

TALKING ANIMALS, LAW, PHILOSOPHY – AND BEYOND

by Raffael N Fasel*

1. Introduction

In his recent book, the primatologist Frans de Waal asks if we are “smart enough to know how smart animals are.”¹ He explains that the history of ethology is replete with examples of unsuccessful attempts to determine whether other animals possess features – self-awareness, language, culture, and so on – which we humans deem to be particularly valuable.

Self-awareness is a case in point. In one study, three elephants were tested on their ability to recognise themselves in mirrors. Primates, dolphins, and other animals generally believed to be “smart” had already passed the so-called “mirror test” that is often used as a benchmark for consciousness. In the mirror test, subjects are marked somewhere on their body, and then expected to investigate the mark on their own body rather than that of their mirror image. At first, none of the three elephants displayed the anticipated behaviour. As it turned out, the humans studying the elephants had used mirrors that were too small – and, on top of that, inaccessible to the pachyderms’ trunks.² Once the design of the experiment had been improved, one of the elephants successfully passed the test. The two other test subjects failed to inspect the marked parts of their bodies, but instead used the mirror to analyse other, non-marked parts.³ Can we conclude from this study that the first pachyderm is self-aware while his two fellow elephants are not?

For de Waal, the issue with the mirror test, as well as with similar tests which aim to identify human-like traits in animals, is that they are often insufficiently adapted to the unique natures of the beings under investigation. The mirror test, for instance, is based on visual self-recognition, which works well with human beings, for whom the sense of sight is essential.⁴ For animals that primarily use different

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¹ See Frans de Waal, *Are We Smart Enough to Know How Smart Animals Are?* (Granta 2016).

² *ibid* 17–18.

³ Michael D Breed and Janice Moore, *Animal Behavior* (2nd edn, Academic Press 2016) 188.

⁴ It is worth noting, however, that also some humans, such as for example infants under 18 months, fail the test, *ibid*.

senses than vision, on the other hand, the test is ill-suited. Dogs, for instance, rely largely on olfaction and hearing, and have thus far not been able to pass the test.⁵ For this reason, such tests are particularly prone to yield false negatives – thereby playing to existing prejudices about the inabilities of other animals. This is not to say that studying the cognition and behaviour of other animals is a futile endeavour. As de Waal points out, the key consists in “trying to understand [animals] on their own terms”, rather than on human terms.⁶

Tests like the mirror test usually say more about the unfeathered bipeds conducting them than about their animal “subjects”. In particular, these tests bespeak the human urge to determine which (if any) features make members of the human species special, and which (if any) features they share with other earthlings. This urge has become particularly prominent since an event we can refer to as the *grounding of humanity*. Humanity became grounded in a “merely” earthly existence with its inclusion in the Linnaean taxonomy and its subjection to the studies of other naturalists. These naturalists examined the human being as one among many animals, thereby effectively stripping it of the special ontological status many believed it to possess. The intellectual importance of this event – which is, in many ways, still ongoing – can hardly be overestimated. Long-standing claims about the superiority of human beings who, created in the image of God, were all supposed to be equally endowed with an immortal soul, seemed to be losing their appeal. With the almost exponential growth of knowledge about nature in the Enlightenment, it became increasingly difficult to defend the claim that humans were exceptional. The boundary between them and other animals was called into question from within, as naturalists were debating whether they should classify newly discovered tribes as human or non-human. And it was challenged from without, through the discovery of orang-utans and other primates which many suspected might belong to the human species.⁷

In the wake of these challenges, it was no longer enough to assert the superiority of humanity by invoking traditional or religious beliefs. Instead, with the critical spirit of Enlightenment, rational arguments were required to back up claims of human exceptionalism. Identifying the precise features of human nature that made humans (and only humans) special, however, proved difficult. The theory of

⁵ See eg Stanley Coren, ‘Does My Dog Recognize Himself in a Mirror?’ [2011] *Psychology Today* <<http://www.psychologytoday.com/blog/canine-corner/201107/does-my-dog-recognize-himself-in-mirror>> accessed 23 June 2017.

⁶ de Waal (n 1) 13.

