

Equal Treatment for Equal Relevance:
The Unjustifiable Exemption of Farm Animals
from Animal Cruelty Laws

by

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A Thesis Presented in Partial Fulfillment
of the Requirements for the Degree
Master of Arts

Approved April 2012 by the
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ARIZONA STATE UNIVERSITY

May 2012

ABSTRACT

In the past 100 years pet, zoo/aquarium, and research animals have gained unprecedented legal protection from unnecessary human harm via the creation of strict animal cruelty laws. Due to the work of moral philosophers and compassionate lawyers/judges animal cruelty laws have been improved to provide harsher punishments for violations, had their scopes widened to include more animals and had their language changed to better match our evolving conception of animals as independent living entities rather than as merely things for human use. However, while the group of pet, zoo/aquarium, and research animals has enjoyed more consideration by the US legal system, another group of animals has inexplicably been ignored. The farm animals that humans raise for use as food are exempted from nearly every state and federal animal cruelty law for no justifiable reason. In this paper I will argue that our best moral and legal theories concede that we should take animal suffering seriously, and that no relevant difference exists between the group of animals protected by animal cruelty laws and farm animals. Given the lack of a relevant distinction between these two groups I will conclude that current animal cruelty laws should be amended to include farm animals.

DEDICATION

To my Mother who taught me to dream and to my Father who has always supported my dreams.

ACKNOWLEDGMENTS

This work would have been sorely lacking without the helpful concerns and criticisms of Dr. Joan McGregor and Dr. Cheshire Calhoun.

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Introduction

Humans and non-human animals have had a long history of interaction that has ranged from antagonistic to symbiotic in nature. During the infancy of our species, humans and non-human animals¹ began their relationship as competitors or enemies. But as humans matured and began to form societies the relationship between humans and some non-human animals became one of mutual dependence, in the case of non-human animals used for food, or even friendship, in the case of non-human animals treated as pets. The recognition of the value of non-human animals to humans facilitated the creation of legal protection for these animals and that legal protection has continued to expand, albeit slowly, to the point that ethical and legal arguments are now being made in favor of granting many non-human animals a variety of the rights that historically have been the exclusive rights of people. However, while a select group of non-human animals, namely pet, zoo/aquarium, and research animals, has gained an increasing amount of legal protection, another group of non-human animals, those people use for food, has inexplicably been left in the dark-ages in terms of legal protection.

¹I will use non-human animals and animals interchangeably throughout the paper. My reason for using non-human animals at all is to draw attention to the fact that humans are also animals.

My goal in this paper will be to attempt to shed some needed light on the unjustifiable discrepancy between legal protection for the privileged group of non-human animals and non-human animals used for food (which will henceforth often be referred to as farm animals). I will outline five of the best² ethical theories (virtue ethics, Kantianism, contractarianism, utilitarianism and rights based), that deal with human obligations to animals. I will follow by sketching a brief history of animal law beginning in the 17th century and continuing to the present. In my examination of the various ethical theories I will show that while the ethical theories are not in complete agreement on what the relationship between humans and animals ought to look like, all of the theories highlight some intuitively appealing characteristic of the relationship between humans and animals. All, these theories at least agree that humans should not be cruel³ to animals. Having shown that

² I count these theories as the best because they are the most consistent and the most plausible with respect to our intuitions about morality.

³ What I mean by cruel here and everywhere else in this paper is something that is unnecessarily harmful. To better illustrate what I mean consider the following examples of necessary and unnecessary pain. Getting vaccinations for various diseases is painful, but the pain of vaccination is a necessary result of being stuck with a needle and therefore the practice or act of vaccination is not cruel. Contrast the vaccination case with a case of performing invasive surgery without the use of readily available anesthetic. The surgery will be

the major ethical theories all agree on some form of protection from cruelty for animals, I will then examine current laws pertaining to the protection of pet, zoo/aquarium, and research animals, and I will conclude the paper by arguing that current laws that protect only pet, zoo/aquarium, and research animals ought to extend the same protection to farm animals.

Morality and the Law

Before delving into the history of animal law or examining arguments about the moral and legal worth of animals I would like to give an explanation of the relationship between morality and the law. What is morally required and what is legally required do not always mean the same thing, for instance a law that commanded white-skinned people to kill black-skinned people, in order to keep the gene line pure, would not be moral but might be the law in certain states. Nevertheless, what is legally required is often influenced by what is morally required. Laws against incest, stealing, murder, assault, and so on all seem to be influenced by the moral views of the society that creates the laws. For instance, murder is illegal, but it is illegal because it is morally wrong to kill innocent people. Moreover

excruciatingly painful, but it needn't thanks to availability of anesthetics and thus the pain is unnecessary and the act cruel.

much of the debate about controversial laws such as gay marriage laws and abortion laws often hinges on differences in the moral convictions between the opposing sides. If one believes that there is a moral sanction against homosexuality, then one is probably going to endorse the creation of a law that prevents homosexual marriage and vice versa. It should be noted that there are also laws that do not necessarily line up with a moral requirement. Traffic laws requiring that one not turn left or right during specific times of the day are laws that do not seem to have a moral corollary. While the law and morality do not always go hand in hand, the laws that are believed to be the most important, laws against murder, cruelty, etc., always have an underlying moral parallel and given this relationship we may infer that a moral requirement may serve as a reason to create an identical, or nearly identical, legal requirement.

Moral beliefs are, I claim, essential to the creation of the most important laws in a society and laws protecting people and animals from unnecessary harm, aka cruelty, and injustice are two such laws. The method of moving from a moral requirement to a legal requirement has heavily influenced the creation of the laws protecting animals from harmful human action and in my argument I assume that a moral sanction against being cruel to animals provides us with a

reason that may justify the creation of a legal sanction against being cruel to animals.

Descartes, Religion and Animal Consideration Prior to the 1800s

For the longest time in human history animals were not treated with much, if any, moral consideration and very little theorizing about what humans ought to do, paid any attention to the possibility that humans had obligations to animals. Two of the main culprits behind the belief that animals were not worthy of moral consideration up until about the beginning of the 17th century, were probably Christianity and the philosopher Rene Descartes.

The language in the Christian story of creation can easily be interpreted as giving humans dominion over animals and as presenting the view that animals exist to be used by humans.⁴ While this dominion and use interpretation of the Genesis story has been challenged in recent history,⁵ the following passage was undoubtedly used as justification for treating animals as mere objects for human use, “And God blessed them and God said unto them, Be fruitful, and

⁴ *The Holy Bible*, King James Version, Genesis Ch. 1, (New York: American Bible Society: 1999); Bartleby.com, web accessed February 18, 2012, <http://www.bartleby.com/108/01/1.html#S1>.

⁵ Roderick Nash, *The Rights of Nature: A History of Environmental Ethics* (University of Wisconsin Press, 1989).

multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.”⁶ If human kind was commanded by their revered creator to take control over all other living creatures it, and no stipulations or advice was given on how that control ought to be exercised, it might follow that humans are allowed to do anything to animals, including killing, eating, trapping, beating, and depriving them of food, water, shelter without fear of violating a moral or legal obligation. Given how widespread the influence of Christianity was in the pre-modern western world it should not be surprising that no moral or legal laws specifically addressing human treatment of animals were adopted until the 17th century. Christian doctrine dominated much of the moral landscape leading up to the 17th century, but it was not just religious teachings that called into question whether humans have any obligations to animals. Renes Descartes is hailed by many in field to be “the father of modern philosophy”, but the “father” had a very un-modern view of animals. According to Descartes animals were akin to fleshy machines, because while animals have the ability to move and interact with the world

⁶ “Genesis” Ch.1 Verse 28, Accessed February 18, 2012.
<http://www.bartleby.com/108/01/1.html#S1>

they lack the capacities to speak, believe, think, consciously⁷ feel pain, and reason.⁸ He further claimed that God created the human soul to have the aforementioned capacities and that these special capacities create an inseparable divide between humans and animal machines. Descartes did note that animals are similar to humans in many respects; he admitted that animals eat, sleep, reproduce, and make their passions known to one another, and that animals are better at humans with respect to some physical tasks, but he staunchly denied that animals share the ability to think, speak, believe, consciously feel pain, or reason with humans. He concluded that since animals lack the special human capacities, that humans commit no crime when they eat, kill, or use animals; just as a human does not commit a crime when they take apart or destroy a piece of machinery they own.⁹

⁷ Descartes claimed that animals had the proper equipment to produce the reaction that humans associate with pain, but since they lacked minds animals were unable to consciously experience pain in the way that humans do.

⁸Rene Descartes, "Animals are Machines," in *Environmental Ethics: Divergence and Convergence*, eds. S. J. Armstrong and R. G. Botzler (New York: McGraw-Hill, 1993), 281-283.

⁹ "Thus my opinion is not so much cruel to animals as indulgent to men—at least to those who are not given to the superstitions of Pythagoras—since it absolves them from the suspicion of crime when they eat or kill animals." -Rene Descartes, "Animals are Machines," 285.

Descartes had an incredible mind and he made tremendous contributions to the growth of philosophy, but there are two striking problems with his argument that animals are no different than machines.

The first objection to Descartes's argument is an empirical one. He claimed that animals lack certain capacities that humans have. Today most educated people would not disagree with the claim that animals do not have the capacity to reason or that animals cannot speak in the way that humans do, but the claim that animals cannot consciously feel pain, think, or form beliefs should be readily denied, given the discoveries of modern animal biology and psychology. Animals are certainly capable of perceiving the world around them and coming to form beliefs based on those perceptions. For example, a cat or dog may come to form the belief that the sound of an electric can opener will lead to appearance of food in her food bowl and as a result of this belief quickly appears next to her food bowl. Descartes may have objected to such an example by claiming that in such instances what is really going on is not belief formation, but some form of

conditioning to a stimulus that is a mere biological reflex.¹⁰ Such an objection, however, seems mistaken. A reflex action entails that the animal will automatically respond to the stimulus regardless of other circumstances, but a dog or cat who hears the can opener may not always quickly appear next to the food bowl. I have observed on numerous occasions that a cat, who normally rushes to the food bowl when the can opener is used, will not respond to the can opener sound if otherwise occupied in a game of catch-the-yarn-ball or when she has just eaten. That the animal does not always respond to the can opener in the same fashion seems like a good reason to think that the animal's behavior is not a mere reflex and that something more sophisticated, like belief formation that the can opener sound will result in food in the food bowl, is going on in the animal's brain.

The second objection to Descartes's claim that animals are mere machines is that some of his reasons for thinking that animals are machines just are not relevant. Descartes claimed that animals lack a rational soul (or the capacity to reason) and the capacity for human-like speech and are therefore more similar to machines than humans. But one might object that being able to reason or speak as humans do

¹⁰ Reflex in the sort of knee-jerk reaction sense. These sorts of action are mere responses to a stimulus that bypass any higher cognitive functioning, such as belief formation or assessment.

is not a good reason for differentiating a living human from a machine. Young children, the comatose and people with serious cases of alzheimers may not have the capacity to reason or speak, but most people agree that despite this lack of capacities these individuals are still people and not mere machines. Similarly it is easy to imagine a case of some non-human rational agent¹¹ that does not communicate in the way that humans do, via speech, writing, or sign-language, and yet still believe that this agent is a living biological entity more similar to a human than a machine.

Descartes did not explicitly say anything about the moral worth of animals, but given his description of animals as mere machines and his claim that a person is above suspicion of criminal activity when they eat or kill animals¹² it is probably safe to assume that Descartes's view on what humans owed to animals was very minimal. It also does not seem unreasonable to assume that if one thought of animals as machines, then it would be morally unproblematic to use and treat animals like machines. But regardless of what Descartes thought about the moral status of animals, his argument that animals are no

¹¹ An extraterrestrial that has some extra sense perception enabling the species to communicate via thought for example.

¹² See footnote 9.

different than fleshy machines has been empirically disproven and should be dispensed with.

Virtue Ethics: Aristotle and Nussbaum

Another way to think about human moral obligations to animals was created ~2,500 years ago by philosophy's founding fathers. Plato and Aristotle are credited with creating an ethical theory based on promoting and attaining human virtues like courage, temperance, benevolence and wisdom. Both writers were focused on providing guidance for human moral action, but the quest for virtue could certainly have implications about how a person ought to interact with animals.

According to the virtue theory of ethics, what a person ought morally to do is what a virtuous person would do. This requires that a person act in ways that are not only virtuous, but also promote the growth of commonly accepted human virtues, such as loyalty, respect, courage, benevolence and so on. The intuitive support of this view is that some people really seem to be model moral agents who embody characteristics that obviously less moral people should have. Mother Teresa, for instance, had virtuous character traits that made her an ethical person and most of us would unhesitatingly admit that her

compassion should serve as a guide to how we all should act towards other people.

I listed a number of simple virtues, but according to virtue theory a real virtue cannot be described so simply. It is not enough that one simply have the virtues of compassion or generosity as particular traits, but one must also have the complex set of desires, emotions, and beliefs that we associate with the purest form of the trait. So if Mother Teresa had behaved with compassion, but lacked the desire to be compassionate or had the belief that being compassionate would allow her to get away with some other vice, then she would not have been compassionately virtuous. I have used Mother Teresa as an example of a moral saint who embodies the pure form of some virtues, but virtue theory also recognizes that less pure instantiations of a given virtue are still admirable. Not all of us can be Mother Teresas, but all of us can attempt to aim at the pure form of a virtue and through frequent iterations of behaving virtuously one may form their character to be the purely virtuous sort represented by moral saints.

