

Exploring Different Philosophical Approaches to Animal Protection in Law

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[T]he simple truth is that we exploit the other animals and cause them suffering because we are more powerful than they are.¹

Introduction

The legal status of animals – reflected in their property status, the prohibition of cruelty, the imposition of duties of care, and so on – implicitly raises important questions about the moral significance of animals. The ways in which the law regulates the treatment of animals arguably reflects, even if imperfectly, society's moral regard for animals. Importantly, law may also be constitutive of our understanding of the place of animals in the world, helping to normalise our understanding of their moral significance.

At common law, domesticated animals are classified as personal property. However, the existence of animal welfare legislation in all Australasian jurisdictions suggests that animals have greater moral significance than their formal legal classification as personal property might suggest. Contrary to an understanding of animals as mere objects, even those philosophers who are most sceptical about an expansive moral standing for animals accept that the imposition of gratuitous suffering on an animal is wrong. However, with the possible exception of companion animals, where duties of care are legislatively imposed on animal guardians in some jurisdictions, the law generally goes no further than protection against gratuitous cruelty. And

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1 Ryder, R (1998) *The Political Animal: The Conquest of Speciesism*, McFarland, North Carolina, p 51, cited in Armstrong, S and Botzler, R (eds) (2003) *The Animal Ethics Reader*, Routledge, London, p 10.

it may even fall short of this standard when the issue of what constitutes a 'good reason' for imposing suffering on an animal is closely examined.

If, as suggested in other chapters of this book, the prevailing legal position for almost all animals is no more than that they deserve protection against gratuitous cruelty, it is clear that the orthodox understanding of the moral significance of animals is a narrow one. But this position invites questions about where the line should be drawn. Why and to what extent do animals deserve protection from suffering? Why and to what extent do they deserve the opportunity to live a fulfilling life in accordance with their capabilities? On what basis should some animals be singled out for greater legal protection than others? This chapter will consider some of the major contemporary contributions that have been made in answering these questions, and the ways in which these inform arguments for re-evaluating the legal status of animals.² It will be argued that, while there are a variety of ways in which these questions may be addressed, a unifying theme is that a change in the prevailing orthodoxy on the moral significance of animals, as reflected in law, is warranted.

In the first part of the chapter, after first setting out a preliminary assumption that animals are worthy of at least some moral consideration, I explain three concepts commonly employed in ethical and legal arguments about the need for change in the significance accorded to animals: speciesism, the principle of equal consideration, and the argument from marginal cases. The second part analyses some of the key philosophical accounts of the moral significance of animals. The third part turns to the legal significance of animals, highlighting the ways in which the ethical arguments and concepts considered in the previous parts are consistent with legal responses to the treatment of animals.

Background Assumptions and Key Concepts

A preliminary assumption: Animals are worthy of some moral consideration

This chapter assumes, without examining or defending the position in any depth, that animals are worthy of some moral consideration. As has been

2 The focus on contemporary contributions reflects the practical consideration of limited space, as well the broadening of the debate over the past three decades. As Singer states, '[t]he most obvious difference between the current debate over the moral status of animals and that of thirty years ago is that in the early 1970s, to an extent barely credible today, scarcely anyone thought that the treatment of individual animals raised an ethical issue worth taking seriously': Singer, P (2003) 'Animal Liberation at 30' 50(8) *New York Review of Books*, 15 May, <<http://www.nybooks.com/articles/16276>>. For an historical account of Western philosophical thinking about the moral status of animals, see Steiner, G (2005) *Anthropocentrism and Its Discontents: The Moral Status of Animals in the History of Western Philosophy*, University of Pittsburgh Press, Pittsburgh.

suggested already, animal welfare legislation in Australasia reflects at least a limited recognition of the moral significance of animals. For example, the *Australian Animal Welfare Strategy*, the Australian government's blueprint for the future development of animal welfare law and practice in Australia, states that the Strategy 'covers all sentient animals—that is, those with a capacity to experience suffering and pleasure. Sentience is the reason that welfare matters'.³

The Australian government's emphasis on sentience is no accident. It reflects a central justification for according any moral status at all to animals.⁴ Since animals have conscious awareness – that is, they experience feelings of pain and pleasure – they have an interest in avoiding suffering.⁵ There can be disagreement about the nature of animal sentience, and how it compares with human sentience, but, if animals can suffer, it means that they have a claim to be recognised as beings worthy of moral consideration. There is very limited support to be found in contemporary literature for the idea that even if animals are sentient they nonetheless are undeserving of *any* moral consideration.⁶ There is even less support for the idea that animals are not sentient at all,⁷ even if debate continues on where to draw the boundary on what constitutes an 'animal'.⁸ The key issue explored in this chapter, then, is not whether animals are deserving of any moral consideration, but rather how narrow or expansive that consideration ought to be, and how this might be reflected in law.

3 Commonwealth, Department of Agriculture, Fisheries and Forestry (2011) *Australian Animal Welfare Strategy and National Implementation Plan 2010-2014* (AAWS), p 6.

4 For an excellent account of the moral significance of sentience, and of the broader issue of whether animals matter at all morally, see Garner, R (2005) *Animal Ethics*, Polity Press, Cambridge, 2005, pp 24-43, 70-73.

5 'Sentient' animals are 'animals endowed with any sorts of feelings: (conscious) sensations such as pain or emotional states such as fear or suffering': DeGrazia, D (2003) 'The Ethics of Animal Research: What are the Prospects for Agreement?' in Armstrong and Botzler, above n 1, p 253. The Commonwealth government has adopted a similar definition, accepting that sentient animals are 'those with a capacity to experience suffering and pleasure', and that 'sentience implies a level of conscious awareness': AAWS, above n 3, p 10.

6 Garner, above n 5, pp 14-16.

7 Carruthers has suggested animals lack 'consciousness' in the sense of perceiving pain in the way humans do, but has accepted that this is a controversial assumption which may turn out to be wrong: Garner, above n 5, p 43, citing Carruthers, P (1992) *The Animals Issue*, Cambridge University Press, Cambridge, pp 192-193. Indeed, it has been persuasively argued that on this point Carruthers is, on the available empirical evidence, clearly wrong: see DeGrazia, D (1998) 'Animal Ethics Around the Turn of the Twenty-first Century' 11 *Journal of Agricultural and Environmental Ethics* 111 at 118.

8 For a critical account of boundary setting, both as between human and animal and between animals, see Fox, M (2004) 'Re-thinking Kinship: Law's Construction of the Animal Body' in Holder, J, O'Connell, C and Freeman, M (eds) 57 *Current Legal Problems* 469.

Key concepts: speciesism, the principle of equal consideration and the argument from marginal cases

Before addressing moral and legal theories of the status of animals, three key inter-related concepts first need to be explained: speciesism, the principle of equal consideration of interests and the argument from marginal cases (AMC). These concepts underpin, to a greater or lesser extent, some of the most prominent theories of the moral status of animals and, usually implicitly, theories of the legal status of animals.

Speciesism and the principle of equal consideration of interests

Analogous to racism and sexism, speciesism refers to an arbitrary, irrational and morally unjustifiable preference for the interests of humans over animals on the basis of species. The concept, first articulated by Richard Ryder in 1975,⁹ has since been adopted by many animal philosophers, in particular by Peter Singer.¹⁰ Speciesism challenges the assumption that membership of the human species, by itself, bestows a moral superiority on humans:

Racists violate the principle of equality by giving greater weight to the interests of members of their own race when there is a clash between their interests and the interests of those of another race. Sexists violate the principle of equality by favoring the interest of their own sex. Similarly, speciesists allow the interest of their own species to override the greater interests of members of other species. The pattern is identical in each case.¹¹

Both utilitarian and animal-rights theories suggest that the principle of equal consideration of interests (or inherent value) should be applied to animals. As DeGrazia suggests:

Both extend to animals a principle of equal consideration. Any such principle requires that we (in some significant way) give equal moral weight to comparable interests, regardless of who has those interests. Utilitarianism counts equally the interest of everyone who has interests, including sentient animals, in stating that we must maximize good consequences. An animal-rights view (as philosophers understand the term) protects human and animal interests somewhat more rigorously, generally resisting the sacrifice of particular individuals in the name of the common good.¹²

9 Ryder, R (1975) *Victims of Science*, Davis-Poynter, London, p 16.

10 The concept has now become so well-established that a definition is included in the *Macquarie Dictionary* ('human discrimination against other animal species, especially in regard to the exploitation of certain animals for human benefit'): (2005) *Macquarie Dictionary*, Macquarie Library, Sydney, 4th ed, p 1355.

