'RUFF' JUSTICE: CANINE CASES AND JUDICIAL LAW MAKING AS AN INSTRUMENT OF CHANGE

By
Richard Jochelson & James Gacek*

The regulation of animals in North America should be apprised of evolving socialities. As the judiciary encounters situations of contestation between humans and animals in adjudication, it should take notice of the emergence of animal recognition in Western societies. Law is apprised of sociality, can absorb social information, and may, at times, reflect how citizens view issues of justice. What was once innocent behavior can be reconstituted as criminal through the adjudicative exercise (and vice versa). In this Paper, we investigate socio-legal constructions of 'the animal' in two recent North American adjudications. In two recent cases, R. v. D.L.W. and State v. Newcomb, the Supreme Court of Canada and the Oregon Supreme Court contested what it means to be an animal in situations of bestiality and animal welfare investigations respectively. We argue that the jurisprudence in Canada and the United States should begin to incrementally shift towards progressive conceptions of animal existence. Such an understanding would (re)consider animals as beings, capable of worth and dignity – as more than expendable property. In light of a relative void of modern animal welfare legislation in North American jurisdictions, let alone animal bills of rights, the judicial decision remains the most likely site of progress for animal advocacy.

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* © Dr. Richard Jochelson is an associate professor at the Faculty of Law at the University of Manitoba and holds his Ph.D. in law from Osgoode Hall Law School at York University, a Masters in Law from University of Toronto Law School, and a Law Degree from University of Calgary Law School (Gold Medal). He is a former law clerk who served his articling year at the Alberta Court of Appeal and Court of Queen's Bench, before working at one of Canada's largest law firms. He worked for ten years teaching criminal and constitutional law at the University of Winnipeg prior to joining Robson Hall. A SSHRC winning principle investigator, he has published peer-reviewed articles dealing with obscenity, indecency, judicial activism, police powers, criminal justice pedagogy and curriculum development, empiricism in criminal law, and conceptions of judicial and jury reasoning. He is a member of the Bar of Manitoba and has co-authored and co-edited several books. He has most recently co-authored with James Gacek: Criminal Law and Precrime: Legal Studies in Canadian Punishment and Surveillance in Anticipation of Criminal Guilt (Routledge 2017).

James Gacek is currently a doctoral candidate at Edinburgh Law School, University of Edinburgh. He has lectured in criminology and criminal justice at the University of Manitoba and the University of Winnipeg. He continues to publish in areas of incarceration, genocidal carcerality, critical issues in media, justice, and security studies, and the broader politics of judicial reasoning. He is an American Sociological Association Paper Award winner (2014).

I. INTRODUCTION

Bestiality law is a matter rarely explicated in critical literature. Its links to social harms, such as its adjunct status to sexual assault, are relatively well established.[1] There is little doubt that crimes of bestiality, coupled with crimes against humans, are universally treated as harmful and as deserving of the law's force.[2] Yet, crimes of bestiality have their roots in two distinct and somewhat interrelated spheres of law: bestiality laws reveal that common law jurisdictions understand animals as property.[3] They also reveal that common law jurisdictions, such as Canada and the United States of America, understand that sexual acts with animals are immoral—they represent a type of sexuality at odds with our Victorian-rooted sex laws and therefore, these crimes are considered harmful under the law because they are considered immoral.[4]

Yet conceptions of the animal in law are beginning to change. Certainly, the regulatory laws of jurisdictions such as those of New Zealand portray an understanding of some animals as sentient beings that can experience suffering, and impose a correlative duty in some cases, to deal with animals in ways that limit undue suffering.[5] The passing of these laws suggest that even legal traditions that see animals as property can change as social conditions change.

There exists great power in law to both retain social information and to advise citizens on how to view legal issues of justice. Law is a coercive regulator of behavior, but it is also iterative and reiterative. It

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[1] *See* James Gacek & Richard Jochelson, *Animal Justice and Sexual (Ab)use: Consideration of Legal Recognition of Sentience for Animals in Canada*, 40 Man. L.J. 335, 339 (discussing judicial interpretation that contextualizes bestiality laws by analogizing them to sexual assault-based offenses).

[2] *See generally id.* at 337–38 (discussing the approach of the judiciary regarding the harm caused by sexual offenses to both humans and animals).

[3] *Id.* at 337.

[4] *Id.* at 352.

[5] Peter Sankoff, *The Animal Rights Debate and the Expansion of Public Discourse: Is it Possible for the Law Protecting Animals to Simultaneously Fail and Succeed?*, 18 ANIMAL L. 281, 302 (2012). *See generally* Animal Welfare Amendment Act (No.2) 2015 (N.Z.) (stating that "animals are sentient" and requiring "owners of animals, and persons in charge of animals, to attend properly to the welfare of those animals").

can reflect or refract aspects of the social world, past, and present.[6] Law, then, in addition to its regular forces and effects, is subject to similar phenomena, effects, and consequences that one would expect from any media.[7] Of course, law also possesses the power of coercion and can deploy discipline and indeed punishment on its subjects. The judicial decision is intriguing legal media because the judiciary, as arbiters of legal issues before a court, interpret law. However, interpretation can sometimes lead to the reconstitution of law. For instance, what was once innocent behavior can be reconstituted as criminal (or conversely, legal) through the adjudicative exercise.[8] The malleability of the judicial decision means that progressive and conservative interpretive approaches are always possible. Across jurisdictions we might expect to see different conceptions of the animal. Such is the case in reviewing of the two recent decisions we explore in this Paper: one from Canada and one from the United States.

In this Paper, we review the recent decisions of the Supreme Court of Canada in *R. v. D.L.W.* and the Oregon Supreme Court in *State v. Newcomb*, respectively. We undertake this investigation to unpack the different conceptions of the animal that each of these decisions suggests. In undertaking this analysis, we are less interested in the doctrinal explications of the cases than in achieving social understandings of animal existence that each case establishes. The United States remains a complicated republic in which effectively fifty different jurisdictions regulate property and criminality.[9] The regulation of property across Canada is also a matter determined by each of its provincial jurisdictions.[10] Yet unlike America, Canada's criminal law applies universally across all provinces, especially in the face of binding Supreme Court decision-making.[11] Our review of these two cases must be prefaced by the observation that the Canadian case involves federal criminal law whilst the Oregon decision deals with state level animal welfare investigation law, though it implicates state and federal constitutional guarantees.[12] Nonetheless, both cases reveal an understanding of the animal as a subject of legal coercion and regulation that is worth comparing, contrasting, and understanding. We argue

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6 Gacek & Jochelson *supra* note 1, at 353.

7 *Id.* at 342.

8 *See id.* (discussing how judicial interpretations change over time, which slowly creates a new way of thinking and talking about animal regulation).

9 *See generally State Property and Real Estate Law*, FINDLAW, http://statelaws.findlaw.com/property-and-real-estate-laws.html [https://perma.cc/94AJ-A9QD] (accessed Jan. 19, 2017) (listing property laws by state); *Criminal Code – By State,* CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/table_criminal_code [https://perma.cc/ZY3W-2BP5] (accessed Jan. 19, 2017) (listing criminal codes by state).

10 *Canada's Legal System - Sharing of Legislative Powers in Canada*, U. OTTAWA, https://slmc.uottawa.ca/?q=laws_canada_legal [https://perma.cc/98NA-7HFH] (accessed Jan. 19, 2017).

11 *Id.*

12 R. v. D.L.W., [2016] 1 S.C.R. 402, 402 (Can.); State v. Newcomb, 375 P.3d 434, 435–36 (Or. 2016).

that portrayals of the animal as chattel, as incidental to crime, and as incapable or unworthy of protection as potentially sentient, is a viewpoint grounded in rigid statutory interpretation apprised by out of date common law: principles of strict construction and drafters' intent will do very little to ensure that animals will be treated with any sense of dignity.

