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CITIZEN RUFF: DO HUMANS HAVE POLITICAL OBLIGATIONS TO ANIMALS?

Helena Silverstein *

SUE DONALDSON & WILL KYMLICKA, *ZOOPOLIS: A POLITICAL THEORY OF ANIMAL RIGHTS* (2011). Pp. 264. Hardcover \$29.95.

KIMBERLY K. SMITH, *GOVERNING ANIMALS: ANIMAL WELFARE AND THE LIBERAL STATE* (2012). Pp. 240. Hardcover \$34.95.

In a recent *New York Times* column, Nicolas D. Kristof asks the following question: “Some day, will our descendants be mystified by how good and decent people in the early 21st century—that’s us—could have been so oblivious to the unethical treatment of animals?”¹ Though he does not answer the question, Kristof compares the progress and contradictions in the development of human rights and animal rights:

We have the same inconsistencies, controversies and hypocrisies in dealing with human rights. We may disagree about waterboarding terror suspects, but almost everyone shares a revulsion for genocide, the use of poison gas or the torture of children.

Now we are plodding along a similar controversial, inconsistent, hypocritical—and progressive—path on animal rights. We may disagree about eating meat, but growing numbers share a disgust for extreme behavior, like the force-feeding of geese (now banned in California) to produce pâté.

We as a global society have crossed the Rubicon. We disagree about where to draw the line to protect animal rights, but almost everyone now agrees that there is a line to be drawn.²

Kristof was moved to pose his question and offer his commentary after reading a review of *Blackfish*, a new documentary about the treatment of captive whales in marine parks and the consequences to the whales and their handlers.³ The film

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1. See Nicolas D. Kristof, *Can We See Our Hypocrisy to Animals?*, N.Y. TIMES, July 28, 2013, http://www.nytimes.com/2013/07/28/opinion/sunday/can-we-see-our-hypocrisy-to-animals.html?_r=0.

2. *Id.*

3. BLACKFISH (Dogwoof 2013).

does not make a broad argument as to where lines should be drawn with respect to nonhuman animals. But according to one reviewer, it “makes a strong case that the whales are incredibly intelligent, evolved creatures that aren’t suited for small pens, no matter how cute and humanlike we think these animals are when they do tricks.”⁴ The film’s “message is clear: Killer whales belong with their families in their natural habitat, not performing for audiences”⁵ and “keeping killer whales, or orcas, in captivity is an unavoidably cruel thing to do.”⁶ Furthermore, “what seems indisputable is that these marine mammals are amazing and inspiring, and they deserve to be protected and cherished, not exploited . . . ‘Blackfish’ seems likely to be the rare film that inspires real reform and that helps awaken viewers to their kinship and responsibility to the animal kingdom.”⁷

Debates about line drawing are, in part, about the extent of human responsibility to the animal kingdom and the nature of our kinship. In *Blackfish*, a professor and former whale trainer describes the intelligence and personality of killer whales in this way: “When you look into their eyes, you know somebody is home.”⁸ This characterization evokes, at least, relationship, empathy, and kinship. And after watching the documentary’s depiction of mistreatment of orcas, one reviewer commented that “[y]ou don’t have to be anything close to a PETA loyalist or an anthropomorphist to appreciate the genuine sorrow and eventual psychosis on display in footage of these whales.”⁹

It is, of course, not just bad treatment of whales that elicits such responses, questions, and calls for reform. At the end of June 2013, the National Institutes of Health (“NIH”) announced new and strict guidelines for the use of chimpanzees in experiments, as well as regulations for their housing and treatment.¹⁰ The NIH will retire about 310 chimps to sanctuaries, maintain a “colony of up to 50 [chimps] . . . in case there is a compelling need to use them in research,” and proffer “new guidelines . . . for any future research and for chimpanzee housing.”¹¹ Explaining the new policy, NIH Director Dr. Francis S. Collins described chimpanzees as “very special animals” and “our closest relatives.”¹² He further stated that “[w]e believe they deserve special consideration as special creatures.”¹³

Shortly before the release of NIH’s new policy, the United States Fish and

4. David Lewis, *‘Blackfish’ Review: Doom Looms in Orca’s Story*, S.F. CHRON., July 25, 2013, <http://www.sfgate.com/movies/article/Blackfish-review-Doom-looms-in-orca-s-story-4686737.php>.

5. Moira Macdonald, *‘Blackfish’: The Troubled Lives of Captive Killer Whales*, SEATTLE TIMES, Aug. 1, 2013, http://seattletimes.com/html/movies/2021520922_blackfishmoviexml.html.

6. Marc Mohan, *‘Blackfish’ Review: Documentary Wants to Free the Whales*, THE OREGONIAN, Aug. 8, 2013, http://www.oregonlive.com/movies/index.ssf/2013/08/review_blackfish_wants_to_free.html.