⁷ See Justin EH Smith, *Nature, Human Nature, & Human Difference: Race in Early Modern Philosophy* (Princeton University Press 2015) 115–116.

evolution revealed that living beings differ in degree, but not in kind.⁸ As such, although human beings have some features which are particularly distinctive, there are almost always other species which possess these features to at least a lesser degree, and there are almost always some humans who do not possess the feature in the same way as their brethren. Reason is a good example. It is generally believed that what makes human beings special is their capacity to think and act rationally. The problem with this capacity, however, is that some animals (including other primates, dolphins, and elephants) also seem to have the ability to reason. This makes reason *overinclusive* as a criterion for “specialness”. At the same time, some human beings – as a result of congenital disabilities, advanced age, certain illnesses, or other impairments – are incapable of rational decision-making and acting. Hence, reason is also *underinclusive* as a relevant criterion. Other proposed features also have serious shortcomings. The advances in knowledge of the last 200 years have made it increasingly difficult to argue convincingly that human nature is wholly different from the “natures” of other living creatures.

Some, of course, do not seem to be impressed with this difficulty. But to avoid it, they must neglect what the most up-to-date science has to say about the capacities of other animals. Such thinkers often end up falling back upon pre-Darwinian theories of human essence, of *scala naturae*, or similarly outdated views. This is as indefensible intellectually as it is morally. It is one thing to have a questionable metaphysics: getting the *physics* wrong, as it were, is another thing altogether.

2. Talking Animals, Law and Philosophy

But as important as it is to have an informed descriptive account of the nature of human and other animals, this alone will not determine how animals are, or ought to be, treated – legally, morally, or otherwise. In order to be able to answer *these* questions, we need a firmer understanding of how philosophy and law approach animals. To do this, in turn, we should avoid framing philosophy and law as entirely separable disciplines. Philosophy, if unaided by more practical disciplines, runs the risk of being too abstract. Entangled in “trolley problems” and similar “intuition pumps”, it is in danger of missing out on the fundamentally practical nature of humans and other animals. Law, although it can be coarse, is much less susceptible to this problem. Embedded in social practices, it has its finger on the pulse of the respective

⁸ See eg Charles Darwin, *The Descent of Man, and Selection in Relation to Sex*, vol 1 (D Appleton 1871) 179: “the difference in mind between man and the higher animals, great as it is, is certainly one of degree and not of kind”.

society it governs. At the same time, however, this great practical strength of law is also its greatest intellectual weakness. With its focus on the concrete, it risks missing the forest for the trees. Here, philosophy can provide a remedy, infusing law with critical and argumentative depth. It can help equip law with the intellectual tools to go beyond the legal status quo and to reshape it according to societal or moral requirements.

Putting law and philosophy into dialogue is particularly important when it comes to the question of how we ought to treat animals. In these fields, and especially at their intersection, many fundamental questions are still largely unresolved. For example, is the role of law simply to mandate improved welfare for animals exploited by humans? Or do animals also require fundamental rights to protect their basic interests? If the latter, what are the grounds upon which animals should have such rights? And what rights should they have? Do animal rights “compete” with human rights? Are animals entitled to some sort of “political” status – for example, through some form of “citizenship” or other mechanism for community participation? Constructive exchange between disciplines will be essential to answering these questions. As Paul Waldau notes, in *Animal Studies*,

Both a great number and a wide variety of disciplines are needed if Animal Studies is to engage the past, present, and future possibilities of human interactions with living beings outside our own species. There is simply no other way to explore the diversity of other animals, respect the variety in human responses, and describe the peculiar dynamics of human animals.⁹

The *Talking Animals, Law and Philosophy* series, which was launched at the Faculty of Law in Cambridge in 2015, was set up with this purpose in mind. In the minds of its founders, law and legal science have remained relatively untouched by the animal turn that has changed the way other fields approach non-human animals. To the limited extent that law has turned its attention to the fate of animals, the way it treats them is all too often insufficiently informed by philosophy. At the same time, both law and philosophy are often poorly versed in other disciplines. The aim of *Talking Animals* is to help remedy this situation by providing an engaging and rigorous forum for debate and ideas for scholars and practitioners working at the intersection of law, philosophy, and the sciences. Since its inception, *Talking Animals* has hosted talks by speakers from fields as diverse as bioethics, environmental law, global

⁹ Paul Waldau, *Animal Studies: An Introduction* (Oxford University Press 2013) 21–22.

justice, democratic theory, and animal welfare law. A further year of exciting talks is in the pipeline as this edition goes to press.

3. Overview of this special issue

Papers from three of the series' talks are included in this special issue of the *Global Journal of Animal Law*. Despite the difference in approaches, the authors whose work appears here are each attempting, in their different ways, to spell out what humans and other animals are like and how they ought to be treated.