Animals do not possess anything approaching the guaranteed rights and protections of persons outlined in constitutional documents in Canada or the United States.[13] While human beings have legal rights, rights that are meant to ensure that our fundamental interests (such as our interest in life, liberty, and security of the person/pursuit of happiness) cannot be overridden—except in limited circumstances and on a principled basis—the same cannot be said for animals.[14] Animals, conversely, remain mere property under the law, a categorization that troubles many who advocate for animal welfare, regardless of which side of the 49th parallel one calls home.[15]

Like other decisions that have extended rights to humans where it was previously thought that the common law stunted progress and change,[16] perhaps it is time for courts to interpret laws that implicate animals in light of potential sentience and view the animal as a being that is worthy of, at the least, modest protections and immanent worth. We see this potential in Oregon's recent jurisprudence, and lament its absence in the latest Supreme Court of Canada bestiality decision.

A. A Brief Word About Method

As discussed above, there is significance in the reflective and refractive measures of the law, and how the law, often through judicial prose, generates legal texts that create the potential to discursively shift the construction of issues of justice, animal-related or otherwise. In this Paper, we query how legal texts construct the animal and its relationship to justice. As we will discuss, the freedom for animals to be secured from harm, exploitation, and negligence in Canada and the United States is qualified, at best. Law reform, seeking that animal regulation be reflective of contemporary insights and values, has been advocated by animal rights activists and legal scholars both within Canada and abroad.[17]

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[13] Gacek & Jochelson *supra* note 1, at 337.

[14] *Id.* at 336–37.

[15] *Id.*

[16] *See generally* Richard Jochelson & Kirsten Kramar, *Governing Through Precaution to Protect Equality and Freedom: Obscenity and Indecency Law in Canada after R. v. Labaye,* 36 CANADIAN J. SOC. 283, 285 (2005) (discussing the history of jurisprudence regarding obscenity and indecency and its evolution from a limited common law doctrine to a more human-inclusive framework).

[17] *See generally* Sankoff, *supra* note 5, at 281–320 (discussing Canada's and New Zealand's efforts at extending protection to animals through the law).

There has been an increased interest in multi-disciplinary and inter-disciplinary study across all academic fields.[18] As scholars who work with legal text, we do not study the judiciary merely for doctrinal purposes. We see the significance of socio-legal scholarship that transcends the bounds of the legal discipline and constructs a comprehensive understanding of the law with external but linked disciplines—such as sociology, criminology, and critical animal studies, to name a few. Discourse-based methods aid in unpacking the complexity of language, power, and sociality intrinsic to the constitution of judicial text.[19] This approach helps reveal animal justice issues within the law since law is a source of language in society and a forum for the expression of power.[20]

To apply a socio-legal method to issues of animal justice is to recognize that we currently stand on scholarship that has come to form the bedrock of critical socio-legal analyses. In doing so, we endeavor to engage in a discussion that asserts that the social complexities of human-animal relations and animal justice must be reconsidered if legal jurisprudence in Canada and the United States is to advance beyond Victorian roots.

Law is essential both to the making of "knowledge claims" that serve to legitimize discipline and to the exercising of power on recalcitrant subjects.[21] This allows us to think of cases beyond precedential value. Law legitimizes the use of state coercion, and "provides foundation for the so-called truths that underwrite state action. . . . Law then can be viewed as a kind of rebooting system of social control, whose tyranny emerges not from the fact that it is a sovereign emanation, but because it creates its own truths and limits responses to those truths to very bounded (if flexible) delineations[.]"[22] Critical analysis of the legal decision can reveal that the assumptions of law, and its impacts, are a "mobile and contingent" feature of the "social ties" that bind.[23]

The questions we confront in this Paper are: how does a critically discursive analysis of *D.L.W.* and *Newcomb* inform us about current jurisprudence, and does the potential exist for the jurisprudence to develop a more progressive, rights-centric approach to animal regulation? Our approach is "fundamentally interested in . . . investigat[ing] critically social inequality as it is expressed, constituted, and legiti-

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[18] *See* Harry Arthurs & Annie Bunting, *Socio-Legal Scholarship in Canada: A Review of the Field,* 41 J.L. & Soc'y 487 (2014) (discussing the development of socio-legal studies in Canada and their relationship with multi-disciplinary and inter-disciplinary study in different fields).

[19] Ben Golder & Peter Fitzpatrick, Foucault's Law 15–17 (2009).

[20] Joshua C. Gellers, *Greening Critical Discourse Analysis: Applications to the Study of Environmental Laws,* 12 Critical Discourse Stud. 482, 484 (2015).

[21] Golder & Fitzpatrick, *supra* note 19, at 61.

[22] Richard Jochelson, *Let Law be Law, and Let Us Critique: Teaching Law to Undergraduate Students of Criminal Justice,* 4 Ann. Rev. Interdisc. Just. Res. 234, 247 (2014).

[23] Golder & Fitzpatrick, *supra* note 19, at 125.

mized . . . by language use."[24] We seek to expose the judicial packets of reasoning within the supreme courts in the *D.L.W.* and *Newcomb* decisions. We endeavor to interpret judicial decisions and legal text thoroughly, while simultaneously investigating and examining "the micro features of the text."[25] This process allows us to gain insight "into the situation in which [the text] was produced."[26] Below, we analyze the cases of *D.L.W.* and *Newcomb*. We undertake an analysis of construction of the animal in these cases. We conclude this Paper by inviting socio-legal and animal scholars alike to take up the challenge of studying the legal text critically to assist the development of progressive jurisprudence towards a socially conscious animal justice.

II. CANADA: CRITIQUING "CARNAL KNOWLEDGE" AND *D.L.W.*

In 2016, a case was brought before the Supreme Court of Canada (SCC), which was an appeal from a decision from the British Columbia Court of Appeal that provided a narrow interpretation of the Criminal Code offense of "bestiality."[27] In *D.L.W.*, the appellant was charged with a total of fourteen sexual offenses involving his two step children.[28] The appellant was then found guilty on thirteen counts by the trial judge in the Superior Court of British Columbia, including the one count of bestiality.[29] The bestiality charge emerged from an incident caused by the accused that involved the family dog and a stepdaughter, which was non-penetrative in nature.[30]

Justice Romilly, the trial judge, noted two legal issues that required resolution. The first legal issue was whether "carnal knowledge" (i.e., penetration) was an element of the bestiality offense;[31] and second, whether the current term of "bestiality" should include acts of sexual touching with animals without penetration.[32] Thus, Justice Romilly expanded the scope of interpretation for the meaning of bestiality. Furthermore, the trial judge indicated that the term "bestiality" was undefined by the Criminal Code,[33] and that other jurisdictions—notably Australia—prohibit any sexual activities with animals and favored an approach consistent with the "criminalising of non-consensual act[s] generally."[34]

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[24] Ruth Wodak, *Critical Linguistics and Critical Discourse Analysis*, *in* HANDBOOK OF PRAGMATICS 50, 53 (Jan Zienkowski et al. eds., 2006).

[25] John Flowerdew, *Description and Interpretation in Critical Discourse Analysis,* 31 J. PRAGMATICS 1089, 1093 (1999).

[26] *Id.*

[27] *D.L.W.*, [2016] 1 S.C.R. at 403.

[28] R. v. D.L.W., 2013 CanLII 1327, para. 1 (Can. B.C.C.A.).

[29] *Id.*

[30] *D.L.W.*, [2016] 1 S.C.R. at 402.

[31] *Id.*; R. v. D.L.W., 2015 CanLII 169, para. 1 (Can. B.C.S.C.).

