BETWEEN THE SPECIES

The Integration of the Ethic of the Respectful Use of Animals into the Law

ABSTRACT

This article develops an ethical construct of “respectful use” to govern the conduct of humans toward animals. The scope of the terms “use” and “respectful” are developed. Some guidelines for the discernment of respectful use of animals are suggested. Then the status of animals within the legal system is briefly considered. Within the law, the socially defined key term is “unnecessary” rather than respectful. Finally, the newer legal standard of duty of care is shown to be approaching the ethical concept of respectful use.

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I. Introduction

Observations:

1. An ethical (or religious) discussion will seek to produce a framework of human decision making which will direct an individual in all of their life activities; the ethically lived life or the religiously lived life.
2. Law, as the product of a social discussion, seeks to establish minimum levels of acceptable conduct within that society.
3. Therefore, in circumstances where ethics (or religion) will seek to engage an individual and their conduct towards others, the law may well be silent.

Caveat: In the realm of either ethics or law, animals should not expect to receive higher levels of consideration or protection than humans.

This article shall focus upon two areas; first, a presentation of a frame of reference for the ethical consideration of how humans should deal with animals (nonhuman animals). The second will be a brief consideration on how the legal system differs from an ethical system, showing that there has been some migration of ethical concerns into the language of the law.

The ethical construct offered to the reader is: animal-human interactions shall only occur on the basis of respectful use. Consider the traditional family trip to the zoo. Among the exhibits will be one containing two chimpanzee and another with a single turtle. Humans are using these animals for purposes of entertainment with, at best, a dash of education. Is this an ethical use of these individual animals? How about dog fighting or the declawing of cats? Are these acceptable uses of animals?

These questions will be considered, if not fully answered, in the following discussion.

In order to answer these questions, a number of concepts must be developed. Why should animals be part of any ethical discussion? Which animals should be included? What would it mean to use an animal, and can some uses be excluded from acceptability? How would a use be considered respectful? As a final area of thought, assuming we accept the proposition of respectful use, to what degree has this ethic been integrated into the law, and what might be expected in the future as legal development.

II. Why are Animals within any Discussion of Ethics

In deciding who should be within a discussion of ethics, consider life as a play to be acted out on a stage; then, who are the actors and what are the props? Are at least some animals to be characters in the play, part of the plot of life's development? Do they have a role that we should acknowledge, or are they merely props to be used, consumed, or destroyed without ethical concern regarding the impact of human actions on these "things?" It is the position of this author that animals are significant and important players on the stage known as earth, and that we have a duty to consider them as we develop the plots of our inter-tangled lives.

As a first level consideration, these ethical duties arise out of being part of a shared community of living beings. We are familiar with many human communities existing at different levels; the human family being the smallest and strongest, and the global population of humans being the broadest of communities with much less of an ethical pull on any one person. We have a

stronger duty to our children than to children in other cultures who are not known to us personally. Some communities assert the power to adopt and enforce laws; others wish they could. This is a paper in itself. The question for today is whether or not any animals should be acknowledged as within any of our human communities. The dog, cat, bird, or horse that individual humans allow into their daily lives clearly can become a part of that person's family, by adoption if not by genetic linkage. With the admission into the community of the family, an ethical duty arises concerning the relationship between the companion animal and the humans within the community. At the other end of the spectrum, as the parallel to community of all humans, is the global ecosystem: do all humans form a community with the other animals of this planet, with the other life of this planet? I think yes. Again at the highest level of abstraction we are all part of the same ecological community of life on Earth.

There have been a number of attempts to define the relevant group of animals for purposes of ethical or legal discussions. Most attempts at definitions are on a comparative basis relative to human characteristics (Wise, 2002). For example, it might be argued that ethical consideration should be extended to those animals who are conscious, self-aware, have language, use tools, or feel pain. This author seeks a different, more fundamental, starting point of analysis. There is a more compelling characteristic common to all, that of being alive. Moral and ethical concerns should start with all beings who have self-interests. The various species-specific capacities, such as consciousness or self-awareness, of groups of animals will be important in deciding which rights an animal might deserve. However, consideration of capacities is not necessary for initial consideration of admission into the category of ethical relevant beings.

