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## **The Anthropomorphic Hegemony of Subjectivity: Critical Reflections on Law and the Question of the Animal**

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# Animal rights theory, animal welfarism and the ‘new welfarist’ amalgamation: A critical perspective

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## Abstract

Adherents of the ‘new welfarist’ approach advocate welfare reforms as essential short-term steps *en route* to the ultimate ideal of animal rights. A critical engagement with the ideological underpinnings of animal welfare theory and animal rights theory illustrates the contrasting moral spaces that the animal occupies in these theories and that the ‘new welfarist’ approach is philosophically unsound in assuming that these approaches are ideologically compatible. Karin van Marle’s ‘jurisprudence of slowness’ and Jacques Derrida’s exposition of the sacrificial logic underlying Western culture’s exclusion of animals from the ‘thou shalt not kill’ proscription provides a framework within which to illustrate and engage with the ideological purview that separates these theories.

## 1 Introduction

Humans’ relationship with other animals has proven to be a complex, confusing and disconcerting one, often exposing the capacity to arbitrarily discriminate, marginalise and enslave. Through centuries of denouncing animals as objects to be used as we see fit, we have normalised the torture, exploitation and killing of our fellow earthlings. We embody a set of assumptions wherein animals occupy a space as sacrificial beings unworthy of moral concern, making our actions seem rational. This exclusionary logic is maintained by a complex network of relations and traditions. Jacques Derrida uses the term ‘carnophallogocentrism’ to illustrate the complexity of the various axes that configure the sacrificial structure characterising ‘the (human) subject’ and the hegemony that typifies our interaction with animals. He delineates carnophallogocentrism as:

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The whole canonized or hegemonic discourse of Western metaphysics or religions, including the most original forms that this discourse might assume today ... [being discourse that is] a matter of discerning a place left open, in the very structure of these discourses (which are also 'cultures') for a noncriminal putting to death. Such are the executions of ingestion, incorporation, or introjections of the corpse. An operation as real as it is symbolic when the corpse is 'animal'.<sup>1</sup>

A deconstruction of carnophallogocentrism, for Derrida, fundamentally necessitates an interrogation of our (anthropocentric) conceptualisation of animality and the ethical, political and legal consequences thereof. Whilst the question of animality 'is difficult and enigmatic in itself, it also represents the limit upon which all the great questions are formed and determined, as well as all the concepts that attempt to delimit what is "proper to man", the essence and future of humanity, ethics, politics, law, "human rights", "crimes against humanity", "genocide", etc'.<sup>2</sup> Derrida engages with these (de)limitations by questioning the way in which the human-animal distinction is drawn in Western metaphysical discourse as an oppositional cut. By juxtaposing the human (subject) and animal (object), the differences between humans and animals are conceptualised as a contradiction and our hegemony is maintained. I have previously argued that we need a deconstruction and ensuing displacement of the human subject as phallogocentric structure and patriarchal centre of beings and that we need to embrace a mode of being that allows us to promote an ethical relation to the animal Other. To this end, I explored the possibility of justice, specifically in relation to the animal, and advanced veganism as a form of deconstruction and one ethical way of being that allows us to criticise and resist anthropocentric configurations that maintain and perpetuate subjugation of the animal Other.<sup>3</sup>

Destabilisation of the human-animal oppositional distinction however not only challenges the anthropocentric order in which the human claims a position as patriarchal centre of beings, but opens up a space for a further deconstruction of traditions and institutions that are founded on, and maintain such distinction, like the *de jure* legitimisation of animal exploitation and sacrifice. The law has always facilitated and legitimised a culture of animal sacrifice, excluding animals from the status of being full subjects of the law and denying them basic legal protection. The anthropocentric constraints that limit and shape traditional legal discourse and the way in which the concept of legal subjectivity has historically been constituted, raises several important issues with regard to the question whether

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<sup>1</sup>Derrida and Nancy "'Eating well" or the calculation of the subject: An interview with Jacques Derrida' (trans Connor and Ronell) in Cadava, Connor and Nancy (eds) *Who comes after the subject?* (1991) 112.

<sup>2</sup>Derrida and Roudinesco *For what tomorrow ... A dialogue* (trans Fort) (2001) 63.

<sup>3</sup>See De Villiers 'Towards an ethical relation to the nonhuman Other: Deconstruction, veganism and the law' (2012) *SAJHR* 18.

legal institutions can (at all) be reformed in order to embrace animals as full legal subjects. Issues pertaining to juridical images of personality or personhood, reproduction and representation where the law marks genealogies of different kinds of being, the 'lawful' space of the animal and the function of law as an instrument of social change and institution all warrant serious critical engagement.<sup>4</sup>

My focus in this article is a more modest one: I will consider law's relation to animal subjugation, both as facilitator of animal sacrifice and as possible enabler of animal liberation, by philosophically examining the relationship between the two most prominent theories intended to address the plight of the animal. I will illustrate how the animal advocacy movement has since its genesis been broadly divided into two camps, one advocating for the 'humane' treatment of animals and the other for the complete abolition of human (ab)use of animals. The distinction and interaction between these approaches, respectively known as animal welfarism and the rights based approach, has been muddled in recent years by intellectual and practical efforts. This has led to the emergence of 'new welfarism', an approach that sees welfarist reforms as essential short term steps *en route* to the ultimate ideal of animal rights. My main aim in this article is to explore the ideological foundations underlying animal welfare and animal rights theory and to illustrate that these approaches are based on contrasting and irreconcilable ideologies, rendering an amalgamation of the approaches highly problematic and detrimental to the ideal of animal liberation.

To the extent that the (present) attempt at synthesising a welfarist- and rights based approach finds its point of departure in a (past) conflict period, I am of the opinion that an engagement with the historical-ideological trajectory of the animal defence movement is vital to understanding and thinking about the problem of animal oppression that we face. History, as Douzinas and Gearey aptly note whilst commenting on the value of slow reflection, 'is not the nightmare from which we must awake, but the process which we must slow down and understand'.<sup>5</sup> I will accordingly start off by briefly sketching the history of the animal advocacy movement and highlighting the developments that facilitated the divergence of the welfare- and rights based approaches. I will then examine the rationale and assumptions underlying the new welfarist position and argue that this approach constitutes an uncritical 'privileging of the present' that is ultimately

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<sup>4</sup>For a comprehensive engagement with these issues and other related themes, see Otomo and Mussawir (eds) *Law and the question of the animal: A critical jurisprudence* (2013); Haldar 'Law and animalities' (2009) *Law and Humanities* 71; Haldar 'Zoologian jurisprudence' (2011) *International Journal for the Semiotics of Law* 291; Braverman *Zooland: The institution of captivity* (2012); Braverman 'Animal mobilities: The regulation of animal movement in the American city' (2013) *Humanimalia* 104.

<sup>5</sup>Douzinas and Geary *A Critical jurisprudence: The political philosophy of justice* (2005) 255.

to the detriment of the ideal that animal rightists strive to realise. I will draw on Karin van Marle's jurisprudence of slowness to argue that we need to create a (moment of) thinking that is able to address the plight of the animal and meaningfully reflect on the way in which we utilise the law to facilitate the transformation towards animal liberation. By following Van Marle's deconstructive approach, which she connects with 'slowness, lingering and greater attention',<sup>6</sup> we can reflect on the fundamental ideological discrepancy between the welfare- and rights based approaches that makes a theoretical and strategic amalgamation highly problematic. In order to illustrate this ideological dissonance I will engage with Derrida's thesis that humans maintain a conceptual human-animal divide by failing to embrace animals in the proscription 'thou shalt not kill' and examining how this prohibition translates into the respective theories.

## 2 The history of the animal advocacy movement

The history of a united attempt at addressing the interests of animals in the Western world can be dated back to the eighteenth century. After a sixty year period that saw several works critiquing the widespread brutality towards animals, the 1800s subsequently saw a united effort take shape in England to address the plight of animals.<sup>7</sup> These literary works *inter alia* denounced sadistic practices like cock throwing, critiqued the cruel treatment of horses used by carters and advanced the notion that the murderous behaviour of criminals stems from society's failure to suppress all forms of cruelty.<sup>8</sup> Whilst these works did not enjoy mainstream readership and were generally regarded as 'super sensitive or even eccentric', they played an important role in gradually sensitising the general public to change: 'the writers were, so to speak, the artillery bombarding a position from a reasonably safe distance; the brunt of the fighting had to be done by the Members of Parliament'.<sup>9</sup>

This struggle began in 1800 when Sir W Pulteney introduced a bill in the English Parliament that was aimed at the prevention of bull-baiting, a cruel form of 'entertainment' that had steadily decreased in popularity amongst the upper classes in the years following the reign of Queen Elizabeth. Despite the decreasing popularity of bull baiting, the majority of the Parliament found that the bill interfered with the amusement of the people and opposed the bill.<sup>10</sup> Led by Lord Thomas Erskine, a more detailed and inclusive bill aimed at prohibiting cruelty to domestic animals was introduced nine years later and passed in the

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<sup>6</sup>Van Marle 'Law's time, particularity and slowness' (2003) *SAJHR* 239 at 245.