[32] *D.L.W.*, 2013 CanLII at para. 303.

[33] Criminal Code, R.S.C. 1985 c. C-46 §160 (Can.).

[34] *D.L.W.,* 2013 CanLII at para. 308.

In the case of the accused on trial, Justice Romilly contended that the offense of bestiality should reflect current societal views of what encapsulates prohibited sexual acts.[35] Moreover, the trial judge indicated that legislation related to mores should be read in a "modern context."[36] In effect, the mores at the root of animal protection crimes, he asserted, included certain moral understandings:

> Members of our society have a responsibility to treat animals humanely, which is especially true for domesticated animals that rely on us. Physical harm is not an essential element of bestiality; that is because, like many sexual offences in the *Code*, the purpose of the bestiality provisions is to enunciate social mores. Those mores include deterring non-consensual sexual acts and animal abuse.[37]

The trial judge, relying upon the guilty pleas entered on charges under § 160 of the Criminal Code (i.e., the provision that defines "bestiality")[38] suggested that current social values "abhor *all forms* of touching for sexual purposes on those who do not consent to it . . . 'bestiality' means touching between a person and an animal *for a person's sexual purpose.*"[39] Such a view was also "consistent with the entire scheme of the *Code*" including provisions that criminally sanction animal cruelty, sexual offenses, and offenses tending to corrupt morals.[40] Therefore, Justice Romilly could justify a conviction for the accused for the bestiality offense.

Upon appeal, however, the appellate court majority disagreed with the trial judge.[41] The majority asserted in their decision that "the words of a statute are to be construed as they would have been the day after the statute passed."[42] Effectively, the court of appeals majority agreed with the concurring reasons of Justice McLachlin (now Chief Justice), in *R. v. Cuerrier*.[43] Chief Justice McLachlin infamously noted in *Cuerrier* that we must exercise caution when approaching the definition of elements of old crimes:

> Clear language is required to create crimes. Crimes can be created by defining a new crime, or by redefining the elements of an old crime. When courts approach the definition of elements of old crimes, they must be cautious not to broaden them in a way that in effect creates a new crime. Only Parliament can create new crimes and turn lawful conduct into criminal conduct. It is permissible for courts to interpret old provisions in ways that reflect social changes, in order to ensure that Parliament's intent is carried

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[35] *D.L.W.,* 2013 CanLII at para. 315.
[36] *Id.* at paras. 310–11.
[37] *Id.* at para. 310.
[38] Criminal Code, R.S.C. 1985 c. C-46 § 160 (Can.).
[39] *D.L.W.,* 2013 CanLII at para. 312 (emphasis added).
[40] *Id.* (emphasis added).
[41] *D.L.W.*, 2015 CanLII at paras. 4, 21.
[42] *Id.* at para. 20.
[43] *See* R. v. Cuerrier, [1998] 2 S.C.R. 371, para. 34 (Can.) (discussing the importance of not broadening the language, so as to create a new crime, when interpreting the elements of an old crime).

> out in the modern era. It is not permissible for courts to overrule the common law and create new crimes that Parliament never intended.[44]

Under review, the court of appeal found that carnal knowledge remained an element of the offense even after the offense was amended in 1985 to separate the offenses of buggery (reworded as anal intercourse) and bestiality into different Criminal Code provisions.[45] Furthermore, the appellate court remained unconvinced that the 1954 amendments prohibited non-penetrative sexual activities with animals.[46] The majority contended that the 1954 amendments added the term bestiality (to the buggery offenses) and removed the phrases "either with a human being or with any other living creature."[47] Such amendments effectively united the buggery offenses and bestiality provisions within the same section. Moreover, the court of appeal's majority argued that various annotations found within the sociopolitical history of bestiality definition required penetration as an element of the offense.[48] Such annotations, they contend, could be found in the Criminal Code prior to 1985 and as late as 2015, as well as in the 1970s era Law Reform Commission work.[49] The appeals court also noted a lack of Parliamentary committee engagement with the specific question of penetration in the amendment processes.[50] The appeals court was thus able to create direct connections between the common law bestiality prohibition, the 1954 legislation and the current Criminal Code prohibition. The court of appeals thus acquitted the accused of the bestiality charge.[51]

The dissenting opinion at the court of appeal found that the 1954 amendments indicated a parliamentary intention to modernize the definition.[52] Chief Justice Bauman, writing the dissenting decision, noted that "no legislative provision should be interpreted so as to render it mere surplusage,"[53] per Chief Justice Lamer. He went on further to indicate:

> Parliament chose to add "or bestiality" to the Code. It must be presumed to have had some reason for doing so; the words must be given meaning. If "bestiality" simply meant "buggery with an animal", then the 1954 Amendment was enacted in vain and "or bestiality" was mere surplusage.[54]

In addition, the dissenting judge noted an unexpected corollary of the majority's reasoning. As Chief Justice Bauman indicated:

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[44] *Id.*
[45] *Id.* at para. 54; *D.L.W.*, 2015 CanLII, at paras. 22–23.
[46] *Id.* at para. 22.
[47] *Id.* at para. 21.
[48] *Id.* at paras. 32, 34.
[49] *Id.* at paras. 22–34, 32.
[50] *Id.* at para. 37.
[51] *Id.* at para. 40.
[52] *Id.* at para. 44.
[53] *Id.* at para. 46 (quoting R. v. Proulx, [2000] 1 S.C.R. 61, para. 28 (Can.)).
[54] *Id.*

> Interpreting bestiality as a subset of buggery also gives the offence an illogical scope. If, like buggery, bestiality requires anal penetration, then it is a criminal offence for a human to anally penetrate (or be anally penetrated by) an animal, yet it is perfectly lawful for a human to vaginally penetrate (or be vaginally penetrated by) an animal. I find it difficult to imagine that Parliament intended to impose criminal sanction on the one while letting the other go entirely unpunished.[55]

By June 2016, the SCC had come to a decision regarding whether carnal knowledge was an integral factor in the definition of bestiality.[56] The SCC, in majority of six-to-one, upheld the appellate court's decision.[57] In their decision, the majority noted that the scope of both bestiality and criminal liability at large must be determined by Parliament.[58] Judges, in the majority's opinion, "are not to change the elements of crimes in ways that seem to them to better suit the circumstances of a particular case."[59] Supreme Court Justice Cromwell, in writing for the SCC majority, concurred with the majority ruling of the appellate court, in which he noted that "the old case law is not abundant, but what there is supports the view that penetration was an essential element of the offence"[60] Moreover, "whatever [bestiality] was called [throughout history], the offence required penetration."[61]

Per the SCC majority, the early history of bestiality in Canada was subsumed under the offenses of sodomy or buggery and penetration was certainly one of the offense's essential elements.[62] The majority held so, regardless of other courts' decisions where broad statutory categories were included in order to consider "things unknown when the statute was enacted" or whether "words in constitutional documents [could] be capable of growth and development to meet changing circumstances."[63] Justice Cromwell indicated that this interpretive approach for *D.L.W.* was not warranted.[64] Additionally, amongst the comprehensive revisions and amendments of sexual offenses throughout Canadian legislative history, the SCC majority noted that Parliament never sought to change the common law definition of bestiality.[65] In the eyes of the SCC majority, this demonstrated a clear indication that Parliament's intention to retain the term was "well-established"[66]

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55 *Id.* at para. 52.

56 *D.L.W.*, [2016] 1 S.C.R. at 402.

57 *Id.*

58 *Id.* at para. 3.

59 *Id.*

60 *Id.* at para. 33.

61 *Id.* at para. 24.

62 *Id.* at 50.

63 *Id.* at 61.

64 *Id.*

65 *Id.* at 52.