That living beings have interests is not a matter of philosophy or debate, it is a matter of fact that is derived from the existence and nature of the DNA that creates each individual being on Earth. Inherent in the nature of the DNA molecule is the fact that it self-replicates. This is done in the context of a cell structure that has great complexity, not important to the points being made here. The DNA that is found in living beings are special groups of self-replicating molecules that have evolved increasingly complex packages that help assure the replication of the next generation of DNA molecules. This concept was developed by Richard Dawkins back in 1976:

We are survival machines, but ‘we’ does not mean just people. It embraces all animals, plants, bacteria, and viruses . . .

We are all survival machines for the same kind of replicator—molecules called DNA—but there are many different ways of making a living in the world, and the replicators have built a vast range of machines to exploit them. The survival machines protect the DNA from environmental harm, seek out optimal conditions for creating the next generation, and may actually shelter and support the next generation of DNA until they have the best chance to survive on their own. Some machines learned to breathe oxygen, others to run toward or away from others. Some can see the world with color, others smell the world around them. Many DNA packages have developed the capacity to feel pain and some have a capacity for self-awareness or consciousness. These specific packages of DNA, which we see as the animals and plants around us, have evolved over millions of years under the rules of natural selection. Rocks and cars have no DNA, they do not have a capacity to self-replicate; and, therefore, they have no interests

deserving our attention and can be considered the props of our lives. Admittedly my ethical concerns are primarily with the more complex packages; packages that are, at least, big enough to be visible.

III. Which Living Beings Might we Focus Upon

As an ethical construct, it is easy to extend this duty to all living things. But, of course, many living things are so small that we are not aware of them. While an argument can be made about duties to unseen life, there are more important issues to focus upon. Another major category of living beings is that of plants, observable plants, those we see daily, some with life spans that dwarf the life span of us mere humans. Again, they clearly can be part of a conversation of ethical duties. Plants certainly are living beings, but we simply do not know how to think about plants at this point in time. They do not seem to have a central nervous system and do not seem to feel pain in the way that animals do. As a result, they do not trigger the bridge of compassion that exists with animals, with whom we share the experience of pain. However, they have interests in the sense that they will use all resources available to them to continue life and produce the next generation.

Humans certainly do own plants, use them, possess them, create new ones, and kill them on a regular basis, both intentionally and unintentionally. But the world is complex enough when just dealing with animals, and resources are limited in both the political and legal worlds. Most humans just have not given sufficient thought to plants to propose general ethical or legal principles beyond that of protection of plants as endangered species. One group in Switzerland has given some initial thoughts about plants and human ethical duties (Federal Ethics Comm. 2008).

For purposes of the ethical discussion, there is no need to distinguish between animals that are wildlife (not within the control of specific humans) and domestic animals which are owned by some human or substitute humans (e.g. corporations or cities). While we are all part of the community of living beings, at lesser levels of abstraction, the communities we share with animals are usually domestic animals. But it should be noted that within the world of law, wildlife and domestic animals are important categories of animals and different laws will be applied to each category.

IV. The Use of Animals

Accepting that animals have interests of their own, apart from humans, is it appropriate/ethical for humans to use animals to their benefit? It is important to decide this question first as the alternative answers of yes or no provide two very different paths forward. At the present it is this question that divides the animal rights/welfare movement into distinct camps of thought. The question is not do humans use animals, but should humans use animals? To use an animal is to seek a benefit from an animal that may or may not be voluntarily provided by the animal. The benefits sought by humans fill a full spectrum; their flesh is used for nutrition, the skins for clothes, their muscle for labor in the field or the road, their bark for protection and their affection for human emotional support. Indeed, millions and billions of domestic animals exist because they provide benefits to humans. The reality is that if animals did not provide benefits to humans, then very few domestic animals would exist. But, of course, acknowledging the extensive present use does not suggest the answer to the ethical question of whether or not we ought to use animals.

