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Foregrounding Embodied Vulnerability and Human-Animal Relationality: How the Disasters of the Anthropocene Promise to Transform Animals' Property Status

'the law reveals its stress points in its continuing contacts with the specter of catastrophe.... [a]nd... we can say with certainty that these stress points will be tested severely in the years to come.'¹

I. Introduction

In 2072, nonhuman animals within the Western legal tradition will enjoy a status which is markedly more attentive to their material condition as *physical* and *relational* beings. While myriad factors could contribute to such a paradigm shift, this essay posits one: the escalation in the 'frequency and severity'² of disasters caused by natural hazards, an anticipated product of anthropogenic climate change. The inadequacy of animals' existing property status, and its persistent failure to recognise its bearers' embodiment and the complex ways in which their relationships with humans constitute them vulnerable to or protect them against harm, will become undeniable under the pressure of recurrent disasters. As Austin Sarat and Javier Lezaun observe, disasters have a 'revelatory quality'; they offer potent 'reminders of the fragility of our social and institutional architectures, making painfully evident vulnerabilities in our social organization that were otherwise invisible.'³ In addition to identifying points of social dysfunction, disasters also create an appetite for reform. In this respect, law performs a 'crucial role in drawing lessons from disaster... and in correcting the vulnerabilities that caused or compounded the destruction'.⁴

¹ Lawrence Douglas, Austin Sarat and Martha Merrill Umphrey, 'A Jurisprudence of Catastrophe: An Introduction' in Lawrence Douglas, Austin Sarat and Martha Merrill Umphrey (eds), *Law and Catastrophe* (Stanford University Press, 2007) 1, 16.

² IPCC, *Working Group II contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Report, 27 February 2022) 2-14.

³ Austin Sarat and Javier Lezaun, 'Introduction: The Challenge of Crisis and Catastrophe in Law and Politics' in Austin Sarat and Javier Lezaun (eds), *Catastrophe: Law, Politics and the Humanitarian Impulse* (University of Massachusetts Press, 2009) 1, 1.

⁴ *Ibid.*

Animals represent one cohort for whom these illuminative and remedial functions of disaster have been especially salient in recent decades. The exclusion of animals from emergency management protocols during Louisiana’s Hurricane Katrina in 2005, as well as the consequent evacuation failure, and the immense human and animal mortality which followed, etched their plight in disasters indelibly into the public imagination. The experiences of animals and their human companions in subsequent disaster events, including the Australian State of Victoria’s 2009 Black Saturday Bushfires and New Zealand’s 2010-2011 Canterbury Earthquakes, have only reinforced this seismic shift in popular sentiment. Dissatisfied with the outcomes of each of these disasters (the ‘case studies’), the affected jurisdictions inaugurated bespoke planning mechanisms to improve provision for animals.⁵ Although these instruments beneficially *gesture* at the significance of animals’ embodiment and their relationships with humans, they leave their underlying property status intact; in Louisiana, New Zealand and Victoria, companion, agricultural and wild animals continue to be classed as property, as they were at the time of the case studies.⁶ Yet the disasters of the Anthropocene necessitate a more radical and ontologically responsive intervention: they demand that law address a crucial slippage between animals’ extant legal status and their concrete, material circumstances and needs.

Drawing upon select contributions to the critical property law literature and instructive examples from the case studies, this essay forecasts how future disasters will expose animals’ property status as ill-adapted to -- and unsustainable in -- the 21st Century. It contends that Western concepts of property as abstract and ‘dephysicalised’ will increasingly render it a defunct model for the regulation of animals under law. It begins by outlining the nature of the dephysicalisation critique of Western property law and its applicability to animals (Part II). The essay then articulates why property law, given its tendency to erase embodied “objects” from its purview, will emerge as palpably inapt to govern animals in an era marred by constant natural hazards: first, that it overlooks the importance of constructive and mutualistic bonds between humans and (companion) animals, jeopardising both groups in disasters (Part III); and second, that it

⁵ *PETS Evacuation and Transport Standards Act* Pub. L. No. 109-308, 120 Stat 1725 (2006); Victoria, *Victorian Emergency Animal Welfare Plan*, October 2019; *National Civil Defence Emergency Plan Order 2015* (NZ) Schedule cl 75.

