THE (SYMBOLIC) LEGISLATIVE RECOGNITION OF ANIMAL SENTIENCE

By
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Abstract

This Article will draw conclusions from the legislative recognition of animal sentience in animal welfare legislation of Oregon, New Zealand and Québec. A range of jurisdictions have, in recent times, amended their animal welfare legislation to recognize that animals are "sentient." While seemingly a progressive and welcome advance, there are a range of reasons to doubt the actual impact of such amendments. The limited impact of the amendments within animal welfare case law in these jurisdictions appear to confirm these doubts. This Article questions whether such symbolic amendments are benign or have a damaging effect on the attempt to reform and advance animals' interests within the law.

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I. INTRODUCTION

In 1997, the fifteen member states of the European Union (EU) signed the Treaty of Amsterdam.[1] The Treaty made significant institutional changes to the EU, including allowing for its expansion and for the transfer of powers from domestic governments to the European Parliament, affecting millions of people in Europe. Nonhuman animals[2] were also affected by the Treaty; in one of the Treaty's protocols underpinning EU animal welfare policy,[3] animals were recognized as "sentient beings."[4] For the first time, legislation recognized what Charles Darwin postulated 125 years earlier: animals are capable of emotions and feeling.[5]

In the intervening years, many other jurisdictions have also given legislative recognition to animal sentience. The Australian Capital Territory,[6] Chile,[7] Colombia,[8] France,[9] Greece,[10] Lithuania,[11] the Netherlands,[12] New Zealand,[13] Oregon,[14] Peru,[15] Québec,[16] and

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[1] Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1.

[2] Hereinafter animals.

[3] R. Horgan & A. Gavinelli, *The Expanding Role of Animal Welfare within EU Legislation and Beyond*, 103 LIVESTOCK SCI. 303, 303 (2006).

[4] Consolidated Version of the Treaty Establishing the European Community, Mar. 25, 1957, 2006 O.J. (C 321 E) 314 (Protocol (No 33) on Protection and Welfare of Animals (1997)).

[5] *See generally* CHARLES DARWIN, THE EXPRESSIONS OF EMOTIONS IN MAN AND ANIMALS (1872) (explaining that animals have emotions to express).

[6] *Animal Welfare Act 1992* (ACT) s 4A (Austl.).

[7] Law No. 20380 art. 2, Sobre Protección de Animales, Septiembre 11, 2009, BIBLIOTECA DEL CONGRESO NACIONAL DE CHILE [B.C.N.] (Chile).

[8] L. 1774, enero 6, 2016, DIARIO OFICIAL [D.O.] (Colom.).

[9] CODE RURAL ET DE LA PE^CHE MARITIME [C. RUR.] [RURAL AND MARITIME FISHERIES CODE] art. L214-1 (Fr.).

[10] Nomos (2012:4039) Gia Ta Deopozomena Kai Ta Adeopota Zoa Syntrophiaskai Ten Zoonapote Ekmetalleyse e Te Chresimottoiese me Kerdookopikookotto [Concerning Domestic and Stray Companion Animals and the Protection of Animals from any Exploitation or Use for Economic Profit], EPHEMERIS TES KYVERNESEOS TES HELLENIKES DEMOKRATIAS [E.K.E.D.] 2012, A:15, art. 1 (b) (Greece).

[11] Gyvūnu Gerovés ir Apsaugos Istatymas [Animal Welfare and Protection Law] VII-500 (2012) (Lith.).

[12] Wet van 19 mei 2011, Stb. 2011, 345 (Neth.).

[13] Animal Welfare Act 1999, ss 1(a)(i), 80(2)(b)(iii)–(iv), 100(1)(fa)(i)–(ii) (N.Z.) [hereinafter Animal Welfare Act].

[14] Offenses Against General Welfare and Animals, OR. REV. STAT. § 167.305(1).

[15] Law No. 30407 art. 14, Ley de protección Animal, junio 2018, Normas Legales, (Peru).

[16] Animal Welfare and Safety Act, C.Q.L.R. 2016, c B-3.1. (Can.) [hereinafter Animal Welfare and Safety Act].

Tanzania,[17] all make explicit mention of sentience in their animal welfare legislative regimes.[18] Additionally, both Victoria, Australia and the United Kingdom are considering amendments to their animal welfare legislation to include recognition that animals are sentient.[19] Thus, there is a growing appetite to recognize in legislation that animals are sentient. An international animal rights NGO, World Animal Protection, has made formal legislative recognition of animal sentience one of the metrics when compiling its Animal Protection Index, "a ranking of 50 countries around the globe according to their legislation and policy commitments to protecting animals."[20]

At first blush, this seems like an unqualified positive development; legislative recognition that animals are sentient *ought* to lead to better protection of their welfare. The logic behind this initial impression is straightforward. This Article defines 'sentience' as the capacity to have positive and negative emotional states.[21] Presently, most animal welfare legislative regimes impose an obligation on those who own (or are otherwise in charge of) animals to provide for their welfare, measuring 'welfare' according to the avoidance of negative physical states.[22] However, if those regimes now acknowledge that animals have positive and negative *emotional* states, 'welfare' will now encompass those states, too. If so, this would mean those in charge of animals have a legal imperative—in addition to any existing moral imperative—to improve those emotional states, enhancing the positive and reducing the negative.

This Article tests the logic above. The starting point is doubt that simple recognition of animal sentience in legislation will have any significant positive benefit for animals, and the Article provides an expla-

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[17] Animal Welfare Act 2008, Cap. 319 (2008) §4(b) (Tanz.).

[18] Such regimes typically criminalize two types of conduct toward animals: (1) cruelty (infliction of unreasonable or unnecessary of pain), and (2) neglect (failing to provide for their welfare).

[19] DEPARTMENT OF JOBS, PRECINCTS, AND REGIONS, VICTORIA STATE GOVERNMENT, A NEW ANIMAL WELFARE ACT FOR VICTORIA: DIRECTIONS PAPER 16 (2020); SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS, ANIMAL WELFARE (SENTENCING AND RECOGNITION OF SENTIENCE) DRAFT BILL, 2017, Cm. 9554, at 4 (UK).

[20] World Animal Protection, *Methodology*, ANIMAL PROTECTION INDEX (2020), https://perma.cc/M3BU-DPQF (accessed Sept. 29, 2021) ("Full formal recognition of sentience into law applicable to, at a minimum, all vertebrates, cephalopods and decapod crustaceans. Such a formal recognition of sentience should be enshrined in animal welfare legislation, as well as in the country's Civil Code.").

[21] D.M. BROOM, ENCYCLOPEDIA OF ANIMAL BEHAVIOR 131-133 (2nd ed. 2019) ("Sentience means having the capacity to have feelings. This requires a level of awareness and cognitive ability. There is evidence of sophisticated cognitive concepts and for both positive and negative feelings in a wide range of nonhuman animals.").

[22] For example, malnourishment or the symptoms of disease where an owner has failed to properly seek treatment and diagnosis of that disease. *See Animal Welfare Assessments*, WILD WELFARE, https://perma.cc/K3RA-E5RW (accessed Oct. 22, 2021) (explaining how most animal welfare assessments have focused on the "health of the animal and other physical measures" and how numerical measures are often used, rather than emotional measures).

nation for that position in Part II. In Part III, the Article tests that cynicism by looking to three jurisdictions—Oregon, New Zealand and Québec—to see whether legislative recognition of sentience has led to any change in the way that courts approach animal welfare obligations. Finally, in Part IV, the Article queries whether any change in judicial approach means that such legislative recognition is symbolic, and if so, whether such symbolism is a problem.

II. REASONS FOR CYNICISM

There are two key reasons to be cynical that various jurisdictions' recognition of sentience is not necessarily the profound or significant development it appears to be. First, there is not a fixed, universal definition of sentience, and the species that fall within this category are matters of debate.[23] That lack of determinacy affects the capacity of legislative recognition of sentience from having a clear and meaningful effect. Second, even if that indeterminacy was not an insurmountable barrier to such recognition having a significant effect, the fundamentals underlying animal welfare legislation prevent the recognition of sentience from having such an effect.

A. Definitional Inconsistency

Before outlining the definition and scope of animal sentience, it is worth quickly recounting the history behind its recognition. While the Classical and Cartesian views of animals as *automata* was a dominant position for centuries, by the time of the Enlightenment such a view was increasingly the subject of challenge.[24] Both David Hume and Jeremy Bentham postulated arguments in favor of animals having subjective emotional experiences, with the latter famously articulating the issue of whether animals are due moral consideration as follows: "The question is not, *Can they reason?* nor, *Can they talk?* but, *Can they suffer?*"[25]

After Darwin, feelings were viewed as adaptations relevant to natural selection, such that "120 years ago, it was commonly accepted by scientists that animals were sentient and this was also the commonsense view held by the community."[26] Behaviorism—the theory that feelings and consciousness, as non-observable subjective affective states, are irrelevant—dominated thinking in the first half of the twentieth century, leading to the concept of animal sentience being dismissed and ignored.[27] From the 1960s onwards, however, coincid-

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[23] Helen S. Proctor et al., *Searching for Animal Sentience: A Systematic Review of the Scientific Literature,* 3 ANIMALS 882, 884 (2013).

[24] Ian J.H. Duncan, *The Changing Concept of Animal Sentience*, 100 APPLIED ANIMAL BEHAV. SCI. 11, 12 (2006).

[25] *Id.* (citing JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, 144 (Clarendon Press 1823) (1789)).

[26] *Id.*

[27] *Id.* at 13.

ing with the emergence of animal welfare science,[28] and the recognition of animal interests,[29] there was a resurgence of study in the area.[30] By the 1980s, feelings were considered a necessary—perhaps singular—component of animal welfare, even if, as Ian Duncan notes, recognition of that fact "brings with it a huge, almost insurmountable problem, which is that we can never prove conclusively that any organism is sentient."[31]

Today, although there is broad consensus about what the fundamentals of animal sentience entails, the scope of the term and its particulars are disputed. Until around fifteen years ago, sentience was "conceptualized mainly in terms of animals' capacity to have negative affective experiences, especially pain and any associated suffering," whereas the capacity of animals to feel positive experiences is now considered possible and important.[32] Modern definitions range from complex[33] to far too simplistic; for example, "hav[ing] the capacity to feel."[34]

A compromise articulation of sentience is posited by Donald Broom.[35] Broom expands upon a simple definition, namely, that "sentience means having the awareness and cognitive ability necessary to have feelings."[36] In Broom's expanded definition, he states that a sentient being is one who has some ability to:

(a) evaluate the actions of others in relation to itself and third parties;

(b) remember some of its own actions and their consequences;

(c) assess risks and benefits;

(d) have some feelings; and

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[28] *See generally* RUTH HARRISON, ANIMAL MACHINES (1964) (describing the cruelties of modern husbandry and recommending changes); TECHNICAL COMMITTEE TO ENQUIRE INTO THE WELFARE OF ANIMALS KEPT UNDER INTENSIVE LIVESTOCK HUSBANDRY SYSTEMS, REPORT, 1965, Cmnd. 2836, at 13 (UK) (establishing the 'Five Freedoms' for animal welfare).

