



**Directorate of Distance Education
Centre for Distance and Online Education (CDOE)
NALSAR University of Law, Hyderabad**

**Course Material
ADVANCED DIPLOMA IN
ANIMAL PROTECTION LAWS**

1.2.4 Animal Ethics

Compiled by
(For private circulation only)

NALSAR University of Law, Hyderabad
First Edition: 2022
(For private circulation only)

ANIMAL WELFARE ETHICS
SEMESTER II
READING MATERIAL

1. Who is an Animal?

READINGS :

- *A case for Personhood for Non-Human Animals*, Published by FIAPO
- *Legal Personhood and Animal Rights*, Visa Kurki, Journal of Animal Ethics
- *Do Animals have a standing in Courts? Understanding the scope of Personhood in the Indian context*, Taniya Malik, Bharati Law Review

CASES AND LAWS:

- *Wildlife Rescue and Rehabilitation Centre and Ors v. Union of India and Ors.*, W.P (C) No. 743 of 2014)
- Legal Provisions :
 - o Section 2(h), Wildlife Protection Act, 1972
 - o Section 2(c), Prevention of Cruelty to Animals Act, 1960
 - o Section 2(d), Prevention of Cruelty to Animals Act, 1960
- *In Re : Smuggling and Illegal Trading of Endangered Species of Birds*, W.P. No. 10138 of 2020
- *Royal Hatcheries Pvt Ltd v. State of Andhra Pradesh* (1994) AIR 666
- *Narayan Dutt Bhatt v. union of India and Ors.*
- *Karnail Singh v. The State of Haryana* (2014) 7 SCC 547
- *Durand v. Attorney General of Quebec* (2018) QCCS 2817, [1] (Superior Court)

2. Why do Animals matter?

READINGS :

- *The recognition of Animal Sentience by the Law*, Charlotte E Blattner, Journal of Animal Ethics
- *Which animal rights should be recognised?* Natasha Stojanovic, Belgrade Law Review
- *Animal Sentience and Welfare: An overview*, International Journal of Microbiology an Applied Sciences
- *Towards a theory of legal animal rights: Simple and Fundamental Rights*, Saskia Stucki, Oxford Journal of Legal Studies
- *Granting animal rights under the Constitution: A misplaced approach? An analysis in light of Animal Welfare Board of India v. A. Nagaraja*, Jessamine Therese Mathew and Ira Chadha-Sridhar
- *The Moral Status of Animals: A critical analysis and a gradualist proposal*, Francesco Allegri

CASES:

- *Animal Welfare Board of India v. A. Nagaraja and Ors* (2014)
- *N.R Nair and Ors v. Union of India*, Civil Appeal No. 3609-3620 of 2001
- *Road to Home Rescue Support v. Ville de Montreal* [2019] Q.C.C.A 2187 (Can.Que.)
- *State v. Newcomb*, 375 P.3d at 437
- *State v. Fessenden*, P.3d 278, 284 (Or.2014)
- *Bueckner v. Hamel* 886 S.W.2d 368 (Tex.App.1994)

3. Why does animal suffering matter?

READINGS:

- [*The connection between animal abuse and human violence*](#), Dr. Harold, J Hovel
- *Developmental Links between Cruelty to Animals and Human Violence*, Mark R Dadds, Cynthia Turner and John McAloon
- *Animal Cruelty, pet abuse and violence : The missed dangerous connection*, Scott A Johnson
- *Animal abuse in the context of adult intimate partner violence : A systemic review*, Michelle Cleary, Deependra K Thapa, Sancia West, Mark Westman, Rachel Kornhaber

CASES:

- *Animal Welfare Board of India v. A Nagaraja and Ors.* (2014) 7 SCC 547
- *Animal Welfare Board of India v. People for Elimination of Stray Troubles* (2015) SCC OnLine SC 1193
- *State v. Adbi-Issa*, No. 80024-8-1

4. Historical References to Animal Welfare

READINGS:

- *Animal Welfare : A brief history*, Ian J.H.Duncan
- *Animal Rights and Animal Welfare: Historical resources* (Article to be shared after Journal Permissions Team Approval)
- *A History of Animal Welfare Science*, Donald M Broom
- [*The history of Animal welfare law and the future of Animal rights*](#), Marie Blosh

CASES:

- *Animal Welfare Board of India v. A. Nagaraja* (2014) 7 SCC 547

5. How should we treat Animals?

READINGS :

- [*The Brambell Report \(1965\)*](#), Professor F.W. Rogers Brambell
- [*The five freedoms of animal welfare are rights*](#), Clare McCausland
- *A critique of FAWC's Five Freedoms as a framework for analysis of animal welfare*, S P McCulloch

CASES:

- *Animal Welfare Board of India v. A. Nagaraja* (2014) 7 SCC 547

A Case for Personhood for Non-Human Animals

Publication year - 2018





About Federation of Indian Animal Protection Organisations (FIAPO)

FIAPO is India's apex
animal rights organisation.
As the collective voice
of the animal rights
movement in India,
FIAPO is the catalyst
that protects the interests
and rights of animals
on local and national
levels - through education,
research, lobbying, mobilisation,
networking, training
and direct action.
Created for the movement,
by the movement,
FIAPO is India's only
national federation.
It has over 83 members
and over 200 supporter
organisations across
the country.

Join us to protect the interests and rights
of animals by visiting www.fiapo.org.

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Introduction

In the area of animal law, there is a growing debate as to what the legal classification of animals should be. Presently, within India's welfarist approach, animals are defined as property, (with limited instances of some rights being granted) and laws are designed to prohibit the unnecessary suffering of animals.

This document seeks to depart from the status quo and classify animals with legal personhood. The arguments for the same are compelling, recognising animals to have rights by looking at the current legal framework, recognising the sentience of animals and ultimately creating linkages between the rights of animals and human beings.



Should animals have rights?

The relationship between human and animals has developed culturally in a manner that regards animals not as equals, but as “things/property” allowing for the use of animals. When animals meet the criteria for a property status, they are by virtue of that status considered as objects under law. This objectification takes “personhood” out of how we regard animals, allowing humans to use animals contrary to the animals' interests.

The definition of rights excludes animals on the claim that only natural persons or legal personalities have rights, protections, privileges, responsibilities, and legal liability. However, this distinction stands to question in view of the following arguments that call for key fundamental rights for animals:-

- Animals are sentient beings capable of feeling pain and suffering
- Animals have inherent/intrinsic value
- There is not enough reason for 'morality' to be a defining factor while granting fundamental rights
- Speciesism as a concept is an anthropocentric view and doesn't embody the richness and diversity of life on earth

Furthermore, a closer look at the lives of animals reveals that many of the activities that are thought to be distinct to humans occur in animals as well. Most animals do demonstrate a certain amount of interest in maintaining basic welfare by making sure of their food and sleep, alongside other common social behaviors and interactions such as nurturing young ones, building kinship, altruism, hierarchies, grief and intellect.

These indicate- among other things – a growing need to recognize fundamental rights for animals.

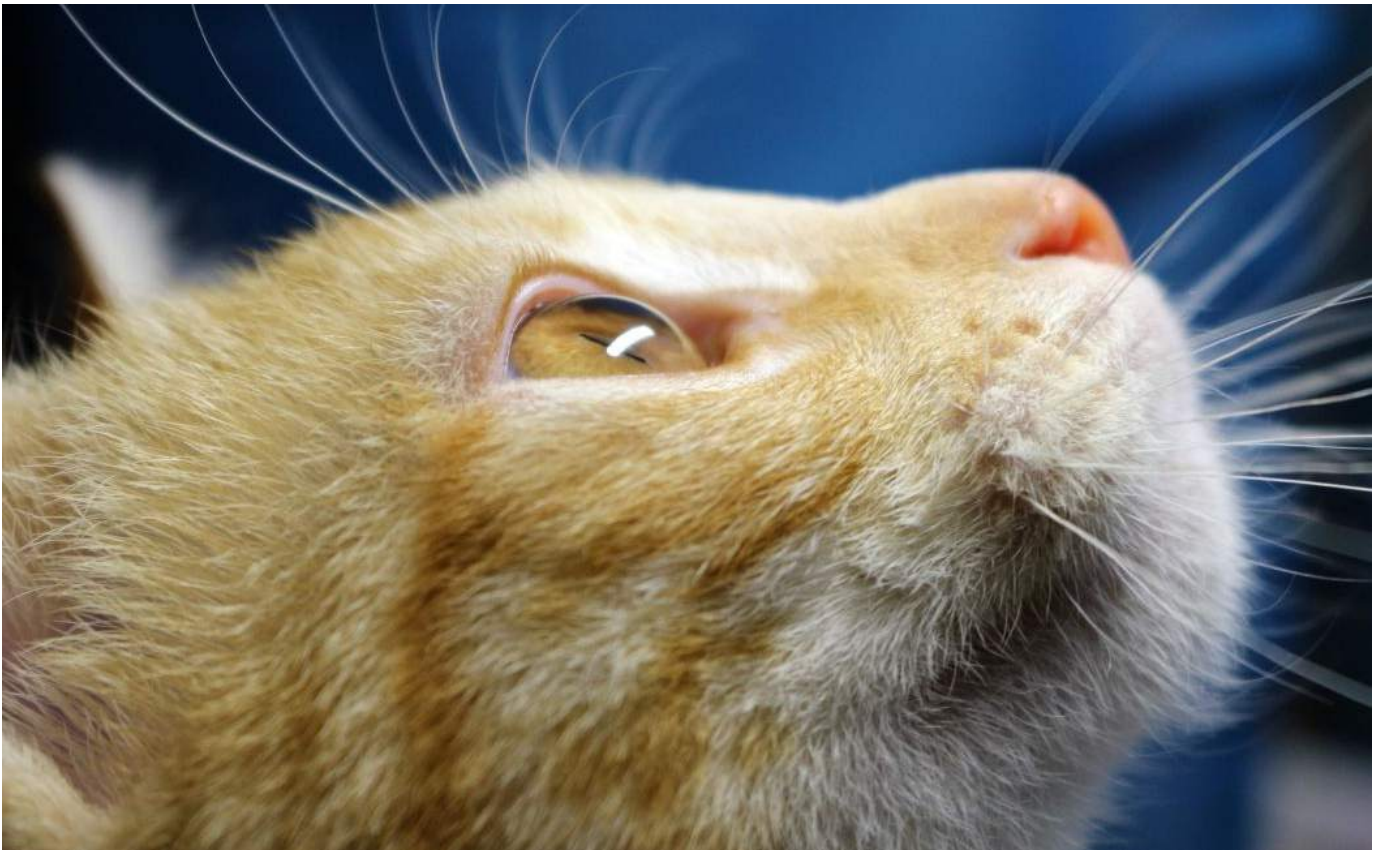


Animal Rights: An Overdue Change

Animals have been consistently exploited, used and abused for human needs and denied a dignified life. With no legal recognition of their rights, countless animals lead miserable and degraded lives with constant suffering. Like humans, animals are sentient living beings, they feel pain and suffer when they are hurt or deprived of their lives, families and freedom. They have social behaviours and interactions similar to humans such as nurturing young ones, building kinship, altruism, hierarchies and grief. At present, animals are considered as mere property under the law and such objectification of living beings sanctions use of such beings contrary to their interests.

We recognise that animals have inherent value and deserve to be treated with dignity. Their interests deserve equal moral and legal consideration. We believe that animals should not be commodified and should be a subject of rights. At the same time we realise that the legal status of animals as that of property requires reconsideration and change. Thereby, we strongly affirm that all animals must be entitled to the following legal rights:

1. Right to life with dignity
2. Right to bodily liberty, integrity and autonomy
3. Right against commercial exploitation, torture, cruel and degrading treatment
4. Right to physical and mental well-being
5. Right to interact and socialise with others of the same species
6. Right to a healthy environment and protection of natural habitat
7. Right to equal consideration of interests



A Brief History of Animal Rights

While the property status of animals has left little regard in their legal treatment, history does show signs of according a '**personhood**' status to animals in rare occurrences. A history of the same can be found below:

1981	1992	1999	2002	2015
The first US conviction for animal abuse against an experimental laboratory is achieved, after an undercover investigation by animal rights activists	Switzerland amends its constitution to recognize animals as beings and not things	New Zealand grants basic rights to five great ape species, banning their use in research, testing or teaching. This is considered the greatest legal success in the history of animal rights	Germany amends its constitution to guarantee rights for animals, becoming the first EU country to do so	A New York court considers whether chimps are legal persons



The Link between Human Rights and Animal Rights

The biological definition of human beings classifies human beings as animals, making it relatively simple to conclude that human rights are only a subset of the larger group of “animal rights” that should include rights for all sentient beings. However, humankind has had a long history of distinguishing and bestowing rights based on external traits without due deference to coherent arguments. Rights have historically not been granted on the basis of Color, Caste, Creed, Gender, Sexual Orientation, Nationality, Faith/Non-Faith, Political Beliefs, and/or Disability.

The movements to get rights for the disabled, for people with varied sexual orientation to be heard, or to end discrimination basis the color of your skin, have been tirelessly working towards making a change in the attitude of individuals and the society at large.

Culturally, we have progressed from many of these; however some of these still remain entrenched in different parts of the world. Peter Tatchell, a British human rights activist, argues speciesism to be analogous to homophobia, racism and misogyny, creating room for a possible tangible shift in the legal status of animals in the times to come.

Misconception, belief, culture are some of the eminent components that have affected movements in the past. To break the belief of the majority and alter cultures, which then brings about a change in ideologies of the masses, is the biggest challenge for any movement. But the success of these movements in the past proves that it is in fact possible, and may even be an eventual reality.

Noting that it is difficult to win a movement in isolation, a brief look into the history of human rights movements reveals that a lack of legal personhood for animals leads to a deprivation of rights for humans because of their interdependence.

Denying rights to animals ultimately does result in deplorable conditions for both human and non-human animals, thereby leaving the rights of both violated. Here are some examples of the interdependence of human and animal rights:

- 1) **Global Hunger:** Currently, there are over 800 million people who do not have enough to eat, while 90 million acres of land are currently used to grow corn to feed factory-farmed animals.
- 2) **Slavery:** Men who come to Thailand, America's second-largest seafood supplier, from bordering countries in search of work are tricked into lives of slavery on fishing boats, where captains subject them to horrific brutality. Those who resist are often murdered. This is one example of how denying the rights of animals have led to the downfall of human rights.

- 3) **Environmental Injustice:** Waste from factory farms pollutes air, contaminates streams and rivers, jeopardizes our water supply, and compromises the quality of life for families who live nearby.
- 4) **Child Labour:** Many factory farms hire underage and undocumented labour, working them overtime with no rights. Federal officials fined House of Raeford, one of the largest poultry processors in the country, when 2008 immigration raid uncovered more than 300 undocumented workers and six underage employees, including a 15-year-old girl, working 10-hour shifts slaughtering chickens.



The Legal View of Animal Rights in India

Landmark judgments in India have awarded animals with certain rights. A brief summary of the same is given below. For detailed legal definitions and doctrines used in awarding these rights, please refer to the Annexure 3 on Legal Definitions.

1. The following rights have been explicitly recognized by the Supreme Court:

- a) Right to live in a healthy and clean atmosphere
- b) Right of animal to not be inflicted with unnecessary pain or suffering
- c) Right to proper care
- d) Right to get protection from human beings against inflicting of unnecessary pain or suffering
- e) Right to get food and shelter
- f) Right to dignity and fair treatment
- g) Right, not to be beaten, kicked, over-ridden or over-loaded
- h) Inherent right to live

2) All animals are legal persons with right to life and bodily liberty

The Uttarakhand High Court has granted personhood to the entire animal kingdom including avian and aquatic. It noted that animals cannot be treated as mere property. [Narayan Dutt Bhatt v. Union of India (2018), Uttarakhand High Court]

3. Right to live peacefully without human interference

This judgment recognises the right of animals to non- interference into their lives and territories by humans and the government. [Nitin Singhvi v. Union of India (2017), Chhattisgarh High Court]

4. Right to fly and to not be caged (for birds)

[People for Animals v. Mohd. Mohazzim – Delhi High Court]
[Abdulkadar Mohamad Azam Sheikh v. State of Gujarat – Gujarat High Court]

5. Cows should have the status of legal entity

Jago Janta Society v. State of Rajasthan and Ors. (2017) [Rajasthan High Court]

Laws and Policies

- a) Ban on Dolphinariums: The Ministry of Environment and Forest noted that dolphins must be seen as 'non-human' persons.
- b) The Prevention of Cruelty to Animals Act, 1960: The law recognizes every dog need not have an owner.
- c) The Wildlife Protection Act, 1972: The Act recognizes that wild animals in general are not property.
- d) Constitution of India: Recognises the intrinsic value in all creatures.

Judgments

1) Animal Welfare Board of India v. A Nagaraja (2014) [Supreme Court of India]

The court recognized that Sections 3 and 11 of the Prevention of Cruelty to Animals Act, 1960 confers corresponding rights on the animals as against the persons in-charge or care, as well as AWBI, to ensure their well-being and to not be inflicted with any unnecessary pain or suffering or cruelty as provided by Section 11. The Apex Court opined that animals also have intrinsic value and worth. Stress was also laid on the protection of dignity of animals.

Emphasis was laid on the doctrine of *parens patriae*. The Court has a duty under the doctrine of *parens patriae* to take care of the rights of animals, since they are unable to take care of themselves as against human beings.

The court recognized an animal's right to dignity, honour and fair treatment.

It was emphasized that the statutory rights possessed by animals by virtue of Section 3 and 11 of the PCA Act need to be elevated to the status of fundamental rights as has been done by few countries around the world, so as to secure their honour and dignity. Rights and freedoms guaranteed to the animals under Sections 3 and 11 have to be read along with Article 51A(g)(h) of the Constitution, which is the magna carta of animal rights.

It was stated that animals also have honour and dignity which they cannot be arbitrarily deprived of, and their rights and privacy have to be respected and protected from unlawful attacks.

2) Narayan Dutt Bhatt v. Union of India (2018) [Uttarakhand High Court]

The Uttarakhand High Court declared the entire animal kingdom including avian and aquatic as legal entities having a distinct persona with corresponding rights, duties and liabilities of a living person. The Court has also declared that “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.” The High Court in this judgment has stated that “The animals should be healthy, comfortable, well-nourished, safe, able to express innate behaviour without pain, fear and distress. They are entitled to justice.” It was also noted that animals cannot be treated as merely as property and that animals, including avian and aquatics have a right to life and bodily integrity, honour and dignity.

The Court recognised that “animals breathe like us and have emotions. The animals require food, water, shelter, normal behaviour, medical care, self-determination.” Reliance was placed on scientific evidence and works of various literary authors upon intelligence, high cognitive, emotional and social skills of animals – language, memory, altruism, culture, co-operation, foresight, self-awareness.

3) Nitin Singhavi v. Union of India (2017) [Chhattisgarh High Court]

This PIL was filed by the petitioner to seek release of a wild elephant named “Sonu” held in captivity by the authorities of Achanakmar Tiger Reserve in Bilaspur district of Chhattisgarh after catching the pachyderm from wild a year and half ago.

The Court observed that “it is part of principles and policies ingrained in Article 39 and Article 48A among the directive principles of the state policy, read along with the fundamental duties of the citizens in terms of Article 51A(g), **that we need to recognize that animals do have the rights, the enforcement and preservation of which depend largely upon the self-imposed or, otherwise enforced, restrictions that humans should maintain:** individually, collectively and through institution of governance; against invading the life and territories of animals.”

Thus, this judgement highlights the need of non- interference into the lives and territories of animals by humans and the government. An inference maybe draw that animals have a right to live peacefully.

4) Jago Janta Society v. State of Rajasthan and Ors. (2017) [Rajasthan High Court]

Rajasthan High Court recommended that cows too should be declared as the national animal of India. Keeping Article 48 and 51 A (g) of the Constitution of India in mind, the Court recommends **that cows should have the status of legal entity** and they should be declared as the national animal for its protection.

The Court appointed the Chief Secretary of Rajasthan Govt. and the Advocate General as persons in loco parentis (in the place of a parent) for preservation of cattle and to get cow the status of legal entity and declare it as a national animal.

5) Mohd. Salim v. State of Uttarakhand and others (2017) [Uttarakhand High Court]

The Court, in exercise of its parens patriae jurisdiction declared Yamuna and Ganga rivers and all their tributaries, (including streams, every natural water flowing with flow continuously or intermittently) as legal persons.

It was stated that recognition of an entity as an artificial/legal person is subservient to the needs and faith of the society. It was also highlighted that for a bigger thrust of socio-political-scientific development, evolution of a fictional personality to be a juristic person becomes inevitable.

The court acknowledged that the rivers are sacred and worshipped by Hindus, but also threw light on the physical and natural importance of the rivers: “They support and assist both the life and natural resources and health and well-being of the entire community. Rivers Ganga and Yamuna are breathing, living and sustaining the communities from mountains to sea.”

The operation of this judgment has been stayed by the Supreme Court vide interim order dated 7th July, 2017 in a special leave petition moved by the State of Uttarakhand.

6) Pet Lovers Association v. Union of India and Ors. (pending) [Supreme Court of India]

This case is still pending before the Supreme Court. The legal question before the Supreme Court is whether birds have a fundamental right to fly. There have been no orders in this case so far.

The following two judgments have been challenged in this case:

a) People for Animals v. Mohd. Mohazzim (2015) [Delhi High Court]

It was held that birds have the fundamental right to "live with dignity" and fly in the sky without being kept in cages or subjected to cruelty. The judge stated that all birds have fundamental rights to fly in the sky and human beings have no right to keep them in small cages for the purposes of their business or otherwise.

b) Abdulkadar Mohamad Azam Sheikh v. State of Gujarat [Gujarat High Court]

The Court in this judgment declared that birds have a fundamental right to fly. "When everybody is talking about fundamental rights of the citizen, such as, right to live freely, right to food, right to move freely etc. a day has come to think about the rights of the birds and animals, because of such act even the birds have vanished and their numbers are in decrease."

It was held that every bird / animal has a right to move freely and as far as the birds are concerned, they have every right to move freely in the open sky / air and they cannot be kept in cages at all. To keep the birds in cages would be illegal confinement of such birds, against their wish which would be against the fundamental right of the birds to move freely.



Laws and Policies

1) Ban on Dolphinariums

In May 2013, the Central Zoo Authority and the Ministry of Environment and Forest Affairs put a ban on the establishment of Dolphinariums in the country. While considering this, the central zoo authority opined that cetaceans in general are highly intelligent and sensitive, and various scientists who have researched dolphin behavior have suggested that their unusually high intelligence; as compared to other animals means that dolphins should be seen as “non-human persons” and as such should have their own specific rights and it is morally unacceptable to keep them captive for entertainment purposes.

2) The Prevention of Cruelty to Animals Act, 1960

Animal Birth Control Rules, 2001: Section 3 of this Act classifies dogs into pet dogs and street dogs. According to Section 3(2), the owner of pet dogs shall be responsible for the controlled breeding, immunization, sterilization and licensing in accordance with these rules and the law for the time being in force within a specified local area.

Section 3(3) provides that the street dogs shall be sterilized and immunized by participation of animal welfare organizations, private individuals and the local authority.

By reading the above-mentioned provisions, it can be said that the law recognizes that every animal (street dogs here) need not have an owner.

According to Section 7(3) street dogs cannot be relocated from their territory after they are caught for sterilization. This implies that the law recognizes the territorial nature of dogs and sees them as more than just “things” and instills respect towards their natural behavior.

3) The Wildlife Protection Act, 1972

Section 11(3) provides that any wild animal killed or wounded in self defence of any person shall be Government property. Any wild animal (other than vermin) hunted or kept or bred in captivity in violation of the provisions of the Act or any rule or order made thereunder or if found dead or killed by mistake shall be considered to be Government property.

An inference may be drawn that wild animals in general are not owned by anyone and are not considered to be property. It is only in certain circumstances as mentioned in the Act like the ones mentioned above and also when a person is given permission by the Chief Wildlife Warden to own an animal, can they be considered as “property” or have an owner.

4) Constitution of India

Article 48(A) puts the onus on state to protect and safeguard the environment, wildlife and forests.

Article 51A (g) this article states that it is the fundamental duty of every citizen of India to have compassion for all living creatures. Thereby, it may be implied that the Constitution of India recognizes the intrinsic value (as opposed to instrumental value) in all living creatures.

International Precedence

- The Association of Officials and Lawyers for Animal Rights argued that Sandra, a 29-year-old orangutan who's lived in Argentinian zoos for most of her life, is too intelligent to be considered an object or commodity. And unlike in the United States, the court actually agreed. It's not as if Sandra will be let out into the street or sent into the wild — she may have the basic rights of personhood, but no one is saying she can live as a human. And after a life in captivity, she probably wouldn't be able to survive in the wild. Instead, Sandra's "freedom" will be in a sanctuary, where she can live with others of her species and avoid gawking humans.
- Animals as beneficiaries of trusts and wills
- Custody of Companion Animals in Divorce Cases
- Legal personhood to selected lands and rivers in New Zealand: Although New Zealand has not formally adopted the Rights of Nature into statutory or constitutional law, the nation has acknowledged the inherent rights of nature by granting legal personhood to selected lands and rivers. New Zealand has granted legal personhood to the Te Urewera National Park and Whanganui River and its tributaries.
- In 2013, the Tūhoe people and the New Zealand government agreed upon the Te Urewera Act, giving the Te Urewera National Park "all the rights, powers, duties, and liabilities of a legal person." A Board was then established to serve as "guardians" of Te Urewera and to protect its interests. The stated purpose of the Act was to protect Te Urewera "for its intrinsic worth," including its biodiversity and indigenous ecological systems. As a result, the government gave up ownership of Te Urewera, and all decisions must serve the interests of and preserve the relationship of the Te Urewera and the Tuhoe people.
- Whanganui River and its tributaries granted legal status: Under the Tutohu Whakatupua Treaty Agreement, the river is given legal status under the name Te Awa Tupua. Te Awa Tupua is recognized as "an indivisible and living whole" and "declared to be a legal person." This treaty is especially important because it "recognizes the intrinsic interconnection between the Whanganui River and the people of the River (both iwi and the community generally)," and finds "the health and wellbeing of the Whanganui River is intrinsically interconnected with the health and wellbeing of the people." In March 2017, the Treaty settlement passed into law.

⁶Pet Animals: What happens when their humans die? | Gerry W Beyer | <http://bit.ly/2xySGoS>

⁷Knick-Knack, Paddy-Whack, Give the Dog a Home?: Custody Determination of Companion Animals Upon Guardian Divorce | Tabby T. McLain | <http://bit.ly/1RIJOwn>

- On 3rd November 2016, Argentine Judge María Alejandra Mauricio, ruled that a captive chimpanzee named Cecilia at the Mendoza Zoo is a “non-human legal person” with “inherent rights.” The Court granted Association of Professional Lawyers for Animal Rights’ (AFADA) petition for a writ of habeas corpus and ordered her transfer to a sanctuary within six months. The Nonhuman Rights Project (NhRP), the only civil rights organization in the United States working to secure legal rights for nonhuman animals, hailed Judge María Alejandra Mauricio's November 3 ruling that a captive chimpanzee named Cecilia at the Mendoza Zoo is a “non-human legal person” with “inherent rights.”



Personhood for Elephants -Introduction

The Indian elephant (*Elephas maxima*) is a keystone species of the tropical forests in India and has been accorded the highest level of protection in India by the Wildlife Protection Act 1972. Elephants are an endangered species according to the IUCN (International Union for Conservation of Nature) red list.

To protect the elephant, their habitats and corridors, the Government of India launched the Project Elephant in 1992. Given the significance of the elephant, ecologically and culturally, the Elephant Task Force set up by the Ministry of Environment and Forests, Government of India in its report titled *Gajah: Securing the Future for Elephants in India* recommended that the elephant be declared a National Heritage Animal which happened on 21st October 2010.

Elephants as a species have several special characteristics, and are often considered to be more human-like than any other large mammal. They are extremely intelligent beings with memories that span several years. Elephant intelligence has been compared with that of primates and cetaceans. Scientists are of the opinion that elephants are self-aware and self-reflective. This document seeks to create a case for personhood for elephants.



Legal Definitions and Framework

According to the Wildlife Protection Act 1972 captive and wild elephants are defined as follows:

- a) Captive elephant – Asian elephant which is captured or bred in captivity
- b) Wild elephant – Asian elephant found wild in nature

Legal Framework for protection of wild elephants

1. Wildlife Protection Act 1972

- a. Asian Elephants (found in India) have been given the highest legal protection an animal can get in our country. They are categorized as a Schedule I species under the Wildlife (Protection) Act 1972.
- b. Ownership of elephants
 - According to Section 40 of the Act, no person can keep in his control, custody or possession an elephant or sell, offer for sale or otherwise transfer or transport any elephant without the permission of the Chief Wildlife Warden of the state.
 - Section 42 of the Wildlife (Protection) Act gives the power to the Chief Wildlife Warden to issue a certificate of ownership to a person who in his opinion is in lawful possession of such animal; provided that he is convinced that there are 'adequate facilities for housing, maintenance and upkeep of the animal'.
- c. Transfer/sale of elephants
 - Section 43(1) of the Wildlife (Protection) Act 1972 prohibits the transfer of captive elephants by sale or offer for sale or by any other mode of consideration of commercial nature.

2. Declaration of Wild Life Stock Rules 2003 under the Wildlife Protection Act 1972

According to Rule 12, any captive elephant in respect of which ownership certificate has not been granted or obtained should be treated as government property.

3. Kerala Captive Elephants (Management and Maintenance) Rules, 2012

These rules have been framed under Section 64 of the Wildlife Protection Act 1972 laying down specific standards for management of captive elephants in Kerala.

4. Tamil Nadu Captive Elephants (Management and Maintenance) Rules 2011

These rules have been framed under Section 64 of the Wildlife Protection Act 1972 laying down specific standards for management of captive elephants in Tamil Nadu.

Government Policies for Protection of Elephants

1. Project Elephant (Ministry of Environment, Forest and Climate Change)

i) Project Elephant (PE) was launched by the Government of India in the year 1992 as a Centrally Sponsored Scheme with following objectives:

- a) To protect elephants, their habitat & corridors
- b) To address issues of man-animal conflict
- c) Welfare of captive elephants

ii) Guidelines for care and management of captive elephants

The Guidelines for Care and Management of Captive Elephants, 2008 issued by the Ministry of Environment & Forests under the aegis of Project Elephant provide specific standards regarding issue of ownership certificates, housing, feeding, transportation and work load of elephants held in captivity. These Guidelines have been issued to the Chief Wildlife Wardens of all the states and union territories.

2. Elephant Task Force (Ministry of Environment, Forest and Climate Change) - Gajah Report 2010

Some of the recommendations of the Elephant Task Force in its 2010 report are as follows:-

- a) Eventual phasing out of the acquisition of elephants, already in captivity or wild-caught, for entertainment, commercial or other purposes by agencies, institutions or individuals. It has further recommended 'an end to new commercial acquisition of wild-caught elephants by agencies, institutions or individuals'.
- b) Amendment to the Wildlife (Protection) Act 1972 to prohibit the 'use of elephants in exhibitions, circuses, weddings, unregulated tourism, public functions, begging or for other entertainment'.
- c) Elephant should be declared as the national heritage animal.

The Elephant Task Force concluded that “captive elephants have specific needs for access to water, adequate nutrition and exercise. **They ideally need to interact with others of their own species. Elephants are a long lived and intelligent species with a developed sense of self and relationships with other elephant kin. The Task Force is convinced of the need to act decisively to improve the quality of care of captive elephants.**”

The report also recognized the sentience and intelligence of elephants. It said that compassion must not only extend to other humans but also to other living beings.

The report cited and referred to certain research articles and studies indicating the high cognitive skills of elephants. Some of these are as follows:-

- a) “Whether endangered or not, ivory comes from highly intelligent, social animals that are affected by death and are bound by close familial ties. This is demonstrated by a plethora of elephant studies.” (Varner, 2003)
- b) Whether through poaching or culling, ivory sourced from non-natural mortalities originates from the killing of sentient individuals. In a recent paper on elephant person-hood and memory, Varner concludes that elephants are “near-persons” based on biographical consciousness, Machiavellian intelligence and encephalization quotients among other traits. He argues that although “person” is normally considered synonymous with human beings, that “among ethicists, the descriptive component usually refers to certain cognitive capacities which may or may not be unique to human such as rationality, self-consciousness, or moral agency”.
- c) “Elephants exhibit remarkable physical vigour, unusual social complexity and significant cognitive abilities. Furthermore, it acknowledges that elephants are complex, self-aware individuals, possessing distinct histories, personalities and interests, and that they are capable of physical and mental suffering.” (Global Elephant Charter)

3. The Ministry of Environment & Forests has issued Memorandum dated 07.11.2013 in F. No. 2-31/2013-PE stating that Chief Wild Life Wardens do not have the power to issue 'No Objection Certificates' to the transfer of elephants for religious purposes. According to the Memorandum, transfer in the garb of religious purposes would go against the spirit of the prohibition under Section 43 of the Wildlife (Protection) Act 1972.

4. The Government of India declared elephant as the national heritage animal of India vide gazette notification dated 21st October 2010 based on the recommendation of the Elephant Task Force in order to accord the species due pride of place for its central role in the country's diverse ecosystems as much as a symbol of cultural diversity.



Judgements and Orders regarding Elephants in India

a) **Dr. Manilal Valliyate v. State of Maharashtra and others** [Bombay High Court]

Sunder, a captive elephant held by a temple in Kolhapur district in Maharashtra, was subjected many years of cruel treatment by its mahout. A criminal complaint was filed in the local police station. In view of Sunder's best interest, the Hon'ble High Court of Bombay directed that the elephant be set free and relocated to Wild Life Rescue and Rehabilitation Centre, Bengaluru.

The Court **acknowledged that elephants are highly cognitive and intelligent animals.** It also opined that “**Laws being man-made, there is likelihood of bias towards the man and the rights of animals have been treated as subservient.** It is the duty of the Court to ensure that the balance exists in the system.”

b) **CUPA and others v. Principal Secretary to Govt.** (Environment and Ecology) and others [Karnataka High Court]

The hon'ble Court directed the Karnataka Government authorities to formulate guidelines for prohibiting the use of elephants in any form of begging, performance or procession.

This is a significant step in ending the use of elephants by humans for their own purpose.

c) **Wildlife Rescue and Rehabilitation and others v. UOI and others** [Supreme Court of India]

The writ petition in this case highlights the following 4 issues pertaining to captive elephants–

- i) Cruel treatment suffered by elephants in captivity that is in violation of constitutional and statutory provisions
- ii) The illegal sale and transfer of elephants under the guise of gift or donation
- iii) The illegal use of elephants in commercial and/or religious activities
- iv) The poor conditions of housing and upkeep that the elephants are subjected to.

One of the main issues in this case is the **ownership of elephants.** Following fundamental issues have been raised in this case:-

- i) After the Wildlife Protection Act has come into force, whether any person can keep an elephant in his custody as the owner?
- ii) Assuming there is no prohibition for keeping an elephant, what Rule should govern the upkeep of the animal?
- iii) Who are the authorities to regulate the health, upkeep and manner in which the elephants are to be treated and used?

The case is still pending before the Supreme Court and will largely affect the issue of ownership of elephants. As of now an interim order has been passed directing the state governments to not issue any ownership certificate to any persons in possession of elephants. The persons who are in possession of elephants cannot transfer the elephants outside the state or part with the elephants by way of transfer in any manner.

Research Supporting Animal Sentience – Annexure 1

- The science of animal sentience underpins the entire animal welfare movement and there is scientific proof that animals really are not that different from humans.
- The most basic way of experiencing the world is through feeling or sensation. 'Sentience' is defined as the ability to have perceptions and sensations. A 'sentient animal' is an animal that is aware of his/her surroundings and of what happens to him/her and is capable of feeling pain and pleasure, at the least. The current scientific consensus is that all vertebrate animals, at least, are capable of feeling pain and experiencing distress.
- Demonstrating objectively what animals are capable of is the key to achieving a positive change in attitudes and actions towards animals, and a real, sustainable difference for animal welfare. (Animal Sentience: Where are we and where are We Heading? Helen Proctor)
- The database of research on animal sentience is strong and rapidly growing. Scientists know that individuals from a wide variety of species experience emotions ranging from joy and happiness to deep sadness, grief, and post-traumatic stress disorder, along with empathy, jealousy and resentment.



Biological Arguments – Annexure 2

Both scholarly and popular work on animal behavior suggests:

- Many species of non-humans develop long lasting kinship ties.
- Orangutan mothers stay with their young for eight to ten years and while they eventually part company, they continue to maintain their relationships.
- Less solitary animals, such as chimpanzees, baboons, wolves, and elephants maintain extended family units built upon complex individual relationships, for long periods of time.
- Meerkats in the Kalahari desert are known to sacrifice their own safety by staying with sick or injured family members so that the fatally ill will not die alone.
- Canids and primates are particularly adept at it, yet even chickens and horses are known to recognize large numbers of individuals in their social hierarchies and to maneuver within them.
- Coyotes, elephants and killer whales are also among the species for which profound effects of grief have been reported.
- Dolphins are extremely intelligent mammals with a highly-developed social structure. Recent research shows that dolphins call each other by name and can remember the unique name whistles from old "friends" heard just one time 20 years ago.
- A number of high-profile and controversial studies took place where researchers tried to prove intelligence by attempting to communicate with primates kept at research facilities. These included Kanzi, a bonobo that can reportedly communicate by using lexigrams (symbols representing words); Koko, a gorilla which uses sign language, and Ayumu, a chimpanzee that exhibits an amazing memory (it is shown the numbers one to nine on the computer screen, and given just a fraction of a second to remember their random location. The chimpanzee can tap the numbers in the correct order).
- Darwin reported this in *The Descent of Man*: "So intense is the grief of female monkeys for the loss of their young, that it invariably caused the death of certain kinds" (1871: 40).
- Jane Goodall's report of the death of the healthy 8 year old chimpanzee Flint just three weeks after the death of his mother Flo also suggests that sorrow can have a devastating effect on non-human animals (see Goodall 2000: 140–141 in Bekoff 2000).
- A number of high-profile and controversial studies took place where researchers tried to prove intelligence by attempting to communicate with primates kept at research facilities. These included Kanzi, a bonobo that can reportedly communicate by using lexigrams (symbols representing words); Koko, a gorilla which uses sign language, and Ayumu, a chimpanzee that exhibits an amazing memory (it is shown the numbers one to nine on the computer screen, and given just a fraction of a second to remember their random location. The chimpanzee can tap the numbers in the correct order).

Legal Definitions – Annexure 3

1) Personhood

Personhood is the status of being a person. A person is a legal entity that is recognized by law as subject of rights and duties. The Supreme Court in *Shiromani Gurudwara Prabandhak Committee, Amritsar v. Shri Som Nath Dass & others* (2000), has defined a person as any entity (not necessarily a human being) to which rights or duties may be attributed.

There are two kinds of persons –

- a) Natural persons – Human beings are natural persons. They possess the status of personhood since birth. According to *Corpus Juris Secundum*, Vol LXV, Page 40 as referred to by the Supreme Court in *Shiromani Gurudwara Prabandhak Committee, Amritsar v. Shri Som Nath Dass & others*– “A natural person is a human being; a man, woman, or child, as opposed to a corporation, which has a certain personality impressed on it by law and is called an artificial person.”
- b) Legal or artificial person – These are created by law and is also a legal fiction. Legal persons are entities to whom personality is attributed by law by way of fiction where it does not exist in fact. As referred to by the Supreme Court in *Shiromani Gurudwara Prabandhak Committee, Amritsar v. Shri Som Nath Dass & others* *Corpus Juris Secundum*, Vol. VI, page 778 says: “Artificial persons. Such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic.” For example, companies, registered trade unions, corporations are artificial persons.

One of the most important attributes of personhood is the capacity to sue and to be sued.

In India, there is no formal recognition of animals as persons in law. In fact, the animals are considered as property that can be “owned” by humans. For example, in the Indian Penal Code, Sections 428 and 429 (which refer to killing or maiming an animal) fall under the chapter titled “Offences against property”. This implies that animals are the property of humans.

2) Rights

A right is an interest which is recognized and protected by law. As it is recognized by law, the possessor is entitled to have it. As it is protected by law, the possessor can enforce it by an appropriate action in a Court.

⁸Corpus Juris Secundum is an encyclopedia of US state and federal law. This encyclopedia has been referred to by the Indian Courts in numerous cases and is a reliable source.

a) Fundamental rights

In the Indian context, fundamental rights refer to those human rights (inherent rights of a human being, rights which a being possesses by virtue of being a human) which are protected by the Constitution of India. The Supreme Court of India is the guardian of these rights.

The fundamental rights are enshrined in Articles 14 to 32 under Part III of the Constitution of India. Some of the fundamental rights are:-

- Right to equality
- Right to life and personal liberty
- Right to freedom of speech and expression
- Right to practice any profession or to carry on any occupation, trade or business
- Right to education
- Right to freedom of religion

b) Natural law (natural rights)

A political theory that individuals have basic inherent rights given to them by nature or God that no individual or government can deny.

c) Rights in Rem

Rights residing in persons availing against other persons generally. For example, right to life and limb, violence, fraud etc.

d) Rights in personam

Rights which avail against a particular individual or a determinate class of persons. For example, a right which a person may obtain under a contract.

3) Sentience

Capacity to feel, perceive or experience. To say that animals are sentient is to state explicitly that they can experience both positive and negative emotions, including pain and distress. The anti-cruelty and welfare laws in India (such as the Prevention of Cruelty to Animals Act, 1960) implicitly hint at the fact that animals are sentient beings. However, there is no explicit recognition of animal sentience. Few countries like New Zealand have explicitly recognized animals as sentient beings.

■ °Concise Law Dictionary, P Ramanatha Aiyar

4) Property

Generally, property is any physical or virtual entity that is owned by an individual or jointly by a group of individuals.

5) Living property

Briefly, the idea of this concept is to recognize rights of the animals while retaining their status of that of property by creating a separate category of property under which animals would fall.

A premise of this concept is that it is ethically acceptable to continue to have animals within a property status. This premise is contrary to the beliefs of a number of animal rights activists, particularly those who identify themselves as abolitionists. Among these individuals, the first order of business is the elimination of the property status of animals, and then making animals (or some subset of animals, such as primates) legal persons. David Favre rejects this path forward and believes that positive human communities can include animals that are owned and used by humans.

In the research article written by him, David Favre provide a comprehensive contrary view of the opinion that animals will not be able to receive legal rights so long as they remain the property of humans and has provided a scheme of legal rights which the animals can possess.

The article develops the proposition that non-human animals can possess and exercise legal rights. This proposal is supported by the fact that the legal system already accommodates a number of animal interests within our criminal anti-cruelty laws and the civil trust laws. To make a more coherent package of all the animal related public policy issues, it is useful to acknowledge the existence of a fourth category of property, living property. Once separated out from other property, then a new area of jurisprudence will evolve providing legal rights for at least some animals. This article establishes why animals should receive consideration within the legal system, which animals should be focused upon, what some of the legal rights might be and how the traditional rules of property law will be modified to accommodate the presence of this new category of property.

¹⁰On May 5, 2015, the New Zealand Parliament unanimously passed the Animal Welfare Amendment Act (No. 2) 2015, which includes an amendment to the long title of the principal legislation, the Animal Welfare Act 1999, in order to specifically recognize animals as sentient.

<http://www.legislation.govt.nz/act/public/2015/0049/latest/whole.html#DLM5174807>

¹¹This concept has been proposed by David Favre, Professor at Michigan State University College of Law

¹²<https://www.animallaw.info/article/living-property-new-status-animals-within-legal-system>

6) Speciesism

Speciesism means prejudice or discrimination based on species of a living being. It means that species is in itself a reason for treating some beings as morally more significant than others. In the context of exploitation of animals, speciesism is the assumption of human superiority.

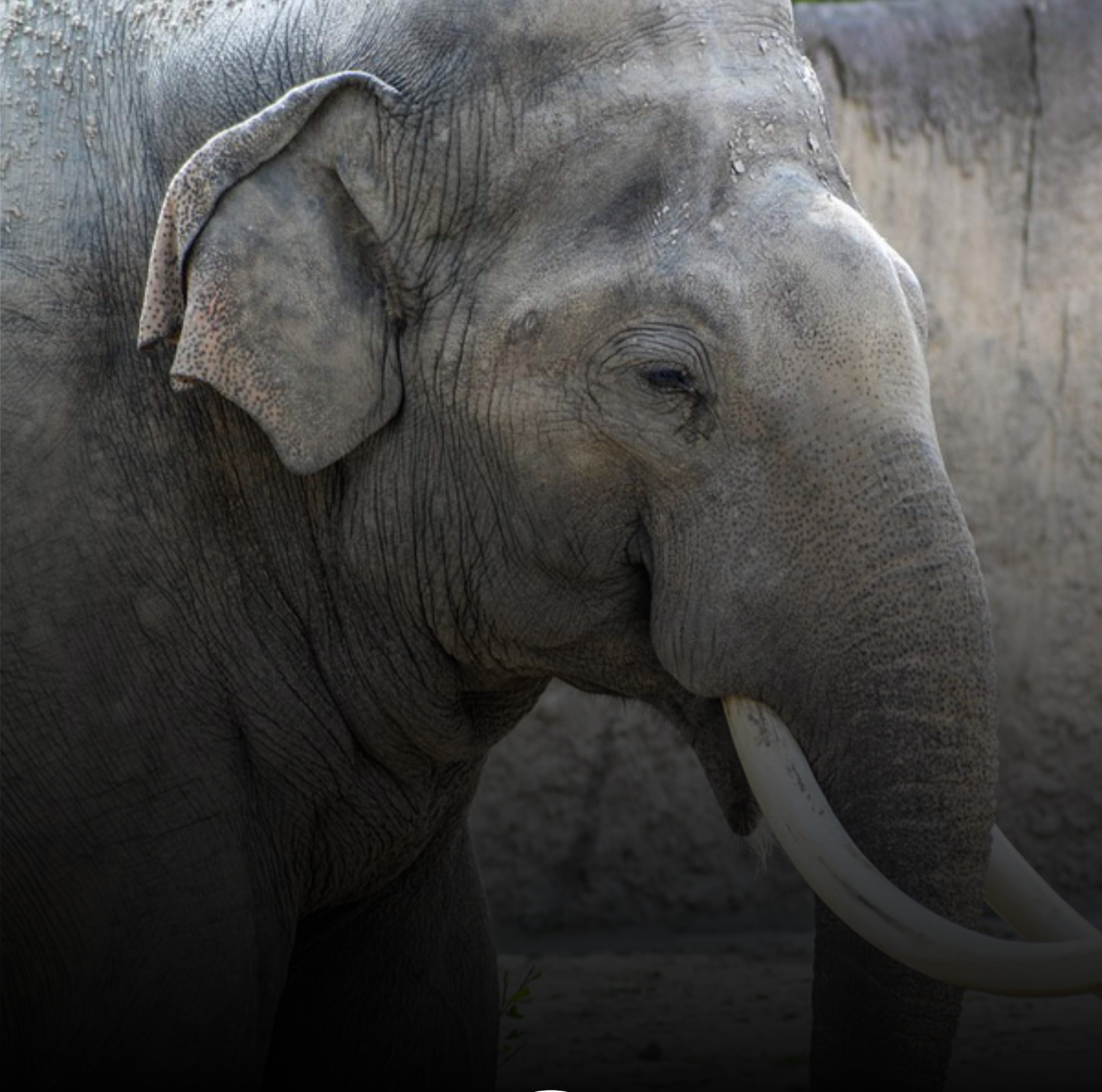
7) Doctrine of parens patriae

In Latin, parens patriae means “parent of the country”. It refers to the power of the state to intervene against an abusive or negligent parent, legal guardian or caretaker, and to act as the parent of any child or individual who is in need of protection. For example, some children, incapacitated individuals, and disabled individuals lack parents who are able and willing to render adequate care, thus requiring state intervention.

This doctrine was highlighted by the Supreme Court in *Animal Welfare Board of India v. A Nagaraja and Ors* (2014) with respect to animals. It was stated that it the Court's duty under this doctrine to take care of the rights of the animals. The apex court, by reading into the provisions of Sections 3 and 11 of the PCA Act along with Article 51A (g) of the Constitution of India, has listed down a few rights guaranteed to the animals. These are:-

- Right to live in a healthy and clean atmosphere
- Right to get protection from human beings against inflicting unnecessary pain or suffering
- Right to get food and shelter
- Right to dignity and fair treatment
- Right, not to be beaten, kicked, over-ridden or over-loaded
- Inherent right to live





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ILLINOIS PRESS**

Ferrater Mora Oxford Centre for Animal Ethics

Legal Personhood and Animal Rights

Author(s): Visa Kurki

Source: *Journal of Animal Ethics*, Spring 2021, Vol. 11, No. 1 (Spring 2021), pp. 47-62

Published by: University of Illinois Press in partnership with the Ferrater Mora Oxford Centre for Animal Ethics

Stable URL: <https://www.jstor.org/stable/10.5406/janimalethics.11.1.0047>

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Legal Personhood and Animal Rights

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Abstract: A relatively recent form of animal activism is lawsuits intended to declare some animals as legal persons. A pioneer of this approach is the U.S.-based Nonhuman Rights Project (NhRP). This organization's primary strategy has been to invoke the writ of habeas corpus, which protects the right to personal freedom of "persons." The article criticizes the notion of legal personhood that the NhRP is employing and explains how an alternative understanding of legal personhood could perhaps make nonhuman rights more palatable for courts.

Key words: rights, personhood, legal personhood, personal freedom, habeas corpus

INTRODUCTION

A relatively recent form of animal activism is lawsuits aiming to declare some animals as legal persons. One of the pioneers of this approach is the U.S.-based Nonhuman Rights Project (NhRP), founded by Steven Wise. According to its mission statement, the NhRP works "to change the common law status of great apes, elephants, dolphins, and whales from mere 'things,' which lack the capacity to possess any legal right, to 'legal persons,' who possess such fundamental rights as bodily liberty and bodily integrity" (NhRP, n.d.). The primary strategy of the NhRP has been to invoke the writ of habeas corpus, which protects the right to personal freedom. The writ is normally understood—either implicitly or explicitly—to protect "persons." Hence, the NhRP has argued that it should protect nonhuman animals who meet the criteria of personhood as well. However, most attempts at getting animals recognized as legal persons have faced severe resistance by the courts and have failed in all but one case, which took place in Argentina.¹

This work has also involved philosophers, most notably in the form of the "Philosophers' Brief" (Andrews, Kristin, Comstock, Crozier, Donaldson, Fenton, . . . Walker, 2018), submitted by 17 philosophers in support of the NhRP's case on behalf of chimpanzees Tommy and Kiko, held captive in the state of New York. In the brief, the authors discuss whether certain animals can be understood as persons and scrutinize the personhood conceptions

employed by courts.² They argue that “if the concept of ‘personhood’ is being employed by the courts to determine whether to extend or deny the writs of *habeas corpus*, they should employ a consistent and reasonable definition of ‘personhood’ and ‘persons’” (Andrews, Kristin, Comstock, Crozier, Donaldson, Fenton, . . . Walker, 2018, p. 3) and conclude that “when criteria for personhood are reasonable and consistently applied, Kiko and Tommy satisfy the criteria and are entitled to *habeas corpus* relief” (Andrews, Kristin, Comstock, Crozier, Donaldson, Fenton, . . . Walker, 2018, p. 36).

The NhRP’s work has thus brought together legal and philosophical perspectives on personhood and rights. It is these notions—personhood, legal personhood, and rights—as well as their interconnections that I will address in this article. I will offer some theoretical criticism of the premises that the NhRP is basing its work on, criticism that I believe may be highly relevant for animal rights litigation. In particular, I will focus on the notion of legal personhood that the NhRP is employing, which I call the orthodox view of legal personhood. I have recently published a book-length critique of this view and offered an alternative account: the bundle theory of legal personhood (Kurki, 2019). According to the bundle theory, legal personhood consists of numerous elements, not all of which always come together. I cannot recount all of the problems of the orthodox view in this article.³ Rather, I will focus on issues most pertinent to the personhood trials and explain how an alternative understanding of legal personhood could perhaps make nonhuman rights more palatable for courts. Thus, the arguments offered here are not merely theory for theory’s sake; rather, they have important implications for animal rights litigation. I will mention two such implications.

First, the NhRP frames its *habeas corpus* cases as momentous and historic: Winning a case would turn rightless animals into persons with rights, breaking a legal barrier that goes back to antiquity, as “nonhuman animals had never had legal rights from the time the Romans divided persons from things” (Wise, 2019, p. 368). The stakes are thus extremely high—which I think is a problem. Though some judges are braver than others, very few dare upset the whole fabric of the legal system. But suppose the cases were not about whether animals should receive their first legal rights. What if animals already hold some rights, and now the question is simply: Should they receive the right protected by *habeas corpus* as well?

Second, I wish to cast some doubt on the legal import of arguments according to which animals meet the criteria of some philosophical conception of personhood. Given that legal personhood is not a monolith, it would be more apt to argue why animals are entitled to some particular rights, rather than to legal personhood more generally.

ANIMAL RIGHTS

Many legal scholars and animal ethicists alike share the notion that animals do not currently hold legal rights (see, e.g., Kendrick, 2018; Shyam, 2015; Staker, 2017). This view typically—though certainly not always—builds on two separate, though interrelated, assumptions.

The first assumption is that there is a strict dividing line between “welfarist” protections of animals on the one hand and “animal rights” on the other. When welfarism is contrasted with the animal *rights* position, it is natural to suppose that welfarism does not result in rights. Though not all thinkers adhere to this division, it is still influential.⁴ For instance, according to the welfarist ideology, animals may be reared, used, eaten, and so on as long as they are protected from the infliction of “unnecessary” suffering and/or some forms of “animal cruelty.” Many think that welfarism does not result in animal rights. The adherents of “animal rights,” on the other hand, are more radical, usually rejecting animal use.

The second assumption builds on a division between legal persons and legal things, in accordance with what I call the orthodox view of legal personhood. According to this view, a legal person is an entity that holds, or can hold, legal rights; a thing is either property or simply an entity without rights (see Kurki, 2017). Given that animals are currently “things,” they cannot hold rights.

I am critical of both assumptions. Though the majority of this article will focus on criticizing the prevalent understanding of legal personhood, I should briefly address the welfarism/rights division as well.

Welfarism and Rights

The main reason why I find the welfarism/rights distinction unhelpful is that the term “right” can be used in a variety of ways. In fact, Shelly Kagan (1998) laments that talk of (moral) rights is “horrendously ambiguous” (p. 170; emphasis removed).⁵ Thus, the phrase “X has rights” can mean various things, for instance (a) that X has *moral standing*—that X “counts from the moral point of view” (Kagan, 1998, p. 170), but also (b) that “there is a constraint of some sort governing how agents are permitted to treat” X (Kagan, 1998, p. 172). Kagan also brings up various other meanings of the term, but I will focus on these two here.

According to Kagan (1998), “Much of the debate concerning the existence of animal rights comes down to disagreement over whether or not animals truly have moral standing in their own right” (p. 171), thus following the first meaning of the term. However, this meaning of “right” is vague, as

to say of someone or something that they have rights (in the broadest sense of the term), is simply to say that they have some sort of claim against us to be treated appropriately; it is not yet to say anything about the content or the force of the claim. (Kagan, 1998, p. 172)

In this sense of “right,” a welfarist should most likely think that animals have rights.⁶

The second meaning of “right,” which understands rights as constraints, is normally associated with deontological views of rights. According to such a view, there are certain duties toward right-holders that may not be breached even if they would benefit the “common good.” Of course, welfarism mostly rejects the existence of such rights: Animals may be afflicted with suffering, as long as the suffering is not “unnecessary” and does

not constitute “animal cruelty.” However, even this understanding of rights as constraints does not need to be antithetical to welfarism.⁷ This is the case because rights can be defined and individuated at various levels of specificity. For instance, a welfarist could think that certain forms of animal treatment are so cruel that they are never acceptable. It would follow that animals would indeed hold rights classifiable as constraints, such as the right not to be subjected to some very cruel types of treatment. But, of course, such rights would not be sufficient to satisfy the adherents of the so-called animal rights position. Rather, the adherents of this position argue that animals should hold strong, broad fundamental rights, which preclude various forms of animal exploitation. Hence, describing this position in terms of fundamental rights, rather than rights *simpliciter*, would be more appropriate.⁸

LEGAL PERSONHOOD

As mentioned above, one of the NhRP’s objectives is “to change the common law status of great apes, elephants, dolphins, and whales from mere ‘things,’ which lack the capacity to possess any legal right, to ‘legal persons,’ who possess such fundamental rights as bodily liberty and bodily integrity.” Steven Wise has conceptualized the issue with the help of an “Animal Rights Pyramid,” where he takes legal personhood to be a precondition for rights (Figure 1).

Wise has most recently articulated his view in a scholarly article in 2019. It is evident that he remains committed to the notion that legal personhood means “the capacity to have a legal right” (Wise, 2019, p. 371). Furthermore, he thinks one may have the capacity for rights without holding any rights at all. Wise is here echoing a version of the orthodox view of legal personhood. The orthodox view comes in numerous formulations, of which I will mention three here:

- 1. X is a legal person if and only if X has legal rights or duties (rights-or-duties position).
- 2. X is a legal person if and only if X has legal rights and duties (rights-and-duties position).

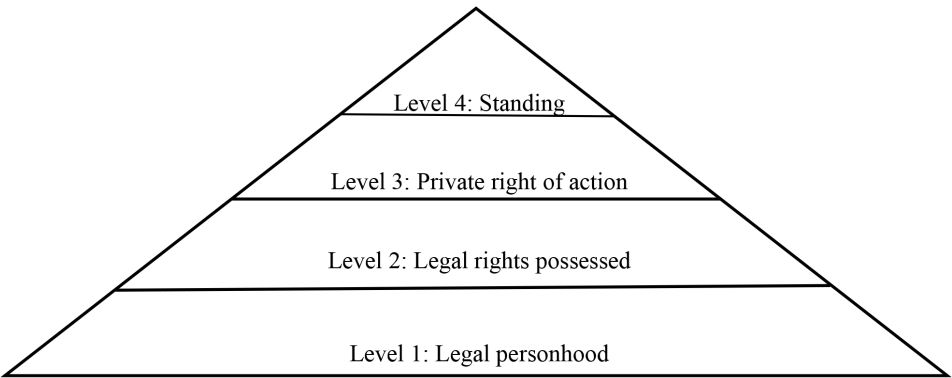


FIGURE 1: The “Animal Rights Pyramid” of Steven Wise (2010, p. 2)

3. X is a legal person if and only if X has the capacity for rights or duties (capacity-for-rights position).

Wise clearly subscribes to the capacity-for-rights position. This formulation shares a number of features with other views falling under the orthodox view. For instance, it connects rights and legal personhood together in a black-and-white manner: One can hold rights if and only if one is a legal person. Thus, there is no “gray area” in between legal persons and nonpersons. Furthermore, the view is decidedly *formal*: Being a legal person does not say anything about one’s substantive normative situation, as (the capacity for) any right at all will suffice for legal personhood. It thus resembles the first meaning of “right” distinguished by Kagan (1998), according to which the expression “X has rights” simply means that X has moral standing.

I will next outline some of the problems that afflict the orthodox view.⁹

Contesting the Orthodox View

The most central problem of the orthodox view is what may be termed the *problem of extension*. There are certain widely shared beliefs about the extension of legal personhood (i.e., who or what is a legal person). Generally, only born human beings (natural persons) and corporations (artificial persons) are taken to be legal persons. Furthermore, scholars and jurists widely agree that slaves in the antebellum United States were not legal persons, and that animals are not legal persons. Hence, according to the orthodox view, the following should hold:

- born human beings hold/can hold rights, whereas unborn do not
- corporations hold/can hold rights
- nonhuman animals do not hold rights
- slaves did not hold rights

However, if we don’t simply take these rights ascriptions at face value, but rather appraise them in light of contemporary theories of rights, we will discover discrepancies. The most significant theories of what it means to hold a legal right are the interest theory and the will theory.¹⁰ The *interest theory of rights* connects right-holding and the furtherance of interests: Anne holds a right if Ben bears a duty that—very roughly put—typically benefits Anne. This theory of rights is popular among those who argue for animal rights, given that it can easily accommodate such rights. The main opponent of the interest theory is the *will theory of rights*, according to which the holding of a right involves having control over a duty of another. Will theorists of rights are typically more skeptical of animal rights, given that nonhuman animals cannot make decisions over the duties of others.

Now, applying these theories to the cases listed above will yield some strange results. According to the interest theory of rights, slaves in the antebellum United States in fact held some limited legal rights because they were protected from certain types of physical violence. (Slaves bore some legal duties, too, as they could be prosecuted for crimes.) Similarly, animals already hold legal rights, since they are protected by animal welfare statutes. Thus, slaves were and animals are legal persons—a puzzling result. The will theory leads to even more puzzling results. For instance, according to certain versions

of the will theory, young children cannot hold rights.¹¹ This would mean that children are not legal persons, but slaves were: Slaves could, for instance, appeal their criminal convictions, which is a will theory right.

There are thus discrepancies between the common understanding of who or what is a legal person, and who or what holds legal rights. We must therefore reconsider either the proper extension of legal personhood, our understanding of rights, or the equation of legal personhood with right-holding. For reasons I cannot recount here, I maintain that the most fruitful approach is the last one: Legal personhood and right-holding should not be understood as mutually entailing in the simple, black-and-white manner as the orthodox view would have it.¹²

Now, the reply of an adherent of the capacity-for-rights view would likely be that slaves did not and animals do not, in fact, hold rights. Legal personhood is a legal precondition for rights, and a court or a legislator must first recognize an entity as a legal person before it can hold rights. To reply, we should examine the capacity-for-rights view closer.

First, we should distinguish two types of “capacities to hold rights.” The phrase can, first, refer to a *conceptual capacity* to hold rights. Interest and will theorists alike would say that rocks lack the conceptual capacity for rights: Rocks have neither interests nor a will. However, the “capacity for rights” to which Wise adverts is not such a conceptual capacity. Rather, he is referring to a *legal capacity* for rights, which is understood as a status conferred by the legal system. What exactly is this legal capacity?

Explaining legal personhood in terms of the legal capacity for rights stems primarily from 19th-century German theories of private law.¹³ Private law deals with issues such as contracts and property. The capacity-for-rights view makes sense in this context: A legal system can determine who has the capacity to acquire private law rights by, for instance, deciding whose agreements to enforce. This is most apparent with corporations. A corporation can normally only enter contracts and own property once it has been registered. It thus receives the capacity to hold private law rights at the point of registration. However, for some reason, this perfectly reasonable explanation of legal personhood in private law has, after the 19th century, expanded to cover all areas of law. It is actually often mentioned in contexts such as private law textbooks, but regardless offered as a general theory of legal personhood.¹⁴ Given that animals can be the beneficiaries of “pet” trusts in certain U.S. states, it may be argued that they already have some kind of limited capacity in private law. Wise has, in fact, occasionally employed such examples to argue that animals are already legal persons in these states.¹⁵ It is puzzling why he thinks that simply having the *potential* to be the beneficiary of a trust makes every affected animal a legal person, whereas actual legal protections in the form of animal welfare legislation do not. Furthermore, the right to contract and own property are not the kind of rights that the NhRP is primarily interested in. The organization works to achieve fundamental freedom for (some) nonhumans, not the right to enter contracts. So the capacity-for-rights view manages to explain one aspect of legal personhood but not the aspect that is most relevant for nonhuman animals.

I myself hold that legal personhood is a cluster property: It consists of numerous elements—*incidents of legal personhood*—that don’t always go together. According to the bundle theory, there is not always a clear-cut line between legal personhood and

Table 1. The Incidents of Legal Personhood

Passive incidents of legal personhood		Active incidents of legal personhood
Substantive passive incidents	Remedy incidents	
Fundamental protections: protection of life, liberty, and bodily integrity	Standing in courts and other official bodies	Legal competences: capacity to administer the other incidents without a representative (e.g., the capacity to enter into contracts)
Capacity to be the beneficiary of special rights	Victim status in criminal law	
Capacity to own property	Capacity to undergo legal harms	Onerous legal personhood: legal responsibility in criminal law, tort law, and other contexts
Insusceptibility to being owned		

legal nonpersonhood. Clear cases of legal persons are endowed with all, or nearly all, of these incidents of legal personhood. Historically, women have in many Western countries gradually attained full recognition as legal persons. Though animals indeed hold some legal rights, they are endowed with such a limited number of the incidents that they are not properly classifiable as legal persons.

These incidents can be divided into *passive* and *active*: Even, say, an infant or a nonhuman animal can meaningfully be endowed with passive incidents, whereas the active incidents presuppose more advanced deliberative and agential capacities, which is why only adult humans of sound mind are typically endowed with a full set of active incidents. Two main factors separate the legal status of adult humans of sound mind—who are endowed with the full set of incidents—from that of young children, who are only endowed with the passive incidents. First, adult humans are held legally responsible for their deeds, and second, they can administer their rights and duties by, for instance, choosing to waive or enforce a right.

Though I cannot go through the different incidents in detail here, I should address an issue pertaining to active and legal personhood. Courts have occasionally embraced the rights-and-duties view of legal personhood view to reject claims for animal personhood. They have thus denied that one could be a purely passive legal person, with only the benefits of legal personhood but no duties.

Passive and Active Legal Personhood

Passive legal personhood consists primarily of the most central type of rights—namely, so-called *claim-rights*. According to the analysis introduced by legal theorist Wesley Newcomb Hohfeld (1913), X holds a claim-right toward Y if and only if Y holds a duty toward X.¹⁶ There is thus a logical connection between rights and duties, corresponding with the intuitive idea that “rights and duties go hand in hand.” However, this idea can be unpacked in various ways, some of them problematic. The idea can be given a conceptual interpretation: Conceptually, one must be able to bear duties in order to hold rights. The idea can also be interpreted in a substantive manner: Rights *should not*, for some moral or political reason, be conferred to beings that cannot bear duties.

The New York State Supreme Court, Appellate Division, maintained in the Tommy chimpanzee case that “legal personhood has consistently been defined in terms of both

rights and duties” (*People ex rel. Nonhuman Rights Project v. Lavery*, 2014, p. 4; emphasis in original). As “chimpanzees can’t bear any legal duties, submit to societal responsibilities, or be held legally accountable for their actions,” it would have been inappropriate to give them “legal rights—such as the fundamental right to personal freedom, protected by the writ of habeas corpus—that have been afforded to human beings” (*People ex rel. Nonhuman Rights Project v. Lavery*, 2014, p. 4). The court thus embraced the rights-and-duties view of legal personhood. We should also note that the claim was primarily substantive rather than conceptual. The court held that the conferral of habeas corpus to chimpanzees would be *inappropriate*.¹⁷ Tackling this substantive claim is a task for moral and political argumentation. For instance, Wise’s (2019) point that “millions of New Yorkers and Americans [such as children] are legal persons with legal rights despite their inability to bear duties” (p. 372) puts the court’s claim in a strange light. The court tried to preempt this argument with the fascinating claim that children can hold rights because “collectively, human beings possess the unique ability to bear legal responsibility” (*People ex rel. Nonhuman Rights Project v. Lavery*, 2014, p. 5f). This reasoning is picked apart in the Philosophers’ Brief. However, when arguing against the New York court’s conclusion, Wise takes the court to be endorsing not only the substantive but also the conceptual claim, leading him to make some problematic concessions.

A central counterargument by Wise (2019) is that animals can indeed hold the rights protected by habeas corpus because the rights in question are immunity-rights rather than claim-rights. Wise relies here on a Hohfeldian distinction between two types of normative positions: “Claim-rights” are correlated by duties, whereas “immunity-rights” (or simply “immunities”) have to do with someone else’s inability to effect a normative change, and are correlated by disabilities.¹⁸ Many constitutional rights have a significant immunity component, as they disempower legislatures from enacting laws that infringe upon the rights protected by the constitution. Thus, immunities are certainly important. Regardless, conceding that animals cannot hold claim-rights would be extremely problematic—because at the core of virtually all meaningful animal rights is a claim-right. For instance, the right to bodily integrity is certainly correlated by the *duty* of others to refrain from infringing said integrity. Of course, this claim-right needs to be protected from change in order to be meaningful. Enslavement would extinguish many of one’s claim-rights, and thus freedom from enslavement is certainly an immunity, as Wise (2019, p. 377) notes. Regardless, if claim-rights could only be held by beings that can also bear duties, the project of the NhRP would be compromised. Thus, one should certainly not concede as much, or even sidestep the issue of whether animals can hold claim-rights. Rather, one should argue in favor of why animals can hold claim-rights, and why they therefore can be (passive) legal persons.

I understand claim-rights in line with the interest theory of rights: One’s holding of a claim vis-à-vis a duty has to do with one’s potential to benefit from the performance of that duty. The interest theory does not presuppose that one can bear or fulfill duties in order to hold rights. Rather, the holding of claim-rights presupposes (unsurprisingly) that one has interests—that one can enjoy benefit or suffer detriment. Animals can therefore

hold claim-rights, and be passive legal persons without a capacity for duties. A claim-right is, of course, always correlated by the duty of *someone*, but this is almost invariably someone other than the right-holder. The will theory does not exactly presuppose the bearing of duties either—but it does presuppose capacities roughly similar to those that make the bearing of duties reasonable, such as the capacity for deliberation. At any rate, the will theory should be rejected. The interest theory has various strengths, of which the capacity to explain animal rights is only one.¹⁹ Thus, animals can certainly be passive legal persons and hold claim-rights (as well as immunities).

IMPLICATIONS OF THE BUNDLE THEORY FOR LEGAL STRATEGY

If we accept the bundle theory of legal personhood, this will have certain significant consequences both for the framing of legal arguments in support of the legal status of animals as well as for the work of philosophers who wish to support such efforts.

The NhRP is exhorting courts to grant the animal plaintiffs their first legal right(s). This is a momentous task: breaking a legal barrier that goes back to antiquity. It takes a very brave judge to dare to do away with this (supposedly) millennia-old tradition. No wonder some judges have resorted to problematic philosophical arguments in denying the claims of the NhRP.

But what if we instead supposed that animals already hold legal rights—meager and weakly enforced, but rights nonetheless? What if the stakes in the habeas corpus trials are not whether animals should be included in the community of legal right-holders, but rather whether certain animals should receive the right to personal freedom, protected by habeas corpus? Such cases would certainly still be a hugely significant issue, but not quite as earth-shattering as the way the NhRP frames its cases. This puts a different perspective on the stakes of the habeas corpus lawsuits and animal rights litigation more generally.

Some judges, both in the United States and other countries, have embraced an approach similar to the one I am proposing. The judge in the *Tilikum v. Sea World* (2012) case, initiated by People for the Ethical Treatment of Animals (PETA), denied that the 13th Amendment of the United States Constitution would apply to nonhumans—but held that animals already hold legal rights:

Even though Plaintiffs lack standing to bring a Thirteenth Amendment claim, that is not to say that animals have no legal rights; as there are many state and federal statutes affording redress to Plaintiffs, including, in some instances, criminal statutes that “punish those who violate statutory duties that protect animals.” (*Tilikum v. Sea World*, 2012, p. 7, quoting *Cetacean v. Bush*, 2004, at 1175)

Similar judicial opinions were voiced in an NhRP-initiated case: At a hearing before the Appellate Court of Connecticut, Wise argued that all animals are already legal persons in the state of Connecticut because the state has a “pet” trust statute. However, one judge explicitly voiced her understanding that animals may very well hold rights in virtue of

both the statute as well as their being protected by animal welfare legislation. She regardless doubted whether this implies their legal personhood. However, Wise insisted that anticruelty statutes do not result in animal rights.²⁰

In the legal proceedings surrounding the Swiss cantonal initiative to endow animals with certain basic rights, a court quite aptly noted that the status of animals in private law as “things” (property) does not directly bear upon whether they could hold basic rights under the cantonal constitution (Appellationsgericht, 2019). The decision marks a welcome departure from the understanding of legal personhood dominated by private law.

Personhood and Legal Personhood

The bundle theory also brings to question the legal relevance of the philosophical arguments that animals are persons. It is understandable to think that if, say, chimpanzees qualify as *persons* in a moral or metaphysical sense, then this is sufficient reason to treat them as *legal persons*. But it's not quite that straightforward.

Let us first note that personhood is a very contested concept—so contested that Amélie Rorty (1988) has, in fact, suggested that “there is no such thing as ‘the’ concept of a person” (p. 31). Accounts of personhood are typically propounded in some particular context: There is something at stake when determining whether an entity is a person or not. Thus, for Peter Singer (1993), “persons” are beings who have an interest in continued existence. Taking the life of a person is therefore “worse” compared to depriving the life of a “merely conscious” being (Singer, 1993, pp. 71–93). Singer thus attaches a specific moral status to personhood. On the other hand, Philip Pettit and Christian List (2011), in their account of group agency, argue that organized human groups are persons because they can “perform effectively in the space of obligations” (p. 173). Though such a capacity certainly has moral significance, Pettit and List are not claiming that because group agents are persons, there would be moral reasons not to “kill” them (whatever that might mean). Many recent accounts arguing for animal personhood have as a direct or indirect goal to provide support for a claim about the moral standing of animals. For instance, Mark Rowlands (2019) ends his book on animal personhood with the suggestion that animals should not merely be understood as mere moral patients:

Recognition of the other as a person shifts focus from a *treatment* paradigm to a *listening* paradigm. . . . But the fundamental requirement for dealing with persons—a requirement that must be satisfied before one can even raise the question of what to do—is to listen. Instead of simply treating animals as we think best, we might try to ask them what they want. (p. 199)

This is clearly a moral implication.

Similarly, the “Philosophers’ Brief” does not scrutinize the personhood conceptions employed by courts merely for the sake of intellectual exercise. Rather, the authors have a specific goal in mind. The brief concludes: “This Court should recognize that when criteria for personhood are reasonable and consistently applied, Kiko and Tommy satisfy the criteria and are entitled to *habeas corpus* relief” (Andrews, Kristin, Comstock, Crozier, Donaldson, Fenton, . . . Walker, 2018, p. 36).²¹ It thus not only makes a claim about the

personhood of certain nonhuman animals, but also seems to posit a connection between personhood and legal personhood: If one is a person, one is entitled to legal personhood, or at least to an element of it.

