18. Thinking about law and the question of the animal

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PRELUDE: WHAT IS THIS TEXT TRYING TO DO?

Research, whether in the humanities and social sciences or in other fields of study, never starts or finishes as a monologue. It can be tentative at times, interrupted by other thoughts, unsure of its footing, born out of disjointed conversation or from unexpected encounters. It is sustained sometimes less by posited hypotheses which it aims either to confirm or to disprove, than by experiments that are, in a way, their own accidents of thought and existence: a 'what happens if . . .?' without any formal conjecture. Much of this, however, often remains consigned to the margins once we are left with the results of research put into print.

This text follows the style of a dialogue between its two authors, thinking about law and the question of the animal. The purpose of this dialogue however, is not to stage a kind of dialectic on the subject. It does not aim, through presenting counterposing viewpoints, to reach a synthesis of positions and thus some firmer ground for a terrain on which there is already much uncertainty and much contention and debate. Instead, there is an acknowledgement only that dialogue, between the right persons, is both a necessary part of research and at the same time the first step in disrupting what might otherwise become a conventional thesis caught by the form of a self-conscious and self-assuring monologue. More than presenting merely the results of a research that has culminated in determinate and defensible positions then, the authors are interested in demonstrating something also of the method and conduct of research itself, the indeterminacies and uncertainties and confrontations of which one should not be too tempted to artificially erase in writing. In this way, following the contour of conversation, the text tries to attend to minor and sometimes neglected aspects of research methodology. It tries to bring some of the necessary digressions, anticipations, provocations, improvisations and sketches, those that make research possible and necessary, back within its frame. This dialogue furthermore tries to demonstrate something of the collaborative work of thinking together – something that occurs outside and sometimes directly in spite

of the current managerial trend and competitive framework for individuals within research institutions.

The text looks at something minor as its topic: animals. It draws upon thinking and research that the two authors have been engaged with, in recent years, on the question of law and non-human animals, posing new problems and directions for critical study in the area and analysing some of the productive avenues and potential pitfalls that mark it today. More than a collective exposition of the field, and more than a scholarly debate or intellectual 'discussion' as such, the authors are engaged – to borrow a musical term – in something of a 'call and response': commentary, rephrasing, return. This approach is not just a stylistic choice in the mode of representing one's research. It is also a style of research itself and one that, in the authors' view, may be all the more necessary for a field that often finds itself wrought by dialogue and argument of a very different nature. Instead of rehearsing the static philosophical 'camps' in which one tends to be caught today even before one begins to think about the scene of animal law or animal rights, the authors try to create a space for new problems to be defined, methods to be explored and tools to be shared. In this way, it may be possible still to think seriously about non-human animals and the law, without jumping to speak on behalf of one or the other.

WHY LOOK AT ANIMALS?

Yoriko Otomo: In his essay 'Why Look at Animals?' John Berger writes:

> to suppose that animals first entered the human imagination as meat or leather or horn is to project a 19th century imagination backwards across the millennia. Animals first entered the imagination as messengers and promises . . . the choice of a given species as magical, tameable and alimentary was originally determined by the habitats, proximity and 'invitation' of the animal in question . . .[1]

It seems a great loss that this richness of imagination of which Berger reminds us, has been reduced to a language of regulation and to the depiction of animals as being empty of experience. For Berger, it is important to recuperate a sense of what animal life could be, by writing about the affective relationships between animals and humans. I think that we too seek to recover a heritage of sorts by examining how jurists have conceived of animals in the past.

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[1] John Berger, 'Why Look at Animals?' in John Berger, *About Looking* (Bloomsbury 1980) 4.

Edward Mussawir: Yes. But, I think that it's also necessary for there to be jurists now and not just as a thing of the past. The jurists of the future will I figure have very good reasons to continue to look at animals. This wouldn't necessarily be to peer somehow into their inner experience, nor out of a nostalgia for a lost intimacy with the animal world or out of a perceived need for juridical institutions to react to the moral crises that modern production and destruction and marginalisation of animal life creates seemingly like never before. Much less would it be to simply stoke the fire of legislation and regulation in response to political, ethical, environmental causes of the day, or in response to the biotechnologies of the future that will place the human and the animal into new configurations that we are told will supposedly 'challenge' law. The reason would be rather one that I think is actually quite far from Berger's concern in his essay. The jurist is a craftsman rather than a public intellectual, and his or her craft surveys a territory that is a world apart from that of metaphysics, from philosophical speculation, even from political and cultural theory, and far apart especially from the ironic, acerbic wit of the social critic. The concern of the jurist is a sober one: one that Gilles Deleuze (himself a philosopher rather than jurist) once described as to 'invent the right'.[2] Legal science, jurisprudence, has no resort to the figurative ease of literature, the metaphor that Berger says is the 'essential relation between man and animal'.[3] It deals instead with institutional categories, definitions and qualifications in which there is no 'essential relation', only the sign or shape of an outer makeshift technical envelope. Such a science, I like to imagine, mustn't simply tie its fate to the certainties or uncertainties of the humanities in general. Its task is to secure for itself some authentic form of experimentation of its own. In this way, it has a special need for the most diverse approaches and non-conventional forms of legal study.