7. John Beifuss, *‘Blackfish’—A Review: Species Slavery*, THE COMMERCIAL APPEAL, Aug. 8, 2013, http://blogs.commercialappeal.com/the_bloodshot_eye/2013/08/blackfish---a-review.html.

8. Macdonald, *supra* note 5 (quoting BLACKFISH, *supra* note 3).

9. Mohan, *supra* note 6.

10. James Gorman, *U.S. to Begin Retiring Most Research Chimps*, N.Y. TIMES, June 27, 2013, <http://www.nytimes.com/2013/06/27/science/us-to-retire-most-chimps-from-research.html>.

11. *Id.*

12. *Id.*

13. Geoff Brumfiel, *NIH Takes Another Step toward Retirement of Research Chimps*, NPR NEWS, (June 26, 2013), <http://m.npr.org/news/Science/195926114>.

Wildlife Service proposed extending Endangered Species Act (“ESA”) protection to captive chimpanzees.¹⁴ Daniel M. Ashe, the director of the Fish and Wildlife Service, also cited the close connection between humans and chimps: “The chimpanzee is said to share 98 percent of our genes” and “[i]t is in our nature to protect and conserve this iconic species, and this proposal will help.”¹⁵ The federal agency’s proposal, “a long time in the works, [was] a response to a petition filed in 2010 by the Humane Society of the United States, the Jane Goodall Institute and other groups with concerns about biomedical research on chimpanzees and the use of the animals in advertisements and entertainment.”¹⁶ According to a *New York Times* article by James Gorman:

If the new rule is enacted, it will be a major success for animal welfare groups, a grave disappointment for some scientists and another sign of the profound changes over the last half-century in the way animals are used and imagined in science and popular culture.

“What the chimpanzee has done is to prove there is no hard and fast line dividing us from the rest of the animal kingdom,” Dr. Goodall said Friday. “That’s the greatest gift the chimpanzee has given those of us who care about animal welfare.”¹⁷

The link between humans and chimpanzees is cited here as grounds for erasing lines and dissolving distinctions. At the same time, implicit in highlighting the common genetic link to these closest of relatives and their “iconic” character is the suggestion that those animals further removed from humans might fall outside zones of protection and consideration.

Of course, there have long been cautions against anthropomorphizing as a way to blur the lines between humans and animals. Indeed, according to Goodall, “I could not talk about chimpanzees having personalities.”¹⁸ “That,” she said, “was the worst anthropomorphic sin.”¹⁹ But some versions of anthropomorphizing—or, more accurately, examining the similarities between humans and nonhuman animals for the purposes of determining the kind of moral, legal, and political considerations animals deserve—have become commonplace in efforts to draw, redraw, and even erase lines. Philosophers, political theorists, bioethicists, legal scholars, and others within and beyond the academy have worked to delineate whether, on

14. See James Gorman, *U.S. Proposes Wildlife Protection for Captive Chimps*, N.Y. TIMES, June 11, 2013, <http://www.nytimes.com/2013/06/12/us/us-moves-to-declare-captive-chimps-endangered.html> [hereinafter Gorman, *Wildlife Protection*]. Though the ESA covers wild chimpanzees, it does not apply to chimps in captivity. *Id.*

15. James Gorman, *Goal of Broader Protection for Chimpanzees Emerges from Changing Perspectives*, N.Y. TIMES, June 16, 2013, <http://www.nytimes.com/2013/06/16/science/goal-of-broader-protection-for-chimpanzees-emerges-from-changing-perspectives.html?pagewanted=all> [hereinafter Gorman, *Changing Perspectives*].

16. Gorman, *Wildlife Protection*, *supra* note 14.

17. Gorman, *Changing Perspectives*, *supra* note 15.

18. *Id.*

19. *Id.*

what grounds, and where lines should be drawn. For example, some follow Immanuel Kant's view that because humans and nonhumans are distinguishable in terms of their capacities for rational thought, nonhumans are mere things to whom humans have no direct obligations.²⁰ Some counter that the higher cognitive capacities of humans notwithstanding, because nonhumans have an interest in avoiding suffering, they are worthy of moral consideration.²¹ Still others subscribe to "the similar-minds theory" of the human/animal relationship, which holds that some (though not all) nonhumans have certain cognitive qualities akin to humans, such as "self-awareness, emotions, and the ability to communicate with a symbolic language," and that having these characteristics justifies "inclusion within the community of equals."²²

*Zoopolis*²³ and *Governing Animals*²⁴ present new conceptualizations of human-animal relations. Both seek to delineate the *political* obligations humans have toward nonhuman animals. They do so by drawing on related concepts. Sue Donaldson and Will Kymlicka, authors of *Zoopolis: A Political Theory of Animal Rights*, apply citizenship theory to present an account of human relationships with animals.²⁵ Kimberly K. Smith, author of *Governing Animals: Animal Welfare and the Liberal State*, deploys liberal political theory, particularly social contract theory, to explore whether and how the liberal state can defend animal welfare.²⁶ The arguments offered by Donaldson and Kymlicka suggest that humans have a number of robust positive obligations to those nonhumans who are properly understood as "co-citizens," "sovereigns," and "denizens."²⁷ Smith argues, similarly, that humans have a number of duties to those nonhumans who are properly understood as being members of the social contract.²⁸ Not all animals, though, fall under the categories set forth by Donaldson, Kymlicka, and Smith. The duties owed to animals vary depending on their status within the citizenship and social contract frameworks.

