ESSAYS

POLITICAL IDEOLOGY AND THE LEGAL STATUS OF ANIMALS

By
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*This essay argues that the benefits of changing the legal status of animals from their current position as items of property have been exaggerated. This assertion is based on the arguments that abolishing the property status of animals is not a sufficient guarantee that they will cease to be exploited and that, whilst the abolition of animals' property status is a necessary step towards the fulfilment of an animal rights agenda, it is incorrect to suggest that significant improvements to their well-being cannot be achieved from within the existing property paradigm.***

I. INTRODUCTION

This essay considers a number of the claims made by animal advocates and legal scholars about the relationship between property and the well-being of animals. The first claim is that the notion of equal consideration of animal and human interests cannot be achieved unless the property status of the former is removed. More contentiously, it is also argued by some that the property status of animals is not even compatible with the most basic protection of animals.[1] This latter argument, described by Tannenbaum as the "activist's view" of the law

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** *Animal Law* has retained the author's original voice to the fullest extent possible, including his use of British spellings.

[1] *See generally* Gary L. Francione, *Animals, Property and the Law* (Temple U. Press 1995); Gary L. Francione, *Rain Without Thunder: The Ideology of the Animal Rights Movement* (Temple U. Press 1996); Thomas Kelch, *Toward a Non-Property Status for*

relating to animals,[2] contains a number of interrelated claims: 1) that animals are regarded as little more than inanimate objects; 2) that despite the existence of anti-cruelty statutes the most fundamental interests of animals are more often than not sacrificed in favour of even trivial human interests; and 3) that these statutes are invariably concerned, not with the direct protection of animals, but with the moral character of humans who, without legal constraints, might be tempted to behave in an inhumane fashion.

This essay suggests that all of these claims are contestable—that is, the benefits of changing the legal status of animals from their current position as items of property can, contrary to the opinion of many animal advocates, be exaggerated. There are two main dimensions to this contention. The first is the argument that abolishing the property status of animals is not a sufficient guarantee that they will cease to be exploited. The second is that, whilst the abolition of animals' property status is a necessary step towards the fulfilment of an animal rights agenda, it is incorrect to suggest that significant improvements to animals' well-being cannot be achieved from within the existing property paradigm. This error is, partly at least, a product of a failure to recognize that the degree to which the welfare of animals can be sustained and improved is not a determinant of their legal status but is a product of first-order political factors, not the least of which is the prevailing ideological climate. More specifically, it is suggested that a version of liberalism prominent in the West, and particularly the United States, seriously compromises the welfare of animals.

II. THE PANACEA OF PROPERTY

There is a consensus among animal law scholars, and many in the animal rights movement, that abolishing the legal status of animals will open the door to an animal rights Garden of Eden where liberated animals will cease to be systematically exploited by humans.[3] It is argued here that, although abolishing the property status of animals is a necessary step towards the achievement of an animal rights agenda whereby animals are regarded as the moral equals of humans, it is by no means a sufficient one. That is, there are a number of reasons to suppose that without any additional changes, animals would continue to be exploited even if their property status were abolished.

A. Benefiting from Human Ownership

In the first place, not all animals are regarded as the property of private citizens, yet this has not prevented them from being merci-

Animals, 6 N.Y.U. Envtl. L.J. 531–85 (1998); Steven M. Wise, *Rattling the Cage: Toward Legal Rights for Animals* (Perseus Books 2000).

[2] Jerrold Tannenbaum, *Animals and the Law: Property, Cruelty, Rights*, 62 Soc. Research 539, 540–41 (1995).

[3] The author is referring to exploitation such as that which occurs on factory farms, in biomedical facilities, and in the entertainment context.

lessly exploited. Wild animals, for example, fall into this category. While there are various ways in which ownership of wild animals can and has been conferred, without this confirmation, animals in the wild are not owned by private citizens. Despite this fact, wild animals are not regarded as possessors of rights. Conversely, it should be noted that there are cases where domestication, and therefore ownership, has had positive implications for wild animals. For instance, although contentious, it might be suggested that animal species with little or no chance of surviving in the wild, that are kept in zoos with very good records of environmental enrichment, benefit from human ownership.