Y: I would want to hold on, however, to the possibility of extending our concern for what you describe as law's 'technical envelope' to looking at how this is produced by, and produces, our society. Particularly because society asks so much of law in its management of human/animal relations, with the humanities tending to leave legal discourses of animal rights and animal welfare unchallenged. In that sense we do perhaps need to remain attentive to different ways of looking, while at the same time working out what law's own questions of 'the animal' might be. You say that jurists for example will have good reasons to look at animals in the future. Why

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[2] Gilles Deleuze, *L'Abécédaire de Gilles Deleuze, avec Claire Parnet* (DVD Editions Montparnasse 2004).

[3] Berger, 'Why Look at Animals?' 7.

animals in particular? What problems of jurisprudence do you see them raising?

E: Animals often challenge legal categories. However what's interesting is that the discourse of animal rights has not had an immediate interest in what I would call, along with Deleuze, 'cases for jurisprudence'[4] – cases that extend and interrogate the immanent and technical limits of legal thought. Animal rights discourse is content to wage the scholarly battle largely on a moral philosophical terrain and on the legal front through purely ad hoc pragmatic and strategic approaches shaped by a more general practice and inclination for advocacy. But the technical craft of law and legal science has much to offer the kind of critical project that animal law scholarship hints at. Contemporary animal law research and certain strands of environmental law for example seem to construct a novel domain for an important legal category: the subject of rights. But the critique is not carried far enough when, rather than displacing this subject from the centre of legal thought, it is instead recouped and even extended beyond what the scholar has seen as its traditionally cloistered (human) limits. In this way, the ideology of legal liberalism is confirmed only more strongly. It confirms in other words an inability to imagine any kind of legal status (for an animal for instance) outside of being or becoming a subject of rights; an individual who can have its claims recognised and satisfied before a uniform and universal rule of law. When jurisprudence is concerned on the other hand with discrete cases concerning the subtle and peculiar contours of the legal person – its minor, modest, technical beginnings – the inquiry into the subject of rights comes from a vastly different angle.[5] In both situations it is true that one is dealing with the recognition of a form of non-human legal personality. But whereas animal rights discourse has the tendency to see the extension of legal personality to animals as the sign of a subjectivity 'won' (or worse 'granted') for a category of being whose natural moral/ethical significance is not questioned, jurisprudence concerns itself only with testing, through certain limit-cases, the stability of the juridical category of the 'subject' itself: a category that most modern legal and moral thought has tended simply to presuppose.

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[4] Deleuze, *L'Abécédaire*.

[5] See e.g. Yan Thomas, 'Le sujet de droit, la personne et la nature: sur la critique contemporaine du sujet de droit' (1998) 100 *Le débat* 85.

LAW AND THE QUESTION OF THE ANIMAL

Y: So you're saying that on the one hand jurisprudence has a more limited interest vis-à-vis animals, in that it sees them only through the lenses of juridical categories; on the other hand, it offers a more radical potential for thinking about animals: the potential to destabilise modern notions of subjectivity by thinking about how they are made and unmade by law. How have you taken up this potential in your own work?

E: One of the main questions that I thought we needed to ask for the project in *Law and the Question of the Animal*[6] was: how can one return the discourse of animal rights to a critical jurisprudence: to a technical and intellectual discipline of 'right', *ius*, on the one hand, but also to a critical method able to hold on to the uncertainties of the categories of the human and the animal? In my own chapter in that collection, 'The Jurisprudential Meaning of the Animal: A Critique of the Subject of Rights in the Laws of Scienter and Negligence',[7] the approach that I had taken to this problem was to consider the common law principles relating to the liability for damage caused by animals and more specifically to the jurisprudential meaning of the animal that emerges when one considers it through a shift between two different civil juridical forms: the action of *scienter* in which liability turns on knowingly keeping an animal of a certain type, and the action of negligence in which there is no animal, or if there is an animal it is no more than a mere accident; a circumstance of a more general, more abstract duty to neighbours. This approach, which built upon the work of others in this field such as Bernard S Jackson,[8] seemed to offer a few modest methodological advantages. Firstly, rather than trying to ascribe or transcribe a pre-determined objective value or significance to the animal from some external disciplinary field, or developing arbitrary criteria that lend themselves to a categorical application of normative or ethical precepts within law, the approach allowed a treatment of the meaning of the animal within the registers that law itself has constructed for ordering its practical knowledge of civil liability. However, far from simply replicating

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[6] Yoriko Otomo and Edward Mussawir (eds), *Law and the Question of the Animal: A Critical Jurisprudence* (Routledge 2013).

[7] Edward Mussawir, 'The Jurisprudential Meaning of the Animal: A Critique of the Subject of Rights in the Laws of Scienter and Negligence' in Yoriko Otomo and Edward Mussawir (eds), *Law and the Question of the Animal: A Critical Jurisprudence* (Routledge 2013) 89.