11 Singer, P (2002) *Animal Liberation*, Ecco, New York, rev ed, p 9.

12 DeGrazia, above n 8, p 112. In a rights-context the principle is more precisely expressed as respect for the inherent value of an individual, with this inherent value

A virtue of this principle is that it provides a rational basis for balancing interests, and is 'blind' to species membership, mitigating against the bias which otherwise inevitably arises when humans 'balance' their interests with those of animals. Instead, judgments are made across species, with individuals accorded interests (or rights) which are not contingent on species membership but on underlying characteristics, such as sentience. Strictly applied, the principle might rule out many of the ways in which animals are used today to further human interests, including for food and entertainment. However, the principle cannot, by itself, establish a case for change. As Garner points out:

It would be wrong to assume that we can, as is sometimes implied, move directly from an acceptance of the equal consideration of interests principle to the conclusion reached by pro-animal philosophers without additional arguments. The major limitation here is that the principle provides no content to the term 'interests'.¹³

The principle does not suggest that humans and animals should be treated equally. The interests of humans and animals differ, so that, for example, humans may have an interest in a claim to free speech that is obviously not shared by animals.

The AMC

A common intuitive response to the charge of speciesism and the principle of equal consideration of interests is to state that humans and animals differ from each other in ways that men and women, or people of different races, do not, and that it therefore cannot be prejudicial or morally unsound to treat animals in ways inconsistent with the requirements of these doctrines.¹⁴ An answer to such intuitive responses is provided by the AMC, which has been described as 'the central argument for the animal rights/animal welfare perspectives'.¹⁵ The AMC purports to provide a rational account, based on a form of syllogistic reasoning, of why the interests of humans and members

grounding an equal moral right against being harmed: see Regan, T (1983) *The Case for Animal Rights*, University of California Press, Berkeley and Los Angeles, pp 276-279.

13 Garner, above n 5, p 21.

14 See, for example, Posner, P (2001) 'Dialogues: Animal Rights', Peter Singer and Richard Posner, *Slate*, 12 June <<http://www.slate.com/id/110101/entry/110129/>>, where he states: 'I do not agree that we have a duty to (the other) animals that arises from their being the equal members of a community composed of all those creatures in the universe that can feel pain, and that it is merely "prejudice" in a disreputable sense akin to racial prejudice or sexism that makes us "discriminate" in favor of our own species'. See also Graft, D (1997) 'Against Strong Speciesism' 14 *Journal of Applied Philosophy* 107 at 107 for a sample of common critiques of speciesism.

15 Anderson, E (2004) 'Animal Rights and the Values of Nonhuman Life' in Sunstein, CR and Nussbaum, MC (eds) *Animal Rights: Current Debates and New Directions*, Oxford University Press, New York, p 279.

of other species are worthy of equal moral consideration. A simplified summary of the AMC is as follows:

1. Members of species other than humans have important interests, given their sentience, such as an interest in avoiding pain and suffering, and an interest in seeking pleasure.
2. Some humans, such as infants or the severely intellectually impaired (the so-called 'marginal cases'), lack fully developed human capacities (such as self-consciousness, purposiveness, etc), only possessing interests comparable to members of some species other than humans.
3. Even in the absence of fully developed, distinctive human capacities, such 'marginal' humans enjoy certain rights and demand equal consideration.
4. If some sentient animals have similar capacities as these humans, why should their interests not also be regarded as deserving of equal consideration?¹⁶

Not surprisingly, the AMC has proven to be a highly controversial doctrine, attracting criticism from a range of perspectives. For example, the concern has been expressed that it opens up the possibility of arguing for the exclusion of some humans from our moral consideration, rather than the inclusion of some animals. The argument here is that there are significant differences between 'categories' of humans (those with fully developed capacities and those who are 'marginal'), such that it is rationally permissible to exploit animals (eg in animal experimentation), only so long as it is accepted that 'marginal humans' may be exploited in the same way.¹⁷

Another criticism is that the AMC overlooks the significance of species membership, whether from a kinship perspective (ie the fact that we are more emotionally attached to members of our own species),¹⁸ or from a perspective which emphasises the importance of social context and social relations in determining how we respond to each other and to animals.¹⁹ The

16 For a fuller summary, see Dombrowski, DA (2006) 'Is the Argument from Marginal Cases Obtuse?' 23 *Journal of Applied Philosophy* 223 at 223-224. It should be noted that different versions of the AMC are relied on by rights and utilitarian philosophers, with my summary seeking to capture the essence of the AMC. For more nuanced accounts of the AMC, see Dombrowski, *ibid* and Pluhar, E (1995) *Beyond Prejudice: The Moral Significance of Human and Nonhuman Animals*, Duke University Press, Durham.

17 See Frey, RG (1983) *Rights, Killing and Suffering*, Clarendon Press, Oxford for a detailed account of such an argument. A straightforward response to this argument is to focus on intent: the point of the AMC is to provide a coherent basis for improving the status of animals, not to diminish the status of humans.

18 Garner, above n 5, p 59.

19 Anderson, above n 16.

problem with such accounts, however, is the arbitrary nature of the drawing of boundaries between animals and humans that they require.²⁰

The AMC, then, continues to be significant. The criticisms made of it do not necessarily stand up to close scrutiny,²¹ and it underpins two of the most prominent theories suggesting the need for a stronger conception of the moral significance of animals, Singer's utilitarianism and Regan's case for animal rights, considered in the next part.

The Moral Significance of Animals

In his introductory essay in *Animal Rights: Current Debate and New Directions*, Sunstein suggests that 'in at least some sense, almost everyone believes in animal rights. The real question is what that phrase actually means'.²² This section pursues an answer to this question, starting with the status quo, before moving on to some challenges to the prevailing understanding of the moral significance of animals.

The status quo: Limited moral significance for animals

The orthodox understanding of the moral significance of animals is centred on the idea of the 'humane' use of animals. On this account, animals should not be subjected to gratuitous cruelty or neglect, since it is clear that animals are sentient and experience pain. However, while animals ought to be treated humanely, the needs of humans, as higher level autonomous beings, must prevail where they conflict with the needs of animals. Francione summarises this orthodox position in terms of a 'general moral theory' of animal welfare:

Animal welfare, understood in a very broad sense, is the view that it is morally acceptable, at least under some circumstances, to kill animals or subject them to suffering as long as precautions are taken to ensure that the animal is treated as "humanely" as possible. That is, an animal welfare position generally holds that there is *no* animal interest that cannot be overridden if the consequences of the overriding are sufficiently "beneficial" to human beings.²³

This definition begs the question: Why is it that human interests should inevitably prevail over animal interests? One of the most significant justifica-

20 As Dombrowski suggests: 'One of the problems with the criticisms of the AMC offered by Anderson [is that she places] too much importance on actually existing moral communities and their ability to legislate into existence moral boundaries; ideal moral communities as discovered by rational analysis (eg through consideration of the AMC) are ignored or denigrated. The danger here is that this view could lead to the reification of certain traditional prejudices': above n 17, p 229.

21 For a very useful summary of the full range of criticisms, and their rebuttal, see Garner, above n 5, pp 57-65. See also Dombrowski, above n 17.

22 Sunstein, CR (2004) 'Introduction' in Sunstein and Nussbaum (eds), above n 16, p 4.

23 Francione, GL (1995) *Animals, Property and the Law*, Temple University Press, Philadelphia, p 6.

tions for such an outcome is provided by social contract theory, with its emphasis on rationality.²⁴

Immanuel Kant's highly influential theoretical work on morality and ethics rejects the idea that animals have any moral standing in their own right, so that no direct duties are owed to them. Instead, humans' treatment of animals is significant only to the extent that it may be a marker of the moral character of humans:

So far as animals are concerned, we have no direct duties as animals are not self-conscious, and are there merely as a means to an end. That end is man ... If a man shoots his dog because the animal is no longer capable of service, he does not fail in his duty to the dog, for the dog cannot judge, but his act is inhuman and damages in himself that humanity which it is his duty to show towards mankind ... He who is cruel to animals becomes hard also in his dealings with men.²⁵

Kant's position turns on an understanding of humans as having intrinsic moral worth, based on their possession of rationality, reflected in the ability to make judgments. On the other hand, animals, lacking rationality, are not able to exercise free will in the same way. The absence of free will in animals means that they cannot possess moral standing in their own right.

