

December 2020

Working with and for Animals: Getting the Theoretical Framework Right: Foreword

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Recommended Citation

Michael Harris, Working with and for Animals: Getting the Theoretical Framework Right: Foreword, 94 Denv. L. Rev. 605 (2017).

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FOREWORD

MICHAEL HARRIS[†]

Normally, when you hear an “animal advocate” speak it is about one of two topics, either about the humane treatment of animals or about animal rights. The humane treatment of animals is a topic that has a lengthy history in this country. The work of some of the largest animal advocacy groups in the world, like the Humane Society, largely falls under this umbrella. Over the past half-century or so, the fight to criminalize or otherwise make illegal various forms of animal abuse—whether against domestic pets, farm animals, or animals used for commercial gain—has seen some success in the United States, starting with the federal Animal Welfare Act and trickling down to various state and local laws across the nation.

Some of us distinguish, however, between advocating for humane treatment and advocating for animal rights. Animal rights advocates often start with the premise that animals, like humans, have autonomy. Accordingly, to protect this autonomy, animals should be given some of the legal protections and privileges normally associated with humans. For example, personhood, perhaps starting with non-human primates and cetaceans, has long been seen as the ultimate goal of animal rights activists. This has been the life work of the animal rights lawyer Steve Wise and others. Another example would be the right for an animal to protect its interests in the courtroom, perhaps through some human guardian *ad litem*. We have seen in recent years conceived lawsuits to seek compensation on the behalf of animals held for entertainment, or most recently, the idea of suing an animal’s captor for libel when the public is told the animal is enjoying his captive home. Still others have stressed the need for direct legislative action—often at the state level—that would give animals statutory rights to protect their autonomy and freedom.

Some animal rights activists and scholars are not fully convinced that arguing that some animals have autonomy (which often sounds short-hand for intelligence) and, therefore, should extend to specific rights, is the best path forward. For example, Martha Nussbaum has stat-

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ed that as used in the animal rights context, the term autonomy has not been well defined and ignores that the concept of autonomy has many different meanings depending on the philosophical approach one chooses to consider or apply. Martha has suggested that animal rights activists should focus less on the vague concept of autonomy and instead focus on species-specific, central capacities: life, bodily health, bodily integrity, play, sense/imagination/thought, emotion, practical reason, affiliation, and control over one's environment.

More practically, one of the problems that has confronted Steve, for example, is that judges have demanded he show more than autonomy as a basis for granting primates the legal status of personhood; the judges also demanded that he demonstrate that primates could take an active role in fulfilling the "rights and duties" of citizenship within a society. Apparently this means voting, paying taxes, holding down a job, and otherwise not being a burden to the rest of society.

Thus, what is intriguing about Martha's approach is the ability to now argue that fulfilling "rights and duties" of citizenship is not the proper basis for determining personhood; instead, it is the ability of an animal to lead a meaningful life and even enrich the lives of other animals around her.

It is also exciting that science is rapidly proving that Martha is right regarding the capabilities of animals. We are truly in a revolutionary time with respect to scientific analysis of the cognitive, emotional, and social lives of so many animals. When I first entered the field of wildlife conservation in the 1990s, the fields of wildlife biology, conservation, and ecology focused almost exclusively on the physical needs of a species. In other words, the focus was largely on what essential habitat conditions a group of animals need to survive and reproduce. Today, scientists are fascinated with the knowledge that animals feel emotions, connect socially, and have points of view based upon their interactions with the world around them. Moreover, the work of Dr. Marc Bekoff and others in the field of compassionate conservationism has helped document the vast amount of research into animal feelings that has exploded over the past couple decades.

The problem for animal rights activists, however, is that rational thinking and sound science does not necessarily translate into legal protections and principles. If you did not already know this, you certainly do today as a result of the current policy direction of our nation on so many issues as a result of last year's presidential election. The reason for this—at least in my mind—is that, in a democratic society, law and policy often reflect a mixture of human emotions, which can be influenced by secular philosophy and science, but are also shaped by a collection of individual beliefs, biases, prejudices, and other basic fears, such as feeling that one's own place in the world is threatened. Collectively, these

emotions help form basic social norms that help hold us together and, more importantly, provide the basis for new legal rights and obligations.

Of course, history shows us that social norms are not always stagnant. They can both evolve and devolve. That is a subject that can be, and has been, explored in great depth elsewhere. For our purposes here, I merely wish to make a suggestion as to how social norms often do in fact change—namely through deliberation. I believe that our society, basic constitutional structure, established political institutions, and even some existing laws are designed to promote deliberation as a means of establishing new legal rights and protections. Of course, the system also ensures that deliberation is often painfully slow, which is a major contributor to some of the reasons our democracy has proven, so far, inadequate in protecting the rights of so many beings. I would be the first to argue that as a society we need to do a better job of deliberating and figure out methods to speed the process up.

Still, I believe that deliberation is the only proven means in our society to ensure lasting, and hopefully better, legal protections for humans, non-human animals, and even the environment. Which leads me to our approach to animals' rights at Friends of Animals.

Simply put, through our work we seek to convince, or even force, governmental decision-makers to incorporate the whole body of knowledge regarding an animal's well-being before undertaking any human-initiated action that could impact that animal. Despite the capabilities approach discussed by Martha, and despite this vast, ever-growing body of knowledge we can call compassionate conservationism, legal protections for animals still focus almost exclusively on physical suffering, death, or loss of elements essential to an animal's ability to survive.

What we are trying to establish is what Friends of Animals calls a "right to ethical consideration." This right is not the granting of specific substantive rights to animals, like the right to life or freedom. We fully support the granting of such individual rights to animals in many cases. Again, such rights are currently not part of our common social norm and are not embodied in most human legal systems. On the other hand, there is already philosophical, scientific, and I would also argue, legal tools available to us to make a strong case—whether before legislatures, administrators, or judges—to implement a right to ethical consideration in many jurisdictions.

Establishing a right to ethical consideration is a pathway to strengthening legal protections for animals. By requiring decision makers and others to maintain a dialogue—a deliberation—about the human impact on animal well-being, it is possible that societal and legal norms regarding the rights of other animals will gradually change.