66 *Id.* at 19.

and the definition of bestiality itself had a "well-understood legal meaning."[67]

In the dissent, Justice Abella afforded a critical decision, asking for an interpretation of the common law definition of bestiality within a modern context:

> [*D.L.W.*] is about statutory interpretation, a fertile field where deductions are routinely harvested from words and intentions planted by legislatures. But when, as in this case, the roots are old, deep and gnarled, it is much harder to know what was planted.
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> We are dealing here with an offence that is centuries old. I have a great difficulty accepting that in its modernizing amendments to the Criminal Code, Parliament forgot to bring the offence out of the Middle Ages. There is no doubt that a good case can be made, as the majority has carefully done, that retaining penetration as an element of bestiality was in fact Parliament's intention.
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> But I think a good case can also be made that . . . Parliament intended, or at the very least assumed, that penetration was irrelevant. This, in my respectful view, is a deduction easily justified by the language, history, and evolving social landscape of the bestiality provision.[68]

In sum, Justice Abella argued that imposing the penetrative component of buggery to bestiality would leave "as perfectly legal" all sexually exploitative acts with animals that do not involve carnal knowledge.[69]

Since the SCC decision, the aftermath of *D.L.W.* has left many scholars and animal activists alike wondering what is to be done about this judicially conservative definition of bestiality.[70] A private member's bill before Parliament: Bill C-246 the *Modernizing Animal Protections Act* was proposed.[71] Among several proposed amendments to acts dealing with shark finning, banning cat and dog fur, and requiring textiles made from animals to be labelled, the main proposition was to amend the Criminal Code to consolidate and modernize various offenses against animals. However, the bill was unfortunately defeated in Parliament.[72] Studies that have examined attempts to propose changes to anti-cruelty legislation show that industry groups and politicians within major political parties resist these propositions rou-

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[67] *Id.* at 18.

[68] *Id.* at 125–27 (emphasis added).

[69] *Id.* at 142.

[70] *See* Feliks Garcia, *Most Bestiality is Legal, Declares Canada's Supreme Court,* INDEPENDENT (June 9, 2016, 4:00 PM), http://www.independent.co.uk/news/world/americas/bestiality-legal-canada-supreme-court-a7073196.html [https://perma.cc/T463-72SL] (accessed Jan. 19, 2017) (discussing the public response to the Supreme Court decision).

[71] Bill C-246, Modernizing Animal Protections Act, 42d Parl., 1st Sess., 64–65 Eliz. II (2016) (Can.).

[72] *Id.*

tinely.[73] In turn, the result is often inaction or rejection of the proposed amendments.[74]

In sum, the case of *D.L.W.* critically considers the sexual harms done to animals by humans, the sexual integrity of the animal becoming violated, and the cruelty imposed upon animals as vulnerable beings.[75] Significantly, the dissenting SCC judge, the dissenting appellate judge and the trial judge advanced an argument that is indicative of growing concern for understanding human-animal relationships in modern contexts.[76] Rather than expanding the scope of criminal responsibility (as such power is not within the role of the judge, but in Parliament), these judges sought to acknowledge the societal concern for animal welfare; they see an inherent exploitation of animals in bestial acts, based on modern understandings of consent and dignity of all beings.

In contrast, the majority of the Supreme Court of Canada, using statutory interpretation principles such as legislative intent, sees the crime of bestiality as narrowly encompassing carnal knowledge.[77] Advances in understanding of consent, and emerging social mores about animal sentience thus are irrelevant to their calculi. In these constructions, understandings of the animal as a being are irrelevant. Their decisions uphold the animal as a chattel, and the focus of the harm at play is on the moral damage done to persons or society at large as a result of immoral sexual behaviors.[78] The animal is merely the circumstance in which the criminal act takes place.

Yet in other contexts, judicial decisions are not immune to shifts in societal perceptions. Indeed, as we will see in *Newcomb*, the Oregon case seems to welcome the emerging morality of animal protection, and the developing acknowledgement of certain animals' sentience as relevant to the adjudicative context.

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[73] *See* Lyne Letourneau, *Toward Animal Liberation? The New Anti-Cruelty Provisions in Canada and Their Impact on the Status of Animals*, 40 ALTA. L. REV. 1041, 1046 (2003) (discussing discussions during parliamentary debates on enacting anti-cruelty legislation); John Sorenson, *Some Strange Things Happening in Our Country: Opposing Proposed Changes in Anti-Cruelty Laws in Canada*, 12 SOC. & LEGAL STUD. 377, 388–89 (2003) (discussing the reception of anti-cruelty laws in Canada generally); Antonio Verbona, *The Political Landscape Surrounding Anti-Cruelty Legislation in Canada*, 23 Soc'y & Animals 45, 46–52 (2015) (discussing the failure of the Canadian legislature to update their animal-related criminal laws).

[74] Verbona, *supra* note 73.

[75] *See generally D.L.W.*, [2016] 1 S.C.R. at paras. 1–123 (finding that bestiality requires sexual intercourse between a human and an animal).

[76] *Id.* at paras. 140–42; *D.L.W.*, 2015 CanLII at para. 44; *D.L.W.*, 2015 CanLII at para 310.

[77] *D.L.W.*, [2016] 1 S.C.R. at para. 122.

[78] *See generally id.* (upholding the animal as chattel and focusing on the moral damage of immoral sexual behaviors to persons or society at large).

III. UNITED STATES: *STATE V. NEWCOMB* AND THE PROBLEM OF "PROPERTY"

In *Newcomb*, the court considered whether the conduct of Amanda Newcomb, the defendant, towards her dog, Juno, was animal negligence under Oregon law.[79] The Oregon Humane Society received a citizen's report that Newcomb had been neglecting and abusing her dog.[80] In response, an animal cruelty investigator and police officer went to Newcomb's apartment to further investigate.[81] The case indicates that while the police officer spoke to Newcomb in her apartment, the officer could see a nearly-emaciated Juno standing in Newcomb's back patio area through the double sliding doors leading out of Newcomb's apartment.[82]

When the officer questioned Newcomb regarding the condition of her "near-emaciated" dog, Newcomb responded that she usually gave Juno dog food from a local supermarket in the area and that she bought Juno's dog food in small, four-pound quantities.[83] However, she had run out of the dog food and intended to buy more that evening.[84] The officer believed there was enough corroborating evidence to reasonably believe that Newcomb was neglecting Juno. Although Newcomb believed her dog to be healthy, she refused the officer's request to remove Juno from the home.[85] Once Newcomb became irate, the officer then proceeded to take custody of Juno without Newcomb's consent, on the grounds that the evidence of animal neglect was present and that there was a strong possibility Juno required medical treatment immediately.[86] The officer then transported Juno to the Oregon Humane Society, where the dog was housed and medically treated.[87] Furthermore, the officer also expected that, with Juno undergoing medical tests, the state would be able to determine whether neglect charges were warranted, or whether Juno should be returned to Newcomb.[88]

After Juno arrived at the Oregon Humane Society, a veterinarian, Dr. Hedge, further examined Juno to test whether he was a very thin dog by nature or emaciated due to neglect.[89] From the initial examination, Dr. Hedge could not make an exact determination.[90] As part of standard practice, the veterinarian medically tested Juno in order to

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79 *Newcomb*, 359 P.3d at 436.
80 *Id.*
81 *Id.*
82 *Id.*
83 *Id.* at 437.
84 *Id.*
85 *Id.*
86 *Id.*
87 *Id.*
88 *Id.*
89 *Id.*
90 *Id.*

reveal the dog's "body condition score."[91] The test is ordered on a nine-point scale, where a score closer to one indicates emaciation, and where a score closer to nine indicates obesity.[92] After examining Juno—whose ribs and vertebrae were visible without Dr. Hedge having to feel for them—he gave Juno a body condition score of 1.5.[93] However, at that point Dr. Hedge could not be certain that Juno was emaciated due to malnourishment caused by Newcomb, as the potential existed for Juno to have a parasite or an intestinal or organ condition that caused him to be thinner than typical.[94] As a result, Dr. Hedge drew a blood sample from Juno for laboratory testing.[95]

