Animal Law and Earth Jurisprudence

A Comparative Analysis of the Status of Animals in two Emerging Critical Legal Theories

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# Contents

Introduction .......................................................................................................................... 1

Animal Law .......................................................................................................................... 2

- Philosophical Approaches to Animals ............................................................................. 3
- Animal Welfare ................................................................................................................... 3
- Animal Rights .................................................................................................................... 4

From Animal Rights Philosophy to Animal Law: Approaches to Legal Reform .................. 6

- Gary Francione: Abolitionist Reforms ......................................................................... 6
- Steven Wise: Toward Legal Rights to Animals .............................................................. 7

Earth Jurisprudence ........................................................................................................... 8

- Rights and Earth Jurisprudence ..................................................................................... 10
- The Rights of Animals in Earth Jurisprudence ............................................................... 11
- Wild animals and domesticated animals ..................................................................... 12

Animals in Animal Law and Earth Jurisprudence: Comparative Analysis ....................... 14

- Common threads .............................................................................................................. 14
  - Critique of property ...................................................................................................... 14
  - Reframing rights .......................................................................................................... 14
  - The Challenges for Recognition ................................................................................. 15
- Differences ....................................................................................................................... 16
  - Basis upon which rights are reframed ......................................................................... 16
  - Scope of protection for animals .................................................................................. 16
  - Domestic and Wild Animals ....................................................................................... 16

Animal Law and Earth Jurisprudence: may the twain meet? ........................................... 17

- Animal Rights and Environmentalism: A rocky relationship .................................... 17
- Reconciling Animal Rights and Environmentalism ....................................................... 18
- Animal Law and Earth Jurisprudence: toward reconciliation ..................................... 19
- Pragmatic Holism ............................................................................................................ 21

Conclusion .......................................................................................................................... 23
Introduction

Two emerging critical legal theories, Animal Law and Earth Jurisprudence, have recently proposed paradigm shifts in the way animals are treated under our legal frameworks. Animal Law provides a critique of our current legal system on the basis that it fails to accord rights or adequate consideration to animals, while Earth Jurisprudence’s core premise is that all natural entities, including animals and the environment, have the right to carry out their natural functions. Both approaches advocate that the concept of rights be radically reframed.

I will first provide a brief outline of Animal Law and Earth Jurisprudence, including a history of each and an overview of their key concepts, proponents and texts. I will start with the classical approach to animals, the animal welfare paradigm, moving on Singer’s utilitarianism, the first to use the language of ‘rights’, and Regan’s ‘subject-of-a-life theory, the main rights-based theory on animals. I will then discuss more recent legal approaches to implementing these animal rights theories, discussing Francione’s abolitionism and Wise’s campaign to incrementally extend rights to those nonhuman animals that are closest to us.

Earth Jurisprudence’s core texts have largely left the position of animals unconsidered. This paper explores how animals would be treated under an application of Earth Jurisprudence, in particular focusing on the nature of rights in Earth Jurisprudence and what the content of animals’ rights would be under such an approach.

The key contributions of this essay will be a comparison of the status of animals under the Animal Law and Earth Jurisprudence approaches, identifying and discussing key similarities and differences, and a discussion of whether the two differing approaches can be reconciled. Environmentalism and Animal Rights have historically been considered irreconcilable, but I will conclude that, though they are indeed somewhat at odds, their approaches to law reform, Animal Law and Earth Jurisprudence, can be
reconciled by a pragmatic holist approach which recognizes that the two are mutually advancing and complementary in many significant ways.

Animal Law

The term ‘Animal Law’ refers to a range of interrelated concepts concerning animals and the law, three of which will be briefly introduced in this section.

Firstly, Animal Law can be used to describe laws that seek to promote animal welfare within a legal framework that generally allows their exploitation. This is perhaps better termed ‘animal welfare law’. This strand of Animal Law describes the current state of law in most jurisdictions, and allows animals to be treated as property and exploited, but seeks to define ‘acceptable’ limits to exploitation by prohibiting ‘unnecessary pain and suffering’.¹

A second conception of Animal Law relates to the emergence of a specific area of academic study. Since 1996, when the first course dedicated to the study of animals’ interests and the law was taught in New York, the field has grown exponentially. Since 1999, an average of 8 university courses have been added each year, and around 75 courses now run worldwide.²

Thirdly, Animal Law refers to the emerging critical legal theory that deconstructs the relationship between animals and the law and critiques the foundations of the current legal framework. It is this critical legal theory that inspires this paper, through a comparison of Animal Law and Earth Jurisprudence. Animal Law seeks to question the underlying justification of the legal treatment of animals. This is similar to the way in which critical race theory questions the inherent racial biases in legal systems and feminist legal theory deconstructs the treatment of gender issues under the law. Animal Law as a critical theory questions the status of animals as property, and proposes legal reforms that move toward better recognition and protection of the rights of animals.

Underlying this approach is a long line of philosophical engagement with questions about how humans should treat nonhuman animals. In the following section, this lineage will be briefly traced from animal welfare approaches, to the key contemporary proponents of animal rights, and the to the recent calls for the recognition of animal rights through legal reform.

Philosophical Approaches to Animals

Animal Welfare

Humans’ views of animals have advanced markedly since the days of 17th century philosopher René Descartes, who declared animals to be no more than mere biological machines. This view was challenged by Jeremy Bentham, who cultivated a proactive anticruelty movement and helped shape legal reforms aimed at improving welfare. For this he has been called the “first patron saint of animal rights”. Bentham’s famous footnote, written in 1823, stated that in assessing whether to give consideration to animals, “the question is not, Can they reason? nor, Can they talk? but, Can they suffer?”.

