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Animal Rights: Time to Start Unpacking What Rights and for Whom

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ANIMAL RIGHTS: TIME TO START UNPACKING WHAT RIGHTS AND FOR WHOM

Jane Kotzmann* and Nick Pendergrast**

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I. INTRODUCTION

“We are on the cusp of changing the legal relationship between nonhuman animals and humans. The time is now to push even harder, as hard as we can. And keep pushing until we win.”¹

Public concern for animals has dramatically increased in recent years, particularly in the United States and other Western nations. There has been a rise in the uptake of vegan diets² and animal advocacy in general. At the same time, human cruelty toward animals has escalated. A burgeoning global population has led to increased food requirements,³ while growing wealth in many countries has increased the demand for animal food products.⁴ Animals used for food are subject to cruel treatment daily.⁵ While the public interest in animal welfare is yet to be fully embraced by the law, it does suggest that a significant proportion of the public wishes to see an increase in the legal protections granted to animals.

In terms of how to better protect animals, direction can be taken from the animal advocacy movement (AAM). Following the publication of Peter Singer’s seminal text *Animal Liberation* in 1975, the AAM developed and flourished. Yet, there are significant differences in the ideologies⁶ and types of activism that are accepted and practiced by the wide range of individuals and organizations that make up the AAM. Their views on human and animal relations are markedly divergent, as are their views about the best methods to achieve their goals. However,

¹ NONHUMAN RIGHTS PROJECT, <https://www.nonhumanrights.org> [https://perma.cc/Z9X9-PANH].

² Lindsay Oberst, *Why the Global Rise in Vegan and Plant-Based Eating Isn’t A Fad (600% Increase in U.S. Vegans + Other Astounding Stats)*, FOOD REVOLUTION NETWORK (Jan. 18, 2018), <https://foodrevolution.org/blog/vegan-statistics-global/> [https://perma.cc/JZ2V-8UHB].

³ Maarten Elferink & Florian Schierhorn, *Global Demand for Food Is Rising. Can We Meet It?* HARV. BUS. REV. (Apr. 7, 2016), <https://hbr.org/2016/04/global-demand-for-food-is-rising-can-we-meet-it> [https://perma.cc/8QT6-N9BB].

⁴ *Availability and Changes in Consumption of Animal Products*, WORLD HEALTH ORG., https://www.who.int/nutrition/topics/3_foodconsumption/en/index4.html [https://perma.cc/CBS9-2QS8].

⁵ Rachel Hosie, *The Undercover Investigators Exposing Animal Abuse in Factory Farms*, INDEPENDENT (Jan. 4, 2017), <https://www.independent.co.uk/life-style/animal-abuse-factory-farms-undercover-investigators-pigs-chickens-cows-turkeys-mercy-for-animals-a7501816.html> [https://perma.cc/8SE8-DTQD].

⁶ See David Snow & Robert Benford, *Ideology, Frame Resonance, and Participant Mobilization*, in FROM STRUCTURE TO ACTION: COMPARING SOCIAL MOVEMENT RESEARCH ACROSS CULTURES, 197–217 (Bert Klandermans et al. eds., 1988); David Snow, *Framing Processes, Ideology, and Discursive Fields*, in THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS, 380–412 (David Snow et al. eds., 2004); Pamela Oliver & Hank Johnston, *What a Good Idea! Frames and Ideologies in Social Movement Research*, 5 MOBILIZATION: AN INT’L Q. 37, 37 (2000).

there is still enough commonality amongst the various participants and ideologies to identify one broad movement.

The chief ideological divide is between animal welfare and animal rights.⁷ Put simply, animal welfare allows humans to continue using and killing animals while ensuring some protection for animals.⁸ Animal welfare is associated with “humane” animal products, such as free-range eggs and organic milk. Animal rights theory provides a more fundamental challenge to our current relationship with animals. The ideology of animal rights contests the concept of animals existing for humans to use and slaughter, regardless of how “humanely” or otherwise this is done. It holds that humans should confer fundamental rights to animals. Animal rights are closely tied to veganism, which involves an individual commitment not to eat or otherwise consume animal products as well as to avoid other instances of animal exploitation, such as the use of animals for entertainment.⁹ Broadly, animal activist ideologies often sit somewhere on the spectrum between these two positions.

The animal welfare paradigm remains the dominant legal approach to animal protection in most countries.¹⁰ In this respect, numerous countries have enacted animal welfare legislation, which seeks to regulate the ways in which humans interact with animals such that animal suffering is reduced.¹¹ For example, in the United States, the *Animal Welfare Act* provides minimum acceptable standards for the care and treatment of particular kinds of animals.¹² The Act came into operation in 1966 and is the primary piece of federal legislation in the United States that regulates the ways humans treat animals.¹³ Similarly,

⁷ Robert Garner, *Animal Welfare: A Political Defense*, 1 J. ANIMAL L. & ETHICS 161, 161 (2006); Tania Signal & Nicola Taylor, *Attitudes to Animals in the Animal Protection Community Compared to a Normative Community Sample*, 14 SOC'Y & ANIMALS 265, 266 (2006) [hereinafter *Attitudes to Animals*]; Nicola Taylor & Tania Signal, *Willingness to Pay: Australian Consumers and “On the Farm” Welfare*, 12 J. APPLIED ANIMAL WELFARE SCI. 345, 346 (2009) [hereinafter *Willingness to Pay*].

⁸ AM. VETERINARY MED. ASS'N, ANIMAL WELFARE: WHAT IS IT?, <https://www.avma.org/KB/Resources/Reference/AnimalWelfare/Pages/what-is-animal-welfare.aspx> [https://perma.cc/42J6-9VE5].

⁹ Cary Williams, *The Framing of Animal Cruelty by Animal Advocacy Organizations* 13–14 (2012) (unpublished Honors thesis, The Honors College, University of Maine).

¹⁰ Tara Ward, *Suffering Under the Law: Could Human Rights Be Used to Protect the Basic Interests of All Animals?*, 1 AUSTL. ANIMAL PROTECTION L.J. 57, 57 (2008).

¹¹ *Id.* at 57–58.

¹² Animal Welfare Act of 1966, Pub. L. No. 89–544, 80 Stat. 350 [hereinafter *Animal Welfare Act of 1966*].

¹³ U.S. DEP'T OF AGRIC., NAT'L AGRIC. LIBRARY, *Animal Welfare Act*, <https://www.nal.usda.gov/awic/animal-welfare-act> [https://perma.cc/LEU8-NN8N].

Australia and New Zealand have animal welfare laws that cover a wide range of animals used for different purposes.¹⁴

In recent times, however, animal rights language has emerged in some jurisdictions. In December 2013, the Nonhuman Rights Project lodged its first lawsuits on behalf of four chimpanzees held in captivity in New York State, seeking recognition of the chimpanzees' rights to bodily liberty.¹⁵ While this case was ultimately unsuccessful, it did inspire reflection by New York Court of Appeals Judge, Eugene M. Fahey, that "the issue [of] whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching" and will need to be addressed.¹⁶ In India, the High Court in Uttarakhand has recognized animals as rights holders.¹⁷ Some countries, including Bolivia and Ecuador, have introduced protections for animals using the language of animal rights in their constitutions.¹⁸

This article contends that the case has been persuasively made for the attribution of rights to animals. Rights have the potential to lead to significant gains for animals, whereas any advances within the welfare framework will always be extremely limited. Yet, for some people, the concept of rights for animals seems absurd. Accordingly, this article argues that the focus of academic discussion should be on what rights animals are entitled to, rather than whether animals require welfare protections or rights. While there has been some academic commentary on what rights might be attributed to animals,¹⁹ developing a coherent and comprehensive framework for the attribution of rights will demystify what constitutes a rights-based approach to animals. This framework could also potentially remove some of the fear associated with granting rights to the "other."

This article will begin with an overview of the contemporary AAM, as well as the ways in which animal welfare and rights ideologies are

¹⁴ See DEBORAH CAO, ANIMAL LAW IN AUSTRALIA AND NEW ZEALAND 96–97 (Rozelle, N.S.W. ed., Thomson Reuters, 2010).

¹⁵ *A Former Animal "Actor," Partially Deaf from Past Physical Abuse*, NONHUMAN RIGHTS PROJECT, <https://www.nonhumanrights.org/client-kiko/> [https://perma.cc/UF9S-6557]; *The NhRP's First Client*, NONHUMAN RIGHTS PROJECT, <https://www.nonhumanrights.org/client-tommy/> [https://perma.cc/3Q8V-ZMGM]; *Two Former Research Subjects and the First Nonhuman Animals to Have a Habeas Corpus Hearing*, NONHUMAN RIGHTS PROJECT, <https://www.nonhumanrights.org/hercules-leo/> [https://perma.cc/RF7J-F7X3].

¹⁶ Nonhuman Rights Project, Inc., *ex rel. Tommy v. Lavery*, 100 N.E.3d 846, 849 (N.Y. 2018) (Fahey, J., concurring).

¹⁷ *Narayan Dutt Bhatt v. Union of India and Others*, Writ Petition (PIL) No. 43 of 2014, 99A (India) [hereinafter *Narayan Dutt Bhatt*].

¹⁸ CONSTITUCIÓN POLÍTICA DEL ESTADO [CONSTITUTION] art. 33 (Bol.); CONSTITUCIÓN DE ECUADOR DE 2008 [CONSTITUTION] arts. 71, 73 (Ecuador).

¹⁹ See, e.g., ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha Nussbaum eds., 2006); GARY L. FRANCIONE & ROBERT GARNER, THE ANIMAL RIGHTS DEBATE: ABOLITION OR REGULATION? (2010).

represented in law.²⁰ The article will then summarize the case for granting legal rights to animals, with reference to human rights literature.²¹ After this, attention will turn to the obstacles to granting rights to animals and the merits of developing an animal rights framework.²²

There are related issues that lie beyond the scope of this article. First, it is important to note that animal welfare and rights are not the only theories that provide a framework in which to understand our obligations to animals. Other perspectives include the feminist ethics of care framework.²³ While the focus of this article is animal rights and welfare, the significance of other perspectives is acknowledged due to their legal applicability and the particular importance of these theories to the AAM.²⁴ Further, entities other than animals are also excluded in the discussion of legal rights; for example, insects and the environment. The merits of different legal approaches to other excluded entities are also beyond the scope of this article.

II. AN IDEOLOGICAL OVERVIEW OF THE CONTEMPORARY ANIMAL ADVOCACY MOVEMENT* * *

Ideology is an important factor in motivating actors in social movements generally,²⁵ and in the AAM specifically. The need for many activists to provide “intellectual justifications for their feelings,” and perhaps a desire to be seen as being driven by a clear ideology rather than more emotive concerns, has led to animal advocates looking to philosophical writings on our relationship with animals to underpin their goals and actions.²⁶ These writers include Tom Regan and Gary Francione, whose impact has been considerable, especially since the widespread adoption of the Internet.²⁷ In addition, Peter Singer’s philosophy has been, and continues to be, particularly influential. Julian

²⁰ See *infra* Part II.

²¹ See *infra* Part III.

²² See *infra* Part IV.

²³ THE FEMINIST CARE TRADITION IN ANIMAL ETHICS 2–3 (Josephine Donovan & Carol Adams eds., 2007).

²⁴ Garner, *supra* note 7, at 161; *Attitudes to Animals*, *supra* note 7, at 266; *Willingness to Pay*, *supra* note 7, at 346.

²⁵ Editor’s Note: The following section is taken largely from Nick Pendergrast’s thesis.

²⁶ Snow, *supra* note 6, at 383.

²⁷ Julian Groves, *Animal Rights and the Politics of Emotion: Folk Constructions of Emotions in the Animal Rights Movement*, in *PASSIONATE POLITICS: EMOTIONS AND SOCIAL MOVEMENTS* 212, 221 (Jeff Goodwin et al. eds., 2001); Nicola Taylor, *Luddites or Limits? The Attitude of Animal Rights Activists Towards Science*, 3 J. FOR CRITICAL ANIMAL STUD. 46, 46 (2005).

²⁸ See, e.g., Groves, *supra* note 26 at 221; Roger Yates, *The Social Construction of Human Beings and Other Animals in Human-Nonhuman Relations. Welfareism and Rights: A Contemporary Sociological Analysis* (2004) (unpublished thesis, Bangor University).

Groves labels the philosophers of the AAM as the “high priests” of the movement.²⁸ Sociologist Bob Torres uses similar language to Groves in his depiction of the role of Singer as the unquestionable “god,” or at least “father” of the AAM.²⁹

A. *Singer and Animal Welfare*

James Jasper and Dorothy Nelkin’s comment that “philosophers served as midwives of the animal rights movement in the late 1970s”³⁰ captures the significance attached to these writers. In this period, before Regan and Francione’s work began to influence the movement, Singer’s utilitarian philosophy was vital to the growth of the AAM, and a catalyst for an increase in concern amongst the general public about animal suffering. Singer’s text, *Animal Liberation*,³¹ was first published in 1975 and led to not only an “organizational explosion” in groups advocating for animals but also assisted in the rise of the animal rights arm of the AAM.³² Mark Pearson, Executive Director of Animal Liberation New South Wales, emphasized the importance of Singer in “legitimising” concern for animals:

Singer's work caused a big shock wave in faculties, industries, companies, animal industries and beyond because of his clear logic rather than the emotion and anthropomorphism usually associated with animal rights groups. Singer's work tore away the armoury that industries usually used to dismiss the claims of animal rights activists due to his rationality.³³

In his book, Singer drew on liberation sociology to understand that through “othering,” dominant groups assume their interests are more important than the interests of the oppressed group. This fundamental dynamic is useful in understanding racism and sexism, as well as

²⁸ Groves, *supra* note 26, at 222.

²⁹ BOB TORRES, MAKING A KILLING: THE POLITICAL ECONOMY OF ANIMAL RIGHTS 4, 111 (2007).

³⁰ Siobhan O’Sullivan, Conflict and Coherence Within the Australian Animal Protection Movement 3 (2006) (Conference Paper, Australasian Political Studies Association Conference).

³¹ Peter Singer, *Animal Liberation or Animal Rights?*, in THE ANIMALS READER: THE ESSENTIAL CLASSIC AND CONTEMPORARY WRITINGS (Linda Kalof and Amy Fitzgerald eds., 2007).

³² DIANE L. BEERS, FOR THE PREVENTION OF CRUELTY: THE HISTORY AND LEGACY OF ANIMAL RIGHTS ACTIVISM IN THE UNITED STATES 3 (2006).

³³ Interview with Mark Pearson, Executive Director, Animal Liberation New South Wales in The University of Melbourne (2011) [Reproduced in: A Sociological Examination of the Contemporary Animal Advocacy Movement] [hereinafter Interview with Mark Pearson].