In a similar light, private property in land can have positive animal welfare results. One of the strategies of the British League Against Cruel Sports (LACS), for instance, is to buy land in hunting areas.[4] The LACS now owns approximately 2,000 acres of land in thirty separate sites in the West of England.[5] Not only does this prevent some animals from being killed by hunters, it can also lead to extensive publicity whenever a hunt trespasses onto the land. On a related theme, the LACS also provides legal assistance to those whose property—whether companion animals or inanimate objects—has been damaged by hunts. Equally important has been the successful campaign to persuade the National Trust, a private British owner of land and historic buildings, to ban deer hunting on its land, a decision made in April 1997 and confirmed several times since.[6] Another British land owner, the Forestry Commission, followed suit in 1997.[7] Finally, certain animal protection legislation benefits *only* those animals that are captive. For instance, the British Protection of Animals Act of 1911, a general anti-cruelty statute, only provided protection to those animals that were regarded as captive when an offence took place.[8] This legal loophole was closed in 1996.[9]

It is undoubtedly the case that the plight of wild animals tends to get more publicity, and more sympathetic coverage, than domesticated animals in factory farms and laboratories. This may be partly due to the fact that wild animals are seen as free and not the property of humans to exploit as they see fit. Whilst the majestic nature of at least some species of wild animals allowed to roam freely is undoubtedly a factor in courting positive public opinion, it should also be recognised that the motives for protecting wild animals are primarily anthropocentric ones. Thus, far from being free from human exploitation, wild animals are used by humans for a variety of purposes—hunting for food, tourism, aesthetic pleasure and so on—despite the fact that they

4 *See* Richard H. Thomas, *The Politics of Hunting* 89–91 (Gower 1983).

5 Robert Garner, *Defending Animal Rights*, 51:3 Parliamentary Affairs 462–63 (1998).

6 David Hencke, *National Trust Rejects Move to End Ban on Stag Hunting*, The Guardian (Jan. 28, 2000).

7 *Forestry Commission Bans Deer Hunting*, Wildlife Guardian 5 (Winter 1997).

8 *See* Noel Sweeney, *Animals and Cruelty and Law* (Alibi 1990).

9 *See* Wild Mammals (Protection) Act, 1996 (Eng.).

are not regarded as property in the same sense as are domesticated animals. Thus, it is clear that the abolition of animals' property status is not a guarantee of protection.

B. The Socialist Critique of Rights

The second argument in support of the view that abolishing the property status of animals is not sufficient to prevent their continued exploitation focuses on the traditional left-wing critique of the concept of rights.[10] Even for humans, there is a world of difference between proclaiming the existence of rights and upholding them in practice. Thus, despite the fact that governments throughout the world proclaim human rights, this has not ensured that human exploitation and suffering has been eliminated.[11] This is not surprising given the context of the vastly unequal nature of modern societies where "for the majority, rights are merely abstract, formal entitlements with little or no *de facto* purchase on the realities of social life."[12]

The parallel with animals is obvious.[13] Merely abolishing the property status of animals and granting them rights does not guarantee that they will cease to be exploited. What is required, additionally, is a change in social attitudes toward both humans and animals to ensure that the aim of according rights—to ensure that the recipients are treated with respect and as ends in themselves—is achieved. Of course, the implication of this view is that the property status of animals will only be abolished when social attitudes have changed. The debate around legal status, then, becomes of secondary importance since it is merely a reflection of wider societal attitudes. Moreover, because the formal granting of rights and legal status to humans and animals is secondary to societal attitudes, the need to formally accord rights, of freedom or anything else, becomes redundant once societal attitudes change. In other words, the imposition of formal rights is predicated on the existence of a competitive individualism whereby humans need protecting from each other, and animals need protecting from humans. Remove the cause of this conflict and it is possible to remove the need for formal legalistic notions of rights.

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[10] *See e.g.* Steven Lukes, *Marxism and Morality* (Clarendon Press 1985).

[11] One need only consider the rights accorded to citizens in the Constitution of the former Soviet Union to recognise the gap between objective and achievement. Moreover, not even the most patriotic American would claim that their Bill of Rights has always been successful in upholding rights. Many would claim, of course, that it has sanctioned, or failed to prevent, major infringements of the rights of women and various minority groups.

[12] Ted Benton, *Animal Rights and Social Relations*, in *The Politics of Nature: Exploration in Green Political Theory* 161, 166 (Andrew Dobson & Paul Lucardie eds., Routledge 1993) (emphasis in original).

[13] *See e.g*. Ted Benton, *Natural Relations: Ecology, Animal Rights and Social Justice* (Verso 1993); Benton, *supra* n. 12; Ted Benton, *Animal Rights: An Eco-Socialist View*, in *Animal Rights: The Changing Debate* (Robert Garner ed., N.Y.U. Press 1996).