Bentham’s approach was utilitarian and reformist: he accepted the legitimacy of utilizing animals for human benefit, but argued that unnecessary suffering, i.e. cruelty, should be eliminated. Bentham stated, “every act by which, without prospect of preponderant good, pain is knowingly and willingly produced in any being whatsoever, is an act of cruelty”.

The modern animal welfare approach, Bentham’s legacy, is perhaps best summarized by the ‘Five Freedoms’, which aim, in line with Bentham’s approach, to eliminate unnecessary suffering. The Five Freedoms have their genesis in the Brambell Report. The report was commissioned by the British Government partly in response to Ruth Harrison’s 1964 book Animal Machines, which brought the conditions in factory farms to public attention for the first time. The Five Freedoms, listed below, are not intended to define minimum standards for animal welfare, but instead describe ‘ideal states’ which form a “logical and comprehensive framework for analysis of welfare”. The purpose in highlighting this limitation is to show that the animal welfare approach, in contrast to the rights-based approaches outlined below, does not offer animals concrete protection from suffering, but rather an aspirational goal to reduce their suffering as much as possible. This means that animal suffering is reduced insofar as

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it is economically and practically viable to do so, i.e. welfare is increased only if human interests are not significantly impacted. The Five Freedoms are as follows:

1. Freedom from Hunger and Thirst;
2. Freedom from Discomfort;
3. Freedom from Pain, Injury or Disease;
4. Freedom to Express Normal Behaviour;
5. Freedom from Fear and Distress.

**Animal Rights**

In contrast to the conservative reformist agenda of the animal welfare approach, a more radical movement began in the late 1970s, starting with Peter Singer’s seminal book, *Animal Liberation*. This movement, rather than seeking to improve the welfare of animals exploited for human purposes, seeks to put an end to this exploitation altogether.

**Peter Singer’s Utilitarianism: A Step on the Road to Rights**

Peter Singer was perhaps the first to move away from welfarism and propose an entirely new framework for considering the interests of animals. Singer’s utilitarian theory builds on Bentham’s welfarism, and takes a step forward, not only arguing that animals should not be treated cruelly, but that an animal’s interest in not being treated cruelly, or, alternatively, its interest in enjoying happiness, must be considered equally with the interests of humans. To assume that humans are worthy of greater consideration simply by virtue of their species is to ignore the fact that nonhuman animals’ basic interests are the same as humans’ basic interests. Singer argues that, as both humans and nonhuman animals share a basic interest in pursuing happiness and avoiding cruel treatment, to disregard the interests of nonhuman animals is to discriminate on species membership alone. Without a

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9 While it is difficult to find a statement to this effect, it is clear that this is the tenure of an animal welfare approach. For example, Animal Welfare Approved, a US animal welfare certification provider, states that it “works diligently to maintain a farm’s ability to be economically viable” in improving welfare (Animal Welfare Approved, ‘Standards’, available at http://www.animalwelfareapproved.org/standards/, and the Animal Production Systems Group at the University of Wageningen in the Netherlands states that it focuses on “exploring trade-offs and synergies among environmental impact, animal welfare performance and economic viability of livestock systems” (Wageningen University, ‘Animal Production Systems Group’, available at http://www.aps.wur.nl/UK/.


11 Deriving from the Latin *rad*, meaning ‘root’, ‘radical’ is used here to signify that the rights based approaches to animals seek to attack the root of the problem, rather than simply alleviate the symptoms.


13 Ibid at 7.

14 Ibid at 7.

15 Ibid at 6.
rational basis, this denial of nonhuman animals’ interests, which Singer terms ‘speciesism’, is analogous
to denying rights based on sex or race:

racists violate the principle of equality by giving greater weight to the interests of their own race...
sexists violate the principle of equality by favouring the interests of their own sex... speciesists
allow the interests of their own species to override the greater interests of members of other
species... the pattern is the same in each case. 16

It is pertinent to note that Singer’s utilitarianism is not strictly a rights approach. Singer allows animals to
be exploited, so long as the suffering caused is outweighed by the benefit gained. For example,
regarding animal testing Singer states, “if an experiment on a small number of animals can cure a
disease that affects tens of thousands, it could be justifiable”.17 Despite this, it is clear that the equal
consideration Singer proposes would render much animal exploitation indefensible, and so Singer’s
utilitarianism goes much further than the animal welfare approach that currently dominates legal
thinking.

Nonetheless, the possibility of animal exploitation which Singer’s theory allows, contrasts with
absolutist, or rights-based approaches, to be discussed below. An absolutist approach would free all
animals from all exploitation. Because Singer’s theory does not offer absolute protection for animals, his
approach is here termed a step on the road to rights. Singer’s work nevertheless makes use of the
language of rights as, in his own words, “convenient political shorthand”. 18 That Singer’s theory allows
continued exploitation is significant because subsequent approaches, including that of Tom Regan, have
rejected utilitarianism on this basis.

**Tom Regan: Rights for All Subjects-of-a-Life**

Tom Regan’s approach to animals is now arguably the preeminent theory of animal rights, both in
academic circles and the animal rights movement. In *The Case for Animal Rights*, 19 Regan argues not for
welfarist reform, nor for the additional protection of utilitarianism. Rather, Regan instead develops an
absolutist position on animal rights. Regan breaks from utilitarianism, arguing that it allows the

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16 Ibid at 9.
http://www.utilitarian.net/singer/by/20061203.htm.
18 Singer, P., note 12 above at 8.
continuation of morally indefensible exploitation of animals for human gain.\(^{\text{20}}\) This position is best summed up by Regan’s phrase that animal rights advocates want empty cages, not bigger cages.

