

REVIEW ESSAY

ANIMALS AND THE LAW: A NEW LEGAL FRONTIER?

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I INTRODUCTION

The general area of animal law is not one that has excited much scholarly interest in Australia. There are, so far as I am aware, no Australian legal texts exploring the area. Philip Jamieson authored a number of journal articles addressing a range of ‘animals and the law’ issues in the late 1980s and early 1990s.¹ However, since then there have only been a handful of further articles in the field.² Legal looseleaf services are a useful source of black-letter law in the

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¹ See, eg, Philip Jamieson, ‘On Charity’s Edge: The Animal Welfare Trust’ (1987) 13 *Monash University Law Review* 1; Philip Jamieson, ‘A Question of Criminal Guilt: Mens Rea under Animal Protection Law’ (1988) 15 *University of Queensland Law Journal* 75; Philip Jamieson, ‘Duty and the Beast: The Movement in Reform of Animal Welfare Law’ (1991) 16 *University of Queensland Law Journal* 238; Philip Jamieson, ‘The Legal Status of Animals under Animal Welfare Law’ (1992) 9 *Environmental and Planning Law Journal* 20.

² See, eg, Mark Gregory, ‘Commerce and Cruelty: Should Battery Farmers Be Exempted from Animal Welfare Legislation?’ (1994) 19 *Alternative Law Journal* 186; Jane Nosworthy, ‘The Koko Dilemma: A Challenge to Legal Personality’ (1998) 2 *Southern Cross University Law Review* 1; Jim Maspero, ‘An Act that Lacks Some Bite: Prosecutions under the *Companion Animals Act 1998*’ (2000) 38(2) *Law Society Journal of New South Wales* 60; Keith Akers and Mirko Bagaric, ‘No Absence of Malice towards the Gallus’ (2001) 18 *Environmental and Plan-*

area: *Halsbury's Laws of Australia*, the most thorough, has a separate entry on animals;³ whilst *Laws of Australia* incorporates legal issues relating to animals under other legal categories (such as torts).⁴ Otherwise, very little has been written in this area in Australia. Furthermore, no Australian law school has, as yet, offered an undergraduate course on animals and the law, although in a national first, the Faculty of Law at The University of New South Wales has introduced an 'Animal Law' course for postgraduate students.⁵

The paucity of legal scholarship and teaching in the area of animals and the law is puzzling, particularly given the general interest in, and intense debate about, the treatment of animals by humans over the last 30 years.⁶ The lack of interest in Australia is ironic, as it was the work of the Australian philosopher Peter Singer, in the highly influential book *Animal Liberation*,⁷ which can be said to have reinvigorated much of the modern debate about the status of animals.

By contrast with the Australian uninterest, the United States legal academy has been actively exploring legal issues relating to animals for a number of years. There is a large and growing body of literature in the area, across monographs, textbooks and journal articles too numerous to cite. The Lewis and Clark Law School, in Portland, Oregon, has established the National Center for Animal Law and publishes an annual journal, *Animal Law*.⁸ Approximately 40 law schools in the United States offer courses on animals and the law.⁹ The legal profession in the United States has been no less active. A large number of State Bar Associations have established animal law sections or committees.¹⁰ Activist attorneys established the independent Animal Legal Defense Fund ('ALDF') in 1981. The ALDF not only provides free legal advice and assistance to prosecutors in

ning Law Journal 505; Paul Martyn, 'What's New Pussycat: Caught in the Act' (2001) 21(11) *Proctor* 21; Katrina Sharman, 'Sentencing under Our Anti-Cruelty Statutes: Why Our Leniency Will Come Back to Bite Us' (2002) 13 *Current Issues in Criminal Justice* 333; Steven White, 'Legislating for Animal Welfare: Making the Interests of Animals Count' (2003) 28 *Alternative Law Journal* 277; George Seymour, 'Animals and the Law: Towards a Guardianship Model' (2004) 29 *Alternative Law Journal* 183.

³ Butterworths, *Halsbury's Laws of Australia*, vol 1(2) (at 4 March 2005) 20 Animals.

⁴ Law Book Company, *Laws of Australia* (at 4 March 2005) General Index, 'Animals'.

⁵ This course was first offered in February 2005. See The University of New South Wales, *Animal Law Subject Page* (2005) <<http://www.handbook.unsw.edu.au/postgraduate/courses/2005/LAWS9194.html>>. As for the legal profession more generally, the New South Wales Young Lawyers Animal Rights Committee seeks to raise awareness of animal rights issues among both the legal profession and the general public: see New South Wales Young Lawyers, *Animal Rights Committee* (2005) <<http://www.lawsociety.com.au/page.asp?partid=6153>>.

⁶ The use of the terms 'human' and 'animal' is not intended to assert that humans are not animals. Rather, common parlance is adopted as a means of distinguishing between humans and animals. It should be acknowledged that some authors in this area prefer terms that are less susceptible to category confusion, the most common alternative labels being 'humans' and 'non-human animals' respectively.

⁷ Peter Singer, *Animal Liberation* (1975).

⁸ See Lewis and Clark Law School, *National Center for Animal Law* (2005) <<http://www.lclark.edu/org/ncal>>; Lewis and Clark Law School, *Animal Law* (2005) <<http://www.lclark.edu/org/animalaw>>.

⁹ See Animal Legal Defense Fund, *Student Animal Legal Defense Fund* (2005) <<http://www.aldf.org/students.asp?sect=resources>>.

¹⁰ See Animal Legal Defense Fund, *Bar Association Animal Law Sections and Committees* (2005) <<http://www.aldf.org/associations.asp?sect=resources>>.

cruelty cases, but also maintains a national database of cruelty cases, and provides support for lawsuits that test the boundaries of animal law.¹¹

It is from the United States environment of significant scholarly activity and an engaged legal profession that a new, lively and important collection of essays has emerged, *Animal Rights: Current Debates and New Directions*.¹² The majority of contributing authors are legal academics and legal practitioners, or both, with the remainder comprised of philosophers and neuroscientists. While all of the authors are based in the United States, the issues explored in the essays transcend any particular jurisdiction.

