

Milked: Nature, Necessity, and American Law

Jessica Eisen[†]

INTRODUCTION.....	71
I. A SOCIO-LEGAL HISTORY OF NATURE AND NECESSITY.....	73
A. Colonialism: Animals and Property.....	75
1. Animals, Property, and Animal Property.....	79
B. Race: Nutritional and Industrial Regulation.....	83
1. Superior Bodies.....	85
2. Milk as a Pseudo-Public-Utility.....	88
C. Gender: Feminized Animals, Feminist Legal Theory.....	92
1. Legal Method and Animal Experience.....	95
2. The Farm as Private Sphere.....	98
II. MODERN DAIRY AND THE LIVES OF CATTLE.....	101
A. Cattle Experience.....	101
B. Dairy Experience.....	106
III. RETHINKING ANIMALS AND THE LAW.....	109
A. From Property as “Status” to Property as “Process”.....	111
B. Finding the “Public” in the “Private”.....	111
C. From Analogy to Interconnection.....	113
CONCLUSION.....	114

INTRODUCTION

Questions about what we ought to eat and how we ought to relate to animals generate distinct but overlapping contests, engaging both distributive and identity politics. In the United States, cow’s milk has provided a critical arena for these

DOI: <https://doi.org/10.15779/Z383X83M0N>

[†] Assistant Professor, University of Alberta Faculty of Law. The author wishes to thank Martha Minow and Catharine MacKinnon for the many thoughtful conversations that inspired this Article, and the Someone Project for supporting my research at the Farm Sanctuary. In addition, the author is extremely grateful for helpful comments on earlier drafts from Martha Minow, Kristen Stilt, Angela Harris, Maneesha Deckha, Jennifer Nedelsky, Andrea Freeman, the participants in the Alberta Early Career Legal Scholars Workshop, the 2018 Annual Meeting of the Canadian Law and Society Association, the 2018 Institute for Global Law and Policy Conference, the British Animal Studies Network Sex Workshop, the 2018 Conference of Feminist Legal Studies Queen’s, and the 2017 Relational Autonomy Workshop at the University of Toronto.

contests.¹ Presently, milk enjoys a widespread cultural signification in this country as a natural and necessary food for human beings.² Milk's virtues as natural and necessary are so deeply entrenched that they are rarely recognized as culturally-specific beliefs, let alone ones that have been carefully cultivated over generations of complex public-private partnerships.³

This Article explores the relationship between Americans, milk-drinking, and the animals who produce milk, not as a matter of the private, inevitable, or natural march of history, but as a product of particular, contested, socio-legal choices. Part I of this Article will explore the prevailing American cultural signification of milk as natural and necessary, arguing that this signification is in fact historically particular, and deeply interlaced with colonial, racial, and gendered deployment of these same terms (nature and necessity) as justifications for dominance and hierarchy as between human beings. In particular, this Part will explore the role of law in entrenching American dairying as a component of the European colonial project; in advancing (at times explicit) white supremacy through dietary and industrial policies that universalize Euro-American bodies; and in reinforcing a gendered view of female bodies across species as defined by the sexual and (re)productive interests of the state and its most powerful members.

Part II will focus on the experience of cattle in this story—taking up the challenge increasingly issued within the social sciences to account for the lives of animals who have long been treated only as materials or pawns in humanist accounts of public life.⁴ This Part will begin with an introduction to what we know of the social and emotional lives of cattle in spite of the persistent challenge of making animal subjectivity visible to law. This necessarily partial account of cattle subjectivity will form the starting point for setting out the harms of contemporary dairy practices, with a particular focus on the frustration and domination of the social, sexual, and reproductive lives of animals. This Part will consider cows not (only) as resources, but as parents and as members of communities, and will explore contemporary dairy practices—including physical confinement and the immediate separation and isolation of calves—in this light. People often see

-
1. Hereafter, where I use the word “milk,” I am referring to cow’s milk.
 2. See generally E. Melanie DuPuis, *Nature’s Perfect Food: How Milk Became America’s Drink* (New York University Press, 2002); Andrea S. Wiley, *Re-Imagining Milk* (Routledge, 2nd ed., 2011).
 3. See Martha Minow, “Public and Private Partnerships: Accounting for the New Religion,” 116 *Harvard Law Review* 1229 (2003). While Minow’s study focuses on private entities that have taken on public functions, the public-private partnerships associated with dairying have taken the reverse form: public entities like the United States Department of Agriculture taking on characteristically-private functions like product marketing.
 4. See e.g. Maneesha Deckha, “Critical Animal Studies and Animal Law,” 18 *Animal Law Review* 207 (2012) (on the rise of posthumanism in legal education, and the distinct interdisciplinary field of Critical Animal Studies); Erica Fudge, “A Left-Handed Blow: Writing the History of Animals,” in *Representing Animals*, 3 (ed. Nigel Rothfels, Indiana University Press, 2002) (on incorporating animal experience in accounts of history); Robert Garner & Siobhan O’Sullivan, “Introduction,” in *The Political Turn in Animal Ethics*, 1 (eds. Robert Garner & Siobhan O’Sullivan, Rowman & Littlefield, 2016) (on developing political theory that accounts for animals).

something of themselves in the ways that animals care for and protect their young,⁵ but my hope here is not to make the common claim that animals deserve moral and legal concern because they are “like us.”⁶ Instead, my claim is that the subjectivity and experiences of cows are their own sources of value with which a legal and political account of our most natural and necessary food must contend.

Part III will revisit the role of law, arguing that a complex intermingling of public and private legal power not only permits but enables and promotes contemporary milk practices. This section will begin with an overview of existing legal protections for farmed animals in the United States, and will set out the common critical takes on the current state of affairs: namely, that the harsh conditions of animal lives are enabled by a *lack of law*—either a lack of “rights” or a lack of “welfare” protections curbing the worst practices of industrial animal use. Applying the legal narratives of Part I and the accounts of the lives of cattle offered in Part II, this Part will seek to enrich prevailing accounts of the legal treatment of animals by elaborating the many ways that law is in fact active in this space. What is often seen as a simple failure to protect farmed animals is in fact better understood as a complex of legal and cultural practices that affirmatively support the intensification and industrialization of milk production. We will see that the farm has earned a place among those institutions like the “home” and the “family” that have been misleadingly cast as apolitical and beyond the reach of law. Following generations of legal theorists in feminist and other justice traditions, we will see that the farm represents yet another jealously guarded “private” space that in fact embraces, expresses, and enables contestable public purposes defined by race, gender, and economic power.

I. A SOCIO-LEGAL HISTORY OF NATURE AND NECESSITY

Assumptions that human beings are compelled (by necessity) and authorized (by nature) to appropriate the nursing materials of other species—particularly through the highly industrialized processes that characterize advanced capitalist dairy production—echo and intermingle with the logics of other forms of hierarchy.⁷ Arguments from nature and necessity, even when made only by implication, are infused with the ghostly credibility of “time immemorial.” History is invoked against historicism. Relations of power and hierarchy for which law and justice might be brought to account are transformed into poetry for the ages.

In reality, milk’s signification as a natural and necessary food for human beings has a particular history in North America, and law has played an important

5. Think, for example, of references to a protective human parent as a “mama bear” or to parents of grown children as “empty nesters.”

6. See notes 166–171.

7. See Jared Piazza et al., “Rationalizing Meat Consumption. The 4Ns,” 91 *Appetite* 114, 117, 119 (2015) (summarizing research findings that “the belief that eating meat is *natural, normal, necessary, and nice*” commonly rationalizes meat-eating, and further finding an empirical correlation between these views and broader “social dominance orientation” defined by a “motivat[ion] to see their own groups dominate other groups”).

role in this story.⁸ Although dairying has certainly been practiced in some (but not all) human communities for millennia,⁹ the prized position cow's milk holds in the United States is shaped by the particular socio-legal histories of this place—including fraught and ongoing histories of colonialism, race, and gender. Following feminist and other justice projects, this Section seeks to expose what looks natural as political, what looks private as public, and what looks wholesome by hegemonic standards as oppressive when viewed from below.¹⁰ What follows is an account of milk's ascension to its current cultural status as a natural and necessary food, emphasizing political power, legal choice, and intersecting histories of colonialism, race, and gender.

The following account of the construction of milk's asserted nature and necessity is organized according to the respective roles of colonialism, race, and gender, while also providing a rough chronological account of the ascendance of milk in American socio-legal history. This is not intended to serve as a complete or definitive narrative, but rather as a series of snapshots or quick cuts of this impossibly rich history, with the aim of illuminating law as a driver of contemporary dairy practices.

The first subsection will explore the colonial process by which the classification of animals as property, the consumption of non-human milk, and cattle themselves were introduced then imposed in this country, including through legal and pseudo-legal force. Here, we will see the first building blocks of a Euro-American legal regime that permits, and even requires, the treatment of animal bodies as objects to be owned, confined, and used—and will come to understand this regime as a product of choice and contest in which alternative (Indigenous) legal orders were forcibly suppressed.¹¹

The second subsection will examine the cultural transformation of fluid milk from an occasional food, even for Europeans, into “America's drink,” heralded as “nature's perfect food,” necessary first for babies, then for literally “everybody”—and the attendant legal support for an increasingly industrialized and concentrated system of dairy production. In particular, this section will explore the ways in

8. See generally DuPuis, note 2; Wiley, note 2, at 37-63.

9. For a historical overview, see Deborah Valenze, *Milk: A Local and Global History* (Yale University Press, 2011). See also Wiley, note 2, at 107 (demonstrating that “dairy consumption is evolutionarily novel, historically rare across populations (most of East and Southeast Asia, Oceania, and the whole New World), and routine milk drinking is only a little over 100 years old”).

10. See Mari Matsuda, “Looking to the Bottom: Critical Legal Studies and Reparations,” 22 *Harvard Civil Rights-Civil Liberties Law Review* 323, 324 (“Looking to the bottom—adopting the perspective of those who have seen and felt the falsity of the liberal promise—can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice.”).

11. Of course, Indigenous laws persist, and their suppression in North America has not been complete. See e.g. John Borrows, *Canada's Indigenous Constitution*, 8-11 (University of Toronto Press, 2010); Patrick Macklem, “Distributing Sovereignty: Indian Nations and Equality of Peoples,” 45 *Stanford Law Review* 1311, 1316-22 (1993). The United States' dominant legal order and the food system that it supports, however, are now defined primarily by Euro-American constructions of land and animals as owned and own-able property.

which the narratives supporting the regulatory drive to intensify dairying drew on the supposed racial superiority of milk-drinking cultures and minimized or disregarded growing scientific evidence that many ethnic groups do not easily digest milk. Again, we will see law as a crucial force in the story of how and why American dairy practices came to take on their current form and scale.

Finally, the third subsection will consider the role that gender plays in contemporary dairying—an industry that is fundamentally dependent on the reproductive and sexual control of female animal bodies, and on the casting of that control as necessary and natural. In addition to echoing longstanding cultural criticism of the overt reliance on gender tropes in representations of dairying inside and outside of the industry, this section sets out a further connection: the extent to which feminist analyses of legal method and the “private sphere” illuminate law’s role in industrial dairying. Taken together, this section paints a picture of contemporary dairying not as *natural and necessary*, but as *naturalized and normalized*—echoing and intersecting with intra-human practices of hierarchy and control that rely on similar tropes of nature and necessity for their own sustenance. In particular, we will see here that feminist analyses of legal method and the legal-rhetorical trope of the private sphere illuminate critical aspects of the regulatory environments that shape the lives of animals within contemporary American dairy farming.

A. Colonialism: Animals and Property

Neither cows nor dairying are indigenous to the Americas.¹² The story of milk’s rise to its current status in the American imagination is inextricable from the story of European colonization of the so-called “new world.” The violent and deliberate imposition of European agriculture and foodways on Indigenous populations, including through law, was crucial to the settler colonial project. Dairying and cattle farming were at the heart of this enterprise. Virginia DeJohn Anderson offers a riveting and thoroughly-researched history of this dynamic as it unfurled in the early colonies of New England and the Chesapeake, and the following account owes a great debt to her work.¹³

Early colonial encounters in the United States were marked by collisions

12. Virginia DeJohn Anderson, *Creatures of Empire: How Domestic Animals Transformed Early America*, 15-17 (Oxford University Press, 2004); Alfred W. Crosby, *Ecological Imperialism: The Biological Expansion of Europe, 900-1900*, 173 (Cambridge University Press, 2nd ed., 1986); Timothy Silver, *A New Face on the Countryside: Indians, Colonists, and Slaves in South Atlantic Forests, 1500-1800*, 42 (Cambridge University Press, 1990); Wiley, note 2, at 44; see also Carolyn Merchant, *Ecological Revolutions: Nature, Gender and Science in New England*, 75, 81-83 (The University of North Carolina Press, 2nd ed., 2010) (detailing Indigenous dietary practices in colonial New England).

13. See generally Anderson, note 12. For accounts of the relationship between milk and colonialism extending beyond the North American context, see Mathilde Cohen, “Animal Colonialism: The Case of Milk,” 111 *American Journal of International Law Unbound* 267 (2013); Yoriko Otomo, “The Gentle Cannibal: The Rise and Fall of Lawful Milk,” 40 *Australian Feminist Law Journal* 215 (2014).

between irreconcilable approaches to animals and to the laws and ethics by which those animals were incorporated into human diets.¹⁴ English colonists held “dominion over animals” to be “both natural and divinely sanctioned.”¹⁵ The line between humans and animals was clear, firm, and expressive of a natural ordering that placed human beings at the worldly pinnacle of a “Great Chain of Being.”¹⁶ The legal manifestation of this worldview was a property regime¹⁷ under which only human beings might possess property,¹⁸ any animal might become property,¹⁹ and legal limits on animal use pertained primarily to restrictions on what one might do to *someone else’s* animal.²⁰ Animal products were brought into English food systems almost exclusively through farming practices wherein animal breeding was (loosely) controlled, each farmed animal had a human owner who would

-
14. Ron Schmid, *The Untold Story of Milk: The History, Politics and Science of Nature’s Perfect Food*, 23 (New Trends Publishing, 2nd ed., 2009); William Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New England*, 12 (Hill and Wang, 2nd ed., 2003) (remarking that “[t]he choice is not between two landscapes, one with and one without a human influence; it is between two human ways of living, two ways of belonging to an ecosystem”); Wiley, note 2, at 44. The overview offered here flattens both sides of this encounter, as both European and Indigenous traditions were complex, diverse, and characterized by internal countercurrents. On the competing views of animals within European and Indigenous communities during the colonial period, see Anderson, note 12, at 43-71 (detailing UK perspectives) and 15-42 (focusing on Indigenous perspectives in the regions that would become New England and the Chesapeake); see also Yin C. Paradies, “Beyond Black and White: Essentialism, Hybridity and Indigeneity,” 42 *Journal of Sociology* 355 (2006) (on the risks of pan-Indigenous essentialism, drawing primarily on the Australian context).
 15. Anderson, note 12, at 45, 52-53 (describing the interplay of classical, Christian doctrinal and philosophical arguments constitutive of the English view of human dominion and hierarchy over other animals).
 16. *Id.* at 53.
 17. For an influential contemporary treatment of animals’ legal status as property in the Anglo-American legal tradition, see Gary Francione, *Animals, Property and the Law* (Temple University Press, 1995).
 18. Only human beings (or human organizations in the form of corporations or the state) could possess property, but not *every* human being could possess property. Race, gender, and social class were expressed through this property regime in complex and dynamic ways, with the effect that some people’s rights to hold property were limited or extinguished, and some people (ranging from children to slaves to women to indentured servants) were assigned legal status closer to the property side of the ledger. See *Animal Law: Cases and Materials*, 51-65 (eds. Bruce A. Wagman, Sonia S. Waisman, & Pamela D. Frasch, Carolina Academic Press, 4th ed., 2010).
 19. Anderson, note 12, at 44, 68 (quoting John Locke’s explanation that a person who tamed a wild animal “did thereby acquire property in them”); see *Pierson v. Post*, 3 Cai. R. 175, 1805 N.Y. (1805) (post-dating the colonial period, but demonstrating the English, and ultimately Anglo-American, legal treatment of wild animals as convertible into personal property). For a historical treatment of this case, see Angela Fernandez, *Pierson v. Post, The Hunt for the Fox: Law and Professionalization in American Legal Culture* (Cambridge University Press, 2018).
 20. Despite the lack of “formal sanctions,” it is likely that economic considerations constrained some forms of violence and neglect, and possible that “complaints by concerned passersby may have kept the worst excesses in check, or simply out of sight.” Anderson, note 12, at 92-93. A noteworthy exception to the general lack of legal regulation of the treatment of one’s own animal was the legal prohibition on bestiality. As with early anti-cruelty laws (which would not appear until many years after the colonial period), concern over community morals, rather than animal well-being, was the focus of colonial concern respecting both illegal bestiality and informal complaints of abuse and neglect. *Id.* at 92-93, 96, 169-70.

automatically become the owner of all of that animal's offspring and bodily emissions, and human owners were permitted and required to enclose their animals on land to which they had related property rights.²¹

Indigenous legal and spiritual traditions, on the other hand, did not characterize animals as inherently subordinate to human beings.²² Remarkably, there does not appear to have been a word analogous to the English word "animal" in any pre-contact North American Indigenous language, suggesting that these communities "did not conceive of the natural world in terms of a strict human-animal dichotomy but rather as a place characterized by a diversity of living beings."²³ Rather than conceiving of humans as dominant in a hierarchical chain with all other life grouped as "animals" below them, inter-species relations were characterized by values such as "mutual support" and "balance," including the recognition of powerful spirits within prey animals, demanding respectful treatment of such beings.²⁴ (To European audiences, the notion that animals might lay claim to such immortal spirit was an "offensive absurdity."²⁵)