“speciesism”—that is, discrimination based on species.³⁴ Animals are sentient (conscious and able to experience suffering and pleasure), meaning that they have interests (for example, an interest in avoiding suffering). Yet, due to speciesism, their interests are denied simply because of their species.³⁵ Singer’s notion of animal liberation and discussion of speciesism were strong influences in the more widespread adoption of an animal rights ideology that challenged human-imposed hierarchies.

These views challenged long-held values related to the animal welfare ideology, which was, and remains, focused on limiting the harm caused by the lower place in the hierarchy of living beings ascribed to animals. The focus is on working for better treatment of animals used for human ends.³⁶ Animal welfarists oppose acts of cruelty towards animals, but not what they view as the humane use of animals, such as for food and clothing.³⁷ While there had been individuals advocating for vegetarianism and against vivisection (experimentation on live animals) since the 1800s, a more radical movement with a significant animal rights component did not exist before the 1970s. Most animal advocacy organizations were traditional animal welfare organizations such as the Royal Society for the Prevention of Cruelty to Animals (RSPCA).³⁸

Welfarists not only accept human supremacy over all animals but also uphold hierarchies amongst animals: while all animals deserve ethical consideration, some are more deserving than others.³⁹ For example, “the family companion animal, [welfarists] contend, unquestionably earns a higher place on the pyramid than a cow or pig.”⁴⁰ Elizabeth Cherry explains that in Western culture, cats and dogs are seen as “symbolically unfit for consumption,” in contrast to other animals socially constructed as “food animals.”⁴¹ Welfarists do not challenge these social constructions.

In this respect, Singer’s rejection of speciesism and the serious consideration he gives to a wide range of species places his position closer to that of animal rights theorists such as Regan than the traditional

³⁴ D. Wicks, *Humans, Food, and Other Animals: The Vegetarian Option*, in *A SOCIOLOGY OF FOOD & NUTRITION* 269 (John Germov & Lauren Williams eds., 2004); Interview with Peter Singer, at The Univ. of Melbourne (2012) [hereinafter Interview with Peter Singer].

³⁵ Wicks, *supra* note 34, at 269.

³⁶ BEERS, *supra* note 32, at 3–4; Interview with Peter Singer, *supra* note 34.

³⁷ BEERS, *supra* note 32, at 3.

³⁸ Lyle Munro, *The Animal Rights Movement in Theory and Practice: A Review of the Sociological Literature*, 6 *SOC. COMPASS* 166, 170 (2012); Interview with Peter Singer, *supra* note 34.

³⁹ BEERS, *supra* note 32, at 3; Munro, *supra* note 38, at 170.

⁴⁰ BEERS, *supra* note 32, at 3.

⁴¹ Elizabeth Cherry, *Shifting Symbolic Boundaries: Cultural Strategies of the Animal Rights Movement*, 25 *SOC. F.* 450, 458 (2010).

animal welfare approach.⁴² Although Singer has played a vital role in the move towards animal rights in the broader AAM and, as noted above, has often been labelled as the “father of the animal rights movement,” he explicitly rejects a rights-based approach.⁴³ Singer’s philosophy of “animal liberation” can be viewed as a “middle ground” approach, between animal welfare and animal rights.⁴⁴

This shows that these ideologies should be viewed as a continuum rather than a binary, with many views falling somewhere in between the two.⁴⁵ Many animal advocacy organizations and individual animal advocates cannot be labelled as purely promoting animal welfare or animal rights, as they promote a mixture of both. For example, People for the Ethical Treatment of Animals believe in animal rights as their ideal “end goal,” reflected in their slogan “animals are not ours.” However, the organization engages in animal welfare campaigns alongside their animal rights campaigns in order to achieve short-term, pragmatic gains.⁴⁶ This is why some theorists refer to various “clusters” in the movement,⁴⁷ acknowledging a wide variety of “goals, tactics, and philosophical positions.”⁴⁸ Siobhan O’Sullivan provides a critical analysis of these various clusters.⁴⁹

Singer explains that he is “far from those who take a rights-based approach philosophically.”⁵⁰ He acknowledges that there is “more than a verbal difference” between the approaches; in fact, the philosophical differences are “fundamental.”⁵¹ These differences are also likely to have “practical implications.”⁵² Singer uses the term “‘animal rights’ [as a] shorthand reference [for the] way in which the needs and desires of animals [create] moral obligations on our part.”⁵³ His association with

⁴² Interview with Peter Singer, *supra* note 34.

⁴³ D. Bourke, *The Use and Misuse of “Rights Talk” by the Animal Rights Movement*, in ANIMAL LAW IN AUSTRALASIA: A NEW DIALOGUE 136 (Peter Sankoff & Steven White eds., 2009); Munro, *supra* note 38, at 171; Singer, *supra* note 31, at 15.

⁴⁴ Munro, *supra* note 38, at 173.

⁴⁵ Interview with Mark Pearson, *supra* note 33; O’Sullivan, *supra* note 30, at 3; *Protecting Animals 33: Glenys Oogjes from Animals Australia*, KNOWING ANIMALS (Apr. 15, 2019), <https://knowinganimals.libsyn.com/protecting-animals-33-glenys-oogjes-from-animals-australia> [https://perma.cc/U6Q7-HN25].

⁴⁶ Ingrid Newkirk, *A Pragmatic Fight for Animal Rights*, THE GUARDIAN (Jan. 21, 2010), <http://www.guardian.co.uk/commentisfree/cif-green/2010/jan/21/peta-animal-rights-campaign> [https://perma.cc/PP9K-FCG9].

⁴⁷ See, e.g., GARY FRANCIONE, RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT 36–40 (1996); JAMES M. JASPER & DOROTHY NELKIN, THE ANIMAL RIGHTS CRUSADE: THE GROWTH OF A MORAL PROTEST (1992).

⁴⁸ JASPER & NELKIN, *supra* note 47, at 8; O’Sullivan, *supra* note 30, at 3.

⁴⁹ O’Sullivan, *supra* note 30, at 22–24.

⁵⁰ Interview with Peter Singer, *supra* note 34.

⁵¹ *Id.*

⁵² Singer, *supra* note 31, at 3.

⁵³ *Id.*

the term “animal rights” at the same time as philosophically rejecting a rights-based position illustrates the widespread confusion over the term “animal rights.”⁵⁴

Singer’s utilitarianist beliefs contribute to his rejection of a rights-based position. It is the “rights” aspect of “animal rights” rather than the “animal” aspect to which Singer objects. He contends that to say human beings have rights just because of their species is an example of speciesism and that if humans do have rights, then so should animals. He rejects human rights and rights in general.⁵⁵ Singer maintains that rights are not the only way to raise the status of animals.⁵⁶ Instead, he proposes that we focus on animals’ interests and other considerations, such as animals’ preferences and their experiences of pleasure or pain.

The focus on interests is consistent with a utilitarian approach, although other philosophical approaches also use the concept of interests. Utilitarianism focuses on the result of one’s actions.⁵⁷ Utilitarians use the universal “greatest happiness principle” to judge actions, with actions considered right if they produce happiness (defined as pleasure and the absence of pain) and wrong if they produce the opposite of happiness (defined as pain and taking away pleasure).⁵⁸

Singer contends that animal interests “should be given the same consideration as the like interests of any other being.”⁵⁹ Singer’s critique of speciesism means that his approach to animals is different than the traditional animal welfare perspective,⁶⁰ which contains “an in-built assumption that human interests are almost always more important than those of animals.”⁶¹ Giving animals equal consideration in these cases would not allow practices “based on treating animals as things to be used for our advantage, without any thought being given to the interests of the animals themselves.”⁶² The phrase “without any thought being given to the interests of the animals themselves” is critical. It clearly differentiates Singer from animal rights-based theorists. Singer’s utilitarian viewpoint⁶³ would not necessarily protect animals from uses such as experimentation but would require weighing the animals’ suffering against the benefits humans might realize from such experimentation.

⁵⁴ FRANCIONE, *supra* note 47, at 2; Bourke, *supra* note 43, at 136, 143.

⁵⁵ Singer, *supra* note 31, at 3.

⁵⁶ *Id.*

⁵⁷ Charles Taylor, *The Diversity of Goods*, in UTILITARIANISM AND BEYOND 129, 131 (Amartya Sen & Bernard Williams eds., 1982).

⁵⁸ John S. Mill, *Utilitarianism*, in PHILOSOPHY: THE BIG QUESTIONS 386 (Ruth Sample et al. eds., 2004).

⁵⁹ Singer, *supra* note 31, at 3.

⁶⁰ Interview with Peter Singer, *supra* note 34.

⁶¹ Bourke, *supra* note 43, at 133.

⁶² Singer, *supra* note 31, at 3.

⁶³ *Id.*

The idea of animal welfare came about with the realization that animals' physical and emotional well-being is important, not just their productivity for human ends.⁶⁴ Cary Williams explains that “[b]oth animal rights and animal welfare advocates agree that animals should be protected, and that animals are sentient creatures.”⁶⁵ These ideologies, however, vary greatly in the protection that should be granted to animals as a result of their sentience. According to the animal welfare approach, when humans use animals for their own ends, they have a duty to provide the following five freedoms for animals: “to be free from thirst or hunger; to have adequate shelter; to be kept free from pain, injury and disease; to be permitted to express normal behaviours (by providing sufficient space); and to be free from fear or distress.”⁶⁶

Despite the widespread acceptance of the idea of animal welfare in attitudes and legislation, these freedoms are not necessarily guaranteed for animals, who continue to be routinely crowded, confined, and harmed.⁶⁷ The animal welfare approach, which opposes “unnecessary” suffering to the animals used by humans, assumes that animal pain and suffering can be acceptable, as long as humans believe the pain and suffering caused is “reasonable” or “necessary.” Even when the five freedoms are ensured, animal welfare ideology gives animal lives no inherent value and accepts their slaughter and use, while facilitating and regulating the process.⁶⁸

Singer’s utilitarian weighing of interests is primarily focused on pleasure and pain, much like the animal welfare perspective. Robert Nozick, however, criticizes utilitarianism as being too focused on experiences of pleasure and happiness while ignoring other considerations.⁶⁹ Singer’s views are also questioned by Francione, who objects to Singer’s position on “replaceability.”⁷⁰ Singer explains that “replaceability refers to the argument that one could defend raising animals in good conditions and kill them based on the fact that other animals could replace them.”⁷¹ Singer rejected the concept of replaceability in the first edition of *Animal Liberation* in 1975. However, in the second edition of this book, published in 1990, he explained that this rejection was not sound. Singer is now somewhat

⁶⁴ Bourke, *supra* note 43, at 132.

⁶⁵ Williams, *supra* note 9, at 12.

⁶⁶ Bourke, *supra* note 43, at 132.

⁶⁷ Aysel Dogan, *A Defense of Animal Rights*, 24 J. AGRIC. & ENVTL. ETHICS 473, 473 (2011); Ward, *supra* note 10, at 57.

⁶⁸ Taylor, *supra* note 26, at 47; *Attitudes to Animals*, *supra* note 7, at 266; Bourke, *supra* note 43, at 133.

⁶⁹ ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 42–45 (1974).

⁷⁰ GARY FRANCIONE, INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR THE DOG? 141 (2000).

⁷¹ Interview with Peter Singer, *supra* note 34.

undecided on the concept but is more inclined to accept it than he once was.⁷²

Singer's position that animal suffering is important but continued life for animals is not is similar to traditional animal welfarists such as John Stuart Mill and Jeremy Bentham (who were also utilitarians). Bentham's famous quote about animals says, "[t]he question is not can they reason? Nor, can they talk? But can they suffer?"⁷³ However, Bentham, like Mill and Singer, did not see killing an animal as imposing harm in and of itself.⁷⁴ According to Francione, the utilitarian focus on pleasure and pain⁷⁵ leads Singer to overlook animals' interest in the continuation of their lives. To account for all animal interests, rights-based theorists such as Francione and Regan argue that both utilitarianism and animal welfare are inadequate.

B. Regan, Francione, and Animal Rights

Regan applies fundamental moral rights to all sentient beings, regardless of intelligence or rationality.⁷⁶ These sentient beings include vulnerable humans, such as infants and severely mentally disabled people, as well as all animals. According to rights-based theories, the rights of the individual trump the collective interest. In the moral game, the rights card is the "trump card."⁷⁷

In the context of animal rights, Regan believes that animals should have certain moral rights, such as the right to bodily integrity and the right not to suffer.⁷⁸ These rights place limits on what humans can do to animals, with individual rights trumping any benefits that come about to others as a result of violating their rights. For example, unlike Singer's utilitarian perspective, Regan's rights theory would protect animals from being forced organ donors and being subjects in medical experiments, regardless of the benefits to humans.

Francione's rights-based theories share many similarities with Regan's but also some differences. Regan, as a philosopher, focused on moral rights but argued legal rights are an entirely separate matter.⁷⁹ Francione is a lawyer focused on legal rights for animals. Under the law,

⁷² *Id.*

⁷³ JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 144 (1789).

⁷⁴ Gary Francione, *Animal Welfare and the Moral Value of Nonhuman Animals*, 6 L., CULTURE & HUMAN. 24, 26 (2010).

⁷⁵ Gaverick Matheny, *Utilitarianism and Animals*, in IN DEFENSE OF ANIMALS: THE SECOND WAVE 15 (Peter Singer ed., 2006).

⁷⁶ Tom Regan, *The Rights of Humans and Other Animals*, in THE ANIMALS READER: THE ESSENTIAL CLASSIC AND CONTEMPORARY READINGS 28–29 (Linda Kalof & Amy Fitzgerald eds., 2007).

⁷⁷ *Id.* at 25.

⁷⁸ *Id.* at 23–27.

⁷⁹ *Id.* at 24–25.

persons are largely distinct from property,⁸⁰ and animals are categorized as property.⁸¹ However, it is important to note that humans are afforded more limited property rights toward wild animals.⁸² Property comprises a “bundle of rights”⁸³ that can be exercised by the property owner in relation to property, such as the rights to possess, to use, and so forth.⁸⁴

The problems created by the legal status of animals as the property of humans have been a “constant theme” of Francione’s work.⁸⁵ Francione argues that instrumentalism, which is the view of animals as means to humans’ ends,⁸⁶ is only possible due to the property status of animals, as “to be property means precisely to be means to an end exclusively.”⁸⁷ This instrumentalism is central to the exploitation of animals, as exploitation is defined as “making use of and benefiting from resources” and “making use of a situation to gain unfair advantage for oneself.”⁸⁸ For Francione, it is the use of animals as property, for profit, and other selfish reasons, such as enjoyment, which is central to the problem of our current relationship with animals.⁸⁹ These human interests are placed above the fundamental interests of their animal property, such as avoidance of suffering and continuation of life.⁹⁰

The egg and dairy industries are relevant illustrations of these processes in action. In these industries, males are generally killed within a few days of birth because they cannot produce the desired product.⁹¹ Similarly, females are slaughtered once they are no longer producing enough eggs or dairy to be profitable.⁹² There is no desire to keep

⁸⁰ Adam Ray, *The Conception of Animals as Property*, in ANIMAL L.: PRINCIPLES AND FRONTIERS 235 (Graeme McEwen ed., 2011); George Seymour, *Animals and the Law: Towards a Guardianship Model*, 29 ALTERNATIVE L.J. 183, 183 (2004).