Animal Rights is divided into two parts. Contributors to Part I focus on prevailing issues in the animal rights versus animal welfare debate, while those in Part II offer some new theoretical and practical approaches to the relationship between humans and animals. *Animal Rights* is an avowedly ambitious book, with the editors seeking to ‘bring some new clarity to the animal rights debate’, and to ‘chart out some new directions for both theory and practice’, so as to ‘provide guidance for many years to come.’¹³ The underlying rationale of the book is that ‘in at least some sense, almost everyone believes in animal rights. The real question is what that phrase actually means.’¹⁴

II ANIMALS AS LEGAL OBJECTS

A useful starting point when considering animals and the law is to acknowledge that domesticated animals exist as the property of humans, whether as companion animals, animals used in scientific research, animals performing for entertainment, or farmed animals. The question thus becomes: what is the nature and scope of this proprietary interest? As *Halsbury's Laws of Australia* puts it, ‘domestic animals, like other personal and moveable chattels, are the subject of absolute property.’¹⁵ By itself, this would suggest that there are no constraints on the ways in which humans may deal with animals. They may do so compassionately, sensitively and respectfully; equally though, under a regime of ‘absolute property’, they may treat animals insensitively and in a way that is gratuitously cruel, without legal ramifications. Of course, in practice parliamentary intervention, in the form of anticruelty and other animal welfare statutes, places limits on the rights of absolute property that humans may exercise in relation to animals.¹⁶ A central issue is whether such intervention adequately addresses the position of animals, or whether the fundamental premise of property in animals as vested

¹¹ Animal Legal Defense Fund, *Animal Legal Defense Fund* (2005) <<http://aldf.org/default.asp?sect=home>>.

¹² Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (2004) (*Animal Rights*).

¹³ Cass R Sunstein, ‘Introduction’ in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (2004) 3, 4.

¹⁴ *Ibid.*

¹⁵ *Halsbury's Laws of Australia*, above n 3, [20–5].

¹⁶ See, eg, *Animal Welfare Act 1992* (ACT); *Prevention of Cruelty to Animals Act 1979* (NSW); *Animal Welfare Act 1999* (NT); *Animal Care and Protection Act 2001* (Qld); *Prevention of Cruelty to Animals Act 1985* (SA); *Animal Welfare Act 1993* (Tas); *Prevention of Cruelty to Animals Act 1986* (Vic); *Animal Welfare Act 2002* (WA).

absolutely in humans needs to be overturned. Arguments concerning this issue have most often occurred between those committed to the idea of animal welfare and those committed to the idea of animal rights, including the right for animals not to be regarded as property. This debate forms the focal point of Part I of *Animal Rights*.

III ANIMAL WELFARE, PROPERTY AND ANIMAL RIGHTS

Modern animal welfare law is based, broadly speaking, on utilitarian principles. By protecting animals from cruelty, such legislation aims to improve the quality of life enjoyed by animals.¹⁷ While once expressed in purely negative terms (such as the duty not to be cruel), such legislation is increasingly incorporating a positive duty of care towards animals — for example, to provide adequate food and accommodation.¹⁸ Incorporating such a duty into legislation is an important development, since it helps to clarify what constitutes cruelty, as well as some basic obligations inherent in the proper care of animals. However, most animal welfare legislation is problematic in that it inevitably reflects an unbalanced trade-off between human and animal interests. This is evidenced through the use of legislative language that qualifies or limits the pain that can be imposed on animals to that which is not unjustifiable, unnecessary or unreasonable.¹⁹

For Singer, a utilitarian, the qualified protection provided by animal welfare legislation reflects a failure to give equal consideration to the interests of animals. In turn, this failure reflects ‘speciesism’ — an irrational, discriminatory and morally unjustifiable preference for the interests of humans over animals. Why is it irrational and morally unjustifiable to prefer the interests of humans to animals? The answer, suggests Singer, derives from the intellectual capacities of

¹⁷ Animal welfare groups also emphasise the benefits that flow to humans from the protection of animals, reflecting the instrumentalist idea that cruelty to animals leads to degradation in human relations. Criminologists and other researchers are exploring the idea that there are links between cruelty to animals, especially by young persons, and a propensity to commit violent criminal offences against other humans: see, eg, Paul Wilson and Gareth Norris, ‘Relationship between Criminal Behaviour and Mental Illness in Young Adults: Conduct Disorder, Cruelty to Animals and Young Adult Serious Violence’ (2003) 10 *Psychiatry, Psychology and Law* 239; Mark Dadds, Cynthia Turner and John McAloon, ‘Developmental Links between Cruelty to Animals and Human Violence’ (2002) 35 *Australian and New Zealand Journal of Criminology* 363; Sharman, above n 2, 334; Randall Lockwood, ‘Animal Cruelty and Violence against Humans: Making the Connection’ (1999) 5 *Animal Law* 81. In Queensland, the Royal Society for the Prevention of Cruelty to Animals (‘RSPCA’) is consulting with the Queensland Police Research Unit and the Department of Child Safety to further research and information sharing in this area: RSPCA Queensland, ‘RSPCA Qld Defends “Disturbing” Images in Animal Cruelty Campaign’ (Press Release, October 2004) <http://www.rspcaqld.org.au/links_061004.pdf>. This is one of the first Australian examples of the process, which is better established in the United States and the United Kingdom, of the integration of ‘animal protection processes [with] child and family welfare and crime prevention bodies’: Dadds, Turner and McAloon at 364.

¹⁸ See, eg, *Animal Care and Protection Act 2001* (Qld) s 17; *Animal Welfare Act 1993* (Tas) s 6. Cf *Animal Welfare Act 2001* (ACT) s 8(2)(a), which is expressed in negative terms.

¹⁹ See, eg, *Animal Care and Protection Act 2001* (Qld) s 18; *Animal Welfare Act 1993* (Tas) s 8(1); *Animal Welfare Act 2001* (ACT) s 8(1).

humans and animals.²⁰ Many animals have developed intellectual capacities which are equal to or greater than those in some humans (such as very young children and the intellectually impaired). Moreover, just like humans, animals are sentient and capable of feeling pain. If it is wrong, as a general proposition, to inflict suffering on very young children and the intellectually impaired, how can the infliction of suffering on animals with comparable or greater intellectual capacities be justified? Singer may regard animal welfare legislation as a positive development, but would argue that to be effective such legislation needs to consider the interests of animals and humans equally.

Gary Francione, a legal academic who has written extensively on the status of animals,²¹ rejects a welfarist approach altogether. In his chapter, Francione argues that most animal welfare legislation is based on an understanding of animals as commodities (evidenced by the significant exemptions and qualifications typical of such laws, including the use of animals for food and for scientific research).²² Francione also embraces the principle of equal consideration of the interests of animals, thus rejecting the speciesism inherent in treating animals as property.²³ The fact that animals are sentient — that is, conscious, self-aware beings — means that they should not be made to suffer. The way to truly protect animals from suffering is to recognise their basic right not to be treated as property. Although making an argument that is in some respects similar to that of Singer, Francione departs from Singer in important ways. For example, Francione rejects Singer's 'hard utilitarianism'.²⁴ Whereas Singer would accept that the painless killing of animals is acceptable (even if unlikely to be achieved in practice), Francione would reject this on the basis that it perpetuates the paradigm of human exploitation of animals. In addition, Singer does not squarely address what Francione considers to be a key problem with the characterisation of animals as property: that their interests will almost always be overborne by those of their human owners, so that it will never be possible to properly apply the principle of equal consideration.