-
21. On the relationship between ownership of animals and ownership of land, see Anderson, note 12, at 79-80 (explaining that "by making agriculture the sole measure of use [that defined property rights in land] . . . colonists denied Indians any claim to the hunting lands essential to their way of life"); Cronon, note 14, at 55-56; Valenze, note 9, at 145 (quoting John Winthrop's assessment that Indigenous peoples had no legal claim to private property because "they inclose noe [sic] Land and had no tame Cattle to improve the Land by").
 22. For a contemporary treatment of Indigenous knowledge systems as an alternative to dominant conceptions of human-animal relations, see Margaret Robinson, "Veganism in Mi'kmaq Legends," 33 *Canadian Journal of Native Studies* 189 (2013).
 23. Anderson, note 12, at 18; Silver, note 12, at 40. This history supports a line of argument advanced within the field of Critical Animal Studies that the human-animal binary is a social construction. See e.g. Erika Cudworth, "Beyond Speciesism: Intersectionality, Critical Sociology and the Human Domination of Other Animals," in *The Rise of Critical Animal Studies: From the Margins to the Centre*, 19, 21 (eds. Nik Taylor & Richard Twine, 2014); Yoriko Otomo, "Law and the Question of the (Nonhuman) Animal," 19 *Society & Animals* 383, 385 (2011) (identifying Jacques Derrida, Martin Heidegger, Donna Haraway, Bernard Stiegler, Giorgio Agamben, Matthew Calarco, Mark Rowlands, and Carey Wolfe as advocating "attention to the economic, historical, linguistic, and social forces that engender the separation of 'human' from 'animal,' and broadly interrogat[ing] the technologies and discourses through which the 'human' is constructed"). For a discussion of such interventions as specifically necessitated by settler ideologies, see Kim TallBear, "Beyond the Life/Not-Life Binary: A Feminist-Indigenous Reading of Cryopreservation, Interspecies Thinking, and the New Materialisms," in *Cryopolitics: Frozen Life in a Melting World*, 179, 180 (eds. Joanna Radin & Emma Kowal, Massachusetts Institute of Technology, 2017) (remarking that "academic conversations" that "seek new language to articulate relations between humans and nonhumans" stand to "benefit from indigenous standpoints that never forgot the interrelatedness of all things").
 24. Anderson, note 12, at 21, 29, 31; Silver, note 12, at 40-42; see Russel Barsh, "Food Security, Food Hegemony, and Charismatic Animals," in *Toward a Sustainable Whaling Regime*, 147, 147-61 (ed. Robert Friedheim, University of Washington Press, 2001); Margaret Robinson, "Animal Personhood in Mi'kmaq Perspective," 4 *Societies* 672, 672-82 (2013); Richard White, "Animals and Enterprise," in *The Oxford History of the American West*, 236, 237 (eds. Clyde A. Milner II, Carol A. O'Connor, & Martha A. Sandweiss, Oxford University Press 1994) (explaining that Indigenous tradition in the western plains "made animals other-than-human persons with whom relationships were social and religious instead of purely instrumental").
 25. Keith Thomas, *Man and the Natural World: Changing Attitudes in England 1500-1800*, 33

While Indigenous peoples in New England and the Chesapeake had sophisticated agricultural practices (including horticulture, crop rotations, and selective burning of vegetation to create environments hospitable to grazing animals), they did not confine or enclose animals; instead, animal foods were acquired through hunting and gathering.²⁶ Indigenous laws governed (and continue to govern) hunting with an eye to respect for prey animals, including prohibitions on hunting some mother animals with their young, prohibitions on hunting in excess of subsistence needs, and mandatory rituals and practices delineating respectful use of the dead bodies of hunted animals.²⁷ Although Indigenous legal orders might have recognized something like an individual property right in the dead body of a hunted animal, and something like collective territorial rights to hunt in certain regions, there was no Indigenous legal analogue to the English law and practice of “owning” live animals.²⁸ Even dogs, the animals with which Indigenous communities in New England and the Chesapeake lived most closely, and who were sometimes consumed as food in exigent circumstances, were not subject to controlled breeding, forcibly confined, or considered to be property.²⁹ Indigenous food systems were thus based on ongoing reciprocal relationships with animals that Europeans considered to be “wild.” In part because milk is not a food that can reasonably be hunted or gathered from a wild animal, dairy products formed no part of Indigenous foodways.³⁰

European colonists were disdainful of Indigenous practices and beliefs respecting animals. The English viewed hunting as a sport, not a means of subsistence, and so cast Indigenous hunters as like idle “country gentlemen” who preferred recreation over fulfilment of their Christian duties to domesticate animals and improve the land through more intensive forms of control and dominion.³¹ The English considered Indigenous peoples’ lack of dairying in

(1983), quoted in Anderson, note 12, at 52.

26. Sunmin Park, Nobuki Hongu, & James W. Daily III, “Native American Foods: History, Culture and Influence on Modern Diets,” 3 *Journal of Ethnic Foods* 171 (2016); Anderson, note 12, at 80-81; Merchant, note 12, at 81-83. For a comparison of Indigenous food systems in the more agriculturally-based southern New England and the more hunting-and-gathering-based northern New England, see Cronon, note 14, at 34-53.
27. See all sources cited in note 26; Silver, note 12, at 40-42; Paul Driben et al., “No Killing Ground: Aboriginal Law Governing the Killing of Wildlife among the Cree and Ojibwa of Northern Ontario,” 1 *Ayaangwaamizin: International Journal of Indigenous Philosophy* 91 (1997).
28. Cronon, note 14, at 58-68, 129-30 (describing Indigenous legal relations respecting land and water, hunted animals, and personal items in New England and explaining that “[w]hat most distinguished a hog or a cow from the deer hunted by Indians was the fact that the colonists’ animal was owned”).
29. Anderson, note 12, at 34-35; see generally Marion Schwartz, *A History of Dogs in the Early Americas* (Yale University Press, 1997); see Pamela Amoss, “A Little More Than Kin, and Less Than Kind: The Ambiguous Northwest Coast Dog,” in *The Tsimshian and their Neighbors of the North Pacific Coast* (eds. Jay Miller & Carol Eastman, University of Washington Press, 1984).
30. Cronon, note 14, at 129; Schmid, note 14, at 23; Wiley, note 2, at 44.
31. Anderson, note 12, at 61 (quoting Rev. Francis Higginson’s assessment that Indigenous men “for the most part live idely, they doe nothing but hunt and fish” [sic]; but also noting that this

particular to be proof of their “primitive” status, with the keeping of dairy cattle held out as a particularly significant dimension of civility’s demand for close control of land and animals.³² Colonists asserted their right and duty to bring animal domestication, together with property rights and Christian hierarchies of species, to the Americas—a process that began with efforts to model and encourage domestication, and ended (or, more properly, began a new chapter) with the forcible slaughter and displacement of Indigenous persons and wildlife.³³

1. Animals, Property, and Animal Property

The imposition of an English-style regime governing land and animals as private property in the American colonies was not straightforward or uncontested. When efforts by colonists to domesticate North American wildlife failed,³⁴ English colonists determined that their efforts to “serve as models of the proper relationship between people and animals” would require them to bring European livestock to the colonies via deadly overseas transport.³⁵ Ironically, a lack of infrastructure and laborers meant that the colonists’ farming practices ended up differing significantly from “civilized” English ways, with many domestic animals essentially re-wilding or going feral in the woods surrounding colonial towns and plantations.³⁶ Feral cows who calved in the woods tended to travel in packs and aggressively defend their young.³⁷ In part due to this rewilding, and in part due to

negative view of country gentlemen and sport hunting was less pronounced in the Chesapeake region than in the more Puritanical colonies of New England); Cronon, note 14, at 52-53.

32. Valenze, note 9, at 145 (explaining that cattle “represented a technological and moral indicator of utmost importance to the colonial venture: they belonged to a mode of civilized agriculture, bounded by fences and furthered by labor-intensive strategies” and that “[t]he argument could be extended to the pursuit of dairying”); Anderson, note 12, at 108 (describing the English view that “cows were ideal instruments for introducing Indians to English ways” and the colonial aspiration to see “Indian families putting down roots in villages encircled by enclosed pastures, native women milking docile cows, and men and boys carting dung to enrich worn-out cornfields and cutting hay to nourish growing herds”).
33. Anderson, note 12, at 7, 62.
34. Id. at 68-70 (describing the domestication of wild turkeys as the only meaningful success amongst these efforts, and numerous failures arising from, *inter alia*, buffaloes’ tendency to “stress-related disorders” in captivity).
35. Id. at 70-71, 97-100 (explaining that “distressingly large number of animals perished at sea,” often exceeding half the animals shipped in “dark, fetid stalls below decks” where they “struggled to keep their footing as ships rose and sank with ocean swells”); see Kristen Stilt, “Trading in Sacrifice,” 111 *AJIL Unbound* 397, 398 (2017) (describing contemporary overseas livestock transport from Australia, in which “tens of thousands of animals are housed in small spaces for journeys up to one month,” with 1 to 2 percent of animals perishing at sea, and arguing that international law fails to adequately regulate this practice).
36. Anderson, note 12, at 108-22 (describing this phenomenon in the Chesapeake, where the more lucrative demands of tobacco farming also contributed to looser control of livestock); Silver, note 12, at 174-75 (explaining that feral cattle were so common in Virginia by the end of the 1600s that they were commonly hunted for sport, and quoting John Clayton’s observation that these cattle were “difficult to be shott [sic], having [like other wild beasts] a great acuteness of smelling”).
37. Anderson, note 12, at 122; see Crosby, note 12, at 178-79 (remarking that “[t]he majority of the cattle of the Americas from the sixteenth to the nineteenth century were probably feral” and reporting Father Martin Dobrizhoffer’s account that cows in Río de la Planta “could not

a lack of English women whose traditional roles included milking cows, dairying was neglected in the Chesapeake.³⁸

As *de facto* control over livestock loosened in the Chesapeake, law's role in defining their property status became more visible, with the development of harsh penalties (including death) for theft of livestock, laws requiring the reporting of stray animals encountered in the woods, and official public records of "earmarks" confirming animal ownership.³⁹ The fact that animals seemed to be escaping their property status was perceived as a threat to the civilizing mission, which the Crown ultimately sought to correct by asserting royal ownership over re-wilded livestock—with some debate as to whether this ownership was best understood as an instance of the Crown's right to wild animals (*ferae naturae*) on Crown lands, or as an instance of the Crown's rights over stray animals.⁴⁰ Anderson explains that "[r]oyal rights to feral livestock, however tenuously upheld, preserved the animals' status as property" and thus "ensured that even in their wild state the creatures still served as representatives of English occupation."⁴¹

In New England, animals were more easily controlled and dairying flourished early on, in part because the English settled in towns rather than on plantations.⁴² The level of control over livestock, however, still did not match that of the "old world." Legal forms of animal property evolved somewhat to match the demands of semi-feral livestock, for example through the emergence of town-wide rather than individual ownership markings, and communal animal care roles such as town keepers to mind animals in the woods.⁴³ Localities further supported

be milked unless their feet were tied and their calves were present, and the cows and bulls alike moved 'with a sort of ferocious arrogance,' holding their heads high like stags, which they almost equaled in speed").

38. See Anderson, note 12, at 111-12, 145 (describing the relative lack of dairying in the Chesapeake and the flourishing of dairying in New England).
39. See *id.* at 123-29; Cronon, note 14, at 129-30 (Connecticut law established that a nearby "Indian town" would be liable for "any Indian" killing livestock, and explaining that "[e]ven when it grazed in a common herd or wandered loose in woodlands or open pastures, a fixed property right inhered in [a hog or a cow]. The notch in its ear or the brand on its flanks signified to the colonists that no one other than its owner had the right to kill or convey rights to it.").
40. See Anderson, note 12, at 129-39 (explaining the Crown's traditional ownership over "waifs (property found without an owner) and strays (animal property that had wandered away from owners who neglected to retrieve them)" and colonial resistance to the legal casting of feral livestock as wild animals on the basis that "Livestock could no more become *ferae naturae* than colonists could become Indians").
41. See *id.* at 135; Cronon, note 14, at 14 (remarking that "[t]he pig was not merely a pig but a creature bound among other things to the fence, the dandelion, and a very special definition of property").
42. See Anderson, note 12, at 145; see also Valenze, note 9, at 145 (noting the greater presence of women colonists in New England as a factor contributing to dairying in that region); Sarah F. McMahon, "A Comfortable Subsistence: The Changing Composition of Diet in Rural New England, 1610-1840," 42:1 *William & Mary Quarterly* 26, 38 (1985) (reporting that "dairy played an important part in the routine of food production on most New England farms").
43. See Anderson, note 12, at 161, 164; see also Cronon, note 14, at 134 (describing labor shortage as an obstacle to the system of "individual herders" that prevailed in England, and explaining that "towns and colonies alike were constantly shifting their regulations in an effort to control the relationship between domesticated animals and crops").

the development of animal ownership and dairying in New England through the coordination of livestock fairs, the maintenance of common grazing land for certain animals at the center of town, and the identification and fencing of pasturelands outside of town.⁴⁴

Colonists sought to encourage Indigenous populations to take up livestock farming, for example by donating livestock to English-style Indigenous “praying towns,” hiring Indigenous livestock keepers, and by rewarding the killing of wolves with gifts of cattle—a policy that supported cattle farming both through its direct enablement and through the elimination of predators.⁴⁵ Because cattle and dairying were the most quintessentially English forms of farming, they were preferred by the English as a means by which to introduce Indigenous people to animal farming and ownership. The time-consuming nature of dairying, the control over animals it required, and widespread lactose intolerance among Indigenous persons, however, thwarted these efforts.⁴⁶

As the colonists’ livestock populations grew, along with their insatiable hunger for grazing land, efforts to persuade and impress Indigenous peoples into a “civilized” life of animal domestication gave way to outright forcible displacement—often with livestock used as tools in the ensuing conflicts over land. Colonial livestock shared the woods with North American wildlife, eventually coming to drive them out, in part because they alone were legally protected from hunters. Indigenous subsistence hunting was frustrated not only by the displacement of wild animal populations, but also by legal restrictions on traditional trapping practices.⁴⁷ Initially, New England colonists demonstrated some sympathy for Indigenous farmers when colonial livestock raided their cornfields (an Indigenous food source that the colonists respected more than hunting because it more closely aligned with their understanding of property).⁴⁸ Seizing the opportunity to impart their ownership models, colonists helped Indigenous peoples to build fences around their fields, and even occasionally enforced damage awards when colonial livestock broke through properly-

44. See Anderson, note 12, at 149, 159-60.

45. *Id.* at 199-201, 203-04; see Schmid, note 14, at 25-26; see also Cronon, note 14, at 132-34 (on colonial New England efforts to address “the wolf threat,” including town-ordered wolf hunts, and the establishment of bounties to which livestock owners were required to contribute, amounting to “a court-ordered market” for wolf heads in order to “encourage their destruction”); see Silver, note 12, at 175-77 (describing wolf bounties in the southern colonies).

46. See Anderson, note 12, at 213. Indigenous farmers more readily took to pigs, whom they allowed to range freely in their villages. Ultimately, colonists forbade Indigenous communities from allowing their pigs access to communal lands or from accessing the protection of earmarks. See *id.* at 213-17. But see Silver, note 12, at 196 (describing early resistance to eating pig in some southern Indigenous communities).

47. See Anderson, note 12, at 189-90, 197-98; Cronon, note 14, at 103. On displacement of wildlife by domestic animals, see Silver, note 12, at 179.

48. See Anderson, note 12, at 191-92; see also Cronon, note 14, at 56-57 (explaining that English notions of land tenure had the effect that “only the fields planted by Indian women could be claimed as property” and quoting John Winthrop’s conclusion that “the rest of the country lay open to any that could and would improve it”).

constructed fences.⁴⁹ (In the Chesapeake, such restitution was less generously permitted, and Indigenous persons who killed even trespassing livestock were summarily executed.⁵⁰) Ultimately, as conflicts over resources grew more intense, New England colonists would come to purposefully tear down these same fences and let their animals loose on Indigenous crops as colonial authorities increasingly looked the other way.⁵¹

With vanishingly few exceptions, colonists starved, executed, and drove the Indigenous communities of New England and the Chesapeake off their land—legally, or with a wink from the colonial authorities. Deer were displaced by pigs and cattle, and hunting was made increasingly difficult and illegal in support of livestock farming. By the early eighteenth century, this process was all but complete in the early colonies, but was set to begin in another form as settlers moved west, a migration motivated in large part by the quest for more land on which to graze their cattle.⁵² Jeremy Rifkin’s history of this period concludes that the slaughter of plains buffalo, often described simply as “wasteful exuberance” is better explained as “a clear and systematic policy designed to replace the buffalo with the steer and the Indian with the cowboy.”⁵³ As Thomas Jefferson oversaw this expansion and famously championed an agrarian America, he echoed the logics of New England and Chesapeake colonists in predicting that introduction to cattle farming would serve to ensure that Indigenous populations would “acquire a knowledge of the value of property.”⁵⁴ By the early nineteenth century, when English-speaking colonists began to flood California and Hawaii, a distinct brand of “cattle colonialism” was already underway under the banner of Spanish

49. See Anderson, note 12, at 192; Cronon, note 14, at 130-32.

50. See Anderson, note 12, at 194.

51. *Id.* at 225.

