

## *Legal Welfarism: The Consequences of the Property Status of Animals*

FOR THE PAST DECADE, I have lectured, both in this country and abroad, at high schools, colleges, universities, professional schools, community groups, and animal protection groups about the topic of animal rights. I have debated research scientists in public forums. I have represented over a dozen of the major animal protection organizations in this country in connection with some of their most controversial cases. In 1985 I represented over one hundred animal advocates who, for the first time in the history of the National Institutes of Health, occupied that institution illegally for four days in order to force the closure of a federally funded animal laboratory at the University of Pennsylvania. The sit-in, which attracted attention worldwide and caused an avalanche of mail and phone calls to pour into congressional offices, ended when then Secretary of Health and Human Services Margaret Heckler ordered the lab closed for violating federal law. Since 1990 I have served with Anna Charlton as codirector of the Rutgers Animal Rights Law Center. The Center is part of the curriculum of the Rutgers University Law School, and law students earn academic credit as they learn litigation skills through working on animal rights cases. The Center has been involved in dozens of legal cases involving such matters as grand jury investigations into the activities of those who allegedly remove animals illegally from laboratories, the right of a student to refuse to dissect or vivisect an animal as part of her required coursework, the right of religious groups to perform animal sacrifices, the question whether pigeon shoots constitute cruelty to animals, the constitutionality of hunter harassment statutes, and the propriety of wild-horse “management” by the federal government.

In sum, I am well aware of what is at stake in the debate about animal rights and how acrimonious that debate may become on all sides.

It is clear to me that despite the sharp disagreement within our society over various issues of animal protection, almost everyone—including those who directly or indirectly support various forms of animal exploitation—agrees that nonhuman animals ought not to be subjected to “unnecessary” pain and that nonhuman animals ought to be treated “humanely.” Indeed, I have yet to find a

single person in the course of my work, including the people who defend the pigeon massacre that I discussed in the Preface, who does not enthusiastically embrace the principle that we ought to treat animals “humanely.” The law purports to reflect this concern in that there are laws that require that we accord such humane treatment to animals in every context in which we use animals. Despite this seemingly broad moral agreement and its supposed reflection in the law, no one can dispute that animals are routinely subjected to treatment that may be considered barbaric. The law in practice does little, if anything, to protect animals, even if there is absolutely no justification for their exploitation other than human amusement. On the one hand, it appears clear that most people strongly condemn, on moral grounds, the mistreatment of animals. On the other hand, although our written laws ostensibly reflect this concern, the legal system in practice seems to be completely unresponsive to that moral sentiment and permits any use of animals, however abhorrent.

The purpose of this book is to propose and to defend a thesis that explains why this is the case. The thesis is straightforward and simple. In our legal system, animals do not have rights as that term is normally used. Although there are restrictions on the use of animals (as there are on the use of all property), such restrictions, such as anticruelty laws or laws governing the use of animals in experiments, do not establish any rights for animals or impose any duties on humans that are directed ultimately to the well-being of the animal. Rather, these laws require that in determining whether suffering is “unnecessary” or treatment is “inhumane,” we balance the interests of animals against the interests of human beings. The problem is that human interests are protected by rights in general and by the right to own property in particular. As far as the law is concerned, an animal is the personal property, or *chattel*, of the animal’s owner and cannot possess rights. Indeed, it is a fundamental premise of our property law that property cannot itself have rights as against human owners and that, as property, animals are objects of the exercise of human property rights.<sup>1</sup> I emphasize that property rights are not the only rights relevant to this balancing process, but they are clearly the most important. There are other rights, however, such as the right of personal liberty or the right of expression, that also weigh in the “balance” against animal interests. Consequently, when we are faced with a human/animal conflict and use the prescribed “balancing” method to determine whose interests should prevail, the answer is determined from the outset. In such a system, animals almost never prevail, irrespective of what might be the relatively trivial human interest at stake and the relatively weighty animal interest involved in the particular case.

Throughout this book, I describe the prevailing legal theory concerning animals as *legal welfarism*. Legal welfarism is a normative theory implicit in the law and whose foundational assumptions are hardly ever recognized, much less discussed, in case law or academic comment. That is, although the law prohibits the infliction of “unnecessary” pain and suffering on animals and requires that they be treated “humanely,” these terms are interpreted in light of the legal status of animals as property, the importance of property in our culture, and the general

tendency of legal doctrine to protect and to maximize the value of property. Consequently, what is considered “humane” treatment or “unnecessary” suffering may, under the law, differ considerably from the ordinary-language interpretations of those terms. We recognize that animals are different from inanimate property, so we enact laws to protect this peculiar species of property; yet these laws are interpreted against a background that effectively obscures the difference between animal property and other forms of property. The result is that regulation of animal use does not, as a general rule, transcend that level of protection that facilitates the most economically efficient exploitation of the animal.

Many legal theorists subscribe to the view that the development of the common law may be explained largely by reference to the notion of wealth maximization—that is, that legal doctrines have the effect of maximizing overall social wealth.<sup>2</sup> Legal welfarism is the doctrine that developed to maximize the use of animal property. The doctrine of legal welfarism tends to proscribe only those uses of animals that are not “efficient” or that decrease overall social wealth. If an “unnecessary” infliction of pain is nevertheless part of an institutionalized or accepted exploitation of animals, then the activity is permitted. The property owner must not inflict gratuitous pain on the animal, since this would generate no social benefit and would decrease overall social wealth.

In addition, legal welfarism is characterized by the notion that the law can best assure the “welfare” of animals (understood as the level of care that maximizes the value of animal property) by allowing the property owner to determine what will maximize the value of the property to the property owner. Accordingly, the doctrine of legal welfarism tends to defer to owner determinations about animal welfare. For example, under the federal Animal Welfare Act, the primary source of regulation of laboratory animals is by those who own and use the animals. It is they who have the greatest interest in the integrity of scientific data, and they who presumably will be motivated the strongest to ensure that the appropriate level of animal welfare is provided. The approach to animal treatment embodied in legal welfarism is a logical consequence of the possession of rights by humans and the status of animals as property.