Here we should note a distinction between “legalist” and “realist” approaches to legal personhood, introduced by Ngaire Naffine (2009). Legalists treat legal personhood as clearly distinct from “real” personhood: One’s “legal nature . . . should not be confused with one’s nature beyond the confines of law” (Naffine, 2009, p. 19). Realists, on the other hand, posit a strong connection between personhood and legal personhood. Occasionally, the “Philosophers’ Brief” seems to treat personhood and legal personhood as the same notion, for instance when it claims that “the concept of ‘personhood,’ with all its moral and legal weight, is not a biological concept and cannot be meaningfully derived from the biological category *Homo sapiens*” (Andrews, Kristin, Comstock, Crozier, Donaldson, Fenton, . . . Walker, 2018, p. 8). But even realists must accept that legal personhood is clearly a legal *status* that can be bestowed or rescinded by a legal system. After all, this is what the NhRP is trying to do: to make animals count as legal persons. Only a diehard natural lawyer—one who denies the legal validity of laws that violate the principles of morality—would claim that persons are legal persons *regardless* of the decisions of legislatures and courts.²² A more reasonable realist claim would be that legal personhood should track personhood: Persons, and perhaps only persons, should be treated as legal persons. This kind of realist approach is apparent in the conclusion of the “Philosophers’ Brief”: If chimpanzees are persons, then they should be endowed with legal personhood.²³

In the courtroom, a realist approach may have a kind of rhetorical force, since it paints the legal personhood of chimpanzees as a necessity—if chimpanzees are persons, then the court must endow them with legal personhood. More specifically, the argument can be constructed as something like this:

If some X is a person, then it should be entitled to legal personhood.
 Nonhuman animal N is a person.
 Legal personhood includes the rights protected by habeas corpus.
 Therefore, N is entitled to the rights protected by habeas corpus.

However, this argument is problematic, which has to do with the monolithic understanding of legal personhood that underlies it. It is not obvious what “being entitled to legal personhood” even means because legal personhood can take various forms. An animal could enjoy various bundles of the incidents of legal personhood, such as:

- the former companion animal of a deceased owner, now benefiting from a “pet” trust;
- a chimpanzee enjoying the personal freedom and integrity protected by the writ of habeas corpus; and
- “owned” animals having the “living property” status suggested by David Favre (2010), with, for instance, the right to a living space.

However, I cannot see any moral reason for endowing *all* nonhuman animals with *all* of the incidents of legal personhood—much like human beings, as not all humans should

be endowed with all of the incidents either. It may very well be that all animals are morally entitled to some of the incidents—such as fundamental protections and standing in courts—but probably no nonhuman animal should be endowed with the full set of incidents.

Now, if legal personhood were a precondition for rights, then “minimal” accounts of personhood, which simply identify personhood as having moral standing, might be pertinent. Such an account could be used to establish that animals are entitled to *some* legal rights because they are persons. But, as I have argued, legal personhood is not a precondition for legal rights. An entity can hold legal rights without being endowed with “capacity for rights,” because such capacity primarily has to do with private law. On the other hand, this notion of capacity for rights is not suitable for most other areas of law. For instance, consider constitutional rights, as with the Swiss case of primate rights. If the legislature wants to endow chimpanzees with constitutional rights, it can just give them these rights directly.²⁴ What would a constitutional change that gave primates the capacity for constitutional rights, but no actual rights, even mean? Such a capacity would in itself be completely immaterial.

Accounts of personhood may in fact not be very helpful with regard to determining the legal status different animals should be endowed with. As Jonas-Sébastien Beaudry (2019) notes:

The use of arguing that animals are persons in a legal sense is . . . questionable if one is concerned with negotiating for animals’ particular entitlements instead of the list of entitlements typically granted to human beings. So far, the claim that animals are sentient beings with biological needs and a welfare, rather than mere things, has had more success (and received legal recognition in certain jurisdictions) than the claim that they should be legally recognized as “persons.” (p. 10)²⁵

A more fruitful path would be to focus on the specifics: What particular rights are particular animals entitled to? Instead of concentrating on the question of whether animals are persons, the argument should perhaps address an aspect of personhood: What are the reasons why human beings are entitled to some particular right or some particular incident of legal personhood?²⁶ Why are the same reasons applicable to (some) nonhuman animals as well? This approach was, in fact, endorsed by Judge Fahey of the Court of Appeals of New York. In his concurring opinion in the Tommy chimpanzee case, Fahey noted that:

The better approach in my view is to ask not whether a chimpanzee fits the definition of a person or whether a chimpanzee has the same rights and duties as a human being, but instead whether he or she has the right to liberty protected by habeas corpus. That question, one of precise moral and legal status, is the one that matters here. . . . The reliance on a paradigm that determines entitlement to a court decision based on whether the party is considered a “person” or relegated to the category of a “thing” amounts to a refusal to confront a manifest injustice. Whether a being has the right to seek freedom from confinement through the writ of habeas corpus should not be treated as a simple either/or proposition. (*People ex rel. Nonhuman Rights Project v. Lavery*; Fahey concurring opinion, 2018, 1057–1059)

CONCLUSION

I have in this article argued that welfarism is not antithetical to animal rights, and that animals already hold legal rights, in spite of not being legal persons. Such rights are typically meager and poorly enforced, but rights nonetheless. A court's granting habeas corpus to a nonhuman animal would not transform them from a rightless "thing" to full-fledged legal person. Regardless, such a verdict would considerably improve the animal's legal status by endowing them with certain incidents of legal personhood. Framing the habeas corpus lawsuits on such terms might make the cases an easier sell.

Furthermore, maintaining that animals already hold rights averts a number of typical counterarguments that have to do with the question of whether animals should hold rights at all. For instance, rights are occasionally denied to animals because they do not bear duties. However, such a denial is inapt if animals already hold rights without bearing duties.

In spite of the criticism presented in this article, I find the work of the NhRP extremely important. Though the organization's success in the courtrooms has been limited, it has challenged the legal status quo, brought much attention to the issue of animal rights, and inspired jurists around the world.

ACKNOWLEDGMENTS

I wish to thank Raffael Fasel and Saskia Stucki for their extremely helpful comments.

Notes

1. The most significant victory has taken place in Argentina, where the chimpanzee Cecilia was declared a subject of law/rights (*sujeto de derecho*). Expte. Nro. P- 72.254/15, Presentación efectuada por a.f.a.d.a respecto del chimpancé "Cecilia"—sujeto no humano. English translation by Ana María Hernández available at https://www.nonhumanrights.org/content/uploads/Chimpanzee-Cecilia_translation-FINAL-for-website-2.pdf. See also Stucki (2016b).

2. The brief has since been expanded into a book (see Andrews, Kristin, Comstock, Crozier, Donaldson, Fenton, . . . Sebo, 2018).

3. See Kurki (2019).

4. In fact, the notion of "animal rights law," as opposed to "animal law"—which the Cambridge Centre for Animal Rights Law hopes to promote—seems to be based on such a distinction.

5. See also Margaret Gilbert's (2018, pp. 283–89) discussion of Kagan.

6. Unless they subscribe to welfarism purely on indirect terms (i.e., that welfarism is justified only because treating animals cruelly will lead to some other bad consequences).

7. See also McCausland (2014).

8. To me, the most comprehensive account of fundamental animal rights is Stucki (2016a). See also Stucki (2020), as well as the fundamental rights proposal by the Finnish Animal Rights Law Society at <https://www.elaintenvuoro.fi/english/>.

9. I offer a comprehensive criticism of the orthodox view in Chapter 2 of Kurki (2019).

10. For an overview, see Campbell (2017).

11. This position is held by the so-called "hard" will theorists. See, for example, Steiner (1998).

12. Jeffrey Skopek (2014), for instance, argues (in an academic blog post) that animals should already be understood as legal persons.

13. See Chapter 1 in Kurki (2019).

14. For instance, Wise (2019) himself refers to Peter Birks's *English Private Law* as support for his view.
15. See, for example, Wise (2019, p. 373). Wise and the NhRP seem to shift between the position that animals are already legal persons and that they are not.
16. For a more recent introduction to the Hohfeldian analysis, see, for example, Kramer (1998).
17. We should also note the exact wording of the conclusion: The court did not hold that it is inappropriate to confer *any* kind of rights to chimpanzees, but rather rights that *have been afforded to human beings*.
18. On the import of immunities, see Kramer (2008).
19. For arguments in favor of the interest theory (or against the will theory), see, for instance, Bowen (2020); Kramer (2013); Kurki (2018); and MacCormick (1976).
20. See <https://www.youtube.com/watch?v=MVryNgXkgUM> (from approximately 34:30). Many thanks to Joe Wills for bringing this to my attention.
21. It should be said that the authors adopt this approach because they take the courts to be applying it as well: "If the concept of 'personhood' is being employed by the courts to determine whether to extend or deny the writs of habeas corpus, they should employ a consistent and reasonable definition of 'personhood' and 'persons.'" (Andrews, Kristin, Comstock, Crozier, Donaldson, Fenton, . . . Walker, 2018, p. 3).
22. Joshua Jowitt (n.d.) has recently put forth this kind of a natural-law argument for the legal personhood of animals.
23. See also pp. 6–8 of the brief.
24. I am using "legislature" in an extended sense to refer to any body that can enact constitutional changes.
25. See also Beaudry (2016).
26. This is, in fact, what I think the NhRP is doing when arguing for the personal autonomy of chimpanzees, for example, and why that entitles them to habeas corpus. The question of whether chimpanzees are persons is a distraction from this core issue.

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Do Animals have a Standing in Courts? Understanding the Scope of Animal Personhood in the Indian Context

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Abstract: *Most environmental law instruments suffer from an inherent anthropocentric bias, as legal systems globally do not recognize the intrinsic value of natural elements such as rivers, lakes, mountains, trees, or animals. Any legal protection offered to these natural elements caters only to human interest, instead of recognizing their intrinsic value. This selective protection lies at the root of biodiversity loss and species' extinction. However, this approach is slowly transforming, and globally we are witnessing a rise of ecocentrism. The spread of rights of nature movement and recognition of environment personhood reflect this trend. In India, few judicial pronouncements, most notably by Justice Rajiv Sharma, have taken a step in this direction by recognizing animal personhood. In the cases of Narayan Dutt Bhatt v. UOI (2018) and Karnail Singh v State of Haryana (2019), Indian courts have recognized animals as legal entities and designated all citizens as the legal guardians of the non-human animals. This article analyses the legal status of animals, concept of animal personhood and its attributes, and how it has been adopted in the Indian legal system. This article also discusses its shortcomings and suggests some measures to enhance its effectiveness in protecting the rights of animals.*

Keywords: *Animal Personhood, Eco-centrism, Legal Status of Animals, Narayan Dutt Bhatt v. UOI*

I. INTRODUCTION

Noted British anthropologist Jane Goodall once remarked that "[I]t is not only humans that suffer...It is now clear that there is no sharp line between us and chimpanzees, between us and the rest of the animal kingdom. The more we learn, the more blurry the line

becomes. We are not the only beings on the planet with personalities and minds capable of rational thought and feelings."^[1] Despite the availability of numerous scientific evidence which concludes that animals are sentient beings, the legal systems have systematically denied respect, and protection that other species

on the planet deserve, on arbitrary and irrational grounds. The inability of the legal systems to treat animals at par with humans partly stems from the anthropocentric bias that most of our environmental law instruments suffer with.

The anthropocentric bias can be observed in the international environment law starting from the Stockholm Convention (1972), which set the tone of the global environmental agenda for decades.[2] Environmental ethics, which governs the moral relationship that exists between humans and the environment, is dominated by the two opposing views of ‘anthropocentrism’ and ‘ecocentrism’.[3] People who prescribe to anthropocentrism believe that the homo sapiens lie at the center of the ecological cycle, and all other species are subservient.[4] Thus, they are least concerned with the rights of other species unless they have some significance to humans, such as food, clothing, shelter, and medical benefits. Consequently, even the environmental law instruments suffering from this bias have failed to arrest the exploitation, abuse and decimation of animals. On the other hand, ecocentrism views humans as a part of nature, where both humans and non-humans have intrinsic values.[5] In ecocentrism,

human interest does not take precedence over non-humans. It also encourages people to respect and care for animals and plants for their own sake. Anthropocentrism and ecocentrism are understood as one of the most significant ecological and moral dilemmas that lawmakers have found very difficult to reconcile.[6]

However, the deeply entrenched anthropocentric bias is slowly transforming. The spread of rights of nature movement globally supports this view. Many jurisdictions have witnessed the adoption of constitutional reforms, enactment of legislations, or pronouncement of judicial decisions recognizing the rights of nature.[7] However, it needs to be kept in mind that the bid to recognize the rights of nature and its elements is not new to environmental legal theory. Stone (1972) suggested that the natural environment should be seen as capable of holding certain rights.[8] Because the natural environment could not stand on its own before any authority or Court, it was proposed that the natural environment should be represented through its guardians.[9] When seen as a holder of rights, the nature acting through its guardians becomes capable of protecting its interests. However, when rights are accorded to nature, it also becomes

entangled in the web of legal personhood or environmental personhood. Thus, there are legal hurdles to be cleared before environment personhood can become an effective environmental protection tool.

Indian courts have also drawn inspiration from the rights of nature movement and recognition of environmental personhood in select jurisdictions. More specifically, the judicial pronouncements by Justice Rajiv Sharma, while presiding over High Courts of Uttarakhand,[10] and Punjab & Haryana,[11] giving recognition to legal personhood of rivers and animals are quite significant. However, it is submitted that the jurisprudence on environmental personhood is still at a nascent stage in India and is not devoid of legal challenges associated with its adoption.

This paper attempts to highlight and address the concerns associated with the attribution of legal personhood to animals in India. This paper is divided into six parts. Followed by the introduction, Part II of the paper analyses the legal status of animals, i.e., whether they are classified as 'persons' or 'property' in law and if this classification has reasonable basis. After that, in Part III, we discuss the views of prominent legal scholars, which

favor recognition of animal personhood and the positive impact such recognition could have on animal welfare. Part IV of the paper analyses the judgments on animal personhood in India while studying the reasons given by courts before granting such recognition. In Part V, after critically analyzing the judgments on animal personhood in India, we highlight some practical problems associated with the enforcement of these judgments. Also, we provide some solutions for the effective adoption of animal personhood in the Indian legal system. In Part VI, concluding observations on the topic are presented.

II. ANIMALS AS ‘PERSONS’ OR ‘PROPERTY’?

Any inquiry in animal rights discourse is incomplete without first understanding the legal status of animals. Are animals treated as 'persons' or 'things' under the law? Has the legal classification of animals as 'things' taken into account scientific, ethical, and moral considerations? This part attempts to address these fundamental questions by referring to the scholarly works of scientific and legal experts in this field.

A perusal of works of early thinkers and philosophers suggests that western legal thought is dominated by ‘dualism’ which

believes that for moral and legal considerations, all entities in the world can be categorized into ‘persons’ and ‘things.’[12] This dualism is observed in secular as well as religious thought. For instance, Aristotle (384-322 BCE) believed that humans inherently differed from animals because humans possess the ability to reason, which is absent in animals as they are driven by instinct.[13] Aristotle postulated that humans should be placed higher in the hierarchy of nature because of their ability to reason, i.e., above animals and plants.[14] Aristotle's views of human superiority over non-human animals inspired many of his successors in legal thought and theology. Catholic theologian Saint Thomas Aquinas (1225-1274)[15] and French philosopher Rene Descartes (1596-1650)[16] also endorsed such views. John Locke (1632-1704), noted jurist on western property rights, went to the extent of arguing that God gave humans dominion over animals and even proposed a theory of property that attributed the property status to non-human animals in law.[17]

Thus, western legal thought assigned the legal status of ‘property’ to animals. Steven Wise, famous animal rights advocate and founder of the Non-human Rights Project, has also

noted that for the last 4000 years, a legal wall has separated humans from non-human animals, especially in western legal thought.[18] Consequently, legal personality is attributed to only humans, as they are seen as natural ‘persons’, while on the other side of the wall, there are only legal ‘things’. Thus, far from being seen as holders of rights, animals came to be recognized as ‘things’ or objects of enjoyment in legal theory.

However, more receptivity towards the improved legal status of animals can be found in modern legal thought, mainly inspired by the works of Charles Darwin's (1809-1892), who scientifically demonstrated that through his *Theory of Evolution* that *homo sapiens* are animals and the trait of intelligence is not unique to them.[19] His scientific works established that non-human animals such as mammals, birds, and even fish possess considerable intelligence, emotions and engage in complex social interactions.[20] With advancements in the scientific study of animal behaviour and physiology, many modern thinkers have discarded the traditional beliefs that animals are devoid of intelligence, emotions, or sentience. Most notably, Richard Ryder, British psychologist, and animal rights activist

observes that there is sufficient physiological, biochemical, and behavioural evidence that many animal species suffer the same way as humans do.[21] Building upon the works of Ryder, Singer (1995) also became an advocate for the rights of animals. Singer brought Ryder's term of 'speciesism' into more considerable public attention, which refers to discrimination against a non-human animal based on the morally irrelevant distinction that the animal is not a member of the human species, despite no evidence of lack of sentience in animals.[22] Thus, despite the existence of compelling scientific evidence that mandates a better treatment for animals as sentient beings, the law mostly has failed to accord animals the legal status they deserve and mostly inclined to view them as 'property' rather than 'persons.'

III. ARGUMENTS IN FAVOUR OF RECOGNIZING ANIMAL PERSONHOOD

Before considering the question of grant of legal personhood to animals, we must analyze whether the denial of legal personhood to animals is based on sound legal principles. Let us begin this inquiry by asking a very basic question: Who in law is a 'person'? Salmond, noted jurist on the theory of personhood, regards

the capability of bearing rights and duties as the determinant of personhood.[23] In the context of animals, Salmond has claimed that "[t]he only natural persons are human beings. Beasts are not persons. They are merely things—often the objects of legal rights and duties, but never the subjects of them".[24] Therefore, as per Salmond's conception of personhood, denial of legal personhood to animals is based on two grounds – (i) the dominant view that animals are 'things' and not 'persons' and (2) animals are incapable of performing duties. In response to the first ground, as already pointed out in part II, it is submitted that the notion that humans and animals are entirely different from each other is not correct, in light of available scientific evidence to the contrary. The incapability of animals to recognize or perform duties should not become an impediment to their claim of personhood as even in case of young children, mentally disabled or unsound persons we have seen that law recognizes them as entities capable of holding rights, even though they cannot be saddled with duties and obligations because of their limited cognitive capacities.[25] This shows that Salmond's conception of personhood permits exceptions, and there is no legal basis for excluding only

animals from availing this benefit. Thus, animals can still be viewed as legal persons and possess legal rights even if they do not have corresponding legal duties. Naffine (2009) reiterated this idea when she noted that “[l]egal personhood is a flexible concept that is capable of responding to new circumstances, and in theory could include animals.”[26]

The next question to consider is: what are the other significant conditions for legal personhood? Historically, humans have invoked characteristics like "rationality" or "moral reciprocity" to assert their superior claim while denying personhood to animals.[27] However, this does not stand up to scrutiny. As already pointed out above, even cognitively impaired humans are given basic rights and legal standing. Therefore, on this argument itself, the law cannot logically deny the same respect to non-human animals.

Many modern theorists such as Wise (2000) and Francione (2013) have advocated granting of legal personhood to animals. Wise (2000) identifies ‘*autonomy*’ as a sufficient condition for granting legal personhood to any entity, including animals.[28] According to him, our legal systems are designed to protect the interests of autonomous and self-determining beings, such as humans and

animals. On the other hand, Francione (2013) identifies ‘*sentience*’, i.e., the ability to feel as the only necessary and sufficient condition for moral consideration and legal personhood.[29] As animals are sentient beings, just like humans, their claim to legal personhood cannot be denied on any arbitrary ground.

It needs to be pointed out that the grant of legal personhood to animals will have far-reaching consequences on how animals will be in a legal system. In legal ethics, a ‘person’ becomes an object of respect and should be valued for his/her own sake. Whereas a ‘thing’ has only a derivative value, and it may be used as a means to some person’s ends. ‘Things’ don’t possess rights; they are solely the objects of rights. Therefore, recognizing someone’s legal personhood is to acknowledge that they have inherent value under the law.[30]

Unfortunately, at present, in mostly all jurisdictions, animals are viewed as legal ‘things’ or ‘property.’ Because animals do not possess any rights or legal personhood, it becomes difficult to protect their interests in a court of law. With no legally recognized right to sue through a representative/guardian, animals’ interests remain at the mercy or

discretion judges, state agencies or animal rights groups, which follow a very selective approach. This approach has failed to protect the interests of animals. The present *status quo* can be changed if animals are reclassified from 'property' to legal 'persons.' Such a change in the legal status of animals would mean that animals are simply not subject to their owner's rights, but they are rights holders themselves by virtue of being sentient beings. This logically would entail that animals would possess basic rights such as the right to life or an exclusive right to their bodies. This would create a presumption that others cannot interfere with them physically because they are the rights holder.

IV. ANIMAL PERSONHOOD IN INDIA

In India, both executive and judiciary have shown receptivity towards acknowledging the legal personhood of animals. In 2013, the Ministry of Environment and forests ('MoEF'), while acknowledging that dolphins are highly intelligent and sensitive and possess human-like traits, declared dolphins are '*non-human persons*' and banned their captivity for entertainment purposes in dolphinariums.[31] Recognizing the intrinsic value of animals as

sentient beings, the MoEF has also banned the use of big cats, elephants, bears, and monkeys in all performances, including circuses[32] and stopped animal testing by the cosmetics industry.[33]

Judicial recognition of animal personhood in India is a result of the decision of the Hon'ble Uttarakhand High Court ('the Court') in *Narayan Dutt Bhatt v. UoI*. [34] ('*Bhatt*') In this case, the petitioner, filing the PIL, had sought directions from the Court for the welfare and prevention of cruelty to the horses pulling carts across India-Nepal border. During the hearing, the Court expanded the scope of the PIL to include the protection and welfare of all animals. In addition to passing directions for the welfare of the horses, the bench comprising of Justice Lok Pal Singh and Justice Rajiv Sharma categorically laid down that, "*[T]he 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.*" [35]

In arriving at the decision to grant personhood to animals, the Court has relied on existing scientific evidence, writings of scholars and jurists, and judicial precedents. The judgment has referred to the decision of the Hon'ble Supreme Court ('the SC') in the cases of *Yogendra Nath Naskar v. CIT, Calcutta*,^[36] and *Ram Jankijee Deities v. State of Bihar*,^[37] wherein it was held that a Hindu idol was a juridical person for the purposes of owning property and being taxed via trustees. Based on these pronouncements, where idols have been vested with legal personhood to meet society's needs, the court reasons that animals can also be attributed legal personhood for securing their welfare. The judgment has extensively referred to the decision of the SC in the case of *Animal Welfare Board of India v. A. Nagaraja & oths.*,^[38] ('Nagaraja') wherein while banning the traditional sport of *Jallikattu*, the SC has held that species best interest must be kept in mind while interpreting animal welfare laws. The SC, in this case, also expanded the scope of “life” under Art. 21 to include animal life necessary for human life.^[39]

In *Bhatt*, while granting personhood to animals, the Court also reasons that animals exhibit many characteristics such as

emotions, intelligence, self-awareness, and altruism that are identified primarily with humans, by referring to the scholarly works of David R. Boyd's on rights of nature.^[40] In addition to this, by referring to Jane Nosworthy's article "The Koko Dilemma: A Challenge to Legal Personality", the Court has emphasized the need to expand the idea of legal personhood to include animals.^[41] Further, the Court has also referred to the scholarly works of Peter Singer, which advocate grant of personhood to animals based upon evidence of sentience and self-awareness observed in animals.^[42]

In similar lines, Justice Rajiv Sharma, while presiding as a judge of the Punjab and Haryana High Court, delivered a similar verdict recognizing animal personhood in *Karnail Singh v. State of Haryana* ^[43] ('Singh'). It is submitted that while recognition of animal personhood by the Indian courts is a positive step, yet the enforcement of these judgments is difficult, as there is still a lack of clarity regarding the operationalization of this concept by Indian courts.

V. PRACTICAL DIFFICULTIES IN RECOGNITION OF ANIMAL

PERSONHOOD AND SUGGESTIONS
Being widely worded and because of lack of suitable legislation, there

are practical problems associated with the recognition of animal personhood in the way it has been judicially pronounced. This part highlights such concerns and makes some suggestions for the practical realization of animal personhood in India.

1. Scope of Animal personhood: In *Bhatt*, while declaring all animals to be legal entities and capable of holding rights,[44] the Court has committed a manifest oversight. The Court has failed to distinguish between those categories of animals that are solely used for the benefit of humans, such as meat consumption, medical testing, and medication, and culling of vermin animals deemed dangerous to crops. Such oversight can open up floodgates of litigation. Thus, there is a need to determine the categories of animals that can safely be granted legal personhood.

2. Selection of the Most Suitable Guardians: As per *Bhatt* and *Singh*, all citizens are deemed as legal guardians of the non-human animals.[45] However, it is practically impossible to assume that all citizens will act as the legal guardians of animals, as even the violators of animal rights will fall in the same category. Therefore, selecting the most suitable guardians/representatives for protecting animals' rights has become

a source of headache. Thus, there is a need to accurately identify the best guardians of animals who have the best interest of the animals at heart and have no conflicting interest with them, whether an individual or an organization or even a state agency working in animal welfare.

3. Principles governing Welfare of Animals: The judgments are largely silent on the principles that would guide the welfare of animals. In *Nagaraja*, the Hon'ble SC has held that animal laws have interpreted keeping the species' best interest in mind.[46] Further animal welfare legislations such as the Prevention of Cruelty to Animals Act, 1961, can provide guidance regarding the minimum standard of life that an animal must be allowed to attain. To bring clarity on these aspects, the recognition of animal personhood in India should be backed by a legislative framework.

VI. CONCLUSION

The author of this article has made a strong case for granting legal personhood to non-human animals by referring to extensive scholarly literature and case-laws on this subject. The article has also highlighted some practical problems associated with the recognition of animal personhood in India and has made some

suggestions for improvement of its implementation. Ironing out such creases is crucial as ultimately, the success of the adoption of animal personhood in India will depend upon how effectively the animals are represented before the courts.

The immediate outcome of granting standing to animals will be an increase in access to courts for non-human animals. In the long term, the recognition of animals' legal personhood will present an opportunity to inculcate ecocentrism and evolve new jurisprudence on animals' rights, recognizing their intrinsic value rather than viewing them as secondary to human beings. At the same time, it needs to be remembered that mere granting legal personhood to animals will be a hollow victory for animal rights movements till this recognition is backed by the imposition of duty-based obligations on humans, which guarantee certain basic standards for the peaceful existence of animals. If we are serious about arresting the alarming rate of species' extinction and animal welfare, we need to radically transform society's conception and treatment of animals. Therefore, reclassifying animals as 'persons' instead of 'things,' recognizing legal personhood for animals, and inculcating eco-centric ethics in

environmental legislations are the means to achieve this transformation.

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The Recognition of Animal Sentience by the Law

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Abstract: In order to protect nonhuman animals effectively, animal law must overcome many hurdles, be it the balance of human and nonhuman interests, the use paradigm, or narrow definitions of legal personhood or basic rights. A fact often overlooked in this uphill struggle is that the laws of most states recognize that animals must be protected because and to the extent that they are sentient. The legal recognition of animal sentience seems to nullify all and any attempts to deny them legal protection simply because they are not sufficiently appealing, emotionally close, or economically useful to us. However, the legal recognition of animal sentience does not overcome all our cognitive prejudices about animals. Using a comparative law method and insights from moral philosophy, this article analyzes the nature and scope of the legal recognition of animal sentience. It identifies its advantages in challenging arbitrariness and inconsistency and championing intrinsic animal protection and points to the most pressing shortcomings, including some states' refusal to commit themselves to animal sentience and remaining prejudices in society and science. In concluding, the article offers ways to address and remedy these shortcomings and points to ways in which the concept can be used more effectively by academics and practitioners.

Key words: animal sentience, animal law, science, cognitive biases, legal status

INTRODUCTION

In moral and political philosophy, the question of what criterion ties moral worth to animals is still debated: Is it rationality? Practical autonomy? Being a subject of a life? Sentience? Vulnerability? These debates notwithstanding, a majority of states across the world have enacted laws providing that nonhuman animals (henceforth animals) must be protected *because they are sentient* (see below). By determining that those animals who feel pain and suffering must be protected, the law delimits the personal scope of animal protection acts with reference to scientific findings, excluding, for example, nonsentient animals. Thus, if scientific findings show that an animal is sentient, this is sufficient to bring them directly under the purview of the law without getting the administration or

legislature involved. This strategy seems to nullify all and any attempts to deny animals legal protection simply because they are not sufficiently appealing, emotionally close, or economically useful to us. Fish, for example, who are today recognized by most scientists as being capable of suffering (e.g., Sneddon & Leach, 2016), cannot be denied legal protection because they do not evoke feelings of empathy and compassion in lawmakers or society at large, due to differences in looks, locomotion, or language. The recognition of animal sentience seems to help animal law overcome cognitive biases—systematic patterns of deviation from norm or rationality in judgment (Ciccarelli & White, 2018, p. 324)—that most people have about animals. Despite the widespread avowal to sentience, the function and operability of the legal recognition of animal sentience are nebulous and lack scholarly conceptualization. It is, for instance, unknown if the concept has symbolic value only, or if it gives rise to moral, and potentially legal, duties owed to animals. Answering these questions may help us gain more certainty about the laws in place and bring to the fore new strategies for practicing lawyers, academics, and activists.

Using a comparative law method and insights from moral philosophy, this article analyzes the recognition of animal sentience by the law. It first presents the jurisdictions that have at their basis the commitment to animal sentience and examines the ways in which this has been catalyzing progress in animal law, in particular to champion intrinsic animal protection and challenge arbitrary and inconsistent exclusions of certain animals. It then shows how in three notable respects, the legal recognition of animal sentience remains limited at present: the refusal of some states to recognize animals as sentient, the remaining cognitive biases in society, and the cognitive biases of scientists when they examine whether animals are sentient. In concluding, the article puts these shortcomings into perspective and offers ways for practitioners and academics to use the legal recognition of animal sentience more effectively.

THE NEAR UNIVERSAL RECOGNITION OF ANIMAL SENTIENCE

States that recognize animal sentience either do so directly, by enshrining it in their animal protection acts, or indirectly, by applying animal protection acts only to sentient animals. Article 13 of the Treaty on the Functioning of the European Union (2016) requires the European Union and its member states to “pay full regard to animal welfare requirements of animals” in formulating and implementing the EU’s agriculture, fisheries, transport, internal market, research, technological development, and space policies, “since animals are sentient beings.” Referring to the European Union’s commitment to animal sentience, Directive 2010/63/EU of the European Parliament and of the Council on the Protection of Animals Used for Scientific Purposes (2010) covers not only vertebrate animals but also cyclostomes and cephalopods, “as there is scientific evidence of their ability to experience pain, suffering, distress and lasting harm” (recital 8). The directive also applies to all fetal forms of mammals because they “are at an increased risk of experiencing pain, suffering and distress” (Directive 2010/63/EU, 2010, recital 9). The European Convention for the Protection of Vertebrate Animals Used for Experimental and Other Scientific Purposes (1986) explicitly recognizes that “man

has a moral obligation to respect all animals and to have due consideration for their capacity for suffering and memory” and that it is therefore “desirous to adopt common provisions in order to protect animals used in those procedures which may possibly cause pain, suffering, distress or lasting harm” (preamble). As the Council of Europe sees it, laws should be put in place where there is reason to believe that actions impair sentient animals physically or psychologically.

The Finnish Animal Welfare Act (Eläinsuojelulaki, 1996) declares that it applies to all animals and lays bare its objective, which is “to protect animals from distress, pain and suffering in the best possible way” (section 1[1]). In France, L. 214–1 of the *Code rural et de la pêche maritime* (2016) clarifies that “all animals that are sentient shall be placed by the owner under conditions compatible with the biological requirements of their species.” Section 1 of the German Animal Welfare Act (Deutsches Tierschutzgesetz, 2006) aims “to protect the lives and well-being of animals, based on the responsibility of human beings for their fellow creatures. No one may cause an animal pain, suffering or harm without good reason.” This suggests that it is the animals’ capacity to experience pain, suffering, and harm that gives rise to duties of protection for humans.

Under Greek law, “an animal is every living organism that has the capacity to experience feelings (sentient being) that lives on the land, air and sea or in any other aquatic ecosystem or wetland” (Nomos Gia Ta Deopozomena Kai Ta Adeopota, 2012, article 1[a]). The Indian Prevention of Cruelty to Animals Act (1960) defines animals as any living creatures other than human beings (section 2[a]). Its preamble shows that it was established “to prevent the infliction of unnecessary pain or suffering on animals and for that purpose to amend the law relating to the prevention of cruelty to animals.” In Lithuania, animal sentience is a guiding principle of the Law on Welfare and Protection of Animals (Gyvūnų Gerovės ir Apsaugos Įstatymas, 2012): “This Law shall lay down the remit of state and municipal authorities in ensuring the welfare and protection of animals as sentient beings” (article 1[a]). Section 2(1)(a) of the Animal Welfare Act of New Zealand (1999) defines animals as “any live member of the animal kingdom that is a mammal, or a bird, or a reptile, or a amphibian, or a fish (bony or cartilaginous), or any octopus, squid, crab, lobster, or crayfish (including freshwater crayfish).” Also prenatal animal life is protected by the act, at least within certain limits (section 2[1][b]). The rationale for this inclusive approach is laid bare by the New Zealand Guide to the Animal Welfare Act (1999):

The Animal Welfare Act 1999 has a much wider definition of animal than the Animals Protection Act 1960. It includes most animals capable of feeling pain and applies to all such animals whether domesticated or in a wild state. It excludes animals such as shellfish and insects as there is insufficient evidence that they are capable of feeling pain. (p. 1)

According to section 2 of the Norwegian Animal Welfare Act (2009), the law applies to conditions that affect the welfare of or respect for mammals, birds, reptiles, amphibians, fishes, decapods, squid, octopi, and honey bees. The second sentence of section 2 extends this protection to animals in prenatal stages, with reference to sentience: “The Act applies equally to the development stages of the animals referred to in cases where the sensory apparatus is equivalent to the developmental level in living animals.” In Poland,

the Law Regarding Animal Protection (O Ochronie Zwierząt, 1997) protects vertebrate animals, determining that “the animal as a living creature, capable of suffering, is not an object. The human being should respect, protect and provide care for it” (article 1[1]). In the Slovenian Animal Protection Act (Zakon o Zaščiti Živali, 1999), animals that “have developed senses for the reception of external stimuli and developed nervous systems to feel painful external influences” (article 1) are protected. The law further states that it must be “strictly implemented in vertebrates, in other animals, according to their degree of sensitivity in accordance with established experience and scientific knowledge” (Zakon o Zaščiti Živali, 1999, article 1).

In Switzerland, “no one may inflict pain, suffering or harm on an animal, induce anxiety in an animal or disregard its dignity in any other way without justification” (Schweizerisches Tierschutzgesetz, 2005, article 4[2]). Article 2(1) of the Swiss Animal Welfare Act (Schweizerisches Tierschutzgesetz, 2005) defines animals as vertebrates but acknowledges that this definition is subject to expansion to the extent required by science: “The Federal Council decides to which invertebrates it applies and to what extent. In doing so, it is guided by scientific knowledge on the sensitivity of invertebrate animals.” Therefore, sentience is the relevant criterion for determining which animals qualify as “animals” for the purposes of the act. The Federal Council has been reluctant to expand the group of animals considered sentient to invertebrates and has so far only recognized cephalopods and *Reptantia* as invertebrates capable of suffering (Schweizerische Tierschutzverordnung, 2008, article 1).

The Turkish Animal Protection Law (Hayvanlari Koruma Kanunu, 2004) provides that “the purpose of this law is to ensure that animals are afforded a comfortable life and receive good and proper treatment, to protect them in the best manner possible from the infliction of pain, suffering and torture, and to prevent all types of cruel treatment” (article 1) and is thereby committed to sentience. The Animal Welfare Act of the United Kingdom (2006) declares that an animal “means a vertebrate other than man” (section 1[1]). The law’s narrow focus on vertebrates is justified with reference to sentience:

The Act will apply only to vertebrate animals, as these are currently the only demonstrably sentient animals. However, section 1(3) makes provision for the appropriate national authority to extend the Act to cover invertebrates in the future if they are satisfied on the basis of scientific evidence that these too are capable of experiencing pain or suffering. (section 1[1])¹

Ukrainian legislation reinforces that it is the purpose of the law “to protect animals from suffering and death as a consequence of being cruelly treated, to protect their natural rights, and to reinforce morality and compassionate behavior in society” (Pro Zakhyst Tvaryn Vid Zhorstokoho Povodzhennya, 2006, preamble). Though the act is manifestly motivated by anthropocentric concerns, it protects those animals who are capable of suffering, and thereby commits to the concept of sentience.

These examples are only indicative of many more laws around the world that explicitly recognize animal sentience or do so indirectly by defining animals with reference to sentience. These recognitions, by occupying a central place in animal laws worldwide,

are proof of an emergent universal consensus among state actors that sentience serves as a gateway to according animals protection under the law.

THE RECOGNITION OF ANIMAL SENTIENCE AS A TOOL TO COUNTER ARBITRARINESS AND INCONSISTENCY

The recognition of animal sentience is a testament to the fact that animals are radically different from inanimate objects, like a chair or a fork, and also distinguishes them from animate, yet seemingly insentient objects, like a sunflower or a tree (see further on graded sentience in Tomasik, 2017). Sentience comprises far more than the ability to experience nociception, which is a simple response to sensations. In reaction to nociceptive stimuli, sentient animals learn to associate these stimuli physically and emotionally. For example, they seek to avoid negative stimuli and, if they cannot avoid them, they develop anxiety or learned helplessness. The reactions of sentient animals demonstrate their ability to feel pain, suffering, and pleasure (i.e., to experience affective states) and the fact that these feelings motivate animals to seek satisfaction and avoid suffering (Webster, 2010, p. 508). As Darwin (1872) succinctly put it: “A Sentient Animal is one for whom Feelings Matter.” Some scholars refer to the ability to experience affective states as *sentience* and to the intrinsic importance of affective states as *consciousness* (see, for example, Duncan, 2006, p. 11). This renders sentience a minimal definition or a nuance of consciousness (Birch, 2018, p. 2; Raspé, 2013, pp. 183ff.; Wild, 2015, p. 57). When legislators refer to sentience, however, they usually use a broad definition that includes both the ability to experience pain and pleasure and the intrinsic importance to the being experiencing those feelings. The praiseworthy fact is that most animal protection or welfare acts choose sentience rather than looks or utility as the decisive element governing the protection on animals. Modern animal protection acts use animal sentience as a proxy to determine their personal scope of jurisdiction: Those who are sentient are protected. This standard is science based (using a wide variety of behavioral, physiological, clinical, brain function, and other measures; Broom, 2016, p. 4) and seemingly objective because animals are not protected based on their attractiveness, their appearance, their similarity to humans, or their emotional proximity to humans. Without the recognition of sentience, it is much more likely that the law simply mirrors the many cognitive biases that shape our subjective social reality, so only those animals we like most or find most appealing will make it into the law. For example, in the past, fish have often been denied legal protection based on the assumption that they are not sentient. This belief emerged from and has been reinforced by our biased views about fish: they have fins but lack limbs and digits, they have a respiratory system with gills rather than lungs, they move differently than mammals, they have their eyes on complete opposite ends of their head, they are cold-blooded rather than warm-blooded, they lack a neocortex, and so forth (on fish pain, suffering, and consciousness see Elder, 2014, pp. 16ff.). Having a law in place that determines that none of these criteria matter but that sentience alone indicates whether animals deserve protection helps to eradicate or at least attenuate human biases against animals.

THE RECOGNITION OF ANIMAL SENTIENCE AS A COMMITMENT TO INTRINSIC ANIMAL PROTECTION

Sentience-based laws are also significant because they give a legal status to animals who experience affective states in a subjectively relevant way. Animals' well-being matters to the law, because it matters to them (Bolliger, Richner, & Rüttimann, 2011, pp. 24–25; Leondarakis, 2001, p. 29). A number of states are expressly committed to this sentientist ethic. For instance, the preamble to the Dutch Animal Welfare Act (*Wet van 19 mei 2011*, 2011) expresses “recognition of the intrinsic value of the animal.” Article 3(a) of the Swiss Animal Welfare Act (*Schweizerisches Tierschutzgesetz*, 2005) states that “the inherent worth of the animal that has to be respected.” And the Latvian Animal Protection Law (1999) recognizes that it is “the ethical obligation of humankind [...] to ensure the welfare and protection of all species of animals, because every unique being is in itself of value” (preamble).

Ensuring that animals are protected for their own sake is an objective most academics and lawyers working for animals aim to achieve, so the legal recognition of animal sentience should be used more systematically in the future. One way to do this would be to check that the judiciary and enforcement authorities are up to date with the latest scientific findings on animals, especially those newly classified as sentient. Switzerland, for example, made international headlines when it became the first country to ban boiling lobsters alive because this causes them a long and painful death (*Schweizerische Tierschutzverordnung*, 2008, articles 178, 179a; Polianskaya, 2018). Another way to give effect to the recognition of animal sentience would be to insist on internal consistency so that unpopular but sentient animals (e.g., octopi; see “Cambridge Declaration,” 2012) receive the same protection as popular, sentient animals (e.g., polar bears). And finally, in any given case, the rationale of animal law—to protect animals for their own sake—should be used to help balance human and nonhuman interests (today, these balances are strongly skewed in favor of human interests; see, for example, in research Blattner, 2019b). Taken together, these benefits make apparent the need and opportunities for animal advocates to use existing laws to create a better reality for animals.

Despite these remarkable advantages of the legal recognition of animal sentience, it is not a panacea to remedy the many shortcomings of animal law. The concept is limited in three main respects: the fact that some states refuse to recognize animals as sentient (caveat 1), the persistent prejudices in society that prevent animals from enjoying full protection under the law (caveat 2), and scientific biases in assessing sentience (caveat 3).

CAVEAT 1: REFUSAL OF RECOGNITION

Although a majority of states are committed to animal sentience, some states, including the United States, refuse to do so. When the U.S. Animal Welfare Act—the major federal law designed to protect animals—was passed in 1966, it was termed the Laboratory Animal Welfare Act. Today, ironically, the act does not cover 95% of animals used for research

purposes, including birds, rats, mice, and all cold-blooded animals, regardless of the fact that they are vertebrates and, as such, capable of suffering (see section 2132[g]; for a discussion, see Orlans, 2000). This exclusion deprives animals—who have an inherent interest in their well-being—of protection and undermines the very object and purpose of the Animal Welfare Act (section 2131[1] determines that it is the act’s policy “to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment”). Fish, for instance, are widely recognized as sentient by the scientific community (Sneddon & Leach, 2016), which makes them, in principle, eligible for legal protection (as done, for example, under the Aquatic Animal Health Code of the World Organization for Animal Health, 2017, article 7; the U.S. National Institutes of Health’s, 2015, Public Health Service Policy, article III(A); and the U.S. National Research Council’s Guide for the Care and Use of Laboratory Animals, 2011, pp. 77ff). The U.S. Animal Welfare Act actively discriminates against certain animals like fish by not recognizing them as sentient beings under the law. This example evidences that some legislators continue to make instrumental use of the legal recognition of animal sentience—granting or withholding their recognition of animal sentience depending on their vested interests—which leads to self-serving views shaping the law. As a result, animals are pushed to the margins of our moral and legal concerns, and neither producers nor legislators are obliged to justify what is done to animals. These far-reaching consequences make abundantly clear the importance of the recognition of animal sentience as a basic principle of animal law.

CAVEAT 2: COGNITIVE BIASES IN SOCIETY

Despite the widespread recognition of animal sentience and the *prima facie* applicability of animal welfare acts to sentient animals, not all animals receive protection commensurable with their sentience. For example, while extreme confinement of pigs is legal, dogs must be given adequate space and taken for regular walks. Similarly, cats are euthanized while cows and chickens are slaughtered by electric current, gas, or gun bolts—methods that are considered cruel when used to end the lives of cats. States—even though their laws document their commitment to animal sentience—often do not protect animals to the degree necessary for them to experience well-being as sentient beings. Cows, for instance, are mammals and, as such, widely recognized to feel pain, also by Australian standards (Animal Health Australia, 2016, p. 4), yet, they are largely invisible to Australian law due to the exemption for “common farm practices,” which means that if a sufficiently high number of farmers treat cows in a cruel manner, their actions are exempt from the law (see further Bruce & Faunce, 2017, p. 370; White, 2007, p. 355). As Ribbons (quoted in Joy, 2011) explains, “If you are raising an animal for meat, for milk, or for eggs, you can without restriction subject that animal to conditions, which, if you did that to a dog or cat, would land you in jail” (pp. 7–8). Ensuring that the law recognizes animals as sentient beings and covers them on these grounds does not guarantee that (all) animals will benefit from the full range of animal law instruments.

The fact that legislators do not go all the way to protect animals once they have laid down the general commitment to animal sentience is not surprising considering humanity's long history of animal exploitation. This historical and contemporary truth alone compels us to be vigilant, but even more so does the fact that duties arising from animal law are self-judging obligations. Humans—the ones benefiting from animal exploitation—are the sole legislators and judges about what we owe to animals. Self-judging obligations are to a high degree susceptible to biases. Legislators acknowledge animal sentience as an axiom but only protect animals where it is expedient, and thereby embrace an incoherent morality: “We love dogs and eat cows not because dogs and cows are fundamentally different—cows, like dogs, have feelings, preferences, and consciousness—but because our *perception* of them is different. And consequently, our perception of their meat is different as well” (Joy, 2011, p. 18). This mental shortcut between perception and morality leads to “internal inconsistency” in animal law (O’Sullivan, 2011) and forms a central element of “carnism”—the invisible belief system that conditions people to eat certain animals (Joy, 2011).

In the human case, self-judging obligations are rarely accepted as legitimate. As Judge Lauterpacht (1957) authoritatively put it in the *Norwegian Loans* case:

An instrument in which a party is entitled to determine the existence of its obligation is not a valid and enforceable legal instrument of which a court of law can take cognizance. It is not a legal instrument. It is a *declaration of a political principle and purpose*. (p. 43; emphasis added)

In animal law, such arguments are still in their infancy. Philosophers have put considerable effort into debunking self-serving perceptions about animals as immoral (for example, Singer, 1975), but experimental psychology suggests that regardless of whether individuals consider their actions to be moral or immoral, cognitive biases are what impair their decision-making and account for considerable discrepancies between value judgments and actions. Until recently, cognitive biases have mostly been examined in the context of economic decision-making, but there is a growing research community that explores cognitive imprints and obstacles in ethical decision-making (e.g., Mazutis & Eckhardt, 2017; Sezer, Gino, & Bazerman, 2015; Young, 2017).

Recent research on ethical decision-making in human-animal relations suggests that a major part of society is subject to the *anthropocentric bias*, which means that we tend to favor those actions that serve our economic, moral, and societal interests in exploiting animals (Caviola, Mannino, Savulescu, & Faumüller, 2014, p. 1; for a similar critique, see Cox & Montrose, 2016, p. 44; Faria & Paez, 2014, p. 82). Anthropocentric bias is an umbrella term that encompasses different biases. Continuing to disfavor animals in decision-making for one’s own benefit is known as the *self-serving bias* (Forsyth, 2008, p. 429). In denying animals full protection, people are moreover prone to the *status quo bias*—the tendency to prefer the current state of affairs over a change, even if a change would result in better expected outcomes (Caviola et al., 2014, p. 2). So, although putting an end to our exploitation of animals would bring about benefits in ethical, environmental,

and social respects, society will continue to favor the status quo (see Linzey, 2009, pp. 57ff, for details on resistance to moral change when it comes to animal suffering). Closely related to this bias is *loss aversion*, the bias to weigh losses more than gains (Caviola et al., 2014, p. 3). If losing \$100 is worse than gaining \$100, then giving up on consuming animal protein is worse than profiting from the many health benefits of plant protein. When making individual decisions about the use of animals, people also often misjudge the stakes at hand, as they are unable to cognitively comprehend the difference between 90,000 and 900,000 animals affected by their decision. By not assigning appropriate weight to the quantity of a decisional option, decision-makers suffer from the *scope insensitivity bias* (Caviola et al., 2014, p. 3; Kahneman, 2000). Together, these biases help explain why most animals continue to be legally mistreated even as the law recognizes them as sentient beings worthy of protection by the law.

CAVEAT 3: COGNITIVE BIASES IN SCIENCE

A third danger of the recognition of animal sentience is the law's overreliance on and overconfidence in science when it transfers scientific knowledge to animal law. Science follows rigorous methods to explore natural regularities and probe them by means of observation and trials. "Good science" is expected to, and indeed prides itself to be, objective, replicable, universal, and value-free (Graham, 2005, p. 119). Yet, science might be too overconfident when making this claim about findings produced by humans about animals. Consider a thread on fish pain initiated by Brian Key's (2016) article "Why Fish Do Not Feel Pain" in the journal *Animal Sentience*. Key's controversial claim prompted more than 42 scientists to speak out about fish pain and debunk his findings, among others, by pointing to the biases Key suffered in his analysis (see e.g., Burghardt, 2016; Elwood, 2016; Merker, 2016; Shriver, 2016; Stevens, 2016). Moral psychologists would agree that an obvious explanation for this divergence is that science is run by humans. People who develop, plan, authorize, and perform scientific experiments are human beings who are just as prone to cognitive prejudice as any other human performing any other task.

But what biases must scientists be most attentive to? Researchers, like most people, tend to favor results in their analysis of animal sentience that ensure the continued use of animals, so they are subject to the *anthropocentric bias* (for a more general critique of the failure of science to self-correct, see Marino, 2011). Scientists are moreover *biased in an anthropomorphic sense*: They tend to ascribe sentience only to those animals that possess the most human-like physiological traits and do not pay sufficient attention to the fact that nonhuman-like structures in animals allow for similar, if not more intense, experiences of suffering (Akhtar, 2011; "Cambridge Declaration," 2012). According to a new study by Oxford scholars Caviola, Everett, and Faber (2018), who specialize in the psychology of speciesism (the assignment of different moral worth based on species membership), the prejudicial attitude toward animals stems from *social dominance orientation*. Even though up-to-date science points to a negative correlation between intellect and susceptibility to pain—meaning that animals typically considered less cognitively developed might actually

suffer more (Dawkins, 2011; Tomasik, 2016; arguing that pain is not always worse for us than for animals, Akhtar, 2011)—intergroup biases prompt people to deanimalize animals, which reduces moral concern for animals (Bastian, Loughnan, Haslam, & Radke, 2012; Caviola et al., 2018). These biases are part and parcel of an interconnected web of cognitive distortions: People who view the superiority of humans over animals as justified also believe in the superiority of some humans over others (Dhont, Hodson, Costello, & MacInnis, 2014). Accordingly, there are strong moral reasons to alert scientists, supervisors, people designing research, ethics committees, and funders to these biases.

PUTTING THE CAVEATS INTO PERSPECTIVE

The three caveats cast serious doubt on our continued reliance on and support for the recognition of animal sentience as a gateway to animal protection. Not all three caveats, however, call into question the validity and desirability of the concept. The fact that not all states bite the bullet and commit themselves to animal sentience does not invalidate the legal recognition of animal sentience. Rather, it reinforces it: The more changes a concept brings to the status quo, the more effective it is, considering how poorly animals are currently treated. The two other caveats, by contrast—the fact that legislators fail to abide by the demands of animal sentience and the fact that researchers prove or disprove animals' sentience in a biased manner—make apparent the limits of the concept. So is it better not to use the criterion of sentience at all? This conclusion is tempting but not very useful. After all, any criterion used to determine the moral and legal value of someone, be it rationality, practical autonomy, the ability to make or use tools, or language, will be subject to these two biases.

We must therefore take additional measures to remedy the shortcomings of the concept. As for the first caveat, states should periodically review and update their laws to do justice to their recognition of animal sentience. For example, if a state bans the consumption of dog and cat meat, then it should also prohibit the production and consumption of animals that are equally sentient, like pigs, cows, or chickens. Or, if decisions about companion animals in custody are to be made in their "best interest" (Frasch, Hessler, & Waisman, 2016, p. 194), then decisions affecting the lives of chickens, pigs, or cows should also be taken in their "best interest." With respect to the second caveat, scientists must prevent biases by observing the principles of good science, including randomization, blinding, sample size circulation, allocation concealment, inclusion/exclusion criteria, primary outcome variable, and statistical analysis plan (see in detail on the widespread lack of these practices in animal research, Vogt, Reichlin, Nathues, & Würbel, 2016, pp. 1ff). Given the far-reaching consequences of biased decision-making in science, we should introduce an additional measure: the precautionary principle. Even with significant technical advances and the many conclusions they allow us to draw about our treatment of animals, the chances are high that parts of animals' cognition are inaccessible to us. Our conclusions about their minds and sentience are thus indices, rather than strong evidence. Since we remain uncertain as to whether the conclusions we draw from these

indices are correct, the precautionary principle should be a guiding principle for scientists to assess whether animals are sentient. We must therefore decide in favor of animals (*in dubio pro animali*) wherever and whenever actions impair or likely will impair their physical and psychological integrity (Birch, 2018; Gerick, 2005, pp. 212–213; Peters, 2012, p. 100; Robertson, 2015, pp. 67, 156ff.).

Despite the many remedies that must be put in place to tackle the shortcomings of the recognition of animal sentience, it is a worthwhile and momentous achievement. Sentience is by far the most objective and reasonable criterion to determine the moral and legal status of someone. And if the recognition of animal sentience is enshrined in law, this means, from a moral psychology perspective, feeding two birds with one scone: If we can tackle the cognitive biases of scientists and directly translate their findings to animal law, cognitive biases of legislators need not additionally be overcome. Moreover, once animals are scientifically proven and legally recognized to be sentient, denying them protection (e.g., through exemptions) will require (greater) justification. The preamble to the European Convention for the Protection of Vertebrate Animals Used for Experimental and Other Scientific Purposes (1986) in this sense states: “Man has a moral obligation to respect all animals and to have due consideration for their capacity for suffering and memory.”

And finally, because animal sentience is recognized *by law*, it entails *legal duties*. For most states, these include ensuring that sentient animals do not experience negative affective states *and* that they get to experience positive affective states. Different from what numerous philosophers claim, namely that animal sentience demands only that we do not actively infringe animals’ interests in living a life free of pain and suffering (e.g., Francione, 1995, p. 260), modern animal protection acts lay down positive duties owed to animals to ensure their well-being (Blattner, 2019a, pp. 36–38) because they have an interest in leading flourishing lives (Donaldson & Kymlicka, 2016, p. 89). In addition, the Swiss Animal Welfare Act (Schweizerisches Tierschutzgesetz, 2005), whose purpose it is to protect the dignity and welfare of animals (article 1), makes it an obligation of “anyone who keeps or looks after animals” to “feed and care for them properly and provide them with the activities and freedom of movement needed for their well-being, as well as shelter where necessary” (Schweizerisches Tierschutzgesetz, 2005, article 6[1]). Because the recognition of animal sentience acts as a gateway for both negative and positive legal obligations owed to animals, it is not only a necessary, but a foundational concept of animal law.

CONCLUSION

Though the question of which criterion ties moral worth to individuals is still debated among philosophers, an overwhelming majority of states today recognize that animals are sentient beings who are capable of experiencing pain and suffering. The law’s recognition of animal sentience serves two functions that are key to the development of animal law. First, it gives rise to moral and legal obligations that humans owe animals on grounds of their sentience. Second, it provides that animals who are sentient deserve protection. As a result, animals are protected because they have an intrinsic interest in their well-being,

not because they are particularly appealing to humans or economically (un)profitable. The recognition of animal sentience is momentous because it suggests that animal law has overcome certain cognitive biases of scientists and that these results are directly translated into the law, without having to grapple with legislators' cognitive biases too. Also, once animals are recognized for their capacity to feel pain and suffering, ignoring their interests in protection and flourishing will require greater justification.

This development could be hailed as a success, but we have to be aware of its pitfalls, three of which are most significant. First, some states continue to use the recognition of animal sentience in an instrumental manner, notably to bereave animals of the protection they require to lead meaningful lives. Second, many states acknowledge animals' ability to feel pain and pleasure, but expressly deny them protection for reasons of convenience, social acceptance, or profit-making. Third, scientists evaluating animal sentience are, as humans, susceptible to a number of biases that exclusively serve their in-group—a tendency that scientific methods have not been able to eradicate. This article has offered ways to remedy each of these shortcomings and, while recognizing animal sentience cannot eliminate the risk that legislators continue to unduly discriminate against animals (both vis-à-vis humans and vis-à-vis other animals), it seriously calls into question our current treatment of animals. One of the biggest challenges of animal law thus likely is addressing and overcoming biases inherent in human psychology, rather than winning philosophical debates.

ACKNOWLEDGMENTS

I would like to thank Will Kymlicka, Lucius Caviola, and the editors of the *Journal of Animal Ethics* for their helpful comments on earlier versions of this article. This article was written during my postdoctoral fellowship at the Department of Philosophy at Queen's University, Kingston, Ontario, to which I am greatly indebted for its support.

Note

1. See for a discussion of ways to write animal sentience (i.e., article 13 TFEU) into UK law ahead of Brexit: Loeb, 2018.

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Nataša Stojanović, PhD*

WHICH ANIMAL RIGHTS SHOULD BE RECOGNISED?

The paper considers the issue of the possibility to award the fundamental rights to sentient animals. Taking as a starting point contemporary animal protection laws, particularly the ones in which animals are treated as human's co-beings, the latest scientific investigations, which prove irrefutably a sizeable genetic similarity between humans and animals, but also negligible differences in intelligence and capability to communicate between themselves, as well as the change of course in individual contemporary codifications towards disallowing treating animals as things, the author advocates argumentatively for recognising the fundamental rights of animals and thereby their legal personhood. According to the author's understanding, sentient animals should be awarded the fundamental rights corresponding to their interests, needs and species, such as: the right to life; the right to freedom; the right to not have pain, suffering and stress inflicted on them; the right to be cared after by humans; the right to acquire ownership rights; and the right to legal protection.

Key words: *Legal protection of animals. – Animal behaviour. – Animal fundamental rights.*

1. INTRODUCTORY NOTES

Contemporary law recognises people and legal persons as legal subjects. Presently, just as at the beginning of human civilisation, animals have no status of legal subjects.

However, in the last couple of decades, mostly thanks to the passing and application of the laws protecting the welfare of animals and particularly those progressive normative creations where an animal as a

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co-being of human beings is at the centre of attention,¹ then to the numerous researches that showed a great resemblance in the genetic material between human beings and animals (particularly chimpanzees, bonobo monkeys, and pigs),² animals' intelligence and their capacity for empathy and socialisation,³ as well as the change of the course of individual civil codifications in the direction where animals are not considered things,⁴ a legal dilemma occurs: are these natural creations legal subjects or objects? If they are subjects, then which rights are to be recognised to animals to protect them in the most efficient manner?

In this paper, we make an attempt to provide answers to the questions posed.

2. ANIMAL RIGHTS – A BRIEF BACKGROUND

Fight for animal rights is not an achievement of the 21st century. As far back as 1964, at the request of the English Government, a Committee was formed, headed by Roger Brambell with a task to assess the real status and conditions in which domestic animals raised on farms live. The following year already, the mentioned Committee drew up and delivered a report (Report of the Technical Committee to Enquire into the Welfare of Animals kept under Intensive Livestock Husbandry Systems) to the Government, where the rights (freedoms) of an animal to “to turn round, groom itself, get up, lie down and stretch its limbs” are mentioned for the first time. A short while later, in 1979, the newly established Farm Animal Welfare Council, FAWC improved the concept of the five stated rights of those animals to: right to diet and water; right to life free from

¹ 1 See in particular: Austrian Law on the Protection of Animals – ALPA, (Tier-schutzgesetz, 2004, BGBl. I, Nr. 118/2004, including the amendments dated 4. 3. 2016, BGBl. I, Nr. 80/2013), para. 1 and the German Animal Welfare Act – GAWA (Tier-schutzgesetz, 1972, in its version published in 2006, BGBl. I S. 1206,1313, including the amendments dated 3. 12. 2015, BGBl. I S. 2178), para. 1.

² The data are retrieved from the following web page: http://www.b92.net/zivot/vesti.php?yyyy=2012&mm=06&dd=25&nav_id=621302, last visited 5 February 2016.

³ So, for instance, the results of the conducted research can be found with: V. Joveski, “Neobična životinjska inteligencija”, 2013. Retrieved from <http://znanost.geek.hr/clanak/neobicna-zivotinjska-inteligencija>, last visited 22 February 2016; L. Medak, “Empatija kod životinja češća nego što se prije mislilo”, 2016. Retrieved from <http://znanost.geek.hr/clanak/empatija-kod-zivotinja-cesca-nego-sto-se-prije-mislilo/#ixzz40tTmSd6e>, last visited 22 February 2016.

⁴ For instance, see the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch, 1811, JGS Nr. 946/1811, including the amendments dated 30. 7. 2015, BGBl. I, Nr. 87/2015), para. 285a; the German Civil Code (Bürgerliches Gesetzbuch, 1896, RGBI I S. 195, including the amendments dated 19. 2. 2016; L. I S. 254, 264), para. 90a and the Swiss Civil Code – SCC (SR 210 Schweizerisches Zivilgesetzbuch, 1907, including the amendments 2009, AS 2009, 3577), para. 641a.

pain, injuries and diseases; right to appropriate shelter; right to express normal behaviour, including also social contacts with the animal's own kind, and the right to life free from fear and suffering.

Today the concept of five rights of animals on farms is widely accepted in practice for pets and animals kept in zoos.

The Universal Declaration of Animal Rights,⁵ as the Universal Declaration of Human Rights,⁶ acknowledges a broad range of the so-called natural rights to these beings, placing them practically in the position of legal subjects. Thus, this legal document proclaims: that the life of any animal deserves respect; that animals have the right to live and reproduce freely in their natural environment; the right to be cared for and protected by humans; the right to life free from pain, stress and suffering.⁷

The World Society for the Protection of Animals, the creator of the Universal Declaration on Animal Welfare,⁸ being aware of the fact that the use of the term “rights” of animals will not attract the support of states at international plane, opted for the term “welfare”⁹ of animals.

Although there are opinions¹⁰ in legal literature that essentially it is about the same rights that are directly (in the Universal Declaration of Animal Rights), or indirectly (in the Universal Declaration on Animal Welfare) acknowledged to animals, we cannot agree with it since the latter legal source puts the improvement of conditions for animals used by humans for various needs in the foreground, not the guaranteeing of the elementary rights of animals, such as the right to live and the right to freedom. The point where both Declarations coincide is the right of animals to be protected against maltreatment.¹¹

⁵ The text of the Universal Declaration of Animal Rights – UDAR, can be found on the following web page: <http://www.declarationofar.org/>, last visited 6 March 2016.

⁶ The text of the Universal Declaration of Human Rights – UDHR, can be found on the following web page: <http://www.poverenik.rs/yu/pravni-okvir-pi/međunarodni-dokumenti-pi/146-univerzalna-deklaracija-o-ljudskim-pravima.html>, last visited 1 March 2016.

⁷ See UDAR, art. 1–5.

⁸ The text of the Universal Declaration on Animal Welfare – UDAW, can be found on the following web page: http://worldanimalprotection.ca/sites/default/files/ca_-_case_for_a_udaw_tcm22-8305.pdf, last visited 6 March 2016.

⁹ This term implies the provision of conditions, by man, in which an animal should satisfy its biological needs, free from fear, suffering, pain and stress. The biological, basic needs of animals are: need for food, water, adequate space for shelter, need for expressing normal patterns of behaviour and veterinary care. Such a determination of this term, say, is contained in the UDAW, art. 1.

¹⁰ See: M. Paunović, “Životinjska prava, Prilog proširenoj teoriji ljudskih prava”, *Strani pravni život* 3/2005, 39.

¹¹ Cf. UDAW, art. 2, para. b and c, with UDAR, art. 3, para. 1.

Depending on whether the advocates for the protection of animals focus their attention to the prohibition of the use of animals, in all its aspects, or to the improvement of conditions in which animals live, for their further exploitation, animals are given higher or lower number of rights of various contents.

So, Francione believes that the basic right to be guaranteed to animals is the right not to be treated as objects of property rights.¹²

Paunović does not insist to a strict application of the previously mentioned law¹³ and he advocates for a bit wider range of animal rights, proposing the following to be acknowledged to animals: right to life; right to freedom, in accordance with the species they belong to; right to habitat adequate to animal species; right not to be harmed by man, and right to be cared for by man.¹⁴

Favre advocates for an improvement of conditions for animals and proposes the following rights to be acknowledged: Not to be put to prohibited uses; not to be harmed; to be cared for by man; to have living space; to be object of a “proper” ownership; to acquire property; to “enter into contracts”; to be legally protected.¹⁵ In this author’s opinion, this must not be a final list of rights to be acknowledged to animals anyhow.¹⁶

Visković approaches the rights of animals cautiously, pointing out that there are general and special rights. The former shall be valid for all animal species and all the individual ones within them, such as the case of the right of animals not to be inflicted pain, suffering and harm. The latter stated rights would only be intrinsic to specific species; for example, the right to life would only be “intended” to those animals that are not used as food for man. Some general rights, according to the understanding of this theoretician, would have various modalities, depending on the animal species they refer to, say, the right to freedom.¹⁷

¹² G. Francione, R. Garner, *The Animal Rights Debate, Abolition or Regulation?*, Columbia University Press, New York 2010, 1.

¹³ Paunović states several possible discrepancies from the right of animals not to be treated as objects. See in more detail: M. Paunović, 41.

¹⁴ *Ibid.*, 40–44.

¹⁵ D. Favre, “Living Property: A New Status for Animals within the Legal System”, *Marquette Law Review* 93/2010, 1062–1070.

¹⁶ *Ibid.*, 1062.

¹⁷ N. Visković, “Stradanja, zaštita i prava životinja (Prilog raspravi o ‘trećoj generaciji prava’)”, *Zbornik radova Pravnog fakulteta u Zagrebu* 39 (5–6)/1989, 820.

3. WHY SHOULD THE FUNDAMENTAL RIGHTS AND LEGAL SUBJECTIVITY BE RECOGNISED TO ANIMALS?

Although it may be closer to science fiction than to cruel reality that is mainly not benevolent to animals, particularly to those abandoned or used for satisfying various necessities of man, we dare to bring up a stand that the fundamental rights belonging to man should also be recognised to animals, and which are, as such, guaranteed by the Universal Declaration on Human Rights and the supreme legal acts (constitutions) of any state.¹⁸ Thereby, those rights must fit the interests of animals. The recognition of, say, the right to life or the right not to be inflicted pain, suffering or stress is something intrinsic to any animal species that feels. To the contrary, other animals, besides man, do not need, for example, electoral right, right to education or freedom of association.

Why is it necessary that the norm setters undertake this revolutionary step in legislative practice? In our opinion, this is the only way in which animals as our co-beings may enjoy a more complete legal protection, now as legal subjects. The mere fact that animals are legally guaranteed narrower or broader array of rights may be a specific type of barrier, first created in heads of people and then demonstrated in the real world to act contrary to what law guarantees and protects.¹⁹

There are more and more reasons for recognising the rights to animals. Here we shall implicate those that can be, with their volume and weight and each one individually taken, a sufficient justification for a different status of animals.

Respecting the basic postulate of Darwin's Theory Of Evolution, it entails that people are connected to other animal species through evolution,²⁰ that man is not God's creation, but they originate from animals and are at the same time the top evolutionary phase in the development of animals.²¹ Modern Zoology classifies human species in the superfamily Hominoidea – consisting of, besides people, great apes, too.²² Because of that evolutionary connectedness, the recognition of appropriate corps of the fundamental rights of animals follows as a logical conclusion.

¹⁸ See: The Constitution of the Republic of Serbia (*Official Gazette of the RS*, no. 98/2006), art.s 23–74.

¹⁹ Similar observation, see: N. Visković, 820.

²⁰ Darwin's Theory of Evolution, say, is processed in more details with: J. Stevanović, Z. Stanimirović, N. Đelić, *Zoologija*, Fakultet veterinarske medicine, Beograd 2013, 275.

²¹ On origins of man, see in detail: C. Darwin, *Čovekovo poreklo i spolno odabiranje* (*The Descent of Man and Selection in Relation to Sex*), Matica srpska, Novi Sad 1977.

²² See: J. Stevanović, Z. Stanimirović, N. Đelić, 159.

If legal entities are recognised legal subjectivity,²³ which bear no much resemblance to physical persons, we do not see the reason why animals cannot enjoy legal protection as subjects with rights adequate to their needs, interest and species.

The long time ago confirmed scientific knowledge that numerous animals are, as people, sensitive beings, supports our claims, as they have, like people, in their organism: oxytocin, epinephrine, serotonin and testosterone, the substances that affect feelings and behaviour.²⁴ Hence, animals have interest not to suffer, not to be exposed to stress and pain.²⁵

Additionally, genetic similarity of animals to people would be confirmed with legal norms by acknowledging the fundamental rights of animals. Here, first of all, we bear in mind that genetic materials between chimpanzee and bonobo monkey is almost identical (98.7%), on one hand, and man, on the other hand.²⁶ In the last years, however, some scientific research have confirmed the similarity between genomes of pigs and man.²⁷

The similarity in regard to intelligence, the manner of communication and the complex rules of conduct in their community are in favour of the recognition of the elementary rights to animals. There are many examples from the animal world testifying in favour of the existence to intelligence with animals and, thereupon, the closeness to human species. Monkeys particularly stand out in that regard: chimpanzee, orangutans and bonobo monkey. Characteristically, they learn fast, have the best memory in animal world and possess a very developed sense for justice. Besides that, they can plan, set objectives themselves and fulfill them. Like people, these kinds of monkeys also live in communities, they can fight, but can also comfort each other. Maybe it seems a bit strange, because they are not primates; but crows also belong to the order of very intelligent animals. They have excellent memory and capability to recognise people. Besides, crows regularly use twigs, stones and well-shaped

²³ On legal entities as subjects in law, see in more detail: V. Vodinelić, *Građansko pravo, Uvod u građansko pravo i opšti deo građanskog prava*, Pravni fakultet Univerziteta Union, Beograd 2014, 413–417.

²⁴ Emotional life of animals is particularly considered by: M. J. Moussaieff, S. McCarthy, *Kada slonovi plaču – Emocionalni život životinja (When Elephants Weep – The Emotional Lives of Animals)*, Algoritam, Zagreb 2004, 36.

²⁵ T. Regan, *Defending Animal Rights*, University of Illinois Press, United States of America 2001, 42; G. Francione, R. Garner, 7.

²⁶ The data are retrieved from the following web page: http://www.b92.net/zivot/vesti.php?yyyy=2012&mm=06&dd=25&nav_id=621302, last visited 5 February 2016.

²⁷ Some geneticists, such as for example prof. Eugene M. McCarthy, claim that man is actually a hybrid originating from a wild boar and a female chimpanzee. See the basic ideas of the conducted research titled: “Human Origins the Hybrid Hypothesis. Human Origins: Are we Hybrids?” Retrieved from: <http://www.macroevolution.net/human-origins.html>, last visited 5 February 2016.

wires to reach food. Even besides their genetic similarity to people, it is characteristic for pigs; they belong to the most intelligent species among domestic animals. They remember for a long period of time, they learn fast and respond when called by name, they are social and capable of expressing complex emotions.²⁸

Those, but also many other examples from animal world only confirm that differences among individual animals and people are only the matter of degree, not the species.²⁹ Intelligence, thus, is not something that separates people from other animals, but it is on the contrary their “brand”; therefore, the fundamental rights that belong to man should also be acknowledged to animals.

Omnipresent hunger in the world goes in favour of acknowledging the elementary rights to animals. Currently, over 864 million undernourished people are recorded within the international frameworks.³⁰ According to the assessment of competent experts,³¹ meat industry and their consumers are considered the main culprits for such a situation. Today 80% of the produced cereals in the developed world is used for raising animals on farms, and in the poor countries, instead to be used to feed population, they are mainly sold and transported to richer countries for livestock breeding.³² Thus, there is enough food in the world, but it is not rationally distributed.

By acknowledging the fundamental rights to animals, the health status of human population would significantly improve because staple food would be of plant origin. Numerous studies and multiyear researches showed that vegetarians, as well as vegans, in principle, are the healthier part of human population since they are less exposed to risks of cancer, cardiac diseases, diabetes, osteoporosis, Alzheimer’s disease, arthritis and meat poisoning because they normally have no obesity problem.³³ Besides, scholars confirmed in a number of research projects that vegetarians are more resistant, stronger, recover quicker after hard work comparing to meat eaters.³⁴

²⁸ The data are retrieved from the following web page: http://www.b92.net/zivot/vesti.php?yyyy=2012&mm=06&dd=25&nav_id=621302, last visited 5 February 2016. See also: V. Joveski.

²⁹ C. Darwin, 121–122.

³⁰ Food and Agriculture Organization of the United Nations, *Livestock’s long shadow – environmental issues and options*, Rome 2006, 271. Retrieved from <http://www.fao.org/docrep/010/a0701e/a0701e00.htm>, last visited 29 February 2016.

³¹ For example: M. F. Lappé, *Diet for a Small Planet*, Ballantine Books, United States 1971.

³² Food and Agriculture Organization of the United Nations, 14–20.

³³ The data are retrieved from the following web page: <http://www.prijatelj-zivotinja.hr/index.hr.php?id=1734>, last visited 15 December 2015.

³⁴ The data are retrieved from the following web page: <http://www.prijatelj-zivotinja.hr/index.hr.php?id=227>, last visited 15 December 2015.

By acknowledging the fundamental rights to animals, the existing biosphere of the planet Earth would also be protected better. Grim statistics shows that livestock industry “participate” with 18 percent in greenhouse gas emissions, thus, much bigger share than the one of transportation (14%). Carbon dioxide, methane, nitrous oxide and ammonium produced by animals raised on farms are to be mainly blamed for this. Particularly dangerous, out of this range of detrimental gases is ammonium that is directly responsible for the occurrence of “acid rains”, which have detrimental effects on environment, particularly on forests, rivers, lakes, and soil quality.

Mass deforestation carried out for the sake of creating pasture and land for raising food for animals on farms surely contributes to the increased greenhouse gas emissions. Mass destruction of forests, for the needs of animal husbandry, further contributes to endangering and even destruction of numerous animal species, whereby it directly contributes to the decrease of biological diversity.³⁵ Not less significant contribution to ecological disaster is made by the waste that is product of animal husbandry, in total 13 billion tons per year.³⁶

More economic use of natural resources surely goes in favour of acknowledging the elementary rights to animals. It seems that data about spending averagely 990 litres of water for the production of one litre of milk is alarming enough, which is enormously more than spent for the production of cereals (for 1 kilo of wheat, 150 litres of water is spent) and out of the total consumption of water of human population, at the global level, 8% refers to animal husbandry.³⁷ Almost the same disbalance also exists in the use of fossil fuels. According to the calculation done, 11 times more energy is spent for the production of meat and other animal products than for the production of cereals. At the global level, 1/3 of the total consumption of fossil fuels is attributed to animal husbandry.³⁸

4. THE FUNDAMENTAL RIGHTS THAT SHOULD BE ACKNOWLEDGED TO ANIMALS

4.1. Animal right to life

The right to life as the highest value of man is guaranteed, as we have already said, by international and the highest legal acts of each state, too.

