

A CRITICAL ASSESSMENT OF BILL S-203, *ENDING THE CAPTIVITY OF WHALES AND DOLPHINS ACT*: CHALLENGING THE EXCLUSIVITY OF ANTHROPOCENTRISM AND SCIENCE-BASED JUSTIFICATIONS

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Bill S-203, An Act to amend the Criminal Code and other Acts (ending the captivity of whales and dolphins) became Canadian law in 2019, banning the captivity of cetaceans. This Article critically examines Bill S-203, arguing that it is underpinned by anthropocentric and science-based justifications that will work as exclusionary forces against many animals in need of legal protection. Instead, the Article advocates for an empathetic and multi-jural approach that accounts for human-animal interconnectedness and the unique cultures of animals. This argument is theoretically rooted in vegan ecofeminism’s empathic and non-binaristic perspective. As such, this Article scrutinizes the reasoning behind Bill S-203, asserting that the justifications employed by its proponents are exclusionary. The bill was presented through an anthropocentric lens, focusing on minimizing the captivity of select humanized animals while overlooking other unique animal qualities. Additionally, similar proposed legislation for great apes and elephants would perpetuate these anthropocentric tendencies. An alternative, multi-jural approach to legal reform that rejects anthropocentrism and science-based reasoning can recognize animal-human interconnectedness by leveraging the language of Indigenous legal orders in Canada. Such an approach would acknowledge the distinct norms, lifestyles, and cultures of animals. This Article contributes to existing literature by emphasizing empathy, alterity, and the importance of recognizing the interconnectedness of all life forms. It strives to carve out a space for the legal consideration of the ‘laws’ of other-than-human animals, challenging prevailing anthropocentric paradigms in animal legal protections.

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I. INTRODUCTION

In my community, the Anishinaabe recognize that we are all related, not just you and I, but you and I and all life forms of creation. As living things, we are connected to each other. We depend upon one another. Everything we do has an effect on other life forms and on our world. . . . So bear in mind why we are here. We are here to take care of our nation, to take care of our land, to take care of the people and to take care of all that is part of this Creation. So *n'gwamazin*: Be strong and steadfast in your beliefs. *Nii-konasiitook*: Take care of all of our relations.¹

Senator Murray Sinclair spoke these words in support of Bill S-203, *An Act to amend the Criminal Code and other Acts (ending the captivity of whales and dolphins)*, which came into law in Canada in 2019, banning the captivity of cetaceans (with some exceptions).² His words stood out as unique among the sentiments of many who spoke in support of the bill. Where Senator Sinclair's words show an understanding

¹ Canada, Parliament, Debates of the Senate, 3d Reading, 42d Parl., 1st Sess., Vol. 150, No. 210 (29 May 2018) [hereinafter *Bill S-203 Senate Debate, 3d Reading*].

² *An Act to amend the Criminal Code and other Acts (ending the captivity of whales and dolphins)*, SC 2019, c. 11 (also referred to as the *Free Willy Act*) (Cetaceans are marine mammals of the order Cetacea, including whales, dolphins, and porpoises.).

of the imbricated nature of animal and human lives,³ others focused on the intelligence, socialness, and emotional capacity of cetaceans.⁴ This Article engages in a critical assessment of Bill S-203, arguing that the legislation is rooted in anthropocentric and science-based justifications that work as exclusionary forces against many animals that require legal protection. The path forward should be defined not by human exceptionalism and science-based reasoning, but by a multi-jural approach that exalts empathy, human-animal imbrication, and the unique cultures of animals.

Section I of this Article sets out its theoretical framework, which is rooted in the empathy and non-binarism characteristic of vegetarian ecofeminism. Section II describes how the Canadian legal system views animals as property and treats them as objects. This brief overview of the current legal status of animals is intended to demonstrate the impact of Bill S-203 and to show the amount of work that needs to be done to obtain effective legal protections for animals.

Section III of this Article explores the reasoning and debates behind the bill. It argues that the justifications used by the proponents of Bill S-203 are exclusionary and would preclude the vast majority of animals that require legal protection from benefiting from any momentum generated by this bill. These exclusionary justifications are, first, anthropocentric, and second, science based.

First, the parties justifying the bill to the public, the Senate, and the House of Commons did so using anthropocentric reasoning.⁵ The intent behind the bill was not to abolish animal captivity, but only to minimize the captivity of certain humanized animals,⁶ evidenced by the support offered by the senators and members of Parliament who spoke in support of the bill as they highlighted the human-like qualities of cetaceans, ignoring many of the other qualities that make cetaceans unique among other species.⁷ Furthermore, the reasoning behind Bill S-218, *An Act to amend the Criminal Code and the Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade*

³ Generally, the term “animal” and occasionally “other-than-human animal” will be used in this Article to refer to animals that are not human. This is not intended to affirm and reinforce the perceived human-animal dualism, but to recognize that human animals and other-than-human animals have differences that the law must address. *Bill S-203 Senate Debate, 3d Reading, supra* note 1.

⁴ Canada, Parliament, Debates of the Senate, 2d Reading, 42d Parl., 1st Sess., Vol. 150, No. 8 (22 March 2016) [hereinafter *Bill S-203, Senate Debate, 2d Reading*] (referring to human-like activities performed by cetaceans).

⁵ Jodi Lazare, ‘Free Willy’ Law Spotlights Contradictions in How Canadians See Animal Rights, *THE CONVERSATION* (July 8, 2019), <https://theconversation.com/free-willy-law-spotlights-contradictions-in-how-canadians-see-animal-rights-119583> (accessed Oct. 1, 2023).

⁶ *Id.*

⁷ *Bill S-203, Senate Debate, 2d Reading, supra* note 4 at 385; *Cetaceans*, THE MARINE MAMMAL CTR., <https://www.marinemammalcenter.org/animal-care/learn-about-marine-mammals/cetaceans> (accessed Sept. 25, 2023).

Act (great apes, elephants and certain other animals) and Bill S-241, of the same name,⁸ demonstrates the extent of the entrenchment of the humanizing tendencies introduced in Bill S-203. The anthropocentric justifications used to promote Bill S-203 are problematic because they entrench the suffering of many animals by perpetuating an exclusionary definition of the types of animals that are considered worthy of legal protection. The anthropocentric justifications are also problematic because they endorse dualistic thinking that legitimizes the abasement of anything other than the ‘ideal’ human.

Second, the science-based reasoning behind Bill S-203 acted as a catalyst for its exclusionary, human-centered justifications. Scientific discovery was one of the driving forces behind the bill.⁹ People began to realize that cetaceans are like humans in many ways: they are intelligent, and they have strong social and familial bonds.¹⁰ While the biological sciences are authoritative and influential in their perceived neutrality, they take an anthropocentric view in the way they evaluate animal intelligence.

Section IV suggests alternative ways of proceeding with legal reform that reject anthropocentric and science-based justifications. First, legal reformers should engage in a multi-jural approach that recognizes the interconnectedness and interdependency of animal-human relations. This approach should take advantage of the language that is already present in Indigenous legal orders in Canada and recognize that animals have their own norms, ways of living, and cultures that merit consideration. Second, reformers should engage in an empathetic approach that celebrates the differences between species.

The existing literature in this field engages with the anthropocentric and humanizing tendencies in litigation and legal reform.¹¹ This Article seeks to contribute to the existing literature by emphasizing empathy, alterity, and a multi-jural approach that recognizes the interconnectedness of all beings. It seeks to carve out a space for the ‘laws’ of other-than-human animals.

⁸ (Bill S-241 contains the proposed legislative reform that came in the wake of Bill S-203.)

⁹ See *Bill S-203, Senate Debate, 2d Reading, supra* note 4 at 385 (“In captivity, whales and dolphins are confined to the relative isolation of swimming pools. Scientific evidence establishes that, physically and psychologically, these creatures suffer in these conditions...”).

¹⁰ Bill S-203, Senate Debate, 2d Reading, *supra* note 4, at 154.

¹¹ See, e.g., MANEESHA DECKHA, *ANIMALS AS LEGAL BEINGS: CONTESTING ANTHROPOCENTRIC LEGAL ORDERS* [hereinafter DECKHA, *ANIMALS AS LEGAL BEINGS*] (Toronto: Univ. of Toronto Press, 2021) (discussing the anthropocentric development of laws, particularly in Canada, and suggesting changes to this framework).

II. THEORETICAL FRAMEWORK

This Article is rooted in feminist legal theory that seeks to dethrone the place of science in legal discourse and engages with feminist animal care theory, or ecofeminism. The law must look at human-animal relationships with empathy and care.¹² While ecofeminism is diverse in its iterations, certain common principles underlay its theoretical framework. Ecofeminists hold that the oppression of women and the deterioration of the environment are inextricably linked, and both result from the “long-held masculinist ideologies” that perpetuate dualist thinking.¹³ Dualisms include man/woman, human/animal, and nature/culture.¹⁴ In its pursuit of justice for humans and other-than-human animals, ecofeminism also rejects humanism and hyper-rationalism by placing other-than-human concerns in its purview.¹⁵

The vegetarian iteration of ecofeminism (also referred to as animal ecofeminism or vegan ecofeminism) recognizes that the oppression of women results from their classification as “Not-Man” and suggests that this “Man/Not-Man binary” also underlies racial, gender, class, and species divides.¹⁶ Vegetarian ecofeminists thus recognize the interconnected nature of racism, sexism, colonialism, and speciesism.¹⁷ Those who are “Not-Man”—whether they are women, queer, Indigenous, or other-than-human animals—are dehumanized.¹⁸

In the spirit of vegetarian ecofeminism, this Article carries out an analysis rooted in empathy and care. It engages in an ecofeminist critique of justifications that place reason- and science-based arguments above factors like empathy and care. It also seeks to situate the speciesism that permeates the legal system within the wider web of racism, sexism, and colonialism to create a more sustainable approach to legal reform that can benefit *all* animals.

To clearly articulate objections to the differentiated effects among animals that result from Bill S-203, this Article engages with the species grid formulated by Cary Wolfe, an English Professor at Rice University who advocates a post-humanist position in animal studies.¹⁹

¹² *Id.* at 11; S. MAREK MULLER, *IMPERSONATING ANIMALS: RHETORIC, ECOFEMINISM, AND ANIMAL RIGHTS LAW 9–10* (E. Lansing: Mich. St. Univ. Press, 2020).

¹³ MULLER, *supra* note 12, at 6.

¹⁴ *Id.*

¹⁵ *Id.* at 10.

¹⁶ *Id.* at 8.

¹⁷ DECKHA, *ANIMALS AS LEGAL BEINGS*, *supra* note 11, at 15. (this Article equates “colonialism” with “civilization”).

¹⁸ MULLER, *supra* note 12, at 8–9.

¹⁹ *Cary Wolfe Profile*, RICE UNIV., <https://profiles.rice.edu/faculty/cary-wolfe> (accessed Oct. 1, 2023). See Cary Wolfe & Johnathan Elmer, *Subject to Sacrifice: Ideology, Psychoanalysis, and the Poverty of Humanism*, in *ANIMAL RITES: AMERICAN CULTURE, THE DISCOURSE OF SPECIES, AND POSTHUMANIST THEORY* 97, 100–01 (Univ. Chi. Press ed., 2003) (explaining that the law of culture makes distinctions between “human” and “animal,” forming a grid of species significations). See also Colleen Glenney Boggs, *American Bestiality:*

The species grid differentiates between the humanized human, the animalized human, the humanized animal, and the animalized animal.²⁰ As elucidated by Colleen Glenney Boggs, English Professor and Parents Distinguished Research Professor in the Humanities at Dartmouth College, animalized animals receive no protection from abjection.²¹ They are denied subjectivity, abased, and abused.²² Animalized animals include the animals whose flesh we eat, whose skin, fur, and feathers we wear, and whose bodies we use for research.²³ Humanized animals, on the other hand, are animals to whom we ascribe human features, like companion animals.²⁴ Animalized humans, like animalized animals, endure abjection, such as racism, sexism, and homophobia,²⁵ whereas humanized humans are “sovereign and untroubled,”²⁶ allowing them absolute control over animalized animals.²⁷

Humanized animals feature heavily in this Article. Cetaceans, unlike animals raised for consumption or testing, are elevated in the eyes of the public.²⁸ Popular documentaries and family films reveal the intelligence, emotion, and culture that cetaceans have.²⁹ While cetaceans, particularly orcas, have been stigmatized in the past as violent killers,

Sex, Animals, and the Construction of Subjectivity, 76 CULTURAL CRITIQUE 98, 99 (2010) (explaining and further contextualizing the species grid, which explores the ordering of these species hierarchies. Boggs argues that “human exceptionalism does not protect human beings from abjection, but it enables abuse by creating animality as a position of non-subjectivity and of socially sanctioned abjection. Abjection takes on many forms, but one thing ‘interlocking oppressions’ such as racism, sexism, and homophobia have in common is that their mechanisms of shame and violence revolve around literal and figurative animals. The abjection of animals is the essential condition of these forms of domination.” This argument will feature later in this Article during the discussion of the problems that result from the anthropocentric reasoning used in justifying Bills S-203 and S-218).

