THE PHILOSOPHICAL FOUNDATIONS OF ANIMAL LAW

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I. Introduction

The law can only effectively protect animals if we acknowledge that animals have rights that ought to be protected by human laws. After discussing where the law currently stands with regard to animals, and some of the efforts to change it, I will explain the philosophical grounds on which we might suppose that animals have rights that should be protected by our laws.

Following the tradition of Roman Law, legal systems currently divide the world into two kinds of entities, persons and property, reflecting a commonplace metaphysical division of the world into persons and things. Human beings are presumed to be persons, and all other entities, including non-human animals (hereinafter 'animals'), are things.[1] Persons are the subjects of both rights and obligations, including the right to own property. Things, being by their nature for the use of persons, are potentially property, and do not have rights. Persons are presumed to have a kind of dominion over their property that allows them to do whatever they please with it. In the language of Immanuel Kant, persons are ends-in-themselves, while things are mere means to persons' ends.[2]

This bifurcation gives rise to practical and philosophical problems whenever there is good reason not to allow persons to have complete dominion over the entities usually categorized as things. In some cases, the reason derives from the potential impact of this dominion on other persons. In other cases, the reason is that the entities themselves are not naturally regarded merely as usable or disposable things. This second sort of problem is at work in the case of animals. Although the law classifies animals as property, at least since the 1600s there have been some laws forbidding (certain forms of) cruelty to (certain kinds of) animals, and the number and reach of such laws has been escalating since the late 1800s. As this body of law

[1] Non-human animals will be referred to as 'animals.' Corporations are legal persons, and some of what I say here does not easily apply to them, but I do not have space to deal with the resulting issues.

[2] Immanuel Kant, *Groundwork of the Metaphysics of Morals*, trans. Mary Gregor (CUP 1998) 36. 4:428 in the marginal numbers normally used when citing Kant.

has grown, the incoherence of the legal philosophy behind it has become increasingly apparent. Although such laws appear to reflect the idea that the welfare of animals matters for its own sake, exceptions are often made for animals raised for food or used in laboratory experiments, and certain species of animals are not covered by the laws. Most importantly, these laws characteristically do not give the animals genuine legal rights, rights which may be enforced in the name of the animals themselves. In the United States, for example, people trying to ensure the enforcement of such laws have not usually been permitted to sue on behalf of the animals. To have standing to sue, you must be a person and show that you have some sort of specific personal interest in the way the animals are treated.[3] This seems to imply that the laws are not intended to mitigate cruelty to animals for the sake of the animals, but rather for the sake of human beings who have some interest in the animals' welfare. Animals therefore occupy an unstable legal position, neither that of persons or ends-in-themselves in Kant's sense nor that of mere means to persons' ends.

II. Animals as Legal Persons

Some legal activists have addressed the situation by trying to persuade the courts or the legislatures to reclassify animals, or some species of animals, as legal persons. Philosophically, this requires that we give an account of the criteria for personhood. Among the attributes that have been cited as definitive of personhood are rationality, autonomy, self-consciousness, the capacity for higher-order desires, and morality.

Reclassifying animals as legal persons is problematic for several reasons. The attributes listed, as they are usually understood, are found only or at most in the so-called 'higher' animals, those with more sophisticated cognitive faculties. 'Lower' animals are not covered, and therefore would not be protected by laws based on the claim of animal personhood. Of course, we could take the position that for legal purposes, a 'person' is just a being with rights, and argue that since animals ought to have rights, they ought to count as legal persons. But

[3] Cass Sunstein, 'Can Animals Sue?' Cass R. Sunstein and Martha C. Nussbaum, eds. *Animal Rights: Current Debates and New Directions*. (OUP 2004) 251.