Virtue theory equates being moral with having a virtuous character that disposes one to behave in virtuous ways, but why should any of the virtues serve as a model for leading a moral life? According

to Aristotle the concept of a personal virtue is closely tied to the concept of a good life or natural flourishing for people. All people seem to grasp that there is a bad way for people to live and then there is a way for people to flourish or live well. The bad way for people to live is one in which their natural capabilities as a human are frustrated or not nourished to the extent that they should be. We can imagine such a bad life with respect to capability frustration by thinking about the life of a slave who is unable to exercise her autonomy, interact with the people she chooses, have the freedom to move and explore, and so on. Such a life is an undignified way for a person to live and no one would admit that such a life of enslavement is a good one. Similarly we can imagine the case of an incredibly lazy person who has no ambitions and spends the majority of their time sitting on a couch alone watching television and come to the undisputed judgment that a life so sedentary and devoid of social interaction is not the sort of life that a person should live. The cases in which people lead bad or undignified lives make us realize that what we want, as Aristotle understood, is to live well. The person who lives well seeks to better themselves and others by doing things like forming meaningful relationships, gaining knowledge, eating nutritious foods, exercising his or her body, promoting justice, and so on. The virtues are then ways in which a

person can achieve this kind of flourishing and it is the moral duty of individuals to promote that flourishing for themselves and it is the moral duty of a society, as required by the virtue of justice, to allow individuals to flourish by not impeding an individual's ability to flourish and by teaching the members of the society what is and what is not virtuous.

Aristotle and Plato were primarily concerned with the flourishing of human beings, but Aristotle recognized that flourishing was not a concept unique to humans. Animals too have natural ways in which they can live well or flourish. The cat who is able to hunt, procreate, play and socialize lives the life it was naturally made to live and lives that life well, while the cat who is kept in a cage all its life or dies young from disease fails to flourish.

Since virtue theory requires the promotion of flourishing it might seem like virtue theory requires direct consideration of animal flourishing and the promotion of good lives for all animals. However, this is not the case, because virtue theory privileges human flourishing above all others, which is unsurprising since the theory was designed specifically to promote human flourishing through virtue. So while animals have ways of flourishing independent of humans, human

flourishing entails using animals to further human ends.¹³ Human flourishing entails animal use, because it is claimed that humans live better lives by enjoying the pleasure and nutrition of eating animals, protection from the elements by using parts of animals to make clothing and so on. Basic virtue theory does afford, however, some consideration to the flourishing of animals. Virtue theory admits that it is moral to use animals to achieve the end of human flourishing, but it places moral sanctions on certain ways in which that use is carried out. For instance, a virtuous person may morally kill and eat animal to feed herself or others, but a person acts contrary to morality if she tortures an animal before killing it or kills an animal for mere enjoyment, because a virtuous person would not do such an inhuman act. A moral person then has certain duties to animals, but these duties are indirect, i.e. not to the animals themselves, but rather stem from the human requirement to act virtuously in order to nurture personal flourishing. Of course this seems like a plausible enough guide for how humans ought to behave towards animals, but it also seems that there is more wrong with torturing an animal than just the failure on the part of the human torturer to act virtuously.

¹³ Tom Regan, *Defending Animal Rights* (University of Illinois Press, 2006), 5-6.

Aristotle's virtue theory affords more consideration to animals than Descartes's view or early theological views by requiring that humans not be cruel in their treatment of animals, but the original theory was not meant to give a robust account of how humans ought to behave towards animals and does not posit any direct duties to animals. The ancients created virtue theory with humans in mind and animals were likely considered only in cases in which they were useful to humans. So, while ancient virtue theory lines up with many of our shared intuitions about how humans ought to act, I think it misses the mark with respect to our intuitions and beliefs about all the duties that humans have to animals.

The virtue theory put forth by Aristotle does not, I claim, thoroughly account for all the direct duties that humans have to animals, but modern virtue theorists, like Martha Nussbaum, have tweaked and expanded Aristotle's view to provide a richer explanation of what virtuous humans owe to animals. In *"Beyond 'Compassion and Humanity': Justice for Nonhuman Animals* Nussbaum argues for a capabilities based approach that would create direct duties to animals based on an animal's capability to flourish.¹⁴

¹⁴ Martha Nussbaum, "Beyond 'Compassion and Humanity': Justice for Nonhuman Animals," in *Animal Rights: Current Debates and New*

Nussbaum mounts an argument for the promotion and protection of animal flourishing by moving from the intuitive judgment that humans have a moral obligation to promote all human flourishing to the judgment that human beings ought to promote the flourishing of any being that can flourish. Nussbaum claims that human beings and all living things have intuitively dignified ways of living in which the needs, desires, and capabilities of a living thing are fostered. For humans a dignified life is one in which a human is able to: live a full life, be healthy, be protected from bodily harm, socialize with other people and other species, exercise all of the senses including imagination and thought in a relatively unrestricted fashion, grow and develop emotionally, exercise the capacity for reason and plan one's life, enjoy play and recreational activities, freely participate in politics, own property and have that property protected.¹⁵ The constituents of a dignified life are based on the basic capabilities that human beings need in order to flourish, but the list is not meant to cover every capability that contributes to human flourishing. In keeping with a basic tenet of virtue theory Nussbaum asserts that individuals,

Directions, ed. Cass Sunstein and Martha Nussbaum (New York: Oxford University Press, 2004), 304-305.

¹⁵ Martha Nussbaum, "Beyond "Compassion and Humanity": Justice for Nonhuman Animals," 313-314.

societies, and governments have a moral obligation to promote the basic capabilities required for human flourishing and to remove impediments to flourishing.¹⁶ Nussbaum further asserts that it is also a requirement of justice to promote and protect human flourishing. Fostering and protecting the basic capabilities that lead to flourishing is what is owed to human beings, which in turn creates an entitlement for humans to have their flourishing promoted.

Additionally Nussbaum is quick to point out that the capabilities approach focuses on the potential to have a capability rather than actual functioning. In the case of humans the basic capabilities are derived from thoughtful examination of functioning capacities that contribute to dignified life for most normally developed human beings, but functioning is not the determining factor for promoting individual flourishing.¹⁷ According to the capabilities approach even if a human does not have a functioning capacity, such as the capacity to reason, that human¹⁸ should not be excluded from

¹⁶ Martha Nussbaum, "Beyond "Compassion and Humanity": Justice for Nonhuman Animals," 305.

¹⁷ Martha Nussbaum, "Beyond "Compassion and Humanity": Justice for Nonhuman Animals," 312.

¹⁸ Nussbaum applies the same approach to animals, but it should be noted that some animals lack even capability with respect to some

having the opportunity to meet all of the basic requirements for flourishing. Nussbaum does admit that degrees of paternalism are warranted when an individual's capacity for making autonomous choices is lacking or compromised, which seems to be the case for all animals, but even in these cases promotion of many of the basic capabilities is still possible and the obligation to promote those capabilities remains.

Nussbaum appeals to the intuition that there is a dignified way for human beings to live based on the promotion of basic capabilities required for human flourishing, but she also recognizes the shared intuition that all living things are capable of living dignified lives in which their basic capabilities are allowed to flourish.¹⁹ The vast variety of animals that share the earth with humans each have unique ways of flourishing, the specific freedoms and opportunities required for the flourishing of a predator or undoubtedly different from that of a cow, but all animals also have basic capabilities that must be met in order

capacities that humans have and that one is not obligated to promote a capacity that a being is not even capable of having. This means that although we have an obligation to promote the capability for practical reasoning for children, even those with cognitive deficiencies, by creating the opportunity for children to go to school, we have no such obligation to create the opportunity for frogs to go to school.

¹⁹ Martha Nussbaum, "Beyond "Compassion and Humanity": Justice for Nonhuman Animals," 306.

for that animal to live a dignified life. Nussbaum sees an analogy between some of the basic human capabilities required for a dignified life and the basic capabilities of animals. She claims that the basic capabilities required for animals flourishing are: life,²⁰ bodily health, bodily integrity, sense/imagination/thought, emotions, practical reason (in some cases), affiliation, play, and control over one's environment.²¹ Animals share these capabilities with humans and are entitled to similar promotion and protection of these capabilities, but there are some noticeable differences based on the difference in quality between human capabilities and animal capabilities. Not all animals are capable of exercising practical reasoning to the extent that humans can and are thus not entitled to the promotion of practical reasoning. Animals also cannot take part in the political environment, so their ability to actively participate need not be promoted, but their

²⁰ Nussbaum draws a significant distinction between the human entitlement to life and the animal entitlement for life, even though the entitlements are based on the same capability. For humans the capability for life entitles one to be free to live a full life, but for animals Nussbaum is unwilling to extend the same entitlement. Nussbaum claims that animals are entitled to continue to live, even if they have no interest in continued life, but that life may be cut short in order to serve some necessary end such as feeding people or further medical knowledge through research.

²¹ Martha Nussbaum, "Beyond "Compassion and Humanity": Justice for Nonhuman Animals," 317.

flourishing requires that they be included in the conceptual framing of political policies. The key point is that although animals have qualitatively different capabilities and thus flourish in different ways, many of the basic capabilities we have a direct duty to promote for humans are shared by animals. So we should recognize that animal flourishing is different than human flourishing in many ways, which will influence judgments about what entitlements individual animals ought to have, but also acknowledge the similarities between human and animal capabilities. We can acknowledge the similarities by claiming direct duties to animals to promote the flourishing of the animals that humans have a responsibility for and by refraining from hindering the flourishing of those wild animals that humans are not directly responsible for.²²

Nussbaum's capabilities approach gives a far more robust account of what humans owe to animals than Aristotle's virtue theory by positing direct entitlements for animals. She, however, does not claim that humans and animals have the same entitlements. She admits that animals may ethically be used in ways that humans may

²²Martha Nussbaum, "Beyond "Compassion and Humanity": Justice for Nonhuman Animals," 311-312.

not,²³ but she is adamant that humans have a direct obligation to promote animal flourishing. At the least promotion of animal flourishing requires that we not treat them as mere means by using them in unnecessary experimentation, by treating them in ways that are unnecessarily harmful, by providing basic veterinary care for animals under human care, by allowing them to socialize with other animals and move about in an open environment, providing animals with the opportunity for play and expression of natural behaviors, and to include them in the framing of political policies.²⁴

The Classic Kantian Approach and a Modern Interpretation

Aristotle's virtue theory does not afford direct duties to animals and permits the virtuous person to use animals for his or her ends. A basic reading of the moral theory of Immanuel Kant offers a slightly different alternative that, like ancient virtue theory, denies that humans have duties to animals themselves. It does, however, affirm that humans have duties to one another not to harm animals. Additionally, a more nuanced and modern reading of Kant by

²³ Martha Nussbaum, "Beyond "Compassion and Humanity": Justice for Nonhuman Animals," 318-319.

²⁴ Martha Nussbaum, "Beyond "Compassion and Humanity": Justice for Nonhuman Animals," 314-318.

Christine Korsgaard provides reasons to believe that humans have duties to animals that are more than just duties to other humans.

An interesting feature of Kant's moral theory, aka Kantianism, is that it offers a variety of different insights about what is morally required of people and how people ought to go about choosing a moral course of action. Kant was in tune with a variety of insights about moral action and was not uncomfortable in giving what appeared to be multiple methods for assessing how one ought to act. For instance, Kant gave three versions of what he called the categorical imperative (a command without exception used to guide human action). Version 1 reads as follows, "Act only on that maxim whereby thou canst at the same time will that it should become a universal law."²⁵ This version equates the moral with what is rationally acceptable to all rational beings across all time. The second version of the imperative seems to focus less on rationality and more on the common belief and intuition that autonomous human beings are worthy of respect. Version 2 reads as follows, "So act as to treat humanity, whether in thine own person or in that of any other, in every case as an end withal, never as a

²⁵ Immanuel Kant, *Groundwork of the Metaphysics of Morals*, in *Basic Writings of Kant*, translated by F. Max Mueller and Thomas K Abbot, edited by Allen Wood (New York: Modern Library, 2001), 178.

means only.”²⁶ The third version of the imperative is “[to treat] the will of every rational being as a universally legislative will.”²⁷ With each version Kant illustrated a different insight, that moral laws should be universal and rational, that morality should require respect for all humans as ends and that the moral laws willed by one rational being should be applied to all rational beings. Kant’s willingness to embrace multiple insights not only affected his moral theory for humans, but also his view on how humans ought to treat animals.

Kant divided the world of living things into two²⁸ categories: ends-in-themselves and means.²⁹ Rational beings, the category which most adult humans fall into, are the only ends-in-themselves and everything else is a mere means. Kant argued that rational beings are ends in themselves, because by the power of each rational being’s

²⁶ Immanuel Kant, *Groundwork of the Metaphysics of Morals*, 186.

²⁷ Immanuel Kant, *Groundwork of the Metaphysics of Morals*, 188.

²⁸ It may be objected that in addition to ends-in-themselves and means that there are also ends, but ends, as it turns out, are just those means that an end-in-itself (otherwise known as a rational being) chooses to value as an end. For example, money, in its original state, exists as a means, but it may become an end if a rational being chooses to value it as such.

²⁹ Immanuel Kant, *Groundwork of the Metaphysics of Morals*, in *Cambridge Texts in the History of Philosophy*, translated and edited by Mary Gregor (Cambridge University Press, 1997), 34-37.

legislative will he or she affirms that he or she matters as an end, and through rational reflection he or she comes to recognize that all other rational beings also count as ends worthy of his or her respect.³⁰ For Kant nothing without such a legislative will could be an end-in-itself, because only rational beings can create value³¹ and nothing has the intrinsic value to make it an end-in-itself.

Kant also claimed that only an end-in-itself could create a duty for others to follow and therefore moral duty can only be owed to an end-in-itself. Given these beliefs one might have expected Kant to categorically deny that humans, as ends, have any duties to animals, as mere means,³² but Kant was surprisingly sympathetic to animals. In *Metaphysics* he claimed that a person should not be cruel or violent in their treatment of animals, because a person has a duty to herself and humanity in general to avoid cultivating such ghastly character

³⁰ Christine Korsgaard, "Fellow Creatures: Kantian Ethics and Our Duties to Animals," delivered at the Tanner Lectures on Human Values (University of Michigan, 2004), 3-4.

³¹ Which includes the creation of the value of oneself and one's ends.

³² Kant even seems to suggest as much in "Conjectures on the Beginning of Human History," in *Kant: Political Writings*, 2nd ed. trans. H.B. Nisbet, ed. Hans Reiss (Cambridge University Press, 1991), 223-225.

traits.³³ Kant's theory, like virtue theory, affords indirect duties to animals. According to Kantianism humans have a duty not to treat animals with cruelty, not because doing so would be a violation of some duty to the animal itself (which would be a direct duty), but because individual humans have an obligation to his or herself and to each other not to cultivate inhuman traits that are inconsistent with or harmful to human rational nature.