Ultimately, the central focus of *Newcomb* was on Dr. Hedge's withdrawal of the blood sample from Juno.[96] There was nothing "medically wrong with Juno that would have caused him to be thin," according to the laboratory results, and therefore Dr. Hedge concluded that Juno was malnourished, placing the dog on a special feeding protocol.[97] The resulting diagnosis allowed the police to charge Newcomb with second-degree animal neglect.[98]

At trial, Newcomb made two main arguments related to Juno: (1) the "[police] officer lacked probable cause to take Juno into custody," and in effect the seizure of Juno by the state should be considered unlawful and the results of the laboratory tests suppressed;[99] and (2) the state engaged in an unlawful search of Newcomb's property.[100] As dogs are considered personal property under Oregon law, the state intrusion into the dog's interior to withdraw a blood sample was warrantless, and violative of Newcomb's constitutional right to privacy in seized property (contained in the protection against unreasonable search and seizure) as a result, both in the Oregon Constitution under Article I, Section 9 and under the Fourth Amendment of the United States Constitution.[101]

Refuting these claims in turn, the prosecution indicated to the court that the police officer had reasonable cause to believe Juno was being neglected by Newcomb, based on the citizen's report and the officer's direct observation of Juno at Newcomb's apartment.[102] Therefore, the seizure of Juno from Newcomb to take Juno to the Oregon Humane Society for further care and treatment was argued to be lawful.[103] Furthermore, although personal property, the state insisted

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91 *Id.*
92 *Id.*
93 *Id.*
94 *Id.*
95 *Id.*
96 *Id.*
97 *Id.*
98 *Id.*
99 *Id.*
100 *Id.*
101 *Id.* at 437–38.
102 *Id.* at 437.
103 *Id.*

that dogs are not merely inanimate objects found within the confines of a citizen's home; a dog "is not a container and not legally analogous to one because . . . a dog 'doesn't contain anything'; instead, inside a dog is just 'more dog.'"[104] The withdrawal and testing of Juno's blood was lawful, the State argued, as testing the dog's blood did not reveal private information concealed inside Juno, but instead confirmed that Juno was what the officer believed he had seized: "a malnourished dog."[105]

The trial judge denied Newcomb's request to suppress the laboratory results and admitted the evidence into the trial.[106] In doing so, the trial court agreed with the State, contending that a dog is neither a container nor analogous to one, and viewed the testing of Juno's blood as more analogous to "confirmatory chemical testing of a substance seized on probable cause," such as a lawfully-seized firearm examined for fingerprints.[107] For these reasons, the judge rejected Newcomb's argument that her constitutional rights were violated, and a guilty verdict was issued, convicting Newcomb on the second-degree animal neglect charge.[108]

Newcomb appealed the decision, challenging the denial of her motion to suppress the laboratory results.[109] At the court of appeals, the court agreed with the trial court that Juno's seizure was lawful, but disagreed with the trial court's argument that the dog's blood could be tested without a warrant.[110] Specifically, the court of appeals concluded that the dog's seizure was justified by the "plain view" exception to the warrant requirement, and considered several key facts that had been presented to them about the case at hand.[111] Not only had the officer received a report from the humane society about the near-emaciated dog, but Newcomb indicated to the officer that she had run out of dog food.[112] Furthermore, the officer could visibly see the dog "eating at random things in the yard and then attempting to vomit[,]" which supported the strong possibility that Juno required immediate medical treatment.[113] The court of appeals indicated that although the dog's physical appearance might have been consistent with either neglect or illness, the facts, coupled with Juno's physical appearance, supported the reasonable belief that the dog was in an emaciated state.[114] This is because Newcomb "had failed to provide enough food for the

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104 *Id.* at 438.

105 *Id.*

106 *Id.* at 436.

107 *Id.* at 438.

108 *Id.*

109 *Id.*

110 *Id.*

111 State v. Newcomb, 324 P.3d 557, 559 (Or. App. 2014), *rev'd*, 375 P.3d 434 (2016).

112 *Newcomb*, 375 P.3d at 436–37.

113 *Id.*

114 *Newcomb*, 324 P.3d at 562.

dog to maintain a normal body weight, and, therefore . . . the dog was evidence of a crime."[115]

In turning to the question of whether the veterinarian conducted a "search" of the dog, the court of appeals examined the definition of "search" in the context of property under Article I, Section 9 of the Oregon Constitution.[116] The constitution indicates that a search occurs when a government agent "invades a protected privacy interest," an interest that "is not the privacy one reasonably *expects* but the privacy to which one has the *right.*"[117] Newcomb argued that she had a privacy interest in the information concealed within Juno, and that she retained that right to her privacy interest even though the officer had seized her dog.[118] The State countered this argument, contending that "although [animals] are property in the eyes of the law, they have a statutory right to basic care separate and apart from their owners' possessory interests."[119] Furthermore, the State justified this argument by pointing to Oregon's statutes that criminalize animal mistreatment and to the same court's determination in past cases that concluded that "each animal identified in a count of animal neglect is a 'victim' of crime."[120] In effect, the State concluded that "[w]here the property rights of an animal owner conflict with the animal's right to be free from abuse and neglect, the animal's rights as a crime victim trump."[121]

However, the court of appeals could not endorse this view.[122] While the court of appeals verified that the Oregon legislature had criminalized the mistreatment of animals and, in effect, that animals received statutory protections against abuse and neglect, animals still retain their status as personal property of the owner under the law.[123] They argued that animal abuse and neglect statutes can impose certain limits on what owners can do with their property.[124] At the same time, however, such statutes cannot by themselves justify a government intrusion on the possession and privacy rights of an animal owner.[125] Therefore, the court of appeals concluded that "a person who owns an animal does not have diminished *constitutional* possessory and privacy rights" with respect to that animal though neglect of the property was regulated through animal welfare legislation.[126]

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115 *Id.*

116 *Id.* at 559.

117 *Id.* at 563 (emphasis in original).

118 *Id.*

119 *Id.*

120 *Id; see* State v. Nix, 334 P.3d 437, 446, 448 (Or. 2014) (regarding the mistreatment of horses by the horses' owners and treating each individual animal as a "victim" of a crime).

121 *Newcomb*, 324 P.3d at 563.

122 *Id.*

123 *Id.* at 564.

124 *Id.*

125 *Id.*

126 *Id.* (emphasis in original).