A related point is that the granting of rights is arguably not the best way of identifying responsibility for wrongdoing in the setting of institutional exploitation.[14] In such a setting, the issue of ownership is also confused. Rights are individualistic in the sense that they assume the existence of an agent who can be held responsible. For a case of cruelty to companion animals, this model is usually appropriate because it is possible to identify a distinct transgressor. Such a model is not really appropriate, on the other hand, for the institutional exploitation of animals which occurs mainly on factory farms and in laboratories, since it is difficult, in such cases, to identify who is responsible for the infringement of rights. In the case of animal agriculture, for instance, who is responsible for the plight of animals reared for food? Is it the farm hand, the owner of the farm, agribusiness companies who provide the equipment, the retailer of the finished product, or the consumer? In addition, of course, the implication of removing the property status of animals is that it is the owner who is the most likely to infringe the rights of his or her animals.[15]

III. ANIMAL WELFARE WITHIN THE PROPERTY PARADIGM

Altering animals' property status would undoubtedly increase the prospects for protecting them. Clearly, whilst animals remain property they cannot have the full entitlement of rights, and especially the right to be free from exploitation, that animal rights advocates insist they should have. Ownership implies entitlements to the owner and, while (as is discussed below) it does not necessarily translate into a right to do as one pleases, the case for restricting property rights has to be made on each occasion and for good reason. In other words, while animals remain property they cannot be said to have rights in the strict sense of an entitlement (in the negative sense of the term) to be left alone unless an infrigment can be justified. The obvious parallel here is to human slavery where, irrespective of the treatment meted out to slaves, they were regarded as lacking some basic entitlement that was granted to free humans.[16] The consequences of abolishing the property status of animals is summed up neatly by Tannenbaum:

> [I]t would be impossible to buy or sell animals, to pass their ownership on through inheritance, to tax their value, or to use them in a myriad of ways

[14] By "institutional exploitation," the author refers to that which occurs, for example, in factory farms and research laboratories.

[15] Quite clearly, this is not always the case because as previously discussed, the owner of an animal can sometimes be the source of protection against non-owners. *See supra* section IIA.

[16] For example, the U.S. Supreme Court in *Scott v. Sanford* held that "Negroes" were "property" and not "citizens." 60 U.S. 393 (1856). The Court cited the U.S. Constitution as support for its holding, stating that "the right of property in a slave is distinctly and expressly affirmed in the Constitution." *Id*. at 451. For further reading on the parallels between human and animal subjugation, see Marjorie Spiegel, *The Dreaded Comparison* (rev. expanded ed., Mirror Books 1996).

(such as sources of food and fiber) that will continue to be regarded as acceptable by the great majority of people.[17]

In other words, if the aim is to secure for animals the equal consideration of their interests with those of humans, then it *is* necessary to abolish their property status.

Still open to debate, however, is the degree to which animals can be protected whilst they still have property status. Logically, this will be dependent upon the degree to which any particular state and society is willing to sanction interfering in an individual's property right in order to benefit animals. In theory, such an eventuality is clearly possible, even to the point where the state can prohibit private citizens from owning animals.[18] Even within rights discourse, rights are not necessarily regarded as absolute, since there are always occasions when we have to consider intervening in order to protect other rights.[19] Many, from other traditions such as utilitarianism, also recognise a case for sacrificing the important interests of individuals in pursuit of the general good or the maximization of preferences.[20] In practice, all societies are prepared to intervene to restrict property rights in order to achieve desired ends.[21] This does not just apply to sentient animals. There are even limits to what individuals may do with inanimate objects they own if infringing property rights is perceived to result in the securing of other valued human ends.[22]

It is undoubtedly the case that there are many inadequate animal welfare laws. As such, animals often lose out to relatively trivial human interests—either because the laws have limited scope, because courts interpret them in a conservative fashion, or because they are badly enforced.[23] However, the existence of poor statutory protection for animals has nothing to do with the property status of animals, and those who link the two are making an assumption that is not supported by the evidence. It is clearly possible to envisage a situation

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17 Tannenbaum, *supra* n. 2, at 593.

18 *Id*. at 556.

19 Richard B. Brandt, *Morality, Utilitarianism, and Rights* 184 (Cambridge U. Press 1992).

20 The major nineteenth century utilitarian thinkers were Jeremy Bentham, James Mill, and John Stuart Mill. More recently, two utilitarians who have also written about animal issues are Peter Singer, *Animal Liberation* (2d ed., Cape 1990), and R. G. Frey, *Interests and Rights: The Case Against Animals* (Oxford U. Press 1980).

21 Tannenbaum, *supra* n. 2, at 555–56.

22 The best example here is legislation designed to control what owners do to those buildings regarded as important for historical and/or aesthetic reasons.

23 *See generally* Francione, *Animals, Property and the Law*, *supra* n. 1; Robert Garner, *Political Animals: Animal Protection Politics in Britain and the United States* (Macmillan 1998); Kelch, *supra* n. 1, at 540–44; David Wolfson, *Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food or Food Production* (2d ed., Farm Sanctuary 1999).

where anti-cruelty regulations "trump property rights when they conflict,"[24] and effective animal protection statutes do just that.

