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What Rights for Animals? A Modest Proposal

Roger W. Galvin*

I. Introduction

For many, limiting the applicability of the concepts of morality and legal responsibility to solely our fellow man seems right, proper, and grounded on a solid moral foundation. During the past few years, however, the realization has grown that such an attitude is both parochial and archaic. It is a product of speciesism: that is, an arbitrary limiting of moral and ethical concerns to members of only our own species.¹ A shift in awareness and perception has led many to the inevitable conclusion that justice only for man is a perverse distortion of any meaningful concept of justice.

Despite a growing realization that animals feel pleasure, feel pain, and possess an awareness of their own existence,² society has afforded them no real protection from the dominant species of man. Over sixteen million dogs, cats, and other companion animals are killed each year in animal pounds.³ Over four billion animals are slaughtered in the United States alone every year for food.⁴ It is estimated that between sixty

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1. See generally P. Singer, *Animal Liberation: A New Ethics For Our Treatment Of Animals* (1975).

2. See D. Griffin, *Animal Thinking* (1984); D. Griffin, *The Question of Animal Awareness: Evolutionary Continuity of Mental Experience* (1981).

3. This is a direct result of the fact that people often take in or adopt pets on impulse, with little or no understanding of the liabilities and responsibilities involved. See A. Beck & A. Katcher, *Between Pets and People: The Importance of Animal Companionship* (1983).

4. M. Fox, *Farm Animals: Husbandry, Behavior, and Veterinary Practice* (1984).

to one hundred million animals die in laboratories and research facilities every year in the United States.⁵ Many wild-life species are approaching extinction because of habitat destruction, predator control programs, hunting, and trapping.⁶ Although an array of federal, state, and local humane laws exist, they are seldom enforced by already overworked and underbudgeted government agencies.⁷

This article asserts the position that animals need legal recognition of their inherent rights and interests. They must have access to our courts, legislatures, and administrative agencies so they may have their rights and interests given the same consideration as that of any other legal entity. This article also sets forth a framework of basic rights which are minimally necessary to ensure justice for all animal species, including man.

II. Personhood and Legal Rights

In a society which is increasingly conscious of the world as a

Animals that survive to be slaughtered have been raised in factory farms that in no way resemble the bucolic image that most people conjure up when they hear the word "farm." Animals in factory farms are considered as mere machines with no consideration whatsoever for their natural instincts, physical requirements and emotional needs. They are manipulated to maximize production regardless of the consequences to their health or ours.

5. It must be understood that the vast majority of these animals are used to test items such as hairsprays, oven cleaners, floor polishes, and other similar products deemed necessary for modern life. The remaining millions of animals used in research suffer through agonizing lives of experimental or behavioral studies that are often useless, redundant, counter productive, and morally indefensible. *See generally* J. Diner, *Physical and Mental Suffering of Experimental Animals* (1979); B. Kuker-Reines, *Environmental Experiments on Animals: A Critique of Animal Models of Hypoxemia, Heat Injury and Cold Injury* (1984); B. Kuker-Reines, *Psychology Experiments on Animals: A Critique of Animal Models of Human Psychopathology* (1982); D. Pratt, *Alternatives to Pain in Experiments on Animals* (1980); A. Rowan, *Of Mice, Models, & Men: A Critical Evaluation of Animal Research* (1984); R. Ryder, *Victims of Science: The Use of Animals in Research* (1983); *Nonanimal Research Methodologies: Proceedings of a Symposium* (A. Posner, ed. 1981).

6. *See generally* M. Bean, *The Evolution of National Wildlife Law* (1983); L. Regenstein, *The Politics of Extinction* (1975). Habitat destruction is a major cause of species extinction. *See, e.g.,* *TVA v. Hill*, 437 U.S. 153 (1978).