Our legal system is quite adept at making it appear as though disenfranchised groups receive legal protection. By directing our attention to issues that are often quite tangential, legal discourse steers clear of the more important fundamental moral and economic assumptions upon which the legal system ultimately rests. One need only read cases from the eighteenth and nineteenth centuries concerning slavery; these cases read with the same formality as cases decided just yesterday by the United States Supreme Court and solemnly discuss the same issues of due process and rights. Nevertheless, these slave cases avoid completely the issue of the justice of the institution of slavery and assume that the legal system functioned to provide adequate legal protection to those who were enslaved.

The same is true with nonhuman animals. We have numerous laws that purport to protect animals, and laws that ostensibly give rights to animals. These laws, however, focus our attention on matters of “unnecessary” suffering, “hu-

mane” treatment, and the “welfare” of animals. Never does the law examine the fundamental assumptions that are the basis of the various institutions of animal exploitation. Rather, the law creates the illusion that a vulnerable group that is, as a matter of law, treated primarily, if not exclusively, as means to human ends is provided with adequate protection through laws that provide for “humane” treatment.

### Animal Welfare as a General Theory

Legal welfarism is a version of the general moral theory of animal welfare. Animal welfare, understood in a very broad sense, is the view that it is morally acceptable, at least under some circumstances, to kill animals or subject them to suffering as long as precautions are taken to ensure that the animal is treated as “humanely” as possible. That is, an animal welfare position generally holds that there is *no* animal interest that cannot be overridden if the consequences of the overriding are sufficiently “beneficial” to human beings. Legal welfarism establishes a strong presumption in favor of letting animal owners determine what uses of animals best maximize the value of animal property. The presumption is that a benefit exists unless a use can be shown to be gratuitous.

Although a welfarist may base her theory ultimately on any one of a number of moral theories or on some combination of theories, most welfarists subscribe to some version of utilitarian moral theory. The details of utilitarian thought are complicated; it will suffice, however, for present purposes to say that utilitarian moral theory holds that the rightness or wrongness of an act is determined by reference to the consequences of an act understood in terms of “happiness,” “pleasure,” the “greatest good,” and so on. A utilitarian will look at the available options, weigh the “pluses and minuses” of each option, or its “costs and benefits,”<sup>3</sup> and then choose to perform that act, or that type of act, that will maximize the desirable consequences however understood.

The connection between utilitarian theory and animal welfare is made explicit in the writings of nineteenth-century philosopher Jeremy Bentham. Bentham argued that although the state could create legal rights, the notion of rights made no sense apart from this purely positivist use, and that the moral worth of actions was to be determined by their consequences. Bentham rejected the position that only consequences *to humans* should matter when we weigh the results of actions. According to Bentham, as long as a being could suffer, the consequences to that being must be weighed in determining the propriety of action.<sup>4</sup>

There are many versions of animal welfare depending, for the most part, on the weight that is assigned to animal interests in performing the utilitarian balance, and to a lesser, but still important degree, on what is viewed as the intrinsic value (pleasure, happiness, preference satisfaction, and so on) that is sought to be maximized. For example, philosopher Peter Singer, who holds that the intrinsic value to be maximized is the furtherance of interests of those affected,

argues that equal interests of nonhumans and humans should be given equal consideration.<sup>5</sup> Singer's more progressive version of animal welfare would require a drastic reduction in animal suffering but would permit animal exploitation when the consequences, properly characterized and considered, outweighed the animal's interest in not being exploited.<sup>6</sup> Other welfarists purport to take animal interests seriously in determining the propriety of animal use, but then merely endorse the status quo as it concerns animal use.<sup>7</sup> Still other animal advocates argue that the law should incorporate "improved" welfarist notions, such as additional layers of review, to ameliorate the treatment accorded to laboratory animals.<sup>8</sup>

I think it uncontroversial to say that *all* versions of welfarism involve some type of balancing. To the extent that animal advocates suggest that legal welfarism be replaced with some other, ostensibly more protective, theory of animal welfare, the replacement theory may very well still encounter the problem of trying to balance the interests of a human rightholder with property rights against the interests of property that is without any claim of right. In all but the most unusual circumstances, such a framework would probably employ the analytical approach of legal welfarism because animal interests, unprotected by rights, are balanced against competing claims of human right, including the right to exercise control over (animal) property and to determine what best maximizes the value of that property to the owner of the property.

In the Epilogue, I discuss some alternatives to legal welfarism in order to examine whether arguably more "humane" versions of animal welfare can ameliorate the deficiencies that I hope to identify with legal welfarism. Any consideration of the ways in which legal welfarism might be altered is, however, secondary to my more limited goal of demonstrating the systematic features of legal welfarism and thereby explaining the gap that exists between what I intuitively regard as our social concern for the "humane" treatment of animals and the extreme animal abuse that is currently sanctioned by the law.

It is, however, necessary that I introduce at the outset some notion of animal rights. As a practical matter, many of those who oppose legal welfarism are not seeking to improve animal welfare, but are, instead, looking to replace the paradigm that we use to understand human/animal relations in the first place. The replacement theory involves the notion of extending rights to animals. There are two reasons the reader should have at least a basic understanding of rights theory, especially as it applies to nonhuman animals. First, legal welfarism is a theory that treats animals solely as means to ends; rights theory requires that we see animals not merely as means to ends but as beings with value and with interests that should be respected. Rights theory, then, provides a contrast to legal welfarism. Second, I argue that despite some claims to the contrary, animals possess no rights under legal welfarism. In order to test that claim, I need some notion of rights against which to measure the supposed rights protection that some regard as existing under the current welfarist paradigm.