The view that a person does harm to oneself and to others when he or she commits an act of cruelty against an animal has some intuitive appeal to it, but there is also something intuitively lacking about such a view. It seems clear that when one beats the pet cat or dog of another that he harms the person who cares for that pet and that harm should provide a reason not to beat the pet.³⁴ It also seems plausible that fostering the character trait of cruelty would be bad for the individual who fostered such a bad trait.³⁵ However, while

³³ Christine Korsgaard, "Fellow Creatures: Kantian Ethics and Our Duties to Animals," 15.

³⁴ Kant claims that each person has a duty to respect what other rational agents value and thus in disregarding another's value(s) one acts immorally by failing to treat the other person as an end-in-itself.

³⁵ Such a trait would probably interfere with a person's ability to peacefully interact with other people and peaceful interaction with others seems a necessity for any rational person's existence.

harming oneself and other people seem to be reasons justifying the moral wrongness of unnecessarily beating an animal, the harm that the animal is subjected to seems equally, or even more strongly, justifying. What matters is not just that a human owner or the psychology of some individual person suffers, but also that an animal suffers. It would be immoral and disturbing to light my neighbor's cat on fire and watch it burn to death, and my neighbor would no doubt be hurt by the loss of her cat, but to claim that the only thing that would be wrong about this act is the grief caused to my neighbor is to grossly ignore the fact that a living creature has suffered and died a terrible death. Kant deserves some credit for defending animals against human cruelty, but his view still leaves something to be desired.

A classic reading of Kant does not fully encompass modern beliefs and intuitions about the duties humans have to animals, but Christine Korsgaard claims that Kantianism is equipped to grant greater respect to animals themselves than the classic reading would lead one to believe.³⁶ Korsgaard posits that Kant's theory would allow not only the valuing of the autonomous, rational nature of a being as

³⁶ Christine Korsgaard, "Fellow Creatures: Kantian Ethics and Our Duties to Animal," 2-4.

an end-in-itself, but also the animal nature of any being that has an animal nature.³⁷

Korsgaard accepts Kant's view that rational humans are the only conveyors of value, normative and otherwise, in this world, but also believes that in order for the project of morality to get off the ground rational humans must accept that the nature of any living being is good for that living being from that being's point of view. This means that for a human, being rational is part of one's natural good, but so is eating, drinking and socializing and these other natural goods are just like the natural goods of any living being (in this respect, unlike rationality, humans are not special). Korsgaard agrees with Kant that a duty can only be created by the legislative will of a rational being,³⁸ but she also claims that if rational beings could not accept that their own natures were good, then it would seem to follow that the being could never have a reason to act or legislate with his or

³⁷ Christine Korsgaard, "Fellow Creatures: Kantian Ethics and Our Duties to Animal," 31.

³⁸ Important to note is that although a rational being is an end-in-itself that creates value for herself, the values the rational being creates are not valuable just because he or she creates them (in the hedonistic sense). The values are valuable, and worthy of respect by everyone, because a rational being created them. This recognition is what creates a duty for other rational beings to respect the values that any rational being creates.

her will, at least according to Kant's view.³⁹ Korsgaard emphasizes that she does not mean that people are just intrinsically valuable,⁴⁰ but that every autonomous person must recognize, and legislate via his or her will, that she has value as an end-in-itself and consequently that all autonomous rational human beings have value, not just as an autonomous being, but also as an animal being with a natural good. Put another way, in recognizing that a person is an end-in-itself one wills that both the rational nature and the animal nature/natural good of a person are valuable independent of one another. When a person universalizes this idea, as Kant believed rational beings must, then it becomes clear that a person must will that the natural good of any living thing is a good end-in-itself. Korsgaard's conclusion is that

³⁹ According to Kant humans create valuable ends by conferring value on them and this provides the incentive to pursue that end, but implicit in this process of value creation is the idea that each human is valuable as an end-in-itself and has a natural good that his or her rational nature helps him or her achieve. If one is unwilling to admit that he is valuable as an end-in-itself, then nothing he chooses to value as an end could have a reason to be thought of as good and therefore he would have no reason to pursue that end.

⁴⁰ Korsgaard, paralleling Kant, claims that value only comes from an act of legislation by the will of rational beings like human people and that positing that people simply have intrinsic value is a violation of this position. Korsgaard maintains that a person must choose that his or her own nature, both rational and animal, is good in order to make the judgment that he or she is a valuable end-in-itself, and that this gives a reason to pursue anything else that he or she values.

human animal natures, and the animal nature of any living being, must be valued as a good that is an end-in-itself and that is why people have moral duties to animals.⁴¹

There is something much more appealing about the view that human beings ought to respect the natural good of living things and therefore treat animals with moral respect, than the view that humans ought to treat animals with respect only because it would be harmful to humans not to. That a cow has a natural good to eat grass, raise offspring, and interact with other cows seems sufficient to create a duty to respect the natural good of the cow as an end-in-itself and not just as a mere means. However, Korsgaard notes that this view, when embraced to the fullest, has some problematic implications.

If all living things have a natural good that is a valuable end-in-itself, then it seems to follow that plants have such a natural good and so do cockroaches, mosquitos, rats, etc. That these organisms have such natural goods then creates a duty for people to treat them as ends and it would seem that discharging all these duties would be impossible or intuitively implausible. Korsgaard does not want to claim

⁴¹“In taking ourselves to be ends-in-ourselves we *legislate* that the natural good of a creature who matters to itself is the source of normative claims. Animal nature is an end-in-itself, because our own legislation makes it so.” Christine Korsgaard, “Fellow Creatures: Kantian Ethics and Our Duties to Animal,” 33.

that people have a duty to not eat plants or to refrain from killing pests like cockroaches, but her proposed theory of animal nature's being ends-in-themselves, taken to its logical extreme, does seem to commit one to such unrealistic duties. Her response is that while it seems impossible or implausible to accept the extremes of her view, this should not deter anyone from trying their best to respect plants and animals and to readily accept the duties that one can act on. She claims this includes, in addition to the general Kantian prohibition against animal cruelty, refraining from hunting and killing animals and also stopping painful experimentation on animals, because animals matter. Animals, like people, are beings with their own natural goods and just as people respect the natural goods of other people, so too must they respect the natural good of animals.

Contractarianism

In thinking about human obligations to animals one might wonder why people have moral duties to anything and what reason one has to be moral. Contractarianism is a moral theory, originally put forth by Thomas Hobbes around the middle of the 17th century, which attempts to provide an explicit answer to both of these important questions. Although the theory can readily explain the grounds for

duties between humans it has a much more difficult time explaining why people have any duties to animals.

There are several versions of contractarianism, but most versions can be safely assigned to one of camps, Hobbesian or Rawlsian, and for simplicity's sake I am going to limit my discussion to these two forms of contractarianism. On the Hobbesian account pre-social humans became moral and recognized duties to others purely as a result of rational self-interest. Hobbes imagined that humans living in a bleak and dangerous state of nature would recognize the bleakness and the danger of living in a state where each individual person was left vulnerable to being preyed upon by some stronger person, and decide to form imagined social contracts⁴² that would protect their interests, like owning property and being free from unnecessary harm. This social contract is what grounds the moral duties that people owe to one another and coupled with an executor of the terms of the contract insures that people discharge their duties. According to Hobbes when humans create this contract they are fully aware of their present status and capabilities. This way of creating the contract, in which the creators are "fully aware", seems most like the

⁴² Imagined in the sense that there is not a physical contract that people actually sign when entering into a moral society.

way in which actual contracts are made, but it can lead to problems of inequality and injustice if a particularly strong or large group wants to look out for its own best interest. So one can imagine that a large group of men living in a state of nature rationally want to create a social contract and that this group of men also lives with a much smaller group of women. It would be fair and just if the men also included the interests of the women in the contract, but there would be nothing irrational about the men opting to not only exclude the interests of the women from the social contract, but stipulate terms in the contract that would be in direct opposition with some or all of the women's interests, since the men are likely physically stronger and far more numerous than the women. Likewise, in the case of animals, human beings would not act irrationally by completely excluding the interests of animals from the social contract. On Hobbes's account animals can create no duties for people, since animals could not rationally enter into the contract or contribute to its creation, and people should treat animals only as their human interests dictate, which might include torturing or killing animals just for sport. That these sorts of injustices could result from the Hobbesian version of contractarianism might give one reason to reject the theory outright,

but one could also revise the theory in an attempt to avoid the problem of injustice.

John Rawls attempted just such a revision in the 1970s. Like Hobbes, Rawls imagined that the rational creators of a social contract, contractors in what Rawls called the “original position”,⁴³ have certain motives in mind for creating the contract. These motives include the desire to procure the greatest amount of goods for oneself and the disinterest in the amount of goods procured by anyone besides oneself, or the difference between the goods procured by oneself and the goods procured by another. Unlike Hobbes, Rawls further imagined that the original contractors should choose,⁴⁴ for reasons of justice and equality, to operate from behind a “veil of ignorance”. This hypothetical veil would restrict the original contractors from knowing their race, social status, capabilities (aside from the capability for reason or

⁴³ “Original Position,” Stanford Encyclopedia of Philosophy, 2008, Web accessed 2/20/2012, <http://plato.stanford.edu/entries/original-position/>

⁴⁴ Rawls’s theory has a more classically normative element than Hobbes in that Rawls asserted that justice and fairness should be emphasized in the creation of the social contract, while Hobbes made claims about what, empirically, the original contractors would rationally do. Rawls further claimed that the reason justice and fairness should be emphasized is because people have a shared intuition that justice and fairness are concepts that ought to be emphasized.

rationality),⁴⁵ sex, life goals and so on. If the original contractors operated with the sort of ignorance that Rawls imagined, then the contractors would rationally accept two basic principles of justice: the liberty principle and the difference principle.

The liberty principle states that all individual members of a society should be able to pursue their goals to the greatest extent possible without impeding the goals of other members. The original contractors would assent to this principle, because every rational person would assent to having the right to pursue their own goods, and since the rational contractors do not know what their individual goods will be they would also assent to giving everyone this right. The difference principle posits that social and economic inequalities should be arranged so that they always benefit the least well off. This principle would be accepted, because the original contractors do not know what their position in society will be, which could very well be the worst position, and as a result it would be in each individual contractor's best interest to insure that the interests of the worst off are always considered. The payoff of coupling the "veil of ignorance"

⁴⁵ Rawls believed that knowing one is rational is a requirement for creating a social contract, because without rational thought one would not be able to get a grip on the self-interested reasons that one has for entering into the contract.

with these two principles is that every member of society should be able to live an enjoyable life in which they pursue their own goods and this coupling should almost guarantee that minorities and the weak are not victimized by the majority or the powerful.

Rawls's theory posits a concept of justice as fairness with respect to individuals in a society being able to pursue their own goods and this conception of justice alleviates much of the worry about possible injustices associated with Hobbesian contractarianism. However, with respect to animals both forms of contractarianism seem to provide no satisfactory explanation of why humans have duties to animals. In *A Theory of Justice* Rawls expressly said, "Certainly it is wrong to be cruel to animals....The capacity for feelings of pleasure and pain and for the forms of life of which animals are capable clearly impose duties of compassion and humanity in their case. I shall not attempt to explain these considered beliefs. They are outside the scope of the theory of justice, and it does not seem possible to extend the contract doctrine so as to include them in a natural way."⁴⁶ It seems rather cold of Rawls to assert that animals lie outside the scope justice, but he saw no natural way to extend the hypothetical contract to include animals.

⁴⁶ Martha Nussbaum, "Beyond "Compassion and Humanity": Justice for Nonhuman Animals," 299.

The “veil of ignorance” prevents a contractor from knowing all kinds of information about themselves, but one is allowed to know whether or not they are a rational human. With this knowledge one would have no rational problem with ignoring the interests of non-rational animals, and since animals cannot participate in the creation of the contract or abide by its mandates any duties that people have to animals would at best be indirect and would amount to something like “duties of compassion and humanity” which dictate that humans not treat animals with cruelty.

Despite what is explicitly stated by Rawls about animals being outside the scope of justice and the potential for Hobbesian contractarianism to deny human obligations to animals, both forms of contractarianism can admit that humans at least have an obligation to not be cruel to animals, because it is a wide spread interest of humans not to be cruel to animals.

Utilitarianism, Singer and Objections

The ethical theories I have examined up to this point, discounting the modern interpretations, have not seemed to be able to account for the present commonly held intuition that humans have at least some direct duties to animals, such as the duty not to torture them. That most historic moral theories did not attribute direct human

duties to animals was likely due to the conception of animals as being insignificant when compared to humans, but that historic conception was eventually challenged by a new moral theory that would prove to be highly influential in the shaping of the modern animal ethics and animal law.

In 1780 Jeremy Bentham made one of the earliest attempts to shift the focus of human duty to animals from being duties to other humans to being duties owed directly to animals by controversially claiming that, “The question is not, Can they [animals] *reason?* nor Can they *talk?* but, Can they *suffer?*”⁴⁷ Bentham, unlike Aristotle, Hobbes, or Kant, did not ground moral worth in having some advanced cognitive capacity like reason or autonomy, nor did he require that moral worth be tied to human virtue or participating in the creation of a social contract. No for Bentham all that was needed to be included in the moral decision making process was the ability to feel pleasure or pain,⁴⁸ and animals, it seemed to Bentham, could definitely feel pain.

⁴⁷ Peter Singer, *Animal Liberation* (HarperCollins Publishers, 2002), 203.

⁴⁸ It is important to note that while pleasure and pain might be described as mere physical sensations, they may also be described in terms of interest satisfaction for pleasure and interest frustration for pain.

But, then the obvious question is, “Why should suffering or feeling pleasure matter to morality?”

