**Beyond (Property and) Personhood** (book chapter draft – please do not cite)

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In 1993, philosophers Peter Singer and Paola Cavalieri launched the Great Ape Project, an initiative meant to generate worldwide support for the protection of rights to life, liberty and security of the person for nonhuman Great Apes (chimpanzees, gorillas, orangutans) by relying on the expertise of biologists, psychologists, ethicists, and philosophers and other scholars in related fields.[[1]](#footnote-1) Although each expert approached the question from the unique frames of their institutional discipline, they all advanced the view that nonhuman Great Apes were sufficiently close enough to human Great Apes in cognition, emotional expression, social organization, and sentience to warrant the core fundamental rights of life, liberty and security of the person that humans enjoy.[[2]](#footnote-2) By signing onto the Great Ape Declaration – considered to be the crux of the initiative - country signatories and individuals could signal their support for including nonhuman Great Apes in the “community of equals”[[3]](#footnote-3) and recognizing them as legal persons. The Project has enjoyed some significant successes; as of this writing, more than 20 countries have signed onto the Declaration.[[4]](#footnote-4)

As might be expected, however, the initiative attracted its share of criticism from those who believe that humans are fundamentally different from animals and that animals could never qualify as legal persons.[[5]](#footnote-5) It also drew critique from those more sympathetic to the cause, but nevertheless concerned that any endorsement of similarity between humans and other animals let alone an affirmation of personhood portends animalization of an already precarious human status for marginalized groups of humans.[[6]](#footnote-6) The Great Ape Project also garnered criticism from perhaps a less expected faction – scholars and animal advocates who worried about its exclusionary and anthropocentric parameters. Voices here challenged the decision to exclude all other animals other than nonhuman Great Apes from the purview of the Declaration and larger initiative. They also impugned the rationales given for why chimpanzees, gorillas and orangutans deserved the three core rights grounded as they were in stressing proximity and/or sameness to humans.[[7]](#footnote-7)

The Great Ape Project and the debate it has generated within animal circles brings into sharp relief the lack of consensus as to how to move forward legally for animals. The debate encapsulates a set of questions on which scholars and advocates are divided: is legal personhood necessary to “liberate” animals or can meaningful protection against exploitation accrue through less radical, more incremental legally welfarist measures?; if not, and animals’ property status must be abolished, how to inaugurate such a disposition among jurists? Should abolitionist legal reform be strategic and focus on the animals that are most likely to pass through the otherwise tightly closed legal door? If so, is personhood the legal status that animals should have? This chapter takes up these questions about how animal law should move forward by prioritizing the insights of the critical theoretical research practices (feminist, postcolonial, queer) that earlier chapters have discussed.

The opening section briefly addresses the first question in this set of cascading queries – must animals’ legal status as property change for the condition to improve in any notable and lasting way? As the literature here is well developed I briefly sketch the main contours of the debate before indicating, again, quite summarily, why the answer to this questions must be in the affirmative for any critically informed engagement with the question. The rest of the chapter casts a critical theoretical lens on the most popular proposal among animal rights advocates for property’s replacement: personhood.

**A. The Property/Personhood Debate**

i) property as a bar to animal rights - the abolitionist position

The property/personhood debate is closely related to the welfare-rights debate canvassed earlier. Scholars have taken divergent views as to whether animals’ property status must change in order to launch improvement in their lives as well as anti-exploitative conditions. Gary Francione is well known as a passionate and resolute proponent of the abolitionist position, so called for its insistence that the property status of animals in law must be abolished before any meaningful change can occur. Everything else for Francione is window-dressing with the very urgent material reality that violence against animals will continue at ease because people’s consciences will be assuaged while animals will lack the protection personhood status can provide in law.[[8]](#footnote-8) As David Delaney stresses, “(t)o own an animal is to have virtually complete dominion over the life and experiences that the being is to have.”[[9]](#footnote-9) The legal nature of property being what it is, i.e. more oriented around owners’ rights vis-à-vis legal objects than their duties to beings lacking legal subjectivity, a continued owned status will not give animals the trump cards they need to challenge the uses or treatment their owners wish to make of them.[[10]](#footnote-10) This seems especially so, as Delaney points out, given the mind/body, subject/object and culture/nature binaries underlying human-animal relations where most humans perceive themselves as superior in kind to animals.[[11]](#footnote-11) This dynamic inheres even in the ideal companion animal situation where we may assume that animals command the love and respect of their human owners. For Francione, as property and thus without rights, animals are vulnerable to shifts in their owners’ emotional dispositions toward them and cannot avail themselves of the protection of law over those who hold rights in them.[[12]](#footnote-12) Under the abolitionist view, animals need rights via legal personhood to protect them from instrumental use.

ii) property as incidental to progressive law reform – welfarism

Those who seek justice for animals but disagree with Francione’s abolitionist position offer two main arguments in reply. The first argument emphasizes strategy and efficacy of law reform. Theorists here contend that the abolitionist position is too idealistic and Utopian and if advocates only concentrate their efforts on that position no change for animals will result.[[13]](#footnote-13) They disagree with Francione that welfarist measures are ineffectual insisting that they can have tangible suffering-reducing effects on animals’ lives even if animals’ overall exploitation within a certain industry continues.[[14]](#footnote-14) These effects can be experienced by animals in the here and now despite their eventual death in whatever industry may be exploiting and consuming their bodies. The divergence of opinion on this point is clear in the positions articulated in relation to Proposition 2 in California, the voters’ referendum that will ban current-sized veal and sow gestation crates as well as battery cages for chickens in California by January 1, 2015.[[15]](#footnote-15) When Francione was asked whether he supports Proposition 2 he replied that he did not since the initiative did not abolish factory farming or the tremendous suffering in entailed but merely made its existence more palatable to consumers.[[16]](#footnote-16) His welfarists critics disagree, arguing that while the Proposition is modest in scope, it is still a “step forward”.[[17]](#footnote-17)

A second common welfarists reply to the abolitionist view in the property debate adopts a different view of the implications that the legal status of property entails. Cass Sunstein has argued that it is not animals’ property status that impairs the operation of animal welfare laws but poor enforcement.[[18]](#footnote-18) For Sunstein, the duties that owners have to provide the basic necessities of life that these laws typically provide translate into rights for animals and the defect in the system is proper enforcement.[[19]](#footnote-19) With animal welfare laws working properly, animals will enjoy cruelty-free and nourished lives notwithstanding the human and corporate service to which their lives might be put; this last point is not a problem for Sunstein.

iii) property as amenable to law reform - the rehabilitative position

Other critics of the abolitionist approach accept Francione’s appraisal of the subordinating effects of property traditionally conceived, but see more potential to recuperate property from its normalised owner-oriented connotations and transform it into a concept that demands more from owners in relation to their living yet objectified charges. They thus seek to rehabilitate property from its usual owner-obsessed connotations. David Favre has developed this view most robustly in a series of articles dedicated to advancing animals’ interests without waiting for a revolutionary change in law that he sees as very remote and unrealistic to expect.[[20]](#footnote-20) He has offered the concept of “living property” for domesticated animals as a new legal category that would entail, in his view, more duties on owners than they currently have under anti-cruelty statutes or otherwise.[[21]](#footnote-21) Favre has also suggested reconceptualising current property rights in animals through the prism of equitable principles that have supplemented the common law for centuries.[[22]](#footnote-22) Favre presents the idea of giving animals equitable title to themselves by resorting to the long-accepted practice of dividing legal from equitable ownership rights when equity calls for it. The most relevant contemporary use of equitable principles is through the vehicle of the trust that separates legal title (which resides in the trustee who manages the trust fund but is not able to benefit from any of the funds) from equitable title (which resides in the beneficiary who does not get to direct her money but gets the benefits of it once the trustee sees fit to disperse it). A crucial part of the trust dynamic is the principle that the legal owner must act in the best interests of the equitable owner.

