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The History of Animal Welfare Law and the Future of Animal Rights

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THE HISTORY OF ANIMAL WELFARE LAW AND THE FUTURE OF ANIMAL RIGHTS

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Abstract

Animals were included within the protection of the law in the early nineteenth century. Why have there been so few advances since then? Discussion about this question tends to focus on the moral and legal status of animals. That is undoubtedly an important issue, but it stems from a tradition that looks for the singular trait that distinguishes humans from all other animals. This thesis uses an historical approach to explore the tension between the humane impulse to alleviate animal suffering and the sense of human superiority that permits animal exploitation. The conclusion is that animal rights theory could build on the precedent set by the anti-cruelty laws if legal rights for animals are used as a shield to protect animals from the excesses of property rights rather than as a way to elevate animals out of their status as property.

Keywords

Animal Law and Jurisprudence, Animal Rights, Animal Welfare Law History, Anti-Cruelty to Animals Law

Acknowledgments

This thesis has been a long time in the making. My thoughts on animals and the law have emerged only after many years of reading and contemplating the relationship between humans and animals. I expect they will continue to develop, but the requirements of a thesis include reaching a conclusion, and at this moment in time my ideas are as set as they can be. I am indebted to my advisor Dr. Margaret Martin. Without her patience and encouragement I would have abandoned this project and I thank her from the bottom of my heart for having faith in me. Her comments and advice improved my work immeasurably. Professor Tom Telfer also took the time to make suggestions that helped me move the thesis forward. Dr. Margaret Ann Wilkinson offered much needed guidance on the researching and writing of a thesis. I dropped out of an earlier attempt at an LL.M. and am grateful to Anne Dyer-Witheford for convincing me to try again. My return for a second chance was facilitated by the former dean of the law school, Dean Ian Holloway, and I thank him for his efforts. My utmost thanks go out to my husband, Dr. Samuel Trosow, for sharing his interest in jurisprudence and encouraging me to pursue my interest in animal law. Finally, I would be remiss in not extending appreciation to animals as well as humans. Thank you to the cats, dogs, rabbits, chickens, pigs, horses, cows, and all those animals “that are not cattle” who shared their lives with me and inspired me.

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Introduction

The aim of this thesis is to explore the philosophical underpinnings of our legal relationship with other members of the animal kingdom in an historical context.[1] The idea that the human-animal relationship raises *moral* concerns is ancient. But how have these moral standards been translated in *law*? And how have ethical concerns about animals *changed* the law over time? These questions are of more than historical interest. The best way to understand contemporary Canadian law about animals is to appreciate its origins.

Animal protection law in Canada has remained remarkably stagnant, although some might describe it as stable, for two hundred years. The statutory offence of cruelty to animals has changed very little since it was first enacted in England in response to the great humane movements of the nineteenth century. But the creation of the offence itself was a groundbreaking change. The establishment of criminal liability for mistreating an animal conceded the crucial point that animals deserve legal protection. The problem is that this approach is at its best in situations where a person treats an animal in a way that is socially unacceptable. The process of imposing individual criminal liability is far less effective against institutional cruelties and the systematic mistreatment of animals. It is mostly for this reason that how animals are treated continues to raise serious issues of law and public policy.

Debate flares the hottest over the question of whether the appropriate legal remedy is to regulate animal *welfare* or to grant animals *rights*. The issue is sometimes framed as a choice between providing animals with larger cages or releasing them from the cage altogether, but it is more nuanced than those two options might suggest. Owners

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[1] Language is full of meaning and the term “non-human animal” is often used to make the point that humans are animals. I have chosen not to follow this convention in this thesis. My reasoning is that the Canadian *Criminal Code*, RSC 1985, c. C-46, §§ 444 (1) and 445 (1) uses the word “animal” to include cattle, dogs, birds and animals that are not cattle. This definition leaves something to be desired, but since the thesis looks at the *Criminal Code* I decided to adopt both the word and the meaning. I do prefer the word “humans” to “people”, and refuse to use the pronoun ‘it”, which refers to inanimate objects, in reference to animals.

of factory farms,[2] researchers and others who want to continue using animals in institutional settings have embraced *animal welfare* and in the process redefined it. The horrors inflicted on animals through commonly used intensive agricultural practices, for instance, have been well documented.[3] Yet these same practices are still the norm. A label on an egg carton saying "free-range" is the exception that proves the rule; most chickens are not free to walk around. In contrast, the philosophy of *animal rights* begins with the premise that all animals have value in and of themselves. This value goes beyond their monetary worth as commodities.

The concept of rights for animals raises the troubling, and controversial, issue of their legal status. It is often argued that our legal tradition classifies everything as either "human" or "not human", and animals are, by default, in the category that is "other" than human.[4] One of the consequences of this classification for animals, it is pointed out, is that like the other, but inanimate, "things" in their category, animals can be owned and are subject to the property rights of their owners.[5] It is this legal status that has led some to conclude "as long as animals are property, we will face severe limitation in our ability to protect them and their interests".[6]

There is some validity to the argument. The various points of contact between animals and the law, what might be termed "animal law jurisprudence", are diverse and provide numerous examples of how property status is consistently elevated over animal welfare.

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[2] The industry prefers the term Intensive Livestock Operation (ILO) or Confined (or Concentrated) Animal Feeding Operation (CAFO).

[3] While they are often castigated, animal activists have been responsible for surreptitiously taking the film that documents these practices. This documentation is widely available. A good overview is given in Gene Bauer. *Farm Sanctuary: Changing Hearts and Minds About Animals and Food* (New York: Touchstone Pr., 2008).

[4] Wendy A. Adams, "Human Subjects and Animal Objects: Animals as 'Other' in Law (2010) 3 Jn of Animal Law and Ethics 29.

[5] Steven M. Wise, "The Legal Thinghood of Nonhuman Animals" (1996) 23 BC Envtl Aff L Rev 471.

[6] Steven J. Bartlett, "Roots of Human Resistance to Animal Rights: Psychological and Conceptual Blocks" (2002) 8 Animal Law 143, 144, citing Joyce Tischler, "Toward Legal Rights for Other Animals" in Pamela D. Frasch, et al. *Animal Law* (Carolina Academic Pr., 2000) at 747-749.

Two Canadian cases have been in the news recently and will be discussed in Chapter 4. The first is a dispute that arose between Marineland in Ontario and Florida's SeaWorld over possession of a whale named Ike. Although it was essentially a custody dispute, the best interests of the whale were not considered. Instead, the case was decided using principles of contract law. The second example concerns an elephant named Lucy, who lives a solitary life at the Edmonton zoo. It is well established that elephants are social animals that have difficulty thriving in captivity, particularly when they are alone and in a cold climate. Some believe that keeping Lucy in these conditions is cruel, especially since a sanctuary for elephants in California is willing to take her. Their argument on her behalf raised questions about the purposes of public interest standing and citizen review of governmental action. In the end, however, the Supreme Court of Canada declined to review the matter, so there continues to be no procedural method to challenge the property rights of animal owners.

Once the problem is identified as the classification of animals as "property", moving them into the only other category available, thereby reclassifying them as "persons", begins to seem like the obvious solution.[7] Self-styled "abolitionists" contend that animals, like human slaves, cannot be both liberated and owned as property at the same time. But "personhood" for animals is still a flexible concept. It could, as the abolitionists would like, give animals the right to not be owned as property. Alternatively, "personhood" could encompass a group of rights, or could be limited to a narrow definition that is essentially standing to sue.[8] A precedent for these latter options has been found in the classification of corporations as "persons", for while corporations are created by and consist of humans, the entity itself is not human.[9]

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7 *See*, for example, Steven M. Wise, "Legal Personhood and the Nonhuman Rights Project" (2010) 17 Animal Law 1.

8 Tamie L. Bryant, "Similarity or Difference as a Basis for Justice: Must animals be like humans to be legally protected from humans?" (2007) 70 Law & Contemp Probs 207.

9 Laurence Tribe, "Ten Lessons Our Constitutional Experience Can Teach Us about the Puzzle of Animal Rights: The Work of Steven M. Wise" [Remark] (2001) 7 Animal Law 1.

In my view this emphasis on animals as either property or legal persons is a useful critical device but it defines the issue too narrowly. From an historical perspective, legal reform for animals was successful when the focus was less on the status of animals and more on the obligations of humans. Natural law theory had excluded animals from moral consideration, but accepted a duty to not mistreat them based on the effects of that cruelty on humans. Utilitarian theory was willing to consider animal suffering but never purported to place animals on the same moral level as humans. Similarly, the creation of the offence of cruelty to animals in the nineteenth century made the mistreatment of animals legally wrong, but it did not grant animals any new status or entitlement. Rather, the law obligated humans to treat animals, including the animals they owned, humanely. Prosecuting those who continued to mistreat animals enforced this obligation.

The transformation of animals into legal persons is appealingly dramatic and, more importantly, would make the point that animals are not commodities or "things". The viewpoint advanced in this thesis, however, is that legal reform is more likely if it follows the earlier precedents. If Ike the whale and Lucy the elephant were to be granted a higher moral status and become legal persons, they would continue to be subjected to the will of their owners *unless being persons meant that they could not be owned*. A less expansive definition of legal personhood for animals might still acknowledge that they have moral standing and perhaps affect how we view the human-animal relationship, no doubt for the better. But short of freedom from being owned altogether, personhood would benefit animals only to the extent that corresponding legal rights would place limitations on the property rights of their owners. These limitations are possible even while animals retain the status of property. That precedent was set in the nineteenth century.

There are three main parts of this thesis: an historical analysis of how animals came to be included within the protection of the law, how animal protection law has been interpreted, and where it should be headed. Each part examines a distinct shift in the law. Think of a platform with humans on one side and animals on the other. A pendulum is suspended above the humans. Part I of the thesis looks at why the pendulum begins on the human side, and what caused it to swing toward the animals in the early nineteenth century. Part II examines how the interpretation given to animal protection law by the

courts has resulted in the pendulum swinging part of the way back toward the humans. Part III critiques the utilitarian and rights theories advanced by some of the humans who are attempting to push the pendulum once again to the side of the animals.

The first part of the thesis focuses on history. Chapter 1 considers why animals were initially excluded from moral, and legal, consideration. The analysis necessarily goes back to Aristotle's hierarchical structure in biology and the religious teachings of Aquinas. It was within this tradition that Locke and Kant reached the conclusion that cruelty to animals is wrong because of its effect on humans. This same justification was replicated in law. Cruelty to animals could be addressed, but only through the common law offences of mischief, injuring property or disturbing the public order, or as a secondary concern of a statute with an entirely different primary goal.

Chapter 2 turns to the early nineteenth century, when social change and a concern for animal suffering found expression in utilitarian theory and humane movements. Animals came under the protection of the law directly when the British Parliament of 1822 made cruelty to animals a criminal offence, a legislative approach that continues to form the basis of our current animal welfare regime. The Hansard report of Parliamentary debates provides a record of the intent of the legislators in enacting the new law. The legislators certainly referred to the earlier justification that cruelty to animals is wrong because of its effects on humans. But they also talked about their desire to protect animals from abuse because animals are sentient, can suffer, and deserve decent treatment. In making these comments the legislators were turning away from the idea that animals are inferior beings that do not matter legally. The pendulum had moved, at least a little bit, toward the animals.

The second part of this thesis examines how animal protection law has developed. What did it mean for the law to begin to take animal suffering into account? In deciding what pain or injury is "unnecessary", should the court look at the need for the human activity, or just at whether the suffering is gratuitous to the end sought? Chapter 3 compares the

quite different answers given to these questions by the courts in *Ford v Wiley*[10] and *R. v Ménard*.[11]

Ford v Wiley is an 1889 English case that is eerily prescient of modern factory farming. In that case, the court interpreted the animal cruelty law as requiring the application of a balancing test between the amount of pain felt by the animals and the benefit gained. In other words, the issue was identified as one of proportionality. This proportionality test was not generally followed, however. The test used in Canada is the *Ménard* test, which looks at whether the suffering was "unnecessary" in the context of achieving a legitimate human purpose. The distinction has significant consequences. Unlike the proportionality test, the *Ménard* test can permit a large amount of suffering to be inflicted on animals in order to achieve a relatively trivial human purpose.

The *Ménard* test moved the pendulum back toward the presumptions of human superiority and entitlement to use animals that were promoted by Aristotle and Aquinas and Kant. In an effort to explain this reversal, legal scholars have argued that the primary problem is that the law never stopped regarding animals primarily as things that can be owned by humans. In short, animals were brought under the protection of the law in the nineteenth century, but the question of their status was evaded.

Chapter 4 looks at this issue of the property status of animals and applies it to the two recent Canadian cases already mentioned: the contract dispute over possession of Ike the whale, and the request for public interest standing on behalf of Lucy the elephant at the zoo. In both cases property rights triumphed over considerations of animal welfare, and it could be argued that the underlying problem in both is the status of Ike and Lucy as property. I don't completely disagree, but suggest that this view of animals as property is animated by the assumption of human superiority. Put simply, the law classifies animals as property in response to the belief that humans are entitled to own animals. Reclassifying animals as something other than property would not, by itself, address this

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10 *Ford v Wiley* (1889) 23 QBD 203.

11 *R. v Ménard* (1978) 43 CCC (2d) 458 (Que CA).

sense of superiority and entitlement. Something more would be needed to limit how humans use or interact with animals.

On this foundation, the third part of the thesis examines how the pendulum could be made to swing once again toward animals. Chapter 5 discusses two dominant theories, one of which is based in utilitarianism and the other in rights. The chapter begins with Peter Singer's utilitarian principle of "equal consideration" in the balance of pleasure and pain.[12] This principle can be applied in law in the form of a "proportionality test". As already mentioned, the nineteenth century English case of *Ford v Wiley* used a proportionality test. A more recent example is presented by *Noah v The Attorney General.*[13] In *Noah*, the Israeli Court Supreme Court held that the pain experienced by geese during the process of force-feeding outweighed the benefit gained from the production of a luxury food, a decision that effectively ended the foie gras industry in Israel. *Noah* has limited applicability to Canada since this country does not have a similar regulatory scheme over the agricultural industry. The case does, however, demonstrate the linkage between theory and practice.

In contrast to this utilitarian approach, Tom Regan re-examines the traditional criteria used to determine inclusion in the moral community, and argues that animals measure up because they are the "subject-of-a-life".[14] Being the subject-of-a-life goes beyond the ability to feel pain, and it this additional characteristic that grounds his claim that animals have rights in addition to the mere right to "not suffer". Regan's approach is limited at the beginning, however, by his acceptance of the idea that before animals can be granted rights they must first demonstrate a trait that justifies their inclusion with humans in the moral community. Gary Francione avoids this dilemma by insisting that sentience alone

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[12] Peter Singer. *Animal Liberation* (New York: Random House, 1975; revised edition New York: Random House, 1990, reissued with a new preface, Ecco, 2001).

[13] *Noah v The Attorney General, et al.*, HCJ 9232/01, 215 (Israeli Supreme Court Aug. 11, 2003), available in English at http://elyon1.court.gov.il/files_eng/01/320/092/S14/01092320.s14.pdf

[14] Tom Regan. *The Case for Animal Rights* (Berkeley: Univ of California Pr., 1985).

is a sufficient basis for moral rights.[15] But he in turn is faced with the question of whether the ability to feel pain can support any moral rights beyond a right to not suffer. He neatly sidesteps the issue by saying animals only need one right, the right to not be property, which takes us back to the discussion about the meaning of "personhood" for animals.

In Chapter 6, I ask whether the history of animal *welfare* law can shed light on where animal *rights* theory should be headed. I conclude that a second generation of fundamental change for animals should follow the pattern set by the nineteenth century reform movement. The historical example emphasized animal suffering and focused on changing human behaviour in order to relieve that suffering. Animal rights should be granted along these same lines, meaning they should not be intended to change their legal status. Instead, animal rights should act as a protective mechanism to limit the property rights of owners.

If one of the functions of law is to limit the tyranny of the powerful, it would seem immaterial whether the subjugated entity is property or person. Moral questions about how we treat animals might best be answered by analyzing the traits that make humans and animals similar. The problem with the old method may very well be its emphasis on the characteristics, such as rationality, that distinguish humans from animals. In the end, however, the discussion is still about *our* actions and *our* humanity. The legitimacy of the belief that humans are superior to all other species is a moral question. The issue in law is how to mitigate the consequences of that belief.

There is a set of values underlying the law that both privileges humans and promotes the institution of private property. Yet, the overall history of legal thought about animals is more than the singular denigration of animals as property that is sometimes assumed. We have been left a complex legacy. If we are even to consider making a fundamental change in the law for animals it is essential to first understand this framework of moral thought and the law.

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[15] Gary L. Francione. *Rain Without Thunder: The Ideology of the Animal Rights Movement* (Philadelphia: Temple Univ Pr., 1996).

Chapter 1

1 Animals and the Pre-Nineteenth Century Law

Before considering how the law is problematic for animals, and making suggestions for change, it is helpful to know how the present-day regime evolved. Part I of this thesis, which consists of Chapters 1 and 2, provides that historical context. In this chapter I trace the origin of our attitudes toward animals, and examine how the belief in our superiority led to the conclusion that we owed them no moral or legal duties. Then, in Chapter 2, I examine the theoretical and legal reforms initiated in the nineteenth century, and show how that experience eventually led to our current animal welfare laws.

1.1 The Superiority of Humans

There are two ways to compare humans with animals: we can look for the traits that make us similar or for those that make us different. Much of the way we view the human-animal relationship depends on which path we take. That choice was made early on. Natural law theory sought to identify universal traits in *human* nature.[16] The qualities that distinguish us from animals were, therefore, the ones that were emphasized.

Humans and animals are obviously different. Yet it was, and is, surprisingly difficult to say exactly how they are different. The use of language, for example, has been suggested as a distinguishing trait but many species communicate among themselves with various sounds and body postures. The concept of rationality as the singular difference is more difficult to refute, but it too can be questioned as more is learned about animal intelligence. Language and rationality, however, were the characteristics relied on in natural law as a basis on which to exclude animals from moral consideration.

The idea that there is a defining characteristic that separates humans from all other animals can be traced back to Aristotle, who observed all living things and constructed a

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[16] M.D.A. Freeman. *Lloyd's Introduction to Jurisprudence*, 7th ed. (London: Sweet & Maxwell, 2001).

hierarchy based on the type of form, or soul, each organism presented. Aristotle noted that plants are alive, but they only reproduce and grow. In his scheme they have a vegetative soul and a place at the bottom of the hierarchy of living things. Animals can grow and reproduce like plants, plus they have mobility and sensation, evidencing both a vegetative soul and a sensitive soul. Humans can do all the things plants and animals can do, and in addition are capable of thought and reflection. Thus a human has a vegetative, a sensitive, and a rational soul. Aristotle explained that souls are analogous to mathematical figures. The triangular soul of a plant fits inside the square soul of an animal, and both can be contained within the rectangular soul of a human.

> The types of soul resemble the series of figures. For, alike in figures and in things animate, the earlier form exists potentially in the later, as, for instance, the triangle potentially in the quadrilateral, and the nutritive faculty in that which has sensation.[17]

Aristotle's concept of souls could be interpreted to mean that humans have common ground with all living plants and animals. After all, their square and triangular souls are contained within our rectangular soul. But Aristotle's notion of increasingly complex souls can also be depicted as a hierarchy. This vertical way of thinking places the big rectangular human soul on the top spot and graces it with the mantle of superiority.

Aristotle’s hierarchical concept of human supremacy over animals was reinforced by a Biblical passage in Genesis that has been translated to read:

> And God said, Let us make man in our image after our likeness: and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth.[18]

This passage was interpreted by the early Christian church as a divine plan in which humans occupy a place in the universe somewhere between God and animals.[19] From this

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[17] Aristotle, De Anima II 3. [Translated by R. D. Hicks, c. 1907] (Amsterdam: A.M. Hakkekrt, 1965).

[18] King James Bible, Genesis 1: 20.

divine hierarchy it was extrapolated that since humans serve God, who is above us, the grant of "dominion" must mean that animals, who are lower than us, exist to serve our purposes. Therefore humans may kill animals even though God created them. As Aquinas put it, the "life of animals…is preserved not for themselves, but for man".[20]

To be fair, Aquinas was probably only seeking a justification to kill God's creatures in order to eat meat, not supporting anything humans could conceivably do to animals. Aristotle's description of the triangular soul responsible for growth and reproduction belongs equally to plants, animals, and humans, and we all share these traits. Similarly, the square animal soul representing sensation fits within the larger rectangular shape of the human soul, and indicates that humans and animals share the ability to feel pain. Since humans and animals are alike in this way, there needs to be some reason to ignore the similarity and kill them for food. The theistic belief that God created animals so they could serve human needs offers this justification.

Montaigne seems to have disagreed when he observed in 1592 that "it is not upon any true ground of reason, but from a foolish arrogance and stubbornness, that we put ourselves before the other animals.[21] He famously gave the example of his cat. "When I play with my cat, who knows if I am not a pastime to her more than she is to me?"[22] But we are reading from a perspective gained centuries later. Montaigne's goal may only have been to criticise human pretensions. He may not have been questioning the moral status assigned to animals or the conclusion that they exist to serve human needs.

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[19] Joyce E. Salisbury. *The Beast Within: Animals in the Middle Ages* (New York: Routledge, 1994) 5, citing Augustine, "Divine Providence and the Problem of Evil," trans. Russell, in Writings of Saint Augustine, vol. 1, Fathers of the Church (New York, 1948), 326.

[20] St. Thomas Aquinas, "No Friendship with Irrational Creatures" in A.B. Clarke and Andrew Linzey (eds). *Political Theory and Animal Rights* (London: Pluto Pr., 1990), 102-105. *See also*, Salisbury, *The Beast Within, Id.*, at 16-17, citing Aquinas, Summa Theologica, Q 64, 1 (1466).

[21] Michel E. de Montaigne, "Exclusion from Friendship is Not Rational" (1592). Reprinted in A.B. Clarke and Andrew Linzey (eds). *Political Theory and Animal Rights* (London: Pluto Pr., 1990), 105-112 at 111.

[22] Michel E. de Montaigne. *Essays*, Bk. II, ch. 12. This quote can easily be found today on tee-shirts and mugs.

But what human needs did God intend animals to serve? Is scientific experimentation on a living animal, or vivisection, that type of need? In 1637 dogs were being nailed to boards and dissected without anaesthesia in order to observe the functions of the lungs and circulatory system. Descartes tried to justify this practice on the grounds that animals are mere "automata" or machines.[23] He argued that they did not have a mind capable of understanding or articulating pain, so their screams and writhing were just reactions to a stimulus, and it did not matter how they were treated.

Yet there must have always been some who were repulsed at this sort of callousness toward animals. We know that in 1776 the Anglican priest Humphrey Primatt turned his mind to the matter and wrote that no animal is useless or ugly. He depicted nature as a unified system with a creator who could have had many reasons for placing animals on earth. These reasons may not be obvious to humans, but a divine scheme does exist, and every animal has a purpose.

> Every creature is to be considered as a wheel in the great machinery of Nature; and if the whole machine is curious and beautiful, no wheel in it, however small, can be contemptible or useless. … The most ugly animals, though we know no other use for them, may be considered as a foil, like the shades in a good picture, to set off the beauties of the more perfect. … An Animal, whatever it be, or wherever it is placed in the Great Scale of Being, is such, and is so placed, by the Great Creator and Father of the Universe.[24]

Primatt's writings are significant because he broke with the tradition of looking for a trait that separates humans from animals, and instead focused on a way in which we are connected. It is noteworthy that he suggested the unifying characteristic is the ability to feel pain. Primatt was perhaps the first to say that animals should be treated well because *they can suffer*.

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[23] Rene Descartes. *Discourse on Method and Mediations on First Philosophy* [c. 1637]. Translated by Donald A. Cress, 4th ed. (Indianapolis: Hackett, 1998).

[24] Humphrey Primatt. *A Dissertation on the Duty of Mercy and Sin of Cruelty to Brute Animals* (London, 1776), 5-6. [Electronic ed.]

> … a man can have no natural right to abuse and torment a beast, merely because a beast has not the mental powers of a man. For, such as the man is, he is but as God made him; and the very same is true of the beast. … A brute is an animal no less sensible of pain than a Man. He has similar nerves and organs of sensation; and his cries and groans, in case of violent impressions upon his body, though he cannot utter his complaints by speech, or human voice, are as strong indications to us of his sensibility of pain, as the cries and groans of a human being, whose language we do not understand … the difference of shape between a man and a brute, cannot give to a man any right to abuse and torment a brute.[25]

Around this same time, Rousseau was also using the common trait of sentience to conclude that animals have some moral standing. He stopped short of granting animals full participation in natural law, but he was certain they should not be excluded entirely. At a minimum, he wrote in 1761, animals had a "natural right" to "not being wantonly ill-treated" by humans:

> … we put an end to the time-honoured disputes concerning the participation of animals in natural law: … if I am bound to do no injury to my fellow-creatures, this is less because they are rational than because they are sentient beings and this quality, being common both to men and beasts, ought to entitle the latter at least to the privilege of not being wantonly ill-treated by the former.[26]

Primatt's views were through the lens of religious doctrine, but Rousseau was zeroing in on a huge dilemma in natural law theory – how to exclude animals from the moral community and at the same time acknowledge that humans have a duty to treat animals humanely. His use of sentience to support his argument, however, seems to have been somewhat unusual. The more commonly accepted rule that was crafted to limit human

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[25] Humphrey Primatt, "Differences do Not Justify Inequality" (1742). Reprinted in A.B. Clarke and Andrew Linzey (eds). *Political Theory and Animal Rights* (London: Pluto Pr., 1990), 125.