²⁰ WOLFE & ELMER, *supra* note 19, at 101.

²¹ Boggs, *supra* note 19, at 99; *People: Colleen Glennie Boogs*, DART. DEP’T OF ENG. AND CREATIVE WRITING, <https://english.dartmouth.edu/people/colleen-glenney-boggs> (accessed Oct. 1, 2023).

²² Boggs, *supra* note 19, at 113.

²³ WOLFE & ELMER, *supra* note 19, at 101.

²⁴ *Id.*

²⁵ Boggs, *supra* note 19, at 99.

²⁶ WOLFE & ELMER, *supra* note 19, at 101.

²⁷ Boggs, *supra* note 19, at 113.

²⁸ See Maneesha Deckha, *Initiating a Non-Anthropocentric Jurisprudence: The Rule of Law and Animal Vulnerability under a Property Paradigm*, 50 ALTA. L. REV. 783, 805 (2013-07-01) (explaining how megafauna like cetaceans, elephants, and primates occupy an ‘honorary human status’ in the human imagination. These animals are humanized animals due to their cultural significance, intelligence, and (social and emotional) similarities to humans) [hereinafter Deckha, *Initiating*].

²⁹ See *Reflecting on Seaspiracy*, GOOD HEART ANIMAL SANCTUARY, <https://www.goodheartanimalsanctuaries.com/reflecting-on-seaspiracy/> (accessed Sept. 17, 2023) (explaining the human-like qualities of cetaceans as seen in documentaries *Seaspiracy* and *Blackfish*); Sandi Doughton, *The \$20M Lessons Of “Freeing” Keiko The Whale*, THE SEATTLE TIMES (May 13, 2009), <https://www.seattletimes.com/seattle-news/the-20m-lessons-of-freeing-keiko-the-whale/> (accessed Sept. 25, 2023).

sustained interest has revealed more complex lives than first imagined. Because of their cultural status and their similarities to humans, cetaceans are considered ‘honorary’ humans (or humanized animals).³⁰ Bills S-203, S-218, and S-241 reinforce this hierarchization of animals. This Article’s focus on these bills is not intended to support this hierarchization but to call it into question.

III. THE CURRENT LEGAL STATUS OF ANIMALS IN CANADA: PROPERTY

Canadian law categorizes animals as property.³¹ The purpose of this Article is not to provide a comprehensive overview of the current state of Canadian law regarding animals. This section is meant to provide a brief statement regarding the baseline from which the bills discussed in this Article are working. It is meant to demonstrate the ubiquity and pervasiveness of the assumption that it is ethically acceptable for animals to be owned and the difficult work that must be carried out to change the legal status of animals.

Domesticated animals are the private property of their owners, and wild animals can become property according to the government’s property granting rules.³² While it seems counterintuitive, wild animals are commodifiable. This is evident in the hunting and fishing licensing regimes implemented by the federal and provincial governments.³³ Both domesticated and wild animals, then, are “objects to which property rights attach.”³⁴ As such, their legal rights and interests are subject to those of humans and other legal persons, like corporations. The law as it relates to other-than-human animals is, therefore, premised on a species divide, humans having the upper hand.³⁵

Piecemeal laws and regulations vary according to the types of animals and the purposes humans find in them. Property in wildlife, for example, is vested in the Crown.³⁶ Because people have an interest in hunting wildlife, the provincial government regulates this ownership through the various provincial *Wildlife Acts*, providing a way for hunters to lawfully kill animals.³⁷ Additionally, the *Criminal Code* generally files offenses involving animals under the property sections (Offences

³⁰ Deckha, *Initiating*, supra note 28, at 805.

³¹ Victoria Shroff, Recognizing Animals in Canada as Sentient, CAN. BAR ASS’N (Dec. 8, 2021), <https://nationalmagazine.ca/en-ca/articles/law/opinion/2021/recognizing-animals-in-canada-as-sentient> (accessed Sept. 12, 2023).

³² DECKHA, ANIMALS AS LEGAL BEINGS, supra note 11, at 39; Deckha, *Initiating*, supra note 28, at 787.

³³ Deckha, *Initiating*, supra note 28, at 787.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Wildlife Act*, R.S.B.C. 1996, c. 488, s. 2 (Can.).

³⁷ See, e.g., *Wildlife Act*, s. 2(2) (“A person does not acquire a right of property in any wildlife except in accordance with a permit or licence issued under this Act or the Animal Health Act or as provided in subsection (3) of this section.”).

Against Rights of Property and Wilful and Forbidden Acts in Respect of Certain Property);³⁸ animals are protected only in as much as their interests coincide with those of their owners.

While the law categorizes animals as property, this perception is not ubiquitous. Attitudes regarding the status and treatment of animals are almost as numerous and diverse as the people that hold them.³⁹ For example, many people view their companion animals as family, and couples have disputes regarding custody of their companion animals upon separation.⁴⁰ Some people are also starting to rethink the ethics of captivity, at least when it comes to large animals that humans can relate to, like whales, elephants, and chimpanzees.⁴¹

This shift in perception is known as the “animal turn.”⁴² As public perception shifts and some people begin to question the assumption that animals should be property, the law, too, is beginning to evolve. The animal turn has shifted interest to the relationships between humans and other-than-human animals, encouraging the understanding that animals are individuals who have experiences that matter.⁴³ Both the public and the law are engaging with and responding to this animal turn, and legal reform is starting to emerge. However, are these changes moving in the right direction? Is the disposition of the general public—and the ensuing legal reform—moving toward an ethical, compassionate, and sustainable position? An examination of Bill S-203 suggests that the answers to these questions are in the negative. Rather, the anthropocentrism and science-based justifications that are characteristic of Bill S-203 will exclude many animals from the purview of legal reform.

³⁸ See, e.g., *Criminal Code*, R.S.C. 1985, c. C-46, s. 348, 445, 446, 447 (Can.) (punishments for injuring, endangering, or killing certain animals covered under acts against “certain property” in criminal code).

³⁹ Gary L. Francione, *Animals as Property*, 2 ANIMAL L. INST. (1996).

⁴⁰ Deborah Rook, *Who Gets Charlie? The Emergence of Pet Custody Disputes in Family Law: Adapting Theoretical Tools from Child Law*, 28 INT’L J. L. POL’Y & FAM. at 177 (2014); T. Christopher Wharton, *Fighting Like Cats and Dogs: The Rising Number of Custody Battles Over the Family Pet* (2007 2008), 10 J.L. & FAM STUD 433, 433.

⁴¹ Katie Sykes, *The Whale, Inside: Ending Cetacean Captivity in Canada*, 5:1 CAN. J. COMPAR. & CONTEMP. L. 349 377, 391 (2019); see Michael Gonchar, *Should Certain Animals Have Some of the Same Legal Rights As People?*, N.Y. TIMES (Apr. 29, 2014, 5:00 AM) <https://archive.nytimes.com/learning.blogs.nytimes.com/2014/04/29/should-certain-animals-have-some-of-the-same-legal-rights-as-people/> (accessed Sept. 17, 2023); see also *About Us*, NONHUMAN RIGHTS PROJECT (2023), <https://www.nonhumanrights.org/about-us/> (accessed Sept. 17, 2023).

⁴² Jessica Eisen, *Animals in the Constitutional State*, 15 INT’L J. CONST. L. 909, 912 (2018).

⁴³ *Id.*

IV. A CRITIQUE OF BILL S-203

This section explores the reasoning behind Bill S-203 by analyzing the parliamentary debates and concludes that the justifications used by the proponents of the bill are exclusionary because a great number of animals that require legal protection will not be able to benefit from any momentum generated by this bill. These exclusionary justifications are, first, anthropocentric, and second, science based.

A. THE CONTENT OF BILL S-203

Bill S-203, *An Act to amend the Criminal Code and other Acts (ending the captivity of whales and dolphins)*—colloquially referred to as the *Free Willy Act*—received Royal Assent on June 21, 2019.⁴⁴ Bill S-203 amends the *Criminal Code* to create certain offences relating to cetacean captivity.⁴⁵ It also amends the *Fisheries Act* to prohibit taking a cetacean into captivity, as well as the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act* to regulate the import and export of cetaceans into and out of Canada.⁴⁶ In general, the bill makes it illegal to keep cetaceans captive, to breed them or possess their reproductive material, and to compel them to perform.⁴⁷ However, it contains some notable exceptions. The bill does not apply to cetaceans already in captivity; those cetaceans already held captive need not be freed.⁴⁸ However, the prohibition on performances does not have this ‘grandfather’ exception, so performances must cease.⁴⁹ The exceptions also extend to rehabilitation, keeping a cetacean captive for its ‘best interests,’ and research.⁵⁰ Furthermore, the bill in no way abrogates existing aboriginal or treaty rights.⁵¹

B ANTHROPOCENTRIC JUSTIFICATIONS FOR BILL S-203

Many see Bill S-203 as a step in the right direction when it comes to legal reform.⁵² However, this perception fails to consider that the anthropocentric reasoning used to push the bill through the Senate and the House of Commons necessarily categorizes certain animals as ineligible for legal protection. The bill’s intent was not to end animal captivity,

⁴⁴ Luc Bourgeois, *Pushing the First Domino: Freeing the Whales in Canada* 3 (Aug. 2021) (LLM Thesis, Dalhousie University, Schulich School of Law) (on file with Dalhousie University).

⁴⁵ *Id.* at 3–4.

⁴⁶ *An Act to amend the Criminal Code and other Acts*, *supra* note 3 at 3(a); See Sykes, *supra* note 41, at 355–56 (providing a succinct summary of the implications of the Act).

⁴⁷ Bourgeois, *supra* note 44, at 3–4.

⁴⁸ *An Act to amend the Criminal Code and other Acts*, *supra* note 3 at 3(a).

⁴⁹ *Id.* s. 4.

⁵⁰ *Id.* s. 3(a)(b), (3.1).

⁵¹ *Id.* s. 6.

⁵² *Bill S-203 Senate Debate, 3d Reading*, *supra* note 1, at 5624–5625.

but only to regulate the captivity of humanized animals. Additionally, the bill's supporters emphasized the human-like qualities of cetaceans, overlooking many of the species' unique traits.⁵³ Furthermore, the reasoning behind Bill S-218 (proposed legislation that followed Bill S-203) shows the strength of the humanizing tendencies in Bill S-203.⁵⁴

Bill S-203 entrenches human-centered and human-exceptionalist thought.⁵⁵ Anthropocentric attitudes are prevalent when one looks at the justification for the creation of the bill. In 2015, then-Senator Wilfred Moore introduced Bill S-203.⁵⁶ Before this, the Senator and his son had watched *Blackfish*, a 2013 documentary that follows the life of Tilikum, an orca who was captured in 1983 at the age of two.⁵⁷ He spent the remainder of his life in captivity, held in a tank—first at Sealand of the Pacific in Victoria, British Columbia, and then at SeaWorld in Florida.⁵⁸ Tilikum was involved in the deaths of three people, which *Blackfish* framed as the tragic consequence of an orca driven mad by captivity.⁵⁹ Both father and son were moved by the film, and Moore's son asked if his father could do anything.⁶⁰ The result was Bill S-203.⁶¹

⁵³ *Id.* at 5624, 5626.

