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When Is it Right to Speak of Animal Rights?

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Abstract

This article examines the ways in which the language of legal rights is invoked by those seeking to improve the treatment of animals. Drawing from a range of analytical, realist, and critical legal and social theorists, it argues that certain argumentative techniques commonly employed to justify the extension of legal rights to animals may serve to strengthen and reproduce the very forms of exploitation they seek to challenge. The article begins by identifying and critiquing the binary characterisation of rights/welfare and property/personality in liberal animal law scholarship. It then employs the insights of Theodor Adorno and Walter Benjamin to expose and critique various appeals to an 'exterior' or 'extra-legal' domain which functions to stabilise the meaning of these doctrinal categories. In doing so, it explores the strategic viability of rights discourse in the animal advocacy movement with a view to highlighting the limitations of liberal constructions of animal rights.

Keywords: *legal rights; critical theory; animal law; liberalism; Frankfurt School*

Introduction

For many animal advocates, engagement with the legal sphere is essential to the realisation of material improvements in the lives of animals.[1] Law provides a common language through which demands can be articulated, a set of processes through which established meanings can be contested, and a public forum in which the plight of animals can be brought to wider attention. Yet, as for any movement seeking to harness law in pursuit of a particular cause, success is far from guaranteed. Considered and strategic interventions are therefore vital.[2] This article is concerned with the deployment of the language of rights by those

1. See Gary L Francione, *Animals, Property, and the Law* (Temple University Press, 1995); Steven M Wise, *Rattling the Cage: Toward Legal Rights for Animals* (Perseus Books, 2000); Thomas Kelch, "Toward a Non-Property Status for Animals" (1998) 6:3 NYU Envtl LJ 531.
2. See Austin Sarat & Stuart Scheingold, eds, *Cause Lawyers and Social Movements* (Stanford University Press, 2006); Austin Sarat & Stuart Scheingold, eds, *Cause Lawyering: Political Commitments and Professional Responsibilities* (Oxford University Press, 1998) [Sarat & Scheingold, *Political Commitments*]; Michael McCann, ed, *Law and Social Movements* (Routledge, 2006).

seeking to enhance the legal position of animals. It explores whether certain argumentative techniques concerning the extension of legal rights to animals are implicated in the very exploitation they are intended to oppose. In doing so, it investigates whether such modes of reasoning remain strategically viable, both in terms of making incremental gains before courts and legislatures and in shaping wider social understandings of human-animal relations.[3] As will become clear, the general jurisprudential insights advanced below are likely of relevance to fields beyond animal law. These include environmental and natural resource law, as well as other areas concerned with law's role in ecological conservation.

The article proceeds in three parts. Part I identifies two sets of binary oppositions commonly employed in animal law scholarship: rights/welfare and property/personality. Drawing from numerous analytical and realist theorists, I argue that rigid distinctions between these categories cannot be meaningfully maintained at the doctrinal level. In view of this, Part II turns to consider the common argumentative move of appealing to an 'external' or 'extra-legal' domain as a means of delineating between them. Drawing from the work of Theodor Adorno and Walter Benjamin, I expose and critique the moral and epistemological foundations underlying many such gestures. While often intended to challenge the instrumental use of animals, I argue that these approaches risk contributing to its continuation by appealing to a logic that has functioned to sustain and reproduce human domination over animals and the wider natural world. Having queried both 'internal' and 'external' restraints on the deployment of rights discourse, Part III explores whether it continues to hold any special power or advantage for animal advocates. Adorno's reflections on language, rhetoric, and subjectivity are employed to uncover the perennial dangers of legal discourse in general, and constructions of rights common to liberal animal law scholarship in particular.

The insights concerning epistemology, moral philosophy, and language utilised throughout this article are interconnected, and offer a compelling and novel perspective on this topic. While Frankfurt School scholarship has been utilised in Critical Animal Studies (CAS), it has not been employed in a deep and sustained fashion in the field of animal law.[4] Despite important, critical contributions from feminist legal scholars in recent decades, animal law nonetheless remains strongly liberal in orientation.[5] The result is a field with a "narrow ideological starting point" which has shown "little interest in calling law itself into question

3. See Helena Silverstein, *Unleashing Rights: Law, Meaning, and the Animal Rights Movement* (University of Michigan Press, 1996).

4. See Maneesha Deckha, "Critical Animal Studies and Animal Law" (2012) 18 Animal L 207; John Sanbonmatsu, ed, *Critical Theory and Animal Liberation* (Rowman & Littlefield, 2011); Ryan Gunderson, "The First-generation Frankfurt School on the Animal Question: Foundations for a Normative Sociological Animal Studies" (2014) 57:3 Sociological Perspectives 285.

5. See Maneesha Deckha, *Animals as Legal Beings: Contesting Anthropocentic Legal Orders* (University of Toronto Press, 2021); Jessica Eisen, "Feminist Jurisprudence for Farmed Animals" (2019) 5 Can J Comparative & Contemporary L 111.

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as an instrument and artefact of social change."[6] Additionally, CAS accounts typically lack a nuanced analysis of rights of the type supplied by over a century of analytical, realist, and critical jurisprudence. In response, this article employs a theoretical device frequently invoked by Adorno and Benjamin.[7] It constructs a *constellation* of perspectives on the nature of rights. It seeks to bring, in Adorno's words, "the singular and dispersed elements" of the question of animal rights "into various groupings long enough for them to close together in a figure out of which the solution springs forth, while the question disappears."[8] A similar sentiment is expressed in Benjamin's drive to construct 'dialectical images' of phenomena—to depict objects of study from numerous, potentially contradictory standpoints so as to defamiliarize and estrange them with a view to illuminating the partiality of our conventional understandings.[9] In much the same way, this article seeks to bring the reader into a different relation with the question that forms its title—to strip it of its power, in a sense, as an answer emerges.

I. The Binary Structure of Animal Law Scholarship

While animal advocacy cannot be reduced to a singular movement cohering around a set of complementary strategies, its proponents are united in their desire to materially improve the lives of non-humans. Animal lawyers are equally diverse, with proposals ranging from modest improvements to existing anti-cruelty laws to the elimination of the 'property-status' of animals.[10] A strong liberal orientation is shared even by those seeking radical changes in human-animal relations.[11] Many draw inspiration from the twentieth-century civil rights and women's suffrage movements, seeking to expand the circle of legal protection on the basis of characteristics shared by humans and non-humans, and strongly emphasising dignity, autonomy, equality, and bodily liberty.[12] While not embraced universally, the language of rights dominates in the formulation of these demands.[13]

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6. Ed Mussawir & Yoriko Otomo, "Law's animal" in Yoriko Otomo & Ed Mussawir, eds, *Law and the Question of the Animal: A Critical Jurisprudence* (Routledge, 2013) 1 at 1, 2.
7. See Theodor W Adorno, *Negative Dialectics*, translated by EB Ashton (Continuum, 1983) at 162ff. Adorno adapted Benjamin's notion of the 'constellation': see Walter Benjamin, *The Origin of German Tragic Drama* (Verso, 1998) at 34; David Kaufmann, "Correlations, constellations and the Truth: Adorno's ontology of redemption" (2000) 26:5 Philosophy & Social Criticism 62.
8. Theodor Adorno, "The Actuality of Philosophy" 31 (1977) Telos 120 at 127.
9. See e.g. Walter Benjamin, *The Arcades Project*, translated by Howard Eiland & Kevin McLaughlin (Harvard University Press, 2002) at 475 [N10a,3]; Richard Wolin, *Walter Benjamin: An Aesthetic of Redemption* (University of California Press, 1994) at 118-26.
10. See Cass R Sunstein, "Standing for Animals" (1999) University of Chicago Public Law & Legal Theory Working Paper No 6; Francione, *supra* note 1.
11. Similar observations are made in recent feminist animal law scholarship situated outside of the liberal tradition: see Deckha, *supra* note 4 at 210; Deckha, *supra* note 5 at 7.
12. See Wise, *supra* note 1 at 49, 243; Francione, *supra* note 1 at 110; Reed Elizabeth Loder, "Animal Dignity" (2016) 23:1 Animal L 1; Tom Regan, *The Case for Animal Rights* (University of California Press, 1983) at 84, 247.
13. See Silverstein, *supra* note 3 at 75; Gary Francione, *Rain without Thunder: The Ideology of the Animal Rights Movement* (Temple University Press, 1996) at 38.

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This scholarship commonly frames itself around a series of binaries, the status of which is often difficult to discern. At times they are invoked as oppositional categories that are purely 'internal' to legal doctrine, while at others, they operate within a wider interior-exterior dichotomy. In the second instance, law is conceived as a largely flexible and independent domain that passively mirrors some ontologically-prior, extra-legal object, attribute, or principle. These commonly include various physiological or mental characteristics of animals, as well as certain moral precepts employed to aid the identification of beings that can and should benefit from legal rights. On this view, law plays no active or constitutive function. Stability in legal terminology is achieved by tethering concepts to these extra-legal 'exteriors'. I argue that, however conceived, these categories are socially-constructed, contingent, and subject to extensive mediation. Moreover, their depiction as static and mutually exclusive threatens to undermine the stated goals of animal advocates. This section confines itself to the 'internal' doctrinal position, focusing on the interrelated distinctions between rights/welfare and property/personality.

The work of Gary Francione articulates these binaries most explicitly. He advances a 'rights-based approach' in opposition to what he terms "legal welfarism."[14] Legal welfarism constitutes the dominant regime of animal protection, seeking to promote humane treatment and prohibit "'unnecessary' suffering."[15] Francione regards welfarism as deferential to human interests, in that decisions as to which forms of suffering are "unnecessary" are prejudiced by the property status of animals.[16] Liberal legal systems generally impose strong limitations on interference with personal property, particularly where its use is efficient and aligns with generally-accepted, institutionalised practices.[17] Thus, the instrumental use of animals for economic ends is not directly challenged by classical animal welfare law. Only inefficient exploitation, which is presumed to be against the interests of property owners, will constitute inhumane treatment.[18]

Although a strand of "new welfarism" which sees the abolition of all animal exploitation as a long-term goal has emerged, Francione also regards it as reinforcing dominant property law paradigms.[19] While he acknowledges that welfarist concepts such as 'unnecessary suffering' may be open-textured enough to accommodate the future abolition of the property status of animals, in practice, this would depend upon 'enlightened' property owners voluntarily departing from the existing standards which foreground efficiency and value-maximisation.[20] Thus, for Francione, this system "structurally resists moving beyond those regulations that owners think are not cost-justified."[21] Accordingly, all forms of 'welfarism' are

14. Francione, *supra* note 1 at 18.
15. *Ibid* at 26.
16. See *ibid* at 24.
17. See *ibid* at 25.
18. See *ibid* at 27ff.
19. Francione, *supra* note 13 at 3, 126-39.
20. See *ibid*; Gary L Francione & Robert Garner, *The Animal Rights Debate: Abolition or Regulation* (Columbia University Press, 2010) at 28, 64, 141-42, 249-52.
21. Francione, *supra* note 13 at 138.

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said to reinforce the *property* status of animals, whereas 'rights-based' approaches confer *personhood* or *personality*.[22] Francione maintains bright lines between these categories, deriding the tendency to "elide the differences between rights and welfare."[23]

This framing has proven highly influential, and continues to inform recent critical scholarship in the field. For instance, Maneesha Deckha's wide-ranging recent study draws from feminist and post-colonial theoretical traditions which "eschew binaries as well as ... essentialised understandings of terms within those binaries."[24] Deckha expertly identifies the binary fashion in which the categories of 'property' and 'person' are deployed by animal lawyers, and even acknowledges (albeit in passing) that entities can potentially *straddle* the two categories.[25] Nevertheless, Deckha's diagnosis of the current state of Western liberal animal law substantially aligns with Francione's. Both ultimately conclude that "property is inherently exploitative" and that in order "to inaugurate a legal system that prevents animal exploitation, the declassification of animals as property is a necessary step."[26] The main point of distinction between them is that Deckha also regards 'personhood' as "inherently anthropocentric" and thus "irrevocably tainted as a viable option for respecting animals, and all their alterity, as legal subjects."[27] In view of what follows, both characterisations arguably lack nuance.[28]

A style of analysis developed by Karl Llewellyn is useful in appraising whether such binary distinctions are truly sustainable. Llewellyn famously condemned the use of 'lump-concepts' in legal decision-making. His central example was that of 'title', and its portrayal as "a somewhat mystical something, located ... in some definite person."[29] He criticised decisions that relied on an initial determination of the "location of title," followed by a deductive process by which resolutions to specific disputes were said to flow as logical consequences from abstract to concrete.[30] Accordingly, various micro-issues concerning freedom to use, sell, and make gains from property were treated as subordinate to the 'lump'. Put another way, they were conceived not as *constituents*, but as *consequences*, of title.[31] For Llewellyn, this position invited inconsistency and unpredictability, lacked fidelity to the facts of modern economic transactions, and concealed distributive and other policy-dimensions to rulings from view.[32]

22. See *ibid* at 110.
23. *Ibid* at 37.
24. Deckha, *supra* note 5 at 32.
25. See *ibid* at 243.
26. *Ibid* at 121, 85.
27. *Ibid* at 121, 92.
28. For a similar perspective, see Angela Fernandez, "Not Quite Property, Not Quite Persons: A 'Quasi' Approach for Nonhuman Animals" (2019) 5 Can J Comparative & Contemporary L 155.
29. Karl N Llewellyn, *Cases and Materials on the Law of Sales* (Callaghan, 1930) at 561.
30. *Ibid* at 568-69.
31. *Ibid* at 561.
32. See Karl Llewellyn, "Through Title to Contract and a Bit Beyond" (1938) 15 NYU Law Quarterly Rev 117 at 129-30.