Transposing these equitable principles and trust dynamic to the domestic companion animal situation, the human owner would now be legally required to act in the best interests of their companion animal who would still be owned but now would possess the equitable title in herself rather than the human owner holding both forms. Despite the innovation in this solution it is perhaps revealing that Favre only applies this theory of equitable self-ownership to certain groups of animals. Tellingly, the solution where the human owner is divested of equitable title in the animal applies only to animals kept for companionship rather than profit. In the more corporate realm of ownership where animals are bred, confined, and slaughtered routinely to turn a profit, it is highly debatable whether any amount of tweaking of the property concept will divest it of the power it gives to owners to control, maim, kill and generally exploit the items they own and in which they hold rights. Favre does not address this shortcoming to the theory.

iv) assessing the positions through critical theory

Without discounting the importance of the property/personhood debate and the nuanced positions that have been articulated by its participants, I believe critical theory offers us a more decisive and satisfying answer as to whether property is a problematic category for animals. In all the critical theoretical examinations of human injustice it is virtually impossible to encounter any theorist who accepts that the situation of owning a human being is compatible with justice for that individual or group of individuals. Despite all the richness of opinion across and within these theoretical frameworks, ownership of one person by another is not entertained as a viable option for conditions of justice through whatever frame they may be theorized.

This is the case even in scholarship guided by liberalism and economic theory where what is at issue is the practice of *voluntary* slavery and servitude (i.e. where an adult agent chooses to enter into a contract of servitude because he believes the arrangement to be a better option than what current impoverished life circumstances allow). Notwithstanding strong commitments to individual adult agency, free markets, capitalism, globalization and market efficiencies, scholars here have argued that it is immoral to permit a human being to enter into a servile relationship with another.[[23]](#footnote-23) As Debra Satz has noted in arguing against the legality of such contracts, “(e)ven those who have defended the economic rationality of such relationships have noted the “ugly power relations” involved in the phenomena.”[[24]](#footnote-24) If a basic vision of human justice (whether understood as freedom, autonomy, dignity, or equality) disqualifies selling oneself even where adult agents opt to do so given a range of limited economic opportunities, how can the same type of servile relationship with all its “ugly power relations” (at least in the industrial context where the vast majority of owned animals exist) pass muster when the living beings at issue are nonhuman and do not choose to be owned? Even if we switch the last premise and accept the view that animals do consent to their domestication and subordination to human and corporate owners,[[25]](#footnote-25) the argument Satz advances would still hold. As the title of her most recent monograph – *Why some things should not be for sale: the moral limits of markets*[[26]](#footnote-26) – suggests, consent by someone to adopt a completely commodified position vis-à-vis another is irrelevant. Satz, like many others, maintains this position even where the “thing” at issue are dispensable body tissues and not the entire person.[[27]](#footnote-27)

When animals are owned it is their entire body that is propertised. There are no debates about whether it is acceptable to commodify parts of animals because of their absolute commodification. This is what property status in the law entails.[[28]](#footnote-28) Indeed, the association of animals with property is so entrenched that animalisation has become almost synonymous with propertisation and the loss/denial of legal personhood. Returning to Delaney again, we see the force of these associations between property and animality. He writes:

A being, a baboon, a dolphin, a pit bull, is doubly objectified, doubly reduced by prevailing discourses of power. First, it is reduced to “animality” and all that that means and doesn’t mean. Second, it is reduced to property and all that that entails. It is positioned within forms of meaning, and so positioned within circuits of power vis-à-vis the legal subject and vis-à-vis the state as the guarantor of the rights of ownership. Its figurations as animals, as nature, as body, on the one hand, and as property on the other hand, are mutually reinforcing and neither can be severed from the other. Because it is “an animal” it can be treated like property; because it is property it can be treated like an animal.[[29]](#footnote-29)

Both critical theory and more classically oriented liberal theories instruct that this status - the status of being owned - is ethically unacceptable for human beings. An openness to queering the human-animal divide prompts the question why the same conclusion has not yet been reached about animals. The entrenchment of the associations between property and animality that Delaney highlights provides an instructive explanation. Yet it is precisely these associations that critical research practices need to investigate and dismantle. The implications of not taking up this work are too dismal and violent. As property, animals occupy a commodified and objectified social status that only cherished and respected companion animals have the hope of transcending. All animals though occupy a position of legal invisibility due to their propertised status; this is the case also for wild animals who are always already amenable to propertisation schemes. The negligible protections under anti-cruelty statutes do not yield anything remotely approximating legal subjectivity. If the desire is to inaugurate a legal system that prevents animal exploitation, the declassification of animals as property is a necessary step. What new legal status should prevail can then emerge as the more interesting and pressing question.

**B. Alternatives to Propertisation - Personhood**

i) origins and competing legal theories about personhood

By far, the most common alternate legal status proposed for animals by abolitionist scholars is personhood. Personhood is a Western legal concept that has its roots in ancient Roman theatre. The concept person originally meant a mask used in Roman classical dramas. The dramaturgical mask conveyed a persona to audiences and it was this concept that eventually inspired the idea of personhood as a vehicle to encode legal subjectivity in an entity in both the common and civilian legal systems. David DeGrazia provides an abbreviated but helpful explanation of the development of the concept:

The word “person” traces back at least to the Latin persona: a mask, especially as worn by an actor, or a character or social role. The concept evolved into the Roman idea of a bearer of legal rights – so that, notably slaves did not qualify as persons – before broadening into the Stoic and Christian idea of a bearer of moral value; perhaps this transition involved broadening the relevant conception of law from human legal systems to “natural” law. The modern concept, as exemplified in John Locke’s writings (Locke 1694: Bk 2, ch. 27), understands persons as beings with certain complex forms of consciousness.[[30]](#footnote-30)

Although personhood initially applied only to human actors in law it extended to corporations and ships in the 19th century.[[31]](#footnote-31) Animal advocates often make much of this point to illustrate that personhood does not correlate with an innate biological species status and, moreover, does not require a living being or even a tangible and material entity to ground its application.[[32]](#footnote-32) If personhood can operate at such a high level of abstraction so as to accommodate the “interests” of corporations who do not think, feel, or breathe then surely it can extend to animals without serious controversy.[[33]](#footnote-33) With such arguments, animal lawyers draw upon what Ngaire Naffine terms the Legalist perspective on how law should define persons – that they are a pure construction of law and thus do not mandate any pre-existing biological form or physical or mental capacity, a lack of correlation and mark of law’s independent nature that Legalists celebrate about the law.[[34]](#footnote-34)