⁵⁴ Canada, Parliament, *Debates of the Senate*, 43d Parl., 2d Sess., Vol. 152, No. 13 (19 November 2020) at 434–36. [hereinafter *Bill S-218 Senate Debate, 2d Reading*].

⁵⁵ There are a number of critiques of the bill that do not relate to its anthropocentric underpinnings. First, Bill S-203 will likely not impact a large number of animals, so its practical significance is limited. Only two Canadian aquariums still keep cetaceans: Marineland Park in Ontario and the Vancouver Aquarium (though many others contain other aquatic life—mammals, reptiles, amphibians, and many classes of fish). Holly Lake, *An End to the Captivity of Whales and Dolphins: A Historic Piece of Animal Rights Legislation, the 'Free Willy' Bill, is Now Set to Become Law*, NATIONAL (June 12, 2019), <https://www.nationalmagazine.ca/en-ca/articles/law/hot-topics-in-law/2019/an-end-to-the-captivity-of-whales-and-dolphins> (accessed on Sept. 13, 2023). Provincial legislation in Ontario has already outlawed orca captivity and established strong welfare standards for captive marine mammals. Additionally, the Vancouver Aquarium only has one cetacean left in captivity and has already indicated that it will voluntarily cease its whale and dolphin program. Sykes, *supra* note 41, at 391. Second, Bill S-203 is reflective of society's changing perception when it comes to animals like whales and dolphins; it is more a mirror and less a catalyst for change. Cetacean captivity in Canada is already almost obsolete. As previously stated, there are only two aquariums in Canada that still hold cetaceans captive, and one of them has volunteered to stop the practice. Sykes, *supra* note 41, at 400. In this sense, it is not revolutionary legislation; it is the natural extension of popular perception. *Canadians See Value in Zoos, Aquariums, but Voice Support for Banning Whales and Dolphins in Captivity*, ANGUS REID INST. (May 22, 2018), <https://angusreid.org/cetacean-ban-marineland-vancouver-aquarium/> (accessed Sept. 13, 2023). Third, Sykes also critiques the Bill for “picking low-hanging fruit.” Sykes, *supra* note 41, at 401. That is, there are complex and extensive threats to wild cetaceans, and opting to forgo visiting and watching captive cetaceans is not a significant sacrifice when considered against the social transformation that would be required to address the global practices that contribute to cetacean death and loss of habitat.

⁵⁶ *Bill S-203 Senate Debate, 3d Reading, supra* note 1, at 5625.

⁵⁷ Lake, *supra* note 55.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

At its second reading, Senator Donald Neil Plett of the Conservative Party argued against the bill, citing the educational and scientific work supported by zoos and aquariums.⁶² Despite Senator Plett's incorrect assumptions about the educational and scientific value of aquariums,⁶³ he says one phrase that brings to the forefront the anthropocentric issues embodied in Bill S-203:

Simply banning the keeping of *certain* animals in human care, which is all this bill seeks to do, denies us the opportunity to educate our children and ourselves and rejects the cornerstone principles of a continent-wide network of legislation that demands and requires the active positive study, protection and preservation of all our wildlife.⁶⁴

Senator Plett is certainly not admonishing the bill for its anthropocentrism, but he rightly notes that the bill only defends *certain* animals. As will be demonstrated, demarcating certain animals for protection based on their similarities to humans—as is the case here—more deeply entrenches the gap between animals that are quite different from humans and the protection they require.

That Bill S-203 is only meant to implicate certain animals is also exemplified in an exchange between Senator Plett and Senator Moore. Senator Plett notes that polar bears, like whales, are reasonably intelligent, and he asks: “Is the long-term objective to close all aquariums and zoos and take all animals out of captivity or is there a reason why you’re focusing specifically on these?”⁶⁵ Senator Moore’s response, while perhaps unsurprising, is discouraging. He replied, “I’m not dealing with other species. I’m not looking to close down aquariums like you were alluding to. I’m sticking to the issue with regard to cetaceans, whales and dolphins...”⁶⁶ Again, Senator Plett’s objective is not to critique the bill by noting its exclusionary forces; rather, he is seeking to highlight the ostensible absurdity and undesirability of extending protection to other animals. Senator Moore’s mollification of Plett confirms that the intent behind the bill was not to reduce animal captivity, but to reduce captivity of humanized animals, or honorary humans.

Senator Moore also highlighted the intelligence, socialness, and emotional capacity of cetaceans in his speeches before the Senate.⁶⁷ Senator Janis G. Johnson, of the Conservative Party, noted these

⁶² Canada, Parliament, Debates of the Senate, 42d Parl., 1st Sess., Vol. 150, No. 31 (3 May 2016) (Hon. Donald Neil Plett) [hereinafter *Senate Debate*, Plett Commentary].

⁶³ Senator Plett argues that zoos and aquariums are necessary for public education and scientific research. *Id.* For a discussion on why zoos and aquariums are not required for these purposes, see Dale Jamieson, *Against Zoos*, in *IN DEFENSE OF ANIMALS: THE SECOND WAVE*, (Peter Singer ed., 2006) at 134–42. (discussing why zoos and aquariums are not necessary tools for public education and scientific research).

⁶⁴ *Bill S-203, Senate Debate, 2d Reading, supra* note 4, at 577 (emphasis added).

⁶⁵ Canada, Parliament, Debates of the Senate, 42d Parl., 1st Sess., Vol. 150, No. 8 (27 January 2016).

⁶⁶ *Id.* at 156.

⁶⁷ *Id.* at 154.

attributes as well, citing the close familial groups of whales and dolphins and their “complex, meaningful communications and interactions.”⁶⁸ These are the same themes taken up during the bill’s passage through the House of Commons. Green Party Leader, Elizabeth May, who guided the bill through the House, built upon the intelligence and social nature of cetaceans when she said that not only are whales sentient and intelligent, but they are also our relatives; they grieve as we grieve.⁶⁹ May recounted the story of Tahlequah, a southern resident orca in the Salish Sea who carried her dead calf through the waters for seventeen days in a tour of grief.⁷⁰ Fin Donnelly, of the New Democratic Party, also referred to Tahlequah in his defense of the bill, highlighting her empathy and “extraordinary human-like behaviour.”⁷¹ However, stressing the human-like qualities of cetaceans in defense of granting them protection and autonomy undercuts efforts to obtain protection and autonomy for those beings that have very few perceived similarities with humans.

The justifications used by Senator Murray Sinclair, who took on sponsorship of the bill when Moore retired in 2017, are more useful than those of Moore, May, and Donnelly when considered in light of animal advocates’ concerns for *all* life, rather than just for humanized animals. He noted that societal attitudes are shifting when it comes to humans’ relationship with—and responsibility to—animals.⁷² He acknowledged the critique made earlier in this Article that the bill, while significant, is a “consolidation of related developments.”⁷³ His outlook is different from the other senators, who highlight the similarities between cetaceans and humans by noting whales’ intelligence and social capacity. Senator Sinclair did note the animals’ intelligence, but he also asked the Senate to engage in empathy.⁷⁴ He encouraged the senators to curiously explore the aspects of orcas’ lives that are quite different from humans’ and uniquely fascinating in their own right.⁷⁵ Sinclair also emphasized the relationship between humans, cetaceans, and all

⁶⁸ *Bill S-203, Senate Debate, 2d Reading, supra* note 4, at 385.

⁶⁹ Canada, Parliament, *House of Commons Debates*, 42d Parl., 1st Sess., Vol. 148, No. 361 (29 November 2018) [hereinafter *House of Commons Debate*, No. 361].

⁷⁰ *Id.*

⁷¹ *Id.* at 24242.

⁷² See *supra* Part III of this Article regarding the “animal turn” (expanding upon the change in societal attitudes toward human responsibilities to animals); Canada, Parliament, *Debates of the Senate*, 42d Parl., 1st Sess., Vol. 150, No. 210 (29 May 2018); *Bill S-203, 3d Reading, supra* note 1, at 5625.

⁷³ *Bill S-203, Senate Debate, 3d Reading, supra* note 1, at 5625.

⁷⁴ *Id.* at 5268.

⁷⁵ For example, Senator Sinclair talks about how orcas travel in “pods of 50 to 100 individuals,” and “[m]others and their calves are the main components of large dolphin social groups that are often comprised of three generations.” Belugas make chirping sounds like canaries, and “[t]heir dives may last up to 25 minutes and can reach depths of 800 metres.” Orcas are also curious creatures and like to “sky hop” (“poke their heads out of the water, and they look around”). They also “sleep together in a tight circle and have synchronized breathing.” *Id.*

other animals, advocating for stewardship and respect.⁷⁶ His view is more inclusive and recognized the interconnectedness and interdependency of all things as he called upon the Senators to “take care” not only of cetaceans but of “all that is part of this Creation.”⁷⁷

While Senator Sinclair’s justifications for Bill S-203 are not characterized by the same anthropocentric considerations as the other Senators, they seem not to have affected the perceptions of the other Senators. Senator Sinclair expressed his views at the third reading in the Senate, however members of Parliament continued to promote human-centered justifications as the bill passed through the House of Commons.⁷⁸ This is not to dismiss Senator Sinclair’s reasoning, but instead to comment on its failure to influence a shift away from anthropocentric reasoning. Advocating an empathetic, curious worldview that is sensitive to the interconnected nature of our world is precisely what is required, as the Article will later discuss.

Those who opposed Bill S-203 employed the ‘slippery slope’ argument. Referring to the ban on cetacean captivity, MP Robert Sopuck of the Conservative Party asked, “Who knows where it will lead, to rodeos or medical research? Who knows where this will lead once a bill like this is passed?”⁷⁹ He called the animal rights movement “clever” in how it advocates for legislation or policy change, claiming that “[t]he process is to start with something that seems innocent and then keep going and going, and pretty soon who knows what will be banned?”⁸⁰ Both Marineland and the Vancouver Aquarium had similar fears. Marineland claimed the bill’s agenda was to entrench animal rights into the law by first granting rights to whales and then to other species.⁸¹ This may very well have been the strategy of the bill’s proponents, and such a strategy may even be successful to a degree, but only to the extent that humanized animals might be drawn into a protected category. Furthermore, even proponents of the bill would secure protection for cetaceans at the expense of other animals. Speaking to the economic concerns raised by those opposing the bill, May said: “We do not want to put the one institution that keeps whales in captivity out of business. There are lots of other ways to maintain a tourist attraction with the great facilities present in that institution. There are display and trained seal operations, one can imagine.”⁸² May’s suggestion to switch out whales for seals

⁷⁶ *Id.*

⁷⁷ *Id.* See the opening quote of this Article (describing the Anishinaabe belief of the interconnected nature of all living creatures and the responsibility of humans to care for all of Creation).

⁷⁸ Canada, Parliament, *House of Commons Debates*, 42d Parl., 1st Sess., Vol. 148, No. 361, 24237 (29 November 2018).

⁷⁹ *House of Commons Debate*, No. 361, *supra* note 69, at 24240.

⁸⁰ *Id.* at 24241.

⁸¹ Canada, Parliament, Senate of Canada, *Proceedings of the Standing Senate Committee on Fisheries and Oceans*, 42d Parl., 1st Sess., No. 16 (16 May 2017).

⁸² *House of Commons Debate*, No. 361, *supra* note 69.

belies the overwhelming tendency to advocate for humanized animals while ignoring the plight of animalized animals.