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Llewellyn's stress on clarity and the importance of ensuring legal concepts and adjudicative techniques stay close to 'the facts' demands caution, in that it threatens to overlook the extent to which our apprehension of these facts is shaped, to some degree, by existing legal, economic, and other categories.[33] Nonetheless, the importance he accorded to disaggregation is highly instructive. Much like 'title' or 'property', the categories of 'rights' and 'personality' are often invoked as lump-concepts. I begin by connecting this analysis to the rights/welfare dichotomy, before turning to the property/personality context.

Hohfeld, whose work pursued the kind of "narrow-issue analysis" Llewellyn endorsed, is a common starting point for any discussion of rights.[34] Wary of its "chameleon-hued" character, Hohfeld disaggregated the general category of 'rights' into a system of jural opposites and correlatives.[35] In a quasi-structuralist register,[36] he also argued that a "right" or "claim" could only be understood when set in relation with a corresponding "duty" or "obligation."[37] This perspective unsettles the rights/welfare dichotomy common to animal law scholarship. It suggests that any human obligation concerning animals will entail the conferral of some form of right. Understood in this "mundane and pragmatic way," it is clear that "animals have long had a wide range of 'rights' against cruelty and mistreatment."[38] There is nothing in the discipline of law, at least at the level of *form*, that prevents us from clothing welfare laws in 'rights-talk'. As Sunstein explains:

> It is possible to imagine a regime of animal "rights" … so undemanding, that animals are hardly protected at all. It is possible to imagine a regime of animal "welfare" in which the interest in avoiding pain and suffering is taken extremely seriously, so much so that it overcomes many significant human interests.[39]

Yet Francione continues to dispute the view that existing welfare laws contain "some 'milder' form of rights."[40] He argues that *genuine* subjects of rights must benefit from a right not to be regarded exclusively as *a means to human ends*, which he regards as synonymous with a right not to be regarded as property.[41]

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33. See *ibid* at 118-19; Llewellyn, *supra* note 29 at 565; Gary Peller, "The Metaphysics of American Law" (1985) 73:4 Cal L Rev 1151 at 1240-45; LL Fuller, "Legal Fictions" (1930) 25:8 Illinois L Rev 877 at 908.

34. Llewellyn, *supra* note 29 at 572. See also David Frydrych, "Hohfeld vs the Legal Realists" (2018) 24:4 Leg Theory 291.

35. Wesley N Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale University Press, 1919) at 35-36.

36. On Hohfeld's structuralism, see Akbar Rasulov, "International Law and the Poststructuralist Challenge" 19:3 (2006) Leiden J Intl L 799 at 808.

37. Hohfeld, *supra* note 35 at 38. Llewellyn held a similar view at the level of 'paper rules', as did Hans Kelsen, though his theory is ultimately obligation-centric. See Karl Llewellyn, *The Bramble Bush* (Oxford University Press, 2008) at 90; Karl Llewellyn, "A Realistic Jurisprudence: The Next Step" (1930) 30:4 Colum L Rev 431 at 447-48; Hans Kelsen, *Pure Theory of Law*, 2d ed, translated by Max Knight (University of California Press, 1967) at 128.

38. Sunstein, *supra* note 10 at 32.

39. *Ibid* at 33.

40. Francione, *supra* note 13 at 112.

41. *Ibid* at 153-55.

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While acknowledging that prohibitions seeking to incrementally abolish property-status might be described as 'proto-rights', Francione regards Sunstein's position as misleading because the term 'right' implies a degree of substantive protection *beyond* that supplied by existing welfare law.[42] For Francione, it would be ludicrous to clothe a prohibition on unnecessary suffering in the language of rights because this would provide nothing more than a right to efficient slaughter.

While Francione's argument is powerful, it has little bite at the level of doctrine.[43] Without wishing to endorse a rigid separation between these spheres, Francione's argument has more to do with the *content* than the *form* of a right. This is equally apparent in his treatment of prohibitions: "Laws that prohibit only 'inhumane' behaviour do not constitute *true* prohibitions."[44] Neither 'right' nor 'obligation', in their purely formal aspect, is sufficient. Rather, Francione must invoke some external, normative foundation to which the law must be oriented in order to distinguish between *rhetorical* and *authentic* rights and obligations.[45] Below, I argue that this tendency reinforces a logic that has itself been implicated in animal exploitation, and consequently demands caution. Before doing so, I connect these insights to the property/personality dichotomy.

If welfare laws can be clothed in the language of rights, then animals arguably possess a form of legal personality.[46] For Steven Wise, "legal rights are actually the building blocks of legal personality" and "a 'rightless person' is an oxymoron."[47] Wise's statement is intended to oppose Sunstein, though it actually supports his position. Far from advocating "rights without personhood," Sunstein disputes a binary view of property/personality by highlighting the ways in which animals already bear rights and property status simultaneously.[48] This understanding aligns with Llewellyn's desire to disaggregate law's seemingly monolithic categories, such that 'property' and 'personality' are reconceived as "complex aggregate[s]" of rights and/or obligations governing relations between persons.[49] Accordingly, 'personality' and 'property' are often highly-mediated categories operating as poles on a spectrum.[50] Wise's problem with this

42. *Ibid* at 140, 206.
43. On Francione's misapplication of Hohfeld, see Visa AJ Kurki, *A Theory of Legal Personhood* (Oxford University Press, 2019) at 69-70.
44. Francione, *supra* note 13 at 195 [emphasis added].
45. See Duncan Kennedy, *A Critique of Adjudication* (Harvard University Press, 1997) at 307; Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart, 2009) at 175.
46. See Fernandez, *supra* note 28 at 157.
47. Steven M Wise, "Rattling the Cage Defended" (2002) 43:3 Boston College L Rev 623 at 682.
48. *Ibid*. See Cass Sunstein, "The Chimp's Day in Court", *The New York Times* (20 February 2000), online: https://www.nytimes.com/2000/02/20/books/the-chimps-day-in-court.html; Sunstein, *supra* note 10 at 31-34. See also David Favre, "Equitable Self-Ownership for Animals" (2000) 50:2 Duke LJ 473.
49. Hohfeld, *supra* note 35 at 96. Endorsing Hohfeld's approach, see Llewellyn, *supra* note 29 at 572-74. See also Margret Davies, *Property: Meanings, Histories, Theories* (Routledge-Cavendish, 2007) at 80; Kelsen, *supra* note 37 at 172-73.
50. See Naffine, *supra* note 45 at 47; Kurki, *supra* note 43 at 103-04; Fernandez, *supra* note 28 at 218.

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account is similar to that of Francione—he seeks to extend a specific set of common law rights to bodily liberty/integrity to certain animals based on the mental capabilities they share with humans.[51] In doing so, he equates 'personality' with the possession of particular rights. Again, this approach has more to do with *content* than *form,* and anchors itself in the extra-legal attributes of particular animals, a point I return to below.

Whether rights are central to legal personality as Wise claims has been the subject of debate. For instance, in the case of Tommy the chimpanzee, the New York Supreme Court declined to extend the right of *habeas corpus* to a chimpanzee on the basis that animals "cannot bear any legal duties," and thus do not have personality.[52] This raises an important issue. If legal personality requires that an entity be addressed by certain obligations, then arguably a degree of mental capacity is required in order to find that entity legally responsible for violations.[53] Were this so, then personality would potentially turn on the presence of certain extra-legal attributes. I believe this position to be misguided. While I agree that an entity may be described as a legal person where it is solely an addressee of obligations, I believe the same is true for an entity that is solely the addressee of rights. Moreover, whether an entity benefits from rights of the kind contemplated by animal advocates does not hinge on the possession of particular mental or physiological traits.

The work of Hans Kelsen helps cast light on this issue. Kelsen advanced a largely obligation-centric conception of personality, according to which it is possible to bear personality without rights of any kind. Like Hohfeld, Kelsen recognised that most rights were essentially identical to their corresponding obligations. Nevertheless, Kelsen described such rights as mere 'reflexes' that were parasitic upon, and thus secondary to, obligations. Consequently, he limited personality to duty-bearers for the most part.[54] The only 'rights' capable of conferring personality under Kelsen's theory are the distinct set of *powers* required to initiate the enforcement of a violation of an obligation, a competence that is likely inappropriate to the animal context.[55] Yet Kelsen regarded these 'rights' as inessential features of legal norms.[56] They were merely 'conditional' factors forming part of a cumbersome 'if-then chain', terminating in the application of a sanction by an official.[57] Clearly, the enforcement of animal laws can be triggered through various means, including public prosecution and private claims brought on behalf

51. See Wise, *supra* note 1 at 119; Steven M Wise, *Drawing the Line: Science and the Case for Animal Rights* (Perseus Books, 2002) [Wise, *Drawing the Line*].
52. *People ex rel Non-human Rights Project, Inc v Lavery* 124 AD (3d) 148 at 152 (NY App Div 2014). This argument is erroneous from Hohfeld's perspective, not least because privilege-rights are the jural opposites of duties: see Hohfeld, *supra* note 35 at 65.
53. See Richard L Cupp Jr, "Moving Beyond Animal Rights: A Legal/Contractualist Critique" (2009) 46:1 San Diego L Rev 27 at 66-72.
54. See Kelsen, *supra* note 37 at 128.
55. See *ibid* at 134-37.
56. See *ibid* at 136.
57. See Hans Kelsen, *General Theory of Law and State*, translated by Anders Wedberg (Harvard University Press, 1949) at 81-83.

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of the animal by agents, guardians, or third parties.[58] As such, Kelsen's disaggregation of obligations, *passive* 'reflex' rights, and *active* power-conferring rights extinguishes the need to possess a particular physiological or mental attribute in order to benefit from extensive legal protections, however described.[59]

Yet, Kelsen was clearly an outlier in advocating both an obligation-centric theory of personality and in pursuing the virtual elimination of the language of rights from his jurisprudence. From the viewpoint of Hohfeld, it would be equally valid to speak of rights, and by extension personality, in the context of addressees of passive rights. Indeed, Kelsen's tendency to conceive one side of the coin in isolation from the other, concealing their relation—even their interdependence—aligns with a wider tendency to prioritise norm over fact, validity over efficacy, objectivity over subjectivity, etc.[60] Moreover, despite helpfully disaggregating traditional conceptions of rights, personality, and property, his inclination to re-congeal these pieces into evermore abstract lumps of 'norms' reveals the limits of his approach when viewed holistically. This brings to mind Fuller's observation that "[t]he trouble with the law does not lie ... in the use of 'lump concepts.' The difficulty lies ... in part in the fact that we have often forgotten that the 'lumps' are the creations of our own minds."[61]

In contrast to Kelsen, Visa Kurki has forcefully disputed obligation-centric views of personality.[62] Like Wise, he argues that an entity can have personality without obligations, but not in the absence of particular rights.[63] Some expansion on this point is worthwhile given that Kurki provides one of the more nuanced recent analyses of legal personality. According to Kurki's 'Bundle Theory', personality consists of a series of "interconnected but disseverable incidences."[64] No single incident is sufficient to establish personality, nor is it necessary to engage them all. Rather, certain combinations may indicate personality when "clustered" or 'lumped' together.[65] Kurki groups these incidents of personality into active and passive categories. While active incidents (e.g., competences to perform legal acts or bear criminal responsibility) cannot establish personality by themselves, clusters of passive incidents alone may be sufficient.[66] While I depart from Kurki on this point, I concede that 'active' components of legal personality are unlikely to arise in the animal context.

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58. See Sunstein, *supra* note 10 at 28-32; Kelsen, *supra* note 37 at 128-29.
59. See Kelsen, *supra* note 57 at 83-85; Kelsen, *supra* note 37 at 171-74. Hohfeld is inconsistent on this issue: see Frydrych, *supra* note 34 at 295-98.
60. For a detailed analysis of this tendency in Kelsen's work, see Lee McConnell, "Opportunity and impasse: social change and the limits of international law" (2022) 14:1 International Theory 25 at 41-42.
61. Fuller, *supra* note 33 at 909-10.
62. See Kurki, *supra* note 43 at 146-47.
63. See *ibid* at 15, 65, 118; see also Wise, *supra* note 47 at 682.
64. Kurki, *supra* note 43 at 94. This approach resembles aspects of Honoré's conception of ownership: see Anthony Honoré, "Ownership" in AG Guest, ed, *Oxford Essays in Jurisprudence* (Oxford University Press, 1967) at 107.
65. Kurki, *supra* note 43 at 120-21.
66. See *ibid* at 113-21.