52. *Id.* at 10-11, 244-45; see Schmid, note 14, at 28; for an account of westward colonial expansion in Canada, and its relationship to Plains Cree law and food systems, see Darcy Lindberg, “Transforming Sovereignty: Plains Cree Constitutionalism and Food Sovereignty,” in *Food Law and Policy in Canada* (eds. Heather McLeod-Kilmurray, Angela Lee, & Nathalie Chalifour, Carswell, forthcoming 2019).

53. Jeremy Rifkin, *Beyond Beef: The Rise and Fall of Cattle Culture*, 77 (Dutton Books, 1992). Rifkin quotes Eric Ross’ assessment that the extinction of the buffalo was “an absolute prerequisite for the advance of cattle raising on the Great Plains: and it was widely considered necessary to end the resistance of the Plains Indians.” *Id.* at 77-78. Rifkin further quotes General Philip Sheridan’s contemporaneous assessment that buffalo hunters had “done . . . more to settle the vexed Indian question than the entire regular army has done in the last thirty years” by “destroying the Indians’ commissary,” and his urging that once “the buffalo is exterminated,” the prairies might be “covered with speckled cattle and the festive cowboy who follows the hunter as a second forerunner of an advanced civilization.” *Id.* at 78; see also William Temple Hornaday, *The Extermination of the American Bison with a Sketch of Its Discovery and Life History*, 367-548 (1889). For a broader environmental history of this period and the decades following, and the associated ascendance of a “cattle kingdom” where “humans reigned, where uselessness among lesser living things was a crime punishable by death, and where enterprise was the reigning virtue,” see White, note 24, at 257, 269-70. In the expansion of cattle farming on the plains, beef far eclipsed milk in defining the commercial and symbolic value of cattle, with the virtuous lifestyle represented being “American” more than “English.” *Id.*

54. Thomas Jefferson, quoted in Anderson, note 12, at 245.

colonial expansion.⁵⁵ Cattle became “tokens in the games of imperial rivalry that dominated the region for centuries,” and again served an ostensibly “civilizing” role in the imposition of “European concepts of private property” on Indigenous populations.⁵⁶

And so went the first, necessary, steps in casting cow’s milk as a natural and necessary food in a land where humans had lived for millennia without having contact with a single cow, without regularly drinking any kind of milk past infancy, and without the milk of other species forming any part of their food system. Law played an essential role in shaping American landscapes to accommodate cattle-farming, and in driving away peoples and lifestyles that were incompatible with this agenda.⁵⁷ Legislators and judges made choices governing each foot of fencing, each wolf scalp submitted for reward in cattle, each deer starved or run off its forest home, and each Indigenous person struggling to feed her family in an increasingly hostile colonial-legal world. If milk-drinking in North America is natural and necessary, so too is the legal property status of land and animals, and the colonial history through which these socio-legal forms were imposed at heavy costs in human and animal life.⁵⁸

B. Race: Nutritional and Industrial Regulation

Despite the symbolic significance of dairying during the colonial period, fluid milk did not become big business in North America until the mid- to late-nineteenth century.⁵⁹ Urbanization, railroads, refrigeration, pasteurization,

-
55. See generally John Ryan Fischer, *Cattle Colonialism: An Environmental History of the Conquest of California and Hawai’i* (North Carolina Press, 2015).
56. Id. at 4-6 (“It was not a simple story of linear Anglo-American progress, but rather one of overlapping imperial conquerors and indigenous people who alternately accommodated, adapted, and resisted.”).
57. On the transformation of the physical landscape, see generally Cronon, note 14; Silver, note 12.
58. See Billy-Ray Belcourt, “Animal Bodies, Colonial Subjects: (Re)Locating Animality in Decolonial Thought” 5 *Societies* 1, 3 (2015) (arguing that “animal domestication, speciesism, and other modern human-animal interactions are only possible because of and through the historic and ongoing erasure of Indigenous bodies and the emptying of Indigenous lands for settler-colonial expansion”); Kelly Struthers Montford, *Agricultural Power: Politicized Ontologies of Food, Life, and Law in Settler Colonial Spaces*, 15 (Dissertation: University of Alberta Department of Sociology, 2017) (arguing, with a focus on the Canadian context, that “settler food cultures . . . sustained and made possible by animal agriculture are taken to be natural and inevitable, when instead they should be understood as a particular iteration of western humanism that institutes and makes possible our dominant ontologies of humans . . . farmed animals . . . and food”). Notably, claims of “nature” and “necessity” have been recurring themes in attempts to justify colonialism more broadly. See Mike Hawkins, *Social Darwinism in European and American Thought, 1860-1945: Nature as Model and Nature as Threat* (Cambridge University Press, 1997); Stanford M. Lyman, *Militarism, Imperialism, and Racial Accommodations: an Analysis and Interpretation of the Early Writings of Robert E. Park* (The University of Arkansas Press, 1992); see also Michael Wilcox, “Marketing Conquest and the Vanishing Indian: An Indigenous Response to Jared Diamond’s *Guns, Germs, and Steel* and *Collapse*,” 10 *Journal of Social Archaeology* 92, 96 (2010) (criticizing narratives of colonialism in which “human agency and ideology are left unexamined”).
59. Melanie Dupuis, *Nature’s Perfect Food: How Milk Became America’s Drink*, 4-5 (New York

condensation, and tinning, along with a perceived need to find a substitute for breastmilk to feed the children of working women, all contributed to the development of milk as an industrial-scale product.⁶⁰ A thicket of legal institutions developed around the provision of fluid milk to city children, responding to the high demand for cow's milk as a breastmilk substitute, and the high mortality rates associated with a product so easily adulterated, easily spoiled, and easily contaminated.⁶¹

The twin pressures to scale up and clean up urban milk supplies were intensified by the public and expert association between milk and racial whiteness. Melanie Dupuis's history of the ascendance of milk-drinking in America explores rhetorical advocacy around milk, noting a gradual shift from religious foundations (treating milk-drinking as universal and divinely ordained) to a more consciously nationalist grounding by the early twentieth century.⁶² By World War I, milk was explicitly defined as "the food of an imperial nation and superior race."⁶³ As the modern regulatory state grew, this view of milk influenced the emergence of at least two interrelated aspects of government policy: official nutritional guidance and economic regulatory treatment of milk as something akin to a public utility.

The explicit racial-rhetorical underpinnings of these aspects of milk governance have largely receded.⁶⁴ The central place of milk in American dietary and economic policy has, however, remained remarkably durable even in the face of a now-established scientific consensus that Euro-Americans are among the very few American ethnic populations whose majority are able to digest lactose as

University Press, 2002); Wiley, note 2, at 44-46.

60. Dupuis, note 59, at 35, 46-66; Alissa Hamilton, *Got Milked? What you Don't Know about Dairy, The Truth about Calcium, and Why You'll Thrive Without Milk*, 7-10 (William Morrow, 2015); Wiley, note 2, at 44-51; Janel Obenchain & Arlene Spark, *Food Policy: Looking Forward from the Past*, 182 (CRC Press, 2016). In addition to the practical constraints on breastfeeding posed by women working outside the home, the science of the day exhibited increasing skepticism about the healthfulness of breastfeeding in general, especially insofar as women were judged to be "diseased" or stricken with "nerves" and "reprehensible habits" provoked by city living. Dupuis, note 59, at 48-49.
61. Dupuis, note 59, at 67-89; Wiley, note 2, at 44-58; see also Kwang-Sun Lee, "Infant Mortality Decline in the Late 19th and Early 20th Centuries: The Role of Market Milk," 50:4 *Perspectives in Biology and Medicine* 585 (2007) (arguing that a major cause of infant mortality prior to the early twentieth century was bottle-feeding of unclean milk); Ronald F. Wright & Paul Huck, "Counting Cases about Milk, Our 'Most Nearly Perfect' Food, 1860-1940," 36 *Law & Society Review* 51, 52 (2002) (describing urban consumption of potentially dangerous milk products as generating a "rising tide of governmental activity between 1860 and 1940" with implications for the development of US constitutional and criminal law); James L. Guth, "Herbert Hoover, the US Food Administration, and the Dairy Industry, 1917-1918," 55 *The Business History Review* 170 (1980) (describing interest group politics engaged in this expanding regulatory context).
62. See Dupuis, note 59, at 74 ("American dependence on milk in the diet had moved from God's Design to national identity.").
63. See *id.* at 117.
64. But see Amy Harmon, "Why White Supremacists Are Chugging Milk (and Why Geneticists Are Alarmed)," *The New York Times* (17 Oct. 2018), <https://perma.cc/8C3A-R262>; Iselin Gambert & Tobias Linné, "How the Alt-Right Uses Milk to Promote White Supremacy," *The Conversation* (26 Apr. 2018), <https://perma.cc/TQ3N-GMQ4>.

adults.⁶⁵ Despite the fact that a *majority* of African Americans, Asian Americans, Hispanic Americans, and Indigenous Americans lose the ability to digest lactose after infancy, American law continues to treat cow's milk as an essential public good—the only food source honored with its own food group under official nutrition policy, and operating within a regulatory environment that actively promotes production in excess of market demand.

1. Superior Bodies

Even America's mostly-white law and policy makers have long recognized that dairying is not a part of every cultural history, and that Asian and African Americans in particular often avoid or are made ill by dairy products.⁶⁶ In the early years of America's growing industrial-regulatory state, this aversion to dairy products was viewed as a cause and consequence of racial inferiority—a product of cultural miseducation that might be corrected to make these “lesser people” more civil or heartier, and, in either case, more “American.” President Herbert Hoover, for example, declared that “[t]he white race can not survive without dairy products,” and called for increased dairy consumption as essential to “more rapid Americanization of our foreign population.”⁶⁷ A 1929 nutritional text expressed the prevailing view: “The races which have always subsisted on liberal milk diets are the ones who have made history and who have contributed the most to the advancement of civilization.”⁶⁸

-
65. Frederick J. Simoons, “Dairying, Milk Use, and Lactose Malabsorption in Eurasia: A Problem in Culture History,” 74 *Anthropos* 61, 66 (1973).
66. Mathilde Cohen, “Of Milk and the Constitution,” 40 *Harvard Journal of Law & Gender* 115, 159-60 (2017); see also Donna R. Gabaccia, *We are What We Eat: Ethnic Food and the Making of Americans* 124 (Harvard University Press, 1998) (describing the aversion to milk products among Asian and southern European immigrants as “shocking to American sensibilities” as early as the interwar period); Nicholas Scott Cardell & Mark Myron Hopkins, “The Effect of Milk Intolerance on the Consumption of Milk by Slaves in 1860,” 8 *Journal of Interdisciplinary History* 507, 512-13 (1978) (observing low milk consumption by African American slaves, hypothesizing that this resulted from slaveholders' knowledge that milk might provoke symptoms); Kenneth Kiple & Virginia Kiple, “Slave Child Mortality: Some Nutritional Answers to a Perennial Puzzle,” 10 *Journal of Social History* 284, 302 footnote 31 (1977) (querying whether “southern planters did not pioneer in recognizing and treating the problem [of lactose intolerance] in blacks” and identifying publications from the 1850s recommending that only soured milk be provided to slaves); Frederick J. Simoons, “The Traditional Limits of Milking and Milk Use in Southern Asia,” 65 *Anthropos* 547, 552-53 (1970) (noting the long-standing understanding among anthropologists that some Asian and African cultures held “prejudices” against milk, and that these attitudes may have some physiological basis); Isidore Snapper, “Food Preferences in Man: Special Cravings and Aversions,” 63 *Annals of the New York Academy of Sciences* 92, 96 (1955) (remarking, before the modern scientific discovery of lactase impersistence, that the “greater number of Chinese loathe dairy products as much as the Americans crave them”).
67. Cohen, note 66, at 148 (quoting Herbert Hoover).
68. See Samuel J. Crumbine & James A. Toney, *The Most Nearly Perfect Food: The Story of Milk* (Williams & Wilkins, 1929), quoted in Wiley, note 2, at 33-34. A history of New York State Agriculture published in 1933 echoed these sentiments, remarking that “[a] casual look at the races of people seems to show that those using much milk are the strongest physically and mentally, and the most enduring of the peoples of the world,” citing “the Aryans” as his primary example. Ulysses P. Hedrick, *A History of Agriculture in the State of New York*, 362-

The National Dairy Council (NDC), a dairy trade group established in 1915, amplified this racialized promotion of milk.⁶⁹ In several of its early publications, the NDC quoted nutritionist E. V. McCollum's racialized articulation of the value of milk consumption:

The people who have achieved, who have become large, strong, vigorous people, who have reduced their infant mortality, who have the best trades in the world, who have an appreciation for art, literature and music, who are progressive in science and every activity of the human intellect are the people who have used liberal amounts of milk and its products.⁷⁰

From its 1915 inception, the NDC enjoyed a close relationship with the United States Department of Agriculture (USDA), which began explicit public-facing promotion of milk as early as 1916.⁷¹ The USDA sometimes echoed the racial overtones of NDC rhetoric. For example, the agency installed a fifteen-thousand-square-foot dairy building at the 1933-34 Chicago World's Fair with the slogan "Dairy Products Build Superior People."⁷² The USDA presentation of milk and its drinkers as "superior" bled into the promotion of milk as a "normal and normative" component of a healthy diet.⁷³ Government-sponsored nutritional advice, forged in cooperation with the NDC and other commodity producers, urged children to drink milk in massive quantities, with the recommendation for children hitting a full quart of milk daily by the 1930s.⁷⁴

This governmental message that milk is a natural and necessary food continued even *after* the 1960s, when researchers began to turn up scientific evidence that racial and ethnic background has a strong correlation with the ability

63 (1933), quoted in Dupuis, note 59, at 117-18; see also Berthold Laufer, "Some Fundamental Ideas of Chinese Culture," 5:2 *The Journal of Race Development* 160, 170 (1914) (associating "mental achievements" with dairy consumption, noting as evidence that East Asian populations "abstaining from milk are deficient in epic poems").

69. On the establishment of the National Dairy Council, see Wiley, note 2, at 56. Government promotion and marketing boards were not the originator of these accounts of the nature and necessity of milk, but rather reflected and validated existing public ideologies. Dupuis, note 59, at 20-21, 43; Dani Zylberberg, "Milk, Ideology, and Law: Perfect Foods and Imperfect Regulation," 104 *Georgetown Law Journal* 1377, 1382 (2016).
70. National Dairy Council, "Milk Made the Difference," quoted in Dupuis, note 59, at 117 footnote 51 (and noting that this same quote appears in several NDC publications throughout the 1920s).
71. Susan Welsh, "Atwater to the Present: Evolution of Nutrition Education," 124 *The Journal of Nutrition* 1799S, 1799S-1800S (1994); Wiley, note 2, at 52.
72. See Wiley, note 2, at 34; Ann Folino White, "Performing the Promise of Plenty in the USDA's 1933-34 World's Fair Exhibits," 9 *Text & Performance Quarterly* 22 (2009).
73. Wiley, note 2, at 34.
74. Dupuis, note 59, at 112 (quoting historian Harvey Levenstein's account that "in 1926 experts were recommending that children up to the age of eighteen should drink one pint of it a day. By 1937, this was the recommended intake for adults; the under-eighteens were up to one quart a day," and adding that despite the high financial cost of such milk consumption at a time when many families were impoverished, "both the USDA and the private dairy councils were making this recommendation at the time.").

to digest lactose into adulthood.⁷⁵ Subsequent studies have confirmed a strong correlation between the persistence of lactase production (an enzyme necessary to the digestion of milk) past infancy and those ethnic populations for whom dairying has a long cultural history.⁷⁶ The NDC now concedes that close to 100 percent of Native Americans, 90 percent of Asian Americans, 80 percent of African Americans, and 53 percent of Hispanic Americans do not produce lactase as adults—referring to these bodies in pathological terms as “lactose maldigesters.”⁷⁷

Still, the US government continues to actively promote milk as a dietary staple for all demographics. The USDA dietary guidelines not only “shape the way Americans think about a healthy diet” but also have a direct impact on the regulated purchasing choices of the School Lunch Program, the School Breakfast Program, food stamps and the Special Supplemental Nutrition Program for Women, Infants, and Children—programs which were initiated in part to create markets for surplus milk production.⁷⁸ Dairy has appeared as its own food group in each iteration of the food guide from the 1940s’ “Basic Seven” to the 2011 “MyPlate” circle.⁷⁹ This emphasis on consumption of milk and dairy has only recently and partially acceded to growing evidence of lactose intolerance in non-white populations. The 2011 MyPlate, for the first time, allows that soymilk may count as a dairy product “[f]or those who are lactose intolerant,” but nonetheless continues to recommend milk products for those Americans in “smaller portions” or in “[l]actose-free and lower-lactose” forms.⁸⁰ In addition to formal emphases on milk-drinking in nutritional assistance programming, anthropological research has revealed that nutritionists informed by food guidelines persistently advise women in predominantly African American and Mexican American nutritional programs to consume dairy products despite digestive irritation.⁸¹

75. Wiley, note 2, at 34.

76. See e.g. Frederick J. Simoons, “The Determinants of Dairying and Milk Use in the Old World: Ecological, Physiological, and Cultural,” 2 *Ecology of Food & Nutrition* 83 (1973).

77. National Dairy Council, *Lactose Intolerance and Minorities: The Real Story* (2003), quoted in Andrea S. Wiley, “‘Drink Milk for Fitness’: The Cultural Politics of Human Biological Variation and Milk Consumption in the United States,” 106 *American Anthropologist* 506, 510 (2004).