Anthropocentric attitudes are even evident in the positive responses of animal advocates to Bill S-203.⁸³ The Humane Society International/Canada, for example, lauded the bill's successful passage as "a watershed moment in the protection of marine animals."⁸⁴ Some saw the success of Bill S-203 as an indication that the door is now open for the implementation of protections for other species.⁸⁵ In other words, Bill S-203 could serve as one of the first steps in an incremental approach to the amelioration of animals' lives. However, the proposed legislation that came in its wake only reiterated the human exceptionalist reasoning used in support of Bill S-203.⁸⁶ Bill S-218 also advocated for legal protection for humanized animals, though the justifications of the bill would ensure that any protection received would be at the expense of animalized animals.⁸⁷

C. IN THE WAKE OF BILL S-203: BILLS S-218 AND S-241 AND THE GALVANIZATION OF EXCLUSIONARY FORCES

Bill S-218, *An Act to amend the Criminal Code and the Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act (great apes, elephants and certain other animals)*—or the *Jane Goodall Act*—proposed an amendment to the *Criminal Code* to establish offenses relating to the captivity of great apes, elephants, and other non-domesticated animals.⁸⁸ It also proposed an amendment to the *Wild Animal and Plant Protection and Regulation of International*

⁸³ See e.g., *BC SPCA Applauds Passing of Bill S-203 to Ban Whale and Dolphin Captivity in Canada*, BC SPCA (Jun. 10, 2019), <https://spca.bc.ca/news/s203-ban-cetacean-captivity/> (accessed Oct. 1, 2023) ("The BC SPCA is praising the passing of Bill S-203..."). See also e.g., *Victory: Canada Officially Bans Cetacean Captivity*, IN DEF. OF ANIMALS (Jun. 13, 2019), <https://www.idausa.org/campaign/cetacean-advocacy/latest-news/victory-canada-officially-bans-cetacean-captivity/> (accessed Oct. 1, 2023) ("We celebrate the fact that holding cetaceans in captivity will soon be a thing of the past in Canada. Also cause for celebration is what S-203 symbolizes: a societal shift in perceptions around captive cetaceans.")

⁸⁴ *Humane Society International/Canada Hails Landmark Victory as Canada Bans Whale, Dolphin and Porpoise Captivity*, GLOBE NEWSWIRE (Jun. 10, 2019), <https://www.globenewswire.com/news-release/2019/06/10/1866481/0/en/Humane-Society-International-Canada-hails-landmark-victory-as-Canada-bans-whale-dolphin-and-porpoise-captivity.html> (accessed Sept. 16, 2023).

⁸⁵ See, e.g., Bourgeois, *supra* note 44, at 94–95 ("Overall, this new law should be seen as a precursor to new developments, or as a likely springboard for granting substantive legal and political protections for other animals in Canada.")

⁸⁶ Jordan Reichert, *Jane Goodall Act Continues the Slow March of Animal Rights Legislation in Canada*, ANIMAL PROT. PARTY OF CAN. (Nov. 28, 2020), <https://www.animal-protectionparty.ca/jane-goodall-act-animal-captivity-canada-murray-sinclair-s218/> (accessed Sept. 17, 2023).

⁸⁷ *Bill S-218 Senate Debate, 2d Reading*, *supra* note 54.

⁸⁸ Canada, Senate, *An Act to amend the Criminal Code and the Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act (great*

and *Interprovincial Trade Act* to “require a permit for the import, export or interprovincial travel of great apes, elephants and other non-domesticated animals and to prohibit the importation and exportation of elephant ivory, with several limited exceptions.”⁸⁹ While Bill S-218 died before the 2021 federal election, a modified version of the bill, Bill S-241, was recently reintroduced.⁹⁰ The similarities between the content matter and justifications of the two bills demonstrate their close linkage, and both merit consideration, as the updates to the legislation in Bill S-241 demonstrate the galvanization of anthropocentric and exclusionary forces.⁹¹

As with Bill S-203, Bill S-218 would prohibit new captivity and breeding of great apes and elephants pursuant to animal cruelty and international trade laws.⁹² However, the bill would permit new captivity if licensed for either one of two reasons. First, permits could be obtained if it were in the animals’ best interests, considering both the individual welfare of the animals and species conservation.⁹³ Second, permits could be obtained to facilitate non-harmful scientific research.⁹⁴ While the bill has not become law, it nonetheless merits consideration for three reasons. First, while it died at the end of this parliamentary session, it has been re-introduced in Bill S-241, though slightly modified.⁹⁵ Second, it relates directly to Bill S-203 in that it constitutes the next progression of the incremental approach endorsed by the bill’s proponents. Third, the justifications used by the bill’s supporters reveal important truths about the way many view animals and their place in the legal system. Only by understanding the assumptions underlying the bill’s justifications, content, and strategy is it possible to critique and correct the anthropocentric attitudes that guide the formation of legislation.

Many animal advocates welcomed the changes proposed by Bill S-218, just as they welcomed the changes ushered in by Bill S-203.

apes, elephants and certain other animals) 44th Parl, 1st Sess, Vol 153 (17 November 2020) [hereinafter *Bill S-218, 1st Reading*].

⁸⁹ The reference to “other non-domesticated animals” refers to the provision in the bill that would enable the Governor in Council to designate certain species for protection under the act. *Id.*

⁹⁰ Canada, Senate, *An Act to amend the Criminal Code and the Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act (great apes, elephants and certain other animals)*, 44th Parl., 1st Sess., Vol. 153 (22 Mar. 2022) [hereinafter *Bill S-241, 1st Reading*]; see Canada, LEGISinfo, Bill S-218, An Act to amend the Criminal Code and the Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act (great apes, elephants and certain other animals), <https://www.parl.ca/legisinfo/en/bill/43-2/s-218?view=progress> (accessed 23 Sept. 2023) (historical bill progress tracker provided by the Parliament of Canada).

⁹¹ *Bill S-241, 1st Reading*, *supra* note 90; Simon Shields, *Bill S-214 [the Jane Goodall Bill] and Why It’s Worthwhile*, ZOOCHECK, 9–10, <https://www.zoocheck.com/wp-content/uploads/2022/11/Why-the-Jane-Goodall-Act-is-Worthwhile.pdf> (accessed Oct. 1, 2023).

⁹² *Bill S-218 Senate Debate, 2d Reading*, *supra* note 54.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See *infra* Section C.

Advocates who support the bills argue that they are evidence of the beginning of a domino effect, providing the basis for incremental change.⁹⁶ Jordan Reichert, the deputy leader of the Animal Protection Party of Canada, argues that both bills find their justification in moral outrage regarding the unnatural and cruel captivity of “intelligent, social, [and] emotional” beings.⁹⁷ He says that Bill S-218 builds on Bill S-203 as Bill S-218 grants (limited) legal standing.⁹⁸ According to Reichert, the granting of legal status amounts to an acknowledgement of a systemic wrong.⁹⁹ He does also note a shortcoming of the bills, as they only apply to a handful of species, and acknowledges that the bills will not affect the major industries that engage in systemic and intense animal cruelty, and they do not even mark the end of aquariums and zoos.¹⁰⁰ While nonetheless conceding that this is just the way it has to be—change is slow, but the door is now open for a shift in law, politics, and society—this bill, according to Reichert, is a step in the right direction.¹⁰¹ Victoria Shroff, animal law lawyer and professor and founding Chair of the national Canadian Animal Law Study Group, is similarly optimistic, calling Bill S-218 a “monumental stride for captive animals.”¹⁰² She is excited about the limited legal standing proposed by the bill, as well as the “best interest” consideration imposed.¹⁰³ After a conviction is secured, the bill would allow the court to appoint an animal advocate at the sentencing hearing who would participate in the process.¹⁰⁴ Shroff hopes that the protections articulated in the bill would eventually be afforded to other species.¹⁰⁵

Despite such optimism, Bill S-218, like Bill S-203, is rooted in anthropocentric assumptions and justifications, and its impact will therefore not extend to the billions of other animals used for food, clothing, makeup, entertainment, and other purposes. For example, the bill states that humans are justified in keeping animals in captivity for the purposes of individual welfare and conservation.¹⁰⁶ This provision reveals some troubling underlying assumptions. First, it assumes that humans are well positioned to determine the best interests of an animal, and second, that captivity can be in an animal’s best interest. While the justifications are not exclusively human centered and human

⁹⁶ See, e.g., Bourgeois, *supra* note 44, at 95, 101 (arguing that “the *Whales Act* may lead to other similar legislative initiatives” and “the *Jane Goodall Act*, if enacted, may incite new developments in the field of animal law.”).

⁹⁷ Reichart, *supra* note 86.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Victoria Shroff, *What Jane Goodall Act Could Mean for Animals*, LAW360 CAN. (Dec. 2, 2020), <https://www.law360.ca/articles/22832> (accessed Sept. 14, 2023).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Bill S-218 Senate Debate, 2d Reading*, *supra* note 54, at 435.

exceptionalist (as will be discussed below), the anthropocentric reasoning behind the bill sets future legal reform on the wrong path with its exclusionary implications.

As mentioned, not all the reasoning behind Bill S-218 is exclusionary; some provides an encouraging and inclusive baseline. As he did with Bill S-203, Senator Sinclair encourages empathy and again invokes the concepts of interconnectedness and interdependency in his comments:

We must change course, both for their sake and for our own well-being. In many Indigenous cultures, we use the phrase, “all my relations” to express the interdependency and interconnectedness of all life forms and our relationship of mutual reliance and shared destiny. When we treat animals well, we act with both self-respect and mutual respect.¹⁰⁷

The senator’s words are encouraging because they call on people to be more concerned about the broader impact of their actions. Human lives are deeply intertwined with the lives of other-than-human animals, plants, and all other aspects of nature, whether animate or inanimate. This connectedness of all life necessitates a worldview that is not premised on the divide between human and other.¹⁰⁸

However, an emphasis on the interconnectedness of all things can also facilitate anthropocentrism if one is not mindful. One might consider the effects of their actions in the other-than-human sphere *because* of the consequences these effects might have in their own life.¹⁰⁹ For example, someone might be concerned with runoff pollution entering a river, but only because it might harm the fish they would otherwise kill to eat. This view still perceives animals as commodities. However, some evidence suggests that the bill strives to veer away from the conceptualization of animals as commodities or property.

Bill S-218 recognizes that the Canadian legal system commodifies animals by treating them as property.¹¹⁰ Senator Sinclair claimed that the bill would force the government to ask what conditions are best for the animals in question.¹¹¹ The bill proposed limited legal standing for select animals,¹¹² and it would allow the court to make orders that are in the best interests of animals when sentencing for the offences created under the amendments to the *Criminal Code*.¹¹³ However, ‘best interests’ as conceived by the proponents of the bill include captivity.¹¹⁴ Senator Sinclair notes that orders that accommodate best interests might include modification of the current holding environment

¹⁰⁷ *Id.* at 434.

¹⁰⁸ DECKHA, ANIMALS AS LEGAL BEINGS, *supra* note 11, at 135.

¹⁰⁹ *Id.*

¹¹⁰ *Bill S-218 Senate Debate, 2d Reading, supra* note 54, at 435.

¹¹¹ *Id.* at 437.

¹¹² *Id.* at 435.

¹¹³ *Id.*

¹¹⁴ *Id.* at 435, 437.

or relocation to a new holding area.¹¹⁵ Proposing that remaining in captivity would be in the animal's best interests seems to undermine the bill's goal to veer away from the current classification of animals as property, as captivity entails ownership. On a more basic level, however, the senator also fails to question the ethical viability of animal captivity. He states, "this bill will not put zoos out of business, but I hope it will generate dialogue and innovation, with consensus on putting animals first."¹¹⁶ Putting animals first is fundamentally at odds with supporting institutions that profit from animal captivity, such as zoos and aquariums.

As he did with Bill S-218, Senator Sinclair encourages curiosity. He gives fascinating insight into chimpanzee behavior, explaining how they greet each other with a kiss, tickle each other, play games, and experiment with fashion.¹¹⁷ He speaks of elephants' amazing sense of smell and the versatility of their trunks.¹¹⁸ However, he also employs anthropocentric justifications for the creation and implementation of Bill S-218, which widen the gap between humanized animals and animalized animals. He highlights the genetic similarities between chimpanzees and humans and emphasizes their cognition and self-awareness, indicating that the only other animals that have this capacity are whales, elephants, and humans.¹¹⁹ The senator also noted that chimpanzees have culture and complex societies in order to justify legislating their protection, even comparing chimpanzee society to Parliament.¹²⁰ He asserted that these characteristics "create a responsibility" on the part of humans to protect chimpanzees and therefore sets the

¹¹⁵ *Id.* at 435.

¹¹⁶ *Id.* at 437.

¹¹⁷ *Id.* at 436.

¹¹⁸ *Id.* at 438.

