

Animals, aren't we? The Gradualist Approach for Animal Rights

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Abstract: Among the most disputed issues in applied ethics, we are faced with the challenging relationship we entertain with nonhuman animals. There are obligations to which we must abide by, due to legislation, in our treatment of non-human animals; they mainly deal with a prohibition on cruelty and torture. When it is about moral obligations, so what an individual feels compelled to do, the discourse differs. Many leading philosophers in the field, such as Peter Singer, Tom Regan and Marta Nussbaum, have attempted to define a threshold, based on different criteria, for which animals are deserving of being objects of moral obligations. Whether based on a pre-existing condition, or built on a specific legal framework, such discourses often end up clashing with the difficulties of their pragmatic application. The treatment of nonhuman animals, considering scientific findings and a growing “animal-friendly” attitude, has become a top tier topic in the global political agenda. After a historical analysis, comprehensive of the role of science in the development of the Western-centric moral and legal positions, this paper suggests a blend of Marta Nussbaum’s Capabilities Approach and Francesco Allegri’s gradualism, to reach a gradualist approach based on the individual animals’ abilities.

Keywords: Animal Rights; Gradualism; Applied Ethics; Moral Philosophy; Philosophy of Law.

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1. Introduction

Humans, animals, nonhuman animals, human animals. Living in a world of contradiction does not seem to be easy: watching some streaming platforms, anthropomorphic animals are depicted here and there, even in your favorite shows, asking you to empathize with them. However, you always end up with a diet based on them. You turn on your phone, and an ad from a fast-food franchise pops up on your social media: huge offers, less money, more meat. Horse meat is full of iron, chicken stock is healthy, so what? Let's turn to fishes, they do not seem to be so smart, after all. Then one finds out about the complexity of the ocean ecosystem. Not being raised to understand how animals should be treated, if not only for what is taught a familiar philosophy¹, is not easy: not for us, but for animals themselves².

Trying to depict a complete collection of animal welfare, let

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¹ It was Aristotle himself, in his *Politics*, who defined family as a model to organize the state: who dealt with anthropology, dealt with family. It is clear that is the first attempt of providing individuals, future members of a so-called society, with an idea of morality.

² The data about animals harvested, and consumed for meat, may be found by reading the works of the NGO Sentient Media. For instance "every second of the day, 1.758 animals are killed for food" around the globe. See Sentient Media, *How many animals are killed for food every year?*, available at [sentientmedia.org](https://www.sentientmedia.org) (last visited 17 February, 2025).

alone something huge as animal rights, is almost impossible in a single document. Although we could refer to a specific country, the landscape is too diverse. It is this diversity that leads us to a first realization: cultural factors, combined with different backgrounds and legal frameworks, prevent the possibility of having a universally and uniformly applicable treatment toward nonhuman animals. The gap seems to be difficult to bridge since, quoting Aristotle, we possess the capability to engage in a discourse, something unique to mankind, us: the *zoon politikon*. Animals are not included in the discourse about rationality, this is why they are limited to the term *zoon*³. Without proper dialogue they cannot stand for themselves, but we can: the same discourse applies to plants, seas, mountains, and even monuments. Anticipating what will follow, in this context, science may be the key to opening up the debate on animal rights. It was, for instance, neuroscience that told us - through studies on neuroreceptors - that a dog feels pain when it gets hit. Similarly, ethology showed us that such an animal would not approach you again, because it is capable of experiencing pain. Not limiting ourselves to just dogs: it was a scientific finding that allowed us to understand that elephants have self-awareness, and that a parrot itself can have a kind of dialogue⁴.

Rather than getting into the discourse of defining “which” and “how” animal rights should be implemented, this paper aims to define a new approach to moral obligations towards nonhuman animals. To clarify the meaning of such a statement, we could adapt

³ Aristotle never compared men and animals. The term *zoon politikon* is essentially destined to mankind, due to logos and other conditions. *Zoon* simply means “animal” in greek.

⁴ Mason B., *Do birds have a language?*, (Smithsonian Magazine, 2025), available at smithsonianmag.com (last visited 17 February, 2025).

Immanuel Kant's moral philosophy. According to Kant, moral duties⁵ are derived from the "categorical imperative", the moral law – thus, rights are the result of the respect owed to rational beings⁶. The main assumption here is that animals are rational beings, and not merely animate *materia*. Given this assumption, following a kind of Socratic intellectualism, we should act accordingly: knowing what is "bad", we ought to follow what is "good", also while approaching other species.

To understand what is "bad", and whether a kind of treatment, codified as a right – where rights are intended as a societal struggle – may be given to nonhuman animals, has been deemed a human task. Being the infamous *zoon politikon*, proper to logos and similar weapons, capable of building and destroying societies, there is no one else that can argue in favor of such a condition known as "animal welfare"⁷. Do animals have a standing? If so, who can stand for them, if it cannot be themselves? How can we define a potential key criterion? Should we base it on their cognitive capabilities? Such doubts allow us to introduce our *deus ex machina*: science.

Societal attitudes, reflected in constitutions, laws and referenda,

⁵ Duty is here implied as meaning "obligation". A moral duty is an obligation "rising from oneself". See Zimmerman M., *Moral obligation and Ignorance*, Oxford University Press, 2014, available at academic.oup.com (Last visited February 21, 2025).

He distinguishes between three main accounts of a moral obligation: the first is the Objective Views, "One ought to perform an act if and only if it is in fact the best option that one has", then the Subjective Views - "One ought to perform an act if and only if one believes that is the best option", and, finally, the third position, the Prospective View - "One ought to perform an act if and only if it is probably the best option one has".

⁶ Kant did not consider nonhuman animals as rational beings, still we may apply his discourse - as many animal rights activists have been doing - thanks to the current status of arts in sciences. See Samuel Camenzind, *Kantian Ethics and the Animal Turn. On the Contemporary Defence of Kant's Indirect Duty View*; Vol.11(2), *Animals*, 2011, at 1-10.

⁷ Gary Francione, *Animal welfare and society - Part 1, The viewpoint of a philosopher*; *Animal Frontiers*, 2022, available at <https://pmc.ncbi.nlm.nih.gov/articles/PMC8929975/> (last visited 22 February, 2025).

are clearly shaped by the environment in which they are produced. Among the first lectures in the philosophy of law course, pupils are introduced to the “truth”, which may be of different kinds, among which we find the “historical truth”. It may be that a sentence, commonly recognized as true nowadays, was considered heresy in the 14th century, just as the opposite may be true: the same applies to animal welfare.

Scientific findings, intended as the result, for example, of biology, zoology and anatomy, led us to the realization that animals are a universe of their own. This led to zoos adapting their policies to the understanding that animals have needs⁸, as well as politics – defining these topics as top priorities on their agenda, with an increasing awareness of modern society’s will, which is becoming more and more aligned with a new attitude towards animal welfare. This is why we begin this paper by trying to define to whom such considerations may be destined, as well as the philosophical stances that may be foundational to a potential concretization of moral obligations. In approaching such discourse, it is fundamental to take into account the timeline followed: the chronological order may be helpful in understanding how the stances toward nonhuman animals have been evolving. After the “philosophical” reading, matters abstracted from legal cases regarding animal welfare will be analyzed. The perspectives presented, involving “law and science”, in infamous cases such as Happy the Elephant, and medieval trials of cats and pigs, provide some clues as to what will become actual through the stance proposed in the third chapter: gradualism. This

⁸ Rafael Miranda, Nora Escribano, Maria Casas, Andrea Pino Del-Carpio, Ana Villarroya, *The role of zoos and aquariums in a changing world*, Annual Review of Animal Bioscience 2023, at 288-300, available at <https://www.annualreviews.org/docserver/fulltext/animal/11/1/annurev-animal-050622-104306.pdf?expires=1742477425&id=id&accname=guest&checksum=F27BCFBE554000AD27D435BB62177499> (last visited 21 February, 2025).

kind of new school of thought tries to adapt the law to the “specific” circumstances to which it is presented. The almost case-by-case analysis may allow a more animal-friendly legal system, with a particular connotation given to it by reading Nussbaum's legal and ethical approach which is based on the capabilities of each animal.