78. Cohen, note 66, at 154-57, 162-63; Andrea Freeman, “The Unbearable Whiteness of Milk: Food Oppression and the USDA,” 3 *U.C. Irvine Law Review* 1251, 1264-65 (2013).

79. Cohen, note 66, at 163.

80. *Id.* At the same time, government-facilitated marketing programs, funded through mandatory “check-off” programs, has actively promoted dairy products to ethnic groups most prone to lactase impersistence. See Freeman, note 78, at 1252-53 (describing “campaigns that specifically target [racialized Americans], such as ‘Got Milk?’ and ‘Toma Leche?’ ads featuring African American and Latina/o celebrities”). On the dairy “check-off” program more generally, see notes 104-105 and accompanying text. The NDC has also funded scientific and medical journal articles promoting consumption of dairy among these populations, including in journals directed to African American physicians. See e.g. Rahn K. Bailey et al., “Lactose Intolerance and Health Disparities Among African Americans and Hispanic Americans: An Updated Consensus Statement,” 105 *Journal of the National Medical Association* 112, 112 (2013) (recommending strategies to increase dairy consumption among ethnic groups predisposed to “perceived or actual lactose intolerance,” and acknowledging support “by an unrestricted educational grant from the National Dairy Council”).

81. Catherine P. Kingfisher & Ann V. Millard, “‘Milk Makes Me Sick but My Body Needs It’:

Scholars have developed terms like “bio-ethnocentrism,” “food oppression” and “nutritional racism” to describe the tacit bias animating this continued push for universal milk-drinking.⁸² The Black vegan movement and other food justice advocates have protested the “natural” and “necessary” casting of milk, particularly insofar as this rhetoric seems to label the majority of human bodies as abnormal or deficient.⁸³ Food justice advocate lauren Ornelas, for example, emphasizes her preference for the term “lactose normal” over the term “lactose intolerant,” given that lactase imperistence is in fact the global norm, and in light of the colonial origins of milk-drinking in the Americas.⁸⁴ While the overt racial rhetorics of early milk advocacy have receded,⁸⁵ there can be little doubt that ethnocentric assumptions animate food policies that actively promote the universal consumption of a product for which there is such extreme ethnic variation in digestibility. In light of this history, the official casting of milk-drinking as natural and necessary takes on a racial dimension, with “[t]he perfect whiteness of this food” culturally linked to “the white body genetically capable of digesting it.”⁸⁶

2. Milk as a Pseudo-Public-Utility

As the USDA and NDC public-private alliance promoted the view of milk as an essential and irreplaceable food, the production of milk became increasingly viewed as a matter of public interest. The “vision of a safe, plentiful, and

Conflict and Contradiction in the Establishment of Authoritative Knowledge,” 12 *Medical Anthropology Quarterly* 447, 452, 455 (1998).

82. Cohen, note 66, at 165-68; Freeman, note 78, at 1268; Wiley, note 2, at 4; Breeze Harper, “Eating the Buddhadharmā: On Mindfulness, Nutritional Racism, and Food Justice,” *SistahVegan* (18 Jul. 2012), <https://perma.cc/NM65-RS59>; see also Patricia Bertron, Neal D. Barnard, & Milton Mills, “Racial Bias in Federal Nutrition Policy, Part 1: The Public Health Implications of Variations in Lactase Persistence,” 91 *Journal of the National Medical Association* 151 (1999); Patricia Bertron, Neal D. Barnard, & Milton Mills, “Racial Bias in Federal Nutrition Policy, Part II: Weak Guidelines Take a Disproportionate Toll,” 91 *Journal of the National Medical Association* 201 (1999).
83. See e.g. “Lactose Intolerance is not a Disease,” *Vegans of Color* (11 Jan. 2009), <https://perma.cc/DY3U-T8TE>. On Black veganism, see Syl Ko & Aph Ko, “Why Black Veganism is More than Just Being Black and Being Vegan,” in *Aphro-ism: Essays on Pop Culture, Feminism and Black Veganism from Two Sisters*, 50 (eds. Aph Ko & Syl Ko, Lantern Books, 2017).
84. See e.g. lauren Ornelas, quoted in Khushbu Shah, “The Vegan Race Wars: How the Mainstream Ignores Vegans of Color,” *Thrillist* (26 Jan. 2018), <https://perma.cc/DQ9E-HC85>.
85. But see Vanessa Romo, “‘Ghost Skins’ And Masculinity: Alt-Right Terms, Defined,” *National Public Radio* (6 Sept. 2017), <https://perma.cc/CJ2P-47P5> (explaining that milk emerged as “a signifier of white supremacy” within contemporary alt-right communities “after an anonymous poster shared a graphic study in the science journal *Nature*, showing ‘Lactase hotspots,’ where certain populations that can trace their ancestry to Europe have higher milk tolerances”); Andrea Freeman, “Milk, A Symbol of Neo-Nazi Hate,” *The Conversation* (30 Aug. 2017), <https://perma.cc/9SZX-A9JX>. See also Emma Grey Ellis, “The Alt-Right’s Newest Ploy? Trolling with False Symbols,” *Wired* (10 May 2017), <https://perma.cc/Q7H6-QRGT> (suggesting that the adoption of milk as an alt-right symbol is part of a broader strategy of repurposing mainstream symbols—including the peace sign, the “ok” gesture, and Pepe the Frog—in an “attempt[] to normalize itself and its ideas” and to make “being a Nazi” appear “more pedestrian”).
86. Dupuis, note 59, at 11.

consistently available supply” of cow’s milk “required government intervention.”⁸⁷ This was especially true in light of milk’s perishability. Because fluid milk could not be safely stored for long periods of time, farmers had to “have enough cows to meet consumer demand for fresh fluid milk at the lowest levels of production, and figure out what to do with the surpluses in flush months.”⁸⁸ Small independent dairy farmers proved unable to meet the demands of coordinated bargaining and calibrated productivity necessary to make their industry profitable.⁸⁹ Facing violent protests from struggling depression-era dairy farmers and pressure from consumer advocates to ensure a safe and affordable milk supply, governments responded with “intervention that favored industrialization.”⁹⁰

As government interventions in the milk economy grew in number and impact, courts evinced a special friendliness toward regulations that supported high milk production—in many cases relying on the USDA-NDC account of milk’s necessity. For instance, in 1919, the Supreme Court of the United States permitted Ohio to ban the sale of filled milk (wherein butterfat is replaced with vegetable fat) that was “admitted to be wholesome” and accurately advertised, under a law designed to protect the dairy industry.⁹¹ This ruling is particularly notable because it approved a restraint on commerce during the *Lochner* era—a period in which the Supreme Court notoriously tended to favor a more *laissez-faire* economic agenda.⁹² When a subsequent case suggested in *obiter* that the dairy industry could not be granted economic protections unconnected to a public health justification,⁹³ a spate of scholarly articles called for a constitutional finding

87. Zylberberg, note 69, at 1384.

88. *Id.* at 1383; see also Dupuis, note 59, at 139; Greta Gaard, “Toward a Feminist Postcolonial Milk Studies,” 65 *American Quarterly* 595, 597 (2013) (remarking that “[t]he pervasive availability of cow’s milk today—from grocery stores to gas stations—is a historically unprecedented product of industrialization, urbanization, culture, and economics. Without human intervention, fresh cow’s milk is largely unavailable for more than part of a year (March to November).”)

89. Zylberberg, note 69, at 1383-84.

90. *Id.*; Valenze, note 9, at 267-68; see Obenchain & Spark, note 60, at 182 (explaining that cities’ demand for fresh milk created, for the first time, “a prominent dairy industry” which in turn spurred “a growing list of consequences: surpluses, shortages, sanitation regulations, waste disposal, and environmental contamination”). From the outset, USDA interventions tended to support an increasingly industrial farming system, and consistently disadvantaged non-white farmers. See Freeman, note 78, at 1277; Pete Daniel, *Dispossession: Discrimination Against African American Farmers in the Age of Civil Rights* (The University of North Carolina Press, 2015); see also Jessica Hoffman, “Farm Subsidies Overwhelmingly Support White Farmers,” *Colorlines* (29 Jan. 2009), <https://perma.cc/MFF3-6L6X>.

91. *Hebe Co. v. Shaw*, 248 U.S. 297, 303 (1919); see Geoffrey P. Miller, “The True Story of Carolene Products,” 1987 *Supreme Court Review* 397, 402 (1987); Zylberberg, note 69, at 1387.

92. The *Lochner* era is named for the case of *Lochner v. New York*, 198 U.S. 45 (1905), in which the Supreme Court held that a law setting maximum hours of employment for bakers contravened the Fourteenth Amendment. As with other cases in the *Lochner* era, the Court relied on an expansively defined “freedom of contract” to restrain economic regulation. On the *Lochner* era and its notoriety in US and international constitutional thought, see Sujit Choudhry, “The *Lochner* Era and Comparative Constitutionalism,” 2 *ICON: International Journal of Constitutional Law* 1 (2004).

93. *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932); see also Zylberberg, note 69, at 1387-

that dairy amounted to a “public utility” sufficiently important to the public interest to warrant otherwise-impermissible economic regulation.⁹⁴ The Court ultimately rejected these calls, but only in a decision that marked an erosion of *Lochner*’s hold, permitting economic regulation supportive of the dairy industry on the grounds that “a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose.”⁹⁵ Throughout the changing doctrinal justifications for milk regulation, two interrelated themes are apparent: an acceptance of the NDC-USDA position that milk-drinking is necessary,⁹⁶ and a tendency toward judicial outcomes that ensured the “maintenance and distribution of an adequate supply of milk.”⁹⁷

The racialized justifications for milk regulation were not distant from the Court’s early rulings relating to milk, and occasionally formed part of the congressional record underlying legislation under examination. The 1923 Filled Milk Act at the heart of the *Carolene Products* conflict,⁹⁸ for example, was passed following congressional testimony supporting laws restricting the sale of coconut-fatted “filled milk” with reference to “the Japanese” as “a small and physically inferior people,” who might be made bigger and stronger by an American, milk-heavy diet.⁹⁹ Mathilde Cohen notes that briefs filed in these cases sometimes invoked racialized imagery, personifying coconut oil and other imported milkfat substitutes as “foreign” or “oriental” threats.¹⁰⁰ Cohen’s survey of America’s distinctive “dairy jurisprudence” concludes that milk effectively holds a “quasi-constitutional” status, with courts consistently accepting dominant narratives of milk’s status as a necessary product, a symbol of American industry and “frontier ethos,” and as embodying a “purity and wholesomeness [that] goes beyond the liquid’s sanitary and dietetic properties as well as its economic importance.”¹⁰¹ This judicial image of milk’s purity and Americanness has, on Cohen’s account, been linked to and supported by the identification and rejection of “various forms of otherness.”¹⁰²

88.

94. See e.g. “Legislative Regulation of the New York Dairy Industry,” 42 *Yale Law Journal* 1259 (1993); Henry S. Manley, “Constitutionality of Regulating Milk as a Public Utility,” 18 *Cornell Law Review* 410 (1933); see also Zylberberg, note 69, at 1388.

95. *Nebbia v. New York*, 291 U.S. 502, 537 (1934); see also *United States v. Rock Royal Cooperative*, 307 U.S. 533 (1939); *United States v. Carolene Products Co.*, 304 U.S. 144 (1938); Zylberberg, note 69, at 1388-89.

96. Zylberberg, note 69, at 1389-90 (citing various judgments declaring milk to be “an essential item of the diet,” “a vital food product,” “a necessity of life,” “essential . . . for [the] health [of] the consumer,” and a “valuable food of almost universal use”).

97. Cohen, note 66, at 136 (quoting *United States v. Rock Royal Co-Op*, 307 U.S. 533, 549 (1939)).

98. See *United States v. Carolene Products Co.*, 304 U.S. 144 (1938) (upholding the constitutionality of a federal law that prohibited the interstate shipment of filled milk).

99. Elmer McCollum, quoted in Cohen, note 66, at 149.

100. Cohen, note 66, at 149.

101. *Id.* at 131-49.

102. *Id.*

Even setting aside the racial-rhetorical coding of milk's ascendance to a prized judicial and regulatory status, it is remarkable that a food product which is not easily digestible by the majority of non-white Americans continues to enjoy such aggressive governmental support for its production and sale. More remarkable still, especially in the context of this country's highly racialized poverty rates, many of these efforts include provision of large quantities of milk to poor Americans, or partnering with fast food chains to market the highest-fat dairy products, with the gravest health consequences falling on poor Americans. One component of this programing is government purchasing of dairy products in order to donate them to non-profit organizations when dairy profit margins drop below a specified amount.¹⁰³ Another component is the country's most well-funded "check-off" program, through which the federal government collects mandatory fees from producers to be directed at "public relations enterprises to benefit certain food commodities."¹⁰⁴ The dairy check-off program has supported partnerships between dairy producers and fast food chains, spending millions of dollars marketing products jointly developed by fast food companies and commodity groups for the purpose of selling more cheese. These projects have included the development and promotion of Domino's Pizza's "American Legends" line of pizzas, containing 40 percent more cheese than other Domino's pizzas, and Taco Bell's steak quesadilla, which contains over 800 percent more cheese than any other menu item.¹⁰⁵

In the contemporary United States, official milk promotions no longer explicitly champion milk in ethno-nationalist terms, but the nutritional and economic regulations built on these premises continue to shape the place of dairy in American life.¹⁰⁶ Our most "natural" and "necessary" food rose to its place of

103. Freeman, note 78, at 1273 footnote 10.

104. Marion Nestle, *Food Politics: How the Food Industry Influences Nutrition and Health*, 142-45 (2002, 10th Anniversary ed., 2013). The NDC now operates as just one branch of the larger Dairy Management Inc., which is funded by the check-off program. See Obenchain & Spark, note 60, at 193. For a brief USDA-sponsored description of the aims and functions of federal check-off programs, see David R. Shipman, "Industry Insight: Checkoff Programs Empower Business," *USDA* (21 Sept. 2011), <https://perma.cc/258X-ALWM> ("The consumer's perspective that there is a general uniformity to some commodities serves as the catalyst for many individual farms and businesses to collaborate on a comprehensive, industry-wide strategy to expand markets. Promoting a commodity as a whole instead of by individual businesses means everyone in the industry benefits through increased sales, consumer awareness and higher overall demand.").

105. Freeman, note 78, at 1267; see also Andrea Freeman, "Fast Food: Oppression Through Poor Nutrition," 95 *California Law Review* 2221, 2223 (2007) (remarking that the "close association between the government and the fast food industry can foment confusion and misinformation, yet it remains largely hidden from the public").

106. As is often the case, within agricultural economics in particular, initial government protections for producers have spurred the development of now-entrenched and powerful policy communities who jealously guard their interests and their entitlement to governmental subsidies and support. On the general dynamics of "agricultural exceptionalism," whereby agricultural industries receive special treatment from governments, see Carsten Daugbjerg & Peter H. Feindt, "Post-Exceptionalism in Public Policy: Transforming Food and Agriculture Policy," 24 *Journal of European Public Policy* 1565 (2017).

prominence in part *because* of its association with racial whiteness and Euro-American foodways. Now the racial harms of dairy regulation are cast in “facially neutral” terms. Despite this rhetorical shift, however, the legal and regulatory treatment of milk as a universal good continues to pathologize and undermine the health of racialized bodies.¹⁰⁷

C. Gender: Feminized Animals, Feminist Legal Theory

Not only have law and politics shaped and reflected cultural associations relating to the raced bodies fed by milk, these forces have also shaped and reflected social values attached to the gendered bodies that produce milk. Feminists have long observed interconnections between animal exploitation and the exploitation of women. While this research has most often focused on material and rhetorical interconnections—the cultural treatment of women as animals, and vice versa—examination of the role of law in contemporary dairy farming reveals that feminist *legal* theory may offer distinct contributions to our understanding of the connections between the oppressive socio-legal systems that harm women and animals. In particular, feminist analyses direct us to consider the ways that background assumptions and questions of “method” shape legal force, and furthermore illuminate law’s continued operation even in spaces socially and legally defined as “private.”

Carol Adams’ classic text on *The Sexual Politics of Meat* posits “a cycle of objectification, fragmentation, and consumption” linking the slaughter and reproductive control of animals for food with violence against women.¹⁰⁸ Animals, like women, are transformed through language, images, and cultural associations into body parts to be consumed, their own experiences denied as they become “absent referents” in a culture that embraces only the perspective of those who consume them.¹⁰⁹ As Catharine MacKinnon elaborates, “animals are treated like women, and women like animals, and both like things.”¹¹⁰ Maneesha Deckha, operating in a more explicitly intersectional feminist mode, has questioned the

107. Freeman, note 78, at 1267.

108. Carol Adams, *The Sexual Politics of Meat: A Feminist-Vegetarian Critical Theory*, 47 (Bloomsbury, 1990) [hereinafter Adams, *The Sexual Politics of Meat*]; see also, Carol Adams, “After MacKinnon: Sexual Inequality in the Animal Movement,” in *The Carol J. Adams Reader: Writings and Conversations 1995-2015*, 295, 319 (ed. Carol J. Adams, Bloomsbury, 2016) (“There is one road, not two: a road of objectification, fragmentation, and consumption that requires and enacts the structure of the absent referent in relationship to nondominant others, whom it posits not just as objects but similar, metaphorically-overlapping objects providing sexual pleasure. I have called this the *sex-species system*. The *sex-species system* insures that men have access to feminized animal bodies and animalized women’s bodies.”).