7. *See, e.g.,* U.S. General Accounting Office, *Report to the Chairman, Senate Subcomm. on Agriculture, Rural Development and Related Agencies, Comm. on Appropriations: Dep't of Agriculture's Animal Welfare Program* (1985).

seamless web of life, the notion of legal rights for animals is hardly a far-fetched one. Yet, when speaking of animal rights in a legal context, some fundamental facts must be understood at the outset. First, there is no universally accepted definition among legal philosophers of the term "legal right" or its origin.⁸ Second, animals in the United States possess no legal rights. It is true that individual animals are the objects of various federal and state humane and anti-cruelty laws, and entire species of animals are the object of endangered species laws.⁹ However, being the object or beneficiary of a law does not necessarily create a right to specific treatment by the law at the behest of the beneficiary. Third, whatever place in the law animals now occupy, it is safe to say that they are variously considered as dumb beasts,¹⁰ personal property,¹¹ or what are known traditionally as *ferae naturae* (a sort of ecological adornment held in trust by the federal or state governments for the use and enjoyment of human citizens).¹² Thus,

8. Hohfeld sets forth a scheme of "jural opposites" and "jural correlatives" for use in jurisprudential reasoning. Under that framework, "a duty is the invariable correlative of that legal relation which is most properly called a right or claim." Thus, when a right is invaded, a duty is violated. See W. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* 35-38 (W. W. Cook ed. 1964). As to the origin of legal rights, let it not be forgotten that legal rights, and in fact the law itself, are not the product of natural causes, divine intervention, nor some mythical primal contract. The law is what we make it; legal rights are the expression of a particular world view coupled with political power and action in the broadest sense.

9. See generally E. Leavitt, *Animals and Their Legal Rights: A Survey of American Laws from 1641 to 1978* (1978). See also *Humane Methods of Slaughter Act*, 7 U.S.C. §§ 1901-1906 (1982); *Animal Welfare Act*, 7 U.S.C. §§ 2131-2156 (1982); *Horse Protection Act*, 15 U.S.C. §§ 1821-1831 (1982); *Tule Elk Preservation Act*, 16 U.S.C. §§ 673d-673g (1982); *Bald Eagle Protection Act*, 16 U.S.C. §§ 668-668d (1982); *Migratory Bird Treaty Act*, 16 U.S.C. §§ 701-711; *Migratory Bird Conservation Act*, 16 U.S.C. §§ 715-715s; *Wild Free-Roaming Horses and Burros Act*, 16 U.S.C. §§ 1331-1340 (1982); *Marine Mammal Protection Act*, 16 U.S.C. §§ 1361-1407 (1982); *Endangered Species Act*, 16 U.S.C. §§ 1531-1543 (1982); *Lacey Act*, 18 U.S.C. § 42 (1982).

10. See D. Favre & M. Loring, *Animal Law* (1983).

11. See, e.g. *Graybill v. State*, 672 P.2d 138 (Alaska Ct. App. 1983), *rev'd on other grounds* 695 P.2d 725 (Alaska 1985); *Grooms v. State*, 673 P.2d 162 (Okla. Crim. App. 1983); *Irwin v. State*, 658 P.2d 64 (Wyo. 1983).

12. The doctrine of *ferae naturae* gives one who captures a wild animal a property or ownership interest in that animal. See, e.g., *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805) ("a fox is an animal *ferae naturae*, and . . . property in such animals is acquired by occupancy only.").

for example, whether one is a bird hunter or a bird watcher, birds are recognized in the law only to the extent that they have a perceived value to human beings.

Despite the ambiguities associated with the concept of a legal right, a working definition may be formulated as follows:

(1) A legal right is recognized as such by the law and thereby protected from destruction or infringement.

(2) The entity holding the right can seek legal protection on its own behalf.

(3) The assertion of the right should protect the entity from injury.

(4) The relief the law provides should directly compensate or benefit the holder of the right.

(5) Incapacity on the part of the holder of the right does not preclude a representative from protecting the best interests of the holder of the right.