Bentham was dissatisfied with the ethical theories that came before him and sought to create an ethical theory that matched up moral obligation with the motivators of human action. Bentham believed that there were but two motivators of human action, pleasure and pain,⁴⁹ and that pleasure was a good to be sought while pain was a bad to be avoided.⁵⁰ Using these motivators as a guide Bentham created the ethical theory of utilitarianism, according to which an action is moral if it creates more pleasure than pain for the world and immoral if it creates more pain than pleasure for the world. However, while Bentham was looking for what motivated human beings, he did not restrict the focus of the utilitarian ethic to only human pleasure and pain. According to the theory, pleasure and pain are respectively morally good and morally bad, regardless of the race or species of the entity that experiences them, and therefore human beings, as moral agents, have a moral duty to consider the pain and pleasure of anything that can experience pleasure or pain. Animals can experience

⁴⁹ Pleasure and pain are also used synonymously with happiness and suffering.

⁵⁰ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford: Clarendon Press, 1907), 1.

pleasure and pain, and thus when one is considering whether or not to kill and eat an animal, or to use an animal for entertainment or labor, one must weigh the pleasure that he will get from using the animal against not just the pain that some other human being who has an interest in the animal will feel, but also the pain that the animal will feel directly. If one is honest with the calculations, then it will often be the case that the animal pain is greater than the human pleasure for some act, and one therefore has a moral duty to refrain from the considered act.

Bentham advocated for the consideration of the pleasure and pain of all sentient beings, but many critics were quick to point out that pleasure and pain both come in degrees and differ in quality, and that perhaps the pleasure of people is of more moral significance than that of animals. Bentham's student, John Stuart Mill, fleshed out Utilitarian theory to include both higher and lower pleasures as a way of distinguishing between a pleasurable action like reading a book and a pleasurable action like eating.⁵¹ Mill claimed that the higher pleasures should be preferred to the lower and although he does not come right out and say it, it seems implicit in his claims that only

⁵¹ The higher pleasure of reading a book seems better in the sense of being richer and engaging the more sophisticated capacities of human beings.

humans are capable of experiencing the weightier higher pleasures.⁵² While humans might be the only beings capable of experiencing the higher pleasures, being able to experience higher pleasures does not elevate all of one's interests to a higher status than that of another sentient being. Due to greater complexity of the human nervous system it seems that the pleasure that a human gets from exercising all of his or her mental capacities is a better sort of pleasure than the pleasure that a cow gets from basking in the sun and likewise the pleasure that a human gets from eating an artfully prepared steak dinner is probably a richer sort of pleasure than the pleasure that a cow gets from eating grass,⁵³ but just because the human can experience a richer sense of pleasure than the cow it does not follow that the human can discount the pleasure of the cow in his or her moral considerations. Both Bentham and Mill made a case for the consideration of animal pleasure and pain, but their pleas were not taken very seriously in their day and it was not until Peter Singer wrote *Animal Liberation* nearly 200 years after Bentham first made

⁵² John Stuart Mill, *Utilitarianism*, in *Classics of Moral and Political Theory*, 4th Edition (Hackett Publishing Company, 2005), 1000.

⁵³ For the reason that the human can appreciate the effort that went into cooking the steak and can enjoy the complexity of flavors present in steak due to her more sophisticated sense of taste.

his claim about the equal significance of suffering that animal pain was really considered by a significant number of people.

Utilitarianism became a dominant moral and political theory following its creation, and many animals benefitted from the theory's rise to prominence. The first animal cruelty laws were ratified in the early 1800s,⁵⁴ which resulted in a large reduction in the occurrence of intentional torture of animals for sport, such as in the case of dog and cock fighting, and an increase in the welfare of common livestock animals. While it was certainly a good thing that laws were created to deter people from fighting dogs and to penalize farmers who did not adequately feed or water their animals; the full implications of utilitarian theory were often left unrealized, probably due to the fact that many people still believed that human pleasure and pain counted for far more than animal pleasure and pain. This was especially true in the case of animals used for food and research and it was these groups of animals that Singer advocated for in 1975.

In *Animal Liberation* Singer argues that the happiness and suffering of animals counts just as much as the pleasure and suffering of humans, because there is no morally relevant difference between the interests of animals and the interests of humans. Singer makes an

⁵⁴ Peter Singer, *Animal Liberation*, 204-205.

analogy between the arbitrary and unfounded distinctions drawn by racists or sexists to distinguish one group of people from another, and the distinction that is drawn between humans and animals, which is now referred to by many philosophers as speciesism.⁵⁵ The speciesist, Singer claims, attempts to draw a distinction between humans and animals by appealing to sentience, other mental capacities, souls, or some other criteria, but fails in this attempt, because each proposed distinction can be shown to be either unjustified or arbitrary. The Cartesian claim that animals cannot consciously feel pleasure or pain has been proven false by empirical science, the claim that humans have a special soul that animals do not have is empirically unverifiable and has been well argued against, the mental capacities of borderline⁵⁶ human cases (who are granted the same protection of interests as normal humans) are the same or less than that of most animals, and differences in genome, having fur or lacking a resemblance to human form are just arbitrary distinctions that should have no more bearing on moral relevance than skin color or gender. Given the moral irrelevance of speciesism Singer concludes that the practices of using

⁵⁵ Peter Singer, *Animal Liberation*, 6-7.

⁵⁶ Borderline human cases include very young children, the senile, the severely mentally handicapped and the comatose.

animals for food and for research are immoral, because the pain caused to the animal is obviously greater than the benefit that humans derive from using the animal.

Singer's argument is powerful and resonates with many of our shared intuitions about how people ought to treat animals, but the full extent of his view is also radical and as such his argument has garnered more than a few opponents. One of the more outspoken critics of Singer's view is Judge Richard Posner and his argument contra Singer is, I think, fairly representative of the view of a majority of the human populace.

In *Animal Rights: Legal, Philosophical, and Pragmatic Perspectives*, Posner attacks both the plausibility of utilitarianism as a moral theory and Singer's argument that animal pains and pleasures count just as much as similar human pains and pleasures. Posner first sets his sights on utilitarianism in general and asserts that, "By itself it has a certain appeal" but that when one takes the theory to its logical extreme "it becomes unpalatable and even bizarre".⁵⁷ He claims that utilitarianism entails a panspeciest ethic that could very well

⁵⁷ Richard A Posner, "Animal Rights: Legal, Philosophical, and Practical Perspectives," in *Animal Rights: Current Debates and New Directions*, ed. Cass Sunstein and Martha Nussbaum (Oxford University Press, 2004), 60.

obligate medical experimentation on humans in order to increase the pleasure of the far more numerous members of the non-human animal kingdom. He also makes an appeal to intuition in a hypothetical example in which a dog will bite the face of a child unless some incredible pain is administered to the dog, a pain so great that it is more than the pain that the child will experience from being bitten by the dog. In this example the utilitarian seems committed to letting the dog bite the face of the child and Posner wagers that no-one will agree to such a consequence of utilitarianism.⁵⁸ These particular counter examples seem like strong reasons to question the credibility of utilitarian theory, but are Posner's concerns valid?

The imagined case of human experimentation for the sake of animals could be devastating to utilitarianism, if humans and animals experienced the same sorts of pleasures or pain and if there was no other way to increase animal pleasure than by testing on humans (which is obviously not the case). As Mill⁵⁹ pointed out most humans⁶⁰

⁵⁸ Richard A Posner, "Animal Rights: Legal, Philosophical, and Practical Perspectives," 60.

⁵⁹ Singer seems to disagree with Mill that some human pleasures (or preferences) are qualitatively better than animal pleasures, but Singer admits that most humans are capable of having more complex and varied pleasures than animals, which would *prima facie* give more weight to human lives when performing a utilitarian calculus.

are capable of experiencing many higher order pleasures that animals cannot experience and the extent to which a human can feel pain is typically greater than that of a non-human animal.⁶¹ Because humans can experience more varied and better quality pleasures their lives are worth more in the utilitarian calculus and human pain generally counts for more than animal pain,⁶² and therefore it is nearly always better to do testing, if such testing increases the amount of pleasure in the world, on non-humans, even if the goal of such testing is to discover some cure for animals. So in order for Posner's example to have much bite he would need to imagine some ridiculous situation in which a handful of human utilitarians exist and billions of sick animals exist and that the humans are able to discover a cure for the sick animals by

⁶⁰ The borderline human cases seem to be on a par with or worse off than most animals with respect to experiencing pleasure and pain and in such cases the utilitarian might be have to admit that she has no decisive reason to test on animals rather than borderline human cases.

⁶¹ Humans are capable of experiencing anxiety and fear of death or pain in a way that most animals are not, because humans are able to see themselves as temporal beings with an extended future. Thus humans are not only harmed by the anticipation of pain, as well as the actual physical pain, but also by the loss of being able to complete future projects or fulfill future interests.

⁶² This is not to say that human pain always counts more than animal pain, but that the pain that a human experiences is usually more significant and therefore it is granted more consideration. As a rule though, a human pain that is equally as intense and qualitatively the same as an animal's pain counts the same as the animal pain.

performing some painful experimentation on one another. Given the ridiculousness of the scenario it is unclear how strong the example is in showing the absurdity of utilitarianism. Likewise in the biting dog example, Posner asks us to assume that the only way to stop the dog is to deliver some great pain to him or her and that this pain will be greater than the pain of the child,⁶³ but isn't this assumption just silly? Are we really to assume that nothing but the infliction of some horrible pain is going to stop the dog from biting? Posner has a point that the possible extremes of utilitarianism seem, well, extreme, but his counter examples seem equally far-fetched and thus not very convincing. If Posner wanted to argue against utilitarianism I think he would have been better served by focusing on the classic human only counter examples in which one human being is sacrificed in order to provide happiness or pleasure to others.

Having given what he considers a counter to utilitarianism, Posner then turns specifically to Singer's argument for treating animal pain as being on an equal footing with human pain. He begins this new attack by claiming that Singer does not adequately take into account the pleasure that people get from eating meat and by attempting to

⁶³ The child is a better example to use, because the child's ability to experience pain should be roughly equal with that of a dog due to the limited psychological and emotional capacities of the child.

show a correlation between equating human and animal pain with some of the horrendous acts perpetrated against humans by the Nazis in WWII.⁶⁴ The Nazi correlation is not even worth examining, but the pleasure people gain from eating meat perhaps has some merit. It is true that many people gain much gustatory satisfaction by eating the flesh of animals and for the particularly glutinous eating animal flesh might result in lots of pleasure. However, it would be a mistake to think that the amount of pleasure that a human being gets from eating an animal is greater than, or perhaps even comparable to, the harm that an animal suffers when it is killed to feed a human. This is not to say that the pleasure that human beings get from eating tasty food does not count for anything, but rather to point out the arrogance in thinking that a preference for eating juicy steaks should receive more consideration than the life of an animal. One might argue that an animal need not suffer in order to feed a human, ie the animal is raised in a respectable way, allowed to live an acceptably lengthy life, and is killed in a painless fashion, and that minus any suffering humans commit no moral foul in using animals as a food source. From a utilitarian perspective this imagined case seems morally

⁶⁴ Richard A Posner, "Animal Rights: Legal, Philosophical, and Practical Perspectives," 61-63.

unproblematic and even Singer would likely endorse such a practice of using animals for food.⁶⁵ However, this imagined case is a far cry from the actual practices exercised in the use of animals for food. Posner's objection is not that farm animals could be used in a harmless way, but that Singer does not take the human pleasure from eating meat into enough consideration given current (often very cruel) animal husbandry practices. I judge that Posner provides many poor reasons to reject utilitarianism and Singer's animal consideration argument, but he does make a very strong criticism towards the end of his paper.

Posner's best counter to Singer is the denial of the view that speciesism is on the same level as racism or sexism and the appeal to the shared moral intuition that human lives, regardless of mental capacities, are inherently worth more than animal lives. Singer claims that speciesism is a bad thing and provides a valid argument for thinking that this is the case, but the fact of the matter is that most people just do not agree. The empathy that human beings share with one another is generally just greater than the empathy that humans

⁶⁵ In my opinion the imagined harmless use of animals for food is not as morally pristine as a utilitarian might think. The imagined practice is certainly better than the cruel ways in which we use farm animals now, but even if an animal is treated with the utmost respect and killed in a painless fashion after having lived for a few years, it still seems morally repugnant to take the life of a living creature just to satisfy the human preference for eating animal flesh.

share with animals and when given the choice between saving a group of animals or a single human, most anyone, who isn't a moral philosopher, is not going to think twice about sacrificing the animals to save the human. People are speciesist, they like being speciesist and Posner knows this. Posner's example of choosing between saving a single human and 101 chimpanzees, with 1% of the life value of a human,⁶⁶ is as powerful a refutation of Singer's argument as he likely needs for most people, because in the end Posner's practical approach is likely to resonate more strongly with common shared intuitions than Singer's precise and logical philosophical argument.

Posner rejects the rational, and perhaps disconnected, philosophical view given by Singer and instead proposes a more commonsense or practical approach for interacting with animals. Posner wants to give human interests much greater value than any animal interest, but he is not unsympathetic to the suffering of animals, he claims that we ought to, "... learn to feel animals' pains as our pains and to learn that... we can alleviate those pains without substantially reducing our standards of living and that of the rest of the world and without sacrificing medical and other scientific

⁶⁶ Richard A Posner, "Animal Rights: Legal, Philosophical, and Practical Perspectives," 66.

progress.”⁶⁷ He also accepts that laws punishing cruelty to animals are good laws to have.⁶⁸ One gets the feeling that Posner is not anti-animal protection, but rather anti-philosophy about animal protection. He claims that philosophical argument is not convincing and that the best route to obtaining better treatment for animal is not through sound reasoning, but by appeal to human empathy. His point about what psychologically makes an argument convincing to most people is well taken, and even though he is unwilling to embrace the kind of liberation that Singer argues for, Posner is at least willing to accept that human beings should not be cruel to, or neglect, animals.

Utilitarianism was the first major Western ethical theory to posit that humans have direct duties to animals and Peter Singer used the theory to argue for one of the most comprehensive views about human duties to animals that has ever been published, but as strict as utilitarianism is about human duties to animals it still leaves some room for animal exploitation, so long as a humans stand to gain a lot from causing animals pain. There is also an issue regarding how one is to go about actually using the theory as a guide for action.

⁶⁷ Richard A Posner, “Animal Rights: Legal, Philosophical, and Practical Perspectives,” 66.