At the core of Regan’s philosophy is the ‘subject-of-a-life’ principle that, because the subject-of-a-life cares about its life, its life has inherent value. This inherent value is equal among all beings, as one either is or is not a subject-of-a-life. Regan argues that a variety of criteria are to be considered in assessing whether a being is the subject-of-a-life, including, \textit{inter alia}, its perception, desire, memory, and a sense of the future.\(^{\text{21}}\) Regan explores this principle in great depth and finds that the preponderance of evidence leads to the conclusion that the majority of animals indeed are subjects of a life, rather than biological entities without such subjective worlds.

Regan acknowledges the subject-of-a-life principle does not, of itself, enjoin us to treat subjects in any particular way. In order for justice to be done, Regan argues that the overarching principle, which he terms the respect principle, is that, “We are to treat those individuals who have inherent value in ways that respect their inherent value”.\(^{\text{22}}\)

\textbf{From Animal Rights Philosophy to Animal Law: Approaches to Legal Reform}

It is pertinent at this stage to discuss how legal theorists have proposed that the philosophical acknowledgement of animal rights be transposed into legal reform. For the purposes of the present paper, ‘Animal Law’ can be taken to mean these approaches to reform, in the same way that Earth Jurisprudence, discussed below, is an approach to legal reform in favour of the environment. The two most prominent such theories, which will be discussed here, are based on the animal rights approach, in that they call for absolute rights to be given to animals.

\textbf{Gary Francione: Abolitionist Reforms}

Gary Francione’s abolitionism is so-called because it argues for the complete abolition of animal exploitation. In terms of rights, Francione argues that “abolition requires the recognition of one moral right: the right not to be treated as property or as things”.\(^{\text{23}}\) Francione agrees with Regan that welfarist

\(^{\text{20}}\) Indeed, Bentham himself said of cruelty to animals that “the more [it] is indulged in, the stronger it grows, and the more frequently productive of bad fruits” it becomes. Note 6 above.

\(^{\text{21}}\) \textit{The Case for Animal Rights}, note 19 above at 243.

\(^{\text{22}}\) Ibid at 248.

reforms fail to challenge the underlying cause of animal suffering and may legitimize animal exploitation. Francione argues that the only right that animals need is the right not be considered property, as the legal fiction of the property status of animals is the primary mechanism by which humans exploit animals. The aim of abolitionism therefore is to secure a paradigm shift in moral and legal thinking, whereby animals are no longer regarded as things to be owned and used.

In *Rain Without Thunder*, Francione envisages a practical legal approach to achieving abolition. He argues that animal rights advocates should propose and support legal reforms that seek prohibition, as opposed to regulation, of particular forms of animal exploitation. For example, Francione argues that a prohibition on using any nonhuman animals in a particular type of experiment is to be preferred to a regulation that requires animal use to be made more ‘humane’.  

Another example can be drawn from the regulation of battery-hen cages. A welfarist reform may be to increase the size of the cages, whereas an abolitionist reform would be to ban battery cages altogether. While it could be argued that these are really just different degrees of the same action, there is a difference between increasing welfare within the confines of current methods of exploitation and removing a particular method altogether. Abolitionist reforms ‘draw a line’ under certain actions, outlaw them, and progress the legal system to genuinely humane methods and, ultimately, to a rights-based treatment of animals in legal systems.

While Francione acknowledges that it is a shift in societal attitudes that ultimately drives legal change, he suggests that we can incrementally work towards abolition through gradually increasing prohibitions on animal exploitation in legal regimes.

**Steven Wise: Toward Legal Rights to Animals**

Steven Wise builds on the general idea of incrementally increasing prohibitions of animal exploitation by making a cogent and comprehensive case that complete prohibition of exploitation of Chimpanzees and Bonobos should be the first step in granting legal rights to animals. Wise takes Regan’s approach to moral rights, arguing that scientific evidence and the closeness of these animals to humans overwhelmingly supports the conclusion that they are subjects-of-a-life. Wise applies Francione’s approach to legal reform, arguing that nonhuman animals should no longer be considered property. In

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25 See note 23 above.
arguing for rights for Chimpanzees and Bonobos, Wise states that, given their closeness to humans and their characteristics as subjects-of-a-life, “justice entitles [them] to legal personhood and to the fundamental legal rights of bodily integrity and bodily liberty”. If Wise’s argument were to be accepted, this would prohibit all exploitation of these animals and entail recognition that Chimpanzees and Bonobos are not property.

Wise’s book, *Rattling the Cage*, is of particular note for the development of Animal Law as a distinct movement as it offers a comprehensive legal analysis of the issues and specifically proposes that legal recognition of the rights of Chimpanzees and Bonobos will “arise from a great common law case”. While Francione’s framework for either opposing or supporting legal reform based on whether it is abolitionist in nature provides a useful benchmark for potential reforms, Wise takes a step further and specifically proposes an abolitionist reform that is conceivable, but that would surely push the boundaries of the law.

The famous evolutionary biologist Richard Dawkins has alluded to Wise’s arguments, stating:

> Such is the breathtaking speciesism of our Christian-inspired attitudes, the abortion of a single human zygote (most of them are destined to be spontaneously aborted anyway) can arouse more moral solicitude and righteous indignation than the vivisection of any number of intelligent adult chimpanzees! […] The only reason we can be comfortable with such a double standard is that the intermediates between humans and chimps are all dead.

