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## Social Membership: Animal Law beyond the Property/Personhood Impasse

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*While animal law has been subject to frequent reform in Canada and abroad, the basic legal foundations of animal oppression are largely unchanged. There are many reasons for this impasse, but part of the explanation is that legal reforms are caught in what we might call the property/personhood dilemma. In most legal systems, domesticated animals are defined as property, and so long as this remains true, reforms are likely to be marginal and ineffective. However, the main alternative—to shift animals from the category of property to personhood—is politically unfeasible, particularly for the domesticated animals who are most intensively exploited in our society. In this paper, I explore a third option for legal reform, which is to include domesticated animals into other legal categories such as “workers” or “members of the family” which carry with them social standing and social rights, even if not full legal personhood. Indeed, there is already some movement in this direction: the law is recognizing (some) animals as (rights-bearing) workers or family members, for at least some purposes, without having declared them to be persons. I call this the social recognition strategy, and argue that it has unexplored promise for advancing justice for animals, although it is not without its own dilemmas and limits.*

*Même si le droit des animaux a fait l'objet de réformes fréquentes au Canada et à l'étranger, les fondements juridiques élémentaires de l'oppression des animaux sont largement inchangés. De nombreuses raisons expliquent cette impasse, mais une partie de l'explication est que les réformes juridiques se heurtent à ce que l'on pourrait appeler le dilemme propriété-personnalité. Dans la plupart des systèmes juridiques, les animaux domestiques sont définis comme étant des biens, et aussi longtemps que cela demeure, il est probable que les réformes soient marginales et inefficaces. Toutefois, la principale autre possibilité—accorder la personnalité aux animaux au lieu de les considérer comme des biens—est politiquement impossible, particulièrement pour les animaux domestiques les plus intensivement exploités dans notre société. Dans l'article, l'auteur explore une troisième possibilité de réforme juridique : donner aux animaux domestiques un autre statut juridique, par exemple « travailleurs » ou « membres de la famille, » statuts qui comportent une position sociale et des droits sociaux, même s'ils ne confèrent pas la pleine personnalité juridique. On constate en effet qu'il existe déjà un mouvement dans cette direction : la loi reconnaît (certains) des animaux comme étant des travailleurs ou des membres de famille (jouissant de droits), au moins à certaines fins, sans avoir déclaré qu'ils sont des personnes. L'auteur appelle cela la stratégie de reconnaissance sociale et avance que c'est un début prometteur pour faire progresser la justice pour les animaux, quoique cette stratégie comporte aussi ses dilemmes et ses limites.*

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\* Canada Research Chair in Political Philosophy, Queen's University, Kingston. This paper draws extensively on ideas developed in collaborative work with Sue Donaldson, as part of our ongoing work in elaborating a new “zoopolis” model of animal rights (Sue Donaldson & Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (New York: Oxford University Press, 2011)). An earlier version was presented at the 6th annual Frederik van Eeden Lecture at the Internationale School voor Wijsbegeerte in Leusden, Netherlands, and to the Political Science department at the Université du Québec à Montréal. Thanks to Erno Eskens and Eva Meijer (ISVW), and Eve Seguin (UQAM), for the invitations, and to Christiane Bailey, Vaughan Black, Maneesha Deckha, Sue Donaldson, Jessie Eisen, Josh Milburn, Peter Sankoff, Saskia Stucki, and Katie Sykes for very helpful comments.

*Introduction*

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*Introduction*

Law is central to the oppression of animals—it is the legal system which authorizes humans to harm and exploit animals—and legal reform is therefore essential to the ending of their oppression. A great deal of imagination and effort has been put into reforming animal law, with a number of striking and high-profile legislative initiatives and court cases. A lot is happening in animal law, around the world, at a speed that makes it difficult to keep up with the changes.<sup>1</sup>

I believe, however, that these efforts at reform have reached an impasse, and that beneath the dizzying array of change there is actually a great deal of stability and immobility: the basic legal foundations of animal oppression are largely unchanged. For the purposes of this paper, I am particularly interested in the status of domesticated animals—those animals who have been selectively bred over generations to be able to live and work alongside us—which includes companion animals (e.g., dogs and cats), farmed animals (e.g., cows, sheep, pigs, chickens, salmon), and some lab animals (e.g., domesticated mice, zebrafish). These are the animals that are most intensely governed and exploited by humans, under a legal framework that has been largely impervious to meaningful reform.

There are many reasons for this impasse, but part of the explanation, I believe, is that legal reforms are caught in what we might call the property/personhood dilemma. The dilemma is this: in most legal systems, domesticated animals are typically defined as property. The first question for reformers, therefore, is whether to work within that framework or to challenge it. On the one hand, we know that it is politically feasible to

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1. Deborah Cao & Steven White, eds, *Animal Law and Welfare—International Perspectives* (Switzerland: Springer, 2016); Thomas Kelch, *Globalization and Animal Law: Comparative Law, International Law and International Trade* (Netherlands: Kluwer Law, 2011).

adopt welfarist reforms without changing the property status of animals (e.g., increasing the size of cages)—we have many such examples around the world. However, there is good reason to believe that such reforms are at best treading water: they mitigate some older forms of animal oppression while doing nothing to prevent or slow down the emergence of new forms of animal oppression. The only effective remedy to oppression, therefore, is to move animals from the legal category of “property” into the category of being a rights-bearing subject—i.e., into “personhood.” However, this “property to personhood” strategy is utopian in the foreseeable future, at least in relation to those animals who are most oppressed in our society (e.g., farmed animals). In short, working within the property framework is politically feasible but ineffective, and struggling for legal personhood would generate real change but is politically unfeasible.

In this paper, I will try to show that this is indeed a dilemma: both the property and personhood frameworks face serious difficulties as a basis for current legal reform. However, my main aim is more constructive, to explore a third option for legal reform, which is to get domesticated animals included into other legal categories such as “workers” or “members of the family” which carry with them social standing and social rights, even if not full legal personhood.<sup>2</sup> In fact, as we will see, there is already movement in this direction: the law is recognizing (some) animals as (rights-bearing) workers or family members, for at least some purposes, without having declared them to be “persons.” I will call this the social recognition strategy: getting domesticated animals included into everyday legal categories of social membership. I think this has unexplored promise for advancing justice for animals.

To be clear: I do not believe that this sort of social recognition of animals as workers or family members can take the place of recognition of their personhood. Justice for domesticated animals will require both the recognition of legal personhood and the recognition of social membership. So I am not suggesting to replace the personhood strategy with a social recognition strategy. However, I want to advance three claims: (1) that social recognition is an essential, irreducible dimension of justice for domesticated animals, alongside recognition of personhood; (2) that pursuing social recognition is, for the foreseeable future, more politically feasible than pursuing recognition of personhood; and (3) that achieving social recognition may in fact facilitate and expedite the recognition of

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2. In the fuller version of this argument, I will also explore third options for non-domesticated animals, beyond the property/personhood impasse, but as I discuss below, these are unlikely to take the form of membership rights.

personhood.<sup>3</sup> The quickest route to the recognition of personhood might involve a detour through social recognition.

### I. *The need for reform*

Before discussing strategies for reform, it is important to first show that reform is indeed needed. I will not dwell on this, since many other commentators have documented at length the painful inadequacies of existing regimes of animal law.<sup>4</sup> Animal law is premised on the assumption that humans have the right to use animals for our benefit, but that we should avoid “cruelty” or “unnecessary suffering” in this use. This proviso against “unnecessary suffering” or “cruelty” is sometimes described as a commitment to “animal protection,” but as Ani Satz has documented, the basic logic of such laws inherently subordinates animal protection to human use. We protect animals only if and insofar as this protection is consistent with our use of them. So, for example, it is consistent with our interest in eating meat to require that cows be insensate when killed, but it is not consistent with our interest in eating wild fish to require that fish be insensate when killed. There is no way to kill most wild fish without inflicting intense pain, and to insist on a principle that fish be insensate when killed would require us to give up using fish as food. Since we assert the right to use fish in this way, we abandon the principle of “humane” slaughter.<sup>5</sup> The fish’s interest in a painless death counts for nothing since it is not compatible with our interest in using fish for food.

Satz calls this “interest-convergence” principle: we recognize the interests of animals only if and insofar as it is consistent with our prior claim to use them in a particular way.<sup>6</sup> For this reason, it is in fact quite misleading to call this “animal protection law”: the fundamental purpose of these laws is not to protect animals, but on the contrary to assert the right to use animals. We have animal use laws, not animal protection laws. At its core, animal law authorizes the harming of animals: indeed, that is its fundamental legal purpose, to provide legal cover to the harming

3. Since the first point has been developed in depth in earlier work (*Zoopolis*, *supra* note \*), I will focus here on the latter two claims.

4. Gary Francione, *Animals, Property, and the Law* (Philadelphia: Temple University Press, 1995).

5. The term “humane slaughter” is of course an oxymoron.

6. Ani Satz, “Animals as Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy, and Property,” (2009) 16:1 *Animal L* 65. Satz’s focus is American animal law, but Létourneau shows that the same logic applies in Canada (Lyne Létourneau, “Toward Animal Liberation? The New Anti-Cruelty Provisions in Canada and their Impact on the Status of Animals” (2002) 40:4 *Alta L Rev* 1041). The “interest-convergence” principle was originally developed by critical race theorists in the US to explain the inadequacies of racial equality law (Derrick Bell Jr, “Brown v. Board of Education and the Interest-Convergence Dilemma” (1980) 93:3 *Harv L Rev* 518), but as Satz notes, it fits perfectly the logic of animal protection law.

of animals. As Taimie Bryant puts it, these laws “are so favourable to the interests of those ostensibly restrained by them that scientists and flesh food producers would fight for exactly these laws if they did not exist. Such laws provide them with ample coverage to inflict horrendous suffering while wearing the mantle of complying with state and federal laws that purport to protect animals.”<sup>7</sup>

Virtually everyone who studies animal law agrees that this framework is inadequate, sacrificing even the most basic interests of animals to the most trivial interests of humans. But how should we reform it? As noted earlier, the approaches to date fall into two broad categories: (1) welfarist reforms that seek to strengthen animal protection without disputing the right of humans to use animals; (2) the pursuit of legal personhood. I will briefly discuss the limits of both.

## II. *Welfarist reforms*

“Welfarist” legal reforms cover a range of possibilities, but I will focus here on two. One set of reforms seek to eliminate the most egregious forms of harm that are found within a particular use of animals. So, for example, animal advocates seek to eliminate sow crates or battery cages, on the grounds that these harms are “unnecessary” and “cruel” in meat or egg production. Some critics argue that such single-issue reforms are counter-productive, since they leave untouched, and indeed arguably reassert, the underlying assumption that animals are property and that humans have the right to use animals for our benefit.<sup>8</sup> Defenders respond that these reforms not only reduce specific instances of suffering, but also give public visibility and legal recognition to animals’ interests, and thereby contribute to larger societal processes of rethinking our relations with animals.

I will not take a stand on the pros and cons of specific reformist measures, which often depend on the details.<sup>9</sup> But I would argue that

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7. Taimie Bryant, “Denying Animals Childhood and its Implications for Animal-Protective Law Reform” (2010) 6:1 *L. Culture and the Humanities* 56 at 62. See also Piers Beirne, “For a Nonspeciesist Criminology: Animal Abuse as an Object of Study” (1999) 37:1 *Criminology* 117 at 129: “Ironically ... law is a major structural and historical mechanism in the consolidation of institutionalized animal abuse.”