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As regards 'purely passive legal personhood', Kurki identifies three substantive incidents: i) the capacity to benefit from fundamental rights/protections; ii) the capacity to bear 'special rights', such as those established by contract; and iii) the capacity to own property.[67] While these incidents are presented as discrete, Kurki acknowledges that passive legal personality functions primarily through what Hohfeld termed "claim-rights."[68] Thus, while these substantive incidents can be distinguished at the level of *content*—i.e., their hierarchical position in the legal order and the number of persons bearing any corresponding obligations—they are indistinguishable at the level of *form*.[69] In light of this, it seems odd to conclude, as Kurki does, that an animal could be described as a legal person where it has been conferred equitable title to property, but not where it is a beneficiary of publicly-enacted animal welfare legislation.[70] While the conferral of claim-rights is common to both scenarios, Kurki's depiction of personality as a cluster (or lump-concept) means that the engagement of at least one passive *procedural* incident is required. These are identified as: i) standing; ii) the capacity to be subject to tortious harms; and iii) the capacity to count as a victim of criminal offences.[71] The implication is that these are missing from most animal welfare laws.

In denying that existing animal welfare laws confer legal personality, Kurki cites an example from Finland, under which humans alone may challenge welfare inspection decisions before a court, and no criminal sanction may be instituted.[72] Clearly, these are not necessary features of animal welfare laws. As established above, some form of standing for animals is theoretically conceivable.[73] Moreover, as Kelsen noted in one of his more ideological-critical gestures, standing is "a specific technique of the capitalist legal order … and appears fully developed only in the realm of so-called private law and in some parts of administrative law."[74] Indeed, to equate 'legal personality' with a particular instantiation under capitalism would be to take an ahistorical view of the category.[75] Yet, even if we accept that the engagement of one of these procedural incidents is integral to personality, the UK's criminalisation of violations of animal welfare statutes surely fulfils Kurki's requirements.[76] While the procedural status of the animal will not be identical to a human, in that they may not be able to institute corresponding civil claims, this is designated by Kurki as a separate procedural

67. See *ibid* at 97-107.
68. *Ibid* at 141.
69. See Hohfeld, *supra* note 35 at 72; Kelsen, *supra* note 37 at 130-32.
70. See Kurki, *supra* note 43 at 102, 122-23.
71. See *ibid* at 107-13.
72. See *ibid* at 122-23.
73. See e.g. *ibid* at 192-93; Sunstein, *supra* note 10 at 28-30.
74. Kelsen, *supra* note 37 at 136.
75. Without suggesting that the category 'legal person' is a transhistorical-constant, or even a necessary component of a legal order, the concept has clearly been invoked outside of liberal-capitalist legal systems. See e.g. William W Buckland, *The Roman Law of Slavery* (Cambridge University Press, 1908) at 3-4; Patrick Duff, *Personality in Roman Private Law* (Cambridge University Press, 1938).
76. See *Animal Welfare Act 2006* (UK), s 32.

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incident, and it is therefore not necessary to be considered a 'victim' in a purely criminal context.[77] Indeed, he is keen to emphasise that personality is not a binary matter; just because an entity is a legal person in one context, does not imply it is in another.[78] I entirely agree with this point; the term 'legal person' says little, if anything, about an entity's specific rights, duties, and competences.

Suppose we put these criticisms aside and accept all of Kurki's doctrinal stipulations. Suppose we envisage a scenario in which a river is endowed with substantial legal protections backed by criminal law, an administrator is empowered to initiate civil claims for damage resulting from pollution, and any compensation is held on trust for the preservation of the river. Despite engaging a significant number of substantive and procedural incidents, for Kurki, "it would be a mistake to infer that … the river itself has become a (passive) legal person."[79] Consequently, despite his intricate doctrinal arguments, legal personality is not something that is purely *internal* to, or constituted by, law. In this regard, Kurki makes the common argumentative move of appealing to objects, attributes, and principles *outside* of legal doctrine so as to limit the entities that are able to bear claim-rights.[80] In doing so, he seeks to distinguish between duties *towards a subject* of rights, and those that merely *pertain to an object* of regulation.[81] Curiously, Kurki concludes that animals, corporations, and artificial intelligence (AIs) have this capacity and can properly be described as legal persons, whereas rocks and rivers cannot.[82] I turn to address the problems arising from this internal-external dynamic below. For now, it suffices to conclude that there is little at the doctrinal level to justify a binary distinction between rights/welfare or property/personality.

II. A Critique of 'External' Doctrinal Anchors

This section considers various appeals to 'external' or 'extra-legal' objects, attributes, and principles that function to stabilise the meaning of the categories considered above. Some are said to be discoverable via the scientific method, and may be observed in the physiological or mental characteristics of humans and animals. Others are moral precepts employed to advance normative arguments as to the types of beings that can and should bear legal rights. While seemingly discrete, they often rely on interrelated premises that are rarely expressly confronted. I bring these common foundations into view before deploying a mode of critique derived from Theodor Adorno and Walter Benjamin.

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77. This is the only procedural distinction Kurki provides. That these incidents can be disaggregated is demonstrated by the examples he cites, namely cases of manslaughter/murder, and crimes against children. See Kurki, *supra* note 43 at 100, 112-13.
78. See *ibid* at 87.
79. *Ibid* at 151.
80. See *ibid* at 138.
81. See *ibid* at 26.
82. See *ibid* at 128.

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The works of Adorno and Benjamin express a philosophically-sophisticated form of dialectical materialism.[83] Both saw the ideas, concepts, and categories employed by humanity in pursuit of knowledge as shaped by the socio-historical conditions in which they were formulated.[84] Consequently, neither claimed direct or objective knowledge of a stable material/social world lying 'outside' of our conceptual frameworks.[85] Such knowledge could at best be obtained *indirectly*, by examining the contradictions and disjunctions *within* our conceptual schemas. In this way, they argued that the structure of our epistemological frameworks could be analysed or interpreted for meta-references to our material conditions.[86] In making these connections, they sought to reveal the historically-specific character of our ways of thinking, and to highlight the possibility of change both socially and conceptually.[87] In his inaugural lecture, Adorno remarked:

> He who interprets by searching *behind* the phenomenal world for a world-in-itself … which forms its foundation and support, acts mistakenly like someone who wants to find in the riddle the reflection of a being which lies *behind* it, a being mirrored in the riddle.… Authentic philosophic interpretation does not meet up with a fixed meaning which already lies *behind* the question, but lights it up suddenly and momentarily, and consumes it at the same time.[88]

Adorno's metaphors of *illumination* and *destruction* strongly echo Benjamin, and stress the enlightening potential of critique.[89] This ethos informs what follows. I argue that the gestures towards the 'exteriors' lying 'behind' legal doctrine fail to provide the stability that liberal animal lawyers seek. Moreover, the manner in which they make such appeals risks strengthening a logic that has been central to the instrumental use and exploitation of animals they seek to oppose.

The normative case for animal rights—shared Kantian foundations

The first sense in which an appeal is made to an 'extra-legal' domain is with regard to the various normative claims advanced by these scholars in support of their proposed reforms. A degree of faith in the transformative potential of law is implicit in their works. While strength of feeling will vary, all see law as strategically important and at least *capable* of accommodating their demands.

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83. See Deborah Cook, "Adorno's critical materialism" (2006) 32:6 Philosophy & Social Criticism 719; Susan Buck-Morss, *The Origin of Negative Dialectics: Theodor W. Adorno, Walter Benjamin, and the Frankfurt Institute* (The Free Press, 1977) at 24.

84. See Brian O'Connor, *Adorno's Negative Dialectic: Philosophy and the Possibility of Critical Rationality* (MIT Press, 2014) at 82-83; Deborah Cook, *Adorno on Nature* (Routledge, 2011) at 34-46.

85. See Adorno, *supra* note 7 at 170-72. On the Adorno-Benjamin dispute over materialist methods, see Wolin, *supra* note 9 at 163.

86. See Buck-Morss, *supra* note 83 at 80; Adorno, *supra* note 8 at 127.

87. See Adorno, *supra* note 7 at 12.

88. Adorno, *supra* note 8 at 127 [emphasis added].

89. See Walter Benjamin, "Goethe's Elective Affinities" in Marcus Bullock & Michael W Jennings, eds, *Walter Benjamin: Selected Writings Volume 1 1926-1931* (Harvard University Press, 2004) 297 at 298.

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Accordingly, each seeks to articulate a convincing 'pre-legal' basis on which the circle of beings owed direct moral consideration might be expanded. The hope is that this *external* normative foundation will later be reflected *inside* the positive law, leading to an enhanced status for animals via the conferral of legal rights.[90]

Many such approaches can be read as a response to, and continuation of, a Kantian problematic. While Kant opposed animal cruelty, this was not based on a moral duty owed to them directly.[91] Only humans—as rational beings—were owed direct moral consideration, and any proscription on animal cruelty aimed to preserve the moral character of humans. While all of the scholars considered throughout this paper are in conversation with Kant to some degree, the works of Martha Nussbaum, Tom Regan, and Gary Francione are the most explicit. These scholars expressly position themselves as offering partial revisions to the second formulation of Kant's Categorical Imperative:

> Act in such a way that you always treat *humanity* ... never simply as a means, but always at the same time as an end.[92]

Two components are central to the functioning of this moral precept: i) the identification of a stable class of beings to which the principle applies; and ii) a commitment to rational consistency, such that no one is arbitrarily excluded from its scope.[93] I analyse and critique the manner in which both these components manifest within liberal animal law scholarship below. First, it is worth setting out some of Adorno's general remarks on this centrepiece of Kantian moral philosophy.

Despite Kant's efforts to formulate a moral law capable of standing for all time, Adorno argued that certain historically-specific social concerns were visible within Kant's work.[94] Indeed, he regarded Kant's moral philosophy as doing more to reproduce his immediate social circumstances than to challenge them.[95] For Adorno, the Categorical Imperative expressed a concern that every individual be respected as more than "a mere function of the [exchange] process" in

90. See Kennedy, *supra* note 45 at 307-09.

91. See Immanuel Kant, "The Metaphysics of Morals" in Immanuel Kant, *Practical Philosophy*, ed & translated by Mary Gregor (Cambridge University Press, 1996) 363 at 563 [Ak 6:442].

92. Immanuel Kant, *Groundwork on the Metaphysics of Morals*, translated by HJ Paton (Routledge, 1992) 96 [Ak 4:429] [emphasis added]. See also Regan, *supra* note 12 at 249; Francione, *supra* note 1 at 10-11; Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Belknap Press, 2006) at 70-71 [Nussbaum, *Frontiers of Justice*]; Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Belknap Press, 2011) at 94 [Nussbaum, *Creating Capabilities*]; Martha Nussbaum, *Justice for Animals* (Simon & Schuster, 2023) at 72, 94 [Nussbaum, *Justice for Animals*].

93. Universality/consistency is the key demand of Kant's first formulation. All three were said to express "the very same law, and any one of them unites the other two in it." Immanuel Kant, "Groundwork on the Metaphysics of Morals" in Kant, *supra* note 91, 41 at 85 [Ak 4:436].

94. See Immanuel Kant, "Critique of Practical Reason" in Kant, *supra* note 91, 137 at 164ff [Ak 5:31-5:34]; Fabian Freyenhagen, *Adorno's Practical Philosophy: Living Less Wrongly* (Cambridge University Press, 2013) at 115-16; JM Bernstein, *Adorno: Disenchantment and Ethics* (Cambridge University Press, 2001) 140-41.

95. See Bernstein, *supra* note 94 at 136.

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capitalist society.[96] Evidence for this can be found in the extensive references to market exchange and fungibility appearing throughout Kant's work:

> everything has either a *price* or a *dignity*. What has a price can be replaced by something else as its *equivalent* … but that which constitutes the condition under which alone something can be an end in itself has not merely a relative worth, that is, a price, but an inner worth, that is, *dignity*.[97]

For Adorno, Kant's means-ends distinction stressed a *social* difference between individuals who were viewed as 'commodities' or "merchandise … and the human beings who even in the form of such merchandise remain the subjects for whose sake the whole machinery is set in motion."[98] Were it to be fully abstracted from this social context, the practical import of Kant's moral law would be lost.[99]

These reflections cast further light on the nature of the binaries explored above. Indeed, the phrasing of the second formulation ("*never simply* as a means, but *always at the same time* as an end") erodes any rigid distinction between 'property' and 'personality'. Moreover, Kant's stress on the immutability of his moral law presents the objectification and instrumental use of humans under capitalism as a pervasive social threat that can be mitigated through moral instruction, but never completely overcome.[100] This insight is central to Adorno's critique of moral philosophy in general: its privileging of abstract, unchanging rules obscures the historically-specific character of the concerns they express, and forecloses the possibility of social, conceptual, and moral change. In this way, Kant's idealist moral philosophy seeks to transcend its material conditions, but in fact, continues to bear their impression.[101] To some degree, Francione and others remain caught in this same dynamic when they appeal to marginally revised but similarly abstract, transhistorical moral foundations so as to maintain distinctions that cannot be said to exist at the internal, doctrinal level. In designating the danger of the commodification of animals as perennial, they in some sense implicitly deny the possibility of the social change they seek. Having briefly sketched these initial points of critique, the following sections examine in detail the ways in which liberal animal rights advocates seek to revise and rehabilitate the central components of the Categorical Imperative identified above.