<sup>7</sup>Silverstein *Unleashing rights: Law, meaning and the animal rights movement* (1996) 30.

<sup>8</sup>Niven *History of the humane movement* (1967) 53-54.

<sup>9</sup>*Id* 55.

<sup>10</sup>*Id* 57-58.

House of Lords before it was rejected in the House of Commons. A new era of benevolence had to wait until 1822 when we saw the first instance of a legislature regulating and criminalising cruelty to an animal with the adoption of the Ill Treatment of Cattle (or Martin's) Act.<sup>11</sup>

During this time, structured efforts began to grow outside the realm of the legislature and in 1824 Richard Martin and other English humanitarians organised the Society for the Prevention of Cruelty to Animals (SPCA).<sup>12</sup> The SPCA is regarded as the first animal protection organisation and is credited with laying the foundations for what would eventually become the animal welfare movement.<sup>13</sup> The SPCA struggled in the early years after its formation and would only gain noteworthy momentum in 1840 when, after becoming Queen, Victoria ordered the organisation to add the prefix 'royal' to its name. This gave the organisation great leverage and enabled the RSPCA to establish additional associations in Ireland, Germany, Austria, Belgium and Holland.<sup>14</sup>

Whilst the welfare movement in England initially focused exclusively on cruelty to domesticated animals, a new branch of animal protection was born in the 1860s when the antivivisection movement formed.<sup>15</sup> With this, the focus expanded to include animals used in scientific experimentation. The formation of the antivivisection movement would bring about the first split in the larger animal advocacy movement. Whilst some proponents of the movement sought to minimise the suffering imposed on animals used in experimentation, others advocated the complete abolition of vivisection. These ideological inconsistencies divided the animal advocacy movement into the antivivisection camp and the welfare camp.<sup>16</sup> Notwithstanding these ruptures, the new branch of animal advocacy achieved notable success. The British Cruelty to Animals Act passed in 1976, securing a foundation for the regulation of animal use in laboratories.<sup>17</sup>

The animal welfare movement soon moved to the United States, a country that had tremendous world influence. After retiring as the secretary of the American legation to Russia, Henry Bergh returned to the United States with the ambition of introducing the idea of animal protection and organising an American equivalent of the RSPCA.<sup>18</sup> Supported by humanitarians like Abraham Lincoln, Bergh's efforts lead to the first anticruelty statute being passed in the State of New York in 1866. A few days before the act was passed, parliament also

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<sup>11</sup>Nash *The rights of nature: A history of environmental ethics* (1989) 25.

<sup>12</sup>*Ibid.*

<sup>13</sup>Silverstein (n 7) 31.

<sup>14</sup>Carson *Men, beasts and gods: A history of cruelty and kindness to animals* (1972) 54.

<sup>15</sup>Silverstein (n 7) 31.

<sup>16</sup>*Ibid.*

<sup>17</sup>Nash (n 11) 26.

<sup>18</sup>*Id* 46.

chartered a humane society. The American Society for the Prevention of Cruelty to Animals, headed by Bergh, was the first of its kind in the Western hemisphere. Enjoying delegated police powers, the ASPCA was able to prosecute numerous incidents of animal cruelty.<sup>19</sup>

## 2.1 *The shift from welfarism to rights*

After the death of Bergh, the American humane movement gradually lapsed into 'a dog and cat concern'. Whilst several factors contributed to this shift, the most prominent factors included the location of the welfare organisations in the cities, where the majority of animals were domesticated animals, and limited city funds being allocated to address doorstep issues like stray animals.<sup>20</sup>

The World Wars and worldwide industrialisation amplified this shift and animal welfare issues were gradually pushed to the periphery. Consequently, the welfare movement lost momentum during the first half of the century.<sup>21</sup> The 1960s brought a steady revival of animal welfare concerns, but it would not be until the 1970s that the intellectual efforts of scholars like Peter Singer would revitalise the movement and initiate a shift towards rights talk. It is important to note that, whilst Singer's approach to animal liberation is grounded in utilitarian theory and not rights theory, his work has nevertheless provided a philosophical foundation for animal rights theorists and played a pivotal role in the creation of many animal rights organisations, including People for the Ethical Treatment of Animals (PETA), the world's largest animal rights organisation.<sup>22</sup> The re-born movement rapidly gained momentum during the 1980s and established popularity as the 'animal rights movement', advocating the philosophy that animals should be included in the community of rights-holders.<sup>23</sup>

The emergence of the rights movement was accompanied by inevitable tension and conflict with the animal welfare movement, whose approach to animal advocacy differed in 'focus, philosophy, language and tactics'.<sup>24</sup> By now, the welfare movement focussed almost exclusively on companion animals and turned a blind eye to the plight of farm animals and animals used in experimentation. As Helena Silverstein notes, 'it was not uncommon for board members of humane organisations to support hunting and meat consumption. Moreover, welfare groups held that treatment of animals should be guided by compassion: animals deserve *some* protection, deserve to be treated humanely, but do not have

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<sup>19</sup>Carson (n 14) 96.

<sup>20</sup>Niven (n 8) 109.

<sup>21</sup>Silverstein (n 7) 32.

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

<sup>23</sup>*Ibid.*

<sup>24</sup>*Id* 33.



rights'.<sup>25</sup> The focus of welfarists has always been one of reform. Animal welfarists seek the implementation of legislation that improves the lives of the animals that we utilise and not a basic shift in the way we see and relate to animals.

Conversely the animal rights movement rejects human utilisation of animals, irrespective of the degree of 'humaneness' accompanying the use. Animal rightists contend that a desire for meat consumption, leather products, hunting or entertainment cannot validate or justify the emanating suffering imposed on animals and therefore seek a radical shift in the way we relate to animals. For the rightists, this shift will not stem from mere compassion but requires the extension of rights to animals.<sup>26</sup>

Whilst the chasm between the welfare camp and the rights camp remains, recent years have seen the gap shrink and in some cases even disappear. The reason for this narrowing, as we will see, has been both practical and theoretical. Some welfare societies have started to expand their focus to the plight of animals used in food production and experimentation and some rightists believe that welfare strategies should be employed *en route* to the extension of rights to animals. Some theorists see (ideological) common ground between these two approaches and argue that there can consequently be no meaningful separation.

The consequence of this is that 'animal rights' has become a generic term that refers to a wide range of views and approaches to the protection of animals. Tom Beauchamp, for instance, sees the distinction between the two camps as 'a crude tool for dividing up the world of protective support for animals' and rejects the use of 'animal rights' as a polarising term that suggests that there is 'inherent conflict or an inseparable gulf between "rightists" and "welfarists"'.<sup>27</sup> Rather, he argues that 'the many theories that afford protection to animals are better analysed as a spectrum of accounts spread across a continuum that ranges from, on one end, a minimal set of human obligations to animals (eg, "do not treat animals cruelly" and "do not slaughter inhumanely") to, on the other end, a maximal and prohibitionist set of human obligations to animals (eg, "do not kill animals" and "do not utilise animals in laboratories")'.<sup>28</sup> These hybrid approaches maintain a new welfarist stance that supposes the possibility of mutually reinforcing reciprocity between welfarism and rights theory.

In the remainder of this article I will argue that this continuum account of animal advocacy theories and the hybrid approach of new welfarism are theoretically unsound and counterproductive. The welfare- and rights based approaches rest on fundamentally incompatible views on the place of animals in

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<sup>25</sup> *Ibid* (own emphasis).

<sup>26</sup> See Regan *The case for animal rights* 2 ed (2004).

<sup>27</sup> Beauchamp 'Rights theory and animal rights' in Beauchamp and Frey (eds) *The Oxford handbook of animal ethics* (2011) 200-201.