Although the general anti-cruelty statutes that depend upon the difficult task of proving unnecessary suffering are not particularly effective, even these have some worth.[25] As Tannenbaum remarks, however, "there is nothing in cruelty laws that prohibits the legal system from giving certain animal interests greater weight than has been done in the past."[26] It should be noted that the general anti-cruelty statute approach is not the only animal welfare model. In Britain, for instance, the value of the primary statutes governing animal agriculture—the 1968 Agricultural (Miscellaneous Provisions) Act[27]—and animal experimentation—the 1986 Animals (Scientific Procedures) Act[28]—is not so much in the basic unnecessary cruelty prohibitions they both contain, but in the potential they afford for abolitionist regulations to be added. For example, regulations banning veal crates and sow stalls and tethers have been added under the 1968 Act,[29] and a decision prohibiting cosmetic testing of finished products and the use of wild-caught primates for biomedical research was made under the auspices of the 1986 Act.[30]

A related argument espoused by critics of the property status of animals is that the inability of animal advocates to gain legal standing under anti-cruelty statutes has meant that it is difficult, albeit not impossible, to assert the interests of animals in the judicial system. For some critics, this is a direct consequence of animals being regarded as private property and not having legal rights.[31] Clearly, animals do not have the right to legal standing, but this is not the same as saying they do not have legal rights. Under state and federal criminal laws, private citizens do not have the right to sue criminals, and yet we do not generally consider that the rights of the victims of crime have been infringed upon as a result. This is because, as in anti-cruelty statutes, public prosecutors perform the representative role. The fact that anti-cruelty statutes are weak, or that public prosecutors and courts are not interested in animal cruelty cases is a distinct issue, and neither is caused by the lack of a right to legal standing for animals. The existence of legal rights for animals is therefore independent from the issue of standing.

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[24] Petra Renée Wicklund, *Abrogating Property Status in the Fight for Animal Rights*, 107 Yale L.J. 569, 574 (1997).

[25] *See* Michael Radford, *"Unnecessary Suffering": The Cornerstone of Animal Protection Legislation Considered*, Crim. L. Rev. 702 (Sept. 1999).

[26] Tannenbaum, *supra* n. 2, at 586.

[27] Agricultural (Miscellaneous Provisions) Act, 1968, (Eng.), summary available at <http://www.defra.gov.uk/animalh/welfare/publications/legislation/sumoflaw.htm> (accessed Jan. 22, 2002).

[28] Animals (Scientific Procedures) Act, 1986, (Eng.).

[29] The Welfare of Calves Regulations, 1987, (Eng.).

[30] S*ee* Michael Radford, *Partial Protection: Animal Welfare and the Law*, in *Animal Rights: The Changing Debate*, 67–91 (Robert Garner ed., N.Y.U. Press 1996).

[31] *See e.g*. Kelch, *supra* n. 1, at 535–37.

The law might intervene in property rights to protect animals directly or indirectly. In the latter case, the welfare of animals may be improved, but only as an indirect consequence of a law designed to benefit humans. The paradigmatic case is the existence of legal sanctions for injurious harm towards an animal belonging to someone else.[32] Such sanctions are designed not to protect animals directly, but to protect the animal's owner against any unnecessary distress or economic loss. The ethical backdrop to such a view is the assumption that the interests of the animal do not exist or do not matter, and many esteemed names in the history of political and legal thought—Hobbes, Locke, Kant, and Descartes, to name but a few—held that the only duties we had to animals were indirect ones.[33] There are few thinkers now, however, who would deny that animals are sentient,[34] and, as a result, have interests that ought to be taken into account in any moral calculation.

It is argued by some legal scholars that modern animal welfare statutes also tend to have as their main aim the moral improvement of humans rather than a direct concern to protect the interests of animals.[35] This assertion is surely incorrect. It is certainly true that at the time the first anti-cruelty statutes appeared in the nineteenth century, many, but by no means all, legislators and courts did express an anthropocentric purpose for the statutes.[36] It is difficult now, though, to maintain this position. Most animal protection statutes recognise that animals can be harmed directly. Thus, in most developed countries a plethora of animal welfare statutes and regulations exist whose aim is to limit property rights in order to benefit animals directly. As Tannenbaum correctly points out, "if one were to ask legislators, prosecutors, judges, and employees of humane societies . . . they would say, virtually *universally*, that the primary purpose of these laws is to protect animals."[37]

This error, that the purpose of anti-cruelty statutes is for human ends, stems, it seems, from the incorrect assumption that because animals are regarded as property they are equivalent to inanimate objects. Thus, Francione compares anti-cruelty statutes with the protection of historical landmarks, the aim of which is to ensure that

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[32] *See e.g. Brousseau v. Rosenthal*, 443 N.Y.S.2d 285 (N.Y. Civ. Ct. 1980); *Corso v. Crawford Dog & Cat Hosp., Inc.*, 415 N.Y.S.2d 182 (N.Y. Civ. Ct. 1979); *La Porte v. Associated Independents, Inc.*, 163 S.2d 267 (Fla. 1964).