[26] Jean-Jacques Rousseau. *The Social Contract and Discourses* [Preface] (c. 1761). Translated by G.D.H. Cole (London and Toronto: J.M. Dent & Sons, 1923). [Electronic ed.]

mastery over animals focused on the affect of cruelty on those for whom it was thought matter morally, that is, humans.

1.2 The Moral View of Cruelty to Animals

Mistreating animals can seem obviously wrong, but if one steadfastly asserts that animals are not members of the moral community, on what basis is it wrong? An answer was found in the principle that kindness should be a part of "man's character".[27] The advantage to this way of thinking over Primatt's and Rousseau's is that it is consistent with Aquinas' conclusion that animals exist for human purposes. The rule of kindness places no limitations on how humans can use animals, so there is no need to worry about causing them pain or killing them in order to use them. Rather, humans must only refrain from inflicting *gratuitous* cruelty on animals.

Locke summed up this idea when he stated that children should be prevented from tormenting animals because it "will, by degrees, harden their minds even towards men; and they who delight in the suffering and destruction of inferior creatures, will not be apt to be very compassionate or benign to those of their own kind."[28] Locke was not worried that household pets were suffering. He was concerned about the effect of the cruelty on the children who were tormenting the pets. He could think this way because for him rationality remained the trait "whereby Man is supposed to be distinguished from Beasts, wherein it is evident he much surpasses them."[29]

Once it was accepted that the effect of cruelty on the person mistreating animals was a legitimate concern, the effect of that cruelty on those around that person could be considered as well. Kant postulated that children who were cruel to animals would, as adults, transfer that cruelty to humans. Locke had hinted at this idea, but Kant found a

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[27] Rod Preece and David Fraser. "The Status of Animals in Christian and Biblical Thought: A Study in Colliding Values" (2000) 8 Society and Animals 245, 256, citing Aquinas Summa Theologia vol. 2, 1, 102, 6, 106.

[28] John Locke. *Some Thoughts Concerning Education* (c. 1693), at sec. 116. [Electronic ed.]

[29] John Locke. *An Essay Concerning Human Understanding* III.XI.16.

causal connection by analogy between some qualities in animals that can be said to be similar to qualities in humans.[30]

Still, despite this acknowledgement that there could be similarities between humans and animals, Kant held fast to the belief that animals are not moral agents and humans do not owe animals any direct duty. Animals remained instrumental and outside the moral community. The human duty toward animals was only indirect, because the obligation to avoid mistreating animals was strictly to oneself and other humans. Kant used the example of a man who has his dog shot when the animal is no longer of service. Casting the dog aside like a worn out tool is not a violation of any duty to the dog, but of the man's duty to cultivate the kindly and humane qualities in himself, which he ought to exercise in virtue of his duties to other humans.

> If a man shoots his dog because the animal is no longer capable of service, he does not fail in his duty to the dog, for the dog cannot judge, but his act is inhuman and damages in himself that humanity which is his duty to show toward mankind. If he is not to stifle his human feelings, he must practice kindness toward animals, for he who is cruel to animals becomes hard also in his dealings with men.[31]

My intent, here, is not to assess Kant's theory. Instead, I want to point out that Locke's principle of kindness requires us to think about the perpetrator of the cruelty. In contrast, Kant's idea that cruelty to animals can be transferred to violence against humans is a notion that strikes at our own self-interest and perhaps for that reason is particularly compelling. The theory is well accepted today and how it is being used to champion the cause of animals will be discussed further at Chapter 5. For now, I will turn to how the idea that mistreating animals harms humans was represented in the law.

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[30] Heather Fieldhouse. "The Failure of the Kantian Theory of Indirect Duties to Animals" (2004) 2 Animal Liberation Philosophy and Policy Journal 1, 4.

[31] Immanuel Kant. *Lectures on Ethics*, 240. Translated by Louis Infield (Indianapolis: Hackett Pub. Co., 1980).

1.3 The Legal View of Cruelty to Animals

Given the contemporaneous belief that animals do not have moral standing, it is not surprising that cruelty to animals as such was not considered an offence at common law. Mistreating an animal could be a legal matter, but only if it resulted in an economic loss to the animal's owner or caused some other harm to humans. That harm could be to the public. One example is an American case in which a man beat a cow to death on a public street and was indicted under the common law as a public nuisance. The incident occurred in the District of Columbia in 1834. At trial, the defendant contended it was necessary to the offence to prove the cow died as a result of that beating, and the issue was appealed. The appellate court ruled "the gist of the offence was the public cruelty to the common nuisance". [32] It was, therefore, not necessary for the prosecutor to prove that the cow died of the beating. The offender could be convicted and, although it was through an indirect route, the cow could have some justice.

Statutory law of the time followed the same pattern. Instances can be found where laws affected animal welfare but, like the common law, this result was a by-product of a different goal that served the needs of humans. For example, in the mid-seventeenth century, An Ordinance for Prohibiting Cock-Matches banned staged fights in which one bird "wins" by killing the other and possibly dying in the process.[33] The ban protected these birds, but the stated grounds had nothing to do with them. Instead, cock-matches were objected to because they caused public disturbances and led to the ruin of the participants and their families due to excessive gambling.

> Whereas the Publique Meetings and Assemblies of People together in divers parts of this Nation, under pretence of Matches for Cock-Fighting, are by experience found to tend many times to the disturbance of the Publique Peace, and are commonly accompanied with Gaming, Drinking, Swearing, Quarreling, and other dissolute

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[32] *US v Jackson* 1834 US LEXIS 264 (1834) [Circuit Court, District of Columbia].

[33] "An Ordinance for Prohibiting Cock-Matches," 31 March 1654, in *Acts and Ordinances of the Interregnum, 1642-1660.* Collected and edited by C.L. Firth and R.S. Raitt (London: H.M. Stationary Office, 1911).

> Practices, to the Dishonor of God, and do often produce the ruine of Persons and their Families; For prevention thereof, Be it Ordained by His Highness the Lord Protector, by and with the Advice and Consent of His Council, That from henceforth there shall be no Publique or Set-meetings or Assemblies of any persons within England or Wales, upon Matches made for Cock-Fighting; and that every such Meeting and Assembly of People for the end and purposes aforesaid, is hereby Declared to be an Unlawful Assembly.[34]

Likewise, an Act for the Better Observation of the Lord's Day included bear-baiting, another "sport" detrimental to the animals involved, in a list of activities that were prohibited, but in this case only on Sundays.[35] Bear-baiting was a staged fight in which a bear, or a bull if no bear was available, was tied to a post or otherwise hindered in a pit before dogs were set upon the animal. Bets were placed on which animal would "win" and the entire spectacle was accompanied by much rowdiness. The Act was intended to address this behaviour on the part of the spectators, not relieve the plight of the animals in the bear pit.

In at least two statutes, however, the treatment of animals was front and center. On the surface these statutes seem to be exceptions to the rule that only humans mattered morally. The first was in 1635 when Ireland enacted a law that made it a crime to pull (not shear) wool off sheep or tie a plough to a horse's tail.[36] The Act's stated justification was that the practices involved "cruelty used to the beasts" and in the case of ploughing impaired the "breed" of horses. A discussion about the reasons for the law was published in an archaeological journal in 1858.[37] It seems that poor farmers had been using "short plows" in a manner that resulted in a large number of horses being maimed or killed. A

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34 *Id.*

35 "An Act for the Better Observation of the Lord's Day," 26 June 1657, in *Acts and Ordinances of the Interregnum, 1642-1660.* Collected and edited by C.L. Firth and R.S. Raitt (London: H.M. Stationary Office, 1911).

36 "An Act Against Plowing by the Tayle and Pulling the Wooll off Living Sheep" (1635). *The Statutes at Large*. Dublin, 1786, Ch. 15, 168-169.

37 W. Pinkerton, "Ploughing by the Horse's Tail" (1858) 6 Ulster Jn of Archaeology 212.

short plough is a digging stick with a beam in front. Since the impoverished farmers had no harness, they tied the animal's tail to the beam. Efforts to end the practice through the imposition of a fine had failed, in large part because agents authorized to impose the fine were instead collecting a smaller fee to look the other way. The archaeologists cited a letter from the King in which the law was described as a "sharper course" to end the cruelty:

> The King, in a letter of instructions to Sir Oliver St. John, then lord Deputy, (dated June, 1620,) states that he had heard the "Agents" with his "accustomed patience," and then, proceeding to deal with the grievances seriatim, he says: -
>
> "The barbarous custome commonly used in the Northerne parts was the cause of the grant of the penaltie for plowing with horses by the tailes, and our chiefest end thereby was the reformation of that abuse, which we were then assured would with few yeares be brought to passe, and we did presently see a good effect thereof in some parts of that country. But now the Agents such that are employed under our Patentee, more respectting their own profit than our intention … opened a way for that rude and hatefull custome to spread it selfe …we shall … take some sharper course …"[38]

So it is tempting to agree with the archaeologists that the Act was the first to criminalize a practice because it was cruel to animals. The problem is that this conclusion disregards the fact that the horses were property and the law generally left it up to owners to decide how to use their property. Bierne suggests looking at the law from the point of view of the English.[39] There was a desire on the part of the English administrators to impose their own farming practices on the Irish or, if that failed, increase the fines that were a valuable source of their income. In support of this alternative view, Bierne notes that the Irish rebellions against English rule sought repeal of the law. In response, the Secretary for

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[38] *Id.* at 213.

[39] Piers Beirne. *Confronting Animal Abuse: Law, Criminology, and Human-Animal Relationships* (Lanham, MD: Rowman & Littlefied Pub., 2009), 21-68.

Foreign Tongues to the Council of State, John Milton, maligned the Irish people but never mentioned a desire to prohibit cruelty to horses.

> [Milton] condemned plowing by tail and sought to uphold the existing law against it not because he saw the practice as cruel to animals – an idea that he did not mention – but because he thought it a custom that showed the Irish to be primitive, savage, idiots, and fools.[40]

The opinion of one person hardly seems like conclusive evidence of the intent of the law, but it does cast a different perspective on the matter. The talk about cruelty to the horses caused by ploughing by the tail very well may have been used to hide an ulterior purpose. When faced with a farmer who followed the practice, it would have been far easier to convince him that the Irish custom was wrong because it injured a valuable horse than because the English method of ploughing was better. And if the argument failed, the English administrator would at least be able to collect a fine to make his effort worthwhile. The archeologists who discussed the matter in their mid-nineteenth century journal may, perhaps, have made the classic error in historical research of bringing their perspective to a much earlier period in time. Their perception that the mistreatment of animals is both an offence and a legitimate matter for the law may very well have shaped their analysis of the King's letter.

The other statutory evidence of an early concern for animal welfare is equally subject to the argument that it did, in fact, have an entirely different purpose. The code of laws known as the Body of Liberties adopted in 1641 by the Puritans settling the Massachusetts Bay Colony provided that, "No man shall exercise any Tirranny or Crueltie towards any bruite Creature which are usuallie kept for man's use."[41] Given the

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40 *Id.*, at 54.

41 William H. Whitmore (ed.). *The Colonial Laws of Massachusetts. Reprinted from the edition of 1660, with the supplements to 1672. Containing also the Body of Liberties of 1641* (Boston: Rockwell and Churchill, 1889) at 52-53 [Electronic ed.]. The *Body of Liberties* Numbers 92 and 93 concern animals and provide: 92. No man shall exercise any Tirranny or Crueltie towards any bruite Creature which are usuallie kept for man's use. 93. If any man shall have occasion to leade or drive Cattel from place to place that is far of, so that they be weary, or hungry, or fall sick, or lambe, It shall be lawful to rest or refresh them, for a competent time, in any open place that is not Corne, meadow, or inclosed for some peculiar use.

central place of religion in the lives of the colonial settlers, it is plausible they felt that animals could lay claim to being God's creatures as much as humans can, and for this reason animals deserve decent treatment. The text does not offer any explanation, however, so there is little guidance on why this provision was included. Like the statute that banned bear-baiting on Sundays, the Puritans may simply have had the goal of encouraging "better observation of the Lord's Day". A disorderly congregation that worked animals every day, after all, would be likely to fail to properly observe the Sabbath.

It is reasonable to conclude from all this that the place of animals and their welfare in the law before the nineteenth century was as a secondary, as opposed to primary, concern. This approach presented the humane reformers of the early nineteenth century with a significant hurdle if they were to be successful in their attempts to include animals within the protection of the law. They could be forgiven if they chose to present their proposals for reform in language that referred to the effects of cruelty on humans, and to some extent that was done. But other factors, including the emergence of utilitarianism, encouraged more direct attention to the suffering of the animals themselves. Cruelty to animals was clearly wrong because it harmed humans. At the same time, it was increasingly being recognized that cruelty was wrong because it harmed animals. The importance of utilitarian theory, and how the law incorporated this new idea about pleasure and pain, including animal pain, will be examined in the next chapter.

Chapter 2

2 Nineteenth Century Reforms

We have seen that natural law theory concluded that the differences between humans and animals meant that humans are superior beings who owe animals no moral duties. Humans were entitled to use and even kill animals, albeit with the proviso that cruelty to the animals should be avoided because it had negative effects on humans. Locke and Kant described these effects as a hardened character and a tendency toward violence against humans. It made sense, therefore, that animals were excluded from the protection of the law except as a secondary consideration to the offences of mischief, disorderly conduct, or property damage. As the writings of Primatt and Rousseau show, however, the pain and suffering of the animals was obvious to some. This chapter looks at how the emergence of utilitarianism provided a way to address this concern in theory. How the concern for the humane treatment of animals translated into legal reform in England is then examined. Finally, the influence of the English statute on Canadian cruelty law is reviewed.

2.1 The Importance of Utilitarian Theory

It is well known that Bentham strenuously rejected natural law theory, famously calling it “nonsense upon stilts”, and with it he abandoned the idea that a cluster of natural rights exists that can be discerned through reason. What was so revolutionary about utilitarianism for animals was the focus on the utility of an action as the ruler by which to measure ethics. In contrast to the natural law philosophers, utilitarianism does not strive to discern the moral course of action through reasoning, although reason is still necessary to make judgments about the system. Instead, deliberations about utility look at the pleasure to be gained and the pain to be suffered, and the ethical course of conduct is the one that results in the greatest happiness for the greatest number. Bentham described utilitarianism as a system in which pain and pleasure are “two sovereign masters”:

> Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do.[42]

This classic calculation of the greatest amount of happiness did not initially include animal pains and pleasures.[43] The concern was limited to humans. Animals were incidental, mentioned only as they reflected the moral choices made by humans. Yet once pain and pleasure become the defining factors, there is no longer any need for the dichotomy between humans and animals that natural law insisted on and based in rationality or language. The suffering of any sentient being is a more relevant consideration than that being's ability to reason or to talk.

This line of thought is similar to the theistic justification for treating animals well based on respect for all sentient beings within the unified system of creation that was proposed, as mentioned earlier, by the Reverend Primatt.[44] Whether Bentham was aware of Primatt's reasoning or not, he incorporated it into utilitarian theory when he said that any sentient being that can suffer – and presumably also enjoy happiness – deserves to have that interest taken into account. In what is probably the most often quoted footnote in history, Bentham concisely and eloquently summed up the issue with the question, "Can they *suffer*?"

> The day has been, I am sad to say in many places it is not yet past, in which the greater part of the species, under the denomination of slaves, have been treated by the law exactly upon the same footing, as, in England for example, the inferior races of animals are still. The day *may* come when the rest of the animal creation may acquire those rights which never could have been witholden from them but by the hand of tyranny. The French have already discovered that the blackness of the skin is no

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[42] Jeremy Bentham. *Introduction to the Principles of Morals and Legislation* (Printed for publication 1781, published 1789) Reprinted in J.H. Burns and H.L.A. Hart, eds. *An introduction to the principles of morals and legislation* (London: Athlone Press, 1970) at 1.

[43] Stephen R.L. Clark. *Animals and their Moral Standing* (London and New York: Routledge, 1997) at 11.

[44] *Supra*, n. 24.

> reason a human being should be abandoned without redress to the caprice of a tormentor. It may one day come to be recognised that the number of the legs, the villosity of the skin, or the termination of the os sacrum are reasons equally insufficient for abandoning a sensitive being to the same fate. What else is it that should trace the insuperable line? Is it the faculty of reason or perhaps the faculty of discourse? But a full-grown horse or dog, is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day or a week or even a month, old. But suppose the case were otherwise, what would it avail? The question is not, Can they *reason*? nor, Can they *talk*? but, Can they *suffer*?[45]

Utilitarianism can include animals in the moral community precisely because rationality is <u>not</u> the key factor. Sentience, or the ability to feel pleasure and pain, is necessary to the calculus, not the ability to reason, and aside from the Cartesian philosophy, the presence of this ability in animals has never really been in question. Aristotle himself had concluded that animals could be defined by their possession of the sense of touch, which allowed them to feel pleasure and pain, and this ability is what separated them from plants.

> … all animals have at least one sense, touch: and, where sensation is found, there is pleasure and pain, and that which causes pleasure and pain; and, where these are, there is also desire, desire being appetite for what is pleasurable."[46]

Bentham took this observation and ran with it but, unfortunately, he did not go terribly far. Instead of focusing on pain, he could have considered whether sentience means animal "pleasure" should be considered, but he did not. He only said that humans should not engage in superfluous cruelty to animals, which the natural law philosophers had been willing to grant, albeit on different grounds. However rational or intelligent

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[45] Jeremy Bentham. *Introduction to the Principles of Morals and Legislation* (Printed for publication 1781, published 1789). Reprinted in J.H. Burns and H.L.A. Hart, eds., *An introduction to the principles of morals and legislation* (London: Athlone Press, 1970), at footnote 122.

[46] Aristotle, De Anima II 3. [Translated by R. D. Hicks, c. 1907] (Amsterdam: A.M. Hakkekrt, 1965).

Bentham thought adult horses and dogs might be, he never felt that this meant humans could not use animals or cause them any pain whatsoever. According to Bentham, when we kill and eat animals "we are the better for it and they are never the worse", because "they have none of those long-protracted anticipations of future misery that we have."[47] Bentham did not elaborate on how he reached this conclusion, and there is little reason to speculate. What is more important to the early nineteenth century movement for an animal protection law is his point that since animals can suffer, their suffering should be taken into account.

Utilitarian theory fit well with social values that were developing around the turn of the nineteenth century in England. The era has been described as a "fertile ground for social movements".[48] Societies were formed to abolish the slave trade, reform prisons, provide public education, set up programs for the poor, eliminate child labor, and establish Sunday as a day of rest for workers. Along with these humanitarian causes for people a movement to promote the humane treatment of animals emerged.[49]

The reason most commonly cited for the emergence of this new concern for the welfare of animals is the huge increase in the urban population due to industrialisation.[50] The theory is that rural populations live closely with animals and, therefore, are in touch with the cruel reality of life for animals on the farm, including slaughter. Farmers directly rely on animals for sustenance and as a result consider animals as livestock rather than individuals. People living in cities are removed from this reality of farm life. Their interactions with animals are primarily through pets, which encourages a view of animals as individuals with personalities and, consequently, allows humanitarian impulses toward

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47 Jeremy Bentham. *Introduction to the Principles of Morals and Legislation* [1789]. Reprinted in A.B. Clarke and Andrew Linzey (eds). *Political Theory and Animal Rig*hts (London: Pluto Pr., 1990) at 135.

48 Craig Calhoun, "'New Social Movements' of the Early Nineteenth Century " (1993) 17 Social Science History 385, 392.

49 In Anna Sewell's classic book *Black Beauty*, first published in 1877, the fictional horses are subjected to several different types of ill-treatment in both the city and the countryside. The book was specifically written to point out the cruelty of these practices and teach how to treat horses kindly.

50 B. Harrison, "Animals and the State in Nineteenth Century England" (1973) 88 English Historical Review 786.

animals to surface.[51] This new attitude toward animals was helped along by the Evangelicalism of the Anglican Church and the religious revival of Victorian society in general, both of which encouraged support for all humanitarian causes.[52]

It could be argued that urban populations lose the ability to distinguish individual farm animals and are in fact more likely to see them all as interchangeable "pigs" or "cows". This analysis is quite possibly true in modern times when these animals are for the most part hidden in factory farms. In the nineteenth century, however, humans shared their city streets with animals. More importantly, how these animals were treated was readily visible. Seeing a horse or other animal being beaten can generate concern for that animal regardless of how one thinks about animals in the abstract.

Ultimately, whether from the influence of utilitarian theory, social changes, or some combination of the two, legislative reform for animals was attempted. The first challenges were narrowly written bills that targeted the "sport" of bull-baiting. This pastime had been banned on Sundays, as mentioned earlier, and it may have been thought that extending that ban to the other six days of the week was as good a place to start as any. It may also have been easier to target an activity that had questionable morals and was engaged in primarily by the lower classes. In either case these early attempts at reform show an emerging willingness to say outright that animals deserved legal protection.

2.2 The Bull-Baiting Bills

The first legislative attempt to extend legal protection to animals in England was a bill introduced on April 2, 1800 to prohibit bull-baiting. Like the earlier law that prohibited bear-baiting on Sundays, this bill stated it was intended to address disorderly conduct. But this time the additional goal of ending the cruelty to the animals involved was

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[51] Richard W. Bulliet. *Hunters, Herders, and Hamburgers: The past and future of human-animal relationships.* (New York: Columbia University Press, 2005).

[52] Chien-hui Li, "A Union of Christianity, Humanity, and Philanthropy: The Christian Tradition and the Prevention of Cruelty to Animals in Nineteenth-Century England" (2000) 8 Society & Animals 265, 266.

explicitly stated. The record shows that Sir William Pulteney cited both rationales when he introduced the bill, but it is worth noting that he mentioned the cruelty involved first.

> The reasons in favour of such a motion as this were obvious. The practice was cruel and inhuman; it drew together idle and disorderly persons; it drew also from their occupations many who ought to be earning subsistence for themselves and families; it created many mischievous and disorderly proceedings, and furnished examples of profligacy and cruelty.[53]

The most vocal opponent in the House of Commons was William Windham, who had served as Secretary of War and was an amateur mathematician. His objection to the bill may have been because he thought that staged fights between animals was a legitimate form of public amusement, but it is equally likely that he believed that animals were simply not worthy of the legislature's attention. He began his oration by dismissing the bill as unimportant and stemming from a “petty, meddling” spirit.

> Really, Sir, in turning from the great interests of this country and of Europe, to discuss with equal solemnity such matters as that which is before us, the House appears to me to resemble Mr. Smirk, the auctioneer in the play, who could hold forth just as eloquently upon a ribbon as upon a Raphael. This petty, meddling, legislative spirit cannot be productive of good: it serves only to multiply the laws, which are already too numerous, and to furnish mankind with additional means of vexing and harassing one another.[54]

Yet animals and their welfare had become a matter of public concern and the bill could not be dismissed quite so easily. Accordingly, Windham went on to his next line of attack and characterized the bill as an assault on the leisure pursuits of the lower classes that left the blood sports of the upper classes, such as fox hunting, unchallenged.

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[53] *The Parliamentary History of England from the Earliest Period to the Year 1803*, vol. 35 at 202, covering the debate on April 2, 1800. Available online at http://books.google.ca/books?id=AlcxAAAAIAAJ&q=pulteney#v=snippet&q=bullbaiting&f=false

[54] *Id.* at 204.

> …why should the butcher be deprived of his amusement any more than the gentleman? …when gentlemen talk of cruelty, I must remind them, that it belongs as much to shooting, as to the sport of bullbaiting; nay, more so …[55]

This tactic forced Sir Pulteney into a debate over the relative cruelty of various activities, a debate that to this day can derail any attempt to alleviate animal suffering. Pulteney gamely tried to define the difference between shooting an animal and tying one to a stake, pointing out that the latter involved torture:

> There was a great difference between [bull-baiting] and hunting and shooting. In this case a poor animal was tied to a stake, with no means of defence or escape, and tormented and tortured for a whole day, or even for several succeeding days. In the other sports, there was no such refinement of torture.[56]

Sir Pulteney had lost, however. Windham's comments shifted the focus of the discussion and ultimately the bill failed to garner enough support. Whatever his underlying motivations may have been, Windham fully believed he was correct on this point. He later wrote a letter to his nephew and eventual heir, Captain Lukin, "I would rejoice in your bull-baiting if I could rejoice in anything. … I defy a person to attack bull-baiting and to defend hunting."[57]

The next attempt to ban bull-baiting was introduced two years later by William Wilberforce, best known for leading the Parliamentary fight to end the slave trade. He took a different approach than Pulteney had in the earlier bill. This time the cruelty involved in bull-baiting was the focus. At the second reading of this bill on May 24, 1802, Sir Richard Hill, the first Evangelical Christian elected to Parliament, gave an account of a hideously cruel incident. A calm and mild-natured bull not suited for the fighting pit had been stabbed with knives and pitchforks in an attempt to enrage him. The

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55 *Id.* at 207.