In acknowledging the indubitable similarities between humans and Chimpanzees and Bonobos, Wise agitates for legal reforms that remove arbitrary species distinctions and recognize the inherent rights of these great apes. This is both an application of Regan’s rights approach and of Francione’s rights-based reform framework.

**Earth Jurisprudence**

Earth Jurisprudence suggests that the core failure of modern human governance systems is that they regulate human behaviour based on the fallacy that we are separate from nature and can operate outside the boundaries imposed by natural systems. Earth Jurisprudence reminds us that human beings do not exist in a vacuum, rather, we are part of a greater system, the ‘Earth System’. We rely on the

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27 Ibid at 270.
Earth System for our existence, and we cannot continue to flourish unless this system is healthy. The environmental challenges we face suggest that we have been living on ‘borrowed time’ and that there is a need to change our governance structures to ensure the health of the Earth System into the future. Proponents of Earth Jurisprudence submit that the planet we live on does not have capacity for infinite economic growth and continued environmental degradation.

This ecocentric legal theory draws on theories of jurisprudence and governance, spirituality, politics, sociology and ancient wisdom. For the purposes of this paper, the focus will be on outlining the approach of Earth Jurisprudence and assessing its implications for nonhuman animals.

Earth Jurisprudence discerns the fundamental laws of nature (termed the ‘Great Jurisprudence’) and sets our laws within this context. Throughout history there have been philosophies based on some notion of a universal code or framework or power. In a similar vein, the Great Jurisprudence ‘is what it is’; it is the nature of the world, the “fundamental laws and principles of the universe”. Earth Jurisprudence holds that the Earth, a self-regulating system that has existed, developed and flourished for millennia, provides us with a universal framework in which to bound human laws.

Berry and Swimme propose that the three most basic elements of the Great Jurisprudence are differentiation (in that ‘nature abhors uniformity’), autopoiesis (literally, ‘self-making’), and communion (the interconnectedness of all aspects of the universe). However, Cullinan notes that, as the Great Jurisprudence is derived by examining the universe, rather than being deduced from a theory, we can expect our understanding to deepen as our knowledge and understanding increases.

Earth Jurisprudence, being the theory that human laws should be bound by the laws of nature, includes, *inter alia*.

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30 Natural Law is perhaps the most well known in Western cultures.


35 *Wild Law*, note 31 above at 79.

36 Ibid.

37 *Wild Law*, note 31 above at 117.
- recognition that rights stem from the nature of the universe, from the nature of existence itself, rather than from human legal systems;
- recognition that all beings play a role in the Earth system;
- recognition that human conduct must be restrained to prevent impinging on the roles of other beings; and
- ensuring that human governance arrangements are based on what is best for the whole Earth system.

Thus "binding prescriptions, articulated by human authorities, which are consistent with the [Great Jurisprudence] and enacted for the common good of the comprehensive Earth Community” are consistent with Earth Jurisprudence.  

**Rights and Earth Jurisprudence**

The central tenet of Earth Jurisprudence is that all components of a natural system have certain rights by virtue of their being part of that system. Thus rights in Earth Jurisprudence have at their core a very different philosophical foundation to those contemplated by animal rights philosophers. Indeed, Earth Jurisprudence’s ‘rights’ may be more akin to the rights discussed by Singer, in that the rights of natural subjects in Earth Jurisprudence are more considerations to be weighed rather than absolute moral rights.

Thomas Berry states that rights mean: “the freedom of humans to fulfil their duties, responsibilities and essential nature and by analogy, the principle that other natural entities are entitled to fulfil their role within the Earth Community”. The core nature of rights in Earth Jurisprudence is the freedom of the rights holder to carry out its role in the Earth system.

At the recent Peoples’ Conference on Climate Change in Bolivia, following the failed diplomatic climate change talks in Copenhagen, attendees drafted a Declaration on the Rights of Mother Earth (the Declaration), echoing the tone and intention of Earth Jurisprudence.

Article 2.1 of the Declaration expands on this broad conception of rights and identifies the rights of nature as including, *inter alia*, the right to life and to exist; the right to be respected; the right to regenerate its bio-capacity and to continue its vital cycles and processes free from human disruptions; and the right to maintain its identity and integrity as a distinct, self-regulating and interrelated being.

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39 Quoted in *Wild Law*, note 31 above at 97.
Likewise the Constitution of Ecuador sets out the rights of nature, which has “the right to exist, persist and maintain and regenerate its vital cycles”.\textsuperscript{40}

**The Rights of Animals in Earth Jurisprudence**

Animals are not accorded any rights in Earth Jurisprudence over and above those granted to all other components of the Earth system. Rather, all natural subjects hold the same basic ‘rights’.

In his book *Wild Law* which outlines the legal approach of Earth Jurisprudence, Cormac Cullinan does not explore how the rights of animals would be balanced with those of humans in any detail. Cullinan simply notes that “the starting point for humans is the principle that each member of the Earth Community should be at liberty to fulfil its role within the Earth Community”. Indeed, the one passage of substance directly regarding animals is a discussion of the limitations to be placed on human rights, rather than a detailed look at the rights of animals per se. Cullinan’s treatment of this issue leaves much to be discerned by future contributors to this emerging theory. This section of the paper is an attempt to elaborate on the place of animals in Earth Jurisprudence.

