaculture Law and Policy: Struggling in the Wake of the Blue Revolution, in Aquaculture Law and Policy: Towards Principled Access and Operations* 1 (David L. Vanderzwaag et al. eds., 2006) (pointing out that the environmental effects of drugs like SLICE used to fight sea lice and antibiotics used to combat infectious diseases such as ISAv “are largely unknown”).


114 Marceau, *supra* note 91, at 946. See also 940-41 using the term “doublespeak” from George Orwell’s 1984 to describe the false promise of saying one thing but really meaning another.
more genuinely protective of animals and their interests, which so often cut against human interests in their exploitation and use. Personhood faces a number of challenges in terms of being the legal status able to do this, at least in the short term.

II. Property v. Persons

Animal law as a field has been dominated for the last twenty-five years by one thesis: property is the problem for nonhuman animals and the solution is to cease treating them as property and to obtain personhood status for them. In his influential “abolitionist” book, *Animals, Property and the Law* (1995), Gary Francione argued that as long as animals were property, they would lose when their interest (however significant) was balanced against a human interest (however insignificant).115 A dog might be legally killed by their owner if the owner calculated that it was more expensive to board the dog while away on vacation than to buy a new dog at the end of their holiday, even though the inconvenience and expense was trivial when weighed against the dog’s interest in their life.

Although Francione is a law professor, he did not argue that nonhuman animals should be given *legal* personhood; instead his understanding of personhood was personhood in the moral sense.116 In his view it was “folly” to look to the legal system to lead the way in eradicating the property status of nonhuman animals either under the common law or in legislation. Why? Because the principles of the common law and the process of common law adjudication protect

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116 Legal personhood is sometimes discussed in the work (see e.g. id. at 110). However, there is no advocacy for the use of the status. The idea that the sense of personhood intended is moral rather than legal is supported in later work, which states, for example, that animals are not things, they “matter morally” and that animals “have the right to be a moral person and not a thing.” See Gary L. Francione & Anna Charlton, *Animal Rights: The Abolitionist Approach* 12, 29 (2015). See also Gary L. Francione, *Why Veganism Matters: The Moral Value of Animals* 11 (2020) (“the legal right of animals not to be used as property will never even be a possibility until the paradigm shifts and we accept the personhood of nonhuman animals as a moral matter”).
property interests and legislators are dependent on those directly and indirectly involved in animal exploitation.117

Francione’s view has been influential. Yet one might sensibly ask why a nonhuman animal interest must necessarily lose against any human interest, however trivial or insignificant. It is possible to attach greater weight to an animal’s interest (e.g. a cetacean living a life free from being forced to perform tricks for humans) than the human interest (e.g. in seeing a dolphin perform tricks). The fact that this has happened for dolphins and whales in relationship to their captivity in aquaria in a number of jurisdictions shows that possibility is a real one even if it is certainly true that in most human-nonhuman animal conflicts, the nonhuman animal loses.118

Property status often operates to facilitate this loss but not always, as shown by rampant indifference to the fate of wild animals, who are unowned prior to capture, and are being lost at unprecedented rates at both individual and species levels.119 The idea that humans are entitled to use and exploit nonhuman animals is presupposed by the private property status ascribed to both domesticated and caught wild animals. That attitude of entitlement is in turn further entrenched and supported by that continuing status. Hence the need to disrupt it in some significant sense, as the “quasi” proposal here aims to do but without the concept of full moral personhood Francione insists upon, not because this is not something that is impossible, it might even be ideal, but does not seem to be realistic at the present time.120

119 Wild animals are “owned” by the state only in the loose sense that governmental entities assume jurisdiction for their management (states in the United States and provinces in Canada). However, the common law ownership of wild animals is effectuated only by a complete capture from which escape is impossible. See ANGELA FERNANDEZ, PIERSON V. POST, THE HUNT FOR THE FOX: LAW AND PROFESSIONALIZATION IN AMERICAN LEGAL CULTURE (2018).
120 In his most recent book, Francione calls the view of animals as quasi-persons “our conventional wisdom.” See FRANCIONE, WHY VEGANISM MATTERS, supra note 116, at 18-45. Francione did refer to animals as quasi-persons in an earlier piece of writing. See Gary L. Francione, Animals – Property or Persons? in, ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS, 108 (Cass R. Sunstein et al. eds., 2004). However, referring to it as “conventional” would suggest more general circulation or use. One would have fairly
Steven Wise founded the Nonhuman Rights Project in the 1990s and has been working since that time to have certain nonhuman animals recognized as legal persons, starting in 2013 litigation arguing that individual chimpanzees kept in inappropriate living conditions should have a *habeas corpus* right to be free from unlawful detainment and moved to a sanctuary.\(^{121}\) His book *Rattling the Cage* (2000), and the previous literature published in a variety of law review articles, argued strongly in favor of the existence of a bright line distinction between property and persons. He called this the “Great Legal Wall,” inherited from Roman law, which placed every human possessing legal rights on one side and every other non-human thing no rights on the other.\(^{122}\) It is this wall that would be broken down by moving (certain) nonhuman animals from property to personhood. Wise agreed with Francione that “the interests of nonhuman animals can only be protected by the eradication of their legal property status.”\(^{123}\)

However, unlike Francione, Wise’s form of personhood is legal not moral personhood. This is a very important difference, as *legal* personhood is not necessarily related to moral status. It can (and often, even usually) maps onto human beings as a recognition of their ability to engage in valid legal relations (at least white, male, propertied ones). However, it can be used for entities other than humans, as in the case famously of corporations. Ships were actually the quintessential example of an artificial legal person at a time when maritime trade rather the Google or Amazon ruled the economic world. Other examples of nonhuman legal persons

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\(^{121}\) The chimpanzee cases are covered in the documentary *Unlocking the Cage*. See Angela Fernandez, *Already Artificial: Legal Personality and Animal Rights*, in *HUMAN RIGHTS AFTER CORPORATE PERSONHOOD: AN UNEASY MERGER?* 211 (Jody Greene et al. eds., 2020). The NHRP has been bringing cases on behalf of elephants in both New York and Connecticut after the loss of the chimpanzee cases.


include entities as diverse as municipalities, rivers, and trusts. Legal personhood, even for human beings, is a fictional attribution given to an entity so that they can be the recipient of legal rights (like the corporation’s right to be sue or be sued). There is no sentience requirement. Personhood in this case is like an empty vessel into which certain rights can be poured (e.g. owning property, entering into contracts, even freedom of speech for a corporation) but not others (e.g. voting in the case of a corporation or getting married).

Although the NHRP was asking for the recognition of legal personhood for its clients, this has (understandably) been a little confusing for the judges hearing the arguments because the evidence the group led relates to the advanced cognitive capacities of these special nonhuman animals (chimpanzees and now elephants). In other words, the argument is about how much like human beings these nonhuman animals are. Hence, the request for a recognition of “personhood” sounds very much like a plea to rule that the special nonhuman animal in question is the moral and/or legal equivalent of a human being. This argument runs directly up against speciesism, an inability (or difficulty) in acknowledging that human beings are not necessarily superior to all other animals. As I have written elsewhere:

Even though the judges, and all of us, especially those who are legally trained, should be should be able to hear the personhood argument and think about nonhuman entities like ships, rivers, trusts, and corporations, I think an emotional part of the brain kicks in, creating a negative reaction, a kind of outrage factor, ‘no, they are not like us’.¹²⁴ That outrage factor, “What, persons like us!,” rightly or wrongly, has been an enormous obstacle to the success of these litigation attempts.¹²⁵

¹²⁵ Id. at 213.
In addition to the conflation problem, it is also possible that the NHRP personhood argument is not landing correctly given the way that legal persons are understood in the common law by way of a (pretty disparate) set of examples that have little to do with one another. It is therefore difficult to see one as analogous to another or the whole area of law hanging together in a coherent way. This is different from the legal systems in civil law countries such as France, Spain, Germany, Switzerland, Austria and by way of European colonization Latin and South America. In these countries, the civil code governing private law includes a first book: “Persons.” The “law of persons” is not only a coherent category, it is also a body of law about which one might take a course or pick up a treatise. It is conceptualized in abstract terms and is thickly populated in terms of rules and provisions gathered together explicitly and located in one place. For example, in Quebec, the first book on “Persons” in the Civil Code of Quebec makes a fundamental distinction between natural persons and legal persons who are “endowed with juridical personality” (as opposed to simply possessing juridical personality by virtue of being a human being). When a civil law trained lawyer hears “person” they likely immediately think, “do you mean natural or artificial?”

In the Quebec code, the book on persons sets out under the first category of natural persons (i.e. human beings) almost three hundred provisions relating to topics like the integrity of the person and consent to care, forced confinement for psychiatric reasons, children’s rights, respect of the body after death, change of name, change of designation of sex, change of domicile and residence, absence and declaratory judgment of death seven years after a person’s disappearance, what happens if a person returns, and many provisions on the register and acts

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of civil status (births, marriage or civil union, and death), what the registrar of civil status must do and how registries must be published and kept, the rights of minors, emancipation and various types of tutorship, protective supervision of, tutorship to, and being an advisor to a person of full age. The second category of legal persons are those “endowed with juridical personality.” Whether they are established in the public interest or the private interest, legal persons “have full enjoyment of civil rights.” Their only incapacities are “those which may result from their nature or from an express provision of law.” Most of these rules are geared towards corporations, their name, where they are domiciled, that they are distinct from their members and act through their board of directors, the obligations and grounds for disqualifying directors, and the process of dissolving or liquidating the enterprise. However, the Code does not use the word “corporation,” insisting on calling them at every turn “legal persons.”

The private law codes of civil law countries are explicitly patterned on the Roman law tripartite distinction (created by Gaius, the Emperor Justinian’s chief architect in the Institutes) persons-property-actions. English lawyers like Thomas Wood quietly borrowed the “institute” scheme. Think Blackstone, who turned the first book “Of the Rights of Persons” in his Commentaries on the Laws of England into a treatment on the English System of government. Lawyers trained in common law countries such as England, the United States,

128 See id. at arts. 10-297.
129 Id. at art. 298.
130 Id. at art. 301.
131 Id. at art. 303.
132 See id. at arts. 305-364.
133 See Donald R. Kelley, Gaius Noster: Substructures of Western Thought, 84 AM. HIST. REV 619, 620 (1979) (“Gaius formulated (if he did not create) one of the most distinctive and enduring systems of thought in Western history”).
134 See A.W.B. Simpson, The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature, 48 U. CHICAGO L. REV. 632 (1981). Wood’s first book covered persons in their natural capacity (e.g. the age of responsibility and relations between sexes) and persons in their civil capacity (e.g. relations of husband and wife, master and servant, prince and subject). Michael Lobban, Blackstone and the Science of Law, 30 HIST. J. 311, 320 (1987).
135 See John W. Cairns, Blackstone, an English Institutist: Legal Literature and the Rise of the Nation State, 4 OXFORD J. LEGAL STUD. 318 (1984). Blackstone included in his “persons” the several branches of the English system of government (Parliament, King,
most of Canada, Australia, and New Zealand get very little exposure to the civil law and to thinking about the law of persons as a distinct area of law, as it relates to both “natural” persons and legal persons. Common law law school curricula tend to jump immediately to the second category, which gets hived off into the law of business organizations or corporate law with little sense that it sits in civil law systems in a larger and more general category of “the law of persons.” There are some jurisdictions surrounded by common law which “mix” it with civil law. Québec, for instance, in Canada, Scotland in the United Kingdom, and Louisiana in the United States. There are also country systems that “mix” civil law with customary or religious law such as China and Japan, and those that “mix” common law with customary or religious law like India. Mixing might result in more awareness of the historical roots of the law of persons simply because it is a living area of law that has not been turned into what we would currently think of as constitutional law or hived off into family law or employment/labor law – “persons” is where the statuses and rules arising from relationships like husband and wife, parent and child, and master and servant traditionally resided.