Francione calls for a reconceptualisation of the status of animals based on a 'right' for animals not to be treated as property.²⁵ Of course, welfarist claims for the ethical treatment of animals are also, in a sense, 'rights' claims (for example, the right for animals to be free from cruelty). Indeed, Sunstein goes so far as to suggest that some animal welfare legislation almost amounts to 'a bill of rights

²⁰ Peter Singer, 'Ethics beyond Species and beyond Instincts: A Response to Richard Posner' in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (2004) 78, 79.

²¹ See, eg, Gary Francione, *Introduction to Animal Rights: Your Child or the Dog?* (2000); Gary Francione, *Rain Without Thunder: The Ideology of the Animal Rights Movement* (1996); Gary Francione, *Animals, Property, and the Law* (1995).

²² Gary Francione, 'Animals: Property or Persons?' in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (2004) 108, 116–20. For a consideration of the shortcomings of animal welfare law in the Australian context, see White, above n 2.

²³ Francione, 'Animals: Property or Persons?', above n 22, 112–13, 120–2, 131.

²⁴ *Ibid* 125, 132–4.

²⁵ *Ibid* 124–5.

for animals²⁶; and that an increased commitment to the enforcement of existing law could achieve a great deal, regardless of claims for the recognition of ‘rights’ in a formal sense.²⁷ It is also true that welfarists and rights adherents may agree on the best approach to a wide range of issues affecting animals. However, as argued above, there will be circumstances where a rights-based conception of animals, as compared to a welfarist approach, will lead to differing conclusions about their treatment.²⁸ How can the potentially more radical agenda of recognition of animal rights be justified?

A common argument made for the recognition of animal rights is that some animals, at least, are not so very different from humans. Steven Wise, a legal practitioner and leading jurist in the area of animals and the law,²⁹ argues that it is possible to categorise animals according to the probability that they have ‘practical autonomy’, which encompasses the ideas of sentience and consciousness, of desire and an intention to fulfil that desire.³⁰ Thus, basic liberty rights should be recognised in animals to the extent that such autonomy is possessed. For some, this may imply legal personhood (as would be the case for chimpanzees), while for others with lower practical autonomy, a watered-down version of legal rights may be more appropriate. However, for others still, it may be simply impossible for us able to reach a view as to the extent of their autonomy. The ‘precautionary principle’ should be observed in these cases, and legal reality adjusted in accordance with new empirical evidence. Wise wants to use biological determinism to persuade judges to take what he calls the ‘first, most crucial step’³¹ of overcoming the status of animals as property, and to invest them with legal personhood, so that they can be the bearers of rights.

In challenging the deontological arguments of Wise, Richard Posner’s contribution raises two principal objections. First, tying recognition of rights to

²⁶ Cass R Sunstein, ‘Can Animals Sue?’ in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (2004) 251, 255.

²⁷ *Ibid* 255, 261. See also Cass R Sunstein, ‘Standing for Animals (With Notes on Animal Rights)’ (2000) 47 *UCLA Law Review* 1333, 1342, 1363–4, 1366.

²⁸ Tom Regan, a prominent animal rights philosopher who is not a contributor to *Animal Rights*, provides a detailed consideration of the implications of a rights approach for the treatment of animals, including the need for vegetarianism and the ultimate demise of the agricultural industry, in his influential work: Tom Regan, *The Case for Animal Rights* (1983) ch 9. There are significant similarities between Regan’s approach and that of Francione, although Francione argues that rights should extend to any sentient being, whereas Regan would recognise rights in a narrower category of animals who have ‘preference autonomy’. Francione also claims that Regan fails to address the issue of the status of animals as property: Francione, ‘Animals: Property or Persons?’, above n 22, 142 fn 98. In fact, Regan addresses this issue in two ways: firstly, by arguing that property rights are not absolute and may be constrained by moral rights expressed in legal form; and, secondly, by maintaining that ‘the very notion that farm animals should continue to be viewed as legal property must be challenged’: Regan at 348, see also 347–9.

²⁹ His most significant work is Steven Wise, *Rattling the Cage: Toward Legal Rights for Animals* (2000). More recently, Wise has published Steven Wise, *Drawing the Line: Science and the Case for Animal Rights* (2002).

³⁰ Steven Wise, ‘Animal Rights, One Step at a Time’ in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (2004) 19, 32.

³¹ *Ibid* 41.

cognitive capacity is inherently flawed.³² For, although cognitive capacity might be a necessary precondition to the exercise of some rights (such as voting), it is not an absolute prerequisite for all rights. The one-day old infant has certain important rights, regardless of his or her extremely limited cognitive capacity. Further, if a computer were to be developed which displays ‘consciousness’, a rights theory premised on cognitive capacity would be logically compelled to accept that such a computer could be a bearer of rights. Secondly, Posner criticises Wise’s attempt to argue that a court that recognised rights in cognitively well-developed animals such as chimpanzees would be acting in a way consistent with a step by step development of the common law.³³ For Posner, this amounts to confusing a *reason* for changing the law with a *rationalisation* for doing so.³⁴ Posner seems to be suggesting that we are all realists now, and if courts are persuaded to change the law in the way advocated by Wise, they will do so for other reasons, using the rationalisations provided by advocates such as Wise merely ‘to conceal the novelty of their actions.’³⁵ If they are to change the law, they need to know the consequences. For Posner at least, recognising rights for animals raises as many questions as it answers.

Richard Epstein makes the rhetorical charge that contemporary arguments for recognition of animal rights are ‘altruistic sentiments’ reflecting the ‘indulgence of the rich and secure’.³⁶ The use of such descriptors is provocative, but although it might raise the hackles of those agitating for a change in the status of animals, it adds little to assessment of the justifications put forward for change. On this front, perhaps not surprisingly, Epstein is firmly opposed to any radical change in the present legal conception of animals. Epstein argues that the changes in legal status accorded to women and slaves do not provide a defensible argument for changing the status of animals.³⁷ This is because animals have capacities that are more limited than those of women and slaves (that is, more limited than those of humans), so that it is not possible to create full parity. Nor is partial parity possible, since it raises too many difficult questions: how should humans arbitrate differences between animals? Would a human be justified in using force against an animal in self-defence? If the answer to the latter question is yes, this implies that although animals may be granted limited rights, they would still be denied any moral agency, which is incongruous with rights theory. Epstein also highlights the difficulty in drawing boundaries: although Wise makes a case for recognition of rights in animals with ‘higher’ levels of consciousness and cognitive capacities, the line Wise draws is not clear cut, and would be unlikely to be accepted by other animal rights advocates.