[29] *See generally* PETER SINGER, ANIMAL LIBERATION: A NEW ETHICS FOR OUR TREATMENT OF ANIMALS (1975) (arguing that animals deserve equal consideration to humans and thus better treatment); Tom Regan, *The Moral Basis of Vegetarianism*, 5 CAN. J. OF PHIL. 181, 209 (1975) (arguing that animals have base interests and, thus, a right to life).

[30] Duncan, *supra* note 24, at 13.

[31] *Id.* at 14.

[32] David J. Mellor, *Welfare-Aligned Sentience: Enhanced Capacities to Experience, Interact, Anticipate, Choose and Survive*, 9 ANIMALS 440, 449–50 (2019).

[33] *See id.* at 448 (defining "welfare-aligned" sentience as "a capacity to consciously perceive negative or positive sensations, feelings, emotions or other subjective experiences which matter to the animal," but only after an extensive analysis of the key attributes of sentience, as expressed in eleven different statements about the features of sentience).

[34] James K. Kirkwood, *The Distribution of the Capacity for Sentience in the Animal Kingdom, in* ANIMALS, ETHICS AND TRADE: THE CHALLENGE OF ANIMAL SENTIENCE 12, 12 (Jacky Turner & Joyce D'Silva eds., 2006).

[35] DONALD M. BROOM, SENTIENCE AND ANIMAL WELFARE (2014).

[36] *Id.* at xiii.

(e) have some degree of awareness.[37]

This definition is far more useful because it explains what an affective state actually means. However, in noting all that is required is "some" ability to engage in these states, Broom acknowledges that sentience is a matter of degree.[38] Some species have a higher capacity for such affective states, and this leads to disagreement regarding the outer edges of which species are sentient. Science quickly progressed from accepting as sentient "certain mammals that were kept as companions; animals which seemed most similar to humans such as monkeys; the larger mammals; all mammals; all warm-blooded animals; then all vertebrates; and now some invertebrates."[39] For example, as recently as 1985 scientists regarded fish as being incapable of consciousness and this is still a common popular misconception.[40] Today, it is now understood that fish "have excellent long-term memories, develop complex traditions, show signs of Machiavellian intelligence, cooperate with and recognize one another and are even capable of tool use."[41] The boundaries of which species are sentient, and the degree to which they are sentient, are constantly shifting.

Animal sentience may not be "an abstract concept"[42] or "something without real definition or tangible indicators,"[43] but it is, at the very least, not self-explanatory, nor is there a clear and incontrovertible definition at present—this poses a problem. David Mellor explains the difficulties in determining a statutory definition:

> [A] definition must be specific enough to provide a direction for policy development and to be useful legally. On the other hand, a definition needs to be sufficiently general to reflect the key features of sentience as they are currently understood and, with greater difficulty, to anticipate changes that may be required as the underlying scientific knowledge evolves.[44]

In her excellent analysis of the recognition of sentience by the law, Charlotte Blattner observes that when legislators define sentience, they usually employ a "broad definition that includes both the ability to experience pain and pleasure and the intrinsic importance to the being experiencing those feelings."[45] However, legislators do not properly define sentience. Of the three jurisdictions compared in this Article, New Zealand provides no definition whatsoever and Québec states,

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[37] *Id.* at xiii–xiv.

[38] *Id.* at 5.

[39] *Id.*

[40] Stephanie Yue Cottee, *Are Fish the Victims of 'Speciesism'? A Discussion About Fear, Pain and Animal Consciousness*, 38 FISH PHYSIOLOGY & BIOCHEMISTRY 5, 7 (2012).

[41] Culum Brown, *Fish Intelligence, Sentience and Ethics*, 18 ANIMAL COGNITION 1, 1 (2015).

[42] Proctor et al., *supra* note 23, at 897.

[43] *Id.*

[44] Mellor, *supra* note 32, at 449.

[45] Charlotte E. Blattner, *The Recognition of Animal Sentience by the Law*, 9 J. ANIMAL ETHICS 121, 125 (2019).

minimally, "animals are sentient beings with biological needs."[46] Oregon is the closest in providing a definition: "Animals are sentient beings capable of experiencing pain, stress and fear[.]"[47] Even if Oregon's definition is more extensive than New Zealand's or Québec's, in failing to recognize positive affective states, Oregon's definition is outdated and far more restricted than the current prevailing scientific view.

Lacking a complete (or any) legislative definition, courts might be expected to fill the gap. But which definition should a court select? As Mellor notes, this is a complex policy choice, and thus one perhaps unsuited for courts,[48] and without explaining the definition or significance of such a provision, there is a risk that the provisions will disappoint those seeking significant policy change. The indeterminacy of the definition, combined with interpretative limitations on courts, likely means that risk will be realized.

B. The (Limited) Potential Impact

Theoretically, if courts were to ignore the incomplete or absent definitions of sentience in New Zealand, Québec, and Oregon, and instead accept a broad definition of sentience—one that aligns best with scientific consensus—the potential impact of the acceptance of that broad definition is significant.

Indeed, Ian Robertson and Daniel Goldsworthy argue that such a significant effect *will* occur regarding New Zealand's recognition of sentience.[49] Since sentience includes the capacity to experience both positive and negative emotions, they argue that its legislative recognition will mean the negatively framed existing responsibilities of those in charge of animals, like ensuring that they do not have experiences of unreasonable pain or distress, will expand.[50] Eventually, they argue, those in charge of animals will not only have to prevent negative experiences, but also appropriately provide for positive experiences.[51] Courts could "require an assessment, based on best practice and scientific knowledge, of whether [an] animal is experiencing (and demonstrating) positive states of consciousness."[52]

Arguably, however, the significance this change would represent is nothing short of fantastical. New Zealand's Animal Welfare Act jurisdiction is broad, covering most large animals, regardless of whether they are companion animals, agricultural animals, animals used for

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[46] Animal Welfare and Safety Act, *supra* note 16.

[47] OR. REV. STAT. § 167.305(1).

[48] Mellor, *supra* note 32, at 449.

[49] Ian Robertson & Daniel Goldsworthy, *To Feel or Not to Feel; That Is the Legal Question*, 1 N.Z. L. J. 10, 10 (2017).

[50] *Id.* at 12.

[51] *Id.* at 13.

[52] *Id.* at 14.

research, or animals found in the wild.[53] While it might be possible to envisage the capacity of owners of companion animals to provide for positive experiences, given the nature of industrialized agriculture, it is almost by definition impossible to provide for positive experiences for agricultural animals. Any intensive farming of livestock would become impossible. While this result may be desirable, courts are unlikely to imply an obligation that would lead to such significant change. Moreover, it is unlikely that courts could do so, because as a matter of orthodox statutory interpretation, a court cannot imply additional obligations in a criminal statute unless the implication is clear and obvious.[54] Given the murkiness of the definition of sentience, such an implication will never be clear and obvious. In failing to provide a definition for sentience, it is near impossible to determine Parliament's intention as to how broad that concept should be. Thus, the court is without any interpretative lodestar.

Turning to Québec, arguably more important than its recognition of sentience in its animal welfare legislation is the amendment to its Civil Code that occurred at the same time.[55] That amendment also acknowledged that animals are sentient but went further by recognizing animals are not "things," thereby potentially undermining their status as property.[56] Both legislative references to sentience suffix their recognition with the statement that animals have "biological needs."[57] This suffix aligns with the legislative obligations on owners of companion animals (but not agricultural animals): "An animal's welfare or safety is presumed to be compromised if the animal does not receive care that is consistent with its biological needs."[58] Compared to New Zealand, it is more tenable for "biological needs" to include positive affective states, especially since this obligation only applies to companion animals, not those used in agriculture, and thus would not represent such a massive shift.[59] However, given that "biological needs" is defined as the provision of objectively measurable requirements (food, water, shelter, appropriate transport, etc.),[60] the same statutory interpretation issue that occurs in New Zealand will arise in Québec. It is unlikely that a court would enlarge a definition listing only objectively-framed needs to include subjectively-framed needs.

It is more likely that the recognition of sentience will have greater effect in Oregon, but only because Oregon has adopted a far more restrictive definition. Oregon's definition—animals are "sentient beings

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[53] Animal Welfare Act, *supra* note 13, at s 2 (defining "animal" broadly as "any live member of the animal kingdom" and only excluding human beings and "any animal in the pre-natal, pre-hatched, larval or other such developmental stage").

[54] FRANCIS BENNION, BENNION ON STATUTORY INTERPRETATION 495 (5th ed. 2008).

[55] An Act to improve the legal situation of animals, S.Q. 2015, c 35 § 1 (Can.).

[56] Civil Code of Québec, C.Q.L.R. 2021, c CCQ-199, s 898.1 (Can.).

[57] *Id.*; An Act to improve the legal situation of animals, S.Q. 2015, c 35, s 7.

[58] Animal Welfare and Safety Act, *supra* note 16.

[59] *Id.* at s 7.

[60] *Id.* at s 5.

capable of experiencing pain, stress and fear"[61]—allows the definition to align completely with the misdemeanors of first and second degree animal neglect.[62] By excluding positive affective states from the definition of sentience, the expectations of what the recognition of sentience can do are far lower as compared to that in New Zealand and Québec, and thus easier to meet. The recognition simply buttresses the existing protections given to animals in that jurisdiction. Accordingly, there is no reasonable expectation that Oregonian legislation could lead to fundamental systemic change.

C. The Key Stumbling Block to Progress

At first glance, it appears promising when a legislature appears to catch up with the science and recognizes that animals, like humans, are sentient. That is why 'landmark' developments generate such positive press.[63] This part of the Article has explained why there is reason to doubt the promise of these developments. Despite overwhelming evidence for the existence of animal sentience,[64] the term "remains somewhat poorly defined and understood by the scientific community, let alone by lay people."[65] There is no fixed, universal definition even within the scientific community. Given that dissensus, there is little reason to expect a more coordinated and clear approach within the legal community. As Blattner observes: "despite the widespread avowal to sentience, the function and operability of the legal recognition of animal sentience are nebulous and lack scholarly conceptualization."[66] It is the nature of this indeterminacy that makes sentience an unlikely candidate for a transformational legal term.