See William Blackstone, Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769, vol. 1, Of the Rights of Persons 142-225 (1765) (University of Chicago Press, 1979). James Kent did a similar thing in his Institute-structured books, Commentaries on American Law, the first book of which begins with the law of nations, turns to “the government and constitutional jurisprudence of the United States,” and then treats the sources of municipal or state law (e.g. statutes, common law, civil law). See James Kent, Commentaries on American Law, vol. 1 (1826).

I was trained at McGill in Montreal Quebec in both the common law and the civil law, a fact that informs the way I see this area of law.


See Janet Hally, What is Family Law? A Genealogy, Part I, 23 YALE J. L. & HUMAN. 1, 8 (2011) (explaining that Blackstone’s combination of government with the status relationships, as well as corporations, should be understood as cutting across the public/private distinction). Tapping Reeve treated these (with the exception of corporations) separately in his 1816 treatise The Law of Baron and Femme, of Parent and Child; of Guardian and Ward; of Master and Servant; and of the Power of the Courts of Chancery. Hally says that this book “introduces into Anglo-American law, perhaps for the first time, a legal classification that can meaningfully be tied, genealogically to modern family law.” Id. at 9. Roscoe Pound called it in effect the first American legal treatise. See Angela Fernandez, Tapping Reeve, Coverture, and America’s First Legal Treatise, in Law Books in Action: Essays on the Anglo-American Legal Treatise 63, 66 (Angela Fernandez et al. eds., 2012).
Common law/civil law distinctions between different state legal systems might also make it easier for a person who is trained in a civil law system or one mixed with some civil law to hear “person” and think of the empty vessel sense rather than “human being” because they are more likely to think, “yes, the law of persons, that is a thing” that they recognize. It might be that this familiarity helps explain why the only jurisdiction in which the personhood argument has worked (so far) is a civil law jurisdiction: Argentina.

The first significant case in 2014-2015 involved an orangutan named Sandra who was ordered to be moved to a sanctuary but not on a habeas corpus petition, which failed.139 However, the judge who held that Sandra had the right to better living conditions than those existing at this zoo was very clear she saw Sandra as a “non-human person.”140 Yet the reviewing court avoided discussion of that controversial point (creating the question as to whether or not that aspect of the decision was over-ruled), although they did not disagree that Sandra’s living conditions ought to be improved.141 A technical committee was set up to figure out where and how to do that.142 Sandra finally arrived at a sanctuary in Florida in 2019.143 “The real breakthrough” happened in November 2016, again in Argentina, when a judge recognized that a chimpanzee named Cecilia “had been illegally and arbitrarily deprived of her right to freedom and a dignified life by the zoo of the city of Mendoza.”144 The ruling was based on recognizing animals as sentient and emotional beings, great apes in particular given their proximity to human beings, cognitive abilities, use of tools and culture, as well as the current ecological crisis

140 Id.
141 Id. at 19.
142 Id.
and the human responsibility to protect the environment, including great apes which would be best advanced by recognizing them as legal subjects entitled to nonhuman rights.\textsuperscript{145} Holding that Cecilia was not just a “movable” object (the term for personal property in the civil law) the judge who wrote the argument was careful to say that the decision did not put sentient beings on the same level as human beings, nor did it give the status to all existing fauna of the country, just primates, who are part of the natural patrimony which there is a constitutional right to protect and conserve, recognizing the fundamental right to be born, to live, to grow, and to die in an environment appropriate to one’s species.\textsuperscript{146} The openness to seeing primates at least as “unique ape person[s]” was not easy to arrive at, likely in either of these cases.\textsuperscript{147} However, the capacity was there, not just to entertain the argument but to follow it through in creative ways.

It might be that members of the legal profession in the Global South and people more generally are less inclined to feel the outrage triggered by the comparison to human being than those in the Global North. This is certainly possible. When a well-loved hippopotamus named Gustavito died mysteriously at the National Zoo of El Salvador in 2017 and it was thought that he had been the victim of gang violence, citizens identified with him to the extent that the hashtag circulating on social media read \textit{TodosSomosGustavito} (We are all Gustavito).\textsuperscript{148} Such spontaneous reaction suggests that there might well be cultural differences in degrees of human exceptionalism expressed in different places. Most individuals in the United States or Canada

\textsuperscript{145} Id. at 23.
\textsuperscript{146} Tercer Juzgado de Garantías de Mendoza 3 November 2016, Expte Nro P-72-254/15. \url{https://www.animallaw.info/case/afada-habeas-corpus-cecilia}.
\textsuperscript{147} See Thompson, supra note 139, at 19, 14 (describing the pressure Justice Elena Liberatori was under in Sandra’s case, who shared with Thompson that her decision bothered many people in Spain and Argentina and at one point “she felt she was dealing with a ‘whole judicial and nonjudicial structure’ that did not fit ‘the spirit and commitment that I personally put into this case.’” The public pressure included an op ed piece written by the Attorney General of Buenos Aires who claimed that the case was reversing Darwinism by saying monkeys were decended from humans and was contrary to nature and the divine).
might empathize with or pity murdered or otherwise victimized zoo animals. They are not likely
to identify with them to the extent of the tens of thousands of individuals who visited the zoo in
southern San Salvador to mourn Gustavito’s death, held candlelight vigils, in an incident that
saw the environment secretary brought publicly to tears.\textsuperscript{149} Obviously there is a lot more going
on here than just views towards nonhuman animals and how much people will allow themselves
to identify with them. Yet there is also a sense that \textit{standing with} a nonhuman animal in terms
of thinking about shared experiences of suffering and being like them in terms of a shared sense
of vulnerability is not something that triggers an outrage button in the same way with everyone
everywhere.

Personhood for nonhuman animals makes the most sense in Indigenous legal systems
where there is no question that nonhuman animals are persons, as are rivers, trees, rocks,
anyone or anything that is “living” in the sense of being an enspirited entity with whom one is
interconnected, including those who have died. As historian Virginia DeJohn Anderson writes
about the Indigenous people Europeans encountered in North America:

Native understandings of animals fit into a larger set of conceptions about the world that
drew no sharp boundary between natural and supernatural realms and did not dictate the
subordination of nonhuman creatures. Some animals possessed spiritual power, obliging
the humans who hunted or otherwise dealt with them to show respect.\textsuperscript{150}
That spiritual power was known as \textit{manitou} amongst Algonquin peoples.\textsuperscript{151} This was “foreign to
the colonists’ Christian beliefs, specifically the idea that animals were not “lesser beings, defined
from the moment of Creation as invariably subordinate to humans.”\textsuperscript{152} Anderson writes:

\begin{flushright}
\textsuperscript{150} ANDERSON, supra note 17.
\textsuperscript{151} Id. at 20.
\textsuperscript{152} Id. at 21.
\end{flushright}
“Indians did not conceive of the natural world in terms of a strict human-animal dichotomy but rather as a place characterized by a diversity of living beings.”  

Consider salmon, who are more than food to Indigenous people. They are teachers. The waters they live in and the land the water runs through are teachers and relatives also. These ideas have been successfully translated into settler-society state legal systems. For example, a river in New Zealand, important to the Maori, was recognized as a legal person and one in Quebec, which runs through Cree territory, has also been recently recognized. Indigenous people in the United States and Canada sometimes use the phrase “all my relations” to refer to “the network of beings, sometimes including those not

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153 Id. at 18. See also Kelly Struthers Montford & Chloë Taylor, Beyond Edibility: Towards a Nonspeciesist, Decolonial Food Ontology 129, 136–42, 136 COLONIALISM AND ANIMALITY: ANTI-COLONIAL PERSPECTIVES IN CRITICAL ANIMAL STUDIES (Kelly Struthers-Montford et al. eds., 2020) (drawing on Anderson’s work and the work of Mi’kmak scholar Margaret Robinson, who writes that “Mi’kmak legends view humanity and animal life as being on a continuum, spiritually and physically. Animals speak, are able to change into humans, and some humans marry these shapeshifting creatures and raise animal children”). Citing to Margaret Robinson, Veganism and Mi’kmak Legends, 33(1) CAN. J. NATIVE STUD. 189 (2013) and Margaret Robinson, Animal Personhood in Mi’kmak Perspective, 4(4) SOCIETIES 672 (December 3, 2014).

154 For one such Tlingit teaching, see Shanyaax’utlax: Salmon Boy (February 6, 2019), https://www.youtube.com/watch?v=iGH8cmKK7z8.

155 See also Enrique Salmón, Kincentric Ecology: Indigenous Perspectives of the Human-Nature Relationship, 10(5) ECOL. APPL. 1327, 1327 (2000) (on “kincentric ecology” understood in part as the insight from Indigenous people in North America “that life in any environment is viable only when humans view the life surrounding them as kin”).

156 See Deborah McGregor, Indigenous Environmental Justice, Knowledge, and Law, 5(2) KALFOU 279, 282 (2018) (speaking specifically about Anishinaabe knowledge systems). See also REVITALIZING INDIGENOUS LAW FOR LAND, AIR AND WATER: ST’ÁT’IMC LEGAL TRADITIONS REPORT, https://www.wcel.org/publication/revitalizing-indigenous-law-land-air-and-water-statimc-legal-traditions-report (on the “water ways” of this Northwest Coast group in British Columbia, which have been “dramatically altered” by “dams, clear cut logging, water removals and contamination,” quote from p. 7; salmon are specifically included in the stories of The South and North Winds and The Salmon Men; or The Origin of Salmon, which are “said to reflect the ending of the ice age and the coming of the salmon to the territory between 18,000 and 12,000 years ago,” p. 16).


158 New Zealand granted personhood to the Whanganui River in 2014. The Mutesheka-shipu (or Magpie) River in Quebec granted personhood in 2021. See Sean Nixon, A Quebec River Now Has Legal Personhood – What That Means for Granting Nature Rights (March 5, 2021, updated April 14, 2021), https://ecojustice.ca/quebec-river-legal-personhood-rights-of-nature/. The river as a “living entity” argument was used in the New Zealand example with the Māori taking the position that harm to the river is harm to the tribe and the tribe and the river are the same, captured in the expression translated as “I am the river, and the river is me.” See Alberta Civil Liberties Research Centre, Rights of Nature, https://www.aclrc.com/rights-of-nature#:~:text=Boyd%20defines%20the%20Rights%20of%20Nature%20as%20a%20living%20entity%2C%20captured%20in%20the%20expression%20translated%20as%20%22I%20am%20the%20river%2C%20and%20the%20river%20is%20me.%22.
considered alive by Settlers, such as rivers and mountains.”\(^{159}\) This view of animals and other-than-human beings is not anthropomorphism; “personhood is understood as an experience common to all forms of life.”\(^{160}\)

Scholars are increasingly noticing that “Amerindian perspectivism” is “silently crawling into the underwood of modern philosophical thought, gradually reshaping our very relationship with other species.”\(^{161}\) This idea, coined by Brazilian anthropologist Eduardo Viveiros de Castro, is that “animals are perceived as people or persons with their own (humanized) cultures.”\(^{162}\) The view is anthropocentric in that “the original common condition of both humans and animals is not animality, but rather humanity” and what type of human or other animal depends on context and perspective.\(^{163}\) Certainly humans are seen as “just one species among many” and “all living species have the capacity to be persons, depending on the context and situation.”\(^{164}\) Sometimes differences amongst humans are on par with species-specific humans but there is not a unified non-human domain, “nature,” as opposed to “culture.”\(^{165}\) This is relevant to rivers, plants, trees, and helps explain why rights of nature have been recognized and constitutionalized in countries where there is a significant Amerindian perspective in the population, Ecuador for example, as well as Bolivia’s adoption of the Law on the Rights of Mother Earth.