8. Gary Francione, “Animals—Property or Persons?” in Cass Sunstein & Martha Nussbaum, eds, *Animal Rights: Current Debates and New Directions* (New York: Oxford University Press, 2004) 108. See also Jason Wyckoff, “Toward justice for animals” (2014) 45:4 *J Social Philosophy* 539; Wyckoff, “Analysing animality: A critical approach” (2015) 6:6 *Philosophical Q* 529.

9. patricejones offers a helpful list of considerations for deciding which welfarist proposals generate substantive change that is worthy of support in “Strategic Analysis of Animal Welfare Legislation: A Guide for the Perplexed” (2008), *patricejones.info* (blog), online: <<http://blog.bravebirds.org/wp-content/uploads/perplexed.pdf>>. Peter Sankoff argues that the procedural dimensions of legal reforms can be just as important. Adopting a more open and deliberative process for debating animal law may be more important in the long term than any specific set of substantive reforms, see Peter

they are always insufficient, partly because they leave untouched the premise that animals are property, but also because they are reactive, attempting to mitigate the harms of pre-existing practices. Welfarist reformers often write as if there were a fixed set of ways of using animals, and that each new welfare reform is slowly but surely reducing the harm involved in these uses. In reality, scientists and capitalists are continually inventing new ways of exploiting animals. Think about biotechnology, which is developing new ways of using and harming animals that were inconceivable just twenty years ago.<sup>10</sup> In fact, it is part of the very logic of contemporary science and capitalism that they are “voracious” in their pursuit of new ways of instrumentalizing animals.<sup>11</sup> For every successful welfarist reform to yesterday’s instrumentalization of animals, a new and often even worse way of instrumentalizing animals is emerging. Welfarist reforms therefore, at best, are treading water.<sup>12</sup>

A second form of welfarist reforms focuses not on specific practices, but on articulating some more general ethical concept or principle that is intended to moderate or restrain this impulse to instrumentalizing animals. For example, Switzerland has enshrined the principle that animals should be treated with “dignity,” which the Federal Animal Welfare Act defines as:

the intrinsic value of an animal, which has to be respected by anyone handling animals. The dignity of an animal will be violated if the animal’s burden cannot be justified by overriding interests. An animal is considered to be burdened, in particular, if pain, suffering, harm,

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Sankoff, “The Animal Rights Debate and the Expansion of Public Discourse: Is It Possible for the Law Protecting Animals to Simultaneously Fail and Succeed?” (2012) 18:2 *Animal L* 281.

10. As Zipporah Weisberg notes, recent developments in biotechnology can only be seen as an “ethical collapse”: the renouncing of any ethical constraints on human impulses to dominate and manipulate animals. See Weisberg, “Biotechnology as End Game: Ontological and Ethical Collapse in the ‘Biotech Century’” (2015) 9:1 *NanoEthics* 39.

11. See John Gluck, *Voracious Science & Vulnerable Animals* (Chicago: University of Chicago Press, 2016). Gluck is a former primate researcher who documented the multiple forces that lead scientists to expand the use of animals.

12. My skepticism about cumulative progress through welfarist reforms may be informed by living in Canada, where even the most modest reforms have proven very difficult to achieve; see John Sorenson, “Some Strange Things Happening in Our Country’: Opposing Proposed Changes in Anti-Cruelty Laws in Canada” (2003) 12:3 *Social & L Studies* 377; Antonio Verbora, “The Political Landscape Surrounding Anti-Cruelty Legislation in Canada” (2015) 23:1 *Society & Animals* 45). Canada has fallen to the bottom of the Western world in the World Animal Protection’s index of animal protection laws; see World Animal Protection, *Animal Protection Index: Canada* (2014), online: <<http://api.worldanimalprotection.org/country/canada>>; see also International Fund for Animal Welfare, *Falling Behind: An International Comparison of Canada’s Animal Cruelty Legislation* (2008), online: <[www.ifaw.org/canada/resource-centre/falling-behind-international-comparison-canada-s-animal-cruelty-legislation](http://www.ifaw.org/canada/resource-centre/falling-behind-international-comparison-canada-s-animal-cruelty-legislation)>. But I would argue that the structural limits of welfarist reforms apply equally to those countries at the top of the WAP ranking.

anguish or humiliation is caused to the animal, if his or her appearance or abilities are profoundly interfered with, or if she or he is excessively instrumentalized.<sup>13</sup>

This reform was initially greeted with some optimism by animal advocates, but closer inspection reveals that it remains firmly embedded within the interest-convergence model. For example, the very same Act explicitly permits invasive animal experiments, which means that it “allows the pure instrumentalization of animals.”<sup>14</sup> The same act also states that anyone who handles animals must ensure their wellbeing, but only as far as the purpose of their use (*Verwendungszweck* or *le but de leur utilisation*) permits. As Michel notes, “This terminology is of course hardly compatible with protection of the animal’s dignity. Any suffering that accompanies the ‘designated use of the animal’ is permissible.”<sup>15</sup> Underneath the rhetorical declaration of animal dignity lies pure interest-convergence logic.<sup>16</sup>

The same is generally true of other such rhetorical reforms, such as the provisions in the German, Austrian and Swiss Civil Codes which state that “Animals are not things,”<sup>17</sup> or Article 13 of the EU Lisbon Treaty which states that “animals are sentient beings.” These sound like a break from interest-convergence, but on inspection, they are not. Here for example, is the full text of Article 13 of the Lisbon Treaty:

In formulating and implementing the Union’s agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are

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13. *Tierschutzgesetz [TSchG] [Animal Welfare Act]*, 16 December 2005, JR 455, art 3(a). Translation in Margot Michel, “Law and Animals: An Introduction to Current European Animal Protection Legislation” in Anne Peters, Saskia Stucki & Livia Boscardin, eds, *Animal Law: Reform or Revolution?* (Zurich: Schulthess, 2015) 87 at 99-100.

14. *Ibid* at 100.

15. *Ibid* at 102.

16. See Jessica Eisen, “Liberating Animal Law: Breaking Free from Human-Use Typologies” (2010) 17:1 *Animal L* 59 for a similar diagnosis of the failure of these reforms to break free from “human-use typologies.” Gieri Bolliger offers a more hopeful account of the Swiss animal dignity provision, although he too concedes that it “has not yet led to a fundamental change in the human-animal relationship in practice” (Bolliger, “Legal Protection of Animal Dignity in Switzerland: Status Quo and Future Perspectives” (2016) 22:2 *Animal L* 311 at 312.

17. See, e.g., art 641 of the *Schweizerisches Zivilgesetzbuch [ZGB] [Swiss Civil Code]*, 10 December 1907, SR 210, or s 90a of the German *Bürgerlichesgesetzbuch [BGB] [Civil Code]*, translation online: <[www.gesetze-im-internet.de/englisch\\_bgb/index.html](http://www.gesetze-im-internet.de/englisch_bgb/index.html)>, which states, “Animals are not things. They are protected by special statutes.” In December 2015, the *Civil Code of Quebec* was amended by the addition of art 898.1, which declares, “Animals are not things. They are sentient beings and have biological needs.” However, it then goes on to say, “the provisions of this Code concerning property nonetheless apply to animals.” The amending statute, SQ 2015 c 35, also enacted the *Animal Welfare and Safety Act*, but specifies that the new act’s provisions concerning obligations of care and its prohibition against causing distress to animals do not apply to scientific research or to generally accepted agricultural practices.



sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.<sup>18</sup>

Here again, we see the logic of interest-convergence: we first assert our right to use animals in designated ways (for food, for research), and we then consider the welfare of animals as far as their designated use permits.<sup>19</sup>

### III. *Personhood*

To overcome this deeply entrenched logic of interest-convergence, we need more radical legal reforms. We need to get animals out of their current use-based and property-based classification. We need to assert that animals have interests and rights that are independent of our uses of them, and that constrain whether or how we can legitimately interact with them. We need, in short, to assert that animals are rights-bearing subjects, with their own lives to lead, not resources for us or a caste group that exists to serve us.

The best known version of this strategy involves moving animals from the category of “property” into the category of “personhood.”<sup>20</sup> This appeal to personhood is natural, and perhaps inevitable, since personhood is the category used in existing constitutional law to define rights-bearing subjects. Bills of rights typically take the form of stating that “all persons have a right to X,” and so the most secure way to ensure animals have rights is to recognize animals as persons. Moving animals “from property

18. *Consolidated Version of the Treaty on the Functioning of the European Union*, art 13, [2012] OJ, C 326/47 at 54.

19. Yet another version of this type of reform is the inclusion of animal welfare as a “state objective” or *Staatsziel*. Since 2002, the “state objective of animal protection” has been part of Germany’s constitution, (*Grundgesetz* [GG] [Basic Law], art 20a, translation online: <[www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html)>) and in 2013, animal welfare was endorsed in Austrian constitutional law as a state objective (*Bundesverfassungsgesetz über die Nachhaltigkeit, den Tierschutz, den umfassenden Umweltschutz, die Sicherstellung der Wasser- und Lebensmittelversorgung und die Forschung* [Federal Constitutional Act on sustainability, animal protection, comprehensive environmental protection, on water and food security as well as research], BGBl I 111/2013, s 3.). In principle, this reform could be more significant than changes to the Civil Code declaring that animals are not things, because unlike regular legislation, “state objectives” can justify limits on fundamental rights. Prior to 2002, animal welfare did not constitute a constitutional value in Germany, and could therefore not justify restrictions of unconditionally guaranteed rights such as freedom of religion (e.g., re ritual slaughter), freedom of research (e.g., re animal experimentation) or freedom of artistic expression (e.g., re harming animals as part of artistic production). In principle, now that animal welfare is a state objective, animal welfare concerns could justify restricting these other constitutional rights. In practice, however, little has changed in patterns of animal use. The constitutional amendment permits a rebalancing of the interests of animals and humans, but it does not require such a rebalancing, and the subordination of animal interests to human interests in relation to religion or research has not materially changed in Germany. For an overview, see Michel, *supra* note 13.

20. Francione, “Animals—Property or Persons?,” *supra* note 8.

to personhood” is, therefore, often described as the “holy grail” of animal law advocacy.<sup>21</sup>

The difficulty with this strategy, however, is that it is wildly utopian, at least with respect to the animals we oppress in the most systematic way, namely domesticated animals, including farmed animals. It is difficult to know what percentage of the general public would support the idea of personhood for pigs and chickens, but if we take the number of ethical vegans as a quick proxy, the number is perhaps 1–2% in most Western countries. The idea is not supported by any major political party, and is not even discussed in mainstream political and public debate.

This helps explain why existing projects in defense of animal personhood have almost always focused on non-domesticated animals, and even more specifically on primates, elephants, whales, and dolphins.<sup>22</sup> This is true, for example, of the Great Apes Project, started in 1993 by Paola Cavalieri and Peter Singer, and the Nonhuman Rights Project, directed by Steven Wise.<sup>23</sup> The two projects differ in various ways—GAP aims primarily at legislative change; the NhRP at courts—but they share the same decision to single out primates for personhood. One common reason given for singling out primates is that they are closest to humans in their evolutionary history, and we have powerful scientific evidence that their cognitive capacities are continuous with those of humans. They therefore provide a particularly striking example of the moral arbitrariness of drawing personhood at the line of *Homo sapiens*.