2. *Philosophical Stances*

The disparity characterizing human and non-human animals' treatment does not seem to be equally present throughout the globe, it is rather possible to differentiate on a geographical basis. This claim is based on the analysis of both Western and Eastern traditions related to animals. The Western philosophical approach seems to have been shaped by a religious heritage, one difficult to forget or contravene. The assumption that “God blessed humans”, telling them they had to be “masters of the fish of the sea, of the birds of heaven and all living animals on earth”⁹, may already be a basis as to why religion proposed a supernatural role of human beings, intended literally. Mankind is not God, but is created in His image, however he does not consider himself animal either, due to his possession of rationality. This rationality, if deprived of its Christian connotation – given by God's will –, still finds a way to exist by translating it into the capability to deliberate: the *logos*. Not even the societal developments brought forward by the enlightenment were enough to eradicate the bias of a flaunted supremacy. The man is seen as central even in the treatment of nonhuman animals: imposing not to harm them is more of a means not to create a predisposition, in the human being's *modus operandi*, to harm other human beings. The basis is sympathy and empathy, rather than some morally-binding principles.

Changing perspective, we clearly see that the Eastern

⁹ Bible, Genesis 1:26, “Then God said, “Let us make man in our image, after our likeness. And let them have dominion over the fish of the sea and over the birds of the heavens and over the livestock and over all the earth and over every creeping thing that creeps on the earth”.

experience differs, with principles tied to the religious character forming the foundation for an egalitarian approach, where arguing for gradualism would be redundant. Considering the *ahimsa*¹⁰, we can see the difference with Western approaches. Hinduism acknowledges the existence of biotic violence, seeking to ritualize and contain it, promoting vegetarianism, with a spiritual and divine significance of animals¹¹. Buddhism, which rejected ritual sacrifices, also shifted the focus to intentional non-harming, embracing vegetarianism and protecting animals through the law, already from the 2nd century before Christ. In both religions, for instance, animals are treated as worthy of moral considerations: Hinduism recognizes animals as possessors of a soul as well as their participation in the cosmic order, while Buddhism recognizes that they are sentient beings who deserve compassion and should not be harmed, hence seeing slaughter has moral and spiritual consequences¹². Coming back to Western philosophies, similar conceptions are incompatible. Here lies the reason for which the following chapter will analyze the Western approach of philosophers in a chronological order: the perspective on non-human animals has evolved, but room for improvement still exists.

¹⁰ Kenneth Valpey, *Animal Rights and Ahimsa: An Ancient Discourse on Humans, Animals, and the Earth*, Nidan, 2024,, available at https://journals.co.za/doi/pdf/10.10520/AJA10165320_119 (last visited 22 February, 2025).

¹¹ Divine figures often have animal traits: see Ronald. L. Massanari, *A Problematic in Environmental Ethics: Western and Eastern Styles*, vol. 18, Buddhist-Christian Studies , 1998, at .

¹² The foundation of karma may be understood as if every action holds consequences on the life of the individual committing said action. The Venerable Guan Cheng explained it correctly by enunciating *The "parable" of Auntie Zhang*, by Master Zuhong, available at buddhisttemple.ca, International Buddhist Society (Last visited February 17, 2025).

2.1. Pre-speciesism Philosophical Stances

The long distance between man, so human animals, and nonhuman animals, starts when moral philosophy needs to distinguish “who” is worthy of moral consideration, as well as who can be held morally accountable. Moral obligations are obligations that arise from what we define as right and wrong. A moral obligation cannot be enforced legally: instead, it may be described as “natural existences”, which means to feel obliged, whether it is by a right or by a duty, to do something or act a certain way. The origin may be traced back to social bonds: thus, a right may be defined here as a claim on another’s responsibility¹³. Such obligations have been directed toward the so-called “moral agents”. As Pluhar, in 1988, said “You and I are moral agents”, since “we are capable of understanding and acting upon moral principles”. Therefore this implies a responsibility in our actions¹⁴.

On the other hand, not all living beings seem to possess the capacity to act as moral agents. Thus another category where also nonhuman animals could fit has been defined¹⁵: “moral patients”. By confirming that nonhuman animals lack the capacity to be considered as moral agents, we ended up confronting ourselves with the first objection used to argue in favor of an improved moral status for nonhuman animals over the years. This is the ground on which the argument from marginal cases¹⁶ finds its way into the discourse on animal rights. The idea is that if we grant rights to human beings somehow “marginal”, so lacking capacity labelled as “standard”, we should apply the same reasoning for nonhuman animals. This

¹³ Herbert Schneider, , *Moral Obligation*, Ethics, Vol. 50(1), 1939, at 50

¹⁴ Evelyn Pluhar, *Moral Agents and Moral Patients: between the Species*, California Polytechnic State University, vol. 4(1), 1988, at 32-45

¹⁵ Definition from Stanford Encyclopedia of Philosophy, available at plato.stanford.edu (last visited 21 February 2025).

¹⁶ Maija Aalto-Heinilä, *Animal Rights and the Argument from Marginal Cases: Animal Law and Animal Rights*, , March 2021, at 204-220 . The specific term was coined in 1977.

concept could be framed also as an argument of “species overlap”, in order to avoid using a potentially offensive term as “marginal”¹⁷. The rationale behind the argument is that being guided by reason was not enough as a criterion to define one’s own moral worth – especially considering the condition of many humans. A possible answer to reject such a statement was the slippery slope objection. The objection holds that, although marginal humans are not “strictly speaking” morally considerable, they deserve moral consideration, otherwise “we will slide down a slippery slope” ending by not giving “normal humans due consideration”¹⁸. A focus is clearly put on the worth of “humans”, rather than a general concept of animals: this is an oversimplification, but it is still a valuable insight to reach a potential definition of “speciesism”. The origin of this concept can be traced back to 1970, when Dr. Rychard Ryder firstly presented his ideas in a privately published pamphlet¹⁹. Five years later, Peter Singer, an Australian philosopher, central to this discourse, popularized the term in his masterpiece *Animal Liberation*, dated 1975. The ground for using it as a watershed date is based on the attention that it shifted on the subject, ultimately leading to the rise of the Animal Rights Movement²⁰.

To achieve a societal push to recognize moral obligations toward nonhuman animals as moral patients, many steps have been necessary. By reading Peter Singer’s *Animal Liberation*, the whole chapter, the fifth, is dedicated to an historical recollection of how speciesism weighted on such status, with a particular focus on Pre-Christian thought, Christian thought and Enlightenment. A speciesist

¹⁷ See Ibid. The argument is also known as “from species overlap”, to avoid a potentially offensive term as “marginal humans”.

¹⁸ See Id.

¹⁹ Jeroen Hopster; *The Speciesism Debate: Intuition, Method, and Empirical Advances*; vol 9(12), *Animal*(Basel), 2019, at .

²⁰ Orzechowski K., *Animal Rights Movement: History and Facts about Animal Rights*, Faunalytics, 09/04/2020, available at faunalytics.org (last visited February 21, 2025).

vision is already traceable, to Singer, in the Bible – as mentioned before, the man is “master to the heartily beings”²¹ – but even before Christianity we have coinciding views. Aristotle found a great interest in animals, recognizing their intelligence and capabilities like humans’ ones, but with no rationality. The following period, up to the Middle Ages, has a “church-made” connotation. Philosophers such as Aquinas denied animals as moral patients, for mainly two reasons: God made animals “exclusively for human use”, “we ride, wear work, and eat animals, there is no sin in using a thing for the purpose for which it is”, and that animals cannot use reason²². Thus, only rational beings are object of moral concern: how one treats animals is moral as long as this treatment does not affect rational beings; no torture can be reserved to them because this could subtly influence one to torture humans too²³.