traditionally, a 'person' is a being with both rights and obligations, and many of the characteristics that have been thought to define personhood are supposed to explain why persons have obligations as well as why they have rights. Most people agree that animals are not moral beings, and that therefore they cannot have obligations. In fact, one of the standard arguments against the idea of animal rights is that having rights and having obligations are reciprocal conditions, and since animals cannot have obligations, they cannot have rights either. Even if we reject that argument, it appears that the attributes that define personhood explain not only why persons have obligations, but also why persons have certain kinds of rights that we are inclined to grant only to human beings. For example, philosophers in the Kantian tradition explain personhood in terms of rational autonomy, the capacity to act in accordance with reasons or principles that you are able to evaluate. You are able to think about whether the reasons for which you propose to act are good ones or not, and to shape your conduct accordingly. This capacity is part of the explanation why persons can have obligations. But it is also supposed to be part of the explanation why persons should have the very basic right to act as we choose so long as that is consistent with the rights of others. If we think animals have should have different rights than people (for example, that they have a right to be treated well but not to act as they choose) and that those are rights one can have without obligations, it seems worth establishing a separate category for animals, both legally and philosophically.

III. The Moral Standing of Animals

The claim that animals have, or should have, rights, depends on the claim that what is good or bad for animals matters for its own sake, not merely for the sake of the human beings who deal with them.[4] Only then do animals have what philosophers call 'moral standing.' The idea that

[4] The idea that animals have rights was originally defended by Tom Regan in *The Case for Animal Rights* (Berkeley, 1983, 2004), although Regan did not clearly distinguish the questions of moral and legal rights. For an account of the basis of animal legal rights in particular, see Saskia Stucki, "Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights" (*Oxford Journal of Legal Studies*, Vol 40, No. 3 (2020) 533-560). I defend the idea of animal legal rights on Kantian grounds in "The Claims of Animals and the Needs of Strangers: Two Cases of Imperfect Right" (*The Journal of Practical Ethics*. Volume 6 No.1 2018).

what is good for animals matters for its own sake, however, has been understood in two different ways, corresponding to the two most influential moral outlooks of the modern period.

In the utilitarian or consequentialist tradition, represented by Jeremy Bentham and John Stuart Mill, a being has moral standing because he or she is the subject of states or conditions that are positively or negatively valuable in themselves.[5] In the traditional utilitarian version of this theory, the states in question are pleasures and pains. In other versions of consequentialism, what is valuable is the satisfaction of desire, or other states and activities that according to the theory are intrinsically valuable. The value of an action, rule, or policy is given by the aggregate value of its consequences. The effects of an action or policy on animals must be included in that aggregate because animals are the subjects of these positively and negatively valuable states and conditions.

In the Kantian tradition, it is the creature (person or animal) himself or herself who is regarded as having value, and what is good for that creature matters morally because it is what is good for a valuable being, one who is an end-in-itself.[6] Your pleasures and pains, for example, matter because they matter to you and you matter—you have value. According to one of Kant's formulations of the categorical imperative, a creature who has this kind of value should always be treated as an end-in-itself and should never be used as a mere means to the ends of others. Moral requirements are derived from that injunction. You claim the standing of an end-in-itself when you take what is good for you (including the good of your loved ones) to be objectively valuable, in the sense that (1) what is good for you and your loved ones provides you with reasons to choose actions that will promote it, and (2) it also licenses you to require others to respect your reasons as long as you respect theirs. It may also give others a reason to help you to achieve the things that are good for you. Morality is a set of prescriptions generated from

[5] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, ed. Wilfrid Harrison. (Blackwell 1948). John Stuart Mill, *Utilitarianism*, ed. George Sher. (Hackett 1979).

[6] Kant, *Groundwork* (n 2). see also Christine M. Korsgaard, *Fellow Creatures: Our Obligations to the Other Animals*. (OUP 2018).

the point of view of people who regard themselves and each other as ends-in-themselves, and so regard themselves as legislating moral laws reciprocally, for one another.