Although animals have been the subject matter and object of litigation, they currently have no rights which may be asserted in court in the quest for justice for themselves and their kind.¹³ No legal precedents currently exist which allow animals to assert legal rights on their own behalf,¹⁴ although a growing body of philosophical and legal literature support such a proposition.¹⁵

13. For example, in *State v. Hudson*, 420 A.2d 286 (Me. 1984), the humane society, not the actual animal victim, was considered the victim after an animal cruelty conviction, and received the damage award.

14. *But see Palila v. Hawaii Dep't of Land and Natural Resources*, 471 F.Supp. 985 (D. Hawaii 1979), *aff'd* 639 F.2d 495 (9th Cir. 1981), where the Palila (a type of bird) was the first named plaintiff in the suit, although the suit did not rely on the Palila as a party, nor did the court consider the Palila as a party.

15. In the field of moral philosophy, *see, e.g.*, T. Regan, *The Case For Animal Rights* (1983); T. Regan, *All That Dwell Therein: Essays on Animal Rights and Environmental Ethics* (1982)); B. Rollin, *Animal Rights and Human Morality* (1981); H. Salt, *Animals' Rights: Considered in Relation to Social Progress* (1982); P. Singer, *supra* note 1; *Ethics and Animals* (H.B. Miller & W.H. Williams eds. 1983). In the field of legal theory, *see, e.g.*, C. Stone, *Should Trees Have Legal Standing? Toward Legal Rights for Natural Objects* (1974); Burr, *Toward Legal Rights for Animals*, 4 *Env'tl. Aff. L. Rev.* 205 (1975); Dichter, *Legal Definitions of Cruelty and Animal Rights*, 7 *B. C. Env'tl. Aff. L. Rev.* 147 (1978); Morris, *The Rights and Duties of*

The evolutionary process intrinsic to the common law has led to the recognition of legal rights for many people who historically were considered subhuman and therefore possessed no legal rights. Recall that the United States Supreme Court once held that a black man had no rights that a white man need respect;¹⁶ yet today such a viewpoint is considered aberrant and absurd. Our law also recognizes a variety of artificial entities that possess rights that are protected from infringement. As holders of legal rights, entities such as maritime vessels, corporations, partnerships, joint ventures, and governmental bodies may sue on their own behalf. The legal fiction that these entities are "persons" is generally recognized by the common law countries of the world.¹⁷

The notion that "personhood" is a prerequisite to the conferring of legal rights is a common theme in the law.¹⁸ Thoughts on the essence of "personhood" or humanity have evolved over the centuries. The significance of the efforts to identify "personhood" is that in actuality it represents a quest to separate human beings from the rest of the living world.¹⁹

Beasts and Trees: A Law Teacher's Essay for Landscape Artists, 17 J. Leg. Ed. 185-92 (1964); Comment, *Rights for Nonhuman Animals: A Guardianship Model for Dogs and Cats*, 14 San Diego L. Rev. 484 (1977). It has also been advocated that inanimate objects such as trees have standing to sue in court. See generally *Sierra Club v. Morton*, 405 U.S. 727, 741-53 (1972) (Douglas, J. dissenting); C. Stone, *supra*.

16. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

17. Note also that the legal rights of the mentally incompetent or disabled are established and protected by guardians and "next friends."

18. In the abortion context, the United States Supreme Court has found that a human fetus is not a "person" within the meaning of the Constitution, and therefore a fetus cannot claim protection under the fourteenth amendment. See *Roe v. Wade*, 410 U.S. 113, 158 (1973).

