

**'Richard Ryder once wrote: "Since Darwin, scientists have agreed that there is no 'magical' essential difference between human and other animals, biologically speaking. Why then do we make an almost total distinction morally?" Assuming this is correct, how does this affect arguments for and against animal rights laws?'**

## Introduction

2023 marks 40 years since Tom Regan made the case for animal rights.<sup>1</sup> 40 years on, and for lawmakers it appears that the case still needs to be made. But on what basis? This essay analyses one of the most common arguments in favour of animal rights: that biological similarities between humans and animals should translate into legal similarities. It traces this argument in both the literature and in case law. However, the essay warns against using a biological-based criterion, such as cognition or sentience, as a justification for granting animal rights, since it fails to justify the denial of rights to – and thus legitimises the continued suffering of – animals deemed the least 'humanlike'. In order to avoid taking this speciesist position, an ecofeminist perspective which embraces the differences between humans and animals and recognises that they are worth protecting is needed.

Scientific evidence has long attested to Ryder's observation that, 'since Darwin, scientists have agreed that there is no 'magical' essential difference between human and other animals, biologically speaking'. Humans and animals have been found to share both physical and mental traits. For example, in relation to the former, basal impulses like feelings are located in the limbic bark and are well developed in all mammals and birds,<sup>2</sup> whilst fish are similarly capable of feeling pain.<sup>3</sup>

Furthermore, for a long time researchers also thought that possessing a dominant hand was something exclusively human. However, this too has been debunked, with science finding that big

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<sup>1</sup> Tom Regan, *The Case for Animal Rights* (University of California Press, 1983).

<sup>2</sup> Ragnhild Sollund, 'Causes for Speciesism: Difference, Distance and Denial in Ragnhild Sollund, *Global Harms: Ecological Crime and Speciesism* (Nova Science Publishers, 2008), 118.

<sup>3</sup> Ibid.

apes and some bird species, like hens and parrots, use their right claw to scratch themselves and handle different items, whilst whales, dolphins and toads have also all been found to be right-handed.<sup>4</sup> Other physical similarities include the fact that humans are not the only species to use tools; primates have long been recognised as capable of using tools, but to these we can also now add animals like parrots,<sup>5</sup> as well as even fish, which use stones to crush sea urchins.<sup>6</sup> Language is additionally not unique to humans, with researchers having discovered more than 50 words in the language of hens and at least 300 in that of crows.<sup>7</sup> Whilst it is often thought that no animal besides a human uses symbolic communication – where one concept is represented by another, as it is in writing - consider the honeybee, which conveys information about a distant food source to its hive members by dancing.<sup>8</sup> Mental traits which were once believed to be unique to humans have also since been found in animals, as illustrated by the fact that elephants, great apes, dolphins, birds and dogs all express grief following a death.<sup>9</sup>

Yet, the biological similarities between humans and animals are not reflected in legal similarities. Despite modern scientific discoveries, the law continues to base its treatment of animals on the outdated, Cartesian view of animals as unfeeling automata. As such, humans are legal persons whilst, in most jurisdictions, animals are legal property. For example, chimpanzees are intellectually comparable to a 4-year-old human child, yet in most legal orders a chimpanzee is legally comparable to a chocolate bar, rather a child.<sup>10</sup> There is growing recognition that animals need fundamental legal

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<sup>4</sup> Sollund (n 2), 118.

<sup>5</sup> Ibid

<sup>6</sup> A.M Jones, C Brown and S Gardner, 'Tool use in the tuskfish *Choerodon schoenleinii*?' (2011) Coral Reefs.

<sup>7</sup> Sollund (n 2), 118.

<sup>8</sup> Alison Benjamin, 'Scientists decode honeybee 'waggle dance' (*The Guardian*, 3 April 2014) available at < [Scientists decode honeybee 'waggle dance' | Bees | The Guardian](#)> accessed 4 March 2023.

<sup>9</sup> Nicola Davis, 'dogs experience a form of mourning when another dog in the household dies' (*The Guardian*, 24 February 2022) available at < [Dogs experience a form of mourning when another dog in the household dies | Animal behaviour | The Guardian](#)> accessed 5 March 2023.

<sup>10</sup> Fred Motson, 'Geronimo the alpaca – the case for animals having the same legal rights as people' (*The Conversation*, 16 August 2021) available at < [Geronimo the alpaca – the case for animals having the same legal rights as people \(theconversation.com\)](#)> accessed 5 March 2023.

rights akin to human rights in order to protect them from institutionalised abuse.<sup>11</sup> But on what basis should these rights be granted?