Moreover, this indeterminacy deprives the courts of the tools necessary to make that transformation. Only when it is given a far more restricted definition—like that in Oregon—does its potential become meaningful. Likewise, that restriction limits power to merely buttressing existing legislative protections. Certainly, the hope that legislative

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61 OR. REV. STAT. § 167.305(1).

62 OR. REV. STAT. §§ 167.330, 167.325.

63 *See Quebec Defines Animals as 'Sentient Beings in New Legislation*, CTV NEWS (Dec. 4, 2016, 6:12 PM), https://perma.cc/L86P-W59X (accessed Oct. 24, 2021) (explaining how Quebec passed legislation to better protect animals and define them as sentient). *See also* Giuseppe Valiante, *Quebec Bill Calls Animals 'Sentient Beings' and Includes Jail Time for Cruelty*, THE CANADIAN PRESS (June 5, 2015), https://perma.cc/DJR4-X3P4 (accessed Sept. 28, 2021) (describing legislation that recognizes animals as sentient as a "positive step"); Sophie McIntyre, *Animals Are Now Legally Recognised as 'Sentient' Beings in New Zealand*, INDEPENDENT (May 19, 2015), https://perma.cc/9ZLN-HLCU (accessed Sept. 28, 2021) (describing how legislation recognizing animals as sentient is responding to New Zealand's "changing attitude on the status of animals in society").

64 Amelia Cornish et al., *Demographics Regarding Belief in Non-Human Animal Sentience and Emotional Empathy with Animals: A Pilot Study Among Attendees of an Animal Welfare Symposium*, 8 ANIMALS 174, 2 (2018).

65 *Id.*

66 Blattner, *supra* note 45, at 122.

recognition will impose additional obligations upon owners of animals to provide for positive affective states and single-handedly dismantle industrialized agriculture is, to say the least, highly improbable.

Gary Francione explains why simple recognition of sentience is insufficient to lead to fundamental change.[67] Humans have "moral schizophrenia" when it comes to animals: humans claim to take animal suffering seriously and see it as a moral wrong, and yet simultaneously cause animals to endure an overwhelming amount of suffering that "cannot be regarded as necessary in any coherent sense."[68] This cognitive dissonance is attributable to the way society has designated animals as property on the basis that they are of lesser mental capacity.[69] So long as that property status persists, recognition of sentience will never have much of an impact. It is worth quoting Francione's argument in full:

> In sum, although our conventional moral and legal thinking appears to reject the link between cognitive characteristics and moral status and to regard sentience alone as morally significant, the property status of animals rests squarely on the view that animals, unlike humans, do not have an interest in their lives because they are cognitively different from us. So although we reject the link in one sense, we accept it in another sense through the position that supposed cognitive differences justify our using animals in ways in which we do not use any humans. The result is that our moral and legal acceptance of the importance of sentience has not resulted in any paradigm shift in our treatment of nonhumans.[70]

Thus, given that the fundamentals in our relationship with animals—and the status we give them—have not changed, it is folly to expect that recognizing the scientific fact of their sentience will lead to significant change. While recognizing sentience might change the spirit or intent of animal welfare legislation, it is incapable of instigating significant legal change so long as animals retain their status as property. This barrier is the root of this Article's cynicism; cynicism exacerbated by the indeterminacy of the term that is supposed to lead the revolution.

Still, this cynicism may be misplaced. It has now been five years since the enactment of the legislative recognition of sentience in both Québec and New Zealand, and seven years since its enactment in Oregon.[71] This should be ample time to see the beginnings of a transformational shift in thinking, should one be on the horizon, and thus an opportunity to test this cynicism.

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[67] Gary L. Francione, *Taking Sentience Seriously*, 1 J. OF ANIMAL L. & ETHICS 1 (2006).

[68] *Id.* at 6.

[69] *Id.* at 8.

[70] *Id.*

[71] Ross Kelly, *Recognition of Animal Sentience on the Rise*, VIN NEWS (May 14, 2020), https://perma.cc/ZE2R-WVW2 (accessed Oct. 24, 2021) (explaining that New Zealand and Quebec recognized animal sentience in 2015 and Oregon recognized animal sentience in 2013).

III. TESTING THAT CYNICISM

This part will test the Article's hypothesis that in Oregon, New Zealand and Québec, the impact of the legislative recognition of animal sentience has been limited and not led to any meaningful improvement in animal welfare. It will look at the cases that have been decided since those enactments and that explicitly refer to the concept of animal sentience, before attempting to weave the threads together.

A. Oregon

Oregon recognizes sentience in its legislative finding[72]—a sort of preamble to the animal welfare chapter of its revised statutes—by stating that, "[a]nimals are sentient beings capable of experiencing pain, stress and fear."[73] Of the three jurisdictions analyzed in this Article, Oregon has evinced the greatest shift in jurisprudential thinking since its legislative recognition of sentience in a suite of amendments to its animal welfare law in 2013.[74] However, it is not clear whether this shift is due to those amendments, or instead due to a broader evolution in the way animals are viewed.

The first case to mention the amendments was *State v. Nix*,[75] where the question before the Supreme Court of Oregon was whether animals were "victims" for the purposes of Oregon's law preventing the merging of charges.[76] If they were "victims," the defendant would face twenty separate counts of second-degree animal neglect, rather than having those counts merged into one representative count.[77] The Court of Appeals held that the anti-merger law applied, partially on the basis that "although animals are usually considered the property of persons, [Oregon's animal welfare law] reflects a broader "public interest in 'protect[ing] individual animals as sentient beings.'"[78] While the Supreme Court of Oregon upheld that judgment, it was not on the basis of sentience; the 2013 amendments did not apply, given the offending predated them.[79] Indeed, the Court took pains to "emphasize that our decision is not one of policy about whether animals are deserving of such treatment under the law."[80] Nevertheless, the Court held the intention behind Oregon's animal welfare law was to protect individual animals, and they were thus classifiable as "victims."[81] The

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[72] Legislative findings appear at the commencement of a chapter within the Oregon Revised Statutes and work essentially as a preamble to substantive provisions.

[73] OR. REV. STAT. § 167.305(1).

[74] *See* Rebecca F. Wisch, *Table of State Law Amendments from 2013*, ANIMAL LEGAL & HIST. CTR. (2015), https://perma.cc/B878-E77U (accessed Oct. 24, 2021) (listing the suite of amendments to Oregon's animal welfare law in 2013).

[75] State v. Nix, 334 P.3d 437 (Or. 2014).

[76] *Id.* at 438.

[77] *Id.*

[78] *Id.* at 439.

[79] *Id.* at 438 n.1.

[80] *Id.* at 448.

[81] *Id.* at 447.

case is definitely a positive development, and its progressive approach was due to the general purpose behind Oregon's animal welfare law, rather than its recognition of sentience specifically.[82]

In 2018, the Court of Appeals considered the approach of the Supreme Court in *Nix* in *State v. Crow*.[83] In *Crow,* the question before the Court was whether "eleven miniature horses, multiple cats, and a dog were separate victims for purposes of merger."[84] Crucially, in contrast to *Nix*, this decision came five years after the legislative recognition of sentience, and thus had the potential to illustrate any effect of that recognition. *Nix* was not binding as the Supreme Court's decision was later vacated on a technicality about jurisdiction.[85] Still, Nix's reasoning was influential and applied in other cases,[86] but without any mention of the amendments recognizing sentience. Similarly, in *Crow*, the legislative recognition of sentience was mentioned, but only in passing.[87] Far more influential to the Court were other amendments that "confirm[ed] that the legislature's focus was on the development of a comprehensive statutory scheme to protect individual animals from abuse and neglect."[88] The reference to sentience was relevant, but like *Nix*, the general thrust and context of the progressive evolution of Oregon's animal welfare law was far more determinative.

In 2014, the Supreme Court of Oregon decided *State v. Fessenden*, a companion case to *Nix*, and decided on the same day.[89] In *Fessenden*, the Supreme Court of Oregon decided whether an animal welfare officer violated either the Oregon or U.S. Constitution when "he entered private property without a warrant, seized an emaciated horse, and took the horse to a veterinarian."[90] One of the arguments advanced by the state was that the officer's intrusion was permitted under the emergency aid doctrine, "in which immediate action is necessary to render aid to 'persons.'"[91] The question before the court was whether animals could be considered as persons, rather than property, for the purpose of this doctrine. The court in *Fessenden* held:

> Although Oregon's animal welfare statutes impose one of the nation's most protective statutory schemes, defendants are correct that Oregon law still considers animals to be property. . . Although the Oregon legislature has found that '[a]nimals are sentient beings capable of experiencing pain, stress and fear,'. . . Oregon law nevertheless permits humans to treat animals in ways that humans may not treat other humans.[92]

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[82] *Id.*

[83] State v. Crow, 429 P.3d 1053, 1055–55 n.3 (Or. Ct. App. 2018).

[84] *Id.* at 1053.

[85] State v. Nix, 345 P.3d 416, 416 (Or. Ct. App. 2015).

[86] *See, e.g.*, State v. Hess, 359 P.3d 288, 290, 293 (Or. App. 2015) (citing *Nix* several times and adopting its reasoning in support of making the ruling).

[87] *Crow*, 429 P.3d at 1055.

[88] *Id.* at 1056.

[89] State v. Fessenden, 333 P.3d 278 (Or. 2014).

[90] *Id.* at 279.

[91] *Id.* at 282.

[92] *Id.* at 283 (citing OR. REV. STAT. § 167.305(1)).