In what follows, I briefly outline the arguments put forward by Donaldson, Kymlicka, and Smith. I suggest that while Nicolas Kristof is correct in saying that we are approaching consensus that there is a line to be drawn,²⁹ what these two books demonstrate is how far away we are from consensus on where and how to draw lines. Because these works are situated within the same strand of thought—that is, liberal political theory—one might expect that they would be relatively close in

20. For a discussion of Immanuel Kant's views about animals, see, e.g., Lori Gruen, *The Moral Status of Animals*, STANFORD ENCYCLOPEDIA OF PHIL. (Edward N. Zalta ed., 2012), available at <http://plato.stanford.edu/archives/win2012/entries/moral-animal/>.

21. See, e.g., PETER SINGER, *ANIMAL LIBERATION* (2d ed. 1990).

22. See, e.g., Gary L. Francione, *Taking Sentience Seriously*, 1 J. ANIMAL L. & ETHICS 1, 2-3 (2006). Francione is critical of the similar-minds theory, and argues instead for position that "sentience alone is sufficient for full membership in the moral community and that no other cognitive characteristic is required." *Id.*

23. SUE DONALDSON & WILL KYMLICKA, *ZOOPOLIS: A POLITICAL THEORY OF ANIMAL RIGHTS* (2011).

24. KIMBERLY K. SMITH, *GOVERNING ANIMALS: ANIMAL WELFARE AND THE LIBERAL STATE* (2012).

25. DONALDSON & KYMLICKA, *supra* note 23, at 14.

26. SMITH, *supra* at note 24, at vii.

27. DONALDSON & KYMLICKA, *supra* note 23, at 101, 169, 210.

28. SMITH, *supra* note 24, at 41.

29. See Kristof, *supra* note 1.

thinking. In addition, because liberal theoretical notions of citizenship and the social contract are related, extending these to animals might produce similar conclusions. However, *Zoopolis* and *Governing Animals* present visions of human-animal relations and obligations that are far apart.

I. ANIMALS AS CITIZENS, SOVEREIGNS, AND DENIZENS: *ZOOPOLIS*

Donaldson and Kymlicka begin by asserting that “[t]he animal advocacy movement is at an impasse”³⁰ and by presenting their work as an effort to gain some forward momentum. They also briefly outline the primary moral frameworks used to examine animal issues—the welfarist, ecological, and animal rights frameworks—and align with the “core premise” of the latter, saying that “[t]he only truly effective protection against animal exploitation requires shifting from welfarism and ecological holism to a moral framework that acknowledges animals as the bearers of certain inviolable rights.”³¹ Before defending that claim in greater detail, the authors suggest that animal rights theory (“ART”) has notable shortcomings that they hope to overcome.³² The problem with traditional ART, on their view, is that it is simultaneously too narrow and too broad. Its narrowness derives from its focus on negative rights, such as not being killed, tortured, and exploited.³³ Its broadness owes to the application of these negative rights “*generically* to all animals possessing a subjective existence—that is, to all animals that have some threshold level of consciousness or sentience.”³⁴ This approach suggests that ethical treatment of animals entails noninterference, that is, “leaving them alone.”³⁵ Thus, according to Donaldson and Kymlicka, “ART flattens our moral landscape in a way that is not only intellectually implausible but unattractive: it ignores the inevitability of, and desire for, ongoing and morally significant relationships with animals.”³⁶

Challenging ART’s “abolitionist/extinctionist” approach,³⁷ Donaldson and Kymlicka present a more complicated and nuanced framework. They cast animal rights as relational rather than universal, emphasizing the varied and situational interactions we have with nonhumans, as well as the interest in and inevitability of these interactions.³⁸ “We are part of a shared society with innumerable animals” and it is “simply not tenable for ART to assume that humans can inhabit a separate realm from other animals in which interaction, and therefore potential conflict, could largely be eliminated.”³⁹ Acknowledging the necessity and indeed desirability of human-animal interaction, Donaldson and Kymlicka press for recognition of the positive duties humans owe to nonhumans:

30. DONALDSON & KYMLICKA, *supra* note 23, at 1.

31. *Id.* at 4.

32. *Id.* at 5.

33. *Id.* at 5-6.

34. *Id.* at 6.

35. *Id.* at 9.

36. *Id.* at 10.

37. *Id.* at 79.

38. *Id.* at 8, 11.

39. *Id.* at 8.