³⁵ Food and Agriculture Organization of the United Nations, 214–218.

³⁶ The data are retrieved from the following web page: <http://www.prijatelj-zivotinja.hr/index.hr.php?id=1516>, last visited 15 December 2015.

³⁷ Food and Agriculture Organization of the United Nations, 167 and 272.

³⁸ The data are retrieved from the following web page: <http://www.prijatelj-zivotinja.hr/index.hr.php?id=1734>, last visited 15 December 2015.

Does/should the same right belong to animals? At the current development degree of scientific thought and legislative practice, the answer may be undetermined at the very least. On one hand, when the UDHR guarantees this right, it does not limit itself to humans only, using the formulation “Everyone has the right to life...”³⁹ On the other hand, animals, even besides significant changes in treating them, are still closer to being treated as things, than to the recognition of their legal subjectivity.

Two streams, which exist in relation to the protection of animals, give a special seal to the complexity of the situation. Within the framework of the one, there are theoreticians (the so-called welfarists)⁴⁰ who deem animals are things; they do not propose abolition of their use, and they strongly support the reform and improvement of treating animals in the form of welfare.⁴¹ On the other side, there are abolitionists who advocate for the abolition of all aspects of exploitation of animals and recognition of their fundamental rights.^{42, 43} Between these diametrically opposed conceptions, Cochrane proposed the so-called free-range farms where animals are bred for milk, chicken for eggs, where animals would not be killed or exposed to suffering. Consequently, according to this author, such an aspect of the use of animals would not be, because they are not independent, opposed to their interest.⁴⁴

It is quite clear that on the basis of the presented starting ideas, the right to life of animals is not in the welfarists’ focus of attention, because in that case it would mean that people should not eat animals or use them for experiments, which are the two main aspects of using animals.

Advocates for the welfare of animals share common opinion that life of animals is morally less valued comparing to life of people, therefore, it is justified to use and kill them.⁴⁵

³⁹ See: UDHR, art. 3.

⁴⁰ From English term “animal welfare”.

⁴¹ In that direction, say, see: J. Bentham, *An Introduction to the Principles of Morals and Legislation*, Hafner Press, New York 1948; J. S. Mill, “Utilitarianism”, *Utilitarianism and Other Essays: J. S. Mill and Jeremy Bentham* (ed. A. Ryan), Penguin, Harmondsworth 1987; P. Singer, *Osobodenje životinja*, IBIS grafika, Zagreb 1998; R. Garner in: G. Francione, R. Garner.

⁴² This conception of legal protection of animals, for instance, is advocated for by: G. Francione, “Animals as Property”, *Animal Rights Law* 2/1996; T. Regan.

⁴³ Some authors, however, state their attitude that these two theoretical directions should not be so radically separated, which, finally, have protection of animals as their goal. So, Garner deems that standardisation of animal welfare can serve as a means for ending their exploitation or decreasing their use or suffering of animals. See: G. Francione, R. Garner, 9.

⁴⁴ A. Cochrane, “Ownership and Justice for Animals”, *Utilitas* 4/2009, 438.

⁴⁵ G. Francione, R. Garner, 125.

Welfarists justify the absence of interests of animals to go on living and be used as resources, since they cannot conceive of themselves existing in the future, as people can,⁴⁶ and are not aware of themselves, as well as the fact that emotional experiences of people far outweigh those of animals.⁴⁷ Besides, derecognition of this rights is justified by death not being harmful to animals, since they live in present and are not aware of what they are losing when their life is taken from them. Also, welfarists believe that killing animals, *per se*, is not a moral issue until they are treated and killed “in a humane way”.⁴⁸

On the contrary, abolitionists hold that animals, as sensitive beings, have an interest to live; that they are aware of their existence and affiliation to a specific species; that death is harm to them;⁴⁹ as well as that life offers them an opportunity to acquire precious experiences, which is obvious welfare for them.⁵⁰

According to abolitionists, the right to life of animals is directly linked to the rights of animals not to be treated as things and property of people.⁵¹ Until animals are treated as things, they will not be members of moral community, and the value of the interest of animals as things will be worth less than the interest of the owners of animals.⁵² Hence, the joint belief of theoreticians who fight for the fundamental rights of animals is that life of beings having feelings, as people, so animals too, have the same moral value, so it is equal for the purpose of not being treated like resources.⁵³

If biodiversity and life on the planet Earth are to be preserved, the right to life to animals that feel must be guaranteed, not only to the animals that are currently endangered.

The right to life must also be acknowledged to animals raised for feeding people or satisfying other people's needs. Only exceptionally,

⁴⁶ P. Singer, *Practical Ethics*, Cambridge University Press, Cambridge 1993, 199.

⁴⁷ G. Francione, R. Garner, 15.

⁴⁸ J. Bentham, 310–311.

⁴⁹ G. Francione, R. Garner, 15.

⁵⁰ D. DeGrazia, *Prava životinja: kratak uvod*, TKD Šahinpašić, Sarajevo 2002, 59–64.

⁵¹ There are opinions in the theory that the abolition of possessions does not necessarily mean that animal will be recognised the right to life and other fundamental rights. It is also debatable whether the ownership right over animals a barrier to significant reforms on the welfare of animals, since that authorisation is a reflection and not the cause for the existence of the laws on the welfare of animals that are being applied. See: G. Francione, R. Garner, 130.

⁵² *Ibid.*, 22.

⁵³ *Ibid.*, 5.

killing animals for the sake of feeding people if no food of plant origin or other kind of food is available, may be permitted.

The right to life may only be, as well as with people, abolished to animals in strictly stipulated, limited cases: if an animal represents danger to life and health of people and other animals; if the animal is incurably ill, and therefore, it suffers great pain or suffers a lot, according to the assessment of competent experts in the area of veterinary science, and with the permission of owner, i.e. another person authorised for the protection of animals.⁵⁴

4.2. Animal right to freedom, according to the category it belongs to

Animal right to life gains in weight if related to the right to freedom. Animal right to freedom implies that the animal lives in its natural environment, where it can express and satisfy its physiological needs (to get up, lie down, move, mate, etc.).

In theory, there is no unique viewpoint on acknowledging this right to animals. Cochrane and Garner, say, deem that, since animals have no interest to be guaranteed the right to freedom (as well as the right to life), as they have no autonomy, this right should not be acknowledged to them.⁵⁵ Francione, for example, directly opposes this opinion, claiming that sentient animals have interest to be free (as well as to live) and to have the necessary level of autonomy, which enables them to live without being owned also.⁵⁶

The animal right to freedom must be viewed primarily through a prism of the category the animal belongs to. So, for wild animals (as for hunted animals, so for non-hunted ones also), freedom represents the condition for survival and a “shield” of possible suffering and stress, because of its loss or limitation. For tamed animals (as for economic animals, so for pets also), freedom has another form, because of multi-centennial dependence on man.⁵⁷ Full “liberation” (abandonment) of these categories of animals from man’s authority and their release in wilderness, without human care, regularly results in their fear, stress and suffering. Hence, it seems that the opinion expressed in literature that owning animals limits their freedom, but the lack of that freedom does not necessarily disturb their interests, which depends on the nature and type of those limitations.⁵⁸ So, owning wild animals does not essentially disturb their free-

⁵⁴ On other reasons, listed in the literature, why an animal may be deprived of life, see: M. Paunović, 41–42.

⁵⁵ A. Cochrane, 424–442; R. Garner in: G. Francione, R. Garner, 128.

⁵⁶ G. Francione in: *Ibid.*, 128.

⁵⁷ Classification of animals in the stated categories is taken from: N. Visković, 821–822.

⁵⁸ A. Cochrane, 436.

dom if they live in natural reserves, contrary to those kept in zoos. On the other hand, “being free in the wild might not be valuable to him simply for its own sake, but it might make his life more enjoyable”.⁵⁹ Keeping domestic animals in cages, boxes, etc. enables them regularly to function naturally, whereby their interest not to suffer is disturbed.⁶⁰ On the other hand, however, since domestic animals, like children, have no capacity frame, revise and pursue their own conceptions of the good, that lack of autonomy confirms that complete freedom is not their basic interest.⁶¹

Independently of whether we consider animal freedom is important to them or it is relevant only for the interest that animals have thereof, just as Cochrane believes that freedom is important for animals only when suffering is alleviated,⁶² this authorisation must be a basic element of the legal subjectivity of animals.

4.3. The right of animals not to be inflicted pain, suffering and harm

Where the advocates for the protection of animals agree is that a high number of animals belong to the group of sentient animals, which are capable of experiencing pain, suffering, fear and pleasure. This allegation is sufficiently illustrated by Bentham’s understanding,⁶³ that animals are not considered with whether people use or kill them for their own needs. Their concern is not to suffer, as the result of being used or killed by humans. Garner shares similar positions.⁶⁴

The right of animals not to be inflicted pain, suffering and harm is guaranteed by almost all laws protecting the welfare of animals.⁶⁵

What theoreticians has no unique viewpoint upon is that individual theoreticians advocate for the understanding that the majority of animals possess no mental capability that is expressed in an existence of the awareness of themselves,⁶⁶ whereas the others deem that animals are

⁵⁹ *Ibid.*

⁶⁰ Similar examples mentioned by: G. Francione, R. Garner, 128.

⁶¹ A. Cochrane, 436.

⁶² A. Cochrane, “Do animals have an interest in liberty?”, *Political Studies*, 3/2009, 660–679.

⁶³ J. Bentham, 310–311.

⁶⁴ R. Garner in: G. Francione, R. Garner, 128.

⁶⁵ See, for instance: ALPA, para. 5 para. 1, para. 2, point 1, 8, 9, 10, 11, and 13; GAWA, para. 1 and para. 2, para. 2; Swiss Law on Animal Welfare – SLAW, (SR 455 Tierschutzgesetz, 2005, including the amendments dated 1. 5. 2014, art. 4, para. 2; Croatian Law on the Protection of Animals – CLPA (*Official Gazette*, no. 135/2006, 37/2013, and 125/2013), art. 4, para. 1 and para. 2, point 1, 11, 12, 13 and 14 and Serbian Law on Animal Welfare – SrLAW (*Official Gazette of the RS*, no. 41/2009), art. 6, para. 5 and art. 7, para. 1, point 4, 7, 12, 17 and 29.

⁶⁶ P. Singer, (1998), 16–17.

aware of their own existence; that they comprehend that they are beings of a specific species, and not of any other; that they certainly recognise that they suffer, and that they feel the need or desire for this experience to stop.⁶⁷ The opinion of welfarists that people have superior mental strength and, therefore, they experience pleasure and pain more intensively, follows as a “natural continuation” of those allegations.⁶⁸ Abolitionists categorically refuse such a thinking with the argumentation that if such a thing would be accepted as correct, that would mean that there is a difference in the degree of pleasure and pain between less intelligent and more intelligent people, as well as between more and less educated people.⁶⁹

Welfarists, since they consider the use of animals for satisfying various needs of humans acceptable, agree that they are treated for those purposes as much as possible humanely and no unnecessary pain is inflicted on them.⁷⁰

Abolitionists are against any use of animals by man, therefore, against any suffering generated as the product of such a use.⁷¹

If we read the texts of animal welfare laws thoroughly (independently of the state), and fathom their essence, it is obvious that they serve man and represent primarily a “legalisation and legitimisation of a bloody practice of abusing, torturing and killing animals, and not a legal speech on the welfare and protection of animals”.⁷² Hence, this right, which is indirectly proclaimed by the regulations on the protection of animals, is more an idea with no real cover.

4.4. The right of animals to be cared for by man

Survival of domestic as well as wild animals is directly linked to the duty of man to care for them.

The term “care for animals” implies an entire array of activities undertaken by man with an aim to alleviate life of animals and enable the satisfaction of their biological needs.

Man, according to this right, is obliged to provide to domestic animals appropriate food, adapted to their species, necessary quantity of water, adequate shelter that meets their basic needs: to be able to move, get up, communicate with other animals of own kind or other kind, to lie

⁶⁷ D. Griffin, *Animal Minds: Beyond Cognition to Consciousness*, University of Chicago Press, Chicago 2001, 274.

⁶⁸ G. Francione, R. Garner, 18.

⁶⁹ *Ibid.*, 18–19.

⁷⁰ J. Bentham, 310–311; *Ibid.*, 5 and 10.

⁷¹ T. Regan, 24; *Ibid.*, 24.

⁷² H. Jurić, “Veliki ciljevi i mali koraci”, *Zarez* 194–195/2006.

down, breathe clear air, have daylight and adequate temperature, needed care, in the event of illness or very old age, and veterinary aid.⁷³ In principle, the same goes for wild animals – pets, as well as for wild animals kept in zoos, animal shelter or wild animals breeding centre.⁷⁴

Care for wild animals in the wild primarily refers to conservation of their natural habitats and not undertaking any actions preventing them to perform their physiological functions (feeding, watering, reproduction); and when the circumstances require (e.g. due to major natural disasters), provision of needed food and care, too.⁷⁵

4.5. The right of animals to acquire property rights

In the series of challenging the rights to animals, a special place belongs to property rights. Argumentations mainly go in the direction that animals, since they have no interest to live, but only not to suffer, have no interest to acquire property, therefore, it should not be protected by law either.⁷⁶ Besides, it is claimed that animals do not recognise the concept of property law, therefore, they cannot make correct decisions on investment or use of money or other property.⁷⁷

That animals are not benevolently looked at as the holders of property rights in legislative practice either, is also testified by the solution contained in the Swiss Civil Code that stipulates that an animal cannot be specified as a testamentary heir, but if an animal receives a bequest by testamentary disposition, this is transformed through a legal conversion to an order to the heir or the legatee by which the animal must be cared for according to the rules on animal welfare.⁷⁸

The presented arguments in theory may equally be valid for children, even for many adults and persons capable for business (particularly the lateral explanation stated), but acquiring property rights in human population is not challenged in any way.⁷⁹ It seems that the presented stands are losing weight if one takes into consideration the animal potential to, thanks to their physical (e.g. participation in horse races) or intellectual efforts (e.g. creation of a work of art by elephants or chimpanzees),⁸⁰

⁷³ See: ALPA, para. 13–19; GAWA, para. 2, and para. 2a; SLAW, art. 6 and art. 7; CLPA, art. 36–42 and SrLAW, art. 6 and art. 20–21.

⁷⁴ See: ALPA, para 25–26 and SrLAW, art. 58 and 71.

⁷⁵ See: CLPA, art. 46 and art. 47 and Serbian Law on the Protection of Nature (*Official Gazette of the RS*, no. 36/2009, 88/2010, 91/2010, and 14/2016), art. 71–85.

⁷⁶ J. Bentham, 310–311.

⁷⁷ D. Favre, “Living Property: A New Status for Animals within the Legal System”, *Marquette Law Review* 93/2010, 1021–1071.

⁷⁸ See: SCC, Art. 482, para 4.

⁷⁹ Also: D. Favre, 1069.

⁸⁰ Examples stated with: *Ibid.*, 1068–1069.

enable their owner to acquire certain property (first of all, monetary awards). The fairness principle orders to take into consideration the efforts and engagement of the owner, but also the efforts of the animal, and to share the gain accordingly. Property acquired in that way would be used by the representatives of animals for the needs of the animals themselves exclusively.⁸¹

Also, we do not see the reason why an animal cannot be, by bequeath, specified for a heir, particularly if it, during its lifetime, was emotionally closer to the owner than the persons who he/she was in family or other legally recognised relations influential for constructing a legal inheritance order.⁸² The position of a heir in the legal trade is much safer than the position of the beneficiary of the order, which animals have today.

On the other hand, the limitation of the authorisation of animal's owner, in relation to the animal itself, by banning animals to be objects of specific rights (e.g. right of pledge, right of retention, object of enforcement,⁸³ or that, when dividing common acquired property, the animal falls to the participant of the division who can care for animals better⁸⁴), speaks in favour of a consistent respect of the principle of animal welfare.⁸⁵

4.6. The right of animals to legal protection

Within the framework of the proposed rights that would fall to animals, the right to legal protection would also make an inextricable whole that would enable animals to protect their vital interests with the intervention of state organs.

Since animals do not have legally relevant will and capacity for legal communication, their interests, primarily, should be protected by people who care for them. For those animals that no one cares for or does it sporadically, it is acceptable, as per the Austrian law,⁸⁶ to establish special and independent state organ – animal ombudsman for each county in the territory of the Republic of Serbia.

Animal ombudsman would be authorised to protect interests on animals that are not cared for, and on animals that are owned, unless the

⁸¹ *Ibid.*

⁸² Also M. Paunović, 21; F. Foster, "Should Pets Inherit?", *Florida Law Review* 4/2011, 844–852.

⁸³ See: Serbian Law on Enforcement and Security (*Official Gazette of the RS*, no. 106/2015), art. 218, para. 6.

⁸⁴ See: SCC, art. 651a.

⁸⁵ Also: V. Vodinelić, 426.

⁸⁶ Austrian LPA regulates the appointment of animal ombudsman for each province. See: para. 41, para. 1 therein.

owner instigated adequate legal mechanism for the protection of animals' interests. Animal ombudsman would have to, by the wording of law, have the position of a party to the procedure conducted for the protection of animals' interests.⁸⁷

5. CONCLUDING CONSIDERATIONS

Correlation of people with other animal species through evolution, irrefutable scientific evidence that numerous animal species (like people) are sensitive animals, genetically similar to people, that they have intelligence and capability to communicate are arguments that speaks in favour of acknowledging the elementary rights to animals. Additional incentive to the norm setter in guaranteeing basic rights to those natural creations may be the following: omnipresent hunger in the world, improvement of the healthcare status of human population and a more quality protection of the ecosystem on the planet Earth.

All the presented arguments exactly speak in favour of our assertion that animals should be acknowledged the basic rights that fit their interests, needs and species, and consequently, their legal subjectivity. In our opinion, the basic rights to be acknowledged to animals should include the following: right to life; right to freedom, adequate to the category they belong to; right not to be inflicted pain, suffering and harm; right to be cared for by man; right to acquire property rights and right to legal protection. Animals, thus, should be acknowledged the so-called limited or passive legal subjectivity, which excludes obligations, since they, like children or persons fully deprived of business competency, do not have such intellectual capacities to understand their essence, as well as they do not have an acquired sense on correct and incorrect behaviour.

Just as the acknowledgement of the fundamental rights to people by international documents and the supreme legal acts of each state does not represent any guarantees that they will be observed in practice, so the acknowledgement of the rights to animals will not represent any guarantee that animals will really protect their legal position. What is, however, certain (analogous to what happens in the area of human rights) is that acknowledgement of the rights to animals will create change in awareness of a large number of people, and consequently (sooner or later) changes in their behaviour in relation to animals, too.

⁸⁷ Analogous to what is contained in the ALPA, para. 41, para. 4.

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Article in *International Journal of Current Microbiology and Applied Sciences* · August 2019

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Animal Sentience and Welfare: An Overview

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ABSTRACT

Animal sentience and welfare needs utmost importance as animal sentience is the capacity to feel pleasure and pain whereas, welfare would be intimately connected with the physiological stress response and it would simply be a matter of finding a reliable indicator of stress. Sentient animals are aware of their feelings and emotions. Animals also enjoy positive and negative emotions from carrying out natural behaviour. These could be negative feelings such as pain, frustration and fear. Sentient animals have complex social lives involving communication, organized groups and family bonds, the disruption of these relationships can severely damage animal welfare - Separating bonded individuals like a mother and infant can cause the animals to protest and despair. Sentience like feelings can be measured directly or indirectly by the methods such as preference testing, motivational testing and understanding animal communication. However, sentience as a science have limitations like anthropomorphism, cognition and demonstrating its existence at a scientific level is that the concept relates to a being's own thoughts, feelings and emotions. From, this study it may be concluded that animal sentience is imperative for improving animal welfare and attitudes towards animals.

Keywords

Animal sentience,
Emotions, Pain,
Pleasure, Welfare

Article Info

Accepted:

07 July 2019

Available Online:

10 August 2019

Introduction

Sentience is the ability to perceive and feel things. An animal is sentient if it is capable of being aware of its surroundings, its relationships with other animals and humans and of sensations in its own body, including pain, hunger, heat or cold (Turner *et al.*,

2006). In 2012, an international group of eminent neuroscientists signed the Cambridge Declaration on Consciousness, which confirmed that many animals, including all mammals and birds, possess the “neurological substrates that generate consciousness” (Low *et al.*, 2012). It is logical to suppose that sentient animals also enjoy feelings of

comfort, enjoyment, contentment and perhaps even great delight and joy. A sentient animal is “a being who has interests; that is, a being who prefers, desires or wants” (Francione *et al.*, 2012). These animals naturally try to avoid suffering and seek positive experiences (Webster *et al.*, 2005) just like humans. Animals have evolved to cope as successfully as possible with life in the wild. Thousands of years of domestication of farm animals have changed their basic motivations and behaviour patterns very little. Industrial-type farming often fails to appreciate animals’ needs and their capacity to suffer. This can mean that very large numbers of sentient animals are routinely subjected to pain and deprivation. Globally each year we farm 70 billion farm animals for meat, milk or eggs. The majority of commercially-farmed animals are confined in cages, narrow stalls or in overcrowded sheds. In such confinement, there is little or no opportunity to carry out the natural behaviours which are so important to them. It is urgent that farming systems and practices adopt methods which recognise animal sentience and pay full regard to the animals’ needs.

Scientists believe that sentience is necessary because it helps animals to survive by:

Learning more effectively from experience in order to cope with the world.

Distinguishing and choosing between different objects, animals and situations such as working out who is helpful or who might cause them harm.

Understanding social relationships and the behaviour of other individuals.

History of animal sentience

Animals are conscious beings capable of feelings such as pain, pleasure and suffering.

Ancient thinkers Plutarch, Hippocrates and Pythagoras were all advocates for the fair treatment of animals. Their urgings were based on their understanding of the capacity of animals to feel pain and suffer (Preece *et al.*, 2002). During the renaissance period (14th–17th century), a number of perspectives were proposed which included the infamous view from Descartes, who saw animals as automata, incapable of feeling or suffering (Duncan *et al.*, 2006). Descartes' way of thinking was soon overshadowed by the drive for intellect and reason that was characteristic of the 18th century and the age of the Enlightenment. This period saw great changes in how animals were viewed, with a number of philosophers discussing the ability of animals to suffer (Senior *et al.*, 2008). Darwin often spoke about the capacity of animals to feel pain and their many similarities to the human animal. In the 1960's, the book “Animal Machines” was written. In her book, Ruth Harrison exposed the realities of intensive farming at the time and the suffering of the animals within them (Harrison *et al.*, 1966). In response to this, the UK Government set up the Brambell Committee in 1965, this looked specifically at the welfare of animals in farming systems. The committee understood the importance of sentience, and ensured that all assessments took in to account both the feelings and behaviour of the animals (Duncan *et al.*, 2006). Since then, there has been a notable increase in the number of publications concerned with animal welfare and the recognition of sentience.

How do we know that animals feel pain and other feelings

While pain itself cannot be directly observed in another being (Balcombe *et al.*, 2009), there is mounting scientific evidence to support the common assumption that animals suffer. Dr. Bernard E. Rollin, Distinguished

University Professor at Colorado State University, explains that:

“The neural mechanisms responsible for pain behaviour are remarkably similar in all vertebrates” (Rollin *et al.*, 2003). Pain relieving drugs control what appears to be pain in all vertebrates and some invertebrates. The natural pain-inhibiting systems found in the human body (such as endorphins) are very similar to those found in all other vertebrates.

Humans’ capacity to feel pain is a method of survival that is likely to have been preserved during our evolution. “Given that the mechanisms of pain in vertebrates are the same, it strains credibility to suggest that the experience of pain suddenly emerges at the level of humans.”

De Camp Professor of Bioethics at Princeton University, Peter Singer, argues that “it is surely unreasonable to suppose that nervous systems that are virtually identical physiologically, have a common origin and a common evolutionary function, and result in similar forms of behaviour in similar circumstances should actually operate in an entirely different manner on the level of subjective feelings.” While animals cannot verbally report their feelings as humans do, all other methods of studying human emotions can also be applied to animals (These measures have shown that many animals have “rich and deeply emotional lives” (Bekoff *et al.*, 2007), while much attention is given to negative feelings such as stress and fear, animal welfare is also dependent on pleasurable emotions (Webster *et al.*, 2005). Play behaviour is widespread in mammals and many birds. Young calves often have playful fights and prance about, while young chickens jump around and flap their wings for fun (Appleby *et al.*, 2004). Animals also find pleasure in the search for and consumption of food, tactile interactions like

grooming, sexual activity and basic comforts like basking in the sun. Today, millions of animals are denied the freedom to experience these basic pleasures because they are confined in cages, kept in isolation or crowded in sheds without access to a natural environment.

Pain

Psychologists usually define the pain that humans feel as a deeply unpleasant experience affecting the senses and the emotions. The bodies of vertebrates have most of the features which are involved in awareness of pain and therefore it would seem that conditions which cause pain to humans will also cause pain to animals. The great majority of scientists accept that animals feel pain and should be protected from it. Some animals who are at risk from predators, such as sheep and cattle may try to hide pain and distress because showing weakness puts them at greater risk so they may feel pain but not act as though they are suffering. Animal behaviour experts use a range of indicators to judge whether an animal is in pain. They look at how the animals behave whether they try to avoid using an injured limb, their cries, changes of mood, unresponsiveness and their reaction to pain relieving drugs. Confined and crowded animals often display disturbed behaviour and can injure each other. Rather than address the root causes producers may routinely mutilate their animals often without anaesthetic. This includes the debeaking of poultry, castration and tail docking of piglets. The screams of a castrated piglet suggest he is experiencing considerable pain (Fraser and Broom, 1997). Lamé meat chickens that have difficulty walking choose feed that contains a pain-killing drug (Danbury *et al.*, 2000). A study of a commercial strain of chickens found that nearly 30 per cent of chickens had difficulty walking and over three per cent could barely walk (Knowles *et al.*, 2008). In a

study (Gleerup *et al.*, 2017) investigated pain face evaluations, using the bovine (*Bos taurus*) pain face and for this Forty-one *B. indicus* bulls underwent halothane-anaesthesia allocated to four groups: one non-surgical group (n=5), and three castration treatment groups: CL, intratesticular and subcutaneous lidocaine (n=12), CM, subcutaneous meloxicam (n=12) and C, no analgesia (n=12). The animals were observed before anaesthesia (t0) and after anaesthesia (t1, t2, t3 and t24) by the same observer (blinded to treatment), trained to evaluate the bovine pain face (*B. taurus*). The face was evaluated as a whole as described for *B. taurus* but an intensity score was added to the pain face evaluation using a simple descriptive pain face intensity scale where 0=no pain face, 1 = mild intensity, 2 = moderate intensity, 3 = severe intensity. All ratings were performed by visual inspection from the distance through binoculars. Thirteen missing ratings were evaluated (blinded) from videos retrospectively. All animals scored 0 (no pain face) before anaesthesia. The non-surgical group scored 0 at every time point. For the castrated animals, the risk of receiving a pain face intensity score 2 or 3 during the first 24 hours following surgery was, 77% for group C, 80% for group CL and 53% for group CM. The results of this study indicate that, a direct pain face evaluation with an intensity score may be useful for quantifying pain in *B. indicus* cattle. In this study, the animals treated with pre-operative meloxicam (CM), had a lower risk of receiving a moderate-severe intensity pain face score during the first 24 hours, compared to the animals in the C and CL groups.

Facial expressions

Facial expressions have the potential to indicate psychological and emotional experiences in animals, and can provide information on temporal or stimuli specific

reactions (Descovich *et al.*, 2017). Facial expressions also have social, reproductive and health functions and can therefore be more broadly relevant to welfare assessment than exclusively as indicators of affective state and it was proposed that irrespective of the proximate causes of facial expressions which are primarily communication and affective state, facial muscle movements or changes in the frequency of such may be reliably linked to underlying welfare states. It is concluded that the measurement of facial behaviour in animals is a useful but infrequently used measure that complements existing tools in the assessment of welfare. Sheep could use images of faces displaying different emotional states as cues in a simultaneous discrimination task (Bellegarde *et al.*, 2017) and for that photos of faces of four sheep in three social situations: two with a negative valence (social isolation or aggressive interaction) and a neutral situation (ruminating in the home pen). In a two-armed maze, sheep (n=16) were then presented with pairs of images of the same familiar individual taken in the neutral situation and one of the negative situations. Sheep had to learn to associate one type of image from a pair with a food reward. Once they had reached the learning criterion, sheep then had to generalise the task to new pairs of images of different conspecifics displaying the same emotions as in the previous phase. For every run in the maze, the latency to choose an arm and the outcome of the choice (success or error) were recorded, as well as the total number of runs needed to learn the task (learning speed). Influence of the type of image rewarded and of the side of presentation of the rewarded image were analysed by linear mixed models and learning speed was analysed by Mood's median test. All sheep learned the task with images of faces. Sheep that had to associate a negative image with a reward learned faster than sheep that had to learn the neutral-reward

combination. With the exception of sheep from the Aggression-rewarded group, sheep could generalise the discrimination task to images of new faces. Sheep chose an arm correctly more often and more quickly when the rewarded image was displayed on the right side suggesting the influence of a right hemisphere/left visual field bias in face-based perception of emotions and they suggested that sheep can perceive the emotional valence displayed on faces and that this valence affects learning processes.

Fear, anxiety and stress

Repeated and/or prolonged stressful situations can cause illness and suffering in farm animals. The result can be stomach ulcers, reduced fertility, heart disease, reduced immunity to infection and increased death rates. In farming, animals are often put in situations which cause fear, anxiety and distress. These emotions are unpleasant and can cause suffering. The challenge now is to put our modern knowledge of animal sentience into practice, by protecting the physical and psychological welfare of the billions of animals we farm worldwide through better farming systems which meet their needs. Startle response as a measure of fear, defined here as the behavioral and physiological response to a perceived threat in dairy calves (Adcock *et al.*, 2017) and predicted that calves exposed to predator odor, a fear-eliciting stimulus, would have a higher startle magnitude, elevated heart rate and longer latency to feed in response to a sudden noise than calves exposed to the odor of a herbivore or water. Thirty-four calves were assigned to 1 of 3 treatments (coyote urine, deer urine, water) in a between-subjects design. Each calf was fitted with an accelerometer and heart rate monitor and tested individually in 10 min trials in a familiar arena on 3 consecutive days. A bucket feeder containing 500 ml of milk

replacer was secured to the side opposite the arena entrance. Immediately before the trial the odor was dispersed into the arena with fans. The startle stimulus burst of white-noise was delivered upon the calf's arrival at the feeder. We assessed treatment (coyote, deer, and water) and test day effects on startle magnitude and heart rate with linear mixed models using the restricted maximum-likelihood method and calf identity fitted as a random effect. The effect of treatment and test day on latency was modeled using a parametric survival model.

Correlations between variables were made using Spearman's rho. The magnitude of the behavioral startle response was higher in the coyote treatment than in both controls on the first day of testing (mean total acceleration on day 1} SE: Coyote: 19}15 g; Deer: 166}3 g; Water: 172}8 g; Treatment $\times$ Day: $F_{450}=2.56$, $P=0.050$). Calves exposed to coyote odor tended to take longer to return to the feeder following the sudden noise compared to control animals (mean } SE: Coyote: 11}5 s; Deer: 4 • }2 s; Water: 4}1 s; Treatment: $X^2_{2}=8.32$; $P=0.016$; post-hoc tests: $P\leq 0.086$).

The cardiac startle response did not differ between treatments (mean heart rate} SE: Coyote: 164} 6 bpm; Deer: 167}6 bpm; Water: 177} 6 bpm; $F_{2, 30}=1.29$, $P=0.290$) nor days ($F_{2, 52}=0.02$, $P=0.979$). Startle magnitude and latency to return to the feeder were positively correlated ($\rho=0.60$, $P<0.0001$). Unexpectedly, heart rate correlated negatively with both startle magnitude ($\rho=-0.26$, $P=0.019$) and latency to return to the feeder ($\rho=-0.46$, $P<0.0001$), which suggests fear brachycardia – a defense mechanism characterized by a decrease in heart rate – may accompany the startle response. In conclusion, the results provide support for using the behavioral startle response as a measure of fear in dairy calves.

Frustration of natural behaviour

Farm animals feel and show frustration when they are prevented from carrying out natural behaviour. Animals' responses to frustration show that they are aware of what they want to do and how they expect the world to be. Animals in confinement may react to long-term frustration and stress by carrying out apparently pointless, repetitive behaviours or 'stereotypies'. Many stereotypies look like the original behaviour that the animal was strongly motivated to perform – such as escaping from being confined, getting food or exercising over a large range but in the captive setting they appear useless and abnormal. Stereotypies include the pacing of confined zoo animals and the bar-biting, head-weaving and tongue rolling of sows confined to narrow sow stalls. Confined farmed fish are affected by stereotypies too (Sneddon *et al.*, 2007). Maternal deprivation which affects very large numbers of farm animals may be a factor in stereotypic behaviour (Latham and Mason, 2008). Piglets and calves are abruptly removed from their mothers at a very young age. Commercially farmed poultry are artificially incubated and never see their parents or other adults of their species while growing.

Pleasure and play

Animals also enjoy positive emotions from carrying out natural behaviour. Many of the skills that animals need in their adult lives in nature are partly learned by play activities when young. The fact that young farm animals clearly enjoy playing is a hallmark of their complex mental life.

Sentient animals have complex social lives involving communication, organized groups and family bonds

Cows are extremely social animals that live in

small herds, forming social hierarchies and friendship pairs (Fraser and Broom, 1996). Chickens share information with specific calls to communicate their frustration, the discovery of food or the presence of a predator, suggesting some level of language (Millman and Duncan, 2001). Familiar pigs greet each other by touching noses and grunting, while those with close bonds may groom each other (Wood *et al.*, 2006). Young piglets separated from their mothers give distinctive and frequent squeals to call her (Weary and Fraser, 1997). Dairy cows develop a strong maternal bond with their calf after as little as five minutes of contact after birth (Hudson and Mullord, 1977) and become stressed when their four-day old calf is removed (Sandem and Braastad, 2005). Mixing unfamiliar cows can cause a tenfold increase in conflict between the animals. Chickens in large flocks (up to 60,000 can be housed in a single shed) can constantly try to establish a social hierarchy without ever achieving it, while overcrowding can cause feather pecking and cannibalism amongst the birds (Mench and Keeling, 2001).

Sentience and animal welfare

Scientific investigations into animal welfare gradually increased in the late 1960s, following the publication of Harrison's book "Animal Machines" and the follow-up British government investigation published as the so-called "Brambell Report" (Command Paper 2836, 1965) it was generally assumed that welfare would be intimately connected with the physiological stress response (Bareham *et al.*, 1972, Bryant *et al.*, 1972 and Gush *et al.*, 1975). An animal that was stressed would have poor welfare and an animal that was not stressed would have good welfare. However, it is worth pointing out that it was the suffering of animals in intensive agriculture, in biomedical research and in product testing that spurred Harrison to write her book. It was

not just the fact that these animals were stressed that troubled her; it was the fact that they were sentient and could feel stressed. The Brambell Committee also acknowledged that sentience was important. They stated, "Welfare is a wide term that embraces both the physical and mental well-being of the animal. Any attempt to evaluate welfare, therefore, must take into account the scientific evidence available concerning the feelings of animals that can be derived from their structure and functions and also from their behaviour" (Command Paper 2836, 1965). So the Brambell Committee also realised that an understanding of sentience is an essential part of assessing welfare. Through the 1980s, and triggered by the publication of Dawkins' book "Animal Suffering" (Dawkins *et al.*, 1980), behavioural scientists gradually accepted the importance of feelings in their investigations into animal welfare problems. There was a progression from a position in which feelings were seen as a necessary component of welfare (Dawkins *et al.*, 1980; Dawkins *et al.*, 1990; Duncan *et al.*, 1981; Duncan and Dawkins, 1983) to one in which feelings are the only thing that matters (Duncan, 1996; Duncan, 2004).

Acceptance of the fact that welfare is all to do with feelings brings with it a huge, almost insurmountable problem, which is that we can never prove conclusively that any organism is sentient. Subjective feelings are just that—subjective and available only to the animal experiencing them. Fortunately, in the animal welfare debate we do not need to know exactly what an animal is experiencing. An indication of how positive or negative the animal is feeling would be extremely useful. For example, if we are considering a chicken that we suspect is frightened, we do not need to know if it is experiencing what a human being experiences when being threatened by a savage dog or being trapped in a burning building. In order to assess the chicken's

welfare, all we need to know is whether or not it is experiencing something negative. If the chicken is experiencing negative feelings, it would also be helpful to know how negative these feelings are. Although it is impossible to measure feelings directly it is possible to get some indication of what an animal is feeling by indirect means.

Cognition usually refers to mental processes such as perception, memory, learning, computational skills, expectation etc. In other words, these are processes that have evolved to help the animal deal with the external world in a flexible way. Consciousness, on the other hand gives the animal information about its internal environment. Consciousness may be similar to an "inner eye" that allows the animal awareness of certain inner states such as fear and pain (Humphrey, 1986; Humphrey, 1992). In any investigation into how animals feel, it may be necessary to involve cognitive processes (Can an animal learn to avoid a frightening stimulus, can an animal remember a rewarding experience). There may also be interesting interactions between emotions and cognition (Paul *et al.*, 2005). However, it should be remembered that it is the animal's awareness of what is happening that is crucial for its welfare, and in investigations into welfare we should be striving for measures (Albeit indirect measures) that give some indication of how positive or negative the animal feels.

It is possible to investigate feelings by indirect methods such as preference testing, motivational testing and understanding animal communication. Preference testing was pioneered by Hughes and Dawkins, both working with domestic fowl (Hughes and Black, 1973; Hughes *et al.*, 1975; Hughes *et al.*, 1977; Dawkins *et al.*, 1976; Dawkins *et al.*, 1977 and Dawkins *et al.*, 1978). According to this method, the animal is given a choice of aspects of its environment and we

assume that it will choose in the best interests of its welfare. There are certain pitfalls to be avoided when using preference tests. Despite all their limitations, preference tests give a good first indication of what the animal feels about various aspects of its environment. But a preference test is only the first step in investigating how an animal feels about its environment; it is also necessary to know how important a particular choice is. Even a consistent choice in one direction may not be important for the animal if, say neither choice results in suffering. But a choice may also represent the lesser of two evils with the animal suffering with both options. For these reasons, it is necessary to measure the strength of the preference as a follow up to preference testing.

There are various methods being used to measure strength of preference and an economic analogy is often used in the description of these methods (Mason *et al.*, 1998). For example, we can “increase the price” of the commodity that the animal is choosing. This is done by seeing how hard the animal will “work” in order to obtain its preferred choice. Obstruction tests, in which the animal has to push past an obstruction or push open a weighted door in order to reach its preferred choice, is a common method (Nicol and Guildford, 1991; Mason *et al.*, 2001). Operant responding is another common method being used to measure motivation (Dawkins and Beardsley, 1986). It is ironic that the operant conditioning chamber or “Skinner box” developed by behaviourists who campaigned so strongly against giving any consideration to feelings (Skinner *et al.*, 1975), is now being used to investigate these very subjective feelings in an indirect way. Rather than “increasing the price” of a commodity, it is also possible to investigate motivation by reducing an animal's “income”, although this is rather stretching the economic argument. The time

that an animal has available to perform its various activities can be regarded as “income”. The available time can be reduced until there is insufficient time for the animal to perform its full repertoire of behaviour. When this point is reached it is assumed that the animal will perform the activities that are really important to it and that other, less important activities will be omitted.

Of all the states of suffering, pain is probably responsible in animal agriculture for a bigger reduction in welfare than any other (Benson *et al.*, 2004). Many farm animals are injured through living in ill-designed environments. For example, sows housed in dry sow stalls often have pressure sores on their hips from lying on hard surfaces, hens in battery cages often have hyperkeratosis of their feet pads from continually slipping on sloping floors and dairy cows often have feet and hock injuries from standing and lying on hard surfaces. Injuries also arise from social interactions such as fighting, tail-biting and feather-pecking. In addition, there are lots of surgical interventions, such as castration, tail-docking, dehorning, teeth-trimming, beak-trimming, de-snooding and de-toeing all carried out without analgesic or anaesthetic cover. Then there are procedures, carried out for identification purposes such as ear-tagging, ear-notching and branding that could be painful. Finally, the poultry and swine sectors are running into fast-growth problems such as skeletal weaknesses, and the dairy sector is experiencing metabolic problems all of which could be painful (Benson *et al.*, 2004).

Asking animals if they are experiencing pain, is much more of a challenge than asking them about other feelings. We can use an animal's tendency to avoid as a measure of its fear and we can use its tendency to approach as a measure of how motivated it is to gain access to some environmental feature. Looking very

carefully at the behaviour of animals with and without analgesics can give some indication (Duncan *et al.*, 1990; Molony and Kent, 1997). In a very exciting development of this method, it has been found that broiler chickens are capable of self-administering a pain-killing drug. When given a choice between two feeds, one of which contained a pain-killer, lame broilers ate more of the drugged feed than did broilers with no lameness. Moreover the walking ability of the lame birds was improved by this self-administered treatment (Danbury *et al.*, 2000).

Another possible route for gaining information about what animals may be feeling is through an understanding of their systems of communication as the severity of pain experienced by piglets during castration by carefully analysing their vocalizations (Weary *et al.*, 1998; Taylor and Weary, 2000).

Difficulty of measuring or proving sentience

One of the key issues with understanding sentience and demonstrating its existence at a scientific level is that the concept relates to a being's own thoughts, feelings and emotions. The problem is however we cannot know exactly what or how another is feeling (Dawkins *et al.*, 2001). This applies to both humans and animals and means that it can be difficult to ultimately prove the capacity for sentience. This is particularly difficult for animals as they lack the power of speech to convey their feelings. As a result, sentience is often described as anthropomorphic assumptions and its credibility as a science has suffered. This has had negative impacts on the development of the science and our understanding of sentience. Scientists in the field are often hindered by this and continue to seek unquestionable proof of sentience in

animals. However, because sentience is characterised by personal phenomena and it cannot be known with absolute certainty what another is feeling it does not lend itself to this type of rigorous analysis.

Sentience and Anthropomorphism: Another of the key limitations to the acceptance and development of the science of animal sentience is the fear of anthropomorphism; the attribution of human characteristics to an animal. The concern over anthropomorphism really began following the behaviourist movement, when there was a drive to think of animals only in terms of behaviour and to not attribute any subjective feelings or experiences to them (Kennedy *et al.*, 1992). Some avoidance of anthropomorphism is necessary as misuse can undermine the science of sentience however, complete avoidance of anthropomorphism can also be unhelpful and in many ways impossible. Our anthropomorphic tendencies may even be an innate part of our hereditary make-up. The ability to predict and control the behaviour of other animals may have been an advantage selected for in natural selection. Anthropomorphism appears to be unavoidable because not only is it a part of us culturally, hereditarily or both it is also apparent and often necessary in how humans make sense of and relate to animals.

Sentience and Cognition: The attribution of sentience to animals can also be hindered by the common misconception that the capacity for sentience is linked in some way to a species' cognitive ability. Cognition refers to the mental action or processes by which animals perceive process and store information (Dawkins *et al.*, 2001). Sentience, on the other hand, refers to the capacity of an animal to have feelings and to be aware of a variety of states and sensations such as pleasure and suffering (Broom *et al.*, 2007). It is often assumed that cognition and sentience

are inextricably linked in that cognition automatically implies sentience. Indeed, evidence of higher cognitive abilities such as theory of mind and language has previously been used as a basis for advocating for the rights of certain species such as the great apes (Cavalieri and Singer, 1993). Cognition is not actually a prerequisite for sentience and it can be demonstrated independently (Dawkins *et al.*, 2006).

Developing our understanding of animal sentience is imperative for improving animal welfare and attitudes towards animals. Concentrating on filling the gaps in our knowledge, humanely and reliably is essential given the extent of human impact on animals. With increasing attention on animal sentience science and the further development of humane approaches the future of the science of animal sentience is looking ever more promising and as a result so does the treatment of animals.

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How to cite this article:

Suresh Kumar, Sanjay Choudhary, Rohit Kumar, Alok Kumar, Prasanna Pal and Kanika Mahajan. 2019. Animal Sentience and Welfare: An Overview. *Int.J.Curr.Microbiol.App.Sci*. 8(08): 635-646. doi: <https://doi.org/10.20546/ijcmas.2019.808.074>

Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights

Saskia Stucki*

Abstract—With legal animal rights on the horizon, there is a need for a more systematic theorisation of animal rights as legal rights. This article addresses conceptual, doctrinal and normative issues relating to the nature and foundations of legal animal rights by examining three key questions: can, do and should animals have legal rights? It will show that animals are conceptually possible candidates for rights ascriptions. Moreover, certain ‘animal welfare rights’ could arguably be extracted from existing animal welfare laws, even though these are currently imperfect and weak legal rights at best. Finally, this article introduces the new conceptual vocabulary of *simple* and *fundamental* animal rights, in order to distinguish the weak legal rights that animals may be said to have as a matter of positive law from the kind of strong legal rights that animals ought to have as a matter of future law.

Keywords: legal animal rights; simple and fundamental animal rights; theories of rights; animal welfare law

1. Introduction: The Need for Legal Animal Rights Theory

Legal animal rights are on the horizon, and there is a need for a legal theory of animal rights—that is, a theory of animal rights as *legal* rights. While there is a diverse body of *moral* and *political* theories of animal rights,¹ the nature and conceptual foundations of legal animal rights remain remarkably underexplored. As yet, only few and fragmented legal analyses of isolated aspects of

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¹ Seminally, Tom Regan, *The Case for Animal Rights* (University of California Press 1983); Sue Donaldson and Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (OUP 2011).

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animal rights exist.² Other than that, most legal writing in this field operates with a hazily assumed, rudimentary and undifferentiated conception of animal rights—one largely informed by extralegal notions of *moral* animal rights—which tends to obscure rather than illuminate the distinctive nature and features of *legal* animal rights.³ A more systematic and nuanced theorisation of legal animal rights is, however, necessary and overdue for two reasons: first, a gradual turn to legal rights in animal rights discourse; and, secondly, the incipient emergence of legal animal rights.

First, while animal rights have originally been framed as moral rights, they are increasingly articulated as potential legal rights. That is, animals' moral rights are asserted in an 'ought to be legal rights'-sense (or 'manifesto sense')⁴ that demands legal institutionalisation and refers to the corresponding legal rights which animals should ideally have.⁵ A salient reason for transforming moral into legal animal rights is that purely moral rights (which exist prior to and independently of legal validation) do not provide animals with sufficient practical protection, whereas legally recognised rights would be reinforced by the law's more stringent protection and enforcement mechanisms.⁶ With a view to their (potential) juridification, it seems advisable to rethink and reconstruct animal rights as specifically legal rights, rather than simply importing moral animal rights into the legal domain.⁷

Secondly, and adding urgency to the need for theorisation, legal animal rights are beginning to emerge from existing law. Recently, a few pioneering

² See, notably, Matthew H Kramer, 'Do Animals and Dead People Have Legal Rights?' (2001) 14 CJLJ 29; Tom L Beauchamp, 'Rights Theory and Animal Rights' in Tom L Beauchamp and RG Frey (eds), *The Oxford Handbook of Animal Ethics* (OUP 2011); William A Edmundson, 'Do Animals Need Rights?' (2015) 23 *Journal of Political Philosophy* 345; Gary L Francione, *Animals, Property, and the Law* (first printed 1995, Temple UP 2007) 91ff; Steven M Wise, 'Hardly a Revolution—The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy' (1998) 22 *Vt L Rev* 793; Anne Peters, 'Liberté, Égalité, Animalité: Human-Animal Comparisons in Law' (2016) 5 *TEL* 25; Thomas G Kelch, 'The Role of the Rational and the Emotive in a Theory of Animal Rights' (1999) 27 *BC Env'tl Aff L Rev* 1.

³ Much legal scholarship deals with animal rights in a rather cursory and incidental manner, because it typically focusses on parallel debates that are closely related to, but seen as preceding, the issue of rights. For example, much has been written about the systemic shortcomings of animal *welfare* legislation, which—within the entrenched animal welfare/rights-dualism—has served to undergird calls for shifting towards a *rights*-paradigm for legal protection of animals. Another focal point of legal scholars has been to change the legal status of animals from *property* to *person*, which is taken to be a prerequisite for right holding. Yet, even though legal rights for animals may be the ultimate goal informing these debates, surprisingly little detailed attention has been given to such envisaged legal animal rights per se.

⁴ Joel Feinberg, *Social Philosophy* (Prentice-Hall 1973) 67.

⁵ See eg Alasdair Cochrane, *Animal Rights Without Liberation: Applied Ethics and Human Obligations* (Columbia UP 2012) 14–15, 207 (whose 'account of the moral rights of animals ... proposes what the legal rights of animals *ought to be*'); cf Joel Feinberg, 'In Defence of Moral Rights' (1992) 12 *OJLS* 149 (describing this indirect way of referencing legal rights as the "'There ought to be a law" theory of moral rights', 156).

⁶ As noted by Favre, what is required is 'that the legal system intervene when personal morals or ethics do not adequately protect animals from human abuse'. David Favre, 'Integrating Animal Interests into Our Legal System' (2004) 10 *Animal Law Review* 87, 88.

⁷ Even though moral and legal rights are intimately connected (see HLA Hart, 'Are There Any Natural Rights?' (1955) 64 *Philosophical Review* 175, 177), a somewhat distinct (or at least modified and refined) theorisation is warranted because, unlike moral animal rights, legal animal rights are constituted by legal systems, and their existence and scope have to be determined based on the applicable legal rules. As Wise puts it: 'philosophers argue moral rights; judges decide legal rights'. Steven M Wise, *Drawing the Line: Science and the Case for Animal Rights* (Perseus 2002) 34.

courts have embarked on a path of judicial creation of animal rights, arriving at them either through a rights-based interpretation of animal welfare legislation or a dynamic interpretation of constitutional (human) rights. Most notably, the Supreme Court of India has extracted a range of animal rights from the Prevention of Cruelty to Animals Act and, by reading them in the light of the Constitution, elevated those statutory rights to the status of fundamental rights.⁸ Furthermore, courts in Argentina⁹ and Colombia¹⁰ have extended the fundamental right of *habeas corpus*, along with the underlying right to liberty, to captive animals.¹¹ These (so far isolated) acts of judicial recognition of animal rights may be read as early manifestations of an incipient formation of legal animal rights. Against this backdrop, there is a pressing practical need for legal animal rights theory, in order to explain and guide the as yet still nascent—and somewhat haphazard—evolution of legal animal rights.

This article seeks to take the first steps towards building a more systematic and nuanced theory of legal animal rights. Navigating the existing theoretical patchwork, the article revisits and connects relevant themes that have so far been addressed only in a scattered or cursory manner, and consolidates them into an overarching framework for legal animal rights. Moreover, tackling the well-known problem of ambiguity and obscurity involved in the generally vague, inconsistent and undifferentiated use of the umbrella term ‘animal rights’, this article brings analytical clarity into the debate by disentangling and unveiling different meanings and facets of legal animal rights.¹² To this end, the analysis identifies and separates three relevant sets of issues: (i) *conceptual* issues concerning the nature and foundations of legal animal rights, and, more generally, whether animals are the kind of beings who can potentially hold legal rights; (ii) *doctrinal* issues pertaining to existing animal welfare law and whether it confers some legal rights on animals—and, if so, what kind

⁸ Supreme Court of India 7 May 2014, civil appeal no 5387 of 2014 [27] [56] [62ff]; see further Kerala High Court 6 June 2000, AIR 2000 KER 340 (expressing the opinion that ‘legal rights shall not be the exclusive preserve of the humans’, [13]); Delhi High Court 15 May 2015, CRL MC no 2051/2015 [3] [5] (recognizing birds’ ‘fundamental rights to fly in the sky’).

⁹ Tercer Juzgado de Garantías de Mendoza 3 November 2016, Expte Nro P-72.254/15; this landmark decision was preceded by an *obiter dictum* in Cámara Federal de Casación Penal Buenos Aires, 18 December 2014, SAJJ NV9953 [2] (expressing the view that animals are right holders and should be recognized as legal subjects).

¹⁰ Corte Suprema de Justicia 26 July 2017, AHC4806-2017 (MP: Luis Armando Tolosa Villabona). This ruling was later reversed in Corte Suprema de Justicia 16 August 2017, STL12651-2017 (MP: Fernando Castillo Cadena). In January 2020, the Constitutional Court of Colombia decided against granting *habeas corpus* to the animal in question.

¹¹ Similar *habeas corpus* claims on behalf of chimpanzees and elephants, brought by the Nonhuman Rights Project, have not been accepted by US courts. See, notably, *Tommy v Lavery* NY App Div 4 December 2014, Case No 518336.

¹² On the ambiguity of the term ‘animal rights’, see eg Will Kymlicka and Sue Donaldson, ‘Rights’ in Lori Gruen (ed), *Critical Terms for Animal Studies* (University of Chicago Press 2018) 320; in using the umbrella term ‘animal rights’ without further specifications, it is often left unclear what exactly is meant by ‘rights’. For example, the term may refer to either moral or legal animal rights—or both. Furthermore, in a broad sense, ‘animal rights’ sometimes refers to any kind of normative protection for animals, whereas in a narrow sense, it is often reserved for particularly important and inviolable, human rights-like animal rights. Moreover, some speak of ‘animal rights’ as if they already existed as a matter of positive law, while others use the same term in a ‘manifesto sense’, to refer to potential, ideal rights.

of rights; and (iii) *normative* issues as to why and what kind of legal rights animals ought ideally to have as a matter of future law. These thematic clusters will be addressed through three simple yet key questions: *can*, *do* and *should* animals have legal rights?

Section 2 will show that it is conceptually possible for animals to hold legal rights, and will clarify the formal structure and normative grounds of legal animal rights. Moreover, as section 3 will demonstrate, unwritten animal rights could arguably be extracted from existing animal welfare laws, even though such ‘animal welfare rights’ are currently imperfect and weak legal rights at best. In order to distinguish between these weak legal rights that animals may be said to have as a matter of positive law and the kind of strong legal rights that animals ought to have potentially or ideally, the new conceptual categories of ‘*simple* animal rights’ and ‘*fundamental* animal rights’ will be introduced. Finally, section 4 will explore a range of functional reasons why animals need such strong, fundamental rights as a matter of future law.

2. Can Animals Have Legal Rights?

As a preliminary matter, it seems necessary to first address the conceptual issue whether animals potentially *can* have legal rights, irrespective of doctrinal and normative issues as to whether animals *do* in fact have, or *should* have, legal rights. Whether animals are possible or potential right holders—that is, the kind of beings to whom legal rights can be ascribed ‘without conceptual absurdity’¹³—must be determined based on the general nature of rights, which is typically characterised in terms of the structure (or form) and grounds (or ultimate purpose) of rights.¹⁴ Looking at the idea of animal rights through the lens of general rights theories helps clarify the conceptual foundations of legal animal rights by identifying their possible forms and grounds. The first subsection (A) focusses on two particular forms of conceptually basic rights—claims and liberties—and examines their structural compatibility with animal rights. The second subsection (B) considers the two main competing theories of rights—the will theory and interest theory—and whether, and on what grounds, they can accommodate animals as potential right holders.

¹³ Joel Feinberg, ‘Human Duties and Animal Rights’ in Clare Palmer (ed), *Animal Rights* (Routledge 2008) 409; the class of potential right holders comprises ‘any being that is capable of holding legal rights, whether or not he/she/it actually holds such rights’. Kramer, ‘Do Animals and Dead People Have Legal Rights?’ (n 2) 29.

¹⁴ See generally Alon Harel, ‘Theories of Rights’ in Martin P Golding and William A Edmundson (eds), *Philosophy of Law and Legal Theory* (Blackwell 2005) 191ff.

A. The Structure of Legal Animal Rights

The formal structure of rights is generally explicated based on the Hohfeldian typology of rights.¹⁵ Hohfeld famously noted that the generic term 'right' tends to be used indiscriminately to cover 'any sort of legal advantage', and distinguished four different types of conceptually basic rights: claims (rights *stricto sensu*), liberties, powers and immunities.¹⁶ In the following, I will show on the basis of first-order rights¹⁷—claims and liberties—that legal animal rights are structurally possible, and what such legal relations would consist of.¹⁸

(i) Animal claim rights

To have a right in the strictest sense is 'to have a claim *to* something and *against* someone', the claim right necessarily corresponding with that person's correlative duty towards the right holder to do or not to do something.¹⁹ This type of right would take the form of animals holding a claim to something against, for example, humans or the state who bear correlative duties to refrain from or perform certain actions. Such legal animal rights could be either

¹⁵ Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale LJ 16; Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 Yale LJ 710.

¹⁶ See Hohfeld, 'Fundamental Legal Conceptions' (n 15) 717; these Hohfeldian incidents of rights are merely 'atomic' units, whereas many common rights are complex aggregates, clusters or 'molecular rights' consisting of combinations thereof. *ibid* 746; Leif Wenar, 'The Nature of Rights' (2005) 33 Philosophy & Public Affairs 223, 225, 234.

¹⁷ First-order rights (claims and liberties) directly concern someone's actual rather than normative conduct, whereas powers and immunities are second-order rights ('meta-rights') that concern other legal relations; by prioritising, for the sake of this analysis, first-order rights regarding (in)actions of and towards animals, this is not to say that second-order rights are not important to accompany and bolster the first-order rights of animals. For instance, just as many complex (eg fundamental) rights contain immunities, that is, the freedom from the legal power of another (the disability bearer) to change the immunity holder's rights, animals' claims and liberties may be bolstered by immunity rights that protect those first-order rights from being altered, notably voided, by others. For example, one of the most basic rights frequently discussed for animals, the 'right not to be property' (Gary L Francione, *Introduction to Animal Rights: Your Child or the Dog?* (first printed 2000, Temple UP 2007) 93ff), may be explained as an immunity that would strip away the legal powers that currently go along with the state of legal disposability entailed by animals' property status, and would thus disable human 'owners' to decide over animals' rights. As passive rights, immunities are quite easily conceivable as animal rights, because they are specified by reference to the correlative position, that is, by what the person disabled by the animal's immunity right cannot legally do (see generally Matthew H Kramer, 'Rights Without Trimmings' in Matthew H Kramer, NE Simmonds and Hillel Steiner, *A Debate Over Rights: Philosophical Enquiries* (OUP 1998) 22). By contrast, a power refers to one's control over a given legal relation and entails one's normative ability to alter another's legal position (see Hohfeld, 'Some Fundamental Legal Conceptions' (n 15) 55). *Prima facie*, powers may thus seem ill-suited for animals. This is because, unlike passive second-order rights (immunities), powers are active rights that have to be exercised rather than merely enjoyed and, unlike first-order active rights (liberties), powers concern the exercise of legal rather than factual actions and thus require legal rather than mere practical or behavioural agency. Notwithstanding, it may be argued that animals, not unlike children, could hold legal powers (eg powers of enforcement) that are exercisable through human proxies (cf Visa AJ Kurki, 'Legal Competence and Legal Power' in Mark McBride (ed), *New Essays on the Nature of Rights* (Hart Publishing 2017) 46).

¹⁸ For a discussion of Hohfeldian theory in the context of animal rights, see also Wise, 'Hardly a Revolution' (n 2) 799ff; Francione, *Animals, Property, and the Law* (n 2) 96–7; Kelch, 'The Role of the Rational' (n 2) 6ff.

¹⁹ Joel Feinberg, 'The Rights of Animals and Unborn Generations' in Joel Feinberg, *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy* (Princeton UP 1980) 159; Hohfeld, 'Some Fundamental Legal Conceptions' (n 15) 55.

negative rights (correlative to negative duties) to non-interference or *positive rights* (correlative to positive duties) to the provision of some good or service.²⁰ The structure of claim rights seems especially suitable for animals, because these are *passive rights* that concern the conduct of others (the duty bearers) and are simply enjoyed rather than exercised by the right holder.²¹ Claim rights would therefore assign to animals a purely passive position that is specified by the presence and performance of others' duties towards animals, and would not require any actions by the animals themselves.

(ii) *Animal liberties*

Liberties, by contrast, are *active rights* that concern the right holder's own conduct. A liberty to engage in or refrain from a certain action is one's freedom of any contrary duty towards another to eschew or undertake that action, correlative to the no right of another.²² On the face of it, the structure of liberties appears to lend itself to animal rights. A liberty right would indicate that an animal is free to engage in or avoid certain behaviours, in the sense of being free from a specific duty to do otherwise. Yet, an obvious objection is that animals are generally incapable of having *any* legal duties.²³ Given that animals are inevitably in a constant state of 'no duty' and thus 'liberty',²⁴ this seems to render the notion of liberty rights somewhat pointless and redundant in the case of animals, as it would do nothing more than affirm an already and invariably existing natural condition of dutylessness. However, this sort of 'natural liberty' is, in and of itself, only a naked liberty, one wholly unprotected against interferences by others.²⁵ That is, while animals may have the 'natural liberty' of, for example, freedom of movement in the sense of not having (and not being capable of having) a duty not to move around, others do not have a duty *vis-à-vis* the animals not to interfere with the exercise of this liberty by, for example, capturing and caging them.

The added value of turning the 'natural liberties' of animals into liberty rights thus lies in the act of transforming unprotected, naked liberties into protected, vested liberties that are shielded from certain modes of interference. Indeed, it seems sensible to think of 'natural liberties' as constituting legal rights only when embedded in a 'protective perimeter' of claim rights and correlative duties within which such liberties may meaningfully exist and be

²⁰ So far, animal rights theory has largely focussed on negative rights. See critically Donaldson and Kymlicka (n 1) 5ff, 49ff.

²¹ cf Wenar, 'The Nature of Rights' (n 16) 233.

²² See Hohfeld, 'Some Fundamental Legal Conceptions' (n 15) 55; Kramer, 'Rights Without Trimmings' (n 17) 10.

²³ See eg Feinberg, 'The Rights of Animals and Unborn Generations' (n 19) 162; but see Kramer, 'Do Animals and Dead People Have Legal Rights?' (n 2) 41–2 (arguing that it would not be impossible, though 'cruel and perhaps silly', to impose legal duties on animals).

²⁴ A 'liberty' is the negation of 'duty' and may thus be redescribed as 'no-duty'.

²⁵ On the distinction between naked and vested liberties, see HLA Hart, 'Legal Rights' in HLA Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (OUP 1982) 172.

exercised.²⁶ This protective perimeter consists of some general duties (arising not from the liberty right itself, but from other claim rights, such as the right to life and physical integrity) not to engage in ‘at least the cruder forms of interference’, like physical assault or killing, which will preclude most forms of effective interference.²⁷ Moreover, liberties may be fortified by specific claim rights and correlative duties strictly designed to protect a particular liberty, such as if the state had a (negative) duty not to build highways that cut across wildlife habitat, or a (positive) duty to build wildlife corridors for such highways, in order to facilitate safe and effective freedom of movement for the animals who live in these fragmented habitats.

(iii) *Animal rights and duties: correlativity and reciprocity*

Lastly, some remarks on the relation between animal rights and duties seem in order. Some commentators hold that animals are unable to possess legal rights based on the influential idea that the capacity for holding rights is inextricably linked with the capacity for bearing duties.²⁸ Insofar as animals are not capable of bearing legal duties in any meaningful sense, it follows that animals cannot have legal (claim) rights against other animals, given that those other animals would be incapable of holding the correlative duties. But does this disqualify animals from having legal rights altogether, for instance, against legally competent humans or the state?

While duties are a key component of (first-order) rights—with claim rights necessarily implying the *presence* of a legal duty in others and liberties necessarily implying the *absence* of a legal duty in the right holder²⁹—neither of them logically entails that the right holder bear duties *herself*. As Kramer aptly puts it:

Except in the very unusual circumstances where someone holds a right against himself, X’s possession of a legal right does not entail X’s bearing of a legal duty; rather, it entails the bearing of a legal duty by somebody else.³⁰

This underscores an important distinction between the conceptually axiomatic *correlativity* of rights and duties—the notion that every claim right necessarily implies a duty—and the idea of a *reciprocity* of rights and duties—the notion that (the capacity for) right holding is conditioned on (the capacity for) duty bearing. While correlativity refers to an existential nexus between a right and a duty held by separate persons within *one and the same legal relation*, reciprocity

²⁶ Hart, ‘Legal Rights’ (n 25) 171, 173.

²⁷ Hart, ‘Legal Rights’ (n 25) 171.

²⁸ eg Richard L Cupp, ‘Children, Chimps, and Rights: Arguments from “Marginal” Cases’ (2013) 45 Ariz St LJ 1; see also Christine M Korsgaard, *Fellow Creatures: Our Obligations to the Other Animals* (OUP 2018) 116ff.

²⁹ See David Lyons, ‘Rights, Claimants, and Beneficiaries’ (1969) 6 American Philosophical Quarterly 173, 173–4.

³⁰ Kramer, ‘Do Animals and Dead People Have Legal Rights?’ (n 2) 42.

posits a normative nexus between the right holding and duty bearing of *one and the same person* within separate, logically unrelated legal relations.

The claim that the capacity for right holding is somehow contingent on the right holder's (logically unrelated) capacity for duty bearing is thus, as Kramer puts it, 'straightforwardly false' from a Hohfeldian point of view.³¹ Nevertheless, there may be other, normative reasons (notably underpinned by social contract theory) for asserting that the class of *appropriate* right holders should be limited to those entities that, in addition to being structurally *possible* right holders, are also capable of reciprocating, that is, of being their duty bearers' duty bearers.³² However, such a narrow contractarian framing of right holding should be rejected, not least because it misses the current legal reality.³³ With a view to legally incompetent humans (eg infants and the mentally incapacitated), contemporary legal systems have manifestly cut the connection between right holding and the capacity for duty bearing.³⁴ As Wenar notes, the 'class of potential right holders has expanded to include duty-less entities'.³⁵ Similarly, it would be neither conceptually nor legally apposite to infer from the mere fact that animals do not belong to the class of possible duty bearers that they cannot belong to the class of possible right holders.³⁶

B. The Grounds of Legal Animal Rights

While Hohfeld's analytical framework is useful to outline the possible forms and composition of legal animal rights, Kelch rightly points out that it remains agnostic as to the normative grounds of potential animal rights.³⁷ In this respect, the two dominant theories of rights advance vastly differing accounts of the ultimate purpose of rights and who can potentially have them.³⁸ Whereas the idea of animal rights does not resonate well with the will theory, the interest theory quite readily provides a conceptual home for it.

³¹ Kramer, 'Do Animals and Dead People Have Legal Rights?' (n 2) 42.

³² In this vein, *Tommy v Lavery* NY App Div 4 December 2014, Case No 518336, p 4, 6; but see critically New York Court of Appeals, *Tommy v Lavery* and *Kiko v Presti* decision of 8 May 2018, motion no 2018-268, concurring opinion Judge Fahey.

³³ For example, the Supreme Court of Colombia explicitly departed from this reciprocity paradigm and held that animals are right holders but not duty bearers. Corte Suprema de Justicia 26 July 2017, AHC4806-2017 (MP: Luis Armando Tolosa Villabona), 14ff; for a refutation of the contractarian reciprocity argument, see also Brief for Philosophers as Amici Curiae Supporting Petitioner-Appellant, *Nonhuman Rights Project v Lavery* 2018 NY Slip Op 03309 (2018) (Nos 162358/15 and 150149/16), 14ff.

³⁴ See Peters (n 2) 45–6; David Bilchitz, 'Moving Beyond Arbitrariness: The Legal Personhood and Dignity of Non-Human Animals' (2009) 25 SAJHR 38, 42–3; Feinberg, 'The Rights of Animals and Unborn Generations' (n 19) 163; but see *Tommy v Lavery* NY App Div 4 December 2014, Case No 518336, 5.

³⁵ Leif Wenar, 'The Nature of Claim Rights' (2013) 123 Ethics 202, 207.

³⁶ See Kramer, 'Do Animals and Dead People Have Legal Rights?' (n 2) 43.

³⁷ See Kelch, 'The Role of the Rational' (n 2) 9.

³⁸ For an overview, see generally Matthew H Kramer, NE Simmonds and Hillel Steiner, *A Debate Over Rights: Philosophical Enquiries* (OUP 1998).

(i) *Will theory*

According to the will theory, the ultimate purpose of rights is to promote and protect some aspect of an individual's autonomy and self-realisation. A legal right is essentially a 'legally respected choice', and the right holder a 'small scale sovereign' whose exercise of choice is facilitated by giving her discretionary 'legal powers of control' over others' duties.³⁹ The class of potential right holders thus includes only those entities that possess agency and legal competence, which effectively rules out the possibility of animals as right holders, insofar as they lack the sort or degree of agency necessary for the will-theory conception of rights.⁴⁰

However, the fact that animals are not potential right holders under the will theory does not necessarily mean that animals cannot have legal rights altogether. The will theory has attracted abundant criticism for its under-inclusiveness as regards both the class of possible right holders⁴¹ and the types of rights it can plausibly account for, and thus seems to advance too narrow a conception of rights for it to provide a theoretical foundation for *all* rights.⁴² In particular, it may be noted that the kinds of rights typically contemplated as animal rights are precisely of the sort that generally exceed the explanatory power of the will theory, namely inalienable,⁴³ passive,⁴⁴ public-law⁴⁵ rights that protect basic aspects of animals' (partially historically and socially mediated) vulnerable corporeal existence.⁴⁶ Such rights, then, are best explained on an interest-theoretical basis.

³⁹ Hart, 'Legal Rights' (n 25) 183, 188–9.

⁴⁰ See Kramer, 'Do Animals and Dead People Have Legal Rights?' (n 2) 30; Hart, 'Legal Rights' (n 25) 185.

⁴¹ A problematic corollary of the will theory is its conceptual awkwardness, or inability, to accommodate as right holders not just non-human but also human non-agents, such as infants and the mentally incapacitated. As noted by Hart, 'Are There Any Natural Rights?' (n 7) 181, the will conception of rights 'should incline us not to extend to animals and babies ... the notion of a right'; see also Kramer, 'Rights Without Trimmings' (n 17) 69.

⁴² As pointed out by van Duffel, neither the will theory nor the interest theory may be a 'plausible candidate for a comprehensive theory of rights', and it may be best to assume that both theories simply attempt to capture the essence of different kinds of rights. See Siegfried van Duffel, 'The Nature of Rights Debate Rests on a Mistake' (2012) 93 *Pacific Philosophical Quarterly* 104, 105, 117 *et passim*.

⁴³ Under the will theory, inalienable rights are not 'rights' by definition, as they precisely preclude the right holder's power to waive the correlative duties. See DN MacCormick, 'Rights in Legislation' in PMS Hacker and J Raz (eds), *Law, Morality, and Society: Essays in Honour of HLA Hart* (OUP 1977) 198f; Kramer, 'Rights Without Trimmings' (n 17) 73.

⁴⁴ The will theory is primarily modelled on active rights (liberties and powers) that directly facilitate individual autonomy and choice, but is less conclusive with regard to passive rights (claims and immunities) which do not involve any action or exercise of choice by the right holder herself. cf Harel (n 14) 194–5.

⁴⁵ Hart, 'Legal Rights' (n 25) 190, conceded that the will theory does not provide a sufficient analysis of constitutionally guaranteed fundamental rights; legal animal rights, by contrast, are most intelligibly explained as public-law rights held primarily against the state which has correlative duties to respect and protect.

⁴⁶ The will theory appears to limit the purpose of rights protection to a narrow aspect of human nature—the active, engaging and self-determining side—while ignoring the passive, vulnerable and needy side. Autonomy is certainly an important good deserving of normative protection, but it is hardly the only such good. See Jeremy Waldron, 'Introduction' in Jeremy Waldron (ed), *Theories of Rights* (OUP 1984) 11; MacCormick, 'Rights in Legislation' (n 43) 197, 208.

(ii) *Interest theory*

Animal rights theories most commonly ground animal rights in animal interests, and thus naturally gravitate to the interest theory of rights.⁴⁷ According to the interest theory, the ultimate purpose of rights is the protection and advancement of some aspect(s) of an individual's well-being and interests.⁴⁸ Legal rights are essentially 'legally-protected interests' that are of special importance and concern.⁴⁹ With its emphasis on well-being rather than on agency, the interest theory seems more open to the possibility of animal rights from the outset. Indeed, as regards the class of possible right holders, the interest theory does little conceptual filtering beyond requiring that right holders be capable of having interests.⁵⁰ Given that, depending on the underlying definition of 'interest', this may cover all animals, plants and, according to some, even inanimate objects, the fairly modest and potentially over-inclusive conceptual criterion of 'having interests' is typically complemented by the additional, more restrictive moral criterion of 'having moral status'.⁵¹ Pursuant to this limitation, not just *any* being capable of having interests can have rights, but only those whose well-being is not merely of instrumental, but of intrinsic or 'ultimate value'.⁵²

Accordingly, under the interest theory, two conditions must be met for animals to qualify as potential right holders: (i) animals must have interests, (ii) the protection of which is required not merely for ulterior reasons, but for the animals' own sake, because their well-being is intrinsically valuable. Now, whether animals are capable of having interests in the sense relevant to having rights and whether they have moral status in the sense of inherent or ultimate value is still subject to debate. For example, some have denied that animals possess interests based on an understanding of interests as wants and desires that require complex cognitive abilities such as having beliefs and language.⁵³ However, most interest theories opt for a broader understanding of interests in the sense of 'being in someone's interest', meaning that an interest holder can be 'made better or worse off' and is able to benefit in some way from protective action.⁵⁴ Typically, though not invariably, the capacity for having

⁴⁷ See Kelch, 'The Role of the Rational' (n 2) 10ff; for an interest-based approach to animal rights, see eg Feinberg, 'The Rights of Animals and Unborn Generations' (n 19); Cochrane (n 5) 19ff.

⁴⁸ Kramer, 'Do Animals and Dead People Have Legal Rights?' (n 2) 29; MacCormick, 'Rights in Legislation' (n 43) 192.

⁴⁹ J Raz, 'Legal Rights' (1984) 4 OJLS 1, 12; Waldron, 'Introduction' (n 46) 12, 14.

⁵⁰ See William A Edmundson, *An Introduction to Rights* (2nd edn, CUP 2012) 97; Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) 176; Feinberg, 'The Rights of Animals and Unborn Generations' (n 19) 167.