⁸¹ See *Saltoon v. Lake* [1978] 1 NSWLR 52 (Austl.); C. M. Korsgaard, *Kantian Ethics, Animals and the Law*, 33 OXFORD J. LEGAL STUD. 629, 629 (2013); Steven White, *Exploring Different Philosophical Approaches to Animal Protection in Law*, in ANIMAL L. IN AUSTRALASIA: A NEW DIALOGUE 97 (Peter Sankoff & Steven White eds., 2009).

⁸² See Ray, *supra* note 80, at 240; *Sutton v. Moody* (1697) 91 Eng. Rep. 1063 (KB); *Yanner v Eaton* (1999) 201 CLR 351, 358 (Austl.).

⁸³ *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 284 (Austl.).

⁸⁴ Ray, *supra* note 80, at 234; White, *supra* note 81, at 97.

⁸⁵ Francione, *supra* note 74, at 25.

⁸⁶ FRANCIONE, *supra* note 47, at 25.

⁸⁷ *Id.* at 10.

⁸⁸ *Exploitation*, OXFORD ENG. DICTIONARY (Apr. 22, 2019), <https://www.oed.com/> [<https://perma.cc/WE29-6F6V>].

⁸⁹ FRANCIONE & GARNER, *supra* note 19, at 22–23, 62–63.

⁹⁰ TORRES, *supra* note 29, at 67.

⁹¹ FRANCIONE & GARNER, *supra* note 19, at 41; *What Happens With Male Chicks in the Egg Production Industry?*, RSPCA (Oct. 4, 2016), http://kb.rspca.org.au/What-happens-with-male-chicks-in-the-egg-production-industry_100.html [<https://perma.cc/UYE7-AF2K>]; *What Happens to Bobby Calves?*, RSPCA (Oct. 5, 2018),

http://kb.rspca.org.au/What-happens-to-bobby-calves_87.html [<https://perma.cc/K876-G9NP>].

⁹² FRANCIONE & GARNER, *supra* note 19, at 41.

animals alive, feed them food and water, provide them with space, and attend to their other needs when they are no longer profitable to their property owners.

The property status of animals is the basis for Francione's critique of animal welfare. Lisa Chalk, spokesperson for the RSPCA, explains that animal welfare is based on the idea of balancing the interests of the industries using animals and the interests of the animals themselves.⁹³ Francione argues that it is not possible to meaningfully balance the interests of animals and the industries that use them. This balance is meant to occur between property and the property owner, but the property owner always wins.⁹⁴ As a result, despite animal welfare regulations designed to provide animals with some protection, "animals are largely unprotected from harm, so long as an overriding human interest can be identified."⁹⁵

Francione believes that industries using animals only improve the treatment of animals when such gains are in their economic interests.⁹⁶ As animals are property, there will not be any gains in their treatment for their own sake, but only coincidentally. For example, there is a widely held belief amongst companies producing animal products, and even some animal advocates, that minimizing stress (especially prior to slaughter) and generally better treatment of animals leads to higher quality meat.⁹⁷ Another example from the poultry industry is provided by some companies moving to controlled-atmosphere killing (gassing) of chickens. This practice is touted as a welfare gain in comparison with other methods of slaughter, such as slitting animals' throats or maceration (blending them alive), although some experts debate this is a gain, as the RSPCA argues that maceration is more humane than gassing.⁹⁸ Francione contends that this change to the slaughter method has been implemented because it is a more efficient way to kill chickens, rather than out of concern for the chickens themselves. Economically, there are benefits to the industry, including reducing worker injuries.⁹⁹ To sum up the point Francione is making, while animals are property under the law, improvements in their treatment will be negligible and are only initiated to make their exploitation and slaughter more efficient or profitable.

⁹³ *Bobby Calves Endure Milk of Human Cruelty*, SYDNEY MORNING HERALD (Jan. 27, 2011), <http://www.smh.com.au/environment/animals/bobby-calves-endure-milk-of-human-cruelty-20110127-1a5u2.html> [https://perma.cc/27P6-YWE8].

⁹⁴ TORRES, *supra* note 29, at 67 n.16.

⁹⁵ White, *supra* note 81, at 97 n.68.

⁹⁶ FRANCIONE & GARNER, *supra* note 19, at 30 n.52.

⁹⁷ Temple Grandin, *Lowering Stress to Improve Meat Quality and Animal Welfare*, GRANDIN, <http://www.grandin.com/meat/meat.html> [https://perma.cc/V7XQ-4X2V].

⁹⁸ See, e.g., *What Happens with Male Chicks in the Egg Production Industry?*, *supra* note 91.

⁹⁹ TORRES, *supra* note 29, at 47-48; FRANCIONE & GARNER, *supra* note 19, at 33 n.76.

In terms of practical differences between animal rights and animal welfare, animal rightists are abolitionists seeking to abolish animal exploitation rather than merely regulating it.¹⁰⁰ They consider that exploiting and killing animals for human ends is wrong in principle, rather than occasionally wrong in practice. Therefore, it is “not larger cages, but empty cages that animal rightists call for.”¹⁰¹ As Francione states, the problem with our current relationship with animals from an animal rights perspective is *that* we kill and use animals, in contrast to the animal welfare perspective, which is concerned with “*how* we treat them and how we kill them.”¹⁰²

While Francione and Regan’s theories, taken together, provide a useful summation of the animal rights perspective, there are differences in their approaches that go beyond Francione’s focus on legal rights and Regan’s focus on moral rights. One of these differences is more philosophical. When discussing the hypothetical situation of dogs and humans on a lifeboat that cannot support everyone, Regan contends that death is a much more significant harm for humans than animals.¹⁰³ As a result, he argues that a dog should be sacrificed before humans, and even that one million dogs should be sacrificed to save one human, as the loss of human life is so much more significant.¹⁰⁴ In contrast, Francione defends the idea of the “moral equality of human and nonhuman life.”¹⁰⁵ This view goes against the consensus, even amongst “pro-animal” philosophers, “that human life is more valuable than animal life.”¹⁰⁶ There are also other differences with more practical implications for activism.

Regan and Francione’s views diverge markedly when it comes to the types of animal rights campaigns they advocate. Regan favors “winnable abolitionist campaigns” that focus on unpopular uses of animals, with the aim of abolishing these practices (rather than campaigning for better treatment generally).¹⁰⁷ He cites examples such as animals performing in circuses, greyhound racing, seal slaughter, whaling, animals in product testing, and the fur industry.¹⁰⁸ In contrast,

¹⁰⁰ Taylor, *supra* note 26, at 47 n.13; Regan, *supra* note 76, at 26–27 n.63; FRANCIONE & GARNER, *supra* note 19, at 1, 75; Munro, *supra* note 38, at 170–75.

¹⁰¹ Regan, *supra* note 76, at 27.

¹⁰² FRANCIONE & GARNER, *supra* note 19, at 24, 33 n.76 (emphasis added).

¹⁰³ Regan, *supra* note 76.

¹⁰⁴ GARY FRANCIONE, ANIMALS AS PERSONS: ESSAYS ON THE ABOLITION OF ANIMAL EXPLOITATION 212, 227 (Columbia Univ. Press 2008).

¹⁰⁵ Francione, *supra* note 74, at 25 n.2.

¹⁰⁶ FRANCIONE & GARNER, *supra* note 19, at 115.

¹⁰⁷ Carolyn Bailey, *Animal Rights Philosopher Tom Regan Addresses a New Generation*, ANIMAL RTS. ZONE (May 16, 2011, 2:00 PM), <https://arzone.ning.com/profiles/blogs/animal-rights-philosopher-tom> [https://perma.cc/4TBU-XCV6].

¹⁰⁸ *Id.*

Francione sees single-issue campaigns focused on just one form of animal exploitation, rather than campaigning against all animal exploitation, as inconsistent with the aim of furthering progress towards the abolition of all animal exploitation.¹⁰⁹ He maintains that single-issue campaigns “almost always reinforce the notion that certain forms of animal exploitation are better than others.”¹¹⁰ For example, he asserts that a campaign that opposes animals being killed for their fur, while not mentioning leather or wool, implies that fur is ethically a “worse” product.¹¹¹

Just as the property status of animals is central to Francione’s analysis of the current problems with our relationship with animals, the concept also underpins his solution. Francione believes that all sentient beings deserve not to be considered the property of someone else,¹¹² so animals need just one right, which is “the right not to be treated as the property of humans.”¹¹³ According to Francione, if this right is extended to animals, they will become moral persons.¹¹⁴ This means that they will be considered beings with morally significant interests, rather than things.

In order to achieve the legal personhood of animals, Francione believes the focus of the AAM should be on “vegan education” (the promotion of veganism) as the main tactic to incrementally move towards the goal of the abolition of animal exploitation.¹¹⁵ He explains that “ethical veganism is a profound moral and political commitment to [the] abolition [of animal exploitation] on the individual level and extends not only to matters of food but also to the wearing or using of animal products.”¹¹⁶ Ethical veganism, beyond just diet, is a rejection of the idea of animals as mere resources for human use and a recognition of their intrinsic moral value.¹¹⁷ Francione believes that this “rejection of the commodity status of nonhuman animals” through veganism leads towards the legal personhood of animals and the abolition of their exploitation.¹¹⁸ He sees this as being achieved through reducing the demand for animal products immediately and building a long-term

¹⁰⁹ *Id.*

¹¹⁰ FRANCIONE & GARNER, *supra* note 19, at 79.

¹¹¹ Deb Unferth, *An Interview with Gary Francione*, THE BELIEVER (Feb. 1, 2011), <https://believermag.com/an-interview-with-gary-francione/> [https://perma.cc/7QUW-549J].

¹¹² FRANCIONE, *supra* note 70, at 101.

¹¹³ Gary Francione, *One Right for All*, NEW SCIENTIST (Oct. 5, 2005), <https://www.newscientist.com/article/mg18825205-100-one-right-for-all/> [https://perma.cc/Y3ZM-6ZRK].

¹¹⁴ FRANCIONE, *supra* note 104, at 61.

¹¹⁵ FRANCIONE & GARNER, *supra* note 19, at 64–65, 71.

¹¹⁶ *Id.* at 62.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

movement objecting to the use of animals as “things” or property, which can lead to meaningful prohibitions on animal use in the future.¹¹⁹

C. Parallels to Human Rights in the Literature on Animal Rights

Clear parallels exist between human rights and animal rights advocacy, which are illustrated in literature on animal rights. Regan and Francione often draw on examples from human rights to build their cases for animal rights rather than welfarist or utilitarian positions. One striking example from Regan was the Nazis’ use of human prisoners for hypothermia research. Without rights as a trump card, a utilitarian must weigh what was learned through research and how the results would protect others against the suffering of these prisoners. To the rights theorist, such benefits are very much beside the point and do not justify this research, as the individual’s right to bodily integrity has been violated.¹²⁰

Regan also draws on human rights examples to reject welfarist animal advocacy.¹²¹ He explains that death penalty abolitionists—who believe that capital punishment is inherently wrong in principle rather than just sometimes immoral in practice—call for the complete abolition of the practice, rather than attempting to reform it to make it more “humane.”¹²² He draws not only on these human rights debates about the death penalty, but also other debates such as human slavery or child labor to compare them to the animal rights and animal welfare debate. He sees differences but also some commonalities in the issues and the logic used in opposing these practices. He argues for the abolition of the exploitation of animals rather than attempting to make it more “humane.” Regan urges animal rights activists to take up this call just as human rights advocates call for the abolition of the death penalty. Similar arguments have also been made by others, such as Torres¹²³ and Francione.¹²⁴

Francione draws on human rights to clarify his position on animal rights, explaining that his concept of animal rights does not mean giving animals the same rights as humans, since many human rights (such as the right to vote or free speech) have no application to animals.¹²⁵ Indeed, as Regan notes, some of these rights also have no application to vulnerable humans, such as infants and severely mentally disabled people.¹²⁶

¹¹⁹ *Id.* at 64–65, 71.

¹²⁰ Regan, *supra* note 76, at 25.

¹²¹ *Id.* at 27.

¹²² *Id.* at 26–27.

¹²³ TORRES, *supra* note 29.

¹²⁴ Francione, *supra* note 74, at 9–10.

¹²⁵ FRANCIONE, *supra* note 70, at 100–01.

¹²⁶ Regan, *supra* note 76, at 28–29.

With the property status of animals as a central theme of Francione's work, he draws on institutionalized slavery in the United States to establish some lessons for animal advocates today.¹²⁷ Francione explains that in the case of human slavery—where certain groups of people were classified as merely property rather than persons—there was some attempt to create a third legal category for slaves as “quasi-persons,” or “things plus.”¹²⁸ He argues that this did not work because this alternative category did not grant these individuals the right to have equal consideration given to their interests. Therefore, they were still at risk of being treated as non-person “things.” Francione explains that there are only two kinds of beings recognized in the moral universe—persons and things—and that for the rights of animals to be taken seriously, they also need to be granted legal personhood.

This overview of the contemporary AAM shows that there are significant ideological differences between animal welfare and animal rights positions. While advocates from each school seek to improve the status of animals, animal welfare advocates do not seek to end the use and exploitation of animals by humans, whereas animal rights advocates do. As was noted earlier, these positions cannot always be viewed as binary, as many advocates promote a mixture of rights and welfare, and some promote welfare in the short-term despite a long-term desire for animal rights. The next section of this article will consider the extent to which the law reflects animal welfare and animal rights ideologies.