[33] *See generally* Thomas Hobbes, *Leviathan* (Richard Tuck ed., Cambridge 1992); John Locke, *Two Treatises of Government* (Peter Laslett ed., Cambridge U. Press 1988); Immanuel Kant, *The Metaphysics of Morals* (John Ladd trans., Bobbs-Merrill 1965); Rene Descartes, *A Discourse on Method* (John Veitch trans., E.P. Dutton & Co. 1912).

[34] By "sentient," the author is referring to an animal's ability to feel and, to a certain extent, think.

[35] *See e.g.* Bernard E. Rollin, *Animal Rights and Human Morality* 12–23 (Prometheus Books 1992); Francione, *Rain Without Thunder*, *supra* n. 1, at 133–36.

[36] *See* David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800s*, Det. C.L. Rev. 3, 11 (1993).

[37] Tannenbaum, *supra* n. 2, at 580 (emphasis in original).

human enjoyment of this property continues.[38] But, as Wicklund points out, "Francione assumes more than proves that animals share the same status as any other property."[39] On the contrary, there are plenty of judicial decisions where animals are regarded as a special type of private property.[40] As Tannenbaum remarks, "the actual history of the legal concept of property provides *absolutely no support* for the claim that property, 'true' property, or property properly speaking is or should be inanimate."[41] The whole point of most animal protection legislation is to protect animals against suffering and, by definition, such legislation recognises the fact that animals are sentient.

Support for the judgment that the property status of animals is not incompatible with a considerable degree of animal protection is found in the recognition that the welfare of animals is protected more effectively in some countries than others, and yet the property status of animals remains the same. For example, it is widely recognised that animals receive better legal protection in Britain than the United States.[42] Accordingly, the property status of animals cannot be a determining factor since animals are regarded as property in both countries.

There are a number of possible reasons for this discrepancy, which are more important than property status, in explaining animal welfare standards. The first is the political structure and the social attitudes that, to a greater or lesser extent, influence political decisions. It might be argued that a crucially important influence on animal welfare decision-making is the balance of power between those interests arrayed against each other in the political arena. The suggestion here is that the animal-use industry is, for a variety of reasons, much more influential in the United States than in Britain. One of those reasons may be, of course, that public opinion is much more favourably inclined towards animal welfare in Britain, and this reduces the influence of the animal use lobby. This suggests, then, that differences in the stringency of animal protection in the two countries is not a product of the property status of animals, but rather of the political process involving the interaction between interested groups and public opinion.

The discrepancy is also a product of the wider ideological framework existing in both countries. It might be argued that the ideology of liberalism, or at least a particular version of it, is much more promi-

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38 Francione, *Rain Without Thunder*, *supra* n. 1, at 131–32.

39 Wicklund, *supra* n. 24, at 572.

40 Kelch, *supra* n. 1, at 537–40; *see e.g. Corso v. Crawford Dog & Cat Hosp., Inc*., 415 N.Y.S.2d 182, 183 (N.Y. Civ. Ct. 1979) ("[A] pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property."); *Bueckner v. Hamel*, 886 S.W.2d 368, 378 (Tex. App. 1994) (Andell, J., concurring) ("[A] dog is not just a thing . . . [and to say so] is a repudiation of our humaneness"); *Katsaris v. Cook*, 180 Cal. App. 3d 256, 270 (1986) (Sabraw, J., concurring) ("Not only is [a dog] more than property today, he is the subject of sonnets, the object of song, the symbol of loyalty. Indeed, he is man's best friend.").

41 Tannenbaum, *supra* n. 2, at 545 (emphasis in original).

42 *See generally* Garner, supra n. 23.

nent as a guiding set of principles in the United States than in Britain, or any other country for that matter. Classical liberalism puts great emphasis on the removal of constraints from individuals. The best-known account is John Stuart Mill's "harm" principle whereby, providing that an individual's actions remain self-regarding, they remain legitimate and only when they become other-regarding does the state or society have the right to intervene.[43] The value or purpose of private property, in the context of Mill and the liberal position, is that it provides an arena of autonomy for individuals. There has to be a very good reason, then, for intervening to constrain or limit what individuals do with their private property.