⁵¹ See Kramer, 'Do Animals and Dead People Have Legal Rights?' (n 2) 33ff, 39.

⁵² Raz, *The Morality of Freedom* (n 50) 166, 177ff; see also Neil MacCormick, 'Children's Rights: A Test-Case for Theories of Right' in Neil MacCormick, *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (OUP 1982) 159–60.

⁵³ See RG Frey, *Interests and Rights: The Case Against Animals* (OUP 1980) 78ff; HJ McCloskey, 'Rights' (1965) 15 *The Philosophical Quarterly* 115, 126; but see Tom Regan, 'McCloskey on Why Animals Cannot Have Rights' (1976) 26 *The Philosophical Quarterly* 251.

⁵⁴ Harel (n 14) 195; Kramer, 'Do Animals and Dead People Have Legal Rights?' (n 2) 33.

interests in this broad sense is bound up with sentience—the capacity for conscious and subjective experiences of pain, suffering and pleasure.⁵⁵ Thus, most interest theorists quite readily accept (sentient) animals as potential right holders, that is, as the kind of beings that are capable of holding legal rights.⁵⁶

More importantly yet for legal purposes, the law already firmly rests on the recognition of (some) animals as beings who possess intrinsically valuable interests. Modern animal welfare legislation cannot be intelligibly explained other than as acknowledging that the animals it protects (i) have morally and legally relevant goods and interests, notably in their welfare, life and physical or mental integrity.⁵⁷ Moreover, it rests on an (implicit or explicit) recognition of those animals as (ii) having moral status in the sense of having intrinsic value. The underlying rationale of modern, non-anthropocentric, ethically motivated animal protection laws is the protection of animals *qua* animals, for their own sake, rather than for instrumental reasons.⁵⁸ Some laws go even further by directly referencing the ‘dignity’ or ‘intrinsic value’ of animals.⁵⁹

It follows that existing animal welfare laws already treat animals as intrinsically valuable holders of some legally relevant interests—and thus as precisely the sorts of beings who possess the qualities that are, under an interest theory of rights, necessary and sufficient for having rights. This, then, prompts the question whether those very laws do not only conceptually allow for *potential* animal rights, but might also give rise to *actual* legal rights for animals.

3. Do Animals Have (Simple) Legal Rights?

Notwithstanding that animals *could* have legal rights conceptually, the predominant doctrinal opinion is that, as a matter of positive law, animals *do not* have any, at least not in the sense of proper, legally recognised and claimable

⁵⁵ See eg Feinberg, ‘The Rights of Animals and Unborn Generations’ (n 19) 166; Kramer, ‘Do Animals and Dead People Have Legal Rights?’ (n 2) 39–40; Visa AJ Kurki, ‘Why Things Can Hold Rights: Reconceptualizing the Legal Person’ in Visa AJ Kurki and Tomasz Pietrzykowski (eds), *Legal Personhood: Animals, Artificial Intelligence and the Unborn* (Springer 2017) 79–80.

⁵⁶ See eg Wenar, ‘The Nature of Claim Rights’ (n 35) 207, 227; Kramer, ‘Do Animals and Dead People Have Legal Rights?’ (n 2) 54; Feinberg, ‘The Rights of Animals and Unborn Generations’ (n 19) 166.

⁵⁷ See also Kurki, ‘Why Things Can Hold Rights’ (n 55) 80.

⁵⁸ See Thomas G Kelch, ‘A Short History of (Mostly) Western Animal Law: Part II’ (2013) 19 *Animal Law Review* 347, 348ff; Bilchitz, ‘Moving Beyond Arbitrariness’ (n 34) 44ff; in this vein, the Constitutional Court of South Africa (8 December 2016, CCT 1/16 [57]) noted that ‘the rationale behind protecting animal welfare has shifted from merely safeguarding the moral status of humans to *placing intrinsic value on animals as individuals*’ (emphasis added); the well-established German concept of ‘*ethischer Tierschutz*’ expresses this non-anthropocentric, ethical thrust of animal welfare law. See Margot Michel, ‘Law and Animals: An Introduction to Current European Animal Protection Legislation’ in Anne Peters, Saskia Stucki and Livia Boscardin (eds), *Animal Law: Reform or Revolution?* (Schulthess 2015) 91–2.

⁵⁹ 1999 Federal Constitution (Bundesverfassung) (CH), Article 120(2) and 2005 Animal Welfare Act (Tierschutzgesetz) (CH), Article 1 and 3(a); 2010 Animal Welfare Act (Tierschutzgesetz) (LI), Article 1; 2018 Animal Welfare Act (Loi sur la protection des animaux) (LU), Article 1; 1977 Experiments on Animals Act (Wet op de dierproeven) (NL), Article 1a; European Parliament and Council Directive 2010/63/EU of 22 September 2010 on the protection of animals used for scientific purposes [2010] OJ L276/33, Recital 12.

rights.⁶⁰ Yet, there is a certain inclination, especially in Anglo-American parlance, to speak—in a rather vague manner—of ‘animal rights’ as if they already exist under current animal welfare legislation. Such talk of existing animal rights is, however, rarely backed up with further substantiations of the underlying claim that animal welfare laws do in fact confer legal rights on animals. In the following, I will examine whether animals’ existing legal protections may be classified as legal rights and, if so, what kind of rights these constitute. The analysis will show (A) that implicit animal rights (hereinafter referred to as ‘animal welfare rights’)⁶¹ can be extracted from animal welfare laws as correlatives of explicit animal welfare duties, but that this reading remains largely theoretical so far, given that such unwritten animal rights are hardly legally recognised in practice. Moreover, (B) the kind of rights derivable from animal welfare laws are currently at best imperfect and weak rights that do not provide animals with the sort of robust normative protection that is generally associated with legal rights, and typically also expected from legal animal rights *qua* institutionalised moral animal rights. Finally, (C) the new conceptual categories of ‘*simple* animal rights’ and ‘*fundamental* animal rights’ are introduced in order to distinguish, and account for the qualitative differences, between such current, imperfect, weak animal rights and potential, ideal, strong animal rights.

A. Extracting ‘Animal Welfare Rights’ from Animal Welfare Laws

(i) The simple argument from correlativity

Existing animal welfare laws are not framed in the language of rights and do not codify any explicit animal rights. They do, however, impose on people legal duties designed to protect animals—duties that demand some behaviour that is beneficial to the welfare of animals. Some commentators contend that correlative (claim) rights are thereby conferred upon animals as the beneficiaries of such duties.⁶² This view is consistent with, and, indeed, the logical

⁶⁰ See eg Steven M Wise, ‘Legal Rights for Nonhuman Animals: The Case for Chimpanzees and Bonobos’ (1996) 2 *Animal Law Review* 179, 179; Richard A Epstein, ‘Animals as Objects, or Subjects, of Rights’ in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (OUP 2005) 144ff; Francione, *Animals, Property, and the Law* (n 2) 91ff; Kelch, ‘The Role of the Rational’ (n 2) 18; Court of Appeal of Alberta, *Reece v Edmonton (City)*, 2011 ABCA 238 [6]; *Herrmann v Germany* App no 9300/07 (ECtHR, 26 June 2012), separate opinion of Judge Pinto de Albuquerque, 38; *Noah v Attorney General HCJ* 9232/01 [2002–2003] IsrLR 215, 225, 232, 253.

⁶¹ This type of current legal animal rights will be called ‘animal welfare rights’ in order to indicate their origin in current animal welfare laws.

⁶² See eg Cass R Sunstein, ‘Standing for Animals (with Notes on Animal Rights)’ (2000) 47 *UCLA Law Review* 1333 (claiming that current animal welfare law creates ‘a robust set of animal rights’ or even ‘an incipient bill of rights for animals’; *ibid* 1334, 1336); Bilchitz, ‘Moving Beyond Arbitrariness’ (n 34) 43ff, 48–9 (concluding that ‘the existing statutory framework can already be seen to confer certain legal rights upon animals’; 50 fn 61); Jerrold Tannenbaum, ‘Animals and the Law: Property, Cruelty, Rights’ (1995) 62 *Social Research* 539, 581; Beauchamp (n 2) 207; Wise, ‘Hardly a Revolution’ (n 2) 910ff; this view was endorsed by the Supreme Court of India 7 May 2014, civil appeal no 5387 of 2014 [27] (stating that the Prevention of Cruelty to Animals Act ‘deals with duties of persons having charge of animals, which is mandatory in nature and hence confer corresponding rights on animals’).

conclusion of, an interest-theoretical analysis.⁶³ Recall that rights are essentially legally protected interests of intrinsically valuable individuals, and that a claim right is the 'position of normative protectedness that consists in being owed a ... legal duty'.⁶⁴ Under existing animal welfare laws, some goods of animals are legally protected interests in exactly this sense of ultimately valuable interests that are protected through the imposition of duties on others. However, the inference from existing animal welfare duties to the existence of correlative 'animal welfare rights' appears to rely on a somewhat simplistic notion of correlativity, along the lines of 'where there is a duty there is a right'.⁶⁵ Two objections in particular may be raised against the view that beneficial duties imposed by animal welfare laws are sufficient for creating corresponding legal rights in animals.

First, not every kind of duty entails a correlative right.⁶⁶ While some duties are of an unspecific and general nature, only relational, *directed* duties which are *owed to* rather than merely regarding someone are the correlatives of (claim) rights. Closely related, not everyone who stands to benefit from the performance of another's duty has a correlative right. According to a standard delimiting criterion, beneficial duties generate rights only in the *intended* beneficiaries of such duties, that is, those who are supposed to benefit from duties designed to protect their interests.⁶⁷ Yet, animal welfare duties, in a contemporary reading, are predominantly understood not as indirect duties *regarding* animals—duties imposed to protect, for example, an owner's interest in her animal, public sensibilities or the moral character of humans—but as direct duties *owed to* the protected animals themselves.⁶⁸ Moreover, the constitutive purpose of modern animal welfare laws is to protect animals for their own sake. Animals are therefore clearly beneficiaries in a qualified sense, that is, they are not merely accidental or incidental, but the direct and intended primary beneficiaries of animal welfare duties.⁶⁹

⁶³ See eg Joel Feinberg, 'Human Duties and Animal Rights' in Feinberg, *Rights, Justice, and the Bounds of Liberty* (n 19) 193–4 *et passim*; Kramer, 'Do Animals and Dead People Have Legal Rights?' (n 2) 54; Wenar, 'The Nature of Claim Rights' (n 35) 218, 220; Visa AJ Kurki, *A Theory of Legal Personhood* (OUP 2019) 62–5.

⁶⁴ Matthew H Kramer, 'Legal and Moral Obligation' in Martin P Golding and William A Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell 2005) 188.

⁶⁵ eg, for Sunstein correlativity seems to run both ways: 'Not only do rights create duties, but the imposition of a duty also serves to create a right.' Cass R Sunstein, 'Rights and Their Critics' (1995) 70 *Notre Dame L Rev* 727, 746.

⁶⁶ On this objection, see also Kelch, 'The Role of the Rational' (n 2) 8–9.

⁶⁷ See Lyons (n 29) 176; Waldron, 'Introduction' (n 46) 10; critically Kramer, 'Rights Without Trimmings' (n 17) 85ff; Visa AJ Kurki, 'Rights, Harming and Wronging: A Restatement of the Interest Theory' (2018) 38 *OJLS* 430, 436ff.

⁶⁸ See eg Beauchamp (n 2) 207; Feinberg, 'The Rights of Animals and Unborn Generations' (n 19) 161–2, 166; Bilchitz, 'Moving Beyond Arbitrariness' (n 34) 45–6; in this vein, a German high court held that, based on the criminal law justification of necessity ('rechtfertigender Notstand'), private persons may be authorised to defend the legally protected goods of animals *on behalf of* the animals, independently of or even against the interests of their owners. OLG Naumburg, judgment of 22 February 2018, case no 2 Rv 157/17, recital II; on why animals need directed rather than indirect duties, see Edmundson, 'Do Animals Need Rights?' (n 2) 350ff.

⁶⁹ See also Francione, *Animals, Property, and the Law* (n 2) 100.

Secondly, one may object that an analysis of animal rights as originating from intentionally beneficial duties rests on a conception of rights precisely of the sort which has the stigma of redundancy attached to it. Drawing on Hart, this would appear to cast rights as mere 'alternative formulation of duties' and thus 'no more than a redundant translation of duties ... into a terminology of rights'.⁷⁰ Admittedly, as MacCormick aptly puts it:

[To] rest an account of claim rights *solely* on the notion that they exist whenever a legal duty is imposed by a law intended to benefit assignable individuals ... is to treat rights as being simply the 'reflex' of logically prior duties.⁷¹

One way of responding to this redundancy problem is to reverse the logical order of rights and duties. On this account, rights are not simply created by (and thus logically posterior to) beneficial duties, but rather the converse: such duties are derived from and generated by (logically antecedent) rights. For example, according to Raz, 'Rights are grounds of duties in others' and thus justificational prior to duties.⁷² However, if rights are understood not just as existentially correlative, but as justificational prior to duties, identifying intentionally beneficial animal welfare duties as the source of (logically posterior) animal rights will not suffice. In order to accommodate the view that rights are grounds of duties, the aforementioned argument from correlativity needs to be reconsidered and refined.

(ii) *A qualified argument from correlativity*

A refined, and reversed, argument from correlativity must show that animal rights are not merely reflexes *created* by animal welfare duties, but rather the *grounds* for such duties. In other words, positive animal welfare duties must be plausibly explained as some kind of codified reflection, or visible manifestation, of 'invisible' background animal rights that give rise to those duties.

This requires further clarification of the notion of a justificational priority of rights over duties. On the face of it, the idea that rights are somehow antecedent to duties appears to be at odds with the Hohfeldian correlativity axiom, which stipulates an existential nexus of mutual entailment between rights and duties—one cannot exist without the other.⁷³ Viewed in this light, it seems paradoxical to suggest that rights are causal for the very duties that are simultaneously constitutive of those rights—cause and effect seem to be mutually dependent. Gewirth offers a plausible explanation for this seemingly circular understanding of the relation between rights and duties. He illustrates that the 'priority of claim rights over duties in the order of justifying purpose or final

⁷⁰ Hart, 'Legal Rights' (n 25) 181–2, 190.

⁷¹ MacCormick, 'Rights in Legislation' (n 43) 199.

⁷² Raz, *The Morality of Freedom* (n 50) 167, 170f; see also Alan Gewirth, 'Introduction' in Alan Gewirth, *Human Rights: Essays on Justification and Applications* (University of Chicago Press 1982) 14.

⁷³ See Kramer, 'Rights Without Trimmings' (n 17) 40.

causality is not antithetical to their being correlative to each other' by means of an analogy:

Parents are prior to their children in the order of efficient causality, yet the (past or present) existence of parents can be inferred from the existence of children, as well as conversely. Hence, the causal priority of parents to children is compatible with the two groups' being causally as well as conceptually correlative. The case is similar with rights and duties, except that the ordering relation between them is one of final rather than efficient causality, of justifying purpose rather than bringing-into-existence.⁷⁴

Upon closer examination, this point may be specified even further. To stay with the analogy of (biological)⁷⁵ parents and their children: it is actually the *content* of 'parents'—a male and a female (who at some point procreate together)—that exists prior to and independently of possibly ensuing 'children', whereas this content turns into 'parents' only in conjunction with 'children'. That is, the concepts of 'parents' and 'children' are mutually entailing, whilst, strictly speaking, it is not 'parents', but rather that which will later be called 'parents' only once the 'child' comes into existence—the pre-existing content—which is antecedent to and causal for 'children'.

Applied to the issue of rights and duties, this means that it is actually the content of a 'right'—an interest—that exists prior to and independently of, and is (justificationally) causal for the creation of, a 'duty', which, in turn, is constitutive of a 'right'. The distinction between 'right' and its content—an interest—allows the pinpointing of the latter as the reason for, and the former as the concomitant correlative of, a duty imposed to protect the pre-existing interest. It may thus be restated, more precisely, that it is not rights, but the *protected interests* which are grounds of duties. Incidentally, this specification is consistent with Raz's definition of rights, according to which 'having a right' means that an aspect of the right holder's well-being (her interest) 'is a sufficient reason for holding some other person(s) to be under a duty'.⁷⁶ Now, the enactment of modern animal welfare laws is in and of itself evidence of the fact that some aspects of animals' well-being (their interests) are—both temporally and justificationally—causal and a sufficient reason for imposing duties on others. Put differently: animal *interests* are *grounds* of animal welfare *duties*, and this, in turn, is conceptually constitutive of animal *rights*.

In conclusion, existing animal welfare laws could indeed be analysed as comprising unwritten 'animal welfare rights' as implicit correlatives of the explicit animal welfare duties imposed on others. The essential feature of legal rules conferring rights is that they specifically aim at protecting individual interests or goods—whether they do so *expressis verbis* or not is irrelevant.⁷⁷ Even so, in order for a right to be an actual (rather than a potential or merely

⁷⁴ Gewirth (n 72) 14.

⁷⁵ For the sake of the argument, I am only referring to *biological* parents.

⁷⁶ Raz, *The Morality of Freedom* (n 50) 166, 180–1.

⁷⁷ See MacCormick, 'Rights in Legislation' (n 43) 191–2; Raz, 'Legal Rights' (n 49) 13–14.

postulated) legal right, it should at least be *legally recognised* (if not claimable and enforceable),⁷⁸ which is determined by the applicable legal rules. In the absence of unequivocal wording, whether a legal norm confers unwritten rights on animals becomes a matter of legal interpretation. While theorists can show that a rights-based approach lies within the bounds of a justifiable interpretation of the law, an actual, valid legal right hardly comes to exist by the mere fact that some theorists claim it exists. For that to happen, it seems instrumental that some public authoritative body, notably a court, recognises it as such. That is, while animals' existing legal protections may already provide for all the ingredients constitutive of rights, it takes a court to *actualise* this *potential*, by authoritatively interpreting those legal rules as constituting rights of animals. However, because courts, with a few exceptions, have not done so thus far, it seems fair to say that unwritten animal rights are not (yet) legally recognised in practice and remain a mostly theoretical possibility for now.⁷⁹

B. The Weakness of Current 'Animal Welfare Rights'

Besides the formal issue of legal recognition, there are substantive reasons for questioning whether the kind of rights extractable from animal welfare laws are really rights at all. This is because current 'animal welfare rights' are unusually weak rights that do not afford the sort of strong normative protection that is ordinarily associated with legal rights.⁸⁰ Classifying animals' existing legal protections as 'rights' may thus conflict with the deeply held view that, because they protect interests of special importance, legal rights carry *special normative force*.⁸¹ This quality is expressed in metaphors of rights as 'trumps',⁸² 'protective fences',⁸³ protective shields or 'No Trespassing' signs,⁸⁴ or 'suits of armor'.⁸⁵ Rights bestow upon individuals and their important interests a particularly robust kind of legal protection against conflicting individual or collective interests, by singling out 'those interests that are *not to be sacrificed to the utilitarian calculus*' and 'whose promotion or protection is to be

⁷⁸ According to some scholars, legal rights exist only when they are enforceable. See eg Ronald Dworkin, *Justice for Hedgehogs* (Harvard UP 2011) 405–6 (stating that legal rights are only those that the right holder is entitled to enforce on demand in directly available adjudicative processes).

⁷⁹ A significant practical hurdle to the legal recognition of animal rights is that in virtually any legal order, animals are legal objects rather than legal persons. Because legal personhood and right holding are generally thought to be inextricably linked, many jurists refrain from calling the existing legal protections of animals 'rights'. See critically Kurki, 'Why Things Can Hold Rights' (n 55) 71, 85–6.

⁸⁰ See generally Francione, *Animals, Property, and the Law* (n 2) 91ff.

⁸¹ On this, see Kai Möller, 'Proportionality and Rights Inflation' in Grant Huscroft, Bradley W Miller and Grégoire Webber, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (CUP 2014) 166; Harel (n 14) 197ff; Waldron, 'Introduction' (n 46) 14ff.

⁸² Ronald Dworkin, 'Rights as Trumps' in Waldron, *Theories of Rights* (n 46) 153.

⁸³ Bernard E Rollin, 'The Legal and Moral Bases of Animal Rights' in HB Miller and WH Williams (eds), *Ethics and Animals* (Humana Press 1983) 106.

⁸⁴ Tom Regan, 'The Day May Come: Legal Rights for Animals' (2004) 10 *Animal Law Review* 11, 15–16.

⁸⁵ Frederick Schauer, 'A Comment on the Structure of Rights' (1993) 27 *Ga L Rev* 415, 429 *et passim*.

given *qualitative precedence* over the social calculus of interests generally'.⁸⁶ Current 'animal welfare rights', by contrast, provide an atypically weak form of legal protection, notably for two reasons: because they protect interests of secondary importance or because they are easily overridden.

In order to illustrate this, consider the kind of rights that can be extracted from current animal welfare laws. Given that these are the correlatives of existing animal welfare duties, the substance of these rights must mirror the content laid down in the respective legal norms. This extraction method produces, first, a rather odd subgroup of 'animal welfare rights' that have a narrow substantive scope protecting highly specific, secondary interests, such as a (relative) right to be slaughtered with prior stunning,⁸⁷ an (absolute) right that experiments involving 'serious injuries that may cause severe pain shall not be carried out without anaesthesia',⁸⁸ or a right of chicks to be killed by fast-acting methods, such as homogenisation or gassing, and to not be stacked on top of each other.⁸⁹ The weak and subsidiary character of such rights becomes clearer when placed within the permissive institutional context in which they operate, and when taking into account the more basic interests that are left unprotected.⁹⁰ While these rights may protect certain secondary, derivative interests (such as the interest in being killed *in a painless manner*), they are simultaneously premised on the permissibility of harming the more primary interests at stake (such as the interest in *not being killed* at all). Juxtaposed with the preponderance of suffering and killing that is legally allowed in the first place, phrasing the residual legal protections that animals do receive as 'rights' may strike us as misleading.⁹¹

But then there is a second subgroup of 'animal welfare rights', extractable from general animal welfare provisions, that have a broader scope, protecting more basic, primary interests, such as a right to well-being, life,⁹²

⁸⁶ Jeremy Waldron, 'Rights in Conflict' in Jeremy Waldron, *Liberal Rights: Collected Papers 1981–1991* (CUP 1993) 209, 215–16 (emphasis added); see also Frederick Schauer, 'Rights, Constitutions and the Perils of Panglossianism' (2018) 38 OJLS 635, 637.

⁸⁷ Correlative to Council Regulation (EC) 1099/2009 of 24 September 2009 on the protection of animals at the time of killing [2009] OJ L303/1, Article 4 and Annex I.

⁸⁸ Correlative to European Parliament and Council Directive 2010/63/EU of 22 September 2010 on the protection of animals used for scientific purposes [2010] OJ L276/33, Article 14(1)(2).

⁸⁹ Correlative to 2008 Animal Welfare Ordinance (Tierschutzverordnung) (CH), Article 178a(3).

⁹⁰ The permissive character of animal welfare law was highlighted by the Israeli High Court of Justice in a case concerning the force-feeding of geese. Commenting on the 'problematic' regulatory language, it noted that the stated 'purpose of the Regulations is "to prevent the geese's suffering." Clearly these regulations do not prevent suffering; at best they minimize, to some extent, the suffering caused'. *Noah v Attorney General* (n 60) 234–5. See also Shai Lavi, 'Humane Killing and the Ethics of the Secular: Regulating the Death Penalty, Euthanasia, and Animal Slaughter' (2014) 4 UC Irvine Law Review 297, 321 (noting the disparity between 'the resolution to overcome pain and suffering, which exists side-by-side with inhumane conditions that remain unchallenged and are often taken for granted').

⁹¹ As MacCormick, 'Children's Rights' (n 52) 159, has succinctly put it: 'Consider the oddity of saying that turkeys have a right to be well fed in order to be fat for the Christmas table'; this is not to minimise the importance of existing animal welfare protections. Even though they are insufficient and weak compared to proper legal rights, that does not mean that they are insignificant. See, on this point, Regina Binder, 'Animal Welfare Regulation: Shortcomings, Requirements, Perspectives' in Anne Peters, Saskia Stucki and Livia Boscardin (eds), *Animal Law: Reform or Revolution?* (Schulthess 2015) 83.

⁹² eg correlative to 1972 Animal Welfare Act (Tierschutzgesetz) (DE), § 1 and 17(1).

dignity,⁹³ to not suffer unnecessarily,⁹⁴ or against torture and cruel treatment.⁹⁵ Although the object of such rights is of a more fundamental nature, the substantive guarantee of these facially fundamental rights is, to a great extent, eroded by a conspicuously low threshold for permissible infringements.⁹⁶ That is, these rights suffer from a lack of normative force, which manifests in their characteristically *high infringeability* (ie their low resistance to being overridden). Certainly, most rights (whether human or animal) are relative *prima facie* rights that allow for being balanced against conflicting interests and whose *infringement* constitutes a *violation* only when it is not justified, notably in terms of necessity and proportionality.⁹⁷ Taking rights seriously does, however, require certain safeguards ensuring that rights are only overridden by sufficiently important considerations whose weight is proportionate to the interests at stake. As pointed out by Waldron, the idea of rights is seized on as a way of resisting, or at least restricting, the sorts of trade-offs that would be acceptable in an unqualified utilitarian calculus, where 'important individual interests may end up being traded off against considerations which are intrinsically less important'.⁹⁸ Yet, this is precisely what happens to animals' *prima facie* protected interests, any of which—irrespective of how important or fundamental they are—may enter the utilitarian calculus, where they typically end up being outweighed by human interests that are comparatively less important or even trivial, notably dietary and fashion preferences, economic profitability, recreation or virtually any other conceivable human interest.⁹⁹

Any 'animal welfare rights' that animals may presently be said to have are thus either of the substantively oddly specific, yet rather secondary, kind or, in the case of more fundamental *prima facie* rights, such that are highly infringeable and 'evaporate in the face of consequential considerations'.¹⁰⁰ The remaining question is whether these features render animals' existing legal protections *non-rights* or just particularly unfit or *weak rights*, but rights nonetheless. The answer will depend on whether the quality of special strength, weight or force is considered a conceptually constitutive or merely typical but not essential feature of rights. On the first view, a certain normative force would function as a threshold criterion for determining what counts as a right

⁹³ eg correlative to 2005 Animal Welfare Act (Tierschutzgesetz) (CH), Article 1 and 26(1)(a).

⁹⁴ eg derived from Animal Welfare Act 2006 (UK), s 4.

⁹⁵ See eg Supreme Court of India 7 May 2014, civil appeal no 5387 of 2014 [62] (extracting from animal welfare law, *inter alia*, the right to life, to food and shelter, to dignity and fair treatment, and against torture); similarly, Court of Appeal of Alberta, *Reece v Edmonton (City)*, 2011 ABCA 238, dissenting opinion Justice Fraser [43].

⁹⁶ For example, the *prima facie* right to be free from unnecessary pain and suffering is, in effect, rendered void if virtually any kind of instrumental interest in using animals is deemed necessary and a sufficient justification for its infringement.

⁹⁷ See Edmundson, 'Do Animals Need Rights?' (n 2) 346; Harel (n 14) 198; Laurence H Tribe, 'Ten Lessons Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Work of Steven M Wise' (2001) 7 *Animal Law Review* 1, 2.

⁹⁸ See Waldron, 'Rights in Conflict' (n 86) 209–11.

⁹⁹ See Francione, *Animals, Property, and the Law* (n 2) 17ff, 109.

¹⁰⁰ Francione, *Animals, Property, and the Law* (n 2) 114.

and for disqualifying those legal protections that may structurally resemble rights but do not meet a minimum weight.¹⁰¹ On the second view, the normative force of rights would serve as a variable that defines the particular weight of different types of rights on a spectrum from weak to strong.¹⁰² To illustrate the intricacies of drawing a clear line between paradigmatically strong rights, weak rights or non-rights based on this criterion, let us return to the analogy with (biological) 'parents'. In a minimal sense, the concept of 'parents' may be essentially defined as 'biological creators of a child'. Typically, however, a special role as nurturer and caregiver is associated with the concept of 'parent'. Now, is someone who merely meets the minimal conceptual criterion (by being the biological creator), but not the basic functions attached to the concept (by not giving care), still a 'parent'? And, if so, to what extent? Are they a full and proper 'parent', or merely an imperfect, dysfunctional form of 'parent', a bad 'parent', but a 'parent' nonetheless? Maybe current animal rights are 'rights' in a similar sense as an absent, negligent, indifferent biological mother or father who does not assume the role and responsibilities that go along with parenthood is still a 'parent'. That is, animals' current legal protections may meet the minimal conceptual criteria for rights, but they do not perform the characteristic normative function of rights. They are, therefore, at best atypically weak and imperfect rights.

C. The Distinction between Simple and Fundamental Animal Rights

In the light of the aforesaid, *if* one adopts the view that animals' existing legal protections constitute legal rights—that is, if one concludes that existing animal welfare laws confer legal rights on animals despite a lack of explicit legal enactment or of any coherent judicial recognition of unwritten animal rights, and that the kind of rights extractable from animal welfare law retain their rights character regardless of how weak they are—then an important qualification needs to be made regarding the nature and limits of such 'animal welfare rights'. In particular, it must be emphasised that this type of legal animal rights falls short of (i) our ordinary understanding of legal rights as particularly robust protections of important interests and (ii) institutionalising the sort of inviolable, basic moral animal rights (along the lines of human rights) that animal rights theorists typically envisage.¹⁰³ It thus seems warranted to separate the kind of imperfect and weak legal rights that animals may be said to

¹⁰¹ For Schauer, a certain normative force seems to be constitutive of the concept of rights. He argues that a right exists only insofar as an interest is protected against the sorts of low-level justifications that would otherwise be sufficient to restrict the interest if it were not protected by the right. See Schauer, 'A Comment on the Structure of Rights' (n 85) 430 *et passim*.

¹⁰² In this vein, Sunstein holds that animal welfare laws 'protect a form of animal rights, and there is nothing in the notion of rights or welfare that calls for much, or little, protection of the relevant interests'. Sunstein, 'Standing for Animals' (n 62) 1335.

¹⁰³ On the universal basic rights of animals, see eg Donaldson and Kymlicka (n 1) 19ff.

have as a matter of positive law from the kind of ideal,¹⁰⁴ proper, strong fundamental rights that animals potentially ought to have as a matter of future law.

In order to denote and account for the qualitative difference between these two types of legal animal rights, and drawing on similar distinctions as regards the rights of individuals under public and international law,¹⁰⁵ I propose to use the conceptual categories of *fundamental* animal rights and other, *simple* animal rights. As to the demarcating criteria, we can distinguish between simple and fundamental animal rights based on a combination of two factors: (i) *substance* (fundamentality or non-fundamentality of the protected interests) and (ii) *normative force* (degree of infringeability). Accordingly, simple animal rights can be defined as weak legal rights whose substantive content is of a non-fundamental, ancillary character and/or that lack normative force due to their high infringeability. In contradistinction, fundamental animal rights are strong legal rights along the lines of human rights that are characterised by the cumulative features of substantive fundamentality and normative robustness due to their reduced infringeability.

The ‘animal welfare rights’ derivable from current animal welfare laws are simple animal rights. However, it is worth noting that while the first subtype of substantively non-fundamental ‘animal welfare rights’ belongs to this category irrespective of their infringeability,¹⁰⁶ the second subtype of substantively fundamental ‘animal welfare rights’ presently falls in this category purely in respect of their characteristically high infringeability. Yet, the latter is a dynamic and changeable feature, insofar as these rights *could* be dealt with, in case of conflict, in a manner whereby they would prove to be more robust. In other words, while the simple animal rights of the second subtype currently lack the normative force of legal rights, they do have the *potential* to become fundamental animal rights. Why animals need such fundamental rights will be explored in the final section.

4. *Should Animals Have (Fundamental) Legal Rights?*

Beyond the imperfect, weak, simple rights that animals may be said to have based on existing animal welfare laws, a final normative question remains with a view to the future law: whether animals ought to have strong legal rights proper. I will focus on fundamental animal rights—such as the right to life, bodily integrity, liberty and freedom from torture—as these correspond best

¹⁰⁴ ‘Ideal right’ in the sense of ‘what *ought* to be a positive ... right, and would be so in a better or ideal legal system’. Feinberg, *Social Philosophy* (n 4) 84.

¹⁰⁵ In domestic public law, fundamental or constitutional rights are distinguished from other, simple public (eg administrative) law rights. Likewise, in international law, human rights can be distinguished from other, simple or ordinary international individual rights. See Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (CUP 2016) 436ff.

¹⁰⁶ Indeed, substantively non-fundamental simple animal rights may be quite resistant to being overridden, and may sometimes even be absolute (non-infringeable) rights.

with the kind of ‘ought to be legal rights’ typically alluded to in animal rights discourse. Given the general appeal of rights language, it is not surprising that among animal advocates there is an overall presumption in favour of basic human rights-like animal rights.¹⁰⁷ However, it is often simply assumed that, rather than elucidated why, legal rights would benefit animals and how this would strengthen their protection. In order to undergird the normative claim that animals *should* have strong legal rights, the following subsections will look at functional reasons why animals *need* such rights.¹⁰⁸ I will do so through a non-exhaustive exploration of the potential legal advantages and political utility of fundamental animal rights over animals’ current legal protections (be they animal welfare laws or ‘animal welfare rights’).

A. Procedural Aspect: Standing and Enforceability

Against the backdrop of today’s well-established ‘enforcement gap’ and ‘standing dilemma’,¹⁰⁹ one of the most practical benefits typically associated with, or expected from, legal animal rights is the facilitation of standing for animals in their own right and, closely related, the availability of more efficient mechanisms for the judicial enforcement of animals’ legal protections.¹¹⁰ This is because legal rights usually include the procedural element of having standing to sue, the right to seek redress and powers of enforcement—which would enable animals (represented by legal guardians) to institute legal proceedings in their own right and to assert injuries of their own.¹¹¹ This would also ‘decentralise’ enforcement, that is, it would not be concentrated in the hands (and at the sole discretion) of public authorities, but supplemented by private standing of animals to demand enforcement. Ultimately, such an expanded enforceability could also facilitate incremental legal change by feeding animal rights questions into courts as fora for public deliberation.

However, while standing and enforceability constitute crucial procedural components of *any* effective legal protection of animals, for present purposes, it should be noted that fundamental animal rights (or any legal animal rights) are—albeit maybe conducive—neither necessary nor sufficient to this end. On the one hand, not all legal rights (eg some socio-economic human rights) are necessarily enforceable. Merely conferring legal rights on animals will

¹⁰⁷ Nonetheless, the usefulness of legal rights is not undisputed within the animal advocacy movement. For an overview of some pragmatic and principled objections against animal *rights*, see Kymlicka and Donaldson (n 12) 325ff.

¹⁰⁸ See generally Edmundson, ‘Do Animals Need Rights?’ (n 2); Peters (n 2) 46ff.

¹⁰⁹ Today, animals’ legal protections remain pervasively under-enforced by the competent public authorities as well as practically unenforceable by the affected animals or their human representatives for lack of standing. See eg Sunstein, ‘Standing for Animals’ (n 62) 1334ff; Tribe (n 97) 3.

¹¹⁰ The link between rights and the legal-operational advantage of standing was famously highlighted by Christopher D Stone, ‘Should Trees Have Standing? Toward Legal Rights for Natural Objects’ (1972) 45 S Cal L Rev 450; see further Cass R Sunstein, ‘Can Animals Sue?’ in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (OUP 2005); Peters (n 2) 47–8.

¹¹¹ See Stone (n 110) 458ff; Tribe (n 97) 3.

therefore, in itself, not guarantee sufficient legal protection from a procedural point of view. Rather, fundamental animal rights must encompass certain procedural rights, such as the right to access to justice, in order to make them effectively enforceable. On the other hand, animals or designated animal advocates could simply be granted standing auxiliary to today's animal welfare laws, which would certainly contribute towards narrowing the enforcement gap.¹¹² Yet, standing as such merely offers the *purely procedural* benefit of being able to legally assert and effectively enforce any given legal protections that animals may have, but has no bearing on the *substantive content* of those enforceable protections. Given that the issue is not just one of improving the enforcement of animals' existing legal protections, but also of substantially improving them, standing alone cannot substitute for strong substantive animal rights. Therefore, animals will ultimately need both strong substantive *and* enforceable rights, which may be best achieved through an interplay of fundamental rights and accompanying procedural guarantees.

B. Substantive Aspect: Stronger Legal Protection for Important Interests

The aforesaid suggests that the critical function of fundamental animal rights is not procedural in nature; rather, it is to substantively improve and fortify the protection of important animal interests. In particular, fundamental animal rights would strengthen the legal protection of animals on three levels: by establishing an abstract equality of arms, by broadening the scope of protection to include more fundamental substantive guarantees and by raising the burden of justification for infringements.

First of all, fundamental animal rights would create the *structural* preconditions for a level playing field where human and animal interests are both reinforced by equivalent rights, and can thus collide on equal terms. Generally speaking, not all legally recognised interests count equally when balanced against each other, and rights-empowered interests typically take precedence over or are accorded more weight than unqualified competing interests.¹¹³ At present, the structural makeup of the balancing process governing human–animal conflicts is predisposed towards a prioritisation of human over animal interests. Whereas human interests are buttressed by strong, often fundamental rights (such as economic, religious or property rights), the interests at stake on the animal side, if legally protected at all, enter the utilitarian calculus as unqualified interests that are merely shielded by simple animal welfare laws, or simple rights that evaporate quickly in situations of conflict and do not

¹¹² See eg Constitutional Court of South Africa 8 December 2016, CCT 1/16 (affirming the National Council of Societies for the Prevention of Cruelty to Animals' statutory power of private prosecution and to institute legal proceedings in case of animal cruelty offences).

¹¹³ See Frederick Schauer, 'Proportionality and the Question of Weight' in Grant Huscroft, Bradley W Miller and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (CUP 2014) 177–8.

compare to the sorts of strong rights that reinforce contrary human interests.¹¹⁴ In order to achieve some form of abstract equality of arms, animals' interests need to be shielded by strong legal rights that are a match to humans' rights. Fundamental animal rights would correct this structural imbalance and set the stage for an equal consideration of interests that is not *a priori* biased in favour of humans' rights.

Furthermore, as defined above, fundamental animal rights are characterised by both their substantive fundamentality and normative force, and would thus strengthen animals' legal protection in two crucial respects. On a *substantive level*, fundamental animal rights are grounded in especially important, fundamental interests. Compared to substantively non-fundamental simple animal rights, which provide for narrow substantive guarantees that protect secondary interests, fundamental animal rights would expand the scope of protection to cover a wider array of basic and primary interests. As a result, harming fundamentally important interests of animals—while readily permissible today insofar as such interests are often not legally protected in the first place¹¹⁵—would trigger a justification requirement that initially allows those animal interests to enter into a balancing process. For even with fundamental animal rights in play, conflicts between human and animal interests will inevitably continue to exist—albeit at the elevated and abstractly equal level of conflicts of rights—and therefore require some sort of balancing mechanism.¹¹⁶

On this *justificatory level*, fundamental animal rights would then demand a special kind and higher burden of justification for infringements.¹¹⁷ As demonstrated above, substantively fundamental yet highly infringeable simple animal rights are marked by a conspicuously low threshold for justifiable infringements, and are regularly outweighed by inferior or even trivial human interests. By contrast, the normative force of fundamental animal rights rests on their ability to raise the 'level of the minimally sufficient justification'.¹¹⁸ Modelling these more stringent justification requirements on established principles of fundamental (human) rights adjudication, this would, first, limit the sorts of considerations that constitute a 'legitimate aim' which can be balanced against fundamental animal rights. Furthermore, the balancing process must encompass a strict proportionality analysis, comprised of the elements of suitability, necessity and proportionality *stricto sensu*, which would preclude the

¹¹⁴ See generally Saskia Stucki, *Grundrechte für Tiere* (Nomos 2016) 151ff.

¹¹⁵ For example, under the Swiss 2005 Animal Welfare Act (Tierschutzgesetz), life itself is not a legally protected good, and the (painless, non-arbitrary) killing of an animal does not therefore require any justification.

¹¹⁶ See also *Noah v Attorney General* (n 60) 253–4 (pointing out that balancing different interests is 'part and parcel of our legal system').

¹¹⁷ See generally Edmundson, 'Do Animals Need Rights?' (n 2) 346; Sunstein, 'Rights and Their Critics' (n 65) 736–7.

¹¹⁸ On this threshold-raising conception of rights, see generally Schauer, 'A Comment on the Structure of Rights' (n 85) 430; Ronald Dworkin, *Taking Rights Seriously* (Harvard UP 1978) 191–2 (noting that a right cannot justifiably be overridden 'on the minimal grounds that would be sufficient if no such right existed').

bulk of the sorts of low-level justifications that are currently sufficient.¹¹⁹ This heightened threshold for justifiable infringements, in turn, translates into a decreased infringeability of fundamental animal rights and an increased immunisation of animals' *prima facie* protected interests against being overridden by conflicting considerations and interests of lesser importance.

Overall, considering this three-layered strengthening of the legal protection of animals' important interests, fundamental animal rights are likely to set robust limits to the violability and disposability of animals as means to human ends, and to insulate animals from many of the unnecessary and disproportionate inflictions of harm that are presently allowed by law.

C. Fallback Function: The Role of Rights in Non-ideal Societies

Because contemporary human–animal interactions are, for the most part, detrimental to animals, the latter appear to be in particular need of robust legal protections against humans and society.¹²⁰ Legal rights, as strong (but not impenetrable) shields, provide an instrument well suited for this task, as they operate in a way that singles out and protects important individual goods *against* others and the political community as a whole. For this reason, rights are generally considered an important counter-majoritarian institution, but have also been criticised for their overly individualistic, antagonistic and anti-communitarian framing.¹²¹ Certainly, it may be debated whether there is a place for the institution of rights in an ideal society—after all, rights are not decrees of nature, but human inventions that are historically and socially contingent.¹²² However, rights are often born from imperfect social conditions, as a ‘response to a failure of social responsibility’¹²³ and as corrections of experiences of injustice, or, as Dershowitz puts it: ‘rights come from *wrongs*’.¹²⁴ Historical experience suggests that, at least in non-ideal societies, there is a practical need for rights as a safety net—a ‘position of fall-back and security’¹²⁵—that guarantees individuals a minimum degree of protection, in case or because other, less coercive social or moral mechanisms fail to do so.

¹¹⁹ At present, the overwhelming portion of permissible interferences with animals' interests can hardly be said to be necessary or proportionate in any real sense of the word. See Francione, *Introduction to Animal Rights* (n 17) 9, 55.

¹²⁰ As noted by Teubner, animal rights ‘create basically defensive institutions. Paradoxically, they incorporate animals into human society in order to create defences against the destructive tendencies of human society against animals’. Gunther Teubner, ‘Rights of Non-Humans? Electronic Agents and Animals as New Actors in Politics and Law’ (2006) 33 *Journal of Law and Society* 497, 521.

¹²¹ See eg Mark Tushnet, ‘An Essay on Rights’ (1984) 62 *Tex L Rev* 1363; Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (Free Press 1991); for a modern reformulation of the rights critique, see eg Robin L West, ‘Tragic Rights: The Rights Critique in the Age of Obama’ (2011) 53 *Wm & Mary L Rev* 713.

¹²² See generally Alan Dershowitz, *Rights from Wrongs: A Secular Theory of the Origins of Rights* (Basic Books 2004) 59ff.

¹²³ See Sunstein, ‘Rights and Their Critics’ (n 65) 754.

¹²⁴ Dershowitz (n 122) 9.

¹²⁵ Jeremy Waldron, ‘When Justice Replaces Affection: The Need for Rights’ (1988) 11 *Harv JL & Pub Pol’y* 625, 629.

Yet, as Edmundson rightly points out, this view of rights as backup guarantees does not quite capture the particular need for rights in the case of animals.¹²⁶ It is premised on the existence of a functioning overall social structure that can in some cases, and maybe in the ideal case, substitute for rights. However, unlike many humans, most animals are not embedded in a web of caring, affectionate, benevolent relations with humans to begin with, but rather are caught up in a system of exploitative, instrumental and harmful relations. For the vast majority of animals, it is not enough to say that rights would serve them as fallbacks, because there is nowhere to fall from—by default, animals are already at (or near) the bottom. Accordingly, the concrete need for rights may be more acute in the case of animals, as their function is not merely to complement, but rather to compensate for social and moral responsibility, which is lacking in the first place.¹²⁷ To give a (somewhat exaggerated) example: from the perspective of a critical legal scholar, meta-theorising from his office in the ivory tower, it may seem easier, and even desirable, to intellectually dispense with the abstract notion of rights, whereas for an elephant who is actually hunted down for his ivory tusks, concrete rights may make a very real difference, literally between life and death. Therefore, under the prevailing social conditions, animals need a set of basic rights as a primary ‘pull-up’ rather than as a subsidiary backup—that is, as *compensatory baseline* guarantees rather than as *complementary background* guarantees.

D. Transformative Function: Rights as ‘Bridges’ between Non-ideal Realities and Normative Ideals

Notwithstanding that animals need fundamental rights, we should not fail to recognise that even the minimum standards such rights are designed to establish and safeguard seem highly ambitious and hardly politically feasible at present. Even a rudimentary protection of fundamental animal rights would require far-ranging changes in our treatment of animals, and may ultimately rule out ‘virtually all existing practices of the animal-use industries’.¹²⁸ Considering how deeply the instrumental and inherently harmful use of animals is woven into the economic and cultural fabric of contemporary societies, and how pervasive animal cruelty is on both an individual and a collective level, the implications of fundamental animal rights indeed seem far removed from present social practices.¹²⁹ This chasm between normative aspirations

¹²⁶ See Edmundson, ‘Do Animals Need Rights?’ (n 2) 358.

¹²⁷ More generally, the practical need for rights as complementary or compensatory guarantees will vary depending on social context, and may be more immediate and pressing for the disempowered, disenfranchised, marginalised, victimised, vulnerable, disadvantaged or even oppressed portions of society. See generally Patricia J Williams, ‘Alchemical Notes: Reconstructing Ideals from Deconstructed Rights’ (1987) 22 *Harvard Civil Rights-Civil Liberties Law Review* 401.

¹²⁸ Donaldson and Kymlicka (n 1) 40, 49; see further Tom Regan, *The Case for Animal Rights* (University of California Press 2004) 330ff, 348–9; Bilchitz, ‘Moving Beyond Arbitrariness’ (n 34) 69.

¹²⁹ See Bilchitz, ‘Moving Beyond Arbitrariness’ (n 34) 69.

and the deeply imperfect empirical realities they collide with is not, however, a problem unique to fundamental *animal* rights; rather, it is generally in the nature of fundamental rights—human or animal—to postulate normative goals that remain, to some extent, aspirational and unattainable.¹³⁰ Aspirational rights express commitments to ideals that, even if they may not be fully realisable at the time of their formal recognition, act as a continuous reminder and impulse that stimulates social and legal change towards a more expansive implementation.¹³¹ In a similar vein, Bilchitz understands fundamental rights as moral ideals that create the pressure for legal institutionalisation and as ‘bridging concepts’ that facilitate the transition from past and present imperfect social realities towards more just societies.¹³²

This, then, provides a useful lens for thinking about the aspirational nature and transformative function of fundamental animal rights. Surely, the mere formal recognition of fundamental animal rights will not, by any realistic measure, bring about an instant practical achievement of the ultimate goal of ‘abolishing exploitation and liberating animals from enslavement’.¹³³ They do, however, create the legal infrastructure for moving from a non-ideal reality towards more ideal social conditions in which animal rights can be respected. For example, a strong animal right to life would (at least in industrialised societies) preclude most forms of killing animals for food, and would thus certainly conflict with the entrenched practice of eating meat. Yet, while the current social normality of eating animals may make an immediate prohibition of meat production and consumption unrealistic, it is also precisely the reason why animals need a right to life (ie a right not to be eaten), as fundamental rights help to denormalise (formerly) accepted social practices and to establish, internalise and habituate normative boundaries.¹³⁴ Moreover, due to their dynamic nature, fundamental rights can generate successive waves of more stringent and expansive duties over time.¹³⁵ Drawing on Bilchitz, the established concept of ‘progressive realisation’ (originally developed in the context of socio-economic human rights) may offer a helpful legal framework for the gradual practical implementation of animal rights. Accordingly, each fundamental animal right could be seen as comprising a *minimum core* that has to be ensured immediately, coupled with a general *prohibition of retrogressive measures*,

¹³⁰ On the aspirational dimension of human rights, see generally Philip Harvey, ‘Aspirational Law’ (2004) 52 Buff L Rev 701.

¹³¹ *ibid* 717–18; Raz, ‘Legal Rights’ (n 49) 14–15, 19; ‘rights are to law what conscious commitments are to the psyche’. Williams (n 127) 424.

¹³² See David Bilchitz, ‘Fundamental Rights as Bridging Concepts: Straddling the Boundary Between Ideal Justice and an Imperfect Reality’ (2018) 40 Hum Rts Q 119, 121ff.

¹³³ Donaldson and Kymlicka (n 1) 49; see also Gary L Francione, *Rain Without Thunder: The Ideology of the Animal Rights Movement* (Temple UP 2007) 2.

¹³⁴ cf Kymlicka and Donaldson (n 12) 331–2.

¹³⁵ On the dynamic nature of rights and their generative power, see Raz, *The Morality of Freedom* (n 50) 171; Waldron, ‘Rights in Conflict’ (n 86) 212, 214.

and an obligation to progressively move towards a *fuller realisation*.¹³⁶ Therefore, even if fundamental animal rights may currently not be fully realisable, the very act of introducing them into law and committing to them as normative ideals places animals on the 'legal map'¹³⁷ and will provide a powerful generative basis—a starting point rather than an endpoint¹³⁸—from which a dynamic process towards their more expansive realisation can unfold.

5. Conclusion

The question of animal rights has been of long-standing moral concern. More recently, the matter of institutionalising moral animal rights has come to the fore, and attaining legal rights for animals has become an important practical goal of animal advocates. This article started out from the prefatory observation that the process of juridification may already be in its early stages, as judicially recognised animal rights are beginning to emerge from both animal welfare law and human rights law. With legal animal rights on the horizon, the analysis set out to systematically address the arising conceptual, doctrinal and normative issues, in order to provide a theoretical underpinning for this legal development. The article showed that the idea of legal animal rights has a sound basis in both legal theory as well as in existing law. That is, legal animal rights are both conceptually possible and already derivable from current animal welfare laws. However, the analysis has also revealed that the 'animal welfare rights' which animals may be said to have as a matter of positive law fall short of providing the sort of strong normative protection that is typically associated with legal rights and that is furthermore expected from legal animal rights *qua* institutionalised moral animal rights. This discrepancy gave rise to a new conceptual distinction between two types of legal animal rights: simple and fundamental animal rights.

While the umbrella term 'animal rights' is often used loosely to refer to a wide range of legal protections that the law may grant to animals, distinguishing between simple and fundamental animal rights helps to unveil important differences between what we may currently call 'legal animal rights' based on existing animal welfare laws, which are weak legal rights at best, and the kind of strong, fundamental legal rights that animals should have as a matter of future law. This distinction is further conducive to curbing the trivialisation of the language of animal rights, as it allows us to preserve the normative force of fundamental animal rights by separating out weaker rights and classifying them as other, simple animal rights. Lastly, it is interesting to note that, with courts deriving legal animal rights from both animal welfare law and from

¹³⁶ See David Bilchitz, 'Does Transformative Constitutionalism Require the Recognition of Animal Rights?' (2010) 25 *Southern African Public Law* 267, 291ff.

¹³⁷ Bilchitz, 'Moving Beyond Arbitrariness' (n 34) 71.

¹³⁸ cf Harvey (n 130) 723 (noting that human rights will always remain a 'work in progress rather than a finished project'); similarly, Kymlicka and Donaldson (n 12) 333.

constitutional, fundamental or human rights law, first prototypes of simple and fundamental animal rights are already discernible in emerging case law. Whereas Christopher Stone once noted that ‘each successive extension of rights to some new entity has been . . . a bit unthinkable’ throughout legal history,¹³⁹ the findings of this article suggest that we may presently be witnessing a new generation of legal rights in the making—legal animal rights, simple and fundamental.

¹³⁹ Stone (n 110) 453.

THE MORAL *STATUS* OF ANIMALS: A CRITICAL ANALYSIS AND A GRADUALIST PROPOSAL*

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ABSTRACT

In this essay the author, after having distinguished and analyzed four options on the moral *status* of animals, argues in favour of the third, for which animals undergo an unjustifiable harm not only from the suffering caused to them by many human practises, but also from a death induced in advance. Finally, he defends the principle of the equal consideration of the interests and suggests that the value of life of sentient beings is directly proportional to their cognitive, emotional and social complexity.

KEYWORDS

Moral status, animal ethics, equal consideration of interests, gradualist approach

1. INTRODUCTION: FOUR OPTIONS FOR THE MORAL STATUS OF ANIMALS

The question of the moral *status* of animals is nowadays hard to avoid for anyone who deals with practical ethics, and more generally with moral philosophy, given the enormous interest it arouses in the public opinion. It is sufficient to see the amount of websites in favour of vegetarianism or veganism and against vivisection and

* This text is a reworking of the paper presented at the Eleventh International Conference of the Italian Society for Analytic Philosophy (S.I.F.A.), entitled "Philosophy, Analysis and Public Engagement", held at the Department of Human Sciences of the University of L'Aquila, from 3 to 5 september 2014. A similar version was read on 29 november 2017 at the Bioethics seminar organized by the University of Turin, where I was invited by Maurizio Mori. I thank all the people intervened with questions and comments for their contribution to the improvement of the paper.

factory farms. Or take a look at the ever-growing number of associations in favour of animals. Not to mention the many campaigns promoted or sponsored by famous actors. But, above all, by now most moral philosophers have expressed an opinion on the ethics of the relationship between man and animal, highlighting its importance. In this paper I will try to identify the most plausible position on so current and so controversial a subject.

Asking ourselves what is the moral *status* of animals means asking the following questions: do we have moral obligations to animals? If the answer is yes, are they due to the effects that our actions towards them have on humans, or are they *direct* obligations, because animals deserve consideration as such? If, as in the latter case, animals are moral *patients*, in what sense are they part of the moral community? How much do their interests count compared to human interests? And what relation does their value as individuals have with that of our own species?

I will divide the answers to these questions into four main options (listed in ascending order of consideration of animals).

O₁ (anti-animalism): animals do not possess any moral *status*. We have no direct obligations to them, they are not part of the moral community (they are not moral patients). This is the widely prevalent attitude in the history of Western thought. It can be found in Aristotle, St. Augustine, Thomas Aquinas, Kant, etc., and today is represented by Carruthers, Narveson and Peter Harrison¹. Not to attribute any moral *status* to animals means not to ascribe a direct moral consideration even to their suffering, i.e. not to accept what we might call the *minimal animalist argument* (hereafter MAA), structured as follows:

it is directly wrong to procure unjustified suffering to sentient beings
animals are sentient beings

it is directly wrong to procure unjustified suffering to animals

O₁'s supporters deny MAA either because they do not subscribe to the first premise (Aristotle, Narveson, etc.) or because they do not subscribe to the second (Descartes, P. Harrison) or because they reject both of them (Carruthers). They either deny that animals suffer or they deny the relevance of their suffering. While denying direct consideration to non-human sentient beings, these philosophers make extensive use of indirect reasons for not mistreating them (among which stands out the one made famous by Ovid motto: *saevitia in bruta est tirocinium crudelitatis in homines*). In their perspective, the interests of animals matter only when they are causally related to human interests.

¹ Cf. Carruthers 2011, Narveson 1977 and Harrison 1991.

O₂ (moderate animalism): animals possess moral *status*, i.e. they are worthy of direct moral consideration, but it is not comparable (in any way) to that of humans, whose value in itself is higher and whose interests are to be given greater importance. Whoever chooses this option, in modern times Scruton, Pollan etc.², accepts MAA and accordingly rejects all those human practices that involve unjustified suffering directed at other sentient beings (the emblematic example is given by intensive rearing). But he does not think that animal suffering has the same weight as human suffering. Furthermore, he does not believe that an early induced death constitutes a harm to beings without a sense of the future (or lacking a sense of the long-term future). Or, if it is, it is not such as to render their killing unjustifiable.

O₃ (strong animalism): animals possess a full moral *status*. This type of position is defended by Singer, Regan, Rachels, DeGrazia, Nussbaum, Korsgaard, etc.³. They, going beyond MAA, also give weight to animal life, arguing that its abbreviation damages them. Many of O₃'s supporters arrive to accept the idea that equal consideration should be given to the interests of animals and human beings when equal or that all «subjects-of-a-life» should be ascribed equal value, coming to recognize the suffering of animals the same weight as human suffering. But they believe that this does not preclude the possibility of valuing the life of mentally more complex beings (persons) as being more important than the life of mentally less complex beings (non-persons), because the former receive greater harm from a premature death than the latter.

O₄ (radical animalism): all sentient beings have the same moral *status*, irrespective of their biological belonging or cognitive abilities. It is the thesis supported by radical animal rights movements and is founded on the texts of Sapontzis, Johnson, Dunayer, etc.⁴, from which comes the request (addressed to defenders of O₃) to draw fully the consequences of attributing equal consideration to sentient beings or equal value to subjects-of-a-life, placing them on the same level also in regard to the value of their lives and to the harm they receive from an early death. For the proponents of this option, there is no convincing argument for asserting that the life of a mentally more complex being has more value than the life of a less complex being.

In the following paragraphs I will argue against O₁, O₂ and O₄, defending the animalism of O₃.

2. AGAINST O₁

The thesis that denies non-human animals any direct moral consideration, dominant in the Western philosophical tradition, today is no longer likely to be

² See Scruton 2004, Pollan 2006.

³ Cf. Singer 1975, Regan 1983, Rachels 1990, DeGrazia 1996, Nussbaum 2006, Korsgaard 2011.

⁴ See Sapontzis 1987, Johnson 1983, Dunayer 2004.

proposed because the premises supporting MAA (*conditio sine qua non* for offering animals a ticket to join the moral community) are hardly questionable, making its conclusion fully compelling.

In fact, with regard to the second premise of MMA, we should note that attributing states of consciousness to at least some parts of the animal world is at present the predominant position in the scientific community, which is not with Descartes, Harrison and Carruthers. The recent *Cambridge Declaration on Consciousness*, underscribed by eminent scholars (cognitive scientists, neurophysiologists, neuropharmacologists, neuroanatomists, etc.), is significant in this respect. In this text we find written that it is fully justified on the basis of available scientific data to ascribe consciousness to animal species other than our own⁵. The data that comes from the study of animal behaviour, evolutionary theory and physiology (especially neurophysiology) make it reasonable to attribute the ability to feel at least to all or almost all vertebrates, plus cephalopods (highly-developed marine molluscs such as octopus, cuttlefish, squid, flying squid, musky octopus, etc.). The specimens of these species, in addition to a complex central nervous system, possess *nociceptors*, axonic terminations of sensory neurons that appear to constitute «the machinery or plumbing of pain»⁶. *The Cambridge Declaration* confirms this conclusion. It closes with the following statement: «the weight of evidence indicates that humans are not unique in possessing the neurological substrates that generate consciousness. Non-human animals, including all mammals and birds, and many other creatures, including octopuses, also possess these neurological substrates»⁷. Moreover, numerous studies prove that animal species closest to our own are able to go beyond simple sensitivity, showing complex mental qualities such as performing rational operations of a certain level, recognising themselves in the mirror, perhaps learning languages, and so on⁸.

With regard to the first premise of MAA, which identifies in sensitivity a sufficient condition for possessing moral *status*, it does not appear ethically plausible that the ability of a being to experience pain should not impose at least a *direct* obligation not to make it suffer. This thesis is nowadays largely shared (few people today believe at the same time that animals feel pleasure and pain and that such states of consciousness are morally irrelevant, at least in direct terms, as Aristotle, Aquinas and Kant did). Those who deny it usually do so on rationalistic or contractualist grounds. In the first case, moral relevance is only attributed to the suffering of rational beings. But such an attitude does not seem convincing. Meanwhile, even if

5 *The Cambridge Declaration on Consciousness* was written by P. Low, edited by J. Panksepp, D. Reiss, D. Edelman, B. Van Swinderen, P. Low and C. Koch and declared publicly on 7 July 2012 at the *Francis Crick Memorial Conference on Consciousness in Human and non-Human Animals*, Churchill College, University of Cambridge.

6 Rollin 1989: 124.

7 Low 2012.

8 Cf. Singer 2011.

we have direct obligations only to rational beings, it is questionable – in the light of what we have just said – that *all* animals are excluded from this category. However, if we make such an assumption, then we must also exclude from the moral community all those atypical humans who, for various reasons (genetic, developmental or tied to pathologies or accidents), are at the same mental level as animals (*argument from marginal cases*).

But the main path pursued today to limit the moral community to human beings is of a contractualist nature, a perspective already broadly present in tradition (it can be found, for example, in Stoic and Epicurean thought). In its general lines it is a theoretical model that defines moral conduct exclusively in terms of instrumental rationality, conceiving it as an agreement between individuals trying to pursue their interests in the most effective way. Instead of obeying the golden rule, contractualism seems guided by what has been called the silver rule: «Treat others as others treat you»⁹. In other words, this type of theory is founded on a *principle of reciprocity*, according to which «it is impossible for A to have duties to B unless B has duties to A»¹⁰. With this approach, it can be argued that we have no direct obligations to animals as they are not in a position to have obligations to us. This way of thinking, which bases duties on reciprocity, has many undesired effects, however. First of all it should also be applied to infants or gravely retarded humans, who are also incapable of reciprocity, with the effect of relieving us from any direct obligation towards them. Moreover it should also be applied to remote future generations, nullifying or seriously limiting our commitments to their needs. As Singer has written,

We could save ourselves a lot of money and effort by storing radioactive waste from nuclear power plants in containers designed to last no more than, say, 150 years. If we only have duties to those who have duties toward us, why would that be wrong? There is an old joke that goes, “Why should I do anything for posterity? What did posterity ever do for me?”¹¹.

This is not to say however that contractualism *qua talis* produces such adverse outcomes for animals and that it can protect them only by resorting to weak indirect reasons. At least if we refer to the *ideal* contractualism of Rawls and Scanlon (where rational contractors are in a state of ignorance about the natural qualities they will have)¹². Van De Veer gives proof of that. He resumes the Rawlsian concept of *original position* (the hypothetical initial situation in which persons agree to establish in

9 Cavalieri 1999: 53.

10 DeGrazia 1996: 66.

11 Singer, Mason 2006: 243.

12 Only the theories *à la* Rawls and Scanlon, today, in the English-speaking world, are labeled with the term *contractualism*. They are differentiated from the theories *à la* Narveson and Gauthier, indicated preferably with the term *contractarianism*.

accordance with justice the principles of the society of which they will be members), but introduces an important change in the *status* of unawareness of the contracting parties (the famous *veil of ignorance*, placed as a guarantee of impartial choices): deliberating individuals are not only unaware of their physical and mental characteristics and the role they will play in the society in which they will live, but they do not even know which animal species they will belong to. They only know that they are beings with sensitivity, without knowing how it will be employed: whether that of a dog, a cat, a horse or an elephant. With these premises, the principles that the contractualistic paradigm produces acquire the characteristics of a theory of interspecific justice¹³.

In the light of all this, I would therefore say that, among the options on the moral *status* of animals, O₁ does not appear to be well founded.

3. AGAINST O₂

But it is possible to go beyond MAA and sustain, against O₂'s defenders, that it is not only morally wrong to make animals suffer in an unjustifiable manner; it is morally questionable to kill them as well. This thesis can be found in the advocates of O₃ and O₄.

Peter Singer argues brilliantly against the claim of moderate animalists that animals do not suffer any harm in being killed. This attitude is well exemplified by Scruton. He does not see anything wrong in killing, without causing suffering, cattle that have been reared in a traditional way, as they, unlike humans, do not have «an eye to the future» (they have no aspirations, plans, etc., and their life has a repetitive character). In his view,

there is a real distinction, for a human being, between timely and untimely death. To be «cut short» before one's time is a waste – even a tragedy [...]. No such thoughts apply to domestic cattle. To be killed at thirty months is not intrinsically more tragic than to be killed at forty, fifty, or sixty¹⁴.

A reasoning of this kind, however, even to accept it, does not seem to cover the entire animal world, as already pointed out. There are certainly animals that are self-conscious and have «a look toward the future»: apes, dolphins, whales and so on. But even if it were true that all non-human species are devoid of a prospective view of reality, it cannot be said that they do not lose anything in dying before their time. Also beings which are only sentient, without self-awareness and rationality, killed

13 Cf. Van De Veer 1983.

14 Scruton 2004: 88.

prematurely lose all those satisfactions conform to their own species which they would have enjoyed living longer: more food, more sex, more children to be raised, etc.¹⁵. They do not need to have a sense of the future and/or a desire to continue living to undergo harm. The fact that a lizard – assuming it is a being without complex mental gifts – cannot have an interest (in the sense of desire) to live, having no sense of the future, does not mean that it is not in its interest to avoid a premature death. That it is not – cannot be – interested in continuing its life does not mean that it is not in its interest to continue it.

In addition, Scruton's reasoning is put to a difficult test by the argument from marginal cases. As Singer observes, Scruton's view could be repropounded by replacing the animals with atypical human beings (as suffering from relevant brain disabilities). That is, it could be said that

there is a real distinction, for a cognitively normal human being, between timely and untimely death. To be «cut short» before one's time is a waste – even a tragedy [...]. No such thoughts apply to a being unable to make plans for the future. For such a being to be killed at an early age is not intrinsically more tragic than to die in old age¹⁶.

Scruton's argument therefore implies that «it would be permissible to kill humans who, because of profound intellectual disabilities, are not conscious of their lives as their own and do not look forward to future achievements». But «Those who find this conclusion too shocking to accept cannot defend the killing of animals for meat on the grounds that animals lack the higher mental abilities that make it wrong to kill normal humans»¹⁷. If we are not disposed to support the morality of killing of an innocent human being – in broad terms – with severe cognitive limits (and we do not have to be), then we cannot accept the morality of killing sentient beings (which do not harm us) without a prospective view of the future, just because they belong to other species.

If these theses are correct, then not only O_1 , but also O_2 , i.e. moderate animalism, is an inadequate option for the moral *status* of animals.

4. AGAINST O_4

At this point, putting aside alternatives O_1 and O_2 , we have still to choose from O_3 and O_4 for our notion of animals' moral *status*. Despite the undeniable fascination of

15 Cf. Singer, Mason 2006: 253.

16 Singer 2009: 576.

17 Singer, Mason 2006: 253.

O₄, for which the life of all sentient beings has equal value (it is attractive to think of an equality that, in addition to the boundaries of race and sex, also crosses the boundaries of species), some of its results are strongly counter-intuitive. We can see them in Joan Dunayer's theses which criticises Singer as guilty of making morally unjustified distinctions between animal species, favouring apes (which he wants to give legal *status* to) and valuing the life of a paradigmatic human as more important than that of a hen. For Singer, it is not speciesism to think that the killing of thousands of humans (for example, the death of three thousand people on September 11, 2001) is more tragic than the killing of several million chickens (the thirty-eight million killed in American slaughterhouses on that same day)¹⁸, while according to Dunayer it is¹⁹. In fact, to be a speciesist does not only mean privileging one being over another solely because the first belongs to the human species and the second does not (this is the *old* form of speciesism which Singer also contrasts). But also discriminating against animals by adopting an anthropocentric perspective. Singer represents a *new* form of speciesism. He wants to extend moral *status* beyond the human sphere, but illegitimately favouring the animals closest to man on the mental plane over those more distant. Hence the consequence of placing self-aware and rational beings (persons) at a hierarchically higher level with respect to beings which do not possess such characteristics (non-persons)²⁰.

Dunayer's animal ethics reaches a further level of radicalism because in it the axiological assumption for which all sentient beings possess the same value is associated with the descriptive thesis whereby it is sufficient to have any kind of nervous system, even the most rudimentary, to have psychological states. This leads her to ascribe the capacity to experience pleasure and pain to insects and arachnids, ctenophores and coelenterates such as jellyfish, hydra, sea anemones, gorgonians and corals²¹. Thus arriving to assert that a spider has the same right to life as a human being²².

I would say that the decisive move to defend the plausibility of O₃ over O₄ is to assert that the same factors that for O₂'s supporters (moderate animalists) are crucial to having a «right to life», in reality play a significant role in attributing *greater* value to the life of a mentally more complex being than to the life of a mentally less complex being. What are these factors? Meanwhile a non-repetitive pattern of life compared to the inevitably fixed nature (static, always the same) of the life of beings without the characteristic traits of a person, whose satisfactions are simply incremental. For them, as McMahan points out, «Each day is merely more of the same. As an animal continues to live, goods may continue to accumulate in sequence,

18 Cf. Singer 2001: 12-13.

19 See Dunayer 2002: 16-17.

20 Cf. Dunayer 2005.

21 See Dunayer 2004: 127.

22 Cf. Dunayer 2004: 134.

but the effect is merely additive»²³. This argument, which we have already found outlined by Scruton, if – contrary to what is asserted by him – does not seem to be a good strategy to deny value to the life of merely sentient beings and to argue that they do not suffer harm from an early death, can instead be a convincing tool to argue that persons receive greater harm from death before their time.

We can perhaps say the same thing about future-oriented desires, and in particular that of continuing to live. Expressed in Regan's terms, a mentally complex individual, in addition to having future-oriented *welfare-interests*, also has (in more) future-oriented *preference-interests*²⁴. If the first are sufficient to lead to a ban on killing (and therefore those who link this prohibition to the *status* of the person are mistaken), the presence of a preference-interest to not die makes the life of an individual more important and the harm they receive from a prematurely induced death of greater gravity. Compared to a merely sentient being, a mentally complex subject with a premature death not only loses the satisfactions of future life, has also frustrated his preference to survive and all the future-oriented preferences that presuppose remaining alive in order to be satisfied.

5. DEFENCE AND ARTICULATION OF O₃

Having eliminated O₁, O₂ and O₄, there remains O₃, which appears the most convincing option for the moral *status* of animals. It has taken various forms, starting from the models developed by Singer and Regan 30-40 years ago, which philosophically still represent the two main points of reference for those who want to defend the reasons of animals. Although Regan's deontological model is not without problems, it seems preferable to the utilitarian model of Singer because utilitarianism is an ethical theory that is hardly in a reflective equilibrium with our considered beliefs. It is sufficient to think about issues like justice (distributive and retributive) or special obligations, on which the results of the application of the utilitarian conception are difficult to accept²⁵. But the limits of the utilitarian theoretical model do not invalidate the principle of equal consideration of interests advanced by Singer. In fact, this principle accords with a broad spectrum of moral theories. As Regan rightly points out, it does not imply the principle of utility and even less utilitarianism, even though compatible with them²⁶. But most of all, it does not appear to offer counter-intuitive results, as is often believed, because this option is

23 McMahan 2002: 197.

24 By «preference-interests» Regan means what we are interested in. By «welfare-interests» he means what is in our interest. The two concepts must be kept distinct because not everything that interests us is in our interest and vice versa (see Regan 1983: 87-88).

25 About this see, for example, Allegri 2008.

26 Cf. Regan 1983: 211-217.

fully compatible with the thesis of favouring the value of the life of self-aware and rational beings over purely sentient beings. This means we can attribute equal value to the suffering of all sentient beings with little difficulty. Meanwhile, putting the pain of animals on the same plane as human pain does not mean that they suffer as much as we do. The pain of many sentient species does not appear to match ours in its intensity and duration. And even in those cases where it may be (I think of the animals closest to us for their mental complexity), in situations of dilemma, the greater value of our life must lead us to favour the human animal over the non-human animal. That is, once the value of the lives is differentiated, even if we attribute the same importance to the pain of a dog as that of a human, in situations of serious conflict the greater damage inflicted by death to humans will cause us to give precedence to the latter's pain²⁷.

But, remaining in comparison with Singer, it should be noted that in order to establish the value of lives and the harm that individuals receive from a premature death, perhaps a simple division like that between persons and non-persons, favoured by him, is not appropriate, because it does not capture the multiple differences existing between individuals. Between fully self-aware and rational beings – typical humans – and mere sensory containers, there are many intermediate gradations. The concept of a person is hardly categorical. One can be *more* or *less* a person. And *almost* a person. Self-awareness and rationality do not have an “all or nothing” nature. Inasmuch as a dog, cat or ape is self-aware and rational, it is difficult to conceive of them as persons in the same way as an ordinary human being. It therefore seems more plausible to posit a *gradualist* conception of the value of life and the harm caused by death, for which the value of life increases gradually, rising up the phylogenetic scale, on the basis of the complexity of an organism. Expressed in more precise terms, the value of sentient life is *directly proportional* to the cognitive, emotional and social complexity of individuals. The more an organism is complex under these aspects, the more its life has value. And the more harm it receives from premature death.

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27 See the excellent examples in DeGrazia 1993: 26-27.

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GRANTING ANIMALS RIGHTS UNDER THE CONSTITUTION: A MISPLACED APPROACH? AN ANALYSIS IN LIGHT OF *ANIMAL WELFARE BOARD OF INDIA V. A. NAGARAJA*

*Jessamine Therese Mathew & Ira Chadha-Sridhar**

In May 2014, the Supreme Court of India delivered a sensational judgment banning certain bull-fighting practices. The Court, in its analysis, sought to bring animals under the protection of the rights discourse by stating that Article 21 of the Constitution of India could be applied to animal life. The Court stated that the term 'life' must be expansively interpreted. As animals form a crucial part of human beings' environment, their rights must also be protected under Article 21. This paper seeks to address the deeper implications of this judgment by examining the viability of such an approach. It argues that bringing animals within the ambit of rights is not only incompatible with the traditional jurisprudence of rights, but may also be an ineffective method of addressing the larger issue of protecting animals. It recommends a shift to a duty-based approach towards animal welfare which is more likely to succeed in ensuring the safe and humane treatment of animals by humans.

I. INTRODUCTION

India first embarked on its endeavours to promote animal welfare and ensure animal safety with the enactment of the Prevention of Cruelty to Animals Act in 1960 ('the PCA Act'). Since then, there has been a sustained movement towards animal welfare in the country. This is evidenced by the setting up of the Animal Welfare Board in 1962 and the rising prominence of animal welfare organisations. There has been significant progress as a result of these events, which is seen in the development of various laws and policies like those on the treatment of performing animals¹ and the ban on animal testing of cosmetics². The judiciary's intervention with regard to the issue of animal

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¹ The Performing Animals Rules, 2005.