Naffine contrasts this technical and abstract understanding of law’s person and law’s singular role in constructing personhood with legal theories that insist that law should take its cues from humanist disciplines and theories as to who is a person and align legal personhood with those other visions of personhood.[[35]](#footnote-35) Naffine classifies these latter theories desirous of going outside of law for guidance and ascribing legal personhood with a more anthropocentric form under the umbrella term of “Metaphysical Realists”.[[36]](#footnote-36) Here, she locates three main groups: Rationalists, Religionists and Naturalists. Rationalists believe that legal personhood should correspond to the predominant vision of the person in moral philosophy – the rational, autonomous, moral agent of adult age. For Rationalists, only those persons who hold these capacities are moral persons and only they should qualify as legal persons.[[37]](#footnote-37) Religionists resort to religion, particularly Judeo-Christian traditions, and exalt the belief that all human life is sacred because we all hold the divine within us and thus all humans qualify as moral persons even if they lack the ability to reason.[[38]](#footnote-38)

Naturalists also seek to be more inclusive than Rationalists in who should count as a legal person, but instead of religion Darwinian ideas and evolutionary biology influence their ideas about legal personhood. Legal theorists under this branch of metaphysical realism emphasize our biological natures as embodied entities that can feel sensory pain and pleasure, asserting that the Kantian influenced Rationalist view presents an impoverished account of what is valuable about humans (i.e. their reasoning capacity) by discounting our embodied aspects.[[39]](#footnote-39) It is this aspect of our being that law should underscore in its conceptualization of the legal person. Some Naturalists concede that their reasoning as to why humans matter (sentient biological capacity) can extend to non-humans.[[40]](#footnote-40) Animal arguments can draw sustenance from this line of Naturalist reasoning about law’s person as it leaves an opening for personhood to transcend law’s current species divide.[[41]](#footnote-41)

ii) classifying abolitionist calls for animals’ personhood

We can see both the Legalist and Naturalist lines of reasoning operating in the work of Francione who was the earliest legal scholar to deliberately and comprehensively argue for the extension of personhood to sentient animals and still remains the most influential.[[42]](#footnote-42) For Francione, personhood naturally flows from the abolition of property that must occur if we are to treat all sentient beings equally. If we are committed to the principle that humans should not suffer from exploitation due to their sentience and grant them rights to protect this interest against suffering, then, on the principle of equal consideration, we should treat animals in a similar vein as they, too, have interests in not suffering.[[43]](#footnote-43) Legal personhood will permit animals to be the rights-bearers they deserve as sentient beings and thus be entitled to protection from the state against those who wish to violate their rights.[[44]](#footnote-44) The status will communicate full moral status but, more importantly, if working optimally, trigger the state to act to enforce the application of the equal consideration principle.

Francione acknowledges that many people already distinguish animals from the realm of mere things and that anti-cruelty laws also connote this elevated status from the realm of other entities classified as property. Yet, the property status of animals “militates strongly against significant improvement in our treatment of animals, and animal welfare will do little more than make animal exploitation more economically efficient and socially acceptable.”[[45]](#footnote-45) Any connotation of non-thing status by anti-cruelty laws or other animal welfare laws is dulled by the overarching property paradigm that applies to animals, making personhood the only choice in the current legal system to ensure that animals have the right not to be treated as property. Francione impresses his point by reminding us of the deficiencies of American “humane” slave laws in protecting slaves from harm, terror, and exploitation. He writes:

Slavers were regarded as chattel property. Laws that provided for the “humane” treatment of slaves did not make slaves persons because, as we have seen, the principle of equal consideration could not apply to slaves. We tried, through slave welfare laws, to have a three-tiered system: things, or inanimate property; persons, who were free; and in the middle, depending on your choice of locution, “quasi-persons” or “things plus” (the slaves). That system could not work. We eventually recognized that if slaves were going to have morally significant interests, they could not be slaves any more, for the moral universe is limited to only two kinds of beings: persons and things. “Quasi-persons” or “things plus” will necessarily risk being treated as things because the principle of equal consideration cannot apply to them.[[46]](#footnote-46)

In the same way that an intermediate hybrid person-thing status for American slaves did not provide much in way of protection or what we would today recognize as justice for slaves in the United States, Francione argues anything less than full personhood will continue to subordinate animals to human interests, control and domination. “Humane” animal laws cannot overcome the devastating legal effects of a property categorisation because it rejects the principle of equal consideration.

iii) abolitionist critiques of personhood for animals

However compelling personhood arguments for animals may be, the law has thus far stayed adamantly opposed to such an initiative. This is a situation we can glean from our discussion of legal doctrine from other chapters as well as from Naffine’s treatise *Law’s Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* exploring conceptualizations of legal persons in Canada, the UK, the United States, Australia and New Zealand.[[47]](#footnote-47) As she bluntly puts it: “There is profound legal resistance to the idea that law is for (non-human) animals and that animals should be rightsholders and therefore legal persons. This still strikes the vast majority of the legal community as a preposterous suggestion.”[[48]](#footnote-48) Naffine highlights the paradox in this refusal: social institutions, including law, have embraced Darwin’s teachings about the continuities among species yet this scientific orientation has not led to a legal disposition willing to interrogate the sharp legal species divide that maps onto personhood and property categories.[[49]](#footnote-49) Further, despite the availability of the technical formalist Legalist model as well as the sentient-based Naturalist model, jurists who respond to the insights of these models consistently filter them through anthropocentric worldviews.

What is perhaps most frustrating for animal law scholars who wish for different outcomes is the stark reality that “the nature and the operation of law’s human preferences and discriminations are quite difficult to grasp, and even more difficult to explain, expound and defend.”[[50]](#footnote-50) For all its monumental importance in structuring the law and configuring the social and global order,[[51]](#footnote-51) we learn from Naffine that the jurisprudence on legal personhood is sparse and “poorly articulated”;[[52]](#footnote-52) where it is most developed is in the realm of corporate law in relation to the capacity of corporations.[[53]](#footnote-53) Instead, jurists rely on broader cultural norms to underpin their decisions and supplement the gaps and silences in their reasoning favouring an anthropocentric hold on personhood whether Legalist, Rationalist, Religionist, Naturalist or a combination thereof. We can understand juridical resistance to including animals under personhood’s remit as a product of systemic cultural bias reflected in everything from the moral philosophical presuppositions to the common sense on which jurists explicitly and implicitly rely. Anthropocentric definitions of personhood may thus be dismissed as a self-serving normative vision. Less easily dismissed are the arguments within animal scholarly circles authored by those who advocate for an abolitionist endpoint for animals (and thus are not welfarist) but yet still reject personhood for animals.

An influential example of this view is found in David DeGrazia’s article “Great Apes, Dolphins and the Concept of Personhood”[[54]](#footnote-54) in which he takes issue with the ascription of personhood to what he and others call “borderline persons”.[[55]](#footnote-55) DeGrazia’s article is in part a reply to the personhood proposals for Great Apes set out in Cavalieri and Singer’s *Great Ape P*roject collection.[[56]](#footnote-56) DeGrazia is not a welfarists and has elsewhere defended the interests of animals as morally relevant subjects so it is worth examining his argument at some length. He is an “animal-friendly” critic of personhood for animals unlike, say, those who would contest the law concerning itself with those who are not human other than corporations (i.e. Rationalists, Religionists, some Naturalists). DeGrazia rejects personhood as an appropriate moral classification for animals because he views personhood as a vague concept.[[57]](#footnote-57) For DeGrazia the vagueness stems from the typical ontological trait-based approach by which philosophers routinely approach their investigations into who qualifies as a person asking something to the effect “what are the necessary and sufficient conditions for personhood” and, having identified this list, determining whether entity x has it.[[58]](#footnote-58) DeGrazia believes this approach renders useless information because of the gradations among capacities including those that usually feature on the “personhood list” (e.g., rationality, consciousness, self-consciousness, moral agency, etc.) and the plural forms they can take.[[59]](#footnote-59) DeGrazia further attests that ascribing personhood to animals or other entities whose personhood is currently insecure compels arbitrariness in judging which traits matter and which degree/level of trait is required before it qualifies a being for personhood (whether as a singular criterion or part of a larger cluster of criteria).[[60]](#footnote-60)