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21. Richard Cupp, “A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood as Stepping Stones Toward Abolishing Animals’ Property Status” (2007) 60:1 Southern Methodist U L Rev 3.

22. For defences of personhood for these species, see, among many others, Paola Cavalieri, “Whales as persons” in M Kaiser & M Lien, eds, *Ethics and the Politics of Food* (Wageningen: Wageningen Academic Publishers, 2006) 28; Denise L Herzing & Thomas I White, “Dolphins and the Question of Personhood” (1998) 9 *Etica & Animali* 64; Thomas White, *In Defense of Dolphins: The New Moral Frontier* (Malden: John Wiley, 2008); David DeGrazia, “Great apes, dolphins, and the concept of personhood” (1997) 35:3 *Southern J Philosophy* 301.

23. It is also true of two recent Argentine cases where advocates sought personhood for primates: a 2014 case involving Sandra the orangutan (Cámara Federal de Casación Penal [Federal Court of Penal Cassation], Buenos Aires, 18 December 2014, *Orangutana Sandra s/ recurso de casación s/ Habeas Corpus* [Sandra the Orangutan, Appeal in Cassation in re Habeas Corpus], CCC 68831/2014/CFCP); and a 2016 case involving Cecilia the chimpanzee (Tercer Juzgado de Garantías [Third Court of Guarantees], Mendoza, 3 November 2016, *Presentación efectuada por A.F.A.D.A. respecto de “Chimpancé Cecilia”—Sujeto No Humano* [Presentation by A.F.A.D.A. about the Chimpanzee “Cecilia”—Non-Human Individual], P-72.254/15, translation online: <[http://www.nonhumanrights.org/content/uploads/2016/12/Chimpanzee-Cecilia\\_translation-FINAL-for-website.pdf](http://www.nonhumanrights.org/content/uploads/2016/12/Chimpanzee-Cecilia_translation-FINAL-for-website.pdf)>). For a discussion of these cases, see Saskia Stucki, “Toward Hominid and Other Humanoid Rights: Are We Witnessing a Legal Revolution?” (30 December 2016), *VerfBlog* (blog), online: <<http://verfassungsblog.de/toward-hominid-and-other-humanoid-rights-are-we-witnessing-a-legal-revolution/>>.

This decision to ground claims for animal personhood on their closeness to and continuities with humans has been criticized as reinscribing ideologies of human supremacism: this strategy takes humans as the unquestioned exemplar of moral status, and then evaluates other species by how close or distant they are to us. Even if this strategy allows extending personhood to the members of some species that seem particularly close to us in their cognitive abilities, it reinforces the idea that man is the measure of all things.<sup>24</sup> Defenders of the GAP and NhRP respond that breaching the legal wall that currently separates “rights-bearing humans” from “animals,” even if just done for one species, will not only protect the rights of members of that particular species, but will inevitably trigger a wider public debate about our relations with all animals.<sup>25</sup>

I will not take a stand on this debate about whether these species-specific strategies for achieving legal personhood reinscribe human supremacism, which is likely to depend on the specifics of how these strategies are framed.<sup>26</sup> But I would point out a second clear limitation of these species-specific strategies: namely, that they focus on animals that are largely peripheral to the “animal-industrial complex” that is at the

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24. Steve Sapontzis, “Aping Persons—Pro and Con” in P Cavalieri & P Singer, eds, *The Great Ape Project: Equality Beyond Humanity* (London: Fourth Estate, 1993) 269.

25. Paola Cavalieri, “The Meaning of the Great Ape Project” (2015) 1:1 *Politics and Animals* 16; Cavalieri, “Animal liberation: A political perspective” in Paola Cavalieri, ed, *Philosophy and the Politics of Animal Liberation* (New York: Palgrave, 2016) 15; Lee Hall, “Does Nonhuman Ape Personhood Contradict Egalitarian Animal-Rights Principles? The Top Ten Questions” *GRASP: Great Ape Standing and Personhood*, originally posted online at the now-defunct website <<http://personhood.org>>. It remains accessible at: <<https://web.archive.org/web/20071105223837/http://www.personhood.org/hierarchical/>>.

This debate about species-specific personhood reforms mirrors the debate about practice-specific welfarist reforms. In each case, the narrow focus makes reform more feasible, but leaves the wider framework in place, and therefore has both destabilizing and re-legitimizing effects. In my view, we do not yet have the sort of social science evidence that would enable us to make confident predictions about the balance of these effects.

26. A related debate is whether the very term “personhood” is too imbued with human-supremacist and cognitivist associations to provide a viable basis for defending legal subjectivity for animals. In *Zoopolis*, we suggested that “selfhood” would be a more apt term to designate legal subjectivity (Donaldson & Kymlicka, *Zoopolis*, *supra* note \* at 30-31). Deckha has similarly argued for replacing “personhood” with “beingness” (Maneesha Deckha, “Humanizing the Nonhuman: A Legitimate Way for Animals to Escape Juridical Property Status?” forthcoming in John Sorenson & Atsuko Matsuoka, eds, *Critical Animal Studies* (Lanham: Rowman & Littlefield, 2017). The shared goal is to move animals from being a legal “something” to being a legal “somebody,” but there is disagreement about whether “being a somebody” is best captured in the language of personhood, selfhood or beingness. Since most existing legal strategies for gaining legal subjectivity for animals use the language of personhood, I will follow that terminology in the rest of the paper, although I continue to believe that “selfhood” would provide a more accurate and secure basis, given that personhood has historically been interpreted to exclude not only animals, but also many humans who are perceived as falling outside some “normal” range of cognitive capacities.

heart of the oppression of animals.<sup>27</sup> This indeed is a deliberate part of both the GAP and NhRP strategies: pursuing personhood for primates, whales and elephants is politically feasible in large part because their use is not central to contemporary Western economies or ways of life.<sup>28</sup> We can grant them basic rights without any change in everyday practices.

Recall that the interest-convergence principle rests on some idea of the “designated use” of animals, and then accords weight to animal welfare if and insofar as it is consistent with this designated use. Pursuing personhood for chimps, elephants and whales is politically feasible precisely because the average citizen has no clear idea of the “designated use” of such animals. On the contrary, most citizens think that the appropriate life for such animals is to live freely in their own habitat. Of course there are some primates, elephants and whales in research labs, zoos and aquariums—and these are the focus of GAP and NhRP campaigns—but these species are not primarily defined by their human use, and many citizens are quite prepared to accept that they have no designated use, and so should be exempt from the interest-convergence logic.

The real challenge, in my view, is to gain rights for those animals who are central to the animal-industrial complex, and who have been defined socially and legally by their “designated use.” These are the animals who are most trapped by the current interest-convergence logic, and for whom legal reform is urgent. And these, of course, are domesticated animals: the animals who have been brought into our society to serve us, and whose designated use is a central part of our way of life. It is striking and telling fact that neither GAP nor NhRP have been able to imagine a strategy for achieving personhood for domesticated animals.

As a result, it is possible that GAP or NhRP might succeed in gaining personhood in a particular jurisdiction for Great Apes, say, without having any beneficial effects for domesticated animals. Indeed, this is arguably what we see in New Zealand. In 1999, New Zealand adopted a version of the GAP declaration, guaranteeing basic rights for five species of great apes. Yet New Zealand has one of the most intensive systems of animal agriculture in the world: the New Zealand economy is built on animal agriculture. To date, at least, the decision to adopt GAP has not really been a repudiation of the interest-convergence logic, but simply

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27. The term “animal industrial complex” originates in Barbara Noske, *Humans and Other Animals: Beyond the Boundaries of Anthropology* (London: Pluto Press, 1989). For an update and elaboration, see Richard Twine, “Revealing the Animal-Industrial Complex: A Concept and Method for Critical Animal Studies” (2012) 10:1 *J Critical Animal Studies* 12.

28. Of course whales were once a central part of New England’s economy, but the political feasibility of personhood claims depends on the fact that this is no longer true.

a recognition that Great Apes lack the designated use that activates the interest-convergence logic in the first place.<sup>29</sup>

#### IV. *A third approach*

So we seem to be stuck between a rock and a hard place: pursuing reforms within the property framework is ineffective, but pursuing personhood for domesticated animals is utopian, at least for the foreseeable future. Is there a third option? In the rest of this paper, I want to explore one possibility: namely, the recognition of social membership.

In order to set up this third option, it is worth stepping back and considering more generally what justice requires in our relations with domesticated animals (hereafter DAs). This is a surprisingly neglected question within animal rights theory. We know part of the answer: justice requires that we stop harming, exploiting and killing them. We must recognize that they are individuals with their own lives to lead, not resources for us. But this is only part of the story: it tells us something important about how we must not treat DAs, but it does not yet tell us how we should relate to them. What kinds of relationships, activities, and interactions should we have with DAs?

Think of this as the “day after” question: imagine that society decides on day one to treat animals as persons not property. What happens on the day after? It seems likely that we would and should have different types of relations with different groups of animals. Think about wolves and dogs. Since dogs are domesticated wolves, they are very similar in their basic biology, with similar forms of sentience, and similar claims to personhood. Yet we would surely have different relations with them. In respect to wolves, our obligation would largely be to leave them alone, to live freely on their own habitat. But having bred dogs to be part of our society and to be dependent on us, we have obligations to care for them and to provide the conditions for their flourishing with us.

How can we make sense of this distinction between dogs and wolves? Why would we have different obligations to two groups of animals who are so similar in their basic sentience and who have similar personhood rights? The answer is that domestication has made DAs members of our society, and as such, they have membership rights, in addition to the basic personhood rights owed to all sentient animals. Recognition of social membership is an essential component of justice for DAs: having taken

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29. Indeed, Sankoff suggests that the recognition of rights for Great Apes may in fact have been adopted in part to deflect attention from criticism of New Zealand’s animal agriculture practices (Sankoff, “Five Years of the New Animal Welfare Regime: Lessons Learned from New Zealand’s Decision to Modernize Its Animal Welfare Legislation” (2015) 11 *Animal L* 7).

them out of the wild, and bred them to live and work alongside us, we must accept that they are now members of a shared society, and that society belongs to them as much as to us. Through domestication, they have acquired a birthright in our society.

Sue Donaldson and I have argued elsewhere that recognition of social membership has far-reaching implications. If DAs are members of society, then they are entitled to shape the social norms that govern our shared life, to have their interests included when determining the public good or the national interest, to benefit from public goods and public services, and to a fair distribution of the benefits and burdens of social cooperation.<sup>30</sup> Concretely, this would include a range of rights, including, to mention just two examples, a right to a system of publicly-funded health care for DAs, and a right that emergency services be trained and equipped to rescue DAs in case of fires or floods. The historic failure to extend these rights to DAs is evidence of their subaltern caste status.

This suggests that justice for domesticated animals operates at two levels. First, there is a set of basic rights owed to all sentient animals—wild or domesticated—such as the right not to be killed, experimented on or enslaved. Let's call these the universal rights of personhood, which are generally negative rights. Second, we have a set of rights that vary with the relationship that animals have to human society, which in the case of domesticated animals involves membership rights to flourish within a shared society. (For wilderness animals, by contrast, these relational rights might include rights to habitat and to autonomy, to protect them from encroachment by human society.)<sup>31</sup> Let's call these "group-differentiated" or "relational" rights, since they vary with an animal's relationship to human society. These tend to be positive rights, to particular relationships or resources.