Kristen Stilt argues that these examples are promising for animal rights because nature includes animals and giving nature rights will allow for the possibility of making rights-based claims on behalf of animals.\(^{166}\) Brazil has the constitutional protection for the right to an

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\(^{160}\) Id.

\(^{161}\) Fraundorfer, *supra* note 144, at 20.

\(^{162}\) Id.

\(^{163}\) Id.

\(^{164}\) Id. at 21.

\(^{165}\) Id.

“ecologically balanced environment,” and Stilt describes how a Brazilian court used this to discuss the dignity and rights of a captive wild parrot relying on the concept of dignity for nonhuman animals from Germany and Switzerland and the rights of nature in Ecuador and Bolivia.\textsuperscript{167} Cecilia’s case would seem to be another example of the phenomenon Stilt describes, as the Argentinian court referred to both Gaia (the Greek goddess of Mother Earth) and Pachamama (the Andean goddess of Mother Earth) and Indigenous thought in order to ground the idea that as a special member of an ecosystem humans are obliged to protect humans are also obliged to recognize that as a member of that ecosystem Cecilia is a subject (not a mere object) with rights to freedom and a dignified life.\textsuperscript{168}

What about interpenetration into the United States? Stilt points to the Navajo National Code’s recognition of all creation, including animals and plants, which “have their own law and have rights and freedoms to exist.”\textsuperscript{169} She also refers to the \textit{Sierra Club v. Morton} (1972) dissent in which United States Supreme Court Justice Douglas relied on Christopher Stone’s “Should Trees Have Standing?” to argue that environmental entities should be able to sue for their own preservation in order to protect “nature’s ecological equilibrium.”\textsuperscript{170}

Some jurisdictions in the United States have recognized rights of nature for water at the community level in Pennsylvania and the city level in Toledo, Ohio which passed a Bill of Rights for Lake Erie.\textsuperscript{171} The situation in Toledo was that city’s response to a toxic algae bloom caused by waste that had seeped in the groundwater and spread to the lake from the concentration of Centralized Animal Feeding Operations (CAFOs) in the area, making water from the lake

\textsuperscript{167} Id. at 279-80.
\textsuperscript{168} See Fraundorfer, supra note 144, at 22-23.
\textsuperscript{169} Stilt, supra note 166, at 281 n. 45.
\textsuperscript{170} Id.
undrinkable. These precedents, while promising, do not bode particularly well for the prospects of judicial or legislative recognition of animal legal personhood in the United States. First, adoption of the Lake Erie Bill of Rights was done in an emergency situation in which people woke up to find they could not drink their tap water. The animals that most need a designation of personhood or quasi-personhood are invisible and can be ignored in a way that this problem could not. Second, from a European settler perspective, rather than an Indigenous one, it seems likely that the distance between a river and a nonhuman animal is so great that personhood for natural entities like rivers will not trigger the outrage factor, something that bodes well for those initiatives (and also for the nonhuman animals who can be swept up in them). The climate crisis might change this and cause United States (and Canadian) courts to get creative along the lines of the Argentinean judges in the cases of Sandra and Cecilia.

The Nonhuman Rights Project litigation results indicate that at least at the present time the personhood argument in the United States is running up against a block. Judges are hearing “human being” even when the sense of personhood could be thought about narrowly as mere legal personhood, the empty vessel into which only species-specific rights would be poured. There are at least two important lessons to take from the current stalemate. First, and this is a point that connects to intersectionality, people genuinely and in good faith hear personhood for nonhuman animals differently depending on their jurisdiction, background/belief systems, and particular subject positions. As Rodrigues writes with respect to white normativity, “people have different perceptions and experiences of the world.” This is going to effect how they hear and

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172 The situation then was an emergency one, somewhat like the Turag River case in Bangladesh in 2019, which Stilt describes in which dredging and polluting threatened to kill the river and was causing “a major shortage of potable water,” which the court linked to a “collective suicide” given the centrality of waterways in that country. See Stilt, supra note 166, at 282-83.

173 It is the routine nature of brutalization in animal industries that is one of their most salient features. See TIMOTHY PACHIRAT, EVERY TWELVE SECONDS: INDUSTRIALIZED SLAUGHTER AND THE POLITICS OF SIGHT (2011).

respond to different advocacy approaches to the rights of nonhuman animals, what they find offensive, what they find plausible, what they will want to throw their own personal weight behind. Angela Harris, for instance, has written about comparisons of human to animal slavery triggering the “visceral shudder that I, an African American, feel when confronted by an ape – the urge to insist, ‘I am not that.’” Situatedness may seem obvious, but I think many of us often make the mistake of assuming where we are coming from is where others are coming from or where we think they should be coming from. I would not like to over-generalize about what it means to hear a personhood argument from the perspective of a civilian legal system or an Indigenous legal system or one significantly influenced by Amerindian perspectivism; however, it stands to reason that there are important differences. There are also important differences between countries when it comes to the depth of the entrenchment of cultural practices such as zoo-going or meat consumption. Racialized people do not want to be compared to nonhuman animals, in the way that Harris describes (because in a speciesist culture that is usually an insult). However, it does not seem impossible to me that those who are themselves othered might understand and empathize more with a zoo animal than a person in a hegemonic subject position in relation to what it means to be imprisoned and stared at, for example. People

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175 Harris, supra note 69, at 29 (Harris continues that the confrontation with an ape “provokes the gesture of differentiation that, Meg Baldwin argues, every woman finds herself performing: “I am not a whore,” creating what Regina Austin has called a “politics of respectability” that LGBTQ+ folks also find themselves trying to aspire to, or people with physical disabilities find themselves doing to those with mental disabilities).

176 See Elena Wewer, Man, Animal, Other: The Intersections of Racism, Speciesism and Problematic Recognition within Indigenous Australia, NEW: EMERGING SCHOLARS IN AUSTRALIAN INDIGENOUS STUDIES (2017-18) (“in a speciesist society, the comparison of humans with animals is seen as demoralizing and insulting,” specifically when “ape” or “monkey” has a history of being used as a racist slur). See generally MARJORIE SPIEGEL, THE DREADED COMPARISON: HUMAN AND ANIMAL SLAVERY (1988).

177 Gender also compounds this. See CAROL J. ADAMS, THE SEXUAL POLITICS OF MEAT: A FEMINIST-VEGETARIAN CRITICAL THEORY (1990). As a young girl growing up in a overwhelmingly white province in Canada, Newfoundland, as a member of a visibly inter-racial family in the 1970s and 1980s, I will say that I often felt like I was being stared at like a zoo animal, more intensely than the usual reception given to those who “Come from Away” (CFA). The phrase has been made familiar in a heart-warming way due to the musical of that name (written by Irene Sankoff and David Hein) about the real-life hospitality extended to Americans stranded in the week following September 11 on thirty-eight planes diverted to Gander airport and this small community. CFA does however have a less heart-warming dimension to it, as people who have lived a long time in Newfoundland, and especially visible minorities, often
following diets that have not been meat-heavy and in countries where CAFOs are more recent or operate on a smaller scale and economic interests are less entrenched or they are a country that produces beef primarily for export might all be places where people in general will be less hostile to arguments that recognize the kinship between human and other animals and what that means for how we treat them simply because they are less personally invested in denying those arguments. This might also apply to dairy consumption in parts of the world such as China where milk production was unimportant up to the end of the 1970s and there was “lactophobia” due to lactose intolerance.178 Although dairy has now taken a strong hold there.179

The second important point is that there is a lot riding on the distinction between property and persons as it has been framed by those like Francione and Wise, especially if it is put in the mutually exclusive, binary, black and white terms it has been to date. It is unwise to insist that nonhuman animals are either property or persons with no other option. Why? Because if they are rejected as persons, as it seems likely will most often happen, then there is only one other thing for them to be: property. A tremendous amount of energy poured into twenty-five years of scholarship has been persuasively laying out what a thoroughly abject and hopeless space property is. Although this was certainly not the intention of animal scholars and activists, if the choice is made and the choice is property, their own writings are the most eloquent support for all the terrible things a property status for non-human animals permits. This is a chilling...
thought, or at least it should be. “More than property” (or things plus) might not be ideal; but it is a lot better than property full stop.

Even if some nonhuman animals do make it into the “person” category because they are deemed to be “human enough,” most, counted either by species or as individuals, will not. Fish almost certainly would not given the general difficulties humans have relating to fish, e.g. what we usually interpret as expressionless eyes, the fact that they swim and live in such a different world, it is difficult to register the noises that they make, and the assumption that they do not feel pain or distress, which they do. The field, in other words, has appeared to have boxed itself in with no “Plan B.” The question then is what other possibilities are there?

III. More Than Property

Nonhuman animals are routinely categorized as property in the law. Take, for example, the following statement by the judge deciding the fate of the (now famous) IKEA monkey, a Japanese macaque named Darwin found at the entrance to a Toronto-area IKEA store in 2012. Animal Control Services were called and they sent Darwin to a sanctuary where there were other Japanese macaques. The former owner sued the sanctuary trying to retrieve Darwin. There was extensive media on the case in which the former owner called Darwin her child and described herself as his mother. The judge, who decided Darwin belonged at the sanctuary wrote: “[T]he monkey is not a child. Callous as it may seem, the monkey is a chattel, that is a piece of property. The court may only apply property principles when considering the issues in this case.”

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180 VICTORIA BRAITHWAITE, DO FISH FEEL PAIN? (2010).
181 The case refers to an on-line chat in the Toronto Sun newspaper (December 19, 2012) in which the owner, Yasmin Nakuda, wrote Darwin was her “needy ‘child’ [...] he needs his mother.”
182 Nakuda v. Storybook Farm Sanctuary, 2013 ONSC 5761, para. 4 (Can. Ont.). See Fernandez, Already Artificial, supra note 121 at 219–21 (explaining more about the case and problems with the wild animal reasoning the judge used). See also Mary J. Shariff, A Monkey in the Middle: Reflections on Darwin the Macaque and the (R)evolution of Wild Animals in Canadian Common Law, in CANADIAN PERSPECTIVES ON ANIMALS AND THE LAW 83 (Peter Sankoff et al. eds., 2015) (arguing that the common law rule for wild
The IKEA monkey case relied on the common law status of nonhuman animals. Statutes can also classify nonhuman animals as property. For instance, jurisdictions in which aquaculture is a significant part of the economy sometimes make the property status of the fish on a fish farm explicit. Consider Newfoundland as a case in point. Its Aquaculture Act sets out that all aquatic plants or animals specified in an aquaculture license are “the exclusive personal property of, and belong to, the licensee,” as do escapees “within 100 metres of the boundary of the site.”183 Nova Scotia and New Brunswick have similar provincial statutory provisions.184 However, British Columbia does not make the fish the farm’s private property by statute and case law from the province has expressly indicated that the property status is an open question given the public right to fish and federal jurisdiction over the seas and fish located in those seas.185 There are a variety of situations in the United States, with California making farmed fish property explicitly.186 However, Maine and Oregon do not.187 Washington State strongly implies that farmed fish are property by describing them as “products” but does not expressly designate them as property.188

animals should not include animals that are not native to the environment they escape into, e.g. the North York parking lot of an Ikea store).