² Govt. of India, Ministry of Health and Family Welfare, F. No. - X.11014/11/2013-DFQC (October 13, 2014).

welfare and protection has also increased with the expansion and evolution of debate. In general, Indian courts have adopted liberal and welfare-oriented stances towards these issues. In 2000, the Kerala High Court, in *N.R. Nair v. Union of India*³ ('N.R. Nair'), considered the question of extending fundamental rights to animals and emphasised that legal rights should not be "the exclusive preserve of humans which has to be extended beyond people thereby dismantling the thick legal wall with humans all on one side and all non-human animals on the other side".⁴ This view was further developed by the Supreme Court in *Animal Welfare Board of India v. A. Nagaraja*⁵ ('A. Nagaraja').

In what has been described as a landmark judgment,⁶ the Supreme Court of India created history by banning *jallikattu* (a bull-fighting festival celebrated in Tamil Nadu) and bullock-cart races in Maharashtra and Punjab. Delivered by Radhakrishnan J. and Ghose J., the judgment held that animal life could be included within the ambit of the right to life under Article 21 of the Indian Constitution (albeit to the extent that human rights were not harmed).⁷ It further held that the provisions of the PCA Act were indicative of animals' rights to "live in a healthy and clean atmosphere" or "not to be beaten, kicked".⁸ The judgment also briefly pondered upon the notion of the legislature granting animals constitutional rights so as to protect their "dignity and honour" and suggested that an amendment to that effect be made by the Parliament.⁹ This approach towards animal protection has been adopted outside of Indian jurisprudence as well, with a Court in Argentina, in the context of an orangutan's habeas corpus petition, stating that it is "necessary to recognise the animal as a subject of rights".¹⁰ Despite further stating that it has adopted a "dynamic rather than a static interpretation of the law",¹¹ the Court did not substantiate its basis for its view on the rights of animals.

We believe that a rights-based interpretation of animal welfare legislation is misplaced. This is fundamentally because it has been consistently upheld by Indian courts that Article 21 of the Constitution of India is a source

³ *N.R. Nair v. Union of India*, AIR 2000 Ker 340.

⁴ *Id.*, ¶13.

⁵ *Animal Welfare Board of India v. A. Nagaraja*, (2014) 7 SCC 547.

⁶ People for the Ethical Treatment of Animals, *Supreme Court Bans Jallikattu, Bull Races and Bullfights*, May 7, 2014, available at <http://www.petaindia.com/blog/sc-bans-jallikattu-bull-races-fights/> (Last visited on February 21, 2015).

⁷ *Animal Welfare Board of India v. A. Nagaraja*, (2014) 7 SCC 547, ¶62.

⁸ *Id.*, ¶62.

⁹ *Id.*, ¶77.

¹⁰ *Orangutan Sandra s/ appeal s/ HABEAS CORPUS*, Federal Criminal Court of Appeals, Cause No. 68331/2014/CFCI, December 18, 2014 (Argentina) (a translated version of judgment can be accessed at http://a.fastcompany.net/asset_files/-/2014/12/24/Argentina-Habeas-Corpus.pdf (Last visited on March 7, 2015)); see also Reuters, Richard Lough, *Captive orangutan has human right to freedom: Argentine court rules*, December 21, 2014, available at <http://www.reuters.com/article/2014/12/21/us-argentina-orangutan-idUSKBN0JZ0Q620141221> (Last visited on February 26, 2015).

¹¹ *Orangutan Sandra*, *id.*, ¶12.

of protection for *human* rights and *human* dignity.¹² By protecting non-human animal life through Article 21, the Supreme Court has defied earlier notions of who the possessors of this right are. Beyond the concept of possessors of rights, the larger question revolves around the effectiveness of a rights-based approach towards animal protection. Through this paper, we will argue that adopting a rights-based approach towards securing animal welfare, as endorsed by the Supreme Court, is not tenable. As an alternative, we suggest that a duty-based approach would prove to be more effective in protecting animals.

Part II will briefly summarise the *A. Nagaraja* case, upon which the paper is based. In Part III, it will be argued that animals cannot possess rights in the way that humans do within the realm of human society and will identify the possible problems that would arise should rights be created in favour of non-human animals. Against this, it will be argued that even in the realm of animal welfare and protection, a rights-based approach will be inadequate and that there should be another method of securing such welfare. Following this analysis, in Part IV, we will present an alternate approach wherein the focus will be on the duty of humans individually and the State as the collective voice of its citizens towards non-humans. We will first assess the source of such a duty and then examine the benefits. Finally, Part V will offer concluding remarks.

II. ANIMAL WELFARE BOARD OF INDIA V. A. NAGARAJA: A BRIEF SUMMARY

Delivered on May 7, 2014, *A. Nagaraja* deals with the “rights of animals under the Constitution of India as well as Indian laws, culture, tradition, religion and ethology”.¹³ The judgment was specifically in the context of the bull-taming sport ‘*jallikattu*’, which is “played” in Tamil Nadu as well as the practice of bullock-cart racing in Maharashtra. The case was primarily analysed with reference to the PCA Act, 1960, along with the Tamil Nadu Regulation of Jallikattu Act, 2009 (‘the TNRJ Act’).

The AWBI, statutorily set up under the PCA Act for the promotion of animal welfare, argued for the abolition of the foregoing practices on grounds that it violated various provisions of the PCA Act, namely §3,¹⁴ §11(1)

¹² *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 : AIR 1978 SC 597; *State of A.P. v. Challa Ramakrishna Reddy*, (2000) 5 SCC 712 : AIR 2000 SC 2083; *Kartar Singh v. State of Punjab*, (1994) 3 SCC 569, ¶448 (in which it has been stated, “... each expression used in this Article enhances human dignity and values...”).

¹³ *Animal Welfare Board of India v. A. Nagaraja*, (2014) 7 SCC 547, ¶1.

¹⁴ The Prevention of Cruelty to Animals Act, 1960, §3 reads, “It shall be the duty of every person having the care or charge of any animal to take all reasonable measures to ensure the well-being of such animal and to prevent the infliction upon such animal of unnecessary pain or suffering.”

(a) and (m)¹⁵ and §22¹⁶. It further asserted that neither of the two practices had any historical, cultural or religious significance in the two states where it was carried out. Due to its lack of significance, welfare legislation like the PCA Act would override the same as it is a Parliamentary legislation.¹⁷ Further, it argued that the TNRJ Act was repugnant to the provisions of the PCA Act and hence, cannot be given effect by the State without Presidential assent under Article 254 of the Constitution of India. As the bulls are forced to undergo great pain and suffering, this practice clearly violated §3, §11 (a) and (m), read with Article 51A(g) and Article 21 of the Constitution.

In response to these arguments, a collective of bull race organisers, argued that these sports had been “played” for the last three centuries and were, therefore, an integral part of the custom and tradition of the culture. In the course of their pleadings, they asserted that extreme care and protection was often taken to ensure that there was no pain or injury caused to the animals that participated in the event. An economic angle to their submissions was also presented in the contention that this practice was a great source of revenue for the State as it attracted a large number of spectators, who were inclined to pay to watch.¹⁸ They finally put forth the argument that sporting events can only be regulated by the State and not banned. This purpose was clearly covered by the TNRJ Act serves this purpose and clarifies the apprehensions that arise out of this case. The State of Tamil Nadu also presented arguments in this case and stated that every effort would be made to ensure that the bulls chosen for *jallikattu* were not subjected to cruelty. It also argued that §22 of the PCA Act would not apply as there is no sale of tickets for the events. The State of Maharashtra made no representations and the Court interpreted this to mean that it was in favour of a ban on such practices.

Thus, the main issues that arose for consideration were: *first*, whether *jallikattu* and bullock-cart racing are harmful to the bulls and violate

15 The Prevention of Cruelty to Animals Act, 1960, §11 (1) (a) and (m) read,

“If any person (a) beats, kicks, over-rides, over-loads, tortures or otherwise treats any animal so as to subject it to unnecessary pain or suffering or causes, or being the owner permits, any animal to be so treated; (m) solely with a view to providing entertainment confines or causes to be confined any animal (including tying of an animal as a bait in a tiger or other sanctuary) so as to make it an object or prey for any other animal [...] he shall be punishable, in the case of a first offence, with fine which shall not be less than ten rupees but which may extend to fifty rupees and in the case of a second or subsequent offence committed within three years of the previous offence, with fine which shall not be less than twenty-five rupees but which may extend, to one hundred rupees or with imprisonment for a term which may extend, to three months, or with both”.

16 The Prevention of Cruelty to Animals Act, 1960, §22 reads,

“No person shall exhibit or train (i) any performing animal unless he is registered in accordance with the provisions of this Chapter; (ii) as a performing animal, any animal which the Central Government may, by notification in the official gazette, specify as an animal which shall not be exhibited or trained as a performing animal.”

17 Animal Welfare Board of India v. A. Nagaraja, (2014) 7 SCC 547, ¶4.

18 Animal Welfare Board of India v. A. Nagaraja, (2014) 7 SCC 547, ¶5.

provisions of the PCA Act; *second*, whether the practice could be justified, culturally or historically; *third*, whether bulls had a right to life under Article 21. The Court held that *jallikattu*, and other sports involving bulls, was indeed harmful to their being. It carefully analysed the nature of a bull's response to external stimuli or danger and found that bulls' natural response is that of 'flight' as opposed to 'fight'. However, as these sports take place in closed or restricted environments, bulls are not able to exercise their natural responses, resulting in considerable harm.

With respect to the question of the cultural significance of these practices, the Court endorsed the argument of AWBI and held that the PCA Act overrides this culture or tradition. The Court reasoned that even if it had been a cultural practice, it must now give way to the provisions of the PCA Act. Finally, the Court extensively examined the "rights" of animals under Article 21. The definition of "life" under the said Article was extended to include animal life, which would further expand to mean a life of dignity, worth and honour. Reading provisions of the PCA Act along with Articles 21 and 51A(g) of the Constitution, it was held that animals also have a right against human beings not to be tortured and against the infliction of unnecessary pain or suffering. Therefore, the Court reasoned that animal dignity must be protected, and to that effect, the TNRJ Act is invalid and such sports are illegal. It further emphasised on the absence of an international framework for the protection of animal rights, and held that practices harming animals must be banned.

III. THE LEGAL CAPACITY TO POSSESS RIGHTS – WHERE DOES IT COME FROM?

In *A. Nagaraja*, the Court placed non-human animals within the paradigm of rights. This section of the paper will scrutinise this aspect of the judgment. While applying rights to entities under the State, it is seen that they are not universally applied to every object or entity that exists but are restricted to those which possess certain characteristics. The existence of these characteristics form the basis for what has been defined as "capacity for rights"¹⁹ by Joseph Raz. In his analysis of the same, he specifically refers to the idea of granting animals rights. According to him, rights can only be accorded to beings which have an "ultimate, non-derivative value" rather than an "instrumental value". The value of non-human animals to humans is merely instrumental as they are largely only brought into human society for their use and not for their intrinsic value. He goes on to propose that as animals have no individual "interests" in the manner that humans do, *i.e.*, interests which have an ultimate, non-derivative value in themselves. By virtue of their lack of mental development as compared to humans, they are incapable of forming interests which would then constitute the basis for rights. Any interest that an animal has would

¹⁹ Joseph Raz, *On the Nature of Rights*, 93 (370) MIND 194, 204 (1984).

be only “instrumental” (meaning that it exists only for the benefit of humans) and not “ultimate”.²⁰ However, it may be incorrect to infer that animals have absolutely no interests simply because they do not possess a level of mental development that humans are thought to have. Most animals, especially mammals, do demonstrate a certain amount of interest in maintaining their basic welfare by making sure of their food and sleep. Therefore, this value-oriented assessment of the capacity for rights is inadequate as it does not truly address *why* non-human animals are incapacitated to possess rights.

In order to analyse the same, it is necessary to look at other indicators which point towards the inability or incapacity of animals to possess rights. These indicators should not rely on the ‘intrinsic value’ of animals but, rather, concentrate on certain qualifying criteria for the possession of rights and consequently, on the abilities of non-human animals to satisfy them. The oft-sung anthem of the animal ‘rights’ movement is a quote by Jeremy Bentham wherein he argues for the rights of non-human animals by emphatically stating, “[t]he question is not can they reason? Nor, can they talk? But, can they suffer?”²¹ Most animal welfare organisations and movements have chosen the central theme of this emphatic statement, i.e., the capacity for suffering, as a reason to grant animals protection through rights.²²

However, the idea that the ability to feel pain and suffering automatically warrants inclusion within the ambit of the rights discourse is flawed as it fails to acknowledge the very nature of a right. While it is undoubtedly true that the ability to suffer is a commonality between human and certain non-human animals, rights are hardly based on this sole notion of suffering and its alleviation.²³ When trying to extend rights to animals, it is relevant to note whether the common characteristics between animals and humans are also in conformity with the ascription of rights that are granted to or possessed by humans in a society. If such commonalities are not apparent, the analogy that is sought to be made between the two ceases to have any meaning.²⁴

A. THE RELATION BETWEEN LEGAL PERSONHOOD AND RIGHTS

The central question that arises while attributing constitutional or legal rights to non-human animals is whether they can be said to be legal

²⁰ *Id.*

²¹ JEREMY BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 144 (1789).

²² People for the Ethical Treatment of Animals, *About PETA*, available at <http://www.peta.org/about-peta/why-peta/why-animal-rights/> (Last visited on February 20, 2015).

²³ TOM REGAN, *The Radical Case for Animal Rights* in ENVIRONMENTAL ETHICS (L. Pojman eds., 1994).

²⁴ Jens David Ohlin, *Is the Concept of a Person Necessary for Human Rights?*, 105 (1) COLUMBIA LAW REV. 209, 222 (2005).

persons. This notion of connecting animals to personhood has been a relatively untouched one, with some even writing off the need to equate animals with the idea of a person for their security of welfare.²⁵ However, this view is dangerous as it neglects to consider an essential part of the animal rights and welfare debate: whether or not animals are entitled to rights on a conceptual and principled level. With specific reference to the Indian scenario, it is vital to discuss this notion of personhood, which also finds specific reference under Article 21. The conjoint reference to personhood and Article 21 was also made in A. Nagaraj to grant animal rights.

Similar to the idea of a 'right', the concept of a 'person' itself is one that has been engulfed in serious philosophical debate. There has never been a consensus on who or what exactly constitutes a person or what this entity's defining characteristics would be.²⁶ Philosophical considerations on the topic present a person to be a free and rational agent "whose existence is an end in itself",²⁷ to a more abstract "bundle or collection of different perceptions" with the feeling of self-identity that may exist being only a "persistent illusion".²⁸ While it is ordinarily and in common parlance used to represent any human being,²⁹ there have been different identities and capabilities granted and ascribed to a person in the context of legal order. In Western jurisprudence (primarily in Roman law), a person has been defined as a rights-holder,³⁰ whereas in Indian philosophy and jurisprudence, the focus has been on the individual's ability to be bound by obligations.³¹ It is in this context of rights and obligations that the concept of personhood will be assessed here.

The most obvious qualifiers for legal personhood in a rights-based context can be found within the analysis of the nature of rights itself, particularly within a Hohfeldian analysis of jural relations.³² In his matrix, the correlative of a right would be a duty and a person's right would be satisfied only by another person's duty to not infringe upon that right. As a right requires a correlated duty, the natural inference that follows is that every person who

²⁵ Nathan Nobis, *On David Degrazia's "On the Question of Personhood beyond Homo Sapiens"*, available at http://www.morehouse.edu/facstaff/nnobis/papers/DeGrazia_comments.htm (Last visited on 22 February, 2015) (The author notes that "the question about whether any animals are persons is a harmful distraction for animal advocacy...I think very little, if any animal advocacy, should be done in terms of whether animals are persons or not").

²⁶ See generally THE IDENTITIES OF PERSONS (A.O. Rorty ed., 1976) (which presents many conflicting views on the issue).

²⁷ IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 28-29 (1785), available at <http://www.earlymoderntexts.com/pdfs/kant1785.pdf> (Last visited on February 26, 2015).

²⁸ DAVID HUME, *Of Personal Identity* in A TREATISE OF HUMAN NATURE 132-133 (1888) available at <http://www.earlymoderntexts.com/pdfs/hume1739book1.pdf> (Last visited on February 26, 2015).

²⁹ ENCARTA WORLD ENGLISH DICTIONARY 1407 (Special Indian ed., 1999).

³⁰ Max Radin, *Fundamental Concepts of the Roman Law*, 13 CAL. L. REV. 207, 222 (1925).

³¹ A.C. PARANJE, *SELF AND IDENTITY IN MODERN PSYCHOLOGY AND INDIAN THOUGHT* 60 (1998).

³² Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 (1) YALE L.J. 16 (1917).

seeks to claim a right must also be able to perform the corresponding duty that a right entails. This, in part, relates to the capacity of the entity in question to perform this duty. Thus, in a Hohfeldian sense, a 'person' is an entity who is able to perform the correlated duty to a right and ensure the protection of another person's right. For example, a person who is granted the right to life has a duty not to endanger the lives of others. In a practical sense, it would be impossible to expect non-human animals that possess a lower level of human-defined intellect and rationality to perform these duties. While as humans we may try to protect the lives of different species, it is not expected of a snake not to bite or for a tiger not to hunt. Further, the claimant of a right must also be able to have rights claimed against them, i.e., rights must be able to be enforced against a person for them to truly be entitled to them.³³

This means that the non-performance of a duty by a person may be punishable if it violates the right of another person. It is obvious that no non-human animal will ever satisfy or be expected to satisfy this requirement. Although, there were once courts which allowed cases against beetles for causing crop failure or which exiled a ram to Siberia for goring a man to death,³⁴ it is highly unlikely that modern day judicial systems would allow such claims or enforcing such punishments. This thought was echoed in a New York Appellate Court decision to dismiss a petition demanding the human right of bodily liberty for a captive chimpanzee. The Court held that rights could belong only to persons because only they could "be held legally accountable for their actions".³⁵ Therefore, an analysis purely based on the nature of rights and the concept of personhood related to rights, renders animals incapable of possessing them.

In response to such a line of thought, the response has been to compare animals to persons with disabilities and human infants or children, who cannot participate in society or perform duties in the same way that less disabled humans and adults can.³⁶ Proponents of this school of thought argue that if the ability to perform duties or the level of rationality is what qualifies an entity to be a person, persons with disabilities and infants or children would also be excluded from the purview of personhood.³⁷ Aside from the dangers of

³³ *Id.*

³⁴ See Cristina Pelayo, *Uncommon Law: The Trial of Otiorhynchus Sulcatus*, 26 (2) LITIGATION 59 (1999).

³⁵ The People of the State of New York ex rel. The Nonhuman Rights Project, Inc., on Behalf of Tommy v. Patrick C. Lavery, No. 518336, 2014 WL 6802767 (N.Y. App. Div. Dec. 4, 2014); See also David Grimm, *Chimpanzee 'personhood' fails on appeal*, SCIENCE MAG, December 4, 2015, available at <http://news.sciencemag.org/plants-animals/2014/12/chimpanzee-personhood-fails-appeal> (Last visited on February 26, 2015).

³⁶ Edd Doerr, *Ape and Essence*, 54 (4) THE HUMANIST 44.

³⁷ See generally BENTHAM, *supra* note 21; PETER SINGER, ANIMAL LIBERATION: A NEW ETHIC FOR OUR TREATMENT OF ANIMALS (1995); PAOLO CAVALIERI AND PETER SINGER, THE GREAT APE PROJECT: EQUITY BEYOND HUMANITY (1993).

comparing non-human animals to disabled humans or infants,³⁸ such a view disregards the basis for rights within a human society: the capacity to reason and to act upon such reason to make decisions to interact and exist within that society. With respect to infants and children, the reason why they must be brought within the ambit of rights is that they will prospectively become rational and reasonable members of society following a developmental process, *i.e.*, there is great potential for all children to develop and perform the duties that society demands of them in order to entitle them to rights.³⁹

On the other hand, while assessing the abilities of more disabled humans *vis-à-vis* that of less disabled humans⁴⁰ who are able to display greater signs of rationality or reasoning, it must be established as to whether there exists a non-arbitrary manner of differentiating between non-human animals and more disabled humans. This non-arbitrary distinction lies in the fact that under normal developmental circumstances, individuals who are disabled would be 'normally' functioning humans who would be able to contribute effectively to society. However, under normal developmental circumstances, no animal would be considered rational (as judged by human standards of rationality).⁴¹ The essence of this argument lies in the fact that there may be different points in a person's life where they may not be able to perform duties as mandated by the State or by society, but with changes in technology and society itself, this inability may be neutralised and transform into an ability. The fact that such an inability or disability exists at different points does not diminish the inherent capacity for performance of such duties.

The referred argument is best illustrated against the backdrop of the evolution of medical science. The vast array of cures and therapies to remedy illnesses extends not only to physical illnesses or disabilities but also to mental illnesses. Even though a person may be born with severe disability (like mental retardation or blindness), there are ways in which their condition may be improved (through intensive therapy or surgery), even to the extent that their disabilities are removed completely and they are capable of being compared to less disabled persons who possess the mental and cognitive capacity to perform their mandated duties. The potential of there being a change or reduction in their disability is what brings them within the ambit of a rights-based

³⁸ See Nora Ellen Groce & Jonathan Marks, *The Great Ape Project and Disability Rights: Ominous Undercurrents of Eugenics in Action*, 102 (4) AMERICAN ANTHROPOLOGIST 818 (2000) (The authors have argued that comparing animals and highly disabled humans could result in a dehumanisation of the disabled. This altered perception could lead to a reduction in the already precarious rights of the disabled, exacerbating the incidence of rights violations against individuals who are in most need of such protection).

³⁹ Alan Gewirth, *The Basis and Content of Human Rights*, 13 GA. L. REV. 1143, 1157 (1978).

⁴⁰ See generally Malavika Prasad, *Towards A No-Force Paradigm in Mental Health Law*, 5 NUJS L. REV. 7 (2012) (for an analysis on disability and the concept of "normal").

⁴¹ Shawn Klein, *The Problem of Animal Rights*, Navigator Magazine, September 9, 2004, available at http://news.heartland.org/sites/all/modules/custom/heartland_migration/files/pdfs/15656.pdf (Last visited on February 20, 2015).

discourse. However, animals will never possess this inherent capacity for reason and rationality, which is what renders them ineligible for rights within a human-created rights framework.

Another way in which non-human entities have achieved legal personhood is through the recognition of the State.⁴² This is a form of legal fiction which is ordinarily and most commonly followed through the creation of juristic persons. For instance, this has been done wherein companies⁴³ and religious idols⁴⁴ have been recognised as juristic persons. However, this itself is an idea that is not entirely compatible with the theory of rights as belonging to individual persons which, however, requires separate analysis and is beyond this scope of this paper.⁴⁵

Aside from an analysis originating from the nature of rights, a three-pronged test has been laid down to determine the capacity of an entity to possess legal rights under the State.⁴⁶ The *first* prong is that the entity must be able to institute legal action on its behalf. *Second*, the court must take the entity's injury into account while deciding upon relief. *Third*, any relief granted by the court must prove to be beneficial to the entity. Under our current legal system, it cannot be said that any of these three criteria is satisfied towards granting personhood to animals.

With respect to the first criterion, an animal cannot institute a suit on its own behalf. In all animal welfare cases, it is an organisation, group or human individual that institutes a suit against an offender. Although it is possible for other bodies or organisations to institute suits on behalf of groups of human individuals as well,⁴⁷ this does not negate the ability, capacity or potential of individuals to be cognisant of a violation of their own rights and to file suits against offenders.

⁴² See THOMAS ERSKINE HOLLAND, *ELEMENTS OF JURISPRUDENCE* 82 (N.R. Madhava Menon ed., 2004).

⁴³ *Saloman v. A. Saloman & Co Ltd.*, 1897 AC 22.

⁴⁴ *Pramatha Nath Mullick v. Pradyumna Kumar Mullick*, AIR 1925 PC 139; *Bishwanath & Another v. Radha Ballabhji*, AIR 1967 SC 1044 : (1967) 2 SCR 618; *Ram Jankijee Deities v. State of Bihar*, (1999) 5 SCC 50 : AIR 1999 SCW 1878.

⁴⁵ See Daniel N. Hoffman, *Personhood and Rights*, 19 (1) *POLITY* 74 (1986); See also Dale Rubin, *Corporate Personhood: How the Courts Have Employed Bogus Jurisprudence to Grant Corporations Constitutional Rights Intended for Individuals*, 28 *QUINNIPIAC LAW REV.* 523 (2009) (for a criticism of the extension of personhood to corporations).

⁴⁶ Christopher D. Stone, *Should Trees Have Standing? – Toward Legal Rights for Natural Objects*, 45 *S. CAL. L. REV.* 450, 458 (1968).

⁴⁷ See *Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India*, (1981) 1 SCC 246 : AIR 1981 SC 298; *People's Union for Democratic Right v. Union of India*, (1982) 3 SCC 235 (where the idea of a group filing Public Interest Litigation suits on behalf of individuals was analysed).

With respect to the other two criteria, while it is not impossible for courts to take animal injury into account, the remedying of such an injury is often not done in continuance of the best interest of the animal but in consonance with accepted human interests.⁴⁸ These cases are decided not with specific focus on the plight of the animals *per se* but on how much the creation of this plight and the plight itself deviates from acceptable *human* standards. This is because it is impossible to ever truly determine what the best interests of the animal are and whether any remedy granted has, in actuality, been beneficial. For example, while animal testing for the purposes of cosmetics has been outlawed in India, medical testing is still an accepted practise.⁴⁹ When assessing such a situation from the perspective of identifying the impact caused to the animal, both scenarios may have an equally disastrous consequence, resulting in death or permanent damage to the animal in question. However, since human standards of ethics and instincts of survival deem medical testing to be a far more worthy cause than cosmetic testing, it is deemed an appropriate practise. This demonstrates how the laws and regulations that are to protect animals are in effect passed against the backdrop of human interests and standards.

B. THE PROBLEM WITH A RIGHTS-BASED APPROACH TO ANIMAL WELFARE AND PROTECTION

Recognising non-human animals as legal persons and according them rights would result in several problems and conflicts within the existing rights regime. The primary problem with such an approach is that a conflict between human rights and animal rights would automatically arise. Granting animals rights, especially under the Constitution, would entitle them to a range of benefits. These benefits could possibly damage the way in which human life is benefitted through the ascription of rights to humans (for example, there may arise a conflict between human religious rights and animal rights). However, the language of rights has evolved such that the word itself can evoke feelings of “moral and metaphysical meaning” and have been used in a largely rhetorical sense.⁵⁰ Rights are important only in the context of the benefits that may be claimed through their existence. Once they are granted, rights are rarely irrevocable and unchangeable and often expand to include elements that were never initially intended.⁵¹ Any creation of rights for animals would automatically

⁴⁸ David R. Schmahmann & Lori J. Polacheck, *The Case Against Animal Rights*, 22 B. C. ENVTL. AFF. L. REV. 747, 755 (1995).

⁴⁹ The Prevention of Cruelty to Animals Act, 1960, §14.

⁵⁰ Iredell Jenkins, *The Concept of Rights and the Competence of Courts*, 18 AM. J. JURIS. 1, 7 (1973).

⁵¹ An example of this would be how Art. 21 of the Indian Constitution has been expanded far beyond the mere right to life. *See, e.g.*, Sunil Batra (2) v. Delhi Admn., (1980) 3 SCC 488 (where it was used for prisoners' rights); Olga Tellis v. Bombay Municipal Corpn., (1985) 3 SCC 545 (where it was extended to the right to livelihood); Neeraja Chaudhary v. State of H.P., (1984) 3 SCC 243 (where it was used to release bonded labourers); Mohd. Ahmed v. Union of India, 2014 SCC OnLine Del 1508 (where it was used to define the right to health in India).

create a duty on the part of humans to protect the rights of animals in an absolute sense, even to the extent that human welfare itself may be neglected, and not just to improve the treatment or welfare of animals. It has been said that a conflict of rights can only result in the prevailing of human rights,⁵² but the possibility of the effects of the evolution of such jurisprudence could prove worrisome to human welfare and social order.

Although under the benefit theory of rights⁵³ it may be argued that “rights in a weak sense” could be created for animals wherein the right exists only to the extent of the benefit that humans choose to extend unto animals.⁵⁴ However, it is practically impossible to precisely distinguish between what a ‘strong’ and a ‘weak’ right intends to protect, especially in the event of a conflict between human rights and animal rights.⁵⁵ Even if this could be done, it would possibly defeat the concept of a right as universally applicable and enforceable entitlements.

Along with the possibility of conflict, the primary drawback of adopting a rights-based approach towards animal welfare lies in the possibility of it never taking effect in the manner intended. It must not be forgotten that rights are, in essence, only instruments to realise the actualisation of human want or for the attainment of a further human goal. Rights are, therefore, more of a functional characteristic than an inherent characteristic of existence and governance. Any right that is created or sanctioned by the State is done so as to allow people to develop to their full potential and to enhance their lives. The inference that may be drawn from this is that every right, whether a claim, a privilege, an immunity or a power is only granted to a person for the purpose of furthering their own good. Rights are valued only when they effectively accomplish the reason for which they were created. In this light, a test was proposed by eminent jurist Iredell Jenkins to identify whether a proposed right will achieve the desired balance of good over possible harmful effects.⁵⁶ Jenkins proposes three questions to test the effectiveness of granting a particular right. The *first* is whether the end that is envisaged by this right is a “real and legitimate human value”.⁵⁷ *Second*, he asks whether the right will be an effective means to this end. *Finally*, will the implementation of the claimed right further good rather than harm?

⁵² P.J. FITZGERALD, SALMOND ON JURISPRUDENCE 63 (2004).

⁵³ JEREMY BENTHAM, *Of Laws in General* in THE WORKS OF JEREMY BENTHAM (1970) (Bentham developed a benefit theory of rights wherein he argued that if the performance of a duty that bestows upon another a benefit, then the other party possessed a right to have that duty performed).

⁵⁴ Michael Wilkinson, *Animal Rights: A Test Case for Theories of Rights*, 1998 UCL JURISPRUDENCE REV. 144, 145 (1998).

⁵⁵ Andrew Johnson, *A Blind Eye to Animal Rights?*, 64 (248) PHILOSOPHY 255, 258 (1989).

⁵⁶ Jenkins, *supra* note 50, 3.

⁵⁷ *Id.*

When the subjects on which the rights are conferred are animals, these questions form a substantial part of whether rights should be granted to animals or not. The *first* question itself refers to a legitimate human value, as the only end to conferring any right. There has been much discourse on whether the protection of animals is a matter of human concern and we believe that it is and it will continue to be so, either for as long as humans and non-humans share an ecosystem and environment or until humans cease to use animals for their collective or individual benefit. This point is elaborated further in the following sections of the paper. However, just because it is a legitimate human value, it does not mean that the value can only be placed on a rights pedestal or that a rights-based view will enable humans to better realise that value. This is where the second question becomes important.

The *second* question refers to the most suitable means to arrive at a particular end. If the desired end is unanimously agreed to be the protection of animals, there is more than one method of achieving this end. Granting rights to animals, rather than legislating towards their welfare would be an impractical means of achieving the final goal as it is impossible for animals to ever identify a rights violation and seek their own protection. Therefore, creating rights for them will not be the most effective means of securing and enforcing their protection. A rights-based approach would not lay down the exact manner in which animals are to be protected and, and for the reasons listed above, it would create a system of entitlements that would be almost impossible to adequately address.

Finally, if the harms and benefits of granting animals rights were to be analysed, it would be difficult to conclude that adopting such an approach would further animal welfare. This is partly due to the possibility of conflict between human and animal rights, the result of which will almost always be the victory of human rights and a subjugation of the 'rights' of animals. As will be explained in the subsequent section, there are more effective ways of protecting animals rather than forcibly bringing them within the domain of rights.

At its core, all laws relating to animal welfare and protection seek only to better their status and reduce the capacity of humans to harm them. With such an objective underlying the legislative framework relating to non-human animals and taking the nature of animals as less rational beings (as judged by humans) into consideration, a rights-based approach would not aid in the same. The focus must not be shifted by creating an unstable system of forced entitlements backed by the force of law. To sustainably protect animals, there is a need to shift the approach to animal welfare from a rights-based to approach to a duty-based approach.

IV. LOCATING ANIMAL WELFARE IN A DUTY-BASED APPROACH WITHIN THE THEORY OF JUSTICE

An analysis of animal-based legislation across temporal and spatial scales reveals several approaches towards animal welfare.⁵⁸ For the purpose of theoretical clarity, these approaches can be broadly classified into the rights-based approach and the duty-based approach. The previously addressed argument, that animals cannot possess ‘rights’ in a legal sense, negates the viability of the ‘rights-based approach’. This part of the paper finds an alternative to the right-based approach in the duty-based approach.

Non-human animals have been the subject of extensive philosophical debate.⁵⁹ The debate largely rests on the Aristotelian characterisation of nature as an ‘infinity of beings’.⁶⁰ A hierarchy of species with indistinct and doubtful boundary lines had been constructed as the basis for further analysis. Aristotelians believe that there is a ‘natural good’ in all non-human animals in terms of their productivity in the ecosystem and argue that this good should be used solely for human benefit.⁶¹ It was later, with the strong influence of Darwin’s treatise,⁶² which highlighted the evolutionary similarities between human beings and animals, that the question of granting animals ‘moral rights’ became prominent. Bentham furthered this understanding, by asserting that animals’ capacity for suffering formed the basis for their rights.⁶³ Although earlier argued in this paper that this suffering alone is not a sufficient or appropriate basis for granting rights, it still becomes relevant as the focus of animal welfare legislation and animal protection, because it is this suffering that the mechanisms of law must prevent. This notion of sentience and suffering became the basis for protecting the interests of non-human animals as it invoked compassion in the human species towards their non-human counter-parts.⁶⁴ Sentience can be approached on one hand as the basis for allocating rights to animals, and on the other, as the reason to legislate towards their welfare through a duty.

⁵⁸ Elisa Aaltola, *Animal Ethics and Interest Conflicts*, 10 (1) ETHICS AND THE ENVIRONMENT 19 (2005).

⁵⁹ See generally IMMANUEL KANT, LECTURES ON ANTHROPOLOGY (translated by Robert B. Louden, Allen W. Wood ed., 2012); CHARLES DARWIN, THE DESCENT OF MAN (1902); JEREMY BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1879); PETER SINGER, ANIMAL LIBERATION (1995).

⁶⁰ ARISTOTLE, ARISTOTLE: ‘HISTORIA ANIMALIUM’: VOLUME 1, BOOKS I-X: TEXT (D.M. Balme ed., 2002).

⁶¹ *Id.*

⁶² CHARLES DARWIN, THE DESCENT OF MAN (1902).

⁶³ BENTHAM, *supra* note 21.

⁶⁴ See PETER SINGER, PRACTICAL ETHICS (1979).

The following parts of the paper begin by examining the root of the duty that human beings owe to non-human animals. Various types of duties advocated by several jurisprudential canons are demarcated. The paper argues that human beings owe the highest of such duties to non-human animals. Finally, it is contended that it is not the abstract concept of 'animal rights', but this urgent duty that should be the focus of legislation and courts of law in India.

A. THE SOURCE OF THE DUTY – BENEVOLENCE OR JUSTICE?

A duty-based approach rests on the premise that human beings owe a duty towards non-human animals. Within the Indian context itself, The PCA Act, the primary legislation for animal protection, codifies certain acts that are obligations that humans owe to non-human animals.⁶⁵ Therefore, it seems to propose a duty-based approach towards the issue of animal welfare. The fundamental question that arises subsequently is: where does this duty emanate from? In this regard, Martha Nussbaum's work, 'Beyond Compassion and Humanity' is crucial as a contemporary compilation of various ethical approaches towards the welfare of non-human animals. This sub-part examines Nussbaum's approach in the context of several theoretical schools, and tests the viability of locating non-human animals within a complex 'theory of justice'.⁶⁶

Nussbaum begins her theoretical analysis by narrating an incident wherein Pompey, the Roman leader of 55 B.C.E., stages a combat between humans and elephants, woven into a spectacle, for the entire Roman town to watch.⁶⁷ The elephants, attempting to invoke pity in the hearts of the guests, mourn through gestures at their plight. The "agonised trumpeting" of the elephants, often quoted as part of Cicero's famous letter to M. Marius, became a symbol for extensive ethical discussion. It was believed that it was the commonality of the feeling of suffering that the elephants had with the human race that inspired sympathy and moral concern. It is this sympathy and evolved compassion that were considered the source of any legal or moral duty that human beings owed to non-human animals.⁶⁸

Aristotelians argued that all of nature is a continuum, and that all living things were worthy of respect, even wonder.⁶⁹ Conversely, Western

⁶⁵ The Prevention of Cruelty to Animals Act, 1960, §3.

⁶⁶ MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE* 327 (2009).

⁶⁷ See PLINY (THE ELDER), *THE NATURAL HISTORY OF PLINY* (translated by H.G. Bohn, 1857); MARCUS TULLIUS CICERO, *CICERO: EPISTULAE AD FAMILIARES: VOLUME 1, 62-47 B.C.* (D.R. Shackleton ed., 2004).

⁶⁸ Anders Schinkel, *Martha Nussbaum on Animal Rights*, 13 (1) *ETHICS AND THE ENVIRONMENT* 42, 42 (2008).

⁶⁹ NUSSBAUM, *supra* note 66, 328.

religious traditions asserted that the human beings were given dominion over plants and animals.⁷⁰ Religious canons have also deeply influenced philosophical thought, particularly with respect to non-human animals. These religious canons further assert, that we owe our duty to non-human animals due to the sympathy we feel for them. Nussbaum argues that this version of Aristotelianism compatible with Christianity demarcated a sharp divide between human beings and other species, re-enforcing the idea of dominion and duties towards animals emanating solely through benevolence.⁷¹ Traditional schools of thought, hence, viewed our obligations towards non-human animals as duties stemming from charity and benevolence. Nussbaum suggests the most significant alternative to this approach: the source of human duty towards non-human animals is not a misplaced idea of charity, but a concrete theory of justice that forms the content of the subsequent portion of the paper.

1. Evaluating the Viability of Nussbaum's Entitlement-Based Approach

Locating human duty towards non-human animals within a theory of justice is a complex task. According to Nussbaum, this theory is based on the premise that animals have an entitlement (as distinguishable from a right) to a 'dignified existence'. This approach was specifically borrowed from the influential N.R. Nair judgement in 2000.⁷² In Nussbaum's approach, this dignified existence comes with several 'entitlements'. This paper, in the subsequent analysis, argues that an inclusive theory of justice does not stem from these entitlements, but from positive and direct duties towards non-human animals.

Nussbaum outlines ten capabilities that animals have, and considers granting them 'entitlements' on the basis of these capabilities.⁷³ This exercise reveals several inconsistencies. Nussbaum's entitlements are based on the capabilities of animals to realise their full potential, a controversial extension of the capability approach⁷⁴ which extends across the species barrier. This approach reveals that these 'entitlements', are not inherent or enforceable like 'rights' and are subject to conditions like human beings ability to grant these

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² N.R. Nair v. Union of India, AIR 2000 Ker 340.

⁷³ NUSSBAUM, *supra* note 66, 392-400 (She highlights the following on which animal capabilities are based: Life, Bodily Health, Bodily Integrity, Senses, Imagination and Thought, Emotions, Practical Reason, Affiliation, Association with other Species, Play and Control Over One's Environment).

⁷⁴ AMARTYA SEN, THE IDEA OF JUSTICE 231-238 (2009) (The capabilities approach focuses on the existence individuals' ability to perform activities they have reason to value. The central components of this approach are the actual functionings that constitute a person's life and the alternate combinations of functionings or capabilities that person has the potential to achieve. The theory places importance on the agency of the individual and stresses that an individual's achievements must, therefore, be evaluated in terms of the goals they desire to accomplish).

entitlements, human need and demand. This excessive conditionality associated with the entitlements renders them problematic. The life of a non-human animal, which is considered to be its primary capability, is inherently subject to human need. The killing of an animal, under Nussbaum's rendition of the capabilities approach is permitted when there is a 'plausible reason' for the killing, like obtaining necessary food, harm caused to crops, other people or animals, the killing of an animal.⁷⁵ It is hard to see how an entitlement of animals to continue their lives is compatible with a justification of killing them for food.⁷⁶ As has been argued by Anders Schinkel, in his critique of Nussbaum's work, this situation gives rise to the phenomenon of 'doubling', a term used to describe Nazi doctors who carried out cruel experiments on Jews while living ethically decent family lives at home.⁷⁷ A society in which human beings are to treat animals with respect, admiration, wonder and dignity on one hand, and are entitled to kill them for advancement of their needs on the other, arguably results in a 'moral schizophrenia', which results not in progress, but in dangerous inconsistency.

Additionally, there is an evident theoretical contradiction in Nussbaum's analysis regarding killing of animals for human benefit, as she justifies⁷⁸ these exceptions within the utilitarian tradition, which she has criticised extensively.⁷⁹ She reasons that the capabilities approach is superior to utilitarianism because it respects each individual creature, refusing to rely solely on the aggregate.⁸⁰ While her central argument seems to be that every individual animal is worthy of respect because of their capabilities, she does not adequately address the use of non-human animals by humans for achieving their own ends. Nussbaum's justification under utilitarianism, therefore, results in a major (and possibly dangerous, as it allows for a way in which the indiscriminate limiting of an animal's capability may be justified) discrepancy, reducing the value of her alternative approach.

This entitlement-based approach is borne out of a deep criticism of the Kantian contract that states that only human beings can possess entitlements and rights because of their ability to participate in a social contract with the state. Nussbaum criticises the Kantian contract for its rigid distinction between species and its insistence that only members of a single species can participate in a given social contract. However, in an attempt to reconcile 'difficult situations' of using animals for food or experimentation, Nussbaum's approach endorses the premise of the Kantian contract. She states that human beings can, and must, use animals as a source of food, thereby assenting to the

⁷⁵ Schinkel, *supra* note 68, 58.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ NUSSBAUM, *supra* note 66, 402-403.

⁷⁹ *Id.*, 344.

⁸⁰ *Id.*, 345.

superiority of the human species, which also forms the basis of the Kantian contract. The arrival at an eventual ‘universal consensus’⁸¹ towards the use of animals is an unsubstantiated and ambiguous solution to the issue. The theory of entitlements is hence, unsuccessful in rationalising the fundamental question that has plagued thinkers and jurists: how can the concept of human benefit be reconciled with a theory that grants non-human animals rights?

2. Locating Nussbaum’s Theory of Justice in a Duty-Based Approach

Despite its discrepancies, Nussbaum’s analysis regarding a theory of justice remains persuasive, especially in the context of certain duties that human beings owe to non-human animals. The source of such a duty, particularly in the Indian context, could also arise from ancient teachings and beliefs that were based on a different perception of the relation between man and the universe. Unlike the West (deeply influenced by Christian texts), where man was essentially understood to be the centre of the universe,⁸² Eastern religions and cultures reflected a view which endorsed that humans were only a part of a larger universe.⁸³ Ancient Indian concepts of how to treat animals were far more complex and compassionate than the human-centric approach of the West. There were even times where the killing of animals was completely prohibited.⁸⁴ This model of law and order largely rested on the duty-based approach of humans, towards both other humans and non-human animals which was further based on principles of *dharma*.⁸⁵ This line of philosophical thought is also seen in Jainism where Jains recognised the intrinsic value of life, specifically non-human life, and sought to protect it, not through a system of entitlements but through a system of positive duties.⁸⁶ Furthermore and possibly in a bid to reconstruct these ideals, the Indian Constitution uniquely recreates the idea of a duty with no corresponding right through the insertion of the Directive

⁸¹ *Id.*, 389.

⁸² The Bible, Genesis 1:27-28 (New King James Version, 1982) (This demonstrates how God created man and woman to have dominion over every other creature on earth:

“Then God said, ‘Let Us make man in Our image, according to Our likeness; let them have dominion over the fish of the sea, over the birds of the air, and over the cattle, over all the earth and over every creeping thing that creeps on the earth.’ [...] Then God blessed them, and God said to them, ‘Be fruitful and multiply; fill the earth and subdue it; have dominion over the fish of the sea, over the birds of the air, and over every living thing that moves on the earth.’”

⁸³ DERYCK O. LODRICK, SACRED COWS, SACRED PLACES: ORIGINS AND SURVIVAL OF ANIMAL HOMES IN INDIA 55-56 (1981).

⁸⁴ Susan L. Goodkin, *The Evolution of Animal Rights*, 18 COLUM. HUM. RTS. L. REV. 259, 283 (1986).

⁸⁵ S.K. PUROHIT, ANCIENT INDIAN LEGAL PHILOSOPHY 235 (2001).

⁸⁶ See ARTHUR L. BASHAM, *Jainism and Buddhism* in SOURCES OF INDIAN TRADITIONS 45 (1958).

Principle of State Policy⁸⁷ and the Fundamental Duties.⁸⁸ These provisions are not enforceable in the way that a right ordinarily is in India. Nonetheless, they provide guiding principles for governance, jurisprudence and legislation.

Evidently, there is theoretical, historical and even constitutional consensus that human beings owe a *duty* to non-human animals, due to their co-existence within a common ecosystem and mutual benefit derived from our surroundings.⁸⁹ Further, as an intellectually evolved species, human beings also owe a duty to act towards the holistic welfare of non-human animals.⁹⁰ However, the source of this duty is disputed, amongst traditional thinkers like Bentham and contemporary thinkers like Nussbaum, which leads to uncertainty regarding approaches to animal welfare.

In this regard, the concept of 'dignified existence', as a source of human duty that has been suggested by the N.R. Nair judgment, forms an interesting and persuasive suggestion. On analysis of the Aristotelian and utilitarian traditions and Nussbaum's capability approach, it revealed that it is indeed this dignified existence that is the essence of human duty towards non-human animals. This dignified existence premises itself on the fact that non-human animals have traits within themselves that deem them entities with dignities of their own that deserve to be respected. The 'dignified existence' of non-animals, although a seemingly obscure intervention of legal and philosophical notions, complies with the Aristotelian naturalism, with Ancient Indian notions of life and with theories of painless killing. Like these philosophical doctrines, the concept of 'dignified existence' also supports the idea of continuity within nature, and an inherent duty towards non-human animals to prevent the infliction of pain on them. Further, Nussbaum regards the dignity of animals, as used similarly in the context of N.R. Nair, as the basis of animal welfare and the conscious source from which human beings should derive their duty.⁹¹ Nussbaum's approach relies on this judgement as an ideal, regarding it as the basis for granting animals 'entitlements' based on their capabilities. This vital decision harmonises these theoretical canons and arrives at a distinct and simple source of our duty: the recognition and commitment to the 'dignified existence' of the animal.⁹²

Therefore, the source of the duty that human beings owe to non-human animals must be viewed as arising not from what we *give* non-human animals through charity, but as what we *owe* to these species because of their

⁸⁷ The Constitution of India, 1950, Arts. 36-51 (Art. 48A specifically deals with protection of animal life under the Constitution).

⁸⁸ The Constitution of India, 1950, Art. 51A (Cl. (g) is specific to caring for the natural environment and animals).

⁸⁹ NUSSBAUM, *supra* note 66, 372.

⁹⁰ *Id.*, 373.

⁹¹ *Id.*, 335-336.

⁹² *Id.*

inherent faculty. However, to state that animals have several rights on the basis of their capabilities located within a theory of justice, leads to theoretical inconsistencies regarding the use of non-human animals for survival and benefit. It is consequently concluded that the source of human duty towards non-human animals is the commitment to ensure the ‘dignified existence’ of animals. The emphasis should not be on the inconsistent concept of the entitlement of the animal but on the concrete duty of human beings.

B. THE NEED FOR A DIRECT AND POSITIVE DUTY

By subscribing to an approach that negates the viability of granting animals ‘rights’ based on their capabilities, it does not imply that the current laws relating to animal welfare are effective, or even sufficient. The idea of an absolute duty was first suggested by Austin, through his positivist analysis of rights and duties, as a duty that exists within the human species, without the creation of a correlative right.⁹³ The creation of a correlative right considered the determination of a legal person as a pre-requisite.⁹⁴ There are several situations in which human beings owe ‘absolute duties’ to indeterminable legal entities, or entities that are not capable of possessing rights. Duties can be positive or negative, direct or indirect.⁹⁵ The majority of legislation in relation to animal welfare across jurisdictions is the codification of negative and often indirect duties that we owe to non-human animals.⁹⁶ However, the need of the hour is the codification of direct and positive duties into legal provisions, and the enforcement of the same.

The distinction between positive and negative duties bases itself on the distinction between what an individual is supposed to refrain from doing, and what an individual is obliged to do.⁹⁷ Nussbaum herself posits that “traditional morality” holds that it is wrong to harm another by aggression or fraud, but that letting people perish of hunger or disease is not morally problematic.⁹⁸ It follows from this that we have a strict duty not to commit bad acts, but no corresponding duty to act towards their cessation.⁹⁹ This distinction brings with it a hierarchy between positive and negative duties.

Positive duties are considered to be of higher ethical and legal value, as evidenced by the fact that the majority of early legislation in the world,

⁹³ JOHN AUSTIN, *JURISPRUDENCE, OR THE PHILOSOPHY OF POSITIVE LAW* 113 (R. Campbell ed., 2002); Roscoe Pound, *Legal Rights*, 26 (1) *INTERNATIONAL JOURNAL OF ETHICS* 92, 94 (1915).

⁹⁴ Pound, *id.*, 162.

⁹⁵ Marcus G. Singer, *Negative and Positive Duties*, 15 (59) *THE PHILOSOPHICAL QUARTERLY* 97 (1972).

⁹⁶ See, e.g., Act on Welfare and Management of Animals, 1972 (Japan); Animal Welfare Act, 1966 (USA); Animal Welfare Act, 2006 (UK).

⁹⁷ Pound, *supra* note 93, 98.

⁹⁸ NUSSBAUM, *supra* note 66, 336.

⁹⁹ *Id.*

whether criminal or civil, was the codification of negative duties as opposed to positive ones.¹⁰⁰ With the evolution of legal systems, positive duties were codified with varied implications and reactions from society. However, the process of codifying positive duties or making individuals act in a particular manner leads to the endorsement of certain normative behaviour, and causes disputes within a society that is differently morally charged. The codification of positive duties leads to the codification of certain responsibilities that citizens have towards the State, sometimes at the cost of the individual's agency.¹⁰¹ With the advent of the liberal tradition, the supporters of positive legal duties began being labelled as 'moralists' for restricting human freedom by imposing a normative ideal, rather than enhancing it.¹⁰² These disputes, however, are irrelevant when the same standard is imposed with respect to non-human animals, and the need for positive duties towards non-human animals is urgent.

A positive duty towards the welfare of non-human animals does not restrict the moral freedom of an individual directly. It merely ensures that the duty that humans owe to non-human species is optimally served. These positive duties are essential with regards non-human animals because a large number of them live directly under human control, imposing a direct responsibility of nutrition and care of the animals on human beings.¹⁰³ Such animals may live in farms and zoos, or may be domesticated. With technological advancement, human intervention within the world of non-human animals is massive, and the aspect of intervention brings with it a corresponding duty to protect animal habitats. Further, the human race can maintain the 'balance of nature' by preserving several species and saving them from extinction, creating a real duty of material aid and medical assistance towards these species.¹⁰⁴

It is regretful that the large part of animal-based legislation globally merely codifies negative duties that human beings owe to animals. In India, the PCA and the proposed Animal Welfare Act, 2011, codify our duties towards animals to refrain from causing harm, but none to facilitate their 'dignified existence' within the ecosystem. The European Union is a pioneer regarding legislation for the welfare of non-human animals. The German Animal Welfare Act, 1998, was enacted to protect the lives and well-being of animals, based on the responsibility of human beings for their fellow creatures.¹⁰⁵ Article 20A, German Basic Law, after an amendment of 2002 states that animals, like humans, have the right to be respected by the state and to have their dignity protected. This provision, however, reflects

¹⁰⁰ Singer, *supra* note 95, 93.

¹⁰¹ Common examples would be of taxation, conscription, and specific to India, the Flag Code of India, 2002, which prescribes imprisonment for burning an India flag.

¹⁰² Singer, *supra* note 95, 93.

¹⁰³ NUSSBAUM, *supra* note 66, 365.

¹⁰⁴ *Id.*, 368; Daniel B. Botkin, *Adjusting Law to Nature's Discordant Harmonies*, 7(1) DUKE ENVIRONMENTAL LAW & POLICY FORUM 25, 26 (1996).

¹⁰⁵ Animal Welfare Act, 1998 (Germany).

a general duty or responsibility of the state towards animals, and no specific, enforceable right is created.¹⁰⁶ Article 80 of the Swiss Constitution, holds that the State will positively regulate the keeping and care of animals; experiments and intervention on live animals; the use of animals; the importation of animals; animal trade and transportation of animals and the killing of animals.¹⁰⁷ We contend that similar laws enforcing positive duties of human beings towards non-human animals are required within the Indian legal context.

The second pertinent distinction is between direct and indirect duties that the human race owes towards non-human animals. The school of thought advocating indirect duties locates non-human animals within a larger ecological spectrum.¹⁰⁸ The environment, in all its diversity, must be properly maintained to maximise human benefit, and cater optimally to human development. Hence, the ultimate end of any duty which human beings owe to non-human animals is a duty towards the human race itself.¹⁰⁹ Direct duties are those duties that we owe to animals because *they* are beings worthy of a 'dignified existence'.¹¹⁰ An emphasis on this commitment towards a duty to non-human animals because of their inherent nature as productive beings is crucial to highlight the seriousness of any duty owed by the human race. As shown above, there is a gradual change in the manner in which laws have denoted not indirect but to direct duties, based on the inherent nature of the animal.

C. THE BENEFITS OF A DUTY-BASED APPROACH OVER A RIGHTS-BASED APPROACH

While acknowledging that a duty and a right are co-related concepts, there are a range of duties that are not associated with corresponding rights. Further, there are different mechanisms for enforcing a right and a duty, and legislation always emphasises one over the other.

Rights in general perform the task of regulating the autonomous management of one's life. Since they can play this role only for beings capable of being self-managers, rights constitute a form of moral protection that is simply out of place for creatures other than human beings, as has been argued under Part II of this paper.¹¹¹ This, however, does not mean that the law will deny animals protection, or will not legislate towards their welfare. In fact, a stronger duty obligation may arguably, be imposed upon the human race, in this scenario.

¹⁰⁶ GRUNDGESETZ, The Constitution of the Federal Republic of Germany, 1949, Art. 20A.

¹⁰⁷ BUNDESVERFASSUNG DER SCHWEIZERISCHEN EIDGENOSSENSCHAFT, The Federal Constitution of the Swiss Confederation, 1874, Art. 80.

¹⁰⁸ NUSSBAUM, *supra* note 66, 373.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Wilkinson, *supra* note 54, 148.

The fundamental premise of the rights-based approach is to create, in people or the State, a sense of entitlement which they may effect against the State or other bodies who violate their rights.¹¹² However, as has been argued, this view cannot be sustained in the context of animal entitlements or welfare as it is inefficient and unlikely to yield desired results, especially due to the difficulty in truly enforcing the approach against aggressors. At the same time, a duty-based approach will create a positive and direct obligation upon humans and the State to protect non-human animals and as such, will be a more sustainable model upon which animals may be granted protection. As opposed to the rights-based approach, which relies on the possessors' ability to ask for their rights and make various State and non-state actors accountable, a duty-based approach has no such requirement. Additionally, the absence of a rights-based entitlement model could allow for greater dilution of the doctrine of standing and permit humans to ask for the performance of duties on behalf of non-humans in a less controversial sense of procedure. In India, as has been seen in animal welfare case law, this could take the form of Public Interest Litigation suits.¹¹³

In employing jurisprudential theory while legislating, the terms 'rights' and 'duties' are often used interchangeably, which often leads to ambiguity. In actuality, reference is made specifically to one of the two concepts. Having established that animals cannot possess 'rights' within the legal meaning of the term, it is evident that the duty towards non-human animals must be the focus of legislations. This reduces problems of enforceability, and increases conceptual clarity regarding any dispute that is presented before a court of law.

In *A. Nagaraja*, the Supreme Court essentially seeks the codification of a direct and positive duty towards non-human animals to combat the inherent speciesism that pervades our legal thought. However, the Court is inconsistent in its approach by its usage of Article 21 to further its arguments. The Court argues that animals have a right that goes beyond mere survival or existence or instrumental value for human-beings, but to lead a life with some intrinsic worth, honour and dignity. It furthers this claim by saying that animals possess rights to the extent of human rights' protection. This approach is abstruse and problematic. By invoking Article 21 in such a manner, the Court has relied on the age-old rationale, disregarded even by traditional moralists, that non-human animals should be protected solely for the eventual benefit of

¹¹² See Jakob Kirkemann Boesen & Tomas Martin, *Applying a Rights-Based Approach: An Inspirational Guide for Civil Society*, available at <http://www.acfid.asn.au/aid-issues/files/applying-a-rights-based-approach-2013-an-inspirational-guide-for-civil-society> (Last visited on February 23, 2015).

¹¹³ *Ramesh Sharma v. State of H.P.*, 2014 SCC OnLine HP 4679, ¶12 (on animal sacrifice); *Suo Motu v. The State of Karnataka*, (2012) 5 Kar LJ 313 (on the mysterious death of wild elephants); See DNA News Network, *PIL in Bombay High Court Seeks Ban On Cock Fighting*, December 29, 2014, available at <http://www.dnaindia.com/india/report-pil-in-bombay-high-court-seeks-ban-on-cock-fights-2047718> (Last visited on February 26, 2015).

the human race. This contradicts the Court's own stance that animals should be treated with 'dignity' because of a certain intrinsic value they possess. This inconsistency within the judgement leads to a lack of clarity that could have been easily avoided by recognising the necessity of direct and positive duties with regard to the welfare of non-human animals.

V. CONCLUSION

In interpreting provisions of legislative acts and laws, it is important for courts to maintain ideals that correspond to the foundations of what constitutes jurisprudential theory. To this end, the judgment in *A. Nagaraj* has erred in its findings. Not only will adopting a rights-based approach towards securing animal welfare be inconsistent with basic notions of who the possessors of rights are but it is also an impractical way of addressing the problem at hand, *i.e.*, the protection of animals under the law. Granting rights to animals is unlikely to have the desired effect as questions of standing as well as conflicts with existing human rights are likely to arise. Thus, the correct approach is one which already exists in Indian jurisprudence and constitutional law, that which creates a direct and positive duty upon humans. This approach ensures that courts are able to interpret animal welfare and protection laws in the language of compassion and dignity as well as avoid addressing clashes between animal and human rights.

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Developmental Links between Cruelty to Animals and Human Violence

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Reviews evidence for the significance of childhood cruelty to animals as a predictor of later violence toward humans. Moves are underway in the United States (US) and Britain to encourage communication and cross-fertilisation between animal welfare and child protection and crime prevention services. Literature on healthy versus deviant child–pet interactions is reviewed, with particular regard to the prediction of later violence. Assessment and definitional issues are addressed. The discussion culminates with a summary of substantive findings and the identification of several research designs that are needed to clarify the potential of early identification and remediation of child cruelty to animals as a mental health promotion and violence prevention strategy.

Developmental Links Between Cruelty to Animals and Human Violence

The phenomenon of childhood cruelty toward animals has slowly emerged as a topic of scientific interest for two related reasons. Concern for the possible pain and suffering experienced by animals became increasingly widespread after the emergence of companion animals as a social phenomenon in the 16th and 17th centuries. About this time, societies gradually allowed animals to enter the house, encouraging the view that animals are worthy of moral consideration (Thomas, 1983). Of considerable interest to the behavioural and health sciences is the idea that abusive treatment of animals is associated with increased likelihood of similar conduct toward human beings. A memorable depiction of this view was provided by English artist, William Hogarth, who condemned cruelty toward animals in his now famous series of four etching-engravings, *The Four Stages of Cruelty*, produced in 1751. The series depict a progression in four scenes: a boy being cruel toward animals; the same person, now a young man, beating a disabled horse; the young man killing a woman; and finally, the execution of the man himself. The etching-engravings eloquently summarise the proposed developmental progression attracting

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much attention today; that early cruelty to animals is a prognostic sign of severe violence to follow in adulthood.

Hypothesised links between cruelty to animals and cruelty to humans is currently a topical and important issue. Instances of animal cruelty are increasingly being seen as grounds for investigation into the welfare of children and their families associated with the cruelty, and more generally, as a sign of concurrent or impending violence toward humans. Already in the United States (US) (e.g., First Strike Program — Humane Society of the United States), Britain, and elsewhere, moves are underway to integrate animal protection processes to child and family welfare and crime prevention bodies.

The aim of this paper is to provide a critical review of the literature on the phenomena, causes and correlates, and outcomes of animal cruelty, especially in children. Given our primary interest in community and preventive mental health, we pose the following questions: to what extent is cruelty to animals a concurrent or prognostic sign of pathology in children and/or their family systems. Can cruelty to animals be a specific predictor of concurrent and future violence (to humans) over and above other associated problems in the child and family? What are its correlates and causes? If cruelty to animals is a distinctive marker for concurrent or future problems, how can its identification be used to reduce violence and other problems in our society? Can cruelty to animals, or conversely, concern and empathy for the welfare of other organisms, be modified by social interventions?

The complexities of child–animal interactions are not unlike the complexities of human interactions; complexities that need to be explored, documented and empirically examined (Boat, 1997). However, one major impediment to research and reporting on the subject of childhood cruelty to animals is the lack of a clear and standardised operational definition of animal cruelty (a point noted by a number of researchers including Felthous & Kellert 1986; Miller & Knutson, 1997; Agnew, 1998). Without such a foundation, it is impossible to accurately measure the phenomenon, and develop a cohesive body of literature. In an effort to overcome this barrier, several researchers (e.g., Ascione, 1993; Felthous & Kellert, 1987; Vermeulen & Odendaal, 1993) have proposed definitions of animal cruelty.

Definitions of Cruelty to Animals

The Oxford English Dictionary defines cruelty as, "... a disposition to inflict suffering; delight or indifference to another's pain; merciless, hard-heartedness ...". Clearly this definition considers cruelty to be an enduring trait. Other definitions, specific to animal cruelty have emphasised a more behavioural dimension. Felthous and Kellert (1986) define "substantial cruelty to animals" as a "pattern of deliberately, repeatedly, and unnecessarily hurting vertebrate animals in a manner likely to cause serious injury" (p. 57). Brown (1988) and Vermeulen and Odendaal (1993) defines animal cruelty as above but notes that it can occur through acts of commission and omission, that is, failing to provide care.

A number of consistent dimensions of cruelty are raised by the above definitions. All definitions include a behavioural dimension ("inflicted"), whereby behaviour is typically seen to include both acts of commission (e.g., beating a dog) and omission (e.g., neglecting to provide adequate food or water). The majority

require a sense of purpose (“deliberate” or “knowingly”), however Vermuelen and Odendaal (1993) include accidental acts (“unintentional or ignorant”). The dimension of frequency is similarly controversial. Felthous and Kellert (1987) require repeated acts while Vermeulen and Odendaal (1993) suggest that a single act will suffice. There is somewhat more consensus on the issue of whether acts of cruelty are physical or psychological, with the majority of definitions accounting for both. Psychological abuse is considered to encompass the instillation of negative emotional states, such as fear and anxiety, as well as neglectful acts such as the deprivation of affection, or appropriate stimuli (Vermeulen & Odendaal, 1993). However, there is recognition that psychological abuse is somewhat subjective and harder to determine (Ascione, 1993; Vermeulen & Odendaal, 1993). Although not reflected in the final definitions, several researchers also provide comment on the affective dimension of obtaining pleasure from perpetrating or witnessing cruelty (Ascione, 1993; Felthous & Kellert, 1987). Finally, there is an implicit assumption in the definitions that the cruelty is proactive, that is, not solely occurring in response to provocation (as would be the case for a child who hits out at a dog who bites or scratches). For the purposes of this paper, then, cruelty to animals refers to repetitive and proactive behaviour (or pattern of behaviour) intended to cause harm to sentient creatures. The implications of this are that accidental, unknowing, and single occurrences, as would be expected from many young children, are not included.

Measurement of the Dimensions of Cruelty

Without consensus concerning the definition of animal cruelty and its relevant dimensions, uniform measurement of the phenomenon is difficult. Some investigators (e.g., Heath et al., 1984) have used the single checklist item “cruelty to animals” on the Achenbach Child Behavior Checklist (CBCL), while others have simply asked about childhood animal cruelty in unstructured clinical interviews. Even more contentious is the practice of reviewing inpatient files in order to determine if there is a history of cruelty. Boat (1985) and Kellert and Felthous (1985) developed structured interview schedules for the purposes of their own clinical/research use. While these represent improvements on unstructured assessments, there is still no uniformity across the depth of information that is gathered. It is little wonder that there are large discrepancies between empirical studies with respect to the prevalence and correlates of childhood animal cruelty.

In an effort to overcome the lack of standardisation in measurement, Ascione, Thompson and Black (1997) report on the development of the Children and Animals (Cruelty to Animals) Assessment Instrument (CAAI). The CAAI is a semi-structured interview developed for use with children over 4 years and their parents, to obtain information on animal maltreatment. The CAAI was field-tested with a community sample of 20 children (75% boys, 65% with a pet) and a clinical sample. The clinical sample included children in residential and day treatment programs for emotionally disturbed youth, incarcerated adolescents, and children accompanying their mothers to shelters for battered women. Interview questions were organised to assess witnessing and performing cruelty and kindness toward animals in four categories (farm, wild, pet, stray).

Ascione et al. (1997) included nine dimensions of cruelty. *Severity* is the degree of intentional pain or injury caused to an animal, as well as the sexual abuse of an animal. *Frequency* concerns the number of separate acts of cruelty noted in assessment results. *Duration* covers the period of time over which cruel acts occurred, while *Recency* is the dimension based upon the most current act(s) of cruelty. *Diversity* (across and within categories) concerns the number of different categories of animals harmed, as well as the number of individual animals harmed within categories. *Sentience* is an indication of the child's feeling for the animal that was harmed. This is distinct from the *Empathy* dimension, which is concerned with the degree of the child's remorse for cruel acts or the child's concern for the animals' welfare. *Covert* is a dimension assessing the child's attempts to conceal cruel behaviour, and finally, *Isolate* is whether the cruelty occurred alone or with other children and/or adults present. Inter-rater reliability for the CAAI ranged from 60–83%.

On a qualitative note, the CAAI was found to be valuable for assessing some of the motivations that children may have for engaging in animal cruelty. For example, curiosity/exploration was a significant motivator, especially for younger children. Other motivations included peer reinforcement for cruel behaviour (i.e., gang membership), cruelty as a means of altering the perpetrator's mood state, and imitation of the witnessed cruelty toward animals. Establishing the motivations for animal cruelty is extremely important as it assists in determining whether clinical intervention or remediation is required, and if so, of what nature.

Ascione et al. (1997) examined the relation between the CAAI and the "cruel to animals" item on the CBCL (Achenbach, 1991). Not surprisingly, they concluded that assessing cruelty by use of only one checklist item could provide misleading information or fail to fully capture the level of cruelty that some children displayed toward animals. While initial evaluations of the CAAI appear promising, one significant limitation to its widespread use is its length, which would typically exclude its use from anything except a research context. Consequently, Ascione and colleagues (1997) report that they are currently developing a checklist version.

Our team has similarly developed a parent and child report checklist form of the CAAI. Each of the 10 scoring criteria for the CAAI was used as a likert scale based on the scoring criteria of the CAAI. A pilot study of $n = 131$, 6- to 13-year-old children showed adequate convergence between parents and children, internal consistency of .80 for the child and .96 for the parent versions, and test-retest reliabilities over one week of .96 and .97 respectively (Dadds, Whiting, & Fraser, 2002).

Motivations for Cruel and Extremely Aggressive Behaviour Toward Animals

Given the definitions explored above, measurement of the phenomenon of cruelty stands to benefit by consideration of the various motivations or intentions that children have for engaging in acts of cruelty toward animals. While invoking unobservable mental states such as motivation and intentions raises some well-worn methodological problems, clearly there is a need for researchers to distinguish cruelty derived from developmental immaturity from cruelty that may be malicious.

Kellert and Felthous (1985) provide a preliminary classification of motivations for cruel behaviour toward animals derived from their retrospective interviews with incarcerated criminals. They have proposed nine motivations for cruelty; however, they note that the motivation for any particular act is typically multidimensional. First, they propose the motivation to control an animal. This encompasses shaping an animal's behaviour or eliminating undesirable characteristics of an animal (e.g., kicking a dog in the testicles when the dog barks in the house). The second motivation is retaliation, in which a perpetrator may use extreme punishment or revenge for a presumed wrong on the part of an animal (e.g., burning a cat for scratching the furniture). The third is satisfaction of a prejudice against a species or breed, whereby perpetrators designate a species as either good or bad (e.g., cat hatred). Kellert and Felthous (1985) note that extreme prejudice is frequently found against certain types of rodents, pests or insects (e.g., cane toads, rats). There is an accompanying belief that such animals are not worthy of moral consideration.

A fourth and equally common motivation is proposed to be the expression of aggression through an animal (e.g., where dogs are trained to attack other animals or people). A similar motivation is the enhancement of one's own aggression. Kellert and Felthous (1985) report that perpetrators used cruelty to animals as a way of improving their own aggressive skills or to impress others with their capacity for violence (e.g., perpetrators used animals for target practice, or to impress fellow gang members). The sixth motivation encompasses shock value and amusement (e.g., burning cats and setting them to run around a tavern). Retaliation or exacting revenge against other people by abusing their pets is proposed as the seventh motivation (e.g., castrating a neighbour's cat). The displacement of hostility and aggression from a person to an animal was a common motivation for criminals who had been abused as children. Displaced aggression typically involved authority figures that the subject hated or feared but was afraid to aggress against (e.g., perpetrators exacting revenge for beatings they suffered).

The final motivation is proposed to be non-specific sadism. This encompasses the desire to inflict injury, suffering, or death on an animal in the absence of any particular provocation or especially hostile feelings toward the animal. The primary goal here is the pleasure derived from causing injury and suffering. Kellert and Felthous (1985) found that sadistic gratification was sometimes associated with the desire to exercise total power and control over an animal, and may have served to compensate for a person's feelings of weakness or vulnerability (e.g., snapping animals' necks "for kicks and for fun"). Clearly, further empirical substantiation of these motivations for animal cruelty is needed as they are crucial to precision of assessment. As will be seen below, the prognostic value of early cruelty to animals is controversial and much of the contradictory findings can be attributed to problems of defining and measuring cruelty. Where the multidimensional nature of the motivations for cruelty have been assessed, the quality of the data increases.

Cruelty to Animals as Psychiatric and Prognostic Phenomena

The significance of children's cruelty to animals as a symptom relevant for assessing a child's psychological health has been formally acknowledged in the last two revisions of the *Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R;*

DSM-IV; American Psychiatric Association [APA] 1987, 1994), specifically with reference to conduct disorder. Cruelty to animals was first included in the DSM-III-R. In the DSM-IV, the essential feature of conduct disorder is "... a repetitive and persistent pattern of behaviour in which the basic rights of others or major age-appropriate societal norms or rules are violated" (APA, 1994, p. 85). These behaviour patterns fall into four major groupings, one of which is aggressive conduct that causes or threatens physical harm to people or animals. In this context, cruelty toward animals is considered indicative of a disturbed mental and/or emotional state in children. However, consistent with the trend in the DSM toward multiple diagnostic criteria, (Spitzer, Davies, Russell, & Barkley, 1990), this is only the case when the cruelty is part of a larger pattern of antisocial behaviour, that is, held to be a part of a symptom cluster. Current diagnostic systems have little to say about the individual contribution of any particular behavioural symptom. Thus, the role of cruelty to animals within the general diagnosis of CD is unclear.

However, efforts have been made to re-evaluate and refine the diagnostic basis of conduct disorder with regard to specific behaviours and their prognostic value. Loeber, Keenan, Lahey, Green, and Thomas (1993) developed an alternative diagnostic framework for oppositional defiant disorder (ODD) and conduct disorder (CD) in an effort to construct a developmentally based diagnostic system for these disorders. They found that a number of low base rate symptoms, including cruelty to animals, did not discriminate well between different diagnostic categories. Loeber et al. (1993) advocate the importance of retaining low base rate symptoms within the symptom list, however, arguing that the *variety* of early problem behaviour is one of the best predictors of chronicity. In another study using meta-analysis of 60 factor analyses (Frick et al., 1993), cruelty to animals did discriminate between subtypes, falling in the extremes of the destructive dimension. Frick et al.'s (1993) destructive/nondestructive dichotomy corresponds to a wealth of CD literature supporting subtypes based on an aggressive versus non-aggressive distinction. Further, aggressive behaviour can be broken into reactive or proactive. The latter refers to premeditated, instrumental aggression, and would correspond most closely to the phenomena of intentional cruelty to animals.

Reviews indicate that early onset of symptoms, the early presence of firesetting, low intelligence, comorbidity, and severe social adversity are some of the common variables found to predict chronicity (Loeber, 1990; Robins & Price, 1991). Importantly, children with high levels of proactive aggression are at higher risk for later delinquency than those with reactive aggression only (see Dodge, Bates, & Pettit, 1990). In support of this, Luk, Staiger, Wong, and Mathai (1999) examined persistent conduct problems in a clinic-referred sample of 141 children and a community sample of 36 children aged 5–12 years. The children who showed cruelty to animals were found to have more severe conduct symptoms compared with the non-cruel group. The authors conclude that cruelty to animals is possibly a marker of a subgroup of conduct disorder that has a poor prognosis.

Despite the potential importance of early proactive aggression, few longitudinal studies have attempted to measure cruelty to animals in all but the most superficial ways (e.g., using one item from general adjustment measures such as the CBCL).

An exception to this general failure to measure cruelty comes from the early literature examining childhood cruelty to animals as part of a triad of behaviours (cruelty to animals, firesetting, and enuresis) proposed to be predictive of later violence/aggression and criminality. Heath, Hardesty, and Goldfine (1984) explored the historical basis to this behavioural cluster. They report that as early as 1905, Freud noted that it was common to warn children that playing with fire would lead them to wet the bed. Freud proposed a link between enuresis, firesetting, and sexual problems. Heath et al. (1984) report that while this relationship was maintained in the psychoanalytic literature, it was given a somewhat different direction by later authors who pointed to the importance of aggression in firesetting and bedwetting.