⁶⁸ Richard A Posner, “Animal Rights: Legal, Philosophical, and Practical Perspectives,” 66.

Utilitarianism purports to provide a straightforward moral course of action by weighing the pleasure and pain for everyone involved not only at any particular moment, but also into the future. However, it has proven to be well-nigh impossible to do an actual empirical measurement of the pleasure and pain experienced by all the parties in any course of action and since there is not precise way of empirically measuring the consequent pleasure and pain of an action we are forced to rely on rough estimates based on intuition. Our intuitions favor human pleasure and absence of pain over animal pleasure and absence of pain and if the human pleasure gained from using an animal is great, such as in the case of using a few mice to test a cancer treatment that has the potential to save thousands of human lives, then utilitarianism provides no prohibition against sacrificing the animal. For many, this possibility of animal use is either an unproblematic aspect or a benefit of utilitarianism, but for the final group of ethical theories that I will examine, human duties are not tied to substantial or equal consideration of animal pleasure and pain, rather human duties to animals stem from rights that animals possess.

Rights Based Theories

In the 20th century animals arguably received more philosophical attention than they did in every century prior. With all

the new attention, novel theories about human obligations to animals were formed and arguments for the amount of consideration that animals should receive were taken to unprecedented levels. Towards the end of that century some philosophers began to see animals as deserving of more than just respect as useful tools for human beings, but as independent living entities entitled to the basic rights that all humans have.

Rights based views, like utilitarian views, posit direct human obligations to animals, but unlike utilitarian views, rights based views do not allow for any wiggle room with respect to use or sacrifice of animals to serve human interests. Take the case of a human right, such as the right to be free from unnecessary harm. If a human being has this right⁶⁹ then the human cannot be unnecessarily harmed in order to serve another's interest, even if some good is suspected to come from infringing upon the right, like in the case of torturing a

⁶⁹ I say "if a human being has this right", because how any being has a right is not readily agreed upon. On one view rights are intrinsic and are granted just by being a certain sort of thing and on the opposing view rights are granted via a contract that is established by a society of rational beings. According to the intrinsic view humans have rights just because they are human, but on the contract view rights are human inventions that are granted by being agreed to in a social contract. The same opposing accounts could be applied to animal rights, but the animal rights theorists that I examine both appeal to the intrinsic rights view.

petty thief for information about a suspected theft. Animal rights theorists want to grant certain basic rights including the right to life, freedom from unnecessary harm, right to food, shelter, space, social outlets, etc. to non-human animals and they argue that animals deserve the same sort of unfringeable protection for their rights that humans have. According to this sort of theory our duties to animals come directly from the rights that animals have and the strength of the duties to animals is just as strong as the strength of the analogous person-to-person duties.

All rights based theories of animal ethics appeal to rights as the source of duties, but each individual theory does not claim the same set of rights exist for animals in general or that all groups of animals have the same rights. One theory may claim that pet animals have the right to be free from unnecessary harm, but not wild animals, while another theory might extend the right to include wild animals. There are many theories about what rights animals have, but I will only be examining the work of two philosophers that I think present the best arguments for animal rights, Tom Regan and Gary L. Francione.

According to Regan all animals have the basic moral right to respectful treatment and respectful treatment requires that animals

are never treated as mere means for use by humans.⁷⁰ Regan's basic moral respect is just like Kant's second formulation of the categorical imperative, but Regan extends the imperative to cover animals, because he claims that animals have inherent value as experiencing subjects of a life. So while Kant claimed that humans have inherent value as rational agents, Regan posits that having a complex set of psychological and physical characteristics, that include but are not limited to being sentient, having desires, being able to plan and intend, having means of perception, and having emotions, is indicative of being an inherently valuable subject of a life.

On Regan's view inherently valuable subjects of a life, which all animals are, have the moral right never to be treated as a means. This entails that many of the ways in which humans interact with animals is morally wrong. Killing animals for food is wrong as is killing animals for their fur or skin. Additionally using animals as scientific, medical or cosmetic research subjects is wrong and any other way in which an animal's basic right to respectful treatment is violated is also wrong. This view may seem rather extreme; using mice to test drugs to cure cancer does not really seem all that morally reprehensible to most

⁷⁰ Tom Regan, *Defending Animal Rights* (University of Illinois Press, 2006), 43.

people, but as Regan would probably be quick to point out the view that slaves had rights or that women had rights was viewed as extreme only a short while ago in human history.

Still one might agree that treating people as slaves or restricting women's' rights on the basis of gender alone was and is wrong, but disagree that using animals as a means to human ends, whether significant or trivial, is similarly wrong. One could maintain that animals are somehow relevantly and significantly different than humans, but what would the relevant and significant difference be? Just as Singer asserted that the alleged differences between humans and animals was a result of mere speciesism, Regan claims that the differences proposed by critics of the rights view are irrelevant and that the only thing that matters for having rights is being the experiencing subject of a life. Some critics of the view propose that humans have rights and animals don't, because humans are rational or because humans actually contribute to the society of the social contract, but Regan's response is that very young children, the senile and mentally impaired human beings lack these capacities or abilities and yet are still viewed as having the basic moral right to respectful

treatment. Other critics, such as R. G. Frey,⁷¹ claim that the idea of inherent rights is just non-sense and that neither humans nor animals have inherent rights. Frey gives the example of human being whose quality of life is so bad that it "...is a life I would not even wish upon my worst enemies,"⁷² and concludes that to call such a life inherently valuable makes no sense and that it would be best to dispense with talk of inherent value all together. Regan admits that Frey is correct in his assessment that the quality of life for both humans and animals can vary to the degree that one would not wish to live at certain levels of life quality, but as Regan rightly points out, inherent value is not the same as quality of life. Regan notes that inherent value is a difficult thing to verify empirically and that his ethical theory would be simpler if he did not appeal to inherent value, but nevertheless he asserts that the best ethical theory about human obligations must posit inherent value,⁷³ and that being the experiencing subject of a life is sufficient for having inherent value. His response appears valid,

⁷¹ Tom Regan, *Defending Animal Rights*, 48-49.

⁷² Tom Regan, *Defending Animal Rights*, 49.

⁷³ Regan does not say specifically why the best ethical theory, but presumably he has something like Kant's view about the grounding of human created value necessarily stemming from the inherent value of people in mind.

because inherent value does seem to do the best job of explaining why humans have the shared belief that humans have obligations to animals and to borderline persons with incredibly low qualities of life. When we argue about whether a person in a coma ought to be kept alive or that a person with a severe mental impairment ought to be able to live a life, any judgment on the side of protecting the lives of these individuals must appeal to the idea of inherent value of being the subject of a life. Even if one does not posit the existence of inherent value, one could still claim that animals and humans, regardless of quality of life, should not have their qualities of life further degraded by cruel or unnecessarily harmful treatment. One could mount such an argument by deriving a right to be protected from cruelty via an appeal to some general moral law such as, “it is always wrong to unnecessarily harm sentient beings”. This is the approach that Gary L. Francione uses in *Animals: Property or Persons?*

Francione claims that any action that results in unnecessary pain to a sentient being is wrong in itself, and that this gives everyone a moral duty, owed directly to the sentient being, to refrain from

performing such an action.⁷⁴ Francione calls this the *humane treatment principle* and supports the claim that we ought to follow such a principle by both an appeal to the incredibly widespread acceptance of the principle and to the use of the principle by the legal system to justify all sorts of animal cruelty laws. The *humane treatment principle* is uncontroversial, but Francione makes the further claims that although people generally agree that animals should not be unnecessarily harmed, in practice all sorts of unnecessary harm is perpetrated against animals, that the reason for this disparity between people's beliefs and their actions is due to the fact that animals are viewed as property and that in order to promote the following of the *humane treatment principle* the interest of animals in not being subjected to unnecessary harm by humans must be protected by a legal right.⁷⁵

As Francione points out, there are far too many cases in which the interest of animals in being free from unnecessary harm is blatantly ignored in favor of some less weighty human interest. In

⁷⁴ Gary L Francione, "Animals: Property or Persons?" in *Animal Rights: Current Debates and New Directions*, ed. Cass Sunstein and Martha Nussbaum (Oxford University Press, 2004), 113.

⁷⁵ Gary L Francione, "Animals: Property or Persons?" 113, 116 and 124.

laboratory experimentation animals are subjected to all sorts of pains that may not be necessary to attain the information that the researchers are looking for, as in the case of a fairly recent obesity experiment on rhesus monkeys,⁷⁶ and factory farms across the country are allowed to do any number of cruel acts to animals, like un-anesthetized castration, “[w]henver the purpose for which the act is done is to make the animal more serviceable for the use of man.”⁷⁷ So the law does not practice what it preaches and according to Francione the culprit responsible for the failure to act on the *humane treatment principle* is the property status of animals.

The law and most people view animals as property of humans and Francione claims that it is ridiculous to think that the interests of property will ever really be considered when weighed against the interests of a property owner.⁷⁸ If the owner of a car wants to change

⁷⁶ Andrew Pollack, “Today’s Lab Rats of Obesity: Furry Couch Potatoes,” *New York Times*, February 19, 2011, web accessed 3/1/2012, http://www.nytimes.com/2011/02/20/health/20monkey.html?_r=1&page_wanted=all

⁷⁷ Gary L Francione, “Animals: Property or Persons?” 118.

⁷⁸ Dr. Joan McGregor pointed out to me that there are some legal cases, wetlands for example, in which a property owner is significantly restricted in the use of their property. These cases, however, are few in number and the cases involving legal protection of a shared

the color of the car or put in a new engine, the owner never stops to consider if the car has an interest in not having the changes made, and even if the car had such an interest the owner's interests would just override the car's interest. Animals, although living and thus distinct from non-living property like a car, are labeled and treated as property and so long as animals are treated as property they will suffer the injustice of having their interests ignored by humans, even in cases in which the interest at stake is the interest in being free from unnecessary harm or cruelty.

In order for the disparity between the acceptance of the *humane treatment principle* and the practice of the principle to be fixed, Francione argues that the status of animals must be changed from that of human property to that of persons⁷⁹ whose interests are worthy of equal consideration with any human interest.⁸⁰ Francione arrives at this conclusion by systematically refuting various attempts to draw a relevant distinction between human persons and animals, including mental capacities, interest in continued existence, self-awareness and

environment do not seem analogous to cases involving protection of private property like animals.

⁷⁹ What Francione means by person is a being that cannot be used as a mere means, or the opposite of a thing.

⁸⁰ Gary L Francione, "Animals: Property or Persons?" 131.

use of language, and by appealing to another commonly accepted principle, the *principle of equal consideration* or *principle of equality*. According to this principle relevantly similar cases are to be treated the same and since there is not a relevant distinction between humans, then we ought to treat cases of animal suffering the same as human suffering. Francione further claims that the only way that animal interest in not suffering will be treated with equal consideration is if animals are treated as persons and granted the right not be treated as a means to an end.

More Objections to Rights Based Views

Both Francione and Regan claim that animals have rights that put them on an equal footing with humans with respect to being used as a means to an end, but one might wonder just how far the rights view forces humans to go in their treatment of animals. Specifically one might object that granting animals rights that we have historically only associated with humans would entail the ridiculous requirement that animals be given the right to vote or own firearms or that wild animals should be policed and penalized for actions that humans consider criminal such as stealing from or killing one another. However, both philosophers are quick to point out that their views only advocate treating animals as beings with the right to not be treated as

things for human use, not that animals should be given all the rights that humans have or treated exactly the same as any rational adult human.⁸¹ Regan and Francione argue that we ought to treat animals as being worthy of respect as living things that are not mere means, but admitting that an animal has the right not to be used does not entail that the animal has the right to vote any more than accepting the right that a two year old child has not to be used entails that the child has a right to vote. Likewise the acceptance of animals having the right not to be used creates a duty for human beings who understand the concept of rights, to refrain from treating animals as a means, but it does not require that humans police the animal kingdom. Animals do not understand the concept of rights, nor could they, and therefore do not have the moral or legal duty to treat other animals as having the right not be used and humans do not have a duty to protect the rights of one animal against another.

Another worry that one might have is that the rights based approach fails to appreciate some distinctions between humans and animals that are not dependent on equally relevant interests, mental capacities or some other sort of shared biology. Most people accept that

⁸¹ Gary L Francione, "Animals: Property or Persons?" 132.
Thom Regan, *Defending Animal Rights*, 50-51.

killing another innocent person is wrong and that biological characteristics such as being able to feel pain contribute to the wrongness of killing a human and that animals have many of the biological characteristics that contribute to the wrongness of killing a person. Most people also accept that biological distinctions between people do not affect the wrongness of killing a person, ie whether one is tall, short, black, white, thin, fat, male or female makes no difference with respect to the wrongness of killing. However, these same people might also claim that although the ability to feel pain contributes to the wrongness of killing a person, it is not the main reason that killing a person is wrong.

Cora Diamond claims that there is something distinctive about a human person that all of people understand and that this distinction is made clear when we think about eating an animal that has died of natural causes after having lived a good long life in comparison to eating a human that has died after having lived a good long life.⁸² Arguments against killing animals in order to eat them, like Regan's or Singer's or Francione's view, all appeal to a principle of equality

⁸² Cora Diamond, "Eating Meat and Eating People," in *Animal Rights: Current Debates and New Directions*, ed. Cass Sunstein and Martha Nussbaum (Oxford University Press, 2004), 95.

between cases of human suffering and cases of animal suffering, and conclude that humans ought to treat cases of animal suffering equally with relevantly similar cases of human suffering. None of these theories argues for a moral prohibition against eating the flesh of animal that has died of natural causes. That one has no moral duty not to eat the flesh of an animal that has died of natural causes does not seem strange at all to most people, even those who accept the arguments against killing animals for food. Diamond calls attention to a disparity that is confounding for animal rights arguments that turn on the equivalence principle, namely that while most everyone agrees that it is morally acceptable to eat the flesh of animal that has died of natural causes, it is never morally ok to eat the flesh of a dead human, regardless of the cause of death. Diamond claims that there is something contained within our understanding of what it means to be a human that prohibits us from ever viewing humans as a source of food and that this prohibition is not built into our understanding of what it means to be an animal.⁸³ Diamond also asserts that this extra stuff built into what it means to be a human person, as opposed to an animal, is also the reason why we hold funerals for people and not dogs and why we would judge a slave owner who, on his deathbed, released

⁸³ Cora Diamond, "Eating Meat and Eating People," 96.

his human slaves as benevolent and a cow owner who released his cows on his deathbed as crazy.⁸⁴ However, this fact about human psychology does not do the work that Diamond thinks it does.