[8] A substantive bibliography of Jackson's work on liability for animals appears in Bernard Jackson, 'Liability for Animals: An Historico-Structural Comparison' (2011) 24 *International Journal for the Semiotics of Law* 259.

the prejudices that animal rights proponents identify as long entrenched in the history of the Western legal tradition, the aim and effect was instead to critique the category of thought (the subject of rights) that this tradition has – in its modern formulation – treated as itself a kind of dogmatic or axiomatic predicate. In this way, some of the preconceptions of the field of study seemed to me to be able to be displaced. The attention, in the exercise of this methodology, did not need to be cast once more on whether or not an animal can be recognised as a subject of rights. It could be cast instead on how the animal itself can – within its jurisprudential meaning – be understood as a modification of that very subject.

A second methodological advantage was that the approach seemed to allow me to circumscribe some of the registers in which animals and the rights of animals in particular tend to be spoken for by others. One of the difficulties peculiar to the field of animal law today relates to the ability to tie this field to a *jurisdiction* as such, to a discrete idiom and territory of right. It's true that an advocacy group like the Non-human Rights Project (an organisation that describes its mission as: through 'litigation, to change the common law status of at least some nonhuman animals from mere "things," which lack the capacity to possess any legal right, to "persons"')[9] has found the need, from a purely strategic viewpoint, to take account of detailed jurisdictional advantages and disadvantages of conducting their litigation in certain forums and through certain legal forms over others.[10] The entire aim of this project is like that of a prospector hoping to find the weak point in a legal terrain, hoping to find the perfect 'animal petitioner' to represent in order to provoke a judge, any judge, into finally extending the category of the subject of right beyond the species barrier. But the close connection that animal law as a field of scholarship has with such a practice of advocacy that tends to motivate everything from the juridical to the purely polemical engagements with animal rights means that it is all the more difficult for any kind of prudence to emerge in relation to understanding how, if at all, animals themselves may speak in the language of right. As soon as an animal appears in law, it appears as though it is already being spoken for. The advantage that I had imagined in the study of liability for animals was that, by holding only more tightly to the procedural register of law – a register that, whether it includes or omits the animal as a technical element, at the very least resists operating purely as *metaphor* – one can at least afford the animal a little more earnestness within a field that has not yet completely erased the subtlety of its strict juridical status.

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[9] The website is <www.nonhumanrightsproject.org> accessed 1 October 2015.

[10] E.g. through the writs of *habeas corpus* and *de homine replangiando*.

Y: What you find in that chapter is indeed surprising: our notions of modern law as being progressive (gradually extending its circle of protection to include more types of animals as we become more civilised) are turned inside out. Your contrast of the medieval law of *scienter* with the modern law of negligence shows that under the former, courts looked to the nature or tendency of animals who caused harm, while under the latter they did not. What you show there is that we have lost something in that transition: the tendency of courts to look at each animal as a subject (with their own desires, tendencies and capacities), although of course even these ascriptions were very limited in terms of practical benefit to the animals themselves. The importance of your argument is borne out still more strongly, I think, in relation to modern laws regulating dangerous dogs. When today a dog causes harm to a human, they may automatically killed by the state in the name of public security. Certain breeds of dogs may be banned altogether. So individual dogs – and the context of the harm enacted, as well as their specific relationships to the human community – have become invisible to the court, which has forgotten the legal technology with which they might look at those animals.

E: Yes, absolutely. At the same time, for me it seemed as though it was easy to underestimate the value in law when it staunchly refuses to look at animal 'subjectivity' as such, rather than what the animal (and its appearance in law) modifies within the category of the 'subject of right'. It seemed to me important to note the remarkable difference in the law when it makes a wrongful act depend upon the specific nature of the animal that one keeps as compared to a more general and abstract breach of duty in which keeping a dangerous animal is like any other factual circumstance. This was one way at least to respond to the call in *Law and the Question of the Animal*: the need for the construction of a critical jurisprudence around the animal.

I feel that your own research has constructed a unique and perhaps somewhat more critical engagement with this emerging discipline of animal law. Would you describe your approach as 'critical' and, if so, what should that term mean in contemporary legal scholarship?

Y: My curiosity about animal law derives from the disconnect between my experience in living with, observing and eating animals, and the way in which laws regulate animal life. What I mean is that international agreements which deal with animal life (within the rubric of biodiversity, animal health and welfare) focus on controlling the risks involved in the production and consumption of animals and ecosystems. In these regimes, animals are dealt with in terms of the relevant category: endangered; wild; invasive; food. On the other hand, laws that purport to deal with animals

as sentient beings grant certain categories of animal varying standards of comfort for their welfare, without recognising any basic interest that they might have in being alive. Neither set of modern laws (which are usually taught separately as environmental law and animal law) engages with animals as individuals or as beings outside of human jurisdiction. And yet, our human interest in animals – as friends, protectors, family, food, hunters, symbols, archetypes, metaphors, and so on – is so rich and is invested most certainly in keeping animals alive. Animals, or at least the idea of 'the animal' as the binary opposition to 'the human', also abound in political treatises that give us our founding suppositions for modern law. So I suppose I am interested in a few different aspects of 'animal law': the ways in which 'humanity' has historically emerged as a concept in opposition to animality in legal texts; the consequent legal categorisations of animals, and the ways in which we have to justify or hide our hypocrisies. In the course of research, I also can't help but notice the myriad ways in which our anxieties about our regulation of animal life manifest, as well as the ways in which the animal itself (whether that be a group, species, individual, or the idea) often exceeds law's knowledge of it.