Due to the prevailing liberal ideology, there is a general reluctance to restrict property rights in the United States. This does not just affect the treatment of animals, of course, but also other aspects of American life. The classic case is the unwillingness of successive generations of American politicians to limit the control of guns,[44] whereas, by contrast, the British Parliament quickly outlawed the ownership of handguns little more than a year after one major shooting incident in Dunblane, Scotland in March 1996.[45] Since animals are also regarded as property it might be suggested that there is a greater reluctance in the United States than in Britain to intervene to protect animals against their owners. It may seem from this that altering the property status of animals in the United States, if not Britain, is necessary even to provide a moderate level of animal protection. However, the reluctance of the legal and political systems to intervene in property rights to protect animals is itself a product of a society that does not give the welfare of animals a very high priority. In other words, it is not the property status of animals that is ultimately the main problem: it is a disinterested public and a political system dominated by economic interests which stand to lose in the event of tighter and more stringent animal protection legislation.

IV. ANIMALS AND THE LIBERAL THEORY OF JUSTICE

These economic interests are aided by a particular version of liberalism that excludes animals from a theory of justice. It is important to recognise that liberalism is not necessarily incompatible with animal protection. Rather, animals are vulnerable to a version of liberalism that excludes them from a theory of justice, and, significantly, this type of liberal theory is particularly associated with the American po-

[43] *See generally* John Stuart Mill, *Utilitarianism, On Liberty, and Considerations on Representative Government* (Dent 1993).

[44] For a discussion regarding various obstacles to gun control in the United States, see Thomas J. Walsh, *The Limits and Possibilities of Gun Control*, 23 Cap. U. L. Rev. 639 (1994).

[45] 1997 Firearm Act. For information regarding the Dunblane incident, see *Remembering Dunblane* <http://www.dunblane.braveheart.com/dunblane.htm> (accessed Nov. 20, 2001).

litical philosopher John Rawls. Unfortunately for animals, Rawls' account, found in his book *A Theory of Justice*,[46] is regarded by many as the most important work of political philosophy to be written since the Second World War, if not in the twentieth century.[47] Even more significantly, there is some evidence that the theory has a practical resonance in the way that animals are actually treated in liberal societies, and particularly the United States.[48]

There is no reason in a liberal polity why animals cannot be incorporated into a theory of justice. Mill's harm principle, for instance,[49] can be adapted to include animals. From an animal rights perspective, where the case for an enhanced moral status for nonhumans has been accepted, actions that harm animals become other-regarding and therefore illegitimate. Indeed, it is significant that, almost without exception, the case for a higher moral status for animals has been made from within the liberal tradition, whether it be a rights-based approach associated in particular with Regan,[50] a utilitarian approach associated with Singer,[51] or a contractarian approach associated with Rowlands.[52] If we accept an animal welfare position, whereby animals matter morally but not as much as humans, the harm principle can be adapted to take into account the fact that harm inflicted on animals which can be shown to serve significant human benefits is regarded as legitimate, but that harm which is unnecessary to further human interests is ruled out.

The problem occurs where, as in the liberalism associated with Rawls, and other leading names in political philosophy such as Brian Barry,[53] the harm principle does not apply because animals are excluded from a theory of justice. Rawls writes that human "conduct toward animals is not regulated by the principles of justice, because only "moral persons . . . [are] entitled to equal justice."[54] Two features distinguish this moral personhood. Firstly, moral persons

> are capable of having . . . a conception of their good [as expressed by a rational plan of life]; and second they are capable of having . . . a sense of

46 John Rawls, *A Theory of Justice* 504 (Oxford U. Press 1972).

47 *See* Chandran Kukathas & Philip Pettit, *Rawls: A Theory of Justice and Its Critics* 16 (Stanford U. Press 1990) (*A Theory of Justice* is "the testament of political theory reborn.").

48 Examples of this, including vegetarianism as choice and issues such as hunting and ritual slaughter, are discussed *infra* Section V.

49 *See generally* Mill, *supra* n. 43.

50 *See generally* Tom Regan, *The Case for Animal Rights* (U. Cal. Press 1983).

51 *See generally* Singer, *supra* n. 20.

52 *See generally* Mark Rowlands, *Animal Rights: A Philosophical Defence* (Macmillan 1998).

53 *See* Brian Barry, *Sustainability and Intergenerational Justice*, in *Fairness and Futurity: Essays on Environmental Sustainability and Social Justice* 71 (A. Dobson ed., Oxford U. Press 1999).

54 Rawls, *supra* n. 46, at 504.

> justice, a normally effective desire to apply and to act upon the principles of justice, at least to a certain minimum degree.[55]

Under this rationale, only those who can understand what it is to be just, and are able to claim it for themselves and respect the rights of others, are entitled to be beneficiaries of justice.