III. ANIMAL WELFARE AND ANIMAL RIGHTS IN THE LAW

While the ideological overview provided above discusses animal welfare and animal rights positions both in moral and legal terms, this section of the article is focused solely on the manifestation of ideological positions in the law. For the remainder of the article, animal welfare laws refer to those laws that seek to improve the situation of animals, without attributing legal rights to them. For example, laws might require larger cages for battery hens or that sheep be protected from extreme temperatures when being exported by ship. Welfare laws like these do not give animals rights or impose duties on the animals in question.¹²⁹ In contrast, animal rights laws refer to those laws that grant animals fundamental rights, which can be claimed through a guardianship arrangement, declared in and enforced through the law.¹³⁰ In this respect, the following definition from Francione and Anna Charlton is useful:

We use the term ‘animal rights’ in a different way, similar to the way that ‘human rights’ is used when the fundamental

¹²⁷ FRANCIONE, *supra* note 104.

¹²⁸ FRANCIONE, *supra* note 70, at 101.

¹²⁹ Seymour, *supra* note 80, at 183.

¹³⁰ Paul Vinogradoff, *The Foundations of a Theory of Rights*, 34 YALE L.J. 60, 60-64 (1924).

interests of our own species are concerned. For example, if we say that a human has a right to her life, we mean that her fundamental interest in continuing to live will be protected even if using her as a non-consenting organ donor would result in saving the lives of 10 other humans. A right is a way of protecting an interest; it protects interests irrespective of consequences. The protection is not absolute; it may be forfeited under certain circumstances. But the protection cannot be abrogated for consequential reasons alone.¹³¹

A. *Animal Welfare Laws*

Currently, there is no international agreement relating to animal welfare.¹³² Nevertheless, past decades have seen multiple efforts aimed at achieving some international recognition and protection for animal welfare. Although it was never adopted, in 1988, the *International Convention for the Protection of Animals* was drafted seeking to establish standards for the treatment of animals.¹³³ Subsequently, the World Society for the Protection of Animals commenced a process intended to create an international agreement relating to animal welfare.¹³⁴ The *Universal Declaration on Animal Welfare* was drafted and has been subject to amendments in 2003 and 2005. Yet to date, it has not been adopted by the United Nations.¹³⁵ There has been more success in the adoption of animal protection agreements in the regional sphere. For example, animal welfare is recognized in the *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*. Article 13 of the Treaty provides that member states will “pay full regard to the welfare requirements of animals.”¹³⁶ Article 13 also recognizes animal sentience.¹³⁷

Animal welfare ideology is, however, prominently reflected in national laws. Most states in the United States have enacted legislation seeking to recognize, protect, and improve the life circumstances of

¹³¹ Gary Francione & Anna Charlton, *The Case Against Pets*, AEON (Sept. 8, 2016), <https://aeon.co/essays/why-keeping-a-pet-is-fundamentally-unethical> [<https://perma.cc/JED2-9XTG>].

¹³² Jane Kotzmann & Cassandra Seery, *Dignity in International Human Rights Law: Potential Applicability in Relation to International Recognition of Animal Rights*, 26 MICH. ST. INT’L L. REV. 1, 28 (2017).

¹³³ *Id.* at 29.

¹³⁴ ALEX BRUCE, ANIMAL LAW IN AUSTRALIA: AN INTEGRATED APPROACH 291 (LexisNexis, 2d ed., 2018).

¹³⁵ *Id.* at 291-92.

¹³⁶ Consolidated Version of the Treaty on the Functioning of the European Union art. 13, Oct. 26, 2012, 2012 O.J. (C326).

¹³⁷ *Id.*

some or all animals.¹³⁸ In 1641, the *Puritans of Massachusetts Bay Colony Code* was passed, making the United States the first country in the world to enact laws to protect animals from cruelty.¹³⁹ At the federal level in the United States today, the *Animal Welfare Act of 1966* provides minimum acceptable standards for the care and treatment of particular kinds of animals (excluding rats, mice, and livestock) and is implemented by the United States Department of Agriculture.¹⁴⁰ Further, all fifty states have some form of anti-cruelty legislation in place, although there is variability in the scope of protections afforded and numerous exclusions.¹⁴¹ Similarly, in Australia, all states and territories have passed legislation that seeks to protect animal welfare.¹⁴² In New Zealand, the *Animal Welfare Act 1999* is directed towards safeguarding animal welfare.¹⁴³

Many countries have also included animal welfare statements in their constitutions. For example, under the Federal Constitution of the Swiss Confederation, Switzerland is required to legislate on animal protection.¹⁴⁴ In India, the Constitution of India 1950 confers a duty on every citizen of India to “have compassion for living creatures.”¹⁴⁵ Similarly, in Brazil, the Constitution of the Federative Republic of Brazil requires the government to “protect the fauna and the flora, with prohibition . . . of all practices which represent a risk to their ecological function, cause the extinction of species or subject animals to cruelty.”¹⁴⁶

While there is a proliferation of animal welfare laws around the world, animals continue to suffer in countless and often unthinkable ways as a result of human action.¹⁴⁷ There are a number of reasons for this. One reason that animals continue to suffer is the legislative exceptions, defenses, and qualifications that are frequently included in

¹³⁸ BRUCE, *supra* note 134, at 291.

¹³⁹ Emily Stewart Leavitt & Diane Halverson, *The Evolution of Anti-Cruelty Laws in the United States*, in ANIMALS AND THEIR L. RTS. IN A SURV. OF AM. LAWS FROM 1641 TO 1990 1 (Animal Welfare Inst., 4th ed. 1990).

¹⁴⁰ Animal Welfare Act of 1966, *supra* note 12.

¹⁴¹ USA, WORLD ANIMAL PROTECTION, https://api.worldanimalprotection.org/country/usa#_ftn4 [https://perma.cc/U7CW-HEEQ].

¹⁴² *Animal Welfare Act 1992* (ACT) (Austl.); *Prevention of Cruelty to Animals Act 1979* (NSW) (Austl.); *Animal Welfare Act 1999* (NT) (Austl.); *Animal Care and Protection Act 2001* (Qld) (Austl.); *Animal Welfare Act 1985* (SA) (Austl.); *Animal Welfare Act 1993* (Tas) (Austl.); *Prevention of Cruelty to Animals Act 1986* (Vic) (Austl.); *Animal Welfare Act 2002* (WA) (Austl.).

¹⁴³ *Animal Welfare Act 1999*, s 9(1) (N.Z.).

¹⁴⁴ CONSTITUTION FÉDÉRALE DE LA CONFÉDÉRATION SUISSE [CST] [CONSTITUTION] arts. 78(4), 80(1)–(2) (Switz.).

¹⁴⁵ INDIA CONST. art 51A(g).

¹⁴⁶ CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 225 (Braz.).

¹⁴⁷ Ward, *supra* note 10, at 57.

animal welfare legislation.¹⁴⁸ For example, in Australia, many Acts contain provisions that enable compliance with industry practice or a code of practice to operate as a defense to an animal cruelty charge.¹⁴⁹ In other words, so long as there is compliance with common industry practice or a code of practice, prosecutions for animal cruelty will be unsuccessful. Further, animal cruelty legislation often excludes particular species. For example, in the United States, the protections provided by the *Animal Welfare Act of 1966* do not extend to animals raised for food or the majority of animals used for research.¹⁵⁰ These exceptions mostly limit cruelty prosecutions to isolated individual acts of harm to animals, rather than institutionalized suffering through animal industries. Even where animals are covered by legislative welfare protections, there can be a lack of enforcement of those protections.¹⁵¹ In order for a law to be effective, it must be monitored and enforced. Therefore, violations of the law require consequences, but this is often not the case for animal welfare legislation.¹⁵²

A common feature of animal welfare legislation is that it discriminates between different species of animals. In particular, a distinction is often made between companion and non-companion animals and between wild and non-wild animals.¹⁵³ Many jurisdictions also have special laws for assistance animals, animals used in entertainment, livestock, non-native species often referred to as “pests,” and animals used in research.¹⁵⁴ The discrimination evident in many animal welfare laws is fundamentally based on the nature of the relationship between each species and humans.¹⁵⁵ Thus, companion animals—those that are most valued by humans—enjoy higher levels of welfare protection than farm animals.¹⁵⁶ The welfare protection that is

¹⁴⁸ *Id.* at 60; Ray, *supra* note 80, at 231.

¹⁴⁹ See, e.g., *Animal Welfare Act 2002* (WA) ss 23, 25 (Austl.); Ian Weldon, *Why Doesn't Animal Legislation Protect Animals? (And How It's Getting Worse)*, 1 AUSTL. ANIMAL PROTECTION L.J. 9, 9 (2008).

¹⁵⁰ *Animal Welfare Act of 1966*, *supra* note 12, § 2132(g).

¹⁵¹ Keely Boom & Elizabeth Ellis, *Enforcing Animal Welfare Law: The NSW Experience*, 3 AUSTL. ANIMAL PROTECTION L.J. 6, 31 (2009).

¹⁵² CAO, *supra* note 14, at 219–21; Steven White, *Regulation of Animal Welfare in Australia and the Emergent Commonwealth: Entrenching the Traditional Approach of the States and Territories or Laying the Ground for Reform?*, 35 FED. L. REV. 347, 348 (2007); *USDA Enforcement of Animal Welfare Act Hits a New Low*, AM. SOC. FOR PREVENTION CRUELTY TO ANIMALS (ASPCA) (Aug. 10, 2018), <https://www.aspc.org/news/usda-enforcement-animal-welfare-act-hits-new-low> [https://perma.cc/DY9G-QGKK].

¹⁵³ RICHARD RYDER, *SPECIESISM, PAINISM AND HAPPINESS: A MORALITY FOR THE TWENTY-FIRST CENTURY* 55 (Imprint Academic, 2011); CAO, *supra* note 14, at 67, 71.

¹⁵⁴ See BRUCE, *supra* note 134.

¹⁵⁵ Jessica Eisen, *Liberating Animal Law: Breaking Free from Human-Use Typologies*, 17 ANIMAL L. 59, 59 (2010).

¹⁵⁶ CAO, *supra* note 14, at 151.

afforded to animals, therefore, is based on the perceived value of the animal to humans, and in this sense is speciesist.¹⁵⁷ This aligns with animal welfare ideology in that animals are a means to an end, rather than having value in and of themselves.

B. Animal Rights Laws

Although the animal rights ideology is not commonly reflected in the law, in recent times, animal rights language has been invoked in the legal context. For example, article 33 of the Constitution of Bolivia confers the “right to a healthy, protected, and balanced environment” of “other living things.” Similarly, articles 71 and 73 of the Constitution of the Republic of Ecuador recognize the rights of Mother Earth and provide for the protection of species. In terms of legislation, the Norwegian *Animal Welfare Act 2010* provides that “[a]nimals have an intrinsic value which is irrespective of the usable value they may have for man.”¹⁵⁸ Some significant advances in the attribution of animal rights are detailed below.

1. Recognition of Animal Rights in the United States: The Nonhuman Rights Project

One of the most prominent examples of the emergence of animal rights in the law is the Nonhuman Rights Project (NhRP), founded by lawyer Steven Wise in the United States. The NhRP seeks to secure the legal recognition of rights for animals.¹⁵⁹ In order to achieve this goal, the NhRP initiates litigation by filing writs of habeas corpus on behalf of animals held in captivity, advocating recognition of legal personhood, and in some cases, the right to bodily integrity.¹⁶⁰ To date, the litigants include the great apes Tommy, Kiko, Hercules, and Leo; the elephants Beulah, Karen, Minnie, and Happy; as well as dolphins and whales.¹⁶¹ The NhRP has also set up legal working groups in England, Spain, France, Sweden, Finland, Switzerland, Portugal, Argentina, Israel, Turkey, India, and Australia “to develop nonhuman rights campaigns suited to the respective legal systems” of those countries.¹⁶² The NhRP also seeks to work with local governments to develop legislation that

¹⁵⁷ Eisen, *supra* note 155; Ward, *supra* note 10, at 67.

¹⁵⁸ Animal Welfare Act 2010 art. 3 (Nor.).

¹⁵⁹ *Mission*, NONHUMAN RIGHTS PROJECT, <https://www.nonhumanrights.org/> [<https://perma.cc/3PEU-AS9X>].

¹⁶⁰ *Frequently Asked Questions*, NONHUMAN RIGHTS PROJECT, <https://www.nonhumanrights.org/frequently-asked-questions/> [<https://perma.cc/TV93-STBW>]; *Overview*, NONHUMAN RIGHTS PROJECT, <https://www.nonhumanrights.org/litigation/> [<https://perma.cc/7DMX-F8SX>].

¹⁶¹ *Litigation*, NONHUMAN RIGHTS PROJECT, <https://www.nonhumanrights.org/litigation/> [<https://perma.cc/7DMX-F8SX>].

¹⁶² *Id.*

recognizes animal rights and raises awareness of the significance and legal basis for animal rights through education.¹⁶³

The NhRP has experienced significant successes through its efforts. In the case of *Nonhuman Rights Project, Inc. v. Stanley*,¹⁶⁴ Justice Barbara Jaffe of the New York County Supreme Court ordered the Respondents to show cause as to why an order should not be made for the release and transfer to an animal sanctuary of the chimpanzees Hercules and Leo, who were being used as research subjects. This order made Hercules and Leo the first nonhumans in history to be granted a habeas corpus hearing to determine whether their imprisonment was lawful.¹⁶⁵ Further, in her 2015 ruling, Justice Jaffe determined that persons (such as the NhRP) have standing to bring cases on behalf of animals without alleging any injury to human interests.¹⁶⁶ This constituted a significant achievement because standing is a fundamental precondition necessary to receive any protection from the law.¹⁶⁷ Subsequently, in proceedings brought on behalf of the elephant named Happy, the Honorable Tracey A. Bannister of the Orleans County Supreme Court issued an order to show cause to determine the legality of Happy's imprisonment at the Bronx Zoo.¹⁶⁸ This made Happy the first elephant to be granted a habeas corpus hearing, as well as the second time in the United States that an animal had been granted such a hearing.

In separate proceedings on behalf of the chimpanzee, Tommy, Judge Eugene M. Fahey of the New York Court of Appeals expressed views that were sympathetic to the attribution of rights to some animals. He stated that “[t]he issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it.”¹⁶⁹ While Judge Fahey's comments are not legally binding, they do speak to a willingness on the part of at least some members of the legal community to engage in a discussion regarding the potential attribution of rights to animals.

¹⁶³ *Mission*, NONHUMAN RIGHTS PROJECT, [https://www.nonhumanrights.org/\[https://perma.cc/3PEU-AS9X\]](https://www.nonhumanrights.org/[https://perma.cc/3PEU-AS9X]).

¹⁶⁴ *Nonhuman Rights Project, Inc., ex rel. Hercules v. Stanley*, 49 Misc.3d 746, 748 (N.Y. Sup. Ct. 2015).