109. *Id.*

110. Catharine A. MacKinnon, “Of Mice and Men: A Feminist Fragment on Animal Rights,” in *Animal Rights: Current Debates and New Directions*, 263 (eds. Cass R. Sunstein & Martha C. Nussbaum, Oxford University Press, 2004); see also Joan Dunayer, “Sexist Words, Speciesist Roots,” in *Animals and Women: Feminist Theoretical Explorations*, 11, 12 (eds. Carol J. Adams & Josephine Donovan, Duke University Press, 1995) (observing and examining the phenomenon that “[n]on-human-animal pejoratives frequently target women: *catty*, *shrews*, *dumb bunny*, *cow*, *bitch*, *old crow*, *queen bee*, *sow*”) (emphasis in original).

centering of gender over other hierarchical forms in these accounts. Deckha and others have instead pursued inquiries into how the more general cultural affirmation of “humans” over “subhumans” has operated in and through complex dynamics of gender, race, and colonialism to the detriment of both “animalized animals” and “animalized humans”—with “animalization” engaging intersecting hierarchies and oppressions.¹¹¹

In dairy farming, a process which quite directly exploits the sexual and reproductive capacities of mammals, these themes are even starker.¹¹² Milk is the nursing product of mammals, produced by female bodies after they give birth.¹¹³ Since birth and breastfeeding are socio-biological processes inextricably connected with female bodies, women and feminists have long struggled to earn legal and social recognition of these events not only as something “natural” and “necessary,” but also as sites of power, agency, and subjectivity. Breastfeeding, on these accounts, is something women *do* or *don’t do* or *do a certain way* not because they have succeeded or failed in realizing their ahistorical nature, but because they are agents making choices, often constrained by race, class, gender, and other vectors.¹¹⁴ For dairy cattle, the “natural” and “necessary” quality of their provision of milk remains powerful in a cultural imagination that presumes cows need and want to be milked by people—to the extent that they are portrayed as having any perspective at all.¹¹⁵

-
111. Maneesha Deckha, “The Subhuman as a Cultural Agent of Violence,” 8 *Journal of Critical Animal Studies* 28 (2010); Syl Ko, “We Can Avoid the Debate about Comparing Human and Animal Oppressions, if We Simply Make the Right Connections,” in *Aphro-Ism: Essays on Pop Culture, Feminism, and Black Veganism from Two Sisters*, 82 (eds. Aph Ko & Syl Ko, Lantern Books, 2017). Both MacKinnon and Adams include racial and other hierarchical analysis in their treatments of these questions. Deckha, however, argues that even authors who “intend[] an inclusive theory” may “imperil this goal” where they “start[] with gender as the main analytic,” insofar as such approaches “misunderstand[] gender as ontologically separate from other differences and *a priori* assign[] a secondary role to the work that other social forces (of race, culture, and otherwise) perform in these oppressions.” Maneesha Deckha, “Toward a Postcolonial, Posthumanist Feminist Theory: Centralizing Race and Culture in Feminist Work on Nonhuman Animals,” 27 *Hypatia* 527 (2012).
112. See e.g. Adams’ identification of milk as an instance of “feminized protein.” Carol Adams, “Feminized Protein: Meanings, Representations, and Implications,” in *Making Milk: The Past, Present and Future of Our Primary Food*, 19 (eds. Mathilde Cohen & Yoriko Otomo, Bloomsbury, 2017).
113. But see Mathilde Cohen, “The Lactating Man,” in *Making Milk: The Past, Present and Future of Our Primary Food*, 141, 160 (eds. Mathilde Cohen & Yoriko Otomo, Bloomsbury, 2017) (observing that, although “actual cases of physiological male lactation are extremely rare,” they have “long been reported in the scientific-medical, religious, and gender studies literature, as well as in folklore, the popular press, fiction, and visual arts”).
114. See Melanie Jackson & Esther Leslie, “Unreliable Matriarchs,” in *Making Milk: The Past, Present and Future of our Primary Food*, 63 (eds. Mathilde Cohen & Yoriko Otomo, Bloomsbury, 2017); and the essays in *Beyond Health, Beyond Choice: Breastfeeding Constraints and Realities* (eds. Paige Hall Smith, Bernice L. Hausman, & Miriam Labbok, Rutgers University Press, 2012).
115. Adams, note 112, at 34 (“The cows [in advertisements for dairy products] are burdened by sexist cultural representations: they *want* to be made pregnant, they *want* to “give” their milk, they *want* to feed us, they *want* to be consumed.”); Sherry F. Colb, “‘Never Having Loved at All’: An Overlooked Interest that Grounds the Abortion Right,” 48 *Connecticut Law Review* 933 (2016) (remarking that “[m]ost people, including most women, have an imaginary vision

Feminist scholars outside of law have copiously documented the “overt and implicit misogyny” associated with human use of animals, particularly within the dairy industry.¹¹⁶ The valuing of the bodies of female cows as “reproductive machine[s]” often explicitly invokes a similar devaluing of female humans. One contemporary US advertisement for Bovi-Shield Gold cattle vaccine asks, “[i]f she can’t stay pregnant, what else will she do?” and depicts a cow in the traditionally-male role of driving a fire truck.¹¹⁷ Kathryn Gillespie comments (referencing another ad from the same campaign, this time showing a cow, liberated of her reproductive duties, acting as a hunting dog), “because biologically she *can* reproduce, ‘staying pregnant’ must be the inherent function and purpose of her life.”¹¹⁸

In advertisements for the bull semen used to artificially inseminate dairy cattle, male “sires” are individually named (GW Atwood, Sanchez, Governor, and Java, for example) and advertised with grand, personalizing qualities (“hottest bull to hit the market,” “greatness in his genes”) while the female cattle are left pluralized and unnamed, identified in sexual, bodily, and reproductive terms (“youthful mammary systems that catch the eye,” “great rear udders and attractive rumps,” and “the kind you can have fun with”).¹¹⁹ Cows are often portrayed as sexualized female bodies desiring insemination. For example, in a Universal Semen Sales T-shirt, a bull (a mascot named “Sammy Semen”) is depicted “sauntering up behind two smiling cows with large udders, bright red lipstick, and prominent backsides angled at Sammy.”¹²⁰ The industry application of gendered tropes to dairy cattle also emerges in the most explicitly violent and hostile corners of the industry, with undercover videos of farm violence and industry Facebook groups including references to recalcitrant cows using gendered epithets like “cunt” or “bitch from hell.”¹²¹

of what it takes for a cow to produce milk ‘for us’”). The intuitions that cows produce milk without getting pregnant and that cows want to be milked by humans emerge frequently in casual conversations I have had about milk. The latter intuition is sufficiently pervasive that it appears on lists of “myths” with which dairy critics feel they must contend. See e.g. “But Don’t Cows Need to be Milked?,” *PETA*, <https://perma.cc/FVQ8-8UGD>.

116. Kathryn Gillespie, “Sexualized Violence and the Gendered Commodification of the Animal Body in Pacific Northwest US Dairy Production,” 21 *Gender, Place & Culture: A Journal of Feminist Geography* 1321, 1325, citing Donna Haraway, *Primate Visions* (Routledge, 1989).

117. Adams, note 112, at 34 (“In such representations, stereotypes about women’s reproductive functions and constructed sexual availability are framed through representations of cows. Such images provide permission to use and eat the cow while also contributing to encroachments on reproductive choice for women.”).

118. Gillespie, note 116, at 1329.

119. Id; see also W.A. Harffert, “New Jersey Launches First Unit in Artificial Breeding,” 9 *New Jersey Farm and Garden* 5 (1938), excerpted in *Readings in the History of American Agriculture*, 271 (ed. Wayne D. Rasmussen, University of Illinois Press, 1960) (describing the “Outstanding sire” N.J.E.S. Sir Mutual Ormsby Jewel Alice and Sensation Aaggie Beets Career, both of whom were owned by the New Jersey Experiment Station, alongside references to their unnamed “daughters”).

120. Gillespie, note 116, at 1331-32.

121. Adams, note 112, at 38; MFACanada, “Watch: Cows Kicked, Beaten, and Hanged at Massive Dairy Factory Farm,” *YouTube* (9 Jun. 2014), <https://perma.cc/FVQ8-8UGD>.

Contemporary advertising materials promoting milk to the public almost never reference pregnancy or calving as part of the process by which milk is produced. We are invited to “reconceptualise the relationship of milk production as being between the cow and us, not the cow and her calf.”¹²² An advertising genre that was once populated by images of female milkmaids, cows, and even calves, is now almost exclusively populated by images of the healthy human beings who consume milk—most famously in the parade of celebrities and athletes wearing milk moustaches in the check-off funded “Got Milk?” campaign.¹²³ Where cattle are depicted, they are almost always literal cartoons, girlish, or matronly, but always gendered female, happy, and relaxed in their reproductive duties.¹²⁴ The “Laughing Cow,” complete with cheese-wheel earrings and a girlish giggle, is perhaps the most prominent example.¹²⁵ Breeze Harper has remarked that these gendered images of joyful service also carry disturbing racial echoes in light of the historical and contemporary deployment of images like “Aunt Jemima” to promote “the idea to white Americans that Black cisgender women’s bodies existed to happily feed the nation.”¹²⁶

Law has not always been explicit in advancing these visions of dairy cattle leisurely enjoying their reproductive duties on modern farms. Instead, law’s support for these cultural images has taken forms familiar to feminist theory: (1) the rejection of cows’ experiences as relevant to legal method, and (2) the delineation of the spaces and practices that define cows’ lives as being “private” and thus beyond the proper scope of legal intervention. Through both of these familiar mechanisms of legal support for material hierarchies, dairy cattle are kept on farms, inseminated, milked, and slaughtered, in systems that are at once enabled by law and disclaimed by it.

1. Legal Method and Animal Experience

Feminist legal theorists have long argued that assertions of law’s objectivity mask particular perspectives. Legal forms are always animated by a background “method” that “organizes the apprehension of truth.”¹²⁷ “Legal method” is thus

122. Adams, note 112, at 23.

123. Wiley, note 2, at 81, 110 footnote 10.

124. Corey Lee Wrenn, “Toward a Vegan Feminist Theory of the State,” in *Animal Oppression and Capitalism*, 201, 212 (ed. David Nibert, Praeger, 2017); see also Adams, *The Sexual Politics of Meat*, note 108, at 203.

125. See Adams, note 112, at 30 (citing Élise Desaulniers).

126. Breeze Harper, “Fairy Tales and Cowlifornia Nightmarin’: Who Else is Sick of the Sugarcoating of the Endless Nightmare of Systemic Oppression?,” *The Sistah Vegan Project* (6 Aug. 2015), <https://perma.cc/NM65-RS59>. Harper emphasizes that her aim is not to compare the underlying suffering in these two disparate material contexts, but rather to note the systemic and representational features common to normalized oppression.

127. Catharine MacKinnon, *Toward a Feminist Theory of the State*, 106 (Harvard University Press, 1989); Sandra Harding, “Introduction: Is there a Feminist Method?,” in *Feminism and Methodology*, 1, 2 (ed. Sandra Harding, Indiana University Press, 1987). For a related discussion of the challenges that attention to animal experiences poses for legal method, see Jessica Eisen, “Milk and Meaning: Puzzles in Posthumanist Method,” in *Making Milk: The*

thought to embrace the collectivity of assumptions that shape “what counts as evidence,” and “what is taken as verification.”¹²⁸ In other words, legal method works to structure legal inquiry, often by tacitly adjudicating the “claims to know” from which legal thinking inevitably proceeds.¹²⁹ Feminist legal method has endeavored to center overlooked perspectives as relevant to the study of law, including through such practices as “consciousness raising,”¹³⁰ “intersectional analysis,”¹³¹ and “looking to the bottom” to seek the perspectives of those “who are uniquely able to relate theory to the concrete experience of oppression.”¹³²

That animal experiences are not taken seriously is well-trod terrain in the field of human-animal studies. It is widely acknowledged that human communities have so depended on animal labor and products—so presumed their availability in defining “our visions of progress and the good life”—that we have been “unable to (even try to) fully see” animals as subjects in their own right.¹³³ Nowhere is this denial of animal experience starker than in law. The most obvious and most thoroughly theorized aspect of this dynamic is animals’ status as rightless property.¹³⁴ While animal rightlessness is generally treated as a blanket background assumption, it has very particular institutional forms that most bluntly mark the experiences of *farmed* animals as beyond the scope of legal concern.

Animals have no public law rights in the United States, as harms to animals have been found not to constitute the kind of “injury” for which the state might be accountable at law.¹³⁵ Courts have strictly limited the circumstances in which harm to an animal might ground a public law claim to those circumstances where

Past, Present and Future of our Primary Food, 237 (eds. Mathilde Cohen & Yoriko Otomo, Bloomsbury, 2017).

128. MacKinnon, note 127, at 106.

129. Kathryn Abrams, “Feminist Lawyering and Legal Method,” 16 *Law & Social Inquiry* 373, 373 (1991).

130. MacKinnon, note 127, at 83; Katharine T. Bartlett, “Feminist Legal Methods,” 103 *Harvard Law Review* 829, 866 (1989).

131. Kimberlé Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,” 1989 *University of Chicago Legal Forum* 139, 140 (1989).

132. Matsuda, note 10, at 324-25. On the challenges associated with this methodological commitment to continually seeking overlooked perspectives, see Martha Minow, “Feminist Reason: Getting It and Losing It,” 38 *Harvard Journal of Legal Education* 47 (1988).

133. Jennifer R. Wolch & Jody Emel, *Animal Geographies: Place, Politics, and Identity in the Nature-Culture Borderlands*, xi (Verso, 1998).

134. See generally Francione, note 17; Steven Wise, *Rattling the Cage: Toward Legal Rights for Animals* (Perseus Books, 2000).

135. See “Developments in the Law—Access to Courts,” 122 *Harvard Law Review* 1151, 1204-16 (2009); Jessica Eisen, “Beyond Rights and Welfare: Democracy, Dialogue and the Animal Welfare Act,” 51 *University of Michigan Journal of Legal Reform* 469, 485, 486 (2018). But see Cass Sunstein, “Can Animals Sue?” in *Animal Rights: Current Debates and New Directions*, 251, 260 (eds. Cass R. Sunstein & Martha C. Nussbaum, Oxford University Press, 2004) (arguing that it is open to Congress to revise animal protection statutes so as to recognize harms to animals as grounds for legal action, and that the constitutional injury requirement would not necessarily present an independent hurdle since “Congress is frequently permitted to create juridical persons and to allow them to bring suit in their own right,” with corporations presenting “the most obvious example”).

a human being (or other juridical person) can show that they themselves were affected by the harm.¹³⁶ Private law claims similarly exclude harm to animals as actionable or as a foundation for determining damages.¹³⁷ Only harms and damage to persons with a property interest in an animal's well-being are legally cognizable if that animal is harmed by a private party.¹³⁸ Some scholars have argued that animals do in fact enjoy limited *de facto* "rights" in the form of legal protections directed at their interests, most notably the federal Animal Welfare Act and state laws prohibiting cruelty to animals.¹³⁹ But, remarkably, the Animal Welfare Act explicitly excludes farmed animals from its definition of "animal," and state animal cruelty laws either explicitly exclude customary agricultural practices or have been judicially construed to do so.¹⁴⁰ David J. Wolfson and Mariann Sullivan's compelling survey of the legal scheme governing (or failing to govern) the protection of farmed animals observes that, while there are some under-enforced rules respecting transport and slaughter, there are none at all restricting what can be done to animals in the normal course of farming.¹⁴¹ In Wolfson and Sullivan's analysis, this amounts to a "legal sleight of hand" by which "farmed animals disappear from the law."¹⁴² "As far as the law is concerned," Wolfson and Sullivan posit, farmed animals "simply do not exist."¹⁴³

While this language of "disappearance" is provocative, it risks eliding what is truly disappeared from law, which is not *animals*, but *animal experience*. The erasure is not ontological but epistemological: not exclusion of their *bodies* as things to be *governed*, but exclusion of *their experiences* as a matter of *legal method*. Animal bodies, as we have seen, have not been excluded from law at all. Far from it: their continued presence as physical bodies is closely guarded. Law has worked to produce a very specific set of relations with these animals, geared not toward their bodily erasure, but toward their continued confinement, production, and reproduction. Relations of human use and control over animal

136. *Id.*

137. Eds. Wagman et al., note 18, at 191-264.

138. *Id.*

139. Cass Sunstein, "Standing for Animals (with Notes on Animal Rights)," 47 *UCLA Law Review* 1333, 1333-34 (2000) (arguing that "[h]owever controversial the idea of 'animal rights' in theory, federal law has begun to recognize a wide range of animal rights in practice," including under the Animal Welfare Act); see David Favre, "Judicial Recognition of the Interests of Animals—A New Tort," 2005 *Michigan State Law Review* 333, 347, 366-67 (2005) (arguing that even absent recognition of "rights," animal "interests" are "represented within our legal system," including under the Animal Welfare Act).

140. David J. Wolfson & Mariann Sullivan, "Foxes in the Henhouse: Animals, Agribusiness, and the Law: A Modern American Fable," in *Animal Rights: Current Debates and New Directions*, 205, 207 (eds. Cass R. Sunstein & Martha C. Nussbaum, Oxford University Press, 2004).

141. *Id.* at 206 (concluding that "as a practical matter, farmed animals have no legal protection at all").