<sup>28</sup> *Id* 201.

our moral community and are therefore indeed, in my opinion, separated by an ideological gulf. This gulf, I will furthermore argue, needs to be maintained if we are to circumvent some of the violent and reductive aspects of the law relating to animals and ultimately facilitate the much needed shift in the way we view animals.

### 3 The amalgamation of welfarism and rights

The new welfare approach regards adherence to welfare measures that aim to address the suffering of animals as important incremental steps towards the ultimate goal of animal rights, animal welfare is seen as the short term means towards the long term goal of animal rights. As Gary Francione explains, 'it appears as though the new welfarists believe that some causal connection exists between cleaner cages today and empty cages tomorrow, or between more "humane" slaughter practices today and no slaughtering tomorrow'.<sup>29</sup> The consequence of this approach is that the 'animal rights' movement 'temporarily' pursues an ideological and practical agenda that concurs with the approach followed by those who condone the utility status of animals.<sup>30</sup>

The rationale behind the new welfarist approach is twofold. Firstly, welfarist reforms are seen as bringing about positive change to the conditions in which animals live and die by reducing their suffering and it is believed that these types of improvements can incrementally lead to the eradication of all animal (ab)use. Secondly, the extension of rights to animals is seen as a 'utopian' ideal that can only (possibly) be realised in the long-term. Consequently, the new welfarists argue, we need concrete normative guidance in the form of welfare policies to inform the way we interact with animals on a day to day basis *en route* to the ideal of animal liberation.<sup>31</sup>

As Francione argues, a certain confusion regarding the micro and macro levels of moral theory preoccupies the reasoning of the new welfarists.<sup>32</sup> Ingrid Newkirk, co-founder and current president of PETA, sees welfare reform as something that 'can only bring us closer to our ultimate goal' of animal rights.<sup>33</sup> Newkirk uses the example of a statute requiring that a thirsty cow awaiting slaughter be provided with water to illustrate her support of welfare legislation. Newkirk criticises animal rights advocates who refused to support such a statute

<sup>29</sup> Francione 'Animal rights and animal welfare' (1996) *Rutgers LR* 397 at 399.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Id* 399-400. Animal rights theorists Steven Wise and Susan Hankin also argue in favour of an incremental approach to ultimately secure rights for animals; see Wise *Drawing the line: Science and the case for animal rights* (2002); Hankin 'Not a living room sofa: Changing the legal status of companion animals' 2007 *Rutgers Journal of Law and Public Policy* 314.

<sup>32</sup> Francione (n 29) 422-426.

<sup>33</sup> *Id* 423.

on the basis that it maintains the utility status of animals, arguing that she 'cannot imagine how those vegetarians with clean hands, who declined to help, could explain their politics to the poor cows, sitting in the dust with parched throats'.<sup>34</sup>

I have little doubt that most people, and I include meat eaters as well as ethical vegetarians and vegans, will feel a moral imperative to give water to a thirsty cow awaiting slaughter and will act on this belief when having the opportunity to do so. The point is, of course, that it is not a matter of *either* supporting welfare reform *or* turning a blind eye to the cow's suffering. It is possible to feel morally obligated to minimise her suffering without supporting an animal welfare stance merely because it also strives to lessen suffering. In fact, there is good reason to oppose welfarism if you believe that it perpetuates the institutionalisation of animal exploitation that lies at the very core of the suffering that the cow awaiting her slaughter has to endure.<sup>35</sup>

Francione uses a hypothetical scenario to forcefully deconstruct Newkirk's argument and expose the interconnectedness between the suffering of exploited animals, which presents only one interest that warrants consideration and protection, and the enabling ideological foundations of the schemata of domination in which that suffering occurs. Francione asks that we place ourselves in the position of 'a guard working in a prison in which completely innocent people are being tortured and jailed by government security forces for no reason other than that they have political views that differ from those of the government'.<sup>36</sup> As you disagree with the way in which the prisoners are treated, you take all the steps that someone in your position can to minimise the suffering of the prisoners. This means that you refrain from directly partaking in the infliction of torture and physical ill-treatment of the prisoners and provide hungry and thirsty prisoners with food and water when you are able to do so.<sup>37</sup>

Upon deciding that you not only disagree with the institutionalised violation of the prisoners' basic rights but that you want to eradicate the system of political persecution and bereavement of other interests 'that together define the minimal conditions of what it means to not be treated exclusively as a means to an end',

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<sup>34</sup>*Ibid.* For an adaptation of Ingrid Newkirk's thirsty cow story to illustrate how the pursuit of welfare reform is detrimental to the animal rights movement, see DeCoux 'Speaking for the modern Prometheus: The significance of animal suffering to the abolition movement' (2009) *Animal Law* 9.

<sup>35</sup>Taimie Bryant shares Francione's view that the property status of animals, which is maintained and perpetuated by welfarism, is foundational to the problem of animal exploitation. Bryant argues 'the reason that the legal status of animals as the property of humans has such a dramatic effect is that it rests so firmly on the ideology of humans' presumed superiority to animals and humans' presumed centrality in the natural world'. Bryant 'Sacrificing the sacrifice of animals: Legal personhood for animals, the status of animals as property, and the presumed primacy of humans' (2008) *Rutgers LJ* 247.

<sup>36</sup>Francione (n 29) 423.

<sup>37</sup>*Ibid.*

you resign from your position as guard and form an organisation that seeks to destabilise the regime.<sup>38</sup>

This pursuit of destabilisation can be approached from at least two perspectives. Firstly you can seek the enactment of legislation requiring that the prisoners periodically be given water and food, except under circumstances that the warden deems it 'necessary' that food and water be withheld in the interest of state security. This can be followed by another law requiring that prisoners be tortured 'humanely', except under circumstances wherein it is necessary to deviate from this directive. Alternatively you can aim your efforts at the foundation of the institutionalised exploitation, at the government that condones and facilitates the imprisonment and torturing of people for the regime's self-benefit. You might raise public awareness on the existence of such practises through demonstrations or protests and lobby for political change.<sup>39</sup>

These two approaches differ significantly in focus. The first approach exclusively addresses the prisoner's interest in not suffering and seeks that legislative reform concretise at macro level what the guard, whilst working in prison, did at micro level. Whilst the second approach continues to address the prisoner's pain and suffering, it acknowledges this pain and suffering as an outgrowth of the system of institutionalised exploitation in which people are treated as a means to an end and aims to destabilise the hegemonic foundation rather than alleviating the symptoms.<sup>40</sup>

The guard faced by a hungry and thirsty prisoner decides on an issue of morality at a micro level that concerns a course of action in response to another person's suffering that stems from a socially and legally sanctioned deprivation of her interests. The guard's response and approach at macro level is an entirely different issue: 'it is not the case that the decision to offer water to the prisoner requires that the guard try to secure laws to achieve that reduction of suffering on an institutional basis by, for example, providing a glass of water to each prisoner on the way to execution'.<sup>41</sup> Whilst the interest in not suffering is certainly one that warrants protection, there are other interests at stake that need to be recognised as well.<sup>42</sup> The interest in not suffering is in fact secondary to the interest in not being treated instrumentally in a system of institutionalised exploitation when the

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<sup>38</sup>*Ibid* 424.

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

<sup>40</sup>The premise of Francione's argument pertaining to institutionalised animal exploitation is that the animal is maintained in a subordinate and vulnerable position due to her legal categorisation as 'a thing' or property. For the view that the recalibration of animals' property status poses a challenge to 'humans' primacy at the top of a hierarchical world order', see Bryant (n 35).

<sup>41</sup>Francione (n 29) 425.

<sup>42</sup>For a critique on the centrality of suffering in the utilitarian approach, see Diamond 'Eating meat and eating people' in Sunstein and Nussbaum (eds) *Animal rights: Current debates and new directions* (2004) 93-107.

suffering emanates from that very utilisation: 'after all, even if the prisoner was not tortured, or subjected to thirst and hunger – that is, even if the interest in pain and suffering was respected completely – the prisoner would still be a prisoner'.<sup>43</sup>

I want to argue that the welfare-rights amalgamation is akin to an attempt at mixing oil and water. The discordant ideological foundations of welfare theory and rights theory renders a consolidation disagreeable for the same reason that the molecular structure of water and oil makes suffusion impossible. Welfarism accepts the utility status of animals and maintains the anthropocentric framework in which it functions, whilst rights theory seeks the total abolition of human use of animals and attempts to displace this hegemonic structure. The constituent parts of new welfarism are thus fundamentally at odds, rendering the approach internally fissured and philosophically unsound.