56 *Id.* at 209.

57 Letter to Captain William Lukin dated October 17, 1801. Reprinted in Mrs. Henry Baring (ed.) *The Diary of the Right Hon. William Windham 1784-1810* (London: Longmans, Green and Co., 1866), 436-437. [Electronic ed.]

bull escaped, but was caught and restrained by means of cutting off all four of his hooves. By now undoubtedly maddened with pain, the bull nevertheless "feebly sustained and defended himself on his stumps":

> I shall beg leave to bring forward some statements of facts, which I have taken from different provincial newspapers, and which, I hope, will prove the means of setting forth the savage and barbarous custom of bull-baiting in its true light. Sir Richard then read some passages which he had selected to that purpose, particularly one from the Bury paper, mentioning the shocking cruelties which had been inflicted on a poor animal, in order to make him furious enough to afford diversion, as it was called, to his brutal tormenters; but the tortured creature soon becoming what was thought too outrageous, he was entangled with ropes, his hoofs cut off, and baited again, whilst he feebly sustained and defended himself on his stumps.[58]

Despite this and other evidence of cruelty, Windham argued once again that bull-baiting was no worse than foxhunting. A number of opinions were expressed both for and against the proposal, but in the end this bill also failed.[59] It was the end of the effort. There were no further attempts to pass a law banning bull-baiting.

While these attempts at legislative reform failed, they remain historically significant. Wilberforce and Hill had done something radical when they focused on the cruelty to the bull rather than on the negative effects of bull-baiting on the spectators. They openly acknowledged that animal suffering was in itself a sufficient reason for the legislature to consider enacting a law. This attention on animals and their welfare, rather than humans, would continue in the bills that would follow.

2.3 The 1809 Animal Protection Bill

In 1809, Lord Thomas Erskine introduced an entirely different type of bill, entitled *An Act to prevent malicious and wanton Cruelty to Animals.* This bill addressed the issue of

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[58] *The Parliamentary Register: or an Impartial report of the debates that have occurred in the two houses of Parliament*, Volume 3, at 298. [Google e-book.]

[59] *Id.*, at 318. The vote was ayes 64, noes 51.

cruelty generally, and it applied to all domestic animals. There was no chance of being distracted from the merits of the proposal by a discussion of the relative cruelty of bull-baiting versus foxhunting.

This tactical change and focus on ending all cruelty to all animals was likely a decision by Lord Erskine himself. He was a barrister who had gained fame defending his cousin, George Gordon, against charges of inciting the anti-Catholic riots of 1780.[60] He also had less publicly represented the wife of Richard "Humanity Dick" Martin when the marriage ended in 1791. Martin was a member of the House of Commons from Ireland and a Catholic. The fact that Lord Erskine would eventually join forces with Martin to work for an animal protection law says volumes about the characters of both men, and shows their deep commitment to the cause of animal protection.

When he introduced his bill to the other members of the House of Lords, Lord Erskine talked about the cruel treatment of horses. He read from a letter that described in detail how horses, after having suffered years of abuse, were left to starve during their final days while waiting to be slaughtered according to the dictates of the market.

> A very general practice exists of buying up horses still alive, but not capable of being even further abused by any kind of labour. These horses are carried in great numbers to slaughter–houses, but not killed at once for their flesh and skins, but left without sustenance, and literally starved to death, that the market may be gradually fed; the poor animals in the mean time being reduced to eat their own dung, and frequently gnawing one another's manes in the agonies of hunger.[61]

In the speech, Lord Erskine's passion and desire to do something about the suffering of animals is palpable. He rails against it. He talks about the "poor suffering animals".[62] He

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60 The "Gordon Riots" sought repeal of the Catholic Relief Act of 1778.

61 Lord Erskine on the Second Reading of the Bill for Preventing Malicious and Wanton Cruelty to Animals. 14 Hansard HL Deb 15 May 1809, 553-571, at 563.

62 *Id.*

compares animals to humans. Rather than focus on the traits that distinguish us, he says that we share almost every sense, including the ability to feel pain and pleasure.

> … nature has taken the same care to provide, and as carefully and bountifully as for man himself, organs and feelings for [the animals'] own enjoyment and happiness. Almost every sense bestowed upon man is equally bestowed upon them; seeing, hearing, feeling, thinking; the sense of pain and pleasure; the passions of love and anger; sensibility to kindness, and pangs from unkindness and neglect, are inseparable characteristics of their natures as much as of our own.[63]

Lord Erskine may, indeed, have been the first to take the position that the problem is that animals are property and "*have no rights!*":

> Animals are considered as property only—to destroy or to abuse them, from malice to the proprietor, or with an intention injurious to his interest in them, is criminal: but the animals themselves are without protection. The law regards them not substantively—they have no rights! [64]

It is initially a bit puzzling, then, that the preamble to his bill cites the superiority of humans and the right of humans to use animals, and refers to the divine grant to humans of "dominion" over animals. One possible explanation for the discrepancy is that in Lord Erskine's view "dominion" means a trust, akin to stewardship, not absolute control. He explained that it is our responsibility to God, who created animals, that requires us to treat them with compassion. Cruelty to animals does not only cause them to suffer. Such cruelty also hardens *our* hearts and diminishes *our* humanity. In other words, Lord Erskine agreed with Primatt and Bentham that cruelty is wrong because animals can suffer, but he is willing to also rely on the view expressed by Locke and Kant that such cruelty is wrong because of its affect on humans.

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63 *Id.* at 555.

64 *Id*. at 554.

> I am to ask your lordships, in the name of that God who gave to man his dominion over the lower world, to acknowledge and recognize that dominion to be a moral trust. … I will now read to your lordships the preamble as I have framed it: Whereas it has pleased Almighty God to subdue to the dominion, use, and comfort of man, the strength and faculties of many useful animals, and to provide others for his food; and whereas the abuse of that dominion by cruel and oppressive treatment of such animals, is not only highly unjust and immoral, but most pernicious in its example, having an evident tendency to harden the heart against the natural feelings of humanity.[65]

Despite Lord Erskine's lengthy speech no one responded that day. The bill was sent to committee, after which it was agreed that the bill had a better chance of success if, rather than applying to all animals, it was limited to "beasts of draught or burthen".[66]

> Lord Ellenborough could well recollect, that the measure now brought forward, was one which had engaged, to his knowledge, the attention of his noble and learned friend for these twenty years past, and which every man must allow, did infinite honour to his heart. He was anxious the bill should succeed, and he should therefore advise his noble and learned friend, to adopt the opinion of the noble and learned lord on the wool-sack, and to confine the measure, for the present, to beasts of draught or burthen. … Lord Erskine observed … he was very anxious, that to some extent at least the bill might be allowed to operate, he should cheerfully adopt the suggestions of his noble and learned friend, and shape the measure with the limitations he had advised.[67]

When the matter came up for debate in the House of Commons, however, it was not treated so kindly. William Windham had previously led the charge against the bull-baiting bills and he attacked this latest bill as well. He began by challenging the assertion

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65 *Id.*, at 554, 557.

66 Draught (or draft) refers to strong animals used for heavy work.

67 14 Hansard HL Deb. 31 May 1809, at 807.

that the grant of dominion means we have an obligation to treat animals humanely and claiming that he cannot see the connection. In contrast to Lord Erskine, who thought "dominion" means stewardship or a "trust" from God, Windham saw dominion as meaning that humans are superior to animals and we can use them as we choose. Using another tactic that is still employed today, Windham points out that Lord Erskine's argument would lead to the abolition of the use of animals by humans for *any* purpose, and scornfully notes that the bill does not propose *that* degree of humanity.

> The measure sets out with a preamble … wherein it is declared that God has subdued various classes of animals to the use and benefit of man: and from thence it seems to be inferred, not very consequentially, that we ought to treat them with humanity. … If humanity indeed were carried to its utmost extent, it would rather run, counter to that permission, and lead us, like the Gentoos, at least to abstain from eating the animals thus consigned to us, if not from using them in any way that should not be productive to them of more gratification than suffering. The humanity, however, that is now recommended, is not meant, it seems, to go that length. We may destroy them for the purposes of food, that is of appetite and luxury, … Another class of us likewise, namely the rich, may destroy them, in any modes, however lingering and cruel, which are necessary for the purposes of sport and diversion.[68]

Windham's stance against legal protection for animals had clearly not changed since the debates over the bull-baiting bills. So another possible explanation for the preface is that Lord Erskine had anticipated opposition and offered the reference to human "dominion" over animals as a reassurance that legal protection for animals would not unduly restrict human behaviour. The law could take animal suffering into account and still allow humans to use and eve kill animals, despite Windham's argument to the contrary, because the law would not prohibit the legitimate uses people had for animals.

Lord Erskine was firm on one very important point, however, which is that his concern was animals, particularly cattle being driven to market or slaughter and horses used in

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[68] 14 Hansard HC Deb. 13 June 1809, at 1032-1033.

transport. Cruelty to animals was, in his words, a subject "very near my heart".[69] Unlike the bull-baiting bills, he did not offer some additional goal, such as a desire to end disorderly conduct, to support the measure. By taking the position that animals and their suffering were all that mattered, he was obviously acting on his convictions, but he was also doing something unprecedented. He was asking the legislature, for the very first time, to prohibit cruelty *solely* because of its affect on the animal. The bull-baiting bills had included the additional rationale that it harmed the human character or led to violence against humans. The 1809 bill did not. Perhaps it should not be surprising that it failed.

2.4 Martin's Act of 1822

The next attempt to pass legislation prohibiting cruelty was made in 1821 by "Humanity Dick" Martin. Lord Erskine had perhaps unwittingly opened his 1809 bill to collateral attack. By introducing the philosophical rationale behind it, he gave Windham a window of opportunity to once again shift the focus of the debate. Martin's great contribution was to steer an animal protection bill through Parliament without becoming bogged down in this type of debate. Opposition to the bill followed the same lines as it had in 1809, although William Windham had died in 1810, and without his oratory it seemed somehow less eloquent. There was more reliance on laughter and joking. Mr. Monck, for instance, thought the bill unnecessary. If it should pass he "would not be surprised to find some other member proposing a bill for the protection of dogs." Another member responded by yelling out "and cats!"[70] Ultimately, however, this bill failed as well.

Undaunted, Martin tried again the following year. This time the opposition was even more perfunctory and the bill, perhaps to the surprise of long-time opponents, passed. One factor was that by this time the public abuse of animals on city streets had resulted in overwhelming popular support for the cause of animal protection. Cruelty to cattle and sheep as they were being driven to slaughter, and to horses overloaded with cargo, was especially obvious. These animals were often starved and beaten until they literally fell

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69 14 Hansard HL Deb. 15 May 1809, at 553.

70 5 Hansard HC Deb 01 June 1821, at 1099.

down dead. Magistrates, clergymen, businessmen and concerned citizens submitted more than thirty petitions in support of Martin's bill.[71] Many supporters drew an analogy with the anti-slavery movement. They pointed out the property status of both human slaves and animals, and argued that this legal status sanctioned the brutal treatment dished out by their owners.[72] In Martin's words, the "common sense of the whole nation" and "every pulpit in London" favoured the bill.[73]

Martin's Act, formally titled *An Act to Prevent the Cruel and Improper Treatment of Cattle*, applied to only a limited number of species, namely horses, sheep, oxen and "other cattle".[74] In sharp contrast to Lord Erskine's 1809 bill, the preamble to *Martin's Act* simply states that "it is expedient to prevent the cruel and improper Treatment of Horses, Mares, Geldings, Mules, Asses, Cows, Heifers, Steers, Oxen, Sheep, and other Cattle". [75] The reason why it was expedient was not recited. This omission was most likely an effort to avoid the fate of the earlier bills. By not mentioning any specific rationale, Martin did not hand his opponents a platform from which to raise peripheral issues such as class distinctions, comparisons about the relative cruelty of different sports, or the meaning of the Bible's grant of dominion.

The text of the *Martin's Act* set forth a procedure that generally followed the established practice for other criminal offences. Convictions for animal cruelty were to be treated the same as any other crime. The law simply substituted a victim-animal in the place of a human victim. If a person acted cruelly toward an animal, then that person could be taken before the proper authority:

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71 Kathryn Shevelow. *For the Love of Animals: The Rise of the Animal Protection Movement* (New York: Henry Holt and Co., 2008) at 251.

72 *Id.* at 230.

73 7 Hansard HC Deb 24 May 1822, at 759.

74 The word "cattle" had a much broader meaning in the nineteenth century that included most domesticated farm animals.

75 *Statutes of the United Kingdom of Great Britain and Ireland*, 3 Geo. IV, c 7 (London, 1822).

> … That if any person or persons shall wantonly and cruelly beat, abuse or ill-treat any Horse, Mare, Gelding, Mule, Ass, Ox, Cow, Heifer, Steer, Sheep, or other Cattle, and Complaint on Oath thereof be made to any Justice of the Peace or other Magistrate within whose Jurisdiction such Offence shall be committed, it shall be lawful for such Justice of the Peace or other Magistrate to issue his Summons or Warrant, at his Discretion to the bring the party or parties so complained of before him …[76]

The Justice of the Peace or other Magistrate would then hear witnesses and make a decision based on the evidence:

> … who shall examine upon Oath and Witness or Witnesses who shall appear or be produced to give Information touching such Offence …[77]

Punishment was set at a fine between ten shillings and five pounds, or imprisonment for a time period up to a maximum of three months if the fine was not paid:

> … he, she, or they so convicted shall forfeit and pay any Sum not exceeding Five Pounds, nor less than Ten Shillings to His Majesty … and if the person or persons so convicted shall refuse or not be able forthwith to pay the Sum forfeited, every such Offender shall … be committed to the House of Correction or some other Prison within the Jurisdiction …there to be kept without Bail or Mainprize for any Time not exceeding Three Months.[78]

Passing an animal protection law could do nothing, however, unless it was enforced, and prosecutions were rare.[79] The Royal Society for the Protection of Animals was formed in large part to lobby for better enforcement.[80] The new law faced additional problems with statutory construction. In defending against a charge of cruelty, issues of interpretation

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76 *Id.* at section I.

77 *Id.*

78 *Id.*

79 Elaine Hughes and Christiane Meyer, "Animal Welfare Law in Canada and Europe" (2000) 6 Animal Law 23, 26.

80 Arthur William Moss. *Valiant Crusade: The History of the R.S.P.C.A.* (London: Cassell, 1961).

could be raised, such as whether an act had to be both wanton *and* cruel, or whether overloading a cart could be considered beating, abusing or ill-treating an animal. The result was that the spirit of the law often fell victim to lax enforcement and the deficiencies in its drafting, and animal advocates were forced over the next few decades to continually seek amendments. In one case, for example, an amendment to the Act was sought because "two learned judges" had determined that it did not apply to bulls. The grounds given to exclude bulls were that they were not specifically listed and, being cattle, they could not be included in the category of "other cattle".[81]

In 1849, the amendments were consolidated into *An Act for the More Effectual Prevention of Cruelty to Animals*.[82] This Act dropped the word "wantonly". Cruelty to animals became a summary offence by anyone who "cruelly beat, ill-treat, over-drive, abuse, or torture, or cause or procure to be cruelly beaten, ill-treated, over-driven, abused, or tortured, any animal." The word "animal" meant "any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, hog, pig, sow, goat, dog, cat, or any other domestic animal." The consolidated Act banned bull-baiting and other staged fights between animals, required anyone who impounded animals to supply them with food and water, and regulated transport and slaughter. The penalty for cruelty to animals was set at an amount not exceeding five pounds or imprisonment, with or without hard labour, for a period of time not to exceed three calendar months. This wording of the offence of cruelty to animals was in effect when Canada first looked to England for a set of statutes on criminal law.

2.5 The Canadian Law on Cruelty to Animals

Shortly after confederation in 1867 the new Canadian federal government enacted several Acts that were copied from the Statutes of England, one of which was the prohibition against cruelty to animals. The thinking on the part of the Canadian legislators was that following the lead of the motherland was "as safe a starting point as we could get for the

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81 21 Hansard Parliamentary Deb. HC 12 May 1829 at 1319.

82 *An Act for the More Effectual Prevention of Cruelty to Animals* (1849) 12 & 13 Vict. c 92.

preparation of the criminal law."[83] They chose to make only one change. They lightened the punishment for anyone convicted of cruelty to an animal. The provision for a fine or imprisonment was kept, but the term of confinement was limited to a maximum of thirty days rather than the three months permitted under the English law.

The legislators were aware that this more lenient sentence would supercede the animal protection law that the Province of Nova Scotia had enacted in 1824, which specified the punishment for cruelty to an animal would be public whipping. They limited their discussion about this provincial law, however, to an observation that the Maritime Provinces followed the old English system of severe punishments for criminal offences in general and might not welcome the more lenient sentence.[84] They must have concluded this objection was surmountable because they proceeded to adopt the new animal protection law, along with its reduced sentencing provisions, without further discussion.

The criminal law was codified into a federal code in 1892 in the belief that a unified code would help unite the country and build the nation.[85] The new Canadian code was based on the draft "Stephen Code", which was a compilation of the English statutes by Sir James Fitzjames Stephen in 1879 that had been commissioned but not adopted by that country. When the draft Stephen Code was adopted in Canada as the basis for our *Criminal Code*, the word "wantonly" was added back in to the offence of cruelty to animals, and the word "unnecessarily" appears for the first time.[86] The original English punishment of up to three months imprisonment also re-appeared.

In his draft code, Sir Stephen had placed cruelty to animals in the category of "crimes against property". That is the section they were assigned, and in which they remain, in the

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83 Hansard, Debates of Senate of Canada 1867-1868, May 15, 1868, p. 320.

84 *Id.*, at 321.

85 See generally, Desmond H. Brown. *The Genesis of the Canadian Criminal Code of 1892* (Toronto: Published for the Osgoode Society by the Univ of Toronto Pr., 1989).

86 Section 512 (a) applied to everyone who "wantonly, cruelly or *unnecessarily* beats, binds, illtreats (sic), abuses, overdrives or tortures any cattle, poultry, dog, domestic animal or bird" (emphasis in the original). The word "unnecessarily" was not used in the statute so Sir Stephen may have added it based on the interpretation given to the statute by the courts. I was unable to access a copy of his draft code to verify this hypothesis, however, so it remains speculation on my part.

Canadian Criminal Code. Sir Stephen's decision to place animals in the property section was possibly a result of his focus on the nuances of the law of theft regarding animals. In his *Digest of the Criminal Law*, Sir Stephen dealt at length with larceny, distinguishing between the animals who could be the subject of theft at common law versus those under statutory provisions only. He omitted the cruelty to animals altogether on the grounds it was only a summary offence.[87] Yet, the statutory offence of cruelty to animals applied to the owner of the animal, and as we saw was intended to protect animals, not their owners. Sir Stephen's decision to classify cruelty to animals as a crime against property was not an entirely accurate reflection of the nature of this offence. The error that may have seemed minor at the time but would cause significant havoc when attempts were made to correct it a century later.[88]

Between the first codification in 1892 and the overhaul of the *Criminal Code* in the early 1950's there were only a handful of changes to the animal cruelty provisions.[89] The first was in 1895, when the protection of the law was extended to include cruelty to "any wild animal or bird in captivity".[90] In 1925, the element of failing to supply food, water or shelter was added to the definition of the offence.[91] Five years later, in 1930, the words "proper and sufficient food, water, bedding, care and shelter" were added for clarification.[92] In 1938, however, that section was repealed and the reference to the supply of food, water, bedding, care and shelter was deleted.[93]

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87 Sir James Fitzjames Stephen. *A Digest of the Criminal Law* (c. 1878). [Electronic ed.]

88 The attempts to reclassify the offence are discussed in chapter 6 of this thesis.

89 This legislative history is set out in *R. v Clarke* [2001] N.J. No.191 (Nfld Prov Ct).

90 *An Act Further to Amend the Criminal Code*, SC 1895, c 40 added the words "any wild animal or bird in captivity" to then section 512(a). The section was subsequently renumbered s 542 (RSC 1906, c. 146).

91 *An Act to Amend the Criminal Code*, SC 1925, c38, s12 repealed and reenacted then section 542(a) to state: "wantonly, cruelly or unnecessarily beats, binds, ill-treats, abuses, overdrives, tortures or abandons in distress, or having actual possession and control thereof in any way fails to provide and supply food, water and shelter for any cattle, poultry, dog, domestic animal or bird, or wild animal or bird in captivity, so that unnecessary suffering or injury is caused to the same;".

92 *An Act to Amend the Criminal Code*, SC 1930, c11, s11.

93 An Act to Amend the *Criminal Code*, SC 1938, c44, s35.

The reforms that came into force with the *Criminal Code* of 1955 made two changes to the animal cruelty provisions. First, the reference to the supply of food, water, care and shelter was returned to the definition of the offence, although the words "suitable and adequate" were used rather than the earlier terminology of "proper and sufficient".[94] Second, the term “wilfully”, was used in place of “wantonly”, and was defined to include an alleged omission to act.[95] This definition was “intended to extend and broaden the meaning of the word ‘wilfully’.”[96] The consolidation of federal statutes in 1985 renumbered these provisions but left them substantively the same.[97]

2.6 Summary and Conclusion of Part I

The objective of this first part of the thesis was to explore how moral principles and thoughts about the human-animal relationship are reflected in law. We have seen that prior to the nineteenth century the common and statutory law mirrored the philosophical idea that only humans are moral agents. To the extent cruelty to animals was prohibited, it was as a secondary concern to some other goal.

The status quo changed in the first part of the nineteenth century, which also saw the rise of humanitarian movements and the emergence of utilitarian theory. The first reform bills introduced in the British Parliament tried to ban bull-baiting. These bills were unsuccessful, but they are historically significant because they form a bridge between the old ideas and the new. The motivation for the bills was to end the suffering of the animals involved in bull-baiting. Yet the authors of the bills felt compelled to cite the earlier rationales based on human interests such as preventing mischief and disorderly conduct. The first bill to straightforwardly address cruelty to animals was introduced in 1809. This

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94 *Criminal Code* 1953-54, c51 s 541 was reenacted as s387 and the words “proper an sufficient” added.

95 The term “wilfully” was defined at s481 in the 1955 Code.

96 *R. v Clarke* (2001) N.J. No.191 (Nfld Prov Ct) at para [38], citing *R v Schmidtke* (1985) CCC 3d 390 (Ont C A).

97 The current provisions are numbered sections 429 and 446 as a result of the consolidation of Federal Statutes in 1985. RSC 1985, C46.

bill also failed, but a similar proposal, commonly called *Martin's Act*, was enacted in 1822. That English statute, as amended, eventually formed the basis of the *Canadian Criminal Code* provisions.

Martin's Act established the criminal offence of cruelty to animals. Enforcement only required substituting a victim-animal in the place of a human victim, so the new offence fitted seamlessly into the established procedures for prosecution and sentencing. The offence applied to one's own animal and was, therefore, a limit on property rights over an animal. But Lord Erskine had assured his peers that an anti-cruelty law was consistent with the Biblical grant of "dominion", or "stewardship" as he saw it. His law would not prohibit the use of animals. The target was gratuitous cruelty such as beating animals and starving them.

Yet, as William Windham may have foreseen, a very different approach is possible. If a court were to balance animal pain against human benefit, the court could find the pain outweighed the benefit. If so, the practice would be cruel and unlawful regardless of how accepted or legitimate it was otherwise thought to be. Part II of this thesis will examine these two options, how the courts chose between them, and the problems that arose as a result of their decision.

Chapter 3

3 The Problem with "Necessary" Animal Suffering

This second part of the thesis consists of Chapters 3 and 4. Having reviewed the history of the anti-cruelty laws, I now turn to the problems that have arisen with them. These problems arose after *Martin's Act* was passed, and the courts were faced with two options when it came to figuring out how to apply the new law. They could follow Lord Erskine's prescription and use the ordinary procedures of the criminal law, the only difference being that now the victim would be an animal. There would be no testimony from the victim-animal, of course, but there would be witnesses, and judges were accustomed to weighing that kind of evidence. The alternative approach, which Windham seems to have feared, would have been for the courts to weigh the amount of animal suffering against the need for that suffering or, in utilitarian terms, the pain versus the pleasure. In some circumstances, this balancing test would open up the possibility that the court could find the suffering of the animal too great to allow the activity to continue. One such decision occurred in the 1889 English case of *Ford v Wiley*.[98] This chapter reviews that case and the "proportionality test" it established. As will be seen in Chapter 5, some courts, notably the Israeli Supreme Court, continue to use a proportionality test. The Canadian courts do not, instead using the test articulated in *R. v Ménard*.[99] The consequences of that test have led to the argument that the core of the problem is the legal status of animals as property. Chapter 4 will take a closer look at that issue.

3.1 The Proportionality Test

When Lord Erskine argued in 1809 that animals "have no rights!" he was fighting strenuously for a law against cruelty to animals. But he couched his proposal in the language of human "dominion" over animals, and that is a critical point. According to

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98 *Supra*, n. 10.