186 CA Fish & Game Code § 15001, 15002
187 Or. Rev. Stat. § 167.310(3), 167.335(g); 12 MRS § 6810-B.
188 Wash. Rev. Code § 15.85.020
Even statutes that expressly recognize the sentience of nonhuman animals typically retain their property status. This happened both implicitly and explicitly in Quebec in 2015 when an amendment to the Civil Code adopted the following provision: “[a]nimals are not things. They are sentient beings and have biological needs.” It was inspired by France’s recognition of nonhuman animals as “living beings endowed with sensibility.” However, the Quebec provision is located in the book of the Civil Code on “things” or property (biens), which implicitly signals that even though nonhuman animals are recognized as sentient and “not things,” they are still property. The Quebec provision also explicitly states that the recognition of sentience and biological needs does not change any other laws “concerning property [that] nonetheless apply to animals.”

A similar proviso is found in other jurisdictions that have recognized in their civil codes that nonhuman animals are “not things” (Austria and Germany) and “not objects” (Switzerland). The bold statement is followed then by a significant qualifier, suggesting that in these legal systems animals might be technically property, they are also, at the same time more than mere property. They are property plus.

This more-than-property recognition manifests itself in a variety of ways. Animal welfare statutes themselves, as ineffective as they have been at actually protecting nonhuman animals, are premised on the recognition that nonhuman animals suffer in a way that would not make sense in relationship to inanimate forms of property and so human actions with respect to the cruel treatment of nonhuman animals need to be policed by organizations like SPCAs. As Cass Sunstein puts it, “as a matter of positive law, animals have rights in the same sense that people...
do, at least under many statutes that are enforceable only by public officials.” In that sense, “[s]tatutes protecting animal welfare protect a form of animal rights.” These are what we have been calling here the “small r” rights that date to the 1820s in England and the 1860s and 1870s in the United States.

More recent trends in the United States attesting to the more-than-property status of nonhuman animals include courts awarding more than the (usually nominal) market value in civil cases in which companion animals are injured or killed, either in the form of compensatory damages that take into account the actual value of the animal to the person or punitive damages going to the way that the defendant killed or injured the animal. Another is the recognition that human individuals can provide for companion animals in wills and trusts, a practice that is currently allowed throughout the United States. Yet a third is the fact that trend-setting states (e.g. Illinois, Alaska, and California) have been using statutory tests relating to the “best for all

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194 Id. at 1335 n. 9.
195 See e.g. Elaine Hughes & Christiane Meyer, *Animal Welfare in Canada and Europe*, 6:1 ANIMAL L. 23, 26 (2000) (explaining that the earliest SPCA in Canada was in Montreal in 1869, the same year as the first Canada-wide anti-cruelty provisions, although Nova Scotia was apparently the first jurisdiction to pass an animal cruelty statute in North America in 1822, with New York following in 1828).
196 See Lauren M. Sirois, *Recovering for the Loss of a Beloved Pet: Rethinking the Legal Classification of Companion Animals and the Requirements for Loss of Companionship Tort Damages*, 163:4 U. PENN. L. REV. 1199, 1203-1204, 1212-1214 (2014-2015) (canvassing Tennessee’s “T-Bo Act” allowing for the recovery of up to $5000 in noneconomic damages for the negligent or intentional killing of a domesticated dog or cat under certain conditions and an Illinois statute allowing plaintiffs to recover emotional and punitive damages for certain acts towards their animals). See also 1214-1215 (on a Connecticut statute that does not allow for noneconomic or emotional damages but does allow for punitive damages in the situation of an intentional killing or injuring of a dog or cat, in addition to veterinary care, fair value of the animal, and burial expenses), 1215-1220 (canvassing common law cases in which sentimental value or loss of companionship have been included in actual value from New York, Illinois, Florida, and Hawaii, along with other cases from Ohio, Alaska, Texas, and Indiana in which value was limited to cost of replacement, veterinary care, training costs and loss of potential income).
197 See *PAMELA D. FRASCH, KATHERINE M. HESSLER & SONIA S. WAISMAN, ANIMAL LAW IN A NUTSHELL (2nd ed. 2016), 241-52.*
concerned” or the “well being” of the animal to decide who should have custody of a companion animal in the case of separation and divorce.198

In the absence of express statutory language, judges, while accepting that a family pet is “considered in law to be personal property” and rejecting an overt “best interests” test, have nonetheless recognized that deciding “[t]he ownership of a dog is a more complex and nuanced question than the ownership of, say, a bicycle.”199 As one judge from the Newfoundland Court of Appeal, Justice Hoegg, put it in the case of a separating common law couple who disagreed about who should keep the family dog:

Determining the ownership of family pets when families break apart can be challenging. Ownership of a dog is more complicated to decide than, say, a car, or a piece of furniture [...] it is not as though animate property, like a dog is a divisible asset. But dogs are more than just animate. People form strong emotional relationships with their dogs, and it cannot be seriously argued otherwise. Dogs are possessive of traits normally associated with people, like personality, affection, loyalty, intelligence, the ability to communicate and follow orders, and so on. As such, many people are bonded with their dogs and suffer great grief when they lose them. Accordingly, “who gets the dog?” can pose particular difficulty for separating family members and for courts who come to the assistance of family members when they cannot agree on “who gets the dog.”200

198 Alaska Stat. § 25.24.160(a)(5); Illinois, Ch. 705, § 5/501(f); Cal. Fam. Code § 2605. See “Animal Law Professors Amicus Curiae Brief” (December 26, 2018) in Justice v. Vercher, Washington County Circuit Court Case No. 18CV17601, CA No. A169933 (C.A. Oregon) (arguing that a horse named Justice is entitled to compensatory damages for injuries suffered due to criminal neglect by the defendant for his on-going medical expenses) [hereinafter Justice v. Vercher Amicus Curiae Brief]. The Brief sets out the prior three arguments for nonhuman animals as “more than property” at pp. 7-10.


200 Id. at para. 48.
Family pets are, therefore, not to be equated with other forms of personal property such as bicycles, cars, or furniture. Such an approach is woefully inadequate.\(^{201}\) First, it does not recognize that “humans have a relationship with nonhuman animals that is not based on economic value or property interests.”\(^{202}\) Justice Hoegg noted that “[p]eople form strong emotional relationships with their dogs.”\(^{203}\) Second, the people-like traits this judge identifies, “personality, affection, loyalty, intelligence, the ability to communicate and follow orders,” make it natural to think about the well-being of the nonhuman animal in any legal decision made with respect to them.\(^{204}\) “[W]ell-being is not a relevant concept for property that cannot feel.”\(^{205}\)

More evidence of the more-than-property status of nonhuman animals (at least for companion animals) include the fact that in the United States, domestic violence protective orders allow pets to be included in thirty-three states.\(^{206}\) More and more shelters are permitting those seeking refuge from domestic abuse to bring their pets with them, recognizing that victims often will not leave them behind because they are so valuable to them, despite a low monetary value as property.\(^{207}\) Connecticut has a 2016 law, “Desmond’s Law,” allowing pro-bono lawyers and volunteer law students to be appointed as advocates in cases involving the welfare or custody of a dog or cat.\(^{208}\) This recognition that “the interests and experiences of victim animals are presented to and considered by the court suggests that they have legally cognizable interests


\(^{202}\) Justice v. Vercher Amicus Curiae Brief, supra note 198, at 10.


\(^{204}\) *Id.*


\(^{206}\) *Id.* at 11.

\(^{207}\) *Id.*

\(^{208}\) *Id.* at 13.
and must be more than property.” This example shows that “[d]omestic animals are much more than property in the eyes of the law; they are beings capable of holding and exercising limited judicial rights.”

Hence, there are a myriad of ways in which nonhuman animals are treated in the law as more than mere property. Justice Eugene Fahey, a judge who penned what has turned out to be the strongest support the Nonhuman Rights Projects received in its cases involving habeas corpus applications brought on behalf of imprisoned chimpanzees in the State of New York, wrote: “[w]hile it may be arguable that a chimpanzee is not a ‘person’, there is no doubt that it is not merely a thing” Nonhuman animals are a special kind of property, special because they move (i.e. are animate), special because they are sentient and can suffer, special because their interests matter to us given our relationships with them, and special because they have a well-being separate from us and what they do for us or bring to humans, either economically or psychologically.

As we have seen, not only has the law done a terrible job at protecting nonhuman animals, much of its structure seems to have been designed to look like it protects when it definitely does not. The scope and scale of this failure is incalculable, especially with respect to farmed food animals, and even more so when one thinks about fish. However, the fact that some nonhuman animals have some rights, as limited as they are and as connected as they typically are to human interests, shows that despite what animal-use industries like fish farms and CAFOs would have

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us believe, nonhuman animals are not the same, and should not be treated the same, as ordinary inanimate personal property. As Sunstein has put it, “[i]f we understand ‘rights’ to be legal protection against harm, then many animals already do have rights.”212 Writing about the conflicting moral conceptions involved in “living with owning,” Matt Ampleman and Douglas Kysar state that “the right to a safe living space free from abuse – implicitly treats nonhuman animals as subjects that may hold interests of their own accord in our legal system.”213 Holding legal protected rights and interests makes nonhuman animals a special kind of property. As one New York court put it, “a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property.”214

Legal scholars have made a variety of suggestions regarding how to best characterize this “special” or “in between” place. David Favre has proposed “living property.”215 Carolyn Matlack suggested “sentient property.”216 Susan Hankin used “companion animal property.”217 Lauren Sirois put forward “semi-property.”218 And Kelly Wilson used the term “inimitable property,” to emphasize “the live, conscious, and unique qualities of pets that distinguish them from other forms of inanimate property.”219 As this plethora of proposals indicates, in Sunstein’s words, “the rhetoric of ownership really does misdescribe people’s conceptions of and relationships to

214 Carso v. Crawford Dog and Cat Hospital Inc., 415 N.Y.S. 2d 182, 183 (N.Y. Civ. Ct. 1979) [emphasis added].
217 See Hankin, supra note 201, at 385-87.
218 Sirois, supra note 196, at 1227.
219 Kelly Wilson, Catching the Unique Rabbit: Why Pets Should be Reclassified as Inimitable Property Under the Law, 57 CLEV. ST. L. REV. 167, 171 (2009). See also 183 (“To be inimitable is to be so rare as to surpass or defy imitation ... to be without compare”).
other living beings.” Scholars like Wilson and Sirois emphasize the point that companion animals like dogs and cats are thought about and treated like family members. Matlack and Hankin take pains to disclaim personhood for nonhuman animals, even when Matlack, for instance, allows for the possibility of including domestic companion animals that are also farm animals. The proposals generally are not meant to include food animals.