Beyond Aquinas, in the medieval period, a common thread can be read among philosophers in holding humankind as morally more worthy than nonhuman animals, also by considering one of the most debated figures in the discussion related to animal rights: René Descartès. His position has been largely criticized, mainly because of his idea on animal welfare, which may be understood in the light of a strong speciesism. Peter Harrison’s historical and contextual analysis of the Cartesian view²⁴ may clarify the incomprehension at the basis of such misunderstanding. The common view at the time was the Aristotelian one, according to which living beings may have one of three “kinds of souls”: vegetative souls for plants, sensitive souls for nonhuman animal beings, or rational souls, proper of

²¹ See Ronald Massanari, *A Problematic in Environmental Ethics: Western and Eastern Styles* (cited in note 10).

²² See Id.

²³ Jesse Ramirez, *Faith Seeking Food*, Santa Clara University, 25/05/2005, available at scu.edu (last visited February 21, 2025). It enhances a kind of human supremacy, in line with the idea of men as masters of animals.

²⁴ Peter Harrison, *Descartes on Animals*, vol. 42, *The Philosophical Quarterly*, 1992, at 219-227.

mankind. The “father of modern philosophy” tried to challenge such model: the common narrative held that animals were “unfeeling machines”²⁵, so he asked for proof to define a similar status. Descartes needed evidence of an animal soul, and his threshold was very high: no clear scientific evidence must have a mechanical explanation. Animals, to him, had “passions”, intended as reactions proper to the body, but the limits – even in the scientific field – were too many: “He was an agnostic, rather than a dogmatic”. No dogmas in a soul-based philosophy calls for evidence, thus rejecting the traditional metaphysical construct.

Strong criticisms have been made also of the direct influence traced in his pupils, as Malebranches, who wrote that animals “have no intelligence”, “They eat without pleasure, cry without pain, grow without knowing this. They have no desires and no knowledge”²⁶. As a strong reaction, some of his contemporaries attempted to confront Descartes directly. Between them, we find the British philosopher Ralph Cudworth, who proposed a morally valuable existence to animals. Such view was based on subjectivity, that is, experiences – denied at first in the Cartesian view – and the possibility itself to have a body²⁷. Descartes himself was not cruel to animals, we can even find some anecdotes about the treatment he had for animals, such as the love he had for his little dog, Monsieur Grat. However, we must affirm that he was holding a superiority of human animals: “My view is not so much cruel to beasts, but respectful to human beings, whom it absolves from any suspicion of crime, whenever they kill or eat

²⁵ See Ibid.

²⁶ See Id.

²⁷ The approach is similar to the religious one, based on the traditional model of body plus soul as the proper form of human being.

them”²⁸.

Once again we see a lack of moral consideration due to an absence of rationality in beasts. Immanuel Kant’s approach fits perfectly into this description: he considered nonhuman animals as having only a conditional and relative worth for humans. No direct duty could be established, as animals were incapable of being moral agents in his philosophy, but rather an indirect one. Following this view, it is “allowed” to raise animals using them for meat consumption, and even exploiting them: the focus of moral duties lies here on the consequences it can have on people. Mistreating animals may make mankind more keen to be cruel to his own kind, the moral character is seen as endangered if exposed to a mistreatment of animals. This leads to a status of “means to an end”²⁹, where the end is the man itself.

The attitude switches towards a kind of respect, although not yet a moral duty, more “concerning animals” than toward animals themselves³⁰: this is only the first shade of the Enlightenment. Henry Salt opened his 1892’s work about animal rights by confirming the 18th century, the Age of Enlightenment, as the period in which a new sensibility for the rights of animals obtained a deliberate recognition. Voltaire and Rousseau, poster boys of their cultural revolution, have been spokesmen also for the animal rights movement, although neither of them was an animal rights philosopher. Still, they shared a common feature with Henry Salt, the foundation to the modern philosophical approach to the matter: a deconstruction of Cartesian

²⁸ Samuel Kaldas, *Descartes versus Cudworth: On The Moral Worth of Animals*, Philosophy Now, 2015, available at https://philosophynow.org/issues/108/Descartes_versus_Cudworth_On_The_Moral_Worth_of_Animals (last visited February 21, 2025). Descartes stated: “My view is not much cruel to beasts but respectful to human beings”, “Whom it absolves from any suspicion of crime whenever they kill or eat animals”.

²⁹ Micheal Cholbi, *A Direct Kantian Duty To Animals*, 52, *The Southern Journal of Philosophy*, 2014, at 338-358.

³⁰ See Id.

stances. Voltaire, in his *Dictionnaire Philosophique*, in the section about “beasts” – *bêtes* – confronted the approach that defined animals as machines³¹: he painted a picture of a dog getting cut, vivisected, while a scientist was stating that “the dog felt nothing”. The appeal is to human conscience; although it was an ideal based on empathy, it is a first instance against a dormant speciesism. In the same chapter he denied a potential human superiority, enunciating moral virtues proper of animals, still using dogs as examples: their loyalty to their owner, for instance, is seen as a moral virtue that not all men could “be proud of”.

Rousseau, instead, did not appeal to empathy and kindness, but included nonhuman animals in his “Discourse on the Origin of Inequality” as part of the natural law³². The contractualistic view is shielding animals under Rousseau’s idea: their suffering must be recognized. Sensitivity is key, rather than reason³³. Furthermore, the French philosopher used animals as a means to expose social injustices by comparing their condition to the exploitation of the poor by the wealthier component of society. As their exploitation had been imposed due to a misconception about suffering, which is that the poor “were not suffering that much”³⁴; the same had been said about animals to exploit them. Rousseau held it as a form of oppression: the distinction drawn between men and animals is used to construct an analogy with the distinction that people create among themselves³⁵.

³¹ In its traditional reading the notion of “animal machine” held that nonhuman animals behavior was equal to a machine, excluding - the possibility of sentience in animals. The reasoning is reached, mainly, due to scientific limitations.

³² Rousseau said that we owe brutes something, as we owe it to animals. Having brutes and animals on the same level, means “ending the debate about the role of animals” - whether they are part of said natural law, or not.

³³ As it will be presented later, it is a clear anticipation to Jeremy Bentham’s argument.

³⁴ Raymond Giraud, *Rousseau and Voltaire: The Enlightenment and Animal Rights*, vol. 1, Between the Species, at 4-10, Stanford University Press (1985).

³⁵ See Id.

Sensitivity is central also in Jeremy Bentham's philosophy, who became – a couple of decades later – one of the main actors in the discourse about animals and morality. He did not ask himself whether they could reason, but rather if they could suffer. The degree to recognize their moral worth, to a certain extent, is not anymore reason, but the possibility of feeling pain. Less anthropocentric, Bentham introduced the central question – “Can they suffer?” – by using a prototype of what would be theorized as the argument from marginal cases. In his 1789's writings of “An Introduction to the Principles of Morals and Legislation”³⁶, he compared the condition of nonhuman animals – aspiring for a future where their rights would be recognized – to the condition of equality inspired by the French Revolution. Here, the marginal cases are vested by the differences destroyed by the spirit of said historical events. As Voltaire had previously done, he compared men and animals with regards to their qualities: “A full grown horse or dog is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day, or a week, or even a month old”³⁷. He argued that when we are dealing with suffering, neither rationality nor language matters. Being an utilitarian, what matters to him is an overall balance of pleasure and pain. Every sentient creature shall here be taken into account: suffering of both, nonhuman animals and humans, equates³⁸.