Expanding the category of 'humanity'

The primary feature of the Categorical Imperative that animal rights advocates seek to modify is the category of 'humanity'. In order to expand the set of beings

96. Adorno, *supra* note 7 at 257.
97. Kant, *supra* note 93 at 84 [Ak 4:434-435] [emphasis in original, footnotes omitted].
98. Adorno, *supra* note 7 at 257.
99. See *ibid.*
100. See Bernstein, *supra* note 94 at 142.
101. See *ibid* at 153.

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owed direct moral consideration, most seek to modify or remove the 'species' requirement and install a more inclusive condition of entry. Accordingly, they seek to identify a 'relevant similarity' shared by humans and non-humans. Here, their appeals to certain stable, 'factual' qualities of particular beings become most explicit. These facts, in turn, prove central to maintaining the doctrinal binaries examined above. For instance, in order to delineate the laws that confer 'rights' and justify their extension to non-humans, Francione employs a theory of natural rights derived from the moral philosopher, Tom Regan. For Regan, all beings that possess "inherent value" are owed direct moral consideration.[102] Regan argues that—as a minimum—mammalian animals aged one and over fall into this category. Such beings are "subjects of a life," possessing an extensive list of physical and mental traits, including: beliefs, desires, perceptions, memory, emotion, sensitivity to pleasure/pain, preference and welfare interests, and a stable identity, among others.[103] Substantial portions of Regan's book are dedicated to justifying the presence of these qualities. This project has been built upon by Wise, for whom 'autonomy' is the relevant criterion in determining the beneficiaries of common law rights to liberty and bodily integrity.[104] By this, he means a form of mental-life, consciousness, or sentience, and this is discoverable by reference to the bodily features and observed behaviours of the being in question.[105] For David Favre, such features are discernible at the most abstract molecular level, presenting in an animal's DNA.[106]

Kurki employs a similar strategy to distinguish entities that are capable of bearing claim-rights from mere objects of regulation. Drawing on a combination of Kramer and Raz, he discriminates between beings of "instrumental, intrinsic, and ultimate" value.[107] Only the latter are said to have the capacity to bear claim-rights as legal persons.[108] These categories are very close to those employed by Regan. 'Ultimate' or 'inherent' value expresses the idea that a being has value *in itself*. By contrast, 'intrinsic value' corresponds to the pleasures, pains, and satisfactions experienced by a being.[109] Kurki proceeds from the premise that only *sentient* beings are of ultimate value, a trait he attributes to humans and animals, as well as contemplating its existence in AIs.[110]

Kurki's distinction between 'legal persons' and what he terms 'legal platforms' also turns on this issue. Kurki argues that legal personality is "an attribute of a non-legal entity," but curiously, this attribute is "conferred by an efficacious

102. Regan, *supra* note 12 at 235ff.
103. *Ibid* at 243ff.
104. See Wise, *supra* note 1 at 82-87, 251-66; Regan, *supra* note 12 at 84.
105. See Wise, *Drawing the Line*, *supra* note 51.
106. See David Favre, "Living Property: A New Status for Animals Within the Legal System" (2010) 93:3 Marq L Rev 1021 at 1048-49; Wise, *supra* note 1 at 131-32.
107. Kurki, *supra* note 43 at 63. See also J Raz, "On the Nature of Rights" (1984) 93:370 Mind 194; Matthew Kramer, "Do Animals and Dead People Have Legal Rights?" (2001) 14:1 Can JL & Jur 29.
108. See Kurki, *supra* note 43 at 27.
109. See Raz, *supra* note 107 at 205; Regan, *supra* note 12 at 235.
110. See Kurki, *supra* note 43 at 63-64.

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legal system."[111] On this framing, a supposedly external, non-legal feature is at the same time a product of the internal, legal domain. What Kurki means is that in order to be a 'legal person', one must be a 'being of ultimate value', but this alone is not enough. Such beings must also 'attach to' or 'correspond with' at least one 'legal platform', described as "a specific kind of bundle of legal entitlements and burdens."[112] At the level of doctrine, then, the situation is potentially indistinguishable: a cluster of Kurki's passive incidents pertaining to a river will be a legal platform, whereas an identical bundle corresponding to a human will designate a legal person.[113] All turns on whether a being of ultimate value 'stands behind' the platform in some sense. To exploit Kurki's own metaphors, legal platforms are "masks" or 'cloaks' that beings of ultimate value alone are able to 'wear'.[114] Participation in this cosplay designates a being of ultimate value as a legal person.

The significance these scholars accord to *sentience*, as well as to other physiological and mental traits, represents a major gesture towards the extra-legal domain. This is illustrative of an ongoing dialogue between law, philosophy, and science. In this regard, much can be learned from Adorno's critique of scientific/positivist epistemologies and the Kantian assumptions that often underwrite them.[115] Kant famously posited a number of stable *a priori* categories through which the empirical world could be known.[116] Indeed for Kant, it was impossible to apprehend an object of study without human-imposed concepts or categories.[117] While Adorno largely agreed with this position, he was sceptical of Kant's claim to have established an objective and unchanging conceptual system. For Adorno, Kant failed to appreciate the ways in which our modes of thought are shaped by the material conditions in which we are situated as subjects.[118] As a consequence, Kant also failed to acknowledge the *historical* and *variable* nature of our epistemologies. For the sake of stability, Kant imposed major limitations on what it is possible to know, and asserted that these limitations would stand for all time.[119] Any aspect of an object that could not be assimilated to Kant's conceptual framework—anything that was "non-identical" to it—was deemed permanently unknowable.[120] This perspective invited what Adorno called *identity-thinking*—a tendency to equate the limited,

111. *Ibid* at 133.
112. *Ibid.*
113. See *ibid* at 141-43.
114. *Ibid* at 136, 167.
115. See Theodor Adorno, "Introduction" in Theodor Adorno et al, *The Positivist Dispute in German Sociology* (Heinemann, 1976) at 1-67; Theodor W Adorno, *Kant's Critique of Pure Reason*, translated by Rodney Livingstone (Stanford University Press, 2001) [Adorno, *Kant's Critique*].
116. See Immanuel Kant, *Critique of Pure Reason* (Cambridge University Press, 1998) at 137 [Ak B4].
117. See *ibid* at 338 [Ak A235/B294].
118. See Adorno, *supra* note 7 at 183-84; Cook, *supra* note 84 at 34-46.
119. See Kant, *supra* note 116 at 380 [Ak A287/B343]; Adorno, *Kant's Critique, supra* note 115 at 175-80.
120. Adorno, *Kant's Critique, supra* note 115 at 175-76.

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subjective *appearance* of an object at a particular moment in history with *the object itself*.[121] A key task of Adorno's philosophy was to highlight the difference or 'non-identity' between our *perceptions* of objects and the *objects themselves*—to expose the inability of our epistemologies to fully register the objects we seek to know, and to demonstrate the scope to revise our modes of thought and the material conditions which shape them.[122]

For Adorno, Kant's attempt to present an inherently partial and rigid mode of thought as *enlightening* was further evidence of his philosophy's historically-specific character. Indeed Adorno regarded this as integral to the maintenance and reproduction of capitalism. For Adorno, commodity exchange under capitalism was a key social condition which had intensified 'identity-thinking'.[123] He drew parallels to Marx's analysis of commodity fetishism, according to which the "exchange-value" of objects under capitalism came to be prioritised over all other measures of value.[124] For Adorno, this had strong parallels with Kantian epistemology. This is because the partial and socially-constructed category of 'exchange-value' came to be regarded as providing an exhaustive and indeed *objective* account of the value of an item, while at the same time establishing a reductive equivalence between otherwise materially-distinct objects.[125] While Adorno acknowledged that abstract concepts such as 'exchange-value' were not unique to capitalism, and had been used to draw equivalences throughout most of human history, he argued that the expansion and growth of exchange relations under capitalism had intensified their use to such a degree that it became increasingly difficult to see beyond them.[126] For Adorno, aspects of Kantian epistemology exemplified this tendency:

> Kant's model for criticizing reason duplicates the structure of a production process where the merchandise drops out of the machines as his phenomena drop out of the cognitive mechanism. . . . The final product with its exchange value is like the Kantian objects, which are made subjectively and are accepted as objectivities.[127]

Each approach above is caught in this dynamic to the extent that they seek to identify a stable, objective criterion on which an abstract equivalence between otherwise distinct beings may be drawn. Many infer complex forms of consciousness from the observed behaviour, physiological traits, and even the genetic code of non-humans. For instance, Wise claims that "[w]e share almost identical DNA with chimpanzees and bonobos."[128] As for the parts that are non-identical, "[a] lot

121. See *ibid* at 149.
122. See Yvonne Sherratt, *Adorno's Positive Dialectic* (Cambridge University Press, 2002) 132-48.
123. See Adorno, *supra* note 7 at 146.
124. Simon Jarvis, "Adorno, Marx, Materialism" in Tom Huhn, ed, *The Cambridge Companion to Adorno* (Cambridge University Press, 2004) 79 at 88-89.
125. See Karl Marx, *Capital: A Critique of Political Economy,* translated by Ben Fowkes (Penguin, 1976) vol 1 at 163-77.
126. See Jarvis, *supra* note 124 at 93-94; Cook, *supra* note 84 at 91-92.
127. Adorno, *supra* note 7 at 387.
128. Wise, *supra* note 1 at 132.

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of it doesn't do anything; it's 'junk DNA.'"[129] These statements typify Adorno's notion of identity-thinking.

Yet, Wise also claims to keep 'relevant differences' or *non-identity* in view. Channelling Llewellyn, he characterises his book as one long argument against "unreasonable lumping."[130] This relationship between *similarity* and *difference* evokes what Benjamin termed 'mimesis'.[131] Reflecting on the diverse ways in which humanity has produced and perceived similarities throughout history, Benjamin recognised that *similarity* between two or more things did not necessarily infer that they were *identical.* Merely *similar* objects are just as united by the ways in which they *differ* as by the traits they positively *share.* [132] Indeed, while each approach above at least flirts with the logic of identity-thinking, each also acknowledges the potential relevance of 'non-identical' features by stressing the mere *sufficiency* of the criteria identified, rather than their strict necessity.[133] This constitutes a crucial acknowledgement that this 'extra-legal' domain is itself partial, socially-constructed, and thus incapable of providing any long term stability. To return to Kurki's metaphors, beneath the cloak and behind the mask of the legal platform is another set of garments representing a being of ultimate/inherent value.

Arguably the most nuanced construction is provided by Nussbaum, whose Aristotelian-inspired "Capabilities Approach" offers an alternative liberal justification for animal rights, while nonetheless affirming several familiar positions.[134] These include a reformulation of Kant's Categorical Imperative, and a stress on *sentience* in determining which beings are owed "entitlements based on justice."[135] While acknowledging its power and importance, Nussbaum also highlights various "unsatisfactory features" of the language of rights.[136] Anchoring rights in 'capabilities' is said to bring "important precision" to a discourse that is prone to obscure complex theoretical questions.[137] This appeal to a more stable 'exterior' is also familiar. Nussbaum seeks to identify various 'entitlements' that precede, and are thus external to, the system of legal-political rights that might secure them.[138] These entitlements are established by identifying a

129. *Ibid*.
130. *Ibid* at 84.
131. See Walter Benjamin, "On the Mimetic Faculty" in Michael W Jennings, Howard Eiland & Gary Smith, eds, *Walter Benjamin: Selected Writings Volume 2, Part 2, 1931-1934* (Harvard University Press, 2005) 720.
132. See Benjamin, *supra* note 9 at 418 [M1a,1]; Walter Benjamin, "The Task of the Translator" in Bullock & Jennings, *supra* note 89, 253 at 256.
133. See Wise, *supra* note 47 at 650; Regan, *supra* note 12 at 245; Francione, *supra* note 1 at 11; Kurki, *supra* note 43 at 64.
134. Martha Nussbaum, "Aristotle, Politics, and Human Capabilities: A Response to Antony, Arneson, Charlesworth, and Mulgan" (2000) 111:1 Ethics 102 at 124.
135. Nussbaum, *Frontiers of Justice*, *supra* note 92 at 362. See also Nussbaum, *Creating Capabilities*, *supra* note 92 at 88; Nussbaum, *Justice for Animals*, *supra* note 92 at 124.
136. Martha Nussbaum, *Women and Human Development* (Cambridge University Press, 2000) at 100.
137. Nussbaum, *Frontiers of Justice*, *supra* note 92 at 284.
138. *Ibid*.

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sentient being's 'capabilities'. Accordingly, Nussbaum establishes an essentialist account of what humans and other animals are "able to do and to be."[139]

Nussbaum's essentialism is philosophically sophisticated. She renounces any stable metaphysical or biological grounding for capabilities, and continually stresses their partial, socially-constructed, and revisable character.[140] Consequently, Nussbaum cannot be said to read a set of comprehensive, static norms from a set of empirical 'facts' that are uncontaminated by experiential and interpretive processes.[141] Rather:

> All human descriptions of animal behaviour are in human language, mediated by human experience. . . . All of our ethical life involves . . . an element of projection, a going beyond the facts as they are given.[142]

Much of this is in harmony with the perspective advanced in this article, and variations of this approach have been utilised by scholars such as Deckha, whose work shares a similar ethos.[143] Nonetheless, key aspects of Nussbaum's work are in tension with Adorno's philosophical orientation.