Of these proposals, “living,” is consistent, according to Favre, with eating animals and breeding them for specific purposes. It is also too literal and will not work well in situations where Indigenous ideas relating to the rights of nature are able to penetrate state legal systems and these turn out to be an effective way to protect nonhuman animals, e.g. a river or lake in which fish live. “Sentient” is too controversial, especially for a nonhuman animal like fish. “Companion animal” is too narrow in its focus. “Semi” makes it sound like the category is exactly half property and half not, or half something else. I think not enough people will know what “inimitable” means. I think “quasi” is the best word to attach to the property status of nonhuman animals, because it is both legally known or recognizable and it has the benefit of appearing to be neutral, although like “living” it might be seen as consistent with various

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221 See e.g. Wilson, supra note 219, at 186; Sirois, supra note 196, at 1202.
222 See Hankin, supra note 201, at 320 (disclaiming personhood), 385 (explaining that Matlack’s definition of “sentient property” as “any warm blooded, domesticated nonhuman animals dependent on one or more human for food, shelter, veterinary care, or compassion and typically kept in or near the household of its owner, guardian or keeper” is problematic as it might apply to domesticated farm animals living near the humans upon whom they are dependent). Matlack’s definition would appear to be in line with the Animal Legal Defense Fund’s definition of a companion animal. See Sirois, supra note 183, at 1228.
223 See e.g. Wilson, supra note 219, at 182 (being very clear that she does not mean to include food animals in her rare and “inimitable” classification). But see Favre, “Living Property,” supra note 215, at 1058 (leaving open the possibility that “[i]t is time to face up to the living conditions endured by industrial animal agricultural animals,” specifically to decide “what are acceptable living conditions for animals who will become human food”).
225 Legge and Robinson, supra note 159, use the acronym “OTH” – other-than-human – in order to capture the idea that Indigenous spirituality has been defined as a “belief in the fundamental interconnectedness of all living things” (quoted at 2).
instrumental uses even if I do not wish it to be so. Hence, Francione’s idea that “quasi-person”
describes the “conventional” animal welfare view.227 Even if quasi-hood is so consistent, it is not
the language that we currently use, or have used in the past, and for that reason it might be filled
with more protective content.228 It is certainly better than the language in which the status of
nonhuman animals is usually put (and as Francione himself usually puts it), i.e. a pure property
status. We know that this is often (perhaps more often than not) the right fit and our speech
should reflect that.

The Oxford English Dictionary describes “quasi” as being “prefixed to a noun” (think
“property” or “person”) with the sense “resembling or simulating, but not really the same as,
that properly so termed; having some but not all of the properties of a thing or substance; a kind
of.”229 Webster’s puts it in terms of “as if, as it were, in a manner, in some sense or degree.”230
Black’s Law Dictionary similarly defines “quasi” as “as if, almost as it were, analogous to” and
says it is “a term used to mark a resemblance, and supposes a difference between two objects.”231
Examples include “quasi contract,” which is not quite a contract (because it does not require a
promise and is not based on intention) but is enforceable insofar as the person who has been
unjustly enriched by the transaction might be required to disgorge the advantage they obtained
under it.232 Webster’s flags quasi as “having a given legal status only by operation or
construction of law and without any intent of the party,” as in the case of a quasi-crime, a quasi-

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227 See Francione, supra note 116 at 18-45.
228 One exception I have been able to find is Nancy Perry, who, on the occasion of the celebration of a decade of animal law at the
Lewis and Clark Law School in the early 2000s, made a passing reference to “the quasi-property, quasi-being status of animals in the
230 Webster’s Third New International Dictionary of the English Language Unabridged (1981), sub verso “1. quasi.”
232 Id. sub verso “quasi contract.” This is now thought about as a third area of private law – unjust enrichment, liberated or
separated from contract. See Deglman v. Guarnaty Trust Co. of Canada and Constantineau, (1954), S.C.R. 725, 734 (Can.)) (where
the Supreme Court of Canada narrowly held that the right to recover on quasi-contract or restitution was based “not on the contract,
but on an obligation imposed by law”).
trustee and a quasi-right.\textsuperscript{233} There are many other quasi legal concepts such as “quasi-admission” (e.g. an extra-judicial utterance that might create an inconsistency with admitted evidence), or “quasi-estoppel” (in situations of legitimate reliance, a person is estopped from asserting a claim inconsistent with a previous claim).\textsuperscript{234} Black’s lists no less than thirty-one other legal concepts that use of “quasi,” including quasi-corporation, quasi-delict, quasi-trustee, quasi-possession, quasi-usufruct, and quasi-easement. Webster’s describes the National Labor Relations Board as a “quasi-judicial” body and the Interstate Commerce Commission as a “quasi-legislative” one.\textsuperscript{235} These administrative bodies have some but not all of the powers of courts or legislatures, but the powers they do have resemble those of courts and legislatures. They are a “kind of.” The famous property case,\textit{ INS v. AP}, saw the United States Supreme Court using the idea of “quasi-property” to characterize the valuable interest one news organization had in the news, intangible yet deserving protection.\textsuperscript{236} The Supreme Court of Canada has recognized since the 1970s that human rights statutes, privacy and official languages legislation, and other bill of rights statutes have a quasi-constitutional status.\textsuperscript{237}

Indeed, in many ways “quasi-hood” is \textit{exactly} what lawyers would resort to in order to try and capture, or perhaps to impliedly admit that it is impossible to capture, a situation (or in the case of nonhuman animals, entities) that exists, legally speaking, between two (overly rigid) legal categories: persons and property. Quasi-hood has the advantage of describing what already arguably exists. And it has the potential to expand to include more species than ever have a hope of making it into the category of “persons,” which it is difficult to imagine going much beyond primates, elephants, and orcas, and perhaps not even for them. “Quasi” might still be pushing it

\begin{footnotesize}
\item[233] Webster’s, supra note 230 sub verso “2. quasi.”
\item[234] Black’s, supra note 231 sub verso “quasi admission,” and “quasi estoppel.”
\item[235] Webster’s, supra note 230 sub verso “quasi-judicial” and “quasi-legislative.”
\end{footnotesize}
for fish, who often lack even basic welfare “small r” rights; however, “person” seems very far away in settler-colonial states that do not incorporate Indigenous law and teachings. Quasi-hood status will not result in all nonhuman animals having the same rights and protections. It is meant to be flexible as between species and can even operate on a sliding scale in relationship to a particular species over time, which might be thought to be closer to one end or the other over time and in changing circumstances (e.g. as we learn more about say octopuses from a film like *My Octopus Teacher*). Personhood is probably not going to work for the animals that most need our protection, food animals such as cows, chickens, goats, pigs, and fish. It seems likely that something else will be needed for them. Quasi-hood might be able to do it and be helpful in terms of thinking of them as something other or more than mere property.

I must note that there is nothing inherently bad or inferior about the term “quasi.” It is valuable for an obligation to make it into the category of “quasi-contract” when it is not based on an intentional promise or there is some other problem with finding it constitutes a valid contract. Members of the National Labour Relations Board would not take offence at being called “quasi-judicial” officers. This is not the same as referring to them as pseudo, false, or lesser officials. They are different from but similar to judges. Animals as quasi-property/quasi-persons can be descriptive but not derogatory in much the same way. In that sense, quasi-hood

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238 But see Christopher Bear & Ally Eden, *Thinking Like a Fish? Engaging with Nonhuman Difference Through Recreational Fishing*, 29 Environ. & Planning D: Soc. & Space 336 (2011) (a surprising study of how anglers see fish as individuals, can overcome ideas about their presumptively “alien” world, and even see fish as persons and endeavor to learn to think so much like a fish that they “become-fish”). This sense of fish personhood sounds a lot like getting inside the mind of a fish, of course, in this context, in order to better hunt and catch them. What it does have going for it, however, is a recognition of the nonhuman animality of fish, respect for and knowledge of the way in which they are not human-like. For a non-hunting perspective on the inner-world and inner-minds of fish, see Jonathan P. Balcombe, *What a Fish Knows: The Inner Lives of Our Underwater Cousins* (2016).

239 *My Octopus Teacher*, dirs. Pippa Ehrlich & James Reed (2020) (about one man’s relationship with a wild Octopus and how she saved him and gave him purpose in life).

240 This is not to say that it is impossible to craft a charismatic depiction of these animals in fiction, nonfiction, and film. See e.g. Perumal Murugan, *The Story of a Goat* (2016, English trans. by N. Kalyan Raman, 2018) (for an powerful story of a goat named Poonachi); Laline Paull, *The Bees* (2014) (for the incredible life story of a worker bee named Flora). See also *Gunda*, dir. Victor Kossakovsky (2021) (a mother pig who is impossible to forget).
for nonhuman animals is neutral as between a positive and negative connotation, at least for lawyers.

Although Wise and Francione do not want to admit it, there are clearly more than two categories to choose from when it comes to the legal status of nonhuman animals. Maneesha Deckha, reacting against the anthropocentrism of “person,” has proposed the third category “being.” “Quasi” is a different third way. However, it needs to go beyond property in order for it to be able to significantly move the dial on this debate in a pro-animal direction. Hence, “quasi” must be attached not only to “property” but also to “person” or “being.”

I prefer “person” to “being” in order to make it clear that the status includes rights. Also while “person” might sound unforgiveably anthropocentric to some ears, it carries with it the very legally powerful empty-vessel sense of personhood that I believe Wise is correct to insist upon. “Being” is a useful term to use, leaving open as it does the possibility of protections for other entities beyond the sentient ones. It also does not trigger the outrage that “person” for a nonhuman animal will. I also think it is a good word to use in a legislative context such as Québec’s Civil Code provision, specifically its language that animals are “sentient beings and have biological needs.” However, as a common law category, it lacks the history and power of “person.” Yet, as we have seen, “person” pushes the outrage button. “Quasi” while perhaps sounding like a diminishment to some if it is attached to “person” does leave room for the nonhuman “animality” of most animals that most need protection. The preservation of this space for nonhuman animals is the crucial thing that I take from Deckha’s argument and the core of her opposition to the anthropocentrism of “person.”

Deckha objects to the personhood approach because even if some nonhuman animals can make it in, by proving that they are “human-enough,” e.g. chimpanzees, elephants, or cetaceans, this route “inevitably highlights the differences and putative inferiority of the excluded animals ... as well as the included animals[’] .. residual embodied non-humanness.”\(^{243}\) In other words, they are included but not on their own terms. This strategy intensifies existing hierarchies.\(^{244}\) In Cary Wolf’s terms, the approach might work for the “humanized animals” but not those who are at the bottom, the “animalized animals.”\(^{245}\) Deckha writes: “And it is the latter category into which most animals (consider farmed animals and trawled fish) are placed.”\(^{246}\) She continues, “[e]fforts to personify some animals will thus necessarily accent the thingness of other beings ... pushing them deeper into the realm of property/thing.”\(^{247}\) I take from this argument that the favored category for the legal status of nonhuman animals must make it at least plausible that the most vulnerable nonhuman animals, the least humanized ones like fish, can make it in. This is something that a quasi-hood status permits. Indeed, I propose it because I share Deckha’s sense that “person” is not going to work for most nonhuman animals that most need protecting.