99 *Supra*, n. 11.

Lord Erskine's way of thinking, it would not have been a fundamental change in the law to begin taking animal suffering into account. He explained it this way:

> Having passed my life in our courts of law when filled with the greatest judges, and with the ablest advocates, who from time to time have since added to their number, I know with the utmost precision the effect of it in practice, and I pledge myself to your lordships, that the execution of the Bill, if it passes into law, will be found to be most simple and easy; raising up no new principles of law, and giving to courts no larger discretion, nor more difficult subjects for judgment than they are in the constant course of exercising.[100]

William Windham, who as we saw questioned whether the Biblical grant of dominion carries with it an obligation to treat animals humanely, did not let this assertion go by without challenge. He thought that legal protection of animals would set a dangerous precedent. The criminal law was "confined to the injuries sustained by men", and he warned that extending that protection to injuries sustained by animals should not be "undertaken lightly".[101] In other words, Lord Erskine's assurances to the contrary, Windham felt that including animals within the ambit of the law by punishing those who are cruel to them *was* a fundamental change to the law.

Windham's motivations in fighting against the animal protection bills were without a doubt complex and he muddied the waters by raising numerous objections. Sifting through his comments it is clear that he was no friend to animals. He may have been correct, however, in thinking that legally prohibiting cruelty to animals had the *potential* to do more than Lord Erskine promised. It could indeed have put an end to certain practices toward animals that cause them to suffer, on the basis that the suffering is simply too great.

An example of this approach is *Ford v Wiley*. The case was an appeal by a prosecutor after five justices of the peace dismissed charges of cruelty against a farmer who had

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100 14 Hansard HL Deb. 15 May 1809, at 566.

101 14 Hansard HC Deb. 13 June 1809, at 1029.

hired people to saw the horns off his cattle. The charge was under the 1849 *Act for the More Effectual Prevention of Cruelty to Animals*, which provided "if any person shall … cruelly beat, ill-treat, over-drive, abuse, or torture, or cause or procure to be cruelly beaten, ill-treated, over-driven, abused, or tortured any animal," such offender "shall be subject to" the punishment prescribed by the statute.[102] The question submitted to the court was whether the operation of de-horning cattle, as proved to have been performed, was justifiable under the Act.

The evidence was clear that the procedure was difficult, bloody and excruciatingly painful for the cattle and that it was done so the farmer could keep more cattle in the available space, thereby increasing his profits. The court noted that the "mere infliction of pain … is manifestly not by itself sufficient".[103] Pain can, after all, be inflicted for benevolent reasons, such as in medical procedures that benefit of the animal.

In Chief Justice Lord Coleridge's view, a finding of necessity meant that the ends sought must be adequate and reasonable, that is, in proportion to the amount of pain inflicted. Applying this test, he thought the de-horning of cattle was not necessary. He pointed out that the practice had been entirely disused in England and Wales for twenty years, and had not been thought necessary in all that time. A finding of necessity could not be based on the desire of the owner to make a higher profit or "pack away a few more beasts in a farm yard".[104]

> There is no necessity and it is not necessary to sell beasts for 40s. more than could otherwise be obtained for them; nor to pack away a few more beasts in a farm yard, or a railway truck, than could otherwise be packed; nor to prevent a rare and occasional accident from one unruly or mischievous beast injuring others. These things may be convenient or profitable to the owners of cattle, but they cannot with any show of reason be called necessary. …*There must be proportion between the object and the*

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102 12 & 13 Vict. c 92, *supra,* n. 82.

103 *Ford v Wiley*, *supra*, n. 10. Decision of Lord Coleridge, C.J., at 209-210.

104 *Id.*

> *means*. … a conclusion not of sentimentalism but of good sense.[105] [emphasis added]

In short, the Chief Justice used a "proportionality test" to balance the magnitude of the pain experienced by the cattle against the purpose for it. Justice Hawkins agreed, noting that even if the de-horning the cattle was found to be a legitimate purpose, the suffering of the animals was out of proportion and, therefore, cruel.

> I have said enough to indicate my views, namely, that the legality of a painful operation must be governed by the necessity for it, and even where a desirable and legitimate object is sought to be attained, the magnitude of the operation and the pain caused thereby must not so far outbalance the importance of the end as to make it clear to any reasonable person that it is preferable the object should be abandoned rather than that disproportionate suffering should be inflicted.[106]

The court in *Ford v Wiley* did observe that the practice of sawing horns off cattle had been abandoned by most farmers, and this factor no doubt influenced their decision. The "proportionality test" the justices set out, however, has the potential to ban even socially acceptable and generally followed practices on the grounds that they cause too much suffering for animals. The agricultural practice of confining sows in gestation crates, for example, is accepted in the industry but could nevertheless be prohibited because the animals suffering is out of proportion to the amount of benefit gained by the farmer.

Yet the "proportionality test" did not become the generally followed rule. Lord Erskine's "simple and easy" route allowed the courts to start from the premise that socially acceptable uses of animals are legitimate. From there, the courts only needed to determine whether the person charged with the offence had inflicted more suffering on the animal than was necessary to achieve the stated goal. If the pain was beyond what was needed it was cruel. If not, the charge was dismissed. The annotations to the animal

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105 *Id.*

106 *Id.* Decision of Mr. Justice Hawkins.

cruelty provisions in the *Canadian Criminal Code* of 1892 explain that if there was a necessity for the pain, or reasonable grounds for thinking there was some necessary purpose for the pain, then there is no offence:

> … cruelty exists whenever the animal is subjected to unnecessary pain or suffering. But the mere infliction of some bodily pain will not, of itself, constitute the offence. There must be not only some ill-usage, from which the animal suffers, but the ill-usage must be without any *necessity*, actually existing or honestly believed to exist. If there be a necessity for it, or a reasonable ground for believing that there is a necessity for it, there will be no offence.[107]

Under the facts of *Ford v Wiley* the court could have come to the same conclusion using this approach, but it would have required a different analysis. Instead of balancing the suffering of the cattle against the desire of the farmer to increase his profits, and finding the pain to outweigh the pleasure, the justices would have had to first consider whether de-horning cattle was a legitimate purpose. As Lord Coleridge mentioned, the practice had been discontinued in England for twenty years, so there were grounds to find it was not necessary and, accordingly, cruel. On the other hand, there obviously were some people who thought de-horning cattle was acceptable. Assuming the justices were convinced that the practice was appropriate, the method used could still have been found to be cruel, on the basis that there was a reasonable alternative. Justice Hawkins observed that naturally polled (hornless) cattle could be purchased for a small extra price.

The important distinction between the two tests is that under the proportionality test the pain suffered by the cattle can be so extreme that it outweighs any benefit the farmer accrues from inflicting the pain. Under the alternative test, if the object being sought is desirable for humans, any amount of pain can be inflicted on animals in order to achieve that goal. Cruelty occurs only when gratuitous pain is inflicted. In contrast to the proportionality test set out in *Ford v Wiley*, there is no balancing of animal suffering against human considerations. Rather, the interpretation incorporates the notion that we

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[107] Annotations to section 512 of the Canadian *Criminal Code*, *supra*, n. 86.

have “dominion” over animals and can use them for our purposes no matter how much pain it may cause them. We are only obligated to inflict as little pain as reasonably possible. This line of thinking, which recognizes and accepts human superiority over animals, not only predominated over the proportionality test, it also forms the basis of our current test of cruelty as it was explained in the Canadian case of *R. v Ménard*.[108]

3.2 The Ménard Test

Modernly, the two words in the Canadian animal protection law that present the most difficulty in prosecutions for cruelty are “wilfully”, which replaced the original requirement that the act be done “wantonly”, and “unnecessary”. Under the general provision against cruelty, the offence must be both wilfull and cause unnecessary pain, suffering or injury to the animal or bird. The meaning of the word “wilfully” is specifically defined as “knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not”.[109] This definition is derived from, but not exactly the same as, the older term “wantonly”, which Black's Law Dictionary defines as “unreasonably or maliciously risking harm while being utterly indifferent to the consequences”.[110] The annotations to the provision included in the *Canadian Criminal Code* of 1892 noted that “any act, which is unjustifiable by the circumstances, is wanton.”

Both wilfull and wanton behaviour disregard risks that are known to the individual and so great as to make it highly probably that harm would follow. The definition of wanton behaviour, however, may apply to unreasonably risking harm, which would include risks that are so obvious that a person must be taken to be aware of it.[111] Wilfullness, in

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[108] *Supra,* n. 11.

[109] Canadian *Criminal Code* section 429 (1) provides: Every one who causes the occurrence of an event by doing an act or by omitting to do an act that it is his duty to do, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be deemed, for the purposes of this Part, wilfully to have caused the occurrence of the event.

[110] *Black's Law Dictionary* (7th ed., 1999) at 1576.

[111] There seems to be some dispute in the Canadian courts whether the term “wanton” generally requires an objective or subjective standard. An American jurisdiction that interpreted the term as it is used in an animal protection statute applied an objective test. See, *Commonwealth v Tomey* 884 A. 2^{d} 291, 294

contrast, requires proof that the defendant had knowledge of the risk and showed a moral disregard for its consequences. It is a subjective standard of foreseeability.[112] This subjectivity adds to the difficulty of establishing the *mens rea* element of the crime, because it depends on the state of mind of the particular defendant. There may be pity for an animal that suffered, but the apparatus of the legal system is concerned with the conviction and punishment of human offenders, and will not punish someone who did not intend to harm that animal.

Two cases highlight the difficulty with the intent requirement. The first involved the commission of a harmful act while the second raised an issue of passive harm through omission to perform a duty. In the first case, a man was angry because a cat knocked over a trashcan. The man grabbed a broom and chased the cat around the house, ultimately hitting the cat with enough force to break the animal's leg. The court found that the man did not know that hitting a cat with a broom could result in the injury, and he was acquitted on the basis that the element of wilfullness was not met.[113]

In the second case, the defendant was a hunting guide who left two dozen horses in a pasture in Alberta over the winter. He claimed to have checked on them a few times, but a nearby farmer became sufficiently alarmed at their condition to call the SPCA. An investigator found three horses had died of starvation and others were severely emaciated. Snow and ice on the ground had prevented the horses from obtaining enough to eat and no supplemental feed had been provided for them. The court found that the defendant was incredibly naïve to think that horses would have adequate food in an unattended pasture over the winter, but since he genuinely and honestly held this belief the element of wilfullness had not been met.[114] In cases of both commission and

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(Pa Super 2005), appeal denied, 90 A2^{d} 542 (2006), citing *Lewis v Miller*, 374 Pa Super 515, 543 A2d 590, 592 (1988) (quotation omitted).

112 *R. v Clarke* [2001] N.J. No.191 (Nfld Prov Ct)

113 *R. v Higgins* [1996] 144 APR 295 (Nfld Prov Ct).

114 *R. v Heynan* [1992] 136 AR 397 (Alta Prov.Ct.).

omission, therefore, the *mens rea* requirement means that the measure of criminality is not the welfare of the animal but, rather, the intention of their owner.

The second prong of the animal cruelty law requires proof that the pain, suffering or injury caused to the animal was “unnecessary”. The phrase is sufficiently broad to apply to a multitude of different situations. It does not have to be amended for the courts to reinterpret it in light of new knowledge about the ability of animals to feel pain, or in response to changing social attitudes. The problem is the modifier “unnecessary” presupposes that *some suffering is necessary*. Unnecessary suffering is only that which is gratuitous.

The analysis used by the courts to make this determination is the test set out in *R. v Ménard*.[115] In that case a municipality was killing (“euthanizing”) animals utilizing a carbon monoxide box without a coolant system attached to it. The animals suffered severe burns before dying although it would have been relatively easy and inexpensive to utilize a coolant so that the carbon monoxide gas was cool when ingested by the animal. Justice Lamer, as he then was, and who later became the Chief Justice of the Supreme Court of Canada, explained that both the purpose and the means must be considered. If “the purpose sought” is legitimate, then the next step is to look at the “means employed”.

> The animal is subordinate to nature and to man. It will often be in the interests of man to kill and mutilate wild or domestic animals, to subjugate them and, to this end, to tame them with all the painful consequences this may entail for them and, if they are too old, or too numerous, or abandoned, to kill them. This is why, in setting standards for the behaviour of men towards animals, we have taken into account our privileged position in nature and have been obliged to take into account at the outset the purpose sought. We have, moreover, wished to subject all behaviour, which would already be legalized by its purpose, to the test of the "means employed".[116]

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115 *R. v Ménard*, *supra*, n. 11.

116 *Id.*, at 464.

The essence of the *Ménard* test is that it is not the degree of pain that is inflicted, but whether it was unnecessary in the context. In formulating this rule, Justice Lamer was faced with the problem that the language of the old English statute in *Ford v Wiley* and the *Canadian Criminal Code* were essentially the same. So he took pains to explain that in *Ford v Wiley*, Chief Justice Coleridge "quantifies the pain in an isolated fashion, whereas Mr. Justice Hawkins measured the pain only in relation to necessity." Justice Hawkins did, as quoted above, agree with his Chief Justice that the pain suffered by the cattle was disproportionate to the economic benefit gained by de-horning them. Justice Lamer, however, distinguishes these statements by noting that they related to that particular case.[117] He admits that he prefers "the more flexible standard suggested" by Justice Hawkins and offers the opinion that the 1953-54 amendments to the *Criminal Code* "instructed us to that effect".[118]

Thus under the Canadian rule there can be a great deal of pain that is necessary or a slight degree of pain that is unnecessary. In determining whether pain is unnecessary, the *Ménard* test requires the court to look at what other options were available and whether they were reasonable. In contrast to the "proportionality test" of *Ford v Wiley*, harm that is inevitable to accomplish a legitimate purpose is allowed, up to and including the death of the animal. Certain acts against animals, primarily sexual acts and sadistic torture, are unlawful *per se*. Most uses that humans can find for animals, however, are considered legitimate.

The issue of whether confining a breeding sow in a gestation crate is cruelty is illustrative. A gestation crate is a stall about 2 meters by 60 cm (7 feet by 2 feet) with metal bars designed to force the animal to lay continuously on one side. Under the Ménard test the court would look first at whether the purpose was a legitimate one. How the purpose was defined would affect this analysis. If it were characterized as the production of food or as a safety precaution, it would probably be thought legitimate and pass this test. If the court went on to find there is no viable alternative to achieve the

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117 *Id.*, at 463.

118 *Id.*

purpose, then keeping the sow in the gestation crate would not be cruelty. The degree of suffering experienced by the sow would not matter. Under a proportionality test, in contrast, the sow's suffering would be weighed against the benefit to her owner.

There are, of course, some valid reasons to leave the establishment of minimum standards of care in the hands of the agricultural industry. Judicial reliance on industry practice lets those working in the industry know what is not considered cruelty. If a farmer is following the general custom he does not need to worry about being in violation of the law. Deference to industry practice also provides a discernible standard that is consistent rather than dependent on which judge is making the determination. It has the added advantage of being efficient in that judges do not need to learn about the industry before making a ruling. In short, all the reasons that justify the "business judgment rule" can be used to argue that deference to industry practice in agriculture is understandable.

The problem is that deference to industry practice in establishing standards for animal welfare allows the industry to determine the criminality of their own conduct. This problem is theoretically offset by an assumption that property owners will seek the best way to protect their property and that would include their animal property. That assumption may have been true in the nineteenth century when animals were living on small farms, although cases like *Ford v Wiley* question it even then. Today, however, the belief that owners will care for their property does not take into account the economies of scale that mean the welfare of an individual animal on factory farms is unimportant. The increase in profits gained from the higher volume of animals is sufficiently great to offset the loss of a few deaths.

In sum, the *Ménard* test protects animals, but only to a limited extent. The test accepts the belief that humans enjoy a higher status than animals, and we are entitled to use them for whatever purpose we choose short of intentional cruelty. As a result, if the intended use cannot be accomplished without causing pain to the animal, then the suffering is deemed "necessary" and, therefore, not cruel. As a result, much pain and suffering continues to be inflicted on animals despite the sweeping language of the law against "cruelty". The "proportionality test", in contrast, requires that the suffering of the animal be in

proportion to the benefit gained. In many cases the result would likely be the same. The proportionality test remains preferable, however, because it provides the opportunity to balance suffering against benefit, and conclude that the animal is being asked to pay too high a price to accommodate a human desire. The next chapter will take a look at the argument that the shortcomings of the *Ménard* test are symptoms of a bigger problem: the legal status of animals as property.

Chapter 4

4 The Problem of Animals as "Property"

Regardless of whether the courts use a proportionality test in defining cruelty or not, the core of the problem with our animal welfare regime is thought by some to be the status of animals as property. Under this theory, so long as animals are our property we will be required to treat them "humanely", but we will not have to consider them as anything more than "things" that we can exploit. This chapter explores what the property status of animals means for them in terms of the legal protection it affords. Two case studies are presented to put the discussion in context.

4.1 The Legal Status of Animals as Property

Our property rights regime wherein humans "own" animals undoubtedly arose due to a multiplicity of factors. Certainly, farmers in an agrarian society needed to ensure that they would be the exclusive beneficiaries of any profit from the animals they possessed. Their chattel ownership may have been based on mere possession or it could have arisen from Locke's view that they had co-mingled their labour with the animal.[119] In either case, property rights over animals do not appear in the early codes of law; rather than being taken from those sources, religious doctrine seems to have been a more significant factor in the justification.[120] Blackstone, too, found the origin of the common law of property in the divine grant of "dominion" in the Bible:

> In the beginning of the world, we are informed by holy write, the all-bountiful creator gave to man "dominion over all the earth; and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth." This is the only true and solid foundation of man's dominion over external things, whatever airy metaphysical notions may have been started by fanciful writers on this subject. The

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[119] Carol M. Rose. "Possession as the Origin of Property" (1985) 52 Chi. L. Rev. 73.

[120] Elizabeth DeCoux "Pretenders to the Throne: A First Amendment Analysis of the Property Status of Animals" (2006-2007) 18 Fordham Envtl. L. Rev. 185.

> earth, therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the creator.[121]

There is still debate over how the word "dominion" should be interpreted.[122] Some suggest that dominion over animals led to the common law developing property rules over animals.[123] Support for this theory is found in the fact that many people in the older agrarian society possessed farm animals, but only a few owned significantly valuable personal items like books and jewels. The early courts, therefore, had to decide which party had the best right of possession over, or liability for, a particular animal. The process of classification could have begun with a distinction between persons and animal property. Later on, as inanimate objects such as farm tools and family heirlooms came to be more commonly owned, this type of personal property would also have become the subject of litigation. These inanimate items could easily have been added to the category of property along with animals. There would have been no obvious reason to create a new category with a new set of rules of possession for inanimate objects when the ones already established for animals would work perfectly well.

In a treatise published in 1900, on the other hand, Ingham asserted that there has always been a distinction in law between animate and inanimate chattels. He may have overstated the argument in order to sell copies of his guide to practicing lawyers, but he makes a compelling argument that there is an "elaborate system" of rules for animals, just as there is for real property:

> … just as the law of real property differs from that of personal property as dealing with what is immovable and indestructible, so the law of animate differs from that of inanimate property as dealing with powers of consciousness, volition and reproduction, and liability to suffering and death, – a distinction far more significant

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[121] William Blackstone. *Commentaries on the Laws of England*, Book II, 2-3 (1776). [Electronic ed.; internal citation omitted.]

[122] Matthew Scully. *Dominion: The Power of Man, the Suffering of Animals, and the Call to Mercy* (St. Martin's Griffin: New York, 2002).

[123] Jerrold Tannenbaum. "Animals and the Law: Property, Cruelty, Rights" (1995) 62 Social Research 539.

> in science and philosophy, however it may be in jurisprudence, than that existing in the former case. As a matter of fact, these powers and liabilities in animal life form the basis of an elaborate system of rights and responsibilities which may be termed with perfect propriety the Law of Animals.[124]

The common law of animate chattels as Ingham saw it, however, primarily dealt with the rights and responsibilities of humans. Ingham writes, for instance, that title over domestic animals becomes absolute. Wild animals are more likely to run away, so title over them could vest upon possession, but was lost if the animal escaped. Along with these property rights he discusses liabilities in situations where an owned animal caused harm or injury.

Regardless of how animals came to be grouped with inanimate chattels, that classification has become firmly established today. It is not a particularly surprising result, given the history of the place of animals in traditional moral and religious thought that has been outlined in this thesis. The dual categories of "persons" and "things" is consistent with the view that humans, or at least certain privileged ones, are superior, rational, near god-like beings who have "dominion" over animals. In law, these superior "persons" have rights. All "things", including animals, do not have rights. But how much does this legal status actually harm animals?

4.2 Is Property Status the Key Issue?

Gary L. Francione's work has become synonymous with the argument that animals are the legal equivalent of inanimate objects. He writes that the classification scheme of "persons" and "things" means that animals are property, and there is a limit on the extent to which law can protect animals:

> Common-law and civil-law traditions are dualistic in that there are two primary normative entities in these systems: persons and things. Animals are treated as

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[124] John H. Ingham. *The Law of Animals: A Treatise on Property in Animals, Wild and Domestic, and the Rights and Responsibilities Arising Therefrom* (Philadelphia: T. & J.W. Johnson & Co., 1900) [Electronic ed.], Preface, at iii.

> things, and, more specifically, as the property of persons. … The status of animals as property has severely limited the type of legal protection that we extend to nonhumans.[125]

It is undeniable that animals and "things" held as property do not have rights such standing to sue. Francione, however, is making an argument that goes beyond consideration of such legal rights. He contends the status of animals as property is detrimental because it facilitates avoidance of the *moral* question of whether humans may exploit animals for everything from food and clothing to research or entertainment. The answer is always presumed to be in the affirmative. The discussion is restricted, right from the beginning, to the issue of whether the animals are treated humanely while they are being used:

> When we consider our moral obligations to animals without first addressing the status of animals as property, we tend to confine our discussion to ways in which we might exploit animals more 'humanely' rather than to ask whether our exploitation – however 'humane' – is morally justifiable.[126]

Francione has a valid point. There is a presumption in law that humans are superior to animals and entitled to use them. As discussed in Chapter 3, the *Ménard* test asks whether the use is legitimate, but most uses humans have for animals meet this standard. Once this relatively low hurdle is overcome, any amount of animal suffering can be justified on the grounds it is "necessary" to achieve that use. Justice Lamer, as he then was, explicitly stated his reading of the statute "reveals a legislative policy which seeks to recognize the protection of animals in accordance with the place which is theirs in the hierarchy of our 'world' and the responsibilities that we impose on ourselves as their 'masters'."[127]

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125 Gary L. Francione. "Animals as Property" (1996) 2 Animal Law 1.

126 Gary L. Francione. "Animals, Property and Personhood", in Marc D. Hauser, et al. (eds.) *People, Property or Pets?* (West Lafayette, IN: Purdue U. Pr., 2006) at 77.

127 *R. v Ménard*, *supra*, n. 11, at 464.

Before concluding that property status hurts animals, however, it must be asked whether there are ways in which property status *protects* animals. As discussed in Chapter 1, the common law traditionally provided owned animals with greater legal protection than wild or unowned animals. A third party who harmed an owned animal ran the risk of prosecution for mischief and/or liability to the owner for the loss, and this possibility served as a deterrent, albeit a small one in many cases. The disincentive would be reduced to almost nothing in cases of injury to animals that had little or no economic value, such as pet dogs. The intent of the law was to protect the owner's investment in the property, not the property itself. This intent is made clear by the fact that the owner, and any authorized employee, was free to treat an animal, even a valuable animal, in any way he pleased.[128] The law has historically provided a very minimal protection for animals owned as property, however, and continues to do so today.

In Canada, this pattern can be found in the *Criminal Code*. The general provision on cruelty to animals applies to all animals and birds, but the offence of injuring or endangering animals applies only to cattle and animals "kept for a lawful purpose".[129] This wording means that it is not an offence to injure or kill, without cruelty, an animal that is wild or stray or unowned. Hunting wild animals is allowed and landowners are permitted to destroy wild or stray animals, including cats and dogs, they deem to be nuisances or pests.

Some judges have interpreted the term "kept animal" as used in this provision so narrowly as to justify killing almost any animal. In one case, a trial court decided that it was not an offence to shoot a pet dog that had strayed a half mile away from home. The dog was not under his owner's immediate control at the time of the shooting and was, in

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[128] Lyne Létourneau. "Toward Animal Liberation? The New Anti-Cruelty Provisions in Canada and Their Impact on the Status of Animals" (2003) 40 Alta. L. Rev. 1041, citing M. Radford, *Animal Welfare Law in Britain: Regulation and Responsibility* (Oxford: Oxford University Press, 2001) at 99.