This way of thinking about animals retains some contemporary theoretical currency through the work of Peter Carruthers, although he extends the basis for an indirect duty to animals to include a concern for the distress caused to other humans – animal lovers – when animals are cruelly treated:

Animals must fail to be accorded direct rights, through failing to qualify as rational agents. While contractualism allows that we do have duties towards animals, these only arise indirectly – on the one hand, out of respect for feelings of animal lovers, and on the other hand, through the good or bad qualities of character that animals may evoke in us.²⁶

A problem with the Kantian position, exemplified by Carruthers, is that it is not clear why abusing animals should be a marker of poor character at all, if it is considered irrelevant that an animal has a direct interest in not being harmed.²⁷

24 Although contractualism has been most concerned with matters of political philosophy, it is 'in principle, capable of deriving general principles of morality, and not simply principles relating individuals to basic societal structures': Rowlands, M (1997) 'Contractarianism and Animal Rights' 14 *Journal of Applied Philosophy* 235 at 236.

25 Kant, I (1780-81) *Lectures on Ethics – Duties Towards Animals and Other Spirits*, translation published 1963, Harper & Row, New York, pp 239-240 cited in Brooman, S and Legge, D (1997) *Law Relating to Animals*, Cavendish, London, p 100. For similar sentiments expressed by John Locke, see Regan, above n 13, p 409.

26 Carruthers, above n 8, p 194.

27 See Garner, above n 5, pp 41-42. See also Nozick, R (1974) *Anarchy, State and Utopia*, Basic Books, New York, pp 35-36.

Significantly, the most influential contractarian philosopher of modern times, John Rawls, takes a broader approach to the moral significance of animals. However, he does so in a context in which animals are excluded from any claims to justice. Like Kant, and Hobbes and Locke before him, Rawls sets up the social contract as one freely entered into by rational persons with the capacity for moral choice. By necessity, this must exclude animals:

On what grounds then do we distinguish between mankind and other living things and regard the constraints of justice as holding only in our relations to human persons? ... Moral persons are distinguished by two features: first they are capable of having (and are assumed to have) a conception of their good (as expressed by a rational plan of life); and second they are capable of having (and are assumed to acquire) a sense of justice, a normally effective desire to apply and act upon the principles of justice, at least to a certain minimum degree.²⁸

Despite animals being incapable of entering into a contract with humans in any meaningful way, Rawls nonetheless argues that animals have moral significance in their own right:

Certainly it is wrong to be cruel to animals ... The capacity for feelings of pleasure and pain and for the forms of life of which animals are capable clearly impose duties of compassion and humanity in their case.²⁹

Excluding animals from claims to justice, including a basic entitlement not to be mistreated,³⁰ while allowing them a moral significance requiring 'duties of compassion and humanity', provides a clear (if flawed) theoretical foundation for the animal welfare paradigm, with its focus on humane treatment, considered above.

Re-thinking the moral significance of animals

Even if it may not be possible to come to any prescriptive, all-embracing conclusions about the way we should conceptualise our relationship with animals, including in law, we can conclude with considerable confidence that prevailing approaches are inadequate. There is a rich literature challenging the status quo position of limited moral significance for animals. This section considers two of the main contributions, utility and rights-based accounts respectively, as well as a revised social contract theory and, briefly, alternative accounts less abstract and less universal in nature.

28 Rawls, J (2005) *A Theory of Justice: Original Edition*, Harvard University Press, Cambridge Mass, p 505.

29 Ibid, p 512.

30 Nussbaum, MC (2004) 'Beyond "Compassion and Humanity"' in Sunstein and Nussbaum (eds), above n 16, p 302.

Singer's utilitarianism

Peter Singer draws on the legacy of Jeremy Bentham and John Stuart Mill to advance a utilitarian theory of how we should treat animals. Sometimes misunderstood as endorsing an animal welfare perspective, Singer's ethical critique of speciesism, based on preference utilitarianism, undermines prevailing animal welfare conceptions of the moral significance of animals.

For Singer, humans and animals alike, as sentient beings, have the capacity to suffer and/or to experience enjoyment or happiness. This in turn entitles them to equal moral consideration. His argument is not, for example, that the capacity of a particular human and a particular animal to suffer is the same. He cautions that great care needs to be exercised when comparing the interests of different species, acknowledging that the mental capacity of humans can lead them to suffer more than animals in particular circumstances. Rather, an assessment needs to be made of the extent to which each suffers, with priority given to relieving the greater suffering.³¹ In a situation of competing interests, this requires an aggregation of preferences, with the better outcome being that which maximises satisfaction. Singer's approach is more subtle than a classical utilitarian approach – which provides little guidance as to the content of pain and pleasure and applies the balancing act impersonally – since it turns on a subjective expression of preference by individuals (eg a preference to go on living).³²

Singer argues that if, after aggregating preferences, we apply the equal consideration test to a range of human practices involving animals, these practices would need to come to an end. This is most clearly the case where the human interest is trivial and the collective suffering of animals significant, such as reflected in eating meat from animals confined in factory farms, and the wearing of fur.³³ The utilitarian position in relation to some other uses of animals is less clear-cut. Animal experimentation is a useful example here. The utilitarian must acknowledge the potentially significant, clearly non-trivial human interests at stake, even if in a qualified way, as well as relevant animal interests:

In the past, argument about animal experimentation has often missed [the point that in many cases the benefits to humans are either non-existent or uncertain, while the losses to members of other species are real and certain] because it has been put in absolutist terms: would the opponent of experimentation be prepared to let thousands die from a terrible disease

31 Singer accepts that precision is not possible here, but argues that this does not matter, given that in most situations the distinction between trivial human interests and substantial animal suffering is clear enough: Singer, P (2011), *Practical Ethics*, Cambridge University Press, Cambridge, 3rd ed, pp 52-3.

32 See Singer, above n 35, ch 3 for an extended account. See also Garner, above n 5, pp 88-90; Regan, above n 13, pp 206-208.

33 Meat-eating may be justifiable for Inuit, where the choice is to kill animals for food or starve, but cannot be justified in industrialised cultures, where eating animals is a luxury: Singer, above n 35, p 54.

that could be cured by experimenting on one animal? This is a purely hypothetical question, since the experiments do not have such dramatic results, but as long as its hypothetical nature is clear, I think the question should be answered affirmatively – in other words, if one, or even a dozen animals had to suffer experiments in order to save thousands, I would think it right and in accordance with equal consideration of interests that they should do so.³⁴

The criticisms of utilitarian conceptions of the moral significance of animals are the same as those that can be made of utilitarianism more broadly, with two key criticisms considered here.³⁵

First, how do we accurately *measure* pleasure and pain, even if we can *define* them clearly, and then balance these up in cases of conflict? Even if Singer's more sophisticated preference utilitarianism is relied on, how do we measure the content of preferences? Is it correct to suggest, as Singer does, that a preference for eating meat is 'trivial', given the significance of 'food as pleasure' in contemporary Western cultures?³⁶

Second, a commitment to sum-ranking or preference aggregation 'has no way of ruling out in advance results that are extremely harsh toward a given class or group'.³⁷ Prima facie, it is not possible to rule out, in advance of understanding the consequences, the use of animals in a variety of exploitative settings. In the case of ceasing to eat meat, for example, abolition would cause substantial social and economic upheaval. Trying to assess the balance of preferences between those of humans in favour of eating meat, against the combined preferences of humans opposed to eating meat and of animals 'remains cloudy at best'.³⁸ At the heart of this criticism is the concern that on any utilitarian analysis significant interests of individual animals are always susceptible to being overridden by human interests, where enough humans may have their preferences restricted.

Regan and rights

If even a non-speciesist utilitarian account does not exclude the possibility of animal exploitation by humans, an animal rights perspective, by contrast, suggests that an animal (although not all categories of animal)³⁹ has inherent value, as the 'subject-of-a-life', and should not be treated as a means-to-an-end.⁴⁰

34 Ibid, p 57.

35 For a succinct summary of criticisms, see Garner, above n 5, pp 89-95.

36 Regan, above n 13, pp 220-221.

37 Nussbaum, above n 34, p 303.

38 Regan, above n 13, pp 222-223. See also Garner, above n 5, Chapter 7.

39 Adopting a deliberately conservative approach to knowledge of the capacities of animals, Regan limits his rights theory to mammals at least one year old: see Regan, above n 13, pp 77-78.

40 If it is not already clear, the consideration here is of moral rights, not legal rights. For a succinct discussion of some of the key differences between the two, see Regan,

In seeking to establish a case for animal rights, Regan distinguishes between moral agents and moral patients.⁴¹ Moral agents are those with sophisticated abilities, including the ability to act in a moral way. In other words, moral agents are human beings at a stage of development where they can exercise judgment as to right and wrong.

Moral patients are those who are unable to control their actions in a moral sense, where it would not make sense to hold them morally accountable for their actions. This category includes infants, young children, the mentally afflicted and so on. This category also includes animals, but only those demonstrating a range of cognitive and volitional abilities.