The term “use” by itself is a conclusion of fact, not a judgment of appropriate or inappropriate conduct. Qualifiers such as illegal, legal, abusive, unnecessary and respectful add the human judgment aspect on the nature or character of the use.

Some would urge that given our shared biological background, there are no ethical relevant differences between humans and animals. Therefore, humans should not use animals. It is not clear if this argument acknowledges that humans use other humans all the time and often in ethically acceptable contexts. So it is not clear that the existence of animal use, standing alone, should be condemned as unethical.

Perhaps, a deeper focused initial concern of some could be stated as: there are no differences between humans and animals which justify the placement of animals in the legal institution of property which allows for the use of animals by owners. All domestic animals are property and some consider the mere existence of the property status of animals to be disrespectful of the animal (Francione, 2004). Clearly the property status of animals has allowed many unethical humans and corporations to abuse that position of power and inflict pain and suffering on untold numbers of animals over the years. However, there is a profound difficulty with seeking to eliminate the property status. Remember that animals who are within the property status of the law have humans who provide care for them. These animals could not really exist in any safety or numbers if some human did not take care of them. An outcome of the property status is to have certainty about which human has the duty of care and protection for each particular domestic animal.

If a person's position is there should not be any domestic animals, then the removal of the property status is more under-

stood. But very few hold this position. Most believe that positive relationships with domestic animals are possible. Also, it is possible to transform the law of property to be more animal respectful. This author has proposed the proposition that domestic animals should be acknowledged as a unique category of property, living property (Favre 2011). So rather than the property status being the deciding factor, we return to the issue of acceptability of use.

There is disrespectful and oppressive use with the egg laying chickens in battery cages. There is also respectful use, which exists for millions of household pets. Both of these animals' uses exist while being the property of humans. This creates a logical disconnect with the position of those who say it is morally wrong for humans to use animals. Consider the parallel issue of the human use of children who cannot consent. If such use can be found to be acceptable, then perhaps the use of animals may also be acceptable.

Is it ethically acceptable for a married couple to use the labor of their children? Yes, indeed much of human history finds that children are used by their family to support the family and each other. The child's labor is an important asset of a human family. How many farmers and ranchers have depended upon the children to make the farms and ranches economically viable? Additionally, it is often through the imposition of labor and responsibilities by parents upon children that the human values of the family and society are transmitted from one generation to the next. This might include acceptance of responsibility, pride in work, the need to work, self-reliance and confidence to accomplish tasks.

Can the use of children become ethically unacceptable? Yes. Abusive child labor in industrial settings was historically condemned within the United States. Working 10 hour days for 6 or 7 days a week is too much use. It does not allow the child to be educated, receive health care, or develop those characteristics which are important to them as individuals in the realization of their potential. Historically, when industry had possession and control of a child, and the primary goal was the making of money, clearly some abused that power position. There clearly have to be some lines drawn by society to protect the children from abusive parents or abusive jobs. The risk of abuse by business is deemed so high that society has adopted laws to prohibit the use of children under a certain age in most circumstances (Anderson 2011).

What is allowed under the laws is the use of children within the family setting. Our social ethical concerns for the children are reflected in the laws which put some outer limits on the use of children. Some possible abuses, such as sexual use of a child, are considered the most heinous of human acts. Sexual use of a child is not a respectful use; it is disrespectful of the individual at the highest level, regardless of who does it.

Does the risk of abuse require the conclusion that there should be no children because some may be abused? No. Society has the duty to reduce the risk of abuse, and it must be acknowledged that notwithstanding our best efforts, some abuse still exists. Likewise, the risk of abuse of animals by humans does not support the conclusion that there should be no domestic animals. It must be acknowledged that the risk of abuse of animals by humans is significantly higher for animals than children, particularly for agricultural animals where human owners are primarily focused on the desire for economic profit.