Despite these limitations, DeGrazia accepts that the term has a role to play in *human* rights campaigns where the public’s sense that a moral person means a human being is sedimented. Conversely, because prevailing common sense does not associate animals with moral personhood, DeGrazia does not favour promoting the concept for animals; in his view, the common sense definition is too asynchronous with the new prescriptive use of the term.[[61]](#footnote-61) Instead, he favours the use of more specific terms related to directly relevant capacities to describe what is morally valuable about a being. This would entail the recognition of intermediate categories of moral status (thus transcending the personhood/not personhood dichotomy that predominates in Western philosophical traditions) for beings who are morally valuable but not clearly persons in the traditional paradigmatic human sense of the term.[[62]](#footnote-62)

Other moral philosophers have disagreed with DeGrazia and embraced personhood as the proper *legal* status for all conscious animals.[[63]](#footnote-63) Notable in this realm is the work of Paola Cavalieri whose co-founding of the Great Ape Project was introduced at the beginning of this chapter and served as partial motivation for DeGrazia to craft his anti-personhood argument.[[64]](#footnote-64) In *The Animal Question: Why Nonhuman Animals Deserve Human Rights*, Cavalieri meticulously argues that human rights may logically extend to all animals expressing consciousness, thus implicitly endorsing the legal capacity of personhood that corresponds with human rights.[[65]](#footnote-65) Cavalieri defines “consciousness” as the ability “to have experiences and to care about these experiences. It means to have at least the interest in avoiding pain and experiencing pleasure.”[[66]](#footnote-66) Cavalieri does note some concerns with the personhood model but accepts it nonetheless, specifically arguing against DeGrazia’s argument why animals should not be called moral persons.[[67]](#footnote-67)

In reply to DeGrazia’s argument, Cavalieri questions his reliance on the intuitive use of the term due to the correlation of intuition with commonly held prejudices.[[68]](#footnote-68) She raises a second argument as well about the origins of the word. Recall that the term was derived from Roman law where “person” denoted the wearing of a mask in a play.[[69]](#footnote-69) That the use of “person” did not originally have the human biological connotation but a metaphorical one about one’s role in life is a further reason countenancing releasing the term from its anthropocentric descriptive connotations. In response to DeGrazia’s vagueness thesis, Cavalieri notes that though capacities relevant to personhood vary in degree and kind, simply and clearly identifying the mandatory level will remedy any vagueness. With these counterarguments, Cavalieri defends her position that personhood is a viable philosophical and legal term to apply across the species border.[[70]](#footnote-70)

We may agree with Cavalieri against DeGrazia that personhood is a viable concept that can sensibly extend to nonhuman animals both morally, but more importantly for our purposes, legally. We may also agree with Francione that legal personhood and the rights protection inherent to it is the only legal status (given current choices between property and personhood) that will actually protect animals and help them flourish. Yet, this may presuppose the question to be addressed. We have not yet had an opportunity to seek another alternative for animals – not an intermediate category like the “quasi-personhood” or “things plus” kind that Francione properly impugns in discussing slave welfare laws in connection with animal welfare laws – but an alternative that can reach the abolitionist conclusions that Francione, Cavalieri and like-minded scholars and advocates wish to reach without promoting the problematic affinities a rising chorus of critical scholars argues that personhood entails. First, however, it is important to understand the problems with personhood.

**C. Personhood’s Exclusionary Imprint and its Implications for Animals**

i) exclusionary history

Like all entrenched legal terms, contemporary invocations of personhood to denote legal subjects flow from a particular historical trajectory. A primary concern with personhood is the hierarchical imprint of this background. While the open-ended, non-biologically rooted Legalist accounts of legal personhood circulate, and the Religionist and Naturalist theories have also resonated in jurisprudence, it is clear that the Rationalists’ vision of the legal person dominates in the jurisprudence.[[71]](#footnote-71) Recall that Rationalists privilege the intelligent human agent who can make decisions as well as accept accountability. As Naffine underscores, the underlying narrative about the creation of rationale actors engaged in legal transactions and encounters is the social contract theory that follows from Lockean and Kantian political philosophy.[[72]](#footnote-72) These narratives imagine a fully formed adult human who is independent, autonomous, intelligent, and can be held accountable due to these qualities who freely enters into society in this state in order to take advantage of law’s ordering power to maximize his self-interests in staying this way.[[73]](#footnote-73) Critical to this path of self-maximization is the ability to contract to acquire property to further one’s freedom and flourishing.[[74]](#footnote-74)

 In this narrative, it is obvious that personhood was reserved for an elite sector of humanity that accentuated stratifications of class, gender, race and age at the time these stories of creation were formulated and advanced. Further, as Naffine notes, this creation story often presents the social contract society as the ideal type of society, a refuge from the inegalitarian nature of societies based on status, family obligation, and custom, and a marker of modernity, freedom and progress.[[75]](#footnote-75) This story is firmly implicated in the British colonial idea of a civilizational hierarchy among nations, cultures and races wherein theories of racial and cultural Otherness premised upon, among other factors, non-western peoples’ perceived reliance on family ties, duties, and tradition helped demarcate and consolidate ideas of westernness and the western legal self.[[76]](#footnote-76) Matching law’s legal person to this vision of the reasonable and self-actualizing man invests in this colonial and otherwise exclusionary logic, a move that some find discomforting.

ii) contemporary (impossible) assimilation

The hierarchical imprint of the Rationalist view of the person presents a further and related concern: the assimilationist model it now facilitates. Is the personhood model able to transcend its exclusionary origins and include previously excluded groups? The task of fitting in beings that the law has traditionally disavowed as legal subjects into the coveted category of personhood is not an easy task. It can be an awkward fit into a category that has a definite culturally constructed originating and exclusionary identity.[[77]](#footnote-77) Sheryl Hamilton demonstrates the constructedness and exclusionary dimensions of personhood as a legal category in *Impersonations: Troubling the Person in Law and Culture*.[[78]](#footnote-78) Hamilton selects four different types of boundary-troubling entities – entities she terms liminal beings[[79]](#footnote-79) to illustrate the “fragility of…(the) concept of the person, its limits, and also its normalizing power.”[[80]](#footnote-80) Exploring the historical legal status of middle-class white women and the current legal status of corporations, clones, machine intelligence and celebrity personae, Hamilton shows how “(q)uestions of the person, the treatment of liminal beings, always exceed law’s capacity to render them sensible.”[[81]](#footnote-81) This tension arises from the anthropocentric cultural narratives that shape law that renders any inclusion of liminal beings into the personhood category an anxiety-producing measure. As Hamilton writes, attempting this fit “require(s) us to recognize the instability of one of our most fundamental concepts of the self”.[[82]](#footnote-82)

For Hamilton, the pursuit of personhood for these liminal beings will always turn up short because of the indelible, however unacknowledged, imprint of the Western, white, propertied and thus reasonable man on personhood’s contours.[[83]](#footnote-83) This implicit standard has set the mold for personhood into which newer candidates, whether animals or otherwise, cannot fit. Hamilton argues that it is better to understand the personhood that results for these figures at the end of their contestations and encounters with the concept as personae. She argues that personae is a “richer notion” to understand the outcome of liminal beings’ personification attempts since it encapsulates the always already incompleteness of these attempts to become persons and highlights the ongoing delicacy of personhood as a universalizable concept because of its gendered, classed, and raced origins.[[84]](#footnote-84)