On this two-level view, justice requires both respect for the universal basic rights of personhood and respect for relational rights, such as membership rights for DAs (or territorial rights for wilderness animals). I believe these relational or group-differentiated rights are as important to justice as the universal rights of personhood.

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30. Donaldson & Kymlicka, *Zoopolis*, *supra* note \*, chap 5. Since the category used to recognize membership is "citizenship," we argue that DAs should be seen as our co-citizens.

31. In *Zoopolis*, Donaldson and I discuss a third group—what we call "liminal" animals—who are non-domesticated but live amongst us rather than on their own habitat (e.g., urban wildlife). We suggest that justice for them also requires both universal rights of personhood and group-differentiated relational rights: in their case, rights to residency and accommodation. For a schematic representation of our approach, see Appendix.

If this two-level view is correct, then it suggests a possible approach to animal law reform that goes beyond the existing property/personhood options. To date, the main alternative to welfarist reforms has taken the form of pursuing universal basic rights of personhood. But as we've seen, that strategy is blocked for DAs for the foreseeable future. Could we make more progress if we shifted some of our attention to the second level of membership rights?

This suggestion may seem even more utopian than the personhood strategy. After all, as we've seen, personhood rights are largely negative rights not to be harmed, whereas membership rights are often positive rights. If it's unrealistic to expect public support for negative rights of personhood, how can we hope to get support for positive membership rights?

Yet that is indeed my suggestion. I believe that there are trends in both law and public policy towards recognition of the membership rights of DAs. I will consider two examples: recognition of DAs as family members, and recognition of DAs as workers.

#### V. *Domesticated animals as family members*

Ideas about the place of companion animals in the family are evolving. Surveys show that the vast majority of North Americans with companion animals consider them as one of the family, and expect the legal system to respect and honour this relationship.<sup>32</sup> Yet the law traditionally views companion animals as mere property. And because companion animals (hereafter CAs) are property, legal decisions about them are made on the basis of ownership principles. The result is a growing gulf between the self-understandings of average citizens and the rules of the law, which

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32. A 2011 Harris Poll showed that over 90 per cent of Americans with companion animals considered them to be members of the family (Harris Poll, "Pets Really Are Members of the Family" (10 June 2011), *The Harris Poll*, online: <[http://www.theharrispoll.com/health-and-life/pets\\_really\\_are\\_Members\\_of\\_the\\_Family.html](http://www.theharrispoll.com/health-and-life/pets_really_are_Members_of_the_Family.html)>). Nor is this just a ritualized phrase. Studies using standard psychological measures of attachment (e.g., proximity seeking, safe haven, secure base, and separation distress) show that people's closeness to their companion dogs is equal to their closeness to their mothers, siblings, and best friends (and higher than to their father). See Lawrence Kurdek, "Pet Dogs as Attachment Figures" (2008) 25:2 *J Social and Pers Relationships* 247; Gail Melson, *Why the Wild things are: Animals in the Lives of Children* (Cambridge, MA: Harvard University Press, 2001) at 39; Catherine Amiot & Brock Bastian, "Toward a Psychology of Human-Animal Relations" (2015) 141:1 *Psychological Bulletin* 6. It's worth noting that in many studies of family relationships, people spontaneously list companion animals as members of the family even when the researchers themselves had assumed a human-only conception of family, and so not had considered or prompted inclusion of companion animals as family members (Nickie Charles & Charlotte Aull Davies, "My Family and other animals: Pets as kin," in Bob Carter & Nickie Charles, eds, *Humans and Other Animals: Critical Perspectives* (New York: Palgrave, 2011) 69; Melson, *Why the Wild things are: Animals in the Lives of Children*, at 2).

is a source of growing frustration for many citizens, who are calling for the law to move CAs out of the property box into the category of family member.

We can see this at work in several contexts. Consider first the issue of *custody* in the event of divorce. In the case of children, the established rule is that custody should be based on the best interests of the child, including a commitment to maintaining family ties wherever possible (e.g., courts try to avoid splitting up children). In the case of CAs, however, since they are merely property, custody is based on whoever has the best ownership claim. Custody can be determined, for example, on the basis of who originally paid for the animal, without any attention to who has cared for the animal or whom the animal prefers, and without any commitment to preserving family ties (e.g., no effort is made to avoid splitting up companion animals).

This property approach is almost universally denounced, yet judges insist that they are legally bound to treat CAs as property. Consider these quotes from recent custody cases in Canada:<sup>33</sup>

Emotion notwithstanding, the law continues to regard animals as personal property. There are no special laws governing pet ownership that would compare to the way that children and their care are treated by statutes such as the *Custody and Maintenance Act* or the *Divorce Act*. Obviously there are laws that prohibit cruelty to animals, but there are no laws that dictate that an animal should be raised by the person who loves it more or would provide a better home environment. As such, slightly distasteful as it may be in the case of two loving and devoted pet owners, I must consider which one has the better property claim.<sup>34</sup>

[A] dog is a dog. Any application of principles that the court might normally apply to the determination of custody of children are [*sic*] completely inapplicable to the disposition of a pet as family property. Any temptation to draw parallels between the court's approach in this case to the principles applied to settle child custody disputes must be rejected.<sup>35</sup>

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33. For similar American cases, see *Rabideau v City of Racine* 627 NW (2d) 795 at 798 (Wis 2001): "We are uncomfortable with the law's cold characterization of a dog...as mere 'property'... This term inadequately and inaccurately describes the relationship between a human and dog"; *Travis v Murray* 977 NYS (2d) 621 at 625 (NY App Div 2013): the pet is an "actual member of the family, vying for importance alongside children"; *Nuzzaci v Nuzzaci*, 1995 WL 783006 (Del Fam Ct): "While their dilemma is certainly a viable one...the fact is that this Court is simply not going to get into the flora or fauna visitation business"; *Lachenman v Stice* 838 NE (2d) 451 at 467 (Ind Ct App 2005): "However unfeeling it may seem, the bottom line is that a dog is personal property"; *Corso v Crawford Dog and Cat Hospital Inc* 415 NYS (2d) 182 at 183 (NY Civ Ct 1979): "To say [a dog] is a piece of personal property and no more is a repudiation of our humaneness. This I cannot accept."

34. *Gardiner-Simpson v Cross*, 2008 NSSM 78 at paras 4-5.

35. *Ireland v Ireland*, 2010 SKQB 454 at para 12.



At law, dogs are property. The ‘best interest of the dog’ is not a concept any more relevant to the law than would be the best interest of the motorcycle in a dispute over a Harley-Davidson.<sup>36</sup>

I have no doubt that the dog currently has a good home with Dr. Hawes and her family, but that is not the point. This case is not about the best interest of the dog; it is about who has the better claim to legal ownership. The analysis is no different than it would be if we were talking about a bicycle.<sup>37</sup>

Many dogs are treated as members of the family with whom they live. But after all is said and done, a dog is a dog. At law it is property, a domesticated animal that is owned. At law it enjoys no familial rights.<sup>38</sup>

In all of these cases—and one could cite dozens of others<sup>39</sup>—the petitioners are demanding that the animal be seen as a family member, and that his or her interests be taken into account in adjudicating family law. Yet the courts cling to the principle that CAs are just property, even while acknowledging that this is “distasteful,” out of step with social realities, and that “the concept of companion animals as property does not provide the legal tools to adjudicate and resolve” custody issues.<sup>40</sup>

In response to this crisis, many scholars have advocated legal reforms that recognize companion animals as members of the family for the purposes of custody decisions (including “petimony” in cases where the person best equipped to care for the CA is poorer), adapting legal rules developed for custody of human members of the family.<sup>41</sup> And an increasing number of judges are, de facto, following these guidelines.

36. *Savoie v Dowell*, 2009 NSSM 5 at para 8.

37. *Hawes v Redmond*, 2014 NSSM 57 at para 26.

38. *Henderson v Henderson*, 2016 SKQB 282 at paras 1-2.

39. Including the now-famous case of Darwin the “IKEA monkey,” a pet monkey whose custody was being litigated. In *Nakhuda v Story Book Farm Primate Sanctuary*, 2013 ONSC 5761 at para 4, Justice Vallee said, “[T]he court does not have jurisdiction to determine what is in the best interests of the monkey. For example, is it best for him to live with Ms. Nakhuda or in the Sanctuary? The monkey is not a child. Callous as it may seem, the monkey is a chattel, that is to say, a piece of property. The court may apply only property law principles when considering the issues in this case.” See the discussion in Mary Shariff, “A Monkey in the Middle: Reflections on Darwin the Macaque and the (R)evolution of Wild Animals in Canadian Common Law,” in Peter Sankoff, Vaughan Black & Katie Sykes, eds, *Canadian Perspectives on Animals and the Law* (Toronto: Irwin Law, 2015) 83.

40. *Ploni v Plonit* (18 March 2004), Ramat Gan 32405/01 (Fam Ct), cited in Deborah Rook, “Who Gets Charlie? The Emergence of Pet Custody Disputes in Family Law: Adapting Theoretical Tools from Child Law” (2014) 28:2 Intl JL Pol’y & Fam 177. In her review of the American cases, Rook argues (at 180): “[T]he majority of the cases share the same underlying inconsistency between the courts’ insistence that animals are personal property and their reluctance to rely on property principles alone to resolve the dispute.”

41. Among many such proposals, see Tony Bogdanoski, “Towards an Animal-friendly Family Law: Recognising the Welfare of Family Law’s Forgotten Family Members” (2010) 19:2 Griffith L Rev 197; Ann Britton, “Bones of Contention: Custody of Family Pets” (2006) 20:1 J American Academy

A similar dynamic is at work in relation to *liability* for harms caused by CAs, most commonly in relation to dog bites. In some jurisdictions, as a result of recent statutory changes, owners of companion animals are subject to strict liability for any harm their dogs cause.<sup>42</sup> The result is to equate possessing a dog with possessing dangerous property, such as storing dynamite in one's backyard. Anyone who stores dynamite is subject to strict liability for any explosion, and it is no defense to say that one took reasonable precautions to avoid such an explosion. This is a sound legal principle if one wants to discourage people from having dangerous property. But the same principle is now being applied in many jurisdictions to CAs: anyone who keeps a dog in their backyard is subject to strict liability for any dog bites, no matter how conscientious and careful they are. The (intended) result is to either discourage people from having CAs or to keep them continually confined or chained, since they are categorized legally as a threat to others.<sup>43</sup>

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of Matrimonial Lawyers 1; Tabby McLain, "Knick-Knack, Paddy-Whack, Give the Dog a Home? Custody Determination of Companion Animals upon Guardian Divorce" (Animal Legal and Historical Center, Michigan State University College of Law, 2009), online: <<http://www.animallaw.info/articles/dduspetcustodyindivorce.htm>>; Schyler P Simmons, "What Is the Next Step for Companion Pets in the Legal System? The Answer May Lie with the Historical Development of the Legal Rights for Minors" (2013) 1:1 Tex A&M L Rev 253; Christopher Seps, "Animal Law Evolution: Treating Pets as Persons in Tort and Custody Disputes" (2010) 2010:4 U Ill L Rev 1339; Eithne Mills & Keith Akers, "Who Gets the Cats... You or Me? Analyzing Contact and Residence Issues regarding Pets upon Divorce or Separation" (2002) 36:2 Fam L Q 283; Heidi Stroh, "Puppy Love: Providing for the Legal Protection of Animals When their Owners get Divorced" (2007) 2 J Animal L & Ethics 231; Morgan Eason, "A Bone to Pick: Applying a Best Interest of the Family Standard in Pet Custody Disputes" (2017) 62 SDL Rev; and Rook, "Who Gets Charlie?," *supra* note 40. A version of the good of the animal principle has been adopted in Israel (Pablo Lerner, "With whom will the dog remain? On the meaning of the 'Good of the Animal' in Israeli Family Custodial Disputes" (2010) 6:1 J Animal L 105) and in Switzerland, where Article 651a of the Swiss Civil Code, *supra* note 18, states that upon divorce, custody should go to whoever "ensures the better keeping of the animal" (Margot Michel & Eveline Kayasseh, "The Legal Situation of Animals in Switzerland: Two Steps Forward, One Step Back—Many Steps to go" (2010) 7 J Animal L 1). Owing to recent reforms (in 2016), Alaska law now provides for consideration of "the well-being of the animal" when determining custody (AS 25.24.160).