## Regan and Rights Theory

The primary alternative to the welfarist approach is found in rights theory. The reason that I label the rights approach as the “primary” alternative to welfarism is that there are other nonrights approaches that are nevertheless critical of welfarism. For example, certain feminist theorists are critical of rights talk but nevertheless reject welfarist theory and have very strong notions of animal protection.<sup>9</sup> Similarly, Marxists are critical of rights, but at least some theorists working in that tradition reject animal exploitation.<sup>10</sup> In any event, rights are important normative notions that we use to discuss the level of both moral and legal protection provided in particular circumstances, and it is to rights theory that I now turn. In addition to describing rights as an alternative to welfare, I want to examine a rights theory that embraces nonhumans. Although there may be criticisms of this theory, I believe that it represents a plausible account of animal rights against which we can compare legal efforts to protect animals, in order to see whether these laws create animal rights.

Generally speaking, when we say that someone has a right, we mean that the person has some value that requires our respect, whether or not our exploitation of that person would be beneficial to others. The point of having a right is to have something that stands as a sort of barrier between the holder of the right and everyone else. A right generally cannot be taken away simply because it would be beneficial for someone else if the rightholder lost the right. Rights theorists argue that at least some animals possess at least some of the same rights enjoyed by humans. Although they acknowledge that there may be conflicts between rights and that these conflicts may require accommodation of some sort, they reject out of hand the position that animals lose their rights whenever, or just because, humans stand to benefit by exploiting animals.

Although there has been a great deal of excellent philosophical scholarship concerning our treatment of animals,<sup>11</sup> the theory of animal rights that is regarded as most influential may be found in Professor Tom Regan’s *The Case for Animal Rights*.<sup>12</sup> Regan begins by exploring the Cartesian claim that nonhuman animals are not conscious and, therefore, not sentient. Descartes, who is largely responsible for our current attitudes about animals, argued that the use of language by humans demonstrated consciousness and that since nonhuman animals did not exhibit linguistic behavior, they could not be regarded as conscious beings.<sup>13</sup> Regan effectively demonstrates that as an empirical matter, Descartes was wrong: at least some nonhuman animals exhibit linguistic behavior. More important, Regan also shows that Descartes was wrong as a logical matter; that is, Regan argues that humans have to be conscious *before* they learn to use language.

Regan then goes on to argue that evolutionary theory, common sense, and ordinary language all point to the possession of consciousness—indeed, of a complex mental life—by nonhuman animals. Normal mammals aged one year or more all (human and nonhuman) share mind states such as perception, memory, desire, belief, self-consciousness, intention, a sense of the future, emotion, and

sentience. Most of us regard these features—as they are exhibited by human beings—as necessary and sufficient for the status of personhood. Although a more progressive utilitarian, such as Singer, might agree that these features as exhibited by nonhumans require that their equal interests be given equal consideration in terms of determining the consequences of certain actions, Regan, as a *deontologist*, treats these similarities as erecting rights barriers that are impervious to mere consequential considerations. As a deontologist, Regan argues that what is right, wrong, good, or bad cannot be determined by an appeal to consequences or contractarian social theory.<sup>14</sup> Accordingly, Regan rejects the utilitarian and animal welfare approaches, which do rely on an appeal to consequences, and argues that human and nonhuman animals possess equal inherent value precisely because they share a crucial similarity: almost every mammal—human or nonhuman—is the subject-of-a-life that is meaningful to that being, irrespective of the value of that being to anyone else. Indeed, Regan distills clearly the concept of a right as it is used in modern law and philosophy: a right acts as a barrier of sorts between the rightholder and everyone else, and the barrier cannot be breached solely because that breach will be of utility to someone else.

Regan argues that the basic moral right possessed by all moral agents and patients is the right to respectful treatment. This right is based on the “respect principle,” which precludes treating the rightholder merely as a means to an end. Rather, the rightholder must be treated in a manner consistent with the recognition that she possesses an inherent value that is the same as any other holder of such a right. Regan interprets the notions of inherent value and respect to support the “harm principle,” which holds that we have a *prima facie* duty not to harm individuals and that we owe this duty directly to the beneficiaries of the duty.<sup>15</sup> Regan recognizes, of course, that to say that animals (or humans) have rights is not to say that those rights can never be overridden. Indeed, the reason that the harm principle imposes a *prima facie* obligation—as opposed to an absolute obligation—is that the obligation may be overridden, but anyone who wishes to override the harm principle must present valid moral reasons for doing so and may not simply appeal to consequences that would result were the right to be overridden. For example, Regan accepts that rights can conflict and argues that in certain circumstances “numbers count” and that in those circumstances it is better to override the rights of the few rather than the rights of the many. In other circumstances, such as when overriding the rights of the few will leave the few worse off than any of the many, then we should override the rights of the many. Regan is clear, however, that “we must never harm individuals who have inherent value on the grounds that all those affected by the outcome will thereby secure ‘the best’ aggregate balance of intrinsic values (e.g., pleasures) over intrinsic disvalues (e.g., pain).”<sup>16</sup>

After presenting his basic argument, Regan asks what implications arise from accepting that nonhuman animals share with human animals this basic right to respectful treatment. He concludes that most forms of animal exploitation are morally indefensible and that animal exploitation should be *abolished* and not

merely regulated. He rejects vivisection, animal agriculture, sport hunting, and other practices condoned by a Cartesian dualism that sees nonhuman animals as fundamentally different from humans.<sup>17</sup> Regan considers the major forms of animal exploitation as resulting from a general failure to regard animals as subjects-of-a-life. This failure is the direct result of the status of animals as property.

Accepting a rights position does not lead to the absurd result—as it is often asserted by those who exploit animals—that animals enjoy the exact same rights that humans enjoy or that humans and animals are the same for legal purposes.<sup>18</sup> Unfortunately, this misunderstanding about the nature of rights theory is endorsed by at least some academic commentators as well. For example, sociologists James Jasper and Dorothy Nelkin state that the animal rights position as a general matter maintains that animals “[h]ave absolute moral rights to full lives without human interference.”<sup>19</sup> Neither Regan nor any other deontological theorist argues for “absolute” or “equal” rights for animals. Rather, rights are *prima facie* reasons for eliminating recourse to consequences, but these reasons may be overridden by appropriate moral considerations. Animal rights are no more “absolute” than human rights. Moreover, no one argues that nonhuman animals should be given a right to drive vehicles or to vote in national elections. Although all rightholders have equal inherent value, that does not mean that they have the same rights.