Using a different exception, the Supreme Court of Oregon held the officer's actions were permissible and not a constitutional violation.[93] Still, this was the first case to cite the sentience provision as evidence of the State legislature's approach to animal welfare, and in doing so, showed that it had limited effect.[94]

Similar arguments were at issue in *State v. Newcomb*.[95] The question in *Newcomb* was whether a veterinarian violated either the Oregon or U.S. Constitution by failing to obtain a warrant before testing a dog's blood—the results of which helped establish the dog was malnourished due to the defendant's neglect.[96] The answer to that question turned on whether the testing of the dog's blood was an interference with the defendant's interest in her property.[97] In *Newcomb*, the Supreme Court of Oregon observed that "the seized property was a living animal—Juno, the dog—not an inanimate object or other insentient physical item of some kind. Central to the issue that we must resolve is whether that distinctive fact makes a legal difference."[98]

After similar analysis to *Fessenden*—noting the base proposition that animals were property—the Supreme Court of Oregon held that "the welfare of animals is subject to a series of explicit statutory protections that are distinct to animals and do not apply to inanimate property."[99] That status was reflected in the State's recognition of sentience, and while the court held that the protection given to animals under Oregon law did not place them on a par with humans,[100] it nevertheless noted that the effect was that "Oregon law prohibits humans from treating animals in ways that humans are free to treat other forms of property."[101] The welfare protections had the effect of imposing a legal obligation on dog owners, and underscored that a "dog owner simply has no cognizable right, in the name of her privacy, to countermand that obligation."[102] Accordingly, the veterinarian's testing of the blood to determine the health and condition was not government interference that breached the defendant's constitutional rights.[103]

It is clear that Oregon courts have noted the progressive nature of its animal welfare legislation, reflected in its recognition of sentience, but it remains unclear whether that recognition itself has had a direct impact in improving the interests of animals.

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93 *Id.* at 288.

94 *Id.* at 287.

95 State v. Newcomb, 375 P.3d 434 (Or. 2016).

96 *Id.* at 436–37.

97 *Id.* at 439.

98 *Id.*

99 *Id.* at 440.

100 *Id.* at 441.

101 *Id.*

102 *Id.* at 443.

103 *Id.*

B. New Zealand

New Zealand recognizes animal sentience in the long title,[104] a preamble to the Animal Welfare Act 1999, stating that it is an act to, amongst other things, "recognize that animals are sentient."[105] The effect of New Zealand's recognition of sentience is decidedly more muted than the effect in Oregon, but this is not surprising. The sponsor of the bill that amended the Animal Welfare Act to recognize sentience in 2015 spoke to the rationale behind the amendment: "Animal sentience has been proven in science for some time, and a number of overseas jurisdictions already recognize that animals are sentient. It is, therefore, appropriate that New Zealand's primary piece of animal welfare law also recognize animal sentience."[106]

This was hardly a full-throated endorsement of why it was important to recognize animal sentience *per se*, and revealing of the motivations behind the amendment. It reflected the views of the responsible government department about the impact of the Bill:

> Including sentience within the preamble to the Act would not impact the detail of any of the rights, duties and obligations set out within the Act, but it would shape the overall spirit and intent of the Act. This change would also bring New Zealand legislation into line with international animal welfare legislation and with our stated international position.[107]

As predicted, recognition of sentience has not impacted any substantive aspect of the Animal Welfare Act, but it also is unclear if it has had any significant impact on its spirit or intent either. Three cases have mentioned the recognition of sentience, but only in quoting or describing the overall scheme of the Act.[108]

However, in one case, recognition of sentience was explicitly invoked to assist with the intent of the Act.[109] *Wallace v. Royal Society for the Prevention of Cruelty to Animals Auckland*, focused on whether a court could grant an order for the sale or destruction of seized animals at the same time as the trial for their ill-treatment was occurring.[110] The High Court in *Wallace* held this was a different situation

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[104] The term "long title"—a common term in New Zealand, Australia and the United Kingdom—does not seem to have currency within North American jurisdictions, and although there is a technical difference between "long title" and "preamble" in New Zealand legislation, they appear functionally and aesthetically similar. *See* N.Z. L. COMM., LEGISLATION MANUAL: STRUCTURE AND STYLE 9–10 (1996).

[105] Animal Welfare Act, *supra* note 13, s 1(a)(i).

[106] (26 November 2014) 702 NZPD 898–99.

[107] MINISTRY FOR PRIMARY INDUSTRIES, ANIMAL WELFARE AMENDMENT BILL: REPORT OF THE MINISTRY FOR PRIMARY INDUSTRIES 69–70 (2014) (N.Z.).

[108] *Erickson v. Ministry for Primary Industries* [2017] NZCA 271 at [32] per Kós P. (N.Z.); *McCartney v. Canterbury Society for the Prevention of Cruelty to Animals* [2018] NZHC 2624 at [48] per Venning J. (N.Z.); *New Zealand Animal Law Association v. Attorney-General* [2020] NZHC 3009 at [70] per Cull J. (N.Z.).

[109] *Wallace v. Royal Society for the Prevention of Cruelty to Animals Auckland* (SPCA Auckland) [2019] NZHC 1599 at [24] per Walker J. (N.Z.).

[110] *Id.* at [1].

than the prejudice to a fair trial that could arise from an application for forfeiture of criminal proceeds, in part because of the "negative impacts for the animals if disposal proceedings had to wait for the criminal prosecution to conclude."[111] That approach reflected the purpose of the Act to recognize their sentience.[112] This was only one factor that led the High Court to this conclusion,[113] but it is a signal that it had some effect. Animals are sentient creatures and were impacted by prolonged criminal proceedings; remaining in limbo and in the custody of animal protection authorities.

This is the high-water mark, so far, of the impact of the legislative recognition of sentience in New Zealand. However, perhaps ironically, judicial recognition of animal sentience has had greater relevance under different legislation that does *not* explicitly refer to sentience: the Dog Control Act 1996.[114]

In *Turner v. South Taranaki District Council*, the High Court interpreted what amounted to an "attack" by a dog.[115] The court held, "Physical contact between dog and victim will suffice so long as it results from deliberate aggressive action. The legislation thus recognizes that dogs are sentient creatures, and that from a dog's perspective contact need not always signify hostility."[116] To reiterate, the Dog Control Act does not explicitly mention sentience. Notwithstanding this, the judge was able to use a commonsense understanding of animal sentience—that dogs will have different emotional states—to provide a gloss on the idea of an attack: physical contact is not sufficient, and there needs to be some sort of quasi-aggressive intent on the part of the dog.[117] Recognizing that capacity—and the impact that it will have on the legislative provision—is a significant development.

A far more anodyne example is *Risdom v. Auckland Council*, where the High Court recognized the sentience of dogs without the benefit of a legislative prompt.[118] This case was an appeal against the order for the destruction of a dog after he committed an attack.[119] The appeal was filed after the relevant deadline, but "taking into account the merits of the proposed appeal as bearing on the life of a sentient being,"[120] the Court extended the time for filing. This might seem a small, perhaps inconsequential, development, however, the recognition that a dog owner's tardiness may literally be life-threatening for the dog, shows a substantive recognition of the dog's emotional well-being.

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111 *Id.* at [23].

112 *Id.*

113 *Id.*

114 Dog Control Act 1996 (N.Z.).

115 *Turner v. South Taranaki District Council* [2013] NZHC 1603 at [5] per Miller J. (N.Z.).

116 *Id.* at [21].

117 *Id.*

118 *Risdom v. Auckland Council* [2020] NZHC 905 per Jagose J. (N.Z.).

119 *Id.* at [1].

120 *Id.* at [8].

Thus, while the *legislative* recognition of sentience in New Zealand has been muted and largely ineffectual, the *judicial* recognition of sentience has had a far more significant and substantive impact.

C. Québec

Finally, Québec states in the preamble to its Animal Welfare and Safety Act that "animals are sentient beings with biological needs."[121] Compared to New Zealand, Québécois courts have wrestled with the implications of the recognition of sentience on a deeper level.[122] Although, as will become clear, this has not necessarily led to positive outcomes for the animals involved.

Trahan c. Ville de Montréal was an application for judicial review of an euthanasia order made under a Montreal bylaw after a dog committed a fatal attack.[123] The case was determined on administrative law grounds about the procedural fairness leading up to the order.[124] However, when interpreting the bylaw, one of the values that helped to resolve its ambiguity cited by the Superior Court of Québec was animal welfare and, specifically, that the Québec Civil Code no longer regarded animals as mere goods.[125]

On the other hand, the Québec Court of Appeal in *Road to Home Rescue Support c. Ville de Montréal* regarded the legislative change as unhelpful.[126] Again, this case was an attempted judicial review of the Montreal bylaws relating to the euthanasia of stray dogs.[127] An argument by the applicant that the bylaws were inconsistent with the recognition of sentience in the Animal Welfare and Safety Act was given short shrift by the court: "The fact that animals (including, of course, dogs of all kinds) are sentient beings does not prevent them from occasionally constituting a nuisance or danger and being the subject of measures intended to counteract them . . . or to remedy them temporarily or permanently."[128]

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[121] Animal Welfare and Safety Act, *supra* note 16.

[122] In the Canadian context, it is also worth noting that recently, the Alberta Court of Appeal in *R v Chen* (2021 ABCA 382) specifically invoked sentience as demanding a nuanced approach to sentencing for animal cruelty offending. At para 27: ". . .sentient beings that experience pain and suffering, must be treated as living victims and not chattels. Smashing a pet through a window is not the same as smashing a window." Neither Canada's federal Criminal Code (R.S.C., 1985, c. C-46) nor Alberta's provincial Animal Protection Act (RSA 2000, c A-41) recognises animal sentience. This judicial recognition and use of sentience in the absence of legislative recognition further strengthens the argument advanced in this Article.

[123] Trahan c. City of Montréal, 2019 CanLII 4607, para. 1 (Can. Q.C.C.S.).

[124] *Id.* at para. 32.

[125] *Id.* at para. 30 (translated from "Aux termes de ce nouvel article, les animaux ne sont plus de simples biens[.]").

[126] Road to Home Rescue Support c. City of Montréal, 2019 CanLII 2187, para. 57 (Can. Q.C.C.A.).

[127] *Id.* at para. 5.