Nussbaum's articulation of a minimal threshold of central capabilities necessary for a 'dignified life' is informed by a sensitive and dynamic ethical evaluation of the characteristics of individual beings.[144] Accordingly, more complex beings are said to have "more and more complex . . . capabilities to be blighted, so they can suffer more and different types of harm."[145] Yet, Nussbaum does not endorse a purely individualised assessment of capabilities in which every being is owed a *sui generis* set of entitlements.[146] Such an approach would generate no *general* ethical guidance, nor would it provide a stable normative foundation on which the system of legal-political rights she favours could be constructed.[147] Rather, the individual is always viewed in relation to the norms pertaining to the more general "form of life" under which it is categorised (or *lumped*).[148]

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139. Nussbaum, *Creating Capabilities*, *supra* note 92 at 18. See also Martha C Nussbaum, "Social Justice and Universalism: In Defense of an Aristotelian Account of Human Functioning" (1993) 90 Modern Philology (Supplement) S46 at S50 [Nussbaum, "Social Justice and Universalism"].

140. See Nussbaum, "Social Justice and Universalism", *supra* note 139 at S51; Martha C Nussbaum, "Aristotle on human nature and the foundations of ethics" in JEJ Altham & Ross Harrison, eds, *World, Mind, and Ethics: Essays on the ethical philosophy of Bernard Williams* (Cambridge University Press, 1995) 86 at 121-24 [Nussbaum, "Aristotle on human nature"]; Nussbaum, *Frontiers of Justice*, *supra* note 92 at 75-76, 180-82.

141. See Martha C Nussbaum, *The fragility of goodness: Luck and ethics in Greek tragedy and philosophy* (Cambridge University Press, 1986) at ch 10.

142. Nussbaum, *Frontiers of Justice*, *supra* note 92 at 354.

143. See Deckha, *supra* note 5 at 150-52. On Adorno's Aristotelian sympathies, see Freyenhagen, *supra* note 94; Craig Reeves, "Beyond the Postmetaphysical Turn: Ethics and Metaphysics in Critical Theory" (2016) 15:3 J Critical Realism 217 at 231.

144. See Nussbaum, *supra* note 141 at ch 10.

145. Nussbaum, *Frontiers of Justice, supra* note 92 at 361.

146. See *ibid* at 363-66.

147. See Nussbaum, *Creating Capabilities*, *supra* note 92 at 166.

148. Nussbaum, *Frontiers of Justice*, *supra* note 92 at 361-62. By contrast, Deckha eschews ethical approaches centring solely on individual beings/species, stressing the importance of inter-species relationality. While it is unclear how precisely this interacts with the capability

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Nussbaum acknowledges that there is "enormous potential for abuse" in establishing these demarcations.[149] She criticises Aristotle's designation of women, slaves, barbarians, and labourers as possessing a "species" of capabilities distinct from those of other humans.[150] Yet, while Nussbaum acknowledges that "we need to know a great deal more … about the capacities of animals," and that "[c]apacities crisscross and overlap" various species, she finds it wrong to conclude "that species membership is morally and politically irrelevant."[151] This decision to differentiate between various 'forms of life' via species allows Nussbaum to arrive at the familiar position of justifying enhanced protections for humans on the basis of our particularly sophisticated capacity for *practical reason*.[152]

Within Nussbaum's theory, decisions as to how beings are 'lumped together' to demarcate a particular 'form of life' will affect the content of any norms generated, and vice versa. In this way, there is an inherent connection between *form* and *content*. Yet, Nussbaum's treatment is arguably asymmetrical. She is keen to stress the dynamic character of the *content* of species-level norms, which are always open to revision in light of new evidence.[153] Yet the *form* of life is presented as far more stable. Indeed, she expressly claims that the category 'human' is preferable over "vague moral" categories such as 'person'.[154] Treating 'human' as a category capable of impartial and uniform application might be read as positing a 'natural referent'—a biological or metaphysical ground that stabilises its meaning.[155] Nussbaum denies this, insisting that her conception remains internal to human judgment and purely evaluative in character.[156] But this position sacrifices any real limits on the scope of the term's application.[157] In order to provide some form of stability, Nussbaum resorts to the idea of an *overlapping consensus* among peoples of many cultures regarding what it is to be human.[158] In this regard, Nussbaum admits the socially-constructed character of species-categories, while finding security in a meaning and ethical significance ascribed by discursive convention alone. But as her own critique of Aristotle demonstrates, terminological boundaries can shift over

assessments she endorses, it offers an interesting point of distinction from Nussbaum's approach. See Deckha, *supra* note 5 at 127-30, 150-51.

149. Nussbaum, "Social Justice and Universalism", *supra* note 139 at S62.

150. Martha Nussbaum, "Nature, Function and Capability: Aristotle on Political Distribution" in Julia Annas, ed, *Oxford Studies in Ancient Philosophy,* Supplementary ed (Clarendon Press, 1988) 145 at 171-73.

151. Nussbaum, *Frontiers of Justice*, *supra* note 92 at 363.

152. See *ibid* at 398; Nussbaum, *supra* note 150 at 181; Nussbaum, *supra* note 136 at 87.

153. See Nussbaum, "Social Justice and Universalism", *supra* note 139 at S51; Nussbaum, "Aristotle on human nature", *supra* note 140 at 121-24; Nussbaum, *Frontiers of Justice*, *supra* note 92 at 75-76, 180-82.

154. Nussbaum, "Social Justice and Universalism", *supra* note 139 at S62.

155. See Louise M Antony, "Natures and Norms" (2000) 111:1 Ethics 8 at 35.

156. See Nussbaum, *supra* note 134 at 118.

157. See Antony, *supra* note 155 at 35.

158. See Nussbaum, *supra* note 134 at 119-20; Nussbaum, *Frontiers of Justice*, *supra* note 92 at 297, 388-92; Nussbaum, *supra* note 150 at 175-79.

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time—as can our views on how 'forms of life' ought to be demarcated.[159] As Antony explains, there is "no natural level of abstraction at which to cease generalising. We could stop well before the level of species; we could go on much further. . . . [A]ll nature can tell us is where we'll get the generalisations—the rest is up to us."[160] The deeply contradictory language Nussbaum employs to defend her position—her search for "provisionally nonnegotiable" or "provisionally fixed" points in our judgments about what it is to be 'human'—perfectly expresses this tension.[161] Any stability is ultimately qualified as being socially-constructed and thus open to revision.

Each of these attempts to hinge the extension of legal rights on certain physiological or mental traits is distinct yet interrelated. This dynamic can be brought to light via Benjamin's notion of *aura*.[162] Benjamin explained the experience of 'aura' in terms of a viewer (or 'subject') observing an external object. Subjects experience 'aura' when they recognise that the object before them cannot be fully known or registered. No matter how close the subject tries to draw to the object in order to comprehend it, something always escapes their grasp. When confronted by an object's aura—its resistance to the imposition of a rigid conceptual scheme—the subject's attention is drawn to the partial and potentially arbitrary nature of their mode of perception. This has the potential to induce an openness to revise their ways of thinking/seeing. Each approach considered above seeks to bring the 'aura' of non-human animals into view; to dispute their characterisation as mere 'objects' or 'machines', and to reconceive them as 'subjects'.[163] The hope is that this new appreciation of the complexity and subjectivity of the animal will later be reflected in law. Thus, much like Adorno's notion of 'non-identity', aura can be said to describe an ungraspable, dynamic complexity lying beyond the surface appearance of an object or being.[164]

Yet as Benjamin recognised, aura can also manifest in a far more dogmatic fashion.[165] While a viewer/subject may recognise that they cannot fully comprehend an object, they may still treat that object as stable enough to anchor their own limited perspective. Indeed, the urge to tightly police the meaning of a doctrinal category via an appeal to an 'exterior' that is *fixed*—and thus impervious to reconceptualisation or historical variation—perfectly exemplifies this position. As Kelsen observed, the notion that a legal person is a *real* entity sitting *outside* of legal doctrine has the "tendency to induce the legislator . . . to justify

159. See Nussbaum, "Aristotle on human nature", *supra* note 140 at 122.
160. Antony, *supra* note 155 at 35.
161. Nussbaum, *supra* note 134 at 120.
162. See Walter Benjamin, "The Work of Art in the Age of Mechanical Reproduction", translated by Harry Zohn, in Hannah Arendt, ed, *Walter Benjamin: Illuminations* (Schocken, 1969) 217 at 222-23.
163. See René Descartes, *Discourse on Method and Meditations on First Philosophy,* translated by Donald A Cress (Hackett, 1998) at 32, n 58; Regan, *supra* note 12 at 3; Walter Benjamin, "On Some Motifs in Baudelaire" in Arendt, *supra* note 162, 155 at 188. See also Adorno's reflections on the 'aura' of a rhinoceros in Theodor Adorno, *Aesthetic Theory* (Continuum, 1997) at 112.
164. See Sherratt, *supra* note 122 at 206.
165. See Benjamin, *supra* note 162 at 220-21.

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[his] regulation as the only 'possible' and hence the only right one."[166] For Adorno, the social conditions in which we are situated as subjects—that of late-capitalism—meant that this dogmatic denial of variation was an ever-present threat.[167] Indeed, this tendency was characteristic of what Adorno termed 'affirmative' philosophy, an orientation prone to reconcile thought with the societal status quo of the time, thus facilitating its continuation.[168]

This inclination is arguably visible in Kurki's desire to achieve coherence between what is described as "legal personhood" and our "extensional beliefs" as to what is capable of being a legal person in this particular socio-historical moment.[169] In this regard, it is unsurprising that his theory accommodates entities that are increasingly remote from the beings of 'ultimate value' that are said to 'stand behind' them. By ascribing personality to corporations and AIs engaged in economic transactions and denying it to rivers and rocks, Kurki privileges economy over ecology, painting the latter *always simply* as a means and *never* an end in itself.[170] Accordingly, his analytical project offers a marginal revision to the boundary between subject and object—person and non-person—which functions to exclude rivers, trees, and other non-sentient objects vital to our ecosystem.

In their efforts to expand the category of beings owed direct moral consideration and displace orthodox understandings of legal personality, the approaches outlined above strive to highlight the partial, contingent, even arbitrary character of past accounts. Yet they each then proceed to install one of their own—one that is informed by an appraisal of certain extra-legal physiological and mental traits. In doing so, they seek to provide a fairer, more objective, and less arbitrary construction of legal personality. Yet as the foregoing demonstrates, these too are partial and fundamentally historical constructions. Some acknowledgment of this is present in the stress each scholar places on the sufficiency rather than the necessity of their new criteria, and in their emphasis on provisionality. These qualifications do much to mitigate any charge of dogmatism, and indicate a desire for stability that is, simultaneously, not *too stable*. Nevertheless, there is a more fundamental sense in which they risk privileging the reductive and ahistorical modes of thought that Adorno and Benjamin sought to critique. As the analysis below demonstrates, it is in this respect that they remain dependent on a logic that has been integral to animal exploitation.

Consistency, rational judgment, and the domination of nature

Adorno's general critique of dominant approaches to moral philosophy is connected to the so-called "disenchantment of the world"—the separation of

166. Kelsen, *supra* note 57 at 108.
167. See Cook, *supra* note 84 at 91-93.
168. See Deborah Cook, *Adorno, Habermas and the Search for a Rational Society* (Routledge, 2004) at 48-49.
169. Kurki, *supra* note 43 at 14. See also Maija Aalto-Heinilä & Juha Karhu, "Animals, slaves, and beyond" (2021), online: *Revus* https://journals.openedition.org/revus/7004.
170. See Kurki, *supra* note 43 at 167-74, 182-89.

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values from *facts*.[171] In this regard, the revised depictions of the physiological and mental qualities of animals set out above carry no normative weight on their own.[172] They must also be subject to an *evaluative judgment* to the effect that they provide a morally-sound, non-arbitrary basis on which beings capable of bearing legal rights may be identified.[173] An emphasis on *rational consistency*—on equal treatment of like cases—is key. This issue is squarely confronted by Regan, who marries the factual characteristics of 'beings of inherent value' with a 'formal' principle of justice. According to this principle, "justice is the similar, and injustice the dissimilar, treatment of similar individuals."[174] A near-identical move is visible in Wise's depiction of the common law principle of 'equality', and implicit in Nussbaum's stress on consistency in the application of species-level norms.[175] Little explanation as to the status of this principle is offered, with most treating it as a purely formal *a priori*.[176] Such is the position it occupies in Kant's moral philosophy, where it is designated as a "fact of reason."[177] In this regard, each approach offers a marginal revision of Kant while leaving certain fundamental premises of his wider philosophical project unchallenged. As will become clear, the way in which Kant grounds this principle rests on yet another layer of identity-thinking which has proven integral to the exploitation of animals and the wider natural world.

Consistency or *non-contradiction*—which Adorno described as "the principle of naked identity"[178]—is central to the first formulation of Kant's Categorical Imperative: "[A]ct only in accordance with that maxim through which you can at the same time will that it become a universal law."[179] In order to ensure the purity, immutability, and universality of this moral law, Kant recognised that it could not be derived from the contingent empirical features, preferences, or desires of its human addressees.[180] Indeed, his moral law holds "not only for

171. Max Horkheimer & Theodor W Adorno, *Dialectic of Enlightenment: Philosophical Fragments*, ed by Gunzelin Schmid Noerr, translated by Edmund Jephcott (Stanford University Press, 2002) at 1ff. See also Bernstein, *supra* note 94 at 103-04.