For example, certain social relationships (e.g., parent-child, teacher-student, employer-employee) generate stronger duties of care because of the dependencies and power asymmetries involved. Political relationships . . . also generate positive duties, because of the distinctive rights and responsibilities of citizenship involved in governing bounded communities and territories.⁴⁰

The authors thus argue that “[a] central task of any plausible theory of animal rights . . . is to identify analogous categories for the animal context, sorting out the various patterns of human-animal relationships and their associated positive duties.”⁴¹ Accepting that animals have rights and working to identify these categories, the authors set out to show “how ART, when specified to include both positive and negative duties, sets the conditions under which these interactions can be respectful, mutually enriching, and non-exploitative.”⁴²

Before developing these specifications, Donaldson and Kymlicka explain why we should see most animals as rights-bearing beings. They summarize and accept the foundational arguments put forward by ART, which, put briefly, posits that “[c]onscious/sentient beings are selves—that is, they have a distinctive subjective experience of their own lives and of the world, which demands a specific kind of protection in the form of inviolable rights.”⁴³ Putting it in the same words as one of the former trainers interviewed in *Blackfish*, Donaldson and Kymlicka argue that rights apply “whenever we encounter ‘someone home.’”⁴⁴ After defending this theory against objections, the authors concede its dramatic implications: certain “universal negative rights—the right not to be tortured, experimented on, owned, enslaved, imprisoned, or killed” extend to animals.⁴⁵ Respecting these rights means ending various practices, including farming, hunting, animal experimentation, and so forth.⁴⁶

Nevertheless, Donaldson and Kymlicka critique the standard versions of ART

40. *Id.* at 8-9.

41. *Id.* at 9.

42. *Id.* at 10.

43. *Id.* at 24.

44. *Id.* at 25 (quoting Barbara Smuts, *Encounters with Animal Minds*, 8 J. OF CONSCIOUSNESS STUD. 293, 308 (2001)).

45. DONALDSON & KYMLICKA, *supra* note 23, at 49. Donaldson and Kymlicka do not definitively specify which animals are conscious or sentient:

The truth is, we may never be able to fully answer this question . . . Are molluscs conscious? Insects? The evidence to date suggests they are not, but this may just reflect the fact that we are looking for a distinctly human form of subjective experience, and not considering other possible forms.

Id. at 31. Still, the authors insist that this difficulty

doesn't change the fact that we can readily identify [consciousness] in many instances. Indeed, the types of animals that are most cruelly abused are precisely those whose consciousness is least in doubt . . . To invoke the difficulty of determining a threshold of basic consciousness as a justification for continuing animal exploitation is dishonest.

Id.

46. *Id.* at 49.

for mistakenly holding that respect for rights requires prohibition of all or most human-animal interaction. “Ending the human exploitation of animals is a necessary start, but we need to know what non-exploitative relations might look like. . . . And what kinds of positive obligations do we owe to animals . . . ?”⁴⁷ Here, Donaldson and Kymlicka turn to citizenship theory to advance a modified and extended version of ART.⁴⁸

Citizenship theory begins with the premise that humans have certain inviolable and universal rights because they are “persons” or members of the moral community. The existence of such generalized rights does not preclude the existence of particularized rights and duties that obtain because of situational and political relationships. In other words, humans have not only universal rights but also specific rights that apply because they are “citizens” or members of a bounded political community. “Citizenship, in short, generates distinctive rights and responsibilities, beyond the universal human rights owed to all persons, including foreigners.”⁴⁹ There are, furthermore, other categories that generate particularized sets of rights and obligations. These include “sovereigns” who are self-governing sub-communities that exist within territorial boundaries of larger political communities (e.g., indigenous people) and “denizens” who reside inside a political community without being full members of that community (e.g., migrant workers).⁵⁰

The bulk of *Zoopolis* is spent applying the concept of citizenship, as well as the related concepts of sovereignty and denizenship, to the human-animal relationship.⁵¹ This first requires re-theorizing citizenship, which is typically connected to active political participation and thus thought to disqualify animals. Donaldson and Kymlicka cast the functions of citizenship in terms of nationality (the right to reside in a particular territory),⁵² popular sovereignty (representation of the will and interests of members),⁵³ and democratic political agency (exercising the right and responsibility to shape laws and governance).⁵⁴ The first two functions easily extend to nonhumans, but the third function is trickier, since animals cannot engage as political agents. Donaldson and Kymlicka revise citizenship theory by drawing upon insights from disability theory to argue that the capacity for independent political agency is not a necessary condition for citizenship.⁵⁵ “It is a serious mistake,” the authors insist, “to treat political agency as a threshold or criterion that determines *who is a citizen*, such that those who are incapable of this or that form of agency are relegated to a status of non-citizenship. As we have seen, this would have the perverse effect of excluding children and the mentally disabled from citizenship.”⁵⁶ Instead, facilitating representation of dependents serves to satisfy the third function

47. *Id.*

48. *Id.* at 50.

49. *Id.* at 13.

50. *Id.*

51. *See generally id.*

52. *Id.* at 55.