42. This was not the traditional rule under the common law, which distinguished liability in relation to domesticated animals and wild animals. Whereas the latter were seen as dangerous (*ferae naturae*), the former were presumed not to be dangerous (*mansuetae naturae*), and so did not attract strict liability, unless there was evidence to the contrary. So the statutory attribution of strict liability in relation to companion animals is a deterioration compared to the common law, and the proposed reforms to strict liability discussed in the next paragraph are in some respects an effort to restore earlier common law principles of presumptive sociability.

43. Bans on specific breeds, such as pit bulls, rest on a similar premise: see Safia Hussain, "Attacking the Dog-Bite Epidemic: Why Breed-Specific Legislation Won't Solve the Dangerous-Dog Dilemma" (2005) 74:5 Fordham L Rev 2847; Kristen Swann, "Irrationality unleashed: The pitfalls of breed-specific legislation" (2009) 78:3 UMKC L Rev 839; Sabrina DeFabritiis, "Fido's Fallacy" (2016) 9 Albany Government L Rev 168; Ann Schiavone, "Barking up the Wrong Tree: Regulating Fear, Not Risk" (2015) 22:1 Animal L 9.

This equation of CAs with dangerous property is out of step with social perceptions. For many people, CAs are valued members of the family, and so should be subject to the same liability rules as, say, harms done by young children. In the case of young children, parents have a duty to exercise reasonable supervision and control, so as to reduce the potential risk that children might harm others, but children are seen as presumptively sociable members of the family and of society who have a right to be part of social life. We could reduce the risk that children will harm others if we kept children locked up all the time, but children are not dangerous property to be confined, they are members of society with a right to engage in social life, subject to parental duties of reasonable supervision. And so here too we see many proposals to replace strict liability for dog bites (animals as dangerous property) with a model based on parental duties of supervision (animals as sociable family members).<sup>44</sup>

A third context where claims for family membership arise concerns *trusts*. Many people are deeply concerned about the fate of their companion animals after they die—just as they are concerned about the fate of their children or other dependents—and so often wish to establish a trust fund to ensure that resources are set aside to care for an aging CA. Yet since CAs are property, they can no more be a beneficiary of a trust than a piece of furniture can be the beneficiary of a trust. And so here too we see proposals to reform trust law to recognize that CAs are family members, not property, and as such deserve to be eligible for consideration in wills.<sup>45</sup>

Yet another context concerns tort *damages* when CAs are injured. Let's imagine that you negligently run over my 8-year old mixed-breed dog. Since CAs are property, damages will be based on the "fair market value" of the property you damaged: that is, by calculating "the difference between the market value of the animal before and after the injury."<sup>46</sup> But

44. Amongst many such proposals, see Lynn A Epstein, "There Are No Bad Dogs, Only Bad Owners: Replacing Strict Liability with a Negligence Standard in Dog Bite Cases" (2006) 13:1 Animal L 129; Jacquelyn Shaw, "Dangerous Dogs in Canadian Law" (Animal Legal and Historical Center, Michigan State University, 2009), online: <<https://www.animallaw.info/article/dangerous-dogs-canadian-law>>. As mentioned in note 42, these reforms in part restore earlier common law principles, but go further in invoking analogies with parental duties in relation to children.

45. See, for example, Shidon Aflatooni, "The Statutory Pet Trust: Recommendations for a New Uniform Law Based on the Past Twenty-One Years" (2011) 18:1 Animal L 1; Frances Foster, "Should Pets Inherit?" (2011) 63:4 Florida L Rev; Rachel Hirschfeld, "The Perfect Pet Trust: Saving Your Dog from the Unexpected" (2016) 9:1 Albany Government L Rev 107. In the US, the Uniform Probate Code was amended in 1990 to include a statutory pet trust (Unif Probate Code s 2-907), and since then 46 states have adopted laws allowing pet trusts (Simmons, "What is the Next Step," *supra* note 41 at 277-278).

46. Lauren 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" (2014) 163:4 U Pa L Rev 1199 at 1208.

most dogs and cats—unless purebreds—have little or no market value. Eight year-old mutts can be bought and sold at a very low price. As a result, your injuring my dog may have negligible effects on his market value: perhaps I could only have sold him for \$20 before the injury. If so, then your damages are limited to \$20, as the fair market value and replacement cost of such dogs.

Here again, this is entirely at odds with people's perceptions of CAs as family members, not property, and so many citizens demand legal reforms that would recognize that animals should be valued as family members not just as replaceable property. This would require, for example, damages to cover veterinary costs (if the CA is injured), as well as emotional damages for loss of companionship (if the CA is killed), on the premise that CAs cannot just be replaced, but are unique individual members of the family.<sup>47</sup> Some state jurisdictions have moved in this direction, such as Tennessee and Illinois, as have a few court decisions.<sup>48</sup>

In all of these contexts, and others,<sup>49</sup> there is a strong push to redefine companion animals, for at least some legal purposes, not as the property of the family, but as members of the family, with membership-based claims (to the preservation of family bonds in the case of divorce; to engage in social life in the case of liability; to be eligible for family benefits in the case of wills).<sup>50</sup> In my view, this trend will only grow in strength, and is arguably irreversible. The social reality is that CAs are members of the family, and whenever the law is so far out of touch with social realities,

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47. Among many such proposals, see William Root, "Man's Best Friend: Property or Family Member" (2002) 47:2 Vill L Rev 42:3; Elizabeth Paek, "Fido seeks full membership in the family: dismantling the property classification of companion animals by statute" (2003) 25:2 U Haw L Rev 481; Sirois, "Recovering for the Loss," *supra* note 46; Seps, "Animal Law Evolution," *supra* note 41; Rebecca Huss, "Valuing Man's and Woman's Best Friend: The Moral and Legal Status of Companion Animals" (2002) 86:1 Marq L Rev 47; Sabrina DeFabritiis, "Barking Up the Wrong Tree: Companion Animals, Emotional Damages and the Judiciary's Failure to Keep Pace" (2012) 32:2 Northern Illinois University L Rev 237. For doubts, see Cupp, "A Dubious Grail," *supra* note 21; Phil Goldberg, "Courts and Legislatures Have Kept the Proper Leash on Pet Injury Lawsuits: Why Rejecting Emotion-Based Damages Promotes the Rule of Law, Modern Values, and Animal Welfare" (2013) 6 Stan J Animal L & Pol'y 30.

48. Sirois, "Recovering for the Loss," *supra* note 46.

49. Consider the increasing recognition in the law of a duty of veterinarians to report suspected abuse of CAs, based on the precedent of health care providers having a duty to report child abuse (Simmons, "What is the Next Step," *supra* note 41 at 261). Or consider legal challenges to bans on CAs in public housing, which may effectively prevent poor people from keeping their more-than-human family together. Or consider the way several jurisdictions have amended laws changing ownership language to guardianship. The General Laws of Rhode Island now provide that the term "guardian" may be used interchangeably with "owner" in respect of CAs (see, e.g., Title Four RI Gen L s 4-3-1.2).

50. As Simmons notes, these developments track the historic evolution in the rights of children. Children too needed to move out of the property box into the family membership box, requiring comparable changes in laws regarding custody, inheritance, torts, etc. (Simmons, "What is the Next Step," *supra* note 41 at 256).

it needs to adapt, and indeed it is adapting on these issues of custody, liability, torts and trusts.<sup>51</sup>

What should we make of these changes? Do they represent a genuinely new type of animal law reform that replaces the older logic of interest-convergence grounded in human use typologies with a new ethics of membership? The short answer is that we don't know. It is too early to tell, and as we will see, there are ample grounds for scepticism. At the end of the day, these reforms may not in fact be any different in their motivations or effects from other welfarist reforms that regulate the "humane use" of animals.

However, I believe there is a potential here for a new type of progressive animal law reform that rests on a genuinely different normative logic, rooted in an ethic of membership rather than an ethic of humane use. I argued earlier that justice for domesticated animals requires recognizing both their personhood rights and their membership rights. If we accept that premise, then the key questions to ask of these legal reforms are two-fold:

- Do they move us closer to the recognition of membership rights? That is, are these reforms rooted in and inspired by an ethic of membership, and do they operate to strengthen the social, political and legal salience of an ethics of membership?
- How would the recognition of these membership rights affect the pursuit of personhood rights? Is there any reason to believe that pursuing membership rights would delay or defer the achievement of personhood rights? Or on the contrary, is there reason to think that recognition of membership rights might facilitate and expedite the recognition of personhood?

As I said, I don't think we know the answers to these questions. A skeptic could argue that these reforms to the status of companion animals are not about recognizing the membership-based interests and rights of the animals, but rather are about advancing the interests of the humans in having secure use of the animal. We have a long history of using animals for companionship, and these legal reforms regarding custody, torts, liability and trusts can all be seen as operating to provide greater legal security to humans who use animals for companionship. In that sense, we can see them as strengthening the rights of the owners of companion animals, not as recognizing the rights of animals themselves. Humans assert a right to

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51. For a comparison of the pace of these changes in Canada and the US, see Maneesha Deckha, "Property on the Borderline: A Comparative Analysis of the Legal Status of Animals in Canada and the United States" (2012) 20:2 *Cardozo J Intl & Comparative L* 313. Deckha notes that the law is moving more quickly on these issues in the US than Canada.

use animals for companionship, and these reforms simply specify how that right to use animals will be legally protected.

Given the long history of instrumentalizing animals, including the use of pet ownership as a means of marking gender and racial hierarchies, we cannot quickly discount this sceptical interpretation.<sup>52</sup> And it surely captures some of the motivations at work (particularly in relation to tort damages).<sup>53</sup> But at the end of the day, I do not think it is the only, or even the primary, dynamic at work. When people mobilize to secure these legal reforms, they are not saying “please respect my right to use animals for companionship,” they are saying “please recognize that companion animals are members of my family.” Just as they do not think of their companionable relationships with children or spouses as use-based relationships, so too they do not think of their relationships with dogs or cats as use-based relationships. They are, rather, relations of co-membership in a shared social unit—in this case, the family. People are not saying that “we” (humans) have a right to use “them” (companion animals), but rather are saying that companion animals are members of the “we,” and are demanding legal recognition of this interspecies we-ness, this interspecies familial relationship.<sup>54</sup> Recognition of family membership is precisely a membership relationship, and it carries with it membership claims, rather than claims to “humane use.” Animals have always provided companionship but recognizing them as co-members of the family is new, and entails claims to shared membership of the home.<sup>55</sup>

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52. On the gendered and imperial history of pet ownership, see James Kim, “Petting Asian America” (2011) 36:1 *Melus* 135; Laura Brown, “The Lady, the Lapdog, and Literary Alterity” (2011) 52:1 *The Eighteenth Century* 31.