[128] *Id.* at para. 56 (translated from "Le fait que les animaux (incluant, cela va sans dire, les chiens de toutes sortes) sont des êtres doués de sensibilité n'empêche pas qu'ils puissent occasionnellement constituer une nuisance ou un danger et faire l'objet de

If anything, the Court of Appeal viewed the Animal Welfare and Safety Act's recognition that dogs are sentient as an indication dogs should be held to an elevated standard of conduct.[129] This echoed that Court's earlier view in *Doucet c. City of Saint-Eustache*,[130] which was a challenge to the removal of domestic animals in excess of the municipal limits:

> The municipal power to restrict the number of animals per home falls under the nuisance jurisdiction. The scope of this jurisdiction has not been altered by the passage of the *Animal Welfare and Safety Act* nor by the recognition that animals are not property, but rather sentient beings with biological needs.[131]

Another indication of the lack of impact that the recognition of sentience has had occurred in *Durand c. Attorney General of Quebec*,[132] which was an attempt by the applicant to institute a class action on behalf of "persons, flora, fauna, pets and animals relating to electromagnetic field ('EMF') pollution."[133] Regardless of the merits of the case, the Superior Court of Québec held it was not possible to include fauna, pets or animals in the action, notwithstanding the recent legislative recognition of sentience, as "[a]nimals are not 'things' but they can still be 'property' and they can still be killed for commercial profit and transferred by successions. That is not indicative of being qualified to be a class member."[134]

By far the most positive treatment of the legislative recognition of sentience occurred in *R. c. Steimer*.[135] In that case, the defendant was charged with willfully killing a dog and using a firearm in a careless manner, after shooting a dog on his rural property that he suspected had killed one of his hens.[136] The defendant raised the defense of "color of right"—that he had made an honest mistake about the state of the law, and thought he was able to kill a stray dog on his property.[137] Part of the reason the Court of Québec dismissed his defense was because the accused "ought to have known" that Québec had enacted the Animal Welfare and Safety Act, which recognized animal sentience and humans' individual and collective responsibility to en-

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mesures destinées à contrer l'une ou l'autre ou à y remédier de façon temporaire ou definitive.").

[129] *Id.* at para. 57.

[130] Doucet c. City of Saint-Eustache, 2018 CanLII 282, para. 59 (Can. Q.C.C.A.).

[131] *Id.* (translated from "Le pouvoir municipal de restreindre le nombre d'animaux par demeure relève de la compétence en matière de nuisance. L'étendue de cette compétence n'a pas été altérée par l'adoption de la *Loi sur le bien-être et la sécurité de l'animal* ni par la reconnaissance que les animaux ne sont pas des biens, mais plutôt des êtres doués de sensibilité possédant des impératifs biologiques.").

[132] Durand c. Attorney General of Québec, 2018 CanLII 2817, para. 50 (Can. Q.C.C.S.).

[133] *Id.* at para. 1.

[134] *Id.* at para. 50.

[135] R. c. Steimer, 2020 CanLII 2011, para. 23 (Can. Q.C.C.Q.).

[136] *Id.* at para. 1–2.

[137] *Id.* at para. 3.

sure animal welfare and safety.[138] While the recognition of sentience was not the sole reason the court rejected the defense, the tenor of the preamble to the Animal Welfare and Safety Act clearly assisted the court in reaching that conclusion.

Instead, the recognition in Québec's Civil Code that animals "are not things"[139] has proved far more potent than the recognition that they are sentient. In at least three cases, that recognition has meant that animals are no longer considered "moveable property" for the purposes of Section 2280 of the Code.[140] This appears to have had a significant impact on the responsibilities of those taking care of companion animals (for example, dogs in kennels). What would previously have been treated as bailment situations are now service contracts for the purposes of the Code, attracting different obligations.[141]

The relative lack of impact of the recognition of sentience was predicted by Martine Lachance.[142] In her analysis of the new Animal Welfare and Safety Act, she refers to the recognition of sentience as an "unfinished reform" that has only symbolic value.[143] While it might please our sensibilities, it is simply the status quo in disguise and does not represent real change.[144] Certainly, this view appears to align with the view of Québécois courts: while the recognition of sentience has had some peripheral "and unforeseen" effects, ultimately, it does not and should not alter the status of animals in the law.

D. Drawing the Threads Together

Although the impact of the legislative recognition of sentience in Oregon, New Zealand, and Québec has been different in each jurisdiction, there are some commonalities. First, the recognition has had limited impact. In New Zealand, the legislative change has barely registered, with many cases simply noting its existence and then moving on. Indeed, the recognition of animal sentience at common law has had far more impact than that of the Act's recognition of sentience. At the other end of the spectrum, while it has had some positive reception in Québec, senior courts have explicitly downplayed the change. While the reception has been more positive in Oregon, that seems to reflect instead a generally progressive approach to animal welfare.[145] It is difficult to isolate the recognition of sentience as the prime cause for rec-

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138 *Id.* at para. 53.

139 Animal Welfare and Safety Act, *supra* note 16.

140 Lavigne v. Brousseau-Masse (Chenil Moya), 2017 CanLII 503, para. 33 (Can. Q.C.C.Q); O'Connor v. Chenil Duroy enr., 2018 CanLII 2559, para. 27 (Can. Q.C.C.Q.); Esposito v. 9177-3184 Québec Inc., 2017 CanLII 11485, para. 21 (Can. Q.C.C.Q.).

141 Lavigne v. Brousseau-Masse (Chenil Moya), CanLII 503 at para. 35.

142 Martine Lachance, *Le Nouveau Statut Juridique de L'animal au Québec*, REVUE DU NOTARIAT 333 (2018).

143 *Id.* at 346.

144 *Id.*

145 Kayla A. Bernays, *We've Still Got Feelings: Representing Pets as Sentient Property*, 60 ARIZ. L. REV. 485, 498–99 (2018).

ognizing animals as individuals. In any case, the limited definition of sentience in Oregon's legislation similarly limits the potential for substantive change.

However, despite the lack of major impact, it is important to not dismiss the changes at the margins. In each jurisdiction, there appears to be a slow, but positive, evolution of thought about the status of animals within the law, and how the law can protect their interests. Especially in Oregon, recognizing animals as victims affords them greater consideration in limited situations, and this is a shift to be celebrated. Overall, in each jurisdiction, it is clear that the legislative recognition of sentience itself has not led to a sea change. Animals' status has not changed in any significant way. Those who are in charge of animals' welfare are not suddenly obliged to enhance their animals' positive affective states. Ultimately, the recognition of sentience has done little to improve the welfare and protection of animals.

This muted outcome was entirely expected. So long as animals retain their status as property, preambular, throat-clearing statements about animal sentience do not have the capacity to alter and expand explicit, negatively framed obligations into positively framed obligations. Part IV investigates this claim further, and considers the implications on animal welfare if recognition is purely symbolic.

IV. IS THE LEGISLATIVE RECOGNITION OF ANIMAL SENTIENCE SYMBOLIC?

The conclusion this Article draws from the analysis in Parts II and III is the legislative recognition of animal sentience has not led to any substantive change in the status of animals or any wholesale improvement in their welfare and protection.

However, even if this conclusion is true, does it mean that legislative recognition of sentience is an exercise in pure legislative symbolism? And, if the recognition *is* an exercise in legislative symbolism, is this necessarily a negative outcome? In Part IV, the benefits and disadvantages of symbolic legislation in the abstract and in the present context will be considered, before determining whether the legislative recognition of sentience is a symbolic, but a net-positive, change.

A. Defining Symbolic Legislation

Before considering the merits of any legislative symbolism in the present instance, it is important to make clear this Article means by the term itself, for amongst commentators, "there is no consensus what the term stands for."[146] This Article adopts the analysis used by Jens Newig when categorizing environmental legislation as symbolic.[147]

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[146] Angelika Siehr, *Symbolic Legislation and the Need for Legislative Jurisprudence: The Example of the Federal Republic of Germany*, 2 LEGISPRUDENCE 271, 279 (2008).

[147] Jens Newig, *Symbolic Environmental Legislation and Societal Self-Deception*, 16 ENV'T. POL. 276 (2007) ("Symbolic legislation deliberately fails to meet its declared objectives. Yet not every apparently 'ineffective' law may be described as symbolic legis-

Newig makes the important distinction between legislation that—despite drafters' best intentions—proves ineffective *ex post*, and that which was *designed* to be ineffective *ex ante*.[148] Only the latter has the capacity to be symbolic legislation.[149] However, both may have positive effects. Newig focuses on the German Summer Smog Act 1995, which proved to be an example of the former, because it had the stated purpose of preventing further increases in ozone levels but no substantive provisions to achieve that purpose.[150]

Just as with legislation that proves unintentionally ineffective in practice, symbolic legislation designed to be ineffective in theory may have positive—albeit unintended—effects in practice. Newig explains this unintended effectiveness by differentiating between the legal and political-strategic effectiveness of legislation.[151] Legislation drafted as a means to achieve the ends of some real-world change is not symbolic legislation, even if it fails to achieve those ends in practice.[152] True symbolic legislation, in contrast, is that which is neither intended nor expected to be legally and substantively effective but instead enacted "with certain political-strategic intentions."[153] That is, symbolic legislation may have positive political-strategic effects, but is unlikely to have positive effects in a substantive legal sense.

It is important to note at this juncture that discerning legislative intent—even whether that is possible—is obviously a matter of rich debate.[154] However, it is sufficient to rely upon, for example, the very clear statements made by New Zealand's governmental authorities that they expected the recognition of sentience "would not impact the detail of any of the rights, duties and obligations" contained in the Animal Welfare Act.[155] The key idea is that the legislature does not expect symbolic legislation to lead to substantive change. It may be effective in starting a conversation and shifting the political needle, quelling agitation from lobby or pressure groups, or improving the image and fortunes of its drafters, but in failing to effect legal and substantive change, it remains symbolic.

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lation in the sense of this contribution. Many laws that *ex post* turn out to be 'ineffective' were enacted with the best of intentions. Symbolic legislation, in contrast, is passed by the legislature against the better knowledge of its creators (Noll, 1981; Kinderman, 1988, Dwyer, 1990).").

148 *Id.* at 278–79.

149 *Id.* at 279.

150 *Id.* at 285.

151 *Id.* at 279.

152 *Id.*

153 *Id.* at 280.

154 *See* RICHARD EKINS, THE NATURE OF LEGISLATIVE INTENT 14 (2012) (arguing that "the well-formed legislature exercises rational agency in legislating, forming and acting on complex intentions to convey certain meanings and to change the law in the chosen way, for the common good."); *cf.* Ronald Dworkin, LAW'S EMPIRE 335–56 (1st ed. 1986) (arguing that legislative intent is a fiction).

155 MINISTRY FOR PRIMARY INDUSTRIES, *supra* note 107.

B. Does the Legislative Recognition of Sentience Meet This Definition?

Using the definition above, this section will consider whether the recognition of sentience by Oregon, New Zealand, and Québec are instances of symbolic legislation. The strongest indication the answer to this question is 'yes' is the legislatures' decisions recognizing sentience in the preambles to their animal welfare legislative regimes.

As noted in Part III, Oregon, New Zealand, and Québec have, respectively, recognized sentience in the legislative findings,[156] long title,[157] and preamble to their substantive animal welfare legislation.[158] Despite the difference in terminology, in substance, these are all preambular in nature.