³² Richard Posner, ‘Animal Rights: Legal, Philosophical, and Pragmatic Perspectives’ in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (2004) 51, 54–6.

³³ *Ibid* 56–7.

³⁴ *Ibid* 58.

³⁵ *Ibid*.

³⁶ Richard Epstein, ‘Animals as Objects, or Subjects, of Rights’ in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (2004) 143, 148.

³⁷ *Ibid* 151.

IV THE FALSE DISTINCTION BETWEEN THEORETICAL PURITY AND PRAGMATISM

The rejection by Posner and Epstein of any radical shift in our legal conception of animals runs deeper than objections to rights-based arguments of the type offered by writers such as Wise and Francione. Both Posner and Epstein accept that the current treatment of animals by humans is in some respects unsatisfactory and regrettable. However, they are both deeply sceptical that the response to such concerns can be found in philosophical arguments.

Both articulate a narrow objection to philosophical arguments of the kind advocated by Singer. Posner argues that humans are ‘humancentric’, which means that outcomes in which the interests of animals prevail over those of humans, as logically suggested by Singer’s utilitarianism, are unlikely to be accepted.³⁸ Epstein points out the difficulties in identifying which interests are worthy of recognition in a calculation of social utility, and in measuring how suffering is increased or reduced.³⁹

More generally, Posner contends that philosophy is an inconclusive determinant of animal rights, and that it is therefore of little use to those concerned for the wellbeing of animals.⁴⁰ Philosophy has played no role in changing moral norms around issues of race, sex and gender. Instead, philosophy follows rather than leads such changes. Moral conceptions of our relationship with animals are no exception to this.

If theories of rights or utility provide no clear basis for how we should treat animals, where do we turn? For both Posner and Epstein, the answer lies in pragmatism. Posner argues that our moral intuition guides our treatment of animals, and this intuition will be driven by empathy, not by rationality (as embodied, for example, by hard utilitarianism).⁴¹ If our moral intuitions are shown to be based on wrong facts, our intuitions may change, but otherwise they are not susceptible to rational challenge. Given this empirical reality, an approach consistent with Posner’s pragmatic perspective would argue that an insistence on the implementation of a full-blown rights agenda is misconceived, since it risks sacrificing modest improvements in human relationships with animals for an unattainable theoretical purity. Change lies in making the pain of animals our pain, and in persuading humans that they can ease this pain without significantly affecting their standard of living.⁴² Similarly, Epstein states that it

³⁸ Posner, above n 32, 51.

³⁹ Epstein, above n 36, 152–6.

⁴⁰ Posner, above n 32, 63–6.

⁴¹ *Ibid* 66.

⁴² This argument gives rise to interesting implications regarding judgements made of the activities of radical animal rights groups. On the one hand, if the treatment of animals is to be improved through empathy, which is stimulated by exposing the hidden, horrific practices regularly carried out against animals, then this might justify radical action, including breaking the law. Consistent with this view, Posner argues that Singer’s seminal text, *Animal Liberation*, above n 7, is significant not by reason of the philosophical and ethical arguments advanced therein, but because it graphically exposes cruel practices inflicted on animals: Posner, above n 32, 67. On the other hand, and I suspect that this would be Posner’s position, radical action risks alienating these groups from law-abiding citizens. Moreover, it fails to answer whether the elimination of impugned practices can be achieved without substantial impact upon our standard of living.

would be ‘insane’ to treat animals as inanimate objects,⁴³ and that we should take action to minimise the suffering of animals where this does not come at the expense of human interests.

Nevertheless, why should we make the pain of animals our pain, or take action to minimise animal suffering, particularly given the dismissal by Posner and Epstein of the philosophical justifications for this conduct which are offered by Singer and Francione? Both Epstein and Posner want to jettison the absolutism of those who advocate recognition of animal rights or equal consideration of animal interests, arguing that this purity comes at the expense of jeopardising more modest improvements in our treatment of animals.⁴⁴ However, this is problematic as they offer a highly contestable deconstruction of moral justifications for respecting the interests of, or conferring rights on, animals, yet provide no principled alternative other than a vague pragmatism. Furthermore, as Singer identifies in a generally acerbic response to Posner, it is disingenuous to reject philosophy as being of no value, as though pragmatism is not itself a philosophical position.⁴⁵

V BEYOND UTILITARIANISM AND UNIVERSAL RIGHTS: ALTERNATIVE THEORISING ABOUT ANIMALS

If the pragmatic approach of Posner and Epstein is an unsatisfying response to legitimate questions that can be raised about the arguments of Singer, Francione and Wise, there is no shortage of alternative conceptions of the relationship between humans and animals. A strong theme that emerges from a number of essays in Part II of *Animal Rights* is the need to understand animals on their own terms, as far as this is possible, or at least as a part of a shared community of creatures, which includes humans. This theme is explored in different ways, but the underlying proposition is a questioning of the claim that universal theories of utility or moral rights can provide a panacea for the troubled relationship between humans and animals.

In her 2001 article, ‘Animal Rights: The Need for a Theoretical Basis’, Martha C Nussbaum argued that existing moral theories about animals were inadequate, and that a new way of thinking about justice for animals needed to be developed.⁴⁶ In *Animal Rights*, Nussbaum begins the response to her own challenge by considering, and rejecting as inadequate, two theories of justice which might be applicable to animals: contractarianism and utilitarianism.

⁴³ Epstein, above n 36, 156.

⁴⁴ Posner, above n 32, 58–9; Epstein, above n 36, 148–9, 152.

⁴⁵ This debate between Singer and Posner reflects an earlier online debate between the two: Peter Singer and Richard Posner, *Dialogues: Animal Rights* (11–15 June 2001) Slate.com, <<http://slate.msn.com/id/110101/entry/110109/>>.

⁴⁶ Martha C Nussbaum, ‘Animal Rights: The Need for a Theoretical Basis’ (2001) 114 *Harvard Law Review* 1506.

In regards to the first theory, contractarianism, Rawls, unlike Kant, accepted that we have direct duties to animals — ‘duties of compassion and humanity’ —⁴⁷ but argued that their limited capacity for rationality and moral choice meant they fell outside the boundaries of the contractarian world, and therefore the world of justice. As Nussbaum puts it, ‘[t]he whole idea of a bargain or contract involving both humans and nonhuman animals is fantastic’.⁴⁸ Nussbaum argues that the difficulty with contractarianism is that it conflates two key questions that should be separated: who frames the principles by which justice will be served; and for whom are these principles framed?⁴⁹ For Rawls, the answer to both questions is one and the same: humans.⁵⁰ Although Nussbaum contends that contractarianism is intrinsically incapable of recognising the justice claims of animals, she maintains that how we engage with animals is nonetheless an issue of justice — while the relevant principles of justice will be articulated by humans, these principles can be framed for both humans and animals.⁵¹ The claim for ‘animal justice’ transcends mere compassion or humanity, since animals are both agents and subjects who possess capabilities and are desirous of a flourishing existence.