Bentham included in his philosophy the possibility to consume animals' meat: a painless kill is seen as beneficial for everyone, because it is of no harm to the animal, but produces benefits. It is from this reasoning, a variant of the so-called Larder Argument, that Henry

³⁶ Jeremy Bentham, *An introduction to the principles of morals and legislation*, Econlib 1, at 311 (1789).

³⁷ International Union of Vegetarians; *History of Vegetarianism, Europe: The Middle Ages to the 18th Century*, available at <https://www.ivu.org/history/renaissance/europe18.html> (last visited February 22, 2025).

³⁸ An action is “right” to an utilitarian if it produces the most “good”.

Salt, at the dawn of the 19th century – disrupted the discussion on animal rights and their moral worth. Salt is known for his radical character: he argued in favor of vegetarianism, ahead of his times, firmly rejecting possibilities as the Larder Argument. Philosophers³⁹ used Bentham's reasoning – the possibility to replace an animal when consumed – against such stances of vegetarianism. It is still commonly held that farm animals are better when bred by humans, even if for food – due to the fact that their lives, as species goes on. In his 1914's *The Humanities of Diet*, Salt deconstructed such a stance, defined as the Logic of the Larder. He defined it as sophistry, a rationalization "put on for the occasion", since nonhuman animals' lives are not actually valued for their length, but only from "birth to slaughter"⁴⁰. This argument is proposed by the pig's perspective, with a Voltairian appeal. "Revered moralist", starts the pig – through Salt's words, "Thou hast not spared my life, at least spare me thy sophistry". "It is not for his sake, but for thine, that in his life the Pig is filthily housed and fed, and the end barbarously butchered", wrote Salt.

2.2. Post-speciesism Philosophical Stances

Fishes are capable of recognizing themselves⁴¹, dolphins have high levels of communication⁴² and cows hold some of their peers as

³⁹ David George Ritchie, *Natural Rights: A Criticism of Some Political and Ethical Conceptions*, Swan Sonnenschein & Co., 1985, (1895).

⁴⁰ Rachel Robinson-Green, *Meat Replacement and the Logic of the Larder*, DePauw University, 06/10/2022, available at pridleinstitute.org (last visited 21 February, 2025).

⁴¹ Ake Buehler, *This tiny fish can recognize itself in a mirror. Is it self-aware?*, National Geographic Society, 08/02/2019, available at nationalgeographic.com (last visited February 21, 2025).

⁴² Christine Dell'Amore, *Dolphins Have "Names", Respond When Called*, National Geographic Society, 23/07/2013, available at nationalgeographic.com (last visited February 21, 2025).

“friends” – they are even capable of sadness when they are not around⁴³. In the first half of the 20th century, ethology⁴⁴ was not quite there for the Western Front. The study and, most importantly, the interpretation of nonhuman animal behavior – both farmed and wild – was popularized right before the two World Wars, which may have been a trigger to raise the concern for animals⁴⁵. It was not only the role of the major slaughters known to history, but also a consequence of the rising interest in evolutionism, that had accompanied both scientific findings, to improve animal welfare, and supremacist ideals proper of the first 20th century. The rising interest in nonhuman animal status, also philosophically – not only juridically – peaked in the ‘70s: figures such as Peter Singer opened the gates to a strongly ethical-based moral consideration of animals. Followed by peers such as Tom Regan and, more recently, Marta Nussbaum, their position will be analyzed to summarize the rise of more animal-inclusive ethical philosophies. Speciesism is definable as the tendency to consider one individual more worthy than others, solely based on a discriminatory character. If the criterion amounts to skin colour or ethnicity, among people, this would amount to racism, but in this case, the focus is on the species itself. Akin to racism, speciesism has roots in an alleged superiority – a “rational one”. Beyond the rational superiority, the meaning may be found in a natural conception – a natural condition for which one species “prefers” the ones of their kind, in order to survive⁴⁶. The bias laying in the background has been

⁴³ Hannah Velten, *The emotional depth of a cow*, Guardian News & Media Limited, 07/07/2011, available at theguardian.com (Last visited February 24, 2025)

⁴⁴ Ethology is definable as the science studying animal behavior.

⁴⁵ Bernard Unti, Andrea Rowan, *A Social History of Postwar Animal Protection*, The state of the animals, Humane Society Press, 2001, available at https://www.wellbeingintlstudiesrepository.org/cgi/viewcontent.cgi?article=1000&context=sota_2001 (last visited February 21, 2025).

⁴⁶ Edward Wilson, *Sociobiology: The New Synthesis, Twenty-Fifth Anniversary Edition*, Harvard University Press, 1st ed., 2020. Once again, the roots are in Darwinian theories. The same could be said about Herbert Spencer’s “Survival of the fittest”.

exposed by Richard Ryder, who coined the term, in a privately published pamphlet against animal experimentation. Peter Singer popularized it in his masterpiece, *Animal Liberation*, in which he suggested that speciesism itself is morally unjustifiable.

In his *Practical Ethics*, Singer adopts an utilitarian framework to emphasize how ethical reasoning can be applied to actual issues, arguing that moral theories should move our practical actions, setting "goals rather than rules". Differing from hedonistic utilitarianism, the "traditional" one, followed by Bentham, Singer proposed a different approach. He argued that nonhuman animals' preferences were to be weighted as human ones, thus adopting a "preference utilitarianism", or "interest utilitarianism": the interest to be taken into account is proper of all sentient beings.

Having a more pragmatic approach, he criticized the consumption of meat, labelled as morally wrong: he exposed the "true face of farming", "and the callous waste of animal lives in biomedical testing and experimentation"⁴⁷. In his philosophy, animal experimentation might be justifiable, but under a constant skeptical eye. We must take into account the overall reduction of suffering and the subsequent increase in well-being. If suffering was to be minimized, with a maximization of the benefits of experimentation, Singer would "consent to it". This would be effective, at least, theoretically, with this term, "theoretically", being extremely valuable here: he often stressed that in practice, the situation is often different. Thus, his principle was not one of equal treatment but rather one of equal consideration, without biases based on the species. Every animal's interest must be taken into account in avoiding suffering, even though the treatment may differ.

One of the main criticisms of his stance was the absence of a strong position against killing animals, at least in the '70s. He

⁴⁷ Peter Singer, *Animal Liberation: The Definitive Classic of the Animal Rights Movement*, Harper Perennial, edition used, 2015, (1975) at page .

gradually recognized that almost never the kills come without pain, and he advocated – in the following versions of his *Animal Liberation* – in favor of a plant-based diet, which results more consistent with his ethical framework. Singer found that speciesism was grounded in many aspects of our daily lives, such as food production, animal experimentation, and even in philosophy. In his "Practical Ethics" this is underlined by taking an ethical stance on diet: Singer declared that more proteins were to be found in plants, rather than meat. Not only: he argued that experimentation was completely cruel to animals, even using strong words: "If the experimenter is not prepared to use an orphaned human infant, then his readiness to use nonhumans is simple discrimination"⁴⁸. By doing so, Singer played the trump card of marginal cases: if we were to define mistreatment of animals, based on their cognitive capabilities, we are supposed to accept the exploitation of humans with the same cognitive abilities. A denial of such an instance would amount to speciesism. The result of his philosophy is a call for moral obligations toward nonhuman animals, an equal consideration of their suffering, and an appeal to stop supporting factory and animal experimentation, as well as dietary changes and a shift in philosophy.

Even if their ideas clashed, in particular in regard to which animals had to be recognized as morally worthy – the "shift" for which Singer called found an answer in Tom Regan, a contemporary of Singer. The American philosopher rejected utilitarianism, arguing for an inherent moral value in nonhuman animals. Moral worth, here, cannot be understood in the light of suffering, but on the being subject-of-a-life. Can they experience it?⁴⁹ Can they have interests? Then they must be considered as having an inherent value. This is Regan's foundation to define animals' moral rights, denying their

⁴⁸ Peter Singer, *Practical Ethics*, Cambridge University Press, third ed., 2011, at 52.