In turning to the question of whether Dr. Hedge's actions to inspect the dog invaded the personal privacy interests of Newcomb, the court of appeals argued that, when the police lawfully seize an object, the observing, touching, and even weighing of the seized object does not violate the owner's protected privacy interests.[127] The ability for the veterinarian to observe the external aspects of the dog is within the veterinary doctor's legal rights of care and medical inspection.[128] Furthermore, the court asserted that even the doctor's observation and measurement of Juno's weight gain does not constitute a governmental search, as the examination of the dog's weight over time is an "incremental intrusion" that does not invade Newcomb's protected privacy interest, nor does it disclose beyond what was already readily available and apparent to the officers and the veterinarian.[129]

While the court recognized that animals are not solely inanimate containers possessed by their owners, the extraction and testing of Juno's blood did involve a physical intrusion into the owner's property, which subsequently implicated the owner's protected privacy interests.[130] In short, the appellate court's decision was to reverse the trial court's determination, as the higher court concluded that the state failed to obtain a warrant for the extraction and testing of the dog's blood, and because no exception to the warrant requirement applied.[131]

At the Supreme Court of Oregon, the state petitioned the court to reconsider and resolve whether Newcomb had a protected privacy interest in Juno's blood under Article I, Section 9 of the Oregon Constitution (and thus by implication the Fourth Amendment of the United States Constitution).[132] This court interpreted the case as unique, with "its own set of distinctive facts and circumstances" pertaining to "the seized property [being] a living animal."[133] The court noted that the animal raised a different context of search and seizure issues, since the animal is "not an inanimate object or other insentient physical item of some kind."[134] Indeed, the court contended that an overarching theme reflected in the statutes governing animal mistreatment and neglect under Oregon law was the recognition that some animals are sentient beings capable of experiencing pain, stress, and fear, and what mattered specifically in regards to the case at hand was whether Oregon law prohibits humans to treat their animals in ways that they are legally able to treat other forms of property.[135] The court found that there was probable cause by the officer to believe that Juno re-

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127 *Newcomb*, 324 P.3d at 565.
128 *Id.* at 566.
129 *Id.*
130 *Id.* at 565–66.
131 *Newcomb*, 375 P.3d at 436.
132 *Id.*
133 *Id.* at 439.
134 *Id.*
135 *Id.* at 441.

quired medical attention; the officer could act not only to preserve the evidence of animal neglect but to physically render aid to a near emaciated canine.[136]

Therefore, the Oregon Supreme Court concluded that, given the context involved in this case, Newcomb had no protected privacy interest in Juno's blood that was invaded by the medical procedures performed.[137] Specifically, the court found there was probable cause to believe that an animal's welfare was jeopardized by way of malnourishment, and that the drawing and testing of the dog's blood would both assist in medically diagnosing and treating the dog.[138]

The court reasoned that "Juno is not analogous to, and should not be analyzed as though he were, an opaque inanimate container in which inanimate property or effects were being stored or concealed."[139] The "contents" extracted from Juno by Dr. Hedge, per the supreme court, was in fact "more dog" and "the chemical composition of Juno's blood was a product of physiological processes that go on inside of Juno and not 'information' [Newcomb] placed in the dog for safekeeping or to conceal from public view."[140] While the court was mindful that a dog is considered personal property under Oregon law, which provides animal owners dominion and control over their animals, the court contended that, simultaneously, Oregon law limits ownership and possessory rights in ways that cannot be equated with other inanimate property.[141] These findings were "reflections of legal and social norms" to ensure that live animals receive basic minimum care and veterinary treatment, and that an animal owner "simply has no cognizable *right*, in the name of her privacy, to countermand that obligation" to their animal.[142]

In the court's opinion, such a conclusion resolves the Article I, Section 9 contention.[143] As it was articulated and emphasized by the same court in the *Fessenden/Dicke* decision:

> As we continue to learn more about the interrelated nature of all life, the day may come when humans perceive less separation between themselves and other living beings than the law now reflects. However, we do not need a mirror to the past or a telescope to the future to recognize that the legal status of animals has changed and is changing still . . . .[144]

In sum, the *Newcomb* Court indicated that, when assessing the constitutionality of an animal owner's protected privacy interests, such interests of privacy and possession must be contextualized with the "evolving landscape" of social and behavioral norms, of which may ac-

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136 *Id.* at 442.
137 *Id.*
138 *Id.*
139 *Id.*
140 *Id.* at 442–43.
141 *Id.* at 443.
142 *Id.*
143 *Id.* at 444.
144 State v. Fessenden, 333 P.3d 278, 284 (Or. 2014).

knowledge and potentially reconfigure humans' relations with their non-human counterparts.[145]

The supreme court, unlike the court of appeals, found that the animal simultaneously occupies both the status of property, and that of a quasi-rights bearing subject.[146] The animal is deserving of health and wellness, and this entitlement outweighs the privacy interest of humans in the sentient property.[147] The supreme court was willing to interpret the Oregon and Federal Constitutions in consideration of the evolving social and legislative landscape of animal welfarism.[148] The decision incrementally develops the recognition, by law, that some animals are sentient beings and that a duty of protection is demanded for those animals, which can compete with and, on some occasions, outstrip civil and human rights like the right to privacy.[149]

IV. READING LEGAL DEFINITIONS IN MODERN CONTEXTS

Within *D.L.W.*, we view a majority judgment at the Supreme Court of Canada level, which understands criminal law—in the absence of a constitutional challenge—as static (largely to preserve the due process rights of an accused), and sees interpretation as bound by the intent of the drafters of the legislation.[150] This ethic manifests an understanding of non-human animals as singular and universalist: as property. Therefore, the harms to be prevented are the corruption of human persons and morals. A manifestation of this is the prohibitions on illicit sexual conduct in Canada's Criminal Code, which trace back to Victorian conceptions of sexuality.[151] Certain immoral sexual expression, conduct and relationships were prohibited because they tended to corrupt the morals of the lower, working classes (men in particular) and children.[152] These prohibitions have roots in Judeo-Christian teachings, but the anxiety about their corrupting influence reached a particularly acute height in the Victorian era and as the excavation of the rampant erotica of ancient Pompeii began to be promulgated.[153] In this context, the bestiality provisions, which the majority of the Supreme Court of Canada finds trace back to the intention of the

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145 *Id.* at 444.

146 *See id.* at 440 (noting that, while animals can be legally owned, their welfare is also the subject of statutory protections that do not apply to other forms of property).

147 *See id.* at 441 (recognizing that minimum care standards, which include consideration of the health and wellbeing of an animal, are significant in determining whether the defendant has an expectation of privacy that society is willing to recognize as legitimate).

148 *Id.* at 444.

149 *See id.* at 441, 443 (noting that animals are sentient beings capable of experiencing pain, stress, and fear that are subject to statutory welfare protections that limit the owner's possessory rights and impose an obligation to provide minimum care to the animals).

150 *D.L.W.*, [2016] 1 S.C.R. at para. 3.

151 Gacek & Jochelson, *supra* note 1, at 343.

152 Jochelson & Kramar, *supra* note 16, at 291.

153 Gacek & Jochelson, *supra* note 1, at 352–53.

original drafters, are less concerned with damage to property itself, but with the anxieties of moral corruption.[154] By viewing Canada's laws as framed and demarcated by the intent of the drafter, emerging moralities cannot, for the SCC majority, inform the meaning of carnal knowledge in the case. The dissent at the Supreme Court (and the dissent at the appellate court and the trial court decision), conversely, relies on other statutory interpretation rules: statutes should be interpreted so as to not yield surplus language, and original intent should be given credence only when that intent is clear.[155] Indeed, the Supreme Court dissent sees an alternative drafters' intent in that the changes to the section could indicate an intention to liberate the meaning of bestiality from a rigid penetrative definition.[156] Further, these judges see as absurd that Parliament would prohibit penetrative bestiality while countenancing the fondling of animals.[157] The absurdity of this result allows the dissent to interpret criminal law as apprised of societal evolutions.[158] These evolutions would include recent developments of the law of consent, the inability of animals to provide this consent, and the emerging societal knowledge of sentience for some animals. Simply put, in the context of ambiguous legislative intent or of absurd results, societal developments may shed light on or help constitute ambiguous legal terms.

In *Newcomb*, we see a unanimous majority judgment at the Oregon Supreme Court level that combines both traditional understandings of the animal and an evolving recognition of the nature of the animal as a being. The court is not bound by the peculiarities of the Victorian socio-sexual order because the dispute in question relies, in the main, on issues of state investigative processes and property ownership.[159] In other words, the court acknowledged that within the current state legislative regime, domesticated and companion animals are the property of their owners.[160] However, a proprietary interest is qualified, because the animal is more than a vessel.[161] The *Newcomb* supreme court analysis of the extraction and testing of Juno's blood reveals an interpretation that highlights the constitutional and investigative law as dynamic: if human-animal relations are continually evolving then so should contexts of harm, suffering, and neglect. While all levels of court in *Newcomb* did not discount the owner's right to protected privacy interests in property, the supreme court's unanimous interpretation of property in relation to animals suggests that

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154 *D.L.W.*, [2016] 1 S.C.R. at paras. 18–19, 25.