¹⁶⁵ *Clients, Hercules and Leo (Chimpanzees)*, NONHUMAN RIGHTS PROJECT, [https://www.nonhumanrights.org/hercules-leo/\[https://perma.cc/RF7J-F7X3\]](https://www.nonhumanrights.org/hercules-leo/[https://perma.cc/RF7J-F7X3]).

¹⁶⁶ *Stanley*, 49 Misc.3d at 757.

¹⁶⁷ *Animals and Standing to Sue*, INT'L SOC'Y FOR ANIMAL RIGHTS, [https://isaronline.org/animals-and-standing-to-sue/\[https://perma.cc/Y3EH-5Y7W\]](https://isaronline.org/animals-and-standing-to-sue/[https://perma.cc/Y3EH-5Y7W]).

¹⁶⁸ *Client, Happy (Elephant)*, NONHUMAN RIGHTS PROJECT, [https://www.nonhumanrights.org/client-happy/\[https://perma.cc/Y53M-5CH9\]](https://www.nonhumanrights.org/client-happy/[https://perma.cc/Y53M-5CH9]).

¹⁶⁹ *Nonhuman Rights Project, Inc., ex rel. Tommy v. Lavery*, 100 N.E.3d 846, 849 (N.Y. 2018) (Fahey, J., concurring).

2. *Recognition of Animal Rights in Argentina*

The NhRP has also had a significant impact outside of the United States. In 2016 in Argentina, as a result of litigation modelled on that of the NhRP, Judge María Alejandra Mauricio ruled that a captive chimpanzee named Cecilia was a “non-human legal person” and had “inherent rights.”¹⁷⁰ This made Cecilia the first animal in the world to gain legal personhood and have legally recognized rights.¹⁷¹ Judge Mendoza explained in her judgment that the ruling recognized and affirmed that primates are nonhuman legal persons that have fundamental rights “that should be studied and listed by state authorities, a task that exceeds the jurisdictional scope.”¹⁷² Further, she stated:

This is not about granting [animals] the same rights humans have, it is about accepting and understanding once and for all that they are living sentient beings, with legal personhood and that among other rights; they are assisted by the fundamental right to be born, to live, grow and die in the proper environment for their species.¹⁷³

This was a very significant ruling that potentially sets a precedent for animal rights gains for other animals in Argentina and beyond.

3. *Recognition of Animal Rights in Switzerland*

Recently, Swiss courts have also begun to talk about animal rights. In a decision handed down on January 15, 2019, the Cantonal Constitutional Court ruled that an initiative that aims to grant primates constitutional rights to life and bodily and mental integrity was valid and is required to be submitted to people in Basel-Stadt for a vote.¹⁷⁴ While the decision is subject to appeal, if the vote proceeds it will constitute the first democratic vote on whether animals should have rights.¹⁷⁵

¹⁷⁰ *Media Release: The NhRP Praises Argentine Court’s Recognition of Captive Chimpanzee’s Legal Personhood and Rights*, NONHUMAN RIGHTS PROJECT, <https://www.nonhumanrights.org/media-center/12-5-16-media-release-nhrp-praises-argentine-court-on-legal-personhood-for-chimpanzee/> [https://perma.cc/6KA5-T9W8].

¹⁷¹ *Frequently Asked Questions*, *supra* note 160.

¹⁷² *Presented by A.F.A.D.A. About the Chimpanzee “Cecilia” – Non Human Individual*, NONHUMAN RIGHTS PROJECT (Nov. 3, 2016), https://www.nonhumanrights.org/content/uploads/2016/12/Chimpanzee-Cecilia_translation-FINAL-for-website.pdf [https://perma.cc/CVR6-T5CS].

¹⁷³ *Id.*

¹⁷⁴ Raffael Fasel & Charlotte E. Blattner, *Swiss Court Rules Citizens Allowed to Vote on Primate Rights*, NONHUMAN RIGHTS PROJECT: NONHUMAN RIGHTS BLOG (Mar. 22, 2019), <https://www.nonhumanrights.org/blog/citizens-allowed-to-vote-on-primate-rights/> [https://perma.cc/Q3A3-LWM2].

¹⁷⁵ *Id.*

4. *Recognition of Animal Rights in India*

Courts in India seem to be prepared to recognize rights for animals. In *Animal Welfare Board of India v. Nagaraja*,¹⁷⁶ the supreme court considered whether events relating to “Jallikattu” and bullock-cart races conducted in the states of Tamil Nadu and Maharashtra were violations of provisions of The Prevention of Cruelty to Animals Act, No. 59 of 1960 (PCA Act), read with provisions of the Constitution of India.¹⁷⁷ The court stated that the imposition of obligations on persons having charge of animals in the PCA Act “confer[red] corresponding rights on animals.”¹⁷⁸ It indicated that “[a]ll living creatures have inherent dignity and a right to live peacefully,” and have the right to have their well-being protected.¹⁷⁹ It also noted that while there remains no international agreement relating to the protection of animals, there has been an observable trend towards greater recognition of nature—including animal—rights.¹⁸⁰ Consequently, “every species has an inherent right to live and shall be protected by law, subject to the exception provided out of necessity. Animal [sic] has also honour and dignity which cannot be arbitrarily deprived of and its rights and privacy have to be respected and protected from unlawful attacks.”¹⁸¹

Additionally, the court in *Nagaraja* indicated that rights granted to animals under the PCA Act must be read in conjunction with articles 51A(g)–(h) of the Constitution of India,¹⁸² which provides:

51A. Fundamental Duties.

It shall be the duty of every citizen of India —

....

(g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;

(h) to develop the scientific temper, humanism and the spirit of inquiry and reform....¹⁸³

Article 21 of the Constitution of India provides protection for “life,” and the court indicated that life includes animal life and “means something more than mere survival or existence or instrumental value for human-beings, but to lead a life with some intrinsic worth, honor,

¹⁷⁶ Sonia Shad, *Indian High Court Recognizes Nonhuman Animals as Legal Entities*, NONHUMAN RIGHTS PROJECT: NONHUMAN RIGHTS BLOG (July 10, 2019), <https://www.nonhumanrights.org/blog/punjab-haryana-animal-rights/> [<https://perma.cc/QES2-9XSB>].

¹⁷⁷ *Welfare Board of India v. Nagaraja*, (2014) 7 SCC 547, at 29 (India).

¹⁷⁸ *Id.* at 27.

¹⁷⁹ *Id.* at 28.

¹⁸⁰ *Id.* at 33.

¹⁸¹ *Id.* at 35.

¹⁸² *Id.* at 36.

¹⁸³ INDIA CONST. art. 51A, §§ (g), (h).

and dignity.”¹⁸⁴ Further, the rights protected under sections 3 and 11 of the PCA Act include the right to live in a healthy and clean atmosphere, to be protected from humans against the infliction of unnecessary pain or suffering, to food and shelter, and to dignity and fair treatment.¹⁸⁵ Moreover, the “five freedoms” found in chapter 7.1.2 of the guidelines of the World Organisation for Animal Health are to be read into sections 3 and 11 of the PCA Act:

- (i) freedom from hunger, thirst and malnutrition;
- (ii) freedom from fear and distress;
- (iii) freedom from physical and thermal discomfort;
- (iv) freedom from pain, injury and disease; and
- (v) freedom to express normal patterns of behaviour.¹⁸⁶

While these five freedoms were discussed above as welfare rather than rights protections, Indian law has gone well beyond traditional welfare protections and has started to transition toward rights for animals. The case of *Narayan Dutt Bhatt* concerned the treatment of horses that were being used to transport loads over the border of India and Nepal.¹⁸⁷ Allegations were made that the conditions experienced by the horses were cruel in that the loads were very heavy, the horses lacked adequate shelter and, in some circumstances, were abandoned.¹⁸⁸ The parties agreed to broaden the scope of the issues to be decided by the court, as it was considered in the public interest to do so.¹⁸⁹ In particular, the court considered the question of whether legal personhood might be extended to animals, with legal personality generally being a prerequisite for the attribution of rights.¹⁹⁰

In the course of its judgment in *Narayan Dutt Bhatt*, the court emphasized that the concept of legal personhood is a legal fiction.¹⁹¹ In other words, it is up to humans to decide what does and does not count under the law, and legal personality is the way in which law makes something count. The court identified that there is precedent for a “gradual extension” of legal personality to all human beings,¹⁹² as various groups, including children and people with disabilities, did not enjoy such rights in the past.¹⁹³ While the attribution of rights to animals may

¹⁸⁴ Welfare Board of India v. Nagaraja, (2014) 7 SCC 547, at 37 (India).

¹⁸⁵ *Id.* at 38.

¹⁸⁶ *Id.* at 35, 42–43.

¹⁸⁷ *Narayan Dutt Bhatt v. Union of India and Others*, Writ Petition (PIL) No. 43 of 2014, 99A (India).

¹⁸⁸ *Id.* ¶ 7.

¹⁸⁹ *Id.* ¶ 8.

¹⁹⁰ *Id.* ¶ 12.

¹⁹¹ *Id.* ¶ 92 (quoting Jane Nosworthy, *The Koko Dilemma: A Challenge to Legal Personality*, 2 S. CROSS U. L. REV. 1, 10 (1998)).

¹⁹² *Id.*

¹⁹³ *Id.*

seem fanciful, it is likely that the extension of rights to new groups always appears fanciful before it occurs.¹⁹⁴ Further, legal personality has been granted to nonhuman entities in the past, including corporations¹⁹⁵ and deities.¹⁹⁶ Where legal persons, such as children, are not able to exercise their legal rights, the law operates to empower another person to exercise those rights on their behalf.¹⁹⁷ Thus, having considered the relevant authorities, the court held that animals, birds, and fish are all legal persons with equal rights to human beings, and that all human beings have standing to seek the enforcement of animal rights:

The entire animal kingdom including avian and aquatic are declared as *legal entities* having a distinct *persona* with *corresponding rights, duties and liabilities* of a living person. All the citizens throughout the State of Uttarakhand are hereby declared *persons in loco parentis* as the human face for the welfare/protection of animals.¹⁹⁸

The “corresponding rights” approach taken by the court includes three basic ideas. First, it involves attributing legal personality to animals. This means that, like human persons and corporations, animals are legal people capable of suing and being sued, owning property, and entering into contracts. Second, it requires legal recognition of animal rights, which will correspond to those capable of being held by humans. Given that fundamental human rights are recognized in law, animals should also be entitled to the enjoyment of fundamental rights. Finally, humans are empowered to act as legal representatives for the rights, duties, and liabilities of animals.

IV. WHY THE CASE FOR ANIMAL RIGHTS IS MORE PERSUASIVE THAN THE CASE FOR INCREASED WELFARE PROTECTIONS

The debate regarding whether animals should be granted increased welfare protections or attributed rights has continued for several decades. This section of the article looks at the reasons why animal rights arguments are more compelling than those for increased animal welfare protections. In this respect, it considers the failure of animal welfare laws to adequately protect animals’ interests. It then proceeds to look at the importance of legal rights when compared with legislative welfare protections and the principles that might inform a rights-based approach to animals by reference to the experience of human rights.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* ¶ 72 (quoting AIR 2000 SC 1421).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* ¶ 99(A) (emphasis added).

A. *Failure of Animal Welfare Laws*

Most countries have enacted laws that seek to protect the welfare of animals. For example, as identified earlier in this article, the United States was the first country to pass laws designed to protect animals from cruelty and negligence.¹⁹⁹ In contemporary United States laws, the federal *Animal Welfare Act* provides for the care of some warm-blooded animals.²⁰⁰ Further, the *Humane Methods of Slaughter Act 1958* aims to protect cattle, calves, horses, mules, sheep, and swine from being slaughtered in an inhumane manner.²⁰¹ At the state level, all fifty states have enacted anti-cruelty legislation, although the scope and content of the legislation varies significantly between jurisdictions.²⁰²

Despite the commonality of animal welfare laws, animals not only continue to be treated cruelly by humans, but the extent to which humans exploit them has grown.²⁰³ In the context of the agricultural use of animals, the emergence of factory farming methods of production has resulted in an increased use of cruel practices, including de-beaking, branding, cropping, and castration, as well as increased confinement and removal of natural light for animals.²⁰⁴ Similarly, in sports, animals, including horses and greyhounds, are increasingly subjected to overbreeding, poor conditions, and massacres.²⁰⁵ Even wildlife is not spared; each year, millions of animals are killed as “pests,” including rabbits, deer, and squirrels.²⁰⁶

There are many reasons that animal welfare laws have failed to prevent cruelty to animals. One reason is that many practices that are cruel to animals actually remain within the law, as a result of common

¹⁹⁹ See LEAVITT & HALVERSON, *supra* note 139, at 1.

²⁰⁰ 7 U.S.C. §§ 2131-59.

²⁰¹ 7 U.S.C. §§ 1901-07.

²⁰² *USA*, *supra* note 141.

²⁰³ See generally MIRKO BAGARIC & KEITH AKERS, *HUMANISING ANIMALS: CIVILISING PEOPLE* (2012).

²⁰⁴ See SONIA S. WAISMAN ET AL., *ANIMAL LAW: CASES AND MATERIALS* 408-10, 425, 429-30, 432, 436, 438-40, 443, 453 (5th ed. 2014); *Factory Farming: Misery for Animals*, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS (PETA), <https://www.peta.org/issues/animals-used-for-food/factory-farming/> [https://perma.cc/ES42-GT2U]; *Factory Farms*, AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY AGAINST ANIMALS (ASPCA), <http://www.aspca.org/animal-cruelty/farm-animal-welfare> [https://perma.cc/J7DG-8U4W].

²⁰⁵ *Horse Racing*, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS (PETA), <https://www.peta.org/issues/animals-in-entertainment/horse-racing-2/> [https://perma.cc/MAC4-D726]; *Greyhound Racing: Death in the Fast Lane*, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS (PETA), <http://www.peta.org/issues/animals-in-entertainment/animals-used-entertainment-factsheets/greyhound-racing-death-fast-lane/> [https://perma.cc/J5BM-BEK4].