And I've been writing about these concerns using various different methods. My first foray into animal law deconstructed Japanese animal welfare legislation to show how what seemed on its face to be a politically progressive project was in fact enabling the very violence it purported to redress.[11] Subsequent projects such as my contribution to *Law and the Question of the Animal*[12] try to make sense of endangered species legislation with reference to the ontotheological stakes of such enactments.[13] The work of environmental historians has influenced my work a great deal, as they've shown me interesting ways of tracing animals across time. By looking at historical texts (including case law and legislation) as cultural objects, we can contextualise the ways in which we think and talk about

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[11] Yoriko Otomo, 'Law and the Question of the (Non-Human) Animal' (2011) 19(4) *Society and Animals* 383.

[12] Yoriko Otomo, 'Species, Scarcity and the State' in Yoriko Otomo and Edward Mussawir (eds), *Law and the Question of the Animal: A Critical Jurisprudence* (Routledge 2013) 166.

[13] The term 'ontotheology' was first coined by Immanuel Kant and then used by Martin Heidegger to critique the mixing up of theology and ontology in thinking about metaphysics: see generally Iain Thomson, *Heidegger on Ontotheology: Technology and the Politics of Education* (CUP 2005). Jacques Derrida uses the term in his discussions of Heidegger (see for example Jacques Derrida, *Of Spirit: Heidegger and the Question* (University of Chicago Press 1991), and in his own work, to make sense of the world by deconstructing given discourses with reference to their theological epistemology.

animals today.[14] In doing so, one way of focusing my analysis has been to use feminist theories that show how regulatory discourses have used essentialised notions of masculinity and femininity (as well as heteronormative/homosocial relations between the two) to produce modern notions of what animals are, and how they relate to humans.[15] Is my approach to the discipline 'critical'? I think it is, in so far as I question the generally accepted liberal discourses of animal welfare and animal rights. It is also less focused on a strictly jurisprudential approach to the question of the animal than your work: I'm interested in understanding our shifting political economies by tracing histories of juridical ideas.

HUMANE/INHUMANE

E: It does seem that welfare is a dominant trope when it comes to speaking about the animal in relation to law. How do you think that scholars can or should contribute to discussions about welfare, or even to discussions about animal rights?

Y: There are many ways of thinking about the relationship between humans and non-human animals, and 'rights' is one way of framing it. The idea that certain entities (formerly property-owning men, more recently also women and children) can claim certain things against the state is certainly compelling. As you mentioned, there are people bringing

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[14] This is something that I pursued with colleagues from the UK and Australia in a special issue of the *Australian Feminist Law Journal* 40(2) that I edited with Cressida Limon in 2014, entitled 'Dogs, Pigs and Children: Changing Laws in Colonial Britain'. Another recent project, written up in 'Law/The Trial of Farmer Carter's Dog, Porter' in Lynn Turner, Ron Broglio and Undine Sellbach (eds), *The Edinburgh Companion to Animal Studies* (EUP 2016) examines an eighteenth-century satirical play written for a London coffeehouse, on the trial of a dog for the murder of a hare. I have dramatised the play itself for radio (on file with the author).

[15] One example is a co-authored study into the colonial history of international wildlife conservation law, where I argue that the gendered economy of the hunt has been transmuted into a narrative whereby white, civilised and upper-class men save (feminised) endangered species from barbaric, lower-class men: Mario Prost and Yoriko Otomo, 'British Influences on International Wildlife Law: The Case of Conservation Law' (forthcoming, 2016) *British Institute for Comparative and International Law*. Another example is my article in the above-mentioned special issue: 'The Gentle Cannibal: The Rise and Fall of Lawful Milk' (2014) 40(2) *Australian Feminist Law Journal* 215, which traces a postcolonial history of human and animal milk production and consumption.

legal claims (sometimes successfully) on behalf of certain great apes at the moment, arguing that those individuals have legal personhood.[16] It's understandable why you might want to fold more and more animals into the 'protective ambit' of the law, but it's also worth being wary of this, since questions about which rights accrue to which species, and under what circumstances, will always be a part of more general exercises in line-drawing. 'Animal welfare', on the other hand, is a term often associated with 'animal rights' on the liberal end of the political spectrum. What distinguishes it from the animal rights discourse is that it is far more explicitly anthropocentric – 'welfare' is a conversation about the comfort of certain species in certain jurisdictions for defined aspects of their existence, while 'rights' requires the law's recognition of something intrinsic in individual animals that entitles them to make constituent claims against the state. I think that it's important for us, as legal scholars, to engage in discussions about welfare and rights, not least because scholars in other disciplines who are thinking about animals may suspend their critical analysis of law. There's an eagerness in both scholars and activists who care about animals to believe in there being a 'good law' or of a 'justice that will prevail' as well as there being 'bad laws'.

E: What about animals that are routinely killed, is it a concern for their 'welfare' that replaces something like a concern for their proper sacrifice? And what's at stake, then, in the idea of the lawful killing of animals? If we speak of 'humane killing' and 'inhumane killing', does that refer to anything tangible from a jurisprudential point of view?