142. *Id.*

143. *Id.*; see also Taimie Bryant, "Animals Unmodified: Defining Animals / Defining Human Obligations to Animals," 2006 *University of Chicago Legal Forum* 137, 151 (2006) (citing Wolfson and Sullivan in assessing that "most animals produced and dismembered for food are legally invisible").

bodies are expressed and affirmed through dietary guidelines that define such use as a legal imperative; regulatory structures that configure animals' bodily fluids as a pseudo-public-utility; and a background socio-legal edifice that centers Anglo-American foodways and the replacement of "wild" animals with more closely dominated "productive" animals.¹⁴⁴ In a pattern familiar to feminist theory, access to these bodies is a social imperative supported by law. The denial of animal experience at the level of method is in service not of animals' erasure, but of law's imagination and regulation of particular, continued relations of access and use.

2. The Farm as Private Sphere

Equally familiar to feminist theorists is the legal delineation of a "private sphere"—constructed *by* law, but cast as creating a space *outside* of law. In some instances, the so-called public/private divide has been used to describe "the distinction between state regulation and private economic activity (the market)," and in others the public/private divide references "the perceived divisions between state regulation and family relations, and between work and family."¹⁴⁵ Both definitions of the "private sphere" resonate with representations of dairy farming in dairy product advertising, in which cattle are alternately cast as beloved "family" and as valued "workers."¹⁴⁶ The common thread is a legal and rhetorical structure that "allows government to clean its hands of any *responsibility* for the state of the 'private' world"¹⁴⁷ and casts harm and "domination" as "private matters that the state did not bring about."¹⁴⁸

Elsewhere, I have observed rhetorical analogues between the private sphere of feminist critique and the private farms where dairy cattle live:

The relationship between farmer and milk cow is thought to be natural, primordial, salutary—not unlike the classical legal image of the husband and wife. It defines the imperative of the collectivity (to eat; to reproduce) in terms of the interests of its strongest members, and uses law to create a lawless space for its enforcement at their hands. It draws on ingrained hierarchies for its justification (man over beast; man over woman), and wrings its hands over the

144. In addition to the colonial history surveyed above, note continued governmental culling of wild animals that might compete with grazing cattle. See e.g. Rachel Revesz, "US Government to Kill 45,000 Wild Horses to Make Room for Cattle," *Independent* (14 Sept. 2016), <https://perma.cc/WDJ2-W426>.

145. Susan B. Boyd, "Can Law Challenge the Public/Private Divide? Women, Work and Family," 15 *Windsor Yearbook of Access to Justice* 161, 162 (1996).

146. On representation of animals as "family" and the connection to the public/private divide, see Eisen, note 127, at 240. On representations of animals as workers, see Adams, note 112, at 24-26; Jessica Eisen, "Down on the Farm: Status, Exploitation and Agricultural Exceptionalism," in *Animal Labour: A New Frontier of Interspecies Justice?* (eds. Charlotte Blattner, Kendra Coulter, & Will Kymlicka, Oxford University Press, forthcoming 2019).

147. Nicola Lacey, "Theory into Practice? Pornography and the Public/Private Dichotomy," 20:1 *Journal of Law & Society* 93, 97 (1993).

148. Frances Olsen, "The Family and the Market: A Study of Ideology and Legal Reform," 96:7 *Harvard Law Review* 1497, 1506 (1983).

disastrous consequences that may attend their disruption. It trusts private actors (farmers; husbands) to wield their power appropriately because they are well-intentioned, bound by duty, and even because they love those in their charge. . . . In many ways, the farm may be to animals what the family has been to women within some strands of feminist critique: the arbiter and enforcer of their place, their purpose, their meaning; so naturalized that it is not even worth asking what they might think of it, even if we thought they were capable of answering.¹⁴⁹

Here, I will turn more specifically to the legal mechanics of the supposedly private sphere of dairy farming.¹⁵⁰

As we have already seen, law is not neutral as to how humans relate to cattle. Law effectively *requires* that cattle be maintained in large numbers, in industrial scale operations, producing vast quantities of milk for human consumption. Dairy cattle are marked by law not merely as “property” but as tools in the production of a pseudo-public-utility. They are legally held by private producers in circumstances that make them highly vulnerable to abuse and over-exploitation.¹⁵¹ At the same time, law increasingly demarcates the sphere of agricultural production as *outside* the sphere of social life in which animal lives and bodies might receive some minimal protection through federal regulation or state anti-cruelty laws.¹⁵² The legal regime governing dairy cattle thus “exacerbates background conditions of deeply unequal power, then absolves itself of responsibility for abuse.”¹⁵³

This basic structure is reinforced by a number of law-reform projects initiated by agricultural industries to further assure the farm’s status as a private space. When animal activists began to take jobs on industrial farms for the purpose of filming and exposing conditions on those farms,¹⁵⁴ producers responded by successfully seeking the enactment of laws creating harsh penalties for those who enter an “animal facility” under false pretense or record those facilities without

149. Eisen, note 127, at 240 (citations omitted).

150. See also Cohen, note 66, at 152 footnote 238 (drawing a comparison between the private sphere of the farm and the private sphere of the family and suggesting that “the more ubiquitous and visible milk has become in American culture, the more invisible and hidden cows’ labor and suffering has become”).

151. See Part I.B.2.

152. See notes 140-141 and accompanying text.

153. Eisen, note 127, at 239-40.

154. At least one of these early undercover operations targeted a dairy farm. The video, shot by a Mercy for Animals member who worked at the facility for several weeks, “shows workers at the dairy beating cows with a pink cane as the animals slipped and slid on the wet concrete floor; workers kicking and stomping cows that have fallen between the metal bars in the milking stalls; and a cow being dragged out of the barn by a chain around her neck as she lies on the concrete floor.” Associated Press, “Idaho Workers Charged with Animal Cruelty at Bettencourt Dairies’ Dry Creek Dairy,” *New York Daily News* (11 Oct. 2012), <https://perma.cc/TT8J-PBFH>. See also Justin F. Marceau, “Ag Gag Past, Present, and Future,” 38 *Seattle University Law Review* 1317, 1337 (2015).

explicit permission.¹⁵⁵ These laws (commonly referred to as “ag gag” laws)¹⁵⁶ reinforce and extend the privacy already created by traditional property and trespass laws.¹⁵⁷ Animal agricultural facilities operating under these laws enjoy an “unprecedented level of secrecy,” insofar as they are protected against “all whistleblowing, regardless of whether trade secrets or intellectual property is threatened.”¹⁵⁸ While defamation laws would substantially protect against *untrue* speech, these laws aim not at truth or falsity, but at *privacy*. These protections assume and require that animal agricultural facilities are sacrosanct spaces, and that what happens within them should not be dragged into “the court of public opinion.”¹⁵⁹ To this end, advocates of these laws consistently portray undercover investigators as “terrorists” and “enemies” seeking to “destroy the ability to produce food.”¹⁶⁰ These same communications portray agricultural facilities as “small businesses” or “farm families,” and emphasize the need to “respect what these farm families are doing every day and . . . how important it is to preserve their way of life and their family business.”¹⁶¹

The contemporary legal treatment of dairy cattle is set against a backdrop of cultural representations that code cows according to tropes of female sexuality—as objectified, commodified, and ultimately content in their natural roles rendering familial, sexual, and reproductive service.¹⁶² But feminist legal theory also furnishes structural tools for understanding the confinement and exploitation of

155. See Marceau, note 154, at 1332-39 (2015); Pamela Fiber-Ostrow & Jarret S. Lovell, “Behind a Veil of Secrecy: Animal Abuse, Factory Farms, and Ag-Gag Legislation,” 19 *Contemporary Justice Review* 230 (2016).

156. The term “ag gag” was coined by Mark Bittman. Mark Bittman, “Who Protects the Animals?” *The New York Times* (26 Apr. 2011), <https://perma.cc/29D3-5GCX>.

157. Marceau, note 154, at 1334-35; *id.* at 1342-44 (describing related legislative initiatives to make evidence of offenses gathered in the course of trespass onto agricultural facilities inadmissible in legal proceedings against those facilities).

158. *Id.* at 1335. Timothy Pachirat has connected the visual secrecy enabled by Ag Gag laws with his broader theory of “the politics of sight,” describing the enactment of these laws as “a reactive move that underscores how important concealment is to the continued operation of industrialized animal agriculture.” Timothy Pachirat, quoted in Wayne Pacelle, “Inside the Slaughterhouse: My Interview with Timothy Pachirat – Part 2,” *A Humane Nation: Kitty Block’s Blog* (30 Apr. 2013), <https://perma.cc/5PK9-L45Y>. For an elaboration of Pachirat’s “politics of sight,” developed in the context of an ethnography of a slaughterhouse, see Timothy Pachirat, *Every Twelve Seconds: Industrialized Slaughter and the Politics of Sight* (Yale University Press, 2011).

159. Marceau, note 154, at 1338-39. In a recent twist, a new generation of ag gag laws have taken the form of mandatory reporting requirements, making it an offence to fail to report known instances of animal cruelty within a short timeframe. Though framed as a measure to bring animal cruelty to light, the effect is to protect the privacy of the farm by preventing lengthy undercover investigations that might demonstrate “patterns of abuse or complicity on the part of management.” *Id.* at 1341.

160. *Id.* at 1338-39, quoting Senator Jim Patrick.

161. Susie Cagle, “Two Views on Ag-Gags: The Investigator and the Farm Advocate,” *Grist* (25 Apr. 2015), <https://perma.cc/QTT8-EAUP>; see also *id.* at 1336.

162. See Gaard, note 88, at 613 (arguing that “[f]or too long, the dominant culture has childishly projected its own gendered image onto nature as selfless and self-sacrificing mother . . . or onto other mammal species, requiring the female bovine to symbolize maternal nature: mindless, patient, slow-moving, lactating”).

animals. Feminist analyses of legal “method” offer conceptual resources for examining the legal status of animals. Through the lens of feminist method, we can see that law at once requires bodily exploitation of cows, and denies that what cows *know* or *experience* might be relevant to legal analysis. Moreover, the legal invisibility of animal experience, and the shrouding of human relations with farmed animals behind a veil of privacy, are as much a part of the mechanics of modern dairying as property status, dietary guidelines, and economic regulation. Together, these legal forms enable and support the practices and relationships that currently define the lives of American farmed animals in general, and dairy cattle in particular.

II. MODERN DAIRY AND THE LIVES OF CATTLE

The preceding section shows that widespread assumptions about milk as a “natural” and “necessary” food have been constructed and cultivated through a dynamic and contested interplay between public and private actors. This cultural coding of cow’s milk as a necessary and natural drink for human beings has been interlaced with the concurrent development of colonial, racial, and gendered politics. My aim has not been to prove that milk-drinking is inherently “bad” because of these associations, but rather to demonstrate that milk practices are sites of justice and contest—that what we do to animals in this context is neither inevitable nor incorrigible, any more so than the other entrenched justice challenges with which dairy practices intersect. With this in mind, I turn to what happens on contemporary dairy farms, with a particular focus on the perspectives and experiences of cattle.

A. Cattle Experience

Who are the cattle at the center of this story? How can we understand their lives in the context of industrial dairying? We have already seen that law treats the experiences of dairy cattle as irrelevant,¹⁶³ and that this erasure at the level of legal method is mutually reinforced by widely-held and gendered cultural impressions of cattle subjectivity as silly, alien, lesser, untroubled, or even non-existent. Perhaps some readers have made it this far still wondering whether and why law *should* consider the experiences of these animals as having any weight at all.

This kind of skepticism is hard to dislodge with evidence and argument. Philosophers have long grappled with the problem of “other minds”—asking how we can ever be sure of anyone’s experience besides our own.¹⁶⁴ Versions of this question often arise in justice movements confronted with recalcitrant social and legal methods that treat the experiences of some people as being less important or

163. See notes 133-143 and accompanying text; Eisen, note 127.

164. Alec Hyslop, “Other Minds,” *Stanford Encyclopedia of Philosophy* (6 Oct. 2005, revised 14 Jan. 2014), <https://perma.cc/9F5Z-8HGT>.

wholly unimportant.¹⁶⁵ Often, some version of the answer has come in the form of appeals to “sameness”—assertions that excluded groups or persons are relevantly *like* those who already have the sought moral or legal status.¹⁶⁶ Many legal efforts on behalf of animals have taken this form, offering copious scientific evidence and arguments to the effect that animals (or some animals) are relevantly *like people*, such that their legal treatment as property or non-persons is irrational or “speciesist.”¹⁶⁷

But treating likes alike is a dangerous game for those seeking recognition and inclusion. First, arguments from “sameness” preserve the basic underlying hierarchy of value, seeking only that a fortunate few be classified on the other side of the ledger. Second, arguments from “sameness” often land us in “endless loops of analysis of sameness and difference” that presume that objective distinctions explain social hierarchy.¹⁶⁸ Syl Ko and other social justice theorists have worked to unsettle the “assumption” that social hierarchies and exploitation “are caused by or can be explained by appealing to data (real or imagined) about differences in capacities, intelligence, behaviors, features, and so on.”¹⁶⁹ Instead, “this type of information (again, real or fabricated) plays a role in helping to *maintain* and especially to *make normal* specific oppressions and exploitation.”¹⁷⁰ In other words, its role is rhetorical rather than explanatory. The “difference” that defines the socio-legal position of dairy cattle does not lie in some factual information about their capacities or psychology, but in *what we want to do to them* combined with *our power* to do it.¹⁷¹

At the same time, some reference to what we know about animal minds is relevant to an understanding of contemporary agricultural practice. In the face of relentless cultural representations of cattle as mindless and vacant, a narrative interrogating modern agricultural practices requires some window into the subjectivity of the animals at the heart of the enterprise—not to prove that animals are like people, but to illuminate how these practices might be experienced by

165. See e.g. MacKinnon, note 110; Matsuda, note 10; Tyrone S. Palmer, “‘What Feels More Than Feeling?’ Theorizing the Unthinkability of Black Affect,” 3 *Critical Ethnic Studies* 31, 32 (2017) (exploring “the fundamental opacity and *unthinkability* of Black feeling within the onto-epistemological framework that structures civil society and the modern field of representation.” Palmer observes that in, this context, “Black affective responses are only legible as signs of pathology, further reifying blackness-as-subhumanity”).

166. Syl Ko, “Emphasizing Similarities Does Nothing For the Oppressed,” in *Aphro-ism: Essays on Pop Culture, Feminism and Black Veganism from Two Sisters*, 37 (eds. Aph Ko & Syl Ko, Lantern Books, 2017); MacKinnon, note 110, at 266-67.

167. See e.g. Steven Wise, *Rattling the Cage: Toward Legal Rights for Animals*, 22 (2000) (arguing that the legal treatment of animals is the product of an “outdated” worldview and offering scientific evidence of animal capacities as a corrective); Tom Regan, *Animal Rights, Human Wrongs: An Introduction to Moral Philosophy*, 94 (Rowman & Littlefield, 2003); Peter Singer, *Animal Liberation*, 6 (3d ed., 2002).

168. MacKinnon, note 110, at 264, 271.

169. Ko, note 166, at 40-41.

170. *Id.* (emphasis in the original).

171. *Id.* at 41; MacKinnon, note 110, at 269.

these animals “on their own terms.”¹⁷² My hope here is to create a bridge to understanding these practices as harmful, not because cows are what *we* are, but because cows are what *they* are.

Despite formidable obstacles to imagining the experiences of others—particularly across vast differences in psychology, power, and embodiment—cows are not “black boxes” whose lives are so distant as to foreclose any understanding and communication.¹⁷³ Sue Donaldson and Will Kymlicka have identified expert knowledge, folk knowledge, and personal knowledge as resources.¹⁷⁴ Many people who spend time with cows report that they possess undeniably distinct “personalities” that seem to reflect the ineffable qualities of selfhood.¹⁷⁵ Scientific research certainly gives us some insight into cows and what they value in their lives, limited as such inquiries may be by the questions we ask and the methods we employ.¹⁷⁶ And in reviewing this evidence, I am always struck by how awkward and incomplete an effort to describe human subjectivity and experience would seem if it relied only on provable scientific outcomes. Nonetheless, for the reasons sketched above, it is important to share some of this data.¹⁷⁷

We know, for example, that, as herd animals, cows generally prefer to be around other cows rather than to be alone.¹⁷⁸ Cows care who they spend time with, often preferring cows with whom they have personality traits or life experiences in common.¹⁷⁹ They can tell each other, and even human beings, apart from one

172. MacKinnon, note 110, at 264.

173. Sue Donaldson & Will Kymlicka, “Rethinking Membership and Participation in an Inclusive Democracy: Cognitive Disability, Children, Animals,” in *Disability and Political Theory*, 168, 191-96 (Barbara Arneil & Nancy Hirschmann eds., Cambridge University Press, 2016); Jessica Eisen, “Animals in the Constitutional State,” 15 *ICON: International Journal of Constitutional Law* 909, 947-49 (2018); Eisen, note 135, at 504-07.

174. See Donaldson & Kymlicka, note 173, at 193-96.

175. I am grateful in the course of writing this piece to have spent time with cattle at the Farm Sanctuary in Watkin’s Glen, New York, with the support of the Someone Project. I learned as much about cattle subjectivity from Shelter Director Susie Coston, and from the bovines Jackie, Nancy, Stanton, and newborn Charlie, as I did from all the scientific literature cited below. See Christina M. Colvin et al., *Thinking Cows: A Review of Cognition, Emotion, & The Social Lives of Domestic Cows*, 17-18 (2017), <https://perma.cc/TW65-KUXR> (surveying scientific studies on cow sociality and remarking that “[t]hese studies provide scientific backing to what people familiar with cows already know: namely, that each cow is a distinct individual”). On the relationship between the industrialization of animal production systems and declining affective connections farmers feel for their animals, see Jocelyne Porcher et al., “Affective Components of the Human-Animal Relationship in Animal Husbandry: Development and Validation of a Questionnaire,” 95 *Psychological Reports* 275 (2004).