Diamond highlights an intuition or belief that many people have in order to refute the claim of rights based arguments that it is wrong to kill animals for food, but despite her claim to the contrary,⁸⁵ this distinction in the way that we view humans and the way that we view animals seems to be speciesist. Diamond claims that there is a relevant distinction between humans and animals, but provides no specific relevant reason for thinking this is the case. She is correct that people accept the food label for animal flesh and reject the label of food for human flesh, but that people do so is not a good reason to think that there is a relevant difference between humans and animals.

Many actual views about how humans ought to treat animals seem, or just are, speciesist in the sense that the distinctions used to justify treating animal interests different than similar human interests are just unjustifiably arbitrary preferences for our own species, but many people also have no problem being speciesist and do not accept that speciesism is morally comparable to racism or sexism.

⁸⁴ Cora Diamond, "Eating Meat and Eating People," 104.

⁸⁵ Cora Diamond, "Eating Meat and Eating People," 96.

Such people claim that although empirical evidence has refuted most of the claimed distinctions between humans and animals, that there is still nothing wrong with favoring human interests over animal interests. Such people might even accept the view that animals have certain rights, such as the right not to be unnecessarily harmed, but that many of the ways in which we use animals really are necessary or are better than any alternative. Take for example the case of medical experimentation on animals in research laboratories. Some people might claim that in order to protect the human right to be free from unnecessary harm human researchers are required do painful experiments on animals so that current or future humans can be spared the pain associated with a disease like cancer, because testing on animals is the only way to learn how to treat human disease or that animal testing is the best of all the possible alternatives including voluntary human testing and computer modeling. It is obvious that using animal testing is neither the only way to learn how to cure human disease, nor is it the best way when compared to testing on voluntary human subjects, but many people still have no moral qualms about using animals as test subjects and in fact praise the medical progress our species has made as a result of using animals as a means to our ends. I can think of no reply that would convince a person who

refuses to acknowledge the moral turpitude of holding the speciesist belief that animals have no right to not be used as means to further human end while relevantly similar humans do, and I further admit that I feel little reason to try to convince anyone who has suffered, or has known someone who has suffered, from cancer that using animals as test subjects for procedures that may cure cancer is a serious moral wrong. However, what I would argue, and what I believe most anyone would agree to, is that animals have a right to be free from use that is cruel, tortuous, or neglectful.

The rights based view provides the strongest reasons in support of the common belief that animals are worthy of moral consideration that is owed directly to the animal and the rights view seems to be the most consistent with how humans treat other humans, but this type of view also has the strictest and most far reaching requirements for human interaction with animals, some of which may seem too extreme for most people to accept. Many people are just unwilling to accept that animals have a right not be used as a source of food that humans evolved to eat or that there is anything wrong with doing painful testing on mice in order to cure cancer. Such people might be making some mistakes about the degree to which evolution has a say in ethical matters or how necessary animal testing is to curing human disease,

but even if one rejects some of the more extreme obligations of rights based views, one could surely agree to the claim that animals have the right not to be treated with cruelty by humans or to be neglected by humans who have at some point chosen to take care of the animal.

Animal Law History

Up to this point I have outlined what I think are the best ethical theories and some objections to those theories and have claimed that each of these theories agrees that humans should not be cruel to animals, but I will now shift my focus from ethics to the law and likewise argue that the law also agrees that humans should not be cruel to animals. I will begin my exploration of animal law by sketching a brief history of it.

Up until the 1600's animals were not considered proper targets for legal protection, but just as philosophers in this period began to take the ethical consideration of animals more seriously so too did the law. Legal protection for animals was long thought by law scholars to have begun with the passing of Richard Martin's *Cruel Treatment of Cattle Act* in 1822, but Thomas Wentworth's *Act against Plowing by the Tayle, and Pulling the Wool off Living Sheep, 1635 Ireland* and Nathaniel Ward's *Off the Bruite Creatures*, Liberty 92 and 93 in The Body of Liberties of 1641 Massachusetts Colony, are the first official

animal cruelty laws⁸⁶ of England and America.⁸⁷ The language of these early laws suggests that the obligations that humans had to animals were at best indirect,⁸⁸ but these laws broke ground in sanctioning legal punishment for abuse of common livestock of the time, and set the stage for a much richer body of animal law that would follow in the coming centuries.

Over the course of the next 80 years English public and legal beliefs about the value of animals began to change and Martin's Act was modified to better fit these changing beliefs. In 1835 Martin's Act was changed to the Cruelty to Animals Act and updated to include punishment for baiting or fighting any animal and to widen the scope of punishment for animal cruelty (which included wanton beating,

⁸⁶ These laws sanctioned punishment in the form of fines for pulling the wool off of living sheep and for acting with cruelty towards many creatures commonly used by man.

⁸⁷ "Animal Rights Law," Animal Rights History, 2011, web accessed 3/1/2012, <http://www.animalrightshistory.org/timeline/animal-rights-law.htm>.

⁸⁸ "No man shall exercise any Tirranny or Crueltie towards any brute Creature which are usuallie kept for man's use." – Massachusetts Colony [Nathaniel Ward], "Off the Bruite Creatures," Liberty 92 and 93 in *Massachusetts Colony Body of Liberties 1641*, Animal Rights History, 2011, web accessed 3/1/2012, <http://www.animalrightshistory.org/animal-rights-law/renaissance-legislation/1641-massachusetts-liberties.htm>.

negligence and torture) to encompass all domestic animals.⁸⁹ In just 13 years, English law had come to recognize that nearly all animals deserved to be protected from cruel treatment by humans, and even though the punishment was a small monetary fine the message that animal suffering mattered was clear. The Cruelty to Animals Act was updated again in 1850 and 1854, to provide imprisonment as a possible punishment for animal cruelty and in 1879 the act was amended to cover animals used as test subjects for research. In 1900, a final amendment of the act was made to the effect that “Any person shall be guilty of an offence who, whilst an animal is in captivity or close confinement, or is maimed, pinioned, or subjected to any appliance or contrivance for the purpose of hindering or preventing its escape from such captivity or confinement, shall, by wantonly or unreasonably doing or omitting any act,... cause or permit to be caused any

⁸⁹ “An Act to Consolidate and Amend the Several Laws Relating to the Cruel and Improper Treatment of Animals, and the Mischiefs Arising from the Driving of Cattle, and to Make Other Provisions in Regard Thereto,” in *A Collection of the Public General Statutes Passed in the Fifth and Sixth Year of the Reign of His Majesty King William the Fourth, 1835*, Animal Rights History, modified 2011, web accessed 3/1/2012, <http://www.animalrightshistory.org/animal-rights-law/romantic-legislation/1835-uk-act-cruelty-to-animals.htm>.

unnecessary suffering to such animal; or cruelly abuse, infuriate, tease, or terrify it, or permit it to be so treated.”⁹⁰

While Martin’s Act was being amended in England, Henry Bergh began leading the charge for legal animal protection in the United States.⁹¹ Bergh started in New York, creating the American Society for the Prevention of Cruelty to Animals (ASPCA) in 1866, and due largely to his efforts New York passed “*An act for the more effectual prevention of cruelty to animals*,” in 1867. This act stated, “If any person shall over-drive, over-load, torture, torment, deprive of necessary sustenance, or unnecessarily or cruelly beat, or needlessly mutilate or kill, or cause or procure to be to be over-driven, over-loaded, tortured, tormented or deprived of necessary sustenance, or to be unnecessarily or cruelly beaten, or needlessly mutilated, or killed as aforesaid any living creature, every such offender shall, for every such offence, be guilty of a misdemeanor.”⁹² The act also provided further

⁹⁰ “Wild Animals in Captivity Protection Act 1900,” Animal Rights History, web accessed 3/28/2012, <http://www.animalrightshistory.org/animal-rights-law/victorian-legislation/1900-uk-act-wild-animals-captivity.htm>

⁹¹ David Favre, “Overview of Historical Materials,” Michigan State University Animal Legal and Historical Center, modified 2002, web accessed 3/1/2012, <http://www.animallaw.info/historical/articles/ovushistory.htm>.

conditions for penalizing animal fighting, animal negligence, animal abandonment and the use of dogs as vehicles. A similar version of this law was soon passed by most of the North Eastern States and today every US state has an animal cruelty law similar to the New York act of 1876⁹³ and in 35 states animal cruelty is a felony offense.⁹⁴

Anti-cruelty laws constituted most of the animal laws that were passed in the US up until 1958. In this year the Humane Slaughter Act was passed, which was unique in a few ways. First, this act created legal recognition of an animal's interest in not dying in specific ways and it was the first federal animal protection law. The act specifies that animals used for food are to be, "...rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut; or by slaughtering in accordance with the ritual requirements of the Jewish faith or any other religious faith that prescribes a method

⁹² "An act for the more effectual prevention of cruelty to animals," in *New York Revised Statutes 1867*: Chapter 375: Sections 1-10, Animal Legal and Historical Center, web accessed on 3/1/2012, <http://www.animallaw.info/historical/statutes/sthusny1867.htm>.

⁹³ Stephan K. Otto, ed., *Animal Protection Laws of the United States of American and Canada 6th Edition*, Animal Legal Defense Fund, modified 2011, web accessed 3/2/2012, <http://aldf.org/form.php?id=54>.

⁹⁴ Stephan K. Otto, "State Animal Protection Laws – The Next Generation," *Animal Law* Vol. 11:131, (2005), 134.

of slaughter whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument and handling in connection with such slaughtering.”⁹⁵ So while the act asserted that humans have a duty to treat animals in a humane way, even when killing them, the act also made an exemption for the practice of kosher slaughter. This exemption would spark a new beginning for animal law in the United States.

In 1972, Henry Mark Holzer, with support from the Humane Society of the United States (HSUS), filed a lawsuit against the Humane Slaughter Act on the basis that the act’s special exemption of kosher slaughter methods violated the Establishment and Free Exercise Clauses of the First Amendment of the US constitution.⁹⁶ Holzer’s suit was ultimately unsuccessful, but his bold move, coupled with the release of Singer’s *Animal Liberation* in 1975, got other lawyers and institutions interested enough in animals to start making moves of their own.

⁹⁵ “Humane Methods of Livestock Slaughter,” in *United States Code Annotated*. Title 7. Agriculture. Chapter 48, Animal Legal and Historical Center, modified 2011, web accessed on 3/1/20112, <http://www.animallaw.info/statutes/stusfd7usca1901.htm>.

⁹⁶ Joyce Tischler, “The History of Animal Law, Part 1 (1972-1987),” *Stanford Journal of Animal Law and Policy* Vol. 1, (2008), 5, 7.

The first animal rights law course was taught in 1977 and in the next year a group of attorneys from the San Francisco area formed Attorneys for Animal Rights (AFAR), which would later become known as the Animal Legal Defense Fund.⁹⁷ For the first time animals had a group of professional lawyers who were intent on serving as champions for animal rights and these lawyers were not afraid to attack human interests that resulted in animal harm. Animals had unquestionably been the ideal test subjects for medical and scientific research for a long time prior to the formation of AFAR, but in 1981, the newly formed group of animal lawyers filed a criminal suit against Dr. Edward Taub accusing Dr. Taub of treating the monkeys he used in his research in cruel and inhumane ways.⁹⁸ This suit brought the seemingly pristine scientific use of animals for research under the legal and ethical spotlight and also was one of the first major suits to appeal to the newly enacted federal Animal Welfare Act of 1966. This act was created 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; to assure the humane

⁹⁷ Joyce Tischler, “The History of Animal Law, Part 1 (1972-1987),” 5, 10.

⁹⁸ Dr. Taub’s cruelty included keeping the monkeys in tiny cages and failing to clean the cages so that the monkeys were forced to sit in their own feces, feeding the monkeys with inedible food and failure to provide proper veterinary care for the monkeys.

treatment of animals during transportation in commerce; and to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.”⁹⁹ Taub was convicted on one charge of failure to provide proper veterinary care at the circuit court level, but this charge was later overturned by an appellate court.¹⁰⁰

Although many of the initial suits brought against cases of animal cruelty met with failure, this did not stop the growing number of lawyers sympathetic to the plight of animals in this country from mounting new cases and spreading information about the legal status of animals. In 1985, the ALDF filed a lawsuit against the Department of Environmental Conservation (DEC) for the use of cruel leg traps for trapping animals.¹⁰¹ The very next year members of the ALDF Boston chapter filed a lawsuit against the Provimi Corporation claiming that the corporation’s practice of total confinement of the veal calves was a violation of Massachusetts’s anti-cruelty laws.¹⁰² Also in 1986, the ALDF teamed up with the Humane

⁹⁹ “Transportation, Sale, and Handling of Certain Animals,” *United States Code Annotated*. Title 7. Agriculture. Chapter 54, Animal Legal and Historical Center, modified 2010, web accessed on 3/1/2012, <http://www.animallaw.info/statutes/stusawa.htm>.

¹⁰⁰ Joyce Tischler, “The History of Animal Law, Part 1 (1972-1987),” 20.

¹⁰¹ Joyce Tischler, “The History of Animal Law, Part 1 (1972-1987),” 36.

Society of Rochester to win one of their first suits against the cruel practice of branding the faces of dairy cows.¹⁰³ In addition to the ever increasing number of cases involving protection of animal interests being filed, the first “Animal Law Report” was established in 1984, as an official report of the American Bar Association’s Animal Protection Committee. This report provided case information and information pertaining to new advances within animal law to the legal community, and today there exist numerous peer reviewed journals that are specifically focused on animal law and policy.