⁴⁹ Experience is intended as "sensitivity", which in this case amounts to: feeling the passing of time, as having preferences.

usage as mere means⁵⁰. These rights are not considered as man-made, so not a hypothetical social construct where, still, at the top of the pyramid we find mankind: they are pre-existing in nature when dealing with animals with a sufficient cognitive capacity. Regan rejected the possibility of indirect duties⁵¹, proper of Kantian philosophy: it would still hold animals as mere “experience containers”. He defined the mistreatment of animals as wrong by itself, because it is “inherently immoral”⁵², not basing the reasoning on the consequences of potential mistreatments – as Kant and Aquinas argued in different ages. Being a right-based framework, it means that nonhuman animals have rights of their own, to which a direct duty from men is corresponding.

Central among the rights – in which we can list the “Right to a life worth living” and the “Right to be treated as ends in themselves”⁵³ – is the “Right not to be harmed or killed unnecessarily”, that can be translated as the harm principle, also called the minimization of harm principle. It amounts to a denial of every gratuitous suffering: none can be inflicted, as a “direct prima facie duty not to harm individuals”⁵⁴ exists. By showing that animals can suffer both pain and frustration, he appeals to a pre-reflective intuition: “It is wrong on principle to inflict gratuitous suffering”, but he never goes as far as to put animals on the same level as humans. Instead, he aims at putting on the same level the harm inflicted to each one of them. His philosophy is not about a “comparative magnitude” of pain: inherent value is there due to a subjectivity that must be respected, for the

⁵⁰ Kant defined nonhuman animals as “means to an end”: Regan criticized this position. See Tom Regan; *The Case for Animal Rights*; University of California Press, 1st Ed., 1983 . See also Immanuel Kant, *Metaphysics of Morals*, Cambridge: Cambridge University Press, 1st Ed., 1996 (1797).

⁵¹ See Id.

⁵² See Id.

⁵³ See Id.

⁵⁴ See Id.

existence of feeling themselves: “It’s the cup, not what goes into it, that is valuable”. He justified no exploitation, arguing for veganism: using animals as resources would amount to a violation of their rights. If Singer called for animal welfare, Regan demanded a total abolition of animal use. It was this radicalism that led the latter to a break with many animal rights activists that preferred, mainly, Singer’s position, calling not for actual rights, but for a welfarist system. Regan’s view was more fundamentalist, and more pragmatic approaches were preferred. Nonetheless, he shared some common foundations with Peter Singer: they both rejected speciesism – seen by Regan as “morally arbitrary” – as well as opposing animals’ exploitation and dietary changes. Clearly, neither was satisfied by the legal and social norms existent, burdensome to animals.

Another useful insight, with a potential legal application, may be what Marta Nussbaum theorized: she proposed constitutional protection for animals within human legal systems. In her 2006 *Frontier Justice*⁵⁵ we can read an application of the Capabilities Approach, firstly developed by Nobel Laureate Amartya Sen⁵⁶, for an ethical treatment for nonhuman animals. The Capabilities Approach, in its original shape, argued for a more inclusive treatment when dealing with traditional economic measures related to countries’ development, with a focus on the failure resulting from a definition of freedom, as well as other indexes, based on the resources a country possesses. One should also take into account the kind of life they value: the concern is not on resources themselves, but on what people can do with such possibilities to lead a fulfilling life. In this framework, freedom is considered a source of justice. The result is a pluralistic approach, more case-specific, that Nussbaum actualized in

⁵⁵ Martha Nussbaum; *Frontiers of Justice: Disability, Nationality, Species Membership*; Harvard University Press, 2006, available at <https://www.jstor.org/stable/j.ctv1c7zftw> (Last visited 21 February, 2025).

⁵⁶ Amartya Sen, *Development as Freedom*, Oxford University Press, 1999, available at <http://www.c3l.uni-oldenburg.de/cde/OMDE625/Sen/Sen-intro.pdf> (last visited 21 February, 2025).

ten capabilities later extended to animals: life, bodily health, bodily integrity, senses, imagination, thought, emotions, practical reason, affiliation, other species, play, and control over one's environment. As mankind does, nonhuman animals possess these capabilities, adapted to the species and the needs of each individual. This means that the beings taken into account – explicitly the sentient ones, thus mammals, along with various birds – should not be treated exactly as humans, but under specific moral and legal frameworks. The legal framework is built to reach “justice”: Nussbaum's theory is then a theory of justice, one in which nonhuman animals are included.

The rights of each species should exist under a “good political conception of justice” used to “frame laws and institutions to protect animals”⁵⁷, even from a constitutional perspective: “We need a set of constitutional protections, ensuring that they have opportunities to flourish according to their kind”⁵⁸. Such rights must be based on individual capabilities, making it a political goal through a set of positive rights. If this is what justice means, an “injustice” is intended as an interference with these capabilities. The animals proper of such considerations are the ones for which “the world looks like something to them”, “they strive”⁵⁹, but – clearly – a similar consideration cannot be done by jurists. The need is for experts, collecting species' capabilities, and for an enhancement of the legal apparatus, potentially through specialized courts and similar legal mechanisms. Here we must recall that this theory is presented as an idealistic framework: “Ideal theory directs our political efforts”⁶⁰, she wrote. Said efforts are directed toward animal rights recognized and protected by law. Thus, if at the start it was “simply” philosophy, now we are confronted with a biological foundation to the law. Rights are

⁵⁷ See Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (cited in note 55).

⁵⁸ See *Id.*

⁵⁹ See *Id.*

⁶⁰ See *Id.*

mainly seen as an abstraction: it is a resort to courts, positive law, and science.

3. *Between Law and Science: Case Studies*

Reading the developments in the philosophical stances diachronically, we looked at how the unknown animal world, so obscure and mysterious to Cartesians such as Malebranches, evolved to the point where biology became the foundation of a rather universal philosophical framework, upheld by a strong comprehension of scientific phenomena⁶¹. By introducing some case studies, we aim now to understand the development of the legal treatment reserved to nonhuman animals in front of courts, focusing along the way on the potential role that sciences can have in such a discourse.

3.1. *Happy the Elephant*

Happy is an elephant living in the Bronx Zoo, where she has resided for the last 48 years. She was captured in the early '70s, probably in Thailand, and brought to the US when she was one year old.. She was sold to the old Lion Country Safari, in California, which named her and other calves after the dwarves in Snow White and the Seven Dwarves. In 1977 the elephants were relocated: eventually, she was moved to the Bronx Zoo, where she had to give rides and to do tricks, entertaining the public. In 2005 she became the first elephant to “pass” the mirror self-recognition test, regarded as an indicator of both self-awareness and empathy. Dr. Joshua Plotnik, leading the experimentation, explained that there are some reactions to the test – consisting of applying an “X” marker, painted, on the animals’

⁶¹ Samuel Sigal, *You may be thinking about animals all wrong (even if you are an animal lover)*, (Vox 25/01/2023), available at <https://www.vox.com/the-highlight/23522207/animal-rights-justice-ethics-martha-nussbaum>, (last visited 22 February 2025).

forehead, leading to the conclusion that Happy successfully passed the test. Although many doubts revolve around such a test, mainly due to the lack of consensus on how fishes exposed to it reacted – Happy was deemed a deserving creature by many rights activists, also taking into account the biological framework in which these species' genetic heritage is inserted. Elephants are indeed among the most empathic species and among the few animals capable of considering each other's feelings, as well as the capacity to understand and remember past experiences to better manage similar instances. Therefore, it does not come as a surprise that they grieve and mourn their dead, possess strong communication systems based on scent, and are capable of passing down knowledge to their following generations. This does not mean that if the majority of its species are capable, every individual would act accordingly, but nonetheless some instances are groundbreaking, as is the case of Happy. Due to her conditions of captivity, combined with her capacity of being self-aware⁶², her conditions were subject to an opposition from animal rights activists⁶³. In particular, she eventually lived by herself after her “flatmate”, Grumpy, died from a confrontation with other elephants in 2002.