The quasi-hood argument in a nutshell is that the interests (and “small r” rights) that nonhuman animals already have not only prove that they have a special or quasi-property status, which must be recognized, but those rights and interests mean that they also possess a personhood that is of a “quasi” sort.\(^{248}\) Why? Because only legal persons have legally protected rights and interests and so nonhuman animals must be legal persons of some kind. If sentience, the ability to possess a well being, and the like can modify the property status of a nonhuman animal, there is no logical reason why such features cannot also create a modified personhood.

\(^{243}\) Deckha, supra note 228, at 88, 89.
\(^{244}\) Id. at 93.
\(^{245}\) Id.
\(^{246}\) Id.
\(^{247}\) Id. at 94.
\(^{248}\) See Fernandez, Not Quite Property, Not Quite Persons, supra note 124, at 155.
status. Indeed, what else would the holding of rights and interests amount to if not some kind of legal personhood?

The acquittal of Save Movement activist Anita Krajnc, founder of Toronto Pig Save, for giving water to a thirsty pig in a truck full of pigs on their way to slaughter, probably provides a realistic snapshot of where things are at the current time. The judge, in dismissing the charge of mischief and interference with private property against Krajnc, rejected expert witness testimony that pigs were persons.249 Noting that “Dr. Lori Marino was allowed to testify as an expert in neuroscience and animal behavior,” the judge summarized the testimony as consisting of the fact that pigs like to roam and graze, will form social groups, engage in very complex communication, have different personality traits and interact with each other in very interesting and complex ways, have similar intelligence levels and emotional and psychological traits as dogs, empathize, experience joy and happiness, are sentient and capable of feeling good and bad depending on the circumstances, and, suffer, physically and psychologically in a factory farm setting.250 He rejected her conclusion that pigs were persons under common law because they have “practical autonomy” with “the capacity to be self-aware and ... the ability to understand that they have a life that they are going to be leading.”251 The personhood argument was not made by Krajnc’s lawyers and as such, this whole part of the decision, eleven paragraphs in total, was unnecessary.252 However, this judge went out of his way to say that “by law in Canada, pigs

250 Id. at para. 30.
251 Id. at para. 31.
252 The judge wrote, id. at para. 28, that “[c]ounsel for Ms. Kranjnc argued that the pigs were not property. They are in fact persons.” My understanding is that the testimony was entered but the explicit argument was not made. This is similar to the approach taken in the IKEA monkey case with the “best interests” test, which also was not explicitly argued. It received a similar reaction, no, the nonhuman animal is property not a person.
are not persons and they are property.”

Marino has spoken with the Nonhuman Rights Project about “the giggle factor” involved in taking up the cause of nonhuman animal personhood. This, it seems to me, has to do with respect/disrespect and the field of animal law, as it has come to maturity in the United States and other jurisdictions in the last twenty-five to thirty years. Yet the outrage factor goes well beyond giggles. Its speciesism and human exceptionalism is connected to a long history of such outrage, which can take on a surprisingly forceful tone and content. There are many examples that might be mentioned in this respect. Consider the following one.

The “nature fakers” controversy was a debate that raged in the United States between 1903 and 1907. This event became famous in large part because sitting President, naturalist, and hunting enthusiast, Theodore Roosevelt publicly supported the criticisms eminent naturalist John Burroughs made against those who wrote animal stories from the point of view of the nonhuman animals, specifically for being inaccurate and too anthropocentric in their stories. Probably the best practitioner of the genre, a renowned Canadian poet named Charles G.D. Roberts, described what the authors of the stories were trying to do in terms of bringing the reader “face to face with personality, where we were blindly wont to predicate mere instinct and automatism.” Roosevelt himself apparently conceded that animal behavior was not all

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253 Id. at para. 35.
254 Id. at para. 37.
255 See Whale Sanctuary Project, Judges Say the Darndest Things! (a conversation between Dr. Lori Marino of the Kimmela Center for Animal Advocacy, Kevin Schneider of the Nonhuman Rights Project, and philosopher Robert Jones) (April 19, 2021), https://www.youtube.com/watch?v=Bk2wo-L_sjQ.
256 See Fernandez, Not Quite Property, Not Quite Persons, supra note 124, at 164, 213 (characterizing the outrage factor as “‘What, persons like us!’ – driven by religious or cultural beliefs about human superiority to all other species and a long history of animal exploitation as normal”).
However, the claims that made Burroughs go mad related to things like nonhuman animals described as teaching their young or really anything that ascribed to an animal a conscious intention. The concern was that school children and other members of the public would be led into confusing science and sentimentality. One historian of the controversy, Ralph Lutts, wrote: “Most people must have found the whole affair a bit strange – a bunch of grown men, prominent and respectable men at that, arguing over whether porcupines roll downhill or foxes ride across a field on a sheep’s back.” Yet rage on the controversy did (mostly against another writer, an American who entered publicly into the fray, William J. Long). Roosevelt risked charges of impropriety for wading into a social/cultural issue so publicly while he was the sitting President. He obviously cared deeply about the issue (Long accused him of caring because the animals being anthropomorphized included the ones that Roosevelt liked to shoot and he did not want them to be described in human-like terms).

Yes, this controversy took place over a hundred years ago; but the ferocity with which people react to any humanizing of nonhuman animals is alive and well. Why? Because humanizing nonhuman animals problematizes much of what people want to do to them, e.g. hunt them, eat them, bring their children to see them in captivity for entertainment. Most of this use of nonhuman animals is convenience rather than necessity. However, people deeply dislike being inconvenienced or hearing anything that will make them think there might be something wrong with the way that they eat or otherwise engage in the world. Religious and cultural beliefs about “the great chain of being” and the place of humans at its apex are very deep. Hence, resistance to personhood is not about refusing to recognize that nonhuman animals can be

259 LUTTS, supra note 244, at 67 (Roosevelt believed there was “unconscious” teaching of offspring).
260 Id. at 40-41.
261 Id. at 66.
262 See Angela Fernandez, Anthropomorphizing Animals: Foxhunting Stories and the Nature Faker Controversy forthcoming in SOCIETY AND ANIMALS (arguing that anthropomorphization of the fox was considered to be just fine in stories that communicated a pro-hunting perspective, e.g. a fox is too sly or cunning to feel sorry for or he participates willingly and enthusiastically in a hunt).
vessels or “entities” with rights and interests necessarily; it is about the risk of conflating human and nonhuman animal persons, especially food animals, which would seem to imply that those who continue to eat meat even after learning about how certain nonhuman animals are worthy of personhood would be not just the violent ideology of carnism (the choice to eat meat when that is not necessary to do so) but even a form of cannibalism.263

If rivers have made it into the category of legal person, surely food animals also could. Consider the possibility however that rivers have made it in part because, like the traditional categories of legal persons such as corporations, there is nothing human-like about them. Living breathing beings (and this might also go for trees and plants as well as nonhuman animals) have to overcome the (somewhat counter-intuitive) disadvantage that their living status carries, namely, that personhood is tied in people’s minds (including the minds of lawyers, judges, legislators and members of the public) to human beings, who also live and breathe. As we saw above, water, plants, wind, animals are all thought of as living beings in many Indigenous knowledge systems. However, in the Western European settler society world-view, an entity like a river, while it can be acknowledged as important and having rights and interests that ought to be legally protected, would not be thought of as living. Hence, in that world-view, making a river a “legal person” does not threaten those who think that humans as a species are being demoted by being compared to a river.264 Personhood for nonhuman animals, however, smacks directly up against that speciesism.265 Probably forests and rivers would be better protected if we


264 See Fernandez,Already Artificial, supra note 121, at 243 (quoting from the NonHuman Rights Project hearing for Hercules and Leo, when the Assistant State Attorney General, Christopher Coulston said “[I worry about the diminishment of these rights in some way if we expand them beyond human beings”), 249 (again Coulston referring to ships, corporations, and a river in New Zealand as nonhuman exceptions assigned legal personhood that are nonetheless related to and advance human interests: “There is nothing about the river [in New Zealand] itself that entitled it to rights”).

265 Martha Nussbaum wrote in a review of Wise’s Rattling the Cage that she wants to be able to say that humans are special. Martha C. Nussbaum,Animal Rights: The Need for a Theoretical Basis, 114 HARV. L. REV. 1506, 1521 (2001). Quoted in id. at 240.
thought of them as kin, relatives, and teachers.²⁶⁶ This might also lead to better protection of the animals living in them and even animals more generally in jurisdictions that acknowledge rights to nature.²⁶⁷ However, there is what Stilt calls “a limit to the analogy between nature and nonhuman animals,” namely, that personification of the river is done so that humans can use the river, while “[t]he rights that advocates seek for animals are far more robust and categorically reject that the inherent purpose of an animal is to serve human interests and uses.”²⁶⁸ Hence, “[r]ights of nature approaches are instructive to the cause of animal rights, intellectually and practically [but] [t]hey do not offer a model to be copied wholesale.”²⁶⁹ The limited point to note here is that anthropomorphizing the rivers or other bodies of water does not seem to trigger the negative reaction that often emerges in discussions about nonhuman animals, or at the very least skepticism about the appropriateness of using human concepts to characterize the behavior of nonhuman animals.²⁷⁰

**Personhood, A Splintered Concept**

Personhood understood as the range of rights and correlative duties that propertied white European human males possess is not the personhood that those who might be loosely thought of as the subaltern have been able to exercise. Slaves were property with limited rights. Married women and children, were never property at common law; however, the law permitted them to be treated as if they were property insofar as they came under severe limitations in terms of the

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²⁶⁷ See Stilt, *supra* note 166, at 284.
²⁶⁸ *Id.*
²⁶⁹ *Id.* at 285.
²⁷⁰ NYU Department of Environmental Studies, *Seeing Octopuses* (February 1, 2021) (a Zoom webinar including one of the directors of *My Octopus Teacher*, Pippa Ehrlich, and the chat included many questions from the audience members focused on issues around anthropomorphism – was the octopus, for example, really “playing” with the fish in the film or doing something else. It seemed like a miniature version of the “Nature Fakers” controversy all over again, minus the sitting President).
freedoms they were able to exercise. Married women, for instance, could not own separate property or make certain kinds of contracts as long as they were married or under “couverte.” Slaves, married women, and children, the quintessential categories of “nonpersons” were all persons, not just in the sense of being human beings, but also in the sense of holding some legal rights, as truncated as they were. Both slaves and married women had enough “personhood” to be liable for their own crimes. Roman slaves could own property at the discretion of their masters. Married women could act for their husbands in certain kinds of transactions (e.g. issuing receipts), they could sue or be sued with him, and they could be a guardian to minor children. None of this was full legal personhood. It was personhood of a splintered or “quasi” sort.

Visa Kurki has suggested that the kind of personhood held historically by “nonpersons” shows that personhood is already a kind of “cluster” concept, comprised of distinct “incidents” that can configure or reconfigure in different ways, creating different kinds of legal persons. Think of corporations that can own property and be sued but cannot vote. Entities “can simultaneously be a legal person for some purposes and a legal nonperson for others.” Kurki writes, “[r]ather than being a black-and-white affair, legal personhood comes in shades of grey – it is a cluster property ... legal personhood consists of divisible but interconnected incidents of legal personhood.” A quasi-personhood idea can capture exactly this shade of grey.