53. *Id.* at 55-56.

54. *Id.* at 56.

55. *Id.* at 105.

56. *Id.* at 58.

of citizenship. By developing “forms of dependent agency,” we can extend the umbrella of citizenship to some animals.⁵⁷

The authors proceed to make the case for seeing domesticated animals, such as pets and farm animals, as co-citizens. They contend that respect for animal rights does not entail ending relationships with domesticated animals. Just as the appropriate response to ending slavery was not abolishing the existence of former slaves, the end of the injustices associated with domestication is not the extinction of domesticated species.⁵⁸ Instead, we can maintain relations with pets and farm animals as long as we end our exploitation of them and facilitate their status as animal co-citizens. For example, we can develop non-exploitative conditions for interacting with sheep and chickens that allow some human consumption of wool and eggs. We can “imagine citizen chickens whose rights are fully protected, and who enjoy the same rights as other citizens to be supported in leading a flourishing life”⁵⁹ and, at the same time, envision humans living alongside their “chicken companions” and consuming some of the chickens’ eggs.⁶⁰

Not all animals fit this model of co-citizenship. Donaldson and Kymlicka identify two categories of wild animals toward which we have certain positive obligations, albeit distinct from the co-citizenship model. First are “‘truly wild’ animals, that is, those animals who avoid humans and human settlement, maintaining a separate and independent existence (insofar as they are able to) in their own shrinking habitats or territories.”⁶¹ Mountain lions, wolves, and bears, for example, should be seen as “wild animal sovereigns.”⁶² Trapping, hunting, and other violence toward these animals is impermissible, as traditional ART holds. Additionally, Donaldson and Kymlicka contend that we should respect “the right of wild animal communities to lead autonomous, self-directed lives,”⁶³ recognize that wild animal habitats are inhabited lands, and acknowledge “that existing inhabitants have the right to maintain their forms of community life on that territory.”⁶⁴ Respect for the sovereignty of these wild animals sometimes requires non-interference, but it also imposes certain positive obligations, such as protecting habitats and assisting during natural disasters.

Second are “liminal animals—wild animals living in close association with humans.”⁶⁵ Donaldson and Kymlicka here have in mind those non-domesticated animals that live among us: squirrels, mice, rats, sparrows, raccoons, skunks, and so forth.⁶⁶ Their in-between status as neither domesticated nor wilderness animals makes them liminal: neither co-citizen nor sovereign. They are “akin to migrants or

57. *Id.* at 60-61.

58. *Id.* at 79-80.

59. *Id.* at 138.

60. *Id.*

61. *Id.* at 156.

62. *See generally id.* at 27.

63. *Id.* at 205.

64. *Id.* at 205-06.

65. *Id.* at 156.

66. *Id.* at 210.

denizens who choose to move into areas of human habitation.”⁶⁷ To these animals Donaldson and Kymlicka apply a model of denizenship. We must respect their basic rights and extend to them various positive obligations. These include reasonable accommodation of their interests in the way we develop the human-built environment and positive forms of assistance when these can be undertaken without undermining their basic liberty and autonomy.”⁶⁸ Though extermination and eviction are not acceptable responses to liminal animal denizens, “it is legitimate for humans to limit increases in liminal populations, and to manage their mobility and access.”⁶⁹

Zoopolis offers many detailed recommendations for human interaction with domesticated, wild, and liminal animals. At other times, the authors admit that much more needs to be spelled out to implement their broad recommendations. For example, institutional mechanisms would need to be established to facilitate the political representation of animal co-citizens.⁷⁰ While Donaldson and Kymlicka cite possible models for such implementation (e.g., animal “defenders” or “ombudsmen”), they leave open some of these details for future development.⁷¹

Donaldson and Kymlicka recognize the heavy demands their recommendations impose⁷² and are realistic in noting the limited prospects for dramatic change in human relations with nonhumans.⁷³ But they are also hopeful, aiming to articulate a “more positive and creative vision—one that recognizes that human-animal relations can be compassionate, just, joyful, and mutually enriching.”⁷⁴

II. ANIMALS AS MEMBERS OF THE SOCIAL CONTRACT: *GOVERNING ANIMALS*

Like Donaldson and Kymlicka, Kimberly K. Smith sets out to articulate the kinds of obligations humans have toward nonhumans.⁷⁵ More precisely, Smith is interested in the political obligations that citizens and the liberal state have toward animals.⁷⁶ Emphasizing that hers is a work of political theory rather than moral philosophy, Smith begins by assuming that animals have moral standing and interests, that the interests of animals vary depending on sentience and intelligence, and that the interests of animals can be identified. With these starting points, she proposes to develop a liberal political theory to determine whether a liberal government can legitimately protect the welfare of animals.⁷⁷ To make sense of our relationships with animals, Smith argues, we need:

[A] deeper, richer ethic for our treatment of animals—an ethic appropriate to their biological, ecological, and social natures. But we

67. *Id.* at 14.

68. *Id.* at 251.