¹¹⁹ Senator Sinclair says: "Colleagues, why do we need this bill? The short answer is that we owe it to the animals. First, the grape [sic] apes. Chimpanzees are humanity's closest living relatives, sharing 98.6% of our DNA. They live in the forests and savannahs of Central Africa. Cognitively, like all great apes, chimpanzees can recognize themselves as individuals in mirrors, demonstrating self-awareness. The few other creatures known to have this capacity include whales, elephants and us. Like all great apes, chimpanzees can learn and communicate in American Sign Language, even learning the skill from each other. They can add numbers, and they can vastly outperform humans in certain memory tests. Wild chimps use between 15 and 25 different tools per community. Some groups prepare five-piece tool kits in order to raid beehives. Other groups make spears to hunt small animals." *Id.* at 435.

¹²⁰ Senator Sinclair says: "Chimpanzees live within complex societies, forming political alliances to achieve their goals—kind of like Parliament. Male chimps even fawn over infants when vying for power—kind of like parliamentarians. When disputes break out, diplomatic individuals will patch things up. Chimps, like humans, can be violent, but they also demonstrate cooperation and altruism, such as delivering food and water to elderly relatives. They have been seen saving others in danger and helping wounded birds. Chimpanzees grieve their dead." *Id.* at 436.

bar extremely high: those animals with human qualities—“our closest relatives”—deserve our protection *because* they have those qualities.¹²¹

Senator Sinclair’s explanation of the ‘Noah clause’ in Bill S-218, which allows for an extension of the bill’s protection to certain captive, non-domesticated species, is also problematic.¹²² The senator affirmed the bill’s preference for humanized animals when he noted that new species designated using the Noah clause “must also be similar in relevant ways to either great apes, elephants or whales given the relative consensus around protecting these species.”¹²³ As will be discussed below, Bill S-241 builds on the Noah clause by specifically articulating the types of animals that can attract the proposed legislation’s protection, which are by and large humanized animals—a predictable development given the anthropocentric justifications of Bills S-203 and S-218.

The short title of Bill S-218, ‘the *Jane Goodall Act*’, serves as a reminder of the research and work done by Jane Goodall, whose approach to studying chimpanzees was scientific.¹²⁴ She observed chimpanzees in the wild and saw them fashion and use tools at a time when people believed that humans were the only species able to do so.¹²⁵ During the second reading of the bill, Senator Sinclair quotes Dr. Leakey’s telegram concerning Goodall’s research: “Now we must redefine tool, redefine man, or accept chimpanzees as humans.”¹²⁶ The exclusionary forces of the science-based reasoning behind the bills are another weakness that will be addressed later in this Article.

Bill S-218 died before Parliament was prorogued prior to the 2021 federal election.¹²⁷ However, Senator Marty Klyne reintroduced a modified version of the bill, now Bill S-241, on March 22, 2022.¹²⁸ The Senate completed the second reading of the bill on June 8, 2023.¹²⁹ Bill S-241 differs from Bill S-218 in several ways. Whereas Bill S-218 did not specifically list any animals that might benefit from the bill’s protection in the future, the preamble of Bill S-241 explicitly lists the non-domesticated animals that may benefit from the bill’s protection

¹²¹ *Id.*

¹²² *Id.* at 435; *Bill S-218 1st Reading*, *supra* note 88. See the definition of “designated animal” and the section entitled “Designation of non-domesticated captive animals by the Governor in Council.”

¹²³ *Bill S-218 Senate Debate, 2d Reading*, *supra* note 54.

¹²⁴ Gemma Walsh, Class Discussion: Canadian Developments – Pathbreaking Reform for Megafauna? *Law 381: Animals, Culture and the Law* (16 November 2021).

¹²⁵ *Be Like Jane: Observing, Conserving, and Communicating*, NAT’L GEOGRAPHIC, <https://education.nationalgeographic.org/resource/be-jane-observing-conserving-and-communicating/> (accessed Sept. 19, 2023).

¹²⁶ *Bill S-218 Senate Debate, 2d Reading*, *supra* note 54.

¹²⁷ *Revisiting the Jane Goodall Act*, THINK TURTLE CONSERVATION INITIATIVE (Aug. 21, 2023), <https://thinkturtleconservationinitiative.wordpress.com/2023/03/24/revisiting-the-jane-goodall-act/> (accessed Sept. 19, 2023).

¹²⁸ *Bill S-241, 1st Reading*, *supra* note 90.

¹²⁹ Canada, Parliament, *Debates of the Senate, 2d Reading*, 44th Parl., 1st Sess., Vol. 153, No.132 (8 June 2023).

through future designation.¹³⁰ These animals include big cats, bears, wolves, pinnipeds, non-human primates, and ‘dangerous’ reptiles.¹³¹ Bill S-241 more strictly defines the species of animals that can attract future protection. As the human-centric reasoning in Bill S-218 hinted at, many of these species are humanized animals, such as primates and big cats.¹³² The most notable exceptions to this characterization are ‘dangerous’ reptiles, such as crocodiles, alligators, giant pythons, and venomous snakes.¹³³ However, reptiles were also designated based on human-centric reasoning. Senator Klyne reveals that reptile designations were “prioritized on public safety grounds” after a python killed two boys in 2013.¹³⁴

Additionally, in “consultation with professionals in animal science, veterinary medicine and animal care and with representatives of groups whose objects include the promotion of animal welfare,” the Governor in Council can add or remove species from the schedule that limits which species may be designated for protection in the future.¹³⁵ The bill sets out factors that the foregoing list of specialists must consider in adding or removing a species designation. These factors include:

Whether the species is capable of living in captivity; whether the biological and ecological needs for individual animals of that species to live a good life can be met in captivity, including in particular the ability of animals of the species to engage in natural behaviour while in captivity; the intelligence, emotions, social requirements, physical size, lifestyle and potential use in performances of animals of the species; the public safety risks posed by animals of the species; and the evidence of harm to animals of the species in captivity, including stereotypies, health problems in captivity, shorter lifespans and increased infant mortality rates.¹³⁶

As with Bill S-218, this provision in Bill S-241 fails to question the ethical viability of animal captivity.

Bill S-241 waters down the already anthropocentric protections offered by Bill S-218. Bill S-241 seeks to further amend the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act* by enabling eligible animal care organizations to obtain a permit from the Minister to keep designated animals

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Maneesha Deckha, *Intersectionality and Posthumanist Visions of Equality*, 23 WIS JL GENDER & SOC’Y 249, 258 (Jan. 20, 2009) (also using the term “boundary animals”); DECKHA, ANIMALS AS LEGAL BEINGS, *supra* note 11, at 80–81; WOLFE & ELMER, *supra* note 19, at 101.

¹³³ Canada, Senate, *An Act to amend the Criminal Code and the Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act (great apes, elephants and certain other animals)*, 2d Reading, 44th Parl., 1st Sess., Vol. 153, No. 28, 2022 [hereinafter *Bill S-241 2d Reading*].

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

in captivity; conduct non-harmful scientific research on them; breed them in captivity; and import, export, or transport designated animals or their sperm, eggs, embryos or tissue cultures.¹³⁷ This amendment allows “educational demonstrations—such as supervised public observations and interactions—of an animal’s natural behaviour or practices required for animal care.”¹³⁸ The bill defines “animal care organizations”, which require designation by the Minister.¹³⁹ Section 19 of the bill sets out a list of deemed eligible animal care organizations, which include a number of zoos and aquariums.¹⁴⁰ Furthermore, Bill S-241 removes Bill S-218’s prohibition of importing elephant ivory and hunting trophies.¹⁴¹ While Bill S-241’s preamble still acknowledges that a ban “on trade in elephant ivory and rhinoceros horn and on the collection of elephant and rhinoceros hunting trophies will help to conserve elephant and rhinoceros populations and encourage bans in other countries,” prohibitions on such activities have been removed.¹⁴²

In sum, Bills S-203, S-218, and S-241 were justified to the public, the Senate, and the House of Commons using human-centered reasoning. The intent behind the bills is not to abolish animal captivity and commodification, but only to regulate the captivity of humanized animals like whales, chimpanzees, and elephants. Additionally, those who spoke in support of the bills highlighted the human-like qualities of cetaceans, great apes, elephants, and big cats, while largely ignoring the qualities that make these animals unique. The reasoning behind Bill S-218 demonstrates the extent of the entrenchment of human exceptionalism. Bill S-241 reaffirms this entrenchment in its narrowed list of designated animals that are either humanized animals or animals that can cause injury to humans. The next section will demonstrate why these anthropocentric tendencies are so harmful and exclusionary.

D. ANTHROPOCENTRIC JUSTIFICATIONS ENTRENCH THE SUFFERING OF ANIMALIZED ANIMALS AND ANIMALIZED HUMANS

The anthropocentric justifications used in the promotion of Bill S-203 (as well as Bills S-218 and S-241) are problematic, firstly, because they entrench the suffering of animalized animals by perpetuating an exclusionary definition of who is considered worthy of legal protection. The anthropocentric justifications are problematic, secondly, because

¹³⁷ *Bill S-241, Senate Debate, 1st Reading, supra* note 90, at 15.

¹³⁸ *Id.* at 11 (alteration in original).

¹³⁹ *Id.* at 10–11.

¹⁴⁰ *Id.* at 16.

¹⁴¹ Compare *Bill S-218, 1st Reading, supra* note 88, at 8 (containing a section that prohibits the importation of elephant ivory and hunting trophies), with *Bill S-241, 2d Reading, supra* note 133 (no longer containing the section prohibiting the importation of elephant ivory and hunting trophies found in Bill S-218).

¹⁴² *Bill S-241, 2d Reading, supra* note 133, at 1.

they endorse the dualistic thinking that legitimizes the abjection of animalized humans.

i. Animalized Animals

The humanizing justifications used in support of Bill S-203 have only redrawn the boundaries of legal protection. The animals that humans find substantially similar to themselves—such as whales, chimpanzees, and elephants—may more easily find themselves in the realm of legal protection.¹⁴³ However, the animals with whom humans cannot find genetic or attributional similarities, like intelligence or culture, fall outside the bounds of legal protection.¹⁴⁴ The same is true for animals that humans are unwilling to find similarities with. Humans are less likely to recognize the traits that they have in common with animals in animal agriculture, like chickens, pigs, and cows, because they have ‘othered’ these animals as food.¹⁴⁵ Animals in animal agriculture are commodified to the extreme, and using anthropocentric justifications to extend legal protection will do nothing to subvert their current legal status.¹⁴⁶

When legal reform targets the animals that humans perceive to be similar to themselves *because* of that similarity, countless other animals remain outside of the purview of reform because humans are unable or unwilling to find the same kinds of similarities.¹⁴⁷ By justifying the protection of cetaceans with anthropocentric reasoning, the bill’s proponents have reinforced the human-animal binary by re-affirming the qualities they believe deserve legal protection, namely human qualities.¹⁴⁸ As a result, the animals that do not have the qualities that humans and cetaceans share—human intelligence, socialness, and culture, for example—are precluded from benefiting from the same justifications used to secure protection for cetaceans. This human-animal

¹⁴³ Gonchar, *supra* note 41; see NONHUMAN RIGHTS PROJECT, *supra* note 41 (“[T]he law has to catch up to what we know about nonhuman animals, and courts and legislatures have to begin figuring out which species are entitled to which rights on what basis.”).

¹⁴⁴ See generally Gonchar, *supra* note 41 (discussing extending legal personhood to certain animals with a high level of intelligence); NONHUMAN RIGHTS PROJECT, *supra* note 41.

¹⁴⁵ See Alexander Bradley et al., *Some Animals are More Equal than Others: Validation of a New Scale to Measure how Attitudes to Animals Depend on Species and Human Purpose of Use*, 15 PLOS ONE, 13 (Jan. 21, 2020) at 1 (“The use of animals like pigs and chickens for food production was generally found to be more acceptable...”).

¹⁴⁶ *Id.*; see DECKHA, ANIMALS AS LEGAL BEINGS, *supra* note 11, at 143 (stating that many animal theorists observe animal campaigns merely attempt to shift the zones of inclusion and exclusion rather than subvert the eliminating exclusion overall).