Her captivity gave rise to a lawsuit that started with the Nonhuman Rights Project (from now on NhRP) filing a writ of habeas corpus to the New York State court to attempt to have personhood recognized to Happy. However, in front of the law, happiness amounts only to a thing. The idea of this lawsuit was to ground the habeas corpus on her cognitive abilities and to declare her condition as an illegal detention in order to move her to an elephant sanctuary. The judges rejected the claim in a 5-2 decision, given the fact that the

⁶² Robert Siegel, *Elephants Have a Concept of Self, Study Suggests*, National Public Radio, 31/10/2006, available at npr.org (last visited 21 February, 2025).

⁶³ Nonhuman Rights Project launched, for instance, the hashtag “#freehappy”. The NGO is behind the lawsuit aiming at her transferral to an elephant sanctuary.

habeas corpus intends to protect human beings' liberties. The NhRP stressed that the law defines who is a legal person and who is not, as clarified by a reading of the New York's Practice Law and Rules, specifically Article 70, which states that a "person" is a fictional entity determined by law. In addition to this, the court refused the analogy between minorities and nonhuman animals, defined as an "odious comparison with concerning implications"⁶⁴. Regarding this issue, no precedent exists in the U.S. to strengthen Happy's position, but the same could not be said about third countries – India, for instance, banned the capture and confinement of dolphins and orcas on their widely recognized intellective abilities⁶⁵.

Among the dissenting opinions, we can analyze Judge Wilson's position, which was based on the Latin maxim "*tempora mutantur et leges mutantur in illis*" – times change, and the laws change with them. He pointed out that in 1906, the Bronx Zoo had displayed a member of an African tribe in the monkey's house "behind iron bars,"⁶⁶ illustrating how, over time, such practices evolved. This historical application of the marginal cases argument was consistent with the NhPR's position.

Still, Happy was entitled to some rights: the main framework on anti-cruelty was established in the U.S. in 1966, with the Animal Welfare Act. However, it does not go as far as to grant a stance in front of a court. The *amicus curiae*, by Animal Legal Defense Fund in the case, reached the same conclusions when declared that "Society should be cautious in assuming those rights resulting from anti-

⁶⁴ Nonhuman Rights Project, Inc. ex rel. Happy v. Breheny, No. 52, 2022 WL 2122141 (N.Y. 2022). See Rachael Reed, *The Court Simply Refused to Extend to Happy the Elephant the Opportunity to Prove, through Her Lawyers, That She Deserves Her Freedom*; Harvard Law School 07/06/2022, available at hls.harvard.edu. (last visited 21 February, 2025).

⁶⁵ Lawrence Wright, *The Elephant in the Courtroom*, The Newyorker (Condé Nast), 28/02/2022, available at [newyorker.com](https://www.newyorker.com) (Last visited 21 February, 2025).

⁶⁶ Rachael Reed, *The Court Simply Refused to Extend to Happy the Elephant the Opportunity to Prove, through Her Lawyers, That She Deserves Her Freedom* (cited in note 65).

cruelty legislation are written in stone: we must consider a possibility to advance our understanding of animals and nature – as we did with “children and disabled persons, because we, as a society, want to”⁶⁷. Ultimately, the case shows how we conceive liberty rights, but also who is capable in a common and Western understanding to hold them, no matter what the scientific findings seem to be⁶⁸.

3.2. Medieval Trials

A common misconception, associated with animal rights activists, is that they would push for a kind of equality unrepresentable in our reality⁶⁹: humans and nonhuman animals on the same level, both from a moral and legal perspective. To find an example of said “complete” equality, where no scientific ground and not even moral ones are considered, we may resort to the Medieval period. The treatment, or better to say, mistreatment of animals, is well explained by Hampton L. Carson, in a 1917 essay, *Trial of Animals and Insects*. Imagine a stereotypical scenario of a Middle Ages execution: an open square, an old Norman city, and a vast crowd. The crime? Killing children. The prisoner, well-dressed, was subject to the *lex talionis*. The guilt? A sow. Responsible for “eating infants on the streets”: this is one of the examples brought forward by Carson. Over the years it even became a custom to have animals heard in courts – as per the Rat case, where rats were tried for spreading the plague. Trials of similar instances can be traced up to the 19th century, like in Pleternica, Slavonia, where – once again – a pig was tried for biting

⁶⁷ Lawrence Wright, *The Elephant in the Courtroom*, (cited in note 66).

⁶⁸ Danny O'Connor, *The Sad Case of Happy the Elephant*, vol. 91, Cincinnati Law Review 13/09/2022, available at <https://uclawreview.org/2022/09/13/the-sad-case-of-happy-the-elephant/> (last visited February 21, 2025).

⁶⁹ Kartik Chug, *The Case Against Animal Rights*, 2020, available at cuesonline.org (last visited February 21, 2025).

off “maliciously” the ears of an infant⁷⁰. The perception started to switch from this period: the pig was thrown to hungry dogs, while his owner was condemned to pay the baby’s family a sum for compensation. Many animals were tried also in the following years, following the same, or similar, criminal procedures destined for humans – for example, in the case of a dog who aided murderers in a crime committed in Switzerland in 1906⁷¹.

This approach has been common to Italy, Spain, France, as well as the United Kingdom, and even beyond the Pillars of Hercules: including Connecticut and Canada⁷². In France the *bête puantes*, stenchy animals, were under the jurisdiction of civil and criminal courts, they risked – for their crimes – death by hanging or burning at the stake. Beyond the secularized trials, we have similar instances, proper of animals under the jurisdiction of ecclesiastical tribunals: vermin, as mice, moles, and bugs. Animals serviceable to men, as the farmed ones, were to be treated as members of the family undergoing the same trial, whereas the others, under a superstition proper of Greek derivation, were a religious matter. It was believed that a religious treatment was needed to avoid disasters. The secular cases were treated as if they were any other, especially when it came to murder. It was held, by both commoners and intellectuals, as something perfectly reasonable. As using sorcery was a common offence, animals were common plaintiffs. It is the first and only equal consideration in front of the law we can count on – at least with our Eurocentric focus. Some moral consideration was existent even in the common Christian narrative: the “Great Chain of Being”, counted

⁷⁰ Carson L. Hampton, *The trial of animals: a little known chapter of medieval jurisprudence*, New era Printing, 12/04/1917, available at [jstor.org](https://www.jstor.org) (Last visited 21, February 2025).

⁷¹ Sonya Vatomsky, *When Societies Put Animals on Trial*, Jstor Daily (2017), available at [daily.jstor.org](https://www.jstor.org) (Last visited 21 February, 2025).

⁷² Peter Dinzelsbacher, *Animal Trials: A Multidisciplinary Approach*, vol. 32, *The Journal of Interdisciplinary History*, Winter 2002, available at muse.jhu.edu (Last visited February 21, 2025).

also on nature, stating that everything was interconnected. Some jurists, such as Bartholomé Chassenée, believed that nonhuman animals had enough cognitive skills to be treated under human legal systems⁷³: the moral status was higher than the current one. In practice, their treatment was still a means to an end. Their legal status under property law reflected it: nonhuman animals were mainly labelled as commodities. Still, this example provides a foundation to understand that when science does not come into play, and it does not intersect with the law, the results may be weird to our understanding. It was the Enlightenment that put forward a speciesist consideration: Kant and Voltaire are the two sides of the same coin.

