

Made in ‘Our Likeness’:

The Impact of Darwin’s ‘Similarities-Point’ in modern Animal Rights Law

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Prompt: “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 that is correct, how does this affect the arguments for and against animal rights laws?”

I. Introduction

It is a truth universally flawed that ‘man’ is superior. The human animal species has turned time and time again in their recordings and reflections of the world to their own special place within it. We live in the ‘Anthropocene’: ‘the age of man.’¹ We are of ‘mankind’: ‘the whole of the human race.’² We are different. So, when Darwin wrote that there is no “‘magical’ essential difference between human and other animals,” it is no wonder that this truth has been so universally ignored: it simply does not compute with what we have been taught the world is, and who we are within it.

I refer to Darwin’s point here as the ‘similarities-point’ for brevity. While the ‘similarities-point’ has the potential to offer great strides forward in regarding non-human animals as beings deserving of greater consideration and respect, this potential has only been realised in limited areas and to a relatively limited extent in the past two centuries. Societies, for instance, have passed laws protecting companion animals from cruelty.³ Yet, the non-human animal laws of today’s world by and large emphasise not the biological similarities between our species, but further entrench our differences. This is most noticeably and pervasively observable in the stubborn characterisation of non-human animals as property. This begs the question of how influential the ‘similarities-point’ has really been in changing the conception of non-human animals in the law.

¹ National Geographic Society, *Anthropocene* (20 May 2022) National Geographic <<https://education.nationalgeographic.org/resource/anthropocene>>

² Cambridge Dictionary, ‘mankind’ (2023) <<https://dictionary.cambridge.org/dictionary/english/mankind>>

³ See, for instance: *Prevention of Cruelty to Animals Act 1960* (Zimbabwe); *Prevention of Cruelty to Animals Act 1960* (India); *Animal Welfare Act 2006* (Germany); *Animal Welfare Act (Australian Capital Territory) 1992* (Australia).

In this Article, I will explore the question of how the ‘similarities-point’ affects the arguments made for and against Animal Rights Law. I will approach this question by examining two legal topics that have dominated the Animal Rights Law space in the past few decades: (1) attempts to grant non-human animals’ personhood, and (2) attempts to promote veganism. I have chosen these topics as channels through which to explore how the ‘similarities-point’, and rebuttal to it, has been adopted by both proponents and opponents of these causes, and posit an understanding of ‘success’ that is non-reliant on its use.

Before examining these two topics, a brief note on this author’s conception of the distinction of ‘Animal Rights Law’ from ‘Animal Law’, as well as the related distinction between ‘rights’ and ‘Rights’. While certain authors have characterised the provisions of non-human animal statutes as already granting so-called ‘small r’ rights, others maintain that the term refers to more fundamental ‘big R’ Rights, those generally regarded as a “moral trump card that cannot be disputed”⁴ and such as those articulated in the UN Declaration of Human Rights.⁵ Branded ‘abolitionists’, such as Gary Francione and Steven Wise, have critiqued traditional constructs that are applied to non-human animals, such as their property status, and have advocated for the extension of more fundamental Rights, such as the Right to physical security, to be granted to non-human animals.⁶

On the other ‘side’ (as so often bifurcated within and outside of the Animal Law field), existing laws which concern the treatment of non-human animals have been read as already creating a level of rights for non-human animals, insofar as they legally protect these beings from certain actions, such as human animal cruelty, and compel human animals to take

⁴ James M. Jasper and Dorothy Nelkin, ‘The animal rights crusade: The growth of a moral protest’ (1993) *Free Press*, 5.

⁵ *Universal Declaration of Human Rights*, UN Doc A/810 (10 December 1948).

⁶ Gary L. Francione and Anna Charlton, ‘Animal Rights: The Abolitionist Approach’ (2015) *Exempla Press*; Stephen M Wise, ‘Thunder Without Rain: A Review/Commentary of Gary L Francione’s Rain Without Thunder: The Ideology of the Animal Rights Movement’ (1997) 3:1 *Animal Law* 45, 47.

certain actions, such as providing sustenance, shelter, and veterinary care.⁷ However, that right is ultimately under the exclusive control of the human animal, which may choose not to fulfill their legal requirement at any time. Within the scope of this article, ‘Animal Rights Law’ is considered to connote the field of law concerned with the ‘Big R’ Rights that may, but largely have not, been extended to non-human animals.