Despite excluding animals from a theory of justice, Rawls, Barry, and others clearly accept that what is done to animals matters morally, and that there should be some restrictions on the way they are treated. This apparent contradiction can be explained by the fact that these thinkers seem to be making the point that justice is a much narrower area of inquiry than ethics. For Rawls, "a conception of justice is but one part of a moral view" in that a "political" conception of justice is narrower than a comprehensive view because it only concerns the basic political structure and not "all kinds of subjects ranging from the conduct of individuals and personal relations to the organization of society as a whole."[56]

Rawls is arguing that the treatment of animals should be discussed in the arena of morals rather than the arena of justice. However, the effect of excluding animals from a theory of justice is problematic for animals in a liberal society because a basic principle of most liberal theories is the assumption that it is no business of a liberal society to advocate one conception of the good over another.[57] In other words, any genuine liberal political theory must include an anti-perfectionist principle of moral pluralism. This is the idea, derived from a wider theory of liberty, that it is no business of the state or society to interfere in individual moral codes or individual conceptions of the good life. As Rawls points out, "[w]hich moral judgments are true . . . is not a matter for political liberalism," and the difference between this position and that which holds that "there is but one such conception [of the good] . . . to be recognised by all citizens [is] . . . one of the deepest distinctions between conceptions of justice."[58] A liberal state, then, is one that is based on protecting individual rights rather than pursuing certain goals to which the individual must be subsumed.

Taking this liberal theory to its logical conclusion, the treatment of animals becomes a matter of individual moral choice rather than a matter of justice. Thus, my conception of the good might include a commitment to the well-being of animals, but I am not entitled to impose it upon others, and likewise, others must respect my conception of the good whilst not having to follow it themselves. In other words, to use

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[55] *Id*. at 505.

[56] *Id*. at 512; *see* John Rawls, *Political Liberalism* 12–13 (Columbia U. Press 1993).

[57] *See e.g.* Anthony Arblaster, *The Rise and Decline of Western Liberalism* 45 (Blackwell 1984); Brian Barry, *Justice as Impartiality* 77 (Clarendon Press 1995); Stephen Mulhall & Adam Swift, *Liberals and Communitarians* 30 (Blackwell 1992); Raymond Plant, *Modern Political Thought* 77 (Blackwell 1991).

[58] Rawls, *supra* n. 56, at 134.

Mill's terminology, because animals are not included in the "harm" principle, human treatment of them becomes a self-regarding action with which society and the state are not allowed to interfere. As Clark asserts, the implications are that "third parties have no right to come between the whaler and her prey, or the farmer and her veal-calves, since none of us have a right to impose our 'merely' moral standards on other autonomous agents."[59]

V. MORAL PLURALISM AND THE TREATMENT OF ANIMALS

The liberal theory of the superiority of the right over the good is significant in the debate about the treatment of animals because it undoubtedly has some practical relevance to social and political attitudes and claims about animal welfare. These attitudes and claims can be seen to some degree in many countries, but it may well be that they are especially evident in the United States, where this version of liberalism is particularly prominent.

It is very noticeable how much human choice is invoked in the debate about animal welfare. This illustrates the influence of the moral pluralism central to most liberal theories. From the moral pluralism viewpoint, we are free to choose whether to eat free-range meat or not to eat meat at all, free to avoid hunting or fishing, free to visit zoos, and free to resist drugs developed by using animals. What we are not entitled to do under this principle, however, is to prevent others from eating intensively produced meat, or going hunting and fishing, or visiting zoos, or partaking in drugs developed through animal testing, just because some of us find such activities morally repugnant. The state, therefore, must remain neutral when it comes to competing conceptions of the moral status of animals.

There is no doubt that the greater availability of free-range meat, meat substitutes, and products not toxicity-tested on animals is a positive step for animal advocates.[60] Nevertheless, the greater availability of choices is no substitute for statutes regulating and/or prohibiting certain ways of treating animals. In the United States, there remains no federal statute regulating animal husbandry,[61] and many of the worst excesses of intensive animal agriculture—veal crates, battery

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[59] Stephen R. L. Clark, *Animals, Ecosystems and the Liberal Ethic*, 70 The Monist 114, 121 (1987).

[60] All major supermarket chains in Britain now stock a variety of free-range meat products and soy-based meat substitutes. The Royal Society for the Prevention of Cruelty to Animals now operates a so-called "Freedom Foods" scheme whereby certain welfare-approved outlets are allowed to use the logo. These developments, of course, reflect the fact that the number of vegetarians in Britain alone has increased to nearly 7% of the population. In terms of cosmetics, the number of animals used for the toxicity testing of cosmetics in Britain has declined in recent years and, in 1997, the Government announced a ban on the testing of finished products. Moreover, a number of leading manufacturers—Benetton, Avon, Revlon, and Faberge—announced in 1989 that they would no longer test their products on animals.