In regards to the second theory, utilitarianism, Nussbaum acknowledges that it, more than any other ethical theory, has contributed to the increased recognition of animal interests.⁵² By relying on sentience as a guiding principle of moral entitlement, utilitarianism has provided a rational basis for identifying circumstances in which it is wrong to harm animals. Nevertheless, despite how important this has been, Nussbaum argues that utilitarianism has its shortcomings, in particular that it is ‘too homogenizing — both across lives and with respect to the heterogeneous constituents of each life — to provide us with an adequate theory of animal justice.’⁵³ The impersonality of utilitarianism, expressed through requirements such as aggregation of preferences, and the indeterminate nature of identifying pleasure or preference satisfaction, not to mention its essential narrowness, can lead to harsh, confused or inadequate outcomes for animals, just as it can for humans.

In preference to contractarianism or utilitarianism, Nussbaum develops a theoretical approach which is referred to as the ‘capabilities approach’.⁵⁴ This approach is grounded in the idea that humans have a claim to dignity, and to a flourishing life that reflects this dignity. The key human capabilities include: life; bodily health; bodily integrity; senses, imagination and thought; emotions; practical reason; affiliation; play; and control over one’s environment.⁵⁵ How-

⁴⁷ John Rawls, *A Theory of Justice* (1971) 512, as cited in Martha C Nussbaum, ‘Beyond “Compassion and Humanity”’ in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (2004) 299, 300.

⁴⁸ Nussbaum, ‘Beyond “Compassion and Humanity”’, above n 47, 301.

⁴⁹ *Ibid.*

⁵⁰ Rawls, above n 47, 504, as cited in Nussbaum, ‘Beyond “Compassion and Humanity”’, above n 47, 300–1.

⁵¹ Nussbaum, ‘Beyond “Compassion and Humanity”’, above n 47, 302.

⁵² *Ibid.*

⁵³ *Ibid.* 319.

⁵⁴ *Ibid.* 300.

⁵⁵ *Ibid.* 314–17.

ever, what is the moral imperative for respecting this dignity, for wanting to see these capabilities lived out? For Nussbaum, it lies in a sense of wonder about the nature and complexity of human life, which in turn ‘suggests the idea that it is good for that being to flourish as the kind of thing it is.’⁵⁶ Nussbaum then argues that the idea can be extended, by analogy, to species other than humans.⁵⁷ Importantly, her approach is flexible, so that the method of identifying the above capabilities will vary according to what is required for a particular type of animal to flourish. The conclusions about what the application of the ‘capabilities approach’ to animals would require in a public policy sense are tentative, but they include a ban on gratuitous activities such as killing animals for fur, freedom from cruelty and neglect, substantial improvements in the care of animals raised for food and used in scientific research, and the legal recognition of these sorts of entitlements as being held by animals, so that a human guardian has standing to go to court on their behalf.

Similarly to Nussbaum, James Rachels, a moral philosopher, counsels against generalisations in characterising the moral standing of animals.⁵⁸ For Rachels, moral theories since the 1970s, including utilitarianism of the Singer variety and universal theories of rights, suffer from the assumption that ‘the answer to the question of how an individual may be treated depends on whether the individual qualifies for a general sort of status, which in turn depends on whether the individual possesses a few general characteristics.’⁵⁹ Rachels’ argument is that the moral standing accorded to a creature should not be an all or nothing affair.⁶⁰ Different creatures will exhibit, to a greater or lesser extent, the general characteristics typically identified as important in theories of moral standing, such as autonomy, self-consciousness and the ability to feel pain. There is no general answer to the question of how a particular type of creature should be treated. Creatures, including humans, may be treated in many different ways, and determining the method of treatment requires a consideration of their particular characteristics. Creatures may suffer pain, in which case to inflict pain on them is objectionable. It may be objectionable to separate a chimpanzee mother from her baby, because we know that chimpanzee mothers and their babies have an emotional bond similar to that observed between human mothers and their children. On the other hand, it would not be morally wrong to exclude a chimpanzee from a university class or from a choir.⁶¹

Although acknowledging that some rough lines (that is, generalisations) do need to be drawn in order to shape public policy and its manifestation in law, Rachels argues that these need to be contextualised — for example, by reference

⁵⁶ Ibid 306.

⁵⁷ Ibid.

⁵⁸ James Rachels, ‘Drawing Lines’ in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (2004) 162.

⁵⁹ Ibid 166–7.

⁶⁰ David DeGrazia has also argued that the moral status of animals should be a matter of degree: David DeGrazia, ‘Equal Consideration and Unequal Moral Status’ (1993) 31 *Southern Journal of Philosophy* 17.

⁶¹ Rachels, above n 58, 173.

to the setting in which a particular treatment is likely to be imposed.⁶² Rachels thinks that this is reflected in the rationale underpinning animal welfare law, although it is not always visible in the law itself.⁶³

In a somewhat elusive essay, Cora Diamond expresses misgivings about the tendency of the theoretical approaches of Singer and Regan to reduce animals, and humans for that matter, to mere things, to interests, which need to be balanced or protected.⁶⁴ Diamond emphasises instead the ‘creatureliness’ of humans and animals, and believes that if a persuasive argument is to be made for not eating animals it must come from our conceptions of humans and animals *as* humans and animals, and not from a disembodied, abstract application of ideas like ‘interests’ or ‘rights’.⁶⁵ Not surprisingly, then, Diamond rejects reliance on the principle of suffering as a proper justification for treating animals well, not due to unconcern about animal suffering, but because such an approach may be counterproductive. Such a principle is dehumanising and ‘encourages us to ignore pity, to forget what it contributes to our conception of suffering and death, and how it is connected with the possibility of relenting.’⁶⁶ In the end, a moral response to the plight of an animal must come from ‘our hearing it speak — as it were — the language of our fellow human beings.’⁶⁷ At this point, Diamond’s argument becomes less convincing. For one thing, recognising limited rights in animals need not be inconsistent with the sentiments expressed by Diamond; in fact, such recognition may be tangible confirmation that we have been ‘listening’, at least as far as this is possible. In addition, from a legal perspective, it is not at all clear what we are to do when faced with an animal that does not speak to us in ‘the language of our fellow human beings’. A similar problem emerges in Catharine MacKinnon’s feminist reading of the animal rights debate.⁶⁸

When Singer and Wise draw on changed attitudes to sexism in support of their argument for the rejection of speciesism, they are implicitly acknowledging the success of liberal feminist arguments against sexual discrimination. This rhetorical device is suggestive of a broader question — can the animal rights movement learn from the feminist legal critique addressing the historical dominance of men over women?⁶⁹ MacKinnon thinks so, although the lessons to be learned are sobering ones. MacKinnon starts with the observation that as ‘[p]eople dominate animals, men dominate women.’⁷⁰ A number of parallels are

⁶² Ibid 167, 173.