II. The ‘Personhood’ debate

‘Great Chain of Being’ conceptions, as persistently reinforced within religious, social, and legal institutions, have become deeply entrenched in human animal ways of framing the world. This may take the form of ‘Biblical dominion’, where ‘hu-man’ is ordained by a higher entity as having righteous control over other living entities on the earth.⁸ It may take the form of an expressed bias parading as ‘science’, such as Linnaeus’ merging of his classification system with the ‘Chain’, which contributed to support of racist conceptions of certain human animals.⁹ What both of these expressions of the ‘Chain’ do is assert an ideal image of a ‘person’ predominately as the ‘white male’ by relying heavily on the ‘differences-point’. The ‘differences-point’ highlights an arbitrary (in terms of whether ‘Rights’ should be afforded) selection of characteristics (for instance, skin colour or sex) as essential reasons for why certain entities deserve superior consideration.

Given the historical tendency to equate ‘person’ with this very narrow definition, attempts to grant legal personhood to non-human animals in today’s world are still hampered by the association. Further complicating personhood debates, the meaning of the term ‘person’ will also have very different connotations depending not only on the socio-cultural

⁷ Cass R. Sunstein, ‘Enforcing Existing Rights Introduction’ (2002) *Animal Law* 8, ii.

⁸ *Genesis* 1:26.

⁹ William M. Wiecek, ‘The Origins of the Law of Slavery in British North America’ (1996) *Cardozol. Rev.* 17, 1733.

context, but the system of law functioning (or attempting to function) within any country. For instance, personhood may be conceived more generally in civil law systems than in common law systems. However, the legal system will not always be an accurate indicator of how receptive that system is to considering non-human animals as legal persons, as the disparity in court outcomes between Argentina and Columbia (civil law jurisdictions with disparate habeas corpus claim results) demonstrates.¹⁰ For the purposes of this article, legal personhood may be understood as a formal recognition that an entity, sentient or not, is capable of holding a Right.¹¹ These Rights will depend on the kind of ‘person’, with the ‘white male person’ being historically afforded immensely greater Rights than other living entities, as supported by reliance on the ‘differences-point’.

The advocates who have challenged the ‘differences-point’ to promote some level of appreciation that non-white non-male *human* animals may also have a form of intrinsic value took generations and concerted, dedicated efforts. However, when considering these efforts in comparison to the comparative non-human animal case, it should also be appreciated that the ‘reassurance factor’ of shared humanness undoubtedly contributed to the possibility of the challenge. Professor Angela Fernandez speaks of the ‘outrage factor’ that human animals express when attempts are made highlight ‘similarities-point’ between human and non-human animals.¹² The ‘outrage factor’ surely still inspired heated rebuttals in the historical debates surrounding the possibility of extending legal personhood to women and slaves, but could be quelled, I posit, to a greater extent in the individual mind by highlighting the shared ‘humanness’ of these groups. Arguments for extending legal personhood to non-human

¹⁰ The Guardian, ‘Orangutan Sandra granted personhood settles into new Florida home’, *The Guardian* (online), 8 November 2019 <<https://www.theguardian.com/world/2019/nov/07/sandra-orangutan-florida-argentina-buenos-aires>> ; The City Paper, ‘Colombia’s Constitutional Court denies Habeas Corpus for Andean bear’, *The City Paper* (online), 23 January 2020 <<https://thecitypaperbogota.com/news/colombias-constitutional-court-denies-habeas-corpus-for-andean-bear/>>

¹¹ Angela Fernandez, ‘Not Quite Property, Not Quite Persons: A Quasi Approach for Nonhuman Animals’ (2019) *Can. J. Comp. & Contemp. L.* 5, 161.

¹² *Ibid*, 164.

animals continue to struggle today as a consequence of this ‘outrage factor’, while varying degrees of legal personhood recognition has been achieved for other human animal groups.

Advocates for extending legal personhood status to non-human animals also face resistance from the reticence of human animals to recognise one’s food as once being sentient. The sentience recognition, as a point of biological similarity between human and non-human animals, can elicit a more visceral nausea (i.e. akin to the cannibalism repulsion), than recognising one’s own non-consumption behaviour as morally egregious. This repulsion, related likewise to the veganism debate, is also applicable to understanding the difference between the pursuits of personhood status for human and non-human groups. Either consciously or subconsciously, it is an unavoidably relevant factor for opposing arguments that are hesitant to face potentially repulsive and immoral behaviour.