In addition, accepting a rights position does not mean that there can never be a conflict between rights. That is, the fact that animals may have certain rights does not mean that those rights will always trump other rights that may be held by humans or other nonhumans. This is another way of saying that rights are not absolute. For example, the First Amendment to the United States Constitution gives us the right of free speech. But even though the actual language of the First Amendment seems quite unequivocal—“Congress shall make *no* law” prohibiting speech—the right of free speech is not, and cannot be, absolute. If, for instance, we are sitting in a crowded movie theater, we cannot yell “fire” just for the fun of seeing everyone stampede out of the theater. Our speech rights are limited by the rights of others in the movie theater to their bodily safety; and their right is unnecessarily jeopardized by our “joke” of yelling “fire” when, in fact, there is no fire. So, too, if animals have rights, those rights cannot be absolute. There will be times when animal rights will conflict with human rights. There is no certain way to resolve such conflict, but then, our legal system must struggle with such conflict every day in the context of conflicts between human rights.

Although Regan’s theory is important for many reasons, one of his primary contributions is to have presented a plausible account of how a central notion of rights theory—the notion that the rightholder is entitled to be treated as an end and not solely as a means to an end—applies to animals. That is, the concepts of animal rights and human rights are similar in at least this crucial respect, and anything that we call a right—whether human or animal—should exhibit this normative characteristic. As I argue, however, animals do not have rights in the



sense that Regan uses that term, which is the way that the term is normally used in rights theory. Indeed, the law at present regards animals as the property of their owners and institutionally regards animals only as means to human ends. Legal welfarism recognizes only one animal interest—the interest of the animal in not being used “improperly” as property. According to the normative assumptions that are at the foundation of legal welfarism, animals *cannot* be regarded as subjects-of-a-life, or as carriers of interests, because to characterize animals as property is, from the outset, to treat animals as a legal entity that cannot, as a matter of law, truly have rights.

As far as animal interests are concerned, and in contrast with rights theory, legal welfarism reflects a particularly severe form of utilitarian thought in at least two respects. First, legal welfarism generally requires that when we determine the consequences of an act involving an animal, we should, for all intents and purposes, ignore any interests that the animal may have, because it is appropriate to regard animals solely as means to human ends.

Second, although legal welfarism does not seriously consider animal interests as “consequences” that need to be balanced, it does count as a “consequence” the violation of any possible legal or moral *human rights*. For example, some argue that humans have the *right* to knowledge that may (or may not) facilitate medical cures; scientists argue that they have the *right* to gather knowledge, whether or not it is ultimately useful. So although legal welfarism appears to be based on considerations of the consequences of actions, those consequences almost always implicate the supposed violation of human rights, and often of human rights to exercise control over property. As I just discussed in the context of explaining Regan’s theory, a right is a *prima facie* reason to protect the rightholder’s interest in the absence of a compelling reason to do otherwise. Since an animal is regarded solely as a means to an end as the property of human owners, and since the animal’s interests are evaluated against this status as property, the outcome is almost certain: people win and animals lose.

In an important sense, then, legal welfarism is partly a theory about human rights and partly a theory of animal welfare; although it purports to balance the consequences, in its actual implementation in the legal system it provides virtually complete protection to human property rights except when doing otherwise would result in the gratuitous (i.e., economically unproductive) infliction of animal suffering or death.

It should come as no surprise that such a system does not work particularly well to provide meaningful protection to nonhuman animals.

## The Organization of the Book

The book is divided into three parts. In Part I, I examine in a general way the paradigm of property that pervades our treatment of animals, and I provide an extended discussion of legal welfarism. As part of this exploration of the status of animals as property, I present a brief historical sketch of our treatment of animals

as property and discuss the effect that this categorization has had on selected legal doctrines that concern our treatment of animals. In this context, I explore the concept of “standing,” a jurisdictional concept that has often been used to keep human/animal conflicts out of the courts. The concept of “standing” requires that the entity before the court be the entity properly empowered by the law to bring the particular claim. By treating animals as property, animals are simply excluded as unable to raise legal claims. This is true even though nonhuman entities, such as corporations, have standing to raise legal claims. I also explore how the characterization of animals as property often conflicts with the nonlegal status of at least certain animals as members of human families.

I argue that our way of resolving human/animal conflicts is facilitated by what may be called the “normativity” of legal regulation, or the notion that fundamental normative assumptions of legal welfarism are obscured by certain *other* normative notions. For example, the assumptions of legal welfarism that animals exist only as means to human ends and that animals have no interests that trump human property rights (themselves normative notions) are obscured by the normative principle that animal exploitation is perfectly permissible as long as it is done as “humanely” as possible.

Finally, in Part I, I consider the general theoretical claim that current laws regulating the use of animals do not give rise to animal rights. It is important for me to establish this claim as part of my argument that we balance considerations of human rights against animal interests that are unprotected by rights. If the current regulation of animal exploitation per se creates meaningful rights in animals, then my criticism of legal welfarism becomes far more difficult and far less interesting as a mere clash of rights. In any event, I explore the regulation/ rights question in general in Part I and then pursue the matter in Parts II and III in order to test the thesis, and its general theoretical formulation in terms of normative analysis and rights theory, in particular contexts.

In Part II, I examine how the paradigm of property applies in the context of anticruelty laws. Although “humane” laws provide an opportunity to test the thesis in a specific context, these statutes actually apply to a wide variety of conduct concerning animals, and in this sense, the context is more general than that provided in Part III. I argue that although anticruelty statutes supposedly represent a “regulation” of or restriction on our use of animals as property, these statutes are, for the most part, completely ineffective in protecting animals, although these laws probably do a very good job of protecting human property rights in animals.

In Part III, I examine the use of animals in an even more specific context—the use of animals in experiments. The use of animals in experiments is ostensibly the most heavily regulated use of animals in the United States. The primary regulatory structure, the federal Animal Welfare Act, and its various amendments and implementing regulations represent what at least appears to be a pervasive regulatory scheme. Further, this regulation occurs against a backdrop of certain assumptions that militate against governmental regulation of research and serve to

inform how the “balancing” framework is applied in the case of animals used in experiments.