Heath et al. (1984) and Felthous and Kellert (1987) review the early literature with respect to cruelty, firesetting, and bedwetting as predictors of later criminality. At best, the relationship can be considered tenuous. Some studies found no significant relationships (e.g., MacDonald, 1968), whereas others found partially supportive relationships (e.g., Hellman & Blackman, 1966; Heller, Ehrlich & Lester, 1984). For example, Hellman and Blackman (1966) retrospectively compared aggressive and non-aggressive criminals in an effort to determine whether firesetting, enuresis, and cruelty to animals were predictive of aggressive adult crimes. Seventy-four per cent of the prisoners charged with aggressive crimes had a history of the symptom triad or part of the triad, while only 28% of non-aggressive criminals exhibited the triad or part of the triad. This was a statistically significant difference. However, Heller et al. (1984) retrospectively investigated the incidence of cruelty to animals, firesetting, and enuresis in the case reports of 1935 offenders evaluated at a court psychiatric clinic. The incidence of the triad, or part of the triad was found equally among violent and non-violent criminals. Significantly, only cruelty to animals significantly differentiated between those charged with a violent crime and those charged with a non-violent crime. In both of the previous studies, some subjects only exhibited a part of the triad. Indeed, there is no consensus within the literature that the component behaviours within the triad are related to each other. Some studies find no association between these behaviours (e.g., Michaels, 1955) while others find partial relationships (Kuhnley, Hendred, & Quinlan, 1982).

In an effort to determine if a relationship exists between firesetting, enuresis, and cruelty to animals, Heath et al. (1984) compared children exhibiting these behaviours on demographic variables, and clinical measures of adjustment (internalising and externalising behaviour, total pathology, and social competence). Participants were 204 consecutive outpatient admissions, aged 4–16 years (130 boys, 74 girls). Children were identified as enuretic, cruel to animals, or firesetting by parental identification on the CBCL (Achenbach, 1991). Additional clinical information was gained from the clinic charts and a family information sheet. Findings indicated partial relationships, with enuresis and cruelty to animals being related to, and interacting with, only a portion of the total firesetting population. Enuresis was significantly associated with non-cruel firesetters, and cruelty to animals was associated with non-enuretic firesetters. No significant associations were found between cruelty to animals, and socioeconomic status, age, or sex.

Heath et al. (1984) concluded that situational or environmental factors are likely to be more significant than individual behaviours (e.g., cruelty, firesetting, bedwetting) in predicting future aggressive behaviour.

Nonetheless, empirical study into the stability of cruelty from childhood to criminality in adulthood, the so called "graduation hypothesis" (Arluke, Levin, Luk, & Ascione, 1999) or "escalation thesis" (Bernie, 1999) continued. The retrospective research conducted by Alan Felthous and Stephen Kellert (Kellert & Felthous, 1985; Felthous & Kellert, 1986) has been influential in establishing a link between childhood animal cruelty and later violence/aggression toward people. Using the previously reported studies for guidance, they began with several assumptions. First, repeated acts of serious cruelty to socially valued animals (e.g., dogs) are more likely to be associated with violence toward people than are isolated acts of cruelty, minor abuses, and victimisation of less socially valuable species (e.g., rats). Second, if animal cruelty is associated with aggression against people, it is most likely associated with serious, recurrent personal violence. A single violent offence or act would not identify this core population with continuous aggression. Third, subjects must be interviewed directly because prison records and other documents do not contain systematically gathered and adequately detailed historical data. Fourth, if a positive history of cruelty to animals exists, it will most likely be elicited by inquiry into a number of areas wherein animal involvement is possible. One or two questions on cruelty to animals do not sufficiently tap the history of an individual's involvement with animals.

Based upon these assumptions, Felthous and Kellert (1986) defined substantial cruelty toward animals as "... a pattern of deliberately, repeatedly, and unnecessarily hurting vertebrate animals in a manner likely to cause serious injury" (p. 57). In addition, they defined adult aggression as that which is recurrent, impulsive and injurious to other people. Two prisons were studied and counsellors were asked to rate their assigned prisoners on a scale of aggressiveness from 1–10. Aggressive behaviours ranged from threatening speech to violent acts, with high scores reflecting frequent, severe, and multiform aggressive behaviour. Only those subjects with extremely high or low scores were asked to participate in the study. In addition to the prisoners, randomly selected men were interviewed as non-institutional control subjects. A standard interview schedule was administered to each participant. The interview items pertained to antisocial behaviours, environmental background, and various aspects of animal involvement such as owning family pets, raising livestock, training animals, hunting, and attending organised fights (e.g., dog fights). The subjects were asked about 16 specific types of animal cruelty. A survey on attitudes toward animals was also administered. For each subject who consented, a parent or family member who knew him in childhood was contacted and interviewed.

Statistical analysis showed a significant association between acts of cruelty to animals in childhood and serious, recurrent aggression against people as adults. It was found that 25% of the aggressive criminals had abused animals 5 or more times in childhood, in contrast to 5.8% of the non-aggressive criminals, and 0% for non-criminals. The differences between the aggressive criminals and control subjects were significant, regardless of whether the control group comprised non-aggressive prisoners or randomly selected non-prisoners. Therefore, the hypothesis that recurrent

serious animal abuse in childhood is related to a chronic violent disposition toward people was supported.

Arluke et al. (1999) provided evidence to suggest that it may be less appropriate to represent childhood or adolescent abuse of animals in terms of a "graduation hypothesis", and more appropriate to represent it in terms of a generalisation of deviance whereby the abuse of animals by children is seen as one of a range of forms of antisocial behaviour that becomes evident in childhood. Arluke et al. (1999) compared the criminal records of 153 animal abusers with the criminal records of the same number of controls who were matched on demographic characteristics. The results of the study indicated that while those who had abused animals were more likely to be interpersonally violent than were controls, they were also more likely than controls to engage in a range of antisocial behaviours, particularly property, drug and public disorder offences. In addition, the authors concluded that instances of animal abuse were no more likely to precede than they were to follow violent offences. These findings suggest that rather than representing animal abuse as a discrete step in the development of criminal/violent behaviour, it may be more appropriate to represent adolescent animal abuse as one of a cluster of anti social behaviours from which both violent and non-violent criminal behaviour may result.

Miller and Knutson (1997) used self-report data to investigate whether people charged with violent offences differed from people charged with non-violent offences with respect to prior exposure to animal cruelty. This study concluded that prior animal abuse did not differentiate between the four groups (homicide, violent, sex, and other) of offenders they investigated.

Felthous and Kellert propose that the above discrepancies within the literature may themselves have multiple determinants. For instance, the thoroughness with which historical information is obtained within different studies varies considerably. For example, their study involved a personal and in-depth historical interview, whereas others have used a single checklist criteria to ascertain animal cruelty. In the second part of the study, Felthous and Kellert (1986) isolated the subjects who had a pattern of substantial animal abuse in childhood. Of the 20 prisoners who gave this history, 16 belonged to the most aggressive category, and 4 fell into the non-aggressive category. Three of the 50 non-prisoners had shown a pattern of animal cruelty. Several other observations were made about abusive aggressive criminals (AAC) in comparison to abusive non-aggressive criminals, and abusive non-criminal subjects. AAC subjects tended to engage in a greater variety of abusive acts, tended to abuse a greater number of animal species, had been cruel to cats and dogs, showed less restraint during the act of abuse and less remorse afterwards.

These findings suggest that certain features of childhood cruelty to animals may be more meaningful in evaluating aggressive individuals. These features include: direct involvement, lack of self-restraint, lack of remorse, variety of cruelty acts, variety of species victimised, inclusion of socially valued species (e.g., pets), and motivations for cruelty. Felthous and Kellert therefore concluded that cruelty to animals appears to be one of several behaviours (e.g., injurious assaults, window smashing, fire setting) that can represent a pattern of impulsive, diffuse aggression

in childhood or adolescence. The pattern may or may not subside with attainment of adulthood. This interpretation is more consistent with Arluke et al. (1999), who suggest that animal abuse is one of a number of behaviours representative of a more general class of antisocial behaviour, rather than a distinct step in the development of adult criminal or violent behaviour.

This broader interpretation is in accordance with earlier studies (e.g., Hellman & Blackman, 1966) that suggest that childhood cruelty toward animals is a deviant interactional pattern that may operate as one component of a behavioural spectrum associated with violence and criminality in adolescence and adulthood. It must be concluded that while there are strong indications that cruelty to animals may have unique power in predicting later adult violence, no existing study has been able to unequivocally demonstrate that early animal cruelty is prognostically distinct from other aspects of early conduct problems and aggression. The design of a research program that would test this question is discussed at the end of this paper.

Causes and Correlates of Cruelty to Animals

Several etiological explanations for the development of cruelty in children exist within the literature, and below, they are presented as separate models. In reality, it is likely that the causal mechanisms are interactive.

Family Functioning and Parent–Child Interactions

Multiple variables indicating dysfunctional family functioning have been implicated in the onset and maintenance of aggressive and antisocial behaviour in children (see Dadds, 1995). Typically, however, they are mediated by dysfunctional parent-child interactions. Patterson (1982) identified coercive family processes as a major characteristic and contributor to child and family dysfunction marked by aggression. In brief, by failing to reinforce prosocial behaviour, backing down from requests, and reinforcing a child's escalating demands, parents negatively reinforce a child's increasingly defiant and aggressive behaviour. Similarly, harsh and abusive discipline practices, displayed when the child escalates to misbehaviour, are rewarded by the child's temporary capitulation. Such interactions typically result in an explosive escalation of aggression, and these coercive interchanges, once established, become reinforcing and self-sustaining. Established aggressive interactions within the family serve to intensify aggressive behaviour outside the family. Ascione (1993) speculates that children growing up in such families may learn to generalise aggressive and coercive control techniques and begin to apply such behaviours to animals. Flynn (1999) examined the relationship between corporal punishment inflicted by parents and the perpetration of animal abuse in 267 undergraduates. Males who committed animal cruelty in childhood or adolescence were physically punished more frequently by their fathers, both as preteens and teenagers, than males who did not perpetrate animal abuse. Over half of male teenagers who were hit by their fathers had perpetrated animal abuse. The social learning model has much to offer the study of childhood cruelty, both in terms of the proposed mechanisms (modelling, imitation, reinforcement theory, coercive processes) and its use of relatively rigorous methodologies. Particularly with young

children, the potential for direct observational studies of parent–child interactions with pets should be noted.

In their retrospective study of aggressive and non-aggressive criminals who were cruel to animals, Kellert and Felthous (1985) found that domestic violence was frequent among subjects with cruelty histories (particularly extreme paternal violence and alcoholism) and which has been supported by numerous other studies. Boat (1995) reports on battered women who frequently describe how pets have been stabbed, shot, hung, or otherwise mutilated by abusive spouses. Gelles and Straus (1988, as cited in Ascione, 1993) provide equally compelling evidence from children who were witness to parental violence. Deviney, Dickert, and Lockwood (1983) found that higher rates of animal abuse are found in families where child abuse or neglect is substantiated than in the general population. Deviney et al. (1983) studied 53 families who met New Jersey legal criteria for child abuse or neglect and who also had companion animals in their homes. Observations during home interviews revealed that pets were abused or neglected in 60% of these families. When the sample was categorised into physically abused (40%), sexually abused (10%), and neglected (58%), an alarming finding was that in 88% of families displaying child physical abuse, cruelty to animals was also present. Two thirds of pets were abused by fathers, one third by children.

A history of childhood sexual abuse is also associated with deviant interactions between children and animals. Ressler, Burgess, Hartman, Douglas, and McCormack (1986) explored the relationship of childhood sexual abuse to deviant interactions in 36 convicted sexually-oriented killers. Ressler et al. (1986) provide no methodological information regarding how they determined the presence of behavioural, emotional and somatic symptoms in childhood or adolescence. However, those offenders who were sexually abused in childhood or adolescence were significantly more likely than non-abused offenders to report, among other psychiatric symptoms, cruelty to animals, cruelty to other children, and assaultive behaviour toward adults. An analysis of the relationship between past sexual abuse and participation in certain sexual activities indicated that the sexually abused murderers were significantly more likely than non-abused murderers to engage in deviant sexual contact with animals (40% versus 8%).

Boat (1995) also cited anecdotal reports by several authors describing the sexual abuse of children in day-care settings and acts of bestiality. Forcing children to interact sexually with animals and ensuring children's silence by threatening to hurt or by actually maiming pets are noted in numerous case studies of sexually abused children. Therefore, the association between cruelty to animals and childhood sexual abuse clearly deserves further empirical attention.

On the basis of the evidence cited above, it appears reasonable for researchers and clinicians alike to be aware of the importance of childhood animal cruelty as a potential indicator of disturbed family relationships. The research clearly indicates relationships between the violent and abusive environments in which children are raised and children's own violent reactions toward animals. Indeed, Robin and ten Bensele (1985) reported that abused and disturbed youth suffered more pet loss, had their pets for less time, and were more likely to have had their pets killed accidentally or purposely than non-disturbed youth. While not directly addressing the

reliability and utility of using pet abuse as an indicator of child problems, the foregoing studies certainly provide broad support for more communication between pet and child welfare agencies.

Social Information-processing and Social Adjustment

Dodge and colleagues' research on peer rejection and social maladjustment in boys (Crick & Dodge, 1994; Price & Dodge, 1991) has shown that aggressive children display deficits and distortions at various levels of social information processing. For example, in ambiguous social situations, these children under utilise pertinent social cues, misattribute hostile intent to neutral peer behaviour, respond with aggression, and expect that aggressive responses will lead to reward (Crick & Dodge, 1994). Peers typically retaliate to such aggressive behaviour with aggression in return. The aggressive child's belief in a hostile environment is reinforced, as is his own aggressive behaviour. Ascione (1993) speculates that if such children can attribute hostile intentions to their peers, intention cues provided by animals would be even more ambiguous, and the child could easily respond to animals with aggression and cruelty. Ascione (1993) describes a boy's brutalisation of a dog after the dog had barked at him. The boy interpreted the bark as personally directed aggression, without ever considering that the dog may have been startled or frightened. However, research into whether cognitive styles predictive of aggression are also characteristic of cruelty to animals has not been conducted. Further, the idea of cruelty involves intentionality and the perpetrator taking pleasure in the suffering of the victim. Children who show reactive aggression only are the group with high levels of hostile attributional biases; children with proactive aggression are generally not characterised by hostile attributional biases (Crick & Dodge, 1994). This limits the usefulness of this model given its reliance on the imputation of hostility to others as the cause of the violent act.

Biological Factors

It is not the place here to present a general discussion on the biological models of aggression, however, some specific observations have been made that, when integrated with psychosocial correlates, may bear fruit. Kruesi (1989) notes that human aggression, both self- and other-directed, has been associated with low cerebrospinal fluid (CSF) concentrations of the serotonin metabolite 5-hydroxyindoleacetic acid (5HIAA). He briefly reports on the case of a 12-year-old girl, raised in a middle class household, who had a low CSF concentration of 5HIAA and a distinct history of physically cruel behaviour to animals by age 12. At a 4-year follow-up, the child was being held in a detention centre and had begun to self-harm. Kruesi concludes that the case study suggests that relationships between cruelty to animals and low 5HIAA concentrations warrant further investigation and prospective follow-up.

Rogeness, Hernandez, Macedo, Mitchell, Amrunga, and Harris (1984) consider the role of Dopamine- β -hydroxylase (D β H) in the development of aggression. D β H is an enzyme involved in the conversion of dopamine to norepinephrine. Twenty boys with very low levels of plasma dopamine (D β H) were matched and compared to 20 boys with plasma D β H greater than 15 μ M/min/L. All 40 had been

hospitalised in a children's psychiatric hospital. Rogeness et al. (1984) report a significant association between zero D β H and the diagnosis of conduct disorder, which incorporated cruelty to animals as a symptom. Interestingly, there were also significantly more cases of familial neglect or abuse in the zero D β H group. Such an association provides further support to the gene-environment interaction hypothesis. The two studies above highlight that biological abnormalities may be causal or merely correlates of adverse environmental conditions. The important implication is that children will vary inherently in their propensity to aggression and conversely, their propensity for empathy and nurturance. Thus, the type and severity of environmental adversity and learning needed to produce cruel behaviour will vary from child to child.

Dynamic Theories of Personality Development

Psychodynamic theorists argue that the foundation of aggression and cruelty in children arises from narcissistic injuries that threatens the cohesion of the self, especially a narcissistic injury inflicted by the (caregiver) of the child. Parens (1987) asserts that cruelty in children does not arise spontaneously. The mechanism and capacity for its experience and expression, however, is part of every infant's adaptive make-up and is ready to function at birth. Goldberg (1995) proposed a theoretical delineation of the development of the malevolent (cruel) personality, with references to his own clinical experiences. He proposed five stages to the development of the malevolent personality: (1) child of scorn: the shaming of the vulnerable child, (2) child of the devil: the inoculation of the "bad" self, (3) the transition from victim to perpetrator of insensitivity and disregard, (4) experimental malevolence, and (5) the forging of the malevolent personality.

Goldberg (1995) suggests that shame (stage 1) is one of the most devastating interpersonal weapons a person can use to influence or punish someone else. Each shaming experience, especially those that involve disregard and mistreatment, threaten to deplete a person's sense of personal identity. These experiences inform the sufferer in destructive and painful ways that he or she is inadequate. As such, they undermine the sufferer's interpersonal relationships and feelings of wellbeing and security. Chronic shame prevents one from defining oneself constructively to others, leaving one vulnerable to further abuse and neglect, and resulting in the internalisation of inadequacy (stage 2). A critical aspect of Goldberg's model is that the shaming is *disintegrative* in that it results in disrupted interpersonal relationships and stigmatisation. This is in contrast to criminological models of "reintegrative shaming" (e.g., Braithwaite & Mugford, 1994) that argue that a shaming process that co-occurs with social reintegration can be an effective method for reductions in deviant and criminal behaviour.

People in stage 3, unlike earlier stages where shame and humiliation was passively tolerated, feel disregard and insensitivity toward others, both toward those who have mistreated them and toward anyone else who tries to get close. Everyone in the world is regarded as responsible for having permitted shame and humiliation. The sufferer then begins to experiment with malevolent actions (stage 4) and the relief/pleasure that such actions bring are subsequently internalised into the malevolent personality (stage 5). Thus Goldberg (1995) believes that people make their

choices to behave in such a way by disregarding any positive/pleasurable experiences that result from acting in a non-malevolent manner. While it is easy to criticise these personality/analytic ideas as highly speculative, Goldberg's model is noteworthy in that it directs us to consider a developmental progression toward cruelty, and in terms of its stage specification, is testable through empirical studies.

Positive Interactions Between Children and Animals

It is important to note that a pattern of cruelty to animals can also mark a loss of opportunities for much positive learning in the child's life. A number of authors have pointed to the developmental importance of the relationship between children and companion animals (Agnew, 1998; Kellert & Felthous, 1985; Robin & ten Bensel, 1985; Wilson & Turner, 1998). Robin and ten Bensel (1985) argue that companion animals are a vital part of the healthy emotional development of children. They assert that the constancy of animal companionship can facilitate the child's mastery over a variety of developmental tasks, such as developing a sense of responsibility and competence, and developing the feelings of empathy toward others. Some literature even suggests that pets may have a preventative effect on the development of mental disturbance. For example, Levinson and Mallon (1997) suggest on the basis of clinical experience that children who have pets evidence less separation anxiety than those who do not. Bodmer (1998) suggested that having a positive relationship with a pet can moderate the negative effects of family and other stressors on children's wellbeing.

Robin and ten Bensel (1985) review research that suggests that animals can have positive benefits by serving a variety of roles. First, pets function as playmates and companions. Companion pets have a unique ability to create feelings of security within children. They are devoted, attentive, loyal, and non-critical, and they unconditionally love and accept a child. In this way, pets have the ability to function as transitional objects, assisting children in the developmental task of separation and individuation and helping children to feel safe within this process. Second, pets allow for the gradual introduction of responsibilities in a child, and allow the child to experience the pleasures associated with such responsibility. Much of the usual activity of children and pet animals resembles a parent/child relationship, with the animal representing the child as an infant. Consequently, children may treat their pets as they are treated, or as they want to be treated themselves. Pets have been found to elicit maternal and caring behaviour in even very young children (Fogle, 1983; cited in Robin & ten Bensel, 1985). However, very little research of this type has been conducted. A high priority is for more experimental research to be conducted using direct observations of nurturance, care, and empathy versus aggression, neglect, and cruelty as measures of the ways children and their parents interact with animals.

Third, pets provide education and life experiences for children. For example, observation of animals can lead to education about the normal functions of sexuality and elimination. Similarly, pet loss provides experience for the child in dealing with the process of death and bereavement, thus preparing them for later experiences with human life. It is common that children learn through pets that

grief following death is a natural process that is painful, but is tolerable and does not last forever.

Finally, Robin and ten Bensel (1985) argue that pets function in a similar way to a new family member within the family system. With the arrival of a new pet, families undergo a variety of changes, both positive and negative. The role of the pet depends upon the emotional climate of the family, as well as the family structure. For example, pets may facilitate increased familial closeness as a result of playing together with the pet, or they may exacerbate family dysfunction as a result of disagreements over the rules and care of pets. Pets may also become a part of the families' pathology. For many disturbed and abused children, a pet may become a sole love object. Alternatively, for violent and abusive families, pets often serve as an object against which violence may be perpetrated.

To this list we would add the importance of developing empathy for the experiences of other organisms. A common occurrence in functional families is the parent modelling caregiving to a pet and educating the child about the pet's feelings and needs (Agnew, 1998). All young children will at one time accidentally or experimentally cause discomfort to a pet. Consider the differential effects of the parent who shows concern and advocates the pet's feelings to the child, compared with the parent who finds the discomfort amusing and encourages the child to continue, on the child's development of empathy. Little empirical work is currently being done in this regard, however, the idea has been around for some time. Bathurst (1933, cited in Baenninger 1991) found that preschoolers who lived in houses with pets displayed more sympathetic responses to their peers than were preschoolers who came from homes without pets. This idea has important implications for community intervention models and will be reviewed in the next section.

Thus, cruelty to animals may not only represent a marker for problematic development in children, but also a wealth of lost opportunities for the positive social benefits that healthy relationships with pets can bring.

Potential Strategies for Identification and Intervention

Clearly, the evidence that cruelty to animals has any prognostic over and above other symptoms of conduct problems is at present not strong enough to warrant alarm at every observed instance, or special programs being set up to identify its occurrence. However, evidence of a pattern of cruelty should warrant further assessment of a child's general adjustment and family circumstances. It appears that a pattern of cruelty in a child with conduct problems may indicate a high risk for later delinquency, and may be a sign of violence within the child's environment.

Apart from family members, neighbours and in some instances, teachers, the professionals most likely to identify cruelty to pets are veterinarians. Research indicates they regularly detect abused animals, and feel ethically obliged to report, with nearly half believing that reporting should be mandatory (Donley, Patronek, & Luke, 1999).

Given that the evidence reviewed indicates that cruelty to animals is likely to be a part of a complex of conduct and family problems, the idea of working directly or specifically on the cruel behaviour is less indicated than attending to the underlying problems that the cruelty reflects. Further, there is very little literature

describing or evaluating direct interventions for cruelty. However, there are some indirect reasons for not entirely dismissing this idea. Programs for children and adolescents who have committed sex offences (and who have usually been abused themselves) typically focus on the development of empathy as a prime target (Becker, 1996; Bunston, 2000; Rich, 1998). Similarly, interventions for victims of physical and emotional abuse typically target the experience of receiving and showing empathy as a major component. Recent articles from therapists have even discussed ways that pets can be utilised in therapy to aid children who have problems with empathy (Fine, 2000; Mason & Hagan, 1999).

We could locate only one trial, however, that directly worked with children's relationships with animals. Ascione and Weber (1996) assessed a year-long school-based humane education program on 4th graders' attitudes toward animals. Generalisation to human-directed empathy was also measured. In a controlled trial, increases in humane attitudes relative to the control group was evident at 2-year follow-up and had generalised to human-directed empathy. The study involved a community sample and so effects on the severe end children showing cruelty is unknown. However, it paves the way for research looking at the effectiveness of such interventions used both preventively, as tertiary treatments, and as contexts in which children with major problems with cruelty can be identified.

Conclusions and Directions for Future Research

In summary, we are beginning to develop a clearer picture of the phenomenon of childhood animal cruelty and this review has highlighted several noteworthy points. Before summarising these substantive conclusions, we wish to make some suggestions for research studies that are a high priority to move the area onwards:

1. Epidemiological studies of child and adolescent cruelty to animals that adopt: a developmental perspective, comprehensive definitions that involve important components of its characteristics and motivations, and consideration of contextual factors such as the broader adjustment of the child and family.
2. Experimental studies of caregiver-child interactions in the presence of pets and other animals that focus on the development of specific caregiving versus cruel behaviours and more general constructs such as empathy.
3. Longitudinal studies of children showing cruel behaviours. Specifically, subtyping models of conduct disorder need to be tested in which the predictive power of early cruelty is compared with that afforded by more general aspects of the child's adjustment.
4. Intervention studies looking at the efficacy of reducing cruelty and increasing empathic and nurturant behaviours in children already showing signs of cruelty.
5. Larger studies examining the utility of community-based identification and intervention strategies for children at risk or already showing signs of cruelty, and the relationship of these to related issues of child abuse and domestic violence in families.
6. Continuation of retrospective studies of violent offenders using the design innovations exemplified by the study by Felthous and Kellert (1986).

In terms of substantive conclusions, the above review leads us to offer the following:

1. Child–animal relationships are a part of normal development that offer parents and children opportunities to learn about the nature of power-dependency relationships. On the healthy side, they offer opportunities to learn nurturant, caregiving, and empathic behaviours toward subordinates. Very little research, however, has been conducted into the developmental pathways associated with healthy child–pet relationships, or the microprocesses characteristic of parent–child interactions in this context.
2. Evidence is emerging that cruelty to animals will be best understood by adopting definitions and assessment strategies that embrace several dimensions, including the type and variety of cruel behaviours, the type and variety of targets (different species, different relationships to child), motives for the behaviour (e.g., causing pain versus attracting a caregiver's attention), the child's potential for empathic and remorseful responding, and evidence of enjoyment of the animal's pain.
3. Child–animal relationships characterised by cruelty are clearly deviant and commonly exist within a broader pattern of aggressive and antisocial behaviour. Retrospective studies of violent criminals produce findings consistent with the idea that early cruelty to animals is predictive of later violence. Prospective studies are limited to evidence that the presence of proactive aggression in childhood, of which cruelty may be a part, is predictive of later delinquency. Whether the presence of early cruelty has predictive power that is unique over and above predictions that could be made by other early behaviour problems (e.g., aggression to humans, truancy, stealing) has not been adequately studied.
4. There is little evidence that cruelty to animals exists in a triad of uniquely predictive behaviours (i.e., with firesetting and bedwetting).
5. A problem with the inclusion of animal cruelty into the DSM system is that no attempt is made to build in assessment of the various dimensions of cruelty that may characterise its unique prognostic features (i.e., variety of cruel acts and targets, deriving pleasure from the pain of others).
6. Cruelty to animals is clearly associated with a family context characterised by violence and abusive behaviour to subordinates. Thus, the child's behaviour may in part reflect behaviour toward animals and other members of the family they have observed, and behaviour they have experienced directed toward themselves. As such, the relationship of childhood cruelty to animals to family factors has both etiological significance, and important applicability in that childhood cruelty and/or the presence of abused animals offer an opportunity for identification of families and children in distress. However, it should be noted that this conclusion refers to groups of people, and cases of cruel children have been reported in apparently healthy families (see earlier section on biological factors).
7. The best of current theoretical formulations centre around two major propositions. The first are models that, derived from more general models of the learning of aggression in families, emphasise coercive family microprocesses within a social-learning framework (e.g., see Dodge et al., 1990; Patterson, 1982). The

second are developmental models, exemplified by Goldberg (1995), that emphasise the experience of abuse and humiliation, the resultant internalisation of shame, and the development of a generalised malevolence that expresses itself through the infliction of pain and humiliation onto others.

8. Little work has been done on community and clinical procedures for identifying and helping children who show cruelty to animals. Given the strong associations found between cruelty and other behavioural and family problems, it would be premature to set up clinical programs that specifically target cruel behaviour out of context from the child's general health and adjustment and family relationships. Several innovative approaches were noted, however, specifically, community interventions in which empathy toward animals can be targeted with potential benefits to levels of human empathy, and clinical interventions which utilise pets as vehicles for learning about empathy and nurturance.

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Animal cruelty, pet abuse & violence: the missed dangerous connection

Abstract

The mistreatment and abuse of animals is a significant indicator of violence towards humans, up to and including intimate partner abuse, sexual assault, rape, murder. All too often mental health professionals and prosecutors miss the seriousness of any cruelty towards animals and the significant role animal cruelty plays in the perpetuation of violent and non-violent criminal behavior. The literature supports that animal cruelty is one of the earliest markers for future acts of both violent and nonviolent criminal behaviors. Whether animal cruelty occurs prior to or subsequent to witnessing or experiencing any type of abuse is unknown. What is known is the connections between experiencing abuse, witnessing domestic abuse, and animal cruelty. This means that the directionality of cruelty to animals is not always clear, that is, which occurs first, the negative environmental factors (abuse) or animal cruelty.

Volume 6 Issue 5 - 2018

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Received: September 22, 2018 | **Published:** November 20, 2018

Background

It is sad to see time and time again how information on the seriousness and dangerousness of animal cruelty goes unnoticed or is minimized when intervention and prosecution occurs. Research from the 1980's to the present has demonstrated that cruelty to animals is a hallmark or signature indicator for future acts of violence, including rape, child molestation, domestic abuse, school shootings, and other forms of violence. If someone can be abusive or cruel to animals, then it makes sense that they could and often do become aggressive and violent towards people. Animal cruelty is defined as the crime involving the infliction of pain, suffering, or death to an animal. Animal neglect can include withholding of food and water and shelter and that as a result the animal has in any way suffered, died, or been placed in imminent danger of death (animal cruelty, n.d.). In short, anything that is done to mistreat an animal. People who engage in animal cruelty are monsters. What does it take to abuse or neglect a living and gentle pet? The answer is simply monstrous and evil intentions.

Definition of animal cruelty

In summary, animal cruelty is defined as any intentional and repeated behavior that causes physical or psychological distress in animals, including, but not limited to, causing unnecessary pain, suffering, distress, or death of an animal.¹⁻³ The terms *animal cruelty* and *animal abuse* will be used interchangeably in this article.

Definition of domestic violence

The term domestic violence will include any act of emotional, psychological, physical, or sexual abuse or neglect that occur within a family unit, regardless of the relationship between the adults and children. Intimate partner violence will be used interchangeably with domestic abuse, partner abuse, dating violence, any relationship violence between romantic partners.

Definition of batterer

The term batterer will include those who emotionally, psychologically, physically, or sexually harm or abuse their romantic

or relationship partner, regardless of whether married, sexual preference, or whether residing together. Abuser and batterer may be used interchangeably.

Problems in assessing abuse and animal cruelty

It should be noted that numerous researchers have mentioned a weakness in assessing whether domestic or child abuse had occurred in the home, that being that it relies on someone's, usually the mothers, self-report. It is understandable that parents may under- or over-estimate the degree of or any type of abuse that occurred in the home, especially when looking retrospectively at their child's violent behavior. Victims have also been known to minimize the degree of violence that occurs in the home. The prevalence of abuse or violence within the home of children who engage in animal cruelty would likely be higher if there were better means to assess it other than simply self-report. In addition, defining a *violent* from *non-violent* offender is challenging because the majority of offenders are versatile and commit both violent and non-violent crimes. In fact, those who habitually commit violent crimes share similarities with those who habitually commit non-violent crimes.^{4,5}

What the research has to say

There have been consistent research findings to suggest a strong link between animal cruelty and violence towards people including domestic abuse and child abuse.⁶⁻¹⁶ Law enforcement is also aware of the connection between animal abuse and human violence.¹⁷⁻²⁰ Animal abusers are more likely to engage in criminal behavior and to be diagnosed as having Antisocial Personality Disorder.²¹⁻²⁴ Those who engage in animal cruelty were 3 times more likely to commit other crimes, including murder, rape, robbery, assault, harassment, threats, and drug/substance abuse.²¹ The major motivations for engaging in animal cruelty include anger, fun, control, fear, dislike, revenge, imitation, and sexual pleasure.²⁵⁻²⁷ Cruelty to animals is first often reported when children are ages 4-6 and older.²⁸ Unfortunately, parents often underreport children who are abusive to animals. Children who demonstrate cruelty to animals often display callous unemotional traits and have often been the victim of abuse or witness abuse in their home. Childhood animal cruelty is also linked to violence against

people, including committing future acts of child abuse and abuse against the elderly.^{29–31} MacDonald³¹ first wrote about the Triad of childhood cruelty to animals, firesetting, and enuresis, and that child who had these behaviors were often sadistic. However, when later retested in 1967, he found that his sample of homicide offenders presented with histories of parental brutality, parental seduction, childhood firesetting, and cruelty to animals, but not enuresis. The *Dark Triad* of narcissism, Machiavellianism, and psychopathy³² have been associated with negative interaction styles and negative behavior, though not always criminal in nature. The Dark Triad involves callous and manipulative behaviors. Those who present with higher levels of the three traits in the Dark Triad demonstrated more negative attitudes towards animals and reported engaging in more acts of animal cruelty.³³ Callousness has been found to be at the core of the Dark Triad.^{33,34} The younger the age and having higher level of the Dark Triad traits correlate with more negative views of animals and is predictive of an anti-social or violent trajectory. Early onset of animal cruelty is predictive of engaging in multiple acts of animal cruelty among men incarcerated for murder or attempted murder.^{35,36} Incarcerated men reported higher rates (25%) of “substantial cruelty to animals” in childhood.³⁷ Approximately 36% of assaultive women reported having engaged in cruelty to animals as well.³⁸ Female serial killers have reported histories of engaging in the torture or killing of animals, especially cats.³⁹ Law enforcement is also aware of the connection between animal abuse and human violence.^{17–20} Perhaps one of the first symptoms of Conduct Disorder is animal cruelty in childhood.⁴⁰

Domestic abusers may engage in animal cruelty because they likely lack empathy and conscience. Domestic abusers and child abusers also engage in animal cruelty as a means to control and further intimidate their victims. Harming the family pet is an effective way to instill fear in and secrecy from victims and even giving the pet away or killing it effectively teaches the victims that they can just as easily be killed or seriously injured as well. Children who were sexually abused were also more likely to be cruel to animals.⁴¹ Adolescent sex offenders may use animal cruelty to gain compliance from victims.⁴² 40% of sexual homicide perpetrators admitted that they had been sexually abused and that they had engaged in sexual contact with animals.⁴³

Children who engage in animal cruelty

Children who witness animal cruelty are 3–8 times more likely to abuse animals.⁴⁴ Children who engage in animal cruelty are more likely to abuse in the community, at school, and in the family and to be exposed to domestic violence.^{45–47} Children may engage in cruelty to animals out of curiosity or imitation, because they have been desensitized to violence, have decreased empathy, or lack of attachment.^{48–50} In extreme cases, children living in a violent home may kill their pet to prevent their pet from sustaining further injury.⁵¹ Approximately 30% of women in violent homes reported that their children had harmed or killed their companion animals.⁴⁹ In her study, Baldry⁵³ found that over 50% of youth who witnessed parental domestic abuse engaged in animal cruelty, nearly 70% of the children were male. Children who engage in animal cruelty are more likely to engage in other antisocial conduct, including a decrease in empathetic response toward violence against others and animals as well as more emotional and behavioral problems.^{53–55} The exposure to witnessing animal violence may desensitize the child to violence. Significant

relationships were found between active animal abuse (e.g., beating, stabbing) and both interpersonal violence and substance abuse as well as between sexually abusing animals (bestiality) and sexual offending against humans.¹³ Children exposed to domestic abuse, sexual abuse, *and who were physically abused or neglected* were more likely to engage in animal cruelty than other children.^{56–58} Children exposed to physical *and/or* sexual abuse were far more likely to engage in animal cruelty than those children not abused.^{59–61} Children who were physically abused were twice as likely to engage in animal cruelty as their peers⁴⁸ and children from homes with domestic abuse and who were maltreated were more likely to engage in animal cruelty. In summary, children who experienced multiple types of abuse were more likely to engage in animal cruelty. It is suggested that early antisocial childhood behavior that includes callous and unemotional traits is related to both genetics and family environment, though in some studies family environment did not always appear to play a significant role.^{54–62} In some cases, approximately half of the children that were cruel to animals had not been physically maltreated. Over 80% of children who were maltreated did not engage in animal cruelty.^{63,64} Acts of animal abuse that continue without intervention may escalate to more severe violence against humans in the future.⁶⁵ Children who engage in animal cruelty is a hallmark of psychopathy.⁴⁴ Again, not all children who engage in animal cruelty will become psychopaths or harm others. Ascione¹⁵ found that 32% of abuse victims indicated that their children had hurt or killed one or more of their family pets. Children of women in shelters were 20 times more likely to have witnessed animal cruelty.⁴⁹ Duncan and Miller⁶⁶ identified several family risk factors associated with childhood animal cruelty and adult violence: physical abuse, sexual abuse, paternal alcoholism or paternal absence, and exposure to domestic abuse. Baldry⁵³ found that over 50% of children/adolescents in their study that had been exposed to children domestic violence and witnessing animal cruelty actually engaged in animal cruelty themselves. Baldry also found that witnessing a mother enact animal cruelty resulted in over 90% of boys directly abusing animals. This may suggest a more damaging developmental impact on children when their mother is the animal cruelty perpetrator. Animal cruelty may well be a reaction to the exposure to domestic violence and/or a result of modeling. The theory of modeling animal cruelty and other violence has support.^{66,67} The two are intertwined and other factors may also impact the children. Domestic violence and child abuse have consistently been found to exist prior to children engaging in animal cruelty.^{8–46} One study found that children exposed to domestic abuse are 3 times more likely to engage in animal cruelty.⁶⁴

Domestic abuse

In a review of the literature, it was demonstrated that children’s exposure to domestic abuse is correlated with negative outcomes, including psychosocial impact, which increases the chance for the children to engage in intimate partner violence later in life.⁶⁸ The rates for intimate partner violence range from 11%–71%^{69–72} Exposure to intimate partner violence includes direct observation of the violence as well as being aware of the violent behavior.^{73,74} Exposure to domestic abuse has been associated with numerous negative outcomes, including the development of serious and persistent social, emotional, and behavioral problems, all of which may impact the development or maintenance of healthy adult relationships. These factors have been associated with engaging in domestic abuse in adulthood.^{75–77}

Kimber et al.⁶⁸ found that exposure to intimate partner violence in childhood increased the likelihood of engaging in adulthood intimate partner violence fourfold. The more types of intimate partner violence that are co- occurring (e.g., emotional and physical), the stronger the connection with engaging in later adulthood partner violence.^{78,79} It is more frequently the case that if one form of intimate partner violence is occurring, that other forms are occurring as well (e.g., emotional, psychological, physical, and sexual). In addition, early and enduring exposure to environmental stressors, including witnessing intimate partner violence has been shown to impact the immune system which in turn may significantly impact the child's responsivity (ability to cope) with subsequent stressful situations and therefore more likely to respond to interpersonal stress and conflict with violence.^{80,81} Levitt, Hoffer, Loper,¹⁴ found that at least half of their sample had one or more arrests for intimate partner violence and animal cruelty. Violent individuals tend to attack multiple family members, including pets.⁸² In the majority of families where physical abuse occurred animal cruelty also occurred; approximately 66% of the animal cruelty perpetrators were the fathers or males in the home and in approximately 33% of the abusive homes the children were the perpetrator of the animal cruelty.⁸³ Abusers often used threats against the family pet to maintain control over the victims.^{84–86} Studies found that abusers had injured or killed the family pet in order to prevent the victim from leaving.¹⁹ When violence occurs between the parents or within the household, children are also likely to be abused or neglected.^{87–89} Animal cruelty and domestic violence occur together regardless of the sexual preference of the partners⁷ and sexual abuse has also occurred within the same families as domestic/partner abuse and animal abuse.^{57–90} One study found that when reports of animal cruelty were investigated, 82% of the families were identified as having children who were at risk of abuse or harm.⁹¹ The forms of violence used against the family pet often parallels the violence used against the partner (e.g., hands or feet used to punch or kick; strangulation, choking, throwing).⁹² In one study, 46% of those arrested for animal cruelty had also been arrested for domestic abuse.¹⁴ Physical violence and verbal aggression of humans predict threats, abuse and murder of animals in the same home. Approximately 12–80% of battered women report that their abuser threatened to harm or actually harmed or killed the family pet.^{93–99} The fear for the safety of the family pet keeps many battered women from leaving the home for safety or returning home soon following a violent incident. Approximately 18% to 65% of battered women report that they delayed leaving the home out of fear that harm would occur to their pet.^{93–97} Remember that when a victim leaves the violent home for a shelter, as many as 50% or more of the pets remain with the abuser.^{15,16}

The impact of witnessing parental violence

Witnessing parental or other violence may increase the likelihood for the development of antisocial traits and behaviors.^{100–104} This fits into Bandura's Vicarious Learning Theory¹⁰⁵ which theorizes that the observation of a behavior is more likely to lead to the replication of the behavior when the observer and model have a meaningful relationship. Parents and adults who model any type of violence or aggression are likely to teach that same behavior to the children who witness it.¹⁰⁶ Witnessing significant others and those in the media engage in violence or animal cruelty encourages children to replicate the behavior and may result in the child being desensitized to later violence as well as a decreased physiological arousal following exposure to violence.^{107–110}

This scenario sets the child up to accept violence as a way to deal with and vent emotions and desensitizes the child to the use of violent behavior. Children exposed to domestic violence are at increased risk for developing psychological maladjustment^{111,112} Boys are especially at risk for showing externalization of symptoms such as physical aggression and antisocial behavior.^{113,114} Girls exposed to domestic violence may become more submissive and withdrawn.¹¹⁵ Both male and female children who witness domestic violence are at higher risk for engaging in the same violent behavior.^{116,117} The strongest predictor of violence towards a partner was presence of Conduct Disorder and the second strongest predictor was exposure to domestic abuse. Additional mediating events in the household may also account for that relationship. The relationship between children who were cruel to animals and abuse is very strong, the strongest relationship was for children who had been physically abused and/or sexually abused and for those who witnessed parental domestic abuse.^{42–59} Gullone⁹⁶ summarizes that childhood animal cruelty, parenting, and the home environment are important for the development of antisocial behavior for children and adolescents. Gullone⁹⁶ indicates that homes where there is a greater instability in the family, more conflict, and problematic parenting strategies (i.e., physical punishment) are more likely to model and direct the child's development towards an antisocial and violent path. Children who experience or observe domestic violence are more likely to be negatively impacted in regards to maladaptive cognitions as well as to develop a callous unemotional response to the violence, thereby disengaging from a normative empathic reaction typical of victims and others.

Corporal punishment

Parents who condone corporal punishment are at higher risk of also engaging in animal cruelty.^{118,119} Father's use of corporal punishment (spanking, slapping, or hitting) was correlated with engaging in animal cruelty.¹²⁰ These same men were over twice as likely to have experienced corporal punishment as adolescents. In addition, the link between animal cruelty, intimate partner violence, and child abuse suggests that everyone in the offender's lives is potentially at risk for being abused or assaulted as well.¹²¹

Animal abuse as an indicator of child abuse

Numerous studies have demonstrated a correlation between children who were sexually abused and subsequently abused animals. Friedrich, Urquiza, & Beilke,¹³ found that 35% of boys who were sexually abused engaged in animal abuse versus only 5% of those not abused. One study found that of boys who had sexually abused other children and engaged in other acts of violence, that 20% had a history of engaging in bestiality.¹²² many of the children had themselves been severely abused during childhood. Another study found that 20% of sexually abusive children had histories of severe abuse and neglect and had a history of cruelty to animals¹²³ when child abuse or neglect occurred, animal cruelty often co-occurred. This is an important and dangerous connection. When a perpetrator chooses to abuse others, they have little reason not to harm the family animals as well. It would be fruitful for child protection services to refer cases to the police or other mental health professionals to assess for animal cruelty. Conversely, for animal control and law enforcement to refer families and individuals who are engaging in animal cruelty for further mental health assessment.

Risky families

Children who develop aggressive and antisocial behaviors (including animal abuse) tend to be exposed to what is referred to as the risky family.¹²⁴ These families are characterized by abusing the children, overt family conflict, expressions of negative affect, and low nurturance and warmth. Risky parents are often cold, neglectful and unsupportive of their children. Tapia¹²⁵ explained that a chaotic home environment with aggressive parental models created a hostile environment for the children. Cruelty to animals occurs in conjunction with other hostile behavior (e.g., bullying, fighting, and lying, stealing). The chaotic home environment along with aggressive parents who often utilized harsh corporal punishment created a situation that modeled the children into behaving violently.¹²⁵ Curry found that children exposed to domestic violence were significantly more likely to engage in animal cruelty. Approximately 29-32% of children exposed to domestic violence engage in animal cruelty.⁴⁸⁻⁵⁰ Children physically or sexually abused engaged in cruelty to animals at a rate of 44%, and 54% of children who were exposed to domestic abuse and animal cruelty engaged in animal cruelty.⁴⁸ For children who were sexually abused, physically abused, and exposed to domestic abuse demonstrated higher rates of animal cruelty than those who experienced only one form of abuse.⁴² Those children who experienced multiple types of abuse, including exposure to domestic abuse, were also more likely to present with more psychological distress than those who experience one form of abuse or only witnessed domestic abuse.⁴²⁻¹²⁷

Bullying & animal cruelty

A relationship has also been established between animal cruelty and bullying.^{128,129} Males tend to perpetrate both animal abuse and bullying at higher rates than females and those that have engaged in bullying have higher rates of engaging in animal cruelty behavior. Witnessing animal cruelty, family conflict, and being the victim of bullying resulted in higher rates of engaging in animal cruelty.¹³⁰ High rates of bullying and of victimization are predictive of multiple acts of animal cruelty and vice versa.¹³¹ When children are identified as engaging in bullying behavior, it is important to assess whether they have engaged in animal cruelty as well, and vice-versa. Imagine the pain the child who is the bully experiences to lead to their decision to hurt others and animals. This is important not only in understanding the bully's motivation but to offer the most effective intervention. The bully may well live in a violent home and intervention is needed there as well.

Rapists, pedophiles, violent offenders

Researchers found that approximately 50% of rapists over 25% of pedophiles had childhood histories of harming animals.¹³² In one study, nearly all homicidal sex offenders in the study engaged in significantly more animal cruelty when young and no homicidal sex offenders engaged in animal cruelty in both childhood and adolescence.¹³³ It is suggested that bestiality is also forced on children who are sexually abused and involved in the production of child pornography.¹³⁴ It was reported that 50% of boys who were sexually abused were involved in bestiality.¹³⁵ Of serial murderers, as previously mentioned above, a significant percent engaged in animal cruelty as children, adolescents, and as adults.^{136,137} There is also a significant correlation between sexually abusing animals (bestiality) and sexual offending against humans.¹⁴ In fact, they found that at

least 20% of their sample committed a sex offense including rape or child molestation- this statistic is higher for batterers and animal cruelty offenders than in the general population. Cruelty to animals is a hallmark background for serial murderers.¹³⁷ Approximately 25% of incarcerated violent offenders admitted they had engaged in animal cruelty versus approximately 7% of the nonviolent group.¹³⁸ Kellert & Felthous¹³⁹ also found that 25% of aggressive inmates reported multiple incidents of cruelty to animals in childhood. Aggressive inmates also reported more extreme forms of animal cruelty, higher levels of generalized violence in childhood, and exposure to domestic abuse. Aggressive, violent criminals often report paternal violence, reporting repeated and excessive child abuse and approximately 75% of non-criminals who reported childhood physical abuse reported engaging in animal cruelty. McPhedran¹⁴⁰ points out that although 25% of animal cruelty offenders engage in violence towards people, 75% do not. This is important in that animal cruelty is a marker for more severe psychopathology and violence towards people but not all will become those violent criminals. It is important that the sex offenders and domestic abuse perpetrators be assessed for a history of animal cruelty not only to understand the progression of violence in the offender's life but to ascertain the degree to which the offender has or lacks attachment capabilities. To engage in animal cruelty or animal killing may suggest a more serious personality disordered individual. Of *school shooters*, 45% had histories of alleged animal cruelty¹⁴¹ and 21% of serial murderers reported they had engaged in cruelty to animals as children.¹³⁷ Serial murderers and mass murderers often have engaged in animal cruelty in childhood.¹⁴² These are facts that are simply too important for law enforcement and mental health to overlook. Early intervention is the key to address this dangerous connection of animal cruelty and violence towards humans.

Motivations for animal cruelty

Batterers use threats to harm, actual harm, and actually kill pets in order to control their victims.^{143,144} Batterers who harmed the family pet or other animals tended to engage in more extreme forms of violence including higher rates of sexual violence, marital rape, emotional violence, and stalking, and utilized more controlling behaviors including isolation, exercising the male privilege, blaming, intimidation, threats, and economic abuse.¹⁴⁵ Jealousy has also been identified as a reason why batterers engage in animal cruelty, suggesting that the abuser is jealous of his partner's relationship with the animal.¹⁴ Men abuse companion animals in order to confirm their power over others; to express rage; to punish or terrorize; to teach submission; and to discourage their partner from leaving.¹⁴⁶ The impact of the above motivations increased when the batterer killed a companion animal. Threatening to or actually harming the family pet is at times an effective way to deter the partner from leaving the relationship, instilling fear, punish the partner for attempt to leave, and isolating the partner from supportive relationships, as well as used to force the victim to return to the violent relationship out of fear for the family pet.¹⁶⁻⁴⁵ Some have suggested that those who engage in intimate partner violence and animal cruelty have a compromised capacity to empathize with others, have an uncontrollable anger, attempt to dominate others who are weaker than themselves, and/or a desire to control one's intimate partner.¹⁴ Another motivation for animal cruelty appears to be a perceived misbehavior of the pet. For example, an abuser who has unrealistic expectations of the animal or does not understand the animal's reactions to situations or how to appropriately

train the animal.^{14–93} Some of the abusers who engage in animal cruelty may do so for far more nefarious motives, such as sadism.^{22–45} These sadists may abuse the animals before moving to human victims or concurrently. In summary, adult animal cruelty offenders may harm the family pet in order to intimidate, retaliate, punish, to isolate the victim/s, prevent the victim/s from leaving, or to force the victim to return.¹⁴⁷ Just as for any crime, the motivations of the offender vary. It is important to determine what the underlying motives are. Often the witnesses to the animal cruelty provide information that is helpful in this matter. Some of the witnesses may also be victims of direct abuse or violence at the hands of the perpetrators as well and they have valuable information to help assess the underlying and direct motives for the animal cruelty.

Explanation of the role animal cruelty plays in violent histories

The *Violence Graduation Hypothesis* (VGH) and the *Deviance Generalization Hypothesis* (DGH) both help to understand how animal cruelty occurs. Gullone⁹⁶ provides a thorough review and explanation of these hypotheses. It is within the context of the home environment, the parenting relationship, relationships at school, and personality factors. There is no one theory that fully explain how animal cruelty occurs and/or the directionality of how the known factors interact to allow for animal cruelty to occur. Both of the hypothesis provides a better understanding for assessment and intervention into the lives and homes of the person who engages in animal cruelty.

The violence graduation hypothesis

This approach suggests that animal cruelty in childhood is predictive of violence towards humans in adulthood.^{148,149} A significant association was found between violence in adulthood and animal cruelty. This included animal torture and killing of animals in childhood and adolescence. Of serial murderers, in one study 36% engaged in animal cruelty as children, 46% engaged in animal cruelty as adolescents, and 36% engaged in animal cruelty as adults.¹³⁶ Another study showed that 21% of serial murderers had engaged in animal cruelty.¹³⁷ *In short, this theory suggests that children learn about and practice animal cruelty and are desensitized to the consequences of the violent behavior before they graduate to violence against humans.*

Violent offenders were significantly more likely to present with a history of animal cruelty than non-violent offenders.¹⁵⁰ However, animal cruelty was correlated with both violent and non-violent offending, not just violent offending. Therefore, at least for males, animal cruelty may be a marker for antisocial behavior in general, including violent and non-violent crimes. However, for female offenders, animal cruelty correlated twice as high with violent offenses.¹⁵⁰ The presence of Antisocial Personality Disorder, Antisocial Personality traits, and polysubstance use is highly related to those who engage in animal cruelty.⁹ Two factors related to repeated interpersonal violence were bestiality and young age at first act of animal cruelty.¹⁵¹ Those with childhood onset of animal cruelty present with more severe forms of antisocial behavior than those who began in adolescence. They demonstrated an escalation of severe aggression and were referred to as the life-course persistent group.^{152,153} Another study found that 37% of abused children engage in animal cruelty.⁵⁸ Factors related to childhood animal cruelty includes being a victim of physical or sexual abuse, witnessing parental violence, witnessing parents or peers engage in animal cruelty, and bullying or being the bully.¹⁵⁴

Being abused or neglected in childhood may lead to the development of callous-unemotional traits,¹⁵⁵ which is related to animal cruelty and violent behavior later in life. Fighting, bullying, cruelty to animals, and assault were some of the earliest indicators of conduct disorder and cruelty to animals placed the individual at the severe end of the continuum.^{156–158} Perhaps one of the first symptoms of Conduct Disorder is animal cruelty in childhood¹⁵⁶ and the animal cruelty may lead to further forms of violence and can disrupt development.¹¹⁸

The deviance generalization hypothesis (DGH)

This approach suggests that aggressive behaviors occur in the context of other antisocial behavior; including substance abuse, not just physically or sexually aggressive behavior.¹⁵⁹ The view of the DGH is that aggressive behaviors, including animal cruelty, lie on the antisocial behavior spectrum.^{160,161} Animal cruelty is simply one aspect along the continuum of violent and non-violent criminal behavior. Animal cruelty may precede or follow other non-violent or violent behavior- directionality is not specific.²² *In the DHG theory, animal cruelty may precede or follow interpersonal violence, whereas the VGH model described above would argue that the animal cruelty would likely have occurred prior to the interpersonal violence.* Research has demonstrated that those who engage in animal cruelty are associated with more serious and recurrent violence¹⁶² and in one study 25% of the animal cruelty offenders committed other offenses including rape, homicide, assault, abduction/kidnap, and harassment as well as property crimes and drug/other offenses.¹⁶³ Animal abusers were more likely to be involved in other criminal and violent behavior, with as many as 70% of those cruel to animals committing at least one property or person offense. In addition, those who were cruel to animals also presented with lifetime histories of “lifetime nicotine dependence” and “lifetime alcohol use disorder”.¹²⁸ Animal cruelty was correlated with both violent and non-violent offending.¹⁵⁰ The first incident of animal cruelty generally occurs around 6 ½ years of age along with other aggressive behaviors.¹⁵⁶ Of those children diagnosed as having conduct disorder, approximately 25% engage in animal cruelty.¹⁵⁶ Males were by far more likely to engage in animal cruelty however when females did so, they were just as likely to engage in other antisocial and aggressive behaviors. Some have suggested that older children who engage in animal cruelty present with callous-unemotional traits, characterized by a lack of guilt and empathy, and that they also possessed other traits related to psychopathy (e.g., superficial charm, lack of empathy, grandiose sense of worth).^{164,165} Among factors for lifetime animal cruelty and violence included being male, younger when the first aggression or animal cruelty occurred, being from a lower socioeconomic status.¹⁶⁶ Other identified consistent behavior included arson, harassment, threatening others, rape, and lifetime substance abuse including nicotine.

Summary of the VGH & DGH models

Both the Violence Graduation Hypothesis (VGH) and the Deviance Generalization Hypothesis (DGH) help explain how the role that animal cruelty plays in the course of developing a violent lifestyle. Both offer support from the research community in explaining the role of animal cruelty. The VGH model suggests that one form of violence leads to other forms of violence and from violence against animals to violence against humans. The DGH model proposes that animal cruelty simply lies on the continuum of violence and occurs with other crimes, both violent and nonviolent. The progression from Conduct

Disorder to Antisocial Personality Disorder is well documented and supported in the DSM-5. This offers support for both the *Violence Graduation Hypothesis* (VGH) and the *Deviance Generalization Hypothesis* (DGH). Both models appear to have validity though neither independently explains the directionality of childhood negative environments, the occurrence of animal cruelty, and the progression to adult violent behavior. A caveat is necessary here. Not all violent offenders have a history of animal cruelty as children, adolescents or adults. In addition, the vast majority of children who engage in animal cruelty do not go on to become serial killers.¹

Risk assessment

Youth who engage in animal cruelty are likely to come to the attention of mental health and the juvenile justice system at younger ages and more likely to have experienced multiple traumas in their lives.¹⁶⁷ They were also more likely to be White non-Hispanic and more likely to be male (however some will be female). The majority of youth engaged in animal cruelty are likely to have experienced domestic violence, caregiver divorce, and the incarceration of a caregiver.¹⁶⁷ The authors also identified that the youth had “also experienced physical abuse, sexual abuse, household substance use, physical neglect, sexual abuse, emotional neglect, and household member with mental illness...” (p. 294). Their findings were supported by numerous other researchers.¹²⁶ Children who have experienced trauma often demonstrate difficulty controlling their emotions and behavior¹⁶⁸ which may lead to engaging in cruelty toward animals. Others have suggested that the above factors play a less direct role for children who are cruel to animals and indicate that factors such as the child’s psychopathology, including callous and unemotional traits play a role.⁵⁴ However, this author cautions that directionality has not been nor likely will ever be proven. Whether the child or adolescent presents with psychopathology including callous and unemotional traits *prior* to having experienced the negative environment (e.g., witnessing domestic violence or being the victim of any type of abuse) or as a result of the negative environment is difficult to determine. Parents in the negative environment may present facts about the home and family members in a less than forthcoming manner. Therefore, it is recommended that a thorough assessment of the youth involved in animal cruelty and their family occurs and that they all undergo a thorough psychological and violence risk assessment. It is important to assess repeated acts versus isolated acts of animal cruelty when assessing the future risk of violence.¹⁶² Even more so to investigate and assess intentional animal cruelty because it serves as a red flag for the propensity of engaging in violent behavior including intimate partner violence¹⁷ intra-familial violence¹⁶⁸ sexual assault¹⁶⁹ and bullying.¹⁷ Even the American Psychiatric Association includes animal cruelty as a criterion for concern, especially under Conduct Disorder and Intermittent Explosive Disorder. Included in the Diagnostic and Statistical Manual of Mental Health Disorders under *Conduct Disorder* is “A repetitive and persistent pattern of behavior ...” and one of the criteria (criteria 5) states: “Has been physically cruel to animals”. When assessing a children or adolescent who has engaged in animal cruelty it is important to assess other ways they may have behaved violently and to thoroughly assess the child’s environment. The connection between having been physically and sexually abused, witnessing domestic abuse, and witnessing animal cruelty and behaving violently towards animals and others is important to understand. It is understood that adults and juveniles who

abuse animals vary on their motives for engaging in animal cruelty. Motivations may suggest specific mental health diagnosis and may be a symptom of the disorder, but mental health diagnosis never cause someone to engage in animal cruelty. Some of the motivations for engaging in animal cruelty include:¹³⁹

- I. Control (of the animal or of others)
- II. Retaliation
- III. Expression of aggression
- IV. Shock and amusement
- V. Displacement of aggression
- VI. Sadism

Specific developmental motivations may include:⁴⁹

- I. Curiosity or exploration
- II. Peer pressure
- III. Mood enhancement
- IV. Sexual gratification
- V. Force abuse (being forced to engage in sex with animals)
- VI. Attachment to the animal
- VII. Posttraumatic play
- VIII. Imitation
- IX. Intimidation (abuse pet to intimidate others)

For more in-depth discussion on motivations see¹³⁹ a typology for juvenile firesetters has been used to also assess juveniles who engage in animal cruelty.²⁹ The three categories are:

- i. Normal curiosity (typically ages 3-7)
- ii. Pathological (“Plea for help”) (typically ages 7-13)
- iii. Delinquent animal abuse or fire setters (typically ages 13 to adulthood).

The above three categories may provide an effective way to assess and intervene in addressing juvenile animal abusers. The following DSM-5 diagnostic categories include animal cruelty. It should be noted that animal cruelty may or may not play a role for a violent individual and those with any of the following diagnosis may or may not have ever engaged in animal cruelty. However, unless specific questions are asked, it is likely that many individuals who are psychologically or forensically assessed may not disclose a history of animal abuse. Self-report is also a concern in that people can deny engaging in animal cruelty despite having done so. However, when considering any of the following diagnosis (or other diagnosis as well) it is imperative that specific questions be asked to determine whether the individual has ever engaged in animal cruelty.

Intermittent explosive disorder

Involves “Recurrent behavioral outbursts representing a failure to control aggressive impulses as manifested by either of the following:” criteria 1 (Verbal aggression) includes temper tantrums and verbal

arguments/fights toward property, *animals*, or others at least twice weekly regardless of whether physical injury occurred; Criteria 2-three behavioral outburst within a year involving damage or physical assault involving physical injury against *animals* or others.

Psychopathy

Traits of *psychopathy* become evident in childhood, including the hallmark sign of callous-unemotional traits. These include a lack of a sense of guilt and empathy and the callous use of others for their own gain.^{170,171} Callous-unemotional traits remained stable from childhood into adulthood and are predictive of adult antisocial behavior and psychopathy.^{172,173} Cruelty to animals may be one of the first symptoms of conduct disorder, often evident around age 6 ½.²⁹ Children who engage in animal cruelty are demonstrating a hallmark of psychopathy 36% of sexual homicide perpetrators had engaged in animal cruelty in childhood and 46% continued to do so in adolescence.⁴⁴ Lockwood¹⁹ concluded that nearly all serial killers first abused animals. Again, not all children who engage in animal cruelty will continue to do so nor will they all become psychopathic or homicidal.

Oppositional defiant disorder and conduct disorder

When assessing children and adolescents for *Oppositional Defiant Disorder* and *Conduct Disorder*, it is imperative to assess for other types of acting out behavior as well, in addition to assessing the home environment for abuse and other deviant issues. Childhood animal abuse has been tied to childhood histories of physical abuse, sexual abuse, and exposure to domestic violence.²⁹ When assessing children for *Conduct Disorder*, it is important to separate out those that engage in animal cruelty from those who do not.¹⁷⁴ There is significant support in the literature to support that if animal cruelty is present in childhood that adult violence against people is highly likely. Remember that animal cruelty¹⁷⁵ occurs within the context of a complicated set of factors (e.g., home environment, parental abuse and criminality, absent father, high stress environments) that impact the child or adolescent in unique ways and each child/adolescent may be impacted differently. Animal abuse is a marker for adult violence¹⁷⁶ but should not in and of itself be the only factor assessed.^{55,66} The entire environment must be taken into account. Animal cruelty occurs within a deviant environment.¹⁷⁷

Bestiality

When assessing *bestiality*, it is important to remember that bestiality and young age of first instance of animal cruelty are important indicators for a dangerous home and for future violence against people.¹⁷⁸ In fact, bestiality alone is the only single factor that if present significantly predicated recurrent future acts of violence.¹⁵¹ It should be noted that zoophilia¹⁷⁹ (a paraphilic interest in animals) had the highest rate of paraphilic crossover with an average of just under 5 paraphilias.¹⁸⁰ A history of bestiality was the single greatest predictor for engaging in future child sexual abuse.¹⁸¹ In fact, those who engaged in bestiality had a significantly high rate of engaging in sexual offenses against humans.¹⁸² It is important to recognize that not all of those with bestiality and zoophilia will engage in sexual or other violence towards humans.¹⁸³ However, it is a robust factor. There is also a significant relationship between sexually abusing animals (bestiality) and sexual offending against humans.¹⁸⁴ Animal sexual abuse and interpersonal violence, including sexual assault/rape

may involve the fusion of aggression and sexuality.¹⁸⁵ The pairing of violence against humans and animals may have a sexual release and the animal cruelty may escalate to the killing of the animal.¹⁸⁶ Engaging in sex with animals, animal cruelty, and sexual assault/rape suggest a preference for abusing those who are unable to refuse or resist.¹⁸⁷ In one study, 36% of incarcerated sexual offenders admitted to having had sex with animals.¹⁸⁸ Perhaps more sexual offenders who target intoxicated, drugged, or unconscious victims also have also engaged in sexual contact with animals or engaged in animal cruelty-this needs to be further assessed. Engaging in sex with an unconscious or severely intoxicated individual implies at least some degree of preference of sex with those unable to refuse or resist.

Additional mental health diagnosis associated with animal cruelty

Other mental health diagnosis correlated with cruelty to animals include *Conduct Disorder*, *Antisocial Personality Disorder*, *Obsessive-Compulsive Personality Disorder*, *Histrionic Personality Disorder*, and a significant association with *Substance Use Disorders*, *Pathological Gambling*, and a family history of antisocial behavior.¹⁸⁹ *Borderline Personality Disorder* would also likely be correlated with animal cruelty, however again, the clinician would have to ask specific questions to assess whether animal cruelty has occurred.¹⁹⁰

What we can do

Because of the important role pets play in the family, it is imperative that domestic abuse shelters allow for pets. Victims are often isolated from family, friends, and then their pets, which places them at higher risk for returning to the abusive and violent home. Keeping the pets with the victim will help in victim safety. This has been echoed by many others, including Allen, Gallagher, & Jones,¹⁴³ Komorosky, Woods, Empie,¹⁹¹ Krienert, Walsh, Matthews, & McConkey.¹⁹² One strategy that I teach police officers nationwide is to use the local humane society,¹⁹³ animal shelters, as well as the local pet food/supply stores. Most will temporarily shelter a pet to help a victim of domestic abuse be safe.¹⁹⁴ And the result is often a more cooperative victim when it comes to prosecution,¹⁹⁵ not to mention a victim is now safe. For veterinarians,¹⁹⁶ it is important to work with other agencies, especially law enforcement, when abuse or neglect is suspected.¹⁹⁷ It is also imperative that humane societies, societies for the prevention of cruelty to animals,¹⁹⁸ and animal control agencies report to child welfare and law enforcement agencies any suspected animal abuse or neglect.¹⁹⁹ These agencies may be the first to recognize dangerous patterns²⁰⁰ of animal cruelty and child abuse, domestic abuse, and other serious mental health and behavioral problems. For further information, see.²⁰¹

Summary

The reason this article and review of literature was undertaken was to address frustration at how the dangerous connection between animal abuse, domestic and child abuse, and witnessing parental abuse somehow continue to be missed. Professionals intervening in animal abuse or domestic violence/child abuse situations need to assess the presence or history of animal cruelty. The missed dangerous connection between animal cruelty and other forms of violence is one for mental health professionals to address. The literature and research has clearly demonstrated that the risk factors for animal cruelty are no

different than those for aggression, violence, and antisocial behaviors. Pet abuse is often one of the first indicators noticed of a violent home situation, one that if ignored may develop into a pattern of violence against both animals and people. Over fifty years of research supports that animal cruelty is an indicator of risk for violence towards humans. Physical batterers and assaulters, as well as sexual offenders, often have a history of engaging in animal abuse. The Dark Triad of narcissism, Machiavellianism, and psychopathy often result in violence towards animals and humans. Callousness is perhaps the most supported factor involving the development of aggression towards animals and humans. Early onset of animal cruelty is predictive of engaging in multiple acts of animal cruelty among men incarcerated for murder or attempted murder. It is suggested that early antisocial childhood behavior that includes callous and unemotional traits is related to both genetics and family environment; Children who engage in animal cruelty are demonstrating a hallmark of psychopathy. Again, not all children who engage in animal cruelty will become psychopaths or harm others. The importance of identifying and intervening in situations where children are exposed to domestic violence is imperative. Witnessing parental violence is an important and often missed connection between children who become violent towards animals and humans and those who do not become violent. Rapists, pedophiles, and murderers often have histories of engaging in animal cruelty beginning in their childhood or adolescence. Domestic abusers and child abusers often abuse or kill companion animals in order to exert power over others, to express rage, to punish or terrorize, to teach submission, and to discourage their partner from leaving. In summary, abusers engage in animal cruelty to control and intimidate others. The *Violence Graduation Hypothesis* (VGH) and the *Deviance Generalization Hypothesis* (DGH) both help to understand how animal cruelty occurs. In summary, the VGH theory suggests that children learn about and practice animal cruelty and are desensitized to the consequences of the violent behavior before they graduate to violence against humans. The DGH theory suggests that animal cruelty may precede or follow interpersonal violence, following a trajectory of violence in many arenas. Both offer support for the importance of examining the presence of animal cruelty. Intervention for any type of violence should include an assessment to address whether the individual has a current or prior history of engaging in acts of animal cruelty. When law enforcement and animal control officials are called to investigate animal cruelty complaints, it is important to refer the suspects for a violent risk assessment. Again, not all people who engage in animal cruelty will become mass murderers and certainly many children who have engaged in animal cruelty may cease the animal cruelty on their own or when intervention occurs.

Acknowledgements

None

Conflict of interest

The author declares that there is no conflict of interest.

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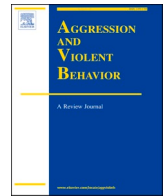
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Animal abuse in the context of adult intimate partner violence: A systematic review

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ARTICLE INFO

Keywords:

Animal abuse
Intimate partner violence
Domestic violence
Pets
Systematic review

ABSTRACT

This systematic review focused on animal cruelty in abusive adult intimate partner relationships with a specific focus on the prevalence, motivations, and impact of animal abuse on victims of intimate partner violence (IPV) and the pets involved. Peer-reviewed research articles were sourced from online databases PubMed, CINAHL, Scopus and PsycInfo in July 2020. Overall, 427 records were retrieved, of which 35 articles from 30 studies were included in this review. Relevant data were extracted, with results presented as a narrative summary. The findings showed that the prevalence of animal abuse is high in households with intimate partner violence (range: 21%–89%) and there is a significant relationship between intimate partner violence and animal abuse. Both are often perpetrated concurrently, with animal abuse used as a mechanism to control the partner and facilitate intimate partner violence. Animal abuse affected a victim's decision to leave the abusive relationship and seek support and had an ongoing psychological impact on both animal and human victims. The findings have practical implications for organizations, professionals and researchers working in the field of intimate partner violence and animal abuse.

1. Introduction

Animal abuse (AA) is defined as “all socially unacceptable behavior that intentionally causes unnecessary pain, suffering or distress and/or death to an animal” (Ascione, 1993, p. 83). Physical abuse (e.g., kicking, punching, throwing, burning, drowning, asphyxiation, animal fighting) and neglect (e.g., deprivation of food, water, shelter, companionship, veterinary care, physical exercise) are the most basic forms of AA. AA is distinguished as active (e.g., stabbing, kicking, and beating) and passive (e.g., neglect and deprivation) abuse (Vermeulen & Odendaal, 1993) and is often underreported. For instance, there are around 60,000 reported incidents of AA to the Royal Society for the Prevention of Cruelty to Animals (RSPCA) in Australia every year (RSPCA Australia, 2019). However, this figure is likely only a small fraction of the estimated total instances of AA and underestimates the problem, as more than one quarter (25.7%) of people surveyed in one Australian study witnessed AA, of which only 9% reported the incident (Glanville et al., 2019). Among an undergraduate sample at a UK university, Newberry (2018)

found that 55% of the sample reported committing at least one act of animal cruelty, with jealousy, amusement, control of an animal, and retaliation against an animal often reported as motivations for AA.

Violence towards animals and humans is often interconnected and AA frequently parallels human abuse, with a significant overlap between the two (DeGue & DiLillo, 2009). AA has been identified as a potential indicator of and precursor to interpersonal violence, and this relationship has been termed the ‘Link’. Among the different types of violence, intimate partner violence (IPV) has been reported to be commonly associated with AA, with households with IPV more likely to report AA than households without IPV. Levitt et al. (2016) observed a significant relationship between active IPV and AA, with 41% of abusers of pets arrested for IPV at least once. Gullone and Clarke (2008) reported that 55% of people arrested for AA had a criminal record of domestic violence. The incidents of AA most frequently occurred as a result of an argument between the offender and his or her intimate partner, with the offender abusing pets in retaliation (Levitt et al., 2016) and to gain or maintain power and control over their partner. Further, children who

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<https://doi.org/10.1016/j.avb.2021.101676>

Received 28 September 2020; Received in revised form 3 June 2021; Accepted 15 October 2021

Available online 18 October 2021

1359-1789/© 2021 The Authors.

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had been abused were more likely to perpetrate AA during adulthood (DeGue & DiLillo, 2009). There, of course, exist many types of violence within relationships, such as physical, sexual, psychological and financial, as well as typologies of IPV. These typologies include Violent Resistance to meet violence with resistive violence; Separation-Instigated Violence, or Controlling Coercive Violence, where emotionally abusive intimidation, coercion and control are used against the victim; and Situational Couple Violence, which does not have its basis in power or control (Kelly & Johnson, 2008). Controlling Coercive Violence is particularly relevant to AA due to the focus on the animal as a tool for exercising control. These typologies give an understanding of what motivates the perpetrator to violence in that specific situation, and its application to AA is therefore specific to the context of the AA and the perpetrator's relationship with the victim.

Two overarching theoretical considerations in the field of studies related to IPV and AA and the Link are the 'Violence Graduation Hypothesis' and the 'Deviance Generalization Hypothesis'. The 'violence graduation hypothesis' posits that perpetrators begin by abusing animals and then subsequently move on to human abuse (Arluke et al., 1999) and that AA in childhood is a significant predictor of violence towards humans in adulthood. In contrast, the 'deviance generalization hypothesis' purports that AA is simply one among many forms of antisocial behavior, and offenders who commit one form of abuse are likely to engage in other forms of abuse with no specific chronological order (Frick & Viding, 2009).

These theories of 'violence graduation' and 'deviance generalization' hypotheses, whilst foundational in the understanding of what underlying forces are likely to have led perpetrators to commit acts of violence, do not focus on the more immediate motivations for AA in the context of IPV and do not consider the victim at all. These theories therefore take a very perpetrator-centric and less situationally-focused view of the link between AA and IPV.

1.1. Purpose of the systematic review

Previous reviews have examined the significance of the relationship between IPV and AA from the veterinary (Monsalve et al., 2017; Newland et al., 2019) and child (McPhedran, 2009a, 2009b) perspectives. Yet no systematic reviews have been conducted on the situational-specific motives driving AA, and its impact on human and animal victims involved, from an IPV victim's perspective. This is despite research pointing to AA as being a form of trauma to the people who witness it, and despite our growing understanding of the Link, this understanding is largely failing to translate into tangible measures, such as asking about pet ownership and animal abuse in domestic violence and child protection services (Randour et al., 2021). Studies assessing the context of AA in IPV are disparate, and thus a systematic review to help guide clinical practice and future directions for research is warranted.

Therefore, the primary objective of this study was to systematically review the peer-reviewed literature for studies investigating the association between adult IPV and AA, from the perspective of IPV victims. The secondary objectives were to assess the situational motives for AA among perpetrators and to explore the concern of victims towards their pets during the abusive relationship, and then consider these through the lens of the identified theories of IPV. By including both qualitative and quantitative studies, this review aimed to assess the prevalence of AA in abusive relationships, the association between IPV and AA, the motivations of AA, and its impact on victims of IPV and the pets involved.