69. *Id.*

70. *Id.* at 209.

71. *Id.* at 154.

72. *Id.* at 255.

73. *Id.* at 252.

74. *Id.* at 255.

75. See generally SMITH, *supra* note 24.

76. *Id.* at xii.

77. *Id.* at 34-35.

also need a public philosophy that explains the respective roles of government, civil society, and private individuals in governing the mixed human/animal community, along with new practices and institutions that facilitate meaningful and justifiable relations with our fellow creatures. We need a public philosophy that recognizes, as Vicki Hearne says, that the good of the human polis depends on the happiness of animals.⁷⁸

One of the primary challenges with constructing such a theory, as Smith explains it, is that liberal political theory traditionally limits the role of government to the protection of human welfare.⁷⁹

Cruelty toward animals may be morally repugnant, but it doesn't follow that the state has authority to prevent it It is a basic principle of liberal government that the state's coercive power should be used only for certain purposes: to make its members safe and healthy and free, not to make them good.⁸⁰

The problem facing efforts to legislate on behalf of animal welfare, then, is this: "If the purpose of government is to protect *human* welfare and freedom, on what grounds does the government restrict our freedom to treat animals any way we please?"⁸¹

A common answer to this question relies precisely on appeals to *human* welfare and interests, arguing that animal protection benefits humans. This answer, Smith contends, does not get us very far, in part because many forms of animal mistreatment do not harm humans.⁸² What's more, given the limited authority of the liberal state, the question becomes: "Why should the government *ever* be allowed to protect animals at the expense of human interests?"⁸³ Smith's answer to this question is that some animals are members of the political community—that is, members of the social contract—and thus owed protection by the liberal state.⁸⁴ This is the only answer that "makes sense in light of the liberal tradition and the practices of modern liberal communities"⁸⁵

But there are challenges to extending social contract theory to animals. In particular, social contract theory traditionally is thought to apply only to beings capable of entering into contracts, and animals obviously cannot consent to contracts. Smith responds to this challenge by offering a revised conception of social contract

78. *Id.* at 34. (citing VICKI HEARNE, *ANIMAL HAPPINESS: A MOVING EXPLORATION OF ANIMALS AND THEIR EMOTIONS* (1994)).

79. SMITH, *supra* note 24, at 35.

80. *Id.* at 40.

81. *Id.*

82. *Id.*

83. *Id.* at 41.

84. *Id.*

85. *Id.* Smith adds the caveat here that she uses the "social contract device *not* as a general theory of moral obligation but merely as a way to think about political obligation in a liberal state." *Id.*

theory:⁸⁶

The social contract, as it is used in political theory and practical politics, usually includes *everyone* in a given political society, even those (like infants and the severely mentally impaired) incapable of consenting. You don't have to sign up; you don't have to give actual consent, either explicit or implicit. If you have significant social relations with other members of the community, you're a member. Of course we often have trouble with marginal cases (immigrants seeking membership, for example). But many animals are not hard cases; they are clearly part of our social community. We have social relations with our pets—or at least an overwhelmingly large number of us do. We communicate with them, recognize duties toward them, interact with them, and recognize the social value of these relationships. Indeed, many people consider pets to be members of the family.⁸⁷

That animals cannot consent to the contract is not, according to Smith, determinative of whether they are members of the political community. Rather, “those animals that the human parties to the social contract recognize as having welfare or liberty interests . . . may properly be included in the social contract.”⁸⁸ Moreover, “membership in the social contract is limited to animals with whom we have social relationships.”⁸⁹

Which animals are these? Here, Smith asserts that certain types of relationships with animals provide grounding for their inclusion in (and exclusion from) the social contract.⁹⁰ Political relationships of care and dependence are the sort that merit membership in the contract.⁹¹ Pets and livestock are members, living with us “in close relations of interdependence and mutuality.”⁹² “Commensal animals, such as the birds who visit our birdfeeders, might also qualify for membership.”⁹³ And confined wild animals, like those in zoos, “become public pets of a sort . . .”⁹⁴ But most wild animals fall outside the scope of the social contract.⁹⁵ Similarly, “pests” are not members.⁹⁶ “Their interests cannot, by definition, be harmonized with ours, and therefore they are not properly speaking engaged in a scheme of social cooperation with us. Politically speaking, pests are our enemies, so our laws do not have to

86. *Id.* at 53-57.

87. *Id.* at 48.

88. *Id.* at 53.

89. *Id.* at 55.

90. *Id.* at 57-68.

91. *Id.* at 62.

92. *Id.* at 63.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

take their interests into account.”⁹⁷

Classifying which animals fall within the social contract, Smith is careful to distinguish between political obligations and moral duties. Her goal, she reminds the reader, is to spell out the former. While pests and most wild animals are not, in her analysis, members of the social contract and thus not the political responsibility of the liberal state, they may be owed certain moral duties by private individuals. For example, we may have moral obligations to not inflict suffering on pests and wild animals.⁹⁸ But whether we have such moral obligations is not Smith’s question.