⁶³ Ibid 162–3, 173–4.

⁶⁴ Cora Diamond, ‘Eating Meat and Eating People’ in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (2004) 93.

⁶⁵ Ibid 94–5.

⁶⁶ Ibid 106.

⁶⁷ Ibid.

⁶⁸ Catharine MacKinnon, ‘Of Mice and Men’ in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (2004) 263.

⁶⁹ There is a small but significant body of literature on feminism and animal rights: see, eg, Josephine Donovan and Carol Adams (eds), *Beyond Animal Rights: A Feminist Caring Ethic for the Treatment of Animals* (2000); Carol Adams, *Neither Man nor Beast: Feminism and the Defense of Animals* (1995); Carol Adams and Josephine Donovan (eds), *Animals and Women: Feminist Theoretical Explorations* (1995).

⁷⁰ MacKinnon, above n 68, 264.

drawn between the treatment of women and animals: in both cases, there is a denial by the dominant group that it is responsible for imposing inequality;⁷¹ both women and animals are identified with nature rather than reason;⁷² both have been regarded as property to be possessed and used;⁷³ and both are seen to need to be controlled and subdued.⁷⁴ Of course, any parallels must be illustrative only, since the inequality faced by women is different to that faced by animals — in relation to animals, ‘[w]e eat them’.⁷⁵

In seeking equality, women have had to argue that they possess the qualities that men value in themselves, such as the capacity to reason and an inherent dignity. Animal rights advocates, such as Wise and Francione, have relied on similar arguments in justifying consideration of animal interests together with those of humans. For MacKinnon, this amounts to the same intellectual and strategic failure that women have faced — the standard is set by the dominant group, and the requirement for meeting this standard overlooks the fact that just as women don’t exist for the sake of men, animals don’t exist for the sake of humans. As MacKinnon puts it,

[i]f qualified entrance into the human race on male terms has done little for women — granted, we are not eaten, but then that is not our inequality problem — how much will being seen as humanlike, but not fully so, do for other animals?⁷⁶

Although MacKinnon concedes that possessing some rights is better than possessing none, in her view the articulation of formal rights may result in little substantive change to the treatment and status of animals, and ultimately be an exercise in futility.⁷⁷

Is it possible to advance an agenda for animal interests that does not fall prey to the shortcomings identified by MacKinnon? She argues that this is only possible if the phenomenon of ‘speaking for the other’ is overcome. We need to ask animals ‘what they want from us, if anything other than to be let alone, and what it will take to learn the answer.’⁷⁸ Already we can intuit some answers — for example, animals often flee from us — and advances are being made in communication with some species. A problem, though, is that this communication remains severely limited. In other words, although the questions that MacKinnon argues we should be asking of animals may be useful, if only to suggest restraint in the way humans treat animals, what do we do until such time as we can obtain clear answers to them? The empirical reality of animal suffering needs to be addressed now, and, in the absence of answers from animals to the questions suggested by MacKinnon, what are we to do?

⁷¹ Ibid 264–5.

⁷² Ibid 265.

⁷³ Ibid.

⁷⁴ Ibid 266.

⁷⁵ Ibid 269.

⁷⁶ Ibid 271.

⁷⁷ Ibid.

⁷⁸ Ibid 270.

The welfare utilitarianism of Singer and the deontological rights theory of Regan have a strong sense of unbending universality about them, and purport to provide theoretically complete, although conflicting, responses to the question of how we should relate to animals. Like Rachels and Diamond, Elizabeth Anderson wants to deconstruct this universality. Anderson starts by challenging an analogy drawn by both advocates of animal welfare and of animal rights — the so-called ‘argument from marginal cases’ that underpins the claim to equal consideration of human and animal interests.⁷⁹ At the risk of oversimplification, this argument can be briefly stated in three steps. First, we do not consider it morally proper to neglect or abuse infants, the severely intellectually impaired, or demented people.⁸⁰ Secondly, even in the absence of fully developed, distinctive human capacities, such persons enjoy certain rights and demand equal consideration. Thirdly, if sentient animals have similar capacities as these persons, why should they not also be regarded as deserving of rights or equal consideration? Anderson’s response to this argument echoes that of Diamond: species membership is distinctive; is constitutive of what it is to be human; and what it is, differently, to be an animal.

[T]he animal dignity of humans is essentially tied to their human species membership, conceived hierarchically in relation to nonhuman animals and independently of the capacities of the individual whose dignity is at stake. There is no way to place animals on an equal footing in this system of meanings. If we were to dress up and spoon-feed a dog as we would an Alzheimer’s patient, such action would not dignify the dog, but make a mockery of it.⁸¹

Anderson seeks to ground our moral response to animals in a sense of admiration for animals, in ‘the sheer glory and diversity of the animal kingdom.’⁸² If we admire animals, whether it be for their beauty, intelligence or athleticism, we are more likely to want to be considerate towards animals and to protect the qualities we admire in them. However, tellingly, Anderson fails to consider intensively-farmed animals at all in her essay. Is a factory-farmed cow, sheep or pig as deserving of admiration and respect as a domesticated dog, a ‘magnificent eagle’, an ‘inquiring giant river otter’, a ‘majestic breaching humpback whale’, or a ‘splendid multicolored green-winged macaw’?⁸³ The factory-farmed animal may be unlikely to engender the same degree of ‘wonder and awe’ in which Anderson wants to ground our highest moral considerations of animals. Realistically, a much more practical approach to the issue needs to be taken. Such an approach is provided for in one of the most important contributions to *Animal Rights*, the essay by David Wolfson and Mariann Sullivan.⁸⁴

⁷⁹ Elizabeth Anderson, ‘Animal Rights and the Values of Non-Human Life’ in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (2004) 277, 279–80.

⁸⁰ Even if, reflecting their vulnerability, they are in fact sometimes neglected or abused.

⁸¹ Anderson, above n 79, 282.

⁸² *Ibid* 292.

⁸³ *Ibid*.

⁸⁴ David Wolfson and Mariann Sullivan, ‘Foxes in the Hen House’ in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (2004) 205.