Cullinan poses the question, “does Earth jurisprudence entitle a human hunter to shoot a zebra?”\textsuperscript{41} The answer, says Cullinan, depends on the circumstances, “different communities will have different versions of Earth Jurisprudence”, based on the ecological characteristics of the locality, their local customs, and their relationship with nature.

Cullinan compares an indigenous hunter killing a Zebra for food in accordance with traditional rituals and customs, which is deemed to be acceptable, with a hunter that is “out to make some extra cash by shooting pregnant zebra mares in the hope that every so often the foetus will be at just the right stage of development to yield a fluffy, brown-striped pelt”. The latter hunter’s actions are unacceptable for Cullinan. Cullinan notes that there will be many difficult cases between these two extremes.

The use of these examples demonstrates the difficulty of identifying the rights of nonhuman animals within Earth Jurisprudence and how human rights interact with these rights. Cullinan simply asserts that we need to “develop far more sophisticated mechanisms for making decisions in accordance with the dictates of the Great Jurisprudence”.

\textsuperscript{40} Constitution of Ecuador, Chapter 7.

\textsuperscript{41} Wild Law, note 31 above at 106.
The example used by Cullinan seems so extreme as to be almost comical. While Cullinan states that there are difficult cases between his two extremes, it seems more accurate to say that the two extremes are guided not by the principles of Earth Jurisprudence as such, but instead on intuition: the vast majority of people would agree that the bushman does no wrong whereas the opportunistic and wasteful hunter commits an act that is against the moral sensibility of most people. As Judge Posner argues, “We realize that animals feel pain, and we think that to inflict pain without a reason is bad. Nothing of practical value is added by dressing up this intuition in the language of philosophy; much is lost when the intuition is made a stage in a logical argument”. While Posner was referring to Singer’s utilitarian approach and arguing that it fails because it is contrary to intuition, his argument seems much stronger here, where Cullinan’s use of extremes does invite criticism that he is merely restating widespread intuition as principle. This does not mean that Earth Jurisprudence is defective in relation to animals, merely that the exposition to date is lacking.

A more philosophically problematic aspect of animals’ rights in Earth Jurisprudence is the difficulty in determining what rights a particular animal has. An animal’s role in the Earth system is the starting point for determining its rights, but simply identifying the role of an animal in the ecosystem does not in itself provide any detail on how human actions should be limited in relation to that animal. As Professor Lee notes, “zebrakind as a concept in isolation is not that helpful in determining the rights and wrongs of actions directed at zebras.”

Overall, whatever the rights ultimately held by an animal, the position of animals under Earth Jurisprudence generally involves, as in Singer’s utilitarianism, a balancing or weighing of an animal’s rights with the rights of other members of the Earth Community with which the animals interact, including humans. It is clear that this ‘right to be’ proposed by Earth Jurisprudence is not the same as the absolute right to life sought for animals by animal lawyers. Cullinan for example clearly envisages that animals can be exploited by humans so long as the exploitation is conducted as part of an ecologically sustainable relationship with the Earth’s natural systems.

**Wild animals and domesticated animals**

It is clear from *Wild Law* that Earth Jurisprudence applies to wild animals: these animals should be

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allowed to carry out their natural functions. However, the situation is far less clear in relation to domesticated animals because it is difficult to determine what the natural function of domesticated animals is. On the one hand, their domesticated nature essentially means that it is now the function of these animals to provide the products that they have been bred for: domesticated animals would not be in existence but for human use and would serve no function if transferred to their original habitats, in contrast to their non-domesticated ancestors. On the other hand, it seems fair to argue that the right of a subject to carry out its natural role in the Earth system should be discerned from the Great Jurisprudence, rather than from the roles that humans have imposed through modern agricultural systems. That is to say that although humans have changed the ability of domesticated animals in such a way as to prevent them from existing in the wild, the rights accorded to these animals should arguably be derived from their role pre-human intervention.

At a recent Wild Law conference, Melissa Hamblin elaborated on the way that Earth Jurisprudence could apply to animal farming industries and used the egg production industry as a case study. Her comments are particularly instructive given the relatively underdeveloped nature of Earth Jurisprudence vis-à-vis its application to agriculture.

Firstly, Hamblin rightly notes that the regulation of animal industries is guided by human interests, with profitability enshrined as the core value. Other goals, such as animal welfare and biodiversity, remain peripheral at best. Modern industrial agriculture, facilitated by these regulatory regimes, has led to a well-documented decrease in animal welfare and a high impact on the environment.

Secondly, Hamblin argues that an Earth Jurisprudence approach to animal industries would reframe regulation so that the core concern would be improving humans’ relationships with other members of the Earth Community. In particular, an Earth Jurisprudence approach to animal agriculture would require smaller operations, improved welfare standards, a strong focus on whole of system environmental impacts and better consumer education.

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45 The paper talks specifically about Australia, but her comments apply equally to other states that have moved to mostly large-scale industrialised agricultural systems.

Hamblin does not explicitly state why it is that the ‘right to be’ in Earth Jurisprudence does not require abolition of the killing of animals. As discussed above, implicit in Earth Jurisprudence is some notion that wild animals are ‘fair game’ so long as the taking is in line with the holism of Earth Jurisprudence, while the position in relation to domestic animals is less clear. Hamblin does not explain whether an animal’s role in the Earth System includes a role as a resource for humans.

**Animals in Animal Law and Earth Jurisprudence: Comparative Analysis**

**Common threads**

**Critique of property**

The critique of property as the vehicle for exploitation is common to both Animal Law’s abolitionism and to Earth Jurisprudence. In both of these theories a critique of private property is central to an understanding of how exploitation is made acceptable.