[129] *Criminal Code* section 444(1) makes it an offence to kill, maim, wound, poison or injure cattle. Section 445(1) applies to dogs, birds or animals that are not cattle and are kept for a lawful purpose.

that court's opinion, not being "kept". Fortunately, this acquittal was set aside on appeal.[130]

More typically, a dispute arose between two neighbours over a stray cat. One neighbour took on a caretaker role and fed the cat every morning, but did not permit the animal inside the house due to an allergic reaction to cat dander. The other neighbour was unhappy with this arrangement and admitted to shooting and killing the cat. This neighbour was nevertheless acquitted on the grounds that since the cat lived outdoors the element of injuring a "kept animal" was not met. In reaching this conclusion the court noted that the offence "is designed to protect domesticated or domestic animals and does not purport to deal with situations where the victim animals are stray animals or animals that are wild or generally at large".[131]

In this case it might be argued that an animal's status as property provides greater legal protection. If the cat who came around for breakfast each day had been allowed into the house, the judge would have been more likely to find the animal met the requirement of being "kept", and convicted the neighbour for injuring an owned animal. It must be stressed, however, the fact that the outcome of the case depends on this factor only emphasizes that the stray cat is unrecognized as a sentient being. The reason the law makes it an offence to injure kept animals is to protect the property interests of the owner, not the welfare of the animal. It is the interests of the kind neighbour, not the stray cat, that matter.

In addition to this fairly limited protection, the statutory offences of intimidation and mischief potentially allow prosecution in cases where the general offence of cruelty to animals might not, for instance where an animal is killed without the requisite pain or suffering. Intimidation is the use of violence or threats of violence to a person's property, which would include an animal, for the purpose of compelling that person to do

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130 *R. v Sunduk* (1999) 178 Sask. R. 157, 1999 CanLII 12570 (SK QB).

131 *R. v Deschamps*, [1978] 43 CCC (2d) 45 (Ont Prov Ct) at 48.

something or refrain from doing something is an offence.[132] Mischief applies to the destroying, damaging, or interfering with the use and enjoyment of property.[133]

Beyond these provisions in the *Criminal Code*, the legal status of animals as property has the advantage of facilitating protection through the process of regulation. Some, such as Richard A. Posner, argue that it is simply a matter of animal advocates using this power strategically and obtaining better enforcement once regulations are in place. On the positive side, this approach can result in improvements. Such changes can only occur after a lengthy process of review, however, and since they generally require an outlay of capital are unlikely to change again until enough time has passed to recoup the investment. Posner himself acknowledges this limitation, and believes regulation is a better alternative mainly because it is more realistic than animal rights.

> No doubt the most aggressive implementations of animal rights thinking would benefit animals more than commodification and a more determined program of enforcing existing laws against cruelty to animals. But those implementations are unlikely, and so the modest alternatives are worth serious consideration.[134]

Posner may be correct in asserting that stronger regulations and better enforcement have the potential to improve life for many owned animals, particularly those animals that are seen as agricultural commodities. The sheer magnitude of farmed animal suffering points

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132 *Criminal Code* § 423(1) provides, in relevant part, that "Every one is guilty of an indictable offence and liable to imprisonment for a term of not more than five years or is guilty of an offence punishable on summary conviction who, wrongfully and without lawful authority, for the purpose of compelling another person to abstain from doing anything that he or she has a lawful right to do, or to do anything that he or she has a lawful right to abstain from doing, (a) uses violence or threats of violence to that person or his or her spouse or common-law partner or children, or injures his or her property; (b) intimidates or attempts to intimidate that person or a relative of that person by threats that, in Canada or elsewhere, violence or other injury will be done to or punishment inflicted on him or her or a relative of his or hers, or that the property of any of them will be damaged; …"

133 *Criminal Code* § 430(1) states "Every one commits mischief who wilfully (a) destroys or damages property; (b) renders property dangerous, useless, inoperative or ineffective; (c) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property; or (d) obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property."

134 Richard A. Posner. "Animal Rights: Legal, Philosophical, and Pragmatic Perspectives" in Cass Sunstein and Martha C. Nussbaum, (eds.) *Animal Rights: Current Debates and New Directions* (Oxford Univ Pr., 2004) 51, at 74.

to the need for more protections of any kind. Regulations could recognize that these animals have interests and provide that their owners must act in a way that protects those interests. Whether farmed animals are better served by a detailed regulatory scheme or a strong anti-cruelty law may be an issue worthy of further study. In the meantime, governmental regulation in Canada is unlikely since there is an established system of voluntary standards, and any proposal that could be depicted, even inaccurately, as affecting the legal status of animals as property would be extremely controversial.

To recap, then, the question Francione raises about the legal status of animals as property gets to the heart of the issue about how humans treat, and mistreat, animals. There is an underlying assumption that we are superior to animals and they are ours to use as we please. Thus Francione's point is well taken as an analytical tool. At the same time, however, the question of whether animals have a *moral* status equivalent with humans based on our shared sentience is a matter separate from the issue of whether animals should have the *legal* status of persons. There is a wide middle ground, in which our property rights over animals could be limited by their rights.

In the Introduction to this thesis I mentioned two cases, chosen because they are recent and, at least when I began this study, unresolved. By coincidence, both cases involve large captive animals, Ike the whale and Lucy the elephant. These cases will be examined in more detail here to place the theoretical issue of the legal status of animals as property in context.

4.3 Case Study 1: Seaworld v Marineland [135]

This case was a custody battle between two marine parks over a 1,815-kilogram, nine-year-old killer whale named Ikaika, or simply Ike. In 2006, Florida-based SeaWorld entered into an agreement with Marineland in Niagara Falls to exchange Ike for four beluga whales. The primary purpose of the trade was for Ike to breed at Marineland. When he reached sexual maturity, however, SeaWorld announced that it wanted to have

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[135] *Seaworld Parks & Entertainment LLC v Marineland of Canada Inc*., 2011 ONSC 4084, upheld on appeal at 2011 ONCA 616.

Ike relocated to one of its facilities. Marineland refused to send Ike back to SeaWorld, maintaining that the loan was for life or until they could no longer properly care for the animal. Marineland produced two veterinary reports giving Ike a clean bill of health, thereby negating any argument that Ike was not being properly cared for, at least physically. Ike, they argue, was theirs until he died.

The Ontario Superior Court of Justice examined the contract, found that under the terms of the breeding loan agreement SeaWorld was within its rights to terminate the arrangement between the two parks, and ordered Marineland to return Ike.[136] In setting the amount of costs, the lower court noted that the case presented "a difficult area of contract law".[137] Put another way, the court saw the case as presenting a question of contract interpretation to resolve a dispute between two businesses over ownership and control of property that just happened to be a whale. The welfare of that whale was relevant to Marineland's argument that the contractual terms contemplated ownership for life, subject only to a requirement that they continue to provide proper care. Beyond that limited concern, Ike's welfare was never an issue. It did not matter which park had better facilities for Ike, whether he was thriving, or whether he had formed a bond with another whale. Whether marine parks should hold killer whales captive in the first place was never questioned, nor was there a way to introduce the question. Almost any animal has the potential of becoming human property.

In September 2011, the Ontario Court of Appeal upheld the lower court's interpretation of the contract language, noting in addition that there had been no financial investment showing detrimental reliance on the part of Marineland. Again, there was no concern for Ike's interests.

> There is no suggestion of capital investment being undertaken by the receiving party in reliance on the length of the agreement. Both parties have the right to terminate at

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136 *Id.* at para [6].

137 *Seaworld Parks & Entertainment LLC v Marineland of Canada Inc*., 2011 ONSC 5231.

> any time. This was not a guaranteed long term relationship. The termination provision is clear and not commercially unreasonable.[138]

Marineland's response to their loss of Ike, who was a major and profitable attraction at the park, was to file a lawsuit in Florida.[139] Having failed to convince the Ontario courts to agree with their interpretation of the agreement, Marineland is now raising the issue of animal welfare, pointing out that moving Ike has not only separated him from his female companion, Kiska, but also has left her alone. In a press release, Marineland expressed concern that "Both Ike and Kiska would suffer from the separation, and our attempts at breeding and increasing the population of this protected species would end."[140] Marineland's concern about animal welfare at this late point in the litigation appears to be more in furtherance of their claim of ownership than it is about the bond between Ike and Kiska. Whether the Florida courts will take animal welfare into consideration when interpreting the contractual issues remains to be seen.

Yet Marineland's concern, for whatever motive, underscores the fact that animals such as Ike are viewed by the law as property only and, as Lord Erskine phrased it over two hundred years ago, "have no rights!". Francione's argument that Ike only needs the right to not be property would in this case mean neither Marineland nor SeaWorld could hold him captive. The analysis does indeed get right to the point of human dominion over animals, and questions whether we have the right to capture these wild animals for the purpose of amusing ourselves. One solution could be to grant Ike personhood and with it a right to sue on his own behalf. But a legal analysis can and must go further. Ike's status as property should not preclude a consideration of other procedures in which the interests of the animals involved in a dispute can be addressed. For instance, without altering Ike's status as property it should be possible to appoint a guardian to protect his interests, or to

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138 *SeaWorld Parks & Entertainment LLC v Marineland of Canada Inc*., 2011 ONCA 616 at para [25].

139 Marineland is seeking $75,000 and trial by jury. Liam Casey. "Marineland sues SeaWorld over orca custody." *The Star*, Oct 20, 2011. http://www.thestar.com/news/article/1073504 [retrieved 2011-10-22].

140 Alison Langley, "Marineland Vows Killer Fight over Whale." *The London Free Press*, Oct. 22, 2011, at A2.

find an implied term in the contract that that the best interests the animals must be considered in any decisions that affect them. By disregarding these sorts of alternatives we do a disfavour to Ike.

4.4 Case Study 2: Reece v Edmonton [141]

In contrast to Ike, who could be described as a third party to a contract dispute, Lucy the elephant is at the heart of this case. *Reece v Edmonton* raises the issue of public interest standing on behalf of an animal. Lucy is a 36-year-old Asian elephant currently held by the Edmonton city zoo. Tove Reece (Voice for Animals Humane Society), Zoocheck Canada, and People for the Ethical Treatment of Animals (PETA) joined forces in an effort to move Lucy from the Edmonton city zoo to a sanctuary for elephants.[142] They claimed that the City of Edmonton was in violation of section 2 of the Alberta *Animal Protection Act* because the municipal zoo was keeping Lucy in distress.[143] The source of the distress was described as poor living conditions made worse by isolation, since Lucy had been alone for four years and there are no plans to add another elephant to the zoo. There was no dispute that elephants are extremely social animals who live in herds in the wild and do better in captivity when they are with other elephants. They need a large amount of space, normally walk great distances, and prefer a moderate climate. Zoo

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141 *Reece v Edmonton (City)* 2010 ABQB 538, upheld on appeal at 2011 ABCA 238, application for review dismissed 2012 CanLII 22074 (SCC).

142 Justice Fraser noted that PETA had 1849 members in Edmonton and described the plaintiffs: "Reece is the founder of Voice for Animals Humane Society which works to improve animal welfare in Alberta. Zoocheck is a Canadian federally incorporated charity established to protect wildlife in captivity and in the wild. It has been actively involved in monitoring Lucy's well-being since 2005. PETA is a non-profit corporation based in the United States. Various PETA staff and members have been actively involved in advocacy work relating to Lucy." [44] n. 13.

143 Alberta's *Animal Protection Act*, RSA 2000, c A-41, provides at section 2(1) "No person shall cause or permit an animal of which the person is the owner of the person or charge to be or continue to be in distress". Section 2(1.1) states "No person shall cause an animal to be in distress." Section 2(2) grants an exemption: "This section does not apply if the distress results from an activity carried on in accordance with the regulations or in accordance with reasonable and generally accepted practices of animal care, management, husbandry, hunting, fishing, trapping, pest control or slaughter." The term "distress" is defined at section 1(2): "For the purposes of this Act, an animal is in distress if it is (a) deprived of adequate shelter, ventilation, space, food, water or veterinary care or reasonable protection from injurious heat or cold, (b) injured, sick, in pain or suffering, or (c) abused or subjected to undue hardship, privation or neglect."

accreditation standards require that all animals "be maintained in numbers sufficient to meet their social and behavioural needs."[144]

Reece *et al* were seeking public interest standing, a procedural concept that was developed in a series of three cases where private interest standing was inapplicable but the validity of legislation was at issue. The first grant of public interest standing was in 1975, to a taxpayer in a class action suit that challenged the constitutionality of official bilingualism.[145] Public interest standing was next extended to a newspaper editor who challenged the constitutionality of censorship legislation.[146] In the third case, public interest standing was granted to a "right-to-life" advocate who sought to represent the interests of fetuses in a challenge to the abortion provisions of the *Criminal Code*.[147] The three requirements of public interest standing established in these cases were a justiciable issue, a plaintiff who is directly affected by or has a genuine interest in the issue, and a showing that there is no other reasonable and effective way of bringing the matter before the court.

In 1986, this discretionary approach to public interest standing was applied in an administrative law context in *Finlay v Canada*.[148] In that case a recipient of social assistance asserted that the cost-sharing agreement between the federal and provincial governments was not in compliance with the governing statute. Accordingly, it could be stated that public interest standing is appropriate where government action is alleged to be unconstitutional or illegal, and the plaintiff is motivated by public concern about an issue that will not otherwise be litigated. This rule was subsequently interpreted in a restrictive fashion, however, in cases raising issues under the *Charter of Rights and Freedoms.*[149] In these cases "the court asserted a general rule that traditional private

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144 *Reece v Edmonton (City)* 2011 ABCA 238 at para [183].

145 *Thorson v Canada (Attorney General)* [1975] 1 SCR 138.

146 *Nova Scotia Board of Censors v McNeil* [1976] 2 SCR 265.

147 *Canada (Minister of Justice) v Borowski* [1981] 2 SCR 275.

148 *Finlay v Canada (Minister of Finance)* [1986] 2 SCR 607.

149 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, Schedule B of the Canada Act (UK), 1982, c 11, s 2A(a).

litigation should have preferential status as compared with that commenced by public interest plaintiffs."[150] The test, at least in *Charter* issues, became whether traditional litigation was available. Public interest standing was limited to situations where "no directly affected individual might be expected to initiate litigation."[151]

In Lucy's case, the trial court dismissed the action without reaching the question of public interest standing on grounds the action was an attempt to enforce the criminal animal protection law through a civil action and, therefore, an abuse of process.[152] The Court of Appeal upheld this ruling but in its decision did address the standing issue.[153] The majority noted that courts have held that a proceeding is an abuse of process where it is used to enforce or engage a punitive penal statute, and that "[s]ometimes the court reaches that result by finding that the applicant has no standing to apply for the requested relief."[154]

In his analysis, Justice Slatter narrowly characterized the issue on appeal as a question of legal procedure, and thereby avoided looking at the applicable animal welfare law or any evidence about Lucy's living conditions. He explained that while *Finley* had indeed relaxed the test for standing in public law matters, "just because a private litigant might be granted standing in a public matter does not mean that there are no limits on the types of relief that can be obtained. None of the leading cases on standing involves an attempt to obtain a declaration that a particular respondent was in violation of a penal statute."[155] Justice Slatter noted that courts are reluctant to grant a declaration that someone is in violation of a penal statute in a civil proceeding due to the different standards of proof and evidentiary rules in criminal and civil proceedings. Moreover, "[w]here a person is charged with a penal offence the protections of ss 7 and 11 of the *Charter* are engaged,

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150 June M. Ross "Standing in Charter Declaratory Actions" (1995) 33 Osgoode Hall L. J. 151, 165.

151 *Id.*, citing *Canadian Council of Churches v Canada (Minister of Employment and Immigration)* [1992] 1 SCR 236, 251.

152 *Reece v Edmonton (City)* 2010 ABQB 538.

153 *Reece v Edmonton (City)* 2011 ABCA 238.

154 *Id.*, at para [20].

155 *Id.*, at para [24].

and they should not be undermined by changing the form of the procedure."[156] The appropriate procedure for the organizations advocating for Lucy was, in his opinion, to file a complaint with the Edmonton Humane Society.

> The appellants argue that there is no other effective alternative way to bring this issue before the courts. Stating the issue in that way presupposes that this is a suitable issue for the courts. Whether the City is discharging its operational duties in the care of Lucy is a hotly contested issue. It is not appropriate to expect the courts to take over the animal husbandry of the animals at the City zoo through the ability to issue declarations on points of law. As mentioned, there are other public officials who have that responsibility, and other appropriate legal procedures to possibly engage if they fail to discharge their duties.[157]

Justice Catherine Fraser wrote a strong dissenting opinion. In contrast to Justice Slatter's conclusion that the issue was a procedural matter in which the elephant herself did not matter, Justice Fraser saw the issue in the larger context of the underlying dispute and the social values that support public concern for animal welfare. She viewed the issues "through the animal welfare lens":

> Viewed through the animal welfare lens, this appeal raises important issues fundamental to the effective protection of animals in this province. Under what circumstances can citizens or advocacy groups be granted public interest standing to seek a declaratory judgment that the government itself has failed to comply with animal welfare laws? And under what circumstances, if any, and to whom, is a civil declaratory judgment an available remedy where the alleged unlawful government acts may also be the subject of a prosecution under a regulatory animal welfare statute? Both are linked to a crucial issue in a constitutional democracy. Is the

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156 *Id.*, at para [29].

157 *Id.*, at para [35].

> government, and that includes the City as an arm of the state, immunized from judicial scrutiny of alleged unlawful acts?[158]

Justice Fraser explained that it was "putting the cart before the horse" to first find an abuse of process and then use this finding to deny standing.[159] She pointed out that there is a procedure under which individuals may initiate an action to enforce the criminal law by swearing an information and, in addition, citizens have a right to challenge unlawful government conduct. In her opinion, the test for abuse of process that should have been applied was "whether it is plain and obvious that allowing the appellants' action to continue would be contrary to the interests of justice."[160] Under that test she concluded the matter merited a trial.

Applying the three-part test for public interest standing, Justice Fraser noted that the parties had essentially agreed there was a serious issue and the plaintiffs had a genuine interest. The dispute centered on the third prong of the test, namely whether there was another reasonable and effective way to bring the matter before the court. Here she looked at the alternatives available to the plaintiffs, as opposed to the government itself, and found them deficient.

> When a court is considering whether there is another reasonable and effective way to bring the issue in question before the court, a court is not looking at whether *government* has another way to do so, but rather whether *citizens* do. That is why a court will first ask whether another private litigant will likely bring the issue before the court. Or could do so. A reasonable and effective alternative to a proceeding holding the executive branch to account cannot logically be a proceeding which can only occur with the effective consent of the executive branch.[161] [Citations omitted; emphasis in the original.]

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158 *Id.*, at para [47].

159 *Id.*, at para [141].

160 *Id.*, at para [146].

161 *Id.*, at para [191].

> The City claims that the appellants do have another reasonable and effective alternative – write more letters to the Minister responsible for administering the *Act*. But an effective alternative is not one that can be dismissed out of hand. It is hardly sufficient to say that the only option for citizens who sincerely believe that the executive branch is acting unlawfully is to write letters to one part of the executive branch asking it to charge another part with an offence, especially where the alleged offender is the delegatee of the charging branch.[162]

Accordingly, Justice Fraser concluded that the appellants, "for the public and on behalf of Lucy, are entitled to their day in court."[163] The Supreme Court denied review.[164]

Lucy's position is fundamentally the same as Ike's in the sense that both animals have the legal status of property and do not have a way to counter-balance the property rights of their owners. But just as Ike's interests could be represented in some way other than reclassifying him as a legal "person", Lucy's interests could be better represented while she maintains the status of property. Public interest standing could be granted on her behalf, or she could have the right to sue on her own behalf.

A distinguishing factor in Lucy's case is that the issue can be framed in terms of the interest of citizens in good government.[165] Public interest standing is arguably required because the government has failed to act, that is, has not charged the zoo with cruelty. This analysis places the human interest in holding their government accountable above the concern for animal protection, and disregards Lucy's interests in her own welfare entirely. Yet this approach advances the ultimate goal and may prove to be an effective

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162 *Id.*, at para [193].

163 *Id.*, at para [199].

164 *Reece v Edmonton (City of)* 2012 CanLII 22074 (April 26, 2012).

165 Clayton Ruby, who represented the appellants on behalf of Lucy, gave this perspective of the case when he spoke at Western law school on March 5, 2012.

legal strategy. The cost of focusing on this human element is that it perpetuates the view that under the law animals are property and should "have no rights!".

4.5 Summary and Conclusion of Part II

The second part of this thesis focused on how animal protection law has been interpreted. The British Parliament enacted *Martin's Act* because it was "expedient" to address the nineteenth century problem of individuals mistreating animals, particularly horses hauling people and cargo, and cattle being driven to market. The solution provided by the Act, subsequently amended to prohibit cruelty to all animals and birds, continues to provide a way to deal with individuals who abuse animals. This animal protection law is inadequate, however, to address institutionalized forms of cruelty.

That result was not inevitable. In the 1889 case of *Ford v Wiley* an English court applied a proportionality test that balanced the amount of animal suffering against the ends sought. Sawing the horns off cattle was found to cause such tremendous pain for the animals that it outweighed the benefit of packing more animals into a confined space in order to increase profits for their human owner. Yet the case is an anomaly. The *Ménard* test followed in Canada takes a very different approach. This test recognizes the superior status of humans and accepts the legitimacy of almost any use humans can find for animals, including making a monetary profit. Rather than balancing the means against the ends, it defines "necessary" suffering as that which cannot reasonably be avoided. The degree of pain inflicted is not the determining factor.

The *Ménard* test, combined with the restrictions imposed by the *mens rea* requirement for a criminal act, means that a great deal of pain is legally permitted to be inflicted on animals. Individual acts of sadism toward animals can be prosecuted, but institutionalized practices that mistreat animals are left largely untouched. The property rights of owners generally override concerns for animal welfare.

The underlying justification – human entitlement to use animals – has been interpreted as a problem arising out of the legal status of animals as property. This controversial idea provides a useful way to critically analyze the issue. In a custody dispute between two

marine parks, for example, the interests of the property were not considered even though that property is a whale that has specific needs that must be met if he is kept in captivity. Similarly, property does not have the right to sue, so whether the owner of an elephant in a zoo is keeping her in conditions that cause distress cannot be challenged if the local humane society chooses not to intervene.

Part III of this thesis will pull these various strands together in a search for solutions. Can Kant's thesis that harming animals leads to violence against humans be used to justify further protections for animals? Is there an answer in utilitarian theory? Or does limiting the property rights of owners require granting rights to animals? Finally, I will ask what lessons might be learned from the nineteenth century experience in changing the law for animals.

Chapter 5

5 Challenging the Moral Orthodoxy

The first part of this thesis looked at the presumptions of human superiority and entitlement to use animals that underlie animal protection law. The second part examined how the courts have interpreted the cruelty law in such a way that those underlying presumptions have allowed a great deal of suffering to be inflicted on animals. This third part, which consists of Chapters 5 and 6, discusses contemporary efforts to challenge those presumptions and reform the law once again for animals. This chapter focuses on the moral standing of animals. First, Kant's theory is reconsidered in light of modern attitudes about animals. Second, Singer's proposal for equal consideration in utilitarian theory is presented, followed by an analysis of the Israeli foie gras case that applied his concept in law. Third, Regan's rights-based theory is examined. Chapter 6 will turn to the implications of granting rights for animals in law.

5.1 Revisiting Kant's Theory

Kant's thesis that cruelty to animals is a precursor of bad behaviour towards humans has become well established. Some researchers contend that enough empirical evidence has been collected in support of the theory that the existence of a link should be accepted as proven.[166] The American Psychiatric Association lists animal abuse as a symptom of "conduct disorder", a mental health problem in children that involves a number of antisocial behaviours such as lying and stealing.[167] "The Link", a registered trademark owned by the American Humane Association, has put a great deal of effort into researching the connection between cruelty to animals in childhood and later domestic violence, and sponsors programs aimed at early intervention.[168]

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166 Andrew Linzey (ed). *The Link Between Animal Abuse and Human Violence* (Portland, OR: Sussex Academic Pr., 2009) at 2.

167 *Diagnostic and Statistical Manual of Mental Disorders, 4th ed.* (Washington, DC: American Psychiatric Association, 2000) at 94.

168 Frank Ascione. *Children and Animals: Exploring the Roots of Kindness and Cruelty* (West Lafayette, IN: Purdue Univ Pr., 2005).

Even so, there are still some skeptics who point out that a history of animal abuse is present in some serial killers and not in others, and there are cases of cruelty to animals that never lead to aggression against humans.[169] They cite the emergence of new academic fields, particularly Animal Law, as contributing to the promotion of an unproved connection between animal abuse and violence towards humans.

> …the emergence of the multidisciplinary field of Human-Animal Studies (HAS; aka "Animal Studies" and "Anthrozoology") provides an academically credible home for the studies of the link …Another important development in higher education that is a powerful instrument of policy innovation in the area of the link is the emergence over the past two decades of the field of Animal Law (AL). …The field of AL is in large part responsible for a number of judicial, legislative, and regulative developments that provide policy relevant to the link. …. In addition to their punitive and deterrent functions for at-risk and actual perpetrators, laws educate and shape the attitude of the general public regarding the importance of animal abuse and its relationship with other forms of violence.[170]

It is true that advocates for animal welfare have been promoting Kant's theory ever since Lord Erskine relied on it back in 1809. In the short run, it seems politic to use any argument to end cruelty to animals, including the self-interest of humans. Over time, however, this tactic has had the unintended consequence of validating the perspective that animals occupy a rung on the hierarchy ladder below humans and do not warrant moral consideration on their own. The Link project, for example, is clearly concerned about animals. It defines companion animals as family members and champions laws that permit the inclusion of pets in protective orders.[171] Nevertheless, The Link's stress on abusive behaviour in childhood as an early warning sign for future domestic violence

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169 For an overview of research in this field, *see* Frank R. Ascione. and Kenneth Shapiro, "People and Animals, Kindness and Cruelty: Research Directions and Policy Implications" (2009) 65 Jn of Social Issues 569.