19. The abortion literature contains many discussions of the nature of "personhood" and its relevance to the morality of abortion. See, e.g. Tooley, *Abortion and Infanticide*, 2 Phil. & Pub. Aff. 37 (1972), in *Values in Conflict* (B. Leiser ed. 1984) at 59; English, *Abortion and the Concept of a Person*, 5 Can. J. Phil. 233 (1975), in *Values in Conflict*, *supra*, at 83. Tooley treats the concept of a person as a purely moral concept, free of all descriptive content. Using this definition, "it seems . . . that while it is not seriously wrong to kill a newborn kitten, it is seriously wrong to torture one for an hour. This suggests that newborn kittens may have a right not to be tortured without having a serious right to life." Tooley, *supra*. English refutes the argument that the personhood of the fetus determines its rights by stating "if a fetus is not a person, that does not imply that you can do to it anything you wish. Animals, for example, are not persons, yet to kill or torture them for no reason at all is wrong."

Yet we have consistently shortened the list of our supposedly unique attributes as we have discovered similar attributes possessed or displayed by species other than our own. As other species are discovered to possess a particular attribute that was previously ascribed as unique to human beings, we have reacted by arbitrarily deciding that the specific attribute in question was not essential to our claimed uniqueness. Thus, our assumed moral supremacy and legal hegemony remain intact. The notion that human beings are unique, that what separates "us" from "them" is a difference in kind rather than merely one of degree, has been the basis for our refusal to extend the scope of our moral universe beyond our own species.

One example of this process involved the early belief that man's uniqueness was based on his ability to manufacture and use tools to modify his environment.²⁰ However, ethological field studies have shown that various species ranging the entire phylogenetic scale make and use tools.²¹ Although tool use has thus been shown not to be a distinguishing characteristic of man, many have simply discarded the idea that it was an attribute essential to "personhood" rather than question the validity of such a homocentric concept itself.

The current last bastion of human uniqueness is our presumed monopoly on the ability to fashion and use language. Fitting neatly in the Cartesian tradition that all non-human animals are mere unfeeling, non-thinking automata, some maintain that language is the genetic essence of humanity.²²

English, *supra*.

20. For a critical discussion of this earlier view see A. Jolly, *The Evolution of Primate Behavior* (2d ed. 1985).

21. See generally B. Beck, *Animal Tool Behavior: The Use and Manufacture of Tools by Animals* (1980); see also J. van Lawick-Goodall, *In the Shadow of Man* (1971); W. Kohler, *The Mentality of Apes* (2d ed. 1927); G. Teleki, *The Predatory Behavior of Wild Chimpanzees* (1973); Goodall, *Tool-using and Aimed Throwing in a Community of Free-Living Chimpanzees*, 201 *Nature* 1264 (1964); Hall & Schaller, *Tool Using Behavior of the California Sea Otter*, 45 *J. Mammalogy* 287 (1964); G. Teleki, *Chimpanzee Subsistence Technology: Materials and Skills*, 3 *J. Hum. Evol.* 575 (1974).

22. Noam Chomsky posits the existence of a hypothetical neural language origin in the human brain. See Chomsky, *Initial States and Steady States*, in *Language and Learning: The Debate Between Jean Piaget and Noam Chomsky* 107 (M. Piatelli-Palmarini ed. 1980). See also Chomsky, *Rules and Representations*, 3 *Behav.*

Yet in light of scientific research conducted on the communicative skills of honey bees,²³ ants,²⁴ canids,²⁵ monkeys,²⁶ dolphins,²⁷ gorillas,²⁸ chimpanzees,²⁹ and other species, the definitions of language have constantly been modified in an attempt to exclude non-human communicative skills. As one commentator has lamented:

[I]t is not that we have *discovered* them [non-human species] to lack a language but rather that we define, and redefine, what [l]anguage is by discovering what beasts do not have. If they should turn out to have the very thing we have hitherto supposed language to be, we will simply

and Brain Sci. 1 (1980); cf. P. Lieberman, *The Biology and Evolution of Language* (1984).

23. See K. von Frisch, *The Dancing Bees: An Account of the Life and Senses of the Honey Bee* (1966); K. Von Frisch, *Bees: Their Vision, Chemical Senses, and Language* (1964).

24. See B. Holldobler, *Communication by Tandem Running in the Ant*, 90 J. Compar. Physiology 105 (1974); see also Holldobler, *Communication in Social Hymenoptera*, in *How Animals Communicate* 418 (T. Sebek ed. 1977).