53. Some of the reforms around tort damages essentially take the form of people claiming that the use value of their animal property is not adequately captured by standard measures of fair market value. This sort of claim falls entirely within old interest-convergence logic. But even here, I would suggest, people often invoke this use value framework, not because it captures their self-understanding, but because it is the only framework that the law recognizes.

54. If relations with CAs were use-based, it would be difficult to explain the growing evidence of how much humans grieve for their CAs when they die, even though that grief is not socially permitted and indeed is ridiculed if it goes too far. See David Redmalm, “Pet grief: when is non-human life grievable” (2015) 63:1 *Sociological Rev* 19.

55. Of course, for much of Western history, the family has been seen as the property of the male head of household: women, children, slaves and animals were all considered in law as property of the *paterfamilias*. The family was seen as a zone governed by natural hierarchy and biological imperatives, in which the father’s exercise of private power was restrained only by his sense of love and moral duty, not by legal rights. In Eisen’s words, the law constructed the family as a “lawless space,” which “supports and exacerbates background conditions of deeply unequal power, then absolves itself of responsibility for abuse.” Being included in the family was therefore hardly a guarantee of justice or rights. Indeed, as Eisen notes, the current status of DAs can be seen as essentially a vestige of this earlier conception of the family. Even as we have moved away from the idea that the exercise of power over humans in the family should be a “lawless space” governed only by hierarchy and biology, the law still implies that the exercise of private power over animals can be left as a lawless space restrained

So I would suggest that (some of) these reforms are, in an incipient way at least, rooted in an ethic of membership, and thereby have the potential to constitute a genuinely distinct approach to animal law reform. By recognizing claims of co-membership, these reforms explicitly depart from the older use-based instrumentalized logic of current animal law, without having first established personhood.<sup>56</sup> Of course, as I've emphasized, justice ultimately requires both membership rights and personhood rights. Membership without personhood is a radically precarious and unjust status.<sup>57</sup> So before we endorse these reforms, we would also need to evaluate whether pursuing these membership-based reforms would somehow delay or undermine efforts to achieve personhood. But as I discuss below, I see no grounds for thinking that recognizing membership would jeopardize recognition of personhood, and on the contrary, many reasons for thinking that the former facilitates and expedites the latter.

Assuming that these reforms do indeed positively advance membership-based claims, without negatively impacting on the pursuit of personhood-based claims, how far can these reforms be pushed? Is there some built-in limit to how far family membership-based reforms can take

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only by love and moral duty. (Jessica Eisen, "Milk and Meaning: Puzzles in Posthumanist Method" in Mathilde Cohen & Yoriko Otomo, eds, *Making Milk: The Past, Present and Future of our Primary Food* [forthcoming]). Needless to say, my argument for the progressive potential of recognizing of CAs as family membership depends on the assumption that we have indeed left behind the old conception of the family as the property of, or subject to the lawless power of, the *paterfamilias*.

56. In some discussions, recognition of family membership is described as embodying semi-personhood status (or conversely, "semi-property" status). See, for example *Corso v Crawford Dog and Cat Hospital Inc* (415 NYS 2d 182, 183 (NY App Div 1999) "A pet is not just a thing but [it] occupies a special place somewhere between a person and a piece of personal property"; or Seps's analysis that the legal recognition of family membership in custody and tort decisions would not mean that CAs "actually receive full personhood status," but rather they would be "treated as a person under the law for the purposes of that dispute only" (Seps, "Animal Law Evolution," *supra* note 41 at 1372); or Sirois's suggestion that CAs be given a "semi-property" status (Sirois, "Recovering for the Loss," *supra* note 46). In my view, treating family membership as a mid-way point between property and personhood is a category mistake, since family membership operates on a different plane than personhood. Membership rights are not partial personhood rights, but are their own independent grounds for valid claims of justice. Achieving membership rights does not obviate the need for personhood, just as achieving personhood would not obviate the need for membership rights.

57. To take just one example, under s 20(6)(c) of the *Ontario Animals for Research Act*, RSO 1990, c A.22 if companion animals who are lost are not claimed within three days, shelters are allowed to sell them to research labs to be experimented on. When membership status fails, as in the case of lost dogs, they have no personhood rights to fall back upon, and so are subject to pure instrumentalization. See Animal Alliance of Canada, "Pound Seizure," online: <<https://www.animalalliance.ca/campaigns/pets-research/pound-seizure/>>. See also Steven White, "Companion Animals: Members of the Family or Legally Discarded Objects?" (2009) 32:3 UNSWLJ 852 on the way that Australian law increasingly recognizes companion animals as family members and yet simultaneously defines them as disposable property to be relinquished at will. Given this duality, Saskia Stucki has suggested to me that it might be more accurate to say, not that the law itself recognizes or prescribes that CAs are family members, but rather that the law is acknowledging and accommodating the *social fact* that (some) people view (some) CAs as family members.

us in the pursuit of justice? I will briefly discuss two important limitations. First, legal reforms to date have largely focused on acknowledging animals' membership within private families, but as I noted earlier justice requires that DAs be recognized as members of the broader society and polity as well. To be fully recognized as a member of society would not just involve being treated as a member within private familial settings, but also being treated as a member of the public, with rights to public goods, public services and public spaces. So the first challenge is whether the recognition of private family membership can be a springboard to recognition of a wider public membership.<sup>58</sup>

The second challenge is that legal reforms to date have only applied to CAs, and not farmed animals or lab animals. People rarely view sheep, cows, pigs, mice or rats as members of the family, and so extending membership rights based on perceptions of familial bonds will not help them. So the second challenge is whether we can extend this recognition beyond dogs and cats to farmed animals and lab animals.

These are both big challenges: there is growing evidence that CAs are being treated in the law as family members, but we need to extend this membership from the private to the public, and from companion animals to all domesticated animals. I am relatively optimistic about the first challenge. In fact, we can already see evidence that the recognition of private family membership is having implications for broader social membership. Consider, for example, the legal change adopted after Hurricane Katrina requiring emergency services to be trained and equipped to rescue companion animals.<sup>59</sup> Or consider the growing movement demanding that cities provide dog parks.<sup>60</sup> Or the recent declaration of a Spanish town (Trigueros del Valle) that redefines "residents" and "citizens" to include dogs and cats.<sup>61</sup> Or consider proposals advanced by some animal rights

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58. This echoes debates regarding the rights of people with cognitive disability, where much of the scholarship has focused on how to recognize and enable supportive private relationships, to the neglect of issues of public standing (Stacy Clifford Simplican, *The Capacity Contract: Intellectual Disability and the Question of Citizenship* (Minneapolis: University of Minnesota Press, 2015).

59. Cynthia Hodges, "Detailed Discussion of State Emergency Planning Laws for Pets and Service Animals" (Animal Legal and Historical Center, Michigan State University College of Law, 2012), online: <<http://www.animallaw.info/articles/ddusstateemergencylaws.htm>>; Leslie Irvine, *Filling the Ark: Animal Welfare in Disasters* (Philadelphia: Temple University Press, 2009); Anne Potts & Donelle Gadenne, *Animals in Emergencies: Learning from the Christchurch Earthquakes* (Christchurch: Canterbury University Press, 2014).

60. Jule Urbanik & Mary Morgan, "A tale of tails: The place of dog parks in the urban imaginary" (2013) 44 *Geoforum* 292; Taryn Graham & Troy Glover, "On the Fence: Dog Parks in the (Un) Leashing of Community and Social Capital" (2014) 36:3 *Leisure Sciences* 217.

61. Alistair Dawber, "Human rights for cats and dogs: Spanish town council votes overwhelmingly in favour of defining pets as 'non-human residents,'" *Independent* (22 July 2015), online: <<http://www.independent.co.uk/news/world/europe/human-rights-for-cats-and-dogs-spanish-town-council>



parties for public health insurance for CAs.<sup>62</sup> All of these involve claims to public goods and public services in the name of CAs as family members.

This should not be surprising, since once we acknowledge that CAs are members of the family—and hence that we live in more-than-human families—people will want to take their families with them into the broader society. They will want to vacation with their more-than-human family, or to bring their more-than-human family into commercial spaces or onto public transportation, or to ensure the health and safety of their more-than-human family. All of these involve claims on public services and public spaces. More-than-human private families will, sooner or later, demand a more-than-human conception of the public and of social membership. I suspect that this too is an inexorable change.<sup>63</sup>

The second challenge, however, is more daunting: it is difficult to see how this model of social recognition can be extended to most farmed or lab animals, who are not perceived as members of the family. This perception might change over time, due to the rise of farm sanctuaries, especially urban and suburban micro-sanctuaries, which allow more and more people to experience first-hand the possibilities of companionship with such animals.<sup>64</sup> Humans are certainly capable of having companionable

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votes-overwhelmingly-in-favour-of-defining-pets-10408546.html>. For the original declaration (in Spanish), see: [http://www.lainformacion.com/interes-humano/animales/un-pueblo-espanol-declara-por-primera-vez-vecinos-no-humanos-a-perros-y-gatos\\_aaQFSi5m2H7ennqXFcbU44/](http://www.lainformacion.com/interes-humano/animales/un-pueblo-espanol-declara-por-primera-vez-vecinos-no-humanos-a-perros-y-gatos_aaQFSi5m2H7ennqXFcbU44/). For similar developments in Chamonix, France, see Ted Kerasote, *Merle's Door: Lessons from a Freethinking Dog* (Orlando: Harcourt, 2007) at 306-310.

62. In its Manifesto for the 2010 UK general election, Animals Count! (which changed its name to the Animal Welfare Party in 2013) included a commitment to “establish an ‘NHS for animals’ to better protect the health of our animal companions.” Animal Welfare Party, *2010 CE Manifesto*, online: <[animalwelfareparty.org/vision/2010-ge-manifesto/](http://animalwelfareparty.org/vision/2010-ge-manifesto/)>.

63. And this, ultimately, would entail claims to political representation. If CAs are members of the public, their good should be included when determining the public good, and this requires that their interests be represented. For thoughts about the political representation of DAs, see Kim Smith, *Governing Animals: Animal Welfare and the Liberal State* (Oxford: Oxford University Press, 2012), chap 4. As Smith notes, there already are some examples around the world of appointing “advocates” or “ombudsmen” for animals within policy-making processes. But in some cases, their mandate is simply to ensure effective implementation of existing laws regulating humane use (or endangered species), and so operate within welfarist paradigms. This is different from the idea, explored by Smith, that DAs are owed representation because of social membership. See also Robert Garner, “Animals and democratic theory: Beyond an anthropocentric account” (2016) *Contemporary Political Theory* 1.