2. Methods

This review followed the Preferred Reporting Items for Systematic Reviews and Meta-Analyses (PRISMA; Liberati et al., 2009) which provides a transparent structure for reporting systematic reviews. Original peer-reviewed, published research was systematically searched using

PubMed, CINAHL, Scopus and PsycInfo in July 2020 using Medical Subject Headings and keywords accounting for the different indexing among databases. The following terms were used in the different searches including 'intimate partner violence' OR 'domestic violence' OR 'physical abuse' OR 'spouse abuse' AND 'animal rights' OR 'animal abuse' OR 'animal cruelty' OR 'animal welfare' OR 'veterinary medicine' OR 'veterinarian AND pets' OR 'cats' OR 'dogs' OR 'domestic animals'. Boolean terms AND/OR were used to combine the search string. Journals were hand searched, and forward citation tracking of included studies was conducted.

2.1. Inclusion and exclusion criteria

The search criteria incorporated peer-reviewed primary research involving IPV and AA across adult (>18 years) populations published in the English language. Studies assessing self-reported or partner-reported findings, as well as studies reporting objective sources, such as police investigation records, including the information pertaining to the perpetration of AA in IPV context, were included. Both qualitative and quantitative studies were included. Excluded articles were studies focused on child (≤18 years) populations and studies reporting pet maltreatment in abusive relationships from the perspective of practitioners (veterinarians) and service providers (domestic violence shelter providers) as they did not directly align with the purpose of the review. Published research in peer-reviewed journals was only included due to the challenges in systematically searching and acquiring non-peer reviewed studies, including the potential risk of bias and varying quality (Mahood et al., 2014). Reviews, opinion pieces, theses, conference proceedings and editorials were also excluded for the same reasons.

2.2. Quality appraisal

Quality appraisal of included studies that met the inclusion criteria was independently undertaken (by DKT, MC, RK) using the Joanna Briggs Institute (JBI) Critical Appraisal Checklist for Analytical Cross Sectional Studies (Moola et al., 2017) for quantitative studies (n = 25) and applied based on the aspects of the study in reporting the relationship between IPV and AA. For qualitative studies (n = 5), the Critical Appraisal Skills Programme (CASP) Qualitative Checklist (Critical Appraisal Skills Programme, 2019) was used. Any discrepancies in ratings were discussed (by MC, DKT, RK) and agreement made for each item. No studies were excluded on the basis of the quality assessment (see Section 3.2.4 for quality appraisal results).

2.3. Data extraction and synthesis

Data extracted from each study comprised of the author/s, publication year & country; objectives; design, participants & settings; measures of IPV and AA used in the study; data analysis method and main findings (see Table 1). Two or more articles published from the same study were treated as a single study. These duplicate publications were identified by reviewing the list of authors; references authors made to companion papers; the setting, participants and sample; and the ethics approval number. Due to the methodological heterogeneity, a meta-analysis was not possible. Extracted data were reviewed across studies, with similar concepts grouped into broad themes, these were then discussed, and reviewed by the authors to ensure consensus and that the aim of the review was met. Results are presented as a narrative summary.

3. Results

3.1. Search outcomes

Systematic searches identified 427 articles, of which 109 duplicates were removed. Three reviewers (MC, RK, DKT) conducted the screening

Table 1

Summary of the included studies (35 articles from 30 studies).

	Author(s), country	Objective	Method, participants, and setting	Measures/scales	Analysis	Major findings
1	Gallagher et al. (2008) Allen et al. (2006) Ireland	Investigate the connection between domestic violence and non-accidental injury in animals.	Questionnaire N = 23 Women victims of IPV recruited from 3 refuges. All participants owned pet/s at time of IPV.	Self-reported experiences of pet abuse, motivation of abuse, the effect of abuse	Descriptive statistics	13/23 (57%) witnessed threats of abuse, 11/23 (48%) witnessed actual abuse to companion animal. Animals were either physically abused (kicked, swung by tail, thrown, cigarette burn, killed) or neglected (denied food, access to exercise/outdoors and shelter). Pet abuse was used as a form of control over the women or their children, anger, and revenge. Concern for pets delayed seeking shelter in the refuge.
2	Ascione (1997) USA	Determine the prevalence of threatened and/or actual harm to pets by the women's partners in a sample of women entering domestic violence shelters.	Survey N = 38 Women victims of IPV recruited from a shelter. 74% had pet animal. Age mean (range): 30.2 (20–51) years	Battered Partner Shelter Survey (BPSS) – Pet Maltreatment Assessment	Descriptive statistics	71% reported that their partner had threatened and/or hurt or killed their pets, with 57% reporting actual physical harm. Physical violence included slapping, shaking, throwing, or shooting dogs and cats, drowning a cat, and pouring lighter fluid on a kitten and igniting. 18% reported concern for their animal's welfare had prevented them from coming to the shelter sooner.
3	Ascione et al. (2007) USA	Describe the relationship between domestic violence and pet abuse.	Questionnaire N = 221 Shelter women (n = 101) who were victims of IPV recruited from domestic violence shelters, aged 31.7 ± 8.0 years. Non-shelter women (n = 120) who had not experienced IPV recruited from local community, aged 32.5 ± 9.9 years. Eligibility required current pet ownership or pet ownership during previous year.	BPSS (for shelter women) and Families and Pets Survey (for non-shelter women) Conflict Tactics Scale (CTS)	Descriptive statistics, chi-square, logistic regression	Higher proportion of shelter women, compared to non-shelter women, reported threats to hurt or kill pets (52.5% vs. 12.5%, $p < 0.001$) and actual hurting or killing (54.0% vs. 5.0%, $p < 0.001$). Shelter women were nearly 11 times more likely to report that their partner had hurt or killed pets than the comparison group who had not experienced intimate violence. Pets of shelter women were less likely to receive regular veterinary care (55.5% vs. 80.0%, $p < 0.001$) and appropriate vaccinations (73% vs. 88.1%, $p = 0.004$). Minor physical violence and verbal aggression to women were the significant predictors of threats to pets, while severe physical violence perpetrated by the partner to women was significantly associated with actual hurt to the animals.
4	Barrett et al. (2020) Canada	Assess if women's experiences of specific subtypes of intimate partner victimization and controlling behaviors vary along with the frequency and severity of animal maltreatment.	Questionnaire N = 86 Women victims of IPV receiving services from domestic violence shelters Participants were divided into three groups: women who did not have pets during their relationship (n = 31), women who had pets and reported little or no animal maltreatment (n = 21), and women who had pets and reported frequent or severe animal maltreatment (n = 34).	Partner's Treatment of Animals Scale (PTAS) Revised Conflict Tactics Scale (CTS-2), Checklist of Controlling Behaviors (CCB)	Descriptive statistics, correlation, ANOVA	89% of the women with pets reported pets had been mistreated by their partner. Correlations between the PTAS and all the subscales of CTS2 and CCB were significant (correlation coefficients ranged from 0.34 to 0.46), suggesting AA was positively associated with domestic violence. Statistically significant group differences were observed in the Severe Psychological Abuse, Minor Physical Abuse, and Severe Physical Abuse subscales of the CTS2, and Physical Abuse, Sexual Abuse, and Economic Abuse subscales of CCB. 56% of the sample reported they delayed leaving their abusive partner due to concern for their pets' safety.

Table 1 (continued)

Author(s), country	Objective	Method, participants, and setting	Measures/scales	Analysis	Major findings
Barrett et al. (2018) Canada	Describe the relationship between animal maltreatment and help-seeking and terminate abusive partnership among women.	Questionnaire N = 86 Women victims of IPV recruited from women's shelter. 64% (n = 55) owned pets. Age mean (SD): 37.9 (10.9) years	PTAS CTS-2	ANOVA, regression analysis	35.2% indicated their partner abused (actually harmed) their pet(s), with the abuse escalating over time. Emotional and physical abuse of pet, threats to harm pet and neglect of pet were negatively associated with (i.e. delayed) women's decision to leave the relationship.
Fitzgerald et al. (2019) Canada	Assess the association between different subtypes of IPV and survivors' perceptions of why their partners engaged in animal maltreatment in the context of their relationships.	Questionnaire N = 100 Women victims of IPV recruited from emergency shelters, of which 55 had at least one pet at the time of relationship. Age mean (SD): 40.5 (11.0) years	PTAS CTS-2	Correlation, linear regression	47.3% reported AA escalated over time. The predictors of 'threats to harm animals' and 'neglect of animals' were 'to upset women or children', 'to regain control over the situation or argument', 'to exert control over the situation', while 'to upset women and children' was the main predictor of 'physical abuse' of animals.
5 Carlisle-Frank et al. (2004) USA	Examine the attitudes, perceptions and behaviors of both pet-abusing and non-pet-abusing perpetrators of family violence.	Questionnaire N = 48 Women victims of IPV recruited from domestic violence shelters. 34/48 had pets and were grouped into pet abusers and non-pet-abusers, with the designation including only actual abuse. Age range: 21–41 years	Sentient Beings Scale, Hassles & Stressors Scale, and Unrealistic Expectations Scale	Descriptive statistics, chi-square, t-test, linear regression	53% of partners had physically harmed (actually abused) pets, of which 90% reported physical abuse, 10% neglect. Pet-abusing perpetrators showed less affection towards pets ($p = 0.003$), more communication with pets through commands and threats ($p < 0.0001$), more often viewed companion animals as property ($p = 0.0004$), more likely to scapegoat pets ($p = 0.0006$), more likely to have unrealistic expectations about pets ($p = 0.026$), and more frequently punished pets ($p = 0.0003$).
6 Cavazos and Faver (2007) USA	To describe AA by partners of domestic violence victim women and assess how the concern of women about their pets affect the women's decision about seeking shelter.	Survey N = 501 Women victims of IPV owning a pet who sought help from the domestic violence program. Age mean (SD): 31.0 (9.2) years	Adapted from Pet Abuse Survey (PAS)	Descriptive statistics, chi-square	36% reported that their partners had threatened, harmed, or killed pets; 35% worried about the safety of pets during the relationship; and 20.5% delayed seeking shelter services due to concern for pet safety. Women whose pets had been abused (88%), compared to (51%) those whose pets had not been abused, reported pets were an important source of emotional support ($p < 0.001$).
7 Collins et al. (2018) USA	Explore the intersection of IPV and animal cruelty in an ethnically diverse sample.	Qualitative N = 103 Pet-owning women victims of IPV recruited from community-based domestic violence programs. Age mean (SD): 36.6 (7.5) years	Three open-ended questions of the Pet Treatment Survey (PTS)	Template analysis	75% had partners threaten a companion animal, 66% harmed, 16% neglected; and 11% killed. Animals were also abused by partners as discipline or punishment (39.8%). 20.4% reported deleterious impact of AA on their emotional and psychological well-being. Concern for pets prevented 38% of women from being able to engage in effective safety planning due to partner's use of AA as a tactic of coercive power and control.

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Table 1 (continued)

Author(s), country	Objective	Method, participants, and setting	Measures/scales	Analysis	Major findings
8 Faver and Strand (2003) USA	Examine the impact of perpetrators' threats or actual harm to pets on the likelihood that concern for pets would affect women's decisions to leave their abusers.	Questionnaire N = 41 Pet-owning women victims of IPV receiving services from women's shelters. Age mean: 36.0 years	Domestic Violence PAS	Descriptive statistics, logistic regression	48.8% reported partner had threatened pets, and 46.3% had actually harmed pets. 26.8% reported that concern for the welfare of their pets had affected their decision to leave/stay. Women whose partners had threatened ($OR = 7.1$) and actually harmed or killed ($OR = 7.9$) their pets were more likely to report that concern for their pets had affected their decision about leaving their abuser.
9 Febres et al. (2014) USA	Assess the prevalence of adulthood AA perpetration and its association with IPV perpetration, among men arrested for domestic violence.	Questionnaire N = 307 Men arrested for domestic violence recruited from court referrals to Batterer Intervention Programs. Age mean (SD): 33.1 (10.2) years	Aggression Toward Animals Scale (ATAS) CTS-2	Descriptive statistics, correlation, linear regression	41% committed at least one act of AA since the age of 18 years, with the mean number of 9.5 ± 13.0 . Physical abuse 80.0%, threats 71.2% and neglect 12.0%. Psychological and physical violence, total adulthood AA, and physical AA were all positively and significantly correlated with each other. In the final adjusted models, the statistical significance of the association of AA with physical assault ($p = 0.052$) and severe psychological aggression ($p = 0.057$) were at cut-off level.
10 Febres et al. (2012) USA	Examine the prevalence of adulthood AA perpetration and its association with interpersonal violence perpetration among women arrested for domestic violence.	Questionnaire N = 87 Women arrested for domestic violence recruited from court referrals to Batterer Intervention Programs. Only pet owning women were included in the analysis. Age mean (SD): 30.5 (10.3) years	ATAS CTS-2	Descriptive statistics, correlation	17% of participants committed at least one act of AA during adulthood. No statistically significant differences on frequency of IPV (psychological and physical) perpetration between the women who abused animals and those who did not. Animal abusers reported more frequent psychological aggression and physical assault perpetration in their relationships than women who did not abuse animals.
11 Fielding and Plumridge (2010) Bahamas	Examine the link between animal abuse, animal care, and domestic violence and other deviant behaviors in the household.	Questionnaire N = 641 College students aged 18 years or over, of which 132 who lived with an intimate partner with pets completed questions relating to personal domestic violence. 47.3% were pet owners. 63.2% were under 21 years and 69.6% were female.	Intentional harm and caring of pet Hitting, intimidating, threatening, and swearing, (HITS©) inventory	Fisher's exact test, chi-square, logistic regression	Domestic violence was significantly associated with pets harmed intentionally (47.3% vs. 14.1%, $p < 0.001$) and pets not well cared for (47.4% vs. 19.0%, $p = 0.007$). Respondents in the household with pet abuse were more likely to be victims of IPV compared to households with no pet abuse (19.2% vs. 5.7%, $p = 0.04$). Respondents were more likely to be sexually abused in households where pets were not well cared for than in households where pets were well cared for (36.4% vs. 2.6%, $p < 0.001$).

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Table 1 (continued)

Author(s), country	Objective	Method, participants, and setting	Measures/scales	Analysis	Major findings
12 Flynn (2000a) USA	Explore the role of companion animals in abusive relationships.	Qualitative interviews N = 10 Women victims of IPV recruited from a shelter for women. Eligibility included women with pet ownership. Age range: 22–47 years	Semi-structured interview on pet abuse and motives of abuse.	Qualitative analysis	8/10 women had companion animals threatened or abused by their male partners. Controlling, hurting, and intimidating the women, and sometimes children, were the motivations of AA. Concern for pets delayed women from leaving their abusers. AA added to the stress and terror the victims were already experiencing.
13 Flynn (2000a) USA	Explore experiences of abused women seeking shelter about pet abuse and the roles of pets in their abusive relationships.	Questionnaire N = 107 Women victims of IPV recruited from a shelter for women. 40.2% owned pets. Age mean (range): 32.4 (17–61) years	Abused women's experiences of pet abuse	Descriptive statistics	46.5% women with pet reported that their partner had threatened to harm or actually harmed their pets. Women having an abused pet indicated a stronger emotional attachment to their pet than women whose pets had not been abused.
14 Gupta (2008) USA	Investigate the potential mediational role of expressive representations in the relationship between rejection sensitivity and both IPV and AA.	Questionnaire N = 427 (228 males and 199 females) Undergraduate students recruited from a university population. Study restricted to dog owners. Age mean (SD): 19.7 (2.1) years	ATAS CTS-2	Structural equation modelling	IPV was significantly correlated with AA among males ($r = 0.55$, $p < 0.001$), but not among females ($r = 0.13$, $p > 0.05$).
15 Haden et al. (2018) USA	Examine associations between animal cruelty, IPV, and antisocial personality disorder among incarcerated adult males.	Questionnaire N = 42 Men incarcerated for IPV in a prison. Age mean (SD): 37.4 (8.3) years	Interview for Antisocial Behavior—Caretaker Form (IAB), Boat Inventory of Animal-Related Experiences (BIARE), Reports of Animal Care and Abuse (RACA) CTS-2	t-test, chi-square	38% endorsed using threats against animals during a relationship conflict, and 52% reported abusing and/or killing a pet. Individuals who had a history of childhood AA were more likely to have threatened harm or killing of a pet during a relationship conflict. Lifetime perpetration of AA was significantly associated with both threats to ($p = 0.02$), and actual perpetration of ($p = 0.02$) AA during relationship conflicts.
16 Hardesty et al. (2013) USA	Explore abused women's decisions about pets when seeking help from a shelter.	Qualitative interviews N = 19 IPV abused women recruited from a domestic violence shelter. Eligibility included women with pet ownership. Age mean (range): 39.8 (21–56) years	Emotional bonds to, abusers' treatment of, and decisions about pets	Grounded theory	7 women's pet had been physically harmed, 12 had experienced threats to physically harm their pets. Women whose partners used pets as a control tactic ($n = 9$) reported strong bonds to their pets. Women whose abusers did not use pets as a control tactic ($n = 10$) expressed less emotional attachments to their pets. For these women, decisions about personal and child safety were more important than decisions about their pets.

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Table 1 (continued)

Author(s), country	Objective	Method, participants, and setting	Measures/scales	Analysis	Major findings
17 Hartman et al. (2018) USA	Examine rates of AA in pet-owning families experiencing IPV and association between IPV and the risk for partner-perpetrated AA.	Questionnaire N = 291 IPV abused women seeking services from domestic violence agencies. Women having a pet animal currently or within the past year were included. Age mean (SD): 36.3 (7.4) years	PTS CTS-2	Descriptive statistics, logistic regression	11.7% of partners threatened to harm a pet and 26.1% actually harmed a pet. Interpersonal violence (none of the subscales) was not associated with threats to pets in the adjusted model, while more Psychological Aggression (OR = 1.07, $p = 0.011$) and less Physical Assault (OR = 0.90, $p = 0.019$) significantly predicted higher risk of actual harm to pets.
18 Levitt et al. (2016) USA	Examined various forms of AA and possible links between corresponding forms of interpersonal offenses.	Review of criminal histories of adult males arrested for AA obtained from the FBI's Behavioral Analysis Unit. N = 150 men Age mean (SD): 37.4 (13.2) years 41% (n = 61) of the offenders lived with their intimate partner.	Active, passive, and animal sexual abuse offenses IPV perpetrated by the participants	Descriptive statistics, chi-square	41% of the offenders in the sample were arrested for interpersonal violence at least once, with offender's spouse being the most common victim. 20% were arrested for physically assaulting their spouse or intimate partner. 32% of those who had abused a pet belonging to their intimate partner did so to retaliate. A significant relationship was found between abuse of one's partner's pet and domestic violence ($p < 0.001$), with offenders who assaulted their intimate partner also performing acts involving active cruelty against an animal/s.
19 Loring and Bolden-Hines (2004) USA	Explore threatened and/or actual pet abuse as a means of coercing abused women into committing illegal acts.	Questionnaire N = 107 IPV affected women referred to a family violence centre. 62% (n = 72) had owned pets. Women included had committed at least one illegal behavior. Age mean (range): 31 (16–73) years	BPSS	Descriptive statistics	75% of the pet owner women reported threatened and/or actual pet abuse. 44% (n = 24) of women who reported pet abuse experienced coercion in the form of threats or actual harm to animals in order to force the women to commit an illegal act. The coerced women reported committing the illegal act(s) to spare their pet the experience of abuse.
20 Monsalve et al. (2018) Brazil	Identify the associated factors of companion animal neglect in the family environment.	Review of investigations carried out by the Animal Protection Division. N = 118 AA investigations Households with pet were included in the analysis.	Neglect or physical abuse of pets Reports of the presence of domestic violence made by family members or neighbours	Descriptive statistics, chi-square, Fisher's exact test, logistic regression	76.3% of the cases were categorized as AA, all of which were neglect. Domestic violence in the household was not associated with animal neglect.
21 Newberry (2017) UK	Explore the link between domestic violence and AA.	Qualitative analysis of AA within the context of domestic violence. N = 74 stories Anonymous stories were obtained from online discussion forums where victims voluntarily shared their experiences.	Pet as a source of support, motivations for AA	Thematic analysis	Companion animals provided emotional support for victims and physical protection from violence. Motivators of AA included control, discipline of the animal, jealousy, and use of alcohol. Victims often attributed abuser's behavior to their childhood cruelty.

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Table 1 (continued)

Author(s), country	Objective	Method, participants, and setting	Measures/scales	Analysis	Major findings
22 Richard and Reese (2019) USA	Explore the relationship between the nature of animal cruelty perpetrated by owners versus cruelty against animals of domestic partners, family members, and neighbours.	Review of police reports of animal cruelty incidents. N = 181 incidents The incidents included those perpetrators who had also committed some other crime. 83% of the perpetrators were male.	Types of AA: dog fighting, shooting, neglect, poisoning, threat, stabbing, kicking/hitting with blunt force, and "other." Motivations for the AA Domestic violence	Descriptive statistics, chi-square, logistic regression	Perpetrators who were intimate partners or family members of the owner of the animal were more likely to demonstrate active cruelty (e.g., kicking, blunt force injuries). Partners (of the pet owners) were less likely to engage in dogfighting and shooting, while more likely to kick or hit the animal. Apathy (less likely; OR = 0.13, $p < 0.05$) and hurt or intimidating another person (more likely; OR = 47.3, $p < 0.01$) were the main motivations for partners committing abuse of animals. Individuals charged with domestic violence were most likely to kick/hit an animal and were motivated by a desire to hurt or intimidate their partner and other family members.
23 Riggs et al. (2018) Australia & UK	To explore the link between domestic violence and animal cruelty in abusive relationship.	Questionnaire N = 503 (304 females) 258 from Australia (age 39.4 ± 30.1 years) and 244 from the United Kingdom (age 38.5 ± 12.5 years).	Pet Attitude Scale (PAS) Participants' experience of domestic violence (researcher developed)	Descriptive statistics, chi-square, t -test, Cohen's d	Of participants who had experienced IPV, 21.0% had also witnessed their pets being abused. There was no significant difference in AA (PAS score) between participants experiencing domestic violence or not. Female participants who had witnessed AA reported greater psychological distress and lower levels of social support.
Taylor et al. (2019) Australia & UK	How humans respond to violence directed towards animals in the context of violent human relationships.	Qualitative N = 137 (83 females, 28 transgender) Participants from a larger mixed-method study, whose open-ended responses were analysed. Age mean (SD): 38.4 (12.5) years	Experience of domestic violence, animal abuse, and participants' response to the abuse.	Thematic analysis	108 participants reported domestic abuse perpetrated by an intimate partner and 16 reported the partner abused their animal. Animal companions are an important source of emotional strength and support to those experiencing domestic violence. Witnessing AA was traumatic, caused additional feelings of guilt and triggered leaving the abusive relationships. The experience of AA in the context of IPV among the transgender sample resonated with the cisgender and heterosexual focused literature.
24 Simmons and Lehmann (2007) USA	Gain a greater understanding of pet abuse within the context of the controlling behaviors displayed in violent relationships.	Survey N = 1283 IPV abused women recruited from a domestic violence shelter. Eligibility included women with pet ownership.	Researcher developed instrument on pet abuse (presence or absence) and severity (continuous scale) of pet abuse CCB	Descriptive statistics, chi-square, Fischer extract, correlation, t -test	25% indicated their abuser committed some form of pet abuse. Higher percentage of individuals reporting pet abuse also reported their abuser used sexual violence ($p < 0.001$), marital rape ($p < 0.001$), emotional violence ($p = 0.009$), and stalking ($p = 0.005$). Association between pet abuse and physical violence was not significant. Perpetrators who abuse their pet demonstrated greater use of controlling behaviors than those who do not abuse their pets ($p < 0.001$).

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Table 1 (continued)

Author(s), country	Objective	Method, participants, and setting	Measures/scales	Analysis	Major findings
25 Strand and Faver (2006) USA	Assess factors associated with abused women's concern for their pets and decision making associated with this concern.	Survey N = 51 IPV abused women recruited from two domestic violence shelters. 84% owned pet animal. Age mean (SD): 38.0 (9.2) years	Modified version of the PAS	Descriptive statistics, chi-square, correlation	86% of women with a pet reported that their pets had been abused (threatened 74%, harmed 52% and killed 14%). 91% worried about the pet's safety whilst they were in the abusive relationship. 65% reported that their decision to seek shelter was affected by concern for the safety of their pets, among which 88% delayed seeking shelter and 12% prompted to leave their abusers. Women without children were more likely to indicate that their decision to seek shelter was affected by concern for their pets than women who reported having children (85% vs. 45%, $p = 0.01$).
26 Tiplady et al. (2012) Australia	Investigate the effect of IPV on companion animal welfare.	Survey N = 26 Adult women with experience of IPV and concurrent animal ownership recruited from the general public. Majority were 30–60 years of age.	Self-reported effect of IPV on pet animal	Descriptive statistics, chi-square, Fischer's exact test	Animals had been verbally threatened with harm (68.2%) and physically abused (77%). 84% (16/19) of the multiple-pet-owning women reported that there was an individual 'target animal'. Animals targeted for abuse were most likely to be dogs owned by the victimized women. 85% reported behavioral changes in animals, which included being frightened and cowering, running away, fearful and avoiding the abuser, aggressive to the abuser, proximity seeking to women and hiding. 92% were unwilling to discuss the AA with a veterinarian.
27 Tiplady et al. (2015) Australia	Identify the ongoing impact on behavior and welfare of companion animals who had been exposed to a domestic violence relationship.	Survey N = 5 Women who had left violent relationships and had accessed the domestic violence crisis service or stayed at a refuge were interviewed immediately and six months after leaving the relationship. Age range: 43–50 years	Women's experiences of companion animal during domestic violence, incidents of AA, animals' behavioral changes	Thematic analysis	Women reported that the abusive partner selectively used violent behavior towards animal and much of the violence was hidden from public view. The shared experience of domestic violence had made women closer to their animals. Exposure to domestic violence impacted animals, especially fear and anxiety. Companion animal behavioral changes such as distrust and fear towards men persisted at six months after the violent relationship ended.
Tiplady et al. (2018) Australia	Explore issues of animal and veterinary involvement in domestic violence situations.	Qualitative interviews N = 13 Women who had accessed the domestic violence crisis service or stayed at a refuge. Eligibility included having companion animals during domestic violence in which the participant was victimized. Age median (range): 43 (20–55) years	AA, veterinary care, behavioral changes observed, concern for companion animals as a barrier to leaving	Qualitative analysis	8 women reported that their pets had been abused e.g. shouting or screaming, physical abuse, and neglect. An attempt to control/punish the animal, increase the animal's perceived "toughness", and deliberately upset the women were the main reasons of AA. In households with multiple pets, most of the abuse was directed at a particular pet with whom the woman shared an emotional bond. Pets exposed to violence had a number of behavioral changes including being protective of the woman and becoming aggressive towards others. Women often delayed leaving due to concerns for their pets.

(continued on next page)

Table 1 (continued)

Author(s), country	Objective	Method, participants, and setting	Measures/scales	Analysis	Major findings
28 Travers et al. (2009) Australia	Identify the prevalence of perpetrator violence against the family pet and its effect on decision making by women.	Survey N = 85 Pet-owning women experiencing domestic violence and had attended the Domestic Violence Court Advocacy Service.	Threatened to and actually hurt or killed	Descriptive statistics, logistic regression	27% of partners had threatened to hurt or kill a pet, and 23% had done so. Women whose partners had threatened or killed a pet were more likely to delay leaving, return home, delay calling police, or refuse to lay charges than women whose partners had not.
29 Volant et al. (2008) Australia	To examine the connection between domestic violence and AA.	Survey N = 204 IPV group, n = 102, aged 38.5 ± 9.5 years; control group, n = 102, aged 42.1 ± 13.3 years. Women in IPV group recruited from domestic violence support services and control group recruited from the general public. Participants in both groups included women owning a pet.	Threats and actual AA	Descriptive statistics, chi-square, logistic regression	AA in the IPV group was 52.9%, while none of the participants reported pet abuse in non-IPV group ($p < 0.01$). Partner threats of AA in the IPV group were 46.0%, while 5.8% of the participants reported AA threats in non-IPV group ($p < 0.01$). In the final adjusted model, women whose partners had threatened the pets were more likely to belong to the IPV group ($OR = 5.1, p = 0.044$). 33.3% of women (in IPV group) had delayed leaving their violent relationship because of concern for their pet's welfare.
30 Walton-Moss et al. (2005) USA	Identify risk factors for IPV and related injury among (community-dwelling) women.	Survey N = 845 IPV group, n = 427; comparison group, n = 418 Participants were the control group of a case control study of intimate partner homicide. Women aged (18–50) and relationship criteria (intimate partner within the past year) recruited from the general public. 74.1% were 26–50 years	Pet abuse CTS	t-tests, chi-square, logistic regression	Threat or actual abuse of a pet was a significant risk factor for partners perpetrating IPV ($OR = 7.59, p = 0.011$).

Note: IPV, Intimate Partner Violence; AA, Animal Abuse; BPSS, Battered Partner Shelter Survey – Pet Maltreatment Assessment; CTS, Conflict Tactics Scale; PTAS, Partner's Treatment of Animals Scale; CTS-2, Revised Conflict Tactics Scale; CCB, Checklist of Controlling Behaviors; PAS, Pet Abuse Survey; PTS, Pet Treatment Survey; ATAS, Aggression Toward Animals Scale; OR, Odds ratio; SD, standard deviation.

of titles and abstracts for relevant studies and independently reviewed them for inclusion. After screening for relevance, the full text of 68 articles was assessed for eligibility, of which 30 articles met the inclusion criteria. Five additional studies were identified by handsearching and reviewing the reference lists of included studies (see Fig. 1). The resulting 35 articles, which reflected 30 individual studies for analysis, were included in this review [articles from the same study included Gallagher et al., 2008 and Allen et al., 2006; Barrett et al., 2020, Barrett et al., 2018 and Fitzgerald et al., 2019; Riggs et al., 2018 and Taylor et al., 2019; and Tiplady et al., 2015 and Tiplady et al., 2018].

3.2. Study characteristics

3.2.1. Study design

Studies emanated mainly from the USA ($n = 20$), with others conducted in Australia ($n = 4$), Ireland ($n = 1$), Canada ($n = 1$), the Bahamas ($n = 1$), Brazil ($n = 1$), the UK ($n = 1$), and one study in both Australia and the UK ($n = 1$). Most of the included studies ($n = 25$) used cross-sectional questionnaire (quantitative) surveys while the remaining five were qualitative. Among the included studies, four assessed participants' descriptive self-reports on the issue of AA (Allen et al., 2006; Ascione, 1997; Flynn, 2000b; Loring & Bolden-Hines, 2004), seven showed bivariate association between IPV and AA (Cavazos & Faver, 2007; Febres et al., 2012; Haden et al., 2018; Levitt et al., 2016; Simmons & Lehmann, 2007; Strand & Faver, 2006; Tiplady et al., 2012), and 13 reported multivariate association between IPV and AA. Five studies

analysed and reported qualitative findings (Collins et al., 2018; Flynn, 2000a; Hardesty et al., 2013; Newberry, 2017; Tiplady et al., 2018). One study reported quantitative (Riggs et al., 2018) and qualitative (Taylor et al., 2019) findings in two separate papers.

Among the quantitative studies, three studies employed a comparison group, among which two studies (Ascione et al., 2007; Volant et al., 2008) compared women recruited from domestic violence shelters with community-dwelling women who had not experienced IPV. Walton-Moss et al. (2005) compared IPV-abused and non-abused women, both recruited from the general public. Two studies (Barrett et al., 2020; Carlisle-Frank et al., 2004), although they did not include a comparison group when recruiting participants, compared findings between pet abusers and non-pet-abusers.

3.2.2. Participants and setting

Participants in most of the studies ($n = 20$) were female victims of IPV reporting incidents of AA perpetrated by their partner, among which 18 studies recruited participants from domestic violence shelters and/or domestic violence support programs. The remaining two studies included Febres et al. (2012), who recruited women arrested for domestic violence, and Tiplady et al. (2012), who recruited IPV-affected women from the general population. One study (Walton-Moss et al., 2005) recruited women living with a partner from the general public. In the case of Loring and Bolden-Hines (2004), women included had committed at least one illegal act. Two studies (Febres et al., 2014; Haden et al., 2018) included men arrested for domestic violence, while

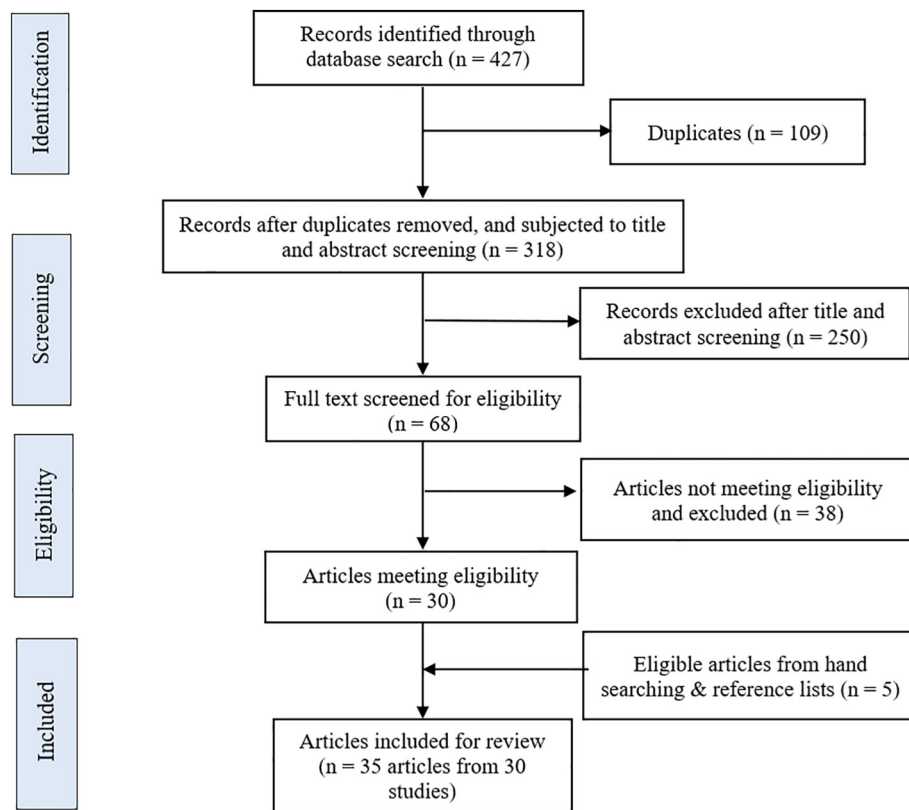


Fig. 1. Flow diagram showing studies selection process.

another two studies (Fielding & Plumridge, 2010; Gupta, 2008) had male and female college students as participants. For Riggs et al. (2018), participants did not need to be living with animal companions nor did they need to have experienced IPV.

Three American studies reported the analyses of criminal investigations of AA incidents carried out by the Animal Protection Division (Monsalve et al., 2018; $n = 118$), police reports (Richard & Reese, 2019; $n = 181$), and the Behavioral Analysis Unit of the FBI (Levitt et al., 2016; $n = 150$). One UK study (Newberry, 2017) analysed anonymous stories ($n = 74$) of AA from online discussion forums within the context of domestic violence.

The total number of study participants across the included studies was 6123 participants, comprising 449 AA incidents and 74 online stories of AA. Sample sizes across the individual studies ranged from 10 to 1283 (10 to 103 in qualitative and 23 to 1283 in quantitative studies). The mean age of the participants, among the studies which reported age, ranged from 30.2 (Ascione, 1997) to 43.0 (Tiplady et al., 2018) years.

3.2.3. Assessment of IPV and AA

Ten studies used standard validated scales to measure IPV, with the Conflict Tactics Scale (CTS) (Ascione et al., 2007; Walton-Moss et al., 2005) and the Revised Conflict Tactics Scale (CTS2) (Barrett et al., 2020; Febres et al., 2012; Febres et al., 2014; Gupta, 2008; Haden et al., 2018; Hartman et al., 2018) the most commonly used scales. CTS includes subscales for reasoning, verbal aggression, minor physical aggression, and severe physical aggression (Straus, 1989). Other scales used included the Checklist of Controlling Behaviors (CCB) (Barrett et al., 2020; Simmons & Lehmann, 2007) and the Hitting, Intimidating, Threatening and Swearing (HITS©) inventory (Fielding & Plumridge, 2010).

Fifteen studies used standard validated scales to assess AA, among which three studies (Ascione, 1997; Ascione et al., 2007; Loring & Bolden-Hines, 2004) used the Battered Partner Shelter Survey – Pet Maltreatment Assessment (BPSS) and two (Collins et al., 2018; Hartman

et al., 2018) used the Pet Treatment Survey (PTS) which was a revised version of the BPSS. Three studies used the Aggression Toward Animals Scale (ATAS) (Febres et al., 2012; Febres et al., 2014; Gupta, 2008), while the other three used the domestic violence Pet Abuse Survey (PAS) (Cavazos & Faver, 2007; Faver & Strand, 2003; Strand & Faver, 2006). Other scales used included the Partner's Treatment of Animals Scale (PTAS) (Barrett et al., 2020), the Pet Attitude Scale (Riggs et al., 2018), the Interview for Antisocial Behavior—Caretaker Form (IAB) and the Boat Inventory of Animal-Related Experiences (BIARE) (Haden et al., 2018), and the Unrealistic Expectations Scale (Carlisle-Frank et al., 2004).

Some studies used multiple measures of IPV as well as AA. Few used adapted versions of the scales mentioned, while some used only part of the items from the scale.

3.2.4. Quality appraisal

Quality appraisal has been applied to studies, not individual articles, as two or more articles stemming from a single research were treated as one study. All the quantitative studies ($n = 25$) described the setting and participants in detail and defined the criteria for inclusion. Though most studies ($n = 22$) identified confounding factors, fewer ($n = 13$) stated strategies to deal with confounding. Ten studies used valid and reliable scales for measuring IPV, and 15 studies used such scales for measuring AA. The majority (21/25) used appropriate statistical analyses.

Qualitative studies in general had clearly stated aims, applied appropriate qualitative methodologies, had appropriate recruitment and data collection strategies, and had a clear statement of findings. Some studies (2/5) did not clearly state potential ethical issues and/or whether the relationship between researcher and participants had been taken into consideration. The quality ratings applied are based on the aspects of the study in reporting the association between IPV and AA (see Tables 2 and 3).

3.3. Main findings

3.3.1. Prevalence of AA and types of abuse (in IPV context)

Included studies often reported the prevalence of AA in terms of threats to harm and actual harm to animals. The proportion of pet owning female victims of IPV who reported their partner threatened harm to animals ranged from 12% (Hartman et al., 2018) to 75% (Collins et al., 2018). Similarly, the prevalence of actual abuse (physical harm, neglect or killing) as reported by female victims varied between 23% (Travers et al., 2009) and 77% (Tiplady et al., 2012). Some studies included both threats and actual abuse, and reported instances from 21% (Riggs et al., 2018) to 89% (Barrett et al., 2020). Tiplady et al. (2012) recruited adult women experiencing IPV and concurrent companion animal ownership from the general public and reported 57.7% of women experienced verbal threatening behavior and 77% witnessed physical abuse of their pets. Around half of the participants (47.3%) reported that the extent of AA in the abusive relationship escalated over time (Fitzgerald et al., 2019).

Two studies used samples of men arrested for domestic violence in which 41% (Febres et al., 2014) and 52% (Haden et al., 2018) admitted committing at least one act of AA. Febres et al. (2012) conducted a similar study among women arrested for domestic violence and found a history of AA in 17% of the participants. Fielding and Plumridge (2010) found 47.3% of college students experienced AA in the context of domestic violence. Monsalve et al. (2018) reviewed the investigations carried out by the American Animal Protection Division and found 76.3% of incidents were AA, all of which were due to neglect.

3.3.2. Association between IPV and AA

Most of the studies revealed that AA emerged during IPV, indicating a strong association between AA and IPV. Women who reported that their partner abused their pet were more likely to suffer from frequent and severe forms of violence (Barrett et al., 2020; Hartman et al., 2018; Levitt et al., 2016). Animal abusers showed greater use of controlling behaviors towards their partner (Simmons & Lehmann, 2007), and were less affectionate towards their pets, used commands and threats while communicating with pets, considered pets as property, and had unrealistic expectations about their pets (Carlisle-Frank et al., 2004; Fielding & Plumridge, 2010). Offenders charged with offenses relating to IPV were more likely to show active and more severe forms of animal cruelty than those not charged with IPV (Levitt et al., 2016; Richard & Reese, 2019).

Controlled studies examining the relationship between IPV and AA supported the findings of a strong association. Ascione et al. (2007) found women in shelters were 11 times more likely to report that their partner had hurt or killed pets than the comparison group who had not experienced IPV. Volant et al. (2008) reported partner threats of pet abuse were significantly higher ($OR = 5.1, p = 0.044$) in the IPV group than the control group. Pets in IPV families (compared to non-IPV families) were less likely to receive regular veterinary care (55.5% vs. 80.0%, $p < 0.001$) and appropriate vaccinations (73% vs. 88.1%, $p = 0.004$) (Ascione et al., 2007). In a study comparing abused and non-abused women both recruited from the general public, Walton-Moss et al. (2005) reported AA was a significant risk factor for partners perpetrating IPV ($OR = 7.59, p = 0.011$).

In one study, minor physical violence and verbal aggression by men towards women were associated with threats to pets, while severe physical violence perpetrated by the partner towards women was significantly associated with actual physical harm to pets (Ascione et al., 2007). Hartman et al. (2018), however, found partners' psychological (i. e. non-physical) aggression increased the risk of AA ($OR = 1.07, p = 0.011$), while physical assault decreased the risk ($OR = 0.90, p = 0.019$). Two studies reported that psychological aggression towards a partner was associated with AA among men, but not among women (Febres et al., 2012; Febres et al., 2014). Simmons and Lehmann (2007) found AA was significantly associated with sexual violence ($p < 0.001$),

marital rape ($p < 0.001$), emotional violence ($p = 0.009$), and stalking ($p = 0.005$) towards the partner, but not with physical violence ($p = 0.668$). Pet abusers were also more likely to engage in other illegal actions (Haden et al., 2018; Levitt et al., 2016; Richard & Reese, 2019).

Among the studies investigating a relationship between IPV and AA, only two studies did not find an association. Riggs et al. (2018) found no significant difference in animal abuse (as measured by PAS score) between households with and without IPV among a sample of women from the general public. Monsalve et al. (2018), while reviewing the investigations of AA incidents, found IPV was not associated with animal neglect. Gupta (2008) found IPV significantly correlated with AA among males ($r = 0.55, p < 0.001$), but not among females ($r = 0.13, p > 0.05$).

3.3.3. Motivation for AA in the context of IPV

Controlling and deliberately upsetting the partner by hurting, terrorizing, and intimidating them was the primary purpose of AA. Studies reported AA as a means of control over IPV victims (Allen et al., 2006; Flynn, 2000a; Gallagher et al., 2008; Newberry, 2017; Tiplady et al., 2018), retaliation against the partner and pet (Levitt et al., 2016), discipline or punishment of the pet (Collins et al., 2018; Newberry, 2017; Tiplady et al., 2018), and anger and revenge (Gallagher et al., 2008). Offenders' jealousy of the partners' closeness with pets was perceived to have contributed to AA (Flynn, 2000a; Newberry, 2017). Fitzgerald et al. (2019) reported the major motivators of threats and neglect of pets as being 'to upset women or children', 'to regain control over the situation or argument', and 'to exert control over the situation', while 'to upset women and children' was the main motivator of actual harm (physical abuse) to pets. Richard and Reese (2019) found apathy (less likely; $OR = 0.13, p < 0.05$) and to hurt or intimidate another person (more likely; $OR = 47.3, p < 0.01$) were the main motivations for partners committing AA. Perpetrators also used AA as a means of coercing women to commit illegal acts such as bank robbery, drug trafficking, bank fraud and credit card theft or fraud (Loring & Bolden-Hines, 2004). Pets were also abused as revenge for leaving the offender following separation.

3.3.4. Impact of AA on IPV victims

Companion animals were an important source of emotional and social support for victims of IPV (Newberry, 2017; Taylor et al., 2019) and the shared experience of domestic violence made human victims closer to their pets (Tiplady et al., 2015). Newberry (2017) found animals provided physical protection from the violent partner. Strand and Faver (2006) reported 91% of IPV victims were worried about the safety of their pets during the abusive relationship. The abusive partner selectively used violent behavior towards pets with much of the violence hidden from public view (Tiplady et al., 2015). Pets targeted for abuse were most likely to be dogs and owned by the victimized partner (Tiplady et al., 2012). IPV-affected women whose pets had been abused showed a stronger emotional attachment to their pet (Flynn, 2000b; Hardesty et al., 2013) and considered pets as important source of emotional support (Cavazos & Faver, 2007) compared to women whose pets had not been abused.

For the victims of IPV, witnessing AA was traumatic and caused additional feelings of guilt, anger, anxiety and stress (Flynn, 2000a; Taylor et al., 2019). Collins et al. (2018) reported 20.4% IPV victims experienced a deleterious impact of AA on their emotional and psychological well-being. Women witnessing AA reported higher emotional distress and lower social support compared to men who witnessed AA (Riggs et al., 2018). Women also engaged in criminal activities to protect their pets from the abusive partners (Loring & Bolden-Hines, 2004).

Victims of IPV were emotionally bonded to their pets and the fear of AA significantly affected victims' decisions to seek support, plan for safety and terminate the abusive relationship (Cavazos & Faver, 2007; Collins et al., 2018; Faver & Strand, 2003; Flynn, 2000a; Gallagher et al., 2008; Tiplady et al., 2018; Volant et al., 2008). Across the included studies, the proportion of women who reported a delay in leaving the

Table 2Joanna Briggs Institute (JBI) critical appraisal checklist for analytical cross-sectional studies^a.

Studies	Were the criteria for inclusion in the sample clearly defined?	Were the study subjects and the setting described in detail?	Was the exposure measured in a valid and reliable way?	Were objective, standard criteria used for measurement of the condition? ^b	Were confounding factors identified?	Were strategies to deal with confounding factors stated?	Were the outcomes measured in a valid and reliable way?	Was appropriate statistical analysis used?
Gallagher et al. (2008)	Yes	Yes	NA	NA	No	No	No	No
Allen et al. (2006)								
Ascione (1997)	Yes	Yes	NA	NA	Yes	No	Yes	No
Ascione et al. (2007)	Yes	Yes	Yes	NA	Yes	Yes	Yes	Yes
Barrett et al. (2018)	Yes	Yes	Yes	NA	Yes	Yes	Yes	Yes
Fitzgerald et al. (2019)								
Barrett et al. (2020)								
Carlisle-Frank et al. (2004)	Yes	Yes	NA	NA	Yes	Yes	Yes	Yes
Cavazos and Faver (2007)	Yes	Yes	NA	NA	Yes	No	Yes	Yes
Faver and Strand (2003)	Yes	Yes	NA	NA	Yes	Yes	Yes	Yes
Febres et al. (2014)	Yes	Yes	Yes	NA	Yes	Yes	Yes	Yes
Febres et al. (2012)	Yes	Yes	Yes	NA	Yes	No	Yes	Yes
Fielding and Plumridge (2010)	Yes	Yes	Yes	NA	Yes	Yes	No	Yes
Flynn (2000b)	Yes	Yes	NA	NA	Yes	No	No	No
Gupta (2008)	Yes	Yes	Yes	NA	Yes	Yes	Yes	Yes
Haden et al. (2018)	Yes	Yes	Yes	NA	Yes	Yes	Yes	Yes
Hartman et al. (2018)	Yes	Yes	Yes	NA	Yes	Yes	Yes	Yes
Levitt et al. (2016)	Yes	Yes	No	NA	Yes	No	No	Yes
Loring and Bolden-Hines (2004)	Yes	Yes	NA	NA	No	No	Yes	No
Monsalve et al. (2018)	Yes	Yes	No	NA	Yes	Yes	No	Yes
Richard and Reese (2019)	Yes	Yes	No	NA	Yes	Yes	No	Yes
Riggs et al. (2018)	Yes	Yes	No	NA	Yes	No	Yes	Yes
Taylor et al. (2019)								
Simmons and Lehmann (2007)	Yes	Yes	Yes	NA	Yes	No	No	Yes
Strand and Faver (2006)	Yes	Yes	NA	NA	Yes	No	Yes	Yes
Tiplady et al. (2012)	Yes	Yes	NA	NA	Yes	No	No	Yes
Travers et al. (2009)	Yes	Yes	No	NA	No	Unclear	No	Yes
Volant et al. (2008)	Yes	Yes	No	NA	Yes	Yes	No	Yes
Walton-Moss et al. (2005)	Yes	Yes	Yes	NA	Yes	Yes	Unclear	Yes
Total (n = 25)	25 Yes	25 Yes	10 Yes	25 NA	22 Yes	13 Yes	14 Yes	21 Yes

^a All quality ratings applied are based on the aspects of the study in reporting the relationship between domestic violence and animal abuse. Response options: Yes, No, Unclear, Not Applicable (NA).

^b Rated NA across all studies due to no objective criteria measuring the condition.

Table 3
Critical Appraisal Skills Programme (CASP) ratings of qualitative studies.

Studies	CASP Question	Collins et al. (2018)			Flynn (2000a)			Hardesty et al. (2013)			Newberry (2017)			Tiplady et al. (2018) Tiplady et al. (2015)		
		Yes	Can't tell	No	Yes	Can't tell	No	Yes	Can't tell	No	Yes	Can't tell	No	Yes	Can't tell	No
1	Are the aims stated clearly?	●			●			●			●			●		
2	Is the qualitative methodology appropriate?	●			●			●			●			●		
3	Is the research design appropriate to address aims of the research?	●			●			●			●			●		
4	Is the recruitment strategy appropriate to aims?	●			●			●			●			●		
5	Does the data collection method address the research issue?	●			●			●						●		
6	Has the relationship between researcher and participants been considered?	●				●			●					●		
7	Have ethical issues been taken into consideration?	●				●			●		●			●		
8	Was the data analysis sufficiently rigorous?	●			●			●			●			●		
9	Is there a clear statement of findings?	●			●			●			●			●		
10	How valuable is the research?	●			●			●			●			●		

partner and entering a domestic violence shelter due to concern for their pets ranged from 18% (Ascione, 1997) to 56% (Barrett et al., 2018). Strand and Faver (2006) found 65% of IPV victims reported that their decision to seek shelter was affected by concern for the safety of their pets, among whom 88% delayed seeking shelter. Further, women without children were more likely to report that their decision to seek shelter was affected by concern for their pets than women with children (85% vs. 45%, $p = 0.01$; Strand & Faver, 2006). Among the correlational studies, emotional and physical abuse of pets as well as threats of abuse were significantly associated with the decision to leave the relationship (Barrett et al., 2018; Faver & Strand, 2003). Women whose partners had physically abused their pets were more likely to delay leaving, return home, delay calling police, or refuse to lay charges than women whose partners had not (Travers et al., 2009). Most of the studies found experience of AA prevented women from seeking support except Taylor et al. (2019) who reported witnessing animal abuse triggered leaving the abusive relationships.

Taylor et al. (2019) sample included diverse genders and sexualities, and reported the experience of AA in the context of IPV among trans-genders largely mirrored the cisgender and heterosexual focused literature. However, there could be unique aspects of companionships provided by animal to people of diverse genders and sexualities who experienced significant IPV related to their identity.

3.3.5. Impact of AA (and IPV) on animal victims

The most prominent impact of AA in IPV was the actual physical harm, suffering and even death caused to the pet, with the perpetrator using a range of methods to harm pets such as punching, throwing, hitting, kicking, drowning, shooting, swinging by the tail, stabbing and neglect (Allen et al., 2006; Ascione, 1997; Gallagher et al., 2008; Tiplady et al., 2018). Participants reported behavioral changes and ongoing psychological impact on pets. Common behavioral changes included being frightened and cowering, running away, hiding, aggression towards the abusers, seeking proximity and being protective towards the victimized women, avoidance of strangers and decreased food consumption (Tiplady et al., 2018), with Tiplady et al. (2012) reporting almost 85% of participants experiencing such behavioral changes. Psychological impact on the abused pet as perceived by the IPV victims were increased anxiety, distrust, and fear towards men (Tiplady et al., 2015). The behavioral changes and psychological impact on the pets persisted when victims were interviewed six months after terminating the violent relationship.

4. Discussion

4.1. Discussion on major findings

This review found that pet animals are often threatened, harmed, or killed by abusers in households with IPV, with the prevalence of AA among IPV households owning pet ranging between 12% and 89% across the included studies. The wide range of prevalence of AA documented in the studies reviewed is due to the different definitions of AA used across studies and study settings from where participants were recruited. Some studies considered threats to harm animals, some considered actual harm to animals, while some reported both threats and actual harm. The actual enactment of abuse also varied from neglect to physical harm. Furthermore, some studies used single item indicators of AA in IPV (e.g., whether the perpetrator harmed/threatened to harm your pet), while others used multi-items measures. Studies using multiple items of AA (e.g., the Partners Treatment of Animals Scale, Pet Treatment Survey, Aggression Toward Animals Scale) reported higher prevalence rates than the studies that use only single items. Studies recruiting participants from domestic violence shelters and support programs reported higher rates of AA than studies which had community-based samples of IPV survivors. This indicates that the prevalence of AA is higher when there is more severe IPV as severity of IPV might be correlated with victim's help seeking. Thus, the methodological issues including the context of IPV and operationalization of AA across the studies reviewed have contributed to a wide variation in prevalence estimates.

In our review, men were the offenders in most incidents of IPV and AA. Men were more likely to endorse physical abuse and be threatening towards animals than women, consistent with previous studies (Febres, 2015). Psychological and physical violence were positively and significantly correlated with AA among men, but not among female perpetrators of AA. It is also important to note while debates about gender symmetry/asymmetry continue in the IPV literature, there is growing consensus among scholars that AA conducted in the context of IPV is a highly gendered phenomena even in cis-hetero relationships (with the evidence suggesting that males are far more likely to perpetrate abuse of animals in the context of IPV than females). Previous studies have reported controlling an animal, retaliation against an animal, amusement, prejudice, fear or dislike of the animal, and acting out of anger as the major motivators for AA (Hensley & Tallichet, 2005; Newberry, 2018). This review identified that perpetrators of IPV primarily used threats or actual abuse of animals to control, coerce, hurt, and intimidate partners, with anger towards animals and retaliation against animals being reported in fewer cases. Previous studies have found similar motivations

for AA in a domestic violence context (Alleyne & Parfitt, 2019; McPhedran, 2009b). Abusers considered pets as objects/property which might have minimized cognitive dissonance while abusing the animal (Carlisle-Frank et al., 2004). In addition, perpetrators used AA as a means to upset the victim (Fitzgerald et al., 2019). These findings are unable to be linked back to either the 'violence graduation hypothesis' or the 'deviance generalization hypothesis' as the study participants are unable to reflect upon whether they believe the perpetrator's actions have stemmed from childhood or represent a larger picture of anti-social behavior. Likewise, those two same theories are unable to predict whether power and control, or retribution and the aim of upsetting others, are the situationally specific motives of perpetrators. The findings are largely consistent with the typology of power and control (Coercive Control Violence) as the motivator for AA in IPV. However, the findings were not entirely consistent with this. Whilst exerting control or influence is consistent, motivators such as retaliation and to upset the victim are less so. These instances not related to Coercive Control Violence may instead be indicative of Separation-Instigated or Situational Couple Violence, meaning power and control is not exclusively at the core of AA in IPV.

For victims of IPV, pets were an important source of emotional support. This is consistent with a previous systematic review reporting the benefits of pet in reducing loneliness and improving emotional well-being (Cleary et al., 2020). Due to the strong bonds IPV victims have with their pets, AA may exacerbate their psychological trauma and serve as an additional obstacle in many victims' safety plans. Indeed, research has shown how this emotional bond is deliberately exploited by the perpetrator and therefore makes AA a method of IPV as well as a form of violence in its own right (Upadhy, 2014). The fear of leaving their pet was the primary concern affecting victims' decisions to end the abusive relationship and seek for support services, and was further exacerbated by the limited number of shelters that allow pets to accompany victims and resistance by some shelters to facilitate co-sheltering (Stevenson et al., 2018). In multi-pet families, pets owned by the IPV victim (usually women) and pets with whom the women had stronger emotional attachments were selectively targeted. These findings show that AA in the context of IPV is important and an extension of domestic violence against the partner.

The importance of viewing AA as an extension of IPV, and understanding the Link between IPV and AA, is being increasingly recognised. Recently, a motion was brought before the Victorian Legislative Council that called for animal abuse to be recognised as a form of family violence, for animals to be recognised as vulnerable individuals, and for a review of the *Family Violence Protection Act 2008* that would include protection for companion animals (Legislative Council, 2021). This is in addition to the 35 States in the USA that have enacted protections for animals under domestic violence protection orders (Wisch, 2021). This demonstrates a commitment to advancing the issue of AA and protections afforded to animals to move into the realm of government action and legislation.

4.2. Methodological notes

Participants in most of the included studies were women seeking domestic violence support services who reported incidents of AA perpetrated by their partner. Other studies recruited undergraduate students, offenders arrested for domestic violence, records of AA investigations and stories of AA from online forums. As IPV often goes unreported (Ascione, 2008), there may be an underestimation of domestic violence, and therefore AA, in the included studies (Levitt et al., 2016).

Studies investigating the Link between IPV and AA typically rely on samples constituting human victims (usually women) of IPV, with few studies recruiting offenders of AA. The link established in such extreme cases may not be present in the general population (Arluke et al., 1999). Whilst most of the studies reviewed involved female victims of IPV, the

research of Taylor et al. (2019) specifically involved gender and sexually diverse (LGBTQ) populations. As the experiences of individuals who are not cisgender and/or heterosexual may be distinct in important ways from those who are cisgender and heterosexual, further research is recommended. For example, transgender and gender diverse survivors of IPV relationships with their animal companions may be even more salient in their survival and coping.

Due to the cross-sectional design of the included studies, the direction of causality between IPV and AA cannot be established. AA might have occurred either before, concurrently with, or after, the aggressive behavior towards the partner. As many studies suggested that perpetrators of AA are involved in concomitant incidents of other forms of violence and aggressive behavior (Carlisle-Frank et al., 2004; Simmons & Lehmann, 2007), this review provides some support for the 'deviance generalization hypothesis', with perpetrators of AA often involved in other types of offending. However, this study does not provide any evidence against the 'violence graduation hypothesis' as the included studies did not focus on how AA led to IPV and it is not clear whether a particular circumstance, motivation and method of cruelty prohibits, maintains or escalates the perpetration of AA. Longitudinal prospective studies are suggested to shed further light on this issue.

4.3. Limitations

As many women were reluctant to leave their abusive partner due to fear and concern for their pets, it is likely that those unreported incidents of IPV may have higher prevalence of AA. Generalization of findings from self-selected volunteer samples of violence-affected victims could be problematic as they may not be representative of all victims with pets who experience IPV.

4.4. Implications for future research

The study of the Link between IPV and AA appears to take on two angles of perspective. The first angle is where the tendency towards violence comes from, be it through childhood, developing further as the perpetrator ages, or through a general tendency towards violence that is unrelated to childhood. The second angle is what motivates the perpetrator at the moment of AA in IPV. The perpetrator may be unaware of underlying drivers towards violence and instead be motivated by emotions such as power, retaliation or a desire to upset. Theories seem to be divided between these two perspectives, and both are very much angled towards the perpetrator, and how and why they act as they do.

Future research has considerable scope. First, a further analysis of the drivers behind victims' perceptions and response is warranted, as well as the development of a theoretical framework from this. Why do victims respond as they do, and why do they perceive their pets as they do in the context of AA? Second, research that attempts to draw some predictive analysis and understanding of how underlying tendencies towards violence and situational motivators intersect could also be warranted. If violence stems from a gradual increase of violent acts from childhood, does this find more prevalence in power and control? Or in a desire of retaliation? If perpetrators merely have a more generalized tendency towards violence, does this manifest in all types of motives or does its prevalence show more in a desire for control? Without this higher-level view of the intersection between theoretical bases the two will remain separate and isolated from one another. Finally, future research could include the success of interventions like law reform to reduce the incidence of AA within IPV.

4.5. Implications for practitioners

Increased awareness about the co-existence of IPV and AA among the public and other key stakeholders such as police, veterinarians and professionals working for the elimination of violence is important for prevention of both types of abuse. Development of cross-reporting

systems to enable co-recording of IPV and AA incidents could help to better identify perpetrators of both human and animal abuse in the community. As human and animal abuse rarely occur in a vacuum, and instead often overlap (Ascione, 2005), occurrence of one type of violence should be considered as a warning sign of the other. Community workers, veterinarians and other professionals should be trained to recognize the various forms of domestic violence and AA (Becker & French, 2004), and those encountering IPV should investigate the presence of AA in the household, and vice-versa, and report possible incidents to the relevant authorities. Community based crime surveys and domestic violence studies should include questions related to AA to systematically collect data on community prevalence of AA in the context of domestic violence.

As participants in the included studies showed reluctance to report incidents of AA in the household, difficulties experienced in disclosing such abuse should be understood and AA should be considered as a part of domestic violence and treated confidentially. Women's shelters and refuges should have provision for accommodating pets as this can positively impact on the decision to leave the abusive relationship.

Recognizing the complexity of AA in a domestic violence context, Jegatheesan et al. (2020) recommended a bioecological systems model, to enable better understanding of the psychological problems of AA and family violence. A transdisciplinary collaborative approach is required in the identification, prevention, and protection of animals and people experiencing AA and domestic violence. AA remains a complex issue that requires a multidisciplinary approach (Arluke et al., 1999).

5. Conclusion

This study extends the current literature on the Link between IPV and AA by providing a comprehensive review of studies reporting AA in IPV situations. AA in IPV situations adversely affects the physical and psychological wellbeing of both human and animal victims. Studies should consider the cultural issues, social norms, legal frameworks, and people's perception towards violence against pets and humans. The findings have practical implications for organizations, professionals and researchers working in the field of IPV and AA. By actively applying this understanding of the interrelated nature of IPV and AA, health and social support services can maximise victims' and pets' safety by considering AA as both a form of IPV and a tool for inflicting IPV by perpetrators, and using this understanding to design services for the protection of both forms of victim.

Funding

Partially funded by a donation from the Cat Protection Society of NSW, Australia.

CRediT authorship contribution statement

Michelle Cleary: Conceptualization, Methodology, Formal analysis, Investigation, Data curation, Writing – original draft, Writing – review & editing, Project administration, Funding acquisition. **Deependra K. Thapa:** Conceptualization, Methodology, Formal analysis, Investigation, Data curation, Writing – original draft, Writing – review & editing. **Sancia West:** Methodology, Formal analysis, Investigation, Data curation, Writing – original draft, Writing – review & editing. **Mark Westman:** Writing – review & editing. **Rachel Kornhaber:** Conceptualization, Methodology, Investigation, Data curation, Writing – original draft, Writing – review & editing.

Declaration of competing interest

No conflict of interest has been declared by the authors.

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I

Animal Welfare: A Brief History

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Abstract

This paper traces the relationship of humankind to animals from the ancient Greeks to the 21st century. Up until the 17th century, philosophers regarded animals as being quite distinct from human beings; human beings had rationality whereas animals had none. This meant that animals had only instrumental value and could be used in any way that human beings desired. During the Enlightenment, philosophers started to realize that the distinction was not clear-cut; animals had some rationality. Bentham (1823) pointed out that rationality was not the important factor; animals could suffer and that was what mattered; animals had intrinsic value. Also during the 19th century, as part of Darwin's theory of evolution by natural selection, it was seen that states of suffering and states of pleasure could also be adaptive. Although the foundation was now in place, the emergence of modern animal welfare science was delayed through the first 70 years of the 20th century by Behaviorism, which eschewed any consideration of subjective experiences. It took a controversial book by a layperson, Ruth Harrison, to stir both the scientific and philosophical community into developing theories of animal welfare and a book by an ethologist, Donald Griffin, to make it acceptable to study the feelings of animals.

Philosophers and Animal Welfare

A short consideration of the history of how animals have been dealt with by various Western philosophers sets the scene for how they are regarded today. Much of this early history is taken from Preece and Chamberlain (1993) and Preece (2002).

Aristotle (384-322 BC) studied under Plato at the Academy in Athens. Because Aristotle's ideas were so different from those of Plato, he did not succeed Plato as head of the Academy when Plato died. Instead Aristotle moved to Macedonia for a few years where he educated Alexander (the Great). He then returned to Athens and founded his own academy called the Lyceum. He obviously had an interest in animals since he gave lectures on zoology at the Lyceum. But of course, he is better known for his views on ethics and logic. Aristotle thought that the ability to reason is the highest of all abilities and it is this that sets human beings (actually Greeks!) above all other creatures. Aristotle also introduced the teleological argument i.e. "things being there for a purpose" e.g. "the purpose of rain is to water the plants". From these two ideas, a great hierarchical structure was built in which those with more reason should control those with less (with Gods being superior to men and controlling them, men being superior to women, Greeks being superior to other races, humans being superior to animals, and so on). According to this structure, human beings had absolute authority over all animals and could do what they liked with them. However, the indifference of the Greeks to the plight of animals pales into insignificance when compared to the attitude of the Romans. The Roman period is infamous for the cruelty to animals (and to human beings) inflicted over 400 years. Hundreds of thousands of animals of a wide range of species were subjected to unspeakable cruelty in the circuses - and all for human entertainment. The decline of the Roman Empire giving way to the Dark Ages is generally mourned as a loss of civilization, but at least the scale of cruelty to animals waned.

There is little in recorded history during the next thousand years detailing how animals were regarded by humankind until Aquinas in the 13th century. Saint Thomas Aquinas (1224-1274) was an Italian Philosopher and a Theologian. He was educated at first at a monastery in Monte Casino, then at Naples, Paris and Cologne. He is best known for his subtle and delicate assimilation of Aristotle's ideas into the theology of his day. His ideas have experienced short periods of popularity through history. Aquinas rediscovered Aristotle's writings and he agreed that it was the ability to reason (or rationality) that made human beings distinct from all other animals. However, he gave Aristotle's ideas a Christian twist. He postulated that animals do not have immortal souls. He also claimed that human beings had no direct obligations to animals. However, they might have indirect moral obligations, in that people who mistreat animals may (1) pick up cruel habits and then treat other human beings badly, and (2) perpetrate a property wrong against the owner of the animal. According to Aquinas, animals do not have moral standing; they only have instrumental value. It is noteworthy that in one respect, Aquinas was correct. Recent research has shown that people who are maliciously cruel to animals early in life are at greater risk of being cruel to people later in life (Boat, 1995; Tallichet and Hensley, 2004; Hensley and Tallichet, 2005).

René Descartes (1596-1650) is often thought of as the father of modern philosophy. He was also a physicist, a physiologist and a mathematician. Descartes is usually singled out for special blame for introducing the idea of animals as 'automata' or machines. However, in a more considered review of Descartes' works, Cottingham (1978) points out that even though Descartes states that animals have no thought or language he does not actually say that they have no feelings or sensations. Indeed Kenny (1970) translates Descartes as saying "Similarly of all the things which dogs, horses and monkeys are made to do, are merely expressions of their fear, their hope, or their joy; and consequently, they can do these things without any thought." Present-day scholars continue to argue about what Descartes really meant by this. However, he certainly did not *treat* animals as if they were sentient. He was a vivisectionist, and dissected living, conscious animals (usually dogs) which suggests that he thought that 'fear', 'hope' and 'joy' were in some way unconscious emotions. The concept of 'unconscious emotion' is controversial and is currently being debated (e.g. Öhman *et al.*, 2000; Winkielman and Berridge, 2004). Like Aristotle and Aquinas, Descartes also believed that rationality distinguished human beings from other animals and he added that language, which is a unique human attribute (sic), is the only real test of rationality. However, as suggested by the translated passage above, his translators and interpreters may have gone too far in blaming him for 'animals are machines'. He does seem to allow that animals might have emotions and might be driven by these emotions.

Thomas Hobbes (1588-1679) was an English philosopher who, in 1651, wrote the famous book ***Leviathan*** which formed the basis for Western political philosophy. ***Leviathan*** concerns the structure of society and legitimate government, and is regarded as one of the earliest and most influential examples of [social contract theory](#). Hobbes' contention was that human beings act out of self-interest and that this leads to co-operation and social contracts. Since animals have no language (sic), they cannot enter into social contracts with other animals or with human beings. They are therefore not worthy of moral consideration. So, whereas Descartes thought that language was important as a sign of rationality, Hobbes thought that it was necessary for the drawing up of social contracts. However, the end result was the same; animals do not have language, therefore they do not merit moral consideration.

Overlapping with Hobbes was the English philosopher John Locke (1632-1704) who is considered to be the first of the British Empiricists. Empiricism emphasizes the role of experience, particularly sensory perception, in the formation of ideas. Locke postulated that when people are born, their minds are 'blank slates' or 'tabula rasa'. This was contrary to the previous belief that people were born with innate ideas. Locke also developed Thomas Hobbes' ideas on social contract theory. He was one of the earliest and most influential thinkers of the Enlightenment contributing

to political philosophy and liberal theory. His ideas had a big influence on later Enlightenment thinkers such as Voltaire, Jean Jacques Rousseau and David Hume.

It is in Locke's writings that we get a first glimpse of a change of view with regard to animals. Locke says that there is evidence that animals (or what he calls "brutes") have the capacity to remember. He also allows that animals seem to have some very simple ideas and they can compare one thing to another – but only very imperfectly. To some extent they can compound (put ideas together) but Locke draws the line at abstraction. He clearly states that animals cannot form abstractions. So Locke concludes that there are huge differences between human beings and other animals, but that animals do have some simple mental capacities, and this is a big departure from calling them 'automata'.

The German, Immanuel Kant (1724-1804) lived well after Locke but he maintained the traditional view that animals have only instrumental value. Kant is an important philosopher in the development of moral philosophy. He wrote a very influential book called *Groundwork of the Metaphysic of Morals*. Kant believed that morality is a case of following absolute rules. For example, he thought that lying was morally wrong and that we should never lie no matter what the circumstances are. Kant's philosophy was that one should treat a human being as an end in himself/herself and not as a means to an end. He developed the philosophy that human beings have intrinsic (or inherent) value and not merely instrumental value. The reason they have intrinsic value (once again) is that they have rationality and in particular they can **reason about ethics**. Animals, on the other hand, cannot reason (particularly about ethics!), and therefore have only instrumental value.

So these five philosophers, Aristotle, Aquinas, Descartes, Hobbes and Kant, developed a position that has dominated the traditional Western view of how animals should be treated. The position was based on two claims: (1) Human beings have a special attribute that makes them distinct from all other animals (a factual claim) and (2) having this special attribute makes human beings objects of direct moral concern (a moral claim). The special attribute was rationality, and in particular having language and being able to engage in ethical thought. The traditional Christian view incorporated an additional distinction, namely that animals did not have immortal souls. John Locke has been left out of this list because he was the first to realize that the distinction between animals and human beings was not as clear cut as the others suggested.

With the emergence of the period we call 'The Enlightenment' in Europe, things started to change. The Scottish philosopher, David Hume (1711-1776), wrote on learning in animals, "It seems evident, that animals learn many things from experience, and infer that the same events will always follow from the same causes". He went on to say: "Is it not experience, which renders a dog apprehensive of pain, when you menace him, or lift up the whip to beat him?" (Hume, 1739 pp. 397-398). He thus began to dispute the previous views that animals have no moral standing. Hume was a hard-line atheist and so the question of anyone having an immortal soul did not arise.

Jeremy Bentham (1748-1832) was an English social reformer who was very concerned about the conditions that many workers were forced to accept during the Industrial Revolution. He worked closely with James Mill, a like-minded Scottish social reformer. In contrast to Kant, Bentham thought that it was the consequences of actions that were important. So, for example, telling a lie might be morally acceptable if the consequences of doing so were better than not telling a lie. He had little to say about animals. However, in one of his books he dealt very briefly with animals. He rejected both of the previous claims of Aristotle, Aquinas, Descartes, Hobbes and Kant outright. According to Bentham, rationality is not the relevant matter. "The question is not, Can they *reason*? nor, Can they *talk*? But, Can they *suffer*?" (Bentham, 1823). John Stuart Mill (1806-1873) was the son of James Mill and a close friend of Jeremy Bentham. Mill developed Bentham's ideas into the philosophy of Utilitarianism (Mill, 1910) or The Greatest Happiness Principle

according to which “Actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness”. Happiness is defined as pleasure and the absence of pain; unhappiness is defined as pain and the privation of pleasure. Bentham and Mill did not wish their new theory to have the title “The Greatest Happiness Principle” and they searched around for another name. They came across the word “utilitarian” in the writings of a Scottish novelist, John Galt, and they asked him if they could use this for the name of their theory, and Galt agreed.

Scientists and Animal Welfare

These ideas and theories were those of philosophers. But what about scientists? When did they start to think about animal welfare and, in particular, when did they start to think about sentience? Of course, it could be argued that Descartes was a scientist as well as a philosopher. However, as has already been argued, the evidence shows that Descartes certainly did not treat animals as if they were sentient or as if their welfare mattered.

Most people would probably reach back to the writings of Darwin for some reference to animal sentience. However, more than thirty years before Darwin’s (1872) *The Expression of the Emotions in Man and Animals*, an English veterinarian was writing about sentience in animals. William Youatt (1776-1847) embarked on a career as a veterinarian at the mature age of thirty-five. He was training to be a minister of the church when he suddenly left home in south-west England and moved to London. He attended the Veterinary College there (later to become the Royal Veterinary College) for two years before leaving and setting up in practice without completing his training. He was a very prolific writer and published several books including *Canine Madness* (1830) (a book on rabies), *The Horse. With a Treatise on Draught* (1831), *Cattle. Their Breeds, Management and Diseases* (1834) and *Sheep* (1837), many of which are still referred to today. The book that is of particular interest to us is one that deals with many different aspects of animal welfare (Youatt, 1839). In this book Youatt writes of animals’ senses, emotions, consciousness, attention, memory, sagacity, docility, association of ideas, imagination, reason, instinct, social affections, the moral qualities, friendship and loyalty. So he, most definitely, knew that animals were sentient! He wrote of the intellectual faculties “We are endeavouring to shew that the difference [between humans and animals] in one of the most essential of all points, is in degree and not in kind”. He also wrote “We are operating on animals that have, probably, as keen feelings of pleasure and of pain as ourselves”. Youatt condemned many practices as being cruel and inhumane such as, too early training of race horses, steeple-chasing, transport methods for newly-born calves, methods of raising veal calves, slaughter-house management, tail-docking and ear-cropping of dogs, using live bait for fishing, dissection of living animals, and force-feeding of capons and turkeys. It is noteworthy that many of these practices are still being hotly debated today!