## 4 The theoretical foundations and internal paradoxes of new welfarism

As stated before, my main aim in this article is to illustrate the ideological inconsistencies regarding the place of animals in our moral community that inheres in the space that separates welfare- and rights based approaches, and not to elaborate on the theories underlying the respective approaches. A brief exposition of the theoretical foundations of these approaches is however necessary to elucidate and facilitate the following discussion.

### 4.1 *Utilitarianism*

The philosophical grounding of animal welfarism can be traced back to the writings of scholars like Jeremy Bentham and John Stuart Mill, whose work provides a framework for a utilitarian defence of animal interests. Up until the late-twentieth century Mill's views were almost regarded as a canonical expression of utilitarian theory, with utilitarian thought not undergoing any major changes in the hundred years since Mill's contribution.<sup>44</sup> Mill's views provided a model that approaches utilitarian theory as 'consequentialist, welfarist, aggregative, maximising, and impersonal'.<sup>45</sup> His views were consequentialist insofar as the rightness or wrongness of an act depended on the goodness or badness of its consequences. His views were welfarist in that rightness was seen as a function of goodness, the goodness being understood as counting the welfare of both humans and animals. The impersonal and aggregative dimensions of this model

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<sup>43</sup>Francione (n 29) 426.

<sup>44</sup>Frey 'Utilitarianism and animals' in Beauchamp and Frey (eds) *The Oxford handbook of animal ethics* (2011) 172-197.

<sup>45</sup>*Id* 172.

stem from the view that rightness should be determined through the neutral assessment of the increase and reduction in the welfare of all influenced by the act, and that the increases should be calculated across all subjects affected. Lastly his views were maximising in that the principle of utility was formulated, in light of welfarist considerations, as 'always maximise net happiness'.<sup>46</sup>

It was however Bentham who had a greater impact on utilitarian theory as a foundation for animal welfare. Bentham claimed that a being's capacity to suffer is a sufficient condition for moral consideration. The question, he argued, 'is not Can they *reason*? nor Can they *talk*? But, Can they *suffer*?'<sup>47</sup> With this, Bentham included animal suffering in the social utility function and almost all the utilitarians after Bentham, including Robert Nozick and most prominently Peter Singer, would follow suit.<sup>48</sup> It is not hard to see what effect this emphasis on suffering has on the utilitarian argument, 'it simply seizes upon the pain involved, weighs it against the pain on the other side (though the method of doing so is not obvious and hardly ever discussed), and decides accordingly what ought to be done'.<sup>49</sup> It thus comes down to a utilitarian balancing: the right action will be the one that produces the largest summative balance of pleasure over pain.<sup>50</sup>

## 4.2 Moral rights

Animal rightists, on the other hand, reject utilitarian balancing and believe that the rightness of an act towards an animal requires the recognition of moral rights. The theoretical underpinnings of animal rights can be found in natural law and natural rights theory.<sup>51</sup> Human rights developed from these theories and provided a framework that was adapted to advance rights theories that can accommodate animals. Consequently the term 'rights' fundamentally has the same meaning in both human- and animal rights paradigms.

In order to claim that animals have rights within a natural rights theory, theorists advance different views on what (exact criterion) grants an animal moral citizenship or standing. Whilst there is no consensus on this point, they commonly employ an interest theory to assert that animals share one or more attributes or interests that we regard as fundamental to being human and that merit protection by rights. These attributes or interests, they all agree, grant animals the rights to

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<sup>46</sup>*Id* 172-173.

<sup>47</sup>Singer *Animal liberation* 4 ed (2009) 7.

<sup>48</sup>For an alternative engagement with the Benthamite idea of suffering – as provoking a reversal in the way we consider animals in terms of their capacities to considering their embodied exposure and vulnerability – see Derrida *The animal that therefore I am* (trans Wills) Mallet (ed) (2008).

<sup>49</sup>Frey (n 44)175.

<sup>50</sup>Nussbaum 'The capabilities approach and animal entitlements' in Beauchamp and Frey (eds) *The Oxford handbook of animal ethics* (2011) 228-251.

<sup>51</sup>Silverstein (n 7) 27.

*inter alia* life, liberty and bodily integrity. The most comprehensive theory of animal rights was developed by Tom Regan, who primarily relies on subjective consciousness to argue that animals are, like humans, 'subjects of a life' and that this grants animals rights that cannot be violated for the sake of human interests. Regan argues as follows:

[Animals] bring the mystery of a unified psychological presence to the world. Like us, they possess a variety of sensory, cognitive, conative, and volitional capacities. They see and hear, believe and desire, remember and anticipate, and plan and intend. Moreover as is true in our case, what happens to them matters to them. Physical pleasures and pain – these they share with us. But they also share fear and contentment, anger and loneliness, frustration and satisfaction, and cunning and imprudence; these and a host of other psychological states and dispositions collectively help define the mental lives and relative well-being of those humans and animals who ... are 'subjects of a life'.<sup>52</sup>

Steven Wise grounds his argument for animal rights on Immanuel Kant's philosophy of dignity and proposes a neo-Kantian test to determine which animals possess 'practical autonomy' and subsequent moral rights.<sup>53</sup> Wise's approach is related to Regan's insofar as Wise argues that practical autonomy 'is not predicated on the ability to reason, but on a being's possession of preferences, the ability to act to satisfy them, and the sense that it is she who wants and seeks satisfaction'.<sup>54</sup> Rights theorist Gary Chartier also argues that animals possess moral rights and draws on natural rights theory to advocate for (legal) animal rights.<sup>55</sup>

By regarding animals as possessing moral rights, these theorists bestow a distinctive moral status on animals. This moral status cannot be harmonised with a view of animals as utility objects or the property of their owners, a view that welfarists readily accept. Animal rightists see animals as possessing inherent value separate from their usefulness to humans. The new welfarist attempt at synthesising animal welfare and rights dissolves this progressive ideological foundation that undergirds animal rights theory into general rhetoric that serves to justify our continued containment of animals in a subordinate position, thereby entrenching the *status quo* and indefinitely postponing the striving for justice. The water cannot eventually infuse with the oil to create a new substance. But in order to understand why welfarism will not serve the ideal that the animal rights

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<sup>52</sup>Regan *Defending animal rights* (2001) 42-43.

<sup>53</sup>Wise 'Animal rights, one step at a time' in Sunstein and Nussbaum (eds) *Animal rights: Current debates and new directions* (2004) 19-50.

<sup>54</sup>Goodman 'Animal ethics and the law' 2006 *Temple LR* 1291 at 1301.

<sup>55</sup>See Chartier 'Natural law and animal rights' (2010) *Canadian Journal of Law and Jurisprudence* 33.



movement strives to realise, we need to critically reflect on the philosophical foundations, the 'molecular structure', of these theories rather than thoughtlessly yielding to the here-and-now anthropocentric legal disposition in the hope that minor changes in the way we abuse animals now will one day bring about animal rights.

The latter approach amounts to what Van Marle calls a 'privileging of the present' that counteracts 'visions of a future, a not-yetness that is never present, always postponed'.<sup>56</sup> We focus so intently on the present, the fact that we do not have any animal rights today and will not have any animal rights tomorrow, that we do not take the time to critically examine the approach we employ in (re)'negotiating the past, present and future'.<sup>57</sup> I believe Van Marle's call to attentiveness and her proposal of slowness is needed to create 'a thinking' and an instant from which we can critically (re)consider the new welfare approach to animal liberation.

## **5 The need for a moment of slowness and reflection amidst chaotic violence towards animals**

The questions of time and memory lie central to Van Marle's jurisprudence of slowness. Milan Kundera's reflection on the ecstatic slowness of the motorcyclist, cut off from both the past and the future in the instant of his flight, provides Van Marle with a starting point from which to contemplate the law and (legal) interpretation and their relation to time. From here, Van Marle takes on the task of creating an approach of slowness in the midst of chaotic movement.

Law's chronology is one of inescapable speed, inescapable because of the very nature of law. 'Law, because of its rule-bound nature, and judgements, because of their over-emphasis on calculation, excludes the needs of the particular and ... "closes the door of the law"'.<sup>58</sup> This means that the (needs of the) particular moment become enveloped in the general and therein lies the violence of the law: 'the violence (and reductive nature) [of the law] refers to law's tendency to make the particular general and the concrete abstract'.<sup>59</sup> Whilst this intrinsic characteristic of the law and legal judgement is inescapable, it should always be borne in mind as we engage in legal reading and interpretation. We cannot eradicate this inherent characteristic of the law, but an approach of slowness can help us circumvent some of its reductive tendencies.<sup>60</sup>

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<sup>56</sup>Van Marle (n 6) 245.