In order to determine whether an individual is inherently worthy of moral respect, there is a need to consider whether the subject-of-a-life criterion is satisfied.⁴² This is satisfied where an individual (human or animal) possesses a range of abilities, such as: holding beliefs and desires; perception, memory and a sense of the future; an emotional life; preference and welfare interests; and the ability to initiate action and pursue a goal.

Where these are shown, the individual (human or animal) is the subject-of-a-life, with inherent value. Once it is established that an individual has inherent value, justice demands that they be treated with equal respect. Importantly, this equality principle extends to both moral agents and moral patients. In other words, we need to consider humans and animals equally, where they both possess inherent value, with Regan implicitly relying on the AMC to ground this claim. Regan places a great deal of importance on equal respect being a principle of justice. In particular, he argues that it is not an act of kindness to treat animals well. This is just sentimentalism, and suggests a moral superiority on the part of the party being kind.⁴³

What are the implications for the treatment of animals suggested by Regan's insistence on rights? His account would rule out almost all prevailing exploitation of animals. For example, Regan argues that raising animals and killing them for food are morally unjustified – farm animals have a right to life which is violated when humans kill them in the absence of an overriding need to do so (on the premise that humans do not need to

above n 13, pp 267-268 (moral rights are 'universal', legal rights are particular to a culture/society/country; moral rights are equal; and moral rights and legal rights are 'created' differently, with moral rights not created by a legislative body, such as a parliament, or a judicial body, such as a court, even if moral and legal rights may sometimes overlap). Regan draws heavily on the work of Joel Feinberg to argue that rights are a form of valid claim, involving requirements on the part of another which they are capable of satisfying, and treatment from the other that is owed to the individual: *ibid*, pp 271-274, 413 (endnote 9).

41 *Ibid*, pp 151-154.

42 *Ibid*, pp 243-249.

43 *Ibid*, pp 198-199.

eat meat in order to survive, not that the desire to eat meat is necessarily trivial).⁴⁴

In the area of research using animals, a stark contrast can be drawn between rights and utilitarian approaches:

The fundamental differences between utilitarianism and the rights view are never more apparent than in the case of animals used in science. For the utilitarian, whether the harm done to animals in pursuit of scientific ends is justified depends on the balance of the aggregated consequences for all those affected by the outcome ... If the resulting consequences would be at least as good as what are otherwise obtainable, then harmful experimentation is obligatory ... The rights view takes a very different stand. No one, whether human or animal, is ever to be treated as if she were a mere receptacle, or as if her value were reducible to her possible utility for others ... To do so is to violate the rights of the individual. That is why the harm done to animals in pursuit of scientific purposes is wrong.⁴⁵

Regan does concede that there may be some circumstances in which the rights of an animal may need to be overridden. He gives the example of the life-boat scenario where the life of one of four fully functioning humans or of a dog must be sacrificed in order for the others to survive. Regan argues sacrificing the dog is justified by the application of his rights theory, on the basis that the harm suffered by the dog must be less than the harm suffered by the loss of a human.⁴⁶

Regan's approach is subject to criticism on all the same grounds, some persuasive and some not, as rights-based approaches have been criticised in other contexts.⁴⁷

Rights are individual, formal and abstract. They take no account of differing circumstances, cultures or traditions. For example, a range of different ethical issues are raised depending on the circumstances in which animals find themselves, whether companion animals, farm animals, animals in the wild and so on.

Given the universal, absolute nature of rights, how can conflicts between competing rights be resolved without lapsing into a utilitarian calculus? In a human rights context, the criticism can be expressed in the following way:

What do we do, for instance, in the event of right to property conflicting with a right to free movement? Similarly, does the right to free speech extend to making racist comments that threaten the rights of those against

44 Ibid, pp 330-353.

45 Ibid, pp 392-393.

46 This is an application of what he terms the 'worse-off principle': see *ibid*, pp 307-310, 324-325.

47 See Garner, above n 5, pp 96-101 for a lucid summary.

whom the comments are directed? In other words, how do we go about prioritizing rights? Which are more important than others?⁴⁸

In the context of animals, Regan answers this criticism by recourse to principles such as the 'worse-off' principle, as illustrated above in the life-boat scenario, but this may not provide an answer where the rights at stake are more evenly balanced.

Another criticism is that rights are generally only recognised once the acceptance of change has already been achieved. In other words, social and political forces are much more important than abstract theories about rights.

Additionally, even where rights are formally recognized, they might not be respected in practice. Moreover, there may be questions about who is actually able to enforce the rights in question. Animals are themselves never able to individually assert their rights, and in many settings their use is institutionalised, overseen by complex corporate entities operating factory farms or research laboratories, so that it may be difficult to identify the persons against whom an animal's claims should be asserted.⁴⁹

Revised Social Contract Theory

The exclusion of animals from Rawls' contractarian account of justice, with its insistence on possession of the capacity for a sense of justice, considered above, has been subject to significant criticism, when assessed against the requirements of the AMC and the principle of equal consideration. On what basis can children and severely intellectually impaired humans be included in the realm of moral personhood, and so benefit from principles of justice, if some animals possessing equal or greater capacities are excluded?⁵⁰

Rather than abandoning contractarian philosophy, some have argued to expand it to include the interests of animals, the underlying premise being that contractualism remains a powerful theory of justice, but one which could be strengthened by being more inclusive. On a revised account of contractarianism, it does not matter that animals, as moral patients, are not able to make decisions for themselves:

Neither human nor animal moral patients are able to make decisions in the original position but it is not clear why they cannot be beneficiaries of the decisions made, maybe through having rational agents to speak on their behalf. All that is required for this to be possible is a 'thickening' of the veil of ignorance so that the participants do not know whether they are going to be marginal humans or even whether they are going to be members of the human species at all. As a result ... the participants in the

48 Ibid, p 99.

49 Ibid, pp 101-102. This criticism anticipates a particular problem identified by Francione, considered below: the way in which animals are legally characterised as property.

50 See, for example, Rowlands, M (2002) *Animals Like Us*, Verso, London, pp 44-48.

original position would adopt principles which would protect them if they turned out to be animals.⁵¹

As for utilitarianism and rights-based accounts, the persuasiveness of expanded contractarian accounts, incorporating the interests of animals, turns on the persuasiveness of the underlying arguments, including speciesism, the AMC and the principle of equal consideration.

Deconstructing universalist approaches

Despite the centrality of utilitarian and rights arguments to the progressive movement for improving the lives of animals, their pre-eminence has begun to be challenged in recent years. One key criticism, applicable also to revised contractualism, is that they are rational, abstract, universal moral theories 'trying to corner the market on ethical insight with a single, overarching principle'.⁵² Their all-encompassing nature means that they fail to come to grips with differences between categories of animal, and the ethical demands of these differences. For example, whether an animal is wild or domesticated may raise differing implications for the nature of our relationship with them. Within the domestic sphere, the ethical issues raised by keeping animals as pets and the institutionalised nature of the keeping of farm animals may be quite distinct.

In this vein, James Rachels argues that assessing the moral significance of animals needs to be more nuanced than is allowed by the utilitarian and rights approaches, which suffer from the assumption that 'the answer to the question of how an individual may be treated depends on whether the individual qualifies for a general sort of status, which in turn depends on whether the individual possesses a few general characteristics'.⁵³ Rachels argues that a more contextualised understanding of the needs of different types of animals is required, rather than the all-or-nothing approach of full recognition for animals with relevant 'ethical superqualities' and marginalisation of those without.⁵⁴ Instead, degrees of animal complexity need to be recognised, with treatment of different animals tied to this complexity.

A second important criticism of the application of abstract, universal theories to the position of animals, such as those grounded in utilitarianism and rights, is that they fail to comprehend the specificity of the relationship between humans and animals. On this view, the source of our obligations

51 Garner, above n 5, p 85.

52 DeGrazia, above n 8, p 112.

53 Rachels, J (2004) 'Drawing Lines' in Sunstein and Nussbaum (eds), above n 16, pp 166-167.

54 David DeGrazia has also argued that the moral status of animals should be a matter of degree, and argues that the principle of equal consideration can be applied in a way which is consistent with significant harms to animals, even if it still largely condemns much animal exploitation: DeGrazia, D (1993) 'Equal Consideration and Unequal Moral Status' 31 *Southern Journal of Philosophy* 17.

towards animals is not abstract theory but our understanding of what it is to be a human being living with animals and what this social and cultural reality may require of our relationship with them. By eschewing reliance on sentiment, empathy or kindness in grounding our responses to animals, rights-based and utilitarian accounts provide only an incomplete understanding of how we might best determine what we owe to animals. What, then, might be the alternatives?