In articulating the "aspirations of the legislation," Kent Roach argues that preambles either, at best, candidly recognize the legislation's values and assumptions or, at worst, oversell and simplify the legislation, leading to disappointment in its application.[159] Either way, preambles are "used to provide a symbolic concession to values that are not really advanced by the legislation and thus provide an attempt to assuage those who may be concerned about the [legislation]."[160] This does not mean preambles are meaningless: "the symbolic, aspirational, and expressive ordering that occurs in preambles can be an important instrument of governance and in itself a form of legal pluralism that complements the usual instrumental ambitions of legislation."[161] However, the attendant risks of overstating what the legislation can meaningfully achieve, and disappointing those groups assuaged by the inclusion of their concerns in the preamble, will often outweigh that broader advantage.

Preambles also have the potential to assist in statutory interpretation. Theoretically, the preamble's position at the commencement of a statute gives it a degree of prominence that is powerful: "[B]y spelling out the assumptions the *legislature* takes to be true, the policies and principles *it* wants to advance and the values to which *it* is committed, the preamble offers interpreters an authoritative form of guidance."[162] As Roach discusses, however, the very nature of preambles also means they are not directory; they cannot force a particular outcome.[163] Thus, although "preambles may be used to provide courts

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[156] *See* discussion *supra* Part III.A and note 72.

[157] *See* discussion *supra* Part III. B and note 104.

[158] Animal Welfare and Safety Act, *supra* note 16; Animal Welfare Act 1999, *supra* note 13, s (a)(i) (N.Z.); OR. REV. STAT. § 167.305(1).

[159] Kent Roach, *The Uses and Audiences of Preambles in Legislation*, 47 MCGILL L.J. 129, 148 (2001).

[160] *Id.* at 149.

[161] *Id.* at 151.

[162] *Id.* at 153 (quoting DRIEDGER ON THE CONSTRUCTION OF STATUTES 261 (Ruth Sullivan ed., 3d ed. 1994)) (emphasis added).

[163] *Id.*

with guidance about how they should interpret statutes, there is no guarantee that courts will follow this guidance."[164]

Generally, it appears that courts give limited weight to preambles in practice.[165] There need not be an "exact correspondence between a preamble and enactment" and an enactment "may go beyond, or it may fall short of the indications that may be gathered from the preamble."[166] Specifically, the review of cases in Part III above that followed the legislative inclusions of sentience in Oregon, New Zealand, and Québec indicates that the term has never been called upon to assist in the interpretation of ambiguities in the substantive legislation. Moreover, as Roach notes, "courts are alive to the danger that preambles can oversell the fine print of the legislation" and resistant to any less-than-explicit attempt by the legislature to direct the interpretative task.[167] Given the lack of definition of sentience in Québec and New Zealand, the preambles lack the capacity to assist in resolving ambiguities, and Oregon's restricted definition adds little to that which is already included in its substantive provisions.

The placement of sentience in the preambles of the relevant Oregonian, New Zealand, and Québécois legislation is telling. Although preambles have a lot of potential power, their main function is a political and narrative-shaping tool. While they might have capacity to act as an aid in statutory interpretation, and thus have substantive effect, this has not come to pass in Oregon, New Zealand, or Québec to date. The drafters' intention in recognizing sentience within the preambles of animal welfare legislation was to achieve politically strategic ends, not any substantive or legal effect; this intention was explicitly stated, for example, by New Zealand's drafters.[168] Using the definition above, the legislative recognition of sentience by Oregon, New Zealand, and Québec in their preambles is thus an exercise in legislative symbolism.

C. The Positive Potential of Legislative Symbolism

The foregoing conclusion that legislative recognition of sentience is symbolic merely by virtue of its location might seem lackluster. The next two sections consider the implications of such a conclusion, beginning with the positive aspects. In doing so, they will not consider the personal, purely political advantages that recognizing sentience had for the legislative drafters. Instead, they will consider the broader, positive impact that a symbolic recognition of sentience could have in shifting attitudes, starting conversations, and perhaps, leading to unforeseen positive developments.

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[164] *Id.*

[165] Desnoyers Estate v. Desnoyers, 2020 CanLII 120, para. 41 (Can. A.B.Q.B).

[166] *Id.* at paras. 41–42 (quoting A-G v. Prince Ernest Augustus of Hanover [1957] AC 436 (HL) 467).

[167] Roach, *supra* note 159, at 153.

[168] *See supra* text accompanying note 107.

1. Communicative and Educative Frameworks

The first, and perhaps obvious, advantage of recognizing sentience is that it provides language to express ideas that were formerly unavailable. In turn, Bart van Klink has argued that symbolic legislation can act as a "communicative framework."[169] Such legislation can give expression to values that are fundamental to the community, and in doing so, "offers a vocabulary that affects the way in which legal and political actors perceive reality," and that reality "is accessed through the concepts and distinctions provided by the law."[170] Crucially, for van Klink, the inclusion of amorphous or vague terms—"aspirational norms"—is not a negative attribute of symbolic legislation, since "aspirational norms have no fixed meaning and have to be developed in an ongoing interaction between various legal, political and social actors."[171] Symbolic legislation catalyzes that interaction, beginning a dialogue between actors that ultimately advances the aspiration embedded in the term introduced.[172]

From this perspective, by giving an aspiration (recognizing the sentience of animals) a vocabulary, it begins a debate amongst various actors as to what that recognition could and should mean in practice. Nancy Marion has highlighted this moral educative function of symbolic legislation.[173] By inserting sentience into animal welfare *legislation*, it becomes relevant to any discussion of animal welfare per se. Any concerned citizen (or owner of animals) who wishes to be better informed, would do well to engage in what sentience means and how it is relevant to their practices.

Likewise, Seana Shiffrin has championed the haziness of opaque legal standards and the purpose those standards can serve.[174] The uncertainty of a legal standard can prompt citizens to pay greater attention to their behavior and how to comply, and that deliberative impact should be celebrated.[175] "Standards typically incorporate moral terms that do not lend themselves to immediate, reflexive, precise application."[176] The vagueness and content of "sentience" makes it such a moral term, and incorporating it into legislation means citizens "have to deliberate about what is morally proper and should be expected of them."[177] The moral term "sentience" acts as a 'rule of thumb' to help

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169 Bart van Klink, *Symbolic Legislation: An Essentially Political Concept*, *in* SYMBOLIC LEGISLATION THEORY AND DEVELOPMENTS IN BIOLAW 19, 24 (Bart van Klink et al. eds., 2016).

170 *Id.* at 25.

171 *Id.* at 24.

172 *Id.*

173 Nancy E. Marion, *The Council of Europe's Cyber Crime Treaty: An Exercise in Symbolic Legislation*, 4 INT'L. J. OF CYBER CRIMINOLOGY 699, 706 (2010).

174 Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of the Fog*, 123 HARV. L. REV. 1214, 1214–19 (2010).

175 *Id.* at 1220.

176 *Id.* at 1222.

177 *Id.* at 1223.

citizens 'comply with the precise rule' (the requirements of animal welfare legislation).[178] In other words, it is precisely the vagueness and symbolism of sentience that forces citizens to think about what it means, how it applies in a particular instance, and what the law expects of them when they have animals in their charge. That engagement is a significant and positive effect of symbolic legislation.

2. Setting International Standards

Marion also refers to the function of symbolic legislation as serving as a model for other states to follow.[179] Legislative recognition of sentience certainly seems to fulfill this function; the EU's legislative recognition of animal sentience in 1997 appears to have created a model that many other states have adopted.[180] As referenced in the introduction to this Article, the EU's recognition was simple: in the preamble, the text refers to "DESIRING to ensure improved protection and respect for the welfare of animals as sentient beings" before requiring member states to pay "full regard" to the welfare requirements of animals.[181] The proliferation of other jurisdictions' recognition of animal sentience that followed the EU's recognition adopted a similar format.[182] It is thus likely that those jurisdictions were attempting to emulate the EU—meeting the new standard that the EU set.

However, this function of symbolic legislation—setting standards and models for other states to follow—is a double-edged sword. The EU's recognition of sentience—as in Oregon, Québec, and New Zealand—is notable for its vagueness, and likewise appears in a preamble. Moreover, the protocol in which it features is so abstract and caveated that it is almost meaningless:

> In formulating and implementing the Community's agriculture, transport, internal market and research policies, the Community and the Member States shall pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.[183]

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178 *Id.* at 1221.

179 Marion, *supra* note 173, at 706.

180 Consolidated Version of the Treaty Establishing the European Community, Protocol (No 33) on Protection and Welfare of Animals, Mar. 25, 1957, 2006 O.J. (C 321) 314.

181 *Id.*

182 *See* Kelly, *supra* note 71 (explaining how the U.K. adopted animal sentience into national law, "bringing it in line with European Union directives" and describing other jurisdictions that have also recognized animal sentience). S*ee also* Nicole Pallotta, *Spain Poised to Recognize Animal Sentience within Civil Code, Clarifying Animals Are Not "Things*," ANIMAL LEGAL DEF. FUND (Aug. 18, 2021), https://perma.cc/N9WQ-4H23 (accessed Oct. 24, 2021) (describing how several legal systems have changed their "legal codes to formally recognize animal sentience" along with the European Union).

183 Protocol on Protection and Welfare of Animals, Oct. 2, 1997, 1997 O.J. (C 340) 110 (EC).

This is the protocol in its entirety. While the protocol was an advance in animal welfare legislation at the time,[184] its brevity and abstraction does little to guarantee clear and concrete advances in animal welfare. Such abstraction and symbolism, for the reasons discussed in this section, are not in inherently negative. Moreover, given the way the EU operates, perhaps it is unfair to expect more at this high level of intrastate legislation.

However, the problem is that if the EU's recognition of sentience was a purely symbolic act, and given that it created a model for other states to follow, those other states' recognition will likewise take the form of pure symbolism. It is no coincidence that, like the EU, other states have failed to define sentience, contextualize the term or provide a clear indication of the impact that its recognition should have. Since the EU did not go this far, there was no incentive for other states to go further. Symbolism, it seems, begets symbolism, making the EU's recognition of sentience less a model to follow, and more of an original sin.

3. Symbolism as Power

It is worth interrogating the supposition that the vagueness and abstraction of the EU's recognition of sentience—and the jurisdictions that followed its lead—is meaningless. After all, Shiffrin has already shown the deliberation that is induced by vague terms is itself a positive aspect.[185] However, there is more powerful potential in such exercises of legislative symbolism.