<sup>57</sup>*Id* 255.

<sup>58</sup>*Id* 242.

<sup>59</sup>*Ibid*.

<sup>60</sup>*Id* 243.



Slowness calls for a disruption and a suspension to create a moment from which we can (re)consider. 'Law's present is always that of the need to establish, to distinguish, and to create sure foundations. The present can only be redeemed by affirming a time that is not one of resolution; rather, a holding open of many versions of events, of differently inflected truths'.<sup>61</sup> These inflected truths reside in the past of collective memory. Memory as 'a support of an embodied and embedded recollection' constitutes disruption in itself, for, as Van Marle reminds us, 'memory ... is a construction and in this sense the traditional concepts of linear and chronological time are disrupted'.<sup>62</sup> Here we see why the past is as significant for Van Marle in 'de-privileging the present' as the future is. Legal interpretation's relation with the past and future illustrates a paradox:

Because we employ our past experiences when we imagine and our imagination when we remember, the paradox of imagining the past and remembering the future is created. Time, memory and imagination accordingly become part of a more complex configuration than a mere linear or chronological remembering or projection.<sup>63</sup>

This relation exposes multiple voices, differences and manifold notions of truth. The question that Van Marle poses acknowledges and seeks to address this complexity: how do we listen to these voices and engage with these truths to and from the here and now? Or, (re)turning to my focus in this article, how do we interpret and relate the 'imagined' past and continuing violence towards animals and the only present legal recourse of welfare reform against a postponed and 'remembered' future of animal liberation?

The multiplicity of voices and truths cannot be heard in (law's) speed. We are called to slow down and firstly acknowledge and contemplate the spirit of complexity peculiarising the specific situation which, as Van Marle reminds us, is situated in the past, present and future. In order to adequately address these different dimensions, she calls for 'a disruption of a chronological and linear conception of time' so that we can embrace the nuances of the situation.<sup>64</sup> Van Marle uses artistic passages to illustrate how such a disruption can come about. She specifically engages with Martin Hall's archaeological investigation that offers two contrasting approaches to the contemplation of time and memory, a short story by Paul Auster that highlights the relevance of attention to detail and particularity, and an animated film by William Kentridge in which memory is portrayed in a manner that fractures and problematises conventional conceptions of time.<sup>65</sup>

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<sup>61</sup>Douzinis and Geary (n 5) 254.

<sup>62</sup>Van Marle (n 6) 241.

<sup>63</sup>*Ibid.*

<sup>64</sup>*Ibid.*

<sup>65</sup>*Id* 245-250.

Van Marle then translates the notion of attentiveness that we find in these artistic events into a deconstructive approach to the law and (legal) interpretation. With this, she is not suggesting that a new method of law and legal interpretation be followed, but rather urging a reconsideration, 'an approach which, if embraced by legal scholars, lawyers and judges, could have an effect on how we understand and do law in the long run'.<sup>66</sup> Her main aim is to investigate the time aspect intrinsic to deconstruction and to illustrate how this deconstructive approach can assist in providing an interpretation (of a text or situation) that is regardful of particularity and the fluidity of meaning. Such an approach 'embraces both a disruption of chronological time – and accordingly multiple notions of truth and fluidity of meanings – and a slowness or dwelling (strategy of delay)'.<sup>67</sup> This strategy of delay firstly underlines the ethical imperative of deconstruction by acknowledging the limits of any attempt at interpretation, 'that which cannot be known, that which escapes',<sup>68</sup> thereby recalling the Peircean notion of 'secondness' and the limits and impossibility of (the) law as justice that I have elsewhere examined.<sup>69</sup> This approach furthermore remains, at its very core, a call to 'read and reread, interpret and re-interpret without hastening to a final end', thereby postponing law's time and speed that generalises and universalises.<sup>70</sup> Slowness becomes synonymous with (critical) reflection and, more than just a call to *think*, the challenge to engage in *a thinking* that can adequately address the problems that we face.<sup>71</sup> I believe that by taking up this challenge, we can hold open the possibility of a transformation in our thinking about the question of violence and compassion towards animals and the channels and strategies we employ in the pursuit of animal liberation.

Derrida calls attention to an important recent change in the human-animal relation. The past two centuries have witnessed both an exponential increase in violence perpetuated against animals, and an accompanying upsurge in the presence of an 'organized disavowal of this torture' by the animal advocacy movement. The movement is comprised of 'minority, weak, marginal voices, little assured of their discourse within the law, as a declaration of rights'.<sup>72</sup> For Derrida, the war between the animal protection movement and industrialised overpopulation and the accompanying violence against animals is clearly 'an

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<sup>66</sup>*Id* 254.

<sup>67</sup>*Id* 250.

<sup>68</sup>*Id* 251.

<sup>69</sup>See De Villiers (n 3).

<sup>70</sup>Van Marle (n 6) 255.

<sup>71</sup>Van Marle recalls her approach of slowness and attention in her later work in which she reflects on women's lives and deaths, a politics of refusal and a jurisprudence of generosity. See Van Marle 'Laughter, refusal, friendship – thoughts on a "jurisprudence of generosity"' in Van Marle (ed) *Refusal, transition and post-apartheid law* (2009) 15-28.

<sup>72</sup>Derrida (n 48) 26.

unequal struggle', the former being the marginal force in this struggle.<sup>73</sup> Derrida's hypothesis, however, is that regardless of the inequality of this war, we are nevertheless passing through a complex moment wherein this struggle has become 'uncircumventable for thought'.<sup>74</sup>

This war ... is passing through a critical phase. We are passing through that phase, and it passes through us. To think the war we find ourselves waging is not only a duty, a responsibility, an obligation, it is also a necessity, a constraint that, like it or not, directly or indirectly, no one can escape. Henceforth more than ever. And I say 'to think' this war, because I believe it concerns what we call 'thinking'.<sup>75</sup>

Derrida's reference to 'thinking' is a call for an alternative approach and thought in regard to the question of the animal, one that can think through and critically reflect on the underlying assumptions and anthropocentric constraints at work in the resources we use to address the plight of the animal. It is in this vein that Van Marle's approach of slowness emphasises the need 'to address the new times; to be up to the challenges that they present'<sup>76</sup> and provides a framework through which we can pause and critically reflect on the new welfare approach, its underlying assumptions and theoretical foundations; thereby preserving the possibility of transforming the juridicism and sacrificial logic that underpins our thinking and the legal institutions that reinforce our sacrificial practices. Such a transformation would require that we embrace a spirit of continuity, keeping in mind the complexity of the moment as a configuration of the anthropocentric structures of law's past, present and future, rather than collapsing time into the speed of the present instant only.

It is along these lines that I would now like to 'take the time' to meaningfully reflect on the internal ideological incoherency of the new welfarist position by turning to engage with Derrida's argument that humans maintain their hegemony and a view of animals as sacrificial beings by failing to embrace animals in the 'thou shalt not kill' prohibition. To be clear, Derrida's argument is not aimed at critiquing animal welfarism, at least not directly. Nor does it in any way constitute a support of animal rights theory. It does however provide a suitable platform from which to illustrate and engage with the ideological inconsistencies between the welfare- and rights-based approaches that, in my opinion, demand a conceptual separation of the two paradigms.

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<sup>73</sup>*Id* 28.

<sup>74</sup>Calarco *Zoographies: The question of the animal from Heidegger to Derrida* (2008) 113.

<sup>75</sup>Derrida (n 48) 29.

<sup>76</sup>Douzinas and Geary (n 5) 253.