In *Wild Law*, Cullinan states that the “dominant cultures understand land as property. Land in the eyes of the law is therefore a thing, an object that may be bought and sold, and by definition devoid of any personality or sacred qualities... the current owner is given virtually absolute power over that land”. Similarly, Francione argues that the property status of animals is the major facilitator of continued animal exploitation.

**Reframing rights**

Both Animal Law and Earth Jurisprudence suggest that the main solution to the imbalances in the current law is to reframe our conception of rights. The basis for this reframing is, however, very different, and this is discussed in more detail below.

The reason for choosing the language of rights as the driver of reform is that rights are easily expanded and integrated into our current legal systems. In particular, history has shown that extensions of rights can bring about significant legal change: the abolition of slavery, for example, was a legal as well as cultural process, much like the women’s rights movement. While it is true that these extensions have always related to the human species, this does not affect the capacity of rights as a concept to be a

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47 *Wild Law*, note 31 above at 139.
driver of change. Indeed, rights for animals or trees will require a significant shift in our societal conscience, but the legal concept of rights has been proven to be very pliable: addition extensions of rights can operate within our current legal systems with little difficulty.

This ease of integration means that, as a practical matter, lawyers wishing to press for these additional rights have a platform from which they can argue their case. For example, People for the Ethical Treatment for Animals (PETA) is currently bringing a case in a Federal Court in California, requesting that the court declare that five wild-caught orcas performing at SeaWorld are being held as slaves in violation of the 13th Amendment to the US Constitution. The 13th Amendment states that “[n]either slavery nor involuntary servitude… shall exist within the United States, or any place subject to their jurisdiction”. 48 This is the first ever attempt to apply the 13th Amendment to nonhuman animals. Similarly, the Provincial Court of Loja in Ecuador recently granted an injunction against the Provincial Government in that state which recognized the rights of the Vilcabama river to flow and not be polluted. 49 While these cases are early forays into the expansion of rights, it is clear that the language of rights and that the law and its machinery can provide a platform for pressing these cases.

The Challenges for Recognition

Both theories are in agreement that the diffusion of theories that reframe or expand rights face a lengthy uphill battle for legitimacy and recognition. Just as Francione notes that social changes must come first and drive legal change, Cullinan notes that our societies and legal systems were traditionally framed to promote human interests only. He states that efforts to have animal rights recognized in US courts have largely failed, not because “the American judiciary is particularly insensitive to animals [but because] recognizing that animals should be treated the same way as humans goes against the grain of the whole legal system”. 50 Wise agrees, focusing on incrementalism and hoping for a “great common law judge” and a revolutionary decision in the courts to get the ball rolling. 51

Wise quotes Christopher Stone, author of Should Trees Have Standing, who writes that proposals to extend rights are “bound to sound odd or frightening or laughable. This is partly because until the rightless thing receives its rights, we cannot see it as anything but a thing for the use of ‘us’ – those who

50 Wild Law, note 31 above at 58.
51 Rattling the Cage, note 26 above at 270.
are holding rights at the time”. 52 The common ground here is illustrated by the fact that an Animal Law scholar is citing an Earth Jurisprudence scholar in order to highlight the difficulties in having extensions to rights recognized.

**Differences**

**Basis upon which rights are reframed**

Earth Jurisprudence requires a massive shift in the way we view rights. Rather than increasing the rights of animals to meet those of humans, or including animals in our sphere of moral consideration, under an Earth Jurisprudence approach, the rights of humans and nonhuman animals alike are drastically reframed.

The rights of both are ‘equalised’ – humans’ rights would be far more constrained than at present, while animals would have more rights. Whereas the animal rights approaches discussed above assert that there are objective moral rights that are owed to all living creatures, Earth Jurisprudence asserts that all components of the Earth system, in contributing to the health of the whole, are deserving of the right to perform their natural functions. Essentially, both approaches recognize the inherent value of animals, but do so on different bases.

**Scope of protection for animals**

It will be clear at this point that Earth Jurisprudence and Animal Law based on a philosophy of animal rights offer different levels of protection for animals.

Firstly, Animal Law would protect all animals, domestic or wild, whereas Earth Jurisprudence, as described above, makes some distinction between these two categories. Secondly, the absolutist nature of the rights accorded to animals in the abolitionist approach means that protection is complete and impassable, whereas an Earth Jurisprudence approach to rights offers far more protection than the present welfare paradigm, but does not guarantee the life and liberty of animals.

**Domestic and Wild Animals**

A final important difference between Earth Jurisprudence and Animal Law, as suggested above, is their

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differing treatments of wild and domesticated animals. While the former suggests that some utilization of domestic animals is acceptable, Francione states, “if we took animals seriously in a moral sense, we would stop bringing domesticated animals into existence for our purposes, and not formalize that exploitation by seeking to regulate it further within the legal system” and that “if we stopped bringing domesticated animals into existence, the only conflicts that would remain would involve humans and animals living in the wild”. This difference is significant because it is a barrier to reconciling the two theories, as is discussed below.

**Animal Law and Earth Jurisprudence: may the twain meet?**

Environmentalists and theories of environmentalism have not generally embraced the individualistic and absolute nature of Animal Rights, and the two movements have often been at odds. The emerging legal theories of Animal Law and Earth Jurisprudence, following these philosophical lineages, appear, at first glance to continue this division and as such, to be irreconcilable. This section of the paper will very briefly outline this conflict and suggests that a high level of reconciliation is both practical and desirable. I will draw on the practical legal nature of Animal Law and Earth Jurisprudence, as well as the similarities and differences identified above, to argue for a ‘pragmatic holism’ that acknowledges both the greater moral worth of animals and the intrinsic value, or ‘rights’ of nature. While conflicts are still likely to remain, it is argued that pragmatic holism goes a long way to reconciling these two emerging legal theories.