[61] Wolfson, *supra* n. 23, at 10.

cages, beak trimming, tail docking, and so on—still exist.[62] In many European countries, by contrast, factory farming is much nearer to being phased out by state action.[63] In what is perhaps the classic example of moral pluralism, the United States, Britain, and many other countries still allow ritual slaughter—despite the fact that there is clear evidence it causes easily remedied suffering[64]—on the grounds that to abolish it would offend the principle of religious tolerance.[65] While it cannot be proven that there is a link between the choices available and the relative paucity of statutory law, the existence of the former undoubtedly makes the animal suffering that is still permitted more palatable.

It is important to appreciate the role of property here. It is true that the importance attached to individual autonomy and self-reliance against the interference of the state and society in the United States is reflected in stringent property laws. It is equally the case that attempts to enforce anti-cruelty statutes, which exist in all American states,[66] are hindered significantly by the weight attached to property rights. Furthermore, the general assumption that there has to be good reason for interference in property rights makes general legislative improvements in animal welfare difficult. By contrast, in Britain, it might be suggested, the ideology of individual autonomy and self-reliance has been much less powerful. As Dworkin points out, in the absence of a formal system of protecting individual rights in Britain, "the majoritarian premise has been thought to entail that the community should defer to the majority's view about what . . . individual rights are,"[67] and there is a majority view in Britain that the protection of individual rights does not stretch to the right of humans to abuse their animal property as they see fit.

However, it is not so much the existence of stringent property rights that explains the relatively poor animal welfare record in the United States. Rather, it is the fact that animals are regarded as insufficiently important to be included within a Mill-type harm principle within which their interests would sometimes prevail. Where they are so included, it becomes illegitimate in some cases to exploit animals on liberal grounds because to do so is to act in an other-regarding fashion by depriving them of liberty or even life, or causing them to suffer.

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62 *Id*. at 24–25.

63 Evidence for this assertion is provided by the fact that battery cages are being phased out by the European Union, and were already illegal in Switzerland, Sweden, and Holland. Similarly, veal crates are illegal in the U.K., and pig tethers and stalls are illegal in the U.K., Sweden, and Switzerland. Ritual slaughter is banned in Switzerland, Norway, Sweden, and Ireland.

64 *See* Andrew F. Fraser & Donald M. Broom, *Farm Animal Behavior and Welfare* 152 (Balliere Tindall 1990).

65 *See e.g. Jones v. Butz*, 374 F. Supp. 1284 (S.D.N.Y. 1974) (deferring to Congress' determination that Kosher slaughter is humane, and thus allowable).

66 Frasch et al., *Animal Law* 601 (Carolina Academic Press 2000).

67 Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* 16 (Harvard U. Press 1996).

This applies whether or not animals are regarded as the property of humans.

VI. CONCLUSION

The aim of this essay has been to make a contribution to the ongoing debate about the legal status of animals. It suggests that the case for moderating or abolishing the property status of animals has been exaggerated. It is neither a sufficient nor necessary step towards a relatively high level of protection for animals. It is not a sufficient guarantee of animal liberation, because animals not regarded as property have been shown to be vulnerable to exploitation, because proclaiming rights does not necessarily mean they will be upheld in practice, and because the individualistic language of rights may not be the most suitable vehicle to ensure the protection of animals subject to institutional exploitation in factory farms and laboratories.

It is the case that animals cannot have the full panoply of rights while they remain the property of humans. However, this essay also suggests that it is not necessary to abolish this property status in order to ensure a high degree of animal protection. In other words, animal rights may be incompatible with the ownership of animals, but animal welfare need not be. It is possible to chip away at the property rights of the owners of animals, and envisage a future where the property status of animals is deemed unacceptable. Crucially, though, at that point it will be unnecessary to formally abolish the property status of animals because legislative activity will already have made it redundant.

Further support for the arguments in this essay comes from a comparative analysis which illustrates that it is not the property status of animals that accounts for the differential animal welfare achievements in, for example, Britain and the United States. Instead, we have to look elsewhere for explanatory variables. There is convincing evidence that differential animal protection achievements can be explained by the impact of political and social factors, backed by a dominant form of liberalism in the United States that excludes animals from a theory of justice. According to this liberal doctrine of moral pluralism, individuals should be left alone to pursue their own conceptions of the good life, and the state and society should not intervene to impose one particular moral code over another. As a result, the treatment of animals becomes subject to moral preferences rather than legal compulsion.