Y: If you look at welfare laws around the world, animals we want to eat, farm, annihilate – as well as those we want to pet and protect, are always exempt from the general prohibition on killing. Legislators are unable to think of the animal as having a relation to death, and among all the professions that deal with animals, they are alone in this.[17] And then here, you bring in a theological term – I agree with you that this inability on the part

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[16] For some recent examples see Ciméa Barbato Bevilaqua, 'Chimpanzees in Court: What Difference Does it Make' in Yoriko Otomo and Edward Mussawir (eds), *Law and the Question of the Animal: A Critical Jurisprudence* (Routledge 2013) 71.

[17] I've spoken about this previously in a paper delivered at a workshop organised by Marie Fox, called *Research with Living Beings* (Keele University, June 2011): 'Good Deaths and Competent Executioners: The Animal Life of EU Directive 8869/10', on file with the author. In that paper I examined key concepts in that new animal welfare Directive (unnecessary suffering and competence) to argue that in it, the killing of animals is couched in terms of a logic of sacrifice: a sacrifice that takes place in the name of the state, carried out by state-authorised

of modern legislators has something to do with notions of sacrifice. But that's not to say that they aren't concerned about the 'proper' sacrifice of animals – on the contrary, the work that framing *killing* in terms of welfare undertakes, is neither inattentive nor benign. Legislators are deeply concerned to ensure that any killing of animals is cast precisely as a proper sacrifice – in the name of the state. This effectively takes away the power of animal and humans within a sacrificial economy that lies outside the ordinary jurisdiction of the state, such as that ordained by a religion.[18] This appropriation of a religious economy to shore up the authority of the state is managed not only by discursive reference, but also by practical means, by determining who can and cannot kill, which animal, and when.

We can see this clearly in the evolution of global wildlife conservation policies, which can be traced in part to the criminalisation of local subsistence hunters in Britain for killing game animals reserved for the landowners (for the 'poachers', this was an act of survival and resistance following the ongoing enclosures movement). This governance technique was transposed to British colonial India and Africa, where legislation was enacted describing the killing of wild animals using techniques employed by Africans and Indians as 'inhumane' (and illegal).[19] The only kind of killing that was designated 'humane' was by firearm (which colonial administrators and their visitors were licensed to use). So 'humane' killing as described in law is killing that is authorised by the state, whereas 'inhumane killing' is not. Moreover, 'humane killings' can be enacted in the form of a public spectacle (the burning of chickens at the outbreak of a virus; the culling of badgers for increasing costs to the beef industry) in order to consolidate the power of the state. From a jurisprudential point of view, this means that for law as a source of authority and as a system of knowledge, the death of animals *means* something.

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killers (who are determined to be 'competent' executioners, harking back to the era of human executions in the UK).

[18] For a detailed analysis along these lines, see the work of Dinesh Wadiwel, 'Whipping to Win: Measured Violence, Delegated Sovereignty and the Privatised Domination of Non-Human Life' in Yoriko Otomo and Edward Mussawir (eds), *Law and the Question of the Animal: A Critical Jurisprudence* (Routledge 2013) 116.

[19] Mario Prost and Yoriko Otomo, 'British Influences on International Wildlife Law: The Case of Wildlife Conservation' in Jean-Pierre Gauci, Robert McCorquodale, Jill Barratt, Andraž Zidar and Anna Riddell (eds), *British Influences on International Law* (British Institute for Comparative and International Law, 2016).

DOGS/BEARS

E: Does the species of animal itself play any part in this juridical arrangement, whereby they become expendable lives in the service of the state? Take the example you gave earlier, dogs: there seems to be no shortage of examples of law giving a kind of special treatment to that species of animal. Do you think that this correlates to a special or necessary importance of the dog in law? – Or is it down to a sociological given, a factual familiarity and domesticity between humans and dogs?

Y: The figure of the dog is a very lively one in many cultures. They are able to embody not only our human spirit, but the spirit of their given community. So they carry attributes of loyalty, purity (in their bloodline) and protection (in their muscular strength or their ability to course and kill). In short, they are the keepers of law: the law of the 'hood; the law of the home; the law of an ethnic community; the law of the landed gentry; and so on. And for that reason they might be of particular interest to the state, since dogs are invested with this symbolic power that potentially undermines that of the sovereign.[20] The 'special treatment' that dogs get is therefore aimed at maintaining their domesticity (through culling, breeding, etc.); in so far as this domesticity indicates powerlessness, the regulation of dogs should interest us as it reveals something about the thought of law.

In one of your recent pieces you focus on the meaning of the bear in jurisprudence, giving the example of a case called *Shaw*, a case regarding a kept bear who injured a person.[21] In your analysis, the bear seems to reveal the changing thought of law in this way – the meaning becomes obscured over time, becoming a less distinctive figure. Do you think that this indistinction reflects a more general societal or jurisprudential change in attitude towards animals? Or is such a question unimportant (is your aim primarily to track a shifting jurisprudence, without drawing broader conclusions)?