3.3. *Primates*

Bonobos, chimpanzees, orangutans and gorillas. The dystopian adaptation of our reality, where these animals are conceived as smarter than us, has been showcased by many artists over the years. Whether it was cinema or literature, the curiosity toward our ancestry is undeniable: the empathy, almost non-existent toward other species, seems to be stronger toward apes. Even psychology struggled to understand such feelings. This connection with apes may be the first foundation for the attempts to recognize their personhood, which has been more and more common. Many states started to grant them recognition of human rights, as the Ecuadorian Constitutional Court

⁷³ Esther Cohen, *Law, Folklore and Animal Lore*, vol. 110, *Past & Present* (1986), available at aldf.org (Last visited 21, February 2025). The defense that Chassenée put forward for his clients, rats, was infamous: they could not appear in front of the court due to the impediments provided by cats.

did by ruling that wildlife animals should be protected even in their individuality, resulting in a right “to exist and to flourish”⁷⁴.

Personhood needs challenges, even from a legal perspective, but clearly primates cannot reach courts by themselves. The difficulties are many with regard to the rights that should be prioritized: is it better to grant personhood or a “simple” right to life? Surely, granting proper human rights would align with the Medieval approach, excluded from the potential pathways. The morality discourse may be supported here by science itself: the DNA evidence shows that we share between 96% and 99% percent of our DNA with great apes⁷⁵. Would biology be a foundation on which law could be deliberated? Although possible, it is not the main idea on which animal rights activists moved their reasoning to gain legal ground. If we deny the scientific reasoning, by resorting to morality, we can notice that bonobos, chimps, and gorillas are the perfect case study for a debate on the marginal argument cases. As Jane Goodall tells us, “Great apes form a living bridge between ‘us’ and ‘them’, this knowledge forces us to re-evaluate our relationship with the rest of

⁷⁴ The case was about a specific monkey, Estrellita, who lived with a family for 18 years. Due to the law, she could not live in a household: she was a wild animal. When she was moved to a zoo, she died shortly after: her caretaker, her “mum”, filed a lawsuit on her behalf. The Court found that Estrellita’s rights were violated both when she was forced from her habitat, and again when she was moved to a zoo. Thus, “Nature Rights” - existent in the Ecuadorian Constitution from 2008, cover not only ecosystems, but also individual animals, extending to them some personhood rights. There is no equal treatment, but rather an improvement in their condition. See Nicole Pallotta, *Ecuador’s Constitutional Court Rules Wild Animals Are Subjects of Legal Rights Under the Rights of Nature*, Animal Legal Defense Fund, 04/01/2023, available at aldf.org (last visited February 21, 2025).

⁷⁵ Humans, chimps and bonobos share a surprisingly high 98.8 percent of their DNA, according to the American Museum of Natural History of New York City. Other evidence shows that it may be slightly lower, up to a difference of 5% - making it an estimate of 95% shared. See Roy Britten, *Divergence between samples of chimpanzee and human DNA sequence is 5%, counting indels*, vol. 99(21) National Academy Science U.S.A., at 13633-13635 (2002), available at <https://www.pnas.org/doi/10.1073/pnas.172510699> (last visited February 21, 2025).

the animal kingdom”⁷⁶. By not considering such a stance, current legislation results in adopting an anthropocentric approach to the topic that may be impaired by blending law and science: the problematic relationship with our ancestors explains how the law is lacking.

If we were to recognize rights to primates, what would it mean to protect, perhaps on constitutional grounds, a right to property? This was the central argument in the debate around the famous dispute “monkey selfie”. In July 2011, David Slater – a British photographer – was in Indonesia trying to get monkey pictures: he placed his camera on a tripod that took the full curiosity of the primates. Among the shots, one of the images in which a female crested black macaque portrayed herself “smiling” became famous. Slater published the picture of Naruto – the name of the macaque in question – in the Daily Mail. Later on, in 2014, Wikipedia chose to publish said picture due to the inability of primates to own copyright: the choice was based on the approval of the U.S. Copyright Office. People for the Ethical Treatment of Animals (PETA) sued Slater in the U.S., trying to assess copyright over the picture by declaring that the actions by the primate were voluntary actions. The case was then dismissed two years later. When PETA appealed, the case was dismissed again in front of a Court of Appeals in San Francisco⁷⁷. While it is difficult – impossible, we could dare to say – to assess whether Naruto was willing to hold copyrights, we must interrogate ourselves on whether there would be an actual improvement in

⁷⁶ Jane Goodall, *Chimpanzees - bridging the gap*, (1993), at 10-18, available at <http://www.animal-rights-library.com/texts-m/goodall01.htm> (last visited 21 February, 2025).

⁷⁷ For further explanations about the “Naruto Case”, see Matthew Hooker., *Naruto v. Slater: One Small Step for a Monkey, One Giant Lawsuit for Animal Kind*, vol. 15, Wake Forest Law Review, 2020, at 15-31, available at <https://www.wakeforestlawreview.com/2020/02/naruto-v-slater-one-small-step-for-a-monkey-one-giant-lawsuit-for-animal-kind/> (last visited 21 February, 2025).

animals' condition by recognizing them a full set of human rights. A different approach may be the welfarist one, calling for an improvement of their status, not necessarily dealing with the fundamentality of rights. A point in favor of the latter perspective – the welfarist approach – would be the possibility to actually measure and analyze their welfare, for which both psychological and behavioral indicators are taken into account. From these conditions, animal based measures may be used to design facilities and equipment to improve their housing, when nonhuman animals are in captivity, as well as functional measures to deal with the need to share natural spaces with mankind.

The debate around which approach is more useful to the issue calls for the need to make a clear cut distinction: although comparable with the goals to be reached, the means implied are different. The welfarist approach focuses on improving their living conditions on scientific grounds without necessarily granting legal rights. On the other hand, the right-based approach argues for an intrinsic value of animals from which an upgraded treatment is derived: these perspectives amount to the stance of Peter Singer and Tom Regan. A blend of these two is the potential solution offered in this paper to deal with questions about both moral duties, toward nonhuman animals, as well as their legal status.

4. The Gradualist Approach

After a glance at the legal landscape created by case law and potential precedents, we may formulate the aforementioned potential solution to our dilemma. An interesting answer is given by Francesco

Allegri⁷⁸, especially if integrated with Nussbaum's Capabilities Approach. Allegri explored – and rejected – Regan and Singer's approaches. Regan could not approve of Singer's utilitarianism due to the lack of emphasis on individual worth proper to the utilitarian framework: single members of a species would be only receptacles of value, while moral agents are instrumental to a greater good. Furthermore, in following this approach a number of problems arise, one of them being secret killings. They could not be opposed to the fact that if the death of an animal goes unnoticed it does not alter the overall balance of happiness. Thus, Regan tried to extend the moral-worthy-club-membership by saying that who is a subject-of-a-life is living under a "respect principle". Allegri praised said non-utilitarian foundation, but enhanced it with his gradualism. If one were to hold a value, we should not consider such worth as fixed: the value, under gradualism, "rises gradually, moving up the phylogenetic ladder"⁷⁹. The basis for a potential upgrade is given by the nonhuman animal complexity: a social, cognitive, and emotional one.

The risks of creating a hierarchy are still there: this is why Allegri suggested a complementary option to balance the implications of assigning improved status based on species-specific characteristics. We shall take into account the kind of interests at stake, on levels such as "basic", "important", and "less important". When there is a conflict between a basic interest of a less complex

⁷⁸ Francesco Allegri, *Respect, Inherent Value, Subjects-of-a-Life: Some Reflections on the Key Concepts of Tom Regan's Animal Ethics*, 7(1-2), *Relations Beyond Anthropocentrism*, 2019, at 41-61, available at https://www.researchgate.net/publication/346868876_Respect_Inherent_Value_Subjects-of-a-Life_Some_Reflections_on_the_Key_Concepts_of_Tom_Regan's_Animal_Ethics (Last visited 21 February, 2025).