Additionally, while the farmer of 100 years ago knew, and often respected, the individual animals on their farms, today the shareholder and officers of the corporations seldom, if ever, see or touch the animals they own. They are not individuals; just a bunch of things used to make chicken salad or soup.

It is not the use, but the abuse, that should be the focus of our concern. Rather than stating the negative, that animals should not be abused, it will be more helpful to the discussion to start with the positive, the respectful use of animals. The vision of the future needs to contain our positive vision of the animal–human relationship. Yet, very few within the legal animal movement seem comfortable with articulating a positive vision of use by humans.

V. The Respectful Use of Animals

Respectful use is not a physical characteristic of either the animal or the human. While some animals are capable of being respectful of humans or other animals, the focus here is upon the mind of the human. Respecting is a condition arising in the human mind that comes into play when decisions are made that will impact the life experience of the animal at issue. Respect starts with the realization that an animal is “another being” with their own intrinsic interests. The second step is the weighing of the possible impact of the human’s action or inaction upon the animal’s interests. This impact is added to all other relevant factors; and the human makes a decision. Respectful use is obviously a subjective process.

Someone might well believe their use is respectful, while others might disagree. For example, is it respectful of a cat to have her claws removed? If the cat’s claws are removed then the human has the benefits of a reduced risk of modest harm, or

discomfort to themselves, their children and furniture. The removal for the cat is like a human losing the first joint of all their fingers. Yes, the cat can continue with life, but she is without an important physical attribute fairly important to the cat. In my judgment it is not the respectful use of a cat. Indeed, the cutting off of any body part seems disrespectful. But as other humans intentionally do this to their cats, we do not have a social consensus on the issue.

Another example is that of dog fighting. Is the putting of a dog into a ring in the presence of another fighting dog, with perhaps a fight to the death, a respectful use of the dogs? It is not clear that humans who fight dogs see the dogs as “other beings” with their own interests. In the mind of these humans, their interests in gaining money, prestige and other rewards obviously outweighs any consideration of the extreme pain and suffering imposed upon their dogs.

In this case, the indifference of the dog owner cannot be left to individual decision-making. The consequence to the dog is so horrific that society has decided, through the law making process, that the use of dogs for fighting is so disrespectful, it has been made a criminal act. As exemplified by dog fighting, society can remove the capacity of the individual human to decide in favor of some uses of animals.

The reader might have noticed that there has not been an offering of a formula as to how much weight to allot to the interests of an animal when a human makes a “use decision” about an animal. This is not possible. Ethical decisions are personal and complex decisions not subject to fixed formulas. However, there are some signposts to help a person judge whether ethically acceptable, respectful use is occurring. The threshold is

crossed when an individual realizes the appropriateness and necessity of engaging in the balancing of his conflicting interests with that of his animal. One can hypothesize that humans engaged in dog fighting do not pass this threshold. A person who decides whether or not to declaw their cat may or may not have crossed that threshold.

A second step occurs when the keeper of the animal seeks out information about the animal, both the nature of the species and the characteristics of the individual animal that the person is dealing with. Does the cat keeper understand what is entailed in the declawing operation itself and what the lifelong impact on the cat's behavior and capacity will be? Will the cat be going outside? Will she need to protect herself?

The third test of the presence of respectful use is whether or not the individual human in fact changes their conduct to accommodate the interests of the animal. If the human interests always win, then it is not working. The cheapest and easiest way to take a four day, pet free, weekend trip if you have a pet cat or dog, is to put a bucket of water and an open bag of dried food in a room. Then just put the animal in the room and close the door. More than likely the animal will be alive when the human returns, but somehow this does not seem to be a respectful care of the pet. It will take time and money to find a pet sitter or a good kennel, but that is what respectful use requires. Note that the issue is not what is legal or illegal.