¹⁴⁷ DECKHA, ANIMALS AS LEGAL BEINGS, *supra* note 11, at 87; Maneesha Deckha, *Vulnerability, Equality, and Animals*, 27 CAN. J. WOMEN & L., 47 (2015) [hereinafter Deckha, *Vulnerability*].

¹⁴⁸ Marie Fox, *Rethinking Kinship*, 57 CURRENT LEGAL PROBS. 469, 480–81 (2008).

binary is not a helpful tool for restructuring our legal system to afford protection to other-than-human animals.¹⁴⁹

Humanized animals, like whales, dolphins, apes, and elephants, can benefit from legal protection when they are characterized as ‘honorary humans.’¹⁵⁰ However, some animals will never be able to attain this status, either because they are too dissimilar from humans or because humans have commodified and objectified them to such an extent that society is no longer willing to recognize any human similarity.¹⁵¹ Anthropocentric justifications not only exclude certain animals from legal protection, but they also reaffirm cultural beliefs that humans are exceptional and have the right to subordinate animalized animals.¹⁵² Reinforcing the current legal paradigm will not bring about a status change for the majority of animals.¹⁵³

ii. Animalized Humans

The anthropocentric reasoning employed in the justifications used for Bill S-203 not only entrenches the suffering of animalized animals but also entrenches the suffering of animalized humans. What it means to be human, or to be a person, is defined by society not only in contrast to what it means to be an animal, but also in contrast to what it means to be queer, or a woman, or someone who is a minority, or someone with a disability.¹⁵⁴ That is, the ideal legal person is the “western, able-bodied, propertied, human male.”¹⁵⁵

When legal reformers make arguments that are justified by relying on ‘sameness’ (the notion that animals must be similar to humans in order to merit legal protection), they are accepting and reinforcing a legal divide between the humanized (legally protected) and animalized (legally subjected).¹⁵⁶ This human exceptionalism not only affects animals but also affects animalized humans (those who do not constitute the ideal legal person). Human exceptionalism situates animality, or otherness, as a position of “socially sanctioned abjection.”¹⁵⁷ By allowing

¹⁴⁹ See DECKHA, ANIMALS AS LEGAL BEINGS, *supra* note 11, at 148 (discussing David J. Gunkel’s view that expanding the binary to include more forms of life does little or nothing to challenge the fundamental legal structure that does not afford protection to all life forms).

¹⁵⁰ See Fox, *supra* note 148, at 478, 480 (referring to certain animals being classified as honorary humans that are accorded limited legal rights and primates, whales, and dolphins being claimed to be supremely intelligent); see generally NONHUMAN RIGHTS PROJECT, *supra* note 41 (discussing comparative intelligence of certain species of animals).

¹⁵¹ See generally DECKHA, ANIMALS AS LEGAL BEINGS, *supra* note 11, at 85 (“As property, animals occupy a commodified and objectified social status that only cherished and respected companion animals have any hope of transcending.”).

¹⁵² *Id.* at 93.

¹⁵³ Fox, *supra* note 148, at 489.

¹⁵⁴ Boggs, *supra* note 19, at 99.

¹⁵⁵ *Id.* (citing KATHY RUDY, LOVING ANIMALS: TOWARD A NEW ANIMAL ADVOCACY, at xii).

¹⁵⁶ DECKHA, ANIMALS AS LEGAL BEINGS, *supra* note 11, at 89.

¹⁵⁷ Boggs, *supra* note 19, at 99.

the abasement of animals because they are not human, we accept the premise that some humans can be abased because they are not human *enough* (they do not fit the ideal legal person mold).¹⁵⁸ In other words, speciesism, racism, sexism, and homophobia have the common premise of human exceptionalism, and ‘human’ in this context always has an exclusive definition. Such exclusivity is also evident in the science-based reasons for Bill S-203.

*E. SCIENCE-BASED JUSTIFICATIONS FOR BILL S-203:
EXCLUSIONARY AND ANTHROPOCENTRIC IMPLICATIONS*

Biological science was one of the driving forces behind Bill S-203. Scientific evidence demonstrates just how similar whales are to humans; both are intelligent and live social and cultural lives.¹⁵⁹ Marine scientists were among the most vocal advocates for Bill S-203, and their arguments were brought to the Senate floor.¹⁶⁰ They relied on scientific evidence to suggest that keeping cetaceans is cruel.¹⁶¹ First and foremost, they demonstrated that cetaceans are intelligent and social, just like humans.¹⁶² Having established cetacean’s “honorary human” status, they then articulated the attributes that cetaceans possess which make their captivity inhumane.¹⁶³ Cetaceans are acoustically sensitive, swim vast areas of the ocean, and carry out deep dives.¹⁶⁴ Aquarium tanks do not respect these attributes, as marine scientists observed that captive cetaceans are isolated, bored, unhealthy, and experience high infant mortality.¹⁶⁵ This affirms that they must live in the sea to lead healthy lives.¹⁶⁶ The same scientific justifications were used to create a “Declaration of Rights for Cetaceans: Whales and Dolphins,” which was the product of the conference, *Cetacean Rights: Fostering Moral and Legal Change*, held in Helsinki, Finland in May 2010.¹⁶⁷ Some scientific studies have determined that dolphins and whales have advanced cognitive functions. For example, they can problem solve and learn language, and they have ‘complex’ social behavior.¹⁶⁸ These findings

¹⁵⁸ *Id.*

¹⁵⁹ *Bill S-203, Senate Debate, 2d Reading, supra* note 5 at 385..

¹⁶⁰ David Suzuki, *Science Tells Us to End Whale and Dolphin Captivity. So What’s the Holdup?*, THE GLOBE AND MAIL (Sept. 28, 2017), www.theglobeandmail.com/opinion/science-tells-us-to-end-whale-and-dolphin-captivity-so-whats-the-holdup/article36430136/ (accessed Sept. 16, 2023).

¹⁶¹ *Id.*

¹⁶² *Bill S-203, Senate Debate, 3d Reading, supra* note 2, at 5626.

¹⁶³ *Id.*

¹⁶⁴ Suzuki, *supra* note 160.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Cetacean Rights: Fostering Moral and Legal Change Conference*, CETACEAN RTS., <https://www.cetaceanrights.org/conference.php> (accessed Sept. 16, 2023).

¹⁶⁸ *Declaration of Rights for Cetaceans: Ethical and Policy Implications of Intelligence*, AM. ASS’N FOR THE ADVANCEMENT OF SCI., <https://aaas.confex.com/aaas/2012/webprogram/Session4617.html> (accessed Sept. 16, 2023).

contradicted society's previously held view that orcas were simply vicious killers and indicated that cetaceans are extremely 'sophisticated' creatures.¹⁶⁹ Many people are even willing to recognize that some cetaceans have a form of culture, which is signified by attributes such as "cultural group selection, conformism, [and] cultural ethnicity with symbolic markers."¹⁷⁰ According to scientists, such signifiers are absent in most species, but present in certain cetaceans.¹⁷¹ The American Association for the Advancement of Science used these scientific reasons to justify their criticisms of countries that have continued to allow the killing of whales and dolphins.¹⁷² It was the apparent contradiction between the scientific findings listed above and the reality in countries that still allowed the killing and keeping of cetaceans that incited the *Cetacean Rights* conference.¹⁷³ Scientific evidence has suggested that cetaceans are more like humans than first thought—they have reached the level of humanized animal or honorary human—and many have thus concluded that cetaceans ought to be treated more like humans.¹⁷⁴

Scientific evidence that revealed the social lives and intelligence of cetaceans has had such a significant impact on the fight for these animals' lives and welfare because science is authoritative in its perceived neutrality.¹⁷⁵ Before this huge wave of scientific research into the lives of cetaceans, ethical arguments against cetacean captivity were instead prevalent.¹⁷⁶ The current dominance of science-based arguments rather than ethics-based arguments illustrates a strong preference for the neutrality and logic of science, but ignores that this produces exclusionary and anthropocentric results.

If protection is only afforded to the animals that science can prove are intelligent according to human standards—or in some other way similar to humans—then many animals will be excluded from protection. For example, the argument regarding whether fish feel pain *still* wages on. While scientific evidence quite clearly reveals that fish do feel pain, many are unaware of this fact.¹⁷⁷ Those who are aware and

¹⁶⁹ JASON M. COLBY, ORCA: HOW WE CAME TO KNOW AND LOVE THE OCEAN'S GREATEST PREDATOR 8–11.

¹⁷⁰ AM. ASS'N FOR THE ADVANCEMENT OF SCI., *supra* note 168.

¹⁷¹ Marino et al., *Cetaceans Have Complex Brains for Complex Cognition*, 5 PLOS BIOLOGY 966, 970 (2007).

¹⁷² David Grimm & Greg Miller, *Is a Dolphin a Person?*, SCIENCE (Feb. 21, 2010), <https://www.science.org/content/article/dolphin-person> (accessed Oct. 1, 2023).

¹⁷³ AM. ASS'N FOR THE ADVANCEMENT OF SCI., *supra* note 168.

¹⁷⁴ Steve Connor, *Whales and Dolphins are so Intelligent They Deserve Same Rights as Humans, say Experts*, INDEPENDENT (Feb. 21, 2012, 1:00 AM), <https://www.independent.co.uk/climate-change/news/whales-and-dolphins-are-so-intelligent-they-deserve-same-rights-as-humans-say-experts-7237448.html> (accessed Sept. 17, 2023).

¹⁷⁵ Sykes, *supra* note 41, at 360.

¹⁷⁶ *Id.* at 359.

¹⁷⁷ David N. Cassuto & Amy M. O'Brien, *You Don't Need Lungs to Suffer: Fish Suffering in the Age of Climate Change with a Call for Regulatory Reform*, 5 CAN. J. COMPAR. & CONTEMP. L. 31, 41–42 (2019).

still choose to commodify and eat fish may justify their actions based on their assumptions that fish are not that intelligent, at least compared to whales. This has driven some scientists to try to demonstrate emotional intelligence or the existence of social ties in fish. For example, Jennifer Jacquet and Becca Franks, speaking on *Industrial Fishing and Fish Farming at Yale*, have collated evidence on such topics.¹⁷⁸ They reveal that pufferfish construct intricate circular sand structures and maintain these structures in tidal zones.¹⁷⁹ Giant manta rays recognize themselves in a mirror, potentially indicating self-awareness.¹⁸⁰ Tuskfish use tools.¹⁸¹ Archerfish recognize individual humans, even if humans cannot differentiate between archerfish.¹⁸² Seabass have social learning, which could pave the way for cultural inheritance or traditions.¹⁸³ Cleaner wrasse engage in reconciliation behavior and deception, and they outperformed chimpanzees, orangutans, and capuchin monkeys on a cognitive test.¹⁸⁴ Having found some level of intelligence in certain fish, Jacquet and Franks propose bivalves as a food alternative to fish and thereby exclude them from their scientific framework of protection.¹⁸⁵ This demonstrates that having a humanistic definition of intelligence will necessarily exclude certain animals.

Science is a double-edged sword. Some might argue it has been a great friend to certain animals by deeming them eligible for legal protection. However, science has been a great enemy to the animals used in testing facilities. Science-based research also ignores the autonomy of animals when animals are held in captivity. For example, one of the primary justifications for zoos and aquariums offers that they contribute to the growing body of scientific knowledge on animals.¹⁸⁶

Additionally, science is not an impeccable rationale.¹⁸⁷ Many cognitive tests rank animals according to human capabilities. Humans

¹⁷⁸ Yale Law School, *Jennifer Jacquet and Becca Franks on Industrial Fishing and Fish Farming* at 7:21, VIMEO (Nov. 12, 2019), <https://vimeo.com/396527910> (accessed Sept. 16, 2023); see Jennifer Jacquet et al., *The Octopus Mind and the Argument Against Farming it*, 4 ANIMAL SENTIENCE 1, 1–2 (2019) (commenting on a study that found octopuses “have personalities, causal reasoning, get bored, and have imaginations”).

¹⁷⁹ Yale Law School, *supra* note 178, at 7:51.

¹⁸⁰ *Id.* at 8:16.

¹⁸¹ *Id.* at 8:25.

¹⁸² *Id.* at 8:33.

¹⁸³ *Id.* at 8:45.

¹⁸⁴ *Id.* at 8:56.