176. Frans De Waal, *Are We Smart Enough to Know How Smart Animals Are?* (W.W. Norton & Co., 2016). On science or “expert knowledge” as one of several resources for interpreting animal subjectivity, see Donaldson & Kymlicka, note 173, at 193.

177. For an overview of the current state of research on cow emotion and cognition, see Lori Marino & Kristin Allen, “The Psychology of Cows,” 4 *Animal Behavior and Cognition* 474 (2017).

178. Louise Holm et al., “Calves’ Motivation for Access to Two Different Types of Social Contact Measured by Operant Conditioning,” 79 *Applied Animal Behaviour Science* 175 (2002).

179. See Natasha K. Boyland et al., “The Social Network Structure of a Dynamic Group of Dairy Cows: From Individual to Group Level Patterns,” 174 *Applied Animal Behaviour Science* 1 (2016); see also Donald M. Broom & A.F. Fraser, *Domestic Animal Behaviour and Welfare*,

another, and, when given the freedom to choose, have “best friends” with whom they spend most of their time.¹⁸⁰ When they are under stress, they choose the company of cows who are less stressed. More generally, they find stressful situations less stressful when they can see and smell other cows nearby.¹⁸¹ Cows remember which individual humans have treated them roughly—or kindly—and retreat or approach them accordingly.¹⁸² With appropriate learning opportunities, cows can navigate complex mazes, can remember maze configurations for weeks,¹⁸³ and can solve puzzles—sometimes literally jumping with excitement when they figure out a difficult problem.¹⁸⁴ They can learn how to do new things by observing their more experienced peers.¹⁸⁵ Cows enjoy playing with each other and seek out opportunities to do so, and they tend to be more listless and less interested in play when they have been isolated from other cows, especially their mothers, or if they are in physical pain.¹⁸⁶ Cows relate to one another through

146 (CABI, 5th ed., 2015) (summarizing that “[w]ithin herds, it is often found that discrete pairing through mutual selection of each other’s company is a common social strategy which operates to the advantage of both. . . . The associative characteristics of animals are now recognized as a clear manifestation of their choice for company that must represent a basic need.”).

180. See Kristin Hagen & Donald M. Broom, “Cattle Discriminate between Individual Familiar Herd Members in a Learning Experiment,” 82 *Applied Animal Behaviour Science* 13 (2003); Marjorie Coulon et al., “Individual Recognition in Domestic Cattle (*Bos Taurus*): Evidence from 2D-images of Heads from Different Breeds,” 4:2 *PLoS One* 1 (2009); Marjorie Coulon et al., “Cattle Discriminate Between Familiar and Unfamiliar Conspecifics by Using Only Head Visual Cues,” 14 *Animal Cognition* 279 (2011); Krista Marie McLennan, *Social Bonds in Dairy Cattle: The Effect of Dynamic Group Systems on Welfare and Productivity* (2013) (unpublished doctoral thesis, University of Northampton) (on file with University of Northampton); “Heifer so Lonely: How Cows Have Best Friends and Get Stressed When They are Separated,” *The Daily Mail* (5 Jul. 2011), <https://perma.cc/P9TG-PHVE>.
181. See Toshie Ishiwata et al., “Choice of Attractive Conditions by Beef Cattle in a Y-maze Just After Release from Restraint,” 85 *Journal of Animal Science* 1080 (2007); Luc Mounier et al., “Mixing at the Beginning of Fattening Moderates Social Buffering in Beef Bulls,” 96 *Applied Animal Behaviour Science* 185 (2006).
182. See M.J. Hotzel et al., “Influence of Aversive Handling on Milk Production in Dutch Cows,” 34 *Revista Brasileira de Zootecnia* 1278 (2005); L. Munksgaard et al., “Discrimination of People by Dairy Cows Based on Handling,” 80 *Journal of Dairy Science* 1106 (1997); Alison A. Taylor & Hank Davis, “Individual Humans as Discriminative Stimuli for Cattle *Bos Taurus*,” 58 *Applied Animal Behavior Science* 13 (1998).
183. See D.W. Bailey et al., “Characteristics of Spatial Memory in Cattle,” 23 *Applied Animal Behaviour Science* 331 (1989); Masahiko Hirata et al., “Use of a Maze Test to Assess Spatial Learning and Memory in Cattle: Can Cattle Traverse A Complex Maze?,” 180 *Applied Animal Behaviour Science* 18 (2016).
184. See Kristin Hagen & Donald M. Broom, “Emotional Reactions to Learning in Cattle,” 85 *Applied Animal Behaviour Science* 203 (2004).
185. See J.H. Costa et al., “Dairy Heifers Benefit from the Presence of an Experienced Companion when Learning How to Graze,” 99 *Journal of Dairy Science* 562 (2016).
186. See Margit B. Jensen, “Effects of Confinement on Rebounds of Locomotor Behaviour of Calves and Heifers, and the Spatial Preferences of Calves,” 62 *Applied Animal Behaviour Science* 43 (1999); Margit B. Jensen et al., “Pair Housing and Enhanced Milk Allowance Increase Play Behavior and Improve Performance in Dairy Calves,” 98 *Journal of Dairy Science* 2568 (2015); Carla Krachun et al., “Play Behaviour in Dairy Calves is Reduced by Weaning and by a Low Energy Intake,” 122 *Applied Animal Behavior Science* 71 (2010); Erin M. Mintline et al., “Play Behavior as an Indicator of Animal Welfare: Disbudding in Dairy Calves,” 144 *Applied Animal Behaviour Science* 22 (2013).

touch, and they lick each other often, though scientists do not fully understand why.¹⁸⁷ We know that mother cows lick their calves, first to clean them after they are born, but also frequently thereafter. And we know that cows spend more time licking members of their herd who are sick or injured.¹⁸⁸ Cows experience empathy (what scientists call “emotional contagion”), and their own stress levels rise when they are in the company of other cows who are stressed.¹⁸⁹

Of particular significance to understanding the harms of industrial dairying, cows’ sexual and familial bonds matter to them. Cattle often enjoy sex, exhibiting high levels of oxytocin in their bloodstream immediately before and after mating.¹⁹⁰ Cows express an interest in sexual activity by engaging in mounting behavior (curiously termed “bulling,” although it is also common between female cattle), after first testing the waters with less intrusive contact, such as standing close to each other, licking and grooming, vocalizing, and resting their chins on a prospective partner’s backside.¹⁹¹ Cows engage in mounting behavior most often (though not always) when in oestrus (i.e. “in heat”), and usually with their “closest social associates.”¹⁹²

Cows are generally very strongly bonded with their calves.¹⁹³ For example, when confronted with a vehicle representing a possible threat to their calves, a stunning 99 percent of cows move their own bodies in the path of the threat.¹⁹⁴ Cows spend significant time and attention on their calves, including nursing and licking them, and spend even more time on this kind of care for calves with lower birthweights.¹⁹⁵ When a cow and her calf are separated, the cow generally exhibits significant physiological and behavioral symptoms of distress (e.g., pacing, urinating, and calling out), with those symptoms dissipating if they are reunited.¹⁹⁶

-
187. See Krzysztof Adamczyk et al., “Perception of Environment in Farm Animals. A Review,” 15 *Annals of Animal Science* 565 (2015). Smell represents another significant way in which cattle identify and relate to each other. Broom & Fraser, note 179, at 145.
188. Francisco Galindo & Donald M. Broom, “The Effects of Lameness on Social and Individual Behavior of Dairy Cows,” 5 *Journal of Applied Animal Welfare Science* 193 (2002).
189. Alain Boissy, Claudia Terlouw, & Pierre Le Neindre, “Presence of Cues from Stressed Conspecifics Increases Reactivity to Aversive Events in Cattle: Evidence for the Existence of Alarm Substances in Urine,” 63 *Physiology & Behavior* 489 (1998); Colvin et al., note 175, at 11.
190. Broom & Fraser, note 179, at 173. Oxytocin is colloquially referred to as the “love hormone” within human bodies. “What is Oxytocin,” *Psychology Today*, <https://perma.cc/4YLV-Y77M>.
191. Broom & Fraser, note 179, at 165, 169-71.
192. Id. at 165.
193. L. Pérez-Torres et al., “Maternal Protective Behavior of Zebu Type Cattle (*Bos Indicus*) and Its Association with Temperament,” 92 *Journal of Animal Science* 4694 (2014).
194. Cornelia Flörcke et al., “Individual Differences in Calf Defence Patterns in Red Angus Beef Cows,” 139 *Applied Animal Behaviour Science* 203 (2012).
195. Ilona Stěhulová et al., “Maternal Behaviour in Beef Cows is Individually Consistent and Sensitive to Cow Body Condition, Calf Sex and Weight,” 144 *Applied Animal Behaviour Science* 89 (2013).
196. Jaime Solano et al., “A Note on Behavioral Responses to Brief Cow-Calf Separation and Reunion in Cattle (*Bos Indicus*),” 2 *Journal of Veterinary Behavior: Clinical Applications and Research* 10 (2007); Susan J. Hudson & M.M. Mullord, “Investigations of Maternal Bonding in Dairy Cattle,” 3 *Applied Animal Ethology* 271 (1977).

Calves become more pessimistic and assume the worst outcome in controlled tests when they have been separated from their mothers, with the magnitude of the cognitive impact of maternal separation matching that of severe physical pain.¹⁹⁷ In the longer term, calves who are raised in the company of other cattle grow up to be more relaxed and sociable as adults.¹⁹⁸

B. Dairy Experience

With this necessarily schematic and incomplete portrait of cattle cognition and sociality in mind, we can now consider the conditions of industrial agriculture with reference to the experience of the animals who live through it. The transformation of dairying from relatively small-scale to increasingly large-scale operations, with ever-higher milk-yields per cow, is associated with serious animal welfare challenges. Cows experience increasingly “poor welfare” in the form of mutilation without anesthetic, high rates of foot and leg disorders associated with confinement, and painful udder infections.¹⁹⁹ Genetic selection for high milk yields has been “positively correlated with the incidence of lameness, mastitis, reproductive disorders and metabolic disorders,” as has the use of hormone injections, which are also common in the industry.²⁰⁰ In this section, however, I will not concentrate on the physical pain and illness dairy cattle suffer (although this no doubt affects all aspects of their lives). Instead, I will focus on what modern dairy practices have done to these animals as parents, friends, and family who continue to care for each other even under industrial conditions that disregard or actively frustrate these bonds.²⁰¹

Standard industry practice includes the separation of calves from their mothers within hours of their birth.²⁰² Dairy scientists have diligently researched and debated the most efficient way to time this separation in order to preserve the health benefits of colostrum (or “first milk”) and early contact while also minimizing bonding between cow and calf so as to reduce the physiological stress response to separation. Weight loss following separation and physical injury arising from efforts by cows and calves to reunite are real economic concerns with which the industry must contend.²⁰³ Cows bellow for hours, sometimes days, when

197. Heather W. Neave et al., “Pain and Pessimism: Dairy Calves Exhibit Negative Judgement Bias Following Hot-Iron Disbudding,” 8 *PLoS One* e880556 (2013); Rolnei R. Daros et al., “Separation from the Dam Causes Negative Judgment Bias in Dairy Calves,” 9 *PLoS One* e98429 (2014).

198. J.H.C. Costa et al., “Complex Social Housing Reduces Food Neophobia in Dairy Calves,” 97 *Journal of Dairy Science* 7804 (2014); Kathrin Wagner et al., “Effects of Mother versus Artificial Rearing During the First 12 Weeks of Life on Challenge Responses of Dairy Cows,” 164 *Applied Animal Behaviour Science* 1 (2015).

199. Broom & Fraser, note 179, at 281-91.

200. *Id.* at 290.

201. For an account of animal “care work” and its repression, see Kendra Coulter, “Beyond Human to Humane: A Multispecies Analysis of Care Work, Its Repression, and Its Potential,” 10 *Studies in Social Justice* 199 (2016).

202. Wagner et al., note 198.

203. *Id.*; Frances C. Flower and Daniel M. Weary, “Effects of Early Separation on the Dairy Cow

their calves are taken from them.²⁰⁴ Some farms have experimented with separation techniques that make the rupture of calf-separation less traumatic, for example by allowing cow and calf continued nose-to-nose contact after physical segregation, so that some of the benefits of maternal bonding accrue without having to divert any of the cow's milk toward the nourishment of her calf.²⁰⁵ For the most part though, the separation happens within hours, with male calves generally auctioned to be slaughtered for veal, sometimes while they are still so young that their umbilical cords hang off their bodies at auction sites.²⁰⁶

Female calves are raised for dairy. They spend their early months spent in small individual "hutches," sometimes tethered at the neck and sometimes enclosed with a small fence, where their social lives are limited to visual contact with calves in the surrounding hutches and occasional interactions with human workers.²⁰⁷ Farmers often prefer individual hutches to other housing options because they allow for close monitoring of each calf's food intake and defecation, and because calves that cannot play with each other are less able to spread germs among the herd.²⁰⁸ Except in those operations where calves are bottle-fed by humans, these calves experience virtually no physical contact or affection. They have no opportunities to play with each other, or to be cared for or to learn from their mothers. When they are a few months old, the calves are generally transferred to group housing until they are artificially inseminated, gestate for nine months, and have their first calf (normally around two years of age).²⁰⁹

The process of artificial insemination requires that the cow be physically restrained so that a human being can use one hand to reach into her rectum to tilt her cervix and then use the other hand to inject a straw of bull semen into her

and Calf: Separation at 1 Day and 2 Weeks after Birth," 70 *Applied Animal Behaviour Science* 275 (2001).

204. Jeffrey Moussaieff Masson, *The Pig Who Sang to the Moon: The Emotional Lives of Farm Animals*, 131-62 (2003).
205. See Caroline Abels, "A More Humane Way to Wean Farm Animals," *The Atlantic* (22 Jan. 2016), <https://perma.cc/A87R-57BS>; E.O. Price et al., "Fenceline Contact of Beef Calves with their Dams at Weaning Reduces the Negative Effects of Separation on Behavior and Growth Rate," 81 *Journal of Animal Science* 116 (2003).
206. See e.g. Gillespie, note 116, at 1327.
207. Broom & Fraser, note 179, at 281-84; Lisa M. Wormsbecher et al., "A Method of Outdoor Housing Dairy Calves in Pairs Using Individual Calf Hutches," 100 *Journal of Dairy Science* 7493 (2017) (observing that most American dairy farms use individual hutches and proposing that housing two calves per hutch may improve outcomes); Grace A. Norden et al., "Effects of Enrichment Tools on Dairy Calves Housed in Hutches," 96 *Journal of Animal Science* 253, 253 (supp. 2) (2018) (remarking that "[h]ousing and feeding young calves individually is a common management practice" despite the fact that "[c]alves, as herd animals, have increased stress when separated from their mother and other calves"); "Facility Characteristics and Cow Comfort on US Dairy Operations, 2007," *U.S. Department of Agriculture et al.*, 14 (2010), <https://perma.cc/YF6L-M6D6> (finding in a survey of US dairy farms that "[t]he majority of operations across herd sizes used primarily individual pens/hutches to house pre-weaned heifers").
208. See Frances C. Flower & Daniel M. Weary, "The Effects of Early Separation on the Dairy Cow and Calf," 12 *Animal Welfare* 339 (2003).
209. *Id.*

vagina using a specialized insemination gun.²¹⁰ Bull semen is its own booming industry, with individual bulls branded and advertised as delivering particular qualities in their offspring. For example, “robot ready” bulls are promised to “sire” cows with teats that are particularly well placed for robotic milking.²¹¹ The harvesting of bull semen happens in specialized facilities, not generally on dairy farms. In those facilities, semen is extracted through human stimulation of bulls using an “artificial vagina,” with or without the use dummy cows or castrated “teaser” steers—or through electro-ejaculation wherein a shock is administered to the pelvic nerves to provoke a reflexive ejaculation.²¹² Most dairy cows never meet a bull, and most dairy bulls never meet a female cow after infancy, though sexual reproduction is essential to the dairy industry.

For adult dairy cows, the most common form of housing is a “free stall” barn, where cattle are able to move about within a barn, often without outside access.²¹³ In nearly 40 percent of dairy operations, however, lactating cows are housed in tie stall (or stanchion) systems.²¹⁴ In a tie-stall system, each cow is enclosed in a space just large enough for them to lay down and stand up, and is chained to her enclosure by the neck.²¹⁵ A food trough is generally located in front of the cow’s chained head, and a trough for waste runs behind the animals. Often, highly charged electric “trainers” are suspended above the cattle to administer a shock if the cows move into a position that might allow them to defecate or urinate somewhere other than the trough.²¹⁶ Milking machines allow many cows to be milked in their stalls, eliminating the need to release them from their stalls even for milking.²¹⁷ In some cases, cows are occasionally let out to pasture, but increasingly dairy cattle are held in zero-graze operations where they remain chained in their enclosures while lactating. Such zero-graze housing has proven negative health and welfare implications for cows, including higher mortality rates and development of “repetitive and pointless (stereotyped) behavior” such as

210. Michael L. O’Connor & Jana L. Peters, “Artificial Insemination Technique,” *Penn State Extension*, <https://perma.cc/3VZG-3AB8>; “A.I. Technique in Cattle,” *Select Sires*, <https://perma.cc/79UC-GUH8>.

211. “Semex Launches Revolutionary Robot Ready™ Sires,” *Semex USA* (2 Apr. 2012), <https://perma.cc/3TQ6-YW2M>.