Colin Dayan’s work adds a strong historical current to Hamilton’s argument by charting the multiple ways that personhood cannot be counted on to secure the protections one would wish because of the cultural narratives in which the law is embedded and from which it draws strength, narratives on which jurists and legislators are quick to rely. In *The Law is a White Dog: How Legal Rituals Make and Unmake Persons*, [[85]](#footnote-85) Dayan is concerned to reveal the “sorcery of law” in creating persons and things.[[86]](#footnote-86) In doing so, she also illuminates personhood’s reliance on the concept of animality and the figure of the sub-human. Dayan’s entire book considers law’s agency in defining personhood, assigning it to some, denying it to others, and also withdrawing it when social forces coalesce to make this acceptable.[[87]](#footnote-87) In this latter regard, Dayan discusses at length the concept of civil death – where one is legally alive but no longer a person in law; her main examples are American slavery, and she traces the residue of slave law on contemporary examples of prisoners in the United States and “detainees” held captive at Guantánamo Bay.[[88]](#footnote-88) Dayan considers how personhood can be so quickly lost and reveals the law’s role in, as she puts its, creating these “negative” and “disfigured” models of personhood for human beings.[[89]](#footnote-89) But, more critically, she notes that it is a role bolstered by cultural narratives, among them the familiar narrative tool of dehumanization. The productivity of dehumanization in legitimating slavery is well known. Dayan stresses the same point though in relation to contemporary penal politics. She writes:

Before the state can punish, it must appear to know what is being judged. The rules of law and leeway within them enact and enable a philosophy of personhood and create the legal subject. They also recognize forms of punishment that are activated for people of a certain “nature” or “character” – those labeled unfit, barbaric, subhuman, or “the worst of the worst”.[[90]](#footnote-90)

Dehumanization is an extremely popular strategy to legitimate the stripping away of rights from human beings and exposing them to treatment and violence that would otherwise be unacceptable.[[91]](#footnote-91) It has been used over many centuries and in many instances of war, ethnic conflict and, as Dayan demonstrates, in home-grown domestic policies when the state intervenes in the bodies of its subject through its biopolitical projects.[[92]](#footnote-92)

Samera Esmeir highlights the same associations between property/personhood and animality/humanity but from the obverse angle. She elucidates the tightly entwined nature of the status of legal personhood with the human identity such that any violation of this legal status is immediately perceived and represented as a loss of humanity. As Esmeir puts it:

Contemporary liberal assertions equate illegal oppression and practices of expulsion from the juridical order with exclusion from humanity. It is often argued that violence ensuing from the abandonment of persons beyond the pale of the law not only violates their humanity but also, and perhaps more crucially, dehumanizes them or constitutes them as less than human. While the objective of these critical assertions is to expose the radical evil that illegal violence can institute, they also establish an equation between the protection of the law and the constitution of humanity, effectively granting the former a magical power to endow the latter.[[93]](#footnote-93)

Esmeir argues that law, particularly British colonial law and modern international human rights law, constitutes the human through the conferral and respect of rights-bearing status so much so that the predominant frame advanced when a person’s or people’s rights are violated is not depersonification but dehumanization. Esmeir terms this understanding of humanity, as dependent on and sublimated to the legal status of personhood, a “juridical humanity.”[[94]](#footnote-94) She is dismayed by the hold that law exacts on our understanding of what it means to be human and further concerned that the narrative about dehumanization that attends stories about human rights violations in the global South continues a colonial legacy whereby racialised non-western subjects are forever waiting to be saved by the magical effects of Anglo-American law and, in particular, the rule of law to humanize them.[[95]](#footnote-95) In this postcolonial critique of law, personhood is not a justice-conferring category, but a vehicle that constitutes the human and claims to protect human rights through long-standing colonial premises about the humanizing and enlightening effects of western legal systems for the rest of the world.[[96]](#footnote-96)

This colonial humanizing function of personhood is perceptible in contemporary human rights contestations. When we want to recognize the personhood and human rights of groups today we humanize them. Importantly, this means the ascription of the traits associated with dominant masculinist and Western understandings of what it means to be human: rationality and the capacity and desire for autonomy. Conversely, when the desired outcome is the depersonification of purportedly human subjects, the strategy elected is to dehumanize these subjects. This entails the ascription of the traits associated with dominant understandings of what it means to be less than or nonhuman: animality, the subordination of the mind to the body, and the rejection of Western values. Liberal legal subjectivity cannot escape the power of the human-nonhuman binary in creating its preferred legal subjects and their corresponding masculinist and colonial exclusions. As feminist, postcolonial and queer scholars discussing violence at Guantánamo Bay and Abu Ghraib and other contemporary “states of exception” have commented, this masculinist and colonial and humanist logic of legal personhood and rights is not exceptional, but “symptomatic of the very nature of the predominant liberal democratic system and of the liberal notion of human rights.”[[97]](#footnote-97) Liberal humanism’s traditional exclusions in mapping out the category “human” that generated law’s understanding of the “person” have not disappeared;[[98]](#footnote-98) they are still at work in shaping legal subjectivity, its extension and denial.[[99]](#footnote-99)

Viewed from this angle, personhood is further and irrevocably tainted as a viable option to respect animals and their alterity as legal subjects because persons are made through proving one’s humanity and unmade when that humanity is called into serious question. It is not simply the case that animals are legally property and thus need only to be moved outside of this category and made persons for legal benefits to flow.[[100]](#footnote-100) Instead, animal law advocates are facing a situation where the very category of property is defined through animality. If we accept that in general “(a)nimality is not simply outside of the social order and its mechanisms of subjectification (but) is foundational to it”, the sheer magnitude of the influence of the human/nonhuman divide to law is no surprise.[[101]](#footnote-101) In law, it is this animalized underpinning of property that constitutes property’s real and imagined polar opposite: personhood, which itself is rendered dissociable from humanity.[[102]](#footnote-102) How can animals be legally represented through a legal category that has traditionally repelled them and constituted itself against them? Further, how can animals then move easily into a new legal category that is virtually synonymous with humanity (and problematically relies on racialised geopolitical identity to shore itself)?