Determining the biological attributes which animals must show in order to become rights-holders has long proved contentious both in theory and practice. 40 years ago this year, Tom Regan argued that in order to qualify as a subject-of-a-life and thus be entitled to moral rights, it must be shown that an animal is more than merely alive and conscious.<sup>12</sup> They must instead exhibit a range of 'sophisticated abilities', including having 'beliefs and desires, perceptions, memory and a sense of the future'.<sup>13</sup> They must also be able to feel pleasure and pain and be able to initiate action in pursuit of their desires and goals.<sup>14</sup> Finally, they must have a psychological identity and an individual welfare, in the sense that they understand whether they are enjoying life or not.<sup>15</sup> Many animals do satisfy this subject-of-a-life qualifying criteria, since a range of animals (notably mammals) possess perception, memory, desire, belief, self-consciousness, intention and a sense of the future.<sup>16</sup>

In practice, where animal rights organisations have sought to expand human rights to animals, they have often used similar criteria to Regan, arguing that the animals in question possess similar cognitive abilities to those of humans. For example, The Nonhuman Rights Project has sought to argue that Happy the elephant – a resident at the Bronx Zoo since the 1970s - has autonomy and complex cognition which makes her worthy of holding the right of *habeas corpus*, which is ordinarily reserved

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<sup>11</sup> Ibid.

<sup>12</sup> Regan (n 1).

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Piers Beirne, 'Animal rights, animal abuse and green criminology' in Piers Beirne and Nigel South (eds) *Issues in Green Criminology: Confronting harms against environments, humanity and other animals* (Collumpton: Willan, 2007).

in law for human beings.<sup>17</sup> Happy clearly demonstrates a range of Regan's sophisticated abilities; for example, Happy was the first elephant to pass a self-awareness indicator test when she successfully repeatedly touched a white 'x' on her forehead as she looked into a large mirror,<sup>18</sup> thus evidencing a clear sense of perception. A similar picture can be seen with Tommy the chimpanzee, who The Nonhuman Animal Rights Project also argued possessed sufficiently sophisticated abilities to be granted rights.<sup>19</sup> It was argued that since chimpanzees exhibit highly complex cognitive functions similar to those possessed by human beings, such as autonomy, self-awareness and self-determination, they too should enjoy human rights.<sup>20</sup>

In both cases, the extension of human rights to animals was denied. Happy's case was dismissed in 2022 by Judge DiFiore, who notably did not dispute that Happy is intelligent, autonomous and able to display emotional awareness.<sup>21</sup> Instead, she rejected the idea of rights for animals on the basis that the right of *habeas corpus* 'protects the right to liberty of humans because they are humans.'<sup>22</sup> Highlighting the speciesist nature of the argument, Jowitt notes that 'put simply, whether Happy is a person is irrelevant, because even if she is, she's not human.'<sup>23</sup> A similar argument was deployed by Judge Peters to dismiss the claim in Tommy's case. Judge Peters did not dispute the biological similarities between humans and chimpanzees.<sup>24</sup> However, she based her denial of legal rights to

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<sup>17</sup> Associated Press, 'The person in the room? US court mulls if elephant has human rights' (*The Guardian*, 19 May 2022) available at < [The person in the room? US court mulls if elephant has human rights | US news | The Guardian](#)> accessed 4 March 2023.

<sup>18</sup> Sravasti Dasgupta, 'Is Happy the elephant a person? New York court decides if pachyderm has human rights' (*The Independent*, 19 May 2022) available at < [Is Happy the elephant a person? New York court debates if pachyderm has human rights | The Independent](#)> accessed 5 March 2023.

<sup>19</sup> Joshua Jowitt, 'Monkey sue, monkey sue? Gewirth's principle of generic consistency and rights for non-human agents' (2016) *TCLR* 71.

<sup>20</sup> *Ibid.*

<sup>21</sup> Guardian staff and agencies, 'Happy the elephant is not a person, says court in key US animal rights case' (*The Guardian*, 15 June 2022) available at < [Happy the elephant is not a person, says court in key US animal rights case | New York | The Guardian](#)> accessed 4 March 2023.

<sup>22</sup> *Ibid.*

<sup>23</sup> Joshua Jowitt, 'From Ais to an unhappy elephant, the legal question of who is a person is approaching a reckoning' (*The Conversation*, 2022) available at < [From Ais to an unhappy elephant, the legal question of who is a person is approaching a reckoning \(theconversation.com\)](#)> accessed 5 March 2023.