172. See Kant, *supra* note 116 at 398 [Ak A319/B375].

173. See Reeves, *supra* note 143 at 227; Nussbaum, *Frontiers of Justice*, *supra* note 92 at 353-55, 366. Nussbaum has recently distanced herself from the view that all value is human-imposed. She argues that humans simply recognise and respond to the intrinsic value of animals, which exists external to human judgment. See Nussbaum, *Justice for Animals*, *supra* note 92 at 84-85. This variation hinges on an interior-exterior dynamic and can be subjected to similar criticisms to those advanced throughout this article.

174. Regan, *supra* note 12 at 128.

175. See Wise, *supra* note 1 at 82-87; Nussbaum, *supra* note 134 at 113; Nussbaum, *Frontiers of Justice*, *supra* note 92 at 381.

176. For Nussbaum, the centrality of practical reason to human life is grounded in a circular fashion. She regards it as a necessary *a priori*—a prerequisite to any discursive/deliberative exploration of what constitutes 'the good life'. See Nussbaum, "Aristotle on human nature", *supra* note 140 at 117. For a critique of similar 'self-grounding' strategies in Kant drawing from both Adorno and Aristotle, see Freyenhagen, *supra* note 94 at 115-16

177. Kant, *supra* note 94 at 164 [Ak 5:31]. See also Freyenhagen, *supra* note 94 at 115-16; Bernstein, *supra* note 94 at 140-41.

178. Adorno, *supra* note 7 at 233.

179. Kant, *supra* note 93 at 73 [Ak 4:421]. See also Kant, *supra* note 94 at 236 [Ak 5:120]; Roger J Sullivan, *Immanuel Kant's Moral Theory* (Cambridge University Press, 1989) at 151-53.

180. See Bernstein, *supra* note 94 at 158; Kant, *supra* note 91 at 370-71 [Ak 6:215-216].

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human beings but for all *rational beings as such* … with *absolute necessity*."[181] As such, Kant regards *reason itself* as both the *source* of his moral law and the distinguishing *feature* of its addressees.[182]

For Adorno, this position was achieved through the construction of an "utterly reduced empirical subject" of the moral law.[183] Indeed, Kant regarded the non-rational, *bodily* aspects of humans as being "of slight importance," sharing "with the rest of the animals … an ordinary value."[184] By this, Kant meant a 'use-value' as a mere object or *means to an end*. Only humans that are *at the same time* 'persons' will also acquire an unconditional value as *ends in themselves*. Kant likens the dignity obtained via the designation 'person' to the "universal medium of exchange, money," in that it enables one to "measure himself with every other being of this kind and value himself on a footing of equality with them."[185] Such remarks shed further light on the historically-specific character of Kant's philosophy, pointing to a society in which *market exchange* is increasingly central and even threatens to become an end in itself.[186] Stripped of their distinguishing features, the individual approximates a "fungible and replaceable" commodity.[187]

Kant's radical separation between mind and body also ensures the *autonomy* of subjects of the moral law, who must be free from external determinants, bodily drives, and impulses in order to undertake spontaneous acts of will.[188] Yet for Adorno, Kant achieved only a "caricature of freedom," secured by "eliminating from the subject whatever does not conform with its pure concept."[189] This severance of the empirical and rational components of the human reinforces a strict subject/object dichotomy which has proven integral to the exploitation of both humans and non-humans. Just as subjectivity was denied to animals by Cartesian and later Kantian philosophy, the bodily animality of humans was bracketed in pursuit of pure, autonomous reason.[190] This entailed "a denial of nature in the human being."[191] In contrast, Adorno argued that subject and object are not radically separate categories, but mediated and entwined within human beings:

181. Kant, *supra* note 93 at 62 [Ak 4:408] [emphasis in original].
182. See Freyenhagen, *supra* note 94 at 117-18.
183. Adorno, *supra* note 7 at 178. See also Kant, *supra* note 93 at 64-65 [Ak 4:411]; Deckha, *supra* note 5 at 89.
184. Kant, *supra* note 91 at 557 [Ak 6:434].
185. *Ibid* [Ak 6:434-435].
186. See Gillian Rose, *The Melancholy Science* (Verso, 2014) at 111; Theodor W Adorno, "Late Capitalism or Industrial Society" in Volker Meja, Dieter Misgeld & Nico Stehr, eds, *Modern German Sociology* (Columbia University Press, 1987) 232 at 243.
187. Adorno, *supra* note 7 at 362. See also Horkheimer & Adorno, *supra* note 171 at 65.
188. See Kant, *supra* note 94 at 166-67 [Ak 5:33-5:35].
189. Adorno, *supra* note 7 at 21, 256.
190. See Horkheimer & Adorno, *supra* note 171 at 68, 203-05; Aaron Bell, "The Dialectic of Anthropocentrism" in Sanbonmatsu, *supra* note 4, 163 at 166.
191. Horkheimer & Adorno, *supra* note 171 at 42. See also Theodor Adorno, *Beethoven: The Philosophy of Music* (Polity Press, 2014) at 201-02.

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> An object can be conceived only by a subject but always remains something other than the subject, whereas a subject by its very nature is from the outset an object as well.[192]

It is precisely this understanding of subjectivity that animal law scholars seek to extend to non-humans in designating them rights-bearers.

Yet, this connection between subjectivity and embodiment cannot be reconciled with Kant's project, which aimed to secure the validity of the moral law beyond the human domain to 'immortal souls' and other disembodied rational beings.[193] These wider concerns are not shared by the animal law theorists considered here, all of whom set themselves against theological argument to varying degrees.[194] However, the criteria for moral inclusion they seek to install are powerless without being underwritten by a normative demand rooted in some abstract, *a priori* principle of reason such as Kant's. This continued reliance on Kantian 'givens' haunted by theological baggage remains concealed rather than confronted in this scholarship.[195] In Adorno's words, it is an instance of "*enlightenment* [reverting] to *mythology*."[196] The foregoing brings to light the deeply contradictory nature of its argumentative strategy, which seeks to reinstate a concern for bodily suffering, the abolition of which is required to guarantee the stability of its abstract premises.

Moreover, Adorno's critique of the subject/object dichotomy which underpins formal principles of justice such as Regan's casts light on the historically shifting relations of domination between humans and the wider natural world.[197] Alongside Max Horkheimer, Adorno questioned Enlightenment accounts of progress, according to which 'primitive' societies steadily liberated themselves from subordination to nature through the use of reason.[198] Accordingly, nature was 'disenchanted', objectified, and dominated

> through the very processes of formation (and deformation) which have given humanity its abstract independence. . . . What then makes us *ends in ourselves* is that . . . we bestow value on things . . . even though they have become *mere things* . . . only through the detachment of humanity from them.[199]

A similar dynamic was exposed in the analysis above, whereby rights were *bestowed* or *imposed* on certain animals through *identification*—i.e., by reducing them to *objects* of human knowledge and evaluative judgment, and *assigning* value to particular physiological and mental traits. In this regard, a logic of

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192. Adorno, *supra* note 7 at 183.
193. See Kant, *supra* note 94 at 238-46 [Ak 5:122-5:132]
194. See Regan, *supra* note 12 at 3-25, 125-26; Francione, *supra* note 1 at 178; Kurki, *supra* note 43 at 64; Wise, *supra* note 1 at 263-64.
195. See Naffine, *supra* note 45 at 84-88, 150-51; Theodor W Adorno, *Problems of Moral Philosophy*, ed by Thomas Schröder, translated by Rodney Livingstone (Stanford University Press, 2001) at 73-75.
196. Horkheimer & Adorno, *supra* note 171 at xviii [emphasis added].
197. See *ibid* at 1-7.
198. See *ibid* at 31.
199. Bernstein, *supra* note 94 at 211 [emphasis added].

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domination over animals and the wider natural world is invoked by liberal animal law scholarship.

For Adorno, humanity's attempt to liberate itself from nature through objectification of this kind—its pursuit of "absolute domination of nature" through reason—was self-defeating, and ultimately led to humanity's "absolute submission to nature."[200] The same reversal is at play in the bracketing of the human body in pursuit of a transcendent 'freedom' or 'autonomy' in the domain of rational consciousness. Adorno viewed both as instances of humanity being dominated by our *natural* or instinctual orientation towards survival.[201] Yet unlike Kant, Adorno did not regard this inescapable connection with nature as disabling, oppressive, or deterministic. Rather, he highlighted the scope to realise greater freedom through critical, reasoned reflection on the ways in which humanity is a *part* of nature, without being *identical* to non-human nature.[202] By contemplating the various ways in which humanity has conceived of its relationship with nature across history, a more *rational* relationship with the natural world can be established. Rather than pursuing total domination of that which is 'other' to human reason for the purposes of self-preservation, the survival of the individual—and indeed species—is set in relation with the survival of the wider natural world of which humanity is a distinct part.[203]

Consequently, our 'natural' orientation towards survival is not static or limiting, but may manifest in different ways under different material conditions.[204] Nature/instinct are thus reconceived as *dynamic* and *historical*. By acknowledging the importance—indeed priority—of non-rational, bodily needs, a more substantial freedom can be pursued through the use of technology and the arrangement of our social/material circumstances in order to meet those needs in a manner that is sustainable and accommodates wider non-human nature.[205] Such an approach cannot be accommodated by Kant's project, which instead pursues an illusory, abstract freedom in the rational mind via a mode of identity-thinking which brackets the 'non-rational', and engenders a logic by which both the bodily aspects of humanity and wider non-human nature are feared, oppressed, and dominated.

Despite concluding that "the categorical imperative itself is nothing but the principle for achieving the domination of nature," Adorno clearly saw value in Kant's urge to maintain some distinction between *means* and *ends*, and to prevent the reduction of all beings to mere 'objects' or 'commodities'.[206] Yet, he also felt that "Kant's way of sustaining that difference must be resisted" on the grounds that it "furthers the disenchantment it means to dislodge."[207]

200. Theodor W Adorno, "Progress" in Theodor W Adorno, *Critical Models: Interventions and Catchwords,* translated by Henry W Pickford (Columbia University Press, 2004) 143 at 152.
201. See Adorno, *supra* note 7 at 179, 289.
202. See Adorno, *supra* note 195 at 103-04.
203. See Cook, *supra* note 84 at 160.
204. See *ibid* at 60.
205. See *ibid* at 110.
206. Adorno, *supra* note 195 at 104.
207. Bernstein, *supra* note 94 at 144.

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Precisely this point motivates this critique of liberal animal rights scholarship. By offering only a partial revision to this Kantian position, they risk maintaining, rather than challenging, that which they seek to oppose. As Adorno observed: "This is how animal species like the dinosaur Triceratops or the rhinoceros drag their protective armour with them, an ingrown prison which they seem—anthropomorphically, at least—to be trying vainly to shed."[208]

Similarly, the desire to maintain binary distinctions between rights/welfare and property/personality at the level of legal doctrine impels animal law scholars towards a stable, 'extra-legal' domain against which a fluid and indeterminate legal sphere can steady itself. Yet, this 'external' realm is not some directly graspable, immediately 'given', rigidly stable reality that is simply identified and put to work, but rather a partial, contingent, and fundamentally historical construction. This insight resonates on two levels. First, in terms of their quest for new criteria for moral inclusion, rooted in the identification of certain physiological and mental traits of animals and humans. Second, in their appeals to abstract, *a priori* principles of rational consistency premised on the bracketing of the non-rational, bodily aspects of human beings, and the reduction of non-human nature to mere objects. In this regard, liberal animal lawyers appeal to two distinct but related modes of identity-thinking which have historically proven central to the domination of animals, humans, and the wider natural world. To ignore this in pursuit of certainty/stability—albeit a more inclusive variety—is to offer marginal revisions to a mode of thought which has functioned to exclude and exploit non-human animals, and to risk contributing to its continuation.

III. Rights, Rhetoric, and Legal Strategy

The analysis above has questioned the intelligibility and necessity of the 'exteriors' constructed within liberal-legal argument, and disputed the degree to which legal categories are constrained by them. Advancing this discussion, this section shifts to a more pragmatic register. It explores whether, having cleared this ground, the language of rights retains any special value for animal advocates. For some, the suggestion that the language of rights might be used *indiscriminately* has been said to "cheapen the notion"—to reduce it to "mere rhetoric."[209] This longing for precision in legal discourse is not confined to animal law. While perhaps most transparent in Kelsen's quest for scientific rigor, its reach is pervasive. Hohfeld complained of the "looseness of our legal terminology," while Llewellyn sought "more exact equipment" and greater fidelity between 'doctrine' and 'fact'.[210] The more radically a work departs from the orthodoxy of its time, the more intense the emphasis appears to be, raising questions as to the rhetorical function performed by these appeals to 'clarity'.

208. Adorno, *supra* note 7 at 180.
209. Regan, *supra* note 12 at 270; Francione, *supra* note 13 at 46.
210. Hohfeld, *supra* note 35 at 28; Llewellyn, *supra* note 32 at 161.