²⁰⁶ *Wildlife*, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS (PETA), <https://www.peta.org/issues/wildlife/> [https://perma.cc/B45R-WRQX].

exclusions from anti-cruelty legislation.²⁰⁷ For example, animals used for agriculture are often excluded from the scope of anti-cruelty legislation.²⁰⁸ Another issue is the enforcement of anti-cruelty legislation, which is frequently delegated to underfunded charitable organizations.²⁰⁹ However, while it could be argued that improvements to animal welfare laws might resolve these problems, they would still fail to address the fundamental problem with animal welfare laws. At its heart, such laws always relegate consideration of animal interests below consideration of any rights or interests of humans.²¹⁰ For example, while animal welfare legislation might prohibit causing animals “unnecessary” suffering, suffering may be considered “necessary” where the practices that cause it would reduce the costs involved with the production of animals for food.²¹¹ This suffering could also be considered necessary where such practices may contribute to scientific research outcomes,²¹² or even where they contribute to human entertainment.²¹³

B. Importance of Rights

Academic literature related to the importance of rights is helpful in understanding how welfare standards have been insufficient to protect animals. Rights are of particular significance in the context of animal issues and provide an important tool for advocacy.²¹⁴ One of the key reasons for granting rights is to protect marginalized and persecuted groups.²¹⁵ In this respect, the international legal human rights regime

²⁰⁷ See Pamela D. Frasch, *State Animal Anti-Cruelty Statutes: An Overview*, ANIMAL LEGAL & HIST. CTR., <https://www.animallaw.info/article/state-animal-anti-cruelty-statutes-overview-0> [https://perma.cc/W4HK-M5CS]; see also *Laws That Protect Animals*, ANIMAL LEGAL DEF. FUND, <https://aldf.org/article/laws-that-protect-animals/> [https://perma.cc/L84R-RHR9].

²⁰⁸ Frasch, *supra* note 207.

²⁰⁹ See, e.g., Kendra Coulter, *Why Animal Cruelty Should Become a Matter for Dedicated Police Units*, THE CONVERSATION (Mar. 26, 2019), <https://theconversation.com/why-animal-cruelty-should-become-a-matter-for-dedicated-police-units-114158> [https://perma.cc/RMQ4-X3BH].

²¹⁰ Rebecca Dresser, *Respecting and Protecting Nonhuman Animals: Regan's The Case for Animal Rights*, 9 AM. B. FOUND. RES. J. 831, 831 (1984).

²¹¹ *Frequently Asked Questions (FAQ)*, ANIMALS AUSTL., <https://www.makeitpossible.com/facts/frequently-asked-questions.php> [https://perma.cc/MD38-N664].

²¹² Ingfei Chen, *How Much Pain Should Animals Endure for Science?*, THE ATLANTIC (June 8, 2018), <https://www.theatlantic.com/science/archive/2018/06/how-much-pain-should-animals-endure-for-science/562268/> [https://perma.cc/VPG9-XN5Y].

²¹³ *Animals in Entertainment*, ANIMAL LEGAL DEF. FUND, <https://aldf.org/issue/animals-in-entertainment/> [https://perma.cc/WZ4K-VMXX].

²¹⁴ Michael Freeman, *Why It Remains Important to Take Children's Rights Seriously*, 15 INT'L J. CHILDREN'S RIGHTS 5, 8 (2007).

²¹⁵ *Id.*; see also Navanethem Pillay et al., *What Are Human Rights For? Three Personal Reflections*, in INT'L HUMAN RIGHTS LAW 4 (Daniel Moeckli et al. eds., 2010).

stemmed from a desire to prevent the kinds of atrocities perpetrated by the Nazi regime on Jewish, gypsy, disabled, and homosexual populations, among others.²¹⁶ The attribution of rights to people belonging to marginalized and persecuted groups enables more effective advocacy on their behalf. Advocates are able to argue for improved conditions or better treatment on the basis that rights-holders are *entitled* to such things. Where legal processes are ineffective to enforce rights, the processes of “investigation, reporting and advocacy” enable advocates to pressure governments.²¹⁷ Further, drawing on a rights discourse assists advocates to shape public morality and thus further contribute to political pressure on governments.²¹⁸ In contrast, advocates arguing for improved welfare conditions are positioned to *request* such improvements, because there is no entitlement. Whether improvements are made, then, depends on the benevolence of the relevant decision-makers.²¹⁹

The attribution of legal rights also legitimizes the claims made by rights-holders and their advocates.²²⁰ Laws provide an agreed set of rules through which conduct is regulated. When the law grants rights, it validates claims based on those rights. While a similar argument may be presented in relation to welfare laws, rights provide a stronger claim. For example, legislation may provide that people are prohibited from killing an animal, or it may provide that animals have a right to life. The culling of rabbits as “pests” would, on its face, breach the prohibition on killing the rabbits but also deny the rabbits their right to life. It is a stronger position to claim a violation of the right than failure to adhere to the welfare standard because the focus is on the entitlement of the rabbits to their lives²²¹ rather than on the conduct of people.

Recognition of fundamental rights also provides a framework through which legislation can be analyzed and potentially amended to better respect rights. In the context of human rights, the United Kingdom, and both Victoria and the Australian Capital Territory in Australia, have enacted human rights legislation.²²² These Acts require courts to interpret legislation, as far as it is possible to do so, in a way that is compatible with human rights.²²³ They also require written statements to be prepared in relation to proposed legislation which

²¹⁶ Pillay et al., *supra* note 215, at 3.

²¹⁷ *Id.* at 7.

²¹⁸ *Id.* at 8.

²¹⁹ Freeman, *supra* note 214, at 9; Pillay et al., *supra* note 215, at 4.

²²⁰ Freeman, *supra* note 214, at 8.

²²¹ *Id.* at 9.

²²² *See, e.g.*, Human Rights Act, 1998, c. 42 (U.K.) [hereinafter UK Human Rights Act]; *Charter of Human Rights and Responsibilities Act 2006* (Vic) [hereinafter *Victorian Charter*]; Human Rights Act, 2004 (ACT) [hereinafter *ACT Human Rights Act*].

²²³ UK Human Rights Act, *supra* note 222, § 3(1); *Victorian Charter*, *supra* note 222, § 32(1); *ACT Human Rights Act*, *supra* note 222, § 30.

outline the extent to which that legislation is compatible with human rights.²²⁴ Thus, they require parliaments to consciously consider whether proposed legislation might infringe human rights before it is passed. If similar legislation were introduced in relation to animal rights, there would likely be greater legislative recognition and protection of animal rights.

Further, as alluded to above in the rabbit culling example, rights are important in that they shift the focus to the rights holder rather than the conduct of people involved in rights violations.²²⁵ This is important because it allows human rights holders to feel that their rights are recognized and taken seriously, and that their experience of having their rights violated is given primacy.²²⁶ In the context of the mass violation of human rights during the Holocaust, for example, use of a rights-based approach enables a focus on the experience of those who suffered at that time, rather than the experience of the perpetrators. In the context of animals, animal welfare laws tend to concentrate on the conduct of the person alleged to have infringed the law, in that “the value of animal life takes on a solely human orientated assessment.”²²⁷ The experience of the affected animals tends to be of little importance. While refocusing attention on the experience of the harmed animals may not be of relevance to the animals themselves, it does communicate to humans that animals hold intrinsic value.

One further strength of rights is that they recognize the agency of those to whom they are attributed.²²⁸ In other words, rights-holders are recognized as having legitimate interests and are empowered to make decisions in relation to matters that concern them.²²⁹ This characteristic of agency may appear to be an obstacle to the attribution of rights to animals as it may be difficult to imagine animals having the autonomy to make their own decisions. However, in his book, *Fear of the Animal Planet: The Hidden History of Animal Resistance*, historian Jason Hribal thoroughly debunks the notion of animals lacking agency, documenting countless examples of animals resisting oppression.²³⁰ In addition, as in the case of infants and the severely disabled, animals to whom rights are attributed would be able to exercise agency through a legal guardian. In contrast, legislative welfare protections for animals do not permit the exercise of agency. Rather, these protections seek to regulate the relationships between people and animals, just as the law

²²⁴ UK Human Rights Act, *supra* note 222, § 19; *Victorian Charter*, *supra* note 222, § 28; *ACT Human Rights Act*, *supra* note 222, § 37.

²²⁵ Cassandra Goldie, *Rights Versus Welfare*, 28 ALTERNATIVE L.J. 132, 133 (2003).

²²⁶ *Id.*

²²⁷ Seymour, *supra* note 80, at 184.

²²⁸ Freeman, *supra* note 214, at 8.

²²⁹ *Id.*

²³⁰ JASON HRIBAL, *FEAR OF THE ANIMAL PLANET: THE HIDDEN HISTORY OF ANIMAL RESISTANCE* (2010).

regulates the relationship between people and other forms of property. As lawyer Steven White explains, the “current legal construction of domestic animals” within an animal welfare framework is “as objects of absolute ownership” rather than “guardianship.”²³¹

C. Principles that Inform Rights-Based Approaches

An additional reason why the case for animal rights is more compelling than the case for increased animal welfare protection is the utility of the principles that generally inform rights-based approaches. Particular principles characterize a human rights-based approach. While there is no *single* human rights-based approach, there are principles that inform all such approaches which may be relevant to animal issues, and that are centered on the attribution of rights. These principles include recognition of dignity, accountability, and participation.²³² If animal rights were recognized, these principles potentially hold great benefits for animals.

One of the key principles underpinning a human rights-based approach is that of dignity. While the concept of dignity can be “indeterminate” and “complex,”²³³ it broadly refers to some inherent value possessed by human beings, which should be respected by others.²³⁴ The major human rights documents refer to dignity as the foundation of human rights laws. Thus, according to Freeman, “[t]o accord rights is to respect dignity.”²³⁵ When considering the potential attribution of rights to animals, it is worth considering the applicability of the concept of dignity; if dignity is the foundation of human rights, perhaps it might also function as the foundation of animal rights.²³⁶ Analysis of the meaning of dignity indicates that it is not necessarily specific to humans and may extend to (or beyond) animals.²³⁷ Further, using the term “dignity” in relation to animals would send a message that animals do have intrinsic value and should not continue to be viewed as tools for human use.²³⁸

Another fundamental principle of a human rights-based approach is accountability. While in the context of humans, a welfare approach

²³¹ Steven White, *Companion Animals: Members of the Family or Legally Discarded Objects?*, 32 U.N.S.W. L.J. 852, 853 (2009).

²³² John Tobin, *Understanding a Human Rights Based Approach to Matters Involving Children: Conceptual Foundations and Strategic Considerations*, in *THE HUMAN RIGHTS OF CHILDREN: FROM VISIONS TO IMPLEMENTATION* 69–74 (Antonella Invernizzi & Jane Williams eds., 2011).

²³³ Samantha Besson, *Justifications*, in *INTERNATIONAL HUMAN RIGHTS LAW* 46 (Daniel Moeckli et al. eds., 2d ed., 2014).

²³⁴ Kotzmann & Seery, *supra* note 132, at 25.

²³⁵ Freeman, *supra* note 214, at 7.

²³⁶ Reed E. Loder, *Animal Dignity*, 23 ANIMAL L. REV. 1, 1 (2016).

²³⁷ *Id.*; see also Kotzmann & Seery, *supra* note 132, at 37.

²³⁸ Loder, *supra* note 236, at 63.

involves the provision of discretionary benefits as a result of government policy, a human rights-based approach places *obligations* on the government to ensure people's rights are enjoyed.²³⁹ Thus, people are entitled to the enjoyment of their rights and are able, through a variety of enforcement mechanisms, to hold governments accountable when they fail to fulfill these obligations. One of the key benefits of a rights-based approach to the legal regulation of animals, therefore, is the change in perception that should follow. Rather than positioning animals to rely on the goodwill and intentions of the government, animals (and their human guardians) would be able to claim rights as their entitlement. This would strengthen advocacy efforts in the short-term and should also lead to positive cultural change in the longer term.

Participation is another characteristic of a human rights-based approach.²⁴⁰ Where people enjoy rights, they are entitled to participate in decisions that may impact them. Students, for example, should be involved in decisions concerning pedagogy, as this will impact their enjoyment of the right to education.²⁴¹ Participation is important because what particular rights-holders need should not be assumed.²⁴² As a result of the rights-holders' participation, decisions should better meet the needs of the rights-holder. If animals were granted rights, then they should also be able to participate in decisions that affect them. While direct participation would not be possible, legal guardians could participate on behalf of animals.²⁴³

D. Obstacles to the Attribution of Rights to Animals

Despite the failure of welfare protections to safeguard the interests of animals, and the merits of a rights-based approach to animal issues, there are still people that consider the concept of animal rights absurd.²⁴⁴ This section of the article examines the obstacles to the recognition of animal rights. It begins by looking at the allegation that granting animals rights would be absurd, as well as the possibility that rights language itself is clouding the potential benefits of recognizing animal rights. It also looks at some obstacles that were overcome in the context of human rights and how those obstacles may be overcome in granting animal rights, including that animals are currently treated as property in the law, that animals lack the capacity to exercise rights, and that recognition of animal rights may conflict with human rights.

²³⁹ Goldie, *supra* note 225, at 134.

²⁴⁰ Tobin, *supra* note 232, at 71–72.

²⁴¹ JANE KOTZMANN, *THE HUMAN RIGHTS-BASED APPROACH TO HIGHER EDUCATION: WHY HUMAN RIGHTS NORMS SHOULD GUIDE HIGHER EDUCATION LAW AND POLICY* 79–80 (2018).

²⁴² Goldie, *supra* note 225, at 133.

²⁴³ Seymour, *supra* note 80, at 185.

²⁴⁴ Elisa Aaltola, *Animal Ethics and the Argument from Absurdity*, 19 ENVTL. VALUES 79 (2010).

1. *The “Absurdness” of Animal Rights*

The concept of animal rights is frequently described as absurd. In general, animal rights critics contend that human beings are significantly different from all other animals and that they should, therefore, be uniquely entitled to legal rights. In particular, human attributes, including the ability to make rational choices and exercise autonomy, have been identified as being critical to enable a bearer of legal rights to exercise those rights. Given that animals do not have these attributes, some argue that they cannot be granted legal rights. On occasion, critics also point to the absurdity of granting particular human rights to animals, including the right to vote²⁴⁵ or the right to work.

Many arguments have been advanced to counter these claims. In particular, following the argument from marginal cases, denying rights to animals on the basis that they lack attributes such as rationality or autonomy means that rights should also be denied to human beings who lack such attributes. In other words, the reasoning behind denying animals rights should also compel us to deny rights to severely mentally handicapped human beings and very young children. Such an outcome is unlikely to be accepted by the general public.

2. *Rights Language Itself as a Barrier*

Rights language itself may act as a barrier to the acceptance of the concept of animal rights. Reference to rights in contemporary society has become a common means to advance human claims to protection. In this respect, Sumner asserts that “there is virtually no area of public controversy in which rights are not to be found on at least one side of the question—and generally on both.”²⁴⁶ Yet the general understanding of human rights—and thus rights more broadly—has developed in the context of *human* conflicts. For example, international laws that enshrine human rights were enacted against the background of atrocities committed against human beings during World War II.²⁴⁷ The concept of rights has become intimately connected with human beings,²⁴⁸ and the idea of extending rights to nonhuman animals may seem nonsensical to some people.