A Disparity in Current Animal Law

It should be apparent from examining the history of animal law that people care about animal interests and that the law, in recognition of this fact, has been used, is being used, and will continue to be used as a way of protecting some animal interests from human abuse. Currently the law, at the state level via anti-cruelty laws and at the national level via the humane slaughter and animal welfare acts, is used to protect the interests of many animals in not being subjected to cruel, neglectful or tortuous treatment by human beings, by providing increasingly stiffer

¹⁰² Joyce Tischler, “The History of Animal Law, Part 1 (1972-1987),” 34.

¹⁰³ Joyce Tischler, “The History of Animal Law, Part 1 (1972-1987),” 38.

penalties for instances of animal cruelty.¹⁰⁴ Legal and moral philosophers are also arguing for new and more effective means of protecting many other animal interests¹⁰⁵ and for a new legal status for animal as either a special kind of property,¹⁰⁶ or even to treat animals as persons.¹⁰⁷ Like the ethical theories about human obligations to animals, the legal theories about what the law owes to animals do not agree on a comprehensive list of all the animal interests that the law should protect, but all legal theories at least accept that the law should be used to protect animals from human cruelty (as evidenced by the fact that every state has an anti-cruelty law for animals and that the federal government has a similar law in the form of the Animal Welfare Act). However, while the law and the most plausible ethical theories agree that human beings should not be cruel to animals, there is a surprising disparity within the law between a group of animals that is actually protected from cruelty and another

¹⁰⁴ For proof of the increase in the penalty for animal abuse one need look no further than the recent Michael Vick dog fighting case.

¹⁰⁵ Stephan K. Otto, "State Animal Protection Laws – The Next Generation."

¹⁰⁶ David Favre, "Living Property: A New Status for Animals Within the Legal System," *Marquette Law Review* Vol. 93:1021, (2010).

¹⁰⁷ Gary L Francione, "Animals: Property or Persons?" in *Animal Rights: Current Debates and New Directions*, edited by Cass Sunstein and Martha Nussbaum (Oxford University Press, 2004).

group of equally important animals whose interest in being protected from cruelty is either paid a lip service or outright ignored.

The disparity is between the pets, research and zoo/aquarium animals who receive at least some legal protection from cruelty and the animals raised for food, otherwise known as farm animals. All states have animal cruelty laws that define cruelty along lines similar to the following, “ ‘Cruelty to animals’ includes mistreatment of any animal or neglect of any animal under the care and control of the neglecter, whereby unnecessary or unjustifiable physical pain or suffering is caused. By way of example this includes: Unjustifiable beating of an animal; overworking an animal; tormenting an animal; abandonment of an animal; failure to feed properly or give proper shelter or veterinary care to an animal.”¹⁰⁸

One might wonder how much protection animals are actually afforded given the liberal requirement for an act to be cruel as being “unjustifiable” from a human perspective, but despite that worry one might also applaud the law’s attempts to provide real protection for animals by providing harsh penalties (including fines for thousands of dollars or multiple years of jail time in more extreme instances) for cases of animal abuse. But, read a little further in any state animal cruelty law and you will likely

¹⁰⁸ Stephan K. Otto, ed., *Animal Protection Laws of the United States of America and Canada 6th Edition*, 512.

find the following sort of exemption,¹⁰⁹ “The provisions of [this law] shall not apply to: With respect to farm animals, normal or accepted practices of animal husbandry,”¹¹⁰ that is preceded and followed by a notable absence of reasons for the exemption. The Animal Welfare Act also has effectively the same exemption built into its definition of “animal”:

The term “animal” means any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warm-blooded animal, as the Secretary may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet; but such term excludes (1) birds, rats of the genus *Rattus*, and mice of the genus *Mus*, bred for use in research, (2) horses not used for research purposes, and (3) other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber.¹¹¹

These unreasoned exemptions should temper one’s respect for the law as a protector of animals and strike one as odd, especially given the following statistics: Of the approximately 9.7 billion animals that die annually in

¹⁰⁹ This sort of exemption for “commonly farmed animals” or “common farming practices” is now widespread in animal cruelty laws and is largely the result of lobbying by the industrial agricultural lobbies of this country.

¹¹⁰ Stephan K. Otto, ed., *Animal Protection Laws of the United States of American and Canada 6th Edition*, 1702-3.

¹¹¹ “Transportation, Sale, and Handling of Certain Animals.”

the US, ~9.5 billion are farm animals.¹¹² This means that the lives of the overwhelming majority of the animals that humans interact with are ignored by animal cruelty laws without reason. One might here object that there is a reason that the farm animals are not recognized by animal cruelty laws and that is because farm animals are either covered by further regulations in the form of “common farming practices” and/or are covered by the Humane Slaughter Act. This claim, however, proves unfounded.

To begin with, there is no regulation on “common farming practices” or how one should treat “commonly farmed animals”. A list of what these practices are or what they ought to be simply does not exist¹¹³ and so the farming industry effectively makes up its own regulations as it goes along. Second, the Humane Slaughter Act is meant to protect farm animals from being killed in cruel ways, but it fails utterly in its intention for the following reasons. First the act makes an exemption for the cruel practice of kosher slaughter in which an animal has its throat cut without

¹¹² Marrienne Sullivan and David Wolfson, “FOXES IN THE HEN HOUSE Animals, Agribusiness and the Law: A Modern American Fable,” in *Animal Rights: Current Debates and New Directions*, edited by Cass Sunstein and Martha Nussbaum (Oxford University Press, 2004), 206-207.

¹¹³ Marrienne Sullivan and David Wolfson, “FOXES IN THE HEN HOUSE Animals, Agribusiness and the Law: A Modern American Fable,” 212-215.

anesthetic and dies by bleeding out or suffocating. Second the penalties, which include fines up to \$500,000 and/or up to 10 years of jail time, for killing a farm animal in a cruel way are never enforced.¹¹⁴ Third animals which are unable to walk, for whatever reason including having their legs broken in the process of being moved to or within a slaughter house, are not covered by the act. Lastly the act does also not cover any chicken, turkeys, geese and ducks, which account for ~8.5billion of the ~9.5billion farm animals that are killed annually. In addition it seems obvious that farm animals have an interest in being free from cruelty not just at the moment of their death, but also during the much greater expanse of time in which they are alive. The Humane Slaughter Act makes no attempt to protect animals from cruelty in life.

The Humane Slaughter Act provides little to no protection against cruelty for farmed animals, and put simply farm animals seem not to be considered worthy of legal protection. But surely a good reason must exist for considering the interests of a small group of animals and ignoring the interests of a much larger group? How else could the law justify protecting pet, zoo/aquarium and research animals from cruelty, but not farm animals? These are the sorts of questions that one is forced to confront after having examined the animal cruelty laws, but, as I will argue, the

¹¹⁴ Marrienne Sullivan and David Wolfson, “FOXES IN THE HEN HOUSE Animals, Agribusiness and the Law: A Modern American Fable,” 208.

good reason for not protecting farm animals remains a mystery and this lack of a good reason should force the state and federal law making bodies to reconsider their positions on ignoring the basic interests of farm animals.

Equal Protection for Equally Relevant Animals

My argument is conditional on the acceptance of four points: the acceptance of the claim that human beings should not be cruel to animals and that this human obligation to animals should be enforced by the law via animal cruelty laws, the acceptance of the claim that farm animals are relevantly similar to the other animals protected by animal cruelty laws, the acceptance of the *principle of equality*, and the acceptance of the claim that laws must be enforced in order to be a law. Acceptance of these four points leads one to the irrefutable conclusion that the exemptions within animal cruelty laws for farm animals should be erased and that animal cruelty laws that do include farm animals need to be better enforced. But before I lay out my argument I want to clarify the scope of what I'm arguing. I am interested in the disparity within animal cruelty laws between a privileged group of animals and farm animals, and while my argument for equal treatment could be extended to include wild animals, and no doubt it should be, this is not my goal in this paper. Wild animals are

certainly relevantly like non-wild animals with respect to their capacity to be harmed and their interest in not being treated with cruelty, but because wild animals are not treated as human property by the law a distinction might be drawn between those animals living wild lives and the human owned animals that are typically thought of as the proper targets of animal cruelty laws. It is my personal belief that every person has a strong moral reason not to be cruel to wild animals, but given the current legal emphasis on animals as property it is unclear how this moral reason can be translated into a restrictive law and for this reason wild animals are beyond the scope of the argument I present here. Having made this clarification I will now describe my argument and deal with possible objections that might be raised against it.

Our best ethical and legal theories all agree that humans should not be cruel to animals. Nearly all reasonable people also accept that humans should not be cruel to animals and that the law should be used to enforce this obligation. In addition empirical science and rational inquiry provide reasons to believe that there is no relevant legal or moral difference between farm animals and the animals that are protected by animal cruelty laws. Now recall from my discussion of Gary L. Francione's view that according to the plausible and widely

accepted *principle of equality* we are morally and rationally required to treat relevantly similar the cases equally. According to this principle if we judged that Suzy had done something immoral by shoplifting from a store it would be irrational for us to judge that her equally situated friend Bob acted morally by shoplifting for the same reasons and further it would undermine our theory of morality by allowing such irrational inconsistency. This same principle is accepted and used by the law in order to insure that relevantly similar cases are treated equally. Without such a principle of equality Bob might be punished for intentional shoplifting by spending 40 days in jail and Suzy might receive 2 years as punishment for the same crime, due to the irrelevant fact that Suzy is a woman and Bob is a man. A further universally accepted and plausible requirement of any meaningful law is that punishment for breaking the law is both actually and consistently enforced, because otherwise the law fails in what it purports to do and is for practical purposes meaningless. Most of the animal cruelty laws at the federal and state level violate not only the important *principle of equality* by making an irrelevant exemption for farm animals in being protected from cruelty, but are also so inconsistently enforced with respect to farm animals that the laws that purport to protect farm animals from cruelty are meaningless. This violation and shortcoming

of animal cruelty laws cannot stand and the only way to reconcile these failures of the laws is to change the laws so that they do not exclude the largest group of animals that humans interact with and to stringently enforce the law in any case that involves cruelty to animals. This is my argument in its barest form and although most of the key points in my argument are already widely accepted; there are still objections that might arise dealing with the relevant similarity between farm animals and the other animals that humans interact with, the existence of cruelty to farm animals, the purpose or business of the law, the possible problematic entailments of the *principle of equality*, or the role of actual enforcement in the efficacy of a law. The rest of this paper will be dedicated to refuting these objections.

Despite the scientific and commonsense evidence that farm animals are not relevantly morally or legally different than pet, zoo/aquarium, or research animals,¹¹⁵ one might still try to make the case that there is a significant difference between these two groups. One might claim, for instance, that a relevant difference between farm animals and other animals is that farm animals are intended to be

¹¹⁵ Science has provided empirical evidence that all of the capacities generally associated with moral or legal relevance, sentience, consciousness, having interests, etc., are equally present in both farm animals and the other groups of animals covered by animal cruelty laws.

used as food for humans. This unique, but arbitrary,¹¹⁶ end of farm animals, one might additionally claim, justifies using any means, including cruel ones, to achieve that end and thus farm animals need not be covered by animal cruelty laws. However, while it could be argued that an end justifies a means in some cases, such as harming one person in order to save a million people from death, in the case of using animals as human food, an end which is not necessary for human life, it cannot be the case that feeding humans justifies being subjected to cruelty. Imagine that a person was raising a cat or dog with the intention of eating the cat or dog. Now ask yourself, “Would it be morally or legally ok for that person to torture the cat or dog by slowly skinning it alive, inch by inch, just because the person intends to eat the dog or cat when they are done torturing it?” I think not and I assume that every other moral and law abiding person thinks the same thing. The law, furthermore, makes no such distinction with respect to the animals that are protected by animal cruelty laws.¹¹⁷ Given the widespread acceptance of the claim that it would be morally and legally wrong to torture a pet animal just because one intended to eat

¹¹⁶ Arbitrary, because people could have just as easily picked any other animals to use for food than the ones that we use today.

¹¹⁷ Stephan K. Otto, ed., *Animal Protection Laws of the United States of America and Canada 6th Edition*.

it, it cannot be the case that intending to eat something is a morally or legally relevant reason for differentiating between groups of animals. Here one might object that it is not the case that farm animals are arbitrarily intended to be used as a food, but that their actual purpose, as something innate to farm animals or as a result of evolution plus human engineering, is to be used as food for humans and that this is a relevant difference between farm animals and the other animals. However, the claim that farm animals have the innate purpose is either empirically false or unverifiable and that they have been designed by humans to be used as food is no reason to think that they can be treated with cruelty.

Farm animals are naturally, in the biological or evolutionary sense, meant to live and procreate in the way that any other animal lives and procreates and it was the result of an arbitrary choice by humans that current farm animals are used as human food.¹¹⁸ Additionally, it is true that farm animals have been designed by humans, through the process of gene selection and the use of drugs, to be well suited for use as human food, but this does not justify cruelty any more than intending to eat something justifies cruelty. Humans

¹¹⁸ For evidence of the arbitrariness of this choice one need only look to some eastern cultures in which animals that US citizens view as inedible pets, dogs and cats for example, are viewed and used as food.

may create the purpose for artifacts, but farm animals are not artifact, they are natural living things and humans cannot simply create the purpose for a natural living thing.¹¹⁹ Still one other distinction that one might attempt to make between farm animals and the rest is that people care about pet, zoo/aquarium, and research animals, but not farm animals. This claim, like the claim that farm animals have the purpose of being food is just false. People obviously care about farm animals as evidence by the work of PETA, Peter Singer, the ALDF and numerous other groups and individuals. People who object to including farm animals under the umbrella of protection afforded by animal cruelty laws can certainly provide some reasons for thinking that there is a relevant distinction between farm animals and the rest, but what is needed to justify such a distinction is not just any reasons, but good reasons. There are no good reasons for thinking that farm animals are

¹¹⁹ What I mean by this is that while it is possible for a person or group of people to claim that a natural living has some purpose that the person or group of people have decided upon, (for an example imagine a person deciding that the purpose of a cat is to be entertainment for humans) it does not follow that the human chosen purpose is the actual purpose of the natural living thing, or that the human chosen purpose can be used as justification for doing something terrible to the animal. So even if a person decides that the purpose of a cat is be human entertainment, the person is not justified in lighting the cat on fire to entertain his or herself.

relevantly different than pet, zoo/aquarium, or research animals and absent any good reason one should be forced to reject this objection.