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Adorno's reflections on language provide a helpful lens through which this can be understood. The notion that 'words can deceive' is at the heart of this matter. Rhetoric is classically understood to be part of the "art of persuasion," and as such, is often characterised as untruthful or misleading.[211] Yet for Adorno, the imprecision commonly associated with rhetoric was not a threat to language, but an inescapable aspect of it.[212] Indeed, the desire to erase rhetoric from language—to view language as a vehicle to instrumentally and accurately transmit a particular content—entailed an exaggeration of the fidelity between 'words' and 'things'.[213] In this regard, it is another instance of what Adorno termed 'identity-thinking'. For Adorno, language was inherently incapable of perfectly expressing the objects and ideas it was employed to represent, and to suggest otherwise was itself deceptive. There is a clear proximity here to Benjamin's notion of *aura*. By viewing words as simply mirroring that which they are said to 'stand for', the 'aura' or *distance* between the two is obscured. The partial and contingent character of language is hidden from view along with the complex, dynamic character of the objects it seeks to represent.[214] Indeed, Benjamin famously sought to rehabilitate *allegory*, a device through which the meaning of words and what they 'stand for' threatens to proliferate to the point of arbitrariness.[215] For Benjamin, the lack of simple correspondence between 'words' and 'things' in allegories—their 'failure' as a purely instrumental mode of communication—transparently disclosed this distance between language and that which it attempts to represent.[216]

This double aspect of rhetoric is at play in the work of liberal animal lawyers, many of whom deride competing depictions of rights as 'rhetorical', while simultaneously emphasising the *rhetorical power* of their own constructions. As Wise explains:

> If every inanimate object and animate being who is the subject of legal protection has legal rights, they are stripped of the power and protection of its powerful expressive function; rights no longer symbolize something worth fighting, even dying, for. Rights are reduced to a public declaration that a legislature or court has decided to protect a building or a plant or an animal for any number of reasons.[217]

Similarly, for Sunstein, "rhetoric may matter. . . . [I]t may well make sense to think of animals as something other than property, partly in order to clarify their status as beings with rights of their own."[218] Far from passively *reflecting* a stable

211. John Harrington, Lucy Series & Alexander Ruck-Keene, "Law and Rhetoric: Critical Possibilities" (2019) 46:2 JL & Soc'y 302 at 313.
212. See Adorno, *supra* note 7 at 56.
213. See e.g. Theodor W Adorno, "Theses on the Language of the Philosopher" in Donald Burke et al, eds, *Adorno and the Need in Thinking: New Critical Essays* (University of Toronto Press, 2007) at 35-36; Bernstein, *supra* note 94 at 355; Adorno, *supra* note 7 at 55; Roger Foster, *Adorno: The Recovery of Experience* (State University of New York Press, 2008) at 71.
214. See Adorno, *supra* note 7 at 57.
215. See Benjamin, *supra* note 7 at 233; Wolin, *supra* note 9 at 231.
216. See Benjamin, *supra* note 7 at 185; Adorno, *supra* note 7 at 56; Foster, *supra* note 213 at 59.
217. Wise, *supra* note 47 at 682-83.
218. Sunstein, *supra* note 10 at 34.

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'exterior' domain, these accounts implicitly acknowledge the role of legal language in *shaping* our apprehension of it. In a similar vein, Hohfeld noted the ways in which "words tend to react upon ideas and to *hinder* or *control* them."[219]

But does the conclusion that rights are nothing but declarations by courts or legislatures that can be applied in *any* circumstance undermine their utility for animal advocates? Stripped of the rhetorical power issuing from terminological stability, does it make sense to speak in these terms, and more importantly, is it strategic to do so?[220] For Adorno, the answer would likely depend on whether 'rights-talk' can be deployed in such a way that its inability to exhaustively represent the interests, experiences, and essential properties of animals is acknowledged, and whether any other discourses are better suited to this task.

Adorno was generally sceptical of legal categories, remarking that they "[forbid] the admission of anything that eludes their closed circle."[221] Nonetheless, the efforts of Regan and others to highlight a shared capacity to experience harm through the language of rights is not at all remote from Adorno, for whom "[t]he need to lend a voice to suffering is a condition of all truth."[222] In this regard, Adorno wrote positively of aspects of Schopenhauer's moral philosophy, which presaged the Frankfurt School's orientation towards *aura* and *non-identity*.[223] Schopenhauer enquired: "how is it possible for a suffering which is not *mine* and does not touch *me* … to move me to action? … only by the fact that … [I] *feel it with him, feel it as my own*, and yet not *within me*."[224] He concluded:

> [T]his presupposes that to a certain extent I have *identified* myself with the other man, and in consequence the barrier between the ego and non-ego is for the moment abolished; only then do … I no longer look at him as if he were something given to me by empirical intuitive perception, as something strange and foreign, as a matter of indifference, as something entirely different from me.[225]

These observations resonate with the critique of epistemology central to Adorno and Benjamin's work. Schopenhauer expresses a mode of perception in which the 'other' is not simply an *object* to be apprehended by the subject's conceptual schema, but exceeds any such reduction. This 'excess'—this non-identity—is *shared* by humans and animals alike. They are united—not in a positively-identified, shared, or static characteristic, but in their irreducible, dynamic complexity. Each suffers, and moreover *suffers with* the other, when reduced to a mere 'object' of knowledge.

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219. Hohfeld, *supra* note 35 at 70 [emphasis added]. See also Fernandez, *supra* note 28 at 221.
220. See Kennedy, *supra* note 45 at 332.
221. Adorno, *supra* note 7 at 309.
222. *Ibid* at 17-18. See also Regan, *supra* note 12 at 183.
223. See Adorno, *supra* note 195 at 145; Christina Gerhardt, "Thinking With: Animals in Schopenhauer, Horkheimer, and Adorno" in Sanbonmatsu, *supra* note 4, 137 at 137.
224. Arthur Schopenhauer, *On the Basis of Morality* (Berghahn Books, 1995) at 165 [emphasis in original].
225. *Ibid* at 166 [emphasis added].

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Schopenhauer's insights have been applied to the animal field by feminist ethic of care scholars. Against the rationalism that underwrites much of the liberal rights-based tradition, they emphasise the importance of emotion, compassion, and sympathy in knowledge construction and moral decision-making.[226] An orientation towards non-identity—that which is cut away by rationally imposed concepts—is necessarily implied. Yet their appeals to discourse ethics and intersubjective rationality are often in tension with this.[227] For instance, Donovan calls for "an ethic where the oppressed have an opportunity to voice their needs and where ethical decision making is conducted in a dialogic process."[228] She seeks "an emotional and spiritual conversation with nonhuman life-forms,"[229] which requires us to "pay attention to their communications, to learn their language, and to incorporate their wishes."[230] Although animals do not participate in human speech, Donovan insists that "[i]f we listen, we can hear them."[231]

From the perspective of Adorno, these scholars err when they claim to discover "what the other's reality *really is*," and that it can be directly represented in human language.[232] Such is Gunderson's claim that "the ethics of compassion and sympathy can serve as a means for understanding animal utterances for elevation into practical discourse."[233] Even where it is acknowledged that the 'subjective reality' of animals is *inferred*, this inference takes place on "the assumption that as their external manifestations are similar to ours, their internal states must be similar to what ours would be," a move that threatens to falsely equate humans with animals.[234] Such an approach rests on an understanding of the 'speaker', whatever their species, as capable of knowing and articulating a set of stable qualities, interests, and experiences.[235]

These constructions are at odds with Adorno and Benjamin, for whom even human subjects could never be brought to full representation in language.[236] It is precisely this issue that is visible in Gunderson's suggestion that "the knowledge

226. See Josephine Donovan & Carol J Adams, eds, *The Feminist Care Tradition in Animal Ethics* (Columbia University Press, 2007).
227. See Jürgen Habermas, *Justification and Application* (MIT Press, 1994) at 110; Jürgen Habermas, *The Future of Human Nature* (Polity, 2003) at 33.
228. Josephine Donovan, "Sympathy and Interspecies Care: Toward a Unified Theory of Eco- and Animal Liberation" in Sanbonmatsu, *supra* note 4, 277 at 290.
229. Josephine Donovan, "Animal Rights and Feminist Theory" (1990) 15:2 Signs 350 at 375.
230. Donovan, *supra* note 228 at 278.
231. Donovan, *supra* note 229 at 375.
232. Donovan, *supra* note 228 at 282 [emphasis added].
233. Ryan Gunderson, "Sympathy Regulated by Communicative Reason: Horkheimer, Habermas, and Animals" in Gabriel R Ricci, ed, *The Persistence of Critical Theory: Culture and Civilization, Volume 8* (Transaction, 2017) 187 at 191.
234. Josephine Donovan, "Animal Ethics, the New Materialism, and the Question of Subjectivity" in Atsuko Matsuoka & John Sorenson, eds, *Critical Animal Studies: Towards Trans-species Social Justice* (Rowman & Littlefield, 2018) 257 at 264.
235. See *ibid* at 266.
236. See Walter Benjamin, "Berlin Childhood around 1900" in Howard Eiland & Michael Jennings, eds, *Walter Benjamin: Selected Writings, 1935-1938, Volume 3* (Harvard University Press, 2006) 344 at 374; Adorno, *supra* note 7 at 124-25; Eduardo Mendieta, "Animal Is to Kantianism as Jew Is to Fascism" in Sanbonmatsu, *supra* note 4, 147 at 152-55.

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gained through our sympathetic relations with an animal can be *translated*, to the best of our ability, into symbolic utterances."[237] Yet, while a translation may be *similar* in crucial respects to that which is translated, it is of necessity *different*. As Benjamin reminds us, "no translation would be possible if in its ultimate essence it strove for likeness to the original."[238] To equate 'translation' and 'translated' is to *erase* this difference.[239] As Parsley explains, this position

> grants metaphysical immediacy to language, but leaves uninterrogated both the question of the linguistic apparatus' grasp on the living being and the technological problem of representation and appearance in the constitution of the human and the animal. Animal life is replayed as the fully grasped object of human representation, but in the belief that it has been made a subject or agent.[240]

In their attempts to *restore* the 'aura' of animals—to recognise their resistance to the imposition of human concepts, and indeed *language*—these scholars threaten to *abolish* it.[241]

Far greater sensitivity to these issues is visible in Deckha's recent work, which carefully synthesises insights from feminist care ethics and post-colonial feminism to posit a new legal subjectivity termed 'beingness'.[242] Having rejected 'personhood' on the basis of its inherent anthropocentrism, Deckha goes on to explain that "beingness is meant to *replace* property, not coexist with it."[243] Accordingly, Deckha seeks to *transcend* these categories and inaugurate a new legal ontology that values embodiment, relationality, and vulnerability.[244] As should be clear from the preceding analysis, I depart from Deckha's presentation of the categories of property/personality. Understood in the terms advanced above, the property-personality spectrum is arguably sufficiently flexible to accommodate 'beingness' and its associated values. These comparatively minor points of difference aside, Deckha's wider project is highly nuanced, aligns with many of Adorno and Benjamin's insights, and stands as an important corrective to many of the perspectives considered above. This is visible in her general orientation towards 'alterity' or 'non-identity', through which she emphasises the importance of the embodiment/materiality of legal subjects, and in her

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237. Gunderson, *supra* note 233 at 200 [emphasis added]. See also Josephine Donovan, *The Aesthetics of Care*: *On the Literary Treatment of Animals* (Bloomsbury, 2016) at 93.
238. Benjamin, "The Task of the Translator", *supra* note 132 at 256.
239. Similar points are made in the legal context in Kennedy, *supra* note 45 at 329.
240. Connal Parsley, "The animal protagonist: representing 'the animal' in law and cinema" in Otomo & Mussawir, *supra* note 6, 10 at 24.
241. Recently, Donovan has used Adorno and Benjamin's philosophical and aesthetic insights to argue that humans are capable of positively knowing/communicating the subjective experience of non-human animals. See Josephine Donovan, "Ethical Mimesis and Emergence Aesthetics" (2019) 8:2 Humanities 102; Donovan, *supra* note 237. These claims are in tension with one of Adorno's most central insights—that truth cannot be grasped in positive terms, but only through negation. This is the case in both philosophy and aesthetics. For an extensive overview, see Owen Hulatt, *Adorno's Theory of Philosophical and Aesthetic Truth* (Columbia University Press, 2016).
242. See Deckha, *supra* note 5 at 121ff.
243. *Ibid* at 155 [emphasis in original].
244. See *ibid* at 97.

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critique of arguments based on the physiological/mental 'sameness' or 'identity' between humans and non-humans.[245] Accordingly, 'beingness' is conceived as an inclusive subjectivity that acknowledges varying types and degrees of vulnerability, and is open to historical variation in terms of the entities it accommodates.[246] In identifying and responding to such vulnerabilities, Deckha expressly acknowledges the "inescapably human-centred lens" through which non-humans are understood, and foregrounds the "high risk of epistemic and imperial violence" involved in such processes.[247] These sentiments are echoed by Eisen, who highlights the "real, embodied, experiential factors that make it particularly challenging for participants in human language communities … to make knowledge claims about animal experiences."[248]

In a similar vein, Adorno strove to keep in view the *mediation* between subject and object in any representative process: to reveal the subject's linguistic and epistemological impositions, and disclose their partiality and contingency. The animal's suffering can only be 'given voice' by designating it as particular, unique, and therefore incapable of full expression in human language.[249] The same mediation is at play in Benjamin's depiction of 'aura' as an *encounter* between a subject and an object.[250] The aura of an object is not simply a 'projection' by the subject—it is not possible to simply 'will' mute animals to 'speak'.[251] Rather, aura is "a particular modality of experience on the part of a perceiving subject"; it is a reflexive awareness by the subject of the *limits* of their own perceptual capabilities when confronted with an object.[252] Thus, aura expresses not some *positive* feature about a being or object, but something *negative* about the subject.