E: There are of course considerable limits to what we can know about the societal changes. It is often tempting to brush some of those limits aside, and assume a fairly straight progression – whether that is a legal progression toward greater 'abstraction' in the juridical presentation of

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[20] There is an excellent article that discusses the importance of this relationship between law and the dog at length: Norbert Schindler, 'Dog Wars and Human Rights: Perceptions of Political Despotism at the End of the *Ancien Régime*' (2006) 24(1) *German History* 1.

[21] *Shaw v McCreary* [1890] 19 OR 39 (Chancery Division).

animals, or an ethical progression toward greater consideration for the predicament and vulnerability of animals in themselves. From the point of view of jurisprudence, both of these pictures only tend to mask a more important technical operation. It is not for the legal scholar to correct the historical ledger so to speak; nor to be a kind of revisionary surveyor of the history of the ideas and practices, let alone of the 'attitudes' that would supposedly lie behind the mask of legal form. As legal scholars, it is worth acknowledging – for the sake of a methodology that one could still call one's own – that the paths between what allows the scientist to observe in the nature of society (its changes in attitude and so forth) on the one hand and what jurisprudence makes one capable of seeing on the face of the text of law, is less direct and more circuitous than what it is often tempting to believe. If the law can be considered less a system than an array of make-shift experiments, then the task of the legal scholar is more circumspect but also more necessary than we might first think. This task isn't so great as to require one to reconstruct some transparent interplay of forces, be they historical, social, economic, political, cultural, etc., operating behind the merely formal procedural envelope of law. It would only be to attempt to understand the law as the provisional instrument through which these forces (social, cultural, etc.) are acted upon as well as the kind of lens through which one is capable of viewing the gap for instance between the sedimentation of rules (necessarily abstract) and situations, like life, that are irreducibly singular.[22]

So yes, modern jurisprudence has a tendency to try to hide the fact that an animal itself (and not just its abstract or projected cultural signification) may be the decisive element on a point of law. To come to the example of *Shaw*: it was a Canadian case of the 1890s that concerned civil liability for a bear that escaped from the property where it was being kept and which attacked a child on the street.[23] The property was occupied by a husband and wife, and while it was the husband who had brought the bear to the property and kept it there, the wife was (according to a statute recently passed in Canada at the time allowing a woman to own property independently of her husband) the sole owner of the property itself. The dispute was whether the wife could be held liable for the bear-attack in addition to the husband. The trial judge, we hear, answers the question in the negative on the basis that the wife could not have properly objected to the husband's wishes of keeping it there. The appeal court then overturns

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[22] For a more detailed treatment on the task of legal history, see especially Yan Thomas, 'Présentation' (2002) *Annales. Histoire, Sciences Sociales* 1425.

[23] *Shaw v McCreary* [1890] 19 OR 39 (Chancery Division).

that decision and says that the wife, as owner, having the full right to have the bear removed from the property, therefore should equally be held liable for its actions. There is also a further commentator on the case at the time who makes an alternative argument in a law journal against the decision reached in the appeal court on the basis that property owners in general cannot be expected to know or take precaution against the dangers to third parties where some other person has decided to bring a bear onto the property.[24]

What's interesting in the case is the framing of this jurisprudential problem and the kind of figures one resorts to in order to try and resolve it. Now, it's true that the bear itself doesn't allow itself to be easily held on to in a juridical sense: one seems to prefer the safety of abstraction and analogy to other figures than the unsettling presence of the animal itself. But part of my approach in the article was specifically to show not just that there was this shift of jurisprudential register in the meaning of the bear (from a distinct to a more amorphous figure), but also how this seems to allow us to isolate the place that the animal has in what can be done and what can only be done by means of law. This isn't to ignore that law is embedded in and as a set of practices that are always deeply social, cultural, etc. It's to acknowledge that it is embedded in these in a fairly narrow and peculiar way, with law needing to establish and adapt the procedural forms through which an indeterminate set of facts can be given to judgment and to juridical knowledge. When what makes the animal itself (such as the bear) stand out in a given set of facts as a distinct point of meaning and significance is the procedural form of law itself (and consequently also its formulation as a rule or principle), and not simply the shifting societal or cultural attitudes in general, then one needs to account for the isolation this animal achieves here in its specifically technical legal guise. From that point of view one can see the trial judge in *Shaw* for example as not just beholden to certain prejudices of 1890, but rather unwittingly reverting to an older matrimonial significance of the bear in jurisprudence – one in which it is taken as a solemn spousal gift whose meaning takes precedence over the abstract rights of ownership. According to this juridical symbolic the woman (even as property-owner) could not have validly rejected a bear offered to the household, despite the demands made by third parties who may be injured by the animal.