170 *Id.*, at p. 577.

171 Phil Arkow and Tracy Coppola. *Expanding Protective Orders to Include Companion Animals.* Available online at http://www.americanhumane.org/assets/pdfs/interaction/hab-link-ppo-companion-animals.pdf

puts the emphasis on the impact of animal abuse on humans, not on the animals themselves, regardless of their insistence that pets are members of the family. Some social workers have noticed this discrepancy and begun to argue that their profession should start addressing the needs of the abused animal.[172] This is an admirable position, but it is by no mean a mainstream one.

Programs that provide healing environments for violence-prone individuals surely offer many benefits, but the goal of the programs is to intervene and help the abuser before human family members are injured. When compared to family violence against children, partners, and elderly parents, animal cruelty offences continue to be seen as a minor crime that deserves a minor punishment, mostly to teach the perpetrator a lesson.[173]

The net result of Kant's thesis today, and I would venture to guess tomorrow as well, is the same as it was in the nineteenth century. Situating animal abuse within the larger context of how humans should treat all those with whom they share their lives, whether human or animal, retains the emphasis on the effects of cruelty on humans. If the moral status of animals is to be elevated, some other theory is needed. The two that have been offered are a new principle of "equal consideration" of like interests in utilitarian theory and "animal rights".

5.2 "Equal Consideration" in Utilitarian Theory

In Chapter 2, I pointed out that Bentham's theory of utility coincided with the rise of social reform movements, including the animal protection movement, in the late eighteenth and early nineteenth centuries. Utilitarianism's focus on pleasure and pain meant animal suffering could be considered for its affect on animals, not just its impact on humans. But there was no rule or guidance on how heavily animal interests should be weighted on the utilitarian balancing scale. Human interests could still count for much more.

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[172] Thomas Ryan. *Animals and Social Work: A Moral Introduction* (NY: Palgrave Macmillan, 2011).

[173] Minister of Justice, Canada. *Crimes Against Animals: A Consultation Paper* (Ottawa: Library of Parliament, 1998).

Peter Singer addressed this issue in *Animal Liberation.* [174] He is working strictly in utilitarian theory, but created some confusion because he used the language of rights to support his argument. Specifically, Singer talked about marginal cases and prejudice for one's own species, even though he is clearly concerned with promoting pleasure and minimizing suffering, and agrees with Bentham that all beings who can suffer have morally relevant interests that count.

What Singer adds to Bentham's calculus is a challenge to the norm that humans are superior beings whose interests take precedence over animal interests. Instead of simply acknowledging that animals can suffer, Singer argues that pain should be given *equal consideration with like interests* in the balancing test. Under his proposal, if an animal can suffer, that suffering must be taken into account along with the like suffering of humans. In short, it does not matter what species the suffering being is.

> The argument for extending the principle of equality beyond our own species is simple, so simple that it amounts to no more than a clear understanding of the nature of the principle of equal consideration of interests. We have seen that this principle implies that our concern for others ought not to depend on what they are like, or what abilities they possess … It is on this basis that we are able to say that the fact that some people are not members of our race does not entitle us to exploit them, and similarly the fact that some people are less intelligent than others does not mean that their interests may be disregarded. But the principle also implies that the fact that beings are not members of our species does not entitle us to exploit them, and similarly the fact that other animals are less intelligent than we are does not mean that their interests may be disregarded.[175]

Singer gives the example of a child who kicks a mouse and a stone down the road. The child is sentient and has interests, including the pleasure gained from kicking something, or someone, as he walks. The mouse is also sentient and because mice can suffer this

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[174] Peter Singer. *Animal Liberation* (New York: Random House, 1975; revised edition New York: Random House, 1990, reissued with a new preface, Ecco, 2001).

[175] Peter Singer. *Practical Ethics,* 3rd ed. (NY: Cambridge Univ Pr., 2011) at 49.

mouse has an interest in not being kicked. The stone, on the other hand, cannot suffer and so it would be nonsense to talk about the interest of the stone. If it turns out, after taking all the interests of both the boy and the mouse into account, that the action that leads to the least overall suffering involves causing some suffering for the mouse, then that action is justified. Since species membership is ignored, if less suffering overall would result from causing the child to suffer, then that would be the right course of action too. [176]

There is a difference, however, in Singer's view, between killing the mouse and killing the child, even if both are done painlessly. This is because he believes a person can form a preference for continued life whereas an animal cannot.[177] Thus equal consideration requires taking like interests into account equally, but it does not mean giving animals the same set of rights enjoyed by humans. The child's interest in not being kicked and the mouse's interest in not being kicked are equal interests. But the life of the mouse and the life of the child are not equal, and their non-like interests are not equal either. The mouse does not have an interest in education, so the mouse should not be sent to school or given a cell phone to call home.[178] The interest of the mouse is in living out a mouse-life according to a mouse's instincts and intelligence, in a habitat ecologically sufficient for normal existence, without being exploited for a child's amusement.

Singer used his principle of equal consideration to argue that experimentation on animals inflicts a great deal of suffering on them, and in most cases is morally wrong. Here he differs from Bentham's view of the theory of utility. For Bentham, animal interests could matter because they can suffer, but the scale was always weighted in favour of the human considerations. For example, in the argument over vivisection, which involved cutting open live animals without anaesthesia, he only offered his utilitarian caution that the benefits to humans must outweigh the costs to the animal. If the balance were otherwise, that is, if the pain was inflicted without sufficient benefit, then he thought it was merely

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176 Singer, *Animal Liberation*, *supra*, n. 174, at 8.

177 *Id.*

178 The usual example given to explain this point is that animals would not have an interest in voting. It is not a particularly good example. Wild animals have an interest in their environment and perhaps they should be given a way to speak before it is destroyed.

cruelty and he voiced the same concern Kant expressed – that a person who is cruel to animals will tend to also abuse humans.

> I have never seen, nor ever can see, any objection to the putting of dogs and other inferior animals to pain, in the way of medical experiment, when that experiment has a determinate object, beneficial to mankind, accompanied with a fair prospect of the accomplishment of it. But I have a decided and insuperable objection to the putting of them to pain without any such view. To my apprehension, every act by which, without prospect of preponderant good, pain is knowingly and willingly produced in any being whatsoever, is an act of cruelty; and like other bad habits, the more the correspondent habit is indulged in, the stronger it grows, and the more frequently productive of its bad fruit. I am unable to comprehend how it should be, that to him to whom it is a matter of amusement to see a dog or horse suffer, it should not be matter of like amusement to see a man suffer; seeing, as I do, how much more morality as well as intelligence, an adult quadruped of those and many other species has in him, than any biped has for some months after he has been brought into existence.[179]

Bentham's views on vivisection should be placed in context. In the nineteenth century, animals were sometimes killed in "scientific" demonstrations offered as a kind of educational entertainment. One such demonstration placed a bird or small mammal in a jar and pumped out the air to show that these animals will die without oxygen.[180] Faced with this type of situation, Bentham's utilitarian criteria that justified experiments on animals when it could be shown they benefited humans could be applied in a way that made sense.

In today's world, experiments on animals are conducted in research laboratories hidden from pubic view. Since the details of the experiment are kept secret, it is fairly easy to

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179 Jeremy Bentham. "Letter to the Editor", *The Morning Chronicle*, 4 March 1825. Reprinted in A.B. Clarke and Andrew Linzey (eds). *Political Theory and Animal Rights* (Pluto Pr.: London, 1990) at 136.

180 Shevelow, *supra*, n. 71 at 160-161.

argue in general terms that a cure for cancer, or whatever human interest is at stake, is in the greatest good and justifies the sacrifice of a few animals. Anyone who disagrees can then be described as caring more about rats than people, and further argument is dismissed. In short, the balancing test is not a true analysis because the outcome is predetermined. So Singer shifted the burden and placed the onus squarely on scientists to justify their experiments, rather than on animal advocates to present evidence against it. He asked experimenters who use animals if they would be prepared to carry out their experiments on human beings who are at a mental level similar to those animals. In other words, if scientists justify experimenting on animals because animals lack a feature such as rationality, then *the scientists* should be the ones to explain the reason why it is not acceptable to conduct that same experiment on marginal case humans such as infants who also lack rationality.

Singer accomplished this shift in the burden of proof by expanding on Bentham's observation that while humans are generally more rational than animals, when compared to a human *baby*, an adult horse or dog may be the more rational being. Bentham wanted to refute the place of rationality as a dividing line between those with interests and those without, and substitute in its place the ability to feel pleasure and pain. Since both the adult animals and the human baby in his example can feel pain, both are beings with morally relevant interests. Their comparative levels of rationality are irrelevant.

Singer, on the other hand, used the greater rationality of *some* animals when compared to *some* humans to not only refute the place of rationality, but also shift the burden to those who want to exploit animals to find a legitimate difference. This tactic allowed him to avoid the obligation that he would otherwise have of proving that *all* animals are moral agents. He does not have to show anything other than that animals are sentient. If there is a reason why animals and humans should be treated differently, then someone else has to provide it.

Singer's argument from marginal cases seems compelling because it compares individuals at the edges of the defined border. An adult horse or dog is generally at the apex of that animal's reasoning abilities, whereas a human baby is usually at the lowest

point of its species. If a human trait, in this case rationality, is the boundary, then the horse and dog get to cross over but the baby does not. The horse and dog are now grouped with the majority of humans and the baby is with the majority of animals. Thus it cannot be said that all humans are moral agents and all animals are not. The horse and dog and the baby have proved that statement is wrong.

Yet Singer's argument from marginal cases is not entirely convincing. A counter-argument is that in assigning moral status it is not *individual* traits that are important but those of the *group*. The argument from kinds, for instance, places all kinds of humans in one group and all kinds of animals in another. Being close to the dividing line does not matter because it is the capacity for moral agency that counts. A human who is defective in some way has that capacity even if it is not being realized, whereas the horse and the dog do not. A slightly different argument gives humans who are in the margins the same moral status as normal humans because all group members are similar in other respects.[181] So it does not matter if the horse and the dog are exceptional animals because most horses and most dogs are not rational beings. Likewise, the age of the baby is immaterial since normal adult humans are rational and the characteristics of humans, not one particular baby, are important in assigning moral status.

Another objection to Singer's marginal cases argument is the slippery slope theory, which argues that if we don't give marginal humans moral consideration we will eventually not give normal humans due consideration.[182] Once the boundary line is moved to exclude people in the margin, there will be a precedent for moving it, so it will likely be moved again and again. Eventually, the people in the centre of the category, normal humans, will be in the position that the marginal humans are in now.

These responses to Singer's marginal cases argument can be criticized for relying on general characteristics of humans versus animals and elevating these characteristics

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[181] Jullia Tanner. "Marginal Humans, the Argument from Kinds and the Similarities Argument" (2006) 5 Philosophy, Sociology & Psychology 47.

[182] Julia Tanner. "The Argument from Marginal Cases and the Slippery Slope Objection" (2009) 18 Environmental Values 51.

above the unifying factor of sentience without fully explaining why. In essence, they simply presuppose that all humans clearly belong to one category and all animals to another. In some cases, in the example of a human baby for instance, this position can be justified on the basis that the infant has the potential to grow into an adult. The baby will, in the normal course of events, move from the margin to the middle of the category as a result of nothing more than the passage of time. Humans in vegetative states that were rational at one time could also argue that once moral status is obtained it cannot be lost. The larger problem is that the assumption of rigid boundaries based on species membership ignores the continuities between species demonstrated by anatomy and zoology. Charles Darwin himself thought that "the difference in mind between man and the higher animals, great as it is, certainly is one of degree and not of kind".[183]

The point of the marginal cases argument for Singer, however, is not to argue the fine points. His goal is to attack the barrier between the species. Once this boundary is crossed he can make his point that animal suffering must be considered equally with human suffering. There may be a reason that explains why it is abhorrent to think of experimenting on a brain dead person and at the same time have no qualms about performing that same experiment on a sentient animal. Singer's advantage is that it is hard to explain what that reason is without admitting a preference for one's own species.

If, rather than argue about marginal cases, a preference for humans over animals is simply admitted, Singer brings out his second argument: "speciesism". There are some supporters of experimentation on animals who do straightforwardly argue that there is nothing wrong with humans favouring their own species. Speciesists point out that racism and sexism are wrong because they are prejudices against individual people within a group based on specific physical characteristics. Speciesism, in contrast, does not select out individuals. Rather, it grants full moral status to all humans and denies it, either completely or partially, to all animals. Carl Cohen is a well-known speciesist who refuses to grant any moral status at all to animals on the basis that to do otherwise leads to

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[183] Charles Darwin. *The Descent of Man, and Selection in Relation to Sex,* 2nd ed. (New York: H.M. Caldwell, 1874) at 151.

"absurd" results. Cohen believes that either no one has rights or everyone has the same rights. He sees no middle ground that would distinguish animal rights from human rights.

> I am a speciesist. Speciesism is not merely plausible; it is essential for right conduct, because those who will not make the morally relevant distinctions among species are almost certain, in consequence, to misapprehend their true obligations. … If all forms of animate life … must be treated equally. … we are forced to conclude (1) that neither humans nor rodents possess rights, or (2) that rodents possess all the rights that humans possess. Both alternatives are absurd. Yet one or the other must be swallowed if the moral equality of all species is to be defended.[184]

Bonnie Steinbock is representative of those who only discount, rather than completely deny, the interests of animals. She too is a speciesist, but differs from Cohen in that she is willing to grant animals some moral status, insisting only that it must be considerably less than what humans enjoy. Her position justifies experimentation on animals because "certain capacities" are unique to humans and entitle us to "a privileged position in the moral community".

> … certain capacities, which seem to be unique to human beings, entitle their possessors to a privileged position in the moral community. … Singer thinks that intelligence, the capacity for moral responsibility, for virtue, etc., are irrelevant to equality, because we would not accept a hierarchy based on intelligence any more than one based on race. … But it does not show this at all. … what entitles us human beings to a privileged position in the moral community is a certain minimal level of intelligence, which is a prerequisite for morally relevant capacities.[185]

The speciesists get to the crux of the matter when they say that there is nothing wrong with experimenting on animals but not humans because humans are superior beings. Superiority gives us power and these scientists simply choose to use it. Singer, like

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[184] Carl Cohen, "The Case For The Use Of Animals In Biomedical Research" (1986) 315 The New England Journal of Medicine 865.

[185] Bonnie Steinbock. "Speciesism and the Idea of Equality" (1978) 53 Philosophy 247, 253-254.

Bentham, is not entirely opposed to this idea or to any experimentation on animals at all. He judges actions by their consequences, so an experiment on a small number of animals that would provide a cure for a disease that affects thousands of people could, in his mind, be justified. He is just not going to be the one to justify it. Instead, he demands that if scientists are willing to experiment on sentient animals but not human babies to find that cure, *they* must come up with some morally relevant difference that justifies the difference in treatment.

It is doubtful that Singer really expects scientists to identify a morally relevant difference between humans and animals when centuries of philosophers have tried and failed. He is straightforward in saying that what he is advocating for is equal consideration of interests. In other words, all the talk about marginal cases and speciesism is just to support his proposal to tweak utilitarian theory in way that gives animal interests a fair place on the scale, and removes the weight that currently sits on the side of human interests. By seeming to suggest that experimentation on human babies and adults who are "defective" in some way can be justified, however, he created a separate controversy and added to the perception that animal "liberationists" care more about animals than they do about people.

In my opinion, equal consideration of like interests will not take root in Canada so long as the *Ménard* test remains unchallenged. Yet, Singer's approach has the potential to work as a legal concept. Courts already engage in balancing tests, and a rule of equal consideration would go to the weight to be given to animal interests. The nineteenth century case of *Ford v Wiley*, in which the court weighed the pain the cattle suffered when their horns were sawed off against the economic benefit of this procedure to the farmer, did not explicitly state how much weight was being given to animal interests. But it was clearly sufficient to outweigh the economic benefits to the farmer. A more recent example occurred in 2003, when the Israeli Supreme Court was presented with the issue

of whether force-feeding geese to produce foie gras was cruel in *Noah v The Attorney General*[186].

5.3 Case Study 3: Noah v The Attorney General

In *Noah v The Attorney General* the Supreme Court of Israel reviewed the practice of force-feeding geese to produce the fatty liver used in the production of foie gras. Foie gras is a French delicacy usually served as an appetizer on toast and is controversial because of the treatment of the geese and ducks from which it is obtained. The birds' livers are enlarged to ten times their normal size by pumping food into their stomachs through a metal tube inserted down their throats. After a few weeks of this treatment the birds can be slaughtered and the liver served as foie gras.

The case was an appeal by "Noah", a coalition of animal protection organizations. Noah asked the court to annul the regulation that permitted the force-feeding, on the grounds that the regulation contravened legislation prohibiting cruel treatment or abuse of animals. The court agreed that the entire practice, not just the method, was cruel. The force-feeding caused cuts and lesions in the birds' throats and ruptured their digestive tracts. Many of the birds could hardly walk or stand.

The justices hearing the case acknowledged that humans may use animals and, in particular, use them for food, but they split on how to define the purpose of force-feeding geese. This definition was crucial; how the justices characterized the activity determined the outcome. Justice Grunis, who was in the minority, defined the purpose broadly, calling it "the production of food for humans", in his view an obviously worthy social value.[187] Under this wide definition he concluded that the ends justified the means. In making this determination, however, he was thinking beyond the immediate issue of animal cruelty. He expressed concern that ruling against force-feeding would result in the

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[186] *Noah v The Attorney General, et al.*, HCJ 9232/01, 215 (Israeli Supreme Court Aug. 11, 2003), available in English at http://elyon1.court.gov.il/files_eng/01/320/092/S14/01092320.s14.pdf

[187] Justice Grunis, 235-236 at para [18].

elimination of the entire foie gras industry since there was no alternative method. In short, the economic impact was a factor in to how he defined the activity.

In contrast to Justice Grunis' broad definition of foie gras as food, Justice Strasberg-Cohen drew a distinction between basic foods and delicacies.

> … "the production of food" will have greater weight the more the food item is necessary for human existence. Thus, basic foods are different than luxuries. Unlike my colleague, I do not think the distinction between foods should be completely ignored. This is particularly true when the food is a luxury and its production inflicts grave suffering on animals.[188]

She then balanced the suffering of the geese, which was not disputed, against the human considerations, and concluded that the human interest in maintaining foie gras as a luxury food was not compelling. Thus she held that the regulation at issue did not strike "a correct balance".

> The force-feeding regulations are supposed to set out means for achieving the purpose of the law – preventing the abuse of animals. …Clearly, the regulations do not achieve this goal. …Though they impose several restrictions on the industry, restrictions which may improve the situation, their provisions are not sufficient to achieve a proper balance between the interests involved. When we consider "agricultural needs" – as clarified by my colleague – the regulations should still reflect the price our society is willing to pay in order to produce the delicacy known as foie gras. The price paid at present, the harm caused to the geese, is too high. The regulations greatly harm the interest of protecting animals; as a result, they do not represent a correct balance between the benefit to "agricultural needs" and the harm inflicted on animals. They, to some extent, measure up to the test of appropriateness between the means and the end, but they are not sufficient to stand up to this test. They do not establish the means that will minimize the injury, nor do they answer the

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[188] Justice Strasberg-Cohen, at para [23], 268.

> test of proportionality, which measures the relation between the benefit and the harm.[189]

Nevertheless, Justice Strasberg-Cohen too was concerned with the economic impacts of the case on the foie gras industry. She dealt with it by suspending annulment of the regulation in order to give the industry time to react. In her view it was all right for the geese to suffer a little while longer in order to ease the financial burden on the humans involved.

> Yet, one must give attention to the complexity of the issue, and to the consequences of annulling the Regulations and prohibiting the practice of force-feeding geese on the foie gras industry and those employed in it. All these demand giving respondents time to reevaluate the subject before the annulment takes effect.[190]

The third justice on the court, Justice Rivlin, concurred with Justice Strasberg-Cohen but did not seem as troubled by the task of balancing animal suffering against the viability of the industry or the necessity of foie gras. In a one-paragraph opinion he eloquently stated that the price of ignoring animal suffering in favour of profit or gastronomic pleasure is human dignity.

> As for myself, I have no doubt that wild animals and house pets alike have feelings. They possess a soul that experiences the feelings of happiness and grief, joy and sorrow, affection and fear. Some develop feelings of affection toward their friend-enemy, man. Not all would agree with this view. All would agree, however, that these creatures feel the pain inflicted upon them by physical injury or by violent intrusion into their bodies. Indeed, one could justify the force-feeding of geese by pointing to the livelihood of those who raise geese and the gastronomical pleasure of others. Indeed, those wishing to justify the practice might paraphrase Job 5:7 [65]: It is right

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189 Justice Strasberg-Cohen at para [22], 267-268.

190 Justice Strasberg-Cohen at para [25], 270.

> that man's welfare shall soar, even at the price of troubling birds of light. Except that it has a price – and the price is the degradation of man's own dignity. [191]

Noah has limited relevance in Canada. First, on the particular facts, the agricultural industry in this country is not subject to the same degree of governmental regulatory oversight as it is in Israel. Second, the *Ménard* test is well established and unlikely to be replaced with a proportionality test. What can be taken away from the case, however, is a sense of how Singer's utilitarian philosophy of equal consideration could be applied. It is possible to balance human and animal interests. Indeed, the animal interests may be found to be greater in some circumstances.

At the same time, it should be noted that the outcome of the foie gras dispute most likely would have been different if animal suffering was balanced against the production of a staple or basic food instead of a delicacy. Egg-laying hens held in battery cages are in many ways subjected to more suffering than force-fed geese, but they have less chance of reprieve simply because eggs are generally considered to be more "necessary" to the human diet than foie gras. Eggs are not necessary in the sense that humans will die if they don't eat chicken eggs. The concept of necessity, and consequently the direction of the law, is tangled up with social values and economics.[192] As we saw in his decision, Justice Grunis was extremely troubled by the fact that prohibiting the force-feeding of geese would terminate the industry entirely and "transform those who have been employed in force-feeding geese for decades into felons in a day".[193] Justice Strasberg-Cohen too was concerned about the impact of the ruling on the industry, plus she was well aware of the influence of social values.

> The circumstances under which other interests will override the interest of protecting animals cannot be precisely demarcated. They will "depend on the culture, values,

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191 Justice Rivlin, 272.

192 It has been argued that this entanglement is so great that some governmental regulations about animals come into force only because they are necessary to sustain an economic system that requires the oppression of animals in order to be profitable. *See*, David Nibert. *Animal Rights/Human Rights: Entanglements of Oppression and Liberation* (Lanham, MD: Rowman and Littlefield, 2002).

193 Justice Grunis, 235-236 at para [18] and 242-243 at para [25].

> and worldview of society and its members, and these are contingent on time, place, and circumstance.[194]

A proportionality test, then, might result in very real improvements in standards of animal *welfare*. But it will not lead to animal *rights*. Singer's principle of "equal consideration" requires an evaluation of whether an act is right or wrong based on a balance of pleasure and pain, and stresses the ethical value of minimizing suffering. All claims to moral consideration are conditional upon their not being outweighed by other competing claims. It remains justifiable to use animals, even to kill them, if human interests are crucial. These human interests may include economic factors such as job creation and social values like the practice of eating eggs. Once these considerations outweigh animal interests, the concern shifts back to reducing the suffering of the animal to the minimum amount that is "necessary" to accomplish the end sought. Animal rights theorists, in contrast, argue that animals are members of the moral community and therefore have a value that cannot be outweighed by competing human interests.

5.4 Animal Rights Theory

The term "animal rights" is subject to multiple interpretations. For some, the principles enunciated by the "Five Freedoms" for farm animals are a set of rights. These "rights" would only affect how these animals are housed and treated.[195] At the other end of the spectrum, abolitionists such as Francione urge an end to *all* the uses that humans have found for animals, including food, clothing, research subjects and entertainment:

> …our recognition that no human should be the property of others required that we *abolish* slavery and not merely *regulate* it to be more "humane," our recognition that

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194 Justice Strasberg-Cohen, 254 at para [7].

195 The Farm Animal Welfare Council, an independent advisory body in the UK, developed the Five Freedoms in 1965. The Five Freedoms are: Freedom from hunger and thirst – by ready access to fresh water and a diet to maintain full health and vigour. Freedom from discomfort – by providing an appropriate environment including shelter and a comfortable resting area. Freedom from pain, injury or disease – by prevention or rapid diagnosis and treatment. Freedom to express normal behaviour – by providing sufficient space, proper facilities and company of the animal's own kind. Freedom from fear and distress – by ensuring conditions and treatment which avoid mental suffering.