One alternative is 'virtue ethics', which suggests we should be concerned about how we treat animals because of their significance as members of a shared community, not because they have rights or interests in a formal sense:

The point, according to commentators such as Stephen SRL Clark and Cora Diamond, for example, is that members of our communities, however we conceive of them, pull on us and it is in virtue of this indescribable pull that we recognize what is wrong with cruelty. Animals are individuals with whom we share a common life and this recognition allows us to see them as they are. A person striving for virtue comes to see that eating animals is wrong not because it is a violation of the animal's rights or because on balance such an act creates more suffering than other acts, but rather because in eating animals or using them in other harmful ways, we do not display the traits of character that kind, sensitive, compassionate, mature, and thoughtful members of a moral community should display.⁵⁵

Diamond, in particular, argues for an empathetic, benevolent grounding for our relationship with animals, and that an emphasis on abstract rights 'encourages us to ignore pity, to forget what it contributes to our conception of suffering and death, and how it is connected with the possibility of relenting'.⁵⁶

A feminist critique similarly deconstructs the universal pretensions of rights and utilitarian accounts of the moral significance of animals. For example, Mackinnon argues that just as '[p]eople dominate animals, men dominate women'.⁵⁷ She argues that striving for rights for animals based on notions of formal equality is analogous to the approach taken by women in improving their position relative to men, and that such an approach is ultimately counter-productive, since recognition is always on the terms set by the dominant group. A preferable approach for many feminists is an ethic of care, in which the relationship between humans and animals is built on

55 Gruen, L (2003) 'The Moral Status of Animals' in Zalta, EN (ed) *The Stanford Encyclopaedia of Philosophy*, <<http://plato.stanford.edu/entries/moral-animal/>>. See further Clark, SRL (1977) *The Moral Status of Animals*, Clarendon Press, Oxford and Diamond, C (2004) 'Eating Meat and Eating People' in Sunstein and Nussbaum (eds), above n 16.

56 Diamond, above n 59, p 106.

57 Mackinnon, CA (2004) 'Of Mice and Men: A Feminist Fragment on Animal Rights' in Sunstein and Nussbaum (eds), above n 16, p 264.

empathy. A related strand of theorising emphasises the significance of kinship as a means of understanding our relationship with animals. While ideas of kinship can be used to exclude animals from our moral concern, on the basis that we are 'emotionally attached to members of our own species',⁵⁸ the emergence of techno-scientific knowledge, including the extent of shared DNA between humans and other animals, and the creation of human-animal hybrids, provides a stronger basis for a more inclusive idea of kinship.⁵⁹

An important criticism of accounts turning on a 'feminist ethic' or kinship is that they are 'too vague to be practicable in decisions concerning animals'.⁶⁰ Martha Nussbaum has developed a new theoretical approach, the 'capabilities approach', which seeks to transcend both the impersonal, abstract nature of rights and utilitarianism, and the 'vagueness' of relational accounts of the moral significance of animals. The capabilities approach incorporates a relationship between humans and animals which recognises the need for animal flourishing (in all its diversity), and 'does not operate with a fully comprehensive conception of the good, because of the respect it has for the diverse ways in which people choose to live their lives in a pluralistic society'.⁶¹ At the same time, it 'aims at securing some core entitlements that are held to be implicit in the idea of a life with dignity, but it aims at capability, not functioning'.⁶² Nussbaum draws explicitly on the importance Rachels attaches to levels of complexity in determining how an animal should be treated, and also on utilitarianism, to the extent that it identifies a sentience threshold for admission into the categories of animal which have an entitlement to justice.

Under the capabilities approach, the focus should be on creating the conditions that allow an animal to flourish, according to the type of animal that it is. Different animals flourish in different ways, and have different ends. Some animals are more complex than others, so that a deprivation for one species is not a deprivation for another (a human not able to vote is deprived of a basic democratic right; the same cannot be said of a cow). All animals, Nussbaum argues, have a basic set of capabilities, which amount to entitlements, and their recognition will differ from species to species. These include an entitlement to life, bodily health, bodily integrity, emotions, play, and control over one's environment. Because different animals exercise these capabilities in different ways, so how we treat different animals must vary accordingly.⁶³

58 Garner, above n 5, p 59.

59 Fox, above n 9, pp 491-492.

60 Donovan, J (1990) 'Animal Rights and Feminist Theory' 15 *Signs* 350 at 374. See also Fox, below n 114.

61 Nussbaum, above n 34, p 307.

62 Ibid.

63 For a detailed analysis of Nussbaum's approach, see Tulloch, G (2007) 'From Sentience to Capabilities and Affective Education', *Inaugural Australian Symposium on*

With a focus on rights and utility, this chapter largely reflects advances in thinking about human-animal relations made in the Anglo-American philosophical tradition. More recently, 'the status of animals has been given renewed attention and interpretation within continental theory and philosophy'.⁶⁴ If thinkers such as Nietzsche, Heidegger, Derrida, Deleuze and Levinas have provided a 'far-reaching and profound critique of the virile Western humanistic subject', then Continental philosophy, it is argued, ought to have produced the 'same results in the area of animal philosophy'.⁶⁵ As Calarco argues, by applying the tenets of this tradition, the notion of rights for animals can be critiqued on the same grounds as the idea of human rights:

Regan's work is not a case for animal rights but for rights for subjects, the classical example of which is human beings. And inasmuch as animals manifest morally relevant human, or subjectlike, traits, they are brought under the scope of moral consideration . . . Of course, it is precisely that moral model, language, and demands that have been used to deny animals basic moral standing for centuries, and it is paradoxical, to say the least, that animal rights theorists have used the same anthropocentric criteria that have been used to exclude animals from moral concern to include only certain animals within that scope . . . And the same story could be told for various efforts to bring animals within the scope of legal and political consideration.⁶⁶

Although able to deconstruct the limits of rights discourse by critiquing a humanist ethics, a problem for Continental philosophy has been that a 'kind of implicit anthropocentrism is one of the chief blind spots of much of [this] philosophy'.⁶⁷ Calarco argues, though, that the insights of contemporary Continental philosophy can be used to expose those blind spots and to advance a new way of thinking about animals, including through a rejection of the anthropocentric human-animal binary and by working to build new concepts and practices.⁶⁸

Humane Education, CWIF, Griffith University, Brisbane, 5-6 October, <<http://www.humaneeducation.org.au/tulloch.pdf>>, pp 1-8.

⁶⁴ Mussawir, E (2011) *Jurisdiction in Deleuze: The Expression and Representation of Law*, Routledge, Abingdon, p 58. Atterton and Calarco acknowledge 'that Continental philosophy has lagged behind its Anglo-American neighbour on precisely these issues, despite its tendency to see itself in many ways as the more avant-garde, more radical, more politically engaged, and less philosophically naïve of the two': Atterton, P and Calarco, M (eds) *Animal Philosophy: Ethics and Identity* (2004), Continuum, London, p xvi.

⁶⁵ Atterton and Calarco, *ibid*.

⁶⁶ Calarco, M (2008) *Zoographies: The Question of the Animal from Heidegger to Derrida*, Columbia University Press, New York, pp 8-9.

⁶⁷ *Ibid*, p 13.

⁶⁸ *Ibid*, pp 13, 136-149.

The Legal Significance of Animals

Having identified some of the key ways in which the moral significance of animals might be understood, this part seeks to address two questions: to what extent are these accounts reflected in law, and how have these accounts been used to argue for change in the regulation of the treatment of animals? In doing so, I want to show the extent to which the leading proponents of legal change, either explicitly or implicitly, rely on some of the key arguments considered in the previous part, and the key concepts identified in the first part – speciesism, the principle of equal consideration and the AMC.

The status quo position: Limited legal protection of animal interests

As suggested at the outset of this chapter, and as is argued in detail elsewhere in this book, the prevailing legal understanding of the moral significance of animals is limited. Animals are legally classified as property, with constraints placed on how this property may be treated by animal welfare legislation. Despite the potential promise of such legislation to protect animals from cruelty, close examination of the way in which these laws are generally framed shows that, with the possible exception of companion animals, animals are largely unprotected from harm, so long as an overriding human interest can be identified.⁶⁹ Francione describes the legal manifestation of the animal welfare/humane treatment account of the moral significance of animals as ‘legal welfarism’, with four basic tenets:

First, legal welfarism characterizes animals as the property of human beings ... Second, legal welfarism interprets the property status of animals to justify the treatment of animals exclusively as means to human ends. Third, legal welfarism provides that animal use is “necessary” whenever that use is part of a generally accepted social institution. Fourth, legal welfarism does not proscribe “cruelty” as that term is understood in ordinary discourse. Rather, legal welfarism interprets “cruelty” to refer to animal use that, for the most part, fails to facilitate, and may even frustrate, that animal exploitation.⁷⁰

Francione’s account of legal welfarism is bound up with the legal classification of animals as property. Not surprisingly, then, Francione’s key response to the shortcomings of legal welfarism is to abolish the property status of animals, an argument considered below. First, though, can legal welfarism be defended, even if it falls short of paying due regard to the moral significance of animals? In a United States context, Sunstein argues that, taking

⁶⁹ The use of codes of practice to regulate the treatment of animals, as examined in Chapter 7 (this volume), has important implications for procedural legal values, such as transparency, accountability and the rule of law, quite apart from the ethical implications considered in this chapter. See, for example, Boom, K and Ellis, E (2009) ‘Enforcing Animal Welfare Law: The NSW Experience’ 9 *AAPLJ* 6.