Another route that one might take in objecting to farm animal inclusion in animal cruelty laws is that such inclusion is unnecessary. One could claim that such an inclusion is unnecessary, because farm animals are not actually subjected to any cruelty by humans. But, in making this claim one has to be committed to claiming that the following non-isolated practices are not cruel: keeping veal calves and pigs in crates so small that they cannot turn around,¹²⁰ searing or cutting the beaks off of chicks and chickens,¹²¹ suffocating male chicks by the hundreds in trash bags simply throwing them alive into a grinder,¹²² cutting the testicles off of piglets without the use of anesthetic,¹²³ refusing veterinary care to elderly farm animals or

¹²⁰ Jim Mason and Peter Singer, *The Ethics of What We Eat: Why Our Food Choices Matter* (Rodale Inc. 2006), 44, 45, 49, 58.

¹²¹ Jim Mason and Peter Singer, *The Ethics of What We Eat: Why Our Food Choices Matter*, 37.

¹²² “Undercover Investigation at Hy-line Hatchery,” Mercy for Animals, modified 2009, web accessed on 3/3/2012, <http://www.mercyforanimals.org/hatchery/>. (warning this is graphic)

¹²³ Jim Mason and Peter Singer, *The Ethics of What We Eat: Why Our Food Choices Matter*, 50.

animals that will soon be slaughtered anyway,¹²⁴ constantly impregnating dairy cows and then immediately separating the emotionally attached mothers from their calves,¹²⁵ slitting the throats of cows and pigs and allowing them to suffocate or bleed out as a result,¹²⁶ packing chickens into sunless sheds so tightly that the birds cannot move and may be trampled or suffocated by other chickens,¹²⁷ not allowing pigs or chickens access to the natural world outside of a shed,¹²⁸ allowing cattle to die by the thousands in overcrowded, muddied, feces covered, and shade-less stock yards from heat stroke and disease,¹²⁹ ripping the head off of a live chicken and writing graffiti with its blood or squeezing it like a balloon until it sprays feces

¹²⁴ Jim Mason and Peter Singer, *The Ethics of What We Eat: Why Our Food Choices Matter*, 55.

¹²⁵ Jim Mason and Peter Singer, *The Ethics of What We Eat: Why Our Food Choices Matter*, 58-60.

¹²⁶ Jim Mason and Peter Singer, *The Ethics of What We Eat: Why Our Food Choices Matter*, p 68.

¹²⁷ Jim Mason and Peter Singer, *The Ethics of What We Eat: Why Our Food Choices Matter*, 24-25.

¹²⁸ Jim Mason and Peter Singer, *The Ethics of What We Eat: Why Our Food Choices Matter*, 53.

¹²⁹ Jim Mason and Peter Singer, *The Ethics of What We Eat: Why Our Food Choices Matter*, 63.

out its backside,¹³⁰ and so on. To claim that the aforementioned common practices and acts do not qualify as cruel, or even tortuous in some cases, is ridiculous, rationally indefensible and clearly false. The practices that I listed, and many others that I did not, are undeniably harmful to farm animals and are also unnecessary, as the reasons these reprehensible things are done is to save a few cents towards the cost of raising the animals or to satisfy some sadistic urge. Of all the objections against my argument, this is the worst and should not only be ignored, but militantly refuted.

No relevant difference exists between farm animals and other animals protected by animal cruelty laws and it is clear that all kinds of farm animals are subjected to acts of terrible cruelty on a regular basis. These paths for objecting to my claim that farm animals should be included in state and federal animal cruelty laws are fruitless, but the resolute defender of farm animal exemption might take a different approach for rejecting my claim by focusing on the general purpose of the law or by attempting to show that the *principle of equality* has absurd entailments.

¹³⁰ Jim Mason and Peter Singer, *The Ethics of What We Eat: Why Our Food Choices Matter*, 27.

The purpose of the law is a contested subject and critics of my view might claim that the law does not have any business in protecting farm animals or animals in general. Such critics may draw from the theory of contractarianism and claim that the purpose of the law is only to protect the interests and well-being of the humans who create and maintain the law. Animals, they might claim, fall outside the scope of the law and thus the law should not interfere with how humans interact with animals. The first claim seems false given the acceptance of the valid application of some laws to all societies regardless of whether a society actually has the law,¹³¹ but supposing that this conception of the law is correct, would such a conception rule out any laws regarding human and animal interaction? The answer is no. If the purpose of the law is to protect human interest and well-being the law would still have a valid interest in regulating human interaction with animals. To see why imagine the following case. Sally has a pet cat that she adores and Sally's life is made more enjoyable as a result of the companionship that her cat provides her. Now further suppose that Sally's neighbor, Jim, just hates cats and so one day

¹³¹ Here I'm imagining laws against murder, rape, slavery, etc. that we apply to any society, including societies that do not actually have such laws. Many laws that the US created and maintains are not created and maintained by other societies, but we still enforce such laws on the other societies.

decides to cut off one of the legs of Sally's cat. I think it would be safe to assume that Sally would be grieved by Jim's action and her well-being would be wounded by the harming of her feline companion. Sally, like most actual pet owners, has an interest in protecting her cat from cruel, unnecessary harm and her well-being is tied up with the cat's well-being. We could further assume that even if Sally wanted Jim to cut off her cat's leg or if Sally cut off her cat's leg that the law could legitimately be used to protect Sally's cat. We could make such an assumption, because it seems highly plausible to suspect that Sally's pet loving neighbors, or some other pro-animal protection group, would have an interest in protecting Sally's cat from such unnecessary harm. So the law, as a protector of human interests and well-being, would have a valid use in protecting not only Sally's cat from cruel and sadistic neighbors like Jim, but all animals that people have an interest in, and should therefore take the necessary steps to effectively protect animals from cruelty. The protection of animals would not be owed directly to animals according to a view of the law that maintains that only human interests and well-being should be protected, but animals would still be within the scope of the law so long as humans had an interest in them, and since it is an empirical fact that humans have an interest in protecting pet, zoo/aquarium, research and farm

animals from cruelty it follows that the law would, just as it actually does, have an authentic interest in protecting animals.

A crucial premise of my argument is that the *principle of equality* is a principle that we ought to accept for legal and moral assessment and action. I take it that any rational person would readily accept such a principle, but an especially suspicious person might worry that the principle commits one to a ridiculous conclusion, namely that we treat all moral and legal cases the same. The reasons for this worry might proceed as follows: the *principle of equality* claims that we ought to treat like cases alike, or in other words, not differentiate cases based on arbitrary or irrelevant distinctions, any distinctions between people and animals are arbitrary or irrelevant, and therefore we should treat animals exactly like people. The line of reasoning will continue with the following sort of claim: that we should treat a chicken exactly like a rational adult human being is just absurd, and since this is what is required by the *principle of equality* we should reject the principle. I agree that treating a chicken exactly like a rational adult human would be absurd. Granting chickens the right to vote or to marry, requiring that chickens get a basic education, expecting them to work, pay taxes, and so on would just be silly and no one would agree that chickens ought to be granted these rights or be

expected to perform such action. The *principle of equality* does not commit one to such a ridiculous view. The worry in this case is unfounded, because the principle admits that we should treat different cases that have relevant differences and in the case of animals and humans many of the ways in which we treat humans, but not animals, is the result of a relevant difference. Adult humans are granted the right to vote and marry based on capacities that humans have, namely rationality and autonomy, that animals do not have and this difference in capacities is significant and thus it is no violation of the *principle of equality* to treat humans as having these rights and not animals.

Likewise with our expectations about what humans are to do and what animals are to do. We expect or require adult humans to go to school and receive a basic education in their youth, we also expect or require adult humans to find productive jobs and pay taxes, but we form these expectations based on the assumption that adult humans have certain capacities that allow them to do these things and that not only society, but also individual adult humans are better off for doing these things. Animals lack the capacities that would allow them to learn at a primary school, (with perhaps the exception of some species of apes) hold a job or pay taxes and we justifiably think that neither our society nor the lives of animals would be made better off by expecting or

requiring animals to hold jobs, pay taxes and go to school. The *principle of equality* requires that we treat relevantly similar cases equally. In instances of unnecessary animal suffering requires that we treat cases in which a pet animal suffers unnecessarily the same as cases in which farm animals suffer unnecessarily, but it does not require that we treat a case involving a human not paying taxes the same as a case of an animal not paying taxes.

One final objection I'd like to entertain is one leveled at my claim that a law must be enforced and enforced consistently in order for it to actually be a law. I take it that a person who would raise such an objection would not refute the claim that a law must be effective to actually be a law (what would the purpose of having laws be if not to have some effect on behavior or action?), but would claim that the threat of punishment is often enough for a law to be effective and it is therefore not necessary for the consequences of breaking a law to actually be enforced for the law to be efficacious. I can imagine cases in which the mere threat of some horrific punishment would deter anyone from breaking a law, such as in the case of a law against skipping to work which had death by boiling as punishment, but clearly not every law is effective using only the threat of punishment and all it would take to for such an imagined law to lose its efficacy is for a few people

to break the law and go unpunished. Statistically some people are bound to break such a law at some point, because people are not legal saints who just blindly follow the law, and then the punishment of the law must be carried out, if the law is to remain effective. So for any law, animal cruelty laws included, punishment must be enforced when the law is broken, if the law is to be a law at all, and with respect to animal cruelty laws this includes enforcing the punishment of significant monetary fines and/or jail time.

Additionally, I claim that a law must not only be enforced, but that it must also be enforced consistently in order to be a valid law. This claim follows from the view that laws must be effective and the idea that any valid law also includes a principle of justice and/or equality, which requires that if person A is, or should be, punished for committing crime D and person B commits the same crime D, then person B should be punished for crime D. So part of the reason that a law must be enforced consistently is for the sake of making the law effective in its role as a behavior modifier, and I think it is fairly obvious that if a law is not enforced consistently, then it will also lose its efficacy. If an instance of animal cruelty was punished in Alabama on Monday, but not on Tuesday, Thursday, Friday or Saturday, then people who stood to gain from animal cruelty would quickly become

undeterred by the law against animal cruelty and the law would cease to be effective. But, another reason that the law must be enforced consistently is to satisfy the requirement of justice. If small farmer Fred commits an act of animal cruelty and is legally punished for it, but big farmer Bruce commits the same act of cruelty and is not punished, then justice has failed to be satisfied and so too has the law. Justice requires that relevantly similar cases deserve equal punishment and if animal cruelty laws are enforced only on small farms, but not on the massive industrial farms, then the animal cruelty laws are unjust and therefore invalid.

Farm Animal Protection: Acceptance and Practical Implications

Having read my argument and my refutation of some likely objections, I hope that my reader will have come to the conclusion that farm animals should be included in state and federal animal cruelty laws. I further hope that my reader will see the need for making some serious changes not only to the animal cruelty laws themselves, but also the enforcement of these laws and to the influence that big agricultural lobbies have on animal cruelty laws. These needed changes, however, will be radical and met with much resistance.

Animal cruelty laws have their irrelevant farm animal exemptions, because an enormously powerful lobby has an interest in

such exemptions. Big agriculture spends millions of dollars each year lobbying state and federal legislatures to promote their interests¹³² and have various members of the lobby stationed within the regulatory agencies of the US.¹³³ This lobby does not want animal cruelty laws changed to include farm animals or to have significant penalties imposed for breaking animal cruelty laws for economic reasons, but rationally and morally they can provide no good reason for not including farm animals or for desiring insignificant penalties for breaking animal cruelty laws. Animal cruelty laws need to be amended to include farm animals and the punishment for breaking these laws needs to be significant, ie the punishment should be large monetary fines for each instance of cruelty or years of jail time. Standing up to the big agriculture lobbies and making these changes will require activism on the part of voters, responsible representation by elected

¹³² “10 of the Biggest Lobbies in Washington,” Business Pundit, modified 2011, web accessed 3/5/2012, <http://www.businesspundit.com/10-of-the-biggest-lobbies-in-washington/>.

¹³³ “Lies and Deception: How the FDA Does Not Protect Your Best Interests,” Smart Publications, web accessed 3/6/2102, <http://www.smart-publications.com/articles/lies-and-deception-how-the-fda-does-not-protect-your-best-interests>.

officials and reduction in hesitancy by the courts to pass judgment on illogical and immoral disparities in the law.

Furthermore, animal cruelty laws will have to be far more consistently enforced than they currently are. This will require the creation of regulatory bodies, independent of the farming industry, charged with setting standards for the practices that can be carried out on farms and the creation of inspection units that verify whether or not farms actually comply with these standards. Local law and federal law enforcement agencies will also have to be more diligent in seeking out instances of farm animal cruelty and bringing offenders to justice, which will likely require more work for existing agents and/or spending money to hire more personnel.

Lastly, the consequences of my argument will require that farmers, big and small, take an economic hit in the beginning. Respecting the interest of farm animals in not being the victims of cruelty is going to cost farmers money and time, and will probably require that animal farms either raise the price of their products or reduce the size of their operation, but as I hope I have shown, the economic interests of farmers and consumers is not all that matters. Farm animals sacrifice their well-being and their lives so that humans can satisfy a preference for eating meat, dairy, and eggs and so the

least we can do is pay a little more so that they have adequate veterinary care, are given anesthetics prior to being killed or maimed, and handled in ways commensurate with being a living a creature. Also, a reduction in the size of animal farming operations and a rise in the price of farm animal products would probably not be a bad thing considering the environmental and health concerns associated with large-scale intensive animal farming and the health concerns linked to eating lots of meat.

The changes that my simple argument requires will not be easy to fulfill, but it is what needs to be done if we are to take our apparent interest in animal suffering seriously. Doing what is right has never been synonymous with doing what is easy or profitable and it is right to respect the interest in being free from cruelty of the animals that have their lives sacrificed so that humans can satisfy a desire to eat animal flesh. We owe farm animals this much and we would do well to remember this in all of our dealings with them now and in the future.

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