⁶ In respect of domestic animals: *State v Chambers*, 194 La. 1042, 1045 (1940); *Putt v Roster* (1682) 2 Mod Rep 318; *Saltoon v Lake* [1978] 1 NSWLR 52; *Isbester v Knox City* [2014] VSC 286 [21]. In respect of wild animals: La C. C. art 3413, 3416 (West, 2005); La Rev Stat Ann § 56:3(A); *Sutton v Moody* (1865) 1 Ld Raym 250; *Wildlife Act 1953* (NZ) s 57; *The Case of the Swans* (1592) 77 Eng Rep 435 (KB); *Yanner v Eaton* (1999) 201 CLR 351.

engenders and legitimises an exploitative posture in respect of (agricultural and wild) animals, exacerbating their vulnerability to hazards (Part IV).

II. Western law's 'dephysicalisation' of property

Contemporary property law in Western liberal legal orders has faced persistent criticism for its tendency to 'dephysicalise' or 'abstract'⁷ its object: to erase the material basis of property – whether land or other “things” -- from the ambit of law's concern. The claim is not that property law ignores legal relationships altogether; rather, it is contended that, in line with Hohfeld's rights analysis,⁸ Western law focusses on how the rights or claims of a property holder circumscribe or define the correlative liabilities and duties of *other persons*.⁹ Of little interest is the material subject of property, with this famously described as a 'mere illusion'.¹⁰ Nicole Graham examines how, exhibiting a clear Hohfeldian inheritance, Western legal orders perpetuate an understanding of property that 'is not about things but about people, or rather, about the relations between persons'.¹¹ As a result of its failure to appreciate its moorings in real conditions, Graham contends that contemporary property law is maladapted to the peculiarities of specific locations and accordingly upholds 'unsustainable people-place relations'.¹² Margaret Davies similarly describes ownership in Western law as 'shallow and abstract, disconnected from the object of ownership, and from any ethical bonds that arise in relation to it'.¹³ Against this notion of property relations as abstract and disconnected, Davies juxtaposes Indigenous epistemologies, in which there is greater 'reciprocity'¹⁴; as Aboriginal scholar Irene Watson writes, '[w]e live as part of the natural world; we are in the natural world. The natural world is in us.'¹⁵

Just as it effaces land and other owned things from its gaze by fixating on legal relations between persons, Western property law dephysicalises animal “objects” of property, and by extension, diminishes the tangible, reciprocal bonds which form through their coexistence with humans.

⁷ Nicole Graham, *Landscape: Property, environment, law* (Taylor & Francis, 2010) 2.

⁸ Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (Yale University Press, 1920).

⁹ Margaret Davies, 'Persons, Property and Community' (2012) 2(2) *feminists@law* 4.

¹⁰ Kevin Gray, 'Property in Thin Air' (1991) 50 *Cambridge Law Journal* 252, 252.

¹¹ Graham (n 7) 6.

¹² *Ibid* 5.

¹³ Margaret Davies, 'Can property be justified in an entangled world?' (2020) 17(7) *Globalisations* 1104, 1110.

¹⁴ *Ibid*.

¹⁵ Irene Watson, *Aboriginal Peoples, Colonialism and International Law* (Routledge, 2015) 15.

That property law is principally concerned with an owner's sovereign rights in their animals as against other persons was affirmed by the Supreme Court of Mississippi in the 19th century: '[t]he common law recognized no rights in... animals, and punished no cruelty to them, except in so far as it affected the rights of individuals to such property.'¹⁶ The same is true of civil law jurisdictions, whose property law frameworks protect ownership, while remaining silent as to what constitutes permissible treatment of animals.¹⁷ Through ontological contrivance, animals' property status characterises them as nothing more than mere abstractions, thereby erasing their embodied relationality. Notwithstanding the existence of animal welfare statutes, this phenomenon has profound implications for animals' vulnerability in disasters, two of which are analysed below.

III. Marginalising salutary bonds

Due to its exclusive focus on conduct as between persons, property law principally concentrates on preventing external interference in the enjoyment of the property by third parties; it therefore confers little protection on the owner's relationship with their animal *per se*. Animals' property status is therefore of low protective utility where the ownership relationship is disrupted most directly by the exigencies of the *circumstances* rather than another person, as in the event of a disaster. As floodwaters rose during Hurricane Katrina, numerous New Orleans residents – some of whom were accompanied by their animals -- attended the Superdome as a shelter of last resort. However, with conditions at the venue deteriorating, an evacuation was ordered; yet residents were precluded from travelling onwards with their animals. Powerless evacuees reportedly watched on as members of the National Guard released their animals. One particularly compelling case, which garnered substantial public attention, was that of Snowball: the small, white dog who was extracted by National Guardsmen from the arms of his young owner as he was directed to enter a bus. The boy cried until he vomited, and continued to call for his dog. Snowball's account exemplifies a dissonance between law's conceptualisation of the relationship between owner and owned, and the true, lived nature of that relationship; as Zotarelli observes, the story became an 'iconographic representation of the incompatibility of evacuation policy and the reality of the relationships between companion animal guardians and companion animals'.¹⁸

¹⁶ *Stephens v. State*, 65 Miss. 329, 331 (1888).