## 6 Thou shalt not kill (the human)

I firstly need to contextualise Derrida's argument as part of a bigger project aimed at deconstructing the privileging of the human (subject) within an anthropocentric sacrificial structure. For Derrida, this privileging stems from the entrenched binary human-animal opposition that has been constructed in Western metaphysical discourse. Derrida finds this juxtaposition problematic and urges that we rethink the dissimilarities between humans and animals through the logic of *différance*, rather than an oppositional distinction.<sup>77</sup> This project requires an in-depth investigation and questioning of the place of animality in Western metaphysics, a task that Derrida customarily approaches through a rigorous reading of Martin Heidegger's texts:

Can the voice of a friend be that of an animal? Is friendship possible for the animal or between animals? Like Aristotle, Heidegger would say: no. Do we not have a responsibility toward the living in general? The answer is still 'no,' and this may be because the question is formed, asked in such a way that the answer must necessarily be 'no' according to the whole canonised or hegemonic discourse of Western metaphysics or religions ...<sup>78</sup>

One of the most pervasive ramifications of this oppositional human-animal divide is the problem of sacrifice. The way in which we view the killing of animals within this hegemonic structure, as necessary carnivorous sacrifice, rests on an ideology that assumes the superiority of humans over animals and the centrality of humans in the natural world: 'through our conduct we define the "other-than-human" (animal) as the means to human ends'.<sup>79</sup> The (human) killing of animals is not seen as murder but remains, to use Derrida's phrase, a 'noncriminal putting to death'. With these assumptions, we avoid taking any moral responsibility for the animal. As Derrida explains:

The subject is responsible for the other before being responsible for himself as 'me'. This responsibility to the other, for the other, comes to him, for example (but this is not just one example among others) in the 'Thou shalt not kill'. Thou shalt not kill thy neighbour. Consequences follow upon one another, and must do so continuously: thou shalt not make him suffer, which is sometimes worse than death, thou shalt not do him harm, thou shalt not eat him, even a little bit, etc ... But the 'Thou shalt not kill' is addressed to the other and presupposes him. It is destined to the very thing that it institutes, the other as man. It is by him that the

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<sup>77</sup>Calarco 'Deconstruction is not vegetarianism: Humanism, subjectivity, and animal ethics' (2004) *Continental Philosophy Review* 175 at 189.

<sup>78</sup>Derrida and Nancy (n 1) 112.

<sup>79</sup>Bryant (n 35) 296.

subject is first of all held hostage. The 'Thou shalt not kill' – with all its consequences, which are limitless – has never been understood within the Judeo-Christian tradition ... as a 'Thou shalt not put to death the living in general'. ... the other, such as this can be thought according to the imperative of ethical transcendence, is indeed the other man: man as other, the other as man.<sup>80</sup>

Derrida draws a link between the scope of the term 'murder' and the 'category of others-to-whom-we-owe-responsibilities'.<sup>81</sup> If animals can only be killed and not murdered, they are excluded from the category of others-to-whom-we-owe-responsibilities. The implication is also that the killing of an animal cannot be unjust or unlawful, as it is the element of wrongfulness that characterises the distinction between killing and murdering. 'Thus, the hegemony of humans is sustained by both the act of casual killing and its conceptualisation as not murder'.<sup>82</sup> A displacement of this hegemony, for Derrida, requires that we 'sacrifice sacrifice':

Discourses as original as those of Heidegger and Levinas disrupt, of course, a certain traditional humanism. In spite of the differences separating them, they nonetheless remain profound humanisms *to the extent that they do not sacrifice sacrifice*.<sup>83</sup>

It is important to keep Derrida's thesis on the inescapability of a sacrificial existence in mind when interpreting this passage. Derrida is adamant that certain manifestations of sacrifice inevitably remain in the impossibility of its delimitation, that 'one eats [the Other] regardless and lets oneself be eaten by him'.<sup>84</sup> The unwillingness to 'sacrifice sacrifice', for Derrida, refers to an unwillingness to question dominant discourse that sees the killing of animals as noncriminal and to adapt our (un)ethical response to animals accordingly.<sup>85</sup> Before such a discursive shift can take place, however, we need to reflect on the importance of this very logic (of sacrifice) in understanding why we humans construct and engage in a culture of animal sacrifice.

Derrida tracks and deconstructs this culture of sacrifice along the finest threads.<sup>86</sup> Linking the Genesis tale of Adam and Eve's nudity and shame, the effect of the animal's presence on Cain and Abel's fraternity, Prometheus' act of stealing fire to compensate for man's nakedness and Bellerophon's sense of

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<sup>80</sup>Derrida and Nancy (n 1) 112-113.

<sup>81</sup>Bryant (n 35) 298.

<sup>82</sup>*Ibid.*

<sup>83</sup>Derrida and Nancy (n 1) 113.

<sup>84</sup>*Id* 114.

<sup>85</sup>Calarco (n 77) 181.

<sup>86</sup>See Derrida (n 48).

modesty, shame and reticence, Derrida argues that biblical and Greek myth is united in a problematic understanding of man's privilege over the animal. This 'invariable schema', for Derrida, is the following:

What is proper to man, his subjugating superiority over the animal, his very becoming-subject, his historicity, his emergence out of nature, his sociality, his access to knowledge and technics, all that, everything (in a nonfinite number of predicates) that is proper to man would derive from this originary fault, indeed, from this default in propriety, what is proper to man as default in propriety – and from the imperative necessity that finds in it its development and resilience.<sup>87</sup>

This passage is fundamental to understanding Derrida's thesis on 'the autobiographical animal' and the interconnectedness between autobiography and truth, 'that the question of truth in general, and *my* truth in particular is also structured by this logic of restitution, paying back, making good, putting right, correcting an original fault'.<sup>88</sup> Man is unique in his awareness of his nakedness and resultant attempt at compensation and supplementation, whilst the animal organism simply lives out its life. To sacrifice the animal is to affirm our superiority, privilege and domination over the being of the animal. 'Animals, then, are slaves and sacrificial offerings to our need for ritual symbolic confirmation of our peculiar self-understanding ... the (external) animal we eat stands in for the (internal) animal we must overcome'.<sup>89</sup> This carnivorous violence demarcates our civilization, indirectly legitimising a whole schema of violence. Understanding and addressing this nuanced culture of sacrifice is essential to achieving a much needed shift in the way we relate to the animal. My ongoing concern is the way in which the legal approaches we utilise in the pursuit of animal liberation paradoxically entrenches, rather than destabilises, our 'proper' position at the top of an (anthropocentric) value hierarchy and continue to facilitate this culture.

### 6.1 *Sacrificing the animal*

We have seen that animal welfarists acknowledge that animals possess interests that warrant consideration, most notably the interest in not suffering. But this interest is qualified and can best be described as an interest in not suffering *unnecessarily*. The utilitarian approach does not seek to eradicate suffering, but to balance the (animal) suffering against the (human) pleasure derived from the utilisation (of the animal). We can immediately identify limitations to the balancing process itself. From a methodological perspective the measuring of pleasures

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<sup>87</sup>*Ibid* 45.

<sup>88</sup>Wood 'Thinking with cats' in Calarco and Atterton (eds) *Animal philosophy* (2004) 139.

<sup>89</sup>*Ibid*.

and pains is severely problematic, especially across species. But we can take another step back and ask what is pleasure and what is pain? As Martha Nussbaum argues, these very touchstones of utilitarianism are disputed concepts.<sup>90</sup> These limitations become even more apparent, and confusing, when we examine the legal translation and concretisation of the animal welfare approach.

Animal welfarists seek to address their concerns through the enactment of animal protection legislation that regulates the conditions in which animals live and die. This legislation aims to reduce the suffering of animals whilst confirming the status of animals as property to be used to the benefit of their owners. The Animals Protection Act 71 of 1962 aims 'to consolidate and amend the laws relating to the prevention of cruelty to animals'. A deconstructive reading of the act exposes the need for clarification and qualification of its purpose. Like most animal protection legislation this one is also under-inclusive and vague. The word 'unnecessarily' or 'unnecessary' appears at least eight times in section two alone. Section 2(1)(b) only forbids confinement or tethering that causes the animal 'unnecessary' suffering and similarly, section 2(1)(c) prohibits only the 'unnecessary' starving, under feeding or withholding of water or food from any animal. This means that it is conversely necessary and permissible to sometimes starve the animal. As 'unnecessary' is not defined in the act, standard practices constitute the norm and 'necessity'. Ultimately only acts of gratuitous violence are recognised as contravening the act: 'as long as an individual or entity can justify as necessary the infliction of suffering on animals, that infliction of suffering is beyond the reach of state anticruelty laws, regardless of the type and degree of suffering the animals experience'.<sup>91</sup>

In *S v Gerwe*<sup>92</sup> the appellant was *inter alia* charged with contravening the Animal Protection Act by stabbing a dog in the neck. The relevant section of the act in terms of which the appellant was charged read that 'any person who cruelly overloads, overdrives, overrides, beats, kicks, goads, ill-treats, neglects, infuriates, terrifies, tortures or maims any animals shall, subject to the provisions of this act ... be guilty of an offence'. The appeal court grappled with the word 'cruelly' and in trying to make sense of this proviso shunned the particular and reverted to general, abstract legal doctrine, thereby clearly illustrating Van Marle's argument on the limits of the law and 'the violence that is brought into institutionalised legal readings and interpretations'.<sup>93</sup> The court forced a conclusion to a particular dispute through the imposition of general law. Acting Judge King held that 'the word "cruelly" indicates that *mens rea* in the form of

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<sup>90</sup>Nussbaum (n 50) 236.