Turning back to the example of the Great Ape Project at the start of this chapter, we can now more clearly apprehend a further element of the criticism that followed the initiative that a focus on Great Apes will reinscribe humanism and anthropocentrism. It is not merely the case that an initiative that only includes Great Apes excludes all other animals. Rather, the critique of the personhood model that critical scholars Hamilton, Naffine, Dayan and Esmeir bring forth points to the implicit exclusion the model holds, albeit to widely varying degrees, for all beings not fitting the originating white, Western, propertied, human male identity through which personhood was consolidated. Recalling the international initiatives discussed in Chapter 6, particularly the personhood case in Brazil regarding the chimpanzees, we can perhaps more firmly appreciate Bevilaqua’s critique about the shortcomings of personhood litigation seeking “to convert ‘otherness’ into ‘sameness’”.[[103]](#footnote-103) It is not just that animal advocate petitioners make a “choice” about emphasizing sameness in these proceedings where personhood for an animal or animals is sought, but that the personhood model encourages this route which, paradoxically and inevitably, highlights the differences of animal others from paradigmatic human persons. This is the case even for animals that are doubly humanized – by their genetic similarity to humans (like chimpanzees in general) and by their living arrangements in close proximity to humans (like the specific chimps Lili and Megh at the heart of the litigation) who are infantilized through care practices (sleeping in children’s beds, being fed through a bottle, having a “nanny” as their caregiver) despite their adult status in chimpanzee lifespans.[[104]](#footnote-104) In litigation, the similarities of chimpanzees like Lili and Megh to humans in genetic heritage, sociality, and the ability to impart culture intergenerationally can be stressed,[[105]](#footnote-105) but the nonhumanity of the chimpanzees can never be fully erased. Personhood as a legal concept fits at some levels but not others and the attempts to pursue it for animals solidify the paradigmatic human identity that defines it.

iii) binary reinforcement

Bevilaqua educes a final critique of the personhood model: its reinforcement of the binary vision of legal subjects and legal objects. Personhood proceedings do not disrupt the dichotomy at the heart of the legal system that problematically forces virtually every type of entity into one of two categories.[[106]](#footnote-106) Indeed, the seemingly intractable presence of the term in the law is a reason that some animal scholars who may otherwise wish to abandon the term given its theoretical resonance opt to tolerate it for animals.[[107]](#footnote-107) If we permit personhood to continue, however, aspirations toward personhood will always already rely on the otherness of things, all of them nonhuman. Efforts to personify some animals will thus necessarily accent the thingness of other beings, again not merely excluding other animals from the argument but pushing them further into the realm of the property/thing realm. For Bevilaqua, the legal status for animals that is most consonant with this critical appraisal of personhood for animals is one that can recognize that animals are not things without insisting they be persons.[[108]](#footnote-108) Whether she would endorse Hamilton’s model of personae as a better alternative to personhood is an open question, but both theorists are united in their rejection of personhood for liminal beings and, in the case of Bevilaqua, for animals as a route to granting full legal protection for these beings.

Drawing these points together, they capture the extent to which the concept of personhood takes its tenor from anthropocentric valuations such that a simple extension of personhood to animals will not destabilize the concepts’ anthropocentric parameters. The critique of personhood we find in these writings presage the work of feminist and queer animal scholars who have called for a different model of subjectivity for animals, one that decentres the human and the thinking subject. Calls for such subjectivity have centered on vulnerability, embodiedness, affect and relationality. It is not necessary to resort to scholarship firmly situated in feminist and queer theoretical frameworks to encounter arguments for ending animal exploitation based on a relational account of animals’ vulnerability.[[109]](#footnote-109) But the concepts of embodiment, affect, relationality and vulnerability I seek to combine and cultivate into a new judicial recognition for animals is heavily indebted to the mappings they have received in feminist and queer scholarship. The next chapter thus outlines these proposals and, harnessing their insights, assembles an alternative to personhood as a new legal subjectivity for animals that can nonetheless still signal an anti-exploitation stand vis-à-vis animals.