¹⁸⁵ Jennifer Jacquet et. al., *Seafood in the Future: Bivalves Are Better*, SOLUTIONS J. (Jan. 11, 2017), <https://thesolutionsjournal.com/article/seafood-future-bivalves-better/> (accessed Sept. 16, 2023).

¹⁸⁶ *Senate Debate*, Plett Commentary, *supra* note 62.

¹⁸⁷ Science is also often ambiguous. Scientists come to conflicting conclusions, or they have to make assumptions based on the best available data. For a discussion on the shortcomings on using science in court in cases involving animals and the environment, see Elizabeth Lewis, *Whale Wars: Reconciling Science, Public Opinion, and the Public Display Industry Under the Marine Mammal Protection Act*, 66 ADMIN. L. REV. 861, 891–894 (2014).

prompt rats to go through mazes, they teach gorillas American Sign Language, and they test memory, but these are all human measures.¹⁸⁸ Animals have evolved to become uniquely adapted to their particular environments. They have the intelligence to know what to eat and what not to eat.¹⁸⁹ They know how to find a safe place to live and how to keep their species alive.¹⁹⁰ The ability of an animal to do ‘tricks’ for humans is not indicative of their ability to survive or their own unique intelligence.

Science also has a significant impact on public perception, and scientific findings are disseminated to the public in part through museum exhibits.¹⁹¹ Because of science’s strong proclivity to reinforce humanizing tendencies, it ought to be subject to critique and analysis. An excellent example of this influence is *Orcas: Our Shared Future*, an exhibit on display at the Royal BC Museum from April 16, 2021, to March 31, 2022.¹⁹² The exhibit invites museumgoers to “dive deep” into the science of orcas.¹⁹³ It traces the role of science in changing the public perception of orcas as vicious killers to intelligent, sensitive beings.¹⁹⁴ In many instances, the exhibit draws on scientific evidence to support an anthropocentric worldview.¹⁹⁵

The orca exhibit shows how similar humans and orcas are by exploring the familial lives of orcas and their culture.¹⁹⁶ Yet it also suggests

¹⁸⁸ Saul Mcleod, *Latent Learning in Psychology and How It Works*, SIMPLY PSYCH. (updated Feb. 14, 2023), <https://www.simplypsychology.org/tolman.html> (accessed Sept. 16, 2023); *Sign Language*, THE GORILLA FOUND., <https://www.koko.org/about/programs/project-koko/interspecies-communication/sign-language/> (accessed Sept. 16, 2023); see Patricia S. Brocardo & Joana Gil-Mohapel, *Studying Learning and Memory in Animals: A Look Into Cognitive Function*, 4 BRAIN RSCH. J. 251 (discussing various experiments used to assess learning and memory in animals).

¹⁸⁹ *How Animals Decide What is Beneficial to Consume (While We’re Eating Chicken Fried Steak)*, LANDMARK WILDLIFE (June 5, 2018), <https://landmarkwildlife.com/how-animals-decide-what-is-beneficial-to-consume-while-were-eating-chicken-fried-steak/?cn-reloaded=1> (accessed Sept. 16, 2023).

¹⁹⁰ See Carl Safina, *How Do Animals Learn How to Be, Well, Animals? Through a Shared Culture*, TED (May 21, 2020), <https://ideas.ted.com/how-do-animals-learn-how-to-be-well-animals-through-a-shared-culture/> (accessed Sept. 18, 2023) (discussing how infant animals learn how to survive from their parents).

¹⁹¹ “Orcas: Our Shared Future”, *Royal BC Museum* (Museum Exhibit), visited 9 October 2021 [hereinafter Orca Exhibit].

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Welcome to the World of Orcas* in “Orcas: Our Shared Future” (16 April 2021–31 March 2022), online: Royal BC Museum (on file with ALR).

¹⁹⁵ See *Our Shared Future and Oceans in Crisis* in “Orcas: Our Shared Future” (16 April 2021–31 March 2022) online: Royal BC Museum (on file with ALR) (discussing the impact humans have on the orcas and oceans and how we need to protect our oceans); *Orcas: Our Shared Future*, MUSEUMS PARTNER 6, 20 https://www.museumspartner.com/wp-content/uploads/2023/05/Orca_Brochure_17_05.pdf (accessed Sept. 22, 2023) [hereinafter Orca Brochure].

¹⁹⁶ *Understanding Orcas: Enter their Oceans and Meet the Family* in “Orcas: Our Shared Future” (16 April 2021 – 31 March 2022), online: Royal BC Museum (on file with

that these other-than-human animals are only deserving of our respect and attention because they are ‘sophisticated’ animals. The exhibit also draws on similarities between orcas and humans by highlighting the familial aspects of orcas’ lives.¹⁹⁷ Posters with titles like “Meet the Family” and “Mothers and Grandmothers” teach viewers about the strong familial bonds within orca pods.¹⁹⁸ Several sections of the exhibit also talk about the way mother orcas have displayed grief at the loss of their calves.¹⁹⁹ Museumgoers can relate to familial connection and the grief experienced at the severance of that connection.

The exhibit also emphasizes the relatibility of orcas by describing their culture. They are described as “matriarchal” and “matrilineal,” with grandmother orcas sharing their “wisdom, including knowledge of good places to hunt and areas to avoid.”²⁰⁰ The exhibit draws a direct connection between orca societies and “many Indigenous societies on the Northern coast of British Columbia,” where “clan affiliation, rank, rights and privileges [are] passed down through the mother’s line.”²⁰¹ The exhibit also describes “superpods,” gatherings of different pods where whales “greet each other” and “mingle energetically.”²⁰²

Furthermore, the exhibit introduces an Indigenous perspective that considers orcas as ancestors and kin, while ignoring Indigenous viewpoints that encourage due consideration for all other-than-human animals and the imbricated nature of all living and non-living beings in the environment at large.²⁰³ The line between human and orca is blurred in artwork and oral histories that tell of transformation.²⁰⁴ The exhibit uses this perspective to drive home the similarities between humans and orcas and to argue that “if whales are like people, then they should be respected as we respect our human neighbors.”²⁰⁵ In other words, perceived humanity is a prerequisite for respect. Despite this skewed portrayal of Indigenous culture, the exhibit succeeds in encouraging viewers to consider humans’ relationship with orcas and

ALR); Royal BC Museum, *Digital Field Trip Teaser – Orcas Episode 1*, YOUTUBE (Feb. 7, 2022), <https://youtu.be/g8K1SzH3buQ> (accessed Sept. 22, 2023) [hereinafter *Digital Field Trip*].

¹⁹⁷ *Mothers and Grandmothers* in “Orcas: Our Shared Future” (16 April 202–31 Marc 2022), online: Royal BC Museum (on file with ALR).

¹⁹⁸ *Meet the Family and Mothers and Grandmothers* in “Orcas: Our Shared Future” (16 April 2021–31 March 2022), online: Royal BC Museum (on file with ALR).

¹⁹⁹ *A Mother’s Loss* in “Orcas: Our Shared Future” (16 April 2021–31 March 2022), online: Royal BC Museum (on file with ALR).

²⁰⁰ *Id.*

²⁰¹ *Id.*; Orca Brochure, *supra* note 195, at 26–27.

²⁰² Orca Exhibit, *supra* note 191; *Digital Field Trip*, *supra* note 196.

²⁰³ *Understanding Orcas - The Indigenous View* in “Orcas: Our Shared Future” (16 April 2021 – 31 March 2022) online: Royal BC Museum (on file with ALR); Orca Brochure, *supra* note 195, at 26–27.

²⁰⁴ *Understanding Orcas - The Indigenous View*, *supra* note 203; Orca Brochure, *supra* note 195, at 27.

²⁰⁵ *Understanding Orcas - The Indigenous View*, *supra* note 203.

the protections that these other-than-human animals ought to have. However, the exhibit does not invite museumgoers to think about species beyond the orca.²⁰⁶

In sum, uncritically using science-based reasoning as justification for granting legal protection to animals produces flawed and limited results. A scientific basis for protection that is premised on human-like intelligence excludes many types of animals. Scientific research has played a role in the subjugation and commodification of animals. Scientific research into animal intelligence is premised on anthropocentric assumptions that do not recognize a diversity of knowledge. It privileges rational thought. To accommodate multiple intelligences, we ought to think more plurally about what constitutes science, bringing Indigenous knowledge, for example, into our purview. The following section suggests some alternative ways of proceeding with legal reform that reject the anthropocentric and science-based justifications of Bill S-203.

V. THE PATH FORWARD

Some consider Bill S-203 a matter of strategy. For example, Martha Nussbaum, American philosopher and Professor of Law and Ethics at the University of Chicago, and her daughter, Rachel Nussbaum Wichert,²⁰⁷ argue:

[I]n terms of political strategy, it may be the best we can do at present to focus on species that already attract considerable public sympathy. *This means an uncomfortably anthropocentric focus on intelligence, communicative ability, [and] social learning.* . . . It is an unfortunate fact of today's world that we are far more likely to see protection for whales, great apes, dog [*sic*] and cats, than for pigs, chickens, and calves. . . . However, progress on one issue of urgent human importance should not wait for principled consistency on the part of the public.²⁰⁸

²⁰⁶ While I have spent the last few paragraphs critiquing the orca exhibit, it also has many redeeming qualities. For example, a large portion of the exhibit is dedicated to Indigenous peoples' understanding of orcas and their historical relationship. In this sense, the exhibit encourages a more nuanced approach than simply science-based reasoning. This is its greatest strength, in my opinion. It also highlights the interconnected nature of humans' relationship with animals and nature, encouraging a more thoughtful and considerate approach to life. *Humans and Killer Whales* in "Orcas: Our Shared Future" (16 April 2021–31 March 2022), online: Royal BC Museum (on file with ALR).

²⁰⁷ Rachel Nussbaum Wichert worked as a Government Affairs Attorney in the Wildlife Law Program at Friends of Animals, an international non-profit animal advocacy organization. Sadly, she passed in 2019. Christine Foster, *So Deeply Our Hearts Were Allied*, UNIV. OF CHI. L. SCH. (Apr. 18, 2023), <https://www.law.uchicago.edu/news/sodeeply-our-hearts-were-allied> (accessed Sept. 22, 2023).

²⁰⁸ Rachel Nussbaum Wichert & Martha C. Nussbaum, *Legal Protection for Whales: Capabilities, Entitlements, and Culture*, in ANIMALS, RACE, AND MULTICULTURALISM, 116 (Luís Cordeiro-Rodrigues & Les Mitchell eds., Palgrave Macmillan 2017) (emphasis added).

However, relying on reasoning that more deeply entrenches the suffering of animalized animals and animalized humans is not an acceptable path forward because the exclusionary effects of such reasoning are too strong. This is not to say that no incremental changes can be made. Indeed, the Canadian legal system will not likely be overhauled in one instance of legal reform to recognize the protection that animals require. Incremental legal reform is acceptable, however that reform should not affirm human-centered reasoning that serves to entrench the commodification and suffering of other animals and humans. Such a feat is difficult in a legal system underpinned by human exceptionalism, but that does not mean that the effort should be abandoned. In order to initiate legal reform that is inclusionary and not anthropocentric, there are two main steps we should take. First, we should engage in a multi-jural approach that recognizes the interconnectedness of human and animal lives. This multi-jural approach should take advantage of the legal language that is already present in Indigenous legal orders in Canada, and it should recognize animals as having their own norms and ways of living that require respect. Second, we should engage in an empathetic approach that recognizes and celebrates the differences between species.