If we view legislative recognition of sentience as symbolic, then it is tempting to view the entire exercise as a sham; however, that is not necessarily the only perspective. E.P. Thompson has commented on how law that serves to mask and further entrench a power imbalance in the status quo can have the opposite effect.[186]

As discussed in Part II, the root of this Article's cynicism about the simple recognition of sentience is Francione's critique that it does nothing to change the fundamental power imbalance between humans and animals that stems from the latter's status as property.[187] As discussed further below, this could mean the drafters' recognition of sentience is simply a sop to mollify those agitating for more radical change and further entrench the status quo. However, as Thompson notes, legislators cannot be *too* obvious about dressing up stagnation as real change: "[I]f a law is evidently partial and unjust, then it will mask nothing, legitimize nothing, contribute nothing to any class's hegem-

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[184] *Sentient Beings*, NEW SCIENTIST (June 28, 1997), https://perma.cc/4DM7-J598 (accessed Sep. 29, 2021).

[185] Shiffrin, *supra* note 174, at 1217–18, 1220, 1224.

[186] *See* E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT (1975) (examining the passage of the Black Act 1723, 9 Geo. 1 c. 22 and its part in creating the working class).

[187] Francione, *supra* note 67, at 8.

ony."[188] Legislators, in choosing to recognize sentience, might have reasonably assumed it was an empty rhetorical gesture. In fact, they have crossed the Rubicon: in recognizing animal sentience, it would be a foolhardy legislature to *repeal* that recognition.

That means these jurisdictions are essentially bound to their recognition that animals are sentient, and in doing so, may have unwittingly curbed their power. Per Thompson:

> The rhetoric and rules of a society are something a great deal more than a sham . . . They may disguise the true realities of power, but, at the same time, they may curb that power and check its intrusions. And it is often from within that very rhetoric that a radical critique of the practice of the society is developed. . .[189]

Recognition of sentience does not evaporate the power imbalance between humans and non-humans, and perhaps temporarily disguises that imbalance. However, it may simultaneously represent an irreparable chink in the armor of humans' legal dominance over non-human animals. "Why, if legislation recognizes animals as sentient, does the common law categorise them as non-sentient property?"[190] seems a very reasonable question to ask in the wake of such legislative recognition, and legislators only have themselves to blame for its asking. This is particularly so with regards to Québec, whose Civil Code goes further than its animal welfare legislation by declaring animals are not things.[191] But this question is also pertinent in both New Zealand and Oregon. The idea of sentience has caused small pieces of grit to lodge in the common law, and although it may take decades, something far more powerful might eventuate. Legislatures have shackled themselves to the language of sentience, and if co-opted in the right way, this might lead to results that are antithetical to their intention to mollify agitators for change.

Moreover, the vagueness of sentience does not necessarily mean that its legislative recognition is not, powerful when standing alone. Semantic quibbles about terms by some in the legal community should not derogate from the power they represent to others and *could* possess for all. Writing about the importance of rights-speak to the Black community, Patricia Williams argues that although "rights may not be ends in themselves, rights rhetoric has been and continues to be an

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188 Thompson, *supra* note 186, at 263.

189 *Id.* at 265.

190 Jane Kotzmann, *Recognising the Sentience of Animals in Law: A Justification and Framework for Australian States and Territories*, 42 THE SENTIENCE OF ANIMALS IN L. 281, 283–88 (2020).

191 Civil Code of Québec, S.Q. 2015, c. 35, s.1 (Can.). But also note the odd conclusion reached in *Doucet c. City of Saint-Eustache*, that the recognition of sentience imputed responsibility on the animal to maintain a certain level of conduct. Doucet c. City of Saint-Eustache, *supra* note 130, at para 52. This demonstrates the same point: the unforeseen power of language.

effective form of discourse" for that community.[192] For Williams, attacks by the Critical Legal Studies movement against the misuse, indeterminacy, and vagueness of rights do not undermine their importance.[193] While dominant groups in society have certainly used the language of rights to protect their status and power, "rights are to law what conscious commitments are to the psyche."[194] America's worst historical moments were not the product of rights assertion, but instead a failure of rights commitment.[195]

Attacking the rhetoric and its deficiencies in the hope of abandoning it entirely prevents using that rhetoric to its full, positive potential.[196] Acknowledging animal sentience may not seem like much, because it is simply recognizing a scientific fact. However, that does not prevent it from acting as a powerful signal—a commitment to recognizing animal interests—and becoming a part of the conversation, such that this acknowledgement may possess real power.

There are positive aspects to symbolic legislation. The use of symbolism can prompt new conversations within the community or provide new vocabulary to advance existing conversations. It can set benchmarks to which other jurisdictions should aspire. Even if drafters cynically intended sentience to be an impotent term, it is possible to look past that symbolism and imbue it with substantive power. The question is whether these potential positive effects outweigh their negative counterparts, explored in the next section.

D. The Negative Potential of Symbolic Legislation

If symbolic legislation's positive effects are largely muted or mere potentialities, and the legislation is otherwise largely benign, then it might be of no concern. However, there are two core issues with symbolic legislation: first, the concerns over the rule of law are posed by the inherent deception of symbolic legislation, and second, a more specific concern about the damage it can do to the cause it seeks to promote.

1. Symbolism as Deception

Newig argues that symbolic legislation is often proposed to solve a dilemma.[197] Special interest groups, the media, and political rivals may demand a solution to a problem. However, where the cost of an effective solution is so significant that it will harm the popularity of the politician that promotes it, what is the politician to do? Faced with

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[192] PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR 149 (1992).

[193] *Id.* at 164.

[194] *Id.* at 159.

[195] *Id.*

[196] *Id.* at 163–65 ("The task for Critical Legal Studies, then, is not to discard rights but to see through or past them so they reflect a larger definition.").

[197] Newig, *supra* note 147, at 282.

this dilemma, Newig notes that, "a merely symbolic 'solution' has, from the perspective of the politicians involved, the double advantage that it demonstrates that action is being taken whilst at the same time the costs any substantive solution would incur are avoided."[198] It is the performative act of legislating that becomes the solution to the dilemma, rather than actually solving the original problem. In this way, "[s]ymbolic legislation either deliberately misleads the public, or amounts to self-deception by politicians who are, perhaps, divided between a desire to support a cause and concerns about its financial cost."[199] Regardless of whether the deception succeeds—or whether proponents for substantive action are not fooled—the attempt to mollify such proponents with empty gestures is concerning.

A more substantive concern is the vagueness of symbolic legislation. While van Klink and Shiffrin might argue vagueness has its uses,[200] for others it is potentially inimical to the rule of law.[201] Both Lon Fuller and Joseph Raz argue that clarity is a requirement for the rule of law.[202] That means that symbolic legislation, and especially an amorphous term like sentience, poses a problem. It is not capable of guiding the behavior of citizens.[203] Moreover, as Fuller notes, while it does not make sense to talk of a duty of clarity, it certainly is an aspiration.[204] That aspiration aligns with formal guidance to legislators, with New Zealand's drafting guidelines stating that legislation should be clear and "able to be easily understood by all to whom it applies" in order to conform with the rule of law.[205] Legislators ought to try to make their statutes as understandable and accessible as possible. At the very least, Québec and New Zealand have failed in making their statute understandable and accessible by including undefined and unclear references to sentience, and in turn, have undermined the rule of law.

2. *Unexpected Consequences*

If symbolic legislation is only problematic because it does not reach the Herculean standard of legislating,[206] then it is possible to excuse it. Examples of poor legislation abound, and that ubiquity may mean that it is still largely benign. However, symbolic legislation has two specific deleterious effects that further make it dangerous. First,

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198 *Id.*

199 Tamara Walsh, *Homelessness Legislation for Australia: A Missed Opportunity*, 37 UNIV. NEW S. WALES L.J. 820, 838 (2014).

200 *See* discussion *supra* Part IV.C.1.

201 TIMOTHY A.O. ENDICOTT, VAGUENESS IN LAW 185 (2000).

202 *Id.* at 185–85.

203 *Id.* (citing JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 214–18 (1979)).

204 LON L. FULLER, THE MORALITY OF LAW 43 (1964).

205 Legislation Design and Advisory Committee, *Legislation Guidelines* (Mar. 2018) at 22 (N.Z.).

206 Siehr, *supra* note 146, at 275.

issues arise when symbolic legislation actually proves effective. Second, symbolic legislation prevents advancing more effective legislation. Both these effects are a problem of unexpected consequences.

(i) Unintentionally Effective Symbolic Legislation

As defined earlier in this section, symbolic legislation is that which is intended, by its drafters, to be legally ineffective *ex ante*.[207] What happens, however, when despite those intentions symbolic legislation does prove effective at leading to substantive legal change? This might seem to be an unqualified good. As Thompson and Williams envisaged, that outcome gives power to a term intended to be powerless; a hegemonic tool is used against the very hegemony that created it.[208]

Vaughan Black argues that the legitimacy gap in such an outcome that means symbolic legislation is still problematic.[209] Black referred to legislation "affirming that the capacity of humans to stalk and kill non-humans for enjoyment is among the formers' cherished fundamental rights."[210] As Black notes, these are examples of symbolic legislation because:

> "[R]ight-to-hunt statutes do not actually *do* anything, or at least anything of legal consequence *stricto sensu*. The statutes only grant a right to hunt *in accordance with the law*. That is, at least according to their sponsors, right-to-hunt acts are symbolic and do not alter legal outcomes."[211]

Here, the similarity with the legislative recognition of sentience is clear. Animals were, of course, sentient before receiving legal recognition, just as one could hunt in accordance with the law before such legislation apparently redundantly confirmed this to be so. Black's core concern is not only the wasted time in enacting redundant legislation, but also that "we cannot be confident that such statutes will in future be confined to the symbolic role that their progenitors and proponents claim for them."[212] Since animal sentience legislation was explicitly promoted as symbolic, such legislation "may not be subject to the degree of legislative or committee scrutiny that a substantive statute attracts, thus increasing the possibility of unanticipated effects."[213]

This Article acknowledges that the recognition of sentience has the potential to be powerful and trigger a paradigm shift in the way society views and treats animals. Robertson and Goldsworthy have gone further and predict significant substantive change will occur *purely* because New Zealand has recognized that animals are sentient.[214] However, the indeterminacy of the term sentience, combined

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[207] *See supra* text accompanying notes 147–149.
[208] *See supra* text accompanying notes 189, 192–195.
[209] Vaughan Black, *Rights Gone Wild*, 54 UNIV. NEW BRUNSWICK L.J. 3, 3 (2005).
[210] *Id.*
[211] *Id.* at 5.
[212] *Id.* at 25.
[213] *Id.* at 26.
[214] *See supra* text accompanying note 49–52.

with the categorization of animals as property, means it is unlikely that such a shift will come to pass. If it did, however, Black's concern rings true: such a shift demands appropriate scrutiny by both legislators and the public.