155 *D.L.W.*, 2015 CanLII at paras. 45–46 (Bauman, C.J., dissenting); *D.L.W.*, 2013 CanLII at paras. 143–44 (Abella, J., dissenting).

156 *D.L.W.*, [2016] 1 S.C.R. at para. 127 (Abella, J., dissenting).

157 *D.L.W.*, 2013 CanLII at paras. 311–12; *D.L.W.*, 2015 CanLII at paras. 58–59 (Bauman, C.J., dissenting); *D.L.W.*, [2016] 1 S.C.R. at para. 142 (Abella, J., dissenting).

158 *D.L.W.*, [2016] 1 S.C.R. at para. 127 (Abella, J., dissenting).

159 *Newcomb*, 375 P.3d at 438–39.

160 *Id.* at 440.

161 *Id.* at 442.

humans must (re)consider the interests they possess in animal property.[162]

The recognition of Juno as "not an inanimate object or other insentient physical item of some kind" indicates that while dogs are considered personal property of owners under Oregon law, the Court could consider dogs as sentient beings and inculcate jurisprudence as fixed with this knowledge of sentience.[163] The *Newcomb* decision conceptualizes within criminal and regulatory law how the sentience of animals can influence constitutional protections (as opposed to the reverse, which is the central question in determining the nature of privacy in most search and seizure cases—i.e., the relation of the investigative target to the property in question). The animal, then, exists in multiplicities: it can be owned and entitled to welfare simultaneously. Importantly, the societal interest in an animal's welfare can outweigh the civil rights protections of putative accused persons.[164] The impact of this finding suggests that the right to life and welfare of animals can outpace some rights enjoyed by humans, and the court makes clear that this state of affairs is premised on the changing social and moral conditions of Oregonian society.[165] The supreme court's approach is not constricted by common law definitions of the animal nor by the original intention of the Oregon Constitution.[166] In effect, it sees both as capable of change and growth and in contact with—indeed, driven by—the state of the social world.

The Oregon Supreme Court decision, as opposed to the Supreme Court of Canada's decision, demonstrates how societal conceptions of harm and morality may influence the judiciary's interpretive process. This judicial approach allows conceptions of the non-human animal to be complex and multivalent—simultaneous existence as property and as a being worthy of dignity. This allows for the possibility of amelioration of suffering even in the absence of any animal rights-based constitutional impetus. Whereas civil rights are enumerated in constitutions in North America, animal rights are constructed from a patchwork of regulatory law, animal welfare law and judicial interpretation.[167] The Supreme Court of Oregon demonstrates a powerful opportunity for the judiciary as a constructor of animal rights, in the absence of fulsome, nationwide or international rights forming legislation for animals. These approaches suggest concretized utility for judicial conceptions of

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[162] *Id.* at 439, 443; *Newcomb*, 324 P.3d at 563.

[163] *Newcomb*, 375 P.3d at 441.

[164] *Id.* at 443.

[165] *Id.*

[166] *See id.* at 439–40 (arguing that "'some animals, such as pets, occupy a unique position in people's hearts and in the law,' one that is not well-reflected in the 'cold characterization of a dog . . . as mere property.'") (quoting *Fessenden*, 333 P.3d at 278).

[167] *See* Joseph Lubinski, *Introduction to Animal Rights (2nd Ed)*, ANIMAL LEGAL & HIST. CTR. (2004), https://www.animallaw.info/article/introduction-animal-rights-2nd-ed [https://perma.cc/345W-XU7B] (accessed Jan. 19, 2017) (discussing animal protection laws at varying levels of jurisdictions in the United States).

dignity, absence of suffering, and the inviolability of consent (in the case of sexual violation). These are values that the Oregon Supreme Court is able to place as supreme to the intention of the drafter of statutes or constitutions. These values appear to be immanent for the Oregon Supreme Court, which doubtless is problematic for those that adhere to originalism as the basis for statutory or constitutional interpretation.

V. THE WRONGFUL TREATMENT OF DOMESTICATED, COMPANION ANIMALS

In Canada, present laws that seek to speak to animal welfare and protection acknowledge a "societal concern" about the well-being of animals.[168] Even so, such laws often ultimately treat animals "as little more than commodities to be allocated, in whole or in parts, among competing human interests."[169] Canada and the United States are similar in this circumstance, insofar as laws in both countries generally treat animals as property.[170] Moreover, humans are granted exclusive use of their animals, and as such, property owners have the right to use their property as they see fit.[171] And while the fundamental premises of property law have not changed much since the seventeenth century, humans who were once considered property or quasi-property have since fought and become legal persons. Churches and corporations, for example, have undergone legal transformations from inanimate constructs to legal persons to assert their interests in courtrooms and legal settings.[172] Yet as we have seen from the cases studied, animals remain beings who are legally constituted as property.[173]

The problem of how to deal with humans who act violently toward animals or on a sexual impulse forced upon animals is deeply contentious and is full of ambiguities.[174] Typically, laws in Western democratic countries are governed by liberal parameters and query whether the impugned action in question "does more than simply offend moral sensibilities"—that is, does it cause harm?[175]

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168 Lesli Bisgould & Peter Sankoff, *The Canadian Seal Hunt as Seen in Fraser's Mirror*, *in* CANADIAN PERSPECTIVES ON ANIMALS AND THE LAW 105, 107 (Peter Sankoff et al. eds., 2015).

169 *Id.*

170 *Id.* at 115; Lubinski, *supra* note 167.

171 *See* Bisgould & Sankoff, *supra* note 168, at 116 n.64 ("[A] central tenet of property law is that a property right gives its owner exclusive use and control of an object.").

172 Chris MacDonald, *Why Corporations Must be Legal Persons*, BUS. ETHICS BLOG (Sept. 27, 2009), https://businessethicsblog.com/2009/09/27/why-corporations-must-be-legal-persons/ [https://perma.cc/EN2M-6SAF] (accessed Jan. 19, 2017).

173 Lesli Bisgould, *Gay Penguins and Other Inmates in the Canadian Legal System*, *in* CRITICAL ANIMAL STUDIES: THINKING THE UNTHINKABLE 154, 158 (John Sorenson ed., 2014).

174 Imogen Jones, *A Beastly Provision: Why the Offence of 'Intercourse with an Animal' Must be Butchered*, 75 J. CRIM. L. 528, 542 (2011).

175 *Id.*

However, we suggest there are shortcomings to the liberal parameters of law. For one thing, the term "harm" remains opaque and can range from tangible harms (such as physical harms), to alleged and intangible harms (for example, harms to the proper functioning of society). Further, historically, these sorts of harms have been aimed at protecting a range of human entitlements such as liberty, autonomy, and equality.[176] These entitlements, though often constitutionalized, can seldom be understood as yielding to the need to preserve property. The Oregon Supreme Court decision is disruptive to this liberal philosophy because it considers the wrongfulness of treatment of sentient beings as a limitation on the liberty and autonomy of humans; that is, the weight of the dignity and welfare of the animal as a being, in some cases, may be more important than the autonomy and liberty interests of humans.[177] The Supreme Court of Oregon's decision begins to destabilize the intrinsic and somewhat understandable anthropocentrism of law. Law governs over the dignity and welfare of humans, *and*, per the Oregon Supreme Court, the dignity and welfare of other sentient animals. This represents a legal shift that expresses disapprobation for "coercive acts which violate [animals'] inherent dignity and worth or cause[s] them suffering."[178]

While it may be very difficult to legislate socially conscious animal welfare reforms in the multiple jurisdictions within Canada and America, the Oregon Supreme Court's implicit acknowledgment of the importance of animal sentience in adjudicating the civil rights of humans could have far-reaching consequences. This acknowledgement recognizes that perhaps sentient animals are entitled to something approaching rights and interests; that they are at the least to be protected from harm and suffering. The Oregon decision countenances incremental intrusions into the interests of humans as necessary and in doing so helps develop progressive jurisprudence on the foundation of animal sentience.