These considerations raise important questions surrounding the language employed by animal advocates. As Regan acknowledges, animals "cannot disown or repudiate the claims made on their behalf … and this makes the burdens of one's errors and fallacies when championing their rights heavier."[253] Much like 'compassion theorists', many liberal theorists also root their claims in some pre-existing 'interest', 'wish' or 'inherent value' that animals are said to 'possess'. As demonstrated in Part II, these are taken to be objectively discoverable through scientific observation, rather than inter-subjectively 'voiced' or communicated by the animals themselves.[254] The language of rights is then

245. See *ibid* at 25, 124-27.
246. See *ibid* at 144-59.
247. *Ibid* at 151, 171. See also Lori Gruen, "Attending to Nature: Empathetic Engagement with the More than Human World" (2009) 14:2 Ethics & Environment 27.
248. 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* (Bloomsbury, 2017) 237 at 243.
249. See Adorno, *supra* note 7 at 17-18, 52-53.
250. See Benjamin, *supra* note 163 at 188.
251. See e.g. Bernstein, *supra* note 94 at 113; Buck-Morss, *supra* note 83 at 85-90; Horkheimer & Adorno, *supra* note 171 at 205; Cook, *supra* note 84 at 150.
252. Diarmuid Costello, "Aura, Face, Photography: Re-reading Benjamin Today" in Andrew Benjamin, ed, *Walter Benjamin and Art* (Continuum, 2005) 164 at 166.
253. Regan, *supra* note 12 at xiv.
254. Nussbaum's recent work appears to oscillate between these positions. See Nussbaum, *Justice for Animals*, *supra* note 92 at 88-90, 124-55, 132, 164, 197-202, 247-48.

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selected as the privileged medium for the representation of these properties, in that it designates animals as 'subjects', thus giving "a voice to the silenced."[255]

Conversely, the language of the welfare movement, with its emphasis on 'protection' and 'anticruelty', is often said to suggest "human superiority over the nonhuman world."[256] Yet, as the foregoing demonstrates, the very same complaints can be made against rights discourse. First, given that rights are not 'possessions' or 'properties' of a being, but merely describe *relations* between persons, they always imply human responsibilities as their correlative. Even Francione concedes as much when he admits that *prohibitions* "might conceivably be thought to recognize animal interests and to embody a rights-type concept."[257] Second, even if one takes the welfarist discourse of 'protection' and 'obligation' to depict animals as mere objects of human regulation, this problem cannot be solved at the level of terminology. Indeed, the designation of an animal as a subject of rights "may be little more than a shift from claiming *dominium* in the non-human animal, to claiming *imperium* (the right to rule) over it."[258] While this may be justified on the basis that such rights are said to represent *their* interests, these properties are never direct, unmediated, and objective representations of animals and 'their reality'. They are always partial and to some degree imputed by humans, irrespective of the language employed. In the words of James Boyd White: "The lawyer is a user of words; but like all such people, he must use them in a world of unexpressed and inexpressible experience."[259] To privilege the language of 'rights' over that of 'obligations' on the basis that it better expresses some objectively graspable 'external' interest identified in or communicated by the animal obscures this position.[260]

Consequently, it is understandable that some scholars emphasise human responsibility *without* allocating corresponding rights or designating animals as 'subjects' of law.[261] In this way, "legal duties could be owed not on the basis of the legal inclusion of those to whom we owed this duty as subjects of the law, but as duties that we as subjects of law owe to those over whom we have no jurisdictional claim."[262] In this regard, the adoption of an expressly obligation-, and indeed, human-centric language may more readily disclose the 'lie' that animal interests can be inter-subjectively communicated or objectively discovered. It arguably keeps in view the role of the humans in shaping the very 'exteriors' that rights discourse often claims to impartially mirror.

255. Silverstein, *supra* note 3 at 88.
256. *Ibid* at 115.
257. Francione, *supra* note 1 at 92. See also Francione, *supra* note 13 at 192-211.
258. Victoria Ridler, "Dressing the sow and the legal subjectivation of the non-human animal" in Otomo & Mussawir, *supra* note 6, 102 at 102. Deckha uncovers similar connections between law and imperialism through engagement with post-colonial feminism: see Deckha, *supra* note 5 at 18, 171.
259. James Boyd White, *The Legal Imagination* (University of Chicago Press, 1985) at 3.
260. See Kennedy, *supra* note 45 at 329.
261. See Taimie L Bryant, "Animals Unmodified: Defining Animals/Defining Human Obligations to Animals" (2006) 1 U Chicago Legal F 137.
262. Ridler, *supra* note 258 at 111.

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Nonetheless, it simultaneously risks reinforcing the myth of human mastery over the natural world and obscuring the degree to which our conceptual frameworks are shaped by the socio-historical circumstances in which we are situated.

These twin dangers having been exposed, the question forming the title of this article takes on a different hue. By constellating various perspectives on the nature and language of rights, the question has, in Adorno's terms, been stripped of its power.[263] It is neither immutably right nor wrong to invoke the language of rights in the animal context. All linguistic formulations are limited and limiting. Precisely this understanding motivated Adorno and Benjamin to preserve the 'rhetorical' aspect of language—to maintain a degree of openness/potentiality and to avert closure/stasis. Similarly, Silverstein explores the dialectical nature of the construction of legal meaning, which is at once constituted by, and constitutive of, society. She suggests that playful litigation strategies which deprioritise doctrinal 'accuracy' can provoke reconceptualisations of human-animal relations.[264] This scope for legal techniques to influence public consciousness is indicative of the extensive mediation between the interior and exterior—legal and extra-legal—as well as the dynamic character of both domains. It is, then, more a question of fostering strategic uses of legal language where gains can be made, while keeping its limitations in view.[265] For Silverstein, this type of reflexivity is well-established among animal advocates. Even if the adoption of rights-talk risks the emergence of a new "myth of rights," it will be a transformed one—a myth that discloses itself as a myth:[266] A myth that "realizes that rights talk or litigation alone cannot remake the world and warns that law may only re-create existing power inequities."[267] Thus, rights-talk comes to be seen "as no more than a way to formulate demands" while being "conscious of the critique of the whole enterprise, sensing the shiftiness of the sand beneath one's feet, but plowing on 'as if' everything were fine."[268]

Much as these tactics may benefit animals, the same techniques can easily cut in the opposite direction.[269] Regan is all too aware of this position:

> With those who find mistakes in these pages ... [I] ask that you earnestly consider whether these mistakes can be avoided or corrected without weakening the kind of protection for animals sought by the rights view?[270]

263. See Adorno, *supra* note 8 at 127.
264. See Silverstein, *supra* note 3 at 6-12, 207-209; Francione, *supra* note 13 at 187, 192.
265. See Eisen, *supra* note 5 at 150.
266. Stuart A Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change*, 2nd ed (Michigan University Press, 2004) at 5ff.
267. Silverstein, *supra* note 3 at 241. See also Michael McCann & Helena Silverstein, "Rethinking Law's 'Allurements': A Relational Analysis of Social Movement Lawyers in the United States" in Sarat & Scheingold, *Political Commitments, supra* note 2 at 261.
268. Kennedy, *supra* note 45 at 311, 312.
269. See *ibid* at 246.
270. Regan, *supra* note 12 at xiv.

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This can be read as an expression of intellectual humility, a naked invitation to "prefer error to enlightenment," or as a pragmatic plea to avoid airing one's misgivings publicly for fear of undermining a shared goal.[271] After all, just as rights talk can be employed instrumentally and agnostically in pursuit of a desired outcome, so too can the Kantian premises that often underwrite them. Indeed, despite the thoughtful consideration given to these matters by critical and socio-legal scholars, their own accounts often depend upon the construction of an 'activist-lawyer' subject—one that is capable of attaining an aloof mastery over the legal and philosophical discourses they invoke, while resisting renewed faith in the 'myths' they strategically speak.[272] In this way, they posit a critical lawyer able to transcend the constraints of their material reality so as to achieve "absolute freedom in the sphere of critical rational consciousness."[273] This is not far from the Kantian subject encountered in the liberal animal rights scholarship above. In this regard, Adorno's strength lies in the emphasis he placed on the ways in which our social circumstances shape our modes of thought, which in turn function to sustain and reproduce our material conditions. While it is right to query the stability of our social conditions, and the coherence of any ideology that professes to articulate them, to conclude that they are completely fluid would be to "[disqualify] the world for the sake of [the subject's] own total power."[274] What is required instead is a more express recognition of our limited power as subjects/actors—a constraint that bears, in different ways, upon both humans and non-humans.[275] While Adorno accepted that the illusion of our unbridled power and freedom as subjects might, in Dew's words, "be reflectively broken through ... the full realization of this process would be inseparable from a transformation of social relations."[276] Given the difficulties in obtaining this position, and the dangers inherent in even the most critical strategies, the argumentative tropes employed by many animal rights advocates appear to do more to mythologise than enlighten—to reinforce a logic deeply implicated in the instrumental use and exploitation of animals.

Conclusion

Liberal animal lawyers have done much to challenge orthodox understandings of rights and personality that have served to restrict the legal position accorded to

271. Kennedy, *supra* note 45 at 361.
272. See *ibid* at 346.
273. Sahib Singh, "Koskenniemi's Images of the International Lawyer" (2016) 29:3 Leiden J Intl L 699 at 705.
274. Theodor W Adorno, *Against Epistemology: A Metacritique. Studies in Husserl and the Phenomenological Antinomies*, translated by Willis Domingo (Basil Blackwell, 1982) at 20. See also Peter Dews, *The Limits of Disenchantment: Essays on Contemporary European Philosophy* (Verso, 1995) at 19-36 [Dews, *Limits of Disenchantment*]; Peter Dews, *Logics of Disintegration* (Verso, 2007) at 46-54.
275. See Matthew Liebman, "Who the Judge Ate for Breakfast—On The Limits of Creativity in Animal Law and the Redeeming Power of Powerlessness" (2011) 18:1 Animal L 133.
276. Dews, *Limits of Disenchantment*, *supra* note 274 at 35.

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non-humans. Their interventions continue to test the limits of judicial fidelity and bring numerous forms of animal exploitation to public attention. Nonetheless, their argumentative strategies leave unchallenged certain assumptions that have proven integral to animal exploitation. This is apparent in their efforts to maintain binary distinctions between persons/property and rights/welfare by reference to a stable 'exterior' or 'extra-legal' domain. Over a century of analytical, realist, and critical jurisprudence has demonstrated that these doctrinal categories are far from mutually exclusive. To designate an animal as a 'subject of rights' or 'object of regulation' is to reveal nothing of the level of protection afforded by the law. It is nothing more than the selection of a point of emphasis—a choice of words—though not an easy or unimportant one. The charge that this position both reduces the language of rights to mere 'rhetoric' *and* strips it of its 'rhetorical power' is revealing. It points to a desire to detach legal discourse from an exterior that has produced and preserved the anthropocentric application of these categories, and to replace it with one that is more permissive, but no less stable/objective.

As the foregoing has demonstrated, liberal depictions of this 'extra-legal' domain are as partial and contingent as their doctrinal categories. Indeed, the particular manner in which liberal argument presents these constructions as objective and stable provides an indication of the extent to which it has been shaped by the socio-historical circumstances in which we are situated. In the implication that things cannot be otherwise, the constitutive power of legal discourse is harnessed and at the same time obscured. By imposing rigid limits on the use of legal language, and implying that these limits are unalterable, liberal-legal categories shape our apprehension of these 'exteriors' and facilitate their reproduction. The works of Adorno and Benjamin bring this dynamic to light via their nuanced and interrelated critiques of epistemology, language, and moral philosophy. These perspectives paint our social situation as one oriented towards humanity's domination of the natural world, and in which the production of exchange-value has become an end in itself.[277] To the extent that these material conditions have acquired a veneer of permanence and coherence, this is in no small part due to the arresting power of the logics that suffuse the works of liberal animal lawyers. Situated as we are in such circumstances, all discursive options are vulnerable to this dynamic. There is nothing inherently more strategic or beneficial to animals in 'rights-talk' or 'obligation-talk'. Nor are the challenges to conventional understandings of rights prompted by Adorno and Benjamin without danger. But this is a scholarship that strives to maintain a critical relationship with itself by foregrounding its deficiencies. By contrast, in their efforts to stabilise legal discourse, liberal animal rights advocates continue to invoke a logic that serves to obscure rather than confront the extent to

277. See Adorno, *supra* note 186 at 243.

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which it is entangled in the very problem they seek to address. In their failure to tackle this more fundamental issue, they threaten to sustain and strengthen that which they seek to oppose.

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