Of course, it is not necessary for major reform to come from the legislative rather than the judicial branch of government. F.A. Hayek, for example, has argued that judges possess a different set of attributes than legislators,[215] and that they have the capacity to create new norms when justice calls for them.[216] Legislation is not, and should not be, the only source of law. But even Hayek recognized that "judicial development of law is of necessity gradual and may prove too slow to bring about the desirable rapid adaptation of the law to wholly new circumstances."[217] If the legislative recognition of sentience leads to significant legal change, there is no reason to presuppose that change will be rapid or uniform. As Mark Tushnet and Larry Yackle note, even if a few judges are happy with precipitating major interpretative change, many others will simply condemn symbolic statutes to ineffectiveness, meaning "[t]he result will be that the statutes will occasionally have essentially random adverse effects, serving no discernible public purpose."[218]

These are the results seen in Oregon, New Zealand, and Québec. Indeed, the concept of sentience *has* had some impact, but it has been haphazard and slow. This is reflective of a judicial reluctance to adjudicate upon what Fuller called "polycentric problems," namely those decisions with indeterminate and unforeseen repercussions far beyond the decision at hand.[219] This is an additional source of pessimism as to whether a court could (for example, expand the duties of those in charge of animals) given the legislative recognition of sentience. The judge in any one case "is inadequately informed and cannot determine the complex repercussions" of such a major change.[220] It would be a brave and conceivably foolhardy judge who acts otherwise. Too many parties are affected by such a decision for the common law to be an appropriate vehicle for such a change; deliberative democracy is a better route since it allows all those who are affected to participate.

(ii) Preventing Effective Legislation

The most likely scenario is that the drafters' intent is realized and the legislative recognition of sentience is purely symbolic—and, thus,

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215 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY: A NEW STATEMENT OF THE LIBERAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY 94 (1983).

216 *Id.* at 106.

217 *Id.* at 88.

218 Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L. J. 1, 85 (1997).

219 J.W.F. Allison, *Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication*, 53 CAMBRIDGE L. J. 367, 369–70 (1994).

220 *Id.* at 370.

largely ignored. Still, such a situation is not benign. Fuller would see this scenario as a failure of the rule of law: for it means there is a "discrepancy between the law as declared and as actually administered."[221] Moreover, as Black noted with regard to right-to-hunt legislation, "such statutes stand as an effective roadblock to any fundamental legislative reform of the legal position of non-humans."[222] Here, the greater concern is the backslapping and self-congratulatory sentiments of the legislators in recognizing sentience possibly stalling fundamental and effective legislative reform of the legal position of non-humans. Perhaps less a roadblock, and more a roadside amusement that distracts and prevents progress to the final destination.

Neither enforcement agencies nor courts have altered their interpretation or application of animal welfare legislation in the face of recognizing sentience.[223] If the groups that lobbied for the recognition challenged this inaction, they would be met with the reasonable response that the disproportionate economic costs of appropriately recognizing sentience justified essentially ignoring it. In such a situation, what substantive good has the legislative recognition of sentience achieved? More than this, the time and expense of attempting to enforce the existing, symbolic law could have been spent on other effective action to progress the cause of animal welfare; it is worse than being returned to square one.

Legislative inertia, likewise, means that victory in achieving legislative recognition of sentience may well prove pyrrhic. As Dwyer notes, in enacting symbolic legislation by "making promises that cannot be kept, and by leaving no middle ground for accommodation, the legislature makes it more difficult to reach a political compromise."[224] The political capital expended in achieving legislative recognition of sentience could have been better deployed at achieving more substantive, less symbolic achievements that would have led to better animal welfare outcomes. Politicians who have congratulated themselves on the legislative recognition of sentience—and the good news story it tells about their commitment to animal welfare—may consider their job as done, and that no further progress is necessary, resisting animal welfare proponents' calls for more substantive action. Those groups opposing substantive improvements in animal welfare may well have been happy to allow this symbolic victory, safe in knowing that they are the overall victors in stalling progress.

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221 FULLER, *supra* note 204, at 81.

222 Black, *supra* note 209, at 27–28.

223 *See supra* Part III.

224 John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 ECOLOGY L.Q. 233, 234 (1990).

E. Is the Symbolic Legislative Recognition of Sentience a Net-Positive?

The foregoing analysis leads to the conclusion that while there is important positive potential for symbolic legislation, it is outweighed by the negative potential. While symbolic legislation might not achieve clear and effective legal change in the short term, in shaping the conversation, giving definition to aspirations and shifting the Overton window,[225] it might affect long term substantive change. Applied to the present instance, the introduction of *sentience* into the vocabulary of mainstream animal welfare discourse has intangible but crucial positive impacts on animal welfare that far outweigh any sugar high provided by legal change that is effective but far smaller in scope.

However, there are three reasons for why any distant, long term advantage offered by the recognition of sentience is not worth the risk in the short term.

First, the long-term potential for sentience being a game-changing addition to the legislative regimes in Oregon, Québec and New Zealand is minimal. Part of this is due to the concept of sentience itself. It is not aspirational; it is a statement of fact. The recognitions of sentience are mostly undefined and uncontextualized. They do not, for example state that, "All animals are sentient, and therefore are deserving of enhanced positive experiences." This is an *aspiration*, for it is expressing a hope for a change to the status quo. In contrast, stating animals are sentient is akin to motor vehicle legislation in its preamble recognizing motor vehicles as "inanimate personal property." Legislative recognition of sentience is simply recognizing an accepted scientific fact. Scientific and legal reality may now agree, and that might be significant, but it is simply a reconciliation, not an advancement.

Recognition of scientific fact is not sufficient to cause the long term, aspirational change that symbolic legislation hopes to achieve. Press releases and fanfare upon the enactment of such symbolic legislation might begin a few conversations, but ultimately, it is simply acknowledging reality—rather than expressing an aspiration for changing that reality. Without effectively articulating its aspirations, symbolic legislation's potential for creating a communicative framework to reach those aspirations is decidedly low.

Second, the damage done through the deception of symbolic legislation is not an ill that can be ignored. The bipartisan support for each of the jurisdictions' legislative recognitions of sentience is easily confused with bipartisan support for the advancement of animal wel-

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[225] *The Overton Window*, MACKINAC CTR. FOR PUB. POL'Y, https://perma.cc/4LX5-R9XA (accessed Jan. 30, 2021) ("Politicians are limited in what policy ideas they can support; they generally only pursue policies that are widely accepted throughout society as legitimate policy options . . . but the Overton Window can both shift and expand, either increasing or shrinking the number of ideas politicians can support without unduly risking their electoral support.").

fare.[226] It is not cynical to suppose, however, that this support was contingent on the emptiness of the symbolic gesture. Meaningful legal change would have led to dissent, as every robust legislative process should. While the symbolic legislative recognition of sentience may have had formal legitimacy—duly enacted according to the proper processes—there are substantive rule of law problems with the vagueness of such a law. Moreover, as Black notes, if it is a Trojan horse for actual, substantive legal change over which reasonable people may disagree, the bipartisan support is an indication that it has not received the appropriate level of scrutiny, and courts are inappropriate vehicles for deliberation of such a polycentric issue.[227]

Finally, if the costs and benefits of symbolic legislation are measured by the material change it can deliver, the risk that symbolic legislation distracts from and derails other effective meaningful legislative change is especially worrisome. Any hope that symbolic legislation begins a conversation and momentum to effecting actual change is outweighed by the concrete reality that time, effort and political capital has been wasted; resources that could have been better utilized in obtaining more effective, small-scale change. It is the sorry reality that in the years after the symbolic legislative recognitions of sentience in Oregon, Québec, and New Zealand, even the smallest, seemingly inconsequential improvements to their animal welfare systems have not occurred.[228] Recognizing sentience is, of course, not mutually exclusive with making those substantive reforms. However, there is every likelihood that the 'win' of recognizing animal sentience in legislation gave leverage to those resisting substantive reform who can now argue the recognition means no further reform is necessary. If this is the case, then the recognition of sentience may well have played a part in preventing the improvement of the welfare of thousands of animals. Since the benefits of symbolic legislation seem largely conjecture, the very real risks of such legislation mean that the recognition of sentience is not the positive achievement that it seems at first glance.

V. CONCLUSION

This Article attempted to do three things. First, while it is doubtful that the legislative recognition of sentience will lead to any substantive improvements in the welfare of animals, the vagueness of sentience combined with the property status of animals are insurmountable as barriers. Second, this Article has tested that cynicism; did each of Oregon, New Zealand, and Québec's recognition of sentience lead to substantive improvements? Despite some welcome advances, many of them amounted to tinkering around the edges, and,

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226 *See supra* Part II.

227 Black, *supra* note 209, at 7.

228 For example, in Oregon, reducing the role of non-human hominids in animal research and testing; in Québec, the "puppy mill capital of Canada," regulating that industry; in New Zealand, providing for welfare regulations in the fishing industry.

arguably, were not linked to the recognition of sentience. Finally, this Article considered whether the lack of any substantive change means such legislative recognition is symbolic, and whether that was a cause for concern. The preambular placement of the recognition of sentience in each jurisdiction indicates that is indeed symbolic legislation and, despite the potential advantages, this Article contends that they are outweighed by the risks of such legislation.

In an area of the law with so few positive developments, the legislative recognition that animals are sentient—the law catching up with science—might have seemed to be one of those rare, joyous moments. Unfortunately, the experiences of Oregon, New Zealand, and Québec indicate that a cynical view of these developments was well-deserved, and that the recognition of sentience was merely symbolic. This is not a benign development, and while it is possible to hope that this recognition of sentience is the beginning of a revolutionary reconsideration of the status of animals, a more reasonable expectation is that it actually represents yet another stalling in that fundamental change occurring. If we want to see that fundamental change – and an actual improvement in the lives and status of animals – we cannot rest on the laurels of symbolic legislation.

ANIMAL LAW

Lewis & Clark Law School

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Volume 28 Issue 2 2022

ANIMAL LAW

VOLUME 28 2022

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