The capacity to suffer is a feature many will agree is shared by humans and countless other animals. But what exactly does it mean for an animal to suffer? Important legal consequences turn on whether or not an animal has suffered. Yet, judges and lawyers dealing with such cases often lack the information necessary to identify what exactly constitutes suffering in an animal. In his article "Suffering in non-human animals: Perspectives from animal welfare science and animal welfare law", Peter Fordyce provides a much-needed perspective on what it means for animals to suffer, what can cause such suffering, and how we can recognise suffering in animals. Shedding light on the ways in which key terms such as "sentience", "welfare", "suffering", "emotions", "feelings", "stress", and "distress" are used in the animal welfare science literature and in animal welfare protection legislation, Fordyce emphasises how a more careful use of these terms is likely to improve legal decision-making.

In his article, Fordyce defines suffering as "an unpleasant/aversive subjective mental state, caused by physical or psychological stressors that impinge on the animal in such a way that a failure to avoid (or adapt easily to) them threatens (or potentially threatens) its viability as an organism".¹⁰ This definition is expedient because it easily accommodates terms such as "pain", "fear" or "distress" which are often used in animal welfare protection legislation that does not directly talk of "suffering". More importantly, however, Fordyce's definition allows us to base our assessment of whether or not an animal has suffered on objective data rather than emotional reactions. In the past, determinations of whether an animal has suffered have largely been made on anthropomorphic grounds: the more an animal's reaction resembled a human's reaction to pain, the more likely we were to conclude that the animal has suffered. While such inferences may sometimes be corroborated by animal welfare science, its development over the last half

¹⁰ Peter Fordyce, 'Suffering in Non-Human Animals: Perspectives from Animal Welfare Science and Animal Welfare Law', *infra* 15.

century has provided us with data and methods of assessing animal suffering in a much more precise way. Sometimes, the scientific findings will contradict our anthropomorphic conclusions. A test from 1973 is a good example for this. As Fordyce explains, researchers found that intensively farmed chickens actually preferred to walk on a type of wire floor which an influential report had (from an anthropomorphic perspective) considered to be worse for their welfare. The preferences of animals such as the chickens in our example can be measured in so-called “preference/choice” tests. In these tests, animals are made to work to avoid something they do not want, or to get something they want. By measuring the effort they put into it, we can draw conclusions as to the strength of their preferences or aversions.

Today, a whole range of further well-proven scientific methods and parameters are used for assessing animals’ well-being. These include ethograms (that is, detailed descriptions of the characteristic behaviours of a species against which an individual animal’s reactions can be measured), biochemical and haematological parameters, hormone levels, heart and breathing rate, body temperature, and anatomical observations. But as Fordyce observes, even these objectively measurable parameters require interpretation. This is where experts in the field of animal welfare science come in. It is their role to interpret the data that is often produced as evidence in court to determine whether or not an animal has suffered. Fordyce points out, however, that courts should reassess the criteria by which they accept witnesses as ‘experts’. Even veterinary surgeons may not always possess the necessary expertise in animal welfare science in order to be able to correctly assess the available data. It is therefore often not the absence of such data but the lack of competent interpretation that will lead to a flawed assessment of an animal’s welfare. To round out his contribution, Fordyce adds a useful glossary to his article, in which he defines the most commonly used terms in animal welfare science.

Once one accepts that animals suffer and that we can detect their suffering, one must ask whether animals should possess fundamental rights and/or legal personhood as a means to protect them from such suffering. In their article “From Inside the Cage to Outside the Box: Natural Resources as a Platform for Nonhuman Animal Personhood in the U.S. and Australia”, Randall Abate and Jonathan Crowe focus on two particular jurisdictions – the U.S. and Australia – in order to consider legal avenues for going beyond the current property status of animals, to the establishment of animal legal personhood. Abate and Crowe begin their article by studying the recent attempts of the Nonhuman Rights Project (NhRP) to bring about the recognition of legal personhood for primates in the U.S. The NhRP files so called *habeas corpus* writs, where these writs are a common law tool which allows plaintiffs to demand that a judge verify the

legality of a person's captivity. Providing affidavits by renowned primatologists, the NhRP argues that chimpanzees should be considered "legal persons" for the purposes of the writ of *habeas corpus*. Abate and Crowe note, however, that the cases filed by the NhRP are yet to produce a positive legal outcome. At the time of writing, the New York Supreme Court Appellate Division had just affirmed an earlier decision by the County Supreme Court, which declined to have the chimpanzees in question transferred to a sanctuary.¹¹