271 See VISA A.J. KURKI, A THEORY OF LEGAL PERSONHOOD (2019), 118 (labeling this “purely onerous legal personhood”). See Review Essay of this book, Angela Fernandez, The “Bundle” or “Cluster” Theory of Legal Personhood in its Active and Passive “Incidents”: What Might it Mean for Nonhuman Animals? Forthcoming J. ANIM. ETHICS (pointing out that the variety of legal personhood was not purely onerous, as some benefits and powers were involved even if they were ones that were there to benefit husbands/masters).
272 KURKI, supra note 271, at 103. The property arrangement was known as peculium. See also 106, 185. What Roman slaves did not have was caput, or what we would now call standing. See 32-33.
274 KURKI, supra note 271, at 87.
275 Id. at viii.
Married women no longer operate under the disabilities of coverture and slavery is no longer legal, even it continues to exist in *de facto* form in a variety of situations, e.g. when people are trafficked, their papers are confiscated, or they are effectively unable to escape those to whom they are indebted. As with children or adult humans with permanent mental disability, the incidents of legal personhood that are most relevant will be claim-rights to be protected from harm in tort and criminal law, as well as passive rights to property, which can be owned but not managed.276 These individuals need the help of a guardian or representation to engage in the more active legal acts, such as contracting or suing in court or defending themselves against crimes. We can see that it is perfectly possible for individuals or groups of them to have some incidents of legal personhood without having others, due to either a temporary condition (in the case of a child) or a permanent one (in the case of a mentally disabled adult). Kurki’s bundle of rights theory helps us see how personhood is already a splintered concept, not a matter of black and white, and it would not be unprecedented to acknowledge this fractured sort of legal personhood already exists and would be appropriate precedent for the legal personality or quasi-personhood of nonhuman animals.

Nonetheless, there is something disquieting about the way in which animal rights scholars and advocates (and indeed philosophers generally) invoke examples of “the slave” and “women,” especially when they are neither female nor racialized. We should probably ask why these two examples come tripping off the tongue so quickly, and often carelessly. Kurki, for example, speaks of “women” when he really means “married women,” as married women were the only ones subject to coverture; single women did not suffer from those formal legal disabilities, i.e. it was upon marriage that a women lost her separate legal identity.277 I was surprised that no

276 *See e.g.* KAREN BRADSHAW, WILDLIFE AS PROPERTY OWNERS: A NEW CONCEPTION OF ANIMAL RIGHTS (2020).
277 *See e.g.* Kurki, *supra* note 271, at 118, 69-70.
editor or reviewer of that text caught this error. Ngaire Naffine has argued in a review of the book that its analysis of the concept of the person “tends to assume a male subject.” I think the reason why both examples come so readily to mind is precisely because they continue to resonate in the myriad subtle forms of sexisms and racisms in our present-day institutions and cultural settings, which is exactly the reason they should be handled with care. They leverage the pain of others. And in doing so “erase the specificity – and the seriousness of each rights struggle.”

Even if sex and race discriminations are not as overt or visible as they once were, they certainly still exist. As Rodrigues puts it in terms of racism in the U.S., it now “manifest[s] structurally and more invisibly.” The present-day manifestations help us understand what was so problematic about the PETA campaigns Rodrigues analyzes, specifically “Are Animals the New Slaves?” and “Glass Walls” shown respectively at New York’s Natural History Museum and a Washington D.C. shopping mall. The exhibits showed images of animal cruelty juxtaposed with images of USA antebellum black slavery. For example, there was a photo of a black man being lynched in Indiana, in conjunction with the image of a cow hanging by its feet while being slaughtered. Others photos showed black people being bloodied and burned, juxtaposed with photos that depicted similar treatment of domesticated animals. There were also images linking

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278 See Fernandez, Review, supra note 258.
279 See Ngaire Naffine, Hidden Presuppositions and the Problem of Paradigm Persons [Book Review of] Visa A.J. Kurki’s “A Theory of Legal Personhood” 44 J. CONSTIT. THEORY & PHILOS. OF LAW (2021), HTTPS://JOURNALS.OPENEDITION.ORG/REVUS/6953 (reading Kurki as taking women and their “awkward legal history out of the investigation” and objecting to this because the “personhood of men” has “always, in an important sense, taken its positive meaning from the non-personhood of women” and criticizing the inclusive of disembodied foetuses without talking about the women who carry them). Thank you to University of Toronto LL.M. student Michael Gold for bringing this review to my attention.
280 I am indebted to a student in my Fall 2021 animal law class, Karlie Nordstrom, for putting the point in this way.
281 Harris, supra note 69, at 25 (“The Holocaust is not like anything else”).
282 Rodrigues, supra note 68, at 76.
283 Id. at 74.
the Civil Rights movement with the animal liberation movement. Quotes from 1960s’ USA Civil Rights leaders like Martin Luther King Jr could be found on the panels.\textsuperscript{284}

Rodrigues explains that the problems with these exhibits were manifold. The images of slavery used, because they were from the past, communicated the message that slavery and its effects were a thing of the past, making it seem like they are not still “current forms of anti-blackness” and that, moreover, “black injustice had been overcome” (the invocation of Martin Luther King Jr).\textsuperscript{285}

Sending that triumphant message about the current condition of black people in the United States had at least a double effect. First, it assumed a white gaze or perspective on the piece, the only one from which it could be plausibly maintained that these problems were a thing of the past, by giving “whites the possibility of inhabiting a social and psychological space free from the guilt of participating in current black subjugation.” A kind of “whew, thank goodness, that is over,” without thinking about the ways in which their lives still contribute to current inequalities. As Harris put it, “when new rights claims are routinely analogized to African American rights claims, and it is invariably suggested that if the treatment being protested were being visited upon black people, it would never be tolerated. What’s wrong with such assumptions is their implicit assumption that the African American struggle for rights is over, and that it was successful.”\textsuperscript{286}

Second, that gaze co-opts non-white viewers into also adopting that perspective, effectively forcing them to internalize negative stereotypes of black people, as more animalized than white people, for example.\textsuperscript{287} “This universalization of white experience simultaneously

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\begin{itemize}
\item \textsuperscript{284} Id. at 74-75.
\item \textsuperscript{285} Id. at 75. See also Kim, Dangerous Crossings, supra note 15 at 276, making a related point about NFL football player Michael Vick and his prosecution for dog fighting, namely that those insisting that the case had nothing to do with race were “furthering a conservative discourse that proclaims racism to be over with.”
\item \textsuperscript{286} Harris, supra note 69, at 25.
\item \textsuperscript{287} Rodrigues, supra note 68, at 78.
\end{itemize}
\end{footnotesize}
reifies white experience in the public realm while disregarding black experience, feelings and emotions by either considering them the same as white or considering them unimportant and, therefore, absent.”\textsuperscript{288} It operates as a denial that “black people are still bodied, animalized, objects of fear, as well as over-surveilled and over-analyzed.”\textsuperscript{289} To summarize then, the two main problems with comparing animal issues to slavery is that (i) it makes human slavery seem like a problem of the past, when in reality it is on-going; and (ii) it contributes to the animalization of black and brown bodies.

The reason why Marjorie Spiegel’s \textit{The Dreaded Comparison} is so powerful is that there is a real truth to some of the parallels between black slavery and nonhuman animal slavery.\textsuperscript{290} As Rodrigues notes in relation to this powerful little book, “there is substantial evidence that the ways in which black people suffered oppression during antebellum slavery share relevant similarities with the ways that animals suffer in laboratories and farms.”\textsuperscript{291} The problem is because the effects of black slavery are still so on-going this is not a “truth” that can be thrown about willy nilly, without sensitivity to context and effect. Wise learned that the hard way in his litigation for the chimpanzee named Tommy. In a scene that can be watched in the documentary \textit{Unlocking the Cage}, Wise is firmly told by one of the judges to move off his slavery comparison argument. Presiding Justice Karen K. Peters tells Wise: “I have to tell you. I keep having a difficult time with your using slavery as an analogy to this situation. I just have to tell you.”\textsuperscript{292} And when he persists, she tells him, “My suggestion is you move in a different direction.”\textsuperscript{293} This issue is dealt with at two other points in the film. First, in a media scrum after Tommy’s hearing

\textsuperscript{288} Id. at 79.
\textsuperscript{289} Id. at 78.
\textsuperscript{290} SPIEGEL, \textit{supra} note 176.
\textsuperscript{291} Rodrigues, \textit{supra} note 68, at 73.
\textsuperscript{293} Id. at 1:01:46. Both quotes are reproduced in Fernandez, \textit{Already Artificial, supra} note 121, at 234-35, along with an image from the film of Judge Peters.
and Wise is asked (by a journalist in an outraged tone) if he compared Tommy’s condition to slavery. Second, when a skeptical African-American talk show host interviews Wise and brings up the 3/5s compromise and the history of slavery in the United States.

Much of Wise’s work was built on the slavery comparison. Indeed, the habeas corpus idea comes in large part from his immersion in the history of the famous British decision Somerset v. Stewart (1772), a case in which the writ was used successfully to free a slave, James Somerset, leading Lord Mansfield to declare that the institution of slavery would come to an end in England “though the heavens may fall.” As Wise put it, when I interviewed him in 2018, “I wrote the book to learn how to prosecute civil cases for nonhuman animals.” The slavery idea appears in writing Wise published as far back as the 1980s. It becomes a consistent theme in his law review articles in the 1990s. It also appears in Rattling the Cage in 2000. Yet, the backlash from the chimpanzee cases appears to have had an effect. Starting in 2017, the Nonhuman Rights Project shifted from chimpanzees to elephants. When I asked him about this, Wise emphasized that this was a response to feedback that the comparison between chimpanzees and slaves was racist. “No one has compared African Americans to elephants,’ said Wise in our interview. ‘And people have a soft spot for elephants, who like chimpanzees and...
orcas have extraordinarily complex social and emotional lives.”302 It is not clear, however, that problems with the analogy can be solved by merely switching animals.

**Conclusion**

Changing the legal status of animals from property to quasi-property/quasi-person is something that cannot, by itself, do much to improve the situation for nonhuman animals. Indeed, without significant attitudinal change in the way humans see the permissible range of uses of nonhuman animals, it probably does not matter much whether they are legally “persons,” “property,” “beings,” “quasi-persons,” or “quasi-property.” Quasi-hood really does not push much at the borders of what is already true for nonhuman animals, i.e. they are a special sentient species of property with some limited rights. This is no animal revolution. However, the concept does have the possibility of continuing to fit as social and legal attitudes change and become more pro-animal, as different species of nonhumans have their property status downgraded (as has taken place and is certainly in the middle of happening for companion animals) and their incidents of personhood improved or augmented (as they obtain more and better rights as seems to be happening for wild animals in captivity). We do not know how this is going to look. And that is the point, what we do know is that the legal concept needs to be one that offers the possibility of housing these positive developments. The other option, to focus on and emphasis the negative and overly simplistic (i.e. if animals are not persons, they are property), is unnecessarily limiting and overly pessimistic about the role law can play in nurturing along at least a more liberatory situation for nonhuman animals.