Kant believed that animals are not ends-in-themselves, because they are not rational and therefore cannot participate in a system of reciprocal rights and obligations. But it can be argued that we take what is good for us to be the source of reasons for action not because it is what is good for a rational creature, but simply because it is what is good for a sentient creature who experiences the goodness or badness of what happens to him. In that case, we should extend the standing of end-in-itself to the other animals.[7]

IV. Two Theories of Rights

If the good of animals matters 'for its own sake' in one of the two senses described above, then animals are at least possible subjects of rights. But do they actually have rights, or should they? Philosophers usually accept one of two theories of the function of rights. According to the 'interest theory,' the function of rights is to protect the important interests of the right-holder. According to the 'will theory,' the function of rights is to define a sphere within which the right-holder has a kind of sovereignty or dominion, a sphere of free choice and of normative control over what others may do. If an object is your property, for example, you may decide how to use it, and determine whether and how others may use it.

It is widely acknowledged that neither of these theories completely explains the range or implications of the rights that most of us believe in. Importantly for our purposes, it is often argued that the will theory has trouble explaining how creatures who cannot exercise the kind of free choice or normative control in question—because they are children, animals, or suffer from severe intellectual or mental health problems—can possibly have any rights. Despite these difficulties, the idea that one of these accounts of what rights are for must be roughly correct remains prevalent.

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[7] For a fuller version of this argument see Korsgaard, *Fellow Creatures*, ibid. Chapter 8.

In this chapter I will defend a third possibility that arises when we notice what these two theories have in common. They both represent a commitment to the value of the individual. What I mean is this: there is a certain set of conditions and activities that we think of as pertaining especially to an individual's own life: the pleasures and pains that she experiences, the actions that she does, the thoughts that she thinks, her relationships to her offspring and her associates, and in the case of a human being, her career, her marriage, and her standing in society. All of these things have value, good or bad, for the individual herself, but potentially also for others. These two kinds of value can come into conflict. When we say that someone has a right, we assign a certain priority to the value that some feature that an individual's life has for him over the value that it might have for others. Rights express the idea that the value we should assign to things is the value they have for the individuals in whose lives they play an important part. Of course this thought is vague because it is not always easy to say whether some condition or activity pertains more to my life or to yours. But on this conception, the idea of a right depends on the idea that it is individuals who are the primary source of value. We may call this the 'individual value' theory of rights.

Because of this focus on the value of the individual, it is not surprising that individuals who have traditionally been used for the purposes of others—slaves who were thought of as primarily providing labour for other people or women who were thought of as primarily serving as wives and mothers for men—have found it natural to frame their demands in terms of the concept of rights. To have rights is to have society recognize that you have a life of your own, the value of which is primarily its value for you. According to the individual value theory of rights, to say that animals have rights is to say that we should prioritize the value that animals' lives have for the animals themselves over the value that their lives might have for human beings.

V. The Interest Theory of Rights

Since animals have important interests, it is easy to accommodate the idea of animal rights to the interest theory.[8] The interest theory is favoured by philosophers in the utilitarian tradition.

It is logically possible to believe that each of us has a natural right—a right that exists independently of any particular legal order—to have his or her important interests protected. But utilitarians characteristically reject the idea of natural rights, and regard rights simply as a social device for maximizing utility. How do rights do that? According to John Stuart Mill, there are some good things—our lives, our property, our physical safety—that can have no value for us unless we have some security in their possession.[9] Society provides the needed security by granting us rights.

A complication is that one of the things we need to be secure against is certain losses that might be imposed upon us as a result of utility calculations themselves. Imagine a world in which you may legitimately be executed if enough people would take pleasure in your death. The right not to be killed has to serve as a 'trump' over aggregate utility if we are to avoid the resulting insecurity, but utilitarians do not believe rights should always serve as trumps. They are committed to the idea that rights can be overridden when that is clearly what does the most good. The calculations we would have to engage in to determine whether a given right may or may not be overridden would be complex, but the resulting enforceable rights could turn out to be rather weak. This is why utilitarians, even those who are important champions of the moral claims of animals, often think that the use of animals—or even people—in invasive medical experiments can be justified if it does enough good.[10]

In any case, it does not look as if Mill's security argument supports animal rights. Presumably, domestic animals enjoy life more when they are secure in the sense that they expect to be loved

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[8] Stucki defends the interest theory in her paper "Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights" (n. 4).