1. Paola Cavalieri and Peter Singer*, The Great Ape Project: Equality Beyond Humanity* (New York: St. Martin's Griffin, 1996). See also World Declaration on Great Primates – GAP Project online: <http://www.projetogap.org.br/en/world-declaration-on-great-primates/>. [↑](#footnote-ref-1)
2. See generally Cavalieri and Singer, *supra* note 1. [↑](#footnote-ref-2)
3. Angus Taylor, *Animals & Ethics* (Toronto: Broadview Press, 2003) at 176. [↑](#footnote-ref-3)
4. “Declaration Signed on Great Apes” online: BBC News <http://news.bbc.co.uk/2/hi/science/nature/4232174.stm>. [↑](#footnote-ref-4)
5. See generally Wesley J Smith, “Let Great Apes Be Apes,” (2006) 32:3/4 The Human Life Review 147. [↑](#footnote-ref-5)
6. Nora Ellen Groce and Jonathan Marks, “The Great Ape Project and Disability Rights: Ominous Undercurrents of Eugenics in Action” (2000) 102:4 Am Anthropol 818. [↑](#footnote-ref-6)
7. See, for example, Marc Bekoff, “Deep Ethology, Animal Rights, and the Great Ape/Animal Project: Resisting Speciesism and Expanding the Community of Equals” (1997) 10:3 J Agr Environ Ethic 269. [↑](#footnote-ref-7)
8. Gary L. Francione, “The Abolition of Animal Exploitation” in Gary L. Francione and Robert Garner, *The Animal Rights Debate: Abolitions or Regulation* (New York: Columbia University Press, 2010), 1-102. [↑](#footnote-ref-8)
9. David Delaney, *Law and Nature* (Cambridge: Cambridge University Press, 2003) at 222. [↑](#footnote-ref-9)
10. *Ibid* at 226. [↑](#footnote-ref-10)
11. *Ibid* at 222. [↑](#footnote-ref-11)
12. See Gary L. Francione, *Animals, Property, and the Law* (Philadelphia: Temple University Press, 1995) at 28 and 254. [↑](#footnote-ref-12)
13. Robert Garner, “A Defense of a Broad Animal Protectionism” in Gary L. Francione and Robert Garner, *The Animal Rights Debate: Abolitions or Regulation* (New York: Columbia University Press, 2010), 103-174. [↑](#footnote-ref-13)
14. Jason Wyckoff, “The Animal Rights Debate: Abolition or Regulation? – By Gary L. Francione & Robert Garner” (2011) 28:4 J App Philos at 415. [↑](#footnote-ref-14)
15. See generally Jonathan R Lovvorn, “California Proposition 2: A Watershed Moment for Animal Law” (2009) 15:2 Animal L 149. [↑](#footnote-ref-15)
16. Gary Francione, “What to Do on Proposition 2” online: Animal Rights: The Abolitionist Approach <http://www.abolitionistapproach.com/what-to-do-on-proposition-2/> [↑](#footnote-ref-16)
17. Garner, *supra* note 13 at 143. [↑](#footnote-ref-17)
18. Cass R. Sunstein and Martha C. Nussbaum, *Animal Rights: Current Debates and New Directions* (New York: Oxford University Press, 2004) at 253. [↑](#footnote-ref-18)
19. *Ibid* at 261. [↑](#footnote-ref-19)
20. David Favre, “Integrating Animal Interests Into Our Legal System” (2004) 10:87 Animal L at 88. Robert Garner has also defended the position that property status is not a bar to meaningful legal change for animals. For Garner, the principle of treating animal interests with equal consideration is what matters and a propertied legal status does not prevent this. See Garner, *supra* note 13 at 128-135. For a critical animal studies critique of Garner’s view, please see Maneesha Deckha, “Critical Animal Studies and the Property Debate in Animal law” (forthcoming in Jodey Castricano and Laura Corman, *Animal Subjects 2.0*). [↑](#footnote-ref-20)
21. See generally, David Favre, “Living Property: A New Status For Animals Within the Legal System” (2010) 93:3 Marq L Rev 1021. [↑](#footnote-ref-21)
22. *Ibid* at 1069. [↑](#footnote-ref-22)
23. Debra Satz, “Voluntary Slavery and the Limits of the Market” (2009) 3:1 Law & Ethics of Human Rights 87-109. Satz discusses contemporary examples of slavery called today perhaps more euphemistically “debt bondage, attached labor, serfdom, and debt slavery”. *Ibid* at 87. She distinguishes these from “formally free contractual labor” of the employee-employer kind. *Ibid*. [↑](#footnote-ref-23)
24. *Ibid*, citing Pranab Bardhan, *The Economic Theory of Agrarian Institutions* (1991), chapter 12 “A note on interlinked rural economic arrangements”. [↑](#footnote-ref-24)
25. For arguments to this effect even in the non-companion animal context and so where animals are exploited for profit see Deborah Heath and Anne Meneley, “The NatureCultures of Foie Gras: Techniques of the Body and a Contested Ethics of Care” (2010) 13:3 Food, Culture and Society at 440. [↑](#footnote-ref-25)
26. Debra Satz, *Why some things should not be for sale: the moral limits of markets* (Oxford: Oxford University Press, 2010). [↑](#footnote-ref-26)
27. The literature on whether to commodify human tissue is vast. For divergent feminist views on the topic see generally Donna Dickenson, “Commodification of Human Tissue: Implications for Feminist and Development Ethics,” (2002) 2:1 Developing World Bioethics 55 and Joan Raphael-Leff “Gift of Gametes — Unconscious Motivation, Commodification and Problematics of Genealogy” (2010) 94 Feminist Rev 117. [↑](#footnote-ref-27)
28. Delaney, *supra* note 9 at 222. [↑](#footnote-ref-28)
29. *Ibid* at 223. [↑](#footnote-ref-29)
30. David DeGrazia, “On the Question of Personhood beyond Homo sapiens” in Peter Singer, ed, *In Defense of Animals: The Second Wave* (Malden, MA: Blackwell Publishing, 2006) at 40. [↑](#footnote-ref-30)
31. Rebecca J Huss, “Valuing Man’s and Woman’s Best Friend: The Moral and Legal Status of Companion Animals” (2002) 86:1 Marq L Rev 47 at 72 and 74. [↑](#footnote-ref-31)
32. *Ibid* at 71-78. [↑](#footnote-ref-32)
33. *Ibid* at 77. [↑](#footnote-ref-33)
34. Ngaire Naffine, *Law’s Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Oxford: Oxford University Press, 2001) at 21-22. [↑](#footnote-ref-34)
35. *Ibid* at 26. [↑](#footnote-ref-35)
36. *Ibid* at 22. [↑](#footnote-ref-36)
37. *Ibid* at 22-23. [↑](#footnote-ref-37)
38. *Ibid* at 23-24. [↑](#footnote-ref-38)
39. *Ibid* at 125. [↑](#footnote-ref-39)
40. *Ibid* at 24. [↑](#footnote-ref-40)
41. *Ibid*. [↑](#footnote-ref-41)
42. Also well known is the writing and legal activism of Steven Wise whose litigation efforts will be examined in the next chapter. Wise, however, only advocates for personhood for animals who demonstrate a certain level of cognitive capacity whereas Francione champions personhood for all sentient animals, a much larger group. See Steven Wise, *Rattling the Cage: Towards Legal Rights for Animals* (Cambridge, MA: Perseus Books, 2000) and *Drawing the Line: Science and the Case for Animal Rights* (Cambridge, MA: Perseus Books, 2002). As Naffine remarks in discussing Wise’s views, he is thus aligned with the Rationalist view of legal personhood. Naffine, *supra* note 34 at 132. Interestingly, Naffine suggests that Francione “is perhaps closer to the Religionists, in that he finds innate value (perhaps even a divine spark) in all living beings.” *Ibid* at 136. I would respectfully disagree with this estimation given Francione’s consistent grounding of animals’ recognition in their sentience in his body of work. See Gary Francione, *Animals as Persons: Essays on the Abolition of Animal Exploitation* (New York: Columbia University Press, 2008)*.* [↑](#footnote-ref-42)
43. *Ibid* at 44-61. [↑](#footnote-ref-43)
44. *Ibid* at 61-63. [↑](#footnote-ref-44)
45. *Ibid* at 70-71. [↑](#footnote-ref-45)
46. *Ibid* at 61-62. [↑](#footnote-ref-46)
47. Naffine, *supra* note 34. [↑](#footnote-ref-47)
48. Naffine, *supra* note 34 at 8. See also discussion on p. 57. [↑](#footnote-ref-48)
49. *Ibid* at 122. [↑](#footnote-ref-49)
50. *Ibid* at 6. [↑](#footnote-ref-50)
51. *Ibid* at 12-13. [↑](#footnote-ref-51)
52. *Ibid* at 11. [↑](#footnote-ref-52)
53. *Ibid* at 11. [↑](#footnote-ref-53)
54. David DeGrazia, “Great Apes, Dolphins and the Concept of Personhood” (1997) 35:3 Southern J Philos 301. [↑](#footnote-ref-54)
55. *Ibid* at 309. [↑](#footnote-ref-55)
56. Cavalieri and Singer, *supra* note 1. [↑](#footnote-ref-56)
57. DeGrazia, *supra* note 54 at 301. For other writing see David DeGrazia, *Taking Animals Seriously: Mental Life and Moral Status* (Cambridge: Cambridge University Press, 1996). [↑](#footnote-ref-57)
58. DeGrazia, *supra* note 54 at 303. [↑](#footnote-ref-58)
59. *Ibid* at 304-306. [↑](#footnote-ref-59)
60. *Ibid* at 304-307. [↑](#footnote-ref-60)
61. *Ibid* at 307-310. [↑](#footnote-ref-61)
62. *Ibid* at 312 and 315. Although DeGrazia concentrates his focus on moral personhood, he indicates that his thinking on the subject was prompted as a reply to Cavalieri and Singer’s Great Ape project that advocates for legal personhood for nonhuman Great Apes. We can thus infer that he would extend his reasoning on moral personhood to legal personhood as well. [↑](#footnote-ref-62)