The fourth test, an objective test, is to look at the animal in question and observe whether or not she is a healthy, well adjusted, and socially balanced animal. A dog on a tether for 12 hours a day is not being respectfully treated and more than likely will not be healthy, well adjusted, or socially balanced.

A horse may be used to pull a wagon, but the continuing health of the horse should be a primary concern of the owner, not just the making of money. If money becomes more important, the objective evidence of the failure to realize a proper balance will be found in the well-being the horse himself.

What if the wagon pulling horse is clearly not in good health? There are no ethics police to call. If physical conditions slide far enough, then a violation of the criminal law may occur, but our ethical standard demands more than the law. The only real option for an outsider is to try to engage the owner/ keeper of the animal into dialog. To have a conversation about the horse, what might be done differently, why the horse matters. Ethical conduct arises out of self-enlightenment. Sometimes others can aid in the process of realization of self-enlightenment, but not always.

VI. Transition to Law

Even if we limit our ethical considerations to animals, some additional limitations will be necessary as we move into the law. To keep the discussion focused upon those animals that have the most complex needs and for whom we can do the most, a further limitation will be useful. Many state governments initially define protected animals with the full sweep of the biological definition of the word animal: California with “every dumb creature,” Minnesota with “every living creature except members of the human race.” However, the application of the definition, as reflected in the cases filed at the time, was mostly limited to mammals. More recently, as violations of these laws have become felony violations, the legal definition of “animal” has been redrawn at the line of vertebrate animals; Virginia added the phrase “any nonhuman vertebrate species except fish.” Likewise, the following discussion will be ex-

tended only to vertebrate animals. This is not to suggest that invertebrate animals are not worthy of ethical concern. They do have individual interests even if they may sit more lightly on the scale of our moral concerns.

As the discussion flows from the high goals of ethical treatment to that of criminal conduct, not enough caring individuals understand the difference between the worlds of law and ethics. It is important to remember that criminal anti-cruelty laws deal with circumstances that can cause society to impose the hoariest of penalties, loss of individual human freedom. Therefore, to invoke the criminal law sanction there must be egregious conduct, not merely the socially offensive.

As part of the transition into the law, the word “respectful” will have to be abandoned, while other terms such as, “unnecessary,” will become the focus. The term “respect” has no history of use within the law; it is not a legally useful concept. Not showing respect for other humans is not a crime. The law focuses upon conduct, not subjective attitudes. Thus, it is illegal to beat up or kill a human. In both cases the actor is not respecting the target; but it is the action, not the mindset, that is the crime. Not holding respect for animals has never been a crime and should not become a crime.

Remembering the significant consequences of characterizing an action as a criminal act, when it comes to animal human relations, the law seeks to establish the floor, the minimum level of acceptable conduct. The legal history of the development of the idea that harm to an animal ought to be a crime, is set out in detail elsewhere (Favre & Tsang 1993). A quick summary suggests the following. In the early 1800’s the harming of an animal was a crime only if it was a commercially

valuable animal of another human. If a teenager tortured either his cat or another's cat, it was not a crime. While a few early laws reflected a level of concern about the animals themselves, it was not until the Henry Berg era of the American Society of the Prevention of Cruelty to Animals, and the 1867 law of New York, which was passed with his urging, that defined the new American view of the human animal relationship. It sought to create a more respectful relationship, but did so with the words of a criminal law statute.

The statute seeks to provide protection without regard to human ownership. The goal of the law is the elimination of cruel conditions. The first section of the law states:

If any person shall overdrive, overload, torture, torment, deprive of necessary sustenance, or unnecessarily or cruelly beat, or needlessly mutilate or kill... any living creature, every such offender shall, for every such offence, be guilty of a misdemeanor. (New York Rev. Statute 1867)

This section extended the protection of the law to "any living creature." This marvelously sweeping statement finally eliminated the limitation that protection was only for animals of commercial value. Equally important, all protective provisions of this law applied regardless of the issue of ownership of the animal. The list of illegal acts was greatly expanded from prior laws. This law was not a small step forward, but a paradigm shift. Whereas before this time the law only dealt with the balancing of human interests, this statute acknowledged the capacity of animals to feel pain and suffering. It made it a criminal act when humans do bad things to animals. In subsequent

years various courts would acknowledge that the purpose of the law is to benefit animals, not humans.