[9] Mill, *Utilitarianism* (n 5) 52-53.

[10] Peter Singer, *Animal Liberation* (Harper Collins 2009) 85.

or at least well-treated and have their needs met. But they cannot have any expectations about whether their rights to good treatment are going to be upheld by society. They cannot get any security from knowing that they have rights, because they cannot know that they have them.

The problem here is that according to the interest theory the function of rights is to protect an individual's important interests, but the utilitarian needs a further reason to do that. He needs to show that protecting individual interests promotes general utility. If that reason comes from the security that we get from knowing that we have rights, there is little reason to give rights to animals. This is not a problem with the interest theory of rights itself, which by itself does suggest a possible ground for animal rights. But it is a problem with its deployment by utilitarians.

VI. The Will Theory and the Individual Value Theory

The will theory emphasizes the idea that an individual should exercise control over the important features of her own life. She should be the one who chooses, as far as possible, what she should do and say and think, how she should live, and how she will use the objects she needs in order to pursue her projects. She should not be forced to live and act for the sake of the good of others, or the purposes others have for her.

The will theory, which is associated with the Kantian tradition, at first seems unfriendly to the idea of animal rights. In the Kantian tradition, as I mentioned before, what distinguishes rational beings from non-rational ones is our ability to think about the grounds of our beliefs and actions, and to ask ourselves whether those grounds constitute good reasons for our beliefs and actions or not. Because we can be motivated to refrain from an action when we determine that our reason for doing it would be a bad one, we have the capacity to be self-governing. In this metaphysically undemanding sense, rational beings have free will, and our rights and our obligations are both supposed to spring from that.

But most of us think that animals do not have free will even in this undemanding sense. They may have 'reasons' for their actions, but they cannot think about whether their reasons are good or bad, and shape their actions accordingly. Instead they are governed by a conception of the good that is written into the instinctive ways in which they respond to their environments and

to each other, a conception of the good that they have no ability to evaluate. If the purpose of rights is to give us the scope to live as self-governing beings, then it might seem as if there no purpose to according animals rights.

But this conclusion would be too hasty. Kant himself defined the kind of freedom that rights are meant to protect not as the ability to exercise free will, but as independence from being constrained by another's will.[11] In this sense, animals can be free or unfree: they can live in accordance with their own purposes, or be subject to the purposes of others. In this way, the 'individual value' theory of rights described above can be seen as a natural extension of the will theory. What connects them is Kant's idea that to be free is to have the conditions and activities of your own life determined by your own purposes rather than by the purposes that others may have for you. In the case of animals this does not amount to having a right to live in accordance with their own free choices in the same sense that human beings do. But on the assumption that animals generally pursue their own good, it does amount to animals having a right to live in accordance with their own good, rather than in accordance with the good of human beings.

VII. Animal Rights and Animal Law

I have been assuming that giving a philosophical foundation to animal law rests in making a case for animal rights. It is common enough in the liberal tradition to suppose that an important function of law, probably the most important, is the enforcement and protection of rights. But we need to say more to explain why, even if animals are capable of having rights, they have rights that should come under the protection of our laws: rights against human beings. To have a right is to be in a relational condition: your rights are held against someone, either other individuals, society, or some other group. So we need to say more about who exactly animals have rights against. Certainly not each other, for someone can only have a right against another if that other can have an obligation to him, and non-human animals are not capable of

[11] Immanuel Kant, *The Metaphysics of Morals*, trans. Mary Gregor. Cambridge: Cambridge University Press (CUP 1996) 30, 6:237.

obligation. Are the rights of animals then against human individuals? That is reasonable, but I do not think it is the end of the story. I think that traditional theory of natural rights provides the basis for a case that animal rights are rights against human societies and even against humanity as a whole.