63. It is important here to distinguish between moral and legal personhood. Philosophers have extended *moral* personhood to animals but not legal personhood. Notably, Peter Singer has defined moral personhood for animals as possible where animals are rationale and self-aware, but his utilitarian framework for animals does not ascribe them rights or legal personhood. Peter Singer, *Practical Ethics,* 2d ed. (Cambridge: Cambridge University Press, 1993) at 110-111 [Singer, “Practical Ethics”]. [↑](#footnote-ref-63)
64. Singer’s work, of course, is vastly influential but he is less generous than Cavalieri as to which animals would qualify as persons which is why I have showcased Cavalieri’s argument. While Singer would say that all sentient animals deserve moral consideration under a utilitarian calculus, he insists on self-consciousness, not just consciousness, for personhood. See Singer “Practical Ethics” *supra* note 63 at 73. [↑](#footnote-ref-64)
65. PaolaCavalieri, *The Animal Question: Why Nonhuman Animals Deserve Human Rights* (Oxford: Oxford University Press, 2001), see especially 38-40. Cavalieri has also articulated this position in other work. See Paolo Cavalieri, “The Animal Debate: A Reexamination” in Peter Singer, ed, *In Defense of Animals* at 65. [↑](#footnote-ref-65)
66. *Ibid* at 38 (emphasis in original). [↑](#footnote-ref-66)
67. *Ibid* at 117. [↑](#footnote-ref-67)
68. *Ibid* at 118-119. [↑](#footnote-ref-68)
69. *Ibid* at 120. [↑](#footnote-ref-69)
70. *Ibid* ii) at 121. [↑](#footnote-ref-70)
71. Naffine, *supra* note 34, at 59. [↑](#footnote-ref-71)
72. *Ibid* at 61. [↑](#footnote-ref-72)
73. *Ibid* at 29. [↑](#footnote-ref-73)
74. Tucker Culbertson, “Animal Equality, Human Dominion and Fundamental Interdependence” (2009) 5 J Animal L at 42. [↑](#footnote-ref-74)
75. Naffine, *supra* note 34 at 61. [↑](#footnote-ref-75)
76. *Ibid* at 76 [↑](#footnote-ref-76)
77. *Ibid* at 23. [↑](#footnote-ref-77)
78. Sheryl Hamilton, *Impersonations: Troubling the Person in Law and Culture* (Toronto: University of Toronto Press, 2009). [↑](#footnote-ref-78)
79. *Ibid* at 7. [↑](#footnote-ref-79)
80. *Ibid* at 12. [↑](#footnote-ref-80)
81. *Ibid* at 9. [↑](#footnote-ref-81)
82. *Ibid* at 7. [↑](#footnote-ref-82)
83. *Ibid* at 12 and 21. [↑](#footnote-ref-83)
84. *Ibid* at 12. [↑](#footnote-ref-84)
85. Colin Dayan, *The Law is a White Dog: How Legal Rituals Make and Unmake Persons* (Princeton: Princeton University Press, 2011). [↑](#footnote-ref-85)
86. *Ibid* at 40 and 132. [↑](#footnote-ref-86)
87. *Ibid* at 72. [↑](#footnote-ref-87)
88. *Ibid*, see chapters 3 “Punishing the Residue”. [↑](#footnote-ref-88)
89. *Ibid* at 71 and 115. [↑](#footnote-ref-89)
90. *Ibid* at 73 citing an interview Dayan had with the Arizona Department of Corrections spokesperson discussing super-maximum security units. See fn. 4. See also 26-33, 116-24. [↑](#footnote-ref-90)
91. Tarik Kochi, “Species War: Law, Violence and Animals” (2009) 5:3 Law, Culture and Humanities 353; “Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences” (2008) 94:2 J Pers Soc Psychol 292. [↑](#footnote-ref-91)
92. Slavery and the Holocaust are obvious examples – see Dayan, *supra* note 85 at 115, 118-33 – but also consider the Rwandan Genocide, the dispossession of indigenous peoples in settler countries, and projects of forced sterilization, medical experimentation, and public health. See Kay Anderson, *Race and the Crisis of Humanism* (London: Routledge, 2007) at 12; E.N. Anderson and Barbara A. Anderson, “Animating Tigers: Dehumanization, Justified Violence, and Paper Tigers” in *Warning Signs of Genocide: An Anthropological Perspective* (Lanham, MD: Lexington Books, 2013) at 67; Megan H. Glick, “Of Sodomy and Cannibalism: Dehumanisation, Embodiment, and the Rhetorics of Same-Sex and Cross-Species Contagion (2011) 23:2 Gender & History at 268-269. [↑](#footnote-ref-92)
93. Samera Esmeir, “On Making Dehumanization Possible” (2006) 121:5 PMLA at 1544. [↑](#footnote-ref-93)
94. *Ibid*. For a full discussion of the trajectory of juridical humanity in Egypt see Samera Esmeir, *A* *Juridical Humanity: A Colonial History* (Stanford: Stanford University Press, 2012). [↑](#footnote-ref-94)
95. Esmeir, “On Making Dehumanization Possible”, supra note 93 at 1545-1549; Esmeir, *A* *Juridical Humanity: A Colonial History*, *ibid* at 4. [↑](#footnote-ref-95)
96. *Ibid* at 1548. Esmeir explains that in the late nineteenth century British colonial era, law played handmaiden to colonialism through ideologies that celebrated the rule of law and the establishment independent judiciary as features of a proper civilization that would humanize Britain’s colonial subjects who were subhumanized by their home states and cultures. Esmeir is concerned that international human rights law perpetuates this racialised civilizational logic through human rights “campaigns (that) effectively transform humanity into a legal status to be granted to citizens of the global south.” *Ibid* at 1545. [↑](#footnote-ref-96)
97. Andreja Zevnik, “Becoming-Animal, Becoming-Detainee: Encountering Human Rights Discourse in Guantanamo” (2011) Law Critique at 157. See also, Jasbir K. Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Durham. N.C.: Duke University Press, 2007) at 13-15; Sherene Razack, *Casting Out: The Eviction of Muslims from Western Law and Politics* (Toronto: University of Toronto Press, 2008) at 60-61. [↑](#footnote-ref-97)
98. Rebecca Scott, “Body Worlds’ plastinates, the human/nonhuman interface, and feminism” (2011) 12 Feminist Theory at 169 citing Carol Quillen, Feminism Theory, Justice and the Lure of the Human (2001) 27:1 Signs at 88; Natasha Marhia (2013) “Some humans are more *Human* than Others: Troubling the “human” in human security from a critical feminist perspective” 44 Security Dialogue at 23-26. [↑](#footnote-ref-98)
99. Ngaire Naffine, “Liberating the Legal Person” (2011) 26:1 CJLS at 199 and 203. [↑](#footnote-ref-99)
100. The overwhelming division of entities and beings into either persons or property is evidence of law’s binary classification system. It is useful to note, however, that an entity can sometimes straddle both categories. Francione and Dayan point us to the historical example of the legal status of slaves. A contemporary example is corporations who have the legal subjectivity of persons but can also be sold as property. On this latter point see Naffine, *supra* note 34 at 48. Naffine adds, presumably contemplating embryos, fetuses, and the comatose in the last clause: “…humans too can possess an ambiguous legal status, especially at the margins of life.” Ibid. With this comment, Naffine seeks to draw our attention to the cluster nature of both concepts in law and the ways that the typical attributes of one concept can sometimes attach in the other in certain contexts. Consider, for example, the ability of humans to sell some of their body tissue and biological services on the market, thus propertising parts of why is normally simply personified. [↑](#footnote-ref-100)
101. Colleen Glenney Boggs, *Animalia Americana: Animal Representations and Biopolitical Subjectivity* (New York: Columbia University Press, 2013) at 42. [↑](#footnote-ref-101)
102. Indeed, some of those who oppose personhood for animals emphasize this very point, suggesting that our humanity would be lost if animals lost their property status as it is through their commodification that we concretize our humanity and thus personhood. See Naffine, *supra* note 34 at 142. [↑](#footnote-ref-102)
103. Ciméa Barbato Bevilaqua, “Chimpanzees in court: what difference does it make?” in Yoriko Otomo and Ed Mussawir, eds, *Law and the Questions of the Animal: A Critical Jurisprudence* (Oxon: Routledge, 2013) at 80. [↑](#footnote-ref-103)
104. *Ibid* at 80-81. [↑](#footnote-ref-104)
105. As Bevilaqua notes, the genetic argument is particularly powerful given the precedent of recognizing DNA as proof of kinship and relationship status. *Ibid* at 82. [↑](#footnote-ref-105)
106. *Ibid* at 83-84. [↑](#footnote-ref-106)
107. Sue Donaldson and Will Kymlicka’s *Zoopolis: A Political Theory of Animal Rights* (Oxon: Oxford University Press, 2011) at 30. [↑](#footnote-ref-107)
108. Bevilaqua*, supra* note 103 at 85. [↑](#footnote-ref-108)
109. Notable here in the liberal tradition is Donaldson and Kymlicka, *supra* note 107. [↑](#footnote-ref-109)