Travelling across the Pacific, Abate and Crowe then shed light on possible pathways to achieving animal legal personhood in Australia. The article first explores the potential that Australian standing rules offer for raising animals' interests before the courts, noticing a positive (albeit fragile) trend towards a more liberal interpretation of the "special interest" requirement, which has made it easier for animal welfare organisations to obtain standing. Abate and Crowe then examine the prospect of invoking writs of *habeas corpus* in Australia. They consider this route difficult because Australian courts take a conservative approach to recognising detentions as illegitimate (including in the case of humans), as well as because the idea of animals as property is so deeply-entrenched in Australian law. Then the article considers whether the existing legal institution of guardianship is serviceable for furthering the interests of animals. The authors examine several ways in which human beings can act on behalf of animals to promote their interests.

In the final part of their article, Abate and Crowe discuss recent cases granting legal personhood to landforms and other natural formations, like rivers. Arguing that the moral and legal arguments in favour of animal legal personhood are stronger when considered in light of pre-existing recognitions of legal personhood, they propose that if such landforms are granted the status of legal persons then so, *a fortiori*, should sentient beings like animals. The article concludes by rejecting some of the common objections against animal legal personhood.

While these first two contributions highlight the importance of getting the science, the philosophy, and the law right, the third and final article explores the pragmatic challenge of building the political consensus that is required for action. In "The Boyd Group and Animal Experimentation: A Case Study of Deliberation", Robert Garner discusses the difficulties and prospects of getting to an agreement on

¹¹ In its ruling, the Appellate Division held that "[w]hile petitioner's avowed mission is certainly laudable, the according of any fundamental legal rights to animals, including entitlement to habeas relief, is an issue better suited to the legislative process." *Nonhuman Rights Project, Inc. v Lavery*, Supreme Court of the State of New York, Appellate Division, First Judicial Department (8 June 2017).

controversial cases, like those concerning animal experimentation. In his article, Garner uses the Boyd Group – a group consisting of stakeholders in the British animal testing debate, which was founded in 1992 to foster a dialogue on an issue that seemed to have reached an impasse – as a case study for the deliberative method. Garner examines whether deliberation in the Boyd Group has managed to reduce differences enough to achieve consensus on animal experimentation, as its formation was intended to do.

After introducing the central themes in the field of deliberative democracy, the article sheds closer light on the specifics of the Boyd Group and discusses, among other things, its participants, the relationship between these participants and the organizations they represent, and the Group's working method. Garner notes that there are several reasons – such as the fact that its members are partisan and represent the viewpoints of particular groups – why the Boyd Group cannot serve as an ideal testing case for deliberative theory. He observes however that the Group's operating principles are consistent with the theoretical framework of the deliberative method.

The case study reveals that there is little evidence that the Group's deliberations have induced any substantive change of views in its participants. However, progress has been achieved in how the participants regard each other and how they perceive the legitimacy of decisions taken by the Boyd Group. Furthermore, while consensus could not be reached on many issues, the participants did come to an agreement about using animals for testing cosmetics and household products; about the use of non-human primates for experiments; and about the role of local ethical review processes. Based on these findings, Garner concludes that the Boyd Group's deliberations have delivered results in at least some areas. What the study also shows, however, is that the Boyd Group has failed to reach a consensus on the core issue: whether animals should be used in experimentation at all. Ending on a hopeful note, the article points out that the Boyd Group is still active, and that – as such – it is always possible that it may reach a consensus on the fundamentals at some point in the future.

It seems safe to say that better interdisciplinary dialogues, as well as a deeper understanding of the natures of other animals are both prerequisites for agreement about issues like animal testing. If we seek justice for animals, we need to harness the insights, vocabularies, and ways of thinking of as wide a range of disciplines as possible.¹² This special issue of the GJAL aims to take a step in this direction. We hope that it can contribute at least to some degree to improving the lot of animals, countless numbers

¹² See Waldau (n 13) 9.

of whom still languish in unspeakable conditions. And even if some judge this goal too ambitious, we can still conclude, with Waldau, that the task would be worthwhile, if not for the good of animals, then at least to become aware of our own, human, limitations.¹³

¹³ See *ibid* 2.