On the flip side, Smith is also careful to emphasize that being a member of the social contract does not mean having rights equal to those of other members of the social contract. Thus, while livestock are, on Smith’s account, members of the social contract, we can still consume them.⁹⁹ Smith’s application of the social contract “does not aim at protecting the autonomy of individual animals by recognizing their natural rights. Rather, it aims at protecting individual animal welfare by protecting good human/animal *relationships*. The best protection for animal welfare is to promote these relationships by supporting good practices of animal husbandry and stewardship.”¹⁰⁰

Relatedly, Smith argues that inclusion of animals in the social contract does not preclude ownership of animals.¹⁰¹ To the contrary, she offers a new theory of property as it pertains to animals. She posits “an alternative to banning property rights in animals altogether” and emphasizes custodial arrangements “in which the owners’ rights in the animal are subject to a general duty to care for its welfare.”¹⁰² Drawing on the work of David Favre, who calls for “equitable self-ownership” of domestic animals,¹⁰³ Smith explains that “an animals’ guardian (holding legal title) would have property rights in the animal against the rest of the world, but would be bound to make decisions with the animal’s best interest in mind.”¹⁰⁴ Smith asserts that this “model of equitable self-ownership seems to respect the social meaning of animals and their role in the mixed community. Moreover, it can be used for animals without doing violence to our traditional legal concepts; it fits neatly into the structure of American property law.”¹⁰⁵

Concerning livestock, Smith expresses concern with the mass production and the resulting commodification of animals, which harms their welfare and “violates their social meaning”¹⁰⁶ Not all treatment of livestock risks commodification, according to Smith. But mass production often does, and Smith argues “that the welfare of the animals themselves constitutes a fully adequate reason for (limited) state intervention in pet and livestock production, even at some cost to human lib-

97. *Id.*

98. *Id.*

99. *Id.* at 66.

100. *Id.* at 69.

101. *Id.* at 97.

102. *Id.* at 85.

103. David Favre, *Equitable Self-Ownership for Animals*, 50 DUKE L.J. 473, 476 (2000).

104. SMITH, *supra* note 24, at 85.

105. *Id.*

106. *Id.* at 94.

erty and autonomy”:¹⁰⁷

Animals, and particularly domesticated animals, are acutely vulnerable to mistreatment and are therefore particularly dependent on strong norms of good care. Any practice that systematically treats them as commodities is likely to undermine those norms and will probably lead to poor care. This rationale justifies government regulation aimed at enforcing minimum levels of animal welfare in the pet and livestock trades. It can also support using some government resources to promote a culture of good animal husbandry—at least where there is already a broad social consensus about what the culture entails.¹⁰⁸

These concerns notwithstanding, Smith’s vision of the permissible treatment of farm animals and theory of property in those animals permit raising animals for food and other uses.¹⁰⁹ “[I]f we are going to raise animals for food, we *must* consider them members and accept all the responsibilities that entails.”¹¹⁰ But protecting the welfare and best interests of livestock does not, on Smith’s account, include protecting their lives.

Smith further explains that under her call for extending social contract theory, institutions can be, and in some cases already have been, developed to represent animals. She argues that legal and political representation of animal interests is feasible and consistent with theories of the liberal state. Smith draws on analogies to the representation of children’s welfare to make the case that those animals falling within the purview of the social contract can be represented.¹¹¹

III. COMPETING VERSIONS, VISIONS, AND DIVISIONS

There are several notable affinities between *Zoopolis* and *Governing Animals*. As already noted, both works are situated within political theory and, indeed, liberal political theory; both aim to identify the *political* obligations humans have toward nonhuman animals; both emphasize *relationships*; and both extend related concepts with liberal political thought—citizenship and the social contract—to human-animal interactions.

These affinities should not lead us to overlook a critical point of divergence. *Zoopolis* assumes that sentient or conscious animals have rights that must be respected within the political community and through our relationships with them. *Governing Animals* assumes that animals have moral standing, but otherwise sets aside moral questions. While it may be unethical to raise animals for food, that is not, according to Smith, an appropriate matter of governance for the liberal state.

107. *Id.* at 97.

108. *Id.*

109. *Id.* at 66.

110. *Id.*

111. *See, e.g., id.* at 122.

Prohibiting the consumption of animals for moral reasons would amount to undue interference into private, ethical decision-making. By contrast, Donaldson and Kymlicka assume and assert that we must respect certain universal negative rights that apply to animals, including rights against torture, enslavement, and killing.¹¹² This assumption gets Donaldson and Kymlicka to a very different place and set of recommendations. In short, liberal political theory undergirds the similarities of these two works, but it also divides them because the versions of liberal political theory that ground these works are notably distinct. As such, the extension to the case of animals generates widely disparate conclusions.