The propriety of using live animals in medical experiments is currently a most controversial social issue that has engendered highly charged responses from all sides. Although the issue is certainly not a new one, the debate has recently taken a marked turn. In the early 1980s an aggressive and highly organized animal rights movement emerged that was aimed directly at the use of animals in science. Some who adopt the animal rights position argue for the abolition of all vivisection on the ground that animals have rights that are violated by using them in experiments.<sup>20</sup> This position rejects efforts to apply the welfarist theory through federal laws, such as the Animal Welfare Act, and maintains that even if regulation were effective, it would be morally unacceptable to treat animals as means to human ends. Researchers obviously reject the animal rights position and instead claim to adopt a conservative animal welfare position, according to which “the responsible use of animals in scientific research for the benefit of humans is morally sound.”<sup>21</sup> “Responsible” use, I argue, is any use that produces a “benefit,” which is so measured that virtually *any* use of animals may be said to produce the requisite “benefit.”

A discussion of the use of animals in experiments also serves to illustrate vividly issues of the normativity of law. Reliance on normative concepts such as the “humaneness” of research or the “necessity” of pain is problematic because such concepts are defined within a legal framework that from the outset is highly prejudicial to animal interests and that is inclined to consider any use “humane” or any level of pain “necessary” as long as there is some human benefit to be gained. This benefit may be only the satisfaction of some curiosity on the part of scientists. Moreover, these normative concepts miss the boat in the most crucial sense: they obscure the fundamental question whether such use of animals is morally acceptable in the first place, and assume that such use *must* be acceptable as long as there are benefits for human beings.

### Some Preliminary Observations

I offer four preliminary observations. First, I do not discuss at any length the current philosophical controversies concerning the nature of property.<sup>22</sup> That is, I do not discuss the justification of property or evaluate the institution of property. I discuss various conceptions of private property only to demonstrate that whatever restrictions are placed on an animal owner in terms of what use she may make of her property, such restrictions are unlikely to have any positive effect on the treatment of animals. Moreover, my discussion of property is restricted primarily to American law, with occasional references to British law. Property is, in essence, a bundle of rights that can differ considerably from place to place. Accordingly, I do not attempt a comparative analysis, although it is not disputed that animals are regarded as property in the law of virtually every legal system in the world.

Second, although I argue that the status of animals as property facilitates their exclusion from the scope of our legal (and moral) concern, I do not maintain that characterizing sentient beings as property *necessarily* means that those beings will be treated exactly the same as inanimate objects or that property can never have rights as a matter of formal jurisprudential theory. For example, although slaves were, for some purposes, considered “persons” who technically held certain rights, those rights were not particularly effective in providing any real protection for slaves. We *could* decide to grant certain rights to animals while continuing to regard them as property. The problem is that as long as property is, as a matter of legal theory, regarded as that which cannot have interests or cannot have interests that transcend the rights of property owners to use their property, then there will probably always be a gap between what the law permits people to do with animals and what any acceptable moral theory and basic decency tell us is appropriate. It is my tentative conclusion that animal rights (as we commonly understand the notion of “rights”) are extremely difficult to achieve within a system in which animals are regarded as property, although this precise issue transcends the scope of the present work.

Third, and related to the foregoing consideration, I emphasize that I am only concerned with laws that attempt to regulate our treatment of animals through the requirement that we treat them “humanely” or that we not impose on them “unnecessary” suffering. I do not discuss—except where indicated—laws that regulate our treatment of animals through the imposition of *prohibitions* on particular conduct. The reason such prohibitory laws are important is that they arguably recognize that animals have at least some interests that may not be sacrificed; legal welfarism, by contrast, accepts that all animal interests may be sacrificed in favor of human interests. The vast majority of the laws in this country that affect our treatment of animals do not involve prohibitions, and my analysis will accordingly be focused on those types of laws that do presently characterize the legal treatment of animals in this country. In any event, it is clear that more work needs to be done on the role of prohibitions (as opposed to nonprohibitory regulation) in creating rights.

Fourth, although I will discuss various philosophical issues and doctrines, the reader should not regard these discussions as exhaustive in any sense. My discussions will be limited to those portions of philosophical doctrines that directly concern the legal issues under consideration.

# CHAPTER ONE

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## *The Problem: “Unnecessary” Suffering and the “Humane” Treatment of Property*

### “Necessary” Suffering: Three Examples

THERE IS increasing social concern about our use of nonhumans for experiments,<sup>1</sup> food,<sup>2</sup> clothing,<sup>3</sup> and entertainment.<sup>4</sup> This concern about animals reflects both our own moral development as a civilization and our recognition that the differences between humans and animals are, for the most part, differences of degree and not of kind. For example, recent work in animal behavior and psychology has confirmed that many animals possess highly developed cognitive abilities.<sup>5</sup> A popular magazine had a front-cover feature on the implication of our recognition of animals’ cognitive abilities and concluded that “it is one thing to treat animals as mere resources if they are presumed to be little more than living robots, but it is entirely different if they are recognized as fellow sentient beings.”<sup>6</sup> Philosophical writings, such as *The Case for Animal Rights* by Tom Regan and *Animal Liberation* by Peter Singer, have presented and developed sophisticated and persuasive arguments in favor of increased moral consideration for animals. According to Regan and Singer, prevailing social attitudes toward animals are characterized by “speciesism,” which, like racism, sexism, or homophobia, uses a morally irrelevant criterion—species membership—to determine membership in the moral community. Regan and Singer argue that speciesism is no more logically or morally defensible than is any other form of prejudice against the other or bias in favor of those who are like the self.