Francione, for instance, has written that he thinks a designation of “quasi-person” or “things plus” will not work because “the moral universe is limited to only two kinds of beings:

302 Id. at 206.
persons and things.” Yet why, one wants to ask, ought we limit the moral universe in that way? The legal universe is not so limited. In fact, it is almost infinitely flexible, as lawyers realize. What Francione writes strikes me as analogous to what we used to say about gender and sexual orientation, there are only two options: “There is no third choice.” That is only true if we say it is. And we know that there are nonbinary and agendered people, who do not identify as either male or female (cisgender or trans), as well as demi-girl and demi-boy, gender fluid etc. There are not just straight and gay people but a whole range of sexual orientations from asexual, aromantic, bisexual, polyanimal, pansexual etc. In other words, there are expressions existing along a spectrum or range of identifications. As Anna Pippus has put it, “welfare and rights, personhood and property exist on a spectra rather than as strict binaries ... Being property and being persons aren’t mutually exclusive.” If seeing them as a mutually exclusive, black and white, either/or, leads to an undesirable result, as forcing the choice between property and persons would seem to do for nonhuman animals, then why do it? It feels like a trap.

In my interview with Wise, he said that he agrees with Pippus, stating that “[i]f a person is simply an entity that has the capacity for legal rights, it would be theoretically consistent for a nonhuman animal person to have say the right to bodily integrity but not the right not to be considered property, though the NHRP would hammer away at that property status.” From the perspective of the purely moral space Francione prefers, “quasi” and “spectrum” are bastardized concepts. Francione wrote, for example, in response to the idea of “quasi-persons” or “things plus,” animals “are either persons, beings to whom the principle of equal consideration applies and who possess morally significant interests in not suffering, or things,

303 Francione, Animals – Property or Persons? supra note 120, at 131.
304 Id.
305 See Leah Edgerton, What is the Most Effective Way to Advocate Legally for Nonhuman Animals, ANIMAL CHARITY EVALUATORS, (August 29, 2016), animalcharityevaluators.org/blog/what-is-the-most-effective-way-to-advocate-legally-for-nonhuman-animals/.
beings to whom the principle of equal consideration does not apply and whose interests may be ignored if it benefits us. There is no third choice.”307 Yet from a more pragmatic legal stance, which I take it Wise is more open to, one might prefer the grey space of “quasi” or the “spectrum.”308 Yes, incrementalism is consistent with status quo welfarism; however, incrementalism allows at least for the possibility of change.

Tomasz Pietrzykowski argues that “the situation in which a large class of entities is no longer regarded as mere objects but at the same time is not allowed into the category of subjects is unsustainable in the long run. It makes it necessary to revise either the approach to personhood, or the conceptual division between persons and things as such.”309 We are living at time in which both things are happening for nonhuman animals. As the plethora of proposals relating to the specialness of nonhuman animals as a form of property show, they are no longer being thought about “as mere objects.” Certain of the charismatic species are knocking at the door of subject-hood. Courts and legislatures are generally refusing to let them in on those terms. For example the law in Canada prohibiting the acquiring of any new whales and dolphins in captivity does not say anything about their status as either property or persons.310 The Jane Goodall Bill for primates and elephants takes a similar approach.311 Protection that has been recently extended to wild sharks and a federal ban on shark finning also has nothing to do with property, sharks as wild animals are not owned by anyone unless and until they are reduced to a capture from which they cannot escape, as Pierson holds.312 In other words, the

307 Francione, Animals – Property or Persons?, supra note 120, at 132.
308 Fernandez, Not Quite Property, Not Quite Persons, supra note 124, at 218 n. 269 (providing the example of a Canadian Supreme Court of Canada case Transport North American Express Inc. v. New Solutions Financial Corp (2004), 1 S.C.R. 249, paras 6, 40 (Can.)).
310 Ending the Captivity of Whales and Dolphins Act, SC 2019, c. 11 (Can.).
311 Bill S-218 Jane Goodall Act, 2020, 2nd session 43rd Parliament (Can.).
312 Ban on Shark Fin Importation and Exportation Act, R.S., c. F-14 (Can.).
property/persons distinction need not, and, as these examples arguably show, should not, frame every debate and initiative to protect nonhuman animals. It is, however, important to ask ourselves what these workarounds suggest. First, the nonhuman animals in question are being thought of as “more than” property. They are also being protected from captivity (and painful death in the case of the sharks) because they are seen as having interests separate from human interests, say in entertainment (or a specialized food, specifically shark fin soup). This makes the nonhuman animals something more than objects but not full legal persons. They are in between the two categories in the “kind of” quasi space described here. That is something not nothing. Cetaceans, primates and elephants will benefit from having this augmented status even if it is not called either moral or legal personhood. And, indeed, refraining from calling them “persons,” allows us to resist the temptation to hold them in high regard purely for the human-like intelligence they display.

The truth is, we probably are not “smart enough to know how smart animals are.”\textsuperscript{313} Hence, an initiative like having octopus, incredibly intelligent and amazing animals we do not understand well at all, awarded the status of “honorary vertebrate,” is a bit rich.\textsuperscript{314} We know enough to see that there is something incredible happening with these nonhuman animals.\textsuperscript{315} Our way of acknowledging that is to provide a designation that puts them at the level we think of as the best, namely, the level of vertebrates. This is erasing the animality of octopuses in the way that Deckha warned against. Yet scientists are only beginning to understand how an octopus can, for instance, carry consciousness in one of their tentacles operating separately from the rest

\textsuperscript{313} Marceau, supra note 91, at 938-39 (quoting Frans De Waal, \textit{Are We Smart Enough to Know How Smart Animals Are?} (2016)).

\textsuperscript{314} See Boyd, supra note 157, at 5-6 (explaining that octopus became an “honorary vertebrate” under British law governing the licensing of animal experiments in 1993).

\textsuperscript{315} See Peter Godfrey-Smith, \textit{Other Minds: The Octopus, the Sea, and the Origins of Consciousness} (2016).
of their body when the tentacle is separated from the rest of their body by a wall.\textsuperscript{316} This is incredible and not at all human-like. And is that not the point? Nonhuman animals should not have to present like a human in order to be legally protected. Quasi-hood is a lawyerly way of acknowledging this. This entity is more than property and is eminently deserving of legal rights.

David Boyd notes that the European Union placed tight restrictions on experiments involving octopuses in 2010 because “there is scientific evidence of their ability to experience pain, suffering, distress and lasting harm.”\textsuperscript{317} Sentience, while operating as an effective short-hand for many things, does not begin to capture what we are talking about in relationship to a nonhuman animal like this, and of course many if not all others. Quasi-hood certainly does not do any particular species justice either, let alone (often remarkable) individuals of a given species. However, if, as a blood-less legal tool, quasi-hood can be used to get to a place where the scientists can tell us what is going on, especially with amazing aquatic animals with whom we are very unfamiliar, that would be of great benefit.\textsuperscript{318}

The campaign to raise awareness about octopus is very smart, because the commercial farming industry is still trying to figure out how to feed them because they must eat live food (they will not eat pellets) and as incredibly solitary animals they cannibalize each other when kept in close quarters (so they cannot be kept in a big common tank or net pen like other farmed aquatic animals such as salmon). Jennifer Jacquet has explained that these issues are viewed by the industry as technical problems and it is likely only a matter of time before they will find a way to solve them.\textsuperscript{319} However, a ban on eating octopus, or even just discouraging restaurants

\textsuperscript{316} Description of octopus experiment given by Becca Franks, \textit{Commercial Octopus Farming? Ethical, Legal, and Environmental Considerations}, New York City Bar webinar (July 7, 2021).
\textsuperscript{317} \textsc{Boyd, supra note 157, at 6.}
\textsuperscript{319} \textit{Commercial Octopus Farming? supra note 316.} The group Compassion in World Farming states that there is only one active octopus farm currently operating in the United States. It is located in Hawaii and operates as a research facility and tourist attraction.
from offering it (do many people cook calamari at home?) would both help conserve the lives of wild octopus (yes, calamari, if you are eating it, will be the wild animal) and also stop the commercial industry in its tracks before further investments are made and it becomes increasingly difficult to back track. Fish farming has become an environmental and animal welfare disaster, especially in the context of warming oceans sensitive to toxic algal blooms from the waste and excess feed produced by fish farming. The industry rhetoric that fish farming is environmentally friendly is nonsense because most farmed aquatic species (e.g. salmon, trout, and shrimp) are carnivorous and feeding them “puts additional pressure on wild fish and invertebrates for fishmeal.” It takes two to five pounds of “reduction” or “feed fishes” such as mackerel and hearings to produce one pound of the larger carnivorous fish that diners prefer such as salmon, sea bass, and blue fin tuna. “Scientists estimate that one-third of the global fish catch is turned into feed for other animals, roughly half of which goes to aquaculture” Like the raising of terrestrial animals for food, “[t]here is nothing sustainable about feeding fish to fish, to produce fewer fish.”

The central insight offered here is that quasi-hood can help us avoid falling into the trap of binary thinking, specifically in this case that there are only two legal classifications on offer, property or persons, and that all nonhuman animals must be one or the other. As Justice Fahey but is hoping to develop octopus farming at a commercial level. See On World Octopus Day Animal Welfare Campaigners Urge Governor David Ige to pull Support for Octopus Factory Farming GLOBE NEWSWIRE (October 8, 2021), https://www.globenewswire.com/en/news-release/2021/10/08/2311187/0/en/On-World-Octopus-Day-animal-welfare-campaigners-urge-Governor-David-Ige-to-pull-support-for-octopus-factory-farming.html. See also the group’s report Octopus Factory Farming: A Recipe for Disaster, https://www.ciwf.org.uk/media/7447198/161421_ciwf_octopus-report-_21_aw_web_hybrid.pdf.

320 See Angela Fernandez, Fish Farms in Canada: Where is the Law?, in GREEN CRIMINOLOGY AND THE LAW (James Gacek et al. eds., forthcoming).
321 Jacquet et al, supra note 318, at 40.
322 BALCOMBE, supra note 238, at 215.
323 Jacquet et al, supra note 318, at 40.
324 ALEXANDRA MORTON, NOT ON MY WATCH: HOW A RENEGADE WHALE BIOLOGIST TOOK ON GOVERNMENTS AND INDUSTRY TO SAVE WILD SALMON 317 (2021).
wrote, using the “simple either/or proposition” as to whether an entity is a “person” or a “thing” to decide whether a nonhuman animal has the right to seek freedom from confinement “amounts to a refusal to confront a manifest injustice.”\(^{325}\) We (courts, legislatures, legal academics, and members of the public reacting to various legal trends) decide whether or not to use the categories to decide the issue; or whether we demand that the categories respond to what we want the law to do for nonhuman animals. Francione is correct that to date, the protection has been limited and tends to defer to human use and preference, even when that preference is relatively trivial. However, that might change. Think, for example, about the use of large marine animals in entertainment and zoos and aquarium more generally. A huge shift has happened with respect to circuses and their use of elephants and other businesses like aquaria and their reliance on whales and dolphins. These examples show that social attitudes around what is considered acceptable to do to captive nonhuman animals are far from being fixed in stone. Our legal categories should not be frozen either. They are also not limited to just two options.

\(^{325}\) Fahey Concurrence, *supra* note 211, at 6.
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