212. “Semen Collection from Bulls,” <https://perma.cc/F9M8-Z3S3>; “Semen Collection,” <https://perma.cc/AK33-SSAK>.

213. “Dairy 2014: Cattle Management Practices in the United States, 2014,” *USDA* #692.0216, xviii (2014), <https://perma.cc/TSL5-ZK3L>.

214. *Id.*; *USDA*, note 207, at 18; Silvana Popescu et al., “Dairy Cows Welfare Quality in Tie-Stall Housing System with or without Access to Exercise,” *55 Acta Veterinaria Scandinavica* 43 (2013).

215. Dan McFarland & John Tyson, “Tie Stall Dairy Shelters” (28 Mar. 2018) (webinar), <https://perma.cc/4CFD-QCJZ>.

216. *USDA*, note 207, at 86-88.

217. *Id.* at ix (noting that the majority of operations surveyed used tie-stall or stanchion milking, but also reporting that, because larger farms use milking parlors more frequently, the majority of cows were in facilities where the cows were removed from their stalls to specialized parlors for milking).

chewing at the bars of their enclosures and butting their heads.²¹⁸ Cows remain in these conditions through two or three cycles of insemination, calf separation, lactation, a short dry period, and another insemination, after which time they are considered to be at the end of their productive life. Dairy cows, whose natural life expectancy would be around fifteen to twenty years, are generally sent to slaughter at about four or five years of age.

In sum, industrial dairying involves a system of intensive physical, social, sexual, and reproductive control. Cows are routinely and unrelentingly subject to physical restraint, sexual use, and reproductive control. Their opportunities to form and nourish kinship networks, friendships, and familial ties, which we know they would voluntarily develop, are severely limited, with many cows effectively limited to contact with the individuals tied on either side of them for most of their lives. While confined in tie-stalls, they cannot choose who to lick, with whom to spend time, with whom to have sex, or with whom to play. They do not have opportunities to learn from other cows or to teach them, to comfort other cows or to be comforted by them. And regardless of housing system, cows are not raised by their mothers, or by any adult cows, and their own calves are taken from them immediately after birth, again and again. Finally, their lives end violently, with lengthy, dangerous transport and slaughter.²¹⁹

III. RETHINKING ANIMALS AND THE LAW

How are we to understand the role of law in these animals' lives? Prevailing accounts of "animal law" tend to focus on one of two central analytics: either that there is *not enough law* governing animal use,²²⁰ or that animals' background legal status as *property* necessarily produces oppressive human-animal relations.²²¹ The first of these (i.e. "not enough law") is roughly associated with the "animal welfare" approach, and with calls for stronger laws governing animal use. The latter (i.e. centering "property" status) is roughly associated with the "animal rights" approach, and with calls to revise animals' background legal status by, for example, recognizing animals as legal "persons."²²²

Each account illuminates some critical aspects of how law operates to shape the lives of farmed animals. We have seen that federal animal welfare laws offer no protection for dairy cattle while on the farm, and that state animal cruelty laws do not apply to common agricultural practices, no matter how harmful or invasive.

218. Popescu et al., note 214.

219. On transport, see Broom & Fraser, note 179, at 213-32. On slaughter, see Pachirat, note 158; Broom & Fraser, note 179, at 233-36.

220. See e.g. Wolfson & Sullivan, note 140.

221. See e.g. Francione, note 17; Wise, note 134. Outside of legal theory, scholars in the field of Critical Animal Studies have offered other accounts, often casting the treatment of animals as an instance of "capitalism run amok," arguing that law may have only a limited role in thwarting the "juggernaut" of industrial animal exploitation. See e.g. John Sanbonmatsu, *Critical Theory and Animal Liberation*, 29-30 (Rowman & Littlefield, 2011).

222. For summaries of both the "animal rights" and "animal welfare" positions, see Eisen, note 135, at 488-93.

And we have seen that contemporary dairying practices are fundamentally enabled by the classification of animals as property—a background legal relation that establishes the rights of legal persons to buy, sell, confine, inseminate, milk, and surgically alter dairy cattle, and to claim those same rights in respect of their offspring.

But these conventional framings (centering property status and lack of welfare protections) risk creating a picture of animal exploitation that is essentially “private” in nature. On these accounts, law’s role is limited to setting the background terms of private transactions (i.e. defining animals as property), and intervening (or failing to intervene) to curb excesses that arise from the ensuing private relationships. The foregoing narrative of American legal constructs concerning dairy cattle, however, reveals a more complex story, in which dairying involves both public and private relations, and engages with intra-human questions of identity and distributive justice.

American law has not neutrally permitted the intensification of dairy farming—either by disinterestedly failing to legislate protections, or by classing animals as property and then “stepping back.” The story of industrial dairying is not one of private relationships unfurling of their own accord, in the context of background legal rules assigning animals the status of property, with law then failing to intervene in the face of troubling outcomes. Instead, American law has affirmatively promoted a particular view of dairy cattle as producers of a natural and necessary food source, whose social and reproductive lives *must* be intensively controlled. Their breeding and confinement are shaped by a collective socio-legal determination that reliable access to their nursing materials is a matter of national interest. The classification of dairy cattle as property, and the failure to protect them from abuse, are best understood as elements of a broader process through which courts, legislatures, and executive agencies have tended to endorse and entrench a vision of milk as a natural and necessary element of the American diet.

The story of milk’s ascendance in the United States calls on us to reframe the discipline of “animal law”—focusing not only on law’s potential or failure to *protect* animals, but also on law’s role as a *participant* in the structures of animal exploitation. This recasting is consistent with the emerging discipline of “critical animal law,” which approaches law as just one element (or set of elements) operating within complexes of interconnected values, ideologies, material distributions, and histories.²²³ The following subsections will survey some of the critical theoretical contributions that this case study in milk and dairying in the United States supports.²²⁴

223. For discussions of “critical animal law,” see Maneesha Deckha, “Vulnerability, Equality, and Animals,” 27 *Canadian Journal of Women and the Law* 47, 68-70 (2015); Eisen, note 135, at 533; *Law and the Question of the Animal: A Critical Jurisprudence*, 116 (eds. Yoriko Otomo & Edward Mussawir, Routledge, 2013).

224. See also Jessica Eisen, “Feminist Jurisprudence for Farmed Animals,” in 5 *Canadian Journal of Comparative and Contemporary Law* (forthcoming 2019).

A. From Property as “Status” to Property as “Process”

The property status of animals has undeniably been central to the place of dairy cattle in American social and political life. But this property status does not represent a static, unchanging relation. Instead America’s cattle property regime emerged from pitched colonial conflicts over the place of humans in the natural world. The contemporary animal property regime that enables the American domination of dairy cattle is a legal form that was first shaped in a land of feral cattle, town ear marks, legislated wolf-hunts, and the painstaking building of fences.²²⁵ It is a legal form whose ascendance in America required the displacement of Indigenous regimes governing food and animals in favor of colonial regimes, through force and at great cost in human and animal life.²²⁶ Historically, and in the present moment, animals’ ostensible “status” as property is perhaps better understood as a “process” or “dynamic” that is inevitably shaped and given meaning by its broader contexts.²²⁷

Animals’ status as “property” has been increasingly entrenched, even as the meaning and implications of this status have shifted dramatically over time. A re-wilded cow nursing her calf in a colonial forest, learning with her young to dodge hunters and predators, was legally defined as property. So too is a contemporary Holstein, tied at the neck in an indoor barn with a milking machine at her teat. Yet these two cows must surely be understood to occupy distinct socio-legal positions. That “property” describes the status of both of these animals in relation to the humans who drink their milk only highlights the extent to which the legal form of property finds its substance in deeper relational contexts. With each successive development in milk technologies (pasteurization, refrigeration, and transport), and milk’s subsequent ascendance within US dietary and agricultural policy, the meaning of our property relations with cattle has changed. For dairy cows, property status is not a legal fact from which material conditions flow; it is instead a history, in which legal actors, public and private, have negotiated the terms by which these animals’ milk will be produced and taken from them.

B. Finding the “Public” in the “Private”

With this critical view of animals’ property status in mind, the “public” dimensions of apparently “private” relations become apparent. This study of American dairying suggests an alternative to thinking of *property status* and *lack of welfare protections* as competing narratives for explaining animals’ legal status. Instead, we see both legal forms (or absences) operating in synergy and alongside other phenomena to shape the lives of animals in human captivity. In particular,

225. See Part I.A.

226. *Id.*

227. See Hanoch Dagan, “The Craft of Property,” 91 *California Law Review* 1517, 1519 (2003) (“[T]he forms of property are not free-floating logical entities, each with its own inevitable set of incidents. Rather, property constitutes human institutions, serving human goals and thus involving human values.”).

we see that both property status and *laissez-faire* legal approaches to farmed animal welfare work together, within a broader matrix of social and legal forces, to delineate the farm as a “private sphere,” structurally parallel to that of the “family” within feminist critique.²²⁸

The invisibility of animal experiences in law, and the lack of legal protections for animals, are harmful not (only) because they allow for abuse, but because they are components of a broader legal and material regime that defines cows’ nursing materials as an essential public good, even as a pseudo-public-utility of constitutional dimensions.²²⁹ Feminists have shown the supposedly private family to be, in fact, drenched in public purposes and politics.²³⁰ The dairy farm may be understood in similar terms. This functional echo is amplified by the consistent cultural significations of dairy cattle in gendered terms: as sexually available, content in service, and even, most directly, as family.²³¹ Moreover, a shared set of rhetorical tropes surrounding gender, loving protection, divine order, natural roles, and necessity justify the legal privacy enveloping both farm and family.²³² Laws of property and trespass, amplified by ag-gag legislation, and unrestrained by welfarist interventions, link these representational parallels to practical counterparts in the construction of the farm as a legal “private sphere.”²³³

Dinesh Wadiwel has suggested in other contexts that selective state permission for private violence toward animals amounts to something akin to “delegated sovereignty” and the “privatised domination of non-human life.”²³⁴ In the case of industrial dairying, this framing has considerable descriptive and explanatory force. This portrait of “delegated” or “privatised” control can be productively supplemented by attention to the intricacy of public-private relations in the context of dairying. In practice, public and private power are complex, multifaceted, and intertwined, with each associated “sphere” only imperfectly delineated from the other.

The definition of animals as property—an apparent “private law” category—is revealed in the history of American dairying to carry a distinctly public valence. Public law interventions have consistently characterized the nature and implications of animals’ “private” property status—from colonial struggles to reshape ownership models in the face of cattle rewilding,²³⁵ to contemporary state efforts to shape markets for milk through direct purchasing and the crafting of nutritional advice.²³⁶ Presently, the USDA collects mandatory fees from producers

228. See Part I.C.

229. See Part I.B.

230. See e.g. Boyd, note 145; Lacey, note 147; Olsen, note 148.

231. See Part I.C.

232. See note 149 and accompanying text.

233. *Id.*

234. Dinesh Wadiwel, “Whipping to win: Measured Violence, Delegated Sovereignty and the Privatised Domination of Non-Human Life,” in *Law and the Question of the Animal: A Critical Jurisprudence*, 116 (eds. Yoriko Otomo & Edward Mussawir, Routledge, 2013).

235. See Part I.A.

236. See Part I.B.

to support marketing campaigns in pursuit of the statutory objective of promoting commodities; that the resulting programming includes contracts with Taco Bell, is just one obvious example of the public-private entanglements that characterize the law of milk and dairying.²³⁷ The lives of contemporary dairy cattle are thus governed by a complex constellation of public and private parties, generally united by a shared interest in these animals' confinement, insemination, reproduction, social control, and slaughter.

C. From Analogy to Interconnection

Recognizing these interconnections between the public and the private—and the associated interplay between ideology and legal structures—opens up distinct ways of understanding the relationship between systems of social hierarchy. This study of American dairying has revealed that the history of this unique commodity is indelibly marked by America's racialized politics of identity and distribution. The colonialist assumption of European superiority defined the introduction and growth of dairying in this country, legally and rhetorically authorizing the displacement of Indigenous foodways and legal relations with land and animals.²³⁸ Milk's ascendance in the US cultural and legal imagination is driven by dietary imperatives advanced first *because* they sat ill with many racialized peoples, and then in spite of this digestive reality.²³⁹ The legal status of animals, and the consequences of both property status and lack of welfare protections, are profoundly shaped not only by the gendered construction of a private sphere, but also by the racially-inflected imperative to produce ever-greater quantities of American milk.²⁴⁰

This emphasis on *interconnections* between hierarchies, oppressions, and relations of use differs significantly from efforts to draw simple parallels between these systems of social and legal domination. Efforts to attract attention and concern to the harms of animal exploitation have often taken this simple analogical form: arguing that animal exploitation is wrong *because it is like* human tragedies including slavery, or the Holocaust, or rape.²⁴¹ These comparisons risk portraying ongoing justice struggles as complete, imperiling other justice projects, and denying the singularity and particularity of each of these diverse contexts.²⁴² The analysis of colonialism, race, gender, and animality suggested here takes a different form. The argument is not that harms to animals deserve our attention

237. See notes 104-105.

238. See Part I.A.

239. See Part I.B.

240. See Part I.C.

241. For discussion, see e.g. Marjorie Spiegel, *The Dreaded Comparison: Human and Animal Slavery* (New Society Publishers, 1988); Roberta Kalechofsky, *Animal Suffering and the Holocaust: The Problem with Comparisons* (Micah Publications, 2003); Angela P Harris, "Should People of Color Support Animal Rights?," 5 *Journal of Animal Law* 15 (2009); Ko, note 166; Adams, note 108, at 42-44.

242. See sources cited in note 240.

because animals are *like* humans, or because the harms animals suffer are *like* harms humans have suffered. Instead, the argument is that diverse forms of hierarchy operate dynamically and synergistically to produce a diverse range of harms affecting a diverse range of constituencies—with these harms and constituencies meriting attention and concern in their own right and on their own terms.

This shift from analogy to interconnection has the benefit of redirecting attention away from distracting and unnecessary conversations about whether animals are sufficiently “like us” to warrant legal care and consideration.²⁴³ The question is not whether *they* are like *us*, but rather whether and how *what we do* causes pain and rupture in light of *who they are*. This question presents serious methodological challenges, and caution is warranted when necessarily-human scholars and law-makers seek to describe and thus represent the experiences of animals whose embodiment, experience, and social position differ so widely from their own.²⁴⁴ The present study of dairying has attempted to both acknowledge these risks and embrace the necessary project of incorporating an account of animal experience into our understanding of animal law.

A focus on interconnection rather than analogy, moreover enables a more nuanced articulation of the relationship between oppressions. The point is not to prove that diverse oppressions are *the same*, but there is value in identifying and elaborating the ways in which they may share common or interconnected ideological foundations. In this case study, we have seen colonial, racial, and gendered expressions of power feed into particular conceptions of animality that support intensive animal use. But we have also seen the recurrence of logics common to all three: in particular, that *might makes right* and that *difference authorizes hierarchy*. These interconnections, more so than simple analogies, allow us to excavate, interrogate, and unsettle the complex relationship between the exploitation of animals and the construction of “violence producing categories,” like the “subhuman,” which operate to sustain hierarchies in a range of contexts.²⁴⁵

CONCLUSION

The story of milk’s ascendance in the American cultural imagination, and the attendant rise of intensive, industrial-scale farming of dairy cows, is not only a story of “man versus beast,” but a story of how both “man” and “beast” are constructed through law in the crucibles of colonialism, race, and gender. Public actions and postures within the US dairy economy have reflected and magnified culturally laden assumptions about proper foodways—assumptions which in turn engage broader narratives of public and private power in shaping social hierarchies within human communities.

243. See Part II.

244. Id.

245. Deckha, note 111.

Colonialism, race, gender, and animality have each shaped American public power, and private relations, and the soft membranes that often barely separate the two. In the case of America's dairy history, tales of "nature" and "necessity" have been crucial levers, relying on significations and power relations arising from colonial understandings of property and animality; racialized nutritional imperatives; and gendered tropes of female bodily availability. The resulting industrial dairy practices have required the confinement, social isolation, and intensive reproductive exploitation of feeling creatures. Cultural edifices of "nature" and "necessity" buttress and justify these practices, while also contributing to animals' methodological erasure and confinement to an ostensibly "private sphere" beyond the reach of meaningful legal protection.

In order to confront the depth of the challenges associated with transforming our relationships with other animals, we must confront law's role in constructing and supporting the farm as a violent, only formally private, space. This study has not presented a solution, but rather a reframing of the challenge. What would it mean for American law to take the experiences of dairy cattle seriously? To see something of legal import in the relation between a cow and her mother, her best friend, her calf? To see her sex as something more than an industrial production technique—as something about which she herself has a legal interest?

The answer may lie in something more than telling compelling stories about cattle lives, though this must be part of it. The answer also lies in identifying and challenging the deep social, emotional, and cultural ties that define our relationships with the foods we hold dear. I have focused here on the lesser-told stories of milk—the stories of race, colonialism, and gender—that shape the prized place of milk in our collective lives. But as with so many normalized oppressions, there are stories of warmth and connection and complexity that sit alongside and within these stories. There are fond childhood memories of parents and grandparents pouring tall glasses of milk in moments of genuine affection and care. There are pizza parties, and cheese plates, and Little Miss Muffet. The challenge is not to deny these social associations, but to reshape their cultural meaning, to strip them of their neutrality, and reveal their underlying politics. The challenge is to show our dairy histories in a more fulsome light in order to make questions about these practices legible to our law and politics.