<sup>91</sup>Bryant (n 35) 248.

<sup>92</sup>1977 3 SA 1078 (T).

<sup>93</sup>Van Marle (n 6) 243.



intention is required. It is not enough to show objectively ill-treatment; subjectively it must be shown that the accused intended to "torture and maim". The appeal court found that the stab wounds to the dog's neck did not provide sufficient 'evidence' that the dog was tortured or maimed and overturned the conviction of the court *a quo*.

The approach that the court followed in this case is a clear indication of the way in which the law views animals. The dog was not seen as an individual subject or as a party to the litigation that could be wronged in any way, but a mere object that could (possibly) be damaged. The most palpable trace of the court's (and law's) view of the dog is arguably its reference to the dog as an 'it', as if the dog was not a living, sentient creature with a particular sex and breed, let alone a name. The court's approach and outcome of the case begs a questioning into the role and effectiveness of the Animals Protection Act, which is supposed to promote the welfare of animals and 'prevent cruelty to animals'. We however find the same view of animals in this very act. The act throughout refers to the 'destruction'<sup>94</sup> of an animal, once again inculcating the view of animals as inanimate things and perpetuating a binary human-animal, subject-object opposition. The animal is denied the dignity of being able to 'die' and denounced as an object that can only be destroyed. Derrida has also engaged with the notion of dying and the way that it is used in discourse to appositionally define 'the human' and 'the animal'. He complicates and destabilises this distinction by arguing that:

[o]ne could point to a thousand signs that show that animals also *die*. Although the innumerable structural differences that separate one "species" from another should make us vigilant about any discourse on animality or bestiality *in general*, one can say that animals have a very significant relation to death, to murder and to war (hence to borders), to mourning and to hospitality, and so forth.<sup>95</sup>

Derrida once again asks that we be mindful of the 'innumerable structural differences' between humans and animals, that we approach the partitions and separations as *différance* rather than an oppositional limit. Van Marle's proposal of slowness comes into play here, as it is through a strategy of delay that we can explore difference and particularity and circumvent the universalisation and generalisation brought about by law's speed. The Animals Protection Act however maintains an oppositional dualism and, 'as every opposition does, effaces the differences and leads back to the homogenous'.<sup>96</sup> Through this dualism we

<sup>94</sup>See *inter alia* sections 3(1)(a), 4(3)(b), 5(1).

<sup>95</sup>Derrida *Aporias: Dying – awaiting (one another at) the limits of truth* (trans Du Toit) (1993) 75-76.

<sup>96</sup>Derrida 'Geschlecht II: Heidegger's hand' (trans Leavey) in Sallis (ed) *Deconstruction and philosophy: The texts of Jacques Derrida* (1987) 174.



maintain our hegemony and exclude animals from our sphere of moral consideration. It comes as no surprise, then, that courts have on several occasions found that animal welfare legislation is not aimed at protecting animals at all, but rather to protect humans and their property. In *R v Moato*<sup>97</sup> the court considered the purpose of the Prevention of Cruelty to Animals Act<sup>98</sup> and found that the purpose of the act was not to endow animals with legal personhood or to protect animals. Rather, the purpose was to forbid legal persons to act so cruelly towards animals that it would negatively impact the emotional well-being of society. This *ratio* was upheld in *S v Edmunds*<sup>99</sup> when Judge Miller stated that the object of the act 'was not to elevate animals to the status of human beings but to prevent people from treating animals in a manner which would offend the finer sensibilities of society'. In the minority judgement of *NCSPCA v Openshaw* Judge Cameron departs from this view, arguing that

... though not conferring rights on the animals they protect, the [Societies for the Prevention of Cruelty to Animals Act 169 of 1993 and the Animals Protection Act 71 of 1962] are designed to promote their welfare. The statutes recognise that animals are sentient beings that are capable of suffering and of experiencing pain. And they recognise that, regrettably, humans are capable of inflicting suffering on animals and causing them pain. The statutes thus acknowledge the need for animals to be protected from human ill-treatment.<sup>100</sup>

Cameron however follows this passage by unambiguously reiterating that 'like slaves under the Roman law, [animals] are the objects of the law, without being its subjects'.<sup>101</sup> Scholars have argued that Cameron's statements, whilst representing progression from preceding cases on the legal status of animals, nevertheless remain puzzling and paradoxical.<sup>102</sup> Whilst recognising that animals' capacity to suffer constitutes a ground for protection against cruel treatment, Cameron also asserts that animals are objects without any legal rights. If humans have duties towards animals that stem from their interest in not suffering, one can argue that such duties, in terms of a Hohfeldian conception of rights, do indeed confer correlative rights upon the animals to be free from human abuse.<sup>103</sup>

Wesley Hohfeld published his famous article on the fundamental distinctions between different types of legal rights in 1913. Hohfeld's analysis was the

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<sup>97</sup> 1947 1 SA 490 (O).

<sup>98</sup> 8 of 1914.

<sup>99</sup> 1968 2 PH H398 (N).

<sup>100</sup> (462/07) 2008 ZASCA 78 (RSA) para 38.

<sup>101</sup> (462/07) 2008 ZASCA 78 (RSA) para 39.

<sup>102</sup> See Bilchitz 'Moving beyond arbitrariness: The legal personhood and dignity of non-human animals' 2009 *SAJHR* 38.

<sup>103</sup> *Id* 48-49.

culmination of an extensive body of analytical jurisprudence on the basic differences between legal liberties and legal rights.<sup>104</sup> Hohfeld identified a set of eight basic legal rights consisting of four primary legal entitlements (rights, privileges, powers and immunities) and their opposites (no-rights, duties, disabilities and liabilities). 'Rights' are state enforceable claims that others operate in a certain manner in relation to the holder of the right. 'Privileges' permit the holder to act in a certain manner without being accountable for damages to others and without others having redress to state powers for the prevention of those acts. 'Powers' reflect the ability to, through state-enforcement, alter the legal entitlements possessed by oneself or others and 'immunities' protect one's entitlements from being altered by others.<sup>105</sup> Correspondingly, the four opposites reflect the absence of such entitlements. One has 'no-right' when one does not have the power to beckon the state to direct the conduct of others and 'duties' reflect the absence of permission to act in a certain manner. 'Disabilities' refer to the absence of the ability to alter legal entitlements and 'liabilities' reflect the absence of protection from having one's entitlements being altered by others.<sup>106</sup>

Hohfeld illustrated the internal relationships between the different fundamental legal rights by arranging them in terms of opposition and correlativity. The jural opposites are structured as rights/no-rights, privilege/duty, power/disability and immunity/liability. The jural correlatives are structured as right/duty, privilege/no-right, power/liability and immunity/disability.<sup>107</sup>

Hohfeld used the concept of 'opposites' to express that one must have one or the other right, but not both (of the opposites). As the opposites contradict one another on the same subject, they cannot exist in the same person.<sup>108</sup> The concept of correlativity is more complex. The Hohfeldian analysis emphasises that advantages are just one side of the legal rights coin. At the same time that an advantage is conferred on one citizen, a vulnerability is necessarily constructed on the part of others: 'legal rights are not simply entitlements, but jural relationships'.<sup>109</sup> The notion of correlativity is used to express a single legal relation from the perspective of the two parties:<sup>110</sup>

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<sup>104</sup>Pacewicz 'Human rights in the state of nature: Indeterminacy in the resolution of the conflict between security and liberty' (2011) *University College London Jurisprudence Review* 34 at 37.

<sup>105</sup>Singer 'The legal rights debate in analytical jurisprudence from Bentham to Hohfeld' (1982) *Wisconsin LR* 975 at 986.

<sup>106</sup>*Ibid.*

<sup>107</sup>Hohfeld 'Some fundamental legal conceptions as applied in judicial reasoning' (1913) *Yale LJ* 16 at 30.

<sup>108</sup>Wise 'Hardly a revolution – The eligibility of nonhuman animals for dignity-rights in a liberal democracy' 1998 *Vermont LR* 793 at 801.

<sup>109</sup>Singer (n 105) 987.