⁷⁰ Francione, above n 24, p 26.

animal welfare legislation together with other animal protection legislation (such as legislation protecting marine mammals), 'national law is committed to something not so very different from a bill of rights for animals'.⁷¹ In making this argument, Sunstein is fully aware of the limitations of animal welfare legislation (the significant exemptions and qualifications typical of such laws, especially with regard to the use of animals for food and for scientific research). For Sunstein, though, an increased commitment to the enforcement of existing law could still achieve a great deal, regardless of claims for the recognition of 'rights' in a formal sense.⁷² In particular, in an argument which resonates in an Australasian context, Sunstein argues that reforming the law of standing is warranted. This would allow private actions to be brought on behalf of animals, helping to address the prevailing absence of enforcement, which occurs for a variety of reasons, including lack of government resources.

More trenchantly, Lovvorn argues that it is counter-productive to focus on 'revolutionary' legal change, such as abolishing the property status of animals and bestowing legal personhood on them, suggesting that it 'is an intellectual indulgence and a vice for animal lawyers [to be concerned] with the advancement of such impractical theories while billions of animals languish in unimaginable suffering'.⁷³ Drawing on public opinion poll data, Lovvorn argues there is no widespread public support for radical legal change, but that there is support for addressing the gap between the promise of anti-cruelty legislation and its realisation, especially for farm animals.⁷⁴ He argues for incremental reform, suggesting that 'footsoldiers, not philosophers'⁷⁵ are required, and that:

[T]he legal system actually works. It may not work as quickly or effectively as some would like, but legal change rarely comes quickly. It is important to remember that the law does not change society, society changes the law.⁷⁶

Like Sunstein, Lovvorn is essentially arguing for a more rigorous application of the animal welfare model, in which farm animals in particular are granted greater protection. His hostility towards theory, though, is misplaced. First, it overlooks the extent to which the arguments of philosophers such as Peter Singer and Tom Regan stimulated a ground-swell of interest in the treatment of animals and broadly based campaigns for reform of the law, even if some of those campaigns subsequently provoked a measure of political backlash.

71 Sunstein, CR (2004) 'Can Animals Sue?' in Sunstein and Nussbaum (eds), above n 16, p 254.

72 Ibid, p 261.

73 Lovvorn, JR (2006) 'Animal law in Action: The Law, Public Perception, and the Limits of Animal Rights Theory as a Basis for Legal Reform' 12 *Animal Law* 133 at 139.

74 Ibid, pp 136-138.

75 Ibid, p 148.

76 Ibid, p 149.

Second, as this chapter has shown, approaches to how we should think about animals are continually evolving and are by no means settled. Third, Lovvorn's approach itself reflects a philosophical standpoint: one of pragmatism, in which small, achievable improvements for large numbers of animals are sought. While such a position is defensible, it also must be acknowledged that it impliedly accepts the proposition that animals should be understood as having only limited moral significance.

Re-thinking the legal significance of animals

There is now an extensive legal literature about the inadequacy of the prevailing legal regulation of animals. For some, this is not a failure of the underlying model, but reflects shortcomings in fully realising the potential of existing regulation, for example through lack of enforcement. For others though, it is the animal welfare model per se that is flawed, requiring fundamental legal reform. The problems begin with the way in which animals are legally classified.

Removing the property status of animals

For Francione, the legal categorisation of animals as property is fundamental to their exploitation by humans. Animal welfare legislation is based on an understanding of animals as commodities, and hinges on the general qualification of protection only against 'unnecessary' harm.⁷⁷ In balancing human and animal interests, the choice is pre-determined by the very designation of animals as property, since it means that we start from a position of assuming that animals can be used for a variety of instrumental purposes:

The property status of animals renders meaningless any balancing that is supposedly required under the humane treatment principle or animal welfare laws, because what we really balance are the interests of property owners against the interests of their animal property. It is, of course, absurd to suggest that we can balance human interests, which are protected by claims of right in general and of a right to own property in particular, against the interests of property, which exists only as a means to the ends of humans.⁷⁸

In order to establish the basic premise that animals should not be conceptualised as 'things' in law, Francione draws on the key concepts of species-

77 Francione, GL (2004) 'Animals: Property or Persons?' in Sunstein and Nussbaum (eds), above n 16. The language of ownership is unambiguous in Australasian animal welfare legislation. For example, s 12 of the *Animal Care and Protection Act 2001* (Qld) provides that a 'person in charge of an animal' includes a person who 'owns or has a lease, licence or other proprietary interest in the animal'. Other legislation is equally explicit: see, for example, *Competition and Consumer Act 2010* (Cth) s 4(1), *Fair Trading Act 1989* (Qld) s 5 and *Consumer Guarantees Act 1993* (NZ) s 2 ('goods includes ... animals, including fish').

78 Francione, above n 77, p 117.

ism,⁷⁹ the principle of equal consideration,⁸⁰ and the AMC.⁸¹ He places particular reliance on the rights theory of Tom Regan, arguing that it represents ‘a plausible account of animal rights against which we can compare legal efforts to protect animals’.⁸² At the same time, Francione rejects the ‘hard utilitarianism’ of Peter Singer, including for the reasons that utilitarianism generally has been questioned, considered above.⁸³ Most significantly, in a criticism which arguably underestimates the careful attention Singer pays to application of the principle of equal consideration, Francione states that Singer’s approach:

will probably not work as long as animals are regarded as property. Singer argues, in essence, that we ought to take animal interests seriously when we seek to use the utilitarian balancing apparatus, and that we ought to accord equal consideration to equal interests. The problem is that as long as animals are treated as a form of property, their interests are not likely to be accorded more weight than they are under the framework of legal welfarism.⁸⁴

The most basic right that should be extended to animals, argues Francione, is the right not to be treated as property. This is a moral right, which translated into law would mean abolition of the classification of animals as property, and their recognition as legal persons.⁸⁵ It would mean that institutionalised exploitation of animals, such as farming and research, could no longer be legally permitted.⁸⁶

Francione’s thesis has been subject to wide-ranging criticisms, and here four of the most common are considered.⁸⁷

First, it has been argued that the legal classification of animals as property may serve to protect animals, on the premise that ‘people tend to

⁷⁹ Ibid, pp 130-131.

⁸⁰ Ibid, pp 120-124.

⁸¹ Ibid, p 130.

⁸² Francione, above n 24, p 10.

⁸³ Francione, above n 77, pp 125, 132-134.

⁸⁴ Francione, above n 24, p 254.

⁸⁵ Francione, above n 77, pp 125, 131-132.

⁸⁶ Of course, to the extent that Francione relies on the rights foundation established by Regan, it might be argued that non-mammalian farm animals, such as chickens and turkeys, and non-mammalian animals used in research, will be excluded from Francione’s property critique. In response, it is important to note that Regan recognises this dilemma, and argues for a type of precautionary principle: ‘Because we are uncertain where the boundaries of consciousness lie, it is not unreasonable to advocate a policy that bespeaks moral caution. Such a policy would have us act *as if* nonmammalian animals are conscious and are capable of experiencing pain unless a convincing case can be made to the contrary’ (Regan, above n 13, p 366; see also pp 334, 349).

⁸⁷ For an extended debate which brings out many of these points in more depth than is possible here see Francione, GL and Garner, R (2010) *The Animal Rights Debate: Abolition or Regulation?*, Columbia University Press, New York.

protect what they own'. Epstein asks the rhetorical question: 'Why is it that anyone assumes the human ownership of animals necessarily leads to their suffering ... often quite the opposite is true ... there is no necessary conflict between owners and their animals'.⁸⁸ Tellingly, in supporting this position, Epstein relies most heavily on the position of companion animals, and ignores animals used in research. In relation to farm animals, he is left to argue that farm animals face a more humane death than wild animals, presumably a benefit of ownership by humans. This, of course, confuses two distinct categories of animal, in which our ethical obligations may be quite distinct, and overlooks both the treatment of farm animals while they are alive and the reasons for bringing them into existence in the first place.