This point holds despite the organisations pursuing personhood status for non-human animals, such as the Non-human Rights Project (NhRP), that focus on the so-characterised ‘stereotypically higher intelligence’ non-human animals (a form of ‘exclusive-similarities’), such as elephants and chimpanzees, which are less popularly consumed than ‘farmed’ non-human animals. That is, the pursuit of legal personhood status for non-human animals is not always restricted to ‘exclusively-similar’ non-human animals. The kind of human animals who are willing to break speciesist mental divides between human and non-human animals for the sake of supporting non-human animal personhood, for instance, are also less likely to simply shift the divide to between so-characterised ‘higher intelligence’ animals (human and non-human) and ‘lower intelligence’ animals (human and non-human). This notion is especially supported by increased attention to the intelligence of farmed non-human animal species, such as pigs (which still relies on the ‘exclusively-similar’ point in its capacity focus, but does expand the beneficiaries), and to breaking down the cognitive dissonance

experienced in mental framings of companion versus farmed non-human animals (which relies on the more general ‘similarities-point’).¹³

For those arguments promoting the granting of legal personhood to select non-human animals,¹⁴ there may be great value in using the ‘similarities-point’, even in its more ‘exclusive’ form, if immediate tangible improvements in living conditions for non-human animals result from its use. Such a strategy, in its implicit rejection of non-human animals’ property status, may do more than existing legislative instruments if successful. Where an alternative strategy, such as supporting grassroots vegan activist groups without reliance on arguments highlighting the ‘similarities-point’, would be more conducive to practical improvements in the quality of life of the non-human animals,¹⁵ I am inclined to support these efforts to a greater extent.

The caveat to this general position is that it is partly motivated to rebut the idea that an almost deontologically principled approach is obligatory to apply to the very broad range of non-human animal law debates that exist. There have been a great many words spilled to defend either ‘new welfarist’ (associated with advocating for ‘small r’ advances) or ‘abolitionist’ (associated with advocating for ‘Big R’ advances) positions as being principally superior to the other. I do not wish to further entrench this divide. Rather, I put forward an intentionally encompassing definition of success to implore non-human animal advocates and lawyers alike to seriously consider how the specific non-human animals in their own formal and informal contexts will be best served, and whether this necessitates integrating the ‘similarities-point’ into the argument.

¹³ See: Gary L. Francione, ‘Animal rights theory and utilitarianism: Relative normative guidance’ (1997) *Animal L.* 3, 87; Michael Mendl, Suzanne Held, & Richard W. Byrne, ‘Pig cognition’ (2010) *Current Biology* 20.18, R796-R798.

¹⁴ The Nonhuman Rights Project, *Home*, (2023) <<https://www.nonhumanrights.org/>>

¹⁵ See: Gary L. Francione and Anna Charlton, ‘Animal Rights: The Abolitionist Approach’ (2015) *Exempla Press*.

III. The ‘Veganism’ debate

The use of the law to dictate which foods may or may not be consumed by human animals is a relatively limited phenomena in the modern world. While it is certainly the case that jurisdictions have dictated access to consumable goods,¹⁶ states rarely, if ever, go so far as to directly require or prohibit the consumption of food products. Nonetheless, the law is frequently used as a tool to support some food production industries over others. For instance, farm subsidies account for approximately 40% of the EU’s total budget, equating to around €264 billion spent to support European farmers as part of the new Common Agricultural Policy.¹⁷ In the U.S., massive subsidisation programs exist for Concentrated Animal Feeding Operations (CAFOs), such as the Title I payments given to commodity crop farmers. These payments provide compensation when the price of corn and soybeans (primary ingredients of CAFO feed) falls below production costs.¹⁸ Evidently the law is not neutral when it comes to food.

Neither are human animals. Food choices are influenced by diverse attitudes and beliefs about the food product, as well as sensory characteristics, affective reactions, and intentions for future behaviour.¹⁹ Human animals following a vegan lifestyle are often motivated by some form of the belief that the ‘similarities-point’ creates a moral imperative to refrain from the consumption and use of all non-human animal products, including meat and non-human animal by-products. Vegan advocates will often point to the inadequacies of flexitarian,

¹⁶ For instance, the consumption of alcohol is prohibited in the Indian states of Gujarat, Mizoram, and Nagaland. See: *Bombay Prohibition (Gujarat Amendment) Act 2009* (India), *The Mizoram Liquor (Prohibition) Act 2019* (India), and *The Nagaland Liquor Total Prohibition Act 1989* (India).