Bucchieri writes that "integrating the protection of animals into the heart of the [American] criminal justice system will broadcast the relationship that animals and humans share as sentient beings capable of suffering and will, as a result, elevate the respect they are afforded."[179] Speaking to the Canadian context of progressive animal welfare reforms, Sankoff argues that "[a]lthough Canada has a long-held reputation for being progressive on social issues . . . the country is no haven for animals."[180] Noting that the legislative protections in Ca-

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[176] *Id.* at 299.

[177] *See Newcomb,* 375 P.3d at 441 (explaining that although technically property, human beings are prohibited under Oregon law from treating animals in ways they would be allowed to treat inanimate property).

[178] Jones, *supra* note 174, at 543.

[179] Rebecca L. Bucchieri, *Bridging the Gap: The Connection Between Violence Against Animals and Violence Against Humans*, 11 J. ANIMAL & NAT. RESOURCE L. 115, 130 (2015).

[180] Sankoff, *supra* note 5, at 294.

nada are "among the worst in the Western World," he nonetheless presciently pointed towards hopeful outcomes in other countries such as New Zealand.[181]

Indeed, in 2015, the sentience of animals was legislated in New Zealand.[182] New Zealand's animal welfare legislation already established baseline protection for animal protection; however, the 2015 amendments expanded the breadth of animal protections ensuring, among many aspects of animal welfare, that if animal testing is warranted or required, then an assessment of the suitability of using non-sentient beings or non-living materials in lieu of sentient non-human animals should be thoroughly considered.[183]

The full title of New Zealand's legislation states that it is an Act:

> (a) to reform the law relating to the welfare of animals and the prevention of their ill-treatment; and, in particular,—
>
> to recognise that animals are sentient:
>
> (i) to require owners of animals, and persons in charge of animals, to attend properly to the welfare of those animals:
>
> (ii) to specify conduct that is or is not permissible in relation to any animal or class of animals:
>
> (iii) to provide a process for approving the use of animals in research, testing, and teaching:
>
> (iv) to establish a National Animal Welfare Advisory Committee and a National Animal Ethics Advisory Committee:
>
> (v) to provide for the development and issue of codes of welfare and the approval of codes of ethical conduct. . . .[184]

Setting base standards for engagement with animals across a variety of activities and industries, New Zealand's animal welfare scheme becomes more than simple legal doctrine to be interpreted. Rather, we contend this legislation effectively declares the sentience of animals within New Zealand, and creates quasi-rights for animals. A declaration of sentience for animals is akin to a declaration of personhood for slaves or women in that it provides protections and entitlements heretofore unknown.[185] Certainly, the New Zealand approach is far from an animal bill of rights, but it is an acknowledgement that civil rights may yield to animal rights in the right circumstances.

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181 *Id.* at 300.

182 Animal Welfare Amendment Act 2015, pt 1, s 4 (N.Z.).

183 *Id.* s 41(3).

184 Animal Welfare Act 1999, para. (a) (N.Z.).

185 *See generally* Steven Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. ENVTL. AFF. L. REV. 471, 493–546 (1996) (discussing the structure of law that led to the determination of women, slaves, and nonhuman animals as property).

In jurisdictions like Switzerland, the law overtly protects the dignity of animals and is constitutionalized.[186] The regime is unique and provides animals with value regardless of their sentience.[187] Swiss law moves beyond physiological and physical harm and protects aspects of the animal's dignity.[188] However, Swiss law is only used to counterbalance human interests and does not extend to immanent standalone guarantees for animals.[189]

While the cases we have studied might do little to create vast protections for animals (such as the creation of the dignity, liberty, life, etc.) the Oregon Supreme Court and the dissent of the Supreme Court of Canada seem to be suggestive of incremental shifts in our construction of animals as deserving of welfare and dignity.[190] This kind of incrementalism has the potential to alter our societal conceptions of animal rights and entitlements, as well as absorbing societal shifts into the adjudicative process—explicating the iterative and reiterative nature of common law and constitutional decision-making. In turn, this may pave the way for more sweeping legislative reforms in North America.

VI. CONCLUSION

Within the *D.L.W.* and *Newcomb* decisions, we have observed the power of legal text to discursively shift the construction of what it means to be a sentient animal in North America. At best, the right for animals to be free from harm, exploitation, and negligence in Canada and the United States is qualified. While the purview of the law may not remedy animal rights issues soon, it is clear that there are judges within Canada and the United States that intend to adjudicate cases involving animals with a more progressively and socially conscious mindset.[191] Nevertheless, judicial interpretations of legal provisions apprised of conservative interpretive principals still place animals, principally, under humans' dominion and control.[192]

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[186] Gieri Bolliger, *Legal Protection of Animal Dignity in Switzerland: Status Quo and Future Perspectives*, 22 Animal L. 311, 313 (2016).

[187] *See id.* at 313–14 (finding that Switzerland's protection of animal dignity is unique because it is constitutionalized).

[188] *See id.* at 313 (explaining that the Swiss constitution protects the inherent worth of the animal "beyond physiological and psychological stresses").

[189] *See generally id.* (explaining how Swiss animal welfare laws derived from the Swiss constitution and constitutional mandates protect animals, but are limited because the dignity of animals is valued relative to human dignity).

[190] *See D.L.W.*, [2016] 1 S.C.R. at paras. 10–14 (reading the statute broadly, the dissent in this case interpreted the law to prohibit non-penetrative forms of bestiality). *See generally Newcomb*, 375 P.3d at 434 (finding that a dog was different than other inanimate property for the purpose of Fourth Amendment protections).

[191] *Id.*

[192] *See generally id.* at paras. 1–123 (refusing to expand upon the Canadian parliament's definition of bestiality, the Supreme Court of Canada read a narrow interpretation of Canadian statutory law).

In the deployment of judicial decisions across the Canadian federal and Oregon state jurisdictions, we have explored the tensions existing between conservative and progressive statutory and constitutional interpretations of the place of the animal in limiting the freedom of the human. In Canada, in the context of its criminal law, the liberty of the human is given paramount effect over the incursion of sexual abuse on the sentient animal. The Oregon Supreme Court sees the right to privacy in sentient animals as ceding to the entitlement of the sentient animal to live and be safe in the context of animal welfare investigations. The approaches represent different sides of the same coin. They both principally understand animals as property, though the implications of sentience inculcate the Oregon case in a more pronounced fashion.

Societal understandings of human-animal relations must be further interrogated to provide appropriate and just treatment for animals within both countries. Strict constructions and narrow interpretations of bestiality and the nature of property increase the potential for animals to suffer under the control of their owners and handlers. Additionally, a greater discussion is warranted to reconsider how morality and animal sentience should be implicated in animal welfare legislation. Liberal parameters of legal governance, while espousing and upholding freedoms and rights for its society's citizens, are guided and enforced through socio-political and anthropocentric machinations of the court system. We conclude this Paper by inviting legal, socio-legal, and animal scholars alike to take up the challenge of supplementing and extending further the development of progressive legal jurisprudence in Western, liberal democracies.