64. On the growing presence of formerly farmed animals in urban and suburban settings, see Ralph Ranalli, “The New Faces Settling into Suburbia: Owners Cite Practical, Spiritual Rewards of Farm Animals as Pets,” *Boston Globe* (29 June 2008), online: <[http://archive.boston.com/news/local/articles/2008/06/29/the\\_new\\_faces\\_settling\\_into\\_suburbia/](http://archive.boston.com/news/local/articles/2008/06/29/the_new_faces_settling_into_suburbia/)>. This often involves challenging bylaws prohibiting “farm” animals in urban settings. For two recent Canadian cases of such challenges, see All Points West, “Victoria pig lover refuses to part with pot-bellied pigs,” *CBC News* (24 October 2015), online: <<http://www.cbc.ca/news/canada/british-columbia/victoria-pig-lover-refuses-to-part-with-pot-bellied-babies-1.3286893>>; Gavin Fisher, “Burnaby Pygmy Goats: Woman Gets Reprieve in Fight to Keep Them as Pets,” *CBC News* (24 February 2015), online: <<http://www.cbc.ca/news/>>

relations with most DAs, if given the chance. As more and more people come to know of friends and neighbours who have DAs as family members, perhaps the very distinction between CAs and DAs will gradually break down.<sup>65</sup> This indeed is a good reason to support the farm sanctuary movement, and to view it as key to any larger animal rights agenda.<sup>66</sup>

However that seems a distant goal, and for now, if there is a route to social membership for farmed and lab animals, it will not likely be through recognition as family members or intimate companions.

#### VI. *Domesticated animals as co-workers*

There may however be an alternative route to membership rights, through recognition as co-workers. After all, many DAs were originally brought into human society to labour, and humans and animals today continue to work alongside each other in a striking array of workplaces, from farms and labs to hospitals and seniors homes to military installations and airports.<sup>67</sup> And in some of these workplaces (though by no means all), the human workers have come to think of animals as co-workers, with similar working hours and working conditions, undergoing similar training, facing similar risks, enjoying shared accomplishments. And once animals are seen as co-members of a shared workplace, there is a natural tendency to ask whether animals should have the membership rights of co-workers. (These rights might include the right to safe working conditions, the right to maximum working hours, the right to union representation, the right to a retirement, the right to workers' compensation if injured, and so on).<sup>68</sup>

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canada/british-columbia/burnaby-pygmy-goats-woman-gets-reprieve-in-fight-to-keep-them-as-pets-1.2966950>.

65. Interestingly, some critics of extending family membership to CAs criticize it precisely on the grounds that "with many communities increasingly permitting farm animals as pets, drawing a line even broadly at companion animals can be exceedingly difficult" (Goldberg, "Courts and Legislatures," *supra* note 47 at 48). *Contra* Goldberg, I view this "difficulty" as a crucial virtue of the reform: the political significance of extending family membership to CAs is much greater if it can slowly dissolve the categorical line between CAs and farmed animals.

66. On the political significance of farmed animal sanctuaries, see Sue Donaldson & Will Kymlicka, "Farmed Animal Sanctuaries: The Heart of the Movement?" (2015) 1 *Politics and Animals* 50. On the distinctive political role that urban micro-sanctuaries can play, see Justin Van Kleek, "The Sanctuary in Your Backyard: A New Model for Rescuing Farmed Animals," (24 June 2014) *Our Hen House* (blog), online: <<http://www.ourhenhouse.org/2014/06/the-sanctuary-in-your-backyard-a-new-model-for-rescuing-farmed-animals/>>. Darren Chang discusses the transformative potential of "infiltrating" farmed animals into urban settings in "Resisting Speciesist Segregation: Integration, Separation, and Infiltration with Farmed Animals" [unpublished draft, online: <[https://www.academia.edu/31352684/Resisting\\_Speciesist\\_Segregation\\_Integration\\_Separation\\_and\\_Infiltration\\_with\\_Farmed\\_Animals\\_DRAFT\\_>](https://www.academia.edu/31352684/Resisting_Speciesist_Segregation_Integration_Separation_and_Infiltration_with_Farmed_Animals_DRAFT_>)].

67. For a good overview, see Kendra Coulter, *Animals, Work, and the Promise of Interspecies Solidarity* (New York: Palgrave, 2016).

68. For discussion of such labour rights, see Alasdair Cochrane, "Labour Rights for Animals" in Robert Garner & Siobhan O'Sullivan, eds, *The Political Turn in Animal Ethics* (Lanham: Rowman

This idea is nonsensical within the old use-based, property-based paradigm, where animals are the property of a workplace, not members of the workplace (just as companion animals were seen as the property of the family rather than members of the family). However, an increasing number of human workers refuse to accept this framework for thinking about the status of their animal co-workers. One striking example concerns dogs in the US Army. Until recently, these animals were seen as property—literally listed as “equipment”—and as such, were often left behind (or killed) when the military pulled out of foreign countries. However, in response to pressure from their human co-workers, the Army now defines military dogs as “personnel,” and as such they have rights to repatriation and to rehoming upon retirement.<sup>69</sup> Similar developments have occurred in relation to police dogs—for example, the Nottinghamshire police force in Britain provides retired police dogs with a pension.<sup>70</sup> And there are glimpses of a similar trend regarding therapy animals.<sup>71</sup> In all of these cases, it is the human workers who are mobilizing for recognition of DAs as colleagues and co-workers—as members of a shared interspecies workplace—rather than as property or equipment belonging to a human workplace.

What should we make of these work-related changes? Can we view these too as examples of a new type of animal law reform that replaces the older logic of interest-convergence grounded in human use typologies with a new ethics of membership? As with the case of family membership, it is too early to tell, and a more sceptical interpretation is certainly possible. We have a long history of seeing animals simply as “beasts of burden” who exist to work for us, and these reforms could be seen as reaffirming our right to the “humane use” of animals for their labour.

I do not deny that this use-based interpretation captures a part of the story. Indeed, this is undoubtedly present in many of the more rhetorical invocations of animals as workers. For example, it is a standard trope amongst animal experimenters to call the animals they experiment on

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and Littlefield, 2016) 15; Donaldson & Kymlicka, *Zoopolis*, *supra* note \*, Kymlicka & Donaldson, “Animals and the Frontiers of Citizenship” (2014) 34:2 Oxford J Leg Stud 201; Jason Hribal, “Jesse, a Working Dog” (11 November 2006) *Counterpunch* (blog), online: <<http://www.counterpunch.org/2006/11/11/jesse-a-working-dog/>>.

69. Janet M Alger & Steven F Alger, “Canine Soldiers, Mascots, and Stray Dogs in US Wars: Ethical Considerations” in Ryan Hediger, ed, *Animals and War* (Leiden: Brill, 2013) 77.

70. Coulter, *Animals, Work*, *supra* note 67; Cochrane, “Labour Rights,” *supra* note 68. Another manifestation of this trend is the proliferation of memorials to animals who served in wars.

71. Zipporah Weisberg, “Reimagining animal assisted intervention via interspecies citizenship theory” in Christine Overall, ed, *Pets and People: The Ethics of Our Relationships with Companion Animals* (Oxford: Oxford University Press, 2017) 218.

“partners” in the “work” of research.<sup>72</sup> This is obviously cynical and euphemistic, and obscures the violence of captivity, coercion and death. But of course animal researchers do not in fact want their animal subjects to be treated legally as co-members of the workplace, and indeed have resisted any and all efforts to secure workplace rights for those animals (such as rights to a safe working environment, right to a retirement, etc). For legal purposes, they want animals to be defined as property or equipment in the lab, not as co-workers or personnel of the lab. So too with rhetorical invocations of animal work amongst the “new omnivores” or “happy meat” apologists who assert the right to kill and eat the animals they raise. They too do not want animals legally defined as personnel or co-workers in a shared workplace.

By contrast, in the cases I mentioned earlier, what we see are not just rhetorical invocations of the idea of animals as workers as a mask for relations of exploitation, but a call to recognize membership in an interspecies workplace as a basis for legal claims. When soldiers in the US Army mobilized to secure these legal reforms, they did not say “please respect my right to use animals for work,” they said “please recognize that animals are my co-workers.” Just as they do not think of their collegial relationships with other human soldiers as use-based relationships, so too they do not think of their collegial relationships with military dogs as use-based relationships. They are, rather, relations of co-membership in a shared social unit—in this case, the workplace. People are not saying that “we” (humans) have a right to use “them” (animals), but rather are saying that animals are members of the “we,” and are demanding legal recognition of this interspecies we-ness, this interspecies working relationship. Recognition of collegiality is precisely a membership relationship, and it carries with it membership claims, rather than claims to “humane use.” Animals have always laboured for us, but recognizing them as co-workers is new, and entails claims to shared membership of the workplace.<sup>73</sup>

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72. Lynda Birke, Arnold Arluke & Mike Michael, *The Sacrifice: How Scientific Experiments Transform Animals and People* (West Lafayette, IN: Purdue University Press, 2007). See also the way food companies represent farmed animals as desiring to be eaten (what Ben Grossblatt calls the “suicide food” trope, online: <<http://suicidefood.blogspot.ca/>>).

73. Of course, just as the family was historically defined as the property of the father, and so subjected women and children to the father’s arbitrary power (see note 55), so too the workplace has historically been defined as the property of its owners, and so subjected workers to the owner’s arbitrary power. Recognizing animals as co-workers only has progressive potential if society has overcome this view of the workplace as the private fiefdom of the employer. This is another reason to defend workplace protections for animals precisely as workers’ rights rather than simply as improved standards of ‘animal welfare’: strengthening labour rights advances justice for both humans and animals.

So, as with family membership, I would suggest that these reforms reflect, in incipient form, a genuinely new and distinctive ethic of membership, rather than just the old ethic of humane use. Assuming that these reforms do indeed positively advance membership-based claims, how far can these reforms be pushed? Is there some built-in limit to how far work-based reforms can take us in the pursuit of justice?

Compared to the family membership route, the workplace membership path offers some important advantages, since it does not require intimate companionship or family ties. Social recognition comes through relations of collegiality, as co-workers in a shared workplace, not intimate family relations. As a result, this trend could in principle apply to a wide range of DAs engaged in a wide range of labour in diverse workplaces, outside the private home.

However, here too there are obvious limitations. For one thing, it seems that only a narrow range of work, done by a narrow range of animals, has so far achieved social recognition as a basis for membership claims. It is above all military and police work that has generated social recognition, and primarily for dogs.<sup>74</sup> As a result, this trend, to date at least, has failed to challenge the old distinction between companion animals, whom we socially recognize, and farmed/lab animals, whom we ignore and exploit. Even though social recognition for military and police dogs is tied to work, not family bonds, it seems that society is most inclined to recognize animals as “co-workers” when it is the same types of animals that are viewed as “members of the family.”

However, I do not see any conceptual obstacle to a gradual extension of the social recognition of animals as co-workers to farmed animals. If sniffer dogs at the airport can be seen as co-workers, why not Bill and Lou, the oxen who worked alongside students plowing fields at Green Mountain College farm?<sup>75</sup> Or the sheep who graze environmentally-sensitive grasslands at the San Francisco airport,<sup>76</sup> or the goats on Faroe

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74. For example, the federal government in Canada recently passed “Quanto’s Law” in response to the killing of a police dog in the line of duty (*Justice for Animals in Service Act (Quanto’s Law)*, SC 2015, c 34). As Coulter (*Animals, Work*, *supra* note 67) notes, recognition of animal labour follows the same gendered scripts as the recognition of human labour. Just as we historically privileged male-coded forms of productive labour to the neglect of female-coded care and reproductive work, so too we now recognize the military and police work animals do while neglecting the care work animals do.