Although animal rights may be a remote goal in a nation that still disregards the rights of the poor, of women, of people of color, and of children and the elderly, there can be little, if any, doubt that conventional morality strongly proscribes the infliction of any “unnecessary” pain on animals and imposes an obligation of all humans to treat nonhumans “humanely.”<sup>7</sup> Despite ubiquitous agreement on these points, there is also widespread acknowledgment that animal abuse does continue unabated in our society. What accounts for this ostensible irony is that animals do not have rights under the law. There are, of course, many laws on the federal and state levels that purport to protect animals from “inhumane” treatment, but these laws do not really confer rights in the sense that we

usually use that term. Indeed, the vast majority of these laws do not even prohibit certain types of conduct that adversely affects animals. To the extent that the law does contain any types of prohibitions, such as the illegality of dogfighting or cockfighting, these prohibitions are usually more concerned with class issues or other moral issues than with animal protection. Similarly, aggressive efforts by police to prohibit the use of animals in religious “sacrifices” may have more to do with racist attitudes about the religion involved than with concern about animals. Both dogfighting and cockfighting are activities that are ostensibly more common among members of disempowered minority communities. Although these prohibitions also appear to be related to a general social disapproval of gambling, other animal wagering activities (e.g., horseracing) are more common among the middle and upper classes; indeed, several such events, such as the Kentucky Derby, are quite celebrated. Prohibitions (e.g., no animal can be used in burn experiments) *may* imply that there are some interests possessed by the animal that may not be traded away simply because of consequential considerations (e.g., the animal has an interest in not being used in burn experiments even where it can be plausibly argued that humans will benefit). Animals are the property of people, and property owners usually react rather strongly against any measure that threatens their autonomy concerning the use of their property.

I refer to the current regulatory structure in this country as it pertains to animals as *legal welfarism*, or the notion, represented by and in various legal doctrines, that animals, which are the property of people, may be treated solely as means to ends by humans as long as this exploitation does not result in the infliction of “unnecessary” pain, suffering, or death. I use this expression to distinguish current legal doctrine from other consequentialist moral theories that may advocate greater protection for animals and from the moral notion of animal rights, which, as I discussed in the Introduction, seeks to shift our framework for dealing with animal issues toward a recognition that at least some animals may be said to possess rights that are not subject to abrogation merely because humans will benefit from that abrogation. Moreover, I distinguish legal welfarism from other types of regulatory systems, such as those that might attempt to regulate animal treatment through the imposition of prohibitions. As I mentioned above, when the state prohibits altogether certain types of animal treatment, it may recognize animal interests that are not subject to abrogation simply on the basis of consequential considerations; legal welfarism treats virtually all animal interests as subject to sacrifice in favor of human interests, however trivial relative to the animal interest at stake.

The law requires that we “balance” the interests of humans and animals in order to decide what constitutes “humane” treatment and “unnecessary” suffering. The problem is that the framework of legal welfarism contains numerous normative considerations that render empty, for the most part, any attempt to “balance”—at least as far as animal interests are concerned. The result of legal welfarism is that in many instances a relatively trivial human interest is balanced against an animal’s most fundamental interest in not experiencing pain or death,

and the human interest nevertheless prevails. We all reject “unnecessary” cruelty, but we still allow bow hunting, pigeon shoots, rodeos, and all sorts of activities that are difficult to justify on any coherent moral ground. These practices result in unspeakable cruelty to animals, and none of these practices serves any purpose beyond mere entertainment. Nevertheless, such practices are protected under the law. A legal system that relies primarily on laws requiring “humane” treatment or prohibiting “unnecessary” suffering simply cannot protect beings that are, as a matter of law, regarded as the personal property of their owners. Three examples will illustrate the problem.<sup>8</sup>

First, in *New Jersey Society for the Prevention of Cruelty to Animals v. Board of Education*,<sup>9</sup> a local humane society sought to recover penalties against a school board when a high school student was permitted to induce cancer in live chickens. The state anticruelty law made it a misdemeanor to “inflict unnecessary cruelty upon a living animal or creature” or to “needlessly mutilate or kill a living animal or creature.”<sup>10</sup> The statute also provided that “properly conducted scientific experiments” were not covered.<sup>11</sup> There was no claim that the experiment was one for which there was any medical need. Indeed, the court noted that it was long known that the virus involved caused cancer in chickens and had “been the subject of many experiments over the years.”<sup>12</sup> Nevertheless, the court deferred to scientific experts who, as “a result of Federal Government grants of some eight million dollars,” concluded “that the use of living animals is essential at the high school level for biology studies in that it . . . helps students have sympathy for living things.”<sup>13</sup>

Second, according to a 1992 article, scientists have determined that the same genetic mutation that causes quarter horses to have desirable physical appearance can also “cause the muscles to periodically seize up with spasms so uncontrollable that the afflicted animal may topple over and even die.” The article continues:

[n]ow that scientists have identified the guilty mutation and have developed a relatively simple test to detect it, a debate is roiling the fierce, high-stakes world of horse breeding on whether it is fair to continue propagating a potentially dangerous trait in a breed simply because the characteristic can reap so many rewards for the human owners.<sup>14</sup>

Presumably, those who would opt for breeding for the mutation would regard any resultant suffering or death of the horse as “necessary.”

Third, it was reported in 1993 that a landmark tourist attraction located in the area of New York known as Chinatown had regrettably ceased to exist. The attraction consisted of a specially trained chicken who lived in a small coop that was fitted into a vending machine. When a customer dropped fifty cents into the machine, the chicken, called Willy by his owner, would play tic-tac-toe with the customer—and would almost always win. Willy had spent all of his life—two years—living in the machine. His predecessor spent eight years in the coop, and other performing chickens have been in the Chinatown games arcade since the 1960s. A glass front left the coop, which had a wire floor, exposed constantly to

hordes of tourists who stared at these birds and challenged them to “play.” The coop was located “next to the rows of noisy electronic zappers and death rays,” not far from another chicken, whose name was not reported by the *Times*, and who amused patrons by dancing rather than playing tic-tac-toe. When a customer dropped seventy-five cents into the machine, the chicken “walk[ed] through a trap door to a round metal tray resembling a wobbly turntable. As the tray teeter[ed], the chicken flap[ped] its wings and shuffle[d] to balance itself in a manner that look[ed] like dancing.”<sup>15</sup>