VI THE MAIN GAME: INTENSIVE FARMING OF ANIMALS

Public consideration of the issue of cruelty to animals tends to focus on the treatment of companion animals and animals used in research. Wolfson and Sullivan argue that this focus also underpins law-making and legal scholarship.⁸⁵ Yet, they point out, it is farmed animals that account for almost all animals killed by humans (in the order of 98 in every 100 killed).⁸⁶ Most significantly, in the United States these animals are ‘invisible’ to the law, a situation which is the result of a number of factors. At federal level, farmed animals are exempted from anti-cruelty legislation.⁸⁷ At state level, criminal statutes may include offences about cruelty to animals, but they are usually very broadly expressed, not supported by specific animal welfare regulations and poorly enforced.⁸⁸ Moreover, at the behest of an influential farming industry, states are increasingly incorporating ‘customary farming’ exemptions.⁸⁹ If industry participants can establish that particular treatment of a type of animal is commonplace and accepted industry practice, no criminal liability can arise based on that treatment, regardless of how cruel the treatment might actually be. The end result is a profit-driven industry, with a proven record of sustained infliction of cruelty on animals, which is largely self-regulated on issues of animal welfare.

Wolfson and Sullivan briefly canvass the regulation of the welfare of farmed animals in Europe.⁹⁰ The European Union has been actively engaged in improving the welfare of animals in recent years. For example, the European Union has banned all battery egg production from 2012,⁹¹ veal crates from 2007,⁹² and gestation crates from 2012.⁹³ Some individual member countries have chosen to implement these bans even sooner.⁹⁴ The point to be made by Wolfson and Sullivan in highlighting these European developments is, of course, to show how indefensible the position of the United States remains. The North American approach is contrasted with those of New Zealand and Israel, which, to differing extents, take a European approach.⁹⁵ Australia is not mentioned. There is good reason to be concerned that the Australian approach is more consistent with that of the United States than Europe. Legislation in Australia exempts farming from

⁸⁵ Ibid 206.

⁸⁶ Ibid.

⁸⁷ Farmed animals are exempted from the *Animal Welfare Act*, 7 USC § 2132(g); and both the *Humane Slaughter Act*, 7 USC §§ 1902, 1904, 1906 (1958); 21 USC §§ 601, 610, 620 (1978) and the *Livestock Transportation Act (Twenty-Eight Hour Law)*, 49 USC § 80502 (1994) have limited applicability and are ineffectually enforced: ibid 207.

⁸⁸ Wolfson and Sullivan, above n 84, 209.

⁸⁹ Ibid 212–16.

⁹⁰ Ibid 221–4.

⁹¹ Council Directive, 1999/74/E EC [1999] OJ L 203/53, art 5.

⁹² Council Directive, 91/629/E EC [1991] OJ L 340/28-9, art 3(3); Council Directive, 93/119/EC [1993] OJ L 340/21.

⁹³ Council Directive, 91/630/E EC [1991] OJ L 340/34, art 3; Council Directive, 93/119/EC [1993] OJ L 340/21.

⁹⁴ See discussion in Wolfson and Sullivan, above n 84, 221–2. Countries that have taken such action include the United Kingdom, Sweden and Germany.

⁹⁵ HC 9232/01 *Noah v Attorney-General* (2003) (Strasberg-Cohen J), as cited in Wolfson and Sullivan, above n 84, 223–4.

cruelty offences,⁹⁶ and although most jurisdictions have adopted codes of conduct for the treatment of farmed animals, these are not always compulsory, and are not subject to wide public scrutiny.⁹⁷

VII THE WAY FORWARD

If there is to be a change in the legal status of animals, how is this to be best achieved? Even the most cautious of the contributors to this collection of essays, Posner and Epstein, acknowledge the need for improvements in the treatment of animals. The caution exhibited by Posner and Epstein is partly a reaction to the radical and wide-ranging consequences of the changes in approach proposed by Singer, Francione and Wise. The nature of this debate highlights the great difficulty in identifying specific legal reform that does more than simply render the status quo more palatable by also recognising that there may be a need for a compromise between philosophical purity and political feasibility. David Favre offers one response to this challenge, that of modifying rather than eliminating the property status of animals.⁹⁸ The implication is that incremental change will eventually lead to the radical outcomes sought by the philosophical purists.

Favre draws on an amalgam of equity and guardianship law to provide the basis for a modified property status for animals — the proposal that equitable self-ownership should be recognised in animals.⁹⁹ As in a trust, there would be a separation between legal and equitable interest, but with the legal owner taking on a *guardian* role in protecting the equitable self-ownership of the animal. The separation of legal and equitable ownership could be effected by the animal owner or be imposed by legislation. The content of the duty would be found in animal welfare statutes and in the guardianship obligations owed by a parent to a child. An essential requirement of the relationship would be the need for the human legal owner to take into account the interests of the equitably self-owned animal in making decisions that affect the animal.¹⁰⁰ The juristic status of the self-owned animal would also be significant — the modified status of the animal would provide a basis for private parties to bring an action on behalf of the animal to enforce the obligations owed to it, or to seek recompense for damage suffered as a result of breach of those obligations.¹⁰¹ Although acknowledging that determining the precise content and structure of this modified property status for animals ‘will require books to be written in the future’,¹⁰² Favre argues that the virtue of this approach is that ‘if the next step for animal jurisprudence

⁹⁶ See, eg, *Prevention of Cruelty to Animals Act 1986* (Vic) s 6(1).

⁹⁷ See, eg, *Animal Welfare Act 2002* (WA) s 20(1); *Animal Welfare Act 1999* (NT) s 79(1)(a). For further discussion of these exemptions and the operation of the Codes, see White, above n 2, 279.

⁹⁸ David Favre, ‘A New Property Status for Animals: Equitable Self-Ownership’ in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (2004) 234.

⁹⁹ *Ibid* 237–9.

¹⁰⁰ *Ibid* 242–4.

¹⁰¹ *Ibid* 239–40.

¹⁰² *Ibid* 242.

continues to be spoken in terms of traditional property concepts, then the judges and lawmakers will be more comfortable in pushing the process along.¹⁰³

A second practical approach, advanced by Sunstein, focuses on the issue of standing in animal welfare cases. Sunstein argues that existing animal welfare law offers significant protections for animals, perhaps, as previously noted, amounting to a bill of rights for animals.¹⁰⁴ The problem lies in translating these protections from the statute book to the real world. Generally, public prosecutors have a monopoly on enforcement, but, due to limited resources or because of contrary vested interests, animal cruelty cases may not be vigorously pursued. The result is ‘a great deal of difference between what these statutes ban and what in practice is permitted to occur.’¹⁰⁵