25. See L. Mech, *The Wolf: The Ecology and Behavior of an Endangered Species* (1970); L. Mech, *The Wolves of Isle Royale* (1960); see also B. Lopez, *Of Wolves and Men* (1978); *The Wild Canids: Their Systematics, Behavioral Ecology, and Evolution* (M. Fox ed. 1983).

26. See Struhsaker, *Auditory Communication among Vervet Monkeys*, in *Social Communication Among Primates* 281 (S. Altmann ed. 1967); see also *The Meaning of Primate Signals* (R. Hanne & V. Reynolds eds. 1984).

27. See J. Lilly, *Lilly on Dolphins* (1975).

28. See Patterson, *The Gestures of a Gorilla: Language Acquisition in Another Pongid*, 5 Brain and Language 72 (1978); see also F. Patterson & E. Linden, *The Education of Koko* (1981).

29. See Gardner & Gardner, *Early Signs of Language in Child and Chimpanzee*, 187 Sci. 752 (1975); Gardner & Gardner, *Evidence for Sentence Constituents in the Early Utterances of Child and Chimpanzee*, 104 J. Exptl. Psychology 244 (1975); Gardner & Gardner, *Teaching Sign Language to a Chimpanzee*, 165 Sci. 664 (1969); Gardner & Gardner, *Two Way Communication with an Infant Chimpanzee*, in *Behavior of Nonhuman Primates* (A. Schrier & F. Stollnitz eds. 1971); see also D. Premack & A. Premack, *The Mind of an Ape* (1983); D. Premack, *Intelligence in Ape and Man* (1976); Fouts, *Capacities for Language in Great Apes* in *Socioecology and Psychology of Primates* 371 (R. Tuttle ed. 1975); Premack, *Language in chimpanzees*, 172 Sci. 808 (1971); Premack, *Interspecies Comparisons of Cognitive Abilities*, in *Language and Learning: The Debate Between Jean Piaget and Noam Chomsky* 203 (M. Piatelli-Palmarini ed. 1980); Rumbaugh, Gill, & von Glasersfeld, *Reading and Sentence Completion by a Chimpanzee*, 182 Sci. 731 (1973).

conclude that language is something else again.³⁰

III. Legal Rights for Animals

If the criteria used to define "personhood" are objectively shown to be satisfied by other species besides man, we simply must accept the fact that we are not unique. We cannot ignore our physical, mental and emotional evolution.³¹ Logic dictates that if a species shares with us those attributes that we believe make us essentially human, we must conclude that the species in question is entitled to "personhood." The alternative is to discard the term altogether because it has no scientific, moral or legal justification; it is a term with no descriptive content.³² By clothing animals with the mantle of "personhood" we recognize both their legal existence and the concurrent entitlement of legal protection, to the extent consistent with their nature. Such protection can only be effective if animals possess the right to have their interests judged independently of the subjective values that humans place upon them. As another commentator has observed:

Any rights for animals or nature at the aesthetic and emotional level are extensions of the rights of people for aesthetic and emotional enjoyment of things of nature, which still do not have intrinsic rights themselves. What is needed is an objective, rational, and ethical view of animals independent of self-serving human valuation.³³

What rights should we reasonably expect to be in the best interests of animals? This question, of course, begs the more

30. S.R.L. Clark, *The Moral Status of Animals* 96 (1977) (emphasis in original); see also S.R.L. Clark, *The Nature of the Beast: Are Animals Moral?* (1982). For an example of the thought process Clark decries, see Terrace, *How Nim Chimpsky Changed My Mind*, *Psychology Today*, Sept. 1979, at 65.

31. See C. Darwin, *The Expression of the Emotions in Man and Animals* (1979); Law, Biology, and Culture: *The Evolution of Law* (M. Gruter & P. Bohannon eds. 1983).