> animals have this one basic right [not to be property] would mean that we could no longer justify our institutional exploitation of animals for food, clothing, amusement, or experiments.[196]

Under either definition, the concept of rights for animals has attracted a great deal of attention and support. Bernard Rollins posits that this reaction is in response to the excesses of utilitarianism. Rollins explains that there is a conflict between the good of the group and the good of individuals.[197] Utilitarianism focuses on the greatest happiness of the greatest number, an approach that inevitably leads to the oppression of minorities in the name of the general welfare. Western democracies thwart this result by protecting individuals. Fences, in the form of rights such as freedom of speech, are built around the fundamental interests that are seen as essential to human nature. In other words, rights are necessary because they have legal implication that put a brake on the concept that the general welfare is the sole moral criterion. Granting rights to animals has the effect of plugging animals into this system.

The most systematic philosophical argument for animal rights has been set out by Tom Regan. He begins by challenging the assumption that humans are superior beings who are entitled to use animals for any purpose:

> What's wrong – fundamentally wrong – with the way animals are treated isn't the details that vary from case to case. It's the whole system. … [W]hat is wrong isn't the pain, isn't the suffering, isn't the deprivation. These compound what's wrong. … The fundamental wrong is the system that allows us to view animals as *our resources*, here for *us* – to be eaten, or surgically manipulated, or exploited for sport or money.[198]

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196 Gary L. Francione. *Introduction to Animal Rights: Your Child or the Dog* (Philadelphia, PA: Temple Univ Pr., 2000), xxix.

197 Bernard Rollins. *Animal Rights and Human Morality*, 3rd ed. (Amherst, NY: Prometheus Books, 2006).

198 Tom Regan, "The Case for Animal Rights" in Peter Singer, (ed.). *In Defense of Animals* (Oxford: Blackwell Pr., 1985) at 13-14.

Regan has to begin with this assertion. He is working out of the tradition that sees humans as superior beings. This tradition, as we saw in Chapter 1, places humans in the moral community and excludes animals. Any obligation to not mistreat animals, consequently, is described in terms of it being a duty to humans. Those opposed to rights for animals can rely, as Aquinas did, on this idea of human supremacy and the lower status of animals. Frey, for instance, argues that animals are not the kinds of beings that can have interests or rights.[199]

To get around this problem, Regan, like the utilitarians, relies on sentience. As it was used by Bentham and continues to be used by Singer, sentience only refers to the ability of an animal to suffer. This suffering can be placed on the scale of pleasure and pain but, as we have seen, all sentience gives animals under this balancing test is a claim that they should not be mistreated. The ability to suffer does not provide grounds to respect an animal's life in and of itself. Killing the animal can be justified if it promotes the general welfare and is done humanely.

Animal rights theory, therefore, needs to establish that animals have a moral status derived, not from their ability to suffer, but from some quality that is intrinsic to them. This quality could be *reason* if it can be shown that animals are rational beings. The other option is *sentience*, with the proviso that if it is sentience then the characteristic has to be defined in a way that means more than the ability to suffer. Regan rejects rationality, so he goes with sentience and formulates a definition that he calls being the "subject-of-a-life". [200] By subject-of-a-life he means anyone, whether human or animal, who has the capacity for the subjective experiences of life.

Not every living thing qualifies as the subject of a life as Regan defines it. Only those who are capable of understanding at some level that they are alive and want to stay alive meet this standard. An animal who is a subject of a life is a singular individual, has interests, learns from experience, has emotions like fear and pleasure, has painful and

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199 R.G. Frey. *Interests and Rights: The Case Against Animals* (Oxford: Clarendon Pr., 1980) at 83-110.

200 Tom Regan. *The Case for Animal Rights* (Berkeley: Univ of California Pr., 1985).

pleasurable experiences, and has a good or bad life. In short, what happens to them is meaningful to them even if it doesn't matter to anyone else.

> To be the subject-of-a-life…involves more than merely being alive and more than merely being conscious. …individuals are the subject-of-a-life if they have beliefs and desires; perception, memory, and a sense of the future, including their own future; an emotional life together with feelings of pleasure and pain; preference- and welfare-interests; the ability to initiate action in pursuit of their desires and goals; a psychophysical identity over time; and an individual welfare in the sense that their experiential life fares well or ill for them, logically independently of their utility for others and logically independently of their being the object of anyone else's interests.[201]

With this definition of sentience, Regan is now is able to develop his thesis that it is the quality of being a subject-of-a-life that gives both animals and humans a fundamental right to be treated with respect. Having this right means that an animal's interests cannot, under normal circumstances, be sacrificed to promote the general welfare. Thus, just as Singer expanded on Bentham's ideas, Regan's approach can be seen to have general affinities with Kant's moral theory. The challenge for Regan was to figure out a way to sever Kant's connection between moral status and membership in the human species, and he does this through the characteristic of being a subject-of-a-life.

The hurdle for Regan now becomes whether humans have a direct duty to animals. As discussed earlier, Kant was willing to place restrictions on how humans treat animals, but these limitations were obligations to other people, not to the animals themselves. Regan too "has objections to speaking of a direct duty not to be cruel to animals", on the grounds that neither kindness nor cruelty can answer questions about moral right and wrong.[202] He can't shake his conviction that an act done out of self-interest negates its moral worth. Regan believes that kindness on the part of a bigot to members of his own

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201 *Id.* at 243.

202 *Id.*at 409, footnote 19.

race is wrong because it is rooted in injustice. Similarly, the absence of cruelty does not mean a person is doing the right thing.

Regan rejects the contractarian view that only those who understand and accept a set of rules, or contract, can have rights that are created directly, and all other duties must be indirect. To him it seems that torturing a child is a wrong to the child regardless of whether any adult humans are upset, and if this is true for the child it must also be true for an animal. So in this sense there must be a direct duty to the animal, but as we have seen, Regan cannot accept a direct duty based only on kindness and cruelty.

> …even were we to grant that, by advancing an indirect duty view, Rawls's position is consistent ,,,, we would still have principled reasons for denying that it passes another crucial test – namely, that of impartiality… Rawl's exclusion of animals from the class of individuals who are owed duties of justice is consistent, if it is, only because the grounds for excluding them are arbitrary.[203]

This thinking puts Regan in a bit of a quandary. He has established that animals have inherent value for the same reason humans do, that is, because they are the subjects-of-a-life. Since both humans and animals are subjects-of-a-life, there is an implication that humans have some direct duties to animals, which would seem to include the basic duty to not be cruel. In the end, Regan reluctantly adopts the language of direct duties. He still finds the Kantian idea of indirect duties useful, though, toward animals that are excluded from moral consideration.

Animals that might not be subjects-of-a-life in Regan's opinion include frogs. Even though they do not meet his definition of sentience, he does not want to conclude that it is all right for humans to do anything at all to frogs, or to be cruel to them. So he adopts Kant's rationale and says that we should treat animals that are not the subject-of-a-life as if they were, on the grounds that exploiting these animals will encourage exploitation of animals, and presumably people, who are subjects-of-a-life. Regan objects to requiring

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[203] *Id.* at 174.

the dissection of frogs in secondary school science laboratories, for example, because it might lead to students exploiting animals who do have rights, or accepting that exploitation when it is done by others.

> A variant of Kant's psychological speculations is apt … if it is true … that the animals most frequently dissected in high school and university lab sections lack rights, to continue to require dissecting them is likely to help foster habits that will lead persons to engage in practices that violate the rights of those animals who do have them – or to acquiesce by supporting those who do.[204]

In Regan's view, therefore, the duty of kindness can be both direct (to subjects-of-a-life) and indirect (to animals who are not subjects-of-a-life). One of the reasons he hedges on this point is because his principle of respect does not mean humans and animals are completely morally equal. Regan is unequivocal in stating that death for a normal person is a far greater harm than death for an animal. If asked to choose which four survivors to put in a lifeboat when there are four normal humans and one dog, he easily sacrifices the dog, and even a million dogs, reasoning that death forecloses more sources of satisfaction for people than it does for dogs. Regan counters any charge of speciesism by claiming it cannot be speciesist to sacrifice the dogs, because the decision to sacrifice the dogs is "not based on species membership".[205] Rather, he is looking at the loss each individual faces and assessing those losses equitably.

Regan concludes that current practices toward animals in agriculture, biomedical research, and recreational hunting are an injustice. He is able to take this position because the quality of being a subject-of-a-life allows him to assign animals inherent value. Having independent value as an individual, regardless of species, is the key to moral status and, consequently, the right to be treated with respect. And his interpretation of the

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204 *Id.* at 368.

205 *Id.* at 324-325.

right to respect is that it trumps any benefit to the social good that these industries may promote.

Regan's concept of subject-of-a-life is obviously subject to criticism for setting arbitrary standards and being vague about which animals could meet them. In his defense, the idea that animals either naturally have rights, or can acquire them, is a moral concept at odds with centuries of philosophical thinking. Yet Regan is trying to fit animals within the concept of inherent value, and recognize that their lives have value, which means that there has to be something more than the ability to suffer. If the only interest animals have is in not suffering, then once this interest is taken into account, nothing more can be logically required and we are back to Bentham and Singer's utilitarian balancing test.

The more problematic shortcoming in Regan's thesis is that some animals are always going to be excluded because they do not meet the criteria of being a subject-of-a-life. *Noah v Attorney General* might very well have turned out differently if the Israeli Supreme Court had been asked to determine whether the force-fed geese qualify under the criteria Regan has set. Infant mammals, for instance piglets, might also be excluded from the category of a subject-of-a-life. If so, this would pose an enormous problem in crafting regulations or other legal limitations on practices in factory farms. There are over 15 million piglets born in Canada each year.[206] The average age of piglets killed for meat is five or six months old.[207] If this is too young to have formed the requisite ability to understand they are alive and want to stay alive, then under Regan's philosophy they would never attain inherent value and the right of respect for their lives. Like the frogs on the dissection table, the most these piglets could hope for is an indirect duty based on the idea that harming them might lead to harming animals that are subjects-of-a-life.

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[206] Statistics Canada indicates the 2006 Census of Agriculture counted 15,043,132 pigs, a 7.8% increase from the 2001 census. At the same, there was a 25.7% drop in the number of farms reporting pigs, which shows a move to more intensive farms. http://www.statcan.gc.ca/ca-ra2006/articles/snapshot-portrait-eng.htm

[207] The US Environmental Protection Agency gives the time from nursery (weaning) to market as "usually 14 to 16 weeks". The conclusion that piglets are five or six months old when slaughtered is reached by adding a few weeks to account for the time they spend nursing with their mother. http://www.epa.gov/agriculture/ag101/porkglossary.html

This shortcoming is not inconsequential. Singer's approach, as it is translated in law as a "proportionality test", would require a fundamental change from the *Ménard* test for cruelty. Some form of legal rights for animals presents an alternative option, but a theory that potentially excludes a large number of the most vulnerable animals would fail at the outset.

Francione eliminates this problem by adopting a definition of sentience that is broader than Regan's subject-of-a-life. Francione sees a sentient being as one who is conscious of pain and pleasure, much the same as Bentham and Singer, but he sees more than a desire to avoid pain. A sentient being is self-aware and therefore has an interest in his or her life.

> It is important to recognize that the observation that animals are sentient is different from saying that they are merely alive. To be sentient means to be the sort of being who is conscious of pain and pleasure; there is an "I" who has subjective experiences. Not everything that is alive is necessarily sentient; for example, as far as we know, plants, which are alive, do not feel pain.[208]

By using a broad the definition of sentience Francione is able to avoid the issue Regan faced, which is how to establish anything more for animals than an interest in not suffering. For Francione sentience means something more than wanting to avoid suffering, and something less than being the subject-of-a-life. Sentience means self-awareness and having an interest in one's life.

Like Regan, Francione rejects utilitarianism, but Francione goes further and says that Bentham made a mistake, or at least did not go far enough, in not challenging the legal status of animals as property. Bentham was primarily concerned about *how* animals were used, not *whether* they were used. As we saw earlier, Bentham accepted experimentation on animals if it benefited humans, because he balanced the animal suffering against the greatest good. Francione points out, as Singer noticed too, that in reality Bentham's

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[208] Gary L. Francione. *Introduction to Animal Rights: Your Child or the Dog?* (Philadelphia: Temple Univ Pr., 2000) at 6.

utilitarian balancing test almost always comes out in favour of the human. Singer's approach is to try to readjust how the scale is read so that it is more fair, i.e., so that it gives equal consideration to like interests. Francione believes the reason for the imbalance is that human interests are legally protected by a claim of right, especially the right to own and use property, whereas animals are regarded as property. He thinks the scale can be readjusted only by addressing this imbalance of power.

> …the liberal theory of property assumes that animals have no interests, or, at least, no interests that will prevail against human interests. That is the whole point of classifying animals as "property." Indeed, to classify something as property in the legal sense is to say that the thing is to be regarded solely as a means to the end to be determined by human property owners.[209]

Francione's conclusion is challenged by some, such as David Favre, who agree that that the nineteenth century began with animals being equated with inanimate property, but think the anti-cruelty law changed that perception.

> The nineteenth century saw a significant transformation of society's attitude toward animals, which was reflected in the legal system. The legal system began the century viewing animals as items of personal property not much different than a shovel or plow. During the first half of the century, lawmakers began to recognize that an animal's potential for pain and suffering was real and deserving of protection against its unnecessary infliction.[210]

Francione might say that Favre overstates his case. The anti-cruelty law provided a way to prosecute people who were caught abusing animals, but it did not alter their legal status or eliminate property rights. Animals remained things subject to the property rights of humans.

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[209] Gary l. Francione. *Animals, Property, and the Law* (Philadelphia: Temple Univ Pr., 2005), 46.

[210] D. Favre, D. and V. Tsang. "The Development of Anti-Cruelty Laws During the 1800's" (1993) 1 Detroit College L. Rev. 1, 2.

> … although our conventional moral and legal reasoning appears to reject the link between cognitive characteristics and moral status and to regard sentience alone as morally significant, the property status of animals rests squarely on the view that animals, unlike humans, do not have an interest in their lives because they are cognitively different from us. …The result is that our moral and legal acceptance of the importance of sentience has not resulted in any paradigm shift in our treatment of nonhumans. Indeed, some of the most shocking forms of animal exploitation, including intensive animal agriculture or what is called "factory farming," have developed in the past one hundred years – when we claimed to embrace a more enlightened view of the moral status of nonhumans and of our moral and legal obligations to them.[211]

I would suggest Favre's "significant transformation of society's attitude" was more along the lines of widespread but shallow agreement that cruelty is wrong. Still, Favre is quite right that the animal protection law did, for the first time, interfere with and restrict an individual's property rights over animals. The enormity of this precedent is too often overlooked. The next chapter will consider what it might mean.

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[211] Gary L. Francione. "Taking Sentience Seriously" (2006) 1 J. Animal Law & Ethics 1, 8.

Chapter 6

6 Proposals for Legal Reform

The philosophical arguments for granting moral standing to animals have resulted in calls for legal reform. In particular, Francione's argument that the key to ending animal suffering is the abolition of the legal ownership of animals has been enormously influential. This chapter looks at how that influence was felt in Canada, then turns to a more general discussion of how legal rights for animals could be implemented. The legacy of the nineteenth century reform movement on the modern movement for animal rights is also be considered, and some conclusions are reached.

6.1 The Canadian Experience

In 1998 the Department of Justice issued a consultation paper seeking comments on a number of questions about reforming the law in the area of cruelty to animals.[212] There was no intent to change the legal status of animals, but the offence of cruelty would have been reclassified as something other than a crime against property. A review of the proposal to amend the animal protection provisions contained in the *Criminal Code* shows that the issue of the property status of animals became the centre of controversy almost immediately. The initial consultation paper had pointed out that the anti-cruelty law is grounded on both protection of the human interest in animal property, and concern for the pain and suffering of the animals themselves. The first principle is clear in language that refers to protecting animals that are "kept for a lawful purpose",[213] and to "an animal or a bird wild by nature that is kept in captivity".[214] The second principle can

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212 Minister of Justice, Canada. *Crimes Against Animals: A Consultation Paper* (Ottawa: Library of Parliament, 1998).

213 § 445. (1) Every one commits an offence who, wilfully and without lawful excuse, (a) kills, maims, wounds, poisons or injures dogs, birds or animals that are not cattle and **are kept for a lawful purpose**; or (b) places poison in such a position that it may easily be consumed by dogs, birds or animals that are not cattle and are **kept for a lawful purpose**. [emphasis added]

214 § 445.1 (1) Every one commits an offence who (a) wilfully causes or, being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to **an animal or a bird**; (b) in any manner encourages, aids or assists at the fighting or baiting of animals or birds; (c) wilfully, without reasonable

be deduced from the protection extended to "an animal and bird" without qualification as to whether the animal or bird is owned.[215] It is also evident in the prohibition against people inflicting unnecessary pain on their own animals.[216]

One of the questions the Department of Justice asked in the consultation process was about the classification of cruelty to animals as a crime against property. The wording of the question indicated that the criminal law emphasized the status of animals as property over the principle that animal cruelty is wrong because animals can feel pain and suffer.

> Should the criminal law continue to treat animals primarily as property or should the law protect animals from abuse regardless of their status as property? [217]

In asking this question, it was noted that a separate chapter could be created in the *Criminal Code* for crimes against animals or the offence could be reclassified, possibly as a crime against public order. As discussed in Chapter 1, the common law offence of mischief was used prior to the nineteenth century to address incidents of cruelty to animals, so this suggestion was nothing new. Moreover, law reform commissions, not just animal welfare groups, had expressed concern. The consensus seemed to be that the classification influenced opinion within the criminal justice system. As a crime against property, cruelty to animals was seen as a minor offence and sentencing was lenient.

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excuse, administers a poisonous or an injurious drug or substance to a domestic animal or bird or **an animal or a bird wild by nature that is kept in captivity** or, being the owner of such an animal or a bird, wilfully permits a poisonous or an injurious drug or substance to be administered to it; (d) promotes, arranges, conducts, assists in, receives money for or takes part in any meeting, competition, exhibition, pastime, practice, display or event at or in the course of which captive birds are liberated by hand, trap, contrivance or any other means for the purpose of being shot when they are liberated; or (e) being the owner, occupier or person in charge of any premises, permits the premises or any part thereof to be used for a purpose mentioned in paragraph (d). [emphasis added]

215 *Id.*

216 § 446. (1) Every one commits an offence who (a) by wilful neglect causes damage or injury to animals or birds while they are being driven or conveyed; or (b) **being the owner** or the person having the custody or control of a domestic animal or a bird or an animal or a bird wild by nature that is in captivity, abandons it in distress or wilfully neglects or fails to provide suitable and adequate food, water, shelter and care for it. [emphasis added]

217 *Supra*, n. 212.

> In recent years, many critics, including law reform commissions and groups concerned with animal welfare, have argued that an approach that protects animals, even in part, by virtue of their status as property is misguided and offensive, suggests that the law is less concerned with protecting animals as beings capable of suffering than with the protection of human proprietary interests, and does not satisfactorily convey a moral obligation to avoid inflicting unnecessary harm. They also argue that this approach fails to convey the seriousness of the crimes to the various players in the criminal justice system, including prosecutors and judges. Because of the emphasis on property, the courts are inclined to look for a direct harm to human interests, rather than looking at the harm to the animal; the result is quite lenient sentences in most cases.[218]

Reclassification of the offence within the *Criminal Code* was not seen as being a material change to the substantive law. Rather, it was described as being a clarification:

> One objective of a reformed law might therefore be to clarify the basis on which animals are protected. Since this is already an underlying principle, it would not constitute a radical shift in the law, but such an amendment would serve to make clear that this is the primary basis for criminal prohibitions.[219]

Animal advocates agreed that there was no intention to question the status of animals as property. J. Robert Gardiner, lawyer and co-chair of the Status of Animals Committee of the Canadian Federation of Humane Societies, put it this way:

> [Moving cruelty to Part V.1 from the property Part XI] does not in any way denigrate from the fact that animals are often a person's property. Improving the *Criminal Code* is not going to allow anyone to take away my dog. The cow you purchased, bred or received as a gift is as much your property as your kitchen table.[220]

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218 *Id.* at 7-8.

219 *Id.* at 8.

220 Canadian Federation of Humane Societies. *Brief to the Standing Committee on Justice and Human Rights re: Bill C-15 - Section 15 Cruelty to Animals* (Nepean: Canadian Federation of Humane

The same conclusion was reached, albeit on more philosophical grounds, by Hughes and Meyer. They took the position that the proposal to amend the *Criminal Code* in Canada was designed to *avoid* the debate over the legal status of animals as property, and would accomplish very little.

> … the notion of protecting animals because they have inherent value and rights to lead their natural lives is not even open for discussion. The morality of the list of current "uses" of animals will also not be questioned. Perhaps unsurprisingly, a path of careful avoidance of the many difficult and controversial issues surrounding the modern animal welfare debate seems to have been deliberately chosen, even at the early stage of consulting the public for their opinions. ... The Canadian reform proposals are set firmly within the context of utilitarianism, reflecting no fundamental change in philosophy from the current law. It is a given that some harm to animals is socially acceptable. [221]

Despite this general agreement that reclassification would not accomplish much, the proposed amendments to the *Criminal Code* retained the suggestion to move the provisions out of the section on property crimes, this time into its own section.[222] But Bill C-17, introduced in Parliament in December 1999, died when an election was called less than a year later. [223] Bill C-15 (split into C-15B) was introduced in 2001, and hearings were held, but this bill also died when Parliament was prorogued.[224] Bill C-10

Societies) at 6. Quoted in Lyne Letourneau "Toward Animal Liberaton? The new anti-cruelty provision in Canada and their impact on the status of animals" (2003) 40 Alberta L. Rev. 1040, note 36.

[221] Elaine L. Hughes and Christiane Meyer, "Animal Welfare Law in Canada and Europe" (2000) 6 Animal Law 23, 41.

[222] The first Bill proposed a new Part V titled "Sexual Offences, Public Morals, Disorderly Conduct and Cruelty to Animals". Later Bills provided for a new Part V.1 titled "Cruelty to Animals".

[223] Bill C-17: An Act to Amend the *Criminal Code* (Cruelty to Animals, Disarming a Peace Officer and other Amendments) and the Firearms Act (Technical Amendments) received first reading in the House of Commons on December 1, 1999.

[224] Bill C-15 (split into Bill C-15B) was introduced in March 2001. Hearings were conducted and the Bill passed Third Reading in the House of Commons and First Reading in the Senate, but died when Parliament was prorogued in 2002.

was then introduced in 2002 and received a number of amendments. It suffered the same fate as its predecessors.[225] Bills continued to be introduced during the following years, but each died due to Parliament being dissolved and an election being called.[226]

Any of these bills would have made significant, and substantive, improvements to the law.[227] But reclassification was the main issue raised by opponents. The agriculture industry exaggerated the effects of the proposal and portrayed reclassification as "moving from property rights to almost human rights".[228] They described those in support of the bill as "extremists" and "terrorists", and warned that the engagement in legal activities like reforming the law concealed nefarious intentions.[229]

For example, Douglas K. Pollock, Executive Vice-Chairman of the Fur Institute of Canada, spoke against amending the *Criminal Code* before the Standing Committee on Justice and Human Rights. He testified that animal rights extremists, some of whom are terrorists, had destroyed the seal industry and with it aboriginal heritage and culture. These same extremists were, in his opinion, now using the proposed amendments to target the fur industry:

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225 Bill C-10 (split into Bill C-10B) was introduced in October 2002, and passed Third Reading in the Senate after the senators passed a number of amendments. The Bill was sent back to the House for approval of the amendments but died when Parliament was prorogued in November 2003.

226 Bill C-22 was introduced in March 2004 and died when Parliament was dissolved in May 2004. Bill C-50 was introduced in May 2005 and died when an election was called later that year. Bill C-373 was introduced in October 2006. Bill C-558 was submitted at the same time in an effort to gain a higher priority number. Both Bills died when the election was called in September 2007. Bill C-229 was introduced in 2008, but Parliament voted to enact S-203 instead.

227 The bills would have (a) made it illegal to brutally or viciously kill animals; (b) allowed crimes of killing, harming or neglecting animals to be charged as indictable offences or summary convictions; (c) increased penalties; (d) allowed judges to order lifetime bans on owning animals; and (e) allowed judges to order payment of restitution to the animal welfare organization that subsequently cared for the animal.

228 David Borth, speaking for the British Columbia Cattlemen's Association. Quoted in Lafreniere, Gerald. "Bill C-15B: An Act to Amend the *Criminal Code* (cruelty to animals and firearms) and the Firearms Act" [Legislative Summary LS-433E] (Ottawa: Library of Parliament, 22 Oct. 2001, Revised 27 May 2002).

229 John Sorenson. "Some Strange Things Happening in Our Country: Opposing Proposed Changes in Anti-Cruelty Laws in Canada" (2003) 12 Social & Legal Studies 377, 394.