¹⁷ See, eg, La C. C. (West, 2022).

¹⁸ Lisa K Zotarelli, 'Broken Bond: An Exploration of Human Factors Associated with Companion Animal Loss During Hurricane Katrina' (2010) 25(1) *Sociological Forum* 110, 111.

Law reduced the inimitable connection between Snowball and his owner to a disposable proprietary right, fallaciously atomising them and denying the relation of care which bound them together.

Relatedly, eschewing the significance of their relationships with humans, property law treats animals as mere ‘fungible’¹⁹ commodities; it protects the *value* of owned animals, yet not animals themselves.²⁰ Such an approach is inconsistent with the preservation of individual animal lives and the maintenance of their welfare during disasters; it is also at odds with lived experience, which suggests that societies prioritise the protection of animals over that of inanimate, more replaceable items of property. The remarkable number of individuals who refused evacuation during the case studies to remain with their companion and production animals attests to this discrepancy between legal and popular conceptualisations of the value of owned animals. In their submission to a Royal Commission into the Black Saturday Bushfires, the RSPCA recalled that many people prioritised the safety of their animals above their own, including by remaining on their properties which placed them at ‘serious risk.’²¹ Tragic stories emerging from the disaster corroborated this observation: Donald and Mabelle Hatton were found to have perished alongside their ‘much-loved’ dog,²² while Marisa Robbins deduced that her parents had died upon learning that the body of the dog they ‘adored’²³ – and would not have left behind -- had been located at their burnt property. Similar trends were documented in the aftermath of Hurricane Katrina; of the residents who declined to evacuate during the disaster, some forty-four percent of these took this course due to the hostility of emergency protocols towards animals.²⁴ Staunchly unwilling to leave their animals behind, many of these residents were ‘later found... dead in their homes with their pets sitting beside them.’²⁵ The protective, and even sacrificial, instinct which moved these owners to remain with their animals at their own peril is irreconcilable with the latter’s designation as mere things in respect of which rights accrue. This

¹⁹ Graham (n 7) 7.

²⁰ Estair Van Wagner, ‘Putting Property in its Place: Relational Theory, Environmental Rights and Land Use Planning’ (2013) 43 *Revue générale de droit* 275, 281.

²¹ RSPCA, *Submission to 2009 Victorian Bushfires Royal Commission SUBM.002.021.0248_R* (Submission, 18 May 2009) 3.

²² *The 2009 Victorian Bushfires Royal Commission* (Report, Volume I) 280.

²³ *The 2009 Victorian Bushfires Royal Commission* (Statement of Lay Witness, Marisa Robbins).

²⁴ Paige Chretien, ‘Discretion Bites: The Current State of Animal Emergency Planning’ (2016-2017) 8 *San Diego Journal of Climate & Energy Law* 249, 253.

²⁵ *Ibid* 28.

status will only become more unsuitable and unsatisfactory as climate-induced natural hazards intensify over the coming decades, forcing law to revise companion animals' status to account for their corporeal and uniquely relational existence.

IV. Enabling exploitative relations

In addition to overlooking benevolent human-animal bonds, Western law's erasure of the material subject of property also cultivates a legal climate in which the owner's right to exploit their animals is recognised as paramount; this excludes the possibility that duties may be owed to the animal herself in a mutualistic 'stewardship'-style arrangement.²⁶ As a consequence, animals 'are largely treated as objects without claims of their own',²⁷ with owners permitted to keep, use and treat animals in ways that enhance their productivity or utility, notwithstanding that these might amplify their susceptibility to hazards. The expansive implications of this proprietary power came into sharp focus at Weedons Poultry Farm during the first of the Canterbury Earthquakes. As a result of the tremors, two of the facility's three stands collapsed on top of each other, killing some 3000 of the 26,000 birds intensively farmed there.²⁸ According to Annie Potts and Donelle Gadenne, these animals were 'victims of inhumane structural design – as well as safety and welfare failures – inherent in factory farming'; as such, they argue that their deaths were 'preventable'.²⁹ However, the intensive, densely stocked environment in which these animals resided found support in the law: such perilous conditions were permitted by the chickens' status as the property of their owner, and were unconstrained by meagre statutory welfare requirements.³⁰ Losses at an even greater scale were reported as a result of Hurricane Katrina: more than 600 million farm animals are estimated to have 'suffered and died in horrific circumstances', with intensively farmed chickens constituting the bulk of this number.³¹ These animals' status as property sanctioned a unidirectional, extractive form of association between them and their owner; their fleshy, vulnerable bodies, and the complex sensations, needs and