²⁴⁵ Simon Jenkins, *Votes for Dogs Appeals, but Giving Animals Rights Is Moral Chaos*, THE GUARDIAN (Mar. 18, 2010), <https://www.theguardian.com/commentisfree/2010/mar/18/animal-rights-moral-chaos> [https://perma.cc/L75E-37VD].

²⁴⁶ L. W. SUMNER, THE MORAL FOUNDATION OF RIGHTS 1 (1987).

²⁴⁷ Ed Bates, *History*, in INTERNATIONAL HUMAN RIGHTS LAW 15, 28 (Daniel Moeckli et al. eds., 2d ed. 2014).

²⁴⁸ Ngaire Naffine, *Legal Personality and the Natural World: On the Persistence of the Human Measure of Value*, 3 J. HUM. RTS. & ENV'T 68 (2012); Martha C. Nussbaum, *Capabilities, Entitlements, Rights: Supplementation and Critique*, 12 J. HUMAN. DEV. & CAPABILITIES 23, 25 (2011).

To determine whether this is a legitimate criticism, reference needs to be made to the definition of a right. While this may seem straightforward, following Hohfeld's work regarding rights,²⁴⁹ numerous definitions of right have been put forward. For example, according to Kamenka, "[r]ights are claims that have achieved a special kind of endorsement or success"²⁵⁰ while Campbell asserts that "[t]he standard view is that rights are *moral* entitlements."²⁵¹ Similarly, McCloskey asserts that rights are simply entitlements²⁵² and according to Feinberg, rights are "valid claim[s]."²⁵³ Some definitions of rights do include an aspect of humanness. For example, according to Kleinig, rights are "those minimum conditions under which *human beings* can flourish and . . . which ought to be secured for them."²⁵⁴ Yet, such definitions provide no reason for the exclusion of other beings from rights.

When considering the various definitions, two basic aspects of rights commonly appear. First, rights are *claims* that can be made. In other words, in asserting a right, the rights-holder is making some form of a request. Second, there is *validity* to the claim. This validity can be expressed using varying language such as "entitlement" or "endorsement." Considering rights as legitimate claims, it is clear that there is nothing in the definition of a right that prevents rights from being attributed to animals.

3. *Legal Status of Animals as Property*

As previously identified, animals are generally treated as property under the law,²⁵⁵ and property does not have rights.²⁵⁶ While this is the case, it is not a true obstacle to the attribution of rights to animals as the "body of entities that have been granted legal personhood has continually expanded."²⁵⁷ For example, laws have, in the past, generally

²⁴⁹ W. N. Hohfeld identified four categories of rights: claim-rights, privileges, powers, and immunities. According to Hohfeld, only a claim-right corresponds with the correct meaning of the term right. WESLEY N. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS* 10, 38 (W. W. Cook ed., 1919).

²⁵⁰ Eugene Kamenka, *Human Rights: Peoples' Rights*, in *THE RIGHTS OF PEOPLES* 127, 127 (James Crawford ed., 1988).

²⁵¹ TOM D. CAMPBELL, *THE LEGAL THEORY OF ETHICAL POSITIVISM* 164 (1996).

²⁵² H. J. McCloskey, *Rights: Some Conceptual Issues*, 54 *AUSTL. J. PHIL.* 99, 115 (1976).

²⁵³ Joel Feinberg, *The Nature and Value of Rights*, 4 *J. VALUE INQUIRY* 614, 621-22 (1970) [<https://perma.cc/BZ6F-CPC2>].

²⁵⁴ John Kleinig, *Human Rights, Legal Rights and Social Change*, in *HUMAN RIGHTS* 44-45 (Eugene Kamenka & Alice E. Tay eds., 1978).

²⁵⁵ Ray, *supra* note 80, at 235; Seymour, *supra* note 80, at 183.

²⁵⁶ Seymour, *supra* note 80, at 183.

²⁵⁷ *Id.* at 184.

treated children primarily as property.²⁵⁸ Indeed, the property status of children continued up until the second half of the 20th century. Attributing rights to children has been a very recent development.²⁵⁹ Similarly, institutionalized slavery constituted “a system of property ownership.”²⁶⁰ The law in these contexts operated as part of the problem by marginalizing vulnerable groups and legitimizing the unethical treatment of them.²⁶¹ Changing the law to recognize especially vulnerable groups—such as children and animals—as legal persons and rights-holders would reduce the likelihood that they will be exploited or mistreated because they, or at least their guardians, will be empowered to use the law in cases where their rights are violated.

4. *Capacity of Animals to Exercise Rights*

Similarly, some claim that animals cannot be attributed rights because they do not have the capacity to exercise rights or to recognize and respect others’ rights.²⁶² In particular, rights that are strongly premised on human capacities, such as the right to vote, are pointed to as highlighting the absurdity of recognizing animal rights.²⁶³ Further, rights are said to place obligations or duties on others,²⁶⁴ and the inability of animals to respect rights and fulfill rights-related duties is also used to stand against the recognition of animal rights.²⁶⁵

The capacity argument has also been made in the case against recognition of children’s rights.²⁶⁶ Freeman states that “those who argue against children’s rights . . . argue that children are just not qualified to

²⁵⁸ HANITA KOSHER ET AL., CHILDREN’S RIGHTS AND SOCIAL WORK 9 (2016); S. N. Hart, *From Property to Person Status: Historical Perspective on Children’s Rights*, 46 AM. PSYCHOLOGIST 53, 53 (1991).

²⁵⁹ KOSHER ET AL., *supra* note 258, at 12–14; Hart, *supra* note 258, at 53.

²⁶⁰ *Gregson v. Gilbert* (1783) 99 Eng. Rep. 629, 630 (KB); *Pearne v. Lisle* (1749) 27 Eng. Rep. 47, 48 (KB); Paul Finkelman, *Slavery in the United States: Persons or Property?*, in THE LEGAL UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO THE CONTEMPORARY 105, 107 (Jean Allain ed., 2012); Seymour, *supra* note 80, at 185.

²⁶¹ Seymour, *supra* note 80, at 185.

²⁶² Roger Scruton, *Animal Rights*, CITY J. <https://www.city-journal.org/html/animal-rights-11955.html> [<https://perma.cc/K2M4-DLNC>]; Geordie Duckler, *Two Major Flaws of the Animal Rights Movement*, 14 ANIMAL L. 179, 187, 192–93 (2008).

²⁶³ Jenkins, *supra* note 245.

²⁶⁴ Clare McCausland, *The Five Freedoms of Animal Welfare Are Rights*, 27 J. AGRIC. & ENVTL. ETHICS 649, 654 (2014).

²⁶⁵ See Wesley Smith, *Animal Welfare Versus Animal Rights: A Reply to Matthew Scully*, NAT’L REV., (Mar. 4, 2010), <https://www.nationalreview.com/magazine/2010/03/22/animal-welfare-versus-animal-rights/> [<https://perma.cc/N3GG-FLXJ>]; Duckler, *supra* note 262, at 192–93.

²⁶⁶ MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS 10, 13–14 (2005); Onora O’Neill, *Children’s Rights and Children’s Lives*, 98 ETHICS 445, 463 (1988); Laura Purdy, *Why Children Shouldn’t Have Equal Rights*, 2 INT’L J. CHILD. RTS. 223, 227 (1994).

have rights; they lack the capacity to do so.²⁶⁷ The problem with the capacity argument, however, is that holding rights “becomes exclusive and exclusionary.”²⁶⁸ In other words, rights are only held by those deemed to have capacity. Conversely, those who are deemed to lack capacity, such as children or the mentally disabled, cannot hold rights and their rights claims “*need not be recognised*.”²⁶⁹ Clearly, this result runs counter to the purpose of human rights in the first place—to ensure the respect and recognition of people’s equality and dignity.²⁷⁰ Further, the capacity objection also suffers in that it “underestimates the competencies that children, even young children, have.”²⁷¹

Where the capacity objection is raised against the recognition of animal rights, the same answers outlined above may be made. Animals should be recognized as having moral value and dignity.²⁷² Denying them rights also operates to deny them these, as to grant rights is to recognize dignity.²⁷³ Further, animals do not lack capacity; they possess many capacities, some of which are similar to those that humans possess, and others that are not possessed by humans.²⁷⁴ Humans should be careful not to underestimate the competencies of animals. Where animals lack capacity to claim or exercise rights, they should be entitled, as children are, to have legal guardians act on their behalf.²⁷⁵ In the case of non-domesticated or “wild” animals, an animal advocacy body could be appointed as their guardian, similar to the case of the Whanganui River in Aotearoa (New Zealand), which has been recognized as a living entity, with its interests represented by the office of Te Pou Tupua.²⁷⁶ Further, like children, animals should be “deemed incapable of committing an offence.”²⁷⁷ Humans should not be relieved of their obligations to recognize and respect the rights of others merely because animals are incapable of exercising such restraint due to their nature. As Aysel Dogan points out, humans have the ability to make moral choices and thus “[w]e are morally obliged to observe the good of others whenever

²⁶⁷ Freeman, *supra* note 214, at 12.

²⁶⁸ K. H. Federle, *Rights Flow Downhill*, 2 INT’LJ. CHILD. RTS. 343, 344 (1994).

²⁶⁹ *Id.*

²⁷⁰ *See, e.g.*, G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

²⁷¹ Freeman, *supra* note 214, at 13.

²⁷² Kotzmann & Seery, *supra* note 132, at 1.

²⁷³ Freeman, *supra* note 214, at 7.

²⁷⁴ Jonathan Balcombe, *Animal Pleasure and its Moral Significance*, 118 APPLIED ANIMAL BEHAV. SCI. 208, 208-09 (2009).

²⁷⁵ Seymour, *supra* note 80, at 185.

²⁷⁶ Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (N.Z.); *New Zealand’s Whanganui River Granted Legal Status as a Person After 170-Year Battle*, ABC NEWS (Mar. 16, 2017), <https://www.abc.net.au/news/2017-03-16/nz-whanganui-river-gets-legal-status-as-person-after-170-years/8358434> [<https://perma.cc/EUQ5-DYX2>].

²⁷⁷ Seymour, *supra* note 80, at 186.

we are in a position to do so,” including in relation to the benefit of animals.²⁷⁸

5. *Conflict with People’s Interests*

Another argument that is made against the attribution of animal rights is that they might conflict with human rights and interests.²⁷⁹ It is argued that a legal system that recognizes human rights is not able to accommodate a concept of rights for animals.²⁸⁰ Further, others make the case that to attempt to recognize both human rights and animal rights would result in consequences that are either absurd or fearsome.²⁸¹

These same arguments have been made in relation to children’s rights.²⁸² The truth is that withholding rights from animals works in favor of humans (as withholding rights from children worked in favor of adults).²⁸³ However, like children,²⁸⁴ animals are particularly vulnerable relative to adult humans. Freeman says of children’s rights:

There are good reasons why the interests of children should rule . . . Children are especially vulnerable. They have fewer resources – material, psychological, relational – upon which to call in situations of adversity. They are usually blameless, and certainly did not ask to come into the world. For too long they have been regarded as objects of concern (sometimes, worse, as objects), rather than as persons, and even to-day they remain voiceless, even invisible, and it matters not that the dispute is about them.²⁸⁵

These same points may be made in relation to animals, perhaps even to a greater degree. Animals have no entitlement to resources. They are generally blameless and did not ask to come into the world, let alone be exploited by humans. They have generally been regarded by humans as “things” to be exploited for human needs and desires, and only recently have become objects of concern, despite evidence of their sentience and capacity for suffering. They are almost entirely voiceless, and disputes about them tend to center on human interests, and particularly economic concerns. Thus, animals need laws that will

²⁷⁸ Dogan, *supra* note 67.

²⁷⁹ David Schmammann & Lori Polacheck, *The Case Against Rights for Animals*, 22 BOS. C. ENVTL. AFF. L. REV. 747, 755, 760 (1995); R. L. Cupp, *Moving Beyond Animal Rights: A Legal/Contractualist Critique* 34 (Pepperdine Univ. Sch. of Law, Research Paper No. 2009/11, 2009). See Ward, *supra* note 10, at 69.

²⁸⁰ Schmammann & Polacheck, *supra* note 279, at 761.

²⁸¹ *Id.* at 760. See also Richard Posner, *Animal Rights*, 110 YALE L.J. 527, 534 (2000); Cupp, *supra* note 279, at 34.

²⁸² Freeman, *supra* note 214, at 16.

²⁸³ *Id.* at 7.

²⁸⁴ John Tobin, *Understanding Children’s Rights: A Vision Beyond Vulnerability*, 84 NORDIE J. INT’L L. 155, 155 (2019).

²⁸⁵ Freeman, *supra* note 214, at 16.

operate to protect them from human exploitation and cruelty. On occasion, these protections might undermine human interests, just as children's rights sometimes undermine the interests of adults.

E. The Benefits of Developing a Comprehensive and Coherent Framework for Animal Rights and Some Suggestions in this Respect

This section of the article explores the merits of developing a comprehensive framework for the attribution of rights to animals. While existing literature has begun to explore the question of what rights might be granted to animals and the practicalities of how such rights might operate, significant work remains to be done. Undertaking this work would have immense value for a number of reasons. In particular, shifting the scholarly discussion from the debate over rights versus welfare to “fleshing out of the specific rights to which justice entitles them”²⁸⁶ is likely to overcome some of the obstacles to animal rights identified above. It would also complement efforts by the Nonhuman Rights Project and similar bodies to secure legal rights for animals through the courts. In terms of the initial steps toward the development of an animal rights framework, some argue that in order to be persuasive, a framework should be based on animal sentience, and “must necessarily rely upon the pre-existing basic rights of human animals.”²⁸⁷

1. Animal Rights in the Literature

To date, scholarly discussion relating to the potential attribution of rights to animals has primarily focused on whether animals require legal rights or increased welfare protections. As Alex Bruce asserts, “[t]here are essentially two schools of thought concerning the welfare of animals in liberal democratic societies... ‘animal welfarism’ and ‘animal rights.’”²⁸⁸ For example, in “*The Animal Rights Debate: Abolition or Regulation?*” Gary Francione and Robert Garner debate whether animal use must be abolished through rights, or whether animal interests can be protected within contemporary legal frameworks.²⁸⁹ Similar commentary has included a perspective from renowned ethicist B. E.

²⁸⁶ Nonhuman Rights Project, *Letter #1 from the Front Lines of the Struggle for Nonhuman Rights: the First 50 Months*, MEDIUM (Jan. 29, 2018), <https://medium.com/@NonhumanRights/letter-1-from-the-front-lines-of-the-nonhuman-rights-projects-struggle-for-the-rights-of-nonhuman-b053b100af25> [hereinafter *Letter # 1 From the Front Lines*] [<https://perma.cc/4H2M-JXRB>].