<sup>24</sup> Jowitt (n 20).

animals on social contract theory. She reasoned that legal rights can only be granted to non-human persons if those persons can be said to consciously accept the burden of societal duties in return.<sup>25</sup> She concluded that Tommy possessed no observable ability to comprehend that rights are reciprocal in nature – a prerequisite standard should legal rights be extended to animals.<sup>26</sup> Jowitt rightly describes this argument as ‘flawed’,<sup>27</sup> whilst Stucki similarly argues that this ‘narrow contractarian framing of rights-holding should be rejected’.<sup>28</sup> This is because it fails to explain how or why human beings who are unable to accept duties, such as children and the mentally incapacitated, can still benefit from rights despite their inability to consent to societal obligations. The weakness of the legal reasoning suggests that, like with Happy, the true rationale for denying rights to Tommy was down to pure speciesism.

In light of the weakness of these legal arguments, both of which seem to be grounded in unjustifiable speciesism, it would be reasonable to conclude that there is no acceptable reason to deny human rights to animals based on biological similarities. However, this essay argues that this would be too facile a conclusion to draw. Arguably, the case for animal rights should not be based solely on the ‘sophisticated abilities’ which animals have in common with humans, since this unjustifiably limits the extension of legal rights to ‘higher-order’ species and legitimises the denial of rights to animals deemed the least ‘humanlike’. This would be to fall foul of what Flynn and Hall refer to as ‘hierarchical speciesism’: the ordering of animals according to how ‘sentient, humanlike or even ‘cute’ they are’.<sup>29</sup>

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<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Saskia Stucki, ‘Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights’ (2020) OJLS 533, 540.

<sup>29</sup> Matthew Flynn and Matthew Hall, ‘The case for a victimology of nonhuman animal harms’ (2017) CJR 299.

Evidence of this hierarchical speciesism can be seen in the fact that, so far, the only animals to have been granted legal rights have been primates, widely recognised as ‘the most sentient and humanlike animals.’<sup>30</sup> For example, in 2007 the Balearic Islands granted legal personhood to great apes, a move later extended by the Spanish Parliament which passed a resolution recognising that great apes have the right to life and freedom.<sup>31</sup> The resolution was passed in response to pressure from the Great Apes Project, which bases its argument that great apes should be granted human rights on the biological facts that the ape is, firstly, the closest genetic relative to humans and, secondly, can display anthropomorphic emotions such as love, fear, anxiety and jealousy.<sup>32</sup> Indeed, evidence of hierarchical speciesism can also be seen with the cases outlined above, in which the subjects were an elephant and a chimpanzee: two of the most widely-regarded higher-order species. Indeed, on its website, the Nonhuman Rights Project specifically states that it aims to pursue the recognition of legal rights to ‘appropriate non-human animals’.<sup>33</sup> The Project states that these rights include ‘the rights to bodily integrity, bodily liberty and other civil rights’, which animals should have based on ‘evolving standards of morality, scientific discovery and human experience’.<sup>34</sup> Thus, by its very nature, the Nonhuman Rights Project, much like the Great Apes Project, seeks to limit the range of beings endowed with legal rights to those ‘appropriate nonhuman animals’ which, according to morality, science and human experience, share commonalities with humans.

As ecofeminists have rightly pointed out,<sup>35</sup> the problem with arguing that animals must have these commonalities of ‘subjective consciousness’ or ‘complex awareness’ in the way that Regan does is that it privileges the kind of masculine rationalism which has long reinforced and legitimised human

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<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Jowitt (n 20).

<sup>34</sup> Ibid.

<sup>35</sup> Helena Silverstein, *Unleashing Rights: Law, Meaning and the Animal Rights Movement* (University of Michigan Press, 1996), 46.

control and exploitation of animals. Arguing in favour of animals' rights based on their similarity to humans fails to understand the rich uniqueness that other animals' physical and mental abilities represent.<sup>36</sup> Take cephalopods, for instance, with whom we shared a common ancestor about 600m years ago – far longer ago than that of all vertebrates.<sup>37</sup> This distance is reflected physically, with cephalopods possessing two hearts and about 10,000 more genes than humans do.<sup>38</sup> Crucially, however, this does not mean that they are not intelligent, with octopuses possessing the ability to navigate mazes, solve puzzle toys and open jars.<sup>39</sup>