The tone of the report about Willy was a mixture of maudlin sentimentalism and attempted humor. The writer stated that although it is the “job” of chickens to die, “for those of us who have played the chicken, the sight of its empty box evokes feelings of sadness, if not quite tragedy.” “It showed a great deal of heart almost to the end. Just two days before it died it was still pecking its way through games with whoever dropped 50 cents into the slot in front of its coop.” Willy was “not like meat from Frank Perdue. It was our playmate, and since we have always been a particularly self-centered species, that elevated it.” The dancing chicken “in the best show-business tradition . . . carries on despite the death of its comrade.” The arcade owner is thinking about replacing Willy but complained that trained chickens cost more than \$1,000 “‘which is a good deal of money when you consider that the last one only lived two years.’”<sup>16</sup>

There was not one word in the lengthy report about the propriety of this amusement from the standpoint of the humane treatment of animals. And despite New York’s strongly worded anticruelty statute, the American Society for the Prevention of Cruelty to Animals, located in New York City, has not prohibited this senseless and wholly unnecessary exploitation of these birds.

### “Unnecessary” Cruelty: The “Balance” of Unprotected Animal Interests

It is difficult, if not impossible, to understand the use of “necessity” in any of the three preceding examples. In the first example, a high school student’s infliction of pain and death on chickens is justified as necessary to the child’s development of a “sympathy for living things.” Most of the time, those who use animals in experiments justify that use by pointing to alleged benefits to human and animal health and the supposed necessity of using animals to obtain those benefits. In this case, however, there was no claim of such benefit, and it is certainly difficult to maintain that inducing cancer in an animal is “necessary” to achieve the stated goal of teaching young people “sympathy for living things.” Similarly, those who use animals in teaching usually justify such use as “necessary” for the development of professional skills. In this case, however, the student was in secondary school and clearly did not need to learn such skills at that point in his educational career. Rather, the human interest, described as helping students to develop “sympathy” for animals, was held to outweigh the animals’ fundamental interests in not being used for such purposes.



In the second example, the continued breeding for the mutation is “necessary” for horse owners to profit. There is no claim that the continued breeding will result in any benefit whatsoever—other than monetary profit for human beings. Monetary benefit, then, is sufficient to constitute the “necessity” required when we seek to justify animal exploitation—at least as far as some horse breeders are concerned. As the third example illustrates, human amusement is considered enough of a justification for animal exploitation that the *Times* writer did not consider it necessary even to address the issue of humane treatment in the article.<sup>17</sup> The third example is also reflective of the concerns raised in the context of the pigeon shoot I described in the Preface.

If animal use is “necessary” in these three cases—which are, by far, not the most egregious examples that could be used—then when is animal use “unnecessary” and what, exactly, does “necessity” mean? When we turn to legal doctrine to try to understand the notion of “necessity,” we see that the notion that applies to human/animal conflicts stands in marked contrast to the notion employed when human/human conflicts are involved. Every first-year law student has read *Regina v. Dudley & Stephens*,<sup>18</sup> a case involving cannibalism. Dudley and Stephens, together with Brooks and Parker, were shipwrecked in a storm 1,600 miles from the Cape of Good Hope. The four young men were afloat in a small boat that had survived the storm, but the boat had no water and only two small cans of turnips, and the nearest land was over a thousand miles away. After having no food for nine days or water for seven days, Dudley and Stephens killed Parker without the latter’s consent.<sup>19</sup> They then drank Parker’s blood and ate his body. Four days after Parker was killed, a passing ship rescued the men, and Dudley and Stephens were tried for the murder of Parker.<sup>20</sup> At trial, the defendants argued that their killing of Parker should be excused under the doctrine of “necessity” because it was “necessary” for Dudley and Stephens to preserve their own lives.<sup>21</sup> The court rejected this argument, holding that there is no “absolute and unqualified necessity to preserve one’s life.” In rejecting this notion of necessity, the court asked, “Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured?”<sup>22</sup>

In *Dudley & Stephens* the jury found specifically that at the time of the murder, Parker was in a much weaker physical condition than the other three men, that it was likely that Parker would have died before the other three men even if he had not been murdered, and that there had been no reasonable prospect that the men would be saved.<sup>23</sup> Nevertheless, the court found that the defendants’ actions were not justifiable as “necessary.”<sup>24</sup> Although Dudley and Stephens had interests in remaining alive, so did Parker, and Parker’s right was upheld even though his “sacrifice” had beneficial consequences for a greater number of other people. This is the whole point of a right: as a general matter, it cannot be abrogated even if the violation produces beneficial consequences for others. To put it another way, when it comes to killing innocent human beings or inflicting injuries on them, we tend to reject utilitarian thinking in favor of treating persons as ends, rather than as means to ends. Moreover, the court correctly pointed out that any appeal to the

“necessity” for homicide would invariably involve the courts in value judgments about the relative value of human rightholders and in formulating criteria for determining what constitutes “necessity.”

Indeed, if a researcher needed fifty innocent unconsenting human beings in order to perform an experiment that would result in a cure for cancer, most people would not permit the use of humans in the experiment. Although the use of the humans might be “necessary” in a very direct and causal way, most people would regard the necessity argument as ignoring the rights claims of the potential victims. We simply use the concept of “necessity” in different ways when we talk about humans and nonhumans. In *Dudley & Stephens* the four men also killed and ate a turtle fairly early in their voyage. But the court never discussed any legal or moral issue connected with the death of the turtle. The level of human need that results in the “necessity” for animal suffering or death is clearly different from the level “needed” for human suffering or death.

The problem is that many animal exploiters assert that the notions of “necessity” are the same and equally protective of human and animal life.<sup>25</sup> This assertion is simply not true. When we balance human and animal interests in order to see whether suffering is “necessary” or “justified,” our notion of “necessity” is shaped by the fact that we generally balance two very different entities. Human beings are regarded by the law as having interests that are supported by rights. In the case of *Dudley & Stephens*, the three men were all rightholders, and the court sought to balance competing claims of right. Nonhuman animals are regarded by the law as incapable of having rights—or, at least, the same type of rights possessed by humans—despite an increasing consensus that animals possess some moral rights that ought to be recognized by the legal system. Our entire legal approach to resolving human/animal conflicts, which, as I mentioned above, rests on the notion of animal welfare and not animal rights, virtually guarantees that animal interests will be regarded as of lesser import, even when the human interest is trivial relative to the animal interest. Moreover, there are other normative considerations involved that make it difficult, if not impossible, for animals to prevail. For example, we often assume without question that we can accord “humane” treatment to animals used in sometimes quite painful medical experiments. Thus, to the extent that humans have rights and animals do not, animal interests are, of necessity, accorded less weight.