A. *A MULTI-JURAL APPROACH THAT RECOGNIZES THE
INTERCONNECTED NATURE OF THE LIVES
OF HUMANS AND ANIMALS*

i. *Indigenous Legal Orders as Alternative Modes of Reasoning*

The Canadian legal system, rooted in human exceptionalism, is ill-equipped to deal adequately with animal-human relationships. As is evident in some of Senator Sinclair's words, Indigenous legal orders use concepts and language that are much more conducive to the inclusion of animals.²⁰⁹ During the third reading of Bill S-203, Senator Sinclair notes that the Anishinaabe recognize the interconnectedness and interdependence of all things, and they recognize that they have a duty to care for the land and everything in it.²¹⁰

The view articulated by Sinclair conceives of a place in the law for animals, and it imposes a duty upon humans to care for animals. In contrast to the anthropocentric reasoning pervading much of the senators' speeches, this sentiment could serve as a starting point for an approach to legal reform that is not human centered. The Anishinaabe concepts of interconnectedness and interdependence can be used to

²⁰⁹ My intention here is not to suggest that all Indigenous peoples in Canada view animals the same way. There is great diversity in Indigenous legal orders, and I am by no means an expert in any of them. My point is that the Canadian legal system has not been using helpful language to talk about animal-human relationships, but it does not need to look far for inspiration. Some of the concepts raised by Senator Sinclair provide an encouraging start. *Bill S-203, Senate Debate, 3d Reading, supra* note 1, at 5628.

²¹⁰ *Id.*

buttress the argument that human considerations are just one aspect of legal analysis; animal considerations must also factor in. Similarly, Nunavut has codified Inuit knowledge of animal-human relations in its *Wildlife Act*.²¹¹ Inuit epistemology (or Inuit Qaujimaqatugangit) rejects an instrumentalist view of animals as property.²¹² Instead, it promotes the view that humans, animals, and plants are all dependent on each other and interconnected; animals are worth more than their instrumental value.²¹³ This is not to suggest that Canada ought to adopt Nunavut's *Wildlife Act*, but instead that the presence of such principles in Nunavut indicates that there are alternative, more inclusive languages at our disposal.²¹⁴ As a product of a multi-jural nation, Canadian legal reform should be more in tune with the legal orders that constitute the nation.

Indigenous knowledge ought to be employed to counteract the exclusionary and anthropocentric effects of science-based justifications in the pursuit of legal protection for animals. Indigenous peoples have successfully managed “human-animal-environment relations” for centuries,²¹⁵ and they have lived sustainably within ecosystems.²¹⁶ Central to their success has been the recognition of the interconnected nature of the world. Their knowledge rejects anthropocentrism by conceiving of “other species as conscious and strategic.”²¹⁷ They see the current landscape as a result of “historical conflicts, treaties, and marriages between species”—not a “food chain, but a social network.”²¹⁸ Animals are active agents that merit consideration as part of a living network.

ii. The ‘Laws’ of Other-Than-Human Animals

Animals have their own way of living that merits consideration and respect. In the context of cetaceans, Nussbaum points out that scientists Hal Whitehead and Luke Rendell “conclude that whales and dolphins

²¹¹ Constance MacIntosh, *Indigenous Rights and Relations with Animals: Seeing Beyond Canadian Law*, in CANADIAN PERSPECTIVES ON ANIMALS AND THE LAW 187, 205 (Vaughan Black et al. eds., Irwin Law, 2015).

²¹² *Id.*

²¹³ *Id.* at 205–06.

²¹⁴ This is not to say that Nunavut's *Wildlife Act* is perfect, as these Indigenous laws still condone the killing of animals. Many are hesitant to critique this aspect of Indigenous culture for fear of perpetuating colonializing tendencies. See generally Wichert & Nussbaum, *supra* note 208, at 109–11 (providing justifications for such a critique and noting that Indigenous perspectives on killing animals are not homogenous and that “cultures are neither monolithic nor static,” meaning that alternatives to killing animals can “authentically” be incorporated into Indigenous culture).

²¹⁵ MacIntosh, *supra* note 211, at 204.

²¹⁶ Russel Lawrence Barsh, Taking Indigenous Science Seriously, in *Biodiversity in Canada: Ecology, Ideas, and Action* 153, 154 (Stephen Bocking ed., University of Toronto Press, 2000).

²¹⁷ *Id.* at 159.

²¹⁸ *Id.*

definitely have culture as culture is most often defined.”²¹⁹ According to Nussbaum, this culture merits “ethical respect and consideration.”²²⁰ However, it is not the fact that cetaceans have reached the ‘evolutionary pinnacle’ of culture that merits legal consideration, it is the fact that they have a place in the world—“they are living, sentient organisms who can be harmed or benefited.”²²¹ Using culture as a condition for legal consideration is human centered and exclusionary. Rather, legal reform must recognize that each species has its own “form of life” and “deserves opportunities to flourish in its own way.”²²²

In the context of cetaceans—whales in this specific context—this means asking questions like: Where do whales live? What other animals do they interact with? What kinds of activities do they prefer? How do whales interact with their environment? The goal is to understand how a whale thrives rather than simply drawing similarities and analogies to human culture, as the senators and members of Parliament did when they spoke in support of Bill S-203. By engaging with what it means to be a particular animal, we are acknowledging another voice in the process of legal reform. We acknowledge that human life resides in a network of lives. Human lives affect animal lives, as animal lives affect the lives of humans.²²³ Because the Canadian legal order is situated in a milieu of interdependent interspecies encounters, it must recognize and give due consideration to each party in the encounter.

B. AN EMPATHETIC APPROACH THAT RECOGNIZES DIFFERENCES

Animals have lives, experiences, and interests. Many “are capable of enjoying their lives,”²²⁴ and because they can experience harm and benefit, they deserve legal consideration nuanced enough to account for species-specific characteristics.²²⁵ The anthropocentric justifications for Bill S-203 serve to further entrench animal suffering by focusing

²¹⁹ Wichert & Nussbaum, *supra* note 208, at 114.

²²⁰ *Id.*

²²¹ The purpose of this Article is not to delineate which animals deserve legal protection and which do not. In fact, that is the wrong question to ask. This Article aims to advocate for an inclusive view of the beings that merit legal consideration. All living things, and even inanimate objects and resources, hold a place in a complex ecosystem. Animals merit consideration not only because they hold a place in that ecosystem, but also because they have interests and attributes that require attention. Kai Horsthemke, *Non-Anthropocentric Views, Animals as Moral Subjects, and Equality*, in *ANIMAL RIGHTS EDUCATION* 65, 65 (Palgrave Macmillan, 2018).

²²² Wichert & Nussbaum, *supra* note 208, at 96.

²²³ DECKHA, *ANIMALS AS LEGAL BEINGS*, *supra* note 11, at 134–35.

²²⁴ Horsthemke, *supra* note 221, at 33.

²²⁵ *Id.* at 3–4 (indicating *which* animals qualify for protection and encouraging a caring approach to animal-human legal relations. “The life of an individual, whether self-conscious or merely conscious, constitutes a unity in its own right, whose moral value is not relative to or exhausted by our utilitarian calculations. Even if an individual has no conception of herself as a bearer of interests, preferences, and desires, it does not follow

on how cetaceans are similar to humans, so we must instead endeavor to highlight and respect differences. Only by exploring how animals are different from each other as well as humans can we understand animals' interests and the injustice they experience at the hands of the Canadian legal system.²²⁶ We can use empathy as a tool to understand these differences.

Curiosity is an important part of empathy. Humans must be willing to step away from their self-focus and ask what an animal needs to thrive; ask “what it means to be an elephant, or a pig, or a bird.”²²⁷ This might include “the chance to associate with others of their kind in normal groupings; the chance to sing or trumpet in their characteristic ways; the chance to breed; the chance to move freely through unobstructed space; the chance to pursue curiosity and make new discoveries.”²²⁸ The goal is to understand their unique characteristics.

Instead of listing the similarities between the species in question and humans, proponents of legal reform should examine behavioral requirements and confront how these needs are being addressed or denied. The proponents for Bill S-203 did this to a certain extent in their justifications when they discussed the natural habitat of whales, how far they would travel, and their use of echolocation.²²⁹ However, the behavioral assessment was mired in human comparison, and the debates focused on the intelligence and social capacity of whales.²³⁰ An empathetic approach would discourage drawing analogies to humans and instead invite people to step into the perspective of the animal. To demonstrate the unethical nature of captivity, proponents of reform might ask questions like: Where and how does the animal move in the wild? How does the animal communicate with its family, others of its species, and others not of its species? How does the animal obtain food?

inexorably that she is morally nothing but a replaceable receptacle of value, or valuable experiences.”)

²²⁶ Deckha, *Vulnerability*, *supra* note 147, at 50.

²²⁷ Martha Nussbaum, *What Does It Mean to Be Human? Don't Ask*, N.Y. TIMES (Aug. 20, 2018), <https://www.nytimes.com/2018/08/20/opinion/what-does-it-mean-to-be-human-dont-ask.html> (accessed Sept. 17, 2023).

²²⁸ *Id.*

²²⁹ Canada, Parliament, House of Commons Debates, 42d Parl., 1st Sess., Vol. 1438, No. 361 (29 November 2018) at 24241–42 (MP Donnelly) [hereinafter *House of Commons Debate*, No. 361].

²³⁰ Maneesha Deckha, *Humanizing the Nonhuman: Legitimate Way for Animals to Escape Juridical Property Status?*, in *CRITICAL ANIMAL STUDIES: TOWARDS A TRANS-SPECIES SOCIAL JUSTICE*, 221 (Atsuko Matsuoka & John Sorenson eds., Rowan & Littlefield, 2018). Deckha notes that the weakness in this approach is that “the legal system is a human institution that depends upon human interpretation and reasoning to operate. The injustice in thwarting animal capacities that human jurists can relate to will resonate more with them. This is an anthropocentric element of legal architecture that is very difficult to eliminate.” If the Canadian legal system becomes more empathetic in its outlook and reasoning, this would hopefully become less of a barrier, as jurists would be less concerned with what they can relate to and more able to engage in an empathetic analysis.

The goal is to understand the natural experience of that particular animal.

Engaging in an empathetic analysis would enable legal reformers to understand the needs and preferences of the animals in question. A multi-jural approach would not only give a voice to animals in the legal reform process, but also acknowledge the applicability of existing Indigenous legal languages. An empathetic and multi-jural approach would counter the exclusionary, anthropocentric rhetoric that is currently employed in legal reform relating to animals.

VI. CONCLUSION

The human-centered and science-based justifications used by the supporters of Bill S-203 limit the potential for future legal reform by acting as exclusionary forces against animals that humans do not perceive to be similar to themselves.

Supported by public sentiment, the Senate and the House of Commons used anthropocentric reasoning to justify Bills S-203, S-218, and S-241. Some animal advocates believe these bills can be a step toward addressing animal captivity,²³¹ but this hope is misplaced. The bills do not aim to abolish animal captivity, but only to regulate the captivity of humanized animals. By using the similarities between cetaceans and humans as a justification for the abolition of cetacean captivity, proponents of Bill S-203 exclude other animals from the purview of legal protection. By affirming the animal-human binary, they entrench the suffering of both animalized animals and humanized animals.

The science-based reasoning behind Bill S-203 also encourages dualistic thinking that places humanized humans and humanized animals above animalized animals. Scientific investigation into the lives of marine mammals was one of the driving forces behind the bill.²³² People gravitated to the traits they found familiar, like intelligence and socialness.²³³ However, by affirming that only human traits deserve legal protection, the science-based reasoning behind the bill excludes many animals.

To break animals out of their current property status, legal reformers ought to avoid rooting their arguments in human exceptionalism and human-focused science. Instead, they should engage in a multi-jural approach that not only acknowledges the applicability of Indigenous concepts and languages but also recognizes that animals have ways of living that merit consideration. Legal reformers should also practice empathy and curiosity to respect species' different needs.

²³¹ John Paul Tasker, *Senate Passes Bill That Would Ban Whale, Dolphin Captivity in Canada*, CBC (Oct. 24, 2018, 9:30 AM), <https://www.cbc.ca/news/politics/tasker-whale-dolphin-captivity-canada-senate-bill-1.4876136> (accessed Sept. 24, 2023).

²³² *House of Commons Debate*, No. 361, *supra* note 69, at 24236–24237, 24241.

²³³ *Id.*

While this Article has largely served as a critique of Bill S-203, it is not meant to leave the reader without hope. We already have many of the tools we need for more inclusionary legal reform. Alternative legal languages are right at our fingertips, if only the Canadian legal system was more accepting of its multi-jural nature. The legal system is situated not only within a network of Indigenous legal orders but also within a network of other species that have their own ways of living. Legal reformers must be more attuned to this to initiate far-reaching changes.