32. See Tooley, *supra* note 19.

33. M. Fox, *Returning to Eden: Animal Rights and Human Responsibility* 162 (1980).

fundamental issue of whether we may be presumptuous enough or wise enough to believe that we know what is in their best interests. However, a few basic rights which are minimally necessary to ensure justice for all animal species (including man) can be identified:

(1) All animals have a right to live out their lives according to and in harmony with their nature, instincts, and intelligence.

In the most general sense this requires that we govern our way of living so as to live in harmony with all our fellow creatures. It also requires that we cease interfering with the ecological and ethological relationships between animals that have evolved over the millenia.³⁴

(2) All animals have a right to live in a habitat ecologically sufficient for normal existence.

This right recognizes the seamless web of life in which all animals on this planet are enmeshed. There is almost universal agreement that the single greatest killer of animals is the destruction or degradation of habitat.³⁵ It is obviously in our self-interest to protect and preserve the environment. Moreover, because all animals have a right to live in a healthy and sustaining environment, it is also our duty to do so.

(3) All animals have a right to be free from exploitation.

Once a legal right has been conferred, a correlative duty

34. As a rather exotic example, the Serengeti ecosystem of eastern Africa has been under intensive, multi-disciplinary study for more than twenty years by the Serengeti Research Institute; the purpose of the Institute has been to generate data that would assist in the rational management of Serengeti National Park by the Tanzanian government. The fundamental conclusion that can be drawn from this long-term study is that the best management is that which permits nature to run its course while protected from the depredations of man. Ecological perturbations are so long-term and complex that we simply do not possess the insight and knowledge to interfere or "manage" without destructive results. Implicit is the idea that we are not wise enough to "manage" a dynamic ecosystem that has taken millions of years to evolve, and is continuing to evolve. See *Serengeti: Dynamics of an Ecosystem* (A. Sinclair & M. Norton-Griffiths eds. 1979). Another example is the killing of whales and other cetacea. For products we do not need or can easily replace with suitable substitutes, stocks and species of cetacea have been decimated. See *The Whaling Question: The Inquiry By Sir Sydney Frost of Australia*, 206-10 (1979).

35. See *TVA v. Hill*, 437 U.S. 153 (1978).

exists for all others not to infringe upon that right.³⁶ Necessity is an insufficient rationale for denying any of the above-mentioned rights to animals. We need to share the earth with animals; however, we do not need to eat their flesh, wear their skins, hunt or trap them, amuse ourselves at their expense, or experiment on them.³⁷

IV. Conclusion

We are a society comprised of individuals who pride ourselves in believing that our best instincts lead us in a fervent striving for peace and justice. We have made significant strides in this regard for members of our own species. But there are other animals on this earth who await their fair share of peace, justice, and equality.

As Gandhi once observed, "[t]he greatness of a nation and its moral progress can be judged by the way its animals are treated."³⁸ A truly just society respects all life. A respect for all life entails recognition of legal rights for animals and the correlative legal duties such rights confer. Without such recognition, the scope of our moral universe is artificially narrowed, and the risk of a future without animals grows greater. The world will be a lonely place indeed if we have only our fellow man as company.

36. See Hohfeld, *supra* note 8.

37. See generally K. Akers, *A Vegetarian Sourcebook: The Nutrition, Ecology and Ethics of a Natural Foods Diet* (1983); M. Braunstein, *Radical Vegetarianism: A Dialectic of Diet and Ethic* (1981); D. Dombrowski, *The Philosophy of Vegetarianism* (1984); D. Giehl, *Vegetarianism: A Way of Life* (1979). See also C. Amory, *Man Kind? Our Incredible War on Wildlife* (1974); D. Favre & G. Olsen, *Surplus Population: A Fallacious Basis For Sport Hunting* (1982).

38. Bennon, *Research Guide for Animal Welfare and Animal Rights*, 4 *Legal References Services Q.* 3 (1984). See also M. Fox, *supra* note 33, at 62.