A critic may reply that “necessity,” when used to discuss moral necessity, as opposed to causal necessity, is inherently imprecise whether applied to animals or humans. This criticism requires that I first distinguish briefly two senses of the term “necessity.” Necessity, as I am presently discussing that notion, refers to moral necessity; a judgment that treatment does not result in “unnecessary” suffering is a moral judgment and is quite different from the usual case of a judgment of causal necessity. There is, however, a sense in which judgments about “necessary” suffering all concern causal necessity. For example, those who use animals in biomedical experiments make moral judgments about necessity

(i.e., they routinely deny that animal suffering is “unnecessary”), but they also make a general judgment about causal necessity: they maintain, for the most part, that animal use is necessary—in a causal way—if humans are to achieve progress in fighting disease, developing medicines and new products, and so forth. On this view, progress and animal exploitation are causally linked. Similarly, someone who supports the use of animals in rodeos (in which animals are brutally treated and killed routinely) may argue that animal use is necessary—in a causal way—given the nature of the activity. Although I am more concerned about moral judgments about necessity, the line is difficult to draw, and in a sense, the problem is precisely that from the point of view of the person seeking to exploit the animal, almost all judgments about necessity are of a causal type; the exploiter is asserting that the animal use is necessary given the nature of the practice, which will, by definition, involve animals. From an external point of view (i.e., the perspective of one not involved in the activity), these judgments say more about morality than they do about causation.

Although there is ambiguity surrounding the notion of moral necessity as applied to humans or animals, judgments of moral necessity are more problematic when animals are involved. For example, if one of my colleagues were to tell me that I was being “unnecessarily” harsh in my classroom behavior with my law students who gave wrong answers in recitation, that comment would most certainly represent a value judgment (or, perhaps, a series of such judgments) that probably could not be reduced to any noncontroversial or “precise” assertion. Although there is inherent imprecision in the notion of necessity, my point about its differential application to animals goes well beyond any such imprecision. To return to my colleague’s criticism: if I responded in class to a student’s wrong answer by shooting and killing the student, my colleague’s criticism would not be particularly meaningful, since my reaction already transcended what could be called “necessary” by any standard. Indeed, although my shooting the student could be criticized coherently on numerous moral and legal grounds employing a wide range of moral discourse, I doubt that anyone would think it sensible (or even coherent) to discuss whether I inflicted -“unnecessary” suffering or death on the student. The point is that when we are talking about human beings, not every action is open to discussion and ultimate characterization as “necessary” or “unnecessary,” even taking into consideration the linguistic imprecision. The reason is, as illustrated by *Dudley & Stephens*, that humans have certain rights that protect their interests and those interests are simply excluded from the balancing process. In the case of animals, *every* animal interest that we acknowledge (and we do not recognize many, and some philosophers argue that animals have no interests at all) is subject to being compromised. Therefore, even though judgments of moral necessity are inherently imprecise even as they apply to humans, they are qualitatively more problematic when animals are involved, because there is, by virtue of the fact that animals are not rightholders, no animal interest that cannot be sacrificed if some human decides that the animal’s death or suffering is “necessary.”

### Animal Property and Legal Welfarism

The lopsided results generated by such an unbalanced balancing approach are exacerbated when the property rights of humans are involved, because animals are a form of property. Humans are entitled under the laws of property to convey or sell their animals, consume or kill them, use them as collateral, obtain their natural dividends, and exclude others from interfering with an owner's exercise of dominion and control over them. A property owner's treatment of an animal may ostensibly be limited by anticruelty laws, but property rights are paramount in determining the ambit of protection accorded to animals by law.

The property status of animals dominates the way in which the political and legal systems think about nonhumans. For example, President Clinton recently proclaimed the first week of May as "Be Kind to Animals and National Pet Week."<sup>26</sup> In the proclamation, President Clinton made the following observations concerning animals: (1) in colonial times, animals acted as beasts of burden and carried our belongings; (2) animals helped early settlers to earn a living and otherwise to sustain themselves; (3) animals serve the blind as guides; (4) animals assist in military, customs, and law enforcement efforts; (5) animals ease the loneliness of the ill and the elderly; and (6) animals entertain us and our children in our daily lives. It should be noted that in every instance of our interaction with animals mentioned by President Clinton, the emphasis is upon the instrumental value of animals and not on any inherent value that the animals may have. This is reflective of the notion that animals are property; they are, as a matter of law, *solely* means to human ends. As such, their value is measured in terms of their usefulness to humans, and not in terms of their own interests, the existence of which cannot be denied. Moreover, property rights have an explicit constitutional basis and are considered to be "natural rights," reflecting the moral ontology of English philosopher John Locke.<sup>27</sup>

The property aspect of animals is almost always a major component in the resolution of human/animal conflicts, because even if the property status is not explicit, in almost all circumstances in which human and animal interests conflict a human is seeking to act upon her property. As far as the law is concerned, it is as if we were resolving a conflict between a person and a lamp, or some other piece of personal property. The winner of the dispute is predetermined by the way in which the conflict is conceptualized in the first place. The human interest in regarding animals as property is so strong that even when people do not want to consider animals as mere "property" and instead view animals as members of their family (as in the case of dogs, cats, and other companion animals), the law generally refuses to recognize that relationship. For example, if one person negligently kills the dog of another, most courts refuse to recognize the status of the animal as family member and limit the owner to the same recovery that would be allowed if the property were inanimate.

There are rights other than the right of private property that serve to support the interests against which we balance the unprotected interests of animals, but