Y: I like your insistence on discovering what a particular *law's* bear is, rather than arguing for what law's bear should be. And you're also right,

[24] Anonymous, 'Liability for Injuries by Mischievous Animals' (1890) 26 *Canada Law Journal* 421.

of course, that we should be careful not to draw lazy conclusions about an evolution of jurisprudence on animals over time – as you point out, generalisations drawn from critical analysis are just as prone to falling into the liberal trap of development narratives. But as researchers and teachers of law, I think that we need to take responsibility for the political (social, cultural, economic) ramifications of law's embeddedness in the world, as it produces certain ideas of animals (and human/animal relations) through its creation of institutional categories. In terms of our scholarship, I would argue that taking responsibility extends to 'correcting the ledger' and writing revisionist histories, both about what law has done in the past and about how it has engaged with a transhistorical interplay of forces (to use your phrase) to produce previous or current assumptions about the animal. From a feminist perspective, this kind of work is particularly necessary given that the majority of historical accounts (on all topics, including animals) have been written by men, within a social context that devalues women. Such revisionism doesn't necessarily have to present itself as revealing the truth about law or its subjects; we have the luxury of presenting our commentary using different forms of writing, such as poetry, satire, parody, and so on. The task of securing methods of 'authentic experimentation', to pick up your phrase from the beginning of our conversation, is perhaps a more sober one, as this presumes that we step into the office of law-maker (or at least channel their interests).

GENDER/THE ANIMAL

E: I'm interested in the attention to the question of gender in your approach to the field of animal law. Do you think it is possible to introduce a feminist analysis to a field that takes the question of the distinction between human and animal as its point of departure or critique?

Y: Absolutely, yes. While the dangers of essentialising 'woman' (as well as 'animal') inevitably lurk in the background, we can certainly critique the discursive constructions of gender and species.[25] And coming out of that critique is a speaking position that does not have to present itself as an autonomous, authentic subject, but as an interpellated being that has certain experiences and wisdom. It's this register that I was trying to arrive

[25] 'Essentialism' is expressed for example by reducing those of a particular sex to specific characteristics and capacities and interests (this could also be said for reducing animals – species and individuals – to the same). Aside from imposing generalisations onto individuals this risks depoliticising what is actually at stake.

at in an article that I've written on the production and consumption of milk.[26] The driving tension in that piece is the distinctions and similarities of the lactating woman and the lactating cow.

From the perspective of a feminist legal scholar, there are two patterns that stand out in the regulation of milk over the nineteenth and twentieth centuries. One is the commercialisation of milk production, which has moved the locus of activity from the domestic sphere to the industrial, replacing a multitude of breastfeeding practices, human and animal alike, with a standardised product manufactured from cows' milk. The other is the gradual political capture, by the state, of the symbolic power of milk, wresting it from a religious symbolic economy and from the control of breastfeeding women and cows. I argue that there has been a gradual transformation of cows' milk into a sanitised, standardised global commodity, and that human breastfeeding has been designated an activity subjected to the state's notion of 'the good mother'. The bond between the feeder and the fed has thus been reconfigured over time, shaped in the present day by the liquid that I call 'lawful milk': milk whose extraction and consumption produces lawful subjects, and milk whose national and global distribution acts as a purifying force for the state, making territory lawful.

E: This study seems to me to elegantly maintain the centrality of gender to an analysis where quite obviously it is not possible to be speaking simply for 'women' as a human gender let alone for that portion of non-human animals we designate as 'female'. The story you tell about the place that milk has had in the legal imagination of nourishment, for example, helps makes sense of what might at first appear as unrelated forms of regulation: regulation of animals in the context of their use for large-scale production, and of gender in the construction as you say of 'the good mother'. You show how these forms of regulation are actually about far more than just health and so on, and how it in effect works to deny or disrupt the underlying human–animal relation at its base. You point in that study to a history of the practice of interspecies breastfeeding. What place does law seem to have in relation to taboos over such human–animal relations?

Y: Taboos, as theorists such as Mary Douglas and Sigmund Freud have pointed out, can reveal some very interesting things about their societies. What I think the modern taboo of interspecies breastfeeding reveals is a deep fear of intimacy and desire between humans and animals, as well as a fear of the potential that such an act of care raises in terms of empathy

[26] Yoriko Otomo, 'The Gentle Cannibal: The Rise and Fall of Lawful Milk' (2014) 40(2) *Australian Feminist Law Journal* 215.

(and in turn, disrupting our social symbolic order; the authority of the state, global capitalist relations, and so on). In your work you've touched on the domestication of the dangerous power that women and non-human animals hold (that of bearing life), through a ritual called the *arkteia* (as a ritual that secures the city state by banning animality and the femininity of prepubescent girls).

E: Yes, I think that was at least what Jean-Pierre Vernant's interpretation of it was: this ancient Greek ritual of the *arkteia*.[27] Apparently there is still a paucity of evidence to confirm or disconfirm it. To be honest there was lots to be uncertain about in my own analysis. It was pursued in the context of a study – discussed earlier – whose aim was to explore the juridical signification of the bear. Now, the sources through which to explore this problem don't necessarily present themselves straightforwardly. One approach I followed was to focus on the juridical forms through which civil liability for bears were constructed for example in English common law and their subsequent fate in modern jurisprudence. But this ends up being a very indirect way of approaching the possibility, as I had tried to test, of finding the animal attached to a specific juridical thought as such: the bear as a technical legal operation (and not just as a rhetorical, figurative representation, etc). To follow the more direct route, I was indebted to a study of a private scholar of law and philology, JJ Bachofen's *Der Baer in den Religionen des Alterthums*: a study which on the one hand sought simply to interpret a small Roman artefact, a statuette of a bear, and on the other hand to offer an account of the fullest meaning of the animal itself, the bear, in the religions of antiquity. It's a study that constantly sends the reader I imagine towards new, sometimes unfamiliar and unconfirmed terrains. But it is one that at the same time offers a kind of light to illuminate some of the more uncertain paths. Bachofen had previously tried to uncover the evidence for an ancient maternal legal symbolic in his more famous work *Das Mutterecht*. However in his discussion of the *arkteia* – a certain bear-imitation ritual supposedly undertaken by ancient Athenian girls – he also thought that he recognised the perfect expression of 'religious matriarchy' and 'the oldest system of family law'.[28]