**Animal Rights and Environmentalism: A rocky relationship**

The difficult relationship between Animal Rights and environmentalism was perhaps most notoriously described by Callicott in 1980. In his paper ‘Animal Liberation: A Triangular Affair’, Callicott “appeared to delight in driving a very deep wedge between environmentalism and animal rights”, a wedge that has remained in place ever since. Extending Callicott’s metaphor, Sagoff bluntly states: “Environmentalists cannot be animal liberationists. Animal liberationists cannot be environmentalists”.

The reason for this dichotomy, it is said, is that animal rights are:

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53 Bronzino, note 23 above.


moral notions that grow out of respect for the individual. They build protective fences around the individual. They establish areas where the individual is entitled to be protected against the state and the majority even where a price is paid by the general welfare.\textsuperscript{57}

This conception of rights means that Animal Law does not cover all the natural subjects to which Earth Jurisprudence proponents believe are worthy of moral consideration. While Animal Law may advocate the protection of ecosystems as necessary to protect individual animals at times, no robust protection is offered to the environment. In addition, Animal Law would assign no more value to the individual members of a highly endangered species than to those of a common or domesticated species, and would give the same absolute rights to invasive species which may be an ecological burden. Due to this focus on the individual, Animal Rights theory offers no realistic plan for managing the environment, and could potentially hinder efforts to improve environmental protection.

Likewise, Regan criticizes the environmental holism on which Earth Jurisprudence is based for its protection of ecosystems at the expense of individual animals. As in Singer’s utilitarianism, the rights of animals are not absolute in Earth Jurisprudence: animals can be deprived of their most basic right, the right to life, if doing so would contribute to the overall Earth system. An animal has no absolute right, except rights that are attributed according to the animal’s function in the Earth system. Reagan states that theories like Earth Jurisprudence and Animal Rights are “like oil and water: they don’t mix.”\textsuperscript{58}

**Reconciling Animal Rights and Environmentalism**

This poses the question, is reconciliation of these two approaches to rights desirable, and, if so, is such reconciliation possible? Of particular interest for this essay is whether Animal Law and Earth Jurisprudence can be used as a vehicle for the reconciliation of their philosophical parents, Animal Rights and Environmentalism.

As to the desirability of reconciling the two approaches, it is submitted that reconciliation is definitely desirable. This is firstly because there are considerable similarities between the two theories; seeing them as completely exclusive is unwarranted and unnecessarily divisive. Secondly, reconciliation is desirable because Animal law and Earth Jurisprudence can complement each other and offer mutual benefits.


\textsuperscript{58} The Case for Animal Rights, note 19 above at 362.
Animal Law and Earth Jurisprudence: toward reconciliation

Since Callicott’s divisive article, significant attempts to bridge the divide have been made, including by Callicott himself. The focus of this section will be on reconciliation through Animal Law and Earth Jurisprudence, though I will allude to the philosophical efforts where pertinent.

Animal Law and Earth Jurisprudence are appropriate vehicles by which to reconcile Animal Rights and Environmentalism. Animal Law and Earth Jurisprudence are well suited to this because:

a) they are legal theories that are focused on practical action;

b) they already have a specific and well-defined ‘common enemy’ in Western conceptions of property;

c) an advancement of either theory in a court or legislature will also be an advancement of the other;

d) novel mechanisms have been proposed that are consistent, at least to some extent, with both approaches; and

e) a certain level of pragmatism in the application of the approaches can go a long way toward reconciliation.

Practical Action

Animal Law and Earth Jurisprudence are both approaches to legal reform that are focused on practical action. Given this focus, attention should be paid to their practical aspects, rather than ‘squabbling amongst themselves’ as to the precise nature of their philosophical underpinnings and their compatibility. As approaches to legal reform, both acknowledge the significant barriers they face and the incremental nature of change. In this context, it is far more rational to focus on the practicalities of advancement, rather than on the minutiae of their philosophical differences. This is particularly true in light of the fact that the similarities between the approaches means that their advancement will often offer mutual assistance.

In suggesting that Animal Law and Earth Jurisprudence can be reconciled because they are legal approaches rather than philosophical theories, I do not suggest that differences should not be identified and discussed, but that such minutiae may become more relevant as either approach moves toward
achievement of its goals. Once the differences between the approaches are borne out in practice, it would be apt to conduct a detailed assessment of the relationship between Animal Law and Earth Jurisprudence, but until such time, much more could be gained in taking a reconciliatory approach.

**Common cause against a common enemy**

The second point made above is that Animal Law and Earth Jurisprudence can “make common cause against a common enemy - the destructive forces at work ravaging the nonhuman world” rather than perpetuating the divisive schism that views the two approaches as irreconcilable. As discussed above, a critique of property is central to both Animal Law and Earth Jurisprudence. Given that the core tenet of each approach is the same, it is clear that even the theoretical differences are less pronounced than they may initially appear. While ultimately the driving rationale for reframing the concept of property is different, proponents of both approaches are aiming for a similar practical goal.

**Mutual advancement**

Given that both approaches aim for a similar legal reform, and that both face the same challenges in achieving this reform, it is fair to say that an advancement of either Animal Law or Earth Jurisprudence is an advancement of the other. Incremental recognitions of Animal Rights and Earth Jurisprudence allow the legal machinery to see the subject of rights in a different way and provide an additional platform from which both theories can develop.