Notice that the law does not prohibit the infliction of pain and suffering, let alone create a standard of respectful use by humans. Digging deeper into the language exposes the reality that two categories of actions are prohibited. Some actions are prejudged by the legislature as unacceptable: overdrive, overload, torture, and torment. These are disrespectful under any definition of the terms used. However, the other categories of action are not judged by the legislature directly. Instead, the New York legislature created a standard to be implemented by a jury in other fact patterns: “unnecessarily or cruelly beat, or needlessly mutilate or kill.” This language suggests that in some circumstances it is acceptable to the law if a human beats an animal but if it is a cruel beating, then that is illegal. Likewise, it is illegal to kill an animal only if it is needless. In deciding if a beating or killing is illegal, the concept of respectful use does not seem helpful; instead the focus is upon the word unnecessary.

What is going on, and has been going on for 150 years, in our legal system? Accepting the premise that humans may use animals, the law is drawing a line when it says that use must not result in unnecessary pain and suffering. “Unnecessary” becomes the fulcrum point for social concern. In deciding what is or is not unnecessary, there is a balancing of interests. Is what the human is doing of such importance that it justifies the pain and suffering inflicted upon the animal? A horse may pull a wagon, but if the condition becomes one of overloading, then it is a crime. It is too much to ask of the horse; it is also disrespectful. Overloading has been decided by the legislature to be asking too much of a horse. But of course the determination

of whether the condition of overloading exists is a decision of the courts/jury in light of the facts of a particular case. Is the removal of the claws of a cat a criminal act in that it inflicts unnecessary pain and suffering? Only a jury can answer for the law. The word used in the jury instructions by which a jury will judge the acts of a defendant will be “unnecessary.” The jury will use their life experiences to make this assessment.

VII. The Law Approaching Respectful Use Requirements

The prior legal discussion focused upon the prohibitions of human actions, standard fare for the criminal law. This point focuses upon the duty to do something affirmative. The owner/keeper of an animal not only has the criminal law duty to not inflict unnecessary pain and suffering, but also the affirmative criminal duty to provide a minimum level of care for the animal. In the early laws like New York's, this duty was expressed simply as an obligation for providing food and water. As a society, our evolving sense of duty toward animals has expanded overtime. The state of Michigan now makes it a crime if you do not provide adequate care, defined as:

(a) “Adequate care” means the provision of sufficient food, water, shelter, sanitary conditions, exercise, and veterinary medical attention in order to maintain an animal in a state of good health. (Michigan Comp. Laws Anno. 2013)

These terms promoted by those who deeply care about animals, are approaching the idea of respectful use. While well meaning, this language could cause great difficulty if sought to be applied in the criminal court for anything but the most serious omissions. Just how much exercise, ten minutes, three hours?

Just how much veterinary care, at what cost to owner? If a cat has an eye issue which can be addressed with a \$2,000 operation, does the owner face criminal charges if they do not do the operation? What if they don't have \$2,000? How should end of life issues be faced as health declines with age? These difficult issues are more fully explored in another article (Favre 2008).

VIII. Conclusion

Like humans, animals have interests in their own lives. As humans continue to use animals in a wide variety of settings, an ethical construct is needed to help direct these interactions. Respectful use provides such a construct for individuals who use animals and animal products. However this is not a particularly useful concept in the law where unnecessary becomes the critical term. While in both arenas the analysis proceeds by balancing animal interests against human interests. On the ethical side, best practices are sought as goals while in the legal system a minimum level of conduct is circumscribed. For both areas society is in flux as the non-economic values of animals receive increasing attention and weight.

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