Sunstein argues that at the federal level in the United States, humans have standing to protect animals in three circumstances: first, where ‘they seek information about animal welfare — at least if that information must, under the law, be disclosed to the public’;¹⁰⁶ secondly, where a human suffers what Sunstein refers to as ‘competitive injury’ from the failure of a competitor to comply with animal welfare legislation;¹⁰⁷ thirdly, where a human either works with or visits animals subject to mistreatment.¹⁰⁸ Despite these possibilities, it will often be the case that humans concerned about a vulnerable or harmed animal will not have the right to pursue action on its behalf. To address these circumstances, and to ensure that the potential of animal welfare legislation is realised, Sunstein recommends that Congress confer standing on animals ‘to protect their own rights and interests’.¹⁰⁹ If ships, corporations and children are able to have actions brought on their behalf to secure their rights, then why not animals?¹¹⁰ The right of human representatives to bring a private action on behalf of an animal under animal welfare law would ensure improved accountability under, and hopefully, greater compliance with, the relevant legislation.¹¹¹ A major shortcoming of this suggestion, as Wolfson and Sullivan would be quick to point out, is that it would do nothing to address the routine cruelty inflicted on the overwhelming majority of animals which are farmed for food, as they are excluded from protection under animal welfare legislation. Sunstein acknowledges this limitation whilst discussing whether animals should have standing in their own right, but argues that pursuing changes which would allow persons affected to bring a suit is still worthwhile.¹¹² Although the different legislative context requires more detailed consideration, such an argument suggests interesting possibilities in the Australian setting, where the organisation typically conferred with prosecutorial powers, the Victorian branch of the RSPCA, frankly

¹⁰³ Ibid 239.

¹⁰⁴ Sunstein, ‘Can Animals Sue?’, above n 26, 255.

¹⁰⁵ Ibid 253.

¹⁰⁶ Ibid 259. See especially 256–7.

¹⁰⁷ Ibid 257.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid 260.

¹¹⁰ See also Nosworthy, above n 2.

¹¹¹ Sunstein, ‘Can Animals Sue?’, above n 26, 261.

¹¹² Ibid.

acknowledges that the limited resources available to it means that only the most blatant cases of animal cruelty are pursued.¹¹³

VIII CONCLUSION

In a recent essay reflecting on the 30th anniversary of the first published use of the phrase ‘animal liberation’, Singer acknowledged the gains that have been made in animal welfare since 1973, but noted that these are:

dwarfed ... by the huge increase in animals kept confined, some so tightly that they are unable to stretch their limbs or walk even a step or two, on America’s factory farms. This is by far the greatest source of human-inflicted suffering on animals, simply because the numbers are so great ... last year ten *billion* birds and mammals were raised and killed for food in the United States alone.¹¹⁴

The problems of animal exploitation are not confined to the United States, even if the scale of those problems is not as large in some other jurisdictions. Debate about these issues has been equally vigorous in Europe, especially Britain, for a number of years.¹¹⁵ In contrast to the United States, where a lack of action at federal level¹¹⁶ and an uneven approach at state level has led to a climate of legal inertia, important changes have been occurring in Europe. In addition to the developments discussed in Part IV above, in 1997 a protocol on animal welfare was annexed to the *Treaty Establishing the European Community* (‘*Treaty of Rome*’), which is the foundation document of the European Community.¹¹⁷ The protocol recognises that animals are sentient beings, deserving of ‘improved protection and respect’,¹¹⁸ and requires that ‘full regard’ be given to the welfare of animals in areas such as agriculture and research.¹¹⁹ Finally, in a noteworthy development in 2002, and one which has alarmed some German scientists, the German Parliament has amended the *German Constitution*

¹¹³ RSPCA Victoria, *Annual Report 2001–2002*, 38.

¹¹⁴ Peter Singer, ‘Animal Liberation at 30’ (2003) 50(8) *New York Review of Books* 24, 25 (emphasis in original).

¹¹⁵ For two very useful British texts on animals and the law canvassing aspects of this debate, see Mike Radford, *Animal Welfare Law in Britain* (2001) and Simon Brooman and Debbie Legge, *Law Relating to Animals* (1997).

¹¹⁶ Singer attributes this inaction to the control over the political process exerted by campaign donors, including the agribusiness industry, with individual candidates for Congress highly reliant on, and compromised by, campaign donations: Singer, ‘Animal Liberation at 30’, above n 114, 26.

¹¹⁷ *Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Other Related Treaties*, opened for signature 2 October 1997, Protocol on Protection and Welfare of Animals (entered into force 5 January 1999) <<http://www.europarl.eu.int/topics/treaty/pdf/amst-en.pdf>>, as amending *Treaty Establishing the European Community*, opened for signature on 25 March 1957, 298 UNTS 11 (entered into force 1 January 1958). The consolidated version of the treaty is available at <http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/pdf/12002E_EN.pdf>.

¹¹⁸ *Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Other Related Treaties*, opened for signature 2 October 1997, Protocol on Protection and Welfare of Animals (entered into force 5 January 1999) available at <<http://www.europarl.eu.int/topics/treaty/pdf/amst-en.pdf>>.

¹¹⁹ *Ibid.*

(*Grundgesetz*) to afford protection to animals, a step designed to affirm the role of the state in protecting life, including the lives of animals.¹²⁰

The issues are no less pressing in Australia than overseas. Reform of animal welfare legislation is largely in the hands of the states and territories. These jurisdictions have been progressively strengthening their legislation in the past few years, but the focus of this reform has essentially been on protecting companion animals.¹²¹ Australia lacks a unified, national approach to these issues¹²² and, perhaps not surprisingly given our cultural, social and economic foundations, there is a distinct unwillingness on the part of federal and state legislators to engage in a meaningful way with the issue of animal cruelty in agricultural industries.

The impressive collection of essays in *Animal Rights* provides a balanced, wide-ranging and lucid account of some of the key debates, whether they be characterised as legal or philosophical, about the status of animals and our relationship with them. The book is an invitation to legal scholars, as much as anyone else, to engage in this debate. The question remains as to whether legal researchers and teachers in Australia will accept this invitation.

¹²⁰ See Susan Armstrong and Richard Botzler (eds), *The Animal Ethics Reader* (2003) xi. This excellent text contains a comprehensive collection of extracts from well-qualified authors concerning a range of animal ethics issues including: the use of animals for food; animal experimentation; animals and biotechnology; ethics and wildlife; and animal law and activism. A more detailed account of the German constitutional development can be found in Kate Natrass, ‘“...Und Die Tiere” Constitutional Protection for Germany’s Animals’ (2004) 10 *Animal Law* 283.

¹²¹ See, eg, *Prevention of Cruelty to Animals Act 1979* (NSW) s 34A; *Prevention of Cruelty to Animals Act 1986* (Vic) s 6(1).

¹²² A private member’s Bill was introduced into the Senate and had progressed to a second reading speech, when debate was adjourned. However, this Bill has since lapsed: National Animal Welfare Bill 2003 (Cth); see Commonwealth, *Parliamentary Debates*, Senate, 11 August 2003, 129 86–90 (Andrew Bartlett).