For example, if Wise’s campaign succeeds in achieving rights for certain great apes, as it has done in some jurisdictions, this opens up the possibility that rights can be incrementally extended and changed to protect the environment. Likewise, in *Sierra Club v Morton*, one great common law judge dissented and decided that a tree should be granted standing: had this been the majority view, it would have been a logical extension of the case to request standing for an animals, a request that Wise himself has made and was not granted.

There is another sense in which the two approaches may be mutually beneficial. Regan suggests that rights for animals could actually be beneficial for the Earth community as a whole, thus offering the prospect that Animal Law and Earth Jurisprudence are reconcilable:

*Animal Rights* ought not be dismissed out of hand by environmentalists as being in principle

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59 Such as the UK.
antagonistic to the goals for which they work. It isn’t. Were we to show proper respect for the rights of the individuals who make up the biotic community, would not the community be preserved?

However, there are some problems with this argument. For example, rights for animals would prevent the removal of invasive species which threaten an ecosystem. In addition, the protection of rights may advance environmentalism in relation to wild animals, but the position is less simple in relation to domestic animals, as Earth Jurisprudence makes a distinction between the two.

**Novel mechanisms**

Another option for reconciliation is to identify new legal structures that can bring together the two approaches. Both theories offer a critique of property law, but have, as yet, offered little in the way of proposals for practical reform of property law. For example, Francione simply says that abolition of the property status of animals is key, while Cullinan states that, having identified that property law is at fault, the “challenge that now faces us is how to begin the process of undoing the property systems that impede a proper relationship with the land, and to build a workable alternative in its place”.  

An innovative property law reform that may benefit both theories is the proposal that animals should be afforded property rights. Essentially this proposal would involve extending property rights to animals, with human guardians defending these rights in court. Hadley argues that this could satisfy the core moral demands of both Animal Law and Earth Jurisprudence. While such ideas are nascent and cannot be explored in detail here, they certainly present an interesting method of both reforming the law and of reconciling Earth Jurisprudence and Animal Law.

**Pragmatic Holism**

Mary Warren was the first academic to propose a reconciliatory response to Callicott’s assertion that Animal Rights and Environmentalism are mutually exclusive. Warren took a positive step toward reconciliation, insisting that ecocentric and animal rights approaches are in fact complementary. Warren's approach is a decidedly pluralistic one, agreeing that animals and plants have rights, but

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60 *Wild Law*, note 35 above at 145.
arguing that they do not have the same rights as humans. For Warren, animal rights and human rights are grounded in the differing psychological capacities of humans and animals, while environmental ‘rights’ are based on the value of nature, both as a resource and intrinsically:

*Human beings have strong rights because we are autonomous; animals have weaker rights because they are sentient; the environment should be used with respect - even though it may not have rights - because it is a whole and unified thing which we value in a variety of ways.*

While Warren’s argument is appealing for its simplicity, its pragmatism seems unlikely to convince proponents of Animal Law because it explicitly relegates the rights of animals to beneath those of humans. In addition, Warren’s pluralism will inevitably lead to conflict as “ethical eclecticism leads, it would seem inevitably, to moral incommensurability in hard cases”.

Callicott proposes a different form of pragmatism which is based on a more objective moral foundation. Callicott essentially makes the argument, reminiscent of those of Earth Jurisprudence, that humans have always ‘used’ animals, and it is merely our modern, industrialised relationships with animals that cause our revulsion at the breaching of Animal Rights. Callicott argues that we must return to a relationship with animals whereby we consider them a part of the ‘inner circle’ of our mixed communities, i.e. our community of humans and domestic animals. On the other hand he argues that wild animals should be free from interference.

Arguably, Warren’s pragmatism requires “well-meaning people” to “muddle through the moral wilderness, balancing and compromising the competing interests and incommensurable values”, which will lead to conflict. On the other hand, Callicott’s attempt to find an objective moral basis is well-intentioned, but again falls down because it suggests that human exploitation of animals is in some way completely ‘natural’, such that animals’ rights can always be subsidiary to those of humans. Nonetheless, these pragmatic approaches are likely the closest that it is possible to come in reconciling the two approaches.

Ultimately Animal Law, in insisting upon absolute and individual rights, cannot be completely reconciled with the more flexible Earth Jurisprudence, though the pragmatic approaches suggested above can go

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64 Ibid at 164.
65 Ibid.
some way towards this. This moral pragmatism, coupled with the practical pragmatism outline above suggest that, while complete reconciliation is likely impossible, Earth Jurisprudence and Animal Law can bring Animal Rights and Environmentalism much closer than was previously assumed possible.

**Conclusion**

Animal Law and Earth Jurisprudence are very much works in progress, yet they are rapidly developing, with interest quickly growing amongst academics, activists, and even lawmakers and the judiciary. This paper has further advanced the theories of Animal Law and Earth Jurisprudence by outlining their central tenets and asking where the similarities, differences and synergies lie between them.

It is clear that these emerging theories are not completely mutually exclusive, but that considerable difficulty lies in their reconciliation. As these legal approaches develop, there will no doubt be further discussion of the devil in the theoretical and philosophical detail, which is to be welcomed, but this should not detract from legal approaches that are mutually enhancing. I have argued for a pragmatic and practical approach to the legal aspects of Animal Rights and Environmentalism through Animal Law and Earth Jurisprudence, as they have much in common and much could be gained from taking a reconciliatory approach.
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