There has been much written about the *arkteia* since Bachofen's 1863 work, new evidence, artefacts, new theoretical positions, etc. But I feel that it is still Bachofen's study that offers the clearest (or at least the most

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[27] Jean-Pierre Vernant and Françoise Frontisi-Ducroux, 'Features of the Mask in Ancient Greece' in Jean-Pierre Vernant and Pierre Vidal-Naquet, *Myth and Tragedy in Ancient Greece* (Janet Lloyd trans, Zone Books 1990), 197–198.

[28] JJ Bachofen, *Der Baer in den Religionen des Alterthums* (Ch. Meyri 1863) 26.

heartfelt) guide, if for no other reason than for him, I think, it was not necessarily a question of what social attribute the animal acquires through ritual or taboo, rather it is a question of the animal appearing in its isolation, in its full independence. For him, the *arkteia* stayed faithful to a pure arrangement of maternal law. It's the repetition of the image of mother in the protection offered and secured for daughters, daughters for granddaughters and so on: motherhood in its ethical, protective, caring nature. The image of the bear, he can then go on to suggest – interpreting certain tomb signs where the bear is depicted alongside a mother and her young daughter who survive in the world separated from the deceased husband – 'nowhere speaks as strongly as next to the presentation of widowhood, her loneliness, her sorrows and agonies'.[29] The *arkteia* in this way offered some important clues to the operation of law, the legal thought traced by the animal and the animal in its pure self-sufficiency. It's interesting that Walter Benjamin described Bachofen as creating what he called 'scientific prophesies'.[30] I think sometimes one especially needs the work of scholars like that – perhaps all the more so in research into animals – scholars who are willing to risk the truly unverifiable at the heart of science.

SACRED/PROFANE

Y: Something that has interested me over the last few years has been the role of the sacred and the profane in our ideas of nature, particularly as they are expressed in international environmental laws. Where does the sacred now lie, where once it adhered to certain individuals, relationships, species or places?

E: One lesson I have learnt from studies on the work of Yan Thomas is that it is worth going back to what meaning some of these terms had in the thought of Roman jurisprudence.[31] Not because this offers us a model or system to make use of today, but because what's often ignored is the way in which these meanings, far from depending upon or reasserting the religious taboos of the time, the social prohibitions at their base, in fact

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[29] Ibid, 27–28.

[30] Walter Benjamin, 'Johann Jakob Bachofen' in Walter Benjamin, *Selected Writings Vol 3 1935–1938* (Edmund Jephcott trans, HUP 2002) 11.

[31] See e.g. Yan Thomas, 'La valeur des choses: Le droit romain hors la religion' (2002) 57(6) *Annales: Histoire, Sciences Sociales* 1431; and Yan Thomas, 'Res Religosae: On the Categories of Religion and Commerce in Roman Law' in Alain Pottage and Martha Mundy (eds), *Law, Anthropology and the Constitution of the Social: Making Persons and Things* (CUP 2004) 40.

had something of the opposite effect. For things considered *res sacrae* (a sacred thing) for example, the status of which rested upon the thing being properly consecrated to the gods, the jurists construct a technical legal knowledge not around the proper forms of consecration or 'sacredness', but around the function of *res*; the procedural element through which the thing qualified as sacred becomes something contested and a 'thing' of law. In this way, the part of the sacred that interested jurisprudence was already far from having any concern with God. Similarly, the animal rights discourse that takes as the sole object of its endeavour to displace the prejudice which has enclosed animals in the status of 'thing', i.e. as opposed to 'person', seems to seriously distort the jurisprudential terrain that gives meaning to the terms. It is not necessarily by way of personification that the law would protect, remove from the realm of the ownership, recognise the moral autonomy of some being. Rather it would be by constructing a special status of 'thing', which, like 'sacred things', is outside the realm of ownership, exchange.

I'm interested in whether there are, for you, any new projects that come to mind in terms of exploring the categories of the sacred and profane in relation to animals?

Y: Yes, it seems to me that law is central to the very process of profanation – that is, the process of taking something that is sacred (potentially everything that is non-human) and turning it into something worldly, available for human consumption. Law is central to the process precisely because it has the capacity to imagine a way of looking to transform our relationship (our rights and obligations) towards it. The juridical process also decides the capacity of the thing in question, be it animal or anything else. So what interests me is looking at how law – in different periods and jurisdictions as well as in the international domain – negotiates the various statuses of animals. There is so much work to be done here, and while attaching a contemporary relevance to critical analysis is not necessary as such, I think that research of this kind would enrich jurisprudence.