⁷⁹ Francesco Allegri, *Beyond Anthropocentrism? Yes, but in What Direction?*, vol. 111, *Relations Beyond Anthropocentrism*, 2023, at 89-95, available at <https://philarchive.org/archive/ALLBAY> (last visited 21 February, 2025).

animal, and a minor interest of a more complex one, the basic interest should prevail.

To further implement this option, we can now introduce the blend with the Capabilities Approach which says that if we base our choices solely on complexity, humans would still rank at the top of the hierarchy but every animal should now be granted, even in legal terms, a certain degree of protection.

To extend such protection, we could consider a theory of justice, as Nussbaum did, of which even animals are part of. Nussbaum's ethical framework for animal protection is not founded on subjective feelings of kindness, but on the objective recognition of animals' inherent vulnerability and the consequent imperative to protect them within a just society.. While one might expect to find robust jurisprudence, reality reveals severe gaps if not in the quantity of legislation, at least in its enforcement and recognition.. Nonhuman animals lack legal standing in courts, this means that their rights, if recognised, cannot be directly defended. Their presence in a theory of justice would shield them from such a predicament. A violation of their rights would be recognised in the case of an interference with their abilities – “capabilities” in Nussbaum’s framework. Ideally, she suggests creating a list of capabilities for each creature, putting on the list what matters most to their “survival and flourishing”. It is not just a matter of survival, rather one of enabling fulfilling lives, appropriate to each species. The most effective approach would be to draft a comprehensive list of these capabilities, with the assistance of human experts, to serve as a foundation for the subsequent development of the law. Although Nussbaum’s reasoning seems both complete and up to date, it is based on an idealistic approach: “Ideal theory directs our practical efforts”, Nussbaum wrote. She portrayed an ideal embodied in her Capabilities Approach to show that it actually answers to applied ethics issues – thus general issues of ethics applied in concrete terms.

The need to counterbalance Nussbaum’s idealism finds a solid

ground in Terence Burnham's reading of her proposal: he formulated a transposition of her philosophy into practical, and legal, application through a biological starting point. The Allegrian stance appears as a valuable option: as Burnham also suggested, using Darwinian theories and biology⁸⁰ sounds promising. The understanding of single organisms, as an helpful insight, is explained by an example provided by Burnham to strengthen such a thesis. The analogy traced analyzes the reasons for which men fear death, in parallel with the same fear in animals. He provided an example about male elephant seals fighting each other to control a beach: who gets to win, gets to mate with all the females in the area. Fighting may mean wounds, as well as death, but only those who win reach the possibility of passing their genes to the next generation. Clearly, the possibility to avoid fights is there, but it comes at the cost of a concrete disappearance of one's own genes. Evolutionary theories, backed by genetics, tell us the reason: whoever is stronger, gets to survive, but as a "species". Human fear of death works in a similar fashion: fear leads us to an increased avoidance of danger embedded in our genome. Burnham tells us that a philosopher may find death even as irrational, making it illogical, but a biologist would answer that the same feeling is useful to get our species to survive, making the next generation stronger. Interdisciplinary approaches may offer valuable insights, especially when dealing with nonhuman animals, of which the behavior cannot be fully captured by anthropocentric philosophy.

5. *Conclusion*

Arguing in favor of animal rights may, in the eyes of skeptics, be seen as a quixotic endeavor – tilting at windmills. Actual attempts to extend basic human rights to nonhuman animals, such as the right

⁸⁰ Allegri did so by considering a gradual and scientific-based conception of each animal where no watertight component model is used: no strict hierarchy.

to life, or the individual freedom protection, have been central in the struggles of organizations such as the Great Apes Project, dealing with a pragmatic approach to the topic. An example of such pragmatism is the act of challenging courts in favor of primates' rights. A similar stance may find basis in philosophy, biology, ethology and neuroscience, as explained *supra* in the paragraph dedicated to the case law about primates: from each of these disciplines we should take the relevant insights to build a complete moral first, and then legal, framework – more animal-friendly than the current one. Sentience may serve as a starting point to define a degree to which we should feel bound by moral obligations, however, the term “sentience” must be handled carefully. A transposition into positive law as a result may generate confusion in the actual approach. There is no consensus on a detailed list of sentient animals: mammals show clear signs of experience – definable as “pleasure” and “pain”, as per the utilitarian stances of Bentham and Singer – but the discourse should be extended to other species.

Doubts remain on the sentience of fish and bird species mainly due to testing models limitations⁸¹. If the “science” is not sure, are we – as jurists and philosophers – certain about the exclusion of nonhuman animals from our hypothetical moral community? Not owing them any moral obligation would amount to treating a wide range of nonhuman animals as mere things. Clearly, moral obligations are not law, thus we must first understand how they perceive themselves empirically, to establish a potential degree of sentience to be used legally. As aforementioned, sentience alone may be insufficient, as the argument from marginal cases challenges those theories based only on said ability, and highlighting their limitations. Children have only basic forms of consciousness, but we still include them in our moral community, solely based on their species. Although they feel pain, they cannot be on the same level of a fully

⁸¹ Elizabeth Preston, *A 'Self-Aware' Fish Raises Doubts About a Cognitive Test* (2018), available at quantamagazine.org (last visited February 21, 2025).

developed human from a cognitive perspective, but we still do feel as if we owe them moral obligations.

The result is a speciesist model, considering what “speciesism” amounts to. If we consider that other living beings, beyond children, have no sentience, but still have a legal protection and a favoured ethical treatment, like coral reefs, many doubts about the disparity of treatments for nonhuman animals arise. Coral reefs, although lacking sentience, play a very important role in the protection of our environment, a contribution humankind has deemed so great as to justify providing them legal protection. The Coral Reef Protection Act, for example, extends protection to the whole habitat of said animals.

A similar system only acknowledges the instrumental value of animals: the same things cannot be said about bacteria and mold, living in the same condition of essentiality to their respective environments. Are they deserving of a moral or, at least, a legal protection? An anthropocentric philosophy, placing nonhuman animals on a lower level than “us”, seems to be weak in front of the challenges posed by our century.

Gradualism, in communion with the Capabilities Approach, may be useful here: the moral worth proper of each animal follows the grounds on which their treatment is chosen. Animal related law would mean nothing if not justified by scientific grounds: it would amount to an instrumentalization of nonhuman animals, as Salt defined it: “a rationalization put on for the occasion”. If it is functional as a theoretical background, thus valid for our morals, the clash is right behind the corner: reality waits for a confirmation in applied ethics. Nussbaum’s position may be complementary for an actualization of such perspective: it is difficult to advocate in favor of an absolute ban on animal experimentation, as well as the consumption of meat, but when the suffering is not necessary, it should be avoided. Being a clear heritage of the utilitarian tradition,

the “unnecessary suffering” finds strong application in Singer’s works. Singer called for a moral justification for experimentation: suffering must be minimized, and if we were to allow similar practices, it must be for a concrete and certain improvement in human animals’ condition. Furthermore, the Australian philosopher proposed a cost-benefit analysis for our society.

Ultimately, all the philosophies discussed achieve greater completeness when integrated with scientific insights. The degree of consciousness to be translated into positive law cannot be understood by a mere observation of the world: the need is to go beyond. Whether it is an analysis of brain waves, or a study of genetics, a moral stance grounded on philosophy, or a scientific approach moving from animal-friendly ethics, there are indeed promising ways for reconciling moral theory with scientific evidence. The moral worth would be defined on a sliding scale model⁸², even in relation to the pain inflicted: the more complex the being, the more its understanding of pain, and therefore, the greater the weight given to the pain inflicted.

⁸² David DeGrazia, *Moral Status As a Matter of Degree?*, XLVI, The Southern Journal of Philosophy, (2008), available at https://philosophy.columbian.gwu.edu/sites/g/files/zaxdzs5446/files/2023-01/degrazia_moralstatus2.pdf (last visited February 21, 2025).