The framing of the two works also serves as a notable point of departure. From Donaldson and Kymlicka's vantage point, there is a gap in ART and an impasse within the progressive animal advocacy movement. The goal of closing this gap and overcoming the impasse animates their work. By contrast, the issue that animates Smith's analysis concerns liberal political theory and, in particular, whether there is a way to make animal welfare practices fit within a theory that is traditionally anthropocentric.

The juxtaposition of these two works serves to illuminate their comparative merits. If we accept for the sake of the analysis the starting assumption of these works—that certain animals have moral standing—what Smith offers is a particularly thin version of liberalism that advocates a rather limited conception of legitimate state action. The extension of that version of liberalism to animals and the conclusions it generates will necessarily be thin. Robust calls for animal welfare, let alone animal rights, will be (and indeed are) limited under her analysis. By contrast, Donaldson and Kymlicka adopt a thicker version of liberalism.

Of course, the persuasiveness of their conclusions is based, in part, on which account of liberal theory one accepts. But even setting this aside, *Zoopolis*, in my view, succeeds in offering a more compelling analysis than *Governing Animals*. For one thing, Smith's analysis presents a somewhat under-theorized argument about whether and which animals are rightly seen as members of the social contract and what it means to be a member of that contract. Donaldson and Kymlicka's account presents a richer and more complicated theoretical intervention. In particular, their recasting of citizenship is instructive, and their extension of notions of citizenship, sovereignty, and denizenship to animals is insightful. They do well in anticipating and responding to objections. And they are mindful that their analysis provides a beginning, though not the end, of the analysis.

In addition, while there is theoretical plausibility to the case Smith makes in *Governing Animals*, there is also, at bottom, considerable tension in the idea that members of the social contract can be raised and slaughtered for food. It is difficult to see how social contract theory is elastic enough to allow for routine killing of some members of the contract for the benefit of other members. I am not sure that the social contract device can withstand or be modified to include such an arrangement. There is, to be sure, also some tension in Donaldson and Kymlicka's conception of animals as co-citizens. Does the concept of citizenship comfortably permit,

112. DONALDSON & KYMLICKA, *supra* note 23, at 49.

for example, harvesting and eating the eggs of chicken citizens? This, however, is far more plausible and does less to undermine the concept of citizenship than killing animals does to undermine the notion of the social contract and what it means to be a member of that contract.

Zoopolis is not without its limitations. For example, even though the authors do generally well in responding to anticipated criticisms, they could have taken more time to answer the cosmopolitan challenge to citizenship theory. As Donaldson and Kymlicka note, some cosmopolitans reject the distinctions among universal rights, citizen rights, and denizen rights, arguing instead that “everyone everywhere should automatically have their interests counted equally in political decision-making”¹¹³ Cosmopolitan theory thus poses a direct challenge to the type of citizenship theory put forward in *Zoopolis*. Donaldson and Kymlicka’s response to this challenge is to note some of the benefits of a “commitment to bounded citizenship” and to then “assume that liberal political theory operates in a world of bounded political communities”¹¹⁴ This is, in a certain way, fair enough, but it will not be particularly satisfying to a growing body of political theory that views moral and political communities in more boundless ways.

IV. CONCLUSION

When I consider the reactions to *Blackfish*, I wonder whether it will succeed, as one reviewer speculated, in inspiring real reform and a sense of kinship to animals.¹¹⁵ When I consider the recent developments on animal experimentation, I wonder whether they will be sweeping or be limited by justifications that note how chimpanzees are “our closest living relatives.”¹¹⁶ And when I read works like *Zoopolis* and *Governing Animals*, I wonder whether and how much traction can be gained by further theorizing.

On this count and in conclusion, I note the following: *Zoopolis* and *Governing Animals* are both worthwhile exercises of political theory. They raise interesting questions, seek to fill important gaps in our theoretical frames, and advance our conceptions especially in the realm of liberal political thought. They will therefore be of interest at least to scholars who study political theory, moral philosophy, and law. Both works will also be of interest to those beyond the academy. Both are well written, and, while academic and theoretical in orientation, they are readable and accessible. In my estimation, though, *Zoopolis* has broader value than *Governing Animals*. This is, in part, because I judge the public discourse surrounding notions of citizenship to have broader appeal than the public discourse surrounding the social contract. There is strong value in the citizenship framework, its related notions of sovereignty and denizenship, and the repeated analogies that Donaldson and Kymlicka make to humans who fall into these categories. Moreover, while Smith

113. *Id.* at 52.

114. *Id.* at 53.

115. See Beifuss, *supra* note 7.

116. *Chimpanzee*, NATIONAL GEOGRAPHIC, <http://animals.nationalgeographic.com/animals/mammals/chimpanzee/>.

seeks to articulate “a public philosophy that explains the respective roles of government, civil society, and private individuals in governing the mixed human/animal community,”¹¹⁷ I think many will have difficulty accepting a public philosophy under which the social contract is understood to allow some of its members to be raised and consumed in the ways that Smith’s theory permits.

117. SMITH, *supra* note 24, at 34.