Second, even if the abolition of the property status of animals could be achieved, would this be enough to end the exploitation of animals, in the way envisaged by Francione? It may still be possible to remove the property status of animals, while exerting significant control over them:

There is an assumption amongst many animal law scholars, and many in the animal rights movement, that abolishing the legal status of animals as the property of humans will open the door to an animal rights Garden of Eden where liberated animals will cease to be systematically exploited by humans. There is a strong case for agreeing with the proposition that abolishing the property status of animals is a necessary step towards the achievement of an animal rights agenda where, to all intents and purposes, animals are regarded as the moral equals of humans. However, such a move is by no means a sufficient step.⁸⁹

Third, Francione pursues an 'all-or-nothing' argument: the classification of animals as property must be abolished, with incremental change to the *welfare* position of animals counter-productive:

There is simply no empirical evidence to suggest that if we make animal exploitation more "humane" now, we will be able to abolish such exploitation later through the recognition of rights. Indeed, the evidence that we do have seems to lead to the opposite conclusion, namely, that reforming exploitation through welfarist means will simply facilitate the indefinite perpetuation of such exploitation.⁹⁰

Such a stringent view is vulnerable to the criticism of being disempowering, and politically naive, given the scope of change that is sought. While conceding detrimental consequences for animals associated with their status as property, Radford argues that:

88 Epstein, RA (2004) 'Animals as Objects, or Subjects, of Rights' in Sunstein and Nussbaum (eds), above n 16, pp 148-149.

89 Garner, R (2005) *The Political Theory of Animal Rights*, Manchester University Press, Manchester, pp 43-44. See also Sunstein, above n 23, pp 11-12.

90 Francione, above n 24, p 257.

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This uncompromising dismissal of animal welfare law is unequivocally rejected ... While it is recognized that legislation may always endorse and entrench standards which public policy makers consider to be acceptable, but which are incompatible with the attainment of a high standard of welfare for the animals concerned (hence the need always to keep the law under review) ... legislative intervention *has* made a positive difference, continues to do so, and reform has the potential to improve the situation further.⁹¹

Finally, Francione concedes that the question is open as to whether we '[m]ust await the abolition of the property status of animals before we can talk about restructuring the legal system to reflect the recognition of animal rights, or can rights changes occur – in the legal system – without there being a complete abdication of the status of animals as property?'⁹²

One innovative response to this question is provided by David Favre, who champions a politically astute approach, seeking to incrementally modify the property status of animals, rather than to abolish it outright.⁹³ One of his proposals draws on the distinction drawn in common law jurisdictions between legal and equitable property. He argues that property in an animal should be split, with legal title in an animal held by the human owner, while the title in equity would be held by the animal itself. This would create a trust-like situation, where the human holder of the legal title would become the trustee, or guardian, of the equitable title-holder, the animal. This would entail the human trustee or guardian discharging a range of responsibilities to the animal, akin to those owed by a guardian to a child. It would also provide a right of action on behalf of an animal where these duties were not discharged. Such an approach has yet to be legally tested in practice in Australasia, although an analogous argument has had mixed success in other jurisdictions.⁹⁴ Another proposal put forward by Favre, which incorporates and significantly extends the idea of equitable self-ownership, is to create a new category of property, so-called 'living property'.⁹⁵ This approach would entail a modification of property law to recognise a range of legal rights for some animals (essentially personally identifiable domestic animals) outside the prevailing animal property

91 Radford, M (2001) *Animal Welfare Law in Britain: Regulation and Responsibility*, Oxford University Press, Oxford, p 394.

92 Francione, above n 24, p 260.

93 For a detailed account, see Favre, D (2000) 'Equitable Self-Ownership for Animals' 50 *Duke Law Journal* 473.

94 A non-property, guardianship model was argued in the Austrian court system, on behalf of a Great Ape named Hiasl, but was unsuccessful: see Douglas, K (2007) 'Just like us: Humans have rights, other animals don't – no matter how human-like they are' *New Scientist*, vol 194 (no 2606), 46 (2 June). The same article reports the adoption of a non-property, guardianship model by the regional parliament of Spain's Balearic Islands.

95 Favre, D (2010) 'Living Property: A New Status for Animals within the Legal System' 93 *Marquette Law Review* 1021.

paradigm. These rights would include the right not to be harmed, the right to be cared for, the right to living space, the right to be properly owned, the right to own property, and the right to file tort claims.⁹⁶ This proposal is avowedly incrementalist, recognising the generally piece-meal way in which law is modified over time, but creates the platform for further expansion over time, including in the range of animals included.

Incrementalism – legal personhood for (some) animals

If Francione takes a robust approach to advocating a change in the legal status of all animals, Steven Wise is more cautious.⁹⁷ Like Francione, Wise argues for a shift in the legal status of animals from ‘things’ to ‘persons’, but for a limited class according to their ‘practical autonomy’, on the pragmatic basis that the pursuit of ‘legal rights for animals must proceed one step at a time, as progress is impeded by physical, economic, political, religious, historical, legal, and physiological obstacles’.⁹⁸ Practical autonomy encompasses the ideas of sentience and consciousness, of desire and an intention to fulfil that desire.⁹⁹ Basic liberty rights should be recognised in animals to the extent that such autonomy is possessed. For some, this may imply legal personhood (as would be the case for chimpanzees and bonobos), while for others with lower practical autonomy, a watered-down version of legal rights may be more appropriate. However, for others still, it may be simply impossible for us to reach a view as to the extent of their autonomy. The ‘precautionary principle’ should be observed in these cases, and legal reality adjusted in accordance with new empirical evidence.¹⁰⁰

⁹⁶ For a complete list and a discussion of the content of these legal rights see Favre, *ibid.*, pp 1060-1070.

⁹⁷ The account of Wise which follows, and the criticism from Posner, is a slightly modified version of that found in White, S (2005) ‘Animals and the Law: A New Legal Frontier?’ 29 *Melbourne University Law Review* 298 at 303-304.

⁹⁸ Wise, SM (2004) ‘Animal Rights, One Step at a Time’ in Sunstein and Nussbaum (eds), above n 16, p 19. For more detailed accounts of the same argument, see Wise, SM (2000) *Rattling the Cage: Toward Legal Rights for Animals*, Perseus, Cambridge Mass; and Wise, SM (2002) *Drawing the Line: Science and the Case for Animal Rights*, Perseus, Cambridge Mass. Consistent with this approach Wise is pursuing a ‘Nonhuman Rights Project’, aiming ‘to break through the legal wall that separates humans from nonhumans, thereby gaining legal “personhood” for nonhuman animals, beginning with some of the most intelligent animals on earth, like chimpanzees, elephants and dolphins’: Nonhuman Rights Project, ‘What is the Nonhuman Rights Project?’ <<http://www.nonhumanrightsproject.org/overview/>>. See also Wise, SM (2010) ‘Legal Personhood and the Nonhuman Rights Project’ 17 *Animal Law* 1. The Nonhuman Rights Project has announced that the first lawsuits will be filed in 2013: Steven Wise, ‘2013 is here, and we’re ready!’, Nonhuman Rights Project, 16 January 2013 <<http://www.nonhumanrightsproject.org/2013/01/16/2013-is-here-and-we-are-ready/>>.

⁹⁹ Wise, ‘Animal Rights, One Step at a Time’, above n 95, p 32.

¹⁰⁰ Wise takes the concept of the precautionary principle as developed in an environmental context, and argues for application of a revised version in the context of assessing the practical autonomy of animals: Wise, *Drawing the Line*, above n 95,

Wise wants to use biological determinism to persuade judges to take what he calls the 'first, most crucial step'¹⁰¹ of overcoming the status of animals as property at common law, and to invest them with legal personhood, so that they can be the bearers of significant legally enforceable rights (including to bodily integrity, and to life).¹⁰² For the most part, Wise confines himself to the consideration of legal rights and, by contrast with Francione, does not concern himself at all with Regan's case for recognition of moral rights as a precursor to recognition of legally enforceable rights. Where, then, does Wise derive the ethical imperative for legal change? Perhaps not surprisingly, in the same foundational concepts as Regan, Singer, Francione and many others: he explicitly appeals to the need to avoid speciesism,¹⁰³ and implicitly relies on the principle of equal consideration and the AMC to justify entitlements for animals with practical autonomy.¹⁰⁴

Posner criticises Wise's attempt to argue that a court that recognised rights in cognitively well-developed animals such as chimpanzees would be acting in a way consistent with a step-by-step development of the common law.¹⁰⁵ For Posner, this amounts to confusing a *reason* for changing the law with a *rationalisation* for doing so.¹⁰⁶ Posner seems to be suggesting that we are all realists now and, if courts are persuaded to change the law in the way advocated by Wise, they will do so for other reasons, using the rationalisations provided by advocates such as Wise merely 'to conceal the novelty of their actions'.¹⁰⁷ If they are to change the law, they need to know the consequences and, for Posner at least, recognising rights for animals raises as many questions as it answers.