¹⁷ The Guardian, ‘Abuse of Animals Rife on Farms Across Europe, Auditors Warn’, *The Guardian* (14 November 2018) <<https://www.theguardian.com/environment/2018/nov/14/farm-animal-abuses-widespread-across-europe-warn-auditors>>; European Commission, ‘New Common Agricultural Policy: set for 1 January 2023’, *European Commission* (14 December 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7639>

¹⁸ Doug Gurian-Sherman, ‘CAFOs Uncovered: The Untold Costs of Confined Animal Feeding Operations - Doug Gurian-Sherman’ (2008) *Union of Concerned Scientists*, 18.

¹⁹ Mette Vabø and Håvard Hansen, ‘The relationship between food preferences and food choice: a theoretical discussion’ (2014) *International Journal of Business and Social Science* 5.7.

vegetarian, or ‘happy meat’ consumer models given their continued reliance on the exploitation and consumption of non-human animals.²⁰ Models which allow for the continued production and consumption of beings not so biologically dissimilar from us is presented as morally incongruous.

Nonetheless, the proliferation of CAFO style operations and meat-consumption globally suggests that the use of the point has been relatively unsuccessful as an argument in convincing human animals to give up non-human animal consumption.²¹ There has also been a total increase in the number of non-meat consumers globally, however, this figure does not appear to outweigh the increase in total amount of meat per individual consumed.²²

The use of the ‘similarities-point’ as a strategy to convince human animals of the virtues of veganism depends again on the likelihood that it will result in real improvements. If an alternative argument is more likely to result in less human consumption of non-human animals, then there may be greater practical advantages to using these. For instance, the shift of fashion companies in Korea, like H&M and Zara, to supporting vegan brands was largely responsive to the rising interest in non-human animal welfare as sparked by a concern of communicable diseases affecting human animals.²³ While a more anthropocentrically framed argument, this example shows a real step being taken which benefited those non-human animals which were previously being slaughtered for their skins and fur. The ‘similarities-point’, which is habitually adopted by vegan advocates, was not needed here for a positive

²⁰ Gary L. Francione, ‘Animal Welfare, Happy Meat, and Veganism as a Moral Baseline’ in David Kaplan (ed.) *The Philosophy of Food* (Berkeley: University of California Press, 2012) 169.

²¹ Tim Whitnall and Nathan Pitts, ‘Global trends in meat consumption’ (2019) *Agricultural Commodities* 9(1), 96-99; Ramona Cristina Ilea, ‘Intensive livestock farming: Global trends, increased environmental concerns, and ethical solutions’ (2009) *Journal of agricultural and environmental ethics* 22.2, 153-167; Christopher Matthews, ‘Livestock a major threat to environment’ (29 November 2006), *FAO Newsroom* (online) <<http://www.abolitionistapproach.com/media/links/p90/environmental-disaster.pdf>>

²² Eimear Leahy, Seán Lyons, and Richard SJ Tol, ‘An estimate of the number of vegetarians in the world’ (2010) *ESRI Working Paper No. 340*. For an overview of vegan organisations, see: https://veganwiki.info/en/List_of_vegetarian_organizations

²³ Kyoungah Seo and Seunghee Suh, ‘A study on the characteristics and social values of vegan fashion in H&M and Zara’ (2019) *Journal of Fashion Business* 23.6, 87.

change to be achieved. It may indeed affect the arguments for and against veganism but is not always necessary for either argument to succeed.

IV. Conclusion

Arguments grounded in comparing human animals' biology to non-human animals have been employed by both proponents and opponents of non-human animals Rights. Despite the shift in epoch that Darwin's biological revelations inspired, and the exceptional implications they have had overall for humanity's conception of life on earth, Ryder has presciently highlighted the continued human animal habit of morally distinguishing ourselves from all other species. The practical significance of the 'similarities-point' for Animal Rights Law seems to have not been as a panacea for enduring biases against non-human animals. Its significance may be more aptly measured by its disruption of the universally flawed truth of man's superiority for those fewer human animals who have not only listened but acted in congruence with this new conception of life.

The 'similarities-point' has undeniably inspired growing numbers of human animals to fight for extending Rights to non-human animals. But not all. So, the Rights advocate must be cognisant of the fact that its use to support their perspectives may not always succeed. What those advocates must choose, then, for each non-human animal they wish to protect, is the argument most conducive to the case; one which will produce a result that is still congruous with their own principles, which may be fundamentally grounded in the 'similarities-point'. Yet, the point need not be the buttress of the appeal, especially in light of the oppositions to it explored in this Article. The question, then, is not just 'are they similar?' but 'will the similarity help them here?'