In his book *The Expression of the Emotions in Man and Animals* Darwin (1872) noted the universal nature of human facial emotional expression, described some commonalities in expression of emotions in animals, and suggested a shared evolution. Darwin was mainly interested in emotional expression and so he described the underlying anatomy and physiology, the signal value of the expression, and the evolution of the emotions. He seemed to accept the subjective experience associated with the emotions, but this was not explored in any depth. It was left to George John Romanes (1848-1894), a friend and disciple of Darwin’s, to be explicit about the subjective experiences of feelings. In his book *Mental Evolution in Animals*, Romanes (1883) wrote “Pleasures and Pains must have been evolved as the subjective accompaniment of processes which are respectively beneficial or injurious to the organism, and so evolved for the purpose or to the end that the organism should seek the one and shun the other.”

The 100-year Hiatus

Since it was accepted 130 years ago by philosophers, scientists and society in general that animals have feelings, why did it take another 100 years for animal welfare science to develop as an accepted discipline? The answer seems to be that Behaviorism emerged at the start of the 20th century and had a huge inhibiting effect on the study of subjective phenomena. Behaviorism is a branch of psychology that was developed in the USA during the first 70 years of the 20th century. The foundations were laid by William James (1842-1910) who, late in his career, wrote “Consciousness ... is the name of a non-entity, and has no right to a place among first principles. Those who still cling to it are clinging to a mere echo, the faint rumour left behind by the disappearing ‘soul’ upon the air of philosophy... It seems to me that the hour is ripe for it to be openly and universally discarded” (James, 1904).

The father of Behaviorism is usually considered to be J.B. Watson (1878-1958). He laid out the principles of the discipline and wrote, “The behaviorist sweeps aside all medieval conceptions. He drops from his scientific vocabulary all subjective terms such as sensation, perception, image, desire and even thinking and emotion” (Watson, 1928).

The psychologist who developed techniques for measuring behaviour objectively according to behaviourist rules was B.F. Skinner (1904-1990). He is best known for inventing the operant conditioning chamber or ‘Skinner Box’. He stated, “We seem to have a kind of inside information about our behaviour – we have feelings about it. And what a diversion they have proved to be! ... Feelings have proved to be one of the most fascinating attractions along the path of dalliance” (Skinner, 1975).

The Behaviorists were important scientists and their influence was felt throughout the animal behaviour field including in the discipline of ethology which was developing rapidly in Europe. With very few exceptions, behavioural scientists eschewed any consideration of animals’ subjective experiences. There is no doubt that this delayed the emergence of animal welfare science by 80-100 years.

A Re-awakening

Big changes took place in animal agriculture following the Second World War. In response to the huge demand for cheap food there was a rapid industrialization of production methods. It seems likely that the general public was not aware of these changes since they often took place in closed housing systems. When the more intensive methods were revealed and criticized by Ruth Harrison in her book *Animal Machines* (Harrison, 1964), there was a huge public outcry. Harrison criticized intensive broiler production methods, poultry slaughter houses, battery cages for laying hens, crates for white veal production, broiler beef production, intensive rabbit production and ‘sweat-box’ conditions for fattening pigs. In her criticisms, Harrison laid much emphasis on animal suffering, that is, on the negative subjective states that the animals were experiencing. The public condemnation was so great that the British Government felt obliged to form a Committee of Enquiry under the chairmanship of Professor Rogers Brambell. Their report, often called the ‘Brambell Report’ (Command Paper 2836, 1965) concluded that, indeed, there was some cause for concern about animals in intensive production systems but that, in many instances, there was a lack of good scientific evidence to draw firm conclusions. They also thought that feelings were an important feature of welfare. They stated, “*Welfare is a wide term that embraces both the physical and mental well-being of the animal. Any attempt to evaluate welfare, therefore, must take into account the scientific evidence available concerning the feelings of animals that can be derived from their structure and functions and also from their behaviour*” (Command Paper 2836, 1965).

Nevertheless, in spite of these allusions to the feelings of animals in general and the suffering of animals in particular, the widespread view amongst the scientific community at this time was that welfare was intimately connected with stress. This can be seen in the publications of this period as scientists struggled to investigate welfare (e.g. Bareham, 1972; Bryant, 1972; Wood-Gush *et al.*, 1975).

This pattern was broken by an American ethologist, Donald Griffin, who wrote a book entitled *The Question of Animal Awareness* (Griffin, 1976). He himself was not particularly interested in animal welfare, but his ideas legitimized a consideration of animals' subjective experiences and suddenly new approaches became available to animal welfare scientists. Thereafter, there was a burgeoning literature on animal sentience and welfare (e.g. Dawkins, 1980; Duncan, 1981, 1993; Appleby *et al.*, 2011).

In parallel with the scientific re-awakening of interest in sentience and animal welfare, there has been an intense focus on the ethics of animal use. This was probably started by Peter Singer (b1946), an Australian philosopher who now holds the Chair of Bioethics at Princeton University. He has vigorously promoted a utilitarian approach to animal welfare. He published *Animal Liberation* in 1975 with a 2nd edition in 1990 and a 3rd edition in 2002. This was (and is) a very influential book. Singer argues that most animal use (including animal agriculture) is deeply objectionable. So he is arguing about the *facts*. He says that he *is not* against using animals or even against killing them, if (and only if) they have a good quality life and a painless death. Interestingly, Singer is also regarded as the father of Animal Rights although he himself is most definitely a utilitarian. A utilitarian approach has proved to be very useful in dealing with various moral dilemmas in human affairs. However, when animals are involved, it often becomes extremely difficult to weigh the happiness of humans against the suffering of animals. For example, should a scientist carry out medical research on chimpanzees in which many of the chimps will suffer and die but the research may find a cure for AIDS which will reduce suffering and benefit millions of human beings?

Using much of the evidence produced by Singer in *Animal Liberation*, Tom Regan (1938-2017), Emeritus Professor of Philosophy at North Carolina State University, developed the philosophy of Animal Rights and in 1983 published *The Case for Animal Rights*. In this book he argues that we are all subject of a life, conscious beings, have an individual welfare, want and prefer things, and believe and feel things. Therefore we (and all sentient creatures) have inherent value. Regan builds his argument as follows, "*Individuals who have inherent value have an equal right to be treated with respect... It follows that we must never harm individuals who have inherent value*" (Regan, 1983). According to Regan, killing is the biggest harm we can do to another individual. Regan is an abolitionist. He believes that human beings should not use animals at all – in animal agriculture, in biomedical science, for work or sport, or even as companions. It should be pointed out that Regan's version of animal rights is extreme; it is possible to build theories of limited animal rights (Tannenbaum, 1995). Such a theory might assign rights such as: farm animals have a right to be protected from climatic extremes; laboratory animals have a right to express strongly motivated behaviour; companion animals have a right to daily exercise; and so on.

One of the problems with Complete Animal Rights is that it only deals with human **use** of animals. However, many human activities are more indirect; the pollution of rivers, lakes and oceans, the pollution of the atmosphere, global warming etc., can all have a profound effect on the welfare of animals. Even activities like building roads, laying pipelines, and growing crops can have adverse effects on welfare. How can these indirect effects of human activities be studied properly if we are constrained by the philosophy "Do not use animals"?

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To cite this article (suggested): Duncan I.J.H., "Animal Welfare: A Brief History" [PDF file], In: Hild S. & Schweitzer L. (Eds), *Animal Welfare: From Science to Law*, 2019, pp.13-19.

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1 Pre-publication copy

2 Broom, D.M. 2011. A history of animal welfare science. *Acta Biotheoretica*,
3 59, 121-137. DOI: 10.1007/s10441-011-9123-3

4 A history of animal welfare science.

5

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10

11 ABSTRACT

12 Human attitudes to animals have changed as non-humans have become more
13 widely incorporated in the category of moral agents who deserve some respect.
14 Parallels between the functioning of humans and non-humans have been made
15 for thousands of years but the idea that the animals that we keep can suffer has
16 spread recently. An improved understanding of motivation, cognition and the
17 complexity of social behaviour in animals has led in the last thirty years to the
18 rapid development of animal welfare science. Early attempts to define welfare
19 referred to individuals being in harmony with nature but the first usable
20 definition incorporated feelings and health as part of attempts to cope with the
21 environment. Others considered that welfare is only about feelings but it is
22 argued that as feelings are mechanisms that have evolved they are a part of
23 welfare rather than all of it. Most reviews of welfare now start with listing the
24 needs of the animal, including needs to show certain behaviours. This approach
25 has used sophisticated studies of what is important to animals and has replaced
26 the earlier general guidelines described as freedoms. Many measures of welfare
27 are now used and indicate how good or how poor the welfare is. Naturalness is
28 not a part of the definition of welfare but explains why some needs exist. In
29 recent years, welfare has become established as one of various criteria used to

decide on whether a system is sustainable because members of the public will not accept systems that cause poor welfare. The study of welfare has become part of the scientific basis upon which important political decisions are made.

INTRODUCTION

Animal welfare is a term that describes a potentially measurable quality of a living animal at a particular time and hence is a scientific concept. Much of the discussion about animal welfare concerns what humans do about it, or should do about it. Such a question, about what people ought to do, is an ethical issue. The scientific study of animal welfare should be separated from the ethics but no application of the science can occur without understanding arguments about ethical positions. The first section of this paper will therefore refer to morality in relation to animal use. This will be followed by discussions of the history of the welfare concept and of usable welfare concepts now and how they are inter-related. Some links to other moral issues and some future concerns will then be considered.

MORAL ORIGINS AND EARLY WELFARE HISTORY

Animals have always had welfare but what humans know of it has become modified over time, especially recently. The human concepts of what are and are not moral actions have probably changed little over many millennia except that the category of individuals who are considered to deserve to be treated in a moral way has broadened greatly (Broom 2003). Helping others and not harming others are effective strategies, especially for animals that live in long-lasting social groups. Hence moral systems have evolved in humans and other such animals, as explained in more detail by de Waal (1996), Ridley (1996), Broom (2003). Humans have long espoused the view that they have duties to others. As explained in the references quoted, social animals such as humans have evolved characteristics that make them responsive to others in their societies in a way that promotes dutiful preferences and actions. This

60 deontological position has arisen in every human society and the mechanisms
61 involved have parallels in other animal societies. Other evolved characteristics
62 increase abilities to assess consequences of actions and to evaluate costs and
63 benefits, i.e. some utilitarian decisions.

64 In some human societies, for example those where the Buddhist or Jain religions
65 dominate, the range of living individuals considered to deserve respect has long
66 been wide. However, in most of the world, ideas about which individuals should
67 be the subject of moral actions (Singer 1994) have changed with: (i) improved
68 communication in the world, (ii) increasing knowledge of the functioning of
69 humans and other animals. People will often avoid actions that could harm
70 others, even if only they know about the action (Gert 1988, Broom 2006).
71 However, they are more likely to refrain from causing harm if those in their
72 social group may come to know about what they have done. As human societies
73 have expanded their contacts, the group that is in moral contact with an
74 individual has changed from the family to the tribe, and has subsequently
75 expanded to include much larger communities. The 20th century communication
76 explosion has resulted in information about the actions of particular people
77 becoming known across the world. As a consequence, it has become harder for
78 harmful actions to be concealed (Broom 2003). The spread of knowledge has
79 also been greatly facilitated.

80 The level of sophistication of the functioning of individuals has often been a
81 factor in decisions about whether or not they are a subject of moral actions. The
82 ways in which human and other animal brains work was a mystery to all people
83 until information became available from relatively recent developments in
84 neurobiology. Our language has not kept pace with these changes so people
85 make statements about having feelings or knowing something in their heart or in
86 their gut when all are in the brain. The study of behaviour and of how the brain
87 controls it, and of the great similarities in the physiology of all people and a wide
88 range of other species, has been revolutionary in its impact on human attitudes
89 (Dennett 1984). Until recently it was really believed by many people, especially
90 males, that women had very inferior functioning as compared with men, that it
91 was not realistic to compare the cognitive ability of people with brown or black

92 skin to that of white people and that there was an enormous gap in ability and
93 functioning between humans and other species. A wide range of studies now
94 show these views to be wrong. The group of individuals who are respected, in
95 that harm would not normally be caused to them, has been extended to humans
96 of all nations and races and to many other animal species. To some extent this is
97 a consequence of information that is available from the media. The person
98 watching a television programme and seeing a parrot, or squirrel, or dog, or pig,
99 or sheep, or raven solve complex problems may not in future think of that kind of
100 animal as an object, or as a being of no consequence. That person may well
101 become much less likely to directly harm the animal, or to condone harm by
102 others.

103 Before there was accurate scientific knowledge, in human societies for which
104 there are detailed records there have been descriptions of animal functioning
105 including their behaviour, physiology and pathology. Very many parallels
106 between humans and other animals were apparent to people and these were
107 described by Greeks, Mayans, Chinese and others (Sorabji 1993). Ideas about
108 non-human animals included recognition of similarities to humans in respect of
109 what would harm them, the complexity of their body regulation systems, the
110 existence of their emotional responses and the range of abilities that they
111 demonstrated to control their environment (Engel and Engel 1990). There have
112 been others who placed emphasis on differences between humans and all other
113 species, as explained by Harwood 1928. However, the Descartes view of animals
114 as automata, with almost no similarity to humans, has probably been used by
115 some people during much of human history. It was often used by those for whom
116 it was convenient as a way of justifying some form of exploitation. Such
117 arguments were also used to justify slavery and other suppression of minorities.

118 Bentham (1789) stated that the key question about animals was not can they
119 reason but do they suffer? Most people who have lived with or looked closely at
120 animals have assumed that they could do both to some extent. As Duncan (2006)
121 has said, up to the 19th century, this view was very widespread but later there
122 was some reluctance to hold the view because of difficulty to measure the

123 suffering.. It was based on observation and deduction, i.e. on a scientific
124 approach.

125 WELFARE: 1960s to 1980s

126 In the 19th century and the 20th century up to the 1960s, knowledge about
127 biological functioning increased greatly. By the end of this time, scientific
128 disciplines such as ethology and neuroscience started to become accepted within
129 the scientific community. However, this did not mean that the information was
130 widely known. Unfortunately, in many countries, the division between scientists
131 and non-scientists and the fear of science among those narrowly educated in
132 non-scientific disciplines resulted in ignorance of these biological developments
133 amongst those who came to have influential positions in some parts of
134 government and industry.

135 In 1964 Ruth Harrison's book "Animal Machines" was published and pointed out
136 that those involved in the animal production industry were often treating
137 animals like inanimate machines rather than living individuals. As a consequence
138 of this book, in 1965 the British government set up the Brambell Committee, a
139 committee chaired by Professor F. Rogers Brambell, to report on the matter. One
140 of its members was W. H. Thorpe, an ethologist in Cambridge University. Thorpe
141 emphasised that an understanding of the biology of the animals is important and
142 explained that animals have needs with a biological basis, including some needs
143 to show particular behaviours, and that animals would have problems if there
144 were frustration of those needs (Thorpe 1965). This view came to be written in
145 the Brambell Report as the "five freedoms". The concept of freedom has some
146 logical and scientific difficulties, as explained below (Broom 2003). Bill Thorpe
147 was my Ph.D. supervisor. He asked me in 1965 to comment on some material
148 used by the Committee. This was a tape recording of hens in different housing
149 conditions. Thorpe asked whether it was possible to deduce anything about the
150 welfare of the birds from the sounds that they made. Although some deduction
151 might now be made (Zimmerman et al 2003), these tapes did not allow any at
152 that time. However, the Brambell Report has had great influence in many
153 countries.

154 In the 1960s, the emphasis of discussions was on what people should do, i.e. on
155 animal protection rather than on animal welfare. In the 1970s and early 1980s,
156 the term animal welfare was used but not defined and not considered scientific
157 by most scientists.

158 A development of major importance to the emerging concept of animal welfare
159 was research by ethologists and psychologists on motivation systems. The
160 writings of Neal Miller, Robert Hinde, David McFarland and others in the 1950s
161 to 1980s helped ethologists to understand control systems and how animals
162 came to take decisions (Miller 1959, Hinde 1970, McFarland and Sibly 1975). A
163 review of Broom (1981), a book entitled "Biology of Behaviour", pointed out that
164 the animals described in it were presented as sophisticated decision-makers in
165 almost all aspects of what they did. This view contrasted greatly with the then
166 widespread but subsequently discredited view of animals as automata driven by
167 "instinct". Key research by Ian Duncan and David Wood-Gush (Duncan and
168 Wood-Gush 1971,1972), explained the motivation of animals whose needs were
169 not met so the animals were frustrated. These authors and Barry Hughes
170 explained the biological basis of needs (Hughes and Duncan 1988, Toates and
171 Jensen 1991). Also at this time, there was work on the evolution of behaviour
172 including sociobiology (Wilson 1975), many of whose proponents considered
173 motivation to be of little interest and domestic animals as quite unsuitable
174 subjects for biological research. Some of those who worked on motivation at
175 that time changed to applied ethology studies and particularly to animal welfare,
176 e.g. Broom, M. Dawkins, Duncan, D. Fraser, Ladewig, Matthews, Vestergaard and
177 Wiepkema. At the same time, the scientific use of the term stress was being
178 questioned. Its use by Hans Selye was clearly ambiguous and, as J. Mason
179 pointed out (Mason 1968, Dantzer and Mormède 1979), to some degree
180 erroneous in that the HPA and SAM physiological mechanisms were presented as
181 general to all situations when they are not. Some people used the term stress to
182 mean HPA axis activity whilst others used it for any stimulation. Broom
183 suggested (1983, see also Broom and Johnson 1993) that it should be limited to
184 adverse or potentially adverse effects with fitness reduction as the criterion. This

185 view was supported by Dantzer, von Holst (D), Moberg, Mormède and Toates but
186 was ignored by medical and most physiological researchers.

187 Another view challenged in the 1970s and 1980s was the idea that domestic
188 animals were completely modified by man and therefore scarcely biological and
189 not comparable with their wild equivalents. Glen McBride studied a population
190 of feral chickens on an island off Australia (McBride et al 1969). David Wood-
191 Gush studied another domestic fowl population and, later with Alex Stolba, a
192 group of sows kept in fields with trees (Wood-Gush and Stolba). Per Jensen,
193 encouraged by Ingvar Ekesbo, carried out a detailed study of modern domestic
194 pigs in woodland conditions. (Jensen 1986) The conclusion from all of this work
195 was that the behaviour of these farm animal breeds was scarcely distinguishable
196 in many respects from that of their wild ancestors. Another view, subsequently
197 found to be largely incorrect, was that of Hemmer (1983) that domestic animals
198 have less brain-power and much less complex behaviour than their wild
199 ancestors. A wide range of experimental studies on learning have shown, for
200 example, that sheep and cows recognise many individuals and sheep have units
201 in their brains which make this possible (Kendrick and Baldwin 1987, Kendrick
202 et al 1995, 2001), young cattle can show an excitement response when they learn
203 something (Hagen and Broom (2004), and pigs can use information from mirrors
204 after a few hours of experience with a mirror (Broom et al 2009). The major way
205 in which domestic animals have been changed by human selection is that they
206 are now very different from their ancestors in that they can have some tolerance
207 of human proximity and an ability to breed in restricted, suboptimal situations
208 (Price 2002).

209 At this time, most of the animal welfare researchers were in zoology or animal
210 production departments in universities and research institutes. Although not
211 often aware of the wide range of welfare topics, many veterinarians were aiming
212 to benefit the animals and improve animal welfare by trying to cure or prevent
213 animal disease. Some of these used their clinical knowledge to ensure that the
214 health of animals was properly considered in evaluation of welfare whilst others
215 carried out experimental work. Veterinarians who contributed to more general
216 aspects of animal welfare science included Andrew Fraser, Ingvar Ekesbo, Henrik

Simonsen, Robert Dantzer, Roger Ewbank, Barry Hughes and John Webster. Andrew Fraser was one of the founders of the Society for Veterinary Ethology (later the International Society for Applied Ethology), which is the major scientific society for animal welfare science. He was also editor of the journal then called "Applied Animal Ethology" and now called "Applied Animal Behaviour Science" which is the most important journal for scientific papers on animal welfare. The journal "Animal Welfare" has also been of major importance in more recent years.

Much of the discussion about the use of animals, until relatively recently, centred on whether or not they should be killed. Philosophers and the public were often concerned with the ethics of killing animals for human food, human clothing, scientific research or as unwanted pets (Regan 1990, Fraser 2008). This is an important ethical question but it is not an animal welfare issue. The animal welfare issue is what happens before death, including how they are treated during last part of their lives, often the pre-slaughter period and then the method by which they are killed. However, as Haynes (2008) points out, there is a danger in this position if it results in the ethical question of whether or not it is acceptable to kill and animal being ignored or inadequately considered.

THE HISTORY OF THE ANIMAL WELFARE CONCEPT

In the 1980s, it was accepted by most biologists and veterinarians that animals and their response systems are subject to challenges from their environment. These challenges include pathogens, tissue damage, attack or threat of attack by a conspecific or predator, other social competition, the complexity of information processing in a situation where an individual receives excessive stimulation, a lack of key stimuli such as a teat for a young mammal or those associated with social contact for a social animal and a lack of overall stimulation. In general, an inability to control interactions with their environment causes problems for humans and other animals (Mason 1968, 1971, Weiss 1971,. The Brambell Committee did not define welfare in their report but, following some generally

accepted views of the functioning of animals and also the writings of Lorca, Barry Hughes (1981) proposed that the term animal welfare meant that the animal was in harmony with nature, or with its environment. This is a biologically relevant statement and a precursor of later views but it is not a usable definition. Being in harmony is a single state so it does not allow scientific measurement. The key question is how much the individual is in harmony. The term welfare was being used more and more in science, in laws and in discussion about the effects of the treatment of laboratory, farm and companion animals. Hence there was a clear need for a scientific definition.

Broom (1986) presented this definition of welfare. "The welfare of an individual is its state as regards its attempts to cope with its environment." In a series of publications (Broom 1988, 1991a,b, Broom and Johnson 1993), a number of points relating to this definition, including those below, were emphasised.

Coping means having control of mental and bodily stability (Broom and Johnson 1993). Welfare can be measured scientifically and varies over a range from very good to very poor. Welfare will be poor if there is difficulty in coping or failure to cope. There are various coping strategies with behavioural, physiological, immunological and other components that are coordinated from the brain. Feelings, such as pain, fear and the various forms of pleasure, may be part of a coping strategy and feelings are a key part of welfare. The system may operate successfully so that coping is achieved or may be unsuccessful in that the individual is harmed. One or more coping strategies may be used to attempt to cope with a particular challenge so a wide range of measures of welfare may be needed to assess welfare. Coping with pathology is necessary if welfare is to be good so health is an important part of welfare.

A key point of agreement amongst animal welfare scientists in the early 1990s and later has been that animal welfare is measurable and hence is a scientific concept (see review of the ideas of Duncan, Dawkins, Broom and others by Fraser 2008). However, Broom's definition has been referred to by some as a functional definition and contrasted with the feelings - related definitions of Ian Duncan (see also Broom 2008). Duncan argued that welfare is wholly about feelings (Duncan and Petherick 1991, Duncan 1993). This view was shared by

some other people but a commoner position was that of Marian Dawkins (1980, 1990) who stated that the feelings of the individual are the central issue in welfare but other aspects such as the health of that individual are also important. At the same time, those with a medical or veterinary background sometimes presented the view that health is all, or almost all, of welfare. All of Broom's papers and books discussing the welfare definition referred to feelings but as a part of welfare. The arguments for the evolution of feelings as part of animal functioning are explained by Cabanac (1979), Broom (1991b, 1998, Broom and Fraser 2007) and Panksepp (1998). Even in recent times, the myth that Broom's definition is functional, rather than encompassing suffering and other feelings, has been perpetuated (e.g. Dwyer and Lawrence 2008). The idea that feelings are completely different from other biological mechanisms when individuals are trying to cope with their environment is not biologically sound. When coping is successful and problems are absent or minor, welfare is good. Good welfare is generally associated with feelings of pleasure or contentment.

Like bad feelings, such as pain or fear, good feelings are a biological mechanism and this mechanism has evolved (Cabanac 1992, Keeling and Jensen 2002). A feeling is a brain construct, involving at least perceptual awareness, which is associated with a life regulating system, is recognisable by the individual when it recurs and may change behaviour or act as a reinforcer in learning (Broom 1998).. Suffering occurs when one or more negative feelings continue for more than a few seconds (Broom 1998). There are problems with a definition of welfare that only refers to feelings. Feelings are just one part of an animal's repertoire of coping mechanisms. Although the brain condition which results in a feeling may have first arisen accidentally, most feelings now occurring are a result of natural selection and are adaptive. Although feelings are an important part of welfare, welfare involves more than feelings, for example: an individual with a broken leg but asleep, an addict who has just taken heroin, an individual greatly affected by disease but unaware of it, an injured individual whose pain system does not function (Broom 1991b, 1998).

A few veterinarians were involved in animal welfare research in the 1980s, as mentioned above, and the paper on assessing pain and distress in laboratory

animals by Morton and Griffiths (1985) had substantial influence. However, at this time most veterinarians did not consider animal welfare as a scientific discipline that should be taught to veterinary students and that was relevant to those in practice. Many thought that only veterinarians knew about animal welfare and that almost all of welfare was treatment of or prevention of disease. Animal behaviour and brain function were thought to be of minor importance to veterinary work. These views had close parallels with the medical profession in which those who studied behavioural or mental problems were often considered peripheral to the major tasks of human medicine. Vets, medics and scientists were unwilling to refer to animal feelings (Panksepp 2005). Research biologists in universities did not think of the study of animal welfare as a science. They often viewed it as an impediment to research and were only grudgingly aware of the concept of the 3Rs, reduce, replace and refine presented by Russell and Burch (1959). Despite the fact that many important biological systems have the function of attempting to cope with difficulties in life, the study of welfare has not been greatly valued in the scientific world and welfare scientists are not thought of as significant contributors to science.

USABLE ANIMAL WELFARE CONCEPTS AND HOW THEY ARE INTER-RELATED

Adaptation

It may be helpful to relate the welfare terminology to the concept of adaptation. How well can our domestic animals adapt to the conditions that we impose upon them? Can wild animals adapt to our impact on them? When referring to individual animals, adaptation is the use of regulatory systems, with their behavioural and physiological components, to help an individual to cope with its environmental conditions (Broom 2006a). Animals can adapt better if their needs are met. What are the limits to adaptation? The idea that there are limits has been widely accepted in biology (Mount 1979, Moberg 1985) but resisted by some involved in animal production. An individual attempting to cope may fail to do so. For example, it may be difficult or impossible to cope with: extreme

external temperature, pathogen multiplication, or high predation risk or difficult social conditions. Body state may be displaced to outside the tolerable range and death may follow. An individual may adapt to an environmental situation with difficulty, in which case the welfare is poor. For example, if an individual is adapting, or has adapted, but is in pain or depressed. Coping usually means that all mental and bodily systems have functioned so that the environmental impact is nullified. Hence “to cope” is more than “to adapt”. Adaptation does not necessarily mean good welfare.

Stress

For most people, stress implies the effects of a challenge to the individual that disrupts homeostasis resulting in adverse effects. It is not just a stimulus which activates energy releasing control mechanisms. Stimuli whose effects are beneficial would not be called stressors by most people. Also, for most people, situations which activate the hypothalamic - pituitary - adrenal cortical axis, but whose effects are useful to the individual, would not be called stressors . A definition of stress that is in line with the general public usage of the word is “Stress is an environmental effect on an individual which overtaxes control systems and results in adverse consequences, eventually reduced fitness”(Broom and Johnson 1993, following Broom 1983). There is no good stress. During the development of individuals, stimuli that result from somewhat difficult situations can be useful experience but these are best not referred to as being stressful.. Whenever there is stress, welfare will be poor but welfare could be temporarily poor without any long-lasting adverse effect so without stress.

Needs or freedoms?

Motivational systems have evolved. They enable individuals to ascribe priorities to certain actions, as well as to determine the timing of actions (Broom 1981). This facilitates adaptation. A need is a requirement, which is part of the basic biology of an animal, to obtain a particular resource or respond to a particular environmental or bodily stimulus (Broom and Johnson 1993). The need itself is in the brain. It allows effective functioning of the animal. It may be fulfilled by physiology or behaviour but the need is not physiological or behavioural. There are needs for resources, such as food, water or heat but there are also needs to carry out actions whose function is to attain an objective (Hughes and Duncan 1988, Toates and Jensen 1991). For example: a pig rooting in soil or manipulating material such as straw or twigs, or a hen dust-bathing to keep feathers in good condition, or a hen or a sow building a nest when about to give birth or lay an egg. The idea of providing for "the five freedoms", first suggested in the Brambell Report in 1965 but not quite in line with Thorpe's concept of needs, is now replaced by the more scientific concept of needs. The list of freedoms just provides a general guideline for non-specialists. Animals have many needs and these have been investigated for many species. This is the starting point for reviews of the welfare of a species. A list of needs has been the starting point for Council of Europe recommendations and E.U. scientific reports on animal welfare for over 20 years. The freedoms are not precise enough to be used as a basis for welfare assessment. This is now an out-dated approach that may still be useful as a preliminary guideline but should not be used if scientific evidence about needs is available. The 12 factors presented by the Welfare Quality programme are a better guide than the five freedoms but a list of the needs of the particular animals under consideration, based on published scientific evidence, is more useful.

How do we find out from animals what they need? What is preferred? How hard will the individual work for a resource? An example is work with rats that are given a choice of floors. One measure is which floor they choose but more information is obtained if the rats have to work in order to get to the floor of their choice. A rat can readily learn to lift a weighted door and the amount lifted gives an indication of its strength of preference for the resource.

Terminology used in motivational strength estimation includes the following (Kirkden et al 2003). A resource is a commodity or an opportunity to perform an activity. The demand is a measured amount of action which enables resource to be obtained. The price is the amount of that action required for a unit of resource. Income is the amount of time or other variable limiting that action. The price elasticity of demand is the proportional rate at which consumption or demand changes with price. The consumer surplus is a measure of the largest amount which a subject is prepared to spend on a given quantity of the resource. It corresponds to an area beneath an inverse demand curve. A example of the use of this methodology is the work of Mason et al (2001). The key question was to ascertain the strength of preference of mink, a partially aquatic species, for various resources including water in which they could swim. The mink were trained to perform operants to reach: an extra nest, various objects, a raised platform, a tunnel, an empty cage and a water pool to swim in. The swimming water was given very high priority by the mink.

Obligations or rights?

How should we describe what should or should not be done to other individuals? Most people would say that we all have obligations not to harm others. From the other perspective, it might be said that each other individual has a right not to be harmed by us. However, assertions of rights and freedoms can cause problems (Broom 2003). We should describe the obligations of the actor rather than the rights of the subject. If we keep or otherwise interact with animals we then have obligations in relation to their welfare.

WELFARE PROBLEMS, ASSESSMENT AND DECISIONS

Effects on animal welfare which can be described include those of:

disease,

injury,

starvation,

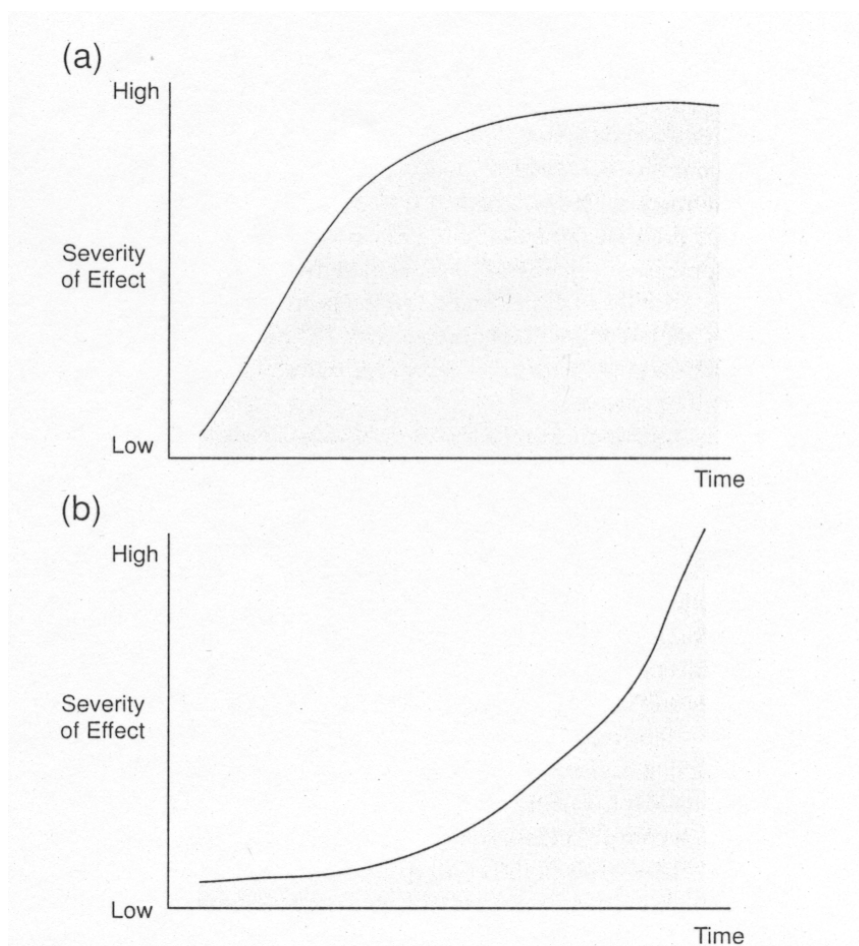
432 beneficial stimulation,
433 social interactions - positive or negative,
434 other forms of success in actions,
435 housing conditions - positive or negative,
436 deliberate or accidental ill treatment,
437 human handling - positive or negative,
438 transport,
439 laboratory procedures,
440 various mutilations,
441 veterinary treatment - positive or negative,
442 genetic change by conventional or other breeding.

443

444 Welfare indicators are described by Broom and Fraser (2007). There are
445 differences between welfare indicators for short-term and long-term problems.
446 Short-term measures like heart-rate and plasma cortisol concentration are
447 appropriate for assessing welfare during handling or transport but not during
448 long-term housing. Some measures of behaviour, immune system function and
449 disease state are more appropriate for long-term problems. Welfare over longer
450 periods is sometimes referred to as quality of life. This term is much used by
451 clinicians but it means welfare over a period of more than a few days (Broom
452 2007b).

453 Over any time-scale, measures of intensity of effect on welfare have to be related
454 to the duration of the state. When welfare is evaluated, the relationship between
455 its intensity (the word severity is sometimes used where the effect is negative)
456 and duration should be taken into account. Fig 1 was initially drawn to exemplify
457 poor welfare during killing methods(Broom 2001b) but the principle is the same
458 for positive effects..

459 Legend Fig.1 The measured intensity of good or poor welfare is plotted against
460 time for two examples. (a) might be an animal being killed by a method involving
461 prolonged pain and other poor welfare, (b) might be an animal killed by a
462 method that has a much more rapid effect (After Broom 2001b).



463

464 Axis labelled Intensity of Effect (not severity)

465 Where there is an adverse impact in Fig. 1, the area under the intensity against
466 time curve is the magnitude of poor welfare. Where the impact is positive,
467 magnitude of good welfare is the area under the curve.

468

469 NATURALNESS AND WELFARE

470 Where does naturalness fit with the concept of welfare? Fraser (1999) pointed
471 out that when members of the public talk about animal welfare, their ideas
472 include the functioning of the animals, the feelings of the animals and the

naturalness of the environment. The feelings, referred to by Fraser and others, fit comfortably into Broom's definition of welfare as they are an important component of coping mechanisms and of biological functioning. Rollin (1990, 1995), Fraser et al (1997) and Fraser (2008) have advocated that "animals should be able to lead reasonably natural lives" and have referred to the importance of understanding animal needs. However, they did not say that naturalness contributes to a definition of the concept of welfare or should be part of welfare assessment. The state of an individual trying to cope with its environment will necessarily depend upon its biological functioning, or put another way, on its nature. Natural conditions have affected the needs of the animal and the evolution of coping mechanisms in the species. The state of an individual trying to cope with its environment will depend upon its biological functioning. Natural conditions have affected the needs of the animal and the evolution of coping mechanisms in the species. The environment provided should fulfil the needs of the animal but does not have to be the same as the environment in the wild.

LINKS BETWEEN ANIMAL WELFARE AND OTHER MORAL ISSUES

In recent years, public pressure in relation to codes of practice, laws and the enforcement of laws have increased in all countries concerning: human health, animal welfare and the impact on the environment. In Europe, one of the big pressures for laws etc. in these areas has been the view that it is uncivilised to allow people to become sick, animals to be treated badly or the environment to be damaged. A system or procedure is sustainable if it is acceptable now and if its effects will be acceptable in future, in particular in relation to resource availability, consequences of functioning and morality of action. Animal welfare is one of the criteria used by the public when deciding whether a procedure or system is acceptable so it is a necessary consideration for sustainability (Broom 2001a, 2002, 2010). For consumers and producers of animal products, the concept of quality has broadened. Good quality now means good in taste and also sustainable, especially: acceptable in relation to human health, animal welfare

and environmental impact. The French 'Label Rouge' scheme has led the way in this (Ouedraogo 1998). The proportion of French consumers who buy only on price is thought to have dropped to 25%.

The term welfare, although not applicable to inanimate objects or plants, is relevant to all animals because they have an ability to detect and respond rapidly to the impacts on them of their environment, usually via the functioning of their nervous system. Whilst the responses of more complex animals are controlled by often complex processes in their brains, those of simpler animals are also part of attempts to cope with the environment. We can assess and consider the welfare of any animal. Separate question are which animals should be protected and to what degree should they be protected? For most people, animals with awareness are thought to be worthy of more protection. A sentient being is one that has some ability: to evaluate the actions of others in relation to itself and third parties, to remember some of its own actions and their consequences, to assess risk, to have some feelings and to have some degree of awareness (Broom 2006c, 2007a). People have long appreciated the sentience of various domestic and other animals and have often thought of them as an example to follow or a friend who would help, rather than just as a resource object. However, a rabbit is viewed differently according to whether it is: a family pet, a laboratory animal, an animal kept for meat production, or a wild animal that eats your crops. This is not scientifically sound. A rabbit is a rabbit and each one feels pain or has cognitive function.

Health refers to what is happening in body systems, including those in the brain, which combat pathogens, tissue damage or physiological disorder. Health is the state of an individual as regards its attempts to cope with pathology (Broom 2000, 2006b-). With disease challenge, as well as with other challenges, difficult or inadequate adaptation results in poor welfare. Health is an important part of welfare. Examples include osteoarthritis in cats and dogs and sole ulcer in cows.

535

536 RECENT AND FUTURE ANIMAL WELFARE CONCERNS

537 There remain some areas of confusion amongst the public and amongst scientists
538 who do not specialise in the area, in relation to what animal welfare is. In
539 contrast, there is a substantial degree of agreement among welfare scientists.
540 Points (i) to (vi) below are areas where there may be some confusion. (i) For
541 some people the concepts of protection of animals and animal welfare are
542 confused. However, the first is a human action and the second is a characteristic
543 of an animal. (ii) The ethical issues about whether or not animals should be killed
544 for human benefit are sometimes perceived to overlap with the concept of
545 welfare but they do not. The term euthanasia is often misused as it should be
546 limited to meaning that an animal is killed for its own benefit. (iii) The concept of
547 health as a key part of welfare rather than a separate topic is misunderstood by
548 many, including medical and veterinary specialists who may not be familiar with
549 the meaning of welfare. (iv) The evolution of animals in their natural
550 environment has led to them having certain needs that must be met for welfare
551 to be good, and good conditions for animals will allow them to function in a
552 natural way, i.e. a normal biological way. However, as discussed above,
553 naturalness is not a component of the definition of welfare. (v) The dignity of an
554 individual is a human concept that may be applied to non-human animals but
555 there is no evidence that other species have such a concept. It may be used as an
556 argument for treating animals well but it is nothing to do with welfare. (vi) The
557 integrity of an animal, in the sense of its wholeness, has some biological basis
558 and is sometimes used to criticise removal of, or change in, any part of an animal
559 including its genotype. The use of such arguments may reduce the likelihood of
560 poor welfare but the concept itself is not connected to welfare. Some of these
561 areas of confusion will become less common as knowledge of welfare and its
562 scientific study becomes more widespread.

563 There will continue to be areas of discussion amongst animal welfare scientists.
564 For some, all coping systems should be considered when assessing welfare. For
565 others, only those involving feelings should be considered. The importance of

trying to assess feelings will continue to be common ground for welfare scientists (Dawkins 1993, Panksepp 1998, Mendl et al 2004, Paul et al 2005, Broom 2010) but better methodologies for all aspects of welfare assessment will be developed. One recent and significant development in animal welfare science has been the substantial increase in attempts to assess good welfare in a scientific way. This has become feasible because of increased acceptance of the validity of measuring positive feelings in animals. Studies like those of Boissy et al (2007) and Mendl et al (2009) are increasing our understanding of animal welfare and pointing to new methods in the future.

Another development in relation to welfare concepts and applications is the measurement of welfare on farm or other places where animals are used. Welfare outcome indicators that can be used by veterinary inspectors, farmers and others have now been worked out with considerable precision (Welfare Quality 2009 a,b,c). It is likely that further progress will be made with measures of pain and other aspects of welfare for use by animal welfare scientists. Assessments are now being made of the risk of poor welfare and the probability of benefits to welfare (Smulders and Algers 2009).

The numbers of animal welfare scientists is increasing rapidly. The subject is now being taught in all European countries and the number of university courses on animal welfare in Brazil has increased from one to over 60 in 15 years. The diversity of animal welfare science is increasing and the expansion is likely to continue. The decision by the American Veterinary Medical Association to promote the teaching of the subject in all American veterinary schools will have a substantial effect.

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A CRITIQUE OF FAWC'S FIVE FREEDOMS AS A FRAMEWORK FOR THE ANALYSIS OF ANIMAL WELFARE

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ABSTRACT. The Brambell Report of 1965 recommended that animals should have the freedom to stand up, lie down, turn around, groom themselves and stretch their limbs. The Farm Animal Welfare Council (FAWC) developed these into the Five Freedoms, which are a framework for the analysis of animal welfare. The Five Freedoms are well known in farming, policy making and academic circles. They form the basis of much animal welfare legislation, codes of recommendations and farm animal welfare accreditation schemes, and are the foundation of the Welfare Quality® assessment scheme. The Five Freedoms are also extensively employed for the education of veterinary and animal welfare science students. Hence they have proven to be of great practical utility. In this paper, the Five Freedoms framework is examined in terms of necessary and sufficient conditions for the analysis of animal welfare. Overall, the Five Freedoms are judged to be individually necessary and jointly sufficient as a framework for the analysis of animal welfare. FAWC has recently criticised the Five Freedoms for concentrating on negative aspects of welfare. However, it is shown here how the satisfaction of the Five Freedoms should lead to good welfare, from the animal's point of view. The Five Freedoms are formulated as ideals of animal welfare. This has significant advantages that have likely contributed to their impact. However, the ideality of the Five Freedoms means that the framework is without power to determine what a satisfactory level of animal welfare is, in an ethical sense.

KEYWORDS: Animal welfare, critical analysis, Farm Animal Welfare Council, Five Freedoms, ideality

INTRODUCTION

In response to public concern after the publication of Ruth Harrison's *Animal Machines* in 1964, the British Government appointed a committee to investigate intensive livestock farming. In the following year the *Report of the Technical Committee to Enquire into the Welfare of Animals kept under Intensive Livestock Husbandry Systems* (1965) was published. In this landmark report the Five Freedoms are found in their embryonic form, sometimes called 'Brambell's Five Freedoms':

An animal should at least have sufficient freedom of movement to be able without difficulty, to turn round, groom itself, get up, lie down and stretch its limbs. (Brambell 1965 p13)

The Brambell Report recommended the creation of a farm animal advisory committee (Brambell 1965 p61). The Farm Animal Welfare Advisory Committee (FAWAC) held its first meeting in October 1967 (FAWAC 1967)¹. In July 1979 the Farm Animal Welfare Council (FAWC) was established and FAWAC was disbanded.

In *Animal Welfare, a Cool Eye towards Eden*, John Webster, a past member of both FAWAC and its successor FAWC, writes of the original formulation:

These minimal standards (which have yet to be achieved) came to be known as the 'Five Freedoms' and for many years dominated discussion of animal welfare in Europe. In my early years on the UK Farm Animal Welfare Council (FAWC), I suggested that this obsession with space requirements was very narrow-minded, since it concentrated almost exclusively on one aspect of behaviour (comfort seeking) to the exclusion of everything else that might contribute to good welfare, like good food, good health, security, etc. (Webster 1994 p.11)

He continues:

Preserving the concept of the 'Five Freedoms', I attempted to produce a logical, comprehensive method for first analysis of *all* the factors likely to influence the welfare of farm animals, whether on the farm itself, in transit or at the point of slaughter. (Webster 1994 p.11)

¹ Chaired by the zoologist Professor Humphrey Hewer.

The current official conception of the Five Freedoms, as employed by the advisory body that created the framework, is documented on the FAWC website. First, FAWC outlines its definition of animal welfare. Second, FAWC lists the Five Freedoms:

The welfare of an animal includes its physical and mental state and we consider that good animal welfare implies both fitness and a sense of well-being. Any animal kept by man, must at least, be protected from unnecessary suffering.

We believe that an animal's welfare, whether on farm, in transit, at market or at a place of slaughter should be considered in terms of 'five freedoms'. These freedoms define ideal states rather than standards for acceptable welfare. They form a logical and comprehensive framework for analysis of welfare within any system together with the steps and compromises necessary to safeguard and improve welfare within the proper constraints of an effective livestock industry. (FAWC website undated)

The Five Freedoms in their current format are listed below (FAWC 2010):

1. Freedom from hunger and thirst - by ready access to water and a diet to maintain health and vigour.
2. Freedom from discomfort - by providing an appropriate environment including shelter and a comfortable resting area.
3. Freedom from pain, injury and disease - by prevention or rapid diagnosis and treatment.
4. Freedom to express normal behaviour - by providing sufficient space, proper facilities and appropriate company of the animal's own kind.
5. Freedom from fear and distress - by ensuring conditions and treatment, which avoid mental suffering.

The Five Freedoms have had an enormous impact on animal welfare. For instance, the UK Animal Welfare Act 2006 mandates duties based on them. Owners and keepers in England and Wales (and similarly in Scotland) are legally responsible for ensuring that the welfare needs of their animals are met. These needs include a suitable environment (place to live), a suitable diet, the need to exhibit normal behaviour patterns, to be housed with, or apart from, other animals (if applicable) and to be protected from pain, injury, suffering and disease (National Archives 2012). The Five Freedoms form the basis of the various UK Defra Codes of Recommendations for the Welfare of Livestock, e.g. those for Meat Chickens and Breeding Chickens (2002), Pigs (2003) and Cattle (2003). The Five Freedoms are also prominent in the criteria and sub-criteria of the European Welfare Quality® scheme, a large and potentially far reaching welfare assessment project (Botreau et al 2007; Veissier et al 2011). Finally, the Five Freedoms are commonly used in the education of veterinary students and animal welfare science students.

Despite their success in terms of impact, the Five Freedoms have, perhaps surprisingly, not been subject to any rigorous analysis in terms of their adequacy. Consider the consequences if the Five Freedoms were inadequate as a framework for the analysis of animal welfare: the welfare of billions of animals might have been and would continue to be assessed using a framework that is not fit for purpose. Similarly, if the Five Freedoms stipulated arbitrary and unnecessary conditions for animals, which were not relevant to their welfare, then livestock producers would be burdened by excessive regulations and recommendations. The simple question that needs to be asked is: ‘Are they fit for purpose?’ To answer this question, the Five Freedoms are examined from first principles, using critical reasoning to assess their sufficiency.

ANALYSIS OF THE FIVE FREEDOMS

Each of the Freedoms is composed of two parts. The first part is called the *freedom* and the second part the *provision* (Webster 2006 p.12). As has been widely observed, in four of the freedoms, the freedom denotes freedom *from* (e.g. freedom from hunger and thirst), whereas in the fourth freedom, the freedom denotes freedom *to* (freedom to express normal behaviour). *Freedom from* can be interpreted as *not* having the state or condition contained in that freedom. In the case of the fourth freedom, the *freedom to* is interpreted as *being able to* express normal behaviour. Some of the freedoms are freedoms from multiple conditions (eg hunger and thirst), rather than from a single condition (discomfort). Some of the freedoms denote relatively simple conditions (hunger, thirst, pain, fear) whilst others denote more complex conditions (discomfort, injury, disease, normal behaviour, distress)².

Although there are nominally five freedoms (the ‘Five Freedoms’), in actual fact the Five Freedoms denote nine conditions (hunger, thirst, discomfort, pain, injury, disease, expression of normal behaviour, fear and distress), as previously noted by Webster (2005 p.15). In addition, discomfort and distress are ‘catch-all’ type words, denoting not simple and irreducible mental and physical states, but complex ones. For instance, consider the word discomfort. On a given day, a human individual could reasonably and accurately describe herself to be in a state of discomfort due to the ache from a lower back condition. Another day, she could report a state of discomfort through having sore feet as a result of prolonged standing. In contrast, hunger and thirst are simpler sensations. It does not make sense to report being hungry in one way on Monday whilst being hungry in quite another way on

² I use the words ‘simple’ and ‘complex’ here to refer to the range of phenomena that the condition covers. Hunger, thirst, pain and fear are terms that refer to well defined physiological processes. In contrast, discomfort, injury, disease, normal behaviour and distress do not refer to well defined physiological processes in the same way. For instance, pain is an aversive sensory and emotional experience caused by stimulation of nociceptors. Discomfort is a much more general terms and its referents include physical and thermal discomfort. Injury, disease and normal behaviour are very general or vague terms since an animal can be injured or diseased, or exhibit normal behaviour, in a multitude of ways.

Friday. Of course, one can feel more or less hungry and thirsty, but these are sensations that are qualitatively the same, although they can vary in intensity (a quantitative measure).

Examining now the provisions, the main descriptive point to make about them is their use of general words. Consider the words *appropriate*, *sufficient*, *proper*, *conditions* and *treatment*.

The Five Freedoms are general guidelines for animal welfare (compared to specific guidelines for, say, breeder broiler hens); therefore a high level of generality is to be expected. Such generality works to give greater scope to the application of the Five Freedoms.

ARE THE FIVE FREEDOMS FIT FOR PURPOSE?

The Five Freedoms are a framework for the analysis of animal welfare. However, in what way can the framework itself be assessed for fitness for purpose? One approach would be to challenge it with a particular definition of animal welfare. For example, Broome (1986) has defined animal welfare as the state of an animal with respect to its ability to cope with its environment. Similarly, animal welfare has been variously understood as being predominantly feelings-based (e.g. Duncan 1993), predominantly physical/functional-based (e.g. McGlone 1993) and predominantly naturalness-based (e.g. Brambell 1965; Rollin 1993). However, any strict definition will necessarily limit what can qualify as good animal welfare. For instance, if we define good animal welfare as ‘fit and feeling good’ (Webster 2005), then good animal welfare is limited to an animal that is fit and feeling good.

Animal welfare is concerned with what has prudential value to an animal, i.e. what is *good* for an animal. The concept of animal welfare therefore has normative elements, which partly explains why it has been so highly contested³. Humans can have different but reasonable conceptions of the good in human society (Rawls 1971). Similarly, we can have different but

³ See Haynes (2010) for a comprehensive discussion of competing conceptions of animal welfare.

reasonable conceptions of the good for animals (i.e. what causes animals to have good or poor welfare). It is for this reason that the Five Freedoms framework should be challenged by the broadest possible reasonable conception of animal welfare. If we used a narrower conception of animal welfare to assess the adequacy of the Five Freedoms, then the analysis would be susceptible to the criticism that the investigation was in effect a tautology: first we select a favoured definition of animal welfare; second we analyse the Five Freedoms framework in terms of the narrow definition. Fraser's integrative conception of animal welfare, which encompasses feelings-based, physical-based and naturalness based elements, can be used to illustrate the idea of a broad and flexible notion of animal welfare:

At least three overlapping ethical concerns are commonly expressed regarding the quality of life of animals: (1) that animals should lead natural lives through the development and use of their natural adaptations and capabilities, (2) that animals should feel well by being free from prolonged and intense fear, pain and other negative states, and by experiencing normal pleasures, and (3) that animals should function well, in the sense of satisfactory health, growth and normal functioning of physiological and behavioural systems. (Fraser et al 1997)

Hence, we should use the broadest possible reasonable conception of animal welfare when assessing the Five Freedoms. In addition to this, we should be willing to alter any pre-conceived limitations to our conception of animal welfare. Once we have a broad and flexible notion of animal welfare, critical reasoning is used to scrutinise the Five Freedoms as a framework for the analysis of animal welfare, in terms of necessary and sufficient conditions. The process of evaluating the Five Freedoms is in fact a two way process as the deliberator is potentially also revising his/her conception of animal welfare. If this is the case, the approach might then be criticised for lacking concrete grounds in terms of justification. However, the process of evaluating the Five Freedoms can, at least in part, be justified through epistemological coherentism. This simply means that the conception of animal welfare in part justifies the sufficiency of the Five Freedoms, and the sufficiency of the Five Freedoms in

part justifies the conception of animal welfare. This does not necessarily mean that the reasoning is circular, and indeed the implication is intuitive; any purely *a priori* conception of animal welfare should be viewed with suspicion, since any conception of animal welfare is intimately tied up with the empirical assessment of animal welfare. Therefore the process of justification is a dynamic one that involves the potential revision of both conception of animal welfare and framework for analysis of animal welfare. (See Forsberg 2007 for a discussion of coherentist justification). So, first we ask, is each freedom individually necessary for good welfare? If the freedom is not a necessary condition for good animal welfare, then an individual animal can experience good welfare without the condition being satisfied. Second we ask, are the Five Freedoms, in combination, jointly sufficient for good animal welfare? This is because even if each of the freedoms denote conditions that are necessary for good welfare, it is possible that, in combination, the freedoms are not sufficient for good welfare. A robust methodology of critical reasoning employing necessary and sufficient conditions has been outlined. Despite the success of the Five Freedoms, the framework has not before been evaluated in such a robust way before. The following sections are a first attempt to conduct such an evaluation.

ARE THE FIVE FREEDOMS INDIVIDUALLY NECESSARY?

Insert Table 1 here

It is important first of all to examine if each of the freedoms is necessary as part of a comprehensive framework for the analysis of animal welfare. If any of the freedoms are not necessary, then they should be discarded as surplus to requirements⁴. In Table 1, the freedoms have first of all been analysed into the conditions contained in the freedom and the

⁴ A freedom—or a condition denoted by a freedom—that is not necessary should be discarded because, amongst other reasons, regulation based on the Five Freedoms may unnecessarily burden farmers economically.

provision. In the next column, important terms are defined. These include all of the conditions denoted by the Five Freedoms, together with the word ‘suffer’, which is part of the provision of the fifth freedom. The provision of the fifth freedom is *by ensuring conditions and treatment which avoid mental suffering*. The latter part can reasonably be interpreted as freedom from mental suffering, so it is useful to define the important verb *to suffer* also. These definitions have been adapted from the Oxford English Dictionary⁵ (OED 1996) and are documented for the following reasons: First, a rigorous assessment of the Five Freedoms necessitates an understanding of the terms that are contained within the framework. Second, they are documented for illustrative purposes. By defining all of the relevant terms, it is a short step to list the biological effects of the conditions satisfied and unsatisfied, in the fifth and sixth columns respectively. However, it is not necessary to consider that these definitions are being used in a strict, exhaustive sense themselves. Hence, the word ‘disease’ has a meaning beyond the simple definition of an ‘unhealthy condition of the body or the mind’. The ‘biological effects of the condition(s) satisfied column’ is often a restatement of the definition of the condition itself. Documenting these definitions and their biological interpretations alongside each other illustrates that no implicit, and possibly unjustified, understandings of these words are being smuggled in. The ‘biological effects of the condition(s) not satisfied’ column lists the physical and mental consequences that the animal can be expected to experience if the condition(s) denoted by that freedom is/are not satisfied. Finally, a judgement is made as to the effect on animal welfare, should the condition(s) not be satisfied. If the judgement is negative, the condition(s) denoted by the freedom, and thus the freedom itself, is a necessary component in an analysis of animal welfare. If the biological effect of a condition that is not satisfied were judged not to be detrimental to animal welfare,

⁵ It is possible to define the words in a more technical sense, perhaps selecting from the scientific and philosophical literature. However, the selected definitions could be contested, ultimately leading to disputing the conclusions of this paper. Therefore although standard dictionary definitions are not ideal for all purposes, they are preferable to more technical definitions for the aims of this paper.

211 then that condition is unnecessary, and the freedom which contains it should be modified
212 accordingly.

213 The judgements in the final column of the table are negative for each of the Five Freedoms.
214 Hence, all of the Five Freedoms, including the conditions that are contained therein, are
215 individually judged to be a necessary component for the analysis of animal welfare. To be in
216 a state of discomfort, pain, fear or distress, to have an injury or disease, or to experience
217 mental suffering, are all states that are called unpleasant and ones that animals avoid. It might
218 be objected that sensations of hunger and thirst, at least within moderation, are not so
219 obviously negative. Pre-reflectively, there is perhaps a positive feeling bound up with hunger
220 and thirst. However, reflection reveals that it is not the hunger or thirst *per se* that is the
221 positive feeling, but rather the anticipation of the enjoyment of eating and drinking, which the
222 sensations of hunger and thirst motivate through the acquisition of food and drink
223 respectively.

224 An interesting point that is illustrated by a full analysis of the freedoms is their
225 interconnectedness. Many of the terms denoted by the conditions contained within the Five
226 Freedoms are inter-definitional. For instance, hunger and thirst are in part defined as
227 ‘discomfort’ (second freedom); discomfort is defined in part by ‘slight pain’ (third freedom);
228 pain is defined by ‘mental suffering’ or ‘distress’ (fifth freedom); fear is defined in part by
229 expectation of ‘pain’, distress by ‘severe pain’ and mental suffering by ‘being subjected to
230 pain’ (third freedom). The interconnectedness extends beyond this semantic, inter-
231 definitional phenomenon; the conditions are related at the biological (animal), rather than
232 simply the word, level. For instance, pain (third freedom) often causes reduced appetite
233 (hunger and thirst – first freedom), which may lead to a greater susceptibility to disease (third
234 freedom) through mental suffering (distress – fifth freedom) causing an immune-
235 compromised state. It could be argued that the interconnectedness suggest that some of the

conditions within the freedoms are superfluous. However it is likely that by discarding conditions as unnecessary, the sufficiency of the framework overall might be jeopardised. For instance although hunger and thirst are in part defined by discomfort, the ‘freedom from discomfort’ condition is clearly not superfluous because its scope is far greater than this, for instance including physical discomfort (e.g. important in a dairy cubicle system). Therefore the overlapping nature of the Five Freedoms promotes its sufficiency as a framework for the analysis of animal welfare.

ARE THE FIVE FREEDOMS JOINTLY SUFFICIENT?

Are the Five Freedoms sufficient as a framework for the analysis of animal welfare? To answer this question, two methods of critical reasoning can be used. These are top-down, analytical reasoning and bottom-up, synthetic reasoning. In top-down reasoning, scenarios are conceived of an animal that is suffering poor welfare. This scenario is then compared against the Five Freedoms framework, to see if the mode of suffering is covered by one of the freedoms. For example, consider the idea of a piglet in the process of being tail-docked. The piglet’s behaviour (vocalisation and escape behaviour) can be interpreted as indicating that the piglet is feeling pain and discomfort, and possibly fear and distress. These conditions are contained in the second, third and fifth freedoms. This reasoning can be carried out for any number of possible husbandry scenarios. If just one scenario is deemed to cause suffering, but is not covered by the Five Freedoms, they are deemed insufficient as a framework for the analysis of animal welfare.

This reasoning process is very similar to Rawls’ method of reflective equilibrium. In the latter, an individual considers which basic political conditions contractors deliberating under a ‘veil of ignorance’ in an ‘original position’ would choose. In the method of reflective equilibrium, an individual deliberates from moral principles (e.g. causing harm is *prima facie*

wrong) to particular moral judgements (e.g. harming a stranger for personal gain is wrong) and back from moral judgements to moral principles. The principles are reflectively worked out and the judgements are considered to be more pre-reflective and intuitive. In the event that the principles and moral judgements conflict, one must be adjusted to be consistent with the other (Rawls 1971 p.20). In a similar way, pre-reflective intuitive judgements about, for example, animal husbandry procedures (a vocal piglet being tail-docked) are deliberated in tandem with reflectively calculated principles (both the Five Freedoms and the conception of animal welfare). In this way, evaluation of the Five Freedoms is very closely related to, but not equivalent to, the evaluation of the deliberator's conception of animal welfare. This is because the conception of animal welfare itself can change (hence the importance of a flexible conception of animal welfare for this exercise). Therefore the exercise of evaluating the Five Freedoms is also illuminating for one's own conception of animal welfare.

The bottom-up, synthetic approach begins with the Five Freedoms framework and works upwards to an animal with good welfare. This method asks the question: does satisfaction of the conditions denoted by the Five Freedoms lead to good animal welfare? If it does, then the Five Freedoms are sufficient as a framework for the analysis of animal welfare. If satisfaction of these freedoms does not lead necessarily to good welfare, then the Five Freedoms are not sufficient as a framework for the analysis of animal welfare.

Webster (2005) suggests that the Five Freedoms are indeed not sufficient as a comprehensive framework:

This list introduces an important further element, not included within the Five Freedoms, namely the concept of exhaustion; the suffering experienced by animals that once could cope but now can cope no more. The nearly-spent hen and the emaciated dairy cow do not suffer because they are killed at an early age (death is the end of suffering). They suffer because they are not killed. They are made to continue production when they appear, and feel, physically worn out. (Webster 2005 p.16)

285 Despites Webster's concerns, suffering due to exhaustion appears to be covered by the Five
286 Freedoms. The word exhaustion indicates a sort of severe fatigue or tiredness that is, in the
287 case of farm animals, a result of being farmed at a biologically unsustainable rate. In the case
288 of the nearly 'spent' laying hen and the emaciated dairy cow, the suffering that they
289 experience is, arguably, covered by the conditions within the Five Freedoms framework. This
290 is a result of the wide scope that the freedoms have been formulated to have. Both the hen
291 and the dairy cow will likely suffer from hunger (first freedom) and the 'feeling physically
292 worn out' aspect may be covered by a broad interpretation of the fifth freedom (avoiding
293 conditions and treatment that avoid mental suffering.) In addition, Table 1 shows that the
294 state of exhaustion is included within the definition of distress. (This point illustrates the
295 utility of returning to the definitions of the concepts contained within the Five Freedoms
296 framework.)

297 With an understanding of this method to assess the sufficiency of the Five Freedoms, together
298 with an understanding of scientific method generally, it is evident that this judgement of
299 sufficiency is revisable in the light of scientific advancement. However, if, after reflection
300 and debate, it is considered that the Five Freedoms are sufficient for good animal welfare,
301 then it is reasonable to assume that this is a valid judgement not only now but for the
302 foreseeable future. This is because our current knowledge of farmed animal species (cows,
303 sheep, pigs, chickens etc, though perhaps not fish), in terms of their physiology and
304 behaviour, can be considered to be at a sufficiently advanced level to make this claim..

305 The above analysis therefore shows that the Five Freedoms are fit for purpose as a framework
306 for the analysis of animal welfare. However, what exactly are the Five Freedoms and what
307 attributes do they have, which contribute to their enduring nature and impact? These
308 questions are addressed in the next section.

THE FIVE FREEDOMS AS IDEALS OF ANIMAL WELFARE

The Farm Animal Welfare Council⁶ was the creator and is the natural guardian of the Five Freedoms concept. In *Farm Animal Welfare in Great Britain: Past, Present and Future* the Council clearly recognises their influence:

The Five Freedoms have achieved public recognition worldwide and can be found in national legislation, marketing and farm assurance schemes, sometimes with minor modifications. They have withstood much criticism and, within Great Britain, are the cornerstone of Government and industry policy and the Codes of Recommendations for the Welfare of Livestock. (FAWC 2009 p2)

However, there are different interpretations of the Five Freedoms. The report's Introduction states:

One criticism of the Five Freedoms is their focus on poor welfare and suffering. This focus was undoubtedly appropriate at the time they were devised but the requirement to provide for an animal's needs in the new Animal Welfare Act implies that good welfare should be an ambition too. (FAWC 2009 p2)

And in the Executive Summary to the same report:

Current legislation on the minimum standard of animal welfare is based on the avoidance of unnecessary suffering and the provision of needs. The Five Freedoms themselves concentrate on suffering and needs. This focus reinforces the negative image of farming and food production. (FAWC 2009 p.iii)

In contrast to this, the ideal nature of the Five Freedoms has been stressed by Webster:

The Five Freedoms identify the elements that determine the ideal welfare state as perceived by the animals (i.e. feeling really good). The Five Provisions define the husbandry and resources required to promote, if never achieve, this ideal welfare state. (Webster 2005 p.12)

⁶ The Farm Animal Welfare Council, a non-departmental public body, had its status changed to an expert committee on April 1 2011 and is now called the Farm Animal Welfare Committee.

332 FAWC also describes the Five Freedoms as ideals, as for example in its recent *Annual*
333 *Review 2009-2010*:

334 In considering the conditions under which farm animals are kept, the Council is guided by ideals that
335 have become known as the Five Freedoms (FAWC 2010 p.4)

336 What then is the correct interpretation of the framework? The tone of the freedoms can
337 appear to be negative in sentiment, probably because four of the freedoms have the form
338 *freedom from*. The *from* in the freedoms logically dictates that the condition of the freedom
339 must be stated in its negative aspect (e.g. *dis-comfort* versus *comfort*). Rather than talk about
340 the freedoms in terms of positive and negative aspects, for the purposes of discussion the
341 *freedom from* will be called a prohibition, and the *freedom to* a prescription. The first
342 freedom is the *freedom from hunger and thirst*, which are sensations that constitute negative
343 feelings (Table 1). If this freedom was formulated as a prescription, rather than a prohibition,
344 it might become something like *freedom to eat and drink* – or, perhaps more accurately,
345 *freedom to satisfy hunger and thirst*. Formulating the first freedom as a prescription appears
346 to be intelligible and practical. It simply prescribes that farm animals should be able to eat
347 and drink. Similarly, inverting the second freedom would yield *freedom to be comfortable*,
348 which is also intelligible and practical. However, when it comes to the third freedom,
349 *freedom from pain, injury and disease*, the intelligibility and practicability breaks down when
350 written as a prescription. In Table 1 pain is defined as ‘a strongly unpleasant bodily sensation
351 produced by illness, injury, or other harmful physical contact’ and ‘mental suffering or
352 distress’. A more precise definition of animal pain is:

353 An aversive sensory and emotional experience representing an awareness by the animal of damage or
354 threat to the integrity of its tissues. It changes the animal’s physiology and behaviour to reduce or avoid
355 the damage, to reduce the likelihood of recurrence and to promote recovery. (Molony 1997)

In particular, pain is stimulated by specific receptors called nociceptors. To formulate the third freedom as a prescription, pleasure might be used as the opposite of pain. However, it is not strictly accurate to describe pleasure as the opposite of pain. Of course, pleasure and pain are often thought of as opposites, at least in everyday life, but the absence of any stimulation of nociceptors does not cause pleasure, but merely a lack of pain. Indeed, an animal can be in a pain-free state, without necessarily experiencing pleasure. Furthermore, an animal could be experiencing another negative emotion, such as boredom, without it being in pain. So *freedom from pain* cannot accurately be substituted by *freedom to experience pleasure*. This leaves the option of writing the third freedom as *freedom to be free from pain* (disease and distress are omitted here, for simplicity). However, such convoluted language indicates the value of formulating at least some of the Five Freedoms in their negative aspect, i.e. as prohibitions.⁷

FAWC has recently written that “The Five Freedoms themselves concentrate on suffering and needs.” (FAWC 2009 p.iii). This is true in a sense; the words of the Five Freedoms do concentrate on suffering and needs. This follows from their being, in the most part, formulated as prohibitions. However, although the words concentrate on suffering and needs, it does not follow that this limits the standard of welfare that farm animals themselves might experience, should the Five Freedoms be satisfied. The *freedom from pain*, in the third freedom, can be used to demonstrate this: *Freedom from pain* means, precisely, freedom from pain. As has been argued above, strictly speaking, pain does not have a positive correlate. On the other hand, it is well known that pain causes debilitation. Pain causes poor welfare directly through its emotional aspect. However, the negative consequences of pain reach further than this. Pain reduces welfare indirectly, via the reduced activity of the painful

⁷ This discussion assumes the centrality of consciousness and sentience in animal welfare. An early argument for animal sentience is found in Brambell (1965 pp.9-10) and there is now an extensive literature on animal consciousness and sentience (see for instance Stamp Dawkins 1993; Griffin 2001; Fraser 2008).

379 individual. Pain can cause mental depression and withdrawal behaviour (Broom & Fraser
380 2007 pp.62-64). Put simply, an animal in pain would not experience as much or any pleasure
381 through such activities as feeding and social interactions⁸. In contrast to the mentally
382 depressed and behaviourally withdrawn painful animal, a pain-free animal is not limited (by
383 pain at least) in terms of mental and behavioural activity. A pain-free animal, other things
384 being equal, is an animal that has the *freedom* to feel and act as it desires, which pain would
385 otherwise restrict. Putting all of this more generally, consider an animal that has all the
386 freedoms satisfied: it is not hungry or thirsty, not in discomfort or pain, does not have any
387 injuries or disease, is free to express normal behaviour and is free from fear, distress and
388 mental suffering. Some of the time, this animal might be in a neutral state with regards to
389 positive and negative feelings. However, much of the time the animal may be in a (very)
390 positive welfare state. This is because satisfaction of the various *freedoms from* (hunger,
391 thirst, discomfort, pain, injury, disease, fear, distress and mental suffering) and the *freedom to*
392 (express normal behaviour) allow the animal to flourish. An animal in this state will
393 experience the following as a direct result of satisfaction of freedoms: pleasure by the
394 satisfaction of desires through eating and drinking; a comfortable state; freedom from any
395 pain, injury and dis-ease; freedom to express normal behaviour; and a secure mental state.
396 However, this is not the end of it. Allowed the potential to flourish (freedoms satisfied), an
397 animal will naturally actualise its species-specific nature, its *telos*, the actualization of which
398 is often associated with the feeling of pleasure and contentment (Rollin 2006 p100)⁹. An
399 analogy to this can be taken from the subject of political philosophy. The doctrine of liberal
400 individualism emphasises the importance of an individual being able freely to think, act,
401 write and associate with others without impediment (Mill 1859). A restriction on these

⁸ Here, one can see that pleasure is diminished due to pain, not in a strictly necessary sense because pleasure is the opposite of pain, but rather because of the effects of pain.

⁹ Also see Nussbaum's capabilities approach (Nussbaum 2004).

402 activities either by the state or other individuals requires very strong reasons (normally
403 protection of the same rights for others). The thinking here is not that without any positive
404 action by the state or community, the individual will be limited in his/her well-being
405 (welfare) because the individual may choose to do nothing. Rather, individuals are more
406 likely to flourish under these conditions, due to fundamental aspects of human nature. The
407 situation with the freedoms is analogous. There is no limitation to animal welfare because the
408 words of the Five Freedoms concentrate on suffering and needs. Rather, these words refer to
409 vital and important interests (hunger and thirst, discomfort and pain) that an animal must
410 satisfy, in order to be able to experience good welfare.

411 The Five Freedoms are ideals, but they are mostly formulated in a negative sense, for logical
412 and practical reasons. Ideals, strictly speaking, are ‘highest conceptions’, ‘perfect’, ‘existing
413 only in idea’, ‘visionary’, and ‘dependent on the mind’. In contrast to this, the Five Freedoms
414 could have been cast as non-ideal, i.e. real. The formulation of the Five Freedoms as ideals
415 leads to both advantages and disadvantages as a framework for the analysis of animal
416 welfare. The main advantage is that the ideals are more likely to be complete and
417 comprehensive. Ideals are more likely to be durable through time, and can appear timeless,
418 as, for example, in the case of the Ten Commandments. The main disadvantage of the Five
419 Freedoms is also related to their *ideality*; cast as ideals, the freedoms cannot themselves
420 determine whether an animal’s welfare is unacceptable, satisfactory or good. The Five
421 Freedoms, in this sense, are a rigid framework for analysis. Although the Five Freedoms can
422 be judged in one sense to be sufficient as a framework for the analysis of animal welfare, they
423 do not provide guidelines as to what extent they should be satisfied for the animal to
424 experience good welfare.¹⁰

¹⁰ A second disadvantage is that if interpreted literally, the five freedoms can be criticised for being over-simplistic in not reflecting how sensations and emotions impact on motivation. For instance, an animal

CONCLUSION

The Five Freedoms may appear to describe an ideal but unattainable state ('Eden') (Webster 2005 p13)

The Five Freedoms have had an enormous impact; they have been translated into much animal welfare legislation, codes of recommendations and farm animal welfare accreditation schemes. Their success is no doubt in part due to their simplicity and the ease of remembering the alliterative words: the 'Five Freedoms'. Despite this, the freedoms have not been subject to a critical analysis in terms of their adequacy. Are they fit for purpose? This paper has demonstrated that individually, each of the freedoms is a necessary component of any comprehensive animal welfare analysis. Second, the Five Freedoms, as they currently stand, appear to be sufficient as a framework for the analysis of animal welfare. However, due to the progressive nature of science, whether the Five Freedoms really are sufficient for the analysis of animal welfare will, to some extent, be an open question and subject to revision.

The Five Freedoms are formulated as *ideals* of animal welfare. Ideals are highest conceptions by definition and, therefore, the Five Freedoms framework does go well beyond a concentration on animal suffering and needs alone. Finally, despite the Five Freedoms being sufficient as a framework for the analysis of animal welfare, their *ideality* means that they do not have the power to determine what is an acceptable level of animal welfare, in an ethical sense. To determine this, an ethical framework is needed which can be used to prescribe how humans ought to treat animals. FAWC's more recent contribution (2009) of the concepts of a good life, a life worth living, and a life not worth living could be used to bridge this gap.

completely free from hunger would not eat, and though it would not suffer from hunger, it would perish of starvation. Similarly, pain has an important adaptive function whereby the individual negatively associates the causative stimulus and learns to avoid it in the future. In this sense the experience of an adaptive intensity and duration of the sensations and emotions contained in the freedoms is necessary for good welfare.

Whether they are suitable for this task, however, is a matter that requires future work to be done.

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