More broadly, outside a US setting, there is another important limitation in Wise's focus on development of the common law. Given the pervasiveness of animal welfare legislation in Australasia, and a host of

pp 38-43. He states that '[i]n light of what we know, it is time to apply a precautionary principle to the law of nonhuman animals ... [w]hen there is doubt and serious damage is threatened, we should err on the cautious side when some evidence of practical autonomy exists': *ibid*, p 40.

101 Wise, 'Animal Rights, One Step at a Time', above n 95, p 41.

102 In a development consistent with the underlying arguments of Wise, but initiated by politicians rather than judges, the Spanish Parliament in June 2008 supported the campaign for legal rights for great apes, led by the Great Ape Project, an 'international group founded to work for the global removal of non-human great apes from the category of mere property, and for their immediate protection through the implementation of basic legal principles designed to provide these amazing creatures with the right to life, the freedom of liberty and protection from torture': Great Ape Project (undated) 'The Great Ape Project: An Idea, A Book, An Organization', <<http://www.greatapeproject.org/index.php>>.

103 Wise, 'Animal Rights, One Step at a Time', above n 95, pp 26-27.

104 Wise, *Rattling the Cage*, above n 95, pp 251-262.

105 Posner, RA (2004) 'Animal Rights: Legal, Philosophical, and Pragmatic Perspectives' in Sunstein and Nussbaum (eds), above n 16, pp 56-57.

106 *Ibid*, p 58.

107 *Ibid*.

other legislation in which the property status of animals is explicit,¹⁰⁸ development of the common law to recognise legal personhood for animals seems a fruitless path to follow. As Radford suggests about the validity of such an approach in Britain, in terms equally applicable to an Australasian setting:

[Even] if the senior judiciary could be prevailed upon to accept that the capacities of a particular species were such as to justify a change in their legal status, it is highly improbable that the judges would consider it appropriate for they themselves to introduce such a novel principle into the law ... [B]ecause there already exists a significant body of animal protection legislation, the judges would most likely conclude that the territory has been occupied by Parliament and it would therefore be proper to leave it to that institution to take the initiative in deciding whether it should be further extended.¹⁰⁹

Contesting the similarity argument

The type of argument made by Wise for advancing the interests of animals explicitly turns on finding relevant similarities between humans and some animals so as to justify their inclusion in the fraternity of legal personhood. Such an approach is also a feature of most of the other accounts considered here for advancing the interest of animals, whether philosophical or legal.¹¹⁰ Such approaches are characterised by Bryant as turning on the 'similarity argument', the argument 'that if animals are similar to humans as to capacities and characteristics of humans that define humans, then animals should receive protections equivalent to the protections of humans because a just society treats like entities alike'.¹¹¹

Problems with reliance on the similarity argument have been raised by Bryant and Fox in slightly different ways, although they agree on one important consequence: the similarity argument potentially embeds a hierarchical order, in which, at best, some small number of animals will be preferred to all others.¹¹² In particular, in order to continue excluding animals from serious moral or legal consideration, our understanding of what it is to be human will be re-defined, 'revising that account upwards'.¹¹³

108 See n 77 above.

109 Radford, above n 90, p 104.

110 Including Singer, Regan, and Francione, as well as, less obviously, Nussbaum and Rachels: see Bryant, TL (2007) 'Similarity or Difference as a Basis for Justice: Must Animals Be Like Humans to be Legally Protected from Humans?' 70 *Law and Contemporary Problems* 207 at 223.

111 Ibid, p 208. The similarity argument resonates with the post-humanist critique which is a feature of Continental philosophy: see above fn 70ff. A point of contrast though is that no legal reform agenda has yet emerged from the Continental critique.

112 Ibid, pp 215-219; Fox, above n 9, pp 480-481.

113 Fox, above n 9, p 479. Bryant states '[n]ew information that appears to prove similarity between humans and animals may only result in a redefinition of the term

Bryant critiques reliance on the similarity argument as counter-productive to the advancement of animal interests for a number of reasons, three of which are considered here. First, she argues it can be 'difficult to prove or to gain acceptance of even basic similarities of animals with humans'.¹¹⁴ For example, 'research conducted to determine the extent of animals' capacity to feel pain still leaves room for vigorous debate about what animals actually feel when they appear to suffer pain'.¹¹⁵ So long as such debate is possible, it is all too easy to dismiss claims of likeness justifying improved legal entitlements for animals. Second, the need to establish similarities necessarily drives continued research on animals, some of it highly exploitative and damaging to the animals involved, undermining the key goal of many of those relying on the similarity argument to improve the position of animals.¹¹⁶ Third, adopting the similarity argument is necessarily defensive, since the onus is on those who wish to advance the interests of animals to establish similarities to humans of a kind sufficient to extend legal entitlements, when the question should be '[b]y what moral entitlement *do* exploiters (ab)use animals in specific cases ... placing the burden of justification on those who wish to harm animals'.¹¹⁷

Fox's concern about reliance on the similarity argument is that it fails to engage with a more fundamental re-thinking of the human-animal boundary, given her contention that the binary distinction is not soundly based. First, 'boundary animals' – for example, apes – straddle the boundary between humans and animals because of their underlying intellectual abilities, rendering the boundary malleable. If there is no clear dividing line, even based on high-level intellectual capacities, to distinguish human from animal, this leaves the rigid legal separation looking highly artificial. Second, techno-scientific developments, including evidence of significant shared DNA between humans and other animals, and the creation of hybrid human-animals through techniques such as xenotransplantation, draw the clearness of the boundary into question. Instead of challenging the human-animal boundary, the similarity argument 'runs the risk of entrenching it more firmly, by bringing certain privileged animals within its moral compass'.¹¹⁸

Perhaps not surprisingly, then, Fox argues that a kinship approach, grounded in feminist theory, offers a better way of thinking about the status

"human" so that the oppositional categories of "human" and "animal" remain intact ... in order to retain the singularity of humans': Bryant, above n 107, p 212.

114 Bryant, *ibid.*

115 *Ibid.*, p 214.

116 *Ibid.*, pp 220-222.

117 *Ibid.*, p 225 (emphasis in original).

118 Fox, above n 9, pp 480-481.

of animals.¹¹⁹ Bryant acknowledges that while the similarity argument will continue to affect advocacy for change to the status of animals,¹²⁰ an 'anti-discrimination' approach is preferable. Such an approach is one in which diversity is valued, and 'equality as a function of being similar to those who already have rights or access is gradually replaced with equality as a function of structures that are designed to permit or even expand the range of participatory possibility to those who had not been included, even before and without the demand having been made'.¹²¹

Conclusion

The purpose of this chapter has not been to develop a new way of conceptualising the status of animals. Given the range of scholarship and the nature of the questions involved, and the necessarily limited account which can be provided in a chapter such as this, the goals have been much more modest. This chapter has sought to show that thinking about the legal status of animals is unavoidably an interdisciplinary process, with the persuasiveness of legal conceptions of the status of animals resting on philosophical and ethical foundations which are themselves contestable. Further, I have sought to develop two compelling points which emerge for anyone who engages with arguments about the moral significance of animals, and their reflection in law. First, a conception of animals as being morally significant only to the extent that they deserve humane treatment or protection from cruelty is, at best, difficult to defend. Second, given that for virtually all animals the law fails to give effect even to this limited understanding of the moral significance of animals, legal change is required. The arguments in favour of significant change in the way we conceptualise animals, and especially how we protect their interests in law, are substantial and varied, even if there might be ongoing debate about how extensive this change ought to be or on what basis it might be justified. What remains to be achieved is the translation of these powerful theoretical arguments into practical outcomes, a significant political and cultural challenge.

119 She also acknowledges that such an approach may not provide straight-forward legal solutions, suggesting that 'against a backdrop where techno-science has the power to produce all manner of creatures, with a capacity for disrupting conventional categories, I remain to be convinced that neat legal solutions can be manufactured to accommodate the kinship relations which are emerging or being rendered more visible. Thus, I am concerned to argue, not for an expanding circle of creatures to whom law grants entitlements or protections, but rather for law to recognise animals as our kin': Fox, above n 9, p 492.

120 Bryant, above n 107, pp 252-253.

121 Ibid, p 238.