> In carrying out my job, I spend a lot of time in the north with aboriginal trappers and northern people. They continually remind me that these animal rights extremists destroyed the seal industry, and with it a part of their heritage and culture. … These same animal extremists, sitting here this evening, want to eliminate in some cases the only economic benefit available to northern people, and to destroy the fur industry as well. … As you know, there is an element of animal rights movement that CSIS and the FBI have classed as terrorism. We take the threat of their activities very seriously, and we have had some effect with it.[230]

John Sorenson notes that politicians who opposed the bills repeated these themes, thereby legitimizing them. Fear was instilled through predictions that if the bills passed there would be dire consequences to the economy:

> Canada's right-wing parties … presented C-15B as a fundamental restructuring of human–animal relationships. Progressive Conservative MP Inky Mark warned: 'This bill is not about cruelty to animals legislation. This is a bill that moves toward the humanization of animals … it is 'a human rights bill for animals'[231]

As a result, starting in 2005, the bills began to be countered with Senate Bills that increased penalties for animal abuse and provided for indictable offences.[232] Animal protection groups opposed these alternatives because it was felt that harsher penalties would be useless if other provisions in the Code that made convictions difficult to obtain were not amended.[233] Despite this opposition, Parliament enacted one of these Senate bills, Bill S-203, on April 17, 2008. This decision ended debate on the issue but did not resolve it. The difficulties in securing prosecutions for animal cruelty remained.

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230 Testimony before the Standing Committee on Justice and Human Rights on October 24, 2001. http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=652659&Language=E&Mode=1&Parl=37&Ses=1.

231 *Supra*, n. 229 at 385.

232 The Senate Bills were S-24 in 2005, S-213 in 2006 and S-203 in 2008.

233 Canadian Federation of Humane Societies (CFHS). "Help Us Stop Bill S-203" explained it was "a useless bill that will NOT protect animals from cruelty. <http://cfhs.ca/features/help_us_stop_bill_s_203/>

There have been no further amendments to the animal protection sections of the *Criminal Code* tabled since 2008. Part of the reason can be attributed to the Provinces having stepped in to fill the gap. Alberta, for example, has a strong animal protection statute that prohibits causing or permitting an animal to be "in distress".[234] Ontario opted to go "from worst to first" in the same year that the federal government quit discussing animal welfare.[235] Bill C-50, The Provincial Animal Welfare (PAW) Act, was a substantial overhaul of the Ontario Society for the Prevention of Cruelty to Animals (OSPCA) Act.[236] Under the amended OSPCA Act, regulations now define standards of care for all animals, dogs that live outdoors, captive wildlife, and captive primates.[237] Farm animals fall under an exception for "an activity carried on in accordance with reasonable and generally accepted practices of agricultural animal care, management or husbandry".[238] Like the federal bills, however, this provincial bill was portrayed by opponents as being an attempt to change the property status of animals. Although animals used in research are not covered by the Act, it was described as part of the "step-by-step tactics and interim agendas" on the part of "animal rights people" that would ultimately end the use of animals for this purpose.[239]

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234 *Animal Protection Act*, SA., ch. A-42.1 (1989).

235 Hansard, Legislative Assembly of Ontario, 5 May 2008, at 0910 (Hon. Rick Bartolucci).

236 *Ontario Society for the Prevention of Cruelty to Animals (OSPCA) Act*, R.SO. 1990, cO.36.

237 Standards of Care, O.Reg. 60/09.

238 *OSPCA Act* section 11.1 states:

11.1 (1) Every person who owns or has custody or care of an animal shall comply with the prescribed standards of care with respect to every animal that the person owns or has custody or care of.

(2) Subsection (1) does not apply in respect of,

(a) an activity carried on in accordance with reasonable and generally accepted practices of agricultural animal care, management or husbandry; or

(b) a prescribed class of animals or animals living in prescribed circumstances or conditions, or prescribed activities.

239 Bessie Borwein. Committee Transcripts: Standing Committee on Justice Policy, July 23, 2008, Bill 50, Provincial Animal Welfare Act, 2008, at 1110. Available online at http://www.ontla.on.ca/web/committee-proceedings/committee_transcripts_details.do?locale=en&Date=2008-07-23&ParlCommID=8855&BillID=1979&Business=&DocumentID=23143#P407_112814 retrieved on 2011-10-21.

Proposals for change have also tapered off because negative stereotypes are rapidly becoming the norm to vilify anyone who questions the treatment of animals. Terms such as "animal liberation loonies", "terrorists" and "people haters" are commonly used to describe groups that work in pursuit of justice for animals.[240] Others "spot a nefarious left-wing plot to impose an animal rights agenda" that "contains the seeds of murder".[241] The Animal Liberation Front (ALF) does promote the infliction of *economic* damage on those who profit from the exploitation of animals, but does not endorse the infliction of physical injury, so whether they can be considered violent is a matter of opinion. Breaking and entering causes damage regardless of the motive, but it has resulted in film footage that would not otherwise be obtainable to document cruelty to animals. It must be acknowledged that some individuals are willing to injure humans in their efforts to "liberate" animals, but these individuals remain on the extreme fringes of the animal protection movement. Describing their activities as being encouraged or supported by anyone who wants to protect animals is more of a tactic to discredit the entire issue than a depiction of reality.[242]

The Canadian government agency FINTRAC (Financial Transactions and Reports Analysis Centre) nevertheless included "animal rights activists" in a list of "single issue terrorists" on their website recently.[243] This web page was inactivated after animal advocates and other organizations tarred with the same brush complained. FINTRAC was established in 2000 to detect and prevent money laundering and other illegal financial transactions by terrorists and organized crime groups. Their adoption of the language of

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240 Robin Webb. "Animal Liberation – By "Whatever Means Necessary" in Steven Best (Ph.D.) and Anthony J. Nocella II (eds.). *Terrorists or Freedom Fighters? Reflections on the Liberation of Animals* (Lantern Books: New York, 2004) at 75.

241 John Sorenson, "Constructing Extremists, Rejecting Compassion: Ideological Attacks on Animal Advocacy from Right and Left" in John Sanbonmatsu. *Critical Theory and Animal Liberation* (Lanham, MD: Rowman & Littlefield Pub. Inc., 2011) at 219-238, 224, quoting J.P. Zmirak in David Horowitz's online FrontPage magazine.

242 *Id.*

243 Lee Berthiaume. "Federal website defines animal-rights groups as terrorists." *National Post* Oct. 13, 2011. Available online at http://news.nationalpost.com/2011/10/13/federal-website-defines-animal-rights-groups-as-terrorists/#more-99907 retrieved on 2011-10-21.

"terrorism" to describe advocates for animal rights, however brief, is a striking example of the power of this idea.

The Canadian experience also shows that any mention of the property status of animals will have a strong backlash effect. Some, such as Jonathon Loworn,[244] make a impassioned argument that the entire idea of animal rights is unrealistic. Loworn points out that the law changes very slowly and, as a practicing lawyer, believes that animal rights theory convinces people that their hands are tied until there are fundamental changes to the legal system. He suggests that animals themselves would prefer more practical reforms that would reduce their suffering and improve their lives.

> It is an intellectual indulgence and a vice for animal lawyers to concern ourselves with the advancement of such impractical theories while billions of animals languish in unimaginable suffering that we have the power to change. … if our voiceless clients languishing in battery cages and gestation crates could speak to us, what would they say to us? What would they ask us to spend out time on? If you were in their place, what would you be saying? Would you be screaming at your lawyer to get you out of a gestation crate now? Or urging them to explore theories for radically reordering our legal system?[245]

Loworn's frustration is understandable, but does not completely dispel Francione's argument that small legal victories may lull people into thinking that the law adequately protects animals from cruelty. Moreover, the legal status of animals as property *does* affect how they are treated. As the case studies of Ike the whale and Lucy the elephant demonstrate, once animals become property the law is concerned primarily with the rights of the owner. The problem arises when Francione's observations become transformed into battle cries for the overly simplistic solution of reclassifying animals as legal persons. The controversy over the placement of the offence of cruelty to animals in

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[244] Loworn is Vice President of Animal Protection Litigation for the Humane Society of the United States.

[245] Jonathan R. Loworn, "Animal Law in Action: The Law, Public Perception, and the Limits of Animal Rights Theory as a Basis for Legal Reform" (2006) 12 Animal Law 133, 139 and 148.

the *Canadian Criminal Code* is but one example. Reclassification of animals as legal persons might change the focus of the current scheme that defines animals based on how humans use them.[246] A rabbit, for example, would have a legal identity as a rabbit, rather than as food, research subject, garden pest or wild animal.[247] But focusing on this issue exclusively is misdirected because "personhood" itself would do very little for the rabbit. Some legal rights must accompany the new classification. The essential questions, then, are what would those rights look like? And how might they be incorporated into the existing legal system?

6.2 Legal Rights for Animals

Animal rights could take one of two forms. The first option would place all animals in a single category and grant them specific protections. All animals, for instance, could be granted standing to sue.[248] This general approach was used in Germany to improve the status of animals. Animals can still be owned, but their interests as something more than property have been acknowledged since 2002, when the words *und die Tiere* ("and the animals") were added to a constitutional clause that obliges the state to respect and protect the dignity of humans.[249] Along these same lines, the European Community has reached agreement among its member states that all animals should be protected and respected "as sentient beings".[250]

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246 Jessica Eisen, "Liberating Animal Law: Breaking Free From Human Use Typologies" (2010) 17 Animal Law 59.

247 Joan Schaffner. *An Introduction to Animals and the Law* (New York: Palgrave Macmillan, 2011) at 173.

248 Tamie L. Bryant. "Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of Animals as Property, and the Presumed Primacy of Humans"[Symposium: Living on the Edge: The Margins of Legal Personhood] (2008) 39 Rutgers Law Journal 247.

249 Katie M. Nattrass, " '… und die Tiere' Constitutional Protection for Germany's Animals" [Comment] (2004) 10 Animal Law 283.

250 Elaine L. Hughes and Christiane Meyer. "Animal Welfare Law in Canada and Europe" (2000) 6 Animal Law 23, 42, citing the Preamble of Protocol #33, Annexed to the Treaty of the European Union and the European Convention for the Protection of Pet Animals, 1987 Europ. T.S. No. 125.

The other option for granting animals legal rights would be to organize animals into groups, possibly by species membership, and then grant each group specific rights or benefits appropriate for that group. This is the approach taken by The Great Ape Project, which advocates for basic rights to life, freedom, and the prohibition of torture for chimpanzees, gorillas, orangutans, and bonobos. [251] The stated goal is a paradigm shift "from the irrational, biased, hyper-formalistic, and overly simplistic question, 'What species is the plaintiff?' to the rational, nuanced, value-laden question, 'Does the plaintiff possess the qualities relevant to whether she should be entitled to the legal rights she claims?'"[252] Another example of this approach is New Zealand's legislation that prohibits the use of great apes in research, although it should be noted that this protection is limited to scientific experimentation, which was not being conducted in that country for other reasons. [253] Moreover, the use of great apes in entertainment such as circuses is not affected.[254]

A hybrid of these two approaches has been offered by Favre, who suggests placing all animals into a new category called "living property" that would be added to the existing categories of real, personal, and intellectual property. [255] The important distinction of living property would be that this category of property has the capacity to hold legal rights. As living property, animals would hold equitable title over themselves, although humans could continue to hold legal title.[256] Within the category of living property, animals would be organized into groups and rights allocated accordingly.

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251 Website of the Great Ape Project. http://www.greatapeproject.org/en-US retrieved 2011-10-25.

252 Steven Wise, "Legal Personhood and the Nonhuman Rights Project" (2010) 17 Animal Law 1.

253 Paula Brosnahan, "New Zealand's Animal Welfare Act: What is Its Value Regarding Non-Human Hominids?" (2000) 6 Animal Law 185.

254 Peter Sankoff, "Five Years of the New Animal Welfare Regime: Lessons Learned from New Zealand's Decision to Modernize Its Animal Welfare Legislation" (2005) 11 Animal Law 7.

255 David Favre, "Living Property: A New Status for Animals Within the Legal System" (2009-2010) 93 Marq. L. Rev. 1021.

256 David Favre, "Equitable Self-Ownership for Animals" (2000) 50 Duke L. J. 473.

Favre has developed a system of red, blue, and green cards that correspond to weak, strong, and preferred levels of rights that could be granted to animals depending on their capabilities. At the weak, or red, level he suggests the "Five Freedoms"[257] developed for farm animals could be enough rights for these animals. On the surface, granting a sow the right to stand up, walk around and socialize with other members of her species may seem similar to regulations governing the minimize dimensions and style of her housing. The approach, however, is entirely different. Granting a sow these rights would recognize that she is a sentient being and give her the entitlement. In contrast, regulations about the size of a gestation crate or stall treat the housing of pigs no differently than the storage of any other commodity. The pig or the commodity have no interest in the matter.

Favre also proposes a list from his own "pondering" that is much more extensive and includes the right to own property, enter contracts, and file tort claims.[258] At first glance these may seem like broad rights. It should be kept in mind, however, that estate lawyers currently set up trusts because clients want to leave money for a pet but cannot make a bequest in their will. If a dog had the right to own property this legal fiction could be dispensed with. If animals could enter contracts, a guardian acting on behalf of captive wild animals may perhaps have been able to ensure there were terms in Ike the whale's contract that would have made his welfare a high priority when the custody dispute between the marine parks arose. Similarly, if animals could file tort claims, the dispute over Lucy the elephant in the Edmonton zoo might be resolved through a claim for any injuries she suffered due to her living conditions.

Cass Sunstein agrees that some rights, in particular standing to sue, could be granted to at least some animals without changing their current status as property.[259] So the status of

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257 *Supra*, n. 195.

258 Favre's list of rights animals would have within their new category of living property are: Not to be held for or put to prohibited uses. Not to be harmed. To be cared for. To have living space. To be properly owned. To own property. To enter into contracts. To file tort claims.

259 Cass R. Sunstein and Martha C. Nussbaum, (eds*). Animal Rights: Current Debates and New Directions* (New York: Oxford University Press, 2004), at 11. In what became a highly publicized controversy, Cass Sunstein's appointment as the Administrator of the White House Office of Information

animals as property may not be the barrier to rights that property law sometimes assumes.[260] The bigger problem with this whole approach is that once we start doling out rights in accordance with an animal's relative intelligence, we are back to figuring out which characteristics other than sentience matter.

The point that should not be lost in all this discussion is that legal rights for animals are possible even while they retain the status of property. Animal rights, in Rollins' sense of rights being a protective fence around the individual, can co-exist with our ownership over them. How animal rights could be implemented in Canada is an area that would benefit from further study. This study should take place across different areas of law. "Animal law" has been heavily influenced, and in some ways limited, by Singer's utilitarian philosophy, Regan's rights-based theory, and Francione's analysis of property. The issue of how we relate to other living creatures goes across all human activity and fields of law. An analysis of the issue from the point of view of contract law, for example, could very well offer a new perspective on the issues presented by the legal dispute over Ike the whale. As mentioned in the case study, the concept of an implied contractual term is one possibility. This view does not immediately present itself when the matter is studied strictly from the point of view of what has become known as "animal law".

The remaining question is what this attempt to place the concept of animal rights in its historical context adds to the discussion. I believe it has shown that there is a crack in the dual categories of "persons" and "things" that has been overlooked in the analysis of the legal status of animals as property. This insight is significant because the nineteenth century reforms in the law for animals set a precedent on which further reforms may be based. These reforms may very well include animal rights.

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and Regulatory Affairs in the current Obama administration was challenged due to his position on animal rights.

260 Jeremy Waldron. *The Right to Private Property* (Oxford: Clarendon Pr., 1990, c.1988) at 27.

6.3 The Legacy of Nineteenth Century Reforms

In 1822, *Martin's Act* provided for the criminal prosecution of owners who mistreated their animals. In doing so, the Act created a legal distinction between animals and the inanimate "things" that can be owned. This protection from cruelty is the "right" that Lord Erskine sought for animals when he pointed out they "have no rights!' in 1809. An anti-cruelty statute is not needed to provide for human interests such as to prevent mischief or keep the public order, because other laws serve these functions. Rather, the anti-cruelty statute was needed as a check on human power and control over animals. A century after Lord Erskine's speech, this concept was well enough established for Ingham to refer to "ethically, though not technically, the rights of the animals themselves."[261] He cited case law to the same effect:

> With regard to the laws against cruelty, it has been well said in an Arkansas case: "They are not made for the protection of the absolute or relative rights of persons or the rights of men to the acquisition and enjoyment of property, or to the peace of society. They seem to recognize and attempt to protect some abstract rights in all that animal creation, made subject to man by the Creator, from the largest and noblest to the smallest and most insignificant. The rights of persons and the security of property and the public peace are all protected by other laws, with appropriate sanctions. The objects of the two classes should not be confounded…"[262]

The "rights" of animals can be seen, therefore, as limitations on humans. Under this interpretation it does not matter whether humans assert ownership over animals or not. The key factor is the limitations we place on ourselves in our dealings with other sentient creatures. We may act out of concern for the suffering of animals, we may believe that the Biblical grant of dominion requires us to be good stewards, or we may worry about the effects of cruelty on humans. As Lord Erskine knew, any number of rationales may serve to justify this limitation. His speech in 1809 is as relevant today as it was then.

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261 Ingham, *supra*, n. 124 at 523.

262 *Id.*, 524.

What other lessons can history teach us? I believe this thesis has shown that we can learn three things. First, while Loworn is correct that the law usually changes incrementally, there are times when incremental change has significant impacts. Before *Martin's Act*, the criminal law only dealt with injuries to people. William Windham had a point when he said extending legal protection to animals was unprecedented. The genius of Lord Ersksine was his assertion that a victim-animal would simply substitute in for a human victim, and the process of the criminal law would remain unchanged. So perhaps animal advocates should not be so quick to give up on the possibility of another fundamental change. The challenge is to find a way to fit that change within the existing structure of the legal system.

Second, the idea of human superiority is ancient and ingrained. The early religious leaders and philosophers used this conceit when they condemned cruelty to animals by emphasizing the benefits of kindness for humans. Bentham's utilitarianism and concern that animals "can suffer" could be accepted because it did not challenge human supremacy over animals. Although some who supported *Martin's Act* may have intended more, the law was subsequently interpreted to prohibit animal suffering only when it is "unnecessary" to meet the demands of our needs, desires, and whims. The challenge for modern theorists is to find a way to grant animal rights within the parameters of this notion that humans are the centre of the universe. Attempting to change our thinking with the argument from marginal cases or trying to convince us that we are speciesist has not been successful. Some arguments against factory farms do raise the negative effects on humans. Runoff from animal manure pits, for instance, is objected to because it degrades the environment for us and pollutes our water.[263] Whether these consideration will lead to improvements in animal welfare, or grant animals a right to shelter adequate for their needs, remains to be seen, but more thought should be given to this approach.

The third lesson from history is that sometimes it is best to simply be "expedient" in addressing an issue. I am not advocating for limited animal welfare reforms. What I am

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263 *See*, for example, David Kirby. *Animal Factory: The Looming Threat of Industrial Pig, Dairy, and Poultry Farms to Humans and the Environment* (New York: St. Martin's Pr., 2010).

saying is that although the source of many problems can be traced to the legal status of animals as property, it is time for legal scholars to refine this analysis to fit the intended goal. Elizabeth DeCoux points out that Francione and other abolitionists who focus on the property status of animals do so because they fear that talk about animal suffering will only lead to reforms to improve animal welfare.[264] She believes they are making a mistake, and I tend to agree. Bills to amend the *Canadian Criminal Code* failed in large part because of misperceptions about how they would affect the property status of animals. The meaning of the proposed classification change that would have moved the animal cruelty provisions out of the section on crimes against property and into a new section was distorted, and that distortion became the focus. The whole experience can be compared to the battle in the British Parliament of 1809, when William Windham was able to defeat the intent of Lord Erskine's animal protection bill by diverting the discussion to a debate over the meaning of the Bible's grant of "dominion". It was only when "Humanity Dick" Martin turned attention back to the cruelty inflicted on animals, and the law's ability to address it, that the bill was successful. In short, history shows that legal reform is more likely to occur when both animal suffering and our humanity are part of the narrative.

6.4 Summary and Conclusion of Part III

The third part of this thesis examined the philosophical basis of the modern animal protection movement. Singer's utilitarian principle of equal consideration of like interests can be translated in law as a "proportionality test". This test considers both the amount of animal suffering and the human need for that suffering, and may find the pain too great to justify the benefit. In Canada, however, the *Ménard* test allows any degree of pain if it is deemed to be "necessary" to accomplish the intended use of the animal. It is unlikely that Canada will abandon the *Ménard* test in favor of a proportionality test. The alternative for legal reform is a theory based in animal rights.

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[264] Elizabeth DeCoux, "Speaking for the Modern Prometheus: The Significance of Animal Suffering to the Abolition Movement" (2009-2010) 16 Animal Law 9.

Regan's theory of animal rights follows the pattern set in natural law theory of seeking a universal trait in animals, other than mere sentience, that will admit them to the moral community. Regan finds this trait in his concept of a "subject-of-a-life". In response, Francione argues that sentience alone is sufficient to move animals out of their status as "things" that can be property and in to the group of those who warrant moral consideration. Applying Francione's view in law has resulted in calls to reclassify animals as legal persons. In Canada, this concept arose in the context of a proposal to move the offence of cruelty to animals out of the section on crimes against property of the *Criminal Code* and in to a new section for animals. A decade of controversy and debate followed. The reform failed and has since been abandoned. .

In my view, it is not entirely accurate to state that the problem is that animals can be property and, accordingly, the answer is not to be found in reclassifying animals as legal persons. Rather, the issue is that human property rights are elevated over animal welfare. While the backlash against the idea of legal personhood for animals has been significant, progress toward recognizing the value of animals as something more than mere property has been made in other countries, notably Germany and New Zealand. In Canada, animal rights are more likely to occur if the concept is separated from the issue of their legal status, and redefined as a protective zone around animals for the purpose of limiting property rights. Historical research shows that this approach has its roots in the nineteenth century animal protection movement, which established that animals are a type of property that is different from other "things", and the law may limit property rights over animals. More study across different areas of law is needed to determine how rights may best be granted to animals while they retain this legal status of property.

Conclusion

Surely the most striking thing about the history of our relationship with animals is how willing we are to justify inflicting pain on them. Aristotle thought animals had sensation but were inferior because they lacked our rational soul. Aquinas interpreted the grant of "dominion" in the Bible to mean that animals exist to serve our needs. Descartes compared the physical bodies of animals to machines and declared that neither could feel pain. Today, the legal test for cruelty assumes that some animal suffering is "necessary" to accommodate human needs and desires.

Yet there have always been those who felt compassion for animals. The Reverend Primatt and Jeremy Bentham doubtlessly spoke for many when they wrote that animals *can suffer*. Lord Erskine and "Humanity Dick" Martin had the support of the public when they introduced an animal protection bill in the British Parliament of 1822. The legislative intent of *Martin's Act* may have been eroded through later court interpretations, but the Act represented groundbreaking legal reform. Unfortunately, nothing like that appears to be on the horizon. Gary Francione's substantial contribution has been too loosely condensed into a solution based on reclassifying animals from property to personhood. Those with a pecuniary interest in exploiting animals have used the potential of such fundamental legal reform, however unrealistic it may be, to arouse fear of "animal rights advocates".

It all seems to confirm what I suggested in the introduction to this thesis: more familiarity with the history of animal *welfare* law might encourage new insights into how to approach the issue of legal *rights* for animals. Hopefully, this historical research will help provide a different perspective. *Martin's Act* was a solution for a nineteenth century problem with individual acts of cruelty. Now, almost two hundred years later, we are in a new era with institutional practices toward animals that raise different issues. We should not forget, however, that *Martin's Act* set a precedent for limiting the rights of owners over their living animal property. The objective was to protect animals, but the focus of the law remained on human behaviour. Rather than elevate the status of animals in order

to grant them rights, we too should be defining legal reforms as a protective zone around animals that will offset the negative effects of our property rights. It is well established that animals *can suffer*. The problem is that they *are suffering.*

Rights for animals can, and should, be granted while they retain the status of property. The precise form animal rights should take in Canada is a subject that would benefit from study across legal disciplines. Singer's utilitarian principle of equal consideration of like interests, Regan's animal rights theory, and Francione's observations about the property status of animals have defined, and in some ways limited, the field of animal law. Questions about how humans interact with other living creatures, and how the law considers animals, raise practical and ethical issues that affect us all. Legal reform for animals must be approached from a multitude of new directions.

I began this study in an effort to learn more about the theoretical underpinnings of animal protection law. During the many months I spent writing this thesis, I have drawn other lessons from it. First, history must be looked at through the lens of that period of time, not through contemporary eyes. We run a very real risk of misinterpreting the past, and in doing so may fail to see the path that earlier advocates for animals have created.

Second, I am cautious about being swept up in what might seem like a consensus in a particular body of literature. A convincing argument can be restated and simplified over time to the point it loses much of its original meaning. It is well worth going to the source and deciding for oneself.

Finally, morality is an influential factor in animal law, but it is not the only factor that underlies the law for animals. Industries that exploit animals have the money to spread fear and misinformation about the consequences of legal reforms. It is reasonable to ask what is in it for them.

What, then, should compassion for animals lead us to do? In this regard the nineteenth century advocates for animals left us a legacy: use the existing structure of the law to limit how owners may treat their animals. They established a precedent. The best we can do is build on what they started.

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