Although to a lesser extent, similar criticism can be made about the argument that legal rights should be extended only to sentient animals with the capacity to feel pain. For example, eco-feminists criticise Singer for imposing the more basic, yet still fundamentally anthropocentric, yardstick of suffering as the criterion for interest-holding.<sup>40</sup> Similar to cognitive abilities, the problem with using sentience as a yardstick for rights is that the suffering of higher-order species, or any species deemed the most 'sentient' or 'humanlike', is more easily understood, for the very reason that it most closely resembles that of human suffering. But this risks overlooking sentience in, and thus excluding rights to, species in which signs of suffering and victimisation are harder to perceive simply because they differ from those of humans. Worryingly, Blattner has observed that the inherent anthropomorphic bias which scientists, like all humans, possess means they 'do not pay sufficient attention to the fact that nonhuman-like structures in animals allow for similar, if not more

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<sup>36</sup> Ragnihild Aslaug Sollund, 'Speciesism as Doxic Practice Versus Valuing Difference and Plurality' in Ragnihild Sollund *et al*, *Eco-Global Crimes: Contemporary Problems and Future Challenges* (Taylor & Francis Group, 2012), 108.

<sup>37</sup> Philip Ball, 'The big idea: should animals have the same rights as humans?' (*The Guardian*, 24 January 2022) available at < [The big idea: should animals have the same rights as humans? | Books | The Guardian](#)> accessed 4 March 2022.

<sup>38</sup> Elle Hunt, 'Do you care about animals? Then you really shouldn't eat octopus' (*The Guardian*, 26 May 2016) available at < [Do you care about animals? Then you really shouldn't eat octopus | Elle Hunt | The Guardian](#)> accessed 5 March 2023.

<sup>39</sup> *Ibid*.

<sup>40</sup> Silverstein (n 35).

intense, experiences of suffering.<sup>41</sup> For example, staying with cephalopods, their nervous systems look very different to those of humans, with most of an octopus' neurons being located in the arms, not the central brain.<sup>42</sup>Crucially, however, this does not mean they are insentient; indeed, some researchers believe they might even possess a dual or even multiple consciousness – a bizarre situation which we as humans struggle to imagine yet which potentially increases their capacity for pain.<sup>43</sup> Cephalopods are indicative of a wider trend, whereby 'animals typically considered less cognitively developed might actually suffer more.'<sup>44</sup>

If legal rights for animals were based on their ability to feel pain, the anthropomorphic bias of all human scientists means that species regarded as having the least sentience, such as fish and insects, are likely to be unduly overlooked since scientists 'ascribe sentience only to those animals that possess the most human-like physiological traits',<sup>45</sup> thereby legitimising the continued killing of tonnes of fish and insects each year.<sup>46</sup> It would also legitimise the suffering of the most objectified animals, such as the 1000 million farm animals slaughtered each year for their meat,<sup>47</sup> since researchers 'favour results in their analysis of animal sentience that ensure the continued use of animals.'<sup>48</sup> Species considered ugly and species perceived as dangerous/disease carrying, such as spiders, snakes and rodents, are all also likely to be neglected. Arguably, all these animals are the worst victims of the system of economic exploitation which necessitates the need for animal rights in the first place, yet they would benefit least from them if the animal legal rights framework was to be based on biological similarity alone. If we are to avoid falling into the hierarchical speciesist trap, there is a pressing need to take an ecofeminist approach which recognises that animals may have

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<sup>41</sup> Charlotte E Blattner, 'The Recognition of Animal Sentience' (2019) *Journal of Animal Law* 121, 129.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> Blattner (n 41), 130,

<sup>45</sup> *Ibid.*, 129.

<sup>46</sup> Flynn and Hall (n 29).

<sup>47</sup> *Ibid.*

<sup>48</sup> Blattner (n 41), 129.



properties, capacities and interests which differ from those of humans, but importantly, which need to be acknowledged and accorded intrinsic value. After all, as ecofeminists rightly point out, it was differences between the white man, viewed as the norm, and all 'other' which was historically used to justify the denial of rights to women, people of colour and infants.<sup>49</sup> The same mistake of oppression on a scientific basis should not be made with animals.

### Conclusion

Humans and animals share a remarkable number of similar characteristics. For philosophers such as Regan and Singer, the similarities between humans and animals logically leads to equal rights - or at least, concerns - for both. However, this essay has argued that, such is the anthropocentric notion of 'rights', basing the extension of rights for animals on their biological similarity with humans, whether in relation to cognition or sentience, is problematic and inherently speciesist. We should instead recognise that the capacities and skills of animals will differ from those of humans. That does not mean they are undeserving of protection. As ecofeminists argue, if we are to avoid speciesism, we should instead admire, value and protect these differences.

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<sup>49</sup> Sollund (n 2), 125.

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