The traditional theory of human natural rights is not just a story about a two-way relationship. It is a three-way relationship, one between two human beings and things (including actions) in the material world. The story has often been told in theological terms, and starts from the claim that God gave human beings the world to use in common. If that is so, if we possess the world in common, I violate your rights by using the natural, material resources of the world to support myself in ways that prevent you from using it to support yourself. Even without the theology, we may hold that until there is private property, the world belongs equally to us all. When we do claim private property, it must be in a way that is consistent with the good, or the consent, of all of its original 'owners.' This idea is reflected, for example, in John Locke's famous claim that when we claim private property, we must leave 'enough and as good' for others.[12] The traditional theory treats animals as among the natural resources God gave human beings to use. But once we grant that animals are ends-in-themselves, whose good matters for its own sake, we should regard them as among the common 'owners' of the natural world.

To see why this matters we need to have two more ideas in place. First, having exclusive or private right to some part of the world is not just a matter of having an exclusive right to the use of the natural resources found there. That is inseparable from having a right to control what happens on that land. It is from this fact that we derive the idea that when a group of people occupy a shared territory, they have the collective right to make laws determining what people may or may not do in that territory. Second, human beings have taken over control of territories that we and the other animals once held in common, and we human beings now determine what people and animals may or may not do in those territories. We do that through the laws we

[12] John Locke, *Second Treatise of Government*, ed. C.B. MacPherson (Hackett 1980) 21.

make. By now, human beings have done this with pretty much all of the territory on earth, certainly all of its terrestrial surfaces.

If we view animals as among the original 'owners' of the world, we will not see them just as natural resources who happen to be sentient. We will see them as a population subject to rule from outside, like the original inhabitants of a colony. We human beings have taken control of territories that are by nature as much theirs as they are our own. Admittedly, they are a necessarily subject population, since we cannot invite them to share control of the territory, say by entering into democratic relationships with us. Nevertheless, we owe them the treatment we would owe to any other subject population. We must exercise our control in ways that are good for them, by respecting their rights and bringing them under the protection of our laws.

An attractive feature of this view is that it suggests we might have different legal obligations to different groups of animals depending on the kind and extent of control we exercise over their lives.[13] It seems natural to suppose that domestic animals, the wild animals who live among us, and the wild animals who live apart from us, should have different legal rights. Domestic animals, every aspect of whose lives depends on us, might have extensive rights against us, while wild animals might only have a right that we do not destroy their habitat. Animals whose habitat we do not destroy might only have a right against cruelty. The rights of animals would vary with the extent to which we have taken control of the world and their lives away from them, and the form that our usurpation takes.

VIII. Conclusion

The view I have proposed here is that the philosophical basis of animal law is an acknowledgment of animal rights. To accord them rights is to recognize their value as ends-in-

[13] Clare Palmer helpfully develops the idea that our moral duties to animals vary with our relationships to them in *Animal Ethics in Context* (Columbia 2010). The idea that domesticated and wild animals and wild animals who live within the boundaries of human societies have or should have different political rights is also spelled out in Donalison and Kymlicka, *Zoopolis* (OUP 2011).

themselves, whose lives should be accorded the value that they have for the animals themselves, not the value they have for human beings. They have those rights as against humanity, in particular, because humanity has taken control of the world that we share with them and have reshaped everything about it, sometimes including intimate features of the lives of the animals themselves, in accordance with our own purposes. The way we have taken over the world is by taking control of all of its territory, and determining what may or may not be done on that territory, and the way we do that is by making laws. The only remedy for a problem that arises from the fact that human beings control the world through our laws is to make laws that mitigate the effects of that control. Because humanity as a whole has taken over the world that we and the other animals by nature possess in common, animal law is indeed a global issue.