<sup>110</sup>*Ibid.*

If X has a right against Y that he shall stay off the former's land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place.<sup>111</sup>

A duty that X owes Y translates into Y having a right against X. The expressions are counterparts, rights are fundamentally duties placed on others to act in a specific manner.<sup>112</sup> Likewise, privileges and no-rights are also correlatives:

Whereas X has a *right* or *claim* that Y, the other man, should stay off the land, he himself has the *privilege* of entering on the land; or, in equivalent words, X does not have a duty to stay off. The privilege of entering is the negation of a duty to stay off.<sup>113</sup>

Relying on this view of rights as claims based on duties, David Bilchitz critiques Cameron for not translating his recognition that we have a duty (not to inflict suffering on an animal) into a right (to not be subjected to suffering by human beings):

A duty towards animals to avoid treating them cruelly would logically entail that they have a correlative right not to be subjected to cruel treatment. Even if we reject a strict correlativity between duties and rights in some cases (such as those involving general positive obligations upon individuals), it appears clear that such correlativity does hold where general negative obligations are involved. A duty to avoid inflicting suffering on an animal applies to every animal one comes into contact with: thus, every animal can claim a right to avoid having suffering inflicted upon it.<sup>114</sup>

Whilst there is certainly merit in this argument, I do not wish to comment on Cameron's unwillingness to think through the implications of his assertions on the status of animals in terms of the correlativity of duties and rights. Some readings and explications of Hohfeldian theory indeed support granting rights to animals<sup>115</sup> whilst others are not favourable to extending rights to animals.<sup>116</sup> Rather, I want to argue that Cameron's judgement reflects a characteristic welfare perspective and indeed a very progressive interpretation and application of this approach, his (minority) judgement thereby clearly highlighting the limits and inability of this approach to 'sacrifice sacrifice'. Cameron departs from an exclusively human-

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<sup>111</sup>Hohfeld (n 107) 32.

<sup>112</sup>Singer (n 105) 987.

<sup>113</sup>Hohfeld (n 107) 32.

<sup>114</sup>Bilchitz (n 102) 48-49.

<sup>115</sup>See Francione *Animals, property and the law* (1995); Wise (n 108).

<sup>116</sup>See Wellman *Real rights* (1995); Sumner *The moral foundation of rights* (1987).

centric approach to animal welfare legislation, arguing that 'the interests of the animals' should be taken into account when the question of granting an interim interdict in terms of the act is considered. Welfare theory does indeed acknowledge that animals have an interest in not suffering, but maintains the object-status of animals. This should not come as a surprise if we consider the theoretical foundations of animal welfarism. The utilitarian aggregation of consequences does not recognise every individual life as an end in itself, but allows for lives to be utilised as means for the ends of others.<sup>117</sup> If the pleasure-and-pain scale tips one way, the utilisation is permissible and the animal may be sacrificed. If it tips the other way the animal may not be utilised, at least not under those specific circumstances.

Peter Singer makes extensive use of images and narratives to vividly describe the almost unthinkable suffering that animals endure on factory farms and in laboratories. As Singer argues that the pleasure derived from these practices cannot possibly outweigh the suffering, he holds that the utilitarian pleasure-and-pain scale holds great value for the plight of the animal.<sup>118</sup> The ongoing suffering of animals in these environments, despite a long history of animal welfare advocacy and legislation, unfortunately suggest otherwise. But even if this was the case and we could eradicate large scale industrial factory farming through a utilitarian balancing of pleasures and pains, the scale would not tilt in favour of the animals in cases where traditional farming practices are appropriately adjusted and an appeal to the collective good outweighs the (reduced) suffering accompanying the utilisation of the animal.<sup>119</sup>

It is this utilisation and view of animals as sacrificial beings that rights theorists seek to eradicate. If animals possess rights, the argument goes, these rights will obstruct appeals to the aggregated human good from outweighing the interests of animals and humans would not be allowed to (ab)use animals as they see fit.<sup>120</sup> Here we see a fundamental ideological dissonance between the welfarist and rights-based approach. Animal welfarism cannot 'sacrifice sacrifice', because the animal is categorised as a sacrificial being. The real problem with utilitarian animal welfare theory 'has nothing essentially to do with pain and suffering, even if they are intrinsically evil. The right starting place is that we are using animal lives for our own purposes and often using them up. Whether pain is or is not inflicted in the process, we are still using and often using up these lives'.<sup>121</sup> Animal rightists reject this view of animals and demand that we view animals as inviolable subjects with intrinsic worth and abolish all human use of animals.

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<sup>117</sup>Nussbaum (n 50) 237.

<sup>118</sup>See Singer (n 47).

<sup>119</sup>Frey (n 44) 176.

<sup>120</sup>*Ibid.*

<sup>121</sup>*Id* 178.

These fundamental discrepancies render welfarism incapable of advancing the ideal of animal liberation, if by animal liberation we understand the emancipation of animals to be free from human exploitation. Animal welfarism cannot displace or destabilise the view of animals as subordinate utility objects, but conversely reinforces the property status of animals. The necessity of human (ab)use of animals as such is never questioned; within a welfarist framework 'only questions about the necessity of particular acts in relation to the presumed entitlement of humans to use animals' are addressed.<sup>122</sup> Consequently, human-animal interaction and conflict arising from competing interests is conceptualised in a way that means the interests of humans will inevitably prevail. Within this framework, a mere concern for the interest of animals in not suffering will not 'eventually' translate into emancipation. Emancipation requires the destabilisation of this anthropocentric sacrificial structure that accepts and maintains the subordinate status of animals. Rights theorists strive to bring about this destabilisation through the extension of rights to animals.

## 7 Conclusion

I have argued in this article that there is inherent conflict between the animal welfare approach and animal rights approach. The same ideological incongruencies that caused the initial split between the antivivisectionists and welfarists during the 1860s remain to this day. This divergence stemmed from incompatible views on the moral status of animals, which not only render the two approaches contradictory, but makes an amalgamation detrimental to the ideals that animal rights theorists strive to realise. Animal welfarists accept and operate within a sacrificial anthropocentric structure that entrenches a human-animal binary opposition by conceptualising the dissimilarities between humans and animals as an oppositional cut. The utility status of animals as sacrificial beings is thereby perpetuated and not displaced, such displacement being the (opposing) aim of the animal rights movement.

I proposed that we follow Van Marle's deconstructive approach of slowness to interpret and reflect on the new welfarist amalgamation of utilitarian-based welfare theory and rights theory. By proposing a 'strategy of delay' and 'de-privileging of the present', Van Marle is not denying the here-and-now, but on the contrary supporting an approach to (legal) interpretation that allows us to better understand the complexities that configure the *status quo*. By relying on Van Marle's deconstructive insights and Derrida's argument that humans maintain their hegemony by excluding animals from the 'thou shalt not kill' prohibition, I tried to not only illustrate the contrasting moral spaces that the animal occupies

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<sup>122</sup>Bryant (n 35) 249.

in animal welfare theory and rights theory, but that the interim employment of welfare strategies to pursue the more liberal future goal of animal rights is the result of an uncritical privileging of the here and now and leads to an indefinite postponement of the striving for justice.

By highlighting the dissonance between the approaches, my aim was to illustrate that (animal) rights theory can and should be celebrated as pursuing a more progressive ideal of animal liberation than its welfarist predecessor. The emanating question, then, is whether the extension of rights to animals will indeed realise this ideal and liberate them from oppression? I have previously undertaken a theoretical problematisation of animal rights by examining the development and theoretical conditions of existence of animal rights and arguing that the theoretical premises of contemporary (animal) rights discourse does not allow for the realisation of its emancipatory ideal, as it paradoxically entrenches relations of subordination by negating plurality and difference and solidifies an anthropocentric hierarchical structure.<sup>123</sup> To critique the theoretical presuppositions of animal rights theory does however not by the fact itself constitute a critique of its underlying ideological values. The ultimate aim of my deconstructive project, driven by a desire to retrieve the emancipatory power of animal rights, is to articulate a response to the question of what it might mean to return 'animal rights' to its ethical substrata and I believe that a clear understanding of its ideological premise is foundational to this project. I aimed to illustrate that such a project requires the implementation of critical tools that can adequately address the challenges with which the question of the animal (in law) presents us and introduced a possible framework within which to philosophically examine and call into question the way we relate to animals and the dominant approaches we utilise to facilitate a transformation of the human-animal relation.

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<sup>123</sup> De Villiers 'Examining the similarity principle and language of (animal) rights as a foundation for animal liberation' (2012) *SAPL* 40.