75. On the infamous case of Bill and Lou, where the College decided to kill and eat the oxen as soon as they were unable to continue work, despite offers to give them sanctuary, see Kymlicka & Donaldson, “Animals and the Frontiers of Citizenship,” *supra* note 68.

76. See Scott Mayerowitz, “S.F. Airport Hires Herd of Goats for Fire Prevention,” *USA Today* (6 July 2013), online: <<http://www.usatoday.com/story/todayinthesky/2013/07/06/san-francisco-airport-hires-herd-of-goats-for-fire-prevention/2493899/>>. Goats protect certain rare wild animals that would be harmed by lawnmowers.

Island who take Google Earth cameras into otherwise inaccessible places,<sup>77</sup> or the pigeons who carry pollution sensors to monitor air quality in the skies above London?<sup>78</sup> And why not the animals who perform what Les Beldo calls “metabolic labour,” producing manure, or wool, or eggs?<sup>79</sup>

Of course, even if there is no conceptual obstacle to such a development, there are clearly many powerful practical obstacles. For one thing, social recognition of others as co-workers is easier when we interact with them on an everyday basis, in a setting of trust, cooperation, and sociability, where we greet others at the start of the work day, socialize, and then embark on working together. It is much more difficult when animals are confined in factory farms, by the tens of thousands, with little or no human interaction or interspecies cooperation. The sociological conditions that make it possible to see others as co-workers in a shared workplace are simply not present in most modern farms or labs.<sup>80</sup>

Moreover, even if we could make this cognitive leap to reimagine farmed animals as our co-workers, those with vested interests in the animal industrial complex will surely mobilize against any recognition of farmed animals as co-workers, since it would threaten the basis of their commercial exploitation of animals. The recognition of military/police dogs as co-workers has been uncontroversial because it is peripheral to the basic structure of the animal industrial complex, but as soon as ideas of workplace-based membership rights start to challenge inherited agricultural practices, and the lifestyles they make possible, the backlash would be quick.

So I am not optimistic that emerging ideas of animals as co-workers can significantly affect, in the near future, the abject status of farmed or lab animals. The very factors that make recognition of personhood for farmed animals politically unfeasible also make the recognition of their social membership unlikely. The vested interests are too strong, and the

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77. Will Coldwell, “Faroe Islands fit cameras to sheep to create Google Street View,” *The Guardian* (12 July 2016), online: <<https://www.theguardian.com/travel/2016/jul/12/sheep-view-360-faroe-islands-google-mapping-project>>.

78. Adam Vaughan, “Pigeon patrol takes flight to tackle London’s air pollution crisis,” *The Guardian* (14 March 2016), online: <<https://www.theguardian.com/environment/2016/mar/14/pigeon-patrol-takes-flight-to-tackle-londons-air-pollution-crisis>>.

79. Les Beldo, “Metabolic Labor: Broiler Chickens and the Exploitation of Vitality,” [forthcoming in *Environmental Humanities*]; Jonathan Clark, “Laborers or Lab Tools? Rethinking the Role of Lab Animals in Clinical Trials” in Nik Taylor and Richard Twine, eds, *The Rise of Critical Animal Studies* (New York: Routledge, 2014) 139.

80. Put another way, the very absence of workers’ rights—such as rights to safe working conditions, maximum working hours, retirement—makes it difficult to see animals as co-workers entitled to such rights.

lack of either intimate companionship relations or collegial work relations weaken the prospects for social recognition.

And yet it would be premature to give up on this approach. It's worth noting that many social justice struggles have grounded their claims for recognition and respect on work. Historically, when excluded or stigmatized groups have claimed social membership, it is not typically through family ties, but rather through work.<sup>81</sup> Participating in labour provides a basis on which subaltern groups can establish their claim to be participants in and contributors to schemes of social cooperation. Of course, people fight to escape or abolish degrading and stigmatizing forms of work, but there is ample evidence that participating in socially-recognized and socially-valued work is an important source of meaning and identity for humans, and an important basis for claims to social membership, and there is no reason to assume that the same is not true of DAs.<sup>82</sup>

Developing models of just interspecies workplaces is, therefore, an important task for animal advocacy and animal rights theory. This will not be easy, but I believe it is an avenue for reform that is worth exploring. To what extent can animals be brought into the legal category of co-worker, and what sorts of advocacy strategies would build public support for such a reform? The challenges are daunting, but it may nonetheless offer a more feasible route to structural reform for farmed animals than either personhood or family membership.

### *Conclusion*

In this paper, I have sketched a new, and underexplored, route to legal reform for domesticated animals—namely, through inclusion into the everyday categories of social membership, such as family members and co-workers. This approach rests on what I have called a two-level model of animal rights: at one level, all sentient animals are owed universal rights of personhood; at the second level, domesticated animals are owed membership-based rights. While progress on the first level is politically blocked for the foreseeable future, reforms regarding family and work can be seen as making progress on the second level, embodying and consolidating an ethic of membership towards domesticated animals. To be sure, these reforms to date reflect only a partial, selective, and incomplete

81. Judith Shklar, *American citizenship: The Quest for Inclusion* (Cambridge: Harvard University Press, 1991). Workers' rights have also historically had an important international dimension—formalized in the International Labour Organization—and so might provide a much-needed opening for developing animal law at the international level.

82. Jocelyne Porcher, "The work of animals: a challenge for social sciences" (2014) 6:1 *Humanimalia* <[www.depauw.edu/humanimalia/](http://www.depauw.edu/humanimalia/)>.

recognition of these membership-based obligations, and moreover remain precarious without first-level personhood rights. Nonetheless, I believe this trend has the potential to generate meaningful reform that helps move animals outside of the use-based framework, with its inherently violent instrumentalization of animals, even when the goal of legal personhood remains out of reach.

It is far too early to make confident assertions about the efficacy of this strategy, in part because it is largely untested. The animal advocacy movement has invested a lot of time thinking about welfarist reforms and legal personhood, but little time thinking about social membership, and as a result, we have surprisingly little systematic research on how recognizing animals as “family members” or “workers” could be a vehicle for interspecies justice.<sup>83</sup>

In closing, however, I want to reiterate that I do not view social membership as a substitute for universal rights of personhood, but rather as a complement to, and step towards, such rights. As I said earlier, justice for DAs requires both universal rights of personhood and relational rights of membership. Without personhood, the recognition of social membership is selective and fragile.<sup>84</sup> For this reason, I disagree with those authors, such as Donna Haraway and Joanne Porcher, who argue that recognition of animals as workers can take the place of rights of personhood. In Haraway’s much-quoted words:

My suspicion is that we might nurture responsibility with and for other animals better by plumbing the category of labor more than the category of rights, with its inevitable preoccupation with similarity, analogy, calculation, and honorary membership in the expanded abstraction of the Human.<sup>85</sup>

I do not share her disdain for the category of rights and personhood, and indeed I would argue that her own discussion clearly reveals the dangers of

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83. It is interesting to note, in this respect, that these developments regarding family and worker status did not emerge primarily as a result of activism by the animal advocacy movement: it is instead members of the general public who have demanded that the state recognize the ties they have developed with their companions and co-workers.

84. For example, in the absence of legal personhood, there are complex questions of who would have standing to bring suits to enforce these membership rights. Wise invokes the need for standing as a reason for prioritizing struggles for personhood (Steven Wise, “Legal Personhood and the Nonhuman Rights Project” (2010) 17:1 *Animal L* 1), although other scholars suggest there can be alternative routes to standing (e.g., David Cassuto, “Legal Standing for Animals and Advocates” (2006) 13:1 *Animal L Rev* 61; Cass Sunstein, “Standing for Animals (with Notes on Animal Rights)” (1999) 47:5 *UCLA L Rev* 1333; Katie Sykes & Vaughan Black, “Don’t Think about Elephants: *Reece v City of Edmonton*” (2012) 63 *UNBLJ* 145; Lauren Magnotti, “Pawing Open the Courthouse Door: Why Animals’ Interests Should Matter When Courts Grant Standing” (2006) 80:1 *St John’s L Rev* 455).

85. Donna Haraway, *When Species Meet* (Minneapolis: University of Minnesota Press, 2007).



seeing social membership as a replacement or alternative to personhood. Having rejected universal rights of personhood for domesticated animals, both Haraway and Porcher endorse the raising and killing of animal “workers” for food and for medical research.<sup>86</sup> This, I would argue, is the predictable outcome when relational social membership is not backstopped by universal rights of personhood.<sup>87</sup>

Indeed, without recognition of personhood, recognition of social membership is always at risk of backsliding into the old interest-convergence model, in which we only consider the interests of DAs insofar as it is consistent with our designated uses of them for companionship or labour. Recognition of personhood makes clear that animals, like humans, have intrinsic moral status, prior to and independent of specific roles or relationships.

Our long-term aim, therefore, should be to achieve both universal rights of personhood and relational rights of membership. If I have focused on social membership in this paper, it is because it has been relatively neglected within the movement, and because it may be a more politically feasible path for the foreseeable future. Far from opposing personhood, I believe that pursuing social membership will ultimately prove to be an important step towards the recognition of personhood. A skeptic might think that we can only recognize DAs as family members and workers if we first recognize them as persons. One might think, for example, that society will only recognize dogs as “personnel” if it first recognizes them as “persons.” But as we’ve seen this is not in fact true. And indeed my hunch is that the reverse is often the case: we recognize DAs as persons because we have first come to see them as family members and co-workers.<sup>88</sup> While perhaps only 2% of the general public is prepared to contemplate personhood for DAs, the evidence suggests that a much larger percentage is prepared to consider (some) DAs as family members and as workers. The animal rights movement has shown little interest in exploring this wellspring of support, and I believe there is untapped potential here, not

86. For an insightful critique, see Ziporah Weisberg, “The broken promises of monsters: Haraway, animals and the humanist legacy” (2009) 7:2 *J Critical Animal Studies* 22.

87. A similar problem arises with accounts of intimate companionship that are not tied to rights of personhood, as in Rudy’s ethic of “loving animals” (until we kill and eat them). Kathy Rudy, *Loving animals: Toward a new animal advocacy* (Minneapolis: University of Minnesota Press, 2011).

88. My argument here echoes Arendt’s argument that the first step towards the denial of universal human rights was to strip people of their social membership: once we lose the ability to see humans as social members, we lose the ability to see them as individual persons. So too in the reverse: enabling people to see animals as social members may facilitate and expedite the recognition of personhood. Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt Books, 1994).

just to strengthen the membership rights of DAs, but also as a step towards personhood.

**Appendix**  
*Schematic Representation of the Two-Level View  
of Animal Rights Law*

1. *Universal Basic Rights* owed to all sentient animals based on intrinsic moral status:
  - From property to personhood
  - Negative rights (not to be killed, confined, experimented on)
  - e.g., Great Apes Project; Nonhuman Rights Project
2. *Relational or Group-Differentiated Rights* based on nature of relationship to human society:
  - Domesticated animals: membership rights in a shared society
  - Urban wildlife: rights to residency and accommodation
  - Wilderness animals: rights to territory and autonomy