²⁶ Davies, 'Persons' (n 9) 16.

²⁷ Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press, 2012) 195.

²⁸ Steve Glassey and Thomas Wilson, 'Animal welfare impact following the 4 September 2010 Canterbury (Darfield) earthquake' [2011-2012] *Australasian Journal of Disaster and Trauma Studies* 49, 53.

²⁹ Annie Potts and Donelle Gadenne, *Animals in Emergencies: Learning from the Christchurch Earthquakes* (University of Canterbury Press, 2014) 224.

³⁰ Animal Welfare (Broiler Chickens: Fully Housed) Code of Welfare 2003 (NZ) Minimum Standards 3 and 5.

³¹ Potts and Gadenne (n 29) 9.

frailties attending this embodiment, were excised from law's concern, foreclosing the possibility that they might benefit from a more mutualistic form of association. However, for economic, ethical, social and environmental reasons, the outcomes which flowed from this will become increasingly unsustainable over the next five decades, compelling the law to grant farm animals a higher, more robust legal status.

Property law also enables humans to extract wild animals from the natural habitats upon which they depend for their subsistence, and to confine them in artificial settings. In many cases, remoteness from humans would better support these animals' wellbeing; however, blind to their material needs, property law doctrines and supporting statutory frameworks³² widely permit humans to bring wild animals into their captivity, a state which can imperil them during disasters. This was the case for countless Red-eared slider turtles, a popular exotic, non-endemic species, during the Christchurch Earthquake. While such animals were ordinarily confined to tanks or ponds that replicated their natural habitats, as the tremors destroyed this equipment across the city, turtle owners were 'suddenly homeless and didn't know what to do with their turtle companions.'³³ Others, such as Bruce and Hope, were left behind in the "red zone" for months after the Earthquake; they were found in water that had turned to 'grey slime', having been fed crayfish by squatters.³⁴ Further casualties of other species were sustained at the Southern Encounter Aquarium, which was entirely levelled by the quake. While certain suitable animals were rehomed or released into the wild, some were required to be euthanised as 'the water quality was deteriorating, the generators were no longer working, and [the] building was inaccessible'.³⁵ As these examples illustrate, property law's conceptualisation of these animals as abstract resources, capable of being transplanted from their natural environment into a situation of confinement, constituted them profoundly vulnerable to the seismic hazard which gripped Christchurch. Yet it was this very disaster which made the inappropriateness of their property status apparent: far from being mere things which could be removed from the wild and placed in confinement to serve anthropocentric ends, the earthquake's toll on captive animals threw their embodiment, physical sensitivities and attachment to place into sharp relief. As climatic changes continue to induce more extreme disaster events, the law will no longer be able to deploy liberal

³² See, eg, *Wildlife Act 1953* (NZ) s 7(1), sch 5, see also ss 3, 53.

³³ Potts and Gadenne (n 29) 182.

³⁴ *Ibid* 186.

³⁵ *Ibid* 217.

concepts of property to legitimise and naturalise the bringing of wildlife into detrimental relation with humans; instead, it will be impelled to fashion a legal status for wild animals that is more attentive to their natural condition and peculiar, situated needs.

V. Conclusion: a *rephysicalised* and relational status for animals

By 2072, animals will hold a wholly recalibrated legal status. The existing property model, which denies animals' embodied relationality, will have become an anachronism -- reduced to the annals of Western legal history. Climate change will have exposed its inadequacy as a framework for governing vital and vulnerable beings; an escalation in disasters will have made it patently apparent that this status overlooks beneficial, mutualistic human-animal bonds, and fails to protect against harmful, anthropocentric ones. In property's place, law will have instituted a far more suitable legal status for animals: one which recognises and respects their physical existence, and accounts for the relationships enabled by it.

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