²⁸⁷ *Id.*

²⁸⁸ BRUCE, *supra* note 134, at 48; see also R. Payne, *Animal Welfare, Animal Rights and the Path to Social Reform: One Movement's Struggle for Coherency in the Quest for Change*, 9 VA. J. SOC. POL'Y & L. 587, 593 (2002).

²⁸⁹ FRANCIONE & GARNER, *supra* note 19.

Rollin on animal rights versus welfare,²⁹⁰ and debates between Matthew Scully and Wesley J. Smith on the topic.²⁹¹ This focus on rights versus welfare has been a reasonable approach to take, given that the welfare paradigm remains the dominant approach to animal protection issues.

While the dominant focus in the literature has been on the welfare versus rights debate, some attempts have been made to give substance to a framework for animal rights that could underpin legal reform. Tom Regan's philosophical theory is one of the most prominent cases for animal rights, yet he has argued that legal rights are a separate matter.²⁹² Gary Francione has argued that animals need only one right, the right to not be the property of humans.²⁹³ Yet it would seem that in the case of human beings, the right to not be the property of humans has been insufficient, warranting the attribution of human rights. Accordingly, it is likely that recognizing an animal's right to not be the property of humans would be insufficient on its own to protect animal interests.

Some theorists go further in identifying specific rights to be attributed to animals. For example, James Rachels²⁹⁴ has argued that research animals should be recognized as entitled to both the right to not be tortured²⁹⁵ and the right to liberty.²⁹⁶ Martha Nussbaum asserts that "all sentient beings, at least, have entitlements to the basic conditions of a life according to the dignity of their species."²⁹⁷ Her capabilities approach provides some substance to the legal rights that might be accorded to animals, including the right to life, to bodily health, to bodily integrity, and so forth.²⁹⁸ Nevertheless, there remains a need to develop and give substance to the specific rights that should be accorded to animals, and the consequences of such recognition.

2. *The Pivotal Role of the Law for Animals*

As Nussbaum identifies, "[n]o major crimes against sentient beings have been curbed by ethics alone, without the coercive force of law."²⁹⁹

²⁹⁰ Bernard E. Rollin, *An Ethicist's Commentary on Animal Rights Versus Welfare*, 43 CAN. VET. J. 913, 913 (2002).

²⁹¹ See Smith, *supra* note 265.

²⁹² *Id.*

²⁹³ Gary L. Francione, *About*, ANIMAL RTS.: ABOLITIONIST APPROACH, <https://www.abolitionistapproach.com/about/> [https://perma.cc/K24L-H5N7] [hereinafter *About*].

²⁹⁴ J. Rachels, *Why Animals Have a Right to Liberty*, in ANIMAL RIGHTS AND HUMAN OBLIGATIONS 122-31 (Tom Regan & Peter Singer eds., 1989).

²⁹⁵ *Id.* at 124.

²⁹⁶ *Id.* at 125.

²⁹⁷ Martha C. Nussbaum, *Capabilities, Entitlements, Rights: Supplementation and Critique*, 12 J. HUM. DEV. & CAPABILITIES 23, 25 (2011).

²⁹⁸ Martha C. Nussbaum, *Working With and For Animals: Getting the Theoretical Framework Right*, 94 DENV. L. REV. 609, 621-22 (2018).

²⁹⁹ *Id.* at 609.

Thus, the law should be a key consideration for those seeking to ensure the protection of animals from human cruelty and exploitation. In this respect, law is important because it is “an important symbol of legitimacy . . . an accomplished fact, which it is difficult to resist. And it change[s] attitudes as well as behaviour.”³⁰⁰ Further, the law is critical because it is what causes animals to be vulnerable to human cruelty in the first place. Therefore, it is the only thing capable of protecting animals from humans. This point is eloquently expressed by Korsgaard:

[I]t is not just because we are individually smarter than the other animals that human beings are able to do as we will with them. It is because human beings are so cooperative and therefore so organized. And the way that we organize ourselves is by making laws, which set the terms of our interactions and so unite us into an effective whole. If the law says it is permissible for a person to inflict torments on an animal in order to test a product, for instance, then there is nothing anyone can do to protect that animal. So it is one of those cases — and there are certainly others — in which the only thing that can afford protection against the power of the law is the law itself.³⁰¹

Thus, the discussion in relation to animal rights needs to focus on what legal changes are required to achieve justice for animals. In this respect, it is important for the law to recognize animals as legal persons because without such recognition, animals are mere property and not able to hold rights.³⁰² Further, in developing frameworks for animal rights, the focus needs to be on the required legal reforms. Philosophical theories will be helpful in this respect, but the means by which such theories might translate into enforceable laws needs attention.

3. *Demystification of the Animal Rights Concept*

For some people, the concept of animal rights may be terrifying. They may wonder, for example, whether their pets would be able to sue them and whether animals would be able to roam the streets. One of the benefits of developing a comprehensive and coherent framework for the attribution of legal rights to animals is to remove some of this fear. By setting out the theoretical basis for recognizing rights, and identifying which specific rights should be attributed, and to which animals, there is less opportunity for “what if” fears. Thus, giving substance to the concept of legal rights for animals can help to overcome some of the obstacles to the recognition of animal rights identified above.

³⁰⁰ Freeman, *supra* note 214, at 17.

³⁰¹ C. M. Korsgaard, *Personhood, Animals and the Law*, 12 THINK 25, 31 (2013).

³⁰² Seymour, *supra* note 80, at 183.

Moreover, clearly identifying the common-sense legal rights that should be attributed to animals is likely to be more persuasive than a “rights are better than welfare protections” style claim. For example, it may be proposed that all animals should be granted a right not to be subject to torture. If so, it would be necessary to flesh out the content of the legal right as applied to animals, identify the particular consequences of its attribution, and discuss circumstances (if any) in which such a legal right may be limited. While some people may object to some aspects of the proposed animal right not to be subject to torture, it is likely that most people would agree that animals should, in general, not be tortured. Thus, clearly identifying the ways in which animals should not be treated and the ways in which animals should be treated is likely to persuade more people to support animal rights.

Further, developing a comprehensive and coherent account of which rights should be accorded to animals *before* changes to the law are made will help ensure the adequacy of animal rights laws. In particular, some attention should be given to the theoretical basis that should underlie animal rights laws, as well as the justification for their enactment. Developing this comprehensive account of animal rights is also likely to ensure consistency in the attribution of rights to animals and anticipate any potential issues that might emerge if animal rights laws are enacted. A detailed account of animal rights will assist countries looking to enact such laws.

4. *Sentience as a Basis*

The jury is no longer deliberating on whether animals are sentient; it is widely accepted and scientifically established that they are.³⁰³ This means that animals have the ability to feel or perceive things.³⁰⁴ Thus, animals are able to feel pleasure and pain and likely have “some of the [same] desires [as humans] . . . for food and water, shelter and companionship, freedom of movement, and avoidance of pain.”³⁰⁵

Animal sentience has formed the basis of many arguments for concern for animals. As noted above, one of the seminal thinkers raising the status of animals, Jeremy Bentham, famously stated in relation to the question of who should be given moral consideration, that “[t]he question is not, Can they reason? nor Can they talk? but Can they

³⁰³ Jan Hoole, *Here’s What the Science Says About Animal Sentience*, CONVERSATION (Nov. 24, 2017), <https://theconversation.com/heres-what-the-science-says-about-animal-sentience-88047> [<https://perma.cc/6ST2-UKWH>]; Philip Low, *The Cambridge Declaration on Consciousness*, FRANCIS CRICK MEMORIAL CONF. (July 7, 2012), <http://fcmconference.org/img/CambridgeDeclarationOnConsciousness.pdf> [<https://perma.cc/AFL2-HYL5>].

³⁰⁴ *Sentient*, OXFORD DICTIONARIES (2019), <https://en.oxforddictionaries.com/definition/sentient> [<https://perma.cc/2K24-M5ZS>].

³⁰⁵ EARTHLINGS (Nation Earth 2005).

suffer?”³⁰⁶ Similarly, Gary Francione’s argument for the recognition of animal rights is based “only on animal sentience and no other cognitive characteristic.”³⁰⁷ He argues that all sentient beings should have the right to not be treated as the property of others.³⁰⁸

Arguably, the sentience of human beings provides much of the justification for the creation of international human rights laws. While the concept of rights has a long history, it was only following World War II that the documents comprising the International Bill of Rights were signed and ratified.³⁰⁹ Thus, the creation of modern international human rights law constitutes a direct response to the atrocities committed in World War II.³¹⁰ In this respect, the Universal Declaration of Human Rights states that “disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind.”³¹¹ The acts committed in World War II, primarily against Jews but also against gypsies and homosexuals amongst others, were barbarous *because* human beings are sentient. If humans did not have the capacity to feel pain or despair, such acts may have had little consequence.

For these reasons, animal sentience should provide the basis and justification for the development of a comprehensive animal rights framework. This would align animal rights with human rights, and thus give clarity to an animal rights legal framework for the broader population.

5. *Drawing on the Pre-Existing Basic Rights of Humans*

As asserted by Steven Wise, the development of animal rights should draw on the pre-existing rights of humans.³¹² In this respect, human rights are granted in a number of ways. International human rights are set out in the International Bill of Human Rights and implemented in many domestic legal systems.³¹³ Human rights are also present in many countries’ constitutions and legislation.³¹⁴ While some

³⁰⁶ J BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 311 n.1 (1789, 1823 ed.).

³⁰⁷ *About, supra* note 293.

³⁰⁸ *Id.*

³⁰⁹ David Shiman, *Teaching Human Rights* 3 (Denver: Center for Teaching International Relations Publications, U. Denver, 1993).

³¹⁰ *Id.*

³¹¹ G.A. Res. 217A, Universal Declaration of Human Rights (Dec. 10, 1948).

³¹² *See Letter # 1 From the Front Lines, supra* note 286.

³¹³ *The Foundation of International Human Rights Law*, UNITED NATIONS, <https://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html> [<https://perma.cc/D5D9-D8NW>].

³¹⁴ UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, HUMAN RIGHTS AND CONSTITUTION MAKING 22 (2018), https://www.ohchr.org/Documents/Publications/ConstitutionMaking_EN.pdf

of these rights—such as the right to vote—would be inappropriate to apply in relation to animals, others—such as the right to not be subject to torture—may be relevant in the development of a framework for animal rights.

A framework for animal rights should be developed using existing human rights laws for a number of reasons. First, human rights are commonly understood and accepted as a means to prevent the suffering of human beings. If it is desirable to prevent the suffering of other animals, it makes sense to apply a similar method to achieve that goal. Second, laws relating to human rights have developed and established frameworks for implementation and operation which may be beneficial when developing an animal rights legal framework. Third, drawing on established human rights laws acknowledges an aspect of equality between humans and other species. That animals feel pain in the same way that humans do is scientifically established, and acknowledging that in the law would provide a reminder of the reasons for attributing rights to animals.

V. CONCLUSION

Recent decades have seen an upsurge of interest in animal issues. This interest has been propelled by advances in human understanding of the extent to which animals are sentient and, in particular, the extent to which animals can feel pain and suffer. Additionally, the increased media attention of the mistreatment of animals, coupled with the developments in technology that enhance the media's reach have increased the public's interest in animal issues. In short, the public has become more aware of the plight of animals. At the same time, driven by the development and implementation of factory farming methods, human cruelty to animals is at an historic high.

Given this context, there is a pressing need to discuss what further legal protections animals require. Two ideological frameworks dominate the discussion in this respect. The ideology of animal welfare accepts the use and slaughter of animals as human property, as long as certain protections are granted to the animals. Animal rights ideology, on the other hand, seeks to end the legal categorization of animals as property and grant them legal rights to protect their interests.

To date, most laws directed towards the regulation of the relationship between humans and animals are representative of welfare ideology. In other words, they seek to place limits on the actions of humans so that the situation of animals is improved, but they do not grant rights to the animals themselves. These laws are not particularly effective. Animals continue to experience harm at the hands of humans

[<https://perma.cc/64F8-VYNG>]; *International Norms and Standards Relating to Disability*, UNITED NATIONS, <https://www.un.org/esa/socdev/enable/comp101.htm> [<https://perma.cc/XPA3-TUYV>].

on a massive scale. Granting legal personhood and rights to animals may be more effective in improving the situation of animals. Some jurisdictions, particularly in recent times, have been willing to entertain a discussion of animal rights. While some of these laws are limited in scope, using a rights-based framework has far greater potential to lead to significant gains for animals than welfare laws.

There are compelling reasons why recognizing animal rights is preferable to legislative welfare protections. Literature relating to human rights suggests that fundamental legal rights carry significant benefits that welfare laws do not provide. As Freeman states, “[t]he most fundamental of rights is the right to possess rights,” and so far, animals have been denied this right.³¹⁵ Holders of rights are legal persons, enabling them to sue and be sued, hold property, and enter into contracts. Where welfare laws fail to provide sufficient protection for animals,³¹⁶ these benefits could prove critical in enabling animals to seek protection from human harm through the law. They strengthen and legitimize advocacy efforts, shift the perspective to the rights subject, facilitate increased agency, and can be used as a framework to scrutinize legislation. Similarly, the principles of dignity, accountability, and participation inherent in all human rights-based approaches would be of great service in the animal context. As the Uttarakhand High Court observed in *Narayan Dutt Bhatt*:

The law's attitude towards animals could be said to amount to a policy statement about human society's regard, or disregard, for animals. Thus were the law to bring animals in 'out of the cold', where they languish as right-less beings, the objects of rights held by legal persons, and draw them under the umbrella of legal personality, it would ideally encourage the development of more respectful and less exploitative social attitudes towards animals.³¹⁷

This article has argued that it is time to shift the academic discussion from the philosophical question of whether rights or welfare protections are more desirable to a focus on setting out a legal framework for animal rights. This shift should operate to dispel some of the fear around attributing rights to animals and provide a reasoned basis for countries to move in this direction. In this respect, it is asserted that animal sentience should provide the basis for an animal rights framework, and that animal rights should build on the pre-existing rights of humans.

³¹⁵ Freeman, *supra* note 214, at 8.

³¹⁶ Steven White, *Exploring Different Philosophical Approaches to Animal Protection in Law*, in ANIMAL LAW IN AUSTRASIA: CONTINUING THE DIALOGUE 31, 51 (Peter Sankoff et al. eds., 2013).

³¹⁷ *Narayan Dutt Bhatt v. Union of India and Others*, Writ Petition (PIL) No. 43 of 2014, 99A (India) ¶ 92.

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